

STATE OF MAINE
BEFORE THE JUSTICES OF THE SUPREME JUDICIAL COURT

DOCKET NO. OJ-18-1

IN THE MATTER OF REQUEST FOR OPINION OF THE JUSTICES

**BRIEF OF HC BANGOR, LLC,
d/b/a HOLLYWOOD CASINO HOTEL AND RACEWAY**

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STATEMENT OF INTEREST

HC Bangor, LLC, d/b/a Hollywood Casino Hotel and Raceway (“Hollywood Casino”) operates casino gaming at Hollywood Casino Bangor, and pari-mutuel wagering at Bangor Historic Track in Bangor, Maine. Hollywood Casino operates in a highly regulated industry. It strives to be a profitable and respected leader in the gaming and racing industries, a valued partner in the community, and a role model for ethical business standards. For the good of both the community and the industry, Hollywood Casino has an interest in gaming being conducted according to well-reasoned and effective laws. Hollywood Casino therefore follows the political and judicial process closely. It submits this brief to ensure that decisions about gaming in Maine are made in accordance with established law, which, in this case, as shown below, is that under the standards set forth in article VI, section 3 of the Maine Constitution, there is no “solemn occasion” that permits the Justices to decide the question referred to them on August 30, 2018, by the Maine House of Representatives concerning *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

STATEMENT OF FACTS

Bills about tribal gaming have been for many years routinely submitted to the Maine Legislature for consideration. An example in 2017 was L.D. 1447 (128th Legis. 2017), “An Act to Recognize and Provide for the Right of the Houlton Band of Maliseet Indians to Operate a Casino on Houlton Band Trust Land Exempt from Certain Gaming Laws.” That bill was authored by Representative Henry Bear and defeated. (*Id.*) Another example, this year, was L.D. 1201 (128th Legis. 2017), “An Act to Authorize Tribal Gaming.” That bill was also defeated. (*Id.*)¹

Earlier this year Representative Bear sponsored H.O. 58 (128th Legis. 2018), a “House Order, Propounding a Question to the Justices of the Supreme Judicial Court.”² The question in HO 58 was identical to the question referred to the Justices on August 30, 2018, except that the question in H.O. 58 was whether *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) allows “federally recognized Indian tribes in this State” to conduct gambling on Indian

¹ For a summary of the recent history of bills pertaining to tribal gaming in Maine, see Christopher Cousins, *Court Opinion Could Free Maine Tribes to Open Casinos Without State Approval*, Bangor Daily News (Feb. 19, 2018), <http://bangordailynews.com/2018/02/19/politics/court-opinion-could-free-maine-tribes-to-open-casinos-without-state-approval/>.

² H.O. 58 (128th Legis. 2018), available at <http://legislature.maine.gov/LawMakerWeb/summary.asp?ID=280067999>.

land without permission from the State,³ whereas the question referred by the Maine House of Representatives (the “House”) to the Justices on August 30, 2018, asks only whether *Cabazon* allows “the Houlton Band of Maliseet Indians” to conduct gambling on tribal land without permission from the State.⁴ The House voted 73 to 67 against H.O. 58, hence the question propounded in H.O. 58 was not referred to the Justices.

Later this year Representative Bear sponsored H.O. 72 (128th Legis. 2018), “House Order, Propounding a Question to the Supreme Judicial Court.”⁵ This time by a vote of 70 to 54 the House passed H.O. 72. The question posed in H.O. 72 (hereinafter the “Question”), namely,

Does the decision of the Supreme Court of the United States in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) allow the Houlton Band of Maliseet Indians, a federally recognized Indian tribe, to conduct gambling on tribal trust land without permission to do so from the State?

was thus referred to the Justices on August 30, 2018. The Justices thereupon issued a Procedural Order dated September 18, 2018, inviting interested entities to submit briefs addressing whether the Question presents a “solemn occasion” within the meaning of article VI, section 3 of the Maine Constitution.

³ H.O. 58 (128th Legis. 2018), available at http://www.mainelegislature.org/legis/bills/bills_128th/billpdfs/HO005801.pdf.

⁴ H.O. 72 (128th Legis. 2018), available at http://www.mainelegislature.org/legis/bills/bills_128th/billpdfs/HO007201.pdf.

⁵ H.O. 72 (128th Legis. 2018), available at <http://legislature.maine.gov/LawMakerWeb/summary.asp?ID=280069586>.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the question propounded by the House—“Does the decision of the Supreme Court of the United States in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) allow the Houlton Band of Maliseet Indians, a federally recognized Indian tribe, to conduct gambling on tribal trust land without permission to do so from the State?”—presents a “solemn occasion” pursuant to article VI, section 3 of the Maine Constitution.

SUMMARY OF ARGUMENT

The question propounded by the House does not present a “solemn occasion” because, among other things, it seeks an advisory opinion relating to the authority of other branches of government, is too imprecise to answer in any meaningful way, does not present a question of “live gravity,” and does not present a situation of “unusual exigency.” *See Opinion of the Justices*, 2017 ME 100, ¶¶ 21-31, 162 A.3d 188.

ARGUMENT

I. The Justices Should Decline to Answer the Question Because, Among Other Things, the House Is Seeking an Advisory Opinion Relating to the Power and Authority of Other Branches of Government, Not Just Itself.

For a “solemn occasion,” to exist, a questioning entity must not seek an advisory opinion relating to the power or authority of other branches of government. *Opinion of the Justices*, 2017 ME 100, ¶ 24, 162 A.3d 188. The Question asks whether permission is needed from the “State.” The “State” can mean many things, but whatever it is, the State certainly covers more ground than just the House, which is the questioning entity in this matter. Thus the Question plainly seeks an opinion relating to the power of other branches of government, but does so so imprecisely that it is not possible to determine even the exact nature of the inquiry. *Id.* (opinions will not be issued unless the question presented is sufficiently precise that the Justices can determine the exact nature of the inquiry). For this reason, alone, the Justices should decline to answer the Question.⁶

II. The Justices Should Decline to Answer the Question Because the Question Is Too Imprecise to Answer in Any Meaningful Way.

To present a “solemn occasion” warranting a response, a question presented must be sufficiently precise that the Justices can determine the exact nature of the inquiry. *Opinion of the Justices*, 2017 ME 100, ¶ 26, 162 A.3d 188. The Justices

⁶ This is not a situation where the Justices may respond to the Question because it is sufficiently precise and specific that there are identifiable overlapping authorities, such as in *Opinion of the Justices*, 571 A.2d 1169, 1179-81 (Me. 1989) (question regarding whether the Legislature could enact certain legislation without the approval of the Governor).

cannot answer generalized questions, not based on clear and compelling facts, and which implicate too broad a range of potential factual and legal possibilities. *Id.* The Question is imprecise, generalized, not based on clear facts, and implicates a broad range of potential factual and legal possibilities.

For example, it is unclear what the Question means by “gambling.” Does it mean so-called ceremonial gaming? Does it mean betting pools on NCAA football and basketball, or on the Super Bowl? Does it mean two people, or a small group of people betting on the New England Patriots or the Boston Celtics or other sporting events? Does it mean bingo, lotto, pull tabs, tip jars, punch boards and card games? If so, what types of card games? Chernay, baccarat, blackjack, poker? Does it mean slots? Does it mean casino games such as roulette or craps? Does it mean dog or horse racing? Jai-alai? Cock fighting? All or none of the above?

It is also unclear what it means to “conduct gambling.” Does it mean operation for profit by individual tribal owners of a gambling establishment? Is the tribe itself the owner? Does it mean operations conducted by a Maine nonprofit corporation or something similar to it, controlled by the Houlton Band of Maliseet Indians, but where there are no equity stakeholders? Does it mean only tribal members can own or operate the establishment, or may there be minority, or even

majority non-tribal owners? At what level is non-tribal participation allowed in the “conduct” of the gambling operations?

And what does “without permission to do so from the State” mean? Does it just mean that the Houlton Band of Maliseet Indians may conduct gambling without getting permission, but not (legally) if legislation is enacted to make it a crime to conduct such gambling? In other words, does “without permission” mean that if Maine law is silent on the issue, they may do so, or does it mean they may do so even if Maine law specifically prohibits it?

And what is the question really asking about *Cabazon*? Is the Question asking the Justices just to look at that decision, by itself, without attention to federal and Maine legislation and case law in the last 31 years since then? In other words, is the Question asking the Justices to assume that *Cabazon* still “rules the day,” at least in terms of federal law applicable in some way to Maine, as though the Justices were responding to the Question on February 26, 1987, the day after *Cabazon* was decided? Or does the Question seek the Justices’ opinion on the application of *Cabazon* in light of federal and Maine legislation and case law in the past 31 years? In that regard it is noteworthy that some (maybe all) legal scholars agree that *Cabazon* was overruled by Congress in 1988 when Congress enacted the Indian Gaming Regulatory Act (“IGRA”), Pub. L. No. 100-497, 102 Stat. 2467 (1988). See, e.g., Courtney J.A. DaCosta, *When “Turnabout” Is Not “Fair Play”*:

Tribal Immunity Under the Indian Gaming Regulatory Act, 97 Georgetown L.J. 515, 521 (2009) (“Congress enacted IGRA to overrule *Cabazon* . . . and to grant states limited regulatory authority over Indian gaming”); Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 Nev. L.J. 285, 289-91 (Winter 2003/2004).

The Question is thus so imprecise and implicates so many different factual and legal scenarios that any attempt to answer it would quickly devolve into so many hypothetical scenarios and permutations that it would amount to a monumental and quite academic enterprise. The Justices should therefore decline to respond to the Question.

III. The Justices Should Decline to Answer the Question Because it Is Not One of “Live Gravity.”

In order to present a “solemn occasion,” the Question must be one of “live gravity,” meaning that the questioning entity “must be faced with the current need to act,” rather than a situation where relevant legislation is not under pressing consideration or “the questioning body adjourned.” *Opinion of the Justices*, 2017 ME 100, ¶ 23, 162 A.3d 188. In order for the Justices to respond, the Question must also not relate to matters “merely tentative, hypothetical and abstract.” *Id.*

There is no tribal gaming legislation now of immediate pressing concern. The House is in adjournment sine die, as the Justices already observed in their Procedural Order. The Question likewise poses matters that are hypothetical and

abstract, as set forth above. For these reasons, too, the Justices should decline to answer the Question.

IV. The Justices Should Decline to Answer the Question Because it Does Not Present a Situation of Unusual Exigency.

For there to be a “solemn occasion” for purposes of article VI, section 3, the Question must arise in a situation presenting an “unusual exigency.” *Opinion of the Justices*, 2017 ME 100, ¶ 22, 162 A.3d 188. The Question arises out of no unusual exigency. On the contrary, the Question arises while the Legislature is adjourned and out of the ongoing public discussion of issues of tribal and other gaming in the State of Maine. For this reason, too, the Justices should decline to respond to the Question.

CONCLUSION

WHEREFORE, Interested Entity HC Bangor, LLC, d/b/a Hollywood Casino Hotel and Raceway respectfully requests that the Justices decline to answer the Question posed by the House because it does not present a "solemn occasion" pursuant to article IV, section 3 of the Maine Constitution.

Respectfully submitted,

Dated at Bangor, Maine this 11th day of October, 2018.


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