No. 14-12004-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF ALABAMA,
Plaintiff/Appellant

v.

PCI GAMING AUTHORITY, ET AL.,
Defendants/Appellees

On Appeal from the United States District Court
for the Middle District of Alabama
Case No. 2:13-cv-00178-WKW-WC

APPELLEES' BRIEF

Adam H. Charnes
Kilpatrick Townsend & Stockton LLP
1001 West Fourth Street
Winston-Salem, N.C. 27101-2400
(336) 607-7382

David C. Smith
Kilpatrick Townsend & Stockton LLP
607 14th Street, NW, Suite 900
Washington, D.C. 20005-2018
(202) 508-5865

Mark H. Reeves
Kilpatrick Townsend & Stockton LLP
Enterprise Mill, Suite 230
1450 Greene Street
Augusta, GA 30901
(706) 823-4206

Robin G. Laurie
Kelly F. Pate
Balch & Bingham LLP
Post Office Box 78
Montgomery, AL 36101-0078
(334) 269-3859
(334) 269-3130

Attorneys for Appellee

APPELLEES' CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1 and Eleventh Circuit Rule 26.1, Appellees PCI Gaming Authority, Stephanie Bryan, Robert McGhee, David Gehman, Arthur Mothershed, Sandy Hollinger, Garvis Sells, Eddie Tullis, Keith Martin, Deno Rolin, Matthew Martin, Billy Smith, and Tim Manning certify that the following persons, firms, and entities have an interest in the outcome of this case:

Balch & Bingham LLP – Counsel for Appellees

Bettenhausen, Margaret A. – Counsel for Amicus Curiae the State of Michigan

Brasher, Andrew L. – Counsel for State of Alabama

Bryan, Stephanie –Appellee

Charnes, Adam H. – Counsel for Appellees

Flax, Meredith – Counsel for Amicus Curiae the United States of America

Fuller, Ben A. –Judge, Elmore County Circuit Court

Gehman, David –Appellee

Harper, Keith M. – former Counsel for Appellees

Hollinger, Sandy –Appellee

Kilpatrick Townsend & Stockton LLP – Counsel for Appellees

Kirkpatrick, Megan A. – Counsel for State of Alabama

Laurie, Robin G. – Counsel for Appellees

Manning, Tim –Appellee

Martin, Keith –Appellee

Martin, Matthew –Appellee

McGhee, Kevin – Appellee

McGhee, Robert –Appellee

Mothershed, Arthur –Appellee

Office of the Attorney General – Counsel for State of Alabama

Pate, Kelly F. – Counsel for Appellee

PCI Gaming Authority –Appellee

Poarch Band of Creek Indians

Reagan, Henry T., II – Counsel for State of Alabama

Reeves, Mark H. – Counsel for Appellee

Reinwasser, Louis B. – Counsel for Amicus Curiae the State of Michigan

Rolin, Deno – Appellee

Sells, Garvis –Appellee

Smith, Billy –Appellee

Smith, David C. – Counsel for Appellees

State of Alabama – Plaintiff/Appellant

State of Michigan – Amicus Curiae

United States of America – Amicus Curiae and Land Title Holder

Watkins, William Keith – Chief Judge, U.S. District Court, Middle District of Alabama

None of the Appellees are nongovernmental corporate entities.

The only change since the Appellees last filed a Certificate of Service is that Kevin McGhee has been added and Eddie Tullis has been deleted. Mr. Tullis was sued solely in his official capacity, and Mr. McGhee has assumed the office formerly held by Mr. Tullis.

Respectfully submitted,

s/ Mark Reeves
Mark H. Reeves

OF COUNSEL:

Adam H. Charnes
Kilpatrick Townsend & Stockton LLP
1001 West Fourth Street
Winston-Salem, N.C. 27101-2400
(336) 607-7382

David C. Smith
Kilpatrick Townsend & Stockton LLP
607 14th Street, NW, Suite 900
Washington, D.C. 20005-2018
(202) 508-5865

Mark H. Reeves
Kilpatrick Townsend & Stockton LLP
Enterprise Mill, Suite 230
1450 Greene Street

Augusta, GA 30901
mreeves@kilpatricktownsend.com

Robin G. Laurie
Kelly F. Pate
Balch & Bingham LLP
Post Office Box 78
Montgomery, AL 36101-0078
rlaurie@balch.com
kpate@balch.com

STATEMENT REGARDING ORAL ARGUMENT

This case presents straightforward issues of statutory interpretation and application of judicial precedent that can be resolved without oral argument. The district court correctly held that: (1) the Indian Gaming Regulatory Act (IGRA) preempts Alabama's putative state-law nuisance claim; (2) Alabama has no valid claim for challenging the Indian lands status of the parcels on which the Poarch Band of Creek Indians (the Tribe) conducts gaming; and (3) IGRA's penal provision, 18 U.S.C. § 1166, does not give rise to a private, federal right of action for Alabama to enforce its state civil gambling laws on Indian lands. All of the information necessary to affirm the district court's decision is set forth therein and below, rendering oral argument unnecessary.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Rules and Regulations

Other Authorities

STATEMENT OF JURISDICTION

The district court lacked subject matter jurisdiction because the Tribal Defendants are entitled to sovereign immunity. To the extent that the Tribal Defendants are not entitled to sovereign immunity, the district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over this appeal as stated in the Appellant's Statement of Jurisdiction

STATEMENT OF THE ISSUES

1. It is settled law that IGRA preempts state laws pertaining to gaming on Indian lands. Trying to avoid preemption, Alabama contends that the gaming activity that it seeks to enjoin does not take place on Indian lands because the Secretary of the Interior acted unlawfully in taking the land in question into trust for the Tribe. Can Alabama challenge the validity of final agency actions in collateral, non-APA litigation against non-federal defendants?

2. The Secretary took the parcels of land at issue into trust for the Tribe in 1984, 1992, and 1995, respectively, and has taken no further relevant action affecting the State. Does the APA's six-year statute of limitations prevent Alabama from challenging decades-old agency decisions that have not been initially applied to the State during the limitations period?

3. IGRA strictly limits state authority over tribal gaming activity outside the context of an agreed upon tribal-state compact. It also includes a penal provision, 18 U.S.C. § 1166, that incorporates state gambling laws for purposes of federal law, criminalizes the violation of the incorporated state laws, and grants the United States exclusive authority to bring criminal prosecutions for violations of the statute. Does § 1166 create a private, federal right of action for Alabama to enforce its civil gaming laws on federally held Indian lands without agreeing to a tribal-state compact?

4. Indian tribes and tribal enterprises and officials enjoy immunity from suit, both for on and off-reservation conduct and for commercial and non-commercial activity, unless that immunity is expressly abrogated by Congress or waived by the tribe. Does the Tribe's sovereign immunity, which has been neither abrogated nor waived in this case, bar Alabama's suit against a tribal enterprise and tribal officials seeking to apply state law to enjoin the Tribe's gaming?

STATEMENT OF THE CASE

The State of Alabama seeks declaratory and injunctive relief barring the Poarch Band of Creek Indians (the Tribe) from engaging in gaming that allegedly violates Alabama law. The Appellees (Tribal Defendants) are immune from this suit, Alabama's state law claim is preempted by federal law, and Alabama has no federal right of action to enforce its state gaming laws on Indian lands.

I. Proceedings and Disposition Below

Alabama initiated this case as a state court public nuisance action. *See* Doc. 1-6. After the Tribal Defendants timely removed the action to federal court, Doc. 1, Alabama filed an Amended Complaint alleging similar claims under state and federal law. *See* Doc. 10.

The Tribal Defendants moved to dismiss Alabama's amended complaint on the basis of sovereign immunity, federal law preemption of the putative state law claim, and failure to state a claim under federal law. Doc. 13. The district court granted the Tribal Defendants' motion, holding that: (1) all Tribal Defendants have sovereign immunity from the putative state law claim; (2) Defendant PCI Gaming has sovereign immunity from the putative federal claim; (3) the putative state law claim is preempted by the Indian Gaming Regulatory Act (IGRA), 25 U.S.C §§ 2701, *et seq.*; and (4) IGRA's penal provision, 18 U.S.C. § 1166, does not create a private, civil right of action for Alabama to enforce its gaming laws on the Tribe's

Indian lands. Doc. 43. Alabama's appeal of the district court's final judgment is now before this Court.

II. Statement of the Facts

The Tribe is a federally recognized Indian tribe. 79 Fed. Reg. 4748, 4751 (Jan. 29, 2014). Tribal Defendant PCI Gaming Authority is a tribal enterprise wholly owned by the Tribe that conducts gaming at three tribal facilities within the exterior geographic boundaries of Alabama. Doc. 10, ¶¶ 5, 9. The individual Tribal Defendants are members of the Tribe's Tribal Council and/or directors of PCI Gaming sued in their official capacities. *Id.* ¶¶ 6-7.

The Tribe's gaming facilities are located on lands that are held in trust by the United States for the benefit of the Tribe. *See* Doc. 1-1; Doc. 43, pp. 45-46. The three parcels in question were taken into trust by the United States in 1984, 1992, and 1995, respectively. *See id.*

Alabama alleges that the Secretary of the Interior exceeded his statutory authority by taking land into trust for the Tribe and that the Tribe's Indian lands are not "properly recognized." Doc. 10, ¶ 25. The State also alleges that the machines used in the Tribe's casinos are class III slot machines. *Id.* ¶¶ 3, 22, 34. It further alleges that the operation of such machines is unlawful and subject to injunction under state or federal law. *Id.* ¶¶ 26-30, 35-36. The Tribal Defendants contest all of these allegations.

STANDARD OF REVIEW

With respect to a Rule 12(b)(1) motion to dismiss, the district court's legal conclusions are reviewed *de novo* and its factual findings are reviewed for clear error. *Odyssey Marine Explorations, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1169 (11th Cir. 2011) (internal quotation omitted). A district court's dismissal of claims pursuant to Rule 12(b)(6) is subject to *de novo* review, with the well plead factual allegations of the complaint accepted as true and considered in the light most favorable to the plaintiff. *Starship Enters. of Atlanta v. Coweta County, Ga.*, 708 F.3d 1243, 1252 (11th Cir. 2013). Questions of statutory interpretation are reviewed *de novo*, with no presumption or inferences favoring either party. *See, e.g.*, *Moore v. Appliance Direct, Inc.*, 708 F.3d 1233, 1237 (11th Cir. 2013). Under no circumstances is the Court required to accept as true any labels or legal conclusions set forth in the complaint. *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1291 (11th Cir. 2010).

SUMMARY OF THE ARGUMENT

This case involves Alabama's attempt to enjoin gaming activity on the Tribe's Indian lands. Alabama alleges that it is entitled to such an injunction pursuant to its own state laws, either as such or as incorporated into federal law by IGRA's penal provision, 18 U.S.C. § 1166. Both of the State's arguments are unavailing.

It is well-settled that IGRA preempts state gambling laws on Indian lands. Because the Tribe's casinos are located on Indian lands, IGRA preempts Alabama's state law claim. Alabama attempts to avoid preemption by arguing that the Secretary of the Interior exceeded his statutory authority by accepting the lands in question into trust for the Tribe, thereby making them Indian lands subject to IGRA. The State's argument is improper in this case, both because it constitutes an impermissible collateral attack on agency actions and because the United States is a necessary party to any litigation challenging its trust title to lands held for the benefit of an Indian tribe. While Alabama argues that it should be allowed to amend its complaint to state a claim against the Secretary, such an amendment would be futile because the proposed claim is time barred by the six-year statute of limitations applicable to Administrative Procedure Act (APA) challenges to agency decisions.

Alternatively, Alabama argues that it has a right to bring a civil action to enforce its state gambling laws on Indian lands pursuant to 18 U.S.C. § 1166. Section 1166 is a penal provision that incorporates state gambling laws to form a body of federal criminal law and grants the federal government the exclusive authority to enforce that law. It makes no explicit reference to civil enforcement of incorporated state laws, and it certainly does not create an express, private right of action for such enforcement proceedings. This reading of the statute is consistent with its text, codification, and labeling, with the text, structure, manifest intent, and legislative history of IGRA, of which § 1166 is a part, and with the weight of judicial authority addressing the statute and the Act.

Even if the State alleged a feasible claim, it could not overcome the Tribal Defendants' sovereign immunity. For all of the foregoing reasons, the district court properly dismissed Alabama's claims for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted.

ARGUMENT

I. IGRA PREEMPTS ALABAMA'S STATE LAW NUISANCE CLAIM.

In the first count of its Amended Complaint, Alabama alleges that the Tribe's gaming should be enjoined as a public nuisance under state law. Doc 10, pp. 6-8. IGRA preempts state laws that purport to regulate a tribe's gaming activity on its Indian lands. Because the gaming at issue takes place on the Tribe's Indian lands and is subject to IGRA, the district court properly dismissed Alabama's state law claim.

A. IGRA Preempts State Gaming Law on Indian Lands.

This Court has recognized that IGRA is "a comprehensive statute governing the operation of gaming facilities on Indian lands" and that it is "intended to expressly preempt the field of Indian gaming regulation." *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla. (Tamiami I)*, 63 F.3d 1030, 1032-33 (11th Cir. 1995) (internal quotation omitted). *See also* 25 U.S.C. § 2702(3); *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1181 (10th Cir. 1991). Alabama effectively concedes that IGRA preempts its state law claim to the extent that the Tribe's gaming takes place on Indian lands. *See* Appellant's Br. at 24. Accordingly, so long as the Tribe's casinos are on Indian lands, Alabama's state law nuisance claim is preempted.

B. The Tribe's Casinos Are on Indian Lands.

Alabama contends that its state law claim is not preempted by IGRA because "on information and belief, [the Tribe's] casinos are not located on properly recognized 'Indian lands'." Doc. 10, ¶ 25. Both the State's belief and its attempt to litigate this issue in this proceeding are misguided.

1. The Tribe's Casinos Are Located on Indian Lands.

There is no legitimate dispute as to whether the lands at issue are Indian lands. IGRA defines "Indian lands" to include "all lands within the limits of any Indian reservation" as well as "any lands title to which … *is* held in trust by the United States for the benefit of any Indian tribe … and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4) (emphasis added).[1] The record includes deeds showing that the United States holds title to the relevant parcels of land in trust for the benefit of the Tribe, and the district court so found. Doc. 1-1; Doc. 43, p. 41. These deeds, the authenticity of which is undisputed, belie Alabama's claim that the Tribal Defendants "have not shown that the United States 'holds' in trust the land at issue …." Appellant's Br. at 25. *See also id.* ("[T]he Secretary of the Interior has purported to hold certain lands in trust on the Tribe's behalf in the years since 1984."); Doc. 43, p.35 n.7. The Tribal Defendants

[1] The State does not deny the Tribe's governmental power over the lands in question to the extent that they are held in trust for the Tribe's benefit; it only disputes the lands' trust status. *See, e.g.*, Doc. 1-4, p. 3; Doc 1-5.

have shown that the Secretary holds title to the lands at issue in trust for the benefit of the Tribe. The lands thus constitute Indian lands subject to IGRA and its broad preemption of state gaming laws.

Rather than disputing that the Secretary holds title to the lands in question, Alabama attempts to cast doubt on the validity of that title. To do this, it relies on *Carcieri v. Salazar*, 555 U.S. 379 (2009). In *Carcieri*, the State of Rhode Island filed suit under the APA challenging the Secretary's prospective notice of intent to accept a parcel of land into trust for the Narragansett Tribe. The Court held that the Indian Reorganization Act (IRA) authorized the Secretary to take land into trust only for tribes that were "under federal jurisdiction" in 1934.[2] *Id.* at 391. Because the United States conceded that the Narragansett was not such a tribe, the Court held that the Secretary could not proceed with taking the parcel into trust. *Id.* at 395-396. Alabama contends that *Carcieri*, coupled with the State's unsupported legal assertion that the Poarch Band was not "under federal jurisdiction" in 1934,

[2] The Court did not define the phrase "under federal jurisdiction," but Justice Breyer was careful to note that (1) being under federal jurisdiction is analytically distinct from formal federal recognition, (2) the IRA imposes no time limit on when a tribe must have obtained recognition, and (3) a tribe may well have been under federal jurisdiction prior to obtaining formal recognition. *Carcieri*, 555 U.S. at 397-399 (Breyer, J., concurring). The Department of the Interior has taken a similar stance. *See* Memorandum M-37029 at 25 (Dep't of the Interior, Office of the Solicitor General, March 12, 2014). *See also Stand up for Cal.! v. United States Dep't of the Int.*, 919 F. Supp. 2d 51, 69-70 (D.D.C. 2013). Accordingly, the fact that the Poarch Band was formally recognized in 1984 has no bearing on the Secretary's authority to take land into trust for the Tribe after its recognition.

operates to negate the Secretary's decades-old decisions to accept lands into trust for the Tribe.

Carcieri cannot bear the weight that the State places upon it for at least two reasons. First, it involved a timely, direct challenge to an agency decision rather than an untimely collateral challenge, an important distinction addressed in detail below. Second, it had no effect on lands already in trust. In fact, the Court expressly limited its decision to the 31 acre parcel that the Secretary intended to take into trust and declined to address the status of 1,800 acres already in trust for the Narragansett Tribe. *Id.* at 385 n.3. There is a tremendous difference between holding that the Secretary lacked the prospective authority to take an action on behalf of one tribe and holding that all of the Secretary's actions previously taken on behalf of any allegedly similarly situated tribes were *per se* invalid and without legal effect. *Carcieri* did only the former; it did not operate to invalidate decades of agency decisions that were not before the Court, nor did it give states free rein to disregard the existence and legal effect of established federal trust title to Indian lands. The district court properly rejected the State's *Carcieri*-based argument.

2. Alabama Cannot Challenge the Status of the Tribe's Lands in This Litigation.

The true thrust of Alabama's argument against IGRA's preemption of its state law claim is not really that the Secretary *does* not hold title to the relevant lands in trust for the Tribe, but rather that the Secretary *should* not hold such title

and violated a statute by accepting it. The Supreme Court has described a challenge to the Secretary's decision to accept land into trust for a tribe as "a garden-variety APA claim." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2208 (2012). The instant action is not an appropriate vehicle for litigating this "garden-variety APA claim" for many reasons.

a. Alabama failed to sue the United States, which is a required party.

The United States is a required party to any suit challenging its trust title to Indian lands. *See* Fed. Rule Civ. P. 19; *United States v. Hellard*, 322 U.S. 363, 367 (1944) (emphasizing the federal interest in Indian lands held in restricted status); *Minnesota v. United States*, 305 U.S. 382, 386-387 (1939) ("A proceeding against property in which the United States has an interest is a suit against the United States."); *Carlson v. Tulalip Tribes of Wash.*, 510 F.2d 1337, 1339 (9th Cir. 1975). But Alabama has not sued the United States, nor, for reasons discussed below, could it now do so. This alone serves as a necessary and sufficient basis to dismiss Alabama's state law claim.

b. Challenges to agency decisions to take land into trust for tribes can be brought only through direct APA suits against the appropriate, federal defendants.

Alabama's state law nuisance claim amounts to an improper collateral attack on the Secretary's decisions to take land into trust for the Tribe. The proper way to

challenge a final agency decision is through a direct attack under the APA or another relevant statute. *Patchak*, 132 S. Ct. at 2208; *S. Miami Holdings, LLC v. FDIC*, 533 Fed. Appx 898, 903 (11th Cir. 2013); *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147, 1153 (8th Cir. 2013) ("While the City may question the validity of the [agency's] position, such challenges are properly made under the [APA].").

Agency decisions that can be or could have been challenged through an APA suit are not subject to collateral attack. *S. Miami Holdings*, 533 Fed. Appx. at 903 n.2 ("[A] collateral challenge to a final agency action is impermissible."); *United States v. Backlund*, 677 F.3d 930, 943 (9th Cir. 2012) (affirming "the eminently reasonable principle that parties may not use a collateral proceeding to end-run the procedural requirements governing appeals of agency decisions"); *United States v. Lowry*, 512 F.3d 1194, 1202-03 (9th Cir. 2008); *United States v. Howard Elec. Co.*, 798 F.2d 392, 394 (10th Cir. 1986) ("A party may not collaterally attack the validity of a prior agency order in a subsequent proceeding."). Alabama could have directly challenged the Secretary's land-into-trust decisions, but it declined to do so. It cannot now collaterally attack those decisions through this suit.

Alabama argues that it can proceed with its state law claim because it seeks not to divest the United States of its title to lands or to "unwind the decisions of the

Secretary of the Interior," but only to enjoin the Tribal Defendants from operating what Alabama believes is a public nuisance under its law. Appellant's Br. at 27. This argument is unavailing. As explained *supra*, state law as such is inapplicable to the extent that the Tribe's casinos are located on Indian lands. Alabama's effort to enforce its laws therefore necessarily places the status of the Tribe's lands at issue; the validity of the State's claim is inextricable from that of the Secretary's decisions. *See, e.g., Otwell v. Ala. Power Co.*, 747 F.3d 1275, 1281-82 (11th Cir. 2014) (rejecting a party's attempt to mount an improper attack on an agency decision by asserting allegedly distinguishable claims that were "inescapably intertwined" with review of an agency order). Alabama cannot allege as a necessary element of its claim that the lands in question "are not … properly recognized 'Indian lands'" and that the Secretary was not authorized to take them into trust, Doc. 10, ¶ 25, and then deny that its claim implicates the lands' status.

The weakness of Alabama's assertion that it can litigate the status of the Tribe's lands in this non-APA action against the Tribal Defendants is mirrored by the weakness of the authority cited to support it. Alabama devotes four pages of its brief to discussing *Big Lagoon Rancheria v. California*, 741 F.3d 1032 (9th Cir. 2014), *en banc rehearing granted*, 2014 WL 2609714 (9th Cir. June 11, 2014), and cites no other authority on this issue. The analysis of *Big Lagoon* need proceed no further than the Ninth Circuit's order granting rehearing *en banc*, which explicitly

states that the panel decision "shall not be cited as precedent by or to any court of the Ninth Circuit." *Big Lagoon*, 2014 WL 2609714 at *1. There can be little precedential value in a decision that has been disavowed by its issuing court.

Even before its disavowal, *Big Lagoon* had little persuasive value for the reasons identified by the district court, Doc. 43, pp. 41-45, and in Judge Rawlinson's *Big Lagoon* dissent. 741 F.3d at 1045-47. The panel majority misread *Carcieri* as permitting an untimely collateral attack on agency land-into-trust decisions, and it nullified federal title to lands without the involvement of the federal government, both of which were error for reasons set forth above. Furthermore, the panel majority erred by purporting to resolve issues that it candidly acknowledged were not addressed in the record and that were "perhaps beyond [its] competence." *Big Lagoon*, 741 F.3d at 1044. The panel should have deferred to the Department of the Interior, the federal agency charged with addressing those complex issues, rather than attempting to resolve them itself in the absence of a developed record. It certainly should not have attempted to resolve the issues in the context of a collateral attack on an agency decision.

In light of the infirmities of the panel majority's decision, it is unsurprising that the Ninth Circuit granted rehearing in *Big Lagoon*. It is equally unsurprising that Alabama could muster no other authority to support its contention that it can

mount a collateral attack on the Secretary's land-into-trust decisions in this proceeding. The district court properly rejected this argument.

c. Amendment to add an APA claim against the Secretary would be futile because such a claim is time barred.

Alabama, likely aware that it cannot legitimately challenge an agency decision or the United States' trust title without suing the federal government, argues that it should be allowed to amend its complaint to add the Secretary as a defendant. Appellant's Br. at 32. This leads to the second problem with Alabama's attack on the Secretary's land-into-trust decisions: it is hopelessly time barred.

A challenge to the Secretary's decision to take land into trust for a tribe is an APA claim. *Patchak*, 132 S. Ct. at 2208. APA claims are subject to the six-year statute of limitations set forth in 28 U.S.C. § 2401(a). *U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1280 (11th Cir. 2007). The limitations period for an APA challenge begins to run at the time of the agency action giving rise to the claim. *See Hire Order Ltd. v. Marianos*, 698 F.3d 168, 170 (4th Cir. 2012). "Unlike an ordinary statute of limitations, 28 U.S.C. § 2401(a) is a jurisdictional condition attached the government's waiver of sovereign immunity, and as such must be strictly construed." *Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1334 (11th Cir. 2006) (internal quotation omitted).

The Secretary accepted the relevant parcels of land into trust in 1984, 1992, and 1995. Doc. 1-1; Doc. 43, p. 41. This action had an immediate, adverse effect

on Alabama sufficient to give rise to an APA claim, as it removed the lands in question from the State's jurisdiction. *Accord Carcieri*, 555 U.S. at 385. The record also establishes that the State immediately knew of and understood the effects of the Secretary's actions. *See* Doc. 1-5 (relaying the Alabama Attorney General's acknowledgement, in 1985, of the Tribe's jurisdiction over its trust lands and the concomitant lack of state and local governmental jurisdiction).

Alabama first brought this action on March 21, 2013, eighteen years after the last of the final agency actions at issue, Doc. 1-6, and it offers no legitimate justification for its delay. The district court properly held that Alabama's attack on the United States' trust title to the lands in question came well after the expiration of the APA's limitations period. Doc. 43, p. 39. Allowing the State to amend its complaint to add the Secretary as a defendant would be futile.

Despite filing suit decades after the Secretary's decisions, Alabama contends that an APA claim would not be time barred because "there are exceptions to the statute of limitations when an old agency action affects a party anew," and these exceptions are "especially" applicable where the agency acted in excess of its statutory authority, which Alabama contends renders agency action void *ab initio*. Appellant's Br. at 33. This is false.

The opinions that Alabama cites involve "as-applied" challenges that were brought within six years of an agency's first application of a decision to the

challenger. *See, e.g.*, *Wind River Mining Corp. v. United States*, 946 F.2d 710, 716 (9th Cir. 1991) ("We hold that a substantive challenge to an agency decision alleging lack of agency authority may be brought with six years *of the agency's application of that decision to the specific challenger*." (emphasis added)); *Legal Envtl. Assistance Fund v. EPA*, 118 F.3d 1467, 1472-73 (11th Cir. 1997) (allowing a challenger to contest EPA's interpretation of longstanding regulations in the context of a timely challenge to EPA's denial of the challenger's petition); *Oppenheim v. Campbell*, 571 F.2d 660, 663 (D.C. Cir. 1978) (allowing a challenge to the validity of a decades old agency circular in the context of a timely challenge to an agency decision relying on the circular to deny the challenger's request for retirement credit). Contrary to Alabama's argument, these cases do *not* create an exception to the APA's statute of limitations. "They merely stand for the proposition that an agency's application of a rule to a party creates a new, six-year cause of action to challenge the agency's constitutional or statutory authority." *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997).

The "as-applied" theory for bringing an APA action has no relevance here. A challenger cannot mount an "as-applied" challenge where the agency decision at issue has not been applied to the challenger. *Dunn-McCampbell*, 112 F.3d at 1288; *see also Fla. Keys Citizens Coal., Inc. v. West*, 996 F. Supp. 1254, 1256-57 (S.D.

Fla. 1998) (dismissing putative "as-applied" challenge because plaintiff failed to identify alleged application of agency action to plaintiff). The land-into-trust decisions at issue were applied to Alabama, if at all, when they went into effect and removed the Tribe's lands from the State's jurisdiction. As there has been no further final agency action by the Secretary, there is no basis for an "as-applied" APA challenge.

Alabama also contends that it can challenge the Secretary's decisions at any time regardless of their application because they allegedly were void *ab initio*. Appellant's Br. at 33. The mere allegation that an agency exceeded its authority or otherwise acted unlawfully in making the challenged decision does not remove or perpetually toll the APA's limitations period, however; the challenger still must identify an agency action involving the challenger within the limitations period. *See Ctr. for Biological Diversity*, 453 F.3d at 1333 (strictly applying § 2401(a)'s six-year limitations period despite the agency's admission that it had acted contrary to statute); *Dunn-McCampbell*, 112 F.2d at 1287; *Fla. Keys*, 996 F. Supp. at 1256; *United States v. Metro. Petroleum Co.*, 743 F. Supp. 820, 826 (S.D. Fla. 1990) ("This Court will not ignore an applicable statute of limitations merely because Defendants now choose to argue that the [agency] exceeded its statutory authority."). Alabama has identified no such agency action.

The rationale underlying the allowance of "as-applied" APA challenges also undermines Alabama's argument. "As-applied" challenges are intended to prevent an agency decision from evading review in situations where potential challengers did not know "the true state of affairs" until the agency applied its action to them. *Wind River*, 946 F.2d at 716. This is not such a case. As explained *supra*, Alabama was contemporaneously aware of the agency actions and their effect and could have brought a direct, timely APA action, yet failed to do so. The application of the APA's statute of limitations could not be more straightforward. *See, e.g.*, *Lowry*, 512 F.3d at 1202-03; *Strich v. United States*, 793 F. Supp. 2d 1238, 1244 n.8 (D. Colo. 2011).

Finally, Alabama's complaints that "[t]he district court's decision guts *Carcieri*" and makes it so that "the State can do nothing to litigate that land's status as 'Indian lands'" miss the mark. Appellant's Br. at 23. If Alabama believed that the Secretary's decisions were in excess of its statutory authority, its remedy was to file a timely APA challenge to the Secretary's decision, just as the plaintiffs in *Carcieri* and *Patchak* did. The district court's enforcement in this case of a jurisdictional statute of limitations that had not run in *Carcieri* hardly "guts" that decision. It does mean that Alabama can no longer litigate the status of the Tribe's trust lands, but establishing a time after which agency decisions can no longer be

challenged is the very purpose of the limitations period.[3] *See Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 424-425 (1988) (holding that parties who failed to timely challenge decisions made under a subsequently invalidated regulation "accept[ed] incorrect adjudication" and were "in no different position from any claimant who seeks to avoid the bar of res judicata on the ground that the decision was wrong"); *see also Backlund*, 677 F.3d at 943 ("Precluding the challenge did not violate due process because [the challenger] was not deprived of judicial review; she chose to forego it." (citing *Lowry*, 512 F.3d at 1202-03)); *Metro. Petroleum*, 743 F. Supp. at 825-826.

The lands at issue are Indian lands within the meaning of IGRA, and Alabama cannot challenge that fact here. IGRA preempts Alabama's state law nuisance claim to enjoin gaming on Indian lands. The Court should affirm the district court's dismissal of Count I of the State's complaint.

[3] While the jurisdictional nature of the APA's statute of limitations means that it must be strictly applied in all cases, *see Ctr. for Biological Diversity*, 453 F.3d at 1334, this is particularly important here, where the agency decision in question affects the title to real property. *See, e.g.*, *United States v. Title Ins. & Trust Co.*, 265 U.S. 472 (1924) (indicating that courts should be very reluctant to disturb decisions affecting title to realty). Alabama's argument would result in perpetually unsettled title to Indian lands across the country, as plaintiffs would be able to challenge land-into-trust decisions at any time provided that they alleged that such decisions were impermissible under *Carcieri*. The effects of such uncertainty would be disastrous for tribes and those who interact with or rely on tribal governments.

II. THE STATE HAS NO FEDERAL RIGHT OF ACTION TO ENFORCE ITS CIVIL LAWS ON THE TRIBE'S INDIAN LANDS.

The second, alternative count of Alabama's Amended Complaint assumes that the lands in question are Indian lands and purports to state a claim for public nuisance under federal law. To do this, the State relies on one of IGRA's penal provisions, 18 U.S.C. § 1166. Selectively emphasizing language in sub-sections (a) and (d) of the statute, the State incorrectly contends that § 1166 expressly grants it a federal right of action to enforce its gaming-related civil laws on Indian lands.

The text of § 1166, its labeling and codification, the overall structure of IGRA, the Act's legislative history, and applicable canons of statutory construction all demonstrate that the statute stops well short of creating the right of action that Alabama asserts. Section 1166 is a purely criminal provision enforceable exclusively by the United States. It gives rise to no civil right of action at all, and it certainly does not create an express federal right of action for Alabama to enforce its civil laws on Indian lands. Any contrary reading misconstrues the nature and intent of IGRA and upsets the Act's careful balancing of state and tribal interests and authority. The district court properly dismissed the State's putative federal claim.

A. Statutory Background

In 1987, the Supreme Court held that state gaming laws could not be applied and enforced on Indian reservations without the express authorization of Congress.

Cabazon Band of Mission Indians v. County of Riverside, 480 U.S. 202, 207, 221-222 (1987). Congress, seeing state gaming laws declared inapplicable in Indian Country and recognizing that "existing Federal law [did] not provide clear standards or regulations for the conduct of gaming on Indian lands," responded by enacting IGRA. 25 U.S.C. § 2701(3). IGRA was intended, *inter alia*, to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments" while simultaneously providing for "independent Federal regulatory authority for gaming on Indian lands [and] the establishment of Federal standards for gaming on Indian lands …." § 2702(1), (3).

The bulk of IGRA is devoted to the establishment of the National Indian Gaming Commission (NIGC), the creation of the Indian gaming civil-regulatory framework that the NIGC implements and oversees, and the division of federal, tribal, and state regulatory authority over gaming on Indian lands. *See* 25 U.S.C. §§ 2704, *et seq.* In addition to addressing the civil-regulatory aspects of tribal gaming, IGRA also includes three penal provisions. *See* IGRA, Pub. L. No. 100-497, § 23, 102 Stat. 2467, 2487-88 (1988) (codified at 18 U.S.C. §§ 1166-1168). It is pursuant to one of these penal provisions, 18 U.S.C. § 1166, that Alabama asserts a federal right of action to enforce its civil nuisance laws.

B. Section 1166 is Exclusively a Criminal Statute.

Alabama's attempt to bring a federal civil action under § 1166 fails out of the gate because § 1166 is a criminal statute that contemplates no civil enforcement. The statute's exclusively criminal nature is evident from (1) its text, labeling, and codification, (2) the structure of IGRA, and (3) applicable canons of statutory construction.

1. The text, labeling, and codification of § 1166 show that it is a criminal statute.

The text, labeling, and codification of § 1166 all demonstrate that the statute is exclusively criminal and not intended to create a body of federal civil law or a civil right of action. In its entirety, § 1166 provides as follows:

> **a)** Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.
>
> **(b)** Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

> **(c)** For the purpose of this section, the term "gambling" does not include—
> **(1)** class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or
> **(2)** class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.
>
> **(d)** The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

18 U.S.C. § 1166. The statute's only explicit reference to enforcement is its grant of "exclusive jurisdiction over criminal prosecutions" to the United States; it makes no reference to civil enforcement of the incorporated laws. § 1166(d) . As the district court concluded, this alone refutes the State's claim that § 1166 expressly grants it a federal right of action to enforce its civil gaming laws, and other considerations lead to the same result. Doc. 43 at 53-54.

In addition to its lack of any reference to civil violations or civil enforcement, the text of § 1166 provides other indicia of the statute's exclusively criminal nature. In particular, § 1166(b) provides that those who violate incorporated state gambling laws – *including* "the laws governing the licensing

[and] regulation" of gaming – are "guilty" of federal "offense[s]" and subject to "punishment." § 1166(b). In other words, anyone who violates a federally incorporated state gambling law, even one that may have been a civil-regulatory provision under state law, commits a federal crime and is subject to prosecution exclusively by the federal government.[4] *See United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1299 (9th Cir. 1998) ("IGRA makes it a federal crime to violate state gambling laws in Indian country …. Only the federal government, not the state, may enforce this provision." (citing § 1166)); *United Keetoowah Band*, 927 F.2d at 1177 ("IGRA's penal provision, 18 U.S.C. § 1166, incorporates state laws as the federal law governing all non-conforming gaming in Indian country. … Nowhere does the statute indicate that the State may … seek to impose criminal *or other* sanctions against an allegedly unlawful tribal bingo game." (emphasis

[4] The broad incorporation of state criminal, civil, and regulatory law into federal criminal law avoided the difficulties that had previously arisen when Congress attempted to incorporate state criminal law into federal law and federal courts made inconsistent decisions as to whether the incorporation applied to state statutes imposing civil or regulatory penalties. *Compare United States v. Carlson*, 900 F.2d 1346, 1347 (9th Cir. 1990) (holding that Hawaii's speeding law is civil and therefore not incorporated into federal law by the Assimilative Crimes Act) *and United States v. Rowe*, 599 F.2d 1319, 1320 (4th Cir. 1979) (holding that Virginia' state law provision allowing license suspension for refusal to take a breathalyzer test was civil and thus not assimilated into federal law) *with United States v. Manning*, 700 F. Supp. 1001 (W.D. Wis. 1988) (assimilating a statute providing only civil penalties). By incorporating *all* state law, including regulatory laws, into federal criminal law, Congress obviated the need to conduct such an analysis in order to determine whether a violation of state law could be federally prosecuted under § 1166.

added)); *Wyandotte Nation v. Sebelius*, 337 F. Supp. 2d 1253, 1257 (D. Kan 2004) (vacated in part on other grounds); *Sycuan Band of Mission Indians v. Roache*, 788 F. Supp. 1498, 1506 (S.D. Cal. 1992), *aff'd* at 54 F.3d 535 (9th Cir. 1994) ("[T]he content of federal law under the IGRA … is defined by state law. The incorporation of state law … does not necessarily indicate that Congress intended to grant concurrent jurisdiction to the states to enforce these new federal rights.").

With this understanding of § 1166 in place, it is easy to see how the parts of the statute work cohesively to facilitate the creation and enforcement of federal criminal law. Sub-section (a) establishes a body of federal law comprising all state gambling laws. Sub-section (b) criminalizes any violation of this newly established body of federal law, including laws that a state may classify as civil-regulatory. Sub-section (c) excludes certain gaming from criminalization. And sub-section (d) grants the United States the exclusive authority to enforce the newly created body of federal criminal law. The statute's omission of any reference to civil enforcement actions is not an invitation to infer such rights of action or an implicit recognition of them; rather, it is evidence that Congress simply did not contemplate one of IGRA's penal provisions giving rise to such rights of action.

The labeling and codification of § 1166 reinforce that the statute is purely criminal. When Congress labels a statutory provision as civil or criminal, the label constitutes "quite clear" evidence of congressional intent regarding the nature of

the statute. *United States v. Ward*, 448 U.S. 242, 249 (1980); *Sanders v. Allison Engine Co.*, 703 F.3d 930, 943 (6th Cir. 2012) ("By labeling actions … 'civil actions,' Congress has thus expressed a preference for 'one label or the other.'" (quoting *Ward*, 448 U.S. at 248-249)). A congressional label "takes on added significance" when one section of an act is labeled criminal and another is labeled civil. *Ward*, 448 U.S. at 249. That is the case with the bill that became IGRA. *See* IGRA, Pub. L. No. 100-497, 102 Stat. 2467, 2487 (1988). Congress labeled section 23 of the bill, which includes the provision codified as § 1166, "criminal penalties;" it labeled section 14, which describes the NIGC's civil enforcement powers, "civil penalties." IGRA, §§ 14 & 23, 102 Stat. at 2482, 2487. While not dispositive, this constitutes strong evidence that Congress intended § 1166 to be a criminal statute.

The provision's codification in Title 18 of the United States Code provides additional evidence. A statute's placement in the civil or criminal code is evidence of "the legislature's manifest intent" regarding the nature of the statute that can be overcome only by "the clearest proof" of a contrary intent. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997); *see also Avila-Santoyo v. U.S. Attorney Gen.*, 713 F.3d 1357, 1360-61 (11th Cir. 2013). Such reasoning should apply with particular force where, as here, a small handful of provisions in a generally civil act are broken out from the whole to be separately codified in the criminal code. In this case, there is

no evidence, textual or otherwise, that Congress intended § 1166 to create a federal, civil right of action for anyone to enforce state civil laws on Indian lands.

2. The structure of IGRA shows that § 1166 is a criminal statute.

The structure and policy of IGRA as a whole also indicate that § 1166 is a purely criminal statute. As this Court has recognized, when interpreting a statute, it is appropriate to consider "the provisions of the whole law, and … its policy" rather than any single word, sentence, or provision. *Durr v. Shinseki*, 638 F.3d 1342, 1349 (11th Cir. 2011); *see In re Colortex Indus., Inc.*, 19 F.3d 1371, 1375 (11th Cir. 1994). Indeed, on occasion, even the plain language of a statute may be overridden when, if read in isolation, it yields a result "completely at odds with the entire statutory context in which the language is found." *Durr*, 638 F.3d at 1349.[5]

The bulk of IGRA is devoted to the creation of a federal civil-regulatory scheme intended to establish uniform, federal standards to regulate gaming on Indian lands and to promote strong tribal government. *See* 25 U.S.C. § 2702. The Act sets forth a detailed classification system for Indian gaming, explicitly delineates the roles and authority of the federal government, tribes, and states, and creates the NIGC, a federal agency dedicated exclusively to the civil oversight and monitoring of Indian gaming. 25 U.S.C. §§ 2703, *et seq.* It then imbues the NIGC

[5] To be clear, this is not a case in which the plain language of the statute must be disregarded for the Tribal Defendants to prevail. The quoted language merely highlights the importance of harmonizing the interpretation of a statute with the act of which it is a part.

with investigative and subpoena powers as well as the authority to levy civil fines or even shutter Indian gaming operations that violate the Act. *See* 25 U.S.C. §§ 2706, 2713 & 2715.

The panoply of civil sanctions available to the NIGC rebuts Alabama's claim that Indian tribes will have no incentive to negotiate IGRA compacts with states if states are not allowed to enforce their civil laws on Indian lands. Appellant's Br. at 47. Quite the opposite is true. If, as Alabama contends, the Tribe were operating unlawful class III gaming on its Indian lands, the NIGC would have the unquestioned authority to shutter the Tribe's casinos, and the Tribe would have a very strong motivation to agree to a compact that would allow it to resume gaming. Adding the additional layer of state civil enforcement authority sought by Alabama on top of the civil enforcement authority that IGRA expressly grants to the NIGC would, if anything, disincentivize states to agree to compacts, as they would have the right to pass and enforce whatever laws they wanted on tribal lands without having a compact in place. *See Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1249 (11th Cir. 1999) ("We will not … undermine one of the few remaining incentives for a state to negotiate a compact with a tribe.").

IGRA's creation of the NIGC and detailed delineation of its civil-regulatory authority over Indian gaming, as well as its stated policies of providing uniform federal standards and promoting strong tribal governments, are difficult to square

with the notion that Congress simultaneously created a wide-ranging federal right of action for states or even private parties to enforce state civil gaming laws on Indian lands. *See id.* at 1247. A more logical reading of the Act is that Congress created one body of civil-regulatory law, which it codified in Title 25 and charged the NIGC with overseeing, and another, separate body of federal criminal law, which it codified in Title 18 and expressly and exclusively authorized the United States to enforce.

3. The Indian canons of statutory construction support reading § 1166 as a purely criminal statute.

Section 1166 plainly creates a body of federal criminal law and not a right of action to enforce state civil laws. But even if the statute were ambiguous, the Indian canons of statutory construction require that any ambiguity be resolved in favor of respect for tribal sovereignty and against the application of state civil authority on Indian lands.

First, because IGRA was enacted for the benefit of Indians, any statutory ambiguity must be resolved in favor of the Tribal Defendants. *See Freemanville Water Sys., Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205, 1208 (11th Cir. 2009) ("Where congressional intent is ambiguous as to Indian rights, those ambiguities must be resolved in the Indians' favor." (internal quotation omitted)); *United Keetoowah Band*, 927 F.2d at 1179 (recognizing the canon's applicability to IGRA, while noting that IGRA's statutory language and legislative history were

so clear as to "almost make it mere surplusage"); *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 366-367 (8th Cir. 1990). 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 cits. and punctuation omitted). While Congress could grant states a private right of action to enforce their civil laws on tribal lands, respect for tribal sovereignty mandates that a statute should 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. Any doubts as to whether § 1166 gives states a private right of action to enforce their civil laws on Indian lands should be resolved in favor of the Tribal Defendants and respect for tribal sovereignty and authority.

4. Alabama misconstrues § 1166 as a civil statute.

Despite the absence of any statutory reference to civil enforcement of incorporated laws, Alabama asserts that § 1166 unambiguously grants states the authority to enforce their civil gambling laws on Indian lands. To reach this conclusion, Alabama emphasizes § 1166(a)'s incorporation of "all State laws" and its statement that such laws shall apply on Indian lands as they do elsewhere in the state. *See* Appellant's Br. at 34-36. It contends that this language federalizes both the State's public nuisance laws and its state law right of action to enforce them.

This is incorrect. As explained above, § 1166(b) criminalizes all of the state laws incorporated by § 1166(a), and § 1166(d) grants the United States exclusive authority to criminally prosecute violations of the statute. Alabama makes no effort to account for the effect of § 1166(b) or to explain how it is not rendered superfluous under the State's reading of the statute. *See* Appellant's Br. at 35.

Alabama also fails to offer any explanation as to why Congress, if it intended for § 1166 to create a private, federal right of action for the enforcement of states' civil gaming laws, would label and codify the statute as a criminal provision. The State's textual argument that § 1166 expressly creates a private right of action for it to enforce its civil laws effectively begins and ends with the final clause of sub-section (a), and the State offers no contextual argument whatsoever.

Alabama's case law citations are also unpersuasive. It cites no authority for the proposition that a state has a civil right of action under § 1166. It musters only two decisions finding any civil right of action under § 1166 at all, and both of those cases involved suits brought by the United States rather than a state or private party. *See* Appellant's Br. at 36 (citing *United States v. Santee Sioux Tribe of Neb.*, 135 F.3d 558 (8th Cir. 1998) and *United States v. Seminole Tribe of Fla.*, 45 F. Supp. 2d 1330 (M.D. Fla. 1999)). These cases are in the minority in recognizing a right for even the United States to bring a civil action under § 1166, and this Court

has refrained from endorsing their conclusion on that issue. *See Seminole Tribe*, 181 F.3d at 1244 n.10 (expressing "no opinion of the correctness of the … district court's holding" in *Seminole Tribe*, 45 F. Supp. 2d 1330). They are overwhelmed by the weight of authority recognizing that § 1166 is a purely criminal statute that contemplates no civil enforcement. *See*, *e.g.*, *Spokane Tribe*, 139 F.3d at 1299 (9th Cir. 1998); *United Keetoowah Band*, 927 F.2d at 1177; *Wyandotte Nation*, 337 F. Supp. 2d at 1257; *Sycuan Band* 788 F. Supp. at 1506.

C. IGRA, Including § 1166, Bars States from Enforcing Their Laws on Indian Lands Without Tribal Consent.

Even if the Court were to conclude that § 1166 contemplates civil as well as criminal enforcement, it does not follow that it creates a right of action for Alabama to enforce the incorporated laws. At most, § 1166 allows the United States, in its role as the federal sovereign, to bring a civil action to enforce the laws that § 1166 incorporates "for purposes of Federal law." § 1166(a). *Accord* Cohen's Handbook of Federal Indian Law (2012 ed.), § 12.07[3] (noting that the United States has "exclusive authority to enforce IGRA in the federal courts").

The structure, manifest intent, and legislative history of IGRA all weigh strongly against reading § 1166 as creating a right of action for states to enforce their civil gaming laws on Indian lands without tribal consent. This Court has held, when rejecting an implied right of action for states to bring such suits, that "the legislative history and statutory scheme of IGRA … unequivocally demonstrate

that Congress did not intend to … creat[e] a private right of action that would allow states to obtain injunctive relief against uncompacted class III tribal gaming." *Seminole Tribe*, 181 F.3d at 1247. Implying such a right of action, the Court said, would "upset the carefully-struck congressional balance of federal, state, and tribal interests and objectives …." *Id.* at 1248. These conclusions ring just as true when applied to the express right of action that Alabama seeks to divine from § 1166 as they did when first applied to Florida's efforts to find an implied right of action to enforce IGRA against the Seminole Tribe.

1. IGRA does not allow states to exercise civil-regulatory authority over gaming and enforce state laws on Indian lands without agreeing to a tribal-state compact.

As explained *supra*, a statute such as § 1166 must be read and interpreted in the context of the broader act of which it was a part. The civil provisions of IGRA strictly limit state involvement in the regulation of gaming on Indian lands and provide no role for unilateral state enforcement of gaming laws in Indian country. Even if Congress did intend for § 1166 to authorize civil enforcement, it did not intend to grant such enforcement authority to the states.

From the outset, IGRA establishes that matters of gaming on Indian lands are left to tribes and the federal government pursuant to federal law, with states and state law playing a very limited role. The Act's stated purposes include "provid[ing] a statutory basis for the regulation of gaming *by an Indian tribe*" and

establishing an "independent *Federal* regulatory authority [the NIGC] for gaming on Indian lands … [and] *Federal* standards" for such gaming. 25 U.S.C. § 2702(2)-(3) (emphases added).

IGRA's substantive provisions likewise provide for nearly exclusive federal and tribal enforcement of gaming laws on Indian lands. If a tribe engages in unlawful gaming on Indian lands – as Alabama alleges here – IGRA provides for criminal prosecution under applicable federal laws, *see* 25 U.S.C. § 2710(d)(6) (referencing 14 U.S.C. § 1175) & 18 U.S.C. § 1166(d), and the NIGC can levy civil fines and shut down the facility in question. *See* 25 U.S.C. § 2713. However, the only enforcement role that IGRA identifies for states is to file suit "to enjoin a class III gaming activity located on Indian lands and conducted *in violation of any tribal-state compact … that is in effect*." § 2710(d)(7)(A)(ii) (emphasis added). Outside of this narrow context, IGRA identifies no private right of action against an Indian tribe to enjoin or otherwise interfere with gaming activity on Indian lands; "if a tribe opens a casino on Indian lands before negotiating a compact, the surrounding State cannot sue; only the Federal Government can enforce the law." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 n.6 (U.S. 2014) (citing § 1166(d)); *see also Seminole Tribe*, 181 F.3d at 1245-49; *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1059 (9th Cir. 1997) ("IGRA limits the state's regulatory authority to that expressly agreed upon in a compact. Outside the

express provisions of a compact, the enforcement of IGRA's prohibitions on class III gaming remains the exclusive province of the federal government." (citation omitted)).

IGRA's legislative history underscores that Congress had no intention of allowing states to enforce their laws on Indian lands without first agreeing to a compact. It also shows that Congress fully considered and "struck a careful balance among federal, state, and tribal interests." *Seminole Tribe*, 181 F.3d at 1247 (citing S. Rep. No. 100-446, at 5-6); *see generally Seminole Tribe*, 181 F.3d at 1247-48 (discussing IGRA's legislative history and its support for limiting state authority over tribal gaming). A "central feature of this balance is IGRA's thoroughgoing limit[ation] on the application of state laws and the extension of state jurisdiction to tribal lands" – a limitation that can only be circumvented through a negotiated tribal-state compact. *Id.* at 1247-48.

The Senate committee responsible for IGRA succinctly explained the Act's limitation of state authority: "unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands [through a tribal-state compact], the Congress will not unilaterally impose *or allow* State jurisdiction on Indian lands for the regulation of Indian gaming activities." S. Rep. No. 100-446, at 5-6 (emphasis added). *See also id.* at 6 ("In no instance, does [IGRA] contemplate the extension of State jurisdiction or the application of State laws for any other

purpose" than through a tribal-state compact.). This legislative history reinforces what is apparent from IGRA's statutory text – Congress did not intend to allow states to enforce their gambling laws on Indian lands outside the context of a compact. It necessarily follows that § 1166 did not create a federal right of action that would allow states to do just that.

Yet this is exactly what Alabama seeks to do – to enforce its state laws to enjoin gaming on Indian lands without agreeing to a compact. Alabama would have this Court subjugate the whole of IGRA, its careful balancing of governmental interests, and its detailed compacting process to a single penal statute from which the State attempts to coax a private right of action to enforce its own civil gaming laws. Alabama asks this Court to read § 1166 in a manner that the Court has correctly recognized would "would frustrate [congressional] intent [and] wreak havoc upon the existing remedial scheme of IGRA." *Seminole Tribe*, 181 F.3d at 1248-49. While *Seminole Tribe* did not rule on the question that Alabama now presents, it laid out many of the problems inherent in the State's reading of § 1166. Frankly put, it is inconceivable that Congress would intend for a penal provision that grants the United States "exclusive jurisdiction over criminal prosecutions of violations of State gambling laws" to undermine the carefully crafted civil-regulatory scheme embodied in the remainder of IGRA.

Numerous courts have reached this same conclusion, recognizing that IGRA gives rise to no private right of action for a state to enforce gaming laws on Indian lands in the absence of a tribal-state compact. *See, e.g.*, *Bay Mills*, 134 S. Ct. at 2024 n.6; *Cabazon Band*, 124 F.3d at 1059 (9th Cir. 1997); *United Keetoowah Band*, 927 F.2d at 1177. *See also Bay Mills*, 695 F.3d at 415 ("Section 1166(a) itself does not expressly authorize the State to sue anyone, much less an Indian tribe."); *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1256 (10th Cir. 2006) ("IGRA gives the federal government exclusive jurisdiction on Indian land."); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 690 (1st Cir. 1994) (citing *United Keetoowah Band*); *Wyandotte Nation*, 337 F. Supp. at 1257 ("The bottom line is, although it may be 'unlawful' for a tribe to engage in Class III gaming absent a compact, the state is powerless to regulate or prohibit such gaming."). The Tenth Circuit's discussion of the issue in *United Keetoowah Band* is representative. The Court recognized that § 1166 "incorporates state laws as the federal law governing all non-conforming gaming in Indian country." 927 F.2d at 1177. But it also recognized that IGRA, when viewed in its entirety, vests "the power to enforce these newly incorporated laws … solely with the United States. … Nowhere does the statute indicate that the State may, on its own or on behalf of the federal government, seek to impose criminal *or other sanctions* against an allegedly unlawful tribal bingo game." *Id.* (emphasis added). Echoing this Court's

reasoning in rejecting an implied right of action for states to enjoin allegedly unlawful gaming in Indian Country absent a compact, the Tenth Circuit went on to explain that "the very structure of the 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." *Id.* (emphasis in original).

IGRA, on the whole, provides a detailed, far-reaching regulatory and criminal framework for gaming on Indian lands. It clearly delineates and divides regulatory and enforcement authority, primarily between the United States and gaming tribes. It does not explicitly identify, or even contemplate, any enforcement role for states outside the confines of a negotiated tribal-state compact. Read in this context, it is impossible to construe § 1166 as creating civil enforcement authority, if at all, for any entity other than the federal government.[6]

2. Alabama's contrary arguments are unpersuasive.

Alabama, of course, claims that § 1166 allows states, and not just the federal government, to bring civil enforcement suits. The State's arguments are unavailing.

Alabama contends that Congress, by granting the United States "exclusive jurisdiction over criminal prosecutions of violations of State gambling laws" incorporated into federal law by § 1166, necessarily granted states a federal right

[6] To the extent that § 1166 is ambiguous regarding the creation of a right for states, as opposed to the United States, to bring civil enforcement actions, the Indian canons of construction described above apply in the same manner and with the same force.

of action to enforce their civil gaming laws. Appellant's Br. at 39-40, 45. This argument relies on a negative inference allegedly supported by the "*expressio unius* …" canon of statutory construction. *See Bay Mills*, 134 S. Ct. at 2033 n.5. But the State fails to explain how an express right of action can be identified through negative inference, and this Court has held that IGRA creates no implied right of action for a state to enjoin allegedly unlawful gaming on Indian lands. *Seminole Tribe*, 181 F.3d at 1246-50. *Seminole Tribe* thus forecloses the State's *expressio unius* argument.

Furthermore, for the reasons set forth above, the *expressio unius* canon carries little weight when § 1166 is properly understood as a criminal statute. *See supra*, Part II.B.1. When Congress enacts a criminal statute that it wants only the federal government to enforce, it makes perfect sense for Congress to state that the United States has exclusive authority to bring criminal prosecutions under that statute. It makes no sense, however, to assume that Congress's statement regarding the United States' exclusive authority to bring criminal prosecutions under a criminal statute is intended to imply a civil enforcement right of action for other parties. Finally, to the extent that the State relies on the *expressio unius* canon to clarify an alleged ambiguity in § 1166, the text and structure of IGRA, its legislative history, and the Indian canons of construction all militate strongly against resolving any such ambiguity in favor of Alabama's position.

Alabama next argues that the incorporation of State licensing laws necessarily implies congressional intent for the State, as well as the federal government, to have civil enforcement authority under § 1166. After all, Alabama says, surely Congress did not intend for the Department of Justice to issue state gaming licenses. Appellant's Br. at 40. This argument also relies on inference. Furthermore, while Congress likely did not contemplate DOJ issuance of state gaming licenses, it explicitly did contemplate DOJ action against those "guilty" of any "offense" involving "any act or omission … under the laws governing the licensing [or] regulation" of gaming that are incorporated by § 1166. § 1166(b). This single, express reference to enforcement underscores the fact that § 1166 is a criminal statute; it does not create an express right of action for states to enforce their civil gaming laws in Indian country.

From here, Alabama proceeds to a discussion of inapposite or unhelpful case law. It cites one case as "persuasively reason[ing] that *states* have exclusive authority to bring civil actions" under § 1166. Appellant's Br. at 41 (emphasis in original) (citing *United States v. Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation*, 983 F. Supp. 1317, 1319 (C.D. Cal. 1997)). It fails to note, however, that the court recognized that its supposedly persuasive analysis was inconsistent with and "foreclosed by" superior authority. *Santa Ynez*, 983 F.

Supp. at 1325 (holding that only the United States may "bring civil injunction actions to prevent non-conforming gaming").

The State next cites this Court's *Seminole Tribe* opinion and the Supreme Court's recent decision in *Bay Mills* as "recogniz[ing] the *possibility* of state lawsuits against tribal officers … pursuant to [§] 1166." Appellant's Br. at 41. As explained *supra*, while Alabama is correct that this Court did not definitively foreclose the possibility of state enforcement actions under § 1166 in *Seminole Tribe*, the Court did identify a host of reasons why it makes no sense to conclude that Congress intended to create such a right of action. *See Seminole Tribe*, 181 F.3d at 1245-49. And in *Bay Mills*, the Supreme Court flatly stated that "if a tribe opens a casino on Indian lands before negotiating a compact, the surrounding state cannot sue; only the Federal Government can enforce the law." *See Bay Mills*, 134 S. Ct. at 2033 n.5 & 2034 n.6. Neither of these cases supports Alabama's argument; *Bay Mills* may in fact be fatal to it.

Even if § 1166 is ambiguous, Alabama next contends, it should be interpreted as authorizing private civil enforcement suits to make it "consistent with other federal laws that grant the federal government exclusive jurisdiction to prosecute crimes, but not an exclusive right to civil enforcement." Appellant's Br. at 44. The State then proceeds to identify no less than nine such acts granting criminal enforcement authority to the United States while also allowing private

enforcement actions. *Id.* What Alabama fails to acknowledge is that *every single one* of those statutes *expressly* addresses private civil enforcement. *See* 18 U.S.C. § 1964(c) ("any person … may sue"); 18 U.S.C. § 2520(a) ("any person" may bring "a civil action"); 33 U.S.C. § 406 (expressly providing for "enforce[ment] by the injunction of any district court"); 15 U.S.C. § 15 ("any person … may sue"); 15 U.S.C. § 78t-1 (making violators "liable in an action … to any person"); 15 U.S.C. § 6309(d) ("Private right of action [:] Any boxer … may bring an action …."); 29 U.S.C. § 1854(a) ("Any person … may file suit in any district court …."); 42 U.S.C. § 1973gg-9(b)(2) ("[T]he aggrieved person may bring a civil action …."); 47 U.S.C. § 227(c)(5) ("Private right of action [-] A person … may … bring … an action."). Clearly, Congress knows how to expressly create a private, civil right of action when it wants to do so. It did not do so in § 1166.

Congress did, however, expressly address state civil enforcement elsewhere in IGRA, when it authorized states to sue tribes "to enjoin class III gaming activity located on Indian lands and conducted *in violation of any tribal-state compact … that is in effect*." 25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added). The explicit inclusion in one part of IGRA of a civil right of action for states to sue tribes under narrowly cabined circumstances not present here (*i.e.*, pursuant to a compact) provides yet another reason to doubt Alabama's claim that Congress intended to implicitly create a much broader civil right of action for states elsewhere in the

Act. *Accord Seminole Tribe*, 181 F. 3d at 1248 ("It is a well-established principle of statutory construction that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." (internal quotation omitted)).

Alabama's remaining arguments, including its attacks on the district court's analysis, are amply addressed by that court's well-reasoned opinion and elsewhere in this brief. The State makes one more assertion that requires a response, however, by claiming that allowing it to enforce its civil laws on tribal lands "does not diminish tribal sovereignty one iota" because the federal government could also enforce those laws under § 1166. Appellant's Br. at 48. Even accepting, *arguendo*, that § 1166 grants the federal government civil enforcement authority, Alabama's argument is a *non sequitur*. While the United States may have plenary authority over tribes, states certainly do not. *See Bay Mills*, 134 S. Ct. at 2030-31; *Cabazon Band*, 480 U.S. at 208 ("[A] grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values."). Presuming that it may exercise authority over the Tribe that is coextensive with the federal government's without diminishing the Tribe's sovereignty only serves to highlight how little Alabama understands and respects that sovereignty.

III. SOVEREIGN IMMUNITY BARS THE STATE'S CLAIMS.

This Court has repeatedly recognized "that 'as a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.'" *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200, 1203-04 (11th Cir. 2012) (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998)); *Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224, 1226 (11th Cir. 2012). The Tribe enjoys sovereign immunity absent a tribal waiver or congressional abrogation. *See Freemanville*, 563 F.3d 1206-08. Sovereign immunity bars actions seeking declaratory and injunctive relief as well as claims for monetary relief. *See Seminole Tribe*, 181 F.3d at 1244-45. It applies to suits brought by states just as much as those brought by individuals. *Bay Mills*, 134 S. Ct. at 2030.

A. PCI Gaming Is Immune from Suit.

Tribal sovereign immunity applies to tribal enterprises, such as PCI Gaming, that are owned by and act as an arm or instrumentality of the tribe. *See, e.g.*, *Miller v. Wright*, 705 F.3d 919, 923-924 (9th Cir. 2013); *Freemanville*, 563 F.3d at 1207 n.1. While it disagrees with this Court's precedent on the issue, Alabama concedes that PCI Gaming is entitled to immunity. Appellant's Br. at 56-57. The district court properly dismissed the State's claims against PCI Gaming. Doc. 43, pp. 21-22.

B. The Tribal Officials Have Immunity from Alabama's Claims.

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). Alabama attempts to circumvent the individual defendants' sovereign immunity by invoking the *Ex parte Young* doctrine, which allows some official capacity suits against tribal officials to enjoin ongoing violations of federal law. *Ex parte Young* does not, however, allow Alabama to circumvent the individual Tribal Defendants' sovereign immunity in this case.

1. Ex parte Young does not apply to state law claims.

The district court correctly rejected Alabama's reliance on the *Ex parte Young* doctrine in the context of the putative state law claim. 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)). 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, the district court correctly dismissed Alabama's state law claim on sovereign immunity grounds.

In an effort to salvage its state law claim against the tribal officials, Alabama relies on dicta from the Supreme Court's recent *Bay Mills* decision. In the context of discussing ways that a state might combat an illegal Indian casino located outside of Indian lands and within the state's jurisdiction, the Court mentioned the possibility of a state law action for injunctive relief against tribal officials.[7] *Bay Mills*, 134 S. Ct. at 2034-35. This was not, as Alabama claims, the Court's holding. And it is not at all clear that the Court meant to imply that a state could bring a state law claim against tribal officials in their official, as opposed to individual capacities. What is clear is that this dicta from *Bay Mills* does not overrule the

[7] It is significant that the Court's dicta regarding the possible availability of an action for injunctive relief against tribal officials came in the context of its discussion of remedies that a state might pursue "on its own lands … that it does not possess (absent consent) in Indian territory." *Bay Mills*, 134 S. Ct. at 2024. This supports the conclusion that Alabama has no valid claim for relief to the extent that the Tribe's gaming takes place on Indian lands.

holding of *Pennhurst – i.e.*, that the *Ex parte Young* doctrine does not apply to state law claims.

Alabama also argues that the individual defendants are not immune from 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. *See* Appellant's Br. at 55-56. In support of its argument, Alabama 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)). *Harbert* has no relevance whatsoever to the individual defendants in this case, whose immunity is derived from the Tribe's and is unaffected by state law.

"Only 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.

Alabama's reliance on *Lapides* is also misplaced. *See* Appellant's Br. at 55 (citing *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613 (2002)). *Lapides* simply held that a state cannot assert Eleventh Amendment immunity – which does not exist in state court – after removal. *Id.* at 617. This Court has since held that a tribe does not waive sovereign immunity by removing a case to federal court, and *Lapides* is not to the contrary. *Compare Contour Spa*, 692 F.3d at 1206-07 (holding that tribal sovereign immunity is not waived by a removal) *with Lapides*, 535 U.S. at 617-618 ("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."). The district court properly held that all Tribal Defendants are entitled to immunity from Alabama's state law claim.

2. Ex parte Young does not apply in IGRA actions.

In contrast with its ruling on the state law claim, the district court held that the individual Tribal Defendants are not entitled to sovereign immunity from Alabama's putative federal claim. The Tribal Defendants concede that the district court properly interpreted this Court's precedents in holding that the allegations of the Amended Complaint suffice, at least at this stage of the litigation, to bring the State's federal claim within the scope of the *Ex parte Young* doctrine.[8] But the

[8] The Tribal Defendants maintain that because the Tribe's gaming constitutes lawful, class II gaming, the State has failed to state a valid *Ex parte Young* claim

district court did not address the argument that the *Ex parte Young* doctrine does not apply in IGRA cases.

The Supreme Court has held that the *Ex parte Young* theory is not available in IGRA enforcement actions between tribes and states. 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*." *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, Alabama should not be allowed to 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 Supreme Court's reasoning applies with equal force. Indeed, recognizing the absence of an *Ex parte Young* remedy in this IGRA case harmonizes the holdings and reasoning of *Seminole Tribe* and *Pennhurst*. Congress has created a detailed remedial regimen for IGRA compliance and a dedicated

---

under federal or state law. But the State's erroneous allegation must be treated as correct at this stage in the case.

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 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.

It is important here to bear in mind exactly what Alabama hopes to achieve through this litigation. It seeks an injunction applying Alabama law to permanently bar 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 Alabama's jurisdiction. *See, e.g.*, Doc. 1-2; Doc. 1-4, pp. 5-11 (NIGC letters explaining that the Tribe's gaming takes place on Indian lands and that the lawfulness of the Tribe's gaming is a matter of federal, not state law). 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 a federal court if they failed to do so. In sum, Alabama 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 a federal 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, Congress did not intend to give states such power under IGRA, and Alabama's expansive reading of the *Ex parte Young* doctrine certainly should not displace IGRA's carefully balanced statutory framework. The Court should not allow Alabama to artfully plead its way into authority that it was never intended to exercise.

IV. CONCLUSION

The text, structure, and legislative history of IGRA unmistakably reflect Congress's considered judgment and careful balancing of the competing interests of "two equal sovereigns." S. Rep. No. 100-446, at 13 (1988). In this lawsuit, one of those equal sovereigns, the State of Alabama, asks the Court to disregard that congressional balancing by allowing it to unilaterally enforce its civil laws on the other sovereign's land. This is justified, Alabama claims, because a single penal statute that does not specifically address civil enforcement grants the State an express, federal right of action to enforce its civil gaming laws on Indian lands. Alabama's argument flies in the face of reason, and the district court properly rejected it.

Alabama alternatively argues that it should be allowed to enforce its state civil gambling laws on the Tribe's Indian lands because those lands should not be Indian lands in the first place. The State's belief is both incorrect and irrelevant. The Tribe's lands were properly accepted into trust by the Secretary, and more importantly, at least at this stage of the litigation, Alabama failed to timely challenge the Secretary's land-into-trust decision. Alabama's argument is now subject to a jurisdictional time bar, and the district court properly dismissed it.

For all of the foregoing reasons, the Court should affirm the district court's dismissal of both counts of the State's Amended Complaint.

Respectfully submitted this 10th day of September, 2014.

s/Adam H. Charnes
Adam H. Charnes
Kilpatrick Townsend & Stockton LLP
1001 West Fourth Street
Winston-Salem, N.C. 27101-2400
(336) 607-7382

David C. Smith
Kilpatrick Townsend & Stockton LLP
607 14th Street, NW, Suite 900
Washington, D.C. 20005-2018
(202) 508-5865

Mark H. Reeves
Kilpatrick Townsend & Stockton LLP
Enterprise Mill, Suite 230
1450 Greene Street
Augusta, GA 30901
(706) 823-4206

Robin G. Laurie
Kelly F. Pate
Balch & Bingham LLP
Post Office Box 78
Montgomery, AL 36101-0078
(334) 269-3859
(334) 269-3130

Attorneys for Appellees

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 13,186 words, excluding the parts of the brief exempted by 11th Circuit Rule 32-4. I used Microsoft Word 2010 to ascertain the word count.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 and 14-point Times New Roman font.

s/ Mark H. Reeves
Mark H. Reeves
Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Appellees' Brief with the Court using the CM/ECF system and that service upon the following counsel of record will take place via electronic mail on this 10th day of September, 2014.

Andrew L. Brasher, Solicitor General
Henry S. Reagan III, Deputy Attorney General
Megan A. Kirkpatrick, Ass't Solicitor General
Office of the Attorney General
501 Washington Avenue
Post Office Box 300152
Montgomery, AL 36130-0152

Bill Schuette, Attorney General
Aaron D. Lindstorm, Solicitor General
Margaret A. Bettenhausen, Assistant Attorney General
Environment, Natural Resources, and Agriculture Division
P.O. Box 30755
Lansing, MI 48909

Thomas C. Horne, Attorney General
Arizona Office of the Attorney General
1275 West Washington Street
Phoenix, AZ 85007-2926

Derek Schmidt, Attorney General of Kansas
Jeffrey A. Chanay, Deputy Attorney General
Memorial Building, 3rd Floor
120 SW Tenth Avenue
Topeka, KS 66612-1597

Marty J. Jackley, Attorney General
State of South Dakota
1303 E. Highway 14, Suite 1
Pierre, SD 57501-8501

Sean D. Reyes, Utah Attorney General
Utah State Capitol Suite #230
P.O. Box 142320
Salt Lake City, Utah 84114-2320

A. Eric Johnston
1200 Corporate Drive, Suite 107
Birmingham, AL 35242

s/ Mark H. Reeves