No. ____

IN THE

Supreme Court of the United States

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
Petitioner,

v.

THE STATE OF SOUTH CAROLINA AND HENRY D. MCMASTER, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of South Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1993, the State of South Carolina settled the Catawba Indian Tribe's claim to a significant tract of land in the State -- a claim that had been the subject of the decision of this Court's decision in *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498 (1986). As part of the settlement, the State agreed to allow the Tribe to conduct video poker on its Reservation and bingo elsewhere in the State. The settlement was embodied in the Catawba Indian Tribe of South Carolina Land Claims Settlement Act, 25 U.S.C. § 941, which incorporated and made a part of federal law the Settlement Agreement and the state legislation approving it. The federal Settlement Act also gave Congressional consent to future amendments to the Agreement and the state legislation, but only upon consent of the Tribe. 25 U.S.C. § 941m(f). In 1999, the State, without the Tribe's consent, reneged on its agreement and amended its gaming laws to ban video poker throughout the State of South Carolina. The Supreme Court of South Carolina held that the Tribe had consented to that amendment, and thus could no longer conduct video poker on its Reservation. The court derived the Tribe's consent from the provision of the Settlement Agreement and the state legislation stating that the Tribe may conduct video poker "to the extent authorized by state law."

The question presented is whether the federal no-amendment provision bars application to the Tribe of the State's ban on video poker.

PARTIES TO THE PROCEEDING

The Petitioner here and Respondent below is the Catawba Indian Tribe of South Carolina.

The Respondents here and Appellants below are the State of South Carolina and Henry D. McMaster, in his official capacity as Attorney General of the State of South Carolina.

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JURISDICTION

The South Carolina Supreme Court entered judgment on March 19, 2007, and denied a timely petition for rehearing on April 18, 2007. This Court has jurisdiction under 28 U.S.C. §1257(a).

STATUTORY PROVISIONS INVOLVED

The Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, 25 U.S.C. §§ 941 *et seq.*, provides in relevant part as follows:

(2) [T]he Settlement Agreement and the State Act are approved, ratified, and confirmed by the United States to effectuate the purposes of this subchapter, and shall be complied with in the same manner and to the same extent as if they had been enacted into Federal law.

25 U.S.C. § 941b(a)(2).

Consent is hereby given to the Tribe and the State to amend the Settlement Agreement and the State Act *if consent to such amendment is given by both the State and the Tribe*, and if such amendment relates to --

(1) the jurisdiction, enforcement, or application of civil, criminal, regulatory, or tax laws of the Tribe and the State;

(2) the allocation or determination of governmental responsibility of the State and the Tribe over specified subject matters or specified geographical areas, or both, including provision for concurrent jurisdiction between the State and the Tribe;

(3) the allocation of jurisdiction between the tribal courts and the State courts; or

(4) technical and other corrections and revisions to conform the State Act and the Agreement in Principle attached to the State Act to the Settlement Agreement.

25 U.S.C. § 941m(f) (emphasis added).

South Carolina Code § 27-16-110(G) provides in relevant part:

The Tribe may permit on its Reservation video poker or similar electronic play devices to the same extent that the devices are authorized by state law.

STATEMENT OF THE CASE

1. In *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498 (1986), this Court, recognizing "the importance of the case," granted certiorari to review application of South Carolina's statute of limitations to the Catawba Indian Tribe's suit against the State, which claimed right to possession of a significant tract of land in the northern part of the State. After the Court's decision that the statute limitations applied, the Fourth Circuit interpreted the statute not to bar the Tribe's

claim against a significant number of landowners in the State. *Catawba Indian Tribe of South Carolina v. South Carolina*, 865 F.2d 1444 (4th Cir.)(en banc), *cert. denied,* 491 U.S. 906 (1989). Following that decision, the State reached a settlement with the Tribe, which was embodied in a federal statute, the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993 ("Settlement Act"). 25 U.S.C. §§ 941 *et seq.*

The Settlement Act stated that, without settlement, "further litigation against tens of thousands of landowners would be likely . . . would take many years and entail great expenses to all parties . . . prolong uncertainty as to the ownership of property; and seriously impair long-term economic planning and development for all parties." 25 U.S.C. § 941(a)(5). The Act also recognized that "both Indian and non-Indian parties enter into this settlement to resolve the disputes raised in these lawsuits and to derive certain benefits." 25 U.S.C. § 941(a)(7).

In the settlement, the Tribe agreed to extinguishment of its land claims, in return for the State's agreement to allow the Tribe to conduct certain video poker and bingo games. The federal Settlement Act embodies this settlement. It extinguishes the land claims (25 U.S.C. § 941d); provides that the Indian Gaming Regulatory Act (25 U.S.C. §§ 2701 *et seq.*) shall not apply to the Tribe; and provides that "[t]he Tribe shall have the rights and responsibilities set forth in the Settlement Agreement and the State Act with respect to the conduct of games of chance." 25 U.S.C. § 941*l*(b).[1] The

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[1] *The Settlement Agreement refers to the settlement between the Tribe* and the State of South Carolina (Pet. App. 35a), while the "State Act" refers to the South Carolina statute approving the settlement (S.C. Code §§ 27-16-10 through 27-16-140). 25 U.S.C. § 941a(10), (12) (Definitions).

Settlement Act further provides that "the Settlement Agreement and the State Act are approved, ratified, and confirmed by the United States to effectuate the purposes of this subchapter, and shall be complied with in the same manner and to the same extent as if they had been enacted into Federal law." 25 U.S.C. § 941b(a)(2).

Then, in recognition of the fact that the Tribe had taken an irrevocable step in giving up its land claims in return for the future right to conduct gaming, the Settlement Act gives consent to amendment of the Settlement Agreement and the State Act only "if consent to such amendment is given by both the State and the Tribe." 25 U.S.C. § 941m(f).

2. In addition to embodying the parties' settlement, the Settlement Act also restored federally-recognized tribal status to the Catawba Tribe. In 1959, following the then-prevalent policy of assimilation, Congress had terminated federal services for the Tribe and provided that "all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to [the tribe and its members], and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction." 73 Stat. 592. In *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498 (1986), this Court applied this provision of the termination legislation to hold the South Carolina statute of limitations applicable to the Tribe's land claim.

The Settlement Act repealed the termination legislation, restored the Tribe's trust relationship with the United States and its status as a federally recognized Tribe, restored its eligibility for federal funding, and authorized $32 million in federal funding. 25 U.S.C. §§ 941b, 941c. This was done to implement "the Federal policy of Indian self-determination

and restoration of terminated Indian Tribes" and the federal policy to settle Indian land claims. 25 U.S.C. § 941(a)(8).

3. As noted, the Settlement Act incorporates both the State Act and the Settlement Agreement between the State and the Tribe and consents to their amendment only with the Tribe's consent. 25 U.S.C. §§ 941b(a)(2), 941m(f). With respect to gambling generally, the State Act provides that "all laws, ordinances, and regulations of South Carolina and its political subdivisions govern the conduct of gambling or wager by the Tribe on and off the Reservation," except as specifically provided otherwise. S.C. Code § 27-16-110(A). With respect to bingo specifically, the State Act provides that the Tribe is entitled to a special bingo license and specifies in considerable detail the terms of the license (S.C. Code § 27-16-110(C)-(E)), but also provides that "[a] license of the Tribe to conduct bingo must be revoked if the game of bingo is no longer licensed by the State." S.C. Code § 27-16-110(F).

With respect to video poker, however, the State Act has no similar provision for revocation of the Tribe's authority if the State no longer allows such devices. Instead, it provides generally that the Tribe "may permit on its Reservation video poker or similar electronic play devices to the same extent that the devices are authorized by state law." S.C. Code § 27-16-110(G). It also has a provision allowing the Tribe to continue to conduct video poker even if a county banned video poker pursuant to local option legislation. *Id.* The Legislature was then considering local option legislation, which it passed before the State Act became effective.[2] *Id.*

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[2] The State Act was passed June 14, 1993. Pet. App. 106a. However, it provided that it would not go into effect until the Governor made certain certifications which could not be made until after the federal Settlement Act was passed. 1993 South Carolina Laws 142 (S.B.

The State trial court concluded that the differing treatment of bingo and video poker arose from the fact that the Settlement Agreement allows the Tribe to conduct bingo at a location off the Reservation, while its video poker operation is confined to the Reservation itself. "[T]he Tribe has greater power to control video poker on the Reservation than it has to operate bingo because video poker is confined to the Reservation while bingo can be an off-Reservation activity." Pet. App. 31a. "The operation of video poker with the approval of the Tribe's governing body on the Reservation is an element of Tribal sovereignty . . ., while the conduct of off-Reservation bingo is subject to state sovereignty." *Id.*

4. At the time the Settlement Act became effective, state law authorized video poker. However, in 1999 the State adopted legislation banning video poker. Following the State Attorney General's threat to prosecute, the Tribe brought this action, seeking a declaration that it had a continuing right to operate video poker or similar electronic play devices on its Reservation. The trial court ruled for the Tribe. Pet. App. 15a. The Attorney General appealed, and the Supreme Court of South Carolina reversed. Pet. App. 1a.

The Supreme Court of South Carolina held that the State Act's provision authorizing the Tribe to conduct video poker and similar devices "to the same extent that the devices are authorized by state law" unambiguously subjected the Tribe to future amendments that might withdraw the authorization of video poker in effect when the State Act was passed. Pet.

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608), § 2; SC LEGIS 142 (1993). The local option law was passed in July, 1993. *Rick's Amusement, Inc. v. State*, 351 S.C. 352, 355, 570 S.E.2d 155, 156-6 (2001). The federal Settlement Act was not passed until October 27, 1993. Pet. App. 118a. Thus the local option law became part of State law before the State Act became effective.

App. 5a. This language, the court concluded, "clearly binds [the Tribe] to any subsequent state legislative enactments affecting video poker devices." Pet. App. 11a. Because there was no ambiguity, the court concluded, it could ignore the omission from the video poker provision of the language in the bingo provision that specifically subjected the Tribe to any future amendment withdrawing its license. Pet. App. 12a. For the same reason, the Court rejected the contention that the State's enactment of a video poker ban constituted an amendment of the State Act without the Tribe's consent, in violation of the Settlement Act's provision allowing amendment only "if consent to such amendment is given by both the State and the Tribe." 25 U.S.C. § 941m(f). Because the State Act allows video poker and similar devices only "to the same extent that the devices are authorized by state law," the court concluded that the Tribe already had given its consent to "any subsequent state legislative enactments affecting video poker devices." Pet. App. 11a.

REASONS FOR GRANTING THE WRIT

This Court previously recognized the "importance" of the Catawba Tribe's land claim against South Carolina, involving as it did some "144,000 acres and 225 square miles," with "some 27,000 persons . . . claim[ing] title to different parcels." *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 499 (1986). This case is no less important. By allowing the State to withdraw a significant concession it made to settle the Tribe's claim, the decision below leaves the Tribe with little to show for its agreement to settle the case and makes a mockery of the federal settlement process.

1. The federal Settlement Act incorporates the State Act and the Settlement Agreement into federal law and gives consent to their amendment only "if consent to such amendment is given by both the State and Tribe." 25 U.S.C.

§ 941m(f). Yet the court below held that there was no "amendment" to the State Act or that the Tribe had already given its "consent to such amendment" (its ruling is unclear), because the Tribe had agreed to the provision of the Settlement Act allowing it to permit video poker and similar devices "to the same extent that the devices are authorized by state law." S.C. Code § 27-16-110(G), Settlement Agreement, § 16.8, Pet. App. 88a-89a.

That is an astonishing, unfair result. If withdrawal of the Tribe's authorization to conduct video poker is not an "amendment" to the State Act, or if the State Act embodies the Tribe's consent to future amendments, it is difficult to know what purpose the Settlement Act's prohibition of unilateral amendment serves. Under the lower court's interpretation, the State is free unilaterally to renege on the concessions it made as the price of settling the Tribe's significant land claims. This totally implausible interpretation eviscerates the bargain that was struck to settle the Tribe's claim and makes the federal settlement process a sham.

The Tribe's agreement that it could conduct video poker only "to the same extent that the devices are authorized by state law" does not consent to future amendments withdrawing such authorization, because the language also reasonably may be read to refer to authorization by state law at the time the Settlement Agreement went into effect. Such an interpretation conforms to the obvious purpose of the Settlement Agreement, which was to give the Tribe a significant benefit from the State in return for the significant concession it made in giving up its land claim.

Any other reading would render the "no unilateral amendment" provision of the Settlement Act meaningless. Moreover, any other reading ignores the fact that, in other provisions, the State Act and the Agreement specifically

provide that future changes of the law will apply to the Tribe. Thus the immediately preceding section provides that "[a] license of the Tribe to conduct bingo must be revoked if the game of bingo is no longer licensed by the State." S.C. Code § 27-16-110(F); Agreement, § 16.7, Pet. App. 88a. Also the State Act and the Agreement provide that the Tribe is subject to all state and local environmental laws and regulations, including "all environmental laws and regulations adopted in the future." S.C. Code § 27-16-120(B); Settlement Agreement §17.2, Pet. App. 90a. The omission of similar language in the video poker provision raises an ambiguity, at the very least, as to whether the Tribe had consented to future amendments.

Congress recognized that the basic purpose of the Settlement Act was to approve an *agreement* between the Tribe and the State -- an agreement in which each party made substantial concessions in return for significant benefits.[3] In that context, one would not expect one party to the Agreement to give the other party *carte blanche* to terminate unilaterally the principal concessions it gave the other party, absent a specific provision to that effect.

Here, the principal benefit the Tribe obtained from the State was the right to conduct video poker and bingo. In return, the Tribe gave up a claim against the State that had considerable value. The Tribe agreed specifically to allow the State to withdraw unilaterally its authorization to conduct bingo. But it did not agree to allow the State to withdraw its authorization to conduct video poker. To infer such an

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[3] "It is recognized that both Indian and non-Indian parties enter into this settlement to resolve the disputes raised in these lawsuits and to derive certain benefits." 25 U.S.C. § 941(a)(7) (Congressional findings).

agreement would eviscerate the benefits for which the Tribe negotiated, allowing the State to settle the Tribe's land claim -- which involved "tens of thousands" of landowners[4] and caused "severe economic and social hardships for large numbers of landowners, citizens, and communities in the State"[5] -- for a concession it could withdraw at any time.

In sum, the South Carolina Supreme Court has construed the "no-unilateral amendment" provision of the Settlement Act in a manner that deprives the provision of any meaning, is not compelled by the literal meaning of the State Act's provision regarding Tribal video poker, ignores the absence in the video poker provision of language contained in other provisions subjecting the Tribe to future amendments, and -- most significantly -- enables the State to withdraw unilaterally a concession it made to settle the Tribal land claims. Such a construction is *not* compelled by the unambiguous language of either the Settlement Act or the State Act, which it incorporates. It is therefore not permissible under the Indian canon that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985).

2. The court below relied on cases holding that the phrase "to the extent . . . permitted by law" includes future legislation. Pet. App. 12a, citing *Lewis v. Quality Coal Corp.*, 270 F.2d 140, 142 (7th Cir. 1959); *State ex rel. Ferguson v. City of Wichita*, 360 P.2d 186, 191-92 (Kan. 1961). The court's reliance was misplaced. *Lewis* construed a contract between two private parties who were necessarily subject to

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[4] 25 U.S.C. § 941(a)(5) (Congressional findings).

[5] S.C. Code § 27-16-20(2) (Legislative Findings).

present and future state and federal law, regardless of what the contract provided. *Lewis*, 270 F.2d at 142. *Ferguson* construed a contract between the City of Wichita and the United States, which recognized that the City was subject to present and future laws of the State (which was not a party to the contract). *Ferguson*, 360 P.2d at 192. In neither case was the application of present and future law subject to negotiation. Neither case bore any resemblance to the settlement between the Catawba Tribe and South Carolina, in which two sovereign bodies entered into an agreement concerning the allocation of sovereign authority between them. In that context, the Tribe's agreement to conduct video poker to the extent authorized by state law does not constitute a consent by the Tribe to future amendment. Such a reading would make the no-unilateral amendment provision of the federal law meaningless, and would deprive the Tribe of the principal benefit for which it agreed to give up its land claims. The conclusion of the court below that unambiguous language requires this result is a clear circumvention of the Indian canon.

For the same reason, the result is not changed by the Settlement Act's provision that, except as specifically set forth in the Settlement Agreement and the State Act, "all laws, ordinances, and regulations of the State . . . shall govern the regulation of gambling devices and the conduct of gambling or wagering by the Tribe on and off the Reservation." 25 U.S.C. §941*l*(b). This provision cannot plausibly be read to allow the State to apply to the Tribe amendments that it adopts in violation of the Act's "no unilateral amendment" provision.

3. The South Carolina Supreme Court referred to the provision in the State Act allowing the Tribe to continue its video poker operation even if a county should ban video poker pursuant to local option legislation. The court

concluded, without explanation, that this provision "further demonstrates the legislature's clear intention to limit [the Tribe's] right to operate video poker devices on its Reservation to the same extent state law authorizes such devices." Pet. App. 9a n.6, citing S.C. Code § 27-16-110(G). But the opposite inference, required by the Indian canon, is more plausible -- the provision reinforces the parties' intent that the Tribe had the right to continue its video poker games despite future changes in the law. In order to preserve the Tribe's continuing right, a special provision was needed for local option legislation, because the State Legislature was considering a local option law at the same time that it was considering the Settlement Act. In fact, the Legislature passed the local option law *before* the Settlement Act went into effect.[6] Thus, absent a special provision, the local option law would have been part of the current state law to which the Tribe was subject under the Settlement Act.

4. The present case does not involve the situation the Court faced in its previous *Catawba* decision, where Congress had *terminated* the Tribe's sovereign status and provided that State laws "shall apply to [former tribal members] in the same manner they apply to other persons or citizens within their jurisdiction." 476 U.S. at 506 (quoting 73 Stat. 592). That provision "subject[ed] members of the terminated tribe to the 'full sweep of state laws,'"[7] thus "remov[ing] . . . federal protections" and instituting "a fundamental change in federal policy with respect to the Indians who are the subject of the [termination] legislation." *Catawba*, 476 U.S. at 508-9. In contrast, the Catawba Settlement Act *repealed* the Termination Act and *restored* the

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[6] See note 2 *supra*.

[7] 476 U.S. at 508, quoting *Bryan v. Itasca* County, 426 U.S. 373, 389 (1976).

federal trust relationship with the Tribe. 25 U.S.C. § 941b(a)(1). There was no intent to relegate Tribal members to the same legal status as other State citizens. Instead, the Settlement Agreement at issue here was an agreement between two sovereign bodies concerning the allocation of sovereign authority. In recognition of that reality, the federal Settlement Act limited the State's authority unilaterally to withdraw the concession it had made with respect to the Tribe's rights to conduct gaming. The lower court's refusal to enforce that limitation violates the Indian canon, undermines the integrity of the federal settlement process, and deprives the Tribe of the benefit of the bargain it struck with the State.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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