No. 07-1109

In the Supreme Court of the United States

KICKAPOO TRADITIONAL TRIBE OF TEXAS,
PETITIONER

v.

STATE OF TEXAS, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in invalidating agency regulations providing that the Secretary of the Interior may establish procedures for Indian gaming in the event that a State does not agree to enter into a tribal-state compact and invokes its Eleventh Amendment immunity from a suit brought under the Indian Gaming Regulatory Act, 25 U.S.C. 2710(d)(7)(A)(i).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-74a) is reported at 497 F.3d 491. The opinion of the district court (Pet. App. 75a-90a) is reported at 362 F. Supp. 2d 765.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2007. Petitions for rehearing were denied on December 6, 2007 (Pet. App. 91a-92a). The petition for a writ of certiorari was filed on February 25, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1987, this Court held that neither the Act of August 15, 1953, ch. 505, 67 Stat. 588 (18 U.S.C. 1662 and 28 U.S.C. 1360), nor the Organized Crime Control Act of 1970 (18 U.S.C. 1955), authorized California to enforce its regulatory gaming laws against Indian Tribes operating bingo and poker games on their reservations. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). That decision left much Indian gaming unregulated by the States. The following year, Congress enacted the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.* Finding that existing federal law did not "provide clear standards or regulations for the conduct of gaming on Indian lands," 25 U.S.C. 2701(3), Congress enacted IGRA both "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," 25 U.S.C. 2702(1) and (2).

IGRA divides gaming activities into three classes, each subject to different rules and prohibitions. Class I gaming, over which Indian Tribes exercise exclusive regulatory control, consists of social games for prizes of minimal value and traditional games engaged in as part of tribal ceremonies. 25 U.S.C. 2703(6), 2710(a)(1). Class II gaming consists of bingo, other games similar to bingo, and non-banking card games. 25 U.S.C. 2703(7). Indian Tribes maintain regulatory jurisdiction over Class II gaming, 25 U.S.C. 2710(a)(2), subject to the supervision of the National Indian Gaming Commission, 25 U.S.C. 2710(b) and (c); see 25 U.S.C. 2704.

Class III gaming, the type of gaming at issue in this case, is gaming that does not fall within Class I or Class II, and includes banking card games, casino games, slot machines, sports betting and parimutuel wagering, and lotteries. 25 U.S.C. 2703(8); 25 C.F.R. 502.4. Class III gaming is lawful only if, *inter alia*, it is "conducted in conformance with a Tribal-State compact." 25 U.S.C. 2710(d)(1)(C). A tribal-state compact may address such matters as standards for the conduct of the gaming, the application of state or tribal criminal and civil laws, assessments to defray the costs of state regulation, taxation by the Tribe, and remedies for breach of contract. 25 U.S.C. 2710(d)(3)(C). The Secretary of the Interior (Secretary) is authorized to approve any tribal-state compact and may disapprove such a compact only if it violates IGRA, any other provision of federal law, or the trust obligations of the United States to Indians. 25 U.S.C. 2710(d)(8).

To facilitate the formation of tribal-state compacts for Class III gaming, IGRA provides that, when a Tribe so requests, "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 negotiations fail, IGRA provides that the Tribe may file 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). If a court finds that the State did not negotiate in good faith, it may order the parties to conclude a compact, 25 U.S.C. 2710(d)(7)(B)(iii), and may order a mediator to administer the process and select from proposed compacts, 25 U.S.C. 2710(d)(7)(B)(iv). Ultimately, should the State refuse to consent to the compact chosen by the mediator, the mediator must notify the Secretary, who "shall prescribe * * * proce-

dures * * * under which Class III gaming may be conducted," consistent with the proposed compact selected by the mediator, IGRA, and the laws of the State. 25 U.S.C. 2710(d)(7)(B)(vii).

b. In 1996, this Court held that IGRA does not validly abrogate state sovereign immunity conferred by the Eleventh Amendment, and that federal courts therefore do not have jurisdiction over suits brought by an Indian Tribe against a State under IGRA unless the State consents to suit. *Seminole Tribe* v. *Florida*, 517 U.S. 44, 72-73 (1996). In response to *Seminole Tribe*, the Secretary promulgated regulations establishing a process for the creation of gaming procedures in the event that a State does not voluntarily enter a tribal-state compact and invokes its Eleventh Amendment immunity from suit. *Class III Gaming Procedures*, 64 Fed. Reg. 17,535 (1999) (codified at 25 C.F.R. Pt. 291) (Procedures Regulations). The regulations provide that, if a Tribe and a State are unable to agree on a compact, and the State invokes its Eleventh Amendment immunity from suit, the Secretary may, after consultation with the State and the Tribe, promulgate procedures setting out the terms under which gaming may occur. 25 C.F.R. 291.1. See generally 25 C.F.R. Pt. 291.

2. Petitioner first requested negotiations for a Class III gaming compact with the State of Texas in 1995. Texas rejected petitioner's request to negotiate a compact, and petitioner sued Texas in federal district court pursuant to IGRA. See Pet. App. 78a (describing prior suit). The district court dismissed petitioner's suit in 1996, after this Court issued its decision in *Seminole Tribe*. *Ibid*.

In December 2003, petitioner submitted to the Department of the Interior an application for Class III

gaming procedures under the Procedures Regulations, and the Secretary invited comments and an alternative gaming proposal from the State, as the regulations require. See 25 C.F.R. 291.7. Texas did not respond to the request, but instead filed a lawsuit challenging the Secretary's authority to promulgate the Procedures Regulations. Petitioner intervened as a party defendant. Pet. App. 6a; Pet. 8. The district court granted summary judgment in favor of the defendants, holding that because no gaming procedures had been issued by the Secretary, the State's suit was not yet ripe. Pet. App. 75a-90a.

3. A divided panel of the court of appeals reversed. Pet. App. 1a-74a. The court first concluded that the case was justiciable, even though the Secretary had not yet issued gaming procedures at the time Texas filed suit. *Id.* at 7a-16a. As to the merits, Chief Judge Jones (*id.* at 1a-41a) and Judge King (*id.* at 42a-44a) both concluded, in separate opinions, that the Procedures Regulations are invalid.

Chief Judge Jones took the position that the Procedures Regulations fail at the first step of the analysis set forth in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), because IGRA "permits limited secretarial intervention only as a last resort, and only after the statute's judicial remedial procedures have been exhausted," and because "Congress did not explicitly authorize the Secretarial Procedures." Pet. App. 19a-20a. Chief Judge Jones further rejected the argument that the Secretary had implicit authority to fill in the statutory gap created by this Court's *Seminole Tribe* decision, concluding that "any delegation-engendering gap contained in a statute, whether implicit or explicit, must have been 'left open *by Congress*,' not created after the fact by a court." *Id.* at

24a (quoting *Chevron*, 467 U.S. at 866). In the alternative, Chief Judge Jones concluded that the Procedures Regulations fail at *Chevron* step two, because IGRA allows the Secretary to prescribe gaming procedures only after "exhaustion of the judicial good-faith/mediation process." *Id.* at 33a. In Chief Judge Jones's view, the Procedures Regulations are not based on a reasonable interpretation of IGRA because, unlike the statute, the regulations do not require a determination whether the State has negotiated in good faith; permit the Secretary, rather than a court, to appoint a mediator; and contain no requirement that the Secretary's procedures be consistent with the proposals of the mediator, the Tribe, or the State. *Id.* at 36a-37a. Finally, Chief Judge Jones rejected the argument that 25 U.S.C. 2 and 9, which confer authority to issue regulations to implement statutes relating to Indian affairs, confer on the Secretary the authority to prescribe the Procedures Regulations. Pet. App. 37a-40a.

Judge King concurred with Chief Judge Jones's opinion respecting the justiciability of the suit, but filed a separate opinion concurring in the judgment as to the merits. Pet. App. 42a-44a. In her view, although the Secretary had the statutory authority to fill the gap in IGRA left by this Court's *Seminole Tribe* decision, the Procedures Regulations exceed that authority because they omit "Congress's chosen prerequisites of a court determination of a state's bad faith and court-directed mediation." *Id.* at 42a-43a.

Judge Dennis dissented. Pet. App. 44a-74a. In his view, *Seminole Tribe* did not create a gap in IGRA; rather, "Congress itself created the gap or ambiguity by mistakenly overestimating its powers and passing a statute that could not be constitutionally applied as Con-

gress intended," and the Court in *Seminole Tribe* "merely declared its existence." *Id.* at 51a. Judge Dennis concluded that the Secretary had authority to fill in that gap both under IGRA and under 25 U.S.C. 2 and 9. Pet. App. 47a. Finally, Judge Dennis concluded that the Procedures Regulations are a reasonable gap-filling measure. He explained that, in enacting IGRA,

> Congress intended to allow Indian gaming to proceed, for the purpose of economically benefitting Indian tribes, after a negotiating process that would give states a right to negotiate towards the ultimate outcome. In the case of a state that attempted to halt or veto this process without good faith, Congress intended that tribes would ultimately be able to force gaming even over the objections of the state. The Secretary's regulations at issue here may not be perfect, but by allowing tribes an alternate process to propose gaming procedures in cases where a state refuses to negotiate and refuses to be sued in federal court, they closely approximate what Congress likely would have intended, while the status quo after *Seminole* undisputedly subverts the national legislative aims in respect to Indian affairs and relations.

Id. at 67a-68a.

ARGUMENT

The court of appeals erred in invalidating the Procedures Regulations adopted by the Secretary of the Interior. No other court of appeals has yet addressed the validity of the Procedures Regulations, however, and the decision below does not conflict with any decision of this Court. Further review of the decision of the court of appeals is thus unwarranted.

1. a. The court of appeals erroneously held that the Procedures Regulations are invalid. As an initial matter, the court erred in reaching the merits, even though, at the time Texas filed suit, the Secretary had done nothing more than invite Texas officials to comment on petitioner's application. Texas suffered no hardship as a result; the mere invitation to comment has not required Texas to alter its conduct in any way. Texas's pre-implementation challenge to the Procedures regulations thus was not ripe, and the court of appeals' intervention was premature. See, *e.g.*, *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 808 (2003).

The court of appeals also erred in its holding on the merits. As Judge Dennis explained in his dissenting opinion (Pet. App. 65a-66a), the elaborate remedial procedure established in IGRA was "not intend[ed] to allow, as the *Seminole*-blunted statute does, a situation in which states could refuse to negotiate and thus veto a tribal-state compact." *Id.* at 65a. Rather, the remedial procedure was designed to result in the creation of a compact—and, failing that, in gaming procedures established by the Secretary, consistent with the compact proposed during mediation. *Id.* at 66a (citing 25 U.S.C. 2710(7)(B)(vii)). IGRA expressly contemplates that the end result of its elaborate remedial process will be gaming procedures, even in a circumstance where the State never agrees to a compact. 25 U.S.C. 2710(d)(7)(B)(vii). The Procedures Regulations are consistent with those provisions of IGRA, and reasonably effectuate the statute's purposes.

b. This Court's review is not, however, warranted. Although petitioner focuses largely on Chief Judge Jones's discussion of "the ability of an Executive Branch

official to fill an unintended and unforeseen gap in a statute he was delegated authority to administer," Pet. 16, that portion of Chief Judge Jones's opinion did not command a majority of the court. Ultimately, the judgment below rested on two judges' separate views that the Procedures Regulations are inconsistent in certain respects with the remedial process envisioned by Congress. Pet. App. 36a-37a, 42a-43a. That decision does not preclude the Secretary from taking future action to ensure that IGRA operates in a manner consistent with its purposes.

2. Petitioner contends (Pet. 11-14) that the decision below conflicts with decisions of the Ninth and Eleventh Circuits. That contention is incorrect. No other court of appeals has yet addressed the validity of the Procedures Regulations. Petitioner is correct that, in *United States* v. *Spokane Tribe of Indians*, 139 F.3d 1297 (9th Cir. 1998), and *Seminole Tribe* v. *Florida*, 11 F.3d 1016 (11th Cir. 1994), aff'd, 517 U.S. 44 (1996), the Ninth and Eleventh Circuits suggested that the Department of the Interior might "promulgate regulations that take the place of the compact process" when a State does not voluntarily enter into a compact and invokes its Eleventh Amendment immunity from a suit brought under IGRA. *Spokane Tribe of Indians*, 139 F.3d at 1302; see *Seminole Tribe*, 11 F.3d at 1029. But those decisions, both of which predated the promulgation of the Procedures Regulations, did not address the validity of the particular process that the Secretary chose to fill the statutory gap revealed in *Seminole Tribe*. There is thus no conflict between the decision below and the decision of any other court of appeals that warrants this Court's intervention.

3. Finally, petitioner contends (Pet. 20-26) that the decision below conflicts with *Alaska Airlines* v. *Brock*, 480 U.S. 678 (1987), in which this Court reaffirmed the traditional principle that an unconstitutional statutory provision must be severed from the remainder of the statute unless the result would be "legislation that Congress would not have enacted." *Id.* at 685. In petitioner's view, the severability principles described in *Alaska Airlines* mean 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." Pet. 25. As petitioner acknowledges (Pet. ii, 25-26), however, the court of appeals did not pass on the issue below; the question before the court was whether the Procedures Regulations are valid, not the consequences of their invalidation. The issue accordingly does not warrant this Court's review. See, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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