No. 17-1330

IN THE

# Supreme Court of the United States

SHARP IMAGE GAMING, INC.,

*Petitioner,*

*v.*

SHINGLE SPRINGS BAND OF MIWOK INDIANS,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT**

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

The Indian Gaming Regulatory Act provides that the Chairman of the National Indian Gaming Commission must approve "a management contract for the operation of a class III gaming activity." 25 U.S.C. § 2710(d)(9); *see* 25 U.S.C. § 2711(a)(1). This approval requirement applies not only to the management contract itself, but also to "all collateral agreements to such contract that relate to the gaming activity." 25 U.S.C. § 2711(a)(3); *see* 25 C.F.R. § 502.5. A regulation defining "management contract" provides that a collateral agreement itself qualifies as a management contract where "such contract or agreement provides for the management of all or part of a gaming operation." 25 C.F.R. § 502.15.

Does regulation 502.15 preclude giving effect to the plain language of § 2711(a)(3), which requires approval of a collateral agreement that "relates to the gaming activity" without regard to whether it qualifies as a stand-alone management contract?

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## INTRODUCTION

This Court does not generally review the decisions of intermediate state courts of appeal, and this case presents no reason to do so. This is a *sui generis* dispute about an outdated form of contract entered after Sharp Image Gaming, Inc.'s ["Sharp Image"] prior management contract was invalidated. It presents neither grounds for certiorari nor legal error by the California intermediate appellate court.

According to petitioner, Sharp Image, this case presents "a frequently recurring question under the Indian Gaming Regulatory Act" ["IGRA"] involving whether "a plain-vanilla promissory note" requires approval by the National Indian Gaming Commission ["NIGC"] if it is "related to a casino-style Indian gaming operation." Pet. 1. Sharp Image misstates the case and the question resolved below.

The note at issue ["Note"] was not a "plain-vanilla promissory note," and the Court of Appeal expressly rejected that characterization. The California Court of Appeal found the Note was inextricably linked to the Equipment Lease Agreement ["ELA"] — a void and unenforceable management contract that required, but did not receive, NIGC approval. Pet. 12. Specifically, the Court of Appeal held "the Note defines a key part of the financial relationship between the parties with respect to casino development and tribal gaming operations, as well as the gaming machines Sharp Image was to provide under the ELA." Pet. 76a. The Note "provides Sharp Image with the potential to collect nearly all of the net revenues for all gaming activities until the note is paid off." *Id.*

Notwithstanding the Note's clear relationship to gaming activity, Sharp Image asserts this case presents "an important and recurring question concerning the scope of the National Indian Gaming Commission's authority" to review management contracts. Pet. 12. Not so. The lower court's decision hinged not on the scope of NIGC's authority, but on the unique nature of the Note at issue in this case. Indeed, the ELA and Note are so closely linked they are properly read as one agreement under California law. *See* Cal. Civ. Code § 1642.

In the end, Sharp Image's Note, like the invalid ELA executed the same day, is a relic of a bygone era when developers routinely presented unsophisticated tribes with one-sided gaming management deals. It merits no space on this Court's docket. The Petition should be denied.

## REASONS FOR DENYING THE PETITION

### I. A Purported Conflict Between Two Federal Circuits And One State Intermediate Appellate Court Does Not Warrant Review.

The crux of Sharp Image's petition is that the Third Appellate District of the California Court of Appeal "created a conflict with the approach taken by the Second and Seventh Circuit[]" federal courts of appeals. Pet. 1. But the decision below does no such thing.

The California Court of Appeal's decision analyzed this issue more rigorously than *Catskill Development L.L.C. v. Park Place Entm't*, 547 F. 3d 115 (2d Cir. 2008), *Wells Fargo Bank, Nat'l Ass'n v. Lake of the Torches*

*Economic Development Corp.*, 658 F. 3d 684 (7th Cir. 2011), or *Stifel, Nicolaus & Co. v. Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 807 F. 3d 184 (7th Cir. 2015).

*Catskill Development L.L.C.* concerned whether a land purchase agreement and development agreement were subject to approval by the Chairman. *Catskill* cites the district court decision in *Machal, Inc. v. Jena Band of Choctaw Indians*, 387 F. Supp. 2d 659 (W.D. La. 2005) as holding that a collateral agreement only requires agency approval if it is itself a management contract under the definition provided by regulation 502.15. *Catskill Development L.L.C.*, 547 F. 3d at 130-131. The Second Circuit's opinion appears to be based solely on regulation 533.7, which provides that "[m]anagement contracts … that have not been approved by the Chairman … are void." 25 C.F.R. § 533.7. Looking just at that regulation, the opinion makes sense because it is applying the definition in regulation 502.15 to the rule in regulation 533.7. What is missing, however, is the statutory rule created by § 2711(a)(3). The *Catskill Development L.L.C.* opinion does not even cite § 2711(a)(3), much less interpret it.

This same cursory analysis was then repeated in *Lake of the Torches*, 658 F. 3d 684, and *Stifel, Nicolaus & Co.*, 807 F. 3d 184, which involved the fallout from improper management contracts related to the same casino project in Wisconsin. In *Lake of the Torches*, the Seventh Circuit followed the Second Circuit's decision in *Catskill*, again without even mentioning § 2711(a)(3). *Lake of the Torches*, 658 F. 3d at 701. In *Stifel*, the Seventh Circuit found the issue foreclosed by its *Lake of the Torches* decision, again without mentioning § 2711(a)(3). *Stifel*, 807 F. 3d at 203.

Thus, while the Second and Seventh Circuits have applied the definition of "management contract" in regulation 502.15 to regulation 533.7, neither Circuit has interpreted § 2711(a)(3) of IGRA. These cases cannot control the interpretation of a statutory provision they do not mention, much less interpret.

But even if the California Court of Appeal's decision did contradict a federal court decision, such a purported conflict would not warrant certiorari. Rule 10(b) provides for consideration of certiorari where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." U.S. Sup. Ct. R. 10(b). The California Court of Appeal is not "a state court of last resort." The alleged conflict here is between an intermediate state court and two federal courts of appeals. Pet. 3, App. 111a; *see also* U.S. Sup. Ct. R. 13.1 (distinguishing between review of a "judgment… entered by a state court of last resort" and a "judgement of a lower state court that is subject to discretionary review by the state court of last resort"). Accordingly, "because this case comes to [the Court] on review of a decision by a state intermediate appellate court," a "denial of certiorari is appropriate." *Huber v. N.J. Dep't of Envt'l Prot.*, 562 U.S. 1302, 1302 (2011) (statement of Alito, J., joined by Roberts, C.J., and Scalia and Thomas, J.J., respecting the denial of certiorari), citing R. 10.[1]

1. Of course, this Court at times grants certiorari to review decisions of intermediate courts of appeal where, for example, under Rule 10(c) such a decision conflicts with a decision of this Court. *See, e.g.*, *KPMG LLP v. Cocchi*, 565 U.S. 18, 22 (2011) (per curiam). No such conflict is at issue here.

Sharp Image also claims this Court should intervene to "dispel the confusion that the decision below creates in California." Pet. 27. Sharp Image does not demonstrate any such confusion. A decision of a California intermediate appellate court "is not binding" on other state courts of appeal, which "may refuse to follow a prior decision of a different district or division, for the same reasons that influence the federal Courts of Appeal of the various circuits to make independent decisions." 9 Witkin, Cal. Proc. 5th Appeal § 498 (2008). It also is "well-established" that a denial of a petition for review by the California Supreme Court "is not an expression of opinion of the [California] Supreme Court on the merits of the case," and so "[n]either the bar nor the lower courts should… read" such a denial as "an indication of agreement" with a lower court. *Camper v. Workers' Comp. Appeals Bd.*, 3 Cal. 4th 679, 689 n.8, 836 P.2d 888, 894 (1992).

In short, Sharp Image's claimed conflict presents no developed risk of inter-jurisdictional confusion over contrary binding precedents. It is just a thin excuse to seek review of this particular case. Respectfully, this Court should decline the invitation.

## II. This Case Is Not An Appropriate Vehicle For Deciding The Question Presented By Sharp Image.

### A. The Agreement Was Not A "Plain-Vanilla" Promissory Note.

In 1996, Sharp Image and the Tribe entered a Gaming Machine Agreement ["GMA"], providing for the lease of gaming machines from Sharp Image, and requiring repayment of "all monies advanced by Sharp Image" to

develop a casino. Pet. 10a. That same year, the NIGC declared the GMA "null and void" (in part for Sharp Image's supply of illegal gaming machines). Sharp Image proposed the ELA and Note as its replacement, stating they "represent *a more complete agreement*" between Sharp Image and the Tribe. Pet. 11a (court of appeal's emphasis), 74a. The Note referenced liabilities incurred under the GMA and addressed "liabilities to be incurred in the future in connection with the ELA." Pet. 74a. In addition, the Note tied the Tribe's repayment obligation to the operation of gaming devices Sharp Image would install and control under the ELA. Pet. 69a-70a, 76a, 80a. Thus, as the California Court of Appeal found, "the Note does not stand on its own." Pet. 75a.

Recognizing the inextricable link between the ELA and the Note, the California Court of Appeal held that the Note defined "a key part of the financial relationship between the parties with respect to casino development and tribal gaming operations, as well as the gaming machines Sharp Image was to provide under the ELA." Pet. 76a. Moreover, the Note contemplated payment from gaming revenues, thus providing Sharp Image "with the potential to collect nearly all of the net revenue for all gaming activities until the note is paid off." *Id.*[2] These

2. The Note's definition of "gross net revenues" largely tracked the "net revenues" definition under the ELA — which ignored IGRA's limiting requirements and defined "net gaming revenues" as essentially "gross revenues," less prizes and pay outs. Pet. 64a, 75a. And, in certain scenarios, the Note *mandated* the Tribe pay Sharp Image "a minimum payment equal to 25% of the gross net revenues" from "operation of the video gaming devices," which was on top of the 30% of gaming revenues Sharp Image would receive under the ELA. Pet. 64a, 75a, 76a.

hardly constitute "plain-vanilla" promissory terms. Pet. 12. In fact, the agreement was not a promissory note at all, because the repayment terms were not "unconditional" as required under governing law.[3]

These facts reveal Sharp Image's distortion of the record. The California Court of Appeal did not interpret the NIGC's authority to review management contracts so broadly as to encompasses "a *plain-vanilla* promissory note" that was "simply" "connected with and referred to gaming activity." Pet. 12. Given their terms and the unique connection between the ELA and the Note, it is difficult to conceive of a contract more deserving of NIGC review than the Note here. Its "key terms [] are expressly dependent on the gaming activity" under the unapproved ELA, rendering the Note "a collateral agreement to a management contract," thereby mandating NIGC review under IGRA. Pet. 80a.

Given the interrelationship between the Note and ELA, review of the Note is necessary for the NIGC to ascertain the financial relationship between the parties as related to the gaming facility, and thereby fulfill its fundamental charge of confirming the Tribe is the "primary beneficiary" of its own casino. *Lake of the Torches Economic Development Corp*, 658 F. 3d at 700

3. *See Saks v. Charity Mission Baptist Church,* 90 Cal. App. 4th 1116, 1132-1133 (2001) ("a promissory note is a form of negotiable instrument — an unconditional promise to pay money signed by the person undertaking to pay, payable on demand or at a definite time") (citations omitted). The Note here was not unconditional or payable at a "definite time," but was contingent on commencement of the "gaming operations" under the ELA. Pet. 7-8.

("One of IGRA's principal purposes is to ensure that the tribes retain control of gaming facilities set up under the protection of IGRA and of the revenue from those facilities.") And so, but for this collateral review under IGRA's § 2711(a)(3) — as the United States argued as amicus in support of the Tribe on this issue before the California Court of Appeal — "[t]he manifest purpose of this provision … could be circumvented by splintering relevant obligations into separate agreements." (United States' Combined Application For Permission to File Amicus Curiae Brief Out Of Time And Brief As Amicus Curiae In Partial Support of Appellant, p. 42.)

Indeed, the terms of this Note, which could deprive the Tribe of most if not all of its gaming revenues, satisfy even the standard that Sharp Image advocates: limiting agency approval to contracts providing management for "all or part" of a gaming operation. Pet. 1. By requiring payment upon the operation of gaming machines *whose nature and type Sharp Image alone controlled* under the corresponding ELA, and by conditionally requiring the Tribe to pay a *further percentage of gross revenues* before operating expenses (25% on top of the ELA's 30%), the Note itself can be read to "provide[] for management of all or part of a gambling operation," or as Sharp Image put it below, to provide for "some aspect of management." Pet. 33a; *see* Pet. 49a ("the control given to Sharp Image over the Tribe's gaming operations here is what makes the ELA a management contract"); *Lake of the Torches*, 658 F. 3d at 698 (noting lender's receipt of a percentage of gaming revenues would be indicia of management, as are contract terms imposing no limits on lender's "discretion to allocate or condition the release of the Casino's gross revenues even to pay operating expenses").

As a result, under any standard, the Court of Appeal properly concluded the Note should have been reviewed and approved by the NIGC.

### B. This Case Cannot Be Resolved Through This Petition.

The ELA and Note are not only inextricably "connected," they constitute a single contract under California law. "[T]he ELA and the Note were proposed together, considered together, and executed together," with repayment of the Note "expressly contingent upon installation of gaming machines under the ELA." Pet. 80a. Accordingly, the Tribe asserted that the Note was "constructively a part of the [ELA]," requiring the two contracts to be read as one. Pet. 74a-75a, n.28; *see* Cal. Civ. Code § 1642. Indeed, Sharp Image admitted the ELA and Note are so closely related that the money advanced under the Note could be viewed as consideration sufficient to support the ELA. (Plaintiff Sharp Image Gaming, Inc.'s Opposition to Defendant Shingle Springs Band of Miwok Indians' Demurrer to First Amended Complaint, p. 9:17-10:8, No. PC 20070154 (Cal. Super. Court, El Dorado County, June 25, 2010) [23 Appellant's Cal. Ct. App. Appendix 5973:17-5974:8.]); *see New Gaming Sys. v. Nat'l Indian Gaming Comm'n*, 896 F. Supp. 2d 1093, 1104 (W.D. Okla. 2012) (affirming NIGC's decision finding that combination of the machine lease and promissory note executed the same day collectively constituted an unapproved management contract).

Although the factual record and the law readily supports a finding that the ELA and the Note should be viewed together and constituted a single management

contract, the California Court of Appeal declined to reach this issue. "[W]e need not decide whether the two agreements are actually one contract, because we conclude the Note is a collateral agreement to the ELA and thereby subject to regulation under IGRA." Pet. 74a-75a, n.28. Thus, even if Sharp Image's petition is granted, and the Court reaches the question of whether the NIGC should have reviewed the Note as a "collateral agreement" to the ELA, there remain unresolved and dispositive state law defenses, precluding any finding that the Note is enforceable on this petition.[4]

## III. The Contracts Are *Sui Generis* And Do Not Present A Recurring Question Requiring Review.

Sharp Image characterizes this as a case presenting a "frequently recurring question" of "great practical significance," and argues this Court's intervention is necessary to "dispel the uncertainty" that investors face in a "rapidly growing Indian gaming industry." Pet. 1, 2. Sharp Image's handful of old examples — some of which relate to the same casino projects — shows no such uncertainty and misstates the current state of the industry.

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4. The California Court of Appeal also declined to reach several other bases supporting judgment for the Tribe, including that (1) Sharp Image's suit, filed 8 years after the Tribe canceled its contract, was time-barred under the applicable statute of limitations; (2) Sharp Image could not have performed the ELA when the Tribe's casino opened in any event because it had been found "unsuitable" to engage in gaming in California by the state's Bureau of Gambling Control; and (3) the Tribe's sovereign immunity remained intact and deprived the Court of jurisdiction to enforce either contract. Pet. 23a n.12, 30a, 81a.

Investors have long known that prudence dictates submitting gaming contracts for review to the NIGC. *See* NIGC Bulletin No. 93-3, p. 1 (July 1, 1993) *available at* https://www.nigc.gov/images/uploads/bulletins/1993-3submitcontandagreem.pdf ("if a tribe or contractor is uncertain whether a gaming-related agreement requires approval …, they should submit those agreements to the NIGC" for a determination); NIGC Bulletin No 94-5, p. 3 (October 14, 1994) *available at* https://www.nigc.gov/images/uploads/bulletins/1994-5mgmtvconsult.pdf ("advance approval is not required but an advance determination under Bulletin No. 93-3 is strongly recommended to avoid a later decision by the Commission that the agreement" is void for lack of approval). Sharp Image chose not to submit the ELA or the Note for agency approval, and it did so at its own peril. *See United States ex rel. Maynard Bernard v. Casino Magic Corp.*, 293 F. 3d 419, 425 (8th Cir. 2002) (party failing to submit its gaming contracts to the NIGC "assume[s] the risk of proceeding without" agency approval).

In addition, Sharp Image's decades-old agreements, which purport to provide Sharp Image with "the majority of the benefit of [the] Tribe's gaming," are far out of step with contemporary practice. Pet. 21a. As former NIGC Chairman Phil Hogen has explained:

> "When I came on the scene in '92, there were a lot of shady consulting agreements," Hogen says of the early days of Indian casinos. "The contractual arrangements weren't being reviewed or approved because they weren't called management agreements. The concept has since become somewhat obsolete, as tribes

> have become considerably more sophisticated than they were at the time IGRA was written, some extremely so."[5]

Today, there simply is no issue of "uncertainty" over new contracts, and certainly no such issue in California, the state with "the largest segment" of the gaming industry. Pet. 2. Sharp Image cites no other California case involving NIGC approval requirements (or any other aspect of IGRA) that is less than 15 years old, and no other California case addressing when a "collateral agreement" requires approval. Far from presenting a recurring issue, this case involves obsolete agreements that rarely, if ever, come before courts anymore.

## IV. The California Court of Appeal Correctly Applied The Law To Sharp Image's Contracts.

In addition to presenting a poor procedural candidate for certiorari, Sharp Image misconstrues the relevant law. IGRA's § 2711(a)(1) provides for management contracts to be approved by the Chairman of the NIGC. 25 U.S.C. § 2711(a)(1); *see* 25 U.S.C. § 2710(d)(9). In turn, § 2711(a)(3) provides that all requirements for approval of

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5. Dave Palermo, Global Gaming Business Magazine, Walking Before Running (May 2016) *available at* https://ggbmagazine.com/article/walking-before-running/; *see also* Kevin K. Washburn, Barry W. Brandon, Philip N. Hogen, Vanya S. Hogen, *Paternalism or Protection?: Federal Review of Tribal Economic Decisions in Indian Gaming* 5 (Arizona Legal Studies, Discussion Paper No. 08-25, Mar. 2008) ("In the early days, a lot of agreements were signed that weren't labeled 'management contracts' though, in fact, they probably were. At that point, the NIGC started 'calling them in,' ordering the parties to submit them to the NIGC.").

a management contract shall also apply to "all collateral agreements to such contract that relate to the gaming activity." 25 U.S.C. § 2711(a)(3); *see* 25 C.F.R. § 502.5. There is nothing unclear about that provision. Whatever requirements are set for a "management contract" pursuant to § 2711(a)(1) *also apply* to "all collateral agreements *to such contract* that relate to gaming activity" under § 2711(a)(3).

Sharp Image, however, insists that the California Court of Appeal should have construed § 2711(a)(3) to apply only to collateral agreements that independently meet the NIGC's definition of "management contract" under 25 C.F.R. § 502.15. As the California Court of Appeal held, Sharp Image's argument, if adopted, renders § 2711(a)(3) meaningless. Pet. 73a-81a. Accordingly, § 2711(a)(3) must extend to collateral agreements that are not themselves management contracts. That is why the statute uses the term "to such contract" — it is talking about a collateral agreement being related to, *but not the same thing as*, a management contract.

Sharp Image claims that interpreting § 2711(a)(3) as applying to collateral agreements that are not independently management contracts is inconsistent with 25 C.F.R. § 502.15. But regulation 502.15 just provides a definition of "management contract." It says nothing about how to interpret § 2711(a)(3). Thus, even if *Chevron* deference would apply to an interpretation of § 2711(a)(3) by the Commission, regulation 502.15 provides no such interpretation. Moreover, § 2711(a)(3)'s terms are clear: the requirements for management contracts also apply to collateral agreements to such contract that relate to gaming. As this Court recently reiterated, "[e]ven under

*Chevron*, we owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' we find ourselves unable to discern Congress's meaning." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018).

As discussed in Section I above, Sharp Image's claim that the California Court of Appeal decision is inconsistent with three federal circuit court decisions is not entirely accurate. The prior federal circuit decisions did not expressly address § 2711(a)(3). Nor did they involve a note that was, as here, inextricably linked with the operation of gaming machines and casino gaming revenues (and thus gaming management).

Under § 2711(a)(3), the NIGC's approval power is expressly extended beyond management contracts to collateral agreements — not merely to collateral agreements that are themselves management contracts — so long as those agreements "relate to gaming activity." No prior Circuit case expressly addresses this issue and, *a fortiori*, no such case expressly contradicts the California Court of Appeal's conclusion (supported by the United States as amicus curiae below) that § 2711(a)(3) requires approval for collateral agreements that relate to gaming activity even if they are not themselves stand-alone management contracts under regulation 502.15.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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May 22, 2018