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 Interior,
Defendant-Appellees

KICKAPOO TRADITIONAL TRIBE OF TEXAS
Intervenor-Defendant-Appellee

FEDERAL APPELLEES' PETITION FOR REHEARING *EN BANC*

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STATEMENT PURSUANT TO 5th CIR. R. 35.2.2

A divided panel of this Court has invalidated the Secretarial Gaming Procedures regulations, despite no procedures having yet been issued in this case, raising an issue of exceptional importance as it significantly reduces the authority of the Secretary of the Interior to effectuate Indian gaming in a manner consistent with the intent of Congress, in any state in this Circuit which does not choose to negotiate with Indian tribes as the Indian Gaming Regulatory Act envisioned. Therefore, *en banc* rehearing is warranted.

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INTRODUCTION AND STATEMENT OF ISSUES

The Federal Appellees respectfully petition this court, pursuant to Fed. R. App. P. 35(b)(1), to grant *en banc* rehearing of this case. The State of Texas challenged the validity of regulations promulgated by the Secretary of the Interior to implement certain provisions of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq.*, in circumstances in which a State invokes its Eleventh Amendment immunity from suit under IGRA. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Supreme Court held that Congress could not constitutionally abrogate a State's immunity under IGRA, and thus a suit under IGRA may not proceed if a State invokes its immunity. The district court upheld the regulations. In a split decision, the panel reversed the district court and remanded for further proceedings without a majority for the rationale.

The majority held that the challenge was ripe despite the Secretary having issued no gaming procedures. In the principal opinion, Chief Judge Jones (not joined on this point by the panel's other two members) then ruled on the merits that a judicial interpretation of a statute could not create a "gap" in the statute which could be filled by an agency's rulemaking authority, and that even if it could, the regulations promulgated by the Secretary were contrary to IGRA and unreasonable. The principal opinion also holds that the challenged regulations are invalid because they were not explicitly authorized in the statute by Congress, a holding difficult to reconcile with *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837,

842-43 (1984), and its progeny. Judge King did not agree that an agency could not promulgate regulations in circumstances such as these. Ultimately, Judge King concurred in the judgment on the ground that the particular regulations exceeded the Secretary's authority under IGRA. Judge Dennis dissented, concluding that the regulations promulgated by the Secretary to address the gap situation in which a State asserts its immunity after the *Seminole* decision are not contrary to law or arbitrary and capricious.

The panel's decision is the first appellate court decision to invalidate the regulations promulgated by the Secretary to address the gap in IGRA for processing an Indian Tribe's request to conduct Class III gaming. In striking down these regulations, the panel's decision allows a state to frustrate the Secretary's consideration of a Tribe's request to conduct Class III gaming. When it enacted IGRA, Congress did not intend to grant a state such unilateral authority. The panel's decision will deny the Secretary the authority to consider the request not only of the intervenor Kickapoo Tribe, but also of any other Tribe within this Circuit that wishes to submit an application to conduct Class III gaming. This case therefore presents issues of exceptional importance requiring *en banc* review.

BACKGROUND AND COURSE OF PROCEEDINGS

Congress enacted the IGRA "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). IGRA establishes

that "Indian tribes have the exclusive right to regulate gaming on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." *Id.* at § 2701(5). IGRA envisions that gaming of the type at issue in this case (known as "Class III" gaming) would occur under the terms negotiated in a "compact" between an Indian tribe and a state. The statute grants states considerable opportunity to negotiate the specific terms of a compact, but IGRA ultimately would permit gaming to occur even in a situation where a state continues to object and does not agree to a compact.

When a tribe requests a compact to conduct Class III gaming, "the State shall negotiate with the Indian Tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A). Should these efforts fail, IGRA provides a comprehensive mediation process to prevent an impasse, triggered by the tribe filing suit against the state alleging that the state has refused to negotiate or has failed to negotiate in good faith. 25 U.S.C. § 2710(d)(7)(B)(ii). Should the district court find either to be the case, the parties are sent to a court-appointed mediator, 25 U.S.C. § 2710(d)(7)(B)(iv), and in the event that an agreement cannot be reached, the mediator must notify the Secretary, who "shall prescribe . . . procedures . . . under which class III gaming may be conducted." 25 U.S.C. § 2710(d)(7)(B)(vii).

However, the Supreme Court found that the statute could not prevent a State from raising its Eleventh Amendment immunity from suit as an affirmative defense

to a suit from a tribe. *Seminole Tribe*, 517 U.S. at 72-73. The Court did not invalidate § 2710(d)(7)(B) (IGRA's remedial process) in its entirety, nor did it overturn the Eleventh Circuit's description of what remained. *Id.* at n. 18. Accordingly, if a tribe files suit against a state under IGRA, and the state invokes its sovereign immunity under the Eleventh Amendment, the procedures for judicial review and subsequent mediation by a court-appointed mediator are inapplicable. *See Seminole Tribe v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1996). The Supreme Court's decision in *Seminole* raised the question whether a state could effectively veto *any* attempt by a tribe to conduct Class III gaming by refusing to negotiate and then asserting Eleventh Amendment immunity from suit.

In response to the decision in *Seminole*, the Secretary promulgated regulations establishing the means by which the IGRA process will proceed if a state does not consent to suit. 64 Fed. Reg. 17,535 (Apr. 12, 1999) (codified at 25 C.F.R. Part 291) ("Secretarial Procedures regulations"). These regulations provide that if a tribe files suit against a state for failure to negotiate in good faith, 25 U.S.C. § 2710(d)(7)(A)(I), and the state invokes its immunity to suit, the tribe may apply for Secretarial Gaming Procedures. 25 C.F.R. § 291.1. The regulations provide an opportunity for both state and tribe to confer and submit proposals for a gaming compact, and should no agreement be reached, the Secretary appoints a mediator. 25 C.F.R. §§ 291.9 and 291.10. The regulations preserve the Secretary's authority under 25 U.S.C. § 2710(d)(7)(B)(vii) to approve procedures by which the tribe may conduct gaming,

consistent with all applicable state and federal laws, if the tribe and state do not reach agreement following mediation. 25 C.F.R. § 291.8(c).

The Kickapoo Traditional Tribe of Texas ("Tribe") first requested negotiations for a Class III gaming compact with the State of Texas ("State") in 1995. The State rejected the Tribe's attempt to negotiate a compact, and the Tribe sued the State in federal district court. *See Texas v. United States*, 362 F.Supp. 2d 765, 767 (W.D. Tex. 2004) (describing prior suit). The State invoked its Eleventh Amendment immunity from suit as an affirmative defense, and following the Supreme Court's decision in *Seminole Tribe*, the district court dismissed the Tribe's suit in 1996.

In December 2003, the Tribe submitted an application for Class III gaming procedures, and the Department of the Interior invited comments and an alternative gaming proposal from the State. *See* 25 C.F.R. § 291.7. The State did not respond, but filed this lawsuit instead. The district court granted summary judgment to the United States, holding that because no gaming procedures had been issued, the State's suit was not yet ripe. On August 17, 2007, this Court reversed the district court's judgment.

ARGUMENT AND AUTHORITIES

I. Chief Judge Jones's Opinion is in Tension with the Supreme Court and Other Circuits on Questions of Exceptional Importance to Administrative Law.

A. The State's Challenge Is Not Ripe.

_____The State's challenge cannot yet be ripe because the possibility remains that

the Secretary may issue no gaming procedures in response to the Tribe's application. "In the cases in which pre-enforcement review of an administrative regulation has been permitted, the Courts have done so only after finding that the 'regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance.'" *Texas Indep. Producers and Royalty Owners Ass'n v. United States Envtl. Prot. Agency*, 413 F.3d 479, 482 (5th Cir. 2005) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 153 (1967)). The panel's opinion, holding that the State's challenge is ripe, violates this basic principle of administrative law.

The State has not had to alter its conduct in any way as a result of the Tribe's application – indeed, when invited to join in a conference with the Tribe and Interior, the State refused to participate at all. It has expended no money and filed no papers (except this lawsuit) as a result of the regulations. Assuming, *arguendo*, that the majority is correct that the State has established sufficient injury for Article III standing, slip op. at 12, the State has not demonstrated sufficient injury to justify pre-enforcement review of these reguations. *Nat'l Park Hospitality Ass'n v. Dept. of the Interior*, 538 U.S. 803, 808 (2003); *Texas Indep. Producers*, 413 F.3d at 482. "Even where an issue presents purely legal questions, the plaintiff must show some hardship in order to establish ripeness." *Cent. & Sw. Servs. v. United States Envtl. Prot. Agency*, 220 F.3d 683, 690 (5th Cir. 2000). As the State has not had to change its legal position or expend any resources, and no gaming has been or is certain to be

authorized, the State has not established that its challenge to the regulations is ripe.

B. The Principal Opinion Holds Incorrectly That a Judicial Decision Cannot Identify a "Gap" in Statutory Language.

The Supreme Court held in *Seminole Tribe* that a state may not be subjected to suit under 25 U.S.C. § 2710(d)(7)(A)(i), without its consent. The Court did not hold in *Seminole Tribe* that the Secretary loses his authority, in 25 U.S.C. § 2710(d)(7)(A)(vii), to approve Class III gaming procedures if the tribe and state do not reach agreement.[1] The Eleventh Circuit has specifically recognized that the Secretary may do so. *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994). *See also United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1302 (9th Cir. 1998).

Nevertheless, the principal opinion flatly rejects the idea that a judicial decision invalidating a certain feature of a statute may create a situation previously unforeseen but that may still be within the authority of the agency charged with administration of that statute to address. Slip op. at 25. The principal opinion asserts that "there is no support for the proposition that later court decisions affect or effect ambiguity" of a statute, *id.* at 26, and holds that "any delegation-engendering gap contained in a

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[1] IGRA's initial sponsor later acknowledged that the idea never occurred to Congress. "During all that time, I do not recall the [Eleventh] Amendment being discussed as something with which we should be concerned." *Oversight Hearing on Status of the Activities Undertaken to Implement the Gaming Regulatory Act, Hearing Before the Select Committee on Indian Affairs*, S. Hrg. 102-660, Pt. 2 at 20 (Mar. 18, 1992) (Statement of Sen. Inouye).

statute, whether implicit or explicit, must have been 'left open *by Congress*,' not created after the fact by a court." *Id.* at 25 (quoting *Chevron*, 467 U.S. at 866) (emphasis in opinion). But IGRA contains a strong severability clause, which provides that if any provision of the Act is held invalid, the remaining provisions of the Act "shall continue in full force and effect." 25 U.S.C. § 2721. Congress itself thus did provide for the situation in which a provision of the Act – here, the abrogation of sovereign immunity – was held invalid, and it specified that IGRA otherwise be given full force and effect. That is what the Secretary has done, under regulations that preserve his authority to adopt procedures for Class III gaming if the State does not negotiate or the parties do not reach agreement, but, to protect state interests, also give the State an opportunity to present proposals and negotiate *even though* it has invoked its sovereign immunity and thereby declined to participate in court.

Both the concurrence, slip op. at 43 (King, J., concurring), and the dissent, *id.* at 54 (Dennis, J, dissenting), rely on this Court's sister circuits, which have uniformly held that a gap in statutory language may be identified by a subsequent judicial interpretation. The cases most clearly addressing this principle involve application of the Coal Act, 26 U.S.C. §§ 9701-22, following the Supreme Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), holding that the application of a particular Coal Act provision worked an unconstitutional retroactive taking as against a particularly situated plaintiff. The courts of appeals recognized that this holding

exposed a gap in the Coal Act and held that the Social Security Commissioner had implicit authority to address the situation. "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." *The Pittston Co. v. United States*, 368 F.3d 385, 403-04 (4th Cir. 2004) (citation omitted). *See also A.T. Massey Coal Co. v. Holland*, 472 F.3d 148, 168 (4th Cir. 2006) ("Once that gap was created, the agency was left with an open policy space, which was the quintessence of legislative-type action to which *Chevron* deference was due.") (citation omitted). The Sixth Circuit concurred. *Sidney Coal Co. v. Soc. Sec. Admin.*, 427 F.3d 336, 346 (6th Cir. 2005). *See also United States Steel Corp. v. Astrue*, 495 F.3d 1272, 1288-89 (11th Cir. 2007).

As the dissent points out, the principal opinion's characterization of the argument "is based on a theory inconsistent with the common-law tradition of the federal courts." Slip op. at 51 (Dennis, J., dissenting). It conflicts with the "prevailing view . . . that the judicial power vested in the federal courts allows them to declare what the law already is, rather than to create new law as the Chief Judge's argument presupposes that the Court did in *Seminole*." *Id.* (citing *American Trucking Ass'n, Inc. v. Smith*, 496 U.S. 167, 201 (Scalia, J., concurring in judgment); *Linkletter v. Walker*, 381 U.S. 618, 622-23 (1965)). In other words, the situation confronting the Secretary under IGRA existed at the time Congress enacted the statute; *Seminole*

Tribe identified, but did not create, the occasion for the Secretary to act.

C. The Principal Opinion Holds Incorrectly That Congress Did Not Authorize the Secretary to Fill this "Gap."

An assessment of the validity of the Secretarial Procedures Regulations must be guided by the framework established by the Supreme Court in *Chevron*. First, a court must ask "whether Congress has directly spoken to the precise question at issue," *Chevron*, 467 U.S. at 842, often referred to as "*Chevron* Step One." Here, the precise question is whether the IGRA remedial process is halted altogether when a state does not consent to be sued by a tribe. That precise issue is in no way addressed by the language of the statute. The principal opinion misapplies this basic test by asking whether the statute "explicitly authorize[s] the Secretarial Procedures," slip op. at 20, which it does not. The principal opinion incorrectly holds that this is the end of the *Chevron* Step One inquiry.

As Judge Dennis points out in dissent, this asks entirely the wrong question. The opinion should have asked first whether *Seminole Tribe* resulted in any ambiguity in the statutory language, which, as discussed above, *supra* at 5-6, it did. Then, the appropriate *Chevron* Step One question would be whether "Congress would have expected the Secretary of the Interior to address any ambiguities in the IGRA." Slip op. at 56. It would. Congress implicitly delegated to the Secretary the power to address this ambiguity that arose in the implementation of IGRA – a proposition reflected in and reinforced by IGRA's severability clause, which provides that the

remaining provisions of the Act be given "full force and effect" if one provision is held unconstitutional.

"Sometimes the legislative delegation to an agency on a particular question is implicit." *Chevron*, 467 U.S. at 844. A statute need not contain an explicit provision authorizing the implementing agency to fill any gaps or clarify any ambiguities in the statutory text. "[I]t can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which Congress did not actually have an intent as to a particular result." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (citation omitted). The principal opinion conflicts with this Supreme Court precedent on this point.

D. The Secretary is Authorized to Promulgate the Secretarial Procedures Regulations.

The principal opinion holds that the Secretary did not have sufficient authority to promulgate the Secretarial Procedures Regulations, focusing on "IGRA's meticulous description of the protracted remedial prelude to the Secretary's involvement in approving Class III gaming without a state's consent." Slip op. at 22. The principal opinion appears to interpret a single provision of the statute – which makes a judicial determination of bad faith negotiation by the state one antecedent to the Secretary issuing gaming procedures – as an express *limitation* on the Secretary's

overall authority to implement the statute.

That is an erroneous understanding of IGRA. Congress enacted IGRA for the purposes of "promoting tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. § 2702(1), and provided that, should all else fail, the Secretary in consultation with a tribe could publish procedures permitting that tribe to engage in gaming activities. 25 U.S.C. § 2710(d)(7)(B)(vii). In this context, it is reasonable to assume that Congress intended IGRA to result not just in a specific finding by a court as to whether a state had negotiated in good faith, but in a framework under which Indian tribes could conduct gaming consistent with state law. It is inconsistent with the basic thrust of IGRA for a state to have an absolute veto over the tribe's ability to do so, as the panel majority allows.

However, Congress has granted the President broad authority to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs," 25 U.S.C. § 9, which was further delegated to the Secretary, 25 U.S.C. § 2. These broad delegations with respect to Indian affairs underpin the Secretary's authority to implement IGRA in the circumstance where a state has invoked its immunity to suit. In the context of the administration of a different statute, the Supreme Court acknowledged this, holding that:

> The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or

> explicitly, by Congress. 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 and his delegates at the BIA.

Morton, 415 U.S. at 231-32 (citing, *inter alia*, 25 U.S.C. §§ 2 & 9). *See also* slip op. at 60-61 (Dennis, J., dissenting) (listing a number of regulations promulgated under this general authority).

The principal opinion nevertheless holds that the Secretary may not rely on this authority in this case, as it "only allows prescription of regulations that implement specific laws, and that are consistent with other relevant federal legislation." Slip op. at 38 (quotations and citations omitted). The Secretarial Procedures do, of course, implement a specific law – namely, IGRA – which is not inconsistent with any other relevant federal legislation.

E. The Secretarial Gaming Procedures are a Reasonable Interpretation of IGRA and Should be Upheld.

After *Seminole Tribe*, the tribes lost "a crucial piece of leverage against the states," slip op. at 68 (Dennis, J., dissenting), as they could no longer realistically threaten to sue a state that refused to negotiate in good faith. The Secretarial Procedures regulations were promulgated to address this situation, which is directly contrary to "[t]he purpose of the IGRA[, which] is not simply to establish a neutral bargaining forum; IGRA's purpose is to affirmatively help Indian tribes enter and conduct the business of gaming." *Id.* at 50. Although the principal opinion "gives lip-service to the deference accorded under *Chevron* at step two to the Secretary's

Procedures regulations," *id.* at 69, it does not follow the Supreme Court's admonition that "a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise." *Mead*, 533 U.S. at 229. Rather, the principal opinion is concerned only with the preservation of a single "procedural safeguard," a judicial determination of whether the state negotiated in good faith, that is unavailable to a state under the statute only if that state invokes its Eleventh Amendment immunity. This cramped reading of the statute is inconsistent with the underlying purpose of the statute and the context of its enactment, in which Congress did not expressly limit the Secretary's broad powers to authorize gaming, except to the extent that it required a compact for Class III gaming and specifically established a series of steps to ensure such a compact was reached. In that context, given that the statute itself requires the Secretary to promulgate gaming procedures in the event that the mediation process fails, 25 U.S.C. § 2710(d)(7)(B)(vii), the regulations must be accepted "unless it appears from the statute or legislative history that the accommodation is not one that Congress would have sanctioned." *Chevron*, 467 U.S. at 845. Both the statute and its history support the approach that the Secretary took in filling the gap identified by *Seminole Tribe*, and the opinion to the contrary could cause considerable difficulty for other tribes in the Fifth Circuit that must renegotiate their gaming compacts or wish to begin such negotiations for the first time.

CONCLUSION

For the foregoing reasons, the United States respectfully asks that this Court grant this petition for rehearing *en banc*.

Respectfully submitted,

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ADDENDUM

CERTIFICATE OF SERVICE

I certify that I caused two copies of the foregoing FEDERAL APPELLEES' PETITION FOR REHEARING *EN BANC* to be served by first-class mail, postage prepaid, as well as by electronic mail, on this 9th day of November, 2007, on each of the following counsel of record:

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