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Gambling-Indian Issues [3]

No. 94-12

In the Supreme Court of the United States

OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA, PETITIONER

v.

STATE OF FLORIDA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER**

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QUESTIONS PRESENTED

The Indian Gaming Regulatory Act, 25 U.S.C. 2710 (d)(7)(A)(i), provides federal courts with jurisdiction over claims by Indian Tribes that States have failed to negotiate gaming compacts in good faith. The questions presented are:

1. Whether *Ex parte Young*, 209 U.S. 123 (1908), permits a suit against the Governor of a State arising from the State's failure to negotiate (through the Governor) an Indian gaming compact in good faith.
2. Whether Congress has authority under the Constitution to abrogate a State's immunity from a suit by a Tribe for declaratory and ancillary injunctive relief arising from the State's failure to negotiate in good faith.

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INTEREST OF THE UNITED STATES

This case involves a challenge to the constitutionality of a section of the Indian Gaming Regulatory Act (IGRA) that provides for suits in federal court by an Indian Tribe arising from the failure by a State to negotiate in good faith concerning a tribal-state compact governing certain gaming on Indian land. See 25 U.S.C. 2710(d)(7)(A)(i). The Secretary of the Interior has substantial responsibilities under IGRA, including the authority to approve all tribal-state gaming compacts, to disapprove them in certain circumstances, and to prescribe gaming regulations when a Tribe and a State are unable to conclude a compact. 25 U.S.C. 2710(d)(7)(B)(vii), 2710(d)(8). In response to this

Court's invitation, the Solicitor General filed a brief at the petition stage expressing the views of the United States.

STATEMENT

1. In 1987, this Court held that neither Public Law 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, codified as amended at 18 U.S.C. 1162 and 28 U.S.C. 1360) nor the Organized Crime Control Act of 1970 (18 U.S.C. 1955) authorized California to enforce its gaming laws against Indian Tribes operating bingo and poker games on their reservations, because the relevant state gaming laws were "civil/regulatory" rather than "criminal/prohibitory" in nature. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). That decision left much Indian gaming unregulated by the States. Pet. App. 3a.¹ At the same time, federal law did not provide "clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. 2701(3). In an attempt to fill that void, Congress in 1988 enacted the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. 2701 *et seq.*

IGRA's purpose is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1). Congress simultaneously sought to "shield [Indian gaming] from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players." 25 U.S.C. 2702(2). To fulfill those

¹ See also 25 U.S.C. 2701(5) (finding that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.").

purposes, IGRA divides gaming into three classes, each of which is regulated differently.

Class I gaming, over which Indian Tribes exercise exclusive regulatory control, consists of social games for prizes of minimal value and traditional games engaged in as part of tribal ceremonies. 25 U.S.C. 2703(6), 2710(a)(1). Class II gaming consists of bingo, other games similar to bingo (when played in the same location), and non-banking card games. 25 U.S.C. 2703(7). Indian Tribes maintain regulatory jurisdiction over class II gaming, see 25 U.S.C. 2710(a)(2), subject to the supervision of the National Indian Gaming Commission (an entity within the Department of the Interior). 25 U.S.C. 2704. An Indian Tribe may engage in class II gaming if: (1) the State in which the gaming is located "permits such gaming for any purpose by any person, organization or entity," (2) such gaming is not prohibited on Indian lands by federal law, and (3) the gaming is conducted pursuant to a tribal ordinance that satisfies specified statutory requirements and is approved by the Chairman of the Commission. 25 U.S.C. 2710(b).

Class III gaming, at issue here, is gaming that does not fall within class I or class II, and includes banking card games, casino games, slot machines, horse racing, dog racing, jai alai, and lotteries. 25 U.S.C. 2703(8); 25 C.F.R. 502.4. Class III gaming is lawful only if it is located in a State that permits such gaming, is authorized by a tribal ordinance that satisfies the requirements for a class II ordinance, and is "conducted in conformance with a Tribal-State compact." 25 U.S.C. 2710(d)(1). A tribal-state compact may address such matters as standards for the conduct of the gaming, the application of state or tribal criminal and civil laws, assessments to defray the costs of state regulation, taxation by the Tribe, and remedies for breach of contract. 25 U.S.C. 2710(d)(3)(C). The Secretary of the Interior is authorized to approve any tribal-state

compact and may disapprove such a compact only if it violates IGRA, any other provision of federal law, or the trust obligations of the United States to Indians. 25 U.S.C. 2710(d)(8).

To facilitate the formation of a tribal-state compact, IGRA provides that, upon request by the Tribe, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. 2710(d)(3)(A). Congress also provided for judicial consideration of a Tribe's allegation that a State has failed to fulfill that responsibility. Specifically, "[t]he United States district courts shall have jurisdiction over * * * 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 [regulating class III gaming] * * * or to conduct such negotiations in good faith." 25 U.S.C. 2710(d)(7)(A)(i). In such a suit, the Tribe must initially introduce evidence that a tribal-state compact has not been concluded and that the State did not respond to the Tribe's request to negotiate or did not respond in good faith. 25 U.S.C. 2710(d)(7)(B)(ii). Once such evidence is introduced, "the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith." *Ibid.* In determining whether a State has negotiated in good faith, the district court may consider such factors as the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming. 25 U.S.C. 2710(d)(7)(B)(iii)(I). A State's demand for taxing authority is evidence of bad faith. 25 U.S.C. 2710(d)(7)(B)(iii)(II).

If the district court finds that the State has failed to negotiate in good faith, "the court shall order the State and the Indian tribe to conclude such a compact within a 60-day period." 25 U.S.C. 2710(d)(7)(B)(iii). If they do not

do so, the Tribe and the State each must submit to a mediator appointed by the district court a proposed compact that represents "their last best offer." 25 U.S.C. 2710(d)(7)(B)(iv). The mediator then must select the compact "which best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court." *Ibid.* Once the mediator submits the selected compact to the State and the Tribe, the State has 60 days in which to consent to that compact. 25 U.S.C. 2710(d)(7)(B)(v) and (vi).

If the State consents to the compact selected by the mediator, it is treated as a tribal-state compact entered into by agreement. 25 U.S.C. 2710(d)(7)(B)(vi). If the State does not consent, "the mediator shall notify the Secretary [of the Interior] and the Secretary shall prescribe, in consultation with the Indian tribe, procedures [for class III gaming] * * * which are consistent with the proposed compact selected by the mediator * * *, the provisions of [IGRA], and the relevant provisions of the laws of the State." 25 U.S.C. 2710(d)(7)(B)(vii).

2. In January 1991, the Seminole Tribe of Florida wrote to the Governor of Florida requesting the State to commence negotiations for a compact governing class III gaming operations proposed by the Tribe. Pet. App. 44a. The State was willing to negotiate concerning the forms of class III gaming specifically permitted by state law: card games, raffles, and pari-mutuel wagering on dog racing, horse racing, and jai alai. The State refused, however, to negotiate over forms of gaming prohibited by state law, such as casino gambling. For that reason, negotiations broke down. *Id.* at 45a-46a.

In December 1991, the Tribe filed suit in the United States District Court for the Southern District of Florida against the State and its Governor, alleging that they had failed to conduct good faith negotiations as required by

IGRA. J.A. 18a. The Tribe specifically alleged that by refusing to negotiate concerning casino gambling, the State had breached its duty under IGRA to negotiate concerning "such gaming" as the State "permits * * * for any purpose by any person, organization or entity." 25 U.S.C. 2710(d)(1)(B). The Tribe asserted that the phrase "such gaming" should be interpreted generically rather than in a game-specific way, so that the State's allowance of some forms of class III gaming required the State to negotiate concerning all forms of class III gaming, including casino gambling. Pet. App. 54a-55a. The Tribe also asserted that Florida "permits" casino gambling because it fails to enforce its gaming laws against charities that hold casino nights. *Id.* at 61a. The Tribe sought a declaratory judgment that IGRA requires the State to negotiate concerning casino gambling; an order requiring the State, acting through the Governor, to conclude a tribal-state compact within 60 days; and appointment of a mediator to resolve any impasse. J.A. 18a-19a.

The State and the Governor filed a motion to dismiss the complaint on the ground that the Eleventh Amendment barred the Tribe's suit. Pet. App. 26a, 28a. The district court denied the motion to dismiss. It held that "Congress did in fact abrogate the States' immunity when it enacted IGRA" and that "pursuant to the Indian Commerce Clause, Congress plainly had the constitutional power to abrogate." *Id.* at 30a.

3. The court of appeals reversed the district court's order denying the motion to dismiss. Pet. App. 1a-25a. The court agreed with the district court that "Congress intended to abrogate the states' sovereign immunity," reasoning that "unless Congress intended to abrogate the states' immunity," IGRA's grant of jurisdiction over

claims that a State has not negotiated in good faith "would be of no effect." *Id.* at 14a-15a.

The court of appeals went on to hold, however, that Congress lacks power under the Indian Commerce Clause of the Constitution (Art. I, § 8, Cl. 3) to abrogate a State's immunity from suit. The court acknowledged that *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), held that Congress has the power under the Interstate Commerce Clause to abrogate a State's immunity from suit. Pet. App. 18a-20a. The court concluded, however, that *Union Gas* was distinguishable for two reasons. *Id.* at 20a-22a.

First, the court noted that although Congress's "plenary powers under the Interstate Commerce Clause * * * allow Congress to place limits on the states in order to 'maintain[] free trade among the States[,]'" * * * "the central function of the Indian commerce clause is to provide Congress with plenary power to legislate in the field of Indian affairs." Pet. App. 21a (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)). For that reason, the court concluded, "the unique abrogation power afforded Congress under the Interstate Commerce Clause in *Union Gas* cannot be extended to the Indian Commerce Clause." Pet. App. 21a. Second, the court of appeals observed that "the Court has allowed federal jurisdiction over states only when the states partake in an activity typical of private individuals." *Id.* at 22a. Viewing the negotiations contemplated by IGRA as within "the typical realm of state authority," the court concluded that "the principles of federalism and sovereign immunity exemplified in the Eleventh Amendment prevent Congress from abrogating the states' immunity." *Ibid.*

The court of appeals next held that *Ex parte Young*, 209 U.S. 123 (1908), does not permit a suit against the Governor of a State to require good faith negotiations

under IGRA. The court believed that, under IGRA, a State has discretion over the terms of a compact as well as the decision whether to negotiate, and that the *Ex parte Young* doctrine “cannot be used to compel an executive official to undertake a discretionary task.” Pet. App. 23a-24a. The court also concluded that *Ex parte Young* was inapplicable because the Tribe’s suit “is, in reality, against the state.” Pet. App. 23a, 24a. The court explained that IGRA “uniformly addresses itself to ‘the State’; not once does it impose duties or responsibilities on a particular officer of the state (e.g., the governor, the legislature, etc.)” *Id.* at 24a. The court therefore remanded with directions to dismiss the suit. *Id.* at 25a.²

SUMMARY OF ARGUMENT

A. The Tribe’s suit against the Governor is permissible under *Ex parte Young*, 209 U.S. 123 (1908). In *Ex parte Young*, the Court held that a federal court could award prospective relief to require a state official to comply with federal law. The Court has repeatedly reaffirmed that holding. In this case, the Tribe alleged that the Governor has failed to negotiate a gaming compact in good faith as

² While the appeal from the order denying the motion to dismiss the complaint was pending in the court of appeals, the district court rejected the Tribe’s claims on the merits and entered final judgment in favor of the State and its Governor. Pet. App. 43a-83a. The district court held that IGRA’s duty to negotiate is game-specific, and that the State’s operation of a lottery and its allowance of pari-mutuel wagering therefore did not require the State to bargain concerning casino gambling. *Id.* at 55a-58a. The court also held that the exercise of prosecutorial discretion not to enforce gaming laws against charities that hold casino nights does not mean that the State “permits” such gaming within the meaning of IGRA. *Id.* at 69a-75a. The Seminole Tribe has appealed that judgment, but that appeal has been stayed pending the decision by this Court on the Eleventh Amendment issue. Pet. App. 84a.

required by the Indian Gaming Regulatory Act (IGRA), and it sought declaratory and injunctive relief to require the Governor to comply with that obligation. If a federal court were to agree that the Governor had failed to negotiate in good faith as required by federal law, an award of declaratory relief to that effect and an order requiring the Governor to participate in IGRA’s narrowly tailored remedial procedures would reflect a straightforward application of *Ex parte Young*.

The court of appeals failed to rely on *Ex parte Young* on the ground that its rationale cannot be invoked to compel a discretionary act. Under IGRA, however, once a Tribe requests a State to negotiate, “the State *shall* negotiate with the Indian tribe in good faith.” 25 U.S.C. 2710(d)(3)(A) (emphasis added). That language creates a mandatory duty to negotiate in good faith.

The court also concluded that *Ex parte Young* was inapplicable because the Tribe’s suit is really against the State. But the Tribe named the Governor as a defendant and has sought relief against him. And while the State is the real party in interest, that is true in all *Ex parte Young* suits. Because a State can only negotiate through its officials, the obligation under IGRA to negotiate must be understood to fall upon the state officials who have authority under state law to negotiate. In this case, the Governor has such authority. Accordingly, under *Ex parte Young*, a suit for prospective relief may be brought against the Governor if he has not complied with his obligation to negotiate in good faith.

B. The Tribe’s suit against the State is not precluded by the Eleventh Amendment because Congress constitutionally abrogated the State’s immunity from suit. In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the Court held that Congress has the power under the Interstate Commerce Clause to authorize federal courts

to award monetary relief against the States. Congress's power to regulate Indian commerce is rooted in the same Clause as its power to regulate interstate commerce, and it is at least as broad in scope. Congress therefore also has the power under the Indian Commerce Clause to abrogate a State's immunity from suit.

The IGRA provision at issue here stands on an even firmer constitutional footing than the provision at issue in *Union Gas*. First, Congress's powers are augmented in this context by its special responsibility and authority with respect to the Indian Tribes. Second, IGRA does not authorize monetary relief. Instead, it does no more than authorize the kind of relief against the State that *Ex parte Young* authorizes against a state official. Third, IGRA affords a cause of action only to Indian Tribes. Suits brought by another sovereign do not implicate the values underlying the Eleventh Amendment to the same extent as suits by individuals. Finally, the provision at issue here is part of a broader scheme that is designed in part to enhance the States' power to regulate Indian gaming. Congress believed that granting additional authority to the States would be inequitable to the Tribes, unless the Tribes could enforce the States' obligation to negotiate in good faith.

The court of appeals sought to distinguish *Union Gas* on the ground that Congress's power to regulate Indian commerce serves different purposes than does Congress's power to regulate interstate commerce. The critical point in *Union Gas*, however, was that the States ceded a portion of their sovereignty when they gave Congress plenary power to regulate interstate commerce. In adopting the Constitution, States also ceded whatever authority they had over Indian affairs.

The court of appeals also sought to limit *Union Gas* to activities that do not fall within the traditional sphere of

state authority. But the Court in *Union Gas* did not mention that factor in its analysis, and this Court has squarely rejected such an approach in the Tenth Amendment context. In any event, negotiating a compact with a Tribe is not a traditional state activity. Historically, States have reached agreements with Tribes under federal auspices, and IGRA is consistent with that tradition.

ARGUMENT

THE ELEVENTH AMENDMENT DOES NOT PRECLUDE A SUIT BY AN INDIAN TRIBE AGAINST A STATE OR ITS GOVERNOR UNDER THE INDIAN GAMING REGULATORY ACT ARISING FROM THE STATE'S FAILURE TO NEGOTIATE A GAMING COMPACT IN GOOD FAITH

The Indian Gaming Regulatory Act (IGRA) provides that "[t]he United States district courts shall have jurisdiction over * * * 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 [regulating class III gaming] * * * or to conduct such negotiations in good faith." 25 U.S.C. 2710(d)(7)(A)(i). Relying on that provision, the Seminole Tribe filed suit against the State of Florida and its Governor alleging that they had not engaged in good faith negotiations. The Tribe sought declaratory relief and an order directing the State, through its Governor, to enter into good faith negotiations. The court of appeals held that the Eleventh Amendment precludes the Tribe's suit. That holding is incorrect. The Tribe's suit against the Governor is permissible under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and its suit against the State is

permissible because Congress has authority to abrogate the State's immunity from suit by a Tribe under IGRA.

A. The Tribe's Suit Against The Governor Is Permissible Under *Ex Parte Young*

1. The Eleventh Amendment to the Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

This Court has not interpreted the Eleventh Amendment in accordance with its literal terms. Instead, the Court has viewed the Amendment as confirmation of a broader principle: that States entered the Union with their immunity from suit intact, and the grant of judicial power in Article III to adjudicate claims against the States did not eliminate that immunity. See *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). Thus, notwithstanding the absence of a textual basis in the Eleventh Amendment, the Court has applied the principle that a State is immune from suit absent its consent in suits by citizens against their own State arising under federal law, *Hans v. Louisiana*, 134 U.S. 1 (1890), and in suits brought by sovereigns like Indian Tribes and foreign nations. *Blatchford, supra*; *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934).

When a suit is brought against a state official, a question arises whether it should be treated as a suit against the State itself. The general rule is that a suit against a state official must be treated as a suit against a State when the State is the real party in interest, *i.e.*, when the relief would operate against the State.

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 107, 109 n.17 (1984). An important exception to that rule is that sovereign immunity does not preclude a suit against a state official to secure compliance with federal law. That exception was first announced in *Ex parte Young*, 209 U.S. 123 (1908). There, the Court held that a federal court could enjoin a state Attorney General from enforcing an unconstitutional state statute. The theory of *Ex parte Young* was that an unconstitutional statute is void and therefore cannot immunize a state official from suit. *Id.* at 159-160. Because the State could not authorize the action, the officer was "stripped of his official or representative character and [was] subjected in his person to the consequences of his individual conduct." *Id.* at 160.

In *Edelman v. Jordan*, 415 U.S. 651, 663 (1974), the Court declined to extend the holding of *Ex parte Young* to suits for retroactive monetary relief. The Court reaffirmed in *Edelman*, however, that a federal court may enter an injunction that governs an official's future conduct. *Id.* at 667-668. Since *Edelman*, the Court has continued to maintain that distinction: prospective relief to secure future compliance with federal law is permissible, while retroactive monetary relief to remedy past wrongs is not. See, *e.g.*, *Puerto Rico v. Branstad*, 483 U.S. 219, 227-228 (1987); *Papasan v. Allain*, 478 U.S. 265, 276-279 (1986); *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Milliken v. Bradley*, 433 U.S. 267, 289 (1977). The rationale for that approach is that while both prospective and retroactive relief implicate Eleventh Amendment concerns, prospective relief is necessary to give life to the Supremacy Clause. *Green*, 474 U.S. at 68. Thus, "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Ibid.* On the other hand, "com-

pensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.” *Ibid.*

2. The Tribe’s suit against the Governor fits squarely within the rationale of *Ex parte Young*. The Tribe has alleged that the Governor has failed to negotiate in good faith as required by IGRA, and the Tribe has sought declaratory and injunctive relief to require the Governor to comply with that obligation. J.A. 18a-19a. Resolution of the Tribe’s claim on the merits turns entirely on an issue of statutory construction. IGRA requires a State to bargain over “such gaming” as the State “permits” * * * for any purpose by any person, organization, or entity.” 25 U.S.C. 2710(d)(1)(B). The Tribe contends that the phrase “such gaming” should be construed generically rather than in a game-specific way, so that Florida’s operation of a lottery, which is a class III game, requires the Governor to bargain over all forms of class III gaming, including casino gambling. Pet. App. 54a-55a.³ The Tribe also contends that Florida “permits” casino gambling within

³ Other suits by a Tribe against a State under IGRA have also involved a legal issue concerning the proper construction of IGRA’s requirement that the State negotiate about “such gaming” as state law “permits.” *E.g.*, *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 41 F.3d 421, 425-426 (9th Cir. 1994); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 278-279 (8th Cir. 1993); *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1029 (2d Cir. 1990), cert. denied, 499 U.S. 975 (1991); *Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*, 800 F. Supp. 1484, 1486 (W.D. Mich. 1992), appeal dismissed, 5 F.3d 147 (6th Cir. 1993); *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F. Supp. 1292, 1294, 1296 (D. Ariz. 1992); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480, 484-488 (W.D. Wis. 1991), appeal dismissed, 957 F.2d 515 (7th Cir.), cert. denied, 113 S. Ct. 91 (1992). The courts of appeals that have squarely addressed the issue have agreed with the game-specific position of Florida in this case. *Rumsey*, 41 F.3d at 425-426; *Cheyenne River Sioux Tribe*, 3 F.3d at 278-279.

the meaning of IGRA because it fails to enforce its gaming laws against charities that hold casino nights. *Id.* at 61a. If a federal court were to agree with the Tribe’s interpretation of IGRA, a declaratory judgment to that effect and an order requiring the Governor to negotiate on the basis of such a legal interpretation would reflect a straightforward application of *Ex parte Young*.⁴

3. The court of appeals nevertheless concluded that *Ex parte Young* is inapplicable here. In the court’s view, *Ex parte Young* does not apply if a suit seeks “to compel an executive official to undertake a discretionary task” or if the suit “is, in reality, against the state.” Pet. App. 23a. The Tribe’s suit, the court concluded, “fit[s] into both categories.” *Ibid.* That reasoning is unpersuasive.

a. The court of appeals concluded that the relief sought in this case would require the Governor to perform a discretionary act because IGRA permits the State to exercise discretion in proposing the terms of any tribal-state compact. Pet. App. 23a. IGRA limits the State’s discretion, however, in one significant respect. Once a Tribe requests a State to negotiate, “the State *shall* negotiate with the Indian tribe in good faith.” 25 U.S.C. 2710(d)(3)(A) (emphasis added). That statutory language

⁴ In many instances, it might not be necessary for a district court to go beyond an award of declaratory relief, especially where the basis of the dispute between the State and the Tribe concerns an interpretation of IGRA itself. If (as in this case), the district court agrees with the State’s interpretation of IGRA that underlies its failure to negotiate about particular games, the court would have no occasion to order the State (or its Governor) to negotiate. On the other hand, if the court agrees with the Tribe’s interpretation of IGRA, the Governor might then agree to negotiate under IGRA as so construed, without any need for a judicial order directing him to do so. Such declaratory relief against a Governor regarding the scope of IGRA would be particularly far removed from the concerns that underlie the Eleventh Amendment.

creates a mandatory duty to negotiate in good faith. A State's refusal to fulfill that duty is a violation of federal law. Thus, although a federal court has no authority to interfere with the State's discretion to propose or agree to particular terms of a compact, it may, under *Ex parte Young*, order the Governor to negotiate in good faith. Such an order does not interfere with the Governor's discretion, because the Governor has no discretion under IGRA to negotiate other than in good faith. See *Ex parte Young*, 209 U.S. at 159 ("An injunction to prevent [a state officer] from doing that which he has no legal right to do is not an interference with the discretion of [that] officer."); cf. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 487-488 (1960) (obligation under Section 8(d) of National Labor Relations Act, 29 U.S.C. 158(d), to "confer in good faith" creates mandatory "duty" to bargain).

As the court of appeals noted (Pet. App. 23a), IGRA prescribes remedial procedures if the district court finds that the Governor has failed to negotiate (or to do so in good faith). The first step is for the court to order the State and the Tribe to conclude a compact within a 60-day period. 25 U.S.C. 2710(d)(7)(B)(iii). If they fail to do so, a mediator appointed by the court is authorized to choose between proposals submitted by the Tribe and the State; if the State submits no proposal, the mediator presumably would choose the Tribe's proposal by default. 25 U.S.C. 2710(d)(7)(B)(iv). Finally, if the State refuses to consent to the mediator's choice, the Secretary has authority to prescribe rules governing class III gaming on the Tribe's lands, subject to conditions prescribed by IGRA. See 25 U.S.C. 2710(d)(7)(B)(vii). Contrary to the court of appeals' view (Pet. App. 23a), the existence of those back-up remedial procedures does not mean that the decision whether to negotiate in the first instance is discretionary. Moreover, a Governor's refusal to participate in IGRA's

remedial procedures would have substantial consequences for the State, because the State would thereby lose its statutory right and practical ability under IGRA to shape the scope of gaming that will be permitted.

The federal duty under IGRA to negotiate about gaming is thus best understood as a conditional one: If the State wishes to preserve its opportunity to shape the scope of gaming, it must negotiate with the Tribe in good faith concerning a compact. Nothing in *Ex parte Young* precludes a federal court from ascertaining whether a Governor has complied with such a conditional duty and from invoking IGRA's narrowly tailored remedial procedures if the Governor has not done so. Indeed, such relief is far less intrusive on state prerogatives—and therefore poses far less of a threat to the values underlying the Eleventh Amendment—than relief granted in suits under *Ex parte Young* to enforce substantive and continuing legal obligations imposed on state officials under federal laws.

Duties imposed under the Spending Clause provide a useful analogy. A State is obliged to fulfill federal statutory requirements enacted pursuant to the Spending Clause only if the State opts to receive federal money. Accordingly, a State willing to forgo receipt of federal money can avoid complying with the federal requirements. The conditional nature of the State's duty, however, does not serve as a barrier to the award of prospective relief under *Ex parte Young* in Spending Clause cases so long as the State continues to receive funding. See *Quern*, 440 U.S. at 346-349 (approving prospective relief under *Ex parte Young* in Spending Clause case). There likewise is no reason why the conditional nature of the duty should serve as a barrier under IGRA.

b. The court of appeals' view (Pet. App. 24a) that *Ex parte Young* is inapplicable because the Tribe's suit is

really against the State is also without merit. The Tribe named the Governor as a defendant and sought relief against him. And while the State is the real party in interest, that is true in all *Ex parte Young* suits. *Pennhurst*, 465 U.S. at 107-109 & n.17; see also *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). The whole point of *Ex parte Young* is that relief nevertheless may be ordered against a state official to comply with federal law. As explained in *Pennhurst*, if a suit seeks prospective relief against a state official to vindicate federal law, it is permitted under *Ex parte Young*, "notwithstanding the obvious impact on the State itself." 465 U.S. at 104.

As the court of appeals noted, IGRA, by its terms, imposes obligations on the State, and not on any particular state official. Pet. App. 24a. States, however, can act only through their officials. See *Pennhurst*, 465 U.S. at 114 n.25. The obligations that IGRA places on the States therefore must be understood to fall not only upon the States but also upon those officials vested with authority under state law to negotiate on behalf of the States.

In that respect, IGRA is similar to the Fourteenth Amendment, which imposes duties directly upon the States and does not specifically refer to state officials. This Court long ago held that the duties of the Fourteenth Amendment nonetheless fall upon state officials as well. As the Court explained in *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 286 (1913), "the provisions of the [Fourteenth] Amendment * * * are addressed, of course, to the States, but also to every person whether natural or juridical who is the repository of state power." See also *Pennhurst*, 465 U.S. at 105 ("an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment").

In this case, there is no dispute that the Governor is the state official vested with authority under the constitution and laws of Florida to negotiate on behalf of the State with the Seminole Tribe. The duty that IGRA imposes on the State to negotiate in good faith therefore falls upon the Governor. A determination by a federal court that the Governor has failed to fulfill that federal obligation, thereby triggering the remedial provisions of IGRA, is permissible under *Ex parte Young*.⁵

⁵ Should this Court hold that judicial relief focused on the alleged failure by the Governor to negotiate in good faith is permissible under *Ex parte Young*, there may be no need to resolve the question whether Congress may abrogate the immunity of the State itself in this setting. A judicial determination that the Governor has failed to negotiate in good faith on behalf of the State—and a resulting order directed to the Governor under IGRA's special remedial procedures of further negotiation, mediation, and (if necessary) the promulgation of rules by the Secretary—would presumably provide complete relief to the Tribe. Thus, if this Court makes clear that a suit against the Governor is permissible under *Ex parte Young*, the Tribe might be willing to forgo seeking relief directly against the State, and the Court (or the courts below on remand) might in any event conclude that relief against the State should be denied as a matter of equitable discretion. Accordingly, if the Court concludes that a suit against the Governor is permissible under *Ex parte Young*, it may be appropriate to reverse the judgment of the court of appeals on that basis alone, without reaching the question whether the Eleventh Amendment forecloses Congress from providing for a suit for prospective relief against the State itself.

B. Congress Has The Power Under The Constitution To Provide For A Suit By An Indian Tribe Against A State For Prospective Relief Arising From The State's Failure To Negotiate In Good Faith

Congress may abrogate a State's immunity from suit "only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). Congress did that here. IGRA provides that a federal court shall have jurisdiction over any cause of action arising from "the failure of a State to enter into negotiations with the Indian tribe." 25 U.S.C. 2710(d)(7)(A)(i). IGRA further provides that once the Tribe introduces evidence that the State has not negotiated 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." 25 U.S.C. 2710(d)(7)(B)(ii). Finally, IGRA provides that if "the court finds that the State has failed to negotiate in good faith * * *, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period." 25 U.S.C. 2710(d)(7)(b)(iii). Those repeated textual references to the State are sufficient to show that Congress clearly intended to abrogate the State's immunity from suit.

The court of appeals agreed that Congress had clearly expressed its intent to abrogate the State's immunity from suit. Pet. App. 14a-15a. It held, however, that Congress lacked authority to effect such a waiver. *Id.* at 15a-22a. That holding is incorrect.

1. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), this Court held for the first time that Congress possesses power in some circumstances to abrogate a State's immunity from suit. At issue in *Fitzpatrick* was the constitutionality of Congress's grant of jurisdiction to federal courts to award retroactive monetary relief against States that discriminate in their employment

practices in violation of Title VII of the Civil Rights Act of 1964. 427 U.S. at 447-448. This Court held that Congress has the power under Section 5 of the Fourteenth Amendment to authorize federal courts to award such relief against the States. The Court explained that "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." 427 U.S. at 456.

In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the Court rejected an Eleventh Amendment challenge to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, which subjects States to liability for the clean-up costs of hazardous waste sites they have contaminated. The Court held that Congress has the power under the Interstate Commerce Clause to authorize federal courts to award such relief against the States. A plurality of the Court reasoned that, "[l]ike the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States." 491 U.S. at 16. "It cannot be relevant," the plurality continued, "that the Fourteenth Amendment accomplishes this exchange in two steps (§§ 1-4, plus § 5), while the Commerce Clause does it in one." *Id.* at 16-17. According to the plurality, "[t]he important point * * * is that the provision both expands federal power and contracts state power; that is the meaning, in fact, of a 'plenary' grant of authority." *Id.* at 17. Because the States ceded plenary power over interstate commerce to Congress, the plurality concluded, the States also "relinquished their immunity where

Congress found it necessary, in exercising this authority, to render them liable." *Id.* at 19-20.⁶

2. It follows *a fortiori* from *Union Gas* that Congress may provide for a suit by an Indian Tribe against a State. The United States' power over Indian affairs derives from the Indian Commerce Clause (a component of Art. I, § 8, Cl. 3), the Clauses giving the President and the Senate exclusive power to make treaties (Art. II, § 2, Cl. 2; Art. I, § 10, Cl. 1), and "from the necessity of giving uniform protection to a dependent people." *Williams v. Lee*, 358 U.S. 217, 219 n.4 (1959) (citing *United States v. Kagama*, 118 U.S. 375 (1886)). Congress's power to regulate Indian commerce is rooted in the same Clause as its power to regulate interstate commerce. And like the interstate component of that Clause, the Indian component is a plenary grant of authority. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). Accordingly, Congress's power to provide for suits against States under the Indian Commerce Clause "cannot be less than its authority [to do so] under the Interstate Commerce Clause." *Spokane Tribe of Indians v. Washington*, 28 F.3d 991, 997 (9th Cir. 1994).

The background and history of the Indian component of the Commerce Clause confirm that Congress's power under that component is at least as broad as its power under the Interstate component. One of the key deficiencies of the Articles of Confederation was that they divided authority over Indian affairs between the States and the

⁶ Justice White expressed his agreement with the conclusion reached by the plurality "that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States," but stated that he "d[id] not agree with much of [the plurality's] reasoning." 491 U.S. at 57 (White, J., concurring in the judgment in part and dissenting in part). Justice White did not offer any additional reasoning.

central government. Article IX of the Articles of Confederation provided that "[t]he United States in Congress assembled" shall have the "sole and exclusive right" of "regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." James Madison viewed that attempted division of sovereign authority as an "endeavor[] to accomplish impossibilities," because it sought "to reconcile a partial sovereignty in the Union, with complete sovereignty in the States." *The Federalist* No. 42, at 268-269 (C. Rossiter ed. 1961). Georgia and North Carolina relied upon the proviso giving States authority within their own limits to treat with Indians regarding their land and other matters. The effect of that construction of the proviso was "to annul the power itself." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). That construction of the proviso also created the potential for individual States to undermine the States' collective commitments to the Indians and the security of the United States.

In response to those difficulties, the States, in the Constitution, ceded to the United States all authority to manage affairs with the Indian Tribes. Accordingly, "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985) (*Oneida II*); see also *Worcester*, 31 U.S. (6 Pet.) at 561 ("The whole intercourse between the United States and this [Indian] nation, is, by our constitution and laws, vested in the government of the United States.").

Thus, the Indian Commerce Clause, perhaps even more than the Interstate Commerce Clause, grants broad power to Congress over a specified domain of public affairs and simultaneously takes power away from the States. It

follows that under *Union Gas*, the authority of Congress to abrogate state sovereignty under the former Clause, as under the latter, is rooted in the plan of the Constitutional Convention. See 491 U.S. at 19-20.

3. Several considerations support the conclusion that the provision for suits by Tribes against States under IGRA stands on even firmer constitutional footing than the provision at issue in *Union Gas*. First, Congress's power over Indian affairs does not stem from the Commerce Clause alone. It stems as well from the historical recognition that the Indian Tribes, though sovereign, "are the wards of the nation," and that from "the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power." *Kagama*, 118 U.S. at 383-384. The United States (on behalf of all the States) has a special responsibility to the Tribes to further their economic well-being and amicable dealings with the States. That special responsibility reinforces the authority of Congress to provide for a Tribe, as a dependent sovereign, to bring an action against a State arising out of the State's failure to negotiate in good faith with the Tribe about a compact governing gaming on the Tribe's land—a matter frequently of central importance to the Tribe and its members.

Second, there is an important difference in the scope of relief authorized under the statute at issue in *Union Gas* and that authorized under IGRA. The provision at issue in *Union Gas* subjected the States to suit for money damages. In contrast, a suit under IGRA cannot result in the imposition of monetary relief; only prospective relief is authorized. This Court recently identified protection of state treasuries from federal court decrees as both "the impetus for the Eleventh Amendment" and "the most important consideration in resolving an Eleventh

Amendment immunity issue." *Hess v. Port. Authority Trans-Hudson Corp.*, 115 S.Ct. 394, 404, 406 (1994) (internal quotation marks omitted). Thus, IGRA does not threaten the core value underlying the Eleventh Amendment.

Moreover, the effect of IGRA is simply to authorize a suit against a State in circumstances in which *Ex parte Young* would authorize a suit against a state official. Whatever the precise scope of Congress's power to abrogate a State's immunity from suit, it must include at least that much. After all, the State is already the real party in interest in an *Ex parte Young* suit. *Pennhurst*, 465 U.S. at 101-102, 104. The notion that an *Ex parte Young* suit is not against the State is a legal "fiction." *Id.* at 105. There is no constitutional impediment to Congress's dispensing with that legal fiction and authorizing what would otherwise be an *Ex parte Young* suit against the State in its own name.

That is particularly true given the limited nature of the relief authorized by IGRA. While IGRA provides for a court to order a State and a Tribe to conclude a compact within 60 days as a remedy for the State's failure to negotiate in good faith, there is no indication that the State's failure to agree to a compact (or even to participate in negotiations) during that period was intended to expose the State to any more intrusive order or to contempt. Compare *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam). Instead, as already noted, should the State decide not to participate in the remedial process of negotiation and mediation, the statutorily specified consequence is that the Secretary of the Interior will ultimately determine the scope of gaming on the Tribe's lands, taking into account the compact that is proposed by the Tribe (and presumably recommended by the mediator).

Yet another difference between *Union Gas* and this case is that the statutory provision upheld in that case grants a cause of action against the State to any individual, while the provision at issue here affords a cause of action only to Indian Tribes. Indian Tribes are sovereigns, *Blatchford*, 501 U.S. at 780, and a suit by a sovereign against a State does not implicate a State's dignity to the same extent as a suit by an individual against a State. See *Hess*, 115 S. Ct. at 400, 406 (one purpose of the Eleventh Amendment is to protect a State's integrity and dignity). There is also considerable historical evidence that the primary purpose of sovereign immunity was to protect States from suits brought by individuals rather than sovereigns. *Blatchford*, 501 U.S. at 780 n.1.

It is true that the Court held in *Monaco* that the Eleventh Amendment applies in a suit brought by a foreign nation against a State. And the Court similarly held in *Blatchford* that the Eleventh Amendment applies in a suit brought by a Tribe. But neither case involved the power of Congress to authorize a suit by another sovereign. The "plan of the convention," *Monoco*, 292 U.S. at 322-323, would provide Congress a firm basis for authorizing a foreign government to sue a State in federal court if it determined that such action was necessary to the conduct of foreign relations and commerce—*e.g.*, to conform the practice in suits involving foreign sovereigns to international norms. Compare *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-487 (1983) (Foreign Sovereign Immunities Act of 1976 codifies restrictive theory of foreign sovereign immunity that had been adopted by other nations). The parallel structure of the Commerce Clause—vesting in Congress the power to regulate Commerce "with foreign Nations" and "with the Indian Tribes"—indicates that the Framers contemplated bilateral relations between the United States and the

Indian Tribes as distinct sovereign entities, just as they contemplated such relations with foreign nations. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 153 & n.19 (1982); see also *Worcester*, 31 U.S. (6 Pet.) at 559. That parallel structure also reflects the fact that, just as it was important to the security of the United States to vest authority in the national government over relations with foreign governments, so too it was important to the security of the United States to vest authority in the national government over relations with the Indians. For those reasons, Congress should have no less authority to authorize Indian Tribes to sue the States than it would have to authorize such suits by foreign nations.

The rationale of *Monaco* and *Blatchford* is inapplicable in this context in any event. Those cases declined to find an abrogation of the State's immunity from suit implicit in the Constitution itself because the Constitution could not be understood to have waived either a foreign government's or a Tribe's immunity from a suit brought by a State. *Blatchford*, 501 U.S. at 781-782. The absence of "mutuality" made it inappropriate to treat the States as having waived their immunity from a suit brought by a foreign government or a Tribe. *Id.* at 782. Congress, however, does have the authority to subject foreign governments and Tribes to suits by States. If mutuality is to be preserved, Congress should also have the power to authorize suits by foreign governments and Tribes against States.

Finally, unlike the situation in *Union Gas*, the abrogation of sovereign immunity in IGRA is part of a broader statutory scheme that is designed in part to enhance state authority. The Senate Report accompanying IGRA explained the reasons for including a provision that would waive the State's immunity from suit as follows:

This section is the result of the Committee balancing the interests and rights of tribes to engage in gaming against the interests of States in regulating such gaming. Under this act, Indian tribes will be required 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. In contrast, States are not required to forgo any State governmental rights to engage in or regulate class III gaming except whatever they may voluntarily cede to a tribe under a compact. Thus, given this unequal balance, the issue before the Committee was how best to encourage States to deal fairly with tribes as sovereign governments. The Committee elected, as the least offensive option, to grant tribes the right to sue a State if a compact is not negotiated and chose to apply the good faith standard as the legal barometer for the State's dealings with tribes in class III gaming negotiations.

S. Rep. No. 446, 100th Cong., 2d Sess. 14 (1988). The Constitution should not be interpreted to preclude such innovative solutions to what otherwise might be intractable problems.

4. The court of appeals acknowledged that *Union Gas* is the closest precedent for this case. But instead of viewing Congress's authority to provide for suits by Tribes against States as following *a fortiori* from *Union Gas*, the court sought to distinguish *Union Gas* on two grounds. Neither distinction is substantial.

First, the court noted that the Interstate Commerce Clause and the Indian Commerce Clause have different purposes: Whereas the Interstate Commerce Clause

allows Congress to place limits on the States to "maintain[] free trade among the States[;]" * * * "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." Pet. App. 21a (quoting *Cotton Petroleum*, 490 U.S. at 192). Those different purposes, however, have no bearing on the question whether Congress has the power under the Constitution to abrogate a State's immunity from suit. The critical point in *Union Gas* was that the States had ceded a portion of their sovereignty when they gave Congress the power to regulate interstate commerce. As we have already explained, the States, in adopting the Constitution, also unequivocally ceded whatever authority they previously had to regulate Indian affairs.

The court of appeals also sought to limit *Union Gas* to situations in which a State engages in an activity "typical of private individuals" and "outside the typical realm of state authority." Pet. App. 22a. That limitation cannot be reconciled with this Court's decisions. In *Fitzpatrick*, the activity engaged in by the State—employing workers to carry out governmental functions—was within the traditional sphere of state authority. In rejecting the State's claim of immunity from suit in that case, the Court made clear that the nature of the State's activity was irrelevant to the constitutional inquiry. 427 U.S. at 452. The nature of the State's activity in *Union Gas*—owning a hazardous waste site—was not mentioned as a factor in the decision. In the Tenth Amendment context, this Court has rejected as "unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is * * * 'traditional.'" *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-547

(1985). A traditional governmental function test is no more appropriate in the Eleventh Amendment context.

In any event, the court of appeals erred in characterizing negotiations by a State with an Indian Tribe as within the traditional sphere of state authority. Pet. App. 22a. The Constitution assigns the power to make Treaties (including those with Indian Tribes) to the national government (Art. II, § 2, Cl. 2), and agreements by States with Tribes historically were accomplished under federal auspices. See, *e.g.*, *Oneida II*, 470 U.S. at 232-233. IGRA is consistent with that constitutional arrangement.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 94-12

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA,

Petitioner,

vs.

STATE OF FLORIDA AND LAWTON CHILES, GOVERNOR OF
FLORIDA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Does the Eleventh Amendment prevent Congress from authorizing suits by Indian tribes against states for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause, Article I, Section 8, Clause 3 of the Constitution?

II. Does the *Ex parte Young* doctrine permit suits against a state governor for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause, Article I, Section 8, Clause 3 of the Constitution?

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2 M. Farran, <i>Records of the Federal Convention of 1787</i> (rev. ed. 1937)	33
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In The

Supreme Court of the United States

October Term, 1994

SEMINOLE TRIBE OF FLORIDA,

Petitioner,

vs.

STATE OF FLORIDA AND LAWTON CHILES, GOVERNOR
OF FLORIDA,

Respondents.

*On Writ of Certiorari to the United States Court of Appeals for
the Eleventh Circuit*

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 11 F.3d 1016. Pet. App. 1a-25a. The order of the United States District Court for the Southern District of Florida is reported at 801 F. Supp. 655. Pet. App. 26a-42a. The district court's subsequent order on cross-motions

for summary judgment (unpublished) is on appeal to the Court of Appeals for the Eleventh Circuit, No. 93-5256, but that appeal has been stayed pending disposition of the proceedings in this Court. Pet. App. 43a-84a.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Eleventh Circuit was entered on January 18, 1994. Pet. App. 1a. Respondents' motion for rehearing was denied April 6, 1994. Pet. App. 86a. The petition for a writ of certiorari was timely filed on July 1, 1994, and certiorari was granted on January 23, 1995. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

U.S. Const. art. I, § 8, cl. 3 (The Commerce Clause):

The Congress shall have Power. . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

U. S. Const. amend. XI:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Statutes

Section 2710 of the Indian Gaming Regulatory Act is reprinted in its entirety in the appendix to the petition for writ of certiorari. Pet. App. 87a-100a. The relevant provisions of the Act, codified at 25 U.S.C. §§ 2701-2721, provide:

25 U.S.C. § 2710(d)(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.

* * *

25 U.S.C. § 2710(d)(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. . . .

* * *

(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).

STATEMENT OF THE CASE

A. The Indian Gaming Regulatory Act

Petitioner Seminole Tribe of Florida is a federally recognized Indian tribe, duly organized under Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476, 48 Stat. 984. The Tribe occupies and possesses broad powers of self-government over its Indian tribal lands, comprising five separate reservations in the State of Florida. In the area of gaming, however, this power of self-government is subject to the provisions of the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721; 18 U.S.C. §§ 1166- 1168).

The decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), holding that a state could not enforce its "civil/regulatory" gaming laws on Indian lands, prompted Congress to enact IGRA "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Congress, recognizing the need to "provide clear standards or regulations for the conduct of gaming on Indian lands," 25 U.S.C. § 2701(3), divided gaming into three separate classes and provided a different scheme of regulation for each.

Class I gaming, consisting of social or traditional games engaged in by individuals in connection with tribal ceremonies or

celebrations, 25 U.S.C. § 2703(6), was left to the exclusive regulatory control of the tribes. 25 U.S.C. § 2710(a)(1). Class II gaming, consisting of bingo games, games similar to bingo, and certain non-banking card games, 25 U.S.C. § 2703(7), was also left to the regulatory authority of the tribes, subject to the supervision of the newly-created National Indian Gaming Commission. 25 U.S.C. § 2710(a)(2). Class III gaming, defined as all gaming that does not fall within the class I and II definitions, 25 U.S.C. § 2703(8), and including various kinds of casino gaming such as banking card games and slot machines, was made subject to tribal and state joint regulation through the complex statutory scheme which is the genesis of this case.

Class III gaming on Indian lands is lawful only if authorized by a tribe located in a state which "permits such gaming," and when "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State. . . ." § 2710 (d)(1); Pet. App. 93a. Congress provided various remedies to the tribes in the event a state refuses either to enter into compact negotiations or to negotiate in good faith. First, IGRA provides that if a state fails to negotiate in good faith a federal court may order the state to conclude a compact within sixty days. § 2710(d)(7)(iii); Pet. App. 98a. The jurisdictional statute provides:

(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. . . .

* * *

(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).

§ 2710(d)(7)(A)(i) & (B)(i); Pet. App. 97a.

IGRA recognizes that agreement on a compact may not be reached even after an order to conclude a compact is entered by the court. The Act provides that, in the event the parties do not execute a compact within the sixty-day period provided by court order, they shall then each submit to a court-appointed mediator a proposed compact which represents that party's last best offer for a compact. 25 U.S.C. § 2710(d)(7)(B)(iv); Pet. App. 98a. The mediator shall select the proposed compact which best comports with IGRA, other applicable federal law, and the findings of the court, and shall submit that compact to the state and the tribe. 25 U.S.C. § 2710(d)(7)(B)(iv) & (v); Pet. App. 98a. If the state consents to the mediator's proposed compact within sixty days, it becomes the applicable tribal-state compact as if entered into by the parties. 25 U.S.C. § 2710(d)(7)(B)(vi); Pet. App. 98a. If not, the mediator shall notify the Secretary of the Interior, who shall prescribe, in consultation with the tribe and consistent with the proposed compact selected by the mediator and applicable law, procedures under which class III gaming may be conducted. § 2710(d)(7)(B)(vii); Pet. App. 98a.

B. The Seminole Tribe Compact Request

In January 1991, the Seminole Tribe wrote to Florida Governor Lawton Chiles requesting the commencement of negotiations, pursuant to IGRA, for a tribal-state compact governing the conduct of class III gaming activities on tribal

lands. Pet. App. 44a; J.A. 21a. On March 4, 1991, the Tribe submitted a proposed compact providing for tribal operation of poker, and all video, electronic and computer-aided games which duplicate poker, bingo, pull-tabs, lotto, punchboards, tip jars, instant bingo and other games similar to bingo. J.A. 26a-35a. Although the Tribe contended casino-type games were permitted in Florida, it excluded them from its initial proposal. In a letter accompanying the proposal, the Tribe stated that it was making a conservative request to expedite the compacting process. J.A. 24a-25a. On May 24, 1991, the Governor's General Counsel responded for the Governor, rejecting all of the Tribe's proposed games with the exception of poker. Pet. App. 45a; J.A. 36a-39a.

The Tribe then wrote to Governor Chiles to express its dissatisfaction and to request the Governor's personal involvement in the compact negotiations. J.A. 16a; Complaint ¶ 17. J.A. 40a. Soon thereafter, the Tribe also submitted a legal memorandum to the State, providing specific support for the proposed compact provisions. Pet. App. 45a.

In August 1991, the Governor's General Counsel reasserted that the State would not negotiate regarding any form of gaming not expressly allowed by State statutes, nor would the State negotiate regarding any machine gaming or any form of casino gaming. J.A. 17a; Complaint ¶ 20. The State expressed a willingness to negotiate only poker and other card games, raffles, parimutuel wagering on dog and horse racing, and jai alai. *Id.* Tribal and State representatives met in September 1991, but the State refused to change its position regarding the scope of the negotiations. Pet. App. 45a-46a.

Invoking the remedy authorized by 25 U.S.C. § 2710(d)(7)(A)(i) & (B)(i), Pet. App. 97a, the Tribe filed suit against the State of Florida and its Governor on September 19, 1991. J.A. 12a-42a. The Tribe alleged that the State and the Governor had

“failed to respond in good faith to the Tribe’s request for compact negotiations and had not conducted those negotiations in good faith.” (Complaint at ¶ 24; J.A. 18a). The Tribe sought (1) an order that the State and the Tribe conclude a compact within sixty days, and if no compact had been concluded at the end of that time, that the court appoint a mediator; and (2) a declaratory judgment that IGRA requires the State to negotiate with the Tribe concerning all class III games, including casino gaming. J.A. 18a-19a.

After filing an answer (J.A. 43a-48a), the State and the Governor moved to dismiss the suit on Eleventh Amendment sovereign immunity grounds. J.A. 49a-51a. The district court denied their motion:

Given Congress’ plenary authority over Indian relations, explicitly noted in the text of the Constitution at Article I, §8, cl. 3, and the uniquely federal issues raised when such authority is exercised, considered in conjunction with the principles enunciated by the Supreme Court in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989), we conclude that Congress, when acting pursuant to the Indian Commerce Clause, has the power to abrogate the States’ immunity.

Seminole Tribe of Florida v. Florida, 801 F. Supp. 655, 658 (S.D. Fla. 1992); Pet. App. 26a, 32a. The State and the Governor sought interlocutory review in the Eleventh Circuit.¹

1. Jurisdiction in the court of appeals was based upon the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). See *Griesel v. Hamlin*, 963 F.2d 338 (11th Cir. 1992) (denial of Eleventh (Cont’d)

That court consolidated the *Seminole* case with the appeals from *Poarch Band of Creek Indians v. Alabama*. There, the Alabama district court had granted the State’s and the Governor’s Eleventh Amendment motions to dismiss. 776 F. Supp. 550 (S.D. Ala. 1991); 784 F. Supp. 1549 (S.D. Ala. 1992). The Eleventh Circuit reversed the *Seminole* decision and affirmed the *Poarch Creek* decisions, concluding that the Indian Commerce Clause does not provide Congress with the power to abrogate the States’ Eleventh Amendment immunity. *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1028 (11th Cir. 1994); Pet. App. 1a, 22a.

The Eleventh Circuit found that Congress clearly “manifested its intent to abrogate the states’ immunity” under IGRA, *id.* at 1024; Pet. App. 14a, and that “Congress enacted IGRA solely under the Indian Commerce Clause,” but that the Indian Commerce Clause does not permit Eleventh Amendment abrogation. The court rejected the relevance of *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), questioning its viability and drawing a distinction between Congress’ powers under the Interstate Commerce Clause (*Union Gas*) and the Indian Commerce Clause. 11 F.3d at 1026-28; Pet. App. 18a-22a.

(Cont’d)

Amendment immunity is an immediately appealable order); *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684 (1993) (collateral order doctrine permits immediate appellate review of orders denying claim of Eleventh Amendment immunity).

Simultaneously with the appeal on the immunity issues in the Eleventh Circuit, the parties filed cross-motions for summary judgment in the district court on the question of whether the State of Florida had fulfilled its obligation under IGRA to conduct compact negotiations in good faith. Pet. App. 43a. On September 22, 1993, the court granted the State’s motion and denied the Tribe’s, ruling that the State had negotiated in good faith. Pet. App. 43a, 83a. Review of the final judgment of the district court is pending in the Court of Appeals for the Eleventh Circuit (No. 93-5256), but has been stayed pending disposition of the Eleventh Amendment issue presented here. Pet. App. 84a.

The court of appeals noted that its conclusion regarding Congress' power to abrogate the Eleventh Amendment conflicted with the Eighth Circuit decision in *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993) (11 F.3d at 1023, n.5; Pet. App. 12a, n.5), and noted the conflict among district courts on the same issues. *Id.* at 1024, nn. 6 & 7; Pet. App. 13a, nn. 6 & 7.

The Eleventh Circuit also refused to apply the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to sustain the Tribe's suit against the Governor. First, the court viewed negotiation of a compact as discretionary, since IGRA leaves the terms of a compact to the discretion of the parties and provides an alternative procedure should the state refuse to negotiate at all. 11 F.3d at 1028; Pet. App. at 23a. Second, the court viewed the suit as one which was "in reality against the state itself," since IGRA authorizes suits against the state to compel the state to conclude a compact. *Id.* at 1029; Pet. App. at 24a.

After rejecting all bases for federal jurisdiction under IGRA's aegis, the court of appeals applied severance principles and carved out a remedy "for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit." 11 F.3d at 1029; Pet. App. 25a. The court concluded that the Tribe's remedy was to notify the Secretary of the Interior of the State's failure to negotiate and objection to jurisdiction, and "[t]he Secretary then may prescribe regulations governing class III gaming on the tribe's lands." *Id.* That remedy prompted Florida's motion for rehearing, despite the State's Eleventh Amendment success. Rehearing was denied. Pet. App. 86a.

The Seminole Tribe filed a petition for a writ of certiorari seeking review of the court of appeals' decision that the Eleventh Amendment barred the Tribe's suit. In a cross-petition, Florida and its Governor sought review of that portion of the decision giving the Secretary of the Interior power to prescribe

regulations. (No. 94-219, *pending*). The Court granted the Seminole Tribe's petition with respect to both questions presented — Congress' power to abrogate the Eleventh Amendment under the Indian Commerce Clause, and the availability of prospective injunctive relief under *Ex parte Young*.

SUMMARY OF ARGUMENT

1. The Indian Commerce Clause, art. I, § 8, cl. 3, U.S. Const., gives Congress "plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). The Indian Commerce Clause was the product of colonial history and ambiguous language in the Articles of Confederation which failed to resolve the relationship between the emerging national government, the states, and the Indian tribes. The power ultimately contained in Article I, Section 8, Clause 3 made "Indian relations . . . the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

The Indian Commerce Clause provides Congress with the plenary power to abrogate states' Eleventh Amendment immunity. That abrogation in the Indian Gaming Regulatory Act, allowing tribes to sue states for prospective injunctive relief to compel compliance with the Act's good faith negotiation requirement, is consistent with the Constitution and with *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). The plurality opinion in *Union Gas*, acknowledging Congress' power to abrogate under the Interstate Commerce Clause to allow private suits for monetary damages, supports Congress' authorization of injunctive relief for tribes that seek the benefits and guarantees created by the Indian Gaming Regulatory Act.

2. Under the doctrine of *Ex parte Young*, 209 U.S. 123

(1908), the Court may order the Governor to comply with IGRA if IGRA did not successfully abrogate the State's Eleventh Amendment immunity. *Ex parte Young* allows federal courts to order state officials to comply with federal law. "[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Ex parte Young*, 209 U.S. at 160). The Tribe's demand under 25 U.S.C. §2710(d)(7)(B)(iii) (Pet. App. 98a), that the Governor be ordered to enter into a compact with the Tribe within sixty days, is a claim for prospective injunctive relief to compel a state official to comply with federal law, and is thus within *Ex parte Young*.

The court of appeals erred in holding that *Ex parte Young* does not apply because IGRA imposes discretionary duties on the State. 11 F.3d at 1028-29; Pet. App. 23a-24a. The discretion allowed the State and its officers, in defining the terms of a proposed compact, is limited by the requirement that they "negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A); Pet. App. 95a; *supra* at p. 3. *Ex parte Young* and later cases distinguish between an official's discretion and limitations on that discretion, and allow suits to enforce limitations on discretion. *See Ex parte Young*, 209 U.S. at 159 ("An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer.").

The court of appeals reasoned incorrectly that this suit seeking prospective injunctive relief against the Governor is in reality one against the State because IGRA refers only to the state and not to its officers. 11 F.3d at 1029; Pet. App. 24a. A state can act only through its officers; all *Ex parte Young* actions require state officials, in their official capacities, to comply with federal

law applicable to the "States," notwithstanding the "obvious impact on the State itself." *Pennhurst*, 465 U.S. at 105. *Ex parte Young* did not require that the official who is sued be named in the statute as the person whose duty it is to enforce the statute. The only requirement is that "the state officer by virtue of his office has some connection with the enforcement of the act," regardless of the source of that connection. 209 U.S. at 157. That criterion is satisfied here, since it is undisputed that the Governor entered into compact negotiations with the Tribe and had the authority to do so.

3. *Hans v. Louisiana*, 134 U.S. 1 (1890), should be revisited, at least as to congressionally authorized tribal suits against states. *Hans*, which expanded the plain language of the Eleventh Amendment to encompass all suits brought against the states in federal courts, has been the subject of repeated criticism within the Court. *Welch v. Texas Dept. of Hwys. and Pub. Transp.*, 483 U.S. 468, 496 (1987) (Brennan, J., dissenting); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 788 (1991) (Blackmun, J., dissenting). Given the Article I, Section 8, Clause 3 Indian Commerce Clause purpose of limiting state sovereignty in Indian affairs, and the Article III grant of judicial power subject to Congress' authority to promote national peace and harmony, Congress' power to authorize tribal suits against states is necessary and unsurprising. Since the text of the Eleventh Amendment does not bar such suits, and since the states surrendered power to the federal government in Indian matters, *Hans v. Louisiana* should not be read to encompass congressionally authorized tribal actions against the states.

ARGUMENT

I.

CONGRESS HAS THE POWER TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY, PURSUANT TO THE INDIAN COMMERCE CLAUSE.

The suit by the Seminole Indian Tribe against the State of Florida and its Governor sought declaratory and prospective injunctive relief. The action and the relief requested were expressly authorized by the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7)(A)(i) and (B)(i). The State maintains that the Eleventh Amendment prohibits the exercise of federal jurisdiction. Sustaining that position would destroy the delicate federal/tribal/ state balance sought by the Act.

The district court denied the State's motion to dismiss on Eleventh Amendment grounds. Pet. App. 26a. Reversing, the Court of Appeals for the Eleventh Circuit concluded that the Indian Commerce Clause does not provide a basis for Congress to abrogate the states' Eleventh Amendment immunity. In contrast, the Eighth, Ninth and Tenth Circuits have held that under the Indian Commerce Clause Congress does have the power to abrogate that immunity. *Cheyenne River Sioux Tribe v. State of South Dakota*, 3 F.3d 273 (8th Cir. 1993); *Spokane Tribe v. Washington*, 28 F.3d 991 (9th Cir. 1994), *petition for cert. filed* No. 94-357, 63 U.S.L.W. 3161, Aug. 29, 1994; *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422 (10th Cir. 1994), *petition for cert. filed* Nos. 94-1029, 1030, 63 U.S.L.W. 3477, Dec. 9, 1994.

This Court has not decided whether Congress, under the Indian Commerce Clause, can abrogate Eleventh Amendment immunity. *Blatchford v. Native Village of Noatak*, 501 U.S.

775 (1991), held that 28 U.S.C. § 1362 – the Indian tribe jurisdictional statute – was not a congressional abrogation of Eleventh Amendment immunity because it lacked language indicating Congress' intent to do so. *Id.* at 788.² *Blatchford* did not address the question of whether Congress can abrogate Eleventh Amendment immunity pursuant to the Indian Commerce Clause. *Id.* *Blatchford's* finding that the Eleventh Amendment precludes an Indian tribe's federal court suit for monetary relief against a state left undecided the question of whether equitable relief is available against a state:

Finally, respondents argue that even if the Eleventh Amendment bars their claim for damages, they still seek injunctive relief, which the Eleventh Amendment would not bar. The Court of Appeals, of course, did not address this point, and we leave it for that court's initial consideration on remand.

Id. at 788. Mootness obviated the inquiry on remand. *Native Village of Noatak v. Blatchford*, 38 F.3d 1505 (9th Cir. 1994) (appeal after remand).

The Seminole Tribe contends that the Indian Commerce Clause does provide a basis for abrogation; that Congress unequivocally intended to and did abrogate Eleventh Amendment immunity *via* 25 U.S.C. § 2710(d)(7)(A)(i); and that even if abrogation was not authorized, the Eleventh Amendment does not bar a suit against an officer of a state for declaratory and injunctive relief to compel compliance with federal law.

The Eleventh Amendment provides:

2. That decision was also based upon a finding that there was no mutuality of waiver between states and tribes in the plan of convention, as there was among the states. 501 U.S. at 782.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

As interpreted in a line of cases beginning with *Hans v. Louisiana*, 134 U.S. 1 (1890), absent abrogation, the Eleventh Amendment has been read to protect states from all suits in federal court unless the state has consented “either expressly or in the ‘plan of convention.’” *Blatchford*, 501 U.S. at 779 (citations omitted).

Here, the State did not expressly consent to suit, and *Blatchford* precludes the Seminole Tribe from arguing state consent in “the plan of convention.” *Id.* at 782. The Tribe invites the Court to revisit *Hans*, at least on a limited basis, an invitation not made by the Native Village governments in *Blatchford*. *Id.* at 779. That argument, made in Point III *infra* at p. 31, draws from the often articulated minority view that the Eleventh Amendment does not apply “outside the context of State/citizen and State/alien diversity suits.” *See Blatchford*, 501 U.S. at 788 (Blackmun, J., dissenting, joined by Marshall and Stevens, JJ.). *Hans* therefore should not be read to create an Eleventh Amendment bar to an Indian tribe’s suit seeking “to vindicate federal rights against a State.” *Id.*

However, *Hans* need not be considered if the Indian Commerce Clause provides Congress with the power to abrogate States’ immunity, or if *Ex parte Young*, 209 U.S. 123 (1908), permits the Seminole Tribe’s suit against the Governor of Florida.

A. Article I Abrogation Power

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), recognized Congress’ power to abrogate Eleventh Amendment immunity pursuant to Section 5 of the Fourteenth Amendment. The *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), plurality held that pursuant to the Interstate Commerce Clause, Congress has the power to abrogate Eleventh Amendment immunity in a suit against the State for monetary relief.

The Eleventh Circuit concluded that *Union Gas* cannot be applied to the Indian Commerce Clause because “the different purposes underlying the two clauses mandate they be treated distinctly.” Pet. App. 21a. The court of appeals believed that the Interstate Commerce Clause’s *raison d’etre* — limiting the states to maintain free trade among them — carries more power to abrogate than does the Indian Commerce Clause, despite the fact that the Indian Commerce Clause’s “central function . . . is to provide Congress with *plenary* power to legislate in the field of Indian affairs.” *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (emphasis supplied).³

There is no principled basis for finding that congressional power under the Indian Commerce Clause is less than that conferred by the Interstate Commerce Clause. *See Spokane Tribe v. Washington*, 28 F.3d at 997 (9th Cir. 1994). Indeed, Congress’ plenary power over Indian affairs lends more, not less, credence to the argument that abrogation under the Indian Commerce Clause is within the power of Congress.

3. The court of appeals rejected the Interstate Commerce Clause as an additional basis for enacting the Indian Gaming Regulatory Act. Pet. App. 16a-17a. The *amicus curiae* Briefs of the National Indian Gaming Association, *et al.*, and the Miccosukee Tribe of Florida, develop the Interstate Commerce Clause basis for IGRA’s enactment. Under that argument, *Union Gas* requires reversal of the decision below.

Congress' ability to abrogate Eleventh Amendment immunity must be premised upon "a valid exercise of power." *Green v. Mansour*, 474 U.S. 64, 68 (1985). The source of the power must be an affirmative constitutional grant of power to Congress. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985):

The States unquestionably do "retai[n] a significant measure of sovereign authority" [but] . . . [t]hey do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.

Id. at 549 (citation omitted).

The Article I, Section 8, Clause 3 plenary federal power to "regulate commerce . . . with the Indian tribes" is exclusive: "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985). The constitutional provision was the product of dissatisfaction and discord caused by an ambiguity in Article IX (4) of the Articles of Confederation, which allowed some states to argue that their Indian trade powers were unencumbered by federal authority. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

Madison cited the National Government's inability to control trade with the Indians as one of the key deficiencies of the Articles of Confederation, and urged adoption of the Indian Commerce Clause, Art. I, sec. 8, cl. 3, that granted Congress the power to regulate trade with the Indians.

County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 n.4 (1985).

Ratification of the Constitution, and the cure effected by Article I, Section 8, Clause 3, solved a problem which had plagued colonial history.⁴ All doubts were removed: Congress has exclusive plenary power to regulate commerce with Indian Tribes.

These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the [articles of] confederation, are discarded.

Worcester v. Georgia, 31 U.S. at 559.

While the Indian Commerce Clause is antecedent to the Eleventh Amendment, abrogation power under that Clause is

4. The Article IX (4) problem was its last proviso:

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any state within its own limits be not infringed or violated.

James Madison viewed this division of powers as "absolutely incomprehensible" and an "endeavor to accomplish impossibilities." *The Federalist*, No. 42, p. 284 (J. Cooke ed. 1961). He advocated the Indian Commerce Clause because under it, "[t]he regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of confederation, which render the provision obscure and contradictory." *Id.*

consistent with constitutional history and compatible with case law. The *Union Gas* plurality held that the Interstate Commerce Clause provided the power to render states liable in private suits for money damages. Here, the Indian Commerce Clause provides an even stronger foundation for Congress' ability to subject states to suits by Indian tribes for prospective injunctive relief. That should be no surprise to the states:

These Indian tribes . . . owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

United States v. Kagama, 118 U.S. 375, 383-84 (1886).

The abrogation power must be available under the Indian Commerce Clause, in order to protect the tribes from state action denying federally guaranteed rights. This is particularly true where the states' limited authority to act is entirely derived from the statute guaranteeing the tribal rights. The states are protected from undue congressional action by their representation in Congress. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. at 550-51:

[T]he principal and basic limit on the federal commerce power is that inherent in all

congressional action — the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.

Id. at 556. The states' representatives in Congress protect the states; the tribes have no representation in Congress, and rely upon the federal government to protect the tribes from the states. Congress' enactment of IGRA and its federal court injunctive remedy is consistent with the political balance of powers between the federal government, the states, and the tribes.⁵

B. The Eleventh Circuit's "Private Activity" Analysis Is Incorrect.

The decision below sought to limit the *Union Gas* abrogation power to situations where "the states partake in an activity typical of private individuals." Pet. App. 22a. Distinguishing *Parden v. Terminal Railway of Alabama*, 377 U.S. 184 (1964), the court of appeals posited Pennsylvania's hazardous waste site land use operations and Alabama's for-profit railroad operation to be like those of private citizens, and therefore subject to commerce power abrogation:

We believe the Supreme Court's jurisprudence clearly evinces an intent to

5. IGRA allows only injunctive relief. Congress' distinction between damages and injunctive relief weighs heavily in favor of Eleventh Amendment abrogation. *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S. Ct. 394, 404 (1994): "[T]he impetus for the Eleventh Amendment [is] the prevention of federal court judgments that must be paid out of a State's treasury." Here, the states' representatives in Congress fashioned a remedy consistent with the core values of the Eleventh Amendment and the Indian Commerce Clause.

allow federal jurisdiction over states only where the state's conduct is outside the typical realm of state authority.

* * *

Thus, even if *Union Gas*' reasoning were to give Congress abrogation power under the Indian Commerce Clause *in general*, we would hold that Congress may not abrogate when it legislates in an area typically reserved to the states (such as negotiating regulations with Indian tribes).

Pet. App. 21a-22a (emphasis in original).

Neither the cases cited by the court below, nor the Constitution, which gives the federal government the paramount and plenary power to treat with tribes (art. I, § 10; art. II, § 2, cl. 2, U.S. Const.), supports the Eleventh Circuit's rationale. *Parden* and *Union Gas* do not ascribe any Eleventh Amendment significance to the functions performed by the states in those cases. And, neither precedent nor practice supports a notion that states' negotiations with tribes have ever been viewed as matters "typically reserved to the states." Indeed, the exclusivity of the federal power over Indian affairs leaves little doubt that "negotiating regulations with Indian tribes" is congressionally circumscribed, and is certainly not "reserved to the states." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

No principled reason supports the Eleventh Circuit's attempt to distinguish *Union Gas* on a private/public activity theory. Either Congress has the power to abrogate, or it lacks that power. If the Eleventh Amendment is not subject to abrogation under the

Indian Commerce Clause, then the federal statutory rights which prompted the Seminole Tribe's suit for prospective injunctive relief are alternatively cognizable in federal court under the doctrine of *Ex parte Young*.

II.

UNDER *EX PARTE YOUNG*, A FEDERAL COURT MAY REQUIRE THE GOVERNOR TO NEGOTIATE IN GOOD FAITH PURSUANT TO THE INDIAN GAMING REGULATORY ACT.

A second and independent ground for reversing the judgment of the Eleventh Circuit stems from the fact that the Seminole Tribe sued not only the State of Florida but also the Governor of Florida. The relief sought against the Governor was a prospective injunction to compel him to obey a federal statutory duty to negotiate in good faith with the Seminole Tribe.⁶ In this situation, *Ex parte Young*, 209 U.S. 123 (1908), makes plain that, whatever Eleventh Amendment immunity from suit the State of Florida might have, such immunity is not shared by the Governor, at least where only prospective relief is sought against him. *Edelman v. Jordan*, 415 U.S. 651 (1974).

The Eleventh Circuit held that the doctrine of *Ex parte Young* is inapplicable in this case for two reasons: (1) the doctrine cannot be used to compel a state official to perform discretionary acts, such as negotiating the terms of a contract, and (2) the

6. The Governor of Florida, acting under his authority as chief executive officer of the state, entered into compact negotiations with the Seminole Tribe. In their answer to the complaint, defendants asserted that "Defendants State of Florida and Lawton Chiles, in his capacity as Governor of the State of Florida, have negotiated in good faith" with the Tribe concerning class III gaming. J.A. 46a. See Fla. Const., art. IV, § 1(a) (vesting "supreme executive power" in the governor).

doctrine does not apply if the suit in reality is a suit against the State itself. The Eleventh Circuit erred. IGRA mandates good faith negotiations, not contract terms. Stripped of their fiction, all *Ex parte Young* actions are suits against states. The court of appeals' view of duty, discretion and state action does not survive analysis.

A. *Ex parte Young*

The doctrine of *Ex parte Young*, 209 U.S. 123 (1908), allows prospective injunctive relief to compel the Governor's compliance with IGRA mandates. The doctrine is an "important exception" to the general Eleventh Amendment bar to suits nominally against state officers. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984). Such suits may proceed because:

[r]ather than defining the nature of Eleventh Amendment immunity, *Young* and its progeny render the Amendment wholly inapplicable to a certain class of suits. Such suits are deemed to be against officials and not the States. . . .

Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 113 S. Ct. 684, 688-89 (1993).

Ex parte Young upheld a federal court injunction preventing the Minnesota Attorney General from enforcing an unconstitutional state statute. The Eleventh Amendment did not bar the suit because an unconstitutional state statute is "void" and cannot "impart to [the officer] any immunity from responsibility to the supreme authority of the United States." 209 U.S. at 159-60.

Ex parte Young's role in ensuring the supremacy of federal

law has been consistently reaffirmed by this Court. *See, e.g., Edelman v. Jordan*, 415 U.S. 651 (1974); *Pennhurst*, 465 U.S. 89. As *Pennhurst* explained, "*Edelman* held that when a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief." 465 U.S. at 102-03. *Pennhurst* specifically approved the "fiction" of allowing relief in official-capacity actions against state officials, notwithstanding the "obvious impact on the State itself," because "the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Id.* at 104-105 (quoting *Ex parte Young*, 209 U.S. at 160).⁷

The Seminole Tribe's suit, seeking injunctive relief to compel a state official to comply with federal law, 25 U.S.C. § 2710(d)(7)(B)(iii), falls squarely within the doctrine of *Ex parte Young*. It seeks only a prospective remedy to end a continuing violation of federal law – a remedy that does nothing more than vindicate the federal interest in assuring the supremacy of that law.

B. The Relief Requested Would Not Compel a Discretionary Act.

The court of appeals held that *Ex parte Young* does not apply because IGRA imposes "discretionary" duties on the State which cannot be compelled under that doctrine. Pet. App. 23a-24a. That rationale fails to recognize that IGRA requires the state and its

⁷ *See Puerto Rico Aqueduct and Sewer Auth.*, 113 S.Ct. 684, 688: "The doctrine of *Ex parte Young*, which ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law, is regarded as carving out a necessary exception to Eleventh Amendment immunity." *See also Green v. Mansour*, 474 U.S. 64, 68 (1985).

officials to adhere to a statutory standard of "good faith." Violation of that non-discretionary statutory requirement can be cured under *Ex parte Young*.

IGRA provides that in negotiations for a compact governing class III gaming, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A); Pet. App. 95a.⁸ IGRA also provides that if a tribe files suit alleging a violation by the state of these requirements and the court finds that the state has failed to negotiate in good faith, it "shall order the State and the Indian Tribe to conclude such a compact within a sixty-day period." 25 U.S.C. § 2710(d)(7)(B)(iii); Pet. App. 98a. If a compact is not concluded within the sixty-day period, the court will then order mediation under 25 U.S.C. § 2710(d)(7)(B)(iv), Pet. App. 98a — an order which the state can disregard if it is willing to give up the limited right to regulate Indian gaming granted by Congress through the compact process.⁹

The Seminole Tribe sought the remedy provided by IGRA (J.A. 18a) because of the State's refusal to negotiate over various

8. As explained at p. 5, *supra*, IGRA provides that class III gaming may be conducted on Indian lands only if "conducted in conformance with a Tribal-State compact entered into by the Indian Tribe and State. . . ." 25 U.S.C. § 2710(d)(1); Pet. App. 93a. That provision of IGRA was intended to delegate to the states an optional role in regulating Indian gaming — a role they did not have under this Court's decision in *Cabazon*, 480 U.S. 202. However, Congress did not give the states the power to block class III gaming by refusing to enter into gaming compacts. Rather, it enacted provisions requiring the states to negotiate in good faith, and providing for remedies in the event the states refused.

9. If the state refuses to participate, the mediation proceeds without it. The tribe's proposal would be the one selected by the mediator and used by the Secretary of the Interior as the basis for prescribing procedures to regulate tribal gaming. 25 U.S.C. § 2710(d)(7)(B)(iv); Pet. App. 98a; *see supra* at p. 6.

forms of gaming which the State "permits" its citizens to conduct.¹⁰ Granting the relief sought would not compel a discretionary act because the obligation to negotiate in good faith is not discretionary; it is a statutory duty imposed on the state and its officials. *Cf. NLRB v. Insurance Agents' Int'l*, 361 U.S. 477, 487-88 (1960) (statutory requirement of "good faith" negotiations creates a "duty on the parties," notwithstanding the wide discretion afforded with respect to terms). *See also NLRB v. Katz*, 369 U.S. 736 (1962); R. Gorman, *Labor Law*, Ch. XX, *The Duty to Bargain in Good Faith*, pp. 399-495 (1976).

The court of appeals confused the Governor's discretion regarding the terms to be included in a compact with his plain duty under IGRA to negotiate in "good faith." The Eleventh Circuit's premise, that discretion in the exercise of statutory duties precludes judicial enforcement of an express limitation on that discretion imposed in the same statute (Pet. App. 23a-24a), is not supported by *Ex parte Young*. There, the Court recognized the distinction between an officer's discretion and limitations on that discretion. Attorney General Young had contended that the court could not control his discretion whether or not to enforce the challenged state statute. 209 U.S. at 158. The Court acknowledged the general rule of noninterference with an officer's discretion, but upheld the injunction: "An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer." *Id.* at 159.

Moreover, *Ex parte Young's* reference to the general rule of

10. The Tribe argued below that the Governor failed to negotiate in good faith by refusing to negotiate various forms of casino gaming that the State "permits" within the meaning of 25 U.S.C. § 2710(d)(1)(B). The district court's summary judgment ruling that the State did not, in fact, "permit" such gaming and is not required to negotiate for those games, Pet. App. 43a, is on appeal to the Eleventh Circuit. That appeal has been stayed pending resolution of this case. Pet. App. 84a.

noninterference with an officer's discretion, *id.* at 158, did not refer to the court's *jurisdiction* to grant injunctive relief against state officers notwithstanding the Eleventh Amendment, but to the quite different question of when any injunction is appropriate. In IGRA, Congress has made a determination that injunctive relief to enforce the duty to negotiate in good faith is appropriate. Therefore *Ex parte Young's* discussion of discretion has no application here.

Other cases have also recognized the distinction between intruding upon an official's discretion and enforcing limits placed on an official's discretion by statute or by the Constitution. *Work v. United States*, 267 U.S. 175 (1925), held that although a federal officer's discretion may not be controlled through mandamus, if his duty is "discretionary within limits," then "he may be controlled by injunction or mandamus to keep within them." *Id.* at 177.¹¹ See also *Heckler v. Chaney*, 470 U.S. 821, 834-35 (1985) (although federal agency decision whether to take enforcement action is generally discretionary, where Congress has limited that discretion, courts may enforce those limits under the Administrative Procedures Act, 5 U.S.C. § 701(a)(2)); *Silveyra v. Moschorak*, 989 F.2d 1012, 1014-15 (9th Cir. 1993) ("Even where an official's responsibilities are in some respects discretionary, mandamus is appropriate if 'statutory or regulatory standards delimiting the scope or manner in which such discretion can be exercised . . . have been ignored or violated.'") (quoting *Carpet, Linoleum and Resilient Tile Layers, Local Union No. 419 v. Brown*, 656 F.2d 564, 566 (10th Cir. 1981), and citing *Work*, 267 U.S. 175).

11. *Work* is relevant because the Court uses the same principles to determine whether sovereign immunity bars a suit against a federal official as it does to determine whether the Eleventh Amendment suit bars a suit against a state official. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 687 n.22 (1982).

The Eleventh Circuit found that "since IGRA provides a procedure should the state decide not to negotiate, even the mere question of whether the state should negotiate at all is subject to discretion." Pet. App. 23a-24a. But that construct ignores the plain duty IGRA imposes on the Governor to negotiate in good faith, a duty which cannot be avoided by the availability of remedial procedures should the Governor breach that duty. The relief sought by the Tribe is an order either to conclude a compact within sixty days, or to invoke the alternative procedure of mediation. See *supra* at p. 8.¹² The possibility that the Governor might ignore an order and allow the mediation to proceed without him does not affect the *Ex parte Young* analysis, or deprive the federal court of jurisdiction to provide the statutory relief.

C. The Governor May Be Ordered to Negotiate in Good Faith.

All *Ex parte Young* actions are, in reality, suits against the state, because they require state officials *in their official capacities* to comply with federal law, notwithstanding the "obvious impact on the State itself." *Pennhurst* at 104; see also *id.* at 105 (calling *Young* a "fiction," and noting the "well-recognized irony" that under *Ex parte Young* an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not under the Eleventh Amendment).

The court of appeals' conclusion that the action is against the

12. While the Governor may ignore an order under 25 U.S.C. § 2710(d)(7)(B)(iii), Pet. App. 98a, to conclude a compact within sixty days, if he did he would be ordered to submit a proposed compact to mediation under 25 U.S.C. § 2710(d)(7)(B)(iv), Pet. App. 98a. That order would itself be allowable under *Ex parte Young*, either as a form of prospective injunctive relief or as ancillary to the earlier award of prospective injunctive relief (i.e., the order to compact within sixty days). See *Quern v. Jordan*, 440 U.S. 332, 349 (1979).

state, because IGRA imposes a duty on and remedies against "the State" and not state officials, (Pet. App. 24a), does nothing to undermine the applicability of the *Ex parte Young* doctrine. A state "can act only through its officials." *Pennhurst*, 465 U.S. at 114 n.25. In *Ex parte Young* and its progeny, the Court has repeatedly compelled state officials to comply with federal law limitations which are applicable by their terms to the states. See, e.g., *Milliken v. Bradley*, 433 U.S. 267, 288-90 (1977) (state officials ordered to comply with Equal Protection Clause of Fourteenth Amendment); *Edelman*, 415 U.S. at 654 & n.3 (state officials ordered to comply with federal regulations regarding "State plan" and "State-established time standards"). Simply put, federal mandates to a state are enforceable against the state officials who implement state action.

Ex parte Young rejected the argument that the official sought to be enjoined must be named in the statute as the official whose duty it is to act. The Court stated:

In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party.

It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced. . . . The fact that the state officer by virtue of his office has some connection with the enforcement of the act is the important and material fact, and whether it arises out of

the general law, or is specially created by the act itself, is not material so long as it exists.

209 U.S. at 157.

In this case, it is undisputed that Governor Chiles entered into compact negotiations with the Seminole Tribe in his capacity as Governor. Having lawfully undertaken that responsibility, he cannot now invoke sovereign immunity in an effort to insulate himself from litigation to vindicate the federal rights guaranteed by the Indian Gaming Regulatory Act. If the Eleventh Amendment applies and renders the State immune, *Ex parte Young* provides a basis for relief against the Governor.

III.

HANS V. LOUISIANA SHOULD BE REVIEWED AND DEEMED NOT APPLICABLE TO SUITS BY INDIAN TRIBES AGAINST THE STATES.

Repeated calls for overruling *Hans v. Louisiana*, 134 U.S. 1 (1890), have been unsuccessful.¹³ In this case *Hans* need not be reviewed if abrogation or *Ex parte Young* yields a reversal. If those arguments fail, Justice Brennan's dissent in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), is pertinent.

13. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 788 (1991) (Blackmun, J., dissenting); *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Brennan, J., dissenting); *Welch v. Texas Dept. of Hwys. and Pub. Transp.*, 483 U.S. 468, 496 (1989) (Brennan, J., dissenting); *Papasan v. Allain*, 478 U.S. 265, 292 (1986) (Brennan, J., concurring in part and dissenting in part); *Green v. Mansour*, 474 U.S. 64, 74 (1985) (Brennan, J., dissenting); *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 140 (1984) (Stevens, J., dissenting). See also Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 S. Cal. L. Rev. 51 (1990); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889 (1983).

Justice Brennan called for a complete reexamination of *Hans*, concluding:

[T]he current doctrine intrudes on the ideal of liberty under law by protecting the States from the consequences of their illegal conduct. And the decision obstructs the sound operation of our federal system by limiting the ability of Congress to take steps it deems necessary and proper to achieve national goals within its constitutional authority.

Id. at 302 (Brennan, J., dissenting, joined by Blackmun, Marshall and Stevens, JJ.). Here, the Court need not undo *Hans* altogether, but only consider its applicability to tribal suits brought under the Indian Commerce Clause, which uniquely present the federalism concerns warranting review of *Hans*. Protecting Indian tribes from state misconduct, insuring a safe and sound union by placing Indian matters in the hands of the central government, enforcing a textual constitutional commitment to the exclusive role of the national government in Indian affairs, are all important reasons for reviewing *Hans*.

Indeed, the role of the Indian Commerce Clause and the reasons why it evidences state acceptance of overriding congressional power can be gleaned from *Atascadero*'s state sovereignty explanation of *Hans*:

The Framers believed that the States played a vital role in our system and that strong State governments were essential to serve as a "counterpoise" to the power of the Federal Government. *See, e.g.*, The Federalist, No. 17, p. 107 (J. Cooke ed. 1961); The Federalist No. 46, p. 316 (J. Cooke ed. 1961).

Atascadero, 473 U.S. at 238-39, n.2. In contrast, the Framers recognized that the Indian Commerce Clause counteracted the powers of the states. The clause rejected "counterpoise" in favor of exclusive federal authority over Indian affairs. *Worcester v. Georgia; County of Oneida v. Oneida Indian Nation, supra*.

The language of Article III echoes the relinquishment of state sovereignty on which we focus. The original draft of Article III provided that "[t]he jurisdiction of the supreme tribunal shall extend . . . to such other cases, as the national legislature may assign, as involving the national peace and harmony. . . ." 2 M. Farrand, *Records of the Federal Convention of 1787*, pp. 146-147 (rev. ed. 1937). The jurisdiction was appellate, "except in...those instances, in which the legislature shall make it original." *Ibid.* *See Atascadero*, 473 U.S. at 263, n.14 (Brennan, J., dissenting). Ultimately the preamble to the Constitution articulated the quest for harmony: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility. . . ." Those principles were embodied in Article III, which as adopted, preserved the concepts of judicial and congressional powers designed to promote pacific relationships. In light of the troubled history of Indian/state relations, the combination of Article I, Section 8, Clause 3 and Article III provides strong evidence that the states acknowledged and accepted Congress' authority to create federal judicial remedies to effectuate its exclusive Indian commerce power.

The *Atascadero* reading of *Hans* — that the Eleventh Amendment "barred a citizen from bringing a suit against his own State in federal court, even though the express terms of the Amendment do not so provide," 473 U.S. at 238, is tied to the belief that "[t]he Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Id.* at 239 n.2. Since the Constitution expressly provided

that the states were to be stripped of their powers over Indian tribes, and Article III expressly provided that the federal courts were to have jurisdiction over cases arising under the laws of the United States, it requires no reach to conclude that *Hans*' broad interpretation of the Eleventh Amendment does not apply to suits brought by Indian tribes pursuant to express congressional authorization. One can accept the long line of cases spawned by *Hans* which are said to stand for the proposition that " 'the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III,' *Pennhurst II*, 465 U.S. at 98," *Atascadero* at 243, n.3, and still find that, in the Indian Commerce Clause, the states recognized Congress' power *vis a vis* tribes, and Congress' ability to invoke federal judicial authority to enforce that power.

This is not to say that the states consented to being sued by tribes in the plan of convention. *Blatchford* bars that argument. 501 U.S. at 782. But the states did give up their sovereign rights to control their commerce with Indian tribes — empowering Congress to undertake that task at the same time the states empowered Congress to create federal question jurisdiction when domestic tranquility required it to do so. *Hans v. Louisiana*'s rejection of the argument that the text of the Eleventh Amendment left the states subject to suit by its own citizens was not based on constitutionally created immunity. *Hans* relied on the principle that the Eleventh Amendment did not need to establish states' immunity because the judicial power did not contemplate such suits. *Hans*, 134 U.S. at 15. Thus the states' immunity is derived from the common law, independent of the Constitution. While Article III alone does not breach the immunity, *Hans* does not preclude Congress from explicitly authorizing the federal courts to hear an Indian tribe's suit against a state.

Congress' explicit authorization is beyond peradventure

here. The IGRA congressional abrogation of State sovereign immunity is both specific and "unmistakably clear in the language of the statute." *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 232, 242 (1985)). The statute provides:

The United States district courts shall have jurisdiction over . . . 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

25 U.S.C. § 2710(d)(7)(A)(i). A separate paragraph states:

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).

25 U.S.C. § 2710(d)(7)(B)(i).

This Court has demanded the "simple but stringent test" of clarity as a means of balancing abrogation versus the Eleventh Amendment. *Dellmuth*, 491 U.S. at 227-28. In *Dellmuth*, abrogation was available because the Education of the Handicapped Act was "assumed" to have been enacted pursuant to Congress' authority under § 5 of the Fourteenth Amendment. *Id.* at 227 n.1. Here, if the abrogation power is encompassed by the Indian Commerce Clause or the *Pennsylvania v. Union Gas* analysis, Congress' clear statement carries the day. But if neither

abrogation nor *Ex parte Young* suffices, then that clear statement of congressional intent demonstrates the importance of preventing *Hans* from infringing upon the fundamental goals of the Indian Commerce Clause.

In IGRA, Congress intended to abrogate state immunity. Article I, Section 8, Clause 3 expressly provides a grant of exclusive power to Congress to regulate Indian Commerce. Article III of the Constitution grants power to federal courts to hear cases arising under the laws and Constitution of the United States. The Eleventh Amendment's plain language *does not* preclude the Tribe's suit. *Hans v. Louisiana* has been candidly conceded to be unfaithful to the text of the Amendment. *Atascadero*, 473 U.S. at 238. Fidelity to federalism forms the foundation for *Hans*. But distinguishing *Hans* in this case is faithful to federalism, because of the history and plain language of the Indian Commerce Clause.

Hans v. Louisiana and *Ex parte Young* have forged powerful doctrines; the latter an acknowledged fiction, the former constructed on language which does not support its scope. Added now is another facet — the Indian Commerce Clause. "The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character." *Kagama*, 118 U.S. at 381. The relation of the Indian Commerce Clause and the Eleventh Amendment need not be anomalous or complex. The plain language of the Eleventh Amendment excludes tribes. The plain language and history of the Indian Commerce Clause supports a surrender of state sovereignty. *Hans v. Louisiana* need not, and does not, preclude the Seminole Tribe's federal court suit against the State of Florida.

CONCLUSION

For the foregoing reasons, the decision of the Eleventh Circuit Court of Appeals that the Eleventh Amendment confers immunity upon the State of Florida and its Governor should be reversed, and the case remanded for further proceedings to determine the merits of the Tribe's claims under the Indian Gaming Regulatory Act.

Respectfully submitted,

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March 31, 1995

No. 94-12

IN THE
Supreme Court of the United States
October Term, 1994

SEMINOLE TRIBE OF FLORIDA,

Petitioner

v.

STATE OF FLORIDA and
LAWTON CHILES, Governor,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS

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CONSTITUTIONAL PROVISIONS

Art. I, § 8, cl. 3, U.S. Const.:

The Congress shall have power...To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Tenth Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Eleventh Amendment

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Fourteenth Amendment:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 5. The Congress shall have power to enforce by appropriate legislation the provisions of this article.

STATEMENT OF THE CASE

This case arises under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* and 18 U.S.C. § 1166–68 (hereafter IGRA). IGRA establishes a comprehensive statutory scheme for the regulation of gambling on Indian lands. It is the result of years of legislative debate and prior judicial decisions. S.Rep. 100–446, 100th Cong., 1st Sess. 1–5, 1988 U.S.C.C.A.N. 3071–3076.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), this Court held that, on reservation lands, the Indian tribes could engage in unregulated gambling activities if such gambling activities were not criminally prohibited by the State. Congress quickly passed IGRA in order “to provide for a statutory basis for the operation of gaming by Indian tribes,” “to provide a statutory basis for the regulation of gaming by Indian tribes,” and to create the National Indian Gaming Commission with authority to establish standards for gaming on Indian lands. 25 U.S.C. § 2702.

IGRA creates three classes of gambling. The issues before this Court relate to class III gambling, which includes all forms of gambling other than traditional Indian social games and bingo. 25 U.S.C. § 2703(8). Class III gambling is lawful only in a State which permits such gambling. 25 U.S.C. § 2710(d)(1)(B).

A Tribe desiring to conduct class III gambling must request the State in which the Indian lands are located to negotiate a Tribal-State compact governing such gambling. IGRA requires that “the State shall negotiate with the Indian tribe in good faith to enter into such a compact.” 25 U.S.C. § 2710(d)(3)(A). If the State fails to negotiate or fails to negotiate in good faith, IGRA provides that a Tribe can initiate a suit in federal district court [25 U.S.C. § 2710(d)(7)(A)(i)] to seek an order from the court forcing the State to the

negotiating table for the conclusion of a compact within 60 days. 25 U.S.C. § 2710(d)(7)(B)(iii)

If the court finds that the State has not acted in good faith, then “the court shall order the State and the Indian tribe to conclude such a compact within a 60 day period.” *Id.* If a compact is not completed within that time, “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.” 25 U.S.C. § 2710(d)(7)(B)(iv) The mediator is required to select the one of the two submitted compacts which best comports with IGRA, other applicable federal law, and the findings and order of the court. *Id.*

The State and the Tribe then have 60 days to agree to the selected compact. 25 U.S.C. § 2710(d)(7)(B)(v)–(vii) If the parties still cannot agree to execute a compact within that time, then the mediator transmits the selected compact to the Secretary of the Interior. At this point, the Secretary is empowered to prescribe regulations for the implementation of class III gambling consistent with the terms of the chosen compact, IGRA, and State law. 25 U.S.C. § 2710(d)(7)(B)(vii)

On January 29, 1991, the Seminole Tribe asked the State of Florida to commence negotiations pursuant to IGRA for a compact governing the Tribe’s proposals for gambling on Tribal lands. [J.A. 21a] On March 4, 1991, the Tribe submitted a proposed compact providing for Tribal operation of poker, and machine or computer-assisted games which duplicate poker, bingo, pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo. [J.A. 24a–25a, 29a] By letter of May 24, 1991, the State agreed to discuss poker and other games allowed by § 849.085, Fla. Stat., but rejected all of the Tribe’s other compact requests as being contrary to Florida law and not the proper subject of negotiation under IGRA. [J.A. 36a–39a] The letter set forth the State’s preliminary legal position on the scope of

games believed by the State to be subject to compact negotiations and also contained suggestions for issues to be negotiated related to regulatory matters. On June 18, 1991, the Tribe submitted additional games that it asserted met the objections set forth in the May 24 letter from the State, and, at the same time, requested expansion of negotiations to include casino gambling. [J.A. 40a]

On August 22, 1991, representatives of the Tribe met with State representatives to discuss the Tribe's compact request. The State agreed to negotiate concerning poker and other card games, raffles, and parimutuel wagering on dog and horse racing and jai alai, all of which are permitted by Florida law. In response to questions from the State representatives, there was some discussion of how the Tribe would conduct these games if a compact were approved. The State, however, refused to negotiate any machine or computer-assisted gaming, which the State determined would violate §§ 849.15 and 849.16, Fla. Stat. Specifically, the State refused to negotiate a compact covering any form of casino gambling. [Joint Pretrial Stipulation at 4-5, ¶ 6, Pet. App. 45a]

On September 17, 1991, the State and the Tribe met to continue discussions. The State expressed its willingness to discuss a compact for games permitted under the interpretation of IGRA set forth in its September 13 letter. [Pet. App. 45a-46a] On September 19, 1991, the Tribe filed its complaint in the district court alleging that the State of Florida had failed to negotiate in good faith for the completion of a Tribal-State compact for gambling operations pursuant to IGRA. [J.A. 12a]

In its complaint, the Tribe requested an order directing the State to enter into a compact within 60 days pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii). In addition, the Tribe sought a declaratory judgment that the State permitted casino gambling and slot machines, thereby seeking to

make those types of gambling subject to negotiation under IGRA. [J.A. 18a-19a]

The State moved to dismiss the complaint based on the immunity afforded it by the Eleventh Amendment. [J.A. 49a] The district court issued its order denying the motion on June 18, 1992. *Seminole Tribe v. Florida*, 801 F.Supp. 655 (S.D. Fla. 1992) [Pet. App. 26a] An appeal to the Eleventh Circuit Court of Appeals ensued.

The Eleventh Circuit Court of Appeals reversed the district court's denial of Florida's motion to dismiss based on the State's Eleventh Amendment immunity, remanding with instructions to dismiss the case. The Court of Appeals held that the Eleventh Amendment immunity of the States could not be abrogated by Congress pursuant to its authority under the Indian Commerce Clause, Art. I, § 8, cl. 3, U.S. Const., and that none of the established exceptions to the State's Eleventh Amendment immunity, including *Ex parte Young*, were applicable. Therefore, the Court found that the federal courts lacked subject matter jurisdiction. *Seminole Tribe v. Florida*, 11 F.3d 1016 (11th Cir. 1994) [Pet. App. 1a]

During the pendency of the appeal in the *Seminole* case, the State of Florida and the Seminole Tribe agreed to proceed with cross-motions for summary judgment on the merits in the district court. After extensive briefing and oral argument, the district court issued an order and opinion defining the proper scope of negotiations for Florida and the Seminole Tribe. The court found that:

IGRA does not require all Class III gaming activities to be included in compact negotiations merely because the State permits specific Class III gaming activities in some form; and second that, contrary to the Tribe's argument, the State does not permit those specific types of Class III gaming activities which it now seeks to include in the

Tribe-State compact negotiations. Having concluded that these proposed Class III activities need not be included in the compact negotiations, we hold that *the State has not violated the IGRA's good faith requirement* by refusing to include them in the negotiations

[Pet. App. 43a, 82a](emphasis added) This order is currently on appeal to the Eleventh Circuit Court of Appeals. That appeal has been abated during the pendency of the instant case.

JURISDICTIONAL NOTE

The *amicus* brief of the State and Local Legal Center raises a substantial jurisdictional question under Article III, contending that the role of federal courts under IGRA is “non-judicial” and that any order a federal court may enter against a State is unenforceable. If so, the Center’s Article III argument and its jurisdictional concerns merit close attention.

The State views the provisions of IGRA as far more coercive. Indeed, the argument of the Seminole Tribe and its *amici*, and the ruling of several Courts of Appeal, lend great weight to its view. Here, for example, the federal district court construed the Florida laws governing gambling. Presumably, it was prepared to enforce the provisions of IGRA based on its interpretation of Florida law and to specify what the State was required to negotiate. Further, there is nothing in IGRA that requires the Secretary of the Interior to accept the State’s interpretation of its own laws. In fact, the Secretary would probably consider himself bound by a federal court’s construction of State law, even if contrary to the State’s interpretation.

SUMMARY OF THE ARGUMENT

The judgment of the Eleventh Circuit dismissing the Tribe’s suit under IGRA against the State should be affirmed. Congress lacks the power under the Indian Commerce Clause to abrogate the Eleventh Amendment sovereign immunity of the States. Additionally, *Ex parte Young* does not apply to allow suit against the Governor for prospective relief in this case.

The Eleventh Amendment to the United States Constitution embodies the doctrine of sovereign immunity, limiting the grant of judicial authority set forth in Article III of the United States Constitution. The Eleventh Amendment prohibits the bringing of suit against a State in federal court absent the consent of the State. By its terms, the Amendment applies to “any suit in law or equity,” and therefore applies regardless of the relief sought.

The State has not expressly consented to this suit nor can implied consent be found by this Court given the extremely limited circumstances under which implied consent can exit. Consent has been found in the “plan of the convention” for suits between sister States and by the United States against a State. Implicit consent in the “plan of the convention” has specifically been found not to exist between the States and Indian Tribes. *Blatchford v. Native Village of Noatak*, ___ U.S. ___, 111 S.Ct. 2578 (1991).

Consent to suit has also been based on certain provisions of the Constitution where this Court has found the power to abrogate the States’ Eleventh Amendment immunity, such as § 5, Fourteenth Amendment. The Fourteenth Amendment allows federal intrusion into the executive, legislative, and judicial powers previously reserved to the States. This intrusion was ratified by the States, and effectuated by specific language in § 5 of the Amendment. The

conclusion that the States thus consented to Congress' power to abrogate the States' Eleventh Amendment sovereign immunity where it is "necessary to enforce" the Amendment is understandable. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

Consent to Congresses' power to abrogate has also recently been found in the Interstate Commerce Clause. In *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), a plurality of this Court held that clause gives Congress the power to regulate the relations between States in order to foster free trade nationally. Viewed in light of the consent of the States to suit in the "plan of the convention" with respect to other States, and the unique aspects of the Interstate Commerce Clause in its restraint of the States, this Court concluded that such a consent to abrogate could be found in that Clause. But the power to abrogate is only available when the commerce power is incomplete without it and the abrogation is necessary to accomplish the goals of Congress under the Interstate Commerce Clause. Such is not the case here.

Petitioner's assertion that the Indian Commerce Clause also grants to Congress consent to abrogate the States' Eleventh Amendment sovereign immunity is without merit. The Indian and Interstate Commerce Clauses were treated as completely separate provisions in the constitutional convention. Consent found in the Interstate Commerce Clause is premised on a structural understanding of the relations between the States and the Federal Government. The powers granted under the Indian Commerce Clause are of a different character. The Indian Commerce Clause grants Congress complete authority over the Tribes, while the Interstate Commerce Clause grants Congress power to control the relations among the States within the ambit of that Clause. There is no basis to import consent to the power to abrogate under the Interstate Commerce Clause to cases involving the Indian Commerce Clause. *Cotton Petroleum v.*

New Mexico, 490 U.S. 163 (1989). It is not necessary for Congress to subject the States to suit under IGRA in order for Congress to achieve its purposes. Those purposes can be achieved under Congress' complete power over the Tribes; no State involvement is necessary.

If this Court concludes that it cannot distinguish the Interstate Commerce Clause from the Indian Commerce Clause or any other Article I power on a principled basis, then this Court's recent plurality decision finding abrogation under the Interstate Commerce Clause should be overruled. For if Congress has the power to abrogate the States' Eleventh Amendment sovereign immunity under any Article I power, then that immunity has been rendered a nullity.

Nor can the Tribe sue the Governor of Florida under the doctrine of *Ex parte Young*, 209 U.S. 123 (1907), in order to avoid the States' immunity. Although this is not an action for damages, under IGRA it can only be a suit against the State. When an action is one against the State, it is barred regardless of the relief sought.

The requested relief also seeks to compel the Governor to act in an area where he has discretion as to whether and how to act. *Ex parte Young* is therefore inapplicable. Moreover, in that the Tribe seeks a mandatory injunction, not the prohibition of unconstitutional conduct envisioned by *Young*, it asks for relief not available under *Young*.

IGRA utilizes State law to determine what types of class III gaming are permissible. The complaint in this case seeks a determination of State law and a mandatory injunction ordering the Governor to negotiate for the types of gambling set forth in the injunction. This suit, and IGRA to the extent it authorizes this suit, impinge on the State's discretion as to the appropriate interpretation of State law and the proper terms for negotiations. This is a serious intrusion on

the discretion of the State in the formulation of its public policy not warranted by the *Ex parte Young* doctrine. Although the Tribe asserts that the State can ignore the coercive orders of a federal court called for by IGRA, this assertion lacks merit. Ignoring a federal court order impugns the court's dignity and constitutes contempt.

To the extent IGRA's commands are mandatory and the orders of a federal court are mandatory, the State is faced with a choice of negotiating for the terms dictated by the Tribes or facing the coercive orders of the federal courts. IGRA thus treats the States as an administrative subdivision of the federal government in violation of the Tenth Amendment. *New York v. United States*, ___ U.S. ___, 112 S.Ct. 2408 (1992)

Contrary to a new assertion made by the Petitioner, *Hans v. Louisiana*, 134 U.S. 1 (1890), should not be overruled or limited. It has stood for over a century and has been the basis of many decisions of this Court and many laws passed by Congress. The States did not consent to suit in federal court by the Indian tribes in the "plan of the convention" and the States did not consent in the Indian Commerce Clause to Congress abrogating the States' immunity. The relationships of the States and the Tribes with respect to their sovereign immunity, confirmed four years ago in *Blatchford v. Native Village of Noatak*, ___ U.S. ___, 111 S.Ct. 2578 (1991), should be left alone.

ARGUMENT

I.

THE ELEVENTH AMENDMENT DOES NOT PERMIT A SUIT BY AN INDIAN TRIBE AGAINST A STATE OR ITS GOVERNOR BASED ON THE ALLEGED FAILURE OF THE STATE TO NEGOTIATE A GAMING COMPACT IN GOOD FAITH

The Indian Gaming Regulatory Act provides that if a State refuses to negotiate or fails to negotiate in good faith with an Indian tribe for the conclusion of a gaming compact, then the Tribe may sue the State in federal court. 25 U.S.C. § 2710(d)(7)(A)(i) The Seminole Tribe brought suit against the State and its Governor alleging that Florida had failed to negotiate in good faith for the conclusion of a gaming compact. The district court denied a motion to dismiss based on the State's Eleventh Amendment immunity; the Eleventh Circuit Court of Appeals reversed holding that Congress lacked the power to abrogate the State's immunity pursuant to the Indian Commerce Clause and that no exceptions applied.

Prosecution of this suit violates the State's Eleventh Amendment sovereign immunity which bars suit against the State in federal court absent the States' consent, regardless of the relief sought. Congress lacks the authority under the Indian Commerce Clause to abrogate such immunity.

A. The Eleventh Amendment Embodies the Concept of Sovereign Immunity in its Entirety

Sovereign immunity is a common law doctrine which shields the sovereign from the coercive power of the courts. This immunity is absolute without the consent of the sovereign. *Employees of the Department of Public Health and Welfare v. Dept. of Public Health and Welfare, State of Missouri*, 411 U.S. 279, 288 (1973). In *Hans v. Louisiana*, 134 U.S. 1 (1890), this Court found:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.

Id. at 13 (quoting Alexander Hamilton, Federalist # 81). See also, *Monaco v. Mississippi*, 292 U.S. 313, 322-27 (1934). This immunity is absolute, regardless of the relief sought. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, ___ U.S. ___, 113 S.Ct. 684, 688 (1993).

In 1793, this Court assumed original jurisdiction over a suit brought by a citizen of South Carolina against the State of Georgia. *Chisolm v. Georgia*, 2 Dall. 419, 1 L.Ed. 440 (1793). This Court's decision, to hold Georgia liable upon certain bonds, "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted." See, *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 97-98 (1984). Although the Eleventh Amendment was adopted in direct response to the holding in *Chisolm*,

this Court has recognized that its greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III.

Pennhurst, 465 U.S. at 98. Thus, in *Hans v. Louisiana*, 134 at 15, the Court found that "federal jurisdiction over suits

against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States."

The Eleventh Amendment embodies the broad and fundamental principles of sovereign immunity. *Welch v. Texas Dept. of Highways*, 483 U.S. 468, 472, 486 (1987); *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985). This limitation on the judicial power of the United States is a "compelling force," *Ford Motor Co. v. Indiana*, 323 U.S. 459, 467 (1945), extending to all suits regardless of the relief sought. *Puerto Rico*, 113 S.Ct. at 688. By its very terms the Amendment applies to "any suit in law or equity," a premise acknowledged in *Cory v. White*, 457 U.S. 85, 90 (1982):

Edelman did not hold, however, that the Eleventh Amendment never applies unless a judgment for money payable from the State treasury is sought. [footnote omitted] It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the state itself simply because no money judgment is sought.

See also, *Pennhurst*, 465 U.S. at 114 n.25 ("[T]here was no suggestion [in *Edelman*] that damages alone were thought to run against the State while injunctive relief did not" thereby barring damage claims but not injunctive claims.) This bar is necessary "to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico*, 113 S.Ct. at 689. See also, *Fitts v. McGhee*, 172 U.S. 516, 527-28 (1899).

The Court has frequently recognized this broad intent:

The fact that the motive for the adoption of the 11th Amendment was to quiet grave apprehensions that were extensively entertained with respect to

the prosecution of state debts in the federal courts cannot be regarded...as restricting the scope of the amendment to suits to obtain money judgments. The terms of the amendment...were not so limited.

Missouri v. Fiske, 290 U.S. 18, 27 (1933). *Accord*, *Employees*, 411 U.S. at 292 (the Eleventh Amendment reversed the holding in *Chisolm* and more generally restored the original understanding of sovereign immunity.)

In *Hess v. Port Authority Trans-Hudson Corp.*, ___ U.S. ___, 115 S.Ct. 394 (1994), this Court held that the Port Authority, a bistate compact clause entity, was not entitled to Eleventh Amendment immunity. Referring to the “impetus for the Eleventh Amendment,” it acknowledged that jeopardy of the public fisc was the most salient factor. *Id.* at 404. However, the Court also recognized that this is not the only issue for Eleventh Amendment analysis, discussing the “twin reasons” for the passage of the Eleventh Amendment: 1) to protect the public fisc; and 2) to accord the States the respect owed them as members of the federation. *Id.* at 400. The Eleventh Amendment “emphasizes the integrity retained by each State.” *Id.* *Accord*, *Fitts v. McGhee*, 172 U.S. at 528 (Eleventh Amendment’s purpose was to prevent the indignity of subjecting the States to the coercive process of the federal courts.)

The Eleventh Amendment is a “fundamental protection” and is

rooted in a recognition that the States, although a Union, maintain certain attributes of sovereignty, including sovereign immunity...It thus accords the States the respect owed them as members of the federation.

Puerto Rico, 113 S.Ct. at 688-89. No matter what relief is requested, suits against the State violate the fundamental value of sovereign immunity as embodied in the Eleventh Amendment and are barred, absent the consent of the sovereign State. Despite this overwhelmingly clear standard, the Petitioner and the Solicitor General argue that the Eleventh Amendment can be abrogated. Their logic fails because they cannot point to any consent in the “plan of the convention” which will support this power.

B. Florida has not Consented to this Suit

The Eleventh Amendment embodies the historical understanding of the immunity of a State as a sovereign entity. It stands for the

presupposition of our constitutional structure...that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty. ...and that a State will therefore not be subject to suit in federal court *unless it has consented to suit*, either expressly or in the plan of the convention.

Blatchford v. Native Village of Noatak, ___ U.S. ___, 111 S.Ct. 2578, 2581 (1991) (emphasis added). Consent in this context can be express or implied, although implied waiver or consent “is not a doctrine commonly associated with surrender of constitutional rights.” *Welch*, 483 U.S. at 473; *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). In this case, Petitioner has never claimed that the State of Florida expressly waived its immunity. Implied consent has previously been found by this Court only by virtue of: 1) an absolute consent in the “plan of the convention”; or 2) consent in that plan to allow Congress to abrogate the States’ immunity. Neither of these doctrines of implied consent can

be applied to a suit by an Indian tribe against the State based on the Indian Commerce Clause. *Blatchford*, 111 S.Ct. at 2582-83.

1. *Plan of the Convention*

The States surrendered a limited quantum of their sovereignty and consented to two classes of lawsuits when the Constitution was adopted in 1789.

States of the Union still possessing attributes of sovereignty shall be immune from suits, without their consent, save where there has been “a surrender of this immunity in the plan of the convention.”

Monaco, 292 U.S. at 322-23 (quoting A. Hamilton, (Federalist # 81))

This Court has found two types of consent in the “plan of the convention.” In order to ensure the permanence of the Union, suits by the United States against a State are permitted. *U.S. v. Texas*, 143 U.S. 621 (1892). The constitutional plan also requires that controversies between States be the subject of judicial settlement.

The waiver or consent, on the part of a State, which inheres in the acceptance of the constitutional plan, runs to the other States who have likewise accepted that plan and to the United States as the sovereign which the Constitution creates.

Monaco, 292 U.S. at 328-30. *See also, Blatchford*, 111 S.Ct. at 2582. Art. III, § 2, U.S. Const., bolsters this finding of consent by specifically granting to the federal courts “judicial power” over “controversies to which the United States shall be a party” and “controversies between two or more

States.” Of critical note, this “plan of the convention” consent does not extend to the Indian tribes.

[I]t would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender *the tribes’* immunity for the benefit of the *States*, we do not believe that it surrendered the States’ immunity for the benefit of the tribes.

Blatchford, 111 S.Ct. at 2582-83 (emphasis in original). Neither is there any indication of such a consent in Article III of the Constitution. In addition to the consent found in the “plan of the convention,” the States have consented to a limited power in Congress unilaterally to abrogate the States’ Eleventh Amendment sovereign immunity.

2. *Abrogation*

In this case, the Seminole Tribe argues that Congress, in the passage of IGRA, intended to and did abrogate the States’ sovereign immunity pursuant to its authority under the Indian Commerce Clause, Art I, § 8, cl. 3, U.S. Const. Congress lacks such power.¹

Petitioner’s arguments ignore this Court’s pronouncement that abrogation of the States’ sovereign immunity places considerable strain on the concepts of federalism which inform the Eleventh Amendment and upsets the fundamental balance set by the Constitution. *Dellmuth v.*

¹ The court below determined that the IGRA was passed pursuant to the Indian Commerce Clause. [Pet App. 17a-18a] *Amici* for the Tribes argue that the Interstate Commerce Clause provided authority for this Act and therefore the Congress had authority to abrogate the States’ sovereign immunity under *Pennsylvania v. Union Gas*. This issue is not properly raised by *amici*. *UPS v. Mitchel*, 451 U.S. 56, 60 n.2 (1981)

Muth, 491 U.S. 223, 227 (1989). In fact, the power to abrogate has been found by this Court in only two contexts: 1) § 5, Fourteenth Amendment; and 2) the Interstate Commerce Clause, Art. I, § 8, cl. 3. Neither applies or lends force to the Tribe's argument.

a. § 5, Fourteenth Amendment

The enactment of the Fourteenth Amendment sanctioned unprecedented intrusions into the legislative, executive, and judicial autonomy previously reserved to the states. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976). The prohibitions of the Fourteenth Amendment are directed to the States:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amend. XIV, U.S. Const.

[The Civil War Amendments] have reference to actions of the political body denominated a State by whatever instruments or in whatever modes that action may be taken.

Quern v. Jordan, 440 U.S. 332, 355 (1979) (quoting *Ex parte Virginia*, 100 U.S. 339, 346–47 (1880)).

Section 5 of the Amendment states that, "The Congress shall have power to enforce by appropriate legislation the provisions of this article." Referring to that section, this Court has held:

We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment,

provide for suits against States or state officials which are constitutionally impermissible in other contexts.

Fitzpatrick, 427 U.S. at 456. *Fitzpatrick* arose under the Civil Rights Act to remedy sex discrimination in the State's retirement benefits program. Title VII was passed pursuant to Congress' authority under the Fourteenth Amendment. *Id.* at 453 n.9. This Court held that Congress could authorize actions against the States for damages and attorneys' fees under that authority. *Id.* at 456–57.

The intrusion into the States' legislative, executive, and judicial authority, coupled with the explicit authority to adopt appropriate legislation, give solid ground to the implication that the States were granting to Congress the power to intrude further on their sovereignty by allowing for suit in federal court to enforce the terms of the Amendment. Neither the terms nor the history of the Indian Commerce Clause bear any resemblance to the Fourteenth Amendment in this respect. Terse in the extreme, the clause does not even hint at a surrender of sovereignty.

b. Interstate Commerce Clause

Although supported by a different foundation, this Court has also found the power to abrogate the States' Eleventh Amendment sovereign immunity in the Interstate Commerce Clause. In *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), this Court held that Congress could abrogate the States' Eleventh Amendment sovereign immunity in its enactment of the "Superfund" Law pursuant to its powers under the Interstate Commerce Clause. *Id.* at 23 (plurality). The ruling was grounded on "the special nature of the power conferred by that Clause." *Id.* at 19. The Court stated that the interstate commerce power would be "incomplete without the authority to render States liable in damages" and

that Congress “found it necessary, in exercising this authority, to render [the States] liable.” *Id.* at 19-20.

In context, this finding is understandable, even though Justice White, the fifth vote for the majority, concurred without explaining his reasoning. *Id.* at 57. The Interstate Commerce Clause is concerned with maintaining free trade among the states. *Cotton Petroleum v. New Mexico*, 490 U.S. 163, 192 (1989). Under the “dormant” commerce clause, the States are restrained in their actions with regard to each other in the absence of federal legislation. Under Congress’ active powers, the aim is still to foster free trade among the States. This clause, both dormant and active, is unique among the Article I powers granted to the national government - it restrains the States and expressly allows regulation of the economic relationships among the States. If the States consented to suits by sister States in the “plan of the convention,” then it is logical to contend that the States consented to Congress’ power to subject them to suit under the power granted to police the relationships of the States to each other.

Both § 5, Fourteenth Amendment and the Interstate Commerce Clause grant powers to Congress which are addressed to the States. The Indian Commerce Clause, on the other hand, is a grant of power to Congress to control the affairs of the Indian tribes. The States did not submit to suits by Indian tribes in the “plan of the convention,” and neither did the States consent to Congress’ power to abrogate the States’ Eleventh Amendment sovereign immunity in the “plan of the convention” by reason of the adoption of the Indian Commerce Clause. No consent can be found to support the abrogation of the States’ Eleventh Amendment immunity pursuant to the Indian Commerce Clause.

no commerce with the Tribes - what of Worcester v. Georgia.

3. *The Indian Commerce Clause*

In order to overcome the States’ sovereign immunity, the Court must find consent. Petitioner argues that the States have consented to Congress’ power to abrogate the States’ Eleventh Amendment sovereign immunity pursuant to its power under the Indian Commerce Clause. This argument lacks merit.

As Chief Justice Marshall observed in *Cherokee Nation v. Georgia*, 5 Pet. 1, 18, 8 L.Ed. 25 (1831): “The objects to which the power of regulating commerce might be directed, are divided into three distinct classes — foreign nations, the several states, and Indian Tribes. When forming this article, the convention considered them as entirely distinct.”

* * *

It is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation,...the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.... The extensive case law that has developed under the Interstate Commerce Clause, moreover, is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause.

Cotton Petroleum, 490 U.S. at 192 (citations omitted).

The Interstate Commerce Clause and the Indian Commerce Clause are wholly dissimilar and the latter provides no

principled basis whatsoever for finding that the States consented to suit by the Indian Tribes. *Blatchford*, 111 S.Ct. at 2583. The States cannot be presumed to have agreed to something indirectly which they clearly did not agree to directly, *i.e.*, consent to suit by tribes in derogation of the States' sovereign immunity. This distinction is consistent with the distinctions made by this Court in *Cotton Petroleum*. The implied consent found in *Union Gas* from the Interstate Commerce Clause is based on a structural understanding of the relationship of the state and federal governments, including the consent derived from the "plan of the convention." That understanding does not apply to the Indian Commerce Clause.

The Indian Commerce Clause gives Congress exclusive and plenary power *over the Indian tribes*. This power is *complete* — complete enough to allow for the elimination of a tribe as a legal entity.

The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance.

United States v. Wheeler, 435 U.S. 313, 323 (1978). *See, e.g.* Alabama and Coushatta Indians of Texas Termination Acts, 25 U.S.C. §§ 721–728.

Petitioner's historical analysis of the Indian Commerce Clause brings it only to this point — that the power of Congress over the Tribes is exclusive and complete with respect to the *Indian tribes*. It does not follow from that proposition that the power to abrogate the States' Eleventh Amendment sovereign immunity is even arguably found in the Indian Commerce Clause.

The Tribe's sovereignty is wholly dependent on the pleasure of Congress. States are not so dependent; they created

a Union premised upon their sovereignty remaining intact. As opposed to its complete power over the Indian tribes, Congress has only the limited powers granted to it by the Constitution to control the relations among the States. The right to abrogate Eleventh Amendment sovereign immunity is available to Congress under the Interstate Commerce Clause only if its power is "incomplete" and abrogation is "necessary" for the exercise of the commerce power. *Union Gas*, 491 U.S. at 19–20 Neither of these conditions is met with respect to IGRA and the Indian Commerce Clause.

Congress' power under the Indian Commerce Clause is complete. With regard to Indian affairs, there are no limitations on Congress' authority to pass legislation affecting the Tribes. Subjecting the States to suit is not necessary either to fulfill that power or to effectuate the stated purposes of IGRA. The purposes of IGRA include providing a statutory basis for the operation and regulation of Indian gambling. 25 U.S.C. § 2702 Inclusion of the States in the regulatory scheme was not necessary. IGRA could have been written to allow the Tribes to regulate themselves, to subject them to federal regulation, to allow *voluntary* participation of the States, or to allow for suit by the United States to enforce the terms of the Act. *See, Employees*, 411 U.S. at 285–86 (FLSA allows for suit by the Secretary of Labor.). None of these schemes would have required that the States be subject to suit by a Tribe in derogation of their Eleventh Amendment sovereign immunity. Contrary to the Tribe's assertion that the remedy crafted by Congress in IGRA is "consistent with the core values of the Eleventh Amendment," [Pet Br. at 21 n.5], that remedy ignores "the very object and purpose of the Eleventh Amendment [which] were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties." *Fitts v. McGhee*, 172 U.S. at 527–28

IGRA's scheme plainly mandates State involvement in permitting casino gambling on tribal lands. The Tribe even interprets IGRA as allowing a federal court to decide that the Tribe is allowed to conduct casino gambling that the State believes is denied to all other citizens by State criminal law. Both fly in the face of the Tenth Amendment. As this Court observed in *New York v. United States*, 112 S.Ct. 2408, 2424 (1992):

[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.

The Tenth Amendment does not allow federal officials to avoid accountability in this manner. *Id.* Casino gambling remains politically unpopular in most States and has been defeated in Florida in three referenda in the past two decades. If Congress wishes to control casino gambling on reservations, it has the complete authority to do so and such a decision should be made "in full view of the public." *Id.*

4. *Union Gas* Should be Overruled

Congress chose to command the States to be involved in Indian gambling and created an enforcement remedy that can only be based on an extension of the plurality opinion of this Court in *Union Gas*. The differences between the Indian and Interstate Commerce Clauses militate strongly against extending that holding to this case. The Indian Commerce Clause provides no authority for Congress to abrogate the States' Eleventh Amendment sovereign immunity. On issues of constitutional law, the doctrine of *stare decisis* is not strictly followed. *Edelman*, 415 U.S. at 671 & n.14. *Stare decisis* is a "principle of policy" not an "inexorable

command." *Payne v. Tennessee*, 115 L.Ed.2d 720, 737 (1991). That is especially true in cases such as this where the issue is constitutional and "correction through legislative action is practically impossible." *Id.* Where a precedent is "unworkable or badly reasoned" the Court should not feel restrained. *Id.* This is the case with the plurality holding of *Union Gas*, a relatively recent, not widely relied upon holding. The divergent interpretations regarding the validity of the remedy found in IGRA is evidence of the difficulty of reconciling that opinion with the existing body of law. In contrast, this Court has refused to overturn *Hans v. Louisiana*, a unanimous decision upon which a minimum of 17 decisions of this Court and innumerable acts of Congress rely. *Welch*, 483 U.S. at 494 n.27, 495-96 (Scalia concurring).

Case could repeat.

If this Court concludes that it cannot limit *Union Gas* to the uniqueness of the Interstate Commerce Clause, or if credence should be given to Petitioner's amici's argument that IGRA was adopted under the Interstate Commerce Clause, then *Union Gas* should be reconsidered and overruled. For a full discussion of this point, see Brief of amici, States, which we adopt here by reference.

Union Gas held that the Interstate Commerce Clause's plenary authority to regulate commerce provides a basis for the power to abrogate. An expansive reading of this power would render the States' Eleventh Amendment sovereign immunity a nullity. All of Congress' power is plenary when read in conjunction with the Supremacy Clause. All of Congress' power is granted by the States with a concomitant reduction in the sovereign power of the States and all of Congress' powers are "carved out" of the States' power. *Fitzpatrick*, 427 U.S. at 456.

A broad reading of *Union Gas* that ignores the unique nature of the Interstate Commerce Clause renders all Article I powers unrestricted and available as a basis for

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overruling the States' Eleventh Amendment sovereign immunity, leaving it without any force. Article I powers are not, however, unrestricted. For example, Congress can regulate the publishing industry under the Interstate Commerce Clause as that power is necessarily limited by the First Amendment. *See, New York* 112 S.Ct. at 2418 (analyzing limitations on Congress' power in a Tenth Amendment context.) Incidents of State sovereignty can be protected from Article I powers. In *New York*, it was the Tenth Amendment which did so; in this case the Eleventh Amendment protects the States' sovereign immunity, an incident of State sovereignty. *Cf. Id.*

In *Fitzpatrick*, this Court found that the Fourteenth Amendment, given its unique history and purpose, allowed suits that would be "constitutionally impermissible in other contexts." 427 U.S. at 456. If a broad reading of *Union Gas* is adopted, there would be no "other contexts" — Congress could subject the States to suit at its pleasure under any of its Article I powers. Arrogating such power to Congress renders the fundamental protection of the Eleventh Amendment a nullity and such a reading should be rejected.

The Indian Commerce Clause provides no basis upon which to find the power to abrogate the States' Eleventh Amendment sovereign immunity. There was no consent in the "plan of the convention" for direct suits by Indian tribes against States and, therefore, there was no consent in the "plan of the convention" to Congress' power to create such causes of action. This distinction controls this case and prevents the importation of the power to abrogate from the Interstate to the Indian Commerce Clause. The judgment of the Eleventh Circuit should be affirmed.

II. THE SEMINOLE TRIBE CANNOT AVOID FLORIDA'S ELEVENTH AMENDMENT SOVEREIGN IMMUNITY SIMPLY BY INVOKING *EX PARTE YOUNG* AND NAMING THE GOVERNOR

The Tribe argues that even if Congress lacked the power to abrogate the States' Eleventh Amendment sovereign immunity under the Indian Commerce Clause, suit can be maintained against the Governor of Florida under the doctrine set forth in *Ex parte Young*, 209 U.S. 123 (1907). The Solicitor General joins in this contention.

The ruling in *Young* has not been given the expansive interpretation the Tribe and the Solicitor General suggest here. *See, Pennhurst*, 465 U.S. at 102. It is a narrow exception and "has no application in suits against the States and their agencies which are barred regardless of the relief sought." *Puerto Rico*, 113 S.Ct. at 688. *Ex parte Young* does not apply here because: A) this is in reality an action against the State; B) the acts sought to be mandated are discretionary, not ministerial; and C) there is neither an allegation of the existence of an unconstitutional State law nor a request to enjoin an unconstitutional action by a State officer.

A. This Suit is in Reality One Against the State

The doctrine in *Ex parte Young* is inapplicable if the suit is in reality one against the State. *Quern*, 440 U.S. at 345 n.17; *Cory*, 457 U.S. at 89. Under IGRA, the suit brought by the Petitioner is plainly one against the State. IGRA's commands are directed solely against the State and require the exercise of the State's legislative, compacting, and contracting powers, and further require that decisions be made

as to the application, *vel non*, of its criminal and civil authority. It is the *State* which must negotiate in good faith [25 U.S.C. § 2710(d)(3)(A)]; it is the *State* which must enter into compacts with the Tribes [25 U.S.C. § 2710(d)(1)(C)]; it is the *State* which may be sued [25 U.S.C. § 2710(d)(7)(A)(i)]; it is the *State* which will be ordered to complete a compact within 60 days [25 U.S.C. § 2710 (d)(7)(B)(iii)]; it is the *State* which will be ordered to submit its last best offer for a compact to a mediator [25 U.S.C. § 2710(d)(7)(B)(iv)].

In other analogous situations, this Court has steadfastly refused to adopt the position of the Tribe and the Solicitor General. In *Cory v. White*, a suit was brought under the Federal Interpleader Act by the executor of the estate of Howard Hughes to determine the domicile of the decedent for death tax purposes. The State officials who were sued raised the Eleventh Amendment as a defense and this Court specifically declined to narrow its reach, declining to hold that all suits for injunctions are permissible under *Young*. *Cory*, 457 U.S. at 91. Similarly, in *Worcester County Trust v. Riley*, 302 U.S. 292, 296 (1937), this Court stated:

[A] suit nominally against individuals, but restraining or otherwise affecting their action as state officers, may be in substance a suit against the state, which the Constitution forbids[.]

See also, Quern, 440 U.S. at 345 n.17 (quoting *Osborn v. Bank of U.S.*, 9 Wheat. (22 U.S.) 738 (1824)(key inquiry is whether the state officer is in fact the real party in interest or whether he is only a nominal party.)) *See also, Great Northern Life v. Read*, 322 U.S. 47, 51 (1944)(State cannot be controlled by courts through suits against officials.) This

Court has never ruled otherwise.² *See, Hawaii v. Gordon* 373 U.S. 57, 58 (1963) (The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter).

Even if the relief is not compensation, but the prevention or discontinuance of the wrong, the compulsion which the court is asked to impose may be against the sovereign although nominally directed against the individual. If so, the suit is barred. *Pennhurst*, 465 U.S. at 101 (relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). It is the essential nature and effect of the proceeding which determines whether it is a suit against the State. *Ford Motor Co.*, 323 U.S. at 464. The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would restrain the government from acting or *compel it to act*. *Dugan v. Rank*, 372 U.S. 609, 620 (1963)(emphasis added)(suit for injunction against officials of the United States actually against the sovereign).

In this case, the Tribe has attempted to avoid the State's Eleventh Amendment sovereign immunity by naming the Governor as the chief executive officer of the State. The

² In cases where damages were at issue, the Court seems to have developed a shorthand test — damage claims are barred as being against the sovereign. However, this must be considered a two tier test, because if the claim is for injunctive relief, the question of whether the claim is in reality one against the State remains. Were this not the case, then all of the language cited above addressing whether the case is really one against the State is merely superfluous; the only question that would need to be answered is the damages question. This Court has disavowed such an interpretation of *Edelman*. *Cory*, 457 U.S. at 90 n.2; *Pennhurst*, 465 U.S. at 114 n.25.

Court, in *Ex parte Young*, specifically disavowed such a subterfuge.³

The things required to be done by the actual Defendants were the very things which, when done, would constitute a performance of the alleged contract by the state.

Id. at 151; *Quern*, 440 U.S. at 345 n.17 The same is true here. Any decree would be an order compelling the State to act, as the only “duties” imposed by IGRA fall upon the State. This not the type of injunction envisioned by *Young*. The injunction in *Young* sought to prevent a State Attorney General from doing “that which he had no legal right to do.” *Ex parte Young*, 209 U.S. at 159. The mandatory injunction requested here seeks to order the Governor to do that which IGRA commands the *State* to do.

It is the effect of the relief sought which determines whether the suit is one against the state. In *Pennhurst*, 465 U.S. at 107-08, all of the relief ordered was institutional and official in character and relief under *Young* was denied. The same is true in the instant case. The relief requested is institutional in that it runs against the only party recognized by IGRA, the *State*; and it is official in that it seeks an order telling the Governor how to act in his official capacity as Governor. An order enjoining the Governor to take action under the dictates of IGRA would require of the Governor the very things IGRA commands of the State. Such a mandatory injunction would impermissibly compel the State to take action and interfere with the public administration. If the Tribe’s argument were accepted, the

³ “Where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record. If the state is not a party, there is no party against whom a decree can be made.” *Governor of Georgia v. Madrazo*, 1 Pet. 110, 123-24 (1828).

“narrow exception” set forth in *Young* would virtually eviscerate the Eleventh Amendment and any request for prospective injunctive relief would be permissible.

The Tribe asserts that the Governor is responsible for negotiating a compact with the Tribe. But the argument fails to distinguish the Governor from the State. Moreover, no citation to IGRA will support the Tribe’s assertion. The only authority cited for this proposition is a provision of the Florida Constitution vesting executive authority in the Governor. [Pet. Br. at 23] But this provision does not vest him with authority to negotiate a compact. Compacting is traditionally a legislative act. Under the federal Compact Clause, interstate compacts are generally approved by the State legislatures and then by Congress. Similarly, other state compacts with Indian tribes are legislatively approved. *See, e.g.*, § 285.165, Fla. Stat. (Water Rights Compact between the Seminole Tribe and the State of Florida) If the legislature assumed the role of negotiator with the Tribes, the Legislature could not be sued under *Ex parte Young* because the Legislature is unquestionably “the State.” This suit is, in reality, one against the State, seeking a mandatory injunction ordering the Governor to exercise his discretion in a certain way, and it is barred by the Eleventh Amendment.

B. The Acts Which are Mandated by IGRA Involve Discretion

Petitioner asserts that the acts sought to be enjoined are not discretionary and therefore are properly subject to the *Ex parte Young* exception. (Pet Br. 25-31) The Tribe asserts that only the requirement to negotiate in good faith is subject to the injunction and that the discretion as to the terms of the negotiation remains unaffected. Finally, the

Tribe asserts that the State can simply refuse to participate in the remedial actions ordered by the Court.

The complaint in this action shows that the Tribe was not merely seeking an order requiring the State to negotiate in good faith, but a declaration that certain games were to be the subject of negotiations based on the Tribe's assertion that those games were "permitted" in Florida. [J.A. 18a-19a] Any order from a court addressing this issue necessarily impinges on the discretion of the State to determine the extent of the negotiations *in accordance with State law*.

By limiting negotiations to gambling activities which are "permitted" by the State, IGRA relies upon State law in the implementation of the federal act. 25 U.S.C. § 2710(d)(1)(B). *See also*, 18 U.S.C. § 1166 (incorporating State law for federal enforcement purposes). In order to grant the Tribe's requested relief, a federal court must interpret State law and order the State to comply. That is prohibited.

It is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.

Pennhurst, 465 U.S. at 106. By asking for an interpretation of what Florida "permits" under its own law, Petitioner requested just such an intrusion.

The Tribe's suggestion that the State can merely refuse to participate in the remedial process militates against its argument. If the State can refuse, then the very willingness to negotiate becomes a discretionary act. The Solicitor General even characterizes the "duty" to negotiate as a "conditional one." [Sol. Br. at 17] If so, then it is not a ministerial duty for which a mandatory injunction will lie. *Young*, 209 U.S. at 158. Petitioner cannot have it both ways;

either the State's participation is discretionary or it is not. If it is, then *Ex parte Young* does not apply no matter how its holding is interpreted.⁴ If the States' participation is mandatory, then IGRA violates the Tenth Amendment.

The Eleventh Circuit did not address the Tenth Amendment issue because it had not been raised in the District Court. [Pet. App. 2a-3a at note 2] This Court's decision in *New York v. United States* had not been issued at the time of the filing of the complaint and motions in this case. Petitioner asserts that the dictates of IGRA are mandatory, thereby allowing an injunction to be issued under *Ex parte Young*. This Tenth Amendment question is therefore subsumed within the second question posed by the Petitioner and accepted for review by this Court. The Court may appropriately address the issue.

New York v. United States, 112 S.Ct. 2408 (1992), held that the "take title" provision of the Low-Level Radioactive Waste Policy Act of 1985 was a violation of the Tenth Amendment. This was based on a finding that, under the Act:

A State may not decline to administer the federal program. No matter which path the State chooses, it must follow the direction of Congress.

Id. at 2429. But, as the Court pointed out, Congress has authority over individuals, not the States. *Id.* at 2422. Hence, it can encourage, but not compel, a State to regulate in a particular way. For example, under the Spending Clause, Congress may condition the receipt of federal funds on compliance with certain dictates, *id.* at 2423, and thus highway funds may be conditioned on the adoption of a minimum drinking age. *South Dakota v. Dole*, 483 U.S. 203,

⁴ If the States' role is discretionary, then the Tribes have another jurisdictional problem — if the State has no duty, then the failure to act does not raise a case or controversy for Article III jurisdictional purposes.

206 (1987). Further, Congress can offer the States an alternative of regulating according to a federal standard or having State law preempted. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981).

Congress afforded the States neither of these alternatives in the passage of IGRA. The Act provides that the State “shall negotiate.” 25 U.S.C. § 2710(d)(3)(A). If the State fails to negotiate, or negotiate in good faith, then it will be subject to the coercive process of the federal courts. 25 U.S.C. § 2710(d)(7)(A)(i). The coercive elements of IGRA, requiring the States to negotiate under pain of federal court compulsion, reduce the States to mere administrative subdivisions of the federal government. IGRA violates the Tenth Amendment when it puts the States in this position *New York*, 112 S.Ct. at 2434.

Petitioner asserts that the State can simply refuse to participate. (Pet Br. at 26 n.9) But that course risks a finding of contempt and undermines the dignity of the federal courts. IGRA empowers a federal court to **order** the parties to conclude a compact within 60 days and then to **order** the parties to submit a “last best offer” to a mediator.⁵ 25 U.S.C. § 2710(d)(7)(B)(iii) and (iv). Failing that, the Secretary of the Interior is empowered to impose regulations governing the conduct of class III gambling, presumably making *his* interpretation of State law the final word. 25 U.S.C. § 2710(d)(7)(B)(vii). Moreover, there is no limitation

⁵ In part V of the opinion of the Eleventh Circuit below [Pet. App. 24a–25a], the court creates a remedy for the Tribes which is not found in IGRA and which upsets the balance of the parties which was carefully crafted in the passage of IGRA. The court may not legislate; if IGRA’s process is barred by the Eleventh Amendment, then it is up to Congress to rebalance the interests of the parties in the creation of a new statutory scheme. This issue is pending on a cross-petition for certiorari in this Court, docket number 94-219.

on his authority to include duties for the State in his proposed regulations.

By subjecting the States to the choice of negotiating and entering into a compact or being subject to the coercive orders of the District Court, IGRA violates the Tenth Amendment. The relief sought under IGRA against the Governor directs him in the exercise of his discretion; no such relief is available under *Ex parte Young* absent an allegation of an unconstitutional State law or an unconstitutional action by State officers.

C. There is no allegation of an unconstitutional State law or an unconstitutional action by State officers

In *Ex parte Young*, the Attorney General of Minnesota was enjoined from enforcing an unconstitutional state law. This Court held that the unconstitutional state law was void and therefore could not impart to the responsible official the immunity of the State. *Id.* at 159-60. In this case, there is no allegation that the actions of the Governor are in furtherance of an unconstitutional law. Nor is there an allegation that his conduct violates the Constitution. Therefore, the rationale of *Young* is inapplicable. This Court found *Ex parte Young* similarly inapplicable in *Worcester County Trust v. Riley*:

the present suit is not founded on the asserted unconstitutionality of any state statute and the consequent want of lawful authority for official action taken under it.

302 U.S. at 300; *Mansour*, 474 U.S. at 68 (*Ex parte Young* exception applies to “a suit challenging the constitutionality of a state official’s action in enforcing [a] state law”); *Employees*, 411 U.S. at 294 n.9 (suits may be brought in federal court against state officers allegedly acting unconstitutionally).

In *Ex parte Young* the Court held that where “the act which the state attorney general seeks to enforce be a violation of the federal constitution” then he will be stripped of the State’s immunity in recognition of the “superior authority of that Constitution.” *Id.* at 160-61; *Pennhurst*, 465 U.S. at 104. This is an obvious reference to the Supremacy Clause which prevents the States from enacting laws in conflict with federal enactments. *See, Mansour*, 474 U.S. at 68 (“Relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause.”) When a State enactment conflicts with a federal law, it is unconstitutional under the Supremacy Clause and an injunction under *Young* would be available to prevent enforcement of the State law. Without an unconstitutional State law or rule, there is no basis for an injunction. *Compare, e.g., Edelman*, 415 U.S. at 653 (allegation that Edelman, the Director of the Cook County Department of Public Aid, administered the federal AABD program pursuant to the Illinois Public Aid Code, which conflicted with the federal regulations prescribing time standards for processing applications. This conflict rendered the code unconstitutional.) The lack of an allegation of the unconstitutionality of either a State law or the action of a State officer renders the doctrine of *Ex parte Young* inapplicable.

III. A TRIBAL EXCEPTION TO *HANS v. LOUISIANA* SHOULD NOT BE ALLOWED

Petitioner argues that the holding in *Hans v. Louisiana* should be limited so as not to be applicable to suits by Tribes against States. In *Hans*, this Court held that the Eleventh Amendment prohibited suits against a State by citizens of that State even though the text of the Amendment did not literally state it. This holding was a confirmation of the sovereign immunity which the States retained upon creation of the Union. *Pennhurst*, 465 U.S. at 98.

The Tribe’s argument would subject the States to suits by the Tribes on the same footing as suits by other States or the United States and require overruling this Court’s holding in *Blatchford*. The only basis for suits by other States or the United States is the consent found in the “plan of the convention.” This Court previously held that the States did not give such consent with regard to the Indian tribes. *Blatchford*, 111 S.Ct. at 2582–83.

In making this argument, Petitioner relies on language found in the Constitution’s preamble. (Pet. Br. 33) This argument again is a “plan of the convention” argument which has been rejected by this Court. The States did not accede to Congress’ power to abrogate their sovereign immunity in favor of the Tribes, any more than they consented to suits by the Tribes in the “plan of the convention.”

The Petitioner’s argument that a clear statement of intent to abrogate the States’ immunity suffices to avoid the application of *Hans* is without merit. Congress cannot arrogate power to itself by simply stating its intent in bold clear language. In *New York v. United States*, 112 S. Ct. 2408 (1992), this Court found that Congress had similarly attempted to subject the States to an unconstitutional requirement in the

“take title” provision of the Low-Level Radioactive Waste Policy Act. That clear statement of intent did nothing to overcome the violation of the Tenth Amendment found there.

Petitioner alludes to various policy considerations which it believes justify limiting *Hans*. However, in *Pennhurst*, this Court said:

[C]onsiderations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a state.

465 U.S. at 123. Similarly, policy considerations suggested by the Tribe cannot override the fundamental limitation on the power of Congress or the judiciary embodied in the States’ Eleventh Amendment sovereign immunity.

Finally, it is unnecessary and unwise at this time to add another layer of complexity to the analysis of the States’ Eleventh Amendment sovereign immunity by creating an exception to *Hans*. The power to abrogate is not necessary for Congress to fulfill its duties and responsibilities under the Indian Commerce Clause. And, contrary to Petitioner’s false plea, [Pet. Br. at 32] there is *no* State misconduct here in need of correction. If Congress wants to authorize virtually unrestricted gambling, it should take the responsibility for doing so. In sum, then, the relationship between the States and the Tribes is best left alone, both entities maintaining their traditional sovereign immunity. One hundred and four years of adherence to *Hans* should not be abandoned.

CONCLUSION

The Eleventh Amendment immunity of the States cannot be abrogated by Congress pursuant to its power under the Indian Commerce Clause, and the doctrine of *Ex parte Young* does not provide a way around that immunity in this case. Therefore, the questions presented by the Petitioner should both be answered in the NEGATIVE, and the holding of the 11th Circuit should be AFFIRMED, pending resolution of the cross-petition of the State of Florida, docket number 94-219.

Respectfully submitted,

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No. 94-12

In The

Supreme Court of the United States

October Term, 1994

SEMINOLE TRIBE OF FLORIDA,

Petitioner,

vs.

STATE OF FLORIDA AND LAWTON CHILES, GOVERNOR
OF FLORIDA,

Respondents.

*On Petition for Writ of Certiorari to the United States Court
of Appeals for the Eleventh Circuit*

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The questions presented in the certiorari petition are whether the Eleventh Amendment precludes Congress from authorizing tribal suits against the states, and whether *Ex parte Young* permits a governor to be sued for prospective injunctive relief to enforce provisions of the Indian Gaming Regulatory Act (IGRA). The Respondents' Brief, and the *amici curiae* Briefs of the National

Governors' Association, *et al.* and the State of California, *et al.*, address those questions and seek to expand the issues in this case with Tenth Amendment and article III arguments. Central to all of the efforts of Respondents is a view that IGRA offends state sovereignty. That view is incorrect, and the arguments seeking to escape *Ex parte Young* and abrogation are not persuasive.

ARGUMENT

I.

IGRA RESPECTS STATES' RIGHTS

The Respondents and their *amici* err in their attempts to portray IGRA as violative of states' rights. IGRA empowers the states; it does not encroach upon their rights. Before IGRA, the states had no power to regulate gaming on tribal lands. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987). Respondents admit Congress could have excluded the states from any role in Indian gaming. (Resp. Br. 9) (“[Congress] purposes can be achieved under Congress’ complete power over the Tribes; no state involvement is necessary”). Therefore, IGRA’s grant of power to the states, conditioned only on the duty to negotiate in good faith with Indian tribes, is protective of federalism. The themes of conflict and intrusion sounded by the Respondents and their *amici* misstate Congress’ approach to balancing the federal/state/tribal interests at stake.

To give Congress its due, the statute should be seen as a statement of its plenary power that does not raise constitutional questions. Congress could have bypassed the states, but in giving the states a role Congress did not cut into state sovereignty, it expanded it.

Richard L. Barnes, *Indian Gaming: Congress Sends the Tribes Into a Constitutional Fray, But Did It Intend To?* 64 Miss. Law J. 591, 596 (1995).

Thus, analysis of this case must begin with Congress’ unique Indian Commerce Clause powers, and the Supremacy Clause duty of state officials to conform to federal laws enacted pursuant to those powers. *Ex parte Young*, 209 U.S. 123 (1908), provides a mechanism for judicial enforcement of the duty to follow federal law.

II.

EX PARTE YOUNG APPLIES

The Respondents’ answer to *Ex parte Young* is that the Tribe’s suit is really against the State; that IGRA’s mandated duties involve discretion; and that the Tribe has not charged the Respondents with violating the Constitution. (Resp. Br. 27-36). The short reply is: (1) *all Ex parte Young* suits are against a state; (2) under IGRA there is no “discretion” to negotiate in bad faith; and (3) it is the Supremacy Clause and vindication of federal law, not just constitutional claims, which justify the *Ex parte Young* doctrine. The Respondents have failed to acknowledge *Young*’s fiction, which allows suits against state officials to obtain prospective injunctive relief against states.

The Governors, recognizing that *Young*’s fiction runs against states, add a “necessity” argument: “There can be no plausible claim that any structural *need* to vindicate the supremacy of federal law, on which *Young* rests, requires that state officials be subject to a judicial order that ‘the state can disregard’ for such an order does not ‘secure compliance with federal law’.” Governors’ *amicus* Br. 17 (emphasis added by Governors) (internal references to Petitioners’ and United States’ Briefs omitted). The Governors have misstated the Tribe’s position,

confusing the goal of a compact with the means of securing it — good faith negotiations. Securing the Tribe's right to good faith negotiations *via Ex parte Young* serves the Supremacy Clause.

State disregard of a lack-of-good-faith final judgment is at the price of losing the legal ability to collaterally attack the resulting gaming. Such a judgment vindicates the supremacy of federal law by demanding adherence to IGRA's good faith requirement — a duty that Congress imposed to solve the delicate tri-sovereign dilemma, as the *sine qua non* for state participation. There can be no quarrel with the fact that under the Indian Commerce Clause Congress could have excluded the states from Indian gaming. Given the genesis of the Indian Commerce Clause (Pet. Br. at 18-21), IGRA's mandate of good faith negotiation is a proper use of the Clause's power. *Ex parte Young* is a principled basis for insuring that the federal formula for protecting state, federal and tribal interests is observed by the state beneficiaries.¹

The justification for *Ex parte Young* — to insure compliance with federal law — is equally compelling whether that compliance is to vindicate Fourteenth Amendment rights, Indian Commerce Clause powers or other federally imposed responsibilities:

[T]he Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presumes some authority to order state officials to comply.

1. The states have received a benefit in IGRA. Indeed, the attempts to portray IGRA's grant of state authority and concomitant good faith negotiation obligation as unconstitutional perverts the concept of federalism which the states so vigorously espouse. Congress' sensitivity to federalism ought to be applauded by the states, not condemned.

New York v. United States, 112 S. Ct. 2408, 2430 (1992) (*citing, inter alia, Ex parte Young*). See also, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) ("Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights.").

The Respondents' offer of *Cory v. White*, 457 U.S. 85 (1982), as an antidote to *Ex parte Young* misses the mark. The *Cory v. White* statutory interpleader action was between two states seeking to tax Howard Hughes' estate. No federal interest was at stake; no allegation of federal law violation was made. Advancing *Cory v. White* as "analogous" (Resp. Br. 28) reveals the weakness of Respondents' argument. *Cory v. White* does not question the established doctrine that suits against state officials to compel compliance with federal law are not barred by the Eleventh Amendment.

Nor is the Respondents' new tack, that the Governor of Florida lacks the authority to negotiate, a tenable position. (Resp. Br. 30). This attempt to avoid *Ex parte Young* by claiming that the good faith duty is legislative is belied by the Respondents' Answer to the Complaint, which asserted that "Defendants State of Florida and Lawton Chiles, in his capacity as Governor of the State of Florida have negotiated in good faith" with the Tribe. J.A. 46a (Answer); see also, J.A. 15a-17a, 22a-23a ¶¶ 2 and 3, 36a, 41a (attachments to Complaint, admitting that the general counsel to the Governor represented the Governor *and* the State in compact negotiations). That admission by the Governor of Florida (and acknowledgment by other Governors that the power to negotiate is theirs)² undermines his attempt to avoid *Ex parte*

2. The Governors' Association *amicus* Brief, p. 20 n. 11, states: "With the exception of Kansas, we are aware of no evidence casting doubt on the complete authority of the Governor in each State, not only to negotiate, but to enter into compacts under IGRA."

Young by clothing the federal duty to negotiate with a state legislative cloak. The Governor accepted the federal duty to negotiate in good faith. He is a proper party for *Ex parte Young* purposes.

Finally, there is no force to the Respondents' argument that deciding IGRA good faith by deciding the scope of gaming permitted under Florida law (Resp. Br. 32), somehow adversely affects the *Ex parte Young* analysis. Under IGRA, good faith and scope of gaming are federal questions. Interpreting state law is a proper role for federal courts. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Many federal laws expressly incorporate or refer to state law. *See, e.g.*, Assimilative Crimes Act, 18 U.S.C. § 13; Johnson Act, 15 U.S.C. § 1172; Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2672, 2674. Other statutes have been judicially construed to incorporate state law. *See, e.g., DeSylva v. Ballentine*, 351 U.S. 570, 580 (1956) ("The scope of the federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law."); *Kamen v. Kemper Fin. Serv., Inc.*, 500 U.S. 90, 98 (1991) ("federal courts should 'incorporat[e] [state law] as the federal rule of decision' " quoting *United States v. Kimbell Foods, Inc.*, 400 U.S. 715, 728 (1979)).

Using state law to resolve the good faith federal question reflects Congress' respect for state interests. Instead of imposing a federal Indian gaming regime on the states, IGRA sought to accommodate state interests. *Ex parte Young* is an available method for reconciling the state and federal interests and tribal rights by insuring state officials' compliance with federal laws.

III.

IN IGRA, CONGRESS ABROGATED THE STATES' ELEVENTH AMENDMENT IMMUNITY

The Respondents acknowledge that "Congress' power under the Indian Commerce Clause is complete" and that regarding Indian affairs, "there are no limitations on Congress' authority to pass legislation affecting the Tribes." (Resp. Br. 23). They acknowledge that it "was not necessary" for Congress to have included the states in Indian gaming, *id.*, but then complain that allowing states to be sued by tribes constitutes "the indignity of subjecting a state to the coercive process of judicial tribunals at the insistence of private parties." *Ibid.*

The Respondents' argument is anomalous. IGRA expanded state authority, giving states a voice to which they were not otherwise entitled. Since Congress has plenary power, it must have the power to abrogate state immunity when it is enlarging state authority. To contend otherwise is inconsistent with the recognition of Congress' complete and unlimited powers in the area of Indian affairs. If Congress creates a role for the states, and then deems it necessary to hold the states answerable for their role, the states suffer no indignity. And, Tribes are not "private parties," but rather sovereigns whose lawsuits stand on different dignity footing than individuals' lawsuits. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 780 n. 1 (1991).

The Respondents say they "understand" the *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), view that the interstate commerce power needs to provide authority for Congress to render states liable to private parties for damages. (Resp. Br. 19-20). But they balk at abrogation power authorizing Indian tribes to seek prospective non-monetary relief, claiming that "complete power over Indian tribes" is different from the constitutional power "to

control relations among the states.” *Id.* at 23. The Respondents mistakenly perceive the Indian Commerce Clause function. The clause takes all power from the states; it does not simply provide for federal rule over tribes. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). Thus, the states must face an indisputable constitutional principle which arises from the fact that they long ago ceded all rights *vis a vis* tribes, save those which Congress allows. *Compare U.S. Term Limits, Inc. v. Thornton*, 63 U.S.L.W. 4413, 4420 (1995):

“The state governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that Act [adoption of the Constitution], *exclusively* delegated to the United States.” The Federalist No. 32, at 198.

* * *

As we have frequently noted, “[t]he states unquestionably do retain a significant measure of sovereign authority. They do so, however, *only to the extent that the Constitution has not divested them of their original powers* and transferred those powers to the Federal Government. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985) (internal quotation marks and citation omitted) (emphasis added); see also *New York v. United States*, 505 U.S. ___, ___ (slip op., at 8-9 (1992)).

The states retain authority and power to validly legislate and regulate matters which affect interstate commerce. The Interstate Commerce Clause only prohibits those acts which interfere with

such commerce. *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2211 (1994):

Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. . . . (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-274 (1988)).

Indeed, the most important aspect of the Interstate Commerce Clause was “as a negative and preventive provision against injustice among the states themselves, rather than as a power to be used for the positive purposes of the General Government.” *West Lynn Creamery*, 114 S. Ct. at 2211 n. 9 (citing 3 M. Farrand, *Records of the Federal Convention of 1787*, p. 478 (1911), quoting James Madison). In contrast, the Indian Commerce Clause left the states with no sovereign authority in the sphere of Indian affairs and commerce; that authority is exclusively delegated to the Congress by the Constitution. Thus, it is not inconsistent with the Eleventh Amendment, or the common law sovereignty upon which the amendment is founded, to conclude that the necessary and complete exercise of the exclusive federal Indian Commerce Clause powers must include Congress’ right to abrogate state immunity when it expands state authority into Indian areas where the states would otherwise be wholly excluded. *Compare Morton v. Mancari*, 417 U.S. 535 (1974):

Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a “guardian-ward” status to legislate on behalf of federally recognized

tribes. The plenary power of Congress to deal with the social problems of Indians is drawn both explicitly and implicitly from the Constitution . . . [which] singles Indians out as a proper subject for separate legislation.

Id. at 551-552. The *Morton* Court unanimously upheld Indian employment preferences in the Bureau of Indian Affairs. The racial classifications did not violate the Fifth Amendment: "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555. The result should be the same in this case.

The distinctions between the Interstate Commerce Clause and the Indian Commerce Clause underscore why the Respondents' invitation to revisit *Union Gas* should be rejected. *Union Gas*' use of the positive and negative Interstate Commerce Clause function as a basis for the power to abrogate is helpful, but not critical to this case. Congress' special powers, duties, and obligations under the Indian Commerce Clause make the abrogation power more necessary than that needed for interstate commerce. (See Pet. Br. 19-21; U.S. Br. 22-24). Thus *Union Gas* need not be the basis for decision here.³

3. One *amicus* brief suggests that Congress did not clearly intend to abrogate Eleventh Amendment immunity in IGRA. (Governors' Br. 19-20). Every court which has addressed that question, including the court below, has found the intent to abrogate to be unmistakably clear. (See, e.g., Pet. Cert. App. 14a-15a (citing cases)); *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422 (10th Cir. 1994); *Spokane Tribe v. Washington*, 28 F.3d 991 (9th Cir. 1994); *Cheyenne River Sioux Tribe v. State of South Dakota*, 3 F.3d 273 (8th Cir. 1993). See also, Note, *Upping the Ante: Allowing Indian Tribes to Sue States in Federal Court Under the Indian Gaming Regulatory Act*, 62 Geo. Wash. L. Rev. 123, 158 (1993) ("No court has even concluded that the question is a close one. Congress clearly has authorized abrogation"). Indeed, neither the Respondents nor the *amici* states assert the no-clear-statement argument.

IV.

THE TENTH AMENDMENT IS NOT AN ISSUE IN THIS CASE

The Brief of the Respondents raises a question as to the consistency of IGRA with the Tenth Amendment. (Resp. Br. 24-25). That question is also advanced and argued in the Brief of the *amici* states (pp. 23-28). The Tenth Amendment issue is not properly before the Court in this case.

As the Respondents acknowledge, the Tenth Amendment issue was not raised in the district court, which thus had no occasion to rule on it.⁴ In the Eleventh Circuit, the court noted that the Respondents "raised one issue [the Tenth Amendment issue] for the first time on appeal." (Pet. App. 2a-3a n. 2). The Eleventh Circuit declined to address that issue, relying on its settled practice of not considering issues on appeal which were not raised in the district court. *Id.* That procedural history precludes its presentation here: "We do not reach for constitutional questions not raised by the parties," *Mazer v. Stein*, 347 U.S. 201, 206 n. 5 (1954), or "not raised or resolved in the lower court," *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

This Court's Rule 14.1(a) states: "Only the questions set forth in the petition, or fairly included therein, will be considered by the Court." Only in the most exceptional circumstances will the Court consider issues not presented in the petition. *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992); *United States v. Williams*, 504 U.S. 36 (1992).

4. Respondents assert that this failure was because this Court's decision in *New York v. United States*, 112 S. Ct. 2408 (1992), "had not been issued at the time of the filing of the complaint and motions in this case." (Resp. Br. 33). But Respondents do not explain their failure to anticipate the Tenth Amendment issue even before the *New York* ruling, or their failure to amend their pleadings after the ruling of this Court.

In this case, the Seminole Tribe's petition for certiorari and Brief on the merits present two Eleventh Amendment questions: an abrogation question, and *Ex parte Young*. The response to the certiorari petition did not quarrel with those two questions nor argue, as is now asserted in Respondents' merits Brief (p. 33), that a Tenth Amendment problem is somehow subsumed in the *Ex parte Young* question.⁵ Nor did the Respondents' cross-petition for certiorari (still pending before this Court, *State of Florida v. Seminole Tribe*, No. 94-219) seek to present a Tenth Amendment issue.

Rule 14.1(a) excludes the Tenth Amendment issue from this case. This Court should again "disapprove the practice of smuggling additional questions into a case after we grant certiorari." *Irvine v. California*, 347 U.S. 128, 129 (1954) (Jackson, J.) (plurality).⁶

Finally, there is no extraordinary reason for this Court to address the Tenth Amendment. This case can be decided solely within the parameters of the two Eleventh Amendment questions that have been raised and argued in both the lower courts and this Court. If the Court wishes to address the Tenth Amendment issue, it will find an opportunity to do so in the pending petition for

5. Respondents' Brief (p. 33) states that because the Seminole Tribe "asserts that the dictates of IGRA are mandatory, thereby allowing an injunction to be issued under *Ex parte Young*" the Tenth Amendment question "is therefore subsumed within the second question posed by the Petitioner and accepted for review by this Court." But the Tribe's argument as to the mandatory nature of the State's duty under IGRA to negotiate in good faith only goes to the *Ex parte Young* exception to Eleventh Amendment immunity, not to any or all other constitutional propositions that might be asserted with respect to that duty.

6. See also, R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice*, § 6.26 (7th ed. 1993).

certiorari in No. 94-1029, *Oklahoma v. Ponca Tribe of Oklahoma*. A question presented in that petition concerns the Tenth Amendment implication of IGRA, an issue that was fully canvassed and dealt with by the Tenth Circuit, 37 F.3d 1422 (10th Cir. 1994), which accurately concluded that IGRA poses no unconstitutional usurpation of powers reserved to the states.

V.

THIS CASE IS JUSTICIABLE

One aspect of the *amici* National Governors' Association argument proceeds from this assumption:

Even if the court agrees with the Tribe's complaint that the state is acting unlawfully (i.e., is failing to negotiate in good faith), the court cannot issue an enforceable order that vindicates the interests asserted in the suit; indeed, real relief for the Tribe ultimately is available only from the Executive Branch.

Amicus Br. of National Governors' Assoc., et al. 7. The argument is put this way: "What IGRA provides for, in short is a wholly unenforceable judicial pronouncement." *Id.* at 12. However, the Governors' submission is based upon the erroneous premise that a final judgment finding that a state has failed to negotiate pursuant to IGRA is not "real relief" to the Tribe. It is; such a judgment vindicates the interests asserted in the Seminoles' suit.

The Governors demean the importance of the relief sought, calling it "only a paper vindication" because "the Tribe cannot, in its lawsuit, judicially secure a compact or other authority for Class III gaming." National Governors' Assoc. *amicus Br.* 11. But the Governors overlook the significant legal consequences

which flow from a favorable final judgment on the scope of permitted gaming and a state's refusal to negotiate in good faith. That judgment could foreclose the State from blocking class III gaming through the compacting process and would provide the Tribe with *res judicata* or collateral estoppel protection which would preclude the State's subsequent attack on a mediator's compact, or a Secretary's order, or authorized tribal gaming. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). The method by which the ultimate gaming rights are achieved (negotiation, mediation, promulgation of rules by the Secretary of the Interior) is not important to article III analysis. The judicially enforceable findings of fact and conclusions of law regarding permitted gaming and good faith lead to an alternative path for securing class III gaming, and provide real relief against future state actions which might attempt to interfere with the tribal gaming.⁷

The other jurisdictional barrier perceived by *amici* is founded on two article III principles: that the judicial power must be conclusive, not advisory, and that the power must not be subject to later administrative review or alteration. IGRA does not offend either principle.

The "general rule" is "that 'executive or administrative duties of a nonjudicial nature may not be imposed on judges

7. The Respondents do not embrace the Governors' contention; Respondents acknowledge the force and effect of the relief sought:

The State views the provisions of IGRA as far more coercive. . . . Here for example, the federal district court construed Florida laws governing gambling. Presumably, it was prepared to enforce the provisions of IGRA based on its interpretation of Florida law, and to specify what the state was required to negotiate.

Resp. Br. 6.

holding office under Article III of the Constitution.' " *Morrison v. Olson*, 487 U.S. 654, 677 (1988). And, "Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." *Plaut v. Spendthrift Farm, Inc.*, 115 S.Ct. 1447, 1453 (1995). The cited cases standing for these rules — *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851); *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) — demonstrate why they do not apply to IGRA.

Hayburn's Case evolved from a statute making article III judges arbiters of disability pension amounts, leaving the Secretary of Interior free to adopt or reject the awards. In *Ferreira*, a federal court in Florida was authorized by Congress to decide, and report to the Secretary of the Treasury, claims arising from the 1819 treaty which ceded Florida to the United States. The Secretary of the Treasury had the final decisionmaking authority as to payment. See *Morrison v. Olson*, 487 U.S. at 677-678 n. 15; *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 480-83 (1894). In *Chicago & Southern Airlines*, the President had final authority to pass on certificates for foreign air transportation, rendering judicial review of Civil Aeronautics Board orders to be both premature and political questions, beyond the powers of article III courts.

While IGRA specifies a post-judgment role for the Secretary of the Interior, that role does not involve reconsideration of a judicial determination that a state has failed to negotiate in good faith. Thus, the Secretary's role is entirely different from that of the Secretary of War in *Hayburn's Case*; different from that of the Secretary of the Treasury under the legislation considered in *Ferreira*; and different from that of the President in *Chicago & Southern Air Lines Corp.* Under IGRA, when a court rules that a state has failed to negotiate in good faith, the Secretary of the Interior eventually may prescribe "procedures [for class III

gaming] . . . which are consistent with the proposed compact selected by the mediator . . . , the provisions of [IGRA], and the relevant provisions of the laws of the state.” 25 U.S.C. § 2710(7)(B)(vii). The Secretary cannot in any way, however, modify the determination of the court that a state has failed to negotiate in good faith. IGRA does not permit or condone revisionary authority by either the executive or legislative branches. The judicial decision is the last word by the judicial branch regarding the IGRA case or controversy. *Compare Plaut*, 115 S.Ct. at 1457 (“Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to *that very case* was something other than what the courts said it was.”) (emphasis in original).

Consistent with article III, Congress may provide a partial judicial remedy, even if that remedy permits additional government action. As long as the judgment of the court is not itself to be modified by later executive or administrative orders, the court’s decision need not be the last word in the ultimate resolution of a larger issue. To paraphrase *ICC v. Brimson*:

If it be adjudged that the [Respondents] are, in law, obliged to do what they have refused to do [negotiate in good faith], that determination will not be merely ancillary and advisory, but in the words of *Sanborn’s Case*, will be a “final and undisputable basis of action,” as between the [Tribe and the Secretary of the Interior and the State] and will furnish a precedent in all similar cases. . . . It is nonetheless the judgment of a judicial tribunal dealing with questions judicial in their nature, and presented in the

customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution.

154 U.S. at 487. Thus, the fact that the Secretary of the Interior may later depend on the court’s determination of the scope of state-permitted gaming and the state’s good faith or lack thereof, does not make those judicial determinations inconsistent with article III power. The Tribal lawsuit sought to provide the legal foundation for the compact. The good faith/scope of gaming judgment authorized by IGRA performs that article III function by deciding whether the State has discharged its federal duty to negotiate in good faith.

CONCLUSION

The decision below should be reversed either because the Indian Commerce Clause provides Congress with the power to abrogate Eleventh Amendment immunity to allow Indian tribes' suits for prospective, non-monetary relief, or because *Ex parte Young* permits such suits against the state officers discharging the federal duties created by IGRA.

Respectfully submitted,

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