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 United States District Court
for the District of New Mexico
No. 1:14-cv-00695-JAP-SCY (Hon. James A. Parker)

BRIEF FOR APPELLEE

Jennifer A. MacLean
JMacLean@perkinscoie.com
PERKINS COIE LLP
700 13th St., N.W., Suite 600
Washington, D.C. 20005
Telephone: 202.654.6200

Eric D. Miller
EMiller@perkinscoie.com
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000

(Additional counsel listed on inside cover)

ORAL ARGUMENT REQUESTED

Jeremiah L. Ritchie
Jeremiah.Ritchie@state.nm.us
OFFICE OF THE GOVERNOR
490 Old Santa Fe Trail, Suite #400
Santa Fe, NM 87501-2704
Telephone: 505.476.2200

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STATEMENT OF RELATED CASES

The State of New Mexico is not aware of any related cases within the meaning of Tenth Circuit Rule 28.2(C)(1).

GLOSSARY

IGRA	Indian Gaming Regulatory Act
NIGC	National Indian Gaming Commission

INTRODUCTION

Under the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (25 U.S.C. § 2701 *et seq.*), an Indian tribe that wishes to conduct casino-style gaming must negotiate a compact with the State. If the tribe and the State are unable to agree, the statute provides a limited remedy: the tribe may sue the State in federal court. If the court determines that the State has acted in good faith, the case is over, and the parties are left to resolve the impasse on their own. If the court finds that the State has acted in bad faith, it may appoint a mediator, and ultimately it may impose gaming procedures as a substitute for a compact.

In *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996), the Supreme Court held Congress lacks authority under the Indian Commerce Clause to abrogate a State's Eleventh Amendment immunity from suit. In response, the Secretary of the Interior decided that what Congress could not do, she would attempt to do herself: she issued regulations providing for the imposition of Secretarial Procedures to allow gaming when a State has invoked its Eleventh Amendment immunity in response to a suit by a tribe. She has now begun proceed-

ings to impose Secretarial Procedures on the State of New Mexico at the behest of the Pueblo of Pojoaque.

The district court correctly enjoined the implementation of the regulations against New Mexico. Its decision is in accord with that of the only court of appeals to consider a similar challenge to the regulations, which held that a State in circumstances like that of New Mexico has standing to challenge the regulations, that its challenge is ripe, and that the regulations are invalid. *Texas* v. *United States*, 497 F.3d 491 (5th Cir. 2007).

As to standing and ripeness, the district court correctly held that the State is suffering an immediate, concrete injury from its compelled participation in the Secretary's unlawful process. On the merits, the regulations—which allow for the imposition of Secretarial Procedures without any finding that the State has acted in bad faith—are contrary to the plain terms of the statute. They exceed the power of the Secretary, who does not have rulemaking authority under IGRA. And they aggravate the constitutional infirmity that the Supreme Court identified in *Seminole Tribe*.

The district court's judgment should be affirmed.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 because this case arises under the Indian Gaming Regulatory Act, 25 U.S.C. § 2710 *et seq.*, and because 5 U.S.C. § 702 waives the sovereign immunity of the United States. App. 13.[1] On October 17, 2014, the district court entered a final judgment. S.A. 73-74. Notices of appeal were filed on December 11, 2014 (No. 14-2219) and December 12, 2014 (No. 14-2222) and were timely under Federal Rule of Appellate Procedure 4(a)(1)(B). The jurisdiction of this Court rests on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether, in light of the determination of the Secretary of the Interior that the Pueblo of Pojoaque is eligible for gaming procedures under 25 C.F.R. Part 291, the State of New Mexico has Article III standing to challenge the validity of those regulations.

2. Whether the State's challenge is ripe.

[1] References to "App." are to Appellants' Appendix; references to "S.A." are to Appellee's Supplemental Appendix.

3. Whether 25 C.F.R. Part 291, which permits the Secretary to impose gaming procedures on an unconsenting State, is contrary to law.

STATUTORY ADDENDUM

Pertinent provisions are set forth in an addendum to this brief.

STATEMENT OF THE CASE

I. Statutory and regulatory background

A. The Indian Gaming Regulatory Act

In 1987, the Supreme Court held that California lacked authority to regulate gambling conducted by Indian tribes on Indian land within the State. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). A year later, Congress found that the Court's decision had left no "clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. § 2701(3). It therefore enacted the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (25 U.S.C. § 2701 *et seq*.), which gives States a role in the regulation of Indian gaming.

IGRA defines three classes of tribal gaming, each of which is regulated differently. 25 U.S.C. § 2703(6)-(8). This case involves class III gaming, which includes slot machines, blackjack, and other forms of

Las Vegas–style casino gaming. *Id.* § 2703(8). Class III gaming on Indian lands is subject to three requirements. First, it must be authorized by a tribal ordinance that has been approved by the Chairman of the National Indian Gaming Commission (NIGC); second, it must be located in a State that permits such gaming; and third, it must be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . that is in effect." *Id.* § 2710(d)(1).

A tribe wishing to conduct class III gaming on Indian lands must "request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities." 25 U.S.C. § 2710(d)(3)(A). When it receives such a request, the State has a duty to "negotiate with the Indian tribe in good faith to enter into such a compact." *Id.* Once an agreement is reached, the compact takes effect only if the Secretary of the Interior approves it or allows it to go into effect by not disapproving it within 45 days. *Id.* § 2710(d)(3)(B), (d)(8)(C).

If no agreement is reached within 180 days of the tribe's request for negotiations, the tribe may bring an action in federal district court to challenge the state's alleged failure to negotiate in good faith. 25

U.S.C. § 2710(d)(7)(B)(i). The court must determine whether the State has negotiated in good faith, and in doing so it "may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities." *Id.* § 2710(d)(7)(B)(iii)(I). If the court finds that the State has negotiated in good faith, it has no authority to proceed—the statute does not authorize the court to break an impasse resulting from good-faith bargaining by the State.

If, however, the court finds that the State has not negotiated in good faith, then the court must order the State and the tribe to conclude a compact within 60 days. 25 U.S.C. § 2710(d)(7)(B)(iii). If the State and the tribe still fail to reach an agreement, the court must appoint a mediator, who will select from each side's "last best offer for a compact" the one that "best comports with" the statute. *Id.* § 2710(d)(7)(B)(iv). If the State consents to the selected compact, then it will be treated as a tribal-state gaming compact. *Id.* § 2710(d)(7)(B)(vi). But if the State does not consent to the proposed compact, the mediator must notify the Secretary, who shall then prescribe procedures to govern gaming by the tribe; the procedures must

be "consistent with the proposed compact selected by the mediator . . . , the provisions of [IGRA], and the relevant provisions of the laws of the State." *Id.* § 2710(d)(7)(B)(vii).

B. The Supreme Court's decision in *Seminole Tribe*

Among the "fundamental postulates implicit in the constitutional design," *Alden* v. *Maine*, 527 U.S. 706, 729 (1999), are that "each State is a sovereign entity in our federal system" and that immunity from suit is "inherent in the nature of sovereignty," *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 54 (1996) (internal quotation marks omitted). In *Seminole Tribe*, the Supreme Court applied those principles to IGRA, holding that the Indian Commerce Clause of the Constitution does not give Congress the power to abrogate a State's sovereign immunity from suit. *Id.* at 47. "Even when the Constitution vests in Congress complete lawmaking authority over a particular area," the Court explained, "the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Id.* at 72. The Court recognized that 25 U.S.C. § 2710(d)(7) reflects "Congress' clear intent to abrogate the States' sovereign immunity" from suits by tribes, but it concluded that the statute "cannot grant

jurisdiction over a State that does not consent to be sued." 517 U.S. at 47. Accordingly, when a tribe sues a State under Section 2710(d)(7) for alleged failure to negotiate in good faith, the litigation cannot proceed unless the State waives its sovereign immunity. *Id.*

C. The Part 291 regulations

After *Seminole Tribe* was decided, the Secretary adopted regulations "in response to the United States Supreme Court's decision." Class III Gaming Procedures, 64 Fed. Reg. 17,535, 17,536 (Apr. 12, 1999). The Secretary opined that allowing States to assert sovereign immunity "will, if no further action is taken, create an effective State veto over IGRA's dispute resolution system and therefore will stalemate the compacting process." *Id.* To avoid that result, the rules authorize the Secretary to "prescribe Class III gaming procedures to end the stalemate." *Id.*

Under the regulations, which are codified at 25 C.F.R. Part 291, a tribe may seek gaming procedures imposed by the Secretary—commonly known as "Secretarial Procedures"—if it demonstrates that it requested compact negotiations, that the State and the tribe did not reach an agreement within 180 days, that the tribe sued the State

under Section 2710(d)(7), and that the court dismissed the case because the State did not waive its immunity from suit. 25 C.F.R. § 291.3. The regulations do not require a determination that a State failed to negotiate in good faith. *Id.*; *see* Class III Gaming Procedures, 64 Fed. Reg. at 17,537 ("The final regulation eliminates the requirement that the Secretary make a finding on the 'good faith' issue.").

To seek Secretarial Procedures, a tribe must submit a complete proposal, including proposed gaming procedures. 25 C.F.R. § 291.4. The Secretary then solicits comment from the State. *Id.* § 291.7. If the State does not respond to the Secretary's request for comment, the Secretary reviews the tribe's proposal to determine whether it is consistent with IGRA and certain other legal requirements. *Id.* § 291.8(a). She may then adopt the tribe's proposal outright or invite the tribe and the State to participate in "an informal conference" before she decides whether to adopt it. *Id.* § 291.8(b). If the State offers an alternative proposal, the Secretary must appoint a mediator, *id.* § 291.9(b), who will resolve the dispute by selecting between the parties' "last best proposal[s]," *id.* § 291.10(a). But the Secretary is not bound to adopt

the proposal that the mediator selects and may instead prescribe "appropriate procedures" of her own devising. *Id.* § 291.11(c).

II. New Mexico's gaming compacts

In 1997, the State of New Mexico negotiated gaming compacts with more than a dozen tribes. App. 17; *see* Notice of Tribal-State Gaming Compact Taking Effect, 62 Fed. Reg. 59,878 (Nov. 5, 1997); Indian Gaming, 62 Fed. Reg. 53,650 (Oct. 15, 1997); Indian Gaming, 62 Fed. Reg. 45,867 (Aug. 29, 1997). Soon thereafter, the New Mexico Legislature enacted a statute to formalize the process for compact negotiations. N.M. Stat. Ann. § 11-13A-1 *et seq*. To ensure that all tribes are treated fairly, the statute generally requires the Governor to approve a tribe's proposed compact if it is "identical to a compact . . . previously approved" for another tribe. *Id*. § 11-13A-4(J). Thus, any concession the Governor makes for one tribe is available to all tribes.

The 1997 agreements provided for the sharing of gaming revenue between the tribes and the State; in exchange, the State restricted non-Indian gaming. App. 17; *see New Mexico* v. *Pueblo of Pojoaque*, 30 Fed. Appx. 768 (10th Cir. 2002). In 2001, after disputes arose over the revenue-sharing payments, the State agreed to a lower revenue-

sharing rate schedule and negotiated new compacts with all of the gaming tribes except the Pueblo of Pojoaque and the Mescalero Apache Nation. App. 17. The Secretary formally approved the 2001 compacts. *See* Indian Gaming, 66 Fed. Reg. 64,856 (Dec. 14, 2001); Indian Gaming, 66 Fed. Reg. 65,740 (Dec. 20, 2001). A few years later, as permitted by Section 11-13A-4(J), the Pueblo of Pojoaque and the Mescalero Apache Nation adopted the terms of the 2001 compacts. App. 18; *see* Indian Gaming, 70 Fed. Reg. 49,942 (Aug. 25, 2005); Indian Gaming, 69 Fed. Reg. 47,459 (Aug. 5, 2004).

In 2007, the State negotiated amendments to the 2001 compacts with most, but not all, of the gaming tribes. App. 18. In the new compacts, in exchange for additional restrictions on non-tribal gaming and an extended compact duration, the tribes agreed to an increased revenue-sharing schedule. *Id.* The Secretary formally approved the amended compacts for eleven separate tribes. *Id.*; *see* Indian Gaming, 72 Fed. Reg. 58,333 (Oct. 15, 2007); Indian Gaming, 72 Fed. Reg. 36,717 (Jul. 5, 2007).[2]

[2] The text of the 2007 compacts and the Secretary's formal letters of approval are available at http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-025062.pdf.

III. The Pueblo of Pojoaque seeks more favorable compact terms than those agreed to by other tribes

The Pueblo of Pojoaque did not sign the 2007 compact but continued to conduct gaming under the 2001 compact. Because the 2001 compact is set to expire on June 30, 2015, the Pueblo requested negotiations for a new compact in 2011. Four other tribes requested compact negotiations at approximately the same time—the Pueblo of Acoma, the Jicarilla Apache Nation, the Mescalero Apache Tribe, and the Navajo Nation.

In December 2013, despite the State's continuing negotiations with other tribes, the Pueblo sued the State under 25 U.S.C. § 2710(d)(7), alleging that the State had failed to negotiate in good faith. S.A. 19-40. The Pueblo claimed that because it did not seek the tribal gaming exclusivity that the 2007 compact tribes negotiated, it should not have to pay the higher rate of revenue sharing they agreed to in the 2007 compact. S.A. 31-32. It also objected to the provisions of the 2007 compact prohibiting casinos from extending credit to patrons, cashing payroll checks, and providing complimentary alcoholic beverages. S.A. 35. Bound by Section 11-13A-4(J), the Governor could not accede to the Pueblo's demands without relinquishing the benefits

negotiated for the State in the 2007 compacts and undermining ongoing negotiations with the other four tribes.

The State asserted its sovereign immunity, and the court dismissed the case. S.A. 41-42.

IV. The Secretary agrees to impose Secretarial Procedures on the State at the Pueblo's behest

After the Pueblo's lawsuit was dismissed, the Pueblo began proceedings under Part 291 by asking the Secretary to impose Secretarial Procedures and submitting its gaming proposal. In June 2014, the Secretary informed the State that the Pueblo was eligible for Secretarial Procedures and that it had 60 days to comment on the Pueblo's gaming proposal or to present an alternative proposal. S.A. 3.

V. The district court holds that the Secretary lacks authority to impose Secretarial Procedures

The State then brought this lawsuit against the Secretary, challenging the Secretary's authority to impose Secretarial Procedures for the Pueblo. App. 12-22. Soon thereafter, the State sought a preliminary injunction to prevent the Secretary from conducting administrative proceedings under Part 291. The district court denied the injunction, concluding that the State had not yet met "its demanding

burden of showing a *substantial* likelihood of success on the merits." S.A. 61.

After the court denied a preliminary injunction, the State submitted comments and an alternative proposal to the Secretary under the Part 291 regulations. The State stated that it was participating under protest, and only after having exhausted all available means to stop the administrative proceedings. It also noted the Assistant Secretary's acknowledgment that the State would not waive any legal rights by providing comments. S.A. 2.

The State, the Secretary, and the Pueblo (which had intervened in the litigation) all moved for summary judgment. The district court granted summary judgment to the State, declaring Part 291 "invalid and unenforceable as applied to New Mexico and its current negotiations with the Pueblo of Pojoaque" and entering a permanent injunction barring the Secretary "from enforcing 25 C.F.R. § 291 *et seq.* as they relate to the Pueblo of Pojoaque's request for procedures." S.A. 74.

The district court held that the State has Article III standing because it is suffering injury to two different interests protected by IGRA: the interest in "preventing mediation between [the State] and

the Pueblo of Pojoaque without a federal court first finding New Mexico breached its obligation to negotiate in good faith," and the interest in "ensuring that the only way Class III gaming takes place on the Pueblo of Pojoaque's lands is under a negotiated gaming compact." App. 50. The court determined that the injury was "fairly traceable to Defendants' eligibility determination" and that it "would be adequately redressed by a favorable decision." App. 52.

The district court next held that the Secretary's eligibility determination is a final agency action that is reviewable under 5 U.S.C. § 702. App. 52-54. It also determined that the State's challenge is ripe because it "raises purely legal questions," App. 56, and because the State is facing a present "impact that counsels in favor of judicial review," App. 59.

On the merits, the district court concluded that Part 291 is contrary to IGRA. The court explained that "because IGRA unambiguously specifies when the Secretary of the Interior may implement gaming procedures permitting a Tribe to conduct class III gaming without a compact, 'that is the end of the matter[.]'" App. 63-64 (quoting *Chevron USA Inc.* v. *NRDC*, 467 U.S. 837, 842 (1984)). "The Part 291 regula-

tions," the court reasoned, "run contrary to Congress's clear intent and are unenforceable for this reason." App. 64. Finally, the court held that the provision of IGRA declared invalid in *Seminole Tribe* is severable, and therefore the court "decline[d] Defendants' request to invalidate any provision of IGRA other than the one invalidated by the United States Supreme Court" in that case. App. 66.[3]

SUMMARY OF ARGUMENT

The district court correctly held that the State has standing to challenge the Part 291 regulations. The Secretary has determined that the Pueblo is eligible for Secretarial Procedures under the regulations. That determination has injured not only the State's statutory interest in preventing mediation between it and the Pueblo without a judicial finding that the State failed to act in good faith but also its interest in ensuring that gaming takes place only under a negotiated gaming

[3] After the district court entered judgment, the State successfully concluded compact negotiations with five other tribes: the Pueblo of Acoma, the Pueblo of Jemez, the Jicarilla Apache Nation, the Mescalero Apache Tribe, and the Navajo Nation. The New Mexico Legislature enacted legislation approving the new compacts. S.J. Res. 19, 52d Leg., 1st Sess. (N.M. 2015). In April 2015, Governor Susana Martinez signed the compacts, which extend to 2037. Office of the Governor, State of New Mexico, *Governor Susana Martinez Signs Gaming Compact* (Apr. 13, 2015), http://tinyurl.com/2015compact.

compact. It also undermines the State's bargaining position in negotiations with the Pueblo and other tribes and its dignitary interests as a sovereign.

The State's claims are ripe for adjudication. The Secretary's arguments to the contrary are largely derivative of her flawed argument that the State lacks standing. The Secretary's eligibility determination, and the initiation of proceedings under Part 291, have inflicted a concrete and immediate injury upon the State. The State's challenge to the regulations raises purely legal issues, and it is appropriate to resolve that challenge at this time.

On the merits, the district court correctly determined that the Part 291 regulations are invalid. Its decision is in accord with that of the only court of appeals to consider the issue. *Texas* v. *United States*, 497 F.3d 491 (5th Cir. 2007).

The regulations are contrary to the plain terms of IGRA. The statute provides a detailed remedial scheme that leaves no role for the Secretary to impose Secretarial Procedures. A basic requirement of IGRA is that, before any remedial process can begin, the court must find that the State violated its obligation to negotiate in good faith; if

the State has acted in good faith, the statute does not authorize either the court or the Secretary to interfere in its negotiations with a tribe. The regulations, however, allow for the imposition of Secretarial Procedures without any finding of bad faith. In addition, while the statute provides for a neutral, court-appointed mediator, the regulations allow the Secretary to appoint a mediator. And unlike the statute, the regulations permit the Secretary to impose procedures of her own devising, which need not be the same as those proposed by the parties.

The Secretary argues that the regulations should be upheld under *Chevron*, but *Chevron* is inapplicable here because the statute assigns rulemaking authority to the NIGC, not the Secretary. In any event, even under *Chevron*, the regulations would fail at step one because they are contrary to IGRA's plain language; at a minimum, they would fail at step two because they represent an unreasonable interpretation of the statute.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*. *Felkins* v. *City of Lakewood*, 774 F.3d 647, 650 (10th Cir. 2014).

ARGUMENT

I. The State has standing to challenge the Part 291 regulations

To establish Article III standing, a plaintiff must show that it is suffering an "injury in fact," that the injury is caused by the defendant's actions, and that the injury is likely to be redressed by a favorable decision from the court. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The State satisfies those requirements for several independent reasons, any of which provides a basis for affirming the district court's conclusion that the State has standing. First, as the district court explained, the State has "cognizable interests under IGRA" not only in "preventing mediation between it and the Pueblo of Pojoaque without a federal court first finding New Mexico breached its obligation to negotiate in good faith" but also in "ensuring that the only way Class III gaming takes place on the Pueblo of Pojoaque's lands is under a negotiated gaming compact." App. 50. The Secretary's eligibility determination has caused ongoing injury to those statutory interests, *id.* at 52, and the court's order granting declaratory and injunctive relief halting further proceedings under the Secretary's regulations has redressed that injury. Second, the State's compelled

participation in the Secretary's administrative process is a cognizable injury because it undermines not only the State's bargaining position in negotiations with the Pueblo and other tribes but also its dignitary interests as a sovereign.

A. The Secretary's application of the regulations injures the State's statutory interests

The district court correctly recognized that the Secretary's application of the Part 291 regulations injures two state interests that IGRA protects. First, the State has an interest in "preventing mediation between it and the Pueblo of Pojoaque without a federal court first finding New Mexico breached its obligation to negotiate in good faith." App. 50. IGRA expressly protects the State's interest in negotiating the terms that will govern class III gaming within its borders without federal interference. It does so by authorizing mediation only after a federal court concludes that a State has failed to negotiate in good faith. 25 U.S.C. § 2710(d)(7)(B)(iii). The State's interest is harmed—indeed, it is entirely defeated—by the Secretary's determination that the Pueblo is eligible for Secretarial Procedures without any judicial finding of bad faith. Second, the State has an interest in "ensuring that the only way Class III gaming takes place on the Pueblo of Pojoaque's

lands is under a negotiated gaming compact." App. 50. That interest, too, is harmed by the Secretary's eligibility determination. Under Part 291, an eligibility determination means that the Secretary has a non-discretionary duty to prescribe Secretarial Procedures—whether or not the State consents. 25 C.F.R. § 291.11(c). The Secretary's eligibility determination has deprived the State of a statutory procedural protection and has led to federally superintended mediation between the Pueblo and the State. Were it not for the district court's injunction, the Secretary would impose Secretarial Procedures on the State without a judicial finding that the State acted in bad faith.

The Secretary asserts that injury to the State's interest in being free from compelled mediation "is no more than 'a procedural injury *in vacuo*,' which is not sufficient to support standing." Br. 22 (quoting *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 496 (2009)). That is incorrect. The State clearly has a concrete interest—the right to be free from secretarial interference when conducting compact negotiations with the Pueblo and from compelled mediation with a tribe in the absence of a judicial determination of bad faith. IGRA grants the State the right to negotiate with tribes the terms under which gaming will

take place within its borders without the Secretary intruding on those negotiations. And IGRA establishes that the State maintains that right until a court determines that the State has abused it. As the D.C. Circuit has explained, Part 291's infringement on the "statutory procedural protection" of IGRA bears "on the likelihood of an ultimate concrete injury—*i.e.*, the Secretary's approval of an Indian gaming proposal," and is therefore sufficient to confer standing for the same reason that a party may challenge "a failure to issue an environmental impact statement that can affect whether or not a project injurious to the plaintiff will be built." *Delaware Dep't of Natural Res. & Envtl. Control* v. *FERC*, 558 F.3d 575, 579 (D.C. Cir. 2009).

This case is therefore significantly different from *Summers*, on which the Secretary relies (Br. 22). The plaintiffs in *Summers* alleged that they had been deprived of the opportunity to comment on various actions of the Forest Service. 555 U.S. at 496. The Supreme Court held that plaintiffs lacked standing because they had failed to show that the underlying Forest Service actions would have any concrete effect on them, adding that a "person who has been accorded a procedural right to protect his concrete interests can assert that right without

meeting all the normal standards for redressability and immediacy." *Id.* (quoting *Lujan*, 504 U.S. at 522) (emphasis omitted). That is precisely the kind of right that the State invokes here.

According to the Secretary (Br. 22), the State does not truly have an interest in being free from compelled mediation without a judicial finding of bad faith. In the Secretary's view, if the State had such an interest, it would not have asserted its sovereign immunity in the earlier litigation brought by the Pueblo under Section 2710(d)(7). The Secretary's argument not only minimizes the right IGRA explicitly grants the State but also overlooks the State's constitutionally protected interest in being free from compelled federal-court adjudication at the behest of a tribe. The State does not waive its statutorily protected rights by asserting its constitutional prerogative. Nor does that assertion sever the causal relationship between the Secretary's interference and the State's injury. The assertion of immunity is a prerequisite for the application of the Part 291 regulations. *See* 25 C.F.R. §§ 291.3, 291.6(b) (predicating an eligibility determination on a State's assertion of immunity in a suit brought by a tribe under Section 2710(d)(7)). The assertion of a State's

constitutional prerogatives therefore cannot break the causal chain between the regulations and the State's injury; it is an essential link in that chain.

The Secretary also argues (Br. 22) that the State's ultimate interest in regulating "the terms on which a tribe may (or may not) conduct gaming" is not threatened by her actions. Relying on this Court's decision in *Essence, Inc.* v. *City of Federal Heights*, 285 F.3d 1272 (10th Cir. 2002), she argues that "[t]he Secretary's eligibility determination alone does not establish such terms or suggest that they are 'certainly impending.'" Br. 22 (quoting *Essence*, 285 F.3d at 1282). That argument lacks merit.

In *Essence*, this Court held that a nude-dancing establishment lacked standing to challenge the city's regulations governing the suspension and revocation of business licenses. 285 F.3d at 1282. The Court explained that the business had not alleged that the city "has sought to suspend or revoke its business license or has threatened to do so. Nor has it alleged any fact indicating that suspension or revocation may be imminent or that it has altered its behavior as a result of the provision." *Id.* Here, by contrast, the Secretary has

actually initiated proceedings under the challenged regulations. And the outcome of those proceedings is not a matter of speculation. Under Part 291, an eligibility determination initiates a defined process. The Secretary "must" submit the tribe's proposal to the State for comment. 25 C.F.R. § 291.7(a). Whether or not the State submits a proposal of its own, the Secretary then "must," within 60 days, either accept the tribe's proposal or appoint a mediator. *Id.* §§ 291.8(b); 291.9.[4] And upon receiving a proposal from the mediator, the Secretary "must" either approve it, *id.* § 291.11(a), or impose procedures of her own, *id.* § 291.11(c). In the circumstances of this case, there is no way (other than a settlement or a decision by the Pueblo to abandon its application) that the Secretary could, consistent with the regulations, decline to impose Secretarial Procedures. The Secretary's eligibility

[4] If the State does not submit an alternative proposal, the Secretary may disapprove the tribe's proposal, but only for one of the reasons set out in 25 C.F.R. § 291.8(a). *See id.* § 291.8(c)(2). The specified reasons are narrow and involve conflicts between the tribe's proposal and other provisions of state or federal law. And the regulations do not limit a tribe's ability to resubmit or petition for procedures again. So long as the tribe ultimately submits another proposal that remedies the Secretary's basis for denial, the Secretary would have to approve it. In any event, disapproval under Section 291.8 is no longer a possibility in this case because the State has submitted an alternative to the Pueblo's proposal.

determination therefore guarantees that gaming will take place on terms that were not freely negotiated by the State under IGRA.

B. The State has also suffered injury to its bargaining position and to its interests as a sovereign

The State also has standing for the independent reasons that initiation of the Part 291 process injures the State's bargaining position in negotiations with the Pueblo (and other tribes), and compelled participation in that process also harms the State's sovereign interests. Although the district court did not base its decision on those considerations, they provide an alternative basis for affirming its judgment. *See Llewellyn* v. *Allstate Home Loans, Inc.*, 711 F.3d 1173, 1185 (10th Cir. 2013) (court may "affirm on any grounds supported by the record") (internal quotation marks omitted).

1. The mere existence of the Part 291 regulations harms the State by undermining its negotiations with the Pueblo (and with other tribes, which may also seek to follow the Pueblo's path). The Part 291 regulations fundamentally change IGRA and diminish the State's negotiating power by establishing a mechanism that permits tribes to seek more favorable terms from the Secretary if a State refuses to yield to their demands. Tribes need only negotiate for 180 days, file

suit against States they know will invoke their constitutionally guaranteed immunity, and then request Secretarial Procedures. The availability of Secretarial Procedures thus greatly diminishes a State's leverage in negotiations. And more specifically, in the mediation with the Pueblo that the Secretary has ordered, the State will be under pressure to make concessions to reach an agreement in order to avoid the threat that the Secretary will impose even worse terms. And when it does so, that will make it difficult for the State to resist making the same concessions to other tribes, especially in light of the provisions of state law allowing any tribe to adopt the terms of a compact negotiated with another tribe. *See* N.M. Stat. Ann. § 11-13A-4(J).

The Secretary suggests (Br. 17) that the State has not adequately demonstrated that the application of the regulations will weaken its bargaining position, but the Secretary's own statements provide ample demonstration of this commonsense observation. In a letter to the State after the Pueblo was found to be eligible under Part 291 for Secretarial Procedures, the Assistant Secretary – Indian Affairs identified what he described as an "impasse" in negotiations between the Pueblo, complained (inaccurately) that "the State has walked away

from the table," and expressed the belief that the eligibility determination would "ensure that a resolution is achieved, either by encouraging the parties to return to the negotiating table or through the gaming procedures process." S.A. 1-2; *see id.* at 2 ("[W]e need the State's participation."). The regulations "encourag[e]" the State "to return to the negotiating table" in much the same sense that a loan shark "encourages" his clients to pay—by threatening something worse. The Assistant Secretary's letter thus makes clear that he views the Part 291 process as a way to coerce the State into making concessions it would not otherwise have made.[5]

The Secretary recognizes (Br. 17) that a weakened bargaining position can constitute an injury where, as here, it inflicts a likelihood

[5] It is irrelevant for standing purposes whether the Secretary will ultimately impose less favorable terms. As this Court has explained, "[f]or a procedural injury, the requirements for Article III standing are somewhat relaxed, or at least conceptually expanded." *WildEarth Guardians* v. *EPA*, 759 F.3d 1196, 1205 (10th Cir. 2014). Thus, a plaintiff alleging a procedural injury "need not establish with certainty that adherence to the procedures would necessarily" result in a different outcome. *Id.* (quoting *Utah* v. *Babbitt*, 137 F.3d 1193, 1216 n.37 (10th Cir. 1998)). Instead, "[i]t suffices that the procedures 'are designed to protect some threatened concrete interest of [the person] that is the ultimate basis of standing.'" *Id.* (quoting *S. Utah Wilderness Alliance* v. *Office of Surface Mining Reclamation & Enforcement*, 620 F.3d 1227, 1234 (10th Cir. 2010)).

of some concrete harm, such as an injury to the State's ability to secure compact terms it deems in the public interest. *See Clinton* v. *City of New York*, 524 U.S. 417, 432-34 (1998). In her view, however (Br. 17 n.5), the "bargaining chip" at issue here—that is, the State's ability to refuse to accede to certain demands, so long as that refusal is not found to be in bad faith—does not count because it is "a benefit that Congress specifically intended that the State *not* have." That argument reflects a misreading of IGRA, but more importantly, it is a *merits* argument, not an argument about standing. This Court has made clear that standing must be evaluated separately from the merits, and that the "threshold inquiry into standing in no way depends on the merits of the [plaintiff's] contention that particular conduct is illegal." *Am. Civil Liberties Union of N.M.* v. *Santillanes*, 546 F.3d 1313, 1319 (10th Cir. 2008) (internal quotation marks omitted).

2. Being subjected to an unlawful administrative process injures New Mexico not only because it weakens its bargaining position in compact negotiations but also because it harms the State's sovereign status. *See Massachusetts* v. *EPA*, 549 U.S. 497, 518, 520 (2007) ("States are not normal litigants for the purposes of invoking federal

jurisdiction" but are "entitled to special solicitude in our standing analysis."). The Supreme Court recognized in *Seminole Tribe* that a State's sovereign immunity protects it from being subjected to suit under IGRA at the behest of a tribe. The same principles of sovereign immunity protect States from being subjected to an administrative process under that statute: "If the Framers thought it an impermissible affront to a State's dignity to be required to answer private parties' complaints in federal court, they would not have found it acceptable to compel a State to do the same thing before a federal administrative tribunal." *Fed. Mar. Comm'n* v. *S.C. Ports Auth.*, 535 U.S. 743, 744 (2002). That is especially so here, where the administrative process was established for the express purpose of circumventing the state prerogatives recognized in *Seminole Tribe*. *See* Class III Gaming Procedures, 64 Fed. Reg. at 17,536.

The dignitary injury to the State from compelled participation in the Secretary's administrative process is immediate. As the Supreme Court has explained, "the primary function of sovereign immunity is not to protect state treasuries, . . . but to afford the States the dignity and respect due sovereign entities." *S.C. Ports Auth.*, 535 U.S. at 769.

For that reason, whether or not a State ultimately prevails in the process, the value of its Eleventh Amendment immunity, "like the benefit conferred by qualified immunity to individual officials, is for the most part lost as litigation proceeds." *P.R. Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 145, 146 (1993) (explaining that immunity is "justified in part by a concern that States not be unduly burdened by litigation" and recognizing "the importance of ensuring that the States' dignitary interests can be fully vindicated").

3. The Fifth Circuit's conclusion that the State of Texas had standing to pursue claims identical to New Mexico's is squarely on point here. *See Texas* v. *United States*, 497 F.3d 491, 496-97 (5th Cir. 2007). In 2004, the Secretary informed Texas that the Kickapoo Traditional Tribe of Texas was eligible for Secretarial Procedures, just as she has done here. Texas was, as New Mexico is now, "subjected to an administrative process involving mediation and secretarial approval of gaming procedures even though no court has found that [it] negotiated in bad faith." *Id.* at 497. "The alleged injury is not hypothetical," the Fifth Circuit explained, "because the Secretarial Procedures have already been applied to Texas," and "Texas's only alternative to partic-

ipating in this allegedly invalid process is to forfeit its sole opportunity to comment upon Kickapoo gaming regulations." *Id.* The Fifth Circuit concluded that that "forced choice . . . is itself sufficient to support standing." *Id.* at 497 (citing *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 582 (1985)). New Mexico faces precisely the same forced choice, which is sufficient to support standing here as well.

4. The Secretary argues (Br. 19-21 & n.7) that she has not compelled the State to participate in the Part 291 proceedings, that its participation is purely voluntary, and that the State therefore faces no "forced choice." That is like saying that a State could avoid the dignitary injury of compelled federal-court adjudication by allowing the entry of a default judgment. The Secretary's argument rests on the unrealistic assumption that the State might choose to "forfeit its sole opportunity to comment" by simply ignoring proceedings that will necessarily result in the imposition of Secretarial Procedures. *Texas*, 497 F.3d at 497. As explained above, the Assistant Secretary's letter demonstrates that he, at least, does not believe the State is likely to ignore the proceedings.

The Secretary also points out (Br. 21) that the State can participate in the Part 291 process under protest. But participating under protest does nothing to avoid the harm to the State's dignitary interests, and making concessions, even under protest, would compromise the State's ability to resist similar concessions elsewhere. Perhaps the Secretary's decision to allow the State to participate under protest might facilitate later redress of some of the State's injuries—although even that is doubtful—but the harm to the State's dignitary interests would be irreparable. *See Burns-Vidlak ex rel. Burns* v. *Chandler*, 165 F.3d 1257, 1260 (9th Cir. 1999) (noting that a denial of a claim of Eleventh Amendment immunity is immediately appealable "since the harm to the state's 'dignitary interests' in not being haled into another sovereign's court in the first instance cannot be undone") (citation omitted). And in any event, the possibility of later redress does not eliminate the State's present injuries.

II. The State's claims are ripe

In determining whether a case is ripe for adjudication, this Court considers "(1) whether the issues involved are purely legal, (2) whether the agency's action is final, (3) whether the action has or will have an

immediate impact on the petitioner, and (4) whether resolution of the issue will assist the agency in effective enforcement and administration." *Qwest Commc'ns Int'l, Inc.* v. *FCC*, 398 F.3d 1222, 1231-32 (10th Cir. 2005). The district court correctly applied those factors and determined that this case is ripe. Its conclusion accords with that of the Fifth Circuit, which held that an identical challenge asserted by the State of Texas was also ripe. *Texas*, 497 F.3d at 499.

First, as the Secretary acknowledges (Br. 25), this case raises purely legal questions.

Second, the agency's action—the determination that the Pueblo is eligible for Secretarial Procedures—is final. App. 56; *see also* App. 52-54. The Secretary concedes that point (Br. 25), but she objects that the State "does not seek review of the Secretary's application of the eligibility criteria; it claims that Part 291 is invalid in its entirety and that the Secretary may not prescribe any gaming procedures under its auspices." That is true, but it is irrelevant to the ripeness analysis. The regulations define the eligibility determination as a final agency action, 25 C.F.R. § 291.6(b), and the State's arguments, if accepted, will require the invalidation of that action. That is sufficient to satisfy

the finality component of the ripeness test. The possibility that the Secretary might take additional actions to injure the State does not make her already final eligibility determination any less final. *See Sackett* v. *EPA*, 132 S. Ct. 1367, 1373 (2012) (concluding that an EPA "compliance order" was a final agency action even though it was not self-executing and could be enforced only if the agency initiated litigation).

Third, the Secretary's actions have had a direct and immediate effect on the State. App. 56-58. As the Fifth Circuit explained in *Texas*, if a challenge such as this one were not ripe, then the State would be "forced to choose one of two undesirable options: participate in an allegedly invalid process that eliminates a procedural safeguard promised by Congress, or eschew the process with the hope of invalidating it in the future, which risks the approval of gaming procedures in which the state had no input." 497 F.3d at 499.

The Secretary's arguments to the contrary (Br. 26-28) are derivative of her flawed arguments that the State lacks Article III standing in that they reflect her failure to appreciate that the eligibility determination, and the initiation of proceedings under Part 291, have in-

flicted a concrete and immediate injury upon the State. According to the Secretary (Br. 27), the Fifth Circuit's reasoning is wrong because "New Mexico can choose whether or not to participate in the Secretarial Procedures with no threat of penalties either way." That is false: the harm to the State's bargaining position and the Secretary's interference with the State's negotiations are penalty enough, but the threatened penalty from nonparticipation is the imposition of Secretarial Procedures that the State has had no opportunity to influence. The Assistant Secretary recognized that reality when he said that he expected the eligibility determination to "encourag[e]" the State to return to the bargaining table. S.A. 2. The State can hardly be expected to ignore a process that will culminate in the imposition of Secretarial Procedures on it.

Fourth, adjudication of this case now will promote effective administration by clarifying the limits of the Secretary's authority. The Secretary objects (Br. 26) that considering the State's claims now will lead to "judicial review on a piecemeal basis." The issue in this case, however, is a fundamental threshold question of the Secretary's jurisdiction to conduct proceedings under Part 291. It is appropriate to

resolve that question now because the existence of those proceedings is itself causing hardship. *See HRI, Inc.* v. *EPA*, 198 F.3d 1224, 1237 (10th Cir. 2000) (explaining that resolution of an agency's jurisdiction "would certainly promote effective enforcement and administration by the agency").

The Secretary also suggests (Br. 26) that she might never issue Secretarial Procedures, noting that in several prior cases in which she found tribes to be eligible under Part 291, no procedures were ultimately issued. In several of those cases, the imposition of Secretarial Procedures became unnecessary because the parties reached an agreement. As the district court correctly observed, the Secretary's track record simply demonstrates "that the Part 291 regulations are working exactly as designed—that is, encouraging States to compact with Tribes where before they were not." App. 57. In other words, it demonstrates the reality that the eligibility determination will have an immediate effect on the State.

III. The Part 291 regulations are invalid

A. The regulations are contrary to the unambiguous language of the statute

The Part 291 regulations are invalid because they are directly contrary to the unambiguous statutory text. As the Supreme Court observed in *Seminole Tribe*, Section 2710(d)(7) is unusually clear: "Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right." 517 U.S. at 74. The Part 291 regulations, however, establish a remedial scheme that differs from that of the statute in several key ways.

First, the regulations do not protect the right of a State to take a good-faith negotiating position that results in a bargaining impasse. The statute provides that before any remedial process can begin, the court must find that the State violated its obligation to negotiate in good faith; if the State has acted in good faith, the court may proceed no further. 25 U.S.C. § 2710(d)(7). The regulations, by contrast, require no such finding. 25 C.F.R. § 291.3; *see* Class III Gaming Procedures, 64 Fed. Reg. at 17,537 ("The final regulation eliminates the requirement that the Secretary make a finding on the 'good faith' issue."). Instead, the State's assertion of immunity in litigation is

sufficient to permit the Secretary to initiate proceedings. 25 C.F.R. § 291.3.

Second, the regulations do not protect the right of the State to a neutral, court-appointed mediator. Under IGRA, if the State and the tribe have failed to reach an agreement within 60 days of being ordered to do so, the court must appoint a mediator, who will select from each side's "last best offer for a compact" the one that "best comports with" the statute. 25 U.S.C. § 2710(d)(7)(B)(iv). Under the regulations, by contrast, the Secretary may appoint the mediator. 25 C.F.R. § 291.9(b). While the regulations subject the mediator to a minimal conflict-of-interest prohibition, *id.* § 291.9(a), they do nothing to insulate him or her from the political influence that can be expected to result from appointment by the Secretary (who owes a trust obligation to the tribe), rather than by an Article III judge (who does not).

Third, the regulations grant the Secretary a power not granted by the statute: the power to reject a mediator's proposed compact. Under the statute, if the State consents to the mediator's proposed compact, then it will be treated as a tribal-state gaming compact. 25 U.S.C. § 2710(d)(7)(B)(vi). If the State does not consent, the Secre-

tary is to prescribe gaming procedures, but they must be "consistent with the proposed compact selected by the mediator." *Id.* § 2710(d)(7)(B)(vii). Under the regulations, however, the Secretary is not bound to adopt the proposal that the mediator selects—whether or not the State has agreed to it—and may instead prescribe "appropriate procedures" of her own devising. 25 C.F.R. § 291.11(c). Indeed, the regulations contemplate that the Secretary may reject a mediator's selection for violating "the trust obligations of the United States to the Indian tribe." *Id.* § 291.11(b)(5). The "trust obligations of the United States" are extraordinarily broad and ill-defined. *See generally United States* v. *Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323-25 (2011). By adding that term to the regulations, the Secretary allowed herself far more discretion to disapprove a mediator's compact than Congress provided in IGRA.[6]

Fourth, the regulations contravene the provision of the Johnson Act, 15 U.S.C. § 1175, permitting a tribe to operate slot machines—typically the most lucrative gaming at any casino—only under a tribal-

[6] IGRA does not assign the Secretary any role in the compacting process, or in court-ordered mediation after a finding of bad faith, except if a State refuses to consent to a mediator's proposed compact. 25 U.S.C. § 2710(d)(7)(B)(vii).

State compact. While the Johnson Act makes it unlawful "to manufacture, recondition, repair, sell, transport, possess, or use any gambling device . . . within Indian country," *id.* § 1175, IGRA states that the statute "shall not apply to any gaming conducted under a Tribal-State compact that—(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and (B) is in effect," *id.* § 2710(d)(6). The Part 291 regulations do not establish a compact, but rather Secretarial Procedures, which are not "entered into under" Section 2710(d)(3). Operating gambling devices under Secretarial Procedures promulgated under the Part 291 regulations would violate the Johnson Act.

The Secretary (Br. 53-54) invokes the canon that statutes are to be construed liberally to favor Indians, but as she acknowledges, that statute applies only to the resolution of statutory ambiguity. *See Negonsott* v. *Samuels*, 507 U.S. 99, 110 (1993) (courts do not "resort to [the Indian] canon of statutory construction" when a statute is unambiguous); *accord Cabazon Band of Mission Indians* v. *Nat'l Indian Gaming Comm'n*, 14 F.3d 633, 637 (D.C. Cir. 1994). In light of the clear differences between the remedial scheme provided by Congress

and the one fashioned by the Secretary, no relevant ambiguity exists. The regulations contravene the statute.

B. The regulations are not entitled to *Chevron* deference because the Secretary lacks authority to issue rules implementing IGRA

The Secretary devotes much of her brief to arguing that the regulations are entitled to deference under *Chevron USA Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), and should be upheld on that basis. But the Secretary's regulations are not entitled to *Chevron* deference, which is applicable only when "Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States* v. *Mead Corp.*, 533 U.S. 218, 226-27 (2001). The Secretary has no delegated authority to make rules under IGRA. That is itself a sufficient reason for invalidating the regulations, and at a minimum, it is a basis for declining to apply *Chevron*.[7]

[7] In the district court, the State discussed the Secretary's lack of rule-making authority as it relates to the applicability of *Chevron*, but it did not expressly argue that the lack of authority provides an independent basis for invalidating the regulations. N.M. Mot. for Summ. J., Dist. Ct. Dkt. No. 39, at 16 n.4; N.M. Opp. to Defs.' Mots. for Summ. J., Dist. Ct. Dkt. No. 41, at 16-18. Nevertheless, the Secretary's lack of authority is

In IGRA, Congress created the NIGC and vested that agency—not the Secretary—with rulemaking authority to implement the statute. Specifically, 25 U.S.C. § 2706(b)(10) grants the NIGC the power to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter."

The Secretary argues (Br. 48) that she has broad, general authority "to promulgate the regulations necessary to effectuate her own role under Section 2710." But that is not correct. Before IGRA was enacted, the Secretary had general statutory authority to implement statutes pertaining to Indians. *See* 25 U.S.C. § 9 (authorizing the President to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs"); *id.* § 2 (further delegating that authority to the Commissioner of Indian Affairs). Congress expressly abrogated that authority as it relates to IGRA: "[T]he Secretary shall continue to exercise those authorities vested in the Secretary on the day before [the enactment of the statute] relating to supervision of Indian gaming *until such time as the*

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apparent from the record, and it is an alternative ground for affirming the judgment below. *See Llewellyn*, 711 F.3d at 1185.

Commission is organized and prescribes regulations." *Id.* § 2709 (emphasis added).

The Commission has long since promulgated regulations under IGRA, and it began to do so well before the Secretary promulgated the Part 291 regulations. *See generally* 25 C.F.R. Part 501 *et seq*. If the Secretary could continue to exercise authority, concurrent with that of the Commission, even after the Commission was organized and began to prescribe regulations, the "until" clause of Section 2709 would be superfluous. *See TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks and citation omitted). Accordingly, in the context of IGRA, the Secretary's general rulemaking authority is trumped by the specific allocation of authority to the Commission. *See Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407 (1991) ("A specific provision controls over one of more general application."). Section 2709 leaves no role for the Secretary to make rules to implement IGRA.

That interpretation of Section 2709 is reinforced by the next sentence of the provision, which states that "[t]he Secretary shall provide staff and support assistance to facilitate an orderly transition to regulation of Indian gaming by the Commission." 25 U.S.C. § 2709. It would make little sense to speak of a "transition" in regulatory authority if the Secretary were to continue to exercise such authority. Similarly, the title of the section—"Interim authority to regulate gaming"—indicates that the Secretary's authority is just that: interim, not permanent. *See INS* v. *Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text.").

This Court has previously recognized that "neither the Secretary nor the Department of the Interior in general is charged with administering IGRA." *Sac and Fox Nation of Mo.* v. *Norton*, 240 F.3d 1250, 1265 (10th Cir. 2001). In *Sac and Fox Nation*, the Court held because the Commission has been granted "the exclusive regulatory authority for Indian gaming conducted pursuant to IGRA," the Secretary's interpretations of the statute are not entitled to deference. *Id.* Significantly, while Congress responded to *Sac and Fox Nation*, it did so in a limited

way that addressed only the Secretary's authority to determine whether a parcel of land is a "reservation" under IGRA (the specific issue presented in the case). *See* Department of the Interior and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, § 134, 115 Stat. 414 (2001) (specifying that the "authority to determine whether a specific area of land is a 'reservation' for purposes of [IGRA] was delegated to the Secretary of the Interior"). And in a subsequent statute, Congress clarified that that nothing in the amendment "affects the decision . . . in Sac and Fox Nation v. Norton, 240 F.3d 1250 (2001)." Department of the Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, § 131, 117 Stat. 1241 (2003). Those acts demonstrate congressional acquiescence in this Court's holding that the Secretary does not otherwise enjoy enforcement authority under IGRA.

The Secretary points out that she, not the Commission, has "promulgated regulations governing her approval or disapproval of negotiated tribal-state gaming compacts." Br. 48 (citing 25 C.F.R. Part 293). Unlike the regulations at issue here, the cited regulations do not purport to be an exercise of the Secretary's delegated lawmaking au-

thority. Instead, they merely set out "procedures" that "tribes and States must use when submitting Tribal-State compacts" and that "[t]he Secretary will use for reviewing such Tribal-State compacts." 25 C.F.R. § 293.1. As such, they are "rules of agency organization, procedure, or practice," and they do not establish that the Secretary has the authority to promulgate substantive rules implementing IGRA. 5 U.S.C. § 553(b)(3)(A).

The Secretary contends (Br. 48 n.13) that "the grant of rulemaking authority to the NIGC ultimately falls under the control of the Secretary of the Interior," but that is incorrect. Although two members of the Commission are appointed by the Secretary, 25 U.S.C. § 2704(b)(1)(B), they are *not* subject to removal by her. Instead, all of the Commission's members serve fixed three-year terms and may be removed only by the President, and only for good cause. *Id.* § 2704(b)(6). The Secretary's effort to exercise rulemaking power that rightfully belongs to the Commission thus subverts Congress's intent to commit that power to an agency that is independent of secretarial control.

C. Even under *Chevron*, the regulations cannot survive

Even if *Chevron* were applicable, it would not save the regulations. Because the regulations contradict the unambiguous text of the statute, they fail to survive step one of *Chevron*. And even if the statute were deemed ambiguous, the regulations should be rejected at step two because they represent an unreasonable interpretation of the statute. *See* 467 U.S. at 842.

1. In applying step one of *Chevron*, the appropriate baseline is the statutory text, not the "gap" supposedly created by *Seminole Tribe*

The Secretary makes no attempt to argue that the regulations represent an interpretation of anything in the statute as Congress wrote it. Instead, she argues (Br. 31) that the subsequent decision in *Seminole Tribe* "result[ed] in a statutory gap" that she is free to fill. That argument lacks merit.

a. Under *Chevron*, a court must "first determine whether the statutory text is plain and unambiguous. If it is, [the court] must apply the statute according to its terms." *Carcieri* v. *Salazar*, 555 U.S. 379, 387 (2009) (citation omitted); *see Chevron*, 467 U.S. at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that

intention is the law and must be given effect."). Thus, as the Fifth Circuit correctly concluded in *Texas*, "any delegation-engendering gap contained in a statute, whether implicit or explicit, must have been 'left open *by Congress*,' not created after the fact by a court." 497 F.3d at 503 (quoting *Chevron*, 467 U.S. at 866); *accord Hernandez-Carrera* v. *Carlson*, 547 F.3d 1237, 1246 (10th Cir. 2008) (deference is appropriate only "[w]hen *Congress* leaves a gap within a statute administered by an agency") (emphasis added).

While *Seminole Tribe* altered the way the statute operates in certain cases, it did not alter the statute's unambiguous language. And as the Supreme Court has observed, "unambiguous language" constitutes "a clear sign that Congress did *not* delegate gap-filling authority to an agency." *United States* v. *Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843 (2012) (plurality opinion). The *Seminole Tribe* decision is thus no different from any other event that occurs after a statute is enacted and that causes the statute to operate differently than it did at the time of enactment. Such an event might be a reason for Congress to amend the statute, but it is not a basis for either an agency or the courts to ignore the statute's unambiguous language. As the Su-

preme Court recently explained, "the power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration," but it emphatically "does not include a power to revise clear statutory terms that turn out not to work in practice." *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2446 (2014); *see Lamie* v. *U.S. Trustee*, 540 U.S. 526, 538 (2004) ("Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding.").

b. The Secretary suggests (Br. 37) that Congress "did not intend or foresee" the result of *Seminole Tribe*. The Secretary fails to appreciate that the role of the court is not to speculate as to what Congress might have been thinking, but rather to review the language Congress actually enacted to determine whether there is ambiguity. *See Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."). Here, there is none.

In any event, the Secretary's factual premise is erroneous because courts presume that "Congress is aware of existing law when it passes legislation," *Hall* v. *United States*, 132 S. Ct. 1882, 1889 (2012) (internal quotation marks omitted), and, as the Supreme Court observed in *Seminole Tribe*, "[i]t was well established in 1989," and therefore in 1988, when IGRA was enacted, "that the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III." 517 U.S. at 63. As of 1988, the Court had upheld a congressional abrogation of Eleventh Amendment immunity in only one circumstance—when Congress enacted legislation to effectuate the provisions of the Fourteenth Amendment. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976). The first time the Court upheld an abrogation of state sovereign immunity under Congress's Article I power was 1989, the year *after* IGRA was enacted. *See Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989). That decision was overruled in *Seminole Tribe*, which reaffirmed the understanding of the Eleventh Amendment that prevailed at the time IGRA was passed. Thus, the result in *Seminole Tribe*

would hardly have been shocking or unforeseeable to the Congress that enacted IGRA.

c. The Secretary relies (Br. 41) on *Pittston Co.* v. *United States*, 368 F.3d 385 (4th Cir. 2004), and cases following it, but those cases do not support her argument. *Pittston* involved the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. § 9701 *et seq.*, which required employers to pay premiums into a combined fund to cover retiree benefits. The statute provided a mechanism for determining which employer was responsible for paying premiums for a given retiree. In *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), the Supreme Court invalidated a provision of the Coal Act that assigned liability to an employer that had transferred its coal operations to a subsidiary and ceased to be involved in the industry decades before Congress passed the Act. 524 U.S. at 516. A plurality of the Court determined that the statute's allocation scheme effected an uncompensated taking because of the severe retroactive liability it imposed on the employer. *Id.* at 532-34.

In response to *Eastern Enterprises*, the Commissioner of Social Security, who was charged with enforcing the statute, had to deter-

mine how to reassign retirees who would have been assigned to employers like Eastern (as to whom application of the statute would be unconstitutional). She chose to follow the terms of 26 U.S.C. § 9706(a), "[t]he provision of the Coal Act [that] provides the method of assigning retirees to signatory coal operators." *Pittston*, 368 F.3d at 402. Recognizing that assignments to companies like Eastern Enterprises "were invalid from the beginning, she had to start over to assign the beneficiaries to comport with the terms of the statute as well as the Constitution," and she did so "exactly as she was instructed to do by § 9706(a)(3) of the Coal Act." *Id.* at 403. The Fourth Circuit upheld the Commissioner's approach after concluding the Commissioner had "followed the Coal Act's assignment structure to the letter." *Id.* As Judge Jones explained in *Texas*, the decision in *Pittston* "does not support the creation of a novel remedial scheme never envisioned by Congress and specifically contradictory of Congress's expressed intent concerning the scope of secretarial rulemaking." 497 F.3d at 505 n.13.

2. Even if *Seminole Tribe* created a "gap," the Part 291 regulations are not a permissible way to fill it

Even if the appropriate baseline for the Court's *Chevron* analysis were the statute without the provision invalidated in *Seminole Tribe*, rather than the statute as enacted by Congress, the Secretary still would not prevail because the statute does not contain a "gap" that the Secretary is authorized to fill.

a. There is nothing ambiguous about a statute that requires States to negotiate in good faith but that provides a judicial mechanism for enforcing that obligation that is effective only when a State chooses to waive its immunity. Congress often enacts statutes with no private right of action at all, and when it does so, an agency is not free to create one by regulation. *Alexander* v. *Sandoval*, 532 U.S. 275, 291 (2001). When Congress does choose to establish an enforcement scheme that gives a party "direct recourse to federal court," the Supreme Court has held that an administrative agency has no authority "to resolve ambiguities surrounding the scope of [the party's] judicially enforceable remedy." *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 650 (1990). It follows *a fortiori* that when Congress has provided a right of

action, an agency does not have authority to create from whole cloth an alternative enforcement scheme simply because it deems the statutory right of action insufficiently effective. That the mechanism is not perfectly effective does not mean that the statute is ambiguous; it simply means that it reflects a balance of competing interests. *See Texas*, 497 F.3d at 506 ("In IGRA, Congress struck a finely-tuned balance between the interests of the states and the tribes[.]") (internal quotation marks omitted).

The fundamental defect in the Part 291 regulations is that they are not tied to anything in the text of the statute—whether as enacted or as modified by *Seminole Tribe*. Whatever the scope of the Secretary's interpretive discretion, it cannot extend to the creation of a remedial mechanism that does not even arguably represent an interpretation of a textual ambiguity. And any ambiguity that may exist in IGRA is not one that can be resolved in such a way as to permit these regulations. *See Home Concrete & Supply*, 132 S. Ct. at 1846 n.1 (Scalia, J., concurring in the judgment) ("It does not matter whether the word 'yellow' is ambiguous when the agency has interpreted it to mean 'purple.'").

Numerous circuits have held that statutory silence, or the mere absence of a prohibition, does not mean that Congress has delegated gap-filling authority to the agency. *Texas*, 497 F.3d at 502-03; *see Prestol Espinal* v. *Attorney General*, 653 F.3d 213, 221 (3rd Cir. 2011) ("[A] statute's silence on a given issue does not confer gap-filling power on an agency unless the question is in fact a gap—an ambiguity tied up with the provisions of the statute." (internal quotation marks omitted)); *Chamber of Commerce* v. *NLRB*, 721 F.3d 152, 160 (4th Cir. 2013); *Sierra Club* v. *EPA*, 311 F.3d 853, 861 (7th Cir. 2002). Instead, "[i]t is only legislative intent to delegate such authority that entitles an agency to advance its own statutory construction for review under the deferential second prong of *Chevron*." *NRDC* v. *Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993) (internal quotation marks and citation omitted). IGRA reveals no such intent.

b. The Secretary complains (Br. 33) that the district court "focused only on IGRA's provisions concerning process, rather than those addressing policies and duties." The premise of her argument appears to be that IGRA somehow guarantees every tribe the ability to engage in class III gaming. That is incorrect. Under the statute, a tribe may

not engage in gaming at all if gaming is not permitted by the laws of the State. 25 U.S.C. § 2710(d)(1)(B). Nor may it engage in class III gaming if the State negotiates with it in good faith but simply fails to reach an agreement on a compact. While the Secretary asserts (Br. 35) that "[t]he legislative history of IGRA supports the conclusion that Congress unambiguously intended tribes to have access to gaming procedures even if a State refused to agree to a compact," the reality is just the opposite. The Senate Report explained that IGRA would require tribes "to give up any legal right they may now have to engage in class III gaming if: (1) they choose to forgo gaming rather than to opt for a compact that may involve State jurisdiction; or (2) they opt for a compact and, *for whatever reason*, a compact is not successfully negotiated." S. Rep. No. 100-446, at 14 (1988) (emphasis added).

In any event, even if it were true that "Congress did not intend to give States the power through litigation to prevent tribes from obtaining gaming procedures" (Br. 35), the statute does not do that, even after *Seminole Tribe*. In cases where a State does not waive its immunity, the Secretary may sue on the tribe's behalf under Section 2710(d)(7). *See Arizona* v. *California*, 460 U.S. 605, 614 (1983) (State

may not assert sovereign immunity against the United States); *United States* v. *Minnesota,* 270 U.S. 181, 193-94 (1926) (United States has standing to sue on behalf of Indian tribes). Congress' remedial scheme therefore remains fully effective.

c. The Secretary's understanding of the "gap" created by *Seminole Tribe* is inconsistent with *Seminole Tribe* itself. In that case, after the Court declared that Congress could not abrogate state sovereign immunity under the Indian Commerce Clause, the tribe sought to enforce the statutory duty to negotiate in good faith by means of an action against the governor under *Ex Parte Young*, 209 U.S. 123 (1908). The Court declined to allow such an action, noting that *Ex Parte Young* actions are inappropriate "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right." 517 U.S. at 74. Crucially, the Court held that Section 2710(d)(7) provides just such a scheme. "[T]he intricate procedures set forth in that provision," it said, "show that Congress intended therein not only to define, but also to limit significantly, the duty imposed by § 2710(d)(3)." *Id.* The Court acknowledged, of course, that Congress lacked the authority to abrogate state sovereign immun-

ity, but it deemed that fact irrelevant to the interpretation of the statute: "[T]he fact that Congress chose to impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter under § 2710(d)(3)." *Id.* at 75-76. If an effort "to rewrite the statutory scheme" is to be made, the Court concluded, "it should be made by Congress." *Id.* at 76.

The Court's reasoning is controlling here. Even though Section 2710(d)(7) cannot establish jurisdiction over nonconsenting States, it still makes clear the limitations on the duty to negotiate that Congress imposed in Section 2710(d)(3). The Secretary's regulations disregard those limitations by replacing the remedial scheme that Congress enacted with a different scheme of the Secretary's devising. The Secretary lacks the authority to do that. *See United States* v. *Jackson*, 390 U.S. 570, 580 (1968) ("It is one thing to fill a minor gap in a statute," but "[i]t is quite another thing to create from whole cloth a complex and completely novel procedure . . . for the sole purpose of rescuing a statute from a charge of unconstitutionality."). If it is necessary to

rewrite the statute in light of *Seminole Tribe*, the rewriting must be done by Congress, not the Secretary.

d. The Secretary notes (Br. 43) that the Eleventh and Ninth Circuits "expressed the view that the Secretary would have *some* authority to provide relief in this unanticipated situation." As she acknowledges, however, both of the cited decisions preceded the adoption of the Part 291 regulations. The Eleventh Circuit merely suggested, in dicta, that "[t]he Secretary . . . *may* prescribe regulations governing class III gaming on the tribe's lands." *Seminole Tribe of Fla.* v. *Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994) (emphasis added), *aff'd*, 517 U.S. 44 (1996). The regulations were not promulgated until five years later. The Ninth Circuit was likewise without the benefit of the final regulations and did not interpret the statutory text in any case. *United States* v. *Spokane Tribe of Indians*, 139 F.3d 1297, 1302 (9th Cir. 1998). Neither court was confronted with the regulations that have now been promulgated, and neither court considered a challenge to their validity. The only court of appeals to rule on such a challenge held the regulations to be invalid. *See Texas*, 497 F.3d at 491. This Court should follow its reasoning.

3. The canon of constitutional avoidance resolves any ambiguity in the statute

Even if the text of IGRA were ambiguous, the Part 291 regulations still would not survive step one of *Chevron*. Instead, as the Supreme Court has explained, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). In other words, the canon of constitutional avoidance is one of the "traditional tools of statutory construction" that courts apply in determining whether Congress has left a gap for the agency to fill. *Chevron*, 467 U.S. at 843 n.9. Here, the regulations are constitutionally defective for two independent reasons; at a minimum, they raise serious constitutional questions. Any interpretation of IGRA that permitted the regulations would similarly pose constitutional difficulties. To avoid those difficulties, this Court should construe the statute not to permit the Secretary's regulations.

First, the regulations directly violate the Eleventh Amendment. The Supreme Court recognized in *Seminole Tribe* that Congress may

not abrogate a State's sovereign immunity from suit at the behest of a tribe. 517 U.S. at 76. The same principles of sovereign immunity protect the State from proceedings under Part 291. In *South Carolina State Ports Authority*, the Court held that the Eleventh Amendment applies not only to adjudication in federal court but also to proceedings before an administrative agency that are designed to substitute for judicial adjudication. 535 U.S. at 768-69. As the Court explained, "if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency." *Id.* at 760. That is just what Part 291 provides. Indeed, the Secretary herself describes the regulations (Br. 1) as a "similar . . . procedure" to the one provided in Section 2710(d)(7)—albeit one that is even less protective of the State because it provides no opportunity to demonstrate good faith. It is similarly offensive to the Eleventh Amendment.

Second, even if Congress had the authority to compel States to submit to compulsory adjudication before the Secretary, it may not use

the threat of such adjudication to coerce them into surrendering their Eleventh Amendment immunity from litigation in court. The Supreme Court has held that the decision to waive sovereign immunity must be "altogether voluntary on the part of the sovereignty." *Coll. Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (quoting *Beers* v. *Arkansas*, 61 U.S. (20 How.) 527, 529 (1858)). For that reason, the Court held in *College Savings Bank* that Congress may not employ a theory of "constructive waiver" under which a State's immunity will be deemed "waived" if the State engages in specified conduct in a field subject to congressional regulation. *Id.* at 680. In reaching that conclusion, the Court looked to waiver principles applicable "in the context of *other* constitutionally protected privileges." *Id.* at 681. Specifically, drawing an analogy to the Court's cases involving conditional grants to States, the Court observed that "in cases involving conditions attached to federal funding, we have acknowledged that 'the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion.'" *Id.* at 687 (quoting *South Dakota* v. *Dole*, 483 U.S. 283, 211 (1987)). The Court concluded that "where the constitutionally

guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity." *Id.*

As in *College Savings Bank*, the regulations at issue here have passed "the point of coercion" to induce a waiver of state sovereign immunity. The regulations were adopted with the express purpose of "respon[ding]" to *Seminole Tribe* by eliminating what the Secretary perceived to be an undesirable "State veto over IGRA's dispute resolution system[.]" 64 Fed. Reg. at 17,536. And they have the effect of coercing States into waiving immunity when sued by a tribe under 25 U.S.C. § 2710(d)(7). If a State is sued under that provision and waives its immunity to allow the litigation to proceed, it will be subject to the imposition of gaming procedures only if the court finds that the State has not negotiated in good faith, and even then, the procedures will be chosen by a court-appointed mediator from one of the proposals submitted by the parties. The Secretary's regulations, by contrast, do not provide those protections. They allow the imposition of Secretarial Procedures without any finding of bad faith; they allow procedures to

be selected by a mediator who is chosen by the Secretary, not by an Article III judge; and they do not restrict the procedures to the proposals of the parties. If the regulations were valid, there would be no reason for a State *not* to waive its immunity: a State would be better off litigating under Section 2710(d)(7), with the safeguards that that provision guarantees, than placing itself at the mercy of the Secretary. The regulations are therefore "properly viewed as a means of pressuring the States to accept policy changes"—namely, waiving their sovereign immunity. *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2604 (2012). Because the purpose and effect of the regulations is to pressure the States into surrendering a constitutionally guaranteed prerogative, they are unconstitutional.

In the district court, the Secretary argued that the regulations cannot be impermissibly coercive because States never had a right to regulate gaming on tribal lands in the first place but rather were granted such a right only as a matter of congressional grace. That is incorrect. No State has a pre-existing entitlement to the benefits of federal spending, so on the Secretary's theory, conditional grants could never be coercive. The Supreme Court has held to the contrary. *See*,

e.g., *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2604. In addition, if the Secretary's theory were correct, Section 2710(d)(7) could be viewed as a "waiver" of a state's Eleventh Amendment immunity in exchange for the federally provided benefit of being allowed to participate in negotiations about tribal gaming. But not even the dissenters in *Seminole Tribe* thought that Section 2710(d)(7) could be upheld on that basis.

Congress granted the State a statutory right to participate in the regulation of class III gaming within its borders and to participate in the compacting process. The Part 291 regulations deny the State its statutory right unless it relinquishes its constitutional right to immunity from suit. The Constitution's structural guarantees may not be so easily circumvented.

4. The Part 291 regulations represent an unreasonable interpretation of IGRA

Even if the statute were ambiguous, the regulations would still be invalid because they are not a reasonable interpretation of the statute. At *Chevron* step two, "the question for the court is whether the agency's interpretation is based on a permissible construction of the statute . . . in light of its language, structure, and purpose." *Am. Fed'n of Labor & Cong. of Indus. Orgs.* v. *Chao*, 409 F.3d 377, 384 (D.C. Cir.

2005) (internal quotation marks omitted). In *Texas*, Judges Jones and King both concluded that the Part 291 regulations are not a permissible construction of IGRA. *Compare Texas*, 497 F.3d at 508 (Jones, J.) ("The role the Secretary plays and the power he wields under the Procedures bear no resemblance to the secretarial power expressly delegated by Congress under IGRA."), *with id.* at 512 (King, J., concurring in part and concurring in the judgment) ("[T]he Secretary's method fails to preserve the core safeguards by which state interests are protected in Congress's 'carefully crafted and intricate remedial scheme.'") (citations omitted).

As explained above, the regulations establish a remedial scheme that differs from that of the statute in several respects. *See* pp. 37-41, *supra*. For that reason, the Secretary is wrong to suggest (Br. 51) that Part 291 "does not jettison any of the provisions of Section 2710(d)(7)" but merely provides a way to overcome a State's assertion of immunity. If the Secretary truly has the authority to respond to *Seminole Tribe* by creating a new remedial scheme, she should create one that mirrors the statutory scheme as closely as possible.

Of Part 291's many departures from the statute, perhaps the most significant is the abandonment of any requirement that the State be found not to have negotiated in good faith. The regulations undermine, rather than promote, one of the key purposes of IGRA—guaranteeing that gaming will be governed by compacts negotiated between States and tribes. Section 2710(d)(7) is a narrow exception to the regime of freely negotiated compacts, and it is intended as a safeguard to protect tribes against recalcitrant States who negotiate in bad faith. The regulations, which require no finding of bad faith, turn the statute on its head by transforming that narrow exception into a mechanism that tribes can use to coerce even cooperative States. Thus, even accepting the Secretary's theory that regulations are somehow necessary to restore the "balance" between States and tribes that Congress intended, that "balance" could be better maintained by regulations that maintained the statute's requirement of a finding of bad faith. Indeed, it could be maintained without regulations at all if the United States were to bring suit on behalf of tribes that believe States have negotiated in bad faith.

D. This Court need not consider the validity of other provisions of IGRA

The Pueblo devotes most of its brief to arguing (Br. 24) that various provisions of IGRA that were not challenged in *Seminole Tribe* must nevertheless be struck down in light of that decision in order "to allow the Pueblo to proceed with the governance of Class III gaming." Those arguments are misdirected. The State's complaint sought a declaration that the Part 291 regulations are invalid and an injunction against their application, App. 21, and that is the relief the district court granted, S.A. 73-74. If the Pueblo believes that *Seminole Tribe* requires the invalidation of more provisions of IGRA than were addressed in that case, it can bring a separate action for a declaratory judgment addressing that issue. The Pueblo's arguments are outside the scope of its intervention in this case, which the district court limited to "the purely legal question of the Secretarial Procedures' validity." S.A. 72.

On the merits, the Pueblo's arguments rest on the same flawed premises that underlie the Secretary's reasoning: namely, that Congress intended to guarantee tribes the ability to conduct class III gaming, that *Seminole Tribe* represented an unforeseeable alteration to the

balance Congress struck, and that the Part 291 regulations are necessary to restore that balance. As the district court correctly observed, however, IGRA "provides a way for a tribe to obtain a compact" even in cases where a State will not waive its constitutionally guaranteed immunity—namely, the United States can sue on the tribe's behalf as its trustee. App. 65. Thus, the immunity recognized in *Seminole Tribe* "does not render the entirety of IGRA 'incapable of functioning independently' from its jurisdiction-granting clause." *Id.* at 27-28 (citation omitted). This Court should not invalidate other provisions of IGRA.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

s/ Eric D. Miller

Jennifer A. MacLean
JMacLean@perkinscoie.com
PERKINS COIE LLP
700 13th St., N.W., Suite 600
Washington, D.C. 20005
Telephone: 202.654.6200

Eric D. Miller
EMiller@perkinscoie.com
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000

Jeremiah L. Ritchie
Jeremiah.Ritchie@state.nm.us
OFFICE OF THE GOVERNOR
490 Old Santa Fe Trail, Suite #400
Santa Fe, NM 87501-2704
Telephone: 505.476.2200

May 2015

ORAL ARGUMENT REQUESTED

In light of the complexity of the statutory and constitutional issues in this case, the State of New Mexico agrees with appellants that oral argument would be of assistance to the Court.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 13,981 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that the 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 in 14-point Century Schoolbook font.

s/ Eric D. Miller
Eric D. Miller

Dated: May 6, 2015

STATUTORY ADDENDUM

Page

25 U.S.C. § 2706 provides in pertinent part:

Powers of Commission

. . . . .

(b) Monitoring; inspection of premises; investigations; access to records; mail; contracts; hearings; oaths; regulations

The Commission—

(1) shall monitor class II gaming conducted on Indian lands on a continuing basis;

(2) shall inspect and examine all premises located on Indian lands on which class II gaming is conducted;

(3) shall conduct or cause to be conducted such background investigations as may be necessary;

(4) may demand access to and inspect, examine, photocopy, and audit all papers, books, and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under this chapter;

(5) may use the United States mail in the same manner and under the same conditions as any department or agency of the United States;

(6) may procure supplies, services, and property by contract in accordance with applicable Federal laws and regulations;

(7) may enter into contracts with Federal, State, tribal and private entities for activities necessary to the discharge of the duties of the Commission and, to the extent feasible, contract the enforcement of the Commission's regulations with the Indian tribes;

(8) may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission deems appropriate;

(9) may administer oaths or affirmations to witnesses appearing before the Commission; and

(10) shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter.

25 U.S.C. § 2709 provides:

Interim authority to regulate gaming

Notwithstanding any other provision of this chapter, the Secretary shall continue to exercise those authorities vested in the Secretary on the day before October 17, 1988, relating to supervision of Indian gaming until such time as the Commission is organized and prescribes regulations. The Secretary shall provide staff and support assistance to facilitate an orderly transition to regulation of Indian gaming by the Commission.

25 U.S.C. § 2710 provides in pertinent part:

Tribal gaming ordinances

. . . . .

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that—

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711 (e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection—

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conform-

ance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of title 15 shall not apply to any gaming conducted under a Tribal-State compact that—

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates—

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

CERTIFICATE OF SERVICE

I certify that on May 6, 2015, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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

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s/ Eric D. Miller
Eric D. Miller