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In the Supreme Court of the United States ~~OFFICE OF THE CLERK~~

STATE OF CALIFORNIA; CALIFORNIA GAMBLING CONTROL
COMMISSION, AN AGENCY OF THE STATE OF CALIFORNIA; AND
ARNOLD SCHWARZENEGGER, AS GOVERNOR OF THE STATE OF
CALIFORNIA, *Petitioners*,

v.

SAN PASQUAL BAND OF MISSION INDIANS, A FEDERALLY
RECOGNIZED INDIAN TRIBE, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT L. MUKAI
Senior Assistant Attorney General
SARA J. DRAKE
Supervising Deputy Attorney
General
RANDALL A. PINAL*
Deputy Attorney General
**Counsel of Record*
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-3075
Fax: (619) 645-2012
Counsel for Petitioners

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QUESTION PRESENTED

In 1999, the State of California and sixty-one federally recognized tribes entered into virtually identical tribal-state class III gaming compacts (Compacts) under the authority of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (IGRA). The Compacts allow those tribes to operate slot machines if they have been issued licenses for those devices from a prioritized and limited license pool established by the Compacts, or if they have obtained a compact amendment allowing them to operate slot machines without reference to that license pool. The question presented is:

Whether a court may conclude that an absent person need not be joined, under Federal Rule of Civil Procedure 19(a), on the ground that, in future cases, if multiple district courts issue inconsistent decisions, the court of appeals could simply resolve the inconsistencies?

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PETITION FOR A WRIT OF CERTIORARI

The State of California, California Gambling Control Commission, and Arnold Schwarzenegger, Governor of California, appearing by and through Edmund G. Brown Jr., Attorney General of California, respectfully petition this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' memorandum decision (App. A, *infra*, at 1-3) and the district court's order (App. C, *infra*, at 5-34) are unreported.

JURISDICTION

The court of appeals entered judgment on October 6, 2008. (App. A, *infra*, at 1.) On December 29, 2008, the court of appeals denied a timely petition for panel rehearing or rehearing en banc. (App. B, *infra*, at 4.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provision, specifically Federal Rule of Civil Procedure 19, 28 U.S.C. § 19, is set forth in full in Appendix J to this brief. (App. J, *infra*, at 121-22.)

STATEMENT OF THE CASE

In 1999, the State of California (State) and sixty-one federally-recognized Indian tribes entered into class III gaming compacts (the Compacts) that provided the tribes the right to operate slot machines and certain banked and percentage card games free of non-tribal competition for twenty years. (*See, e.g.*, Compact Between the State of California and the San

Pasqual Band of Mission Indians (Sept. 10, 1999), App. K, *infra*, at 123-78; 1999 Compact *available at* <http://www.cgcc.ca.gov/compacts.asp> (follow "1999 Compact" hyperlink).)

Specifically, the Compacts allow each tribe to operate up to 350 slot machines or the number of slot machines that tribe was operating on September 1, 1999, whichever is greater. (App. K, *infra*, at 130.) In addition, the Compacts provide that the tribes may operate additional slot machines if they are able to obtain licenses for those devices from a license pool. (*Id.* at 131.)

The Compacts limit the number of available licenses according to a formula and require that the tribes pay specified fees in consideration of receiving such licenses. (*Id.*) They also establish a priority system for the issuance of these licenses. (*Id.* at 131-32.) The California Gambling Control Commission (Commission), as the trustee of the fund into which such license fees are paid, calculated the number of available licenses, and utilized the priority system established by the Compacts to issue licenses to tribes that applied for them, until the available licenses were exhausted. From that point onward, the Commission utilized the Compacts' priority system to issue licenses that became available through the return or relinquishment of previously-issued licenses to the license pool. Other than through acquisition of such licenses under the Compacts' priority system, tribes seeking to operate additional slot machines were required to obtain the right to operate those machines through a compact amendment. (*Id.* at 133, 169-70.)

After the license pool was depleted, the Governor and various tribes commenced compact amendment negotiations. In those negotiations, the tribes sought to obtain the right to operate slot machines other than through issuance of licenses by the Commission from the license pool established by the Compacts. In 2004, the Governor and five tribes

arrived at an agreement on certain amendments to the Compacts (*see, e.g.*, Amendment to the Tribal-State Compact Between the State of California and the Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation (Jun. 21, 2004), App. L, *infra*, at 179-218; 2004 Amended Compact *available at* <http://www.cgcc.ca.gov/compacts.asp> (follow “Pauma Band of Luiseno Mission Indians” hyperlink)) subsequently ratified by the California Legislature under provisions of California law and approved by the Secretary of the Interior under IGRA. In 2007, compact amendments arrived at with several additional tribes in 2006 became effective. (*See, e.g.*, Amendment to Tribal-State Compact Between the State of California and the Pechanga Band of Luiseno Indians (Aug. 28, 2006), App. M, *infra*, at 219-65; 2007 Amended Compact *available at* <http://www.cgcc.ca.gov/compacts.asp> (follow “Pechanga Band of Luiseno Mission Indians” hyperlink).) The amendments allowed the tribes to operate additional slot machines without licenses, increased the period during which the tribes’ slot machines could be operated and provided a monetary remedy in the event non-tribal class III gaming is permitted in California. In return, the tribes agreed to: (a) increase their revenue sharing contributions to the State over that which was required under the Compacts; (b) mitigate adverse environmental impacts stemming from their casino operations; and (c) protect the health and safety of patrons and employees through a series of regulatory measures not found in the Compacts. (*See, generally*, App. L, *infra*, at 179-218; App. M, *infra*, at 220-65.)

The terms of these compact amendments render the operation of slot machines under the amendments more costly to the signatory tribes than under the Compacts’ license structure. (*E.g.*, *compare* 1999 Compact per device costs, App. K, *infra*, at 131-33; *with* per device costs in a 2004 amendment, App. L, *infra*, at 181-85; and in a 2007 amendment, App. M, *infra*, at 221-25.)

The San Pasqual Band of Mission Indians (San Pasqual) filed suit against the State, the Commission and Governor Schwarzenegger for breach of Compact on the basis of the Commission's alleged miscalculation regarding the number of available slot machine licenses. (App. A, *infra*, at 2.) The district court's jurisdiction was invoked under 28 U.S.C. §§ 1361 and 1362, and the Tribal-State Compact between the State and San Pasqual.

In separate suits, the Cachil Dehe Band of Wintun Indians of the Colusa Indian Community (Colusa) and the Rincon Band of Luiseno Mission Indians (Rincon), likewise, sued the State for breach of compact based upon a claim the Commission had miscalculated the number of licenses available. (App. D, *infra*, at 37; App. G, *infra*, at 105.)

Three separate district court judges dismissed all three suits under Rule 19 on the ground that the other tribes that were signatories to the Compacts were necessary (required)¹ parties that could not be joined because of their tribal sovereign immunity. The district court in San Pasqual's suit determined that the absent tribes were required parties because the State faced the possibility of inconsistent obligations with respect to the number of slot machine licenses available under the Compacts. (App. C, *infra*, at 21-22.) In addition, it ruled that the five tribes with amended compacts had a contract-derived interest in any calculation of the maximum number of slot machines that a signatory tribe could operate without a compact amendment. (*Id.* at 27-28.)

The district court in Rincon's suit also concluded that the absent tribal signatories to the Compacts were required because the State faced the risk of

¹ Rule 19's language has been amended since the district court decisions. The word "required" replaced the word "necessary" in Rule 19(a).

inconsistent obligations. (App. I, *infra*, at 115.) Similarly, the district court in Colusa's suit determined that the absent tribes were required, in part, because the Commission could face inconsistent obligations from multiple suits on the same claims for relief with respect to the number of available slot machine licenses. (App. F, *infra*, at 93-94.)

Each district court decision was appealed to the Ninth Circuit. Colusa's and Rincon's appeals were not consolidated, but were argued on the same day. (App. D, *infra*, at 35; App. G, *infra*, at 104.) The Ninth Circuit did not permit oral argument on San Pasqual's appeal. (App. A, *infra*, at 2.) The Ninth Circuit issued a published decision in Colusa's appeal, in which it reversed the district court's decision to dismiss each of Colusa's breach of compact claims for relief. (App. E, *infra*, at 61-62; *see Cachil Dehe Band of Wintun Indians v. California*, 536 F.3d 1034 (9th Cir. 2008).) The court of appeal held that the district court had abused its discretion in finding the absent tribes were required parties. (App. E, *infra*, at 70-72.) The court then issued unpublished memoranda decisions in Rincon's and San Pasqual's appeals, reversing the district court decisions based on its decision in Colusa's appeal. (App. A, *infra*, at 1-3; App. G, *infra*, at 104-07.)

On October 24, 2008, the Ninth Circuit amended its opinion in Colusa's appeal (App. D, *infra*, at 35-36; *see Cachil Dehe Band of Wintun Indians v. California*, 547 F.3d 962 (9th Cir. 2008)), and subsequently denied petitions for rehearing filed by the defendants in all three appeals (App. B, *infra*, at 4; App. D, *infra*, at 36-37; App. H, *infra*, at 108-09). The amended opinion in Colusa's appeal did not alter the Ninth Circuit's original holding that the absent tribes were not required parties.

The Ninth Circuit held that the State would not be subject to a significant risk of inconsistent obligations within the meaning of Rule 19(a) with respect to the number of slot machine licenses that

could be issued because “should different district courts reach inconsistent conclusions with respect to the size of the license pool created under the 1999 Compacts, such inconsistencies could be resolved in an appeal to this court.” (App. D, *infra*, at 50 n.12.)

REASONS FOR GRANTING THE PETITION

The Ninth Circuit’s decision warrants this Court’s review for the same reason its decisions in the *Colusa* and *Rincon* cases warrant review.² Review is appropriate because the appellate court’s decision conflicts with established construction of a rule of civil procedure federal courts routinely apply in countless cases each year.

The Ninth Circuit’s decision undermines a fundamental purpose that this Court and other circuits have identified as underlying Rule 19. That purpose is to avoid exposing a party to the possibility of facing inconsistent obligations stemming from multiple suits on the same claim for relief in different actions by requiring the joinder, under Rule 19(a), of absent parties that might bring the same claim in a different action.

Absent this Court’s review, the Ninth Circuit’s decision could create severe strains in the efficient administration of justice throughout the country by inundating already overburdened district courts with multiple suits raising the same claim for relief. Accordingly, this Court’s plenary review is necessary to correct a decision that directly conflicts with controlling authority from this Court and decisions of other federal courts of appeal on an important matter, departs from the accepted and usual course

² The State filed petitions for writ of certiorari in *State of California, et al v. Cachil Dehe Band of Wintun Indians of the Colusa Indian Community*, No. 08-931, on January 22, 2009, and *Arnold Schwarzenegger, et al. v. Rincon Band of Luiseno Mission Indians*, No. 08-1030, on February 11, 2009.

of judicial proceedings, and calls for the exercise of this Court's supervisory power. *See* Sup. Ct. R. 10(a) & (c); *United States v. Donovan*, 429 U.S. 413, 422 (1977) (certiorari may be granted where the issues simply "concern the construction of a major federal statute"). The State, the Commission and Governor Schwarzenegger, therefore, respectfully request this Court to hold this petition pending disposition of the petition for writ of certiorari filed in *State of California, et al. v. Cachil Dehe Band of Wintun Indians of the Colusa Indian Community*, No. 08-931, and if that petition is granted, grant and hold this petition pending disposition of that case.

DISCUSSION

I. THE NINTH CIRCUIT'S REFUSAL TO RECOGNIZE THE STATE'S EXPOSURE TO INCONSISTENT OBLIGATIONS WARRANTS THIS COURT'S REVIEW

As this Court and other circuits have found, the "social interest in the efficient administration of justice and the avoidance of multiple litigation is an interest that has traditionally been thought to support compulsory joinder of absent and potentially adverse claimants under Rule 19(a)." *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180, 2193 (2008) (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 737-38 (1977)) (internal quotation marks omitted); *see also Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968) (recognizing that one focus of Rule 19 is "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies"); *Knutzen v. Eben Ezer Lutheran Hous. Ctr.*, 815 F.2d 1343, 1356 (10th Cir. 1987) (holding underlying Rule 19 policies include "avoiding multiple litigation, providing the parties with complete and effective relief in a single action, and protecting the absent persons from the possible prejudicial effect of deciding the case without them") (quoting 7 Charles Wright, Arthur Miller & Mary Kay Kane, *Federal Practice and Procedure* 1604, p.

40 (2d ed. 1986)); *Acton Co. v. Bachman Foods, Inc.*, 668 F.2d 76, 78 (1st Cir. 1982) (same); Rule 19 Advisory Committee Notes on 1966 Amend. (“[t]he interests that are being furthered [by Rule 19(a)(1)] are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter”).

Notwithstanding these precedents, the Ninth Circuit’s decision assiduously avoids finding the absent tribes to be required parties through its conclusion that even though the State and the Commission might be subject to inconsistent determinations regarding the number of slot machine licenses authorized by the Compacts, the absent tribes are not required parties because the Ninth Circuit could resolve any such inconsistencies on appeal. (App. D, *infra*, at 50 n.12.) This conclusion, unsupported by any precedent, is inconsistent with *Republic of the Philippines v. Pimentel*, 128 S. Ct. at 2193, where this Court held that it “would not further the public interest in settling . . . dispute[s] as a whole because [the absent parties] would not be bound by . . . [a] judgment in an action where they were not parties.”

The Ninth Circuit’s decision, therefore, rests on two erroneous presumptions. First, it assumes that an appellate court could bind absent tribal signatories to the Compacts to a judgment. Second, it speculates that all claims for relief regarding the maximum number of slot machine licenses authorized by the Compacts whenever and wherever they are brought either will be appealed in a manner that allows all such appeals to be considered at the same time, or that an appellate court will follow prior decisions on the same question regarding later appeals.

While, in this case, the Ninth Circuit easily conformed the appellate results of three trial court decisions, one of which was not argued on the merits, there is no guarantee of such a result in the future.

Thus, the possibility of inconsistent appellate decisions on the same claim for relief exists in cases which do not fortuitously come before the same appellate court on the same issue, in time to permit simultaneous confirmation of conflicting or inconsistent judgments below. Essentially, the Ninth Circuit rewrote Rule 19 in a manner that renders the federal judiciary reactive, rather than proactive, in the administration of justice, and removes all efficiencies intended by the rule.

Further, if a subsequent appellate panel were to consider itself bound by a prior appellate decision on the same claim, irrespective of the merit of arguments advanced in favor of a different conclusion, litigants would be deprived of due process. If future litigants perceived the possibility of such an outcome, individuals and entities that otherwise would be immune from suit or otherwise not subject to joinder could be forced to waive their immunity to protect their interests.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this petition be held pending this Court's disposition of the petition for writ of certiorari pending in *State of California, et al. v. Cachil Dehe Band of Wintun Indians of the Colusa Indian Community*, No. 08-931, and, if that petition is granted, grant and hold this petition pending the Court's disposition of that case.

Dated: March 25, 2009
Respectfully submitted

EDMUND G. BROWN JR.
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT L. MUKAI
Senior Assistant Attorney General
SARA J. DRAKE
Supervising Deputy Attorney
General
RANDALL A. PINAL*
Deputy Attorney General

**Counsel of Record*
Counsel for Petitioners

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