No. COA 09-431 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

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

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PLAINTIFFS-APPELLEES' BRIEF

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QUESTION PRESENTED

DID THE TRIAL COURT CORRECTLY RULE THAT CHAPTER 6 OF THE 2006 SESSION LAWS IS NULL, VOID AND OF NO EFFECT BECAUSE THE FEDERAL INDIAN GAMING REGULATORY ACT PROHIBITS THE NORTH CAROLINA GENERAL ASSEMBLY FROM GRANTING EXCLUSIVE VIDEO POKER GAMING RIGHTS TO THE EASTERN BAND OF CHEROKEE INDIANS?

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STATEMENT OF THE CASE

This action arises out of the interplay among the Constitution of North Carolina; the "Tribal-State Compact Between the Eastern Band of Cherokee Indians and the State of North Carolina" (the "Compact"); the federal Indian Gaming Regulatory Act ("IGRA"); and the General Assembly's comprehensive ban and criminalization of video poker embodied in Chapter 6 of the 2006 Session Laws.

The plaintiffs' complaint, which was filed against then-Governor Michael F. Easley in his official capacity on November, 10, 2008, asserted two claims for relief (R pp. 4-53).[1] The first claim sought a declaration that pursuant to the "separation of powers" clause of the North Carolina Constitution (Article I, §6), the authority to negotiate and approve compacts between the State and other sovereign entities is a legislative function reserved to the General Assembly (*Id.*). Pursuant to this claim the plaintiffs sought injunctive relief to preclude the Governor from usurping the legislature's powers by negotiating or approving any amendments to the Compact between the State and the Eastern Band of the Cherokee Indians ("the Tribe") (*Id.*).

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[1] Since this action was commenced the Honorable Beverly Eaves Perdue has succeeded Governor Easley, and the caption has been revised by consent to reflect this change. Because this action was brought against the Governor in his or her official capacity, the defendant is referred to herein as "the State."

The plaintiffs' second claim sought a declaration that the General Assembly had violated IGRA, and thus rendered Chapter 6 of the 2006 Session Laws null and void, by purporting to exempt the Tribe from a law banning and criminalizing video poker in North Carolina.

On November 21, 2008 the State moved to dismiss the plaintiffs' claims on the grounds that

> (1) Plaintiffs have failed to state a claim upon which relief can be granted; (2) Plaintiffs lack standing to assert all of the claims contained in the Complaint; (3) N.C. Sess. Laws 2006-6 does not have the effect of prohibiting or otherwise interfering with the possession or operation of video gaming activities by federally recognized Indian tribes in North Carolina pursuant to a Tribal/State Compact; and (4) Plaintiff has (sic) failed to join a necessary and/or indispensable party to this action.

(R. p. 54-55).

The Honorable Howard E. Manning, Jr. received briefs from the parties and heard arguments on the State's motion to dismiss on February 16, 2009. On February 18, 2009, the plaintiffs voluntarily dismissed without prejudice their "separation of powers" claim (R p. 57). On February 19, 2009, Judge Manning entered an order denying the State's motion to dismiss and granting plaintiffs judgment on the pleadings (R pp. 59-61). Judge Manning stayed the operation of his ruling pending the resolution of this matter by the appellate courts (R p. 61). Judge Manning's order reflects the State's agreement that it

does not object to and will not challenge the procedural propriety of the trial court's resolution of the matter pursuant to Rule 12(c) (R p. 60).

The State gave notice of appeal to this court on March 6, 2009 (R. p. 63). The Record on Appeal was settled through stipulation of the parties on March 31, 2009 (R p. 66). The printed Record on Appeal was mailed from the Office of the Clerk of this court on April 14, 2009.

The State has abandoned and does not pursue as error its arguments that plaintiffs lack standing to bring their claims or have failed to join a necessary and/or indispensable party (R p. 69).

PLAINTIFF-APPELLEES' STATEMENT OF FACTS

The complaint alleges the following facts which, for purposes of this appeal, are deemed to be true. The plaintiffs are McCracken and Amick, Inc., a Fayetteville-based North Carolina corporation, and its principal owner, Ralph Amick. McCracken and Amick, which does business as The New Vemco Music Company ("New Vemco"), owns and operates video games and vending and amusement devices such as juke boxes, pinball machines and pool tables. Prior to July 1, 2007, the plaintiffs' business included the sale, lease, distribution, operation and maintenance of video poker machines (R p. 9). The plaintiffs'

video poker business was conducted in compliance with the law and was profitable (*Id.*).

Until July 1, 2007, video poker in North Carolina was legal but heavily regulated. In 2006, however, the General Assembly passed and Governor Easley signed Senate Bill 912, which thereby became Chapter 6 of the 2006 Session Laws. This legislation phased out the number of video poker machines permitted in the state and banned them altogether as of July 1, 2007. Among other things the legislation repealed N.C. Gen. Stat. § 14-306.1, which authorized and regulated video poker, and enacted N.C. Gen. Stat. § 14-306-1A, which declares that "it shall be unlawful for any person to operate, allow to be operated, place into operation or keep" a video poker game or any of seven other kinds of video games. The first violation of the legislation is a Class 1 misdemeanor; subsequent offences, and the possession or operation of five or more video poker machines, are felonies. N.C. Gen. Stat. § 14-309(b). The plaintiffs have suffered severe financial loss and injury as the direct result of North Carolina's prohibition and criminalization of video poker (R p. 9).

Although S.L. 2006-6 bans and criminalizes video poker in North Carolina generally, the General Assembly included language purporting to exempt "a federally recognized Indian tribe . . . for whom it shall be lawful to operate and possess [banned]

machines . . . if conducted in accordance with an approved Class III Tribal-State Compact applicable to that tribe . . ." N.C. Gen. Stat. § 14-306.1A(a) and (e). This language applies only to the Tribe, which currently operates more than 850 video poker games and other gambling devices at its casino in Swain County. *See* http://www.harrahscherokee.com.

On October 6, 2008, plaintiffs wrote to then-Governor Easley requesting that he address certain matters of concern regarding the effect of North Carolina's video poker ban (R pp. 51-53). Having received no response from the Governor, the plaintiffs filed this action in Wake County Superior Court on November 10, 2008 (R pp. 4-53).

STANDARDS OF REVIEW

"On a motion to dismiss pursuant to Rule 12(b)(6) ..., the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 480, 593 S.E.2d 595, 598, *disc. rev. denied*, 358 N.C. 543, 599 S.E.2d 48 (2004) (internal quotes and citations omitted).

The standard of review regarding the entry of an order granting a motion for judgment on the pleadings pursuant to Rule 12(c) is *de novo*. *Toomer v. Branch Banking & Tr. Co.*, 171 N.C.

App. 58, 66, 614 S.E.2d 328, 335, *disc. rev. denied*, 360 N.C. 78, 623 S.E.2d 263 (2005).

ARGUMENT

I. CHAPTER 6 OF THE 2006 SESSION LAWS VIOLATES IGRA BECAUSE IT CRIMINALIZES VIDEO POKER EVERYWHERE IN NORTH CAROLINA EXCEPT AT THE CHEROKEE CASINO.

The State's brief asserts that "the only issue before this Court is one of statutory interpretation regarding a single provision in a federal law." (Appellant's Br. p. 4). Plaintiffs-appellees respectfully disagree that this case is that simple. To the contrary, this case calls on this court to review the General Assembly's enactment of Chapter 6 of the 2006 Session Laws, and its effects upon North Carolina's Tribal-State Compact with the Eastern Band of Cherokee Indians, in light of all pertinent provisions of the Indian Gaming Regulatory Act ("IGRA") - not a single clause as interpreted by some California courts under very different factual circumstances.

A. The Indian Gaming Regulatory Act.

Congress enacted IGRA in response to the United States Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), in which the Court held that the states had little or no authority to enforce anti-gaming laws on tribal lands. IGRA, which is codified at 25 U.S.C. §§ 2701-2721 and 18 U.S.C. §§ 1166-1168, declares that "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). IGRA provides statutory authorization for the establishment of Indian casinos, attempts to regulate Indian gaming so as to avoid "corrupting influences" and seeks to ensure that the members of the Indian tribes are the primary beneficiaries of the gaming. *See* 25 U.S.C. § 2702.

IGRA requires a compact between a tribe and the state before the tribe will be permitted to conduct "Class III gaming," which includes the video poker machines that are the subject of this controversy.[2] When a tribe requests that a compact be negotiated, a state is required to do so in good faith. IGRA authorizes a compact only in a "State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B).

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[2] IGRA creates three classes of wagering games. Class I games are those "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6) Class II gaming includes bingo and card games (excluding banking card games) that are operated in accordance with state law limits on the amount of wagers and hours of operation. See 25 U.S.C. § 2703(7). Pursuant to 25 U.S.C. § 2703(8), "Class III gaming" includes all other forms of gambling.

B. The Tribal-State Compact.

In response to IGRA, then-Governor James B. Hunt, Jr. signed the Compact in August 1994 (R pp. 12-32). Governor Hunt signed amendments to the Compact in 1996 (R pp. 33-37) and 2000 (R pp. 38-48). The Compact allows the Tribe to conduct certain specifically defined "raffles" and "video games" together with "such other Class III gaming which may be authorized" in writing by the Governor (R pp. 15, 39).

The Compact authorizes the Tribe to conduct "Class III" gaming under three specific circumstances:

(a) the games are "expressly enumerated" in Section 4(A) of the compact;

(b) the games are approved in writing by the Governor; or

(c) the games are authorized by an amendment to the Compact.

In its current form the Compact "expressly enumerates" only two types of Class III games: the "raffles" referenced in Section 4.(A)(1) and the "video games" referenced in Section 4.(A)(2). Both "raffles" and "video games" are more specifically defined in Section 3. Section 3.(E) defines a "raffle" as "a game in which a cash or merchandise prize with a value of not more than $50,000 is won by random selection of the name or number of one or more persons who have entries in the

game."[3] As amended in 2000, Section 3.(H) defines a "video game" as "any electronic video game or amusement device that allows a player to play a game of amusement involving the use of skill or dexterity as allowed under NCGS 14-306(b) and 14-306.1 or as subsequently amended by the North Carolina General Assembly." (R p. 39).

Section 4.(C) of the Compact provides that "In the event that any Class III gaming authorized [herein] is prohibited by state or federal law, the Tribe shall not conduct such gaming." (R p. 16).

C. Chapter 6 of the 2006 Session Laws.

During most of the Compact's existence video poker has been legal but heavily regulated in North Carolina. In 2006, however, the General Assembly passed and Governor Easley signed Senate Bill 912, which phased out the number of video poker machines permitted in the state and banned them altogether as of July 1, 2007. The legislation, which was codified as Chapter 6 of the 2006 Session Laws, clearly evidences both the General Assembly's intention to permit the Cherokee Casino to continue activities that are criminal elsewhere in the State and its

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[3] This definition is consistent with N.C. Gen. Stat. § 14-309.15, which permits tax-exempt non-profit organizations to conduct raffles in which the prize value does not exceed $50,000.

awareness that it was skating on very thin legal ice in doing so. The intent to afford the Tribe a favored position is reflected by N.C. Gen. Stat. § 14-306.1A(a), which exempts "a federally recognized Indian tribe . . . for whom it shall be lawful to operate and possess [banned] machines . . . if conducted in accordance with an approved Class III Tribal-State Compact applicable to that tribe . . ." N.C. Gen. Stat. § 14-306.1A(a). Similar language appears in N.C. Gen. Stat. § 14-306.1A(e).

The General Assembly's concern over the legality of its own actions is reflected in an extraordinary and apparently unprecedented self-executing veto clause:

> If a final Order by a court of competent jurisdiction prohibits possession or operation of video gaming machines by a federally recognized Indian tribe because that activity is not allowed elsewhere in this State, this act is void.

2006 N.C. Sess. Laws 6, § 12.

By including this unique clause, the General Assembly immunized the Tribe from the potential adverse consequences of its decision to ban video poker everywhere in North Carolina except at the Cherokee casino. If this court agrees with Judge Manning that S.L. 2006-6 abrogates the Compact, the legislation automatically self-destructs, thereby leaving the Compact's terms unaffected. In other words, the General Assembly has

placed the Tribe in a "win-win" position with respect to the outcome of this case.

D. The Interplay between IGRA and S.L. 2006-6.

IGRA declares that "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) (emphasis supplied.) Similarly, 25 U.S.C. § 2710(d)(1)(B) authorizes a tribe and a state to enter into a Class III gaming compact only if the state in question "permits such gaming for any purpose by any person, organization, or entity." In the context of this case, "such gaming" refers to the two kinds of Class III gaming referenced in the Compact - i.e., raffles as defined in N.C. Gen. Stat. § 14-309.15 and video games permitted by N.C. Gen. Stat. §§ 14-306 or 14-306.1.[4]

There is no question that 25 U.S.C.§ 2710(d)(1)(B) makes it perfectly legal for the State to permit the Tribe to conduct raffles, because North Carolina law and public policy permits other persons, organizations or entities to conduct them. Prior

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[4] G.S. § 14-306, which defines "slot machines," has no applicability to this case because the Compact does not purport to permit the Tribe to operate such machines. G.S. § 14-306.1 was repealed by Chapter 6 of the 2006 Session Laws. Therefore, the video poker games currently operated by the Tribe are not permitted by either of the statutes referenced in the Compact.

to July 1, 2007, IGRA also authorized the State to permit the Tribe to operate video poker games because "as a matter of criminal law and public policy" video poker was legal in the State, albeit heavily regulated. In 2006, however, the General Assembly criminalized video poker and similar games, thereby removing the legal and policy foundation from the Compact provisions that allowed the Tribe to conduct such games.

The State argues that the Tribe's continued operation of video poker games is authorized because of the exemption for the Tribe included in S.L. 2006-6 (Appellant's Br. pp. 11-18). This argument effectively ignores 25 U.S.C. § 2701(5), which provides that a state may authorize federally recognized Indian tribes to conduct Class III gaming only to the extent that such gaming is "conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."

The courts have interpreted 25 U.S.C. § 2701(5) as requiring them to determine whether a state's gaming laws are "prohibitory," or merely "regulatory." The United States Supreme Court explained the issue this way:

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within [the area] of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory.... The shorthand test is whether the conduct at issue violates the State's public policy.

California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209 (1987).

In *Cabazon*, the Supreme Court found a California statute that allowed some forms of bingo, but not high stakes bingo, to be regulatory in nature, stating:

> In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular.

Cabazon, 480 U.S. at 211.

A United States District Court reached a similar result in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 770 F. Supp. 480 (W.D. Wis. 1991), appeal dismissed by 957 F.2d 515 (7th Cir. 1992), *cert. denied*, 506 U.S. 829 (1992), holding that by amending their state constitution to permit the establishment of a state lottery and the licensing of on-track pari-mutuel betting, Wisconsin voters established a "regulatory" public policy with respect to Class III gaming. The court also focused on the fact that the specific games that the Chippewa tribe wanted to conduct were not specifically prohibited by Wisconsin law. *See also Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991).

In each of the foregoing cases the courts, relying on the Supreme Court's opinion in *Cabazon*, interpreted IGRA's reference to "such gaming" very broadly and rejected the states' contentions that they could adopt a "regulatory" policy with respect to certain types of gaming while maintaining a "prohibitory" policy as to others. The Eighth Circuit, however, has rejected an "all or nothing" approach to Class III gaming. *See United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 (8th Cir. 1990) (as to section 2710(b)(1)(A) and class II gaming, "the legislative history reveals that Congress intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity."); *see also, Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993) (ruling that South Dakota did not open the door to casino-type gambling by permitting charities to operate bingo games and raffles). The *Cheyenne River* court said, "[t]he 'such gaming' language of 25 U.S.C. § 2710(d)(1)(B) does not require the state to negotiate with respect to forms of gaming it does not presently permit." *Cheyenne River*, 3 F.3d. at 279.

The Ninth Circuit reached the same result in *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 41 F.3d 421 (9th Cir. 1994), *op. superseded and amended on denial of rehearing*, 64

F.3d 1250 (9th Cir. 1994), *op. amended on denial of rehearing*, 99 F.3d 321 (9th Cir. 1996), *cert. denied, Sycuan Band of Mission Indians v. Wilson*, 521 U.S. 1118 (1997). *See also, Coeur D'Alene Tribe v. Idaho*, 842 F. Supp. 1268, 1280 n. 9 (D. Idaho 1994), *aff'd*, 51 F.3d 876 (9th Cir. 1995), *cert. denied*, 516 U.S. 916 (1995), *rehearing denied*, 516 U.S. 1018 (1995).

In short, the federal circuit courts appear to be divided over the question of whether "such gaming" should be construed broadly or narrowly. The Fourth Circuit has not addressed the issue. *Cabazon*, therefore, requires this court to resolve the "regulatory versus prohibitory" issue by examining North Carolina's laws concerning gambling "in detail," but without the benefit of guidance from the Fourth Circuit. *Cabazon*, 480 U.S. 202, 211, n. 10.

E. North Carolina's Video Poker Policy is Prohibitory.

Although the State contends otherwise, the most cursory look at N.C. Gen. Stat. § 14-306.1A makes it plain that the State's bedrock public policy with respect to video poker and similar games is unequivocally and emphatically prohibitory; a policy that bans and criminalizes the ownership, possession or operation of such games simply cannot be described otherwise. The exemption that allows the Cherokee Casino to conduct games that are crimes everywhere else in the state flies in the face of that fundamental policy, and thus of IGRA. In this respect

North Carolina can be distinguished from Wisconsin, which did not specifically prohibit the games that the Chippewa tribe wanted to offer. Further, North Carolina is unlike California, Connecticut or Wisconsin in that it does not permit pari-mutuel betting on horse races, jai alai or other competitions; to the contrary, the General Assembly has criminalized all gambling and pseudo-gambling activity other than the state lottery, certain bingo games, and charity raffles, and the state recently and successfully defended against a lawsuit seeking to declare that poker is not an unlawful "game of chance." *Joker Club, L.L.C. v. Hardin*, 183 N.C. App. 92, 643 S.E.2d 626 (2007), *cert. denied*, 658 S.E.2d 272 (N.C. 2008). And, unlike California and Wisconsin, North Carolina has not amended its constitution, which is the State's most fundamental statement of public policy, to permit gambling.

The State's brief urges this court to ignore the critical public policy considerations presented by the "regulatory" versus "prohibitory" issue that underlies the interplay between IGRA and state law. The State argues, in effect, that North Carolina may adopt a regulatory policy with respect to video poker at the Cherokee casino and a prohibitory policy everywhere else. This argument is not countenanced by IGRA or by the language of the Compact.

At pages 20-23 of its brief, the State again seeks to distance its arguments from and limit the court's consideration of any broader analysis of the issues presented in Judge Manning's order (Appellant's Br. pp. 20-23). In an effort to distinguish the significant body of case law regarding interpretation of § 2710(d)(1)(B), the State urges the court to ignore its first clause ("located in a State that permits such gaming") and focus only on the latter clause ("for any purpose by any person, organization, or entity") in construing the meaning and scope of the phrase as a whole with respect to all of IGRA. The approach posited by the State does not comport with recognized rules of construction.

The North Carolina Supreme Court has held that "this Court does not read segments of a statute in isolation. Rather, we construe statutes in *pari materia*, giving effect, if possible, to every provision." *Rhyne v. K-Mart Corp.* 358 N.C. 160, 188, 594 S.E.2d 1, 20 (2004). The State puts forth no rationale for its proposed contrary approach other than its hope that this court will eschew the analysis required by IGRA and adopt the facile and simplistic approach applied by the California courts in the *Artichoke Joe's* and *Flynt* cases on which the State hangs its entire argument.

Despite the State's contention to the contrary, a careful review of the case law cited by the plaintiffs makes clear that

first, the federal courts are split regarding the proper interpretation of 25 U.S.C. § 2710(d)(1)(B), and second, the State is simply wrong in saying that "the prohibitory/regulatory distinction is a creation of common law which has been superseded by the enactment of IGRA." (Appellant's Br. pp. 18).

At pages 24-25 of its brief, the State relies on *dicta* in *Hatcher v. Harrah's N.C. Casino Co., LLC*, 169 N.C. App. 151, 610 S.E.2d 210 (2005),in support of its argument that this court need not engage in a prohibitory/regulatory analysis of North Carolina public policy regarding "such gaming." The State's reliance on *Hatcher* is misplaced.

In *Hatcher* a patron of the Cherokee Casino sued the casino operator over a disputed payment of a prize. This court held that North Carolina courts had no jurisdiction to hear the dispute owing to the sovereignty of the Tribe. In so doing the panel rejected the trial court's finding that the Tribe's video poker games violated North Carolina's public policy. The panel rested this holding on N.C. Gen. Stat. § 14-306.1, the statute *regulating* video poker that was repealed and replaced by the current ban in 2006. The panel also took note of North Carolina's "extensive statutory law prohibiting gambling" and observed that "the state has very little interest in protecting plaintiff's right to engage in an activity that, *but for the Indian Gaming Regulatory Act, would be contrary to our public*

policy." *Hatcher*, 169 N.C. App. at 156, 610 S.E.2d at 213 (emphasis supplied.)

In sum, the *Hatcher* panel simply recognized that by choosing to regulate video poker pursuant to N.C. Gen. § 14-306.1, North Carolina effectively left itself with no choice under IGRA except to permit "such gaming" on Tribal lands. Once the General Assembly decided to ban video poker, rather than regulating it, the State was no longer under any such compulsion.

II. THE CALIFORNIA CASES ON WHICH THE STATE RELIES ARE NEITHER APPOSITE NOR PERSUASIVE.

Rather than addressing the question presented by the "such gaming" language of 25 U.S.C. § 2710(d)(1)(B) or the question whether S.L. 2006-6 is consistent with 25 U.S.C. § 2701(5), the State rests its argument solely on two California "equal protection" cases.[5] The California courts essentially stood 25 U.S.C. § 2710(d)(1)(B) on its head by ruling that in determining whether an Indian tribe is authorized to conduct a particular type of Class III gaming the phrase "any person, organization or entity" should be construed to include the very tribe whose

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[5] The State also seeks to rely on orders entered by Superior Court judges in two cases -- one from Wake County and another from Union County. Rule 11(c) Supplement to the Printed Record on Appeal, pp. 76-124. These trial court orders, of course, have no value as precedent; moreover, a review of the pleadings and orders submitted by the State clearly reveals that neither case involved the type of claim asserted by the plaintiffs in this case.

authority is at issue. These cases, however, arose under very different circumstances and thus are not applicable here. Both rest in large measure on the unusual fact that California voters, utilizing that state's voter initiative process, amended the California constitution in 2000 via "Proposition 1A" to specifically permit slot machines, lottery games and banking games on Indian tribal lands. Cal. Const. Art. IV, § 19(f). The rulings by the California courts of course are not binding on this court, which should reject the State's invitation to adopt their simplistic analyses.

In *Flynt v. Cal. Gambling Control Comm'n*, 129 Cal. Rptr. 2d 167 (2002), *disc. rev. denied*, 2003 Cal. LEXIS 2123, cert. denied, 540 U.S. 948, 157 L.Ed. 2d (2003), the California appeals court recognized the tension and limitations on IGRA's framework for tribal-state gaming compacts:

> Congress stopped short of giving tribes the unilateral power to force any state to grant Tribes full casino-style class III gaming when such gaming is not permitted by the laws and public policy of that state. Instead, Congress provided that states are required to negotiate with Indian tribes only as to those class III gaming activities permitted under state law. The IGRA recognizes that "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."(§ 2701(5).) Thus, in the key provision we are called upon to construe in this appeal, the IGRA provides that "Class III gaming activities shall be lawful on Indian lands only if such activities are ... [¶] ... [¶] located in a State

> that permits such gaming for any purpose by any person, organization, *1136 or entity .... " (§ 2710(d)(1)(B).) FN11 "Consequently, where a state does not 'permit' gaming activities sought by a tribe, the tribe has no right to engage in these activities, and the state thus has no duty to negotiate with respect to them." (Internal citations omitted).

Id. at 1135-36. The court ultimately determined that by specifically amending its constitution to "permit" tribes to conduct slot machines, lottery and banking games on tribal lands, California had satisfied IGRA's requirement, as set forth in 25 U.S.C. § 2710(d)(1)(B), that the tribal lands where the gaming is at issue must be "located in a State that permits such gaming for any purpose by any person, organization." On the basis of identical reasoning the Ninth Circuit reached a similar result in the other case on which the State relies, *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003), *cert. denied*, 543 U.S. 815 (2004).

As Judge Manning did below, this court should reject the tautological analysis employed by the California courts in the *Flynt* and *Artichoke Joe's* cases. North Carolina's constitution, unlike California's, does not embody a public policy of permitting Indian casinos to profit from gaming activities that are criminal offenses elsewhere in the state. Adoption of the reasoning of the *Flynt* and *Artichoke Joe's* decisions in this case effectively would require this court to ignore IGRA, which represents Congress' attempt to provide a mechanism through

which the states would have a stake in what takes place on sovereign tribal lands. While recognizing the sovereignty of the tribes, IGRA also heeded the states' interests in gaming activity. In striking the balance, IGRA looks to the public policy of each state to determine what class III gaming, if any, is permissible pursuant to a tribal-state compact. IGRA clearly provides that if a state prohibits Class III gaming in the state at large, such activity cannot be permitted on tribal lands within the state. If the state regulates Class III gaming in the state at large, then such gaming is subject to negotiation within a tribal-state compact. Nowhere in its language, its legislative history or its origins in *Cabazon* does IGRA contemplate a situation whereby states that prohibit and criminalize particular types of Class III gaming may carve out an exception for tribal lands within the state. In recognition of this limitation Section 4.(C) of the Compact says:

> In the event that any Class III gaming authorized [herein] is prohibited by state or federal law, the Tribe shall not conduct such gaming.

By like sign, the self-executing veto clause 2006 N.C. Sess. Laws 6, § 12 reads:

> If a final Order by a court of competent jurisdiction prohibits possession or operation of video gaming machines by a federally recognized Indian tribe because that activity is not allowed elsewhere in this State, this act is void.

These passages clearly suggest that both Governor Hunt, who negotiated the Compact and its amendments, and the General Assembly, which passed S.L. 2006-6, understood that – contrary to the argument advanced by the State's brief – IGRA does not give the State *carte blanche* to legalize an activity within the walls of the Cherokee Casino while making that same activity a criminal offense everywhere else. Accordingly, this court should affirm the trial court's judgment and lift the stay imposed by Judge Manning.

III. THE "BLACKFEET RULE" HAS NO APPLICATION TO THIS CASE.

At pages 26-31 of its brief the State invokes the long-standing principle that statutes intended to benefit tribes are to be interpreted in the light most favorable to the tribes. This rule of construction, which derives from *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985), simply has no application here, because the legislative enactment at issue – Chapter 6 of the 2006 Session Laws – cannot be interpreted in any manner that is "unfavorable" to the Tribe.

Although the State's brief belabors the obvious point that IGRA was intended to benefit Indian tribes (Appellant's Br. pp. 26-29) and thus must be interpreted in the light most favorable to the Tribe in the face of conflicting interpretations that may threaten Tribal interests (Appellant's Br. pp. 29-31), it does

not – and cannot – explain why either of those unexceptional propositions is germane here.

The facts of this case make clear that the plaintiffs' interpretation of IGRA does not in any way threaten the Tribe's ability to possess or operate video poker machines or, for that matter, to do anything else that it was able to do before this lawsuit was filed. The General Assembly, in recognition of the questionable legality of S.L. 2006-6, inserted a self-destruct clause in the legislation that insured that the rights of the Tribe to possess and operate video poker machines would not be affected by a successful challenge to the provision. *See* 2006 N.C. Sess. Laws 6, § 12. Therefore, neither the interpretation of IGRA favored by the State nor the interpretation urged by the plaintiffs and accepted by Judge Manning is more favorable to the Tribe than the other.

The State asserts that Judge Manning's interpretation of IGRA ignores Congress' desire to defer to gaming policy decisions of state legislatures (Appellant's Br. p. 31). Although Congress clearly intended to give states an important role in the regulation of Indian gaming, the State goes too far in its claim that Congress gave the states unbridled authority with respect to Indian gambling. Rather, Congress sought to allow states an opportunity to participate in the regulation of Indian gaming *within the framework of IGRA*. That framework, of

course, contemplates that the gambling activities allowed to Indian tribes will be consistent with each state's laws and policies. By authorizing the Tribe to offer games that it has classified as crimes, the General Assembly overstepped the boundaries prescribed by IGRA.

CONCLUSION

For the reasons set forth above, this court should affirm Judge Manning's determination that S.L. 2006-6 is null, void and of no effect and lift the stay on his ruling.

Respectfully submitted, this the 15th day of June, 2009.

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CERTIFICATE OF SERVICE

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