

No. \_\_\_\_\_

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In the Supreme Court of the United States

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ARNOLD SCHWARZENEGGER, GOVERNOR OF CALIFORNIA AND  
THE STATE OF CALIFORNIA,

*Petitioners,*

v.

RINCON BAND OF LUISENO MISSION INDIANS OF THE RINCON  
RESERVATION, A/K/A RINCON SAN LUISENO BAND OF  
MISSION INDIANS A/K/A RINCON BAND OF LUISENO INDIANS,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

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**QUESTION PRESENTED**

In 1999, the State of California and sixty-one federally recognized tribes entered into virtually identical tribal-state class III gaming compacts (Compacts) under the authority of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (IGRA). The Compacts allow those tribes to operate slot machines if they have been issued licenses for those devices from a prioritized and limited license pool established by the Compacts, or if they have obtained a compact amendment allowing them to operate slot machines without reference to that license pool. The question presented is:

May the asserted ability of a court of appeals to resolve inconsistent district court decisions on the same claim for relief be relied upon to conclude that an absent person need not be joined under Federal Rule of Civil Procedure 19(a)?

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## PETITION FOR A WRIT OF CERTIORARI

Arnold Schwarzenegger, Governor of California and the State of California appearing by and through Edmund G. Brown Jr., Attorney General of California, respectfully petition this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

### OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, at 1-4) is unreported. The opinion of the district court is unreported. (App. C, *infra*, at 7-18.)

### JURISDICTION

The judgment of the court of appeals was entered on August 8, 2008. A petition for rehearing was denied on November 14, 2008. (App. B, *infra*, at 5-6.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

### STATUTORY PROVISIONS INVOLVED

The pertinent statutory provision, specifically Federal Rule of Civil Procedure 19 is set forth in an appendix to this brief. (App. M, *infra*, at 290-92.)

### STATEMENT

In 1999, the State of California (State) and sixty-one federally-recognized tribes entered into class III gaming compacts (the Compacts) that provided the tribes the right to operate slot machines and certain banked and percentage card games free of non-tribal competition for twenty years. (See, <http://www.cgcc.ca.gov/compacts.asp>; App. J, *infra*, at 127-85.)

Specifically, the Compacts allow each tribe to operate up to 350 slot machines or the number of slot machines that tribe was operating on September 1, 1999, whichever is greater. (App. J, *infra*, at 135-6.) In addition, the Compacts provide that the tribes may operate additional slot machines if they are able to obtain licenses for those devices from a license pool. (*Id.* at 137.)

The Compacts limit the number of available licenses according to a formula and require that the tribes pay specified fees in consideration of receiving such licenses. (App. J, *infra*, at 137.) They also establish a priority system for the issuance of these licenses. (*Id.* at 138-39.) The California Gambling Control Commission (Commission), as the trustee of the fund into which such license fees are paid, calculated the number of available licenses, and utilized the priority system established by the Compacts to issue licenses to tribes that applied for them, until the available licenses were exhausted. From that point onward, the Commission utilized the Compacts' priority system to issue licenses that became available through the return or relinquishment of previously-issued licenses to the license pool. Other than through acquisition of such licenses under the Compacts' priority system, tribes seeking to operate additional slot machines were required to obtain the right to operate those machines through a compact amendment. (App. J, *infra*, at 139; 181.)

After the license pool was depleted, the Governor and various tribes commenced compact amendment negotiations. In those negotiations, the tribes sought to obtain the right to operate slot machines other than through issuance of licenses by the Commission from the license pool established by the Compacts. In 2004, the Governor and five tribes arrived at an agreement on certain amendments to the Compacts, (see, <http://www.cgcc.ca.gov/compacts.asp>.) subsequently



ratified by the California Legislature under provisions of California law and approved by the Secretary of the Interior under IGRA. In 2007, compact amendments arrived at with several additional tribes in 2006 became effective. (*Id.*) The amendments allowed the tribes to operate additional slot machines without licenses, increased the period during which the tribes' slot machines could be operated and provided a monetary remedy in the event non-tribal class III gaming is permitted in California. In return, the tribes agreed: (a) to increase their revenue sharing contributions to the State over that which was required under the Compacts; (b) to mitigate adverse environmental impacts stemming from their casino operations; and (c) to protect the health and safety of patrons and employees through a series of regulatory measures not found in the Compacts. (See, generally, a 2004 compact amendment, App. K, *infra*, at 186-230 and a 2007 compact amendment, App. L, *infra*, at 231-89.)

The terms of these compact amendments render the operation of slot machines under the amendments more costly to the signatory tribes than under the Compacts' license structure. (E.g., compare 1999 Compact per device costs, App. J, *infra*, at 138; 140 with per device costs in a 2004 amendment, App. K, *infra*, at 188-90 and in a 2007 amendment, App. L, *infra*, at 233-39.)

The Rincon Band of Luiseno Mission Indians (Rincon) filed suit against Governor Schwarzenegger and the State for breach of compact on the basis of the Commission's alleged miscalculation regarding the number of available slot machine licenses. (App. A, *infra*, at 2.)

In separate suits, the San Pasqual Band of Mission Indians (San Pasqual) and the Cachil dehe Band of Wintun Indians of the Colusa Community (Colusa), likewise, sued the State for breach of compact based upon a claim the Commission had

miscalculated the number of licenses available. (App. G, *infra*, at 92; App. D, *infra*, at 26.)

All three suits were dismissed by three separate federal district judges under Rule 19 on the ground that the other tribes that were signatories to the Compacts were necessary (required)<sup>1</sup> parties that could not be joined because of their tribal sovereign immunity. The district court in the *Rincon* suit concluded that the absent tribal signatories to the Compacts were required because the State faced the risk of inconsistent obligations with respect to the number of slot machine licenses available under the Compacts. (App. C, *infra*, at 12.) The district court in the *Colusa* suit determined that the absent tribes were required, in part, because the Commission could face inconsistent obligations from multiple suits on the same claims for relief with respect to the number of available slot machine licenses. (App. F, *infra*, at 83.)

The district court in the *San Pasqual* suit also determined that the absent tribes were required parties because the State faced the possibility of inconsistent obligations. In addition, it ruled that the five tribes with amended compacts had a contract-derived interest in any calculation of the maximum number of slot machines that a signatory tribe could operate without a compact amendment. (App. I, *infra*, at 112; 118.)

Each district court decision was appealed to the Ninth Circuit. The *Colusa* and *Rincon* appeals were not consolidated, but were argued on the same day. (App. A, *infra*, at 1; App. E, *infra*, at 47.) The Ninth Circuit did not permit oral argument on the *San Pasqual* appeal. (App. G, *infra*, at 92.) The Ninth Circuit issued a decision certified for publication in

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<sup>1</sup> The language of Rule 19 has been amended since the district court decisions. The word "required" replaces the word "necessary" in Rule 19(a).

the *Colusa* appeal, in which it reversed the district court's decision to dismiss each of Colusa's breach of compact claims for relief. (App. E, *infra*, at 48-49.) The Ninth Circuit held that the district court had abused its discretion in finding the absent tribes were required parties. (*Id.* at 56-57.) The Ninth Circuit then issued unpublished memorandum decisions in the *Rincon* and *San Pasqual* appeals in which it reversed the district court decisions based on its decision in the *Colusa* appeal. (App. A, *infra*, at 3; App. G, *infra*, at 93.)

The Ninth Circuit denied subsequent petitions for rehearing filed in the *Colusa*, *Rincon* and *San Pasqual* appeals (App. D, *infra*, at 21; App. B, *infra*, at 6; App. H, *infra*, at 94), but did amend its decision in the *Colusa* appeal on October 24, 2008. (App. D, *infra*, at 20-21.) That amendment did not alter the Ninth Circuit's original holding that the absent tribes were not required parties.

The Ninth Circuit held that the State would not be subject to a significant risk of inconsistent obligations within the meaning of Rule 19(a) with respect to the number of slot machine licenses that could be issued because "should different district courts reach inconsistent conclusions with respect to the size of the license pool created under the 1999 Compacts, such inconsistencies could be resolved in an appeal to this court." (App. D, *infra*, at 35 n.12.)

#### REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision warrants this Court's review for the same reason the Ninth Circuit's decision in the *Colusa* case warrants review.<sup>2</sup> Review is appropriate because the appellate

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<sup>2</sup> The State filed a petition for writ of certiorari in *State of California et al v. Cachil dehe Band of Wintun Indians of the*  
(continued...)

court's decision conflicts with the established construction of a rule of civil procedure federal courts must routinely apply in thousands of cases each year.

The Ninth Circuit's decision undermines a fundamental purpose this Court and other circuits have identified as underlying Rule 19. That purpose is to avoid exposing a party to the possibility of facing inconsistent obligations stemming from multiple suits on the same claim for relief in different actions by requiring the joinder, under Rule 19(a), of absent parties that might bring the same claim in a different action.

Absent this Court's review, the Ninth Circuit's decision could create severe strains in the efficient administration of justice throughout the country by inundating already overburdened district courts with multiple suits raising the same claim for relief. Governor Arnold Schwarzenegger and the State, therefore, respectfully request that this Court hold this petition pending disposition of the petition for writ of certiorari filed in *State et al. v. Cachil dehe Band of Wintun Indians of the Colusa Indian Community*, No. 08-931 and, if that petition is granted, grant and hold this petition pending disposition of that case.

## DISCUSSION

### THE NINTH CIRCUIT'S REFUSAL TO RECOGNIZE THE STATE'S EXPOSURE TO INCONSISTENT OBLIGATIONS, WARRANTS THIS COURT'S REVIEW

As this Court and other circuits have found, the "social interest in the efficient administration of

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(...continued)

*Colusa Indian Community*, No. 08-931 on January 22, 2008.

justice and the avoidance of multiple litigation is an interest that has traditionally been thought to support compulsory joinder of absent and potentially adverse claimants under Rule 19(a)." *Republic of the Philippines v. Pimentel*, 128 S. Ct. 2180, 2193 (2008) (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 737-38 (1977)) (internal quotation marks omitted); *Keweenaw Bay Indian Community v. Michigan* 11 F.3d. 1341 (6th Cir. 1993)

Notwithstanding these precedents, the Ninth Circuit's decision assiduously avoids finding the absent tribes to be required parties through its conclusion that even though the State and the Commission might be subject to inconsistent determinations regarding the number of slot machine licenses authorized by the Compacts, the absent tribes are not required parties because the Ninth Circuit could resolve any such inconsistencies on appeal. (App. D, *infra*, at 35 n.12.) This conclusion, unsupported by any precedent, is inconsistent with *Republic of the Philippines v. Pimentel*, 128 S. Ct. 2180, 2193 (2008) in which this Court held that it "would not further the public interest in settling . . . dispute[s] as a whole because [the absent parties] would not be bound by . . . [a] judgment in an action where they were not parties." *Id.*

The Ninth Circuit's decision, therefore, rests on two presumptions, both of which are erroneous. First, it assumes that an appellate court could bind absent tribal signatories to the Compacts to a judgment. Second, it speculates that all claims for relief regarding the maximum number of slot machine licenses authorized by the Compacts whenever and wherever they are brought either will be appealed in a manner that allows all such appeals to be considered at the same time, or that an appellate court will follow prior decisions on the same question regarding later appeals.

While, in this case, the Ninth Circuit easily conformed the appellate results of three trial court

decisions which had not yet been heard on the merits, there is no guarantee of such a result in the future. Thus, the possibility of inconsistent appellate decisions on the same claim for relief exist in cases which do not fortuitously come before the same appellate court on the same issue, in time to permit simultaneous confirmation of conflicting or inconsistent judgments below.

Further, if a subsequent appellate panel were to consider itself bound by a prior appellate decision on the same claim, irrespective of the merit of arguments advanced in favor of a different conclusion, litigants would be deprived of due process. If future litigants perceived the possibility of such an outcome, individuals and entities that otherwise would be immune from suit or otherwise not subject to joinder could be forced to waive their immunity in order to protect their interests.

### CONCLUSION

For the foregoing reasons, petitioners respectfully request that this petition be held pending this Court's disposition of the petition for writ of certiorari now pending in *State et al. v. Cachil dehe Band of Wintun Indians of the Colusa Indian Community*, No. 08-931 and, if that petition is granted, grant and hold this petition pending the Court's disposition of the petition in that case.

Dated: February 9, 2009

Respectfully submitted

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