No. 06 -

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 for the State of New York

PETITION FOR WRIT OF CERTIORARI

Elizabeth G. Taylor
Counsel of Record
William W. Taylor, III
Michael R. Smith
Zuckerman Spaeder LLP
1800 M Street, NW
Washington, DC 20036
(202) 778-1800

Counsel for Petitioner

October 2, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the rule adopted by the New York courts, that they may adjudicate an Indian tribe's interests in its federally approved gaming compact in the tribe's absence because the tribe could waive sovereign immunity and appear as a party in the suit, is preempted by federal law because it conflicts both with federally protected sovereign immunity and with the federal interest in tribal economic development and self-sufficiency through regulated tribal gaming.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the New York Supreme Court were the Plaintiffs, Scott Peterman, Upstate Citizens for Equality, Inc., and the Honorable David Townsend, in his capacity as a member of the New York State legislature ("the UCE"), and the Defendants, George Pataki, Governor of the State of New York, and the New York Racing and Wagering Board and Division of State Police ("the State"). The Oneida Indian Nation of New York ("the Nation") entered a limited appearance in the New York Supreme Court. In the Appellate Division, Fourth Department, the Nation was the Appellant and both the UCE and the State were Appellees, because the State had joined with the UCE in opposing the Nation's Motion to Dismiss.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Statutes

Rules

Other Authorities

Constitutional Provisions

TABLE OF APPENDICES

OPINIONS BELOW

The order of the Court of Appeals of New York, denying leave to appeal, is reported at 6 N.Y.3d 713, 849 N.E.2d 971 (N.Y. 2006) and appears in the Appendix at A1-2. The order of the Appellate Division, Fourth Department, affirming the Supreme Court is reported at 801 N.Y.S.2d 212 (App. Div., 4th Dept. 2005) and appears in the Appendix at A3-5. The Letter Decision of the Supreme Court, Oneida County, is reported at 798 N.Y.S.2d 347 (Sup. Ct., Oneida Cty. 2004) and appears in the Appendix at A6-22. The Supreme Court's Order, dated July 28, 2004, appears in the Appendix at A23-27.

STATEMENT OF JURISDICTION

On September 30, 2005, the New York Supreme Court Appellate Division, Fourth Department, issued an order affirming the New York Supreme Court's Judgment. The Court of Appeals of New York denied discretionary review on May 4, 2006. On July 24, 2006, Justice Ruth Bader Ginsburg granted an extension of time to file a petition for writ of certiorari, until October 2, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the United States Constitution provides that, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI.

Pertinent provision of the Indian Gaming Regulatory Act , 25 U.S.C. §§ 2701, *et seq.*, are set out in the Appendix, at A28-41.

STATEMENT OF THE CASE

In 1993, the Secretary of the Interior, through the Acting Assistant Secretary for Indian Affairs, approved a tribal-state gaming compact ("the Compact") between the Oneida Indian Nation of New York ("the Oneida Nation" or "the Nation") and the State of New York, pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701, *et seq.* (2003). The notice of approval was published in the Federal Register on June 15, 1993, 58 Fed. Reg. 33160 (June 15, 1993), thereby placing the Compact "in effect" as a matter of federal law and authorizing the Nation to engage in the class III gaming specified in the Compact. 25 U.S.C. §§ 2710(d)(1)(C), (d)(3)(B).

Although plaintiffs in this case were aware of the governor's execution of the Compact and the submission of the Compact to the Secretary of the Interior, they did not challenge either.. Nor did they challenge the Secretary's approval of the Compact under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (2000), within the six-year statute of limitations applicable to the APA. The Oneida Nation 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. The Oneida Nation's gaming and resort complex is now the largest employer in an economically depressed region of Central New York.

In March 1999, a group known as the Upstate Citizens for Equality ("UCE") and individuals affiliated with UCE filed suit in New York state court seeking to invalidate the Oneida Nation's gaming compact, for the avowed purpose of helping the State to "renegotiate" the Compact to obtain a

share of casino revenues and to use that "renegotiation" as leverage against the Nation's pending land claim against the State.[1] Among other things, the UCE sought an injunction against all class III gaming activities. The UCE named State officials, the Oneida Nation, and Nation officials as defendants. The Nation moved to dismiss, asserting its federally protected sovereign immunity from suit. In response, the UCE filed an amended complaint, eliminating the Oneida Nation and Nation officials as defendants, but retaining its prayer for a declaration that the Compact was invalid under state law. The court allowed the case to proceed, rejecting the argument of both the Nation and the State that the Nation was an indispensable party and that federal protection of sovereign immunity required dismissal of the suit.

In 2003, the New York Court of Appeals decided *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 798 N.E.2d 1047 (N.Y. 2003). The court held, as a matter of state constitutional law, that the governor needed the legislature's approval to negotiate and execute a gaming compact with an Indian tribe under IGRA. The court also rejected the State's argument that the case could not proceed in the absence of the tribal party to the challenged compact, the St. Regis Mohawk Tribe. The court reached this conclusion after balancing the factors set out in N.Y.C.P.L.R. § 1001, New York's indispensable party statute. In particular, the court found that there was a strong public interest in having the court resolve an important and previously undecided question of state constitutional law. The court also refused to give weight to the potential prejudice to the tribe:

---

[1] Record at 646-48. The UCE also filed a motion to intervene in the Oneida land claims case pending in federal district court, including a proposed "countersuit" alleging that the Nation's gaming compact was invalid, *Oneida Indian Nation of New York v. County of Oneida,* 132 F.Supp. 2d 71, 72-73 (N.D.N.Y. 2000), but then withdrew its motion to intervene in favor of proceeding in state court. *Id.*

> The Tribe has chosen to be absent . . . . While sovereign immunity prevents the Tribe from being forced to participate in New York court proceedings, it does not require everyone else to forego the resolution of all disputes that could affect the Tribe . . . . [W]e will not permit the Tribe's voluntary absence to deprive these plaintiffs . . . of their day in court . . . . [T]o the extent the Tribe is prejudiced by our adjudication of issues that affect its rights under the compact, the Tribe could have mitigated that prejudice by participating in the suit.

Saratoga, 801 N.Y.2d at 820-21 (internal citations omitted).

After *Saratoga,* the UCE sought summary judgment against the state officials for a declaration that the Oneida Nation's Compact was invalid. With the permission of the court, the Oneida Nation entered a limited appearance for the purpose of asserting its federally protected sovereign immunity and seeking dismissal on indispensable party grounds.[2] The State reversed its earlier position and joined with the plaintiffs in requesting a declaration that the Nation's compact was invalid; the State refused the Nation's request that it oppose summary judgment on the grounds of the

---

[2] The court correctly ruled that the Nation could intervene for the limited purpose of moving to dismiss the suit for failure to join an indispensable party. *See Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton,* 327 F. Supp. 2d 995, 1000 (W.D. Wis. 2004), *aff'd on other grounds,* 422 F.3d 490 (7th Cir. 2005) (sovereign may intervene for limited purpose such as moving to dismiss the lawsuit for failure to join an indispensable party without waiving its sovereign immunity); *see also Zych v. Wrecked Vessel Believed to be the Lady Elgin,* 960 F.2d 665, 667-68 (7th Cir. 1992) (state of Illinois did not waive sovereign immunity by intervening in order to move for dismissal of suit).

UCE's laches and lack of standing and opposed the Nation's motion to dismiss.[3]

The court granted the Nation leave to "renew" the motion to dismiss it had made prior to the UCE's Amended Complaint. (Pet. App. at A27). The Nation argued that "[t]he Nation's sovereign immunity simply bars a state court from adjudicating a matter that impacts a significant interest of the Nation." Mem. of Law Supporting the Renewed Mot. by the Oneida Indian Nation of New York to Dismiss Compl. at 4 (citing *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g,* 476 U.S. 877 (1986); *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 547-48 (2d Cir. 1991); and *Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel,* 883 F.2d 890, 894 (10th Cir. 1989)).

The New York Supreme Court granted summary judgment, entering an order declaring the Compact invalid because it was entered into in violation of New York's separation of powers doctrine. (Pet. App. at A23-27). The court refused even to consider the significant record evidence of prejudice to the Nation if the case continued in its absence or the absence of any overriding public interest in addressing again the question of state constitutional law already decided in *Saratoga.* Instead, the court treated *Saratoga* as a *per se* rule allowing adjudication of an immune sovereign's rights in its absence, and held that "the Nation has chosen to voluntarily absent itself from the instant litigation, a choice that is clearly well within its right as a sovereign nation . . . . [T]o the extent that the Oneidas are prejudiced by this court's adjudication, if any, it could have chosen to mitigate its damages by participating in the litigation as a party." (Pet. App. at A15).

---

[3] There could be no argument, therefore, that the state represented the Nation's interests. After the state's change of position, the Nation moved to dismiss on the additional ground of lack of a case or controversy. The court denied that motion.

On appeal, the Nation again urged that reversal was compelled by the federal protection of the Nation's sovereign immunity. Br. of Appellant Oneida Indian Nation of New York at 25, *Peterman v. Pataki*, 801 N.Y.S.2d 212 (App. Div., 4th Dept. 2005) (CA 04-2580 & CA 04-3078) ("Federal law requires reversal of the court's indispensable party ruling, because it punishes the tribe for asserting its federally protected sovereign immunity"); Reply Br. of Appellant Oneida Indian Nation of New York at 2-3, *Peterman v. Pataki*, 801 N.Y.S.2d 212 (App. Div., 4th Dept. 2005) (CA 04-2580 & CA 04-3078) ("The Nation consistently has asserted that its sovereign immunity means *both* that it cannot be sued as a defendant and that its interests cannot be adjudicated in its absence, because forcing the Nation to waive its immunity in order to protect its interests renders its federally guaranteed immunity meaningless") (emphasis in original). The Appellate Division affirmed the judgment for the reasons stated by Supreme Court. 801 N.Y.S.2d 212 (App. Div., 4th Dept. 2005). (Pet. App. at A3-5) The Nation sought review in the New York Court of Appeals, again urging that federal law required reversal. Oneida Indian Nation of New York's Mem. of Law in Support of its Mot. for Permission to Appeal at 10-11, *Peterman v. Pataki* (Mo. No. 186) ("As a matter of federal law, an Indian tribe's immunity bars litigation, to which the tribe is not a party, challenging a compact to which the tribe is a party."). The Court of Appeals denied discretionary review. 6 N.Y.3d 713, 849 N.E.2d 971 (N.Y. 2006) (Pet. App. at A1-2) The Court of Appeals has, therefore, approved the lower courts' understanding of the ruling in *Saratoga:* sovereign immunity does not bar a suit contesting the validity of an immune tribe's compact, even if it bars suit against the tribe itself, so long as the tribe retains the right to waive its immunity and intervene in the litigation.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The New York courts have ruled that they may ignore the Nation's federally protected sovereign immunity and decide issues that could profoundly impair the Oneida Nation's interests in a federally approved gaming compact, in litigation to which the Nation is not a party, because the Nation could be a party if it were willing to waive its federally protected sovereign immunity. The rule that has been applied in this case and in other recent New York decisions is broader and even more troubling than the decision in *Saratoga,* which relied in large part on the New York Court of Appeals' perceived need to address a then unsettled issue of New York constitutional law. The decision in this case has forged language from *Saratoga* into an absolute rule that an Indian tribe may never be indispensable to a suit in which it could waive sovereign immunity and be a party if it chose to do so. The application of that rule is particularly troubling here, where the UCE sought no relief as to the nominal state defendants, and both sides ultimately joined in a request for a declaratory judgment, the sole purpose of which was to impair the Oneida Nation's federal gaming compact.

The New York courts' decision is in blatant disregard of federal interests and conflicts directly with this Court's precedents. There are two strong federal interests at stake in this litigation – the federal protection of tribal sovereignty, repeatedly affirmed by this Court, *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.,* 523 U.S. 751, 756 (1998); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505 (1991), and the federal interest in tribal economic development and self-sufficiency, recognized by this Court in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 216-19 (1987), and codified in IGRA. 25 U.S.C. § 2702(1) (IGRA serves Congress' purpose of

"promoting tribal economic development, self-sufficiency, and strong tribal governments"); S. Rep. No. 100-446, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3075 (affirming "the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian lands"). Forcing a tribe to surrender one in order to protect the other is incompatible with federal protection of both and therefore is preempted by federal law. *Three Affiliated Tribes,* 476 U.S. at 889-90 (tribe cannot be forced to waive sovereign immunity in order to have access to state courts for suits against non-Indians, as intended by Congress); *Cabazon,* 480 U.S. at 216 ("[S]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law").

The intrusion on tribal immunity in this case is not technical or peripheral. At stake are substantial economic and employment interests of Indian tribes and surrounding communities, as protected by an intergovernmental compact, made under federal law between state and tribal governments and approved and put into effect by the federal government. No one suggests that such state court challenge could be brought directly against the tribe or the Secretary of the Interior. It is worse, not better, for the state courts of one of the parties to the compact to proceed with the exact same litigation in the absence of the tribe or the federal government. *See West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951) (a state cannot be its own ultimate judge in a controversy with another sovereign over the validity of an interstate compact to which that state is a party). This Court should grant review to make clear that states may not coerce a waiver of federally protected sovereign immunity or litigate important federal and tribal interests in the absence of both the tribe and the federal government.

I. Federally Protected Sovereign Immunity Includes The Tribe's Right Not To Have Its Interests Adjudicated Without Its Consent

Federal law recognizes and protects tribal sovereignty. *Cabazon,* 480 U.S. at 207; *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 154 (1980). "The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes*, 476 U.S. at 890. "[T]ribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe*, 523 U.S. at 756.

Congress alone can authorize a suit against an Indian tribe, and it must do so explicitly. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58-59 (1978) (Indian Civil Rights Act does not waive tribe's immunity from suit in federal court). This Court has twice struck down a compulsory counterclaim rule that, in the absence of Congressional consent, conflicted with tribal immunity. *See Potawatomi*, 498 U.S. at 509, 514 (federal compulsory counterclaim rule could not be applied to allow counterclaim against tribe that sued for injunctive relief; Congress has not authorized counterclaim against tribe); *United States v. United States Fidelity & Guar. Co.,* 309 U.S. 506, 513 (1940) (same).

Tribal immunity is given force even if its application means that certain issues involving Indian tribes cannot be resolved in the courts. *U.S. F & G*, 309 U.S. at 513 ("[t]he desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity"); *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002) (tribe indispensable to suit challenging gaming compact; plaintiffs' lack of another adequate remedy "is a common consequence of sovereign immunity, and the tribes'

interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims").[4]

Sovereign immunity includes the tribe's "sovereign right not to have its legal duties judicially determined without consent." *Enterprise Mgmt. Consultants,* 883 F.2d at 894. Allowing plaintiffs to challenge a contract to which a tribe is a party "would . . . effectively abrogate the Tribe's sovereign immunity by adjudicating its interest in that contract without consent." *Id.* Thus, federal courts consistently hold that where a necessary party is immune from suit, dismissal is required under the federal indispensable party rule, Fed. R. Civ. P. 19(b).

> [W]hen an indispensable party is immune from suit, there is very little room for balancing of other factors set out in rule 19(b), because immunity may be viewed as one of those interests compelling by themselves . . . . The rationale behind the emphasis placed on immunity in the weighing of rule 19(b) factors is that the case is not one where some procedural defect such as venue precludes

---

[4] In fact, IGRA provides other fora for plaintiffs to challenge a gaming compact, including APA review of the Secretary's decision. *See* 25 U.S.C. § 2714 (decisions made by NIGC pursuant to § 2710 are final agency decisions for purposes of APA review); *Kansas v. United States,* 249 F.3d 1213, 1225-26 (10th Cir. 2001) (tribe not indispensable to suit seeking APA review of NIGC decision; federal government adequately represented tribe's interests). The fact that the Nation's sovereign immunity bars these plaintiffs from obtaining review of the compact in state court is completely consistent with the comprehensive federal scheme set out in IGRA. Class III gaming is legal pursuant to a compact that has been approved by the Secretary of the Interior and published in the Federal Register. 25 U.S.C. §§ 2710(d)(1)(C), (d)(3)(B). Whether a compact is in effect is purely a question of federal law. *Cabazon Band of Mission Indians v. Wilson,* 124 F.3d 1050, 1055-56 (9th Cir. 1997). IGRA assigns all ultimate decision-making to federal authorities, both in approving the gaming and in enforcing gaming laws and regulations. *See* 25 U.S.C. §§ 2715, 2710, 2713; 18 U.S.C. § 1166 (2006). There is no private right of action under IGRA. *Florida v. Seminole Tribe,* 181 F.3d 1237 (11th Cir. 1999).

> litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.

Fluent, 928 F.2d at 548 (internal citations and punctuation omitted); *see also Shermoen v. United States,* 982 F.2d 1312, 1317 (9th Cir. 1992) (absent tribes indispensable to suit challenging settlement act of which they were beneficiaries; "absent tribes have an interest in preserving their own sovereign immunity, with its concomitant right not to have [their] legal duties judicially determined without consent") (internal quotation and citation omitted).

The fact that the tribe could waive its immunity and intervene in the suit does not alter the analysis. "It is wholly at odds with the policy of tribal immunity to put the tribe to this Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it." *Wichita and Affiliated Tribes of Oklahoma v. Hodel,* 788 F.2d 765, 776 (D.C. Cir. 1986); *see also United Keetoowah Band of Cherokee Indians of Oklahoma v. United States,* 67 Fed. Cl. 695, 703 (2005) (same); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) (same). More simply, immunity is lost altogether when it is ignored on the ground that it could be, but was not, waived.

II. Federal Law Preempts New York's Application Of Its Indispensable Party Rule.

Federal law preempts state procedural rules that are incompatible with federal and tribal interests in tribal autonomy and economic self-sufficiency. In *Three Affiliated Tribes*, this Court held that a North Dakota statute that refused to allow state courts to exercise their federally-granted jurisdiction over civil claims on an Indian reservation unless the tribe waived sovereign immunity was preempted by federal law. The fact that the tribe could have the access to state courts that Congress intended by waiving its

sovereign immunity did not remedy the problem because that condition was inconsistent with another clear federal interest: "Congress' jealous regard for Indian self-governance." 476 U.S. at 890.

State litigation over the validity of a federally approved tribal state gaming compact has the potential to impair federal interests in tribal self-sufficiency and economic development, recognized by this Court in *Cabazon* and protected by Congress in IGRA. Although the validity of a federally approved gaming compact is a federal question that cannot be decided by a state court, *supra* n.4, a state court decision that the compact is "invalid" as a matter of state law has been and will be used by gaming opponents in an effort to affect that federal determination. (Pet. App. at A42-43) (Letter from UCE to NIGC urging that Nation's casino be closed in light of *Saratoga*); s*ee also Am. Greyhound,* 305 F.3d at 1024 (tribes not bound by ruling on validity of compact, but tribes' interests may be affected as a practical matter).

Federal courts uniformly hold that litigation over the validity or terms of a gaming compact, or any other tribal-state compact, cannot go forward in the absence of either of the parties to the compact, the tribe or the state. *Wilbur v. Locke,* 423 F.3d 1101, 1113 (9th Cir. 2005) (tribe indispensable to suit challenging cigarette compact between tribe and state; "[n]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable") (citation omitted); *Am. Greyhound,* 305 F.3d at 1027 (tribe indispensable to suit to enjoin governor from entering into, modifying or renewing gaming compacts with tribes); *Kickapoo Tribe of Indians v. Babbitt,* 43 F.3d 1491, 1498-99 (D.C. Cir. 1995) (state indispensable to suit asserting that compact was valid under federal law because it had been submitted to Secretary of Interior for approval); *Cachil Dehe*

Band of Wintun Indians of the Colusa Indian Community v. California, No. S-04-2265 FCD KJM, 2006 WL 1328267, at *6 (E.D. Cal. May 16, 2006) (suit dismissed because plaintiffs seek interpretation of gaming compact that would impact other, immune tribes); *Dewberry v. Kulongoski,* 406 F.Supp. 2d 1136, 1150 (D. Or. 2005) (tribe indispensable to suit challenging gaming compact); *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton,* 327 F. Supp. 2d 995, 1000 (W.D. Wis. 2004), *aff'd on other grounds,* 422 F.3d 490 (7th Cir. 2005) (same); *Pueblo of Sandia v. Babbitt,* 47 F.Supp. 2d 49, 56 (D.D.C. 1999) (state indispensable to suit challenging Secretary of Interior's refusal to exercise authority to disapprove provisions of compact as contrary to IGRA); *Cf. Yashenko v. Harrah's NC Casino Co., LLC,* 446 F.3d 541, 552-53 (4th Cir. 2006) (tribe indispensable to suit challenging tribal preference policy included in management agreement between tribe and defendant management company; judgment would impair the tribe's contractual interests).

The decision in this case is in direct conflict with the unanimous view of the federal courts that a tribe cannot be forced to waive its sovereign immunity in order to protect its interests in a federally approved gaming compact. Here, as in *Three Affiliated Tribes,* important federal and tribal interests, in regulating Indian gaming in a way that preserves the "sovereign rights of tribal governments to regulate activities and enforce laws on Indian lands," S. Rep. No. 100-446, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3075, are prejudiced by allowing state court litigation challenging the validity of the Nation's federally approved gaming compact to proceed in the absence of both the tribe and the federal government. And here, as in *Three Affiliated Tribes,* it is incompatible with federal law for the state to require the Nation to waive its sovereign immunity in order to protect those interests.

III. Review Is Needed Because The New York Decision Conflicts With Decisions Of This Court And With A Uniform Body Of Law In The Federal Courts And Because There Is Confusion Among The State Courts Over The Issue Presented Here.

Review of this decision is needed because, in allowing the decision of the Fourth Department to stand, the New York Court of Appeals has decided an important question of federal law in a way that conflicts with this Court's decision in *Three Affiliated Tribes*, with this Court's scrupulous protection of tribal sovereign immunity, and with the unanimous view of the lower federal courts that the federal policies at stake bar a court from litigating the validity of a tribal state gaming compact in a proceeding to which the tribe cannot be made a party because of its sovereign immunity.

Review is needed because state courts are divided on whether forcing a tribe to abandon its sovereign immunity in order to protect its interests in a gaming compact is acceptable. The Wisconsin Supreme Court has ruled on the validity of a gaming compact in the absence of the tribe after the court of appeals ruled that the tribe was not indispensable. *Dairyland Greyhound Park, Inc., v. Doyle*, 2006 WI 107, 719 N.W.2d 408 (2006). New Mexico, in contrast, has followed the analysis of the federal courts, finding that a tribe is indispensable to a suit challenging a gaming compact. *State ex rel. Coll v. Johnson*, 128 N.M. 154, 990 P. 2d 1277 (N.M. 1999).[5]

---

[5] *Coll* distinguished an earlier New Mexico case, *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (N.M. 1995), in which the court had allowed a mandamus action to prohibit the governor from implementing compacts he had signed as resting on the "special character of mandamus." 128 N.M. at 158 (quoting *Srader v. Verant*, 125 N.M. 521, 964 P.2d 82, 92 (N.M. 1988)). Similarly, *State ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (Kan. 1992), to which the tribe was not a party, was a mandamus/quo warranto action, brought for the purpose of preventing the governor from submitting the compact to the Secretary of the Interior for approval.

Finally, review is needed because the issue presented in this case is of tremendous significance even beyond the gaming context. Like the New York court in this case, other New York courts have interpreted the language in *Saratoga* as a *per se* rule to be applied in every case – an Indian tribe cannot be indispensable as long as it could waive its sovereign immunity and appear as a party in the case. *See, e.g., Concern, Inc. v. Pataki*, 801 N.Y.S.2d 232 (Sup. Ct., Erie Cty. 2005), *appeal dismissed,* 816 N.Y.S.2d 397 (N.Y.App. Div., 4th Dep't 2006) (tribe not necessary to suit seeking to restrain the state from acquiring and transferring land to the Seneca Nation for the establishment of a casino; "[t]he Tribe has chosen to be absent") (citing *Saratoga)*; *Huron Group, Inc. v. Pataki,* 785 N.Y.S.2d 827, 841 (N.Y. Sup. Ct., Erie Cty. 2004), *aff'd,* 803 N.Y.S.2d 465 (App.Div., 4th Dep't 2005), *appeal dismissed,* 2005 NY LEXIS 220 (N.Y. Feb. 21, 2006) (same); *In the Matter of the Herald Co., v. Feurstein,* 779 N.Y.S.2d 333, 345 (Sup. Ct., N.Y. Cty. 2004) (Nation not indispensable to suit seeking state records of any complaints with regard to Nation's casino; "to the extent that the Oneidas are prejudiced by this Court's adjudication of issues that affect its rights under the compact, the Oneidas could have mitigated that prejudice by participating in the suit") (citing *Saratoga*).[6] At least one other state court, citing *Saratoga*, has applied the same rule –

---

[6] These cases demonstrate that the waiver rule New York has adopted cannot be justified under the Ninth Circuit's "public rights" exception to compulsory joinder rules. *Conner v. Burford,* 848 F.2d 1441, 1459-61 (9th Cir. 1988). Even if that rule were applicable in a case where the absent party asserts sovereign immunity, it is a narrow exception applicable only where the litigation transcends the private interests of the litigants, and does not destroy the legal entitlements of the absent parties. *Am. Greyhound,* 305 F.3d at 1025-26; *Dewberry*, 406 F.Supp. 2d at 1148-49. In this case, the litigation was not necessary to resolve any unsettled legal issue. In fact, there was not even a dispute between the only parties to the case, the plaintiffs and the state. The purpose of the litigation was solely to obtain a legal declaration that the plaintiffs could use in their efforts to shut down the Nation's casino. The other cases in which the *Saratoga* rule has been applied are similarly private disputes.

an Indian tribe is not indispensable as long as it can waive its immunity and enter the litigation. *Panzer v. Doyle*, 271 Wis.2d 295, 329, 680 N.W.2d 666, 683 (Wis. 2004), *overruled on other grounds in Dairyland*, 2006 WI 107, 719 N.W. 2d 408 (Wis. 2006).

The same reasoning applied by the New York courts in cases involving the rights of Indian tribes could be applied to any sovereign: the sovereign could mitigate its prejudice by waiving its immunity and entering the suit. The rule that has been adopted by the New York courts therefore means one of two things, both of which are inconsistent with federal interests. The rule may mean that courts in New York (and other states following New York's lead) have assumed the authority to coerce a waiver of sovereign immunity by any sovereign, including another state or the federal government, by threatening to litigate the rights of the sovereign party in the sovereign's absence. If so, review by this Court is needed to make clear that a state cannot, by utilizing a state rule of procedure, abrogate federally protected sovereign immunity. The other alternative is that New York has adopted a rule that applies only to the detriment of Indian tribes but not to other sovereigns. Such a rule clearly requires this Court's intervention, as it flatly contradicts this court's "jealous regard for Indian self-government." *Three Affiliated Tribes*, 476 U.S. at 890.

The record in this case presents the federal question clearly. The Nation has challenged the state court proceedings at every stage, on precisely the federal ground presented in this petition. The New York courts have ignored the federal question and the federal interests at stake. The decision of the New York Supreme Court, which was adopted by the Fourth Department and allowed to stand by the Court of Appeals, is a clear statement of New York's rule: unless Indian tribes waive their sovereign immunity, their rights in gaming compacts and other matters of federal interest will be litigated in their absence. There are no obstacles to the

Court's review of this case to make clear that New York and other states may not hold federally protected interests hostage to a waiver of federally protected sovereign immunity.

CONCLUSION

Petitioner respectfully requests that this Court issue a writ of certiorari.

Respectfully submitted,

Elizabeth G. Taylor
William W. Taylor, III
Michael R. Smith
ZUCKERMAN SPAEDER LLP
1800 M Street NW
Suite 1000
Washington, DC 20036
(202) 778-1800