No. ___

IN THE

Supreme Court of the United States

LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, allows gaming on trust property acquired by the United States after 1988 for the benefit of an Indian tribe, provided that the Secretary of Interior determines that such off-reservation gaming "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). Section 2719(b)(1)(A) also provides, however, that the Secretary cannot act upon her own otherwise final, favorable determination, unless "the Governor of the State . . . concurs in the Secretary's determination." *Id.* The questions presented are:

1. Whether the gubernatorial-concurrence provision of § 2719(b)(1)(A) violates core principles of separation of powers, including the Appointments Clause, by handing over the final federal decision to an individual (i.e., the Governor) who is not subject to any Presidential control?

2. Whether the gubernatorial-concurrence provision violates basic principles of federalism because it rearranges the structure of state government, by which a state has defined itself as a sovereign, and because it makes a state constitutional officer a federal decisionmaker?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

Petitioners, plaintiffs-appellants below, are the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin, a federally recognized Indian Tribe with its reservation in Sawyer County, Wisconsin; the Red Cliff Band of Lake Superior Chippewa Indians, a federally recognized Indian Tribe with its reservation in Bayfield, Wisconsin; and the Sokaogan Chippewa Community (Mole Lake Band of Lake Superior Chippewa Indians), a federally recognized Indian Tribe with its reservation in Mole Lake near the City of Crandon in northern Wisconsin.

Respondents, defendants-appellees below, are the United States of America; the United States Department of the Interior; Gale A. Norton, Secretary of the Department of Interior; and James H. McDivitt, Deputy Assistant Secretary/ Indian Affairs. Respondents, intervening defendants-appellees below, are James E. Doyle, Governor of the State of Wisconsin, and the State of Wisconsin.

Because none of the parties is a corporation, no Rule 29.6 statement is required.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, three federally recognized Indian tribes located in Wisconsin, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, *see infra* Appendix to Petition (Pet. App.) 1a-30a, is reported at 367 F.3d 650 (7th Cir. 2004). One opinion of the district court, Pet. App. 31a-58a, is reported at 259 F. Supp. 2d 783 (W.D. Wis. 2003), and the other, Pet. App. 59a-64a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 2004. Pet. App. 1a. A timely petition for rehearing was denied on July 19, 2004. Pet. App. 65a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case concerns the constitutionality of one provision of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.* Specifically, while § 2719(a) of IGRA prohibits Indian gaming on newly acquired Indian lands, § 2719(b) provides an exception:

> (1) Subsection (a) of this section will not apply when—
>
> (A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, *but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination* . . . .

25 U.S.C. § 2719(b) (emphasis added). It is this gubernatorial-concurrence provision of § 2719(b)(1)(A) that is at issue here.

STATEMENT

This case presents important questions concerning the constitutional authority of Congress to interpose the Governors of the States as dispositive decisionmakers within a federal administrative scheme. In order to place these issues in context, it is useful to describe (1) the basic structure and operation of IGRA insofar as these are relevant to this case, (2) the application of petitioners pursuant to § 2719(b)(1)(A)

of IGRA for authorization to conduct off-site gaming operations and the favorable two-part factual determination of the Secretary of the Interior, (3) the refusal of the new Governor of Wisconsin to provide the concurrence in the Secretary's determination required under § 2719(b)(1)(A), and (4) this lawsuit.

1. Congress's Enactment of IGRA. In the 1970s and 1980s, with the encouragement of the federal government, gaming emerged as a major source of funding for the economic development of Indian tribes. While some States opposed these developments, this Court held in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), that the regulation of gaming by Indian tribes located in States that merely regulated (rather than altogether prohibited) gaming was beyond the authority of the States.

Congress responded by passing IGRA in 1988. The act reflected Congress's finding that "the establishment of independent Federal regulatory authority for gaming on Indian lands [and] the establishment of Federal standards for gaming on Indian lands . . . are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3). IGRA's numerous provisions sought comprehensively to govern relations among the tribes, the States, and the federal government with respect to Indian gaming.[1]

This case involves § 2719 of IGRA, which governs gaming "on lands acquired by the Secretary in trust for the benefit of

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[1] IGRA has been directly before this Court on two previous occasions. In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Court held that IGRA § 2710(d)(7) violated the Eleventh Amendment by permitting tribes directly to sue States in particular circumstances. In *Chickasaw Nation v. United States*, 534 U.S. 84 (2001), the Court held that IGRA § 2719(d)(1) did not exempt two tribes from paying taxes imposed by the Internal Revenue Code.

an Indian tribe after October 17, 1988," 25 U.S.C. § 2719(a), which are usually referred to as "after-acquired trust lands." This provision creates the opportunity for tribes located on isolated reservation lands to obtain the same economic benefits as tribes located near a large population base. After-acquired trust lands are typically obtained by the United States in trust for the benefit of Indian tribes pursuant to the general authorization of 25 U.S.C. § 465, a statute that predates IGRA.

More specifically, § 2719(b)(1)(A) permits off-reservation gaming when the Secretary of the Interior, after consulting tribal, state, and local officials, "determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." 25 U.S.C. § 2719(b)(1)(A).

2. Petitioners' Application for Off-Reservation Gaming. Petitioners are three economically disadvantaged Indian tribes with rural reservation lands in northern Wisconsin. In October 1993, petitioners submitted their application to the Secretary of the Interior for approval of off-reservation gaming at a facility located near the Twin Cities, in Hudson, Wisconsin. In order to permit the Secretary to make the two-part factual determination required by 25 U.S.C. § 2719(b)(1)(A)—concerning whether "a gaming establishment on newly acquired lands [1] would be in the best interest of the Indian tribe and its members, and [2] would not be detrimental to the surrounding community"—the Department of the Interior undertook a lengthy process.

Interior developed a record through environmental and economic studies and through consultations with petitioners and other interested parties, including local municipal governments, state officials, and nearby Indian tribes, as is

required by the unchallenged portion of § 2719(b)(1)(A). This record was developed in the first instance, in accordance with Interior's procedures, by the Minneapolis Area Office of the Bureau of Indian Affairs of the Department of the Interior. This process culminated in favorable recommendations on petitioners' application, first from the Bureau's Area Director in Minneapolis and then from Interior's professional staff in Washington.

Despite these recommendations, the Department of the Interior rejected petitioners' application on July 14, 1995. Petitioners thereupon commenced a lawsuit in the United States District Court for the Western District of Wisconsin, challenging the Department's decision pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* *Sokaogon Chippewa Community v. Babbitt*, No. 95-C-659-C (W.D. Wis.). The complaint alleged, among other things, that Interior officials had violated their duty to consult with petitioners and that the decision was a result of improper political influence. In 1997, District Court Judge Barbara Crabb ruled that "there is considerable evidence that suggests that improper political pressure may have influenced agency decisionmaking," *Sokaogon Chippewa Community v. Babbitt*, 961 F. Supp. 1276, 1286 (W.D. Wis. 1997), and authorized discovery outside of the 3400-page administrative record. This decision, coupled with other events, prompted two congressional investigations and a federal grand jury investigation conducted into the Secretary of the Interior by an independent counsel. The civil case was settled with an agreement that the denial of petitioners' application would be vacated and that the Department of the Interior would review the petitioners' application anew. *See Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941 (7th Cir. 2000) (recounting certain of these events).

Pursuant to the settlement, aspects of the administrative record were updated and, on February 20, 2001, the office of the Secretary of the Interior made the favorable two-part factual findings.

3. The Refusal of Wisconsin's New Governor to Concur in the Secretary's Determination. Throughout most of these events, Wisconsin's Governor was Tommy G. Thompson. However, Governor Thompson was offered a cabinet position in the Bush Administration and resigned on February 1, 2001, just weeks before the Secretary of the Interior executed the favorable two-part factual determination under § 2719(b)(1)(A). Lieutenant Governor Scott McCallum ascended to the Office of Governor.

While Governor Thompson had previously indicated support for the project (provided that it included three economically depressed Wisconsin tribes) and had approved a separate application of a different Indian tribe for off-reservation gaming (in Milwaukee), Governor McCallum expressed, both before and after being sworn into his new position, a philosophical opposition to gaming in general. In a letter to Governor McCallum dated February 20, 2001, the Department of the Interior advised the Governor that the Secretary had determined that the proposed facility at issue here was in the best interests of petitioner tribes and would not be detrimental to the surrounding community and asked for the Governor's concurrence in these findings. Detailed findings of fact prepared by Interior, supported by a massive record, were delivered to Governor McCallum shortly thereafter.

By letter dated May 11, 2001, Governor McCallum formally advised the Secretary of his nonconcurrence. His letter cited a variety of reasons unrelated to the Secretary's two factual determinations. Pet. App. 70a-77a. The Department of the Interior thereupon denied the application,

based entirely upon the refusal of the Governor under § 2719(b)(1)(A) to concur in the Secretary's determination. Pet. App. 68a-69a.

4. This Lawsuit. On May 10, 2001, petitioners brought this action against the United States in the United States District Court for the District of Columbia. Federal jurisdiction was based on 5 U.S.C. §§ 701-706 and 28 U.S.C. §§ 1331, 1346, 1361, 1362, and 2201. The State of Wisconsin and Governor McCallum intervened as defendants, and the case was eventually transferred to the Western District of Wisconsin.

The action sought a declaration that the gubernatorial-concurrence provision of § 2719(b)(1)(A) of IGRA is unconstitutional. Petitioners argued that the provision violates the separation of powers because it transfers authority from the federal Executive to the States' Governors. Petitioners contended as well that the provision violates principles of federalism both because it commandeers Governors and requires them to make a federal administrative decision and because it rearranges the balance of powers and duties established by Wisconsin's constitutional structure of government.[2]

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[2] Petitioners' suit raised other contentions, including an interpretive question under the statute. Petitioners argued that the text of § 2719(b)(1)(A) establishes that a Governor must employ the same two-factor test already favorably employed by the Secretary. *See* 25 U.S.C. § 2719(b)(1)(A) (off-reservation gaming permitted if Secretary "*determines* that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted *concurs in the Secretary's determination*") (emphasis added). Interestingly, this also appears to be the view held by the 20 States that appeared in the Seventh Circuit as *amici* in support of respondents. However, respondents (the federal government, Wisconsin, and its Governor) maintained that a Governor is free under § 2719(b)(1)(A) to apply any factors he or she chooses.

The district court rejected petitioners' various constitutional arguments and granted respondents' motions for judgment on the pleadings. Pet. App. 58a. The court subsequently denied petitioners' Rule 59 motion. Pet. App. 64a.

The court of appeals affirmed. Pet. App. 30a. The court addressed first petitioners' separation-of-powers claim and, in particular, their contention that § 2719(b)(1)(A) unconstitutionally diverts to the Governors of the States the federal government's final decisional authority with respect to Indian tribes' applications for off-reservation gaming. Relying on cases such as *INS v. Chadha*, 462 U.S. 919 (1983), which struck down the one-house-veto provision for federal executive decisions, and *Printz v. United States*, 521 U.S. 898 (1997), which held the transfer of responsibility for handgun-purchaser background checks outside of the federal Executive Branch to be unconstitutional, petitioners maintained that Congress cannot confer upon an actor outside the federal Executive Branch the power to override the execution of federal law by the President (in this instance, through the Secretary of the Interior).

The court of appeals did not deny that under § 2719(b)(1)(A) someone other than a member of the federal Executive Branch effectively possesses ultimate decisional authority on petitioners' applications. It nonetheless concluded that federal separation-of-powers principles are not offended because § 2719(b)(1)(A) can be analogized to a type of statute termed "contingent legislation" by the case law. The court of appeals specifically relied on three decisions of this Court, none more recent than 1939, upholding statutes that made the imposition of certain economic regulation contingent on a majority vote of those to

be regulated. Pet. App. 8a-9a (citing *Currin v. Wallace*, 306 U.S. 1 (1939), *United States v. Rock Royal Co-op*, 307 U.S. 533 (1939), and *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928)).

The court reasoned that under § 2719(b)(1)(A) of IGRA the Governor's decision is itself a contingency and the federal Executive's role is to request, ascertain, and implement the Governor's decision. More specifically, the provision passes constitutional muster, according to the court of appeals, because the federal Executive Branch must ascertain whether the state Governor concurred, and then must approve the application if he did and deny the application if he did not. Pet. App. 7a-8a. This theory of contingent legislation also formed the principal basis for the court of appeals' rejection of petitioners' separation-of-powers argument based on the Appointments Clause. *See* Pet. App. 16a-17a.

The court of appeals rejected as well petitioners' suggestion that § 2719(b)(1)(A)'s provision for a Governor's concurrence or nonconcurrence to control the result of a federal administrative decision "compels state governors to administer federal law in violation of principles of federalism as interpreted in *New York v. United States*, 505 U.S. 144 (1992) and in *Printz v. United States*, 521 U.S. 898 (1997)." Pet. App. 19a. The court distinguished these precedents, stating that "[n]either the States nor their Governors are required to aid the federal administration of § 2719(b)(1)(A) in any way." *Id.* While the court conceded that even a Governor's inaction has an effect under § 2719(b)(1)(A), it concluded that the provision "preserves state sovereignty by merely encouraging the States to decide whether to endorse federal policy and by reserving the ultimate execution of that policy to the federal government." Pet. App. 20a.

Petitioners' other argument with respect to federalism was "that the gubernatorial concurrence provision violates principles of federalism because it impermissibly interferes with the functioning of state government by rearranging its structure." Pet. App. 22a. The court noted petitioners' contention that "when the Secretary of the Interior seeks the concurrence of the Governor of Wisconsin, he or she requires the Governor to legislate Wisconsin's gaming policy in violation of the Wisconsin Constitution." *Id.* The court did not (and could not) suggest that any Wisconsin statute authorizes a Governor to make a decision under § 2719(b)(1)(A) or guides him as to how to do so. It nonetheless stated that in making his determination to concur or not to concur in the Secretary's decision, the Governor "will be informed by the public policy represented by the Wisconsin Constitution and relevant statutes." Pet. App. 23a. On this basis, the court concluded that "[t]he governor's role is not inconsistent with the Wisconsin Constitution, which vests 'the executive power . . . in a governor.'" *Id.* (quoting Wis. Const., Art. V, § 1). The court did not explain how two Governors (Governors Thompson and McCallum) could, consistently with executing the law, take such different approaches to off-reservation gaming under § 2719(b)(1)(A), with the one approving the only application put to him and the other announcing that he would never approve an application and then acting consistently with that statement.

Following the court of appeals' decision, petitioners sought rehearing, relying in particular on the Wisconsin Supreme Court's decision (rendered after the court of appeals' here) in *Panzer v. Doyle*, 271 Wis. 2d 295, 680 N.W.2d 666 (2004). *Panzer*, which concerned the Governor's decisionmaking with regard to another aspect of IGRA, indicated that under Wisconsin law the Governor has no authority to make the decision at issue here. *See infra* p. 23. Although the court of

appeals ordered the government to respond to the petition for rehearing, it denied rehearing on July 19, 2004. Pet. App. 66a.

REASONS FOR GRANTING THE PETITION

Over the past quarter-century, this Court has acted to preserve the constitutional structure of government in two notable respects. First, it has sought to ensure that Congress does not displace the proper role of the Executive Branch in administering the law, whether by arrogating power to itself in ways evident, *see, e.g., INS v. Chadha,* 462 U.S. 919 (1983), or slightly more subtle, *see, e.g., Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991), or by attempting to disperse executive authority elsewhere, *see, e.g., Printz v. United States,* 521 U.S. 898, 922-23 (1997). Second, the Court has acted to preserve aspects of state sovereignty even in instances where pressing public policy issues prompted Congress to think it useful to attempt to incorporate the several States into the federal processes of lawmaking, *see, e.g., New York v. United States*, 505 U.S. 144 (1992), or administration, *see, e.g., Printz,* 521 U.S. at 925-33.

Petitioners ask the Court to continue to enforce these principles and hold the gubernatorial-concurrence provision of § 2719(b)(1)(A) unconstitutional. In all events, there can be no substantial debate concerning the provision's extraordinary importance in a politically and economically significant area of public policy, and it is appropriate that, one way or the other, the Court resolve the doubts about its constitutionality. A ruling by this Court further will provide guidance with respect to any structural limits that the Constitution imposes on what is frequently termed "cooperative federalism." All of these points are developed in detail below.

I. BY TRANSFERRING FROM THE SECRETARY OF THE INTERIOR TO A STATE GOVERNOR FINAL SUBSTANTIVE DECISIONAL AUTHORITY IN A FEDERAL ADMINISTRATIVE PROCEEDING, § 2719(b)(1)(A) UNDERMINES THE EXECUTIVE BRANCH'S AUTHORITY TO EXECUTE THE LAWS, IN VIOLATION OF CORE PRINCIPLES OF SEPARATION OF POWERS.

Section 2719(b)(1)(A) of IGRA is incompatible with the Constitution. Specifically, by assigning to a state Governor final substantive decisional authority on an application by an Indian tribe under the federal Indian Gaming Regulatory Act to allow federally regulated gaming on land held in trust by the United States for the tribe's benefit, Congress improperly subordinated the federal Executive's duty under Article II of the Constitution.

One need look no further than the vesting and other clauses of the Constitution to reach this conclusion. Article II provides that "[t]he executive Power shall be vested in a President of the United States of America" and that the President "shall take Care that the Laws be faithfully executed." U.S. Const., Art. II, §§ 1, 3. By contrast, Congress's structuring of § 2719(b)(1)(A) so as to displace the Secretary of the Interior (or some other executive branch officer) from the ultimate critical determinations necessary to approve an application for off-reservation gaming runs afoul of these provisions and the structure of government mandated by the Constitution. Section 2719(b)(1)(A) impermissibly transfers out of the Executive Branch such "executive functions" as "enforc[ing] th[e] [laws] or appoint[ing] the agents charged with the duty of such enforcement." *Buckley v. Valeo*, 424 U.S. 1, 139 (1976) (internal quotation marks omitted); *see also Bowsher v. Synar*, 478 U.S. 714, 733 (1986) ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law").

The conclusion that § 2719(b)(1)(A) is unconstitutional is confirmed by recent, specific applications of these textual provisions. For example, in *INS v. Chadha*, 462 U.S. 919 (1983), the Court held that federal executive decisions cannot be overturned by the actions of one house of Congress. *Chadha* reflects the basic proposition that a decision properly entrusted to the Executive Branch can be overturned only by Congress, and only when Congress enacts a law in the manner prescribed by the Constitution. Other efforts by Congress to insert itself, even in indirect ways, into the executive sphere have also been rejected by the Court in recent years. *See, e.g., Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991); *Bowsher v. Synar*, 478 U.S. 714 (1986).

This Court's landmark decision in *Printz v. United States*, 521 U.S. 898 (1997), makes clear that the controlling principle is not whether Congress has sought to aggrandize itself, but rather whether its actions improperly permit *any entity* to invade the sphere of executive authority. *See also Clinton v. Jones*, 520 U.S. 681, 701 (1997) ("We have recognized that '[e]ven when a branch does not arrogate power to itself . . . the separation of powers doctrine requires that a branch not impair another in the performance of its constitutional duties.'") (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996)). *Printz* involved the attempt by Congress in 1993 in the Brady Act to require certain state law-enforcement officers to participate in a federal administrative process regulating sales of handguns.

The Court held that, even apart from unlawfully commandeering state officials, *compare infra* Part II (argument concerning federalism here), the challenged portion of the

Brady Act had an impermissible effect upon the constitutional role of the Executive. *See Printz*, 521 U.S. at 922-23. The Court stated that "[t]he Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, 'shall take care that the laws be faithfully executed,' Art. II, § 3, personally and through officers whom he appoints . . . ." *Printz*, 521 U.S. at 922. The Brady Act, by contrast, "transfer[red] this responsibility" to individuals over whom there was no "meaningful Presidential control." *Id.* The Court held that this was contrary to "[t]he insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability . . . ." *Id.*

Section 2719(b)(1)(A) is of the same nature as the Brady Act and the other congressional enactments in the foregoing cases. This gubernatorial-concurrence provision (in reality, a gubernatorial-veto provision) replaces the federal Executive in the execution of federal law, not with Congress itself or with state law enforcement officials, but with state Governors. These individuals are beyond any control or supervision of the President and, in all events, scarcely are "officers whom he appoints." *Printz*, 521 U.S. at 922. Yet under § 2719(b)(1)(A) of IGRA, the Governor of the State, not the Secretary of the Interior or some other executive branch official, is the individual in whom Congress has reposed the final substantive federal decision. Such a dispersion of authority is incompatible with the notion of a unitary Executive. *Compare* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541 (1994), *cited with approval in Printz*, 521 U.S. at 923. It is no wonder that President

Reagan considered an analogous provision in another federal law to be unconstitutional.[3]

In addition to these broader separation-of-powers obstacles, the Appointments Clause of the Constitution also stands in the way of § 2719(b)(1)(A)'s gubernatorial-concurrence provision. "Any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II]." *Freytag v. Commissioner*, 501 U.S. 868, 881 (1991) (quoting *Buckley*, 424 U.S. at 126). The Court's decisions make clear that individuals who wield federal power of a discretionary nature—who have the final say on a federal matter—come within this provision. *See Buckley*, 424 U.S. at 126 n.162 (suggesting that individuals are "Officers of the United States" and thus subject to the Appointments Clause if they are "not subject to the control or direction of any other executive, judicial, or legislative authority"); *Freytag*, 501

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[3] The reference is to President Reagan's statement concerning the Columbia River Gorge National Scenic Area Act, Pub. L. 99-663. The President stated as follows:

> In signing this bill, I have grave doubts as to the constitutionality of the provision in Section 10, which would authorize the Governors of Washington and Oregon and the State-appointed Columbia River Gorge Commission to disapprove Federal condemnation actions. The Federal government may not constitutionally be bound by such State action taken pursuant to Federal law. To avoid this unconstitutional interpretation, I am signing this bill with the understanding that State disapproval of a Federal condemnation action under this legislation will not operate as a veto, but will be merely advisory. Upon receipt of a State notice of disapproval, the Federal government will decide whether to proceed with its condemnation action.

Columbia River Gorge National Scenic Area Act, Pub. L. 99-663, *Statement by President of the United States*, *reprinted in* 1986 U.S.C.C.A.N. 6750, 1986 WL 67622.

U.S. at 880-82 (emphasizing that "exercise [of] significant discretion" as opposed to the mere discharge of "ministerial tasks" characterizes "Officers" subject to the Appointments Clause). Under any reading of § 2719(b)(1)(A), there can be no doubt that the Governor, who without question is not appointed in a manner contemplated by the Appointments Clause, exercises significant discretion. This is sufficient for the constitutional provision to apply.[4]

The court of appeals sought to deflect all of these separation-of-powers concerns by analogizing the gubernatorial-concurrence provision to a rarely used subset of the doctrine called "contingent legislation."[5] Specifically, the court held that the constitutional sphere of executive authority is not violated where "Congress restrict[s] the authority to execute federal legislation contingent upon the approval of an actor external to the federal Executive Branch." Pet. App. 8a, citing *Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688, 694-95 (9th Cir.), *cert. denied*, 522 U.S. 1027 (1997).[6] The court thus ruled that it had no difficulty with

[4] In fact, the Department of Justice opined to Congress in 1988 that a different draft of IGRA under consideration, which authorized Governors and other local officials to approve off-reservation gaming with no role for the Secretary of the Interior, violated the Appointments Clause. S. Rep. No. 446, 100th Cong., 2d Sess., 1988 U.S.C.C.A.N. 3071, 3102, *reprinted in* 1988 WL 169811 at *32. It is difficult to see how inserting the Secretary to serve as a sort of an initial screener and ultimate implementer for the Governor eliminates the problem.

[5] Typically, the phrase "contingent legislation" describes nothing more than Congress's ability to enact legislation that can be implemented upon a finding by the Executive that specified facts exist. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928), established the principle. There, the Court upheld a statute that required the President to adjust tariffs on imported barium dioxide upon a finding that the pre-existing tariff did not compensate for differences in production costs between domestic and foreign producers.

[6] In *Siletz Indians*, the Ninth Circuit turned back a separation-of-powers challenge to § 2719(b)(1)(A). Its opinion did not have the benefit of this Court's subsequent decision in *Printz*, and the Ninth Circuit was not presented with a federalism argument along the lines of Part II of this petition.

Congress's reducing the federal Executive's role in the execution of a law to the mechanical act of requesting and implementing a decision rendered by a non-executive-branch official, even where (as under § 2719(b)(1)(A)) that official is deciding a matter that has *already* been decided by the Executive, *see supra* p. 7 n.2.

This is an extraordinary expansion of the concept of contingent legislation. Under this approach, the Secretary's ascertainment and implementation of the Governor's disposition of the Secretary's determination are indistinguishable from any other fact that a statute requires an executive official to find as a predicate to the execution of a law. This represents a sharp break with the Court's separation-of-powers jurisprudence. If allowed, Congress can employ "contingent legislation" to rearrange the constitutional allocation of powers among the three branches.

Contrary to this approach, the subset of this Court's contingent legislation precedents invoked by the Seventh Circuit here and the Ninth Circuit in *Siletz Indians* in fact consist of a handful of cases upholding statutes that condition the Executive's application of certain economic regulation on a vote of those to be regulated. *Currin v. Wallace*, 306 U.S. 1 (1939), is frequently regarded as involving a representative example of this type of statute. *See, e.g.*, Pet. App. 8a-9a; *Siletz Indians*, 110 F.3d at 695. In *Currin*, the Court upheld a federal statute authorizing the Secretary of Agriculture to designate markets for the sale of tobacco, but only if two-thirds of affected tobacco farmers favored the designation. *See Currin*, 306 U.S. at 6, 15-16. *See also United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 577 (1939) (upholding provision conditioning Secretary of Agriculture's

power to issue marketing orders upon the contingency of vote of producers); *Wickard v. Filburn*, 317 U.S. 111, 116 (1942) (permitting Secretary of Agriculture's imposition of quotas conditioned on a referendum where two-thirds "of farmers who will be subject to the quota" approved it). These cases variously allow certain economic regulation contingent on a favorable vote of the regulated entities. The statutes at issue did not raise separation-of-powers problems because they codified a species of self-regulation by a majority or super-majority vote of the regulated group.

That *Currin* cannot stand for a broader theory of contingent legislation, such as the one articulated by the court of appeals here, was demonstrated by the Solicitor General in *Chadha*. In *Chadha*, the Senate suggested that the one-house-veto provision was valid because *Currin* allowed unbridled contingent legislation. *See, e.g.*, Brief of United States Senate in *Chadha*, n.12 ("It seems difficult to believe that the effectiveness of action legislative in character may be conditioned upon a vote of farmers but may not be conditioned on a vote of the two legislative bodies of the Congress.") (internal quotation marks and emphasis omitted) (available at 1981 WL 388494 at *12 and in LEXIS at 1980 U.S. Briefs 1832, doc. no. 20). The Solicitor General responded by analogizing the statute at issue in *Currin* to one creating a condition that the payment of benefits is contingent upon an application of the beneficiary. According to the Solicitor General, the farmers were beneficiaries of the act of Congress. Under this reading, *Currin* reflects merely that Congress has the authority to "impose certain conditions on the receipt of benefits under a law," although it may not "impose [an] *unconstitutional* condition." Brief of Solicitor General for INS in *Chadha*, n.36 (available at 1982 WL 607220 at *56 and in LEXIS at 1980 U.S. Briefs 1832, doc. no. 7).

Here, of course, Governors are not the beneficiaries of off-reservation gaming applications; the applicant tribes are. In fact, the interests of a Governor of a State and Indian tribes within the State differ and often conflict. Indians are a distinct racial and political minority in the statewide electorate to which a Governor is accountable.[7] The provision in § 2719(b)(1)(A) thus is more accurately seen as an example of a delegation of authority to a person outside the federal government to regulate the activities of others than it is seen as analogous to the self-regulation sort of provisions upheld in *Currin* and its few kin.

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[7] The decision by Congress to empower state Governors as final substantive decisionmakers is particularly vexatious for this reason. The United States has a well-recognized trust obligation in its relationship with Indians. *See Morton v. Mancari*, 417 U.S. 535, 551-53 (1974) (and cases cited). Historically, Congress protected Indians from the divergent interests and even hostility of local officials. *See, e.g., United States v. Kagama*, 118 U.S. 375, 383-84 (1886); *Worcester v. Georgia*, 31 U.S. 515, 561-62 (1832). By contrast, Governors do not have any trust obligations and in fact are answerable at the polls to individuals whose interests (particularly as historically assessed) may be adverse to Indians in the area. Moreover, Wisconsin's Governor, as in many States, has a conflict of interest. He is charged with managing a state gaming operation (a lottery) in direct competition with Indian gaming. In these circumstances, it is difficult to see how Governors can act as trustees for federal Indian policies.

It is worth noting as well that the approach at issue here is not deployed elsewhere in IGRA. Under §2719(b)(1)(A), the Governor is for all practical purposes the final decisionmaker on any off-reservation gaming application that the federal government has otherwise approved. By contrast, in another section of IGRA, authorizing Class III gaming if there is a tribal compact with the State, the federal government remains the final decisionmaker. Specifically, all compacts must be approved by the Secretary of the Interior, a federal officer who has a trust obligation to Indians, and if a State refuses to negotiate a compact, the Secretary can impose its equivalent (i.e., she can prescribe conditions under which Class III gaming is permitted). *See* 25 U.S.C. § 2710(d)(7)(B)(vii), (8).

In all events, there can be no suggestion after *Chadha* that legislation may be contingent on some *unconstitutional* contingency. *Compare Chadha*, 462 U.S. at 987 (White, J., dissenting) (calling into question whether *Currin* survives the decision in *Chadha*). Yet the court of appeals' expansion of the concept of contingent legislation effectively allows Congress to create a contingency that rearranges federal separation-of-powers principles. *Compare Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (Stevens, J.) (post-*Chadha* decision striking down congressional act based on separation of powers where the act imposed an unconstitutional condition). The court of appeals' approach leaves a statute's constitutional validity dependent on style rather than substance. This cannot be. As the Court of Appeals for the D.C. Circuit explained, in a decision which preceded *Chadha* and was summarily affirmed by this Court after *Chadha* and which specifically rejected a broad expansion of this contingent legislation doctrine, "[m]erely styling something as a condition on a grant of power does not make that condition constitutional." *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 470 (D.C. Cir. 1982), *aff'd mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983).

In short, the Court's precedents recognize a more robust constitutional role for the Executive than that contemplated by § 2719(b)(1)(A). And the court of appeals' expansion of the notion of contingent legislation cannot obscure the matter or provide a roadmap around the Executive. The proposition that the federal Executive's constitutional duties can be reduced to mechanical implementation of the executive decisions of others beyond the Executive's control so long as the statute at issue styles the approval of others as a condition is, simply put, not the law.

The Court should resolve these separation-of-powers questions. Over the past several decades, many statutory programs have demonstrated Congress's "increasing willingness to allow states to superintend the implementation of federal law." Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. Rev. 663, 672 (2001). The Court has upheld these statutes where Congress has gone about this in a constitutional manner, such as "attach[ing] conditions on the receipt of federal funds," *South Dakota v. Dole*, 483 U.S. 203, 206 (1987), and (in instances where Congress has the authority to regulate private activity under the Commerce Clause) offering States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation, *see, e.g.*, *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288-89 (1981). But where such statutes have interfered with the separation of powers, *see Printz*, 521 U.S. at 922-23, or federalism (*see infra* Part II and cases cited), the Court has struck them down. What all the decisions share in common is that each has been important to guiding future legislation.

Thus, quite apart from petitioners' view that the challenged statute violates the Constitution, a decision of this Court, one way or the other, addressing the expansion of the contingent legislation doctrine here will help ensure that future legislation is within constitutional guideposts. *Compare Metropolitan Washington Airports Auth.*, 501 U.S. at 277 (striking down congressionally created airport board on separation-of-powers grounds and noting importance of doing so in order to deter Congress from resorting to "similar expedients," for "[a]s James Madison presciently observed, the legislature 'can with greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments'") (quoting The Federalist No. 48, p. 334 (J. Cooke ed. 1961)).

II. BY MAKING A STATE GOVERNOR THE FINAL DECISIONMAKER ON AN OFF-RESERVATION GAMING APPLICATION, CONGRESS HAS REARRANGED THE STRUCTURE OF STATE GOVERNMENT AND INTERPOSED A STATE CONSTITUTIONAL OFFICER IN A FEDERAL DECISION, IN VIOLATION OF PRINCIPLES OF FEDERALISM.

Congress, in authorizing off-reservation gaming on after-acquired trust land, has made state Governors the final substantive decisionmakers in federal administrative proceedings. Quite apart from unconstitutionally encroaching upon the authority of the federal Executive, this approach of IGRA in § 2719(b)(1)(A) rearranges the workings of state governments in a manner beyond the federal government's authority. The federal government also lacks authority thus to interpose Governors in a federal administrative decision.

The State of Wisconsin, like other States and the federal government, divides governmental authority among three branches of government: the legislature, the executive, and the judiciary. *See* Wis. Const., Arts. IV, V, VII; *Panzer v. Doyle*, 271 Wis. 2d 295, 331, 680 N.W.2d 666, 684 (2004). The legislative branch makes the general policy decisions for the State, which thereupon are carried into effect by the executive branch. *See generally State ex rel. Davern v. Rose*, 140 Wis. 360, 363-64, 122 N.W. 751, 752-53 (1909). In the words of another state supreme court, whose decision is otherwise relevant as well (*see infra* p. 23 n.10), such separation of powers is "a principle that is fundamental in the structure of the federal government and the governments of all fifty states." *State ex rel. Clark v. Johnson*, 120 N.M. 562, 573, 904 P.2d 11, 22 (1995).

The Wisconsin legislature has never enacted a general policy for the State on off-reservation gaming or delegated to

the Governor any authority to do so.[8] This lack of state authority is clear in light of the Wisconsin Supreme Court's decision in *Panzer v. Doyle*, 271 Wis. 2d 295, 680 N.W.2d 666 (2004), rendered after the court of appeals' decision here. *Panzer* stated that, absent Wis. Stat. § 14.035, which delegates certain authority to the Governor to enter into compacts with Indian tribes for gaming,[9] the Governor would lack any authority to make such compacts. *See Panzer*, 271 Wis. 2d at 338-39, 680 N.W.2d at 687-88.[10] And § 14.035 is not some broad-ranging authority to approve Indian gaming, but simply gives the Governor authority, "on behalf of this state, [to] enter into [a] compact that has been negotiated under 25 USC 2710(d)." Wis. Stat. § 14.035. Section 2710(d) concerns the *type* of gaming that will be permitted.

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[8] Indeed, § 2719(b)(1)(A) has created tension between the legislature and the Governor in Wisconsin. Two Wisconsin legislatures tried to take this federally granted power from the Governor. The legislature was unable to overcome the vetoes of two Governors (Thompson and Doyle).

[9] IGRA empowered "State[s]" to enter into compacts with tribes. *See, e.g.*, 25 U.S.C. § 2710(d)(1)(C) (permitting Class III gaming activities on Indian lands where, *inter alia*, activities are "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State"). In Wisconsin, the legislature delegated this state authority to the Governor. *See* Wis. Stat. § 14.035. However, the federal government is the final decisionmaker on any compact. *See supra* p. 19 n.7.

[10] This aspect of *Panzer* comports with other decisions involving other States. *See Panzer*, 271 Wis. 2d at 337-39, 680 N.W.2d at 687-88 (citing cases). Indeed, the supreme court of one State concluded, with respect to a suggestion that its Governor "possesses the authority, as a matter of *federal law*, to bind the State to the terms of the compact, irrespective of whether he has the authority as a matter of state law," that such an argument is "inconsistent with core principles of federalism." *State ex rel. Clark v. Johnson*, 120 N.M. 562, 577, 904 P.2d 11, 26 (1995). It thus refused to interpret § 2710(d) of IGRA along these lines and further stated that it was "confident that the United States Supreme Court would reject any such attempt by Congress to enlarge state gubernatorial power." *Id.*

By contrast, there is *no* provision in the Wisconsin Statutes, analogous to § 14.035, that authorizes the Governor to enter into agreements or in any way treat questions concerning the advisability of permitting off-reservation gaming under § 2719(b)(1)(A). In short, Wisconsin law does not authorize the Governor to act upon, approve, or concur in the matters embraced by § 2719(b)(1)(A).

Despite this absence of authority from the source where one would expect a Governor to receive authority (*viz.*, the constitution and the statutes of the State), Congress through § 2719(b)(1)(A) has cast the Governor as the maker of the final substantive decision in a federal administrative decisional process. Precisely how the Governor is supposed to make his determination is not a matter of agreement. One possibility is that the Governor is required simply to undertake the same factual inquiry as that already made by the Secretary of the Interior and may not consider other issues. This is the most natural reading of the statute, and it is the interpretation adopted by the twenty States that appeared as *amici* here in the court of appeals. *See supra* p. 7 n.2. It used to be the interpretation of the United States as well, but the federal government in this case has abandoned that position in favor of another suggestion: specifically, that the Governor is bound by *no* standard.[11] The court of appeals adopted yet another interpretation, even though it was urged upon the court by no party or *amicus* and is apparently supported by nothing in the text of the statute. Specifically, the court held that the Governor's role is to determine whether an off-reservation gaming proposal complies with

[11] *Compare* Brief for the Federal Respondents in Opposition, at 9, *Confederated Tribes of Siletz Indians v. United States*, U.S. Sup. Ct. No. 97-449 (filed Nov. 10, 1997), *with* Brief for the Federal Appellees, at 25 n.10, *Lac Courte Oreilles Band v. United States*, 7th Cir. No. 03-2323 (dated Oct. 14, 2003).

generalized state policy reflected in the State's laws on gaming. *See supra* p. 10; Pet. App. 23a.

The foregoing interpretive differences are immaterial here, for under each of these interpretations the statute suffers from the same constitutional flaw: by authorizing a Governor of a State to approve off-reservation gaming, under any or no standard, § 2719(b)(1)(A) rearranges authority within the State's government. For example, in Wisconsin (as in most States), commercial gaming is heavily regulated pursuant to the criminal laws, and a principal state constitutional power of Governors is to execute the laws of the States. However, when Indian gaming is authorized pursuant to IGRA, state criminal law is pre-empted by a different provision of IGRA. *See* 18 U.S.C. §§ 1166(c), (d). Thus, the effect of a gubernatorial concurrence under § 2719(b)(1)(A) is to exempt certain areas of the State from the State's criminal statutes, even though Governors, simply said, have no state authority to exempt criminal conduct but rather possess the duty to enforce the law. The result of all this is that approval of off-reservation gaming will vary, not only according to other factors, but according to the views of the occupant of the Governor's office. Thus, in Wisconsin, one Governor (Governor Tommy Thompson) approved off-reservation gaming in Milwaukee pursuant to IGRA, while a second Governor (Governor Scott McCallum) disapproved of off-reservation gaming pretty much altogether, including in this case, and there is a third (the current Governor, James Doyle) whose position on off-reservation gaming is unknown.

In all events, Congress has drafted into federal service, to make what will become the final federal agency decision, whoever happens to be Governor of a State at the time when the Secretary of the Interior makes a favorable two-part factual determination pursuant to § 2719(b)(1)(A). Under the structure of § 2719(b)(1)(A), this is the practical result even if the Governor refuses to be involved in the matter, for then the

concurrence required to permit off-reservation gaming has been withheld and the application will necessarily be denied under § 2719(b)(1)(A).

The federal government has no authority to go about its business in this manner.[12] This essential point, while perhaps little commented upon because it falls into the category of "truths . . . so basic that, like the air around us, they are easily overlooked," *compare New York v. United States*, 505 U.S. 144, 187 (1992), is reflected in a variety of respects in this Court's precedents. Although the Court has stated in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), in overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), that Congress has substantial power under the Commerce Clause to compel States to adhere to federal policies of general application (such as minimum wage and overtime rules), the Court has never held that Congress has the power to select a constitutional officer of a State and require him, willing or not, to make what amounts to a federal executive decision. Indeed, *Garcia* itself recognizes that there are limits to congressional authority over the States under the Commerce Clause. *See Garcia*, 469 U.S. at 555-57.

Subsequent opinions of the Court have limited the ability of Congress to regulate States when the regulation impairs a core attribute of state sovereignty. For example, the Court held in *Alden v. Maine*, 527 U.S. 706 (1999), that Congress could not abrogate a State's sovereign immunity to allow suit

[12] Nor does it typically do so, as even IGRA itself reflects in another provision, which empowers "State[s]" to enter into compacts. *See supra* p. 23 n.9. Indeed, in *Testa v. Katt*, 330 U.S. 386, 394 (1947), the Court apparently recognized that state institutions can only be used to decide a federal matter if the matter is within "the state institution's own decisionmaking structure and method." *FERC v. Mississippi*, 456 U.S. 742, 773-74 n.4 (1982) (Powell, J., concurring in part and dissenting in part). *Accord id.* at 760 (opinion of the Court).

against the State in the State's own courts. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Court questioned whether Congress has the authority under the Commerce Clause to determine the qualifications of state policymakers (at issue was an apparent conflict between the federal Age Discrimination in Employment Act and a mandatory retirement provision contained in the Missouri Constitution).[13] The Court observed in *Gregory* that "[t]hrough the structure of its government . . . a State defines itself as a sovereign." *Id.* at 460; *see also Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."). And, of course, the Court has held that Congress does not have the authority to direct state legislatures to make certain policy decisions, *see New York v. United States*, 505 U.S. 144 (1992), or to commandeer local officials into federal service, *see Printz v. United States*, 521 U.S. 898 (1997).

These cases share a common premise. Congress cannot utilize its Commerce Clause authority to strip States of core attributes of state sovereignty. In the case at bar, the core attribute of state sovereignty involves the basic manner by which a State separates the powers of the various branches of its government. Under § 2719(b)(1)(A) of IGRA, as a matter of federal law, Governors make fundamental policy deci-

[13] The Court held in *Gregory* that the determination of Congress to apply the federal Age Discrimination in Employment Act to state policymakers was unclear and that, absent clear congressional direction, the Court would not interpret the statute to apply to state policymakers (there, judges). *Gregory*, 501 U.S. at 457-70. The Court noted, even beyond this, that "[a]s against Congress' powers '[t]o regulate Commerce . . . among the several States,' U.S. Const., Art. I, § 8, cl. 3, the authority of the people of the States to determine the qualifications of their government officials may be inviolate," *Gregory*, 501 U.S. at 464, but its interpretation of the statute meant that the Court did not need to resolve that matter.

sions. There is absolutely no state legislative involvement in these decisions. Thus, far from involving a grant of authority *to the State* (*compare* p. 23 n.9), this case involves a direct federal empowerment of one state constitutional officer who, absent the congressional authorization, would not have the authority under state law to make the decision at issue or one resembling it. In these circumstances, this case presents a more fundamental question even than *Printz* concerning the authority of Congress pursuant to the Commerce Clause to deploy state officials: *Printz* did not involve the powers of a state constitutional officer and did not involve displacing the state legislature's authority to make policy.

Since the power of Congress, pursuant to the Commerce Clause, is broad, if Congress can employ state executive officers in this manner, a limit on the power of Congress to remake the governments of the States for purposes of administering federal law and, in particular, to avoid state legislatures altogether in programs of "cooperative federalism" scarcely suggests itself. Petitioners submit that Congress does not have this authority and that § 2719(b)(1)(A) violates core principles of federalism.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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