No. 08-___

IN THE

Supreme Court of the United States

SEMINOLE TRIBE OF FLORIDA,
Petitioner,

v.

FLORIDA HOUSE OF REPRESENTATIVES
AND MARCO RUBIO
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Florida Supreme Court violated the Indian Commerce Clause and the Supremacy Clause by ruling, based on Florida "policy" and contrary to the express language of the Indian Gaming Regulatory Act and the decisions of a number of United States Circuit Courts of Appeal, that the Governor of Florida lacked authority to agree to tribal operation of banked card games in a tribal-state compact.

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following list represents all parties appearing here and before the Supreme Court of Florida. Petitioner here is the Seminole Tribe of Florida, a federally-recognized Indian tribe. The Tribe joined the suit as a respondent in the Supreme Court of Florida. Petitioners below and respondents here are the Florida House of Representatives and Marco Rubio. Mr. Rubio brought the original petition to the Florida Supreme Court individually and in his capacity as Speaker of the Florida House of Representatives. No longer Speaker of the Florida House, Mr. Rubio is a party here solely in his individual capacity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

Constitutional Provisions

PETITION FOR WRIT OF CERTIORARI

The Seminole Tribe of Florida petitions for a writ of certiorari to review the decision of the Supreme Court of Florida in *Florida House of Representatives v. Crist.*

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 990 So.2d 1035 (Fla. 2008) and appears in the Appendix at 1a-44a. The order of the Supreme Court of Florida denying rehearing is unreported and appears in the Appendix at 45a.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on July 3, 2008. That court denied a timely motion for rehearing on September 11, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Indian Commerce Clause provides that "The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

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 is the Constitution or Laws of any State to the Contrary notwithstanding."

U.S. Const. art. VI.

Pertinent provisions of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2000), and 18 U.S.C. §§ 1166-1168 (2000), are set out in the Appendix at 46a-62a.

STATEMENT OF THE CASE

The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721 (2000); 18 U.S.C. §§ 1166-1168 (2000), establishes a framework for regulating Indian gaming. The IGRA creates three classes of Indian gaming, 25 U.S.C. § 2703(6)-(8) (2000). Class III gaming, at issue here, includes house-banked card games, casino games, slot machines, sports betting, pari-mutuel wagering, and lotteries. 25 U.S.C. § 2703(7)(B) (2000); 25 C.F.R. § 502.4 (2008). The IGRA allows Class III gaming activities on tribal lands if such activities are:

(1) authorized under a tribal ordinance or resolution;

(2) "located in a State that permits such gaming for any purpose by any person, organization, or entity"; and

(3) conducted in conformance with a tribal-state compact. 25 U.S.C. § 2710(d)(1) (2000).

The Governor of the State of Florida and the Seminole Tribe of Florida ("the Tribe") entered into a tribal-state gaming compact ("the Compact") pursuant to the IGRA on November 14, 2007. The Compact was federally approved by operation of law under 25 U.S.C. § 2710(d)(8)(C) (2000) and became effective by publication in the Federal Register on January 7, 2008. The execution of this agreement consummated the Tribe's 17-year pursuit of a compact to authorize the conduct of class III casino gaming on the Tribe's lands in Florida under the IGRA.

The Compact allows the Tribe to offer specified Class III gaming, including slot machines as well as high-stakes poker and banked card games such as blackjack and baccarat, at its currently existing casinos.[1] In exchange for partial exclusivity, the State receives substantial payments from the Tribe that increase at specified thresholds, based upon a percentage of tribal gaming revenue.

Five days after the Compact's execution, on November 19, 2007, the Florida House of Representatives and its Speaker, Marco Rubio, petitioned the Supreme Court of Florida for a writ of quo warranto alleging that the Governor lacked authority to bind the State to an IGRA compact

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[1] An excerpt of the Compact containing the scope of gaming provisions appears in the Appendix at 66a-67a.

absent approval or ratification by the Florida Legislature.[2]

The Tribe and the Governor, in separate response briefs, argued that the Compact was negotiated and executed by the Governor within the scope of his constitutional duties to faithfully execute the law.[3] The Compact did not make new law, create any new agencies, assign any duties to existing agencies not already authorized by law, waive the State's sovereign immunity, allocate state funds, or otherwise encroach upon any exclusive function of the Florida Legislature. Consequently, no legislative approval was required.

The Tribe further pointed out that Florida gambling law permits the Florida Lottery to operate banked card games and other casino games. The Florida Lottery has in the past offered several casino-style games of chance and gaming devices, including a roulette-type wheel, a house-banked card game and a dice game. Although the Florida Lottery does not

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[2] The Petition for a Writ of Quo Warranto requested issuance of a writ directing the Governor to justify his authority and to issue any order necessary to "clarify that the Compact is not binding and enforceable unless and until it is ratified by the Legislature." Pet. Writ Quo Warranto at 6. The Petition further requested that the writ "declar[e] that legislative authorization or ratification is necessary for any compact governing gaming on Indian lands to be valid in this State." *Id.* at 27.

[3] *See* the Seminole Tribe of Florida's Response in Opposition to Petition for Writ of Quo Warranto (hereinafter "Tribe's Response Brief") at 34; and the Response of Governor Crist in Opposition to the Petition for Writ of Quo Warranto (hereinafter "Governor's Response brief") at 32 & 34.

currently offer those casino games, it has retained full statutory authority do so. See Tribe's Response Brief at 33-34. Because IGRA § 2710 makes lawful class III gaming activities "located in a State that permits such gaming for any purpose by any person, organization or entity," 25 U.S.C. § 2710(d)(1)(B) (emphasis added), the Tribe further argued that the gaming authorized by the Compact is fully consistent with the IGRA. *See* Tribe's Response Brief at 24-35.

The Supreme Court of Florida issued an opinion on July 3, 2008. The court concluded that one lone provision of the Compact, which authorized the play of blackjack and other banked card games, violated Florida criminal law. By agreeing to the provision, the court found the Governor to have acted beyond his constitutional authority. It wrote:

> "Enacting laws – and especially criminal laws – is quintessentially a legislative function. . . . The Governor's action therefore encroaches on the legislative function and was beyond his authority. . . . Neither the Governor nor anyone else in the executive branch has the authority to execute a compact that violates state criminal law."

Florida House of Representatives v. Crist, 990 So.2d 1035, 1050 (Fla. 2008) (internal citations omitted) (Appendix at 29a).

While acknowledging that the State permits a wide array of Class III gaming, and even noting that the constitution "authorizes the state lottery, which offers various Class III games," *id.* at 1049, the court

expressed no view nor made any mention of the Tribe's argument that Florida law authorizes the Lottery to offer the lawful play of banked card games.[4]

The Tribe requested rehearing on the ground that the court made an error of law in applying an improper test as to what gaming is permissible on the Tribe's Indian lands located in Florida pursuant to 25 U.S.C. § 2710(d)(1)(B). The Tribe also urged rehearing given the error of the Florida Supreme Court's factual analysis. The court found banked card games to be completely prohibited in Florida even though the Tribe provided description, photographic evidence and a state court order[5]

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[4] The court ignored the Tribe's argument and avoided the question posed under its quo warranto jurisdiction: whether the governor has authority to enter into an IGRA compact, without legislative ratification. The court stated:

> "Whether the Compact violates IGRA, however, is a question we need not and do not resolve. Given our narrow scope of review on a writ of quo warranto, the issue here is only whether the Florida Constitution grants the Governor the authority to unilaterally bind the State to a compact that violates public policy. We conclude that even if the Governor is correct that IGRA permits the expansion of gaming on tribal lands beyond what state law permits, such an agreement represents a significant change in Florida's public policy. It is therefore precisely the type of action particularly within the Legislature's power."

Id. at 1050; Appendix at 28a-29a.

[5] *Seminole Tribe of Florida v. Chiles*, No. 97-014171 (Fla. Broward County Cir. Ct., Dec. 18, 1998). *See* Appendix F.

related to the banked card games operated by the Florida Lottery on its "Flamingo Fortune" television show. The court never addressed this factual evidence, which demonstrated that banked card games are permitted in Florida when operated by the Florida Lottery for the purpose of state revenue generation. *See* The Seminole Tribe of Florida's Motion for Rehearing (hereinafter "Tribe's Rehearing Brief") at 2-6.

The Tribe's motion for rehearing was denied without discussion on September 11, 2008, with Justice Lewis dissenting.

REASONS FOR GRANTING THE WRIT

In determining that one provision of the Compact violates the criminal law and public policy of Florida and that the Governor of Florida lacked authority to agree to that provision, the Supreme Court of Florida ignored controlling provisions of Section 2710 of the IGRA which preempt state law under the Indian Commerce Clause[6] and the Supremacy Clause.[7] This ruling directly conflicts with the decisions of the Courts of Appeal for the

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[6] U.S. Const. art I, § 8, cl. 3; *see, e.g., Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985) ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes" (citing U.S. Const. art. I, § 8, cl. 3, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974), and *Worcester v. Georgia*, 6 Pet. 515, 561 (1832)).

[7] U.S. Const. art. VI, § 2; *see, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

Second, Eighth and Ninth Circuits[8] interpreting Section 2710 of the IGRA and, through this error, deprives the Seminole Tribe of Florida of fundamental rights provided by federal law. In addition to its effect on the Tribe, resolution of this conflict is of national importance because more than 25 tribal-state compacts presently in effect will expire at various times over the next five years and more than 100 compacts are subject to modification while in effect.[9] In a few states, such as Florida, Texas and Alabama, tribes have not been able to achieve compacts under the IGRA. The erroneous decision of the Florida Supreme Court could be relied upon by other states in future tribal-state compact negotiations under the IGRA in conflict with the decisions of the federal Circuit Courts of Appeal cited above. This Court should grant review to resolve this conflict in order to protect the federal rights of tribes.[10]

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[8] *Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024, 1031 (2d Cir. 1990); *United State v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 (8th Cir. 1990); *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1258, 60 (9th Cir. 1994).

[9] See Appendix I (70a-77a) for a list of compacts in effect that will expire and need to be renegotiated.

[10] This Court has granted certiorari where a decision of the highest court in a state conflicts with the decision of a federal appellate court regarding a federal question. *See, e.g., Baldwin v. Alabama*, 472 U.S. 372, 374 (1985); *Andresen v. Maryland*, 427 U.S. 463, 470 n.5 (1976).

I. The decision contradicts the settled interpretation of IGRA § 2710.

A. Gaming permitted "for any purpose by any person, organization, or entity" under § 2710(d)(1)(B).

Under the IGRA, a tribe is authorized to enter into a compact with a state regarding the conduct of gaming on its lands for gaming activity permitted by the state "for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B) (emphasis added).[11] While the federal appellate courts are divided as to whether the phrase "such gaming" refers to the general class of games[12] or specific types of games,[13] all consistently look beyond the letter of the state's law in order to examine what the State actually allows to determine whether such gaming is "permitted." *See, e.g., Rumsey Indian Rancheria,* 64 F.3d at 1258-60 (finding the "plain meaning of the word 'permit' to be unambiguous," the court remanded to the district court to determine "whether California permits the operation of slot

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[11] It is undisputed that the question of what gaming activity is permitted in a tribal-state compact is a question of federal law. *See Mashantucket Pequot Tribe v. Connecticut,* 913 F.2d 1024, 1029-1032 (2d Cir. 1990); *Yavapai-Prescott Indian Tribe v. State of Ariz.,* 796 F.Supp. 1292, 1295-96 (D.Ariz.1992); *Lac du Flambeau Band of Lake Superior Indians v. Wis.,*770 F.Supp. 480 (W.D.Wis. 1991), *appeal dismissed,* 957 F.2d 515 (7th Cir.1992); *cf. United States v. Sisseton-Wahpeton Sioux Tribe,* 897 F.2d 358, 365 (8th Cir.1990).

[12] *Northern Arapaho Tribe v. Wyoming,* 389 F.3d 1308 (10th Cir. 2004); *Mashantucket Pequot,* 913 F.2d 1024; and *Lac du Flambeau,* 770 F.Supp. 480.

[13] *Rumsey Indian Rancheria,* 64 F.3d 1250, and *Cheyenne River Sioux Tribe v. State of South Dakota,* 3 F.3d 273 (8th Cir. 1993).

machines in the form of the state lottery or otherwise"); *Mashantucket Pequot*, 913 F.2d at 1031 (affirming the district court's conclusion "after a careful review of pertinent Connecticut law... that Connecticut permits games of chance, albeit in a highly regulated form"); *Cheyenne River Sioux Tribe,* 3 F.3d at 279 ("The 'such gaming' language of 25 U.S.C. § 2710(d)(1)(B) does not require the state to negotiate with respect to forms of gaming it does not presently permit"); *cf. Sisseton-Wahpeton*, 897 F.2d at 365 (discussing the identical phrase in the class II provisions of IGRA as follows: "The phrase 'for any purpose by any person, organization or entity' makes no distinction between State laws that allow class II gaming for charitable, commercial, or governmental purposes, or the nature of the entity conducting the gaming. If such gaming is not criminally prohibited by the State in which tribes are located, then tribes, as governments, are free to engage in such gaming").

B. The Florida Supreme Court never examined pertinent provisions of Florida law that "permit" the Florida Lottery to conduct banked card games.

The Governor and the Tribe entered into a compact, which authorized banked card games based on the reasonable interpretation that, under IGRA § 2710(d)(1)(B), Florida law permits those games, since those games are permitted to the Florida Lottery. Nothing in the Lottery's implementing statute or other provision of law limits the authority of the Florida Lottery to establish lottery games that use casino card games as the method of selecting prize winners. The Florida Lottery has operated banked

card games in the past. The Florida Lottery's "Million Dollar Flamingo Fortune" television show featured several casino-style games of chance and gaming devices, including a roulette-type wheel, a house-banked card game and a dice game.

The games offered by the Lottery on the show were the subject of a declaratory judgment action brought by the Tribe. On December 18, 1998, the Broward County Circuit Court held that the Florida State Lottery was engaged in operating certain casino-type games on its Lottery television show that "constitute games which, if conducted by any person, organization or entity, other than the [Florida Lottery], would constitute gambling in violation of Florida Statute Section 849.01." *Seminole Tribe of Florida v. Chiles*, No. 97-014171 (Fla. Broward County Cir. Ct., Dec. 18, 1998) (Appendix F).

Although possessing the undisputed power to do so, the Florida Legislature has never interfered with the Florida Lottery's ability to offer banked casino card games in order to generate revenue for the State, by amending, retracting or otherwise limiting the broad statutory authority that it gave to the Lottery.

Yet, in conflict with the IGRA determinations of the federal appellate courts noted above and this Court's statement in *California v. Cabazon Band of Mission Indians*, the Florida Supreme Court never examined the applicable state laws. 480 U.S. 202, 211 n. 10 (1987) ("The applicable state laws governing an activity must be examined in detail before they can

be characterized as regulatory or prohibitory.")[14] The Florida Supreme Court, however, never even considered the State Lottery's authorization to conduct banked card games. Instead, the court made its decision based upon the erroneous understanding that the State's official posture regarding banked card games was universally prohibitory.

The Florida Supreme Court's evasion of these facts frustrates the purpose of the IGRA and must be rejected. *See Stein v. New York*, 346 U.S. 156, 181 (1953) ("this Court cannot allow itself to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding"). Here, the Florida Supreme Court assumed that banked card games are completely prohibited by state law without considering the statutory authorization that permits the Lottery to offer the exact banked card games that are supposedly prohibited. The determination as to whether the Lottery may offer such games is a central issue. Once it is acknowledged that Florida law permits the Lottery to offer banked card games, under IGRA § 2710 the Seminole Tribe of Florida is entitled to offer

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[14] The Court pointed out: "The lower courts have not demonstrated an inability to identify prohibitory laws. For example, in *United States v. Marcyes,* 557 F.2d 1361, 1363-1365 (CA9 1977), the Court of Appeals adopted and applied the prohibitory/regulatory distinction in determining whether a state law governing the possession of fireworks was made applicable to Indian reservations by the Assimilative Crimes Statute, 62 Stat. 686, 18 U.S.C. § 13. The court concluded that, despite limited exceptions to the statute's prohibition, the fireworks law was prohibitory in nature."

such games on its tribal lands pursuant to a tribal-state compact.

II. The Florida Supreme Court's decision is based upon a fundamental error of federal law regarding state jurisdiction over gaming conducted on Indian lands.

It is not open to dispute that prior to the enactment of the IGRA, states had no role in the regulation of Indian gaming. *See Cabazon*, 480 U.S. at 202. Even though Congress, through Public Law 83-280, codified as 18 U.S.C. § 1162 (2000) and 28 U.S.C. § 1360 (2000), permitted certain states (including Florida) to exercise criminal jurisdiction and limited civil jurisdiction over tribes, that grant of jurisdiction did not extend to state regulation of Indian gaming activities. *See Seminole v. Butterworth*, 658 F.2d 310, 313-15 (5th Cir. 1981) (because P.L. 280 permits states to enforce only their criminal-prohibitory laws, states have no role to play with respect to civil-regulatory matters, such as gambling activities that are regulated, but not criminally prohibited, by the State of Florida) (citing *Bryan v. Itasca County*, 426 U.S. 373 (1976)).

The IGRA entirely preempts state regulation of Class I and II Indian gaming and only provides an opportunity for states to participate in the regulation of Class III gaming through the tribal-state compact process.[15]

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[15] States are not allowed by IGRA to regulate Classes I and II. 25 U.S.C. § 2710(a) (2000) (Class I gaming is within the exclusive jurisdiction of the Indian tribes. Class II gaming is within the exclusive jurisdiction of the Indian tribes, but subject

The Florida Supreme Court veered totally off course when it reasoned that "what is legal in Florida is legal on tribal lands, and what is illegal in Florida is illegal there." *Florida House of Representatives*, 990 So.2d at 1048 (Appendix at 25a). The Florida Supreme Court cited 18 U.S.C. § 1166(a) for the proposition that "federal law provides that, except as provided in a tribal-state compact, state gambling laws apply on tribal lands." *Id.* Yet, that provision of the IGRA only specifies that state law will apply "for purposes of Federal law" where the gaming at issue is not a form of gambling authorized by the IGRA. State gambling laws never directly apply to Indian lands.

If the Florida Supreme Court's analysis were correct, then tribes would not be permitted to conduct high stakes bingo where state law allows only low stakes bingo. The fact that the activity is "illegal" for state citizens does not control the result under the IGRA.

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to federal regulation under IGRA). States may regulate Class III only through a tribal-state compact. 25 U.S.C. § 2710(d)(3)(C)(2000). *See Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1247 (11th Cir. 1999) ("The legislative history of IGRA indicates that Congress, in developing a comprehensive approach to the controversial subject of regulating tribal gaming, struck a careful balance among federal, state, and tribal interests. A central feature of this balance is IGRA's thoroughgoing limits on the application of state laws and the extension of state jurisdiction to tribal lands") (internal citations omitted); *see also Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 546-47 (8th Cir. 1996) ("Congress left the states without a significant role under IGRA unless one is negotiated through a compact").

With respect to Class III gaming, similar considerations apply. The fact that state law prohibits various forms of casino gaming to its citizens, but allows them for charities, means that it "permits" those forms of gaming for some persons. Tribes are therefore entitled to offer those games, under a compact, even though they would be illegal if state law applied directly to tribal gaming activities. *See Mashantucket Pequot*, 913 F.2d at 1031 (if an Indian tribe were required to conduct such gaming only according to state law and regulations, "[t]he compact process that Congress established as the centerpiece of the IGRA's regulation of class III gaming would thus become a dead letter; there would be nothing to negotiate, and no meaningful compact would be possible").

The scope of gaming authorized under the IGRA, as discussed above, is not the same scope of gaming authorized to commercial entities under state law, but is such gaming as is permitted "for any purpose by any person, organization or entity." Given its statutory intent for tribal gaming to "promot[e] tribal economic development, self-sufficiency and strong tribal governments,"[16] the IGRA expressly authorizes a competitive advantage for tribal gaming on Indian lands over commercial gaming on state lands. The United States Solicitor General explained the effect as follows:

> "IGRA's compacting process affords reciprocal protection for the significant governmental

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[16] 25 U.S.C. § 2702(1) (2000).

> interests of Tribes by requiring the States to negotiate over a form of Class III gaming as long as the State permits it 'for any purpose by any person.' That provision enables a Tribe to negotiate terms and conditions different (and more favorable) than those applicable to non-Indian gaming operators under state law for any Class III gaming activities that the State, after weighing its own public policies, has not seen fit to outlaw entirely."

Brief of Amicus Curiae United States, Office of the Solicitor General, at 11-12, *Sycuan Band of Mission Indians v. Wilson*, 521 U.S. 1118 (1997) (No. 96-1059) (emphasis added).

Contrary to the Supreme Court of Florida's conclusion, the scope of gaming under the IGRA is not defined by a simplistic and forced assimilation of state law definitions. *See Sisseton-Wahpeton*, 897 F.2d at 366 n.10; *Mashantucket Pequot*, 913 F.2d at 1030-31. Rather, pursuant to the IGRA, state gambling laws, like tribal laws, are subjects of negotiation and upon mutual agreement of the parties, may be included in the compact when "directly related to, and necessary for, the licensing and regulation of such activity." 25 U.S.C. § 2710(d)(3)(C).

III. The Governor's execution of the Compact that authorizes banked card games on Indian lands neither intrudes upon legislative authority nor changes the public policy of Florida.

A. The Governor has performed a typical executive function – rendering a decision based on existing policy.

The Governor's execution of the Compact did not render any change in the public policy of the State of Florida. The question of what games Florida "permits" for the purpose of gaming on Indian lands pursuant to a tribal-state compact under the IGRA has no bearing upon the Legislature's authority to make fundamental policy decisions regarding gambling law applicable to state lands.

Under the IGRA, the scope of gaming is determined in part on the state law in place at the time. *See Coeur d'Alene Tribe v. State,* 842 F.Supp 1268 (D. Idaho 1994). The Governor and the Tribe entered into a compact, which included banked card games, based on the conclusion that existing Florida law permits the Florida Lottery to offer those games.

The Governor has not engaged in unconstitutional policy making as he has in no way changed state gambling law or policy. The decision of Governor Crist resembles a determination made by the Governor of Wisconsin related to Indian gaming under the IGRA found by the Seventh Circuit to be constitutional. *Lac Courte Oreilles Band v. Wisconsin,* 367 F.3d 650 (7th Cir. 2004). There, several tribes questioned the governor's

constitutional authority to concur with the Secretary of Interior on an off-reservation gaming proposal. The court upheld the governor's authority reasoning that:

> "the Governor's decision regarding any particular proposal is not analogous to creating Wisconsin gaming policy wholesale – a legislative function – but rather is typical of the executive's responsibility to render decisions based on existing policy."

Id. at 664.

In *Lac Courte Oreilles*, the Seventh Circuit also pointed out that the legislature had its own authority to place a check on the governor's power to concur and attempted to do so by enacting legislation. *Id.* Similarly, the Florida Legislature possesses the power to limit the Governor's authority to execute through the legislative process.[17] The Legislature's inaction triggered a fundamental disagreement between the majority of the Florida Supreme Court and the concurring opinion of Justice Lewis. Justice Lewis stated that the necessary business clause of the Florida Constitution "does afford the Governor a field of operation to enter into a binding compact under circumstances in which the other branches of government have ignored a problem or neglected to act and thereby created a void by governmental inaction..." *Florida House of Representatives*, 990

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[17] *See, e.g., Florida House of Representatives*, 990 So.2d at 1043 (discussing the Legislature's law-making action in several compacts entered into and ratified by the State) (Appendix at 13a-14a).

So.2d at 1051 (Lewis, J., concurring) (Appendix at 32a). Justice Lewis pointed out that even though "the Tribe actively sought to negotiate resolution of a compact for almost sixteen years, the Legislature – having full access to the information and issues – did not act." *Id.*

Not only could the Florida Legislature have taken action to define the Governor's role in the compact process, lawmakers could have eliminated the Tribe's right to conduct banked card games under the IGRA. The Florida Legislature could have enacted prohibitory laws in a comprehensive manner that would not be subject to exception and would make such games unavailable for compacting under the IGRA.

In other states, constitutional and statutory limitations upon the state lotteries, which are not present in Florida, have been deemed grounds to limit the scope of gaming available for class III gaming under the IGRA. For example, after tribes in Idaho requested compacts to conduct class III casino games, including slot machines and banked card games based on the breadth of gaming permitted under the state constitution to the Idaho lottery, Idaho amended its constitution. *See Coeur d'Alene Tribe v. State*, 842 F.Supp. 1268, 1269 (D. Idaho 1994). The amended Idaho constitution expressly prohibited the state-run lottery from offering casino-type gaming and stated as follows: "No activities permitted by subsection (1) shall employ any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, bacarrat [baccarat], keno and slot machines." Idaho Const. art. III, Sec.

20(2) (amended 1992). The district court concluded that because Idaho gambling policy changed to prohibit such gaming by the state lottery prior to the state entering into compacts with the tribes, under the IGRA, the tribes could not offer such gaming. *Coeur d'Alene*, 842 F.Supp. at 1283.

In order to circumscribe its state lottery from offering casino card games, the Montana Legislature defined "lottery game" to exclude "card games." *See* Mont. Code Ann. § 23-7-103(4). As a result, pursuant to the IGRA, the Ninth Circuit concluded that tribes in Montana were not permitted to offer casino card games. *See Crow Tribe of Indians v. Racicot*, 87 F.3d 1039 (9th Cir. 1996). Like Montana, in Florida, the Legislature itself has authority to modify the Florida Lottery statute in order to prohibit the Lottery from offering banked card games. The Florida Legislature, however, has not done so. As a result, for this and other reasons, in Florida banked card games are a permitted type of gaming for inclusion in a tribal-state compact under the IGRA.

B. Federal law limits state legislative authority regarding gaming conducted on Indian lands.

Not only is the Compact consistent with public policy in Florida, but the gaming activities allowed under the Compact may be conducted only on Indian lands in a manner consistent with the IGRA. The Florida Supreme Court greatly overreaches when suggesting that the authorization of the play of banked card games on the Tribe's Indian lands is "precisely the type of action particularly within the Legislature's power." *Florida House of*

Representatives, 990 So.2d at 1050 (Appendix at 29a). Federal law clearly limits a state legislature's role with respect to what gaming may be conducted on Indian lands under a tribal-state compact. *See Dorsey*, 88 F.3d at 547 (the IGRA has the "requisite extraordinary preemptive force" necessary to completely preempt state law).

The Compact's authorization of gaming activities consistent with the IGRA in no way alters Florida public policy as no entity other than the Tribe has been affected and the gaming activities are restricted to tribal lands where the state has no policy role. In no way has the Governor's action modified the Florida Lottery's authorization to offer banked card games nor has commercial gaming been expanded or restricted. Although the exclusivity provisions in the Compact establish financial incentives to encourage the State to limit the expansion of gambling in Florida, such terms do not preclude the Florida Legislature from making the policy choice to further expand gaming. *See, e.g., Yavapai-Prescott Tribe,* 796 F.Supp. at 1297 ("If gaming is such an economic panacea, the State's public policy may change. The State could legalize gaming, compete for the gaming dollar, and make it unnecessary or less attractive for non-Indians to go to tribal facilities.")

CONCLUSION

The petition for a writ of certiorari should be granted.

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