No. 14-2219 (consolidated with No. 14-2222)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF NEW MEXICO,
Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
Defendant-Appellant

PUEBLO OF POJOAQUE,
Defendant-Intervenor-Appellant.

On Appeal from the U.S. District Court for the District of New Mexico,
No. 1:14-cv-00695-JAP/SCY (Hon. James A. Parker)

REPLY BRIEF OF THE U.S. DEPARTMENT OF THE INTERIOR

ORAL ARGUMENT REQUESTED

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IGRA	Indian Gaming Regulatory Act
NIGC	National Indian Gaming Commission
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INTRODUCTION

The United States' opening brief demonstrated the error in the district court's decision to grant summary judgment in favor of New Mexico. The Secretary has not yet taken any action on the Pueblo of Pojoaque's gaming proposal under 25 C.F.R. Part 291, and even if she had, she would have sufficient authority to do so.

New Mexico defends the district court's jurisdiction by treating a future contingent event as certain to occur. New Mexico assumes that the Secretary will approve gaming procedures for the Pueblo at the end of the Part 291 process, even though she has not done so for any other tribe in the past. The doctrines of standing and ripeness bar this kind of speculative, anticipatory challenge to agency action.

New Mexico also claims certainty where none exists in arguing that Part 291 is invalid. It claims that the text of IGRA reveals Congress's clear intent to guarantee a State the protection of a federal court even when the State asserts its sovereign immunity from the court's jurisdiction. But IGRA's text leaves the Secretary authority to address that situation because Congress has not "directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984). In IGRA, Congress created a duty of good-faith bargaining to prevent States from gaining an unfair negotiating advantage, and it gave the courts jurisdiction to enforce that duty. Assuming this remedy would be effective, Congress failed to consider that States might assert their sovereign immunity, regaining the very advantage Congress

intended to eliminate. Part 291 is a valid exercise of the Secretary's authority to administer IGRA because it resolves this ambiguity in a way that preserves the sovereign dignity of both States and tribes, placing them on an equal footing for negotiating gaming procedures.

ARGUMENT

I. NEW MEXICO DOES NOT HAVE STANDING TO CHALLENGE PART 291 BECAUSE IT HAS NOT SUFFERED AN INJURY IN FACT.

To demonstrate its standing, New Mexico must allege an "actual or imminent" injury to "some concrete interest." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009); U.S. Br. at 15-16. None of the injuries that New Mexico alleges in its Response establishes a present case or controversy that the Court may decide.

A. The Secretary is not compelled to accept the Pueblo's proposal.

Part 291 allows the Secretary, after a series of procedural steps, to prescribe gaming procedures for a tribe even if a State does not agree. If the Secretary prescribed such procedures over a State's objection, they might cause the State some concrete injury. But New Mexico's challenge is based only on the Secretary's determination that the Pueblo is eligible to *present a proposal* for the Secretary's consideration. *See* 25 C.F.R. §§ 291.3, 291.6. New Mexico attempts to turn this preliminary finding into a present controversy by suggesting that the Pueblo's

eligibility for the Part 291 process must inexorably lead to injurious gaming procedures. *See* Resp. at 24-26.

This argument is ineffective for three reasons. First, as the State concedes, *see id.* at 25 n.4, if the State chooses not to participate in the Part 291 process, the Secretary has discretion to choose not to approve any gaming proposal. *See* 25 C.F.R. § 291.8(c). Second, even if the Secretary had a mandatory duty to choose *some* proposal, it is speculative that her decision would injure the State. For example, New Mexico might submit the same proposal that it has voluntarily accepted for other tribes, *see* Resp. at 10-11, and that it is bound by State law to accept here. If the mediator selected that proposal, *see* 25 C.F.R. § 291.10, and the Secretary approved it, *see id.* § 291.11(a), then New Mexico would suffer no injury. Third, events outside this process, such as the successful negotiation of a compact, could cause the Secretary not to act. An alleged injury must be "actual or imminent," to support standing, *Lujan*, 504 U.S. at 560; but at this preliminary stage of the Part 291 process, there is no "guarantee," *see* Resp. at 26, of any particular outcome.[1]

New Mexico therefore offers no convincing distinction between the present case and this Court's controlling decision in *Essence, Inc. v. City of Federal Heights*, 285

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[1] For these reasons, New Mexico's challenge is also unripe. *See infra* pp. 10-12.

F.3d 1272 (10th Cir. 2002). In *Essence*, this Court held that a licenseholder lacks standing to challenge a regulatory scheme that created a possibility that its license would be suspended or revoked. *Id.* at 1282. A plaintiff that is "*immediately in danger of sustaining some direct injury*" may have standing. *Id.* (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983)) (Tenth Circuit's emphasis). But the same plaintiff does not have standing to challenge a regulatory scheme on the grounds it would *allow* a future injurious action. *Id.*

B. New Mexico's claimed injury from the Secretary's eligibility determination is a procedural injury that is not yet concrete.

New Mexico also claims an interest in being "free from compelled mediation," which it describes as a "statutory procedural protection." Resp. at 21. Part 291 does not compel New Mexico to participate in mediation. *See* U.S. Br. at 18-21; *infra* pp. 8-9. Even if it did, New Mexico could not sue to protect a "procedural right *in vacuo*," but only where it has a "concrete interest that is affected" by agency action. *Summers*, 555 U.S. at 496-97; *see* U.S. Br. at 22. New Mexico therefore may only challenge the Part 291 process as procedurally defective if that process culminates in a decision that is adverse to the State's concrete interests.

To surmount this obstacle, New Mexico cites cases that have relaxed the requirements of standing to vindicate procedural rights. *See* Resp. at 22, 28 n.5. This rule, however, relaxes only the causation and redressability prongs of the standing

inquiry, allowing a plaintiff to allege that "compliance with the procedural requirements *could* have better protected its concrete interests" without having to show that "adherence to the procedures *would* necessarily change the agency's ultimate decision." *WildEarth Guardians v. EPA*, 759 F.3d 1196, 1205 (10th Cir. 2014) (quoting *Utah v. Babbitt*, 137 F.3d 1193, 1216 n.37 (10th Cir. 1998)). "[T]he requirement of injury in fact," in contrast, "is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers*, 555 U.S. at 497. Where New Mexico alleges the "right to be free from secretarial interference when conducting compact negotiations," Resp. at 21, it describes a procedural right, not a concrete interest. Even if that right were abridged, New Mexico would suffer no concrete injury unless that abridgment affected final gaming procedures.

Part 291 respects New Mexico's right to be "free from compelled federal-court adjudication" and "free from compelled mediation." Resp. at 23; *see* U.S. Br. at 18-21; *infra* pp. 27-28 (discussing the standard for unconstitutional "coercion"). IGRA also gives New Mexico the right to have a court determine whether it has bargained in good faith. The paradox in New Mexico's argument is that it wants both at the same time. It claims that it is immune from, and simultaneously entitled to, a court hearing. This shows that its real interest lies not in that particular procedural right, but rather in preserving its power over the terms of Indian gaming.

C. New Mexico cannot base standing on an injury to its bargaining position.

New Mexico contends that the Secretary's eligibility determination harms its bargaining power, giving tribes the hope that if they resist the State's demands, they might obtain "more favorable terms" from the Secretary. Resp. at 26. New Mexico does not allege that Part 291 would force it to change its own bargaining positions or agree to any terms that are contrary to its interests, but only that the eligibility determination changes the incentives in the bargaining process. *See id.* at 26-27.

New Mexico's Complaint alleged injury only to its negotiations with several tribes other than the Pueblo of Pojoaque, *see* Compl.¶ 42, but this argument can no longer support its claim of standing because those negotiations are finished. New Mexico has successfully negotiated compacts with each of those tribes. *See* Resp. at 12, 16 n.3. Those compacts are now considered to be approved to the extent they are consistent with IGRA. *See* 25 U.S.C. § 2710(d)(8)(C).

Even if New Mexico had alleged an injury to its bargaining power against the Pueblo, a change in the parties' respective bargaining incentives is not a concrete injury sufficient for standing. The case law does not support standing to challenge ongoing administrative proceedings based on the effect those proceedings might have on settlement (or other contract) negotiations. Instead, it requires a "likelihood of economic injury" based on the denial of a "statutory bargaining chip" enacted "for

the specific purpose of providing a benefit." *Clinton v. City of New York*, 524 U.S. 417, 432 (1998). New Mexico cannot meet these conditions. It has not alleged any "specific facts," *see Lujan*, 504 U.S. at 561, demonstrating how the Pueblo's eligibility for the Part 291 process creates a "likelihood of economic injury." *See* U.S. Br. at 17-18. And Congress did not specifically intend to provide it with the "statutory bargaining chip" of asserting sovereign immunity to defeat a tribe's judicial remedy under Section 2710(d)(7) for bad-faith bargaining. To the contrary, Congress attempted to establish that remedy specifically to place tribes on an equal footing with States in compact negotiations. *See* U.S. Br. at 4-5 (citing S. Rep. 100-446 at 14 (1988)). To the extent that Part 291 affects the bargaining incentives of the State and Pueblo, it does not "fundamentally change IGRA." Resp. at 26. The State's decision to assert sovereign immunity fundamentally changes the balance that Congress intended in IGRA, and Part 291 restores that balance.

New Mexico claims that this is a merits argument rather than a standing argument. *See* Resp. at 29. But New Mexico's claimed injury is that the eligibility determination harms "the State's statutory interests," *id.* at 20, by weakening a bargaining power that (in its view) IGRA guarantees. As *Clinton v. New York* shows, the standing analysis depends on whether IGRA does, in fact, guarantee a State's leverage over a tribe in compact negotiations.

D. Part 291 does not injure the State's sovereign status.

Finally, New Mexico incorrectly claims standing on the grounds of an injury to its sovereign status from being "subjected to an unlawful administrative process." Resp. at 29. This argument rests on a misunderstanding of the Part 291 process, which requires the participation only of the Secretary and a tribe. *See* 25 C.F.R. §§ 291.7-291.8. The Secretary cannot require a State to participate or enter an administrative or judicial judgment against it. The possible outcomes of the Part 291 process are that the Secretary either will, or will not, grant a federal benefit to someone other than the State. *See id.* §§ 291.8, 291.11. *See generally* U.S. Br. at 18-19.

For this reason, the cases that New Mexico cites are easily distinguishable. In *Federal Maritime Commision v. South Carolina State Ports Authority*, 535 U.S. 743, 760 (2002), the Supreme Court considered an administrative adjudication with "overwhelming" similarities to federal court litigation. It began with the filing of a complaint against a State agency, permitted discovery, ended in a judgment against the State that could be enforced in federal court, and provided monetary penalties for the State's noncompliance. *Id.* at 757-58, 763. None of these features is present in the Part 291 process, which does not require a State "to answer the complaints of private parties in federal courts" or "before the administrative tribunal of an agency." *Id.* at 760; *see also Tennessee v. U.S. Dep't of Transp.*, 326 F.3d 729, 735-36 (6th Cir. 2003) (holding that an administrative process to determine whether a State law is preempted

does not implicate sovereign immunity for similar reasons). The State is not required to appear, and there is nothing in Part 291 akin to a "default judgment." *See* Resp. at 32. Any gaming procedures that the Secretary may prescribe establish the rights and obligations of the tribe, not the State. This Court has recognized that sovereign immunity is a defense only to "a suit against a state," and has declined to extend it further. *Magnolia Marine Transp. Co. v. Oklahoma*, 366 F.3d 1153, 1157-58 (2004).

Over the dissent of a colleague who recognized "serious standing and ripeness issues," a majority of the Fifth Circuit panel in *Texas v. United States* held that Part 291 injures a State's dignitary interests by imposing a "forced choice" on the State even prior to a final decision. 497 F.3d at 497; *see id.* at 513 (Dennis, J., dissenting); *see also* U.S. Br. at 20-21 (addressing this point). The Fifth Circuit's holding rested on the erroneous factual premise that a State must either submit to mediation or "forfeit its sole opportunity to comment" upon the tribe's proposal. *Texas*, 497 F.3d at 497; Resp. at 32. Part 291 does not establish such a dilemma, as it provides a 60-day comment period in which a State may comment on and express its disagreement with the tribe's proposal, *see* 25 C.F.R. § 291.7(b), without submitting to mediation under 25 C.F.R. §§ 291.9-291.10.

IGRA and Part 291 thus provide a State with a variety of options to protect its concrete interests and sovereign immunity. It may defend its bargaining behavior in court as Congress intended; it may present its proposal to a court-appointed mediator

or to the Secretary, who will appoint a mediator; it may comment on a tribe's proposal without risking mediation; or it may choose not to engage in this process at all. But it cannot assert its sovereign immunity from a tribe's suit and then claim an injury to its sovereign dignity solely by *discussions* between the tribe and the Secretary about what should happen next.

II. NEW MEXICO'S CLAIM IS NOT RIPE BECAUSE THE SECRETARY HAS NOT PRESCRIBED GAMING PROCEDURES AND MAY NEVER DO SO.

A case is not ripe for review if it "involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1097 (10th Cir. 2006). This case presents a quintessential ripeness problem, as New Mexico challenges the Secretary's authority to issue gaming procedures that she has not yet decided to issue. The courts should decline to hear claims from New Mexico until after the Secretary has made a final decision. *See* U.S. Br. at 24-29.

New Mexico argues that it is irrelevant that the Secretary may never issue gaming procedures, suggesting that in "several" cases, the existence of the Part 291 alternative caused States to compromise on compact terms when they would have preferred to dictate those terms from their position of sovereign immunity. *See* Resp. at 37; Order at 19 (App. 57). A tribe's application for Secretarial procedures has been mooted by a subsequent compact in two out of seven cases, but the record here

contains no evidence that Part 291 induced those compacts or affected their terms. *See* Decl. of Paula Hart (App. 33-34). Furthermore, in the *only* case in which the Secretary reached a final decision under Part 291, she chose not to issue gaming procedures. *See id.* New Mexico's claims impermissibly call upon the courts to rule upon a potential future event that "may not occur at all." *Initiative & Referendum Inst.*, 450 F.3d at 1097.

New Mexico also contends that the case is ripe, in part, because the Secretary has already made a "final" decision with respect to the Pueblo's *eligibility* to make a gaming proposal to the Secretary under Part 291. *See* Resp. at 34-35; *see* 25 C.F.R. § 291.6. That contention misconceives the role that "finality," a separate doctrine of APA review, plays in this Court's ripeness analysis. A "final" agency action is one "by which rights or obligations have been determined, or from which legal consequences will flow," *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal citations and quotation marks omitted), a test that is relevant to whether an action has a "direct and immediate impact upon the plaintiff." *Ash Creek Mining Co. v. Lujan*, 934 F.2d 240, 243 (10th Cir. 1991) (citing *Abbot Labs. v. Gardner*, 387 U.S. 136, 149-54 (1967)). Here, the eligibility determination is a "final agency action" because it affects the Pueblo's right to seek gaming procedures from the Secretary. But that does not demonstrate that *New Mexico's* claims are ripe, because the only agency action contemplated by Part

291 that may have a direct and immediate impact on New Mexico would be the gaming procedures that the Secretary may choose to prescribe.

There is also no "forced choice" making this case ripe. For this argument, New Mexico relies solely on the Fifth Circuit's decision in *Texas*, but the United States' opening brief demonstrated why that decision's ripeness analysis was flawed. *See* U.S. Br. at 26-27. The Fifth Circuit relied on *Abbott Labs.*, in which the plaintiffs had to incur substantial immediate costs to change their behavior or "risk serious criminal and civil penalties." 387 U.S. at 153. Here, the threatened penalty that the State identifies is the possibility that the Pueblo will obtain permission to conduct gaming activities on terms approved by the Secretary rather than the State. That potential future outcome of the Part 291 process does not show that Part 291 presently causes New Mexico to "suffer any immediate or substantial effect," or bear any "appreciable obligations upon [its] daily business." *Mobil Expl. & Prod. Co. v. Dep't of Interior*, 180 F.3d 1192, 1203 (10th Cir. 1999). The Court must therefore withhold review until the Part 291 process ends with a final decision.

III. PART 291 IS A VALID EXERCISE OF THE SECRETARY'S AUTHORITY TO FILL AN UNFORESEEN GAP IN IGRA.

If the Court reaches the merits of New Mexico's claims, it should reverse the judgment of the district court. When it enacted IGRA, Congress did not anticipate that a State might assert the sovereign immunity that the Supreme Court recognized

in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). It therefore did not consider the precise question whether the Secretary may exercise her authority to prescribe gaming procedures under Section 2710(d)(7)(B)(vii) in this situation. In each of the Circuits to have considered the problem of *Seminole Tribe*, a panel majority has recognized that Congress did not contemplate the possibility of a sovereign-immunity defense and that the Secretary could address that situation through regulation.[2] This Court should do the same.

A. There is ambiguity in IGRA because Congress did not speak to the "precise question at issue" here.

New Mexico begins its *Chevron* argument by claiming that IGRA is unambiguous because it does not allow the procedures established in Part 291. *See* Resp. at 38-42. In New Mexico's view, "no relevant ambiguity exists" because of the "clear differences" between IGRA and Part 291. *Id.* at 42. This backwards analysis conflates two questions that are treated separately in the United States' opening brief and in *Chevron* itself. When considering an agency's interpretation of a statute, the first inquiry is whether the Court can identify and give effect to the "unambiguously expressed intent of Congress" on the "precise question at issue." *Chevron*, 467 U.S. at

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[2] *See Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994); *United States v. Spokane Tribe*, 139 F.3d 1297, 1301-02 (9th Cir. 1998); *Texas*, 497 F.3d at 511 (King, J., concurring); *id.* at 515 (Dennis, J., dissenting).

842-43. This is a "threshold determination" that precedes an examination of the agency's interpretation of any ambiguity that may exist. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007).

New Mexico faults the United States for failing to find an ambiguity "in the statute as Congress wrote it," claiming that Part 291 is not "an interpretation of a textual ambiguity." Resp. at 55; *see id.* at 48. This is incorrect. The ambiguity lies in Section 2710(d)(7)(B)(vii), which authorizes the Secretary to prescribe gaming procedures for a tribe. Section 2710(d)(7)(B)(vii) establishes *when* the Secretary may exercise that authority: if "the State does not consent . . . to a proposed compact submitted by a mediator." That condition is met here, because the State has not consented to any proposed compact. Section 2710(d)(7)(B)(vii) also places a constraint on *how* the Secretary may exercise her authority: by prescribing procedures "which are consistent with the proposed compact selected by the mediator." But that constraint is meaningless when a State asserts its sovereign immunity, because in such cases, the IGRA process is cut short before a mediator is appointed. IGRA's bare text therefore permits two different conclusions. The State's conclusion, based on IGRA's procedural details, is that Congress intended the Secretary to be powerless in the absence of a mediator. *See also Texas*, 497 F.3d at 502 (Jones, J.). The Secretary's conclusion, supported by IGRA's system of rights and remedies, is that Congress

simply failed to specify how the Secretary must exercise her authority in the absence of a mediator. *See* U.S. Br. at 31-32; *Texas*, 497 F.3d at 525 (Dennis, J., dissenting).

While IGRA's text is an appropriate starting point, the Court therefore must broaden its inquiry into whether Congress had an intent about this "precise question." The "traditional tools of statutory construction" that the Court employs in *Chevron* cases include both "the statutory language and legislative history." *Anderson v. U.S. Dep't of Labor*, 422 F.3d 1155, 1180-81 (10th Cir. 2005); *see also Elwell v. Oklahoma*, 693 F.3d 1303, 1313 (10th Cir. 2012) (the "traditional tools of statutory construction" include "a close examination of the text together with a careful review of the larger statutory structure").[3] New Mexico's brief barely acknowledges IGRA's context, structure, or legislative history, but those factors uniformly lead to the conclusion that Congress did not intend to leave a tribe without a remedy against a State that asserts its sovereign immunity from suit. *See* U.S. Br. at 33-40.

New Mexico also argues that ambiguity cannot be revealed by an event "that occurs after a statute is enacted and that causes the statute to operate differently than it did at the time of enactment." Resp. at 49. It relies on *Utility Air Regulatory Group v.*

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[3] *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), does not limit the use of these tools. *See* Resp. at 50. *Oncale* did not involve any agency statutory interpretation and therefore did not present a *Chevron* question.

EPA, in which the Supreme Court held that EPA could not "rewrit[e] unambiguous statutory terms" to avoid problems in applying those terms to the unforeseen factual situation of greenhouse gases. 134 S. Ct. 2427, 2445 (2014). Part 291 addresses a different kind of interpretive problem. *Seminole Tribe* did not cause IGRA to operate differently than it did at the time of enactment; it established that there are cases in which IGRA could *never* have operated as Congress intended, because its remedial provisions were based on a mistaken assumption about Congress's constitutional authority. *See Seminole Tribe*, 517 U.S. at 72. It effectively took a provision out of the statute, leaving an interpretive gap that the Secretary filled through regulation.

The Court also should not presume that Congress anticipated this problem, *see* Resp. at 51, in the face of evidence to the contrary. The primary Senate report explaining IGRA's system of rights and remedies makes no mention of State sovereign immunity, assumes that States will be subject to district-court jurisdiction, and obviously sought to limit States' power to veto Indian gaming. *See* S. Rep. 100-446 at 13-15. As the Ninth Circuit noted, "one of the key players in the enactment process" stated that Congress "would not have passed IGRA in the form it did" if had considered the possibility that IGRA's remedy "would later be rendered virtually meaningless" by State assertions of sovereign immunity. *Spokane Tribe*, 139 F.3d at 1300 & n.4.

In a similar situation, several courts of appeals have concluded that ambiguity may arise through judicial action and have upheld agency authority to interpret those ambiguities. *See Pittston Co. v. United States*, 368 F.3d 385 (4th Cir. 2004); *see also* U.S. Br. at 40-42 (discussing the *Pittston* line of cases). To escape these cases, New Mexico relies on *Texas*, claiming that "the Fifth Circuit correctly concluded" that an ambiguity is only relevant for *Chevron* purposes if Congress identified it at the time of enactment. Resp. at 49 (citing *Texas*, 497 F.3d at 503). That is an incorrect statement both of the law and of the Fifth Circuit's holding. Judge Jones wrote only for herself, while Judge King and Judge Dennis each accepted *Pittston* as relevant precedent and found that *Seminole Tribe* rendered IGRA ambiguous. *See Texas*, 497 F.3d at 511 (King, J., concurring); *id.* at 515-17 (Dennis, J., dissenting).

Finally, New Mexico argues that because Congress attempted (in vain) to establish a particular process for the exercise of the Secretary's authority to prescribe gaming procedures, it unambiguously precluded the Secretary from exercising that authority pursuant to any other process. *See* Resp. at 54-55, 58-60. New Mexico relies on the rule that, if there is "no evidence . . . that Congress intended to create a private right" to enforce a statute, an agency cannot provide one. *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001); *see also Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990). But here, the lack of any effective remedy for a tribe is not due to Congress's deliberate omission; Congress unambiguously *did* intend to give tribes a right to obtain

procedures from the Secretary. *See* 25 U.S.C. § 2710(d)(7)(B)(vii). The decision in *Seminole Tribe* affected one element of the process that Congress established to effectuate that alternative remedy – the grant of district-court jurisdiction in Section 2710(d)(7) – but the remedy itself remains within Congress's power. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Part 291 defines how the Secretary will exercise her authority in light of the procedural ambiguity that *Seminole Tribe* created. This is a permissible attempt to "extrapolate from [IGRA's] general design details that were inadvertently omitted." *United States v. Jackson*, 390 U.S. 570, 580 (1968) (cited at Resp. 59). It respects the "balance of competing interests" that Congress struck in IGRA, Resp. at 55, whereas the coercive bargaining power that New Mexico enjoys in light of *Seminole Tribe* utterly subverts it.

In a related argument, New Mexico relies on the Supreme Court's rejection, in *Seminole Tribe*, of an *Ex parte Young* action against State officials to enforce IGRA's good-faith bargaining duty. *See Seminole Tribe*, 517 U.S. at 74-76 (discussed in Resp. at 58-59). The Supreme Court precluded such an action because it would "expose [State officials] to the full remedial powers of a federal court," whereas Congress provided the "quite modest" relief that the Secretary should "prescribe regulations governing class III gaming on the tribal lands at issue." *Seminole Tribe*, 517 U.S. at 75. Part 291 simply provides an avenue to that "significantly more limited" relief, *id.* at 76, and it is therefore not affected by the Court's holding in *Seminole Tribe*.

B. The Secretary has authority to address the ambiguity in IGRA.

New Mexico next contends that, even if there is an ambiguity in IGRA, the Secretary does not have authority to address it because Congress delegated *all* regulatory authority under IGRA to the National Indian Gaming Commission ("NIGC"). New Mexico concedes that the Secretary's "general authorities" once gave her authority to administer IGRA, *see* U.S. Br. at 46-47, but argues that any such authority ended when the NIGC was organized. *See* Resp. at 42-47. That argument is incorrect.

In IGRA, Congress limited the Secretary's ability to regulate certain aspects of gaming by specifically assigning those aspects to the care of NIGC. *See*, *e.g.,* 25 U.S.C. 2709, 2711(h). Relevant here, Congress transferred to NIGC that part of the Secretary's regulatory authority "relating to supervision of Indian gaming," *id.* § 2709, including authority over monitoring, inspections, audits, and background investigations, *see id.* § 2706(b). IGRA's separate provisions for the *approval* of gaming procedures involve the tribe, the State, and the Secretary, but do not give any role to NIGC. *See id.* § 2710(d).

In 2001, this Court held that "neither the Secretary nor the Department of the Interior in general is charged with administering IGRA." *See Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1265 (10th Cir. 2001); Resp. Br. at 45-46. But that holding is no longer good law. Although Congress let the decision itself stand in

2003, *see* Pub. L. No. 108-108, § 131, 117 Stat. 1241 (2003), it stated in 2001 that it IGRA had intentionally delegated authority to the Secretary, including the authority to interpret the provision at issue in *Sac and Fox*. *See* Pub. L. No. 107-63, § 134, 115 Stat. 414 (2001).[4] The D.C. Circuit, recognizing "the Secretary's substantial role in administering IGRA," held that this statute "overrul[ed] the legal premise" of *Sac and Fox*. *Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 465 (D.C. Cir. 2007). Because Congress has affirmed its intention to delegate authority to the Secretary under IGRA, and did not explicitly reserve interpretation of Section 2710 for the NIGC, the D.C. Circuit's reasoning in *Kempthorne* applies equally here.

Pursuant to her delegated authority under IGRA and her general authorities, the Secretary has promulgated several other regulations to implement various provisions of IGRA, including Section 2710. *See* 25 C.F.R. parts 290, 292, 293. These are not merely "rules of agency organization," *see* Resp. at 47 (citing 5 U.S.C. § 553(b)(3)(A)), but are substantive interpretations of IGRA and have been upheld by the courts on that basis. *See Redding Rancheria v. Salazar*, 881 F. Supp. 2d 1104, 1113-14 (N.D. Cal. 2012) (upholding the Secretary's authority to promulgate 25 C.F.R. Part 292), *aff'd on this issue,* 776 F.3d 706 (9th Cir. 2015).

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[4] This also undermines the State's contention that "statutory silence" indicates a lack of intent to delegate. Resp. at 56; *see also* U.S. Br. at 45 & n.12.

C. Part 291 constitutes a reasonable interpretation of how the Secretary may exercise the authority that IGRA grants.

1. Part 291 is consistent with IGRA.

Because the Secretary has authority to interpret and implement the ambiguous provisions of IGRA, this Court must uphold Part 291 as long as it is a reasonable interpretation. Part 291 is reasonable because it borrows elements of the existing Section 2710(d) process for prescribing gaming procedures when States consent to suit, and effectuates Congress's intent by making such procedures available through a similar process in the unanticipated event that a State claims immunity from suit. *See* U.S. Br. at 49-54.

New Mexico argues, correctly, that Congress did not intend to give tribes the right to conduct gaming in all circumstances. *See* Resp. at 56-58. Congress stated in IGRA that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands *if* the gaming activity is . . . conducted within a State which does not, as a matter of criminal law and policy, prohibit such gaming activity." 25 U.S.C. § 2701(5). The situation here is different. New Mexico allows gaming as a matter of public policy, but it wants all tribes to accede to the same terms. *See* Resp. at 12-13. IGRA offers no suggestion that Congress wanted to limit a tribe's gaming rights if it sought

to negotiate different terms than another tribe.[5] Instead, Congress envisioned that "original tribal sovereignty" would apply to gaming activities "unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands," through the mechanism of a tribal-State compact. S. Rep. 100-446 at 5-6; *see also id.* at 13-14. Part 291 is therefore consistent with Congress's intent to "provide a statutory basis for the operation of gaming by Indian tribes." 25 U.S.C. § 2702(1).

The State makes several unpersuasive attempts to find a conflict between IGRA and Part 291. It relies most heavily on the contention that Part 291 does not explicitly guarantee the same procedural safeguards that IGRA provides, particularly the State's right to "take a good-faith negotiating position that results in a bargaining impasse." Resp. at 38, *see also id.* at 68.

This contention does not demonstrate any conflict between IGRA and Part 291 that renders the Secretary's interpretation unreasonable, because Part 291 allows the State multiple opportunities to defend its bargaining behavior. As Congress originally enacted IGRA, it established a presumption of bad faith and placed the

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[5] New Mexico claims that it is "[b]ound by Section 11-13A-4(J)" of State law, which provides that "any concession the Governor makes for one tribe is available to all tribes." Resp. at 10, 12 (citing N.M. Stat. Ann. § 11-13A-1 *et seq.*). But the State obviously has the power to negotiate different compacts with different tribes. Any particular concession that the Governor makes is only available to other tribes if they opt into an entirely "identical" compact. N.M. Stat. Ann. § 11-13A-4(J).

burden on the State to overcome that presumption with evidence. *See* 25 U.S.C. § 2710(d)(7)(B). A State may overcome that presumption in court if it chooses. Or, after a tribe invokes Part 291, the State may present evidence to the Secretary or to a mediator that it has negotiated in good faith. *Id.* § 291.7(b), (c). New Mexico might use these opportunities to persuade the Secretary that approving a tribe's proposal, despite the State's good-faith negotiation, would not be "consistent with all applicable provisions of IGRA." *Id.* § 291.8(a)(6); *see also id.* § 291.11(b)(6). Under Part 291, the Secretary has discretion to take the State's bargaining behavior into account.

New Mexico incorrectly claims that because Part 291 does not *require* the Secretary to make a finding of bad faith, it is facially invalid. *See* Resp. at 68. Because New Mexico seeks to show that Part 291 is inconsistent with IGRA, New Mexico must "show that there is 'no set of circumstances' in which the challenged regulation might be applied consistent with the agency's statutory authority." *Scherer v. U.S. Forest Serv.*, 653 F.3d 1241, 1243 (10th Cir. 2011) (quoting *Reno v. Flores*, 507 U.S. 292, 301 (1993)). If New Mexico believes that the Secretary has prescribed gaming procedures despite its own good-faith bargaining, and that IGRA prohibits this, then it may raise an as-applied challenge to the Secretary's final decision based on the

"particular circumstances" of this case. *Id.*[6] But it cannot seek to invalidate Part 291 entirely based on the possibility that the Secretary *might* make a decision contrary to New Mexico's view of IGRA.

New Mexico also claims that Part 291 is inconsistent with IGRA because it allows the Secretary to appoint a mediator and thus does not "protect the right of the State to a neutral, court-appointed mediator." Resp. at 39. Even assuming that Congress intended to confer a right to a court-appointed mediator even in cases where a State asserts its sovereign immunity from suit, Part 291 is reasonable and consistent with that right. By requiring that a mediator have "no official, financial, or personal conflict of interest," 25 C.F.R § 291.9(a), Part 291 is more protective than IGRA itself (which places no limits on the selection of a court-appointed mediator). *See* 25 U.S.C. § 2710(d)(7)(B)(v). If a State believed that the Secretary might appoint a non-neutral mediator in a particular case, the proper course would be to seek judicial review in that case rather than to invalidate Part 291 in its entirety.

Next, New Mexico argues that Part 291 is inconsistent with IGRA because it allows the Secretary to reject a mediator's proposed compact. Part 291 and IGRA

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[6] The Secretary does not take a position here, and the Court need not decide, whether IGRA *requires* the Secretary to consider a State's bargaining behavior before prescribing gaming procedures under Section 2710(d)(7)(B)(vii).

each require the Secretary to prescribe gaming procedures consistent with the mediator's proposal, IGRA, and the laws of the State. *See* 25 U.S.C. § 2710(d)(7)(B)(vii)(I); 25 C.F.R. § 291.11(b). IGRA, however, does not specify how the Secretary should resolve any conflicts between the mediator's selected proposal and federal or State law. 25 U.S.C. § 2710(d)(7)(B)(vii)(I). Part 291 fills this gap by specifying that the Secretary's procedures should "comport with the mediator's selected proposal as much as possible," while remaining consistent with federal and State law. 25 C.F.R. § 291.11(c). There is no conflict between these provisions.

More broadly, Part 291 situates the Secretary as a decision-maker at the end of a process in which both the tribe and the State have an opportunity to make a proposal and obtain the assistance of a mediator. The Secretary may reasonably decide that this role is more consistent with Congress's intent in IGRA than the State's suggestion, in which the Secretary would act as the tribe's advocate in court in a suit directly against the State. *See* Resp. at 57, 68.

Finally, New Mexico argues that gaming "under Secretarial Procedures promulgated under the Part 291 regulations" would violate the Johnson Act, 15 U.S.C. § 1175, because IGRA exempts activities from the Johnson Act only if they are "conducted under a Tribal-State compact." Resp. at 41. But the same issue could arise under *any* procedures that the Secretary might prescribe under Section 2710(d)(7)(B)(vii), including those prescribed after a judicial determination of bad

faith. Part 291 therefore does not expand the Secretary's existing Section 2710(d)(7)(B)(vii) authority in a manner that conflicts with the Johnson Act; it only establishes how she will exercise her existing authority in a particular situation.

2. Part 291 does not interpret IGRA in a manner that raises serious constitutional doubts.

Under *Chevron*, the Court should defer to the Secretary's reasonable interpretation of any ambiguities in IGRA. The canon of Indian law also requires it to resolve any ambiguities in favor of the tribe. *See* U.S. Br. at 54; *see also* S. Rep. 100-446 at 15 (noting Congress's expectation that this canon would apply to IGRA); *Southern Ute Indian Tribe v. Sebelius*, 657 F.3d 1071, 1078 (10th Cir. 2011).

In response, New Mexico relies on a third canon of construction, claiming that the Court may not accept Part 291 as a valid interpretation of IGRA if that interpretation would be beyond Congress's constitutional power. *See* Resp. at 61-66. This principle, which "has been the last refuge of many an interpretive lost cause," does not require a statutory interpretation to "eliminate all possible contentions that the statute *might* be unconstitutional," but only "*serious* constitutional doubts." *Reno*, 507 U.S. 292, 314 n.9 (1993) (emphasis in original). Because Congress had the power to enact IGRA, even as interpreted in Part 291, this canon of construction is inapplicable.

First, Congress clearly has the power to authorize the Secretary to prescribe gaming procedures on behalf of a tribe through an administrative process. Under *Cabazon Band*, New Mexico has no regulatory power over Indian gaming on a reservation other than the power that Congress may grant. 480 U.S. at 207, 221-22. It is therefore within Congress's power to provide a means for tribes to obtain gaming procedures even if a State chooses not to participate.

Second, Congress has the constitutional power to establish an administrative process like Part 291. New Mexico argues that Part 291 is contrary to the Eleventh Amendment in that it "compel[s] States to submit to compulsory adjudication before the Secretary" and to "answer the complaints of private parties." Resp. at 62. As demonstrated above, *see supra* pp. 8-9, and in the United States' opening brief at pp. 18-19, those arguments mischaracterize the regulations. Part 291 does not subject any State to an administrative adjudication similar to *South Carolina State Ports Authority*, or subject State officers to the threat of penalties as in *Seminole Tribe*. The Eleventh Amendment does not prevent the federal government from granting a benefit to the tribe that the tribe is unable to obtain directly from the State, and that remains true even if the federal government solicits the State's views.

Finally, Congress may constitutionally establish an administrative process for a tribe as an alternative to a judicial process in which a State asserts its sovereign immunity. New Mexico argues that the existence of that alternative unconstitutionally

coerces States into waiving their sovereign immunity. *See* Resp. at 63-65. But as Justice Cardozo observed, "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 589-90 (1937). Congress may create incentives for States as long as those incentives do not "pass the point at which 'pressure turns into compulsion.'" *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Exp. Bd.*, 527 U.S. 666, 687 (1999) (citing *South Dakota v. Dole*, 483 U.S. 203, 211 (1987)). Part 291 does not pass that point. If a State asserts its sovereign immunity from a tribe's suit under Section 2710(d), Part 291 does not threaten the "exclusion of the State from otherwise lawful activity," as in *College Savings Bank*, 527 U.S. at 687, or the "loss of over 10 percent of a State's overall budget," as in the Affordable Care Act case. *Nat. Fed. of Ind. Bus. v. Sebelius*, 132 S. Ct. 2566, 2605 (2012). Instead, the State claims it is "coerced" simply by the fact that, under Part 291, the tribe may be able to obtain better terms directly from the Secretary than it could obtain from the State. Finding a "serious constitutional doubt" in this case would require an unprecedented expansion of the principles upon which New Mexico relies.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the United States' opening brief, this Court should reverse the judgment of the district court.

Respectfully submitted,
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CERTIFICATES

I certify that on June 9, 2015, I am filing the foregoing Reply Brief with the Tenth Circuit via the Court's CM/ECF system. I further certify that, to my knowledge, all counsel of the record in this case are registered to receive service through that system.

I certify that this brief contains 6, 958 words, exclusive of front matter and certificates, in a 14-point Garamond font, and that it otherwise meets the requirements of Federal Rule of Appellate Procedure 32.

I certify that all required privacy redactions have been made.

I certify that, within two business days, I will cause to be delivered to the Clerk of the Court seven copies in paper form of this Reply Brief, which will be exact replicas of the electronically filed version.

I certify that, prior to filing, I have scanned this file using System Center Endpoint Protection updated on June 8, 2015, which indicates that it is free of viruses.

/s/ J. David Gunter II