No. _____

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

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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The Tribe's petition argued that its right to conduct video poker as authorized by State law obtained in the settlement of its land claim was protected by the provision of the federal Settlement Act prohibiting unilateral amendment by the State of South Carolina of the underlying State Act and Settlement Agreement. 25 U.S.C. § 941m(f). By interpreting the Tribe's right to conduct video poker as subject to subsequent amendments of State law, the South Carolina Supreme Court deprived the federal provision prohibiting unilateral amendment of any meaning, and allowed the State to renege on an important commitment it made to settle the Tribe's land claim.

The State responds by asserting that, despite the existence of the federal Settlement Act, no federal question is involved here. Moreover, it boldly contends that, even if a federal question is present, this Court has no authority to review it. The State also asserts that the South Carolina Supreme Court was correct because no ambiguity resides in the State Act and Settlement Agreement, and that, in any event, the issue is too unimportant for review (even though this Court found the underlying land claim issue important enough in 1986 to warrant review of the then-extant federal issues).

As shown below, none of the State's responses has merit.

1. The State argues that the case hinges solely on a question of State law, as to which the decision of the Supreme Court of South Carolina is conclusive. That mischaracterizes both the petition and applicable law. The petition contends that the no unilateral amendment provision of the *federal*

Settlement Act precludes any interpretation of State law that subjects the Tribe to subsequent amendments negating its authority to conduct video poker conferred on it by the land claim settlement. 25 U.S.C. § 941m(f). The petition thus asserts that the Supreme Court of South Carolina erred in construing a provision of the State Settlement Act in a manner that renders a provision of *federal* law inoperative and meaningless. That claim presents a federal question.

Moreover, the federal Settlement Act itself incorporates the State Settlement Act, including the provision the Supreme Court of South Carolina construed. 25 U.S.C. § 941b(a)(2). Thus the provision of State law that the court below construed was itself part of federal law, and for that reason the court's decision also presents an issue of federal law within this Court's jurisdiction.

The State cites a case holding that the fact that a state law was *permitted* by federal law does not make the interpretation of that state law a federal question. *Gully v. First Nat. Bank in Meridian*, 299 U.S. 109, 115 (1936). But here, the Tribe claims that the State court's interpretation of State law was *forbidden* by federal law, resulting in a denial of the Tribe's *federal* right to be free of an unconsented amendment to the Settlement Agreement. Nor is it relevant that in some circumstances a party must comply with state procedural rules in order properly to assert its federal rights. *Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190 (1925). Here, there is no contention that the Tribe violated any state procedural rule in asserting its federal right. The court below held on the merits that there had been no violation of petitioner's federal rights. Pet. App. 10a-12a. That presents a federal question within this Court's review jurisdiction under 28 U.S.C. § 1257(a).

2. The State also observes that a provision of the Settlement Agreement vested exclusive jurisdiction in the State courts over all civil and criminal causes arising out of acts or transactions occurring on the Reservation or involving members of the Tribe, and that the federal Settlement Act incorporated this provision. 25 U.S.C. § 941(h)(1); *Wade v. Blue*, 369 F.3d 407, 411 (4th Cir. 2004). It argues from this provision that this Court has no jurisdiction to review the South Carolina Supreme Court's decision. However, as the Fourth Circuit has pointed out, this provision was an exercise of Congress' authority to "limit the jurisdiction of the *lower* federal courts." *Id.,* 369 F.3d at 410 (emphasis added). There is no indication that this provision was intended to restrict the undoubted authority of this Court to review the judgments of state courts under 28 U.S.C. §1257(a) where any right is claimed under the statutes of the United States. Here, the Tribe claims a federal right under 25 U.S.C. § 941b(a)(2) to be protected against unconsented amendment of State law governing video poker. The State's attempt to avoid this Court's review, while understandable given its dubious merits position, is spurious.

3. On the merits, the State argues that Congress has power to confer on states authority to subject tribes to state law, including any future amendment a state might adopt. But the Tribe does not question Congress' power to do so. It questions whether Congress actually did so here, given the federal Settlement Act's provision forbidding unconsented amendment.

The State responds that there was no unconsented amendment, because State law already subjects the Tribe to future amendments in State law. But the State does not explain what meaning is left in the federal no unilateral amendment provision if the State law provision is interpreted to allow amendments that affect the essence of the settlement.

Where two statutory provisions are in effect, each should be interpreted, if possible, to allow the other to have meaning. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). If the State provision subjecting Tribal video poker to State law is interpreted to subject it to future amendments of State law, the federal no-unilateral amendment provision has no meaning. On the other hand, if the State provision is interpreted as being limited to existing State law, both the federal and State provisions have meaning. Such a result is dictated not only by the requirement to give the federal no-unilateral amendment provision some meaning, but also by the Indian canon's mandate to resolve ambiguities in favor of the Tribe. *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985). The Indian canon is a "principle deeply rooted in this Court's Indian jurisprudence." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation,* 502 U.S. 251, 269 (1992). The lower court's cavalier disregard of the canon should not stand.[1]

4. The State misguidedly cites two cases to support its position -- *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C. Cir. 1998), and *Ysleta Del Sur Pueblo v. State*, 36 F.3d 1325 (5th Cir. 1994). *Narragansett* involved the Rhode Island Settlement Act, which subjected the tribe to state laws. 25 U.S.C. § 1708(a). The First Circuit held that a provision of the Indian Gaming

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[1] The State also cites a provision of the federal Settlement Act providing that "all laws . . . of the State . . . shall govern . . . the conduct of gambling or wagering by the Tribe." Opp. 10-11, quoting 25 U.S.C. 941*l*(b). But, as with the provision of State law interpreted by the Supreme Court of South Carolina, to construe the federal Settlement Act to authorize future amendments would eviscerate the federal no unilateral amendment provision and violate the Indian canon.

Regulatory Act subjecting the Narragansett Tribe to state laws and state jurisdiction was not a violation of equal protection, because it enforced a prior land claim settlement with the tribe and because other tribes -- including the Catawba Indian Tribe -- had accepted land claim settlements that include subjection to state laws. *Narragansett*, 158 F.3d at 1341. However, because the Rhode Island Settlement Act did not contain a no unilateral amendment provision, the First Circuit did not address the effect of such a provision, and its decision has no relevance here.

Ysleta del Sur involved a Restoration Act that also did not include a no unilateral amendment provision. 25 U.S.C. § 1300g. Moreover, the Restoration Act in that case incorporated a Tribal Resolution asserting a "firm . . . commitment to prohibit outright any gambling or bingo in any form on [the Tribe's] reservation." 25 U.S.C. § 1300g-6(a), incorporating Tribal Resolution quoted in *Ysleta del Sur*, 158 F.3d at 1328 n. 2. Thus there was no issue in that case whether the State, through a subsequent amendment, could renege on a commitment to allow Tribal gambling. That decision also has no relevance here.

5. Finally, the State argues that the case is not sufficiently important to warrant certiorari. Opp. p. 19. But the State's proper adherence to the Tribe's land claim settlement is just as important as the land claim itself was when this Court, declaring that it was a matter of "importance," reviewed it in 1986. *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498 (1986). It is also important that federal settlement acts be followed by all concerned, including states. It is important that states live up to their bargains with Indian Tribes. And, as recognized by the Indian canon, it is important that Indian Tribes be treated fairly. That was not done here by the State of South Carolina.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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