No. 04-581

In The
Supreme Court of the United States

TAXPAYERS OF MICHIGAN AGAINST CASINOS,

Petitioner,

v.

THE STATE OF MICHIGAN, NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV, AND GAMING ENTERTAINMENT, LLC,

Respondents.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress delegated to the States under the Indian Gaming Regulatory Act power to establish the regulatory rules applicable to Indian casino gambling within a State's borders?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The only parties to this proceeding are Petitioner and Respondents. Pursuant to Supreme Court Rule 29.6, Petitioner Taxpayers of Michigan Against Casinos states that it has no parent corporation or subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Taxpayers of Michigan Against Casinos ("TOMAC"), respectfully petitions this Court to review the judgment of the Michigan Supreme Court.

OPINIONS BELOW

The opinion of the Michigan Supreme Court (App., 1-110) is reported at 471 Mich. 306, 685 N.W.2d 221 (2004). The opinion of the Michigan Court of Appeals (App., 111-37) is reported at 254 Mich. App. 23, 657 N.W.2d 503 (2002). The opinion of the trial court (App., 138-56) is unreported.

JURISDICTION

The Michigan Supreme Court's judgment was entered on July 30, 2004. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Indian Gaming Regulatory Act, 18 U.S.C. § 1166(a), provides in relevant part:

> Subject to [class III gaming conducted under a State-Tribal compact], for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the

same manner and to the same extent as such laws apply elsewhere in the State.

The Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(5), provides in relevant part:

> Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

INTRODUCTION

This is one of several cases recently decided by state supreme courts and the United States Court of Appeals for the Ninth Circuit that address the nature of the federal power delegated to and exercised by the States under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (IGRA). Contrary to the Ninth Circuit and several state supreme courts, the Michigan Supreme Court concluded that Congress delegated no regulatory power to the States over tribal gaming when it enacted IGRA. This was a crucial – and erroneous – determination of federal law that drove a majority of the Michigan Supreme Court to validate four State-Tribe gambling compacts despite the absence of support from the legislative majority necessary to approve a legislative enactment in Michigan. As dissenting Justice Markman recognized, this erroneous construction of federal law transformed "a realm in which the federal government has unequivocally authorized Michigan to exercise regulatory authority . . . into the exclusive province of a single public official, the Governor. . . ." (App., 109.)

The federal issues raised in this dispute present recurring questions of national significance, as tribal casinos – and the lawsuits they invariably spawn – continue to proliferate. The importance of the question presented, the uncertainty caused by the split of authority, and the significance of this Court's oversight of the compacting process all counsel in favor of this Court's grant of the petition.

STATEMENT OF THE CASE

I. Overview.

In December 1998, Michigan's Governor negotiated and signed gaming compacts with four Indian Tribes: the Little Traverse Bay Band of Odawa Indians, the Pokagon Band of Ottawa Indians, the Little River Band of Ottawa Indians, and the Notawaseppi Huron Potawatomi. The compacts authorized four new Indian casinos in the State of Michigan that would have been illegal under State and federal law in the absence of a valid compact. The compacts also created the regulatory framework for the authorized casinos, and specified payments due to the state and local governments in exchange for the casino franchise.

As contemplated by IGRA, the compacts impact State public policy, create new rules and obligations that bind those outside the legislature, and replace the existing state laws and regulations with the terms of the compacts themselves. Among other things, the compacts:

- create an entire regulatory scheme for Indian gaming in Michigan substantially different than the regulatory scheme defined by Michigan law and made applicable to the Tribes under IGRA, 18 U.S.C. § 1166;
- determine the jurisdictional balance between the State of Michigan and the Tribes;
- determine how many casinos each Tribe will be allowed to have in Michigan;
- set the minimum age for gambling in the four Indian casinos at eighteen, despite existing Michigan law that generally prohibits casino gambling by anyone younger than twenty-one;
- decide how much revenue to raise for the State and where that revenue will go;
- bar casinos within 150 miles of Detroit so as to protect existing Detroit casinos from competition, while leaving other entertainment or business venues unprotected; and
- mandate new local units of government, known as "Local Revenue Sharing Boards," to receive and distribute payments due from the Tribes under the compacts.

Absent the compacts, the permitted gambling would be a crime under Michigan law. Mich. Comp. Laws §§ 750.301-750.303, 750.309. *See* 18 U.S.C. § 1166; *see also United States v. Cook*, 922 F.2d 1026, 1034 (2d Cir. 1991) (affirming conviction for operation of slot machines on Indian lands in violation of New York law).

The four compacts were originally enrolled as House Bill 5872 (1998) and offered for approval as a legislative

enactment. *See Baird v. Babbitt*, No 5:99-CV-14, slip op. at 2 (W.D. Mich. 1999). But legislative approval for this bill never materialized. *Id.* Accordingly, the Michigan Legislature proceeded to "approve" the compacts by resolution, HCR 115 (1998). Unlike a legislative bill, which requires a majority of elected and serving members for passage, a resolution may be passed by a majority of the legislators present at the time a vote is taken, Mich. Const. 1963, art. 4, § 26; Mich. Senate R. 3.107, and is ordinarily reserved for more mundane matters, such as commemorating the 150th anniversary of the selection of Lansing as Michigan's capital, or urging the President to designate the Detroit River as an American Heritage River. (App., 55.)

Casino supporters were forced to proceed by resolution, because the compacts lacked the necessary support to gain approval by a majority of Michigan's elected and serving legislators. In fact, when HCR 115 was first considered during the 1998 lame duck legislative session of the Michigan House of Representatives, it was defeated 52 to 39. Over the next three days, the resolution was defeated twice more before the House finally approved it 48 to 47, a full seven votes short of the 55 that were required to pass legislation. *See* 1998 Journal of the House (listing 108 members).

II. The Trial Court Holds the Compacts Invalid.

Petitioners filed suit, seeking a declaratory ruling that the compacts were unconstitutional because they failed to garner the support of a majority of Michigan's legislators. In its Opinion dated January 18, 2000, the Ingham County Circuit Court agreed. (Cir. County Ct. Op., App., 138-56.) Relying on state supreme court decisions in Kansas and

New Mexico, as well as this Court's decisions in *INS v. Chada*, 462 U.S. 919, 952 (1983), and *Rodriguez v. U.S.*, 480 U.S. 522, 526 (1987), the court concluded that HCR 115 was legislation that could only be approved by bill, not resolution. (App., 144-47.) In particular, the court relied on the compacts' regulatory decisions to (1) authorize casino style gambling by persons under the age of 21, activity that Michigan law otherwise prohibits, and (2) mandate the creation of local revenue sharing boards. (App., 148, 150.) In so holding, the court specifically rejected the defendants' argument that "the State has no authority to regulate any casino gambling on Indian land," recognizing that public policy is implicated by the compacts' lowering of the legal gambling age and their provision for an extensive regulatory scheme over the casinos. (App., 149-50.)

III. The Michigan Supreme Court Concludes that IGRA Delegates No Regulatory Power to the States.

On November 12, 2002, the Michigan Court of Appeals reversed the trial court decision, concluding that the power of the states to regulate in the area of Indian gaming is preempted by federal law (App., 134), notwithstanding IGRA's plain language to the contrary. *See* 18 U.S.C. § 1166. The Michigan Supreme Court accepted leave to appeal and affirmed in a fractured and divided opinion.

The Michigan Supreme Court began with a review of IGRA, concluding that "State legislatures have no regulatory role under IGRA aside from that negotiated between the tribes and the states." (App., 12; *see also id.* at 13 ("The only way the states can acquire regulatory power over tribal gaming is by tribal consent of such regulation in a compact.").)

The court then examined 18 U.S.C. § 1166(a), which specifically states that "for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling . . . shall apply in the same manner and to the same extent as such laws apply elsewhere in the State." The court did not read this plain language as giving the States regulatory power, but rather read the provision as an incorporation of "state laws as the federal law governing nonconforming tribal gaming." (App., 14.) This logic led to the court's astonishing conclusion that "when the Legislature approves a tribal-state compact, it approves a change in *federal* law rather than its own." (*Id.*) In sum, the court said, although section 1166 "effectively 'borrows' Michigan law for purposes of federal law, it does not delegate any regulatory power to the states." (App., 15.)

Having concluded that the State-Tribe compacting process involves no State regulation, but rather a State's amendment of federal law, the Michigan Supreme Court then held that such an amendment could be accomplished permissibly by resolution, rather than legislation. (App., 19-23.) Recognizing this Court's pronouncement that "[t]he essentials of the legislative function are the determination of legislative policy and its formulation and promulgation as a defined and binding rule of conduct," (App., 24, quoting *Yakus v. United States*, 321 U.S. 414, 424 (1944)), the Michigan Supreme Court concluded that the Michigan Legislature had done nothing more than assent to a contract between two sovereign entities, because the Legislature "lacks the authority to bind the tribes at all." (App., 24-25.) In the court's words: "Through IGRA, Congress has determined that states may not unilaterally impose their will on the tribes regarding gaming; rather,

the states may only negotiate with the tribes through the compacting process." (App., 25.)

Justices Stephen J. Markman and Elizabeth A. Weaver dissented. Justice Weaver explained that the "approval of a compact with an Indian tribe involves numerous policy decisions." (App., 54.) She then noted the split in authority, stating that she "would agree with the other state courts that have examined this issue, and hold that committing the state to the myriad policy choices inherent in negotiating a gaming compact constitutes a legislative function," thus requiring approval by legislative act. (*Id.*)

Justice Markman recognized that in enacting IGRA, "Congress provided the consent to the states that was found lacking in [this Court's decision in] *Cabazon* to regulate tribal gambling in the same manner and to the same extent that states regulate gambling elsewhere within their borders." (App., 64.) Justice Markman then noted the split of authority between the majority's reasoning and a recent Ninth Circuit decision, *Artichoke Joe's California Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003):

> My colleagues in the majority . . . simply ignore the relevance of § 1166 in determining the lawfulness, in the absence of a compact, of casino gambling on Indian land. They do this by summarily noting and relying on the fact that it is the federal government that is charged under § 1166 with enforcing the applicable state law regulations. As already indicated, I agree with the United States Court of Appeals for the Ninth Circuit in *Aritchoke Joe's*, that, "the fact that the federal government retained the enforcement power does not change the fact that states may enact laws and regulations concerning gambling

> that have an effect in the absence of a compact on Indian lands." That is, the states retain *substantive* authority over gambling law on Indian lands. . . . *The relevant legislative history indicates that Congress chose to make state gambling laws applicable to tribes* not for reasons of "expediency," but *to specifically give states some regulatory power over casino gambling on Indian land.*

(App., 77-78 n.41 (emphasis added).)

Finally, Justice Markman took issue with the majority's conclusion that the States lack the authority to bind tribes:

> Although § 2710(d) provides for a negotiation process, the tribes are *not* wholly free to withhold their "consent" from the legislature to enter into contracts regulating casino gambling on their lands and to, instead, engage in such gambling without compacts. This is because in the absence of a compact, casino gambling is *unlawful.* § 2710(d)(1).

(App., 94.) Thus, Justice Markman concluded:

> The result of the majority's analyses in this case is that a matter of fundamental policy concern to the people of this state – casino gambling and its social and economic impact – a realm in which the federal government has unequivocally authorized Michigan to exercise regulatory authority, has now been transformed into the exclusive province of a single public official, the Governor. . . . *The [majority's] decision represents the first state supreme court in the United States to conclude that a tribal-state gambling compact does not constitute "legislation"* and, therefore,

> does not require the approval of the branch of government that is most directly representative of the people.

(App., 109-110 (emphasis added).)

REASONS FOR GRANTING THE PETITION

This case presents questions of national legal and societal importance that this Court has not previously addressed. The Michigan Supreme Court has held that Congress did not intend to delegate regulatory power over Indian gaming when it enacted IGRA and that, as a result, there is no need for a State legislative act to approve a State-Tribe compact. But the Michigan Supreme Court's holding is inconsistent with the text and intent of IGRA; further widens a split in authority between the Michigan Supreme Court and the supreme courts of other states, as well as the Ninth Circuit; and leaves the meaning of IGRA, a key statute governing State and Indian affairs, in a state of impenetrable confusion. This Court should grant the petition to clarify the balance of power that IGRA created between the tri-partite sovereigns of the United States, the several States, and Indian Tribes, to resolve the split in authority, and to eliminate the resulting confusion.

I. This Court Should Grant the Petition to Resolve a Split of Authority Between the Michigan Supreme Court and a Number of Other State and Federal Courts on an Important Issue of Federal Law.

A core ground for granting a petition for a writ of certiorari is a conflict between state supreme courts

regarding matters of federal law. S. Ct. R. 10(b); *Illinois v. Wardlow*, 528 U.S. 119, 123 n.1 (2000) (certiorari granted to resolve conflict among state courts over "whether unprovoked flight is sufficient grounds to constitute reasonable suspicion" under the Fourth Amendment); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 753 & n.1, 105 S. Ct. 2939, 2942 & n.1 (1985) (certiorari granted to resolve conflict among state courts over whether certain First Amendment protections previously determined by the U.S. Supreme Court apply to non-media defendants). Certiorari is also appropriate to resolve conflicts between state and federal appellate courts as to matters of federal law, including the interpretation of congressionally approved interstate compacts. *Cuyler v. Adams*, 449 U.S. 433, 435-36 (1981). Here, the Michigan Supreme Court's decision furthers a conflict among state supreme courts and creates a conflict with the Ninth Circuit Court of Appeals regarding the balance of State and Tribal power under IGRA, and therefore warrants this Court's immediate resolution.

In *Saratoga County Chamber of Commerce v. Pataki*, 798 N.E.2d 1047 (N.Y. 2003), for example, the New York Court of Appeals held unequivocally that IGRA State-Tribe compacts represent State regulation and, therefore, legislation:

> gaming compacts are laden with policy choices, as Congress well recognized. . . . *Compacts* addressing [issues such as the application of the criminal and civil laws, the allocation of criminal and civil jurisdiction, and taxation] *necessarily make fundamental policy choices that epitomize "legislative power."* Decisions involving licensing, taxation and criminal and civil jurisdiction

> require a balancing of differing interests, a task the multi-member representative Legislature is entrusted to perform under our constitutional structure.

Id. at 1060 (emphasis added).

Other state courts have reached the same conclusion in a variety of contexts, including the supreme courts of Kansas, New Mexico, Rhode Island, and Wisconsin. *Panzer v. Doyle*, 680 N.W.2d 666, 687 (Wis. 2004) (agreeing with courts in other jurisdictions that have "concluded that entering into a tribal-state compact under IGRA, thereby committing the state to a particular position with respect to Indian gaming, involves subtle and important decisions regarding state policy that are at the heart of legislative power."); *State ex rel. Clark v. Johnson*, 904 P.2d 11, 23 (N.M. 1995) ("We also find the Governor's action to be disruptive of legislative authority because the compact strikes a detailed and specific balance between the respective roles of the States and the Tribe in [a number of respects]."); *Narragansett Indian Tribe of Rhode Island v. Rhode Island*, 667 A.2d 280, 281-82 (R.I. 1995) (only Rhode Island Assembly had legislative power required to execute a gaming compact); *State ex rel. Stephan v. Finney*, 836 P.2d 1169, 1185 (Kan. 1992) ("[M]any of the provisions in the compact would operate as enactment of new laws and the amendment of existing laws."); *accord American Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1072 (Governor engages in a "kind of legislative act by establishing state gaming policy"). *But see Confederated Tribes of Chehalis Reservation v. Johnson*, 958 P.2d 260, 267 (Wash. 1998) ("Tribal-state gaming compacts are agreements, not legislation, and are interpreted as contracts.").

Indeed, as Michigan Supreme Court Justice Markman noted in dissent, "*every state supreme court that has directly considered this issue has held that tribal-state gaming contracts constitute legislation.*" (App., 86 n.48 (emphasis added).) And the fact that so many published decisions address this issue demonstrates the recurring problem of how to define the regulatory balance struck between the federal government, state governments, and tribal governments since Congressional enactment of IGRA.

In contrast to the above authorities, the Michigan Supreme Court has now concluded that State-Tribe gaming compacts may be authorized without a legislative enactment. This conclusion followed directly from the court's mistaken interpretation of federal law, specifically its determination that Congress delegated no regulatory authority to States over tribal gaming when Congress enacted IGRA.[1] But as the Ninth Circuit explained in

[1] The Michigan Supreme Court purported to apply the four factor test this Court articulated in *INS v. Chada*, 462 U.S. 919, 952 (1983), for determining whether a legislative act constitutes "legislation," (App., 22-26), but its erroneous conclusion that IGRA delegates no regulatory authority to the States pre-ordained the outcome of the analysis. For example, based on its misunderstanding of federal law, the Michigan Supreme Court stated that "the compacts do not give the state the power to alter the rights, duties, or relations of anyone subject to the Legislature's authority." (App., 23.) The Court's statement is demonstrably incorrect. Under 18 U.S.C. § 1166, Michigan's general prohibition against casino gaming applies unless and until a compact or other exercise of legislative law-making provides otherwise. Accordingly, approval of a compact plainly alters the legal relations of parties outside the Michigan legislature. Likewise, the Michigan Supreme Court's claim that "[t]hrough IGRA, Congress has determined that states may not unilaterally impose their will on the tribes regarding gaming," is palpably wrong in light of the plain language of § 1166, as described by *Artichoke Joe's*.

Artichoke Joe's, the Michigan Supreme Court's assumption is simply wrong:

> IGRA responded [to *Cabazon*] by creating a statutory basis for gaming regulation that introduced the compacting process as a means of *sharing with the states the federal government's regulatory authority over class III gaming*. Simultaneously, IGRA put into effect 18 U.S.C. § 1166, which provides that "all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." The federal government retained the power to prosecute violations of state gambling laws in Indian country, so as to preserve the delicate balance of power between the States and the tribes. However, *the fact that the federal government retained that power does not change the fact that California may enact laws and regulations concerning gambling that have an effect on Indian lands via § 1166.*

353 F.3d at 722 (emphasis added). *But see Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 546 (8th Cir. 1996) ("Congress thus left states with no regulatory role over gaming except as expressly authorized by IGRA, and under it, the *only* method by which a state can apply its general civil laws to gaming is through a tribal-state compact.") (emphasis added).

The Michigan Supreme Court's interpretation of IGRA and IGRA compacts thus adds to a growing split of authority, with published decisions of the Ninth Circuit and five sister supreme courts on one side, and the

Michigan Supreme Court, the Washington Supreme Court, and the Eighth Circuit on the other. The Michigan Supreme Court's interpretation also directly thwarts the will of Congress, which intended to delegate substantial regulatory authority over tribal gaming to the States. Without resolution of the conflict by this Court, lower courts will continue to disagree over the scope of State power and the validity of State-Tribe compacts, and the law will remain unsettled. This Court's immediate intervention is required to settle this important area of the law, and to vindicate 18 U.S.C. § 1166, which has been rendered a nullity by the Michigan Supreme Court's decision.

II. The Issues Presented by this Case Are of National Importance.

A. State-Tribe compacts are of national interest as a matter of U.S. Constitutional law.

This dispute arises out of four State-Tribe compacts that Congress authorized through IGRA under the Compact Clause of the United States Constitution, art. I, § 10, cl. 3, the same provision that allows Congress to sanction interstate compacts. As this Court has reiterated numerous times, such compacts, between sovereign governments, are federal laws subject to federal judicial review, and thus require only limited deference to state court decisions reviewing the compacts, even if such review involves interpretation of state constitutional law.

In *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951), this Court addressed the validity of an interstate pollution compact, reversing a decision of the West Virginia Supreme Court that the compact was in conflict with the West Virginia Constitution. This Court began by

noting that *a "compact* is more than a supple device for dealing with interests confined within a region[,] it *is* also *a means of safeguarding the national interest. . . ." Id.* at 27 (emphasis added). "Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts." *Id.* at 28. Moreover, while this Court traditionally defers to "what the highest court of a State deems to be the law and policy of its State," this Court is "free to examine determinations of law by State courts in the limited field where a compact brings in issue the rights of other States and the United States," even where "local legislation and questions of state authorization may be involved." *Id.* at 28-29 (citations omitted). *Accord New York v. Hill*, 528 U.S. 110, 111 (2000) ("'a congressionally sanctioned interstate compact' within the Compact Clause of the United States Constitution, Art. I, § 10, cl. 3, the [Interstate Agreement on Detainers] is a federal law subject to federal construction") (quotation omitted); *Cuyler v. Adams*, 449 U.S. 433, 438 (1981) (noting that congressional consent transforms an interstate compact into a law of the United States, thus presenting a federal question, and affirming Third Circuit's conclusion that it was not bound by a state court interpretation to the contrary).

State-Tribe compacts under IGRA likewise present a federal issue of national significance, and this Court should exercise its power to determine the validity of the compacts here. The prevalence of such compacts requires certainty and national uniformity, not only for citizens, but for the co-sovereign States and Tribes that enter into gaming compacts. Because the Michigan Supreme Court's erroneous interpretation of IGRA has significant implications for both federal-state and state-tribe relations, this

Court's review is particularly warranted. *Arizona v. Maypenny*, 451 U.S. 232, 239 (1981) (where a legal issue carries significance for federal-state relations, this Court pays particularly "close attention" to both state and federal law bearing on its resolution); *Kosydar v. Nat'l Cash Register Co.*, 417 U.S. 62, 65 (1974) ("We granted certiorari because the case seemed to present important questions touching the accommodation of state and federal interests under the Constitution."); *Williams v. Lee*, 358 U.S. 217, 218 (1959) (this Court will grant certiorari to address "important question[s] of state power over Indian affairs.").

B. Indian gaming itself presents issues of national importance.

The core issues of whether Congress has delegated some of its regulatory power over Indian gaming to the States and how States can exercise that power in the compacting process are also of great national importance based purely on socioeconomic considerations, as demonstrated by recent front page articles in the Wall Street Journal and the New York Times. John R. Emshwiller & Christina Binkley, *Roll of the Dice: As Indian Casinos Grow, Regulation Raises Concerns*, Wall St. J. Aug. 23, 2004, at A1; Iver Peterson, *Would-Be Tribes Entice Investors*, N.Y. Times, Mar. 29, 2004, at A1. Moreover, casino gambling is "one of the nation's fastest growing industries and most popular leisure activities." Nicholas S. Goldin, *Casting a New Light on Tribal Casino Gaming: Why Congress Should Curtail the Scope of High Stakes Indian Gambling*, 84 Cornell L. Rev. 798, 800 (1999). "[H]igh-stakes casinos boast more visitors than the aggregate attendance of all professional and college football games,

arena and symphony concerts, and theatrical events combined." *Id.*

Existing tribal gaming facilities are extremely lucrative, bringing in gaming revenue of more than $16.7 billion in 2003, up from $5.4 billion in 1995. National Indian Gaming Commission, Growth in Indian Gaming, *available at* http://www.nigc.gov/nigc/tribes/revenue-03-05.jsp. According to the FBI, the tribal gaming industry started as a $100 million industry but, since IGRA's inception, has risen to a current revenue level that exceeds the gaming revenue of Las Vegas and Atlantic City combined. FBI, Indian County Crime, *available at* http://www.fbi.gov/hq/cid/indian/indgaming.htm. And the stratospheric growth of tribal gaming shows no sign of slowing, as 291 groups are now seeking federal recognition as tribes, nearly all of them receiving significant financial backing from non-Indian investors hoping to reap substantial profits from casino management contracts. Iver Peterson, *Would-Be Tribes Entice Investors*, N.Y. Times, Mar. 29, 2004, at A1.

As tribal gaming has become more widespread, so have the societal costs. Negative impacts include over-consumption of public resources such as roads, water, fire, police, and ambulance services. Jan Golab, *The Festering Problem of Indian "Sovereignty": The Supreme Court ducks. Congress sleeps. Indians rule*, The American Enterprise, Sept. 2004, at 26. Casino workers moving into an area with a new casino are often low-income, which strains housing markets and overloads public schools. *Id.* Casinos are associated with increased bankruptcies, foreclosures, divorces, child abuse, and crime. *Id.* Property devaluation near casinos, and lost taxes as tax-exempt tribes buy up surrounding property and businesses, have the potential to devastate local governments' ability to provide

the services that the tribes share, particularly where the tribes are not paying for such services. *Id.* It is no surprise that many "states now facing the biggest budget deficits are also the states with the largest number of tax-exempt Indian casinos and tax-evading tribal businesses." *Id.* at 31.

The simple economics and high societal costs of tribal gaming highlight the need for consistency in IGRA's judicial interpretations and judicial scrutiny of gaming compact validity. The practical effect of the Michigan Supreme Court's decision is to leave such gaming essentially unregulated, since Congress has attempted to delegate regulatory authority to the States, and the Michigan Supreme Court has now disclaimed the States' right to regulate. Again, this Court's immediate intervention is required.

III. The Decision Below Incorrectly Interprets IGRA.

The Michigan Supreme Court premised its decision on its determination that Congress delegated no regulatory power to the States over tribal gaming when it enacted IGRA:

> Section 1166 does *not* grant the state regulatory authority over tribal gaming; rather it simply incorporates state laws as the federal law governing nonconforming tribal gaming. Thus, although a state's gaming laws apply in the absence of a tribal-state compact, they apply only *as federal law*. It follows that when the Legislature approves a tribal-state compact, it approves a change in *federal* law rather than its own.

(App., 14 (emphasis in original).) The Michigan Supreme Court referred to this as the "federalization" of state law, and found that Congress, through IGRA, chose to apply

state law "for purposes of expediency" and not as a means of delegating regulatory power to the states. (App., 14-15; *accord* App., 15 ("Although 18 USC 1166(d) effectively 'borrows' Michigan law for purposes of federal law, it does not delegate any regulatory power to the states.").)

The Michigan Supreme Court's ruling runs contrary to the express and unambiguous language of IGRA. *See* 18 U.S.C. § 1666(a) (subject to a compact, "all State [gambling] laws . . . shall apply in Indian country"). The ruling also ignores history, which demonstrates that Congress enacted IGRA precisely to grant regulatory authority over tribal gaming to States.

That history begins with this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), invalidating California's attempt to enforce a state penal statute against tribes that operated bingo halls. Congress responded to the opinion by enacting IGRA, attempting to reestablish the regulatory power of States over tribal gaming. *See Keweenaw Bay Indian Community v. United States*, 136 F.3d 469, 472 (6th Cir. 1998) ("*Congress enacted the IGRA* in 1988 and thereby created a framework for the regulation and management of gambling on Indian land . . . *which included a role for the states in the regulation of Indian gaming*. . . .") (emphasis added). As the Senate Committee Report explained, "existing State regulatory systems" provided the best mechanism for regulating casino gaming, because "there is no adequate Federal regulatory system in place for class III gaming, nor do tribes have such systems for the regulation of class III gaming currently in place." S. Rep. No. 446, 100th Cong., 2d Sess. 12, 13 (1988); *see also Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1549 (10th Cir. 1997) (quoting S. Rep. No. 100-446, at 13-14), *cert. denied*, 522 U.S. 807;

25 U.S.C. § 2701(3) ("[E]xisting Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands.").[2]

Congress ensured state regulatory involvement under IGRA in two ways. The first is Section 1166(a)'s application of State gambling laws to Indian country. As dissenting Justice Markman explained, "the Congress [through the enactment of § 1166], provided the consent to the states that was lacking in *Cabazon* to regulate tribal gaming in the same manner and to the same extent that states regulate gambling elsewhere within their borders." (App., 64; *id.* at 65-66 (quoting *Artichoke Joe's*).)[3] Justice Markman further noted, "[i]t appears that states [even] have some enforcement powers under § 1166 – civil enforcement powers." (App., 61 n.28 (citing *United States v. Santa Ynez Band of Chumash Mission Indians*, 983 F. Supp. 1317, 1322 (C.D. Cal. 1997)).)

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[2] In fact, some members of Congress announced that they opposed IGRA precisely because it would allow States a regulatory role with regard to Class III gaming. *See, e.g.*, 134 Cong. Rec. 24,029 (Sen. Burdick); *id.* at 24,030 (Sen. Daschle); *id.* at 25,379-25,380 (Rep. Sikorski); *id.* at 25,380 (Rep. Frenzel).

[3] *See also United States v. Santa Ynez Band of Chumash Mission Indians*, 983 F. Supp. 1317, 1323 (C.D. Cal. 1997) ("An essential element of [*Cabazon*] was that Congress had not acted specifically to make state gambling laws applicable in Indian country. This decision made clear that it would require a new act of Congress for states to have any effective ability to prevent or regulate Indian gaming. IGRA was enacted in direct response to *Cabazon*. . . . Subsection (a) of § 1166 expressly makes state gambling laws applicable in Indian country . . . ."); *Hotel Employees & Restaurant Employees Int'l Union v. Davis*, 981 P.2d 990, 1008-1009 (Cal. 1999) (confirming that federal law does not "preempt" state laws concerning gambling in Indian country, but instead applies them).

Second, Congress ensured state regulatory and policy-making power regarding Indian gaming through the compacting process. Under 25 U.S.C. § 2710(d), a Tribe and a State may opt out of the otherwise applicable state rules under 18 U.S.C. § 1166 and arrange for lawful casino gambling under the regulatory terms of a State-Tribe compact. *See* 25 U.S.C. § 2710(d)(1) ("Class III gaming activities shall be lawful on Indian lands only if such activities are . . . (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State. . . ."); Select Committee on Indian Affairs Report, S. Rep. No. 100-446, at 1-6 ("It is also true that [IGRA] does not contemplate and does not provide for the conduct of class III gaming activities on Indian lands in the absence of a tribal-state compact."); *Finney*, 836 P.2d at 1171 (quoting same). And IGRA expressly contemplates that an appropriate compact will apply state regulatory law to Indian gaming. 25 U.S.C. § 2710(d)(3)(C) ("Any Tribal-State compact . . . may include provisions relating to . . . (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity. . . .");[4] 25 U.S.C. § 2710(d)(5) ("Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent

[4] As noted by Justice Markman, "IGRA itself contemplates that states will confront several policy choices when negotiating gaming compacts. Congress provided that potential conflicts may be resolved in the compact itself, explicitly noting the many policies affected by tribal gaming compacts." (App., 84 (quoting *Pataki*, 798 N.E.2d at 1060 (citing 25 U.S.C. § 2710(d)(3)(C) as recognizing the numerous policy choices involved)).)

that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect."). Moreover, while IGRA requires that states negotiate "in good faith" to enter into a compact that establishes the desired regulatory framework, 25 U.S.C. § 2710(d)(3)(A), this obligation in no way diminishes the substantial regulatory and policy-making authority provided to the states.[5]

Thus, under IGRA, the State-Tribe compact is a tool that enables a state to regulate Indian gambling conducted within its borders:

> [T]hrough § 2710(d), the Congress provided the states with a direct means of "escap[ing] the pre-emptive force of federal and tribal interests" regarding class III gaming on Indian land by granting states the power to *specifically* make lawful and regulate casino gambling on particular Indian land, as long as such actions arise from the negotiation process and are otherwise in accordance with IGRA.

(App., 66 (quoting *Cabazon*, 480 U.S. at 221) (underlined emphasis added).)

The State-Tribe compacts are legislation because they set forth an extensive regulatory framework governing tribal gaming activities, Compacts at §§ 3-10, and effectively change Michigan gaming laws that apply to specific

[5] "The fact that federal law imposes some limits on the state's power to regulate in a specific area simply cannot mean any legislative action touching upon such an area is not actually 'legislation.'" (App., 93 (Markman, J., dissenting in part).)

Indian lands.[6] For example, the compacts: specify who may be hired, the types of games that may be played, and who may wager at such games; set forth accounting and record keeping requirements, requirements for posting information in casinos, and standards for gambling supplies and equipment purchased by the Tribes; change the minimum legal gambling age from 21 to 18; expand the category of felons eligible to be hired as managerial casino employees; change the minimum age of eligibility for casino employment from 21 to 18; decide how much revenue to raise for the state and where that revenue will go; determine the jurisdictional balance between the State of Michigan and the Tribes; determine how many casinos each Tribe will be allowed to have in Michigan; bar casinos within 150 miles of Detroit to protect the Detroit casinos from competition; and require local units of government to create local revenue sharing boards to receive and distribute payments due from the Tribes.[7]

Further, the compact negotiation process requires the resolution of "multiple policy-making decisions of great consequence to this state, the most significant of which was the initial decision to make lawful what was otherwise unlawful – casino gambling on the subject Indian lands." (App., 82.) As Justice Markman explained:

[6] Even the Michigan Court of Appeals in this case acknowledged that "[t]he terms of the compact contained various regulatory provisions." (App., 112.)

[7] The Michigan Supreme Court actually found that the compacts did not obligate local units of government to create local revenue sharing boards. (App., 17.) This finding is incredible in light of the unambiguous, mandatory language of the compacts ("a Local Revenue Board shall be created. . . ."). (App., 79-80 n.42.)

> What is important to understand is that, in the absence of the challenged tribal-state compacts, gambling on the subject Indian land was *unlawful*.
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> * * *
>
> Thus, it becomes clear that, before the challenged compacts existed, the tribes would have been engaging in an unlawful activity had they endeavored to operate their respective casinos. It necessarily follows that the compacts had the intended purpose, and the effect, of altering legal rights and relations of Michigan citizens generally. The compacts purport to allow Indian tribes to lawfully engage in activities that would otherwise be unlawful.

(App., 76-79 (emphasis in original).)

In sum, the Michigan Supreme Court's interpretation of IGRA cannot be reconciled with the plain language of the statute, which is sacrosanct. Only this Court's intervention will vindicate Congressional intent as evidenced in the statutory language and history, thus protecting the regulatory role for States that Congress intended.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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685 N.W.2d 221

Supreme Court of Michigan.

TAXPAYERS OF MICHIGAN AGAINST CASINOS, and Laura Baird, Plaintiffs-Appellants,
v.
The STATE of Michigan, Defendant-Appellee,
and
North American Sports Management Company, Inc, IV, and Gaming Entertainment, LLC.,
Intervening Defendants-Appellees.

Docket No. 122830.
Calendar No. 6.

Argued March 11, 2004.
Decided July 30, 2004.

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