No.

IN THE

SUPREME COURT OF THE UNITED STATES

KICKAPOO TRADITIONAL TRIBE OF TEXAS,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, 18 U.S.C. §1166-1168 (1988), granted states a limited role in the regulation of Indian gaming, through gaming "compacts" negotiated in "good faith" with tribes. To prevent state exercise of veto power over tribal gaming, the IGRA also authorized tribal suits in federal court to compel "good faith" negotiations allowing: (1) a court ordered mediation process for the selection of a compact by the mediator, and (2) a fallback remedy allowing the Secretary of the Interior to issue "procedures" regulating the gaming if a state refused to sign the mediator-selected compact. In *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996), this Court held that the Eleventh Amendment prevented the application of IGRA's judicial remedy provisions to an unconsenting state, but did not disturb the Eleventh Circuit's ruling that Secretarial "procedures" were still available. The decision below, which rejected the Eleventh Circuit's analysis, has created a conflict among the circuits on this issue, which requires this Court to answer the critical questions left open by the *Seminole* decision:

1. Does a state's refusal to consent to IGRA's judicial remedy also nullify the Secretary's fallback authority to issue procedures to regulate Indian gaming? The Fifth Circuit held that it did, contrary to the reasoning of the Ninth and Eleventh Circuits.

2. If the Secretary's fallback authority to regulate Class III gaming is struck down, as the Fifth Circuit held, then a corollary question has to be decided –

should not IGRA's now-inappropriate requirement of a Tribal-State compact fall also, consistent with this Court's severance analysis under *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-85 (1987)? This question was fully argued by the Tribe, but the Fifth Circuit elected not to address it.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list represents all the parties appearing here and before the United States Court of Appeals for the Fifth Circuit:

Petitioner here is the Kickapoo Traditional Tribe of Texas, a federally-recognized Indian tribe. The Tribe originally joined this suit as a defendant-intervenor, alongside the other appellees at the Fifth Circuit (originally defendants in the District Court) the United States of America, the United States Department of the Interior, and the Secretary of the Interior, Dirk Kempthorne. The federal defendants have informed the Petitioner that they do not intend to file a petition for a writ of certiorari in this case.

Appellant below and respondent here is the State of Texas.

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The Kickapoo Traditional Tribe of Texas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 497 F.3d 491 (5th Cir., August 17, 2007) (Appendix A). The opinion of the District Court is reported at 362 F. Supp. 2d 765 (W.D. Tex., August 18, 2004)[1] (Appendix B).

JURISDICTION

The Court of Appeals denied the Tribe's and the United States' petition for rehearing *en banc* on November 28, 2007, and entered judgment December 6, 2007 (reprinted at Appendix C). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves provisions of the Indian Gaming Regulatory Act, Public Law 100-497, codified at 25 U.S.C. §§ 2701-2721, 18 U.S.C. §1166-1168 (1988) (relevant portions excerpted at Appendix D), the Procedures Regulations promulgated by the Secretary of the Interior under the authority of the Act, 25 C.F.R. Part 291 (Appendix E), and what are

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[1] The reported opinion reports the date of decision as August 18, 2004. The date of decision, however, was March 30, 2005. This Petition cites the case with the correct year: 2005.

known as the "general authority" statutes at 25 U.S.C. §§ 2 and 9 (Appendix F).

STATEMENT OF THE CASE

This Court is called upon to address the continuing validity of the Indian Gaming Regulatory Act ("IGRA" or the "Act") – one of the most important laws affecting Indian tribes ever enacted by Congress, for the purpose of enabling tribes to become self-supporting – in light of this Court's prior decision in *Seminole Tribe of Florida v. Florida.*[2] In *Seminole Tribe*, this Court struck, as applied, one portion of the Act – the judicial remedy that allowed tribes to sue a state without its consent where the state refused to negotiate a Class III gaming compact with the tribe – as unconstitutional. The Court, however, left open the question of whether Congress's fallback remedy for tribes (the issuance of Secretarial "procedures" to regulate tribal gaming when a state refuses to participate in the statutory compacting process) continued to survive.[3] Two circuit courts – the Ninth and Eleventh – have reasoned that the Secretarial procedures remedy does survive, in effect

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[2] *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996) (holding that IGRA's judicial remedy, which permitted a tribe to sue a state, was unconstitutional as applied when a state asserted its Eleventh Amendment sovereign immunity from such suit).

[3] *Seminole Tribe,* 517 U.S. at 76 n. 18 (noting that the Court "do[es] not here consider, and express[es] no opinion upon" that portion of the Eleventh Circuit's holding that the procedures remedy remains available to the Tribe). *See also Florida v. Seminole Tribe of Florida*, 517 U.S. 1133 (1996) (denying certiorari on state's petition to review that portion of the Eleventh Circuit's decision).

treating the *Seminole Tribe* decision as a limited severance of the judicial remedy only, since that was the only part of the remedial framework that was constitutionally flawed. In a decision at odds with its sister circuits, however, the court below has struck down the Secretary's attempt – through the Procedures Regulations at issue here – to maintain the continued effectiveness of as much of the remaining language of the Act as possible.

Moreover, and perhaps most far-reaching in its implications, the decision below refused to address the corollary argument repeatedly raised by the Tribe throughout this litigation,[4] that if the fallback provision of the Act (Secretarial procedures) is struck down, then should not the now-inappropriate requirement of a Tribal-State gaming compact be struck down as well? As the Fifth Circuit left it, the fallback remedy is no longer available to tribes. The Fifth Circuit's failure to address this question puts its decision at odds with this Court's precedent in *Alaska Airlines, Inc. v. Brock*[5] and numerous similar decisions,[6] which required the Fifth Circuit to ensure

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[4] Judge King, in her concurring opinion below, stated that this issue was not before the Fifth Circuit. *Texas v. United States*, 497 F.3d 491, 512 (5th Cir. 2007). The record, however, shows the Tribe repeatedly argued this issue from the beginning of the case in the District Court and up through the Fifth Circuit. *See* note 63, *infra*.

[5] *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-85 (1987).

[6] *See, e.g.*, *United States v. Booker,* 543 U.S. 220, 246-49 (2005); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191(1999); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 767 (1996) (plurality opinion); *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality

that its severance of part of the statute (here, the availability to the Tribe of any remedy at all, where the state asserts its sovereign immunity to the judicial remedy) did not leave the remainder of the statute operating in a manner contrary to that intended by Congress. While acknowledging that the decision could result in an unintended state veto power over Indian gaming contrary to Congress's intent, the Fifth Circuit simply refused to take this necessary and required step.

The decision, if left standing, will have wide-ranging consequences. It will adversely impact the ability of all tribes in the Fifth Circuit to exercise their rights under IGRA to conduct gaming as a means of generating revenue where the state in which a tribe is located simply refuses to participate in the IGRA framework. It will adversely impact the relationships between states and tribes in other circuits by undermining the deliberate and careful balance of tribal rights and state authority crafted by Congress, creating confusion and sowing discord. The Court should accept certiorari to avoid these impacts and ensure that the Act continues to function as Congress intended.

A. FACTUAL BACKGROUND

Congress enacted IGRA in 1988 to provide a statutory framework for the regulation of Indian gaming with the intent of ensuring that such gaming

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opinion); *Buckley v. Valeo,* 424 U.S. 1, 108-09 (1976) (*per curiam*) (quoting *Champlin Refining Co. v. Corp. Comm'n of Oklahoma,* 286 U.S. 210, 234 (1932)).

was operated to provide tribes with revenue for carrying out important governmental functions.[7] The statute included a carefully balanced compromise between Indian tribes' pre-existing right to conduct gaming free of state regulation[8] and the states' desire to exercise authority in this area.[9] IGRA contains a limited opportunity for states to participate in the regulation of what the Act defines as "Class III" Indian gaming.[10] This opportunity is expressly conditioned upon a state's participation in IGRA's statutory scheme, which requires the state to negotiate a compact in good faith with the tribe,[11] as well as by IGRA's recognition and continued protection of a tribe's right to conduct such gaming if the state "permits such gaming for any purpose by any person, organization, or entity."[12]

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7 *See* 25 U.S.C. § 2701(1) (finding that "numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue"); § 2710(b)(2)(B) (limiting uses of gaming revenue to listed governmental purposes).

8 *See* 25 U.S.C. § 2701(5) ("Indian tribes have the exclusive right to regulate gaming activity 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."). *Accord California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

9 *See* 25 U.S.C. § 2710(d). *See also* S. Rep. No. 100-446, at 6 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3076.

10 Class III includes high-stakes gaming such as slot machines, casino games, lotteries, and pari-mutuel betting. 25 U.S.C. § 2703(8).

11 25 U.S.C. § 2710(d)(3)(A).

12 25 U.S.C. § 2710(d)(1)(B).

As part of this careful compromise, Congress included a remedial framework for tribes faced with states that refused to negotiate or negotiate in good faith.[13] The remedial framework involves two distinct stages. The first stage authorizes the tribe to sue the state in federal court, in which the state has the burden of demonstrating that it negotiated in good faith, and if it does not, mediation and negotiation of a compact is mandated.[14] The second stage is triggered only when the state refuses to consent to the compact chosen at the conclusion of the litigation process, at which point the statute *requires* the Secretary of the Interior to prescribe "procedures" in lieu of a compact under which the tribe can conduct Class III gaming on its lands.[15]

The Kickapoo Tribe's 125-acre reservation is located in a remote area outside Eagle Pass in Maverick County, Texas, along the border with Mexico. The vast majority of the Tribe's members live in poverty.[16] In an effort to raise increased governmental revenue to fund services to its members and to create jobs, the Kickapoo Tribe sought to exercise its rights under IGRA to offer those forms of Class III gaming permitted by the

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13 25 U.S.C. § 2710(d)(7)(A)(i), (B)(i-vii).

14 25 U.S.C. § 2710(d)(7)(B)(i-vi).

15 25 U.S.C. § 2710(d)(7)(B)(vii).

16 *See* (ROA, Attachments to Document #50, Exh. 3 (Joint Stipulations of Fact, FOF No. 18) and Exh. 4 (United States Census Bureau 2000 Data) (showing 68.1 percent of families and 74.3 percent of individuals for the geographic area of the Kickapoo (TX) Reservation are living below the poverty level) (This citation is to the Record on Appeal below in the Fifth Circuit).

State of Texas.[17] In 1995, the State refused to enter into negotiations with the Tribe, and the Tribe filed suit pursuant to IGRA on October 13, 1995.[18] Rather than attempt to demonstrate that its refusal to negotiate was in "good faith," the State moved to dismiss the lawsuit on sovereign immunity grounds. That motion was granted based on the *Seminole Tribe* decision, which held that IGRA's judicial remedy provisions waiving state sovereign immunity could not be constitutionally applied to an unconsenting state.

The *Seminole Tribe* decision revealed an unintended gap in IGRA: how to address the situation where a state refuses to participate in the statutory framework by affirmatively blocking – through its Eleventh Amendment immunity – the operation of the judicial remedy stage. The Secretary responded to this gap by promulgating the Procedures Regulations at issue here, consistent with the Eleventh Circuit's saving construction of IGRA in

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[17] 25 U.S.C. § 2710(d)(1)(B). Texas permits a broad range of Class III gaming including all lottery games (including keno, lotto and numbers); traditional casino style games; and off-track pari-mutuel betting and pari-mutuel betting through simulcasting as recognized by the U.S. Department of the Interior. May 24, 2007, Preliminary Scope of Gaming Decision, George Skibine, Acting Principal Assistant Secretary – Indian Affairs, to Juan Garza, Jr., Kickapoo Tribal Chairman, submitted to the Fifth Circuit on June 18, 2007. The scope of Class III gaming that should be allowed to the Tribe is not at issue in this case.

[18] *See Texas v. United States*, 362 F. Supp. 2d 765, 767 (W.D. Tex 2005).

the *Seminole Tribe* case.[19] The Procedures Regulations (which provide ample opportunity for state participation) are available to a tribe if, *and only if*, the state refuses to participate in the "good faith" suit and has the suit dismissed on sovereign immunity grounds.[20]

On December 11, 2003, the Tribe applied for Secretarial Procedures. On January 12, 2004, the Secretary invited the State of Texas to comment on the Tribe's proposal and submit an alternative. The State rejected the offer to participate, and instead filed this lawsuit.

B. PROCEEDINGS BELOW

The State filed this case in the United States District Court for the Western District of Texas on March 11, 2004, seeking a declaration and injunction against the Procedures Regulations promulgated by the Secretary pursuant to the IGRA.[21] Federal court jurisdiction was based on 28 U.S.C. § 1331 (federal question jurisdiction) and the Administrative Procedure Act, 5 U.S.C. § 705. The Tribe intervened as a party defendant. On March 30, 2005, upon cross-motions for summary judgment, the District Court held that (1) the State's case was not ripe, and (2) that the Secretary had the authority to promulgate the regulations, and ordered that the State's cause of action be dismissed without prejudice.

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19 *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994).

20 25 C.F.R. § 291.3(d), (e) (2007).

21 25 C.F.R. Part 291.

The State appealed to the United States Court of Appeals for the Fifth Circuit. Both the United States and the Tribe participated in the appeal. On August 17, 2007, the Court issued a fractured decision, with all three panel judges writing separately.[22] Chief Judge Jones delivered the opinion of the court on the issue of ripeness, joined by Judge King, holding that the State's cause of action was ripe.[23] Chief Judge Jones and Judge King concurred in the holding that the Procedures Regulations were invalid, but wrote separate and substantially differing opinions as to the grounds therefor. Judge Dennis wrote a detailed and comprehensive dissent.

The Tribe and the United States both filed timely petitions for rehearing *en banc*. The Fifth Circuit issued an order denying the petitions for rehearing on November 28, 2007. This petition for certiorari has been timely filed.

REASONS FOR GRANTING THE PETITION

This case involves an issue of exceptional importance that impacts Indian tribes and states around the country, as well as the United States. Under the result created by the decision below, tribes are barred from the fallback remedy Congress intended to be available to a tribe faced with a state that refuses to consent to IGRA's remedy process, thereby undoing Congress's careful compromise. The decision clashes with the reasoning of two sister

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[22] *Texas,* 497 F.3d at 491, 511 (King, J., concurring), 512 (Dennis, J., dissenting).

[23] While the Tribe argued below that the case was not ripe, it does not seek certiorari on the question of ripeness.

circuits on this same issue (the continued availability of the Secretarial procedures remedy in light of *Seminole Tribe*), fails to grant appropriate deference to the reasonable construction of a statutory gap by the Executive Branch official with delegated authority under the statute, and conflicts with this Court's directly relevant precedent concerning statutory severance.

I. The Fifth Circuit's Decision Creates a Conflict Among the Circuits on a Question of Exceptional Importance Concerning the Indian Gaming Regulatory Act

The two other circuits that have considered IGRA's remedial framework in light of *Seminole Tribe's* holding both reasoned that the Act can continue to function in the manner intended by Congress where the judicial remedy is severed, recognizing that a state's refusal to participate in the judicial remedy does not deprive a tribe of all its statutorily protected rights.[24] Rather, both circuits recognized the continued availability of the Secretarial procedures as a means of regulating and facilitating a tribe's right to offer Class III gaming when the tribe is located in a state that otherwise permits such gaming.[25]

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[24] *See United States v. Spokane Tribe*, 139 F.3d 1297, 1301-02 (9th Cir. 1998); *Seminole Tribe,* 11 F.3d at 1029 (11th Cir. 1994).

[25] Thus, under IGRA, the only tribes that would ever be completely unable to engage in Class III gaming are those tribes located in states that do not permit any Class III gaming anywhere in the state by anyone under any circumstances.

The Fifth Circuit's decision clashes with the reasoning of the Ninth and Eleventh Circuits concerning the impact of this Court's *Seminole Tribe* holding on the continuing availability of the fallback Secretarial procedures remedy. The primary opinion in the Fifth Circuit decision in fact misstates the case and its relation to *Seminole Tribe* from the first sentence, asserting that the Procedures Regulations are an attempt to "circumvent" the *Seminole Tribe* decision.[26] *Seminole Tribe*, however, did not strike down the second stage of the IGRA remedial framework, but rather left open the question of the continued availability of the fallback procedures remedy.[27] The Ninth and the Eleventh Circuits, contrary to the Fifth Circuit here, found that the continued availability of the Secretarial procedures remedy was *consistent with* the holding in *Seminole Tribe*, not a "circumvention" of it.[28]

The Ninth and Eleventh Circuits both reasoned that the Secretarial procedures remedy was an indispensable component of the regulatory structure and compromise framework established by IGRA, and that the judicial remedy could be severed or invalidated while still leaving this provision in place. The Eleventh Circuit in *Seminole Tribe,*

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[26] *Texas*, 497 F.3d at 493.

[27] *Seminole Tribe,* 517 U.S. at 76 n. 18. In fact, the Court refused to grant certiorari on this question. *Florida*, 517 U.S. 1133 (1996).

[28] *Spokane Tribe,* 139 F.3d at 1301-02; *Seminole Tribe*, 11 F.3d at 1029. While the latter decision came out prior to this Court's decision in the same case, the holding on the key point – that IGRA's judicial remedy is invalid when the State does not consent – was the same.

consistent with this Court's subsequent decision on certiorari in that case, found that IGRA's judicial remedy provision was unconstitutional as applied to a state that did not consent to suit. The Eleventh Circuit also addressed the question of whether the entire IGRA (or at least all its state participation requirements) must be struck if the judicial remedy was determined to be unavailable, as the federal District Court for the Eastern District of Washington had previously held[29]:

> The final question we must resolve is whether all provisions for state involvement in class III gaming also fail, as the tribes contend. We hold that they do not. IGRA contains an explicit severability clause, § 2721; and we find no "strong evidence" to ignore that plain congressional directive. *See Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 686, 107 S.Ct. 1476, 1481, 94 L.Ed.2d 661 (1987). Nevertheless, we are left with the question as to what procedure is left for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit. The answer, gleaned from the statute, is simple. One hundred and eighty days after the tribe first requests negotiations with the state, the tribe may file suit in district court. If the state pleads an Eleventh Amendment defense, the suit is dismissed, and

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[29] *Confederated Tribes of Colville Reservation v. Washington,* No. CS-92-0426, slip op. at 4-5 (E.D. Wash. June 4, 1993); (ROA, Attachments to Doc. #50, Exh. 11) (striking down IGRA Class III provisions in absence of remedy for tribes) (This citation is to the Record on Appeal below in the Fifth Circuit).

> the tribe, pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state. The Secretary then may prescribe regulations governing class III gaming on the tribe's lands. This solution conforms with IGRA and serves to achieve Congress' goals, as delineated in § § 2701-02.[30]

Similarly, the Ninth Circuit also reasoned that the judicial remedy could be severed while leaving the procedures remedy intact, noting that:

> IGRA as passed thus struck a finely-tuned balance between the interests of the states and the tribes. Most likely it would not have been enacted if that balance had tipped conclusively in favor of the states, and without IGRA the states would have no say whatever over Indian gaming. [31]

The court went on to note that, in light of this

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[30] *Seminole Tribe*, 11 F.3d at 1029. Contrary to a previous assertion by the State of Texas, the Eleventh Circuit's determination that the Secretary has the authority to issue procedures was not *dictum* since it was a central and necessary part of the court's decision. *See Gochicoa v. Johnson,* 238 F.3d 278, 286 n.11 (5th Cir. 2000) (a statement is *dictum* only if it "could have been deleted without seriously impairing the analytical foundations of the holding"). As noted by the court: "The final *question we must resolve* is whether all provisions for state involvement in class III gaming also fail, as the tribes contend. We *hold* that they do not." *Seminole Tribe*, 11 F.3d at 1029 (emphases added).

[31] *Spokane Tribe,* 139 F.3d at 1301.

Court's decision in *Seminole Tribe,* the Eleventh Circuit's reasoning about the continued availability of the procedures remedy "is a lot closer to Congress's intent than mechanically enforcing IGRA against tribes even when states refuse to negotiate."[32]

As the Eleventh and Ninth Circuits both recognized, Congress did not delegate its regulatory authority over tribal gaming to states – it provided the states with an opportunity to participate in the compacting process along with the tribes and the federal government, and it conditioned that participation on the states' willingness to participate in the statutory process in good faith.[33] Congress intended for the good faith requirement to be enforceable in federal court, and provided for a judicially supervised mediation process under which the *state* has the burden of demonstrating that its refusal to negotiate a compact was done in good faith.[34] Recognizing that some states might still refuse to participate in the statutory process, Congress provided tribes with a fallback remedy – the ability to go directly to the Secretary of the Interior, who has the express statutory authority to prescribe "procedures" to govern tribal gaming in the absence of a compact.[35]

Congress did not anticipate that the Supreme Court would hold that it could not require states to participate in the judicially supervised component of the statutory process. With no way to compel

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32 *Id.* at 1302.
33 25 U.S.C. § 2710(d)(3)(A).
34 25 U.S.C. § 2710(d)(7)(B)(ii).
35 25 U.S.C. § 2710(d)(7)(B)(vii).

participation in the statutory process by states that will not waive their Eleventh Amendment immunity from suit, the tribes, states, and United States were left with an unintended gap in the statute. The Ninth and Eleventh Circuits reasoned that the Act could survive – i.e., could continue to function consistent with Congress's intent – by recognizing the continued availability of the Secretarial procedures remedy. The Secretary of the Interior, following this reasoning, exercised his general authority to promulgate regulations under 25 U.S.C. §§ 2 and 9, and his specific authority under 25 U.S.C. § 2710(d), and filled the gap with the Procedures Regulations at issue here: providing tribes located in states that will not participate in adjudication of their good faith or judicially supervised mediation of compact negotiations with a path to the fallback remedy provided by Congress.[36]

By invalidating the Procedures Regulations, the decision below has undermined the carefully structured compromise between tribes and states intended by Congress, based, largely, on the illogical ground that where a state asserts its sovereign immunity to *avoid* the judicial remedy it has somehow been *denied* the impartial decision maker intended by Congress.[37] As a result of the decision, states in the Fifth Circuit can bar tribal access to the fallback procedures mechanism – despite allowing gaming themselves – by simply refusing to negotiate and refusing to litigate the question of their lack of

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[36] 25 C.F.R. Part 291.

[37] *Texas*, 497 F.3d at 508. The Procedures Regulations are available to a tribe if, and only after, the state asserts its immunity to the good faith lawsuit. 25 CFR § 291.3(d).

good faith in federal court: an outcome contrary to Congress's intent when enacting IGRA. The Court should accept certiorari to resolve the conflict among the circuits on this critically important matter.

II. The Fifth Circuit's Decision Ignores this Court's Relevant Authority Regarding an Exceptionally Important Issue of Administrative Law

The Fifth Circuit's ruling, and in particular the primary opinion by Chief Judge Jones, diverges substantially from existing relevant authority from this Court regarding the ability of an Executive Branch official to fill an unintended and unforeseen gap in a statute he was delegated authority to administer, and diverges from this Court's instruction to "respect and give effect to" the kinds of legislative compromises embodied in IGRA's remedial framework.[38] The Fifth Circuit inappropriately failed to grant deference to the Secretary's reasonable construction of that statute – which respects and gives effect to Congress's compromise in the IGRA – and thus plows new and uncharted ground in the field of administrative law.

First, the decision below focuses too narrowly on one provision of the Act when analyzing the Secretary's authority. *United States v. Mead Corp.* and other decisions instruct that, rather than analyze various sources of agency authority one-by-one (as the Fifth Circuit did below in determining that the Secretary had not been delegated sufficient authority

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[38] *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 94 (2002).

to issue the Procedures Regulations), federal courts must take a more comprehensive and integrated approach to the statute(s) at issue.[39] Express delegation of general rulemaking authority is, these decisions hold, especially powerful grounds for deference,[40] as is the fact that Congress vested the agency with overall responsibility for administering or implementing a statute or program.[41] Here, the exercise of the Secretary's regulatory authority was grounded in such a delegation of authority. In addition to the Secretary's express delegated authority to carry IGRA into effect (including, specifically, the fallback remedy for tribes),[42] his authority to issue the regulations at issue was based on two statutes whose plain terms confer power on the President to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs" [43] and to the Commissioner of Indian Affairs (under direction of the Secretary of the Interior) to "have the management of all Indian affairs and of all matters arising out of Indian relations" pursuant to regulations adopted by the President.[44] Moreover,

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39 *United States v. Mead Corp.*, 533 U.S. 218, 226 (2001); *United States v. O'Hagan*, 521 U.S. 642, 673 n. 19 (1997).

40 *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.

41 *See Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984); *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

42 *See* 25 U.S.C. §§ 2710(d)(8), 2710(d)(7)(B)(vii)).

43 25 U.S.C. § 9.

44 25 U.S.C. § 2. *See also 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 . . . .").

the decision below – directly contrary to the admonition of this Court – failed to grant the appropriate deference to the Secretary's determination of his own statutory authority.[45]

Second, the Fifth Circuit failed to follow this Court's admonition that it must accept the Secretary's interpretation if the following three factors are met: Congress has not previously spoken directly to the issue; the agency has been delegated authority under the statute; and the agency's interpretation is reasonable.[46] The Secretary's Procedures Regulations meet these three requirements: (1) in this case, Congress did not speak directly to the issue because it did not foresee a state's ability to assert Eleventh Amendment

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[45] *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 380-81 (1988) (Scalia, J., concurring). In this frequently cited concurring opinion, Justice Scalia collected numerous examples supporting this approach and explained:

> 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. Virtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the "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. at 381–82 (internal citations omitted).

[46] *Mead*, 533 U.S. at 229.

immunity to avoid its burden of demonstrating that its refusal to participate in IGRA was in "good faith"[47]; (2) Congress did, however, delegate authority to the Secretary of the Interior to implement the Act; and (3) the Secretary's interpretation of the statutory gap revealed by *Seminole Tribe* is reasonable, since it preserves the remaining part of the remedial framework and ensures that the statute continues to function consistent with the manner intended by Congress – keeping intact a critical part of a remedial framework specifically intended to protect IGRA's compromise between states and tribes.[48] In such situations, the question for courts to decide – with deference to agencies' expertise and their political accountability – is whether the agency resolution is "one that Congress would have sanctioned."[49]

Third, the decision below does not follow this Court's clear instruction 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."[50] Rather, the primary opinion in the decision below is concerned only with the preservation of a single "procedural safeguard," a judicial determination of whether the state met its

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47 25 U.S.C. § 2710(d)(7)(B)(ii). *See Spokane*, 139 F.3d at 1300 (quoting Senator Inouye, one of IGRA's sponsors, as stating "if we had known that this proposal of tribal state compacts that came from the States and was strongly supported by the States, would later be rendered virtually meaningless by the action of those states . . . we would not have gone down this path").

48 *Spokane*, 139 F.3d at 1302; S. Rep. No. 100-446, at 13.

49 *City of New York v. FCC*, 486 U.S. 57, 69 (1988).

50 *Mead*, 533 U.S. at 229.

burden of demonstrating that it negotiated in good faith – a determination that is unavailable to a state *only if the state chooses not to participate*. 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 Act itself requires the Secretary to promulgate gaming procedures in the event that the judicial process fails, the regulations must be accepted "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[51]

This Court should grant certiorari to ensure that the Fifth Circuit remains consistent with relevant Court precedent on this important question of administrative law.

III. The Fifth Circuit's Ruling Conflicts with Relevant Decisions of this Court by Failing to Meet its Obligation under the Judicial Severance Doctrine

Finally, the Fifth Circuit's decision conflicts with relevant decisions of this Court regarding judicial severance of statutes. As this Court instructed in *Alaska Airlines,*[52] even where a statute, like IGRA, has a severability clause, the resulting

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51 *Chevron*, 467 U.S. at 845.

52 480 U.S. at 685.

statute after severance of its unconstitutional provisions cannot remain in force if that resulting statute would be inconsistent with Congress's intent. As articulated in *Alaska Airlines*, where a statute is judicially severed it must be done in such a way to ensure that "the statute will function in a *manner* consistent with the intent of Congress."[53] If this cannot be done, the statute must be declared invalid. The purpose of this obligation is obvious: to protect the constitutional separation of powers by ensuring that courts do not legislate. By failing to meet this obligation, the Fifth Circuit's ruling has encroached on the policy-making domain reserved to Congress under the Constitution.

By refusing to recognize the validity of the Procedures Regulations, but failing to address the question of the continuing validity of IGRA's provisions for state involvement in Class III gaming, the panel's decision has the potential to result in a version of IGRA that Congress did not intend to pass. 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" and:

> to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the

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53 *Id.* (emphasis in original).

operator and players.[54]

The IGRA granted states a limited, conditional opportunity (through the compacting process) to participate in the regulation of Indian Class III gaming that states previously lacked, but also provided a remedy for tribes to be able to conduct Class III gaming in those situations where a state objects to such gaming and refuses to enter into a compact.

The IGRA's express statutory language as well as its legislative history demonstrates that Congress did not intend for states to have a veto over tribal gaming under IGRA. The IGRA's statutory findings note, for example, that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government" and that "Indian tribes have the exclusive right to regulate gaming activity 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."[55] The Committee Report accompanying the bill stated:

> It is the Committee's intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.[56]

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54 25 U.S.C. § 2702(1), (2).

55 25 U.S.C. § 2701(4), (5).

56 *See* S. Rep. No. 100-446, at 13.

Granting the state a role in the regulation of gaming was meant to be consistent with these findings and purposes, and not an opportunity for the state to undermine them. For this reason Congress enacted the remedial provisions of the IGRA, including the fallback remedy of Secretarial procedures, to ensure that tribal rights would be protected. Therefore, under the severance doctrine, when the first stage of the remedial process – the "good faith" lawsuit – is declared void where the state refuses to participate, the fallback remedy of Secretarial procedures must remain in place as a saving construction of the statute to ensure that the statute continues to operate in the manner intended by Congress. This limited severance is in fact consistent with the severability clause in the statute[57] as well as with the severability doctrine itself, since severing the judicial remedy while leaving the procedures remedy in place (which does not share the constitutional flaw of subjecting a state to suit without its consent) is consistent with the intent of Congress in ensuring that tribes have a remedy when faced with a recalcitrant state.

The Eleventh Circuit has already expressly held, in severing the judicial remedy provision of IGRA, that the Secretary has both the power and the duty to issue procedures under the circumstances provided for in the Regulations at issue, noting that this is a "solution [that] conforms with IGRA and serves to achieve Congress' goals, as delineated in

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[57] 25 U.S.C. § 2721.

§§ 2701-02."[58] Only by determining that a tribe could go directly to the Secretary for procedures as a fallback remedy did the Eleventh Circuit hold that the Class III compact requirements could stand under a traditional severance analysis, thus recognizing the continued availability of Secretarial procedures as a saving construction necessary to preserve congressional intent.[59]

The Ninth Circuit Court of Appeals ultimately agreed with the Eleventh Circuit's rationale in the *Spokane* case, rejecting its own earlier criticism.[60] Thus, the two circuit courts which have previously addressed the issue both agree that it is proper to sever the unsound portions of IGRA with a saving construction that maintains the Secretary's authority to fill the gap in IGRA's remedial framework.[61]

In the decision below, the concurring opinion acknowledges that without the Procedures Regulations IGRA would not function as Congress intended – that the decision could result in an

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[58] *Seminole Tribe*, 11 F.3d at 1029.

[59] *Id.* Although requested to do so by the States of Florida and Alabama, this Court did not address the decision of the Eleventh Circuit on this issue, and it thus remains the law of that Circuit. *Seminole Tribe of Florida*, 517 U.S. at 76 n.18. *See also Florida*, 517 U.S. 1133 (rejecting separate certiorari petition on this issue).

[60] *Spokane Tribe*, 139 F.3d at 1302 ("the Eleventh Circuit's suggestion is a lot closer to Congress's intent than mechanically enforcing IGRA against tribes even when states refuse to negotiate").

[61] *See also Santee Sioux Nation v. Norton,* No. 8:05 CV147, 2006 WL 2792734, at *6 (D. Neb. Sept. 26, 2006).

unintended state veto power.[62] The Fifth Circuit's failure to take the next step of determining whether it is necessary to strike down IGRA's state participation requirements, puts it in direct conflict with the statutory severance analysis set out by this Court in *Alaska Airlines* and other decisions.

The Tribe has consistently argued throughout this case that *Seminole Tribe's* limited severance of IGRA's judicial remedy mechanism requires the continued availability of the fallback procedures remedy as a saving construction of the statute.[63] In the alternative, and as a necessary corollary to this argument, the Tribe also argued that if the Secretary cannot fill the gap in IGRA's remedial framework for tribes that face unconsenting states, then the entirety of IGRA's requirements regarding state participation must be declared void as applied when the state refuses to participate in the IGRA remedial process.[64] The Fifth Circuit, however, failed to address these well-established and long-standing

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62 *Texas*, 497 F.3d at 512 (noting that, as a result of this decision, the state now has "the leverage to block gaming on Indian land under IGRA in a manner wholly contrary to Congress's intent").

63 The following citations to the record are to the Record of Appeal below in the Fifth Circuit. *See* Tribe's Brief in Opposition to Preliminary Injunction (March 26, 2004) at 8–9 (ROA 00220-21); Tribe's Brief in Support of Motion to Dismiss and for Summary Judgment (August 18, 2004) at 31–39 (ROA "Document #50); Tribe's Response to State's Motion for Summary Judgment (August 18, 2004) at 10 (ROA 00809); Tribe's Summary Judgment Reply Brief (September 7, 2004) at 3 (ROA 00877); Transcript of Summary Judgment Hearing (October 26, 2004) at 52:22–58:16 (ROA Volume 7); Tribe's Fifth Circuit Appellate Brief (August 23, 2005) at 46–50.

64 *Id.*

severance principles set forth by the Supreme Court and to discharge its obligation under those principles.

If IGRA were left without a remedy for tribes, the statute will no longer function in the manner intended by Congress, as the Ninth and Eleventh Circuits have already held (and as the concurrence below concedes). Therefore, this remedy of the Secretarial procedures cannot be removed from the statute without all its state participation requirements being held invalid when a tribe faces an unconsenting state.[65]

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[65] *Alaska Airlines,* 480 U.S. at 684; *Seminole*, 11 F.3d at 1029. While IGRA has a severability clause (25 U.S.C. § 2721), that clause merely creates a rebuttable presumption against the need to declare the entire statute invalid. *Alaska Airlines,* 480 U.S. at 686. At issue here is what portion of the statute needs to be severed to remove the unconstitutional portion while retaining as much of the framework intended by Congress as possible. Moreover, this presumption of severability, even if applicable to this case, would be overcome here because the severance by the decision below will result in a statutory scheme (1) that no longer functions in the manner Congress intended, (2) that bears little resemblance to the scheme enacted by Congress, and (3) that would not be fully operative as a law. *Id.* at 684-85. *See also Confederated Tribes of Colville Reservation,* No. CS-92-0426, slip op. at 4-5; (ROA, Attachments to Doc. #50, Exh. 11) (striking down IGRA Class III provisions in absence of remedy for tribes) (This citation is to the Record on Appeal below in the Fifth Circuit).

CONCLUSION

The Fifth Circuit's decision improperly jettisons Congress's careful compromise in IGRA. In so doing it clashes with the reasoning of its sister circuits, unduly substitutes its reasoning for that of the Executive Branch official charged with implementing the Act, and grants states power unintended by Congress. The decision violates a fundamental precept of statutory construction, which states that "[c]ourts and agencies must respect and give effect to these sorts of compromises."[66] The Kickapoo Traditional Tribe of Texas respectfully requests that its petition for writ of certiorari be granted so that this Court can complete the analysis on the critical questions left open by *Seminole Tribe*.

Respectfully Submitted,

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[66] *Ragsdale*, 535 U.S. at 94 (citing *Mohasco Corp.* v. *Silver,* 447 U.S. 807, 818-819 (1980)).