COUNTER-STATEMENT OF QUESTION PRESENTED

The federal question discussed by the Michigan Supreme Court is not subject to this Court's jurisdiction. However, if this Court disagrees and decides to review that question, the issue is properly stated as follows:

> Does the federal Indian Gaming Regulatory Act confer upon a state the power to regulate gaming on tribal lands where the Indian tribe has not consented to state regulation of its gaming activities in the compact entered into between the Indian tribe and the state?

COUNTER-LIST OF PARTIES

Petitioner has listed North American Sports Management Company, Inc., IV, as a party in this case. However, it was dismissed from this case by the Michigan Court of Appeals on August 12, 2002 and is no longer a party in this proceeding. Accordingly, the only parties in this case are:

Taxpayers of Michigan Against Casinos
The State of Michigan
Gaming Entertainment, LLC

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Respondent State of Michigan ("State") opposes and asks that this Court deny Petitioner Taxpayers of Michigan Against Casinos' ("Petitioner" or "TOMAC") Petition for a Writ of Certiorari to the Michigan Supreme Court ("Petition") for the reasons set forth below.

INTRODUCTION

TOMAC's Petition is an unfounded attempt to have this Court intervene into what is essentially a state law dispute that was resolved by Michigan's highest court on state law grounds. From the inception of this action, TOMAC has always claimed only violations of the Michigan constitution -- it has never asserted a violation of any federal rights. TOMAC's principal claim was that the Michigan legislature violated the Michigan constitution when it approved four gaming compacts between the State and four Indian tribes by a resolution, rather than by a bill. It argued that the legislature must express its approval by bill because the compacts are "legislation" within the meaning of a provision in the Michigan constitution requiring that "legislation" be handled through the bill procedure.

The Michigan Supreme Court disposed of that claim on adequate and independent state grounds. Relying exclusively on its own prior decisions, the court interpreted the term "legislation" in the Michigan constitution as referring to "unilateral regulation". It then concluded that the compacts did not fall within that definition because they resulted from the mutual consent of both the State and the tribes rather than from the unilateral imposition of the legislative will on the tribes. The court found further support for this conclusion in the substantive terms of the compacts, which gave no regulatory role to the State.

The court did find the contractual nature of the Michigan compacts to be consistent with the federal statute that authorized the compacts, the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq*. It viewed IGRA as barring the states from unilaterally regulating tribal gaming in the absence of the tribe's consent to such regulation in a compact. But the court's understanding of IGRA did not decide the outcome of the state constitutional issue. Even if the states could regulate in the absence of tribal consent, the compacts at issue here would still be the products of mutual consent. And it was the mutual consent aspect of the compacts that the court found rendered them to be contracts, and not legislation, under Michigan law.

Fundamentally, the Michigan court resolved a state law question -- whether the Michigan constitution required the Michigan legislature to enact a bill to approve the State's compact with a tribe – on adequate and independent state grounds. No federal question subject to this Court's jurisdiction is presented.

Even assuming that there is a federal question subject to this Court's review, Petitioner has failed to show that it merits granting a writ of certiorari. The asserted federal question is whether a state may regulate gaming on tribal lands in the absence of tribal consent in a compact. The Michigan Supreme Court's view that a state has no such power has not created a split of authority among the courts. Its view is consistent with the Ninth Circuit case relied upon by Petitioner. The Ninth Circuit said that IGRA gives state gaming law an "effect" in tribal lands in the absence of a compact. The Michigan Supreme Court did not disagree, holding that such state laws apply as the federal law in Indian country. Petitioner also says that the Michigan court's decision upholding the compacts is in conflict with the

decisions of other state supreme courts that invalidated compacts before those courts. But those cases have no federal question in common with the Michigan case and, moreover, were decided on the constitutional law of the states involved and on distinguishable facts.

Next, Petitioner argues that the federal question that it presents for review is of national importance. Here, Petitioner's argument is based on a gross misstatement of the applicable law. It is premised on the notion that a tribal-state gaming compact is authorized by the federal Interstate Compact Clause when, in fact, this Court has recognized that it derives from the federal Indian Commerce Clause. Petitioner also asserts that the proffered federal question is of national importance due to the "socio-economic" impact of tribal gaming. But Petitioner's legal issue has nothing to do with the desirability of such consequences.

Finally, Petitioner's assertion that the Michigan Supreme Court's view of federal law is wrong is refuted by the plain language of the IGRA provision relied upon by Petitioner. That provision, 18 U.S.C. § 1166, plainly says that state gaming laws are applicable on tribal lands in the absence of a compact "for the purpose of Federal law." Thus, the Michigan court's view that IGRA "federalizes" state gaming law gives full effect to the statutory language.

COUNTER-STATEMENT OF JURISDICTION

As set forth in detail in the Reasons for Denying the Petition, this Court lacks jurisdiction because there is an adequate and independent state ground for the judgment of the Michigan Supreme Court.

COUNTER-STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The central constitutional provision involved is Article IV, Section 22 of the Michigan Constitution, which provides: "All legislation shall be by bill and may originate in either house." Mich. Const. 1963, art. IV, § 22. In addition, the full text of 18 U.S.C. § 1166 is involved. The full statute appears on pages App. 13-14 of the Petitioner's Appendix.

STATEMENT OF THE CASE

I. Background.

In 1997 and 1998, Michigan's then-Governor John Engler negotiated gaming compacts with four Indian tribes located in Michigan: the Little River Band of Ottawa Indians, the Pokagon Band of Potawatomi Indians, the Little Traverse Bay Bands of Odawa Indians and the Nottawaseppi Huron Band of Potawatomi Indians. These compacts between the State and the tribes ("Michigan Compacts") provided the terms under which the tribes could conduct casino-style gaming on their lands located within the State pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq*.

Under the Michigan Compacts, the parties agreed as to the types of games that would be conducted by the tribes and the tribes agreed to limit gaming to specified "[e]ligible Indian lands." (Michigan Compacts, §§ 2,3; App., 5a, 6a.)[1] The tribes agreed to make semi-annual payments to the local governments affected by the casinos and semi-annual

[1] The terms of the four Michigan Compacts are substantially the same. A sample compact is included in Appendix A.

payments to the Michigan Strategic Fund, which is a unit of State government. (Michigan Compacts, §§ 17 and 18; App., 28a-33a.) The tribes also agreed to certain "regulatory requirements." (Michigan Compacts, § 4; App., 9a-17a.) However, the tribes, not the State, assumed "responsibility to administer and enforce the regulatory requirements." (Michigan Compacts, § 4(M)(1); App., 14a.) Indeed, the Tribes agreed to post a sign in their casinos informing patrons that "THIS FACILITY IS NOT REGULATED BY THE STATE OF MICHIGAN." (Michigan Compacts, § 8; App., 20a-21a.)

The State and the tribes also agreed to an amendment procedure. (Michigan Compacts, § 16; App., 25a-27a.) Under that provision, Michigan's Governor may agree on behalf of the State to an amendment without the approval of the Michigan legislature. No Michigan Compact had been amended until Michigan's current Governor, Jennifer Granholm, agreed to amend the Michigan Compact between the State and the Little Traverse Bay Bands of Odawa Indians on July 22, 2003 ("Little Traverse Amendment").

Significantly, the Michigan Compacts did not become effective unless and until both the tribes and the Michigan legislature approved them. Section 11 of each compact provides in pertinent part:

> This Compact shall be effective immediately upon:
>
> (A) Endorsement by the tribal chairperson and concurrence in that endorsement by resolution of the Tribal Council;
>
> (B) Endorsement by the Governor of the State and concurrence in that endorsement by resolution

> of the Michigan Legislature[.] (Michigan Compacts, § 11; App., 22a.)

The Michigan legislature approved the Michigan Compacts by passing House Concurrent Resolution ("HCR") 115 on December 10 and 11, 1998.

II. Proceedings in the State Courts.

A. The Trial Court's Decision.

On June 10, 1999, Petitioner filed a complaint in the Circuit Court of Ingham County, Michigan, seeking a declaration that the Michigan Compacts violated three separate provisions of the Michigan constitution. (Complaint; App., 35a-54a.) In Count I of its complaint, Petitioner claimed that the Michigan legislature's approval of the Michigan Compacts by concurrent resolution violated the provision of the Michigan constitution requiring that all legislation be by bill, Mich. Const. 1963, art. 4, §22 ("Bill Provision"), because the Michigan Compacts were effectively "legislation." (Complaint, ¶¶ 47-53; App., 49a-50a.) Count II asserted that the State violated the provision of the Michigan constitution prescribing the procedure to be followed for the purpose of enacting a local or special act, Mich. Const. 1963, art. 4, §26 ("Local Acts Provision"). (Complaint, ¶¶ 54-62; App., 50a-52a.) Finally, Count III alleged that the amendment provision in the Michigan Compacts violated the Separation of Powers Clause of the Michigan constitution, Mich. Const. 1963, art. 3, §2. (Complaint ¶¶ 63-69; App., 53a-54a.)

On the parties' cross-motions for summary judgment, the trial court ruled that (1) the Michigan legislature violated the Bill Provision because the Michigan Compacts were

"legislation," and were, therefore, required to be approved through the bill process prescribed by the constitution, (2) the Local Acts Provision did not apply to the Michigan Compacts, and (3) the amendment provision violated the Separation of Powers Clause because it delegated law-making authority to the Governor.

B. The Michigan Court of Appeals' Decision.

Petitioner and the State both appealed to Michigan's intermediate appellate court. In its November 12, 2002 opinion, the Michigan Court of Appeals reversed the trial court's ruling on the claim that the Michigan legislature had violated the Bill Provision, holding that the Michigan Compacts were not "legislation," and affirmed the trial court's decision that the Michigan legislature had not violated the Local Acts Provision. *Taxpayers of Michigan Against Casinos v. State of Michigan*, 254 Mich. App. 23, 49; 657 N.W.2d 503, 517 (2002). The Court of Appeals further held that the claim that the amendment provision violated the Separation of Powers Clause was not ripe for review since, at that time, the Governor had not yet agreed to any amendment. *Id.*, 254 Mich. App. at 48; 658 N.W.2d at 517.

C. The Michigan Supreme Court's Opinion.

The Michigan Supreme Court granted leave to appeal on September 23, 2003, and issued its opinion on July 30, 2004. *Taxpayers of Michigan Against Casinos v. State of Michigan*, 471 Mich. 306; 685 N.W.2d 221 (2004) ("*TOMAC*").

In the *TOMAC* decision, the Michigan Supreme Court affirmed the Michigan Court of Appeals' ruling that approval of the Michigan Compacts by resolution did not offend the Bill Provision because the Michigan Compacts were not

"legislation." The Bill Provision of the Michigan constitution provides that "all legislation shall be by bill[.]" Mich. Const. 1963, art. 4, § 22. The question of whether a resolution was a constitutionally permissible means of approving the Michigan Compacts "necessarily turns on the definition of 'legislation'" under the Michigan Constitution. *TOMAC,* 471 Mich. at 318; 685 N.W.2d at 226. The Michigan Supreme Court defined "legislation" for state constitutional purposes as "unilateral regulation." *Id*. It further emphasized that "[t]his unilateral action is what distinguishes legislation from contracts." *Id*.

The state court found that the Michigan Compacts had the characteristics of contracts and lacked those of legislation. The chief contractual feature of the Michigan Compacts is that they are the products of the mutual assent of the State and the tribes. "[T]he Legislature's role here requires mutual assent by the parties — a characteristic that is not only the hallmark of a contractual agreement but is also absolutely foreign to the concept of legislating." *TOMAC*, 471 Mich. at 324; 685 N.W.2d at 229. The court found that this conclusion was consistent with IGRA. That statute does not view the compact as a vehicle for unilateral state regulation unless the tribe consents to such authority. "The only way the states can acquire regulatory power over tribal gaming is by tribal consent of such regulation in a compact." *Id.*, 471 Mich. at 321; 685 N.W.2d at 228. The court rejected Petitioner's position that 18 U.S.C. § 1166 grants regulatory power to the states in the absence of a compact. Instead, it found that § 1166 merely incorporates state gaming law as the federal law applicable in Indian country in the absence of a compact. "[A]lthough a state's gaming laws apply in the absence of a tribal state compact, they apply only as *federal law*." *Id.*, 471 Mich. at 322-323; 685 N.W.2d at 229 (emphasis in original). Here, the tribes gave no such consent in the Michigan

Compacts. Thus, under the Michigan Compacts, "[t]he state has no power to regulate the casinos[.]" *Id.*, 471 Mich. at 326; 685 N.W.2d at 230.

The Michigan Supreme Court also found that the substantive terms of the Michigan Compacts lacked the characteristics of legislation. For example, it found that "the compacts do not apply to the citizens of the state of Michigan as a whole; they only bind the two parties to the compact"; the "Legislature has not dictated the rights or duties of those other than the contracting parties"; "the compacts do not create any state agencies or impose any regulatory obligation on the state"; and they "do not create new forms of gaming[.]" *TOMAC*, 471 Mich at 325 - 326; 685 N.W.2d at 230-231.

The Michigan Supreme Court concluded that the Michigan legislature had the power to approve the Michigan Compacts by resolution. In reaching this conclusion, the state court first "turn[ed] to our Constitution." *TOMAC*, 471 Mich. at 327; 685 N.W.2d at 231. It stressed that "[u]nlike the federal constitution, our Constitution 'is not a grant of power to the legislature, but is a limitation upon its powers.'" *Id.,* quoting *In re: Brewster Street Housing Site*, 291 Mich. 313, 333; 289 N.W. 493 (1939). The court continued, "We have held that our Legislature has the general power to contract unless there is a constitutional limitation." *TOMAC*, 471 Mich at 328; 685 N.W.2d at 231. Because there are no constitutional restrictions on the Michigan legislature's power to bind the State to a compact with a tribe, and the constitution does not prescribe the method for doing so, the court "conclude[d] that the Legislature has the discretion to approve the compacts by resolution." *Id*.

Although the Michigan Supreme Court resolved the question of whether the Michigan Compacts were legislation within the meaning of the Bill Provision of the Michigan Constitution,[2] it did not reach the issue of whether the amendment provision in the Michigan Compacts violated the Separation of Powers Clause. The court found that the Little Traverse Amendment, which had been executed while this case was pending before it, made the issue ripe for review. But, because the "lower courts have not yet been able to assess this issue since the amendments," the court declined to resolve the issue itself. *TOMAC,* 471 Mich. at 333; 685 N.W.2d at 234. Instead, it "remanded this issue to the Court of Appeals to consider whether the provision in the compacts purporting to empower the Governor to amend the compacts without legislative approval violates the separation of powers doctrine found in Mich Const (1963), art 3, § 2." *Id.* The Michigan Court of Appeals has not yet released its decision on the remanded issue.

REASONS FOR DENYING THE PETITION

I. This Court Lacks Jurisdiction Because there is an Adequate and Independent State Ground for the Judgment of the Michigan Supreme Court.

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117,125 (1945). That principle

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[2] The Michigan Supreme Court also upheld the rulings by the lower state courts that the Michigan legislature had not violated the Local Acts Provision of the Michigan constitution. That ruling is not involved in the Petition.

"is based, in part, on 'the limitations of [the Court's] jurisdiction." *Michigan v. Long,* 463 U.S. 1032, 1041-1042 (1983), quoting *Herb,* 324 U.S. at 125. The "jurisdictional concern is that we not 'render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review would amount to nothing more than an advisory opinion.'" *Id.*, quoting *Herb,* 324 U.S. at 126.

In light of this jurisdictional limitation, this Court will not review a state court judgment merely to correct the state court's discussion of a federal question that is not essential to the judgment. "This Court . . . reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). *Accord, Herb,* 324 U.S. at 125-126 ("And our power is to correct wrong judgments, not to revise opinions."). Thus, this Court "should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds." *Black,* 351 U.S. at 298.

The judgment of the Michigan Supreme Court is supported by independent and adequate state grounds. The state court was called upon to resolve three claims in Petitioner's declaratory relief action. Each claim alleged a violation of the Michigan constitution alone. The issue presented by the principal claim was framed by the Michigan Supreme Court entirely in state constitutional terms: "(1) whether House Concurrent Resolution (HCR) 115 (1998), the Legislature's approval by resolution of tribal-state gaming compacts, constituted 'legislation' and therefore violated Mich. Const. (1963), art 4, § 22[.]" *TOMAC*, 471 Mich. at 312; 685 N.W.2d at 223. The resolution of that issue depended on the court's interpretation of the term "legislation" in that state constitutional provision.

"Resolution of whether HCR115 constituted legislation necessarily turns on the definition of 'legislation.'" *Id.*, 471 Mich. at 318; 226 N.W.2d at 226. The court found that the term "legislation" means "unilateral regulation," reasoning that the "Legislature is never required to obtain consent from those who are subject to its legislative power." *Id.*, 471 Mich. at 318; 685 N.W.2d at 226. In support of that conclusion, the court relied on its own decision in *Boerth v. Detroit City Gas Co.*, 152 Mich. 654; 116 N.W. 628 (1908). *Id*. That definition, based exclusively on Michigan law, led the state supreme court to make a distinction that provided the key to determining if the compacts were "legislation": "This unilateral action distinguishes legislation from contract[.]" *Id*. The Michigan Supreme Court drew further support for this distinction from its own decisions in *Detroit v. Michigan Public Utilities Commission*, 288 Mich. 267; 286 N.W. 368 (1939), and *City of Kalamazoo v. Kalamazoo Circuit Judge*, 200 Mich. 146; 166 N.W. 998 (1918). *Id.*

The opinion then turned to the question of whether the Michigan Compacts were legislation. First, the Michigan Supreme Court concluded that they were not legislation because, being the products of the mutual consent of the parties, the compacts were contracts.

> Here, the Legislature's approval of the compacts follows the *assent of the parties* governed by those compacts. Thus, the Legislature's role here requires *mutual assent by the parties – a characteristic that is not only the hallmark of a contractual agreement but is also absolutely foreign to the concept of legislating*.

TOMAC, 471 Mich. at 324; 685 N.W.2d at 229 (emphasis supplied). Second, the state court found that the substantive terms of the compacts lacked the characteristics of legislation

under the state constitution. In particular, the court concluded that the Michigan Compacts gave no regulatory authority to the State: "The compacts do not create any state agencies or impose any regulatory obligation on the state." *TOMAC*, 471 Mich at 325; 685 N.W.2d at 230. Rather, under the terms of the Michigan Compacts, regulatory "responsibility falls on the tribes alone." *Id*. For these reasons, the Michigan Supreme Court held that "this Legislature's approval of the compacts through HCR115 did not constitute legislation" under the state constitution. *Id.*, 471 Mich. at 312; 685 N.W.2d at 223.

As the above summary demonstrates, the Michigan Supreme Court clearly resolved a claim under the Michigan constitution. Where a state court decides a claim under its own constitution, the state constitutional provision provides an adequate and independent ground for the decision. *See Jankovich v. Indiana Toll Road*, 379 U.S.487, 495-496 (1965)(where a "state court's opinion relies on similar provisions in both State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment.") This is particularly true where, as here, the state court's decision hinges on that court's *interpretation* of its state constitution. "It is important that this Court not indulge in needless dissertations on constitutional law. *It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions*." *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1939) (emphasis supplied).

Furthermore, the Michigan Supreme Court's resolution of the state constitutional claim did not depend on its view of the federal issue cited by Petitioner. In its opinion, the court surveyed the federal law regarding the state's authority to directly regulate tribal gaming. It then concluded that "[t]he

only way the states can acquire regulatory power over tribal gaming is by tribal consent of such regulation in a compact." *TOMAC*, 471 Mich. at 321; 685 N.W.2d at 228. This conclusion, which Petitioner incorrectly attacks as a misstatement of federal law, did not determine the Michigan Supreme Court's ultimate holding that the compacts were not "legislation." What determined that holding is that the Michigan Compacts are the products of mutual assent and lack substantive terms granting regulatory authority to the State.

That holding would not be altered even if this Court were to disagree with the Michigan Supreme Court's determination that a state may not regulate tribal gaming in the absence of tribal consent. A different result on that issue would not convert the Michigan Compacts into "legislation" under state law. The Michigan Compacts would still be the products of mutual assent, not the result of unilateral state regulation. They would still lack a provision giving the state the power to regulate the tribe's gaming activities and other substantive terms that are, in the state court's determination, characteristics of legislation. In short, even if this Court were to address the federal issue, its "review would amount to nothing more than an advisory opinion." *Herb*, 324 U.S. at 126.

II. There is no Split of Authority on the Federal Issue between the Michigan Supreme Court and either the Federal or State Courts.

Petitioner argues that there is a conflict between the Michigan Supreme Court's interpretation of federal law and a decision of the United States Court of Appeals for the Ninth Circuit and decisions of the supreme courts of Kansas, New York, New Mexico, Rhode Island and Wisconsin. Petitioner is incorrect.

A. There is no conflict between the Michigan Supreme Court and the Ninth Circuit.

The Ninth Circuit case cited by Petitioner is *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003). In that case, non-Indian operators of certain card games challenged a California initiated law that authorized certain casino-style ("class III") games on tribal lands subject to compacts negotiated by the governor. They argued that the initiative did not satisfy the IGRA's requirement that California "permits such gaming," 25 U.S.C. § 2710(d)(1)(B), because the law did not authorize non-Indians to engage in that gaming activity. They argued that because IGRA does not "permit" California to regulate class III gaming on tribal lands, "permit" must refer to California's regulation of gaming on *non-Indian* land.

The Ninth Circuit acknowledged that the plaintiffs' argument was "plausible," but found that there was an "alternative understanding of the verb 'permit'." *Artichoke Joe's,* 353 F.3d at 721. Among the reasons supporting that alternative was the Ninth Circuit's view that "California may enact laws and regulations concerning gambling that have an effect on Indian lands via [18 U.S.C.] §1166." *Id*. at 722.

Petitioner asserts that the Ninth Circuit's interpretation of §1166 is contrary to the view that the Michigan Supreme Court expressed on that statute. But the views of the courts are entirely consistent. The Michigan Supreme Court did not disagree that a state's gaming laws and regulations may have an "*effect* on Indian lands via § 1166." *Artichoke Joe's*, 353 F.3d at 722 (emphasis supplied). The court pointed out that § 1166 "incorporates state laws as the federal law *governing nonconforming tribal gaming*" and that "a *state's gaming laws apply* [as federal law] in the absence of a tribal-state

compact[.]" *TOMAC,* 471 Mich. at 322; 685 N.W.2d at 229 (emphasis supplied). Both courts in fact agreed on how state gaming laws have an "effect" on Indian lands – through federal enforcement. The Ninth Circuit acknowledged that the "federal government retained the power to prosecute violations of state gambling laws in Indian country[.]" *Artichoke Joe's,* 353 F.3d at 722. The Michigan Supreme Court concurred that § 1166 "does not give a state enforcement power over violations of state gambling on tribal lands because 'the power to enforce the incorporated laws rests solely with the United States.'" *TOMAC*, 471 Mich. at 323; 685 N.W.2d at 229, quoting *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1177 (10th Cir. 1991).

Finally, even if the language in *Artichoke Joe's* and the *TOMAC* decision could be stretched to suggest a tension between the two, it would not justify granting certiorari. In each case, the discussion of Section 1166 is incidental to the court's ultimate holding. The Ninth Circuit found that, despite the alternative interpretation of the term "permits," it was left with "a statutory provision that is susceptible to more than one interpretation[.]" *Artichoke Joe's*, 353 F.3d at 722. Ultimately, the Ninth Circuit resolved that ambiguity by resorting to the canon of statutory interpretation that requires ambiguous language in a statute enacted for the benefit of Indians to be construed in their favor. *Id.* at 728-729. The Michigan Supreme Court also did not rest its holding on its view that Section 1166 made state gaming law applicable to Indian lands as federal law. As shown above, its ruling that the Michigan Compacts are not legislation was based on a completely different consideration – the fact that every compact is the product of mutual consent, which is not "legislation" under Michigan's constitution.

B. There is no conflict between the Michigan Supreme Court and other state supreme courts.

Petitioner contends that the Michigan Supreme Court's decision is in conflict with cases decided by its sister supreme courts in Kansas, New York, New Mexico, Rhode Island and Wisconsin. No such conflict exists. Petitioner points to no federal issue that the decisions in the other state cases have in common with the Michigan case. Instead, Petitioner asserts that these courts are in "conflict" with the Michigan Supreme Court merely because they struck down the compacts that were before those courts whereas the Michigan court upheld the compacts presented to it. But the decisions in those cases were based on the constitutions of *those states* under *different facts*. Obviously, that type of "conflict" between state courts is not sufficient to justify this Court's review.

The state cases cited by Petitioner all decided whether the constitutions of the states involved authorized the governor to enter into a tribal-state gaming compact, rather than whether federal law permitted a state to directly regulate tribal gaming.

- *Kansas v Finney*, 251 Kan. 559; 836 P.2d 1169, 1185 (1992): "[M]any of the provisions in the compact would operate as the enactment of new laws and the amendment of existing laws. The *Kansas Constitution* grants such power exclusively to the legislative branch of government." (Emphasis supplied.)

- *New Mexico v. Johnson*, 120 N.M. 562; 904 P.2d 11, 25 (1995): "We conclude that the Governor lacked authority under the *state Constitution* to bind the State by unilaterally entering into the compacts and revenue-

sharing agreements in question." (Emphasis supplied.)

- *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 798 N.E.2d 1047, 1049 (N.Y. 2003): Plaintiff's claim was that "by negotiating and signing the agreements without legislative authorization or approval [Governors Cuomo and Pataki] violated the principle of separation of powers under the *State constitution*[.]" (Emphasis supplied.)

- *Narragansett Indian Tribe of Rhode Island v. Rhode Island*, 667 A.2d. 280, 282 (R.I. 1995): "On the basis of *our particular state constitutional history and judicial interpretation*, we find no room in which to permit any such implied power over lotteries in the Governor, as Chief Executive, that would permit him to enter into any compact establishing a lottery operation and facility in this state." (Emphasis supplied.)

- *Panzer v. Doyle*, 680 N.W.2d. 666 (Wis. 2004): Wisconsin governor lacked authority to amend compact providing for indefinite duration "[u]nder *Wisconsin's* contemporary nondelegation doctrine[.]" (Emphasis supplied.)

The specific state law basis for each of these cases underscores the absence of any potential conflict with the Michigan Supreme Court on a *federal* question.

Furthermore, this case is distinguishable from the other state cases on its facts. Here, the Michigan Compacts that were negotiated and executed by the Governor were approved

by the Michigan legislature. In most of the other state cases, however, the governor acted alone.

- *Finney,* 836 P.2d at 1185: "*In the absence of* an appropriate delegation of power by the Kansas Legislature or *legislative approval of the compact*, the governor has no power to bind the State to the terms thereof." (Emphasis supplied.)

- *Johnson,* 904 P.2d at 23: The governor had entered into the compact "in the absence of any action on the part of the legislature[.]"

- *Saratoga County,* 798 N.E.2d at 1061: "[T]he State Executive lacks the power *unilaterally* to negotiate and *execute* tribal gaming compacts under IGRA." (Emphasis supplied).

- *Narragansett Indian Tribe*, 667 A.2d at 282: "[T]he Governor as Chief Executive lacked both constitutional as well as legislative authority to bind the State of Rhode Island" to an IGRA compact.

In addition, the substantive terms of the compacts are significantly different. The Michigan Compacts do not impose any obligations on the State, unlike the compacts in *Finney,* 836 P.2d at 1183 (compact created a state gaming agency), and *Saratoga County,* 798 N.E.2d at 1050 (oversight of gaming operations was vested in a state agency and specifically enumerated enforcement duties were assigned to the state police); they do not authorize more games than the State otherwise permitted, unlike the compact in *Johnson,* 904 P.2d at 21 (compact authorized more forms of gaming than New Mexico otherwise permitted); and they do not provide for an indefinite duration, unlike the compact in *Panzer,* 680

N.W.2d at 692 ("Governor was without authority to agree to duration provision").

In sum, there is no conflict on a federal question between the Michigan Supreme Court and the decisions of the supreme courts of Kansas, New Mexico, New York, Rhode Island, and Wisconsin. In fact, all of those cases were decided on the constitutions of the individual states and on different facts. Consequently, the decisions of those other states on the validity of the state action involved there does not create any conflict with the decision of the Michigan Supreme Court on the governmental action involved here.

III. The Issues Involved in this Case are of Local, not National, Importance.

Petitioner assets that this case presents issues of national importance. Its arguments for this position are simply incorrect.

First, Petitioner attempts to create an issue of national significance by arguing that a tribal-state gaming compact is authorized in the same manner as an interstate compact because the former is "authorized through IGRA under the Compact Clause of the United States Constitution, art. I, § 10." (Petition, p. 15.) It then suggests that this Court's case law recognizing that interstate compacts are subject to federal judicial review[3] applies equally to tribal-state gaming compacts.

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[3] *See West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951), *New York v. Hill*, 528 U.S. 110 (2000), *Cuyler v. Adams*, 449 U.S. 433 (1981).

The fallacy in Petitioner's argument is obvious. The Interstate Compact Clause concerns compacts between a State and another State, not an Indian tribe. It provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with *another State* . . . ." Art. I, §10, cl. 3 (emphasis supplied). Tribal-state gaming compacts, however, take their authority from a different constitutional provision. They were created by IGRA, which was enacted pursuant to the Indian Commerce Clause, U.S. Const. art. I, § 8. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996) (IGRA was "passed by Congress under the Indian Commerce Clause . . ."). Thus, this Court's jurisprudence recognizing that interstate compacts are subject to federal judicial review has no application to a tribal-state gaming compact.[4]

Next, Petitioner argues that the "prevalence of [IGRA] compacts requires certainty and national uniformity, not only for citizens, but for the co-sovereign States and Tribes that enter into gaming compacts." (Petition, p. 16.) But this case cannot provide any "certainty" or "national uniformity" on the means by which a state enters into an IGRA compact. Those means are not specified by IGRA.[5] Rather, it has been

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[4] Petitioner's argument that the Interstate Compact Clause cases apply to tribal-state gaming compacts is as disingenuous as it is unsound. In the brief that it filed with the Michigan Supreme Court, Petitioner flatly asserted that "**[t]he federal Compact Clause is . . . inapplicable.**" (TOMAC's Michigan Supreme Court Brief, p. 38; App., 121a; bold in original.)

[5] Petitioner admitted this point in the brief that it filed with the Michigan Supreme Court: "**IGRA does not determine how a compact is approved.**" (TOMAC's Michigan Supreme Court Brief, p. 38; App., 120a; bold in original.)

recognized that the means by which a state binds itself to an IGRA compact are determined by *state* law. *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997). The Michigan Supreme Court determined that the Michigan legislature's use of a resolution to bind the State to the compacts was authorized by the law of Michigan. While that decision has considerable significance to the State of Michigan, its citizens and the tribes occupying land within the State's borders, it has no national application.

Finally, Petitioner argues that the federal issue for which it seeks review has national significance "based purely on socioeconomic considerations[.]" (Petition, p. 17.) According to Petitioner, such considerations are that the "tribal gaming industry" has experienced "stratospheric growth" at the price of "high societal costs" (Petition, pp. 18, 19.) However much Petitioner may decry the socio-economic consequences of tribal gaming, the proffered federal legal issue has nothing to do with them. Indeed, there is minimal federal interest in the specific resolution of policy questions such as the growth and cost of tribal gaming. Congress left those matters to be decided on a local level through the compacting process between the states and the tribes. *See Pueblo of Santa Ana,* 104 F.3d at 1554, quoting S. Rep. No. 100-446 at 13 *reprinted in* 1988 U.S.C.C.A. at 3083 ("the compact process is a viable mechanism for setting various matters between two equal sovereigns. . ."). Review of those decisions is beyond the realm of the federal courts. *Gaming Corp. of America v. Dorsey & Whitney*, 86 F.3d 536, 546-547 (8th Cir. 1996) ("Congress thus chose not to allow the federal courts to analyze the relative interests of the state, tribal, and federal governments on a case by case basis.").

IV. The Michigan Supreme Court's Decision is Correct on the Merits.

Petitioner attacks the merits of the Michigan Supreme Court's interpretation of IGRA and challenges that court's decision on the state constitutional question. These arguments say nothing about whether this Court should grant a writ of certiorari. As shown earlier in this brief, the state court's view on the federal issue did not form the basis of its decision on the state constitutional issue, which has an independent and adequate state ground. Moreover, the state court's resolution of the state constitutional question is clearly not subject to this Court's review. Nevertheless, the State will address the Petitioner's challenges on the merits. They are, as shown below, entirely defective.

First, Petitioner contends that the decision below incorrectly interpreted 18 U.S.C. § 1166. The Michigan Supreme Court, however, properly construed the clear language of the federal statute. Section 1166 provides, in part, as follows:

> (a) Subject to subsection (c)[pertaining to class III gaming under a tribal-state compact], *for purposes of Federal law*, all State laws pertaining to the licensing, regulation, prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and the same extent as such laws apply elsewhere in the State.

18 U.S.C. § 1166(a)(emphasis supplied).

The Michigan Supreme Court interpreted this language to mean that "Section 1166 does *not* grant the state regulatory authority over tribal gaming; rather, it simply incorporates

state laws as the federal law governing nonconforming tribal gaming. Thus, although a state's gaming laws apply in the absence of a tribal-state compact, they apply only *as federal law*." *TOMAC*, 471 Mich. at 322-323; 685 N.W.2d at 229 (emphasis in original).

Petitioner complains that this interpretation of Section 1166 as "federalizing" or "borrowing" state gaming laws in the absence of a compact "cannot be reconciled with the plain language of the statute[.]" (Petition, p. 25.) But Section 1166(a)'s language plainly says that state gaming laws are applicable in Indian country "for purposes of *Federal* law[.]" (Emphasis supplied.) Petitioner completely ignores this important qualifying language. Petitioner also fails to point out that the Michigan court is not alone in its interpretation of Section 1166(a). The Tenth Circuit has held that this provision "incorporates state laws as the federal law governing all non-conforming gambling in Indian country." *United Keetoowah Bank of Cherokee Indians,* 927 F.2d at 1177. Moreover, this interpretation of Section 1166(a) is supported by subsection (c) of the statute. That provision leaves it entirely to the federal government to enforce state criminal gaming laws in Indian country. "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[.]" 18 U.S.C. § 1166(c)(emphasis supplied). Thus, the "power to enforce these newly incorporated laws rests solely with the United States[.]" *United Keetoowah Band,* 927 F.2d at 1177.

The Michigan Supreme Court's interpretation of Section 1166 as borrowing state gaming laws as the federal law applicable in Indian country gives effect to the express language of the statute. There is no need for this Court to review it.

Second, Petitioner argues that the compacting process "ensured state regulatory and policy making power regarding Indian gaming[.]" (Petition, p. 22.) This is an exaggeration of the rights granted to the states in that process. Petitioner points to 25 U.S.C. §§ 2710(d)(3)(c) and 2710(d)(5) as examples of such transfers of power to a state. But they do not serve that function; rather, they are examples of terms that *may* be included in a tribal-state gaming compact. While Petitioner may believe that an "appropriate" IGRA compact "will" apply state regulatory law to Indian gaming (Petition, p. 22), nothing in the statute betrays any such congressional judgment. Indeed, IGRA presumes that the tribe will regulate its own gaming operation. "Indian tribes have the *exclusive right* to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5) (emphasis supplied). The Michigan Compacts retained the tribes' exclusive regulatory jurisdiction, leaving the State with no such authority. (Michigan Compacts, § 4(M)(1); App., 14a).

Third, Petitioner argues that the Michigan Compacts are legislation "because they set forth an extensive regulatory framework governing tribal gaming activities." (Petition, p. 23). Here, Petitioner merely reargues its position below that the Michigan Compacts are "legislation" under the Michigan constitution. For good reasons, the Michigan Supreme Court soundly rejected Petitioner's arguments. The court found the "regulatory framework" described in the Michigan Compacts was one that does "not create any state agencies or impose any regulatory obligation on the state." *TOMAC*, 471 Mich. at 326; 685 N.W.2d at 230. It concluded that the age restrictions for gaming and employment "are not restrictions on the citizens of Michigan; rather, they were

restrictions only on the *tribes*." *Id.*, 471 Mich. at 325-326; 685 N.W.2d at 230 (emphasis in original). The court rejected Petitioner's argument that the Michigan Compacts impose an obligation on local governmental units to create local revenue sharing boards to receive and distribute the tribal payments; instead the court found that, under Michigan law, local governments are "third-party beneficiaries of the compacts, with the creation of the revenue sharing boards simply a condition precedent to receiving those benefits." *TOMAC*, 471 Mich. at 325; 685 N.W.2d at 230.

Petitioner's arguments that the substantive terms of the Michigan Compacts make them "legislation" are not only wrong—the Michigan Supreme Court's rejection of those arguments has nothing to do with Petitioner's federal question. The court simply interpreted the same compact language differently than Petitioner. Where Petitioner saw an age restriction on Michigan citizens, the court saw a restriction assumed by the tribes as a matter of contract. Where Petitioner saw an obligation on local governments to create local boards to receive tribal payments, the court saw a condition precedent to receiving the tribal revenue. Surely, the Michigan Supreme Court's interpretation of specific compact provisions as contract terms, rather than "legislation," implicates no federal issue.

Finally, Petitioner says that the Michigan Compacts are "legislation" under Michigan law because they make "multiple policy-making decisions. . . ." (Petition, p. 24, quoting dissent of Markman, J.). This argument was also soundly rejected by the Michigan Supreme Court. In this case, the policy decisions underlying the Michigan Compacts were made by the Michigan legislature when it approved those compacts by resolution. But, under Michigan constitutional law, "it must be remembered that not all policy

decisions made by the Legislature are required to be in the form of legislation." *TOMAC*, 471 Mich. at 331-332; 685 N.W.2d at 233. The court then quoted the following passage from this Court's decision in *Yakus v. United States*, 321 U.S. 414, 424 (1944): "[t]he essentials of the legislative function are the determination of legislative policy *and its formulation and promulgation as a defined and binding rule of conduct*. . . ." *TOMAC*, 471 Mich. at 332; 685 N.W.2d at 233 (emphasis by the court). The Michigan Supreme Court correctly concluded that HCR 115 did not meet that test because it "neither promulgated a legislative policy as a defined and binding rule of conduct nor applied it to the general community." *TOMAC*, 471 Mich. at 332; 685 N.W.2d at 233. Consequently, the fact that the Michigan Compacts reflected policy decisions did not render them "legislation" under Michigan law.[6]

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[6] Nothing suggests that this conclusion was affected by the Michigan court's resolution of Petitioner's federal question. The Michigan Supreme Court's citation of *Yakus* does not alter this fact. The court cited *Yakus* not for any governing federal law, but for its illuminating statement of the role played by policy decisions in the law-making function.

CONCLUSION

For the foregoing reasons, Respondent State of Michigan requests that this Court deny the Petition for a Writ of Certiorari to the Michigan Supreme Court.

Respectfully submitted,

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December 30, 2004

APPENDIX A

MICHIGAN GAMING CONTROL BOARD

Tribal-State Compact Agreement

1998

NOTTAWASEPPI HURON POTAWATOMI

COMPACT BETWEEN
THE NOTTAWASEPPI HURON BAND OF
POTAWATOMI AND
THE STATE OF MICHIGAN
PROVIDING FOR THE CONDUCT OF
TRIBAL CLASS III GAMING BY THE
NOTTAWASEPPI HURON TRIBE OF POTAWATOMI

THIS COMPACT is made and entered into this 3rd day of Dec., 1998, by and between the NOTTAWASEPPI HURON BAND OF POTAWATOMI (hereinafter referred to as "Tribe") and the STATE OF MICHIGAN (hereinafter referred to as "State").

RECITALS

WHEREAS, the State of Michigan is a sovereign State of the United States of America, having been admitted to the Union pursuant to the Act of January 26, ch. 6, 1837, 5 Stat. 144 and is authorized by its constitution to enter into contracts and agreements, including this agreement with the Tribe; and

WHEREAS, the Tribe is a federally recognized Indian Tribe under 25 C.F.R. 83 as of December 19, 1995, and its governing body, the Tribal Council, is authorized by the tribal constitution to enter into contracts and agreements of every description, including this agreement with the State; and

WHEREAS, the Congress of the United States has enacted the Indian Gaming Regulatory Act of 1988 (25 U.S.C. 2701 et seq. (hereinafter "IGRA"), which permits Indian tribes to operate Class III gaming activities on Indian reservations pursuant to a tribal-state Compact entered into for that purpose; and

WHEREAS, the Tribe proposes to operate a Class III gaming establishment on eligible Indian lands in the State of Michigan, and by Tribal Council Resolution and Tribal Ordinance will adopt rules and regulations governing the games played and related activities at the Class III gaming establishment; and

WHEREAS, the State presently permits and regulates various types of gaming within the State (but outside Indian lands), including casino style charitable gaming such as craps, roulette, and banking card games, as well as a lottery operating instant scratch games, and "pick number" games, and Multi-state lotto, most of which would be Class III games if conducted by the Tribe; and

WHEREAS, the Michigan Supreme Court in *Automatic Music & Vending Corp. v. Liquor Control Comm.*, 426 Mich. 452, 396 N.W. 2d 204 (1986), *appeal dismissed* 481 U.S. 1009 (1987), and the Michigan Court of Appeals in *Primages Int'l of Michigan v. Michigan*, 199 Mich App 252, 501 NW 2d 268 (1993), have held that the statutory exception found at MCL 750.303(2) allows for the play of electronic gaming

devices, which includes computerized or electronic games of chance, albeit subject to specified restrictions regarding the mode of play; and

WHEREAS, said casino style table games and electronic gaming devices are therefore permitted "for any purpose by any person, organization or entity," within the meaning of IGRA, 25 U.S.C. 2710(d)(1)(B); and

WHEREAS, at the general election held on November 5, 1996, the electors adopted in initiated law which provides for a licensing and regulatory system under which casino gambling may be operated in the City of Detroit; and

WHEREAS, the State and seven (7) other federally-recognized Indian tribes in the State have previously entered into substantially similar Compacts for the conduct of Class III games; and

WHEREAS, a Compact between the Tribe and the State for the conduct of Class III gaming satisfies the prerequisite imposed by the United States Congress by enactment of IGRA for the operations of lawful Class III gaming by the Tribe on eligible Indian lands in Michigan; and

WHEREAS, the State and the Tribe, in recognition of the sovereign rights of each party and in a spirit of cooperation in the interests of the citizens of the State and the members of the Tribe, have engaged in good faith negotiations recognizing and respecting the interests of each party and have agreed to this Compact.

NOW, THEREFORE, the Tribe and the State agree as follows:

SECTION 1. Purpose and Objectives

The purpose and objectives of the Tribe and State in making this Compact are as follows:

(A) To demonstrate good will and a cooperative spirit between the State and the Tribe;

(B) To continue the development of effective working relationships between State and Tribal governments;

(C) To compact for Class III gaming on eligible Indian lands of the Tribe in Michigan as authorized by IGRA;

(D) To fulfill the purpose and intent of IGRA by providing for tribal gaming as a means of generating tribal revenues, thereby promoting tribal economic development, tribal self-sufficiency and strong tribal government;

(E) To provide tribal revenues to fund tribal government operations or programs, to provide for the general welfare of the Tribe and its members and for other purposes allowed under IGRA;

(F) To provide for the operations of Class III gaming in which, except as provided in 25 U.S.C. 2710(b)(4) and (d)(2)(A) of IGRA, the Tribe shall have the sole proprietary interest and be the primary beneficiary of the Tribe's gaming enterprise;

(G) To recognize the State's interest in the establishment by the Tribe of rules for the regulation of Class III Gaming operated by the Tribe on eligible Indian lands;

(H) To recognize the State's interest in the establishment by the Tribe of rules and procedures for ensuring that Class III gaming is conducted fairly and honestly by the owners, operators, and employees and by the patrons of any Class III gaming enterprise of the Tribe; and

(I) To establish procedures to notify the patrons of the Tribe's Class III gaming establishment that the establishment is not regulated by the State of Michigan and that patrons must look to the tribal government or to the federal government to resolve any issues or disputes with respect to the operations of the establishment.

SECTION 2. Definitions

For purposes of this Compact, the following definitions pertain:

(A) "Class III gaming" means all forms of gaming authorized by this Compact, which are neither Class I nor Class II gaming, as such terms are defined in 2703(6) and (7) of IGRA. Only those Class III games authorized by this Compact may be played by the Tribe.

(B) (1) "Eligible Indian lands" means trust and land reservations acquired within Calhoun County, Michigan. A total of one (1) tribal Class III gaming facility may be located on eligible Indian lands; provided, however, if any tribe which attains federal recognition subsequent to the date of this Compact is granted the right, under a valid Compact with the State of Michigan, to operate more than one (1) Class III gaming facility on its Indian lands, the Tribe shall be afforded the same right subject to the same terms and conditions imposed on such newly recognized tribe.

(2) Nothing in this subsection 2(B) shall be construed to limit the Tribe's ability to change the location of the Tribe's Class III gaming facility within "eligible Indian lands".

(C) "Tribal Chairperson" means the duly elected Chairperson of the Board of Directors or Tribal Council of the Tribe.

(D) "Person" means a business, individual, proprietorship, firm, partnership, joint venture, syndicate, trust, labor organization, company, corporation, association, committee, state, local government, government instrumentality or entity, or any other organization or group of persons acting jointly.

SECTION 3. Authorized Class III Games

(A) The Tribe may lawfully conduct the following Class III games on eligible Indian lands:

(1) Craps and related dice games;

(2) Wheel games, including "Big Wheel" and related games;

(3) Roulette;

(4) Banking card games that are not otherwise treated as Class II gaming in Michigan pursuant to 25 U.S.C. 2703(7)(C), and non-banking card games played by any Michigan tribe on or before May 1, 1988;

(5) Electronic games of chance featuring coin drop and payout as well as printed tabulations whereby the software of the device predetermines the presence or lack of a winning combination and payout. Electronic games of chance are defined as a microprocessor-controlled electronic device which allows a player to play games of chance, which may be affected by an element of skill, activated by the insertion of a coin or currency, or by the use of a credit, and awards game credits, cash, tokens, or replays, or a written statement of the player's accumulated credits, which written statements are redeemable for cash; and

(6) Keno;

(7) Any other Class III game that lawfully may be operated by a person licensed to operate a casino pursuant to the Initiated Law of 1996, MCL 432.201 et seq.; and

(8) Games that lawfully may be conducted pursuant to MCL 750.303a and MCL 750.310a.

This Compact shall apply to card games that are considered to be Class II games pursuant to 25 U.S.C. 2703(7)(C) only if those games are expanded beyond their "nature and scope" as it existed before May 1, 1988 and only to the extent of such expansion. The term "nature and scope" shall be interpreted consistent with IGRA, the legislative history of IGRA, any applicable decisions of the courts of the

United States and any applicable regulations of the National Indian Gaming Commission.

Any limitations on the number of games operated or played, their location within eligible Indian lands as defined under this Compact, hours or period of operation, limits on wages, or pot size, or other such limitations shall be determined by duly enacted tribal law or regulation. Any state law restrictions, limitations or regulation of such gaming shall not apply to Class III games conducted by the Tribe pursuant to this Compact.

(B) Additional Class III games may be lawfully conducted by mutual agreement of the Tribe and the State as follows:

(1) The Tribe shall request additional games by letter from the tribal Chairperson on behalf of the Tribe to the Governor on behalf of the State. The request shall identify the additional proposed gaming activities with specificity and any proposed amendments to the Tribe's regulatory ordinance.

(2) The State acting through the Governor shall take action on the Tribe's request within ninety (90) days after receipt. The Governor's actions shall be based on:

(a) Whether the proposed gaming activities are permitted in the State of Michigan for any purpose by any person, organization or entity; and

(b) Whether the provisions of this Compact are adequate to fulfill the policies and purposes set forth in the IGRA with respect to such additional games.

SECTION 4. Regulation of Class III Gaming

(A) Prior to permitting the initiation of any Class III gaming on eligible Indian lands, the Tribe will enact a comprehensive gaming regulatory ordinance governing all aspects of the Tribe's gaming enterprise. The requirements of this Section 4 are intended to supplement, rather than conflict with the provisions of the Tribe's ordinance. To the extent any regulatory requirement of this Compact is more stringent or restrictive than a parallel provision of the Tribe's ordinance, as now or hereafter amended, this Compact shall control.

(B) The regulatory requirements of this Section 4 shall apply to the conduct of all Class III gaming authorized by the Compact. At all times during which it conducts any Class III gaming under this Compact, the Tribe shall maintain, as part of its lawfully enacted ordinances, requirements at least as restrictive as those set forth herein.

(C) The Tribe shall license, operate, and regulate all Class III gaming activities pursuant to this Compact, tribal law, IGRA, and all other applicable federal law. This shall include but not be limited to the licensing of consultants (except legal counsel with a contract approved under 25 U.S.C. 81 and/or 476), primary management officials, and key officials of each Class III gaming activity or operation. Any violations of this Compact, tribal law, IGRA, or other

applicable federal law shall be corrected immediately by the Tribe.

(D) The Tribe may not license, hire, or employ as a key employee or primary management official, as those terms are defined at 25 C.F.R. 502.14 and 502.19, in connection with Class III gaming, any person who:

(1) Is under the age of 18; or

(2) Has been convicted of or entered a plea of guilty or no contest to a gambling related offense, fraud or misrepresentation; or

(3) Has been convicted of or entered a plea of guilty or no contest, to any offense not specified in subparagraph (2) within the immediately preceding five years; this provision shall not apply if that person has been pardoned by the Governor of the State where the conviction occurred or, if a tribal member, has been determined by the Tribe to be a person who is not likely again to engage in any offensive or criminal course of conduct and the public good does not require that the applicant be denied a license as a key employee or primary management official; or

(4) Is determined by the Tribe to have participated in organized crime or unlawful gambling or whose prior activities, criminal records, reputation, habits, and/or associations pose a threat to the public interest or to the effective regulation and

> control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental to the conduct of gaming.

(E) The terms "fraud or misrepresentation," as used in subsection (d)(2), shall mean a criminal offense committed in Michigan or any other jurisdiction, involving, theft, fraud or misrepresentation, which is a felony or would be a felony if committed in Michigan, and which was committed as an adult or prosecuted as an adult offense, and which has not been effectively removed from the employee's criminal record by executive pardon, state court order, or operation of law.

(F) The term "any offense," as used in subsection (D)(3), shall mean any criminal offense not described in subsection (D)(2), whether committed in this state or any other jurisdiction, that is, or would be, a crime under the provisions of the Michigan Penal Code, Act No. 328 of the Public Acts of 1931, as amended, being MCL 750.1 to 750.568, or the controlled substance provisions of the Public Health Code, Act No. 368 of the Public Acts of 1978, as amended, being MCL 333.7101 to 333.7545, or any other criminal offense not specified in subparagraph (2) involving theft, dishonesty, fraud or misrepresentation arising under the law of Michigan or another state or jurisdiction, that was committed as an adult or prosecuted as an adult offense, and which has not been effectively removed from the employee's criminal record by executive pardon, state court order, or operation of law.

(G) All management contracts entered into by the Tribe regarding its gaming enterprise operated pursuant to this

Compact shall conform to all the requirements of IGRA, including 25 U.S.C. 2711, and tribal law, if the Tribe enters into a management contract for the operation of any Class III gaming or component thereof, the State shall be given fourteen (14) days prior written notice of such contract.

(H) All accounting records shall be kept on a double entry system of accounting, maintaining detailed, supporting, subsidiary, records. The Tribe shall maintain the following records for not less than three (3) years:

(1) Revenues, expenses, assets, liabilities and equity for the location at which Class III gaming is conducted;

(2) Daily cash transactions for each Class III game at the location at which gaming is conducted, including but not limited to transactions relating to each gaming table bank, game drop box and gaming room bank;

(3) All markers, IOUs, returned checks, hold checks or other similar credit instruments;

(4) Individual and statistical game records (except for card games) to reflect statistical drop and statistical win; for electronic, computer, or other technologically assisted games, analytic reports which show the total amount of cash wagered and the total amount of prizes won;

(5) Contracts, correspondence and other transaction documents relating to all vendors and contractors;

(6) Records of all tribal gaming enforcement activities;

(7) Audits prepared by or on behalf of the Tribe; and

(8) Personnel information on all Class III gaming employees or agents, including rotation sheets, hours worked, employee profiles and background checks.

(I) No person under the age of 18 may participate in any Class III game.

(J) The Tribe shall not conduct any Class III gaming outside of eligible Indian lands.

(K) The rules of each Class III card game shall be posted in a prominent place in each card room and must designate:

(1) The maximum rake-off percentage, time buy-in or other fee charged;

(2) The number of raises allowed;

(3) The monetary limit of each raise;

(4) The amount of ante; and

(5) Other rules as may be necessary.

(L) Upon the request of the State, the Tribe will provide to the State the background information compiled by the Tribe on all consultants (except legal counsel), management personnel, suppliers and employees required to licensed under 25 C.F.R. Part 556 or the Tribes gaming ordinance to allow the State to verify the Tribe's background information and to make an independent determination as to suitability of these individuals, consistent with the standards set forth in Section 4 (D) herein.

(M) The regulatory requirements set forth in this section of this Compact shall be administered and enforced as follows:

(1) The Tribe shall have responsibility to administer and enforce the regulatory requirements.

(2) A representative authorized in writing by the Governor of the State shall have the following right to inspect all tribal Class III gaming facilities and all tribal records related to Class III gaming, including those records set forth in Section 4(H) herein, subject to the following conditions:

(a) With respect to public areas, at any time without prior notice;

(b) With respect to private areas not accessible to the public, at any time during normal business hours, with 12 hours prior written notice; and

(c) With respect to inspection and copying of all tribal records relating to Class III gaming, with 48 hours prior written notice, not including weekends.

(3) Except as otherwise provided by law or as also allowed by the exception defined below, the State agrees to maintain in confidence and never to disclose to any third party any financial information, proprietary ideas, plans, methods, data, development, inventions or other proprietary information regarding the gambling enterprise of the Tribe, games conducted by the Tribe, or the operation thereof which is provided to the State by the Tribe without the prior written approval of the duly authorized representative of the Tribe, provided that the information is marked as confidential information when received by the State. Nothing contained in this Section 4(M)(3) shall be construed to prohibit:

(a) The furnishing of any information to a law enforcement or regulatory agency of the United States or State government pursuant to a lawful request of such agency;

(b) The State from making known the names of persons, firms or corporations conducting Class III gaming activities pursuant to the terms of this Compact, locations at which such activities are conducted or the

dates on which such activities are conducted;

(c) Publishing the terms of this Compact;

(d) Disclosing information as necessary to audit, investigate, prosecute or arbitrate violations of this Compact;

(e) Complying with any law, subpoena or court order. The State shall immediately notify the Tribe of any request or demand for the release of confidential information under this subsection 4(M)(3) to allow the Tribe to initiate proceedings under Section 7 of this Compact or other applicable law to resolve any dispute regarding the State's intention to disclose such information.

(4) The Tribe shall have the right to inspect State records concerning all Class III gaming conducted by the Tribe consistent with Michigan's Freedom of Information Act.

(5) The Tribe shall reimburse the State for the actual costs the State incurs in carrying out any functions authorized by the terms of this Compact, in an amount not to exceed fifty thousand dollars ($50,000.00) per annum, adjusted annually in accordance with the Consumer Price index (CPI) annual inflation index. All calculations of amounts due shall be based upon a fiscal year beginning October 1

and ending September 30, unless the parties select a different fiscal year. Payments due the State shall be made no later than sixty (60) days after the beginning of each fiscal year. Payments due the State during any partial fiscal year this Compact is in effect shall be adjusted to reflect only that portion of the fiscal year. Within sixty (60) days after each fiscal year in which this Compact is in effect, the State shall submit to the Tribe an accounting of actual costs incurred in carrying out any functions authorized by the terms of this Compact. Any amount of said sums paid to the State which are not expended by the State on said actual costs shall be returned to the Tribe by the State, within sixty (60) days after the fiscal year or treated as a pre-payment of the Tribe's obligation during the subsequent fiscal year.

(6) In the event the State believes that the Tribe is not administering and enforcing the regulatory requirements set forth herein, it may invoke the procedures set forth in Section 7 of this Compact.

(N) The Tribe shall comply with all applicable provisions of the Bank Secrecy Act, F.L. 91-508, October 26, 1970, 31 U.S.C. 5311-5314.

SECTION 5. Employee Benefits

(A) The Tribe shall provide to any employee who is employed in conjunction with the operation of any gaming establishment at which Class III gaming activities are operated pursuant to this Compact, such benefits to which the employee would be entitled by virtue of the Michigan Employment Security Act (Michigan Public Act No. 1 of 1938, as amended, being MCL 421.1 et seq.), and the Worker's Disability Compensation Act of 1969, (Michigan Public Act

No. 317 of 1969, as amended, being MCL 481.101 et seq.) If his or her employment services were provided to an employer engaged in a business enterprise which is subject to, and covered by, the respective Public Acts.

SECTION 6. Providers of Class III Gaming Equipment or Supplies.

(A) No Class III games of chance, gaming equipment or supplies may be purchased, leased or otherwise acquired by the Tribe unless the Class III equipment or supplies meet the technical equipment standards of either the State of Nevada or the State of New Jersey.

(B) Prior to entering into any lease or purchase agreement, the Tribe shall obtain sufficient information and identification from the proposed seller or lessor and all persons holding any direct or indirect financial interest in the lessor or the lease/purchase agreement or permit the Tribe to conduct a background check on those persons. The Tribe shall not enter into any lease or purchase agreement for Class III gaming equipment or supplies with any person or entity if the lessor, seller, or any manager or person holding direct or indirect financial interest in the lessor/seller or the proposed lease/purchase agreement, is determined to have participated in or have involvement with organized crime or has been convicted of or entered a plea of guilty or no contest to a gambling-related offense, fraud or misrepresentation, or has been convicted of or entered a pleas of guilty or no contest to any other felony offense within the immediately proceeding five years, unless that person has been pardoned.

(C) The seller, lessor, manufacturer, or distributor shall provide, assemble and install all Class III games of

chance, gaming equipment, and supplies in a manner approved and licensed by the Tribe.

SECTION 7. Dispute Resolution

(A) In the event either party believes that the other party has failed to comply with or has otherwise breached any provision of this Compact, such party may invoke the following procedure:

(1) The party asserting noncompliance shall serve written notice on the other party. The notice shall identify the specific Compact provision alleged to have been violated and shall specify the factual and legal basis for the alleged noncompliance. The notice shall specifically identify the type of game or games, their location, and the date and time of the alleged noncompliance. Representatives of the State and Tribe shall thereafter meet within thirty (30) days in an effort to resolve the dispute.

(2) In the event an allegation by the State is not resolved to the satisfaction of the State within ninety (90) days after service of the notice set forth in Section 7(A)(1), the party may serve upon the office of the tribal Chairperson a notice to cease conduct of the particular game(s) or activities alleged by the State to be in noncompliance. Upon receipt of such notice, the Tribe may elect to stop the game(s) or activities pending the results of arbitration. The Tribe shall act upon one of the foregoing options within thirty (30) days of receipt of notice from the State. Any arbitration under

this authority shall be conducted under the Commercial Arbitration rules of the American Arbitration Association except that the arbitrators shall be attorneys who are licensed members of the State Bar of Michigan, or of the bar of another state, in good standing, and will be selected by the State picking one arbitrator, the Tribe a second arbitrator, and the two so chosen shall pick a third arbitrator. If the third arbitrator is not chosen in this manner within ten (10) days after the second arbitrator is picked, the third arbitrator will be chosen in accordance with the rules of the American Arbitrator Association. In the event an allegation by the Tribe is not resolved to the satisfaction of the Tribe within ninety (90) days after service of the notice set forth in Section 7(A)(1), the Tribe may invoke arbitration as specified above.

(3) All parties shall bear their own costs of arbitration and attorney fees.

(B) Nothing in Section 7(A) shall be construed to waive, limit or restrict any remedy which is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Compact. Nothing in this Compact shall be deemed a waiver of Tribe's sovereign immunity. Nothing in this Compact shall be deemed a waiver of the State's sovereign immunity.

SECTION 8. Notice to Patrons.

In the facility of the Tribe where Class III gaming is conducted, the Tribe shall post in a prominent position a

Notice to patrons at least two (2) feet by three (3) feet in dimension with the following language:

NOTICE

THIS FACILITY IS REGULATED BY ONE OR MORE OF THE FOLLOWING: THE NATIONAL INDIAN GAMING COMMISSION, BUREAU OF INDIAN AFFAIRS OF THE U.S. DEPARTMENT OF THE INTERIOR AND THE GOVERNMENT OF THE NOTTAWASEPPI HURON BAND OF POTAWATOMI INDIANS.

THIS FACILITY IS NOT REGULATED BY THE STATE OF MICHIGAN.

SECTION 9. Gaming Outside of Eligible Indian Lands.

An application to take land in trust for gaming purposes outside of eligible Indian lands, as defined in Section 2(B) of this Compact, shall not be submitted to the Secretary of the Interior in the absence of a prior written agreement between the Tribe and the State's other federally recognized Indian Tribes that provides for each of the other Tribes to share in the revenue of any gaming facility that is the subject of the application to take lands in trust for gaming purposes outside of eligible Indian lands.

SECTION 10. Regulation of the Sale of Alcoholic Beverages.

(A) The Tribe hereby adopts and applies to its Class III gaming establishment as tribal law those State laws, as amended, relating to the sale and regulation of alcoholic beverages encompassing the following areas; sale to a minor; sale to a visibly intoxicated individual; sale of adulterated or

misbranded liquor; hours of operation; and similar substantive provisions. Said tribal laws, which are defined by reference to the substantive areas of State laws referred to above, shall apply to the tribal Class III gaming establishment in the same manner and to the same extent as such laws apply elsewhere in the State to off-reservation transactions.

(B) The Tribe, for resale at its Class III gaming establishment, shall purchase spirits from the Michigan Liquor Control Commission, and beer and wine from distributors licensed by the Michigan Liquor Control Commission, at the same price and on the same basis that such beverages are purchased by Class C licensees.

SECTION 11. Effective Date.

This Compact shall be effective immediately upon:

(A) Endorsement by the tribal chairperson and concurrence in that endorsement by resolution of the Tribal Council;

(B) Endorsement by the Governor of the State of Michigan and concurrence in that endorsement by resolution of the Michigan Legislature;

(C) Approval by the Secretary of the Interior of the United States; and

(D) Publication in the Federal Register.

SECTION 12. Binding Effect, Duration, and Severability.

(A) This Compact shall be binding upon the State and the Tribe for a term of twenty (20) years from the date it

becomes effective unless modified or terminated by written agreement of both parties.

(B) At least one year prior to the expiration of twenty (20) years after the Compact becomes effective, and thereafter at least one year prior to the expiration of each subsequent five (5) year period, either party may serve written notice on the other of its right to renegotiate this Compact. The parties agree that 25 U.S.C. 2710 (d) (3) through (8), or any successor provisions of law, apply to successor Compacts.

(C) In the event that either party gives written notice to the other of its right to renegotiate this Compact pursuant to Section 12, subsection (B), the Tribe may, pursuant to the procedures of IGRA, request the State to enter into negotiations for a successor Compact governing the conduct of Class III gaming activities. If the parties are unable to conclude a successor Compact, this Compact shall remain in full force and effect pending exhaustion the administrative and judicial remedies set forth in IGRA, and/or any other applicable federal law.

(D) The Tribe may operate Class III gaming only while this Compact or any renegotiated Compact is in effect.

(E) In the event that any section or provision of this Compact is disapproved by the Secretary of the Interior of the United States or is held invalid by any court of competent jurisdiction, it is the intent of the parties that the remaining sections or provisions of the Compact, and any amendments thereto, shall continue in full force and effect. This severability provision does not apply to Sections 17 and 18 of this Compact.

SECTION 13. Notice to Parties.

Unless otherwise indicated, all notices, payments, requests, reports, information or demands which any party hereto may desire or may be required to give to the other party hereto, shall be in writing and shall be personally delivered or sent by first-class, certified or registered United States Mail, postage prepaid, return appearing below or such other address as any party shall hereinafter inform the other party hereto by written notice given as aforesaid:

Notice to the Tribe shall be sent to:

Chairperson
Nottawaseppi Huron Band of Potawatomi
2221 1-1/2 Mile Road
Fulton, MI 49052

Notice to the State shall be sent to:

Governor's Office	Office of Attorney General
State of Michigan	Treasury Building
P.O. Box 30013	First Floor
Lansing, MI 48909	Lansing, MI 48922

Every notice, payment, request, report, information or demand so given shall be deemed effective upon receipt, or if mailed, upon receipt or the expiration of the third day following the day of mailing, whichever occurs first, except that any notice of change of address shall be effective only upon receipt by the party to whom said notice is addressed.

SECTION 14. Entire Agreement.

This Compact is the entire agreement between the parties and supersedes all prior agreements, whether written or oral, with respect to the subject matter hereof. Neither this Compact not any provision herein may be change, waived, discharged, or terminated orally, but only by an instrument in writing signed by the Tribe and the State.

SECTION 15. Filing of Compact with Secretary of State.

Upon the effective date of this Compact, a certified copy shall be filed by the Governor with the Michigan Secretary of State and a copy shall be transmitted to each house of the Michigan State Legislature and the Michigan Attorney General. Any subsequent amendment or modification of this Compact shall be filed with the Michigan Secretary of State.

SECTION 16. Amendment

This Compact may be amended by mutual agreement between the Tribe and the State as follows:

(A) The Tribe or the State may propose amendments to the Compact by providing the other party with written notice of the proposed amendments as follows:

(I) The Tribe shall propose amendments pursuant to the notice provisions of this Compact by submitting the proposed amendments to the Governor who shall act for the State.

(ii) The State, acting through the Governor, shall propose amendments by submitting

the proposed amendments to the Tribe pursuant to the notice provisions of this Compact.

(iii) Neither the tribe nor the state may amend the definition of "eligible Indian lands" to include counties other than those set forth in Section 2(B)(1) of this Compact. The tribe's right to conduct gaming under this Compact shall be terminated if any of the following events occur:

(I) the tribe applies to the United States Department of the Interior to have land taken into trust which would qualify for gaming under Section 20 of the IGRA (25 U.S.C. Section 2719) and which is within 150 miles of the City of Detroit, other than eligible Indian lands described in Section 2(B)(1) of this Compact,

(II) the tribe requests the United States Department of the Interior to approve a Compact for gaming within 150 miles of the City of Detroit which Compact has not been executed by the State of Michigan, or

(III) the Tribe conducts gaming on land within 150 miles of the City of Detroit, other than eligible Indian

lands described in Section 2(B)(I) of this Compact,

Termination of tribal gaming under this Section shall be effective as of the date on which the State learns or receives notice of any tribal action identified in this Paragraph 16(A)(iii), including notice from any person or entity (including any unit of government) which is given to the addresees identified at Section 13 of this Compact.

(B) The party receiving the proposed amendment shall advise the requesting party within thirty (30) days as follows:

(1) That the receiving party agrees to the proposed amendment; or

(2) That the receiving party rejects the proposed amendment as submitted and agrees to meet concerning the subject of the proposed amendment.

(C) Any amendment agreed to between the parties shall be submitted to the Secretary of the Interior for approval pursuant to the provisions of the IGRA.

(D) Upon the effective date of the amendment, a certified copy shall be filed by the Governor with the Michigan Secretary of State and copy shall be transmitted to each house of the Michigan Legislature and the Michigan Attorney General.

SECTION 17. Tribal Payments to State for Economic Benefits of Exclusivity.

(A) The State and the Tribe have determined that it is in the interests of the people of the State and the members of the Tribe to maximize the economic benefits of Class III gaming for the Tribe and to minimize the adverse effects of Class III gaming by providing a mechanism to reduce the proliferation of Class III gaming enterprises in the State in exchange for the Tribe providing important revenue to the State.

(B) So long as there is a binding Class III Compact in effect between the State and Tribe and no change in State law is enacted which is intended to permit or permits the operation of electronic games of chance or commercial casino games by any other person (except a person operating such games in the City of Detroit pursuant to the Initiated Law of 1996, M.C.L. 432.201 *et. seq.*) And no other person (except a federally-recognized Indian Tribe operating pursuant to a valid Compact under IGRA or a person operating in the City of Detroit pursuant to the Initiated Law of 1996, M.C.L. 432.201) within the State lawfully operates electronic games of chance or commercial casino games, the Tribe shall make payments to the State as provided in subsection (C).

(C) From and after the effective date of this Compact (as determined pursuant to Section 11 of this Compact), and so long as the conditions set forth in subsection (B) remain in effect, the Tribe will make semi-annual payments to the State as follows:

(i) Payment to the Michigan Strategic Fund, or its successor as determined by State law, in amount equal to eight percent (8%) of the net win at the casino derived from

all Class III electronic games of chance, as those games are defined in the Compact.

(ii) As used in this subsection, "net win" means the total amount wagered on each electronic game of chance, minus the total amount paid to players for winning wagers at such machines.

(iii) For purposes of these payments, all calculations of amount due shall be based upon a fiscal year beginning October 1 and ending September 30 of the following calendar year, unless the parties agree on a different fiscal year, and all payments due the State pursuant to the terms of this section shall be paid no later than sixty (60) days after October 1 and March 31 of each year. Any payments due and owing from the Tribe in the year this Compact is approved, or the final year the Compact is in force, shall reflect the actual net win but only for the portion of the year the Compact is in effect.

(D) The operation of electronic games of chance by persons or entities other than federally-recognized Indian tribes pursuant to a valid Compact under IGRA or not authorized for gaming under Proposal E shall not violate the tribes exclusive right to operate such machines so long as such machines:

(1) Reward a player only with the right to replay the device at no additional costs;

(2) Do not permit the accumulation of more than fifteen (15) replays at any one time;

(3) Allow the accumulated free replays to be discharged only by activating the device for one additional play for each accumulated free replay; and

(4) Make no permanent record, directly or indirectly, of the free replays awarded.

SECTION 18 Tribal Payments to Legal Governments.

(A) From and after effective date of this Compact (as determined pursuant to Section 11 of this Compact), the Tribe will make semi-annual payments to the treasurer for the county described in paragraph (2)(a) of this subsection 18 (A) to be held by said treasurer for and on behalf of the Local Revenue Sharing Board described below, as follows:

(1) Payment in the aggregate amount equal to two percent (2%) of the net win at each casino derived from all Class III electronic games of chance, as those games are defined in this Compact. The county treasurer shall disburse the payments received as specified by lawful vote of the Local Revenue Sharing Board.

(2) It is the State's intent, in this and its other Compacts with federally recognized tribes, that the payments to local governments provided for in this section provide financial resources to those political subdivisions of the State which actually experience increased operating costs associated with the operation of the Class III gaming facility. To this end, a Local Revenue Sharing Board shall be created by

those local governments in the vicinity of the Class III gaming facility to receive and disburse the semi-annual payments from the Tribe as described below. Representatives of local governments in the vicinity of the Class III gaming facility shall be appointed by their respective elected bodies and shall serve at the pleasure of such elected bodies. The Local Revenue Sharing Board shall consist of representatives from each of the following jurisdictions:

(a) One (1) representative from the county in which the Class III gaming facility is located;

(b) One (1) representative from the village, city, or township in which the Class III gaming facility is located;

(c) One (1) representative from a third local unit of government determined by the representatives identified in sub-paragraphs (a) and (b), above, to be most impacted by the Class III gaming facility.

The procedures for the functioning of the Local Revenue Sharing Board, guidelines for establishment of criteria or a formula for the distribution of revenues, and all other matters not specified in this Compact, shall be determined by the Local Revenue Sharing Board. Decisions of the Local Revenue Sharing Board concerning the

distribution of revenue shall require the unanimous vote of the three (3) representatives. The Local Revenue Sharing Board's sole function shall be to determine and make allocations of the tribal payments for the purpose described and subject to the limitations in subsection (3) - (5) below.

(3) Of the payments made to local unit of government, not less than one-eighth of the aggregate payment described in subsection (1) shall be paid to local public safety organizations for public safety purposes.

(4) Out of the aggregate payments to local units of government, each local unit of government shall receive no less than an amount equivalent to its share of ad valorem property taxes that would otherwise be attributed to the Class III Gaming Facility if that site were subject to such taxation.

(5) Out of the aggregate payments to local units of government, after deducting the payment provided in subparagraphs (3) and (4), the Board shall allocate an additional portion of such payments to local units of government to offset the actual costs incurred by local units of government as a result of the development of a Class III gaming facility in the vicinity. The balance of such payments remaining after reimbursement of such actual costs may be utilized for any other lawful local government purposes.

(6) As used in this subsection, "net win" means the total amount wagered on each electronic game of chance, minus the total amount paid to players for winning wagers at such machines.

(7) For purposes of these payments, all calculations of amounts due shall be based upon a fiscal year beginning October 1 and ending September 30 of the

following calendar year, unless the parties agree on a different fiscal year, and all payments due the local units of government pursuant to the terms of this Section shall be paid no later than sixty (60) days after October 1 and March 31 of each years. Any payments due and owing from the Tribe in the year this Compact is approved, or the final year the Compact is in force, shall reflect the actual net win but only for the portion of the year the Compact is in effect.

IN WITNESS WHEREOF, the Tribal Chairperson acting for the Nottawaseppi Huron Band of Potawatomi and the Governor acting for the State of Michigan have hereunto set their hands and seals.

Date: 11-28-98

NOTTAWASEPPI HURON BAND
OF POTAWATOMI

By /s/ _____
Chairperson

Date: 12-3-98

STATE OF MICHIGAN

By /s/ _____
Governor

APPROVAL BY THE SECRETARY OF THE INTERIOR

The foregoing Compact between the Nottawaseppi Huron Band of Potawatomi Indians and the State of Michigan is hereby approval this _____ day of _____, 199___, pursuant to authority conferred on me by Section 11 of the Indian Gaming Regulatory Act, 102 Stat. 2472. I direct that it be promptly submitted to the Federal Register for publication.

/s/ _____
Kevin Gover
Assistant Secretary - Indian Affairs

APPENDIX B

STATE OF MICHIGAN
IN THE 30TH CIRCUIT COURT

Case No. 99-90165-CZ

[Dated June 9, 1999]

TAXPAYERS OF MICHIGAN AGAINST CASINOS, a Michigan non-profit corporation, and LAURA BAIRD, State Representative, Michigan House of Representatives, in her official capacity, Plaintiffs,	)
v.	)
the STATE OF MICHIGAN, Defendant.	)

Robert J. Jonker (P38552)
William C. Fulkerson (P13758)
Daniel K. DeWitt (P51756)
Attorneys for Plaintiffs
Warner Norcross & Judd LLP
900 Old Kent Building
111 Lyon Street, NW
Grand Rapids, MI 49503-2489
(616) 752-2000

A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in United States District Court for the Western District of Michigan, where it was given docket number 5:99-CV-14 and was assigned to Judge David W. McKeague. The action is no longer pending.

COMPLAINT FOR DECLARATORY RELIEF

INTRODUCTION

1. This is an action for declaratory relief under MCR 2.605 to enforce the power of the people of the State of Michigan and their elected legislators to regulate gambling within the borders of the State as they see fit and in accordance with Constitutional requirement.

2. In the absence of the relief requested in this action, residents of four localities within the State may be subjected against their will to the presence of gambling casinos in their communities even though Michigan law generally prohibits such gambling in the State, MCLA § 750.301, and even though a majority-let alone a super-majority-of the duly elected legislators have not voted in both houses of the Michigan Legislature to authorize the gambling as required by the Constitution of the State of Michigan, and even though the residents of the affected localities have not been given the opportunity to vote on the matter, as required by the State Constitution.

3. In January 1997, purportedly on behalf of the State, the Governor negotiated and signed gambling compacts (the "Gambling Compacts") with four Indian tribes: the Little Traverse Bay Band of Odawa Indians, the Pokagon Band of

Potawatomi Indians, the Little River Band of Ottawa Indians and the Huron Potawatomi. The Gambling Compacts are attached as Exhibit A. If the tribes are permitted to operate casinos under these Compacts as contemplated, they will add to the more than fourteen Indian casinos already operating in Michigan.

4. The Gambling Compacts purport to clear the way for casino-style gambling only in specified and restricted areas within the State and therefore the Compacts will have a disproportionate impact on certain local communities. On information and belief, the four tribes intend to build casinos in Battle Creek, Mackinac City, Mackinac, and New Buffalo.

5. The Gambling Compacts were allegedly made under the federal Indian Gaming Regulatory Act, 25 U.S.C.A. § 2701 *et seq*. ("IGRA" or the "Act"). Under IGRA, casino-style gambling on Indian lands may operate only in conformance with a valid "Tribal-State compact" approved by the "State." 25 U.S.C.A. § 2710(d)(1)(C). State law determines how the State of Michigan may validly enter into and bind itself to Tribal-State compacts.

6. The Gambling Compacts at issue in this case have not been approved as required by the Constitution of the State of Michigan, which expressly requires that all legislation, including these Compacts, be approved by bill. The Michigan Attorney General has expressly so ruled in Attorney General Opinion No. 6960 (Oct. 21, 1997), a copy of which is attached as Exhibit B.

7. Instead of following the procedures specified by the Constitution and the Attorney General of the State for a valid approval of the Compacts by bill, the Legislature chose to test support for the Gambling Compacts by resolution. Unlike a

bill, which must be passed by a majority of elected and serving members, a resolution may be passed by less than a majority of legislators.

8. The Legislature chose to operate by resolution, rather than by bill, because the Compacts lacked the necessary support for approval by bill. Indeed, a majority of elected members has not voted in both houses to approve the Compacts. Instead, during the 1998 "lame duck" session of Michigan's Legislature, a plurality of the members of Michigan's House of Representatives passed a resolution purporting to approve the Gambling Compacts. The resolution, House Concurrent Resolution 115 ("HCR 115"), is attached as the first page of Exhibit A. After being defeated several times, HCR 115 passed the House by a vote of 48 to 47, substantially short of the 56 votes that are required to pass a bill in the House. The Senate eventually approved HCR 115 by a vote of 21 to 17.

9. The Gambling Compacts also violate other provisions of the Constitution of the State of Michigan, as more particularly described in the following allegations.

10. Accordingly, the Plaintiffs ask the court for a declaration that the Gambling Compacts violate Michigan's Constitution of 1963 and are consequently null and void.

PARTIES AND STANDING

11. Michigan'S Constitution is intended to benefit and protect the people of Michigan. Mich. Const. 1963, Art. I, § 1.

12. The issues set forth in this Complaint are of great public interest and importance.

13. Taxpayers of Michigan Against Casinos ("TOMAC" is a Michigan non-profit corporation that seeks to protect the citizenry of the State by opposing the proliferation of Indian casinos and other gambling venues in the State of Michigan. TOMAC has standing to bring this suit based on the standing of its individual members.

14. TOMAC is based in New Buffalo, Michigan, which is one of the localities that will be disproportionately affected if the Gambling Compacts are not invalidated.

15. One of TOMAC's members, Russell Bulin, resides in Union Pier, Berrien County, Michigan where he owns and operates Pine Garth Inn, a bed and breakfast. As a citizen, resident and business owner in Michigan, Mr. Bulin has standing to bring this action in that he has been denied the benefit and protection of Michigan's Constitution. The constitutional violations by the State have injured Mr. Bulin in a way that is different from the citizenry at large. Namely, the Gambling Compact with the Pokagon Band of Potawatomi Indians purports to clear the way for casino-style gambling in Berrien, Allegan, Van Buren and Cass Counties in Michigan. As a resident and business owner in Berrien County, Mr. Bulin believes he will be exposed to, and injured by, the negative effects of casino gambling, including: a) increased crime; b) the diversion of police and judicial resources away from other activities; c) decreased property values; d) the loss of the use of other businesses, such as retail stores and restaurants, forced out by the casino; e) the loss of consumer money to be spent at Mr. Bulin's business; f) increased bankruptcies in the community; g) the diversion of community resources to the treatment of gambling addicts; h) the weakening of the moral and family atmosphere in the community; i) the diversion of community resources to the construction and maintenance of infrastructure for the casino;

and j) the overall weakening of the area's economy. Furthermore, Mr. Bulin has been deprived of his right to vote to approve or disapprove the Gambling Compacts, as required by Article IV, Section 29, of Michigan's Constitution concerning local acts.

16. Another of TOMAC's members, Michael Hosinski, resides in Union Pier, Berrien County, Michigan. Mr. Hosinski owns and operates Union Pier Bench and Table, a custom furniture store also in Union Pier, Michigan. As a citizen, resident and business owner in Michigan, Mr. Hosinski has standing to bring this action in that he has been denied the benefit and protection of the Michigan Constitution. The constitutional violations by the State have injured Mr. Hosinski in a way that is different from the citizenry at large. Namely, the Gambling Compact with the Pokagon Band of Potawatomi Indians purports to clear the way for casino-style gambling in Berrien, Allegan, Van Buren and Cass Counties in Michigan. As a resident and business owner in Berrien County, Mr. Hosinski believes he will be exposed to, and injured by, the negative effects of casino gambling which include: a) increased crime; b) the diversion of police and judicial resources away from other activities; c) decreased property values; d) the loss of the use of other businesses, such as retail stores and restaurants, forced out by the casino; e) the loss of consumer money to be spent at Mr. Hosinski's business; f) increased bankruptcies in the community; g) the diversion of community resources to the treatment of gambling addicts; h) the weakening of the moral and family atmosphere in the community; I) the diversion of community resources to the construction and maintenance of infrastructure for the casino; and j) the overall weakening of the area's economy. Furthermore, Mr. Hosinski has been deprived of his right to vote to approve or disapprove the

Gambling Compacts, as required by Article IV, Section 29, of Michigan's Constitution concerning local acts.

17. Plaintiff Laura Baird was and is the State Representative in the Michigan House of Representatives for the 70th District. Ms. Baird voted against the Gambling Compacts, and was a member of the majority of elected State Representatives that did not vote to approve the Gambling Compacts.

18. As a legislator and member of the majority of elected State Representatives that did not vote to approve the Compacts, Plaintiff Laura Baird has standing to bring this action because her position would have carried the day but for the unconstitutional procedures used to purportedly approve the Compacts. Specifically, HCR 115 cleared the House by a vote of 48 to 47-substantially short of the 56 vote majority that is required to pass a bill in the House.

19. By using resolution, rather than the constitutionally mandated bill, Ms. Baird was also deprived of her constitutional rights as a member of the House to: a) consider, debate or vote to approve or disapprove the Gambling Compacts in accordance with the constitutional requirements for bills; b) consider, debate or vote to approve or disapprove the Gambling Compacts in accordance with the constitutional requirements for local acts; c) consider, debate, draft or vote to approve or disapprove any amendment to the Gambling Compacts; d) participate in the negotiation and drafting of the Gambling Compacts; and e) invoke the provisions of the Michigan Constitution to protect and serve the electorate.

20. The Plaintiffs' injuries and grievances were caused by the State's activities that form the basis of this Complaint and may be redressed by the court's declaration that the

Gambling Compacts are null and void unless and until approved in accordance with Constitutional requirements.

21. The Defendant State of Michigan is a sovereign state of the United States of America. The State's seat of government is in Lansing, Michigan. Mich. Const. 1963 Art. III, § 1.

JURISDICTION AND VENUE

The court has jurisdiction over this action pursuant to MCLA § 600.605 and MCR 2.605(2).

23. As set forth in this complaint, there exists an actual controversy between the parties to this action in that the Gambling Compacts have been negotiated and signed by the Governor and purportedly approved only by resolution, and not by bill, of the State Legislature. Indeed, a majority of the duly elected members of the Michigan Legislature in both houses have not voted to approve the Gambling Compacts in any form. The Gambling Compacts were also not approved in accordance with the constitutional procedures applicable to local acts. Finally, the Compacts, as written, violate the separation of powers doctrine, by giving the Governor of the State the purported power to amend the Gambling Compacts in whatever way he sees fit without the approval of the Legislature in any form, and even over the objection of the Legislature. In sum, the parties to this action disagree regarding the constitutionality of the Defendant's actions.

24. Interpreting the State's Constitution and deciding whether an action exceeds constitutional authority is the function and responsibility of the courts.

25. In accordance with MCLA §§ 600.1615, venue in the 30th Circuit Court in Ingham County is proper.

GENERAL ALLEGATIONS

A. The Gambling Compacts Purport to Set Legislative Policy.

26. Gambling is generally illegal in Michigan and is against the public policy of the State. MCLA § 750.301 *et. seq*. The Gambling Compacts purport to override this general prohibition and public policy, and establish a separate legislative scheme for a series of new Indian casinos.

27. The Gambling Compacts purport to authorize the four Indian tribes to conduct casino-style gambling on their lands. Gambling Compacts.§ 3. Such gambling includes craps, roulette, keno and electronic games of chance. Gambling Compacts, § 3.

28. The four Indian tribes can operate casino-style gambling only while the Gambling Compacts or any renegotiated compacts are in effect. Gambling Compacts, § 12(D).

29. The Gambling Compacts prohibit the application of any state gambling law to the gambling conducted in casinos operated by the four Indian tribes. Gambling Compacts, § 3(A).

30. The Gambling a Compacts regulate the conduct of casino-style gambling on the four Indian tribes' eligible Indian lands. Gambling Compacts, § 4. Such regulations include provision for licensing certain employees, record keeping and accounting practices, and reimbursement by the four Indian

tribes of the State's expenses. Gambling Compacts. § 4(D), 4(H) and 4(M)(5).

31. The Gambling Compacts purport to pick and choose which State laws apply to the tribes' casino operations. For example, the Gambling Compacts make Michigan's worker compensation and employee security laws and regulations applicable to casino employees. Gambling Compacts, § 5. But the Gambling Compacts except the casinos from Michigan's building codes and health and safety laws. The gambling Compacts also fail to make the extensive gaming regulations and safeguards applicable to casino gambling in Detroit applicable to the future Indian casinos. *See e.g.*, the Michigan Gaming Control and Revenue Act, MCLA § 432.201 *et seq*., and accompanying regulations, 1998 AACS Rule 432.1101 *et seq*.

32. The Gambling Compacts grant to the Indian tribes the exclusive right, subject to certain exceptions, to operate electronic games of chance and commercial casino games. Gambling Compacts, § 17(B). In return for this exclusive right, the four Indian tribes are required to pay to the Michigan Strategic Fund 8% of the net win derived from electronic games of chance. Gambling Compacts, § 17(C). In comparison, the casinos authorized for the City of Detroit will pay to the State over 21% of the net win from all forms of gambling.

33. These and other provisions of the Gambling Compacts make them functional equivalents of legislation, thus requiring approval of the Michigan Legislature by bill under Article IV, Section 22 of the Constitution of the State of Michigan.

B. The Gambling Compacts Circumvent the Constitutional Requirements for Legislation.

34. The Michigan Constitution imposes several important procedural requirements on the enactment of legislation in the State. The procedures help ensure that the will of the people of the State is reflected in the outcome of the legislative process.

35. One key procedural requirement for legislation is that it be enacted by bill, not resolution. A bill requires a majority vote of the members elected and serving in both houses of the Legislature. A resolution, in contrast, requires only a majority vote of the members present at the time of the vote. Thus, a resolution can "pass" the Legislature even if a majority of the people's elected representatives do not vote in favor of it in both houses. That is precisely what happened in this case.

36. During the 1998 "lame duck" session of Michigan's Legislator, a plurality of Michigan's Legislators passed HCR 115 purporting to approve the Gambling Compacts. Support for the Gambling Compacts was tested by resolution, instead of by bill, because the Gambling Compacts lacked the support needed for approval by bill.

37. After being defeated several times, HCR 115 cleared the House on December 10, 1998, by a vote of 48 to 47, substantially short of the 56 vote majority required to pass a bill in the House. The Senate initially approved HCR 115 by only one vote, 19 to 18. Due to the close vote, the measure was reconsidered, passing by a vote of 21 to 17 at 1:42 a.m. on December 11, 1998, the last day of the 89th Legislature before official adjournment on December 22. Based on these votes, the Gambling Compacts were deemed "approved" by

the Legislature even though a majority of the people's elected representatives in the House did not vote to support the Compacts.

38. A bill is also subject to numerous additional procedural requirements, including a specified number of readings in each house, procedures for public hearings on the bill, public inspection of the voting records of any committee and the full Legislature, notice periods prior to consideration, the possibility of amendments, and rules relating to final consideration and possible veto of the bill by the Governor. Furthermore, resolutions are immediately effective. For a bill to become immediately effective, a two-thirds majority vote of the members of both houses is required. None of these procedures was followed in the case of the Gambling Compacts.

39. In Attorney General Opinion 6960 (Oct. 21, 1997), issued at the request of two members of the Legislature, the Attorney General concluded that legislative approval of Tribal-State compacts was necessary and that Michigan's Constitution required that the approval be *by bill*, not by resolution. Exhibit B. Contrary to the Opinion, the Attorney General, the procedures for approval by bill were not followed in this case.

C. The Gambling Compacts Circumvent the Constitutional Requirements for Local Acts.

40. The Gambling Compacts purportedly clear the way for casino gambling on the four Indian tribes' "eligible Indian lands." Gambling Compacts, § 3.

41. The Gambling Compact with the Pokagon Band of Potawatomi Indians defines "eligible Indian lands" as

reservation lands acquired within Allegan, Barrien, Van Buren, and Cass counties, in Michigan. The Gambling Compact with the Little Traverse Bay Band of Ottawa Indians defines "eligible Indian lands" as reservation lands acquired within Emmet and Charievoix counties, in Michigan. The Gambling Compact with the Little River Band of Ottawa Indians defines "eligible Indian lands" as reservation lands acquired within Manistee and Mason counties, in Michigan. The Gambling Compact with the Huron Potawatomi Indians defines "eligible Indian lands" as reservation lands acquired within Calhoun County, Michigan.

42. In addition, the Gambling Compacts make it practically impossible for any of the four Indian tribes to establish additional casinos outside of "eligible Indian lands" by requiring that any such casino share revenues with all of the other recognized tribes in the State. Gambling Compacts, § 9. Locality is further restricted by a complete prohibition of any casino within 150 miles of Detroit. Gambling Compacts, § 16.

43. Thus, the Gambling Compacts operate over particular localities, and not over the whole territory of the State, and therefore are "local acts." Yet, they were not approved by a two-thirds vote of the State House and Senate and by a majority vote of the electorate affected, as required by Michigan's Constitution. Mich. Const. 1963, Art. IV, § 29.

D. The Gambling Compacts Violate the Constitutionally Mandated Separation of Powers.

44. The Gambling Compacts purport to be binding on the "State" for 20 years unless modified or terminated by written agreement of both parties. Gambling Compacts, § 12(A). The Indian tribes can invoke IGRA to request the State to negotiate successor compacts to the Gambling Compacts. Gambling Compacts, §.12(C).

45. According to their terms, the Gambling Compacts may be amended by mutual agreement between the appropriate Indian tribe and "the State." Gambling Compacts, § 16. Any amendment must be initiated and negotiated by the Indian tribe and the Governor, "who shall act for the State," and must be approved by the United States Secretary of the Interior. Gambling Compacts, § 16(A), (B) and (C). "Upon the effective date of the amendment," a copy of the amendment is transmitted to the Michigan Legislature. Gaming Compacts § 16(D). No approval of any amendment is required from the Legislature.

46. Accordingly, under the literal terms of the Gambling Compacts, the Governor and the tribes may now reach any agreement they choose even if the Legislature disapproves. This is a blatant and improper delegation of legislative power to the executive, and a violation of separation of powers principles enshrined in the Michigan Constitution.

COUNT I

The Gambling Compacts Violate Article IV, Section 22 (Bills) of Michigan's Constitution

47. Plaintiffs incorporate all preceding allegations.

48. State law determines how the State of Michigan may validly enter into and bind itself to Tribal-State compacts.

49. Article IV, Section 22, of Michigan's Constitution provides that "All legislation shall be by bill and may originate in either house." Mich. Const. 1963, Art. IV, § 22. In addition, to ensure that the Legislature properly considers all legislation, Michigan's Constitution imposes several procedural safeguards, including that all bills be distributed to each member of the Legislature at least five days before passage and be read in each house of the Legislature at least three times. Mich. Const. 1963, Art. IV, § 26.

50. Article IV, Section 26, of Michigan's Constitution requires that all bills be passed by a majority of the members elected and serving in the House and Senate. Mich. Const. 1963, Art. IV, §26.

51. The Gambling Compacts are legislation, evidenced by the fact that they, among other things: legalize gambling activities that otherwise violate Michigan law, establish requirements to be met in the management and operation of the casinos, extend application of selected Michigan laws and regulations to cover the casinos, prohibit the application of other laws, and commit the four Indian tribes to making payments to the State. In addition, the Gambling Compacts are legislation because they purport to be binding outside of the Legislature.

52. House Concurrent Resolution 115 approving the Gambling Compacts cleared the House on December 10, 1998, by a vote of 48 to 47. This is short of the 56 votes required to pass a bill in the House. The Senate eventually approved the resolution by a vote of 21 to 17 on the last day of the "lame duck" session. The Gambling Compacts have never been approved by a majority of the duly elected members of both houses of the Michigan Legislature.

53. The Gambling Compacts are legislation that must be considered and enacted by bill. The State has violated Article IV, Section 22, of Michigan's Constitution by failing to follow the mandated procedure. The Attorney General Opinion No. 6960 (Oct. 21, 1997), attached as Exhibit B.

WHEREFORE, the Plaintiffs respectfully ask the court for a declaration that the State has violated Article IV, Section 22, of Michigan's Constitution and that Gambling Compacts are void until approved by bill.

COUNT II

The Gambling Compacts Violate Article IV, Section 29 (Local or Special Acts) of Michigan's Constitution

54. Plaintiffs incorporate all preceding allegations.

55. Article IV, 5eaion 29, of Michigan's Constitution provides:

> The Legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. No local or special act shall take effect until approved by two-thirds of the

> members elected to and serving in each house and by a majority of the electors voting thereon in the district affected.

Mich. Const. 1963, Art. IV § 29.

56. The Gambling Compacts purportedly clear the way for casino gambling on the four Indian tribes' "eligible Indian lands." Gambling Compacts, § 3.

57. The Gaming Compact with the Pokagon Band of Potawatomi Indians defines "eligible Indian lands" as reservation lands acquired within Allegan, Berrien, Van Buren, and Cass counties, in Michigan. On information and belief, the Band intends to build a casino in the vicinity of the City of New Buffalo, Michigan, even though the City of New Buffalo actively opposes casino gambling and recently passed an ordinance declaring gambling casinos a nuisance.

58. The Gambling Compact with the Little Traverse Bay Band of Ottawa Indians defines "eligible Indian lands" as reservation lands acquired within Emmet and Charlevoix counties, in Michigan. On information and belief, the Band intends to build a casino in Mackinac City, Michigan.

59. The Gambling Compact with the Little River Band of Ottawa Indians defines "eligible Indian lands" as reservation lands acquired within Manistee and Mason counties, in Michigan. On information and belief, the Band has initiated construction of a casino in the City of Manistee, Michigan.

60. The Gambling Compact with the Huron Potawatomi Indians defines "eligible Indian lands" as

reservation lands acquired within Calhoun County, Michigan. On information and belief, the Band intends to build a casino in Battle Creek, Michigan.

61. The Gambling Compacts operate within particular localities, and not over the whole territory of the State. Accordingly, the Gambling Compacts are local and special acts under Article IV, Section 29. Michigan's Constitution, and must be approved by two-thirds of the Legislators in each house and by a majority of the electors found in the affected counties.

62. The Legislature has failed to treat the Gambling Compacts as local or special acts. In particular, a two-thirds majority of the legislators in both houses has not voted to approve the Compacts and the Compacts have not been submitted to a vote of the electors of the affected localities. On information and belief, the State knows that the electors would not approve the Gambling Compacts. Indeed, the City of New Buffalo just passed an ordinance declaring casinos a nuisance.

WHEREFORE, the Plaintiffs respectfully ask the court for a declaration that the State has violated Article IV, Section 29, of Michigan's Constitution and that the Gambling Compacts are consequently null and void until approved by bill including the appropriate voting requirements for local acts.

COUNT III

The Gambling Compacts Violate Article III, Section 2 (Separation of Powers) of Michigan's Constitution

63. Plaintiffs incorporate all preceding allegations.

64. Article III, Section 2, of Michigan's Constitution provides that:

> The Powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

Mich. Const., Art III, § 2.

65. The Legislature is vested with the power to write the laws, determine their applicability, and in so doing, determine the public policy of the State.

66. It is the Governor's duty and within his power to execute the laws.

67. According to their terms, the Gambling Compacts may be amended by the Governor without approval of the Legislature. Gambling Compacts,§ 16. Therefore, the Governor can rewrite the Gambling Compacts and effectively enact new legislation without the involvement of the Legislature, and even if the Legislature disapproves.

68. Furthermore, the Governor effectively usurped the Legislature's right to write the laws by submitting the Gambling Compacts to the Legislature without providing an

opportunity for the Legislature to amend or modify the Compacts.

69. Thus, the State has improperly delegated the legislative power to the executive in violation of the separation of powers doctrine set forth in Article III, Section 2, of Michigan's Constitution.

WHEREFORE, The Plaintiffs respectfully ask the court for a declaration that the State has violated Article III, Section 2, of Michigan's Constitution and that the Gambling Compacts are consequently null and void as currently written.

Dated: June 9, 1999

WARNER NORCROSS & JUDD LLP

By _____

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APPENDIX C

IN THE SUPREME COURT OF MICHIGAN

Appeal from the Michigan Court of Appeals (Before Hood, P.J., Holbrook Jr., J.J., and Owens, J.J.)

Supreme Court No. 122830
Court of Appeals No. 225017
Ingham County Cir. Ct. No. 99-90195-CZ

[Filed November 20, 2003]

TAXPAYERS OF MICHIGAN AGAINST CASINOS, and LAURA BAIRD,
Plaintiff-Appellants,

v.

the STATE OF MICHIGAN,
Defendant-Appellee,

and

NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV and GAMING ENTERTAINMENT, LLC,
Intervening Defendants-Appellees.

BRIEF ON APPEAL - APPELLANT

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE , CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

ORAL ARGUMENT REQUESTED

Submitted by:

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STATEMENT OF JURISDICTION

Taxpayers of Michigan Against Casinos and Laura Baird (collectively, "TOMAC") appeal under Michigan Court Rule 7.301(A)(2) the decision and order of the Court of Appeals dated November 12, 2002, Ct of Appeals Op (App at 122a), reversing the decision of the Ingham County Circuit Court dated January 18, 2000, Cir County Ct Op (App at 106a).

TOMAC asks this Court to reverse the decision of the Court of Appeals and reinstate the judgment of the circuit Court. holding that the Michigan legislature violated Article IV, Section 22, of the Michigan constitution by legislating through concurrent resolution rather than by bill, and violated Article HI, Section 2, of the Michigan constitution by abdicating to the Governor unrestricted authority to amend the terms of the legislative act without legislative approval. TOMAC further asks this Court to reverse the decision of the Court of Appeals and hold that the Michigan legislature violated the "Local Acts" provision of the Michigan constitution, Article IV, Section 29, by "approving" legislation limited to certain counties within the State without following the constitutionally prescribed procedures for local acts.

QUESTIONS PRESENTED FOR REVIEW

1. Are the Michigan legislature's policy determinations in deciding whether and how to allow Indian tribes to operate casinos in Michigan legislative in nature, subject to the enactment and presentment requirements of the Michigan constitution?

The Court of Appeals answered: No
The trial court answered: Yes

TOMAC answers: Yes
State and Interveners answer: No

2. Has Congress, by enacting the Indian Gaming Regulatory Act ("IGRA"), preempted the State of Michigan's right to make policy decisions affecting gambling on Indian lands through compacts and the State of Michigan's constitutional requirements for enactment of legislation?

The Court of Appeals answered: Yes
The trial court answered: No
TOMAC answers: No
State and Interveners answer: Yes

3. Is it a violation of the Michigan constitution's separation of powers for the legislature to abdicate to the Governor the power to make new policy decisions in the compacts with Indian Tribes?

The Court of Appeals answered: This issue is not ripe for appellate review
The trial court answered: Yes
TOMAC answers: Yes
State and Interveners answer: No
Amici Curiae answer: Yes

4. Must a legislative act of local application that purports to limit casino gambling to four particular Michigan communities comply with Article 4, Section 29, of Michigan's constitution, which specifies the procedure for passing "local acts"?

The Court of Appeals answered: No
The trial court answered: No
TOMAC answers: Yes
State and Interveners answer: No

INTRODUCTION

Before December 11, 1998, a Michigan resident who tried to play slot machines on Indian lands in Calhoun county would have been committing a crime. On December 10 and 11, 1998, the Michigan legislature legalized such activity by "approving" a set of compacts with four Indian tribes. This change in the legal status of gambling was not the result of legislation passed by a majority of the elected and serving legislators, but rather the result of a concurrent resolution "approved" by *less* than a majority of all representatives.

Michigan's constitution requires that all legislation be by bill passed by a majority of members elected and serving in each house. This Court, in *Blank v Department of Corrections,* 462 Mich 103; 611 NW2d 530 (2000), articulated the test for determining whether action taken by the State is "legislative" in nature and thus subject to the constitutional requirements of formal enactment. Under this test, an activity is "legislative" if it (1) has the power to alter the rights, duties, and relations of parties outside the legislative branch, (2) involves policy determinations, and (3) supplants other legislative methods for reaching the same result. *Id.* at 114-115. Under this test, the compacts'

"approval" is legislative action that must be effected by bill, not resolution.

The compacts at issue legalized casino-style gambling for four different Indian tribes. The compacts reflect multiple public policy decisions, such as the minimum age of those allowed to gamble and work at the casinos, the conditions under which the State and local governments earl receive revenues from the casinos, the number of casinos permitted to operate in the State, and the jurisdiction given and denied the State over gambling activities. These choices impact not only the legislature, but also the tribes that are subject to the compacts, the State as a whole and how it deals with the Indian tribes, the Michigan residents who may gamble or work at the casinos, and the local communities in which the casinos will operate. Because a majority of the house of representatives could not agree that the compacts struck the proper balance on these important policy issues, the proponents of the compacts made an end run around the required legislative process, "approving" the compacts with less than a majority of the elected and serving representatives.

The compacts also impermissibly allow the Governor of Michigan to amend the compacts without additional legislative approval of any kind. Governor Granhohn recently exercised this power by amending the compact with the Odawa Indians to grant the tribe an additional casino in exchange for additional revenue payments to the State. This is a policy decision that the legislature must make. The legislature may not abdicate its responsibility to the Governor, and the Governor may not arrogate the power to herself. Because the compacts give the Governor unrestricted power to change State policy, the compacts violate the separation of :powers clause of the constitution.

Finally, the compacts also violate the local acts provision of the Michigan constitution. The compacts restrict casino operations to four distinct communities in the State and ensure that a casino will never operate anywhere near the City Of Detroit. As such, the compacts arc local acts that must comply with the local act requirements set forth in the constitution. These requirements include passage by two-thirds of the legislature and approval by the voters in the affected communities. Neither of these requirements have been met.

This Court must instruct the legislature that the constitutional requirements for legislation apply to compacts. Indian gambling is already big business in tint State, and Indian tribes in Michigan continue to press the legislature and the Governor for compacts or compact amendments that will allow even more casinos in Michigan. Voting margins in the legislature are thin and local support for casinos is limited. Accordingly, casino proponents will continue their efforts to skirt the constitutional requirements for legislative enactments. This Court attempted to settle the important question of what constitutes "legislation" just three years ago in *Blank,* but the Court of Appeals has now unsettled it--without even mentioning this Court's decision in *Blank*. As it did in *Blank,* this Court must articulate and enforce the constitutional requirements that the legislature make public policy in this State by bill, and in accordance with all the constitutional requirements for legislation. Accordingly, TOMAC respectfully asks this Court to hold House Concurrent Resolution 115 unconstitutional, and direct that any gambling compacts be approved, if at all, by legislative enactment, and not by resolution.

STATEMENT OF FACTS

I. The legislature "approved" four gambling compacts by mere resolution after failing to marshal the support necessary for legislative enactment

In January 1997, Michigan's Governor negotiated and signed four compacts with four Indian Tribes: the Little Traverse Bay Band of Odawa Indians, the Pokagon Band of Potawatomi Indians, the Little River Band of Ottawa Indians, and the Huron Potawatomi. The purpose of these compacts was to authorize four new Indian casinos in the State of Michigan. These four compacts are the predecessors to the compacts now at issue. By their terms, in order to become effective, the 1997 compacts required "[e]ndorsement by the Governor of the State and concurrence in that endorsement by resolution of the Michigan Legislature." These compacts failed to garner legislative approval in any form.

Prompted by the Governor's negotiation of the four compacts, State Senator John D. Cherry, Jr. and State Representative Kirk A. Profit requested the formal opinion of the Michigan Attorney General on two issues:

> 1) is legislative approval necessary for the State to bind itself to the four compacts, and
>
> 2) does such approval require a statutory enactment by the Michigan legislature?

The Attorney General unequivocally answered "yes" to both questions. OAG, 1997, No 6,960 (October 21, 1997) (App at 43a-45a). After observing that Article 4, § 1, of the Michigan constitution vested the legislative power in the State Senate and House, the Attorney General recognized that:

> In order to protect the integrity of the legislative process, the People have, through the Constitution, imposed specific requirements upon the exercise of this power. Const 1963, art 4, § 22, requires that "all legislation shall be by bill and may originate in either house." Const 1963, art 4, § 26, requires that no bill shall become law without concurrence of a majority of the members of each house.

Id. at *5 (App at 44a). Finding that the compacts were "clearly legislative in character," the State's own legal counsel concluded that legislative approval *by bill* was necessary, *Id.* at *7-*8 (App at 45a).

Despite the Attorney General's opinion, when the Governor and the four Tribes modified and re-executed the compacts in December of 1998, the compacts again required approval only "by resolution of the Michigan Legislature." Compacts at § 11(B) (App at 62a). The compacts were nevertheless enrolled as House Bill 5872 (1998) in an apparent attempt to have them approved by legislative act. *See Baird v Babbitt,* No 5:99-CV-14, slip op at 2 (WD Mich, 1999) (App at 79a). But legislative approval for this bill never materialized either, *Id.*

So, the legislature proceeded to consider the compacts by resolution. *See* HCR 115 (1998) (App at 46a). Unlike a bill, which must be passed by a majority of *elected and serving members*, a resolution may be passed by a majority vote of legislators *present at the time*.[1] *See* Const 1963, art 4, § 26;

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[1] Under the Michigan constitution, a house of the legislature may conduct business if there is a quorum present. Const 1963, art 4, § 14. Thus, once a quorum is present, a

Senate Rule 3.107. Casino supporters in the legislature were forced to proceed in this fashion because the compacts lacked the support necessary to gain approval by a majority of elected and serving legislators.

Indeed, when HCR 115 was first considered during the 1998 "lame duck" session of Michigan's House of Representatives, it was soundly defeated by a vote of 52 to 39. Over the next three days, the resolution was defeated twice more before finally being approved by a vote of 48 to 47. See 37 Gongwor News Service, Michigan Report No 237 (December 10, 1998) (App at 71a-74a), 1998 Journal of the House 2671-2673 (No. 83, December 10, 1998) (App at 75a-77a). The Senate eventually approved HCR 115 by a vote of 21 to 17 at 1:42 a.m. on December 11, 1998, the last day of the 89th Legislature. HCR 115 (App at 46a). Because the House had 108 elected and serving members at the time HCR 115 was considered, 55 votes were required to pass legislation. *See* 1998 Journal of the House (listing 108 members) (App at 75a); *see also Baird;* No 5:99-cv-14, slip op at 5 (noting that the House usually has 110 members, thereby normally requiring 56 votes) (App at 82a).

II. The Compacts' terms reflect policy judgments.

The four compacts in this case purport to clear the way for casino-style gambling in four communities in Michigan. Since the relevant terms of the compacts are identical, a single

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majority of that quorum can pass a concurrent resolution. In real numbers, this means that a concurrent resolution can be passed with just twenty-eight House members and eleven Senators voting in favor, essentially half that required to pass a bill.

compact is reproduced in the Appendix at 47a-70a. The compacts were ostensibly prepared under the federal Indian Gaming Regulatory Act, 18 USC 1166-1168, 25 USC 2701-2721 ("IGRA"). Under IGRA, Indian tribes earl operate gambling casinos only if they do so in conformance with a valid "Tribal-State compact" entered into with the "State" that is "in effect." 25 USC 2710(d)(1)(C). The compacts authorized "Class III gaming" under IGRA, which includes craps, roulette, keno, slot machines, and other casino-style games. 25 USC 9 2703(8); Compacts at § 3 (App at 52a-53a).

As described more fully in the Argument below, the compacts prohibit the application of State gambling laws to the four Indian casinos, *see* Compacts at § 3(A) (App at 52a-53a), and instead establish a new regulatory scheme that governs gambling activities. For instance, the compacts prohibit gambling by any "person" under the age of 18. *See id.* at § 4(1) (App at 56a.) They also govern employee licensing, record keeping and accounting practices, the posting of certain information, and a multitude of other matters, *Id.* at §§ 4(D), 4(H), 4(K) (App at 54a-56a). The compacts decide how much money the tribes will pay to the State (8% of net win from electronic games of chance) and where that money will go (the Michigan Strategic Fund). *Id.* at § 17 (App at 17a-18a). Although the local governments affected are not parties or privy to the compacts, the compacts require them to create new "Local Revenue Sharing Boards" to manage tribal payments earmarked for local expenditures. *Id.* at § 18 (App at 18a-20a).

The compacts also allow the Governor to amend their terms without additional legislative approval of any kind. Any amendment is to be initiated and negotiated by the Indian tribe and the Governor, "who shall act for the State." Compacts at §§ 16(A)-(C) (App at 16a-17a). Exercising her apparent rights

under the compacts, Governor Granholm amended one of the compacts on July 22, 2003, granting the Little Traverse Bay Bands of Odawa Indians an additional casino in exchange for additional payments to be made "to the State, as directed by the Governor or designee." Amended Compact at § 17(C) (App at 138a).

III. Procedural History.

In the Ingham County Circuit Court, TOMAC sought a declaratory ruling that the compacts violated Michigan's constitution because (1) the compacts were legislation, (2) the State failed to consider and approve the compacts in accordance with the constitutional requirements for legislation, (3) the State failed to approve the compacts in accordance with the constitutional requirements for local acts, and (4) the compacts' terms transgressed the separation of powers between the executive and legislative branches.[2]

In its Opinion dated January 18, 2000, the Ingham County Circuit Court declared that HCR 115 was indeed legislation enacted through unconstitutional means, and that the compacts

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[2] Prior to the action in the Ingham County Court, Representative Laura Baird, together with State Senator Gary Peters and Jackson County Treasurer Janet Roehefort, filed suit in federal district court over the approval of the compacts by the United States Secretary of the Interior. The court declined to reach the merits of the ease, finding that the plaintiffs lacked standing, a remedy under federal law, or both. But the federal court noted that the plaintiffs could seek redress in the state courts for any violations of state law. *Baird,* No 5:99-cv-14 (App at 78a-105a).

violated the separation of powers by giving the Governor unrestricted authority to amend their terms. Cir County Ct Op (App at 106a-121a). The court agreed with TOMAC on all counts except one: namely, TOMAC's claim that the compacts were improperly enacted "local acts" under Michigan's constitution. On November 12, 2002, the Michigan Court of Appeals reversed the Circuit Court's ruling that the compacts were unconstitutionally enacted. Ct of Appeals Op at 12-14 (App at 133a-135a). The court also determined that the separation of powers issue was not ripe for review and that the compacts were not local acts. *Id.* at 14 (App at 135a). TOMAC now asks this Court to declare that the "passage" of HCR 115 was unconstitutional, and direct that any gambling compacts be approved, if at all, by legislative enactment, and not by resolution.

STANDARD OF REVIEW

The underlying Circuit Court Opinion and Order resolved cross motions for summary disposition under Michigan Court Rules 2.116(C)(8) and 2.116(C)(10). This Court reviews opinions and orders deciding motions for summary disposition *de novo*. *See Spiek v Michigan Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). Although duly enacted legislation is entitled to a presumption of constitutionality, *see Young v Ann Arbor,* 267 Mich 241, 243; 255 NW 579 (1934), the State and the Interveners cannot benefit from the presumption here because they assert that HCR 115 is not and need not be legislation. TOMAC has found no case affording any presumption in favor of concurrent resolutions, and submits to this Court that none should be applied.

ARGUMENT

I. IGRA expressly gives States a vehicle to apply judgments regarding public policy to Indian gambling.

In *California v Cabazon Band of Mission Indians,* 480 US 202; 107 S Ct 1083; 94 L Ed 2d 244 (1987), the United States Supreme Court determined that in the absence of an express federal law allowing state regulation of gambling in Indian country, the State of California could not regulate such gambling. In reaching this conclusion, the Court stated that "it is clear … that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided," but ruled that Congress had not yet acted to make state laws applicable to tribal gambling operations. *Id.* at 207. In response, Congress enacted IGRA to give the states a role in regulating Indian gambling. *See Keweenaw Bay Indian Community v United States* 136 F3d 469, 472 (CA 6, 1998) ("Congress enacted the IGRA in 1988 and thereby created a framework for the regulation and management of gambling on Indian land … which included a role for the states in the regulation of Indian gaming ….").

When Congress enacted IGRA, it recognized the preeminent regulatory and policy-making role of states: "'there is no adequate Federal regulatory system in place for Class III [casino-style] gaming, nor do tribes have such systems for the regulation of Class III gaming currently in place' and thus 'a logical choice is to make use of the existing State regulatory systems.'" *Pueblo of Santa Ana v Kelly,* 104 F3d 1546, 1549 (CA 10, 1997) (quoting S Rep No 100-446, at 13-14), *cert den* 522 US 807; *see also* 25 USC 2701(3) ("[E]xisting Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands.").

Congress further recognized that a state has significant governmental interests in tribal gambling within its borders:

> As the legislative history of IGRA makes dear, '[a] State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens.

Saratoga County Chamber of Commerce Inc v Patald, 740 NYS2d 733, 737; 293 AD2d 20 (NY App Div, 2002) (quoting S Rep No 100-446, at 13), *aff'd as modified* 2003 NY Lexis 1470; NE2d ___ (NY, 2003); *accord Pueblo of Santa Ana,* 104 F3d at 1554 (quoting S Rep No 100-446, at 13).

Congress ensured state regulatory and policy-making involvement under IGRA in at least two ways. First, in the absence of a duly enacted compact, Congress expressly made state gambling laws applicable in Indian country: "(a) Subject to subsection (c) [providing for compacts] for purposes of Federal law, *all State laws* pertaining to the licensing, regulation, or prohibition of gambling … shall apply in Indian country …" 18 USC 1166 (emphasis added). This express determination by Congress reversed the impact of *Cabazon* and ensured a meaningful role for state policy in regulating Indian gaming.

Second, Congress provided the compacting process as an additional means of applying state policy. Under IGRA, Indian casino gambling is allowed *only* if conducted in conformance with a tribal-state compact. *See* 25 USC 2710(d)(1), *Pueblo of Santa Ana,* 104 F3d at 1553; *see also*

United States v Santee Sioux Tribe of Nebraska, 135 F3d 558 (8 CA, 1998) (ordering closure of Indian casino operating without compact in violation of Nebraska laws). As explained in the legislative history:

> It is also true that S. 555 [IGRA] does not contemplate and does not provide for the conduct of class III gaming activities on Indian lands in the absence of a tribal-state compact. In adopting this position, the Committee has carefully considered the law enforcement concerns of tribal and State governments, as well as those of the Federal Government, and the need to fashion a means by which differing public policies of these respective governmental entities can be accommodated and reconciled.

Select Committee on Indian Affairs Report, S Rep No 100-446, at 1-6 (emphasis added); *accord Kansas v Finney,* 251 Kan 559, 561-562; 836 P2d 1169 (1992) (quoting same). Moreover, IGRA expressly recognizes that an appropriate compact may apply state law to Indian gambling:

> (3)(c) Any Tribal-State compact … 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;

25 USC 2710(d) (emphasis added). Under the IGRA framework, the tribal-state compact is a tool that enables a state to apply its policy decisions to Indian gambling conducted within the state's borders.

II. Compacts are both legislative and contractual in nature, and must be authorized by legislative enactment.

Compacts are a unique form of legislative action that "are both statutory and contractual at the same time." *State v Svenson,* 104 Wash 2d 533, 538; 707 P2d 120 (1985). *See also Aveline v Pennsylvania Board of Probation and Parole,* 729 A2d 1254, 1257 (Pa, 1999) (explaining that compacts function simultaneously as contracts and statutes); Hasday, *Interstate Compacts in a Democratic Society: the Problem of Permanency,* 49 Fla L Rev 1, 3 (Jan, 1997). The dual nature of compacts is described in the Council of State Government's manual on compacts. Zimmerman & Wendell, *The Law and Use of Interstate Compacts* (Council of State Governments, 1976), pp 1-3, 8, 34-35 (hereinafter "Zimmerman & Wendell") (App at 141a-142a, 145a, 158a.) Like any other statute, a compact supercedes prior law. Zimmerman & Wendell, p 27 (App at 154a). Moreover, because a compact is also a contract that cannot be impaired by the State, it takes precedence over subsequent statutes as well. *Id.; Aveline,* 729 A2d at 1257 n 10. A State may not unilaterally nullify, revoke or amend a compact unless the Compact so provides. *Aveline,* 729 A2d at 1257 n 10, Hasday, 49 Fla L Rev at 3.

States may enter into compacts in one of two ways. First, a state may enact the compact's terms by statute. *See Sullivan v Pennsylvania,* 550 Pa 639, 648 n 7; 708 A2d 481 (1998). Second, a state may pass a law authorizing a state agency or committee to enter into a compact, *see e.g., National Transportation, 1nc v Howlett,* 37 Ill App 3d 249, 252; 345 NE2d 767 (1976), although in such a case the authorizing legislation must contain appropriate standards and substantive provisions to support the delegation of legislative power. *See Sullivan,* 550 Pa at 647-648. In any event, as a general

matter, whenever a state enters into a compact, it does so by bill. Zimmerman & Wendell, pp 12-13, 19-20, 34-36 (App at 147a, 150a-151a, 158a-159a).

The Michigan legislature's own research division, the Legislative Service Bureau, confirms that compacts "are usually set forth in state statutes" but that compacts may also be "created by the use of enabling legislation." Michigan Legislative Service Bureau, *Interstate Compacts,* pp 5-6 (App at 5a-6a). In noting the dual nature of compacts, the Bureau remarked: "Not only *is a compact a statute,* but it also has the binding legal features of a contract." *Id.* at 3 (emphasis added) (App at 3a). Aside from the State's gambling compacts under IGRA, neither TOMAC nor the Michigan Legislative Service Bureau has been able to find any other instances in which the State has entered into a "compact" that was not either authorized by statute before or approved by statute after negotiation.[3]

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[3] The following is a list of Michigan's compacts (as codified) and statutes authorizing compacts: Compact concerning boundaries between Minnesota, Wisconsin and Michigan, MCL 2.201; Midwest Interstate Low-level Radioactive Waste Compact, MCL 3.751; Interstate Agreement on Qualification of Educational Personnel, MCL 388.1371; Pest Control Compact, MCL 286.501; Great Lakes Basin Compact, MCL 324.32201; Interstate Agreement on High Speed Intercity Rail Passenger Network, MCL 462.71; Interstate Insurance Receivership Compact, MCL 550.11; Interstate Compact on Mental Health, MCL 330.1920; Midwestern Higher Education Compact, MCL 390.1531; Multistate Tax Compact, MCL 205.581; Interstate Compact on Juveniles, MCL 3.701; Interstate Compact on the Placement of Children, MCL 3.711; Interstate Agreement on

In the instant case, however, the legislature departed from this long-established State and national precedent to "approve" the compacts by mere resolution.

III. House Concurrent Resolution 115 is unconstitutional because approving the compacts is a legislative act requiring action by bill.

A. Michigan law prohibits the use of a concurrent resolution to sidestep the legislative process.

Article IV, Section 22, of Michigan's constitution provides that "all legislation shall be by bill and may originate in either house." This language has been a part of Michigan's constitution since 1908, when it was added to curb inappropriate legislative practices: "prior to [1908] the Legislature used concurrent and joint resolutions in the

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Detainers, MCL 780.601; Tri-Static High Speed Rail Line Compact, MCL 462.81; Compact For Education, MCL 388.1301; Interstate Disaster Compact, MCL 30.261; Authorization to enter interstate agreement for employment of state military forces in other states, MCL 32.559; Authorization to enter interstate corrections compact, MCL 3.981; Authorization to enter reciprocal aid agreement with other states, MCL 30.404; Authorization to enter interstate compact to Conserve oil and gas, MCL 324.62101; Authorization to enter interstate compact concerning regulation of vehicles on public highways, MCL 3.163; Authorization to enter interstate compact for crime prevention, MCL 798.103; Authorization to enter interstate compact conceming probation and parole, MCL 798.101; Authorization to negotiate compact relating to weather modification, MCL 295.107.

lawmaking process to such an extent that it was deemed to have been abusive." State of Michigan Constitutional Convention of 1961, Official Record 766 (Austin C. Knapp ed.). In this case, legislators "passed" a law by concurrent resolution in an attempt to circumvent these constitutional requirements and safeguards. But, as Justice Thomas Cooley wrote:

> nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect, in the mode pointed out by the instrument which invests them with the power, and under the forms which that instrument has rendered essential.

1 Cooley, Constitutional Limitations (8th ed), p 266; *see also Becker v Detroit Savings Bank*, 269 Mich 432, 435; 257 NW 853 (1934) (quoting Cooley).

The proper modes of action for passing legislation are set forth in Michigan's constitution, and they are unambiguous in scope and content:

Article IV, Section 22:

> *All legislation shall be by bill* and may originate in either house.

Article IV, Section 23:

> The style of the laws shall be: The People of the State of Michigan enact.

Article IV, Section 26:

> No bill shall be passed or become law at any regular session of the legislature until it has been printed or reproduced and in the possession of each house for at least five days. Every bill shall be read three times in each house before the final passage thereof. *No bill shall become a law without the concurrence of a majority of the members elected to and serving in each house* ….
>
> **Article IV, Section 33:**
>
> Every bill passed by the legislature shall be presented to the governor before it becomes law, and the governor shall have 14 days measured in hours and minutes from the time of presentation in which to consider it
> ….

Const 1963 (emphasis added).

These procedures are intended to engender responsible legislation worthy of the public trust. *See Alaska v ALIVE Voluntary,* 606 P2d 769, 772 (Alas, 1980). For instance, requiring a specific form of enactment (i.e., "The People of the State of Michigan enact") is to "avoid confusion as to when the legislature is speaking with the force and effect of law, as distinguished from the mere expression of its views and desires." *Id.* The five-day waiting period allows citizens to learn of proposed legislation before it is passed and prevents hasty and careless acts. State of Michigan Constitutional Convention of 1961, Official Record 2334-2335 (Austin C. Knapp ed.). As one constitutional delegate succinctly put it: "Action taken in haste is likely to prove itself not in the best interest of the people." *Id.* The requirement that no law be passed without the concurrence of

a *majority* of the elected members goes to the very heart of our representative system of government. Consequently, TOMAC is especially troubled that only 48 votes were cast in favor of the compacts in the house of representatives, well short of the 55-vote majority constitutionally required to pass legislation.

Courts, including this Court, have enforced these constitutional requirements by invalidating resolutions that skirt legislative procedures. In the seminal case *Immigration and Naturalization Service v Chadha,* 462 US 919; 103 S Ct 2764; 77 LEd 2d 317 (1982), the United States Supreme Court considered the constitutionality of a resolution passed by the United States House of Representatives that would have resulted in the deportation of immigrant Jagdish Rai Chadha and five others. The Court found that the resolution in *Chadha* "had the purpose and effect of altering the legal fights, duties, and relations of persons, including the Attorney General, Executive Branch officials, and Chadha, all outside the Legislative Branch" and therefore was de facto legislation that failed to follow constitutional procedures, *Id*. at 952. Thus, the Court struck down the House's resolution, aptly noting that the legislative process is intended to be a step-by-step, deliberate and deliberative process: "With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." *Id*. at 959.

Simply put, the legislature may not do indirectly what it cannot do directly. This was the conclusion of the Michigan Court of Appeals in *Blank v Department of Corrections,* 222 Mich App 385; 564 NW2d 130 (1997), *aff'd in part* 462 Mich 103 (2000). There, the court considered the constitutionality of a statutory provision that allowed a joint committee of the

legislature ("JCAR") to veto administrative roles, with the qualification that such a veto could be superseded by a concurrent resolution of the legislature. In its analysis, the court underscored the procedural requirements found in Article 4 of Michigan's constitution, including the requirement that all legislation be "by bill" and that all bills be passed by a majority of the members serving in each house. The court determined that the JCAR was an impermissible "smaller legislative body" unconstitutionally "legislating" outside the confines of Article 4. *Id.* at 397.

The *Blank* court also condemned the use of concurrent resolutions, reasoning that resolutions are not "bills" and therefore are not an effective mode of legislative action. Thus, "when the Legislature acts by concurrent resolution, it is not making 'law.'" *Id; accord, Becker,* 269 Mich at 434-435 (noting that a mere resolution "is not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it.") (quoting *Mullah v California,* 114 Cal 578; 46 P 670 (1896)).

This Court affirmed the *Blank* decision and expressly adopted the United States Supreme Court's reasoning in *Chadha*. *See Blank v Department of Corrections,* 462 Mich 103, 114; 611 NW2d 530 (2000). In so doing, this Court emphasized that "[w]hen the Legislature engages in 'legislative action' it must do so by enacting legislation," not by concurrent resolution, *Id.* at 119. Although there was no single majority opinion in *Blank,* a majority of four justices adopted the *Chadha* analysis. *See Blank,* 462 Mich at 114-122

(Opinion of Justice Kelly, joined by Justices Corrigan and Young), 129-30 (Opinion of Justice Weaver, concurring).[4]

Moreover, even the two Justices who did not adopt the *Chadha* analysis[5] recognized the need for some proper legislative enactment to stand behind the action of the legislature. Justice Markman concurred in the judgment of the Court striking down the JCAR resolution process on the particular facts of the ease using a rationale that would not permit the legislature to use a resolution in the absence of *some prior statutory enactment* that properly authorizes its use. Even Justice Cavanagh, in dissent, agreed that a prior statutory enactment was necessary to authorize the resolution process. *Blank,* 462 Mich at 153-178. As he emphasized in his dissent:

> [the Michigan Administrative Procedures Act] became law *as a product of the normal legislative process: enactment by introduction and passage of a bill that* was eventually presented to and signed by the Governor … The enabling statute that conferred rulemaking power upon the Dec in the first place was also enacted pursuant to constitutional procedures.

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[4] Binding precedent is created in a plurality decision if a majority of Michigan Supreme Court justices agree on a grounds for decision. *See People v Stevens,* 461 Mich 655, 663 n 7; 610 NW2d 881 (2000), *cert den* 531 US 902. The only decisions that are not binding under the doctrine of *stare decisis are* those in which no majority of justices agree. *See People v Gahan,* 456 Mich 264, 274; 571 NW2d 503 (1997).

[5] Justice Taylor did not participate in the *Blank case*.

Blank, 462 Mich at 155 (emphasis added).[6] Thus, all justices in *Blank* recognized the constitutional need for some statutory enactment, an element entirely lacking in the legislative process leading up to the "approval" of the compacts by resolution here.

This makes the present ease even more compelling than *Blank*. Unlike *Blank,* which dealt with the use of committee vetoes and concurrent resolutions *authorized by Michigan statute,* this case involves no legislative enabling act at all. Rather, by resolution of less than a majority of elected and serving members of the house, HCR 115 authorizes four new casinos that would otherwise be illegal. There was *no* normal legislative process and *no* bill enacted using constitutionally mandated procedures. To the contrary, the legislative attempt to approve the compacts by bill failed.

B. "Legislation" is any rule that is binding on those outside the legislature, implements public policy, and supplants other forms of legislative action.

In Blank, this Court defined "legislation" as any action that (1) "has the power to alter the rights, duties, and relations of parties outside the legislative branch," (2) "involves policy determinations,"[7] and (3) "supplants other legislative

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[6] The resolution at issue in *Chadha,* too, was authorized by Congressional Act, specifically the Immigration and Nationality Act, 8 USC 1254. *Chadha,* 462 US at 923.

[7] The legislature is, after all, the final arbiter of the State's public policy. *Michigan Gaming lnst, Inc v State Bd of Educ,* 451 Mich 899; 547 NW2d 882 (1996) (adopting dissenting opinion of *Michigan Gaming lnst, 1nc v State Bd of Educ,* 211 Mich App 514, 522; 536 NW2d 289 (1995)). *See also*

methods for reaching the same result." *Blank,* 462 Mich at 112-120.[8] Whether an act is legislation depends not on its form, but upon whether it contains "matter which is properly to be regarded as legislative in its character and effect." *Chadha,* 462 US at 952.

Applying this standard, the *Blank* Court found that the concurrent resolution power (together with the committee veto power at issue) amounted to "legislation" because such resolutions: (1) affected the duties of individuals outside the legislative branch (specifically, the Director of the Department of Corrections, who had promulgated the new administrative roles involved), (2)involved policy decisions (i.e., whether or not to sanction the "inevitable policy issues" enveloping the proposed rules), and (3) supplanted other legislative modes of

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American States 1ns Co v Detroit Auto Inter-Ins Exch, 117 Mich App 361, 367; 323 NW2d 705 (1982) ("Policy making is fundamentally a legislative prerogative"). The United States Supreme Court has reasoned: "The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct …." *Yakus v United States*, 321 US 414, 424; 64 S Ct 660; 88 L Ed 834 (1944).

[8] *See also In re Manufacturer's Freight Forwarding Co,* 294 Mich 57, 63; 292 HW 678 (1940) ("[L]egislation … looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.") (quoting *Prentis v Atlantic Coast Line Co,* 211 US 210; 29 S Ct 67; 53 L Ed 150 (1908) (Holmes, J)).

action (i.e., accepting or amending the rules by bill). *Blank,* 462 Mich at 114-117.

C. The compacts are "legislation."

Even more so than the concurrent resolutions in *Blank,* HCR 115 amounts to legislation. As contemplated by IGRA, the compacts adopted and "enacted"by HCR 115 impact State public policy, create new rules and obligations binding on those outside the legislature, and supplant the constitutionally required mode of approval by bill. Among other things, HCR 115:

- *creates an entire regulatory scheme for Indian gaming* in Michigan substantially different than the regulatory scheme defined by Michigan law and made applicable to the tribes by federal law;

- *determines the jurisdictional balance* between the State of Michigan and the tribes;

- *determines how many casinos each tribe will be allowed to have in Michigan*;

- *sets the minimum age for casino gambling at eighteen* - a significant change from Michigan's current policy, which prohibits casino gambling by anyone younger than twenty-one;

- *decides how much revenue to raise for the State and where that revenue will go;*

- *bars casinos within 150 miles of Detroit* to protect the Detroit casinos from competition, but does not

protect other entertainment or business venues from competition; and

- *creates new local units of government*, known as "Local Revenue Sharing Boards," to receive and distribute what amounts to a local tax on the tribes.

Indeed, in the absence of the compacts, the gambling allowed by compact would be a crime. *See* 18 USC 1166; *see also United States v Cook,* 922 F2d 1026, 1034 (CA 2, 1991) (affirming conviction for operation of slot machines on Indian lands in violation of New York law). It is no wonder the Attorney General of Michigan, in response to a question from the legislature, declared that the compacts are "clearly legislative in character" requiring enactment by bill. OAG, 1997, No 6,960, p *5 (October 21, 1997) (App at 44a).

1. The compacts make policy decisions.

> Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice ….

Rodriguez v United States, 480 US 522, 526; 107 S Ct 1391; 94 L Ed 2d 533 (1987).

a. Gambling involves important decisions of public policy.

Decisions regarding gambling are public policy decisions. This truth rings clear in Justice (then Judge) Corrigan's dissenting opinion in *Michigan Gaming Inst, Inc v State Bd of Education,* later adopted by this Court, in which Justice Corrigan emphasized the connection between gambling, public policy, and the legislature's enactments:

> The legislature is the final arbiter of this state's public policy. The quintessential political judgment whether to alter the quality of our collective life in Michigan in legalizing casino gambling should occur in the political branch. Unless and until the people's elected representatives east their votes to change our state's longstanding policy against casino gambling, petitioners application is premature.

Michigan Gaming Institute, 211 Mich App 514, 522; 536 NW2d 289 (1995) (Corrigan, J, dissenting), *dissenting opinion adopted by* 451 Mich 899 (1996); *see also United States v Washington,* 879 F2d 1400, 1401 (CA 6, 1989) ("It was rational for the Michigan legislature to choose to attack only the dangers presented by private lotteries (such as

cheating, fraud, and particularly the involvement of organized crime).").

It is not just the decision *whether* to permit gambling that involves State policy, but also *how* gambling will be conducted, if permitted. Thus, when the legislature has carved out exceptions to its general prohibition against gambling,[9] it has either strictly limited or "highly regulated" the excepted activities, making policy choices regarding who, when, and where such gaming will be allowed. *See Michigan Gaming Institute,* 211 Mich App at 522 (Corrigan, J, dissenting), *dissenting opinion adopted by* 451 Mich 899 (1996); see, e.g., MCL 432.201 *et se(I.* (regulating the Detroit casinos), MCL 432.101 *et seq.* (regulating charitable gambling).

For instance, setting the minimum age for gambling is a matter of public policy. Policy considerations might include the impact on schools and truancy, the fact that alcohol is served in casinos, and the susceptibility of minors to gambling problems and addiction. The compacts, without legislative enactment, set the age for tribal gambling in Michigan at eighteen. *See* Compacts at § 4(I) (App at 56a). The trial court properly identified this decision as a matter of State policy:

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[9] The general rule in Michigan is that gambling is illegal. For example, under the Michigan Penal Code, individuals can be fined or jailed for taking bets, maintaining a residence for gambling, or running a gambling room. *See* MCL 750.301 - 750.303. Frequenting a gambling site is a misdemeanor. *See* MCL 750.309. The Michigan legislature has also deemed any place used for "lewdness, assignation of prostitution or gambling" a public nuisance. MCL 600.3801.

> There are several aspects of the compacts that have the hallmarks of legislation. Perhaps the most remarkable provision the State has approved, via the compacts, is that a person of the age of 18 may lawfully engage in casino style-gambling, an act generally prohibited by Michigan law. Section 18 of the Michigan Gaming Control and Revenue Act, being MCL 432.201 *et seq;* MSA ____, makes it a misdemeanor for a person under the age of 21 to engage in casino-style gambling. This act excludes from its application gambling on Indian territory. Section 3(2)(d). However, the Court finds instructive that the Legislature has previously made similar policy decisions, e.g. age of person who may lawfully engage in casino gambling, through Legislation.

Cir County Ct Op at 9-10 (App at 114a-115a). In the end, the State could have pursued an age limit of twenty-one, sixteen, twelve, or no age limit at all, depending on its policy goals. This important matter warrants full participation of the legislature, full accountability, and enactment by bill.

b. The compacts create an extensive regulatory scheme.

As with other exceptions to Michigan's general prohibition against gambling, the compacts set forth an extensive regulatory framework governing tribal gaming activities. Compacts at §§ 3-10 (App at 52a-61a). The compacts specify who may be hired, the types of games that may be played, and who may wager at such games. *Id.* at §§ 3 (D), 40) (App at 52a-56a). The compacts also set forth accounting and record keeping requirements, requirements for posting information in casinos, and standards for gambling supplies and equipment purchased by the tribes. *Id.* at §§ 4(H), 4(K),

6 (App at 55a-59a). Even the Court of Appeals in this case acknowledged that "[t]he terms of the compact contained various regulatory provisions." Ct of Appeals Op at 2 (App at 123a).

Comparing provisions in the compacts with statutory provisions regulating the three non-Indian casinos permitted in Detroit underscores this point. The compacts cover the same regulatory ground and, in some instances, make policy choices that differ from the choices applicable to the three Detroit casinos:

Compacts

> No person *under the age of 18* may participate in any Class III game. Compacts at § 4(1) (App at 56a).
>
> The Tribe may not license, hire, or employ as a key employee or primary management official … in connection with Class III gaming, any person who: … (3) Has been convicted of or entered a plea of guilty or no contest to any offense not specified in subparagraph (2) *[gambling related offense, fraud or misrepresentation]* within the immediately- preceding five years. Compacts at § 4(D) (App at 54a).
>
> The Tribe may not license, hire, or employ as a key employee or primary management official … in connection with Class III gaming, any person who: (1) Is under the age of 18 … Compacts at § 4(I)) (App at 54a).

Michigan Gaming Control & Revenue Act

> A person *under age 21* shall not be permitted to make a wager under this Act. MCL 432.209(9).
>
> A casino licensee shall not employ an individual as a managerial employee who has been convicted *of a felony in the* previous 5 years …. MCL 432.209(14).
>
> To be eligible for an occupation license, an applicant shall: (a) Be *at least 21 years of age* if the applicant will perform any function involved in gaming by patrons. MCL 432.208(3).

Such regulatory provisions are hallmarks of legislation. To emphasize this point, TOMAC notes **that** when Michigan law changed to allow casino gambling to take place, it was by a vote of the citizens of the State, it was specifically tailored to allow gambling to take place only in Detroit, and it was followed by implementing legislation that set up a State regulatory scheme. It was not done by concurrent resolution.

c. The compacts determine the number of casinos.

Another policy decision in the compacts is the number of casinos that will be authorized: i.e., how much should the State encourage or discourage the proliferation of gambling? In making such a policy decision, legislators might consider the impact of casinos on gambling addiction, crime, tourism and competing businesses like entertainment venues and restaurants, weighed against the State's need to raise revenue. Although a majority of elected representatives have never determined that the compacts strike the proper balance on this issue, the compacts as originally "approved" limit each tribe to one casino. Compacts at § 203) (App at 51a-52a).

The number of permitted casinos, however, is subject to change without legislative approval. Governor Granholm recently amended the Odawa Indian compact to give the Odawa an additional casino in exchange for additional payments to the State. (Amended Compact, App at 136a-139a.) Thus, it appears that at least the Granholm Administration has made the policy decision to favor additional casinos to raise State revenue. Whether a majority of legislators agree with this policy decision is unknown and, according to the terms of the compacts, irrelevant because the Governor has the putative power to make this key policy choice entirely on her own, thus bypassing the normal legislative process.

d. The compacts set State policy governing the balance of legal jurisdiction between the State and tribes.

Nor was the normal legislative process used to strike the important balance between State and tribal jurisdiction in the compacts. As a general rule, jurisdictional issues **are** addressed through law. *See Straus v Barbee,* 262 Mich 113, 114; 247 NW 125 (1933) (ruling that "[j]urisdiction arises from law, and not from consent"), *Goldberg v Trustee of Elmwood Cemetery,* 281 Mich 647, 649; 275 NW 663 (1937) (declaring that parties cannot by consent deprive the court of jurisdiction conferred by statute). As mentioned above, IGRA applies State gambling law to Indian lands in the absence of a compact, *see* 18 USC 1166, and expressly authorizes the incorporation of State civil or criminal laws in compacts, see 25 USC 2710(d)(3)(C). IGRA further provides that compacts may contain provisions relating to "the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations." 25 USC 2710(d)(3)(C). Thus, as a matter of public policy and

legislative prerogative, a State must decide what jurisdictional balance it will agree to in the compact and negotiate a compact that best reflects that policy. Policy considerations might include the State's interest in protecting its citizens by retaining control over enforcement, the availability of State resources to take on additional criminal or civil jurisdiction, and issues of sovereignty.

The Brief filed by Amicus Curiae Senate Majority Leader Ken Sikkema and Appropriations Chair Shirley Johnson acknowledges that the compacts strike a jurisdictional balance between the State and the Tribes:

> [T]he original Compact adopted by the Michigan Legislature reflected a specific balance between the respective roles of the State and the Tribe in such important matters as the regulation of Class HI gaming activities, the licensing of its operators, the regulation of alcoholic beverages, imposition of age requirements for participation in gaming activities, revenue payments, and the respective civil and criminal jurisdictions for the State and the Tribe necessary for the enforcement of state or tribal laws or regulations.

(Amicus Curiae Brief at 18-19.) These "policy determinations," *(id.* at 19), effectively determine the applicability and reach of Michigan's laws and jurisdiction. This is a balance that must be struck by legislative enactment with a majority of elected and serving legislators, not through approval by resolution of less than a majority of legislators.

In *New Mexico v Johnson*, 120 NM 562; 904 P2d 11 (1995), the New Mexico Supreme Court invalidated IGRA compacts "approved" without an act of the legislature as an Unconstitutional "attempt to create new law" because, among

other things, the compacts struck a "balance between the respective roles of the State and the Tribe in such important matters as the regulation of Class III gaming activities, the licensing of operators, and respective civil and criminal jurisdictions …." *Id.* at 573-574. According to the Court, "the actual balance that is struck represents a legislative function." *Id.* **at** 574. New Mexico has since enacted a statute setting forth the specific terms of the IGRA compacts. *See NM* Stat Ann 11-13-1.

In this ease, the compacts strike the balance in favor of unfettered gambling by the tribes: "Any state law restrictions, limitations or regulation of such gaming shall not apply to Class III games conducted by the Tribe pursuant to this Compact." Compacts at § 3(A) (App at 52a-53a). IGRA itself makes State gambling laws applicable in Indian country in the absence of a compact. *See* 18 USC 1166. A minority of legislators has effectively repealed the application of these laws to Indian lands and left the State without jurisdiction over the tribal gambling operations. This kind of policy decision requires a legislative enactment passed by a majority of elected and serving legislators.

e. The compacts make policy decisions by raising and spending State revenue.

As this Court has previously noted, "[T]he control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the Legislature, and *not to be surrendered or abridged,* save by the Constitution itself." *Civil Service Comm'n of Michigan v Auditor General,* 302 Mich 673, 682; 5 NW2d 536 (1942) (emphasis added). Here, the gambling compacts, passed by mere resolution, require the tribes to pay 8% of **net** wins from electronic games of chance

into the Michigan Strategic Fund ("MSF"). Compacts at § 17 (App at 65a-66a).[10] This 8% payment likely represents hundreds of millions of dollars over just the twenty year period that the compacts are initially effective.[11] How to raise and spend millions of dollars is part of the legislature's right and responsibility to "determine the sources from which public revenues shall be derived and the objects upon which they shall be expended" as provided by law. *Civil Service Comm'n of Michigan,* 302 Mich at 682. This legislative determination requires a legislative enactment.

f. Conclusion: the policy decisions in the compacts are legislative in nature.

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[10] The Court of Appeals has held that the MSF is a quasi public corporation apparently not subject to the constitutional rules regarding legislative appropriations. *Tiger Stadium Fan Club v Governor,* 217 Mich App 439, 452; *553* NW2d 7 (1996). *Tiger Stadium* held that the Appropriations Clause of the Michigan constitution did not require that a bill be passed in order to send Indian gambling payments to the MSF. However, *Tiger Stadium* did not consider the issue here: namely, whether the compacts themselves amount to legislation given the reasoning of *Blank* (which was decided after *Tiger Stadium).* In any event, Governor Granholm's amendment to the Odawa's Compact makes this case factually distinguishable from *Tiger Stadium, as the funds are* no longer directed to the MSF. *See* Amended Compact (App at 136a-139a).

[11] Just two casinos operating from 1999 to 2003 contributed over $34 million to the MSF. *See* http://www.michigan.gov/documents/8__percent_Payments__76616_7.pdf.

In sum, Congress granted an important policy-making role to States for addressing the many societal issues raised by tribal gambling. The legislature, as the "final arbiter of this state's public policy,[12] has a responsibility to follow the legislative process in evaluating the policy choices made in the compacts. As recognized by the trial court below, the legislature abdicated its duty to legislate:

> While it is not this Court's place to pass judgment on this public policy; this ease involves just that - an issue of public policy. As such, it is for the people of the State, via their representatives in the Michigan Legislature, to determine the State's policy regarding gambling. Therefore, when the Legislature changes its longstanding policy regarding casino-style gambling, it must do so through enactment of legislation and all the procedures pertaining thereto.

Cir County Ct Op at 2 (App at 107a).

2. The compacts create new rules and impose additional duties on those outside the legislature.

The compacts also meet the definition of "legislation" set forth in *Blank* because they alter the rights, duties and relations of parties outside the legislative branch. The compacts set forth a variety of requirements applicable to

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[12] *Michigan Gaming Institute*, 211 Mich App at 522 (Corrigan, J, dissenting), *dissenting opinion adopted by* 451 Mich 899 (1996).

"persons"[13] outside the legislature. For example, as noted above, the compacts make casino gambling and employment legal for an entire class of citizens—those who are aged 18, 19 and 20--for whom casino gambling and employment is ordinarily prohibited under Michigan's regulatory scheme. *Compare* Compacts at §§ 4(D), 4(1) (App at 6a-8a) *with* MCL 432.209(9). The compacts also establish background requirements applicable to any person seeking employment at the casino. Compacts at § 4(D) (App at 6a-Ta). All of these regulatory provisions create new rules of conduct applicable outside the legislature.[14]

The compacts also create additional State rights that did not exist before. For instance, according to the compacts, the State now has the right to inspect tribal facilities and records. Presumably, a State employee outside the legislature would carry out such activities. The compacts reimburse the State for these activities up to $50,000 a year. *Id.* at § 4(M)(5) (App at 58a). The compacts also require the tribes to make "semi-

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[13] The term "person" is defined broadly to mean: "a business, individual, proprietorship, firm, partnership, joint venture, syndicate, trust, labor organization, company, corporation, association, committee, state, local government, government instrumentality or entity, or any other organization or group of persons acting jointly." Compacts at § 2(D) (App at 52a).

[14] Note that the State's policy choices affect not only non-Indian citizens of Michigan, but also members of the tribes themselves, who are also citizens of the State. *See Iowa Mutual Ins Co v LaPlante,* 480 US 9, 107 S Ct 971; 94 L Ed 2d 10 (1987).

annual payments to the State." *Id.* at § 17(C) (App at 65a-66a).

Moreover, many of the compacts' requirements involve State or local government activity occurring off-reservation. For example, the compacts are binding on "the State" as a whole. *Id.* at § 12(A) (App at 62a). Among other things, the compacts bind "the State" to secrecy regarding certain types of financial and proprietary information concerning Indian tribes and their members, *Id.* at § 4(M)(3) (App at 57a-58a). This requirement undoubtedly applies to all branches and agencies of the State, not just the legislature The compacts also protect the Detroit casinos from competition. They restrict the tribal casinos to an area 150 miles (90 miles for the Calhoun County casino) outside of Detroit. *Id.* at § 16(A)(iii) (App at 64a). And they restrict the Tribes from having any Indian lands taken into trust in the restricted area. *Id.* at § 16(A)(iii) (App at 64a).

Perhaps most remarkably, the compacts also subject local units of government to a new set of requirements and procedures. Specifically, the compacts obligate the four host communities to establish "Local Revenue Sharing Boards" to receive and disburse what amounts to a 2% tax assessed on the Indian tribe's operations and impose additional duties on County Treasurers:

SECTION 18. Tribal Payments to Local Governments

> (A) From and alter the effective date of this Compact … the Tribe will make semi-annual payments to the treasurer for the county described in paragraph (ii)(l) of this subsection 18(A) to be held by said treasurer for and on behalf of the Local Revenue Sharing Board described below, as follows:

(i) Payment in the aggregate amount equal to two percent (2%) of the net win at each casino derived from all Class III electronic games of chance, as those games are defined in this Compact. The county treasurer shall disburse the payments received as specified by lawful vote of the Local Revenue Sharing Board.

(ii) It is the State's. intent, in this and its other Compacts with federally recognized tribes, that the payments to local governments provided for in this section provide financial resources to those political subdivisions of the State which actually experience increased operating costs associated with the operation of the Class III gaming facility. *To this end, a Local Revenue Sharing Board shall be created by those local governments in the vicinity of the Class 111 gaming facility to receive and disburse the semi-annual payments from the Tribe as described below. Representatives of local governments in the vicinity of the Class 111 gaming facility shall be appointed by their respective elected body and shall serve at the pleasure of such elected body.*

Id. at § 18 (emphasis added) (App at 66a-67a). The compacts dictate the creation of a Board, the makeup of the Board and how the Board will spend the new local revenue. *Id.* at § 18 (App at 66a-68a).

The creation of Local Revenue Sharing Boards is a prime example of the compacts' legislative "character and effect." TOMAC is unaware of any other instance in which the State has created a new unit of local government by a contract

approved by mere resolution. Indeed, the very suggestion seems absurd. Michigan's constitution is replete with instances authorizing the creation of local units of government by bill. *See e.g.,* Const 1963, art 7, §§ 2, 7, 14. There is no provision permitting creation of a local unit of government by contract.

HCR 115 and the compacts it purports to approve meet this Court's definition of legislation, set forth in *Blank,* necessitating action by bill. Michigan's Attorney General concisely summed up this inquiry and conclusion:

> A major purpose of the proposed compacts is to authorize the Indian tribes to conduct specific casino gaming activities that would, absent the compacts, be in clear violation of several Michigan statutes. The proposed compacts further establish numerous requirements to be met in the management and operation of Indian gaming facilities, regulate the types and sources of gaming equipment that may be used, provide for arbitration of disputes that may arise under the compacts, subject the gaming operations to slate liquor licensing and control laws, and 66remit the tribes to make semi-annual payments to the state and to local units of government. These provisions, purporting to be binding upon the state, are clearly legislative in character.

OAG, 1997, No 6,960, pp *4-*5 (October 21, 1997) (App at 44a). Because the compacts are legislation, the legislature's "approval" of the compacts by HCR 115 was unconstitutional.

3. HCR 115 supplants other appropriate modes of legislative action.

House Concurrent Resolution 115 also violates the final test in *Blank,* because it supplants the appropriate and constitutionally mandated modes of legislative action. *Blank,* 462 Mich at 117. As noted in more detail above, the compacts change legislatively enacted laws that otherwise prohibit casino gambling at the locations approved in the compacts. Given the policy decisions made in the compacts and the impact they have on the State and its residents, the tribes, and the local communities in which the casinos will operate, these compacts are legislative in nature and require approval by bill. Moreover, passage by bill has been established by law, treatise, and historical practice as the appropriate means to approve compacts. See Argument Section 11, *supra* at 10-12. As it has done in the past with compacts, the legislature should have approved these compacts by bill, or the legislature should have enacted enabling legislation authorizing the State to enter into compacts.

Indeed, the Michigan legislature considered and rejected an enabling act in 1988 that would have created a "tribal-state commission" to negotiate and enter into IGRA compacts, such as the compacts at issue. SB 1061 (1988) (App at 39a-42a). And, after Michigan's Attorney General ruled that the compacts were "legislative," the legislature also considered but failed to approve the compacts by bill. *See Baird,* No 5:99-cv-14 (App at 78a-105a). Only after proponents tried and failed to enact the compacts through the appropriate mode did they resort to a resolution. This is the same impermissible use of concurrent resolution that was struck down in *Chadha* and the same circumvention of the legislative process that was invalid in *Blank*.

As mandated by *Blank,* the legislative mode of action was clearly the appropriate mode for approving the compacts. This required a bill, styled to say "The People of the State of

Michigan enact," printed and reproduced and in possession of each house for at least five days, read three times, approved by a majority of the members elected to and serving in each house, and then presented to the governor. Const 1963, art 4, §§ 22, 23, 26, 33. Instead of following the constitutionally required method designed to ensure responsible legislation, the proponents of HCR 115 circumvented the constitutional protections and "approved" the compacts with a minority of elected and serving representatives. The constitution requires a more responsible form of legislative decision-making. Therefore, this method of"approving" the compacts must be ruled unconstitutional.

IV. Other State Supreme Courts that have examined compacts agree that compacts are legislative in nature.

Although less than half of the States have entered into gambling compacts with Indian tribes, States normally enter into such compacts pursuant to legislation, either by approving the compacts by bill or by enacting enabling legislation prescribing the process for compact negotiation.[15]

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[15] Some were enacted by legislative bill. *See e.g.* Cal Gov't Code 12012.5(a), (b) (California), NM Stat Ann 11-13-1 (New Mexico); cf. Ohio Rev Code Ann 107.25 (Ohio statute setting forth procedure for ratification of compacts by legislative act). Many were entered into pursuant to a specific statute delegating the authority to negotiate and execute tribal compacts to the governor or a particular commission or committee. *See Ariz* Rey Stat 5-601 (Arizona), Cal Gov't Code I2012.5(d) (California), Cole Rev Stat 12-47.2-101 and 12-47.1-301 (Colorado), Idaho Code 67-429A (Idaho), Iowa Code 10A.104(10) (Iowa), Kan Stat Ann 46-2303 (Kansas),

Other State Supreme Courts that have considered this issue also agree that gambling compacts are legislative in nature, thereby necessitating formal legislative action. For example, in *Kansas v Finney,* 251 Kan 559, 582; 836 P2d 1169 (1992) (per curiam), the Kansas Supreme Court ruled that a compact giving the State the right to inspect tribal casinos and creating a new "State Gaming Agency" within the Kansas Lottery was legislative in nature. Similarly, in *New Mexico v Johnson,* 120 NM 562, 573; 904 P 2d 11 (1995), the New Mexico Supreme Court invalidated IGRA compacts entered into by the governor because the compacts changed existing public policy:

> Our legislature has, with narrow exceptions, made for-profit gambling a felony, and thereby expressed a general repugnance to this activity. Whether or not the legislature, if given an opportunity to address the issue of the various compacts, would favor a more

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La Rev Star--Ann 46:2303 (Louisiana), Minn Stat 3.9221 (Minnesota), Neb Rev Stat-9-1,106 (Nebraska), ND Cent Code 54-58-03 (North Dakota), Okla Stat Ann, tit 74, 1221 (Oklahoma), SD Codified Laws 1-4-25 and 42-713-11 (South Dakota), Wash Rev Code 9.46.360 and 43.06.010 (Washington), Wis Stat 14.035 (Wisconsin). Other states have more generally, through their constitution or statute, delegated the authority to transact business or form agreements and compacts with the Indian tribes. *See Willis v Fordice,* 850 F Supp 523, 532-533, n 10 (SD Miss, 1994) (holding that Mississippi statute, Miss Code Ann 7-1-13, authorized the governor to negotiate and transact business, including compacts, with other sovereigns, such as Indian tribes), Merit Code Ann 18-11-103 and 90-1-105 (Montana).

> restrictive approach consistent with its actions in the past constitutes a legislative policy decision.

Johnson, 120 NM at 574.[16] The court also looked at the State's past practices and noted that since 1923 the State had entered into twenty-two compacts with other sovereign entities, and "[i]n every ease, New Mexico entered into the compact with the enactment of a statute by the legislature." *Id*. at 575. Finally, in *Saratoga County Chamber of Commerce lnc v Pataki,* 2003 NY Lexis 1470, *34; __ NE2d __ (NY, 2003), *cert den* 2003 US Lexis 8378; ___ US __ (November 17, 2003) the New York Court of Appeals invalidated a 1993 compact, explaining that gaming compacts

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[16] The New Mexico Supreme Court confirmed this result in *Gallegos v Pueblo of Tesuque,* 132 NM 207; 46 P3d 668 (2002), when it ruled that as a result of its prior decision the compacts were invalidated until enacted as legislation in 1997. According to the *Gallegos* court the compact was "a contract between the State of New Mexico and Tesuque, codified by the Legislature," *Gallegos,* 132 NM 218, which is consistent with the general rule that compacts are both contracts and statutes. *See also* NW Stat Ann 11-13-1 (enacting IGRA compacts). Although the *Gallegos* court cites without discussion *Confederated Tribes of the Chehalis Reservation v Johnson,* 135 Wash 2d 734, 750; 958 P2d 260 (1998) ("compacts are agreements, not legislation"), it is apparent from a review of the *Johnson* case that the Washington court was speaking in terms of compact *interpretation-i.e.,* that, for purposes of interpretation, compacts follow the rules of contract interpretation. Washington had previously enacted enabling legislation that empowered a commission to enter into compacts. *See* RCW 9.46.360(9).

are "laden with policy choices" that epitomize legislative power.

Like the compacts in *Finney, Johnson and Pataki,* the compacts at issue in this case also require legislative action. The compacts "approved" by HCR 115 are laden with policy choices, as recognized by Michigan's Attorney General. OAG, 1997, No 6,960, pp *4-*5 (October 21, 1997) (App at 44a). The compacts create a new layer of government, requiring the local communities impacted by the casinos to create "Revenue Sharing Boards." Compacts at § 18 (App at 66a-68a). Approval of these compacts by concurrent resolution also departs from the established practice of entering into compacts by statute. Michigan Legislative Service Bureau, *Interstate Compacts,* pp 5-6 (App at 5a-6a). Consistent with *Blank* and the decisions of other States, the compacts at issue could not be approved by mere concurrent resolution.

V. The Court of Appeals' interpretation of IGRA is clearly erroneous and must be reversed.

The Court of Appeals erred in it's interpretation of IGRA. The Court held: (1) that IGRA preempts all State regulation of casino gambling on Indian lands, a ruling that robs the State of the authority Congress expressly granted to it under IGRA; (2)that the federal government can force compacts on States, a determination inconsistent with that of the United States Supreme Court; (3) that IGRA and the federal Compacts Clause determine the manner in which a State must approve an IGRA compact, therefore displacing State constitutional law; and (4) that the compacts are mere contracts, thus ignoring their legislative impact. None of these holdings withstand scrutiny.

A. IGRA does not preempt state law, but instead provides a mechanism for the states to regulate gambling on Indian lands.

A remarkable component of the Court of Appeals' decision is its conclusion that IGRA preempts a State's role in regulating casino gambling on Indian lands. Specifically, the court noted: "The compact agreements were not the result of a decision by the citizenry at large or a policy choice by members of the legislature, but rather, the result of congressional policy in an area where state law is preempted." Ct of Appeals Op at 11 (App at 132a). This is contrary to the plain language of IGRA. If allowed to stand, this ruling would leave the State with no voice as to the nature of Indian gambling within its borders, precisely the opposite of what Congress intended by enacting IGRA. *See* Argument Section I, *supra,* at pp 8-10.

As noted above (see pages 9-10), in the absence of a duly enacted gambling compact, Congress expressly made State gambling laws apply to Indian country. 18 USC 1166.[17] This express determination by Congress reversed the impact of *Cabazon* and ensured that state policy determinations regarding gambling would apply to Indian lands. Citing this

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[17] Under § 1166, federal authorities enforce state gambling laws on Indian lands. Thus, courts that have looked at § 1166 have concluded that conduct violating state licensing, regulatory or prohibitory law is punishable under that section, even though the activity may not violate federal law. *See United States v Cook,* 922 F2d 1026, 1034 (CA 2, 1991) (affirming conviction for operation of slot machines in violation of New York law).

provision, the California Supreme Court recently confirmed that federal law does not "preempt" state laws concerning gambling in Indian country, but instead applies them. *See Hotel Employees & Restaurant Employees Int'l Union* v Davis, 21 Cal 4th 585, 611; 981 P2d 990 (1999).[18]

Second, if a State enters into a compact with a tribe, IGRA's compacting provision gives a State the right to ensure that it's policies will continue to apply. 25 USC 2710(d)(3)(c)). As with all compacts between sovereigns, this ability is not unilateral nor without limitation.[19] IGRA requires that states negotiate "in good faith" to enter into a compact.[20] 25 USC 2710(d)(3)(A). This obligation, however,

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[18] While the Eighth Circuit, in *Gaming Corp of America v Dorsey & Whitney,* 88 F3d 536 (CA 8, 1996), stated that IGRA completely preempts state gambling laws on Indian lands, *the Dorsey* court was dealing with a jurisdictional removal question and thus only looked at the preemption issue in the context of federal court jurisdiction; it did not consider the impact of 18 USC 1166. Two years later, the Eighth Circuit, under 18 USC 1166, applied state law to prohibit Indian casino gambling conducted without a compact. *See United States v Santee Sioux Tribe of Nebraska,* 135 F3d 558, 563-65 (CA 8, 1998). TOMAC is unaware of any case holding that state laws relating to casino gambling do not apply to Indian lands in the absence of a compact.

[19] All State legislation is, of course, subject to limitation by the U.S. Constitution, Michigan's constitution, federal laws, and the bounds of State jurisdiction.

[20] What constitutes good or bad faith has received little attention in the courts due to the decision in *Seminole Tribe of Florida v Florida,* 517 US 44; 116 S Ct 1114; 134 L Ed 2d

does not strip the State of the fight or the duty to make policy decisions in the course of negotiations. Thus, the IGRA compacting process gives a state a means to pursue, negotiate and apply its policy choices to tribal gaming.

The Court of Appeals was wrong not only when it declared that the State's role was preempted by IGRA, but also when it ruled that "federal law dictates that the state negotiate compacts with Indian tribes to allow casino gambling on Indian reservations." It is true that the original legislative scheme permitted a tribe to sue a state in federal court for refusing to negotiate in good faith over a compact, and permitted the federal court to order a state to conclude a compact or to submit to mediation. *See* 25 USC 2710(d)(7). The United States Supreme Court, however, has invalidated this unconstitutional imposition on state sovereign immunity and ruled that an Indian tribe cannot use IGRA to sue an unconsenting state in federal court. *Seminole Tribe of Florida v Florida,* 517 US 44, 72-73; 116 S Ct 1114; 134 L Ed 2d 252 (1996). The decision in *Seminole* preserves the power of the states to control the spread of Indian casino gambling

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252 (1996), which held that states are immune under the Eleventh Amendment from suits that attempt to force states to negotiate IGRA compacts. However, the Eighth Circuit, pre-*Seminole,* was confronted with this issue and determined that a State could demand "in good faith" compact provisions that were consistent with state law. *Cheyenne River Sioux Tribe v South Dakota,* 3 F3d 273, 279 (CA 8, 1993) (ruling that State was not negotiating in bad faith by refusing to agree to set betting limits higher than State statutory $5 limit).

within their borders.[21] Contrary to the Court of Appeals' decision, a state need not negotiate any compact at all.

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[21] The Bureau of Indian Affairs ("BIA") responded to *Seminole* by promulgating regulations that purportedly authorize the agency to impose a compact on an unwilling state by "administrative" proceedings initiated by a tribe. *See* Bureau of Indian Affairs: Class RI Gaming Procedures, 64 FR 17535 (April 12, 1999) (codified at 25 CFR 291). But these regulations are also invalid. In the first place, Congress explicitly delegated all power to enact regulations under IGRA to the newly created National Indian Gaming Commission, not BIA. *See* 25 USC 2706(b)(10), 2709. Second, no executive agency has the power to claim for itself a function-in this case, enforcement of IGRA's compacting procedures-that the statute expressly grants to the federal courts. *See Adams Fruit Co v Barrett,* 494 US 638, 649-50; 110 S Ct 1384; 108 LEd 2d 585 (1990) (refusing to honor agency regulations regarding workers' compensation benefits where Congress delegated enforcement to the judiciary). Finally, any attempt by BIA to do in an administrative forum what *Seminole* said could not be done in court violates sovereign immunity to the same extent as IGRA itself did. *See South Carolina State Ports Authority v Federal Maritime Comm'n*, 535 US 743, 760; 722 S Ct 1864; 152 L Ed 2d 962 (2002) (striking down agency enforcement scheme on the basis of sovereign immunity: "[I]f the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a state to do exactly the same thing before … an agency …. "). To TOMAC's knowledge, the BIA rules have not been used to force any state to negotiate or accept a compact against its will.

In short, these erroneous rulings by the Court of Appeals diminish the role of the state to merely rubber-stamping an Indian tribe's gambling preferences. This is inconsistent with the plain language of IGRA and robs the State of powers that the United States Supreme Court has recognized are preserved to the State under the United States Constitution. These rulings must be reversed.

B. The Court of Appeals erred in deciding that federal law rather than state law determines the manner in which IGRA compacts are approved.

The Court of Appeals also incorrectly held that federal law determines the manner in Which a state approves compacts. Specifically, the court erred in ruling that (1)IGRA expressly authorizes the State legislature to approve a compact by concurrent resolution, and (2) the federal Compact Clause authorizes approval by concurrent resolution. To the contrary, state law determines the proper process for approval of a compact and requires that the compacts be approved as legislation.

1. State constitutional law determines how states enter into compacts.

State law not only sets gambling policy, it also determines how a state can validly "enter into" and bind itself to a gambling compact under IGRA. The question of whether state or federal law determines the manner in which a compact is approved was squarely addressed in *Pueblo of Santa Ana v Kelly,* 104 F3d 1546, 1557-1558 (CA 10, 1997). *Pueblo of Santa Ana* involved a declaratory action brought by Indian tribes from the State of New Mexico for a determination that certain compacts approved by the Secretary of the Interior pursuant to IGRA were valid even though the governor of the

State of New Mexico lacked authority to enter into the compacts, *Id.* at 1548. The Tenth Circuit determined that a compact, even if approved by the Secretary of the Interior, is invalid unless it is first properly approved by a state. *Id.* at 1555. The court then applied U.S. Supreme Court precedent to conclude that in the absence of specific guidance in IGRA, *state law* would determine the proper procedure for executing valid compacts. *Id.* at 1557-1558.

The California Supreme Court recently agreed: "[for a compact] [t]o be 'entered into' [under IGRA] by the state and the tribe means to be 'entered into' validly in accordance with state (and tribal) law." *Hotel Employees,* 21 Cal 4th at 612; *accord, Saratoga County Chamber of Commerce, Inc v Pataki,* 712 NYS2d 687, 696; 275 AD2d 145 (NY App Div, 2000) (ruling that state law determines whether a state has validly bound itself to a compact); see *also New Mexico v Johnson,* 120 NM at 578 (ruling that the United States Congress cannot expand the authority of a state or its officials over and above the authority granted by a state's constitution).

2. IGRA does not determine how a compact is approved.

The Court of Appeals erroneously interpreted IGRA as expressly authorizing a state's approval of a compact by resolution. Ct of Appeals Op at 12-13 (App at 133a-134a). This is a simple misreading of the statute. *See* 25 USC 2710(d). While IGRA specifies that the *Indian tribe* may approve a compact by resolution, *see* 25 USC 2710(d)(1)(A), it is silent as to how a state must approve of the compact, *see* 25 USC 2710(d)(1)((2). Even Appellee, the State of Michigan, admits: "IGRA does not specify what is required for a state to validly bind itself to a compact. It has been held that the issue is determined by state law. *See Pueblo of Santa*

Ana v Kelly, 104 F3d 1546, 1557 (CA 10 1997)." (State of Michigan's Brief in Opposition to Application for Leave to Appeal at 5 n 3.) *See also Saratoga County,* 2003 NY LEXIS 1470, *33 (ruling that IGRA leaves to state law who will negotiate and agree to a compact).

3. The federal Compact Clause is also inapplicable.

In ruling that concurrent resolution was an appropriate method of approving these compacts, the Court of Appeals also relied heavily upon cases interpreting the federal Compact Clause to conclude that approval by bill was unnecessary. Citing *United States Steel Corp v Multistate Tax Comm'n,* 434 US 452; 98 S Ct 799; 54 LEd 2d 682 (1978), the court noted, "The approval by resolution contained in the IGRA is consistent with federal law addressing compacts. Congressional approval was generally one of historic occurrence rather than necessity. The true test of congressional approval occurs when powers of an entity are usurped." Ct of Appeals Op at 13 (App at 134a). While the federal Compact Clause may address the question of whether and how the U.S. Congress must approve a compact, it does *not* address the way in which a *state* must *enter into* a compact.[22]

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[22] The federal Compact Clause provides: "'No State shall, without the Consent of Congress, … enter into any Agreement or Compact with another State, or with a foreign Power …." US Const, art I, § 10, cl 3. A literal reading of the clause would require the states to obtain congressional approval of some form before entering into any agreement among themselves. The U.S. Supreme Court, however, has eschewed such an approach and held that congressional

The *Multistate Tax Commission* opinion verifies that the federal Compact Clause is inapplicable here. The ease involved the issue of whether a compact between states, establishing a Multistate Tax Commission, requires approval by the United States Congress. *Multistate Tax Comm'n,* 434 US at 454. The Supreme Court concluded that Congressional approval was not required because the compact did not impermissibly encroach upon federal supremacy. *Id.* at 472-473. What was not in dispute, and what the Court *did not address,* was the mechanism by which the states had entered into the compact. In fact, each state that had entered into the compact, including Michigan, had done so by way of legislation, *Id.* at 454 n 1; *see also* MCL 205.581.

No other court has looked to the federal Compact Clause to determine how a state is to enter into an IGRA compact. Rather, all courts to have examined the question have concluded that *state* law governs. *See, e.g., Pueblo of Santa Arm,* 104 F3d at 1557-1558. Under Michigan law, the appropriate test for determining whether the compacts constitute legislation, requiring approval as a bill, is set forth in *Blank. The* Court of Appeals' reliance upon *Multistate Tax Commission, instead of Blank,* is clear error.

C. The Court of Appeals erred in concluding that the legislature routinely approves compacts by resolution.

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approval of a compact is only required for agreements that tend to encroach upon or interfere with the supremacy of the United States. *See Multistate Tax Comm'n*, 434 US at 471, *Cuyler v Adams,* 449 US 433, 440; 101 S Ct 703; 66 L Ed2d 641 (1981).

As its final argument for finding that the compacts could be approved by concurrent resolution, the Court of Appeals stated that "contracts executed by the State of Michigan are routinely approved by the resolution process." Ct of Appeals Op at 13 (App at 134a). This ignores the crucial distinction between a ,mere contract for goods or services and a compact between the State and an Indian tribe *regulating* gambling on Indian lands. As made clear by *Chadha and Blank,* it is the effect of the action, not its form, that is determinative. While a compact may take the form of a contract, its substantive impact is legislative. Michigan Legislative Service Bureau, *Interstate Compacts,* p 3 (App at 3a). Michigan's long-standing practice has been to approve *compacts* as legislation. *See id.* at 11-36 (App at 11 a-36a); *see also* Argument Section II, *supra* at 10-12 and n 3.

In further support of its position, the Court of Appeals pointed to a set of IGRA compacts that were at issue in the cases *Tiger Stadium Fan Club, Inc v Governor,* 217 Mich App 439; 553 NW2d 7 (1996), *app den* 453 Mich 866, and *McCartney v Attorney General,* 231 Mich App 722; 587 NW2d 824 (1998), *app den* 601 Mich 101. While both *Tiger Stadium and McCartney* dealt with issues related to Indian gambling, neither case dealt with the determinative **issue** here: whether IGRA compacts require legislative enactment under the Michigan constitution.

Tiger Stadium involved a question regarding the status of funds paid by Indian tribes into the Michigan Strategic Fund under a federal court consent decree settling a compacting dispute under IGRA. *Tiger Stadium,* 217 Mich App at 441-442. The court concluded that the funds at issue were not subject to the Appropriations clause, so that the governor did not need to seek legislative action before agreeing to the payment directly to the fund. *Id.* at 454-455. The court,

however, did not decide the threshold question of whether the compacts were legislation. In fact, the court acknowledged that it was not deciding this question. *Id.* at 455-456 n 5 ("We recognize that it is a separate question whether the concurrent resolution would constitute sufficient legislative action if the revenues were determined to be subject to appropriation, one we do not address because our decision that the revenues are not subject to appropriation makes it unnecessary to do so.")

McCartney involved a suit under FOIA to obtain certain State documents related to IGRA compact negotiations. *McCartney,* 231 Mich App at 724. The court focused on the Governor's power to negotiate compacts, not on whether compacts require legislative approval by bill. *See id.* at 729. If anything, the court strongly implied that the IGRA compacts were legislation by noting, in reference to the compacts, that the Governor "is constitutionally authorized to present and recommend *legislation"* to the legislature. *McCartney,* 231 Mich App at 726 (emphasis added). Other courts, in fact, have cited *McCartney* for the proposition that IGRA compacts are legislative in nature. *See, e.g., Saratoga County,* 2003 NY Lexis 1470, at *37 (citing *McCartney).* In any case, neither *Tiger Stadium* nor *McCartney* decided whether compacts required approval by bill.

As additional support for its characterization of the compacts as mere "contracts," the Court of Appeals also noted, "irrespective of whether the terms of the compact encroach upon legislative functions, the inability to enforce those terms precludes a challenge to the constitutionality of the compact." Ct of Appeals Op at 13 (App at 134a). The court's apparent conclusion-that the compacts are unenforceable is contrary to the plain language of the compacts. The compacts specifically allow the State to inspect the tribal casino operations, *see* Compacts at § 4(M)(2) (App

at 57a), and include an enforcement provision in the event that the State believes that the tribe is not administering and enforcing the regulatory requirements set forth in the compact, *id.* at §§ 4(M)(6), 7 (App at 10a, 11a-12a). IGRA specifically gives substance to these provisions as it only allows gambling to take place "in *conformance* with a Tribal-state compact." 25 USC 2710(d)(1)(C) (emphasis added). Moreover, the Court of Appeal's focus on the enforcement language as a test for whether the compacts are legislative in nature is misguided, for the choice of whether and how a compact will be enforced is itself a policy decision that is legislative in nature. The court should have applied the *Blank* analysis, and its failure to do so is clear error.

VI. The compacts violate Article III, Section 2 (separation of powers) of Michigan's constitution because they purport to empower the Governor to make policy judgments without legislative approval.

Michigan's constitution provides for a separation of powers between the branches of government:

> The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

Const 1963, art 3, § 2. The legislative power is clearly reserved in Michigan's constitution to the State House and Senate. Const 1963, art 4, § 1. Thus, it is neither the

Governor's duty nor right to enact legislation.[23] Instead, it is the task of the executive branch to "take care that the laws be faithfully executed." Const 1963, art 5, § 8; *Sutherland v Governor,* 29 Mich 320, 324 (1874) (Cooley, J.), see *also Musselman v Governor,* 200 Mich App 656, 664; 505 NW2d 288 (1993) (quoting *Sutherland), aff'd* 448 Mich 503. Any delegation of power between the branches of government must be "limited and specific." *Judicial Attorneys Ass'n v Michigan,* 459 Mich 291, 296-297; 586 NW2d 894 (1998).

The compacts unconstitutionally grant the executive branch legislative authority in violation of the Michigan constitution. They empower the Governor to amend the compacts without any legislative approval. *See* Compacts at §§ 16(A)(i)-(iii), (B), (C) (App at 64a-65a); Cir County Ct Op at 13 (App at 134a). Indeed, they require the Governor to report an amendment to the legislature only *after* the amendment has already been approved and entered into by the Governor and by the Secretary of the interior. Compacts at §§ 16(B)-(D) (App at 65a). And the scope of the Governor's authority to enact amendments is virtually unlimited. The only restriction is on the Governor's ability to amend the definition of "eligible Indian lands" to permit gambling in counties other than those listed in the compacts, *Id.* at § 16(A)(iii) (App at 64a). Otherwise, the Governor has complete freedom to amend the compacts without legislative approval.

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[23] The Governor may present and recommend legislation. Const 1963, art 5, § 17. But she may not bind the State to legislation without seeking the approval of the legislature by bill. *See e.g., McCartney v Attorney General,* 231 Mich App 722; 587 NW2d 824 (1998).

The Michigan Court of Appeals ruled that this issue was not yet ripe because the compacts have not yet been amended. But on July 22, 2003, Governor Granholm signed on behalf of the State of Michigan an amendment to one of the Indian compacts challenged in this ease. Amended Compact (App at 136a-139a). The Amendment, which is "binding on the State" for a new term of twenty-five years, demonstrates the far-reaching policy-making power now in the hands of the Governor. Significantly, the amendment:

- *Gives the Little Traverse Bay Bands of Odawa Indians (the "Odawa") an extra casino*. See Amended Compact at § 2(B)(I) (App at 136a). The Traverse City Record Eagle reports that the Odawa are looking at a site in Mackinaw City for their second casino. Keith Matheny, *Granholm Gives OK to New Casino,* Traverse City Record Eagle, July 26, 2003. While casino advocates were unable to garner a legislative majority to support even one casino for the Odawa, now there will be two. Whether the People of the State of Michigan are in favor of yet another casino in northern Michigan is not known because they were never informed through the legislative process.

- *Gives the Governor control over casino revenue sharing payments made to the State*. Previously, the compact required that all revenue sharing payments flow to the Michigan Strategic Fund. Now, all such payments are to go "to the State, as *directed by the Governor or designee."* Amended Compact at § 17(C) (App at 138a). Thus, the Governor can apparently send millions of dollars to the general fund or whatever pet agency, department, or quasi-governmental unit she chooses. This is nothing more

than an appropriation of State funds without a legislative enactment.

- *Changes the age of legal gambling at the new casino from 18 to 21*. Amended Compact at § 4(1) (App at 137a). The implications of this change, however salutary on policy grounds, are troublesome: the Governor alone can now set the legal gambling age at Indian casinos, or do away with the restriction altogether. This is a legitimate issue of State policy that should receive approval by legislative enactment.

- *Trades revenue sharing payments to the State for a casino monopoly in a ten county area and d moratorium on new lottery legislation*. Amended Compact at § 17 (App at 137a-139a). If a "change in State law is enacted" allowing gambling in a ten county area, "including expansion of lottery games beyond that allowable under State law on the date of execution of this document," then payments to the State cease. In effect, a government-sanctioned ten county monopoly has been created, and payments have been arranged to help protect the future of the monopoly, without any legislation whatsoever.

As the amendment illustrates, the compacts allow the governor to make policy choices that have a tremendous impact on the State of Michigan, including more casinos, more deals to raise revenue, and any number of other decisions that will be made without legislative approval. These important choices will never be approved by a majority of the Michigan legislature unless the Court of Appeals' ruling is reversed.

VII. The compacts are local acts under Article IV, Section 29 (local or special acts) of Michigan's constitution because they expressly operate with particular impact on four specifically identified communities within the State.

A. The compacts are local acts.

The compacts are not only legislation, they are "local act" legislation because they operate with particular impact on four Michigan communities rather than on the State as a whole. In general, a local act is an act "which operates over a particular locality instead of over the whole territory of the state or any properly constituted class or locality therein, or which operates on particular persons or things in a class, or which relates to the property or persons of a particular locality." OAG, 1979-1980, No 5,711, p 794 (May22,1980) (quoting 82 CJS, Statutes, § 168, pp 283-284). The legislature cannot circumvent the constitutional prohibition against local acts by subterfuge-instead, it is the practical operation of the legislation that determines its character. *See Michigan v Wayne Co Clerk,* 466 Mich 640; 648 NW2d 202 (2002) (ruling that failure of statute to identify Detroit by name did not prevent it from being a local act); *City of Dearborn v Board of Supervisors,* 275 Mich 151, 157; 266 HW 304 (1936) (invalidating statute that could only apply to Wayne County).

In this case, the legislature did not even attempt to disguise the local nature of the act. Rather, it expressly limited the effect to four specified Michigan communities: 1) the Pokagon Band is limited to the counties of Allegan, Berrien, Van Buren, and Cass; 2) the Little Traverse Bay Bands of Odawa Indians to the counties of Emmet and Charlevoix; 3) the Little River Band of Ottawa Indians to the

counties of Manistee and Mason; and 4) the Huron Potawatomi Indians must build its casino in Calhoun County. To ensure that the effects will be limited to these communities, the compacts make it practically impossible for any of the tribes to establish additional casinos outside of these areas by requiring that any such casino must share revenues with all other recognized tribes in the State. Compacts at § 9 (App at 61a). Locality is further restricted by a complete prohibition of any casino within 150 miles of Detroit (or 90 miles in the case of the Calhoun County casino). *Id.* at § 16(A)(iii) (App at 64a).

Because the casinos are limited to four specific communities, the compacts are local acts. In *Huron-Clinton Metro Authority v Board of Supervisors,* 300 Mich 1; 1 NW2d 430 (1942), the Michigan Supreme Court verified that Michigan Act No. 147 of 1939, establishing the Huron-Clinton Metropolitan Authority, was a local act. Like the present case, the Act restricted the Authority's powers and duties (generally, to purchase, own and operate parks) to five named counties. Unlike the present case, however, the Act was passed according to the constitutionally prescribed procedures for local acts. *Id.* at 14.

B. The compacts do not comply with the constitutional requirements for local acts.

The Michigan constitution imposes strict limits on the ability of the legislature to use local acts:

> The Legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. *No local or special act shall take effect until approved by two-thirds of the members*

> *elected to and serving in each house and by a majority of the electors voting thereon in the district affected*.

Const 1963, art 4, § 29 (emphasis added). This Section is intended to eliminate the vast volume of local legislation that once burdened and discredited the legislature. *Common Council of the City of Detroit v Engel,* 202 Mich 536, 543; 168 NW 462 (1918). As such, the Section's restrictions are viewed expansively, *Id*.

The prohibition against local acts guards against unjustified favoritism, or its opposite--the saddling of certain communities with undesirable "not in my back yard" projects. Such considerations are especially appropriate in the instant case. It is easy to imagine winning support for the compacts by pointing out that the casinos could only be built in certain communities in the State and, therefore, most legislators would be insulated from negative Consequences in their districts or from their constituents. Meanwhile, the citizens in those areas are burdened with additional traffic, crime, and public services that they must provide as a consequence of the compacts.

Despite this, the Court of Appeals ruled that the compacts were not local acts, allegedly because "[t]his state has no authority to regulate conduct on Indian tribal lands." Ct of Appeals Op at 14 (App at 135a). As demonstrated above, however, the court has wrongly concluded that IGRA robs the State of authority over Indian gambling. Even more fundamentally, the geographic restriction is not about regulating conduct on Indian lands, but rather about limiting gambling to certain parts of the State.

Under IGRA, the Indian tribes are not limited to their current reservation land for casino operations. Rather, the

tribes can request the federal government to take additional lands in trust as Indian lands suitable for gambling under IGRA. *See 25* USC 465; 25 USC 2719. In many cases, particularly where the land is part of a restoration of lands (e.g., the Pokagon Band) or an initial reservation (e.g. the Huron Potawatomi), IGRA does not impose any geographic restriction as to where these additional lands may be. Thus, without the geographic restrictions found in the compacts, the tribes could potentially open a casino anywhere within the State. These geographic restrictions, therefore, operate to keep casino operations out of all but the four communities identified in the compacts. *See* Compacts at §§ 9, 16(A)(iii) (App at 61a, 64a). This is a policy decision, insulating the Detroit casinos from competition and other Michigan communities from the unwanted burdens associated with gambling operations. Because the compacts limit the tribes to certain areas of the State when they would not otherwise be so-limited, the compacts are local acts.

The Ingham County Circuit Court also erroneously ruled that the compacts were not local acts. The court based the holding on its conclusion that TOMAC had failed to argue that a general act could have accomplished the same purpose as the local act. With all due respect to the Circuit Court, it appears to have misread the requirements of the constitution.

Constitutional provisions must be interpreted in "the sense most obvious to the common understanding …." *House Speaker v Governor,* 443 Mich 560, 577; 506 NW2d 190 (1993). The most obvious and plain reading of Section 29 is to impose three requirements on local acts: 1) there can be no local act at all if it is possible to enact an act of general application; 2) any proper local act must be approved by a two-thirds vote of the legislators; and 3)any proper local act must be approved by a vote of the people in the affected

community. Failure to comply with *any* of the above requirements is enough to invalidate a local act. Since HCR 115 was "passed" without a two-thirds vote of the legislature and without approval by vote of the people in the affected communities, it failed to comply with the local acts requirement regardless of whether an act of general application was possible.

Moreover, even if it were necessary for TOMAC to establish that a general **act** was possible, TOMAC can do so. A general act would have included approving the compacts minus the restriction on where the casinos could be located, leaving the "Indian lands" question up to the normal operation of IGRA. Thus, if a tribe could procure Indian trust lands in Detroit, it could build a casino there. A general act could easily have been enacted if the political will had existed.[24]

Other States have used the general act approach. Several States have enacted general enabling acts that give the statutory authority to a person or committee to enter into compacts under IGRA without territorial restrictions. *See e.g.,* La Rev Stat Ann 46:2303, Wis Stat 14.035; Wash Rev Code 9.46.360. These are general acts that are not slanted or biased for, or against, any particular location. The Michigan legislature's failure to muster a political majority for this approach is not a constitutional justification for pawning the problem off on four communities.

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[24] Indeed, the legislature originally tried a general act approach by proposing to create by an enabling act a public body that would pass on questions of proposed compacts regardless of their location. *See* SB 1061 (1988) (App at 39a-42a). The proposal failed.

The compacts are local acts, yet were not approved by a two-thirds vote of the State House and Senate and by a majority vote of the affected electorate, as required by Michigan's constitution. The compacts are also invalid because they are local acts that were "enacted" when an act of general applicability could have been enacted instead. For both of these reasons, the compacts violate Article IV, Section 29 of Michigan's constitution of 1963.

CONCLUSION

The "quintessential political judgment" on what terms, if any, to permit casino gambling within the State of Michigan requires public policy judgments. The Michigan constitution requires the legislature, not the Governor, to make these judgments, and to do so by legislative enactment. A resolution supported by neither a majority of all elected and serving legislators, nor by any of the constitutionally required formalities for legislation, is an unlawful end run around the constitution, as both the Circuit Court and the Michigan Attorney General recognized.

Contrary to the Court of Appeals' ruling, IGRA does not trump the State's policy-making role. Quite the opposite: IGRA actually reinforces the role of the State by expressly applying to Indian country the normal laws of the State governing casino-style gambling, unless and until the State makes different policy choices in a valid gambling compact. IGRA itself makes no policy choices for the State. IGRA does not set age limits for gambling. IGRA does not prescribe who may and may not work in a casino. IGRA does not specify the games of chance that a casino may offer. IGRA does not establish wagering limits for the allowed games. IGRA does not direct how much money, if any, the casino must pay to the host state. All of these public policy choices–and hundreds more---are left to a state's judgment in the compacting process.

When the State of Michigan makes binding choices like these for people outside the legislature, the Michigan Constitution requires it to do so by legislative enactment, as this Court held in *Blank,* a ease the Court of Appeals completely ignored. Like the Court of Appeals, the legislature failed to honor *Blank* and the constitutional

requirements it articulated. Instead, after failing to marshal a majority of legislators in support of a legislative enactment, a minority of legislators tried to make these public policy choices by resolution. This Court must declare the attempt invalid and direct that Indian gambling compacts be approved, if at all, by legislative enactment consistent with all applicable provision of the Michigan Constitution.

Dated: November 20, 2003

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Dated: November 20, 2003