No. 01-900

FEB 8 2002

In The

Supreme Court of the United States

ROBERTA BUGENING,

Petitioner,

v.

HOOPA VALLEY TRIBE; THE HOOPA VALLEY TRIBAL COUNCIL; THE TRIBAL COURT OF THE HOOPA VALLEY TRIBAL RESERVATION; BYRON NELSON, JR., Honorable Judge of the Hoopa Valley Tribal Court; MERV GEORGE, Chairman of the Hoopa Valley Tribal Council,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE STATES OF IDAHO, ALABAMA, ALASKA, FLORIDA, INDIANA, NEW MEXICO, NEVADA, NORTH DAKOTA, OKLAHOMA, SOUTH DAKOTA, UTAH AND WYOMING IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

The States of Idaho, *et al.*, respectfully submit through their respective Attorneys General a brief amicus curiae pursuant to S. Ct. R. 37.4 in support of petitioner.

STATEMENT OF AMICI CURIAE STATES' INTERESTS

Perhaps the most sensitive issue in Indian law is the extent to which a tribe may exercise governmental authority over persons who are not its members. This Court has addressed that issue repeatedly over the last twenty-five years.[1] However, those cases dealt with whether a tribe's retained *inherent* authority provided a basis for the authority claimed. The petition here presents the issue in the context of a claimed "delegation" of

[1] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (criminal jurisdiction over non-Indian); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (taxation of nonmembers); *Montana v. United States*, 450 U.S. 544 (1980) (regulation of nonmember hunting and fishing); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (taxation of nonmember); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (zoning authority over nonmember-owned land); *Duro v. Reina*, 495 U.S. 676 (1990) (criminal jurisdiction over nonmember Indian); *South Dakota v. Bourland*, 508 U.S. 679 (1993) (regulation of non-Indian hunting and fishing); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (tribal court civil jurisdiction over nonmember defendant); *Atkinson Trading Co. v. Shirley*, 121 S. Ct. 1825 (2001) (taxation of nonmembers); *Nevada v. Hicks*, 121 S. Ct. 2304 (2001) (tribal court civil jurisdiction over nonmember state fish and game personnel).

federal authority to a tribe to regulate nonmember conduct. While the source of the power asserted by respondents does not originate with the involved tribe, the sensitivity is not lessened because, in either instance, that power is exerted over persons who "are excluded from participation in tribal government" (*Merrion v. Jicarilla Apache Indian Tribe*, 455 U.S. at 173 (Stevens, J., dissenting)) and thus "have not given the consent of the governed that provides a fundamental basis for power within our constitutional system" (*Duro v. Reina*, 495 U.S. at 694).

The amici curiae States do not dispute the abstract principle that Congress may delegate federal authority to tribes. This Court recognized that power in *United States v. Wheeler*, 435 U.S. 313, 326-29 (1978), and reiterated in *Montana v. United States*, 450 U.S. at 564, that "an express congressional delegation" can confer regulatory authority over nonmembers when inherent authority is absent. *See South Dakota v. Bourland*, 508 U.S. at 695 n.15 ("after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation[ ]' . . . and is therefore *not* inherent"). The Court nonetheless has never found a congressional delegation that authorizes the enforcement of the delegated power in a tribal forum. *Duro*, 495 U.S. at 694 (observing that, although *United States v. Mazurie*, 419 U.S. 544 (1975), "approved delegation to an Indian tribe to promulgate rules that may be enforced by criminal sanction in *federal* court, . . . no delegation of authority to date included the power to punish non-members in *tribal* court").

The requirement that the delegation be express reflects certain of the concerns discussed by Justice Souter in his recent concurring opinion in *Nevada v. Hicks*, *supra*, with respect to subjecting nonmembers to tribal

court jurisdiction; i.e., "an overriding concern that citizens who are not tribal members be 'protected . . . from unwarranted intrusions on their personal liberty,' " and the fact that "there is no effective review mechanism in place to police tribal courts' decisions on matters of nontribal law, since tribal-court judgments based on state or federal law can be neither removed nor appealed to state or federal courts." 121 S. Ct. at 2323. Those concerns are singularly relevant where, at least as found by the Ninth Circuit below, a tribe has been "delegated" broad discretion to make and enforce *federal* law. Even if one assumes Congress' authority to enact that type of delegation, its intent to do so must be unmistakably clear to give *Montana*'s use of the term "express" its natural meaning. *Cf. County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 258 (1991) ("our cases reveal a consistent practice of declining to find that Congress has authorized state taxation [of tribal members] unless it has 'made its intention to do so unmistakably clear' ").

The amici States have a strong interest in plenary review of this controversy not only to secure guidance with respect to proper application of the "express delegation" standard generally but also for two reasons related to their sovereign status. *First*, according to the Ninth Circuit, respondent Hoopa Valley Tribe's regulations have "the force of [federal] law" (Pet. App. A-19) by virtue of the congressional delegation deemed embedded in section 8 of the Hoopa-Yurok Settlement Act ("Settlement Act"), Pub. L. No. 100-580, 102 Stat. 2924 (1988) (codified at 25 U.S.C. § 1300i). Conflicting state law therefore will be preempted. Although the ramifications of "federalizing" tribal law and thereby creating a new species of sovereign are thus extraordinary, they were given

no consideration by the court of appeals. *Second*, the Ninth Circuit concluded that under this Court's *Mazurie* opinion Congress may delegate any authority that it otherwise possesses under the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3. Pet. App. A-36 n.12. The "delegation" upheld in *Mazurie*, however, differs materially from that found here, and the court of appeals did not examine those differences or their effect on Congress' authority to delegate broad federal authority to an extra-constitutional entity. Such an examination is important to the amici States because, even in the absence of their laws being preempted by federalization of a tribe's internal law, expansive delegations will lead to concurrent tribal authority over many activities that the tribe could not otherwise regulate or adjudicate. Some measure of overlapping jurisdiction may be inevitable within Indian country, *see Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), but States have a substantial interest in regulatory or other legal burdens being as consistent as possible for all residents.

The petition presents two questions, and they go to the heart of the amici States' concerns: Whether the Ninth Circuit correctly understood and applied the "express congressional delegation" standard adopted in *Montana*, and, if so, whether Congress has authority to "federalize" a tribal constitution and regulations. These questions raise core Indian law and constitutional issues that should be decided by this Court.

STATEMENT

This litigation arose from a tribal-court action brought by the Hoopa Valley Tribe against a nonmember

landowner to enforce a 1995 tribal regulation that proscribes logging activity within a one-half mile radius of a ceremonial site on the Tribe's reservation. Pet. App. J. The nonmember purchased the affected property shortly after the regulation's adoption. The tribal courts enjoined the nonmember from further logging within the "buffer zone." Pet. Apps. F, G. The nonmember thereafter filed suit in federal district court to challenge the Tribe's regulatory authority. The district court rejected the challenge. Pet. App. D. It concluded that Congress delegated to the Tribe federal authority under the Settlement Act to regulate nonmembers within the reservation. Pet. App. D-8. A Ninth Circuit three-judge panel reversed (Pet. App. C), but the panel decision was vacated and rehearing *en banc* granted (Pet. App. B). The *en banc* panel affirmed the district court, with three judges dissenting. Pet. App. A.

The en banc majority, like the district court, relied upon the Settlement Act for its holding. That statute was enacted to resolve a controversy over governance of the Hoopa Valley Reservation as established by executive order in 1876 and modified fifteen years later by another executive order. The 1876 reservation ("the Square") consisted of a square with twelve-mile sides; the 1891 modification added a two-mile wide strip of land ("the Extension" or "the Addition") from the Square to the Pacific Ocean along the Klamath River. The 1876 executive order did not specify any tribe on whose behalf the reservation was set aside. Several tribes inhabited the area, the largest of which is the federally acknowledged Hoopa Valley Tribe. The Department of the Interior ("Department") eventually concluded that the Square had been set aside for the Hoopa Valley Tribe and that the substantial income derived from logging activity accrued

to its members' sole benefit. *See, e.g., Rights of Indians in the Hoopa Valley Reservation, California*, 65 Interior Dec. 59 (1958).

The Department's administrative practice sparked litigation before the Court of Claims by other Indians residing on the reservation, who identified themselves as Yuroks, then not a federally acknowledged tribe. These Indians lived for the most part in the Extension, and their challenge proved successful. *Short v. United States*, 486 F.2d 561, 566 (Ct. Cl. 1973) (holding that the 1891 executive order "is to be given its natural effect of granting to the Indians of the Addition, as Indians of the enlarged reservation, rights to the reservation equally with Indians of the Square"). The decision in *Short* provided the basis for a later ruling requiring the Federal Government to "run the reservation for the use and benefit of all [resident Indians], not for the benefit of some to the clear detriment of others" (*Puzz v. United States*, No. C80-2908 TEH, 1988 WL 188462, at *9 (N.D. Cal. Apr. 8, 1988)) and limiting the Hoopa Valley Tribe's sovereignty to "its own members[ ] and as an advisory body participating in reservation administration" (*id.*, at *10).

The *Puzz* decision served as the immediate catalyst for the Settlement Act. The Senate report accompanying the bill adopted as the Act characterized the district court's ruling to mean that "the reservation, as extended, was intended for the communal benefit of northern California Indian tribes and groups and that, absent statutory delegations, existing tribes lacked power to manage the resources [on the reservation]." S. Rep. No. 100-564, at 9 (1988). The Settlement Act, in part, (1) set aside the Square as a reservation for the Hoopa Valley Tribe and the Extension as a reservation for the Yurok Tribe, (2)

directed the Secretary of the Interior to develop membership rolls for the Tribes, (3) allowed individual Indians eligible for membership in the Tribes to decline such membership and receive a lump sum settlement payment, and (4) formally acknowledged the Yurok Tribe and created a procedure for formation of its government. Section 8 of the Settlement Act further stated that "[t]he existing govening [sic] documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed." 25 U.S.C. § 1300i-7. The Senate report explained that this section "preserves, ratifies, and confirms the existing status of the Hoopa Valley Tribe as a Federally-recognized tribe and reinstates full recognition of its governing documents and governing body as heretofore recognized by the Secretary" in 1972. S. Rep. No. 100-564, at 25; *see* Pet. App. A-16 n.4.

Against this backdrop, the Ninth Circuit concluded that "the plain text of the Settlement Act establishes that, when Congress 'ratified and confirmed' the Tribe's governing documents, it intended to give the Tribe's Constitution the force of law." Pet. App. A-19. It "buttressed" this construction by reference to the Senate report that, " 'absent statutory delegations,' the Hoopas could not manage the Square" and that "the ratification and confirmation of the Tribe's Constitution was exactly that: a 'statutory delegation[ ]' of authority to the Tribe to 'make management decisions relating to the lands and resources of the "Square." ' " *Id.* The court then turned to the Tribe's constitution and identified as relevant two provisions – Article III and Article IX, section (1)(*l*) – that were given the force of federal law by virtue of section 8. Consequently, "when the Tribe passed the ordinance, it

was acting pursuant to authority expressly granted by Congress." Pet. App. A-27; *see also* Pet. App. A-24 n.9.

The court of appeals next rejected petitioner's contention that Congress lacked the power to make this delegation of authority to the Tribe. It concluded initially that Congress *itself* could have adopted the buffer-zone regulation under the Indian Commerce Clause. Pet. App. A-35 (Congress may "prohibit a non-Indian from using such lands so as to put the spiritual health of a tribe at risk"). Having found congressional power, the court relied upon *Mazurie* for the proposition "that Congress can delegate to Indian tribes those powers that are within the sphere of the Indian Commerce Clause powers that are 'rationally related' to the protection of Indians." Pet. App. A-36 n.12.

ARGUMENT

I. THE NINTH CIRCUIT'S CONSTRUCTION OF THE TERM "RATIFIED AND CONFIRMED" IN SECTION 8 OF THE SETTLEMENT ACT RAISES A SUBSTANTIAL QUESTION OVER THE MEANING AND APPLICATION OF *MONTANA*'S "EXPRESS CONGRESSIONAL DELEGATION" STANDARD.

The Ninth Circuit did not dispute the proposition that the Settlement Act's overall objective was "to bring the Hoopa Valley Tribe and the Yurok Tribe within the mainstream of federal Indian law" (S. Rep. No. 100-564, at 2) by resolving "a long-standing controversy between the Hoopa Valley Tribe which is organized under constitutional provisions approved by the Secretary of the Interior and persons who are primarily, but not exclusively, of Yurok Indian descent" (*id.*, at 15). Section 8 of the Act

thus specifically refers to the "gove[r]ning documents" of the Hoopa Valley Tribe "as heretofore recognized by the Secretary." As the court of appeals noted, that recognition had occurred in the context of the Department's approval of the constitution in 1972, with territorial coverage limited to the Square. The most natural reading of Congress' action is that section 8 extended to the constitution the same status which it nominally had acquired at the time of the Secretary's 1972 approval – a status vitiated by the decisions in the *Short* and *Puzz* litigation. Congress simply intended, therefore, to restore the *status quo ante* with respect to the Hoopa Valley Tribe's governance rights in the Square.

The court of appeals did not suggest that the Hoopa Valley Tribe's constitution or any ordinances adopted pursuant to it would have carried "the force of [federal] law" prior to the Settlement Act had the *Short* and *Puzz* cases upheld the Tribe's sovereign primacy with respect to the Square. It is settled within the Ninth Circuit that tribal constitutions approved by the Secretary or ordinances adopted under them do not become "federal law" by virtue of such approval. *Boe v. Fort Belknap Indian Community*, 642 F.2d 276, 279 (9th Cir. 1981); *see also Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1077 (9th Cir. 1990); *Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1476 (9th Cir. 1989). That conclusion is also implicit in *Merrion v. Jicarilla Apache Tribe, supra*, where this Court upheld the inherent authority of an IRA-organized tribe to impose its oil and gas severance tax ordinance, which had been approved by the Secretary (*Merrion*, 455 U.S. at 136), on a nonmember producer, a determination that squarely conflicts with any contention that the ordinance had been transformed into "federal

law" through the approval. *See Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 199 (1985) ("Congress, in passing the IRA to advance tribal self-government, . . . did nothing to limit the established, pre-existing power of the Navajos to levy taxes"). Rather, as the Court made clear in its discussion of the Commerce Clause challenge to the Jicarilla Apache Tribe's tax, Secretarial approval was merely a congressionally established "checkpoint[ ] that must be cleared before [the] tribal tax [could] take effect." *Merrion*, 455 U.S. at 155. The approval, in other words, was a precondition to *implementation* of an ordinance that had been enacted pursuant to the tribe's retained authority.

The Ninth Circuit's reliance on *Antoine v. Washington*, 420 U.S. 194 (1975), as support for its conclusion that section 8 gave the tribal constitution "the force of [federal] law" is, if not wholly misplaced, at least very questionable. Pet. App. A-19-20. There, in the context of an agreement between the United States and a tribe ceding a portion of a reservation, this Court rejected the Washington Supreme Court's "distinction for purposes of the Supremacy Clause between the binding result upon the State of ratification of a contract by treaty effected pursuant to two-thirds of the Senate . . . and the binding result of ratification of a contract effected by legislation passed by the House and the Senate." 420 U.S. at 200-01. The Court pointed to several prior decisions as "sustain[ing] the ratified agreements as the exercise by Congress of its 'plenary power . . . to deal with the special problems of Indians (that) is drawn both explicitly and implicitly from the Constitution itself.' " *Id.* at 204. It therefore held that, "[o]nce ratified by Act of Congress, the provisions of the agreements became law, and like treaties, the supreme law of the land." *Id.*

Congressional ratification of a bilateral arrangement between the Federal Government and a tribe nonetheless presents a substantially different situation than removing a federal law barrier to the otherwise valid exercise of authority by another sovereign. So, for example, in the enabling act associated with the State of Wyoming's admission to the Union, Congress "approved, ratified, and confirmed" that State's constitution, but no plausible argument can be made that such ratification gave the constitution "the force of [federal] law." Act of July 10, 1889, 26 Stat. 222. The difference between these instances of ratification lies in the nature of what is being ratified and the purpose of the ratification. In first instance, Congress adopts the agreement and thereby confers upon it the status of a federal enactment; i.e., the very object of the "confirmation and ratification" is to make the parties' action Congress' own. In the second instance, Congress merely manifests acceptance of a unilateral action as valid for the particular purpose at hand – e.g., recognizing the formation of a State through the territory's adoption of a constitution and acceding to the State's admission to the Union. Indeed, this Court's recent decision in *Idaho v. United States*, 121 S. Ct. 2135 (2001), embodied both uses of the "confirmation and ratification" concept. On one hand, Congress " 'accepted, ratified, and confirmed' " two agreements entered into by the United States with the Coeur d'Alene Tribe adjusting the boundaries of the latter's executive order reservation (*id.* at 2141 (quoting Act of Mar. 3, 1891, §§ 19, 20, 26 Stat. 1027, 1029)), and, on the other, Congress " 'accepted, ratified, and confirmed' " the Idaho Constitution (*id.* (quoting Act of July 3, 1890, 26 Stat. 215)). One effect of ratifying and confirming the agreements was to deprive

Idaho of title to submerged lands underneath a portion of Lake Coeur d'Alene and the St. Joe River – an action which only Congress could take. *See* 121 S. Ct. at 2143 ("[w]e ask whether Congress intended to include land under navigable waters within the federal reservation and, if so, whether Congress intended to defeat the future State's title to the submerged lands").

Most reasonably construed, section 8 reflects the latter situation. The Ninth Circuit identified no reason why Congress would have desired to transform the Hoopa Constitution into an instrument of federal law, and several considerations quite specific to this controversy counsel against that construction. First, the court of appeals' conclusion can hardly be reconciled with congressional intent to bring the Tribe "within the mainstream of federal Indian law" where Secretarial approval does not "federalize" a tribal constitution but merely serves to satisfy a "checkpoint" requirement placed upon those tribes opting either to reorganize under IRA or to subject themselves to such a requirement voluntarily. Second, "federalizing" the tribal constitution would replace inherent tribal authority with federal power; i.e., the Tribe would become a federal actor since the only actions its governing council may take are those sanctioned by its constitution and therefore subject to, *inter alia*, federal constitutional constraints. Hoopa Const., arts. V, § 1 and IX. Thus, while the Hoopa Constitution sets out in *haec verba* the rights guaranteed under section 202 of the Indian Civil Rights Act, 25 U.S.C. § 1302 (Hoopa Const., art. VIII), among the constitutional rights not contained in section 202 and the constitution is a prohibition against the establishment of religion (*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63 (1978)) – a particularly significant

fact here given the objective of the buffer-zone ordinance to protect the Tribe's "most sacred spiritual location." Pet. App. F-23; *see, e.g., Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so' "). Last, since no provision comparable to section 8 exists for the Yurok Tribe, the equality of tribal status within their respective reservations that animated the Settlement Act as a whole would be compromised. *See* S. Rep. No. 100-564, at 1-2.

Because of the Ninth Circuit's reliance on section 8's perceived "plain text" (Pet. App. A-19) and the attendant failure to appreciate the difficulty attendant to its construction, that court did not address the standard to be applied in determining whether the necessary explicitness of delegation exists. This Court, however, has addressed a comparable issue in determining whether Congress has consented to state taxation of tribes or their members with respect to on-reservation activities or property and required that such consent be "unmistakably clear." *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. at 258. In *County of Yakima*, the Court held that a state *ad valorem* tax could be applied to real property owned by a tribe within its reservation, finding the requisite congressional authorization in section 6 of the General Allotment Act, 25 U.S.C. § 349, which not only subjected allottees, once fee title issued to them, to state law but also removed "all restrictions as to sale, incumbrance, or taxation" of the allotted land. It then *rejected* the claim that an excise tax assessed against the sale of land was authorized. Acknowledging

that "[i]t does not exceed the bounds of permissible construction to interpret 'taxation of land' as including taxation of the proceeds from sale of land," the Court characterized such reading as "surely not . . . the phrase's unambiguous meaning." 502 U.S. at 268. It reasoned that "[i]t is quite reasonable to say . . . that though the object of the *sale* here is land, that does not make the land the object of the *tax*, and hence does not invoke the [section 6] proviso." *Id.* at 268-69.

Here, as well, it may be appropriate to conclude in some situations that the words "ratified and confirmed" give the involved instrument "the force of [federal] law" when without such effect the very purpose of the ratification is defeated. The interpretative metric nevertheless changes where congressional delegation of power over nonmembers is involved, since Congress' expression of intent to delegate *that* power must be direct and not susceptible to reasonable dispute – i.e., "unmistakably clear" or "unambiguous." This Court should exercise its jurisdiction to articulate and apply the proper "express congressional delegation" standard.

II. THE NINTH CIRCUIT'S DELEGATION DETERMINATION RAISES A SUBSTANTIAL QUESTION OVER THE SCOPE OF CONGRESS' AUTHORITY TO DELEGATE FEDERAL POWER TO INDIAN TRIBES.

The Ninth Circuit upheld congressional authority to delegate authority over petitioner's activities with syllogistic reasoning: Because Congress has authority under the Indian Commerce Clause to regulate all land within a reservation, including that owned by nonmembers, and because Congress has authority to delegate any power it

possesses under that clause to an Indian tribe, the Hoopa Valley Tribe possesses delegated power to regulate petitioner's use of her property. The second proposition represents, in the amici curiae States' view, a substantial extension of current delegation principles as reflected in *Mazurie* and warrants this Court's review.

The breadth and nature of the authority "delegated" to the Tribe are the starting point for assessing the court of appeals' reliance on *Mazurie*. The Hoopa Constitution defines the powers possessed by the tribal council in expansive terms. Article IX, section 1(k) authorizes the council "[t]o promulgate and enforce ordinances governing the conduct of members and nonmembers of the Hoopa Valley Tribe," while the following subsection authorizes it to regulate "the conduct of trade and the use and disposition of property upon the reservation" for purposes of "safeguard[ing] the [Tribe's] peace, safety, morals and general welfare" with the limitation that any ordinance "directly affecting non-members" must be approved by the Commissioner of Indian Affairs or his designee. Pet. App. I-2. Accepting the Ninth Circuit's construction of section 8 in the Settlement Agreement necessarily means that Congress has imbued actions taken by the tribal council with "the force of [federal] law" and thereby conferred upon the council broad, discretionary legislative power to make such law.

The authority delegated in *Mazurie* differed greatly. In sustaining the conviction of two non-Indians for violation of 18 U.S.C. § 1154 for introduction of liquor into Indian country, this Court held 18 U.S.C. § 1161, which exempts from § 1154's prohibition liquor transactions in conformity with applicable state and tribal law, to constitute a permissible delegation. It analogized § 1161 to a

joint congressional resolution challenged in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). That resolution authorized the President to determine whether proscribing arms or munitions sales to countries engaged in a South American armed conflict " 'may contribute to the reestablishment of peace in those countries.' " *Id.* at 312. In finding the delegation valid, the Court relied on the President's constitutionally-grounded preeminence in foreign affairs. That primacy, it stated, distinguished the delegation in the joint resolution from one made in connection with "domestic affairs." *Id.* at 320 ("congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved").

The Court reasoned in *Mazurie* that tribes, as "unique aggregations possessing attributes of sovereignty over both members and their territory," similarly possess "independent tribal authority . . . quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority 'to regulate Commerce . . . with the Indian tribes.' " 419 U.S. at 557. Importantly, however, the "delegation" under § 1161 is limited to a discrete subject matter – the introduction of alcohol into a tribe's reservation – and can be enforced for federal law purposes solely in a criminal proceeding as a *defense* to a § 1154 prosecution. *See Duro v. Reina*, 495 U.S. at 694. Stated alternatively, *Mazurie* does not suggest that tribal liquor regulations become independently enforceable in federal court by virtue of § 1161; those regulations simply have been adopted by Congress as a potential limitation on federal criminal liability under § 1154. *Cf. United States*

v. Sharpnack, 355 U.S. 286, 295 (1958) (since Congress may enact criminal laws with respect to federal enclaves, "[i]t certainly may do so by drafting new laws or by copying laws defining the criminal offenses in force throughout the State in which the enclave is situated"). To extrapolate from *Mazurie* the conclusion that Congress may delegate any of its Indian Commerce Clause powers to a tribe is thus hazardous given the unusual nature of § 1161.

Crediting such an interpretation raises significant constitutional issues. As this Court observed in *Seminole Tribe v. Florida*, 517 U.S. 44, 62 (1997), "[i]f anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause." "Federalizing" the Hoopa Constitution means that Congress has transferred this expansive power not to carry out its substantive directions in a particular area but rather to legislate with virtually unfettered discretion across the general range of tribal governmental interests – a breadth of delegation the Court has never sanctioned in any context. It further means not only that tribal regulations will have the status of federal law for Supremacy Clause purposes and thereby permit the Hoopa Valley Tribe to supersede state law but also that, if the Ninth Circuit's reasoning is pursued to its logical end, the Tribe can "repeal" congressional enactments. *See, e.g., United States v. Sioux Nation*, 448 U.S. 371, 382 (1980) (ratification and confirmation of agreement "had the effect of abrogating the earlier Fort Laramie Treaty").

Moreover, the sole extrinsic check on the Tribe's lawmaking under its 1972 constitution currently is the need for approval of certain tribal council actions by Department officials, whose discretion in that regard is subject

to no discernable constraint. The Settlement Act, as interpreted by the Ninth Circuit, accordingly effects a delegation of Congress' broad Indian Commerce Clause authority to the Tribe that, in turn, has given to a federal administrative agency standardless veto power over some aspects of the delegated authority's exercise. Congress thereby effectively surrendered its legislative role to an Indian tribe and the Executive Branch. Reconciling this anomalous result with existing separation-of-power principles is plainly difficult. *See, e.g., Whitman v. American Trucking Ass'n*, 531 U.S. 457, 472 (2001) ("when Congress confers decisionmaking authority upon agencies, Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform' "); *Clinton v. City of New York*, 524 U.S. 417, 444 (1998) (holding presidential cancellation authority under the Line Veto Act invalid; "whenever the President cancels an item of new direct spending or a limited tax benefit he is rejecting the policy judgment made by Congress and relying on his own policy judgment").[2]

The amici States, in sum, are troubled deeply by the Ninth Circuit's conclusion that *Mazurie* stands for the principle that Congress may delegate to a tribe unconstrained authority to make federal law. Tribal sovereignty

[2] That this Court relied in *Mazurie* upon the Secretarial certification and publication requirement in § 1161 as a protection against arbitrary tribal action does not dictate the absence of a potential delegation problem here. 419 U.S. at 558 n.12. The text of § 1161 suggests that the certification obligation is ministerial, but, in any event, the question of an improper delegation of authority to the *Secretary* was not addressed in *Mazurie*.

is not comparable to the Federal Government's or the States'. *Atkinson Trading Co. v. Shirley*, 121 S. Ct. at 1832 n.5 ("[o]nly full territorial sovereigns enjoy the 'power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens,' and Indian tribes 'can no longer be described as sovereigns in this sense' "); *cf. Nevada v. Hicks*, 121 S. Ct. at 2314 (the "historical and constitutional assumption of concurrent state-court jurisdiction over federal-law cases is completely missing with respect to tribal courts"). Tribes additionally function outside Bill of Rights or Fourteenth Amendment restraints, have immunity from suit absent waiver or congressional abrogation, and, if adjudicatory jurisdiction exists otherwise, may possess unreviewable authority to resolve federal law-controlled disputes. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 56, 58; *Hicks*, 121 S. Ct. at 2323 (Souter, J., concurring). Any affirmative grant of federal authority therefore should be narrowly circumscribed and accompanied, as in *Mazurie*, by substantial guarantees of constitutional and statutory protection in nontribal forums. *See Reid v. Covert*, 354 U.S. 1, 21 (1957) (plurality op.) (congressional power over land and naval forces under Article I, § 8, cl. 14, even when joined with Necessary and Proper Clause power, insufficient to save statute that authorized trial of nonmilitary United States citizens before military tribunal). Stated alternatively, if Congress employs tribes to carry out specific federal law objectives, not only should the power delegated be defined carefully and have a close fit to those objectives, but federal forum-based redress also should be made available. This is not to say that every delegation must parallel § 1161 by incorporating tribal law as an element of or a defense to a federal statute-based claim. It is to say

that Congress may not delegate to a tribe broad power to create positive federal law which binds individuals and usurps state authority; i.e., Congress may not fashion a "delegation run[ ] riot." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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