15-1688(L), 15-1726(CON)

United States Court of Appeals

for the

Second Circuit

UPSTATE CITIZENS FOR EQUALITY, INC., DAVID BROWN VICKERS, RICHARD TALLCOT, SCOTT PETERMAN, DANIEL T. WARREN, TOWN OF VERNON, NEW YORK, TOWN OF VERONA, ABRAHAM ACEE, ARTHUR STRIFE,

Plaintiffs-Appellants,

– v. –

UNITED STATES OF AMERICA, individually, and as trustee of the goods, credits and chattels of the federally recognized Indian nations and tribes situated in the State of New York,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS TOWN OF VERNON, NEW YORK, TOWN OF VERONA, ABRAHAM ACEE AND ARTHUR STRIFE

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SALLY M.R. JEWELL, in his official capacity as Secretary of the U.S. Department of the Interior, MICHAEL L. CONNOR, in her official capacity as Deputy Secretary of the U.S. Department of the Interior and exercising her delegated authority as Assistant Secretary of the Interior for Indian Affairs, ELIZABETH J. KLEIN, in his official capacity as the Associate Deputy Secretary of the U.S. Department of the Interior and exercising his delegated authority as Assistant Secretary of the Interior for Indian Affairs, UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants-Appellees,

PHILIP H. HOGEN, in his capacity as Chairman of the National Indian Gaming Commission, NATIONAL INDIAN GAMING COMMISSION, MICHAEL B. MUKASEY, in his capacity as Attorney General of the United States,

Defendants.

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INTRODUCTION

This Reply Brief is respectfully submitted on behalf of the Plaintiffs-Appellants in Case No. 15-1726, *Towns of Vernon and Verona, et al.* It will respond to the Brief of the Federal Defendants-Appellees ("the Government").

ARGUMENT

POINT I

Congress Has No Power to Unilaterally Diminish the Sovereignty of Any State

The pivotal issue in this case is the meaning of the word "plenary," as often used by the Courts to define the power of Congress with respect to Indians pursuant to the Indian Commerce Clause of the U.S. Constitution (Article I, § 8, clause 3). While it may be plausibly argued that such power is indeed "plenary" insofar as it applies to the regulation of commerce with the Indian tribes, that does not mean that Congress may unilaterally expand the breadth of that power by acquiring land within a State and transferring sovereignty to an Indian tribe over that land while simultaneously divesting the state of its sovereignty.[1]

[1] The Government erroneously implies that the Appellant Towns have not properly raised the Tenth Amendment issue because they refer to it by name only in passing. Government's Br. at 44. This is more than a little disingenuous as the entire first point of the Appellant's main Brief was focused on the lack of the power of Congress

It is "bootstrapping" to argue that since Congress has the power to regulate commerce with Indian tribes, it can establish new Indian territory to exercise and expand that power by carving out land from an existing state. Historically, the courts have well understood that the powers Congress exercised under the Indian Commerce Clause with respect to land were limited to territories outside of a state or to lands that were carved out of a state at the time of its admission to statehood. Compare *United States v. McBratney*, 104 U.S. 621 (1881) and *United States v. Kagama*, 118 U.S. 375 (1886). *See also, e.g.*, *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) and *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962). These cases teach that the power Congress has over Indians must be limited by the sovereign rights of states. *See also* Matal, J., "A Revisionist History of Indian Country," 14 Alaska L. Rev. 283 (1997).

In this case, the Court below and the Government have conflated federal jurisdiction over tribes with sovereignty over land. The two are not synonymous. The result of that conflation and the absolutist unyielding position of the Government is that the power of Congress to regulate commerce among the Indian tribes has no limits and trumps state sovereignty. It leads to the inexorable and

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to use the Indian Commerce Clause to divest a state of its sovereignty. That is the very essence of what the Tenth Amendment is all about.

logical conclusion that the Secretary of the Interior could, in his or her discretion, and pursuant to Section 5 of the Indian Reorganization Act (25 U.S.C. § 465), buy all the land within a state for the benefit of an Indian tribe and transfer sovereignty over it to the tribes. This, of course, is an impossible conclusion as the continued existence of states is necessary, if for no other reason than that they must exist in order to elect a Congress and a President. U.S. Const. art. I, § 2, clause 1; art. II, § 1, cls. 2-3. Under a more likely scenario, the Government implicitly suggests the Secretary of Interior could, without the State's consent, decide to restore the Oneida Indian Nation's sovereignty to the entire 300,000 acres that were once part of its historic reservation – sovereignty which the Supreme Court has said the tribe relinquished. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). The restoration of that sovereignty would have to come, however, at the expense of the State of New York, as this Court recently made clear in its decision in *Citizens Against Casino Gambling v. Chaudhuri*, 802 F.3d 267 (2d Cir. 2015) ("*CACGEC*"), holding that tribal and state sovereignty may not coexist. *Id.* at 279-280 ("tribal jurisdiction is a combination of tribal and federal jurisdiction over land to the exclusion of the jurisdiction of the State"). It is inconceivable that anything so monumental could be forced up on a state without its consent.

After all the blood the patriots of the original 13 colonial states had shed to win their independence in the Revolution, it is unimaginable that these same states would have ratified the Constitution if it had understood that the Indian Commerce Clause could be invoked by the newly formed National Government to take away the precious sovereignty they had fought so hard to obtain, and cede it to the Indians. To hold otherwise defies common sense and ignores history. The danger in looking backward today, through the lens of nearly 250 years of history, is that it distorts the realities of the past. One of the major reasons the new Constitution was adopted was the realization of the need for a unified central government to conduct war and to be able to better defend the colonial states from foreign invaders and Indians. There was no doubt that "an alliance of tribes and foreign powers [posed] a serious threat to the colonies." Matal, J., "A Revisionist History of Indian Country," 14 Alaska L. Rev. at 289. The idea that the states would allow the Federal Government to turn around and give that land to the tribes is simply "revisionist" history necessary to suit the Government's modern-day agenda.

In *City of Sherrill*, it is true that the Supreme Court stated, *in dicta*, that the proper route to follow for the Oneida Indian Nation to reacquire its sovereignty was via Section 5 of the Indian Reorganization Act. *Sherrill* at 220-221. The Supreme Court, however, did not address, nor did it need to, the question as to whether the

Secretary of Interior could unilaterally acquire land and sovereignty absent the acquiescence of the state. Without such acquiescence, the State's territorial sovereignty could not be compromised. *Printz v. United States*, 521 U.S. 898, 918-19 (1997). *Summa Corp. v. California ex rel. State Lands Commission*, 466 U.S. 198, 205 (1984). As the next point will establish, that consent can be neither tacit nor inferred. *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 538-539 (1885). *See also Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 176 (2009).

POINT II

There Was No Formal Cession of Sovereignty by the State Nor the Required Acceptance Thereof by the United States

At the time that the Secretary of the Interior approved the land into trust, the State had not acquiesced to that transaction. Thus, the federal government had no authority to unilaterally transfer the sovereignty of the State to the Oneida Indian Nation (Point I, *supra*).

The subsequent purported acquiescence of the State pursuant to a Settlement Agreement with the Tribe could not be a rationale for the decision. Any decision must be justified based on the Record existing at the time of the decision. *Yale New Haven Hospital v. Leavitt*, 470 F.3d 71, 81 (2d Cir. 2006).

Assuming that the settlement could be considered, however, such settlement would not satisfy the requirements of a cession required by the Enclaves Cause of the U.S. Constitution.[2] To effectuate a transfer of jurisdiction from a state to the federal government, formalities are to be observed, including the formal acceptance by the Federal Government. *See* 40 U.S.C. 3112(c). The Record is devoid of any such acceptance.

Moreover, there was no unequivocal cession of sovereignty in the so-called Settlement Agreement reached between the State and the Oneida Indian Nation [A. 1788-1866]. Thus, the fact that that settlement led to the State's agreement to withdraw its lawsuit challenging the land into trust acquisition is of no consequence.

The Supreme Court, moreover, has made it abundantly clear time and again that any purported diminishment of state sovereignty must be explicit, clear and unequivocal. *See, e.g.*, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1988). *See also Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).

Given the absence of a clear and unequivocal decision by the State of New York to cede sovereignty to the Tribe, and given the fact that at the time the decision

[2] The Government argues that the Enclaves Clause is irrelevant on the theory that it does not apply because the State retains some jurisdiction. This argument will be addressed in Point III of this Brief.

was made to take land into trust, the State had not settled with the Oneida Indian Nation, the Secretary of the Interior lacked the power to unilaterally diminish state sovereignty by placing the subject land into trust.

Two additional issues must also be discussed before leaving this point. First, even if the State does not itself object to the Federal Government's land into trust acquisition, the individual Appellants that reside in the Towns of Vernon and Verona have standing to challenge that acquisition. *See Bond v. United States*, 564 U.S. 11 (2011) (an individual has standing to bring an action to redress injuries sustained as a result of federal action taken in violation of the Tenth Amendment). *See also New York v. United States*, 505 U.S. 144, 181 (1992) (state sovereignty benefits and protects a state's citizens as well as the state itself).

Second, as previously stated, the decision by the State to withdraw its challenge to the Federal Government's action was based on a settlement agreement with the Tribe. The terms of that Agreement provided, *inter alia*, that in exchange for the State's withdrawal of its legal challenge, the Tribe would have to agree to support a proposed Constitutional amendment being championed by the Governor and which would have to be approved by the voters, that would allow casino gambling statewide. *See* § VI-C-7 of the Agreement [A. 1803]. That deal is the subject of a separate lawsuit in State Court. *See Matter of Town of Verona, et al. v.*

Cuomo, 22 N.Y.S.3d 241 (3d Dep't 2015). While the Appellate Division – Third Department of New York State Supreme Court held that the arrangement did not violate the anti-vote-buying provisions of state law and did not exceed the Governor's authority by demanding the Tribe's support for the Amendment as a *quid pro quo* for withdrawing the lawsuit, that case is *sub judice* as the Plaintiffs in that action, who are also the Appellants in this case, have moved for reargument and/or leave to appeal to the New York State Court of Appeals.

Since the outcome of that case could invalidate the agreement between the tribe and the State that led to the withdrawal of the State's challenge to the trust acquisition, this Court may wish to withhold any final determination of this appeal until there is a final resolution of that state case.

POINT III

The Government's Argument that the Enclaves Clause of the Constitution Does Not Apply Because the State Has Retained Some Jurisdiction Lacks Merit

The District Court found and the Government here argues that the Enclaves Clause does not apply because the State actually retains some jurisdiction over the land in question (Government's Br. at 34). This argument, however, is contradicted by this Court's decision last September in *CACGEC*, 802 F.3d 267, 279-80, which

held that because the land there in question met the definition of "Indian Country," there was "no room for State regulation" and that Congress "had removed the [land] from New York State's jurisdiction." *Id.*

As a result, this Court made it abundantly clear that tribal and state jurisdiction are mutually exclusive. Thus, there is no merit to the Government's argument that the transfer of sovereignty could occur without the full and complete formalities required by the Enclaves Clause in 40 U.S.C. § 3112(c).

POINT IV

The Enabling Acts Admitting Western States to the Union Is What Differentiates Them From Their Colonial Counterparts Like New York

In their main Brief, the Appellant Towns cite to a number of statutes where, as a condition of admission to the Union, it was made clear that the newly-admitted states would not possess jurisdiction over certain lands already occupied or set aside for tribes that lived there. Appellants' main Brief at 26, n. 4. None of the language would have been necessary if, in fact, states would have had no authority over Indians to begin with. New York State, on the other hand, as one of the original 13 colonial states, had no comparable limitations with respect to jurisdiction over Indians within its borders. The existence of this legislation applicable to the newly-admitted States is what Congress used to justify the exercise of its powers under the

Indian Commerce Clause. *See* Matal at 295. It reflects an understanding that without it, Congress would not have had the power to act.

Moreover, redundancy in a statute is not to be presumed. It is a time-honored rule of statutory construction that dates back to some of the most important cases ever decided by the Supreme Court. *See, e.g.*, *Marbury v. Madison*, 1 Cranch. 137, 174 (1803) (lawmakers do not tend to use terms "that have no operation at all"). This begs the question as to why Congress would have insisted upon inserting language into new statehood legislation to carve out jurisdiction over Indian-occupied lands if Congress believed those states would have had no jurisdiction to begin with.

The historical evidence is overwhelmingly clear that Congress itself understood that its powers over Indians were limited, not absolute, and were in addition subject to the Bill of Rights. The Supreme Court agreed. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 161 (1973) ("The powers of Congress over Indian affairs are as wide as state powers over non-Indians, ***subject, of course, to the Bill of Rights***.") (emphasis supplied). The Bill of Rights includes the Tenth Amendment.

The powers of Congress under the Indian Commerce Clause are not, therefore, unlimited, but subject as well to the Bill of Rights and the Tenth Amendment, which gives Congress only delegated and enumerated powers.

POINT V

The Historical Record Does Not Support an Expansive Exercise of Congressional Power Under the Indian Commerce Clause

There is little doubt that the jurisprudence on the Indian Commerce Clause has evolved over time, and that it is neither practical nor realistic to try to turn back the clock completely. The Court is invited, however, to review both Professor Matal's article entitled "A Revisionist History of Indian Country," heretofore cited, tracing a line of cases dating back to the earliest dates of the Republic, as well as Professor Robert Natelson's "Original Understanding of the Indian Commerce Clause," 85 Denv. U. L. Rev., 201 (2007). Both scholars conclude that what the Founders meant with respect to the Indian Commerce Clause and how today's courts have interpreted that clause are far different. It is clear that today Congress, with the support of the judiciary, has allowed far more power over Indians than the term "commerce" might suggest.

However that may be, there is no need to exacerbate the situation by interpreting the Indian Commerce Clause in such a manner that states will be left powerless to protect their own territorial sovereignty.

CONCLUSION

The judgment below should be reversed, summary judgment in favor of the Government Defendants should be vacated, and judgment entered granting Appellants' summary judgment declaring that the land into trust acquisition by the Secretary of the Interior was and is illegal, null and void.

DATED: February 12, 2016

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached brief is proportionately spaced, has a typeface of 14 points, and contains 2455 words. This word count excludes table of contents, table of authorities, and signatures and certificates of counsel.

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