No. 20-753

In The
Supreme Court of the United States

CONFEDERATED TRIBES AND
BANDS OF THE YAKAMA NATION,

Petitioner,

v.

YAKIMA COUNTY, WASHINGTON, et al.,

Respondents.

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

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In posing its Question Presented, the Petitioner explains that the United States reassumed some Pub. L. 83-280 jurisdiction over crimes involving Indians within the Yakama Reservation from the State of Washington pursuant to 25 U.S.C. § 1323, on April 19, 2016. However, the Petitioner fails to acknowledge that it had requested "full" retrocession and that its request was denied, in part, by the Governor of Washington. Further, the Petitioner inaccurately claims that federal officials later re-interpreted the scope of the retrocession that was actually accepted by the United States.

The Petitioner frames the Question Presented to this Court to be whether or not the United States, which the Petitioner did not sue, can change the scope of its re-assumption of Pub. L. 83-280 jurisdiction without the Yakama Nation's prior consent after the re-assumption became effective under 25 U.S.C. § 1323. In reality, that issue had no bearing on the decisions below and misstates what actually transpired previously.

The question the Petitioner originally presented in its Complaint and to the Ninth Circuit, and which is now before this Court, can and should be succinctly framed as follows:

> Did the State of Washington retrocede jurisdiction over criminal matters arising within the exterior boundaries of the Yakama Reservation when non-Indians are in any way involved?

PARTIES TO THE PROCEEDING

Respondents agree with Petitioner's description of the Parties To The Proceeding.

RELATED CASES

Respondents agree with Petitioner's recital of Related Cases.

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OPINIONS BELOW

Respondents agree with Petitioner's description of the Opinions Below.

JURISDICTION

Respondents agree with Petitioner's statement concerning the Court's Jurisdiction.

STATUTES INVOLVED

The Respondents agree that 25 U.S.C. § 1323(a) is relevant to this dispute.

However, 25 U.S.C. § 1326 is not. As originally enacted in 1953, Public Law 280 did not require States to obtain consent of affected Indian Tribes before assuming jurisdiction over them. It was under the original version of Public Law 280 that the State of Washington assumed jurisdiction over the Yakama Reservation in 1963. Not until Title IV of the Civil Rights Act of 1968 amended Public Law 280 did Congress require States to obtain tribal consent prior to the assumption of jurisdiction. Since the State had assumed jurisdiction before its amendment requiring consent, the current version of 25 U.S.C. § 1326 is irrelevant to this dispute.

REASONS FOR DENYING THE PETITION

A. THIS DISPUTE RELATES SOLELY TO THE INTERPRETATION OF THE PLAIN LANGUAGE OF THE WASHINGTON GOVERNOR'S RETROCESSION PROCLAMATION WHICH IS NOT A MATTER OF GREAT GENERAL CONCERN TO THIS COURT OR INDIAN NATIONS.

The Petitioner portrays this as a dispute that presents compelling federal issues of a widespread and vital interest to all tribal nations in the United States. However, both the Ninth Circuit Court of Appeals and the District Court that originally dismissed the plaintiff's complaint for injunctive and declaratory relief correctly decided that this dispute turns on an ordinary interpretation of the specific language that Washington Governor Jay Inslee used in his retrocession Proclamation.

Pursuant to this Court's Rules, "(a) petition for writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10 (2019). This Petition presents none of the "character of the reasons the Court considers" compelling. Even accepting the Petitioner's framing of the issue at face value, the Petitioner has nonetheless still failed to demonstrate that the decision reached by the Ninth Circuit in this case is in conflict with the decision of any other court of appeals on the same matter. To the contrary, the Petition itself describes this dispute as a matter of "first impression."

The record in this case also demonstrates that the Ninth Circuit's decision is actually not in conflict with any decision of the Washington state court of last resort, but instead is entirely consistent with the Washington Court of Appeals' decision in *State v. Zack*, 2 Wn. App. 2d 667, 413 P.3d 65 (2018), *review denied* 191 Wn.2d 1011, 425 P.3d 517 (2018). Similarly, the Petition does not allege, and certainly has not established, that the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a) (2019). The Ninth Circuit simply interpreted the plain language of Proclamation 14-01.

Finally, despite the Petitioner's representations otherwise, the Petition does not present "an important question of federal law that has not been, but should be, settled by this Court" or a situation where the Court of Appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c) (2019). The relevant inquiry here is whether the Ninth Circuit and District Court correctly determined that the Governor of Washington intended to use the word "and" in the disjunctive – i.e., "and/or" – in Proclamation 14-01 when he retroceded partial criminal jurisdiction back to the United States.

Employing a straightforward analysis of the specific words actually used in the Proclamation, the Ninth Circuit determined that the District Court correctly interpreted the plain language of Proclamation

14-01. The Ninth Circuit's decision did not hinge on 25 U.S.C. §§ 1323 and 1326 as asserted by the Petitioner. It was a context specific interpretation of the plain language of Proclamation 14-01, nothing more. Thus, this dispute has little, if any, applicability beyond the specific facts and exact context of this case.

The record in this case demonstrates that this Petition simply does not meet the extremely high threshold demanded to warrant this Court's review. Sup. Ct. R. 10 (2019). On this basis alone the Petition for Writ of Certiorari should be denied.

B. THE NINTH CIRCUIT'S INTERPRETATION OF THE PLAIN LANGUAGE OF THE PROCLAMATION WAS CORRECT AND CONSISTENT WITH WASHINGTON STATE'S ASSUMPTION AND RETROCESSION OF JURISDICTION.

The Petitioner argues that its Petition should be granted because the Ninth Circuit improperly deferred to the Department of Interior's alleged "reinterpretation" of Proclamation 14-01. To address this claim, it is first necessary to consider and understand the specific factual history of this dispute.

Public Law 280

In 1953, Congress passed what is commonly known as Public Law 280 in response to the concern that Indian Tribes lacked "adequate institutions for law enforcement." *Bryan v. Itasca Cty., Minn*, 426 U.S.

373, 379 (1976). Public Law 280 authorized states to assume jurisdiction over criminal offenses committed by or against Indians in Indian country. Pub. L. 83-280, 67 Stat. 588 (1953). The State of Washington assumed partial Public Law 280 jurisdiction over the Yakama Reservation and most other Indian country in the state in 1963. Laws of 1963, ch. 36 (codified in ch. 37.12 Revised Code of Washington). The Petitioner previously challenged this assumption of jurisdiction under Public Law 280 in this Court without success. *See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979).

Pursuant to the Revised Code of Washington ("RCW") chapter 37.12.030, the State assumed jurisdiction over offenses "committed by or against Indians" in the manner set forth in RCW 37.12.010. The assumption of jurisdiction under RCW 37.12.010 depended on the place of the offense and persons involved. For offenses committed by Indians on trust lands within their own Tribe's reservation, the State assumed jurisdiction only as to eight subject matter areas. *Confed. Bands*, 439 U.S. at 475-76. But as to fee lands, as were involved in this case, Washington assumed criminal jurisdiction to the full extent permitted by Public Law 280. *Id*. at 475, 498.

Under RCW 37.12.010, Washington state courts had jurisdiction over offenses committed on fee lands within Indian reservations "to the same extent that this state has jurisdiction over offenses committed elsewhere within this state." RCW 37.12.030; *see Confed. Bands*, 439 U.S. at 498 ("State jurisdiction . . . is

complete as to Indians on nontrust lands"). Washington's jurisdiction under Public Law 280 and RCW 37.12.010 did not change federal or tribal jurisdiction. Regardless of the extent of state jurisdiction, the United States and Indian Tribes retained the same jurisdiction they would have in the absence of state jurisdiction. *See Confederated Tribes & Bands of the Yakima Indian Nation v. Washington*, 608 F.2d 750, 752 (9th Cir. 1979).

Washington State Governor's Proclamation 14-01.

In 1968, Congress modified Public Law 280 to permit states to choose whether they wanted to undo, or "retrocede," all or "some measure" of the jurisdiction previously assumed under Public Law 280. 25 U.S.C. § 1323. Congress expressed no intent to divest States of jurisdiction that pre-existed or was assumed pursuant to Public Law 280. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 150-51 (1984) (*Three Tribes I*). The President delegated the authority to accept retrocession to the Secretary of the Interior. 33 Fed. Reg. 17339 (Nov. 23, 1968).

In 2012, the Washington Legislature enacted a process under which an Indian Tribe could request retrocession of jurisdiction the state previously acquired within the Tribe's reservation under Public Law 280. RCW 37.12.160. The Petitioner requested *full* retrocession of civil and criminal jurisdiction, with the

exception of two areas of the law not relevant here. App. 51. In response, Washington Governor Jay Inslee granted the Yakama Nation's request, *in part*, through Proclamation 14-01. App. 50-54. As required by RCW 37.12.160(4), Governor Inslee submitted the Proclamation to the Department of Interior, along with an unambiguous letter explicitly describing the partial jurisdiction that was being retroceded. App. 55-58.

The Secretary of the Interior accepted the retrocession effective April 19, 2016. 80 Fed. Reg. 63583 (Oct. 20, 2015). The acceptance explicitly notes that it was a "partial retrocession" but does not otherwise articulate what jurisdiction Washington was retroceding and what jurisdiction was being retained. Instead, the Secretary described the Governor's Proclamation as "plain on its face and unambiguous" and specifically commented that "(i)f a disagreement develops as to the scope of the retrocession, we are confident that courts will provide a definitive interpretation of the plain language of the Proclamation." App. 71. Nowhere did the Secretary "reject" Governor Inslee's description of the scope of the retrocession as the Petitioner asserts.

Paragraph 1 of Proclamation 14-01 retroceded all of the state's Public Law 280 civil and criminal jurisdiction over four (4) subject matter areas within the Yakama Reservation, and Paragraphs 2 and 3 retroceded the state's jurisdiction over criminal offenses where only Indians are involved as both perpetrator and victim. But for other offenses, the Proclamation retroceded criminal jurisdiction only "in part." In particular, Paragraph 3 of the Proclamation provides that

the "State retains jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims." App. 53. As Governor Inslee explained in his cover letter to the Department of Interior, "the intent is for the State to retain such jurisdiction in those cases involving non-Indian defendants *and/or* non-Indian victims." App. 57. Finally, Paragraph 7 of the Proclamation states, "Pursuant to RCW 37.12.010, the State shall retain all jurisdiction not specifically retroceded herein." App. 54.

Washington Court of Appeals interpretation of Proclamation.

If any dispute actually existed about precisely what jurisdiction the State was retroceding through Proclamation 14-01, that dispute was definitively resolved by Division III of the Washington State Court of Appeals in a case arising from events that also occurred on the Yakama Reservation in the City of Toppenish. *See State v. Zack*, 2 Wn. App. 2d 667, 413 P.3d 65 (2018), *review denied* 191 Wn.2d 1011, 425 P.3d 517 (2018). Interpreting Governor Inslee's Proclamation in the same fashion that the District Court and Ninth Circuit Court of Appeals did here, the *Zack* court found that the State retained jurisdiction over criminal offenses involving non-Indian defendants *and/or* non-Indian victims occurring on the Yakama Reservation. 2 Wn. App. 2d at 675-76, 413 P.3d at 70.

The Ninth Circuit correctly determined that standard rules of construction precluded the interpretation of the Proclamation offered by Petitioner.

The record unambiguously establishes that the Petitioner requested "full" retrocession of all jurisdiction the State had assumed on the Yakama Reservation. App. 7. In response to the Petitioner's request for "full" retrocession, Governor Inslee unequivocally granted the request only "in part". *Id*. Governor Inslee had neither the ability nor the authority to retrocede jurisdiction that the State possessed prior to Public Law 280. His use of the phrase "in part" in the Proclamation can only be read to mean that the State retroceded something less than what the Petitioner had requested and the State could legally retrocede.

Similarly, the Department of Interior had no ability or authority to accept retrocession of jurisdiction beyond what was assumed under Public Law 280. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 886 (1986) (*Three Tribes II*). Even prior to the enactment of Public Law 280, the State possessed jurisdiction over crimes committed by non-Indians on the Yakama Reservation. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211-12 (1978). Thus, at a minimum, Proclamation 14-01 retained the jurisdiction Washington possessed prior to Public Law 280, plus some part of the jurisdiction that it acquired through Public Law 280. To read the Proclamation any other way renders it meaningless.

Nonetheless, the Petitioner asserts that Proclamation 14-01 should be read to retrocede not only the full jurisdiction the State assumed under Public Law 280, but also jurisdiction that the State possessed even prior to the enactment of Public Law 280. This argument ignores the express language used by Governor Inslee in Proclamation 14-01 that Washington was only granting the Petitioner's retrocession request "in part." It is also implies a Congressional intent that does not exist, namely that States can disclaim jurisdiction beyond what they assumed pursuant to Public Law 280, a proposition this Court has previously rejected. *See Three Tribes I*, 467 U.S. at 150.

As the Ninth Circuit expressly recognized, "DOI's published acceptance (of the Proclamation) simply acknowledged that the United States was accepting 'partial civil and criminal jurisdiction over the Yakama Nation which was acquired by the State of Washington under [Public Law 280],'" without addressing Governor Inslee's correspondence concerning the Proclamation. App. 9. In a letter sent to the Petitioner the same day as its acceptance of partial retrocession, the Department of Interior confirmed what the District Court and the Ninth Circuit found below – the Proclamation was "plain on its face and unambiguous." *Id*. Interior went on to explain to the Petitioner that it was the Department's position that if a disagreement developed "as to the scope of the retrocession" it would be a court that would "provide a definitive interpretation of the plain language of the Proclamation," not DOI. *Id*. The Washington State Court of Appeals and the Ninth

Circuit have now provided a clear, consistent and definitive interpretation of the plain language of the Proclamation.

Contrary to Petitioner's inference otherwise, the role of the Department of Interior was simply to accept the retrocession and post notice of the retrocession in the Federal Registrar once it was accepted. Interior had no ability or authority to interpret the scope of the retrocession even if it had a desire to do so. In addition, DOI expressly recognized that the Proclamation was "plain on its face and unambiguous". It also acknowledged that it was not Interior's role to interpret the Proclamation in the first instance. As DOI unequivocally advised the Petitioner, this duty fell to the courts. When disputes did arise as to the scope of the retrocession as DOI predicted they might, the Washington State Court of Appeals and the Ninth Circuit unequivocally provided a consistent definitive interpretation just as DOI assured they would.

The Petitioner's argument that the Department of Interior somehow "re-interpreted" the Proclamation is founded on several false premises that are not supported by the record. First, there is no evidence in the record that Governor Inslee intended to use the phrase "and" in the conjunctive when he first issued the Proclamation, and in fact as the Ninth Circuit and the District Court correctly noted, the contemporaneous evidence available from that time indicates that he intended a disjunctive meaning to the word.

Second, the record does not support Petitioner's assertion that the Department of Interior either interpreted or re-interpreted the Proclamation. Instead, the evidence demonstrates that Interior cautiously refrained from interpreting the scope of the Proclamation and merely accepted the Proclamation as written, taking no position on its scope.

Similarly, the record does not support Petitioner's claim that Department of Interior "rejected" Washington's characterization of the scope of the Proclamation. The Department simply accepted the retrocession and indicated that if any dispute as to its scope arose it would be the courts that would interpret the Proclamation, not Interior.

Finally, there was and is no mechanism for Interior to actually change the plain language of the acceptance of the Proclamation as published in the Federal Register and there is certainly no evidence that the Department took steps to even attempt to do so.

The Ninth Circuit correctly interpreted the plain language of Proclamation 14-01 as meaning Washington retained criminal jurisdiction over offenses occurring on the Yakama Reservation when those offenses involve non-Indian defendants "and/or" non-Indian victims and the Petition for Writ of Certiorari to review that decision should be denied.

C. THE STATE'S RETENTION OF JURISDICTION OVER CRIMES INVOLVING NON-INDIANS WILL ACTUALLY LEAD TO IMPROVED PUBLIC SAFETY ON THE YAKAMA RESERVATION.

The primary concern of Congress in enacting Public Law 280 was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement. *Bryan*, 426 U.S. at 379. According to the sparse legislative history that exists concerning Public Law 280:

> As a practical matter, the enforcement of law and order among the Indians in Indian country (had) been left largely to the Indian groups themselves. In many States, tribes (were) not adequately organized to perform that function; consequently, there (had) been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicting an ability and willingness to accept responsibility.

H.R. Rep. No. 848, 83d Cong., 1st Sess., 5-6 (1953), U.S. Code Cong. & Admin. News 1953, pp. 2409, 2411-12.

Pursuant to Public Law 280, the State of Washington accepted the responsibility for exercising criminal jurisdiction on the Yakama Reservation to the same extent it exercised jurisdiction throughout the State. Though it agreed to retrocede some of that jurisdiction back to the federal government, the State viewed its responsibility to the Yakama Nation as significant

enough that it decided to retain some criminal jurisdiction within the boundaries of the Reservation.

The Petitioner now turns logic on its head arguing that to allow the State to exercise the criminal jurisdiction that it retained will somehow "exacerbate() public safety challenges" on the Reservation. In other words, the Petitioner postulates that enjoining the State from enforcing the law within the boundaries of the Yakama Reservation will reduce crime on the Reservation.

Common sense dictates that curtailing law enforcement efforts on the Yakama Reservation would actually harm the residents of the Yakama Reservation, not help them. By the Petitioner's own admission, the Yakama Reservation is in the midst of a public safety crisis. Ironically, instead of welcoming the Respondents' answer to its plea for help, the Petitioner filed this lawsuit to prevent Respondents from providing the assistance the Petitioner expressly requested.

It cannot be disputed that there is a strong public interest in the investigation of crime and apprehension of criminals. Moreover, the Respondents are statutorily bound to enforce the law within their jurisdictions and ensure public safety throughout. Enjoining them from doing so would have only endangered the citizens of those jurisdictions, including enrolled Yakama Nation members, and would potentially subject the Respondents and their public employees to civil liability. It would also engender confusion and uncertainty for law enforcement, and the Petitioner, given that it would

contradict existing law, namely the Washington State Court of Appeals decision in *State v. Zack*.

Moreover, as inferred in the Petition, to achieve the Petitioner's desired outcome, this Court would have to overturn established precedent that has guided states and Indian nations for decades. Specifically, not only is the Petitioner asking the Court to reverse the Ninth Circuit below, it is also requesting the Court to abandon its prior rulings in *Oliphant*, 435 U.S. 191 (1978) and *Confed. Bands*, 439 U.S. 463 (1979) in order to do so.

The Petitioner is inviting the Court to unnecessarily create a conflict between state and federal law that does not currently exist. Moreover, its argument that forbidding the State from exercising jurisdiction over crimes involving non-Indians on the Yakama Reservation will somehow make the Reservation a safer place is utter nonsense. The residents of the Yakama Nation deserve the same level of public safety as all other Washington residents and the granting of Petitioner's relief would significantly undermine that goal. Accordingly, the Petition for Writ of Certiorari should be denied.

CONCLUSION

The Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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