No. 03-740

In The
Supreme Court of the United States

JOHN D. ASHCROFT,
ATTORNEY GENERAL, et al.,

Petitioners,

v.

SENECA-CAYUGA TRIBE OF OKLAHOMA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, CONNECTICUT, MASSACHUSETTS, MINNESOTA, NEBRASKA, NEVADA, SOUTH DAKOTA AND TEXAS IN SUPPORT OF THE UNITED STATES

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
WILL BRIEGER
Acting Chief Assistant Attorney General
ROBERT L. MUKAI
Senior Assistant Attorney General
SARA J. DRAKE
Supervising Deputy Attorney General

*PETER H. KAUFMAN
Deputy Attorney General
110 West A Street
San Diego, CA 92101
Telephone: (619) 645-2020
Counsel for Amici Curiae
**Counsel of Record*

(Additional Counsel Listed On Inside Cover)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

WILLIAM H. PRYOR, JR.
Attorney General of
Alabama
11 South Union Street
Montgomery, AL 36130
(334) 242-7300

RICHARD BLUMENTHAL
Attorney General of
Connecticut
55 Elm Street
Hartford, Ct 06106
(860) 808-5318

THOMAS F. REILLY
Attorney General of
Massachusetts
One Ashburton Place
Boston, MA 02108
(617) 727-2200

MIKE HATCH
Attorney General of
Minnesota
102 State Capitol
75 Dr. Martin Luther
King, Jr. Boulevard
St. Paul, MN 55155-1609
(651) 296-6196

JON BRUNING
Attorney General of
Nebraska
P.O. Box 98920
Lincoln, NE 68509
(402) 471-2644

BRIAN SANDOVAL
Nevada Attorney General
Carson City Office
100 North Carson Street
Carson City, NV 89701-4717
(775) 684-1100

LARRY LONG
Attorney General of
South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070
(605) 773-3215

GREG ABBOTT
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548
(512) 936-1822

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

BRIEF OF AMICI CURIAE

The states of California, Alabama, Connecticut, Massachusetts, Minnesota, Nebraska, Nevada, South Dakota and Texas respectfully submit this brief as amici curiae pursuant to Supreme Court Rule 37.4, in support of the petition of the United States. The brief addresses only the first question presented in that petition:

> Whether a machine may be classified properly as a mere technologic aid to a class II game if it is in fact a "slot machine of any kind" within the meaning of IGRA or a prohibited "gambling device" within the meaning of the Johnson Act.

INTEREST OF AMICI CURIAE

Amici curiae are States that have within their borders Indian Tribes that currently conduct class II gaming, as defined by the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2703(7)(A), or may seek to do so in the future. Until relatively recent times, class II gaming has generally consisted of traditionally low-stakes games such as bingo or pull-tabs. With the advent of improved technology, however, this is no longer so. The decision of the Tenth Circuit below would authorize Tribes to offer otherwise prohibited slot-machine gaming in the guise of "technologic aids" to the play of class II games of chance. In so doing, the court of appeals' decision threatens substantially to undermine the only means available for States to ensure adequate regulation of slot-machine gambling conducted on Indian lands, *viz.,* the negotiated Tribal-State compact.

Tribal casinos and the attendant casino-style gambling can place significant financial, environmental,

regulatory, and social burdens upon States. Accordingly, when Tribes seek to offer casino-style gambling, States understandably desire to address not only regulatory oversight of the games and devices themselves, to ensure against fraud, corruption, and infiltration by Organized Crime, but also to negotiate about the acceptable size of the casino operation itself – including, for example, the acceptable number of slot machines that may occupy a casino site. Indeed, California, has negotiated 63 compacts containing provisions that, among other things, limit the number of slot machines permissible on Indian lands and set fees per slot machine designed to provide income to Tribes that are unable or unwilling to operate large class III gaming facilities. Cal. Gov't. Code § 12012.75. These compacts also contain provisions that: (a) make funds available to the State and to local governments to address gambling addiction; (b) provide money to alleviate environmental and other impacts stemming from the construction of tribal gaming facilities; (c) compensate the State for its regulatory costs incurred as a result of the compacts; and (d) provide disbursements for the purpose of implementing the terms of tribal labor relations ordinances included in compacts. Cal. Gov't. Code § 12012.85; see, *In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003), *petition for cert. filed, sub nom., Coyote Valley Band of Pomo Indians v. State of California*, No. 03-804. Congress has ensured that States may negotiate with Tribes to address the potential burdens of casino gambling by classifying all such gambling as "class III gaming" in IGRA and by requiring Tribes to negotiate with States about the regulation and alleviation of those potential impacts.

Prior to issuance of the decision below, States could be assured that slot machines within the meaning of the

Johnson Act, 15 U.S.C. § 1171(a)(1), would be the subject of a negotiated compact if a Tribe desired to offer slot-machine gambling as a source of revenue. Up until now, there was little doubt that Tribes offering gaming by means of slot machines and other devices encompassed by the Johnson Act were engaging in class III gaming within the meaning of IGRA. 25 U.S.C. § 2703(8) (class III gaming is gaming that is neither class I nor class II gaming) § 2703(7)(B)(ii) (class II gaming excludes "slot machines of any kind"); and that they are unquestionably obligated to negotiate with the State about those machines. But the Tenth Circuit has now adopted an analysis that looks first to IGRA for a determination of whether the device can be classified as a "technologic aid" to the play of a class II game of chance. According to the court, if the answer to that question is affirmative, there is no further need to inquire whether the device would also constitute a slot machine or gambling device within the meaning of the Johnson Act.

The result of the lower court's analysis is that machines that are *in fact* slot machines within the meaning of the Johnson Act may nevertheless be offered in tribal casinos as *class II* gaming and may, therefore, be offered without negotiation with the State. Numerous writers confirm that this is no idle threat. For example, the Chairman of the National Indian Gaming Commission has acknowledged that California Indian casinos can be expected to offer a significant number of so-called class II devices because they offer an attractive way to meet the demand for class III devices and, at the same time, avoid the limit on the number of permissible class III devices in the State. (Steve Wiegand, *Casinos Could Hold Cards In Talks,* Sacramento Bee, Nov. 17, 2003, *available at* http://www.gamblingmagazine.com/ManageArticle.asp?C=280&A=

8779; Marian Green, *Class II Games Come of Age,* Slot Manager, Sept. 2003, *available at* http://www.igwb.com/Publications/currentpubs/slotmanagercover.htm. Similarly, a manufacturer of these devices has stated that because "many recognized tribes in California lack compacts with the state [they] are prime candidates for our new generation Class II games." Tom Wanamaker, *Guidelines Make Class II Gaming More Attractive,* Indian Country, Dec. 2003, *available at* http://www.indiancountry.com/?1070389032. By virtue of the Tenth Circuit's decision, the Tribes' ability entirely to circumvent IGRA's negotiation obligations with respect to slot machines is merely a function of human creative ability to design slot machines that – in the case of pull-tab devices, for example – permit push-button "play" of a coded strip-roll of paper "pull-tabs," providing a visual and auditory display of the outcome represented by bells and the aligning of the reels of a virtual "one-armed bandit." From the player's point of view – and, therefore, from the perspective of a need for negotiated compact treatment – these so-called "technologic aids" are indistinguishable in any meaningful sense from any other slot machine along the casino wall. See, e.g., *Diamond Game Enterprises, Inc. v. Reno*, 9 F.Supp.2d 13, 20-21 (D.D.C. 1998), *rev'd*, 230 F.3d 365 (D.C. Cir. 2000). As a gaming industry commentator notes, "a new casino competitor is coming to America: the bingosino." I. Nelson Rose, *Is It Bingo, or a Slot Machine?,* I. Nelson Rose Gaming Gurus, Oct. 14, 2003, *available at* http://rose.casinocitytimes.com/articles/7264.html. The "bingosino" will feature video bingo devices that are "virtually indistinguishable from video slots" and will be joined by "other machines and fast-action table games, giving bingo halls, especially those on Indian land, the look and feel of casinos." *Id.*

Indeed, the Tenth Circuit decision frankly invites creative minds to develop even more highly sophisticated "technologic aids" in order to render the Johnson Act utterly meaningless as a limitation on the kinds of machine-facilitated gambling that can be conducted on Indian lands without a negotiated Tribal-State compact. As the United States correctly observes in its petition for certiorari, if the lower court's decision is upheld, Tribes without compacts could open casinos offering games similar to the one at issue in this case and completely avoid the compact process. Pet. at 20-21. Similarly, those Tribes that do have compacts, could avoid restrictions placed on the number of permissible class III devices by installing slot-machine "technologic aids." *Id.* at 20. They could also avoid revenue sharing obligations by replacing some or all of their class III devices with comparable machines of the sort at issue here. *Id.* at 20-21.

Amici States urge the Court to grant the petition of the United States in order to restore Congress's intended balance between Tribal interests in the conduct of low-stakes class II gaming and State interests in the conduct of high-stakes class III gaming.

SUMMARY OF ARGUMENT

The slot machine is the icon of casino gambling. This case arises precisely because slot machine gambling is highly lucrative – both for Tribes and for the device manufacturers – and Tribes have long sought ways to conduct slot-machine gambling operations free from the restrictions of a Tribal-State Compact. See, e.g., *Diamond Game Enterprises, Inc. v. Reno*, 9 F.Supp.2d 13; *Cabazon Band of*

Mission Indians v. National Indian Gaming Com'n, 827 F.Supp. 26 (D.D.C. 1993) (re video pull-tab machine); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994) (re "Auto-Tab 101").

The determination of whether machine-facilitated gambling constitutes class II gaming within the meaning of IGRA and is, therefore, immune from the compact-negotiation process, cannot reasonably be isolated from a determination of whether the machine constitutes a slot machine or gambling device within the meaning of the Johnson Act, 15 U.S.C. § 1171(a)(1). In IGRA Congress relaxed the Johnson Act's otherwise absolute prohibition against slot machines in Indian country in only one circumstance, *viz.*, the operation of such machines pursuant to a Tribal-State Compact. 25 U.S.C. § 2710(d)(6).

To the extent that the Tenth Circuit analyzes the issue solely by reference to the question of whether a machine can be said to be a "technologic aid" to the play of a class II game, see, 25 U.S.C. § 2703(7)(A)(i) (defining "bingo" to include the game when played with the aid of a "technologic device"), without reference whatsoever to the Johnson Act, the court dramatically and erroneously undermines the important balance between Tribal and State interests in the compromise legislation that is IGRA. Furthermore, the analysis of the Tenth Circuit directly conflicts with that of the Eighth Circuit in *United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607, 611 (2003), *petition pend.*, No. 03-762, in which that court held that the Johnson Act is an express limitation on the conduct of any class II gaming under IGRA.

Amici urge that the Court grant the petition of the United States in order to clarify the proper relationship

between IGRA and the Johnson Act for purposes of classifying gambling machines as class II gaming and in order to resolve the split of authority between the Tenth and the Eighth Circuits on this point.

ARGUMENT

I.

BY AUTHORIZING TRIBES TO OFFER SLOT MACHINES AS CLASS II GAMING ACTIVITIES, THE TENTH CIRCUIT UNDERMINES CONGRESS'S ASSURANCE TO STATES THAT SLOT MACHINES MAY BE OFFERED ON INDIAN LANDS ONLY IN ACCORDANCE WITH A NEGOTIATED TRIBAL-STATE COMPACT.

The critical balance of Tribal and State interests that was ultimately effected by Congress in IGRA is that class I and class II gaming activities may be conducted by Tribes on their lands without state regulatory involvement, and that class III gaming activities may only be conducted on such lands by Tribes in accordance with a negotiated and approved compact. 25 U.S.C. § 2710(d)((1)(C); see, 134 Cong. Rec. 25,376 (1988) (statement of Rep. Udall) (the "core of the compromise" was the requirement that "class III gaming activities, generally defined to be casino gaming and parimutuel betting, will hereafter be legal on

Indian reservations only if conducted under a compact between the tribe and the State").[1]

Relevant to the instant matter, IGRA provides that "class II gaming," *i.e.*, non-compacted gaming, encompasses bingo played with "technologic aids."[2] But IGRA makes equally clear that class II gaming excludes "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7)(B)(ii). Gaming by use of such devices, therefore, constitutes class III gaming, and is subject to regulation pursuant to a Tribal-State compact. 25 U.S.C. § 2710(d)(1)(C).

The balance struck by Congress is substantially altered by the Tenth Circuit's ruling that the determination of whether a machine amounts to class II or class III gaming can be made solely on the basis of whether the machine may be characterized as a "technologic aid" to the play of a game of chance, in this case "pull-tabs." Under the Tenth Circuit's reasoning, the inquiry stops – without regard to the question whether the machine might also come within the coverage of the Johnson Act as a gambling device. Pet. at 38a. The court's methodology thus wholly ignores Congress's express exclusion of "slot machines of

[1] Representative Udall was the House floor manager of the bill that became IGRA.

[2] Some lower courts have construed IGRA to include as class II gaming the conduct of bingo as well as pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo with the assistance of a "technologic aid." See, e.g., *Diamond Game Ent., Inc. v. Reno*, 230 F.3d 365, 367 (D.C. Cir. 2000), but the construction is not universally accepted. Cf., *United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d at 613.

any kind" from the category of class II gaming. 25 U.S.C. § 2703(7)(B)(ii).

Amici States submit that any determination of whether machine-facilitated gambling constitutes class II gaming for purposes of IGRA must include a determination of whether the machine is a gambling device within the meaning of the Johnson Act.[3] That Act prohibits the possession of "any gambling device" within "Indian country." 15 U.S.C. § 1175(a). The Act also prohibits the transportation of such devices to any State where their operation is made unlawful by State law. 15 U.S.C. § 1172(a). The Tenth Circuit's reasoning would permit the operation of slot machines that come within the meaning of the Johnson Act to be operated on Indian lands, without regulation under an approved Tribal-State compact, under the guise of "technologic aids." Nevertheless, the appellate court implicitly concedes that the Government might prosecute operation of identical devices in the same State off-reservation. Such a dual standard for enforcement of the Johnson Act – with respect to the same device, and within the same State – is inconsistent with Congress's insistence that, without agreement by the State, class III gaming activities are permissible on Indian lands only to

[3] Indeed, even if "the Machine," the device at issue in this matter, could be said to constitute class II gaming played by use of a "technologic aid," the court's reasoning ignores Congress's express restriction that class II gaming may be conducted on Indian lands only if "such gaming is not otherwise specifically prohibited on Indian lands by Federal law." 25 U.S.C. § 2710(b)(1)(A). In analyzing IGRA, the Report of the Senate Select Committee on Indian Affairs notes that "the phrase 'not otherwise prohibited by Federal Law' refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. § 1175 [the Johnson Act]." S. Rep. No. 446, 100th Cong., 2d Sess. 12 (1988).

the extent that they are also permitted elsewhere within the State. 25 U.S.C. § 2710(d)(1)(B); see, also, *Rumsey Indian Rancheria of Wintun Indians v. Wilson,* 64 F.3d 1250 (9th Cir. 1994), *opinion amended on denial of rehearing*, 99 F.3d 321, *cert. denied*, 521 U.S. 1118].

Congress expressly acknowledged the relationship between class III gaming and the Johnson Act, relaxing the Johnson Act's Indian-country prohibitions in only one circumstance: "gaming conducted under a Tribal-State compact." 25 U.S.C. § 2710(d)(6). The petition of the Attorney General should be granted to settle that no gambling device within the meaning of the Johnson Act – whether or not characterized as a "technologic aid" to the play of pull-tabs – may be offered by Tribes in their casinos except in accordance with a Tribal-State compact.

II.

THE PETITION SHOULD BE GRANTED TO RESOLVE A CIRCUIT CONFLICT CONCERNING THE RELEVANCE OF THE JOHNSON ACT TO A DETERMINATION OF WHETHER A MACHINE MAY BE CLASSIFIED AS CLASS II GAMING FOR PURPOSES OF IGRA.

Whereas the Tenth Circuit has concluded that coverage of the device under the Johnson Act is irrelevant to classification of a "technologic aid" to the play of pull-tabs as class II gaming, the Eighth Circuit has recently come to the contrary conclusion in *United States v. Santee Sioux Tribe of Nebraska,* 324 F.3d at 611.

In *Santee Sioux Tribe*, the Eighth Circuit concluded that the Johnson Act is the federal law referred to in 25

U.S.C. § 2710(b)(1)(A) as a limitation on IGRA class II gaming and that class II gaming is only lawful in Indian country if it is conducted in conformity with the Johnson Act. *Santee Sioux Tribe* at 611. The court noted that Congress had not expressly repealed the Johnson Act's prohibitions against slot machines in Indian country, except for effecting a *pro tanto* repeal under 25 U.S.C. § 2710(d)(6) in the exclusive context of gaming conducted pursuant to a Tribal-State compact. Moreover, relying on this Court's decision in *Morton v. Mancari*, 417 U.S. 535, 550 (1974), the court rejected the contention that IGRA impliedly repealed the Johnson Act with respect to class II devices. *Santee Sioux Tribe* at 611.

The petition of the United States should be granted to resolve this conflict in the interests of both States and Tribes. The nearly simultaneous issuance of these two conflicting circuit court analyses can only foster confusion and discord between Tribes and States over compacting obligations under IGRA. See, *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1097 (9th Cir. 2003) (as sources of substantial revenue class III gaming activities are recognized as " 'the most controversial part of . . . IGRA and the subject of considerable litigation between various Indian tribes and the states.' " (Citations omitted.).)

CONCLUSION

For the reasons stated, Amici States urge the Court to grant the petition of the United States.

Respectfully submitted,

BILL LOCKYER
Attorney General of the
State of California
MANUEL M. MEDEIROS
State Solicitor General
WILL BRIEGER
Acting Chief Assistant
Attorney General
ROBERT L. MUKAI
Senior Assistant
Attorney General
SARA J. DRAKE
Supervising Deputy
Attorney General
*PETER H. KAUFMAN
Deputy Attorney General
110 West A Street
San Diego, CA 92101
Telephone: (619) 645-2020
Counsel for Amici Curiae
**Counsel of Record*

WILLIAM H. PRYOR, JR.
Attorney General of
Alabama
11 South Union Street
Montgomery, AL 36130
(334) 242-7300

RICHARD BLUMENTHAL
Attorney General of
Connecticut
55 Elm Street
Hartford, Ct 06106
(860) 808-5318

THOMAS F. REILLY
Attorney General of
Massachusetts
One Ashburton Place
Boston, MA 02108
(617) 727-2200

MIKE HATCH
Attorney General of
Minnesota
102 State Capitol
75 Dr. Martin Luther King, Jr.
Boulevard
St. Paul, MN 55155-1609
(651) 296-6196

JON BRUNING
Attorney General of
Nebraska
P.O. Box 98920
Lincoln, NE 68509
(402) 471-2644

BRIAN SANDOVAL
Nevada Attorney General
Carson City Office
100 North Carson Street
Carson City, NV 89701-4717
(775) 684-1100

LARRY LONG
Attorney General of
South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070
(605) 773-3215

GREG ABBOTT
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548
(512) 936-1822