No. 08-655

In the Supreme Court of the United States

HARRAH'S OPERATING COMPANY, INC.,
a Delaware corporation,

Petitioner,

v.

NGV GAMING, LTD.,
a Florida partnership,

Respondent.

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Stanley E. Siegel
Counsel of Record
Peter D. Gray
HALLELAND LEWIS NILAN
& JOHNSON, P.A.
600 U.S. Bank Plaza South
220 South Sixth Street
Minneapolis, MN 55402-4501
(612) 338-1838

Counsel for Petitioner

2009 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

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REPLY IN SUPPORT OF CERTIORARI

An irreconcilable Circuit Split exists as a consequence of the Ninth Circuit's decision below and the Second Circuit's decision in *Catskill Development, LLC v. Park Place Entertainment Corp.*, 547 F.3d 115 (2nd Cir. 2008). The decisions of the Ninth and Second Circuits are directly in conflict with one another. Each case involved contracts that implicated Indian trust lands. Each case involved a requirement for federal agency approval for such contracts -- 25 U.S.C. § 81 ("Section 81") Secretary of the Interior approval in this case and 25 U.S.C. § 2711 ("Section 2711") National Indian Gaming Commission ("NIGC") approval in Catskill Development. Each involved a nearly identical statutory definition of "Indian lands." But the two Circuits expressly disagree on the role of the Dictionary Act, 1 U.S.C. §§ 1-8, in construing the definition of Indian lands.

Respondent's Brief in Opposition ("BIO") fails to overcome Petitioner's demonstration that the issues arising from the facts of this case warrant the Court's immediate review.[1] First, Respondent's argument fails to recognize the direct connection between Section 81 and Section 2711. Second, Respondent's attempt to downplay the Second

[1] Regrettably, Respondent's BIO is replete with irrelevant ad hominem attacks against Petitioner that are intended only to deflect the Court's attention from the genuine issues presented. Petitioner accepts neither the accuracy nor the validity of these attacks; however, Petitioner recognizes that this Reply is not the proper vehicle for responding to characterizations of this sort.

Circuit's express declaration that it disagreed with the Ninth Circuit's interpretation of Section 81 does not change the fact that a Circuit Split now exists. Third, Respondent's interpretation of the Dictionary Act would require this Court to reject its own well-established precedent.

1. Respondent Ignores the Close Relation Between Sections 81 and 2711.

As is explained in the Petition for Certiorari, both Section 81 and the Indian Gaming Regulatory Act ("IGRA"), of which Section 2711 is a part, contain virtually identical definitions of "Indian lands". Both Section 81 and Section 2711 require federal agency approval of contracts between Indian tribes and outsiders. Contrary to Respondent's suggestions, the approval processes of Sections 81 and 2711 are closely related, and the Ninth and Second Circuits opposing constructions of these statutes create an irreconcilable Circuit Split.

To explain, the mechanism of NIGC review and approval of Indian gaming management contracts under Section 2711 is simply an outsourced subspecies of Section 81 review and approval. Prior to IGRA's adoption, Indian gaming management contracts were reviewed and subject to approval by the Secretary of the Interior pursuant to Section 81. Indeed, in *California v. Cabazon Band of Mission Indians*, the Court specifically noted that, "[t]he Secretary has also exercised his authority to review tribal bingo management contracts under 25 U.S.C. § 81, and has issued detailed guidelines governing that review." 480 U.S. 202, 218 (1987). These Section 81 guidelines included detailed disclosure

requirements; procedures to avoid illegal tribal patronage, bribery and kickbacks; specified accounting and management procedures; and Federal Bureau of Investigation background checks. *Id.* at 202 n.22.

Congress enacted IGRA soon after Cabazon Band was decided; and the decision's holding influenced IGRA's legislative process. *See, e.g.*, S. Rep. No. 100-446, at 2-4 (1988) (discussing *Cabazon Band's* impact on IGRA's legislative process). The Senate Report specifically references the then-existing Section 81 review of gaming management contracts, noting that, in *Cabazon Band*, "[t]he Court relied heavily on the fact that the Department of the Interior, as trustee for Indian tribes, reviews tribal gaming ordinances and approves or disapproves them, as well as all joint venture and management contracts with outside firms." *Id.* at 3.

IGRA maintained Section 81 agency review and approval of gaming management while transferring the authority to conduct this review and approval from the Secretary of the Interior to the newly-created NIGC. This is reflected in the Act's text. IGRA states that "[f]ederal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts." 25 U.S.C. § 2701(2). By way of 25 U.S.C. § 2704(a), Congress established, "within the Department of the Interior" the NIGC.[2] Among the

[2] Respondent's assertion that the NIGC "is outside of the jurisdiction of the Department of Interior", (BIO at 15), is incorrect. The NIGC is a subpart of the Department of the

NIGC's powers and duties is the NIGC Chair's authority to review and approve Indian gaming management contracts. 25 U.S.C. § 2711. The Act confirms that this management contract approval power is simply the Secretary's traditional Section 81 contract approval power, but transferred to the NIGC Chair: "The authority of the Secretary under section 81 of this title, relating to management contracts regulated pursuant to this chapter, is hereby transferred to the Commission." 25 U.S.C. § 2711(h).

Under Section 2711(e), the NIGC Chair can disapprove a management contract for a number of reasons, including unlawful tribal patronage, false disclosures, potential links to organized crime, undue interference or influence on the part of the management contractor, and contractor malfeasance. 25 U.S.C. § 2711(e)(1)-(3). The NIGC Chair can also disapprove a management contract for reasons that "a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract." 25 U.S.C. § 2711(e)(4). These criteria are substantially similar to the management contract approval criteria the Secretary utilized under Section 81 before IGRA was enacted. *See Cabazon Band*, 480 U.S. at 202 n.22.

Accordingly, the processes for Secretarial contract review and approval under Section 81 and NIGC review and approval of gaming management

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Interior; indeed, the Secretary of the Interior appoints -- and can remove for neglect of duty, malfeasance or other good cause -- two of the NIGC's full-time members. 25 U.S.C. § 2704(b)(1)(B) and (b)(6).

contracts are quite similar. The fact that the Second Circuit and Ninth Circuit disagree about the interpretation of "Indian lands" in those two statutes is significant and the difference is irreconcilable as the scope of review between the two statutes is virtually indistinguishable.

2. The Second Circuit Expressly Disagrees with the Ninth Circuit's Interpretation of Section 8.

Contrary to Respondent's assertion, express disagreement between two Circuits does not indicate those Opinions are in "harmony." BIO at 13. The panel majority of the Ninth Circuit refused to apply the Dictionary Act when construing Section 81's use of "Indian lands" to encompass only "existing" Indian lands. By contrast, and in direct conflict with the Ninth Circuit panel majority, a panel of the Second Circuit unanimously concluded that "[t]he Dictionary Act, 1 U.S.C. § 1, instructs that '[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise ... words used in the present tense include the future as well as the present.'" App.82. Therefore, the Second Circuit continued, "when construing the definition of 'Indian lands' in 25 U.S.C. § 2703(4), the Dictionary Act instructs us to read the words 'which is held in trust' to also include land that will be held in trust." *Id.* As support for this conclusion, the Second Circuit cited to the Ninth Circuit's dissent. *Id.*

While the Second Circuit observed that Section 81 and Section 2711 differ in that the former involves review of contracts that encumber Indian lands while the latter involves review of

management contracts, it nonetheless stated, "[t]o the extent these differences are not material to the Ninth Circuit's majority opinion, we nevertheless agree with Judge Smith's dissenting view that transactions involving land that 'will be' held in trust trigger the agency's review authority, especially where specific land to be taken into trust is identified in the operative agreements." App.82-83. As is explained in Section 1 *supra*, the differences between Section 81 and Section 2711 are not material; Section 2711 NIGC review is simply an outsourced form of pre-existing Section 81 review.

Respondent incorrectly argues "the Ninth Circuit applied the same rule of law adopted in Catskill in determining that the management contract between Petitioner and the Tribe was void for lack of NIGC approval, despite the absence of Indian lands." BIO at 13. Not only is the argument wrong, it is irrelevant.

First, the Ninth Circuit did not make any holding with respect to NIGC approval. The sole footnote Respondent cites in support of its argument immediately follows the Court's acknowledgement that the issue was not in dispute. App.10-11. ("The Tribe has itself recognized that its management contract with Harrah's (which would have imposed on it an indemnification obligation covering NGV's claims against Harrah's) was void under Section 2705(a)(4) due to the Tribe's failure to have obtained approval of the Chairman of the Gaming Commission.") Moreover, the accompanying footnote does not indicate how the Ninth Circuit would treat a contract under Section 2711 -- it merely notes that the Ninth Circuit did not evaluate NGV's contract

with the Tribe under Section 2705(a)(4). *Id.* ("Because the Tribe's agreement with Harrah's was subject to a different statutory provision from the section applicable to the Tribe's agreement with NGV, such Section 2705(a)(4) invalidity did not extend to the latter [the contract before the court]").

Second, regardless of the Ninth Circuit's position with respect to Section 2711, there is still an important and explicit Circuit Split with respect to Section 81 that warrants this Court's immediate attention. The Second Circuit unequivocally disagrees with the Ninth Circuit's interpretation of the definition of Indian lands in both Sections 81 and 2711-- which means a contract subject to Section 81 -- a contract that "encumbers" to-be-acquired Indian Lands -- requires Secretarial Approval in the Second Circuit in order to be valid, but does not require any type of review in the Ninth Circuit for validity. A disagreement between the Circuits as to the level of federal agency review required to validate the exact same contract necessitates an authoritative resolution from this Court.

In sum, an irreconcilable Circuit Split exists as a result of the Ninth Circuit's decision in this case and the Second Circuit's decision in Catskill Development. The Court should grant certiorari to resolve this conflict between the Circuits.

3. The Dictionary Act Supplies Default Rules that Apply to All Acts of Congress and Not Just Ambiguous Statutes

The Dictionary Act is a statute of general application. It is not a judge-made canon of statutory construction. The Dictionary Act's

application is not limited to ambiguous statutory language, and Respondent cites to no authority from this Court stating that it does.[3] Rather, by its express terms, 1 U.S.C. § 1 applies "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise ...." Instead, the Dictionary Act supplies default rules applicable throughout the United States Code unless the pertinent context indicates otherwise.

In *Wilson v. Omaha Tribe*, 442 U.S. 653 (1979), the Court resorted to the Dictionary Act when interpreting a 145-year old statute that used the term "white person". *Id.* (construing 25 U.S.C. § 194). While the statutory phase "white person" is anachronistic, it is hardly ambiguous. Nevertheless, in *Omaha Tribe*, the Court used the Dictionary Act to construe the unambiguous phrase "white person" to mean "artificial persons" consistent with 1 U.S.C. § 1's definition of person to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals ...." 442 U.S. at 665-66.

Concordantly, in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005), the Court was asked to construe the term "vessel" as it used in the Longshoreman and Harbor Workers' Compensation Act ("LHWCA). *See* 33 U.S.C. § 902(3)(G). While the term "vessel" is not ambiguous, the Court defined "vessel" by reference to the Dictionary Act's definition of "vessel", as including "every description of water-craft or other artificial contrivance used, or

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[3] The Court's opinion in *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438 (2002) does not even mention the Dictionary Act.

capable of being used, as a means of transportation on water." *Id.* at 490-91 (citing and quoting 1 U.S.C. § 3). As the Court observed, the Dictionary Act "continues to supply the default definition of 'vessel' throughout the U.S. Code 'unless the context indicates otherwise.'" *Id.* at 490 (quoting 1 U.S.C. § 1).

The Court's own cases, therefore, confirm the Dictionary Act's function, i.e., to provide default rules of statutory construction for all Acts of Congress "unless the context indicates otherwise." The Court's construction of the Dictionary Act avoids the exceedingly cumbersome requirement of specifying in each Act of Congress *e.g.*: (1) whether the singular imports the plural and vice versa, 1 U.S.C. § 1; (2) whether "vessel" includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water, 1 U.S.C. § 3; and (3) whether "words used in the present tense include the future as well as the present." 1 U.S.C. § 1.[4]

Accordingly, and as the panel dissent correctly observed, the Ninth Circuit panel majority's unsupported conclusion that the Dictionary Act only applies to ambiguous statutes -- which Respondent repeats in its BIO -- is directly contrary to the Dictionary Act's express terms, and is erroneous. Rather, "[n]othing in the United States Code or controlling precedent limits the Dictionary Act's

[4] Or to expand upon the point: (4) whether the masculine gender includes the feminine, *id.*; (5) whether "county" includes a parish or equivalent government subdivision, 1 U.S.C. § 2; and (6) whether "vehicle" includes all means of land transportation, 1 U.S.C. § 4.

application" to ambiguous statutory language. App.38.

CONCLUSION

The decisions of the Ninth and Second Circuits are irreconcilably in conflict with one another. Their competing constructions of "Indian lands" cannot be harmonized. Nor can their contrasting approaches to applying the presumptive rules of the Dictionary Act be reconciled in a principled manner. Lastly, the Ninth Circuit panel majority's constructions of 1 U.S.C. § 1 and 25 U.S.C. § 81 are simply incorrect and contrary to the broad and protective purposes behind these enactments. Indeed, the Ninth Circuit panel majority's decision extends an open invitation to unscrupulous developers to evade federal agency review and take advantage of Indian tribes by consciously entering into contracts that encumber or impinge Indian lands that have not been acquired as of the date of contract execution, but which of necessity need to be acquired to fulfill the contractual purposes.

Petitioner respectfully submits that the petition for a writ of certiorari should, therefore, be granted.

Respectfully submitted,

Stanley E. Siegel
Peter D. Gray
HALLELAND LEWIS
NILAN & JOHNSON, PA
600 U.S. Bank Building
220 South Sixth Street

Minneapolis, MN 55402
612-338-1838

JANUARY 7, 2009