No. COA09-431 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

McCRACKEN AND AMICK, INCORPORATED d/b/a THE NEW VEMCO MUSIC CO. AND RALPH AMICK,	)	
Plaintiffs,	)	
v.	)	**From Wake County**
BEVERLY EAVES PERDUE, in her official capacity as Governor of North Carolina,	)	
Defendant.	)	

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REPLY BRIEF OF DEFENDANT-APPELLANT

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REPLY BRIEF OF DEFENDANT-APPELLANT

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NOW COMES Defendant-Appellant Beverly Eaves Perdue (hereafter "the State"), pursuant to Appellate Rule 28(h)(4), and submits the present reply brief in response to the brief of Plaintiffs-Appellees (hereafter "Plaintiffs").

ARGUMENT

Plaintiffs ask this Court to ignore (1) the purpose and legislative history of the Indian Gaming Regulatory Act (hereafter "IGRA"); (2) the rule of construction mandated by the United States Supreme Court for construing federal statutes such as IGRA; (3) the interpretation given to IGRA by the federal agency charged with

enforcing and implementing it; and (4) the rulings of each of the appellate courts that have considered the precise legal issue currently before this Court. Moreover, Plaintiffs offer no explanation (because none exists) why a federal statute intended both to benefit tribal economies and to give states a say in deciding how tribal gaming is to be regulated within their borders should be interpreted in a way that conflicts with *both* of these congressional purposes.

I. UNDER A PLAIN READING OF IGRA, STATES ARE FREE TO OFFER MORE FAVORABLE GAMING RIGHTS TO TRIBES THAN THOSE EXISTING FOR NON-TRIBAL ENTITIES.

In their brief, Plaintiffs repeatedly insist that IGRA does not allow states to grant preferential gaming rights to tribes as if their mere repetition of this proposition will somehow make it true. However, their rhetoric notwithstanding, IGRA contains no such prohibition.

A. NEITHER THE "SUCH GAMING" PHRASE NOR THE "FOR ANY PURPOSE" PHRASE IN 25 U.S.C. § 2710(d)(1)(B) OF IGRA SUPPORTS PLAINTIFFS' POSITION.

Section 2710(d)(1)(B) of IGRA states that gaming on tribal land pursuant to a compact is permitted only if the gaming is "*located in a State that permits such gaming for any purpose by any person, organization, or entity*[.]" 25 U.S.C. § 2710 (d)(1)(B) (emphasis added). There are two separate phrases in

§ 2710(d)(1)(B) that have resulted in litigation over their meaning: (1) the "such gaming" phrase; and (2) the "for any purpose" phrase.

Only the meaning of the "for any purpose" phrase is at issue here. The proper interpretation of the "such gaming" phrase is not in dispute because – unlike in the cases cited by Plaintiffs in which courts have had to interpret the meaning of "such gaming" – there is no disagreement between North Carolina and the Eastern Band of Cherokees (hereafter "the Cherokee Tribe") over (1) the Cherokee Tribe's right to conduct gaming; or (2) the specific types of gaming the General Assembly has allowed to be the subject of a gaming compact. *See* 2006 N.C. SESS. LAWS 6 (hereafter "S.L. 2006-6"); N.C. GEN. STAT. § 71A-8.

Conversely, because the federal cases cited in Plaintiffs' brief involved situations where a state was *unwilling* to allow certain types of gaming on tribal land that the tribe believed it was entitled by law to conduct, the courts were required to decide how the "such gaming" phrase should be interpreted on the facts presented in those cases. In the present case, however, no such dispute exists.

B. THE CONGRESSIONAL FINDING SET OUT IN 25 U.S.C. § 2701(5) OF IGRA DOES NOT CHANGE THE ANALYSIS UNDER 25 U.S.C. § 2710(d)(1)(B).

In their brief, Plaintiffs incorrectly claim that the State's interpretation conflicts with the doctrine of *in pari materia* by ignoring the congressional finding contained in 25 U.S.C. § 2701(5) of IGRA. This argument is incorrect.

Section 2701(5) states:

> Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. § 2701(5).

Section 2701(5) simply relates to the question of whether *tribal* gaming is permitted under the law of the state at issue. Pursuant to S.L. 2006-6 and N.C. GEN. STAT. § 71A-8, the answer under North Carolina law is yes. These laws make clear that tribal gaming (under the terms set out therein) is neither a criminal offense nor a violation of North Carolina's public policy.

Accordingly, for the same reasons that S.L. 2006-6 does not conflict with § 2710(d)(1)(B), it likewise does not conflict with § 2701(5). *See Flynt v. California Gambling Control Comm'n*, 129 Cal. Rptr. 2d 167, 175 (Cal. App. 1st

Dist. 2002) (recognizing relationship between § 2701(5) and § 2710(d)(1)(B)), *disc. rev. denied*, 2003 Cal. LEXIS 2123, *cert. denied*, 540 U.S. 948 (2003).

The State fully agrees that IGRA, like any other statute, must be construed *in pari materia*. However, it is *Plaintiffs'* interpretation – rather than the State's – which fails to apply *in pari materia* principles based on their refusal to give effect to the clear language in IGRA seeking to promote (rather than restrict) both the ability of tribes to conduct gaming activities and the right of state legislatures to pass laws establishing the parameters of tribal gaming within their borders.

C. THE GENERAL ASSEMBLY HAS ESTABLISHED NORTH CAROLINA'S PUBLIC POLICY AS PERMITTING THE CHEROKEE TRIBE TO POSSESS EXCLUSIVE VIDEO GAMING RIGHTS.

Although Plaintiffs argue that the Cherokee Tribe's gaming activities are inconsistent with the public policy of this State, they fail to grasp that *it is the General Assembly which sets the public policy in North Carolina*. *See In re Appeal of Philip Morris U.S.A.*, 335 N.C. 227, 230, 436 S.E.2d 828, 830-31 (1993), *cert. denied*, 512 U.S. 1228 (1994). As such, the General Assembly had the discretion to establish the public policy of this State through a set of laws (1) prohibiting video gaming statewide for *everyone* (including the Cherokee Tribe); (2) allowing video gaming statewide for all persons (tribal and non-tribal alike); or

(3) allowing video gaming to be conducted only by one or more discrete segments of the population.

The General Assembly chose the third option, permitting video gaming only by the Cherokee Tribe. The present appeal does not raise the question of whether this was a wise or unwise decision. Rather, the point is that the General Assembly has exercised its legislative discretion on this subject, thereby establishing North Carolina's public policy. This enunciation of public policy must, therefore, be accorded deference.

In their brief, Plaintiffs misconstrue this Court's decision in *Hatcher v. Harrah's N.C. Casino Co., LLC*, 169 N.C. App. 151, 610 S.E.2d 210 (2005). In *Hatcher*, this Court held that North Carolina's public policy was not violated by the Cherokee Tribe's operation of a video poker machine because the North Carolina General Statutes created an exception for the Cherokee Tribe from the general prohibition against organized gambling for cash prizes otherwise applicable in North Carolina. *Id*. at 155-56, 610 S.E.2d at 212-13.

Plaintiffs claim *Hatcher* is irrelevant because it was decided before S.L. 2006-6 was enacted. However, this argument misses the point. This Court's ruling explicitly (1) recognized that the General Assembly had established North Carolina public policy in a way that gave preferential treatment to the Cherokee Tribe; and

(2) deferred to that public policy. The same principle applies here. Because North Carolina's current public policy is embodied in S.L. 2006-6, the General Assembly's policy decision is once again entitled to deference.

Plaintiffs then claim that the General Assembly has violated IGRA "[b]y authorizing the [Cherokee] Tribe to offer games that it has classified as crimes." (Pl. Br. at 26). But this ignores the fact that it is the General Assembly who decides what is and is not a crime. It has exercised this authority by determining that tribal gaming as set out in S.L. 2006-6 is *not* a crime.[1]

In sum, Plaintiffs fail to grasp that the General Assembly possessed the legislative authority to make video gaming legal for one segment of the population while making it illegal for others. The only restriction on a legislature's ability to do so is the Equal Protection Clause. Because Plaintiffs have not asserted an equal protection challenge in the present case, there is no constitutional issue currently before this Court. Moreover, the Fourth Circuit has previously rejected an equal protection challenge to the General Assembly's conferral of more favorable

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[1] In their brief, Plaintiffs also try to support their argument by citing Section 4(C) of the Compact which states: "In the event that any Class III gaming authorized [herein] is prohibited by state or federal law, the Tribe shall not conduct such gaming." (Pl. Br. at 23) However, this Compact provision does not help their argument. Video gaming by the Cherokee Tribe is allowed under both state law (via S.L. 2006-6 and N.C. GEN. STAT. § 71A-8) and federal law (via IGRA).

gaming rights upon tribes in North Carolina than those afforded to non-tribal persons. *See United States v. Garrett*, 122 Fed. Appx. 628, 631 (4th Cir. 2005).

D. PLAINTIFFS' DESCRIPTION OF NORTH CAROLINA'S POLICY TOWARD VIDEO GAMING AS "PROHIBITORY" IS BOTH INACCURATE AND BASED ON A COMMON LAW FRAMEWORK SUPERSEDED BY IGRA.

The "prohibitory vs. regulatory" distinction which forms the basis for much of Plaintiffs' arguments stems from *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-17 (1987) – which was handed down *before* Congress enacted IGRA. *See New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 292 (E.D.N.Y. 2007) ("IGRA was enacted to create a comprehensive federal statutory scheme for tribal gaming that differed from the common law principles recognized by the *Cabazon* Court."). Thus, Congress made *IGRA* dispositive as to questions concerning the ability of states to pass laws regarding tribal gaming.

Moreover, to the extent that the term "prohibitory" in this context refers to a state's categorical ban on *all* video gaming activity (with no exceptions for tribes or anyone else), such a label would not describe North Carolina's video gaming law. North Carolina allows video gaming by at least one segment of its population – the Cherokee Tribe.

II. EVEN IF § 2710(d)(1)(B) WAS FOUND TO BE AMBIGUOUS, APPLICABLE PRINCIPLES OF STATUTORY INTERPRETATION MANDATE A CONSTRUCTION OF THIS PROVISION THAT WOULD PERMIT STATES TO AFFORD PREFERENTIAL GAMING RIGHTS TO TRIBES.

A. THE BLACKFEET RULE OF STATUTORY CONSTRUCTION MANDATES THE REJECTION OF PLAINTIFFS' POSITION IN THIS CASE.

Pursuant to *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985), statutes such as IGRA that concern Indian tribes must be interpreted liberally in favor of the tribe with ambiguous terms construed to the tribe's benefit. Plaintiffs acknowledge, as they must, the *Blackfeet* rule of construction. However, they claim that it should not apply here on the theory that even if Plaintiffs prevail in this case, the Cherokee Tribe will continue to possess gaming rights and, therefore, will not be prejudiced.

This argument fails for two reasons. First, this Court must interpret IGRA *before* it can determine IGRA's effect on S.L. 2006-6. A reviewing court must give a federal statute meaning prior to determining the effect of that statute on a related state statute. As such, the question currently before this Court is whether IGRA – on its face – should be construed as allowing states to confer preferential gaming rights on tribes, and this is the issue to which the *Blackfeet* rule of statutory interpretation applies.

If IGRA is construed as allowing states to grant such preferential gaming rights to tribes, this result would clearly be to the benefit of tribes collectively. Conversely, if IGRA is interpreted as not permitting this result, such a ruling would have a detrimental effect on tribes in this country. For purposes of the *Blackfeet* rule, it is irrelevant whether application of a particular state law (such as S.L. 2006-6) might serve to mitigate some of the adverse effects upon a tribe in a particular case otherwise existing as a result of a judicial interpretation of IGRA unfavorable to tribes generally.

Second, Plaintiffs are incorrect when they say that "neither the interpretation of IGRA favored by the State nor the interpretation urged by the plaintiffs . . . is more favorable to the Tribe than the other." (Pl. Br. at 25) In making this assertion, Plaintiffs completely ignore the fact that the declaratory relief they seek, if granted, would end the video gaming exclusivity the General Assembly sought to confer upon the Cherokee Tribe. The availability of video gaming statewide would result in a major reduction in the gaming revenue currently received by the Cherokee Tribe. As such, the Cherokee Tribe will be significantly benefitted if this Court adopts the interpretation advocated by the State and, conversely, will be adversely affected if this Court rules in favor of Plaintiffs. As such, *Blackfeet* is clearly applicable.

B. PLAINTIFFS IGNORE BOTH THE LEGISLATIVE HISTORY OF IGRA AND ITS INTERPRETATION BY THE UNITED STATES DEPARTMENT OF THE INTERIOR.

A prior version of the bill which ultimately became IGRA contained language making it unlawful for tribes to conduct gaming that was illegal in the rest of the state. Had the final version of IGRA that was ultimately passed contained such language, the interpretation sought by Plaintiffs here would have merit. However, Congress deleted this language before enacting the final version of IGRA. (*See* St. Br. at 33-34)

As such, Congress must be deemed to have rejected the interpretation advocated by Plaintiffs in this action. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."); *Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."). Plaintiffs make no effort in their brief to rebut this point.

Furthermore, the United States Department of the Interior has taken the position that gaming compacts between states and tribes allowing for tribal

exclusivity are permissible under IGRA. (St. Br. at 38-40) Plaintiffs offer no explanation as to why the interpretation of a federal statute by the federal agency tasked with administering it should be ignored.

C. PLAINTIFFS FAIL TO MAKE ANY VALID ARGUMENT WHY THE DECISIONS IN *ARTICHOKE JOE'S* AND *FLYNT* SHOULD BE DISREGARDED.

The only two appellate courts that have interpreted the precise question at issue here have both reached the result advocated by the State in the present case. *See Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003), *cert. denied*, 543 U.S. 815 (2004); *Flynt v. California Gambling Control Comm'n*, 129 Cal. Rptr. 2d 167 (Cal. App. 1st Dist. 2002). Despite their failure to cite a single case supporting their position regarding the specific legal issue currently before this Court, Plaintiffs nevertheless attempt to convince this Court to ignore the only appellate courts that have directly addressed this same issue.

Plaintiffs' primary argument as to why this Court should find *Artichoke Joe's* and *Flynt* unpersuasive seems to be the fact that they happened to arise in California – which is, of course, no valid reason at all.[2] While Plaintiffs refer dismissively to these decisions as emanating from "the California courts" (Pl. Br.

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[2] Because of the prevalence of Indian tribes in the western part of the United States, it is not surprising that the bulk of the caselaw interpreting IGRA arises in states such as California and Arizona.

at 18), it is important to note that *Artichoke Joe's* is a decision rendered by one of the twelve United States Courts of Appeals. Plaintiffs have provided no logical reason why this Court should not find persuasive the interpretation given to IGRA by the United States Court of Appeals on this same legal issue.

Plaintiffs also make the puzzling assertion that *Artichoke Joe's* and *Flynt* are not "apposite." However, given that they involve the identical issue presented here – whether § 2710(d)(1)(B) of IGRA allows a state to confer exclusive gaming rights upon a tribe – it is unclear how any case could be more apposite.

Plaintiffs then try to characterize these cases as "facile and simplistic[.]" (Pl. Br. at 18) It is impossible, however, to square their rhetoric with the decisions themselves. For example, in *Artichoke Joe's*, the Ninth Circuit, in an opinion spanning thirty pages, painstakingly addressed every aspect of the issue currently before this Court, carefully analyzing the language, framework, background, purpose, and legislative history of IGRA as well as the applicable rules of statutory construction. Indeed, it is difficult to conceive of a more thorough exploration of this issue than that conducted by the Ninth Circuit in *Artichoke Joe's*. Moreover, the district court's decision that was being reviewed by the Ninth Circuit (and was ultimately affirmed) likewise contained an exhaustive review of this same issue.

See Artichoke Joe's Cal. Grand Casino v. Norton, 216 F. Supp. 2d 1084 (E.D. Cal. 2002), *aff'd*, 353 F.3d 712 (9th Cir. 2003), *cert. denied*, 543 U.S. 815 (2004).

Plaintiffs make a feeble attempt to distinguish *Artichoke Joe's* and *Flynt* on the ground that, in those cases, the provision of state law authorizing exclusive tribal gaming rights was located in a constitutional amendment rather than in a statute. However, a legislatively enacted statute carries the force of "law" just as a constitutional provision does. *See Bailey v. North Carolina Dep't of Revenue*, 353 N.C. 142, 153, 540 S.E.2d 313, 320 (2000) (defining phrase "prescribed by law" as meaning subject to discretion of General Assembly).

Finally, while Plaintiffs also try to avoid the results in *Artichoke Joe's* and *Flynt* by referring to them as "equal protection cases" (Pl. Br. at 20), such a description ignores the fact that each of these decisions addressed *both* the statutory construction question under § 2710(d)(1)(B) at issue here as well as the separate question of whether the granting of preferential gaming rights to tribes was constitutional.

CONCLUSION

For all of these reasons, the trial court's order should be vacated, and this action should be dismissed.

Respectfully submitted, this the 29th day of September, 2009.

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CERTIFICATE OF COMPLIANCE WITH RULE 28(j)(2)(A)2.

The undersigned hereby certifies that the foregoing brief complies with Rule 28(j)(2)(A)2 of the Rules of Appellate Procedure in that, according to the word processing program used to produce this brief (WordPerfect X3), the document does not exceed 3,000 words, exclusive of cover, index, table of authorities, certificate of compliance, certificate of service, signature blocks, and appendices.

This 29th day of September, 2009.

Electronically Submitted
Mark A. Davis
Special Deputy Attorney General

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **REPLY BRIEF OF DEFENDANT-APPELLANT** in the above titled action upon all other parties to this cause by:

[ ] Hand-delivering a copy hereof to each said party or to the attorney thereof;

[ ] Transmitting a copy hereof to each said party via facsimile transmittal; or

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