No. 11-0274

In the Supreme Court of the United States

State of Oregon, Petitioner

v.

Thomas Captain, Respondent and cross-petitioner

BRIEF FOR THE PETITIONER

Team 16

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QUESTIONS PRESENTED

1. Does the Cush-Hook Nation own aboriginal title to the land in Kelley Point Park?
2. Does Oregon have criminal jurisdiction to control the uses of, and to protect, archeological, cultural, and historical objects on the land in Kelley Point Park notwithstanding its purported ownership by a non-federally recognized American Indian tribe?

STATEMENT OF PROCEEDINGS & STATEMENT OF FACTS

Kelley Point Park is an Oregon state park on the original homelands of the Cush-Hook Nation of Indians. The Nation is a tribe of Indians, but is not politically recognized by either the United States or Oregon. The Cush-Hook Indians occupied their homelands from time immemorial until 1850, when the Nation signed a treaty with Anson Dart, the superintendent of Indian Affairs for the Oregon Territory. In the treaty the Nation agreed to relocate 60 miles westward. Subsequently, the entire Cush-Hook Nation relocated as planned. In 1853, however, the U.S. Senate refused to ratify the Cush-Hook treaty, denying the Nation and its citizens both the promised compensation for their lands, and the recognized ownership of the lands they had moved to. After the Cush-Hooks relocated, two American settlers moved onto what is now Kelley Point Park. These settlers ultimately received fee simple titles to the land from the United States under the Oregon Donation Land Act of 1850 despite not residing on and cultivating the land for the your years the act required. Their descendants sold the land to Oregon in 1880 and Oregon created Kelley Point Park.

In 2011, Thomas Captain, a Cush-Hook citizen, moved to Kelley Point Park in order to protect culturally and religiously significant trees that had grown in the Park for over three

hundred years. Vandals had recently begun defacing sacred carvings on these trees, as well as cutting them down and selling them. In order to restore and protect a vandalized image, Thomas cut down a tree and removed the section of the tree that contained the image. He was returning to his Nation's current home when state troopers arrested him. The State of Oregon brought a criminal action against Thomas Captain for trespass on state lands, cutting timber in a state park without a permit, and desecrating an archaeological and historical site under Or. Rev. Stat. 358.905-358.961 (Archaeological sites) and Or. Rev. Stat. 390.235-390.240 (Historical materials). Captain consented to a bench trial. Subsequently, the court held that the Cush-Hook Nation still owned the land within Kelley Point Park, and found Thomas Captain not guilty for trespass or for cutting timber without a state permit. The court did, however, find him guilty of violating Or. Rev. Stat. 358.905-358.961 *et seq*. and Or. Rev. Stat. 390.235-390.240 *et seq*., fining him $250. The State and Thomas Captain appealed the decision. The Oregon Court of Appeals affirmed without writing an opinion, and the Oregon Supreme Court denied review. Thereafter, the State filed a petition and cross petition for certiorari, and Thomas Captain filed a cross petition for certiorari to the United States Supreme Court. The Supreme Court granted certiorari on the questions presented.

STANDARD OF REVIEW

The present case involves a combination of factual and legal questions. Findings of fact, insofar as they are relied upon, are subject to review under a "clearly erroneous" standard. Conclusions of law, on the other hand, are subject to review *de novo*. In cases of application of law to fact, as explained in *Pullman-Standard*, a 3-step process occurs, whereby the relevant facts are identified, the proper rule of law is selected, and the rule of law is then applied to the facts. *See Pullman-Standard, Div. of Pullman, v. Swint et al.*, 465 U.S. 273 (1982). The

Supreme Court will follow a similar process in determining whether the Cush-Hooks own aboriginal title to Kelley Point Park and whether the State of Oregon has jurisdiction to control the uses of objects therein.

SUMMARY OF ARGUMENT

The Cush-Hook Nation no longer owns aboriginal title to the land in Kelley Point Park. Prior to 1850 the Cush-Hook Nation established aboriginal title to the land in Kelley Point Park in accordance with *U. S. v. Santa Fe Pac. R. Co.* by occupying the territory in question exclusively for an extended period of time. According to *Johnson v. M'Intosh*, however, Congress has the power to permanently extinguish aboriginal title. Since Congress authorized the grant of the land that is now Kelley Point Park to settlers via the Oregon Donation Land Act, the Cush-Hook Nation's aboriginal title to that land was extinguished. The subsequent sale of the land to the State of Oregon by the settlers' descendants was valid, and thus the State of Oregon owns the land in Kelley Point Park.

Through an ironic twist of history, Respondent has been found guilty of desecrating an object which has great cultural and historical significance for his tribe. While the Respondent understandably wished to preserve the sacred symbols on the tree which he cut down, his approach hurt the interests of his fellow tribesmen, and the interests of the public at large, and unquestionably breached the law of the State of Oregon. As a Public Law 280 state, Oregon has been the recipient of an express Congressional delegation of criminal jurisdiction over Indian land and people. In light of this jurisdictional grant and in the absence of a "backdrop of sovereignty" surrounding the Cush-Hook nation, the State has the authority to punish criminal activity and even regulate arguably civil actions of the sort undertaken by Respondent.

Respondent's activities should thus be punished under the laws f the State of Oregon even if the Cush-Hooks hold aboriginal title to the land in Kelley Point Park.

ARGUMENT

I. The Cush-Hook Nation does not own aboriginal title to the land in Kelley Point Park.

Respondent claims that aboriginal title to the land in Kelley Point Park is owned by the Cush-Hook Nation of which he is a member. Regardless of the justness of Respondent's claim, it is invalid as a matter of law. The lower courts erred in concluding that the Cush-Hook Nation has aboriginal title to Kelley Point Park, and the land is legally owned by the State of Oregon.

Aboriginal title was established by the Court in *Johnson v. M'Intosh*, in which the Court held that native people maintained the right to live on their land, even though that land had become part of the United States. *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823). The Court also held, however, "that discovery gave an exclusive right to extinguish the Indian title of occupancy" to the United States. *Id.* at 587. Since the United States has extinguished the aboriginal title of the Cush-Hook Nation to the land including Kelley Point Park, its subsequent sale to the State of Oregon was valid.

A. The Cush-Hook Nation did at one time own aboriginal title to the land in Kelley Point Park.

As the Court noted in *U. S. v. Santa Fe Pac. R. Co.*: "occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact." *U. S. v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 345 (1941). The Court noted that a native tribe possessed

aboriginal title to its "ancestral home" to the extent that that home "constituted definable territory occupied exclusively by the" tribe in question. *Id.* at 345. In the trial court various experts testified that the Cush-Hook Nation did in fact occupy and own the land prior to the arrival of Euro-Americans. This testimony is enough to establish that the Cush-Hook Nation did at one time have aboriginal title over the land in Kelley Point Park.

B. The Cush-Hook Nation's aboriginal title to the land in Kelley Point Park has been extinguished.

In the matter of extinguishing a tribe's aboriginal title, "the power of Congress… is supreme." *U. S. v. Santa Fe Pac. R. Co.*, 314 U.S. at 347. Congress may extinguish aboriginal title by a method of its choosing, and the fairness of such decisions is "not open to inquiry in the courts." *Id.* Congress need not compensate the natives for their loss, as the Court has ruled that Fifth Amendment's takings clause does not apply to aboriginal title. *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 60 (1946).

1. The Cush-Hook Nation's aboriginal title to the land in Kelley Point Park was not extinguished when they signed the treaty with Anson Dart.

Congress did not ratify the treaty between the Cush-Hook Nation and Anson Dart. Had Congress done so the Cush-Hook Nation's aboriginal title would certainly have been extinguished, as a treaty is one of the methods Congress may use to extinguish aboriginal title. *Oneida County, N.Y. v. Onedia Indian Nation of New York State*, 470 U.S. 226, 231 (1985). In order to extinguish aboriginal title Congress must take "plain and unambiguous action." *Santa Fe Pac. R. Co.*, 314 U.S. at 346. Since Congress here explicitly determined to take no such action it did not extinguish the Cush-Hook Nation's aboriginal title. Failing to ratify the treaty between

the Cush-Hook Nation and Anson Dart did not, of course, prevent Congress from extinguishing the Cush-Hook Nation's aboriginal title to the land which is now Kelley Point Park through other means.

2. The Cush-Hook Nation's aboriginal title to the land in Kelley Point Park was extinguished by the United States under the authority of the Oregon Donation Land Act.

The Oregon Donation Land Act was duly passed by Congress in 1850, establishing a requirement that "every white settler" who "resided upon and cultivated the [public lands of the Oregon Territories] for four consecutive years" be granted a fee simple title. 9 Stat. 496-500. Fee simple title to the land that now makes up Kelley Point Park was subsequently granted to a pair of settlers under the authority of the act, though those settlers did not reside upon or cultivate the land for the requisite length of time. The settlers' descendants subsequently sold the land to the State of Oregon. Since the granting of fee simple title to the settlers was authorized by Congress, the Cush-Hook Nation's aboriginal title to the land in Kelley Point Park has been extinguished.

i. The land which is now Kelley Point Park was public land according to the Oregon Donation Land Act.

The trial court found that Congress erred in finding that all the land in the State of Oregon was public land of the United States. As discussed above, however, land to which native peoples possess aboriginal title is ultimately under the control of the United States. It is certainly reasonable to conclude that the phrase "public lands" in the Oregon Donation Land Act was

meant to include territory to which native peoples held aboriginal title. *Id.* The act includes numerous exceptions to its requirement that settlers be granted land, excluding land near a military post and land used for some other government purpose. *Id.* The land of native peoples, however, is not listed an exception, suggesting it was not meant to be one; *inclusio unius est exclusio alterius*. It seems even more likely that "public lands" was meant to include land to which native peoples may have possessed aboriginal title, but was no longer inhabited by natives. This, of course, was the status of the land currently in Kelley Point Park when the settlers came upon it in 1850.

ii. The fact that the settlers of the land which is now Kelley Point Park did not reside on it for the requisite length of time does not invalidate the fee simple title they were granted.

Regardless of whether the settlers met the specifications set out in the Oregon Donation Land Act is irrelevant to whether the Cush-Hook Nation's aboriginal title to the land which is now Kelley Point Park was extinguished. Congress authorized the land in question to be distributed to settlers. Whether or not those who received the land were authorized to do so, the Cush-Hook Nation's aboriginal title to the land which is now Kelley Point Park was forever extinguished when fee simple title was given pursuant to an act of Congress.

II. The State of Oregon has criminal jurisdiction to control the uses of, and to protect, archeological, cultural, and historical objects in Kelley Point Park notwithstanding its purported ownership by the Cush-Hook Nation.

In light of Congress's express grant of criminal jurisdiction to the State as well as the lack of a "backdrop of sovereignty" of the Cush-Hook Nation, the State of Oregon was authorized to assert criminal jurisdiction over the archeological, cultural and historical objects in Kelley Point Park. Furthermore, the State's intervention is particularly necessary to preserve these objects in the absence of a complementary set of tribal enforcement mechanisms. Thus, the State's enforcement of its statute prohibiting desecration is within the scope of grant of power delegated to the state by Congress and should be upheld. The concomitant charge of cutting timber without a permit should also be enforced. Although the permit requirement may be characterized as civil/regulatory in nature, it serves the important state goal of preserving natural resources and does not conflict with tribal regulations. As such, it should also be upheld.

A. As a Public Law 280 state, Oregon has criminal jurisdiction over all land within its boundaries, including Indian country.

Public Law 280 provides that, in each of the six original states covered by the law (the "mandatory states"), "[T]he criminal laws of such state or territory shall have the same force and effect within such Indian country [listed] as they have elsewhere within the state or territory." 18 U.S.C.A. §1162(a). The territory listed for the state of Oregon is "All Indian Country within the state, except the Warm Springs Reservation." *Id.* Thus, even under the assumption that the Cush-Hook Nation holds aboriginal title to the land contained within Kelley Point Park, and that this land is, in fact, "Indian country," the State of Oregon has jurisdiction over criminal acts committed in the Park.

Since Public Law 280 presents a delegation of power from the federal government to the states with respect to American Indians, it is important to consider the purpose of this grant. As

the court in *California v. Cabazon Band of Mission Indians* explains, "Congress' primary concern in enacting Pub. L. 280 was combating lawlessness on reservations." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987) *citing Bryan v. Itasca County*, 426 U.S. 373, 379-380 (1976). *Bryan* goes on to explain that conferring criminal jurisdiction over Indian country upon the states in order to fill in the gaps in Native American law enforcement structures was the key aim of Public Law 280. With regard to the reach of state enforcement authority under Public Law 280, "The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Cabazon*, 480 U.S. at 216 *citing New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-334 (1983). Jimenez and Song point out that the Red Lake Band of Chippewa Indians in Minnesota and Warm Springs Reservation in Oregon were exempted from reach of Public Law 280 because each had a fairly well-functioning law enforcement system. Jimenez and Song, Concurrent Tribal and State Jurisdiction under Public Law 280. 47 Am. U. L. Rev. 1627, 1665 (1998); *see* also *Bryan*, 426 U.S. at 385.

In light of Public Law 280's complementary goals of combating lack of law enforcement and bolstering the Indian tribes' role in law enforcement on their lands, we turn to the state of affairs surrounding the Cush-Hook Nation. Although the record below establishes that the Cush-Hooks have occupied the land now enclosed in Kelley Point Park since time immemorial, and although they may in fact still hold aboriginal title to this land, the history of the state and federal governments' transactions with the tribe indicates strongly the need for state law enforcement to step in in order to ensure the orderly administration of justice for this group along with other citizens of the state of Oregon.

Through a series of unfortunate historical twists, the Cush Hooks today find themselves struggling to provide for their livelihood in the foothills of the Oregon coast range of mountains, not protected by a treaty and the accompanying recognition of the federal government. Their situation contrasts with that of the Navajos, detailed in *McClanahan v. Arizona State Tax Commission*: "[I]t cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 175 (1973). While the state of Oregon respects and seeks to further the federal government's aims of encouraging the self-sufficiency and economic growth of Indian tribes, the Cush-Hooks are at present in need of the full benefits of state law enforcement mechanisms.

B. The authority which the State of Oregon seeks to assert over objects in Kelley Point Park is prohibitory in nature and thus falls within the scope of criminal authority as interpreted in *California v. Cabazon Band of Mission Indians*.

The Supreme Court has elaborated on the scope of authority granted to the states by Public Law 280 through the distinction between prohibitory/criminal jurisdiction and regulatory/civil jurisdiction. *See Cabazon*, 480 U.S. at 255. The Court explained that "The shorthand test is whether the conduct at issue violates the State's public policy." *Id.* Applying this test, the court found that California's prohibition of bingo and poker games conducted by the Cabazon Band, while accompanied by criminal sanctions, did not satisfy the public policy test. The court explained, "In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling

through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular. *Id.* at 256.

The conduct which Respondent engaged in, and which the State of Oregon sought to exercise authority over, falls within the criminal/prohibitory category in which exercise of state authority is broadly permissible. It is certainly a public policy concern for the State of Oregon that Kelley Point Park be preserved for the enjoyment of the public and that the historical and cultural artifacts contained therein be protected. While the aboriginal title of the Cush-Hooks to the land in Kelley Point Park, if established, vests them with property rights in the land, it is not, by itself, sufficient to preempt the application of Oregon's criminal law framework to the territory.

C. The state court's conclusion of law affirming Respondent's violation of Or. Rev. Stat. 358.905-358-961 *et seq.* and Or. Rev. Stat. 390.235-390-240 *et seq.* should be upheld.

The District Court was correct in holding that Respondent desecrated an archeological site and damaged cultural and historical artifacts in violation of Oregon's laws. The court found that Respondent cut down an archaeologically, culturally, and historically significant tree containing a cultural and religious symbol. Although there is no doubt that the tree in question has great importance for the Cush-Hook Nation, and although Respondent was moved by a desire to safeguard this object, his actions in fact destroyed its integrity.

To the extent that concerns about free exercise of religion are implicated in this case, the State of Oregon did not violate the Respondent's First Amendment rights, as applied through the 14th Amendment. The threshold for finding such violations, as set out in *Lyng v. Northwest Indian Cemetery Protective Ass'n.*, is quite high. *Lyng v. Northwest Indian Cemetery protective*

Assn'n., 485 US 439 (1988). It is limited to actions which coerce individuals into holding certain beliefs or penalize them for their beliefs. *Id.* In the present case, the aim of the State of Oregon is, on the contrary, to protect the Cush-Hooks' heritage with the force of its laws. And given the present state of affairs, Oregon is the only sovereign equipped to offer such protection.

Respondent's actions were particularly egregious since the state was, in fact, trying to preserve the cultural and religious heritage of the Cush-Hook Nation. As Justice Stewart famously explained, "[I]n the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion." *Walker v. Birmingham*, 388 U.S. 307, 320-321 (1967). The State does not question the Respondent's noble motives, but is not prepared to permit its citizens, including Respondent, to take matters into their own hands.

In the present case, it is particularly crucial to distinguish private, intangible belief from public, tangible objects of worship. Respondent remains free to hold the beliefs he chooses, so long as those beliefs do not infringe upon the rights and liberties of others. *See* Mill, On Liberty (1869). Thus, Respondent's beliefs are his own – he is master of his conscience. Nonetheless, when he interferes with the shared religious heritage of a group of people, he must expect consequences for his actions, and it is here that the law of the State of Oregon steps in. The tree which Respondent cut down embodied not just his beliefs, but the beliefs and history of the people of the Cush-Hook Nation; as such, his unilateral action impacted the interests of many people. Thus, Respondent's violation of Or. Rev. Stat. 358.905-358-961 *et seq.* and Or. Rev. Stat. 390.235-390-240 *et seq* should be upheld.

D. Even if the permit requirement for cutting down trees is civil/regulatory in nature, the state of Oregon is not pre-empted from asserting jurisdiction in light of the absence of competing tribal regulations.

Public Law 280's grant of civil jurisdiction to the states has been much more narrowly construed than that of criminal jurisdiction; nevertheless, room remains for state regulation, particularly in the absence of action by the federal government or the tribe. *See*, e.g., *Bryan*, 426 U.S. 373. In the mechanism envisioned by Congress, Jimenez and Song argue, tribal justice systems are to operate concurrently with state enforcement mechanisms under Public Law 280. Jimenez and Song, 1638. Yet it seems logical for the state to fill in a regulatory vacuum where but no tribal enforcement mechanisms exist. As the court in *Rehner* explains, "The role of tribal sovereignty in pre-emption analysis varies in accordance with the particular notions of sovereignty that have developed from historical traditions of tribal independence." *Rice v. Rehner*, 463 U.S. 713, 719 (1983). "If, however, we do not find such a tradition, or if we determine that the balance of state, federal, and tribal interests so requires, our preemption analysis may accord less weight to the "backdrop" of tribal sovereignty. *Id.* at 720. In addition, a state is permitted to assert civil jurisdiction over tribal members on tribal land in "exceptional circumstances" – circumstances where the state has a particularly compelling regulatory interest. *Cabazon*, 480 U.S. at 258-259. We believe such circumstances are present in this case.

The Cush-Hooks do not, at present, have in place a regulatory framework for preserving the natural resources of Kelley Point Park, a purpose which the State's permit requirement is designed to accomplish. Their situation is in contrast to that described in *New Mexico v. Mescalero Apache Tribe*, where "Numerous conflicts exist between state and tribal hunting

regulations." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 329 (1983). Furthermore, the state of Oregon, under the mandate of Public law 280, is in charge of taking the steps necessary for protecting the Park's natural wealth. A contrast is again found in *Mescalero*, where "None of the waters are stocked by the State" and "New Mexico has not contributed significantly to the development of the elk herd or the other game on the reservation, which includes antelope, bear, and deer." *Mescalero*, 462 U.S. at 328.

The situation in the present case is most analogous to that of *Moe v. Confederated Salish and Kootenai Tribes*, in which Indians and non-Indians shared in common the use of the roads, schools, etc…of the territory in question. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 467 (1976). Even assuming the existence of the Cush-Hooks' aboriginal title to the land in Kelley Point Park, Respondent today shares the use and enjoyment of the Park, as well as the historical and cultural heritage it offers, with other citizens of the State of Oregon. Oregon's purpose in creating Kelley Point Park was to set aside a place for public enjoyment. Its control of the uses of objects in the park, similarly to that imposed in *Moe*, thus impacts the activities of both Indians and non-Indians. *See Moe*, 425 U.S. at 482. Furthermore, the conduct engaged in by Respondent does not fall into the category of beneficial activities that were realized by the Cabazon Band. His behavior was in no way calculated to bring economic benefits to his tribe; by contrast, it was behavior that would be punishable whether committed by an Indian or a non-Indian.

Exceptional circumstances which warrant the application of state civil regulations give Oregon the authority to regulate the disposition of trees present in Kelley Point Park. The state has a demonstrated interest in preserving the natural resources in Kelley Point Park. If, as Respondent argues, the Cush-Hooks have aboriginal title to the land in question, this

conservation will undoubtedly be in their interest; in any scenario, however, it is in the interest of the citizens of the State. In the past, states and tribes in the Pacific Northwest have worked out mutual agreements for the use of scarce resources, such as fish in a fishing season. The Court in *Mescalero* addresses a similar situation, contrasting the facts before it with those of *Puyallup*, explaining, "Unlike *Puyallup Tribe v. Washington Game Dept.*, this is not a case in which a treaty expressly subjects a tribe's hunting and fishing rights to the common rights of non-members and in which a State's interest in conserving a scarce, common supply justifies state intervention." *Mescalero*, 462 U.S. at 342, citing *Puyallup Tribe, Inc. v. Dept. of Game of State of Washington*, 433 U.S. 165 (1977). *Rehner* supplements this analysis, explaining that, where a state limits the total number of licenses issued for a given activity, it is within its authority to limit the amount of licenses issued to Native Americans, and tribal self-government is precluded in this area. *Rehner*, 463 U.S. at 721. Since the state is currently unable to negotiate with the Cush-Hook nation due to a *de jure* and *de facto* absence of a sovereign unit, the State is currently the political unit best situated to promulgate the relevant regulations.

Conclusion

Congress has the key role in regulating relations with the Indian people, and its historical actions must determine the outcome of the present case. A Congressional land grant, along with a Congressional delegation of criminal jurisdiction to the State of Oregon place the State in a position to control the use of objects within Kelley point Park and make the State's assertion of jurisdiction over Respondent proper. Although the Cush-Hook Nation's aboriginal title to Kelley Point Park was not extinguished by its treaty with Anson Dart, it was extinguished by the Oregon Donation Land Act of 1850. Thus, while the Cush-Hooks once had aboriginal title to the land enclosed by Kelley Point Park, that title has since been extinguished. Nevertheless, even if

it is assumed that the Cush-Hooks still hold aboriginal title to the land in question, the State of Oregon has the authority to assert its jurisdiction over the use of historically and culturally significant objects within the park. The desecration statute which Respondent violated was unquestionably criminal in nature, and thus clearly within the jurisdictional scope contemplated by Public Law 280. His violation of the permit requirement, while arguably civil in nature, is nevertheless punishable by the state due to the special circumstances surrounding the Cush-Hook nation. At present, the State's regulatory framework is the only mechanism in place to protect the cultural heritage contained in the bounds of Kelley Point Park, and this mechanism should be respected.