No. 37P10 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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

****

PETITION FOR DISCRETIONARY REVIEW
UNDER G. S. §7A-31
(Filed 25 January 2010)

****

INDEX

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

No. 37P10 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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

****

PETITION FOR DISCRETIONARY REVIEW
UNDER G. S. §7A-31
(Filed 25 January 2010)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiffs-Appellees McCracken and Amick, Incorporated, d/b/a The New Vemco Music Co., and Ralph Amick respectfully petition this Court, pursuant to N.C. Gen. Stat. § 7A-31 and Appellate Rule 15, to certify for discretionary review the attached judgment of the Court of Appeals entered on 22 December 2009.[1] The Court of Appeals' judgment reversed the trial court's entry of judgment on the pleadings in which Judge Manning

---

[1] The Court of Appeals opinion is not yet reported in the Southeastern Reporter. Accordingly, it is cited herein as "Slip Op. at ____."

declared (1) that the General Assembly violated IGRA by attempting to exempt the Tribe from legislation that bans and criminalizes video poker in North Carolina and, (2) that pursuant to a voiding provision included in Chapter 6 of the 2006 Session Laws, the video poker ban is null, void and of no effect. R p. 59-61.

As the trial court recognized and the Court of Appeals reiterated, this unique case arises out of the interplay between and among the federal Indian Gaming Regulatory Act, 25 U.S.C. § 2701-2721 ("IGRA"); the Tribal-State Compact between the Eastern Band of Cherokee Indians ("the Tribe") and the State of North Carolina ("the Compact"); and Chapter 6 of the 2006 Session Laws ("S.L. 2006-6"), which is codified as N.C. Gen. Stat. § 14-306.1A. If S.L. 2006-6 is lawful, its effect is to permit the Tribe to engage in an activity in which the plaintiffs were lawfully engaged prior to July 1, 2007, but that the General Assembly now has declared to be a crime. Therefore, this case involves legal and policy issues of major significance to the jurisprudence of the State, including whether the General Assembly violated IGRA and abrogated the Compact by banning video poker in North Carolina while simultaneously attempting to exempt the Tribe from the ban. It also presents the novel and important issue of whether legislation enacted by the General

Assembly can or does constitute or establish "public policy" for the Tribe, a sovereign entity.

FACTS

The Court of Appeals' opinion includes a comprehensive recitation of the undisputed facts, many of which need not be repeated here. The following facts are particularly pertinent to this Petition:

-- The Tribe and the State entered into the Compact in 1994. Pursuant to the Compact the Tribe operates Harrah's Cherokee Casino in Cherokee, North Carolina, which attracts more than 3.5 million visitors a year and generates annual revenues in excess of $250,000,000. Slip Op. at 3.

-- As amended in 2000, the Compact permits the Tribe to conduct "video games," which are defined as any electronic video device "that allows a player to play a game of amusement involving the use of skill or dexterity as allowed under N.C. Gen. Stat. § 14-306(b) and § 14-306.1 or as subsequently amended by the North Carolina General Assembly." R p. 39.

-- Prior to 1 July 2007, video poker was one of the video games allowed and regulated under N.C. Gen. Stat. § 14-306.1. Slip Op. at 3.

-- In 2006 the General Assembly enacted Chapter 6 of the 2006 Session Laws ("S.L. 2006-6"), which repealed N.C. Gen. Stat. § 14-306.1. *Id.*

-- S.L. 2006-6 also enacted N.C. Gen. Stat. § 14-306.1A, which banned and criminalized video gaming machines, including video poker machines. *Id.*

-- Under IGRA, video games are classified as "Class III gaming." Slip Op. at 2-3, citing 25 U.S.C. §2703(8).

-- Section 4(C) of the Compact provides that if any Class III gaming authorized under the Compact is prohibited by state or federal law, "the Tribe shall not conduct such gaming."

-- Among other things, IGRA provides 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.

Slip Op. at 9, citing 25 U.S.C. § 2701(5).

-- IGRA also provides that Class III gaming, the category at issue in this case, is lawful on Indian lands only if such activities are "located in a State that permits such gaming for any purpose by any person, organization or entity." Slip Op. at 6, 9, citing 25 U.S.C. § 2710(d)(1)(b).

-- S.L. 2006-6, which bans and criminalizes video poker, includes the following provision:

> Notwithstanding any other prohibitions in State law, the form of Class III gaming otherwise prohibited by [this statute] may be legally conducted on Indian lands which are held in trust by the United States government for and on behalf of federally recognized Indian tribes if conducted in accordance with an approved Class III Tribal-State Gaming Compact applicable to that Tribe . . .

Slip Op. at 8.

-- S.L. 2006-6 also contains a voiding clause, which provides that:

> . . . 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.

Slip Op. at 4.

WHY CERTIFICATION SHOULD ISSUE

The plaintiffs contend that properly construed, the IGRA and Compact provisions set out above make it unlawful for Harrah's Cherokee Casino to operate hundreds of video poker machines[2] in the face of North Carolina law that makes it a crime to possess or operate a single such machine anywhere else in the State. The very legislation that outlawed video poker shows

---

[2] The casino's website advertises that "we offer over 850 poker-based games, including Double Double Bonus, Jacks or Better, Deuces Wild, Bonus Draw, Three Card Poker, Let It Ride, and many others, with denominations ranging from $.05 to $100.00. We also feature our ever popular Pot O' Gold games. Pot O' Gold games include Black Gold, Eight Ball Poker, Shamrock 7's, Triple Sevens and more." *See* http://www.harrahscherokee.com/casinos/harrahs-cherokee/casino-gambling/video-poker-detail.html

that the General Assembly itself had serious doubts about the legality of this dichotomy, because it cautiously inserted an unusual self-executing veto clause declaring that

> 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.

S.L. 2006-6, § 12. The trial judge, who concurred with the plaintiffs' interpretation of IGRA and the Compact, invoked this extraordinary clause to declare N.C. Gen. Stat. § 14-306.1A null and void.

The Court of Appeals panel reversed the trial court, ruling that because S.L. 2006-6 includes language exempting the Tribe from the video poker ban North Carolina is deemed to "permit" video poker gaming and does not prohibit such gaming "as a matter of criminal law and public policy." Thus, the panel reasoned, the statute complies with 25 U.S.C. § 2701(5) and 25 U.S.C. § 2710(d)(1)(b). In determining that the putative exemption effectively swallows the language that prohibits and criminalizes video poker, the panel ruled that the sections of IGRA at issue were ambiguous and interpreted them so as to give effect to the General Assembly's intention to exempt the Tribe

from criminal sanctions and to protect the exclusivity of its video poker gaming.[3]

The Court of Appeals' circular analysis countenances an anomalous, unprecedented and self-contradictory situation in which the General Assembly has clearly provided that operating video poker machines is a crime in North Carolina while simultaneously disregarding or attempting to circumvent the Compact's provision that if any Class III gaming authorized under the Compact is prohibited by state or federal law, "the Tribe shall not conduct such gaming."[4]

Given the significant financial, social and legal consequences of the panel's decision and the public interest in North Carolina's law and public policy concerning gambling, the Court of Appeals' opinion merits this Court's review. Moreover, the panel's opinion appears to conflict with *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993), wherein the court ruled that "it would be illegal" for a tribal casino to offer "traditional keno" games to its patrons because the only form of keno permitted by South Dakota law was "video

---

[3] The *de facto* exclusivity of the Cherokee Casino's video poker is simply a by-product of the General Assembly's decision to ban video poker everywhere else. The Compact does not grant the Tribe exclusive rights or privileges with respect to any form of gaming.

[4] The Compact also provides that the Tribe may operate any game allowed by N.C. Gen. Stat. § 14-306.1, but S.L. 2006-6 repealed that statute; therefore, the Compact itself no longer includes any authority for the Tribe to operate video poker.

keno." *Id.* at 279. *See also Dewberry v. Kulongoski*, 406 F.Supp.2d 1136, 1151 (D. Ore. 2005)(The question whether a state "permits" a particular type of Class III gaming requires the court to determine whether applicable state law permits a specific type of game rather than a broad category of gaming.)[5]

The Court of Appeals' opinion rests in part on the panel's determination that S.L. 2006-6 is consistent with IGRA's requirement, in 25 U.S.C. § 2701(5), that Class III tribal gaming must be "conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." Slip Op. at 10-11. In support of this determination, the panel quoted from two opinions of this Court: *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 594 S.E.2d 1 (2004), and *Cauble v. Trexler*, 227 N.C. 307, 42 S.E.2d 77 (1947).

In *Rhyne* this Court said "The legislative branch of government is without question 'the policy-making agency of our government . . .'" 358 N.C. at 169, 594 S.E.2d at 8 (quoting *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956)) (emphasis supplied.) Similarly, in *Cauble* this Court said "[W]here the law-making power speaks on a particular subject over which it has power to legislate, public policy is

---

[5] Both the language of the Compact and the *Dewberry* and *Cheyenne River Sioux* cases make it clear that the Tribe could not force the State via a suit brought pursuant to IGRA to permit video poker at the Cherokee casino in the face of the statewide ban.

what the law enacts." 227 N.C. at 311, 42 S.E.2d at 80. (emphasis supplied.) In other words the panel ruled, in effect, that the public policy of North Carolina is whatever the General Assembly says it is.

As the Supreme Court has plainly and repeatedly held, federally recognized Indian tribes are sovereign entities with respect to which states have no authority to legislate. *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 207, 107 S.Ct. 1083, 1087, 94 L. Ed. 244 (1987) (Indian tribes retain attributes of sovereignty over both their members and their territory, and tribal sovereignty is subordinate only to the federal government, and not the states.) The Court said that ". . . a grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values." *Id.* at 208, 107 S. Ct. at 1088.[6] Accordingly, as the Court of Appeals noted, *Cabazon* held that "states could not enforce state laws *regulating* gaming against Indian tribes - only criminal statutes *prohibiting* gaming could

---

[6] The *Cabazon* decision engendered IGRA and is noted in its legislative history. With respect to IGRA's requirement that tribal-state compacts may allow Indian tribes to engage in gaming that the state permits "for any purpose by any person, organization or entity," the Senate Report says "If such gaming is not criminally prohibited by the State in which tribes are located, then tribes, as governments, are free to engage in such gaming." S. Rep. No. 446, 100th Cong., 2d Sess.)

be enforced under federal law." Slip Op. at 2, n. 1 (emphasis in original.)

The plaintiffs agree that the General Assembly is the primary source and authority for the public policy of North Carolina, but the General Assembly is not authorized to make law or public policy for the Tribe with respect to gaming. The "law" governing Tribal gaming is established by the Compact; the Tribe's "public policy" is established by the Tribal Council.[7] Nevertheless the Court of Appeals panel implicitly ruled that S.L. 2006-6 establishes the "law and public policy" with respect to video poker both for North Carolina and for the Tribe. No one would seriously suggest that our General Assembly can define or establish the public policy of South Carolina or Virginia with respect to gaming or any other subject. *Cabazon* makes it equally plain that the General Assembly cannot declare public policy on behalf of the Tribe.

The tribal sovereignty defined and described by the Supreme Court in *Cabazon* made IGRA necessary; in turn, IGRA requires the State to negotiate with the Tribe concerning tribal gaming policy and practices and embody the results in the Compact. *See Hatcher v. Harrah's N.C. Casino, LLC,* 169 N.C. 151, 156, 610

---

[7] "Public policy" and "law" are not always synonymous, of course. The Tribe's "policy" presumably is to offer as many kinds of Class III gaming as possible, but under IGRA it can implement that policy only to the extent that it can negotiate a compact with the State.

S.E.2d 210, 213 (2005) (State court properly dismissed action to enforce gambling debt allegedly incurred on tribal lands because "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.") (emphasis supplied.) If Tribal sovereignty deprives the General Assembly of the authority to prohibit the Tribe from conducting gaming that it allows ordinary citizens to engage in, it follows that it also has no unilateral authority to authorize the Tribe to engage in activity that is a crime under North Carolina law. Because the General Assembly's authority over "public policy" ends where the State's sovereignty ends, the only viable and cognizable "public policy" of North Carolina embodied in S.L. 2006-6 is the criminalization of video poker. Therefore, the statute violates IGRA.

The Court of Appeal's expansive view of the General Assembly's authority to establish "public policy" appears to conflict with this Court's opinions in *Rhyne* and *Cauble* and provides still another reason why this Court should review the panel's decision.

ISSUES TO BE BRIEFED

If this Court accepts this case for review the plaintiffs propose to brief the following issues, and any others requested by the Court:

DID THE COURT OF APPEALS ERR IN REVERSING THE TRIAL COURT'S RULING THAT CHAPTER 6 OF THE 2006 SESSION LAWS IS NULL, VOID AND OF NO EFFECT BECAUSE THE FEDERAL INDIAN GAMING REGULATORY ACT PROHIBITS THE TRIBE FROM CONDUCTING A TYPE OF CLASS III GAMING THAT IS A CRIMINAL OFFENSE UNDER NORTH CAROLINA LAW?

DID THE COURT OF APPEALS ERR IN RULING THAT S.L. 2006-6 PERMITS VIDEO POKER GAMING IN NORTH CAROLINA?

DID THE COURT OF APPEALS ERR IN RULING THAT NORTH CAROLINA LAW AND PUBLIC POLICY DO NOT PROHIBIT VIDEO POKER GAMING?

DID THE COURT OF APPEALS ERR IN DETERMINING THAT CERTAIN PROVISIONS OF THE FEDERAL INDIAN GAMING REGULATORY ACT ARE AMBIGUOUS AND/OR IN INTEREPRETING THEM SO AS TO GIVE EFFECT TO S.L. 2006-6?

Respectfully submitted this 25th day of January, 2010.

EVERETT, GASKINS, HANCOCK & STEVENS, LLP

Hugh Stevens
N.C. State Bar No. 4158

C. Amanda Martin
N.C. State Bar No. 21186

Michael J. Tadych
N.C. State Bar No. 24556

James Hash
N.C. State Bar No. 38221

127 W. Hargett Street, Suite 600
Post Office Box 911 (27602)
Raleigh, North Carolina 27601
Telephone: (919) 755-0025
Facsimile: (919) 755-0009
Attorneys for Petitioners

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Plaintiffs-Appellees' Petition for Discretionary Review was served on the following by depositing a true and complete copy thereof with the United States Postal Service, first-class postage prepaid, addressed to:

Mark A. Davis
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602

Annette Tarnawsky
Attorney General, Eastern Band
Of Cherokee Indians
P. O. Box 455
Cherokee, NC 28719

Timothy Q. Evans
Holland & Knight, LLP
2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, D.C. 20006-6801

Frank Ronald Lawrence
Holland & Knight, LLP
633 West Fifth Street
21st Floor
Los Angeles, CA 90071-2040

This the 26th day of January, 2010.

C. Amanda Martin

No. 37P10 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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.	)	

****

RESPONSE TO
PETITION FOR DISCRETIONARY REVIEW

****

SUBJECT INDEX

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

No. 37P10 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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.	)	

****

RESPONSE TO
PETITION FOR DISCRETIONARY REVIEW

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COMES Respondent Beverly Eaves Perdue (hereafter "the State"), by and through the undersigned counsel, and, responding to the Petition for Discretionary Review filed by Plaintiffs-Petitioners McCracken and Amick, Inc. d/b/a the New Vemco Music Co. and Ralph Amick (hereafter collectively "Plaintiffs"), prays that the Petition be denied.

STATEMENT OF PROCEDURAL HISTORY

Plaintiffs brought this declaratory judgment action seeking declaratory relief as to several issues relating to the video gaming rights of the Eastern Band of Cherokee Indians (hereafter "the Cherokee Tribe"). (R p. 4) The State filed a motion to dismiss the Complaint pursuant to Rules 12(b)(6) and (7) of the North Carolina Rules of Civil Procedure. (R p. 54)

On 19 February, 2009, the Honorable Howard E. Manning, Jr. entered an order granting judgment on the pleadings in favor of Plaintiffs and denying the State's motion to dismiss. (R p. 59) However, he stayed the effect of his ruling pending a final determination of the State's appeal. (R p. 61) The State subsequently filed a timely notice of appeal. (R p. 63) On 22 December, 2009, a unanimous panel of the Court of Appeals reversed the trial court's ruling. *McCracken and Amick, Inc., et al v. Perdue*, No. COA09-431, slip op. (Dec. 22, 2009).

STATEMENT OF THE FACTS

Plaintiffs own and operate video gaming machines and amusement devices in North Carolina. (R p. 4) Plaintiffs' Complaint requested a declaration that 2006 N.C. SESS. LAWS 6 (hereafter "S.L. 2006-6") violates the federal Indian Gaming Regulatory Act (hereafter "IGRA") by permitting video gaming on tribal land despite simultaneously banning such gaming elsewhere in North Carolina. (R pp. 4-11)

REASONS WHY THE PETITION SHOULD BE DENIED

In its twenty-one page opinion, a unanimous panel of the Court of Appeals carefully analyzed the relevant legal issues in this case before ultimately determining that the trial court's entry of judgment on the pleadings in favor of Plaintiffs was erroneous. No aspect of the Court of Appeals' decision merits further review by this Court. As discussed more fully below, the Court of Appeals' well-reasoned opinion does not conflict with any rulings from this Court and properly interprets the relevant decisions from federal courts bearing on the federal issues presented in this appeal. While Plaintiffs characterize the Court of Appeals' result as "anomalous, unprecedented and self-contradictory" (Pet. at 7), the result reached by the Court of Appeals is, in actuality, not only based on sound legal reasoning but also the same as that of *every other appellate court that has considered this precise issue.*

Accordingly, this appeal does not satisfy the standard for discretionary review under N.C. GEN. STAT. § 7A-31. *See Peaseley v. Virginia Iron, Coal & Coke Co.*, 282 N.C. 585, 592, 194 S.E.2d 133, 139 (1973) (Exercise of discretionary review is appropriate "only [in] those cases of substantial general or legal importance or in which review is necessary to preserve the integrity of precedent established by this Court.").

I. THE KEY ISSUE IN THIS CASE INVOLVES CONSTRUCTION OF A FEDERAL – RATHER THAN A NORTH CAROLINA – STATUTE.

The principal issue in this appeal is one of statutory interpretation regarding a single provision in a *federal* law – IGRA.

A. BACKGROUND.

1. IGRA.

In 1988, Congress passed IGRA in order to establish a statutory framework to balance the respective rights of tribes and States with regard to tribal gaming. *Doe v. Santa Clara Pueblo*, 154 P.3d 644, 654 (N.M. 2007). In order to effectuate this goal, IGRA authorized States to negotiate gaming compacts with tribes located within their borders and established three classes of gaming.[1] *See Texas v. United States*, 497 F.3d 491, 507 (5th Cir. 2007), *cert. denied*, 129 S. Ct. 32 (2008); 25 U.S.C. § 2703(6)-(8). These compacts set out the terms under which gaming can be conducted on tribal land. *Taxpayers of Mich. Against Casinos v. State*, 732 N.W.2d 487, 493 (Mich. 2007).

IGRA authorizes a tribe to request that the state in which it is located enter into negotiations with it concerning a gaming compact. Upon receiving such a request, the state is required to enter into good faith negotiations. 25 U.S.C. § 2710(d)(3)(A).

---

[1] The video gaming at issue here is classified as "Class III" gaming. *See* 25 U.S.C. § 2703 (6)-(8).

IGRA also provides, however, that in order for Tribal/State compacts to be valid, the conditions set out in 25 U.S.C. § 2710(d)(1) must be satisfied. The present case hinges on the interpretation of one of these conditions - the requirement contained in subpart (B) of § 2710 (d)(1). This provision 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). The meaning of this federal statutory provision was the basis for the Court of Appeals' ruling in this case.

2. North Carolina Law.

There is no dispute among the parties in this case as to the meaning of, or the legislative intent underlying, any statute enacted by the General Assembly. Nor could such a dispute exist in light of the clarity of the General Assembly's enactments that are relevant to this case.

North Carolina General Statute § 71A-8 provides that federally recognized Indian tribes in North Carolina are permitted to conduct gaming activities if those activities are consistent with IGRA and in accordance with a valid Tribal/State compact executed by the Governor pursuant to N.C. GEN. STAT. § 147-12(14). Such a compact is currently in existence between North Carolina and the Cherokee Tribe. (R pp. 12-50)

In 2006, the North Carolina General Assembly enacted S.L. 2006-6 which established a staggered phase-out of video gaming machines on non-tribal lands in North Carolina. Pursuant to S.L. 2006-6, video gaming became illegal on non-tribal land effective 1 July 2007. S.L. 2006-6, ss. 1-4. Session Law 2006-6, however, contained clear provisions expressly stating that the ban on video gaming contained therein was not intended to affect the right of the Cherokee Tribe to continue operating video gaming machines pursuant to its compact with the State. *See* N.C. GEN. STAT. § 14-306.1A(a), (e) (2009).

In addition, in order to express even more clearly the General Assembly's intent that nothing in S.L. 2006-6 alter or diminish the Cherokee Tribe's right to continue conducting gaming activities pursuant to the Compact, the following language was added to the end of S.L. 2006-6:

> 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.

S.L. 2006-6, s. 12 (hereafter "the Voiding Clause").

As the above-quoted provisions of S.L. 2006-6 demonstrate, the General Assembly was very clear about what it wanted to accomplish - the banning of video gaming statewide except for such gaming permitted under the Tribal/State compact with the Cherokee Tribe. The Legislature was also aware that any gaming laws it

enacted affecting tribal gaming were required to comply with IGRA. While the General Assembly believed that S.L. 2006-6 was fully compliant with IGRA, the Voiding Clause was inserted purely out of an abundance of caution to address the contingency that a court might reach a different conclusion on this issue.[2]

---

[2] In their Petition, Plaintiffs 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." 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). Likewise, while Plaintiffs claim the Compact's provisions regarding video gaming are no longer valid because N.C. GEN. STAT. § 14-306.1 has been repealed by S.L. 2006-6, they ignore the fact that the reference in the Compact to § 14-306.1 goes on to state "or as subsequently amended by the North Carolina General Assembly." (R p. 39) Session Law 2006-6 constitutes precisely such an amendment, replacing § 14-306.1 with the newly created § 14-306.1A.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH IGRA BECAUSE IGRA ALLOWS STATES TO GIVE PREFERENTIAL GAMING RIGHTS TO TRIBES.

A. SESSION LAW 2006-6 IS CONSISTENT WITH THE LANGUAGE CONTAINED IN § 2710(d)(1)(B) OF IGRA.

Section 25 U.S.C. § 2710(d)(1) of IGRA states, in pertinent part, as follows:

> (d) Class III gaming activities; authorization; revocation; Tribal/State compact.
>
> > (1) Class III gaming activities shall be lawful on Indian lands only if such activities are –
> >
> > . . .
> >
> > (B) 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).

The phrase "for any purpose by any person, organization, or entity" is satisfied by North Carolina law. The North Carolina General Statutes allow video gaming activities for at least one "purpose" (the purpose set out in the Cherokee Compact) by at least one "person, organization, or entity" (the Cherokee Tribe). *See* N.C. GEN. STAT. §§ 14-306.1A; 71A-8. Plaintiffs cannot credibly maintain (1) that the Cherokee Tribe does not qualify as a "person, organization, or entity;" or (2) that gaming conducted because of the terms set out in a Tribal/State compact does not qualify as a "purpose." Section 2710(d)(1)(B) serves to ensure that, before any tribal gaming is

allowed to occur, the legislature of that state has first enacted a law authorizing such gaming in at least one context - even if only for the tribe itself.

If, conversely, a state legislature has made clear its intent to ban such gaming *everywhere* (on both tribal and non-tribal land), then § 2710(d)(1)(B) insulates the state from having to negotiate a gaming compact with a tribe against its will. Thus, by virtue of §2710(d)(1)(B), IGRA reflects congressional deference to decisions by a state legislature regarding gaming within its borders.[3]

The logic of this interpretation is apparent when one looks at the context in which § 2710(d)(1)(B) exists. IGRA sought not only to encourage tribal gaming as a means of benefitting tribes but also to allow states some measure of control over tribal gaming decisions. *See Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1554 (10th Cir.) (respect for state interests relating to class III gaming was of great concern to Congress in passing IGRA), *cert. denied*, 522 U.S. 807, 139 L. Ed. 2d 11 (1997); *see also Doe*, 154 P.3d at 654 (recognizing that, by authorizing Tribal/State compacts, Congress sought a mechanism to balance the interests of both states and tribes).

---

[3] The only instance in which IGRA does not defer to a state's gaming policy is where the state has attempted to gives tribes *less* favorable gaming rights than those enjoyed by non-tribal entities - because such an approach would undermine Congress' desire in enacting IGRA to promote the economic self-sufficiency of tribes. If a state attempted to adopt such an approach, the tribe would be entitled to demand that the state negotiate a gaming compact with it and could, if necessary, then sue the state for failure to do so. *See* 25 U.S.C. § 2710(d)(3)(A), (7)(A)(i).

This, then, is the balance Congress struck in enacting IGRA. Congress gave states the option of granting tribes either equal or greater gaming rights than those afforded to non-tribal entities. Accordingly, states are free to pass laws conferring exclusive gaming rights on tribes.[4]

B. THE UNITED STATES SUPREME COURT HAS RULED THAT STATUTES INTENDED TO BENEFIT INDIAN TRIBES MUST BE INTERPRETED IN THE LIGHT MOST FAVORABLE TO THE TRIBE.

When interpreting a statute, a court's primary emphasis is to identify the legislature's intent. *Williams v. Williams*, 299 N.C. 174, 179-80, 261 S.E.2d 849, 854 (1980). Therefore, it is appropriate to consider the purposes underlying Congress' enactment of IGRA. The Court of Appeals correctly ascertained that the intent of Congress in enacting IGRA was to promote Indian gaming. *McCracken and Amick, Inc.*, Slip Op. at 16-17. *See City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003) ("IGRA is designed to promote the economic viability of Indian Tribes."), *cert. denied*, 541 U.S. 974 (2004).

Congress viewed gaming as an important tool in helping to create strong tribal economies. "[T]he only evidence of intent strongly suggests that the thrust of the

---

[4] While Plaintiffs have not raised any constitutional arguments, it is worth noting that the Fourth Circuit has recognized the constitutionality of tribal gaming preferences, noting that the United States Supreme Court has "carved-out a legitimate special class for Native American gaming preferences due to the unique historical relationship between the United States and Native American nations." *United States v. Garrett*, 122 Fed. Appx. 628, 631 (4th Cir. 2005).

IGRA is to promote Indian gaming, not to limit it." *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Atty.*, 369 F.3d 960, 971 (6th Cir. 2004); *see Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 469 (D.C. Cir. 2007) ("IGRA was designed primarily to establish a legal basis for Indian gaming as part of fostering tribal economic self-sufficiency . . ."); *Grand Traverse*, 369 F.3d at 971 ("[T]he purpose of the IGRA . . . is to encourage gaming."). *See also Artichoke Joe's Cal. Grand Casino v. Norton,* 353 F.3d 712, 741 (9th Cir. 2003) (noting that State's provision of exclusive gaming rights to tribes furthered purposes of IGRA by creating jobs and generating revenue for tribe and its members), *cert. denied*, 543 U.S. 815, 160 L. Ed. 2d 20 (2004).

Conspicuously absent from Congress' stated purposes - as set out in 25 U.S.C. § 2702 - is any intent whatsoever to protect the economic rights of *non*-tribal entities. This absence is significant because a necessary predicate to Plaintiffs' proposed interpretation of § 2710(d)(1)(B) is the notion that IGRA was enacted for the benefit of private entities. Nothing in the text or purpose of IGRA supports such a proposition. *See Flynt v. California Gambling Control Comm'n*, 129 Cal. Rptr. 2d 167, 178 (Cal. 2002) ("[W]e conclude that there is nothing to indicate that the purpose of section 2710(d)(1)(B) was to achieve economic parity between tribes and commercial gaming establishments, thus leveling the playing field, so to speak, by

granting tribes gaming rights only to the extent they are afforded to non-Indian gaming establishments."), *disc. rev. denied*, 2003 Cal. LEXIS 2123, *cert. denied*, 540 U.S. 948, 157 L. Ed. 2d 278 (2003) .

It is illogical to argue (as Plaintiffs do here) that IGRA - a statute designed to benefit Indian tribes - should be interpreted as preventing state legislatures from voluntarily providing economic assistance to tribes. Such a proposition is antithetical to the desire for tribal economic development that lies at the heart of IGRA. Indeed, in their Petition, Plaintiffs have failed to grasp the difference (as did the Court of Appeals) between IGRA's differing treatment of, on the one hand, a state voluntarily agreeing to allow a tribe to conduct gaming activities and, on the other hand, a state seeking to prohibit a tribe from engaging in any such gaming.

Because IGRA is a federal - rather than a North Carolina - law, rules of statutory construction articulated by the United States Supreme Court governing the interpretation of federal statutes are authoritative. *See R. H. Bouligny, Inc. v. United Steelworkers*, 270 N.C. 160, 174, 173-74, 154 S.E.2d 344, 356 (1967) ("It is . . . well settled that a decision of the Supreme Court of the United States, construing an act of Congress, is conclusive and binding upon this Court.").

After accurately determining Congress' intent, the Court of Appeals correctly applied the rule of statutory construction laid down by the United States Supreme

Court in *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 85 L. Ed. 2d 753 (1985). *McCracken and Amick, Inc.*, slip op. at 17-20. In *Blackfeet*, the Supreme Court set out the applicable rule of statutory construction for laws relating to Indian tribes:

> [T]he standard principles of statutory construction do not have their usual force in cases involving Indian law. . . . [The] canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. . . . *[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit*[.]

Id. at 766, 85 L. Ed. 2d at 759 (emphasis added).

Accordingly, where any doubt exists as to the correct interpretation of an ambiguous provision of federal law enacted for the benefit of tribes, "the doubt [will] benefit the [t]ribe, for [ambiguities] in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152, 71 L. Ed. 2d 21, 39 (1982) (internal quotation marks and citations omitted).

As discussed above, IGRA was enacted for the primary purpose of providing economic assistance to tribes. Thus, the *Blackfeet* rule of construction applies. Here, as the Court of Appeals observed, the State's interpretation of § 2710(d)(1)(B) permits states to provide more favorable gaming rights to tribes than those available to non-

tribal entities. Conversely, Plaintiffs' interpretation of this provision would preclude states from doing so. *McCracken and Amick, Inc.*, slip op. at 18-20. Therefore, because the State's interpretation here is the one that would benefit tribes, *Blackfeet* mandates that its interpretation be given effect.

C. PLAINTIFFS' PROPOSED INTERPRETATION OF IGRA ALSO IGNORES CONGRESS' DESIRE TO DEFER TO THE GAMING POLICY DECISIONS OF STATE LEGISLATURES.

The desire to benefit tribes economically was also accompanied by Congress' simultaneous intent to allow states a greater say in decisions regarding the legality of gaming on tribal land. "IGRA's provisions reveal that Congress took great pains to provide states a meaningful opportunity to become intimately involved in the regulation of gaming . . .." *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1296 (D.N.M 1996), *aff'd*, 104 F.3d 1546 (10th Cir.), *cert. denied*, 522 U.S. 807, 139 L. Ed. 2d 11 (1997); *see Artichoke Joe's Cal. Grand Casino v. Norton*, 216 F. Supp. 2d 1084, 1125-26 (E.D. Cal. 2002) (noting that a goal of IGRA was "maintaining state authority" over tribal gaming and that IGRA's statutory scheme gives states "a primary role in the regulatory oversight of tribal gaming"), *aff'd*, 353 F.3d 712 (9th Cir. 2003), *cert. denied*, 543 U.S. 815, 160 L. Ed. 2d 20 (2004).

Given these dual purposes, there is no valid basis for interpreting IGRA as tying the hands of sympathetic state legislatures attempting to use their legislative discretion

to provide economic assistance to tribal entities. Plaintiffs' interpretation of § 2710 (d)(1)(B) is contrary to *both* of the twin cornerstones that underlie IGRA: (1) strengthening tribal economies; and (2) promoting deference to the policy decisions of state legislatures regarding gaming.

D. EXCERPTS FROM THE LEGISLATIVE HISTORY OF IGRA SUPPORT A FINDING THAT THE ACT ALLOWS STATES TO OFFER PREFERENTIAL GAMING RIGHTS TO TRIBES.

The Court of Appeals also properly relied upon the legislative history of IGRA as further support for its ruling. *McCracken and Amick, Inc.*, slip op. at 12-14. Perhaps the most compelling piece of legislative history relevant to this appeal is the fact that Congress rejected proposed language that would have led to the precise result sought by Plaintiffs. An earlier version of the bill that ultimately became IGRA, Senate Bill 555, contained express language making it illegal for tribes to conduct gaming that was prohibited in the rest of the State. Specifically, § 11(d)(1) of Senate Bill 555 stated that, subject to the fulfillment of certain other specified conditions, tribes could conduct Class III gaming "*that is otherwise legal within the State where such lands are located.*" 133 CONG. REC. S555, 3740 (February 19, 1987) (emphasis added). That language, however, was deleted from the final version of the bill. *See Artichoke Joe's*, 216 F. Supp. 2d at 1125.

The italicized language quoted above from Senate Bill 555 conveys a meaning identical to the construction of IGRA advocated by Plaintiffs here - the notion that tribal gaming can take place only where such gaming is lawful in the state at large. However, this language was removed from the bill prior to Congress' enactment of IGRA. The logical implication is that had Congress wished for such a restriction on tribal gaming to exist, it would have included this language in the final version of the bill. The fact that it chose instead to delete this language attests to the variance between Congress' intent and Plaintiffs' interpretation.

E. THE ONLY TWO REPORTED APPELLATE DECISIONS ADDRESSING THIS PRECISE ISSUE HAVE HELD THAT §2710(d)(1)(B) ALLOWS STATES TO PERMIT TRIBAL GAMING EVEN WHERE SUCH GAMING IS NOT ALLOWED ELSEWHERE IN THE STATE.

Each of the only two reported appellate decisions squarely addressing the precise issue presented here have ruled that § 2710(d)(1)(B) allows States to give exclusive gaming rights to tribes. *See Artichoke Joe's Cal. Grand Casino,* 353 F.3d 712; *Flynt*, 129 Cal. Rptr. 2d 167. In both of these cases, the courts held that as long as the law of the state expressly provides for such a result (as is true here), then IGRA is satisfied.

In *Artichoke Joe's*, the court rejected the argument that IGRA should be construed as preventing States from conferring exclusive gaming rights on tribes. The court determined that while § 2710 (d)(1)(B) was ambiguous, the rule of construction

set out in *Blackfeet* was applicable. "IGRA is undoubtedly a statute passed for the benefit of Indian tribes. IGRA's declaration of policy . . . firmly places the statute in the category of legislation to which the *Blackfeet* presumption applies." *Artichoke Joe's*, 353 F.3d at 730. The court ruled that the application of the *Blackfeet* rule was "straightforward" in that "[o]ne construction of the provision favors Indian tribes, while the other does not." *Id.* The same is equally true here.

Likewise, in *Flynt*, the state passed a constitutional amendment giving its governor the authority to negotiate and execute compacts with federally recognized tribes permitting various types of tribal gaming. The plaintiffs, a card room owner and several private gambling establishments, alleged that these compacts were unlawful on the theory that, under IGRA, such gaming could take place only in states that allowed non-tribal citizens to likewise engage in these activities. *Flynt*, 129 Cal. Rptr. 2d at 169-71.

The court determined that while the text of § 2710 (d)(1)(B) - when read in isolation - was ambiguous, the context, legislative history, and purpose of this provision showed no intent by Congress to establish "economic parity" between tribes and non-tribal citizens. *Id.* at 178. The court interpreted § 2710 (d)(1)(B) as simply requiring that a "[s]tate must first legalize a game, *even if only for tribes*, before it can become a compact term." *Id.* (citations and internal quotation marks omitted)

(emphasis in original). In ruling that IGRA permits a state to afford exclusive gaming rights to a tribe, the *Flynt* court concluded that "[q]uite simply, Congress exhibited no desire to command states to enact gaming laws so that private non-Indian enterprises would enjoy the same rights as Indian tribes." *Id.*

In their Petition, Plaintiffs claim the Court of Appeals' opinion in the present case "appears to conflict with" *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993). (Pet. at 7) However, this contention is false as *Cheyenne River* does not involve the issue presented in this appeal - whether IGRA permits a state legislature to voluntarily confer more favorable gaming rights upon a tribe than those which exist for non-tribal entities.

In *Cheyenne*, a tribe sued South Dakota in an attempt to force the state to negotiate a gaming compact allowing the tribe to operate certain types of gaming. The court rejected the tribe's arguments, holding that South Dakota was not required to negotiate certain games that were barred under state law – on tribal and non-tribal land alike. *Id.* at 279. *Cheyenne* did *not* address the issue presented here – whether IGRA allows a state to *voluntarily* extend greater gaming rights to a tribe than those existing for non-tribal persons.

The Petition also claims that pursuant to the holding in *Dewberry v. Kulongoski*, 406 F. Supp. 2d 1136 (D. Ore. 2005), the Cherokee Tribe could not use IGRA to force

North Carolina to allow it video poker rights if such gaming was the subject of a statewide ban. (Pet. at 8 n.5) However, once again, Plaintiffs ignore the fact that the Tribe has not "forced" North Carolina to do anything; to the contrary, the General Assembly has voluntarily elected to grant video gaming rights to the Cherokee Tribe. The question of whether IGRA requires an unwilling state to allow tribal gaming is far different from the question of whether IGRA prohibits a state from voluntarily enacting laws permitting such gaming. The latter is the issue presented here and, for the reasons set out herein, nothing in IGRA bars a state from exercising its legislative discretion in this fashion.

Plaintiffs' Petition also appears to take the position that the 1987 decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 94 L. Ed. 2d 244 (1987), still contains the applicable framework for evaluating Indian gaming issues. However, such a contention ignores the fact that *Cabazon* was handed down before Congress enacted IGRA and was, in fact, superseded by 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.

F. THE UNITED STATES DEPARTMENT OF THE INTERIOR HAS APPROVED TRIBAL/STATE COMPACTS CONFERRING EXCLUSIVE GAMING RIGHTS ON TRIBES.

Finally, it is worth noting that the United States Department of the Interior - which possesses statutory authority for approving Tribal/State compacts and can withhold such approval where a compact's terms violate IGRA[5] - has approved compacts conferring exclusive gaming rights on tribes. Under Plaintiffs' argument, such compacts would be illegal.

By way of background, while IGRA prohibits states from imposing taxes on tribes, *see* 25 U.S.C. § 2710(d)(4), some states have entered into revenue-sharing agreements with tribes in exchange for the conferral of exclusive gaming rights upon the tribe.

> [S]ome states have been able to share in tribal gaming revenues in exchange for exclusive rights to game within a state - at least as against non-Indian gaming. The Secretary of the Interior has approved revenue-sharing arrangements on the ground that those payments are not taxes, but exchanges of cash for significant economic value conferred by the exclusive or substantially exclusive right to conduct gaming in the state. These arrangements are known as "exclusivity provisions" and have become increasingly prevalent.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 12.05 (2005 ed.) at 2. (*See* App. 31.)

---

[5] *See* 25 U.S.C. § 2710(d)(8)(A), (B)(i).

The effect of the General Assembly's enactment of S.L. 2006-6 was to voluntarily confer the same type of gaming exclusivity upon the Cherokee Tribe. Because Plaintiffs seek a construction of IGRA that would render such exclusivity provisions unlawful, their interpretation is in conflict with the determination of the Department of the Interior - the agency charged with administering IGRA - that such provisions are allowed under IGRA.

III. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

In its opinion, the Court of Appeals correctly relied on this Court's decisions in *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 594 S.E.2d 1 (2004), and *Cauble v. Trexler*, 227 N.C. 307, 42 S.E.2d 77 (1947), in ruling that public policy in North Carolina is determined by the General Assembly. *McCracken and Amick, Inc.*, slip op. at 10-11. Indeed, numerous other opinions from this Court could likewise have been cited for this proposition since the ability of the General Assembly to articulate public policy is so clearly established.

Because tribal land in this nation is located within the borders of states, IGRA serves to give states more authority concerning the degree of gaming that is allowed to take place within the borders of those states. That authority includes the power to make decisions regarding the negotiation of gaming compact with tribes. As discussed above, IGRA requires that – by means of such compacts – a state must

offer tribes equal or greater gaming rights as compared with those afforded to non-tribal persons.

The insinuation in the Petition that – in carrying out its authority under IGRA – the General Assembly has somehow attempted to declare public policy *for the Cherokee Tribe* is simply incorrect. The Compact between North Carolina and the Tribe was entered into based on the Tribe's express desire to engage in video gaming – as the Petition appears to recognize. (Pet. at 10 n.7) The General Assembly has not (and, logically, could not) *force* the Tribe to conduct gaming against its will. The Tribe's leadership – not the General Assembly – has made the decision to seek a gaming compact from North Carolina. Instead, the General Assembly has simply done precisely what Congress hoped all states would do – offer favorable gaming rights to tribes – subject, of course, to the tribe's own decision about whether to invoke those rights in a gaming compact.

The statement in the Petition that the Court of Appeals' decision "appears to conflict with . . . *Rhyne* and *Cauble*" (Pet. at 1) makes no sense. By enacting S.L. 2006-6, the General Assembly has simply exercised its broad power to formulate public policy *for North Carolina* (a power that was expressly recognized in *Rhyne* and *Cauble*) and has done so in a manner that is perfectly consistent with IGRA.

CONCLUSION

For the reasons set forth above, the State of North Carolina respectfully prays that the Petition for Discretionary Review be denied.

Respectfully submitted this the 8th day of February, 2010.

ROY COOPER
Attorney General

Electronically Submitted
Mark A. Davis
Special Deputy Attorney General
State Bar No. 18142
mdavis@ncdoj.gov

N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602
Telephone: (919) 716-6900
Facsimile: (919) 716-6763

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **RESPONSE TO PETITION FOR DISCRETIONARY REVIEW** 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

[X] Depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

Hugh Stevens
C. Amanda Martin
Michael J. Tadych
James Hash
Everett Gaskins Hancock
& Stevens
127 West Hargett Street, Suite 600
Raleigh, NC 27602

Timothy Q. Evans
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, DC 20006-6801

Annette Tarnawsky
Attorney General,
Eastern Band of Cherokee
Indians
P.O. Box 455
Cherokee, NC 28719

Frank Ronald Lawrence
Holland & Knight LLP
633 West Fifth Street
21st Floor
Los Angeles, CA 90071-2040

This the 8th day of February, 2010.

Electronically Submitted
Mark A. Davis
Special Deputy Attorney General

NO. COA09-431

NORTH CAROLINA COURT OF APPEALS

Filed: 22 December 2009

McCRACKEN and AMICK, INCORPORATED d/b/a THE NEW VEMCO MUSIC CO. and RALPH AMICK,
Plaintiffs,

v.

Wake County
No. 08 CVS 19569

BEVERLY EAVES PERDUE, in her official capacity as Governor of North Carolina,
Defendant.

Appeal by defendant from order entered 19 February 2009 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 14 October 2009.

Everett Gaskins Hancock & Stevens, LLP, by Hugh Stevens, Michael J. Tadych, and James M. Hash, for plaintiffs-appellees.

Attorney General Roy Cooper, by Special Deputy Attorney General Mark A. Davis, for defendant-appellant.

Eastern Band of Cherokee Indians, by Attorney General Annette Tarnawsky; Ben Oshel Bridgers, PLLC, by Ben Oshel Bridgers; and Holland & Knight LLP, by Frank Lawrence, Los Angeles, California, pro hac vice, for amici curiae Eastern Band of Cherokee Indians, National Congress of American Indians, National Indian Gaming Association, United South and Eastern Tribes, Arizona Indian Gaming Association, and Poarch Band of Creek Indians of Alabama.

HUNTER, Robert C., Judge.

The State appeals from the trial court's order entering judgment in favor of plaintiffs McCracken and Amick, Incorporated, doing business as The New Vemco Music Co., and its principal owner,

Ralph Amick, on their claim that the State is not permitted under federal Indian gaming law to grant the Eastern Band of Cherokee Indians of North Carolina ("the Tribe") exclusive rights to conduct certain gaming on tribal land while prohibiting it throughout the rest of the State. We conclude, however, that state law providing the Tribe with exclusive gaming rights does not violate federal Indian gaming law. Consequently, we reverse the trial court's order.

Facts and Procedural History

In 1988, Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 through 2721 ("IGRA"), in order "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments[.]"[1] 25 U.S.C. § 2702(1). IGRA creates three classes of gaming: Class I gaming is defined as "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 (other than banking card games) operated in accordance with state law regarding the amount of wagers and hours of operation. 25 U.S.C. § 2703(7). Class III gaming encompasses "all forms of gaming that are not class I gaming or class II gaming," including slot

[1]IGRA was enacted in response to *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 94 L. Ed. 2d 244 (1987), where the United States Supreme Court held that states could not enforce state laws *regulating* gaming against Indian tribes – only criminal statutes *prohibiting* gaming could be enforced under federal law.

machines, casino-style games, banking card games, video games, and lotteries. 25 U.S.C. § 2703(8). With respect to Class III gaming, IGRA requires a compact between the federally recognized Indian tribe and the State prior to the tribe being permitted to conduct Class III gaming on its land.

In August 1994, the Tribe entered into a compact with the State of North Carolina that permits the Tribe to conduct "raffles," "video games," and "other Class III gaming which may be authorized" in writing by the Governor. Under the compact, the Tribe operates Harrah's Cherokee Casino in Cherokee, North Carolina, which attracts more than 3.5 million visitors a year and generates annual revenues over $250,000,000. In 2000, the terms of the compact were extended until 2030.

Prior to 1 July 2007, video poker was legal in North Carolina but heavily regulated. In 2006, the General Assembly enacted Senate Bill 912, which became Chapter 6 of the 2006 Session Laws ("S.L. 2006-6").[2] S.L. 2006-6 phased out the number of video poker machines permitted in the State and banned them completely as of 1 July 2007. S.L. 2006-6 repealed N.C. Gen. Stat. § 14-306.1 (2005), which legalized and regulated video poker, and enacted N.C. Gen. Stat. § 14-306.1A (2007), which, effective 1 July 2007, made it "unlawful for any person to operate, allow to be operated, place into operation, or keep in that person's possession for the purpose of operation any video gaming machine," including video poker machines. N.C. Gen. Stat. § 14-306.1A(a). Although N.C. Gen.

---

[2]Act of June 6, 2006, ch. 6, sec. 4, 2006 N.C. Sess. Laws 6-6.

Stat. § 14-306.1A criminalizes video poker in general in North Carolina, the legislature carved out an exception from the ban for "a federally recognized Indian tribe," making it lawful for a tribe to possess and operate video poker machines on tribal land "if conducted in accordance with an approved Class III Tribal-State Compact applicable to that tribe . . . ." N.C. Gen. Stat. § 14-306.1A(a). S.L. 2006-6 also contains a voiding clause, providing that "[i]f 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."

Plaintiffs own and operate video games, vending machines, and amusement devices, such as juke boxes, pinball machines, and pool tables. Prior to 1 July 2007, plaintiffs' business also included selling, leasing, distributing, operating, and maintaining video poker machines. On 10 November 2008, plaintiffs filed a declaratory judgment action against the State, alleging that the State is not permitted under IGRA to grant the Tribe a gaming "monopoly" withing the State. Plaintiffs also asserted a "separation of powers" violation in that "the authority to negotiate, approve and execute tribal-state compacts or amendments to the existing Compact is reserved to the General Assembly" – not the Governor.

On 21 November 2008, the State moved to dismiss plaintiffs' complaint on multiple grounds, including: (1) lack of standing; (2) failure to state a claim for relief; and (3) failure to join a

necessary party – the Tribe – to the action. On 18 February 2009, plaintiffs took a voluntary dismissal of their separation of powers claim. With the consent of the parties, the trial court converted the State's motion to dismiss into a motion for judgment on the pleadings with respect to plaintiff's IGRA claim.

The trial court entered an order on 19 February 2009, concluding that "IGRA does not permit a state to ban the possession and operation of video gaming machines elsewhere in the state while allowing their possession and operation on tribal lands." Thus, the trial court "declare[d] that the State acted unlawfully in authorizing the Eastern Band of the Cherokee Indians to possess and operate video gaming machines on tribal lands within North Carolina because that activity is not allowed elsewhere in this State; pursuant to Section 12 of SL 2006-6, this declaration renders G.S. § 14-306.1A null, void and of no effect." Consequently, the trial court entered judgment on the pleadings in favor of plaintiffs. The State noticed appeal from the trial court's order and the trial court stayed "the operation and effect of [its] rulings . . . pending the resolution of the State's appeal."

Standard of Review

The State contends that the trial court erred in entering judgment on the pleadings in favor of plaintiffs.[3] On appeal, the

[3]*Amici curiae* argue that the Tribe is a necessary party to this action and thus the trial court erred in not joining the Tribe prior to entering judgment. Although the State moved to dismiss on this basis, the trial court did not rule on this issue, the State did not assign error to the court's failure to address the issue, and the State presents no argument on appeal that the Tribe is an unjoined necessary party. As the issue is raised only in the *amici*

trial court's grant of a motion for judgment on the pleadings pursuant to N.C.R. Civ. P. 12(c) is reviewed de novo. *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335, *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005). Judgment on the pleadings is proper "when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974).

Validity of S.L. 2006-6

As the trial court correctly points out, this case "arises out of the interplay" between IGRA, the tribal-state compact between the Tribe and the State of North Carolina, and the State's criminalization of video gaming machines pursuant to S.L. 2006-6. IGRA "divides gaming on Indian lands into three classes – I, II, and III – and provides a different regulatory scheme for each class." *Seminole Tribe v. Florida*, 517 U.S. 44, 48, 134 L. Ed. 2d 252, 262 (1996). IGRA dictates that Class III gaming, the category at issue here, is "lawful on Indian lands only if such activities are": (1) authorized by an approved tribal ordinance or resolution; (2) "located in a State that permits such gaming for any purpose by any person, organization, or entity"; and (3) conducted in

---

curiae's brief, we decline to address the issue in the absence of exceptional circumstances. *See Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 719 n.10 (9th Cir. 2003) [hereinafter *Artichoke Joe's II*] (declining to address whether tribe was necessary party to challenge to the validity of tribal-state gaming compacts because the issue was "raised only in an amicus brief"), *cert. denied*, 543 U.S. 815, 51, 160 L. Ed. 2d 20 (2004).

conformance with a tribal-state compact in effect. 25 U.S.C. § 2710(d)(1)(A)-(C); *Seminole Tribe*, 517 U.S. at 48-49, 134 L. Ed. 2d at 261-62.

Through Chapter 71A of the General Statutes, the chapter dealing with "Indians," the General Assembly permits gaming by federally recognized tribes on tribal lands provided that the gaming is authorized by a tribal-state compact:

> In recognition of the governmental relationship between the State, federally recognized Indian tribes and the United States, a federally recognized Indian tribe may conduct games consistent with the Indian Gaming Regulatory Act, Public Law 100-497, that are in accordance with a valid Tribal-State compact executed by the Governor pursuant to G.S. 147-12(14) and approved by the U.S. Department of Interior under the Indian Gaming Regulatory Act, and such games shall not be unlawful or against the public policy of the State if the State permits such gaming for any purpose by any person, organization, or entity.

N.C. Gen. Stat. § 71A-8 (2007). The Fourth Circuit has recognized that "North Carolina, citing the IGRA and acknowledging that the Eastern Band of Cherokee Indians is a federally recognized Indian tribe, . . . authorized, subject to various regulations, Class III gaming, the operation of video gaming devices, and the administering of raffles." *United States v. Garrett*, 122 Fed. Appx. 628, 630 (4th Cir. 2005).

In 2006, the General Assembly enacted S.L. 2006-6, codified as N.C. Gen. Stat. § 14-306.1A, which provides in pertinent part:

> (a) Ban on Machines. – It shall be unlawful for any person to operate, allow to be operated, place into operation, or keep in that person's possession for the purpose of

> operation any video gaming machine as defined in subsection (b) of this section, except for the exemption for a federally recognized Indian tribe under subsection (e) of this section for whom it shall be lawful to operate and possess machines as listed in subsection (b) of this section if conducted in accordance with an approved Class III Tribal-State Compact applicable to that tribe, as provided in G.S. 147-12(14) and G.S. 71A-8.
>
> . . . .
>
> (e) Exemption for Activities Under IGRA. — Notwithstanding any other prohibitions in State law, the form of Class III gaming otherwise prohibited by subsections (a) through (d) of this section may be legally conducted on Indian lands which are held in trust by the United States government for and on behalf of federally recognized Indian tribes if conducted in accordance with an approved Class III Tribal-State Gaming Compact applicable to that tribe as provided in G.S. 147-12(14) and G.S. 71A-8.

N.C. Gen. Stat. § 14-306.1A(a), (e).

Determining whether S.L. 2006-6 and the Tribal-State compact violate IGRA requires interpretation of 25 U.S.C. § 2710(d)(1)(B), the provision regulating Class III gaming on Indian lands. Questions of statutory interpretation are questions of law, reviewed de novo on appeal. *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 724 (1980). The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature. *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990). To this end, the court must first determine whether the statutory language is clear and unambiguous, and if so, it "will apply the plain meaning of the words, with no need to resort to judicial construction." *Wiggs v. Edgecombe Cty.*,

361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007). Judicial construction is necessary to ascertain legislative intent only where the statutory language is ambiguous. *Burgess*, 326 N.C. at 209, 388 S.E.2d at 137.

The parties' disagreement focuses on the proper meaning of 25 U.S.C. § 2710(d)(1)(B), which provides that "Class III gaming activities shall be lawful on Indian lands only if such activities are . . . (B) located in a State that permits such gaming for any purpose by any person, organization, or entity[.]" This provision raises two separate but related issues of interpretation: (1) whether S.L. 2006-6, which authorizes Class III gaming only by tribes and only on tribal land, satisfies § 2710(d)(1)(B)'s prerequisite that North Carolina be a state that "permits such gaming"; and (2) whether the scope of the language "any person, organization, or entity" includes Indian tribes.

"Permits Such Gaming"

With respect to IGRA's "permits such gaming" provision, plaintiffs maintain that a state that, with the exception of tribal gaming, prohibits Class III gaming statewide does not, as a matter of public policy, "permit such gaming." Plaintiffs contend that S.L. 2006-6 cannot be reconciled with 25 U.S.C. 2701(5), which provides 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.*" (Emphasis added.)

Plaintiffs maintain that the public policy of the State, as expressed by the General Assembly in S.L. 2006-6, is generally to prohibit Class III gaming notwithstanding the exception provided for federally recognized tribes. Thus, plaintiffs argue, because the overarching public policy of the State is to prohibit Class III gaming, the State does not "permit such gaming" under § 2710(d)(1)(B).

The State counters that the "plain language" of the statute "allows a State to ban video gaming statewide but to carve out an exception for gaming occurring on tribal land pursuant to a Tribal/State compact." The State argues that N.C. Gen. Stat. § 71A-8 and N.C. Gen. Stat. § 14-306.1A(e) clearly "articulat[e]" the public policy of North Carolina: "These laws reflect a policy decision by the General Assembly to extend preferential gaming rights in deference to a separate sovereign entity residing within its borders." Thus, the State claims, North Carolina "permits" Class III gaming as required by IGRA.

"The legislative branch of government is without question 'the policy-making agency of our government . . . .'" *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004) (quoting *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956)). "[W]here the law-making power speaks on a particular subject over which it has power to legislate, public policy in such cases is what the law enacts." *Cauble v. Trexler*, 227 N.C. 307, 311, 42 S.E.2d 77, 80 (1947). Here, the General Assembly has expressed the public policy of the State through N.C. Gen. Stat. § 71A-8, which

explicitly authorizes Indian gaming in accordance with IGRA, and N.C. Gen. Stat. § 14-306.1A, which criminalizes Class III gaming in North Carolina except for the Tribe's enterprises. *See Hatcher v. Harrah's N.C. Casino Co., LLC*, 169 N.C. App. 151, 156, 610 S.E.2d 210, 213 (2005) (holding that "trial court erred by concluding that North Carolina public policy is violated by the video poker machine operated by the Eastern Band of Cherokee Indians"). S.L. 2006-6's voiding clause, moreover, manifests the Legislature's intent that the Tribe should retain its Class III gaming rights under the tribal-state compact no matter what the outcome is of a challenge to S.L. 2006-6's legality – if upheld, the Tribe's Class III gaming is exempted from the statewide prohibition; if struck down, the statewide ban is invalidated.

This conclusion is bolstered by the reasoning of the district court in *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084 (E.D. Cal. 2002) [hereinafter *Artichoke Joe's I*], *aff'd*, 353 F.3d 712 (2003), *cert. denied*, 543 U.S. 815, 160 L. Ed. 2d 20 (2004). In interpreting IGRA's "permits such gaming" requirement, the district court observed that Congress had "employed capacious language to clarify the situations in which it would be lawful for Indian tribes to offer class III gaming":

> The Act does not define "permits"; neither placing restrictions on the word nor otherwise limiting its meaning. Section 2710(d)(1)(B) does not say "permits such gaming independently of IGRA for any purpose by any person, organization, or entity." It does not say "permits such gaming for any purpose by any person, organization, or entity other than Indian tribes." And it is precisely because Congress did not write the Act in

> either of these ways that [a state], subject to the Secretary[of the Interior]'s approval, may "permit" class III gaming within the structure of IGRA, even though the permission is not entirely independent of IGRA, and even though IGRA prevents states from unilaterally legalizing tribal gaming. In short, the statute is written broadly, and it is consistent with the co-operative federalism at the heart of IGRA to allow the state to "permit" tribal gaming under the Act by exempting the tribes from state prohibitions on [Class III gaming].

Id. at 1121.[4]

IGRA's legislative history also supports the State's position that IGRA permits states to grant tribes preferential gaming rights. *See Lilly v. N.C. Dept. of Human Resources*, 105 N.C. App. 408, 411-12, 413 S.E.2d 316, 318 (1992) (holding that legislative history of federal statute supported plain meaning of statutory language). When Congress was considering the Supreme Court's decision in *Cabazon*, two different bills were introduced: Senate Bill 555 and Senate Bill 1303. The majority of Senate Bill 555 was adopted and ultimately enacted by Congress as IGRA. The initial draft of Senate Bill 555, however, included § 11(d)(1) and (2), which provided in pertinent part:

> (1) Except as provided in paragraph (2) of this subsection, class III gaming shall be unlawful on any Indian lands under section 1166 of title 18, United States Code.
>
> (2)(A) *A gaming activity on Indian lands that is otherwise legal within the State where such lands are located* may be exempt from the

---

[4]Although not binding on North Carolina's courts, the holdings and underlying rationale of lower federal courts may be considered persuasive authority in interpreting a federal statute. *Security Mills v. Trust Co.*, 281 N.C. 525, 529, 189 S.E.2d 266, 269 (1972).

> operation of paragraph (1) of this subsection where the Indian tribe requests the Secretary to consent to the transfer of all civil and criminal jurisdiction, except for taxing authority, pertaining to the licensing and regulation of gaming over the proposed gaming enterprise to the State within which such gaming enterprise is to be located and the Secretary so consents.

133 Cong. Rec. 3740 (1987) (emphasis added). This language was taken out of the bill and the current, broader language was substituted from Senate Bill 1303. 133 Cong. Rec. 14332, § 10(b).

Senate Bill 555's original language – "otherwise legal within the State" – supports plaintiffs' contention that persons, organizations, or entities other than the Tribe must be allowed to engage in Class III gaming activities in order for the State to permit the Tribe to conduct such gaming activities. As one federal appellate court observed, however: "The fact that the 'permits such gaming' text was taken from another bill suggests that the substitution was deliberate, and the particular substitution that the drafters chose implies that Congress intended a broader meaning than the one proposed by Plaintiffs." *Artichoke Joe's II*, 353 F.3d at 727. "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." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43, 94 L. Ed. 2d 434, 455 (1987) (citation and internal quotation marks omitted). Based on the plain language of the statute, supported by its legislative history, we conclude that

North Carolina satisfies § 2710(d)(1)(B)'s "permits such gaming" requirement.

"Any Person, Organization, or Entity"

The parties similarly disagree about the meaning of IGRA's phrase "any person, organization, or entity." The State argues that because tribal gaming enterprises are not explicitly excluded from the phrase "any person, organization, or entity," IGRA enables the State to grant the Tribe exclusive Class III gaming rights. Plaintiffs, on the other hand, contend that it stands § 2710(d)(1)(B) "on its head" to read the phrase "any person, organization, or entity" as "includ[ing] the very tribe whose authority is at issue." Thus, plaintiffs argue, § 2710(d)(1)(B) must be read as requiring states to permit Class III gaming for any purpose by any *non-Indian* person, organization, or entity, if it permits it for the Tribe.

The focal point of the parties' arguments is the word "any." Under the State's reading of § 2710(d)(1)(B), "any" means "one" – the State may grant the Tribe exclusive Class III gaming rights under IGRA if state law permits Class III gaming for at least *one* purpose for at least *one* person, organization, or entity, including the Tribe itself. The State's interpretation of § 2710(d)(1)(B) is both reasonable and supported by the decisions of other courts of other jurisdictions that have addressed this issue. *See Artichoke Joe's I*, 216 F. Supp. 2d at 1122 ("The word 'any' can mean 'every' or 'one.' However, interpreting 'any' in § 2710(d)(1)(B) to mean 'every' must be rejected. . . . [Section] 2710(d)(1)(B) is best

understood as allowing class III gaming compacts in states that permit that kind of gaming for at least one purpose, by at least one person, organization, or entity."); *American Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1067 (D. Ariz. 2001) ("The State must first legalize a game, even if only for tribes, before it can become a compact term."), *vacated on procedural grounds*, 305 F.3d 1015 (9th Cir. 2002); *Dalton v. Pataki*, 5 N.Y.3d 243, 261, 835 N.E.2d 1180, 1190, 802 N.Y.S.2d 72, 82 (N.Y.) (concluding that "if class III gaming is permitted in the state for any purpose, . . . it will be permitted on Indian land"), *cert. denied*, 546 U.S. 1032, 163 L. Ed. 2d 571 (2005).

According to plaintiffs' interpretation, however, "any" means "every" — in order for the State to grant the Tribe Class III gaming rights, state law must also allow every other person, organization, or entity within the State to conduct Class III gaming, albeit subject to regulation. This interpretation is likewise not unreasonable. *See Artichoke Joe's II*, 353 F.3d at 724 (holding that "[a]lthough the trend of judicial construction of § 2710(d)(1)(B) slightly favors" reading "any" as "one," interpreting "any" as "every" not unreasonable). We, therefore, conclude — as have all other appellate decisions we have found addressing this issue — that the phrase "any person, organization or entity" is ambiguous. *See id.* at 723 ("There is nothing in the text itself that definitively resolves whether Congress intended Indian tribes to fall within the scope of 'any person, organization, or entity' under this provision."); *Artichoke Joe's I*, 216 F. Supp. 2d at 1123

(considering legislative history of IGRA "to the extent that the language of § 2710(d)(1)(B) might be ambiguous"); *Flynt v. California Gambling Control Com.*, 104 Cal. App. 4th 1125, 1138, 129 Cal. Rptr. 2d 167, 178 (Cal. Ct. App. 2002) ("We find the text of section 2710(d)(1)(B) ambiguous."), *cert. denied*, 540 U.S. 948, 157 L. Ed. 2d 278 (2003).

When a statute is ambiguous, principles of statutory construction are necessary to discern legislative intent. *Young v. Whitehall Co.*, 229 N.C. 360, 367, 49 S.E.2d 797, 801 (1948). The best indicia of legislative intent are the purpose and spirit of the statute, the goal it sought to accomplish, its legislative history, and the circumstances surrounding its enactment. *Black v. Littlejohn*, 312 N.C. 626, 630, 325 S.E.2d 469, 473 (1985).

Congress provides that two of the primary purposes of IGRA are

> (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments; [and]
>
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players[.]

25 U.S.C. § 2702(1)-(2). The stated purposes of IGRA "strongly suggest[] that the thrust of the [statute] is to promote Indian gaming, not to limit it." *Grand Traverse Band v. Office of U.S.*

Atty., 369 F.3d 960, 971 (6th Cir. 2004). As recognized by other appellate courts, nowhere in Congress' "[d]eclaration of policy" is there any indication that IGRA was intended to establish parity between Indian and non-Indian gaming enterprises. *See, e.g., Artichoke Joe's II*, 353 F.3d at, 728 ("Nowhere is there any reference to the idea that IGRA serves as a means of policing equality between Indian and non-Indian gaming operations in the context of class III gaming."); *Flynt*, 104 Cal. App. 4th at 1139, 129 Cal. Rptr. 2d at 178 ("Quite simply, Congress exhibited no desire to command states to enact gaming laws so that private non-Indian enterprises would enjoy the same rights as Indian tribes.").

More pertinent to this case, in *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766, 85 L. Ed. 2d 753, 759 (1985), the United States Supreme Court held that "the standard principles of statutory construction do not have their usual force in cases involving Indian law." One of the canons of construction that apply specially to Indian law, known as the *Blackfeet* presumption or trust doctrine, provides that federal statutes passed for the benefit of Indian tribes are to be liberally construed, with ambiguities being resolved in favor of the tribes. *Id.* at 767, 85 L. Ed. 2d at 760; *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 150, 81 L. Ed. 2d 113, 123 (1984). In applying the *Blackfeet* presumption, any doubt as to the proper interpretation of a federal statute enacted for the benefit of an Indian tribe will

be resolved in favor of the tribe as "[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44, 65 L. Ed. 2d 665, 673 (1980).

Plaintiffs assert that the *Blackfeet* presumption "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." Plaintiffs misunderstand the subject of the presumption; it applies to federal Indian law, not state law. *See Arizona Public Service Co. v. E.P.A.*, 211 F.3d 1280, 1293 (D.C. Cir. 2000) ("[C]ourts construe *federal* statutes liberally to benefit Native American nations." (Emphasis added.)).

It cannot be seriously disputed that IGRA – titled the *Indian Gaming Regulatory Act* – is a federal statute designed to benefit Indian tribes. In its declaration of policy, Congress provides that one of the purposes of the gaming regulations in IGRA is to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments[.]" 25 U.S.C. § 2702(1); *accord Artichoke Joe's II*, 353 F.3d at 730 ("IGRA is undoubtedly a statute passed for the benefit of Indian tribes."); *see also* Matthew L. M. Fletcher, *Bringing Balance to Indian Gaming*, 44 Harv. J. on Legis. 39, 51 (2007) ("Overall . . . Congress made clear that the purpose of [IGRA] was to benefit Indian tribes, not states, and to expand

tribal opportunities for self-determination, self-government, economic development, and political stability."). Thus, because § 2710(d)(1)(B)'s phrase "any person, organization or entity" is ambiguous as to whether the Tribe is included within its scope, the *Blackfeet* presumption applies.

Plaintiffs argue that there is no way to apply the *Blackfeet* presumption in this case because neither their interpretation of § 2710(d)(1)(B) nor the State's is "more favorable to the Tribe than the other." According to plaintiffs, if, as the trial court held, S.L. 2006-6 violates IGRA, then its voiding clause is triggered and the Tribe may continue to conduct its Class III gaming activities on tribal land. If, on the other hand, S.L. 2006-6 complies with IGRA's requirements, then the Tribe retains its gaming rights under the tribal-state compact. Thus, according to plaintiffs, "the General Assembly has placed the Tribe in a 'win-win' position with respect to the outcome of this case."

Plaintiffs' characterization ignores the economic impact of invalidating S.L. 2006-6. The tribal-state compact between the Tribe and the State of North Carolina entitles the Tribe to conduct those Class III gaming activities specified in the compact. By prohibiting Class III gaming throughout the rest of the State, S.L. 2006-6 makes the Tribe's gaming rights exclusive. If S.L. 2006-6 were invalidated, the Tribe would no longer have preferential gaming rights, but instead would be in competition with other gaming enterprises, such as plaintiffs'. As their complaint

states, the motivation behind this lawsuit is to "restore the plaintiffs' authority to engage in the video poker business." Plaintiffs' interpretation of § 2710(d)(1)(B) is inconsistent with IGRA's stated purposes of promoting tribal economic development, self-sufficiency, and strong tribal governments. *See Artichoke Joe's II*, 353 F.3d at 731 ("[T]he award of exclusive class III gaming franchises simply furthers the federal government's long-standing trust obligations to Indian tribes and helps promote their economic self-development.").

In applying the presumption, we adopt the State's interpretation of the ambiguous phrase "any person, organization or entity," concluding that S.L. 2006-6, which legalizes the Tribe's Class III gaming rights, satisfies § 2710(d)(1)(B)'s requirement that North Carolina be a state "that permits such gaming for any purpose by any person, organization, or entity[.]" The trial court, therefore, erred in concluding that IGRA precluded North Carolina from granting the Tribe exclusive Class III gaming rights and entering judgment on this basis. We note, in conclusion that North Carolina's

> decision to "permit" tribes to operate class III gaming facilities within the context of IGRA and the compacts, while denying those rights to other persons, organizations, and entities, is a policy judgment, which whether one agrees with it or not, does not conflict with IGRA's goal of maintaining state authority while protecting Indian gaming from discrimination. By contrast, to interpret IGRA to require the states to cho[o]se between no class III gaming anywhere and class III

> gaming everywhere would not further any of IGRA's goals and would limit the states' authority and flexibility without any resulting benefit to the tribes.

Artichoke Joe's I, 216 F. Supp. 2d at 1126. The trial court's order is reversed.

Reversed.

Judges GEER and STEPHENS concur.