No. 18-16696

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLUB ONE CASINO, INC., dba CLUB ONE CASINO; and GLCR, INC., dba THE DEUCE LOUNGE AND CASINO,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT, in his official capacity as Secretary of the Interior; and TARA SWEENEY, in her official capacity as Assistant Secretary of the Interior – Indian Affairs

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California
No. 1:16-CV-1908-AWI-EPG (Hon. Anthony W. Ishii)

APPELLANTS' REPLY BRIEF

SLOTE, LINKS *&* BOREMAN, LLP
Robert D. Links (SBN 61914)
Adam G. Slote (SBN 137465)
Marglyn E. Paseka (SBN 276054)
1 Embarcadero Center, Suite 400
San Francisco, CA 94111
Telephone: 415-393-8001
Facsimile: 415-294-4545

Co-counsel for Plaintiffs-Appellants

GREINES, MARTIN, STEIN & RICHLAND, LLP
Robert A. Olson (SBN 109374)
Timothy T. Coates (SBN 110364)
5900 Wilshire Blvd, 12th Floor
Los Angeles, CA 90036
Telephone: 310-859-7811
Facsimile: 310-276-5261

Co-counsel for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

FEDERAL CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

FEDERAL REGULATIONS

INTRODUCTION

Congress's intent in enacting the Gaming Act was clear: Tribes were not to conduct casino gambling on newly acquired property without the situs State's consent. The Answering Brief turns this principle on its head, arguing that private parties and Indian tribes can, with federal government acquiescence, unilaterally impose casino gambling defying the wishes of 4 million State voters.

The Answering Brief starkly presents the issue: Does the Reorganization Act direct (and the Constitution allow) that a private gambling corporation's donation of land title to the United States in trust for an Indian tribe automatically shifts the situs State's historic territorial jurisdiction to the tribe in order to allow off-reservation casino gambling on land that has never been occupied, settled or governed by the tribe?[1]

The government's position is as clear as it is troubling: An Indian tribe can unilaterally—without State consent—obtain jurisdiction over territory anywhere within a State whenever it and a private party desire to do so by the simple expedient of the private party's donation of the land to the federal government, in trust for the tribe. The tribe can then ignore overwhelming State voter opposition

[1] Rather than the confusing acronyms IRA and IGRA, we use Reorganization Act and Gaming Act to refer to the Indian Reorganization Act, 25 U.S.C. § 5108, and the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, *et seq.*, respectively. *See* Opening Brief at 17.

to casino gambling on the site. *See* Answering Brief ("AB") at 14 ("the statute's tribal jurisdiction requirement as to the Madera Parcel was satisfied once the United States acquired the Parcel in trust for the Tribe"); 22 ("Tribal and federal jurisdiction over the Madera Parcel arose without State consent or cession"). Such an approach would permit private developers with no connection to an Indian tribe to build State-jurisdiction-free casinos or other enterprises in downtown Los Angeles or Boston, so long as a tribe lends its name and the federal government acquiesces.

This, the government claims, suffices under the Gaming Act to allow casino gambling so long as at any time the State's governor consented in the abstract to such casino gambling—even if that consent was effectively disavowed by the voters and the governor before any *final* administrative gambling decision. This is the antithesis of congressional intent in requiring tribal jurisdiction, tribal governance, *and State consent* as prerequisites to Indian casino gambling on newly acquired lands.

There is no statutory or constitutional basis for the government's position. Whatever Congress's power on behalf of Indian tribes, it can—and did—legislate more narrowly. No statute says a transfer of title unilaterally transforms State territorial jurisdiction over lands into tribal jurisdiction. Congress could only possibly so prescribe explicitly, not sub silentio. The Reorganization Act, on

which the government relies, says nothing about transfer of jurisdiction. To the contrary, when Congress enacted the Reorganization Act, federal law, now 40 U.S.C. § 3112, required State consent for a jurisdictional transfer to the federal government. Congress could have envisioned no less for jurisdictional transfers to Indian tribes. Likewise, the Gaming Act put strong State consent strictures on Indian casino gambling on newly acquired off-reservation land, as here.

Even more so, nothing in the Constitution allows for unilateral creation of tribal jurisdiction, even with federal connivance, over a State's territory. Congress does *not* have the power to unilaterally deprive a State of its historic territorial jurisdiction over lands within state boundaries. Nothing in the Indian Commerce Clause hints at such a power. The Tenth Amendment, article IV, section 3, and the Constitution's overall structure combine to prohibit Congress from depriving a State of its birthright territorial jurisdiction.

Faced with this reality, the government resorts to procedural arguments. But the jurisdiction requirement cannot be satisfied by adverse possession or waiver. Per the Gaming Act, the absence of either tribal territorial jurisdiction or the exercise of tribal governance, means the Secretary had *no authority* to issue "Secretarial Procedures." Period. Because the Secretary lacked authority, his actions are void ab initio, subject to challenge at any time.

In any event, the government's procedural arguments boil down to this: heads the government wins, tails everyone else loses. On the one hand, the government has successfully argued before this Court that gambling-opposition parties could not challenge the Secretary's acceptance into trust of lands until they were harmed thereby. Now, the government reverses course and argues that it is too late to challenge the Secretary's action because the challenge had to be made when the trust transfer occurred. The government cannot have it both ways.

This is a textbook example of "reservation shopping" whereby a private gambling company purchases ordinary farmland—land never previously occupied, settled, or governed by an Indian tribe—and then gifts it to the tribe through the conduit of the federal government without State approval, cession, or consent, in order that the private company can build and run a casino that it is barred from running under State law.

Neither the United States nor a tribe can gain territorial jurisdiction—sovereignty—over land within State borders without the situs State's consent. Because that jurisdiction is lacking here, the Secretary lacked authority to issue "Secretarial Procedures" or to otherwise dictate how California's territorial lands could be governed. For these reasons, the district court's judgment must be reversed and the "Secretarial Procedures" set aside.

ARGUMENT

I. The Facts Are Undisputed, the Issue Is Purely One of Law.

1850: California admitted to the Union; the Madera Parcel is subject to California's exclusive territorial jurisdiction.

2011: The Secretary opines that *if* the Madera Parcel is transferred by a private Nevada gambling company to the United States in trust for the North Fork Tribe, then the Tribe may conduct gambling on it.

2012: California's Governor purports to concur in the Secretary's gambling determination *if* there is a future title transfer in trust to the United States.[2] California negotiates and its legislature ratifies a gambling compact with the Tribe. The filing of a referendum ballot measure, per California law, suspends ratification and requires the electorate's vote. The Secretary, before hearing from California's voters, approves transferring the Madera Parcel to the United States to hold in trust.

2013: Madera Parcel title is conveyed to the United States to hold in trust for the Tribe.

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[2] The validity of the Governor's consent is pending before the California Supreme Court. *Stand Up for California! v. State of California*, 6 Cal. App. 5th 686 (2016), *review granted* No. S239630 (Mar. 22, 2017); *United Auburn Indian Community of the Auburn Rancheria v. Brown*, 4 Cal. App. 5th 36 (2016), *review granted* No. S238544 (Jan. 25, 2017).

2014: An overwhelming majority, 61% (4 million votes), of California's electorate decisively *rejects* the Madera Parcel compact (Proposition 48).[3]

2015: Following the voters' will, California's Governor declines to negotiate a new compact, effectively revoking consent to Madera Parcel casino gambling. The district court finds that California's vote is a refusal to negotiate in "good faith."

2015: The Tribe purports to issue a grazing ordinance, its first and only purported governance act, regarding the Madera Parcel.

2016: The Secretary issues "Secretarial Procedures" directing casino gambling on the Madera Parcel despite California's referendum vote.

This is all *undisputed.* No further factual record is needed. The government concedes appellants' standing to contest infringement of California's sovereign interests. AB 32-33, n.2.[4]

The issue here is purely legal: Did the Secretary have authority to issue the Secretarial Procedures? Per the Gaming Act, that authority existed *only* if the

[3] The Answering Brief gives but passing reference to this fact, a fact that the Secretary also gave no weight.

[4] By failing to address the issue, the Answering Brief also effectively concedes that the district court erred in attempting to bind the present parties to the outcome of the Tribe's action against California over its "good faith" in adhering to voters' wishes to not negotiate a compact. *See* Opening Brief at 34-35.

North Fork Tribe exercised governing territorial jurisdiction over the Madera Parcel. *See* Opening Brief ("OB") at 23-24; 25 U.S.C. §§ 2703(4), 2710(d)(1).

The underlying question is whether the North Fork Tribe acquired territorial jurisdiction over the Madera Parcel. More generally: Can a private party and a tribe, using the federal government as a conduit, deprive California of its pre-existing territorial jurisdiction over land within its borders—land that had never previously been Indian land, was never occupied, settled, or governed by an Indian tribe, and as to which the State has never ceded its jurisdiction?

II. The Government's Procedural Dodges Are Baseless.

A. The Tribe's jurisdiction, the key statutory predicate to the Secretary's authority, was appropriately challenged here.

Just as appellants have standing to oppose an infringement on California's sovereignty, AB 32-33 n.5; OB 35-36, they have standing to assert that the Secretary had no power to take the action that he took. The Gaming Act limits the Secretary's authority to instances where a tribe has governing jurisdiction over the proposed casino site. 25 U.S.C. §§ 2703(4), 2710(d)(1)(A)(i). If the tribe had no jurisdiction, the Secretary had no authority. *See* OB at 31-32.

One of the identified jurisdictional problems is that California withdrew its statutorily required consent to Indian gambling on newly acquired land. Indisputably, the Gaming Act requires State consent (to be communicated by its

Governor) to casino gambling on newly acquired land. 25 U.S.C. § 2719. The government argues that California is an indispensable party when State consent is challenged. Not so.

A party is indispensable only if that party (1) has a legally protected interest (2) that cannot be protected or (3) precludes effective relief in that party's absence. *White v. University of California*, 765 F.3d 1010, 1026 (9th Cir. 2014). That's not the case here. If, as appellants demonstrate, California withdrew consent before the Secretary's final action, a determination to that effect fully protects California's interests and affords complete and effective relief. California would only be an indispensable party if appellants were *attacking* the Governor's action. *See Stand Up for California! v. Dept. of Interior*, 204 F. Supp. 3d 212 (D.D.C. 2016) (California indispensable party to claim that Governor acted unlawfully). Appellants are not doing that. Rather, they rely on the electorate's vote, whereby California effectively withdrew—before final government action—any prior consent, regardless whether the initial consent was valid.[5]

As discussed above, there is no factual dispute here as to the events in question. If the Secretary had no power to act, his determination is invalid. That challenge is appropriately made at this time.

[5] As noted, the validity of the initial consent is before the California Supreme Court in cases to which California is a party. *See* n.1, *supra*. The then-pending State referendum suspended any consent before the fee-to-trust decision.

B. Appellants could not have challenged the Secretary's actions earlier.

The government wrongly seeks to avoid the merits by arguing that appellants are too late to challenge a *fait accompli* usurpation of California jurisdiction over the Madera Parcel.

Just because the federal government or a tribe claims jurisdiction, does not make it so. Jurisdiction is not acquired by waiver or estoppel or mere assertion. It does not matter if or when the Secretary "determined" that the tribe would have jurisdiction. If there was no State consent, there was no jurisdictional transfer—that foundational prerequisite could be challenged at any time. Appellants presented their challenge at the earliest opportunity.

In *Stop the Casino 101 Coalition v. Salazar*, 384 Fed. Appx. 546 (9th Cir. 2010), the Secretary successfully argued that Indian gambling opponents were too *early* in challenging a fee-to-trust determination, having not yet suffered injury because Indian gambling had not yet been finally approved. *Id.* at 548; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (until agency action causes injury in fact it is not judicially reviewable due to lack of standing). Now, the government reverses course and argues that appellants are too *late* because they did not challenge the fee-to-trust determination when they had suffered no injury

and had no Article III standing. AB 13. The government's position renders illusory appellants' ability to protect their interests.

The government cannot have it both ways. The first final agency action that actually and concretely injured appellants was the issuance of Secretarial Procedures. The fee-to-trust acquisition and the pre-transfer section 2719 determination did not by themselves cause injury. Although the fee-to-trust determination contemplated that the land would be used for a casino, no specific casino had been approved; no required compact was in place. At the time of the fee-to-trust transfer, the negotiated State-tribe compact was suspended pending the referendum vote, making any harm hypothetical. *See Artichoke Joe's v. Norton*, 216 F.Supp.2d 1084, 1100-02 (E.D. Cal. 2002), *aff'd* 353 F.2d 712, 719 n.9 (9th Cir. 2003), *cert. denied*, 543 U.S. 815 (2004). When California voters overwhelmingly rejected gambling on the Madera Parcel, appellants were still unharmed—at least until the Secretary issued his "Secretarial Procedures" purporting to trump the will of 4 million votes.

Until then, the appellants faced only speculative injury. Once their injury crystalized, appellants had the right to challenge the steps that culminated in that injury. *See California Sea Urchin Comm'n v. Bean*, 828 F.3d 1046, 1051 (9th Cir. 2016) ("an agency should not be able to sidestep a legal challenge to one of its actions by backdating the action to when the agency first published an applicable

or controlling rule. If the operative dispute does not arise until decades later… such a holding would wall off the agency from any challenge on the merits"); *Tsi Akim Maidu of Taylorsville Rancheria v. United States Dep't of the Interior*, No. 217CV01156TLNCKD, 2019 WL 95511, at *4 (E.D. Cal. Jan. 3, 2019) (applying doctrine to tribal rights litigation).

The District Court acknowledged that "[i]f some showing additional to the fee-to-trust determination was required for land to be" subject to the Gaming Act, "a challenge … could appropriately take place outside of a challenge to the fee-to-trust determination." ER 21, 328 F.Supp.3d 1033, 1047 n.14. But, as we discuss below, that is *exactly* the case. Tribal jurisdiction and tribal governance, along with State consent, are required for casino gambling on newly acquired lands. They are not created by a trust transfer alone. The appropriate challenge is to the Secretary's decision as to what is to be *done with* the trust land, not the decision to take that land into trust in the first place.

III. The Gaming Act's Governance and Consent Requirements Are Not Met.

A. California's withdrawal of its consent bars the Secretarial Procedures.

Congress's understanding in enacting the Gaming Act was clear. It barred casino gambling on newly acquired lands, such as the Madera Parcel, unless "the tribe involved obtains *the consent* of certain State and local governing bodies."

H.R. Rep. No. 99-488 at 13 (1986), italics added; see S. Rep. No. 99-493 at 16 (1986) (requiring joint tribal and State consent to any casino gambling). California did not consent to—in fact, opposed by 4 million Proposition 48 votes—Indian casino gambling on the Madera Parcel well before the Secretary issued Secretarial Procedures, the only final administrative act concretely allowing casino gambling on the property.

Whatever consent the Governor may have initially given (the validity of which is before the California Supreme Court), such consent was withdrawn by the California's electorate *before* final administrative action.

The government argues that if the Governor consents at any time before a final gambling decision is made, it irrevocably suffices. But that "gotcha" argument ignores the Gaming Act's purpose of precluding, absent real and abiding State consent, just the sort of off-reservation gambling gambit as is occurring here. The Gaming Act's requirement that the Governor concur in the Secretary's gambling determination presumably means *at the time of* a *final* determination, not as an intermediate step.

The Gaming Act's "mediation" process was not intended as a means to overcome State objection to casino gambling on newly acquired lands. No legislative history or inference supports that the Secretarial Procedures process was meant as a work-around to bypass the State consent or tribal jurisdiction

requirements for casino gambling on newly acquired land. It is only triggered if a State does not negotiate a compact "in good faith." 25 U.S.C. § 2710(d)(7)(B)(iv). But tribes have no absolute right to casino gambling on newly acquired land. To the contrary, voluntary State consent is required. It cannot be an absence of "good faith" for a State to withhold consent to any casino gambling whatsoever when Congress intended States to have the right to consent *or not*. *See New York v. U.S.* 505 U.S. 144, 174-77 (1992) (Congress cannot strong arm States by instructing them as to what they must consent). Rather, the mediation mechanism is a means to resolve disagreements on the margins as to the exact contours of either pre-Gaming Act reservation land casino gambling (as to which a tribe has a right) or otherwise State-consented casino gambling on newly acquired land.

Likewise, the Secretary did not have discretion to simply ignore the will of 4 million State voters by involuntarily imposing Indian casino gambling on newly acquired State land over State objection. In the face of an unambiguous, contemporaneous State objection, the Gaming Act is clear—Indian casino gambling on newly acquired off-reservation land is off-limits.

B. Even if the Tribe had jurisdiction, there is no evidence that it exercised the necessary substantial governing power.

The Gaming Act requires not just tribal "jurisdiction," but also actual tribal *governance*—the "exercise[] [of] governmental power," 25 U.S.C. § 2703(4)—

over non-reservation lands. This requirement prevents using a tribe's imprimatur to authorize casino gambling on land with only a minimal pre-existing relationship to the tribe. Exercise of governmental power is an independent requirement not satisfied simply by the fact the land is held in trust by the United States.

The District Court misapprehended this crucial point when it noted that "the 'exercise of governmental power' clause" is not "analytically significant enough to merit mention." ER 21, 328 F.Supp.3d at 1047. The holding below that "the Madera Site is [Gaming Act entitled] Indian land *because* it is in trust for North Fork," mashes together two independent requirements, jurisdiction and governance. *Id.*, italics added.

The exercise of governmental power is a separate, substantial requirement that must be satisfied before casino gambling may be approved on trust lands. *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 702-03 (1st Cir. 1994); *Citizens Against Casino Gambling in Erie County v. Chaudhuri*, 802 F.3d 267, 286 (2d Cir. 2015); *see Cheyenne River Sioux Tribe v. State of South Dakota*, 830 F. Supp. 523 (D.S.D.), *aff'd*, 3 F.3d 273 (8th Cir. 1993) (examining, e.g., "whether the areas are developed," where "tribal members reside," who provides

"governmental services," whether the tribe or the State provides law enforcement); 25 C.F.R. § 502.12. [6]

The only purported exercise of "governmental power" over the Madera Parcel was a grazing ordinance (for land that from day one was intended to be, and given to the Tribe expressly to be, a casino) enacted *after* California voters had rejected the casino proposal. The purported exercise of minimal, pro forma governance *after* State rejection of casino gambling on the site does not suffice. OB at 29. The intent behind the Gaming Act was to preclude just this sort of ploy whereby a tribe acts as conduit for private-entity, off-reservation gambling over State objection.

IV. Nothing in the Reorganization Act Transmutes a State's Historic Territorial Jurisdiction Into Tribal Jurisdiction.

A. The Reorganization Act says nothing about transferring previously exclusive State jurisdiction over lands to Indian tribes without State consent.

The history of United States-tribe relations falls into roughly four periods. The initial period consisted of mainly co-existence and commerce. The Indian Removal Act of 1830 ushered in relocations and containment to reservations. Four

[6] *Arizona v. Nation*, 818 F.3d 549, 554 n.2 (9th Cir. 2016), relied on by the District Court is not to the contrary. The land there was *reservation* land (added pursuant to a specific federal statute to replace lands lost in a flood). No issue was presented as to tribal exercise of governmental power over that land.

decades later, the Indian Appropriations Act of 1871 ended recognition of additional tribes or independent nations and prohibited additional treaties. It created a policy of assimilation. Indian lands were allotted to individual tribe members who could, and often did, resell the parcels to non-Indians, diluting Indian presence on even pre-existing reservation lands and tribal homelands. No provision was made for tribal governments. The 1934 Reorganization Act reversed the policy of assimilation and tribal identity destruction. It allowed for the creation of tribal governments. It allowed (and allotted funds for) the federal government to purchase and hold in trust lands for tribes. *See generally*, Felix S. Cohen, *Handbook on Federal Indian Law*, §§ 1.03-1.05 at 23-84 (2012 ed.).

We have found no pre-1934 instance of the federal government unilaterally taking State sovereignty over land within State borders and transferring it to an Indian tribe. There is no indication that the Reorganization Act broke with that precedent.

No "jurisdiction" transfer. The government does not dispute that the word "jurisdiction" does not appear in the Reorganization Act's acquisition provisions. Nor does it dispute that the Reorganization Act's text nowhere speaks of transferring sovereignty from a State to a tribe, much less without State consent.

The government also does not dispute that the tangential mention of territorial "jurisdiction" in an early draft was deleted from the final version. Even

that reference was only as to jurisdiction over *individuals*: "The jurisdiction of the Federal Government shall extend to Indians under guardianship who become resident on such [acquired] lands: . . . ." H.R. Rep. No. 73-1804, at 3 (1934); *see id*. at 7 ("Section 7 gives the Secretary authority to add newly acquired land to existing reservations and extends Federal jurisdiction over such lands," i.e., *reservation* lands). The enacted statute and final legislative history contained no reference to territorial jurisdiction, much less displacing State jurisdiction without consent. The sole statutory reference was defining an "Indian" as a member of a *tribe* "under federal jurisdiction." *See* Pub. L. No. 73-383, §19, 48 Stat. 984 (1934); H.R. Rep. No. 73-2049 (1934).

The government argues that, by deleting any "jurisdiction" reference from the draft, Congress infinitely expanded statutory scope to allow the federal government, by fiat, to convert any land, anywhere in any State, to tribal land, under tribal jurisdiction, thus removing it, without consent, from the situs State's territorial jurisdiction. But "'[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language.'" *INS v. Cardoza–Fonseca*, 480 U.S. 421, 442–43 (1987).

The Reorganization Act nowhere otherwise mentions the vast power the government would read into it. Silence is not a grant of unbridled governmental

power. "Congress must be prevented from resorting to ambiguity as a cloak for its failure to accommodate the competing interests bearing on the federal-state balance." Laurence H. Tribe, American Constitutional Law, § 5-8 at 317 (2d ed. 1988); *see id*., § 5-20 at 383 & n.20 (referring to this as the "clear statement rule").

Congress is presumed not to usurp State prerogatives. The "assumption [is] that the historic police powers of the States were not to be superseded by the [f]ederal [a]ct unless that was the *clear and manifest purpose* of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009), italics added. This presumption applies to depriving States' of jurisdictional rights. *See Utah Div. of State Lands v. United States*, 482 U.S. 193, 201 (1987) ("Although arguably there is nothing in the Constitution to prevent the Federal Government from defeating a State's title to land under navigable waters by its own reservation for a particular use, the strong presumption is against finding an intent to defeat the State's title"); *Nation v. City of Glendale*, 804 F.3d 1292, 1298 (9th Cir. 2015) (applying *Wyeth* test to Indian lands issue; congressional enactment's manifest purpose preempted city's attempt to annex tribe's replacement land); *cf. Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1142-43 n.5, 1151 (9th Cir. 2013) (exemplar of "clear and manifest" congressional purpose: specific congressional directive for "replacement of reservation lands…" rendered unusable by federal reservoir; "no party argued that [the acquisition statute] raised serious constitutional problems or implicated

state sovereignty"; expressly not addressing acquiring jurisdiction sufficient for Gaming Act casino gambling).

The evidence of Congress's clear and manifest Reorganization Act purpose—for the first time since the Constitution was ratified—to unilaterally gobble up State jurisdiction over land within State borders and create new tribal jurisdiction in its stead? Nothing. Silence. Utterly no mention of depriving States of their sovereignty over what historically had been their territory.

Certainly 25 U.S.C. § 5110 does not solve the government's problem. It simply says that the Secretary is "authorized" to establish new reservations or add to existing ones with land acquired under the Reorganization Act. It says nothing about transferring a State's jurisdiction over land to a tribe without State consent.

"In trust" does not equal tribal jurisdiction. Another problem is that nowhere does the Reorganization Act say accepting property in trust creates tribal jurisdiction over that property, which is what the Gaming Act requires. *Citizens Against Casino Gambling in Erie County v. Chaudhuri*, 802 F.3d 267, 285 (2d Cir. 2015), recognized that "neither the text of the IRA [the Reorganization Act] nor that of [another statute] explicitly states that lands that pass from fee to trust or restricted fee status are subject to tribal jurisdiction." Nonetheless, the Second Circuit *assumed* Congress must have silently so intended. *Id.* In doing so, the Second Circuit erred. *Cf. Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1013

(8th Cir. 2010) (non-Gaming Act case involving repurchase of former reservation lands in which the court noted: "There is a fundamental difference between acquiring land which has no historical connection to an existing reservation and reacquiring land which once formed part of a Tribe's land base"); *Upstate Citizens for Equality, Inc. v. United States*, 841 F.3d 556 (2nd Cir. 2016) (transfer from fee to trust of reacquired "indigenous homeland" properties) discussed at OB 49, 57-58 & n.12.

Chaudhuri relied primarily on *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975). *Santa Rosa* predates *Wyeth, supra*, by thirty-plus years. And, it predates recent decisions that Congress does not possess unlimited power to usurp State jurisdiction. *E.g.*, *Murphy v. National Collegiate Athletic Association*, 138 S.Ct. 1461 (2018) (Congress cannot dictate state gambling bans); *United States v. California*, 921 F.3d 865, 888 (9th Cir. 2019) (the federal government cannot commandeer States to enforce federal law).

Nor did *Santa Rosa* involve a private party's land transfer to the United States or a claim that such a transfer unilaterally deprived the State—California—of existing territorial jurisdiction. Rather, *Santa Rosa* involved Indian reservation lands over which the tribe had acknowledged jurisdiction. How the tribe had gained that jurisdiction was not discussed. At issue were local zoning ordinances restricting use of land subject to existing tribal jurisdiction. *Santa Rosa* says

nothing about a State's territorial jurisdiction or how an Indian tribe might acquire it. The Supreme Court's *Wyeth* decision, not the Second Circuit's *Chaudhuri* decision, controls.

Preemption is irrelevant. Contrary to the government's suggestion (see AB at 2, 12, 18 and 35), this is not a preemption case. Appellants do not contend that a state statute controls over a federal one. Rather, the issue is the meaning of two *federal* statutes, the Reorganization Act and the Gaming Act. In any event, preemption requires a "clear and manifest purpose of Congress" to supersede State power. *Wyeth*, 555 U.S. at 565. That is not evident here.

Nor does preemption apply to matters of State sovereignty: "[E]very form of preemption is based on a federal law that regulates the conduct of private actors, *not the States*." *Murphy*, *supra*, 138 S.Ct. at 1481 (italics added). No generic federal "preemption" power exists; the federal government has no power to decree as to lands under State jurisdiction whatever it wants on whatever subject it wants. *Id*. at 1479 (preemption "is based on the Supremacy Clause, and that Clause is not an independent grant of legislative power to Congress"; the Constitution must confer a specific power; simply "pointing to the Supremacy Clause will not do").

Inherent sovereignty is a red herring. A tribe's "inherent sovereignty" cannot create territorial jurisdiction out of nothing more than ownership of legal or equitable title. *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197

(2005), held that tribes could not reacquire jurisdiction over even ancestral lands just by repurchasing them. *Cf. Narragansett*, 19 F.3d at 700-03 (State-tribe lands settlement agreement did not abrogate *pre-existing* tribal jurisdiction over lands).[7]

The government relies on *City of Sherrill* dicta that in the Reorganization Act "Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well-being." 544 U.S. at 200. But the decision's precedential scope extends only to the result in the case and those decision portions necessary to that result. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). *City of Sherrill* did not address, because no such issue was raised, whether the Reorganization Act allows private gambling concerns to utilize the federal government as a conduit to convey territorial jurisdiction over a parcel of land from a State to a tribe, or whether such could be done (as here) without the land being made a part of the tribe's reservation. *See Montana v. United States*, 450 U.S. 544 (1981) (limiting inherent sovereignty to reservation lands held by Indians); *United States v. Cooley*, 919 F.3d 1135, 1148 (9th Cir. 2019) (tribe's "inherent or sovereign authority" does not extend to arresting non-Indians on tribal

[7] Congress thereafter rejected any such residual jurisdiction as enabling gambling. Pub. L. No. 104-208, § 330, 110 Stat. 3009-227 (1996) formerly 25 U.S.C. § 1708.

land). The concept of "inherent tribal sovereignty" cannot fill the jurisdictional hole in this case. See OB at 50-52.

40 U.S.C. § 3112 controls. Nor can the government sidestep 40 U.S.C. § 3112. Its predecessor, Pub. L. No. 71-467, 46 Stat. 828 (1930), existed when the Reorganization Act was enacted. It directed that the federal government could not acquire State lands "*until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given*." (Italics added.)

Undeniably, the statutory scheme by which Congress understood the federal government acquired property and jurisdiction required "the consent of the legislature of the State in which the land or site may be," not just federal acceptance of legal title. In the context in which it enacted the Reorganization Act, Congress understood that a State would have to consent to any transfer of territorial jurisdiction from itself to the federal government, much less to an Indian tribe. "[T]he well-settled presumption [is] that Congress understands the state of existing law when it legislates." *Bowen v. Massachusetts*, 487 U.S. 879, 880 (1988). 40 U.S.C. § 3112(b) continues this State-consent concept requiring that the government "accept or secure, from the State in which land . . . is situated, *consent to, or cession of*, any jurisdiction over the land . . . ," 40 U.S.C. § 3112, italics added.

Well-established statutory construction principles dictate that the Reorganization Act must be read as not directing appropriation of State jurisdiction over lands without State consent.

B. The Indian Commerce Clause, read in the Constitution's full structural context including the Tenth Amendment, does not grant Congress the power to unilaterally transfer jurisdiction over State territory to Indian tribes.

Assuming for the sake of argument, and contrary to established statutory construction mandates, that Congress in the Reorganization Act purported to create a federal power to unilaterally acquire jurisdiction over land within State borders and transfer it to an Indian tribe, then Congress acted beyond constitutional limits.

Nothing in the Constitution affords Congress such extraordinary power. A constellation of constitutional provisions compels restricted Federal power—*see, e.g.*, U.S. Const. Art. I, § 8, cl. 17 (requiring State consent to federal enclaves), Art. IV, § 3 (barring involuntary reduction or combination of State territory), as well as the Tenth Amendment. States "retain[] a residuary and inviolable sovereignty.… This is reflected throughout the Constitution's text." *Printz v. United States*, 521 U.S. 898, 919 (1997); *see Franchise Tax Bd. of California v. Hyatt*, 139 S.Ct. 1485 (2019) (inherent structure of Constitution precludes sovereign States from being sued in other States' courts); OB 40. And nothing allows Congress to delegate to

the Executive—in this instance, the Secretary—the authority to determine when State jurisdiction is to be displaced.

Although the Tenth Amendment does not negate *express* grants of congressional power, there is no express grant to Congress that it may assume jurisdiction over State land without State consent and unilaterally transfer such jurisdiction to another sovereign, including an Indian tribe. If the federal government cannot do so for national defense (it cannot; see U.S. Const. Art. I, § 8, cl. 17), it cannot do so for any lesser purpose such as promoting Indian casino gambling run by out-of-state corporate interests over the objection of 4 million California voters. *See Seminole Tribe*, *supra*, 517 U.S. at 72 ("the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government").

Are we to believe that in ratifying the Constitution the States willingly granted to the new federal government the power to unilaterally take away a sovereign State's jurisdiction over its territory so long as it was done on behalf of an Indian tribe? There is not an iota of evidence that even the Constitution's strongest advocates—Hamilton, Madison, Jay—contemplated that. *See* The Federalist No. 42 (James Madison) (no mention of territorial jurisdiction, much

less its transfer from a sovereign state to Indians); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L. Rev. 1012, 1022-23 (2015) ("The ratification debates that followed ignored the Indian Commerce Clause. The only sustained discussion appeared in Federalist No. 42, where James Madison praised the change from Article IX, observing that the elimination of the earlier qualifiers resolved earlier contentions over the division of authority").

The Indian Commerce Clause may be many things, but it is not an unlimited grant of authority to seize jurisdiction over State lands without State consent.

C. No authority supports the proposition that Congress has either exercised or possesses the power to unilaterally create Indian tribal jurisdiction over formerly private land within State borders.

No authority the government cites alters this analysis. None squarely addresses the asserted involuntary State-to-Tribe jurisdiction transfer. None addresses the unique circumstance here of a State electorate rejecting the very jurisdictional entitlement that the government and the tribe claim. None holds that the Gaming Act makes the transferred parcel automatically eligible for casino gambling where the situs State's electorate rejects such activity on the very parcel in question via a statewide referendum.

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) had nothing to do with Indian lands and did not involve any principle of States'

sovereign territorial jurisdiction; nor did it involve the contours of the Indian Commerce Clause, the Reorganization Act, or the Gaming Act. Nothing in *Garcia* suggests a constitutionally based congressional power to take State territory, upon gift by private individuals, and transfer jurisdiction over it to an Indian tribe without the State's consent.

Garcia also represents a jurisprudential nadir of federalism and Tenth Amendment concerns. *See, e.g., Murphy*, 138 S.Ct. at 1476 ("The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms"); *Printz v. United States*, 521 U.S. 898 (1997) (Brady Handgun Violence Prevention Act violates Tenth Amendment); *Seminole Tribe*, *supra*, 517 U.S. 44 (Eleventh Amendment not superseded by Indian Commerce Clause); *United States v. Lopez*, 514 U.S. 549 (1995) (Tenth Amendment precludes Congress regulating gun sales near schools).

United States v. John, 437 U.S. 634 (1978) and ***United States v. McGowan***, 302 U.S. 535 (1938) address federal authority to criminally prosecute persons for conduct occurring in "Indian Country" as defined in 18 U.S.C. § 1151.[8] *John*, 437

[8] "Indian Country" is (1) reservation lands, (2) dependent Indian communities, and (3) Indian allotments, no longer part of a reservation still under Indian title. 18

U.S. at 635, 647 (issue: Whether crime occurred in "Indian Country"; "The definition of 'Indian country' as used here and elsewhere . . . is provided in § 1151"); *McGowan*, 302 U.S. at 536, 539 ("The only question for determination is whether this colony is such Indian country").

The term "Indian Country" appears nowhere in the Reorganization Act or the Gaming Act. Whatever meaning "Indian Country" has for federal criminal law purposes, it has no applicability here. *See* OB at 59-61 (Madera Parcel does not qualify as "Indian Country").

Neither *McGowan* nor *John* addressed whether Gaming Act required tribal jurisdiction over lands existed. At issue was federal criminal jurisdiction in regulating conduct of tribal members in "Indian Country" (in *McGowan*, bringing intoxicants into the Reno Indian Colony; in *John*, an assault committed by a tribe member on the Choctaw Reservation). The only issue was whether the "Indian Country" requirement was met, not the federal government's power therein.

The Gaming Act references "Indian lands"—defined as reservation land (not the case here) or land held in trust "over which an Indian tribe exercises governmental authority," 25 U.S.C. § 2703(4), italics added—*not* "Indian Country." The Gaming Act contains an additional requirement, an ordinance

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U.S.C. § 1151. Vacant, newly acquired, far off-reservation, historically State land does not meet these criteria.

"adopted by the governing body of the Indian tribe having jurisdiction over such lands," 25 U.S.C. § 2710(d)(1)(A)(i). The standard is a tribe's *exercise of governmental jurisdiction* over land, a question not resolved by misplaced references to "Indian Country." No tribal jurisdiction exists over the Madera Parcel, whether it constitutes "Indian Country" or not.

Nevada v. Watkins 914 F.2d 1545 (9th Cir. 1990); ***United States v. Gliatta***, 580 F.2d 156 (5th Cir. 1978); and ***United States v. Urrabazo***, 234 F.3d 904 (5th Cir. 2000), address Congress's power, when invoked expressly, to regulate conduct on federal public domain land. *See* U.S. Const. Art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). *Gliatta*, *Urrabazo*, and *Watkins* do not involve Indian lands or the acquisition of tribal jurisdiction over previously private lands that historically have been under State territorial jurisdiction.

Moreover, the Gaming Act, with its requirement of tribal jurisdiction, was passed under the Indian Commerce Clause, not the Property Clause. See *Seminole Tribe*, *supra*, 517 U.S. at 47.[9] It requires tribal jurisdiction and governance, *not* federal title or Property Clause powers.

[9] The government does rely on or even mention the Property Clause.

The question here is not whether Congress could adopt needful rules and regulations per the Property Clause. It is whether tribal *territorial jurisdiction* silently springs into existence, without State consent, when the federal government accepts a private gift of property to be held in trust.

CONCLUSION

The Secretary's action is a travesty. It is what the Gaming Act prohibits: A private corporation using tribal auspices to impose casino gambling on newly acquired property over the objection of the situs State. The government's position—that it, the North Fork Tribe, and a Nevada gambling corporation can ignore the wishes of 4 million California voters and unilaterally seize from California and convey to the Tribe *territorial jurisdiction* over land which is an integral and insular part of California—flouts the Gaming Act's intent. If the federal government, a tribe, and an out-of-state corporate entity can do this with regard to the Madera Parcel, they can do it as regards *any* property in California, or any other State for that matter. Neither Congress in the Reorganization and Gaming Acts, nor the Founders who wrote the Constitution, nor the States that ratified it, ever contemplated such a result.

The district court's judgment must be reversed with directions to vacate the "Secretarial Procedures."

Dated: June 14, 2019

GREINES, MARTIN, STEIN & RICHLAND, LLP

By: ____s/ Robert A. Olson ____
Robert A. Olson
Co-Counsel for Plaintiffs

SLOTE LINKS *&* BOREMAN, LLP

By: ____s/ Robert D. Links____
Robert D. Links
Co-Counsel for Plaintiffs

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached REPLY BRIEF FOR CLUB ONE CASINO, INC., dba CLUB ONE CASINO; and GLCR, INC., dba THE DEUCE LOUNGE AND CASINO AS APPELLANTS:

(1) complies with Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,767 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2013, in 14-point Times New Roman font.

Dated: June 14, 2019 **SLOTE LINKS *&* BOREMAN, LLP**

By: _____s/ Robert D. Links_____
Robert D. Links
Co-Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 14, 2019 **SLOTE LINKS *&* BOREMAN, LLP**

By: _____s/ Robert D. Links_____
Robert D. Links
Co-Counsel for Plaintiffs