THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2012-CP-40-00626

The Catawba Indian Nation a/k/a
The Catawba Indian Nation of South Carolina a/k/a
The Catawba Indian Tribe of South Carolina ..... Appellant,

vs.

State of South Carolina and Mark Keel, in
His office capacity as Chief of the South
Carolina Law Enforcement Division ..... Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE

I. Did the Circuit Court err in granting summary judgment in favor of the State by holding that the State's passage and implementation of the Gambling Cruise Act did not amount to an authorization of video poker and electronic gaming that necessarily permits the Catawba Nation to conduct the same type of gaming on its Reservation, pursuant to the plain language of § 16.8 of the Agreement?

STATEMENT OF THE CASE

On January 4, 2012, the Catawba Indian Nation ("the Catawba Nation") filed this action against the State of South Carolina and Mark Keel, in his official capacity as the Chief of the State Law Enforcement Division (collectively, "the State"). The Complaint sought a declaratory judgment interpreting a provision in the 1993 Settlement Agreement ("the Agreement") between the State and the Catawba Nation. Specifically, the Catawba Nation sought a declaration that under the clear terms of the Agreement, it had the right to offer video poker and electronic gaming devices on its Reservation identical to those gaming activities currently authorized by the State through the Gambling Cruise Act, S.C. Code Ann. § 3-11-100 *et seq*. The Catawba Nation also sought an injunction restraining law enforcement officials from acting on threats to arrest and prosecute tribal members for conducting such gaming until a court could issue a formal order and declaration as to the rights of the parties.

Before the hearing on the motion for temporary injunction, the parties agreed to seek expedited resolution of the declaratory judgment action, and the Catawba Nation agreed to refrain from engaging in any gaming operations pending an order from the court. The parties further stipulated that the underlying issues were purely matters of law and both parties filed motions for summary judgment. On April 2, 2012, the Honorable J. Ernest Kinard, Jr., Judge, Fifth Judicial Circuit, heard oral arguments from both parties. On April 23, 2012, the Circuit Court granted summary judgment to the State. On May 23, 2011, the Catawba Nation timely filed and served a Notice of Appeal.

STATEMENT OF FACTS

The State's historical treatment of the Catawba Indians has been one of inconsistency and interference at best. Unfortunately, that tradition permeates the State's current ad hoc application of gaming laws which the Agreement was specifically designed to remedy.

Upon arrival on the North American continent, Europeans encountered an indigenous population. In what became the colonies of South and North Carolina, the Europeans encountered the Catawba Nation. In 1760 and again in 1763, representatives of the King of England entered into certain treaties with the Catawba Nation, the terms of which granted the Catawba Nation exclusive occupancy of a 15 square mile territory on the northwest frontier of the South Carolina colony, free from encroachment by colonists.

In 1840, the State of South Carolina, without the approval of Congress, purported to enter into a treaty with the Catawba Nation wherein the Catawba Nation agreed to exchange its then-existing 144,000-acre Reservation in South Carolina for a new Reservation in western North Carolina, on land to be purchased by the State of South Carolina. However, the State did not keep its promise—no new Reservation was purchased and conveyed to the Catawba Nation. Then, in or around 1843, the surviving members of the Catawba Nation were settled on 630 acres located within the original 144,000-acre Reservation.

Despite efforts to seek redress for the loss of its land, no progress was made until 1980, when the Catawba Nation filed suit in federal court seeking the return of the treaty land and damages for trespass. *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986). This massive land-claim litigation was ultimately settled after a decade of negotiations, and the terms of the settlement are set forth in a Memorandum of

Settlement and Agreement in Principle ("the Agreement"). The terms of the Agreement are codified in state legislation ("State Act"), S.C. Code Ann. §§ 27-16-10 to -140 (2007), and are the subject of federal implementing legislation ("Federal Act"), 25 U.S.C. §§ 941-941n. The Federal Act provides that the Agreement and corresponding State Act are to be complied with as if they were federal legislation. 25 U.S.C. § 941b(a)(2).

At issue in this case is § 16.8 of the Agreement, which provides:

> The [Catawba Nation] may permit on its Reservation video poker or similar electronic play devices to the same extent that the devices are authorized by State law.

When the Agreement was executed in 1993, state law authorized video poker gambling. After the State banned such gambling in 1999 by enacting S.C. Code Ann. § 12-21-2710, the Catawba Nation sought declaratory relief to interpret its gambling rights under the Agreement. In *Catawba Indian Tribe v. South Carolina*, 372 S.C. 519, 642 S.E.2d 751 (2007), the South Carolina Supreme Court held that the Catawba Nation's gambling rights under the Agreement are subject to subsequent changes in state law. As a result, the Court held that the Catawba Nation could not "currently" offer video poker on its Reservation. *Id.* at 527 n.7, 642 S.E.2d at 756 n.7.

In 2005, the South Carolina General Assembly passed the Gambling Cruise Act, S.C. Code Ann. § 3-11-100 *et seq.* This Act delegates to local governments

> [t]he authority conferred to this State by the United States Congress pursuant to the Johnson Act ... includ[ing] the power to regulate or prohibit gambling aboard gambling vessels while such vessels are outside the territorial waters of the State, when such vessels embark or disembark passengers within their respective jurisdictions for voyages that depart from the territorial waters of the State, sail into United States or international waters, and return to the territorial waters of the State without an intervening stop.

S.C. Code Ann. § 3-11-200(A). The Gambling Cruise Act has its genesis in Congress's

1992 amendment of the Johnson Act, 15 U.S.C. §§ 1171-1178, to lift the general federal prohibition against gambling on United States flag vessels, including so-called "cruises to nowhere." *See Casino Ventures v. Stewart*, 183 F.3d 307, 309 (4th Cir. 1999). However, recognizing "the vital state regulatory interests in gambling controls," *id.* at 311, Congress granted states the authority to prohibit cruises to nowhere. *See* 15 U.S.C. § 1175(b)(2)(A). "[B]y enacting section 1175 Congress extended the reach of state police power beyond state territorial waters: that provision permits states to change the content of federal law with respect to cruises to nowhere." *Casino Ventures*, 183 F.3d at 311.

The Gambling Cruise Act is South Carolina's legislative response to the Johnson Act amendments. It delegates the State's police power to the coastal counties and municipalities, permitting them "to regulate or prohibit" cruises to nowhere.[1] S.C. Code Ann. § 3-11-200(A). The Gambling Cruise Act permits "[g]ambling" or "gambling device[s]," including but not limited to "slot machines, punchboards, video poker or blackjack machines, keno, roulette, craps, or any other gaming table type gambling or poker, blackjack, or any other card gambling game." *Id.* § 3-11-100(2).

[1] Pursuant to the Gambling Cruise Act, Horry County and the City of North Charleston authorized gambling cruises in 2006 and 2010, respectively.

SUMMARY OF ARGUMENT

The Agreement provides that the Catawba Nation "may permit on its Reservation video poker or similar electronic play devices to the same extent that the devices are authorized by State law." Agreement § 16.8; *accord* S.C. Code Ann. § 27-16-110(G). Since the Agreement was executed and enacted, the Catawba Nation's gaming rights have marched in lock-step with state law. When the Agreement was approved in 1993, the Catawba Nation was authorized to offer video poker gaming on its Reservation. In 1999, when the State banned certain types of gaming machines (including video poker machines), *see* S.C. Code Ann. § 12-21-2710, the Catawba Nation sought declaratory relief to interpret its gaming rights under the Agreement in light of this statutory change. In *Catawba Indian Tribe v. South Carolina*, 372 S.C. 519, 642 S.E.2d 751 (2007), the South Carolina Supreme Court held that the Catawba Nation's gaming rights under the Agreement were subject to subsequent changes in state law. As a result, the Court held that the Catawba Nation "may not *currently* allow [video poker] devices on its Reservation." *Id.* at 527 n.7, 642 S.E.2d at 755 n.7 (emphasis added).

However, following the initial repeal of video poker, South Carolina has since authorized the use of the same gaming devices through the Gambling Cruise Act. This triggered the Catawba Nation's gaming rights under the Agreement as interpreted by the Court in *Catawba Indian Tribe*. Accordingly, the Catawba Nation is merely seeking the rights granted to it under the Agreement. The Circuit Court erred in denying the Catawba Nation's motion for summary judgment.

ARGUMENT

I. The Gambling Cruise Act amounts to an authorization of video poker and electronic gaming within the meaning of § 16.8 of the Agreement. Accordingly, the Catawba Nation is entitled to offer the same type of gaming on its Reservation.

A. Standard of Review

1. Summary judgment is reviewed de novo.

When reviewing a grant of summary judgment, an appellate court applies the same standard used by the trial court. *Lanham v. Blue Cross and Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *Tupper v. Dorchester County*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo. *Catawba Indian Tribe*, 372 S.C. at 524, 642 S.E.2d at 753.

2. Any ambiguity in the Agreement must be resolved in favor of the Catawba Nation.

In *Catawba Indian Tribe*, the South Carolina Supreme Court held that § 16.8 of the Agreement is unambiguous with respect to the applicability of the State's then-existing gambling laws. *See Catawba Indian Tribe*, 372 S.C. at 526, 642 S.E.2d at 754. The words of this statutorily adopted Agreement should be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the Agreement's operation. *See Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). If a statute's language is plain, unambiguous, and conveys a clear meaning, then "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578,

581 (2000).

To the extent this Court may determine that § 16.8 is ambiguous with respect to the Gambling Cruise Act, that ambiguity must be resolved in favor of the Catawba Nation. "[S]tatutes 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); *see White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980) ("Ambiguities in federal law have been construed generously in order to comport with these traditional notions of [tribal] sovereignty and with the federal policy of encouraging tribal independence."). Further, Congress specifically provided that the Agreement and the implementing State Act "shall be complied with in the same manner and to the same extent as if they had been enacted into Federal law," making it clear that the same methods of construction apply. 25 U.S.C. § 941m(e); *see Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979) (holding that where a state law is enacted under the authority of a federal law readjusting jurisdiction over Indians, that state law is reviewed under the same standards as if it were a federal law relating to Indians); *State v. Major*, 725 P.2d 115, 121 (Idaho 1986) (applying the preference in favor of Indian tribes to state statute). Thus, any decision by this Court interpreting the Agreement must resolve any ambiguity in favor of the Catawba Nation.

In ratifying the Agreement, Congress explicitly noted: "It is the policy of the United States to promote tribal self-determination and economic self-sufficiency and to support the resolution of disputes over historical claims through settlements mutually agreed to by Indian and non-Indian parties." 25 U.S.C. § 941*l*(a)(1). This Court should

interpret the Agreement as a protection for the Catawba Nation and it should prohibit the State's current attempts to circumvent its obligation to the Catawba Nation while authorizing games to others. Such a decision would be both morally correct and would comport with Congress's intention to promote the Catawba Nation's economic self-sufficiency by providing the Catawba Nation with a meaningful substitute for the rights enjoyed by virtually all other Indian tribes under the Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, but which the Catawba Nation surrendered in exchange for the gaming rights set forth in the Agreement—the very rights the State now seeks to nullify.

B. Under § 16.8 of the Agreement, the adoption of the Gambling Cruise Act entitles the Catawba Nation to operate video poker and other similar electronic devices on its Reservation.

The Federal Act ratifying the Agreement provides that "[t]he Indian Gaming Regulatory Act (25 U.S.C. 2701 *et seq.*) shall not apply to the [Catawba Nation]." 25 U.S.C. §941*l*(a).[2] It further provides:

> The [Catawba Nation] 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. Except as specifically set forth in the Settlement Agreement and the State Act, all laws, ordinances, and regulations of the State, and its political subdivisions, shall govern the regulation of gambling devices and the conduct of gambling or wagering by the [Catawba Nation] on and off the Reservation.

25 U.S.C. §941*l* (b). Similarly, the Agreement provides:

> *Except as specifically provided in the Federal Implementing legislation and this Agreement*, all laws, ordinances, and regulations of South Carolina and its political subdivisions govern the conduct of gaming or wager by the [Catawba Nation] on and off the Reservation.

Agreement § 16.2 (emphasis added); *accord* S.C. Code Ann. § 27-16-110(A).

Although the Agreement provides that the State's gaming laws and regulations

[2] The IGRA establishes a comprehensive scheme of federal regulation of gaming on Indian lands.

apply to the Catawba Nation, there are important exceptions. First, the Agreement provides the Catawba Nation with rights to offer bingo both on and off of its Reservation. Agreement § 16.3-16.7, 16.9; *accord* S.C. Code Ann. § 27-16-110(B)-(F), (H).

Second, and more importantly for purposes of this litigation, the Agreement contains a broad exception for "video poker or similar electronic play devices." That provision vests the Catawba Nation with the right to

> permit on its Reservation video poker or similar electronic play devices *to the same extent* that the devices are *authorized by State law*.

Agreement § 16.8 (emphasis added); *accord* S.C. Code Ann. § 27-16-110(G). As the South Carolina Supreme Court recognized in *Catawba Indian Tribe,* this provision

> clearly binds [the Catawba Nation] to any subsequent state legislative enactments affecting video poker devices. The inclusion of the phrase "to the same extent that the devices are authorized by state law" is indicative of the parties' intent for Respondent to be subject to any future changes in state law regarding video poker devices.

372 S.C. at 529, 642 S.E.2d at 756.

While *Catawba Indian Tribe* dealt with a law that restricted gaming, its rationale is not limited to the negative. Rather, it applies with equal force to subsequent laws that expand gaming rights. By ruling that the Catawba Nation is subject to "*any* subsequent enactments *affecting* video poker devices,"[3] the decision is clear that the Catawba Nation's gaming rights are not static but vary according to current law. Thus, pursuant to § 16.8 of the Agreement, any future State authorization of video poker or similar electronic gaming triggers an equivalent right for the Catawba Nation to offer those same devices on its Reservation. The Gambling Cruise Act defines "gambling" or "gambling device" to mean "any game of chance and includes, but is not limited to, slot machines,

[3] Emphasis added.

punchboards, video poker or blackjack machines, keno, roulette, craps, or any other card gambling game." S.C. Code Ann. § 3-11-100(2). It is thus plain that South Carolina has authorized video poker and similar electronic play devices pursuant to the Gambling Cruise Act.

1. The Gambling Cruise Act is an "authorization" of video poker and similar electronic play devices, as provided by § 16.8 of the Agreement

The State's enactment of the Gambling Cruise Act is an authorization that triggers the Catawba Nation's right to offer video poker and similar electronic devices on its Reservation pursuant to § 16.8. To "authorize" is "[t]o give legal authority; to empower.... To formally approve; to sanction." Black's Law Dictionary (9th ed. 2009). The power to decide whether to allow an activity falls within the plain meaning of "authorize." In the Gambling Cruise Act, the State has authorized gambling, including the use of gambling devices such as video poker machines, in coastal counties and municipalities that permit "cruises to nowhere." Under the Act, a coastal county or municipality can decide to lift the general ban on video gaming devices, thereby reaping substantial revenues from gambling cruises.[4] This is plainly an "authorization" of gambling devices for purposes of the Agreement.

The State has authority to regulate gambling within the federal waters that lie just beyond the state waters (the three mile limit), just as the State has certain regulatory authority on the federal trust lands that constitute the Catawba Nation's Reservation. In the case of the federal waters, the State has the authority to grant a right to gamble or to deny that right. Pursuant to the Gambling Cruise Act, the State has granted that right. In

[4] For example, the City of North Charleston imposes a surcharge on gambling cruises that must be paid to the City. N. Charleston, SC Ordinances § 10.5-1000.

other words, the State has authorized gaming (including video poker) and with it a gaming regulatory and tax scheme, which controls the gaming operations during the cruise and acts upon the related and supporting activities that occur on shore.

2. The "extent" of the authorization under the Gambling Cruise Act includes video poker and similar gaming devices.

This Court should also give the term "extent" its literal and ordinary meaning. In *Catawba Indian Tribe*, 372 S.C. at 526, 642 S.E.2d at 754-55, the South Carolina Supreme Court relied on *Black's Law Dictionary* (7th ed. 1999) for the definition of the term "permit." That same edition of *Black's Law Dictionary* defines the term "extent" as "amount, scope, range or magnitude." *Black's Law Dictionary* 1160 (7th ed. 1999); *see also Merriam-Webster's Collegiate Dict.* 1113 (11th ed. 2012) (defining "scope" as, *inter alia*, "range of operation"). Thus, the Catawba Nation may permit on its Reservation the same range of gambling activity as is authorized by the Gambling Cruise Act. The *extent* of games authorized by the Gambling Cruise Act includes, but is not limited to, "slot machines, punchboards, video poker or blackjack machines, keno, roulette, craps, or any other card gambling game." S.C. Code Ann. § 3-11-100(2).

3. A conclusion that the Gambling Cruise Act entitles the Catawba Nation to operate gaming devices is consistent with the intent of the Agreement.

Statutes must receive a practical, reasonable, and fair interpretation consonant with the purpose, design and policy of the lawmakers. *TNS Mills, Inc. v. South Carolina Dep't of Revenue*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998). Our Supreme Court in *Catawba Indian Tribe* recognized that the Catawba Nation would be subject to subsequent enactments of law by the General Assembly regarding gambling. Further, common sense and the inherent covenant of good faith and fair dealing are incorporated

into the Agreement. Today, private citizens, corporations, and local governments in South Carolina are profiting from the State's authorization of video poker and similar electronic devices while the State is attempting to defeat the Catawba Nation's attempt to exercise one of the specific rights it was granted in exchange for ceding its indigenous lands. The State's arguments and proposed actions are in direct contravention to the Agreement. The intent of the Agreement could not possibly be to allow the State to grant video poker and other gambling rights to some individuals and other entities (through the Gambling Cruise Act) and at the same time deny the Catawba Nation those same rights it possesses under the Agreement.

In short, the provisions of the Agreement, the State Act, and the implementing Federal Act must be construed *as they are written*, not as the State might wish they were written. The Agreement guarantees the Catawba Nation certain rights for parity with respect to otherwise authorized gaming devices which are solely conditioned upon it operating these games on the Reservation. This is consistent with the legislative intent and stated purpose of the Agreement to ensure the Catawba Nation had gaming rights on its Reservation that, at a minimum, would be equivalent (*i.e.*, to the same extent) to any State authorization of the use of video poker or similar electronic devices.

C. The Circuit Court improperly added a geographical restriction to § 16.8 of the Agreement.

The Circuit Court erred in ruling that "authorization" under the Agreement is limited by geography. The Circuit Court held:

> [N]otwithstanding the Gambling Cruise Act, gambling "devices" are currently not "authorized" by state law in South Carolina. Repeal of § 12-21-2710 would be necessary to "authorize" such devices. In the view of this Court, *Catawba Tribe's* reading is faithful to the Settlement Act language because "same" extent means "identical" or "exact" extent. However, this Court cannot agree with the Tribe's interpretation: that the

> State in authorizing gaming devices *outside the State* thereby triggered the Tribes's right to have the same devices on its Reservation.

R. p. 5 (emphasis added).

The Circuit Court's reasoning violates a cardinal rule of statutory interpretation by reading in language noticeably absent from the Agreement. Moreover, this interpretation improperly disregards the second sentence of § 16.8, which entitles the Catawba Nation to permit video gambling on the Reservation even if the Reservation "is located in a county or counties which prohibit the devices." This provision makes clear that geography is irrelevant: So long as the State has authorized gambling in a place over which the State has police power, the Catawba Nation may offer the identical gambling on its Reservation. The issue is "what" activity the State has authorized, not "where" the authorized activity may take place. There is absolutely no language in the Agreement or interpreting decisions that supports the Circuit Court's addition of a new, geographical element that the gaming activity "authorized" by State law must take place within the territorial boundaries of the State.

Further, under the Johnson Act as amended in 1992, the State has authority to regulate gambling within the federal territorial waters that lie beyond the State waters (the three mile limit) just as the State has certain regulatory authority on the federal trust lands that constitute the Catawba Nation's Reservation. In the Gambling Cruise Act, the State has exercised that authority by authorizing the use of certain gambling devices. In other words, the State has authorized gambling (including video poker) and with it a gambling regulatory and tax scheme, which permeates the gambling operations both during the cruise and on shore.

Moreover, in the Gambling Cruise Act, the State reserves for itself certain police

powers over cruises being operated in federal waters. As noted above, the State's powers pursuant to the Gambling Cruise Act include requirements that the cruise vessels report gambling revenues. Although the State takes the position in this litigation that the gambling activities on the cruise vessels are taking place outside the State's territorial waters, the State has undeniable police power jurisdiction to authorize, regulate and tax this gambling activity. Similar to the State's regulation of cruise vessels operating in federal waters, the Catawba Nation's Reservation is on land owned by the federal government and held in trust for the benefit of its members. Pursuant to the Agreement, the Reservation remains on federal land, but the State reserves for itself certain police powers over Reservation lands.

D. The Catawba Nation's gaming rights are unique.

The Catawba Nation's gaming rights are unique and a product of a massive settlement agreement wherein the Catawba Nation forfeited its claim to 144,000 acres of tribal land. Contrary to the Circuit Court's order, the Catawba Nation is *not* "like everyone else" in South Carolina with regard to gaming rights, and should not be treated "like everyone else."

The Catawba Nation enjoys a host of privileges and exceptions under its sovereign status which are clearly delineated in the Agreement.[5] No other South Carolina citizen receives those specific privileges, which flow directly from the negotiated Agreement, the only parties to which are the state and federal governments and the

[5] For example, members of the Catawba Nation are the beneficiaries of a Tribal Trust Fund, are exempt from certain federal and state income taxes, and are exempt from state and county taxes on personal property, including automobiles. In addition, the Catawba Nation's real property is exempt from county and state property taxes, sales on the Reservation are exempt from sales taxes, and it has the right to operate for-profit high-stakes bingo games.

Catawba Nation. The privileges are the result of decades of negotiations and a part and parcel of the covenants and good faith consideration exchanged for the Catawba Nation's willingness to forever cede rights to their indigenous lands.

This is especially true as it relates to gaming rights and privileges. First, the Agreement gives the Catawba Nation the right to offer high stakes bingo both on and off its Reservation. This gaming right is not enjoyed by "everyone else" or any other citizen of South Carolina. Agreement §§ 16.3-16.7, 16.9. Additionally, the Agreement entitles the Catawba Nation to offer "video poker or similar electronic play devices" on its Reservation to the same extent that the devices are authorized by State law. Agreement § 16.8. This too is a unique right possessed only by the Catawba Nation and not enjoyed by other citizens.

The Circuit Court misapprehended this fundamental concept and instead agreed with the State that the Catawba Nation's rights rise only to the level of "everyone else." It further held that the South Carolina Supreme Court had already determined that the Catawba Nation's gaming rights are exclusively "tied ... to § 12-21-2710, deeming all gambling devices *in South Carolina* contraband *per se*." R. p. 2. However, the Supreme Court most certainly *did not* hold that the Catawba Nation has no right to permit video gambling so long as § 12-21-2710 remains in effect. *Catawba Indian Tribe* stands only for the proposition that changes in the law, or exceptions and authorizations provided by law—such as the enactment of the Gambling Cruise Act—must be considered when determining the Catawba Nation's rights under the Agreement.

The Circuit Court's flawed reasoning on this issue appears throughout its Order:

> "Respondent relinquished any attributes of sovereignty relating to games of chance *in this state*. ... [T]hus, Plaintiff is treated like everyone else *in*

> *South Carolina* for purposes of gaming rights." R. p. 3 (emphasis in original; internal quotation marks omitted).
>
> "In short, the Catawbas agreed that the Indian Gaming Regulatory Act ... is inapplicable; thus, Plaintiff is treated like everyone else *in South Carolina* for purposes of gaming rights." R. p. 4.
>
> "The Tribe bargained away its sovereignty for purposes of gaming rights, and thus its gaming rights and those of other citizens are the same under State law." R. p. 8.
>
> "[P]ursuant to § 27-16-110(G) of the Settlement Act, it was concluded that the Tribe possesses the same video gaming rights as everyone else." R. p. 9.

The Circuit Court's Order disregards the terms of the Agreement. As part of the "bargain" referenced by the State, the Catawba Nation agreed that it would give up its claim to 144,000 acres of land and that it would not to be subject to IGRA in exchange for unique rights to offer video poker and similar electronic play devices on its Reservation *to the same extent* the State authorized such games to any other person or entity. This bargained-for right to conduct gaming on its Reservation is not shared by others in the State. "Everyone else" is not a party to the Agreement and thus the Catawba Nation is not in the same position as "everyone else."

The Catawba Nation was, and continues to be, a sovereign Indian Nation. No other citizen possesses the right to conduct video gaming on the basis that an identical gaming device is authorized by state law. The Catawba Nation waived its sovereign status with respect to gaming *under the IGRA* in reliance upon the promise and guarantee that it retained superior, delineated rights to gaming under the Agreement. The authorization is not limited to statewide blessings on gambling but is instead triggered by *any* State authorization of video poker or other electronic gaming. This is precisely what occurred with the passage of the Gambling Cruise Act. The Circuit Court's order thus

accomplishes exactly what the Agreement was designed to guard against: The State's arbitrary decision to allow a privileged few to conduct a gaming activity to the exclusion of the Catawba Nation who would otherwise possess that very right as a sovereign.

II. The Circuit Court's order is based on incorrect facts and law.

Aside from reaching the incorrect result, the Circuit Court made a number of factual and legal errors in its Order. These errors, and the correct facts and law, are set forth below.

A. This action is not barred by res judicata or collateral estoppel.

The State argued to the Circuit Court that this action is barred because the Catawba Nation *could* have raised its arguments in *Catawba Indian Tribe*. However, "[a] declaratory judgment is not res judicata as to matters not at issue and not passed upon." *Robison v. Asbill*, 328 S.C. 450, 453, 492 S.E.2d 400, 401 (Ct. App. 1997) (internal quotation marks omitted). "Suits for declaratory judgments do not fall within the rule that a former judgment is conclusive not only of all matters actually adjudicated thereby, but, in addition, of all matters which could have been presented for adjudication." 22A Am.Jur.2d *Declaratory Judgments* § 248. Res judicata "is only a bar to matters which were actually litigated, not those that might have been litigated." *Robison*, 328 S.C. at 453, 492 S.E.2d at 401.

In *Catawba Indian Tribe*, the Catawba Nation brought a declaratory judgment action on two specific issues: (1) whether the Catawba Nation had a continuing right to operate video poker despite a statewide ban on video gambling enacted after the execution of the Agreement in 1993, *see* S.C. Code Ann. § 12-21-2710; and (2) whether the State could lawfully require the Catawba Nation to charge or pay an entrance fee imposed by statute against its bingo operation. In this case, the Catawba Nation has

brought a declaratory judgment action on the issue of whether it is authorized to possess and operate, on its Reservation, video poker and similar electronic play devices authorized by the South Carolina Gambling Cruise Act, S.C. Code Ann. § 3-11-100 *et seq.* This action is predicated on the holding in *Catawba Indian Tribe* that the Catawba Nation's gambling rights are impacted by subsequent changes in state law. The issue raised in this declaratory judgment action was not raised, discussed, or decided in the previous case and therefore is not barred by the doctrines of res judicata or collateral estoppel.

B. The *Seminole Tribe* decision does not support the Circuit Court's decision.

The Circuit Court relied, in part, on *Seminole Tribe of Florida v. Florida.*, 1993 WL 475999 (S.D. Fla. 1993). In *Seminole Tribe*, the court was tasked with determining whether certain gambling activities were permitted in Florida, and therefore were a mandatory subject of negotiations between the State and the Tribe under the IGRA. *See* 25 U.S.C. § 2710(d)(3)(A) (requiring states to negotiate in good faith over tribal-state compacts authorizing certain forms of gaming). Focusing on Florida's public policy toward gambling, the court rejected the Tribe's argument that because Florida law specifically exempted certain cruise ships from a State law ban on the possession of gambling paraphernalia, the State's public policy was to permit such games. *Seminole Tribe* at 14.

Seminole Tribe is not relevant to this case, because the IGRA does not apply to the Catawba Nation. Instead of construing the very different language of the IGRA, this Court must apply the Agreement according to its plain terms.

C. The Circuit Court's Order contains numerous errors.

The Circuit Court's Order contains numerous factual and legal errors, as detailed below:

Order page 1, beginning line 11: "Specifically, the Tribe urges that *any State authorization of gambling devices* -- even for the narrow purpose of transportation of the devices for play in federal territorial waters – is sufficient to trigger a right to the same gaming devices on its Reservation."

Order at page 5, beginning line 14: "The Tribe's reading does not reflect, for purposes of § 27-16-110(G), the 'same extent the devices are authorized by state law' because gaming devices are banned completely, even as to possession, to everyone in this State."

Catawba Nation response: Possession of gaming devices is not completely banned by the State. The Gambling Cruise Act permits possession of such devices on ships docked at state ports, with *use of the machines* authorized once a gambling cruise ship enters federal waters over which the State has been delegated police powers. *See Casino Ventures*, 183 F.3d at 311.

Order at page 2, beginning line 1: "Since the Tribe is 'not required to have an ocean' on its Reservation, in order to be given 'equivalent' rights under the Gambling Cruise Act, it must have identical video gambling rights on its Reservation."

Order at page 5, beginning line 11: "However, this Court cannot agree with the Tribe's interpretation: that the State in authorizing gaming devices outside the State thereby triggered the Tribe's right to have the same devices on its Reservation."

Catawba Nation response: The Agreement entitles the Catawba Nation to permit video gambling "to the same extent" as authorized "by State law." Further, the

Agreement entitles the Catawba Nation to allow video gambling on its Reservation even when the county in which the Reservation is located prohibits video gambling. Thus, "authorization" under the Agreement clearly does not entail a geographic component and, by omission, rejects geographic limitations.

Order at page 2, beginning line 5: "The State argues that § 27-16-110(G) of the Settlement Act, as interpreted in *Catawba Indian Tribe v. State*, 372 S.C. 519, 642 S.E.2d 751 (2007), is dispositive."

Catawba Nation response: The Catawba Nation agrees that the outcome of this case turns on the language of § 16.8 of the Agreement. But the State's argument ignores the actual language of § 16.8, which plainly entitles the Catawba Nation to permit video gambling on its Reservation based upon the authorization of video gambling devices in the Gambling Cruise Act.

Order at page 2, beginning line 13: "The Gambling Cruise Act was effective when the *Catawba Tribe* action was filed."

Order at page 2, beginning line 24: "Since the Gambling Cruise Act was effective when the Tribe sued the first time, the State contends Plaintiff could have raised that argument then, but did not. Thus, the first judgment forecloses the bringing of the second."

Order at page 4, beginning line 8: "This Act was not argued in *Catawba Tribe*, but existed when the first action was brought."

Order at page 10, beginning line 3: "Plaintiff's first action was brought on July 28, 2005, almost two months after the Gambling Cruise Act took effect on June 1, 2005."

Order at page 10, beginning line 9: "But there, the Tribe *also had the opportunity* to make the same legal arguments it is now presenting."

Catawba Nation response: All of this is totally irrelevant because res judicata does not bar claims not raised in a previous declaratory judgment action. *Robison*, 328 S.C. at 453, 492 S.E.2d at 401 ("A declaratory judgment is not res judicata as to matters not at issue and not passed upon." (internal quotation marks omitted)); 22A Am.Jur.2d *Declaratory Judgments* § 248 ("Suits for declaratory judgments do not fall within the rule that a former judgment is conclusive not only of all matters actually adjudicated thereby, but, in addition, of all matters which could have been presented for adjudication.").

Order at page 2, beginning line 16: "In the State's view, the Supreme Court's decision tied the relevant Settlement Act language to § 12-21-2710, deeming all gambling devices *in South Carolina* contraband *per se*."

Catawba Nation response: The Supreme Court most certainly *did not* hold that the Catawba Nation has no right to permit video gambling so long as § 12-21-2710 remains in effect. *Catawba Indian Tribe* stands only for the proposition that changes in the law, or exceptions and authorizations provided by law—such as the enactment of the Gambling Cruise Act—must be considered when determining the Catawba Nation's rights under the Agreement.

Order at page 3, beginning line 23: "'Respondent relinquished any attributes of sovereignty relating to games of *chance in this state*.' ... [T]hus, Plaintiff is treated like everyone else *in South Carolina* for purposes of gaming rights."

Order at page 4, beginning line 1: "In short, the Catawbas agreed that the Indian Gaming Regulatory Act of IGRA (25 U.S.C. §§ 2701-2721) is inapplicable; thus, Plaintiff is treated like everyone else *in South Carolina* for purposes of gaming rights."

Order at page 8, beginning line 15: "The Tribe bargained away its sovereignty for purposes of gaming rights, and thus its gaming rights and those of other citizens are the same under State law."

Order at page 9, beginning line 25: "[P]ursuant to § 27-16-110(G) of the Settlement Act, it was concluded that the Tribe possesses the same video gaming rights as everyone else."

Catawba Nation response: The Circuit Court disregarded the terms of the Agreement. As part of the "bargain" referenced by the State, the Catawba Nation agreed that it would give up its claim to 144,000 acres of land and that it would not be subject to IGRA in exchange for unique rights to offer video poker and similar electronic play devices on its Reservation *to the same extent* the State authorized such games to any other person or entity. This bargained-for right to conduct gaming on its Reservation is not shared by others in the State. "Everyone else" is not party to the Agreement and thus the Catawba Nation is not in the same position as "everyone else."

The Catawba Nation was, and continues to be, a sovereign Indian Nation. Though the Catawba Nation may have agreed to forgo coverage by IGRA, it did so in exchange for the rights granted it under the terms of the Agreement, which it negotiated as a sovereign. Again, nothing in the Agreement imposes a geographical limitation on the State law authorization that entitles the Catawba Nation to exercise its negotiated right to permit video gambling on its Reservation.

Order at page 4, beginning line 12: "[T]he Gambling Cruise Act expressly states it does not repeal or modify state gambling laws."

Order at page 4, beginning line 23: "[T]he Gambling Cruise Act does not repeal any law relating to gambling."

Catawba Nation response: The Agreement is triggered when video gambling is "authorized by State law," and to the same extent of that authorization. In the Gambling Cruise Act, the State authorized various forms of gambling, including video gambling. It is irrelevant that the State did not repeal other restrictions on video gambling, and the Catawba Nation does not argue that any such repeal occurred.

Order at page 4, beginning line 17: "As noted, *Catawba Tribe* construed § 27-16-110(G) ["same extent"] as requiring authorization of video gaming devices *in the State*, not outside."

Catawba Nation response: The Supreme Court made no such determination.

Order at page 4, beginning line 21: "In *Catawba Tribe*, the Supreme Court thus rejected use of the longstanding rule of liberal construction in favor of Indian Tribes."

Catawba Nation response: The decision in *Catawba Indian Tribe* did no such thing. The Court held only that § 16.8 of the Agreement is not ambiguous with regard to S.C. Code Ann. § 12-21-2710. The Court did not hold (or even suggest) that the rule of liberal construction would not apply if the Agreement were ambiguous.

Order at page 5, beginning line 23: "In *Palmetto Princess, LLC v. Town of Edisto Beach*, 369 S.C. 50, 52 n.1, 631 S.E.2d 76, 77 n.1 (2006), the Supreme Court recognized that the Johnson Act, 15 U.S.C. § 1175(b)(1), specifies only that 'the possession or transport of a gambling device *within state territorial waters* is not a

violation of the prohibition [against gambling devices] if the device remains on board the vessel and is used only *outside those territorial waters.*'"

Catawba Nation response: This statement overlooks the fact that the 1992 amendments to the Johnson Act granted coastal states police power over federal territorial waters with respect to the use of gambling devices on cruises to nowhere. *See Casino Ventures*, 183 F.3d at 311. This enabled the State of South Carolina to authorize video gambling, as it did in the Gambling Cruise Act.

Order at page 7, beginning line 9: "'Each case interpreting the IGRA which found permission of a Class III gaming activity presented some form of explicit legislative approval of the activity *within the State's territory.*'" (quoting *Seminole Tribe v. Florida*, 1993 WL 475999, at *14 (S.D. Fla. Sept. 22, 1993) (emphasis added).

Catawba Nation response: *Seminole Tribe* is irrelevant. The Catawba Nation's rights to conduct video gambling are controlled by the Agreement, not by the IGRA. *See* Agreement § 16.1 ("The Indian Gaming Regulatory Act ... shall not apply to the Tribe.").

Order at page 8, beginning line 11: "Video gaming is currently banned in South Carolina and the Tribe's reliance upon legislation regulating 'cruises to nowhere' does not lift that ban. If it did, everyone in South Carolina could take advantage of the Gambling Cruise Act to have video gaming in the State. If state law has now 'authorized' these devices for the Tribe on the Reservation, it has authorized them for others."

Catawba Nation response: The Catawba Nation has never argued that the Gambling Cruise Act "lifted" a ban on video poker. What the Catawba Nation has consistently maintained is that the Agreement gives the Catawba Nation unique rights to

offer games on its Reservation to the same extent authorized by the Gambling Cruise Act, even when such games are prohibited elsewhere in the State. Again, "everyone" is not a party to the Agreement; not "everyone" in South Carolina has the benefit of the negotiated rights in the Agreement.

Order at page 10, beginning line 11: "*See, Eichman v. Eichman*, 285 S.C. 378, 329 S.E.2d 764 (1985) ... *Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 189, 417 S.E.2d 569, 571 (1992) ... *Aliff v. Joy Mfg. Co.*, 914 F.2d 39, 43 (4th Cir. 1990) ... *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 36, 512 S.E.2d 106, 110 (1999).

Catawba Nation response: None of the cited cases addressed the res judicata effect of a previous declaratory judgment action, and thus they have no application here.

Order at page 11, beginning line 17: "*Robison* ... is inapposite.... In *Robison*, unlike here, Plaintiff had *prevailed* in the first suit, and then later sought coercive relief in further support of its declaratory relief.... Thus, *Robison* provides no comfort to Plaintiff."

Catawba Nation response: The outcome in *Robison* did not turn on the plaintiff's success in the prior declaratory judgment action. The key to the *Robison* decision—and the reason why a declaratory judgment action "is not res judicata as to matters not at issue and not passed upon"—is that a declaratory judgment action does not involve coercive relief, such as money damages or a writ of mandamus. *See Robison*, 328 S.C. at 453, 492 S.E.2d at 401; *cf. Plum Creek Dev. Co.*, 334 S.C. at 39, 512 S.E.2d at 111 (holding that res judicata barred action for damages following petition for mandamus because mandamus, unlike a declaratory judgment, is a coercive remedy).

Order at page 12, beginning line 1: "Moreover, the same year the Court of Appeals decided *Robison*, that Court also rendered the decision in *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997).... Even though the first action involved a declaratory judgment, the *Pye* Court, nevertheless, concluded that res judicata applied."

Catawba Nation response: In *Pye v. Aycock*, the Court of Appeals held that a *factual finding* made by a jury in a declaratory judgment action was res judicata as to the same factual issue in a subsequent suit for damages. In contrast, *Catawba Tribe* involved only questions of law—no factfinder made any determination of fact in that case. The present declaratory judgment action also presents only questions of law. *Pye* is therefore inapplicable.

Order at page 2, beginning line 23: "Plaintiff asserts the same cause of action, only employing a different legal theory."

Order at page 9, beginning line 22: "The subject matter is the same: the identical provision of the Settlement Agreement."

Order at page 12, beginning line 15: "As the Court recognized, "[e]ven though the federal action is in the form of a declaratory judgment proceeding and the state action is under the ambit of international tort litigation, the subject matter is the same in both actions."

Order at page 12, beginning line 22: "Finally, even assuming that *res judicata* applies only as to claims actually litigated, the claim the Tribe raises here was actually litigated in the first suit."

Catawba Nation response: The claim in this litigation is quite different from the claim raised in *Catawba Indian Tribe*. In *Catawba Indian Tribe*, the claim was that the

Catawba Nation was permitted to operate video gambling devices on its Reservation regardless of the State's ban on such gambling enacted in 1999. In this litigation, the claim is that the 2005 Gambling Cruise Act constitutes a State law authorization of video gambling devices within the meaning of § 16.8 of the Agreement. The claim in *Catawba Tribe* was based on the *non-applicability* of State law; the claim in this action is based on the *applicability* of State law, *as established by the decision in Catawba Tribe*.

Order at page 13, beginning line 8: "In short, the governing rule is that '[i]f a declaratory judgment is valid and final, it is conclusive, *with respect to the matters declared.*'"

Catawba Nation response: The Catawba Nation agrees with this principle. But res judicata does not bar the present declaratory judgment action because the claim at issue was not a "matter[] declared" in the previous action.

CONCLUSION

Restoring the Catawba Nation's gaming rights would satisfy the State's contractual and ethical obligations under the Agreement and is consistent with the holding in *Catawba Indian Tribe*. Accordingly, this Court should reverse the order denying the Catawba Nation's motion from summary judgment and granting the State's motion for summary judgment.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2012-CP-40-00626

The Catawba Indian Nation a/k/a
The Catawba Indian Nation of South Carolina a/k/a
The Catawba Indian Tribe of South Carolina ..... Appellant,

vs.

State of South Carolina and Mark Keel, in
His office capacity as Chief of the South
Carolina Law Enforcement Division ..... Respondents.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant by depositing a copy of same in the United States Mail, postage prepaid addressed to Respondents' attorney of record, C. Havird Jones, Jr., Assistant Deputy Attorney General Office of the South Carolina Attorney General, P.O. Box 11549, Columbia, South Carolina 29211.

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