Nos. 11-15631, 11-15633, 11-15639, 11-15641, 11-15642

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GILA RIVER INDIAN COMMUNITY, et al.,
Plaintiffs-Appellants,
v.
UNITED STATES OF AMERICA, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

FEDERAL DEFENDANTS-APPELLEES' RESPONSE TO PETITION FOR PANEL REHEARING AND PETITIONS FOR REHEARING EN BANC

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INTRODUCTION

Plaintiffs-Appellants filed suit challenging the Secretary of the Interior's decision to accept, pursuant to the Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99-503, 100 Stat. 1798 (1986), trust title to an approximately 54-acre parcel of land (commonly referred to as Parcel 2) that the Tohono O'odham Nation (the Tribe) owns in Maricopa County, Arizona. The district court upheld the Secretary's decision, and a panel of this Court affirmed. Plaintiff-Appellant Gila River Indian Community (the Community) petitions for panel rehearing and rehearing en banc; Plaintiffs-Appellants State of Arizona and City of Glendale (collectively the State) petition for rehearing en banc. (Various members of the Arizona legislature who are also Plaintiffs-Appellants join the Community's and the State's petitions.) The rehearing petitions should be denied because the panel's opinion affirming the Secretary's decision to accept trust title to Parcel 2 is correct and does not conflict with any decision of this Court, another Circuit, or the Supreme Court. Fed. R. App. P. 35(b) & 40(a)(2).

STATUTORY BACKGROUND -- THE GILA BEND INDIAN RESERVATION LANDS REPLACEMENT ACT

The Tohono O'odham Nation (formerly known as the Papago Tribe of Arizona, Pub. L. No. 99-503, 101 Stat. 1798, § 3(2)) is divided into eleven political subdivisions, referred to as Districts. Federal Defendants-Appellees' Supplemental Excerpts of Record (SER) at 276. Two of those Districts -- the San Xavier and San Lucy Districts -- are geographically separated from the Nation's main reservation. *Id.* San Xavier is located near Tucson, Arizona and the San Lucy District, the District relevant here, is located near the town of Gila Bend, Arizona. *Id.*

In 1960, the U.S. Army Corps of Engineers completed the Painted Rock Dam, about ten miles downstream from the Tribe's reservation on the San Lucy District. *See* H.R. Rep. No. 99-851, at 4-5 (1986). Operation of the dam flooded the Tribe's reservation to an "extent and duration . . . far greater than was projected at the time the dam was authorized." *Id.* Stymied in earlier efforts to rectify the situation, Congress, in recognition of its "responsibility to exercise its plenary power over Indian affairs to find an alternative land base[] for the O'odham people at Gila Ben[d]," enacted the Gila Bend Indian

Reservation Lands Replacement Act. *Id.* at 7-8; *see also* Pub. L. No. 99-503, 100 Stat. 1798, § 2(1)-(3). Congress intended the Act to "facilitate replacement of reservation lands with lands suitable for sustained economic use which is not principally farming . . ., and promote the economic self-sufficiency of the O'odham Indian people." Pub. L. No. 99-503, 100 Stat. 1798, § 2(4).

Under the Act, upon the Tribe's assigning to the United States its 9880 acres of reservation land previously impacted by the construction of the Painted Rock Dam, the United States paid the Tribe $30 million. *Id.* § 4(a). The Tribe may spend those funds "for land and water rights acquisition, economic and community development, and relocation costs," as well as related planning and administrative costs. *Id.* § 6(a). The Secretary is "not responsible for the review, approval, or audit of the use and expenditure" of those funds. *Id.* § 6(b). The Act also includes a provision for the Tribe to obtain replacement reservation land. The Act provides that the Secretary will take replacement lands in trust so long as the land meets certain requirements. *See id.* § 6(c) & (d). Specifically, the Act provides that

> [l]and does not meet the requirements of [subsection (d)] if it is outside the counties of Maricopa, Pinal, and Pima,

> Arizona, or within the corporate limits of any city or town. Land meets the requirements of this subsection only if it constitutes not more than three separate areas consisting of contiguous tracts, at least one of which areas shall be contiguous to San Lucy Village. The Secretary may waive the requirements set forth in the preceding sentence if he determines that additional areas are appropriate.

Id. § 6(d).[1] The Act deems any land that the Secretary holds in trust "to be a Federal Indian Reservation." *Id.*

PROCEDURAL BACKGROUND

In January 2009, the Tribe requested that the Secretary accept about 135 acres of land in trust pursuant to the Act. Appellants' Excerpts of Record (ER) at 25; SER292-95. The Tribe later limited its application to what has been referred to as Parcel 2, about 54 of the original 135 acres. ER25. Parcel 2 is what is commonly referred to as a "county island" -- land that has not been annexed or incorporated by the City of Glendale, but is surrounded by the City of Glendale (i.e., unincorporated land surrounded by the municipality of Glendale). On July 23, 2010, the Secretary (through the Assistant Secretary -- Indian Affairs, exercising delegated authority) determined that Parcel 2

[1] The Secretary has waived the three area limit and the requirement that one area be contiguous to the San Lucy Reservation. That waiver is irrelevant here.

satisfied the requirements under the Gila Bend Indian Reservation Lands Replacement Act and authorized the Regional Director to accept Parcel 2 in trust 30 days after publication of the decision in the Federal Register. ER25-32. In making that decision, the Secretary reviewed, among other things, the Tribe's application materials, the Regional Director's recommendation and materials, as well as comments and materials previously submitted by the City of Glendale and the Gila River Indian Community. *See* ER26 (discussing materials reviewed). The Secretary determined that the 54-acre Parcel 2 is wholly within Maricopa County, is outside the City of Glendale's corporate limits, and would be only the second parcel of land acquired in trust for the Tribe pursuant to the Gila Bend Indian Reservation Lands Replacement Act (the prior trust acquisition being about 3200 acres). The Secretary determined that the requirements of the Act were satisfied, and that the Act therefore mandated Parcel 2 be accepted in trust for the Tribe. The Secretary published notice of his decision in the Federal Register. Land Acquisitions; Tohono O'odham Nation, Arizona, 75 Fed. Reg. 52,550 (Aug. 26, 2010).

Plaintiffs-Appellants filed suit challenging the Secretary's decision. As relevant here, Plaintiffs maintained that: (i) Section 6(c) of the Act precludes the Tribe from acquiring more than 9880 acres with money the Tribe received under the Act and that the Tribe had already exceeded that cap before it purchased Parcel 2;[2] (ii) Parcel 2 was ineligible for trust acquisition under Section 6(d) of the Act because Parcel 2 is "within the corporate limits" of Glendale because Parcel 2 is completely surrounded by lands annexed by the City, even though Parcel 2 itself has not been annexed by the City and is not part of the corporate City; (iii) Congress lacked the constitutional authority to enact the Gila Bend Indian Reservation Lands Replacement Act and that the Act violated the Tenth Amendment to the Constitution. (The Community did not join in that last argument.)

The district court upheld the Secretary's decision. As to the three contentions relevant here, the court held: (i) Plaintiffs had not raised their interpretation of Section 6(c) before the agency and therefore had waived it; (ii) the term "within the corporate limits" is ambiguous,

[2] Plaintiffs reach that conclusion based on the total land purchased by the Tribe, while the Secretary assessed the 9880 acre cap based on the amount of land accepted into trust under the Act.

requiring judicial deference to the Secretary's permissible interpretation; and (iii) the State provided no basis for the court "to depart from every court decision that has previously addressed" constitutional arguments of the sort the State raised.

A divided panel of this Court affirmed. As to Plaintiffs' Section 6(c) argument, the majority assumed without deciding that the argument was not waived. The majority then held that the Act is unambiguous and Section 6(c) creates a cap only on land held in trust for the Tribe under the Act, not a cap on total land acquisition by the Tribe using the Act's funds. Slip op. 10,964-67. Even if the Act were ambiguous on that point, the majority explained that it would defer to the Secretary's implicit reading of the 9880 acre limit as a cap on land accepted in trust for the Tribe by the Secretary under the Act. *Id.* at 10,967. The majority next found the phrase "within the corporate limits of any city or town" in Section 6(d) to be ambiguous. *Id.* at 10,968. The Secretary, the majority explained, had opted to analyze the corporate limits restriction based on the jurisdictional nature of the fee land in question rather than its geographic location. *Id.* Finding that interpretation to be

reasonable, the majority deferred to it. *Id.* at 10,968-75. Finally, the majority rejected the State's constitutional arguments. *Id.* at 10,975-77.

Circuit Judge N.R. Smith dissented. Slip op. 10,977-11,006. He would have held that the phrase "within the corporate limits" in Section 6(d) is unambiguous and unambiguously contrary to the Secretary's interpretation. Slip op. 10,982-89 (Smith, N.R., dissenting). And even if the majority was correct that the provision is ambiguous, the dissent would have utilized the "Supreme Court's federalism canon of construction" to reject the Secretary's interpretation of Section 6(d). *Id.* at 10,989-11,006.

ARGUMENT

Plaintiffs provide no basis for panel rehearing or rehearing en banc. The panel's decision does not conflict with any decision of this Court, another Circuit, or the Supreme Court. Indeed, no other federal court (except the district court decision on appeal) has addressed the meaning of the Gila Bend Indian Reservation Lands Replacement Act. Plaintiffs, therefore, are left to quibble with the majority's application of well-settled principles to this case. A disagreement with the application

of well-settled legal principles does not warrant rehearing and that is particularly so where the majority's analysis is correct.

I. THE MAJORITY'S HOLDING REGARDING SUBSECTION 6(C)'S ACREAGE CAP IS CORRECT AND DOES NOT WARRANT REHEARING

The Community (but not the State) contends that the majority erred by not remanding to the Secretary the question of whether Section 6(c)'s 9880 acre cap limits the amount of land purchased by the Tribe with money the Tribe received under the Act or instead limits the amount of land that the Secretary may hold in trust for the Tribe under the Act. Cmty. Pet. 12-14. According to the Community, rehearing is warranted because the majority violated the "ordinary remand rule" by deferring to an interpretation of the Act implicit in the Secretary's decision. *Id.* at 13. The Community is incorrect.

First, the Community's argument ignores the fact that the majority held that Section 6(c)'s acreage limit *unambiguously* creates a cap only on land held in trust for the Tribe under the Act, not a cap on total land acquisition by the Tribe using the Act's funds. Slip op. 10,964-67. Where the statute is unambiguous, there is nothing to remand to the Secretary and the majority's ruling cannot be inconsistent with the "ordinary remand rule." To be sure, the Community proceeds to express

its disagreement with the majority's statutory analysis, essentially reiterating its merits arguments. Cmty. Pet. 16-18. The majority, however, did not overlook or misapprehend any point of law or fact; the Community's disagreement with the panel's decision without more is no basis for rehearing, let alone rehearing en banc. *See* Fed. R. App. P. 35(b)(1) & 40(a)(2).

Second, even if the Act is ambiguous, the Supreme Court has made clear that it is appropriate for a court to defer to an agency's interpretation that "was a necessary presupposition of the [agency's] decision." *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 419-20 (1992). As the majority correctly explained, slip op. 10,964 & 10,967, the administrative record demonstrates that the Secretary interpreted Section 6(c) to place a cap on the number of acres that the Secretary could accept in trust for the Tribe, not a cap on the amount of land the Tribe could purchase with the monies the Tribe received under the Act. Specifically, for purposes of determining whether the Act mandated the Secretary to accept Parcel 2 in trust for the Tribe, the Secretary treated as irrelevant land that the Tribe had purchased in fee

but that the Secretary had not accepted in trust for the Tribe under the Act. Slip op. 10,964; ER26, 31; SER280-82 & n.2.

Finally, this case is an inappropriate vehicle for the en banc Court to address the Community's contentions. That is so because the Court would also need to address an issue that the panel majority assumed without deciding and that the Community does not address in its petition -- whether Plaintiffs waived their Section 6(c) argument where no one presented it to the agency during the administrative process.

II. THE MAJORITY'S HOLDING REGARDING SECTION 6(D) IS CORRECT AND DOES NOT WARRANT REHEARING

A. The Majority Did Not Misapply *Chevron* Principles

The Community and the State contend that once the majority found Section 6(d)'s "within the corporate limits" language ambiguous, the majority erred by failing to remand to the Secretary because the Secretary failed to grapple with statutory ambiguity, rendering *Chevron* deference inappropriate. Cmty. Pet. 7-12; State Pet. 12-14. That, Plaintiffs maintain, warrants rehearing. They are incorrect.

First, the premise of Plaintiffs' contention is mistaken; the record reflects that the Secretary considered potential ambiguity. The Secretary's interpretation must be read in light of the record of material

he considered. When that is done, it is clear that the Secretary's interpretation of the Act and his ultimate decision grappled with the statutory text and the Act's purposes. SER275-91. The Field Solicitor's opinion, which the Secretary considered and explicitly referenced in rendering his decision, thoroughly vets Section 6(d)'s potential ambiguity. *See* SER285-90; *see also* ER30. Moreover, with respect to Section 6(d) the Secretary explained that "[e]ven if Congress's intent was less than clear . . . we interpret the term not to support a conclusion that Parcel 2 is ineligible under the Act." ER30 n.6. As the majority correctly put it, "the agency entrusted to administer the Gila Bend Act faced an issue of pure statutory interpretation, carefully considered alternative approaches in construing the statutory scheme, and reached a reasonable interpretation." Slip op. 10,970. In other words, as one of the cases Plaintiffs rely on states, the Secretary did not "simply pick[] a permissible interpretation out of a hat." *Village of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011). *Chevron* deference to the Secretary was called for here.

Plaintiffs' argument also hinges on the view that, in deciding whether to accord *Chevron* deference, a reviewing court undertakes a

form of arbitrary or capricious review of the reasons the agency gave for its reasonable interpretation. To the contrary, as the Supreme Court has made clear, an agency's "view governs if it is a reasonable interpretation of the statute -- not necessarily the only possible interpretation, not even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 & n.4 (2009).

Moreover, neither this Court's decision in *Delgado v. Holder*, 648 F.3d 1095 (9th Cir. 2011) (en banc), nor the Supreme Court's decision *Negusie v. Holder*, 555 U.S. 511 (2009), helps Plaintiffs. *See* Cmty. Pet. 8-9; State Pet. 12-14. In *Delgado*, this Court opined in dicta that "[e]ven if the [agency] had relied solely on the text of [the statutory provision], [the Court] would not be able to adopt Delgado's preferred interpretation" and instead would remand to the agency. 648 F.3d at 1103 n.12. As previously explained, the Secretary did not rely "solely on the text." Also, *Delgado* said only that the Court could not accept *the challenger's* interpretation of the statute; *Delgado* says nothing about whether the Court could accept the agency's interpretation.

Negusie is similarly irrelevant. There, the agency had not considered the statutory language or exercised any interpretative authority at all. Instead, the agency had determined that an earlier Supreme Court decision controlled the statutory question and thus the Supreme Court concluded remand to the agency was the appropriate course. *See Negusie*, 55 U.S. at 518-19, 522. That clearly is not the case here, and the majority correctly applied *Chevron* principles.

B. The "Clear Statement" Rule Is Inapplicable And The Majority's Decision Does Not Run Afoul Of It

Picking up on Judge Smith's dissent, the State maintains that the majority erred when it failed to apply the "clear statement rule" of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), when determining the meaning of "within the corporate limits" in Section 6(d). State Pet. 6-11. (The Community does not seem to agree with the State, because the Community does not cite *Gregory* and only notes that it "agrees with Judge Smith's dissent that 'within the corporate limits' means the opposite of what the majority held." Cmty. Pet. 7.) Under *Gregory*, if Congress intends to alter the usual constitutional balance between the states and the federal government, it must do so with unmistakable

clarity. 501 U.S. at 460. The majority correctly rejected applying that doctrine here and rehearing is unwarranted.

First, it is too late for the State to rely on *Gregory*'s "clear statement rule." In the nine briefs filed with this Court on appeal (as well as those filed in the district court proceedings), not a single one made any mention of that argument. *See* Slip op. 10,973. The first hint of it came when the panel issued an order four calendar days before oral argument asking the parties to be prepared to address the clear statement rule at oral argument. *See* this Court's docket entries 115 & 199; *see also* slip op. 10,973 n.14. An argument presented for the first time in a rehearing petition, or perhaps oral argument (*see* slip op. 10,973), should not be preserved for rehearing en banc as the State asks. *See United States v. Byers*, 730 F.2d 568, 570 (9th Cir. 1984) ("[Appellant], however, did not raise this contention until oral argument in this appeal and therefore it is not properly before us."); *Talk of the Town v. Dep't of Finance and Bus. Servs.*, 353 F.3d 650 (9th Cir. 2003) (refusing to consider an issue raised for first time in petition for rehearing).

Second, that no party raised the argument in any brief is indicative of the doctrine's inapplicability. It is entirely unexceptionable that the federal government may acquire private land in a state for federal purposes, and the Constitution vests exclusive and plenary authority for dealing with Indians with the federal government -- the use that Parcel 2 will be put. *See, e.g.*, *Oneida County v. Oneida Nation*, 470 U.S. 226, 234 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law."); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("The central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."); *see also United States v. John*, 437 U.S. 634, 649, 652-53 (1978). Moreover, the argument that *Gregory* applies here starts from the incorrect premise that Congress's creation of a reservation within a state disrupts state sovereignty. It does not. The Supremacy Clause makes federal law supreme over state law so all the state loses is the authority to enforce some of it laws, which occurs all the time when the federal government exercises its constitutional powers. Indeed, in seeking to apply *Gregory* here, the State fails to provide any limiting principle for its application.

As the majority correctly explained, "[v]irtually any federal legislation could be construed to have at least minor, derivative implications for traditional state functions." Slip op. 10,974.

And even if the clear statement rule were applicable, its requirements are easily met here. Congress could not have been clearer in the Act that it intended the Secretary to hold land in trust for the Tribe and for that land to be part of the Tribe's reservation. Pub. L. No. 99-503, 101 Stat. 1799, § 6(d); *see also* slip op. 10,974. The only question is what unincorporated land within the three specified Arizona counties the Secretary will hold in trust and be a reservation. And, assuming for the sake of argument that there is an impact to state sovereignty, the State fails to explain how any such impact is different if the land the Secretary accepts in trust is (as under the Secretary's interpretation) unincorporated land completely surrounded by incorporated land, i.e., a county island, as opposed to (as would be permissible under the State's interpretation) unincorporated land "immediately adjacent to a city's outermost boundary or even land that was almost, but not entirely encircled by corporate land." Slip op. 10,975, *see also id.* at 10,971 ("Even under the Arizona appellants' reading, nothing would prevent

the Secretary from holding in trust for the Nation land immediately adjacent to a city's outermost boundary, or even an octagonally shaped parcel that was encircled by corporate land on seven of its eight sides. A county island is no different in principle or practice."). The State's failure to articulate any distinction in that regard demonstrates that the State does not actually invoke *Gregory* as a canon of statutory construction. *Gregory* does not stand for the principle that a state must win in a statutory challenge, which is how the State seems to use it.

III. THE STATE PROVIDES NO BASIS FOR REHEARING EN BANC OF ITS CONSTITUTIONAL ARGUMENTS

The State opines that "[i]f the Court grants rehearing en banc, it should consider [the State's] argument that the Gila Bend Act as applied violates the Indian Commerce Clause." State Pet. 15. The State, however, fails to demonstrate that the majority's resolution of the State's constitutional arguments meets the criteria for rehearing en banc. The State's fundamental contention has been that Congress exceeded its authority under the Indian Commerce Clause and violated the Tenth Amendment because the Act undercut an element of state sovereignty -- territorial control. As the majority correctly explained, slip op. 10,975-77, Congress acted well within its constitutional

authority, expressly stating that it was fulfilling "its responsibility to exercise plenary power over Indian affairs to find alternative land for the [Tribe]." H.R. Rep. 99-851 at 7. And more fundamentally, the State's argument is inconsistent with Supreme Court precedent that long ago rejected as "unsound in principle and unworkable in practice" the analytical approach of trying to identify spheres or categories of distinctly state functions free from the federal government's involvement. *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 546-47 (1985); *see also John*, 437 U.S. at 649, 652-53 (rejecting argument that Congress's creation of reservation and exercise of federal jurisdiction within a state unconstitutionally dispossessed that state of its sovereign rights). There is no basis for rehearing en banc on this question.

CONCLUSION

For the foregoing reasons, the petition for panel rehearing and petitions for rehearing en banc should be denied.

Respectfully submitted,

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CERTIFICATE PURSUANT TO NINTH CIRCUIT RULES 32-3 AND 40-1

Pursuant to Ninth Circuit Rules 32-3 and 40-1(a), I certify that the foregoing brief is proportionally spaced, has a typeface of 14 points or more, and contains 3790 words.

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