No. 03-804

IN THE

Supreme Court of the United States

COYOTE VALLEY BAND OF POMO INDIANS,
Petitioner,

v.

THE STATE OF CALIFORNIA,
Respondent.

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

PETITIONER'S REPLY BRIEF

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The petition for certiorari demonstrated that this case squarely presents an important and recurring circuit conflict over the obligations of a State to negotiate in good faith under the Indian Gaming Regulatory Act (IGRA). The Second and Ninth Circuits take irreconcilable positions over whether IGRA mandates, as a matter of law, that a State permit *all* forms of so-called Class III gaming if it permits non-tribal entities to engage in *any* forms of such gaming. In the Second Circuit, tribes have that right, which *ipso facto* cannot be the subject of negotiations by the State during the compacting process.

The State's arguments in opposition only reinforce that the conflict is outcome determinative in this case. It argues, time and again, that in negotiations with California tribes it made the substantial "concession" that the tribes would be permitted to engage in forms of Class III gaming that were not available to non-tribal entities. (*See* Br. Opp. 3-4, 8). That is precisely the argument that the Ninth Circuit

accepted. But the court of appeals, unlike the State, candidly acknowledged that a contrary rule exists in the Second Circuit, where this case would be decided differently. (*See* Pet. App. 7a-8a).

Certiorari accordingly should be granted.

I. The Circuit Split Is Real and Requires This Court's Intervention.

1. The State's assertion that there is no circuit conflict over whether IGRA requires States to permit tribes to engage in all forms of Class III gaming if the State permits non-tribal entities to engage in any such gaming rings hollow. The Ninth Circuit in this case expressly acknowledged the split. (Pet. App. 7a-8a).

The court of appeals' recognition of the circuit conflict echoes the opinion of six judges of the Ninth Circuit in the previous *Rumsey* case, on which the panel in this case rested its decision. In the Ninth Circuit "IGRA does not require a State to negotiate over one form of Class III gaming simply because it has legalized another, albeit similar form of gaming." *Rumsey Indian Racheria of Wintun Indians* v. *Wilson*, 64 F.3d 1250, 1258 (9th Cir. 1994). But "the Second Circuit . . . arrive[d] at a conclusion precisely the opposite to that of *Rumsey*." *Id.* at 1253 (Canby, J., dissenting from denial of rehearing *en banc*).

The conflict cries out for this Court's resolution because, at bottom, it rests on a fundamental disagreement about the relationship between IGRA and this Court's decision in *California* v. *Cabazon*, 480 U.S. 202 (1987). Specifically, the question is whether *Cabazon*'s criminal/prohibitory-civil/regulatory analytical framework retained its vitality in the aftermath of IGRA. *Compare Mashantucket Pequot Tribe* v. *Connecticut*, 913 F.2d 1024, 1031 (2d Cir. 1990) ("We accordingly conclude that the district court was correct in applying the *Cabazon* criminal/prohibitory-civil/regulatory test to class III gaming . . .") *with Rumsey*, 64 F.3d at 1257 ("The Tribes assert that

IGRA codified *Cabazon*'s "criminal/regulatory" test. . . . We reject this reading of IGRA."). *Mashantucket* properly recognized that *Cabazon* informed the meaning of "permits such gaming" under IGRA, and the Second Circuit/*Cabazon* view comports with IGRA and its legislative history. (Pet. 11-15).[1]

2. Nor is there merit to the State's contention that the conflict is not outcome determinative here. (Br. Opp. 8). Prior to the voters' passage of Proposition 1A, California permitted certain types of Class III gaming. As the Ninth Circuit acknowledged, under the Second Circuit/*Cabazon* approach, the State would have been required to negotiate over all forms of Class III gaming, rather than claiming that such an act constitutes a "meaningful concession." (Pet. App. 7a-8a). But for the Ninth Circuit's erroneous construction of "permits such gaming," the "meaningful concession" lauded by the panel would be revealed for what it really was – nothing.

3. The State's remaining argument that it would prevail even in the Second Circuit – because it acted in "good faith" in the absence of contrary circuit precedent (Br. Opp. 10) – is sophistry. The Second Circuit rejected precisely this argument in *Mashantucket*. "Good faith" is an objective concept. Otherwise, a tribe would lose all of its rights under IGRA because there would never be precedent *ex ante* forbidding the State from engaging in particular unlawful conduct. "The State's protestations that its failure to negotiate resulted from sincerely held views as to the meaning of IGRA . . . do not alter the outcome. The statutory terms are clear, and provide no exception for sincere but

[1] Although Respondent is correct that this conflict was not emphasized before the Ninth Circuit (Br. Opp. 6 n.9, 10 n.13), the obvious reason is that the case was controlled by circuit precedent on this question. Here, as in so many cases, this Court's authority to review the issue arises from the fact that it was "passed upon" by the court of appeals. *See, e.g., Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

erroneous legal analyses." *Mashantucket*, 913 F.2d at 1032; *see also Lac du Flambeau Band of Lake Superior Chippewa Indians* v. *Wisconsin*, 770 F. Supp. 480, 482 (W.D. Wisc. 1991) ("It is irrelevant also what the negotiators thought the statute requires; the requirements of the statute raise an issue of law and not of fact.").

4. Finally, the importance of the question presented – which the State notably does not contest – bears reemphasizing. As detailed in the Petition, the Ninth Circuit's statutory construction poses grave risks to all future tribal-state compact negotiations – throughout not only the Ninth Circuit, but the entire nation. (Pet. 16-22).

In California, for example, Governor Arnold Schwarzenegger has vowed to wrestle up to $2 billion in taxes away from gaming tribes for the State's general fund, which would necessitate renegotiating current compacts.[2] Recent State budget proposals seek to take 25% of gaming revenues in taxes.[3] Additionally, numerous California initiatives for the 2004 ballot propose taxing tribal casinos at various rates, from that of a standard California corporation to as much as 25%.[4] The Ninth Circuit decision paved the way

[2] *See, e.g.*, Governor Schwarzenegger's State of the State Address, Tuesday, January 6, 2004 5:00 pm P.S.T. ("In the next couple of days, I will announce our negotiator who will work with the gaming tribes so that California receives its fair share of gaming revenues."); Governor's Budget Summary 2004-5 ("It is the intent of the Administration to renegotiate tribal gaming compacts with California's 64 tribes that have gaming compacts and to negotiate new compacts with any additional tribes that wish to commence class III gaming. Part of any such renegotiation will include demands by the State that tribes currently gaming, or those wishing to game, pay a significant share of revenues to the State. . . . The Administration has announced a target State share of such revenues to be 25 percent on an annual basis.").

[3] *See, e.g.*, Dan Morain, *Tribes Discuss Profit Sharing*, LOS ANGELES TIMES, Jan. 23, 2004, at B6; Charlie LeDuff, *The California Recall; The Leading Republican*, NEW YORK TIMES, Oct. 2, 2003, at A28.

[4] *See, e.g.*, Initiative SA2004RF0005 ("The Indian Gaming Fair-Share Revenue Act of 2004"); Initiative SA2003RF0071 ("The People's

for such demands, which Congress clearly did not envision, and in fact prohibited by explicitly stating that IGRA was not to be used to force taxation of tribes.

II. Congress Has Already Explained the Importance of Tribal Sovereignty in IGRA, But the Ninth Circuit Failed to Heed Its Message

1. The State gravely mischaracterizes the facts in contending that Petitioner is an outlier that refused an offer that other tribes found beneficial.[5] Those bald assertions are wrong, contrary to the record, and contrary to the facts alleged in the complaint, which were properly accepted as true for present purposes. As a preliminary matter, the fact that some tribes chose to sign a compact under threat of closure is merely an example of those tribes asserting their tribal sovereignty. But Petitioner has been denied its sovereign right to oppose a 30% tax on its revenue and forced unionization. This is a prime example of a violation of one of the basic tenets of tribal sovereignty.

Furthermore, although the State is correct that many tribes accepted the State's supposed "concessions," the reality is that, faced with the State's ultimatum to sign the compact or face closure, they concluded they had no practical choice but to accept the State's "final offer." If they refused, they (like Petitioner) could pursue uncertain litigation but face the dramatic prospect of having their gaming operations – which are the principal source of revenue for all tribal governmental programs — shut down by the government. The course the

Gaming Act"); Initiative SA2003RF0059 ("The Gaming Revenue Act of 2004"); Initiative SA2004RF0007 ("Tribal Fair Share Act of 2004").

[5] Moreover, Respondent's attempt to portray Coyote Valley as an outlier tribe ignores recent authority cited by Respondent in its opposition. *Artichoke Joe's Cal. Grand Casino* v. *Norton*, __ F.3d __, 2003 U.S. App. Lexis 25893, *14 (9th Cir. Dec. 22, 2003). ("Some 44 California tribes are still without compacts . . ."). Many, if not all, of those 44 tribes have requested compacts – some since 1999 – but have been ignored or refused by the Governor until just prior to the 2003 recall election.

tribes chose was to continue gaming while Petitioner pursued the tribes' collective interest through this suit.[6]

The State thus ignores that the negotiations for a state-tribal compact are not between coequal parties; the State holds tremendous bargaining leverage over the tribes. *See United States* v. *The Spokane Tribe of Indians*, 139 F.3d 1297, 1301 (9th Cir. 1998) ("[N]othing now protects the Tribe if the State refuses to bargain in good faith or at all; the State holds all the cards. . ."); S. Rep. 100-466, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083-84 (describing the "unequal balance" between the States and tribes). IGRA was specifically designed to protect the tribes from the States' superior bargaining strength. Viewing compact negotiations as contractual discussions between parties of equal strength is inimical to the statutory design, yet that is precisely what the Ninth Circuit did and what Respondent perpetuates.

In any event, Petitioner has the independent sovereign authority to pursue its rights. *See, e.g.*, S. Rep. No. 100-446, 1988 U.S.C.C.A.N. at 3076 ("[T]o the extent Tribal governments elect to relinquish rights in a Tribal-State compact that they might have otherwise reserved, the relinquishment of such rights shall be specific to the tribe so making the election, and shall not be construed to extend to other tribes . . ."); 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) ("What works for the Taos Pueblo may not work for the Navajo Nation"). Congress certainly did not intend that Indian tribes be treated as a single monolith. Rather, it endeavored to protect a tribe's sovereignty in its negotiations with the State.

2. Finally, Respondent goes to great lengths to avoid addressing the statutory construction issues that lie at

[6] The District Court agreed with Petitioner that the issues raised in this case are of sufficient import to protect Petitioner's operations during the pendency of its appeals.

the heart of the Ninth Circuit's error. Offering little beyond conclusory analysis, Respondent insists that not only were its actions proper, but it also could have subjected the tribes to even harsher demands: "Even if the State had sought a substantial share of tribal gaming revenue for itself, this would not be a violation of IGRA."[7] (Br. Opp. 5 n.8).

Rather than address what IGRA actually says, the State can only take such positions, much like the Ninth Circuit did, if its "meaningful concession" was legitimate. Without the flawed *Rumsey* foundation, however, the State's demands trespass on tribal sovereignty and contravene the plain language of IGRA. Both Respondent and the Ninth Circuit have ignored Congress' admonition that it "does not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands." S. Rep. 100-466, at 14. The taxation provisions insisted upon by Respondent, as well as the mandate forcing unions onto tribal land, can only be viewed as such an incursion on Petitioner's sovereignty. (Pet. 20-24).

If left undisturbed, the Ninth Circuit's interpretation of "other subjects that are directly related to the operation of gaming activities," 25 U.S.C. § 2710(d)(3)(C), will be limitless. States will be freed from all constraint on the subjects on which they care to bargain, because anything can be characterized as "directly related" to the "operation" of gaming under Respondent's view (including environmental regulation, forced unionization, and heavy taxation). *Cf.* 134 Cong. Rec. H8155 (Sept. 26, 1988) ("It is not the intent of Congress to establish a precedent for the use of compacts in other areas, such as water rights, land use, environmental regulation, or taxation. Nor is it the intent of Congress that States use compact negotiations as a means to pressure Indian

[7] Respondent's assertion that it "sought virtually nothing" from the tribes borders on the disingenuous (Br. Opp. 4); even the Ninth Circuit acknowledged that the SDF required "significant" contributions from the tribes. (Pet. App. 37a).

Tribes to cede rights in any other area."). And to the extent that ambiguity is contained in these statutory provisions, they must be construed in favor of Petitioner,[8] rather than exploited by Respondent.

* * *

The Petition should be granted.

Respectfully submitted,

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[8] *See, e.g., Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982).