NO. 06 -

IN THE

SUPREME COURT OF THE UNITED STATES

ONEIDA INDIAN NATION OF NEW YORK,

Petitioner,

-v-

SCOTT PETERMAN, UPSTATE CITIZENS FOR EQUALITY, INC., AND PERSONS AND ENTITIES SIMILARLY SITUATED, and HON. DAVID TOWNSEND, a duly elected official of the New York State Legislature,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the State of New York

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the rule adopted by the New York courts, that they may adjudicate an Indian tribe's interests in its federally approved gaming compact in the tribe's absence because the tribe could waive sovereign immunity and appear as a party in the suit, is preempted by federal law because it conflicts both with federally protected sovereign immunity and with the federal interest in tribal economic development and self-sufficiency through regulated tribal gaming.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the New York Supreme Court were the Plaintiffs, Scott Peterman, Upstate Citizens for Equality, Inc., and the Honorable David Townsend, in his capacity as a member of the New York State legislature ("the UCE"), and the Defendants, George Pataki, Governor of the State of New York, and the New York Racing and Wagering Board and Division of State Police ("the State"). The Oneida Indian Nation of New York ("the Nation") entered a limited appearance in the New York Supreme Court. In the Appellate Division, Fourth Department, the Nation was the Appellant and both the UCE and the State were Appellees, because the State had joined with the UCE in opposing the Nation's Motion to Dismiss.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Statutes

Rules

Other Authorities

Constitutional Provisions

TABLE OF APPENDICES

OPINIONS BELOW

The order of the Court of Appeals of New York, denying leave to appeal, is reported at 6 N.Y.3d 713, 849 N.E.2d 971 (N.Y. 2006) and appears in the Appendix at A1-2. The order of the Appellate Division, Fourth Department, affirming the Supreme Court is reported at 801 N.Y.S.2d 212 (App. Div., 4th Dept. 2005) and appears in the Appendix at A3-5. The Letter Decision of the Supreme Court, Oneida County, is reported at 798 N.Y.S.2d 347 (Sup. Ct., Oneida Cty. 2004) and appears in the Appendix at A6-22. The Supreme Court's Order, dated July 28, 2004, appears in the Appendix at A23-27.

STATEMENT OF JURISDICTION

On September 30, 2005, the New York Supreme Court Appellate Division, Fourth Department, issued an order affirming the New York Supreme Court's Judgment. The Court of Appeals of New York denied discretionary review on May 4, 2006. On July 24, 2006, Justice Ruth Bader Ginsburg granted an extension of time to file a petition for writ of certiorari, until October 2, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the United States Constitution provides that, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI.

Pertinent provision of the Indian Gaming Regulatory Act , 25 U.S.C. §§ 2701, *et seq.,* are set out in the Appendix, at A28-41.

STATEMENT OF THE CASE

In 1993, the Secretary of the Interior, through the Acting Assistant Secretary for Indian Affairs, approved a tribal-state gaming compact ("the Compact") between the Oneida Indian Nation of New York ("the Oneida Nation" or "the Nation") and the State of New York, pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701, *et seq*. (2003). The notice of approval was published in the Federal Register on June 15, 1993, 58 Fed. Reg. 33160 (June 15, 1993), thereby placing the Compact "in effect" as a matter of federal law and authorizing the Nation to engage in the class III gaming specified in the Compact. 25 U.S.C. §§ 2710(d)(1)(C), (d)(3)(B).

Although plaintiffs in this case were aware of the governor's execution of the Compact and the submission of the Compact to the Secretary of the Interior, they did not challenge either.. Nor did they challenge the Secretary's approval of the Compact under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (2000), within the six-year statute of limitations applicable to the APA. The Oneida Nation invested hundreds of millions of dollars in gaming, hotel and other resort facilities, and thousands of employees came to work at the Nation's casino and resort complex. The Oneida Nation's gaming and resort complex is now the largest employer in an economically depressed region of Central New York.

In March 1999, a group known as the Upstate Citizens for Equality ("UCE") and individuals affiliated with UCE filed suit in New York state court seeking to invalidate the Oneida Nation's gaming compact, for the avowed purpose of helping the State to "renegotiate" the Compact to obtain a

share of casino revenues and to use that "renegotiation" as leverage against the Nation's pending land claim against the State.[1] Among other things, the UCE sought an injunction against all class III gaming activities. The UCE named State officials, the Oneida Nation, and Nation officials as defendants. The Nation moved to dismiss, asserting its federally protected sovereign immunity from suit. In response, the UCE filed an amended complaint, eliminating the Oneida Nation and Nation officials as defendants, but retaining its prayer for a declaration that the Compact was invalid under state law. The court allowed the case to proceed, rejecting the argument of both the Nation and the State that the Nation was an indispensable party and that federal protection of sovereign immunity required dismissal of the suit.

In 2003, the New York Court of Appeals decided *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 798 N.E.2d 1047 (N.Y. 2003). The court held, as a matter of state constitutional law, that the governor needed the legislature's approval to negotiate and execute a gaming compact with an Indian tribe under IGRA. The court also rejected the State's argument that the case could not proceed in the absence of the tribal party to the challenged compact, the St. Regis Mohawk Tribe. The court reached this conclusion after balancing the factors set out in N.Y.C.P.L.R. § 1001, New York's indispensable party statute. In particular, the court found that there was a strong public interest in having the court resolve an important and previously undecided question of state constitutional law. The court also refused to give weight to the potential prejudice to the tribe:

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[1] Record at 646-48. The UCE also filed a motion to intervene in the Oneida land claims case pending in federal district court, including a proposed "countersuit" alleging that the Nation's gaming compact was invalid, *Oneida Indian Nation of New York v. County of Oneida*, 132 F.Supp. 2d 71, 72-73 (N.D.N.Y. 2000), but then withdrew its motion to intervene in favor of proceeding in state court. *Id.*

> The Tribe has chosen to be absent . . . . While sovereign immunity prevents the Tribe from being forced to participate in New York court proceedings, it does not require everyone else to forego the resolution of all disputes that could affect the Tribe . . . . [W]e will not permit the Tribe's voluntary absence to deprive these plaintiffs . . . of their day in court . . . . [T]o the extent the Tribe is prejudiced by our adjudication of issues that affect its rights under the compact, the Tribe could have mitigated that prejudice by participating in the suit.

Saratoga, 801 N.Y.2d at 820-21 (internal citations omitted).

After *Saratoga*, the UCE sought summary judgment against the state officials for a declaration that the Oneida Nation's Compact was invalid. With the permission of the court, the Oneida Nation entered a limited appearance for the purpose of asserting its federally protected sovereign immunity and seeking dismissal on indispensable party grounds.[2] The State reversed its earlier position and joined with the plaintiffs in requesting a declaration that the Nation's compact was invalid; the State refused the Nation's request that it oppose summary judgment on the grounds of the

[2] The court correctly ruled that the Nation could intervene for the limited purpose of moving to dismiss the suit for failure to join an indispensable party. *See Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 327 F. Supp. 2d 995, 1000 (W.D. Wis. 2004), *aff'd on other grounds*, 422 F.3d 490 (7th Cir. 2005) (sovereign may intervene for limited purpose such as moving to dismiss the lawsuit for failure to join an indispensable party without waiving its sovereign immunity); *see also Zych v. Wrecked Vessel Believed to be the Lady Elgin*, 960 F.2d 665, 667-68 (7th Cir. 1992) (state of Illinois did not waive sovereign immunity by intervening in order to move for dismissal of suit).

UCE's laches and lack of standing and opposed the Nation's motion to dismiss.[3]

The court granted the Nation leave to "renew" the motion to dismiss it had made prior to the UCE's Amended Complaint. (Pet. App. at A27). The Nation argued that "[t]he Nation's sovereign immunity simply bars a state court from adjudicating a matter that impacts a significant interest of the Nation." Mem. of Law Supporting the Renewed Mot. by the Oneida Indian Nation of New York to Dismiss Compl. at 4 (citing *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877 (1986); *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 547-48 (2d Cir. 1991); and *Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989)).

The New York Supreme Court granted summary judgment, entering an order declaring the Compact invalid because it was entered into in violation of New York's separation of powers doctrine. (Pet. App. at A23-27). The court refused even to consider the significant record evidence of prejudice to the Nation if the case continued in its absence or the absence of any overriding public interest in addressing again the question of state constitutional law already decided in *Saratoga*. Instead, the court treated *Saratoga* as a *per se* rule allowing adjudication of an immune sovereign's rights in its absence, and held that "the Nation has chosen to voluntarily absent itself from the instant litigation, a choice that is clearly well within its right as a sovereign nation . . . . [T]o the extent that the Oneidas are prejudiced by this court's adjudication, if any, it could have chosen to mitigate its damages by participating in the litigation as a party." (Pet. App. at A15).

[3] There could be no argument, therefore, that the state represented the Nation's interests. After the state's change of position, the Nation moved to dismiss on the additional ground of lack of a case or controversy. The court denied that motion.

On appeal, the Nation again urged that reversal was compelled by the federal protection of the Nation's sovereign immunity. Br. of Appellant Oneida Indian Nation of New York at 25, *Peterman v. Pataki*, 801 N.Y.S.2d 212 (App. Div., 4th Dept. 2005) (CA 04-2580 & CA 04-3078) ("Federal law requires reversal of the court's indispensable party ruling, because it punishes the tribe for asserting its federally protected sovereign immunity"); Reply Br. of Appellant Oneida Indian Nation of New York at 2-3, *Peterman v. Pataki*, 801 N.Y.S.2d 212 (App. Div., 4th Dept. 2005) (CA 04-2580 & CA 04-3078) ("The Nation consistently has asserted that its sovereign immunity means *both* that it cannot be sued as a defendant and that its interests cannot be adjudicated in its absence, because forcing the Nation to waive its immunity in order to protect its interests renders its federally guaranteed immunity meaningless") (emphasis in original). The Appellate Division affirmed the judgment for the reasons stated by Supreme Court. 801 N.Y.S.2d 212 (App. Div., 4th Dept. 2005). (Pet. App. at A3-5) The Nation sought review in the New York Court of Appeals, again urging that federal law required reversal. Oneida Indian Nation of New York's Mem. of Law in Support of its Mot. for Permission to Appeal at 10-11, *Peterman v. Pataki* (Mo. No. 186) ("As a matter of federal law, an Indian tribe's immunity bars litigation, to which the tribe is not a party, challenging a compact to which the tribe is a party."). The Court of Appeals denied discretionary review. 6 N.Y.3d 713, 849 N.E.2d 971 (N.Y. 2006) (Pet. App. at A1-2) The Court of Appeals has, therefore, approved the lower courts' understanding of the ruling in *Saratoga:* sovereign immunity does not bar a suit contesting the validity of an immune tribe's compact, even if it bars suit against the tribe itself, so long as the tribe retains the right to waive its immunity and intervene in the litigation.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The New York courts have ruled that they may ignore the Nation's federally protected sovereign immunity and decide issues that could profoundly impair the Oneida Nation's interests in a federally approved gaming compact, in litigation to which the Nation is not a party, because the Nation could be a party if it were willing to waive its federally protected sovereign immunity. The rule that has been applied in this case and in other recent New York decisions is broader and even more troubling than the decision in *Saratoga,* which relied in large part on the New York Court of Appeals' perceived need to address a then unsettled issue of New York constitutional law. The decision in this case has forged language from *Saratoga* into an absolute rule that an Indian tribe may never be indispensable to a suit in which it could waive sovereign immunity and be a party if it chose to do so. The application of that rule is particularly troubling here, where the UCE sought no relief as to the nominal state defendants, and both sides ultimately joined in a request for a declaratory judgment, the sole purpose of which was to impair the Oneida Nation's federal gaming compact.

The New York courts' decision is in blatant disregard of federal interests and conflicts directly with this Court's precedents. There are two strong federal interests at stake in this litigation – the federal protection of tribal sovereignty, repeatedly affirmed by this Court, *Kiowa Tribe of Oklahoma v. Mfg Techs., Inc.,* 523 U.S. 751, 756 (1998); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505 (1991), and the federal interest in tribal economic development and self-sufficiency, recognized by this Court in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 216-19 (1987), and codified in IGRA. 25 U.S.C. § 2702(1) (IGRA serves Congress' purpose of

"promoting tribal economic development, self-sufficiency, and strong tribal governments"); S. Rep. No. 100-446, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3075 (affirming "the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian lands"). Forcing a tribe to surrender one in order to protect the other is incompatible with federal protection of both and therefore is preempted by federal law. *Three Affiliated Tribes*, 476 U.S. at 889-90 (tribe cannot be forced to waive sovereign immunity in order to have access to state courts for suits against non-Indians, as intended by Congress); *Cabazon*, 480 U.S. at 216 ("[S]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law").

The intrusion on tribal immunity in this case is not technical or peripheral. At stake are substantial economic and employment interests of Indian tribes and surrounding communities, as protected by an intergovernmental compact, made under federal law between state and tribal governments and approved and put into effect by the federal government. No one suggests that such state court challenge could be brought directly against the tribe or the Secretary of the Interior. It is worse, not better, for the state courts of one of the parties to the compact to proceed with the exact same litigation in the absence of the tribe or the federal government. *See West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951) (a state cannot be its own ultimate judge in a controversy with another sovereign over the validity of an interstate compact to which that state is a party). This Court should grant review to make clear that states may not coerce a waiver of federally protected sovereign immunity or litigate important federal and tribal interests in the absence of both the tribe and the federal government.

I. Federally Protected Sovereign Immunity Includes The Tribe's Right Not To Have Its Interests Adjudicated Without Its Consent

Federal law recognizes and protects tribal sovereignty. *Cabazon*, 480 U.S. at 207; *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980). "The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes*, 476 U.S. at 890. "[T]ribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe*, 523 U.S. at 756.

Congress alone can authorize a suit against an Indian tribe, and it must do so explicitly. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978) (Indian Civil Rights Act does not waive tribe's immunity from suit in federal court). This Court has twice struck down a compulsory counterclaim rule that, in the absence of Congressional consent, conflicted with tribal immunity. *See Potawatomi*, 498 U.S. at 509, 514 (federal compulsory counterclaim rule could not be applied to allow counterclaim against tribe that sued for injunctive relief; Congress has not authorized counterclaim against tribe); *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 513 (1940) (same).

Tribal immunity is given force even if its application means that certain issues involving Indian tribes cannot be resolved in the courts. *U.S. F & G*, 309 U.S. at 513 ("[t]he desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity"); *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002) (tribe indispensable to suit challenging gaming compact; plaintiffs' lack of another adequate remedy "is a common consequence of sovereign immunity, and the tribes'

interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims").[4]

Sovereign immunity includes the tribe's "sovereign right not to have its legal duties judicially determined without consent." *Enterprise Mgmt. Consultants*, 883 F.2d at 894. Allowing plaintiffs to challenge a contract to which a tribe is a party "would . . . effectively abrogate the Tribe's sovereign immunity by adjudicating its interest in that contract without consent." *Id.* Thus, federal courts consistently hold that where a necessary party is immune from suit, dismissal is required under the federal indispensable party rule, Fed. R. Civ. P. 19(b).

> [W]hen an indispensable party is immune from suit, there is very little room for balancing of other factors set out in rule 19(b), because immunity may be viewed as one of those interests compelling by themselves . . . . The rationale behind the emphasis placed on immunity in the weighing of rule 19(b) factors is that the case is not one where some procedural defect such as venue precludes

[4] In fact, IGRA provides other fora for plaintiffs to challenge a gaming compact, including APA review of the Secretary's decision. *See* 25 U.S.C. § 2714 (decisions made by NIGC pursuant to § 2710 are final agency decisions for purposes of APA review); *Kansas v. United States*, 249 F.3d 1213, 1225-26 (10th Cir. 2001) (tribe not indispensable to suit seeking APA review of NIGC decision; federal government adequately represented tribe's interests). The fact that the Nation's sovereign immunity bars these plaintiffs from obtaining review of the compact in state court is completely consistent with the comprehensive federal scheme set out in IGRA. Class III gaming is legal pursuant to a compact that has been approved by the Secretary of the Interior and published in the Federal Register. 25 U.S.C. §§ 2710(d)(1)(C), (d)(3)(B). Whether a compact is in effect is purely a question of federal law. *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1055-56 (9th Cir. 1997). IGRA assigns all ultimate decision-making to federal authorities, both in approving the gaming and in enforcing gaming laws and regulations. *See* 25 U.S.C. §§ 2715, 2710, 2713; 18 U.S.C. § 1166 (2006). There is no private right of action under IGRA. *Florida v. Seminole Tribe*, 181 F.3d 1237 (11th Cir. 1999).

> litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.

Fluent, 928 F.2d at 548 (internal citations and punctuation omitted); *see also Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) (absent tribes indispensable to suit challenging settlement act of which they were beneficiaries; "absent tribes have an interest in preserving their own sovereign immunity, with its concomitant right not to have [their] legal duties judicially determined without consent") (internal quotation and citation omitted).

The fact that the tribe could waive its immunity and intervene in the suit does not alter the analysis. "It is wholly at odds with the policy of tribal immunity to put the tribe to this Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it." *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986); *see also United Keetoowah Band of Cherokee Indians of Oklahoma v. United States*, 67 Fed. Cl. 695, 703 (2005) (same); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) (same). More simply, immunity is lost altogether when it is ignored on the ground that it could be, but was not, waived.

II. Federal Law Preempts New York's Application Of Its Indispensable Party Rule.

Federal law preempts state procedural rules that are incompatible with federal and tribal interests in tribal autonomy and economic self-sufficiency. In *Three Affiliated Tribes*, this Court held that a North Dakota statute that refused to allow state courts to exercise their federally-granted jurisdiction over civil claims on an Indian reservation unless the tribe waived sovereign immunity was preempted by federal law. The fact that the tribe could have the access to state courts that Congress intended by waiving its

sovereign immunity did not remedy the problem because that condition was inconsistent with another clear federal interest: "Congress' jealous regard for Indian self-governance." 476 U.S. at 890.

State litigation over the validity of a federally approved tribal state gaming compact has the potential to impair federal interests in tribal self-sufficiency and economic development, recognized by this Court in *Cabazon* and protected by Congress in IGRA. Although the validity of a federally approved gaming compact is a federal question that cannot be decided by a state court, *supra* n.4, a state court decision that the compact is "invalid" as a matter of state law has been and will be used by gaming opponents in an effort to affect that federal determination. (Pet. App. at A42-43) (Letter from UCE to NIGC urging that Nation's casino be closed in light of *Saratoga*); s*ee also Am. Greyhound*, 305 F.3d at 1024 (tribes not bound by ruling on validity of compact, but tribes' interests may be affected as a practical matter).

Federal courts uniformly hold that litigation over the validity or terms of a gaming compact, or any other tribal-state compact, cannot go forward in the absence of either of the parties to the compact, the tribe or the state. *Wilbur v. Locke*, 423 F.3d 1101, 1113 (9th Cir. 2005) (tribe indispensable to suit challenging cigarette compact between tribe and state; "[n]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable") (citation omitted); *Am. Greyhound*, 305 F.3d at 1027 (tribe indispensable to suit to enjoin governor from entering into, modifying or renewing gaming compacts with tribes); *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1498-99 (D.C. Cir. 1995) (state indispensable to suit asserting that compact was valid under federal law because it had been submitted to Secretary of Interior for approval); *Cachil Dehe*

Band of Wintun Indians of the Colusa Indian Community v. California, No. S-04-2265 FCD KJM, 2006 WL 1328267, at *6 (E.D. Cal. May 16, 2006) (suit dismissed because plaintiffs seek interpretation of gaming compact that would impact other, immune tribes); *Dewberry v. Kulongoski,* 406 F.Supp. 2d 1136, 1150 (D. Or. 2005) (tribe indispensable to suit challenging gaming compact); *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton,* 327 F. Supp. 2d 995, 1000 (W.D. Wis. 2004), *aff'd on other grounds,* 422 F.3d 490 (7th Cir. 2005) (same); *Pueblo of Sandia v. Babbitt,* 47 F.Supp. 2d 49, 56 (D.D.C. 1999) (state indispensable to suit challenging Secretary of Interior's refusal to exercise authority to disapprove provisions of compact as contrary to IGRA); *Cf. Yashenko v. Harrah's NC Casino Co., LLC,* 446 F.3d 541, 552-53 (4th Cir. 2006) (tribe indispensable to suit challenging tribal preference policy included in management agreement between tribe and defendant management company; judgment would impair the tribe's contractual interests).

The decision in this case is in direct conflict with the unanimous view of the federal courts that a tribe cannot be forced to waive its sovereign immunity in order to protect its interests in a federally approved gaming compact. Here, as in *Three Affiliated Tribes,* important federal and tribal interests, in regulating Indian gaming in a way that preserves the "sovereign rights of tribal governments to regulate activities and enforce laws on Indian lands," S. Rep. No. 100-446, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3075, are prejudiced by allowing state court litigation challenging the validity of the Nation's federally approved gaming compact to proceed in the absence of both the tribe and the federal government. And here, as in *Three Affiliated Tribes,* it is incompatible with federal law for the state to require the Nation to waive its sovereign immunity in order to protect those interests.

III. Review Is Needed Because The New York Decision Conflicts With Decisions Of This Court And With A Uniform Body Of Law In The Federal Courts And Because There Is Confusion Among The State Courts Over The Issue Presented Here.

Review of this decision is needed because, in allowing the decision of the Fourth Department to stand, the New York Court of Appeals has decided an important question of federal law in a way that conflicts with this Court's decision in *Three Affiliated Tribes*, with this Court's scrupulous protection of tribal sovereign immunity, and with the unanimous view of the lower federal courts that the federal policies at stake bar a court from litigating the validity of a tribal state gaming compact in a proceeding to which the tribe cannot be made a party because of its sovereign immunity.

Review is needed because state courts are divided on whether forcing a tribe to abandon its sovereign immunity in order to protect its interests in a gaming compact is acceptable. The Wisconsin Supreme Court has ruled on the validity of a gaming compact in the absence of the tribe after the court of appeals ruled that the tribe was not indispensable. *Dairyland Greyhound Park, Inc., v. Doyle*, 2006 WI 107, 719 N.W.2d 408 (2006). New Mexico, in contrast, has followed the analysis of the federal courts, finding that a tribe is indispensable to a suit challenging a gaming compact. *State ex rel. Coll v. Johnson*, 128 N.M. 154, 990 P. 2d 1277 (N.M. 1999).[5]

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[5] *Coll* distinguished an earlier New Mexico case, *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (N.M. 1995), in which the court had allowed a mandamus action to prohibit the governor from implementing compacts he had signed as resting on the "special character of mandamus." 128 N.M. at 158 (quoting *Srader v. Verant*, 125 N.M. 521, 964 P.2d 82, 92 (N.M. 1988)). Similarly, *State ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (Kan. 1992), to which the tribe was not a party, was a mandamus/quo warranto action, brought for the purpose of preventing the governor from submitting the compact to the Secretary of the Interior for approval.

Finally, review is needed because the issue presented in this case is of tremendous significance even beyond the gaming context. Like the New York court in this case, other New York courts have interpreted the language in *Saratoga* as a *per se* rule to be applied in every case – an Indian tribe cannot be indispensable as long as it could waive its sovereign immunity and appear as a party in the case. *See, e.g., Concern, Inc. v. Pataki,* 801 N.Y.S.2d 232 (Sup. Ct., Erie Cty. 2005), *appeal dismissed,* 816 N.Y.S.2d 397 (N.Y.App. Div., 4th Dep't 2006) (tribe not necessary to suit seeking to restrain the state from acquiring and transferring land to the Seneca Nation for the establishment of a casino; "[t]he Tribe has chosen to be absent") (citing *Saratoga)*; *Huron Group, Inc. v. Pataki,* 785 N.Y.S.2d 827, 841 (N.Y. Sup. Ct., Erie Cty. 2004), *aff'd,* 803 N.Y.S.2d 465 (App.Div., 4th Dep't 2005), *appeal dismissed,* 2005 NY LEXIS 220 (N.Y. Feb. 21, 2006) (same); *In the Matter of the Herald Co., v. Feurstein,* 779 N.Y.S.2d 333, 345 (Sup. Ct., N.Y. Cty. 2004) (Nation not indispensable to suit seeking state records of any complaints with regard to Nation's casino; "to the extent that the Oneidas are prejudiced by this Court's adjudication of issues that affect its rights under the compact, the Oneidas could have mitigated that prejudice by participating in the suit") (citing *Saratoga*).[6] At least one other state court, citing *Saratoga,* has applied the same rule –

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[6] These cases demonstrate that the waiver rule New York has adopted cannot be justified under the Ninth Circuit's "public rights" exception to compulsory joinder rules. *Conner v. Burford,* 848 F.2d 1441, 1459-61 (9th Cir. 1988). Even if that rule were applicable in a case where the absent party asserts sovereign immunity, it is a narrow exception applicable only where the litigation transcends the private interests of the litigants, and does not destroy the legal entitlements of the absent parties. *Am. Greyhound,* 305 F.3d at 1025-26; *Dewberry,* 406 F.Supp. 2d at 1148-49. In this case, the litigation was not necessary to resolve any unsettled legal issue. In fact, there was not even a dispute between the only parties to the case, the plaintiffs and the state. The purpose of the litigation was solely to obtain a legal declaration that the plaintiffs could use in their efforts to shut down the Nation's casino. The other cases in which the *Saratoga* rule has been applied are similarly private disputes.

an Indian tribe is not indispensable as long as it can waive its immunity and enter the litigation. *Panzer v. Doyle*, 271 Wis.2d 295, 329, 680 N.W.2d 666, 683 (Wis. 2004), *overruled on other grounds in Dairyland*, 2006 WI 107, 719 N.W. 2d 408 (Wis. 2006).

The same reasoning applied by the New York courts in cases involving the rights of Indian tribes could be applied to any sovereign: the sovereign could mitigate its prejudice by waiving its immunity and entering the suit. The rule that has been adopted by the New York courts therefore means one of two things, both of which are inconsistent with federal interests. The rule may mean that courts in New York (and other states following New York's lead) have assumed the authority to coerce a waiver of sovereign immunity by any sovereign, including another state or the federal government, by threatening to litigate the rights of the sovereign party in the sovereign's absence. If so, review by this Court is needed to make clear that a state cannot, by utilizing a state rule of procedure, abrogate federally protected sovereign immunity. The other alternative is that New York has adopted a rule that applies only to the detriment of Indian tribes but not to other sovereigns. Such a rule clearly requires this Court's intervention, as it flatly contradicts this court's "jealous regard for Indian self-government." *Three Affiliated Tribes*, 476 U.S. at 890.

The record in this case presents the federal question clearly. The Nation has challenged the state court proceedings at every stage, on precisely the federal ground presented in this petition. The New York courts have ignored the federal question and the federal interests at stake. The decision of the New York Supreme Court, which was adopted by the Fourth Department and allowed to stand by the Court of Appeals, is a clear statement of New York's rule: unless Indian tribes waive their sovereign immunity, their rights in gaming compacts and other matters of federal interest will be litigated in their absence. There are no obstacles to the

Court's review of this case to make clear that New York and other states may not hold federally protected interests hostage to a waiver of federally protected sovereign immunity.

CONCLUSION

Petitioner respectfully requests that this Court issue a writ of certiorari.

Respectfully submitted,

Elizabeth G. Taylor
William W. Taylor, III
Michael R. Smith
ZUCKERMAN SPAEDER LLP
1800 M Street NW
Suite 1000
Washington, DC 20036
(202) 778-1800

APPENDIX A

State of New York,
Court of Appeals

At a session of Court, held at Court of Appeals Hall in the City of Albany on the ……fourth……day of ……May……2006

Present, HON. JUDITH S. KAYE, Chief Judge, presiding.

4-10 Mo. No. 186
Scott Peterman, et al.,
Respondents,

v.
George Pataki, Governor of State Of New York, et al.,
Respondents.
Oneida Indian Nation of New York,
Nonparty-Appellant,
et al.,
Nonparty.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the non-party-appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

_____

Stuart M. Cohen
Clerk of the Court

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1112
CA 04-02580

PRESENT: PIGOTT, JR., P.J., GREEN, GORSKI, SMITH, AND LAWTON, JJ.

SCOTT PETERMAN, UPSTATE CITIZENS FOR EQUALITY, INC., AND PERSONS AND ENTITIES SIMILARLY SITUATED, PLANTIFFS-RESPONDENTS,

ORDER

V

GEORGE PATAKI, GOVERNOR OF STATE OF NEW YORK, NEW YORK RACING AND WAGERING BOARD AND DIVISION OF STATE POLICE, DEFENDANTS-RESPONDENTS,

---

ONEIDA INDIAN NATION OF NEW YORK AND RAY HALBRITTER, APPELLANTS.
(APPEAL NO.1.)

ZUCKERMAN SPAEDER, LLP, WASHINGTON, D.C. (ELIZABETH TAYLOR, OF THE WASHINGTON, D.C. BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND MACKENZIE HUGHES LLP, SYRACUSE, FOR APPELLANTS.

O'CONNELL AND ARONOWITZ, ALBANY (CORNELIUS D. MURRAY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (James W. McCarthy, A.J.), entered August 25, 2004. The judgment, insofar as appealed

from, denied the motion of Oneida Indian Nation of New York and Ray Halbritter to dismiss the third amended complaint upon the grounds of failure to join an indispensable party and lack of a justiciable controversy.

It is hereby ORDERED that the judgment so appealed from be and the same hereby is unanimously affirmed without costs for reasons stated in decision at Supreme Court.

Entered: September 30, 2005

JOANN M. WAHL
Clerk of the Court

SUPREME COURT *)*
APPELLATE DIVISON, **)**
Fourth Judicial Department, **)**
Clerk's Office, Rochester, N.Y. **)**

I JOANN M. WAHL, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, I have thereunto set my hand and affixed the seal of said Court in the City of Rochester, New York, this

……
Clerk

APPENDIX C

SUPREME COURT CHAMBERS
Oswego, New York

Oswego County Courthouse
25 E. Oneida Street, Oswego, New York 13126 **Andrew T. Wolfe**
Telephone: (315) 349-3286 Principal Court Attorney
Fax: (315) 349-8525
James W. McCarthy ***Mailing Address*** **Kim N. Cloonan**
A.S.C.J. 39 Churchill Road, Oswego, New York 13126 Secretary

June 25, 2004

Leon R. Koziol, Esq.
1518 Genesee Street
Utica, New York 13502

Robert A. Siegfried, Esq.
Office of the Attorney General
The Capitol
Albany, New York 12224

Peter D. Carmen, Esq.
Mackenzie Hughes, LLP
PO Box 4967
Syracuse, New York 13212-4967

Re: *Peterman v. Pataki*
RJI No. 32-99-0520

LETTER DECISION

The above-referenced matter is before this court pursuant to [1] Plaintiff's motion for summary judgment [New York Civil Practice Law and Rules § 3212, and [2] the Oneida Indian Nation of New York's [herein after Nation] cross motion for leave to renew [New York Civil Practice Law and Rules § 2221[e]]. Oral argument was heard by the court on April

22, 2004, after which, on May 6, 2004, counsel for the Nation "supplemented" its initial motion. Final submissions were received on May 22, 2004, after which decision was reserved. Having reviewed the submissions of the parties and the Nation, for the reasons set forth below, this court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact:

As more fully set forth in this court's previous Letter Decisions, the instant action finds it genesis in the 1993 Compact entered into between the Nation and the defendant, State of New York. Plaintiffs challenge the authority of then Governor Mario Cuomo to execute a compact with the defendant, Oneida Indian Nation of New York to operate gambling casinos within the State of New York under the Indian Gaming Regulatory Act of 1988 [25 U.S.C. § 2701, *et seq*.]. In essence, the plaintiffs argue that then Governor Cuomo lacked the authority to enter into the compact without legislative approval, and that the compact contravenes public policy against class III gaming activity.

Following a conditional dismissal of the instant action by Justice Murad, this court, by Letter Decision dated October 24, 2001, granted plaintiffs' motion for leave to file second amended complaint, and denied the plaintiffs' motion for summary judgment as premature.[7] On December 20, 2001

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[7]

In granting plaintiffs' motion for leave to file second amended complaint, this court found that the plaintiffs had plead facts sufficient to demonstrate taxpayer standing with respect to Scott Peterman and David Townsend, organizational standing with respect to Upstate Citizens for Equality and found that the Oneida Indian Nation of New York was not a necessary and indispensable party. This

this court signed an Order consistent with its letter decision. The Order was filed and entered in the Oneida County Clerk's office on January 24, 2002. On the same date, plaintiffs filed their second amended complaint. Following entry of the order and service of the second amended complaint, the Oneida Indian Nation of New York moved for leave to renew and reargue this court's January 24, 2002 order, the State of New York moved to dismiss plaintiffs' second amended complaint and plaintiffs, Scott Peterman, Upstate cross moved for summary judgment.

By Letter Decision dated May 23, 2002, the court granted the Nation's motion for leave to renew/and or reargue, and based upon a review of the record before it, adhered to its original decision, denied the State of New York's motion to dismiss and denied plaintiffs' cross motion for summary judgment as premature[8]. Following entry of this Courts' August 14, 2002 Order, the State of New York appealed this court's decision to the Appellate Division, Fourth Department. In December of 2003, the State of New York withdrew its appeal, and the instant motion and cross motions were brought.

Court further found that the plaintiff, the Hon. David Townsend did not have standing to proceed as a legislator.

[8]

In that Letter Decision, this court found, based primarily upon the Appellate Division, Third Department's Decision Saratoga Chamber of Commerce v. Pataki, 293 A.D.2d 20 (3rd Dept. 2002), aff'd as modified, 100 N.Y.2d 801, cert. denied, 124 S.Ct. 570, the Oneida Indian Nation of New York was not a necessary and indispensable party to the action, that the plaintiffs had standing, that the action was not pre-empted, and that the instant action was not barred by the applicable Statute of Limitations and laches.

By Notice of Motion dated February 9, 2004, plaintiffs moved for summary judgment arguing that:

> The high court [New York Court of Appeals] has rendered a decision on the validity of a 1993 compact entered into between the Mohawk Tribe and New York State, finding that the purported transaction violated the separation of powers doctrine. As relevant here, it found that the compact was illegal, by virtue of its lack of legislative authorization. The governor cannot bind the state to such a compact, and notwithstanding the various positions claiming constructive ratification, the [Court of Appeals] handed down a decision substantially consistent with the reasoning of most high courts in other states that have addressed the question.

[Plaintiffs' Counsel's Affirmation in support of Summary Judgment at ¶ 20]. In sum and substance, plaintiffs argue with respect to their first cause of action that, under the doctrine of stare decisis, this court is bound to follow the New York Court of Appeal's Decision in Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801 (2003), and to find the compact invalid[9].

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[9] Plaintiffs additionally moved for summary judgment on their second and third causes of action, in which they allege that the Compact violates Article 1, Section 9 of the New York

Defendants, in opposition to the instant motion for summary judgment, in essence concede the applicability of the decision in Saratoga Chamber of Commerce, supra, with respect to the plaintiffs' first cause of action. This concession, however, is not the end of the court's analysis.

On April 19, 2004, three days before the scheduled return date, the Nation entered: "…special appearance for the limited purpose of contesting the jurisdiction of the court, and specifically to renew the nation's motion to dismiss the Complaint on the grounds of Tribal sovereign immunity." [April 18, 2004 Notice of Special Appearance]. The Nation's motion for leave to renew is predicated on two arguments:

> First, the ruling of the Court of Appeals in *Saratoga Chamber of Commerce v.Pataki*, 100 N.Y.2d 801, *cert. denied*, ___U.S.___, 124 S.Ct. 570 (2003), establishes that this litigation affects significant interests of the nation. Consequently, this Court's decision to the contrary must be reconsidered. Second, the ruling in Saratoga has altered the interests this court considered in ruling that the litigation could proceed in the tribe's absence. There is now no compelling interest in addressing a significant issue of

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State Constitution. Based upon representations made by the Assistant Attorney General at oral argument, plaintiffs withdrew their motion with respect to the constitutionality of the Compact.

> state law. The potential prejudice to the nation, however, is even greater than it was prior to the ruling in *Saratoga*, because it is now clear that the State cannot and will not adequately protect the Nation's interest. The State's refusal to present a meritorious laches defense on behalf of the Nation is illustrative of this conflict.

[Nation's Memorandum of Law at p.2].

Following oral argument on April 22, 2004, counsel for the Oneida Nation submitted a Supplemental Affirmation, raising for the first time an argument that the instant action should be dismissed insofar as there no longer exists a justiciable controversy. The affirmation is predicated on an argument that insofar as the parties agree there is no genuine dispute, and thus no justiciable controversy the court is required to dismiss the instant action. In opposition to the supplemental affirmation, the State defendants argue:

> …The Oneidas now urge that the state and the plaintiffs entered into an agreement regarding the separation of powers issue resolved in the Saratoga County Chamber of Commerce case, which effectively prejudiced the interests of the Oneidas. There was never any 'agreement' made between the State and the plaintiffs.

> As the record demonstrates, the State conceded that under the principal of stare decisis [so in original], this court was bound to follow the Court of Appeal's determination in Saratoga on the separation of powers question pertaining to the Governor's authority to enter into the 1992 Compact with the Oneidas without legislative authority [citation omitted]. The State also concedes that the application of the Saragota decision to the instant matter would result in a declaration that the Governor violated State separation of powers law when he entered into the compact with the Oneidas in 1993, and consistent with the ruling in Saratoga, the Compact was void and unenforceable under State law.

[May 17, 2004 Letter from Assistant Attorney General Robert A. Siegfried].

In light of the foregoing, this court turns its attention to the substantive issues before it.

Conclusions of Law:

A. Motion for Leave to Renew, Oneida Indian Nation of New York's [New York Civil Practice Law and Rules § 2221[e]:

As set forth in the Nation's counsel's affirmation in support of its motion for leave to renew, the Nation's argument is limited to "…the grounds of tribal sovereign immunity and the indispensability of the Nation as a party to the case." [Affirmation of Peter D. Carmen in Support of the Nation's Motion for Leave to Renew at ¶ 2]. As more fully set forth above, the Nation's position is predicated upon an argument that the Court of Appeal's decision in Saratoga County Chamber of Commerce, *supra*, establishes that a significant interest of the Nation will be effected, and second that the State, as a result of the decision, will no longer act to protect the interests of the Nation in this action.

New York Civil Practice Law and Rules § 2221[e] provides:
(e) A Motion for leave to renew:

1. shall be identified specifically as such;
2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
3. shall contain reasonable justification for the failure to present such facts on the prior motion.

N.Y.Civ. Prac. L.& R. § 2221[e] (McKinney 1993) [emphasis added]. Upon review of the papers submitted by the Nation, this Court grants leave to renew.

Turning to the merits, in its two previous Letter Decisions and resultant Orders, this court held that the Nation is not an indispensable party, as defined by the New York Civil Practice Law and Rules § 1101. In reviewing the decision of the Court of Appeals in Saratoga County Chamber of Commerce, *supra*, this court does not find, as the Nation argues, that the decision announced a change in the law sufficient to change the court's prior determination. In holding that the Mohawk tribe was not an indispensable party

in the Saratoga case, the Court of Appeals engaged in a painstaking analysis of CPLR § 1101, and concluded that:

> The Tribe has chosen to be absent. Nobody has denied it the 'opportunity to be heard'; **in fact, the Oneida Indian Nation, which operates the Turning Stone Casino, has appeared as amicus curiae making much the same arguments we would expect to be made by the Tribe had it chosen to participate**. While sovereign immunity prevents the Tribe from being forced to participate in New York court proceedings, it does not require everyone else to forego the resolution of all disputes that could affect the Tribe (see Keene v. Chambers, 271 N.Y. 326, 330 [1936]; Plaut v. HGH Partnership, 59 A.D.2d 686 [1st Dept. 1977]; 3 Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶ 1001.10 [citing cases]). **While we fully respect the sovereign prerogatives of the Indian tribes, we will not permit the Tribe's voluntary absence to deprive these plaintiffs (and in turn any member of the public) of their day in court. In balancing the CPLR 1001 factors, the Appellate Division concluded that the equities weighed against dismissal.** That conclusion was not an abuse of discretion. While in other cases sovereign immunity might support dismissal, [footnote omitted] here the factors weigh toward allowing judicial review of this constitutional

> question (see generally Siegel, N.Y. Prac. § 133 ['Dismissal of the action for nonjoinder of a given person is a possibility under the CPLR, but it is only a last resort']). [footnote omitted].
>
> We conclude that the alleged constitutional violation will be without remedy if this action is dismissed for the Tribe's nonjoinder. **We further conclude that to the extent the Tribe is prejudiced by our adjudication of issues that affect its rights under the compact, the Tribe could have mitigated that prejudice by participating in the suit** (cf. United States ex rel. Steel v. Turn Key Gaming, Inc., 135 F.3d 1249, 1252 [8th Cir.1998]). The Tribe's nonjoinder is therefore excused…

Saratoga County Chamber of Commerce, *supra* at 820-821[emphasis added]. The same can be said in the instant action. While the Nation goes to great lengths on the instant motion for leave to renew to show the potential economic harm it will suffer if the court invalidates the 1993 Compact, the Nation has chosen to voluntarily absent itself from the instant litigation, a choice that is clearly well within its right as a sovereign nation, To paraphrase the Court of Appeal's decision in Saratoga, to the extent that the Oneidas are prejudiced by this court's adjudication, if any, it could have chosen to mitigate its damages by participating in the litigation as party. [see, In the Matter of the Herald Company, Inc. v. Robert Feurstein, *et al*, —Misc.3d—, 2004 W.L. 503440 (S. Ct. N.Y. Co. 2004).[10]

[10]

Nor is the court persuaded by the Nation's argument that the instant action should be dismissed as barred by laches. In support of its position, the Nation argues: "*In Saratoga,* the Court of Appeals affirmed the lower court's refusal to dismiss the Complaint on the ground of laches, because the record was insufficient to support dismissal on that grounds. The record in

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> Respondents also argue that the petition must be dismissed because the Oneidas are a necessary party who cannot be forced to appear in this matter as they are not subject to judicial process. Clearly the Oneidas are not a party to this action. Although their interests are certainly affected by this litigation, the Oneidas have chosen not to participate. Unless Congress provides otherwise, Indian tribes, including the Oneidas, possess sovereign immunity against the judicial processes of states (see Saratoga County Chamber of Commerce Inc. v. Pataki, 100 N.Y.2d 801, 818, 766 N.Y.S.2d 654, 798 N.E.2d 1047, cert. denied ---U.S. ----, 124 S. Ct. 570, 157 L.Ed.2d430 [2003]; see also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L.Ed 106 [1978]; United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512, 60 S.Ct. 653, 84 L.Ed 894 [1940]). **As a result, New York courts cannot force the Oneidas to participate in this matter. However, contrary to respondents' claim, the Oneidas' absence does not require this Court to dismiss this action.**

In the Matter of the Herald Company, Inc. v. Robert Feurstein, *et al,* supra at 2004 W.L.503440,*8.

this case will demonstrate a very different picture." [Nation's Memorandum of Law at p. 11]. While counsel for the Nation is technically correct in his assertion, a more thorough analysis of the opinion is necessary.

In deciding the issue of laches, the Court of Appeals did not limit its decision to the paucity of the record concerning economic harm to the Mohawks, finding:

> Plaintiffs argue that the Tribe was on notice as to the possible illegality of the compact, citing a memorandum from Governor Cuomo's Counsel indicating that the Tribe had been informed that legislative approval would be required before the State could enter into effective compacts. [footnote omitted]. Thus, while the casino is presumably expected to make large sums over the next several years, and while plaintiffs' suit threatens that source of revenue, the prejudice caused by a loss of expected profits based on a predictably vulnerable compact is not the sort of prejudice that supports a defense of laches. Were it otherwise, very few suits would proceed past laches analysis, and certainly no suits seeking to invalidate illegal contracts could ever proceed.

Saratoga County Chamber of Commerce, supra at 817-818. In reaching this conclusion, the Court of Appeals makes reference to the June 15, 1993 Memorandum from Elizabeth Moore, Esq., counsel to then Governor Mario Cuomo, in which she "…amplifies our reasons for seeking enactment of legislation to authorize the state to carry out . . . [its] duties pursuant to the

Indian Gaming Regulatory Act…"[Memorandum of Elizabeth Moore to then Governor Mario Cuomo, attached to Nation's Counsel's Affirmation in Support of Motion to Renew, Exhibit F]. The memorandum goes on to make specific reference to the Compact which is at issue in the instant action. While counsel for the Nation attempts to limit the effect of the Memorandum in the instant action, it is clear that, just as with the Mohawks in the Saratoga case, the Nation was on notice of the potential vulnerability of the Compact, and thus this court finds: "… the prejudice caused by a loss of expected profits based on a predictably vulnerable compact is not the sort of prejudice that supports a defense of laches."

B. Justiciable Controversy:

Following oral argument on April 22, 2004, counsel for the Nation submitted a: "Supplemental Affirmation Supporting Motion by the Oneida Indian Nation of New York to Dismiss Complaint for Lack of Justiciable Controversy." As more fully set forth above, the affirmation is predicated on an argument that insofar as the parties agree there is no genuine dispute, and thus no justiciable controversy, the court is required to dismiss the instant action. As set forth above, and in this court's two previous Letter Decisions, the Nation is neither a party to the instant action, nor is it an indispensable party, thus the first question before this court is whether it has standing to raise the issue of justiciable controversy.

Citing to decisions in which courts have declined to issue judgment declaring the rights of parties, where the rights of a third party would be adversely affected, as well as cases in which courts have declined to issue such judgments where there is no longer a "genuine or justiciable controversy" before it, the Nation argues that the court has been divested of its authority to declare the rights of the parties. The cases cited by the Nation in support of its argument involve fact patterns in which the third parties had

an interest in the outcome of the litigation, which is the case here, but who were
excluded from the litigation. There are no cases cited by the Nation in which a party, that has voluntarily absented itself from the litigation, was later allowed to object to the court rendering a decision.[11]

Even if the Court were to accept the Nation's argument that is has standing in its limited appearance to raise the issue of justiciable controversy, turning to the merits of their argument, this court finds it to be without merit. In the instant case, the court does not find that the actions of the plaintiffs and defendants create a feigned controversy necessitating dismissal. Here there is no agreement either express or implied to submit the action to the court solely to obtain a predetermined declaration of the rights of the parties.

At oral argument in the instant action, counsel for the State of New York conceded that the court, under the doctrine of *stare decisis* was bound to follow the decision of the New York Court of Appeals in Saratoga County Chamber of Commerce v. Pataki, *supra*, insofar as the instant action is indistinguishable from the decision. This court does not find that, under the circumstances of this case, that a concession by counsel in opposing a motion for summary judgment of existing, controlling precedent, divests this court of jurisdiction to declare the rights of the parties before

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[11] Again the Nation argues that is would be substantially prejudiced by the decision of this court. However as the Court of Appeals held when determining that the Mohawks were not an indispensable party: "We further conclude that to the extent the Tribe is prejudiced by our adjudication of issues that affect its rights under the compact, the Tribe could have mitigated that prejudice by participating in the suits." Saratoga Chamber of Commerce v. Pataki, *op.cit*.

it. Where the Nation's argument taken to its logical conclusion, any time that a party cited controlling precedent in support of its position and opposing party conceded the applicability of the precedent to the matter before the court, the court would be precluded from declaring the rights of the parties based upon controlling case law, a position that strikes at the very heart of the doctrine of *stare decisis.*[12] Accordingly, the Nation's Motion to

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[12] `…The doctrine of stare decisis provides that once a court has decided a legal issue, subsequent appeals presenting similar facts should be decided (emphasis added) in conformity with the earlier decision' (People v. Bing, 76 N.Y.2d 331,337-338). The doctrine, which 'rests upon considerations of practicality and principle' (People v. Damiano, 87 N.Y.2d 477, 48 [Simons J., concurring]), recognizes that a legal question, once resolved, should not be reexamined each and every time that it is presented see, Matter of Deposit Cent. School Dist. v. Public Empl. Relations Bd.,214 A.D.2d 288, 290, 1v. dismissed, 1v. denied 88 N.Y.2d 866; Dufel v. Green, 198 A.D.2d 640, affd. 84 N.Y.2d 795). Simply stated, the established precedent prevails unless there is a compelling reason to depart from it (see, Matter of Schulz v. State of New York, 241 A.D.2d 806,808, appeal dismissed 90 N.Y.2d 1007; Dufel v. Green, supra).

Battle v. State, 257 A.D.2d 745, 746 (3rd dept. 1999), 1v.to.app.denied, 93 N.Y.2d 805 (emphasis added); *see also*, 28 N.Y.Jur.2d Courts and Judges §220; 1 Carmody-Wait 2d § 2:261, courts and Their Jurisdiction, Generally; Statement and Purpose of Doctrine [*Stare Decisis*].

7

Dismiss the Complaint based on a Lack of justiciable Controversy is, in all respects denied.[13]

C. Summary Judgment:

Turning to the merits of the case before it, as framed by counsel for the parties to the instant action, the sole remaining issue to be determined by this court on plaintiffs' motion for summary judgment is whether then Governor Mario Cuomo exceeded his authority in entering into the 1993 Compact with the Oneida nation without legislative approval.

Reviewing the case before it in light of the Court of Appeals Decision in Saratoga County Chamber of Commerce v. Pataki, *supra*, this court finds the unilateral actions of then Governor Cuomo in entering into the Compact without legislative approval clearly violated the doctrine of separation of powers recognized by Articles 3-5 of the Constitution of the State of New York (see N.Y. const., art. III, § 1; art. IV, § 1; art. VI, § 1)[14], and thus declares the 1993 Compact invalid.

As Judge Celya, writing for the First Circuit Court of Appeals observed in The Dartmouth Review v. Dartmouth College, *et al*,889 F.2d 13 (1st cir. 1989): "We find this to be a ketchup bottle type argument: it looks quite full, but it is remarkably difficult to get anything useful out of it." Id. at 18.

[14]

"Stated succinctly, the separation of powers 'requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies' (Bourquin v. Cuomo, 85 N.Y.2d 781, 784, [1995] [citing Matter of New York State Health Facilities Assn v. Axelrod, 77 N.Y.2d 340, 349 (1991)])." Saratoga County Chamber of Commerce v. Pataki, *supra at 821-822*.

The foregoing constitutes the Letter Decision of the Court. Counsel for the plaintiffs is to submit an Order consistent herewith the signature within five days of receipt.

ENTER,

_____
Hon. James W. McCarthy
Acting Supreme Court Justice

Dated: June 25, 2004
at Oswego, New York

JWN/knc
cc: Court File

APPENDIX D

At a motion Term of the Supreme Court of the State of New York, held in and for the county of Oneida, at the Oswego County Courthouse, Oswego, New York on the 22nd day of April, 2004.

PRESENT: Hon. James McCarthy
Acting Justice Presiding

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONEIDA

SCOTT PETERMAN, UPSTATE CITIZENS FOR EQUALITY, INC., AND PERSONS AND ENTITIES SMILARLY SITUATED,

Plaintiffs, ORDER

-vs-

Index No.: 99-533
GEORGE PATAKI, GOVERNOR OF THE STATE OF NEW YORK, NEW YORK RACING AND WAGERING BOARD, DIVISION OF STATE POLICE, RAY HALBRITTER AND ONEIDA INDIAN NATION OF NEW YORK, RJI No.: 32-99-0520

Defendants.

Plaintiffs Scott Peterman and Upstate Citizens for Equality, Inc., having filed a motion on February 10, 2004 for an order of summary judgment pursuant to CPLR 3212, and the defendants George Pataki, Governor of the State of New York and the State of New York having applied for and received an

extension for answering said motion, thereafter submitting their opposition papers on April 16, 2004, and the Oneida Indian Nation (hereinafter "Nation") having entered a special appearance to contest the jurisdiction of the court, and specially to renew a prior motion for dismissal of the complaint on the ground of tribal sovereign immunity, and the matter having duly come on to be heard before the undersigned Justice of the Supreme Court on April 22, 2004,

NOW, on reading and filing plaintiffs' notice of motion, supporting affirmation of Leon R. Koziol, Esq. together with exhibits A-E and memorandum of law dated February 9, 2004, the defendants' answering affidavit of Robert T. Williams sworn to on April 15, 2004 together with exhibits A-N, memorandum of law signed by Assistant Attorney General Robert A. Siegfried on April 15, 2004 together with exhibits A-C1, the Nation's notice of special appearance dated April 19, 2004, the Nation's notice of motion and memorandum of law, both dated April 19, 2004 in support of the Nation's renewed motion for dismissal, as supported by Affirmation of Peter D. Carmen, submitted on

April 19, 2004, together with Exhibits A-P and plaintiffs' response papers supported by affidavit of counsel sworn to on April 21, 2004, timely cross-motion for dismissal, all filed on May 7, 2004, and upon the Nation's supplemental memorandum of law, supported by affirmation of Peter D. Carmen, Esq. in support dismissal for lack of a justiceable controversy, submitted on May 6, 2004, and together with exhibits A-B, and response letters of plaintiffs' counsel dated May 7, 2004, and defendants' counsel dated May 17, 2004, and upon hearing from Leon R. Koziol, Esq., attorney for plaintiffs, and upon his representation that the plaintiffs have withdrawn all claims, other than the separation of powers claim, in view of the State's concession that the Saratoga Chamber of Commerce v. Pataki decision of the Court of Appeals was controlling on the separation of powers issue, and upon hearing Robert A. Siegfried, Esq., attorney for defendants and Elizabeth G. Taylor, Esq. attorney for the Nation at oral argument concluded on April 22, 2004, [and the court having rendered a letter Decision] it is hereby

ORDERED that the Oneida Nation's motion for leave to renew is hereby GRANTED, and it is further

ORDERED that the Oneida Nation's motion for dismissal of the case on grounds of Failure to Join an Indispensable Party is in all respects DENIED, and it is further

ORDERED that the Oneida Nation's Motion to Dismiss the Complaint based on lack of a Justiciable Controversy is in all respects DENIED, and it is further

ORDERED, that the Motion for Summary Judgment of plaintiffs Scott Peterman and Upstate Citizens for Equality, Inc, seeking a declaration that the 1993 Oneida Indian Nation Compact with the State of New York is invalid under New York law because it was entered into in violation of the separation of powers doctrine contained in Articles 3 through 5 of the New York State Constitution is GRANTED, and it is

DECLARED, that the 1993 Turning Stone Casino Compact between the Oneida Indian Nation and the State of New York is invalid under New York law, as it was entered into by the Governor in violation of the separation of powers

doctrine set forth in Articles 3 through 5 of the New York State Constitution.

Dated: July 28, 20004
Oswego, New York

ENTERED: _____

_____
Hon. James McCarthy
Justice of Supreme Court

APPENDIX E

25 U.S.C. § 2701

Findings:

The Congress finds that--

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 2103 of the Revised Statutes (25 U.S.C. 81) requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) 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.

APPENDIX F

25 U.S.C. § 2710. Tribal gaming ordinances

(a) Jurisdiction over class I and class II gaming activity.

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this Act.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this Act.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts.

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if--

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that--

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than--

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $ 25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which--

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes--

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities

conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if--

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4) (A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B) (i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was

operating on September 1, 1986, if--

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 13 of the Act [25 USCS § 2712],

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 18(a)(1) [25 USCS § 2717(a)(1)] for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on the date of enactment of this Act [enacted Oct. 17, 1988].

(iii) Within sixty days of the date of enactment of this Act [enacted Oct. 17, 1988], the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming license; certificate of self-regulation.

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II), the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which--

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after the date of the enactment of this Act [enacted Oct. 17, 1988]; and

(B) has otherwise complied with the provisions of this section[,]

may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has--

(A) conducted its gaming activity in a manner which--

(i) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for--

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation--

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 7(b) [25 USCS § 2706(b)(1)-(4)];

(B) the tribe shall continue to submit an annual independent audit as required by section 11(b)(2)(C) [25 USCS § 2710(b)(2)(C)] and shall submit to the Commission a complete resume on all employees hired and licensed by the

tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 18 [25 USCS § 2717] in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(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--

(A) authorized by an ordinance or resolution that--

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b), and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2) (A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b).

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that--

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or

resolution by any person identified in section 12(e)(1)(D) [25 USCS § 2711(e)(1)(D)].

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D) (i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection--

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall

not be affected by such revocation ordinance or resolution.

(3) (A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to--

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section

shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 5 of the Act of January 2, 1951 (64 Stat. 1135) [15 USCS § 1175] shall not apply to any gaming conducted under a Tribal-State compact that--

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7) (A) The United States district courts shall have jurisdiction over--

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B) (i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the

180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that--

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe [tribe] to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court--

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and

with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures--

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this Act, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8) (A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates--

(i) any provision of this Act,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this Act.

(D) The Secretary shall publish in the Federal Register

notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 12 [25 USCS § 2711(b)-(d), (f)-(h)].

(e) Approval of ordinances. For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this Act.

APPENDIX G

18 U.S.C. § 1166. Gambling in Indian country

(a) Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

(b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(c) For the purpose of this section, the term "gambling" does not include--

(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

(2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act [25 USCS § 2710(d)(8)] that is in effect.

(d) The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act [25 USCS § 2710(d)(8)], or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

APPENDIX H

Upstate Citizens for Equality
Niagara Frontier Chapter
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May 21, 2004

Philip N. Hogan, Chairman Fax: (202) 632-7066
National Indian Gaming Commission
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Glenn T. Suddaby, Esq. Fax: (315) 448-0689
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Dear Chairman Hogen and Mr. Suddaby:

I am writing to you today on behalf of the members of Upstate Citizens for Equality regarding the recent ruling of the New York Court of Appeals in the matter of Saratoga County Chamber of Commerce v. Pataki and its effects on Class III gaming in the Mohawk and Oneida casinos. In this decision the Court declared invalid the 1993 compact entered into between the Mohawks and former Governor Cuomo. Therefore any class III gaming occurring at the Mohawk casino is in violation of the IGRA.

The State of New York has recently withdrawn its appeal in our action (Peterman v. Pataki) that challenges the compact between the State of New York and the Oneida Indian Nation of New York and according to the attached letter from Assistant Attorney General Robert A. Seigfried has conceded that Governor Cuomo was without authority to enter into the 1993 Oneida Compact and it is therefore void and unenforceable under State Law. There are currently cases pending that challenges even the
Legislature's powers to authorize these compacts absent a Constitutional amendment (Dalton v. Pataki,

etc.) Therefore, there is no valid compact permitting this establishment to conduct Class III gaming under the Indian Gaming Regulatory Act (IGRA).

Therefore we are requesting that you take immediate action to order the Mohawk and Oneidas to cease and desist from conducting any Class III gaming until such time that they obtain the requisite valid tribal-state compact.

Sincerely,

Daniel T. Warren
Chair
Niagara Frontier Chapter of Upstate Citizens for Equality

Cc: Aurene M. Martin Fax (202) 208-6334
Principal Deputy Assistant Secretary
Bureau of Indian Affairs
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