No. 19-1981

In the United States Court of Appeals for the Seventh Circuit

ONEIDA NATION,

Plaintiff-Appellant,

v.

VILLAGE OF HOBART, WISCONSIN,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin, No. 1:16-cv-01217-WCG.
The Honorable **William C. Griesbach**, Judge Presiding.

ANSWER TO PETITION FOR REHEARING

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-1981

Short Caption: Oneida Nation v. Village of Hobart, WI

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Oneida Nation

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(3) If the party or amicus is a corporation:

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N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

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Attorney's Signature: /s/Arlinda F. Locklear Date: May 31, 2019

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Attorney's Signature: /s/James R. Bittorf Date: June 7, 2019

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Attorney's Signature: /s/Paul R. Jacquart Date: May 30, 2019

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Attorney's Signature: /s/Jessica C. Mederson Date:

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Attorney's Printed Name: Vanya S. Hogen

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Attorney's Signature: /s/William A. Szotkowski Date: May 31, 2019

Attorney's Printed Name: William A. Szotkowski

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Having failed to cross-appeal upon or fully present two claimed defenses, Defendant-Appellee Village of Hobart ("Village") seeks modification of the panel's opinion to remand "to the district court for further proceedings including consideration in the first instance of the Village's Alternative Arguments that were not addressed by the district court." (Doc. 60, Petition for Panel Rehearing ("Petition"), at 14.)[1] The Village also insists that the panel decision conflicts with other circuit cases holding that appellees do not waive alternative arguments by failing to adequately present them on appeal. (Petition at 8-13.)[2] The Village is wrong on all points.[3]

First, the Village's representation that the district court did not address its alternative arguments is disingenuous. The district court did, indeed, consider and reject all these arguments, so that remand is neither necessary nor appropriate. Second, the panel properly concluded that the Village's exceptional circumstances defense, which the Village insufficiently presented, could only have been raised in a cross-

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[1] Citations to this Court's docket are "Doc. [ECF Entry Number], at [Page Number]." Citations to the district court record are: "Dkt. [ECF Entry Number], at [Page Number]."

[2] The Village seeks only panel reconsideration but nonetheless claims that the panel's decision "conflicts with circuit precedent." Petition at 5. Typically, parties seek reconsideration en banc to address a claimed intra-circuit conflict. *Easley v. Reuss*, 532 F.3d 592, 594 (7th Cir. 2008) (rehearing en banc designed to address intra-circuit conflicts); *see also* Fed. R. App. P. 35(a)(1). By not seeking rehearing en banc, the Village undermines its position that an intra-circuit conflict exists.

[3] This response by Plaintiff-Appellant Oneida Nation ("Nation") is filed in accordance with this Court's order of August 17, 2020. (Doc. 63).

appeal. Finally, the Village's exceptional circumstances defense is insubstantial and does not merit reconsideration by the panel or the district court. The Petition should be denied.

I. The district court considered and rejected the Village's so-called "alternative arguments."

The Village claims it raised multiple issues that the district court did not address, which should now be remanded. It purports to identify five such issues: first, that the Village's Ordinance is an exercise of *in rem* jurisdiction over the Nation's fee lands, not of *in personam* jurisdiction over the Nation; second, that the Nation's fee lands are not immune from the Village's regulation under Supreme Court authority; third, that the Nation asserted a landowner's right to exclude by shutting down local roads; fourth, that the balancing test, not the exceptional circumstances test, applies to determine Village authority over the Nation in Indian country; and fifth, that exceptional circumstances exist justifying Village jurisdiction over the Nation's activities on its fee lands. (Petition at 3.) Several of these allegedly open issues are actually subsets of each other.[4] However the issues are broken down, though, the district court considered and

[4] These five issues are really only two – or at most three – just variously phrased by the Village during the course of the litigation. The first and second issues have been presented by the Village as the single argument that its Ordinance is an attempt at *in rem* jurisdiction over the Nation's fee lands, not *in personam* jurisdiction over the Nation. (*See* Dkt. No. 94 at 53, III.B ("Big Apple Fest Activities Occurred on Fee Land and Aspects of the Special Event Ordinance are In Rem.")) The third, fourth, and fifth arguments have been presented by the Village as variations on the exceptional circumstances argument. (*Id.* at 56-61 (Village authority necessary to manage delivery

rejected them all.

A. The district court rejected the Village's arguments on *in rem* jurisdiction and related arguments on two occasions.

These issues have been present throughout this litigation. For example, early on the parties disputed the allocation of the burden of proof on various issues, including the Village's claims that its authority over the Nation's fee lands is the determinative issue in the case, that Supreme Court authority on local regulation of fee lands is relevant, and that a balancing-of-interests test governs the dispute here. In its order on burden of proof, the district court flatly rejected all these arguments:

> Implicit in the Village's response to the Nation's motion is the assumption that the Village has unquestioned authority to enforce its ordinance within its boundaries on land that is not held in trust by the United States for the benefit of the Nation. As the foregoing discussion explains, however, that is not the law. Unlike *Oneida I*, this is not a case where the Village is seeking to exercise *in rem* jurisdiction over land that is held in fee by the Nation. *See Oneida I,* 542 F. Supp. 2d at 923-27 [referring to *Oneida Tribe of Indians of Wis. v. Village of Hobart, Wis.*, 542 F. Supp. 2d 908 (E.D. Wis. 2008), cited by the Village, Petition at 3]. In this case, by contrast, the Village seeks to regulate the conduct of the Nation and its members within the boundaries of the Nation's Reservation. Unless the Village is able to show that the Nation's Reservation has been diminished by Congress, *Cabazon* and not *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation,* 502 U.S. 251 (1992) or *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), provides the rules governing the determination of the case.

(A-44-45.) Plainly, then, the district court addressed and rejected the first, second, and fourth "alternative arguments." (*See* Petition at 3.)

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of emergency services; Village interests outweigh those of the Nation; and the balancing test rather than exceptional circumstances test should apply).)

The Village acknowledges this district court order in its Petition but dismisses it as a "preliminary determination." (Petition at 4 n.1.) The Village cites no authority and offers no explanation as to why this characterization of the order is either correct or significant. True, the order was entered before judgment and was, until judgment was entered, subject to reconsideration or modification by the district court. But the order was *not* reconsidered or modified, despite the Village's explicit request that the district court do so,[5] and thus remained the law of the case. *Schering Corp. v. Illinois Antibiotics,* 89 F.3d 357, 358 (7th Cir. 1996). Once the district court entered judgment and the appeal was filed, this "preliminary determination" was a part of the case before the Court of Appeals. *Matter of Grabill Corp.*, 983 F.2d 773, 775 (7th Cir. 1993) ("An appeal from a final judgment brings up for review all orders (except those that have become moot) rendered by the trial court previously in the litigation"); *Matter of Kilgus,* 811 F.2d 1112, 1115 (7th Cir. 1987) ("An appeal from the final judgment brings up all antecedent issues.")

Further, the district court effectively confirmed its opinion that this case raises *in personam* jurisdiction over the Nation, not *in rem* jurisdiction over the Nation's fee land, in its opinion on the cross-motions for summary judgment: "The underlying issue in this case is whether the Nation is subject to the regulations of a local municipality in the

[5] In its summary judgment motion, the Village expressly invited the district court to reconsider its rejection of the claimed distinction between Nation fee land and trust land but the district court did not do so. (*See* Dkt. 94 at 46.)

conduct of its special events." (A-17.) Similarly, in its ruling on the Village's counterclaim for money damages against the Nation, the district court again made clear that the issue here is *in personam* jurisdiction over the Nation, not *in rem* jurisdiction over the Nation's fee land. The district court denied the counterclaim because of the Nation's sovereign immunity and suggested alternative *in personam* remedies: direct action against Nation officials responsible for the alleged unlawful conduct or, if necessary, actually shutting down the Nation's event. (A-38.) These alternative remedies are in stark contrast to the forced alienation of the Nation's fee land found to be the appropriate *in rem* remedy in *Oneida I.* 542 F. Supp. 2d at 920-21. In light of the district court's repeated rejection of this set of claimed *in rem* jurisdictional issues, there is no need to remand them to the district court for consideration in the "first instance." (Petition at 1.)

B. The district court's judgment rejected the existence of exceptional circumstances.

The Village has consistently declined to identify exceptional circumstances, as that term is commonly understood, that are specific to the tribal activity it seeks to regulate.[6] Instead, the Village has claimed authority to regulate the Nation, even if in

[6] The few cases that consider the existence of exceptional circumstances generally discuss specific, claimed state interests particular to the tribal activity in question that are so weighty that they may override the usual immunity of tribes from local regulations in Indian country. *See, e.g., California v. Cabazon Band of Mission Indians,* 480 U.S. 202, at 220-21 (admittedly legitimate state interest in preventing infiltration of tribal games by organized crime held insufficient to avoid pre-emptive federal and tribal authority over tribal, on-reservation gaming).

Indian country, under a number of unrelated arguments it has cobbled together under the rubric of exceptional circumstances: that its Ordinance is authorized by Supreme Court cases as a land use regulation of fee lands; that the Nation lacks authority to prohibit use of a public highway; that a balancing test applies; and that federal and tribal interests are minimal. (Dkt. 94 at 54-61.) These issues (however the Village may characterize them) were rejected by the district court in its order on the burden of proof above, which indicated that the Ordinance purports to regulate *the Nation*, not *its lands*, and that the Village must justify such regulation in Indian country by identifiable exceptional circumstances.

The district court's judgment also directly contradicts the claimed existence of exceptional circumstances. After holding that the Oneida Reservation had been diminished in size to the approximately 14,000 acres held in trust for the Nation by the United States, the district court held that the Village could *not* impose its Ordinance on the Nation within this diminished Reservation. (A-36.) In other words, the district court necessarily determined that the Village had failed to establish exceptional circumstances to justify imposing the Ordinance upon the Nation within the diminished Reservation. *See California v. Cabazon Band of Mission Indians,* 480 U.S. 202. Significantly, a substantial record on the issue was available – a record developed during extensive discovery demanded by the Village that included hundreds of pages of documents and depositions of 15 fact witnesses. Yet even with a fully developed record and full briefing

on the matter, the Village failed to convince the district court that any exceptional circumstances existed that would support Village regulatory authority over the Nation on the diminished Reservation. Remand to the district court to allow it, yet again, to reconsider the issue is altogether unnecessary.

C. The panel properly concluded that the Village forfeited its exceptional circumstances defense.

In addition to its refusal to consider the exceptional circumstances defense in the absence of a cross-appeal (*see* Part II, *infra*), the panel also declined to do so because the Village presented its argument "largely without citation to authority or substantive development." (Doc. 57 ("Opinion") at 44.) The panel fairly summarized the Village's argument on this point. Other than Supreme Court authority claimed by the Village to authorize local regulation of the Nation's fee land, and distinguished by the panel for other reasons, the Village failed to cite any authority in support of its exceptional circumstances defense.[7] (Doc. 39 at 78-80; Opinion at 45.) The Village also failed to identify any factual circumstances, other than the temporary road closure that was authorized under a state permit (*see* discussion at 13, *infra*), that may suggest an extraordinary need to impose its Ordinance upon the Nation – no public exigency, no unusual public health, safety or other concern, and no occurrence at the Fest indicating a regulatory void. (Doc. 39 at 78-80.) Under these circumstances, the panel reasonably

[7] Even though the panel indicated that the Village had waived its exceptional circumstances claim, the panel nonetheless addressed and rejected the Supreme Court authority cited by the Village in support of the claim. *See* discussion at 10, *infra.*

concluded that the Village had waived the defense. *United States v. Cisneros*, 846 F.3d 972, 978 (7th Cir. 2017) ("We have repeatedly and consistently held that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived"); *Smith v. Richert*, 35 F.3d 300, 305 (7th Cir. 1994) (appellee waived argument that was "so scantily presented that it cannot be considered preserved for our consideration.").[8]

Contrary to the Village's contention, the panel's waiver conclusion is entirely consistent with the general principle that an appellee can raise any ground in support of the judgment below. In fact, the panel noted this general proposition. (Opinion at 39.) But this general proposition does not relieve the appellee of its obligation to present such alternative grounds in a manner permitting review by the court of appeals. Further, cases cited by the Village indicate that the court of appeals should remand such issues to the district court *only when the district court has not yet addressed them. Smith*, 35 F.3d at 305; *Midwest Cmty. Health Serv., Inc. v. Am. United Life Ins. Co.*, 255 F.3d 374, 379 (7th Cir. 2001). But where, as here, the district court has already rejected the alternative argument, "ordering a remand would be a waste of time." *Door Systems, Inc. v. Pro-Line Door Systems, Inc.*, 83 F.3d 169, 174 (7th Cir. 1996).

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[8] The Village implies that the *Smith* panel did not find that the alternative argument had been waived in the court of appeals. (Petition at 7.) This is not correct. The alternative argument was waived in the court of appeals because it had been so scantily presented. *Smith*, 35 F.3d at 305. But the alternative argument was remanded for consideration by the district court because it had not been considered by the district court.

The Village has made tactical decisions regarding which arguments it pressed, how it framed those arguments, and which arguments it did not press. Since its case, as presented, has been considered by the district court and rejected (with the exception of the diminishment claim), the Village should not now be allowed a "do-over" in the form of a remand to the district court.

II. The panel properly declined to consider the Village's exceptional circumstances arguments for the additional reason that the Village failed to preserve them through a cross-appeal.

The Village portrays the panel's decision as ambiguous regarding which, if any, of its alternative arguments the panel declined to consider due to the Village's failure to cross-appeal. (Petition at 8.) The opinion is not ambiguous. The panel considered the merits of the claimed preclusive effect of the *Stevens* case, despite the absence of a cross-appeal on the issue, because it was skeptical that a judgment based upon the *Stevens* case would necessarily expand the district court judgment. (Opinion at 41-44.) But the panel plainly and correctly determined that the exceptional circumstances argument would, indeed, expand the district court's judgment to authorize Village regulation of Nation activities upon the diminished Reservation (*i.e.*, on trust lands), as well as upon the Nation's fee lands. (Opinion at 45.)

The existence of exceptional circumstances may avoid the pre-emptive effect of federal authority over on-reservation activities of tribes and their members, as the Supreme Court made clear in *Cabazon*. 480 U.S. at 215. The *Cabazon* opinion is replete

with references to local authority over tribal activity on reservations and makes no reference at all to whether the activities at issue occur on trust land or fee land. *Id.* at 214-19. The district court explicitly held that the Nation's activities on the diminished Reservation – which the district court determined included only lands held in trust by the United States – are immune from the Village's Ordinance. (A-26-27.) This was necessarily a finding that no exceptional circumstances existed that would justify applying the Ordinance to the Nation's conduct on the diminished Reservation. (A-36-37.) A remand to reconsider claimed exceptional circumstances, an issue the Village *did not cross-appeal*, would require the district court to consider whether the Village could regulate the Nation within the Reservation – an indisputable expansion of the district court's judgment.

The Village attempts to avoid this indisputable expansion of the judgment by arguing that in either event – whether the Ordinance is applicable to fee lands located outside the diminished Reservation or the Ordinance is applicable because of the existence of exceptional circumstance – the judgment is the same that the Ordinance applies. (Petition at 9.) This is pure sophistry. The judgment below held the Ordinance applied to Nation activities on fee lands only because those lands were no longer within the diminished Reservation. A judgment that the Ordinance applied to Nation activities due to the presence of exceptional circumstances would subject the Nation to Village regulation throughout the Reservation, whether or not diminished and without regard

to whether the activity occurred on fee lands or those held in trust. Thus, the scope of the Village's claimed authority to regulate the Nation under the district court judgment is entirely different from the scope of the Village's claimed authority to regulate the Nation due to exceptional circumstances.

The Village's final attempt to avoid the indisputable expansion of the district court's judgment under its exceptional circumstances argument depends on a Village offer to voluntarily forbear from any attempt to impose its Ordinance on the Nation's trust land. (*See* Petition at 9-10.) Even assuming the Village's offer is credible, it is unavailing to avoid its obligation to cross-appeal on the exceptional circumstances defense. When a cross-appeal is necessary, failure to notice a cross-appeal is a jurisdictional defect. *1000 Friends of Wisconsin, Inc. v. U.S. Dep't. of Transp.*, 860 F.3d 480, 483 (7th Cir. 2017) (citing *Bowles v. Russell,* 551 U.S. 205, 206 (2007) (failure to file a timely notice of appeal deprives the appellate court of jurisdiction.) Simply put, the exceptional circumstances argument is not properly before the Court due to the Village's failure to cross-appeal on the claimed defense.

III. Whether characterized as exceptional circumstances or otherwise, the remaining factors claimed by the Village as bases for reconsideration were properly rejected on the merits by the panel.

The Village presents a collection of unrelated arguments as bases for its authority to regulate the Nation on its fee lands, even if those lands are within the bounds of an undiminished Reservation. (Petition at 11-14.) Of course, this is governed by the

exceptional circumstances doctrine and, as discussed above, the arguments made by the Village in this regard have no bearing on the circumstances relating to or conditions of the Big Apple Fest itself (with one exception discussed below). These include: first, whether the Ordinance is a land use regulation applicable to fee lands only or, as stated elsewhere by the Village, whether the Ordinance purports to exercise *in rem* jurisdiction over the Nation's fee lands or *in personam* jurisdiction over the Nation; and second, whether the district court should have applied a balancing test as suggested in *City of Sherrill* to determine the applicability of the Ordinance over the Nation on an undiminished Reservation.

As discussed above, these were explicitly rejected by the district court and only briefly raised by the Village in this Court. Further, the panel correctly rejected these issues as a matter of law. (Opinion at 45 (limitation on tribal jurisdiction over non-Indians not relevant here, and there is no per se rule that Indian fee land is subject to state jurisdiction).) As the panel concluded, "[t]here may be circumstances in which isolated fee land may be subject to local regulation, but the Village has presented no reason to believe that such circumstances are present here." (Opinion at 46.) Nothing in the Village's Petition suggests that remand to the district court on these considered and rejected issues is warranted.

Further, nothing relating to the single factual circumstance raised by the Village that is particular to the Big Apple Fest supports a remand. This single circumstance was

the allegedly unauthorized closure of a Village road by the Nation. (Petition at 13-14.) The Village complains that the closure took place without its permission and might have affected delivery of emergency services. The Village acknowledges that the Nation applied for a permit from the Wisconsin Department of Transportation and Brown County for the closure, but fails to note that the Nation actually received the requested permit. (*Id.* at 13; *see* Dkt. 86, Ex. 3.) The Village makes no contention that the permit was improperly granted, that the State of Wisconsin or Brown County lacked authority to issue the permit (as it impacted Village roads or otherwise), or that the Nation failed to comply with the permit.[9] And as the Nation stated in its Reply Brief here, the Nation made no admission against its interest in making the permit application but did so in light of Wisconsin's established, heightened interests in the operation of its highway system that is open to the public, even on an Indian reservation. (*See* Doc. 44, at 43 n.24.)

In the end, then, the Village seeks a remand based upon the claimed exceptional circumstance that a Village road was temporarily closed during the Nation's Big Apple Fest under a state permit, having made no objection to the validity of or compliance with the permit. The district court considered this circumstance and found it relevant only for its diminishment finding, not as authority for the Village to regulate the Nation on its Reservation. (A-36, 39.) The panel considered this circumstance and found it insufficient as a matter of law to support the Village's asserted authority over the

[9] Neither did the Village make any of these objections to the permit in the district court. (*See* Dkt. 102 at 53-61.)

Nation. It is not now credible to suggest that this circumstance, considered by the district court and argued in passing in this Court, supports either reconsideration by the panel or remand to the district court.

Conclusion

The Village raises no error of fact or law in support of its Petition for Rehearing. It raises only matters considered and rejected by the district court – matters the Village made no effort to preserve by either cross-appeal or a fully developed presentation in this Court. The Petition based upon these insubstantial matters should be denied.

Dated this 31st day of August, 2020.

Respectfully submitted,

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Certificate of Compliance

The undersigned certifies that the foregoing Answer to Petition for Rehearing complies with the type-volume limitation of Fed. R. App. P. 35(b)(B)(2) because it contains less than 3,900 words, excluding the parts of the answer exempted by Fed. R. App. P. 32(a)(7)(b)(iii).

The undersigned further certifies that this answer complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this answer has been prepared in a proportionally-spaced typeface using Microsoft Word Version 2016 in 12-point Palatino Linotype style font.

Dated: August 31, 2020

/s/ Arlinda F. Locklear
Arlinda F. Locklear
One of the Attorneys for Oneida Nation

Certificate of Service

I hereby certify that on August 31, 2020, the Answer to Petition for Rehearing was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Arlinda F. Locklear
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