No. 09-816

In The
Supreme Court of the United States

NORTH COUNTY COMMUNITY ALLIANCE, INC.,

Petitioner,

v.

KEN SALAZAR, Secretary of the United States Department of the Interior; DEPARTMENT OF THE INTERIOR; GEORGE SKIBINE, Acting Chairman of the National Indian Gaming Commission; NATIONAL INDIAN GAMING COMMISSION,

Respondents.

On Petition For 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 FOR REVIEW

The Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.*, authorizes and regulates organized tribal gaming activities, and charges the National Indian Gaming Commission with administration and enforcement of the Act. Gaming under the Act, as well as the Commission's jurisdiction, is geographically limited to "Indian lands" as defined in the Act. Moreover, before a tribe may engage in gaming activities under the Act, the Commission must approve a gaming ordinance submitted by the tribe that governs the tribe's gaming activities.

The questions presented are:

Must the National Indian Gaming Commission establish its jurisdiction over a tribe's potential gaming sites, by determining that such sites qualify as "Indian lands", before approving the tribe's gaming ordinance?

Does the National Indian Gaming Commission act *ultra vires* when it approves a tribal gaming ordinance which allows construction and operation of a gaming facility on land which is never determined by the Commission to be "Indian lands"?

PARTIES TO THE PROCEEDING IN THE COURT BELOW AND RULE 29.6 STATEMENT

The caption of the case in this Court contains the names of all parties to the proceedings in this Court. In the proceedings below, Dirk Kempthorne was a party in his capacity as Secretary of the Department of Interior, and Philip N. Hogen was a party in his capacity as Chairman of the National Indian Gaming Commission. They have been replaced as parties by Ken Salazar and George Skibine, respectively.

Pursuant to Supreme Court Rule 29.6, Petitioner states that it has no parent company or publicly held company owning ten percent or more of its stock.

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OPINIONS BELOW

The opinion below was issued by a divided panel of the United States Court of Appeals for the Ninth Circuit. It is reported as *North County Community Alliance, Inc. v. Salazar* (*NCCA*), 573 F.3d 738 (9th Cir. 2009) and is reprinted in the Appendix beginning at App. 1. The panel majority upheld an unreported order of the United States District Court for the Western District of Washington that was entered on November 16, 2007, and is reprinted in the Appendix beginning at App. 32.

JURISDICTION

Petitioner timely moved for rehearing of the panel decision on September 10, 2009. The motion was denied by order entered October 6, 2009. *See* App. 54. Accordingly, this Court has jurisdiction of this matter under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case concerns the interpretation and application of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 *et seq*. Relevant provisions of the Act are reprinted in the Appendix beginning at App. 56.

STATEMENT OF THE CASE

A. Historical background.

Congress enacted the Indian Gaming Regulatory Act in 1988 against a backdrop of increasing controversy over tribal gaming. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 12.01 (Nell Jessup Newton *et al.* eds., 2005). In the decade prior to IGRA's enactment, a number of tribes began operating bingo and poker parlors. *Id.* Some states asserted these facilities violated their gambling laws. *Id.* Disputes over these gaming facilities culminated in this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 302 (1987), wherein the Court held that tribes could engage in organized gaming in states that did not generally prohibit gambling.

Congress entered the fray the following year by enacting IGRA. Pub. L. 100-497, 102 Stat. 2467 (1988). IGRA was designed to balance the competing federal, state and tribal interests concerning tribal gaming, and to provide a uniform and predictable basis for the operation and regulation of such gaming, provided that it occurred on "Indian lands" as specifically defined in the Act. *See* 25 U.S.C. §§ 2701-02 (Congressional findings and declaration of policy); *see also* COHEN § 12.02(1). The National Indian Gaming Commission (NIGC) was created to administer and enforce the Act. *See* 25 U.S.C. §§ 2704-06.

B. IGRA's regulatory scheme.

Two aspects of IGRA's regulatory scheme are particularly important here. First is the requirement that all tribal gaming under IGRA take place on "Indian lands." As the Ninth Circuit recognized, "[i]t is undisputed that IGRA authorizes tribal gaming only on 'Indian lands' as defined in" the Act. *NCCA*, 573 F.3d at 744 (App. 11). Under IGRA, "Indian lands" are:

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands [1] title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and [2] over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4) (bracketed numbers added); *see also* 25 C.F.R. § 502.12. Part (A) of this definition is relatively self-explanatory. Part (B), however, is not as simple. Whether a particular parcel is held in trust or subject to restriction against alienation is a fact-intensive inquiry governed by other statutes. Moreover, "governmental power" is not established by a mere assertion of "theoretical authority," but requires "concrete manifestations" of actual authority. *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 703 (1st Cir. 1994).

The other feature of IGRA's scheme particularly relevant here is its division of gaming into three

classes, and the different requirements applicable to these classes. "Class I gaming" includes traditional ceremonial and social games for prizes of limited value, 25 U.S.C. § 2703(6), and is generally subject to the tribes' exclusive jurisdiction, 25 U.S.C. § 2710(a)(1). This class of gaming is not at issue here.

"Class II gaming" generally includes bingo and certain card games, but expressly excludes "banking card games" such as blackjack, and slot machines and other similar electronic gaming devices. 25 U.S.C. § 2703(7). To engage in class II gaming, a tribe must receive NIGC approval of a tribal gaming ordinance subject to the requirements of 25 U.S.C. § 2710(b).

"Class III gaming" encompasses "all forms of gaming that are not class I gaming or class II gaming," including slot machines and other electronic gaming devices. 25 U.S.C. § 2703(7)(B)(ii) and (8). Class III gaming is subject to all requirements placed on class II gaming, plus a requirement that such gaming be "conducted in conformance with a Tribal-State compact" entered into by the tribe and the forum state. 25 U.S.C. § 2710(d)(1).

C. The present case.

1. The Northwood Casino.

This case centers on the Northwood Crossing Casino (the Northwood Casino), a class II tribal gaming facility built and operated by the Nooksack Indian Tribe in Whatcom County, Washington. The Northwood Casino is not located on the Nooksack

Reservation; rather, it is located on a twenty-acre parcel purportedly held in trust by the United States for the Nooksacks amid an extensive area of non-Indian farmland about a mile south of the Canadian border. The Nooksack Reservation is in the town of Deming, Washington, about twenty miles southeast of the Northwood Casino site.

The Northwood Casino parcel was purportedly taken into trust by the United States for the Nooksacks in 1984. For over two decades thereafter, the parcel lay largely untouched. In the meantime, Congress passed the Indian Gaming Regulatory Act. Five years after the passage of the Act, the Nooksacks applied for, and the NIGC approved, a gaming ordinance pursuant to the Act.[1] The ordinance contains no references to any particular number or location of gaming sites. The tribe has operated a casino on its reservation in Deming since that time.

In 2006, the Nooksacks announced plans for a second casino, this one located on the Northwood Casino parcel. Members of petitioner North County Community Alliance objected to the NIGC that the "Indian lands" status of the Northwood Casino parcel was not clear, and requested the NIGC to make an "Indian lands" determination with respect to the

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[1] Copies of the Nooksack Gaming Ordinance and of the NIGC letter confirming approval are available at http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances/nooksack/nooksackord102793.pdf (retrieved Dec. 29, 2009).

parcel. The Alliance is a non-profit corporation that seeks to protect the environment, preserve the peace and quality of life for the citizens of Whatcom County and to insure all applicable laws are followed in connection with proposed development projects in northern Whatcom County that could negatively impact the environment and nearby communities. The Alliance's members include residents, property owners, and Nooksack Indian Tribe members who are negatively affected by the construction and operation of the Northwood Casino.

Despite the Alliance's objections, the NIGC took no action regarding the "Indian lands" status of the Northwood Casino parcel, even though such status is essential for a tribe to establish a gaming facility under IGRA, free from state and local regulation of both the construction and operation of the facility.

In light of the NIGC's position that no "Indian lands" determination need be made, there has never been a forum for consideration of the Alliance's arguments that the Northwood Casino site does not qualify as "Indian lands." If such a determination must be made, the Alliance would raise to the NIGC several reasons this site did not qualify as "Indian lands," including the lack of any historical exercise of tribal governmental power on this site. Nevertheless, whether the Northwood Casino parcel qualifies as "Indian lands" is not a question before the Court – a point recognized by the Ninth Circuit below. *See NCCA*, 573 F.3d at 743 (App. 10).

2. Procedural history.

The Alliance filed suit in the United States District Court for the Western District of Washington seeking, *inter alia*, a declaratory judgment ordering the NIGC to make a determination regarding the "Indian lands" status of the Northwood Casino parcel. Defendants filed a motion to dismiss which the court granted. The court asserted that the Alliance's claims were barred by the applicable statute of limitations, App. 36-43, and that IGRA placed no duty on defendants to make an "Indian lands" determination regarding the Northwood Casino parcel, App. 44-50.

The Alliance appealed the District Court's dismissal to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. §§ 1291 and 1294. The panel issued a divided opinion reversing in part and affirming in part. The court unanimously held that the Alliance's claims were not time barred. *See NCCA*, 573 F.3d at 742-43 (App. 6-9) (majority), 749 (App. 24) (Gould, J., concurring in part, dissenting in part). However, the panel majority held that the Commission did not act beyond the scope of its authority when it approved the Nooksacks' gaming ordinance without first determining the "Indian lands" status of the Nooksacks' potential gaming sites, and that nothing obligated the Commission to make such a determination upon the announcement or construction of the Casino. The panel majority claimed that it would be impractical for the NIGC to make such determinations, and that there is nothing in IGRA's text that expressly requires the NIGC to

make such a determination. *NCCA*, 573 F.3d at 744-47 (App. 11-19).

Judge Gould dissented from the majority's holding on this point. Judge Gould observed that the majority's decision left "Indian lands" determinations wholly within the NIGC's discretion, a result completely contrary to Congressional intent, IGRA's stated purposes, and the necessary assumptions underlying the statute as a whole. *Id.* at 749-51 (App. 26-31). He also noted that the NIGC "cannot allow construction of a new gaming facility before it determines that it has jurisdiction over that specific site." *Id.* at 751 (App. 28).

The Alliance now petitions this Court for a writ of certiorari to the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit's opinion decided an important question of federal law that has not been, but should be, settled by this Court.

This Court has never addressed whether the NIGC may approve a tribal gaming ordinance without first determining the "Indian lands" status of sites where the tribe would engage in gaming activity. The importance of this question, however, is manifest.

There are currently 564 federally recognized tribes nationwide according to the Bureau of Indian

Affairs. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 74 Fed. Reg. 40,218 (Aug. 11, 2009). While the numbers are constantly fluctuating, approximately 239 of these tribes currently operate over 450 gaming operations in twenty-nine states,[2] generating $26.7 billion in revenue for the fiscal year ending in 2008.[3] Moreover, in light of the promise that organized gaming has shown as a tool of tribal economic development, these numbers are increasing all the time. In the fiscal year ending in 1998, there were only 297 tribal gaming operations that generated $8.5 billion in revenues.[4] Prior to IGRA's passage in 1988, tribal gaming activities generated revenues only around $212 million per year, *see* COHEN § 12.01 – or less than one percent of 2008's figure.

Thus, the nationwide import of tribal gaming and its regulation is clear. Congress enacted IGRA to provide a uniform and predictable "statutory basis for the operation and regulation" of this gaming. *Seminole Tribe v. Florida*, 517 U.S. 44, 48 (1996). In particular, Congress sought to balance federal, state, tribal and local rights and interests by limiting tribal

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[2] *See* Nat'l Indian Gaming Comm'n, GAMING TRIBE REPORT (SORTED BY STATE) (Nov. 9, 2009), available at http://www.nigc.gov/LinkClick.aspx?fileticket=lGmrRJwYRN0%3d&tabid=68 (retrieved December 29, 2009).

[3] *See* http://www.nigc.gov/Default.aspx?tabid=67 (retrieved Dec. 29, 2009) for the relevant reports.

[4] *Id.*

gaming activities to "Indian lands" on the one hand, and freeing the tribes from the widely varying strictures of state law on the other. The Ninth Circuit's decision, if allowed to stand, shatters this balance – significantly increasing the likelihood that gaming will occur on non-Indian land, yet cloaking that gaming with the imprimatur of a gaming ordinance approved by the federal government.

Indeed, whether gaming should be allowed on a particular site implicates important questions of federalism. This is because the NIGC holds the key to trumping the applicability of local and state regulation of gaming. It is critical that this Court decide whether the NIGC can approve a tribe's gaming ordinance, and thereby preempt state and local regulations, without expressly determining that the gaming facilities that operate pursuant to such an ordinance are located on "Indian lands" as mandated by IGRA. A decision on this question is essential in guaranteeing states and local communities that tribal gaming is limited to those locations authorized by federal law. It is equally essential to tribes wishing to engage in gaming to know that their proposed sites qualify for gaming under IGRA.

Finally, while the Ninth Circuit's decision obviously is binding only within its own jurisdiction, it will undoubtedly influence the NIGC's regulation of gaming nationwide, even when acting outside the Ninth Circuit. Accordingly, this Court should grant the Alliance's petition.

B. The Ninth Circuit's opinion conflicts with fundamental aspects of this Court's administrative law jurisprudence.

While this Court has not answered the precise question presented in this case, it has spoken repeatedly regarding the limits on the powers of administrative agencies. The Ninth Circuit's opinion below contravenes this jurisprudence and approves *ultra vires* action on the part of the NIGC. In particular, the panel decision allows the NIGC to exceed its statutory power by approving a tribal gaming ordinance without first establishing that it has jurisdiction over the gaming that will occur under the ordinance.

It is a long-standing principle of this Court's jurisprudence that "[a]n agency may not confer power upon itself." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Rather, "an agency . . . has no power to act . . . unless and until Congress confers powers upon it." *Id.*; *see also Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). Moreover, courts "must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *Brown & Williamson*, 529 U.S. at 161.

In determining whether an agency has the power to take a certain action, the words of the authorizing "statute must be read in their context and with a view to their place in the overall statutory scheme."

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 666 (2007). Indeed, "[s]tatutory construction . . . is a holistic endeavor." *United Savs. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). "A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole." *Brown & Williamson*, 529 U.S. at 133 (internal quotations and citations omitted).

This Court has applied these principles in numerous cases. A couple are particularly instructive here. In *Brown & Williamson*, the FDA asserted that it had jurisdiction to regulate tobacco products pursuant to its authority to regulate drugs under the Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq*. This Court rejected that assertion, finding that the FDA lacked statutory power to regulate tobacco and striking down its regulations. The Court reasoned that the FDA assertion of authority contravened the essential purposes of the act, 529 U.S. at 133-34, the logical underpinnings of the act, *id*. at 134-43, as well as the requirements of other statutes regulating tobacco products, *id*. at 143-58.

Similarly, in *Ragsdale*, the Secretary of Labor claimed authority to exclude, via regulation, certain days from an employee's entitlement under the Family and Medical Leave Act (FMLA), 29 U.S.C. § 260 *et seq*. This Court rejected this assertion and found that the regulation exceeded the Secretary's authority under the FMLA. Viewing the FMLA as a whole, the Court reasoned that the regulation was

contrary to the FMLA's overall remedial design, 535 U.S. at 88-90, altered the FMLA's cause of action in a fundamental way, *id.* at 90-91, and failed to give effect to the policy compromises embodied in that act, *id.* at 93-94.

Here, similar factors compel the conclusion that the NIGC lacks the power to approve a tribal gaming ordinance without first establishing its jurisdiction over the sites where gaming will occur pursuant to the ordinance. As noted above, it is undisputed that IGRA only authorizes tribal gaming on "Indian lands" as defined in the Act, and that the NIGC's jurisdiction only extends to gaming that occurs on "Indian lands." Also, as noted above, all gaming under IGRA (except for traditional ceremonial games not relevant here) must be conducted pursuant to a tribal gaming ordinance approved by the NIGC.

Given this combination of limitations and requirements, the NIGC cannot approve a tribal gaming ordinance without first ensuring that the gaming that occurs under that ordinance is conducted on "Indian lands" within the NIGC's jurisdiction. "The NIGC, like all federal agencies, does not have authority that expands beyond what Congress has delegated to it." *NCCA*, 573 F.3d at 751 (App. 28) (Gould, J., dissenting). Here, the NIGC lacks the power to approve any tribal gaming ordinance that authorizes, or could be construed to authorize, gaming on land not constituting "Indian lands."

An analysis of IGRA's text confirms this conclusion. As noted above, one must "look[ ] to the provisions of the whole law, and to its object and policy" when interpreting a statute. *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993). Looking at the "provisions of the whole law" here, the extent to which all activities under IGRA are limited to "Indian lands" is striking. For example, all three "classes" of gaming authorized in IGRA are approved subject to the proviso that they occur on "Indian lands." *See* 25 U.S.C. §§ 2710(a)(1), (a)(2), (b)(1), (d)(1). Moreover, one of IGRA's expressly declared purposes is the establishment of an "independent Federal regulatory authority for gaming on Indian lands," 25 U.S.C. § 2702(3) (emphasis added) and to provide "clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. § 2701(3) (emphasis added). All of these provisions presuppose that the NIGC will determine whether particular gaming facilities are on "Indian lands." Indeed, as noted by Judge Gould, "[w]ith these findings Congress could not have intended to create a regime where the NIGC did not have to make Indian lands determinations." *NCCA*, 573 F.3d at 750 (App. 27).

The limitation to "Indian lands" is also present in the provisions governing the content and approval of tribal gaming ordinances. On balance, IGRA indicates that tribes may not simply offer a non-site-specific gaming ordinance for NIGC approval, and then build and operate as many gaming facilities as they wish, free from further scrutiny regarding IGRA's basic,

threshold requirements. IGRA quite directly states that "[a]n Indian tribe may engage in, or license and regulate, class II gaming," but only on "Indian lands within such tribe's jurisdiction." 25 U.S.C. § 2710(b)(1); *see also* §§ 2702(3), 2706(b). It goes on to provide:

> The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that
>
> . . . .
>
> (E) the **construction** and maintenance **of the gaming facility**, and the operation of that gaming is conducted in a manner which **adequately protects the environment and the public health and safety**;

25 U.S.C. § 2710(b)(2) (emphasis added).

This subsection rather plainly contemplates that the NIGC has a responsibility to determine whether the construction of any individual "gaming facility" is occurring on "Indian lands" and whether such construction is being conducted "in a manner which adequately protects the environment and the public health and safety." The NIGC simply cannot fulfill this purpose of protecting the environment and public health and safety if it can approve a gaming ordinance which authorizes the construction and operation of a gaming facility at any location.

Indeed, the statute does not contemplate a blanket approval of untold numbers of gaming facilities that may exist in the future and in unknown locations. Rather, it only speaks of "the gaming facility" presumably known to the NIGC during its deliberations.

The Ninth Circuit majority tried to refute this argument on two grounds. First, it noted that, in practice, most gaming ordinances presented to the NIGC are not site-specific. *NCCA*, 573 F.3d at 746 (App. 18). But there is nothing in the record to support this assertion, nor does it say anything about whether, under the statute, tribal gaming ordinances need to be site-specific. Moreover, assuming the panel's assertion is true, acceptance of this practice has the curious effect of burdening those tribes who are more forthcoming regarding their gaming plans to greater scrutiny, while potentially rewarding those who keep their plans close to the vest or are misleading.

The majority also contended that the Alliance's textual analysis was overly cramped, asserting that if the phrase "the gaming facility" is read literally, each tribal gaming ordinance would be limited to a single gaming facility. *NCCA*, 573 F.3d at 746 (App. 17-18). But the Alliance has never made this argument – indeed, as the Ninth Circuit observed, IGRA plainly contemplates that a tribal gaming ordinance may cover multiple gaming facilities. *Id.* at 746-47 (citing 25 U.S.C. § 2710(b)(1)). Rather, the Alliance has simply argued that if one looks to the provisions of the whole law, and to its object and policy – as one

must – it is clear that the NIGC has environmental and public safety responsibilities under the statute, as well as jurisdictional limitations, that can only be satisfied by determining the "Indian lands" status of potential gaming sites before it approves a tribal gaming ordinance.

The Ninth Circuit asserted that such a requirement is impractical. *NCCA*, 573 F.3d at 746 (App. 17). However, as the majority itself noted, the NIGC has recently promulgated new regulations that require tribes to submit "Indian lands" information to the Commission when the tribe submits a proposed gaming ordinance for approval, or when it seeks to open a new gaming facility. *Id.* at 747-48 (App. 19-20) (citing 25 C.F.R. §§ 522.2 and 559). Critically, the NIGC's regulations stop short of requiring the NIGC to make public "Indian lands" determinations for proposed gaming sites. Nonetheless, given these regulations, the NIGC will have all the information it needs to make such determinations without any undue burden being placed on the Commission.

Finally, requiring such determinations prior to the approval of a tribal gaming ordinance comports with the IGRA's policies and the necessary assumptions underlying the statute. Some of these have already been discussed – specifically, Congress's overarching policy of limiting tribal gaming to "Indian lands." Beyond this, however, Congress also sought to provide Indian tribes with a vehicle for economic development and tribal self-sufficiency. *See* 25 U.S.C. §§ 2701(4) and 2702(1).

The Ninth Circuit's decision jeopardizes this goal. As Judge Gould observed, "[a]llowing an Indian tribe to construct a gaming facility before the tribe knows whether the federal government will recognize it as within its tribal jurisdiction frustrates the goal of promoting tribal economic development and self-sufficiency." 573 F.3d at 750. Indeed, while many tribes may benefit from withholding their intentions regarding possible gaming sites, other tribes may find economic calamity following such a course if it is later determined that a particular gaming facility is not on "Indian lands." In this event, all state and local gambling laws, and all federal laws apart from IGRA, apply. *Id.* As noted by Judge Gould, these laws:

> may be stringent or prohibitive, thus depriving the Indian tribe of their planned economic revenue, and rendering its investment in the gaming facility an economic liability. Such an event would hinder the principal goals of federal Indian policy of promoting self-sufficiency and economic development.

Id. Accordingly, the Ninth Circuit's decision conflicts with this Court's administrative law jurisprudence and should be reviewed.

C. The Ninth Circuit's opinion conflicts with the decisions of other courts that have addressed the questions presented.

While no other court of appeals has addressed the questions presented here, other lower federal

courts have. And those courts agree that the NIGC cannot approve tribal gaming ordinances without first determining whether the Commission has jurisdiction over the gaming that will occur under the ordinance.

The principle conflict lies with a decision out of the Western District of New York. That court recently held that:

> the findings, purpose and language of the IGRA relative to the NIGC's jurisdiction implicitly require such a determination. Whether proposed gaming will be conducted on Indian lands is a critical, threshold jurisdictional determination of the NIGC. Prior to approving an ordinance, the NIGC Chairman must confirm that the situs of proposed gaming is Indian lands. If gaming is proposed to occur on non-Indian lands, the Chairman is without jurisdiction to approve the ordinance.

Citizens Against Casino Gambling in Erie County v. Kempthorne (*Erie County*), 471 F. Supp. 2d 295, 323-24, *reconsideration granted on other grounds*, 2007 WL 1200473 (W.D.N.Y. 2007).

Similarly, in *Apache Tribe v. United States*, No. 04-1184, 2007 WL 2071874 (W.D. Okla. 2007), the Western District of Oklahoma reviewed the NIGC's approval of a state-tribe gaming compact for class III gaming. In rejecting the NIGC's approval, the court noted that "before a compact may be approved, it must be confirmed that the gaming is anticipated on

Indian lands . . . as required by 25 U.S.C. § 2703(4)." *Id.* at *4.

The Ninth Circuit did not address the *Apache Tribe* decision, but attempted to distinguish the *Erie County* case on the grounds that the gaming ordinance in that case was "site-specific" – that is, it identified the particular sites on which gaming would occur – whereas the Nooksack ordinance is not. *NCCA*, 573 F.3d at 745-46 (App. 14-16). There are two problems with this explanation.

First, the Ninth Circuit's characterization of the *Erie County* decision and the Seneca Tribe's gaming ordinance conflicts with the clear language of that decision. The *Erie County* court's conclusion that no "Indian lands" determination had been made was largely premised on its earlier conclusion that the ordinance was not specific enough regarding one of the possible gaming sites to allow the NIGC to rationally make such a determination. As noted by the *Erie County* court, the Seneca ordinance simply proposed gaming on an unspecified site in Erie County that qualified as "'Nation lands' [and that met] the IGRA's Indian lands definition," *Erie County*, 471 F. Supp. 2d at 325 – an extraordinarily vague formulation very similar to that in the Nooksack gaming ordinance. *See* Nooksack Gaming Ord. 56.04.030.[5] The *Erie County* court concluded that the

[5] Available at http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances/nooksack/nooksackord102793.pdf (retrieved Dec. 29, 2009).

description in the Seneca ordinance provided an insufficient basis for the NIGC to make a reasoned determination whether the Senecas' gaming facility was located on "Indian lands."

Second, as noted above, the ultimate effect of the Ninth Circuit's explanation is to subject those tribes who are forthcoming regarding their gaming plans to greater scrutiny than those who are reticent or are misleading. In particular, under the Ninth Circuit's rationale, a tribe that offers a site-specific gaming ordinance must be prepared to establish the "Indian lands" status of that site, whereas a tribe that offers a non-site-specific ordinance will face no such scrutiny – and will then be free to locate its gaming facilities as it pleases, subject only to the potential exercise of the NIGC's enforcement powers. This makes no sense, and both Judge Gould, *NCCA*, 573 F.3d at 749 (App. 25) and the *Erie County* court, 471 F. Supp. 2d at 324, recognized the practical and legal insufficiency of this approach.

CONCLUSION

The NIGC's power under the Indian Gaming Regulatory Act to approve tribal gaming ordinances – without first determining the threshold, jurisdictional issue of the "Indian lands" status of the gaming facilities covered by those ordinances – is a question of exceptional importance. The Ninth Circuit's decision approves *ultra vires* action by the NIGC in

contravention of this Court's administrative law jurisprudence, as well as the decisions of other federal courts. Furthermore, the decision threatens to impair the integrity of Congress's carefully crafted regulatory scheme. For all of these reasons, the Court should grant this petition and issue a writ of certiorari.

DATED: January 4, 2010.

Respectfully submitted,

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