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No.

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IN THE SUPREME COURT OF THE UNITED STATES

ARTICHOKE JOE'S, CALIFORNIA GRAND CASINO; FAIRFIELD YOUTH FOUNDATION; LUCKY CHANCES, INC.; OAKS CLUB ROOM; SACRAMENTO CONSOLIDATED CHARITIES,

Petitioners,

v.

GALE A. NORTON, Secretary of Interior; JAMES McDIVITT, Acting Assistant Secretary of Interior; ARNOLD SCHWARZENEGGER, Governor of California; BILL LOCKYER, Attorney General of California; HARLAN W. GOODSON, Director of California Division of Gambling Control; JOHN E. HENSLEY, Chair, California Gambling Control Commission; MICHAEL C. PALMER, Member, California Gambling Control Commission; J.K. SASAKI, Member, California Gambling Control Commission; ARLO SMITH, Member, California Gambling Control Commission,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Proposition 1A, an amendment to the California Constitution, gives Indian tribes the exclusive right to operate Class III gaming (casino gaming, including slot machines) in California. Such gaming by others is a crime. The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*, provides that Class III gaming shall be lawful on Indian lands only if conducted under a Tribal-State compact in a state that "permits" such gaming by any person, organization, or entity and where slot machines are "legal." 25 U.S.C. § 2710(d)(1), (d)(6). Pursuant to Proposition 1A and IGRA, the Governor of California signed, and the Secretary of Interior approved, compacts with 62 Indian tribes giving them monopoly rights to conduct Class III gaming in California -- a $5-6 billion-a-year business.

The questions presented are:

1. Does IGRA allow a state to permit *only tribes* to engage in Class III gaming?

2. If IGRA allows such a monopoly, does that statute, as well as Proposition 1A and the 62 compacts, violate equal protection principles?

3. More generally, can Congress, consistent with equal protection principles, authorize a state to award a major segment of its economy solely to Indian tribes, while excluding others from participating in that economic arena, even on non-Indian lands?

RULE 29.6 STATEMENT

Petitioner Artichoke Joe's is a California corporation. It has no parent corporation and no publicly held company owns 10% or more of its stock.

Petitioner Lucky Chances, Inc. is a California corporation. It has no parent corporation and no publicly held company owns 10% or more of its stock.

Petitioner California Grand Casino is a sole proprietorship.

Petitioner Oaks Club Room is a partnership.

Petitioners Fairfield Youth Foundation and Sacramento Consolidated Charities are California non-profit corporations.

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PETITION FOR A WRIT OF CERTIORARI

Artichoke Joe's, California Grand Casino, Fairfield Youth Foundation, Lucky Chances, Inc., Oaks Club Room, and Sacramento Consolidated Charities respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Petitioner's Appendix ("Pet. App.") 1a-57a) is reported at 353 F.3d 712. The order of that court denying rehearing (Pet. App. 143a-144a) is unreported. Judge Rhoades, who originally joined the court's decision, dissented from the order denying rehearing. The opinion of the district court (Pet. App. 58a-142a) is reported at 216 F. Supp. 2d 1084.

JURISDICTION

The court of appeals entered judgment on December 22, 2003. A timely petition for rehearing was denied on March 1, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d), provides in pertinent part:

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are --

* * * * *

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

* * * * *

(6) The provisions of section 1175 of title 15 [which generally prohibit gambling devices on Indian land] shall not apply to any gaming conducted under a Tribal-State compact that --

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

A copy of California Proposition 1A, which amended the California Constitution Art. 4 Sec. 19 by adding Section 19(f), is set forth at Pet. App. 145a-146a.

STATEMENT

1. In March, 2000, California voters approved Proposition 1A, which amended the California Constitution to authorize the Governor to sign compacts allowing Indian tribes to conduct certain forms of casino-style gaming, including slot machines (Class III gaming), while maintaining a prohibition against others doing so.[1] Anticipating Proposition 1A, the Governor had signed 57 compacts. These compacts stated their intent to "create a unique opportunity for [each] Tribe to operate its Gaming Facility in an economic environment free of competition from the Class III gaming ... on non-Indian lands in California." Pet. App. 11a.

[1] Class III gaming by others is a crime. Cal. Penal Code, §§ 330, *et seq*. The relevant sections of the California Penal Code are set forth at Pet. App. 147a-148a.

These compacts, plus five more subsequently signed, were approved by the Assistant Secretary of Interior for Indian Affairs acting for the Secretary, as required by IGRA. 25 U.S.C. § 2710(d)(8). The Assistant Secretary concluded that "[t]he compact provision, which gives the Tribe, along with other tribes in the State, the exclusive right to conduct limited forms of Class III gaming on Indians lands, is consistent with IGRA ... and does not violate the United States Constitution." ER 37. In California, tribal gaming is now a $5-6 billion-a-year business. *See* p. 10 n.5 *infra*.

Plaintiffs are California card clubs and charities that have lost customers because they are forbidden from offering types of gaming that tribal casinos operate and that many of plaintiffs' customers prefer. Plaintiffs sued the Secretary of Interior under the Administrative Procedure Act, and the Governor and various state officials under 42 U.S.C. § 1983, alleging that California's creation of a tribal casino monopoly violates IGRA, and that, if IGRA is construed to authorize such a monopoly, it violates equal protection principles, as do Proposition 1A and the compacts.

IGRA provides that Class III gaming "shall be lawful on Indian lands only" if it is "located in a State that permits such gaming for any purpose by any person, organization, or entity . . . ." 25 U.S.C. § 2710(d)(1). It also provides that the general prohibition of slot machines on Indian land is inapplicable if they are operated, pursuant to a compact, in a state where slot machines are "legal." 25 U.S.C. § 2710(d)(6). Plaintiffs contended that this language means that the state must "permit[] such gaming," and make slot machines "legal" *on non-Indian land*, because a state has no authority to permit gaming or legalize slot machines only on Indian land. The district court dismissed the complaint, holding that IGRA authorizes a statewide tribal Class III

monopoly and that this monopoly satisfies equal protection. Pet. App. 58a-142a.

2. The court of appeals affirmed. Pet. App. 57a. The court conceded that plaintiffs have a "plausible" argument that, to satisfy the statute, a state must "permit[]" Class III gaming on non-Indian land. Pet. App. 17a. However, the court concluded, the statute "is susceptible to more than one interpretation." Pet. App 20a.

The court determined that it could not resolve the statutory ambiguity by examining past judicial construction or the statute as a whole. Pet. App. 21a-25a. As to legislative history, the court acknowledged that "[p]laintiffs reasonably interpret IGRA as ... intended to maintain a competitive balance between Indian and non-Indian gaming interests ...." Pet. App. 21a. Nevertheless, the court concluded that "[a]s is true of the operative text, Congress' statements of intent in enacting IGRA, and IGRA's legislative history, leave us in equipoise between the parties' competing interpretations of the statute." Pet. App. 25a. Indeed, the court could not find any clear indication "that Congress even considered the question before us." Pet. App. 26a.

In these unique circumstances, the court decided the statutory interpretation issue by relying *solely* on the canon that ambiguous statutes intended to benefit tribes should be construed in their favor: "We adopt Defendants' construction, not because it is necessarily the better reading, but because it favors Indian tribes and the statute at issue is both ambiguous and intended to benefit those tribes." Pet. App. 34a.

3. The court recognized that, where the doctrine that an ambiguous statute must be construed to avoid

constitutional doubts is applicable, it "trumps statutory constructions favoring Indians." Pet. App. 35a. However, this doctrine, the court said, applies only where needed to "avoid *serious* constitutional doubts." *Id.*, (quoting *Reno v. Flores*, 507 U.S. 292, 314 n.9 (1993)) (emphasis in original). The court applied the Indian canon because it believed the constitutional issues raised by the authorization of a tribal monopoly are not "serious." Pet. App. 35a-36a.

In examining the constitutional issue, the court recognized that the proper test under *Morton v. Mancari*, 417 U.S. 535, 555 (1974) is whether "the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians ...." Pet. App. 38a. The court, however, did not directly address the central constitutional issue presented by this case -- whether Congress may authorize a state to carve out a $5-6 billion-a-year segment of its economy solely for the benefit of tribes. Indeed, the court ducked this issue, concluding that "IGRA does not ..., itself, create[] a monopoly." Pet. App. 43a.

Rather, the court analyzed IGRA and Proposition 1A separately. It held that IGRA (and the compacts) met the unique obligation standard because IGRA generates revenue for Indian tribes and because it "regulates activities only on Indian lands" -- a limitation the court deemed "critical given the well-established connection between tribal lands and tribal sovereignty." Pet. App. 43a.

The court found Proposition 1A "a more difficult question because it establishes the monopoly of which Plaintiffs principally complain." Pet. App. 46a. Nevertheless, despite the fact that Proposition 1A applies throughout the State and thus does not meet the "critical" limitation of regulating activities only on tribal land, the court concluded that Proposition 1A also passes the *Mancari*

test. This is so, the court said, because Proposition 1A regulates a "vice activity" and because it "promote[s] cooperative relationships between the tribes and the State by fostering tribal sovereignty and self-sufficiency." Pet. App. 47a-57a.

The court's decision thus allows California tribes to exercise monopoly rights over a major segment of the state's economy. All others who engage in Class III gaming face criminal sanctions.

REASONS FOR GRANTING THE WRIT

1. This case presents questions of national legal and societal importance. The core issues, not previously directly addressed by this Court, are (1) whether IGRA allows a state to award a *statewide* Class III gaming monopoly to tribes and (2), if it does, whether equal protection principles permit such exclusivity regarding a major segment of a state's economy.

For the first time, a federal court of appeals has allowed a state to carve out a $5-6 billion-a-year segment of its economy and award it to Indian tribes, while excluding all others from this business not only on Indian land, but statewide. The case has national significance because presently there are tribal casinos in 30 states, only seven of which also allow non-Indian casinos. Moreover, the defective logic of the court's constitutional ruling would allow tribal monopolies not only for casinos but also for any lucrative economic activity.

The case is particularly significant because the Ninth Circuit -- if its misguided use of the Indian canon is rejected, as it should be -- has left the interpretation of a major statute, IGRA, hopelessly muddled. The Court should take this case

to decide whether IGRA's language itself allows a state to grant tribes a Class III gaming monopoly, while preventing such gaming by others on non-Indian land.

2. Both a commonsense reading of IGRA and its legislative history demonstrate that, contrary to the Ninth Circuit's conclusion, the statute allows tribes to operate only those Class III games that others in a state may operate on non-Indian land.[2] Moreover, in an important respect, the Ninth Circuit's interpretation conflicts with the Tenth Circuit's decision in *Citizen Band Potawatomi Indian Tribe v. Green*, 995 F.2d 179 (10th Cir. 1993). That case concerned the IGRA provision stating that a tribe cannot operate slot machines unless they are "legal" in the state and conducted pursuant to a Tribal-State compact, which must be "in effect." 25 U.S.C. § 2710(d)(6). *Potawatomi* held that IGRA requires that slot machines "be legal absent the Tribal-State compact: otherwise it would not have been necessary to require both that gambling devices be legal ... and that the compact be 'in effect.'" 995 F.2d at 181. The Ninth Circuit's decision conflicts with *Potawatomi*, because in California slot machines are *not* "legal absent the Tribal-State compact." Proposition 1A expressly makes tribal slot machines legal only if they are "subject to ... the Tribal-State compact." The Court should resolve this intercircuit conflict.

3. The court of appeals' decision, which resolved the statutory interpretation issue *solely* on the basis of the Indian canon, conflicts with decisions of this Court, giving the

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[2] Both Sixth Circuit dictum and an earlier Ninth Circuit decision take this position. *See Keweenaw Bay Indian Cmty. v. United States*, 136 F.3d 469, 473 (6th Cir. 1998); *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1258 (9th Cir. 1994), *amended*, 99 F.3d 321 (9th Cir. 1996), *cert. denied*, 521 U.S. 1118 (1997).

canon far more weight than it can bear. That canon is trumped by the canon providing that statutes should be interpreted to avoid serious constitutional issues. The court of appeals' interpretation at the least raises a serious constitutional issue. Indeed, how can anyone reasonably conclude that giving tribes a $5-6 billion-a-year monopoly slice of a state's economy does not?[3]

As the Court has stated, the purpose of the canon is to protect a weak and defenseless people who are wards of the nation. *McLanahan v. State Tax Comm'n*, 411 U.S. 164, 174 (1973) (*quoting Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)). But this rationale has no application here where politically sophisticated tribes were able to shape IGRA's scope. Moreover, the Court has said that the Indian canon is no more than a rule used to decipher Congressional intent. *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). It should not be used to reach a result -- tribal monopoly -- that, the court of appeals concluded, Congress did not "even consider," and thus did not specifically intend.

4. Not only does the court of appeals' interpretation raise a serious constitutional issue, it conflicts with decisions of this Court as to the scope of preferences that may be afforded tribes.[4] Tribal preferences are permissible only if reasonably tied to "Congress' unique obligation toward the

[3] If, as the court suggested, Congress has virtually unlimited power to authorize a tribal monopoly, then, under this Court's precedents, IGRA must contain a "clear statement" allowing such a monopoly before it will be interpreted to do so. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001). But, as the lower court found, IGRA does not. Pet. App. 16a-25a.

[4] Indeed, an earlier Ninth Circuit decision stated that an Indian casino monopoly would be unconstitutional. *Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997).

Indians." *Morton v. Mancari*, 417 U.S. at 555. That rule is a "limited exception" to the general prohibition against racial preferences. *Rice v. Cayetano*, 528 U.S. 495, 520 (2000). "Congress' unique obligation toward the Indians" does not allow it to permit a state to give tribes exclusive access to a $5-6 billion-a-year business.

Casino gaming has no unique relationship to Indian history or culture. A tribal gaming monopoly cannot be justified on the ground that it betters the economic fortunes of tribes and thus promotes tribal self-sufficiency and sovereignty, because that rationale establishes no limits to the tribal preferences that Congress might allow. Moreover, promotion of tribal sovereignty over Indian land does not justify a state law that allows gaming on Indian land *and prohibits it everywhere else*. And no principled rationale supports the bizarre notion that monopolies for "vice activities" rationally relate to "Congress' unique obligation toward the Indians," and thus are constitutionally allowable, but other monopolies are not.

I. The Issues Presented By This Case Are Of Great National Importance.

The core issues here are whether IGRA allows a state to grant a *statewide* casino monopoly to tribes and, if so, do equal protection principles allow such exclusivity regarding a major segment of a state's economy. These are issues of national legal and economic importance, which this Court previously has not directly addressed.

Casino gambling is "one of the nation's fastest growing industries and most popular leisure activities." Nicholas S. Goldin, *Casting a New Light on Tribal Casino Gaming: Why Congress Should Curtail the Scope of High Stakes Indian Gambling*, 84 Cornell L. Rev. 798, 800 (1999).

"[H]igh-stakes casinos boast more visitors than the aggregate attendance of all professional and college football games, arena and symphony concerts, and theatrical events combined." *Id.* In California alone, tribal gaming generated $3.4 billion a year in 2002, up 17% from the previous year.[5] More recent estimates place California annual tribal gaming revenues at $5-6 billion.[6] Nationwide in 2002, there were 221 tribes operating 348 casinos in 30 states with total revenues over $14 billion; only seven of these states allow competition from non-Indian commercial casinos.[7] There are now 291 groups seeking federal recognition as tribes, nearly all of them receiving significant financial backing from non-Indian investors hoping to reap substantial profits from casino management contracts.[8]

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5 Alan Meister, Ph.D., *The Economic Impact of Indian Gaming 2d Annual Report* 8 Table 3a (Analysis Group, Inc. May 2003).

6 Glenn F. Bunting, *Ex-Actor, Chumash Plan Community*, L.A. Times, Mar. 16, 2004, at B1 ($5 billion), David M. Drucker, *Tribes, Governor Move Ahead on Casino Deal*, Oakland Tribune, Feb. 4, 2004 ($6 billion); Alan Murray, *Political Capital: Tap Casino Money*, Wall Street Journal, Oct. 14, 2003 ($5 billion).

7 Alan Meister, Ph.D., *The Economic Impact of Indian Gaming 2d Annual Report* 6 Tables 1, 2a, 2b (Analysis Group, Inc. May 2003). The tribal casino states are: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Idaho, Iowa, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Washington, Wisconsin, and Wyoming. Of these states, only 7 also allow non-Indian commercial casinos: Colorado, Iowa, Louisiana, Michigan, Mississippi, Nevada, and South Dakota. *Id.* at 8 Table 4.

8 Iver Peterson, *Would-Be Tribes Entice Investors*, N.Y. Times, Mar. 29, 2004, at A1. *See also* Donald L. Bartlett, *et al.*, *Playing the Political Slots: Part Two: How Indian Casino Interests Have Learned the Art of Buying Influence in Washington*, Time Magazine, Dec. 23, 2002, at 52;

As observed, the court of appeals left considerable doubt about the meaning of a significant federal statute. Moreover, the court's constitutional reasoning would allow a tribal monopoly as to any lucrative economic activity. And under the court's reasoning, possible monopolies could extend well beyond reservation boundaries.

Given the political influence tribes have wielded by generous use of gambling revenues, they likely will seek to exploit the Ninth Circuit's ruling in other areas of economic activity.[9] Indeed, there is already an Indian preference for certain federal defense contracts that will not be performed on reservations.[10] The time is ripe for this Court to consider whether Congress in IGRA in fact authorized casino tribal monopolies and, if so, whether equal protection principles prevent such exclusivity.

Donald L. Bartlett & James B. Steele, *Wheel of Misfortune*, Time Magazine, Dec. 16, 2002, at 44.

9 Indian casinos in California gave $7.3 million to California candidates in 1998; the next largest contributor group gave $1.9 million. ER 62. In the recent California recall campaign, Indian tribes reportedly gave more than $11 million of the $88 million contributed. Dan Morain, *Recall Campaigners Spend $88 Million, Despite Limits*, L.A. Times, Feb. 4, 2004, at B6. Between 1998 and 2001, California tribes spent $114 million in political campaigns. (ER 062.)

10 *American Fed'n of Gov't Employees v. United States*, 330 F.3d 513 (D.C. Cir.), *cert. denied*, 124 S. Ct. 957 (2003) (sustaining preference for Alaskan tribal corporation for contract to perform maintenance on Air Force base in New Mexico).

II. The Court Of Appeals' Interpretation Of IGRA Is Erroneous, Ignores The Legislative History, Conflicts With A Tenth Circuit Decision, And Is Not Justified By The Indian Canon.

A. The court of appeals' interpretation violates the plain meaning of the statute.

At issue is whether a state provision that permits *only* tribes to conduct Class III gaming and operate slot machines fulfills IGRA's provisions requiring the state to "permit" such gaming and to make slot machines "legal" as a precondition to Indian gaming. 25 U.S.C. § 2710(d)(1), (d)(6). Plaintiff's commonsense position is that the IGRA sections are purely "location" provisions -- that tribes may do what others may do in the state where the tribes are located.[11] Plaintiffs assert that these requirements must refer to gaming and slot machines on non-Indian land, because the state has no legal authority to "permit" gaming or make slot machines "legal" only on Indian land.[12] The court of appeals conceded that plaintiffs' position is "plausible." Pet. App. 17a. However, it concluded that "an alternative understanding of the verb 'permit'" is also plausible, for three reasons.

[11] Sixth Circuit dictum and an earlier Ninth Circuit opinion adopted this interpretation. "IGRA provides that tribes are entitled to engage in all forms of Class III gaming that a state permits *for other citizens*." *Keweenaw Bay Indian Community v. United States*, 136 F.3d 469, 473 (6th Cir. 1998) (emphasis added). "[A] state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have." *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1258 (9th Cir. 1994).

[12] Plaintiffs also contended that defendants position is glaringly circular, in effect asserting, *e.g.*, that tribes may operate slot machines if they are legal and that they are legal because tribes may operate them.

First, the court argued that, pre-IGRA, "California still had *some* jurisdiction over Indian lands pertaining to gaming," because this Court held that under Public Law 280 a total, criminal prohibition of gaming in California would have been enforceable on Indian land. Pet. App. 18a (emphasis in original) (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)). But the state's authority, under the statute applicable pre-IGRA, to adopt a statewide gaming *prohibition* that applied on Indian land is irrelevant to the issue whether a state under IGRA may "permit" class gaming on Indian land, while denying it elsewhere. It cannot.

Second, the court argued that IGRA gave California regulatory authority over gaming on Indian land. Pet. App. 18a-19a. But the provision of IGRA relied on by the court, *does not apply to compact gaming*. 18 U.S.C. § 1166(c)(2). Moreover, where it is apposite, § 1166 provides that state gaming laws apply in Indian land "in the same manner and to the same extent as such laws apply elsewhere in the State." That language plainly does not authorize a state to permit casino gaming only on Indian land, while making it a crime everywhere else.

Third, the court of appeals construed the verb "permit" as going beyond a "legally binding affirmative act." Pet. App. 19a. That construction is untenable given IGRA's parallel provision for slot machines, which allows them on Indian lands only if they are "legal" in the state. 25 U.S.C. § 2710(d)(6). A "legally binding affirmative act" by a state clearly is required to make slot machines "legal." Similarly, a legally binding affirmative act is necessary to fulfill the requirement that a state "permit" Class III gaming.[13]

[13] The court of appeals conceded that the interpretation of § 2710(d)(6)'s requirement that slot machines be "legal" in the state must

Because California had no jurisdiction to "permit" casino gaming or make slot machines "legal" only on Indian land, it could not fulfill IGRA's state "permission" and "legality" requirements by any measure attempting to do so. IGRA must be interpreted to mean that tribes may conduct only those games allowed others on non-Indian land.[14]

B. The legislative history confirms that Congress did not intend to authorize tribal casino monopolies.

The court of appeals concluded that the legislative history was in "equipoise" (Pet. App. 25a-6a), but it reached this conclusion on the basis of a highly distorted reading of that history. In fact, the legislative history strongly supports the view that Congress did not intend to authorize tribal gambling monopolies.

The court acknowledged that "the notion of free market competition does appear in the legislative history." Pet. App. 27a. Indeed it does. The Senate Report explicitly states that Congress expected "a fair balancing of competitive economic interests," "consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied," and "free market competition" between tribes and "other State-licensed gaming enterprises." S. Rep. 100-446, at 1-2, 6, 13, *reprinted in* 1988 U.S.C.C.A.N. 3083. The court discounted these passages, noting that they occurred "most prominently in the context of warning states not to abuse the compacting process to protect non-Indian gaming interests." Pet. App. 27a. But, while Congress' primary intent may have been to protect tribes, it did so by guaranteeing "consistency and uniformity" and "free market competition" -- not by authorizing Indian monopolies.[15]

The court of appeals also found support for its interpretation because the final language of the "state permission" requirement was broader than the corresponding provision of the original bill, which would have allowed gaming "that is otherwise legal within the State." Pet. App. 29a (quoting Senate Bill 555, 100th Cong. (1987)) But the court of appeals fails to mention that the bill from which the state "permission" language was taken *also* made it plain that a state had no jurisdiction over Indian land and thus could "permit" gaming only on non-Indian land. Under that bill, the tribe -- not the state -- had jurisdiction over Class III gaming on Indian land. S. 1303, 100th Cong. § 10(b) (1987). There was no provision for State-Tribal compacts, and thus no way for a state to "permit" gaming on Indian land.

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be the same as the interpretation of § 2710(d)(1)'s requirement that the state "permit" Class III gaming. Pet. App. 15a n.11.

[14] Even if the court were right in concluding that California had independent authority under IGRA to "permit" Indian gaming apart from the compacts, Proposition 1A does not purport to do that. All Proposition 1A does is to "permit" gaming on Indian land "*subject to those compacts*." Pet. App. 146a. Thus the state's alleged authority to grant "permission" and "legality" independent of the compacts is irrelevant.

[15] The court also ignored the statements of several prominent Senators and Congressmen during the Congressional debates forcefully establishing that Congress did not intend a tribal monopoly. Senator McCain said IGRA addressed the need for a "level playing field" permitting tribes "to install gaming operations that are the same as the States in which they reside." 134 Cong. Rec. 24027 (Sept. 15, 1988). Senator Domenici and Representatives Udall and Bilbray made similar statements. 134 Cong. Rec. 24023, 25381, 25376 (Sept. 15 and 26, 1988).

The final legislation adopted the compact requirement, under which tribes and a state could agree to share jurisdiction. But, as the court acknowledged, the compact requirement was adopted *not* as a way of expanding the state "permission" requirement, but rather "to resolve the most contentiously debated issue in the legislation: which authority -- Tribal, State, or Federal -- would regulate class III gaming." Pet. App. 26a.[16]

In fact, *both* S. 555 and S. 1303 -- the predecessor bills -- would have confined state "permission" to games allowed by the state on non-Indian lands over which the state has jurisdiction. The compact requirement plainly was not introduced to expand the category of permissible Class III gaming beyond that permitted on non-Indian land.[17]

The court also correctly recognized that Congress "enacted IGRA with the assumption that States would use laws and regulatory systems that police *extant* class III gaming operations to regulate similar operations on tribal lands," and thus shield tribal gaming from organized crime. Pet. App. 28a (emphasis in original).[18] *See also* 25 U.S.C. § 2702. While the court of appeals observed that a Congressional assumption may not be a requirement (Pet. App. 28a), here the Congressional assumption of an existing state Class III regulatory system gives meaning to the basic statutory requirement that tribal Class III gaming be "located

[16] The court concluded that Congress did not "even consider" tribal monopolies, and thus cannot legitimately claim that Congress changed the statutory language to allow them. Pet. App. 26a.

[17] The legislative history of IGRA is described in detail in Roland J. Santoni, *The Indian Gaming Regulatory Act: How Did We Get Here? Where Are We Going?*, 26 Creighton L. Rev. 387, 395-412 (1993).

[18] *See*, in the same vein, Pet. App. 29a.

in a State that permits such gaming." 25 U.S.C. § 2710(d)(4).

In sum, the legislative history shows that Congress did not intend to create tribal monopolies. Had it intended such a radical result, the statutory language would have been explicit, the legislative history far different.

C. In an important respect, the court's interpretation conflicts with a Tenth Circuit decision.

As noted, IGRA provides that Class III gaming shall be lawful on Indian lands only if, *inter alia*, it is (i) located in a state that "permits such gaming for any purpose by any person, organization or entity," and (ii) conducted in conformance with a State-Tribal compact. 25 U.S.C. § 2710(d)(1). IGRA also provides that the Johnson Act prohibition against slot machines on Indian land shall not apply to any gaming conducted under a "Tribal-State compact that -- (A) is entered into ... by a State in which gambling devices are legal, and (B) is in effect." 25 U.S.C. § 2710(d)(6). Because slot machines are a form of Class III gaming, these two provisions must be construed in similar fashion, as the court of appeals recognized. Pet. App. 15a n.11.

The Tenth Circuit's decision in *Citizen Band Potawatomi Indian Tribe v. Green*, 995 F.2d 179 (10th Cir. 1993), is directly contrary to the Ninth Circuit's ruling as to the Johnson Act issue. In that case, Oklahoma had entered into a compact with a tribe authorizing it to operate slot machines. The court of appeals held that slot machines were prohibited by Oklahoma law. The court "reject[ed] as patent bootstrapping" the Tribe's argument that "the Compact itself legalizes [slot machines] for purposes of

[§ 2710(d)(6)]," *Id.* at 181. The court reasoned that "Congress must have meant that gambling devices be legal absent the Tribal-State compact; otherwise it would not have been necessary to require both that gambling devices be legal ... and that the compact be 'in effect.'" *Id.*

The same analysis applies to § 2710(d)(1). Congress must have meant that the state permit Class III gaming absent the Tribal-State compact; otherwise it would not have been necessary to require both that the state permit Class III gaming and that it be conducted under a Tribal-State compact.

The Ninth Circuit attempted to distinguish *Potawatomi* on the ground that Oklahoma lacked a provision like Proposition 1A. Pet. App. 16a-17a. However, unless there is some state law authorizing it, a compact is a nullity and IGRA's compact requirement is not met.[19] To avoid "patent bootstrapping," something more than a state law authorizing a compact is needed to fulfill the state permission requirement. A provision authorizing the Governor to sign compacts does not suffice, because any valid compact requires such a provision.

The court of appeals reasoned that "Proposition 1A does more than authorize the Governor to enter into Tribal-State compacts." Pet. App. 17a. "It explicitly states that 'slot machines, lottery games and banking and percentage card games *are hereby permitted* to be conducted and operated on tribal lands' subject to the regulations embodied in the Tribal-State compact." *Id.* (quoting Proposition 1A) (emphasis added by court). But the Proposition 1A language

[19] "[A] compact entered into by someone without authority to bind the state is void." *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1554 (10th Cir. 1997).

relied on by the court "permits" tribal Class III gaming only *"subject to [the] compacts."* Pet. App. 146a. Because the court of appeals, as a functional matter, did not require that slot machines "be legal absent the Tribal-State compact," its holding is in direct conflict with the Tenth Circuit decision in *Potawatomi*.

D. The court's use of the Indian canon conflicts with decisions of this Court.

Finding the statute ambiguous and the legislative history in "equipoise," the court chose an interpretation favoring the tribes *solely* on the basis of the canon that statutes intended to benefit tribes are to be construed liberally in their favor. Pet App. 32a-34a. But that holding takes the Indian canon far beyond this Court's previous decisions. As this Court explained in *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001), (which the court of appeals failed to cite), the canons "are not mandatory rules." They are only "guides" to "help judges determine the Legislature's intent as embodied in particular statutory language." *Id.* In this case, however, the court used the Indian canon as more than a "guide." Here the canon has been made to bear the entire weight of the decision. That is particularly inappropriate because Congress did not "even consider" tribal monopolies (Pet. App. 25a-26a) and perforce did not specifically intend to ordain them.[20]

The Indian canon, first developed as to treaties, is intended to protect "weak and defenseless people who are wards of the nation." *McLanahan v. State Tax Comm'n*, 411 U.S. 164, 174 (1973) (*quoting Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)). But IGRA's legislative history shows that

[20] "[O]ther circumstances evidencing Congressional intent can overcome [the canon's] force." *Chickasaw*, 534 U.S. at 94.

politically sophisticated, financially powerful tribes forcefully advocated their interests and helped shape the eventual legislation. Pet. App. 26a (compact provision was a compromise between states and tribes).[21] To apply the canon blindly here to protect a "weak and defenseless people" would ignore reality. Moreover, this Court previously has used the canon principally to prevent intrusions on tribal sovereignty.[22] Never has it applied the canon totally to exclude non-Indians from a major segment of a state's economy, a result going far beyond the canon's purposes.

As discussed below, allowing balkanization of California's economy also raises serious constitutional issues. This Court repeatedly has said that statutes must be interpreted to avoid such constitutional concerns. *I.N.S. v. St. Cyr*, 533, U.S. 289, 299-300 (2001). And, as the court of appeals recognized, this canon, where apposite, "trumps" the Indian canon, rendering it inapplicable. Pet. App. 35a. For this reason also, the court of appeals was wrong in making the Indian canon the sole basis of its decision.

[21] Also, some tribes took the position that tribes should be only allowed gaming others can have. *Gaming Activities on Indian Reservations and Lands: Hearing before the United States Senate Select Committee on Indian Affairs on S. 555 and S. 1303*, 100th Cong. 231 ("Hearings"), "[t]he legislation should clearly provide for and authorize Indian gaming in any state within which similar activity is permitted by non-Indians under state law" (All Indian Pueblo Council). *See also* Hearings at 421-22, indicating that the Fort Mojave Indian Tribe of Arizona, California and Nevada supported the provision of S. 555 that "authorizes Class III gaming in states where such gaming is legal."

[22] *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-45 (1980) (statute construed to preserve "traditional notions of sovereignty and tribal independence"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71-2 (1978) (statute construed to avoid "additional intrusion on tribal sovereignty").

To conclude that the constitutional issue is not serious, the Court would have to determine that Congress' power to give tribes monopoly rights is virtually unlimited. But if that is so, the Court's opinions require a "clear statement" in IGRA that Congress was ordaining monopoly rights before the statute will be interpreted to allow them. "The Court ... has tended to create the strongest clear statement rules to confine Congress' power in areas in which Congress has the constitutional authority to do virtually anything." *I.N.S. v. St. Cyr*, 533 U.S. at 299 n.10.[23] "[W]hen a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id.* at 299. Here, where the lower court concluded that IGRA is "ambiguous" and that Congress did not "even consider" a tribal monopoly, a "clear statement" allowing such a monopoly is missing and IGRA cannot be read to allow this, the Indian canon notwithstanding.[24]

III. The Court Of Appeals' Opinion Conflicts With This Court's Equal Protection Decisions.

The overarching constitutional issue here is whether Congress can authorize a state to award a major segment of its general economy exclusively to tribes. The court of

[23] Quoting William N. Eskridge, Jr. & Philip P. Frickey "Quasi-Constitutional Law: Clear Statement Rules on Constitutional Lawmaking," 45 Vand. L. Rev. 593, 597 (1992). *See also, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

[24] *See also, Chickasaw,* which held that the canon is "offset" by the rule that statutes should not be applied to exempt tribes from taxation where Congress has not "clearly expressed" this intent, 534 U.S. at 95, and *Williams v. Babbitt,* 115 F.3d 657, 661 (9th Cir. 1997) (if Congress intended "the total and perpetual conclusion" of non-Indians from a business it normally would "spell out ... its intent").

appeals did not directly deal with this question, the answer to which, under this Court's decisions, must be no.

A. Tribal preferences are unconstitutional unless "rationally tied to Congress' unique obligation toward the Indians."

Under *Morton v. Mancari*, a tribal preference is regarded as "political" rather than racial, and escapes constitutional disapprobation only if it is "rationally tied to Congress' unique obligations toward the Indians." 417 U.S. at 555. The preference in *Mancari* concerned hiring at the Bureau of Indian Affairs, an agency the Court characterized as "truly sui generis" because of its role in tribal affairs. 417 U.S. at 554. The Court recognized the limited reach of its decision, noting "the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations." 417 U.S. at 554-55. Recently, the Court, recognizing that the *Mancari* preference had a "racial component," described the case as a "limited exception" to the rule against racial preferences. *Rice v. Cayetano*, 528 U.S. at 520.

B. A casino gaming monopoly is not rationally tied to Congress' unique obligation toward Indians.

Casino gambling does not fall within any category this Court previously has recognized as related to "Congress' unique obligation toward the Indians." Indeed, in an earlier case, the Ninth Circuit itself stated -- contrary to the conclusion reached here -- that an Indian casino monopoly would not relate to such obligation and thus would be unconstitutional. *Williams v. Babbitt*, 115 F.3d at 665.

The only coherent explanation offered for granting tribes a casino monopoly is that it is highly profitable and tribes

need money. But that open-ended justification, supports *any* monopoly worth having. This Court never has accepted economic benefit as a sufficient rationale for an Indian preference, and to do so would ignore the "limited" nature of the *Mancari* exception.

1. Casino gambling has no special relationship to Indian society or culture.

Casino gambling was not invented by Indians or historically conducted as part of Indian culture. ER 70, 167-68. As the Ninth Circuit has said, slot machines and casino card games are not "intricately woven into the fabric of [native] social, psychological, and religious life." *Williams v. Babbitt*, 115 F.3d at 664. A tribal casino monopoly is not justified by decisions sustaining Indian preferences that relate to unique features of Indian culture and society. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 664-65 (1979) (traditional Indian fishing rights); *Livingston v. Ewing*, 601 F.2d 1110 (10th Cir. 1979) (Indian sale of handmade goods at site of traditional Indian market); *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) (religious ceremonies of Native American church); *Gibson v. Babbitt*, 223 F.3d 1256 (11th Cir. 2000) (possession of eagle feathers).

2. A casino gambling monopoly is not lawful simply because it is profitable.

Indian casinos are immensely profitable, particularly where competition is prohibited. But that fact, itself, does not provide a sufficient constitutional justification for a tribal gaming monopoly.

Nothing in this Court's case law supports such a sweeping proposition. As noted, *Mancari* allowed a very

limited preference for BIA hiring. In *Rice v. Cayetano*, the Court, recognizing that "the classification [in *Mancari*] had a racial component," characterized *Mancari*'s holding -- that tribal preferences are legitimate if they relate to "Congress' unique obligation toward the Indians" -- as a "limited exception" to the general rule against racial preferences. The Court said: "It does not follow from *Mancari* ... that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all Non-Indian citizens." 528 U.S. at 520. Similarly, "[i]t does not follow from *Mancari* ... that Congress may authorize a State to establish a ... scheme that limits [participation in a business] to a class of tribal Indians, to the exclusion of all Non-Indian citizens." *Id.* at 497[25]

Mancari and *Rice* do not justify giving tribes a monopoly over a business simply because it is profitable and thus benefits tribes. Such a rationale would justify

[25] The court of appeals cited three other decisions by this Court after *Mancari* (but before *Cayetano*). Pet App. 38-41 (citing *Fisher v. District Court*, 424 U.S. 382 (1976); *United States v. Antelope*, 430 U.S. 641 (1977); and *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979) ("*Yakima III*")). None of these decisions support the broad proposition that tribes may be granted any preference that is economically beneficial.

Fisher sustained the exclusive jurisdiction of tribal courts over adoption proceedings involving tribal members, a matter uniquely related to Indian tribes. *Antelope* upheld the application of federal rather than state criminal law to a crime committed by a tribal member on Indian land and stands for the unremarkable proposition that, where two different sets of laws exist within two adjacent jurisdictions, there is no equal protection violation. *Yakima III* sustained a state's drawing of boundaries that established where state or tribal law would apply. In none of these cases did a state prescribe a rule allowing tribes to engage in a generic business activity, while prohibiting non-Indians from doing so anywhere in the state.

monopolies of all sorts – for example, automobile dealerships, biotech labs, internet operations -- and greatly alter equal protection jurisprudence.

3. A tribal casino monopoly cannot be justified as fostering tribal sovereignty.

The court of appeals wrongly sought to justify California's grant of a tribal casino monopoly on the ground that it furthers the tribes' sovereign interest in "mak[ing] their own decisions about the desirability of gaming operations on Indian lands." Pet. App. 55a.

But Proposition 1A is not confined to activities on Indian land. It governs the legality of casino gaming *throughout the state*. It provides that tribes may conduct casino gambling on Indian land *and* that no one else may do so *anywhere else in the state*.

In this respect, Proposition 1A is dramatically different from the typical federal Indian statutory preference, which gives tribes a preference for activities occurring on Indian land, but does *not* forbid the activities of non-Indians in the rest of a state.[26] Here California has exercised its own sovereignty to enact a single rule applicable throughout the state, including Indian lands, that treats tribes and others

[26] *Williams v. Babbitt*, 115 F.3d at 664 n.6, lists 29 federal statutes creating Indian preferences for various activities on Indian land. *E.g.*, 42 U.S.C. §§ 1437a(b)(9)-(12) (natives on Indian land eligible for low-income housing). Only one (the statute prohibiting possession of eagle feathers except for Indian religious purposes, 16 U.S.C. § 668a) appears to prohibit activity by non-Indians on non-Indian lands. But that preference has a unique relationship to Indian culture. Casino gaming does not.

differently. Such discrimination cannot be justified as a measure promoting tribal sovereignty on Indian land.[27]

Moreover, it is unrealistic to view tribal casinos as businesses that are conducted solely on Indian land. California tribal casinos advertise extensively throughout the state and run bus services to major metropolitan areas to transport customers. ER 60-61, 78, 160. As the Ninth Circuit observed, "outsiders provide most of the money spent at the casino," and thus tribal casinos do not "involve only tribal members involved in on-reservation conduct." *Confederated Tribes of Siletz Indians v. Oregon*, 143 F.3d 481, 486-87 (9th Cir. 1998).

To allow tribal monopolies for any business that could be conducted on Indian land would make a mockery of the "limited" nature of the *Mancari* exception. *Cayetano*, 528 U.S. at 520. In recent years new Indian reservations have been approved for sites chosen solely for their value as business property. For example, a casino has been located in the San Francisco Bay Area at a site that had no historical relation to the tribe, but housed a non-Indian, expandable Class II casino. *Artichoke Joe's v. Norton*, 278 F. Supp. 2d 1174 (E.D. Cal. 2003). Similarly, a tribal casino has been placed in suburban Sacramento on land not previously connected to any tribe. *City of Roseville v. Norton*, 219 F. Supp. 2d 130 (D.D.C. 2002), *aff'd*, 348 F.3d 1020 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1888 (2004). If reservations can be located at whatever site offers the most advantageous business situation -- and if tribal monopolies are allowed for any activity conducted on Indian land -- there is little limit to what is permissible.

[27] Indeed, in IGRA Congress actually *diminished* tribal sovereignty by giving states the authority (within limits) to decide whether gaming would be allowed on tribal lands. 25 U.S.C. § 2710(d)(1).

4. The "vice activity" nature of casino gambling does not justify a tribal monopoly.

The court of appeals sought to limit the broad impact of its holding by distinguishing casino gambling from other economic activity on the ground that casino gambling is a "vice activity." Pet. App. 49a-51a. However, the court failed to explain why a monopoly of a "vice activity" rationally would relate to "Congress' unique obligation toward the Indians" within the meaning of *Mancari*, while a monopoly of any other kind of economic activity would not.

Indeed, there is no meaningful distinction between monopolies of "vice activities" and monopolies of other economic activities in terms of "Congress' unique obligation toward the Indians." Nor is their any other principled basis for a rule that ethnic groups may be given preferences as to "red light district" activities but not otherwise.[28]

The court cited cases according states' wide latitude in fashioning different rules for different localities in regulating "vice activities." *Salsburg v. Maryland*, 346 U.S. 545 (1954) (statute excepting gambling prosecutions in three counties from exclusionary evidence rule); *Philly's Inc. v. Byrne*, 732 F.2d 87 (7th Cir. 1984) (ordinance allowing precincts to vote themselves "dry"); *37712, Inc. v. Ohio Dep't of Liquor Control*, 113 F.3d 614, 621-22 (6th Cir. 1997) (statute allowing counties to go "dry" by local-option elections). *See also McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding state law excepting one county from ban on sale of certain merchandise on Sunday)

[28] Also dubious is the notion that Congress, which has guardianship responsibilities to tribes, may allow states to consign "vice activities" to reservations to protect *other* citizens.

In its analysis, however, the court did not consider the basic question whether Congress constitutionally can authorize a tribal monopoly for a generic business that is not uniquely Indian. A state cannot create a tribal preference without lawful Congressional authorization to do so. *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. at 500-01. If Congress cannot constitutionally empower states to grant a tribal casino monopoly, questions about a state's implementation of that authority are irrelevant, as are the local option and exemption cases.

Moreover, no case has authorized a state to extend an option or exemption only to jurisdictions chosen because of ethnicity.[29] Rather, the cases acknowledge that any state regulation (including regulation of "vice activity") that singles out a "suspect class" is constitutionally dubious. *See 37712, Inc. v. Ohio Dep't of Liquor Control*, 113 F.3d at 620, 621; *State v. Heretic, Inc.*, 588 S.E.2d 224, 225 (Ga. 2003). And whether a tribal preference is unconstitutional depends on *Mancari*'s "unique obligation" test, whether or not a "vice activity" is involved.

Other conduct besides "vice activities" may be subject to local option restrictions. For example, it is clearly constitutional for states to authorize local jurisdictions to restrict the location of economic activity -- "vice" or not -- to preserve a neighborhood's character. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-90 (1926) (sustaining municipal zoning restrictions barring all industrial use in certain

[29] And no "local option" case left excluded parties without the option to pursue their economic activities somewhere in the state.

areas).[30] A state's authority to impose local restrictions cannot control here because to so hold would justify tribal monopolies of all sorts, in evident disregard of the "limited" nature of the *Mancari* exception.[31]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[30] *See also California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (sustaining California coastal zone management program against federal preemption challenge).

[31] Unquestionably, states may adopt reasonable location restrictions for casino gambling, as they may do regarding any other economic activity. Pet. App. 49a n.20 (quoting *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 192 (1999)). But the state must allow all races an equal opportunity to conduct casino gambling, or any other business, at whatever locations are deemed permissible, if constitutional principles are to be respected.