No. 20-791

October Term 2020

IN THE SUPREME COURT OF THE UNITED STATES

EGLISE BAPTISTE BETHANIE DE FT. LAUDERDALE, INC., etc., et al.,

Petitioners,

v.

THE SEMINOLE TRIBE OF FLORIDA, et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, CASE NO. 20-10173

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QUESTIONS PRESENTED

The petition presents two significant questions:

(1) Is a Native American tribe sovereignly immune from a civil suit for damages caused by the off-reservation violations by its police officers of the "place of religious worship" provisions of the Freedom of Access To Clinic Entrances Act of 1994, 18 U.S.C. § 248 ("the Access Act")?

(2) Are the "place of religious worship" and civil remedies provisions of the Access Act, as applied to a congregational leadership dispute, unenforceable because those provisions violate the First Amendment to the United States Constitution?

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REASONS FOR GRANTING THE PETITION

> (1) Is a Native American tribe sovereignly immune from a civil suit for damages caused by the off-reservation violations by its police officers of the "place of religious worship" provisions of the Freedom of Access To Clinic Entrances Act of 1994, 18 U.S.C. § 248 ("the Access Act")?

Respondent Seminole Tribe of Florida ("SemTribe"), in its Brief in Opposition, suggests that the Petition be denied because no United States Court of Appeals has ruled, contrary to the decision of the Eleventh Circuit in this lawsuit, that a Native American tribe is not sovereignly immune from a civil suit for damages caused by the off-reservation violations by its police officers of the "place of religious worship" provisions of the Access Act. That suggestion is premised upon the misconception that certiorari should be granted in this litigation *only* to resolve a federal question conflict between or among United States Courts of Appeals or state courts of last resort. Supreme Court Rule 10(a).

However, Supreme Court Rule 10(c) envisions the grant of certiorari when "a United States court of appeals has decided an important question of federal law that has not been, or should be, decided by this Court..." This is such a case because the Court has long regarded the scope of Native American tribal sovereign immunity from civil litigation as presenting "an important question of federal law that has not been, or should be, decided" by the Supreme Court of the United States.

In *Kiowa Tribe Of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S. 751 (1998), reversing the rulings of the Oklahoma State Courts, the Court held that a Native American tribe is sovereignly immune from breach of contract civil litigation

involving off-reservation commercial conduct. That decision did not resolve conflicts among the decisions of state courts of last resort or of the United States Courts of Appeals.

The Court, in *Michigan v. Bay Mills Indian Community,* 572 U.S. 782, 788 (2014), observed that certiorari had been granted "to consider whether tribal sovereign immunity bar[red] Michigan's suit" to enjoin the tribe from operating an unlicensed off-reservation casino. That decision, too, did not resolve conflicts among the decisions of the United States Courts of Appeals.[1]

In *Upper Skagit Indian Tribe v. Lundgren,* ___ U.S. ___, 138 S. Ct. 1649 (2018), Justice Gorsuch's majority opinion observed:

> Determining the limits on the sovereign immunity held by Indian tribes is a grave question; the answer will affect all tribes, not just the one before us;...

138 S. Ct. at 1654. That decision did not resolve the conflicting decisions of the United

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[1] Footnote 8 to Justice Kagan's majority (5-4) opinion presciently in pertinent part observed:

> We have never, for example, specifically addressed (nor, so far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct.

572 U.S. at 799.

The off-reservation conduct at issue in this litigation was *not* commercial; it *was* a criminal armed insurrection in a church located more than eleven miles from SemTribe's reservation.

States Courts of Appeals or of state courts of last resort.

In summary, certiorari should be granted for two (2) reasons: (1) determining the limits on Native American tribal sovereign immunity is a "grave question"; and (2) in Footnote 8 to the majority opinion in *Michigan v. Bay Mills Indian Community, supra,* the Court reserved ruling on the precise question presented in this case

> (2) Are the "place of religious worship" and civil remedies provisions of the Access Act, as applied to a congregational leadership dispute, unenforceable because those provisions violate the First Amendment to the United States Constitution?

Respondent Aida Auguste ("Auguste"), in her Brief in Opposition, suggests that the Petition be denied because no United States Court of Appeals has ruled, contrary to the decision of the Eleventh Circuit in this lawsuit, that the "place of religious worship" and civil remedies provisions of the Access Act, as applied to a congregational leadership dispute, are unenforceable because those provisions violate First Amendment to the United States Constitution. That suggestion is premised upon the misconception that certiorari should be granted *only* to resolve a federal question conflict between or among United States Courts of Appeals or state courts of last resort. Supreme Court Rule 10(a).

However, Supreme Court Rule 10(c) envisions the grant of certiorari when "a United States court of appeals has decided an important question of federal law that has not been, or should be, decided by this Court..." The question of the "as applied" constitutionality of the "place of religious worship" and civil remedies provisions of the Access Act satisfies the Rule 10© criterion.

In response to the COVID-19 pandemic, the Court has on numerous occasions championed the pre-eminence of the First Amendment in our nation's life. *See, Roman Catholic Diocese of Brooklyn, New York v. Cuomo,* ____ U.S. ___, 141 S. Ct. 63 (November 25, 2020); *Agudath Israel of America v. Cuomo,* ___ U.S. ___, 141 S. Ct. 889 (November 25, 2020); *Harvest Rock Church, Inc. v. Newsom,* ___ U.S. ___, 141 S. Ct. 889 (December 3, 2020); *South Bay United Pentecostal Church v. Newsom,* ___ U.S. ___, 141 S. Ct. 716 (February 5, 2021); *Gateway City Church v. Newsom,* ___ U.S. ___, 2021 WL 753575 (February 26, 2021); and *Tandon v. Newsom,* ___ U.S. ___, 2021 U.S. LEXIS 1866 (April 9, 2021). In these rulings, the Court enjoined the enforcement of governmental public health measures limiting the abilities of religious institutions to conduct in-person services in their facilities and in private homes. None of the foregoing rulings resolved conflicts among the decisions of state courts of last resort or the United States Courts of Appeals.

The "place of religious worship" and civil remedies provisions of the Access Act were designed to enhance the free exercise of religion. In declaring those provisions, as applied to a church leadership dispute, violative of the First Amendment, the Court of Appeals and the District Court, notwithstanding the mandate of 18 U.S.C. § 248, impliedly endorsed the armed insurrection in a "sacred space" which was perpetrated by Auguste and her supporters. The lower courts' "hands off" response to the September 29, 2019, expulsion of Petitioners from their church and the extra-judicial seizure of the church's property should be the subject of plenary review by the Court.

CONCLUSION

The Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, Case No. 20-10173, should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing reply brief have been electronically served this 13th day of April, 2021, on:

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