No. 06-470

IN THE

SUPREME COURT OF THE UNITED STATES

ONEIDA INDIAN NATION OF NEW YORK,

Petitioner,

v.

SCOTT PETERMAN, UPSTATE CITIZENS FOR EQUALITY, INC., AND PERSONS AND ENTITIES SIMILARLY SITUATED, and HON. DAVID TOWNSEND, a duly elected official of the New York State Legislature,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

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November 2, 2006 *Counsel for Respondents*

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the doctrine of Indian sovereign immunity is so extensive that it precludes a state court from deciding whether, under that state's Constitution, its Governor can unilaterally and without legislative authorization enter into a compact on behalf of the state with an Indian tribe under the Indian Gaming Regulatory Act?

STATEMENT PURSUANT TO RULE 29.6

This brief in opposition is submitted on behalf of the parties named on the cover as Respondents in this proceeding. The only corporate entity among them is Upstate Citizens for Equality, Inc., a not-for-profit corporation organized under the laws of the State of New York. Upstate Citizens for Equality, Inc. has no parents, subsidiaries or affiliated entities and has issued no stock owned by any publicly held corporation.

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COUNTERSTATEMENT OF THE CASE

The Statement of the Case recited by Petitioner, the Oneida Indian Nation (the "Oneidas"), omits several salient facts. First, contrary to what the Petition implies, the Compact at issue in this case between the Oneidas and the State of New York, purportedly approved by the Secretary of the Interior, was not an approval for the Oneidas to conduct "Class III" gaming, as defined by the Indian Gaming Regulatory Act ("IGRA"), at the Turning Stone Casino. That is where Petitioner now claims it "invested hundreds of millions of dollars in gaming, hotel and other resort facilities, and thousands of employees came to work at the Nation's casino and resort complex" (Pet. at 2). That complex is located in the Town of Verona, New York, just off Exit 33 of the New York State Thruway (Interstate 90) in Oneida County, New York. IGRA, however, requires that Class III gaming can only be conducted on "Indian land," 25 U.S.C. § 2710(d)(1). By virtue of the decision of this Court last year, *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) ("*City of Sherrill*"), Turning Stone is not "Indian land."

The Secretary of the Interior only gave the Oneidas approval to operate a Class III gaming casino on "Indian lands," as IGRA requires. *See* Letter dated June 4, 1993 from Assistant Secretary of the Interior for Indian Affairs, Thomas Thompson, to Niels Holch, Esq. (Appendix "A" at A-1). That letter noted that at the time it was written, the Oneidas were conducting gaming at the Tribe's historic 32-acre reservation in Madison County (*Id.*). That is the very same 32 acres which this Court identified last year as being all that was left of the Oneidas' original reservation lands in New York State. *City of Sherrill, supra* at 205. That 32 acres is in Madison County, not Oneida County where Turning Stone is situated. *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 160 (2d Cir. 2003). *See also U.S. v. Boylan*, 265 F. 165 (2d Cir. 1920).

In that letter, the Interior Department warned the Oneidas that while it was aware of the Oneidas' intention to build a "major new facility" at a different site (*infra* at A-2), it took no position with regard to whether this new facility was on "Indian land" as that term is used in *IGRA* (*Id.*). Despite the warning, the Oneidas nevertheless went ahead and moved the site of its Class III gambling operation from its 32 acre reservation in Madison County to the new Turning Stone location in Oneida County without any federal approvals. Now they claim that that is a proper venue for gaming and that were they forced to cease and desist, that would upset "settled expectations." That new site, however, is not "Indian land" within the meaning of IGRA, 25 U.S.C. § 2703(4). That provision defines Indian land as land "within the limits of an Indian reservation," or "held in trust by the United States" pursuant to 25 U.S.C. § 465, or held in "restricted fee" status. *See* 25 U.S.C. § 177.

Last year, in *City of Sherrill, supra*, this Court made it abundantly clear that even though the Oneidas may have reacquired fee simple title to land that was once part of its historic reservation (as is the case with the Turning Stone site), it did not, by virtue of such reacquisition, also reacquire sovereignty "in whole or in part" over such land. *Id.* at 202-203. Turning Stone is, therefore, on land subject to the laws of the State of New York, whose Constitution unequivocally prohibits commercialized gambling on non-Indian land. N.Y. Const. Art. I, § 9 (Appendix "B", *infra* at A-4). *See also Dalton v. Pataki*, 5 N.Y.2d 243, 261 n 5 (2005), *cert denied*, 126 S.Ct. 742 (2005). *See also* 25 U.S.C. § 232.

This Court's ruling in *City of Sherrill* was handed down on March 29, 2005. The Oneidas, fully appreciating the ominous implications of that decision in terms of the legality of its continuing operations at Turning Stone, immediately rushed to get that land taken into trust, submitting an application to the Bureau of Indian Affairs on April 5, 2005, exactly one week after *City of Sherrill* was handed down.

That application is still pending, but is actively opposed by New York's Governor, whose counsel, by letter dated May 13, 2005 (Appendix "C", *infra* at A-11), advised the Secretary of the Interior and the Chairman of the National Gaming Commission of his concerns regarding the legality of Turning Stone's continued operation in view of this Court's decision in *City of Sherrill*. The Governor also noted his opposition to the "land to trust" application hastily made by the Oneidas in the immediate wake of the *City of Sherrill* decision (*infra* at A-9). No Indian gaming can occur on "land to trust" territory without the consent of the Governor of the affected state. *See* 25 U.S.C. § 2719(b)(1)(A). Thus, regardless of the decision handed down by the courts below which the Oneidas are now asking this Court to review, the fact remains that Turning Stone is not situated on Indian land and thus would not be entitled to continue its operation at Turning Stone in any event. The issues the Oneidas press here are, therefore, academic.

The Petitioner's Statement of the Case also omits another salient point, which strikes at the very heart of the Tribe's argument that it would be unfairly prejudiced if its casino operation were to be deemed illegal after the Tribe had invested millions of dollars in it. It should have come as no surprise to the Oneidas when the lower courts ruled in this case that the Compact that the Oneidas entered into with New York's Governor was illegal because the Governor lacked the authority under New York's Constitution to unilaterally enter into such compact without legislative authorization. They had been warned at the time of its execution that the Compact was vulnerable to legal challenge on those very grounds. Indeed, by memorandum dated June 15, 1993 (see Appendix "D" at A-12), the Governor's counsel, Elizabeth Moore, wrote as follows:

> We have long recognized the need for legislative action to implement the compacts. The Governor has consistently taken the position that the legislature would have to authorize

> the State to implement compacts that require the State to regulate and oversee Indian gaming. That is why the Governor submitted a program bill in 1990 and 1991, seeking authority from the Legislature to negotiate and enter into compacts with any Indian tribe or nation. And, that is why, from the outset of negotiations with the St. Regis-Mohawk Tribe in 1990, and with the Nation [the Oneidas] last summer, the State's negotiators told their Indian counterparts that legislative approval would be required before the State could enter into effective compacts. (*See* Appendix "B", *infra* at A-20)

Indeed, in *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801 (2003), *cert denied* 540 U.S. 1017 (2003), a case very similar to the one at bar, New York's highest court cited Ms. Moore's memorandum as evidence of the Tribe's full awareness of the risks of proceeding to operate a casino in the absence of legislative authorization. *Id.* at 818, n. 8. There, the Court held that indeed New York's Governor had no power under New York's Constitution to unilaterally enter into casino gambling compacts.

Finally, the Petitioner tribe has also neglected to mention that it unsuccessfully tried to divest the New York courts of jurisdiction in this very case in another action then pending in Federal district court. In *Oneida Indian Nation v. County of Oneida*, 132 F.Supp.2d 71 (N.D.N.Y. 2000), the Court rejected the Oneidas' efforts to obtain an injunction under the All Writs Act, 28 U.S.C. § 1651, whereby the Tribe sought to enjoin the Respondents from bringing this very action in State court on the grounds that it would somehow interfere with the Tribe's land claims then pending in the Northern District of New York in *City of Sherrill, supra.* In denying that motion, the Northern District noted that the nature of the Respondents' claims in this action were not the type that

appeared to be pre-empted by IGRA. 132 F.Supp.2d at 76. Petitioners never appealed from that decision.

REASONS FOR DENYING THE WRIT

I. This Case is Virtually Identical to Another New York State Court Ruling Which this Court Has Already Declined to Review

In *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801 (2003), *cert denied*, 540 U.S. 1017 (2003) ("*Saratoga*"), New York State's highest court, the New York State Court of Appeals, ruled that under New York State's Constitution, and the separation of powers and principles embodied therein, the Governor could not enter into a compact with an Indian tribe under IGRA absent legislative authorization. It held that it was that state's Constitution, not IGRA, that determines what "state actors" can bind the State to a gaming compact under IGRA (*Id.* at 822). This Court subsequently denied *certiorari*. The Oneida Indian Nation, the Petitioner here, participated as an *amicus curiae* before the New York State Court of Appeals in *Saratoga*. *Id.* at 820. The Oneidas fully briefed the very same arguments it now raises in the Petition in this case. They make virtually the same arguments in this Petition that were unsuccessfully advanced just three years ago. The result here should be no different.

II. The Threat to Indian Sovereignty Posed by the Lower Court's Decision is Far Less than the Threat to New York State Sovereignty if Its Courts were Divested of the Opportunity to Decide This Case

The Petition advances the dubious proposition that Indian sovereign immunity is so absolute that it forecloses state review of any cases that could tangentially affect Indian interests. The threat to Indian gaming posed by the prospect of a State court deciding which branch of state government has the power to enter into a compact under IGRA pales in comparison to the threat to a state's sovereignty if

its courts were to be divested of the right to decide such profound constitutional issues that concern the very core of a state's organic governing structure.

Indeed, in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), this Court noted that the question of who had the authority under State law to execute an Indian gaming compact on behalf of a state was a duty not likely to fall on one state executive officer, or even a group of officers. *Id.* at 75, n 17, *citing State ex rel. Stephan v. Finney*, 836 P.2d 1169 (Kan. 1992), where the Kansas Supreme Court held that the Governor of Kansas could negotiate but not enter into an Indian gaming compact under IGRA absent a grant of power from the Legislature. In so holding, the Kansas Supreme Court noted that IGRA itself was silent on what state official could negotiate on behalf of a state (*Id.* at 1179) and decided the case based on the Kansas Constitution, not IGRA (*Id.* at 80). *See also, Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997), *cert denied*, 522 U.S. 807 (1997) (IGRA silent as to what state official can bind a state).

Indeed, in balancing the issues of the State interest and the Indian interest here at issue, it is overwhelmingly clear that New York's sovereignty would be seriously jeopardized if its own courts were deprived of the power to decide which, if any, branch of state government could, under its own constitution, bind that state to a compact under IGRA. Cases relied on by the Tribe to the effect that its commercial contracts with other non-governmental parties should not be adjudicated without the Tribe are not the same as cases in which the very structure of state government is implicated.

III. Even the U.S. Department of the Interior Agrees That State Courts Are the Best Fora to Decide What State Officials Are Authorized Under State Law to Enter Into Gaming Compacts Under IGRA

The U.S. Department of the Interior, the agency charged with the administration of IGRA, clearly does not agree with Petitioner's claim that state courts should have no role in deciding what branch of state government can execute an Indian gaming contract on behalf of the state under IGRA. Indeed, the Interior Department has taken precisely the opposite position. *See* letter dated September 25, 1998, addressed to Hon. Pete Wilson, Governor of California, from Kevin Gover, the Assistant Secretary of Indian Affairs within the Department of the Interior (Appendix "E", *infra* at A-21). Mr. Gover specifically addressed that very issue, stating that "clearly Congress did not intend that the Secretary [of the Interior] become the final arbiter of issues of state law" (A-22). He further wrote:

> We recognize, however, that issues concerning the scope of the Governor's authorities are matters of state law appropriate for ultimate determination by the California judiciary (A-23).

See also letter dated April 5, 1995 from Interior Secretary Bruce Babbitt addressed to Senator Jeff Bingaman (Appendix "F"), *infra* at A-29), noting that once presented with a compact under IGRA, the Secretary of the Interior has only 45 days to approve it. *See* 25 U.S.C. § 2710(d)(8)(C). Accordingly, Secretary Babbitt noted that: "We do not believe that Congress contemplated that the Department of the Interior would address or resolve complex issues of State law raised by an internal challenge to a Governor's authority" (A-29 - A-30).

See also letter dated December 5, 1994, addressed to the Hon. John Chaffee, U.S. Senator from Rhode Island, written by John D. Leshy, Solicitor of the U.S. Department of the Interior (Appendix "G", *infra* at A-31). Mr. Leshy notes:

> Given IGRA's 45-day time constraint and the automatic approval provision, we do not believe that Congress contemplated that the Department would address or resolve complex issues of State law raised by an internal challenge to a Governor's authority (A-32).

It is well-settled that the interpretation imparted to a statute by a Federal agency charged with its enforcement is entitled to great deference and will not be disturbed absent a totally unreasonable interpretation that runs directly counter to the statute. *Chevron USA v. National Resources Defense Council*, 467 U.S. 837, 844 (1984), *Griggs v. Duke Power Company*, 401 U.S. 424, 434-435 (1970). The Interior Department's interpretation of IGRA in this case is entirely reasonable.

IV. Divesting State Courts of Jurisdiction in These Types of Cases Would Create a Judicial Vacuum and Invite Chaos

It is not just Indian sovereignty at stake here, this case is also about the countervailing threat to state sovereignty. Petitioner argues that no state court can decide which state branch of government can enter into a gaming compact with an Indian tribe under IGRA. This aggressive assertion of Indian sovereignty is an invitation to chaos for its logical conclusion is that whenever a tribe seeks to enter into a gambling compact with the State, it can choose to negotiate with either the Legislature or the Executive Branch, depending on which is more favorably disposed to the Tribe's objectives. Then the other branch would be without any power to challenge any compact arrived at because, after all, according to Petitioner, any such decision might implicate the Tribe's vested interests in such a compact and since a

state court has no jurisdiction over a tribe, the case could not be decided because of the doctrine of indispensable parties. The absurdity of such an aggressive posture and the judicial vacuum created thereby totally exalts Indian sovereignty for the sake of gaming, while at the same time inflicting extraordinary damage on state sovereignty.

The Petitioner suggests that perhaps the Federal Administrative Procedure Act provides an alternative to state courts for resolution of such issues. Petition at 3. There would be nothing under the APA to review, however, since the Secretary is not the appropriate official to resolve such issues in the first place. *See* Appendices "E"-"G", inclusive. Nor indeed should the Secretary. It is axiomatic that federal courts do not have the power to compel state actors to comply with state law. *Doe v. Bush*, 261 F.3d 1057 (11th Cir. 2001), *cert denied sub nom, Kearney v. Does*, 534 U.S. 1104 (2002), *citing Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984) ("It is difficult to think of a greater intrusion on state sovereignty than when a Federal court instructs state officials on how to conform their conduct under State law. Such a result conflicts directly with the principles of federalism that underlie the 11th Amendment"). *See also Walker v. Mintzes*, 771 F.2d 920, 933 (6th Cir. 1985) ("[A] federal court should not rule upon the validity of a state regulation challenged on the sole ground that it was not properly adopted under State law by the State Administrative agency").

Federal officials are not the only ones who believe that the resolution of this issue belongs with State court. There is substantial judicial precedent to support Respondents' argument that state courts are the proper fora to resolve what is a quintessential state law question, notwithstanding the absence of an Indian tribe as a party. Determining what branch of state government has the power to bind a state to a Tribal-State Compact is a state constitutional law issue best

decided by a state court. *See, e.g., State ex rel. Clark v. Johnson,* 904 P.2d 11 (N.M. 1995), which held:

> Resolution of this case requires only that we evaluate the Governor's authority under New Mexico law to enter into the Compacts and Agreements absent legislative authorization and ratification. Such authority cannot derive from the Compact and Agreement, and must derive from state law. This is not an action based on breach of contract, and its resolution does not require us to adjudicate the rights and obligations of the respective parties to the Agreement (emphasis supplied).

904 P.2d at 19.

See also, State ex rel. Stephan v. Finney, 251 Kan. 559 (Kan. 1992); *Narragansett Indian Tribe of Rhode Island v. Rhode Island,* 667 A.2d 280 (R.I. 1995); *Catskill Development LLC v. Park Place Entertainment,* 217 F.Supp.2d 423, 442-443 (N.D.N.Y. 2002).

In sum, in adopting IGRA, Congress never intended to sacrifice state sovereignty on the altar of Indian gambling. As noted by the 10th Circuit in *Pueblo of Santa Ana v. Kelly,* 104 F.3d 1546 (10th Cir. 1997), *cert denied,* 522 U.S. 807 (1997):

> While preservation of tribal sovereignty was clearly of great concern to Congress, respect for State interests relating to Class III gaming was also of great concern. We are hesitant to conclude that Congress intended to permit a State to be bound by a compact regulating Class III gaming which it never validly entered. *Id.* at 1554.

V. The Oneidas Had a Complete and Full Opportunity to Make Their Position Known in the Courts Below and They Took Full Advantage of That Opportunity Such That They Were For All Practical Purposes a Party to the Proceeding

The Oneidas contend that issues affecting their interest could not be adjudicated in their absence. The reality is that at every critical juncture of the proceedings in this case, the Oneida Indian Nation was a participant, making so-called "special appearances" even though it was not a party to the action. It is obvious that the Tribe wants to have its proverbial cake and eat it too.

There is a disingenuous aspect to the arguments that permeate its Petition. The Oneidas were named as a party below, but invoking sovereign immunity, dropped out. Then after dropping out, they sought to reappear before the Court, seeking to have the case dismissed on indispensable party grounds because they were not a party to the lawsuit.

As noted by New York's Court of Appeals in *Saratoga County Chamber of Commerce v. Pataki, supra,* Indian interests were at all times articulated both in that case by the Oneida Indian Nation as *amicus* and in the case below for the very same reasons. While the Tribe can invoke sovereign immunity to get out of the case, in so doing it takes the risk that issues may be adjudicated in its absence. While the Tribe counters that it should not have to subject itself to the jurisdiction of a state court, it simply cannot ignore the compelling countervailing interest that a state court has in adjudicating the issue of what branch of state government has the constitutional authority to bind that state under IGRA.

It is simply unacceptable that Indian tribes are totally free to negotiate with whatever state officials or branch of

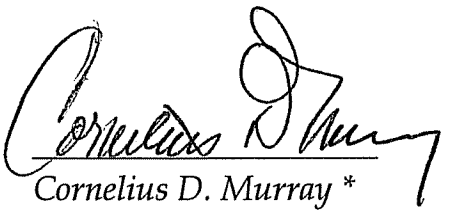
government they so choose, and then deprive a state court of the power to decide whether those officials or branch indeed have the constitutional authority to act. As previously stated, this is an invitation to chaos. The fact of the matter is that indispensable party jurisprudence is one that involves the exercise of discretion and the weighing of countervailing interests, which the courts below properly considered.

Indian gambling simply is not as important in the long run as the ability of state courts to determine what state officials can act on behalf of that state. Once that is decided, then Indian tribes can assert with more equity and conviction that they had a right to rely on the apparent or actual authority of state officials. Here that was not the case, as the Governor's counsel had warned them that the Compact they had entered into was vulnerable absent subsequent legislative authorization which never materialized (Appendix "D", *infra*). The Tribe decided nevertheless to take the risk to proceed. Now it must accept the consequences of that ill-advised gamble. *See Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1549; *cert denied* 522 U.S. 807 (1997) (Indian tribe must bear responsibility for its own precipitous conduct in engaging in gaming before it was determined whether it was legal).

CONCLUSION

For all the reasons heretofore set forth, the petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,



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