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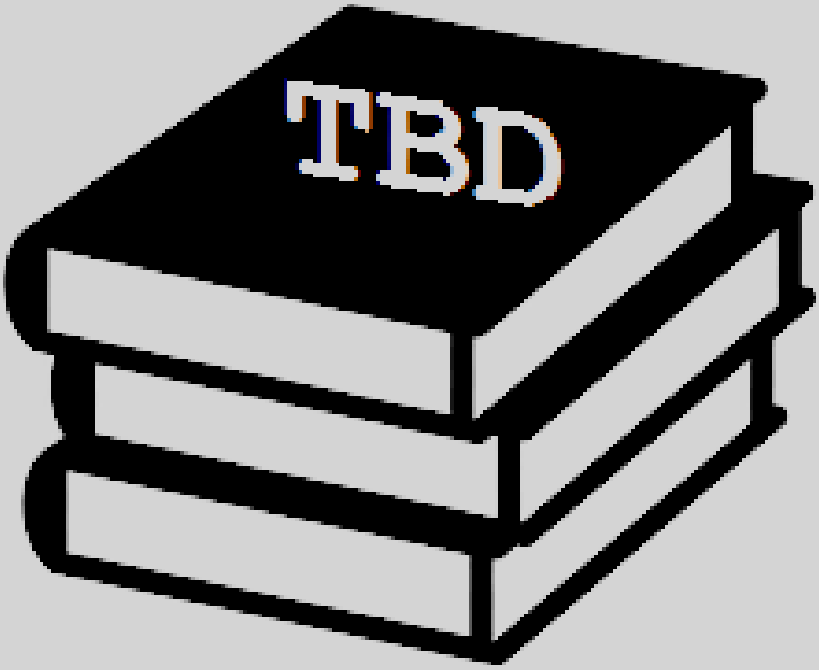

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IN THE SUPREME COURT OF FLORIDA
Case No. _____

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

Petitioners,

v.

CHARLIE CRIST, in his capacity as Governor of Florida,

Respondent.

_____/

PETITION FOR WRIT OF QUO WARRANTO

Petitioners, the Florida House of Representatives and Marco Rubio, individually and as Speaker of the Florida House of Representatives, respectfully petition this Court for a Writ of Quo Warranto directed to Respondent, Charlie Crist, in his capacity as Governor of Florida, and allege as follows:

BASIS FOR INVOKING JURISDICTION

This Court has authority to issue a Writ of Quo Warranto under Article V, Section 3(b)(8), Florida Constitution, and Rule 9.030(a)(3), Florida Rules of Appellate Procedure. This Petition is properly filed as an original action in this Court because Respondent is a state officer whom Petitioners claim is exercising

his executive powers in an unconstitutional manner to enter a compact on behalf of the State of Florida with the Seminole Tribe of Florida.

As this Court has held, an original jurisdiction proceeding is appropriate where "the functions of government would be adversely affected absent an immediate determination by this Court," where there were no material facts at issue and where the constitutional issue would ultimately reach the Supreme Court. *Chiles v. Phelps*, 714 So. 2d 453, 457 n.6 (Fla. 1998) (citing *Dickinson v. Stone*, 251 So. 2d 268 (Fla. 1971)). This Court has held that quo warranto is an appropriate means of enforcing the public right of having the Governor or other government officials exercise their powers in a constitutional manner. *See Martinez v. Martinez*, 545 So. 2d 1338, 1339 n.3 (Fla. 1989); *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404, 411 (Fla. 1998) (examining the authority of capital collateral counsel to represent inmates in post-conviction proceedings); *State ex rel. Merrill v. Gerow*, 79 Fla. 804, 85 So. 144, 145 (1920) (quo warranto is a proper means to challenge a public officer's attempt to exercise some right or privilege derived from the State); *cf. Phelps*, 714 So. 2d at 456 ("members of the public seeking enforcement of a public right may obtain relief through quo warranto"). These criteria for quo warranto are met here.

Petitioners are the Florida House of Representatives and the Speaker of the House of Representatives. The Florida House and its presiding officer are

appropriate parties to assert the House's interests in litigation affecting the Legislature's authority. *See Coalition for Adequacy v. Chiles*, 680 So. 2d 400 (Fla. 1996). Because this case involves allegations of encroachment by the Governor on legislative powers, these Petitioners are entitled to assert their rights on their own behalf and on behalf of the Florida Legislature. This Court has assumed jurisdiction to resolve disputes between the executive and legislative branches. *See, e.g.*, *Phelps*, 714 So. 2d at 456; *Florida House of Representatives v. Martinez*, 555 So. 2d 839, 843 (Fla. 1990) (allowing mandamus action by House to challenge vetoes); *Martinez v. Martinez*, 545 So. 2d at 1338 (quo warranto by House member to challenge governor's inclusion of issues in consecutive special sessions); *Florida Senate v. Graham*, 412 So. 2d 360 (Fla. 1982) (action by Senate to challenge time limits to special apportionment sessions).

STATEMENT OF FACTS

On November 14, 2007, the Governor entered into a putative Compact (hereinafter, "the Compact") between the State of Florida and the Seminole Tribe of Florida. [*See* Compact Between the Seminole Tribe of Florida and the State of Florida, at Appendix A] The Compact is intended to authorize and regulate Class III gaming in seven tribal casinos located in Okeechobee, Coconut Creek, Hollywood, Immokalee, Clewiston, and Tampa. The Governor affirms in the Compact that he has the power to bind the State of Florida.

The Compact alters Florida public policy in a number of ways.[1] It authorizes gaming that is prohibited by state law and the state constitution. It regulates health, safety and morals at the seven casinos. It raises revenues for the state through a revenue sharing arrangement that penalizes the State of Florida for future policy changes. It establishes a regulatory oversight mechanism to be undertaken by the Governor or his designee to ensure enforcement of the regulatory and revenue scheme. It imposes regulatory assessments. It alters the sovereign immunity of the State of Florida by virtue of its contractual nature. It regulates and limits tort claims and workers compensation claims arising out of unspecified activities at the casinos. It makes exceptions to the public records laws of the state. It purports to bind the state for twenty-five years.

The Florida Legislature has not authorized the Compact. Instead, the Governor claims that the Compact is entered under his authority to execute the federal Indian Gaming Regulatory Act (hereinafter, "IGRA"), 25 U.S.C. § 2701 *et seq*. IGRA sets forth the comprehensive statutory scheme through which Congress has chosen to allocate responsibility for regulating gaming on Indian lands.

IGRA separates gaming into three classes of escalating stakes. Class I gaming consists of social games played for minimal value and games played

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[1] *See Compact*, at Appendix A; *see also infra* Part II of Argument (discussing these changes to Florida law).

during traditional Indian ceremonies. 25 U.S.C. § 2703(6). Class II games are bingo and "non-banked" card games, i.e. games in which participants play against each other rather than against the house. 25 U.S.C. § 2703(7). Class III covers all other forms of gaming, including slot machines, blackjack, and lotteries. 25 U.S.C. § 2703(8). The Compact, and therefore this case, involves only Class III gaming.

IGRA regulates Class I and Class II gaming on Indian lands in a manner that pre-empts state law. 25 U.S.C. § 2710(a) & (b). By contrast, IGRA mandates that Class III gaming on Indian lands is lawful only if, among other things, such gaming is conducted pursuant to a tribal-state compact that has been approved by the U.S. Department of the Interior. 25 U.S.C. § 2710(d). Such compacts are authorized to respect the sovereignty and governmental interests of both state and tribe. 25 U.S.C. § 2710(d)(3)(c).

The present legal relationship between the State of Florida and activities on Indian lands would be altered by the newly signed Compact. Except where this has been specifically pre-empted by federal law, Florida is a state that has full civil and criminal jurisdiction on Indian lands. *See* FLA. STAT. § 285.16; *see State v. Billie*, 497 So. 2d 889, 891 (Fla. 2d DCA 1986). Federal law expressly incorporates, and makes applicable on Indian lands, state criminal law applicable to Class III gaming that is not authorized under a compact. *See* 18 U.S.C. § 1166. Although tribal members are thus subject to state law on or off of Indian lands, the

Seminole Tribe of Florida enjoys sovereign immunity from the exercise of state authority. The Compact will alter the legal landscape in all of these areas.

NATURE OF THE RELIEF SOUGHT

Petitioners respectfully request this Court to issue a Writ of Quo Warranto to direct the Respondent to justify his authority to bind the State in a Compact with the Seminole Tribe without legislative authorization or ratification, and to issue any order necessary to clarify that the Compact is not binding and enforceable unless and until it is ratified by the Legislature.

IGRA sets a forty-five day deadline under which a submitted compact must be approved or disapproved by the Secretary of the Interior. 25 U.S.C. § 2710(d)(8)(C) (failure of the Secretary to approve or disapprove will be treated as approval of a compact). It is Petitioners' understanding that the Seminole Tribe of Florida and the Governor submitted the Compact to the Secretary on November 14, 2007. Therefore, this Court is also respectfully requested to consider this matter expeditiously and render a decision accordingly.

ARGUMENT

This case is about the Governor's encroachment on the Legislature's law- and policy-making authority, in violation of our Constitution's strict separation of powers provision. Without any constitutional or statutory authority, the Governor has purported to bind the State to a 25-year Indian gaming compact that, among

other things, authorizes types of gambling that are currently illegal everywhere in Florida and restricts the Legislature's discretion in myriad ways. Every state high court to have considered the issue—five courts in all—has concluded that a governor may not bind a state to an Indian gaming compact without legislative authorization or ratification. This Court must do the same.

I. Florida's strict separation of powers provision prohibits the Governor from encroaching on the Legislature's law- and policy-making authority.

The power to negotiate and bind the State in a gaming compact with an Indian tribe directly implicates the strong separation of powers clause under the Florida Constitution.[2] This Court has consistently held that the Florida Constitution's separation of powers standard is more stringent than that of the United States Constitution and of many other states.[3]

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[2] Article II, Section 3, Florida Constitution, provides:
The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

[3] *See, e.g.*, *Askew v. Cross Keys Waterways*, 372 So. 2d 913, 924-25 (Fla. 1978) (textual incorporation of separation of powers provision in Florida Constitution provides a stricter standard than that in other states or under the U.S. Constitution); *cf. State v. Cotton*, 769 So. 2d 345, 353 (Fla. 2000) (distinguishing Florida's strict separation of powers from that employed in other states); *Avatar Dev. Corp. v. State*, 723 So. 2d 199, 201-02 (Fla. 1998) (strict compliance with separation of powers required in the context of delegation of legislative power).

The roles of the legislative and the executive branches are well-defined. Article III, Section 1, Florida Constitution, states that "[t]he legislative power of the state shall be vested in a legislature." The Legislature is the branch of government given the power to make fundamental determinations of policy in the state of Florida.[4] The lawmaking power of the Legislature "is limited only by the express and clearly implied provisions of the federal and state Constitutions."[5] The Legislature has plenary law- and policy-making power.

The Governor, as head of the executive branch, is charged with ensuring that "the laws be faithfully executed." *See* FLA. CONST. art. IV, § 1(a). This provision is not an endowment of policy-making power but rather the imposition of a duty. The provision must be seen as a limitation of power.[6] In fact these executive powers are explicitly defined by the Constitution,[7] and none confers unilateral

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[4] *See, e.g.*, *Gordon v. State*, 608 So. 2d 800, 801 (Fla. 1992) (referring to the Legislature as "the ultimate policy-maker under our system").

[5] *State* ex rel. *West v. Butler*, 70 Fla. 102, 123, 69 So. 771, 777 (1915); *see also Peters v. Meeks*, 163 So. 2d 753, 755 (Fla. 1964) (citing *Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735, 741-42 (Fla. 1961) (the Florida Constitution is a limitation on the power of the State); *Cawthon v. Town of De Funiak Springs*, 88 Fla. 324, 326, 102 So. 250, 251 (1924).

[6] *See Cawthon*, 88 Fla. at 326, 102 So. at 251 ("the Constitution affords limitations upon the powers of the Legislature as well as upon the executive and judicial departments.").

[7] *See, e.g.*, FLA. CONST. art. IV, § 1(a) (supreme executive power; supervision of executive departments; command of state military forces; administrative and budget responsibilities; ability to seek information from state and local officers); art. IV, § 1(f) (ability to fill vacancies in state and county offices by appointment); art. IV, § 7 (ability to suspend officials for misbehavior or

authority to negotiate and enter state-tribal compacts.

With regard to a useful definition of "executive powers," these can be described as:

> Authority vested in executive department of federal or state government to execute laws. The enumerated powers of the President are provided for in Article II of the U.S. Const. Executive powers of governors are provided for in state constitutions. The executive powers vested in governors by state constitutions include the power to execute the laws, that is, to carry them into effect, as distinguished from the power to make the laws and the power to judge them.
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> *Black's Law Dictionary* (6th ed. 1990).

The Legislature's primacy in the area of policy-making is perhaps best illustrated by the case law on "non-delegation." These cases establish that fundamental policy-making is restricted to the legislative branch, even when the Legislature wishes to involve the executive. The Florida Supreme Court has consistently overturned attempts by the Legislature to give away policy-making power to the executive branch. *See, e.g.*, *Chiles v. Children A, B, C, D, E & F*, 589 So. 2d 260, 264 (Fla. 1991) (power of Legislature includes the power "to declare what the law shall be," and cannot be delegated or usurped by another branch); *Askew v. Cross-Key Waterways*, 372 So. 2d at 925 ("fundamental and primary policy decisions shall be made by members of the legislature who are elected to

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criminal conduct); art. IV, § 8 (clemency powers); art. III, § 8(a) (ability to veto general laws and specific appropriations).

perform those tasks").

If the Legislature may not constitutionally give away its policy-making power, it follows *a fortiori* that the Governor may not take that power uninvited.

II. The Governor's attempt to bind the State to an Indian gaming compact violates the separation of powers clause of Article II, Section 3, Florida Constitution.

The Compact purports to allow and regulate Class III, or casino-type, gaming on Seminole tribal lands in Florida. The Compact works significant changes to Florida law and established policy in a number of specific ways:

- It authorizes Class III slot machines outside of Broward County;[8]
- It allows blackjack and other banked card games that are currently illegal throughout Florida;[9]
- It provides for collection of funds from tribal casinos for State purposes under a revenue-sharing agreement and penalizes the State for any expansion of non-tribal gaming;[10]

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[8] *See Compact* at Part III.E (defining "covered games").

[9] *See id.* at Part III.E (defining "covered games"). Banked games are completely different from other card games because the house is a player. In this regard they are distinguishable from other card games, such as poker, where players compete against each other. For this reason, the Legislature has chosen to treat banked games differently because the "bank" is a direct beneficiary in such games. STAT. §§ 849.086(12)(a), (15)(a); *see also infra* note 18 and accompanying text (discussing current statutory prohibitions against banked card games).

- It allows an exception to Florida's substantive right of access to public records for information dealing with Indian gaming;[11]
- It changes the venue of litigation dealing with individual disputes with the tribal casinos;[12]
- It sets procedures for tort remedies occurring in certain circumstances;[13]
- It waives sovereign immunity to the extent that it creates enforceable contract rights between the State and the Tribe;[14] and
- It establishes a regulatory mechanism to be undertaken by the Governor or his designee.[15]

All of these provisions represent new state policies, and several directly conflict with Florida statutes, including criminal statutes.

Gambling in Florida has traditionally been subject to constitutional and statutory prohibitions, as is reflected by Article X, Section 7, Florida Constitution, which forbids lotteries.[16] In 1986, a provision was added to allow the state lottery.

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[10] *See Compact* at Part XIV.A.
[11] *See id.* at Part VIII.B.
[12] *See id.* at Part XIII.D.
[13] *See id.* at Part VI.D.
[14] *See id.* at Part IX (defining contractual nature of the Compact); *cf.Pan-Am Tobacco Corp. v. Dept. of Corrections*, 471 So. 2d 4, 5-6 (Fla. 1985) (enforceability of contract rights required waiver of sovereign immunity).
[15] *See Compact* at Part III.T (defining "State Compliance Agency").
[16] This prohibition has been found in former constitutions. *See, e.g.*, Fla.

See FLA. CONST. art. X, § 15. In 2004, voters narrowly adopted Article X, Section 23, Florida Constitution, authorizing slot machines in certain pari-mutuel facilities in Broward and Dade Counties when approved by local referenda. In 2005 referenda, voters in Miami-Dade County rejected slot machines, but voters in Broward County approved slot machines for four pari-mutuel facilities in the county. Aside from the Class III slot machines permitted in Broward County, slot machines and other types of casino gambling are prohibited under Chapter 849, Florida Statutes, and most forms of gambling are either forbidden or regulated under that Chapter.[17]

The Compact most blatantly usurps legislative power by authorizing numerous card games that the Legislature has forbidden in all circumstances. The "banked" card games (*e.g.*, blackjack, baccharat and chemin de fer) proposed to be allowed under the Compact between the State and the Seminole Tribe are completely prohibited by the criminal law of Florida.[18] Under American

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Const. of 1868, art. IV, § 20; Fla. Const. of 1885, art. III, § 23. For a useful history of cases involving gambling in Florida, see *Greater Loretta Improvement Ass'n v. State* ex rel. *Boone*, 234 So. 2d 665 (Fla. 1970).

[17] Thus, for example, bingo has been authorized for charitable and community organizations. *See* FLA. STAT. § 849.0931.

[18] Section 849.085(2)(a), Florida Statutes, defines the only "penny-ante" card games currently authorized in cardrooms at parimutuel facilities. These are: "a game or series of games of poker, pinochle, bridge, rummy, canasta, hearts, dominoes, or mah-jongg." *Id.* So-called "banking games," however, are forbidden by Florida law, and made a first-degree misdemeanor for the first offense and a third degree felony for the second offense. *See* FLA. STAT. §§

constitutional jurisprudence, no executive officer has the authority to override or dispense with criminal law.

In fact, Congress in IGRA showed more respect for the state's public policy on gambling than the Governor has in the Compact. IGRA provides that "Class III gaming activities shall be lawful 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)(B). In other words, if a specific type of Class III gaming is illegal in a state, that type of gaming may not lawfully be included in a compact pursuant to IGRA.[19] Thus, in addition to being invalid

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849.086(12)(a), (15)(a). Banking games are defined as games "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." FLA. STAT. § 849.086(2)(b).

[19] As the Attorney General recognized in a recent opinion, federal courts have not required states, in negotiating state-tribal compacts, to allow specific games which the states have prohibited to their citizens. *See* Op. Att'y Gen. Fla. 2007-36 (2006) (explaining case law on 25 U.S.C. § 2710(d)(1)(B)); *see also Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1257 (9th Cir. 1994), *cert. denied sub nom.*, *Sycuan Band v. Wilson*, 521 U.S. 1118 (1997); *Citizen Band Potawatomi Tribe v. Green*, 995 F.2d 179, 181 (10th Cir. 1993) (rejecting as "patent bootstrapping" the argument that a compact can itself legalize a type of gaming that is otherwise illegal under state law); *Cheyenne River Sioux Tribe v. State of South Dakota*, 3 F.3d 273, 279 (8th Cir. 1993); *Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024, 1029 (2d Cir. 1990); *cf. American Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1067-68 (D. Az. 2001) ("The State must first legalize a game, even if only for tribes, before it can become a compact term."), *rev'd on other grounds*, 305 F.3d 1015 (9th Cir. 2002). The only Florida federal court to have considered this matter has rejected the view that "a state's public policy permitting individual Class III activities is somehow equivalent to permitting all Class III

due to the absence of legislative authorization or ratification, the Compact violates IGRA.

The revenue-sharing provisions of the Compact encroach on the "legislature's constitutional duty to determine and raise the appropriate revenue to defray the expenses of the state." *Chiles v. Children*, 589 So. 2d at 267 (citing Art. VII, § 1(d), Fla. Const.). In the Compact, the Governor took it upon himself to determine the appropriate balance between the extent of tribal gambling to be authorized and the amount of state revenue to be raised in return. Significantly, the Compact would restrict the Legislature's policy-making discretion in the future by forcing it to forego all revenue under the Compact if there is an expansion of non-tribal gambling outside of Broward or Miami-Dade Counties.[20]

The Compact also attempts to exempt casino activities from the full scope of Chapter 119, Florida Statutes, by introducing a delay in access to information *held by the State*, and requiring an automatic referral to a judge prior to the release of any information that the tribe considers "confidential and proprietary, or a trade secret." *See Compact*, at Part VIII.B. This restriction on access to public records contradicts the substantive rights guaranteed to Florida citizens by Article I, Section 24(a), Florida Constitution. Only the Legislature, acting under the process

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gaming activities." *Seminole Tribe of Florida v. State of Florida*, 1993 WL 475999, *8 (S.D. Fla. 1993).

[20] *See Compact* at Part XII.

established by Article I, Section 24(c), Florida Constitution, can exempt records from public access.[21]

Finally, a curious provision towards the end of the Compact might be interpreted as giving the Governor power to override a judicial finding that the Compact required legislative action. *See Compact*, at Part XIV.A. The purported effect seems to be that the Compact would permit the parties to the Compact (i.e. the State and the tribe) to continue activities held to be illegal by a court. The reason they could ignore court holdings is that the Compact has "deemed" those actions to be discretionary until authorized or prohibited by the Legislature. It thus seems that this provision, if not struck, claims authority to override or ignore a court decision.

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[21] To protect the important right of access to public records, the Constitution sets out a detailed process for exemptions, requiring: 1) a legislative finding of the specific public necessity justifying the exemption; 2) a narrowly-tailored exemption; and 3) a 2/3 super-majority vote to create the exemption. *See* FLA. CONST. art. I, § 24(c); *see also Halifax Hosp. Med. Ctr. v. News-Journal Corp.*, 724 So. 2d 567, 569 (Fla. 1999) (discussing the "exacting constitutional standard" under which access to public records may be limited). The infringement on this right by executive fiat, unaccompanied by any legislative action, must be struck down.

Furthermore, even where, as in the case of the Earnhardt Act, Section 406.135, Florida Statutes, provision is made for judicial hearings to decide if "good cause" is shown to justify access, this must be accompanied by standards and legislative authorization. *See Campus Communications, Inc. v. Earnhardt*, 821 So. 2d 388, 394-95 (5th DCA 2002), *rev. denied*, 848 So. 2d 1153 (Fla. 2003) (discussing the standards provided for a judge to apply the "good cause" provision in the Earnhardt Act).

Viewed in its entirety, the Compact is permeated with fundamental policy decisions, none of which was inevitable. Significantly, IGRA "does not guarantee an Indian tribe the right to conduct Class III gaming." *Texas v. United States*, 497 F.3d 491, 511 (5th Cir. 2007). Nor does IGRA specify how the state and an Indian tribe are to exercise their shared responsibility to regulate gaming on Indian lands. Rather, IGRA merely requires "the state" to negotiate in good faith to enter a compact and broadly describes the subjects that may be included in a compact. *See* 25 U.S.C. § 2710(d)(3). The Governor's act of negotiating and entering the Compact was tantamount to law-making.

The Compact overrides existing laws, raises revenue, and comprehensively regulates gaming by the Seminole Tribe. It is unmistakably legislative in nature. By purporting to bind the State to the Compact without legislative authorization or approval, the Governor has usurped the Legislature's authority and violated the separation of powers clause of the Constitution.

III. The high courts of all states considering the issue agree that a governor may not unilaterally bind a state to a gaming compact.

No Florida court has addressed whether the Governor may bind the State to an Indian gaming compact without legislative authorization or ratification. But the high courts of five states—Kansas, New Mexico, Rhode Island, New York, and Wisconsin—have considered the issue. Every one of them concluded that the

governor lacked the constitutional authority to unilaterally bind the state to an Indian gaming compact.[22]

The Wisconsin Supreme Court, the last of these courts to rule, acknowledged and concurred with "the consensus among courts that have looked at the issue, that committing the state to policy choices negotiated in gambling compacts constitutes a legislative function." *Panzer*, 680 N.W. 2d at 688. Similarly, New York's highest court concluded that Indian gaming compacts "necessarily make fundamental policy choices that epitomize 'legislative power.'" *Saratoga County*, 798 N.E. 2d at 1060.

The New Mexico Supreme Court's decision offers the most thorough and compelling analysis of the separation of powers issues presented here. The court gave three basic reasons for its conclusion that the governor had infringed on the legislature's constitutional authority: first, the compact restricted the legislature's discretion by providing that certain changes to the state's laws would terminate the tribe's obligation to make revenue-sharing payments; second, the compact purported to strike a "detailed and specific" regulatory balance between the state and the tribe, a balancing that "represents a legislative function;" and third, the

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[22] *See State* ex rel. *Stephan v. Finney*, 836 P.2d 1169, 1183-85 (Kan. 1992); *State* ex rel. *Clark v. Johnson*, 904 P.2d 11, 26-27 (N.M. 1995); *Narragansett Indian Tribe of Rhode Island v. State*, 667 A.2d 280, 282 (R.I. 1995); *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 798 N.E.2d 1047, 1060-61 (N.Y. 2003); *Panzer v. Doyle*, 680 N.W.2d 666, 696-97 (Wis. 2004).

compact "contravened the legislature's expressed aversion to commercial gambling" by authorizing the tribe to conduct types of gambling that were prohibited by state law. *See Johnson*, 904 P.2d at 23-24. As the previous discussion demonstrates, the compact at issue here encroaches on the Legislature's authority in exactly the same ways.

In broad terms, the Kansas Supreme Court based its rejection of the governor's unilateral action on the conclusion that "many of the provisions in the compact would operate as the enactment of new laws and the amendment of existing laws." *Stephan*, 836 P.2d at 1185. Much of the specific discussion in the court's opinion focused on the fact that, without any prior legislative authorization, the compact assigned the state's regulatory function to a division of the Kansas Lottery or to "such other agency of the State as the Governor may from time to time designate." *Id.* at 1182. The court considered this to be, in effect, "the creation of a new state agency by the executive branch." *Id.* at 1184.

In an apparent effort to avoid the same defect, the compact at issue here provides that the State's regulatory functions shall be performed by "the Governor or his designee unless and until [a regulatory agency] has been designated by the Legislature." *Compact* at Part III.T. This attempt to avoid a constitutional infirmity fails. At bottom, in the Compact the Governor has purported to assign himself a function—the regulation of tribal gaming and the monitoring of the

Tribe's payment obligations—that has not been authorized by the Constitution or the Legislature. It is unavoidable that, in the performance of that function, the Governor will impermissibly use personnel and resources without legislative approval.

Caselaw contrary to the state high court decisions just discussed is limited, distinguishable, and unpersuasive. Federal district courts in Mississippi, Louisiana and Oregon found that the governors of those states did have authority to negotiate such gaming compacts. *See Willis v. Fordice*, 850 F. Supp. 523 (S.D. Miss. 1994); *Langley v. Edwards*, 872 F. Supp. 1531 (W.D. La. 1995); *Dewberry v. Kulongoski*, 406 F. Supp. 2d 1136 (D. Or. 2005). In the Mississippi and Oregon cases, the courts relied at least in part on statutory delegations of authority to the governor. There is no comparable broad statutory delegation in Florida. The Louisiana district court approved the governor's action without any analysis of whether the entry of a compact constituted a legislative or an executive function. The Wisconsin Supreme Court later examined the Mississippi and Louisiana federal court decisions and found them either distinguishable or less well reasoned than the numerous state supreme court decisions rejecting unilateral action by a state's governor. *See Panzer*, 680 N.W. 2d at 687.[23]

[23] To the list of states which have rejected unilateral attempts by governors to impose compacts, should be added others which have also recognized or affirmed the need for legislative authorization. *See, e.g.*, *Taxpayers of Mich.*

Particularly in light of Florida's strict separation of powers standard, this Court should join its sister high courts in holding that legislative authorization or ratification is necessary to bind the State to a gaming compact with the Seminole Tribe.

IV. Nothing in Florida's Constitution or laws authorizes the Governor to bind the State to a gaming compact.

Supporters of broad executive power to negotiate state-tribal compacts point to one provision in Article IV, Section 1(a), Florida Constitution, that gives the Governor power to "transact all necessary business with the officers of government" as giving authority to the Governor to transact business with federal and tribal government officers. This reading is mistaken. The use of the term "officers" in Article IV, Section 1(a) always involves state, county or municipal officers. This is likewise true for the use of the term "office" or "officer" in other parts of Article IV, as with the suspension and appointment of state and local

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Against Casinos v. Michigan, 657 N.W.2d 503, 514-17 (Mich. Ct. App. 2002), *rev'd*, 685 N.W.2d 221 (Mich. 2004), *cert. denied*, 125 S. Ct. 1298 (2005) (upholding Michigan compacts ratified by the state legislature by resolution); *Salt River Pima-Maricopa Indian Community v. Hull*, 945 P.2d 818, 822 (Az. 1997) (passage of state law properly delegated power to the governor to enter into state-tribal compacts).

In California, a statute passed by initiative to give the governor authority to enter into compacts was found unconstitutional. *See Hotel Employees and Restaurant Employees Int'l Union v. Davis*, 981 P.2d 990, 1002-09 (Cal. 1999) (striking down California compacts under constitutional provision that forbade casinos). As a result, the California constitution was amended in 2000 to permit the state-tribal compacts. *See* CAL. CONST. art. IV, § 19(f).

officers under Article IV, Section 7. There is no suggestion that officers of other sovereign powers are included here or anywhere in Article IV.[24]

Clearly, the "necessary business" clause is a narrow grant of authority to deal with state officers. As the Kansas Supreme Court concluded in analyzing a similarly-worded provision of Kansas law, "the transaction of business connotes the day-to-day operation of government under previously established law or public policy." *Finney*, 836 P.2d at 1178.[25] Because Congress, in adopting IGRA, deferred to state and tribal governments to work out their respective interests through the compacting process, a governor unilaterally entering a compact could not plausibly claim to be "executing" policy decisions already made by Congress or the Legislature. He would be creating his own policy.

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[24] The use of the term "officers" as referring to state and local officers is made more evident by the first sentence of Article IV, Section 1(a), Florida Constitution, which makes the Governor the commander-in-chief "of all military forces of the state not in active service *of the United States*." (emphasis added) The use of the term "of the United States" shows that the Florida Constitution is able to make clear when it refers to the Federal government.

[25] *But see Dewberry v. Kulongoski*, 406 F. Supp. 2d 1136 (D. Or. 2005). *Dewberry* involved a challenged compact in Oregon, where a federal court interpreted a similar constitutional provision that authorized the governor to "transact business with officers of government" together with a specific statutory authorization for the governor to negotiate with other units of government, including the Indian tribes, as authorizing the governor's entry into a compact. *Id.* at 1154-55. The situation in *Dewberry* is distinguishable because the Legislature in Oregon had also explicitly authorized numerous Class III games by statute. *Id.* at 1151. In Florida, there is neither an explicit grant of authority to negotiate, nor a broad explicit legislative authorization for Class III games.

The Governor can find no support in the Florida Constitution for his overreach into the legislative sphere, and there is also no basis in Federal law for his actions. Congress could have imposed Class III gaming on the states under the Indian Commerce Clause,[26] but it did not choose to do so in enacting IGRA. Rather, it chose to respect the sovereignty of the states. When Congress chose not to impose gambling itself, the Tenth Amendment operates to forbid the federal government from commandeering the results of the compact negotiation process established by IGRA. As the U.S. Supreme Court has held, "It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. It is no more compatible with this independence and autonomy that their officers be 'dragooned' into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws." *Printz v. United States*, 521 U.S. 898, 928 (1997) (citations omitted).[27] Thus, the Governor may not take refuge in any claim that he

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[26] Duly enacted Federal law is the "supreme law of the land." U.S. CONST. art. VI, cl. 2. This is true where, as in the case of IGRA, a federal law draws upon enumerated powers in the U.S. Constitution, such as the Indian Commerce Clause. *See* U.S. CONST. art. I, § 8, cl. 3.

[27] Thus, under the Tenth Amendment jurisprudence, the federal government may not "command" states themselves to legislate or administer federal programs. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 188 (1992) ("The Federal Government may not compel the States to enact or administer a federal regulatory program."). The situation is, of course, different with regard to state

has been "conscripted" by the Federal government into enforcing or executing IGRA. IGRA does not direct any specific outcome of its good faith negotiations. The Governor is neither empowered nor compelled by IGRA to take upon himself the role of the State.

V. Florida's consistent practice in interstate compacts supports the conclusion that legislative authorization of an Indian gaming compact is required.

The tribal-state compacts contemplated by IGRA are similar to the interstate compacts authorized under Article I, Section 10, Clause 3 of the U.S. Constitution.[28] These have never been litigated in Florida,[29] so this Court has never addressed

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sovereignty where Congress, acting under the Taxing and Spending Clause of Article I, Section 8, conditions receipt of federal funds on certain state actions. In such cases, the choice remains with the states themselves to act or not. *See, e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 211-12 (1987) (no Tenth Amendment bar where Congress conditions receipt of federal funds on certain state actions).

[28] These contractual agreements between states have been used for a variety of purposes, including boundary definition, allocation of water resources, pollution control, jurisdiction of courts in criminal or civil matters, flood control, utility regulation, regional planning, and taxation. The general practice has been for these to be made or ratified by act of the state legislature. *See Commonwealth of Kentucky v. State of Indiana*, 281 U.S. 163, 175 (1930); *see generally* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution – A Study in Interstate Adjustments*, 34 YALE L.J. 685, 695-96 (1925) (discussing areas in which compacts have been used by states).

[29] There has been considerable litigation about provisions of compacts in federal courts, and occasionally a state will assert an *ultra vires* argument, especially with regard to obligations assumed by states to make appropriations to an interstate entity established under the compact. *See, e.g.*, *State* ex rel. *Dyer v. Sims*, 341 U.S. 22 (1951); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). There is *dicta* in *Dyer* where the U.S. Supreme Court describes the compact in question as effecting a delegation to

whether the Florida Constitution endows the Governor with inherent power to make such compacts with sister states. There also exists a Water Rights Compact with the Seminole Tribe, which was ratified and approved by legislation in 1987.[30] In Florida, there are currently some thirty cases in which the Legislature has either ratified an interstate or tribal compact by enacting it into law or has authorized the compact subject to very explicit standards. *See* Appendix II (listing the compacts currently in force or authorized in Florida).[31]

The existence of the many interstate compacts in the Florida Statutes argues strongly against some independent authority of the executive branch to enter state-tribal compacts. That the Legislature has consistently either authorized negotiation or subsequently ratified the interstate compacts demonstrates a need for explicit legislative action.

VI. IGRA does not grant to the Governor the legislative power to bind the State to a gaming compact.

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the interstate body, terming the action "a conventional grant of legislative power." 341 U.S. at 30.

[30] *See* FLA. STAT. § 285.165. The compact was incorporated into federal law by Publ. L. No. 100-228, 101 Stat. 1556 (1987), codified at 25 U.S.C. § 1772e.

[31] Of these interstate compacts, the only case in which the Legislature does not either require specific standards or actually ratify and enact the compact itself is a pre-approval for Florida law enforcement agencies to enter mutual aid agreements with agencies of other states. *See* FLA. STAT. § 23.127. These agreements are said to have the status of "compacts," but are not actually agreements between the states themselves. However, it is important to note that they are explicitly authorized by the Legislature.

It is well-settled that "IGRA does not preempt state law governing which state actors are competent to negotiate and agree to gaming compacts." *Pataki*, 798 N.E.2d at 1060. IGRA "is silent relative to who or what group negotiates [a tribal gaming compact] on behalf of the state." *Finney*, 836 P.2d 1179. The statute "does not define what is necessary for a tribe and state to 'enter into' a compact, nor does it state which branch of government can or must sign a compact." *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1553 (10th Cir. 1997). "State law must determine whether a state has validly bound itself to a compact." *Id.* at 1557.

More specifically, as the New Mexico Supreme Court has concluded, there is no evidence "that Congress, in enacting the IGRA, sought to invest state governors with powers in excess of those that the governors possess under state law." *Clark*, 904 P.2d at 26. Indeed, the U.S. Supreme Court itself noted that the state's duty under IGRA to negotiate in good faith and enter into a valid compact "is not of the sort likely to be performed by an individual state executive officer or even a group of officers." *Seminole Tribe of Florida*, 517 US at 75 n.17 (citing *Finney*, 836 P.2d at 1169).

IGRA directs Indian tribes wishing to conduct Class III gaming to initiate negotiations with "the State." 25 U.S.C. § 2710(d)(3)(A). Once the tribe has requested negotiations, IGRA directs "the State" to "negotiate with the Indian tribe in good faith." *Id.* It is the "State" that ultimately enters the gaming compact with

a tribe. 25 U.S.C. § 2710(d)(3)(b). Nowhere in the provisions governing the compacting process does IGRA mention a state's governor.

In reference to IGRA's repeated references to "the State," the New Mexico Supreme Court concluded that "the only reasonable interpretation of this language is that it authorizes state officials, acting pursuant to their authority held under state law, to enter into gaming compacts on behalf of the state." *Clark*, 904 P.2d at 26. For the reasons already explained, Florida's governor has no such authority under state law.

By attempting to enter the Compact without the requisite authority, the Governor offends not just the Constitution and laws of Florida, but congressional intent as well. As the U.S. Court of Appeals for the Tenth Circuit has noted, "to permit a state actor to purport to bind the state when in fact he or she lacks the authority to do so undermines the significance of the compact process as a means of providing meaningful state involvement if a state so desires." *Pueblo of Santa Ana*, 104 F.3d at 1556.

CONCLUSION AND PRAYER FOR RELIEF

The Governor has encroached on the powers of the Legislature in attempting to negotiate and enter a compact with the Seminole Tribe to authorize Class III gaming on tribal lands. This unilateral attempt by the Governor to re-write fundamental policy and alter Florida law is directly contrary to Florida law and

violates Florida's separation of powers doctrine. For this reason, Petitioners respectfully request this Court to issue a Writ of Quo Warranto declaring that legislative authorization or ratification is necessary for any compact governing gaming on Indian lands to be valid in this State.

Respectfully submitted this ___th day of November, 2007

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was supplied by U.S. Mail this ___th day of November, 2007 to the following: THE HONORABLE CHARLIE CRIST, Office of the Governor, The Capitol PL-05, Tallahassee, Florida 32399-0001; and THE HONORABLE BILL MCCOLLUM, Office of the Attorney General, The Capitol PL-01, Tallahassee, Florida 32399-1050.

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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the type style utilized in this brief is 14-point Times New Roman, proportionately spaced, in accordance with Rule 9.110(1), Florida Rules of Appellate Procedure.

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Attorney

APPENDICES

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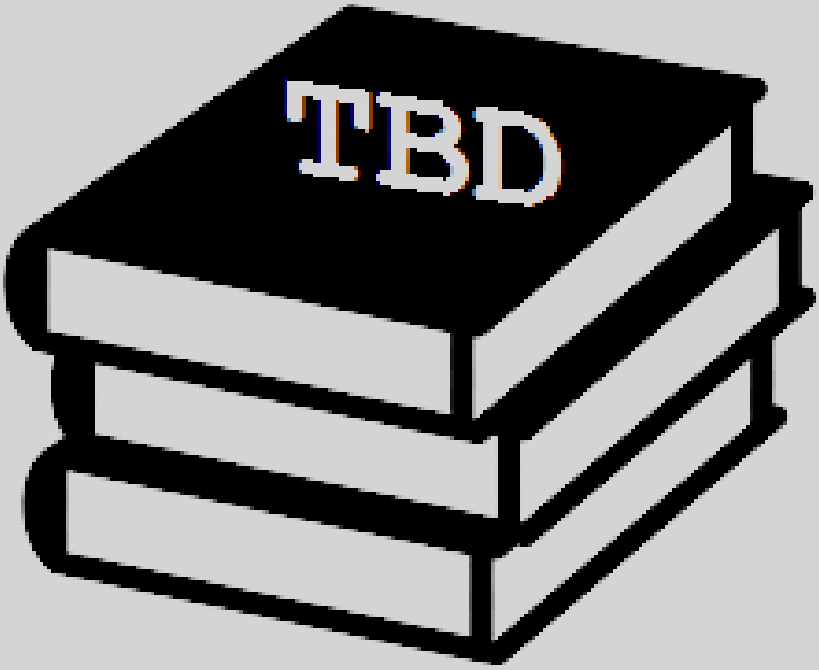

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