No.

In The Supreme Court of the United States of America

JAMES CLAY AND AUDREY OSCEOLA,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court is presented with a case of first impression regarding the authority of a Federally recognized Indian Tribe, the Miccosukee Tribe of Indians of Florida ("Miccosukee Tribe" or "Tribe"), to determine how to compensate its members for the use of their lands. The Bureau of Indian Affairs ("BIA"), which has exclusive authority over matters arising out of Indian affairs, has never challenged the Miccosukee Tribe's longstanding compensation method. Rejecting the authority of the Miccosukee Tribe and the BIA, the Courts below adopted the position of the Internal Revenue Service ("IRS"), which recast payments for the use of tribal lands as taxable distributions of net gaming revenue.

The question presented is: Whether the clear language of Title 25 of the Code of Federal Regulations, and the exclusive authority over federally recognized Indian Tribes granted to the Secretary of Interior under 25 U.S.C. § 2, controls the determination of how the Miccosukee Tribe compensates its members for the use of their lands, to the exclusion of any other federal agency, including the Internal Revenue Service

RULE 29.6 STATEMENT

No corporation is a party to this case and no corporate disclosure statement is required

Petitioners James Clay and Audrey Osceola are enrolled members and citizens of the Miccosukee Tribe of Indians of Florida and are individually and collectively pursuing this action in their individual capacity.

PROCEEDINGS BELOW

The following proceedings are directly related to this petition

Clay and Osceola v. Commissioner, No. 19-14441 (11th Cir.), Opinion filed on March 16, 2021 and reported at 990 F.3d 1296 (2021), affirming the judgment of the United States Tax Court.

Clay and Osceola v. Commissioner, Nos. 13104-11; 7870-13 (United States Tax Court), Opinion filed on April 24, 2019, reported at 152 T.C. 223 (2019) after a trial on the merits.

TABLE OF CONTENTS

APPENDIX CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners James Clay and Audrey Osceola respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") is reported at *Clay and Osceola v. Commissioner*, 990 F.3d 1296 (2021) and is reprinted in the Appendix (App., *infra*, 1a).

The opinion of the United States Tax Court ("Tax Court") is reported at *Clay and Osceola v. Commissioner*, 152 T.C. 223 (2019) and is reprinted in the Appendix (App., *infra*, 12a).

STATEMENT OF JURISDICTION

On March 16, 2021, the Eleventh Circuit filed its opinion, affirming the opinion entered by the Tax Court on April 24, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Petition for a Writ of Certiorari is timely based on this Court's General Order, issued on March 19, 2020, extending the filing deadline to 150 days from the date of the order of the Eleventh Circuit, or August 13, 2021.

STATUTORY PROVISIONS INVOLVED

Relevant portions of 25 U.S.C. §§ 2, 2710 and 25 C.F.R. Parts 162 and 290 are set forth in the Appendix. App., *infra*, 50a-60a.

STATEMENT OF THE CASE

Petitioners James Clay and Audrey Osceola are enrolled members and citizens of the Miccosukee Tribe of Indians of Florida ("the Tribe"). In 1962, Congress formally recognized the Tribe as a federally recognized Indian Tribe. Pursuant to the laws, traditions and customs of the Tribe, as well as a written Constitution that was approved by the United States, the enrolled members of the Tribe hold an undivided interest in all property, lands, and revenue generated from the use, lease, or other disposition of said lands.

Every aspect of how the Miccosukee conduct business is vested in the General Council of the Tribe.[1] No action may be undertaken by any elected official or Tribal representative, including valuation, leasing, and determination of how the Tribal lands are used, without the members of the Tribe as undivided owners of the lands approval.

The Tribe exercises all powers of inherent sovereignty relating to its own self-determination created under the Tribal Constitution as well as additional authority set out in the policies of the Bureau of Indian Affairs ("BIA") under the authority of the Secretary of Interior ("Secretary").[2]

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[1] The General Council of the Miccosukee was later codified for the benefit of the United States in the Miccosukee Constitution as "all adult members 18 years of age or older." Miccosukee Const., Art. III, § 1.

[2] Policies of the BIA and Department of Interior are set out in Title 25 of the Code of Federal Regulations and Title 25 of the United States Code.

Actions taken by the Tribe and approved by the General Council are also approved by the Secretary or its duly designated representative. When the Tribe interprets provisions, policies, or statutes relating to Tribal activities it does so under its sovereign authority and the formal or informal approval of the BIA. Federal law has granted exclusive authority over "all matters arising out of Indian relations" has been granted by Congress to the Secretary. 25 U.S.C. § 2.

As citizens of the Tribe the Petitioners are entitled to share in any revenue generated from the use, exploitation, or other revenue associated with any and all Tribal resources, including leasing or use of Tribal lands. The Tribe determined the process for which it would permit the use of Tribal lands, including compensation for said use, in accordance with applicable federal law and the mandates of the Tribe's constitution and distributed revenue from the use of its lands to the Petitioners.

Title 25 of the Code of Federal Regulations sets out the policies and procedures under which the Secretary of Interior and its designated representatives carries out the day to day management, approval, and implementation of laws and regulations applicable to federally recognized Indian Tribes. Title 25 sets out at Part 162 the process and procedure under which a federally recognized Tribe uses and permits the use of its lands. See generally 25 C.F.R. pt. 162.

Included in Part 162 is the authority for the Tribe to exercise its own sovereign authority when leasing or permitting the use of its lands. Part 162 specifically authorizes and permits a Tribe, among

other items, to determine the fair market value, waive fair market value, enter into written or unwritten agreements and to utilize Tribal culture, tradition and laws in forming agreements for the use of Tribal lands. *"There is no model business lease form because of the need for flexibility in negotiating and writing business leases."* 25 C.F.R. § 162.402 (emphasis added).

The Tribe operates a gaming facility on the undivided lands held in the name and for the benefit of the citizens of the Tribe. Gaming on Indian lands is governed by the Indian Gaming Regulatory Act ("IGRA"). Pub. L. 100–497, 102 Stat. 2467; 25 U.S.C. § 2701. IGRA contains very specific language regarding the use or disbursement of revenue received by a federally recognized Tribe from any gaming activity. Of note, and particularly applicable to this case, is the distribution of revenue to members of the gaming Tribe commonly referred to as "per capita" payments.

IGRA mandates that prior to any distribution of "net" revenue from gaming activity the gaming Tribe must submit for approval a revenue allocation plan ("RAP") to the Bureau of Indian Affairs and the National Indian Gaming Commission ("NIGC"). 25 U.S.C. § 2710(b)(3)(B). The requirement for submitting a RAP is mandatory and cannot be waived and further prevents or prohibits distributions of "net" gaming revenue by a gaming Tribe to its members in the absence of an approved RAP.

The Tribe has been conducting gaming on lands held in undivided interest by its members since 1994. IGRA and the NIGC have utilized and modeled much

of the initial and current regulations applicable to Tribal gaming based on the Tribe's initial agreements and internal controls. The Tribe has regularly been audited each year since beginning gaming on its lands. To date there has never been a RAP submitted by the Tribe to the NIGC or Secretary and no demand for a RAP has been sent to the Tribe.

The Tribe collects fees from any person or entity that uses the lands belonging to the Tribe. The fees are like lease payments for the use of the lands. Given the undivided interest of all the members in Tribal lands the Tribe and its members determined that formal leasing, written leases, or other structural agreements was not feasible as it would require 600 members to sign on any lease agreement. The determination of the value, method and means of compensating the members of the Tribe has always been a percentage-based fee and was established within the policies of the BIA as well as the Tribal Constitution. This percentage-based fee, often referred to as a "gross receipts tax," was determined by the Tribe to be the best way to determine the method, manner and value relating to the use of its lands.

Twenty years after the Tribe began operating a gaming facility and after twenty years of audits and approval by the Secretary of the method, manner and means for compensating the Tribe's members for use of their undivided property interest, the Internal Revenue Service questioned the taxability of the "gross receipts tax." Specifically, the IRS rejected the Tribe's determination of how to value and compensate for the use of its lands, rejected the language set out in Title 25 of the Code of Federal Regulations and

imposed its own interpretation of the method, manner and means of leasing Tribal lands.

The IRS ignored well settled law on interpretation of statutes applicable to Tribes and the preceding twenty-plus years of BIA agency action along with the clear statutory language applicable to Tribes and determined that any and all revenue generated from a gaming facility was includable as taxable income, regardless of where the funds were generated or what the funds were related to in payment or determination by the Tribe.

The Tax Court affirmed the statutory interference by the IRS into an area of law and policy reserved exclusively to the Secretary of Interior. The Eleventh Circuit, while nominally acknowledging that *courts construe statutes "liberally" in favor of American Indians and resolve reasonable ambiguities to their benefit,* rejected the application of the clear language of statutes governing Tribal authority to determine the method, manner and compensation for the use of its lands and affirmed the Tax Court's ruling. *Clay v. Commissioner*, 990 F.3d 1296, 1301 (11th Cir. 2021).

REASONS FOR GRANTING THE WRIT

I. This Court must clarify the conflict between the Commissioner of Revenue and the Secretary of Interior as it relates to matters arising out if Indian Relations.

The text of 25 U.S.C. § 2 clearly grants exclusive authority to the Secretary of Interior over all matters arising out of Indian Affairs. This mandate is without limitation other than by actions Congress or the President. *Ibid.*

Under the plain language of 25 U.S.C. § 2, the BIA, as the designated representative of the Secretary, has developed and implemented policies and procedures applicable to federally recognized Indian Tribes which are contained in Title 25 of the Code of Federal Regulations. In addition, federally recognized Tribes retain inherent sovereign authority to govern themselves, enact laws, interpret statutes and take over the management of their own affairs from the BIA.

The Tribe, under this Congressional authority, became one of the first Indian Tribes to contract the management of virtually all aspects of day to day operations previously handled by the BIA. At the time of its federal recognition, the Tribe also approved a Tribal constitution that was submitted to and approved by the BIA. Approval of the Tribe's actions in managing its affairs, property and members did not require approval by the BIA to become effective and enforceable.

In *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985) this Court rejected the argument that the law requires secretarial approval of all tribal government actions. This Court specifically stated that the Indian Reorganization Act of 1934 (IRA) authorized any Indian Tribe to adopt a constitution, and that tribal ordinances adopted pursuant to a tribal constitution did not require approval of the Secretary of the Interior. *Kerr-McGee Corp.*, 471 U.S. at 198–199.

The Miccosukee Tribe's Constitution was adopted in accordance with the provisions of IRA and does not require Secretarial approval of Ordinances and resolutions passed by the General Council. The Tribe

has always been considered a distinct political community retaining its inherent rights of self-government. The Tribe did not surrender its authority to the Federal Government but rather it *retained "its right to self-government, by associating with a stronger [government] and taking its protection."* *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 159 (1982) (emphasis added). It retains this power until Congress divests it from them.

A. Statutes Applicable to Use of Tribal Lands are Controlling

"Indian tribes retain elements of sovereign status, including the power to protect tribal self-government and to control internal relations." *Smith v. Babbitt*, 100 F.3d 556, 558 (8th Cir. 1996) (citing *Montana v. United States*, 450 U.S. 544, 564 (1981)). Therefore, "[f]ederal courts have consistently affirmed the principle that it is important to guard 'the authority of Indian governments over their reservations.'" *Longie v. Spirit Lake Tribe*, 400 F.3d 586, 589 (8th Cir. 2005) (quoting *Williams v. Lee*, 358 U.S. 217, 223 (1959)).

The clear language of 25 C.F.R. Part 162 permits an Indian Tribe to establish the way its lands are leased and used, including the method of compensation for such use. 25 C.F.R. § 162.016. Further, the Tribe could contract the duties of the Bureau of Indian Affairs away from the Secretary and assume all responsibility for self-governance including the right to interpret and apply the rules, regulations and statutes governing Indian country to their own lands and day-to-day operations. 25 C.F.R. § 162.018.

The General Council and the Business Council, exercising powers of self-government and in

compliance with 25 C.F.R. Part 162, determined that they would agree to compensate Tribal members for the use of their lands by means of a "gross receipts fee."

> Indian tribes, adult Indian landowners, and emancipated minors, may consent to a lease of their land, *including undivided interests* in fractionated tracts.

25 C.F.R. § 162.013(a) (emphasis added).

The General Council determined the valuation, method and manner for valuing and compensating for the use of property belonging to the Petitioners in an undivided interest by following the clear language found in Title 25. The General Council determined that the best method of compensation was the imposition of a gross receipts fee that allocated payment of a percentage of revenue generated by any business conducted on the land. 25 C.F.R. § 162.420.

The Eleventh Circuit ignored that clear language and the well-settled law of interpreting statutes in favor of Indian Tribes, and it also ignored what was being transacted between the gaming operation and other businesses, when it labeled all revenue as "casino revenue" here. *Clay*, 990 F.3d at 1302.[3]

The court further incorrectly affirmed the limited determination of the Tax Court that there was no lease agreement when, in fact, there was undisputed evidence that monthly percentages were paid to the Tribe from all revenue sources including hotel,

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[3] In point of fact the revenue included hotel, restaurant, rentals, merchandise and a host of other revenue generators which were wholly unrelated to gaming.

restaurants, airboat operations, gas stations and gaming facilities. These percentage payments were listed as "gross receipt" payments on all records of the operations. The very narrow determination that there was no "written lease" by the Tax Court, later affirmed by the Eleventh Circuit, ignores the preceding 24 years of land use approved by the NIGC and BIA approving and permitting unwritten use agreements for Indian lands under Title 25. Further, the Courts minimizing Tribal authority to recognize only "written leases[s]" ignores the legal requirement 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) (emphasis added).

There is no question that the clear and unambiguous language of Title 25 that governs leases within Indian country not only permits, but mandates approval and acceptance of land-use agreements that are not contained within conventional written leases. The very language of 25 C.F.R. § 162.402 states that there is no model lease requirement and further acknowledges the need for flexibility in determining leasing within Indian country.

The lower courts have ignored the clear meaning of the statute and instead of liberally construing the Tribe's compliance with applicable law have narrowly tailored the analysis to a very limited written lease construct when in fact no such written lease requirement is provided.

Ignoring well settled principals of statutory analysis and the clear language contained in 25 C.F.R. Part 162 has led to confusion and ignores

almost 30 years of Secretarial acknowledgment of the method, manner, and means by which the Tribe has utilized its lands and compensated its members for the use of their lands under the Congressionally approved Tribal constitution.

It is clear that the IRS does not have control, management, or other oversight in matters arising out of Indian relations. 25 U.S.C. § 2. Instead, the statutes and policies of the BIA exclusively control the use of Tribal lands in even a narrow interpretation. Any confusion or question of interpretation to the contrary should be resolved in favor of the Tribe and the manner in which the Tribe determines the method for compensating for the use of the Tribal members undivided interest in land should control.

B. The Commissioner's Interpretations of Applicable Statutes Create an Impermissible Conflict and Violate Deference to the Department of Interior's Exclusive Authority over all Indian Relations.

In support of the position taken by the Commissioner, the lower courts have ignored well settled and clear statutory language governing the method, manner and means by which an Indian Tribe determines the use and compensation for use of its lands. The Commissioner, as affirmed by the lower courts, recognized only "written leases" as support for the compensation metric that was approved by the Tribe and permitted by the BIA.

The Commissioner and lower courts imposed its own definition and understanding of "net revenue" and "gross revenue" and ignored the definitions

provided within the IGRA. Further, in support of its decision, the Eleventh Circuit ignored undisputed testimony of multiple revenue sources that generated the "gross receipts fee" and simply lumped all revenue together as "gaming revenue" in support of its conclusion to include *all* revenue regardless of source as taxable income.

The determination and inclusion of "all revenue" generated in the gaming facility as "gaming revenue" directly contradicts prior revenue rulings from the IRS. See Rev. Rul. 62-16, 1962-1 Cum. Bull. 7 and Rev. Rul. 60-377, 1960-2 Cum. Bull. 13. While the Eleventh Circuit Court acknowledge the prior conflicting revenue rulings excluding or at the very least permitting separation of revenue from different sources on the same Indian land the Court incorrectly determines that it is not bound by those rulings. This position is contrary to well settled law in providing deference and enforcement of agency actions. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).

The Commissioner, Tax Court and the Eleventh Circuit dismissed the clear language of 25 U.S.C. § 2701 relating to distribution of revenue from gaming activity and imposed a very narrow interpretation of the statute. In essence, the review and interpretation of what constituted a "lease" focused solely on what the Court and Commissioner believed a lease to be and ignored what the BIA and the Tribe had been interpreting as a lease for the preceding twenty plus years.

Contrary to the requirement of liberally construing statutes in favor of the Tribe, the end result was to

supersede the exclusive authority of the BIA granted by Congress under 25 U.S.C. § 2 without deference to the statutory language governing Indian Tribes. Even the very narrow definitions of the IRS Internal Revenue Manual guidelines narrowly define "per capita payments" as those payments "made or distributed to all members of the tribe or to identified groups of members which are paid directly from the ***net revenues*** of any gaming activity." IRS Internal Revenue Manual, at 4.88.1.4.1(2) (emphasis added), https://www.irs.gov/irm/part4/irm_04-088-001#idm139688261606176 (last visited August 12, 2021). This too was ignored by the court even though the language of 25 U.S.C. § 2710 indicated otherwise.

The regulations of the Department of Interior, Bureau of Indian Affairs, define "per capita payment" as "the distribution of money ... which is paid directly from the ***net revenues*** of any tribal gaming activity." 25 C.F.R. § 290.2(2)(2) (emphasis added). The end result was to ignore action of the agency in charge of Indian relations and impose a separate standard and definition without consideration or deference to the BIA.

C. Deference to Agency Action as Determined by the Department of Interior should be granted.

It appears from the lower decisions in this case that the statutes and interpretation thereof by the Department of Interior through the BIA have been ignored. Instead, it is the Commissioner's definitions and statutory construction that is used to support the end result.

Courts have developed a number of doctrinal tests for conducting this inquiry, with varying amounts of judicial "deference" given to an agency's interpretation of the relevant statute. When reviewing a challenge to an agency's interpretation of a statute that it administers and has the force of law, courts apply the two-step framework outlined by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984).

Pursuant to that rubric, at "step one," courts examine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If so, "that is the end of the matter," and courts must enforce the "unambiguously expressed intent of Congress." *Id.* at 842-843. Petitioners respectfully submit that the clear language of 25 U.S.C. § 2 granting exclusive authority over Indian relations is the unambiguous expression of the intent of Congress as to which agencies interpretations should control.

Nonetheless, if the lower courts had found ambiguity or that Congress was silent on which agencies authority controlled Indian relations, then "step two" requires courts to defer to a reasonable agency interpretation even if the court would have otherwise reached a contrary conclusion. *Chevron*, 467 U.S. at 843. This deference is appropriate in certain circumstances because Congress has delegated "authority to the agency to elucidate a specific provision of the statute" and an agency may possess significant expertise concerning the law's administration.

Petitioners again submit that the lower courts ignored this analysis and instead imposed their own determination favoring one agency over another when the clear language of the statute indicated Congressional intent to grant to the Department of Interior sole and exclusive authority over Indian relations. In doing so, the lower courts have created a conflict in the final analysis of what has transpired to date and which requires clarification and resolution from this Court.

CONCLUSION

This case gives the Court the opportunity to resolve a conflict between two agencies relating to issues that, while similar at first blush, present very unique facts wound up in Tribal culture and interaction with the United States that predate even the creation of the Commissioner of Revenue's office. The unique nature of the relationship between Indian Tribes and the United States requires clarity as to which agency will ultimately control interpretation of statutes in conflict.

It is clear that the Department of Interior through the BIA has exclusive authority over all matters arising out of Indian Relations. Interpreting this authority the BIA has created policies and procedures for how an Indian Tribe may exercise inherent sovereignty in using its lands. It is not constrained to conventional ideas of written leases and instead relies on flexibility to meet the particular needs of the specific Tribe.

The Commissioner has ignored the exclusive authority of the Department of Interior over Indian relations and imposed a very narrow definition of

compensation for use of land. Giving no deference to the actions of the other agency the lower courts have adopted this approach and ignored statutes and law which at the very least create a more liberal approach to interpreting statutes applicable to Indian Tribes.

Writ of Certiorari and a review of which agency statutes and action controls Indian relations would at the very least clarify this issue and at the very most provide direction for future review by lower courts. The Petition should be granted.

Respectfully submitted.

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