No. 08-746

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 Writ of Certiorari to the Florida Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Florida Supreme Court violated the Indian Commerce Clause and the Supremacy Clause of the United States Constitution by holding that the Governor of Florida lacked authority to enter into a tribal-state compact without the Florida Legislature's approval when the compact allowed gaming that the court found violated state law?

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The opinion of the Florida Supreme Court, *Florida House of Representatives v. Crist*, is reproduced in the Petitioner's Appendix ("Pet. App.") at 1a-44a and is reported at 990 So. 2d 1035 (Fla. 2008).

STATEMENT OF THE CASE

The Governor of Florida, without the Florida Legislature's approval, executed a compact (the "Compact") with the Seminole Tribe of Florida (Petitioner) to allow Class III gaming under the Indian Gaming Regulatory Act (IGRA) on Petitioner's Indian lands located within the State of Florida. Class III gaming includes slot machines and "banked" card games in which participants play against the house. 25 U.S.C. § 2703(6)-(8) (2000). IGRA permits Class III gaming on Indian lands only if it is: (1) authorized by tribal ordinance, (2) "located in a State that permits such gaming for any purpose by any person, organization, or entity," and (3) "conducted in accordance with a Tribal-State compact entered into by the Indian tribe and the State ... that is in effect." *Id.* § 2710(d)(1).

In relevant part, the Compact authorized Petitioner to conduct several types of Class III gaming that are illegal in Florida, including any banked card games like baccarat, blackjack, and *chemin de fer*. The Florida House of Representatives and its Speaker, Marco Rubio, filed a petition for writ of quo warranto with the Florida Supreme Court disputing the Governor's authority to bind the State to the Compact without legislative authorization or ratification. The court allowed Petitioner to join the action as a

respondent.

The Florida Supreme Court held, on narrow grounds, that the Governor could not unilaterally bind the State to a compact that violated state law. Petitioner requested rehearing, arguing that the court applied an improper test as to what gaming is permissible on Petitioner's Indian lands under IGRA; Petitioner also sought rehearing on the basis that state law permitted the Florida Lottery to operate certain games that were equivalent to the Class III games permitted under the Compact. Petitioner's motion for rehearing was denied.

REASONS FOR DENYING THE PETITION

Petitioner seeks review of a decision of the Florida Supreme Court, which applied state separation of powers principles in holding that Florida's Governor cannot unilaterally bind the State to a gaming compact that violates state law, finding as a matter of state law that banked card games are illegal in Florida. Petitioner contends that this holding violates the Indian Commerce Clause and the Supremacy Clause of the United States Constitution. The issue presented does not warrant this Court's review for two reasons: (I) the case involves only a state law matter; and (II) no conflict exists on a point of federal law.

I. Petitioner Seeks Review of a State Court Decision That Resolves Matters of State Law Pertaining Only to the Branches of State Government.

The case at issue decided only matters of state law, thereby making it a poor candidate for this Court's review. The issue below was the power of the Governor to execute the Compact without prior authority or ratification by the Legislature, and the relief sought was a declaration that the Governor lacked such power. The Florida Supreme Court's decision on this issue was based exclusively on state law:

> the Governor's execution of a compact authorizing types of gaming that are prohibited under Florida law violates the separation of powers. The Governor has no authority to change or amend state law.

> Such power falls exclusively to the Legislature. Therefore, we hold that the Governor lacked authority to bind the State to a compact that violates Florida law as this compact does. We need not resolve the broader issue of whether the Governor ever has the authority to execute compacts without either the Legislature's prior authorization or, at least, its subsequent ratification.

Crist, 990 So. 2d at 1050-51; Pet. App. at 30a. The court's decision was grounded in state law separation of powers principles and was necessarily based on the court's interpretation of Florida law prohibiting the banked card games included in the Compact. *Id*. at 1047-48.

This Court has consistently held that "state courts are the ultimate expositors of state law," and it will deviate from this rule only in "extreme circumstances." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). None of the extreme circumstances that the Court has noted in the past is present here. *See generally* E. Gressman, K. Geller, et al., *Supreme Court Practice* 142-146 (9th ed. 2007) (discussing extreme circumstances).

The disputed question of state law arose in a proceeding under the Florida Supreme Court's original jurisdiction to issue writs of quo warranto, which extends "to state officers and state agencies." Art. V, § 3(8), Fla. Const. Petitioner was not a necessary party to the dispute, and the Florida Supreme Court made no

determination on any of Petitioner's claimed rights under a federal statute or the United States Constitution. The Florida Supreme Court did nothing more than decide disputed issues of state law. This decision involves only a state law matter and leaves federal law undisturbed, thereby making certiorari jurisdiction inappropriate.

II. The Florida Supreme Court's Decision Does Not Conflict with Circuit Decisions Interpreting Federal Law.

Petitioner argues that the Florida Supreme Court's decision conflicts with the Second, Eighth, and Ninth Circuits' interpretations of IGRA section 2710. Pet. 7-8 (citing *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir. 1990); *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990); *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9th Cir. 1994)). None of the cited cases, however, involved the only issue decided by the Florida Supreme Court (i.e., whether a state's governor can unilaterally bind a state to a compact that violates state law). None presents a conflict with each other or with the Florida Supreme Court's decision. Instead, Petitioner's cases discuss the scope of gaming permitted under IGRA, an issue not presented in this proceeding.

Indeed, to the extent that *Rumsey* has application here, it is not helpful to Petitioner. There, the tribes advocated a broad reading of IGRA that would have forced the state to permit all forms of Class III gaming when the state allows similar, but not the same, gaming to be operated in the state. *Id.* at 1256. The court,

however, applied a more narrow construction, finding that a "state need only allow Indian tribes to operate games that others can operate, but need not gives tribes what others cannot have." *Id.* at 1258.

Petitioner's arguments regarding the operations of the Florida Lottery are akin to the broad reading of IGRA advocated and rejected in *Rumsey*. Pet. 10. Petitioner alleges that the Legislature allowed the Florida Lottery to operate the same games it seeks to operate on its land; therefore, IGRA requires the State to negotiate and enter into a compact with it. Specifically, Petitioner contends that the Florida Supreme Court did not consider these arguments and that this omission conflicts with *California v. Cabazon Band of Mission Indians*, which holds that applicable state laws must be examined before they are characterized as prohibitory. 480 U.S. 202, 211 n.10 (1987).

While the Florida Supreme Court did not mention the Florida Lottery in its opinion, it did specifically hold that state law prohibits the games Petitioner sought to operate under the Compact, thereby tacitly rejecting Petitioner's claim. *Crist*, 990 So. 2d at 1049; Pet. App. at 30a; Tribe's Response Brief at 33-34 (making arguments regarding Florida Lottery). Petitioner raised these arguments again in its motion for rehearing, Pet. at 6, which the court denied. Pet. App. 45a. The only reasonable conclusion is that the court considered these arguments and found them to be meritless.

Petitioner also contends that this Court is not bound by the Florida Supreme Court's factual findings

regarding the Florida Lottery under *Stein v. New York*, 346 U.S. 156, 181 (1953). Even if a factual error existed (which is not shown here), this case is not one of those rare instances for which certiorari might be appropriate under Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings."). Indeed, this Court is in no better position to make factual determinations regarding the operations of Florida's Lottery than the Florida Supreme Court, which exercised its original jurisdiction below in reviewing the petition for writ of quo warranto.

Notably, Petitioner fails to cite the one circuit case most applicable here, *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997). In that case, the governor signed compacts with various tribes after the state supreme court found that he lacked the authority to do so, suggesting that state law did not permit the kind of gaming that the tribes were conducting. *Id.* at 1548. The Secretary of the Interior, following IGRA's requirements, approved the compacts and published notice in the Federal Register.[1] *Id.* at 1550.

The Tenth Circuit explained that IGRA has two requirements for a Class III gaming compact: the "compact must be validly entered into by the state and the tribe, and it must be in effect pursuant to

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[1] The Secretary of the Interior published notice of his default approval of the Compact prior to the Florida Supreme Court's decision. *See Notice of Deemed Approved Tribal-State Class III Gaming Compact*, 73 Fed. Reg. 229 (Jan. 7, 2008).

Secretarial approval." *Id.* at 1557. The court found that the "plain language of IGRA makes it clear that Secretarial approval and publication places a compact 'into effect.' IGRA, however, says nothing specific about how we determine whether a state and tribe have entered into a valid compact. *State law must determine whether a state has validly bound itself to a compact*." *Id.* at 1557-58 (emphasis added) (citing *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 493 & n.39 (1979)).

As in *Pueblo of Santa Ana*, the court below applied state law to determine whether the state has validly bound itself to a Class III gaming compact. The Tenth Circuit left open the question of whether a federal court must independently decide whether the state validly bound itself to a compact under state law or whether the federal courts must abide by the highest court of the state's determination of the issue. Instead, the court accepted as determinative the state supreme court's decision because the opinion was well founded. 104 F.3d 1559. Likewise, this Court need not answer this question here due to its deference to the decision of a state court on state law. *Mullaney*, 421 U.S. at 691. As in *Pueblo of Santa Ana*, the decision below was well reasoned, going no further than was necessary to reach its holding that Florida's Governor cannot unilaterally bind the state to a compact that violates state law.

Finally, Petitioner makes three points for this Court's review that are unpersuasive. First, Petitioner argues that the Florida Supreme Court's decision is based on an error of federal law regarding state jurisdiction over gaming conducted on Indian land. It

claims the court misapplied IGRA because Florida law allegedly permits that type of gaming that was the subject of the Compact. Pet. 13. Petitioner's view is that Florida had to negotiate with it under IGRA. Pet. 16. But IGRA does not require a state to negotiate over gaming that state law prohibits. *Rumsey*, 64 F.3d at 1260. In any event, the issue in this case is not the scope of a state's obligation to negotiate under IGRA; rather, the issue is whether a state's governor has the unilateral authority to agree to a Class III gaming compact that includes otherwise illegal gaming. Finally, the decision of this Court in *Seminole Tribe of Florida v. Florida*, 516 U.S. 44 (1996), precludes any lawsuit involving a state's alleged failure to negotiate with a Tribe as required by IGRA.

Second, Petitioner contends that the Governor's execution of the Compact neither intrudes upon legislative authority nor changes the public policy of Florida. Petitioner argues that the Governor has performed a typical executive function. Pet. 17. The Florida Supreme Court disagreed with this policy argument because it found that Florida law prohibits the type of gaming permitted under the Compact. Pet. 20. For support, Petitioner primarily relies on *Lac Courte Oreilles Band v. Wisconsin*, 367 F.3d 650 (7th Cir. 2004), which addressed an IGRA provision that allows the Secretary of the Interior to take land into trust for gaming purposes but a governor can veto the acquisition. *Id.* at 653-54. The question was one of federal law, not an analysis of the governor's authority under state law. IGRA grants no authority to governors in the compacting process. The statute says the State shall negotiate a Class III gaming compact in good

faith, but leaves the definition of who speaks for the State to state law. 25 U.S.C. § 2710 (3)(d)(3)(A) (2000).

Third, Petitioner argues that federal law limits state legislative authority regarding gaming conducted on Indian lands. But the Florida Supreme Court's opinion does not seek to regulate activities on Indian lands – all such regulation is preempted and can be done by the State only pursuant to the terms of a Class III gaming compact. 18 U.S.C. § 1166 (2000).

In summary, because the issue below was a question of state law this Court should not grant review. Likewise, because the Florida Supreme Court's decision does not conflict with the various federal appellate court decisions cited and comports with the principles of IGRA, the Indian Commerce Clause, and the Supremacy Clause, no basis for review exists.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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