No. 03- 392

IN THE

Supreme Court of the United States

GEORGE PATAKI, Governor of the State of New York, *et al.*,

Petitioners,

v.

THE SARATOGA COUNTY CHAMBER OF COMMERCE, INC., *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court may disregard tribal sovereign immunity in determining if an Indian tribe is an indispensable party to a suit that is likely to significantly prejudice the tribe's interests?

PARTIES TO THE PROCEEDING

This proceeding originated as two separate actions that were consolidated in New York Supreme Court, Albany County. George Pataki, in his capacity as Governor of the State of New York, and the New York State Racing and Wagering Board, were defendants in the first action and are petitioners before this Court. Governor Pataki and the State of New York were defendants in the second action and are petitioners before this Court.

The Saratoga County Chamber of Commerce, Inc.; Joseph Dalton; New Yorkers for Constitutional Freedoms, Ltd.; Lee Karr, individually and as chairman of The Coalition Against Casino Gambling; G. Stanford Bratton, individually and as coalition coordinator for the Western New York Coalition Against Casino Gambling; Hon. Frank Padavan, a member of the New York State Senate; and Hon. William Parment, a member of the New York State Assembly, were plaintiffs in the first action and are respondents before this Court. Keith L. Wright, a member of the New York State Assembly, and Larry B. Seabrook, a former member of the New York State Senate, were plaintiffs in the second action and are respondents before this Court.

Judith Hard, a former deputy counsel to the Governor, is no longer a party to this proceeding.

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The Opinion of the New York Court of Appeals, dated June 12, 2003 and electronically reported at 2003 N.Y. LEXIS 1470, is set forth in Appendix A. The Opinion of the New York Appellate Division, Third Department, dated May 2, 2002 and reported at 740 N.Y.S.2d 733 (N.Y. App. Div. 2002), is set forth at Appendix B. The unreported Decision and Order of the New York Supreme Court, Albany County dated April 10, 2001 is set forth at Appendix C. The Opinion of the New York Appellate Division, Third Department, dated August 24, 2000 and reported at 712 N.Y.S.2d 687 (N.Y. App. Div. 2000), is set forth at Appendix D. The unreported Decision and Order of the New York Supreme Court, Albany County dated March 8, 2000 is set forth at Appendix E. The letter from the Supreme Court of the United States, Office of the Clerk, regarding Justice Ginsburg's action on petitioners' stay application, dated July 29, 2003, is set forth at Appendix F.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the New York Court of Appeals pursuant to 28 U.S.C. § 1257(a). The order of the Court of Appeals was entered on June 12, 2003.

STATEMENT OF THE CASE

A. Introduction

This case presents the critical question of whether Indian tribal sovereign immunity – a right long recognized by this Court and central to tribal self-governance – retains any vitality in determining whether an action to which a tribe is

a necessary party may proceed. In this matter seeking invalidation of a gaming compact between the State of New York and an Indian tribe, the New York Court of Appeals refused to dismiss the case despite the tribe's absence. It held that the tribe, which operates a casino pursuant to the compact, was not an indispensable party because it had chosen not to participate in the action.

This complete disregard of the tribe's sovereign immunity conflicts with the decisions of numerous other federal and state courts that have addressed this issue. Five federal circuit courts of appeals, including the Second, Seventh, Ninth, Tenth, and District of Columbia Circuits, as well as the New Mexico Supreme Court, have given substantial, even dispositive weight to tribal immunity in determining that litigation directly prejudicing a tribe's interests could not proceed where the tribe did not consent to join that litigation. In ruling to the contrary, the New York Court of Appeals joins a growing number of courts in departing from the legal standard embraced by the majority of lower courts and required by this Court's tribal immunity precedents.

B. Facts and Procedural History

In 1993, then-Governor Mario Cuomo and the St. Regis Mohawk Tribe signed a tribal-state compact authorizing the Tribe to operate a casino on its reservation in northern New York State. *See Saratoga County Chamber of Commerce, Inc. v. Pataki*, 740 N.Y.S.2d 733, 734 (N.Y. App. Div. 2002). Pursuant to 25 U.S.C. § 2710(d)(8) (a provision of the Indian Gaming Regulatory Act), the United States Assistant Secretary of the Interior, Indian Affairs, approved the compact in December 1993. *See* Notice of Approved Tribal-State Compact, 58 Fed. Reg. 65272 (1993). In April 1999, the Tribe

opened its thirty-million dollar casino pursuant to the compact. *See Saratoga*, 740 N.Y.S.2d at 734; *see also* Record on Appeal, at 409-412. In May 1999, the Tribe and the State signed an amendment authorizing the Tribe to operate certain electronic games; this amendment expired in May 2000. *See Saratoga*, 740 N.Y.S.2d at 734.

In September 1999, respondents brought two actions (later consolidated) in New York Supreme Court, Albany County challenging the gaming compact and the amendment. *See id.* at 735. They alleged, *inter alia*, that the compact and amendment were invalid because the New York Legislature had not approved them. *Id.* They sought a declaration that the compact and the amendment were void, as well as an injunction barring petitioners from taking any further actions to implement them. *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 2003 N.Y. LEXIS 1470 (June 12, 2003) (App. A, 5a).[1]

In March 2000, Supreme Court granted petitioners' motion to dismiss, holding that the Tribe was an indispensable party that would be substantially prejudiced by the continuation of the action (App. E, 105a-111a).[2]

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1. Numbers in parentheses followed by "a" are citations to pages in the attached appendix.

2. N.Y. C.P.L.R. 1001, which governs necessary joinder of parties, provides that persons who ought to be parties to an action if complete relief is to be accorded among the existing parties or those "who might be inequitably affected by a judgment in the action" shall be made parties. N.Y. C.P.L.R. 1001(a) (McKinney 1976). If jurisdiction over such a person can only be obtained by his consent or appearance, the court, "when justice requires," may allow the action to continue without him, taking into consideration (i) whether

(Cont'd)

In August 2000, the Appellate Division, Third Department, reversed, holding that the Tribe was not an indispensable party, rejecting petitioners' other procedural defenses, and remanding the matter to Supreme Court to resolve the merits. *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 712 N.Y.S.2d 687 (N.Y. App. Div. 2000). In April, 2001, Supreme Court invalidated the compact (App. C, 75a-86a). That court's order was adverse to both petitioners and the Tribe, stating, in relevant part:

> [T]he 1993 Tribal-State Gaming Compact and its May 27, 1999 amendment is declared and found to be void and unenforceable as is any Tribal-State Gaming Compact absent Legislative concurrence. The [petitioners] are permanently enjoined from taking any further actions to implement them, including the expenditure of State funds to expand the operation to include the use of electronic gaming compacts with any Indian Tribe without prior legislative concurrence or approval.

(App. C, 85a). In May 2002, the Appellate Division affirmed this order. *Saratoga*, 740 N.Y.S.2d 733.

On June 12, 2003, the New York Court of Appeals, in a 4-3 decision, vacated on mootness grounds that portion of

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(Cont'd)
the plaintiff has another effective remedy, (ii) the prejudice resulting from the nonjoinder to the defendant or the person not joined, (iii) whether and by whom the prejudice might have been or may be avoided, (iv) the feasibility of any protective order, and (v) whether an effective judgment may be rendered in the absence of the person not joined. N.Y. C.P.L.R. 1001(b) (McKinney 1976).

the Appellate Division's order relating to the expired 1999 amendment, and otherwise affirmed the order (App. A, 1a-64a). The majority recognized that "a declaration that the 1993 compact violates the State Constitution" would make the casino operation illegal (App. A, 8a). Nevertheless, the majority held that the Tribe was not an indispensable party to this action because "[a]lthough its interests are certainly affected by this litigation, the Tribe has chosen not to participate" (App. A, 19a-20a). The majority acknowledged "that other courts have held that dismissal is proper when an affected Tribe declines to waive sovereign immunity" (App. A, 22a-23a n.9) (*citing, e.g.*, *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002)). Without giving any further consideration to the tribe's sovereign immunity, however, the court concluded that "to 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" (App. A, 23a) (citation omitted). The majority also rejected petitioners' other defenses and held that the compact was void because the Legislature had not approved it (App. A, 8a-19a, 24a-28a).

Three of the court's seven judges dissented, noting the prejudice that resulted to the Tribe from respondents' nearly six-year delay in commencing this action, and concluding that the Tribe was an indispensable party (App. A, 44a-54a). The dissenting judges pointed out that because the majority declared the compact void and unenforceable, the Tribe must close the casino or face the possibility of federal enforcement action against it (App. A, 53a n.7), a result that the Appellate Division had not anticipated, *see Saratoga,* 740 N.Y.S.2d at 735. The Court of Appeals' remittitur embodying its

order disposing of the case was dated June 12, 2003 (App. A, 63a-64a).

In an order dated July 11, 2003, Associate Judge Rosenblatt granted petitioners a stay of enforcement of the Court's remittitur until August 1, 2003 to allow petitioners to submit a stay application to this Court. Justice Ginsburg denied petitioners' application for a stay pending certiorari on July 29, 2003, but noted that:

> The Appellate Division, whose order the Court of Appeals affirmed in relevant part, noted that "plaintiffs do not seek to shut down the Tribe's casino located on the Akwesane reservation insofar as it is operated in accordance with the original compact." 293 A.D.2d 20, 22 (N.Y. App. Div. 2002). The application for a stay is denied on the understanding that "operat[ing] in accordance with the original compact" includes continued gaming oversight by the New York State Racing and Wagering Board and continued law enforcement by the New York State Police.

(App. F, 112a-113a).

REASONS FOR GRANTING THE PETITION

I. There Is A Conflict Among The Lower Federal Courts And Highest State Courts On The Question Of Whether Tribal Sovereign Immunity Must Be Accorded Any Significant Weight In Determining Whether A Tribe Is Indispensable To A Pending Action

New York courts, like federal courts, are not permitted simply to disregard Indian tribes' immunity from suit in determining whether to allow a suit that substantially prejudices a tribe to continue in the tribe's absence. As the Court of Appeals acknowledged (App. A, 20a), Indian tribes are immune from suit absent Congressional abrogation or waiver. *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). This Court has emphasized that tribal sovereign immunity is a matter of federal law and is not subject to diminution by the states. *Kiowa Tribe*, 523 U.S. at 756. Thus, in litigation that may be prejudicial to tribal interests, tribal immunity is given effect by state and federal rules that authorize dismissal of an action when a necessary party cannot be joined. *See generally* Fed. R. Civ. P. 19(b) (listing factors for determining whether the action should be dismissed when the absent person cannot be made a party); N.Y. C.P.L.R. 1001(b) (McKinney 1976) (same under New York law); *see also* D. Siegel, *New York Practice* § 133, p. 219 (3d ed. 1999) (federal cases under Rule 19 are "pertinent to CPLR 1001(b)"). These rules ensure that plaintiffs cannot circumvent tribal immunity by failing to name the tribe as a defendant and then asserting that the action

can proceed without the tribe. They also protect tribes from being forced to choose between retaining their sovereign immunity and defending an important tribal interest – a "choice" that deprives immunity of any meaning whatsoever.

The Court of Appeals' decision, however, forces the Tribe to make exactly this choice. In invalidating the 1993 gaming compact and thereby jeopardizing continued operation of the Mohawk Tribe's casino, the court recognized that the Tribe's "interests are certainly affected by this litigation" (App. A, 19a), but concluded that "the Tribe could have mitigated that prejudice by participating in the suit" (App. A, 23a) (citation omitted) and that "[n]obody has denied [the Tribe] the 'opportunity to be heard'" (App. A, 22a).[3] Thus, the court required that the Tribe surrender its immunity as the price of defending its interest in the compact.

Numerous federal circuit courts, as well as the New Mexico Supreme Court, have defined tribal immunity far more broadly in such circumstances. In *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986), the District of Columbia Circuit dismissed on indispensable party grounds a tribal cross-claim against the United States that was prejudicial to the rights of two other tribes. The court stated that it rejected

> the notion that the Wichitas' ability to intervene as defendants in the cross-claim ... mitigated the prejudice of proceeding in their absence.

3. Contrary to the court's view (App. A, 22a), the fact that the Oneida Indian Nation filed an amicus brief in that court in support of petitioners did not diminish the independent right of the Tribe, whose interests were at stake, not to have those interests adjudicated in its absence.

> To intervene, the Wichitas would have had to waive their tribal immunity. 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.

Id. at 776. The court concluded that dismissal was "mandated by the policy of tribal immunity" because "society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." *Id.* at 777 (footnote omitted).

Other circuits have adopted the same view of the reach of tribal immunity. In *Enterprise Management Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890 (10th Cir. 1989), the Tenth Circuit found an Indian tribe to be an indispensable party to a suit seeking validation of a bingo management contract that the tribe subsequently opposed. Relying upon the D.C. Circuit's analysis in *Wichita*, the Tenth Circuit dismissed the action, observing that "[i]n addition to the effect this action would have on the Tribe's interest in the contract, the suit would also effectively abrogate the Tribe's sovereign immunity by adjudicating its interest in that contract without consent." *Id.* at 894.

Likewise, in *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993 (10th Cir. 2001), the court found that absent tribes were indispensable parties in a challenge to an agreement under which those tribes shared federal appropriations with the plaintiff tribe, "even though . . . there is no [other] way to challenge the conduct in question." *Id.* at 1001. The court further stressed as a basis for its decision "the 'strong policy that has favored dismissal when a court cannot join a tribe because of sovereign immunity.'" *Id.* (quoting *Davis v. United States*, 192 F.3d 951, 960 (10th Cir. 1999)).

The Second Circuit has held that the absence of a necessary party that is immune from suit is all but dispositive in determining whether the action should be dismissed. In *Fluent v. Salamanca Indian Lease Authority*, the Second Circuit dismissed an action seeking to void a lease renewal agreement to which the Seneca Nation was a party, on the grounds that the Nation was both immune from suit and indispensable. 928 F.2d 542, 548 (2d Cir.), *cert. denied*, 502 U.S. 818 (1991). Citing both *Wichita* and *Enterprise Management*, the court held that when an indispensable party is immune from suit, "there is very little room for balancing of other factors . . . because immunity may be viewed as one of those interests compelling by themselves." *Id.* (citations and internal quotations omitted). *See also Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119 (1968) (in deciding whether to dismiss, some factors may be "compelling by themselves"). As in *Wichita*, the court found that dismissal was required by the policy of tribal immunity. *Fluent*, 928 F.2d at 548 (quoting *Wichita*, 788 F.2d at 777).

The Seventh Circuit has assigned similar weight to sovereign immunity. In *United States ex rel. Hall v. Tribal Development Corp.*, 100 F.3d 476 (7th Cir. 1996), the court held that an Indian tribe was an indispensable party to an action against a gambling equipment vendor seeking to void its equipment supply contracts with the tribe. The court emphasized that "[a] plaintiff's inability to seek relief . . . does not automatically preclude dismissal, particularly where that inability results from a tribe's exercise of its right to sovereign immunity." 100 F.3d at 480 (citation omitted).

The Ninth Circuit, in a challenge similar to the one presented here, also dismissed an action claiming that the

governor of Arizona lacked authority to enter into new gaming compacts with Indian tribes or extend existing ones. *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002). The court held that the Indian tribes were indispensable parties, according the tribes' immunity substantial weight. As the court noted, it had "regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs." *Id.* at 1025 (citation omitted).[4] *See also Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1991) (the ability to intervene is not a factor that lessens prejudice where intervention would require the absent tribe to waive sovereign immunity).

Likewise, the New Mexico Supreme Court has held that "'the public interest in protecting tribal sovereign immunity surpasses a plaintiff's interest in having an available forum for suit.'" *New Mexico ex rel. Coll v. Johnson*, 990 P.2d 1277, 1280 (N.M. 1999) (quoting *Srader v. Verant*, 964 P.2d 82, 91 (N.M. 1998)). Thus, the New Mexico court dismissed on indispensable party grounds an action challenging the legal validity of tribal-state gaming compacts, *Coll*, 990 P.2d at 1280, and other gaming litigation that implicated tribal interests, *Srader*, 964 P.2d at 91-92; *but see New Mexico*

4. The Ninth Circuit reached the same result in numerous other cases. *See Dawavendewa v. Salt River Project Agric. Impr. and Power Dist.*, 276 F.3d 1150 (9th Cir.), *cert. denied*, 123 S.Ct. 98 (2002); *Manybeads v. United States*, 209 F.3d 1164 (9th Cir. 2000), *cert. denied*, 532 U.S. 966 (2001); *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999); *Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996); *Shermoen v. United States*, 982 F.2d 1312 (9th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993); *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976).

ex rel. Clark v. Johnson, 904 P.2d 11 (N.M. 1995) (allowing mandamus action against the governor to proceed without the tribe).

The substantial weight accorded tribal sovereign immunity in these decisions directly conflicts with the New York Court of Appeals' complete disregard of tribal immunity in the decision below. These courts recognized, as the Court of Appeals did not, that state or federal procedural rules regarding the joinder of parties cannot abrogate or diminish Indian tribal sovereign immunity by essentially ignoring it. The manifest prejudice to the Tribe from this action made it an indispensable party; since its federal sovereign immunity precluded its joinder, the action should have been dismissed.

A grant of certiorari at this juncture is particularly appropriate because the Court of Appeals' decision exacerbates a pre-existing split of authority on this question. The Wisconsin Court of Appeals, acknowledging this conflict, sided with the decision of the New York intermediate appellate court below in this case. *Dairyland Greyhound Park, Inc. v. McCallum*, 655 N.W.2d 474, 486 (Wis. Ct. App.), *review denied*, 655 N.W.2d 129 (Wis. 2002) (quoting *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 712 N.Y.S.2d 687 (N.Y. App. Div. 2000)). That court concluded that concerns about the lack of remedy should the case be dismissed far outweighed any intrusion on a tribe's sovereign immunity, and allowed an action challenging the governor's authority to enter into new gaming compacts or renew existing ones to proceed. *Id.* at 486-87; *see also People ex rel. Lungren v. Comm. Redev. Agency, City of Palm Springs*, 65 Cal. Rptr. 2d 786 (Cal. Ct. App.), *review denied*, 1997

Cal. LEXIS 6503 (Oct. 15, 1997) (tribe not indispensable party to action challenging agency's contract to transfer land to the tribe in exchange for a portion of gaming revenues).[5]

II. The Decision Below Is Of Significant Public Importance To New York And Other States

Certiorari is also warranted in this case because the scope of sovereign immunity in the circumstances presented here is of significant importance to New York and the tribes located within the state, as well as to other States and tribes that enter into tribal gaming compacts or other agreements. As the dissenting judges at the Court of Appeals recognized (53a), that court's decision jeopardizes the Mohawk Tribe's continued operation of its reservation casino. *See, e.g.*, *United States v. Santee Sioux Tribe,* 135 F.3d 558, 561 (8th Cir.) (enforcement action by National Indian Gaming Commission in the absence of a compact), *cert. denied*, 525 U.S. 813 (1998); *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1290-91 (D.N.M. 1996) (U.S. Attorney warned tribes that continued casino gaming following a state court ruling that

5. The conflict is further deepened by other decisions of the Tenth Circuit and two district courts holding that a tribe is not indispensable where the participation of the United States as a party can provide the views of the absent tribe. *See Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001); *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250 (10th Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002); *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084 (E.D. Ca. 2002); *Connecticut ex rel. Blumenthal v. Babbitt*, 899 F. Supp. 80 (D. Conn. 1995); *see also United States ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F.3d 1249 (8th Cir. 1998) (concluding that a tribe was not indispensable in the tribal president's action to invalidate casino contracts where the tribe supported invalidation and was seeking similar relief in two other actions).

the compacts were not validly executed was unlawful and risked criminal sanctions), *aff'd*, 104 F.3d 1546 (10th Cir.), *cert. denied*, 522 U.S. 807 (1997). Moreover, at least one other challenge to the validity of a tribal-state gaming compact is pending in New York State, *see Peterman v. Pataki*, No. CA 03-00914 (N.Y. App. Div.) (compact between New York and the Oneida Indian Nation of New York), and the court's decision threatens to deny this tribe the benefits of sovereign immunity as well. Finally, the issue presented here is also critical to Indian tribal governments and States nationwide that have entered into or are negotiating class III gaming compacts. As of July 2001, the Secretary of the Interior had approved 212 Class III gaming compacts in 24 states. *See Indian Gaming Regulatory Act: Oversight Hearing on the Implementation of the Indian Gaming Regulatory Act Before the Senate Comm. on Indian Affairs*, 107th Cong. 10 (2001) (statement of Sharon Blackwell, Deputy Commissioner of Indian Affairs, Dep't of the Interior).

Prompt resolution of this conflict is essential to clarify the parameters of tribal sovereign immunity and avoid its further diminution in circumstances where a tribe's interests may be prejudiced by pending litigation. Otherwise, Indian tribes nationwide will have no protection against the impermissible "Hobson's Choice" of being forced to waive their immunity in order to defend important tribal interests when their gaming compacts or other important interests are challenged.

CONCLUSION

For the foregoing reasons, petitioners respectfully urge this Court to grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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