IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

STATE OF ALABAMA, Plaintiff, v. PCI GAMING AUTHORITY, BUFORD ROLIN, STEPHANIE BRYAN, ROBERT MCGHEE, DAVID GEHMAN, ARTHUR MOTHERSHED, SANDY HOLLINGER, GARVIS SELLS, EDDIE TULLIS, KEITH MARTIN, BRIDGET WASDIN, MATTHEW MARTIN, BILLY SMITH, and TIM MANNING, Defendants.	Civil Action No. 2:13-CV-00178-WKW

CONSOLIDATED REPLY BRIEF IN SUPPORT OF
MOTION TO DISMISS FIRST AMENDED COMPLAINT

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In its briefing, the State of Alabama reaffirms its fundamentally flawed interpretation of the meaning, purpose, and effects of the Indian Gaming Regulatory Act (IGRA), 18 U.S.C. § 1166 & 25 U.S.C. §§ 2701, *et seq.* For all of the reasons stated in their initial brief and in the *amicus curiae* brief of the United States, as well as the reasons set forth in more detail below, the Defendants are entitled to dismissal of the State's Amended Complaint on the basis of sovereign immunity or, in the alternative, for failure to state a claim.

ARGUMENT AND ANALYSIS

I. Alabama Has Conceded That Its Claims against PCI Gaming Authority Must Be Dismissed Due to Sovereign Immunity.

The State of Alabama grudgingly concedes that, due to what it characterizes as "wrongly decided Eleventh Circuit precedents," Defendant PCI Gaming Authority (PCI Gaming) enjoys sovereign immunity from all of Alabama's claims. State of Alabama's Brief in Opposition to Motion to Dismiss (Ala. Br.), Doc. No. 17, at 20. The State is correct that tribal sovereign immunity remains the law of the land, that it applies to tribal entities such as PCI Gaming, and that it is not waived by a tribal defendant's removal of a case to federal court.[1] *See* Ala. Br. at 21-23. Accordingly, the Defendants' motion to dismiss must be granted as to PCI Gaming on the basis of sovereign immunity.

II. Alabama's Putative State Law Claim Must Be Dismissed.

The individual defendants likewise enjoy sovereign immunity from Alabama's putative state law claim. While the State attempts to avoid those defendants' immunity by invoking the

[1] While Alabama concedes that dismissal of its claims against PCI Gaming is required by binding precedent, a brief response to its comments on waiver of sovereign immunity is in order. *See* Ala. Br. at 23. Contrary to Alabama's description, the Eleventh Circuit's opinion in *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida*, 692 F.3d 1200 (11th Cir. 2012), which held that tribal sovereign immunity is not waived when a tribal defendant removes a case to federal court, did *not* focus on claims for money damages. The operative claims in *Contour Spa*, like those at issue here, involved declaratory and injunctive relief. *See id.* at 1203.

Ex parte Young doctrine, it is well-settled that the doctrine applies only to claims alleging ongoing violations of *federal* law and is not available for state law claims.

Even if the Defendants did not possess sovereign immunity, Alabama has failed to state a valid state law claim. As explained in the Defendants' initial brief, IGRA leaves absolutely no room for the application of state law, *qua* state law, to gaming conducted by Indian tribes on Indian lands. Def. Br. at 7-9. *See also* U.S. Br. at 11-13. Any state law claim is therefore preempted and must be dismissed. The State of Alabama articulates two responses to the Defendants' IGRA preemption argument. It first argues that IGRA's penal provision, 18 U.S.C. § 1166, requires gaming tribes to comply with state law and therefore does not preempt state law claims. Ala. Br. at 34. Alternatively, the State contends that IGRA does not apply in this case – and therefore does not preempt a state law nuisance action – because the gaming at issue is not conducted on "Indian lands" within the purview of the Act. *Id.* at 34-35. Both of the State's arguments are incorrect.

A. The individual defendants possess sovereign immunity from Alabama's state law claim.

Tribal officials such as the individual defendants are protected by their tribes' sovereign immunity when acting in their official capacities and within the scope of their authority. *See, e.g., Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212, 1226 (11th Cir. 1999); Brief in Support of Tribal Defendants' Motion to Dismiss (Def. Br.), Doc. No. 14, at 5-6. The State of Alabama and its *amicus* attempt to evade the individual defendants' sovereign immunity by invoking the *Ex parte Young* doctrine, which, in certain, narrowly limited circumstances, allows official capacity suits against tribal officials to enjoin ongoing violations of federal law.

Alabama's reliance on *Ex parte Young* to subject tribal officials to a putative state law claim is misplaced. It is settled law that the *Ex parte Young* exception to sovereign immunity is available only to remedy alleged ongoing violations of federal – not state – law. *See, e.g.*, *Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1305 n.15 (11th Cir. 2011) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104-106 (1984)); *Poindexter v. Dep't of Human Res.*, --- F. Supp. 2d ----, 2013 WL 2237865 at *9 (M.D. Ala. May 21, 2013) (Watkins, J.). As the Supreme Court explained in *Pennhurst*, "the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate *federal* rights and hold state officials responsible to 'the supreme authority *of the United States*.' Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of *federal* rights." *Pennhurst*, 465 U.S. at 105 (quoting *Ex parte Young*, 209 U.S. 123, 160 (1908)) (emphasis added). In the context of an action to enforce state law, "the entire basis for the doctrine of *Young* … disappears." *Pennhurst*, 465 U.S. at 106. Because the *Ex parte Young* doctrine applies only to claims alleging ongoing violations of federal law, Alabama's state law claim must be dismissed on sovereign immunity grounds.

The State argues that the individual defendants nevertheless are subject to its state law claim because they do not enjoy sovereign immunity in Alabama's state courts, and therefore cannot assert it in this removed action in federal court. *See* Ala. Br. at 20 n.6. In support of its argument, the State cites an opinion of its Supreme Court addressing the scope of § 14 immunity available to state officials under the Alabama Constitution. *See id.* (citing *Ala. Dep't of Transp. v. Harbert Int'l, Inc.*, 990 So. 2d 831, 840 (Ala. 2008)). The *Harbert* opinion has no relevance whatsoever to the individual defendants in this case, whose immunity is a function of the sovereign immunity held by the Poarch Band of Creek Indians (the Tribe) and applies in any

forum. The Tribe's immunity cannot be abrogated or diminished by Alabama state laws or judicial decisions. It is hornbook law that "[o]nly Congress, and not a state legislature, can abrogate tribal immunity, because 'tribal immunity is a matter of federal law and is not subject to diminution by the States.'" *Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224, 1230 n.5 (11th Cir. 2012) (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998)). The Tribe's sovereign immunity has not been waived by the Tribe or abrogated by Congress, and it cannot be diminished by the State of Alabama. Accordingly, that immunity remains intact in Alabama's state courts regardless of any allegedly contrary state law.

In light of the foregoing, Alabama's citation to the Supreme Court's *Lapides* decision is entirely inapposite. *Lapides* addressed whether a defendant that has waived its immunity from suit in state court can assert immunity after removing a case to federal court. *See Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 617-618 (2002) ("Nor need we address the scope of waiver by removal in a situation where the State's underlying sovereign immunity from suit has not been waived or abrogated in state court."); *see also Contour Spa*, 692 F.3d at 1206-07 (construing *Lapides* and holding that tribal sovereign immunity cannot be abrogated by states and is not waived by a tribe's removal of a case to federal court). It has no application where, as here, a defendant has not waived sovereign immunity from suit and retains it in both the state and federal forums. The Defendants are entitled to dismissal of Alabama's state law claims due to sovereign immunity.

B. Section 1166 does not allow state law claims seeking to regulate tribal gaming.

Even if the Defendants had no sovereign immunity, Alabama still could not bring a claim against them under state law. The plain language of § 1166 refutes any such notion. It explicitly states that, to the extent that § 1166 renders state law applicable to tribal gaming, it does so only

"for purposes of Federal law." 18 U.S.C. § 1166(a).[2] Section 1166 merely refers to state law to define the substance of federal law governing gaming on Indian lands. It in no way provides an opening for the State (or anyone else) to bring a state law cause of action to enjoin or otherwise regulate such gaming activity.

And even if § 1166 were ambiguous regarding the availability of state law claims to regulate gaming on Indian lands, it is settled law that IGRA as a whole preempts and displaces state laws with respect to such gaming. *See, e.g.*, *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1247-48 & 1248 n.16 (11th Cir. 1999); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030, 1047 n.59 (11th Cir. 1995) (recognizing "the fact that Congress, by enacting IGRA, has expressly preempted the field in the governance of gaming activities on Indian lands" (internal quotation and punctuation omitted)); *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 543-544 (8th Cir. 1996); *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1181 (10th Cir. 1991) ("Congress has clearly occupied the regulatory field on Indian gaming."). Alabama cites no contrary authority in support of its argument that § 1166, or any other provision of IGRA, allows it to bring a state law claim to regulate gaming activity on Indian lands, and the Defendants are aware of none.

Furthermore, while § 1166 incorporates all state laws related to gaming "for purposes of Federal law," it does so only for purposes of federal *criminal* law. 18 U.S.C. § 1166(a). *See* discussion *infra*. Section 1166 is a provision of the federal criminal code, and it provides the United States "with exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section …." § 1166(d). Alabama would have this Court engage in semantic gymnastics to interpret a federal criminal statute that vests the

[2] Tellingly, the State omits the phrase "for purposes of Federal law" when quoting §1166(a) in support of its putative state law claim. *See* Ala. Br. at 15.

United States with "exclusive" enforcement authority as allowing the State to assert a state law civil nuisance action against a sovereign Indian nation based on conduct occurring on Indian lands. The State's argument that it can bring a state law claim, as such, pursuant to § 1166 is meritless.

C. The lands at issue are "Indian lands" within the scope of IGRA, and the State has not challenged the United States' decisions to accept those lands into trust.

The State's second argument – that IGRA does not preempt its state law claim because the gaming at issue is not being conducted on Indian lands – fails because it relies upon an erroneous premise. IGRA defines "Indian lands" as "any lands title to which is … held in trust by the United States for the benefit of any Indian tribe …." 25 U.S.C. § 2703(4)(B). As the Defendants and the United States have explained, and as definitively established by the property deeds that are a part of the record (Doc. No. 1, Ex. A), the lands on which the Tribe conducts its gaming activities are held in trust by the United States for the benefit of the Tribe.[3] *See* Def. Br. at 2; United States' *Amicus Curiae* Brief in Support of Tribal Defendants' Motion to Dismiss (U.S. Br.), Doc. No. 21, at 5. The State cannot credibly contend that the Defendants have failed to "conclusively establish that they are conducting gaming on Indian lands as that term is defined in IGRA." Ala. Br. at 34.

[3] This is a key point of distinction between the instant case and the pending litigation involving the Bay Mills Indian Community in Michigan. While the State of Alabama attempts to paint the United States as taking inconsistent positions here and in that case, *see, e.g.*, Ala. Resp. to U.S. at 12-13, all parties in the *Bay Mills* litigation agree that the United States does not hold the land at issue there in trust. *See, e.g.*, *Michigan v. Bay Mills Indian Cmty.*, Case No. 1:10-cv-01273-PLM, Dkt. 171 at 5 (W.D. Mich. Oct. 23, 2013). Even if the United States has taken the position that a state law cause of action may be available to regulate gaming on lands owned in fee by an Indian tribe, it is not inconsistent for it to now argue that such a cause of action is not available with respect to lands that indisputably are held in trust by the United States for the benefit of the Tribe, such as those at issue here, and therefore fall within the scope of IGRA. It is also important to bear in mind that the *Bay Mills* litigation does not address the scope of § 1166; indeed, the State of Michigan's amended complaint makes no references to that statute. *See id.*, Dkt. 67-1 (W.D. Mich. July 15, 2011).

Alabama tries to sidestep the fatal, indisputable fact that the Tribe's gaming lands are held in trust by the United States by questioning the propriety of the United States' decisions to accept those lands into trust. *See, e.g.*, Ala. Br. at 35-36. This argument is rife with problems. As an initial matter, the Amended Complaint does not directly challenge the trust status of the Tribe's lands. *See* Am. Com. ¶ 25; State of Alabama's Response to Brief of the United States as *Amicus Curiae* (Ala. Resp. to U.S.), Doc. No. 31, at 7. In the absence of such a challenge, and in the absence of the United States as a party, questions regarding the propriety of the United States' decisions to accept the lands at issue into trust are not properly before the Court. The Defendants need only establish that the United States does in fact hold the lands in question in trust, which they have done by proffering the property deeds. Furthermore, even if the Amended Complaint purported to challenge the trust status of the Tribe's lands, that claim could not be addressed in this case (or successfully brought in any case) for all of the reasons articulated by the United States in its *amicus* brief, which are hereby adopted and incorporated by the Defendants.[4] *See* U.S. Br. at 6-11. In short, the State has not mounted and could not successfully mount a challenge to the trust status of the Tribe's lands.

Perhaps recognizing its inability to successfully challenge the United States' land-into-trust decisions, Alabama denies that it is "seek[ing] to unwind the decisions of the Secretary of the Interior." Ala. Resp. to U.S. at 7. At the same time, however, the State argues that the Tribe's gaming lands are not "Indian lands" within the meaning of IGRA because "the Secretary had no authority under federal law to take the Poarch Band's landholdings into trust." Ala. Br. at 35.

[4] The State's contention that certain arguments by the United States are not properly before the Court because they were not raised by the Defendants, *see* Ala. Resp. to U.S. at 9, is misplaced. The Defendants anticipatorily raised these issues in their initial brief. *See, e.g.*, Def. Br. at 8 ("The Plaintiff has not challenged the validity of the United States' trust title … nor could it do so in the absence of the United States as a party."). In response to the State's attempts to clarify its position, the Defendants are addressing the issues again in this brief and incorporating the arguments raised by their *amicus*.

The State cannot have it both ways, simultaneously distancing itself from a challenge to the United States' trust title and asking the Court to disregard the legal effects of that title. Its argument is akin to claiming that a law should be disregarded on the grounds that it is unconstitutional, yet disavowing any challenge to the law's constitutionality. Such a position is untenable.

If the State of Alabama believes that the Tribe's lands should not be held in trust by the United States, then it can attempt to bring an action challenging the propriety of the federal land-into-trust decisions and the validity of the United States' trust title. But unless and until the State or another entity successfully does so, the simple fact remains that the United States holds title to the lands in question in trust for the benefit of the Tribe. Those lands accordingly are "Indian lands" within the meaning of IGRA, and any putative state law claim seeking to regulate tribal gaming activity on them is preempted. The State's second argument in support of its state law theory is meritless, and that claim must be dismissed with prejudice.

III. The State's Putative Federal Law Claim Also Must Be Dismissed.

In the absence of a tribal-state compact, Congress has expressly vested the United States, the National Indian Gaming Commission (NIGC), and gaming tribes with exclusive authority to regulate Indian gaming and enforce related federal laws. *See, e.g.*, 18 U.S.C. § 1166(d) & 25 U.S.C. § 2713. Unable to assert a state law cause of action to regulate the Tribe's gaming activity on Indian lands, however, Alabama seeks to circumvent the "detailed remedial scheme" prescribed by Congress and to usurp the primacy of the federal government by asserting the same claim as a federal cause of action under IGRA's penal provision, 18 U.S.C. § 1166. This claim also must be dismissed, both on sovereign immunity grounds and because the United States, rather than the State, has exclusive authority to enforce federal law under § 1166.

A. The Defendants enjoy sovereign immunity from the State's putative federal claim.

In attempting to assert a federal claim against the individual defendants, the State again relies on the *Ex parte Young* doctrine. Its reliance is again misplaced, albeit for different reasons. While the State's alleged violation of federal law at least comes within the potential ambit of *Ex parte Young*, that doctrine is not available to enforce compliance with IGRA. And even if an *Ex parte Young* action could lie under IGRA, the resulting harm to the Tribe's sovereignty here counsels strongly against allowing the State to proceed under the facts of this case.

It is important here to bear in mind exactly what the State hopes to achieve through this litigation. It seeks an injunction permanently barring the Tribe from conducting what the Tribe and the United States have concluded is lawful gaming activity on Indian lands that are not subject to the State's jurisdiction. Any such injunction or associated declaration would require elected tribal officials to cast votes and take other legislative actions, subjecting them to the contempt power of this Court if they failed to do so. In sum, the State of Alabama, by virtue of the *Ex parte Young* doctrine that it essentially reduces to a pleading requirement, seeks to require the leaders of a sovereign tribal nation – an "equal sovereign" in the words of Congress – to hold votes, to vote as the State (through this Court) directs them to vote, and to ensure that the Tribe's conduct on its sovereign tribal lands conforms to Alabama's present interpretation of Alabama's laws. The Supreme Court did not intend to diminish tribal sovereignty to this degree through the *Ex parte Young* doctrine, and Congress did not intend to give states such power under IGRA. The Court should not allow the State to artfully plead its way into authority that it was never intended to exercise.

1. Ex parte Young *does not apply to claims brought under IGRA.*

Unsurprisingly, in light of the foregoing considerations, the Supreme Court has held that the *Ex parte Young* theory is not available in IGRA enforcement actions between tribes and

states.[5] As the Court explained, "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) (declining to apply the *Ex parte Young* doctrine to allow a tribe to sue a state for violating IGRA). If the congressionally crafted remedial scheme in IGRA renders the doctrine unavailable for tribal enforcement actions against states, it must do the same for state enforcement actions against tribes. Accordingly, the State cannot rely on the *Ex parte Young* doctrine to circumvent tribal sovereign immunity even for its federal claim.

While this case involves a different provision of IGRA than the one at issue in *Seminole Tribe*, the Court's reasoning applies with equal force. Indeed, this case demonstrates a marked harmony between the holdings and reasoning of *Seminole Tribe* and *Pennhurst*. Congress has created a detailed remedial regimen for IGRA compliance and a dedicated federal agency to oversee its enforcement. *See, e.g.*, 25 U.S.C. §§ 2704 & 2713. In so doing, it has expressed an intent to limit the scope of IGRA enforcement actions while simultaneously taking steps to "promote the vindication of federal rights" and ensure that errant tribes remain subject to the "the supreme authority of the United States" in the form of the NIGC. *Pennhurst*, 465 U.S. at 105 (internal quotation omitted). Allowing the State of Alabama to bring an *Ex parte Young* action against tribal officials would circumvent the remedial scheme that the Supreme Court found critical in *Seminole Tribe*, and it is wholly unnecessary to protect the federal interests that the *Pennhurst* Court identified as central to the rationale underlying the *Ex parte Young* doctrine.

[5] It is undisputed that 18 U.S.C. § 1166, despite being codified in the criminal title of the U.S. Code rather than with the civil provisions of IGRA, is a part of IGRA. *See, e.g.*, Ala. Br. at 25.

Accordingly, the Court should reject the State's *Ex parte Young* argument and dismiss the Amended Complaint in its entirety due to the Defendants' sovereign immunity.

2. *If it is to remain more than a mere pleading requirement, the* Ex parte Young *doctrine must require a plaintiff to establish that the named defendant is violating federal law.*

Assuming, *arguendo*, that the *Ex parte Young* doctrine is available for the federal cause of action alleged in the Amended Complaint, and assuming that the State has accurately characterized the Tribe's gaming activity as unlawful class III gaming – all of which the Defendants deny[6] – the individual defendants should still enjoy sovereign immunity. The Supreme Court has explicitly rejected the notion that *Ex parte Young* represents "an empty formalism" that "permit[s] a federal court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997) (citing, *inter alia*, *Seminole Tribe*, 571 U.S. 44, and *Pennhurst*, 465 U.S. at 102-103, 114 n.25).

Despite the Supreme Court's admonition, Alabama and its *amicus*, the State of Michigan, view the *Ex parte Young* doctrine as a mere procedural formality that enables a plaintiff to circumvent sovereign immunity with ease by naming any tribal official as a defendant in any case. It is irrelevant, they contend, whether the named official has done anything wrong. *See* Ala. Br. at 16-20; Brief of *Amicus Curiae* State of Michigan in Support of State of Alabama's Brief in Opposition to Motion to Dismiss (Mich. Br.), Doc. No. 33, at 17-18. In effect, the states' view of

[6] The State falsely claims that the Defendants have "not contested the State's allegations that their gambling devices are unlawful slot machines that do not play the game of 'bingo.'" Ala. Br. at 24. In fact, the Defendants explicitly objected to the State's "erroneous allegation that PBCI is engaged in unlawful class III gaming." Def. Br. at 14, n.11; s*ee also id.* at 2, n.2. The Tribe's motion to dismiss, as it must, credits even the State's erroneous factual allegations and demonstrates that the State has failed to state a claim regardless.

the *Ex parte Young* doctrine reflects exactly the sort of "empty formalism" rejected by the Supreme Court.[7]

Here, the State cannot show that the individual defendants themselves have violated federal law, or even that they have direct, concrete links to entities that have done so.[8] *Cf. Women's Emergency Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003) (indicating that allegations of "general executive power" or "shared authority" over an entity that allegedly violated the law are "simply too attenuated" to support a claim under the *Ex parte Young* doctrine). It certainly does not identify discrete, unlawful acts by the individual officials named as defendants, as it should be required to do. *See* Def. Br. at 6; *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991). Allowing this action to proceed under the *Ex parte Young* doctrine effectively would mean that any action undertaken by the Tribe or any of its entities "could be challenged simply by naming [the tribal councilors] as the defendant[s]." *Bush*, 323 F.3d at 949. It would render the doctrine exactly the sort of procedural formality that the Supreme Court has indicated it should not be, and it would allow any plaintiff to subvert the Tribe's sovereign immunity through a mere pleading requirement. The State's action falls well outside of the intended scope of the *Ex parte Young* doctrine, and it should be dismissed.

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[7] This muddled area of the law has produced some decisions that lend a degree of support to the states' position as well as others that cast considerable doubt on it. *Compare, e.g., Luckey v. Harris*, 860 F.2d 1012, 1015 (11th Cir. 1988) ("Personal action by defendants individually is not a necessary condition" of an *Ex parte Young* action.) *with Bush*, 323 F.3d at 949 (distinguishing *Luckey*). To the extent that this Circuit's case law can be read as supporting Alabama's characterization of the *Ex parte Young* doctrine, the Defendants respectfully suggest that the law should be clarified to reaffirm the existence of meaningful limitations on the doctrine's applicability.

[8] Indeed, the Defendants and, perhaps more importantly, the United States and the NIGC, believe that the Tribe is engaged exclusively in lawful class II gaming activity and that no violations of federal law have occurred at all.

B. The State has no federal right of action under § 1166.

Even if it can circumvent the individual defendants' sovereign immunity, Alabama's federal claim fails because the state has no private right of action to enforce the federal laws at issue. The State and its *amicus* contend that because § 1166 incorporates state gambling laws "including but not limited to criminal sanctions" for purposes of federal law and grants the United States the exclusive authority to bring criminal prosecutions under those incorporated laws, it necessarily (albeit tacitly) grants the State a right of action to enforce its civil gaming laws to regulate gaming activity on the Tribe's lands. *See* Ala. Br. at 27-30; Ala. Resp. to U.S. at 3-5; Mich. Br. at 6-15. This argument is unavailing.

For the reasons explained in the Defendants' initial brief and the United States' *amicus curiae* brief, § 1166 does not grant the State's claimed right of action.[9] *See* Def. Br. at 9-17; U.S. Br. at 13-18. Rather, by incorporating state laws "for purposes of Federal law," § 1166 creates a body of substantive federal law that the United States, as the federal sovereign, can enforce on Indian lands because tribes have no immunity from any enforcement action taken by the United States. The idea that the United States has exclusive authority to enforce federal laws in the absence of express congressional intent to the contrary is hardly radical. *See, e.g.*, *Sycuan Band of Mission Indians v. Roache*, 788 F. Supp. 2d 1498, 1506 (S.D. Cal. 1992) ("The incorporation of state law, however, does not necessarily indicate that Congress intended to grant concurrent jurisdiction to states to enforce the new federal rights."); *accord Alexander v. Sandoval*, 532 U.S. 275 (2001) (recognizing that Congress often creates private rights without private remedies – *i.e.*,

[9] Of course, as set forth in IGRA and in the Defendants' brief, the State's exclusive means of acquiring regulatory authority over gaming on Indian lands is by negotiating a compact with the Tribe. By withholding state regulatory authority over Indian gaming absent the existence of a compact, Congress intended to encourage the compacting process, which it viewed as a fair way of balancing the competing interests and authorities of the equally sovereign states and tribal nations. *See, e.g.*, Def. Br. at 9-13; U.S. Br. at 16.

rights of action). In this context, the United States' exclusive enforcement authority preserves the congressionally intended balance of power between the equally sovereign states and Indian tribes while incorporating a body of substantive law upon which the United States, the superior sovereign, can draw to the extent necessary to ensure compliance with IGRA.

Contrary to the State's argument, the plain language of IGRA simply does not give rise to any right of action by a state, civil or otherwise. At best, the State's argument relies on inferences that are inconsistent with the text, overall structure, and legislative intent of IGRA, a sizeable body of federal case law, and the rule of statutory construction mandating that IGRA be construed in the light most favorable to Indian tribes.

1. *The plain language of § 1166 does not give rise to a private right of action for the State to enforce federal law.*

Contrary to Alabama's arguments, the plain language of § 1166 is silent on the question of civil enforcement, and it certainly does not expressly create a civil right of action for states to regulate gaming on Indian lands outside the context of an enforceable tribal-state compact. In fact, a close reading of the State's putative plain language argument shows that it is based on inferences that the statutory text does not support. *See* Ala. Br. at 28 ("Congress necessarily *implied* that the United States would not have 'exclusive jurisdiction' to bring other kinds of state-law actions incorporated into federal law by Section 1166." (emphasis added)); *id.* at 29 ("[I]t *stands to reason* that Congress envisioned state involvement in civil cases …." (emphasis added)). This alone is fatal to the State's claim, as the Eleventh Circuit has rejected the existence of implied rights of action under IGRA. *See Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1248 (11th Cir. 1999) ("[R]ecognizing an implied right of action under IGRA in which a state, on its own initiative, could sue to enjoin a tribe from conducting class III gaming without a

compact … would surely frustrate [congressional] intent – and upset the carefully-struck congressional balance of federal, state, and tribal interests and objections ….").

Leaving aside the fact that its putative express right of action in fact relies on implications drawn from the statutory text, Alabama errs in arguing that the implications of § 1166 are unambiguous. The State and its *amicus* maintain that Congress necessarily intended for § 1166 to give rise to private, civil rights of action because it incorporates "all state laws pertaining to licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto," then grants the United States "exclusive jurisdiction over criminal prosecutions of violations of State gambling laws" that the statute incorporates. 18 U.S.C. § 1166(a) & (d). *See* Ala. Br. at 24-27. This is an incorrect reading of the statute.

The text and legislative placement of § 1166, even when considered apart from the remaining provisions of IGRA, are more supportive of alternate readings. For instance, the statute's incorporation of state law "for purposes of Federal law," as discussed elsewhere, indicates that Congress intended for the federal government to assume any role that states otherwise might have played in enforcing those statutes for purposes of state law. Furthermore, it is apparent that Congress viewed § 1166 as a criminal statute. It chose to place § 1166 in the criminal title of the United States code rather than with the remaining provisions of IGRA, all of which are codified in Title 25 and include civil remedies for violations of the Act. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997); *Avila-Santoyo v. U.S. Attorney Gen.*, 713 F.3d 1357, 1360-61 (11th Cir. 2013); *McAteer v. Riley*, 2008 WL 898932 at *4 (M.D. Ala. March 31, 2008) (Watkins, J.) ("The manner of the statute's codification is also probative of the legislature's intent." (internal quotation and punctuation omitted)). As the Supreme Court has explained, a provision's placement in the civil code rather than the criminal code, while not

dispositive of the nature of the statute, is evidence of "the legislature's manifest intent" that can be overcome only by "the clearest proof" of a contrary intent.[10] *Hendricks*, 521 U.S. at 361 (internal quotations and citations omitted). In light of Congress's designation of § 1166 as a criminal statute, it makes perfect sense that Congress, in clarifying the United States' exclusive authority to enforce the statute, would refer to its exclusive authority over criminal prosecutions brought thereunder. Congress could have expressly provided that the states have a private, civil right of action under this federal criminal law. It did not. There is no reason to assume, as the states urge, that § 1166(d)'s reference to the United States' exclusive authority to institute criminal prosecutions necessarily gives rise to, or even implies, a cause of action for states to bring civil enforcement proceedings.

Indeed, Congress may not have intended for § 1166 to incorporate state civil laws at all. While § 1166(a) admittedly refers to "all State laws pertaining to the licensing, regulation, or prohibition of gambling," the same language is used in § 1166(b), which is clearly an exclusively criminal provision. *See* § 1166(b) (discussing individuals being "guilty" of "offense[s]" and subject to "punishment"). Nor is § 1166(a)'s incorporation of state laws "including but not limited to criminal sanctions" definitive. That language merely incorporates into federal law a state's prescribed criminal penalties in addition to its other substantive criminal laws, such as the definition of offenses.

The plain language of § 1166, contrary to the State's argument, simply does not evince an unambiguous congressional intent regarding the enforcement of civil laws. It certainly does not

[10] *Hendricks* and other, similar authorities flatly contradict Michigan's argument that Congress's placement of § 1166 in Title 18 of the U.S. Code is insignificant. *See* Mich. Br. at 9 n.3. Michigan is certainly correct that Congress "could just as easily" have codified § 1166 in Title 25, with the other, civil provisions of IGRA. *Id.* But whereas Michigan intends for its statement to show that the provision's placement is irrelevant, the cited authorities show that Congress's choice not to include § 1166 in a civil code title with the remaining provisions of IGRA when it easily could have done so is substantial evidence of congressional intent for § 1166 to have a different effect.

create an express civil right of action for states to enforce their civil laws to regulate gaming activity on Indian lands in the absence of a tribal-state compact. At the very least, the statute is ambiguous and must be interpreted favorably to the Tribe and against the existence of a cause of action on behalf of the State.

2. *The legislative intent expressed in the text and substance of IGRA as a whole and in its legislative history is relevant and refutes Alabama's argument*.

While they argue at length about the supposed plain meaning of § 1166, Alabama and its *amicus* fail to explain how their putative civil right of action is consistent with the congressional intent to prohibit state regulation of tribal gaming without a tribal-state compact. *See* Def. Br. at 9-17 and authority cited therein. Instead, they contend that the congressional intent expressed in the entirety of IGRA and its legislative history is irrelevant to the interpretation of § 1166. *See* Ala. Resp. to U.S. at 4-5; Mich. Br. at 11-15. This argument is unavailing and does not comport with the law of this Circuit.

It is well-settled in this Circuit that courts, when interpreting statutory provisions, must "'look to the provisions of the whole law, and to its policy.'" *Durr v. Shinseki*, 638 F.3d 1342, 1349 (11th Cir. 2011) (quoting *In re Colortex Indus., Inc.*, 19 F.3d 1371, 1375 (11th Cir. 1994)). *See also Durr*, 638 F.3d at 1349 ("[I]n construing a statute, we do not look at one word or term in isolation, but instead we look to the entire statutory context." (internal quotation omitted)). In fact, even if the language of a particular statutory provision is plain on its face – which is not the case here, at least with regard to what Alabama contends is an affirmative creation of a cause of action for states to regulate tribal gaming – the court need not adhere to a statute's plain meaning in the "rare cases" in which doing so "will produce a result demonstrably at odds with the intentions of its drafters." *In re Colortex*, 19 F.3d at 1375 (internal quotation omitted). In light of this precedent, contentions that IGRA's legislative history "need not be consulted" or is

"irrelevant," Mich. Br. at 11 and Ala. Resp. to U.S. at 5, respectively, and that other provisions of IGRA are "irrelevant to the interpretation of § 1166," Mich. Br. at 12, are misguided.

In order to balance tribal and state interests, Congress enacted both a detailed compacting process pursuant to which states can obtain regulatory authority over gaming on Indian lands and a civil enforcement scheme to address non-compacted gaming that allegedly violates IGRA – one that is overseen not by states, but by the NIGC. *See* 25 U.S.C. §§ 2710 & 2713. The Court should not allow the State to undermine Congress's considered determination that IGRA's compacting process provides the sole means by which a state may legitimately regulate any gaming on Indian lands. And, according to Congress, the compacting process, combined with the United States' unquestioned authority to police non-compliant gaming, strikes the appropriate balance "for setting various matters between *two equal sovereigns*." S. Rep. No. 100-446, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083 (quoted in *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1248 (11th Cir. 1999)).

Alabama's reading of § 1166 is inconsistent with IGRA as a whole and its legislative history.[11] *See* Def. Br. at 9-17; U.S. Br. at 13-18. Accordingly, the Court should reject that reading and dismiss Alabama's putative federal law claim due to lack of a valid cause of action.

3. *Alabama's case law-based arguments are unpersuasive*.

As shown in the Defendants' initial brief, the weight of persuasive federal authority shows that the United States enjoys the exclusive authority to enforce § 1166. *See* Def. Br. at 14-16. Neither the additional authority that Alabama cites nor its attempt to distinguish the case law cited by the Defendants changes this fact.

[11] Indeed, evidence of congressional opposition to the assertion of state jurisdiction on Indian lands outside the context of a tribal-state compact is so strong that this would be one of the "rare cases" in which § 1166 could be reinterpreted even if its plain language appeared to grant the State the federal right of action that it claims. Given the absence of such a clear directive in § 1166, however, the Court need not decide that question.

Alabama cites only a few new cases that address § 1166, but it argues that they definitively establish its claimed right to bring a civil action against the Defendants. *See* Ala. Br. at 25-28. One need read no further than the styles of most of those cases to see why they offer limited (if any) support to the State, as they involved actions *by the United States* against Indian tribes. *See United States v. Santee Sioux Tribe*, 135 F.3d 558 (8th Cir. 1998); *United States v. Seminole Tribe of Fla.*, 45 F. Supp. 2d 1330 (M.D. Fla. 1999); *United States v. Santa Ynez Band of Chumash Mission Indians of Santa Ynez Reservation*, 983 F. Supp. 1317 (C.D. Cal. 1997), *abrogation recognized by id.* at 1324-26. The Defendants have not argued that the United States is foreclosed from bringing an action against an Indian tribe under § 1166. Instead, they take the far less novel position that the State of Alabama may not sue to regulate gaming on the Tribe's Indian lands in the absence of a tribal-state compact.

Even a closer look at the authorities cited by Alabama provides no real help for the State. *Santee Sioux* and the district court opinion in *Seminole Tribe* hold that § 1166 incorporates state civil laws such that the United States can bring a federal action to enjoin unlawful tribal gaming activity without bringing criminal charges. *See Santee Sioux*, 135 F.3d at 565; *Seminole Tribe*, 45 F. Supp. at 1331. This holding, whether correct or not, does not establish the existence of an express right of action for the State (as opposed to the United States) to bring such a case. It merely reinforces that § 1166 substitutes the United States as the sovereign capable of bringing suit under state statutes that are incorporated for purposes of federal law. And in *Santa Ynez*, the court ultimately concluded that a state cannot bring a civil enforcement action under § 1166. *Santa Ynez*, 983 F. Supp. at 1325. In so doing, it explicitly indicated that the language quoted in Alabama's brief, which contemplated a civil right of action for states to enforce § 1166, was

inconsistent with binding law, and merely represented how the court would have preferred to decide the issue. *Id.*

Alabama's attempts to discredit or distinguish the authorities cited by the Defendants are equally lacking. The State principally takes aim at the Tenth Circuit's instructive opinion in *United Keetoowah Band of Cherokee Indians v. State of Oklahoma*, 927 F.2d 1170 (10th Cir. 1991), arguing that this Court should disregard that opinion because it did not allege unlawful class III gaming and involved the federal Assimilative Crimes Act (ACA) rather than § 1166. *See* Ala. Br. at 29. These supposed distinctions are easily dismissed. The key instruction from *United Keetoowah* is the Tenth Circuit's recognition that "the very structure of IGRA permits assertion of state civil or criminal jurisdiction over Indian gaming *only* when a tribal-state compact has been reached to regulate class III gaming." *United Keetoowah*, 927 F.2d at 1177; *see also id.* at 1178 (citing other case law indicating that Congress has "clearly … limited the states' enforcement role to class III gaming conducted under a compact"). It is true enough that *United Keetoowah* was an ACA case, but that does not undercut the Defendants' reliance on the opinion – to the contrary, the Tenth Circuit's holding was based on the fact that IGRA, including § 1166, preempted the ACA's incorporation of Oklahoma law and did not allow the state "to continue to use the ACA to bypass the limitations on state jurisdiction imposed by IGRA." *Id.* at 1181. While not binding on this Court, *United Keetoowah* is sound, persuasive authority that expressly rejects the premises underlying the State's case.

Alabama's attempt to distinguish the opinions in the *Wyandotte Nation* line of cases also falls flat. The State argues that those cases involved only state efforts to enforce criminal laws, and thus have no bearing on its alleged right to bring a civil suit. Ala. Br. at 29. This is incorrect, however, as the Wyandotte Nation sought and received a broad injunction preventing the state

"from exercising or asserting jurisdiction over any gaming or related activity" on the Nation's lands. *Wyandotte Nation v. Sebelius*, 337 F. Supp. 2d 1253, 1274 (D. Kan. 2004), *aff'd in relevant part by Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255-57 (10th Cir. 2006). The court's observation that "civil enforcement [of IGRA] lies only with the Tribes or with the National Indian Gaming Commission" further underscores the fact that the court did not believe that its case was limited to criminal jurisdiction. *Wyandotte Nation*, 337 F. Supp. at 1257. Alabama's effort to diminish the persuasive force of these cases is unconvincing.

The State likewise fails in its attempt to distinguish *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir. 1994), which Alabama characterizes as involving a "dispute about jurisdiction under [a] Settlement Act, not Section 1166." Ala. Br. at 29. The State neglects to mention that the issue in *Narragansett* required the resolution of potential conflicts between the relevant settlement act and IGRA. It likewise fails to note that the operative language relied upon by the Defendants is from the critical section of the opinion addressing the meaning and scope of IGRA, focusing specifically on § 1166. *See Narragansett*, 19 F.3d at 697 (indicating that § 1166 "is a penal provision … [that] has no implications for civil jurisdiction").

The State's passing efforts to distinguish other case law are similarly unavailing, and need not be addressed individually. The Defendants stand by their prior discussion of all of these cases, which shows a broad judicial understanding that IGRA in general and § 1166 in particular are not intended to and do not create a civil right of action for states or otherwise allow them to regulate gaming activity on Indian lands absent a tribal-state compact.

4. *Uniquely applicable canons of construction dictate that the Court resolve any ambiguity in §1166 in favor of the Defendants*.

For the reasons discussed herein and in prior briefing, the Court should hold that § 1166 is unambiguous and does not give rise to the federal, civil right of action upon which the State

relies. But if the Court determines that the statute is ambiguous, it must resolve that ambiguity in favor of the Defendants in accordance with universally recognized and uniquely applicable Indian canons of construction. First, because IGRA was enacted for the benefit of Indians, the canons mandate that any ambiguity in the statute be resolved in favor of the Defendants. *See* Def. Br. at 16-17 (citing relevant case law); *see also, e.g.*, *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 366-367 (8th Cir. 1990) (citing legislative history indicating that the Indian canon should apply in any IGRA-related litigation).

Second, "traditional notions of Indian sovereignty provide a crucial backdrop against which any assertion of State authority must be assessed." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) (internal citations and punctuation omitted). While Congress has the power to authorize civil actions against tribal officers, respect for tribal sovereignty mandates that a statute will not be interpreted to do so absent "clear indications of legislative intent." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). No such indications are present here. In fact, IGRA's statutory text as a whole, its legislative history, and the placement of § 1166 within the criminal code overwhelmingly indicate the opposite. Accordingly, even if § 1166 were ambiguous, the Defendants' motion must be granted because any ambiguity in the statute must be resolved in their favor and against the recognition of an implied right of action for the states.

5. *The Defendants have not conceded that the State has a valid right of action against them.*

Near the conclusion of its principal brief, Alabama briefly and erroneously argues that the Defendants somehow have conceded the existence of a valid cause of action for the State's federal claim by arguing that complete preemption provided one of several bases for this Court's removal jurisdiction. *See* Al. Br. at 32-33. The Defendants have made no such

concession.[12] On the contrary, by filing its Amended Complaint alleging a federal right of action, Alabama has conceded, correctly, that this case belongs in federal court. *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1047 (11th Cir. 1995); *see also New York v. Shinnecock Indian Nation*, 274 F. Supp. 2d 268 (E.D. N.Y. 2003) (upholding removal based on IGRA's complete preemption of state-law claim for declaratory and injunctive relief seeking to prevent the construction and operation of a casino on Indian lands); *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184 n.3 (9th Cir. 2002); *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996).

Putting that issue aside, the substance of the State's argument is that if its purported state law claim truly arises under federal law, as Defendants have argued by claiming complete preemption,[13] then the Defendants are attempting to "have their jurisdictional cake and eat it too" by also arguing that Alabama's federal cause of action fails to state a claim. That is simply not the case. There is nothing inconsistent with the ideas that complete preemption transforms a state law claim into a federal one for removal purposes and that a completely preempted state law cause of action also fails to state a claim upon which relief may be granted. *See, e.g.*, *Schafer v. Exelon Corp.*, 619 F. Supp. 2d 507 (N.D. Ill. 2007) (upholding removal based on complete preemption and dismissing plaintiffs' claims as "defensively preempted" based on FERC's exclusive jurisdiction under the Federal Power Act); *St. Mary's Hosp. v. Carefirst of Maryland, Inc.*, 192 F. Supp. 2d 384 (D. Md. 2002) (dismissing completely preempted state law breach of contract claims based on failure to exhaust administrative remedies). If the law were

[12] In fact, the Defendants "expressly reserve[d] the right to assert any and all available defenses," including sovereign immunity and failure to state a claim. *See* Notice of Removal of Civil Action, Doc. No. 1, ¶ 8.

[13] When applicable, complete preemption "transforms the state claim into one arising under federal law, thus creating the federal question jurisdiction requisite to removal to federal courts." *Geddes v. Am. Airlines, Inc.*, 321 F.3d 1349, 1353 (11th Cir. 2003).

as the State suggests, then the Eleventh Circuit would have allowed defendants to "have their jurisdictional cake and eat it too." *Palmer v. Local 8285 United Steel Workers of Am.*, 234 F. App'x 884, 886 (11th Cir. 2007) (affirming a district court's judgment upholding removal based on complete preemption and dismissing certain claims for failure to state a claim). The State's argument is unavailing.

The State's argument also fails if it is intended as a veiled allegation of judicial estoppel. Judicial estoppel applies only where a party (1) takes a position clearly inconsistent with a prior position, (2) successfully persuades the court to accept the prior position, and (3) would derive an unfair advantage from advancing the new, inconsistent position. *See, e.g., Jaffe v. Bank of Am., N.A.*, 395 Fed. Appx. 583, 587 (11th Cir. 2010). The State has made no effort to establish these factors, nor could it do so. As explained above, the Defendants have not taken any inconsistent positions. Nor have they successfully persuaded the Court to adopt any allegedly inconsistent prior position – the State effectively conceded the propriety of removal by filing its Amended Complaint.

The State's argument that the Defendants have conceded the existence of a claim, like its attempt to set forth a valid claim against the Defendants, fails completely. The Court should dismiss the Amended Complaint with prejudice.

CONCLUSION

Read in context and as a whole, IGRA expresses a manifest congressional intent to balance the competing interests of Indian tribes and states as equal sovereigns, subject to the authority and oversight of the United States. Both the Defendants' assertion of sovereign immunity from the State of Alabama's attempt to regulate gaming activity on the Tribe's Indian lands in the absence of a tribal-state compact, and their reading of 18 U.S.C. § 1166 are entirely consistent with this congressional intent. The State's position, on the other hand, disregards congressional intent, asks the Court to upset the balance that Congress carefully struck when enacting IGRA, and seeks to usurp the United States' exclusive authority to enforce federal law.

To be clear, Alabama's inability to state a claim against the Defendants to enjoin what it alleges is unlawful gaming activity does not mean that the Defendants' conduct, if in fact unlawful, could not be addressed. On the contrary, if the United States were to find the Tribe in violation of IGRA, the federal government has the unquestioned authority to take appropriate action, up to and including the closure of the Tribe's gaming facilities and the bringing of criminal prosecutions. Tellingly, instead of taking any such enforcement action, the United States has filed an *amicus* brief in support of the Defendants. The Court should reject the State's arguments and grant the Defendants' motion to dismiss.

Respectfully submitted this 22nd day of July, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and service will be perfected upon the following this the 22nd day of July, 2013:

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