No. 10-330

NOV 22 2010

In The Supreme Court of the United States

ARNOLD SCHWARZENEGGER,
Governor of California; State of California,

Petitioners,

v.

RINCON BAND OF LUISENO MISSION INDIANS of the Rincon Reservation, aka RINCON SAN LUISENO BAND OF MISSION INDIANS, aka RINCON BAND OF LUISENO INDIANS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' BRIEF IN REPLY

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QUESTIONS PRESENTED

The Indian Gaming Regulatory Act of 1988 ("IGRA") compels federally recognized Indian tribes to enter into compacts with states to set the terms by which tribes may conduct casino-style gaming on their Indian lands. IGRA's compact requirement did not abrogate Indian tribes' immunity to state taxation, and provides that a state's demand for direct taxation in compact negotiations is evidence of bad faith. This petition for a writ of certiorari presents the following questions:

1. Whether a state demands direct taxation of a tribe in compact negotiations under Section 11 of the Indian Gaming Regulatory Act, when it bargains for a share of tribal gaming revenue for the State's general fund.

2. Whether the court below exceeded its jurisdiction to determine the State's good faith in compact negotiations under Section 11 of the Indian Gaming Regulatory Act, when it weighed the relative value of concessions offered by the parties in those negotiations.

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I. The Petition Presents Questions of National Importance

The Respondent's Brief in Opposition articulates two principal reasons that the impact of the decision below will be limited to California: (1) that California is the only state to have waived its Eleventh Amendment immunity to tribal bad faith litigation brought under the Indian Gaming Regulatory Act (IGRA); and (2) that California is the only state to have granted Indian tribes exclusive casino gaming rights in its constitution. Opp. 20-23. It is indeed rich with irony that under the Rincon Band's construction of IGRA, California – the only State in the Nation to have favored tribes with both the exclusive casino gaming rights by constitutional amendment, and with the ability to enforce these rights in federal court – is also the only state that may not seek general fund revenue sharing from tribal gaming. Opp. 28. Nevertheless, the State's waiver of Eleventh Amendment immunity is irrelevant to the substance of this litigation, and the operation of the California Constitution is unrelated to the first question presented, and only tangentially related to the second.

A. The State's waiver of Eleventh Amendment immunity does not limit the national importance of this case

The Rincon Band contends that other than California, only a "limited number" of states are subject to bad faith litigation under IGRA, and so "there is no reason to believe" the majority's erroneous

decision will cause any "meaningful disruption" in tribal-state gaming relations. Opp. 21-22. The significance of the decision below, however, is not limited to its potential impact on future bad faith litigation – although that is substantial enough to warrant review. As the State's Petition explains, the decision below has already misinformed the Secretary of the Interior's review of tribal-state gaming compacts. Pet. 29-31. Because the Secretary's authority to approve or disapprove all tribal-state gaming compacts is exercised outside the context of bad faith litigation, 25 U.S.C. § 2710(d)(8), the effects of the decision below are not limited to those states that have waived or will waive their Eleventh Amendment immunity to bad faith litigation under IGRA. If the decision below is not overturned, any state negotiating a share of tribal gaming revenue for its general fund will need to run the gauntlet of the majority's taxation and "meaningful concession" analysis in order to secure Secretarial approval. As a result, states may be improperly limited, or effectively prohibited, from advancing their legitimate governmental interest in raising revenue in tribal-state compact negotiations.

B. The State's constitutional amendment granting exclusive gaming rights to Indian tribes does not limit the national importance of this case

The Respondent's Brief in Opposition places significant emphasis on the fact that the Rincon Band was granted exclusive gaming rights by virtue of the amendment of the California Constitution, rather

than through compact negotiations. Opp. 20, 27, 28. This issue is a red herring. The legal significance of the constitutional origins of exclusive tribal gaming in California, which was not understood by the majority, is that the grant of exclusivity to Indian tribes was not an element of compact consideration, but was a condition precedent to the effectiveness of any gaming compact in California that contemplates casino-style gaming.[1] Furthermore, the exclusivity

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[1] The majority's confusion is reflected in the Rincon Band's Opposition Brief. See Opp. 8 (acknowledging that "compacts were conditioned" on voter approval of Proposition 1A); but see Opp. 28 (characterizing "tribal gaming exclusivity as consideration in the . . . compacts").

The State contends that Proposition 1A was a precondition. IGRA authorizes Indian tribes to conduct only those forms of class III gaming that are "permitted" under state law. § 2710(d)(1)(B); see also *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1256-58 (9th Cir. 1994) (California had no duty to negotiate with tribes over forms of class III gaming not permitted within the State). Prior to the passage of Proposition 1A, forms of class III gaming, other than a lottery, were prohibited by the California Constitution. *Hotel Employees and Restaurant Employees Int'l Union v. Davis*, 21 Cal.4th 585, 612 (1999) (the State could not lawfully enter into a tribal-state gaming compact for casino-style gaming prohibited by the California Constitution). Thus, before a tribal-state gaming compact could take effect in California, the State's Constitution was required to be amended to "permit" these forms of class III gaming within the meaning of IGRA. Proposition 1A effectuated this amendment, and although Congress never anticipated that a State would authorize Indian tribes alone to conduct casino-style gaming, the Ninth Circuit has found that Proposition 1A satisfied IGRA's "capacious" "permit" requirement. *Artichoke Joe's,* 353 F.3d at 731. Accordingly, it is not correct that Proposition 1A

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granted by the California Constitution is meaningless as a practical matter – unless there is a compact negotiated that specifically authorizes the operation of slot machines. Accordingly, whenever the State authorizes the operation of slot machines in California, either by compact or by compact amendment, it is providing an extraordinary benefit that Congress never anticipated a state would provide (see *Artichoke Joe's California Grand Casino v. Norton* ("*Artichoke Joe's*"), 353 F.3d 712, 725 (9th Cir. 2003)), not merely a "routine" concession as the Rincon Band claims. Opp. 23.

But the particulars of this line of discussion have little relevance to why this case is of national import. The first question presented by the Petition concerns whether negotiations for a state share of tribal gaming revenue, to be allocated to the state's general fund, constitutes a demand for direct taxation. This question, involving the construction of the federal IGRA, is of national importance because it implicates all states seeking general fund revenue sharing from tribal gaming – and there are many. App. 104-05, and accompanying notes.

In this case, the majority incorrectly concluded there is no meaningful distinction between a negotiated revenue share and the imposition of direct taxation. App. 20-21. After making this error, the

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was an element of consideration for the Rincon compact, or any other compact.

majority went further astray by engaging in its contorted "meaningful concession" analysis (App. 36-40), under which it erroneously concluded that the California voters' passage of Proposition 1A was "consideration" for the Rincon Band's contributions to the RSTF and SDF" in the 1999 compacts. The majority reasoned that once the Proposition 1A "consideration" had been used in 1999, the State is forever banned from obtaining any benefit in exchange for granting the Rincon Band, and presumably other tribes, enhanced gaming rights in the form of increased slot machine numbers. App. 40.[2]

However, if this Court reverses the decision below on the grounds that negotiations for general fund revenue sharing do not constitute a demand for direct taxation, the majority's erroneous "meaningful concession" analysis, involving the interpretation of the California Constitution, the unique history of California's tribal-state compact negotiations, and the majority's unprecedented inquiry into the subjective value of consideration, would not be reached.

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[2] The notion that Proposition 1A was part of a bargained for exchange is not only analytically incorrect, but is also incompatible with the history of tribal-state compact negotiations in California. Proposition 1A could not be consideration for the Rincon Band's contributions to the Special Distribution Fund (SDF) and Revenue Sharing Trust Fund (RSTF) because the Rincon Band has never contributed to the SDF, and the State derives no benefit from the RSTF. Pet. 12-13. Moreover, Proposition 1A was enacted by the voters of California, who were not parties to the 1999 compact negotiations and so could not participate in an exchange of consideration.

Accordingly, this case does not turn on unique questions of state law, or the specific facts of this case, but the appropriate construction of IGRA.

Finally, the second question presented is also of significant national importance because, like the first question, its resolution impacts any state engaged in tribal-state compact negotiations. This question concerns what standard should apply to the adjudication of a state's good faith. The Court should presume that any state entering tribal-state compact negotiations, whether it has waived its Eleventh Amendment immunity or not, does so in good faith, and so has a strong interest in knowing the correct standard by which good faith is to be measured. Accordingly, both questions presented are of immediate and significant national importance, and warrant the Court's review.

II. Conclusion

The petition of a writ of certiorari should be granted.

Dated: November 22, 2010

Respectfully submitted,

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