No. 04-

In the Supreme Court of the United States

CHIPPEWA TRADING COMPANY,
Petitioner,

v.

JENNIFER M. GRANHOLM; and,
JUNE SUMMERS HAAS
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. For purposes of comity, whether a state remedy is plain, adequate and complete, when there is a facial due process challenge in federal court to the remedy provisions of a state tobacco tax statute, and state officials admit in federal court to utilizing procedural tactics to avoid a decision on the merits in state court?

2. In the event a state remedy is plain, adequate and complete, whether the district courts may decline on the basis of comity, to hear Indian claims against state officials for a continuing pattern of seizure and forfeiture of interreservation Indian trade in tobacco, when the relief requested includes prospective injunctive relief to end a continuing violation of federal law, including *Art. II, Treaty with the Chippewa, 1842*, in which the federal government promised the exclusive application of federal law to Indian trade in return for ceded land?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW AND CORPORATE DISCLOSURE STATEMENT

Petitioner

Petitioner is Chippewa Trading Company, an Indian corporation chartered and organized under the laws of the Keweenaw Bay Indian Community, a federally recognized Indian tribe, on the L'Anse Federal Indian Reservation. The corporation is chartered and organized as a subordinate organization of the Tribe. The Tribe in turn is organized as a federal corporation under Section 17 of The Act of June 18, 1934. Petitioner was the plaintiff in the District Court, and appellant in the Court of Appeals.

Respondents

At the time of the actions complained of in 2001 and 2002, Jennifer M. Granholm was the Attorney General of the State of Michigan, and June Summers Haas was the Commissioner of Revenue of the State of Michigan. Jennifer M. Granholm has since been elected Governor of the State of Michigan, and the Department of Treasury of the State of Michigan has been reorganized. Granholm and Haas were defendants in the District Court, and appellees in the Court of Appeals. Upon issuing the Sixth Circuit's decision, the Sixth Circuit, *sua sponte*, substituted Michael Cox for Jennifer M. Granholm, and Jay B. Rising for June Summers Haas. Petitioner objects to the Sixth Circuit's substitution of the parties, on the basis that Granholm and Haas were plead responsible in their official capacities for their actions in violation of federal law.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a Writ of Certiorari to review the judgment rendered in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit Court of Appeals opinion was issued April 19, 2004, and is reported at 365 F.3d 538 (6th Cir. 2004). (App. B at 3a). An order denying rehearing *en banc* was issued June 22, 2004. (App. A at 1a). The unreported decision of the District Court, by Judge David W. McKeague, was rendered on March 28, 2003, and granted respondents' motion to dismiss on the basis of comity, dismissed petitioner's claims, and denied petitioner's motion for preliminary injunction as moot. (App. C at 19a). A judgment order was issued on March 28, 2003. (Appendix C at 32a).

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals entered its judgment on April 19, 2004, and denied a timely filed petition for rehearing *en banc* on June 22, 2004. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. 1254(1).

TREATY, CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following federal treaty, constitutional, and statutory provisions, which are reproduced in the Appendix at App. H at 74a, *et. seq.*:

A. The Treaty with the Chippewa, 1854.
B. Indian Commerce Clause
C. Supremacy Clause
D. Due Process Clause
E. 28 U.S.C. 1362
F. The Federal Corporate Charter of the Tribe.
G. The Tribe's Constitution.

STATEMENT OF THE CASE AND FACTS

The facts are undisputed. Petitioner was formed by the Keweenaw Bay Indian Community (the Tribe), by Tribal resolution in 1997 as a subordinate organization of the Tribe, pursuant to Article VI, Section 1(o), of the Tribe's Constitution. (App. D at 34a). The Tribe is federally recognized and is organized as a Section 17 federal corporation (App. F at 43a). The Chippewa enjoy a choice of law treaty covenant providing for the exclusive application of federal law to their trade and commerce, guaranteed by the federal government in exchange for ceded land, under the terms of Article II of *The Treaty with the Chippewa, 1842* (the Treaty). (App. E at 36a).

Leading up to and during respondent Granholm's political race for Governor, and during tax compact negotiations with statewide Michigan tribes, respondents interfered with petitioner's interreservation tobacco trade by seizing and forfeiting tobacco products purchased by petitioner from an

on-reservation Indian seller in New York, during delivery on August 31, 2001, by an on-reservation Indian shipper from New York. (App. C at 20a). Numerous seizures and forfeitures of petitioner's interreservation tobacco trade by respondents continued in 2002. The basis of the seizures and forfeitures were petitioner's alleged purchase of unstamped tobacco products, in violation of a state law, the Michigan Tobacco Products Tax Act (the Act), MCL 205.421 *et. seq.* This interference by the respondents occurred indiscriminately to any shipment of unstamped Indian tobacco to any Indian entity on any Indian reservation statewide, amounting to a state-wide reservation embargo in 2001 and 2002.

Petitioner contested the August 31, 2001 seizure and forfeiture in a state case under the Act, which was involuntarily dismissed by the state court. Petitioner contested numerous 2002 seizures and forfeitures in a number of state court cases under the Act, which were later voluntarily dismissed by petitioner.

Petitioner filed the instant action in the District Court below challenging the seizure and forfeiture provisions of the Act on its face on 42 U.S.C. 1983 and federal due process grounds, after the state court dismissal of the 2001 case. Petitioner then amended the federal case to also assert Article II of the Treaty, and the Supremacy Clause, and the Indian Commerce Clause of the federal constitution, to invalidate application of the Act against petitioner. One of the arguments asserted in support of the due process challenge was respondents' use of procedural obstruction in the state cases to avoid reaching the merits, which was admitted on the record by counsel for the respondents at a federal motion hearing.

On March 28, 2003, the District Court issued its decision to abstain, granted respondents' motion to dismiss on the basis of comity, dismissed petitioner's claims, and denied petitioner's motion for preliminary injunction as moot. (Appendix C at 19a). At the time of District Court abstention, petitioner was seeking a declaratory judgment, and the relief sought included damages, and preliminary and permanent injunctive relief to end the ongoing violation of federal law.

On April 19, 2004, the Sixth Circuit Court of Appeals affirmed the District Court, (Appendix B at 3a), and on June 22, 2004, issued an order denying rehearing *en banc*. (Appendix A at 1a).

REASONS FOR GRANTING THE WRIT

This case of federal treaty and constitutional import is one of first impression for the court. The case involves an important question of federalism, and ending ongoing interference by state officials with sovereign interreservation Indian trade, in direct contravention of a federal treaty guaranteeing exclusive application of federal law to Indian trade, in return for ceded land. The Sixth Circuit's published decision creates bad precedent, creates a division with the Ninth and Tenth Circuits, and shows inconsistent application of comity by the District Courts within the Sixth Circuit.

I. For purposes of comity, a state remedy is not plain, adequate and complete, when the remedy provisions of a state statute violate federal due process, and procedural tactics are utilized by the sued state officials to avoid a decision on the merits in state court.

The Sixth Circuit's upholding of the District Court's finding that the state remedy was plain, adequate, and complete, is contrary to this Court's notion of comity and should not be allowed to stand as precedent.

The seizure and forfeiture provisions of the Act includes the statutory remedy, and was attacked as violating federal due process on its face. It was backwards reasoning for the District Court to find a plain, adequate, and complete state remedy, when not deciding the federal facial due process challenge to the statutory remedy, and failing to consider the respondents' admission to the District Court that respondents were utilizing procedural obstruction tactics to avoid a decision on the merits in state court.

The District Court and the Sixth Circuit simply did not address this on the record admission by respondents' counsel, which was argued in petitioner's brief on appeal:

> THE COURT: And in fact, my guess is that you all are probably doing everything procedurally you can think of to try to prevent the Court from ever getting to the merits on that case; am I right?
>
> MR. LEVY: That is correct, Your Honor.

The District Court abdicated its duty to decide the case, and shows how comity is inconsistently used within the Sixth Circuit.

In Tennessee in 1972, in a non-Indian case, a District Court decided abstention did not apply to a similar facial due process challenge to a state forfeiture law and decided the case on the merits. *Fell v. Armour*, 355 F. Supp. 1319 (Md. D. Tenn. 1972)(grant of injunctive relief to bar state officials' enforcement of seizure and forfeiture provisions of a state drug control law in violation of federal due process on its face).

Fell was the easier case, because there were no obstruction tactics by state officials, admitted or alleged, and the District Court refused to abstain.

II. The Sixth Circuit's decision that petitioner must sue state officials in state court to enforce a federal treaty and other federal laws, with overwhelming federal interests at stake, to end a continuing violation, is contrary to principles of federalism enunciated by this Court.

Petitioner brought claims to, among other things, enforce a federal treaty in the District Court to enjoin a continuing violation by state officials. The federal interests in this case are overwhelming.

Article II, *The Treaty with the Chippewa, 1842*, 7 Stat. 591, provides:

> *The Indians stipulate for the right of hunting on the ceded territory*, with the other usual privileges of occupancy, until required to remove by the President of the United States, *and that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress*. [emphasis added]

Congress has not ordered otherwise. This Court has held that, ambiguity, if any, in an Indian treaty, must be construed liberally in favor of the tribe. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). The Treaty is the law of the land under the Supremacy Clause, and by their continued actions, respondents have defied this federal treaty clause with impunity.

The District Court found, without explanation or rationale, that the injunctive relief requested "would unduly interfere with the fiscal operations and independence of the State of Michigan and its system of taxation", and was therefore barred by principles of comity, citing *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943) and *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100 (1981).

In affirming the District Court, the Sixth Circuit decision is contrary to this Court's decision in *Moe, Sheriff v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976). In *Moe*, this Court held that *Great Lakes Dredge* did not apply to Indians where the United States could have brought the kind of claims as trustee, but for whatever reasons were not so brought. *Moe*, 425 U.S., at 470-475, citing *Heckman v. United States*, 224 U.S. 413 (1912)(U.S. sued to cancel conveyances by Cherokee allottees-grantors, who were not parties, as violative of federal restrictions upon the Indians' power of alienation), and *United States v. Rickert*, 188 U.S. 432 (1903)(upholding right of the government to seek injunctive relief against county taxation directed at tools used to cultivate land allotted to and occupied by the Sioux Indians).

This trustee principle was used as recently as 1979 by the federal government against the State of Michigan to enforce

a treaty provision in which, like the present case, the relief requested interfered with Michigan's regulatory and tax system. *United States v. State of Michigan*, 471 F. Supp. 192, 265 (W.D. Mich. 1979)(Chippewa Indian treaty hunting and fishing rights apply off-reservation on ceded land in Michigan). Under this case, state officials do not have jurisdiction to tax and regulate under state natural resource laws Indians exercising their hunting and fishing treaty rights off-reservation on ceded land.

The Sixth Circuit's decision is contrary to this Court's historical exercise of Article III judicial power in Indian affairs off-reservation but within a state. *United States v. Forty-Three Gallons of Whiskey, Etc.*, 93 U.S. 188 (1876)(Upholding forfeiture to federal government of alcohol, pelts and other goods, seized from a white off-reservation in Minnesota to be sold on-reservation, in violation of treaty and Act of Congress); *United States v. Holliday*, 70 U.S. 407 (1865)(Upholding federal indictment of white for selling liquor to Saginaw Chippewa Indian off-reservation in Gratiot County, Michigan, in violation of Act of Congress).

The Sixth Circuit's decision is also contrary to this Court's decisions in *Ex parte Young*, 209 U.S. 123 (1908) and *Green et al. v. Mansour, Director, Michigan Department of Social Services*, 474 U.S. 64, 68 (1985), which permits federal prospective relief against state officials to end a continuing violation of federal law.

This Court should not allow this challenge by state officials to the power of the federal courts to stand as precedent.

III. The Sixth Circuit's decision strips Indian tribes of Congressionally granted corporate and constitutional power to create subordinate organizations with the power to seek redress in the federal courts.

The Sixth Circuit mistakenly distinguished *Moe* and *Winnegago*. The Sixth Circuit holding that petitioner cannot avail itself of federal jurisdiction pursuant to 28 U.S.C. 1362, because petitioner is not an "Indian tribe or band" within the meaning of section 1362, stripped petitioner, and indeed all Indian tribes, of Congressionally granted power to create subordinate organizations with federal corporate power to seek relief in the federal courts.

Congressional grants of power to Indian tribes include the means to implement the federal government's policy of fostering Indian self-government and economic development in Indian Country.

The Sixth Circuit's decision stripped federal corporate power from petitioner. Congress granted federal corporate status to the Tribe pursuant to Section 17 of The Act of June 18, 1934. Article 1 of the Tribe's federal corporate charter provides:

> In order to further the economic development of the Keweenaw Bay Indian Community of the L'Anse Reservation in Michigan by conferring upon the said Community certain rights, powers, privileges, and immunities ... the aforesaid community is hereby chartered as a body politic and corporate of the United States of America, under the corporate name "The Keweenaw Bay Indian Community".

Article 5 provides corporate powers. Article 5(e) of the charter provides:

> To engage in any business that will further the economic well-being of the members of the Community or to undertake any activity of any nature whatever, not inconsistent with law or with any provisions of the Charter.

The Sixth Circuit's decision further stripped petitioner of constitutional power granted by Congress.

Petitioner was created as a subordinate organization of the Tribe, a section 17 federal corporation, pursuant to the Tribes' Constitution, created and approved pursuant to Act of Congress. Article VI, Sec. 1, cl. O, of the Tribe's Constitution provides:

> The Tribal Council shall have the power, subject to any limitations imposed by the Statutes of the Constitution of the United States, and subject to all express restrictions upon such powers contained in this Constitution and attached By-laws: ... To charter subordinate organizations for economic purposes ....

IV. The Sixth Circuit's decision creates a split with the Ninth and Tenth Circuits, and shows inconsistent use of comity by the District Courts within the Sixth Circuit.

The Sixth Circuit decision created a split with the Ninth Circuit on the applicability of comity in a 1983 action. *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002) (Comity does not apply to a 1983 suit challenging the validity of a state tax credit under the Establishment Clause). *Winn* was recently

affirmed by this Court in *Hibbs v. Winn*, 2004 U.S. Lexis 4175 (U.S., June 14, 2004), which was decided after the Sixth Circuit's decision. Now the Sixth Circuit's decision is contrary to this Court's recent decision upholding *Winn*.

The Sixth Circuit decision erroneously distinguished *Winn* on the basis that the object of challenge was a state tax credit, which if successful, would result in the state collecting further tax revenue. It is disingenuous to distinguish *Winn* on the basis of the attacked state statutory provision, be it a tax or tax credit, since the basis of the state invoking comity in the first place is not loss of tax income, but interference in a state tax and regulatory scheme. Although there is no tax credit at issue in this case, this case is easier than *Winn*, because the state has no jurisdiction under the Treaty in the first place to levy or credit the tax.

The Sixth Circuit decision creates a split with the Tenth Circuit. On August 28, 2003, the United States Court of Appeals for the Tenth Circuit affirmed *Winnebago Tribe of Neb. v. Stovall,* 205 F. Supp. 2d 1217, and, 216 F. Supp. 2d 1226. *See, Winnebago Tribe of Neb. v. Stovall*, 341 F. 3d 1202 (10th Cir. Kan. 2003) (Finding no error in district court's declining to abstain under the *Younger* doctrine, no abuse of discretion in granting injunctive relief, and no error in granting preliminary injunction over claims of Eleventh Amendment immunity, where the District Court granted Indian plaintiffs' motions for a temporary restraining order and later temporary injunction, to stay and return state seizures of Indian property and stay state criminal charges against Indian individuals, relating to alleged violations of state gasoline tax.)

Winnebago also involved Indian to Indian trade. *Winnebago* was the easier case, because *Winnebago* involved

use of federal injunctive powers to return seized Indian property and stay state criminal charges against Indians brought by state officials in state court.

Another similar Tenth Circuit Indian case has recently been handed down, again in favor Indian trade, but on preemption grounds. *Prairie Band Potawatomi Nation v. Steven S. Richards, Secretary of the Kansas Department of Revenue*, No. 03-3218, (10th Cir. August, 11, 2004) (Kansas fuel tax invalidated as applied to non-Indian distribution of gasoline to tribe, because the balance of tribal, federal, and state interests preempt state taxation as a matter of law.)

The Sixth Circuit's case shows inconsistent use of comity by the District Courts in the Sixth Circuit on Indian cases, besides in *Fell*.

In Michigan in 1998, District Court Judge McKeague ruled on the merits in a case similar to petitioner's instant case, and was upheld on the merits on appeal to the Sixth Circuit. *Baraga Products, Inc. v. Michigan Commissioner of Revenue*, No. 97-1449 (6th Cir. 1998)(unpublished)(Corporation organization under the laws of a state cannot assert rights of its shareholder, an on-reservation Indian).

Baraga Products was decided by the same District Court Judge, involved the same Tribe, the same reservation, the same Treaty, and the relief requested also involved injunctive relief and the Michigan tax system (Michigan Single Business Tax).

There is no appreciable difference between a state business income tax scheme or a state tobacco tax scheme sufficient to justify invoking comity in one case and not the

other. This is a wildly different application of comity by the same federal judge.

This Court has an inherent interest in securing consistent application of enunciated principles of federalism to prevent the District and Circuit Courts from substituting their own notions of federalism.

CONCLUSION

This case cries out for this Court to take. It is a hard case.

The Sixth Circuit's notions of federalism, abstention, and comity, in favor of state courts have no place as precedent where this decision is contrary to this Court's enunciated principles, the federal treaty, constitutional, statutory, and Congressional policy interests towards Indians are overwhelming, a split is created between Circuits, and shows inconsistent application in the District Courts.

This is a hard case because a decision on the merits in favor of petitioner would enforce a federal choice of law term in a federal treaty, long forgotten by non-Indians, but not forgotten by the Chippewa, whose territory around them was ceded to the federal government by their ancestors in exchange for solemn federal guarantees in the Treaty.

This is a hard case because a decision on the merits in favor of petitioner would breath life into trading relations of Indians, which the Chippewa have long known to be the truth of the Treaty, but the respondents deny and obstruct.

This is a hard case because respondent Granholm was State Attorney General at the time of her actions, is now

sitting Governor, and enforcement action occurred during her political race and state-wide tax compact negotiations.

This is a hard case that made bad law in the Sixth Circuit. This Court has an interest in preserving its enunciated principles of federalism and not letting this case stand as precedent.

Letting the Sixth Circuit decision stand will lead to the following untenable results:

1. The District Courts will have wider latitude of discretion to abstain from exercise of jurisdiction with wildly inconsistent results.

2. The principles of federalism enunciated by this Court will have been heavily tilted in favor of the states in cases involving overwhelming federal interests and a state merely invokes an impact on its tax system.

3. Questions involving treaties entered into by the federal government will be required to be decided in state courts where the impact is on a state tax system.

4. The judiciary branch is seriously diluting its power to order injunctive relief against state officials for an ongoing violation of federal law.

5. Congress' statutory grants of section 17 federal corporation and tribal constitutional power to Indian tribes to foster self-government and economic development in Indian Country will be seriously eroded.

6. The federal government's power to exercise its trustee relationship in federal court on behalf of Indians will be

jeopardized when a state merely invokes an impact on its tax system.

7. By merely invoking its state tax system, state officials will be free to declare open season on Indian treaty rights during state election seasons and during tax compact negotiations without the prospect of the federalism check and balance of the federal courts.

8. State officials will be free to procedurally obstruct state cases even when a state remedial statutory scheme is attacked on federal due process grounds.

For the above reasons, Petitioner respectfully requests this Court to grant the instant Petition for Writ of Certiorari to review the judgment rendered in this case by the U.S. Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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