No. 05-50754

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; DIRK KEMPTHORNE, in his Official Capacity as Secretary of the Department of the Interior, Defendant- Appellees,

KICKAPOO TRADITIONAL TRIBE OF TEXAS,
Intervenor-Defendant-Appellee

BRIEF OF PROFESSORS GILLIAN E. METZGER, DANIEL N. ORTIZ, KEVIN M. STACK, STEPHANIE TAI, AND DAVID ZENGER AS *AMICI CURIAE* SUPPORTING REHEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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2. Daniel N. Ortiz, Professor of Law at the University of Virginia School of Law,* is an *amicus curiae* supporting appellees/petitioners.

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Please Note: Amici's Institutional Affiliations Are Provided For Identification Purposes Only.

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Statement of Interest

Amici are professors who teach and write about administrative law. *Amici* can attest to the extraordinary importance of the legal issues presented by the panel decision in this case. The *Chevron* doctrine occupies a central place in public law, and the panel decision here both reflects and adds to uncertainty and decisional conflict respecting its fundamental contours.

Background

1. This case arises out of the Interior Secretary's response to the Supreme Court decision in *Seminole Tribe*, which held that 25 U.S.C. § 2710(d)(7), the Indian Gaming Regulatory Act provision authorizing tribes to sue states refusing to negotiate gaming compacts, was ineffective against an Eleventh Amendment defense.

It is widely accepted that, after *Seminole*, IGRA's judicial remedy framework remains operative if a state does not assert sovereign immunity, see 497 F.3d at 494 (Jones, C.J). The Supreme Court's decision did not settle, however, what is to occur when a state, after refusing to negotiate, invokes Eleventh Amendment immunity – a circumstance Congress did not provide for in IGRA (or, apparently, contemplate, see U.S. Reh. Pet. 7 n.1). In a part of the Eleventh Circuit *Seminole* decision the High Court declined to review, see 517 U.S. at 76 n.18, the appeals court, noting that IGRA provides for Secretarially-authorized gaming when a state refuses to enter a compact, 25 U.S.C. § 2710(d)(7)(B)(vii), concluded that a similar remedy obtains if suit is

dismissed on immunity grounds, see 11 F.3d at 1129. Other courts have indicated that when a tribe's efforts to negotiate – and to obtain a judicial hearing – are rebuffed, the IGRA requirement of a tribe-state compact must give way. See, *e.g.*, *Confederated Tribes* v. *Washington,* No. CS-92-0426 (E.D. Wash. 1993). Both approaches proceed from recognition that Congress did not intend a regime where a state could (by refusing to negotiate and pleading immunity) unilaterally prevent gaming.

2. In 1996, the Secretary, invoking, *inter alia*, his authority "to prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs," see 25 U.S.C. §§ 2, 9, and his specific responsibility for implementing IGRA, initiated notice-and-comment rulemaking, which culminated in promulgation of the Gaming Procedures Regulations ("Regulations") here in issue. Beginning from Congress's intent to grant states a right of participation, not a veto over gaming on tribal lands, the Secretary undertook to fashion an administrative process that would implement IGRA's core policy judgments. Thus, the final Regulations, like the statute, make a voluntarily negotiated compact (with federal court involvement, if necessary) the preferred path, with Secretarially-authorized gaming as a backstop, see 25 C.F.R. §291.3(d), and provide states with various opportunities to participate in the decision-making process. See, *e.g.*, *id.* § 291.7(b) (proposal); § 291.8(b) (informal conference); § 291.9 (mediation).

3. Texas filed this facial challenge to the Secretary's power to issue the

Regulations after the Kickapoo Tribe submitted an application for Secretarial authorization of Tribe-regulated gaming on tribal lands.

After the district court dismissed Texas's suit on ripeness grounds, 362 F. Supp. 2d 765 (W.D. Tex. 2004), this Court reversed, in a splintered decision that produced three separate opinions. Although all three judges concluded that Texas's claim was governed by the *Chevron* framework, *i.e.*, that courts must uphold an agency's exercise of its regulatory authority, unless (1) contrary to a "precise" congressional directive, or (2) unreasonable, 467 U.S. at 843-44, the understandings of this doctrine expressed in the panel opinions were poles apart.

Thus, the principal opinion concluded that the Regulations were facially *in*valid – reasoning, *inter alia*, that Congress's apparent preference for a (primarily) judicial, rather than an administrative, remedy precluded the Secretary's action, see 497 F.3d at 501, and the "gap" created by the *Seminole Tribe* decision was not the sort *Chevron* allows an agency to fill. Judge Dennis, in contrast, concluded that, in view of the Secretary's responsibilities with respect to Indian affairs generally and to IGRA, in particular, and of Congress's purposes in enacting that law, he had a "clear duty," *id.* at 515, to provide tribes an effective administrative remedy.

Judge King's separate opinion did not join any of Chief Judge Jones's *Chevron* discussion, but also concluded that the Regulations exceeded the Secretary's authority. The Secretary's responsibility to effectuate IGRA, she explained, "does not include

the power to jettison * * * provisions [that] * * * no longer seem wise or appropriate in light of events that Congress did not foresee." *Id.* at 512. Recognizing that Congress did not intend IGRA to give recalcitrant states a veto, Judge King also indicated, however, there would be "circumstances" when a court, to effectuate Congress's intent, would have to hold unenforceable IGRA's provisions prohibiting "gaming without a compact." See *id.* at 511 (citing *United States* v. *Spokane Tribe*, 139 F.3d 1297 (9th Cir. 1998)).

Reasons Warranting En Banc Review

Amici believe this case, which creates intercircuit disuniformity and presents issues of exceptional importance, satisfies the stringent criteria for en banc rehearing.

First, the result reached by the panel majority, that the Secretary is without statutory authority to provide a remedy when a state refuses to negotiate a compact, places this Court in conflict with two Sister Courts of Appeals, see *Seminole Tribe*, 11 F.3d at 1029; *Spokane Tribe*, 139 F.3d at 1302, on a legal question of large practical significance. As all parties and opinions recognize, the availability (*vel non*) of *some* remedy when a state refuses to negotiate is of surpassing import to tribes and their members, and, if the panel decision were to stand, there would be arbitrary disparities in the legal rights of tribes – and states – in different Circuits.

Second, the fractured panel decision raises significant uncertainty as to the law *within* the Fifth Circuit. Judge King's opinion supporting the judgment recognized

that a regime in which IGRA's judicial remedy and the Secretarial Regulations were both *un*enforceable, but the compact requirement remained operative, would be "wholly contrary to Congress's intent," 497 F.3d at 512, and might make *those* provisions unenforceable, in certain (unspecified) "circumstances." Because the opinion concluded that these "difficulties" were "not before th[e] court," in this case, but see Tribe Reh. Pet. 13 n.12 (citing Tribe's repeated presentation of severance arguments), tribes and states within this Circuit are left without guidance as to the "circumstances" in which a compact is or is not required. The very reason that led the panel to address the issue, in disagreement with the district court's conclusion that the dispute was not yet ripe – the need for "guidance into how IGRA's provisions may be administered," 497 F.3d at 499 – make this an untenable place to let matters rest.

Even apart from its large significance for tribe-state relations under an important federal statute, the panel's decision invaliding the Regulations would, we believe, warrant consideration by the full Court. There is no more important or ubiquitous doctrine in American public law than the rules for judicial review of administrative action laid down in *Chevron*, and the opinions supporting the panel judgment here resolved fundamental, recurring questions concerning that doctrine in ways that (1) conflict with decisions of other courts and (2) cannot readily be reconciled with recent Supreme Court (and Circuit) jurisprudence.

A. *En Banc* Consideration is Necessary to Maintain Decisional Uniformity Within the Fifth Circuit, and to Maintain Consistency With Decisions of the Supreme Court and the Other Circuits in Relation to Agency Authority.

1. The Panel Decision's Approach To Agency Authority Is Inconsistent With Supreme Court and Circuit Law

Although the opinions supporting the judgment discussed the Regulations in terms of the two familiar *Chevron* "prongs" – i.e., (1) whether Congress spoke directly to the precise question the Secretary resolved and (2) whether the Regulations were a reasonable approach to what Congress left undecided, their primary focus was on what was treated as a distinct, threshold question: whether Congress had delegated authority to the Secretary in the first place. Thus, the principal opinion reasoned: (1) that Congress vested the Secretary with authority to prescribe gaming procedures only in narrow circumstances (2) that this narrow delegation prohibited the agency from enlarging that category; and (3) the later *Seminole* decision, invalidating Congress's principal remedy for tribes, could not allow courts to recognize rulemaking authority "Congress did not originally intend to confer." 497 F.3d at 502.[1]

Although the general premise that a "congressional delegation of administrative authority" is a "precondition to deference under *Chevron*," *Adams Fruit Co., Inc.* v. *Barrett*, 494 U.S. 638, 649 (1990), is unexceptionable, the panel majority's approach

[1]Although Judge King's concurring opinion did not rest on a rigid distinction between judicially and legislatively created "gaps,"it too took the view that the problem was lack of authority – likening the Secretary's effort to cases where agencies asserted authority over matters Congress never intended them to decide. See *Gonzales* v. *Oregon*, 546 U.S. 243 (2006); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). see pp. 11-14, *infra*.

to determining whether authority was conferred, is, we believe, seriously inconsistent with Supreme Court and Circuit precedent.

First, *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), and other decisions instruct that, rather than analyze various sources of agency authority one-by-one, federal courts must take a more holistic approach, *id.* at 226; *United States* v. *O'Hagan*, 521 U.S. 642, 673 n.19 (1997). Express delegation of general rulemaking authority is, these decisions hold, especially powerful grounds for deference, see *Mead*, 533 U.S. at 226, *United States v. Haggar Apparel Co.*, 526 U.S. 380, 392-93 (1999); *O'Hagan*, 521 U.S. at 673, as is the fact that Congress vested the agency with overall responsibility for administering or implementing a statute or program. See *Chevron*, 467 U.S. at 843-44; *Morton* v. *Ruiz*, 415 U.S.199, 231 (1974).

Here, the exercise of regulatory authority was not grounded, as the principal opinion implied, on the "absen[ce of] an express withholding of * * * power," 497 U.S. at 502-03. In addition to his responsibility for implementing IGRA, see 497 F.3d at 520-21 (Dennis, J.) (citing, *inter alia*, 25 U.S.C. §§ 2710(d)(8)(B) and 2710(d)(7)(B)(vii)), the Secretary pointed to Congress's explicit grant of authority "to prescribe such regulations as he may think for carrying into effect the various provisions of any act relating to Indian affairs," *id.* §§ 2, 9. See *Morton*, 415 U.S. at 231 ("In the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies, and the power has been given explicitly to the

Secretary"). When Congress has enacted such a broad and explicit delegation, the specter of "'limitless [agency] hegemony,'" 497 F.3d at 504 (quoting *Ethyl Corp.* v. *EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995)), has no relevance.

Indeed, even if authority for the Regulations did not fall squarely within the ordinary meaning of those express statutory grants, the panel's restrictive view of agency authority would be at odds with Circuit precedent. In *First Gibraltar Bank* v. *Morales*, 42 F.3d 895 (5th Cir. 1995), this affirmed its agreement with others that have held that an "agency's determination of its own statutory authority" is entitled to deference. *Id.* at 901 & n.7 (citing *NCNB Tex. Nat'l Bank* v. *Cowden*, 895 F.2d 1488, 1494 (5th Cir. 1990) and *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 380-83(1988) (Scalia, J., concurring in judgment)).[2]

To be sure, the Secretary is obliged to exercise these delegated powers consistently with Congress's specific directives and policy judgments, including those expressed in IGRA, and an administrative regime that interfered with the operation of Congress's "self-contained and fully sufficient" judicial remedy, 497 F.3d at 500,

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[2]In his influential opinion, Justice Scalia collected numerous examples supporting this approach, explaining:

> giving deference to an administrative interpretation of its statutory jurisdiction or authority is both necessary and appropriate. It is necessary because there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority. To exceed authorized application is to exceed authority * * * * And deference is appropriate because it is consistent with the general rationale for deference: Congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction.

Id. (citing *Chevron*, 467 U.S. at 843-44).

would be immediately suspect. But the large leap taken by the panel majority – from the proposition that "the Secretary could [not] have promulgated his alternative Procedures * * * before *Seminole Tribe* was decided," *id.*, *i.e.*, when the legislatively intended and "fully sufficient" remedy was operative, to the conclusion that the remedy was foreclosed afterward – is unjustifiable. Under *Chevron*, the hypothetical regime would raise problems that the actual (*i.e.*, post-*Seminole*) one does not. That Congress intended a limited Secretarial role *in a regime where the judicial remedy would be operative* does not settle that it spoke "directly" to the "precise question," 467 U.S. at 843, the Secretary resolved, *i.e.*, what should occur when a recalcitrant state's immunity assertion halts a tribe's suit, see *Pittston Co.* v. *United States,* 368 F.3d 385, 403 (4th Cir.2004), let alone expressed a preference for a state veto. Likewise, that it might have been "[im]permissible," 467 U.S. at 843, for the Secretary to construe the general authority statutes to provide tribes a means of bypassing a *functioning* judicial process does not prevent him from providing a remedy when that path is blocked. Cf. *Ragsdale* v. *Wolverine World Wide, Inc.,* 535 U.S. 81, 91 (2002).

2. The Decision's Approach To Agency Authority to Fill A Judicially Created "Gap" Squarely Conflicts With Decisions of Other Courts

As Judge Dennis explained, the conclusion that the "gap" created by *Seminole Tribe* is not the kind that, under *Chevron*, may be filled through agency action conflicts squarely with the decisions of other Courts of Appeals. In a series of cases involving regulations adopted by the Social Security Administrator in response to the

Eastern Enterprises v. *Apfel*, 524 U.S. 498 (1998) (which held unconstitutional Congress's allocation of pension responsibilities), the Fourth, Sixth, Eleventh and D.C. Circuits have rejected arguments essentially identical to the *Chevron* analysis advanced in the principal opinion here, *i.e.*, that the agency rule was contrary to the one Congress had *expressly* provided and that the later judicial decision could not create "ambiguity" in a statute whose meaning was clear upon enactment. See *A.T. Massey Coal Co.* v. *Holland,* 472 F.3d 148, 168 (4th Cir. 2006) (*Chevron* permitted the agency to fill the gap "created when the Supreme Court found a portion of [a] provision unconstitutional"); *Sidney Coal Co.* v. *Soc. Sec. Admin.*, 427 F.3d 336 (6th Cir. 2005); *U.S. Steel Corp.* v. *Astrue*, 495 F.3d 1272 (11th Cir. 2007); *Elgin Nat'l Indus., Inc.* v. *Barnhart,* No. 04-5243, at *2 (D.C. Cir. Apr. 27, 2005) (unpublished).

As these courts explained, the statute *was* silent on the question the Administrator had undertaken to answer – what allocation should prevail in the event Congress's first choice was ruled unconstitutional:

> In drafting the Coal Act, Congress did not contemplate that some members of the "signatory operators" group could not constitutionally be required to contribute to the Combined Fund. The situation faced by the Commissioner was thus the kind of "case unprovided for" that allows her to engage in gap-filling. See *Barnhart v. Peabody Coal Co.,* 537 U.S. 149, 169, (2003).

Pittston Co., 368 F.3d at 403-04. Accord *Sidney Coal*, 427 F.3d at 346.

These case cohere with recent Supreme Court decisions emphasizing that, under *Chevron*, agency authority is not confined to issues Congress specifically foresaw –

but extends to matters "about which Congress did not actually have an intent," *Mead*, 533 U.S. at 229. Moreover, *Chevron*'s teaching that courts should treat textual silence or ambiguity as a *type of* (implicit) delegation does not mean that other kinds, such as that in a general authority provision, is somehow disfavored.

> A statute may be ambiguous, for purposes of *Chevron* analysis, without being inartful or deficient* * * * Here Congress has authorized the agency to issue rules so that the tariff statutes may be applied to unforeseen situations and changing circumstances in a manner consistent with Congress' general intent * * * * For purposes of the *Chevron* analysis, the statute is ambiguous * * * in that the agency must use its discretion to determine how best to implement the policy in those cases not covered by the statute's specific terms.

Haggar Apparel, 526 U.S. at 392-93. In such situations, the question for courts to decide – with deference to agencies' expertise and their political accountability – is whether or not the agency resolution is "one that Congress *would have* sanctioned," *New York v. FCC*, 486 U.S. 57, 69 (1988) (emphasis added).

B. *Chevron* and Severability Doctrine Strongly Support Secretarial Authority To Conserve The Congressionally-Intended Balance

Both opinions supporting the judgment place reliance on decisions like *Brown & Williamson* and *Gonzales* v. *Oregon*, suggesting that this is a case, like those, where the literal language of a broad enabling statute should not control. The intricate procedures laid down in IGRA, Judges Jones and King posited, reflect such a precise and meticulous balancing of interests, that *any* departure from them – even one that more closely approaches the original balance than does a state-veto construction of IGRA – requires specific, explicit congressional authorization. This, too, we believe,

misapprehends the relevant precedent.

First, the decisions relied upon reflect a limiting principle, not a general rule: that, even under *Chevron*, a court may look beyond literal words of an enabling statute when the broader general legal context and "common sense," 529 U.S. at 133, establish that Congress did not mean to vest the agency with power to decide a matter. Thus, in *Brown & Williamson*, the Court noted the agency's newly-claimed authority to regulate tobacco, though within the wording of a statutory provision, was contrary to decades of executive and legislative understanding, on a matter of vast political and economic importance, *id.* And in *Gonzales*, common sense and statutory structure likewise highlighted the implausibility of the Justice Department's claim that a delegation of the authority needed for enforcing the Controlled Substances Act empowered the Attorney General to act upon his philosophical objections to physician-assisted suicide and punish doctors practicing within Oregon law.

The exercise of regulatory authority here is different in kind. The impetus was a circumstance Congress did not provide for – and the danger that the statutory regime would operate (if it could operate at all, see *Alaska Airlines* v. *Brock*, 480 U.S. 678 (1987)), in a manner completely contrary to Congress's intent. There is no serious dispute that the aim of the Secretary's action – undertaken after notice-and-comment rulemaking – was to produce a regime that respected the basic policy choices expressed in IGRA and approximated, though it could not precisely replicate, the one

Congress sought to establish. Thus, while the Regulations divest recalcitrant states of the veto Congress never intended to confer, they also *preserve* states' ability to insist on a federal "court determin[ation]," 497 F.3d at 502, requiring tribes to afford states the opportunity to claim the protections of IGRA's judicial process. See 25 C.F.R. § 291.3 (procedures apply only *after* a tribe has sued to compel negotiations, and the state has moved, successfully, to dismiss, on immunity grounds). And a court determination that a state's refusal to compact was in "good faith" still prevents a tribe from operating (and the Secretary from authorizing) gaming. See *Haggar Apparel*, 526 U.S. at 393 ("the agency's rules as to instances not covered by the statute should be parallel, to the extent possible, with the specific cases Congress did address").[3]

The conclusion that the Secretary is without power to take such action is inconsistent not only with IGRA's stated purposes and Congress's general allocation of administrative responsibility, but with the legislative judgment apparent from IGRA's severability clause, 25 U.S.C. § 2721. Although, as the Tribe correctly

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[3]Had the Regulations sought, in the guise of responding to *Seminole*, to "wholly revise[] the balance that Congress" struck, 497 F.3d at 511 (King, J.), they would be vulnerable under *Chevron* Step II, but that plainly is not what happened here. To the extent that the "neutral judicial process" is "jettisoned," *id.*, that is a consequence of the Eleventh Amendment and the Supreme Court's decision in *Seminole* (and the state's decision to assert immunity), not the Secretary's Regulations.

Likewise, while, by definition, the administrative remedy cannot replicate exactly what was lost in *Seminole*, the Regulations do not depart in any important or fundamental way from those enacted directly by Congress. See 497 F.3d at 524 (Dennis, J.). Indeed, any implication that the regime is slanted in tribes' favor is hard to square with the fact that more than three and half-years elapsed between the Secretary's receipt of the Kickapoo proposal and his *"preliminary* 'scope-of-gaming decision, " *id.* at 497 n.2 – which came *twelve* years after the tribe first sought to negotiate. See also *Santee Sioux Nation* v. *Norton*, 2006 WL 2792734 at *6 (D. Neb. Sept. 26, 2006) (sustaining Secretary's *denial* of tribe's application under the Regulations).

explains, such a provision *does not mean* that a court may or should preserve provisions that would operate to frustrate Congress's intent of ensuring balance and preventing a state veto, see Tribe Reh. Pet. 13-14 (citing *Alaska Airlines*), this explicit rejection of all-or-nothing invalidation *does* foreclose the claim that Congress viewed the *particulars* of the original balance to be so fundamental that it reserved to itself exclusive authority to respond to an unforeseen judicial decision that would otherwise result in throwing the balance completely off.[4]

Finally, given the expectation that remedial decisions (if any) would be made with an eye toward effectuating the legislation's policy choices, per *Alaska Airlines*, it is singularly implausible to assume that Congress would *not* intend the Secretary to play a central role in this process. See *Mourning* v. *Family Publications Serv., Inc.*, 411 U.S. 356, 371 (1973) ("where reasonable minds may differ as to which of several

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[4]The reasons for such a policy choice are not hard to imagine: in view of the practical and formal obstacles to enacting new legislation, there would have been no reason to expect that a judicial decision remanding the whole subject to Congress would produce any result – let alone one that more faithfully implemented the 100th Congress's policy choices than would a "second best" IGRA.

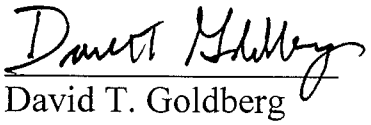
Nor are the state interests so vital that some sort of extra-clear congressional authorization is required. Compare *Gonzales*, 546 U.S. at 274. In view of cases holding that no explicit delegation is required for agency to displace state law in areas of *traditional* state responsibility, see *Fidelity Fed. Sav. & Loan Assn.* v. *de la Cuesta*, 458 U.S. 141 (1982), it follows *a fortiori* that none is required where states have no such claim, see *Seminole*, 517 U.S. at 58 (IGRA "extend[ed] to the States a power withheld from them by the Constitution") – and the role Congress provided was, on all accounts, a "subordinate" one, 497 F.3d at 493. Indeed, as Judge Dennis noted, there is something at least anomalous about emphasis on the protective role of a federal judicial forum, given (1) that the Regulations *only* apply when, as here, a state refuses to consent to that forum, 25 C.F.R. § 291.3– and (2) that the original (invalidated) IGRA framework was enacted with substantial support of states, see *Spokane*, 139 F.3d at 1302 n. 4; cf. 64 Fed. Reg. at 17, 538 (noting that Secretarial evaluation of "good faith" was removed from final regulations at states' urging). See generally *Lapides* v. *Board of Regents*, 535 U.S. 613, 619 (2002).

remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority"). Not only does Secretarial involvement offer the familiar advantages of expertise and political accountability, see *Chevron*, but there is surely an additional, distinct value to prospective, general rulemaking in a setting such as this, where certainty and predictability are recognized to be of special importance.

Conclusion

For the foregoing reasons, *Amici* believe this Court should grant the petitions for en banc rehearing.

Respectfully submitted,



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I hereby certify that on this 15th day of November, 2007, I served the foregoing Brief of Law Professor *Amici* Supporting Rehearing *En Banc*, by depositing in First Class Mail two copies thereof, along with one diskette containing an Adobe Acrobat format version of it, addressed to the counsel listed below:

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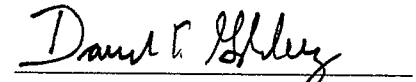

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