No. 07-69

IN THE

SUPREME COURT OF THE UNITED STATES

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
Petitioner,

v.

THE STATE OF SOUTH CAROLINA AND HENRY D. MCMASTER, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of South Carolina

---

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

HENRY DARGAN McMASTER
South Carolina Attorney General
JOHN W. McINTOSH
Chief Deputy Attorney General
ROBERT D. COOK-*Counsel of Record*
Assistant Deputy Attorney General
C. HAVIRD JONES, JR.
Senior Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3970
ATTORNEYS for Respondents.

QUESTIONS PRESENTED FOR REVIEW

I. Whether The Decision Below, In Concluding That South Carolina's Prohibition Of Video Poker Applies To The Catawba Tribe On Its Reservation, Is Correct?

II. Whether Discretionary Review By This Court Is Unwarranted For Additional Reasons, Particularly That Petitioner's Claim Is Based Upon State Law; Jurisdiction Of Petitioner's Claim Is Vested By Congress Exclusively In the State Courts; And Such Claim Is Uniquely A Matter Related To The Catawba Tribe?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

JURISDICTION

Respondents acknowledge that the Catawba Indian Tribe of South Carolina seeks review, as set forth in its statement of jurisdiction, but raise the fact that the terms of the Catawba Settlement vest exclusive jurisdiction of all matters relating to acts occurring on the Reservation of the Catawba Tribe exclusively in the courts of South Carolina.

STATEMENT OF THE CASE

This Petition challenges the decision of the South Carolina Supreme Court in *Catawba Indian Tribe of South Carolina v. State of South Carolina and McMaster*, 372 S.C. 519, 642 S.E.2d 751 (2007). Appendix (*Appx.*) 1a-14a. That decision interpreted S.C. Code Ann. Section 27-16-110(G) as rejecting any present right to operate video poker gaming devices on the Catawba Indian Tribe's Reservation.

In 1993, the South Carolina General Assembly enacted legislation ("state Settlement Act") approving the Settlement Agreement ("state Settlement Agreement") between the Catawbas and the State of South Carolina and others. The Settlement resolved the Tribe's longstanding claims against the State. *See*, *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986); *Wade v. Blue*, 369 F.3d 407 (4th Cir. 2004). Among the many provisions contained in the Settlement was the payment of a large monetary compensation to the Tribe (50 million dollars), *Appx.* at 44a-45a; restoration of the federal trust relationship with the Tribe, *Appx.*, at 43a; establishment generally of application of state law to the Tribe, *Appx.* at 44a; and the grant exclusively to the Catawbas of certain special rights relating to bingo. *See*, *Catawba Indian Tribe v. City of North Myrtle Beach*, 217 F.3d 837 (4th Cir. 2000, unpublished decision). See also, *Appx.* at 86a-89a. In addition, Section 16.8

of the state Settlement Agreement and S. C. Code Ann. Section 27-16-110(G) of the state Settlement Act dealt with (in identical fashion) the Tribe's right concerning the operation of video poker on its Reservation.[1]

Subsequently, the state Settlement Act (S. C. Code Ann. Section 27-16-10, *et seq.*) and state Settlement Agreement (*Appx.* at 39a-103a) were ratified and approved by Act of Congress ("federal Act"). *See* 25 U.S.C. § 941. The federal Act incorporates both the state Settlement Agreement and state Settlement Act into federal law. 25 U.S.C. § 941b(a)(2). Pursuant to 25 U.S.C. § 941m(f), subsequent amendments to the state Settlement Agreement or state Settlement Act are permitted only with the consent of both the Tribe and State. Another provision of the federal Act, 25 U.S.C. § 941ℓ, specifically addresses the Tribe's rights concerning games of

---

[1] Section 27-16-110(G) provides:

> [t]he Tribe may permit on its Reservation video poker or similar electronic play devices to the same extent that the devices are authorized by state law. The Tribe is subject to all taxes, license requirements, regulations and fees governing electronic play devices provided by state law, except if the Reservation is located in a county or counties which prohibit the devices pursuant to state law, the Tribe nonetheless must be permitted to operate the devices on the Reservation if the governing body of the Tribe so authorizes, subject to all taxes, license requirements, regulations and fees governing electronic play devices provided by state law.

chance. Section 941ℓ(a) provides that the Indian Gaming Regulatory Act (IGRA) is inapplicable to the Tribe. Section 941ℓ(b) further provides that "all laws, ordinances, and regulations of the State ... shall govern the regulation of gambling devices and the conduct of gambling or wagering by the Tribe on and off the Reservation."

During the 1990s, video poker became a highly contentious issue in the State, growing "into a multi-billion dollar industry that became the subject of much debate." *Westside Quik Shop v. Stewart*, 341 S.C. 297, 300, 534 S.E.2d 270, 271 (2000) *cert. den.*, 531 U.S. 1029 (2000). Numerous efforts were made to outlaw video gaming, among them a county-by-county local option referendum allowing each county to decide for itself whether video poker machines were to remain legal. Although these referenda were authorized by the General Assembly and were conducted throughout the State, they were declared unconstitutional as special legislation by the State Supreme Court. *Id.*[2] Ultimately, as a means of addressing the issue, the South Carolina Legislature enacted Act No. 125 of 1999. Following a constitutional challenge in *Joytime Distrib. and Amusement Co. v. State*, 338 S.C. 634, 528 S.E.2d 647 (1999) *cert. den.*, 529 U.S. 1087 (2000), in which that portion of Act No. 125 providing for a statewide referendum was declared unconstitutional and severed, a complete ban of video poker machines and other forms of video gaming went into effect throughout South Carolina on July 1, 2000. *Westside, supra*. Pursuant to Act No. 125, these video gaming devices are not only illegal, but constitute "contraband subject to forfeiture

---

[2] See, *Martin v. Condon*, 324 S.C. 183, 478 S.E.2d 272 (1996).

and destruction regardless of their use or operability." *Id.*[3]

Six years after the video poker ban, the Tribe brought an action for declaratory and injunctive relief in the circuit court of South Carolina, seeking a declaration of a permanent right to video poker on its Reservation, notwithstanding the State ban. *Appx.* at 104a-116a. However, in the decision below, the South Carolina Supreme Court reversed the circuit court, concluding that § 27-16-110(G) is clear and unambiguous and that the phrase contained therein – "to the same extent that the [video poker] devices are authorized by state law" – requires that state law governs the legality of any operation of video poker devices on the Reservation. Thus, the Supreme Court found that the state ban provided by Act No. 125 of 1999, even though enacted subsequent to the Settlement, applies equally to the Tribe. In the Supreme Court's view, the Tribe "relinquished any attributes of sovereignty relating to games of chance in this state...." 372 S.C. at 528, 642 S.E.2d at 756. According to the Court, the first sentence of § 27-16-110(G), subjected the Tribe "to any future changes in state law regarding video poker devices." 372 S.C., *id.*, at 529, 642 S.E.2d *id.* at 756. The phrase in the second sentence – "if the Reservation is located in a county or counties which prohibit the devices," – referred not to any statewide ban,

[3] Video poker machines had been declared legal by the South Carolina Supreme Court in *State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991). However, other gambling devices, such as slot machines, were deemed contraband *per se* pursuant to § 12-21-2710. Possession of these devices is a crime and these machines are subject to forfeiture pursuant to § 12-21-2712. Act No. 125 of 1999 added video poker to this category of contraband. Thus, like other gambling devices, possession of a video poker machine is now a crime in South Carolina and such machines are subject to forfeiture as contraband *per se*.

but to "a county's ban on the devices." 372 S.C., *id.* at 527, n. 6, 642 S.E.2d, *id.* at 755, n. 6. Inasmuch as the Supreme Court construed the terms of the State Act to subject the Tribe to future changes in state video gaming law, it also concluded that its interpretation, therefore, did not violate the federal Act's prohibition against amendment of the Settlement without the Tribe's consent, found at 25 U.S.C. § 941m(f). 372 S.C., *id.* at 528-529, 642 S.E.2d, *id.* at 756. The Supreme Court denied a Petition for Rehearing[4] and this Petition followed. Again, Petitioner contends that application to the Tribe of the video poker ban, as construed by the Court below, constitutes an "amendment" of the Settlement without Tribal consent.

SUMMARY OF ARGUMENT

The decision below, holding that the Catawba Tribe has no right to video poker on its Reservation, is correct. Rightly, the Supreme Court construed the language of S.C. Code Ann. Section 27-16-110(G) – "to the same extent ... authorized by state law" – as clear and unambiguous. Such language thus subjects the Tribe – as all other citizens – to a subsequent statewide ban of video poker devices by the South Carolina Legislature. The Supreme Court's interpretation that § 27-16-110(G)'s language does not "freeze" the applicable state law which made video poker legal at the time of the Settlement was finalized, but, instead, subjects the Tribe to its subsequent illegality, is the only reasonable interpretation of the statute.

Further, the Supreme Court's finding that the interpretation making video poker illegal on the Tribe's Reservation does not "amend" the Settlement Agreement is also correct. Section 941*ℓ*(b) of the federal Act, which ratified the

[4] Rehearing denied, April 18, 2007.

Settlement, is clear that "all laws ... of the State ... shall govern the *regulation* of gambling devices and the conduct of gambling or wagering by the Tribe on and off the Reservation." (emphasis added). This specific provision, contained in the same federal Act which Petitioner contends is violated by the Supreme Court's interpretation, fully reinforces the construction that § 27-16-110(G) requires any subsequent enactment banning video poker statewide to be equally applicable to the Tribe's Reservation.

In addition, there are other reasons which make denial of *certiorari* warranted. This case involves nothing more than interpretation of state statutory law. See *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974). [interpretation of state law by highest court of State is binding]; *Michigan v. Long*, 463 U.S. 1032 (1983) [independent and adequate state ground precludes review]. Although Petitioner searches for a federal question here, claiming the Supreme Court's purported erroneous interpretation of state law is an "amendment" of the Settlement, such argument rests entirely upon interpretation of a statute enacted by the state Legislature. Thus, this case is not a proper vehicle for review.

Moreover, the state and federal Settlement Acts vest exclusive jurisdiction in the state courts as to "all civil and criminal causes arising out of acts and transactions occurring on the Reservation or involving members of the Tribe." See, § 27-16-80(H). Congress ratified this exclusivity of jurisdiction in 25 U.S.C. § 941h. In *Wade v. Blue*, *supra*, the Fourth Circuit concluded that these pertinent provisions require that federal courts lack subject matter jurisdiction to hear an intra-tribal dispute. Thus, the fact that the Settlement makes state court jurisdiction exclusive for causes concerning acts occurring on the Reservation or involving members of the Tribe is another compelling reason to deny review by this Court.

Finally, other circuits are consistent and we are aware of none inconsistent with the Supreme Court's ruling. In *Ysleta Del Sur Pueblo v. State*, 36 F.3d 1325 (5th Cir. 1994), the Fifth Circuit found that Congress subjected the Pueblo Tribe to subsequently enacted Texas state gambling laws. Such applicability did not alter tribal sovereignty. As the Supreme Court did here, the Fifth Circuit concluded that the Tribe had consented to such legislative changes and were bound by them. We are unaware of any Circuit which has reached a different conclusion where state law is applicable to a tribe by Settlement Agreement and Act of Congress. Indeed, the Settlement with the Catawba Tribe and its ratifying acts are pertinent only to that particular Tribe. For all of these reasons, the writ of *certiorari* should be denied.

ARGUMENT

REASONS FOR DENIAL OF THE WRIT

I. The Decision Of The South Carolina Supreme Court Is Correct.

Petitioner argues the Supreme Court's interpretation of the state Settlement Act – which applied subsequent state law banning video gambling to the Tribe – constitutes an "amendment" of the Settlement without the Tribe's consent in violation of 25 U.S.C. § 941m(f). However, that Court's rejection of such argument is clearly correct, and is fully supported not only by the language and intent of § 27-16-110(G), but by the federal Act as well.

A. The Supreme Court Correctly Construed Section 27-16-110(G).

The Court below correctly read the phrase "to the same

extent that the devices are authorized by state law" as controlling. Applying the ordinary rules of construction, the Court found that "[u]nder the plain language of § 27-16-110(G), [the Tribe] may allow video poker devices on its Reservation, either by its own operation or a third-party's operation, to the same extent state law authorizes the devices." 372 S.C., *supra*, at 526, 642 S.E.2d, *supra*, at 754. Specifically, the Supreme Court rejected as absurd the Tribe's distinction between use of the words "permit" and "operate," as used in subsection (G). Moreover, the Court deemed the second sentence of § 27-16-110(G) as referring to "a county's ban" rather than a statewide ban. Finding § 27-16-110(G)'s "authorized by state law" provision unambiguous, the Court also disagreed that, in order to interpret this section, comparisons should be made to other provisions in the state Settlement Act [e.g. § 27-16-110(F)] which expressly refer to *future enactments* by the Legislature. Thus, the Supreme Court was unpersuaded by the very same arguments the Petitioner makes here: rather than "freezing in time" State law regarding video poker's legality as of the time the Settlement was consummated, "[t]he first sentence of § 27-16-110(G) clearly binds [the Petitioner] to any subsequent legislative enactments affecting video poker devices." 372 S.C., *id.* at 529, 642 S.E.2d, *id.* at 756.

As the Supreme Court thus correctly concluded, where the statute's language is plain, unambiguous and conveys a clear meaning, the courts may not impose another meaning. The phrase "to the same extent that the devices are authorized by state law" has no other reasonable meaning than the one the lower Court ascribed to it. "State law" is state law – whether viewed through the prism of today, next week, or next year. If the Legislature had wished to impose a limitation, thereby specifically confining the meaning of "state law" governing video poker to the time of the Settlement, it could easily have done so, but it did not. The Legislature could have expressly

defined the relevant time in a manner such as "*now existing* state law." Accordingly, as the Supreme Court persuasively concluded, there has been no "amendment" of the Settlement without Tribal consent. As it did with respect to many other areas (civil and criminal jurisdiction), the Tribe willingly consented to be bound by changing state law concerning video gambling on its Reservation, as subsequently enacted by the state Legislature.

B. <u>The Federal Act Fully Reinforces the Supreme Court's Decision.</u>

Turning to the federal Act, it is also evident that Congress intended subsequent enactments of the Legislature concerning video gaming to apply to the Tribe. Congress "has plenary authority to legislate for the Indian tribes in all matters ... ." *United States v. Wheeler*, 435 U.S. 313, 319 (1978). Moreover, "Congress has to a substantial degree opened the doors of reservations to state laws ... ." *Organized Village of Kake v. Egan*, 369 U.S. 60, 74 (1962). *See also*, *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 172 and n. 8 (1973). As stated in *California v. Cabazon Band of Mission Indians, et al.*, 480 U.S. 202, 207 (1987), "[i]t is clear ... that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided." *See also*, *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980). Here, Congress approved the Settlement through the federal Act. Section 941b(a) restores "the trust relationship between the Tribe and the United States ...." Pursuant to § 941b(c), the Termination Act, which had treated the Tribe no differently from other South Carolinians, see, *South Carolina v. Catawba Indian Tribe, Inc., supra*, was repealed. Section 941b(a)(2) approves the Settlement Agreement and the state Act, and gives these the effect of federal law. It is also important to note that § 941m(e) expressly incorporates § 27-16-

40 of the state Settlement Act. This provision of the state Act provides that the Tribe is "subject to the civil, criminal and regulatory jurisdiction of the State ... and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person ..., except as otherwise expressly provided in this chapter or in the federal implementing legislation." Thus, even though Petitioner ignores this cogent point, it is clear that Congress generally intended here to apply *state law* to the Tribe on its Reservation, absent a specific exception.

Congressional intent to apply state law generally is clearly present as to games of chance specifically. 25 U.S.C. § 941ℓ(a) renders the Indian Gaming Regulatory Act (IGRA), codified at 25 U.S.C. § 2701 *et seq.*, inapplicable to the Tribe. This is significant in terms of the congressional intent to apply state law to Indian gaming because IGRA authorizes "... Native American tribes to conduct various forms of gambling – including casino gambling – pursuant to tribal-state compacts if the State permits such gambling 'for any purpose by any person, organization, or entity.'" *Greater New Orleans Broadcasting Ass'n., Inc. v. U.S.*, 527 U.S. 173, 178 (1999). Thus, as the Court observed in *Narragansett Indian Tribe v. National Indian Gaming Comm.*, 158 F.3d 1335, 1341 (D.C. Cir. 1998), a number of Tribes – the Catawbas among them – have been "excluded from IGRA and subjected instead to state gaming law."

Moreover, Congress dealt specifically with the Catawbas' rights concerning gambling in 25 U.S.C. § 941ℓ(b) which states:

> [t]he Tribe shall have the rights and responsibilities set forth in the Settlement Agreement and the State Act with respect to the conduct of games of chance. Except as specifically set forth in the Settlement Agreement and the State Act, *all laws, ordinances, and regulations of the State and its political subdivisions, shall govern the regulation of gambling devices and the conduct of gambling or wagering by the Tribe on and off the Reservation.*

(emphasis added). As the D.C. Circuit recognized in *Narragansett*, Congress, in approving the Catawba Settlement, clearly provided "for exclusive state control over gambling." 158 F.3d at 1341. In addition, Congress's use of the language, that state law shall "govern" the "regulation" of "gambling devices," made clear that the Tribe is subject to any subsequent prohibition or ban of such devices by the State. There can be little doubt that the power to "regulate" is the power to proscribe. This Court, in *Champion v. Ames (the Lottery Case)*, 188 U.S. 321 (1903), made this quite clear, rejecting any argument that Congress lacked the power subsequently to ban or prohibit the interstate carriage of lottery tickets pursuant to its constitutional authority to "regulate" commerce. It was contended in the *Lottery Case* that "the authority given Congress was not to *prohibit*, but only to *regulate*". (emphasis in original). However, this Court was entirely unpersuaded, reasoning that

> [i]f lottery traffic, *carried on through interstate commerce*, is a matter of which Congress may take cognizance, and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, for the protection of the people of all the states, and, under the power to regulate interstate commerce, devise such means, within

> the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the states?

188 U.S. at 326-327. (emphasis in original). Thus, pursuant to its power to "regulate" commerce, Congress "has plenary power over such commerce, and may *prohibit* the carriage of such tickets from state to state ...." *Id.* at 330. The same power, to "regulat[e]" video gaming devices on and off the Tribe's Reservation, is given by Congress to the State of South Carolina by § 941ℓ(b). For the same reasons expressed by this Court in the *Lottery Case*, such power must necessarily include a subsequent outright ban by the State Legislature. *See also*, *United States v. Forty-Three Gallons of Whiskey, Etc.*, 93 U.S. 188 (1876).

C. Petitioner's Argument Fails.

However, Petitioner contends that the Supreme Court should have read § 27-16-110(G) as giving the Tribe a permanent right to video poker on its Reservation because "[a]ny other reading would render the 'no unilateral amendment' provision of the Settlement Act meaningless." *Petition* at 8. According to Petitioner, the Supreme Court's interpretation "... ignores the fact that, in other provisions, the State Act and the Agreement specifically provide that future changes of the law will apply to the Tribe." *Id.*, at 8-9. In Petitioner's view, the "principal benefit the Tribe obtained from the State was the right to conduct video poker and bingo" and thus the Tribe "did not agree to allow the State to withdraw its authorization to conduct video poker." *Id.* at 9. Thus, Petitioner dismisses the clear language of 25 U.S.C. § 941ℓ(b) – providing that state law "shall govern the regulation of gambling devices and the conduct of gambling or wagering by the Tribe on and off the Reservation" – as essentially meaningless. In

Petitioner's words, such provision "cannot plausibly be read to allow the State to apply to the Tribe amendments that it adopts in violation of the Act's 'no unilateral amendment' provision." *Id.* at 11.

Petitioner's argument is meritless on all scores. Contrary to Petitioner's contention that the "principal benefit" to it in the Settlement was "the right to conduct video poker and bingo," the end result was a lengthy and detailed state Settlement Agreement, consummated after years of negotiations. In that Settlement, the Tribe obtained numerous concessions from the State. See, *Appx.*, at 39a-103a. Specifically, the Tribe received restoration of the trust relationship with the United States; repeal of the Termination Act; $50 million in compensation, special hunting and fishing rights;[5] and economic incentives, among other things.

Moreover, "a section of a statute should not be read in isolation" from the entire statute. *Richards v. United States*, 369 U.S. 1, 11 (1962). In fulfilling its "responsibility in interpreting legislation, ... [the Court must] 'look to the provisions of the whole law, and to its object and policy.'" *Id.* Petitioner's arguments are founded upon a contravention of this basic rule. Choosing to give credence to the "no amendment" provision of the federal Act, Petitioner completely discounts § 941ℓ(b), simply noting that the latter "cannot be plausibly read" to diminish the former. *Petition* at 11. Yet, as the state Supreme Court correctly understood, if Congress (as well as the Legislature) mandates that state law governs, (as § 941ℓ(b) and

---

[5] *See, State v. Keesee*, 336 S.C. 599, 521 S.E.2d 743 (1999) [the combination hunting and fishing license issued to members of the Catawba Tribe entitled the member to hunt without citations on wildlife management lands.].

§ 27-16-110(G) do), there is no "amendment" of the Settlement Agreement when state law subsequently is modified or changed. Petitioner's argument fails to recognize this essential fact; if taken to its ultimate conclusion, Petitioner would eviscerate the state and federal Acts' incorporation of state law in a wide variety of areas. Every time state law changes with respect to subject matter in which that law is made applicable by the state and federal Acts, such logic would lead to the conclusion that an "amendment" has occurred, and the federal Act has been violated. This is obviously not what the South Carolina Legislature or Congress intended and it is not what the Tribe agreed to.

Thus, the federal Act is clear. The fact that Congress, in enacting § 941ℓ(b), provided that state law governs the "regulation" (and the prohibition, if deemed warranted) of video gambling devices "on and off the Reservation" fully reinforces the Supreme Court's interpretation of § 27-16-110(G) and completely defeats Petitioner's argument that an "amendment" of the Settlement without the Tribe's consent has resulted. As Congress may subsequently ban the interstate carriage of lottery tickets pursuant to its power to "regulate" commerce, so too, the State may apply the subsequent ban of video poker to the Tribe pursuant to the power delegated by Congress to "regulat[e]" such devices on and off the Reservation. Petitioner's argument that the Tribe's right to video poker is permanently "frozen" as of the time of the Settlement, therefore, flies in the face of the plain language of § 941ℓ(b) of the federal Act. Accordingly, as the lower Court correctly held, application to the Tribe of the State's subsequent statewide ban on video gambling is not an "amendment" of the state Settlement Agreement without the Tribe's consent in violation of the state Settlement Act or the federal Act. As the Court in *Narragansett, supra*, stated, Congress provided in the Catawba Settlement "for exclusive state control over gambling."

Thus, the decision below is correct.

II. For Other Reasons Also, Discretionary Review Is Inappropriate.

A. Petitioner's Claim Is Based Upon State Law.

This Court has repeatedly recognized that it will not "construe a state statute contrary to the construction given it by the highest court of a State." *O'Brien v. Skinner*, 414 U.S., *supra* at 531 (1974). As *Hebert v. La.*, 272 U.S. 312, 316 (1926) emphasized, "[w]hether state statutes shall be construed one way or another is a state question, the final decision of which rests with the courts of the State." *Certiorari* review of a state Supreme Court decision is limited by 28 U.S.C. § 1257(a), requiring an existing question of federal law. See, *Oregon v. Guzek*, 546 U.S. 517 (2006); *see also*, *Henry v. Mississippi*, 379 U.S. 443, 447 (1965) ["(w)e have no power to revise judgments on questions of state law."]. While we are cognizant that the state Settlement Agreement and state Settlement Act are incorporated into federal law by 25 U.S.C. § 941b, it is, nevertheless, inescapable that Petitioner's claim is based wholly upon a purported misconstruction by the Supreme Court of § 27-16-110(G), a state statute. Petitioner's theory that the Settlement Agreement has been "amended" without Tribal consent is based upon interpretation of the words "authorized by state law" as used in that state statute. Petitioner thinks these words mean the law existing at the time of Settlement. However, the Supreme Court disagreed, holding that the Tribe is bound by subsequent state law banning video poker.

The Petition recognizes the state law nature of its claim, noting that the decision below produces "an astonishing, unfair result." Tellingly, Petitioner argues that § 27-16-110(G) "reasonably may be read to refer to authorization by state law at

the time the Settlement Agreement went into effect." To Petitioner, such a reading – allowing for no subsequent changes in video poker law to apply to the Tribe – is consistent with "the obvious purpose of the Settlement Agreement," i.e. to give the Tribe "a significant benefit" for its "significant concession" in "giving up its land claim." According to the Petition, only Petitioner's interpretation of the state statute prevents the "'no unilateral amendment' provision of the Settlement Act [from being rendered] meaningless ...." Likewise, Petitioner asserts, the Tribe's reading would not "ignore[] the fact that, in other provisions, the State Act and the Agreement specifically provide that future changes of the law will apply to the Tribe." *Petition* at 8-9.

Such a claim, in addition to being incorrect, also rests upon state law, and thus *certiorari* review is inappropriate for that reason. As this Court emphasized in *Hebert*, *supra*, even an erroneous construction of a state law by the State's highest court cannot be used to manufacture a federal claim where one is not otherwise found. Here, Petitioner does precisely that, seeking to turn what it contends is an erroneous interpretation below into an "amendment" of the Settlement in violation of 25 U.S.C. § 941b. As discussed, such an argument must fail for the reasons set forth above. *Infra*, Part I. Moreover, employing Petitioner's reasoning, in every instance where state law is applicable to the Tribe (and there are many), and the state courts wrongly (in the Tribe's mind), construe such evolving state law as controlling, an amendment of the Settlement will have occurred and federal law violated. Certainly, no such result was ever intended.[6] These applications of state law, as subsequently

---

[6] The fact that state law is made applicable to the Tribe in so many areas may be one reason that the Settlement bestows

(continued...)

enacted, were agreed to and ratified by the Legislature, and a state court's declaration to that effect, as occurred here, is clearly independent of federal law. See *Michigan v. Long, supra* [in such circumstances, "we, of course, will not undertake to review the decision."]; *Henry*, 378 U.S. at 447; *Ill. v. Rodriquez*, 497 U.S. 177, 182 (1990).

Moreover, this Court has recognized that mere invocation of a federal statute permitting application of state law will not transform a state matter into a federal question. As was said in *Gully v. First Nat. Bank In Meridian*, 299 U.S. 109, 115 (1936), "[t]hat there is a federal law permitting such [state] taxation [against national bank assets] does not change the basis of the suit, which is still the [tax] statute of the state ...." *Gully* recognized that, certainly, the application of state law "must be consistent with the federal statute consenting," as well as the Constitution. However, recovery of the tax is a right "created by the state" and for purposes of a federal question, "it is unimportant that federal consent is the source of state authority." Accordingly, a "suit brought upon a state statute does not arise under an Act of Congress or the Constitution of the United States ... because permitted thereby." *Id.* at 116. *See also*, *Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190 (1925) [dismissal of writ of error based upon construction of state statute resulting in waiver of federal constitutional right]. Here, as discussed, the federal Act specifically contemplates that future state law is to regulate video gaming devices with respect to the Tribe. Thus, for this reason, the writ should be denied.

---

[6](...continued)
state courts with exclusive jurisdiction over matters relating to the Tribe. However, Petitioner now seeks to undo these clear provisions.

B. The Settlement Vests Jurisdiction Of This Issue Exclusively In The State Courts.

The writ should also be denied because the state Settlement Agreement and ratifying acts vest exclusive jurisdiction of this matter in the state courts. The decision in *Wade v. Blue*, *supra* is highly instructive. There, the Fourth Circuit concluded that, in the absence of tribal courts, "the Settlement Agreement and its implementing legislation provide for exclusive state court jurisdiction over ... claims" concerning tribal leadership. 369 F.3d at 412. *Wade* noted that Congress has the "prerogative to withhold federal court jurisdiction over a particular claim [and to] confer exclusive jurisdiction upon state courts to enforce federal law." *Id.*, at 410. The Court referenced § 12.7 of the Settlement Agreement and § 27-16-80(H) of the Settlement Act vesting jurisdiction in the state courts "for all civil and criminal causes arising out of acts and transactions occurring on the Reservation or involving members of the Tribe." Moreover, 25 U.S.C. § 941h(1) specifies that "[a]ll matters involving tribal powers, immunities and jurisdiction shall be governed by the terms and provisions of the Settlement Agreement and the State Act, unless otherwise provided in this subchapter." Accordingly, concluded *Wade*, "taken together these provisions permit but one conclusion: the Tribe determined, and Congress and the South Carolina legislature agreed, that *all* civil matters involving the Tribe's members are to be brought in state courts where, as here, no Tribal court is established." *Id.* at 412. (emphasis in original).

Also, prior to this case being initiated, Petitioners brought a virtually identical action in the District Court of South Carolina. The federal action was ultimately dismissed without prejudice. *See*, *Catawba Indian Tribe of South Carolina v. Pope and Bryant*, CA No. 0:04-1414-22 (Order of Dismissal Without Prejudice, January 25, 2005). Judge Currie, in that

Order, expressed serious misgivings regarding the District Court's jurisdiction in light of *Wade*. Calling it a "close question," Judge Currie dismissed the case without prejudice on other grounds, but noted that, although the facts in *Wade* were somewhat different, there remained "concerns as to the exercise of this court's subject matter jurisdiction." In view of the provisions mandating the exclusivity of state court jurisdiction, *certiorari* should be denied on this ground as well.

Additionally, construction of an agreement reached to settle litigation between the Catawba Tribe and the State of South Carolina is not a recurring question. No other Tribe or state is affected. No precedent is involved. Thus, there is no reason for this Court to depart from its normal rule of deference to an interpretation of state law by the highest court in the State. *O'Brien v. Skinner, supra*; *United Air Lines Inc v. Mahin*, 410 U.S. 623, 629 (1973); *Williamson v. Berry*, 49 U.S. (8 How.) 495, 562 (1850).

III. There Is No Conflict Among The Circuits

As stated above, this case is unique to South Carolina and the Catawba Tribe. Thus, there is no conflict among the circuits here involved. To the contrary, the Fifth Circuit in *Ysleta Del Sur Pueblo v. State*, *supra* reached a similar conclusion to that of the Court below. In *Pueblo*, the Fifth Circuit concluded that the federal Restoration Act required that Texas law operated as surrogate federal law. 36 F.3d at 1335. Thus, the Court rejected the Tribe's argument that its gaming rights on the Reservation remained static and immune from Texas gambling law enacted by that state's Legislature. As the Fifth Circuit stated,

> [t]he Tribe warns that our conclusion (i.e. that Texas gambling laws and regulations are

> surrogate federal law) will constitute a substantial threat to its sovereignty in that "every time the State modifies its gambling laws the impact will be felt on the reservation." However, any threat to tribal sovereignty is of the Tribe's own making .... To borrow IGRA terminology, the Tribe has already made its "compact" with the State of Texas and the Restoration Act embodies that compact. If the Ysleta del Sur Pueblo wishes to vitiate the compact it made to secure passage of the Restoration Act, it will have to petition Congress to amend or repeal the Restoration Act rather than merely comply with the procedures of IGRA.

Id. We have this same situation here. The Petitioner has made an agreement with the State of South Carolina which the Legislature and Congress have approved. Part of that Agreement ratifying the legislation is that state law is to govern gambling devices on the Reservation. State law has subsequently banned those devices throughout the State. The Tribe must live with the Agreement it made and which the State Legislature and Congress have approved.

CONCLUSION

For the foregoing reasons, the writ of *certiorari* should be denied. This is simply not a case which warrants this Court's discretionary review.

Respectfully submitted,

HENRY DARGAN McMASTER
South Carolina Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

ROBERT D. COOK - *Counsel of Record*
Assistant Deputy Attorney General

C. HAVIRD JONES, JR.
Senior Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3970

ATTORNEYS for Respondents.

August 16, 2007