18-894

No. 18-___

IN THE

Supreme Court of the United States

HAROLD MCNEAL AND MICHELLE MCNEAL,

Petitioners,

v.

NAVAJO NATION AND NORTHERN EDGE NAVAJO CASINO,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In conjunction with this Court's modern jurisprudence fostering tribal sovereignty, Congress enacted the Indian Gaming Regulatory Act (IGRA) intending that States and Native American Tribes "will sit down together in a negotiation on equal terms and at equal strength and come up with a method of regulating Indian gaming," recognizing that "it is up to those entities to determine what provisions will be in the compacts." (App. 115a). Under that statutory regime, the State of New Mexico and the Navajo Nation agreed it was important that visitors to the Navajo gaming facility "who suffer bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise have an effective remedy for obtaining fair and just compensation." (App. 90a).

To accomplish this objective, the State and Nation jointly agreed that the Nation would waive sovereign immunity for torts caused by the conduct of the Gaming Enterprise. They also explicitly agreed that any such claim would be resolved under New Mexico law, and "may be brought in state district court, including claims arising on tribal land, *unless* it is finally determined by a state or federal court that *IGRA does not permit* the shifting of jurisdiction over visitors' personal injury suits to state court." (App. 90a) (emphasis added).

The question presented is:

Whether the Tenth Circuit panel violated the current jurisprudence of this Court and the Congressional policy underlying IGRA by precluding the Nation from exercising its sovereign authority to permit a patron's tort claim against the Nation and its gaming facility to be brought in state court without express congressional permission.

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PETITION FOR A WRIT OF CERTIORARI

Harold McNeal and Michelle McNeal respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 2a-42a) is reported at 896 F.3d 1196. The district court's opinion (App. 43a-87a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2018. A petition for rehearing was denied on September 10, 2018 (App. 1a). On December 6, 2018 Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including January 10, 2019.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

The asserted grounds for jurisdiction in the federal district court were 28 U.S.C. §§ 1331, 1363 and 1343. The circuit court addressed the basis for federal jurisdiction and concluded that federal court jurisdiction was proper under Section 1331 (App. 11a-12a).

STATUTORY PROVISIONS INVOLVED

This case involves the sovereign right of the Navajo Nation to consent to state court jurisdiction in a gaming compact when waiving sovereign immunity, and an interpretation of the language of the Indian

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[1] The New Mexico Attorney General's similar motion for extension of time on behalf of the Honorable Bradford J. Dalley was granted to and including February 8, 2019.

Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 – 2721. Reproduced are: relevant portions of IGRA (App. 95a-109a); relevant parts of the legislative history of IGRA (App. 110a-123a); and relevant sections of the compact between the Navajo Nation and the State of New Mexico (App. 88a-94a).

STATEMENT OF THE CASE

A. Background

This action arose out of a slip-and-fall tort case filed in New Mexico state court against the Navajo Nation and its Northern Edge Navajo Casino by the McNeals. The Navajo Nation contested the state court's jurisdiction over the tort action, both in the state court action and in the federal declaratory judgment lawsuit that gave rise to the Tenth Circuit judgment, of which the McNeals seek the further review of this Court.

B. The State Court Action

In their 2014 lawsuit against the Navajo Nation and its casino in state district court, the McNeals alleged that, while Harold McNeal was a patron at the Casino, he slipped and fell on a wet floor in the casino bathroom. The McNeals asserted claims for negligence and loss of consortium.

The Navajo Nation moved to dismiss the McNeals' lawsuit claiming that IGRA precluded the agreement between the tribe and the state authorizing jurisdiction over casino-visitor personal injury suits to a state court. The Honorable Daylene Marsh—the initial state district court judge assigned to the case—denied the Navajo Nation's motion to dismiss, holding that *Doe v. Santa Clara Pueblo*, 2007-NMSC-008, 141 N.M. 269, 154 P.3d 644, was binding precedent and had expressly rejected that claim. Judge Marsh stayed

proceedings to allow the tribe to challenge the ruling in federal court.

C. The Federal Court Action

The Nation and its casino then filed a declaratory judgment action in federal district court against the state court judge[2] and the McNeals. In its motion for summary judgment, the Navajo Nation asserted that, irrespective of its compact agreement, neither IGRA nor the Navajo Nation Sovereign Immunity Act, 1 N.N.C. § 553 et seq., (the "NNSIA") permitted it to consent to jurisdiction in state court of private personal injury lawsuits against tribes or tribal entities.

The Honorable Martha Vazquez denied the Navajo Nation's motion for summary judgment. Judge Vazquez ruled that the Navajo Nation's agreement in its gaming compact with the State of New Mexico to consent to state court jurisdiction in personal injury cases arising out of the Navajo Nation's gaming facility was within the Tribe's sovereign authority and was not precluded by IGRA or beyond the tribal authority under Navajo law. (*See* App. 64a-86a). Judge Vazquez agreed with the New Mexico Supreme Court's ruling in *Doe v. Santa Clara Pueblo*, that held "Congress intended the parties to negotiate, if they wished, the choice of laws for personal injury suits against casinos as well as the choice of venue for the enforcement of those laws. Nothing in IGRA required the tribes to negotiate the subject, not does anything in IGRA prevent them from doing so." 2007-NMSC-008, ¶ 47, 154 P.3d at 657. As a result, Judge Vazquez

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[2] Judge Dalley had been substituted for Judge Marsh in the state court action, and also in the federal court proceeding.

dismissed the Navajo Nation's declaratory judgment action. (App. 87a).

D. The Appeal

The Navajo Nation and the Northern Edge Navajo Casino appealed and the Tenth Circuit reversed the judgment of the district court, holding that the Nation had no right to consent to state court jurisdiction over the McNeals' tort claim.[3]

The Panel's ruling on the merits, which is the subject of this Petition, rests on several conclusions. First, the Panel determined that Congress must affirmatively authorize any attempt to negotiate and agree to jurisdiction of the McNeal's tort claim in state court, and Congress failed to do so in IGRA. (Panel Op. 13-15.) The Panel opinion did not discuss Judge Dalley's argument that under *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001) and *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), tribes have inherent sovereign authority to consent to state court jurisdiction that is not dependent on permission granted by Congress in IGRA, nor the related argument advanced by Amicus New Mexico Trial Lawyers Association that failure to affirm the judgment below would undermine the Tribe's inherent sovereign powers.

Second, the Panel determined that tortious conduct resulting in the personal injury involved here—negligence in identifying and remediating hazards in

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[3] The Nation's alternative claim, that its compact agreement to authorize state court jurisdiction was not permitted under tribal law, was not ruled on by the circuit court, (App. 15a at n.4) and is not at issue in this Court.

a restroom used by patrons in the tribe's casino—was not "directly related to, and necessary for" the licensing and regulation of gaming activity, or "directly related to the operation of gaming activities," as provided in §§ 2710(d)(3)(C) (i) and (vii) of IGRA. (App. 18a-24a and 28a-34a). Third, and finally, the Panel concluded that these subsections of IGRA were unambiguous thereby precluding it from considering the statute's legislative history which may have indicated a contrary intent of Congress. (App. 26a-27a).

Therefore, the Panel concluded that the Navajo Nation lacked the necessary Congressional permission to agree to state court jurisdiction, requiring the reversal of the district court's ruling with direction to the district court to enter declaratory judgment in the Navajo Nation's favor, barring state court jurisdiction over the underlying personal injury action. (App. 41a-42a).

REASONS FOR GRANTING THE WRIT

A. Summary of Reasons

The Tenth Circuit's decision overturned the Navajo Nation's exercise of its sovereign power agreeing to state court jurisdiction over the McNeals' tort action because Congress had not explicitly authorized the Nation to do so in IGRA. That decision merits this Court's further review for the following reasons:

First, the decision conflicts with this Court's bedrock policy acknowledging and encouraging a tribe's right to exercise its inherent sovereign power to determine for itself what is in the best interest of the tribe. That failure led the court to wrongly conclude that here IGRA must affirmatively grant the Navajo Nation authority to negotiate and agree to state court jurisdiction over the McNeals' tort claims. To the contrary, the

only appropriate consideration of the Congressional power to abrogate inherent tribal sovereignty is whether IGRA contained an express prohibition against allocating jurisdiction to state court because Congress can limit the sovereignty of tribes but does not affirmatively grant sovereign power to tribes.

Second, in construing IGRA as it did the Tenth Circuit decision wholly ignores the legislative history leading to IGRA's passage—a history that confirms Congress's intent to leave tribes free to bargain with states as equals to determine mutually agreeable provisions in state gaming compacts, including matters of the applicability of state law and the enforcement of that law in state courts.

Third, the circuit court has decided an important federal question in a way that conflicts with a decision by the New Mexico Supreme Court.

I. THE TENTH CIRCUIT DECISION VIOLATES THE SETTLED MODERN JURISPRUDENCE OF THIS COURT THAT FOSTERS INHERENT TRIBAL SOVEREIGN POWER AND ALLOWS TRIBES TO PURSUE THEIR OWN INTERESTS IN CONTRACT NEGOTIATIONS

This Court is well aware of the evolution of federal policy with respect to the sovereign status of tribes – from the earliest Marshall Trilogy concerning the Cherokee Nation, to the Allotment and Assimilation Era (1887-1934), followed by the Reorganization Era (1934-1953) and the Termination Era (1953-1961). *See Cohen's, Handbook of Federal Indian Law*, §§ 1.02-1.06 (Nell Jessup Newton ed. 2012) ("*Cohen's Handbook*"). That history finally ended with the dramatic change in Federal Indian policy away from

federal paternalism to self-determination and self-governance. The Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 to 450e-3 (transferred to 25 U.S.C. §§ 5301-5310), and the Tribal Self-Governance Act of 1994, 25 U.S.C. §§ 458aa to 458hh (transferred to 25 U.S.C. §§ 5361-5368), constituted a declaration of independence for tribal governments that acknowledged tribal governments considerable freedom to govern.

It is now recognized that powers lawfully vested in a tribe are not, in general, delegated powers granted by express acts of Congress, but rather "inherent powers of a limited sovereignty which has never been extinguished." *Cohen's Handbook* § 4.01[1][a] at 207 (quoting *Wheeler v. United States,* 435 U.S. 313, 322-323 (1978)). The modern retreat from paternalism and wholesale federal governance over tribal affairs is now the settled doctrine of this Court: tribes possess broad, inherent sovereignty to govern the affairs of tribal members and tribal lands. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 (1982).

Thus, this Court in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* made clear that the forum where a tribe is subject to suit depends on when "the tribe has waived its immunity." 523 U.S. 751, 754 (1998). Three years later in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, this Court explicitly recognized that when a tribe waives its immunity, the tribe may also consent to jurisdiction in state court. 532 U.S. 411, 414 (2001).

Although Congress has plenary authority to abrogate that tribal authority, *Kiowa Tribe*, 523 U.S. at 754 and *C&L Enterprises*, 532 U.S. at 414, Congressional intent to do so must be clear and unambiguous, because "courts will not lightly assume that Congress

in fact intends to undermine Indian self-government." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014).

The Tenth Circuit panel—without any focused attention paid to either *Kiowa Tribe* or *C&L Enterprises*[4]—ignored the doctrine of inherent tribal sovereign power. Instead, it wrongly assumed that IGRA must contain a clear congressional grant of permission to the Navajo Nation to negotiate for and agree to the jurisdiction-allocation provision in the Compact. Finding no express congressional grant of power, the Panel concluded that there was no valid basis for state court jurisdiction over the McNeals' personal injury lawsuit.

The Tenth Circuit erred in ignoring this Court's affirmation of the inherent sovereign power of the Navajo Nation to consent to state court jurisdiction and this Court's insistence that if Congress desires to limit that sovereign power, it must do so explicitly. In accordance with this Court's jurisprudence, the Navajo Nation and the State properly framed the question in the Compact when they mutually agreed to the exercise of state court jurisdiction "*unless* it is finally determined by a state or federal court that *IGRA does not permit* the shifting of jurisdiction over visitors' personal injury suits to state court." (App. at 90a) (emphasis added).

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[4] Instead, the panel misplaced reliance on *Kennerly v. District Court*, 400 U.S. 423 (1971). The *Kennerly* Court twice emphasized that it "was presented solely with the question of the procedures by which 'tribal consent' must be manifested under the new [Indian Civil Rights] Act," *id.* at 429, and that "today's decision is concerned solely with the procedural mechanisms by which tribal consent must be registered." *Id.* at 430, n. 6.

Having failed to properly frame the question, the Tenth Circuit's analysis of the relevant text of IGRA is fatally flawed and the decision undermines the proper balance between tribal sovereignty and the recognized congressional power to abrogate that sovereign power.

II. THE TENTH CIRCUIT'S DECISION WHOLLY IGNORES AND IS CONTRARY TO THE INTENT AND PURPOSE OF IGRA.

Having wrongly searched for an affirmative grant of congressional authority and finding none, the Tenth Circuit departed from the accepted and usual course of proceedings and rejected as irrelevant an analysis of the legislative history preceding the adoption of IGRA. But the legislative history is critical and confirms that IGRA was intended—consistent with this Court's modern jurisprudence—to support the tribes' right to bargain as equals with states in negotiating the terms of gaming compacts. This compounded the Panel's error.[5]

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[5] The Panel's decision to ignore the legislative history of IGRA was also triggered by its erroneous conclusion that "*Bay Mills* leads us to the clear conclusion that Class III gaming actually relates only to activities actually involved in the *playing* of the game." (App. 19a) (emphasis in original). But *Bay Mills* is not controlling. *Bay Mills* dealt with sovereign immunity; not state court jurisdiction. It held only that "the abrogation of immunity in IGRA applies to gaming on, but not off Indian lands." 572 U.S. at 804. Most important, *Bay Mills* rejected an attempt by a State to insist on the abrogation of immunity in the absence of *both* congressional authority and where there was no waiver by the tribe, *id.* at 803-804, while *Kiowa* makes clear that a tribe is subject to suit where Congress has authorized the suit *or* the tribe has waived its immunity. *Kiowa*, 523 U.S. at 751. Here, the Nation

As the Senate Report from the Select Committee on Indian Affairs ("Report"), emphasized, central to the policy debate about IGRA was the matter of providing a platform for sovereign Indian Tribes to assess their own interests and to negotiate and to reach agreement with the States as to the proper balance between Tribal and State interests when class III gaming occurs. Congress concluded "the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises such as . . . casino gaming . . . ." (App. 120a). Congress made clear it intended the compact process to assure the proper balancing of many important tribal and state interests between equal and independent sovereigns.

The Report identified many of the tribal and state interests that were legitimate matters for consideration and signaled that there might be situations where give and take would be required to resolve disputes where the interests of the respective sovereigns might appear to clash:

> A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, *promoting public safety* as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and *regulating activities of persons within its jurisdictional borders.*

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waived its immunity from state court jurisdiction and it consented to state court jurisdiction in the Compact as authorized by both *Kiowa* and *C&L*. *See* Point I, *infra*.

> A State's governmental interests with respect to class III gaming on Indian lands include the *interplay of such gaming with the State's public policy, safety, law and other interests*. . . .

(App. 121a) (emphasis added). Chairman Inouye made it abundantly clear that the legislation "is intended to provide a means by which tribal and State governments can realize their unique and individual governmental objectives" (App. 111a). Senator Domenici, too, noted the desire and need for flexible negotiations and give-and-take between sovereigns:

> The class of gambling beyond bingo will require entering into an agreement where both sovereigns, the State and Indian people, attempt to arrive at a regulatory scheme which will adequately protect the Indian people and the non-Indian people.

(App. 116a). Congressman Bilbray reiterated what the Report stated—that one legitimate state interest was the protection of non-Indians who would be attracted to Reservation casinos—: "The states have a strong interest in regulating all Class III gaming activities within their borders," in large part because "the vast majority of consumers of such gaming on Indian lands would be non-Indian citizens of the State and tourists to the State . . . ." (App. 110a).

The Report makes clear that "States and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribe and States," and that "[t]his is a strong and serious presumption that must provide the framework for negotiations." (App. 121a). The Report emphasized that "[t]he Committee concluded that the compact

process is a viable mechanism for setting various matters between two equal sovereigns." (App. 120a).

Recognizing its significance for tribal sovereignty, Congress intended as a subject for negotiation the allocation of jurisdiction between the tribe and the states within the framework created by IGRA. (*see* App. 122a). The Chair of the Senate Select Committee on Indian Affairs, Senator Inouye, in an important colloquy with Sen. Domenici during the floor debate declared that jurisdictional matters were within the power of the tribes to negotiate and to reach agreement with the State:

> [T]he committee believes that tribes and States can sit down at the negotiating table *as equal sovereigns, each with contributions to offer and to receive. There is and will be no transfer of jurisdiction without the full consent and request of the affected tribe and that will be governed by the terms of the agreement that such tribe is able to negotiate.*

(App. 113a) (emphasis added).

Senator Evans was most explicit that "[t]he Tribal/State compact language intends that two sovereigns will sit down together in a negotiation on equal terms and at equal strength and come up with a method of regulating Indian gaming." (App. 115a). Senator Evans captured the essence of IGRA when he stated that the Compact approach would allow "the possibility that the tribes can fully participate in our economic prosperity while they retain and while we respect their rights to decide to what extent and in what manner they choose to participate." (App. 115a).

It is in that context—evidencing full respect for tribal sovereignty rather than viewed through the

narrow lens of federal paternalism—that the provisions of IGRA, under which Congress delegated compacting authority to states and tribes as equal sovereigns, must be evaluated.

III. THE TENTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A DECISION BY THE NEW MEXICO SUPREME COURT.[6]

The circuit court's decision is in direct conflict with the decision of the New Mexico Supreme Court in *Doe v. Santa Clara Pueblo,* particularly its careful and fully explicated analysis of legislative history. 2007-NMSC-008, ¶¶ 37-45; 154 P.3d at 654-56. That analysis led to the *Doe* court's holding that:

> Congress intended the parties to negotiate, if they wished, the choice of laws for personal injury suits against casinos as well as the choice of venue for the enforcement of those laws. Nothing in IGRA required the tribes to negotiate the subject, nor does anything in IGRA prevent them from doing so. Congress unambiguously left that subject to the parties to determine for themselves.

Id. ¶ 47, 154 P.3d at 657. Thus, the New Mexico Supreme Court's decision correctly viewed IGRA through the prism of the inherent sovereign rights of tribes, recognizing that Congress did not intend to

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[6] Not only do the circuit court decision and rationale have binding authority on New Mexico gaming tribes, but it also directly limits the authority of the more than 50 tribes that have entered into gaming compacts throughout the circuit. See list of gaming compacts, found at: https://www.bia.gov/as-ia/oig/gaming-compacts (last visited January 3, 2019).

limit the exercise of those rights in the negotiation of a gaming compact.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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