STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Joseph M. Strickland, Special Circuit Court Judge

Case No. 05-CP-40-3717

Catawba Indian Tribe of South Carolina,

Respondent,

v.

The State of South Carolina and Henry D. McMaster, in his official capacity as Attorney General of the State of South Carolina,

Appellants.

FINAL BRIEF OF APPELLANTS

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II.

Did the lower court err in concluding that the general bingo entrance fee is inapplicable to the Tribe?

STATEMENT OF THE CASE

Respondent filed this action on July 28, 2005. On August 16, 2005, Respondent amended its Complaint to add as a defendant the Attorney General of South Carolina, Henry D. McMaster. Record at 1-27. On September 28, 2005, Respondent sought certain interrogatories, requests for production and requests for admission. Responses thereto were made on November 28, 2005.

On September 14, 2005, Appellants filed an Answer to the Complaint. Record at 28-36.

On October 11, 2005 Respondent moved for Summary Judgment. Record at 37-41. On November 21, 2005, Appellants likewise filed a Motion for Summary Judgment, seeking dismissal of the action. Record at 42-46.

Respondent's Amended Complaint sought declaratory and injunctive relief, contending that the Catawba Tribe " is entitled to judgment in its favor and a declaration that it has a present right to operate video poker or similar electronic play devices on its Reservation and conduct the game of bingo in accordance with the Settlement Act, Settlement Agreement and State Act prior to its wrongful amendment." Record at 1-27.

Appellants strongly disagree and contend that the operation or possession of video poker machines on the Tribe's Reservation is prohibited by state law, i.e. S.C. Code Ann. Sections 12-21-2710 and 12-21-2712. Section 12-21-2710 deems video poker or similar electronic play devices to be contraband *per se* and the possession of such devices to be a violation of the criminal laws of South Carolina. Appellants further contend that the Catawba Settlement Agreement and Settlement Act expressly states that the Tribe may permit video

poker devices on its Reservation only "to the same extent that the devices are authorized by state law" and thus the Tribe is prohibited from having video poker on its Reservation by state law. Record at 28-36.

Following a full hearing, the circuit court, by written Order, granted summary judgment to Respondent on December 13, 2005. Record at 47-58. The court concluded that Respondent possesses a right, pursuant to S.C. Code Ann. Section 27-16-110(G), to operate video poker on its Reservation. *Id*. In the view of the circuit court, the fact that video poker machines are now illegal *per se* contraband throughout the State is not controlling and that the Tribe is "sovereign" on its Reservation. *Id.* Appellants, pursuant to Rule 59(e) SCRCP, moved before the court for Reconsideration on December 21, 2005. Record at 59-82. A hearing on the Motion was held on January 6, 2006, at which time the circuit court orally denied such Motion. Record at 83-85. A written Order was issued by the circuit court on January 30, 2006 denying the Rule 59(e) motion. Record at 86-91.

Appellants filed a Notice of Appeal, a Motion to Certify to this Court and a Petition for Supersedeas on February 13, 2006. Record at 114-118. On March 8, 2006 this Court certified the appeal and denied the Petition for Supersedeas.

STATEMENT OF FACTS

The historic background preceding the litigation between the Catawba Tribe and the State, and the Settlement Agreement ending that litigation, is fully set forth in the opinion of the Honorable Cameron Currie in *Catawba Indian Tribe of South Carolina v. City of North Myrtle Beach*, Civil Action 4-97-3000-22 (filed July 29 30, 1999). *See, Order*, pp. 2-5. Record at 130-133. The Order also recounts the consummation and content of the Agreement in Principle. *Order* at 5-6. Record at 134-135. We quote from the Court's Order in part to describe briefly the Agreement's terms and the State and federal legislation ratifying the Agreement:

> The negotiations resulted in an "Agreement In Principle" between the State and the Catawbas reached in August 1992. ... Following the negotiation sessions of August 1992, further discussions to refine and extend the terms of the settlement continued. After another negotiating session was convened in January 1993, the parties entered into a revised Agreement in Principle. ... In exchange for extinguishing all claims to the 144,000 acres in question, the agreement purported to: (1) restore the trust relationship between the Catawbas and the United States; (2) restore the Catawbas' status as a federally recognized Indian Tribe thereby entitling its members to all federal benefits and services furnished to recognized Tribes; (3) repeal the 1959 Termination Act; (4) require the federal and state governments to pay a total of $50 million to the Catawbas over a five year period in the form of five different trust funds; (5) provide for the expansion of the reservation to a total of 4,200 acres and establish the means for acquiring such additional property; (6) outline provisions for tribal governance; and (7) establish standards for determining tribal membership. ...
>
> At the time of the negotiations, South Carolina also was concerned that the Catawbas might seek to exercise their federal rights under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21 ("IGRA"). ... In order to secure the Catawbas' waiver of these rights, the parties agreed that the Catawbas would be "entitled to ... [initially, one special bingo license, with a second special license being later added by Representative Kirsh in the House of Representatives. Such amendment was adopted].

Id.

And, in *Wade v. Blue*, 369 F.3d 407 (4th Cir. 2004), the Fourth Circuit Court of Appeals summarized in pertinent part the resolution of the dispute between the Tribe and the State of South Carolina this way:

> [d]uring the 1980s and early 1990s, the Catawba Indian Tribe was involved in land-related lawsuits against the United States and the State of South Carolina. *See generally* 25 U.S.C. § 941(a)(4) (2001) (describing the historical background of the Tribe and its land claims against the United States and South Carolina). However, in 1993 the Tribe ended this extended litigation by entering into a Settlement Agreement with the United States and South Carolina. The Settlement Agreement was implemented through both federal and state legislation. *See* 25 U.S.C. § 941 ("Federal Act"); S.C. Code Ann. § 27-16-20 (2003) ("State Act"). Pursuant to the Federal Act, the Settlement Agreement and the State Act "shall be complied with in the same manner and to the same extent as if they had been enacted into Federal law." 25 U.S.C. § 941b(a)(2).
>
> As part of the settlement, the federal and state governments were to pay a total of $50 million in trust to the Tribe, in return for extinguishment of past and future land claims. *See id*. §§ 941c(a), 941d; S.C. Code Ann. §§ 27-16-50(A), 27-16-60.

369 F.3d at 408.

SUMMARY OF ARGUMENT

This case is of fundamental importance to the State of South Carolina.

The question here is straightforward. What must be answered by this Court is the meaning of the provisions of the Catawba Tribe Settlement Agreement and state Settlement Act, as well as the federal legislation ratifying these, as they relate to the Tribe's right to possess and operate video poker or other forms of video gambling devices on its Reservation. Such question must, of course, be necessarily resolved with a view toward the fact that such video poker devices are now illegal *per se* contraband under state law. Based upon the clear language of the Settlement Agreement, as well as ratifying state and federal legislation, we believe this Court should conclude that neither the framers of the Agreement, nor the General Assembly, nor Congress intended to grant the Tribe the right to have video poker on its Reservation in perpetuity, or at present. It is clear that state law rendering such devices illegal *per se* applies to the Catawbas to the same extent as all others. Accordingly, this Court should reverse the ruling of the circuit court granting summary judgment to Respondent, and thus dismiss this action.

In a case involving a novel question of law, this Court recently emphasized that "the Court is free to decide the question with no particular deference to the lower court. The Court must decide the question based on its assessment of which answer and reasoning best comport with the law and public policies of this state and the Court's sense of law, justice, and right." *Mims Amusement Company v. South Carolina Law Enforcement Division*, 366 S.C. 141, 621 S.E.2d 344 (2005). Here, the circuit court order, we believe, represents an incorrect construction of the

governing statute. Properly interpreted, such statute clearly places the Catawba Tribe on the same footing as other South Carolinians with respect to video gambling rights, or the absence of such rights. However, the circuit court's construction places the Tribe in a pre-eminent position, gives the Tribe sovereign status, and now re-opens the door for the return to this State of video poker. Moreover, by Respondent's own admission, it has sought this judgment to use as a bargaining tool in obtaining passage of legislation placing high stakes bingo in Santee. *See*, Record at 80-81. Respondent is, we think, using a legally incorrect judgment to negotiate for the enactment of legislation to authorize high stakes bingo in Santee. We contend that it has no "right" to video poker with which to negotiate. If such negotiations are successful, the Legislature will have unnecessarily conceded one form of video gaming for another. Our courts do not exist to be used as negotiating chips in the legislative process.

As the Settlement Agreement and state Settlement Act make clear, any right of the Tribe to video poker on its Reservation ended with the statewide ban upon video poker in South Carolina by Act No. 125 of 2000. This conclusion is mandated by the first sentence of § 27-16-110(G), which states quite clearly that the Tribe may permit video poker on the Reservation only "to the same extent the devices are authorized by state law." As of now, the Tribe thus possesses no greater right to video gambling on the Reservation than any other citizen has anywhere in South Carolina – which is none at all. In our view, the Tribe, as well as the circuit court, have misperceived the clear language of the Settlement Agreement and state Act and have overlooked the unmistakable intent of the Act of Congress in ratifying

these. In the words of the D.C. Circuit Court of Appeals, "the Catawba Indians' ... Settlement Act[ ] specifically provide[s] for *exclusive state control of gambling*." *Narragansett Ind. Tribe v. Natl. Indian Gaming Comm.*, 158 F.3d. 1335, 1341 (D.C. Cir. 1998). (emphasis added). State law now bans video poker for everyone in South Carolina, including the Catawbas.

First and foremost, the provisions of the Settlement Agreement, the state Act and the implementing Congressional legislation must be construed *as a whole and as they are written*. As this Court has frequently emphasized over the years, in construing a statute or statutes, the words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. *City of Myrtle Beach v. Juel P. Corp. and Gay Dolphin, Inc.*, 344 S.C. 43, 543 S.E.2d 538 (2001). Statutes, *as a whole*, 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). The Court is not permitted to rewrite the Agreement or implementing statutes and it may not interject matters not in the statute's language. *Timmons v. S.C. Tricentennial Comm.*, 254 S.C. 378, 175 S.E.2d 805 (1970).

Examining the Catawba Settlement Agreement, as well as the implementing state and federal legislation, it is evident that deference to state law concerning gambling – whatever that law might be, either regulation or absolute ban – was the touchstone intended by those who reached the Settlement Agreement and ratified it. Thus, there is absolutely no suggestion in any of these provisions that the Tribe possesses a right in perpetuity to have video poker, or a right to possess and operate video poker devices when such devices are

made illegal *per se* contraband throughout the State pursuant to state law. For the Tribe to contend and for the circuit court to conclude that such right to video poker "vested" with the consummation of the Settlement Agreement and ratifying Acts is utterly inconsistent with the express language of the Agreement and state Act, both of which state quite clearly that the Tribe possesses the right to video poker devices only "to the same extent the devices are authorized by state law." Likewise, the trial court's ruling ignored the words used by Congress in ratifying the State Act and Settlement Agreement – language deeming state law to "govern" with respect to the "regulation" of gambling devices on the Reservation. Moreover, as will be seen below, such ruling by the circuit court is completely at odds with the intent of the framers of the Agreement.

Second, common sense dictates that neither the State of South Carolina nor the General Assembly would have agreed to give the Catawbas a right to possess or operate video poker machines *ad infinitum* in the face of a subsequent statewide ban thereupon. At the time the Settlement Agreement was consummated, there had been numerous efforts in the General Assembly to ban video poker completely. *See, State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991). The entire tenor and tone of the Settlement Agreement – which the Catawbas participated in and agreed to – was to treat the Catawba Tribe similarly to other South Carolinians in terms of the applicability of state civil, criminal and regulatory law. As Judge Currie found in her Order in *Catawba Indian Tribe of South Carolina v. City of North Myrtle Beach*, Civil Action 4-97-3000-22 (filed July 29, 1999), the consideration for the Tribe's negotiated agreement that IGRA be made inapplicable to the Catawbas was not the right to video poker, but the right to two special bingo licenses. Record at 134-138. The

Tribe and the circuit court have engaged in a "revisionist" version of history here; a right to video poker in perpetuity was never thought to have been conceded to the Tribe by the State. We ask this Court now to reverse the circuit court's rewriting the Settlement Agreement.

Thirdly, any argument that the Catawbas' right to video poker may have been "frozen in time" as of the 1993 Agreement, or constituted a right granted in perpetuity – even if video poker was subsequently outlawed throughout the State – is defeated by examination of the Agreement itself and the state Act of ratification. Contrary to the ruling of the circuit court, the only reasonable reading of South Carolina Code Ann. Section 27-16-110(G) is that if video poker is banned by county referendum in the county where the Reservation exists, the Tribe "nonetheless must be permitted to operate the devices ...." However, no such express language is employed in that portion of § 27-16-110(G) which permits the Tribe to operate video poker on the Reservation "to the same extent the devices are authorized by state law ...." The use of this language in one instance, and the omission of this same wording in the other, militates strongly against any argument that the Tribe's right continues even after enactment of South Carolina's statewide ban of video poker. *See*, *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578, 582 (2000) ["to express or include one thing implies the exclusion of another, or the alternative."]

Fourth, if the Tribe possesses a right to possess and operate video poker machines even after the statewide ban, as it asserts, and as the circuit court held, there would have been no need to have included the clause relating to the county-by-county referendum at all. Possession of a broad, unlimited right, notwithstanding a ban statewide, would obviate any need to address the contingency of a ban which might result from a county-by-county

referendum. Again, any argument by the Tribe that it possesses a continuing right to have video poker on the Reservation following South Carolina's ban is thus fatally flawed. In short, there is *but one exception* in § 27-16-110(G) for video poker – the county-by-county referendum. The Tribe's rights, are, however, contingent upon whether state law continued to "authorize" such form of gambling. The Agreement must be read and applied in its entirety, not merely parts thereof. Clearly, the framers of the Agreement and the state Act knew how to use language granting the Tribe the right to video poker in perpetuity; if they had intended to do so, they would not have relied upon a subtle nuance or an implication. Here, to the contrary, they clearly granted no such right.

Fifth, the Tribe enters any contract regarding video poker *subject to* the State's police power. In other words, there is no constitutionally protected right to gamble – whether it be by the Tribe or anyone else. *State of N.C. v. McLeary*, 65 N.C. App. 174, 308 S.E.2d 883 (1983). Absent an express provision in the Settlement Act or Congressional legislation that the Tribe possesses a right to video gambling in perpetuity – and there is none – the State has not, and indeed it cannot, bargain away its police power regarding gambling or video poker. This Court, as well as most other courts, have continually recognized that in the area of gambling, a person entering into a contract does so with the full knowledge that such contract is ultimately subject to the State's police power to further regulate or even ban such activity. With the regulation of gambling, what might be legal one minute may be absolutely prohibited by the Legislature the next. *See, Joytime Distribs. & Amusement Co. Inc v. State*, 338 S.C. 634, 528 S.E.2d 647 (1999); *Westside Quik Shop v. Stewart*, 341 S.C. 297, 534 S.E.2d 270 (2000). This sovereign right of the State is fully recognized in the

Congressional Act ratifying the Settlement Agreement. *See*, 25 U.S.C. § 941 [2][21](b), which provides that "state law shall govern the regulation of [gambling] ... devices." *See also*, *Narragansett*, *supra* [Congress provided for "exclusive state control of gambling" with respect to Catawbas]. Thus, we contend that the Agreement, state Act and Congressional Act gave the Tribe no such right as it asserts. To the contrary, the Tribe was required to submit to *state law* regarding video poker.

Finally, while we believe that the language of § 27-16-110(G) is entirely clear, thus demonstrating that the Tribe is not now entitled to video poker because state law has banned these devices statewide, the Affidavits of Congressman Spratt, Mr. Elam, Senator Hayes and Mr. Tompkins – persons integrally involved in the Settlement negotiations and passage of the state Settlement Act – fully confirm this reading. Record at 44-46, 72-78, 87. All are in complete accord that those who framed the Settlement Agreement and state Settlement Act had no intention whatever to allow the Tribe to possess and operate video poker devices on the Reservation if state law banned such devices statewide. The circuit court, on the other hand, paid little attention to these Affidavits and focused exclusively upon the Affidavit of Mr. Clarkson, Record at 85. ("I just simply can't shake" Mr. Clarkson's Affidavit). This was clear error. Indeed, as will be seen below, Mr. Clarkson's Affidavit said very little and, when read carefully, is not inconsistent with the other Affidavits.

Thus, for all the foregoing reasons, the circuit court clearly erred in granting Respondent summary judgment and concluding the Tribe now possesses a right to video poker on its Reservation.

ARGUMENT

I.

The Circuit Court erred in granting summary judgment to Respondent and in concluding that the Catawba Tribe possesses a continuing right to video poker on its Reservation.

What is required of the Court in this case is to interpret the governing provisions of (1) the Settlement Agreement with the Tribe (2) as well as the state Settlement Act and (3) act of Congress ratifying the state Settlement, as these relate to the Tribe's present right to video poker on the Reservation. The question here is whether the Tribe has been given a right which no other citizen in this State today has – the right to possess and operate video poker devices. Such devices, of course, are made illegal *per se* throughout the State pursuant to Act No. 125 of 2000. *Joytime, supra*; *Westside, supra*. The circuit court, relying erroneously upon the Affidavit of Mr. Crawford Clarkson virtually to the exclusion of a battery of other Affidavits, as well as upon a distorted reading of § 27-16-110(G), concluded that the Tribe does indeed possess such a right. For the reasons set forth below, we believe this was error and should be reversed.

South Carolina's Laws Prohibiting Video Gambling

Prior to addressing the specific issues raised by this lawsuit, it is first important to understand the status of video poker and video gambling in South Carolina and on the Catawba Reservation as of 1993, prior to the Settlement Agreement. In *State v. Blackmon, supra*, this Court held that non-machine payouts from coin-operated video gambling devices did not violate the State's gambling laws. *Blackmon* concluded that then-existing § 16-19-60

"plainly states that coin-operated nonpayout machines with free play features are exempt from the reach of Section 16-19-40 (gambling prohibition) as long as the machines themselves do not disburse money to the player." 304 S.C. at 274. As a result, video gambling from coin-operated video gaming devices exploded in this State. *See, Westside Quik Shop v. Stewart, supra*.

However, following the decision in *Joytime Distrib. and Amusement Co. v. State*, *supra*, which concluded that, pursuant to Act No. 125 of 2000, the General Assembly intended to ban video poker throughout the State and to declare such devices contraband *per se* as of July 1, 2000, this Court has vigilantly preserved and protected the letter and spirit of the legislation placing an absolute ban upon video poker and other similar forms of video gambling. For example, the Court superseded an order which had been issued by the circuit court, enjoining the enforcement by SLED of Act No. 125, the very same day the court issued its Order. *See, Ingram v. Stewart* (July 6, 2000). Another Order enjoining enforcement by SLED of § 12-21-2712 with respect to so-called "Chess Challenge" video gambling devices, was likewise superseded. *See, Castle King LLC v. Stewart*, (December 5, 2002). The Order of another circuit court declaring the entire category of Chess Challenge II video gaming machines to be legal was similarly superseded by the Supreme Court. *See, Allendale County Sheriff's Office v. Two Chess Challenge Machines*, (January, 2004).

Moreover, in its published opinions, this Court has also left no doubt that § 12-21-2710 and -2712, as amended by Act No. 125 of 2000, must be followed to the letter with respect to the confiscation and destruction of video gambling devices. The Court has consistently emphasized that the intent of § 12-21-2712 is to provide a mechanism to deter

the proliferation of video gaming in South Carolina through seizure and civil forfeiture of contraband *per se* gaming devices. *See, Westside Quik Shop v. Stewart, supra* ["... forfeiture serves a deterrent purpose both by preventing the further illicit use of the property and by imposing an economic penalty, thereby rendering the illegal behavior unprofitable."] (recently quoted with approval in *Mims Amusement Company v. South Carolina Law Enforcement Division*, *supra*). In *Mims Amusement Co.*, the Court denied an owner of video gaming devices the right to a jury trial in a post-seizure forfeiture proceeding, and further commented as follows regarding South Carolina's laws banning all gambling devices:

> [w]e recently held that a magistrate's ruling on legality applies only to the machine before the court. We further observed that a particular video gaming machine may be manipulated so as to change its nature from lawful to unlawful, which is one reason why the legality of a particular machine must be determined on an individual basis at the time of seizure and examination. *Allendale County Sheriff's Office v Two Chess Challenge II*, 361 S.C. 581, 587, 606 S.E.2d 471, 474 (2004). We were not faced with the issue of a right to a jury trial in *Allendale* and our observation in that case is not dispositive. While a machine ultimately may be shown to be lawful in a post-seizure hearing before a magistrate, *it is nevertheless deemed contraband per se at the moment of seizure*. We conclude an owner's right to due process in the civil forfeiture of a video gaming machine under the state constitution and pertinent statutes is satisfied when he is given a post-seizure hearing before a magistrate, with the right to appeal that ruling to circuit and appellate courts ....

366 S.C. at 155-156. (emphasis added).

Gambling Laws Relating to Catawbas Generally

Additional background with respect to gambling laws relating to Indian tribes generally, as well as the Catawbas particularly, is also instructive. The federal Johnson Act, 15 U.S.C. § 1175 – enacted in 1951 – makes it "unlawful to ... use any gambling device ...

within Indian Country." A "gambling device" is defined for purposes of the Johnson Act as a "machine or mechanical device" designed "primarily" for gambling and, when operated, either delivers money or entitles the player to receive money "as the result of the application of an element of chance." 15 U.S.C. § 1171. There is no doubt that video poker machines are "gambling devices" and thus generally proscribed on an Indian Reservation by the provisions of the Johnson Act. *See*, *Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760 (1993) [video poker is gambling]; *Sharp v. State*, 88 S.W.3d 848 (Ark. 2002) [video poker machine is a gambling device]. See also § 12-21-2710 [video poker machine expressly classified as an illegal *per se* gambling device]. Thus, video poker is, pursuant to the Johnson Act, absolutely prohibited on an Indian Reservation.

The 1988 Indian Gambling Regulatory Act, (IGRA), codified at 25 U.S.C. § 2701-2721, limited the Johnson Act's applicability with respect to Class III gambling devices (such as video poker) "subject to an extant, effective Tribal-State compact." *Cabazon Band of Mission Indians v. National Gaming Commission*, 14 F.3d 633, 635, n.3 (D.C. Cir. 1994). *See*, 25 U.S.C. § 2710 (d)(6). However, as the Court noted in *Cabazon*, "'[t]here is no repeal of the Johnson Act, either expressed or by implication,' in the Indian Gaming Regulatory Act." *Id*. If IGRA is applicable to a particular Reservation, and the State and Tribe negotiate a compact, Class III gambling can be deemed legal on the Reservation, if permitted by state law and is consummated pursuant to such negotiated Tribal-State Compact. See, *U.S. v. Garrett*, 122 Fed. Appx. 628, 630 (4th Cir. 2005) ["North Carolina facilitates gaming by Native Americans on tribal lands by specifically granting the Governor the power and duty '[t]o negotiate and enter into class III gaming compacts, and amendments

thereto, on behalf of the State consistent with State law and the [IGRA], as necessary to allow a federally recognized Indian tribe to operate gaming activities in this State as permitted under federal law.'" Where IGRA is inapplicable, however, the Johnson Act generally continues to apply to ban a particular form of such gambling on a Reservation. *See e.g. Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1046 (9th Cir. 1996) [where IGRA compact does not authorize Class III slot machines, "(t)he Johnson Act is applicable and the use of slot machines (on the Reservation) is illegal."].

We turn now to the Catawba Tribe specifically. In 1959, Congress enacted the Termination Act, which ended the federal government's trustee relationship with the Tribe. Codified at 25 U.S.C. § 935, that Act provided in part that all federal statutes affecting Indians' status as Indians were deemed inapplicable to the Catawbas and "the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction." Thus, from that point forward, South Carolina law generally governed the Tribe, including the regulation or prohibition of gambling devices. *See, South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986). Therefore, the Termination Act rendered the Johnson Act, and subsequently IGRA, inapplicable to the Tribe prior to the 1993 Settlement Agreement. This meant that South Carolina's gambling laws – including those which had been previously interpreted by our Supreme Court in *State v. Blackmon*, *supra*, (holding that non-machine cash payouts from coin-operated video gaming machines such as video poker were legal) were also applicable to the Catawbas.

As will be discussed more fully below, the Congressional Act, which ratified the Settlement Agreement and state Settlement Act, repealed the Termination Act, and restored

the federal trust relationship with the United States. *See,* 25 U.S.C. § 941(b). IGRA was also made expressly inapplicable to the Tribe by virtue of the Congressional ratification Act. See, § 941 [2][21](a). This was negotiated in exchange for the Tribe having first one, then later, two special bingo licenses. See, Record at 134-138. Accordingly, if Congress had acted no further at this point, such repeal, together with IGRA's being expressly made inapplicable to the Tribe, would have rendered video poker illegal on the Reservation by virtue of the federal Johnson Act.

As noted above, however, Congress and the General Assembly did specifically address gambling, as well as bingo, in the federal and state Settlement Acts. We contend that for purposes of defining the Catawbas' right to video poker on the Reservation, the Settlement Agreement and state and federal ratifying acts continued to treat the Tribe like other South Carolinians, as far as state laws of general applicability concerning video gaming are concerned. In our view, as Senator Hayes, Mr. Elam, Congressman Spratt and Mr. Tompkins explain and confirm in their Affidavits, Record at 44-46, 72-78, 87, the Settlement Agreement and Settlement Act simply intended to protect the Tribe's right to have video gaming on its Reservation should York and/or Lancaster Counties prohibit such devices in those counties pursuant to the local option referendum authorized by the 1993 Video Game Machines Act. This meant that the Tribe would be treated like the majority of South Carolinians at that time; in 34 counties video poker remained legal by virtue of these counties having voted "yes" in the 1994 county-by-county referendum. This did not mean, however, as the Tribe contends, and as the court below concluded, that those who consummated the Settlement Agreement and enacted the Settlement Act intended to grant

the Tribe such rights to video poker in perpetuity. By inserting the phrase in the Settlement Act that the Tribe is permitted video poker on its Reservation to the "same extent the devices are authorized by state law," it is clear that the General Assembly intended that if non-machine cash payouts from coin-operated video gaming devices were banned statewide by general state law (as they indeed were), such ban would also operate to prohibit such devices on the Tribe's Reservation. Thus, the circuit court clearly erred in concluding that the Tribe continues even today to have the right to operate video poker on its Reservation.

Gambling Provisions In The Settlement Agreement And Ratifying Acts

With respect to gambling, and games of chance, the Settlement Agreement provides in Section 16.2 that "[e]xcept 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 gambling or wager by the Tribe on and off the Reservation." (emphasis added). Record at 215. Section 19.1 further states that "... any land or natural resources held in trust by the United States or by any other person or entity for the Tribe, shall be subject to the laws of the State and the civil, criminal and regulatory jurisdiction of the State, to the same extent as any other person or land in the State." *Id*. at 225. Interestingly, § 19.3 of the Settlement Agreement expressly addresses the applicability of *subsequently enacted Federal law*. *Id.* Subsequently enacted state law is not mentioned. This provision (§ 19.3) carefully notes that *subsequently enacted Federal law* after the date of the Congressional Act ratifying the Agreement is deemed not to apply" if such provision would materially affect or preempt the application of the laws of the State, including application of the State to lands owned by or held in trust for Indians, or Indian Nations or

bands of Indians." Furthermore, Section 16.8 states that

> [t]he Tribe may permit on its Reservation video poker or similar electronic play devices to the same extent that the devices are authorized by state law. The tribe is subject to all taxes, license requirements, regulations, and fees governing electronic play devices provided by state law, except that if the reservation is located in a county or counties which prohibit the devices pursuant to state law, the Tribe nonetheless must be permitted to operate the devices on the Reservation if the governing body of the Tribe so authorizes, subject to all taxes, license requirements, regulations, and fees governing electronic play devices provided by state law.

Id. at 216. Section 16.8 is identical to § 27-16-110(G) as contained in the state Settlement Act.

The state Settlement Act, codified at S. C. Code Ann. Section 27-16-10 et seq., likewise defers to state law with respect to the Tribe's conduct of gambling. Section 27-16-40 provides, consistent with the Settlement Agreement, that

> [t]he Catawba Tribe, its members, lands, natural resources, or other property owned by the Tribe or its members, including land, natural resources, or other property held in trust by the United States or by any other person or entity for the Tribe, *is subject* to the civil, criminal, and regulatory jurisdiction of the State, its agencies, and political subdivisions other than municipalities, and the civil and criminal jurisdiction of the courts of the State to the same extent as any other person, citizen, or land in the State, except as otherwise expressly provided in this chapter or in the federal implementing legislation.

As summarized in its title, Section 27-16-110 speaks specifically to the issue of "Bingo, video poker and other similar devices; other gambling or wagering; state laws to

govern; licenses; tax." Consistent with the Settlement Agreement, subsection (A) of 27-16-110 provides that "[e]xcept as specifically provided in the federal implementing legislation and this chapter, all laws, ordinances, and regulations of South Carolina and its political subdivisions govern the conduct of gambling or wager by the Tribe on and off the Reservation."

Subsection (F) of § 27-16-110 deals with the subject of bingo, stating that "[a] license of the Tribe to conduct bingo must be revoked if the game of bingo is no longer licensed by the State. If the State resumes licensing the game of bingo the Tribe's license or special license must be reinstated if the Tribe complies with all licensing requirements and procedures."

Video gaming, such as video poker, is addressed by subsection (G) of § 27-16-110. Such subsection, the interpretation of which is critical to this case, provides in identical form to § 16.8 of the Settlement Agreement as follows:

> [t]he Tribe may permit on its Reservation video poker or similar electronic play devices *to the same extent that the devices are authorized by state law*. The Tribe is subject to all taxes, license requirements, regulations, and fees governing electronic play devices provided by state law, except if the Reservation is located in a county or counties which prohibit the devices pursuant to state law, the Tribe nonetheless must be permitted to operate the devices on the Reservation if the governing body of the Tribe so authorizes, subject to all taxes, license requirements, regulations, and fees governing electronic play devices provided by state law.

(emphasis added).

Congress necessarily needed to ratify the Settlement Agreement and state Act for the provisions thereof to take effect. The Congressional ratifying Act is codified at 25 U.S.C.A. § 941. Subsection 941b(a) restores "the trust relationship between the Tribe and the United

States...." Section 941b(a)(2) states that "the Settlement Agreement and the State Act are approved, ratified and confirmed by the United States to effectuate the purposes of this subchapter, and shall be complied with in the same manner and to the same extent as if they had been enacted in federal law." The Termination Act is repealed pursuant to §941b(c). Section 941m(e) addresses the applicability of state law to the Tribe. Such provision reads as follows:

> (c)onsistent with the provisions of section 941b(a)(2) of this title, the provisions of South Carolina Code Annotated, section 27-16-40, and section 19.1 of the Settlement Agreement are approved, ratified, and confirmed by the United States, and shall be complied with in the same manner and to the same extent as if they had been enacted into Federal law.

Thus, § 27-16-40 which, it will be recalled, deems all "civil, criminal and regulatory jurisdiction of the State," as well as the State's courts, applicable to the Tribe, *unless expressly provided in the Settlement Act or the federal implementing legislation*, is specifically incorporated into the Congressional Act of implementation.

Games of chance are addressed specifically by § 941 $^{2\overline{21}}$ of the federal implementing legislation. As had been done in the Settlement Agreement and state Act, Section 941 $^{2\overline{21}}$(a) expressly states that the Indian Gaming Regulatory Act (IGRA) is inapplicable to the Tribe. Pursuant to § 941 $^{2\overline{21}}$(b), the issue of "games of chance" is addressed as follows:

> [t]he Tribe shall have the rights and responsibilities set forth in the Settlement Agreement and the State Act with respect to the conduct of games of chance. 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 Tribe on and off the Reservation.*

(emphasis added). Accordingly, § 941 $^{2\overline{21}}$(b) makes clear that *state law*, not federal law, is to control the "regulation of gambling devices" and the "conduct of gambling or wagering by

the Tribe on and off the Reservation" unless otherwise "specifically set forth in the Settlement Agreement and the State Act...." This deference by Congress to state law governing those gambling devices which the Tribe may and may not possess or operate on the Reservation is fatal to the Tribe's action here. Congress has incorporated state law related to gambling, as well as the provisions related thereto as expressed in the Settlement Act "as if they had been enacted into Federal law." Thus, as will be demonstrated below, the subsequent ban by the State of all forms of video gambling, including video poker, renders the Tribe's arguments without merit and the lower court's Orders erroneous.

Respondent Has No Right to Video Poker On Its Reservation

We turn now to the arguments which dictate that the Tribe has no right to video poker on its Reservation. Section 941(b)(e) provides that the Congressional Act of ratification "shall not be construed to empower the Tribe with special jurisdiction or to deprive the State of jurisdiction other than as *expressly* provided by this Act or by the State Act." (emphasis added). Thus, any exceptions to State jurisdiction must be express. It is crucial here to remember also that Congress has made it clear in the federal Act that State law "shall govern" the regulation of gambling devices with respect to the Tribe except as "specifically set forth in the Settlement Agreement and the state Act ...." 25 U.S.C. § 941 2)21(b). The word "govern," means to "direct and control the actions of" by established laws, *See, Black's Dictionary*, (3d ed.). Clearly, use of this term by Congress contemplates that state law *as it evolves and changes from time to time* is to control "*the regulation* of gambling devices and the conduct of gambling on and off the Reservation." Moreover, Congress's employment of the word "regulation" is not a static term, either. In matters

relating to the evils of gambling and nuisances *per se*, the power to "regulate" also contemplates the power to prohibit. *Clegg v. City of Sptg*, 132 S.C. 182, 128 S.E.36 (1925). Thus, the federal statute ratifying the Settlement Agreement contemplated not only that South Carolina's gambling laws, which were to "govern" the Tribe, would be changing, but ultimately could ban or prohibit certain forms of gambling altogether. Of course, state law now absolutely forbids even the possession of video poker machines as *per se* contraband. *Westside Quik Shop*, *supra*; *Joytime*, *supra*.

The thrust of Respondent's claim thus rests upon and is defeated by the specific language of § 27-16-110(G). Of course, all parts of a statute must be interpreted as a coherent whole. *Croft v. Old Republic Insurance Co*, 365 S.C. 402, 618 S.E.2d 909 (2005) [Court should not focus on single section, but should consider the statute as a whole]. Section 27-16-110(G) expressly provides that if the Tribe "is located in a county or counties which prohibit the devices pursuant to state law ...." then, "the Tribe nonetheless must be permitted to operate the devices on the Reservation ...." No other right to operate video poker machines is expressly referenced in the statute or is specifically exempted therein, thus making clear that this is *the only right* concerning video poker which the Tribe received pursuant to the Settlement Agreement and state Settlement Act. However, the Tribe's right is clearly limited by the language contained in the first sentence, that the Tribe possesses the right to video poker "to the same extent the devices are authorized by state law."

It is manifest that this sole unique protection of the Tribe's right relates to the possibility that York and/or Lancaster Counties would (as they did) vote in the 1994 county-by-county referendum to "opt out" of the then-existing statewide criminal law which had

made video poker legal in South Carolina. *See, Martin v. Condon,* 324 S.C. 183, 478 S.E.2d 272 (1996); *Westside*. As Senator Hayes, Mr. Elam, Congressman Spratt and Mr. Tompkins attest in their Affidavits, Record at 44-46, 72-78, 87, the local option referendum, authorized by the Video Game Machines Act of 1993, and which could bar video poker in those counties which "opted out" of the provision making video poker lawful, was being considered at the very same time as the Settlement Agreement was being consummated with the State. Counties such as York and Lancaster – which included the Reservation area – were considered highly likely to vote to ban video poker in those counties. On the other hand, video poker would, as the result of the county-by-county vote, continue to be lawful in other parts of the State (34 counties of South Carolina).

Therefore, in order to protect the Tribe against the upcoming referendum, an earlier version of the State Act was modified. Upon reflection, it was apparently thought equitable to permit the Tribe to continue to have the right to video poker on the Reservation if it so desired, notwithstanding any vote by the county or counties in the claim area which would proscribe machines in those counties. With this alteration, the Tribe would thus be treated similarly to the 34 counties where video poker remained legal by virtue of the 1994 county-by-county referendum. Accordingly, the Settlement Agreement and its ratifying state statute contemplated that video poker would remain legal on the Reservation even if York and/or Lancaster voted to ban video poker in that or those counties. *See*, Record at 216.

However such "legality" with respect to the Tribe was deemed to be necessarily governed by the overarching contingency expressed in the first sentence of § 27-16-110(G) – that the Tribe may "permit video poker on the Reservation" *only* "to the *same extent that the*

devices are authorized by state law." (emphasis added). Thus, in accordance with this express contingency, once video poker machines were banned statewide by Act No. 125 of 2000, any right to possess or operate such machines on the Reservation which the Tribe may have enjoyed, then clearly ended. Once video poker machines or devices were no longer "authorized by state law," the Tribe plainly lost any right it may have had to the possession or operation of video poker machines on its Reservation. Just as citizens all over South Carolina lost such right, the Tribe did as well. This reading of the statute as a coherent whole is in complete accord not only with the language used, but with common sense.

The Tribe thus possesses no argument that any earlier right to operate video poker on the Reservation was somehow "frozen in time" or had been granted in perpetuity when the Agreement was consummated and ratified by state and federal law. The "authorized by state law" language is not time-specific to 1993, or to any other time. The word "authorize" means "to grant authority or power to"; "to give permission for." *American Heritage College Dictionary* (3d ed.) Obviously, what is now "authorized" may become "unauthorized," subsequently. What is given permission for, may be revoked. The framers, quite simply, conditioned the Catawbas' right to video poker upon whether "state law" continued to "authorize" video poker devices. Further, it is well recognized that the term "authorized by state law" includes *future changes in state law*. *See e.g.*, *Sitz v. Dept. of State Police*, 443 Mich. 744, 506 N.W.2d 209 (1993) [phrase "except as authorized by law." includes future laws]; *Lewis v. Quality Coal Corp.*, 270 F.2d 140 (7th Cir. 1959) [phrase "to the extent and in the manner permitted by law" is conditioned on conformity to existing or to future law]; *Allen v. Campbell*, 2002 WL 373246 (Tenn. Ct. App. 2002) [good and honor time credits no

longer "authorized by law" by subsequent amendments, and thus not available].

In *Winters v. U.S.*, 281 F.Supp. 289 (E.D.N.Y. 1968), *affd., per curiam*, 390 F.2d 879 (2d Cir. 1968), the Court construed the terms of a Ready Reserve enlistment contract and the Statement of Understanding of the Reservist which used the terms "when otherwise prescribed by law" or "as the law may require" with respect to additional active duty. The contract was entered into "long before" the relevant statute was enacted. The Reservist argued that "a contract ... is a contract ...," and that the Government could not increase the Reservist's obligations except under the terms of the contract, rather than be guided by subsequent changes in the law. The Court rejected this argument, concluding that such limitations "... could indeed operate indirectly as a fetter upon the Congress itself, which would have to take action in contemplation of the large numbers of such agreements in force at any one time, and which it would be only appropriate, even if not necessary, that the Congress should consider enacting new law." 281 F.Supp. at 295. In short, the "authorized by law" language, as used in § 27-16-110(G), contemplated that future changes in the law concerning video poker would also be applicable to the Tribe. If the intent had been to make the language of § 27-16-110(G) time specific, it would have been a simple matter to do so by inserting a qualifying phrase such as "now" or "present" before the word "authorized." Moreover, it must be assumed that if the intent had been to grant the Tribe the right to operate video poker on its Reservation in perpetuity, the framers of the Settlement Agreement and the Settlement Act would have simply done so in a straightforward, clear way, one not dependent upon a reading which is tenuous, at best. Instead, as the Congressional ratifying legislation stated, state law, (as it might change from time to time)

would "govern" the Tribe in the "regulation"of gambling.

Thus, the parties, in consummating the Settlement Agreement, and the General Assembly, in ratifying that Agreement, contemplated a clear distinction between actions taken by the voters of York and/or Lancaster Counties relative to banning video poker in those counties on the one hand, and action taken by the General Assembly in prohibiting video poker altogether on the other. The second sentence of § 27-16-110(G) speaks to a "county or counties which prohibit the devices ...." By comparison, the first sentence addresses whether or not the "devices are authorized by state law ... ." Yet, in the instance concerning the county-by-county referendum, the Tribe "nonetheless must be permitted to operate ...." Tellingly, however, assuming the General Assembly no longer "authorized" video poker under "state law," the framers employed no similar language to the effect that the Tribe "nonetheless may be permitted to operate." The canon of construction "expressio unius est exclusio alterius" holds that "'to express or include one thing implies the exclusion of another, or the alternative.'" *Hodges v. Rainey, supra*. Thus, it is evident from this comparison that the Legislature intended that the Tribe should continue to have a right to operate video poker on the Reservation if the voters of York and/or Lancaster Counties banned such devices, but then would lose such right or immunity if and when the General Assembly of South Carolina prohibited video poker statewide. Such distinction is entirely in accord with the Congressional ratification act which provides that "state law shall govern the *regulation* of gambling devices ... ." 25 U.S.C. § 941 $^{2\overline{21}}$(b). (emphasis added).

Act No. 125 of 2000 Confirms No Right of Tribe to Video Poker

Furthermore, it must be noted that Section 12-21-2710, which has, for the most part,

been on the books since the 1930s, designates gambling devices as contraband *per se*, and subject to immediate confiscation and forfeiture. The amendment to § 12-21-2710, enacted pursuant to Act No. 125 of 2000, mandates that "[i]t is unlawful for *any* person to keep on his premises or operate or permit to be kept on his premises or operated within this *any* ... video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps ...." (emphasis added). In other words, "any" video poker or similar device is now prohibited statewide, under state law. The Legislature did not say "any" video poker device, except on the Catawba Reservation – it said "any." The term "any" is "extraordinarily broad," and leaves no room for exceptions. *A.H. Robins Co. v. Dalkon Shield Claimants Trust*, 996 F.2d 716, 718 (4th Cir. 1993). Use of the word "any" – with no limitation – serves to confirm that the General Assembly, some six years following the Settlement Agreement and Settlement Act, did not read § 27-16-110(G) as continuing any right of the Catawbas to have video poker on the Reservation once video poker was prohibited statewide. No one even thought such was the case. Thus, there is simply no basis to conclude that the statute banning video poker machines statewide failed to include or implicitly excluded any such devices which might be placed on the Catawba Reservation.

Moreover, there is no reason to believe that, pursuant to either of the ratifying Acts (federal or state), the Catawbas were not subject to legislative changes in the statewide laws which might take place subsequent to the 1993 Settlement Agreement. As noted, the Congressional Act demands that any exception to State jurisdiction must be "expressly

provided" in the federal or State Acts or state law controls. See, 25 U.S.C. § 941(b)(e); 25 U.S.C. § 941 2)21(b). The State Act does not "expressly provide" for any continuation of the right to possess or operate video poker machines on the Reservation *beyond that expressly provided pursuant to the county-by-county referendum*. Indeed, the only mention in the State Act regarding any continuing right of the Tribe is that the Tribe's right is to be given only to "the same extent that the devices are authorized by State law." Accordingly, rather than being bestowed a right in perpetuity, any right the Tribe may have earlier possessed, was contingent upon state law continuing to "authorize" such right and thus was eviscerated by Act No. 125 of 2000.

In addition, for another reason, the Catawbas' contention and the lower court's conclusion that the Tribe's right to possess or operate video poker transcends even a statewide ban upon video poker is altogether illogical. If the thinking by those at the bargaining table had been that the Catawbas indeed had a permanent right to video poker, one has to ask why the county referendum exception was inserted at all. From the Tribe's perspective, basing its right upon the contingency of a county referendum would, at the least, be redundant to a right in perpetuity and, at worst, be a limitation upon the broader, more inclusive right. It would have been illogical for the Tribe to have inserted a right contingent upon a local option vote, if indeed the Tribe possessed a right in perpetuity. Moreover, the phrase "to the same extent the devices are authorized by state law" must be given some meaning, particularly in light of the county-by-county exception. When the two phrases are read together, the intent is apparent: the Tribe would *retain* the right to have video poker on the Reservation, even if York and Lancaster Counties voted to prohibit such devices in those

counties; however, if video poker was banned pursuant to general state law – as it was, as of July 1, 2000, such devices were prohibited with respect to the Tribe's Reservation as well. That is why the Tribe never possessed and does not possess now such broad right to be excepted from any subsequent statewide ban upon video poker. Instead, the Tribe's right to video poker devices is, as § 27-16-110(G) expressly states, "to the same extent the devices are authorized by state law." Again, such is consistent with Congress providing that state law shall "govern" the Tribe in the "regulation" of gambling devices.

If there is any remaining doubt whatever regarding the Tribe's absence of a right to operate video poker on the Reservation in perpetuity, such is fully resolved by another clause in § 16.8 of the Settlement Agreement and § 27-16-110(G) of the state Act: "[t]he tribe is subject to all taxes, license requirements, regulations and fees governing electronic play devices provided by state law." The Tribe has no answer to the simple fact that "state law" no longer authorizes taxes, license requirements, regulations and fees governing electronic play devices," inasmuch as video poker has now been banned and video poker machines are deemed to be contraband *per se* under state law. The presence of this phrase making the Tribe "subject to" all taxes, license requirements, etc. clearly indicates that the Tribe's right to video poker ended when state law banned these devices and made them illegal even to possess. In short, the intent was that the Tribe would be subjected to the same taxes, fees, license requirements and regulations regarding video gambling as were applicable in those counties where video poker remained "legal" (those counties voting not to ban it), but once *state law* prohibited video poker altogether, the Tribe was likewise banned from its operation. Otherwise, the Tribe would be subject to taxes, licenses, fees and regulations

which no longer exist under state law. Such was obviously not the intent of those who framed the Settlement Agreement and state Act.

Every contract must remain subject to the State's police power. It is well recognized that "... [a]ll contracts are made with reference to the possible exercise of the police power of the government and with the possibility of such legislation as an implied term of the law thereof." *Bingo Catering and Supplies Co. v. Duncan*, 237 Kan. 352, 699 P.2d 512, 518 (1985), quoting 16A C.J.S., *Constitutional Law* § 283. In the area of gambling, the State's police power remains paramount. Those who seek to enter into contracts to engage in the operation of gambling devices do so with eyes wide open, knowing that the State's police power may ultimately be invoked. Thus, rights concerning the operation of gambling devices are not "vested." It was held in *Westside, supra*, as well as *Mibbs v. S.C. Dept. Of Revenue*, 337 S.C. 601, 524 S.E.2d 626 (1999) and *Rick's Amusement, Inc. v. State*, 351 S.C. 352, 570 S.E.2d 155 (2001), that changes in the law adverse to video gambling interests do not impair pre-existing contracts which might have been consummated under less restrictive laws. In *Mibbs*, the Court emphasized there is "no substantial impairment of a contract where the subject of the contract is a highly requested business whose history makes further regulation foreseeable." 337 S.C. at 608. One Legislature cannot be bound by a previous one in the exercise of the State's police and regulatory power. Thus, cases such as *Westside, Mibbs,* and *Rick's Amusement* make it clear that law in the exercise of the police power subsequent changes in the law to limit or suppress gambling must be readily anticipated and do not unconstitutionally impair such contracts. Here, the General Assembly, in its 2000

amendment of § 12-21-2710 banning video poker, deemed that "any" video poker machine in South Carolina is *per se* contraband. Obviously, the Legislature, acting in special session to ban video poker, must be presumed to have been completely aware of § 27-16-110(G) and the terms of the Settlement Agreement between the Catawbas and the State. As shown, the 1993 Settlement Agreement and its ratifying Acts provided no right to the Tribe to have video poker after a statewide ban. Thus, the lower court was wrong in granting the Tribe relief.

The Settlement Agreement and Settlement Act Anticipate A Possible Ban of Video Poker Under State Law

Any argument by the Tribe that it possesses a vested "federal right" to video poker on the Reservation, notwithstanding that such machines have been banned from the State for more than five years, is without merit. We contend that characterizing the right as "federal" simply begs the question. We recognize, of course, that it was necessary for Congress to approve the Settlement Agreement. However, it is the express language of that Agreement and state and federal ratifying legislation, not the fact that the Catawbas' right is "federal," which must control. As the Court in *Narragassett Indian Tribe, supra* observed, a number of Tribes have been "excluded from IGRA and subjected instead to state gaming law." 158 F.3d, *supra* at 1341. Congress possesses such prerogative pursuant to its plenary power over Indian matters. See, *Negonsott v. Samuels,* 507 U.S. 99 (1993) [Congress has plenary authority to alter jurisdictional guideposts in "Indian country"]. That was exactly what was done with respect to the Catawbas. The Catawbas' federal Settlement Act, as read and understood by the D.C. Circuit in *Narragansett,* "... provide[s] for exclusive state control over gambling." 158 F.3d, *supra*. We submit this is the correct and only reasonable

interpretation: regardless of what state law was and is with respect to video gambling, it is equally applicable to the Catawbas. This reading of the Agreement and ratifying legislation is one entirely consistent with a continuation of the Tribe's placement on equal footing with other citizens by applying the State's criminal and civil laws to it, as the Termination Act had done. By its ruling, the lower court unraveled the carefully agreed upon compromise which the Settlement Agreement and ratifying legislation constructed with respect to video poker. The Court below ignored the words of limitation of § 27-16-110(G) of the State Act – that the Tribe could permit video poker devices on its Reservation, but only "to the same extent that the devices are authorized by state law." Significantly, this phraseology speaks directly to the *legal status* of video poker machines ("devices") under *state law* – a clear contemplation by the drafters of the State Act that if the machines were ever deemed to be contraband *per se* – as they ultimately were by Act 125 of 2000 – such "devices" were then no longer "authorized by state law."

As early as 1991, the *Blackmon* Court noted previous and ongoing legislative efforts to declare video poker machines as contraband. *See*, 304 S.C. at 274, n. 2 [bill to make it unlawful to have or operate a machine for playing games which utilizes a deck of cards]. Thus, it was logical for drafters of the state Settlement Act to anticipate that poker machines eventually might become illegal *per se*. The first sentence of § 27-16-110(G), as modified, gives the Tribe the right to video poker "to the same extent *that the devices are authorized by state law*." (emphasis added). There can be no mistake that, unlike the earlier version – which allowed the Tribe to install video poker devices "to the same extent authorized by state law" – the final language speaks *to the legal status of the machines themselves*, rather

than a mere regulatory power over the machines such as licensing, taxes, etc. Once such legal status was removed, the Tribe, like every other South Carolinian, lost any rights to video poker.

In essence, the Tribe seeks a right which no other South Carolinian today has. Such a right has no basis in the language of the Congressional Settlement Act. To the contrary, Congress made clear in that legislation that state law would "govern" the "regulation" of gambling devices by the Tribe on the Reservation "except as specifically set forth in the Settlement Agreement and the State Act ...." Such exception could not refer to anything in the Settlement Agreement and State Act other than the local option referendum which was then in the process of being put in place pursuant to the Video Game Machines Act.

Thus, Congress required that, notwithstanding the Tribe's right to continue video poker regardless of the results of the local option referendum, state law "governs" the "regulation" of "gambling devices ... on and off the Reservation." 25 U.S.C. § 941 2)21(b). There can be little doubt that the power to "regulate" is the power to proscribe. As long ago as 1903, in the context of Congress' power to ban the sale of lottery tickets in interstate commerce, the United States Supreme Court in *Champion v. Ames*, 188 U.S. 321 (1903) rejected any argument that Congress lacked the power to ban lottery tickets pursuant to its power to "regulate" commerce, concluding that Congress "may prohibit the carriage of such tickets from state to state ...." *Id*. at 363. Likewise, this Court has emphasized that the meaning of the term "regulation" is "the power to prohibit." *Clegg v. City of Sptg.*, *supra*. Accordingly, as the District of Columbia Circuit in *Narragansett Indian Tribe, supra*, recognized, in enacting the Catawba Settlement Act, Congress provided "for exclusive state

control over gambling." This power, delegated by the Congress to the State of South Carolina, includes the power to ban video gambling on the Catawba Reservation. Such statewide prohibition occurred with Act 125 of 2000.

If there is even the slightest remaining doubt concerning whether the General Assembly intended implicitly to "exempt" the Tribe from the reach of Act No. 125 (and § 12-21-2710)'s reach, such doubt must be resolved in favor of there existing no such exception or right. A statute must be construed in a constitutional manner. *U.S. v. Palma*, 760 F.2d 475 (3d Cir. 1985). To interpret § 27-16-110(G) as the lower court did, runs the risk of creating the same constitutional problems recognized by the South Carolina Supreme Court in *Martin v. Condon, supra*. This is particularly the case since Congress has deferred to *state law* in the "regulation" of gambling devices. 25 U.S.C.A. § 941 $2\overline{)21}$. Any "opting out" of the statewide ban by the Tribe would create a powerful argument that the State's criminal laws are discriminatory in favor of one discrete area of the State. Such constitutional problems can be avoided – and must be – by concluding, consistent with § 12-21-2710's express language banning "any" video poker machine, that Act No. 125 of 2000 created or provided no exception in favor of the Catawbas.

The United States Supreme Court has recognized that gambling "implicates no constitutionally protected right; rather it falls into a category of 'vice' activity that could be, and frequently has been, banned altogether." *United States v. Edge Broadcasting Company*, 509 U.S. 418, 427 (1993). In *State of Texas v. Ysleta DEL SUR PUEBLO*, 220 F.Supp.2d 668 (W.D. Tex. 2002), the Court rejected any argument that the Restoration Act constituted an agreement between two sovereign nations, as the Tribe contends is the case with the

Settlement Agreement here. The Texas District Court concluded that the Restoration Act, rather than IGRA, controlled. The Court further held that state law governed the legality of gambling on the Reservation. And, in *DEL SUR PUEBLO v. State*, 36 F.3d 1325 (5th Cir. 1994), the Fifth Circuit Court of Appeals concluded that the criminal/civil dichotomy recognized by the Supreme Court in *California v. Cabazan Band of Mission Indians*, 480 U.S. 202 (1987), applied only to IGRA and not to specific Settlement Acts. Further, the 5th Circuit Court of Appeals emphasized:

> Congress expressly stated that IGRA is *not* applicable to one Indian tribe in South Carolina, evidencing in our view a clear intention on Congress' part that IGRA is not to be the one and only statute addressing the subject of gaming on Indian lands. Therefore, we conclude not only that the Restoration Act survives today but also that it – and not IGRA – would govern the determination of whether gaming activities proposed by the Ysleta del Sur Pueblo are allowed under Texas law, which functions as surrogate federal law.

36 F.3d at 1335. So too here. Importantly, the Fifth Circuit disposed of many of the Tribe's same arguments made here by saying:

> [t]he Tribe warns that our conclusions (i.e. that Texas gambling laws and regulations are surrogate federal law) will constitute a substantial threat to its sovereignty in that "every time the State modifies its gambling laws, its impact will be felt on the reservation." However, any threat to tribal sovereignty is of the Tribe's own making .... To borrow IGRA terminology, the Tribe has already made its "compact" with the State of Texas and the Restoration Act embodies that compact. If the [Tribe] ... wishes to vitiate the compact it made to secure passage of the Restoration Act, it will have to petition Congress to amend or repeal the Restoration Act rather than merely comply with the procedures of IGRA.

Id.

The Lower Court Misconstrued § 27-16-110(G) and In Granting Summary Judgment, Placed Undue Reliance Upon Mr. Clarkson's Affidavit

The lower court readily acknowledged in its Order granting Respondent summary

judgment that the first sentence of § 27-16-110(G) revokes any right of the Catawbas to video poker on the Tribe's Reservation upon a video poker ban statewide pursuant to state law. Record at 52. Unfortunately, the circuit court then concluded that the second sentence of § 27-16-110(G) is paramount to the first. The lower court thus confused the Tribe's rights against county action banning video poker pursuant to the state law with any prohibitory action by the State itself. The circuit court did not recognize that if the Tribe has a permanent right to video poker, then the second sentence is redundant and the first sentence is meaningless. By giving the Tribe a permanent right to video poker no matter what– even if state law deems such devices to be no longer "authorize[d]" statewide – the circuit court completely nullified the words of the Settlement Agreement and State Act. This, the lower court had no power to do. The circuit court justified its erroneous reading of § 27-16-110(G) by noting that the statute does not mention the words "referendum" or "county-by-county." Record at 53. Thus, according to the lower court, there is no evidence that this second sentence addressed only the local option referendum held in 1994 pursuant to the Video Game Machines Act.

This was clear error. No court may construe the Settlement Act in a complete vacuum. The court must, instead, interpret the words in the context in which they were written. *State v. Dawkins*, 352 S.C. 162, 573 S.E.2d 783 (2002). One cannot ignore the historical fact that in 1993, when the Settlement Act was enacted, the local option referendum on video poker was being considered by the Legislature. See, Record at 44-46. Respondent has attempted to sidestep this historic fact – that the two statutes were being considered simultaneously – by arguing that the local option referendum was not yet law

when the Settlement Act was enacted. This argument simply ignores reality. The fact that authorization of the local option weighed heavily on the minds of those who negotiated the Settlement Agreement is fully demonstrated by the Memorandum of Mr. Quarles and the staff Memorandum to Senator Hayes and Representative Hodges (April 7, 1993). Record at 119-20. The Affidavits of Congressman Spratt and Mr. Elam confirm this. Record at 72-78. Thus, any contention that the second sentence of § 27-16-110 (G) does not concern the anticipated local option referendum and its effect upon the Tribe's rights is completely at odds with the historic background of the Settlement Act's passage. The simple fact is that the Tribe was concerned that York and/or Lancaster Counties would vote to bar video poker in those counties and the Tribe sought protection from this county action. No one, however, thought that protection for the Tribe from county action would likewise immunize the Catawbas from *state action* by the General Assembly, banning video poker statewide. Otherwise, the framers of the Agreement would not have used the clear, precise language that the Tribe possesses the right to video poker only to the "same extent the devices are authorized by state law."

The circuit court reasoned that "[i]f the statute contained only the first sentence, the Tribe could not allow video poker on the Reservation once the state prohibited video poker." Record at 52. Nevertheless, the court concluded that the Tribe possesses a permanent right to video poker because the second sentence requires that the Tribe must be permitted to operate the devices on the Reservation "if the Reservation is located in a county or counties which prohibit the devices ...." Rather than recognizing that the second sentence relates solely to action by the

county (not the State), and thus placing this language of the second sentence in the obvious historical context of the then-approaching 1994 county-by-county local option, the court below reasoned that, in view of Act No. 125's ban, "[a]ll counties prohibit video poker pursuant to state law."

Such reasoning simply cannot withstand scrutiny. According to the circuit court, since video poker is now prohibited statewide, and the Reservation is obviously located in a county or counties where that statewide ban is in effect (as it is everywhere, in every county), then, the Legislature must have intended that the Tribe possesses a permanent right to video poker. The court made this quantum leap even though the Legislature had written in the immediately preceding sentence that the Tribe possessed the right to video poker only to "the same extent the devices are authorized by state law." Such reasoning by the circuit court is clearly wrong and turns the Settlement Agreement and Act completely on its head. If we take the circuit court's reasoning to its logical conclusion, every state law prohibiting conduct would constitute the action of the particular county or municipality where the prohibition is being enforced simply by virtue of the fact that the enforcement action is occurring in that county or municipality. Of course, that is not the law. See, *City Council of Anderson v. Fowler*, 48 S.C. 8, 25 S.E. 900 (1896) ["All prosecutions for violations of the laws of the state are brought in the name of the state, which consists of all of its citizens ...."] This Court has emphasized that a court should reject a meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature. *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 440 S.E.2d 364 (1994). The lower court's

misconstruction of the Settlement Agreement and Act represents the epitome of a violation of this fundamental rule of construction.

As our additional Affidavits, submitted to the court below for guidance explain, those who were instrumental in the Settlement affirm the importance of the local option in finalizing § 27-16-110 (G). We agree with the conclusion of the lower court that the statute is not ambiguous and thus parol evidence does not come into play. However, the Court is entitled by way of explanation to the full historic background underlying those words used in the statute. Mr. Clarkson was the State's chief negotiator, appointed by Governor Campbell, to be sure. However, his recollection is, at best, ambiguous. For example, he does not address with any specificity what was intended if York and /or Lancaster Counties voted video poker out in those counties or what was intended if the State banned video poker altogether statewide. He only comments that the Tribe was to have video poker even if prohibited "elsewhere in South Carolina." Yet, the Court relied upon his Affidavit extensively. Even on Rule 59(e) Reconsideration, the lower court clung tenaciously to Mr. Clarkson's Affidavit, saying it simply could not "shake" it. Record at 85.

In our view, the Affidavits submitted to the lower court present a view by those who framed the Agreement which is entirely consistent with the plain language of § 27-16-110(G). Mr. Elam, Congressman Spratt, Mr. Tompkins and Senator Hayes all speak with a single voice in this regard. As the Congressman put it, "... the parties to the negotiation provided that if South Carolina prohibits video poker statewide, and also bans county options, the Catawba Indian Tribe will not be allowed to engage in video poker." Record at 74. Mr. Elam, Governor Campbell's legal counsel, likewise attests that "... our compromise

with the Tribe was to allow the Tribe to continue to have video poker on the Reservation as long as it remained legal anywhere in South Carolina, but if video poker was banned throughout the State, the Tribe lost any right to it, along with every other South Carolinian. The Tribe was given no right to video poker if state law banned video poker." Record at 77. Governor Campbell's Chief of Staff, Mr. Tompkins, puts it this way: "[t]hus, we agreed that, with the exception of bingo, the Tribe would have no greater gaming rights than state law gave other citizens. Under no circumstances however, was it the intent of the settlement that the Catawba Tribe would have a right to video poker which no one else in the State had under the laws of the State." Indeed, the late Governor Campbell himself stated the same thing on October 27, 1993, upon the Settlement Act becoming law by virtue of Congressional approval, that "I didn't want gambling casinos and everything else in this State.... We simply wanted ... [the Catawbas] to come under the same laws as South Carolina." Record at 173. Of course, Governor Campbell's description is the polar opposite of what Mr. Bender claimed immediately after the lower court's ruling, when he stated that "I think what the Tribe would consider is establishing its own gaming commission to provide supervision for any reservation gaming activity." Record at 80-81. The lower court subscribed to the same view – that the Tribe's "sovereignty" on the Reservation is paramount. Record at 52-53. Certainly, Governor Campbell, who thought that the Catawbas came "under the same laws as South Carolina," would be surprised, if not shocked, to learn that the Settlement gave the Tribe a right to video poker which no one else in the State had.

Moreover, as noted above, Mr. Clarkson's Affidavit is, at best, ambiguous. He simply is not specific enough to resolve this issue. His use of the term "elsewhere in South

Carolina" could well be read to mean nothing more than a ban of video poker pursuant to the local option vote by the counties in the claim area (York and/or Lancaster). The word "elsewhere" means, of course, "another place," which could simply mean those counties in which the claim area is located, other than the Reservation portion thereof. Certainly, Mr. Clarkson does not speak specifically to the situation involving a total ban of video poker throughout the State. The Affidavit of Mr. Clarkson, tellingly, as compared with the Affidavits of Messrs. Spratt, Elam and Hayes, never mentions the words "statewide" or "everywhere" or any other word connoting a statewide ban of video poker.

Similarly, in an earlier statement, when asked by Mr. Bender to comment upon the effect of a statewide ban of video poker upon the Tribe's rights thereto, Mr. Clarkson was vague and non-committal. The colloquy which occurred by letters exchanged between the two on February 6, 2004 was as follows:

> Mr. Bender: It is the view of the Tribe that part of the consideration for the settlement and the agreement not to operate gaming under IGRA was that the Tribe could operate video poker on the reservation even if video poker were prohibited elsewhere under state law.... Is it your opinion that the Tribe negotiated for and was given the right to operate video poker on the reservation even if video poker were otherwise prohibited by state law?
>
> Mr. Clarkson [referencing Sec. 16.8 of the Agreement in principle]: In addition, video poker machines were authorized to be utilized by the Tribe, if the Tribe so deemed, but only on its reservation in the claim area.

See, Record at 177-178. Of course, in this statement, Mr. Clarkson was doing nothing more than referencing the second sentence of § 27-16-110 (G). He spoke in the past tense ("were"), not as of 2004. He used no terms such as "statewide" or as Mr. Bender stated to him "even if video poker were otherwise prohibited by state law."

Easily, Mr. Clarkson could have been talking about 1993, when video poker was

legal and undoubtedly the Tribe had the same rights as any other South Carolinian. Plainly, he could have been referring to a vote by York and /or Lancaster Counties to ban video poker in the local option election of 1994 when undoubtedly the Tribe had a right to continue to operate video poker "only on its reservation in the claim area." Yet, when given the opportunity to address Mr. Bender's direct question concerning a state ban, Mr. Clarkson did the same thing he did in his Affidavit. He hedged. Just as in his Affidavit, Mr. Clarkson left open in his February 6, 2004 statement the distinct possibility that he was talking about nothing more than the effect of the local option referendum without addressing a statewide ban by state legislative enactment. By comparison, Senator Hayes, Mr. Elam, Mr. Tompkins and Congressman Spratt attest that under no circumstances was a statewide ban upon video poker to leave the Catawbas with a continued right to operate video poker on the Reservation. In the words of Governor Campbell at the time the Settlement became law, the Tribe would "come under the same laws as South Carolina." Record at 173.

Furthermore, the lower court's ruling defies common sense. Act No. 125 of 2000 prohibited "any" video poker or similar electronic device. Yet, the lower court's Order allows the Catawba Tribe to have video poker when no other South Carolinian may do so. The circuit court's ruling gives the Tribe permanent immunity against state criminal law. Not only is this result out of step with common sense, but it raises the very same constitutional problem addressed by our Supreme Court in *Martin v. Condon, supra* [allowing certain counties to opt out of statewide criminal law is unconstitutional "special legislation."]. Here, the Tribe (and the area of its Reservation) are allowed to opt out of a statewide criminal law.

In 1993, when the Settlement Agreement and Act were consummated, video poker was legal. Counties could only prohibit video poker pursuant to the local option referendum authorized by the Video Game Machines Act of 1993. However, this local option was declared unconstitutional in *Martin* and video poker then became legal again statewide. Yet, by virtue of Act No. 125 of 2000 the devices were banned statewide. It is illogical and irrational to conclude, as the circuit court did, that this statewide ban left video poker legal only on the Catawba Reservation when the Settlement Act expressly states that the Catawbas could operate video poker only to the "same extent that devices are authorized by state law."

Additionally, we believe, that the lower court's construction is totally at odds with the intent of § 27-16-110(a) when construed in light of Act 125 of 2000. In enacting Act No. 125, the General Assembly was presumably aware of § 27-16-110(G), yet nothing whatsoever mentioning or alluding to the Tribe is expressed therein. To the contrary, Act 125's proscription includes "any" video poker devices. Moreover, the statute's reach prohibits these machines "within this State," with no exceptions for any geographic area – including the Reservation – recognized. While Respondent argues that Act No. 125's "Savings Clause" and "Intent" provisions, contained in Article V of the Act, protect its "rights," we believe such rights are instead delineated by § 27-16-110(G)'s clear language that the Tribe may operate video poker on its Reservation only to the "same extent authorized by state law." Once Act No. 125 was enacted, proscribing video poker statewide, such language contained in § 27-16-110(G) was triggered, thereby proscribing video poker on the Tribe's Reservation as elsewhere throughout South Carolina. *See, State ex rel.*

Ferguson v. City of Wichita, 188 Kan. 1, 360 P.2d 186 (1961) [phrase in contract "to the extent authorized by state law" means that "future enactments of the legislature" are governing]. Thus, in light of the plain language of § 27-16-110(G), Act No.125 protects the Tribe with respect to the right to video poker no more than it does any other citizen, which is not at all.

In other words, the clear intent of the General Assembly in enacting Act No. 125 of 2000 was an all encompassing proscription of video poker. As this Court recently held in *Mims Amusement Co. v. SLED, supra*, the Court decides cases involving video gambling generally, as well as its interpretation of § 12-21-2710 (as amended by Act No. 125) specifically, "in light of the recent history of video gambling in South Carolina, which mushroomed from a rather inauspicious beginning in 1986 into a multi-billion dollar business by its demise in July 2000." To interpret 27-16-110(G) together with Act No. 125 as the circuit court did – granting the Tribe the right to video poker in perpetuity – is not only inconsistent with the plain language of these provisions, but undermines the legislative intent of Act No. 125.

Finally, the reasoning of the lower court – that the Tribe's right to video poker "is an element of Tribal sovereignty" – has been squarely rejected by other courts. In *State of Texas v. Ysleta DEL SUR PUEBLO, supra*, the Court found unpersuasive the Tribe's argument that it should be placed in the same sovereign status as the State of Texas in conducting its state lottery. Thus, the Court concluded as follows:

> [t]he Tribe, while it agrees Texas law would not permit any Texas citizen to do what its casino is doing, nevertheless, contends that it is not just any other citizen but, rather, a sovereign nation, and that this

> prevents it from being treated as any other citizen of Texas under the provisions of the Restoration Act .... Rather, it argues that it should be treated as the State of Texas is treated [in operating a state lottery] ....
>
> The problem for the Defendants is that ... the Tribe waived any parallel sovereign status claim that it might have regarding gaming when it made its "compact" with the State in order to obtain federal trust status .... The Tribe simply does not, as regards gambling, share a parallel sovereign status with the State of Texas. The laws may permit the State to engage in certain gaming activities without opening the door for the Tribe or any other person to engage in such activities.

220 F.Supp.2d at 688-690. As this Court emphasized in *Allendale Co. Sheriff's Office v. Two Chess Challenge II Machines*, 361 S.C. 581, 606 S.E.2d 471 (2004), the seizure and forfeiture of gambling devices is an integral part of the police power of the state. Here, even though Congress and the General Assembly made it clear that the Settlement Agreement requires that state law governs the Tribe's power to possess and operate gambling devices, the lower court incorrectly concluded otherwise.

II.

The lower court erred in concluding that the general bingo entrance fee is inapplicable to the Tribe.

The Tribe contends that § 12-21-4030 of he Bingo Tax Act, which imposes an $18.00 entrance fee as to the holder of a Class AA bingo license, cannot be enforced against it in that it constitutes an amendment to the Settlement Act, and any amendment requires the Tribe's consent. The argument is that the entrance fee is, in reality "a "special bingo tax" as addressed in § 27-16-110(C)(3) of the Settlement Act, thus requiring the Tribe's consent to be applicable.

However, the provision in question in § 12-21-4030(B) is part of the general regulatory procedure governing the operation of the Class AA bingo license and is clear and unambiguous on its face. The consent of the Tribe is not necessary in enacting such general regulatory provision because the entrance fee is not collected for the maintenance of government and is thus not a tax. *Casey v. Rich. Co. Council*, 282 S.C. 387, 320 S.E.2d 443 (1984).

CONCLUSION

In short, the framers of the Catawba Settlement Agreement and the state and federal ratifying legislation intended to subject the Tribe to state law concerning video poker. The federal Settlement Act thus expressly made IGRA inapplicable, and required instead that the Tribe "shall have the rights and responsibilities set forth in the Settlement Agreement and the State Act with respect to the conduct of games of chance." The federal Act further stated that "[e]xcept as specifically set forth in the Settlement Agreement and the State Act," state law "shall govern the regulation of gambling devices ... by the Tribe on and off the Reservation." 25 U.S.C.A. § 941 $^{2)21}$(b). The State Act provides a single exception – that the Tribe may continue to have video poker, notwithstanding the banning by the county or counties in the claim area in the county-by-county referendum. However, this right is necessarily contingent, because the Tribe was authorized to permit video poker on its Reservation only "to the same extent the devices are authorized by state law." This phrase subjects the Tribe's "right" to video poker to future changes in state law which would ultimately ban video poker statewide. Such is also fully supported by the Congressional Act making state law to "govern" the "regulation" of gambling devices, as the term "regulation"

clearly encompasses a future prohibition. *Clegg*, *supra*.

Contrary to the Tribe's arguments and the lower court's ruling, the State's position in this case does not effectuate a change in the Settlement Agreement or the Settlement Act without the Tribe's consent. Indeed, by using the language "to the same extent the devices are authorized by state law," the framers of the Agreement contemplated and embraced the fact that there might be changes in state gambling laws regarding video poker. The Tribe agreed that it would be governed by such laws, whatever those laws might be, even if such laws banned video poker altogether. For the lower court to conclude that the Tribe possesses a right to have video poker on its Reservation in perpetuity in the face of its agreement to the "authorized by state law" language and despite the "regulation" language in the Congressional ratifying Act, § 941 $2\overline{)21}$, is misplaced, to be sure. The Tribe agreed to the use of such language both before and after it negotiated to have the right to video poker, notwithstanding that York and/or Lancaster Counties might ban such devices in those counties. In doing so, however, the Tribe also agreed to be governed by any *statewide* ban of this gambling activity altogether. The Tribe cannot have it both ways, choosing to rely on certain language in the Agreement, but ignoring language which clearly removes any right it might have once had. Moreover, for the lower court to grant summary judgment to Respondent, clinging tenaciously to a single Affidavit in the face of numerous others which strongly reinforce the State's interpretation of the Settlement Agreement, is clear error.

Thus, the Settlement Agreement places the Tribe upon equal footing with all other South Carolinians in terms of any right to video poker. When video poker is legal, the Tribe possesses the rights thereto to the same extent as other citizens. However, if video poker is

banned throughout South Carolina – as it now is – it is banned on the Reservation as well. This is the way it has been since the Termination Act – that the Tribe *is subject to state law* regarding gambling. As the Court stated in *Narragansett, supra,* Congress required in the Act ratifying the Catawba Settlement Agreement and state Act that there be "exclusive *state control* of gambling ...." (emphasis added). Thus, contrary to the Tribe's argument that Congress granted it the right to have video poker on the Reservation in perpetuity, Congress, rather, deferred to "exclusive state control of gambling." Such "state control" now mandates that video poker or similar electronic play devices are contraband *per se* with respect to the Catawba Tribe, as all others in the State. Thus, the Tribe's claim is without merit.

Indeed, it would be ironic if the State, insisting as Governor Campbell did, that IGRA be inapplicable to the Tribe, and requiring that state law controlled, got casino gambling anyway, despite the fact state law now bans video poker for every other South Carolinian. An Agreement which made the Tribe subject to governance by the same gambling laws as other South Carolinians was not intended to produce such an irrational result. We respectfully urge this Court to conclude that the careful wording of the Settlement Agreement and ratifying legislation did not produce such an anomaly and such a threat to re-open the whole issue of video poker throughout the State. We believe, that such result is not supported by the language of the Settlement Agreement and the state and federal Acts of ratification and that the Tribe possesses no claim for relief.

For all of the foregoing reasons, the Order of the circuit court should be reversed.

Respectfully submitted,

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July 28, 2006

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
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Catawba Indian Tribe of South Carolina,

Respondent,

v.

The State of South Carolina and Henry D. McMaster, in his official capacity as Attorney General of the State of South Carolina,

Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellants complies with Rule 211(b), SCARC.

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