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No. 03-____

IN THE

Supreme Court of the United States

COYOTE VALLEY BAND OF POMO INDIANS,
Petitioner,

v.

THE STATE OF CALIFORNIA.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In enacting the Indian Gaming Regulatory Act ("IGRA"), Congress adopted a statutory regime under which Indian tribes seeking to conduct the highest-revenue-generating – or "class III" – games on tribal lands must enter into a compact with the State in which the games are conducted. Congress specified the subjects on which a State might bargain in negotiating such compacts and imposed upon the States an obligation to negotiate in "good faith." This case presents the following questions about such compact negotiations:

1. Whether the Ninth Circuit erred in holding, in acknowledged conflict with the Second Circuit, that a State that has legalized some forms of class III gaming has no obligation to negotiate compacts with Indian tribes regarding other forms of such gaming.

2. Whether and to what extent a State may require an Indian tribe to sacrifice core elements of its sovereignty and to subject itself to state taxation and to state labor laws as a prerequisite to the State's agreement to enter into a gaming compact under IGRA.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. at 1a-41a) is reported at 331 F.3d 1094. The amended opinion and order of the district court (App. at 42a-60a) are reported at 147 F. Supp. 2d 1011.

JURISDICTION

The court of appeals' judgment was entered on June 11, 2003. App. at 1a. On August 1, 2003, a timely petition for rehearing and suggestion for rehearing *en banc* was denied. App. at 61a. On motion by Petitioner, the Court of Appeals on August 9, 2003 stayed its mandate until this Petition is determined. Justice O'Connor, sitting as Circuit Justice for the Ninth Circuit, granted Coyote Valley a thirty-day extension in which to file this petition, and it is timely filed within the extended time permitted. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 2710(d) of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, as well as the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, both of which are reproduced in the Appendix at 63a-70a.

STATEMENT OF THE CASE

This case presents what has become the single most important and recurring question concerning State-Tribal compacts under IGRA. And as presented here, the question arises in the context of arguably the most significant demands by a State in the fifteen-year history of compact negotiations under IGRA. Further, the court of appeals' decision sustaining the State's demands is based squarely on, and

extends profoundly the effect of, a prior Ninth Circuit decision that conflicts with a decision of the Second Circuit.

Congress provided in IGRA that sovereign Indian Tribes may conduct Las Vegas-style (or "class III") gaming on their lands – and that the State may regulate such gaming – pursuant only to State-Tribal compacts, the terms of which the State must negotiate in "good faith." 25 U.S.C. § 2710(d)(3)(A). IGRA specifies the subjects that may be included in such compacts, and those subjects do not include taxes for purposes other than to defray the costs of regulating the gaming. Nor do they include labor relations, including union representation, at work places on tribal lands. Yet in this case, California categorically refused to enter into compacts with Tribes absent provisions on those subjects, and the Ninth Circuit sustained the State's position.

The appeals court did so principally on the ground that the State had offered the Tribes a significant "concession" – namely, that Tribes could conduct some games as to which California was not required to negotiate a compact at all. That concession, however, was real only under a prior decision of the Ninth Circuit, which the panel acknowledged is in conflict with the holding of another court of appeals having jurisdiction over substantial tribal gaming – the Second Circuit. Review by this Court is needed to resolve that conflict and to decide the scope of a State's obligations, and the limits, if any, of its power in negotiating gaming compacts under IGRA.

I. The Enactment of IGRA and Its Pertinent Provisions.

"[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 168 (1973) (internal citations omitted). A State may infringe tribal sovereignty only to the limited extent Congress permits and then only in conformity with restrictions Congress may impose. *Williams v. Lee*, 358 U.S. 217, 220 (1959) ("[A]bsent governing Acts of Congress, the question

has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.") Applying that principle, this Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), rejected California's claimed right to regulate tribal gaming. Pointing to California's tolerance of a "substantial amount of gambling activities, including bingo" and that it "actually promote[s] gambling through its state lottery," this Court struck down the California law in question and reaffirmed the principle that the exercise by the States of "general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values." *Id.* at 208.

One year later, Congress enacted IGRA to address the States' authority to regulate tribal gaming. 25 U.S.C. § 2701 *et seq.* IGRA defines three classes of gaming, including class III or Las Vegas-style gaming. *Id.* § 2703. Such gaming is the highest revenue-generating and the subject of the greatest conflicts between States and Tribes. IGRA provides that States permitting class III gaming "for any purpose by any person, organization or entity" shall not interfere with the sovereign choice of Indian tribes to conduct such gaming on tribal lands. *Id.* § 2710(d)(1)(B); App. at 63a. In exchange, Congress granted the States some measure of regulatory control by requiring that the Tribes enter into compacts with the States in which the gaming is conducted. 25 U.S.C. § 2710(d)(3); App. at 65a-66a. However, Congress imposed upon the States the obligation to negotiate such compacts in "good faith." 25 U.S.C. § 2710(d)(3)(A); App. at 65a. The parties may negotiate, and the compacts "may include[,] provisions relating" to seven subjects:

> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(C); App. at 65a-66a.

Congress specifically sought to foreclose any suggestion that IGRA confers on States the power to tax Indian gaming, whether as a means of revenue-sharing or otherwise. *See, e.g.*, S. Rep. No. 100-466, at 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083-84. Rather, Congress provided that, except for assessments or taxes to which the State and Tribe may agree under subpart (iii) of Section 2710(d)(3)(C), "[n]othing in this section shall be interpreted as conferring upon a State . . . authority to impose any tax, fee, charge or other assessment upon an Indian tribe." 25 U.S.C. § 2710(d)(4); App. at 66a. Further, "*any* demand by the State for direct taxation of the Indian tribe or of any Indian lands is evidence that the State has not negotiated in good faith." 25 U.S.C. § 2710(d)(7)(B)(iii)(II) (emphasis added); App. at 68a.

Tribes may enforce IGRA's good faith negotiation requirement through a suit in federal court. 25 U.S.C. § 2710(d)(7)(B); App. at 67a-69a. Once the tribe introduces some evidence to support its claim, "the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith." 25 U.S.C.

§ 2710(d)(7)(B)(ii)(II); App. at 67a. A ruling in favor of the Tribe triggers a period of compulsory negotiation and then mediation. 25 U.S.C. § 2710(d)(7)(B)(iv)-(vii); App. at 68a-69a.

II. The Compact Negotiations Leading to this Case.

For decades, Petitioner Coyote Valley Band of Pomo Indians ("Coyote Valley" or "the Tribe") has sought a means to lift its members from profound poverty. As of 1994, on-reservation unemployment was ninety percent. The Tribe was unable to fund the most basic social services. That year, Coyote Valley opened the casino involved in this case. Today, the casino is the near-exclusive source of funding for health services, elderly homecare, housing, daycare, police, adult and youth education and training, and cultural and language preservation programs for the Tribe's members.

In response to a lawsuit filed by Coyote Valley and other Tribes seeking to force the State to comply with IGRA, California in 1999 commenced comprehensive negotiations over the adoption of gaming compacts. As relevant here, the State's negotiators imposed two preconditions. First, the Tribes had to agree to be taxed by "sharing dollars," ensuring the State a "very large revenue stream." Second, and in recognition of the fact that the then-Governor regarded "the unions as friends, as political friends," "reaching agreement with labor [wa]s a condition for signing the compact."

In exchange, the State agreed to permit the Tribes to conduct expanded forms of class III gaming that had previously been prohibited in California. Under Ninth Circuit precedent interpreting IGRA, California was required to negotiate only with respect to those specific types of class III games that the State had authorized private (*i.e.*, non-tribal) parties to conduct. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1258 (9th Cir. 1994) (rejecting expressly the holding of *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1030-31 (2d Cir. 1990), that if a State permits *any* class III gaming, it must negotiate

with respect to *all* class III games); *see also Rumsey*, 64 F.3d at 1252-55 (Canby, J., joined by Pregerson, Reinhardt, and Hawkins, JJ., dissenting from the denial of rehearing *en banc*). California did not authorize private parties to conduct (and thus, according to *Rumsey*, IGRA did not make available to the Tribes) most Las Vegas-style gaming. *See Hotel Employees & Rest. Employees Int'l Union v. Davis*, 21 Cal. 4th 585, 596-97 981 P.2d 990, 999 (Cal. 1999). The Governor, however, agreed that his administration would not oppose an amendment to the California Constitution, placed on the ballot by the Tribes, authorizing the Tribes to engage in a broader array of class III gaming – but only if the Tribes acquiesced to the taxes and labor relations provisions demanded by the State.

First, the Tribes would pay an up-front tax of $1250 for each new gaming machine, up to a maximum of 2000 machines. (This tax would cost Coyote Valley more than $2 million.) A second tax would require each Tribe to pay a yearly flat fee on each machine for which it had already paid the initial tax of $1250. (This second assessment would have amounted to $4.6 million annually for Coyote Valley if it operated the maximum number of machines allowed.) The State proposed to deposit those first two taxes into a "Revenue Sharing Trust Fund" ("RSTF") – to benefit other California Tribes that conduct limited or no gaming.

A third tax would require the Tribes to pay what the State's final offer denominated "[t]he State's share of the gaming revenue," in an amount from seven to thirteen percent of the "average gaming device net win" for each machine at the Tribes' casinos – the percentage increasing with the number of machines operated. The proceeds from this tax would go into a "Special Distribution Fund" ("SDF") that the California Legislature could appropriate for certain "gaming-related" expenses or for payment of "short-falls that may occur in the Revenue Sharing Trust Fund" as well as for "*any other purpose specified by the Legislature*."

The evidence in the District Court demonstrated that the three taxes combined, under optimal circumstances, would amount to 33.9% of Coyote Valley's gross gaming revenues, which would severely hamper and, in some cases, completely eliminate the services the Tribe was funding from gaming revenues.

Also, notwithstanding repeated and consistent objections by Coyote Valley, the State's final offer required the Tribe to address "organizational and representational rights of class III gaming employees" as well as "food and beverage, housekeeping, cleaning, bell and door services, and laundry employees at the Gaming Facility or associated hotel." Specifically, the Tribal Council of Coyote Valley was required to replace its existing tribal laws and policies with a "Labor Relations Ordinance" drafted by unions and approved by the State and other Tribes.

Thereafter, Coyote Valley sought a declaration, in the district court under Section 2710(d)(7)(B), that California had breached its obligation to negotiate a class III gaming compact with Coyote Valley in good faith. The district court ruled for California, and Coyote Valley appealed to the Ninth Circuit. It affirmed.[1]

III. The Ninth Circuit's Decision

A. The Revenue Sharing Trust Fund Provision

The appeals court held first that the State's insistence on the RSTF provision did not amount to the exercise of "authority to impose any tax, fee, charge or other assessment upon an Indian tribe" in violation of Section 2710(d)(4), because the State did not "impose" the RSTF at all. Rather, it

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[1] This Court's holding in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), that IGRA does not abrogate state sovereign immunity or permit actions under *Ex parte Young*, 209 U.S. 123 (1908), is inapplicable in this case because California has waived its immunity. *Hotel Employees & Rest. Employees Int'l Union v. Davis*, 21 Cal. 4th 585, 613-15, 981 P.2d 990, 1009-11 (1999).

"offered meaningful concessions in return for its demands." App. at 30a. Specifically, the State offered to negotiate a compact that would allow on Indian lands games not permitted elsewhere in the State, and, therefore, according to Ninth Circuit precedent, the State offered something it was not required to offer at all.

Second, the court emphasized that "[t]he idea of gaming tribes sharing revenue with non-gaming tribes traces its origins not to a State-initiated proposal, but rather to [a] tribe-drafted and tribe-sponsored [ballot proposition]" and that "[e]very other compacting tribe in California has agreed to the provision." App. at 34a.

Third, the court ruled "that the RSTF provision falls within the scope of subpart (3)(C)(vii)" of Section 2710(d) – as among the "other subjects that are directly related to the operation of gaming activities." App. at 30a-33a. The court found that the RSTF provision required by California advanced the Congressional goal of promoting "tribal economic development, self-sufficiency, and strong tribal governments" by "creating a mechanism whereby *all* California tribes – not just those fortunate enough to have land located in populous or accessible areas – can benefit from class III gaming activities in the state." *Id.* at 30a (internal citations omitted). According to the Ninth Circuit, that circumstance rendered the RSTF a "subject" that is "directly related to the operation of gaming activities." *Id.* at 30a-31a. To support that conclusion, the court turned to legislative history:

> [B]y limiting the proper topics for compact negotiations to those that bear a direct relationship to the operation of gaming activities, Congress intended to prevent compacts from being used as subterfuge for imposing State jurisdiction on tribes concerning issues unrelated to gaming. *See* S. Rep. No. 100-446, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084. In advocating the inclusion of the

> RSTF, the State has not sought to engage in such a subterfuge.

App. at 31a. In other words, the requirement of revenue sharing with non-gaming Tribes was deemed a subject "*directly related* to the *operation* of gaming activities," because it was not intended as a subterfuge to serve a purpose wholly unrelated to Indian gaming.

Finally, the court reasoned that, even assuming that the RSTF constitutes a "direct tax" and that the State "demanded" it, all within the prohibition of Section 2710(d)(7)(B)(iii)(II), under that statutory provision such a demand is merely "evidence that the State has not negotiated in good faith," not conclusive proof on the issue. App. at 33a-34a. The court concluded that "IGRA's legislative history . . . makes clear that the good faith inquiry is nuanced and fact-specific and is not amenable to bright-line rules." *Id.* at 34a. Given that the RSTF provision "does not put tribal money into the pocket of the State" but "redistributes gaming profits to other Indian tribes" and given that other tribes supported the concept, the State had sustained its burden to prove that its insistence on the RSTF provision did not violate the "good faith" requirement. *Id.*at 34a.

B. The Special Distribution Fund Provision

The SDF provision, as demanded by the State, would permit money to be used for five purposes: (i) to combat gambling addiction; (ii) to support state and local governments impacted by tribal gaming; (iii) to defray the costs of regulation under the compact; (iv) to pay any shortfalls in the RSTF; and (v) "any other purposes specified by the Legislature." App. at 35a. The Ninth Circuit applied the principle of *ejusdem generis* to "save" the SDF provision by limiting the fifth purpose, like the first four enumerated purposes, to matters related to gaming in some way. *Id.* at 35a. This, according to the appeals court, brought all five of the SDF's purposes within the category of permissible subjects for compact negotiations under Section

2710(d)(3)(C) that also justified the RSTF provision – namely subjects "directly related to the operation of gaming activities." App. at 36a. The court did not, however, explain how any of the purposes in the SDF that California proposed were *directly related* to the *operation* of the games.

The Ninth Circuit further determined that "[e]ven if the State's insistence on [the SDF] provision was indeed a 'demand' for a 'direct tax,' . . . circumstances exist in this case to justify the State's conduct." App. at 36a. Again emphasizing that such demand for direct taxation is merely some "evidence" of bad faith and is "not conclusive," the court found that in this case the consideration the State offered in exchange for the tax – again, permitting a broader range of class III gaming on Indian land compared to the rest of the State – was substantial enough and created "an exchange [that] was fair." *Id.* at 36a-38a. In light of some legislative history of IGRA and given that Indian tribes, other than Coyote Valley, and the Secretary of the Interior believed that "such an exchange is fair," the court sustained California's insistence on the SDF provision. *Id.* at 38a.

C. The Labor Relations Provision

Reasoning that "[w]ithout the 'operation of gaming activities,' the jobs [in the casinos and related facilities] would not exist; nor, conversely, could Indian gaming activities operate without someone performing these jobs," the court of appeals ruled that the labor provision also "directly related to the operation of gaming activities" within the meaning of Section 2710(d)(3)(C)(vii), and therefore constituted a permissible "other subject" for compact negotiations. App. at 39a-40a. Further, the appeals court ruled that IGRA permits courts to "consider the public interest of the State when deciding whether [the State] has negotiated in good faith, and a State's concern for the rights of its citizens employed at tribal gaming establishments is clearly a matter within the scope of that interest." *Id.* at 40a. In other words, regardless of whether the labor ordinance truly was "directly related to the *operation* of gaming activities," the "public interest" referenced in Section 2710(d)(7)(B)(i) would justify the State in requiring unionization of employees at tribal casinos and associated facilities. App. at 39a-40a.

Finally, the appeals court ruled that, since the labor ordinance required by the State "provides only modest organizing rights to tribal gaming employees and contains several provisions protecting tribal sovereignty," the State's insistence that it be included in the compact does not "demonstrate the State's bad faith," especially given that representatives of some tribes "met with union representatives and participated in the shaping of the [ordinance]." App. at 40a-41a. Indeed, the court notes that that "all compacting tribes in California have adopted it." *Id.* at 41a.

REASONS FOR GRANTING THE WRIT

This Petition should be granted for three reasons: (1) a conflict among the circuits in construing Section 2710(d)(1)(B) of IGRA has become more acutely defined and has assumed new significance in light of the decision below – a decision that influences and will continue to influence Tribal-State compact negotiations in fundamentally important ways; (2) this Court needs to address the further, substantial erosion of tribal sovereignty and the perversion of "cooperative federalism" principles that the decision below represents and to determine what remains of tribal sovereignty and Congress' power to safeguard that sovereignty; and (3) the Ninth Circuit's decision is erroneous – in both its construction of IGRA and in its conception of the power ceded to the States by the Act – and the implications of those errors are far-reaching.

I. The Split Between The Circuits

While this Court's decision in *Cabazon* respected the principle that the States' power to infringe upon the sovereignty of Indian tribes is limited to what Congress

expressly authorizes (480 U.S. at 208), many saw the practical consequences of the decision as objectionable. The States could not regulate bingo on tribal lands if the State allowed bingo (or perhaps similar games) to be conducted by others within the State. The criminal prohibition/civil regulation distinction of *Cabazon* was, for some, not enough "protection" against Las Vegas-style gaming on tribal lands. IGRA was the legislative response to those concerns.

The Act redefined the balance between the power of the State to regulate Indian gaming and the power of the Tribes to regulate their own affairs. As to class III gaming, Congress declared such gaming on tribal lands lawful only if: (1) the Tribe and the National Indian Gaming Commission ("NIGC"), established by IGRA, authorized the gaming; (2) the gaming was located in a State that "permits such gaming for any purpose by any person, organization or entity"; and (3) the gaming is conducted under, and in conformity with, a Tribal-State compact.

With respect to the second of these requirements, the Ninth Circuit in this case acknowledged that its decision is irreconcilable with the Second Circuit's decision in *Mashantucket*, 913 F.2d 1024 (1990). *See* App. at 8a. There, the Second Circuit held that when a "State permit[s] other types of class III games," as California does, "it [can]not refuse to negotiate over the subset of class III games that [petitioner] sought to conduct." App. at 7a. But the Ninth Circuit recognized that it had previously "rejected [that] construction of IGRA in *Rumsey*," albeit over a substantial en banc dissent urging the adoption of the Second Circuit's holding, 64 F.3d at 1252-55 (Canby, J., dissenting on behalf of four judges). App. at 8a; *see* 64 F.3d at 1253 (explaining that the case presented a question of "major significance in the administration of" [IGRA] and that the Second Circuit

had "arriv[ed] at a conclusion precisely opposite to that of" the Ninth Circuit).[2]

In *Mashantucket*, the Second Circuit held that IGRA required the State of Connecticut to negotiate with Indian tribes regarding forms of class III gaming *without regard* to restrictions on those forms of gaming in non-tribal casinos. 913 F.2d at 1030. The court held that IGRA codified this Court's holding in *Cabazon* that a State may *per se* prohibit gaming by tribes only to the extent that form of gaming is not merely illegal but also violates the State's public policy. *Id.* at 1029. The Second Circuit further held that the relevant provision of IGRA – providing that the State must enter into negotiations regarding class III gaming if it "permits *such gaming* for any purpose by any person, organization, or entity" – was satisfied so long as the State permitted any form of class III gaming. *Id.* at 1032 (citing 25 U.S.C. § 2710(d)(1)(B) (emphasis added)). The Second Circuit recognized that, under the State's contrary view, "[t]he compact process that Congress established as the centerpiece of the IGRA's regulation of class III gaming would [] become a dead letter; there would be nothing to negotiate, and no meaningful compact would be possible." *Id.* at 1031.

In *Rumsey*, the Ninth Circuit avowedly reached precisely the opposite result, adopting the Eighth Circuit's holding in *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993). *See Rumsey*, 64 F.3d at 1258. The Ninth Circuit rejected the claims of various Tribes that, because California permitted some forms of class III gaming, it was required by IGRA to negotiate regarding "certain stand-alone electronic gaming devices and live banking and percentage card games." *Id.* at 1255. The Ninth Circuit explicitly rejected the

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[2] The conflict has been repeatedly recognized. *See, e.g.*, Anthony J. Marks, Comment, *A House of Cards: Has the Federal Government Succeeded in Regulating Indian Gaming?*, 17 Loy. L.A. Ent. L.J. 157, 194 (1996) ("The Ninth Circuit's decision in *Rumsey* created a split among the circuits.").

argument that Congress intended to embrace this Court's *Cabazon* decision in IGRA. *Id.* at 1257. According to the Ninth Circuit, IGRA "does not require a state to negotiate over one form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming." *Id.* at 1258. Rather, "a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have." *Id.*

This square circuit conflict is outcome determinative in the present case. The Ninth Circuit here rested its holding on the rationale that, even if California's demands for a compact violated the strictures Congress enacted in IGRA and impinged on matters central to tribal sovereignty, the State acted in "good faith" because it entered into negotiations that were not required by IGRA – namely, negotiations over forms of class III gaming that were not permitted in non-tribal casinos. App. at 30a. After acknowledging the split between its own precedent and the Second Circuit's decision in *Mashantucket*, the Ninth Circuit explained, "[o]ur decision in *Rumsey* meant that [in this case] the State had no obligation to negotiate with tribes over the most lucrative forms of class III gaming." App. at 8a. The State's willingness to negotiate notwithstanding the supposed absence of any obligation rendered its conduct lawful:

> We do not hold that the State could have, without offering anything in return, taken the position that it would conclude a Tribal-State compact with Coyote Valley only if the tribe agreed to pay into the RSTF. Where, as here, however, a State offers *meaningful concessions* in return for fee demands, it does not exercise 'authority to impose' anything. Instead, it exercises it authority to negotiate, which IGRA clearly permits.

App. at 32a (emphasis added). According to the Ninth Circuit, the State's critical concession was its willingness to negotiate regarding the full range of class III gaming. *Id.* at

33a ("In this case, Coyote Valley cannot seriously contend that the State offered no real concessions in return for its insistence on the RSTF provision. Under our holding in *Rumsey*, the State had no obligation to enter any negotiations at all with Coyote Valley concerning most forms of class III gaming.").

While the circuit conflict in question is a decade old, its significance has not diminished in that time. To the contrary, with the decision in this case, the conflict has assumed profound importance to the balance of sovereign power and autonomy crafted by Congress in IGRA and to dynamics of compact negotiations which are ongoing today and those that will occur in the future. Indeed, in California alone, there are 107 federally recognized tribes, and it is estimated that fifty-eight of them engage in gaming. For its part, the State has recently made clear its intention to increase "revenue sharing" with the Tribes, and, with the decision in this case, there are no *substantive* limitations on the subjects or purposes the State may pursue in negotiating new or amended compacts with the Tribes.[3]

States and Tribes will continue to negotiate compacts. If the Ninth Circuit's decision in this case remains as the sole guide on the "good faith" requirement, it will undoubtedly influence compact negotiations in ways contrary to the balance of sovereign power that Congress intended, regardless of whether a mechanism for judicial intervention is available as "leverage" in all states. *See* n.1, *supra*. Letting the Ninth Circuit's decision stand as the only guidance States and Tribes have in determining the substantive rules that govern compact negotiations has significant implications, as further demonstrated in the next Section of this Petition.

[3] As the Ninth Circuit observed *before* its decision in the present case, following this Court's decision in *Seminole Tribe*, "nothing now protects the Tribe if the State refuses to bargain in good faith or at all; the State holds all the cards." *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1301 (9th Cir. 1998).

II. The Ninth Circuit's Decision Disregards The Fundamental Nature Of Tribal Sovereignty.

According to the Ninth Circuit, so long as a State offers a Tribe something substantial in exchange for what the State wants, there are virtually no limits on what the State may require as a condition to entering into a gaming compact. App. at 32a. What that ruling means to the essence of tribal sovereignty is at stake here.

1. Sovereignty starts with a presumption of "absoluteness" to which is appended from one or more sources certain qualifications and limitations. *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (citing Felix S. Cohen, *Handbook of Federal Indian Law* 122 (1942))) ("Perhaps the most basic principle of all Indian law . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather are inherent powers of a [now] limited sovereignty which has never been extinguished. *Each* Indian tribe begins its relationship with the federal government as a sovereign power, recognized as such in treaty and legislation.") (emphasis added).

Although Indian tribes are no longer "possessed of the full attributes of sovereignty," this Court "has consistently recognized that Indian Tribes retain attributes of sovereignty over both their members and their territory, and that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Cabazon*, 480 U.S. at 207 (internal citations omitted); *Wheeler*, 435 U.S. at 323 ("[U]ntil Congress acts, the tribes retain their existing sovereign powers."). In particular, the "power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980). Similarly,

regulation of labor and employment on tribal lands is an attribute of sovereignty that Congress has not divested and that has not impliedly been lost by the "dependent status" of the Tribes. *Morton v. Mancari*, 417 U.S. 535, 548 (1974) (acknowledging "'Congress' recognition of the long-standing federal policy of providing a unique legal status to Indians in matters concerning tribal or 'on or near' reservation employment"); *see also NLRB v. Pueblo of San Juan*, 70 F.3d 1186, 1194-1196 (10th Cir. 2000).

Consequently, absent congressional action, Indian tribes are possessed of sovereign power and correspondingly the inherent right – not merely a State-conferred privilege – to conduct gaming on tribal lands free from State-imposed taxation and regulation, including regulation of labor and employment on those lands. And undeniably, those attributes of remaining tribal sovereignty are of fundamental importance. Gaming is among the most important assets of Tribes today. It represents the opportunity to overcome generations of deprivation and poverty while still permitting the Tribes to maintain a significant measure of autonomy and cultural identity – to be separate from, but still part of, the life and economy of the nation as a whole.

In enacting IGRA, Congress of course did qualify tribal sovereignty, but it did not eliminate it, and Congress did not reduce sovereignty to a matter of mere privilege controlled by the State. Instead, Congress legislated that the States could infringe the otherwise inviolate autonomy of the Tribes, but only through compacts negotiated sovereign-to-sovereign. In order to ensure that compacts would be so negotiated and that tribal sovereignty would be diminished in the negotiations only to the extent required by legitimate interests of the States, Congress told the States explicitly what they could and what they could not require in compacts.

The reasoning of the court below utterly vitiates those principles and with that negates core attributes of tribal sovereignty that Congress preserved. First, the concept of

sovereign-to-sovereign negotiations and the standards expected in them has been replaced with an essentially commercial notion of "good faith," depending on "fairness" and "reasonableness" of the terms demanded by a State determined by subjective and even political judgments of courts or – in most States, where sovereign immunity precludes judicial intervention – by the States themselves.

Second, under the decision below, a State may condition Indian gaming within its borders not on substantive requirements defined and delimited by Congress, as trustee of Indian sovereignty, but on virtually any requirements the State chooses – so long as it can make out some connection, however remote, to gaming. If ever the strict construction of a regulatory statute were demanded, this is the case.[4]

In short, unless overturned by this Court, the decision below means that a State may satisfy its statutory "good faith" obligation under IGRA even if it substantially ignores the plain language of the Act and the strictures it imposes – so long as it makes "concessions" that generate more revenue for the Tribes and the State. This is hardly "sovereignty" in any meaningful sense of the word.

By, in effect, reading the strictures out of IGRA, the Ninth Circuit has sanctioned a Hobson's Choice for Indian

[4] Especially troubling in this connection is the lower court's application of *ejusdem generis* to the phrase, "any other purposes specified by the [California] Legislature." App. at 35a. The effect of that ruling is that the scope of the quoted phrase will be determined by whatever the California legislature deems a purpose "directly related to the operation of gaming activities" under Section 2710(d)(3)(C)(vii). The Ninth Circuit articulated no reasoned limits to the quoted phrase and included, for example, "gambling addiction" and "shortfalls in the RSTF" as matters "directly related" to the "operation of gaming." Thus, by articulating any connection to gaming or its consequences, the States may create, in effect, new categories that are permissible subjects for compact negotiations. Such a "delegation" of Congressional power and such an invitation to further infringement of tribal sovereignty by the States was surely not intended by the "other purposes" language of Section 2710(d)(3)(C)(vii). *See also* Section III, *infra*.

Tribes: They must either forgo the opportunity to game and forfeit their sovereign and statutorily defined right to do so, or they must "sell" core attributes of their sovereignty and autonomy. This is a choice Congress did not intend.

2. Also important to the future of tribal sovereignty is the Ninth Circuit's repeated reliance on the fact that other tribes in California approved compacts containing provisions that Coyote Valley rejected. Yet, "[t]he reality of tribal sovereignty," as one scholar reminds us, "is that each tribe is a unique and separate entity." Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 81 (1997). That notion was lost on both the State and the Ninth Circuit in this case. Pointing to the fact that many other tribes had acceded to the State's demands, the panel accepted the State's position that it had bargained in good faith. Lumping tribes together and presuming that what is acceptable to some *should* be acceptable to others and therefore must be legally permissible violates the essential character of sovereignty.

3. Finally, this Court long ago recognized that the power to tax is the power to destroy. *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819). California has wielded this power in a manner that will impact the relationships between States and Tribes and among Tribes with respect to subjects other than gaming. Indeed, States can now with relative impunity hold out the carrot of gaming, which for many Tribes represents economic salvation, to achieve any number of other State objectives that do not directly relate to gaming. Illustrative of this phenomenon is *Big Lagoon Rancheria v. California*, ___ F. Supp. 2d ____ (N.D. Cal. August 4, 2003), a case consolidated with this one in the district court. Recently, the district court had occasion to consider and apply the rationale of the Ninth Circuit's decision in this case:

> [T]he State may negotiate for provisions regarding environmental and land use issues as part of the

compacting process, [and] . . . could demonstrate the good faith of its bargaining position by offering the Tribe concessions in return for the Tribe's compliance with requests with which the other tribes were not asked to comply.

___ F. Supp. 2d at ___. That ruling evinces the same thinking underlying the decision of the court of appeals in this case: Regardless of whether a particular demand by a State in compact negotiations "fits comfortably" in one of the permissible subject categories in Section 2710(d)(3)(C), the demand will not constitute a lack of good faith if it is accompanied by concessions that make the demand appear to the court subjectively "fair." Under this reasoning, the Ninth Circuit and the district courts within it have already permitted State infringements on tribal sovereignty in the areas of taxation, labor relations, and environmental regulation. Based on this proliferation of "exceptions," there are no longer any meaningful limits to the subjects on which a State may infringe tribal sovereignty, and Congress' delineation of permissible infringements and express prohibition of others is rendered nugatory.

III. The Ninth Circuit's Decision Is Erroneous.

The panel below concluded that even if IGRA contemplates that some demands by States in compact negotiations would *per se* constitute a lack of good faith, in this case the demands made by California were permitted by IGRA. App. at 33a-34a. To reach that result, the panel, in effect, rewrote key provisions of IGRA, enlarging the reasonable (and at times, plain) meaning of some language and deleting other language. *See, e.g., id.* at 30a, 35a. The panel also found that, in fact, California did not exercise "authority to impose" taxes or other burdens on Coyote Valley prohibited by IGRA but rather merely exercised the "authority to negotiate." *Id.* at 30a. In that respect, the panel's decision defeats the very purpose Congress articulated for imposing the good faith requirement.

A closer look at those points and the Ninth Circuit's reasoning is in order.

A. The Provisions Upon Which the State Insisted Are Not Within Either Subpart (iii) or (vii) of Section 2710(b)(3)(C) of IGRA and Cannot Be Reconciled with Section 2710(d)(4) of the Act

There is no dispute that the three taxes in question here are not "assessments by the State necessary to defray the costs of regulating [gaming] activity," under subpart (iii) of Section 2710(d)(3)(C). Recognizing this, the Ninth Circuit turned instead to subpart (vii), which permits negotiations over "other subjects that are directly related to the operation of gaming activities." App. at 30a, 36a. In holding that the taxes here are such "other subjects," the panel overlooked a basic tenet of statutory construction – that words in a statute are to be given their ordinary and plain meaning, unless a manifest legislative intent to the contrary is demonstrated.

The words "other subjects" at the beginning of subpart (vii) necessarily restricts that subpart to subjects *other* than those addressed in the first six subparts of Section 2710(b)(3)(C) – that is, other than (i) the application of criminal and civil laws; (ii) the allocation of State and tribal jurisdiction; (iii) *assessments by the State*; (iv) taxation by the tribe; (v) remedies for breach of the Compact; and (vi) standards for gaming operations and maintenance of gaming facilities, including licensing. *See United States v. Ron Pair Enters.*, 489 U.S. 235, 241-42 (1987). Assessments by the State are expressly addressed in subpart (iii); therefore, that subject is *not* one of the "other subjects" that might fall within subpart (vii).

Furthermore, the panel construed the phrase "directly related to the operation of gaming activities" in subpart (vii) so broadly as to render meaningless three words in the phrase – "directly related" and "operation." App. at 30a, 36a. The revenue sharing provisions on which the State insisted have nothing to do with gaming *operations*. They have to do with

how the money generated from gaming is spent. The fact that gaming activities generated the funds might render the *distribution* of the funds related in *some* way to gaming activities, but not to the manner in which the games are *operated*. For example, taking revenue from a gaming Tribe in order to give it to a non-gaming Tribe, through the RSTF, is not "directly related" to the "operation" of the games. *Cf. Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 573-75 (1995).

Similarly, the stated objectives of the Special Distribution Fund – "to address gambling addiction," to "support state and local agencies impacted by gambling," to "fund implementation and administration" of the compact, to "pay any shortfalls in the RSTF," and finally *"for any other purpose specified by the legislature"* – are obviously not purposes with a "direct" relationship to gaming "operations." The Ninth Circuit's construction effectively takes the word "operation" out of the statute. Moreover, whatever relationship does exist between the gaming operations that generate the funds and the distribution of those funds or the purposes to which the State requires the funds be put is certainly not a *direct* relationship. The lower court has erased the words "directly related" from the statute as well.

As to the labor ordinance, the Ninth Circuit reasoned that labor relations must be "directly related" to the "operation" of gaming because without gaming there would be no jobs and without people in the jobs there would be no gaming. App. at 34a-40a. This reasoning camouflages the plain truth that how much an employee is paid, whether he or she receives overtime, or what kind of benefits he or she receives is not "directly related" to the games in question or to the *operation* of those games – any more than the architecture or decor of a gaming casino is "directly related" to gaming operations. Again, the Ninth Circuit legislated well beyond the language Congress used. S. Rep. No. 100-466, at 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083-84 ("The Committee does

not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands.").

B. The Ninth Circuit's Distinction Between "Authority to Impose" and "Authority to Negotiate" Is Illusory.

Finally, the Ninth Circuit held that, by insisting on the provisions it did, California exercised its "authority to negotiate," not the "authority to impose" prohibited by Congress in Section 2710(d)(4). App. at 30a. But as alleged by Coyote Valley, and indeed upon the uncontroverted evidence of record, the State here included the three taxes and the labor ordinance requirement in what the State itself called its "final offer," on September 9, 1999. *Id.* at 17a-18a. The finality of that offer was confirmed in a December 8, 1999 letter in which the State rejected *all* counter proposals by Coyote Valley, *without altering one word of the demands in the September 9 "final offer" and making no alternative proposals whatsoever. Id.* at 23a. The "negotiations" to which the Ninth Circuit refers had ended – and they had ended with the State *requiring* the three taxes and the labor ordinance as non-negotiable conditions of the compact. The court of appeals' decision is premised on a distinction between "imposition" and "negotiation" that is at best linguistic.

Alternatively, the Ninth Circuit noted that "the State remained willing to meet with the tribe for further discussions." App. at 23a. If the negotiations had not truly ended in 1999 and were ongoing in any meaningful way thereafter, then the factual and legal landscape of the negotiation changed drastically in March 2000. At that time, California Proposition 1A was passed. It legalized all the gaming on tribal lands for which Coyote Valley had been seeking a compact. This was three months *before* the district court found that the State had sustained its burden on the "good faith" requirement, without mentioning Proposition 1A or the concession the Ninth Circuit found "significant" three

years later. These circumstances provide further context for the appeals court's conclusion that the State's willingness to negotiate a compact that would allow class III gaming on Coyote Valley land, when the State was not required to permit such gaming, amounted to a "real concession" by the State.

CONCLUSION

The current conflict between the States and Tribes occurs against the backdrop of a similar conflict between the States and the federal government. But that should not obscure the importance of this case:

> Although the halls of Congress are ringing today with the cries for more states' rights, we cannot and must not let these cries drown out the principles underlying our solemn trust obligations to American Indians and the government-to-government relationship with Indian tribes. Otherwise, we are no better and no wiser than those who sought to remove Indians to the most remote and desolate parts of our country with empty promises of prosperity for so long as the grass is green and the river runs.

Hearing on S. 487 Before Senate Comm. on Indian Affairs, 104th Cong. 2-3 (1995) (Statement of Senator John McCain, Comm. Chairman, on the IGRA Amendments of 1995); *see also* Tsosie, 29 ARIZ. ST. L.J. at 33. This case does indeed present questions of exceptional importance with far-reaching implications for the future. It should be heard and decided finally by this Court.

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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