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Gambling-Indian Issues [4]

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA,
Petitioner,

v.

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 OF THE NATIONAL GOVERNORS'
ASSOCIATION, COUNCIL OF STATE GOVERNMENTS,
NATIONAL CONFERENCE OF STATE
LEGISLATURES, NATIONAL ASSOCIATION OF
COUNTIES, INTERNATIONAL CITY/COUNTY
MANAGEMENT ASSOCIATION, NATIONAL LEAGUE
OF CITIES, AND U.S. CONFERENCE OF MAYORS
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an Indian Tribe may sue a State or its Governor in a federal court under the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7), notwithstanding the inability of the court under the Act to issue an enforceable judgment vindicating the Tribe's interests and notwithstanding the States' general sovereign immunity from suit in federal court.

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INTEREST OF THE AMICI CURIAE

Amici, organizations whose members include state and local governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. This case raises just such issues: whether a Tribe may sue a State or its Governor in a federal court under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710(d)(7), notwithstanding the inability of the court under the Act to issue

an enforceable judgment vindicating the Tribe's interests and notwithstanding States' general sovereign immunity from suit in federal court. The Court's decision in this case will affect a significant number of suits under IGRA itself and, more generally, clarify the amenability of States and state officials to suit in federal court. *Amici* have a strong interest in the correct resolution of the issues presented.¹

STATEMENT

The Seminole Tribe of Florida brought this suit against the State of Florida and its Governor under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710 (d)(7)(A), (B), alleging a violation of the statutory duty to negotiate in good faith for the purpose of entering into a Tribal-State compact governing the conduct of "Class III" gaming activities, a category that includes casino gambling, lotteries, and other forms of gaming. 25 U.S.C. §§ 2703(8), 2710(d)(3)(A). The Tribe's complaint rested specifically on the State's refusal to negotiate about casino gaming, which Florida viewed as outside the IGRA duty because Florida law generally does not permit anyone to engage in casino gaming. *See* 25 U.S.C. § 2710(d)(1)(B) (Class III gaming activities are lawful, and hence subject to the negotiation duty, only if the State "permits *such* gaming" by others (emphasis added)). The Tribe's suit alleged that IGRA applies here because Florida law permits non-casino types of Class III gaming (and because Florida did not enforce its gaming laws against charities that hold casino nights). *See* Pet. App. 54a-55a, 61a. The parties disagreed, at bottom, about whether IGRA applies to each type of Class III game separately or whether States must negotiate about all types of Class III games if they allow any type.

The defendants moved to dismiss the suit, asserting sovereign immunity as recognized by the Eleventh

¹ The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

Amendment. The district court denied the motion, holding that Congress abrogated, and had the constitutional power to abrogate, such immunity in IGRA. Pet. App. 26a, 30a. On an interlocutory appeal, the Eleventh Circuit reversed. *Id.* at 1a-25a. Although the court of appeals agreed with the district court that Congress intended to abrogate States' immunity in IGRA (*id.* at 14a-15a), it concluded that Congress lacked constitutional authority under the Indian Commerce Clause to effect such abrogation. *Id.* at 18a-22a. The court of appeals also held that the Tribe's claim against the Governor was in reality one against the State and could not be brought within the exception to Eleventh Amendment immunity recognized in *Ex Parte Young*, 209 U.S. 123 (1908). Pet. App. 23a-24a. The court accordingly ordered the case dismissed.²

SUMMARY OF ARGUMENT

The Tribe's suit was correctly ordered dismissed because allowing federal-court jurisdiction over the suit would violate two distinct constitutional constraints. The first constraint is the Article III prohibition on federal courts' performance of adjudicatory roles inconsistent with the historically accepted notion of "judicial" power. The second constraint is the constitutional prohibition, implicit in Article III and recognized in the Eleventh Amendment, on federal courts' entertaining suits against States where sovereign immunity has not been waived or validly abrogated.

I. IGRA assigns a non-judicial task to the federal courts in violation of Article III. IGRA does not provide for a judicially enforceable judgment that itself vin-

² While the interlocutory appeal was pending, the district court decided the merits of the case, granting summary judgment to the state defendants by adopting, in accord with other courts' decisions, the State's game-specific view of the scope of the IGRA duty. Pet. App. 43a-83a. The Tribe's appeal from that judgment is pending in the Eleventh Circuit. *Id.* at 84a.

dicates the Tribe's asserted interests. Rather, the federal court under IGRA can do no more than pronounce a federal-law violation; it cannot carry that judgment into effect so as to secure relief for the Tribe, which must proceed to a non-Article III process (first a mediator, then the Executive Branch) in order to obtain actual relief. The unenforceability of the court's judgment and the dependency on subsequent discretionary Executive Branch action both render IGRA's assignment of jurisdiction to the federal courts inconsistent with long-established principles defining the essential nature of the judicial power under Article III. *See, e.g., Gordon v. United States*, 117 U.S. 697, 702-03 (decided 1864, printed 1886) (opinion of Taney, C.J.); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). Congress, in its effort to avoid independent federalism problems presented by greater intrusions on state sovereignty (*see New York v. United States*, 112 S. Ct. 2408 (1992)), has created a scheme that asks the Article III courts to play an improperly non-judicial role.

II. Independently of that Article III problem, the Tribe's suit was correctly ordered dismissed because both defendants, the Governor and the State, are protected from the suit by the sovereign immunity recognized in the Eleventh Amendment. As to the Governor, the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), should be held inapplicable. *Young* states a doctrine of federal necessity, generally allowing federal courts to *enjoin* state officers to conform their future conduct to federal-law standards; even then, because *Young* displaces an otherwise-available constitutional immunity, the doctrine has been carefully limited so as itself to accommodate States' interests. *See, e.g., Green v. Mansour*, 474 U.S. 64, 68 (1985); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984). Under IGRA, however, the federal court does not issue an injunction compelling compliance with any federal-law standards; and any claim of "necessity" for the federal courts' role in vindicating federal standards (which Congress has re-

fused to set) is utterly hollow. At the same time, applying *Young* to IGRA would involve an extraordinary (if not novel) intrusion on States' sovereign interests, since the object of the IGRA suit is to produce an affirmative exercise of state lawmaking authority (rules for tribal gaming) as a substitute for federal policy choice on the subject. *Cf. New York v. United States, supra*. For each of those reasons, the *Young* exception to the otherwise-fundamental sovereign-immunity principle of our federalist structure should not apply here.

Eleventh Amendment immunity therefore bars this suit unless the immunity has been validly abrogated. But IGRA should not be read as providing a sufficient basis for concluding that the immunity has been abrogated. The Court has made clear that, to find abrogation, it must have "perfect confidence that Congress *in fact intended*" to override States' sovereign immunity. *Dellmuth v. Muth*, 491 U.S. 223, 231 (1989) (emphasis added). IGRA's reference to "State[s]" (25 U.S.C. § 2710(d)(7)) is the sole asserted basis for finding abrogation, but that reference should not by itself be deemed sufficient to demonstrate—in the absence of any other evidence of congressional consideration of the constitutionally significant matter of displacing States' immunity—that Congress actually intended abrogation. Rather, the statute is much more plausibly understood as reflecting a congressional assumption (mistaken, as we have argued) that *Ex Parte Young* made any abrogation unnecessary.

If IGRA is nevertheless read to reflect an intent to abrogate States' immunity, Congress should be held to lack the constitutional power to do so under the Indian Commerce Clause and, indeed, more generally under Article I. As to the narrower point, even if this Court continues to adhere to the holding of *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), that Congress has abrogation authority under the Interstate Commerce Clause, no such authority should be found under the Indian Commerce Clause. The mutuality of interests among the States in legislative power to regulate interstate

commerce (power that is intrinsically concerned with protecting States against each other) is at least a conceptually plausible starting point for inferring a structurally implicit "surrender of [sovereign] immunity in the plan of the convention." *Union Gas*, 491 U.S. at 19 (plurality opinion) (internal quotation marks omitted). That starting point is unavailable for congressional authority under the Indian Commerce Clause, because no comparable mutuality inheres in such authority. Indeed, this distinction is mirrored in the Court's decisions in a closely analogous context: although the Eleventh Amendment does not protect States against suits by other States, it does protect States against suits by Tribes. *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

In any event, this Court should overrule *Union Gas* and find abrogation authority generally lacking under Article I. Fresh consideration of the Article I issue is warranted because there was no rationale of the Court in *Union Gas* (the fifth vote was wholly unexplained) and federalism interests have acquired greater recognition in constitutional doctrine since *Union Gas* was decided. On reconsideration, the issue should be decided in accord with the fundamental principle that Congress has no power under Article I to assign the federal courts judicial power outside the limits set by Article III—a principle recognized in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), in *Hayburn's Case*, *supra*, and often since. Allowing abrogation under Article I would violate that principle because States' sovereign immunity is an implicit limit on the judicial power created by Article III. See *Pennhurst*, 465 U.S. at 98; *Hans v. Louisiana*, 134 U.S. 1 (1890). This principle preventing Article I authority from expanding Article III power has special force as applied to an Article III limit, like sovereign immunity, that gives effect to a basic component of our federalist structure. And on the other side of the federal-state balance, there is no sound reason to conclude that a newly broad Article I abrogation authority is peculiarly necessary to vindicate the supremacy of federal law. Finally, the

authority of Congress to abrogate States' immunity under the Fourteenth Amendment—which modified pre-existing constitutional limits on federal power over States on a specifically defined set of subjects—furnishes no basis for inferring that States broadly surrendered their right to insist on sovereign immunity in the plan of the original convention.

ARGUMENT

I. JURISDICTION OVER THE TRIBE'S SUIT IS INCONSISTENT WITH ARTICLE III BECAUSE THE FEDERAL COURT CANNOT ISSUE AN ENFORCEABLE JUDGMENT VINDICATING THE TRIBE'S INTERESTS

The cause of action created by IGRA assigns a novel and dramatically limited role to the federal court hearing the claim. 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. The issuance of an unenforceable judgment declaring a defendant's conduct unlawful, backed by no ability on the part of the judiciary to award any concrete relief, retrospective or prospective, is not a function within the "judicial power" of the federal courts as it has long been understood. Accordingly, the Tribe's suit should be held to exceed the bounds set by Article III and for that reason be dismissed.⁸

A. It has been clear for 200 years that Congress may not assign to the federal courts adjudicatory tasks outside the scope of the "judicial power" contemplated by Article III of the Constitution. See *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *Muskrat v. United States*, 219 U.S. 346, 352-56 (1911). And, as this Court has recently

⁸ This issue, though not previously raised and not among the questions on which certiorari was granted, is properly raised in this Court because it is jurisdictional.

reiterated, the “judicial power” created by Article III encompasses certain historically understood essential components, including the power to decide a case conclusively. *Plaut v. Spendthrift Farm, Inc.*, 63 U.S.L.W. 4243 (Apr. 18, 1995). The task assigned to the federal court by IGRA implicates two aspects of the “judicial power” that are closely related to, and equally well-founded in accepted understanding as, those underlying the decision in *Plaut*.

First, numerous decisions of this Court have explained that the judicial power necessarily includes the power to render a judgment, enforceable by the judiciary, that vindicates the legal interest of the plaintiff. “The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy.” *Gordon v. United States*, 117 U.S. 697, 702-03 (decided 1864, printed 1886) (opinion of Taney, C.J.) (cited with approval in *Plaut*, 63 U.S.L.W. at 4248); see *In re Sanborn*, 148 U.S. 222, 224 (1893) (following *Gordon’s* holding that “as the so-called judgments . . . were not obligatory upon Congress or upon the executive department of the government, but were merely opinions which might be acted upon or disregarded by Congress or the departments, and which this court has no power to compel the court below to execute, such judgments could not be deemed an exercise of judicial power”); *ICC v. Brimson*, 154 U.S. 447, 484 (1894) (quoting *Gordon*, 117 U.S. at 702); *Muskrat*, 219 U.S. at 356, 362 (“‘Judicial power,’ says Mr. Justice Miller in his work on the Constitution, ‘is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.’”); holding assignment of power invalid because “[i]n a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question”); *Chi-*

ago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948) (“if the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render”). See also *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 630 (1949) (Vinson, C.J., dissenting) (Court’s decisions “clearly condition the power of a constitutional court to take cognizance of any cause upon . . . the power to pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision”) (citing *Muskrat* and *Gordon*).

Second, and relatedly, the Court has made clear in a long line of decisions growing out of *Hayburn’s Case* that actual vindication of the plaintiff’s interest must be provided by the court’s judgment and cannot be made contingent on the subsequent discretionary decision of another branch of the federal government. See *Chicago & Southern Air Lines*, 333 U.S. at 113-14 (“It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action.”), citing *Hayburn’s Case*; *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851); *Gordon*; *Brimson*; *La Abra Silver Mining Co. v. United States*, 175 U.S. 423 (1899); *Muskrat*; *United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386 (1934). Because it is the *judgment* awarding relief that is the essential component of the judicial function, not the factual or legal determinations made by the court on the way to entering the judgment,⁴ this Article III problem is present whenever the court’s ability to

⁴ The Court confirmed this in its recent decision in *Plaut*, where the reopening of the final judgment by another Branch did not repudiate any factual or legal determinations underlying the reopened judgment, but changed the substance of the law that was the sole basis for the judgment. 63 U.S.L.W. at 4245 (statute presented no problem under *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), because it changed the law).

award relief is made dependent on subsequent non-ministerial Executive Branch action, even if the Executive is bound to follow component findings of fact or conclusions of law. Non-judicial discretion subsequently to deny the relief sought in the suit creates the *Hayburn's Case* problem.

B. The function assigned to the court by IGRA is incompatible with each of these deeply entrenched understandings defining the Article III concept of judicial power, because of “the limited nature of the relief” (U.S. Br. 25) that IGRA authorizes the judiciary to provide. The statute carefully “prescribes remedial procedures if the district court finds” that the State did not engage in good faith negotiation (U.S. Br. 16). *See* 25 U.S.C. § 2710(d)(7)(B). But those procedures do not allow the district court’s judgment to vindicate the Tribe’s interests. Worse, concrete vindication of the Tribe’s interests ultimately is available, not through the courts, but only by subsequent discretionary action of the Executive Branch.

The Tribe has some interest simply in having the State *negotiate* in good faith, whether or not they conclude a compact on Class III gaming. But that interest is not vindicated by the federal court under IGRA, because IGRA, by its terms, does not provide for an order directing the State to negotiate—much less a judicially enforceable order. Rather, the statute expressly prescribes that the court, if it finds lack of good faith negotiation toward a compact, issue an order to “conclude such a compact” within 60 days. Paragraph (iii).⁵ Even then, the court has no power to compel compliance with that order: if the State violates it, by not concluding a compact, IGRA expressly provides that the court merely appoints a mediator—and the court plays no further role. Paragraph (iv). As the Tribe indicates, “[t]he relief sought by the Tribe is an order either to conclude a compact within

⁵ We refer here, and in the next several paragraphs in text, to paragraphs of 25 U.S.C. § 2710(d)(7)(B).

sixty days, or to invoke the alternative procedure of mediation.” Pet. Br. 29. The State is at no point judicially forced to negotiate.

Although IGRA gives Tribes no more than a legal right to have the State negotiate in good faith, the Tribe’s ultimate interest, of course, is in securing a compact from the State or otherwise gaining permission for Class III gaming. And the district court under IGRA, upon finding lack of good faith negotiation, does direct the Tribe to enter a compact. Paragraph (iii). But that order, while on its face seeming to vindicate the Tribe’s interest, is only a paper vindication, because it is in no way enforceable by the courts, such as through the usual means applicable to prospective relief, *i.e.*, contempt. Rather, as just noted, if the State fails to conclude a compact, the statute specifies that the court drops out of the picture after referring the entire matter to a mediator. Paragraph (iv). Again, the Tribe cannot, in its lawsuit, judicially secure a compact or other authority for Class III gaming.

In fact, the Tribe cannot, under IGRA, secure any agreement from the State at all. The mediator appointed under IGRA, like any “mediator,” cannot impose an agreement: after choosing between the Tribe’s and State’s proposals “the one which best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court” (paragraph (iv)), the mediator asks the parties to agree to the choice. Paragraph (v). If no agreement is forthcoming, the Secretary of the Interior takes over the process and, rather than ordering any Tribe-State compact, adopts federal regulations for Class III gaming. Paragraph (vii). Ultimately, then, it is only the Secretary, necessarily exercising a substantial range of discretion, who can provide the Tribe the gaming authority it seeks.⁶

⁶ The decision of the Secretary, who is directed to adopt regulations “consistent with” the mediator’s choice (paragraph (vii)), at a minimum incorporates the range of discretion exercised by the mediator in choosing the “best” proposal. *See* paragraph (iv); S. Rep. No. 446, 100th Cong., 2d Sess. 19 (1988) (describing range

The Tribe and the United States agree that the judiciary when applying IGRA lacks authority actually to issue an enforceable award of concrete relief. Thus, the Tribe acknowledges that the court's order is "an order which the state can disregard" (Pet. Br. 26) without judicial sanction. And the United States observes that "there is no indication that the State's failure to agree to a compact (or even to participate in negotiations) during [the 60-day] period was intended to expose the State to any more intrusive order or to contempt." U.S. Br. 25.

What IGRA provides for, in short, is a wholly unenforceable judicial pronouncement. This Court has long made clear that Article III does not allow the federal courts to perform such a role. That is enough to invalidate IGRA's assignment of jurisdiction to the federal courts. Worse still, IGRA treats the federal court as merely the first step in a process under which real relief is available only through the subsequent discretionary act of the Executive Branch. That, too, violates longstanding Article III principles.

C. This problem cannot be solved by treating the judgment under IGRA as if it were a declaratory judgment under 28 U.S.C. § 2201, whose general validity under Article III this Court has upheld. See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937); *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249 (1933). For one thing, IGRA by its terms does not provide for a declaratory judgment, but for a carefully defined form of limited relief, and thus occupies the remedial field to the exclusion of 28 U.S.C. § 2201. See *Katzenbach v. Mc-*

of relevant factors). In fact, the statute surely must be read to authorize the *Secretary* to exercise the full range of available discretion. Against the background of the Constitution's separation of powers, Congress cannot be assumed to have conferred discretionary executive power over States on a "mediator," an inferior officer in Appointments Clause terms, appointed by a court and not apparently accountable to the Secretary. See *Morrison v. Olson*, 487 U.S. 654, 675-77 (1988) ("incongruity" standard for cross-Branch appointments).

Clung, 379 U.S. 294, 296 (1964).⁷ In any event, no decision of this Court suggests that an action for a declaratory judgment would be consistent with Article III if, as under IGRA, the judgment provides no judicially enforceable relief or, worse, requires subsequent discretionary Executive Branch action to be effective.

To the contrary, the federal declaratory judgment statute has long provided that the judicial declaration of rights is backed by the court's power to enforce the declaratory judgment, if necessary, through further appropriate relief. See 28 U.S.C. § 2202; *Powell v. McCormack*, 395 U.S. 486, 499 (1969) ("A declaratory judgment can then be used as a predicate to further relief, including an injunction."). That enforcement power was present in the seminal decisions of this Court holding, contrary to earlier decisions, that Article III does not bar *all* actions for a declaratory judgment. *Aetna*, 300 U.S. at 236 n.1; *Nashville*, 288 U.S. at 260. And those decisions pointedly stressed, in finding no Article III problem, that the judgments were not subject to executive revision (*Nashville*, 288 U.S. at 262, citing *Gordon, supra*) and produced "specific relief through a decree of a conclusive character" (*Aetna*, 300 U.S. at 241, citing *Muskrat, supra*). See also *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237 (1952). It is these fundamental Article III requirements,

⁷ Although the Tribe here pleaded 28 U.S.C. § 2201 in its complaint (J.A. 13a), neither the Tribe nor the United States relies on that provision in their briefs—presumably because any such reliance would be incompatible with their firm insistence, in trying to minimize concern on the Eleventh Amendment issues, that the State is free to "disregard" the district court's judgment in this suit (Pet. Br. 26; see also Pet. Br. 29) and that the district court's order under IGRA cannot be enforced by injunction (U.S. Br. 25). As noted below, declaratory judgments under 28 U.S.C. § 2201 are enforceable under 28 U.S.C. § 2202.

The same problem of inconsistency with IGRA would plague any invocation of other remedies (in federal or state court) that go beyond the carefully prescribed remedial procedures of IGRA.

which must be met even for a declaratory judgment action to be valid, that IGRA fails to meet.⁸

The Article III problems with IGRA likewise cannot be solved by analogy to the judicial role in certain labor-law cases. Under the National Labor Relations Act, for example, a federal court can hear a suit alleging a lack of good faith bargaining and render a judgment ordering good faith bargaining. 29 U.S.C. §§ 158(d), 160(a), (c), (e). The federal court's order, however, is classically judicial: an injunction backed by the power of contempt for its violation. See *NLRB v. Warren Co., Inc.*, 350 U.S. 107, 112-13 (1956). The judicial role in that situation thus furnishes no precedent for the non-judicial role assigned to federal courts by IGRA.

D. The Article III problem with IGRA cannot properly be avoided by a judicial construction of the statute that would ignore "the limited nature of the relief authorized by IGRA" (U.S. Br. 25) by expanding the courts' remedial authority. As a matter of congressional intent, the "innovative" jurisdictional scheme set up by IGRA (U.S. Br. 28) must be understood as an essential element of Congress's careful balancing of competing tribal and state interests, achieved after years of effort. See S. Rep. 446, *supra*, at 13-14; see generally Santoni, *The Indian Gaming Regulatory Act: How Did We Get Here? Where Are We Going?*, 26 Creighton L. Rev. 387, 395-403 (1993). Construing IGRA to authorize greater judicial power than the text allows "would destroy the delicate federal/tribal/state balance sought by the Act." Pet. Br. 14. See also 134 Cong. Rec. 25,377 (1988)

⁸ These basic requirements were not repudiated by *Steffel v. Thompson*, 415 U.S. 452 (1974), which nowhere held that a federal court may issue a declaratory judgment that the defendant is free to disregard (as under IGRA) without any judicial sanction (federal or state). It seems clear, in fact, that a declaratory judgment issued under *Steffel*, like other declaratory judgments, may be enforced, if necessary, under 28 U.S.C. § 2202. See *Wooley v. Maynard*, 430 U.S. 705, 710-12 (1977) (injunction allowed if necessary).

(remarks of Rep. Udall) ("S. 555 is a delicately balanced compromise.").

A more intrusive remedy would also raise other constitutional concerns, which Congress gave no indication it intended to raise. As this Court made clear in *New York v. United States*, 112 S. Ct. 2408 (1992), given the structure of federalism embodied in the Constitution and reflected in the Tenth Amendment, a serious question is presented when Congress, rather than itself making and administering policy in an area at the federal level, forces States to exercise the States' own sovereign governmental authority. *Id.* at 2420-21. A reading of IGRA that would authorize federal court *compulsion* of States to negotiate a legislative deal with Tribes, as a substitute for a federal policy determination of the scope of any authority for Class III gaming, would raise precisely that constitutional question. The Article III problem with IGRA, created by an attempt to avoid federalism difficulties, cannot be solved by a judicial rewriting of IGRA that would raise those difficulties.

II. THE FEDERAL COURT'S EXERCISE OF JURISDICTION OVER THE TRIBE'S SUIT VIOLATES THE CONSTITUTION'S PROTECTION OF THE STATES' SOVEREIGN IMMUNITY

A. *Ex Parte Young* Does Not Remove The Tribe's Claim Against The Governor From The Coverage Of Eleventh Amendment Immunity

The Tribe and the United States suggest that the principal Eleventh Amendment question at issue here—whether IGRA validly abrogates States' immunity—may be avoided, at least as a practical matter, by invocation of *Ex Parte Young*, 209 U.S. 123 (1908). See Pet. Br. 23-31; U.S. Br. 12-19 & n.5. Under that theory, the Tribe's claim against the Governor is not truly a suit against the State within the meaning of the Eleventh Amendment (see, e.g., *Edelman v. Jordan*, 415 U.S. 651 (1974)), so that no immunity question would arise with respect to the Tribe's claim against the Governor. This

invocation of *Ex Parte Young* should be rejected, because the Tribe's suit under IGRA presents a radically different balance of federal and state interests from the balance justifying application of the *Young* doctrine.

The starting point is the basic principle that a suit against a state official seeking relief that runs against the office holder in that person's official capacity is in reality a suit against the State. See *Hafer v. Melo*, 502 U.S. 21, 25-27 (1991); *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). This Court in *Ex Parte Young*, however, created a legal "fiction" carving out an exception to that basic principle. See *Pennhurst*, 465 U.S. at 105; U.S. Br. 25 (*Young* creates "'fiction'" where State is real party in interest). Under that exception, a suit against a state officer seeking an injunction against future violations of federal law generally is deemed not to be a suit against the State for purposes of States' Eleventh Amendment immunity. See, e.g., *Pennhurst*; *Edelman*.

This doctrine rests on a judgment about constitutional "necessity" as a justification for overriding the otherwise-applicable constitutional immunity of States in a particular class of cases. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 688 (1993) (*Young* "is regarded as carving out a necessary exception to Eleventh Amendment immunity"); see *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Pennhurst*, 465 U.S. at 105. In our federalist system, *Young* makes clear, the supremacy of federal law requires that federal courts be able to enjoin state officers' future non-compliance with federal-law standards in order "to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst*, 465 U.S. at 105 (quoting *Young*, 209 U.S. at 160). Even so, as an exception to fundamental structural constitutional principles, the *Young* doctrine has been carefully confined to apply only where necessary to vindicate federal interests; beyond that, the Court has explained "that the need

to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." *Pennhurst*, 465 U.S. at 105.

The first, sufficient reason why the Tribe's suit under IGRA is outside the ambit of *Young* is that there is little if any "federal necessity" for allowing the IGRA claim. As we have explained, and the Tribe and the United States vigorously insist, "the limited nature of the relief authorized by IGRA" (U.S. Br. 25) means that the federal court under IGRA issues no injunction or other enforceable order that compels the Governor to adhere to federally established standards. The federal court cannot enforce compliance with the federal duty asserted, i.e., cannot compel negotiation (or agreement). Even if the court's role under IGRA is permitted by Article III (*but see* Argument I, *supra*), it is decidedly beyond the reach of the *Ex Parte Young* doctrine. Cf. *Green v. Mansour*, 474 U.S. at 73 (declaratory relief would threaten *Edelman* limit on *Young* if not related to injunctive relief). 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" (Pet. Br. 26), for such an order does not "secure compliance with federal law" (U.S. Br. 13 (emphasis added)). Because the entire justification for *Young* is absent, the doctrine should not apply to the peculiar cause of action created by IGRA.⁹

Ex Parte Young should, if necessary, be held inapplicable for a second reason as well: the interests on the state side of the constitutional balance are distinctively

⁹ The Eleventh Circuit, in finding *Young* inapplicable, alluded to the unenforceability of the judicial order under IGRA as follows: "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, quoted at Pet. Br. 29. As noted above, the limited character of the federal intrusion cannot be disregarded, because it reflects federalism principles that are an essential aspect of IGRA.

strong. In the ordinary *Young* situation, a state official is enjoined to refrain from executive or administrative actions that violate substantive federal standards governing such actions (set by the Constitution or by federal statute or regulation). Under IGRA, by contrast, the suit seeks ultimately to require an affirmative exercise of state legislative authority (setting rules for tribal gaming), essentially as a substitute for federal policy choice in the area. *See* Pet. App. 23a. The intrusion on state sovereignty is categorically extraordinary, if not wholly unprecedented, in this circumstance. *Cf. New York v. United States* (special category of federalism problems with federal directives requiring the exercise of state legislative authority). Holding the *Young* doctrine inapplicable in this unusual situation would appropriately “accommodate[]” the doctrine to reflect States’ constitutional interests (*Pennhurst*, 465 U.S. at 105) while leaving unimpaired the federal government’s power to make needed policy choices, and set enforceable federal standards, itself. In short, *Young* should not apply to IGRA because, in addition to the federal interest being distinctively weak, the State’s interest—in being treated as a State when its most sovereign function is at stake—is distinctively strong.

It is no answer to say that Eleventh Amendment immunity is chiefly concerned with money judgments. This Court has often held that the Eleventh Amendment’s “jurisdictional bar applies regardless of the nature of the relief sought.” *Pennhurst*, 465 U.S. at 100; *see Cory v. White*, 457 U.S. 85, 90-91 (1982); *Missouri v. Fiske*, 290 U.S. 18 (1933). Moreover, the principle of sovereign immunity, protecting States’ dignity and independence (*Puerto Rico Aqueduct & Sewer Auth.*, 113 S. Ct. at 689), is centrally implicated by federal intrusions into the exercise of state lawmaking power. What is distinctive about injunctive claims, under *Young*, is not that the States’ interest is weaker, but that the necessity justification for *overriding* the States’ immunity is stronger. Where no such justification is present, however, the con-

stitutional protection of States’ immunity retains its full force. Accordingly, the Tribe’s suit should be recognized as one entirely against the State, subject to dismissal under the Eleventh Amendment unless Congress has validly abrogated States’ immunity.

B. Congress Did Not Clearly Intend In IGRA To Abrogate The States’ Eleventh Amendment Immunity

The question of congressional power to abrogate States’ Eleventh Amendment immunity need not be reached unless IGRA is construed as effecting such an abrogation. On this threshold issue of statutory interpretation, this Court has laid down “a simple but stringent test: ‘Congress may abrogate the States’ constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.’” *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989), quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). This Court should hold that IGRA does not meet this standard.

The entirety of the argument for finding that IGRA effects an abrogation—unavoidably, because there is no other evidence of congressional consideration of the immunity question—is that the statute refers several times to the “State” in describing the Tribe’s cause of action. *See* U.S. Br. 20. These references are indubitably a very important fact in the analysis, but to deem them utterly conclusive in the present circumstances would mistakenly treat the demand for clear textual statement as somehow an end in itself. In fact, the textual requirement is imposed, not for its own sake, but as a guarantor of the underlying congressional *intent* to take the constitutionally extraordinary step of overriding States’ immunity: congressional intent to abrogate remains the test, and that intent must be proved with “certainty.” *Atascadero*, 473 U.S. at 243¹⁰; *see Dellmuth*, 491 U.S. at 231 (“the

¹⁰ “[I]t is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides the guar-

salient point in our view is that it cannot be *said with perfect confidence that Congress in fact intended . . . to abrogate sovereign immunity, and imperfect confidence will not suffice given the special constitutional concerns in this area*” (emphasis added)). In IGRA, the references to the “State” are not enough to show “that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States.” *Quern v. Jordan*, 440 U.S. 332, 345 (1979).

The United States’s discussion of *Ex Parte Young* (see U.S. Br. 18) effectively explains why the statutory language cannot carry the required weight. Because States “can act only through their officials” (U.S. Br. 18, citing *Pennhurst*, 465 U.S. at 114 n.25), the United States correctly insists that, when Congress used the word “State,” it undoubtedly was contemplating that the negotiating obligation imposed by IGRA would fall on, and the suits invoking that obligation would be brought against, “those officials vested with authority under state law to negotiate on behalf of the States” (U.S. Br. 18).¹¹ Surely that is the natural congressional understanding behind the enactment of a statute that does not provide for retrospective relief, since the established doctrine of *Ex Parte Young* generally makes it unnecessary for a plaintiff suing under such a statute to name the State itself as a defendant and hence unnecessary for Congress to consider the question of, or decide to abrogate, Eleventh Amendment immunity.

antees of the Eleventh Amendment. The requirement that Congress unequivocally express this intention in the statutory language ensures such certainty.” *Atascadero*, 473 U.S. at 243.

¹¹ Congress likely assumed that in each State a particular official (particularly, the Governor) would have authority to conduct the negotiations required by IGRA. See Santoni, *supra*, at 424. The article just cited contains a list of compacts under IGRA as of 1993. Except for 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. (With respect to Kansas, see *Kickapoo Tribe v. Babbitt*, 43 F.3d 1491 (D.C. Cir. 1995).)

The text of IGRA is for that reason fully, and most naturally, understood as indicating only a congressional intent to authorize suits against state officials, for which Congress assumed that no abrogation of Eleventh Amendment immunity was required. And the relevant legislative history is, apparently, devoid of any evidence that Congress actually thought about the subject of Eleventh Amendment immunity and decided to abrogate it. That silence is telling in itself, because abrogation is, at a minimum, an extraordinary action in our federal system. See *Quern v. Jordan*, 440 U.S. at 343 (silence significant under 42 U.S.C. § 1983). It is even more significant against the background of grave uncertainty about Congress’s constitutional authority to abrogate States’ immunity under Article I. It would be surprising if Congress meant to exercise this disputed authority when it left no record of its consideration of the issue and almost surely assumed that it had no need to exercise the authority.

These compelling reasons to conclude that Congress did *not* make a decision to abrogate States’ immunity are not altered by the fact, as we have argued, that Congress was mistaken in thinking that *Ex Parte Young* applies and makes abrogation unnecessary.¹² Whether or not Congress’s assumption was erroneous, there is no indication that Congress intended to take away States’ constitutional immunity. And, in a statute reflecting so delicate a balance of state, federal, and tribal interests, it cannot be assumed that Congress would have enacted the same scheme had it recognized that doing so would compel stripping States of their Eleventh Amendment immunity. For these reasons, the Court should find that

¹² Congress may also have thought that 28 U.S.C. § 1362 abrogated immunity (see *Implementation and Enforcement of the Indian Gaming Regulatory Act*, Oversight Hearings before the House Comm. on Interior and Insular Affairs, 102d Cong., 2d Sess. 146, 149 (1992))—though that assumption has turned out to be incorrect. See *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

IGRA does not embody a clearly intended abrogation of Eleventh Amendment immunity.

C. Congress Lacked Power To Abrogate The States' Eleventh Amendment Immunity

This Court in *Union Gas* held that Congress has power to abrogate States' Eleventh Amendment immunity, but the plurality opinion was carefully limited to the question of power under the Interstate Commerce Clause. 491 U.S. at 13-23. Elsewhere, the Court has left open the question of abrogation authority under the Indian Commerce Clause. *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 252 (1985). This Court should, at a minimum, decide that no such authority exists under the Indian Commerce Clause. More broadly, *Union Gas* should be overruled and Article I authority to override States' sovereign immunity denied.¹³

1. Even If Union Gas Is Correct, Congressional Power Is Lacking Under the Indian Commerce Clause

Even if this Court declines to disturb the holding of *Union Gas* that Congress has abrogation authority under the Interstate Commerce Clause, the Court nevertheless should hold that abrogation authority is lacking under the Indian Commerce Clause. The plurality opinion in *Union Gas* accepted that, in order to find congressional authority to abrogate States' sovereign immunity under Article I, the Court has to find that "there has been 'a surrender of this immunity in the plan of the convention.'" *Union Gas*, 491 U.S. at 19 (plurality), quoting *Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934) (quoting *Federalist No. 81*). And in explaining why it found an implicit surrender with respect to the Inter-

¹³ The lack of abrogation authority under Article I as a whole is a ground for answering the first question presented in the petition: does Congress have abrogation authority under the Indian Commerce Clause? Pet. i. The petition does not, however, encompass any claim that abrogation authority exists for IGRA solely under the Interstate Commerce Clause.

state Commerce Clause, the plurality relied centrally on the role played by that provision in solving problems of an inherently interstate character, where single-State solutions often affirmatively harm other States. *Id.* at 20-22 (discussing protectionist state environmental laws). That crucial starting point for the *Union Gas* inference of intrinsic surrender, however, is inapplicable to the Indian Commerce Clause.

As the example of state protectionist legislation discussed in *Union Gas* indicates, the congressional power to regulate interstate commerce rests, at least in large part, on the need for a national authority to protect the interests of the States themselves. Particularly in the early days of the federal government, when the Interstate Commerce Clause was used for the more focused purpose of protecting the commercial aspects of interstate commerce (see G. Gunther, *Constitutional Law* 97-98 (12th ed. 1991)), it would have been plausible for States to view legislation that imposed a duty on States' roles in certain interstate commerce as generally serving to protect the interests of other States in that commerce. In a constitutional sense, therefore, the States forming the Constitution might naturally have viewed themselves as having an inherent mutuality of interest in national legislative authority under the Interstate Commerce Clause. And that mutuality of interest lends some conceptual support to the notion that States, in the Convention, may have implicitly surrendered to Congress the power to hail States into federal court, ultimately for their reciprocal protection against each other.

No such concept of inherent mutuality, or reciprocity, applies under the Indian Commerce Clause. The interests served by statutes enacted under this provision, though they *might* include various States' interests, have no necessary or intrinsic connection to States' interests. The Indian Commerce Clause thus lacks a core feature undergirding any inference of implicit surrender of the full scope of sovereign immunity—*i.e.*, of unabrogable im-

munity, protected even against congressional override—under the Interstate Commerce Clause.

This distinction gains powerful support from this Court's decisions making an analogous distinction with respect to the basic Eleventh Amendment immunity itself. Whereas the Court has long held that States, by entering the Union, necessarily surrendered their entire immunity from suits by other States (*Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 720 (1838)), the Court recently has held that States did *not* surrender their immunity from suits by Tribes, because the intrinsic "mutuality" was lacking. *Blatchford*, 501 U.S. at 782. The same principle supports excluding the Indian Commerce Clause from any doctrine finding in the Interstate Commerce Clause an implicit surrender by States of part of their sovereign immunity.¹⁴ Indeed, the Tribe recognizes that "*Blatchford* precludes the Seminole Tribe from arguing state consent in the 'plan of the convention'" (Pet. Br. 16)—the very standard applied by the plurality in *Union Gas*.

The Indian Commerce Clause is for the foregoing central reason a *less* plausible basis for abrogation authority than the Interstate Commerce Clause. Not surprisingly, therefore, there is little basis for the countervailing suggestions that this case is actually a *more* plausible candidate for finding an implicit surrender of partial immunity

¹⁴ This point is not affected by the power of Congress to abrogate Tribes' sovereign immunity. See *Oklahoma Tax Comm'n v. Pottawatomie Indian Tribe*, 498 U.S. 505, 509 (1991). That authority is not based on any voluntary surrender of immunity by Tribes, which, unlike the States, did not join together to form the Constitution. *Blatchford*, 501 U.S. at 782. Any congressional authority to diminish the full protection of immunity enjoyed by States, in contrast, must come from a voluntary surrender in the Convention, as the plurality in *Union Gas* accepted. 491 U.S. at 19. The States, as the "parties" to the Constitution, could have a mutuality of concession in forming the Constitution that Indian tribes cannot. Cf. *Blatchford*, 501 U.S. at 782 (differences between States and foreign governments, in suing States, based on the different "role of each in the convention").

than *Union Gas*. Thus, although the Tribe heavily emphasizes the "plenary" nature of congressional power under the Indian Commerce Clause and the troubled pre-1787 experience that gave rise to that power (Pet. Br. 17-21), the United States properly avoids such an argument (U.S. Br. 24-28), because both parts of the Tribe's contention are equally true of the Interstate Commerce Clause. See *Union Gas*, 491 U.S. at 17 (plurality); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935). Likewise, we fail to understand how the absence of direct tribal representation in Congress (Pet. Br. 21) suggests an inference of greater state surrender of control over immunity under the Indian Commerce Clause than under the Interstate Commerce Clause. Finally, the "special responsibility" of the United States toward Indian tribes (U.S. Br. 24) tends, if anything, to confirm the lack of any distinct need for abrogation authority: that special responsibility should make it particularly easy for the United States itself to bring suits to protect tribal interests, as it long has done without Eleventh Amendment impediment (*Blatchford*, 501 U.S. at 783; *Arizona v. California*, 460 U.S. 605, 614 (1983)).

2. *Union Gas Should Be Overruled*

If the Court concludes that the Indian Commerce Clause cannot meaningfully be distinguished from the Interstate Commerce Clause for purposes of assessing congressional abrogation authority, then the Court should overrule *Union Gas* and hold that Congress lacks power under Article I to override States' sovereign immunity from suit in federal court. This Court has overruled numerous decisions, particularly in constitutional cases, where no strong reliance on the precedent had been built up, where the stable development of legal principles was not threatened, and where the reasoning of the precedent was out of step with related law and had been subject to persuasive criticism. See *Payne v. Tennessee*, 502 U.S. 808, 827-30 (1991). The Court's decision in *Union Gas* is a proper candidate for departure from *stare decisis*.

To begin with, we are aware of no substantial pattern of congressional reliance on the authority announced in *Union Gas*. Moreover, *Union Gas* has become ever more aberrational, in light of subsequent decisional law on related aspects of the protection of state authority against federal power, in its attribution of relatively little importance to state sovereignty in our federalist structure. See, e.g., *United States v. Lopez*, 63 U.S.L.W. 4343 (Apr. 26, 1995); *New York v. United States*; *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Puerto Rico Aqueduct & Sewer Auth. v. Dept. of Revenue v. ACF Industries, Inc.*, 114 S. Ct. 843, 850-51 (1994). Most strikingly, *Union Gas* comes with a special, perhaps unique, reason why the Court should undertake a fresh reconsideration of the merits of the question of congressional power: there is no rationale of the Court, or even of five Justices, supporting the holding in *Union Gas*, because Justice White, who provided the fifth vote for the result but did not join the plurality, specifically said that he disagreed with much of the plurality's reasoning and yet stated no rationale of his own. 491 U.S. at 56-57 (White, J., concurring in relevant part). The other four Justices, moreover, leveled severe criticisms at the plurality's reasoning. 491 U.S. at 30-42 (Scalia, J., joined by Rehnquist, C.J., O'Connor, J., and Kennedy, J., dissenting in relevant part). The central value supporting *stare decisis*—stability of legal principles—carries little weight where a case establishes no legal principles that could reasonably be relied on.

On reconsideration of the issue, congressional abrogation authority under Article I should be found lacking. As explained above, the notion of mutuality of state interests in the power to regulate interstate commerce lends some support to an inference of a structurally implicit surrender of immunity. But that notion is not in the end a sound enough basis for the suggested inference. For reasons set out in the dissent in *Union Gas*, there are much stronger considerations weighing against finding a

ceded power to Congress in Article I to override the sovereign immunity of States in Article III courts.

Perhaps most fundamentally, as a historical and structural matter, the outer limits of the "judicial power" have always been defined by Article III and have never been subject to expansion by Congress through its Article I power. That fundamental principle was established by this Court in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and in the long line of decisions growing out of *Hayburn's Case*. This Court has consistently adhered to the same fundamental principle that Article III sets the limits of the judicial power—limits that Congress was not authorized, by Article I, to expand. See, e.g., *Mesa v. California*, 489 U.S. 121, 136 (1989); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983); *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 607, 615-16 (1949) (opinion of Rutledge, J., joined by Murphy, J.); *id.* at 626-38 (opinion of Vinson, C.J., joined by Douglas, J.); *id.* at 646-55 (opinion of Frankfurter, J., joined by Reed, J.); *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922); *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809).¹⁵

¹⁵ Congress, in exercising its Article I power to create federal law, may bring a case *within* Article III limits by making it one properly "arising under" federal law. See *Verlinden B.V.*, 461 U.S. at 496. Although the quantum of substantive federal law Congress must create to achieve that result has been debated (e.g., in discussing "protective jurisdiction"), see *Mesa*, 489 U.S. at 137-38, the very premise of that debate is the lack of any Article I power to expand Article III limits.

Similarly, the Court's decision in *Mistretta v. United States*, 488 U.S. 361 (1989), leaves undisturbed the longstanding recognition that Congress may not assign adjudicatory powers to the federal courts outside the limits set by Article III. The Court in *Mistretta* upheld an assignment of certain rulemaking functions to the Sentencing Commission, but only after taking care to stress that the Commission, though "located in the Judicial Branch," is not a court and does not purport to exercise the judicial power. *Id.* at 393.

This basic principle applies to the sovereign immunity at issue here. That immunity, this Court has held since *Hans v. Louisiana*, 134 U.S. 1 (1890), defines a limit on the reach of the “judicial power” granted by Article III. See *Pennhurst*, 465 U.S. at 98 (“this Court has recognized that [the Eleventh Amendment’s] greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III”) (quoting and citing prior decisions to same effect). Reading Article I to allow Congress to exceed that limit is no more justified than reading Article I to allow Congress to exceed other limitations on Article III power, including the limitation of subject matter jurisdiction to the categories enumerated in Article III or the limitation of power to “cases” or “controversies” or the limitation to the “judicial” function reflected in the Article III doctrine discussed in Argument I of this brief. See *Union Gas*, 491 U.S. at 39-40 (Scalia, J., dissenting in part).¹⁶

Adherence to this bedrock understanding of the relation of Article I and Article III authority is particularly important in the present context. After all, the (implied) Article III limit that the Tribe and the United States seek to allow Congress to override is one that, ever since *Hans* was decided, has been recognized as helping to define the essential structure of federalism under our Constitution. See *Pennhurst*, 465 U.S. at 99-100. That structure would be seriously weakened if protection of States’ sovereign immunity were turned into a mere default rule, freely alterable by the federal government. *Union Gas*, 491 U.S. at 38 (Scalia, J., dissenting in part).

¹⁶ The plurality in *Union Gas* thought it significant that the Eleventh Amendment restricts only the “judicial power,” not congressional authority. 491 U.S. at 18. But because Congress has no authority under Article I to expand the judicial power conferred by Article III, a limit on the judicial power implicit in Article III—such as sovereign immunity, as reflected in the Eleventh Amendment—automatically limits congressional authority under Article I.

Nor does the federal-state balance established by the Constitution require broad congressional abrogation authority under Article I for the vindication of the supremacy of federal law. Apparently, Congress did without Article I abrogation power until *Union Gas*. And the unquestioned doctrine of *Ex Parte Young* already ensures, without need of abrogation authority, that federal law can be vindicated against States on a prospective basis. Certainly, our constitutional system has not historically demanded the amenability of the federal government itself to suit (even for constitutional violations, substantively beyond congressional control). See *Union Gas*, 491 U.S. at 33-34 (Scalia, J., dissenting). Indeed, many if not all uniquely strong federal interests that might “require” suits against States in federal court can be protected through the ability of the United States itself to sue States in federal court, without impediment from the Eleventh Amendment. See *Blatchford*, 501 U.S. at 783.

Finally, Article I authority to abrogate States’ immunity does not follow, logically or practically, from the holding of *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), that Congress may abrogate such immunity under Section 5 of the Fourteenth Amendment. As a subsequent amendment, of course, the Fourteenth Amendment can alter pre-existing law and confer abrogation authority without remotely suggesting that the original Constitution conferred such power. And in inferring that the Fourteenth Amendment *should* be construed as adding a previously lacking power to Congress, it is powerfully relevant that the alteration at issue is a narrow one, restricted to specific topics where federal limits on state authority were peculiarly necessary. The alteration of the basic balance of state and federal authority reflected in the original preservation of States’ sovereign immunity is accordingly a limited one, not the sweeping transformation of federal-state relations that would be wrought by a finding of broad abrogation authority under Article I. See *Union Gas*, 491 U.S. at 41-42 (Scalia, J., dissenting in part).

CONCLUSION

The judgment of the court of appeals should be affirmed.

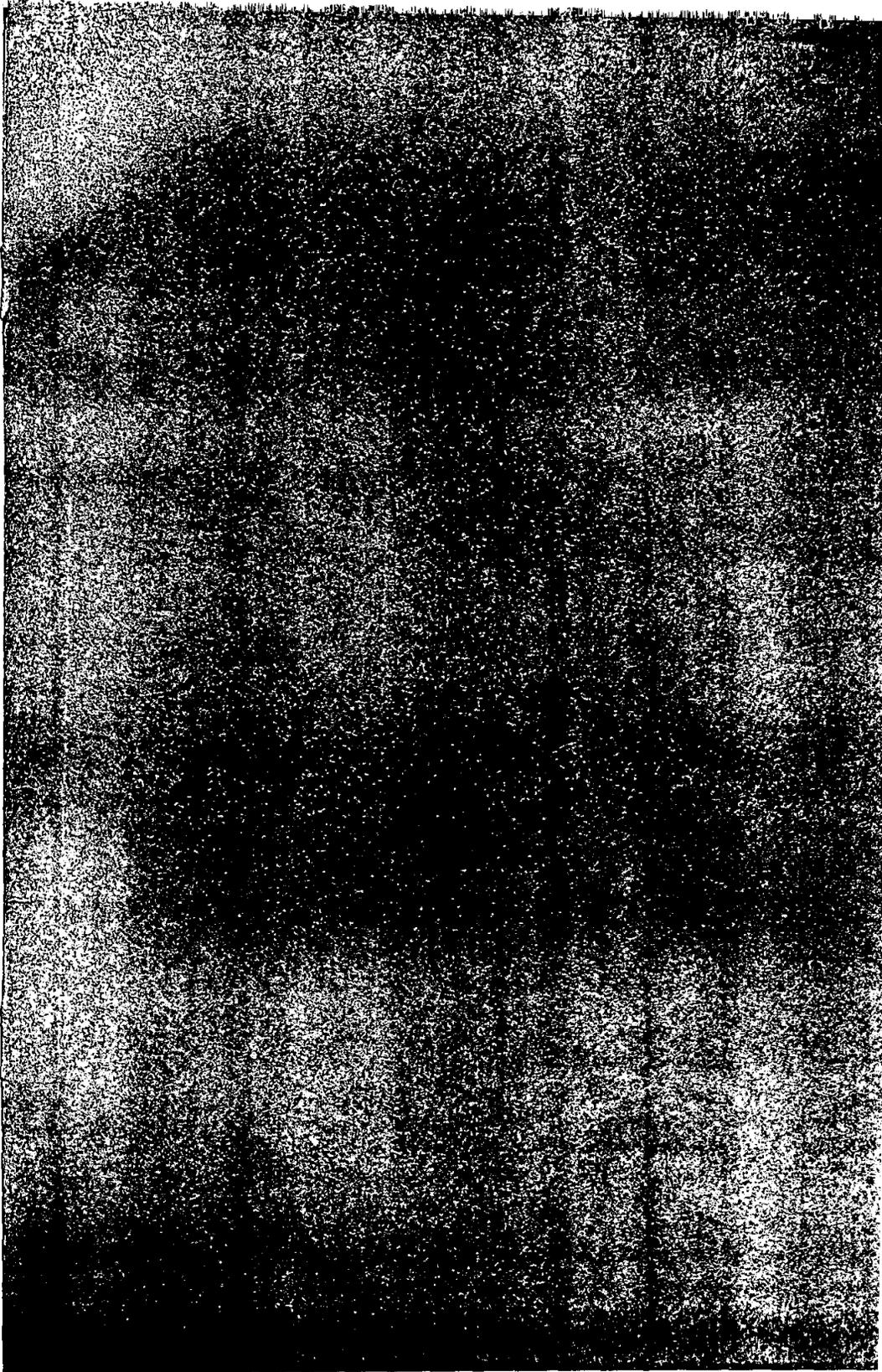
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA,
Petitioner,
v.
STATE OF FLORIDA, *et al.,*
Respondents.

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

BRIEF OF AMICI CURIAE
POARCH BAND OF CREEK INDIANS
AND PONCA TRIBE OF OKLAHOMA
IN SUPPORT OF PETITIONER

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-12

SEMINOLE TRIBE OF FLORIDA,
Petitioner,
 v.
 STATE OF FLORIDA, *et al.*,
Respondents.

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

**BRIEF OF AMICI CURIAE
 POARCH BAND OF CREEK INDIANS
 AND PONCA TRIBE OF OKLAHOMA
 IN SUPPORT OF PETITIONER**

INTEREST OF AMICI

The Poarch Band of Creek Indians, a federally recognized tribe, has a cross-petition (No. 94-189) pending in this Court that raises identical issues, and arises from the same Court of Appeals ruling, as this case. *See Poarch Band of Creek Indians v. Alabama*, 776 F. Supp. 550 (S.D. Ala. 1991) and 784 F. Supp. 1549 (S.D. Ala. 1992), *aff'd*, *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (11th Cir. 1994). The Ponca Tribe of Oklahoma, a federally recognized tribe, is respondent in an action (No. 94-1029) pending in this Court, which also raises the same Eleventh Amendment issue presented here. *See Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422 (10th Cir. 1994).

Amici have been seeking to negotiate compacts with their respective states to permit Class III gaming in accordance with the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* This case will determine whether the Tribes' efforts will continue to be blocked—contrary to the clear intent of Congress—by the States' and Governors' claims of immunity from suit.¹

SUMMARY OF ARGUMENT

This is an action by an Indian Tribe seeking compliance by a State and its Governor with the requirement of the Indian Gaming Regulatory Act (“IGRA”)² that they negotiate in “good faith” regarding the Tribe’s request to undertake gaming. 25 U.S.C. § 2710(d)(7)(A)(i). This case does not involve monetary or other retroactive relief. Only declaratory and prospective injunctive relief are sought. This case does not involve the exercise of Congressional power in derogation of the regulatory authority of states. On the contrary, IGRA provides states with a *greater* potential role in regulating Indian gaming than would be permissible absent IGRA, under this Court’s ruling in *California v. Cabazon Band of Indians*, 480 U.S. 202 (1987). And this case does not involve a statute where Congress’ intent to provide a cause of action against a state is in doubt. Congress in IGRA expressly provided for suits against states regarding the requirement of “good faith” negotiations.

The issue in this case is whether—notwithstanding the limited relief sought, the lack of intrusiveness into state authority, the breadth of Congressional power over Indian affairs, and the clear intent of Congress to permit such suits—the Governor and the State are immune from this suit under the Eleventh Amendment. As against

¹ This brief is filed with the written consent of the parties, filed with the Clerk of this Court.

² Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. §§ 2701 *et seq.*

the Governor, this action for prospective injunctive and declaratory relief, regarding a violation of federal law, is permissible under *Ex parte Young*, 209 U.S. 123 (1908). As against the State, the Eleventh Amendment is not a bar because Congress—acting pursuant to its plenary power over Indian affairs—expressly provided for such a suit against the State. At least in the narrow context of this case—where the only relief sought is prospective injunctive and declaratory relief, and where the federal statute enhances rather than diminishes state authority—Congress has the power to provide for such a suit.

STATEMENT

A. The *Cabazon* Case

In *California v. Cabazon Band of Indians*, 480 U.S. 202 (1987), this Court upheld the right of Indian tribes to undertake gaming activities on their reservations free from state regulation, where state law and public policy fail to prohibit such gaming by others. The Court held that while “state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided,” no federal law permitted the application of California’s laws to on-reservation gaming by tribes. *Id.* at 207, 212, 214. In addition, “in light of the compelling federal and tribal interests” in Indian gaming, most notably the “‘overriding goal’ of encouraging tribal self-sufficiency and economic development”, the Court refused to permit state regulation of Indian gaming in the absence of federal statutory authorization. *Id.* at 216, 221.

Cabazon made clear that gaming by tribes—like other aspects of Indian affairs—is fundamentally the province of federal law. As the Court noted, “‘tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.’” *Id.* at 207 (quoting *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 154 (1980)).

B. The Indian Gaming Regulatory Act

Congress responded to the *Cabazon* decision by enacting the 1988 Indian Gaming Regulatory Act,³ a comprehensive regulatory measure regarding Indian gaming. In IGRA, Congress reaffirmed the important federal interests underlying Indian gaming, including the need 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).⁴ At the same time, Congress provided in IGRA a mechanism for state regulatory involvement in Indian gaming—altering, to that extent, the impact of this Court’s ruling in *Cabazon*.

IGRA divides gaming into three categories.⁵ Class III gaming—essentially gaming other than traditional Indian games, bingo and bingo related games—was the subject of a protracted struggle in Congress, beginning some years before *Cabazon*.⁶ Tribes sought to remain free from state jurisdiction over their on-reservation activity, including gaming—a position that was ultimately buttressed by this Court’s decision in *Cabazon*.⁷ On the

³ 25 U.S.C. §§ 2701 *et seq.*

⁴ IGRA was enacted in the context of the recognized failure of federal policy to provide other meaningful economic development opportunities in Indian country. *See* S. Rep. No. 446, 100th Cong., 2d Sess. 34 (1988) (hereafter “S. Rep.”) (Additional views of Mr. McCain).

⁵ Class I gaming includes traditional forms of Indian gaming such as “social games solely for prizes of minimal value. . . .” 25 U.S.C. § 2703(6). Class II gaming includes bingo and related games such as pull-tabs, punch boards, lotto, tip jars, instant bingo and “other games similar to bingo. . . .” 25 U.S.C. § 2703(7)(A)(i)(III). Class III gaming is all gaming not Class I or Class II, and includes, for instance, casino gaming, slot machines and certain forms of card gaming. 25 U.S.C. § 2703(8).

⁶ *See* S. Rep. at 1-5.

⁷ *See* S. Rep. at 5.

other hand, certain states sought to control Indian gaming within their borders. *See* S. Rep. at 4-6, 33. After considering these sharply contrasting views on this issue for 6 years, Congress arrived at a “delicately balanced compromise”,⁸ and enacted IGRA.

The “core compromise”⁹ was the provision of IGRA permitting Class III gaming if, *inter alia*, such gaming is “conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State. . . .” 25 U.S.C. § 2710(d)(1)(C). This compacting language provided states with an opportunity to negotiate with tribes regarding the terms under which Class III gaming may be conducted on Indian lands. While IGRA provided a list of certain topics that may be included within a compact, it did not determine how any issue should be resolved. 25 U.S.C. § 2710(d)(3)(C). The thrust of the compact provision in IGRA was that tribes and states should come to an agreement regarding how to structure Class III gaming, consistent with the interests of each.

Congress, in enacting IGRA with this compacting process, remained concerned that states not abuse the process by unreasonably refusing to enter compact negotiations, or by unreasonably refusing to agree to compact terms.¹⁰ Accordingly, Congress provided that if a state fails to negotiate at all, or fails to negotiate in good faith, the federal district courts shall have jurisdiction over

⁸ 134 Cong. Rec. 25377 (daily ed. Sept. 26, 1988) (remarks of Cong. Udall) (Chairman of the House Interior and Insular Affairs Committee and primary House sponsor).

⁹ 134 Cong. Rec. 25376 (daily ed. Sept. 26, 1988) (remarks of Cong. Udall).

¹⁰ As the Senate Report on the bill which became IGRA noted:

It is the Committee’s intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming. . . .

S. Rep. at 13.

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 . . . or to conduct such negotiations in good faith.

25 U.S.C. § 2710(d)(7)(A)(i). Congress placed the burden of proof on the state in such an action to justify its position, and “to prove that the State has negotiated with the Indian tribe in good faith. . . .” 25 U.S.C. § 2710(d)(7)(B)(ii).

If a state fails to meet its burden of demonstrating that it negotiated in good faith, IGRA prescribes a remedy designed to provide additional opportunities for the state and tribe to arrive at a mutually agreeable compact. First, the federal district court can order the parties to conclude a compact within 60 days—essentially ordering good faith negotiations for that period. 25 U.S.C. § 2710(d)(7)(B)(iii). If no compact is reached, the court then appoints a mediator who considers the “last best offer” for a compact by each side, and selects one. 25 U.S.C. § 2710(d)(7)(B)(iv). The state may accept the mediator’s selection, 25 U.S.C. § 2710(d)(7)(B)(ii), or failing that, the mediator notifies the Secretary of Interior, who then prescribes federal procedures, consistent with the mediator’s recommendation and the provisions of IGRA, for the conduct of Class III gaming on the tribe’s reservation. 25 U.S.C. § 2710(d)(7)(B)(vii).

In short, the compromise of IGRA was to *expand* the potential role of the states in the regulation of Indian gaming through the compacting process. The price to the states of this enhanced participation in Indian gaming was not onerous. The states were required merely to negotiate “in good faith”. Tribes, on the other hand, were deprived by IGRA of their right—upheld in *Cabazon*—to undertake gaming opportunities free from state law. In return, tribes obtained a mechanism for addressing unfair treatment by states—the right to seek

prospective relief to require states to comply with their obligation to negotiate in good faith. Unless the federal courts are available to enforce the states’ obligation to negotiate in good faith, the “delicately balanced compromise” of IGRA will be unraveled.

ARGUMENT

I. INTRODUCTION

The Eleventh Amendment “implicates the fundamental constitutional balance between the Federal Government and the States.” *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). In accordance with the “principles of federalism that inform [the] Eleventh Amendment”, *Hutto v. Finney*, 437 U.S. 678, 691 (1978), the Court has recognized that this balance between the federal government and the states encompasses a number of exceptions to state immunity from suit.

The Eleventh Amendment does not bar a suit against a state if the state “has consented to suit, either expressly or in the ‘plan of the convention.’” *Blatchford v. Native Village of Noatak*, 501 U.S. —, 115 L.Ed.2d 686, 694 (1991); *Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934). Thus, the Eleventh Amendment does not bar suits in federal court by the United States against a state, or by one state against another. *United States v. Texas*, 143 U.S. 621, 644-54 (1892); *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904). Permitting the federal courts to resolve such disputes was deemed necessary to protect particular aspects of the Constitutional plan.¹¹

¹¹ See *Monaco v. Mississippi*, 292 U.S. at 328 (provision of Constitution authorizing suit by state against another state “necessarily operates regardless of the consent of the defendant state”); *United States v. Texas*, 143 U.S. at 644 (“permanence of the Union might be endangered” if suits by U.S. against states were barred).

Likewise, the Eleventh Amendment does not bar a suit against a state where Congress, acting under a plenary Constitutional grant of power, expressly provides a federal cause of action against a state. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456-57 (1976); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13-23 (1989). By agreeing to a Constitutional provision that affords such plenary power to Congress—and correspondingly limits state power—the states “relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable.” *Id.* at 20. Without the power to provide for suits against states in these instances, “the congressional power thus conferred would be incomplete. . . .” *Id.* at 19.

Finally, the Eleventh Amendment does not bar actions against state officials for prospective injunctive relief regarding violations of federal law. *Ex parte Young*, 209 U.S. 123 (1908); *Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974). Such actions are necessary “to end a continuing violation of federal law . . . [and] to vindicate the federal interest in assuring the supremacy of that law.” *Green v. Mansour*, 474 U.S. 64, 68 (1985).

As these cases reflect, there is often tension between the state interest in immunity from suit on the one hand, and the federal interest in the vitality of certain Constitutional provisions, most notably the Supremacy Clause, on the other. When this occurs, the Court has found a “need to reconcile competing interests”—that is, to resolve the conflict between the state interest in immunity from suit and the other Constitutional interests that are implicated by a particular assertion of state immunity. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). The Court has reconciled these competing interests by construing the Eleventh Amendment to accommodate other fundamental Constitutional interests. Thus, the exceptions to the immunity provided by the Eleventh Amendment are a mechanism

by which this Court “give[s] life to” fundamental principles of the Constitution that would otherwise be jeopardized by the Eleventh Amendment. *Green*, 474 U.S. at 68.

This case involves the application of two exceptions to the Eleventh Amendment. First, the doctrine of *Ex parte Young* provides that actions for prospective injunctive relief against state officials regarding violations of federal law are permissible. This is such an action, against the Governor. Second, Congress has specifically provided for this suit against the State under IGRA—enacted under its broad authority over Indian affairs. For essentially the same reasons that *Ex parte Young* permits actions for prospective relief to protect the supremacy of federal law, Congress has the authority to provide for this action for prospective relief to vindicate IGRA’s requirement that the state negotiate in “good faith.”

II. THIS ACTION AGAINST THE GOVERNOR IS PERMISSIBLE UNDER THE DOCTRINE OF *EX PARTE YOUNG*, 209 U.S. 123 (1908)

This case involves only a claim for prospective injunctive relief and related declaratory relief. The Seminole Tribe seeks to have the defendants conform their future conduct to the requirement of IGRA that, upon receipt of a request by a tribe for a gaming compact, they “negotiate with the Indian tribe in good faith to enter into such compact.” 25 U.S.C. § 2710(d)(3)(A). No money damages or other retroactive relief is sought. Accordingly, as against the Governor, this action is permissible under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

Suits against state officials seeking prospective injunctive and declaratory relief regarding violations of federal law are not barred by the Eleventh Amendment. As this Court has stated, “[i]n an injunctive or declaratory action grounded on federal law, the State’s immunity *can*

be overcome by naming state officials as defendants.” *Kentucky v. Graham*, 473 U.S. 159, 169 n.18 (1985) (emphasis in original). This “important exception” to the Eleventh Amendment was recognized in *Ex parte Young*, 209 U.S. 123 (1908), in which this Court held that “a suit challenging the constitutionality of a state official’s action is not one against the State.” *Pennhurst*, 465 U.S. at 102. While *Ex parte Young* involved a claimed violation of the Fourteenth Amendment by a state official, this Court has recognized that the doctrine encompasses other violations of federal law as well. *E.g.*, *Edelman*, 415 U.S. at 676-77. Thus, “the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law.” *Green*, 474 U.S. at 68. As this Court has emphasized:

the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.

*Id.*¹² The remedy sought by the Tribe here—an order requiring the Governor to stop violating IGRA’s directive regarding good faith negotiations—is precisely the kind permitted under *Ex parte Young*.

The Court of Appeals—while not suggesting that this action involves anything but prospective injunctive relief regarding a claimed violation of federal law—nevertheless rejected the application of the *Ex parte Young* doc-

¹² This Court has also articulated limits to the doctrine of *Ex parte Young*. The doctrine does not apply to claims for monetary or other retroactive relief, *Edelman*, 415 U.S. at 678, to cases involving no claim of continuing violation of federal law, *Green*, 474 U.S. at 71, 73, or to claims arising under state law, *Pennhurst*, 465 U.S. at 106. This case, seeking prospective injunctive relief regarding an ongoing violation of federal law, is not subject to any of these limitations.

trine. The Court of Appeals contended first that “the *Ex parte Young* doctrine cannot compel discretionary acts.” *Seminole*, 11 F.3d at 1028. But, as the Court noted in *Ex parte Young*, “[a]n injunction to prevent him [a state officer] from doing that which he has no legal right to do is not an interference with the discretion of an officer.” *Ex parte Young*, 209 U.S. at 159.

This action seeks to require the Governor to fulfill the statutory mandate of IGRA that, in response to a tribal request he “shall negotiate with the Indian tribe in good faith to enter into such a compact.” 25 U.S.C. § 2710 (d)(3)(A) (emphasis added). The plain language of IGRA imposes a duty to negotiate in good faith, if a state wants to have a role in determining the terms under which Indian gaming may take place. Thus, where a Governor participates in compact negotiations—as he did here—IGRA provides that he must negotiate in good faith as a matter of federal law. While IGRA permits the broad exercise of authority by the Governor in determining the terms of a compact, it does not permit him to refuse to negotiate in good faith.¹³ The Court of Appeals was simply wrong in characterizing this action as one to compel the exercise of discretion by the Governor.¹⁴

¹³ This Court has recognized that the obligation to “confer in good faith” as defined in section 8(d) of the National Labor Relations Act (“NLRA”), 29 U.S.C. § 158(d), creates a “duty on the parties”, notwithstanding the wide discretion afforded to the parties with respect to terms of a “collective bargaining agreement.” *N.L.R.B. v. Ins. Agents’ Int’l*, 361 U.S. 477, 487-88 (1960). An employer’s obligation to confer in good faith under the NLRA is mandatory, not discretionary. The obligation to negotiate in good faith under IGRA—for a state that enters negotiations—should be construed in a like manner.

¹⁴ IGRA provides that if a federal court determines that a state has failed to meet its statutory obligation to negotiate in good faith, the remedy is a series of procedures designed to provide additional opportunities for the parties to reach an agreement, without compelling any action by the state or its officers. 25 U.S.C. § 2710(d)(7)(B)(iii), (iv), (vi), (vii). These procedures do not

The Court of Appeals contended also that the doctrine of *Ex parte Young* does not apply because the suit “in reality is against the state itself.” *Seminole*, 11 F.3d at 1029. The Court noted that IGRA imposes duties on “the States” and “not once does it impose duties or responsibilities on a particular officer of the state” *Id.* The Court of Appeals’ analysis misconstrues the doctrine of *Ex parte Young*.

The issue of whether an action against a state officer is in reality one against the state simply does not arise if the action is within the doctrine of *Ex parte Young*. To be sure, this Court has noted that “[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.” *Pennhurst*, 465 U.S. at 101 (quoting *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963)). But this “general rule” has no application in the context of an action under the doctrine of *Ex parte Young*:

The Court has recognized an important exception to this general rule: a suit challenging the constitutionality of a state official’s action is not one against the State. This was the holding of *Ex parte Young* . . . [W]hen 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 . . .

Pennhurst, 465 U.S. at 102-03. In short, an action for prospective injunctive relief against a state official regarding a claim under federal law is per se not a case against the state for purposes of the Eleventh Amendment. See *Green*, 474 U.S. at 68 (“a suit challenging the

compel any discretionary act. Indeed, they do not compel any act at all. If a state opts out of the process, and does nothing at all, the only consequence is that the terms for a tribe to undertake Class III gaming will ultimately be set by the Secretary of the Interior.

constitutionality of a state official’s action in enforcing state law is not one against the State . . .”).

In addition, IGRA’s references to “the State” do not render the doctrine of *Ex parte Young* inapplicable. To begin with, “an American State can act only through its officials.” *Pennhurst*, 465 U.S. at 114 n.25. Further, *Ex parte Young* was itself an action against a state attorney general to prevent him from enforcing a statute in violation of the Fourteenth Amendment—which contains express prohibitions against actions by a “state”, and does not refer to any duties of state attorneys general or other officials. Contrary to the Court of Appeals’ position, duties imposed on states by federal law are at the heart of the *Ex parte Young* doctrine.¹⁵

In short, as against the Governor, this action may properly proceed under the doctrine of *Ex parte Young*.

III. CONGRESS HAS THE POWER TO AUTHORIZE THIS ACTION AGAINST THE STATE

A. This Action Does Not Substantially Implicate the Core Interests Underlying the Eleventh Amendment

Earlier this Term, this Court articulated the dual interests at the heart of the Eleventh Amendment—the prevention of money judgments by federal courts that must be paid by state treasuries, and the protection of the integrity owed states as sovereigns in our federal system. *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S.

¹⁵ See, e.g., *Edelman*, 415 U.S. at 654 n.3, 664 (requiring that a “state plan” for federal benefits conform to specific time and other requirements; no federal law duty imposed on any specified state official); *Native Village of Venetie I.R.A. Council v. Alaska*, 918 F.2d 797, 800-02 (9th Cir. 1990) (upholding an *Ex parte Young* action against state officials arising under 25 U.S.C. § 1911(d), which requires that “every State . . . give full faith and credit” to child custody proceedings of Indian tribes; no federal law duty imposed on any specified state official).

—, 130 L.Ed.2d 245 (1994). This case seeks only prospective injunctive and declaratory relief. In addition, it arises under a federal statute that, far from undermining the integrity of the states, actually enhances the potential scope of state authority. Accordingly, the state interests at the core of the Eleventh Amendment are not substantially involved here.

1. This action does not seek money damages against the state

As the Court noted in *Hess*, quoting from Justice Stevens' dissent in *Pennhurst*:

Adoption of the [Eleventh] Amendment responded most immediately to the States' fears that "federal courts would force them to pay their Revolutionary War debts, leading to their financial ruin." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 151 . . . (1984) (Stevens, J. dissenting).

Id., 130 L.Ed.2d at 255. The Court emphasized that "the impetus for the Eleventh Amendment" was "the prevention of federal court judgments that must be paid out of a State's treasury", and affirmed that "the vulnerability of the State's purse" is "the most salient factor in Eleventh Amendment determinations." *Id.* at 260.

Hess, then, reinforced the principle—articulated earlier in *Edelman v. Jordan*, 415 U.S. 651 (1974)—that actions for money damages differ from actions for prospective injunctive relief for purposes of Eleventh Amendment jurisprudence. While the Eleventh Amendment generally bars money damage actions, the Court has invoked the fiction of *Ex parte Young* to permit actions against state officials for prospective injunctive relief regarding violations of federal law. As the Court has stated:

Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability

of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. . . . But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.

Green, 474 U.S. at 68 (citation omitted). In other words, notwithstanding the Eleventh Amendment, actions for prospective injunctive relief are not only permissible, but necessary, to protect the supremacy of federal law.

While the Court has thus drawn a sharp distinction between prospective injunctive relief and damages for Eleventh Amendment purposes, it has not yet had occasion to apply that distinction where Congress expressly provides for a cause of action against a state. The leading cases regarding Congressional authority to subject states to suit involve claims for money damages. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). Likewise, money damages were at issue in this Court's cases articulating the requirement of a clear statement by Congress to subject states to suit. *Blatchford v. Native Village of Noatak*, 501 U.S. —, 115 L.Ed.2d 686 (1991); *Dellmuth v. Muth*, 491 U.S. 223 (1989); *Welch v. State Dep't of Highways and Public Transp.*, 483 U.S. 468 (1987); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279 (1973).

This case—unlike the prior cases before the Court— involves Congress expressly providing for suits against states only for prospective injunctive relief. The core interest of the Eleventh Amendment—the state treasury—is not at stake here. On the other hand, the fundamental federal interest in the Supremacy Clause—the vindication of federal law—is directly implicated. In *Ex parte Young*

and its progeny, this Court balanced the state interest in immunity from suit and the federal interest in the supremacy of federal law and held that actions against state officials for prospective injunctive relief regarding violations of federal law are not barred by the Eleventh Amendment.

The same reasoning applies here. Indeed, the presence of an express Congressional cause of action against a state reinforces the Supremacy Clause interests that gave rise to the doctrine of *Ex parte Young*. This Court in applying the doctrine of *Ex parte Young* has determined that suits for prospective injunctive relief are needed to protect the supremacy of federal law even where Congress is silent regarding the need for such suits. In this case Congress has expressly provided that such a cause of action is necessary to assure that the integrity of IGRA is not undermined by unreasonable action by a state. It would be an odd result indeed to hold that the Court is free to create the fiction of *Ex parte Young* to permit suits for prospective injunctive relief regarding violations of federal law, but that Congress is powerless to provide for such suits to protect the efficacy of its own statutes. Such a result would be particularly anomalous because the Eleventh Amendment—by its own terms—restricts judicial power, not the power of Congress.

In sum, for essentially the same reasons that suits for prospective injunctive relief against state officials for violations of federal law do not run afoul of the Eleventh Amendment under *Ex parte Young*, suits for prospective injunctive relief against states for violations of federal law—expressly provided for by Congress—are also not barred by the Eleventh Amendment. The Supremacy Clause requires that suits for prospective injunctive relief—like this one—be available to vindicate federal law. The more difficult issue—whether Congress may subject states to suits involving the core Eleventh Amendment interest in protecting state treasuries from federal court money judgments—is not presented by this case.

2. IGRA enhances state authority over Indian gaming

Hess states that, in addition to concern for state treasuries, the Eleventh Amendment “emphasizes the integrity retained by each State in our federal system. . . .” *Hess*, 513 U.S. —, 130 L.Ed.2d at 255. The Amendment “‘accords the States the respect owed them as members of the federation,’” and protects them from “affront[s] to the dignity” properly due them. *Id.*, 130 L.Ed.2d at 255 (citation omitted), 256.

As noted above, under this Court’s ruling in *California v. Cabazon Band of Indians*, 480 U.S. 202 (1987), tribes could operate gaming on their reservations free from state regulation. IGRA, however, altered the result in *Cabazon*, providing a statutory scheme enabling states to participate—through negotiation of a compact—in the regulation of Indian gaming. This enhancement of state authority with respect to Indian gaming was not an “affront to the dignity” of the states that would implicate core Eleventh Amendment concerns. *Hess*, 513 U.S. —, 130 L.Ed.2d at 256. On the contrary, far from encroaching on state sovereignty in a manner inconsistent with the respect due a state, IGRA expanded state sovereignty over tribal affairs in a virtually unprecedented manner.

B. Congress Has the Power to Subject States to Suit in Federal Court When Exercising Its Plenary Authority Over Indian Tribes

While this case does not touch state interests at the core of the Eleventh Amendment, it does involve the substantial federal interest in Congress’ authority over Indian tribes. In IGRA, Congress balanced the interests of tribes, states and the United States with respect to Indian gaming. That balance is undermined by the ruling of the Court of Appeals—which ignored the breadth of Congressional authority over Indian affairs.

This Court has upheld “Congress’ acknowledged powers of abrogation”, *Dellmuth*, 491 U.S. at 227-28, in connection with legislation enacted under section 5 of the Fourteenth Amendment, and under the Interstate Commerce Clause. *Fitzpatrick*, 427 U.S. at 456; *Union Gas*, 491 U.S. at 19-20. In both cases, the Court emphasized that the Constitutional provisions under which Congress acted were intended significantly to alter the balance of federal-state power—providing plenary power to Congress, and correspondingly diminishing state power. The Court held that Congress, operating pursuant to such a Constitutional grant, has the power to subject states to suit, provided that it expresses its intent to do so in clear language.

The Court of Appeals held in this case that Congress enacted IGRA under the Indian Commerce Clause. *Seminole*, 11 F.3d at 1026. As this Court has reaffirmed often, with respect to Indian affairs, the Constitution provides plenary authority to Congress, and diminishes state authority. In other words, the Indian Commerce Clause—while encompassing a different subject matter¹⁶—shares with the Fourteenth Amendment and the Interstate Commerce Clause the fundamental characteristics held necessary to provide Congress with authority to subject states to suit.¹⁷

¹⁶ The Court of Appeals, relying on *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), stated that the Interstate Commerce Clause and the Indian Commerce Clause have different functions which “mandate that they be treated distinctly.” *Seminole*, 11 F.3d at 1027. But *Cotton Petroleum* held only that tribes were not properly treated as states for purposes of tax apportionment. 490 U.S. at 191-93. *Cotton Petroleum* did not address any issue relating to abrogation of state Eleventh Amendment immunity.

¹⁷ In *Blatchford v. Native Village of Noatak*, 501 U.S. —, 115 L.Ed.2d 686 (1991), this Court held that the “plan of the convention” did not limit the application of the Eleventh Amendment to suits by individuals. *Id.* at 694-96. In that case, the Tribe argued that since suits by certain other sovereigns (states and the United

The Indian Commerce Clause was adopted in response to the deficiencies of the Articles of Confederation, which left power over Indian affairs ambiguously divided between the states and the federal government. Under the Articles of Confederation, as James Madison explained:

What description of Indians are to be deemed members of a State is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.

The *Federalist*, No. 42, p. 217 (William R. Brock ed. 1992). Finding the arrangement of the Articles of Confederation unsatisfactory in this respect, the Framers adopted the Indian Commerce Clause to centralize the full sweep of Indian affairs in the federal government.

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. 1, § 8, cl. 3, that granted Congress the power to regulate trade with the Indians.

Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 n.4 (1985). The Constitution thus provided full and exclusive federal control over Indian affairs. As described by Chief Justice Marshall:

States) are not barred by the Eleventh Amendment, suits by tribes are likewise not barred. The Court rejected this argument. *Id.* at 696.

The only abrogation issue in *Blatchford* involved 28 U.S.C. § 1362—a statute providing federal courts with jurisdiction over federal question actions brought by tribes. The Court held that this general statute—which is silent as to states—did not meet the clear statement test required to find abrogation of state immunity. *Id.* at 698-700.

That instrument [the Constitution] confers on Congress the powers of war and peace: of making treaties, and of regulating commerce with foreign nations, and among the several States, and with the Indian Tribes. *These powers comprehend all that is required for the regulation of our intercourse with the Indians.* They are not limited by any restriction on their free actions. The shackles imposed on this power, in the confederation, are discarded.

Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (emphasis added); see also *United States v. 43 Gallons of Whisky*, 93 U.S. 188, 194 (1876); *United States v. Mazurie*, 419 U.S. 544, 555-56 (1975); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-4 (1977); *Oneida*, 470 U.S. at 234. The broad grant of federal power in the Indian Commerce Clause also limits state authority. As this Court stated, “[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.” *McClanahan v. Arizona Tax Comm’n*, 411 U.S. 164, 168 (1973) (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)).

In short, by adopting the Indian Commerce Clause as part of the Constitution, the states effectively consented to Congressional authority to subject states to suit, when Congress acts under the Indian Commerce Clause. Congress, then, acting under the Indian Commerce Clause, had the authority to subject states to suit by enacting IGRA.

C. Congress in IGRA Clearly and Plainly Expressed Its Intent to Subject States to Suit

“Every federal court that has considered the issue has concluded that the IGRA’s language reveals a clear intent to abrogate the states’ Eleventh Amendment immunity.” *Spokane Tribe of Indians v. Washington State*, 28 F.3d 991, 994 (9th Cir. 1994), *petition for cert. filed*, No. 94-357; see also *Ponca Tribe of Oklahoma v. State of*

Oklahoma, 37 F.3d 1422, 1427-28 (10th Cir. 1994), *petitions for cert. filed*, Nos. 94-1029 & 94-1030. As the Court of Appeals stated in this case, Congress in IGRA “intended to abrogate the states’ sovereign immunity,” *Seminole*, 11 F.3d at 1024.

Moreover, the Court of Appeals’ finding of clear Congressional intent to abrogate was correct. IGRA meets this Court’s requirement of clear, direct language, specifically subjecting states to suit. See *Dellmuth*, 491 U.S. at 227-28; *Pennhurst*, 465 U.S. at 99; *Blatchford*, 501 U.S. —, 115 L.Ed.2d at 698; *Hoffman v. Connecticut Income Dep’t*, 492 U.S. 96, 101 (1989); see also *Astoria F.S. & L. Ass’n v. Solimino*, 501 U.S. —, 115 L.Ed.2d 96, 104 (1991) (citing *Atascadero* as “requiring plain statement of intent to abrogate immunity of states under the Eleventh Amendment”).

In IGRA, Congress specifically directed that tribes may sue states in federal court for failure to negotiate in good faith.¹⁸ IGRA imposes the burden of proof on the state in such a suit,¹⁹ and provides remedies in the event judgment is entered against the state.²⁰ Congress could not have included these provisions in IGRA without intending to subject states to suit, notwithstanding the Eleventh Amendment. Any other conclusion would deprive these sections of IGRA of all meaning and effect. See *Seminole*, 11 F.3d at 1024. Accordingly, IGRA meets this Court’s requirement that Congress must use clear, specific language to subject states to suit.

D. All Factors Support Congressional Power to Subject the State to This Suit

Under this Court’s Eleventh Amendment cases, there are four key inquiries in determining whether a state is

¹⁸ 25 U.S.C. § 2710(d) (7) (A) (i).

¹⁹ 25 U.S.C. § 2710(d) (7) (B) (ii).

²⁰ 25 U.S.C. § 2710(d) (7) (B) (iii)-(vii).

subject to an unconsented suit pursuant to an Act of Congress. First, is the fundamental state interest in protecting its treasury at stake? Second, is the dignity due to state sovereign authority being undermined? Third, did Congress act pursuant to a plenary Constitutional grant, intended to expand federal and diminish state authority? And fourth, did Congress expressly provide for the suit against the state?

In this case, all four factors strongly support a finding that Congress has the power to subject the State to a good faith lawsuit under IGRA, notwithstanding the Eleventh Amendment. The suit is for prospective injunctive relief and does not threaten the fundamental state interest in its treasury. IGRA provides an enhancement of state sovereign authority over Indian gaming, and does not stand as an affront to state sovereignty. Congress enacted IGRA under its plenary power over Indian affairs—a power intended to remove states from the fray of Indian affairs. And finally, the language of IGRA clearly subjects the states to suit. The Court need not address the more difficult issue of Congressional power to authorize suits against states when these factors are aligned differently. All that is required here is a ruling that in the unique circumstances of this case—where Congress, acting pursuant to its broad power over Indian affairs, expressly subjects states to suits for prospective relief only, under a statute that enhances state sovereignty—Congress acted within its authority.

CONCLUSION

For the foregoing reasons, the ruling of the Court of Appeals on the applicability of the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and on Congress' authority to subject states to suit for prospective injunctive relief under IGRA, should be reversed.

Respectfully submitted,

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March 1995

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA,

Petitioner,

v.

STATE OF FLORIDA, *et al.*,

Respondents.

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

**BRIEF AMICI CURIAE OF THE STOCKBRIDGE-MUNSEE INDIAN
COMMUNITY, THE ONEIDA INDIAN NATION OF WISCONSIN,
THE TONAWANDA BAND OF SENECAS, AND
THE TUNICA-BILOXI TRIBE IN SUPPORT OF PETITIONER**

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Interests of Amici Curiae

The Eleventh Circuit's decision in *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (11th Cir. 1994) is based on an incorrect interpretation of the relationship between the Indian Commerce Clause and the Eleventh Amendment. Amici support the Seminole Tribe in challenging the *Seminole* decision.¹

The Stockbridge-Munsee Community is a federally-recognized Indian tribe. The Community was originally located in north central New York. Its land was acquired by the State in a number of transactions that were never approved by the federal government. The Tribe has filed a claim to those lands under the Indian Commerce Clause and Indian Nonintercourse Act, 25 U.S.C. §177. *Stockbridge-Munsee Community v. State of New York*, No. 86-CV-1140 (N.D.N.Y.). The defendants include the State, state officials, counties, and municipalities. The State and state officials have moved to dismiss the Community's claims based on the Eleventh Amendment.

The Oneida Indian Nation of Wisconsin is a federally recognized Indian tribe, with its principal situs at Green Bay Wisconsin. It is one of the three political successors in interest to the aboriginal Oneida Nation, located at the time of white contact in upstate New York. The Oneida Tribe of Wisconsin is also one of three plaintiffs in lawsuits pending in upstate New York known as the Oneida land claim cases. In these suits, the modern day successors to the Oneida

¹ Pursuant to Rule 37.3, written consents from counsel of record for the parties have been filed with the Clerk of the Court.

Nation assert federal law based claims to the territory known as the Oneida Reservation. *Oneida Indian Nation of New York v. County of Oneida*, 70-CV-35 (N.D.N.Y.); *Oneida Indian Nation of New York v. County of Oneida*, 74-CV-187 (N.D.N.Y.). The first of these cases has been before this Court on two occasions. *Oneida Indian Nation v. County of Oneida*, 470 U.S. 226 (1985); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974). Since the Court's 1985 decision, the State of New York has expressed its willingness to negotiate a settlement of the claims and has sporadically engaged in such negotiations. However, the State of New York has to date offered no land, money, or other resources toward a settlement of the Oneida land claim cases.

The Tonawanda Band of Seneca Indians is a federally recognized Indian nation in New York State. It is a party in a pending action concerning a Seneca claim under the Nonintercourse Act. *The Seneca Nation of Indians v. New York*, No. 93-CV-688A (W.D.N.Y.). A decision in the present case upholding State immunity under the Eleventh Amendment would adversely affect the rights and claims of the Senecas.

The Tunica-Biloxi Tribe is a federally recognized Indian Tribe which has a Reservation in Avoyelles Parish, Louisiana. The Tribe lodged a Litigation Request with the Interior Solicitor in August, 1980 regarding some 17,000 acres of land in the State of Louisiana which it claims under the Indian Nonintercourse Act. To date, the federal government has taken no action on this Litigation Request.

Further research and investigation have resulted in an increase to a total of 64,000 acres which can be claimed under the Nonintercourse Act. In addition, the Tribe is operating Class III gaming under the Indian Gaming Regulatory Act. The decision in *Seminole* poses serious questions as to (1) the Tribe's land claims, and (2) the enforceability of the Tribal-State compact for Class III gaming. Since the Indian Commerce Clause is the basis for both the Nonintercourse Act and the Indian Gaming Regulatory Act, this Court should affirm the principle that the Indian Commerce Clause abrogates the Eleventh Amendment immunity of the States.

The Stockbridge-Munsee Community, the Oneida Nation of Wisconsin, the Tonawanda Band of Seneca Indians, and the Tunica-Biloxi Tribe have a significant interest in advancing the proper interpretation of the Indian Commerce Clause and the Eleventh Amendment. If the *Seminole* decision stands, the Tribes' land claims could be subject to dismissal even though the clear purpose of the Indian Commerce Clause was to confer authority in Indian affairs on the federal government to the exclusion of the states.

Summary of Argument

The Indian Commerce Clause gives Congress the authority to abrogate the Eleventh Amendment immunity of states. Congress has validly done so in the Nonintercourse Act and other Indian statutes. Alternatively, the federal courts can enjoin violations of federal Indian statutes, such

as the Nonintercourse Act, enacted under Congress' Indian Commerce Clause authority.

Argument

I. Introduction

The Indian Commerce Clause, Art. 1, § 8, cl 3, states that "Congress shall have the power . . . to regulate commerce . . . with the Indian tribes". Congress has passed a number of Indian statutes, under the Indian Commerce Clause, regulating a broad range of activities in Indian Country. The earliest and most fundamental of such legislation is the Nonintercourse Act² which has been consistently construed by courts to regulate states as well as private individuals in their dealings with Indian lands. *County of Oneida*, 470 U.S. 226; *Oneida Indian Nation*, 414 U.S. 661; *Mohegan Tribe v. Connecticut*, 638 F.2d 612 (2d Cir. 1980) *cert. den.* 452 U.S. 968 (1981). The Nonintercourse Act provides,

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or

² The Nonintercourse Act was initially passed in 1790, ch. 33, 1 Stat. 137. Congress passed a stronger, more detailed version in 1793. Act of Mar. 1, 1793, ch. 19, 1 Stat. 329; *see also* the Act of May 19, 1796, ch. 30, 1 Stat. 469; the Act of Mar. 3 1799, ch. 46, 1 Stat. 743; the Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; the Act of May 6, 1822, ch. 58, 3 Stat. 682; Act of June 30, 1834, ch. 161, 4 Stat. 729. The Nonintercourse Act is now codified at 25 U.S.C. §177 (1983).

equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. . . .

Amici have Nonintercourse Act claims against the State of New York which raise, or could raise, Eleventh Amendment issues. The Eleventh Circuit incorrectly interpreted the relationship between the Indian Commerce Clause and the Eleventh Amendment in *Seminole*.

II. In the Indian Commerce Clause, the States Surrendered to Congress all Sovereign Power to Manage Relations With Indian Tribes, Including States' Sovereign Immunity to Suit in Cases Arising Under Federal Indian Legislation

In perhaps the clearest explication of the law of state sovereign immunity, Justice Stevens observed in *Pennsylvania v. Union Gas*, 491 U.S. 1, 23 (1989) (Stevens, J. concurring) as follows:

It is important to emphasize the distinction between our two Eleventh Amendments. There is first the correct and literal interpretation of the plain language of the Eleventh Amendment that is fully explained in Justice Brennan's dissenting opinion in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247, 87 L.Ed.2d 171, 105 S.Ct. 3142 (1985). In addition, there is the defense of sovereign immunity that the Court has added to the text of the Amendment in cases

like *Hans v. Louisiana*, 134 U.S. 1, 33 L.Ed. 842, 10 S.Ct. 504 (1890).

The former is not implicated in this case, inasmuch as the issue before the Court arises under federal question jurisdiction, not diversity jurisdiction.³ With respect to the latter, that is, the judicially created doctrine of state immunity from suits arising under federal legislation, state sovereign immunity is viewed by the Court as necessary to maintain the "constitutionally mandated balance of power between the States and Federal Government." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).⁴

Under the Indian Commerce Clause of the Constitution, states are effectively ousted from the field in favor of exclusive and plenary congressional authority. The Delegates to the Federal Convention understood the necessity

³ The Eleventh Amendment 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."

⁴ The *Atascadero* Court did not adopt Justice Stevens' two prong analysis of state sovereign immunity, i.e., as a jurisdictional bar in diversity cases only and otherwise as a limitation arising from prudential concerns of federalism. However, the *Atascadero* Court did view a broadly read Eleventh Amendment as necessary to preserve the sovereign balance struck between states and the Federal Government in the Constitution. *Id.* at 238 n.2. Even this broad reading of the Eleventh Amendment allows a finding that Congress can abrogate state sovereign immunity in the exercise of its Indian Commerce Clause authority inasmuch as the Founders contemplated no role for state sovereignty in the field of Indian affairs. See discussion below.

for undivided authority in Indian affairs in the central government because of the unquestionable failure of divided authority over the subject between the states and federal government under the Articles of Confederation. As a result, the states reserved no sovereign authority over Indian affairs under the Constitution and no corresponding sovereign immunity from suit, in the face of a congressional abrogation thereof.⁵

A. The Delegates to the Federal Convention Intended and Accomplished a Delegation to Congress of the Whole and Complete Authority to Manage Relations with Indian Tribes

When the Delegates came together at the Federal Convention, consensus existed among them on fundamental and debilitating defects of the Articles of Confederation. Among these was the inability of the general government to adopt and implement an effective Indian policy. The Delegates set about devising a form of federal government

⁵ In *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), the Court rejected the proposition that states had been stripped of their sovereign immunity to suit by Indian tribes "in the plan of the convention." *Id.* at 782. Amici do not revisit that proposition here. Amici do not argue for a self-executing and complete abrogation of state sovereign immunity under the Indian Commerce Clause, similar to that proposed in *Blatchford*. Rather, Amici argue that Congress holds the authority under the Indian Commerce Clause to abrogate state authority in federal legislation where necessary to maintain the constitutionally mandated pre-eminence of congressional and tribal authority in Indian country.

with these specific concerns in mind, so as to render the new federal government "adequate to the exigencies and government, and the preservation of the Union." See M. Farrand, *The Framing of the United States Constitution*, ch. III (1913).

The difficulties with federal Indian policy existed in large part because of the ambiguous language of the Indian clause of the Articles of Confederation. In Article IX, Congress' enumerated powers included that 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." IX Journals of the Continental Congress 919, November 15, 1777. There is no doubt that the main body of the Articles' Indian clause delegated power to Congress over the subject, but considerable doubt existed regarding the extent of state authority preserved by the "shackles" in the limiting provisos. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 554 (1832).

In Madison's view, the "obscure and contradictory" language of the limiting provisos rendered the effective management of Indian affairs an impossibility: no management of trade could be undertaken by the federal government that did not infringe upon the legislative right of states. *The Federalist*, No.42; P. Prucha, *American Indian Policy in the Formative Years 28-30* (1970). The Continental Congress' experience in administering Indian affairs bore out Madison's criticism of the divided authority over the subject in the Articles' Indian clause.

Immediately after the conclusion of the Revolutionary War, the Congress took steps to establish peace with Indian nations who had fought on both sides of the conflict. In accordance with instructions from Congress, federal treaty commissioners in the northern district made arrangements to treat with the Six Nations for peace. See XXV Journals of the Continental Congress 687. New York State objected to federal efforts to treat with Indian nations in its borders and attempted to conclude peace with the Six Nations itself. Hough Report on Proceedings of the Commission 9-10 (1861). New York State's effort failed, however, and the federal treaty commissioners felt obliged to advise the Six Nations that "a treaty with an individual State, without the sanction of Congress, could be of no validity." N. Craig, II *Olden Times*, 6 (Pittsburgh 1848).

Acting under very similar instructions from Congress in 1786, federal treaty commissioners in the southern district concluded a number of treaties with the Cherokee, Choctaw and Chickasaw Nations, all of whom were located within the borders of North Carolina and Georgia. See *Treaties of Hopewell*, November 28, 1785, January 3, 1786, and January 10, 1786, 7 Stat. 18, 21, and 24. Both states openly challenged Congress' authority to demarcate tribal lands and prohibit intrusions thereon as the *Treaties of Hopewell* had done. Both states encouraged their citizens to settle upon Indian lands and, in some cases, purported to purchase tribal land from individual Indians. See generally, Prucha at 32-40. By the time of the Federal Convention, the intrusions were so aggressive "as to amount to an actual although informal war of the said white inhabitants against the said Cherokees." Report of Secretary

of War Henry Knox to the Continental Congress, XXXIV Journals of the Continental Congress 342, July 1788.

The Continental Congress assured the signatory Indian tribes of the inviolability of the federal treaties, investigated the state intrusions onto tribal lands, and continuously asserted its authority to manage relations with Indian tribes under Article IX. In the end, though, the Continental Congress acknowledged the limitations it faced in effectively administering Indian affairs arising from the authority reserved by the states in the Indian clause:

[B]ut there is another circumstance far more embarrassing, and that is the clause in the confederation relative to managing all affairs with the Indians, &c. is differently construed by Congress and the two States within whose limits the said tribes and disputed lands are. The construction contended for by those States, if right, appears to the committee, to leave the federal powers, in this case, a mere nullity; and to make it totally uncertain on what principle Congress is to interfere between them and the said tribes; the States not only contend for this construction, but have actually pursued measures in conformity to it.

XXXIII Journals of the Continental Congress 457, August 3, 1787. The lesson of this experience was not lost on the Delegates to the Federal Convention.

The few references to Indian affairs made by Delegates at the Convention were variations on the same theme: that states' claim to authority and interference in the conduct of Indian affairs was a defect in the Articles that must be avoided in the new constitution. For example, during debate on the New Jersey Plan, which would have established a far weaker federal government than the Virginia Plan previously debated, Madison queried:

Will it prevent encroachments on federal authority? A tendency to such encroachments has been sufficiently exemplified among ourselves, as well as in every other confederated republic ancient and modern. By the federal articles, transactions with the Indians appertain to Congs. Yet in several instances, the States have entered into treaties and wars with them.

Farrand, I Records of the Federal Convention of 1787 315; *see also* Farrand, III Records of the Federal Convention of 1787 548 (Madison's comment) ("In certain cases, the authy of the Confederacy was disregarded, as in violations not only of the Treaty of peace; but of Treaties with France & Holland, which were complained of to Cong. In other cases, the Fedl authy was violated by Treaties & wars with Indians, as by Geo."); *and* II Papers of James Madison 246-47 (letter of Edmund Randolph observing that a state treaty with Indians would be "in defiance of the confederation.")

When the Convention considered enumerated powers for Congress, Charles Pinckney proposed that Congress be

given the power "to regulate affairs with the Indians, as well within as without the limits of the U.S." I Elliott's Debates on the Federal Convention 223 (1836). This and other enumerated powers were referred to the Committee of Eleven, which simplified the language to read "and with Indian tribes" following the general commerce clause. IV Elliott's Debates 283. The recommendation was adopted by the Convention without any substantive debate, thus stripping Congress' authority over Indian affairs of its shackles.

With respect to management of relations with Indian tribes, it was plainly the intent of the Delegates to delegate the power wholly and entirely to the Congress. Experience had taught the Delegates that division of authority over the subject between the states and federal government was unworkable. Consequently, the language that had reserved states' power over the subject was stripped from the new Indian Commerce Clause, delivering over to the Congress a power in which the states could not participate. *Worcester v. Georgia*, 31 U.S. at 559.⁶

**B. This Court has Consistently
Construed the Indian Commerce
Clause as Ousting State Authority
Over the Subject**

Since *Worcester v. Georgia*, above, the Court has acknowledged the unique position of Indian tribes and

⁶ In this respect, the scope of the Indian Commerce Clause exceeds that of the general Commerce Clause. See Prentice and Egan, *The Commerce Clause of the Federal Constitution* 342 (1898); see also 1 Op.A.G. 645 (1824).

Congress' authority over Indian affairs under the Constitution. There, the Court rejected Georgia's claim to authority over affairs of the Cherokee Nation, observing that, "The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States." *Id.* at 562. This result was based, in part, upon the basic principle of constitutional law that the Constitution delegated to Congress broad legislative authority over Indian affairs, one that excluded states. Cohen's Handbook of Federal Indian Law 260 (1982 ed.). The Court has since consistently interpreted the Indian Commerce Clause as delegating to the federal government an authority to manage relations with Indians in Indian country that excludes the states altogether. See *United States v. John*, 437 U.S. 634 (1978); *United States v. Mazurie*, 419 U.S. 544 (1975); *United States v. McGowan*, 302 U.S. 535 (1938); *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. Kagama*, 118 U.S. 375 (1886).

Indeed, in modern times, the Court has effectively presumed that state laws and regulations have no application to Indian tribes in Indian country, absent the express consent of Congress. Cohen's Handbook at 259-264. This presumption derives in part from the Indian Commerce Clause itself. See *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). It also derives from tribes' unique sovereign status, a status assumed by and enshrined into constitutional law by the Indian Commerce Clause.

We long ago departed from the 'conceptual clarity of Mr. Chief Justice Marshall's view

in *Worcester*' (citation omitted) and have acknowledged certain limitations on tribal sovereignty. Nevertheless, in demarcating the respective spheres of state and tribal authority over Indian reservations, we have continued to stress that Indian tribes are unique aggregations possessing 'attributes of sovereignty over both their members and their territory.' (Citation omitted.) Because of their sovereign status, tribes and their reservation lands are insulated in some respects by a 'historic immunity from state and local control' (citation omitted) . . . our cases establish that 'absent governing Acts of Congress,' a State may not act in a manner that 'infringed on the right of reservation Indians to make their own laws and be governed by them.' (Citations omitted.)

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-332 (1983).

In the important area of taxation, the Court applies a *per se* constitutional rule that, absent the express consent of Congress, states have no authority to tax Indian tribes in Indian country. *California v. Cabazon Band of Indians*, 480 U.S. 202 n.17 (1987); *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985). Outside the area of taxation, state regulation of Indian tribes in Indian Country has been upheld only in "exceptional circumstances" where the burden is a minimal one imposed for the purpose of enforcing state law as against non-Indians. See e.g., *Confederated Tribes of the Colville*

Indian Reservation v. Washington, 447 U.S. 134 (1980) and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), upholding state record-keeping requirements imposed on tribes to enforce payment by non-Indians of certain state taxes.

Even where a state tax or regulation applies to a non-Indian doing business with an Indian tribe in Indian country, the Court has engaged in a particularized inquiry into the nature of the state, federal and tribal interests at stake to determine whether the state law has been preempted by federal law. *Department of Taxation and Finance of New York v. Attea*, 512 U.S. ___, 114 S.Ct. 2028 (1994). The preemption analysis undertaken by the Court in such cases does not depend upon an express statement to that effect in federal statutes, in contrast to the preemption rule applied in other fields. Hirsch, *Toward A New View of Federal Preemption*, 1972 U.Ill. L.Rev. 515. Instead, state authority can fail from implied as well as express federal preemption of state activity. *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

In the end, these special rules that apply only in the field of federal Indian law are premised upon Congress' and tribes' exclusive authority to govern affairs of Indian tribes in Indian country under the Indian Commerce Clause. Simply put, states have no sovereign powers respecting affairs with Indian tribes absent an act of Congress. As a consequence, Congress can abrogate states' immunity to suit in federal Indian legislation when, in the judgment of Congress, such is appropriate to preserve the constitutionally

mandated pre-eminence of federal and tribal authority in Indian Country.

C. In the Sphere of Indian Affairs, State Action Including Immunity to Suit Must be Governed by Applicable Federal Indian Legislation

In *Pennsylvania v. Union Gas Company*, 491 U.S. 1, the Court ruled that Congress could and did, in a particular exercise of its power over interstate commerce, abrogate the states' immunity from suit. Two lines of reasoning were given in support of this conclusion. Both lines support an interpretation of the Indian Commerce Clause as authorizing Congress to abrogate states' immunity from suit as well.

The plurality opinion in *Union Gas* relied upon the so-called waiver cases in its analysis of the immunity issue. Citing *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184 (1964), the Court characterized the Commerce Clause as a surrender of state sovereignty that carried with it a surrender of state sovereign immunity. *Union Gas*, above at 14. This view of the Commerce Clause was confirmed, according to the plurality, in *Employees v. Missouri Dep't of Pub. Health*, 411 U.S. 279 (1973). Although those cases found evidence to support a waiver of state immunity arising from the state's voluntary participation in a federally regulated activity, those cases' interpretation of the Commerce Clause led the plurality to conclude that Congress could simply abrogate state immunity. *Union Gas*, above at 20-22.

As established above, the reach of the Indian Commerce Clause is as great if not greater than the general Commerce Clause. See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989), where the Court observed: "Interstate Commerce and Indian Commerce clauses have very different application. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation (citations omitted), the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." The rationale supporting the plurality's conclusion in *Union Gas* is therefore even more compelling in the case of federal Indian legislation than in the case of legislation regulating interstate commerce.

In concurring in *Union Gas*, Justice Stevens analyzed the issue as "the proper role of the federal courts in the amalgam of federal-state relations." *Id.* at 25. Thus, the availability of state immunity depends upon the application of prudential rather than jurisdictional concerns. *Id.* at 26. When in the exercise of its plain constitutional authority, Congress concludes that the preservation of federal rights or interests requires the abrogation of states' immunity to suit, Justice Stevens concluded that the principles of federalism and comity allow Congress to do so. *Id.* at 27-29.

In Amici's view, Justice Steven's analysis of the state immunity issue is the correct one for this case. As Justice Stevens demonstrates, it explains and is consistent with this Court's body of state sovereign immunity cases. *Id.* More importantly for present purposes, it reflects this Court's

traditional analysis of Indian law issues on principles of federalism that are unique to the field.

This Court has long held that Indian tribes, as "domestic dependent nations," are immune from suit absent a clear waiver by the tribe or congressional abrogation of tribal immunity. *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991); *Oklahoma Tax Commission v. Citizen Band Potawatomi*, 498 U.S. 505 (1991). Plainly, Congress can abrogate Indian tribes' immunity from suit and has done so in limited circumstances. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

To maintain the constitutionally mandated exclusion of state authority from Indian country, then, it follows that Congress must have comparable authority to abrogate states' immunity from suit under the Indian Commerce Clause. In *Blatchford*, the Court saw no blanket waiver of tribal sovereign immunity in the plan of the convention, there being no "mutuality" of concessions in the plan of the convention. *Id.* at 782. If the Indian Commerce Clause authorizes Congress to abrogate tribes' immunity to suit, then "mutuality" of concessions requires that the Indian Commerce Clause be construed to authorize Congress to abrogate states' immunity from suit.

Congress cannot be vested with full power to preserve exclusive federal and tribal authority in Indian country unless it has the authority to abrogate state immunity to suit, where appropriate. Congress' previous inability to regulate or prohibit states activity in Indian country led to the adoption of the Indian Commerce Clause, with its plain

language preserving the field for Congress alone. If Congress can and generally does exclude states from the field altogether, surely Congress can in its regulation of states in the field abrogate state sovereign immunity.

III. Federal Courts Can Compel State Officials to Comply With the Indian Commerce Clause

The Indian Commerce Clause provides a separate basis for relief in Indian land claims, and other, cases. State officials are not immune from suit when they violate the Constitution. In particular, if they withhold property obtained in violation of the Indian Commerce Clause, the federal courts can act to stop the violation.

One of the weaknesses in the Articles of Confederation was that they did not clearly delineate the division of authority between the states and the Confederal government in Indian affairs. "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. 1, §8, cl 3, that granted Congress the power to regulate trade with the Indians." *County of Oneida v. Oneida Indian Nation*, 470 U.S. at 234 n.4. Of specific concern was the states' practice of treating with Tribes for land cessions. Clinton and Hotopp, *Judicial Enforcement of the Federal Restraint on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Me.L.Rev. 17, 36-37 (1979). The Indian Commerce Clause and the Nonintercourse Act changed that making Indian affairs the "exclusive province"

of the federal government and the "extinguishment of Indian title [dependent upon] the consent of the United States." *County of Oneida*, 470 U.S. at 234, 240.

The courts consistently acted to enforce those restrictions on alienation. *Id.* at 234-36; *see also Oneida Indian Nation v. County of Oneida*, 414 U.S. at 669-75. Although states were, in large part, the object of the Indian Commerce Clause and the Nonintercourse Act, it is only in recent times that Tribes have sued states and state officials for violations of those laws. *See e.g., Stockbridge-Munsee Community v. State of New York*, No. 86-CV-1140, *above*; *Mohegan Tribe v. Connecticut*, Civ. No. H-77-434 MJB (D.Conn.); *Golden Hill Paugussett Tribe v. Weicker*, No. 2:92CV00738 (PCD) (D.Conn.).

Such suits are not barred by the Eleventh Amendment. Sovereign immunity does not protect state officers when they violate the Constitution and federal statutes. *Ex Parte Young*, 209 U.S. 123 (1908). Land acquisitions made in violation of the Indian Commerce Clause and the Nonintercourse Act were "void *ab initio*". *County of Oneida*, 470 U.S. at 245. The acts of state officials in holding land so acquired is an ongoing violation of the Indian Commerce Clause and the Nonintercourse Act. It is just such acts that federal courts can enjoin pursuant to the *Ex Parte Young* doctrine.

The doctrine of *Ex Parte Young* developed in order to give "life to the Supremacy Clause." *Green v. Mansour*, 474 U.S. 64, 68 (1985). The "theory" is that "an unconstitutional statute is void . . . and therefore does not

'impart to [the official] any immunity from responsibility to the supreme authority of the United States'". *Id.* (Citations omitted). The *Ex Parte Young* doctrine was foreshadowed by decisions involving real property. In *Tindal v. Wesley*, 167 U.S. 204, 221 (1896), this Court held that the "settled doctrine of this court wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the State simply because the defendant holding possession happens to be an officer of the State and asserts that he is lawfully in possession on its behalf." *Tindal* relied on the earlier decision in *United States v. Lee*, 106 U.S. 196 (1882).

The "rule of law" set out in *Tindal* and *Lee* was clarified in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) and *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 688 (1982). Those cases made clear that the "Eleventh Amendment does not bar an action against a state official that is based on a theory that the officer acted beyond the scope of his statutory authority or, if within that authority, that such authority is unconstitutional." *Id.*, at 689.

The Indian land claim cases fit within the *Ex Parte Young* doctrine as prefigured by *Tindal* and *Lee* and interpreted in *Treasure Salvors*. Where state officers hold land acquired from tribes without federal consent, they are acting in violation of the Indian Commerce Clause and the Nonintercourse Act. The Eleventh Amendment does not protect them in that instance. *Treasure Salvors*, 458 U.S. at 689. Such an ongoing breach of federal law is "precisely the type of continuing violation for which a remedy may

permissibly be fashioned under Young." *Papasan v. Allain*, 478 U.S. 265, 282 (1986). Permitting relief against state officers in these circumstances protects the federal interests embodied in the Indian Commerce Clause and the Nonintercourse Act.

Conclusion

The Indian Commerce Clause gives Congress exclusive authority in Indian Affairs. Concomitantly, Congress and the federal courts have the authority to enforce that authority against the states.

Respectfully submitted,

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In the
Supreme Court
of the
United States

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SEMINOLE TRIBE OF FLORIDA,
Petitioner,

v.

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 OF AMICUS CURIAE THE MICCOSUKEE
TRIBE OF INDIANS OF FLORIDA, IN SUPPORT
OF THE SEMINOLE TRIBE OF FLORIDA**

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INTEREST OF AMICUS CURIAE

Amicus Curiae, the Miccosukee Tribe of Indians of Florida, files this brief in support of Petitioner, the Seminole Tribe of Florida.¹ The Miccosukee Tribe has existed as an independent federally-recognized Indian tribe since 1962 when it organized a council and board, pursuant to the Indian Reorganization Act, and formally became the Miccosukee Tribe of Indians of Florida. In 1971, the Miccosukee Tribe of Indians of Florida was the first Indian tribe in the nation to formalize a contract with the Bureau of Indian Affairs whereby it assumed complete responsibility for managing its own financial, social, economic, and political affairs.

Petitioner, the Seminole Tribe, sought a Tribal-State compact with the State of Florida, required under the Indian Regulatory Gaming Act (IGRA) as a pre-condition to establishing Class III gaming. When negotiations did not result in a compact, the Seminole Tribe sued the State of Florida. IGRA was enacted at the urging of states who wanted a voice in Indian gaming after the Supreme Court decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which reconfirmed that tribal sovereignty is subordinate only to the federal government.

The State of Florida asserted sovereign immunity to bar the Seminole Tribe’s suit under IGRA, even though IGRA was legislation which the states themselves had sought. The outcome of this litigation will directly affect the course of the Miccosukee Tribe’s negotiations with the State as well as any litigation which might arise from those negotiations. The State of Florida’s assertion of immunity, if sustained, would preclude Indian tribes from asserting

¹Letters of consent to file this brief for Amicus Curiae have been filed with the Clerk of the Supreme Court.

their rights under IGRA to establish Class III gaming. One of IGRA's primary goals 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). For the reason expressly set forth in IGRA — to obtain economic self-sufficiency — the Miccosukee Tribe sought a Tribal-State compact with the State of Florida in late 1993; the State failed to negotiate the compact in good faith.

In summary, the Miccosukee Tribe joins as Amicus Curiae in support of Petitioner, the Seminole Tribe of Florida, because the Eleventh Circuit Court of Appeal's decision that sovereign immunity barred the lawsuit by the Seminole Tribe against the State, has a direct and economically adverse effect on the Miccosukee Tribe of Indians which also is seeking to establish Class III gaming activities and which also has unsuccessfully sought a compact with the State of Florida.

STATEMENT OF THE CASE

Amicus Curiae adopts the Statement of the Case of Petitioner, Seminole Tribe of Indians.

SUMMARY OF ARGUMENT

The State of Florida relied on sovereign immunity to bar the Petitioner's lawsuit which alleged that the State had failed to negotiate in good faith, as required by the Indian Gaming Regulatory Act. The suit sought to compel the State, through the Governor, to conclude the Tribal-State compact and also requested declaratory judgment on the obligations of the State of Florida under IGRA to negotiate in good faith regarding the conduct of Class III gaming.

The State's assertion of Eleventh Amendment immunity should be rejected. The Eleventh Amendment does not by its terms preclude citizens from suing their own state; rather, it prohibits suits against a state by citizens of another state or by aliens. The judicially created doctrine of sovereign immunity found in *Hans v. State of Louisiana*, 134 U.S. 1 (1890), which bars citizens from suing their states, should be revisited.

Even if *Hans v. Louisiana* is not revisited, Congress had the power to abrogate the States' sovereign immunity when it enacted IGRA and it clearly intended to abrogate this immunity. The Eleventh Circuit Court of Appeals erred by reversing the district court's denial of the State's motion to dismiss on sovereign immunity grounds, on the basis that Congress did not have the power under the Indian Commerce Clause to enact IGRA. Congress had the power to abrogate the State's sovereign immunity under both the Indian Commerce Clause and the Interstate Commerce Clause. Both clauses derive from the same plenary grant of power in the Constitution, Article I, §8 cl.3.

Through the Indian Commerce Clause the states relinquished authority over Indian affairs to the federal government. Pursuant to its plenary power to legislate in the field of Indian affairs, Congress had the power to abrogate the sovereign immunity of the states. The Interstate Commerce Clause also gave Congress the power to enact IGRA because one of the stated concerns in its enactment was to prevent infiltration by organized crime in Indian gaming. At the urging of the states, and in order to provide the states with a voice in Indian gaming, Congress enacted IGRA. Having urged for its passage, the states cannot at the same time assert sovereign immunity to bar a suit by an Indian tribe for the state's failure to negotiate in good faith as required by the Act.

Finally, the Eleventh Amendment does not prohibit suits against state officials based upon federal law when prospective injunctive or declaratory relief is sought to vindicate federal law. Thus, under the doctrine of *Ex parte Young*, the relief requested by Petitioner is proper and the decision of the Eleventh Circuit should be reversed.

ARGUMENT

I.

THE ELEVENTH AMENDMENT DOES NOT EXPRESSLY BAR A CITIZEN FROM SUING THAT CITIZEN'S OWN STATE.

The language of the Eleventh Amendment does not expressly bar a citizen from bringing a suit against his own state. To the contrary, the text of the Eleventh Amendment refers only to suits brought by citizens of another state or a foreign country:

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.

However, in *Hans v. State of Louisiana*, 134 U.S. 1 (1890), the Supreme Court held that a citizen's suit against that citizen's own state was barred and, as a result, judicially extended the Eleventh Amendment beyond its text. In fact, the Eleventh Amendment has no application outside the context of State/citizen and State/alien diversity suits. See *Blatchford v. Native Village of Noatak*, 501 U.S. 775 ___, 111 S.Ct. 2578, 2586 (1991) (Blackman, Marshall, Stevens, J.J., dissenting) and Amicus Curiae respectfully requests that *Hans v. Louisiana* be revisited.

Amicus Curiae urges the Court to adopt the interpretation of the Eleventh Amendment found in Justice Stevens' concurring opinion in *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), which emphasizes the important "distinction between our two Eleventh Amendments." *Id.* at 23. First, there is the "correct and literal interpretation of the plain language of the Eleventh Amendment that is fully explained in Justice Brennan's dissenting opinion in *Atascadero State Hospital v. Scanlon*. In addition, there is the defense of State sovereign immunity that the Court has added to the text of the Amendment in cases like *Hans v. Louisiana*." *Union Gas*, *supra*, at 23-24 (citations omitted).² Justice Steven's opinion states that, notwithstanding the judicially created doctrine of state sovereign immunity, Congress has the plenary power to subject the States to suits in federal court:

Suffice it to say that the Eleventh Amendment carefully mirrors the language of the citizen-state and alien-state diversity clauses of Article III and only provides that "[t]he Judicial power of the United States shall not be construed to extend" to *these cases*. There is absolutely nothing in the text of the Amendment that in any way affects the

²Had Congress intended to include the doctrine of sovereign immunity in the Eleventh Amendment, it would have done so specifically; the Eleventh Amendment was merely intended to bar citizens of another state, or aliens, from suing a state in federal court. See e.g., *Atascadero States Hosp. v. Scanlon*, 473 U.S. 234, 286-90 (1985). As the dissent pointed out in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), 111 S.Ct. 2578, there is no constitutional principle of State sovereign immunity, no constitutionally mandated policy excluding suits against States from federal court and the historical analysis that supports this view already has been exhaustively detailed in numerous decisions. *Blatchford*, *supra*, 111 S.Ct. at 2586.

other grants of “judicial power” contained in Article III. Plainer language is seldom, if ever, found in constitutional law.

Pennsylvania v. Union Gas, supra, 491 U.S. at 24.

Hans v. Louisiana departed from the plain language, purpose, and history of the Eleventh Amendment, extending to the states immunity from suits promised under the “arising under” jurisdictional grant of Article III, *Pennsylvania v. Union Gas, supra*, 491 U.S. at 25.³ The expansion of state immunity is “not a matter of Eleventh Amendment law at all, but rather it is based on a prudential interest in federal-state-comity and a concern for ‘Our Federalism.’” *Id.* at 25. Justice Stevens’ concurring opinion correctly points out that the Eleventh Amendment, as does Article III, speaks in terms of judicial power. Thus, the question is whether the federal court has power to entertain the suit, and in cases where there is no such power, Congress may not provide it. However, many Eleventh Amendment decisions do not deal with judicial power at all but instead speak in terms of federalism and comity, and are better understood as invoking these

³*Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) does not resolve the Eleventh Amendment Immunity issues in the case at bar. The Supreme Court in *Blatchford* was not asked to revisit *Hans v. Louisiana*. Instead, the respondent argued that the traditional principles of immunity presumed by *Hans* do not apply to suits by sovereign Indian tribes, and even if they did, the states had consented to suit in the “plan of the convention.” *Blatchford, supra*, 111 S.Ct. at 2581. The Supreme Court rejected the respondent’s argument that state sovereign immunity does not extend to suits by another sovereign (citing to *Monaco v. Mississippi*, 292 U.S. 313 (1934)) and also rejected the “plan of the convention” argument that the states waived their immunity against Indian tribes when they adopted the Constitution. Furthermore, the Supreme Court in *Blatchford* only addressed the question of damage suits against the State and not any issue of injunctive or other prospective relief.

concerns. *Union Gas, supra*, at 25-27. The broad notions of sovereign immunity accepted in federal jurisprudence since *Hans v. Louisiana* are not merely, “misguided as a matter of federal law” but they are also unjust. *Hess v. Port Authority Trans-Hudson Corp.*, ___ U.S. ___, 115 S.Ct. 394 (1994) (Stevens, J., concurring).⁴

If the Supreme Court adopts the interpretation of the Eleventh Amendment found in Justice Steven’s concurrence, the Petitioner prevails and the State of Florida’s claim of sovereign immunity fails. For purposes of the remaining arguments in this brief, however, Amicus Curiae will assume that the principles of Eleventh Amendment sovereign immunity, as embodied in *Hans v. Louisiana*, 134 U.S. 1 (1890), are applicable.

II.

CONGRESS HAS THE POWER TO ABROGATE ELEVENTH AMENDMENT IMMUNITY AND EXPRESSLY DID SO BY ENACTING THE INDIAN GAMING REGULATORY ACT (IGRA).

In enacting the Indian Gaming Regulatory Act (“IGRA”), 25 U.S.C. §2701 et seq., Congress unequivocally expressed its intention to abrogate the Eleventh Amendment bar to suits against the states in federal court.

⁴Particularly in this case, where the states sought the legislation, and where the legislation was a compromise to give the states some control over Indian gaming, it is truly unjust to allow the State of Florida to assert sovereign immunity when it failed to comply with its duty under IGRA. Moreover, the Seminole Tribe did not seek monetary relief and, therefore, concerns over the vulnerability of the State’s purse is not a concern here, as it may be in some instances. See e.g., *Hess v. Port Authority Trans-Hudson, Corp.*, ___ U.S. ___, 115 S.Ct. 394 (1994).

Not only did Congress unequivocally intend to abrogate the State's Eleventh Amendment immunity but it had the power to do so under Commerce Clause. IGRA was enacted following the decision of *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) which left Indian gaming largely unregulated by the states; it was enacted at the urging of the states, who sought to be involved in the process of regulating Indian gaming.

a. Congress Has The Power Under The Indian Commerce Clause, As Well As Under The Interstate Commerce Clause, To Abrogate Eleventh Amendment Sovereign Immunity

Although the Eleventh Amendment was not intended to bar a suit by a citizen of a State against his own State, see Argument I, *supra*, the Supreme Court has held that the principle of sovereign immunity limits the grant of judicial authority in Article III, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), and thus, in order to overcome this immunity, Congress must make its intent clear in the legislation and it must do so under a specific constitutional power.

The Eleventh Circuit acknowledged in its opinion in *Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016 (11th Cir. 1994), that the Supreme Court has held that Congress has the power to abrogate a state's Eleventh Amendment immunity pursuant to the Commerce Clause; however, the court of appeals erroneously concluded that Congress' power to abrogate the Eleventh Amendment existed only pursuant to the Interstate Commerce Clause. The court of appeals distinguished the facts in the case at bar from those in *Union Gas* by finding that *Union Gas* was limited solely to the exercise of Congress' power to legislate

under the Interstate Commerce Clause. Acknowledging an intention by Congress to abrogate State sovereign immunity when it passed IGRA, the court below nevertheless found that it was passed pursuant to the Indian Commerce Clause and that the "unique abrogation power afforded Congress under the Interstate Commerce Clause in *Union Gas* could not be extended to the Indian Commerce Clause." *Seminole Tribe v. State, supra*, 11 F.3d at 1027.

The Eleventh Circuit was incorrect for a number of reasons. First, Congress had the power under the Indian Commerce Clause to abrogate the State's Eleventh Amendment Immunity. Second, Congress also had the power to abrogate the State's sovereign immunity pursuant to the Interstate Commerce Clause.

Power Under The Indian Commerce Clause

The plain language of Article I, §8, cl.3 gives Congress the power to regulate commerce and defines what types of commerce: with foreign nations, and among the several States and with the Indian Tribes. As the Supreme Court stated in the "License cases," *Thurlow v. Com. of Mass.*, 46 U.S. (5 How.) 504 (1847), the words in this clause give "all the authority which the United States have over Commerce." *Id.* at 523. The Supreme Court recognized that Congress has the power to abrogate the State's Eleventh Amendment immunity when regulating interstate commerce. *Union Gas, supra*. That the Supreme Court has recognized the existence of this power when Congress enacts legislation pursuant to the Interstate Commerce Clause does not mean that Congress does not also possess the same power when regulating commerce with Indian tribes.

The decision in *Union Gas* implicated one of the three types of commerce which Congress has the power to regulate. This does not mean, however, that Congress cannot similarly legislate with regard to the other types of commerce mentioned in the Commerce Clause, pursuant to the same constitutional grant of plenary power. As the district court noted below, “[i]t is a mistake to simply dismiss *Union Gas* as being inapposite, especially since congressional power over both interstate and Indian commerce derives from precisely the same constitutional clause, Article I, §8, cl. 3, and since its power in both areas is plenary.” *Seminole Tribe v. State*, 801 F.Supp. 655 (S.D. Fla. 1992).

In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192-93 (1989) the United States Supreme Court recognized that the Interstate Commerce Clause and the Indian Commerce Clause have very different applications:

[W]hen 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.

Id. at 192 (citations omitted). *Cotton Petroleum* does not hold that the Indian Commerce Clause gives Congress less power than does the Interstate Commerce Clause, it simply holds that Indian tribes are not states for purposes of the Interstate Commerce Clause and that broad principles of preemption under the Interstate Commerce Clause would not apply. 490 U.S. at 191-192.

Amicus Curiae does not dispute that the Interstate Commerce Clause and the Indian Commerce Clause have different applications. Tribal reservations are not states and the “differences in the form and nature of their sovereignty make it treacherous to import to one notions of preemption that are properly applied to the other.” *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). However, the unique standing of federally recognized Indian tribes in no way restricts the power of Congress to override a state’s Eleventh Amendment immunity under the Indian Commerce Clause. To the contrary, the sovereign power of the Indian tribes makes it an even more compelling argument that Congress has the power, under the Indian Commerce Clause, to abrogate a state’s claim of sovereign immunity against an Indian tribe.⁵

In overriding the states’ Eleventh Amendment immunity when enacting IGRA, Congress was legislating in the field of Indian affairs. Congress clearly had the power to do so under the Indian Commerce Clause and it intended to do so. Indeed, the Indian Commerce Clause provides a stronger basis than the Interstate Commerce Clause for Congress to abrogate State sovereign immunity. In a reaffirmation of an Indian tribe’s inherent power of self government, the Supreme Court stated that, absent Congressional action, no state may impose its laws on the reservation. *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991). The court of appeals in *Spokane Tribe of Indians v. Washington State*, 28 F.3d 991 (9th Cir. 1994) reasoned, “Congressional power

⁵In *Ramah School Bd. v. Bureau of Rev.*, 458 U.S. 832 (1982), finding that federal law preempted state taxes and that it imposed an impermissible burden on tribal sovereignty, the Supreme Court recognized the broad power of Congress to regulate tribal affairs under the Indian Commerce Clause. *Id.* at 837.

pursuant to the Indian Commerce Clause, then, cannot be less than its authority under the Interstate Commerce Clause." *Id.* at 997. The Ninth Circuit in *Spokane* agreed with the district court judge in the case at bar that, based on its paramount and plenary authority over Indian affairs, Congress' power to act pursuant to the Indian Commerce Clause is at least as great, if not greater than its power under the Interstate Commerce Clause. In fact, the plurality⁶ in *Union Gas* speaks in terms of the Commerce Clause as a whole, and that decision was not limited to the Interstate Commerce Clause. *Spokane, supra*, 28 F.3d at 996. Through the Indian Commerce Clause, the states relinquished authority over Indian affairs to the federal government. Pursuant to its plenary⁷ power to legislate in the field of Indian affairs, Congress had the power to abrogate the sovereign immunity of the states. With the adoption of the United States Constitution, Indian relations became the exclusive province of federal law, *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 234 (1985), and as a result, the states ceded whatever authority they previously had to regulate Indians affairs.

In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) the Supreme Court held that Congress could abrogate a state's sovereign immunity when acting pursuant to its plenary authority under §5 of the Fourteenth Amendment. In exercising its power under the Fourteenth Amendment,

⁶"Although Justice Brennan's opinion in *Union Gas* was a plurality opinion, a fifth Justice, Justice White, agreed that states are not immune from suit under statutes enacted pursuant to the Interstate Commerce Clause, provided the Congressional intent is clear." *Spokane Tribe of Indians v. Washington State*, 28 F.3d 991, 996 (9th Cir. 1994).

⁷Plenary does not mean absolute and Congress is, of course, subject to constitutional constraints. *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 83-85 (1977).

Congress was acting pursuant to an amendment of the Constitution whose other sections by their terms embodied limitations of state authority. *Union Gas, supra*, 491 U.S. at 16-17. As noted in *Union Gas*, the Commerce Clause, like the Fourteenth Amendment, gives Congress power while taking it away from the states. The broad grant of power to Congress over Indian affairs necessarily limits the power of the states. *Spokane, supra*, 28 F.3d at 996. Congressional power over Indian Commerce and Interstate Commerce derives from the same clause of the Constitution and Congressional authority to abrogate the State's immunity cannot be less under one clause than the other. Moreover, based on its plenary authority over Indian affairs, Congress' power to act pursuant to the Indian Commerce Clause is at least as great, if not greater than its power under the Interstate Commerce Clause.⁸

Power Under The Interstate Commerce Clause

Congress also had the power under the Interstate Commerce Clause to enact IGRA and to abrogate the State's Eleventh Amendment immunity. For reasons often explained in terms of comity or federalism, power under the Interstate Commerce Clause has not always been given as broad an interpretation as the power to legislate Indian

⁸In fact, the delegation of power to the states to regulate Indian gaming conflicts with the deeply rooted policy of leaving Indians free from states' jurisdiction. See, e.g., *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 168 (1973); *Rice v. Olson*, 324 U.S. 786 (1945). Thus, perhaps the question should be whether Congress had the power at all to enact legislation which allows the states to regulate Indian gaming. Certainly, to delegate such power to the states, pursuant to the request of the states, but at the same time allow the states to invoke sovereign immunity when sued to enforce the requirement to negotiate in good faith, would surrender federal control of Indian matters to the states and, given the express language of the Indian Commerce Clause, raises serious constitutional issues.

commerce and foreign commerce. However, Congress also possesses the power under the Interstate Commerce Clause to abrogate a state's sovereign immunity. In *Employees v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279 (1973), the Supreme Court acknowledged that the states surrendered a portion of their sovereignty when they granted to Congress the power to regulate commerce. *Id.* at 286.⁹ The power to regulate commerce includes the power to override a state's immunity from suit as long as Congress has expressed an intent to do so. The Eleventh Circuit opinion acknowledged that Congress has the power, under the Interstate Commerce Clause, to abrogate a state's Eleventh Amendment sovereign immunity claim. The Supreme Court has specifically decided this in *Union Gas, supra*, 491 U.S. at 14-15. The Eleventh Circuit simply

⁹Although the Eleventh Circuit opinion rejected the argument that the State may have consented to suit either explicitly, under the "plan of the convention" (by ratifying the Constitution), or by participation in a Congressional program, Amicus Curiae notes that in this case the states not only participated in the enactment of IGRA but they actually pursued it in order to have a voice in regulating Indian gaming and to enforce the states' laws. The states consented to suit by participating in the enactment of IGRA. The Eleventh Circuit rejected the Seminole's reliance on *Parden v. Terminal Railway of Alabama*, 377 U.S. 184 (1964) and concluded that *Parden* was "not quick enough to breath life into the Indian tribes' claims in these cases." Under *Parden*, by entering a field of economic activity that is federally regulated, a state impliedly consents to suit and waives sovereign immunity. The reports of *Parden's* death are greatly exaggerated. The attempt to distinguish *Parden* on the basis that the activity involved there was typical of individuals is too narrow. The states entered into the field of economic activity regarding Indian gaming regulation and indeed sought the enactment of IGRA in order to participate in this economic activity. They have, therefore, waived any immunity they may have had. "Indeed, principles of state sovereignty are singularly out of place in such a scheme where the federal government is tailoring a limited grant of power to the states. In this case, sovereign immunity would undermine rather than promote the assertion of state interests." *Spokane Tribe of Indians v. Washington*, 28 F.3d 991, 997 (9th Cir. 1994).

decided that IGRA was not enacted under the Interstate Commerce Clause. This conclusion is incorrect. Congress had the power to enact IGRA under both the Indian Commerce Clause and the Interstate Commerce Clause.

Congress has the power to abrogate Eleventh Amendment immunity when it is exercising any constitutional provision that gives Congress plenary power over matters affecting the states. *Spokane, supra*, 28 F.3d at 995. The fact that IGRA primarily involves matters relating to Indian tribes does not mean that these matters cannot also involve issues of interstate commerce affecting the states.

IGRA was enacted following the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) which made tribal sovereignty subordinate only to the federal government. Although IGRA reaffirmed the federal interest in providing a means for self-sufficiency and economic development for Indian tribes, it was also a response to concerns of the states which sought a voice in regulating gaming within their borders. Pub.L. 100-497 100th Cong. 2nd Sess. 1988. In fact, IGRA actually provided the states with a role in Indian gaming that they did not possess after the Supreme Court decision in *Cabazon*. Given the involvement of the states in the passage of IGRA, and the policy reasons for its passage, which was the result of a compromise urged by the states, Congress' power under the Interstate Commerce Clause can be relied upon as a basis for overriding the State's sovereign immunity.

In enacting IGRA, Congress tried to fashion a plan that would give the states a voice in how tribal gaming should operate and also a means to enforce the states' own laws. *Spokane, supra*, 28 F.3d at 997. The *Background of*

P.L. 100-497, S.Rep.No.446, 100th Cong. 2d Sess. (1988) specifically notes that state and federal law enforcement officials expressed fear that Indian bingo and other gambling enterprises could become targets for infiltration by criminal elements. S.Rep. 446, *supra* at 1. Although, as noted in the "Additional Views" of Senator McCain in that Senate Report, as the debate on IGRA unfolded it became clear that the interests of the states and of the gaming industry extended far beyond their expressed concern about organized crime and centered more in the protection of their own games from a new source of economic competition, the fact remains that the states made organized crime their motive for seeking the enactment of IGRA and Congress relied on this stated intent in enacting it. 25 U.S.C. §2702(2). Moreover, assuming the states also had an economic interest in urging the enactment of IGRA, it cannot be seriously argued that gaming has no effect on interstate commerce. By its very nature gaming affects commerce between the states. Both the desire to protect gaming from the influences of organized crime, and the economic interest in protecting their own economy, affect interstate commerce.¹⁰

In a challenge to the power of Congress in enacting the Organized Crime Control Act of 1970, 84 Stat. 922, the Third Circuit Court of Appeals in *United States v. Ceraso*, 467 F.2d 653 (3rd Cir. 1972), rejected the argument that Congress lacked the power to enact the Act. Citing to the evidence given to Congress showing the serious effects of gambling on interstate commerce the court said:

¹⁰The State attempts to have it both ways. It wants to allow for the power of Congress to enact IGRA to impose the State's regulation on Indian gaming but it does not want to comply with its duty under the Act to negotiate in good faith.

The Report of the President's Commission on Law Enforcement and Administration of Justice, *supra*, at 188-89 stated that "gambling is the greatest source of revenue for organized crime." It noted that estimates of the total amount bet through organized crime's facilities each year varied from \$7 billion to some \$50 billion. All of this activity was accomplished by an intricate system of local, regional, and national "lay-off men," who through the use of the facilities of interstate commerce, captured the substantial bankroll which has been used to "infiltrate legitimate businesses and labor unions, to harm investors and competing businesses, and to corrupt the democratic process." *Schneider v. United States*, 459 F.2d 540, at 542 (8th Cir. filed April 12, 1972). As we previously noted, Congress placed great reliance on the report and the findings it contained. We find that this information was a sufficient rational basis for the conclusion that gambling produced serious detrimental effects on interstate commerce. Further, Congress acted within its authority because the means selected for controlling this evil are reasonably related to the effectuation of the end sought to be achieved.

United States v. Ceraso, supra, 467 F.2d at 657-58.

The Organized Crime Control Act set forth Congress' findings about the effects of organized crime on interstate commerce: it is a highly sophisticated and widespread activity that drains the economy by unlawful conduct and illegal fraud and corruption. The Organized Crime Control Act cites gambling as one of the sources from which organized crime derives its power and finds that this power

and money are increasingly used to infiltrate and corrupt legitimate business and corrupt the democratic process:

[O]rganized crime activities in the United States weaken the stability of the nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce and undermine the general welfare of the nation and its citizens. . .

467 F.2d at 658 n.7

In *United States v. Sacco*, 491 F.2d 995 (9th Cir. 1974) (*en banc*), the appellants challenged 18 U.S.C. §1955 stating that its prohibition of illegal gambling businesses regulated purely local activity and had no effect on interstate commerce. The Ninth Circuit rejected that argument stating that although an activity is local and not regarded as commerce, it can be reached by Congress if it exerts a substantial economic effect on interstate commerce. *See also, Perez v. United States*, 402 U.S. 146 (1971) (Loan sharking operations are carried on, to a substantial extent, in interstate and foreign commerce, and through the means and instrumentalities of such commerce, and even where extortionate credit transactions are purely intrastate in character, they nevertheless affect interstate and foreign commerce). The class of activities which Congress intended to regulate under IGRA burdens interstate commerce. Congress has found that gambling is one of the sources from which organized crime derives its power. Therefore, Congress had a rational basis to find that the regulated activity affected commerce and the regulatory scheme provided by IGRA is reasonable. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

The legislative history of IGRA is replete with references to Congress' concern over the infiltration of organized crime into tribal gaming operations. *See, e.g., S.Rep. No. 446, 100th Cong., 2d Sess. 1, 5 (1988)*. Congress enacted IGRA not only to ensure tribal self-sufficiency, because this was assured to Indian tribes by *Cabazon* and its limits on a state's authority, but also to protect gaming from the corrupting influences of organized crime. Because the stated policy in enacting IGRA was, in large part, to provide a statutory basis for the regulation of gaming by Indian tribes, to shield the gaming from organized crime and other corrupting influences, to ensure that the Indian tribes were the primary beneficiaries of the gaming operation and to also ensure that gaming was conducted fairly and honestly, this policy gives Congress the power under the Interstate Commerce Clause to abrogate the state's sovereign immunity.

b. Congress Intended To Abrogate Eleventh Amendment Immunity By Enacting The Indian Gaming Regulatory Act.

The Eleventh Circuit Court of Appeals in its opinion recognized that Congress intended to abrogate the State's sovereign immunity when it enacted IGRA. *Seminole Tribe v. Florida, supra*, 11 F.3d at 1024. Congress may abrogate the State's Eleventh Amendment immunity from suit only when the Congressional intent to abrogate that immunity is unequivocal. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). (Congress has power to abrogate state immunity when acting pursuant to §5 of the Fourteenth Amendment); *see also, Union Gas, supra*, 491 U.S. at 7 (Congress must make its intent to override a state's immunity unmistakably clear); *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989) (same). In enacting IGRA Congress gave federal district courts jurisdiction "over three types of

cases, the first of which is '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.' The only possible defendant to such a suit is a state." *Seminole Tribe of Florida v. State of Florida, supra*, 11 F.3d at 1024 (citations omitted). It is clear that Congress intended to abrogate the state's sovereign immunity when it enacted IGRA. The question is not whether Congress intended to abrogate sovereign immunity when it enacted IGRA, and respondent conceded as much, *Seminole Tribe v. Florida*, 801 F. Supp. at 658, referring to the State's Memorandum at 1, but whether Congress had the power to abrogate the State's Eleventh Amendment. Congress had such power under the Indian Commerce Clause as well as under the Interstate Commerce Clause.

III.

EX PARTE YOUNG AUTHORIZES THE SEMINOLE TRIBE'S FEDERAL CLAIMS AGAINST STATE OFFICIALS FOR PROSPECTIVE RELIEF.

The Eleventh Amendment does not prohibit suits against state officials based upon violations of federal law when only prospective injunctive and declaratory relief is sought. *Green v. Mansour*, 474 U.S. 64, 68 (1985). The Seminole Tribe's lawsuit against the Governor of the State of Florida, Lawton Chiles, properly sought to invoke the doctrine of *Ex parte Young* and force the state officials to negotiate in good faith. Under IGRA, state officials are required to conduct negotiations for Class III gaming in good faith, and the Act creates a cause of action which gives the federal court jurisdiction for failure of a state to

enter into negotiations, or to conduct such negotiations in good faith. 25 U.S.C. §2710 (d) (7) (A) (i).

Sovereign immunity does not preclude a suit against a state official for prospective relief designed to vindicate federal law. *Pennhurst State School and Hosp., v. Halderman*, 465 U.S. 89, 104-06 (1984). Petitioner sought to require the Governor of the State of Florida to negotiate a compact in good faith and asked for declaratory relief. The Governor is the official in the State of Florida authorized to negotiate on behalf of the state, therefore, the prospective relief requested by Petitioner clearly falls within the doctrine of *Ex parte Young*. *Pennhurst State School & Hosp., supra*, 465 U.S. at 102-03. If a suit seeks prospective relief against a state official to vindicate federal law, it is permitted under *Ex parte Young* notwithstanding the impact on the state itself. *Id.* at 104.

Moreover, the Eleventh Circuit incorrectly held that the actions of the State involved discretionary acts. The State is required to negotiate in good faith and has no discretion to decline to do so. 25 U.S.C. §2710(d)(3)(A). If the state official declines to negotiate at all, there are procedures in IGRA which prescribe the process for regulating the Class III gaming. Because the State of Florida opted to negotiate with Petitioner, it was required to negotiate in good faith; this was not discretionary. It was only the decision to negotiate at all which was discretionary.

Under *Ex parte Young*, the State's assertion of sovereign immunity to bar the lawsuit by Petitioner must fail. Even if the Court were to decide that the Eleventh Amendment bars a lawsuit by a citizen against his own state, based on the need to promote the supremacy of

federal law, *Pennhurst State School and Hosp., supra*, 465 U.S. at 105, such immunity would not apply here.

CONCLUSION

For the reasons stated above, Amicus Curiae, the Miccosukee Tribe of Indians of Florida, supports the Petitioner, the Seminole Tribe of Florida, in its request to reverse the judgment of the Eleventh Circuit Court of Appeals.

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In The
Supreme Court of the United States

October Term, 1994

SEMINOLE TRIBE OF FLORIDA,
Petitioner,

v.

STATE OF FLORIDA, ET AL.,
Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA,
WASHINGTON, ALABAMA, ARIZONA, ARKANSAS,
COLORADO, CONNECTICUT, HAWAII, IDAHO,
KANSAS, LOUISIANA, MAINE, MASSACHUSETTS,
MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA,
NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW YORK,
NORTH CAROLINA, OHIO, OKLAHOMA,
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INTEREST OF AMICI STATES

This case is more about federalism than about Indian tribes. Although the Parties are nominally an Indian tribe and a State, the conflict which brings the case to this Court is between the Congress of the United States and the governments of the several States of the Union. This case involves a statute which directly mandates State participation in a federal regulatory program and seeks to enforce that mandate through federal court action. In so doing, the statute offends the principles of federalism: the idea that we enhance our freedom by diffusing sovereign power "by the creation of two governments, not one." *United States v. Lopez*, ___ U.S. ___ (Kennedy, J., concurring, slip op., at 11).

The sovereign interests of all the States of the Union – those with Indian lands within their borders *as well as* those without – are seriously jeopardized by the method chosen by the Congress to implement this legislation. The statute here directly commands the States to do certain acts, as if the States were mere subdivisions of a national government. No choice, incentive or acceptable alternative is given a State under this legislation. States must comply or face federal court orders.

Thus, the issues in this case go to the heart of our federal system of government – the relationship of States of the Union with the Federal Government and the autonomy of States to govern their own citizens.

SUMMARY OF ARGUMENT

Congress does not have the authority to abrogate State sovereign immunity under any of its Article I powers. The States, in creating the Union, did not agree to allow the federal Congress to create jurisdiction over them in suits brought by private parties against their consent.

The Eleventh Amendment of the United States Constitution is emblematic of the States' deeper sovereign immunity, part of the understood background against which the Constitution was adopted: without their consent, either expressly given or "inherent in the plan of the convention," States are immune from suit in federal courts. The immunity enjoyed by the States extends to all suits, regardless of the relief sought. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, ___ U.S. ___ 113 S. Ct. 684, 688 (1993).

Petitioner, Seminole Tribe of Florida, asks the Court to reject that history and understood background of the Constitution, and to extend the limited holding of its 1989 plurality decision in *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), to other Article I powers of Congress, so as to provide Congress with a unilateral authority to allow suits against States in federal courts by private citizens. Brief for Petitioner, at 17. This Court has never before accepted that view, nor should it now.

Amici States ask the Court to reject Petitioner's claim; to reaffirm that Article I, standing alone, does not grant Congress unilateral authority to abrogate State sovereign immunity – a separate waiver of State sovereign immunity is constitutionally required; and to restore the

Constitutional balance between federal and State authority "inherent in the plan of the [constitutional] convention" by overturning the 1989 plurality opinion of the Court in *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989). Certainly, the Court should reject the notion that the powers given the Congress over Indian affairs gives it authority to abrogate State sovereign immunity, immunity that this Court has recognized, as Petitioner concedes, was never surrendered to Indian tribes in the plan of the convention. *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

The United States, appearing amicus curiae, contends Congress has the power to abrogate State sovereign immunity under the extensive plenary power that it has over Indian affairs, reflecting the erroneous assumption that a plenary power given the Congress includes the authority to subject States to suit in federal courts by private citizens. Brief for United States, at 24-25. The United States also argues, citing *Ex parte Young*, 209 U.S. 123 (1908), as its basis, that state officials can be sued in federal court for prospective injunctive relief under the Indian Gaming Regulatory Act of 1988 ("IGRA"), not merely to restrain an official from performing an unconstitutional act, but to compel the undertaking of any obligation imposed by federal law, without regard to the official's conduct or whether the obligation is discretionary.

Ex parte Young does not support the United States' contention. A litigant may not avoid the jurisdictional proscription of the Eleventh Amendment by the expedient of naming a state officer as a Defendant, when it is the State that is ultimately compelled to take action. In

fact, IGRA, by its own terms and in its practical effect, is directed at the State *qua* State. To the extent a suit is maintained against the governor of the State, or any other state officer, seeking to compel that officer to exercise the sovereignty of the State in its sovereign capacity, it is a suit against the State and is barred by the Eleventh Amendment. Finally, because IGRA directly coerces the States to negotiate and complete tribal-state gambling compacts and sanctions a lawsuit in federal court to compel this exercise of sovereign legislative discretion, it is a definitive example of a Tenth Amendment violation enforced by an Eleventh Amendment violation.

ARGUMENT

I.

ARTICLE I DOES NOT GRANT CONGRESS AUTHORITY TO ABROGATE STATE SOVEREIGN IMMUNITY.

In this case, the Court is presented with the novel assertion that Congress has unilateral authority to abrogate State sovereign immunity acting solely under the Indian Commerce Clause, an Article I power. This Court has never endorsed that view. The implications of the argument are far broader than the statute at issue here, or even Congress' specific authority under the Indian Commerce Clause, upon which IGRA is explicitly based. The assertion presupposes that any Article I power gives Congress the power to abrogate State sovereign immunity, abandoning the long-standing constitutional requirement of a separate waiver.

A. The States Entered Into The Union With Their Sovereignty Intact, Including Their Immunity From Suit As Sovereigns.

When the States entered into the Union, they did so with their sovereignty intact. *Blatchford v. Native Village of Noatak*, 111 S. Ct. at 2581. "The Constitution . . . leaves to the several States a residuary and inviolable sovereignty' . . . reserved explicitly to the States by the Tenth Amendment." *New York v. United States*, 505 U.S. ___, 112 S. Ct. 2408, 2434-35 (1992), quoting *The Federalist*, No. 39.

One of the most important aspects of that retained sovereignty is State sovereign immunity. For nearly two hundred years the analysis expressed by Alexander Hamilton in the *Federalist*, No. 81, guided this Court's determination of State sovereign immunity claims:

It is *inherent in the nature of sovereignty*, not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the Government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the Convention, it will remain with the States[.]" (Emphasis added.)

1. The Eleventh Amendment Preserves State Sovereign Immunity.

Article III of the Constitution explicitly grants to the federal judiciary authority to adjudicate claims involving States in certain enumerated areas. The Eleventh Amendment just as explicitly limits that authority.

This withdrawal of jurisdiction [in the Eleventh Amendment] effectively confers an immunity from suit. Thus this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State. Absent waiver, neither a State nor agencies acting under its control may be subject to suit in federal court.

Puerto Rico Aqueduct v. Metcalf & Eddy, 121 L.Ed.2d 605, 612 (1993) (citations omitted); *see also*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984).

The Eleventh Amendment of the United States Constitution reflects the states' deeper sovereign immunity, which is itself "part of the understood background against which the Constitution was adopted, . . ." *Pennsylvania v. Union Gas*, 491 U.S. 1, 32 (1989) (Scalia, J., concurring in part and dissenting in part); *see also* *Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 487 (1987). Thus, the States, in creating the Union, did not contemplate federal jurisdiction over suits brought against them against their consent. *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). Whether the Eleventh Amendment is wholly jurisdictional or more fundamentally tied to the question of a sovereign's consent, it is clear that its passage was the result of the "shock of surprise throughout the country" at the decision of the Supreme Court in *Chisholm v. Georgia*, 2 Dall. (2 U.S.) 419 (1793), permitting the suit against Georgia by a citizen of another State. The Amendment was proposed and ratified with "vehement speed," *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 708 (1949) (Frankfurter, J., dissenting), from March 4, 1793 to February 7, 1794.

In *Hans v. Louisiana*, the Court made it clear that the Eleventh Amendment's effect was to overturn the result in *Chisholm* and restore the "original understanding" that Article III's grant of federal court jurisdiction did not extend to suits against the States. *Hans*, 134 U.S. at 14-16. This original understanding supported the view that immunity flowed not from the Eleventh Amendment, but from broader concepts of state sovereign immunity generally.

Behind the words of the constitutional provisions are postulates which limit and control. There is the . . . postulate that 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 v. Mississippi, 292 U.S. 313, 322-323 (1934) (quoting A. Hamilton, *The Federalist*, No. 81).

2. States May Not Be Sued Unless Their Immunity Is Waived.

Reflecting the view that the state judicial immunity derives from a broader, general governmental immunity, it follows the immunity is a privilege that the State may waive at its pleasure. This may be done expressly, or impliedly, as suggested by the language of Alexander Hamilton: consent may be implied where there has been a "surrender of this immunity in the plan of the convention." *Monaco*, 292 U.S. at 323.

This surrender of immunity, or implied waiver, is found in the plan of the convention in suits against the

States by the United States because of the Supremacy Clause and because the allowance of such suits was inherent in the agreement to be bound by the Constitution. *United States v. Mississippi*, 380 U.S. 128, 140 (1965). Similarly, the states may sue each other since, inherent in the nature of a federated republic, is the idea that there should be a forum in which states can sue each other on an even footing. *Monaco*, 292 U.S. at 327-328; *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904).

Upon the adoption of the Fourteenth Amendment, a new source for the surrender or withdrawal of immunity appeared by virtue of the purpose and text of the Fourteenth Amendment – which was explicitly addressed to controlling State action – and necessarily limited the reach of the earlier adopted Eleventh Amendment. When acting pursuant to § 5 of the Fourteenth Amendment, Congress can annul, or abrogate, the States’ sovereign immunity without the States’ consent. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985), relying on *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). This authority, however, was still derived from a separate constitutionally-based surrender of State immunity – as the Court repeatedly noted in *Fitzpatrick*.

3. Abrogation Is An Analytical Corollary To A State’s Waiver Of Immunity, Not A Separate Congressional Power.

“Waiver” has been the consistent hallmark of this Court’s determination of State sovereign immunity claims. The *only* circumstance in which the Eleventh Amendment does not bar suits against a State in federal

court is where a State has consented to such a suit. *In Re State of New York*, 256 U.S. 490, 497 (1921).

It was in *Fitzpatrick* that the Court first used the word “abrogation” to express its view of the intersection of Congress’ Article I authority to legislate in a given field and the federal judiciary’s Article III authority to hear cases brought pursuant to such legislation. Implicit in the concept of congressional abrogation is not just delegation of federal authority to *legislate* in a particular sphere, however, but a surrender of State sovereignty to the *judicial* authority of the United States.

“Abrogation” has never been deemed by this Court as a separate power granted to Congress, as asserted by Petitioner. Brief for Petitioner, at 20. Rather, it is a shorthand expression used by the Court to express Congress’ exercise of its power when coupled with a pre-existing, constitutionally-based *separate* waiver of State immunity. Such an “inherent waiver,” albeit dormant, is given life when Congress speaks. There is no separate power to *abrogate* a retained right of the States. Rather, more properly speaking, Congress is enabled to make States liable to suit in federal court because of a preexisting, inherent waiver given to it by the States. Thus, any such power in Congress can go no further than the waiver that was initially made by the states “in the plan of the convention.” When viewed in that light, it is clear that the States made no such broad-gauged waiver as is argued here, or as was suggested in *Union Gas*.

B. *Pennsylvania v. Union Gas* Represents A Radical Departure From Prior Case Law, Is Constitutionally Unsound, And Should Be Overturned.

In 1989, this Court, in a splintered and ambiguous plurality decision, decided that the power granted to the Congress in Article I of the Constitution to regulate interstate commerce was also a limitation on the sovereign immunity of a State, thereby allowing Congress to subject States to suit in federal court by private citizens. *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989). The premise of *Union Gas* was that Congress' power to regulate interstate commerce would be incomplete if Congress could not subject the States to suit in the federal courts. Amici States contend the *Union Gas* decision is constitutionally unsound and its rationale effectively eviscerates the Eleventh Amendment. To understand why *Union Gas* is constitutionally unsound it is necessary to review the intersection of Articles I and III of the Constitution.

1. The Jurisdiction Of The Federal Courts Is Determined By Article III, Not By Congress Under Article I.

The powers of Congress are set forth in Article I of the Constitution, the scope of judicial authority in Article III. Because of this separation, one branch may not expand or otherwise affect the inherent constitutional authority of any other branch. "[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to

the crisis of the day." *New York, supra*, 112 S. Ct. at 2434. Although Congress is given the power to make laws, including the power to create causes of action under federal law, it cannot create jurisdiction in federal courts which is not otherwise established by Article III.

Petitioner's argument deviates from this established rule by suggesting that Congress can unilaterally create jurisdiction, secured by the Eleventh Amendment, whenever it legislates under its Article I authority. This construction skews both the balance of authority inherent in the federal structure of the Constitution and the balance of responsibilities between the federal judicial and legislative branches. It further ignores that

Congress exercises its conferred powers subject to the limitations of the Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment.

New York, supra, 112 S. Ct. 2408, 2418. This Court in *New York* continued by pointing to the limitation on the power of Congress found in the Tenth Amendment: "the power of the Federal Government is *subject to limits* that may, in a given instance, reserve power to the States." *Ibid.* Recently, this Court relied on the principles of federalism to invalidate an Act of Congress where the latter branch so interfered in State matters using its commerce clause powers that it "upset[] the federal balance," thereby bringing this Court to "recognize meaningful limits on the commerce power of Congress." *United States v. Lopez*, ___ U.S. ___, ___ (Kennedy, J., concurring, slip op., at 17).

Similarly, in *Blatchford* this Court found that the judicial authority in Article III is limited by State sovereign immunity as exemplified by the Eleventh Amendment. *Blatchford, supra*, 111 S. Ct. at 2581; *Accord Hans, supra*, 134 U.S. at 14-16; *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Welch v. Texas Dep't of Highways & Public Trans.*, 483 U.S. at 487.

2. *Pennsylvania v. Union Gas* Should Be Overturned.

The fundamental error of *Union Gas* is its misapprehension of the relationship between the nature of Congress' Article I powers and the federal judiciary's Article III authority over the States. *Union Gas*, and the Indian Gaming Regulatory Act suits at issue in this case, represent *private rights of action against States*. It was the pursuit of precisely that remedy which the Eleventh Amendment was enacted to forbid.

There are numerous areas where Congress has the authority to legislate, and Congress has at its disposal a variety of mechanisms to encourage State compliance.¹ What Congress does not have the authority to do, however, is create a private right of action against a State to enforce a federal mandate, *without a separate waiver of State immunity*, either express or inherent. As the Court noted in *Blatchford*, just because the federal government

¹ For example, Congress can restrict the availability of federal funds to States, or make them contingent upon an express waiver of State immunity; it can regulate directly in the absence of a State assertion of authority; and, in some circumstances, may even sue States directly to require compliance. See *New York, supra*, 112 S. Ct. at 2423.

can sue a State, does not mean that Congress can authorize *others* to do so. *Blatchford, supra*, 111 S. Ct. at 2584.

The premise of the 1989 plurality decision announced in *Union Gas* was that the Interstate Commerce Clause represented a surrender of State immunity "inherent in the plan of the Convention." There is no such waiver. *Union Gas* is the first and only time that this Court has found a constitutionally-based waiver of State sovereign immunity beyond that arising from state-federal and state-state relationships, and, by clear implication, in the Fourteenth Amendment. In so finding, *Union Gas* is a radical departure from the Court's previously uniform precedents regarding inherent waiver.

The plurality opinion in *Union Gas* also launched what has become an increasingly detailed search by litigants for other "implied" waivers of State immunity in diverse provisions of the Constitution, and herculean efforts to shoehorn legislation into the analytical niche created by the decision.² These pursuits have done serious damage to the fundamental balance of authority between the State and federal governments inherent in the structure of the Constitution.

² The Amicus Brief of the National Indian Gaming Association typifies this effort. Although neither the Act nor its legislative history make any reference to interstate commerce, amicus tribes contend that it "must have been on Congress' minds." The Eleventh Circuit properly rejected this line of argument. *Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016, 1027, n. 13 (11th Cir. 1994); see S.Rep. No. 446, 100th Cong., 2d. Sess. 1, p. 2 (1988); 25 U.S.C. §§ 2701(3), 2701(4), 2702(3).

As the Eleventh Amendment is a *limitation* on the Article III jurisdiction of the federal courts, Congress cannot change that limitation through the exercise of Article I powers. This is an appropriate case in which to abandon the plurality decision in *Union Gas*. At a minimum, this case presents an opportunity to confine *Union Gas* to its facts and not to extend its reach. Otherwise, the Eleventh Amendment is transformed from a constitutional wall to a statutory hurdle, easily cleared by congressional recitation of a "clear" intent to abrogate the States' sovereign immunity.³ That is not what the framers of the Constitution, or the States which ratified it, intended.

³ One example is the passage last fall of amendments to Section 106 of the Bankruptcy Code which were explicitly directed at overturning this Court's earlier holding in *Hoffman v. Conn. Dept. of Income Maintenance*, 492 U.S. 96 (1989). Those revisions, which are to be applied *retroactively* allow a private individual to force a state into a federal bankruptcy court anywhere in the country to defend enforcement and collection activities that were fully legal at the time they took place. The difficulties this imposes on state governments is exacerbated by the short notice periods in bankruptcy cases and the financial strains of defending out-of-state litigation. As such, the States are highly vulnerable to frivolous or bad faith filings by parties who challenge *bona fide* actions of the state simply in the hope that the States will be unable to defend themselves adequately. For that reason, we suggest that this Court must consider carefully the ramifications of upholding the rationale of *Union Gas*, particularly if that rationale is given an expansive reading that could be expanded to other Article I powers such as the Bankruptcy Clause.

II.

EVEN UNDER *UNION GAS*, CONGRESS DOES NOT HAVE THE POWER TO ABROGATE STATE JUDICIAL IMMUNITY UNDER THE INDIAN COMMERCE CLAUSE.

Even if the Court chooses not to address *Union Gas* in the context of this case, the reasoning of that case does not logically extend to the Indian Commerce Clause. As Petitioner acknowledges, Florida did not expressly waive its sovereign immunity and the Indian Commerce Clause contains no such inherent waiver. Brief of Petitioner, at 16, citing *Blatchford*, 501 U.S. at 779. The Indian Commerce Clause does not, therefore, represent a waiver of State immunity empowering Congress to make States liable to private litigation in federal court.

This Court's conclusion in *Blatchford* that there was no *waiver* of sovereign immunity "inherent in the plan of the convention,"⁴ is a compelling answer to why Congress does not have the power to *abrogate* state sovereign immunity under the Indian Commerce Clause. States did

⁴ What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States [citation omitted], as it 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.

not contemplate granting Congress power to nullify an immunity which they did not intend to surrender, nor did the States contemplate that Congress would have the power to compel the States to perform acts wholly within the scope of federal responsibility.

This Court has not previously found congressional power to abrogate state sovereign immunity when legislating pursuant to the power to regulate commerce with Indians. Nevertheless, several Circuit Courts have done so, citing *Union Gas* as their authority. The Eighth, Ninth and Tenth Circuits found the power of Congress to abrogate state sovereign immunity under the *Interstate Commerce Clause* is equally “applicable” to the *Indian Commerce Clause* prong. *Cheyenne River Sioux Tribe v. State of South Dakota*, 3 F.3d 273, 280-281 (8th Cir. 1993); *Spokane Tribe of Indians v. Washington State*, 28 F.3d 991, 996 (9th Cir. 1994); *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422, 1430 (10th Cir. 1994). The Ninth Circuit went further and suggested that the *Union Gas* plurality framed its analysis in terms of the “Commerce Clause” as a whole, and did not limit it to the *Interstate Commerce Clause* prong. In contrast, the Eleventh Circuit in this case correctly noted that the *Union Gas* Court, in each of its opinions – plurality, concurrences and dissents – addressed *only* the interstate prong, and that its rationale goes only to the regulation of commerce *among the States*. *Seminole*, 11 F.3d at 1027.

A. Plenary Power Alone Does Not Give Congress The Power to Abrogate State Sovereign Immunity.

Amicus Curiae United States rests its application of *Union Gas* to the *Indian Commerce Clause* on the notion that that clause embodies a plenary power of the Congress that limits the power of the states, citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (finding congressional power to abrogate under § 5 of the Fourteenth Amendment), and *Union Gas*, 491 U.S. at 19 (plurality opinion) (like the Fourteenth Amendment, the “Commerce Clause withholds power from the States at the same time as it confers it on Congress.”) Brief for United States, 20-21. Under this reasoning, of course, any Article I power granted to the Congress by the States in the Constitution – since all arguably withhold power from the States in some way – would serve as a basis for congressional power to abrogate state sovereign immunity – rendering the Eleventh Amendment superfluous. It was just such an analysis that Justice Scalia cautioned against in his partial dissent in *Union Gas*:

[I]f the Article I commerce power enables abrogation of state sovereign immunity, so do all the other Article I powers. An interpretation of the original Constitution which permits Congress to eliminate sovereign immunity only if it wants to render the doctrine a practical nullity and is therefore unreasonable.

Pennsylvania v. Union Gas, 491 U.S. at 42 (Scalia, J., concurring in part and dissenting in part).

However, only the Fourteenth Amendment and, arguably, the *Interstate Commerce Clause* provide any

rationale for abrogation. First, they explicitly limit the autonomy of State governments to take certain actions and provide for federal supremacy relating to those particular activities. Second, without conceding the wisdom of *Union Gas*, the plurality in that case expressed an important limitation on the power of Congress to summarily override a state's Eleventh Amendment immunity: the power to abrogate was found to exist only because Congress' power *would be incomplete* without rendering the States themselves liable in federal court. *Union Gas*, *supra*, 491 U.S. at 15, and at 19-20; *see also Fitzpatrick*, 427 U.S. at 456 (Congress' power to enforce the Fourteenth Amendment would be incomplete without the power to make the States, as employers, *liable in federal court* for unlawful employment discrimination: "Congress may . . . provide for private suits against States or state officials which are constitutionally impermissible in other contexts."). The same cannot be said about the Indian Commerce Clause. Congress' authority over Indian relations is *complete*, and need not involve the States at all.

B. Displacement Of States' Power Does Not Give Congress Power Over States.

The Indian Commerce Clause was not intended to affect the autonomous operation of a State government. Fulfilling a different purpose than the interstate commerce prong, it allocated the responsibility for that activity to the United States government.⁵ While the plenary

⁵ The Eleventh Circuit below recognized the important distinctions in the respective purposes of Interstate Commerce

power of the Congress with respect to Indian affairs may *displace* the power of the States with respect to Indians, the Indian Commerce Clause does not permit Congress to mandate the States to assume the federal government's responsibilities with respect to Indian tribes – its displacement of the States simply leaves the States out of the matter. Nor does the Clause provide the power to abrogate state sovereign immunity to compel a State to perform an act otherwise solely within the scope of the federal government's responsibilities. This use of the federal courts to compel the States' performance offends not only the Eleventh Amendment, but also the Tenth Amendment, as discussed below.

To date, this Court has found Congress' power to abrogate only in Section 5 of the Fourteenth Amendment, *Fitzpatrick v. Bitzer*, 427 U.S. 445, and in the Interstate Commerce Clause, *Union Gas*, 491 U.S. 1. The significance of finding yet another constitutional provision that gives

Clause and the Indian Commerce Clause, noting the distinctly different purposes behind each clause:

In [*Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192], the Court acknowledged the plenary powers under the Interstate Commerce Clause that allow Congress to place limits on the states [was] in order to "maintain[] free trade among the States." *Id.* By contrast, "the central function of the Indian Commerce Clause is to provide Congress with power to legislate in the field of Indian affairs. *Id.* Although Congress has the power to limit the states under the Indian Commerce Clause as well, the different purposes underlying the two clauses mandate they be treated distinctly.

Seminole Tribe v. Florida, 11 F.3d at 1027.

the Congress power to abrogate state sovereign immunity, one that permits the courts to compel States to perform certain acts, cannot be understated – it would lead to a critical undermining of the federal system of government and further strengthen the power of the federal government at the expense of the states. *Delmuth v. Muth*, 491 U.S. 223, 227-28 (1989).

III.

EX PARTE YOUNG IS NOT AUTHORITY FOR AN ORDER COMPELLING A GOVERNOR TO EXERCISE THE SOVEREIGNTY OF THE STATE FOR THE SOLE PURPOSE OF EFFECTUATING A FEDERAL REGULATORY SCHEME.

Amicus curiae United States argues that *Ex parte Young*, 209 U.S. 123, permits a suit against a state official who is assertedly required under IGRA to negotiate with Indian tribes for class III gaming. Brief of the United States, at 12. This reliance on *Ex parte Young* is manifestly misplaced, for nothing in that decision, or any successor decisions by this Court, has ever suggested that the Eleventh Amendment does not bar a federal court from *compelling* the exercise of state sovereign powers in the first instance.

In *Ex parte Young*, plaintiff railroad stockholders brought an unsuccessful action to enjoin Young, the state attorney general, from enforcing a state law alleged to be unconstitutional. The question presented by *Young* was essentially this: Is a suit against the State's attorney general seeking to restrain unconstitutional conduct tantamount to a suit against the State itself for purposes of the

Eleventh Amendment? In answer to that question, this Court determined that, where a state actor's conduct is unconstitutional, the official is "stripped" of the mantle of state sovereignty and, therefore, neither the suit nor any consequent order requiring the state actor to bring his conduct into conformity with the Constitution offends the Eleventh Amendment. *Ex parte Young*, *supra*, 209 U.S. at 159-160; *see also*, *Pennhurst*, *supra*, 465 U.S. at 102.

The successors to *Ex parte Young* that are relied on by the Solicitor General thus concern the inquiry whether an order mandating prospective conduct by a state actor is tantamount to an order against the State itself. In each of those cases, the Court determined that the order was not against the State for purposes of the Eleventh Amendment. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (public assistance benefits); *Milliken v. Bradley*, 433 U.S. 267 (1977) (expenditure of public funds to remedy effects of past *de jure* segregation); *Quern v. Jordan*, 440 U.S. 332 (1979) (notice to class members of retroactive relief.)

In this case, however, there can be no reasonable doubt that a suit under 25 U.S.C. § 2710(d)(7)(B) is *necessarily* and *always* a suit against the State itself. Whether or not *Ex parte Young* and its progeny permit orders compelling affirmative conduct by state actors, no decision of this Court has ever read *Ex parte Young* to suggest that an order compelling a state officer to exercise the sovereignty of the State is permissible under the Eleventh Amendment.

Whoever may be the nominal defendant, a suit under IGRA is necessarily directed against the State in its sovereign capacity.⁶ As a threshold matter, the statute on its face expressly states that an order issuing from any suit brought under IGRA is directed against *the State itself*. 25 U.S.C. § 2710(d)(7)(B)(iii). Indeed, such a suit *must* be directed against a State in its sovereign capacity, because, under IGRA, a tribal-state compact addresses issues related to the scope and extent of state police power on Indian lands within the State. 25 U.S.C. § 2710(d)(3)(C). Accordingly, an order directing a State “to conclude a compact,” 25 U.S.C. § 2710(d)(7)(B)(iii), is necessarily an order compelling an unwilling State to exercise *sovereign powers*.⁷

Therefore, even if an order under IGRA is nominally issued against a state governor or any other nominal defendant chosen by the Tribe, rather than against the State itself, it is necessarily presumed that that officer exercises the sovereignty of the State vis-à-vis Indian Tribes and that that officer, therefore, has the power to negotiate and bind the State in a compact defining the extent of the State’s sovereignty over lands within its

⁶ Petitioner named the State of Florida in this suit, in addition to Governor Lawton Chiles.

⁷ In contrast, the orders issued in *Ex parte Young* and successor decisions of this Court sought to compel a state actor, *who is already exercising state governmental powers*, to bring his conduct into conformity with federal law. Thus, in the language of *Ex parte Young*, an injunction lies to “restrain” or to “prevent” the state actor from doing that which he has no right to do. *Ex parte Young*, at 159.

boundaries.⁸ The order would be pointless otherwise. However, inasmuch as a suit against a state governor or other official under 25 U.S.C. § 2710(d)(7)(B) is a suit to compel the governor to exercise the sovereignty of the State, it is necessarily a suit against the State in its sovereign capacity and is therefore barred by the Eleventh Amendment.

IV.

THE TENTH AMENDMENT PROHIBITS APPLICATION OF THE COERCIVE PROVISIONS OF THE INDIAN GAMING REGULATORY ACT

In IGRA, Congress directly commands the States to exercise their sovereignty by negotiating and implementing a tribal-state compact once requested by a tribe. Such a command deprives the States of their sovereign role, in violation of the Tenth Amendment. Under the Act, an Indian tribe retains the sovereign prerogative to request state participation in the regulation of gaming activities on Indian lands. 25 U.S.C. § 2710(d)(1)(C). If an Indian tribe requests a State to negotiate for a compact concerning 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) (emphasis added). The federal government, while it has broad plenary authority for Indian affairs, assumes minimal responsibility under this

⁸ Contrary to the suggestion of the Solicitor General, an order compelling a governor to exercise the sovereignty of the State cannot reasonably be characterized as an order compelling a “ministerial” act.

law for the formulation or implementation of a regulatory scheme for serious Indian gaming.

The *coercive* elements of 25 U.S.C. § 2710(d)(3), *require* States to negotiate, under pain of federal court compulsion. They reduce the States to mere administrative subdivisions of the Federal Government and do injury to their sovereignty. IGRA requires the States to exercise their sovereign discretion and carry out duties which the federal government has chosen not to undertake. As this Court most recently reaffirmed in *New York v. United States*, ___ U.S. ___, 112 S. Ct. 2408 (1992):

States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. . . . The Constitution instead leaves to the several States a residuary and inviolable sovereignty, reserved explicitly to the States by the Tenth Amendment.

112 S. Ct. at 2434 (citations omitted).

The federal government may not *compel* a State to regulate in an area of federal responsibility. Indeed, “[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.” 112 S. Ct. at 2429 (emphasis added). When it comes to handling certain affairs, the States expressly vested in Congress responsibility for regulating commerce “with foreign nations, and among the several states, and with the Indian tribes.” U.S. Const., art. I, § 8, cl. 3. Article I of the Constitution does not authorize Congress to avoid its obligation by forcing the several States to assume responsibility for handling Indian affairs.

Instead, Congress chose to compel a state to negotiate a tribal-state compact under 25 U.S.C. § 2710(d)(3)(A), at the request of a tribe; to subject that state to being hauled into federal court under a claim that it failed to negotiate in good faith under 25 U.S.C. § 2710(d)(7); to subject the state to the compulsion of a federal court order to further negotiate; to subject the state to compulsion to submit a last best offer to a court-appointed mediator; and to require the state to make a selection from the mediator. 25 U.S.C. § 2710(d)(7).

Congress may, of course *encourage* the aid of the States in regulating the conduct of gaming activities on Indian lands. *Red Lake Band of Chippewa v. Swimmer*, 740 F. Supp. 9, 13-14 (D.D.C. 1990), *aff'd*, *Red Lake Band of Chippewa v. Brown*, 928 F.2d 467 (D.C. Cir. 1991). Under Congress’ spending power, it may encourage a state to regulate in a certain way, short of outright coercion, by attaching conditions on the receipt of federal funds.” *South Dakota v. Dole*, 483 U.S. 203, 206 (1936). Where Congress has the authority to regulate private activity under the Interstate Commerce Clause, Congress may offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981); see also *FERC v. Mississippi*, 456 U.S. 742 (1982) (where States are encouraged to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply). Where Congress encourages state regulation rather than compelling it, “state governments remain responsive to the local electorate’s preferences; state officials remain accountable to

the people.” *New York v. United States*, 112 S. Ct. at 2424. No such incentive is present under IGRA.

As with the coercive “take title” provision in the Low-Level Radioactive Waste Policy Amendments Act of 1985, Public Law 99-240, 99 Stat. 1842, 42 U.S.C. § 2021b et seq., struck down by the Court in *New York v. United States*, 112 S. Ct. at 2408, IGRA’s scheme unconstitutionally coerces States into participation in IGRA by holding out two impermissible choices, two coercive applications of federal law: “the State *shall* negotiate with the Indian tribe,” 25 U.S.C. § 2710(d)(3)(A), or else face litigation in federal court, 25 U.S.C. § 2710(d)(7)(A) – with the additional coercive processes of forced negotiations, 25 U.S.C. § 2710(d)(7)(B)(iii); mediation, 25 U.S.C. § 2710(d)(7)(B)(iv); and ultimately, of imposition of a federally prescribed regulatory system which may compel the state to create a system for regulating a game that is illegal within that state, 25 U.S.C. § 2710(d)(7)(B)(vii).

Nor does IGRA merely provide “encouragement,” as opposed to a mandate, to achieve “cooperative rulemaking” with the tribe. IGRA, by its own terms, imposes a requirement on the states to fashion, implement and enforce a regulatory program which the federal government has not done itself. This constitutes a direct interference with the states’ sovereign reserved powers to contract. *United States v. Bekins*, 304 U.S. 27 (1938). It is a direct commandment to the states to engage in a regulatory process or face the prospect of being sued in federal

court, with all of the attendant costs and risks associated with litigation.⁹

Nor are IGRA’s remedial provisions a set of “default provisions,” which leave a “choice” for States. A State’s mere “choosing” to not negotiate must necessarily result in a court finding that the State is *in bad faith* before the mediational procedures ensue to the Tribes’ benefit. Then, the State ignores at its peril a court order to *complete* a compact within a 60-day period. *States submitting themselves to being adjudged to be in bad faith and ignoring federal court orders at their own peril is not a legitimate choice nor would it be a responsible exercise of the State’s sovereign authority and its legislative discretion.*

Finally, when Congress conscripts states into fashioning and implementing a regulatory scheme to achieve federal ends, congressional representatives avoid political accountability. In IGRA, the scheme created by Congress minimizes the accountability of federal officials to the public. The legislation mandates that the States “work it out” with the tribes. It is thus the *State* officials who must bear the brunt of public disapproval, while congressional representatives – and, of course, the Secretary of the Interior, who ultimately approves the regulatory scheme,

⁹ If IGRA only “encourages” “cooperative rulemaking,” and compliance with IGRA’s negotiation provisions is voluntary, then there would be no Article III “case or controversy” in IGRA cases. If the States do not negotiate in a voluntary arrangement, that is the end of the matter – there is then no controversy for the court to adjudicate, no need for orders to negotiate and mediate, and no reason for Article III courts to declare the rights of tribes to negotiate with an unwilling partner.

25 U.S.C. § 2710(d)(8) – remain insulated from the political consequences of the conduct of gaming on Indian lands. As Justice Kennedy noted in *United States v. Lopez*, ___ U.S. ___, federalism “ ‘serves to assign political responsibility, not to obscure it.’ ” (Kennedy, J., concurring, slip op., at 13), quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). The result here leaves us unable to hold either branch of our dual federal-state government properly answerable to the citizens. *Id.*, at 13.

The States did not authorize Congress to impose upon them responsibility for determining the conditions under which casino gambling will be conducted on Indian lands within the State. Congress may either regulate such gambling directly, or Congress may permit the tribes to regulate such gambling exclusively; within either option, Congress may *invite* the States to undertake regulation of the activity in lieu of direct federal or tribal regulation. Such a scheme ensures the electoral accountability of federal and state officials, as the case may be, for the decisions made concerning the regulation of casino gambling on Indian lands. But Congress may not shield itself and federal officials from accountability for the conduct of casino gambling on Indian lands by making state officials responsible for fashioning the regulatory scheme – under threat of suit by Indian tribes who have no accountability to the electorate.

CONCLUSION

For the reasons stated here, the judgment of the Court of Appeal should be affirmed on the issues presented.

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