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Outside Counsel

CASINO LAW IS CONSISTENT WITH EQUAL PROTECTION

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Seven weeks after the tragic events of Sept. 11, 2001 accelerated the collapse of the New York economy, Governor Pataki signed legislation providing for, among other things, up to six new Indian casinos in New York State. [FN1]

The casinos are proposed for sites in Buffalo, Niagara Falls, a reserve in western New York and as many as three sites in the Catskills. [FN2] The Casino Law also legalizes video lottery gaming at no fewer than five racetracks in New York. [FN3] Industry analysts predict that the gambling market spawned by the Casino Law will yield revenues between \$3 billion and \$4 billion per year. [FN4]

Major beneficiaries of this "once-in-a-generation opportunity," after the tribes and racetracks themselves, may include well-known casino and resort operators, such as Harrah's, Park Place Entertainment, and Delaware North Companies of Buffalo. [FN5] Lesser known players, such as Flaum Management, a Rochester-based real estate developer, are also gunning for a role. [FN6]

Most importantly to ordinary New Yorkers, development and operation of the Indian casinos are expected to provide jobs and bolster significantly New York's economy.

On Tuesday, Jan. 29, 2002, a group of plaintiffs filed suit in New York Supreme Court in Albany challenging the constitutionality of the Casino Law. [FN7] Relying primarily (but not exclusively) upon New York law, plaintiffs allege in five separate counts that the Casino Law is unconstitutional - allegations that Governor Pataki's office and Attorney General Eliot Spitzer's office already have denied flatly. The complaint pleads, among other things, that the Casino Law "[gives] tribes the exclusive right to conduct [gaming] that is prohibited for everyone else." Complaint 3.

Whether Plaintiffs intended this language to plead that the Casino Law violates the "equal protection" clause of the U.S. Constitution is unclear but plaintiffs who have asserted constitutional challenges to similar laws across the nation have pleaded this explicitly. This article analyzes the viability of a challenge to the Casino Law under federal equal protection guarantees. [FN8]

Congress enacted the Indian Gaming Regulatory Act (the IGRA) in 1988. The IGRA authorizes states to negotiate gaming compacts solely with federally recognized Indian tribes. 25 U.S.C. 2710(d)(3), 2703(5) (West 2001). With limited exceptions, New York law prohibits gambling of any kind. [FN9]

New York's new Casino Law amends that general prohibition by authorizing the Governor to "execute a tribal-state compact with the Seneca Nation of Indians pursuant to the [IGRA]." [FN10] The Casino Law also authorizes the Governor to "execute tribal-state compacts pursuant to the [IGRA] authorizing up to three [gaming facilities] in the counties of Sullivan and Ulster." [FN11]

Sovereign Nations

The Fourteenth Amendment to the U.S. Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." In the past, lawyers have argued that legislation that grants exclusive rights to Indian tribes confers an illegal preference on one racial group and not on others or, conversely, illegally discriminates against racial groups other than American Indians.

Those arguments, however, reflect a misapprehension of the federal equal protection doctrine. That doctrine plainly establishes a distinction between race-based legislation, on the one hand, and laws that address the rights of federally recognized Indian tribes on the other.

Federally recognized Indian tribes, unlike racial classes, are sovereign or quasi-sovereign nations. The Constitution expressly empowers Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Constitution of the United States, Article I, Section 8, clause 3.

For these reasons, when reviewing laws that contain Indian classifications for compliance with equal protection requirements, the Supreme Court consistently has applied a "rational basis" standard of review, rather than the "strict scrutiny" that it might apply to invidious race-based laws. [FN12] Congress and the Supreme Court also have identified compelling federal interests that support special legal treatment of recognized tribes. In light of this doctrine, as discussed more fully below, we contend that the Casino Law does not violate federal equal protection guarantees although it arguably grants special rights to Indian tribes.

'Rational Basis'

The Supreme Court consistently has applied rational basis scrutiny to Indian classifications. In the leading case of Morton v. Mancari, 417 U.S. 535, 94 S. Ct. 2474 (1974), the Supreme Court addressed whether an employment preference provided to Indians by the federal Bureau of Indian Affairs (the BIA) could withstand the Court's equal protection scrutiny. The Court recognized that classifications dealing with Indian tribes are not truly "racial" classifications at all, but are in fact "political" classifications because they distinguish between individuals based upon whether they are or are not members of federally recognized Indian tribes. Id. at 2484 & n.24.

"Contrary to the characterization made by appellees, this preference does not constitute 'racial discrimination.' Indeed, it is not even a 'racial' preference." Id. "The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." Id.

The Court observed that the preference was also "reasonably and directly related to a legitimate, nonracially based goal." Id. Indeed, the Court in Mancari had recited a number of such goals.

The federal policy of according some hiring preference to Indians in the Indian service dates at least as far back as 1834. Since that time, Congress repeatedly has enacted various preferences of the general type here at issue. The purpose of these preferences, as variously expressed in the legislative history, has been to give Indians a greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life.

Id. The Court emphasized the explicit and implicit Constitutional basis for Congress' policy affording Indians their unique legal status. Id. at 2483.

The Court observed that Congress intended tribal Indians living on or near reservations to benefit from special legislation and that such laws could not be considered invidious racial discrimination in light of the articulated policies and constitutional foundations supporting them. "Literally every piece of legislation dealing with Indian tribes and reservations ... singles out for special treatment a constituency of tribal Indians living on or near reservations." Id. "If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." Id. at 2483-84. The Court upheld the BIA preference under its rational basis standard of review, reasoning that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." Id. at 2485.

Indians Rights Case Law

Courts similarly have upheld other Indian classifications under a rational basis standard of review. See, e.g., Rice v. Cayetano, 528 U.S. 495, 518-20, 120 S. Ct. 1044, 1057-58 (2000) ("[A]s we have established in a series of cases, Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs"); Narragansett Indian Tribe v. National Indian Gaming Commission, 158 F.3d 1335, 1339-42 (D.C. Cir. 1998) (upholding a federal law that interpreted the IGRA in a way that excluded the Narragansetts from the right to engage in gaming); Barona Group v. American Management & Amusement, 840 F. 2d 1394, 1406 (9th Cir. 1987) ("It is well settled that federal legislation with respect to Indian tribes ... is not based upon impermissible racial classifications").

The Supreme Court also has reviewed under the rational basis standard state laws addressing the rights of Indians. In Washington v. Confederated Bands, 439 U.S.

463, 99 S. Ct. 740 (1979), the Court reviewed state legislation [Chapter 36] whose "most significant feature was its provision for the extension of at least some [state] jurisdiction over all Indian lands within the State, whether or not the affected tribe gave its consent." Id. at 748.

In its effort to have the Washington law stricken, the Yakima Nation of Indians argued that "the [Indian] classifications implicit in Chapter 36 are racial classifications, 'suspect' under [prior Supreme Court precedent] that cannot stand unless justified by a compelling state interest." Id. at 761.

The Court rejected the Yakima's argument. "It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians." Id. "States do not enjoy this same unique relationship with the Indians, but Chapter 36 is not simply another state law. It was enacted in response to a federal measure [Public Law 280] explicitly designed to readjust the allocation of jurisdiction over Indians." Id. "For these reasons, we find the argument that such classifications are 'suspect' an untenable one." Id. See also American Legion Post No. 49 v. Hughes, 120 N.M. 255, 901 P.2d 186 (1994) (upholding a state law that was enforced only against non-Indians).

In a recent decision in the case of American Greyhound Racing, Inc. v. Hull, 146 F. Supp. 2d 1012 (D. Ariz. 2001), the Court addressed directly the constitutionality of state legislation granting exclusive gaming rights to Indian tribes. "The Plaintiffs contend that if the Governor, pursuant to [Arizona law], gives tribes exclusive rights to conduct commercial slot machine, keno and blackjack gaming in Arizona, such exclusivity rests entirely on a racial distinction, in violation of federal equal protection principles." Id. at 1074. The court rejected plaintiffs' argument. The Court characterized the issue as "whether [the Arizona statute], if read to grant tribes casino gaming rights not allowed to others, is 'reasonably designed to further the cause of Indian self-government.'" Id. at 1075.

The Court held that "[t]he limitation of such gaming to tribes on tribal lands is sufficiently related to Indian sovereignty over tribal lands to satisfy Mancari's test." Id. at 1077.

While the courts have held that Indian classifications are political classifications subject only to rational basis scrutiny, they have recognized that the federal interests at stake are more than merely "legitimate" federal interests. Congress and the courts have characterized the federal interests supporting Indian gaming in particular as "important," "compelling" and "overriding." California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S. Ct. 1083, 1092, 1095 (1987) (characterizing "Indian sovereignty," "Indian self-government," "tribal self-sufficiency" and "[tribal] economic development" as "important" and "compelling" federal interests).

Writing for the Court, Justice White emphasized the tight relationship between these interests and Indian gaming.

The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the

major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members. The tribes' interests obviously parallel the federal interests.

Id. at 1093. The IGRA, passed into law in 1988, established a federal statutory basis for the operation of gaming by Indian tribes "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1). Congress also sought "[to] ensure that the Indian tribe is the primary beneficiary of the gaming operation" and "to protect such gaming as a means of generating tribal revenue." 25 U.S.C. 2702(2)-(3).

Conclusion

If New York's Casino Law were challenged on federal equal protection grounds, it appears that the court would analyze the Casino Law pursuant to the foregoing principles. The Casino Law would be subject to the rational basis standard of review and, we believe, would be upheld against the argument that it is an unconstitutional race-based law.

The Casino Law promotes tribal economic development, tribal self-sufficiency and strong tribal government. At the same time, the Casino Law opens what may amount to a four billion dollar annual market to a broad spectrum of companies - large and small - while providing additional employment and bolstering New York's languishing economy.

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FN1. Senate Bill 5828, Assembly Bill 9459, signed into law by the Governor on or about Oct. 31, 2001.

FN2. "Senecas Put Off Vote On Gambling Compact, Possibly Until Next Year: President," The Canadian Press, Nov. 9, 2001; "Poll: Majority of New Yorkers Favor Indian-Owned Casinos," Associated Press Newswires, Nov. 15, 2001.

FN3. Casino Law, Part C, 1 (amending tax law 1617-a).

FN4. "Competition Fierce for Stake in New York Gambling Market," The New York Times, Dec. 17, 2001.

FN5. Id.

FN6. Id.

FN7. The verified complaint is captioned Joseph Dalton, et al. v. Hon. George Pataki, Governor of the State of New York, et al. and bears Index No. 719-02.

FN8. The authors do not assess in this article the merits of the Dalton Complaint except insofar as it alleges that the Casino Law is an illegal race-based

classification under the federal equal protection doctrine.

FN9. McKinney's Consolidated Laws of New York, Constitution of the State of New York, Article I - Bill of Rights, 9; see also McKinney's Penal Law 225.00, et seq. (Gambling Offenses).

FN10. Casino Law, Part B, 2 (amending the executive law by adding new 12).

FN11. Casino Law, Part B, 2 (amending the executive law by adding new 12).

FN12. Adarand Constructors, Inc. v. Minetta, 2001 WL 1488214, _____ U.S. ¶ y(5) 6D, ¶y(5) 6D S. Ct. ¶y(5) 6D (Nov. 27, 2001), quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S. Ct. 2097 (1995).

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