No. 15-780

IN THE
Supreme Court of the United States

CITIZENS AGAINST CASINO GAMBLING IN ERIE COUNTY, *ET AL.*,

Petitioners,

v.

JONODEV OSCEOLA CHAUDHURI, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE NATIONAL INDIAN GAMING COMMISSION, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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REPLY TO RESPONDENTS' ARGUMENTS

A. The Second Circuit's Decision Conflicts with this Court's Precedents Recognizing a State's Jurisdiction in Indian Country

Respondents do not dispute that a state has jurisdiction over Indian country within its borders. In case law spanning more than 150 years – which Respondents do not even attempt to distinguish – this Court has recognized the authority of the states, including New York, to enact statutes affecting Indians on Indian lands. *See* Petition at 28-31 and cases cited therein

Nevertheless, the Second Circuit held that "the Seneca Nation has jurisdiction" over the Buffalo Parcel, and "New York has therefore been divested of its jurisdiction." (Pet. App. 36a) This extraordinary holding is plainly erroneous. In a footnote, Respondents try to distance themselves from the appellate court's holding, asserting that the "conclusion that the Buffalo Parcel qualifies as Indian country does not eliminate any authority the State may otherwise have over Indian country within the state." (U.S. Opp. at 18 n.3. Respondents' assertion is the reverse of, and is irreconcilable with, the Second Circuit's decision.

The court's grave error, which Respondents implicitly concede, injects confusion into the law surrounding the reach of a state's jurisdiction in Indian country. Its significance will grow as Native American tribes increasingly seek to reacquire

sovereign Indian lands. It merits this Court's immediate review before the error is compounded.

B. The Second Circuit's Decision Conflicts with this Court's Precedents Requiring a Clear Statement to Abrogate State Sovereignty

The Seneca Nation Settlement Act ("SNSA") does not contain a clear statement abrogating state sovereignty over lands the tribe purchases with SNSA funds. Respondents argue, however, that no express statement is necessary, because SNSA's restricted fee mechanism "is sufficient in itself to indicate Congress's intent for the land at issue to be subject to federal and tribal jurisdiction." U.S. Opp. at 20-21.

As recently as *Bond v. United States*, --- U.S. ---, 134 S. Ct. 2077, 2088 (2014), however, this Court emphasized that statutory interpretation requires recognition that "Congress legislates against the backdrop" of certain unexpressed presumptions. *Id.* (quoting *EEOC v. Arabian American Oil Co.*, 499 U. S. 244, 248 (1991)). Among the bedrock principles of statutory construction are those grounded in the relationship between the federal and state governments, such as the presumption that federal statutes do not abrogate state sovereign immunity, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985). Closely related is the principle that "'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides'" the "usual constitutional balance of federal and state powers." *Bond*, --- U.S. at ---, 134 S. Ct. at 2089 (citations omitted).

This Court has repeatedly cautioned that, if the federal government would "'radically readjust[] the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit'" about it. *Bond*, --- U.S. at ---, 134 S. Ct. at 2089 (citations omitted). There can be no more radical readjustment of state and national authority than the abrogation of state sovereignty in favor of federal and tribal jurisdiction. When legislation "affect[s] the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U. S. 336, 349 (1971). Under SNSA, there is no clear statement of congressional intent to shift jurisdiction, and thus no assurance that Congress intended to bring about that result.

Respondents assert that "no clear-statement rule applies here," because Congress has "plenary authority to legislate in the field of Indian affairs." U.S. Opp. At 19-20. This is a non sequitur. Congress's "plenary power" over Indian affairs does not include power to interfere with the regulatory jurisdiction of a state within its territorial borders. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 71 (1996) (Congress in the exercise of its plenary power under the Indian Commerce Clause could not require a state to surrender immunity from suit, one of the quintessential attributes of sovereignty). *Cf. Adoptive Couple v. Baby Girl*, --- U.S. ---, 133 S.Ct. 2552, 2568-70 (2013) (Thomas, J., conc.) (tracing history and urging limited construction of Indian Commerce Clause).

Respondents' reliance on *United States v. Lara*, 541 U.S. 193, 200 (2004), is also misplaced. There, the Court recognized the power of Congress to change "the metes and bounds of tribal sovereignty," not of state sovereignty, in a context that "involve[d] no interference with the power or authority of any State." *Id.* at 202, 205.

Respondents suggest, in the alternative, that Congress was "reasonably explicit," in subjecting lands acquired pursuant to SNSA to tribal jurisdiction, because the application of 25 U.S.C. § 177 "demonstrates Congress's intent that the United States exercise superintendence over the land." U.S. Opp. at 20. There is, however, no precedent, and Respondents cite none, for the use of the 25 U.S.C. § 177 to create new Indian lands. If SNSA is "unique," as Respondents assert (U.S. Opp. at 22), it is because Congress has ***never*** used 25 U.S.C. § 177 as a vehicle to shift regulatory jurisdiction to an Indian tribe. It is a contradiction to suggest that Congress's reference to this statute in the text of SNSA even remotely suffices as an ***explicit*** statement of intent to transfer jurisdiction, when it ***never*** has had that effect.

In *Nebraska v. Parker*, --- U.S. --- (Mar. 14, 2016), the Court just held that if Congress intends to diminish the boundaries of an Indian reservation, it must express its intent to do so clearly and unequivocally. Assuming *arguendo* that Congress has the power to diminish a state's jurisdiction, no less a threshold of clarity should be required to diminish the boundaries of a State. SNSA does not meet this requirement.

C. The Differences between the IRA and SNSA Demonstrate that Congress in SNSA Did Not Intend to Create a Mechanism for the SNI to Acquire New Off-Reservation Indian Lands

In their effort to imply congressional intent, Respondents rely on supposed "similarities between the SNSA and the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465, which authorizes the Secretary of the Interior to take land into trust for the benefit of Indian tribes. U.S. Opp. at 15. To the contrary, the differences between these statutes are more significant than any similarities and reinforce the conclusion that Congress in SNSA did not intend to create an avenue for the SNI to acquire jurisdiction over off-reservation lands.

The IRA, entitled in part "[a]n Act to conserve and develop Indian lands and resources," 48 Stat. 984 (1934), consisted of 19 separate subsections designed to end the federal policy of Indian assimilation and establish policies to encourage Indian self-determination. It authorized the Secretary to take land into trust to provide "land for Indians," *see* 25 U.S.C. § 465 (a term Congress later echoed in IGRA's "Indian lands"). SNSA, in contrast, had a more modest goal: to resolve disputes over land leases between the SNI and its tenants. Entitled in part "[a]n Act to provide for the renegotiation of certain leases," 104 Stat. 1292 (1990), SNSA addressed such goals as facilitating the negotiation of new leases, resolving past inequities, and providing for stability and security to the surrounding areas. 25 U.S.C. § 1774. None of those purposes included the creation of

new off-reservation sovereign lands for the SNI. Indeed, Congress in SNSA never mentioned "Indian lands" or "sovereignty."

The regulations implementing the IRA require the Secretary to give state and local governments 30 days to comment on the impact of a proposed land-into-trust acquisition on "regulatory jurisdiction, real property taxes and special assessments," 25 C.F.R. § 151.10, 151.11(d). In weighing the acquisition, the Secretary must consider "[j]urisdictional problems and potential conflicts of land use which may arise." 25 C.F.R. §§ 151.10(f), 151.11(a). For off-reservation acquisitions, the Secretary also must consider "the location of the land relative to the state boundaries" and its distance from the tribe's reservation, *id.*, § 151.11(b), (d), and give "greater weight" to governmental "concerns" as the distance of the land from the reservation increases. Under SNSA, in sharp contrast, local governments have ***no opportunity to comment*** on the effect of an acquisition beyond "the impact of the removal of such lands ***from real property tax rolls*** of State political subdivisions." 25 U.S.C. § 1774f(c) (emphasis added). There is no logical reason – and Respondents suggest none – for Congress in SNSA to have sought comment on the removal of the property from the tax rolls only, if it had intended in addition to bring about a shift in regulatory jurisdiction.

The IRA's implementing regulations also require the Secretary to consider a multitude of other factors in 25 C.F.R. 151.10, including the purpose for which the land will be used, potential conflicts of land use, and environmental issues. *See* 25 C.F.R.

151.11(d), incorporating 25 C.F.R. 151.10 by reference. SNSA contains no such requirements.

The regulatory process under the IRA reflects sensitivity to the disruptive practical consequences of a loss of state jurisdiction over land within its borders. *Cf. City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 216 (2005). A loss of state jurisdiction implicates, in addition to tax revenues, the loss of regulatory authority. It exposes neighboring landowners to activities, pollutants and noxious consequences – including but not limited to gambling – which have profound effects but which the state and local municipalities have no authority to regulate. If Congress in SNSA had contemplated a shift of the State's regulatory authority to the SNI, it would have been sensitive to these consequences. The more logical, and the only reasonable, interpretation from the statutory text and structure, is that Congress did not intend for such a shift to occur.

D. The Second Circuit's Decision Conflicts with *Venetie*, and the "Dependent Indian Community" Analysis is Not Determinative of the "Indian Lands" Issue

Respondents contend that the Second Circuit correctly upheld the SNI's exercise of governmental power over the Buffalo Parcel because, in imposing a restriction on alienation, the federal government set the land aside for the SNI and exercised federal superintendence over it, which rendered it a "dependent Indian community," a category of "Indian country, under *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1988), and thereby

transferred regulatory jurisdiction to the SNI. The Buffalo Parcel is not a dependent Indian community under *Venetie*, and the dependent Indian community analysis is not, in any event, determinative of the "Indian lands" issue under IGRA.

As *Venetie* makes clear, the dependent Indian community category is a "limited" and narrow adjunct to the more typical types of Indian country surrounding it in 18 U.S.C. § 1151, grounded in a clear congressional purpose to extend Indian country status to land that Congress dedicated for Indian use and occupancy as the equivalent of a reservation. *See Venetie*, 522 U.S. at 527. The three-part statutory definition of Indian country is based on *United States v. McGowan*, 302 U.S. 535 (1938), following *United States v. Sandoval*, 231 U.S. 28, 46 (1913); *see also United States v. Pelican*, 232 U.S. 442 (1914). "Words of art bring their art with them," and "if a word is obviously transplanted from another legal source ... it brings the old soil with it." F. Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947) ("Reflections"). This trilogy of cases (*McGowan*, *Sandoval*, and *Pelican*) circumscribe the meaning of section 1151(b): a dependent Indian community, like the two "Indian country" categories (reservations and allotments) surrounding it in 18 U.S.C. § 1151, is land that Congress has set aside for Indians as the equivalent of an Indian reservation or allotment. *See Venetie*, 522 U.S. at 530-31. The Buffalo Parcel does not meet this description.

Respondents' reliance on *Venetie* is also unavailing because the Court held that the land there

was ***not*** a dependent Indian community. To qualify as such, Congress must not only set aside the land for an Indian tribe, but also exercise "federal superintendence" over it. *Id.* at 531. In *Venetie*, one of the primary purposes of the statute at issue was "to effect Native self-determination and end paternalism in Federal Indian relations." This "severely undercut" the "superintendence" prong of the argument. *Id.* at 534.

So too here, one of SNSA's primary purposes was "to promote economic self-sufficiency for the Seneca Nation and its members." 25 U.S.C. § 1774(b)(6). The terms "dependency," a necessary element of a "dependent Indian community" under 18 U.S.C. § 1151, and "self-sufficiency, a goal of SNSA, are antonyms, not synonyms. The 9-1/2 acre Buffalo Parcel, which was under New York State sovereign jurisdiction for two centuries and where no Indians lived, was neither dependent, nor Indian, nor a community. As in *Venetie,* Respondents' argument that by enacting SNSA, Congress demonstrated its intent to act as the tribe's "guardian" (Resps. Br. at 14), rings hollow in view of the statute's express purpose to promote self-sufficiency.

Even if the Buffalo Parcel met the test for a "dependent Indian community," this would not make it "Indian lands" under IGRA. In drafting IGRA, Congress eschewed the term "Indian country," opting instead for the term "Indian lands" to describe the land that would be eligible for gambling. Specifically, in 1985, Representative Morris Udall introduced H.R. 1920, a precursor to IGRA, which changed the term "Indian country" to "Indian lands" and added a new

definition of "Indian lands." The Counsel on Indian Affairs to the House Committee on Interior and Insular Affairs during IGRA's development explained the reason for the change:

> One reason for dropping the use of the term "Indian country" was the definition in [18 U.S.C. § 1151, which] . . . defines "Indian country" to be all land within the borders of a reservation and, outside of a reservation, dependent Indian communities and Indian allotments to which Indian title had not been extinguished. ***The question of what constituted a dependent Indian community had become a legal bone of contention.*** The House Committee felt that using the term "Indian lands" and defining that term as all lands within a reservation and all trust or restricted land outside of a reservation over which a tribe exercised jurisdiction would be ***clearer and less fraught with legal problems.***

F. Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 Ariz. St. L. J. 99, 139-140 (2010) (footnote omitted, emphasis added).

Congress recognized that the definition of a "dependent Indian community" was contentious, and therefore carved that concept out of the "Indian lands" definition by limiting Indian gambling to (i) lands within a reservation, and (ii) trust or restricted land outside of a reservation over which a tribe exercised jurisdiction. The Second Circuit reinserted it,

however, in derogation of the statutory language, history and intent. Congress never intended courts to undertake a convoluted analysis – as the courts have done here – to determine whether the imposition of a restriction on alienation under a statute designed to foster tribal self-sufficiency was a sufficient exercise of federal superintendence to create dependence on the federal government and thereby transfer regulatory jurisdiction over land to an Indian tribe.

E. Petitioners are Proper Parties and the State's Presence is Not Required

Respondents observe that New York is not a party to this action (U.S. Opp. at 19), but the State's presence is not required. There is no question that an individual is a proper party to challenge a federal statute on the grounds that it may intrude upon the sovereignty and authority of the States. *Bond v. United States*, 564 U.S. 211, 214 (2011) ("*Bond I*"). Many of the individual petitioners reside in the immediate neighborhood of the casino erected on the Buffalo Parcel (Pet. App. 211a). It is they who suffer the direct effects of the operation of the casino and they who are protected by the New York Constitution's Bill of Rights provision that otherwise would have prohibited the operation of a Class III gambling casino under color of federal law [N.Y. Const., Art. I, § 9].

In *Bond I*, the Court held that, in a proper case, an individual may "assert injury from governmental action taken in excess of the authority that federalism defines." *Bond* contains a lengthy discussion of this Court's precedents, noting that the concepts of

federalism, dual sovereignty, and the protections against federal intrusions on state sovereignty embodied in the 10th Amendment exist not just for the benefit of the States, but for individual citizens of those States. *See New York v. United States*, 505 U.S. 144, 181 (1992). Thus, Petitioners have the right to challenge SNSA or the interpretation Respondents imparted to it, even if New York chooses not to defend its own constitutional prohibitions against gambling.

F. The Second Circuit's Decision Threatens Federalism and Raises Serious Constitutional Questions

Respondents acknowledge no limitations on Congress's "plenary" power under the Indian Commerce Clause of the Constitution. They argue that Congress may acquire non-reservation land for a tribe within the boundaries of a state even if that may have the effect of transferring sovereignty over the land from the State to the tribe. If true, then states are hardly co-equal sovereigns of the federal government, but exist only at its sufferance.

This Court has recognized that "[a]lthough the Constitution establishes a National Government with broad, often *plenary* authority over matters within its recognized competence, the founding document 'specifically recognizes the States as sovereign entities.'" *Alden v. Maine*, 527 U.S. 706, 713 (1999) (emphasis added) (*citing Seminole Tribe,* 517 U.S. at 71); *see Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) (the States entered the federal system with their sovereignty intact). If the appellate court's decision is allowed to stand, Congress in the

future can simply appropriate funds for the purchase of land by Indian tribes and then designate such land as "restricted fee" land, extinguishing state sovereignty in the process. Such absolutism is antithetical to the bedrock principle of federalism, upon which our Constitution rests.

CONCLUSION

The Petition for Certiorari should be granted.

April 18, 2016
Respectfully submitted,

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