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Senator Gayle S. Slossberg and Representative James F. Spallone, Co-Chairs
Government Administrations and Elections Committee
Room 2200, Legislative Office Building
Hartford, CT 06106

Senator Jonathan A. Harris and Representative Elizabeth B. Ritter, Co-Chairs
Public Health Committee
Room 3000, Legislative Office Building
Hartford, CT 06106

Re: Written Testimony from GAE Informational Forum on Tribal Sovereignty and Smoking in Casinos

Thank you for holding an informational forum on tribal sovereignty on May 18, 2009, and for the opportunity to testify before you. Attached is a written version of my testimony, which I hope will be of use to the Legislature as it continues the important work of building its relationship with the Mashantucket Pequot and Mohegan Tribes. These comments first discuss the general legal principles of the tribal-state relationship and then the specific impact of these principles in Connecticut. I welcome the opportunity to be of any further assistance.

1. General Principles of Exclusion of State Law from Tribal Territories

Questions of the role of state law in tribal territories have a long history.

When Europeans arrived in the Americas, they found it inhabited by "separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws."[1] Although both the colonies and the crown soon entered into agreements with these nations, and these relationships varied from tribe to tribe and with each tribe over time, they emerged from an assumption that tribes were separate peoples, to be dealt with more as foreign nations than as domesticated individuals.

Throughout this period, there remained deep conflicts over whether first the British Crown, and later the U.S. federal government, or the colonies, and later the states, had primary authority over relationships with Indians and tribes. This was a vital question in the development of the Articles of Confederation, was apparently resolved in favor of the federal government with the

[1] Worcester v. Georgia, 31 U.S. 515, 542-543 (1832).

adoption of the U.S. Constitution, which gave Congress the power to "regulate . . . Commerce with the Indian tribes,"[2] but continued to persist for many decades. The conflict continued to simmer until the Supreme Court's 1832 decision in *Worcester v. Georgia*.[3] There, Chief Justice John Marshall declared that Georgia's attempt to extend her laws over the Cherokee lands by forbidding a non-Indian missionary to reside there without taking an oath of loyalty to the state was "repugnant to the constitution, laws, and treaties of the United States. They interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union."[4] Despite "bitter criticism" and initial state defiance, "the broad principles of that decision came to be accepted as law."[5]

Although *Worcester*'s holding that state law was totally excluded from Indian country has been substantially eroded, "the basic policy of *Worcester* has remained."[6] While today state law may apply in Indian country, particularly where it applies directly to non-Indians, its scope is limited and the state will often be excluded by federal policies or tribal or Indian rights.

a. State Jurisdiction Pursuant to Congressional Authorization

One of the significant areas in which state law may apply despite tribal or Indian interests is if Congress has authorized it to apply. Congress has "plenary and exclusive powers" to legislate with respect to Indian affairs, powers that include even the right to terminate tribal sovereignty altogether.[7] But when Congress wants to authorize state law to apply or otherwise abrogate existing tribal rights it must make its intent "unmistakably clear."[8] The primary example of express congressional authorization of state law is Public Law 280, which authorized certain states to apply criminal law and civil jurisdiction to Indians in tribal territories.[9] Although Connecticut is not a state in which Public Law 280 applies, aspects of the Mashantucket Pequot and Mohegan Settlement Acts bear some resemblance to the law, and are discussed further below.

Another place in which Congress has authorized the application of state law is under the Indian Gaming Regulatory Act of 1988 (IGRA), which authorizes tribes and states to negotiate regarding "the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation" of gaming activity.[10] Therefore tribes and states may through their compact expand or contract the scope of either state or tribal jurisdiction over matters directly related to gaming activity. Pursuant to IGRA, the State of Connecticut has entered into compacts with both the Mashantucket Pequot

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[2] U.S. Const., Art. I § 8 cl. 3.
[3] 31 U.S. 515 (1832).
[4] *Worcester*, 31 U.S. at 561.
[5] Williams v. Lee, 358 U.S. 217, 219 (1959).
[6] *Id.*
[7] U.S. v. Lara, 541 U.S. 193, 200, 203 (2004).
[8] Montana v. Blackfeet Tribe, 471 U.S. 759, 765 (1985); *see also* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999) (although Congress may abrogate treaty rights to hunt and fish free of state law outside the reservation, it must "clearly express its intent to do so").
[9] Public Law 280 is codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360 (requiring several states to take criminal and civil jurisdiction) and 25 U.S.C. 1321-1326 (authorizing other states to assume jurisdiction with the consent of the relevant tribes).
[10] 25 U.S.C. § 2710(d)(3)(C).

and Mohegan Tribes.[11] As discussed further below, these compacts authorize state law to apply in certain ways to tribal gaming activities, but also to some degree contract the scope of state jurisdiction.

b. State Jurisdiction without Congressional Authorization

Where Congress has not specifically authorized the application of state law, state law may only apply if it neither "infringes on the rights of reservation Indians to make their own laws and be ruled by them" or is "preempted by federal law."[12] Although the analysis in these areas is called a preemption test, its application is quite different from the preemption test normally applied to questions of state authority. Because tribal sovereignty remains the "backdrop" of this analysis, federal law need not expressly preempt state law, and ambiguities are "construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence."[13]

Where state laws apply directly to tribal or tribal member activities in Indian country, state law will usually not apply absent direct congressional authorization.[14] Where state laws apply to tribes but primarily seek to regulate the activities of non-tribal members, the Supreme Court has in one context (the collection of otherwise valid state sales taxes from nonmembers) allowed states to impose "minimal burdens" on tribes and their members,[15] but has not otherwise permitted state law to apply.[16] Where state laws apply directly to non-tribal members, state law will sometimes apply, and sometimes not.[17] Under this analysis, federal interests and involvement in the activity, combined with tribal interests and involvement in the activity, are balanced against state interests in the activity. The greater the federal and tribal regulation of and contribution to the activity, the more likely preemption is; in contrast, where the tribe is not significantly involved in the activity, and the state has significant interests (other than simple

[11] The language of the compacts is identical in all relevant respects, although the method of their adoption is not. The Mashantucket Pequot Compact was not negotiated in the usual manner. Instead, after Connecticut refused to negotiate with the tribe regarding Class III gaming, the tribe sued the state in federal court alleging that it had refused to negotiate in good faith as required by IGRA. Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1025 (2d Cir. 1990). The tribe's claim was upheld, and the litigation was ultimately resolved when the federal court ordered the parties to adopt the compact language proposed by the state in the process of mediation. *See* Proposal of the State of Connecticut for a Tribal-State compact between the Mashantucket Pequot Tribe and the State of Connecticut, Mashantucket Pequot Tribe v. State of Connecticut, Civ. No. H89-717. This compact language was adopted verbatim by the Mohegan Tribe when it received federal recognition in 1994. As the compact language, therefore, was drafted wholly by the state, by analogy from both contract and Federal Indian Law, any ambiguities in this language should be interpreted against the drafters.

[12] White Mountain Apache v. Bracker, 448 U.S. 136, 142-143 (1980).

[13] White Mountain Apache, 448 U.S. at 144.

[14] Cohen's Handbook of Federal Indian Law § 6.03; *see*, *e.g.*, Montana v. Blackfeet Tribe, 471 U.S. 759 (1985) (state could not tax tribal coal royalties absent unmistakably clear congressional authorization); Williams v. Lee, 358 U.S. 217 (1959) (state court had no jurisdiction over contract dispute filed by a non-Indian trader against a Navajo couple).

[15] *See* Dept. Taxation & Finance v. Milhelm Attea & Bros, 512 U.S. 61, 71-72 (1994).

[16] *See* Cohen's Handbook of Federal Indian Law § 6.03[1][b].

[17] *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) (contrasting the "categorical" bar of state taxation of tribes or tribal members and the balancing test applied to taxation of nonmembers); *compare* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (state could not apply hunting and fishing laws to non-Indians hunting on tribal trust lands) *and* White Mountain Apache v. Bracker, 448 U.S. 136 (1980) (state could not tax non-Indian company contracting with tribal business) *with* Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) (state could tax non-Indians purchasing cigarettes from tribal smoke shops).

revenue raising interests) regarding nonmembers involved in the activity, then state jurisdiction is more likely.

The Supreme Court's 1987 decision in *California v. Cabazon Bank of Mission Indians*[18] is a good illustration of these principles. *Cabazon* concerned whether two Indian tribes that were running high stakes bingo and card games on their reservations for non-Indian customers were subject to California laws prohibiting such activities. California was subject to Public Law 280, and the Court first considered whether California could apply its criminal laws prohibiting these gambling activities under the law. The Court rejected this argument, even though Public Law 280 declares that "criminal laws of [a Public Law 280 state] shall have the same force and effect within such Indian country as they have elsewhere within the State."[19] Following its decision in *Bryan v. Itasca County*,[20] the Court recognized that although Public Law 280 gave the affected states criminal jurisdiction and civil adjudicatory jurisdiction over all persons within Indian reservations, it did not give the states general regulatory jurisdiction in Indian country. According to the Court, the power to impose all state regulations would, contrary to congressional intent, "effect total assimilation of Indian tribes into mainstream American society" and "result in the destruction of tribal institutions and values."[21]

Although violation of California's gambling laws was punishable as a crime, the Court found that the laws themselves were actually regulatory, because the state did not wholly prohibit all gaming (it permitted low stakes bingo by charities, pari-mutuel horse racing, a state lottery, and card games by licensed entities) but rather simply regulated it.[22] Citing with approval a number of lower court decisions, including one by the Federal District Court for the District of Connecticut rejecting state jurisdiction over the Mashantucket Pequot Tribe's gaming activities,[23] the Court held that Public Law 280 did not authorize the state to apply its gambling laws to the two reservations.

The Court also rejected an argument that the state could nevertheless apply its laws on the grounds that they were not preempted by federal law. At the time, there were no federal statutes or regulations regarding tribal gambling.[24] Nevertheless, the Court found that federal laws generally encouraging tribal economic development, combined with federal funding and technical assistance to tribes in developing gambling activities, had a preemptive effect.[25] In addition, tribes themselves had overseen development and management of the gambling facilities, and tribes and their members had significant interests in the revenue and employment generated by the facilities.[26] Together, this federal and tribal involvement and interest trumped California's interest in preventing organized crime, resulting in federal preemption of state law.[27]

In reaction to *Cabazon*, Congress enacted the Indian Gaming Regulatory Act in 1988. IGRA actually expands state jurisdiction over gaming, by requiring tribes to enter into a compact with

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[18] 480 U.S. 202 (1987).
[19] 18 U.S.C. § 1162(a).
[20] 426 U.S. 373 (1976).
[21] *Cabazon*, 480 U.S. 202, 208.
[22] 480 U.S. at 210-211.
[23] 480 U.S. at 210 n.9 (citing Mashantucket Pequot Tribe v. McGuigan, 626 F. Supp. 245 (D. Conn. 1986)).
[24] The Court considered and rejected an argument that the Organized Crime Control Act, which authorized the federal government to prosecute violations of state gambling laws as federal crimes, authorized states to apply their laws to tribes directly. The Court found that even if the law permitted the United States to prosecute tribes, this created no authority for states to prosecute tribes for violations of the laws directly. 480 U.S. at 213-214.
[25] 480 U.S. at 217-218.
[26] *Id.* at 219-220.
[27] *Id.* at 221-222.

the state in which their lands are located before engaging in Class III gaming (which includes slot machines, card games played against the house, pari-mutuel gaming and similar activities) in their territory.[28] But where gaming conforms to IGRA, the statute has a significant preemptive effect. Now, in contrast to the situation when *Cabazon* was decided, there is a comprehensive federal statute explicitly declaring federal interests in tribal sovereignty over gaming and extensively regulating the situations under which it may occur. Thus to the general analysis of *Cabazon*, under which state regulation of tribal business activities involving nonmembers will be preempted if tribes are significantly involved in generating the business over which regulation is sought, is added the explicit federal statutory interest in encouraging tribal gaming itself.

2. Application of State Jurisdiction Principles to Connecticut

The application of these principles in Connecticut is affected by the federal Mashantucket Pequot and Mohegan Settlement Acts, and the Class III gaming compacts between the State of Connecticut and each of the tribes.

To resolve the land claims by each of the tribes against the state, the parties entered into two different settlement agreements which were enacted by Congress as federal law. Although each settlement act expands state jurisdiction on the tribes' reservations in different ways, neither gives the state regulatory jurisdiction in the tribal territories.

The Mashantucket Pequot Settlement Act provides that "[n]otwithstanding the provision relating to a special election in section 406 of the Act of April 11, 1968 (82 Stat. 80; 25 U.S.C. 1326), the reservation of the Tribe is declared to be Indian country subject to State jurisdiction to the maximum extent provided in title IV of such Act. 25 USC 1321."[29] Title IV of the Act of April 11, 1868 is the portion of Public Law 280 which permits additional states to assume jurisdiction over tribal territories within their states. It requires states to obtain tribal consent at a special election before new Public Law 280 jurisdiction can be assumed. Although 25 U.S.C. § 1321, cited in the settlement act, is the portion of the statute specifically regarding criminal jurisdiction, the Connecticut Supreme Court has held that this provision permits the state to exercise civil adjudicatory jurisdiction to the maximum extent permitted by Public Law 280 even though the tribe has not consented to such jurisdiction in a special election.[30] Importantly, however, just as in *Cabazon* and *Bryan v. Itasca County*, although this would permit the state to exercise *adjudicatory* jurisdiction over disputes that occur in Indian country, the statute does not give the state any additional *regulatory* jurisdiction over the Mashantucket Pequot Reservation.[31] In addition, as with Public Law 280, the grant of adjudicatory jurisdiction applies only to "Indians" and does not include jurisdiction over tribes directly,[32] nor does the statute waive tribal sovereign immunity.[33]

The Mohegan Settlement Act does not provide the state with any civil jurisdiction. Rather, it provides the state only with criminal jurisdiction, and specifies that the Mohegan tribe retains

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[28] 25 U.S.C. § 2710(d)(1)(B).
[29] 25 U.S.C. § 1755.
[30] Charles v. Charles, 701 A.2d 650 (Conn. 1997) (holding that state court could exercise jurisdiction over a divorce action brought against a tribal member residing on the reservation).
[31] *See* Mashantucket Pequot Tribe v. McGuigan, 626 F. Supp. 245, 249 (D. Conn. 1986).
[32] *See* Bryan v. Itasca County, 426 U.S. 373, 379 (1976) ("[T]here is notably absent from [Public Law 280] any conferral of jurisdiction over tribes themselves.").
[33] *See* Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877, 892 (1977).

concurrent jurisdiction.[34] Again, the grant to the state of concurrent criminal jurisdiction does not include jurisdiction to enforce criminal laws that seek to enforce regulatory laws, or jurisdiction over the tribe itself.

State adjudicatory jurisdiction on both the Mohegan and Mashantucket Pequot Reservations is also limited by the terms of the gaming compacts the tribes have entered into with the state. Section 3(g) of each compact provides that the tribe "shall establish . . . reasonable procedures for the disposition of tort claims arising from alleged injuries to patrons of its gaming facilities." These compact terms have the effect of reserving to the tribal courts exclusive jurisdiction over such claims, even when the claims are not brought against the tribes themselves.[35] In the words of the Connecticut Supreme Court, these provisions "explicitly place [tort actions against non-Indian employees of the tribal gaming authority] in the jurisdiction of the tribe's Gaming Disputes Court. . . . Although Connecticut has a genuine interest in providing a judicial forum to victims of torts, the gaming act provided the state with a mechanism to negotiate with the tribe, to establish the manner in which to redress torts occurring in connection with casino operations on the tribe's land. As a result of these negotiations, the tribe maintained jurisdiction over tort actions of this type."[36]

State criminal jurisdiction is potentially expanded by Section 4(a) of the compacts, which provides that the state has jurisdiction to enforce its criminal laws which prohibit any form of Class III gaming if that gaming is not authorized by the compact. Section 4(b) also provides that state law enforcement officers have "free access" to any gaming facilities to "maintain public order and safety" and enforce the criminal laws authorized to apply by this section. Further, Section 5 requires that all gaming employees receive gaming licenses from the state, and Section 11 gives the state gaming agency authority to access gaming facilities and audit gaming operations for compliance with the compact without notice to the tribes.

Section 14 of the compacts also expand state jurisdiction in certain ways. First, Section 14a provides as follows: "*Tribal ordinances and regulations* governing health and safety standards applicable to the *gaming facilities* shall be no less rigorous than standards *generally imposed* by the laws and regulations of the State *relating to public facilities* with regard to building, sanitary, and health standards and fire safety." Note the limitations of this provision. First, it only applies to "gaming facilities," which Section 2(j) of the compact defines as the "room or rooms within which Class III Gaming is conducted." It therefore does not apply to the casino as a whole, excluding, for example, restaurants, bars, shopping areas, and concert halls.[37] In addition, the health and safety standards are those that generally apply to all public facilities, not those drafted specifically for the tribe, or those applied to certain public buildings and not to others.

More important, the compact does not permit the application of *state* law to the tribes—it instead requires the tribes to adopt laws that are no less rigorous than state laws. Unlike other portions of the compact, this does not authorize the state to directly exercise jurisdiction to enforce state law at the facilities. Instead, should the state believe that a tribe has failed to comply with this provision, it must first provide the tribe with notice of its non-compliance and

[34] 25 U.S.C. §1775d.
[35] Kizis v. Morse Diesel Intern., Inc., 260 Conn. 46, 794 A.2d 498 (2002).
[36] 260 Conn. at 58.
[37] This limited definition is supported by Section 5(j) of the compacts, which provides for investigation of "employees of the Tribe who are not gaming employees but who are employed in ancillary facilities located within the same building as any gaming facility."

request correction, and if this fails may sue the tribe in federal court claiming breach of the compact, not violation of state law.[38]

State law is authorized to apply directly by Section 14b of the compact. This section provides that "Service of alcoholic beverages within any gaming facilities shall be subject to the laws and regulations of the State applicable to sale or distribution of alcoholic beverages." Pursuant to this provision, the gaming facilities obtain state liquor licenses and comply with state law for service of alcohol within those facilities. Section 14b also contains record keeping and taxation requirements.

In sum, while federal statutes and the compacts between the Mashantucket Pequot and Mohegan Tribes and the State expand state jurisdiction on the tribes' respective reservations in certain ways, this jurisdiction remains limited, and does not include broad regulatory jurisdiction by the state.

Thank you again for the opportunity to supplement my oral testimony.

Very truly yours,

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[38] *See* Tribal-State Compacts § 13(c); 25 U.S.C. § 2710(d)(7)(A)(ii) (granting federal courts jurisdiction over suits "by a State . . . to enjoin a class III gaming activity . . . conducted in violation of any Tribal-State compact.") entered into under paragraph (3)."