No. 09-512

In The
Supreme Court of the United States

JONATHAN K. SMITH,
A MEMBER OF THE SHINNECOCK INDIAN NATION
RESIDING ON THE SHINNECOCK INDIAN NATION
RESERVATION,

Petitioner,

v.

DOUGLAS SHULMAN,
IN HIS OFFICIAL CAPACITY AS
COMMISSIONER OF INTERNAL REVENUE,

Respondent,

SHINNECOCK INDIAN NATION,

Interested Party.

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

PETITION FOR WRIT OF CERTIORARI

Scott Michael Moore
Counsel of Record
MOORE INTERNATIONAL LAW OFFICES
A PROFESSIONAL CORPORATION
45 Rockefeller Plaza, Suite 2000
New York, New York 10111
(212) 332-3474

Counsel for Petitioner *Dated: October 28, 2009*

THE LEX GROUP^{DC} ♦ 1750 K Street N.W. ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦www.thelexgroup.com

Blank Page

QUESTIONS PRESENTED FOR REVIEW

I. Whether a "rebate" to a reservation Indian is income?

II. Whether a District Court is barred by statute from exercising subject matter jurisdiction, when an Indian treaty provides a free trade right and a procedural dispute resolution right?

III. Whether this Court should overturn *The Cherokee Nation v. The State of Georgia*, 30 U.S. 1 (1831) insofar as the case provides the legal underpinning of United States' jurisdiction over Indian reservations, where this Court interpreted the Commerce Clause language of "with" to mean "over" and found Indian tribes to be "domestic dependent nations" rather than "foreign nations," an error in Constitutional interpretation and a historical wrong against Native Americans?

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

Petitioner

Petitioner is Jonathan K. Smith, a reservation member of the Shinnecock Indian Nation, was the Plaintiff in the District Court and Appellant in the United States Court of Appeals for the Second Circuit. Petitioner is not a publicly owned corporation or subsidiary or affiliate of a publicly owned corporation.

Respondent

Respondent is Douglas Shulman in his official capacity as Commissioner of Internal Revenue. Douglas Shulman was automatically substituted for former Commissioner Mark W. Everson as party to this case in the Second Circuit. Respondent was the Defendant in the District Court. Respondent is not a publicly owned corporation or subsidiary or affiliate of a publicly owned corporation.

Interested Party

The Shinnecock Indian Nation, an interested party, is Petitioner's Tribe.

TABLE OF CONTENTS

Blank Page

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

TREATY

OTHER AUTHORITIES

Blank Page

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The Second Circuit Court of Appeals reversed the District Court's denial of Petitioner's motion for a preliminary injunction on February 22, 2008. The District Court's Order dismissing Petitioner's Complaint was issued on March 21, 2008. The Second Circuit Court of Appeals Decision was issued on June 17, 2009. An Order denying rehearing *en banc* was issued on August 4, 2009.

STATEMENT OF JURISDICTION

The Second Circuit Court of Appeals entered its judgment on June 17, 2009, and denied a timely filed petition for rehearing *en banc* on August 4, 2009. 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 treaty, constitutional, and statutory provisions, which are reproduced in the Appendix at App F at App. 32 *et. seq.*:

A. *The Fort Albany Treaty, 1664*
B. The Commerce Clause
C. The Cases and Controversies Clause
D. NYS Colony Clause
E. 26 U.S.C. § 6320(c)
F. 26 U.S.C. § 6330(d)(1)
G. 26 U.S.C. § 7421(a) (Tax Anti Injunction Act)
H. 26 U.S.C. § 7422(a)
I. 28 U.S.C. § 2201 (Declaratory Judgment Act)

STATEMENT OF THE CASE AND FACTS

Petitioner's Tribe, the Shinnecock Indian Nation, is an aboriginal self-governing people, which has continuously dwelled on what is now known on Long Island, New York, since at least 1000 B.C. Today, after a series of purported land transfers to the founders of the Town of Southampton, New York, beginning in 1640 and ending with a legislative act of the New York State Legislature in 1859, the Shinnecock Indian Nation occupies what is now known as the Shinnecock Indian Reservation, located within the territorial boundaries of the Town of Southampton.

On February 23, 2006, a Complaint was filed in the United States District Court for the Eastern District of New York, by Petitioner, seeking a declaratory judgment against Everson, to invalidate Everson's one hundred twenty-eight thousand, six hundred fourteen dollars and eighty-six cents ($128,614.86) in assessment, penalties, interest, and collection of alleged underreporting of federal income

tax as to Petitioner's on-reservation rebates as "income" for the tax year 2000. Petitioner first attempted to resolve the issue with the IRS through an administrative due process hearing, but failed.

The Complaint alleges the federal income tax assessment on "rebates" and collection efforts were, and are, invalid, as: 1) improper notice of alleged underreporting; 2) in violation of the free trade guarantee of The Fort Albany Treaty, 1664; 3) in violation of the grant of power by Congress pursuant to section 7801 of the Internal Revenue Code, 4) in violation of the policy of Congress concerning Indians; and 5) in violation of the role of the federal government as trustee and guardian of Petitioner.

After the Complaint was filed, and shortly before Everson filed a motion to dismiss, Everson took further collection action by filing a notice of federal tax lien against Petitioner in Riverhead, Suffolk County, New York, which prompted Smith's filing of a motion for preliminary injunction. The District Court denied Petitioner's motion in a minute entry without any explanation, Petitioner filed an interlocutory appeal, and the Second Circuit reversed and remanded.

The District Court then granted the motion to dismiss filed by Respondent, and dismissed the Complaint for lack of subject matter jurisdiction. There were no findings of fact in the District Court record as instructed in the Second Circuit Mandate, and there was no determination that the rebates were "income." App. 23. The dismissal was upheld by the Second Circuit on the basis of lack of subject

matter jurisdiction under 26 U.S.C. § 6320(c), 26 U.S.C. § 6330(d)(1), 26 U.S.C. § 7421(a) (Tax Anti Injunction Act), 26 U.S.C. § 7422(a), and 28 U.S.C. § 2201 (Declaratory Judgment Act), and a rehearing was denied.

REASONS FOR GRANTING THE WRIT

This case presents federal issues of national and historical importance to the United States and Indian Tribes, giving this Court an opportunity to right a historical wrong against Native Americans, not unlike the abolition of slavery during the Civil War and this Court's repudiation of the subsequent separate but equal racial doctrine over a century later.

I. Reservation rebates are not income for federal income tax purposes.

The District Court, and the Second Circuit assumed without comment, without any legal support or finding of fact, that a rebate was synonymous with income. This was error. Any analysis of income tax jurisdiction must rest upon a factual finding of income, which is lacking in this case. This point was raised, but unaddressed in the courts below. This has national significance for taxation of Reservation Indians. This Court should reverse and remand this action for a finding of fact in the District Court as to whether an on-reservation rebate is income for federal income tax purposes.

II. Petitioner's Treaty provides a right to free trade and a dispute resolution mechanism under which District Courts have subject matter jurisdiction.

On September 24, 1664, the Crown of England, and the newly established Province of New York established that same year, entered into the Treaty with New York Indians at Fort Albany. *The Fort Albany Treaty, 1664*, ("Articles between Col. Cartwright and the New York Indians", *Documents Relative to the Colonial History of the State of New York*, III, pp. 67-68) ("the Treaty"). This peace treaty guaranteed, among other things, free trade to the Indians. App. 34.

Article 4 of the treaty provides:

> The Indians at Wamping and Espachomy and all below the Manhatans, as also all those that have submitted themselves under the proteccôn of His Matie are included in these Articles of Agreement and Peace;

Appended Article 3 to the treaty provides:

> That they may have free trade, as formerly.

The Shinnecock had so submitted themselves under the protection of the English Crown prior to the date of the treaty. Therefore, the Shinnecock are included in the treaty under Article 4, and enjoy the

free trade guarantee provided to the Indians by Appended Article 3.

Paragraph 2 of the Treaty, at App. 32, invoked by Plaintiff provides a dispute resolution procedural right for which the District Court may exercise subject matter jurisdiction:

> That if any English Dutch or Indian (under the proteccon of the English) do any wrong injury or violence to any of ye said Princes or their subjects in any sort whatever, if they complaine to the Governor at New Yorke, or to the Officer in Cheife at Albany, if the person so offending can be discovered, that person shall receive condigne punishmt and all due satisfaccon shall be given; and the like shall be done for all other English Plantations.

The standard for Indian treaty interpretation is to resolve in favor of Indians. As expressed by Chief Justice Warren in *Squire v. Capoeman*, 351 U.S. 1, 7 (1956) (Finding illegal the assessment of federal income taxes on timber sold by the federal government on behalf of Indians protected by treaty):

> "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependant on its protection and good faith. Hence, in the words of Chief Justice Marshall, 'The language used in

> treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.' *Worcester v. The State of Georgia*, 6 Pet. 515, 582." *Carpenter v. Shaw*, 280 U.S. 363, 367.

In the case at bar, the underlying rationale of the courts below failed to consider Petition's argument. Rather, the courts ignored Petitioner's Treaty rights assertion and swept this action into non-Indian statutory schemes. The courts below cited no case law depriving the federal courts from exercising subject matter jurisdiction over a treaty dispute. This action should not be treated differently simply because the treaty dispute involves income.

The Treaty is within the meaning of "Treaties made" under the jurisdictional grant of power to the federal courts under U.S. CONST. art. III, § 2, Cl. 1, at App. 35, and the courts below cited no legal authority under which Congress may validly deprive the federal courts of jurisdiction to hear a treaty dispute. Additionally, this Treaty is binding on New York State under Art. I, § 14, of New York State's Constitution. App. 35.

This Court should enforce the duty of the federal courts to exercise its jurisdiction to hear treaty disputes, and reverse and remand this case to the District Court.

III. The first Supreme Court case involving an Indian Tribe party, upon which United States' jurisdiction over Indian Tribes rests, *The Cherokee Nation v. The State of Georgia*, 30 U.S. 1 (1831), finding Indian tribes to have a legal status of "domestic dependent nations" rather than "foreign nations," was contrary to the plain meaning of the Constitution and should be reversed.

This Court has not had an opportunity to right such a historical wrong done to a people by the government of the United States since the abrogation of the holding that slaves are constitutionally protected property of citizens in *Scott v. Sandford*, 60 U.S. 393 (1856) after the Civil War by the Thirteenth and Fourteenth Amendments, and nearly one hundred years later, the repudiation of the "separate but equal" racial doctrine holding in *Plessy v. Ferguson*, 163 U.S. 537 (1896) by this Court in *Brown v. Board of Eduction*, 347 U.S. 483, 494-495 (1954).

The imposition of a federal income tax on reservation Indians is unconstitutional, and in violation of human rights treaty obligations of the United States.

Unconstitutional as exceeding Congress' power under Article I, Section 8, Clause 3 of the Constitution of the United States ("To regulate Commerce with foreign Nations, and among the

several States, and *with* the Indian Tribes.") [emphasis added]. App. 35. *i.e.* This section has plain meaning: "*with*"- not "*over*". *The Cherokee Nation v. The State of Georgia*, 30 U.S. 1 (1831) should be overturned insofar as the case provides the jurisdictional underpinning of subsequent Congressional regulation of on-reservation Indians, because the case erroneously interpreted "with" to mean "over" and found Indian tribes to be "domestic dependent nations" rather than "foreign nations." *Cherokee Nation*, 30 U.S., at 17.

This would not be the first time this Court nullified a prior decision involving Native Americans. *See, United States v. Forty-Three Gallons of Whiskey*, 108 U.S. 491, 496 (1883) (Upholding application of treaty language and federal statute banning alcohol in ceded Indian territory over a general alcohol licensing statute ("The laws of Congress are always to be construed so as to conform to the provisions of a treaty, if it be possible to do so without violence to their language. This rule operates with special force where a conflict would lead to the abrogation of a stipulation in a treaty making a valuable cession to the United States.").

This Court in *Forty Three Gallons*, 108 U.S. at 497-498, specifically and unequivocally nullified as precedent *Cherokee Tobacco Tax*, 11 Wall. 616 (1871), a post civil war case with an opposite holding, which applied a general federal tobacco excise tax on-reservation over a contrary treaty stipulation, decided twelve years earlier. ("The case of the *Cherokee Tobacco Tax*, 11 Wall. 616, cannot be treated as authority against the conclusion we have

reached. The decision only disposed of that case, as three of the judges of the court did not sit in it and two dissented from the judgment pronounced by the other four.")

Not only does the United States' Indian treaty and regulatory schemes violate the U.S. Constitution, but the Office of the High Commissioner for Human Rights, Committee on the Elimination of Racial Discrimination, recently issued concerns and recommendations directed to the United States with regard to land issues involving the Western Shoshone Tribe. (A/56/18, para. 400, adopted on 13 August 2001) The failure of the United States to respond triggered further U.N. action. (Early Warning and Urgent Action Procedure, Decision 1(68), adopted on 8 March 2006) The United States has failed to respond as of this date. (U.N. High Commissioner for Human Rights letter to United States, 18 August 2006 and 9 March 2007) The Commissioner condemned the status of Indian Tribes as "domestic dependent nations" and Indian treaties that could be unilaterally terminated by the United States.

The United States is increasingly isolated in the world community. On the 13th of September, 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples, by a vote of 143 in favor, 4 against, and 11 abstaining. The only 4 voting against the Declaration are all former colonies of Great Britain with large native populations, including the *United States*.

Genocide, like slavery, is problematic. That is why this Court has struggled with Indian cases over the years.

This Court should overturn *Cherokee Nation* and hold that the Constitution limits Congressional power to regulating commerce *with* Indian Nations, and the imposition of a federal income tax on Reservation Indians is unconstitutional.

CONCLUSION

This Court should enforce what the Constitution plainly stated over two hundred years ago about Indian Tribes and limiting Congressional power. What the Constitution plainly stated then, is consistent with today's voice of the world community.

Respectfully submitted,

/s/

Scott Michael Moore
Counsel of Record
Moore International Law Offices,
A Professional Corporation
45 Rockefeller Plaza, Suite 2000
New York, New York 10111
(212) 332-3474

October 28, 2009

Blank Page