IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-2154

FLORIDA HOUSE OF REPRESENTATIVES, and
MARCO RUBIO, individually and in his capacity
as Speaker of the Florida House of Representatives,

Petitioners,

vs.

CHARLIE CRIST, in his capacity as Governor
of Florida,

Respondent.
_____/

AMICUS CURIAE BRIEF OF
GULFSTREAM PARK RACING ASSOCIATION, INC.

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INTRODUCTION

The Florida House of Representatives and Marco Rubio will collectively be referred to as "Petitioners," Respondent Charlie Crist will be referred to as "the Governor," and Amicus Curiae Gulfstream Park Racing Association, Inc. will be referred to as "Gulfstream."

Citations to the Petitioners' Petition are reflected as [Pet. ____] followed by the appropriate page number. Citations to Gulfstream's Appendix are reflected as [App. ___].

STATEMENT OF THE CASE AND OF THE FACTS

Gulfstream adopts the Statement of Facts in Petitioners' Petition for Writ of Quo Warranto. [Pet. 3-6].

SUMMARY OF ARGUMENT

The Governor violated the separation of powers doctrine through his negotiation and execution of the Compact Between the Seminole Tribe of Florida and the State of Florida. The effect of the Compact modifies state criminal statutes, the state venue statutes, creates an agency, modifies state tort law, and grants rule-making authority – all powers that are reserved unto the legislative branch pursuant to Florida's Constitution. As such, the Compact is void *ab initio*.

Further, a State-Tribal compact cannot authorize games that are prohibited by state law. The Compact at issue in this matter violates the Indian Gaming Regulatory Act as it purports to allow the Seminole Tribe to offer banking games at its Florida facilities despite the Legislature's enactment of statutes prohibiting such games.

Because the issues of state law raised in the Petition ultimately are rightly decided by this Court, the 45-day window for approval of the Compact by the Secretary of the Interior is immaterial to this proceeding. However, given the issues of great public concern raised herein, this Court should decide the matter immediately.

ARGUMENT

I. THE GOVERNOR DOES NOT HAVE THE AUTHORITY TO BIND THE STATE OF FLORIDA TO THE COMPACT BETWEEN THE SEMINOLE TRIBE OF FLORIDA AND THE STATE OF FLORIDA.

The Compact between the Seminole Tribe of Florida and the State of Florida (the "Compact") alters the statutory law and policy of this State in a number of ways. It also restrains future legislative conduct by providing financial disincentives to the state if the Legislature in the future chooses to change state gaming laws. [See App. 1 Part XII].

The Compact establishes a pre-suit procedure for tort remedies and changes the venue law of the state. [See App. 1 Part VI. D.]. Moreover, it establishes a regulatory scheme and purports to grant rulemaking authority to a regulatory agency. [See App. 1 Part V. A.]. All of these are quintessential legislative functions which cannot and have not been delegated by the Legislature to the Governor.

In particular, the Compact authorizes slot machines outside of Broward County and allows card games which are illegal in Florida. [See App. Part III. E.]. The Florida Constitution prohibits slot machines outside Dade and Broward County and only allows slot machines in those counties at existing pari-mutuel facilities and upon an affirmative

referendum vote. *See* Article X, Sec. 23, Florida Constitution. It also permits the Seminole Tribe to offer "any banking or banked card game including baccarat, chemin de fer and blackjack which are Class III gaming activities." [App. 1 at Section III. E. 2.]. Such banking card games are illegal in the State of Florida. §§ 849.086(2)(b) and (12), Fla. Stat. Florida criminal law applies to actions which take place on Indian lands. § 285.16, Fla. Stat.; *State v. Billie*, 497 So.2d. 889 (Fla. 2d DCA 1986).

The Governor, in attempting to bind the State of Florida to an agreement which abrogates validly enacted state laws, violated the fundamental principles of separation of powers which exist in the federal government and the government of all fifty states. The doctrine of separation of powers is the core principle in the development of our system of government. THE FEDERALIST: A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES (Alexander Hamilton, James Madison and John Jay). It prevents the concentration of power by the checks and balances each branch of government has against the other.

The separation of powers doctrine has been strictly enforced in Florida to prohibit any branch of state government from encroaching upon powers of another branch. *Florida Department of State Division of Elections v. Martin*, 916 So. 2d 763 (Fla. 2005); *Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260 (Fla. 1991). Article II, Sec. 3 of the Florida

Constitution provides for the three branches of government and specifically states that "no person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Article III, Sec. 1 of the Florida Constitution vests the legislative power of the State in the Legislature. Legislative power as used in the Constitution means the power to enact laws and to declare what the law shall be. *State ex rel Young v. Duval County*, 79 So. 692 (Fla. 1918).

In particular, "[t]he power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch." *Perkins v. State*, 576 So. 2d 1310 (Fla. 1991); see also *State v. Watso*, 788 So. 2d 1026 (Fla. 2d DCA 2001) ("Any attempt to delegate the authority to define a crime is unconstitutional as a violation of the separation of powers doctrine as is any attempt by another branch to usurp the Legislature's authority to define a crime") and *State v. Ashley*, 701 So. 2d 338 (Fla. 1997) ("Under Florida's constitutional form of government, no branch of state government can arrogate to itself powers that properly inhere in a separate branch").

Here, the Governor has usurped the power of the Legislature and has abrogated policy which the Legislature has established. Nothing in the Florida Constitution grants the governor such legislative authority. The Governor's

attempt to bind the State to the terms of the Compact therefore violates the separation of powers Clause in Article II, Sec. 3, Florida Constitution.

The Supreme Courts of other states have ruled that their governors lack the constitutional and legislative authority to bind their states to tribal state compacts. *State ex rel. Clark v. Johnson*, 904 P. 2d 11 (N.M. 1995); *State ex rel. Stephan v. Finney*, 836 P. 2d 1169 (Kan. 1992); *Narragansett Indian Tribe of Rhode Island v. State*, 667 A. 2d 280 (R.I. 1995). The Court of Appeals of New York in *Saratoga County Chamber of Commerce v. Pataki*, stated that: "Unsurprisingly, every state high court to consider the issue has concluded that the state executive lacks the power unilaterally to negotiate and execute tribal gaming compacts under the IGRA. New Mexico, Kansas, and Rhode Island have each concluded that gaming compacts incorporate policy choices reserved for the Legislature." 798 N.E. 2d 1047 (N.Y. 2003).

The Indian Gaming Regulatory Act ("IGRA") created a federal statutory scheme whereby, among other things, states and tribes can negotiate and contract for Class III gaming within the state. 25 U.S.C. § 2701, *et. seq*. The IGRA is silent as to which state actor has the authority to negotiate compacts such that state law controls that issue. See *State ex rel. Stephan v. Finney*, *supra*. The IGRA contemplates that the state tribal compacts will involve numerous policy choices as set out in 25 U.S.C. § 2710 (d)(3)(c).

Indeed, the United States Supreme Court noted that the duty imposed by the IGRA "is not the sort likely to be performed by an individual state executive officer." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, n. 17 (1996).

Delegated legislative authority or ratification by the Legislature is required for a compact containing such policy changes to be valid. Neither are present here nor are they contemplated by the Compact as a condition precedent to its effectiveness.

II. THE INDIAN GAMING REGULATORY ACT DOES NOT PERMIT THE GOVERNOR TO ALLOW CLASS III GAMING IN THE STATE GIVEN DULY-ENACTED LAWS PROHIBITING SUCH GAMES

The IGRA authorizes Class III gaming on Indian lands only if "such activities are…located in a State that permits such gaming for any purpose by any person, organization or entity…" 25 U.S.C. § 2710(d)(1). That provision has been widely construed to mean that the IGRA is violated where a tribe offers forms of gaming that are prohibited by that state's law. *U.S. v. Santee Sioux Tribe of Nebraska*, 135 F. 3d 558 (8th Cir. 1998) ("[t]he Tribe's gaming activities violate the IGRA because they are being conducted in contravention of Nebraska law."). The existence of a state-tribe compact does not cure the illegality of the offering. *Cheyenne River Sioux Tribe v. State of South Dakota*, 3 F. 3d 273 (8th Cir. 1993); *State ex rel. Clark v. Johnson*, 904 P. 2d 11 (N.M. 1995).

As stated above, "banked" card games or "banking games" are currently illegal in Florida. "Banking games" are defined as those "in which the house is a participant in the game, taking on players, paying winners, and collecting from losers or in which the cardroom establishes a bank against which participants play." § 849.086(2)(a), Fla. Stat. Such games are considered "casino-type" games instead of games where players play only against each other. § 849.086(1), Fla. Stat.

Despite the statutory prohibition against "banking games" in Florida, the Compact, if approved, will authorize the Seminole Tribe to offer at its facilities "[a]ny banking or banked card game, including baccarat, chemin de fer, and blackjack (21)." [App. 1 at Section III. E. 2.]. Because the Compact expressly contemplates games that are currently illegal, it violates the Indian Gaming Regulatory Act. *United States v. Santee Sioux Tribe of Nebraska*, 135 F. 3d 558 (8th Cir. 1998). Moreover, the Compact cannot be saved by result to an argument that the State allows slot machines (Class III gaming) in Broward County therefore other forms of Class III gaming, including banking games, should be deemed equivalent under the IGRA.

In point of fact, several courts have entertained such an argument and dismissed it. *Santee Sioux Nation v. Norton*, 2006 U.S. Dist. LEXIS 70790 (D. Neb. 2006) (under the IGRA, "a state

need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have."); *Cheyenne River Sioux Tribe*, 3 F. 3d at 278-279 (holding that the state need not negotiate traditional keno if only video keno is permitted by state law); *Coeur d'Alene Tribe v. State*, 842 F. Supp. 1268 (D. Idaho 1994) (state compelled to negotiate with tribe only as to lottery, pari-mutuel betting on horse, mule, and dog races as those were the only Class III games permitted by state law).

Here, the Compact goes too far in that it purports to make banking games legal in Florida if undertaken in tribal facilities. There simply is no logical way to square that Compact provision with existing state laws prohibiting banking games. As such, the provision violates the IGRA.

III. THE 45-DAY WINDOW FOR THE SECRETARY OF THE INTERIOR TO APPROVE THE COMPACT HAS NO EFFECT ON THIS COURT'S ABILITY TO PASS ON THE STATE ISSUES RAISED.

Where a compact has been submitted to the Secretary of the Interior pursuant to the IGRA, the Secretary's approval is immaterial to the question of validity under state law requirements. *Pueblo of Santa Ana v. Kelly*, 104 F. 3d 1546 (10th Cir. 1997) ("[s]tate law must determine whether a state has validly bound itself to a [State-Tribe] compact."). Therefore, the Respondent's submission

of the Compact at issue, and the 45 day window for the Secretary of the Interior to act on the submission, has no bearing on the instant Petition.

Irrespective of this Court's ability to pass on the state issues raised even if such consideration is given after the Secretary of the Interior approves the Compact, this Court should decide the issues sooner rather than later. The issues raised by the Petitioners are the type that require immediate resolution by this Court. *State ex rel. Stephan v. Finney*, 836 P. 2d at 1176 (Kan. 1992) (immediate resolution required by state high court where subsequent invalidation of State-Tribe compact was possible). The deleterious effect of allowing the parties to the Compact to conduct the gaming authorized therein is a matter of such great public concern that swift action is needed.

CONCLUSION

The Petitioners' Petition for Writ of Quo Warranto should be granted declaring that legislative authorization or ratification is required for any compact governing gaming on Indian lands to be valid.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Curiae Brief of Gulfstream Park Racing Association, Inc. has been furnished, by United States Mail and electronic mail, to BARRY S. RICHARD, ESQUIRE (richardb@gtlaw.com), and GLENN T. BURHANS, JR., ESQUIRE (burhansg@gtlaw.com), of Greenberg Trauig, P.A., 101 East College Avenue, Tallahassee, Florida 32301; E. JASON VAIL, ESQUIRE (vail.jay@flsenate.gov), Special Counsel, Florida Senate, Room 402, Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-6526; PAUL HUCK, ESQUIRE (paul.huck@myflorida.com), General Counsel, Office of the Governor, PL-05 The Capitol, Tallahassee, Florida 32399-0001; JEREMIAH M. HAWKES, ESQUIRE (jeremiah.hawkes@myfloridahouse.gov), General Counsel, Florida House of Representatives, 422 The Capitol, Tallahassee, Florida 32399-1300; BOB HANNAH, ESQUIRE (bob.hannah@myfloridalegal.com), Deputy Attorney General and Chief Counsel, and SIMONE MARSTILLER, ESQUIRE (simone.marstiller@myfloridalegal.com), Associate Deputy Attorney General, Office of the Attorney General, PL-01 The Capitol, Tallahassee, Florida 32399-1050; JON MILLS, ESQUIRE (jonmills@sprynet.com), TIMOTHY McLENDON, ESQUIRE (mclendon@law.ufl.edu), Post Office Box 2099, Gainesville, Florida 32602; and JOSEPH H. WEBSTER, ESQUIRE (jwebster@hsdwdc.com), JERRY C. STRAUS, ESQUIRE (jstraus@hsdwdc.com), and F. MICHAEL WILLIS ESQUIRE (mwillis@hsdwdc.com), of Hobbs Straus Dean & Walker LLP, 2120 L Street N.W., Suite 700, Washington, D. C. 20037, this ____ day of November, 2007.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that in compliance with the font requirements of Fla. R. App. P. 9.210(a)(2), the font used in this Amicus Curiae Brief is Times New Roman 14-point.

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