12-372

No. 12-

IN THE

Supreme Court of the United States

CONTOUR SPA AT THE HARD ROCK, INC.,

Petitioner,

v.

SEMINOLE TRIBE OF FLORIDA, a federally recognized Indian Tribe, MITCHELL CYPRESS, Chairman of the Seminole Tribe of Florida, JOHN DOE, unknown member(s) of the Seminole Tribe and RICHARD ROE, unknown non-member(s) of the Seminole Tribe of Florida,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BRUCE S. ROGOW
Counsel of Record
BRUCE S. ROGOW P.A.
500 East Broward Blvd.,
Suite 1930
Fort Lauderdale, FL 33394
(954) 767-8909
brogow@rogowlaw.com

243881

BLANK PAGE

QUESTIONS PRESENTED

1. Does *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2003), provide a basis for finding a waiver of tribal sovereign immunity where an Indian Tribe has expressly waived sovereign immunity, is sued in state court, removes to federal court, and then asserts sovereign immunity based on the Tribe's concealment of the fact that the Tribe did not comply with the Secretary of the Interior's lease approval requests?

2. Does Justice Brandeis' opinion in *Turner v. United States*, 248 U.S. 354 (1919). support the concept of tribal sovereign immunity or should that accidental doctrine, questioned in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), be revisited and discarded.

3. Does the Indian Civil Rights Act, Title 25 U.S.C. § 1302(a)(5) and (a)(8) create an implicit cause of action permitting the Tribe to be sued for the taking of property without due process of law?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Jurisdiction.. 1

Statutory Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Petition........................... 5

Conclusion 10

Appendix

Decision of the United States Court of Appeals 1a

United States District Court Decision 28a

TABLE OF AUTHORITIES

Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida, et al.,
--- F.3d ----, 2012 WL 3740402 1

Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida, et al.,
2011 WL 1303163 (S.D. Fla. 2011) 1

Dry Creek Lodge, Inc., v. Arapahoe and Shoshone Tribes,
623 F.2d 682 (10th Cir. 1980) 8, 9

Ingrassia v. Chicken Ranch Bingo and Casino
676 F.Supp 2d 953 (E.D. Cal. 2009) 7

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.
523 U.S. 751 (1998) .... *passim*

Lapides v. Bd. of Regents of the Univ. Sys. of GA
535 U.S. 613 (2003) 4, 5, 6, 7

Santa Clara Pueblo v. Martinez
436 U.S. 49 (1978) 5, 7, 8, 9

State of New York v. The Shinnecock Indian Nation
523 F.Supp, 2d 185 (E.D.N.Y. 2008) 7

Turner v. United States
248 U.S. 254 (1919) 6, 8

BLANK PAGE

PETITION FOR A WRIT OF CERTIORARI

Petitioner Contour Spa at the Hard Rock, Inc., petitions this Court to grant certiorari and address the important questions raised regarding the application of the doctrine of tribal sovereign immunity.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported as *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida, a federally recognized Indian Tribe, Mitchell Cypress, et al.*, --- F.3d ----, 2012 WL 3740402. The decision of the United States District Court for the Southern District of Florida is reported at 2011 WL 1303163 (S.D. Fla. 2011). Both decisions are at Appendix 1a and 28a, respectively.

JURISDICTION

The Eleventh Circuit Court of Appeals entered its decision on August 30, 2012. The Eleventh Circuit Court of Appeals had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291. Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

25 U.S.C. § 1302 provides:

(a) In general
No Indian Tribe in exercising powers of self-government shall –

***

(5) take any private property for public use without just compensation;

***

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

25 U.S.C. § 81 provides:

(b) Approval
No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or designee of the Secretary.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The Amended Complaint was dismissed under Rule 12, Federal Rules of Civil Proceedure, so the facts alleged and the attached exhibits were accepted as true. The Court of Appeals fairly set forth the facts (see App. 2a-7a) and we summarize them here.

Contour entered into a long term lease with the Seminole Tribe to operate a spa at the Seminole Hard Rock Hotel and Casino in Hollywood, Florida. The Tribe expressly waived its sovereign immunity for any breach of the lease and the Tribe submitted the lease to the Secretary of the Interior for approval, which was required under Federal Law.

The Tribe assured Contour that the lease was "'fully executed'" and "'that all paperwork needed for the lease had been submitted and approved,'" and the Spa owner was told "'Girl, you are good to go. Mazal tov. Congratulations.'" App. 5a. As the court below recognized, "Contour then spent more than $1.5 million to design and build the spa, which opened at the Tribe's hotel on May 17, 2004." *Id.* The Tribe insisted that the Spa open on that date.

However, ten days later, in a letter dated May 27, 2004, the BIA wrote to the Tribe noting some deficiencies in the lease and requested that the Tribe "correct them and resubmit the lease application for the Secretary's approval." *Id.* The Tribe did not inform Contour of that fact.

The "Defendant Seminole Tribe never shared this letter with Plaintiff at any time." District Court Order of Dismissal, App. 31a. On March 17, 2010, "the Tribe's counsel e-mailed a letter to Contour informing Contour that the Tribe had decided to retake the premises and to permanently close the spa. By the next day, the Seminole Tribe had padlocked the doors on Contour's business. . . ." App. 6a.

II. THE COURSE OF PROCEEDINGS

Contour quickly sued the Seminole Tribe in state circuit court in Broward County, Florida, the site of Seminole Hard Rock Casino and the Spa, seeking declaratory and injunctive relief. The Tribe removed the case to the United States District Court for the Southern District of Florida. App. 6a.

Contour amended its complaint to seek relief against added tribal defendants, asserting claims under the Indian Civil Rights Act, 25 U.S.C. § 415, in addition to state law causes of action. The Tribe and the individual defendants moved to dismiss, asserting tribal sovereign immunity. The district court dismissed the federal claims and remanded the state claims to state court. App. 7a. The Court of Appeals affirmed, acknowledging that while this Court "has expressed some doubt about the continued wisdom of the tribal immunity doctrine, it is nonetheless clear that '[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the Tribe has waived its immunity." *Id., citing, inter alia, Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998).

The Court of Appeals rejected the argument that the decision in *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2003), could be applied where an Indian tribe has expressly waived sovereign immunity and then voluntarily removed a case brought against them to federal court: "[b]ecause an Indian tribe's sovereign immunity is of a far different character than a state's Eleventh Amendment immunity, we decline to extend *Lapides*." App. 2a. The Court also concluded that the Indian Civil Rights Act provided no recourse "because the Supreme Court has already held that Indian tribes are immune from suit under the statute." *Id.* That conclusion was founded on the quote from *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978), in which this Court held "that suits against the tribe under the ICRA are barred by its sovereign immunity from suit." The Court of Appeals cited that, adding emphasis (App. 20a), which, of course, takes this case back to the quintessential issue: is tribal sovereign immunity alive and well despite *Kiowa's* concerns for its vitality, especially in the context of an expressed tribal waiver and tribal concealment of the BIA's request; a request which would have made the *de facto* waiver of immunity a *de jure fait accompli*.

REASONS FOR GRANTING THE PETITION

1. The application of *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002), to an Indian tribe's voluntary removal from state court to federal court presents an important but unanswered question of federal law, upon which conflict exists among the federal courts.

The question presented in *Lapides* was "whether a 'state waive[s] its Eleventh Amendment immunity by its affirmative litigation conduct when it removes a case to federal court. . . .'" *Id.* at 618. The Court answered affirmatively in "the context of state-law claims, in respect to which the state has explicitly waived immunity from state-court proceedings." *Id.* Here, the Seminole Tribe explicitly waived its immunity and in the period between the time it ordered the Spa to open (May 17, 2004), and the BIA letter (May 27, 2004), that waiver was relied on by both parties. The Tribe's post May 27, 2004 concealment and consequent "no valid lease" mantra cannot avoid the fact of its explicit waiver.

Lapides' principles should apply; the Tribe invoked federal jurisdiction and federal jurisdictional power and should not be allowed to deny that power exits. The Court of Appeals' view that Eleventh Amendment immunity "is not the same thing as a State's Eleventh Amendment immunity" (App. 12a), is true, but the difference favors applying the *Lapides* principle. The Constitution restrains federal courts *vis a vis* the states. Only *Kiowa* (and its sequellae) underpin tribal sovereign immunity, and *Kiowa* itself has voiced grave doubts about the foundation for, and continued viability of, tribal sovereign immunity. "There are reasons to doubt the wisdom of perpetuating the doctrine. . . . in our independent and mobile society, however tribal immunity extends beyond what is needed to safeguard tribal self governance." *Kiowa*, 523 U.S. at 756-57. Given the fact that the doctrine "developed almost by accident" and that the case upon which it was constructed, (*Turner v. United States*, 248 U.S. 354 (1919)), "simply does not stand for that proposition" and that the *Turner* language is "not a reasoned statement of doctrine" (*Kiowa*, *id.*), *Lapides'* logic should apply here.

Two district courts have come to two different views on *Lapides* and sovereign immunity waiver. *State of New York v. The Shinnecock Indian Nation*, 523 F.Supp, 2d 185, 297-98 (E.D.N.Y. 2008), found that removal constitutes waiver. *Ingrassia v. Chicken Ranch Bingo and Casino,* 676 F.Supp 2d 953, 961 (E.D. Cal. 2009), found that "removal to federal court does not waive tribal sovereign immunity. However the issue is not settled and appeal may be fruitful for Plaintiffs." The district court in this case acknowledged that "[t]he Eleventh Circuit has not addressed this rather novel argument." App 40a.

Now that the Eleventh Circuit has addressed the argument, the admixture of tribal sovereign immunity, *Lapides* and *Kiowa* present important questions meriting review.

2. Whether tribal immunity here under the Indian Civil Rights Act, which provides that "No Indian Tribe in exercising powers of self-government shall ... take any private property for a public use without just compensation ... [or] deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law," is foreclosed by *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), is an important but unanswered question because *Santa Clara* involved a tribal member suing the Tribe, not a person who is not a tribal member, but who has had a property interest taken by the Tribe without due process of law.

To the extent that the court below seized upon the *Santa Clara* sovereign immunity sentence that was the product of the now (in light of *Kiowa*) suspect *Turner* accidental construction of tribal immunity, the decision below presents the same continuing viability issue as to the Indian Civil Rights Act and tribal immunity.

As to non-tribal persons, the Tenth Circuit has explained why *Santa Clara's* immunity sentence is inapplicable where non-Indians are subject to unfair treatment and there is (as here) no tribal remedy. See, *Dry Creek Lodge, Inc., v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), addressing *Santa Clara*:

> Much emphasis was placed in the opinion on the availability of tribal courts and, of course, on the intratribal nature of the problem sought to be resolved. With the reliance of the internal relief available the Court in *Santa Clara* places the limitations on the Indian Civil Rights Act as a source of a remedy. But in the absence of such other relief or remedy the reason for the limitations disappears.
>
> The reason for the limitations and the references to tribal immunity also disappear when the issue relates to a matter outside of internal tribal affairs and when it concerns an issue with a non-Indian.
>
> It is obvious that the plaintiffs in this appeal have no remedy within the tribal machinery nor with the tribal officials in whose election they cannot participate. The record demonstrates that plaintiffs sought a

> forum within the Tribes to consider the issue. They sought a state remedy and sought a remedy in the federal courts. The limitations and restrictions present in *Santa Clara* should not be applied. There has to be a forum where the dispute can be settled.

Id. at 685.

The Court of Appeals below shrugged off *Dry Creek Lodge*, calling its analysis "unnecessary when tribal immunity is at issue. The law is crystal clear that tribal immunity applies unless there has been congressional abrogation or waiver by the tribe. *Kiowa Tribe*, 523 U.S. at 754." App. 21 a. That rejection adds conflict between the Tenth and Eleventh Circuits as an additional reason to answer the important question regarding the use of tribal sovereign immunity under the Indian Civil Rights Act.

CONCLUSION

For the foregoing reasons, certiorari shall be granted.

Respectfully submitted,

BRUCE S. ROGOW
BRUCE S. ROGOW, P.A.
500 East Broward Blvd.,
Suite 1930
Ft.Lauderdale, FL 33394
(954) 767-8909
brogow@rogowlaw.com