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No. 02-

IN THE

# Supreme Court of the United States

TABLE MOUNTAIN RANCHERIA,

*Petitioner*,

v.

AMERICAN VANTAGE COMPANIES,

*Respondent*.

**On Petition for a Writ of Certiorari to the California Court of Appeal, Fifth Appellate District**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether state-law claims for breach of contract brought against an Indian Tribe by a private gaming management company, involving matters integrally related to the Tribe's control over its gaming operations, are completely preempted by the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*, and may be pursued only in federal court.

## TABLE OF CONTENTS


Page

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

REASONS FOR GRANTING THE PETITION ..... 10

I. IGRA COMPLETELY PREEMPTS THE FIELD OF INDIAN GAMING REGULATION. ..... 11

A. Federal Law ..... 11

B. Federal Forum ..... 12

II. THE COURT OF APPEAL IMPROPERLY NARROWED IGRA'S PREEMPTIVE SCOPE. ..... 15

A. IGRA Preempts State Claims Relating to Control of Tribal Gaming Operations ..... 15

B. IGRA Preempts State Claims Where the Dispute Turns On Legal Conclusions Under IGRA ..... 17

III. THE DECISION BELOW REFLECTS CONFLICT AND UNCERTAINTY IN THE LOWER COURTS. ..... 19

## TABLE OF CONTENTS—Continued

Page

A. The *Gaming Corporation* Approach .................... 19

B. Uncertainty Over IGRA's Preemptive Scope ............................................................ 21

IV. THIS COURT SHOULD PROVIDE DEFINITIVE GUIDANCE. ................................................... 23

CONCLUSION ........................................................... 25

Appendix A: Opinion of the California Court of Appeal, Fifth Appellate District, filed November 7, 2002 ........................................................ 1a

Appendix B: Order of the California Superior Court granting Defendant's Motion to Quash/Dismiss for lack of jurisdiction, filed April 10, 2001 ............... 10a

Appendix C: Order of the California Supreme Court denying review, filed March 5, 2003 ................ 13a

Appendix D: Order of the United States District Court for the Eastern District of California, filed September 27, 2000.......................................... 14a

Appendix E: Opinion of the United States Court of Appeals for the Ninth Circuit, filed July 29, 2002 .................................................................20a

Appendix F: Relevant Statutory and Regulatory Provisions ..................................................................24a



## TABLE OF AUTHORITIES

### CASES

Page(s)

*Abdo* v. *Fort Randall Casino*, 957 F. Supp. 1111 (D.S.D. 1997) ..............................................................21

*American Vantage Cos.* v. *Table Mountain Rancheria*, 103 Cal. App. 4th 590 (2002) .............*passim*

*American Vantage Cos.* v. *Table Mountain Rancheria*, 292 F.3d 1091(9th Cir. 2002) .......................9

*Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983) ..................................................................14

*Avco Corp.* v. *Aero Lodge No. 735, International Ass'n of Machinists and Aerospace Workers*, 390 U.S. 557 (1968) .........................................................13

*Bruce H. Lein Co.* v. *Three Affiliated Tribes*, 93 F.3d 1412 (8th Cir. 1996).......................................19, 23

*Bryan* v. *Itasca County*, 426 U.S. 373 (1976) ......................11

*Cabazon Band of Mission Indians* v. *Wilson*, 124 F.3d 1050 (9th Cir. 1997)............................................23

*California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) ..................................................11, 12

*Calvello* v. *Yankton Sioux Tribe*, 899 F. Supp. 431 (D.S.D. 1995) .........................................................21

*Caterpillar Inc.* v. *Williams*, 482 U.S. 386 (1987) ...............12

*County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226 (1985) ..................................................11, 23

*Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975) ..................................................................15

*Gaming Corp. of America* v. *Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996).......................................*passim*

*Gaming World International, Ltd.* v. *White Earth Band of Chippewa Indians*, 317 F.3d 840 (8th Cir. 2003)..............................................................22

*Great Western Casinos, Inc.* v. *Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407 (1999) ............14

**TABLE OF AUTHORITIES—Continued**


Page(s)

*Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473 (1981) .......... 13, 14
*Iowa Mgmt. & Consultants* v. *Sac & Fox Tribe*, 207 F.3d 488 (8th Cir. 2000) .......... 21, 22
*Local No. 438 Constr. & General Laborers' Union AFL-CIO* v. *Curry*, 371 U.S. 542 (1963) .......... 15
*Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903) .......... 25
*Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58 (1987) .......... 13, 17
*Musson Theatrical Inc.* v. *Federal Express Corp.*, 89 F.3d 1244 (6th Cir. 1998) .......... 14
*New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983) .......... 11
*Missouri ex rel. Nixon* v. *Coeur D'Alene Tribe*, 164 F.3d 1102 (8th Cir. 1999) .......... 22
*Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974) .......... 13, 14, 24
*Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997) .......... 15
*Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996) .......... 2
*Tafflin* v. *Levitt*, 493 U.S. 455 (1990) .......... 13, 14
*Tamiami Partners, Ltd.* v. *Miccosukee Tribe of Indians*, 63 F.3d 1030 (11th Cir. 1995) .......... 12, 18, 23
*Tamiami Partners, Ltd.* v. *Miccosukee Tribe of Indians*, 177 F.3d 1212 .......... 19
*Tom's Amusement Co.* v. *Cuthbertson*, 816 F. Supp. 403 (W.D.N.C. 1993) .......... 19, 23
*United States ex rel. Bernard* v. *Casino Magic*, 293 F.3d 419 (8th Cir. 2002) .......... 16, 17




**TABLE OF AUTHORITIES—Continued**

**CONSTITUTIONAL AND STATUTORY PROVISIONS**


Page(s)

U.S. Const. art. VI, cl. 2 .......... 2
Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq* .......... 2
25 U.S.C. § 2702 .......... 2, 11
25 U.S.C. §§ 2704 .......... 4
25 U.S.C. § 2705(a) .......... 4
25 U.S.C. § 2706 .......... 4, 18
25 U.S.C. § 2710(b) .......... 3, 5, 18
25 U.S.C. § 2710(d) .......... 5, 18
25 U.S.C. § 2711 .......... 4, 5
25 U.S.C. § 2713 .......... 4, 5
28 U.S.C. § 1257(a) .......... 2, 14


**LEGISLATIVE MATERIALS**


S. Rep. No. 100-446 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071 .......... 3, 4, 10, 12, 20


**REGULATIONS**


25 C.F.R. § 501 *et seq* .......... 2, 5
25 C.F.R. § 502.5 .......... 5, 24
25 C.F.R. § 502.15 .......... 5
25 C.F.R. § 533.7 .......... 5


**OTHER AUTHORITIES**


FELIX S. COHEN, FEDERAL HANDBOOK OF INDIAN LAW (1982 ed.) .......... 14
DONALD L. BARTLETT & JAMES B. STEELE, *SPECIAL REPORT: INDIAN CASINOS*, TIME MAGAZINE, Dec. 16, 2002 .......... 24
Petition for a Writ of Certiorari in *Sac & Fox Tribe of the Mississippi in Iowa* v. *Iowa Management & Consultants, Inc.*, No. 02-1563 (docketed April 29, 2003) .......... 23

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AMERICAN VANTAGE COMPANIES,

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**On Petition for a Writ of Certiorari to the California Court of Appeal, Fifth Appellate District**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal in this case.

## OPINIONS BELOW

The opinion of the California Court of Appeal (App., *infra*, 1a-9a) is reported at 103 Cal. App. 4th 590. The order of the California Supreme Court denying review (App., *infra*, 13a) is not reported. The opinion of the United States District Court for the Eastern District of California in a related case (App., *infra*, 14a-19a) is not reported. The opinion of the United States Court of Appeals for the Ninth Circuit in that case (App., *infra*, 20a-23a) is reported at 292 F.3d 1091.

## JURISDICTION

The judgment of the California Court of Appeal was entered on November 7, 2002. The California Supreme

Court denied review on March 5, 2003. (App., *infra*, 13a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution provides: "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."

Relevant portions of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*, and associated regulations, 25 C.F.R. §§ 501 *et seq.*, are set out in the appendix, *infra*, at 24a-46a.

## STATEMENT OF THE CASE

Congress passed the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 *et seq.*, in 1988. The Act establishes a comprehensive federal scheme to regulate virtually every aspect of gaming operations conducted by Indian Tribes on Indian lands. A primary purpose of the Act was to establish federal standards and oversight for such gaming operations, in order to shield Tribes from "organized crime and other corrupting influences," to ensure that Tribes would be the primary beneficiaries of gaming operations, and to promote tribal economic development and self-sufficiency. 25 U.S.C. § 2702; *see generally, e.g., Seminole Tribe* v. *Florida*, 517 U.S. 44, 48-49 (1996). To implement these "federal standards," Congress intended to "expressly preempt the field in the governance of gaming activities on Indian lands." S. Rep. No. 100-446, at 6 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3076.



This case provides a good example of the sort of exploitation by non-Indians that IGRA was designed to prevent. Petitioner the Table Mountain Rancheria Band of Indians (Table Mountain or the Band) is a federally recognized Indian Tribe with tribal lands situated within the boundaries of Fresno County, California. The Band's gaming operation is its principal economic asset, and provides support for the tribal government and its benefit and development programs. *See* 25 U.S.C. § 2710(b)(2)(B) (providing that net gaming revenues must be used for tribal government operations, providing for the general welfare of the Tribe and its members, tribal economic development, charitable donations, or funding of local government agencies).

Respondent American Vantage Companies, Inc. (AVC) is a Nevada corporation that the National Indian Gaming Commission (NIGC) specifically found to be unsuitable to manage a tribal gaming operation. AVC nonetheless extracted almost $50 million from the Band's gaming operation before the Band was able to terminate its association with AVC.[1] And AVC now seeks to collect, by suing the Band in state court on purported state-law breach-of-contract claims, some $15 million more that it alleges it should receive under two alleged agreements with the Band. The question presented here is whether such state-law claims are completely preempted by federal law, and must be pursued in federal court. It might equally be framed as whether IGRA's protective guarantee of federal oversight is to be honored, by assuring that claims arising from a Tribe's decisions concerning governance of its gaming operations will be decided by federal courts applying federal law.

1. IGRA imposes federal regulatory control over the conduct of gaming operations, in part in order to "protect[]

[1] This case was decided below on jurisdictional grounds, and no findings of fact have been made. The factual description herein includes facts that Table Mountain would expect to prove at trial.

the tribes . . . from unscrupulous persons." S. Rep. No. 100-446, *supra*, at 2. The NIGC, established by IGRA, has broad powers to oversee tribal gaming operations and to enforce the requirements of federal law. 25 U.S.C. §§ 2704-2706. The Commission is charged with "monitoring" Indian gaming operations "on a continuing basis," 25 U.S.C. § 2706(b), and it has the power to levy fines and to order the closure of a gaming operation if it finds a violation of IGRA, an NIGC regulation, or a tribal ordinance. 25 U.S.C. § 2705(a)(1), (2); § 2713(a), (b).[2]

IGRA also imposes strict controls over the management of gaming operations. To shield Tribes from "unscrupulous" or corrupting influences, non-Indian contractors who have a direct financial interest in, or management responsibilities under, a management contract must undergo a background investigation, and secure approval from the NIGC as to their suitability for the fair and legal conduct of gaming operations. 25 U.S.C. § 2711(a), (e).[3] The NIGC must also

[2] As part of this monitoring responsibility, the NIGC must inspect and examine the premises where gaming is conducted on Indian land. 25 U.S.C. § 2706(b)(2). The NIGC may demand access to and inspect, examine, photocopy and audit all papers, books and records relating to gross revenue from Class II gaming and any other matters necessary to carry out the Commission's duties. 25 U.S.C. § 2706(b)(4). The NIGC may order permanent closure after notice and a hearing, subject to review in federal court. 25 U.S.C. § 2713(c). The NIGC has also promulgated comprehensive regulations to implement IGRA's provisions. 25 C.F.R. §§ 501 *et seq.*

[3] IGRA requires that a Tribe's gaming ordinance establish a system to ensure adequate background investigations of primary management officials and key employees and to provide for ongoing oversight of these individuals. 25 U.S.C. §2710(b)(2)(F)(i). This system must include licensing of all such personnel, notification to the NIGC of the results of the background check before any license is issued and notification of the NIGC when any license is issued. 25 U.S.C. § 2710(b)(2)(F)(ii). The system must also contain standards under which those who might pose a threat to the public interest or to the regulation of gaming are ineligible for employment. 25 U.S.C. § 2710(b)(2)(F)(ii)(II). An annual outside



approve all management contracts. 25 U.S.C. § 2711(a)(1); 25 C.F.R. § 502.15. An unapproved management contract is void. 25 C.F.R. § 533.7. Whether a contract is styled a "management" contract is not dispositive; any contract that "provides for the management of all or part of a gaming operation" is a de facto management contract regulated under IGRA. 25 C.F.R. § 502.15. Similarly, any collateral agreement that "is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe" and a management contractor or subcontractor, is considered a management contract under IGRA. 25 U.S.C. § 2711(a)(1), (3); 25 C.F.R. § 502.5. *All* contracts for services over $25,000 (except those for legal or accounting services) must be included in the Tribe's annual outside audit. 25 U.S.C. § 2710(b)(2)(D).

Where IGRA addresses judicial review, it provides for jurisdiction in the federal courts. *See* 25 U.S.C. § 2710(d)(7)(A) (granting federal courts jurisdiction over suits brought by a Tribe arising from a State's failure to enter into negotiations for a Tribal-State compact; suits brought by a State or Tribe to enjoin Class III gaming conducted in violation of a compact; and suits brought by the United States to enforce procedures related to negotiation of compact); 25 U.S.C. § 2711(d) (Tribe may sue in federal court if NIGC has not acted to approve or disapprove a management contract within specified period of time); 25 U.S.C. § 2713(c) (final decision by NIGC to levy fine or close gaming facility is reviewable in federal district court); *see also Gaming Corp. of America* v. *Dorsey & Whitney*, 88 F.3d 536, 545 (8th Cir. 1996) (noting that "[e]very reference to court action in IGRA specifies federal court jurisdiction" and that "[s]tate courts are never mentioned").

2. a. In 1993, Table Mountain entered into a "Management Consultant Contract" with the corporate

audit must be performed, and forwarded to the NIGC, of a Tribe's gaming revenues and related matters. 25 U.S.C. § 2710(b)(2)(C).

predecessor of AVC. Under the contract, AVC was to manage Table Mountain's gaming operations in return for 35 percent of the net revenue from those operations. AVC submitted the contract to the NIGC for approval, informing the NIGC that AVC had "commenced management activities" at Table Mountain—despite IGRA's prohibition on doing so in advance of NIGC approval. Clerk's Transcript on Appeal (C.T.) at 427:21-22. The NIGC did not approve the contract. Instead, the NIGC concluded in 1994 that neither AVC nor its president, Ron Tassinari, was "suitable" for involvement in Indian gaming. *Id.* at 157. By this time, AVC had already collected $1.3 million in "management consultant" fees from Table Mountain.

When the NIGC learned that AVC had continued to manage the Band's gaming operations without an approved contract, it initiated an enforcement action against the company, which was settled in 1996. Although AVC admitted to having engaged in illegal management of the Band's gaming operations, and although it had by this time collected more than $14 million in fees from the Band for that management, it paid a fine of only $500,000 under the settlement. *Id.* at 174-180, 145:1-6. AVC would extract another $32 million in fees before the Band was finally able to terminate its association with AVC in 1999. *Id.* at 333, 349-404.

Remarkably, as part of its settlement of the enforcement action, AVC convinced Table Mountain's then-Chairman, Vern Castro, to replace the illegal "Management Consultant Contract" with two new agreements: (1) a "Termination Agreement," which called for a payment of $16.8 million by the Band to "terminate and extinguish . . . rights, duties, and obligations" under the already void Management Consultant Contract, and (2) a "Consulting Agreement," under which AVC was to provide "technical assistance, advice, training and consulting services in connection with the operation and business affairs" of the Band's gaming enterprise. App., *infra*, 2a-3a. AVC was to receive a monthly fee for its



services, with the fees tied to the net revenue of the gaming operation—as is typical under management contracts. Cons. Agrmt. ¶ VI and Amendments to Cons. Agrmt.; 25 U.S.C. § 2711(c). The "technical assistance, training and advice" that AVC was to provide under the consulting agreement covered virtually every conceivable aspect of the gaming operation, and the payments to be made under both contracts provided AVC with essentially the same amount of money that AVC would have received had the void "Management Consultant Contract" remained in effect. C.T. 251-256, 144-145.

Both agreements specified that they were to be "governed by the laws of the United States." Term. Agrmt. ¶ 15; Cons. Agrmt. ¶ XVIII. The Consulting Agreement provided that either party could seek relief for breach "in a United States District Court." Cons. Agrmt. ¶ VII.B.2.[4] Both contracts were submitted to the NIGC, which determined that on their face the documents were not management contracts, and therefore did not require NIGC approval. See App., *infra*, 2a-3a. Mr. Castro signed both the termination and consulting agreements—purportedly on behalf of the Band but, in the Band's view, without the authority necessary to bind the Band. *See id.* at 3a, 8a.

In February 1999, the NIGC, concerned that AVC was still illegally managing the Band's gaming operations, and about reports that Mr. Castro was misusing tribal funds, issued a subpoena to the Band's government office. When there was no response, the Band was notified that its casino could be closed. C.T. 434. Mr. Castro was subsequently removed from office through a recall election. Shortly after

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[4] The Consulting Agreement provided for suit in a California court if, but only if, the federal district court could not exercise jurisdiction over the claim. Cons. Agrmt. ¶ VII.B.2. Each agreement included a limited waiver of the Band's sovereign immunity for purposes of enforcement. Term. Agrmt. ¶ 9; Cons. Agrmt. ¶ X.

new officers assumed control, the Band terminated its involvement with AVC. See App., *infra*, 3a.

b. In June 1999, AVC sued Table Mountain in federal district court, claiming breach of contract and alleging subject matter jurisdiction based on diversity. The Band filed an answer and raised various counterclaims, alleging that its claims arose under federal law because they related to the validity of contracts governed by federal law. App., *infra*, 15a.

The district court dismissed AVC's complaint, *sua sponte*, for lack of subject matter jurisdiction, because an Indian Tribe is not a citizen of any State for purposes of diversity jurisdiction. App., *infra*, 15a-16a. AVC accepted the court's invitation to replead its claims, but again alleged only diversity jurisdiction. The district court then entered a final order dismissing the case. *Id.* at 16a-19a.[5]

The Ninth Circuit affirmed. App., *infra*, 20a-23a. The court agreed that AVC's case could not be maintained on the basis of diversity jurisdiction, which was the only basis for federal jurisdiction that AVC had alleged. *Id.* at 20a, 22a. On appeal AVC also argued, for the first time, that the federal courts had jurisdiction because IGRA has been found to completely preempt state law insofar as it applies to matters, such as gaming management contracts, that fall within the scope of the federal Act. *See id.* at 22a; Appellant's Opening Brief at 26-27, *American Vantage Companies* v. *Table Mountain Rancheria*, 292 F.3d 1091 (9th Cir. 2002) (No. 00-17355); Appellant's Reply Brief at 14, *American Vantage Companies* (No. 00-17355). The court of appeals declined to consider that argument, because

[5] The court also dismissed Table Mountain's counterclaims. The court concluded that IGRA creates no private right of action for violation of its terms, and it characterized the Band's claims as based either on state law or on the federal Declaratory Judgment Act, 28 U.S.C. § 2201, which did not provide an independent basis for jurisdiction. *Id.* at 15a-16a.



AVC had not advanced it in the district court—despite the opportunity that the district court had afforded AVC to reframe its jurisdictional allegations. *Id.* at 22a & n.11.

c. While its federal appeal was pending, AVC also filed suit in California Superior Court, raising essentially the same allegations concerning breach of the Termination Agreement and the Consulting Agreement. The Superior Court granted Table Mountain's motion to dismiss the state complaint. App., *infra*, 10a-12a. It concluded that AVC's claims essentially challenged the validity of the Band's decision to terminate gaming-related contracts; that IGRA completely preempts state law with respect to such matters; and that AVC's claims could be pursued only in federal court. *Id.* at 10a-11a.[6]

The California Court of Appeal reversed. App., *infra*, at 1a-9a. The court agreed that IGRA completely preempts state law claims that "concern the regulation of Indian gaming activities," transforming any such claim into one that arises under federal law. *Id.* at 6a (citing *Gaming Corp.* 88 F.3d at 547); *see id.* at 4a-6a. It also agreed that if IGRA preempted the claims at issue in this case, then the Superior Court did not have jurisdiction over the action. *Id.* at 7a. In the court's view, however, AVC's claims for breach of its purported termination and consulting agreements with Table Mountain were "state-law causes of action" (*id.* at 6a) that were not preempted by IGRA, *id.* at 6a-8a—despite the agreements' express recognition that they were to be governed by federal law, and despite Congress's stated intention to "expressly preempt the field" of Indian gaming under IGRA. S. Rep. No. 100-446, *supra*, at 6.

The Court of Appeal acknowledged that "IGRA [might] play a role in the resolution of this matter," because if "an examination of the relationship between the parties" showed

[6] The Superior Court did not reach the Band's alternative argument that the purported waiver of the Band's sovereign immunity set out in the agreements was not properly authorized. *See* App., *infra*, 9a.

that "the consulting agreement is in reality an unapproved management agreement," then the agreement would be "void." App., *infra*, 6a-7a. Nonetheless, it reasoned that the NIGC had determined that neither the Termination Agreement nor the Consulting Agreement on its face required federal approval (*id.* at 6a), and that AVC's claim for money damages, as opposed to specific performance, would not "undermine Table Mountain's decision to terminate its business relationship with" AVC or "intrude on the [Band's] *control* of its gaming enterprise" (*id.* at 7a-8a). On that basis, the court concluded that the alleged contracts fell "outside . . . IGRA's protective structure" (*id.* at 6a), and that AVC's claims were not preempted by federal law.

The California Supreme Court denied discretionary review, with one Justice recused and one noting his dissent. App., *infra.*, 13a.

## REASONS FOR GRANTING THE PETITION

AVC's claims that the Band breached a contract relating to the management of its gaming enterprise are completely preempted by the Indian Gaming Regulatory Act, and may be pursued only in federal court. Congress intended IGRA to have extraordinary preemptive force; and it intended that federal courts, applying federal law, would make determinations touching the management of Indian gaming. The California Court of Appeal's judgment cannot be reconciled with that intent or with other authority, and reflects confusion among the lower courts concerning the preemptive scope of IGRA. That confusion directly affects the operation of a federal law designed to protect Indian Tribes, and specifically intended to define jurisdictional boundaries in the traditionally sensitive area of inter-governmental relations among States, the Tribes, and the United States. The need for clarification is great, given the inevitability of disputes between Tribes and their gaming contractors, the rapid growth of the Indian gaming industry and the ease with which intended federal protections can be



avoided under reasoning such as that in the Court of Appeal's decision. The decision below accordingly warrants review by this Court.

### I. IGRA COMPLETELY PREEMPTS THE FIELD OF INDIAN GAMING REGULATION.

#### A. Federal Law

This Court's cases have consistently made clear Congress's "plenary and exclusive power" over Indian affairs. *Bryan* v. *Itasca County*, 426 U.S. 373, 376 n.2 (1976); *see also, e.g.*, *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 234 (1985) ("Indian relations [are] the exclusive province of federal law"). In general, "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *See, e.g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 332-336 (1983); *id.* at 334. Before the enactment of IGRA, this Court used just such an inquiry to conclude that federal law preempted an attempt by California to assert state regulatory jurisdiction over a tribal gaming enterprise. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987), *cert. denied,* 512 U.S. 1221 (1994).

After *Cabazon*, Congress determined that it was "the responsibility of the Congress, consistent with its plenary power over Indian affairs, to balance competing policy interests and to adjust, where appropriate, the jurisdictional framework for regulation of gaming on Indian lands." S. Rep. No. 100-446, *supra*, at 3. Having conducted that balancing, Congress enacted IGRA to "establish[] . . . Federal standards for gaming on Indian lands." 25 U.S.C. § 2702(3). In keeping with Congress's decision to create a comprehensive federal regulatory and jurisdictional scheme, IGRA was "intended to expressly preempt the field in the governance of gaming activities on Indian lands." S. Rep. No. 100-446, *supra*, at 6. In view of the jurisdictional lines

Congress itself drew in the new Act, "Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed." *Id.* Instead, IGRA would occupy the field of Indian gaming, and federal courts would make any determinations called for under the new federal regime. *See Gaming Corp. of America* v. *Dorsey & Whitney*, 88 F.3d 536, 544-545 (8th Cir. 1996) (noting IGRA's "exclusive focus on federal courts").

Under these circumstances, IGRA has been recognized as having "the requisite extraordinary preemptive force necessary to satisfy the complete preemption" doctrine. *See Gaming Corp.*, 88 F.3d at 547; *see also Tamiami Partners, Ltd.* v. *Miccosukee Tribe of Indians*, 63 F.3d 1030, 1047 & n.59 (11th Cir. 1995); App., *infra*, 5a-6a. That doctrine recognizes that "Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 63-64 (1987). A completely preemptive federal law "'displace[s] entirely any state cause of action,'" and "convert[s]" any state claim that might otherwise lie into one that arises under federal law. *Id.* at 64 (quoting *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983)). *See generally Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 393-94 & n.8 (1987) (collecting cases); *Metropolitan Life*, *supra* (Employee Retirement Income Security Act of 1974); *Avco Corp.* v. *Aero Lodge No. 735, Int'l Ass'n of Machinists and Aerospace Workers*, 390 U.S. 557 (1968) (Labor Management Relations Act); *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974) (federal common law relating to Indian lands).

### B. Federal Forum

Moreover, where, as here, there is a "clear incompatibility between state-court jurisdiction and federal interests," federal law requires that claims be adjudicated not



only under federal standards, but in a federal forum. *See Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 478 (1981). The factors relevant to determining such incompatibility include "the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims." *Id.* at 483-484; *see also Tafflin* v. *Levitt*, 493 U.S. 455, 464 (1990).

These factors all support the conclusion that IGRA provides for exclusive federal court jurisdiction over completely preempted claims related to Indian gaming. Achieving IGRA's stated purpose of establishing federal standards for Indian gaming and protecting Indian Tribes from corrupting influences requires that IGRA's regulatory scheme be interpreted and applied uniformly. That goal would be undermined by allowing state courts to adjudicate disputes over the operation of Indian gaming enterprises. Moreover, federal courts are far more likely than state courts to be familiar both with IGRA and with applicable principles of federal Indian law.

Finally, disputes between Indians and non-Indians are quintessential "peculiarly federal" claims, as to which federal courts are not only more expert but predictably more hospitable. *Gulf Offshore*, 453 U.S. at 483-484; *see Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 566-567 (1983) (recognizing that there is "a good deal of force" to the argument that "[s]tate courts may be in-hospitable to Indian rights"); *Oneida Indian Nation*, 414 U.S. at 678 (noting "recurring tension" resulting from state authorities' resistance to principle that "federal law and federal courts must be deemed the controlling considerations in dealing with the Indians"). Thus, for example, while ordinarily it takes "an affirmative act of power under the Supremacy Clause to oust the States of jurisdiction," *Tafflin*, 493 U.S. at 469-470 (Scalia, J., concurring), under basic principles of Indian law, "State law, including judicial jurisdiction, is not applicable to Indian affairs within Indian lands absent the *consent* of

Congress." FELIX S. COHEN, FEDERAL HANDBOOK OF INDIAN LAW 259 (1982 ed.) (emphasis added); *see also Gaming Corp.*, 88 F.3d at 545 ("Every reference to court action in IGRA specifies federal court jurisdiction," and this "exclusive focus on federal courts" is consistent with "the larger jurisdictional framework of Indian law."). In these special circumstances, recognizing state court jurisdiction would be antithetical to the federal interests reflected in IGRA, including the federal government's special responsibility to protect Indian Tribes. *See Great Western Casinos, Inc.* v. *Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 1425-1426 (1999), *cert. denied*, 531 U.S. 812 (2000) (holding that state law claims for wrongful termination of a contract to manage a Tribe's gaming operations are completely preempted by IGRA, and that the state court therefore lacked jurisdiction to adjudicate the claims); *cf. Musson Theatrical Inc.* v. *Federal Express Corp.*, 89 F.3d 1244, 1253 (6th Cir. 1996) (indicating that where complete preemption applies Congress intends "the federal courts to have exclusive subject matter jurisdiction over the preemption defenses to state law claims"); *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922, 925-926 (5th Cir. 1997) (same).[7]

[7] The Court of Appeal agreed that where IGRA completely preempts state claims, "the state court does not have jurisdiction over the action." App., *infra*, 5a (*citing Great Western Casinos, Inc.*, 74 Cal. App. 4th at 1425-1426). The court's decision that a state trial court should nonetheless exercise jurisdiction over the claims at issue here, over the Band's objection that the claims must be pursued in federal court, constitutes a "final judgment[]" on these federal issues for purposes of 28 U.S.C. § 1257(a). *See Local No. 438 Constr. & General Laborers' Union AFL-CIO* v. *Curry*, 371 U.S. 542, 5449 (1963) (Court had jurisdiction under 28 U.S.C. § 1257 despite remand to state trial court for adjudication of state-law claims; federal question whether claims fall within exclusive jurisdiction of National Labor Relations Board was separate from the merits and ripe for review); *see also Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 483 (1975) (discussing *Local No. 438 Constr.* as example of situation satisfying final judgment requirement of 28 U.S.C. § 1257).



## II. THE COURT OF APPEAL IMPROPERLY NARROWED IGRA'S PREEMPTIVE SCOPE.

### A. IGRA Preempts State Claims Relating to Control of Tribal Gaming Operations

In order to fulfill Congress's intent that IGRA broadly preempt claims involving Indian gaming operations—and that federal courts, applying IGRA, adjudicate such claims—IGRA's preemptive scope must encompass claims that are integrally related to a Tribe's conduct or control of its gaming operations. The claims at issue here, which arise from the Band's decision to terminate a non-Indian contractor and reassert control over its gaming operation, meet that description. The Court of Appeal's decision deprives IGRA of its intended preemptive force in such cases.

In this case, the NIGC expressly found that AVC and its president were unsuitable to manage a tribal casino. AVC then prevailed on Table Mountain's then-Chairman to replace an existing but unapproved—and therefore void—management contract with two new agreements, which (i) transferred to AVC almost $17 million in tribal funds, in supposed exchange for the termination of contractual "rights" that the NIGC had already determined were unenforceable, and (ii) promised AVC tens of millions of dollars more, for performing "consulting" services that were essentially indistinguishable from the "management" services the NIGC had forbidden it to provide.

After a change in tribal leadership, precipitated in part by concern about the relationship between AVC and the former tribal Chairman, the Band sought to regain control of its gaming operations, and accordingly terminated its relationship with AVC. AVC sued for breach of contract. Applying its truncated version of the complete preemption

doctrine, the Court of Appeal held that AVC's claims fell "outside . . . IGRA's protective structure" for three reasons: Because AVC had alleged "state law causes of action"; because the Band's argument that the purported agreements are void under IGRA was simply a federal "defense," which in the court's view somehow meant that the alleged agreements were "not subject to IGRA regulation"; and because AVC's claim for more than $15 million in damages, rather than for reinstatement of its position under the alleged contract, would not "intrude on the [Band's] *control* of its gaming enterprise." App., *infra*, 6a-8a. None of those arguments is tenable.

To begin with, it is far from clear that AVC's complaint can properly be read to allege "state law causes of action for breach of contract." *Id.* at 6a. To the contrary, the very writings on which AVC relies make clear the parties' understanding and intent that any dispute would be "governed by the laws of the United States." *See* p. 7, *supra*. Moreover, under IGRA, the question whether the contracts at issue here are enforceable is a matter of federal law. *See* p. 4, *supra*; *cf. United States ex rel. Bernard* v. *Casino Magic*, 293 F.3d 419, 425 (8th Cir. 2002) (question whether contract was a "management contract" under IGRA turned on whether contract and related agreements "served as a management contract implicitly if not explicitly," the key issue being "whether [the contractor], in fact, had managerial control" as defined by IGRA and the NIGC's regulations). But even if the complaint on its face raised only state-law claims, to which the Band's arguments under IGRA would normally present only a federal defense, those circumstances are precisely the ones in which the complete preemption doctrine operates—*converting* what would normally be a state cause of action into a federal one. *See, e.g., Metropolitan Life Ins. Co.*, 481 U.S. at 64.

Nor is there any force to the court's assertion that a claim for more than $15 million in damages for an alleged breach of contract would not "undermine Table Mountain's



decision to terminate its business relationship with" AVC, or "diminish Table Mountain's control over its gaming operation." App., *infra,* 8a. Potential actions posing the threat of enormous money damages must be preempted if IGRA is to provide Indian Tribes with the meaningful federal protection the Congress clearly intended. That is especially true of claims like AVC's, which are based on Table Mountain's decision to reclaim control of its gaming enterprise from a management company that the NIGC had already found to pose the very dangers of "unsuitable" management that IGRA was designed to prevent. This conclusion does not depend on whether a particular arrangement is properly characterized as involving "management" or simply "consulting": As is clear from its exceptionally detailed regulation of all matters touching on the operation of a gaming enterprise, IGRA is intended to occupy the entire field of gaming management, including relations between Tribes and non-Indian advisers.[8] The Court of Appeal's narrow view of IGRA's preemptive scope will frustrate Congress's intent to provide federal standards and a federal forum to adjudicate disputes over Indian gaming.

### B. IGRA Preempts State Claims Where the Dispute Turns On Legal Conclusions Under IGRA

The error in the Court of Appeal's approach is particularly clear where, as in this case, the dispute at issue

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[8] *See, e.g., Sam L. Majors Jewelers.*, 117 F.3d at 925 (noting that a federal regulatory regime may be "so extensive and comprehensive that it is possible to infer that Congress intended any related cause of action to be governed under federal law"). IGRA's detailed regulatory regime is outlined briefly at pp. 4-5 & nn. 2-3, *supra*. *See generally* 25 U.S.C. §§ 2710(b), (d) (describing extensive regulation of Class II gaming, including regulation of tribal ordinances, licensing, audits, background investigations, and environmental and public health and safety regulation); 25 U.S.C. § 2706 (detailing the NIGC's duty to monitor gaming on a continuing basis, including inspection of gaming premises, inspection and audit of gaming records, and promulgation of regulations and guidelines to implement IGRA's provisions).

not only relates to a Tribe's control of its gaming operation, but turns on legal conclusions *under IGRA*. The Court of Appeal apparently realized the dispositive force of IGRA in this case. App., *infra*, 6a-7a. It nonetheless reasoned that *whether or not* the alleged contracts between AVC and the Band amounted to a "management" arrangement that was *void* under IGRA, AVC's claims should be remanded to state court because the contracts were somehow "not subject to IGRA regulation." *Id.* at 6a. Particularly in view of the court's acknowledgement of IGRA's completely preemptive force, there is no way to make sense out of that conclusion.

In *Tamiami Partners, Ltd.* v. *Miccosukee Tribe of Indians*, the Eleventh Circuit concluded that a breach of contract claim brought by a gaming management company against a Tribe arose under federal law. 63 F.3d at 1047. In that case, the Tribe had denied the management company a gaming license, and the company alleged that the license was denied in bad faith for the "sole purpose" of ousting Tamiami Partners as managers of the Tribe's gaming enterprise. *Id.* The court reasoned that a management contract "incorporates—by operation of law if not by reference—the provisions of IGRA and the NIGC's regulations that govern [a tribal gaming enterprise's] operations." *Id.* Because resolution of the claim would require the interpretation of these provisions under IGRA, the claim "aris[es] under" federal law. *Id.*

In a later decision arising out of the same set of disputes, the Eleventh Circuit reaffirmed that decision in the context of a federal suit to compel arbitration, concluding that Tamiami's demand for arbitration presented a federal question, because it required the court to interpret IGRA and its implementing regulations governing Indian gaming licensing procedures. *Tamiami Partners, Ltd.* v. *Miccosukee Tribe of Indians*, 177 F.3d 1212, 1222-1223 (11th Cir, 1999), *cert. denied*, 529 U.S. 1018 (2000); *see also Bruce H. Lein Co.* v. *Three Affiliated Tribes*, 93 F.3d 1412, 1421-1422 (8th Cir. 1996) (sustaining federal jurisdiction over contract and



arbitration dispute between Tribe and gaming contractor, in part because "aspects" of the dispute raised federal questions, "[p]articularly where the entire association between the parties (and their various disputes) arise under IGRA"); *Tom's Amusement Co.* v. *Cuthbertson*, 816 F. Supp. 403, 406 (W.D.N.C. 1993) (asserting federal jurisdiction over contract dispute between gaming contractor and non-Indian supplier, in part because "[t]he interpretation of contractual provisions involving gaming establishments" subject to IGRA "involves federal question issues"). Similarly, the question whether a management contractor is evading IGRA by unlawfully providing "management" services under the guise of a "consulting" contract, or whether the totality of the contractual relationship constitutes a de facto management contract under IGRA, can only be determined by interpreting and applying federal law.

## III. THE DECISION BELOW REFLECTS CONFLICT AND UNCERTAINTY IN THE LOWER COURTS.

### A. The *Gaming Corporation* Approach

The Court of Appeal's decision cannot be reconciled with the approach to IGRA preemption adopted by the Eighth Circuit in *Gaming Corporation*, which recognized that any claim that would interfere with a Tribe's ability to control its own gaming operations should fall within IGRA's preemptive scope. *See* 88 F.3d at 549. *Gaming Corporation* considered claims brought by a gaming contractor against a Tribe's law firm, alleging that the firm had wrongfully interfered with a tribal licensing process. *See id.* at 540. After analyzing the issue at some length and concluding that IGRA completely preempted some state-law claims (*id.* at 543-548), the court turned to consider the scope of that preemption (*id.* at 548-550).

Focusing on the statement in IGRA's legislative history that Congress intended to "expressly preempt the field in the governance of gaming activities on Indian lands" (*id.* at 548, quoting S. Rep. No. 100-446, *supra*, at 6), the court

concluded that "[t]he key question is whether a particular claim will interfere with tribal governance of gaming." *Id.* at 549. Pointing out that a Tribe "has a great interest in not having its decisions questioned by the tribunal of another sovereign," the court explained that, in general, gaming management companies should not have "the right to use state law to challenge the outcome of an internal governmental decision" reached by a Tribe. *Id.* In particular, the court explained that claims completely preempted by IGRA would likely include any "that would intrude on the tribe's regulation of gaming," or even "require examination of the relationship" between the Tribe *and its lawyers* (*id.* at 550 (emphasis added))—even though the claims at issue in that case were brought by the gaming manager against the lawyers, not against the Tribe itself.[9]

The relationship between a Tribe and its gaming contractor is even more clearly related to the Tribe's conduct of its gaming operations. Accordingly, any examination of that relationship—in this case, for example, whether the Band sought to wrest control of its gaming operation from a management company already found to be "unsuitable" by the NIGC, or whether that company was providing management services—is even more clearly within IGRA's field of preemption. *See Abdo* v. *Fort Randall Casino*, 957 F. Supp. 1111, 1114 (D.S.D. 1997) (preemptive scope of IGRA encompasses claims involving tribe's "relationship with agents" hired to assist in the process of regulated gaming; a dispute over whether a contract is in fact a consulting agreement or a management agreement is completely preempted) (citing *Gaming Corp.*, 88 F.3d, at 550)); *Calvello* v. *Yankton Sioux Tribe*, 899 F. Supp. 431,

[9] By contrast, as an example of "[p]otentially valid claims under state law" that "would not interfere with the nation's governance of gaming," the court cited "a count alleg[ing] a violation of a duty owed [by the defendant lawyers directly] to one of the management companies[.]" *Id.*



435 (D.S.D. 1995) (asserting federal jurisdiction over dispute concerning whether contract was an employment contract or an IGRA management contract); *but see Iowa Mgmt. & Consultants* v. *Sac & Fox Tribe*, 207 F.3d 488, 489 (8th Cir. 2000) (discussed below).

The decision below cannot be squared with the view, shared by these federal courts, that IGRA provides federal standards, and a federal forum, for the adjudication of disputes between an Indian Tribe and a non-Indian gaming contractor over the conduct of Indian gaming. Any contractual dispute relating to a Tribe's conduct or control of its gaming operations is completely preempted under IGRA.

### B. Uncertainty Over IGRA's Preemptive Scope

There is also a lack of clear guidance in the case law even on the narrower question whether a dispute focused specifically on the nature and validity of a contract between a Tribe and a non-Indian contractor is within IGRA's preemptive scope. In *Iowa Management & Consultants*, for example, a gaming contractor sued a Tribe in federal court, seeking to compel arbitration of a dispute under a "consulting" agreement. 207 F.3d at 489. With little analysis, the court of appeals agreed with the defendant Tribe that the suit was "a routine contract action . . . over which federal courts do not have jurisdiction," despite the plaintiff's suggestion that the Tribe was likely to defend in part on the ground that the purported contract was void, under IGRA, as a management contract that had not been approved by the NIGC. *Id.*; *cf. Missouri ex rel. Nixon* v. *Coeur D'Alene Tribe*, 164 F.3d 1102, 1109 (8th Cir. 1999), *cert. denied*, 527 U.S. 1039 (1999) (remanding to state court to determine whether property was Indian land, because IGRA does not preempt state regulation of gaming on non-Indian lands).

Judge Bright dissented, arguing in part that "management agreements for gaming operations . . . incorporate the terms of the IGRA by operation of law," so that "disputes arising under such management agreements are

disputes arising under the laws of the United States[.]" *Id.* at 490 (Bright, J., dissenting); *see also Gaming World Int'l, Ltd.* v. *White Earth Band of Chippewa Indians*, 317 F.3d 840, 846, 848 (8th Cir. 2003) (distinguishing *Iowa Management*; claim that management contract was never approved by NIGC invokes federal jurisdiction because it is not a "routine contract action," but "raise[s] issues of federal law" under IGRA's "regulatory scheme"). Judge Bright's dissent in *Iowa Management* relied on the Eleventh Circuit's decision in *Tamiami Partners, Ltd.*, 63 F.3d at 1047, discussed above, which also recognized the breadth of federal jurisdiction under IGRA. *Cf. Cabazon Band of Mission Indians* v. *Wilson*, 124 F.3d 1050, 1055-1056 (9th Cir. 1997) (claim for enforcement of provision of IGRA Compact arises under federal law even if there would be no federal jurisdiction over "run-of-the-mill contract claims brought by Indian Tribes"); *see also Bruce H. Lein Co.*, 93 F.3d at 1421-1422 (contract claims arose under federal law in part because "entire association between the parties" arose under IGRA); *Tom's Amusement Co.*, 816 F. Supp. at 406 (contract claims arose under federal law in part because the interpretation of contractual provisions involving gaming establishments is subject to IGRA).

The decision below reflects this confusion over the proper scope of preemption under IGRA. Without intervention by this Court, the lack of clear authority will present a recurring obstacle to the efficient and uniform administration of Indian gaming. *See, e.g.,* Petition for a Writ of Certiorari in *Sac & Fox Tribe of the Mississippi in Iowa* v. *Iowa Mgmt. & Consultants, Inc.*, No. 02-1563 (docketed April 29, 2003) (also raising question whether IGRA completely preempts state court jurisdiction over a dispute concerning the nature and validity of a contract between a Tribe and a non-Indian casino management company).



## IV. THIS COURT SHOULD PROVIDE DEFINITIVE GUIDANCE.

The need for authoritative guidance in this area is particularly pressing for at least two reasons. First, decisions like that entered by the Court of Appeal in this case allow non-Indian contractors to frustrate IGRA's comprehensive regulatory scheme, and Congress's purpose of providing federal protection to gaming Tribes, simply by styling their gaming contracts as "consulting agreements." The NIGC's Inspector General has recognized this problem, noting that "[a]lmost all tribes are utilizing consulting agreements to circumvent the regulatory and enforcement authority vested in the [NIGC]." Donald L. Bartlett & James B. Steele, *Special Report: Indian Casinos*, TIME MAGAZINE, Dec. 16, 2002, at 48. The decision below encourages such circumvention, by permitting adjudication of contract disputes involving such arrangements to be diverted from the federal courts to state courts, and to be decided under state contract law rather than under the supervening federal standards that Congress intended would apply under IGRA. *See* App., *infra*, 6a-8a. Congress instead intended that IGRA, applied by the NIGC or federal courts, should provide the exclusive framework for governing virtually every aspect of Indian gaming. *See, e.g.*, 25 C.F.R. § 502.5 (providing for jurisdiction over any contract that "is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe . . . and a management contractor"). Disputes between Tribes and their gaming contractors over such issues are common, and the jurisdictional problems they raise are accordingly both varied and recurrent. Clarifying the proper jurisdictional framework for the resolution of these disputes is a matter of great and growing importance, particularly in view of the rapid growth of the tribal gaming industry, which in fiscal 2001 produced net revenue of almost $13 billion. *See* [http://www.nigc.gov/nigcControl?option=TRIBAL_REVENUE.].

Second, the issues raised by this case implicate the traditionally sensitive—and uniquely federal—area of relations among the Nation's federal, state, and tribal governments. As the *Gaming Corporation* decision explains, legal issues relating to tribal gaming must be evaluated in the special context of Indian law as a whole. *See* 88 F.3d at 547-548. Not only are "Indian relations the exclusive province of federal law," *Oneida Indian Nation*, 470 U.S. at 234, but the federal government's special trust relationship with Indian Tribes gives Congress "controlling authority . . . in respect to the care and protection of the Indians." *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564 (1903). The question whether contract disputes between Tribes and private contractors over the management and control of tribal gaming enterprises should be resolved by state courts as a matter of ordinary state-law litigation, or by federal courts applying federal law (including IGRA itself), must be determined in the context of this special federal responsibility for Indian Tribes. *See Gaming Corp.*, 88 F.3d at 547 ("traditional notions of Indian sovereignty provide a crucial backdrop against which any assertion of state authority must be assessed") (*citing White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 1443 (1980)).

As *Gaming Corporation* recognized, the statement in IGRA's legislative history that the Act was "intended to expressly preempt the field" of Indian gaming "demonstrates the intent of Congress that IGRA have extraordinary preemptive power, both because of its broad language and because it demonstrates that Congress foresaw that it would be federal courts which made determinations about gaming." 88 F.3d at 544-545. This case and others like it demonstrate that "determinations about gaming" (*id.*) include, importantly, determinations with respect to disputes between Tribes and non-Indian contractors over the management and control of tribal gaming enterprises. In this context Congress has already struck its own balance among federal, state, and tribal interests—and that balance completely preempts the



ordinary application of state law to contracts or other matters relating to the conduct of Indian gaming.

The decision of the California Court of Appeal in this case denies the preemptive force of IGRA in a wide category of cases in which disputes between a Tribe and a gaming contractor are integrally related to the Tribe's conduct or control of its gaming operations. That decision deprives Table Mountain, and will deprive other Tribes, of the federal right to have preemptive federal law applied in a federal forum. It merits further review by this Court.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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