No. 07-1109

In the Supreme Court of the United States

KICKAPOO TRADITIONAL TRIBE OF TEXAS,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the court of appeals err by concluding that gaming regulations promulgated by the Secretary of the Interior in 1999 were inconsistent with the Indian Gaming Regulatory Act—an issue that no other federal court of appeals has addressed?
2. Assuming that the court of appeals correctly invalidated the Secretary's regulations, did the court err by declining to reach the Tribe's alternative issue regarding severability?

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STATEMENT

This suit began when the State of Texas sued the United States and other federal defendants (the "United States," collectively) over the validity of federal gaming regulations effected by the Secretary of the Interior in 1999. R.1-12. The United States prevailed in district court, Pet. App. 75a-90a, but lost in the court of appeals, *id.*, at 1a-74a. Even though the United States elected not to appeal the court of appeals's invalidation of the challenged regulations, the Kickapoo Traditional Tribe of Texas—an intervenor in the proceedings below—requests that the Court review the court of appeals's judgment and either (1) revive the regulations, or (2) strike portions of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§2701, *et seq.* See Pet. 20, 26. The State of Texas opposes the petition and the Tribe's requested relief.

I. BACKGROUND

In 1987, the Court held that, absent express permission from Congress, States generally could not regulate gaming activity on Indian reservations. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22 (1987). In response, Congress enacted IGRA to "provide a statutory basis for the regulation of gaming by an Indian tribe." 25 U.S.C. §2702(2). IGRA contemplates negotiations between States and tribes over casino gaming and permits casino gaming by tribes only under a tribal-state compact resulting from either (1) a State's agreement to a gaming compact, or (2) a judicial finding that a State negotiated in bad faith. *Id.*, §2710(d)(3)(B), (d)(7)(B)(iii).

Under this statutory scheme, representatives of the Governor of Texas met with representatives of the Tribe in 1995 to discuss the possibility of casino gaming on

tribal land in Texas. R.14. After meeting with the Tribe and reviewing applicable federal and state law, however, the Governor concluded that he could not consent to a tribal-state compact that included casino gaming because Texas law prohibits the operation of casinos. R.14.

After receiving the Governor's decision, the Tribe filed suit against the State of Texas, R.226-61, seeking to force the State to permit casino gaming, R.258-59. But before that suit concluded, this Court held that States may assert Eleventh Amendment immunity to defeat tribal gaming lawsuits filed under IGRA. *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 72-76 (1996). Pursuant to *Seminole Tribe*, the district court dismissed the Tribe's suit against Texas. R.604.

Three years later, the Secretary of the Interior effected final regulations governing gaming on tribal lands. Class III Gaming Procedures, 64 Fed. Reg. 17535 (1999) (codified at 25 C.F.R. Pt. 291). These regulations permit tribes to operate casinos without the consent of the State or a judicial finding of bad-faith negotiation. 25 C.F.R. §§291.1-291.15.[1]

In December 2003, the Tribe invoked the Secretary's 1999 regulations by submitting a gaming application to the Department of the Interior. R.189. The Secretary then notified the State that the Tribe's application was complete and met the regulations' eligibility requirements, and asked the State for comment. R.68.

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1. The Tribe's description of the 1999 regulations as "Congress's fallback remedy," Pet. 2; *id.*, at 9, 14, is inaccurate. The Secretary—not Congress—promulgated the challenged regulations.

II. TEXAS'S SUIT CONTESTING THE VALIDITY OF THE SECRETARY'S GAMING REGULATIONS

In March 2004, the State of Texas filed suit against the United States, seeking to invalidate the Secretary's 1999 gaming regulations. R.1-12. The Tribe intervened, R.138-151, 200, and both the United States and the Tribe moved for summary judgment, asserting that the State lacked standing, that its suit was not ripe, and that the regulations were valid, R.669-723, 821-22. The Tribe alternatively requested that the Court strike portions of IGRA based on a severability theory. See Pet. 25 n.64. The district court concluded that the State's suit was not ripe and that the challenged regulations were valid. Pet. App. 85a-89a. The court did not grant the Tribe's request to strike the remainder of IGRA. *Id.*, at 89a.

Texas appealed to the Fifth Circuit, arguing that its suit was ripe and that the 1999 regulations are invalid. See Texas CA5 Appellant's Br. 11-29. The Tribe did not file a cross-appeal based on its severability argument.

The court of appeals reversed. In separate opinions, Chief Judge Jones and Judge King concluded that the State had standing and that its claims were ripe for review, Pet. App. 7a-16a, 42a, and that the Secretary's regulations were invalid, *id.*, at 16a-44a. Judge King also suggested that the severability issue was "not before th[e] court." *Id.*, at 44a. Judge Dennis dissented. *Id.*, at 44a-74a.[2]

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2. The Tribe's assertion that the court of appeals severed "part of the statute," see Pet. 4, is incorrect. The court did not strike any part of IGRA. Pet. App. 1a-44a.

The United States did not seek a writ of certiorari, but the Tribe did. See Pet. iii. The Tribe's petition asserts that the court of appeals erred by holding that the Secretary's 1999 gaming regulations were inconsistent with IGRA, and, alternatively, by failing to strike portions of IGRA. Pet. i-ii.

The United States opposes the Tribe's petition, in part because "[t]here is . . . no conflict between the decision below and the decision of any other court of appeals that warrants this Court's intervention." Fed. Br. in Opp. 9. In addition, the United States believes that the court of appeals's "decision does not preclude the Secretary from taking future action to ensure that IGRA operates in a manner consistent with its purposes." *Ibid.*

REASONS TO DENY THE PETITION

For many reasons, the Tribe's petition is an unattractive—indeed, inappropriate—vehicle to consider the issues presented. Foremost, the Tribe lacks standing to defend federal regulations that the United States elected *not* to further defend on appeal, and any injury it can claim from the court of appeals's decision is not redressable by a favorable judgment from the Court in this case. In addition, the issues presented do not warrant the Court's review because there is no split in the federal circuits for the Court to resolve; rather, the court of appeals was the first—and only—federal court of appeals to have passed upon the validity of the Secretary's 1999 gaming regulations. Likewise, the petition is fatally flawed if the Tribe and United States are correct that the State of Texas had no standing to challenge the regulations or that the State's suit was not ripe.

Regardless, the Court should deny the petition because the court of appeals did not err in invalidating the Secretary's regulations. The regulations conflict with Congress's intent as expressed in IGRA, and they violate both the separation-of-powers doctrine and the non-delegation doctrine.

I. THE TRIBE LACKS STANDING TO APPEAL.

Article III of the United States Constitution limits the Court's authority to deciding only "'cases' and 'controversies.'" *Diamond* v. *Charles*, 476 U.S. 54, 61-62 (1986) (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)). "To qualify as a party with standing to litigate, a person must show, first and foremost, 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent.'" *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Article III standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Id.* (citing *Diamond*, 476 U.S., at 62).

The Tribe cannot meet Article III's standing requirement for two reasons. First, the Tribe has no authority to assert the sovereign interest of defending governmental regulations. See Part I.A, *infra*. And second, the Tribe has no actual or threatened injury that is redressable by a reversal of the court of appeals's judgment invalidating the Secretary's 1999 regulations. See Part I.B, *infra*.

A. The Tribe Cannot Usurp the United States's Sovereign Authority To Determine Whether To Continue Defending Invalidated Federal Regulations.

By electing *not* to appeal the court of appeals's judgment, the United States indicated its "acceptance of that decision, and its lack of interest in defending its own [regulations]." *Diamond*, 476 U.S., at 63. As a result, no case or controversy exists between Texas and the United States that could support the Court's jurisdiction. *Ibid.* (citing *Princeton Univ.* v. *Schmid*, 455 U.S. 100, 102 (1982) (per curiam)).

Although the Tribe has filed a petition for a writ of certiorari, its non-governmental interest in the lawsuit is insufficient to meet the Constitution's standing requirement. Indeed, the Court has already held that a private intervenor lacks the authority to compel the continued defense of a law that a sovereign entity elects not to continue defending. *Diamond*, 476 U.S., at 65.

In *Diamond*, a private intervenor sought to appeal a lower court's invalidation of an Illinois statute. *Id.*, at 64. Because the State of Illinois elected to discontinue defending its statute, the Court held that the private intervenor had no standing to appeal the lower court's decision. The Court wrote:

> "[C]oncerns for the state autonomy that deny private individuals the right to compel a State to enforce its laws apply with even greater force to an attempt by a private individual to compel a State to create and retain [a] legal framework . . . . The State's acquiescence in the Court of Appeals'

> determination of unconstitutionality serves to deprive the State of the power to [enforce the law at issue]. [The intervenor's] attempt to maintain the litigation is, then, simply an effort to compel the State to enact a code in accord with [the intervenor's] interests. But 'the power to create and enforce a legal code, both civil and criminal[,]' is one of the quintessential functions of a State. Because the State alone is entitled to create a legal code, only the State has the kind of 'direct stake' . . . [necessary to defend] the standards embodied in that code."

Id., at 65 (internal citations omitted).

Pursuant to *Diamond*, the Tribe does not have standing to appeal the court of appeals's invalidation of the Secretary's 1999 gaming regulations. By not filing a petition for a writ of certiorari—and, indeed, by opposing the Tribe's petition—the United States elected not to defend the regulations, thereby "acquiesc[ing] in the Court of Appeals' determination" of the regulations' invalidity. Cf. *ibid.* Its decision to do so is a "quintessential function" of the government—one that cannot be usurped by private interests. *Ibid.* Because the Tribe does not share the federal government's "direct stake" necessary to defend the Secretary's regulations, it has no standing to appeal the court of appeals's judgment. *Ibid.*[3]

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3. The Court should also deny the Tribe standing to appeal for prudential reasons: the Tribe cannot assert the federal government's direct interest in defending its regulations. Cf. *Warth* v. *Seldin*, 422 U.S. 490, 499-500 (1975).

B. The Tribe Has No Redressable Injury.

Article III standing requires litigants to have a concrete and particularized, redressable injury. *Arizonans for Official English*, 520 U.S., at 64, 70. This requirement remains necessary on appeal—and is particularly important when an intervenor wishes to appeal a judgment that the named defendant elected not to appeal. *Ibid.* Here, the Tribe's alleged injury is its inability to operate casinos in Texas. But because casinos are unlawful in Texas—and the Secretary's 1999 gaming regulations do not permit gaming that is otherwise unlawful in a State—the Tribe has no redressable injury on appeal.

Under both IGRA and the Secretary's 1999 regulations, tribes are permitted to conduct only those gaming activities that are otherwise lawful in a State. For example, IGRA makes clear that the Secretary cannot prescribe gaming procedures that are inconsistent with "provisions of the laws of the State" at issue. 25 U.S.C. §2710(d)(7)(B)(vii)(I); see also *id.*, §2701(5) (contemplating gaming only within "a State which does not, as a matter of criminal law or public policy, prohibit such gaming activity"). Likewise, the invalidated regulations permit gaming by tribal-state compact only when the "contemplated gaming activities are permitted in the State." 25 C.F.R. §291.8(a)(3); see also *id.*, §291.11(b)(3).

In turn, Texas law prohibits the operation of casinos. With narrow and inapplicable exceptions, the Texas Constitution categorically prohibits gambling in the State. Tex. Const. art. III, §47(a) (mandating that the State Legislature "pass laws prohibiting lotteries and gift enterprises"); see also Op. Tex. Att'y Gen. No. GA-0103, at

2-3, 8 (2003) (explaining that the Nineteenth Century meaning of "lotteries" included games of chance for a prize). Under this mandate, the Texas Legislature has "adopted numerous penal statutes that prohibit various aspects of gambling." *Id.*, at 1. For example, the Texas Penal Code prohibits anyone from owning, manufacturing, transferring, or possessing "any gambling device that he knows is designed for gambling purposes." Tex. Pen. Code §47.06(a).[4]

Given that IGRA and the invalidated regulations do not permit gaming by tribal-state compact that is otherwise unlawful in a State—and that casinos are prohibited in Texas—the Tribe could not engage in casino gaming on Texas land *even if* the Court held that the challenged gaming regulations were valid. Accordingly, the Tribe has no injury that is redressable on appeal.[5]

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4. That Texas law exempts from prosecution some persons participating in gaming activities in the privacy of their homes is no support for the legality of casino gaming in Texas. The play-at-home exemption applies only in places "to which the public does not have access, and excludes, among other places, streets, highways, restaurants, taverns, nightclubs, schools, hospitals, and the common areas of apartment houses, hotels, motels, office buildings, transportation facilities, and shops," Tex. Pen. Code §47.01(8); see also *id.*, §47.02(b), only when "no person receive[s] any economic benefit other than personal winnings," *id.*, §47.02(b)(2), and only when all persons have the same "chances of winning," *id.*, §47.02(b)(3). Because casinos generate proceeds other than winnings and retain an advantage, they fall outside the play-at-home exemption.

5. Texas's prohibition of casino gaming also defeats the Tribe's standing because its "injury" relies on the speculative conclusion that the Secretary would have ultimately permitted it to operate a casino in Texas—a conclusion that would violate §2710(d)(7)(B)(vii)(I) of

II. THE ISSUES PRESENTED DO NOT WARRANT FURTHER REVIEW.

A. The Tribe's Primary Issue Presented—Whether the Court of Appeals Erred by Invalidating the Secretary's Gaming Regulations—Is Neither Legally nor Practically Important.

The Tribe first asks the Court to review what it perceives as error in the court of appeals's analysis regarding the validity of the Secretary's gaming regulations. Pet. 16-20. But alleged error alone does not warrant review, see SUP. CT. R. 10, and there is no split in the circuits for the Court to resolve.

The Tribe's assertion that a direct and concrete conflict exists between the court of appeals's decision and decisions of other circuits is incorrect: the Fifth Circuit is the first and only circuit to have passed upon the validity of the gaming regulations at issue. As a result, the United States has correctly conceded:

> "No other court of appeals has yet addressed the validity of the [gaming] [r]egulations . . . and the decision below does not conflict with any decision of this Court. Further review of the decision of the court of appeals is unwarranted."

Fed. Br. in Opp. 9.

This case began when the State of Texas challenged the validity of the Secretary's 1999 gaming regulations.

IGRA. Cf. *Diamond*, 476 U.S., at 66 (noting that "unadorned speculation will not suffice to invoke the federal judicial power").

R.6. Texas asserted that, as written, the regulations conflict with IGRA by permitting the implementation of gaming compacts without either the State's consent *or* a judicial finding of bad-faith negotiation. R.7. The court of appeals agreed, concluding that the Secretary's 1999 regulations "are not a reasonable interpretation of IGRA, especially when viewed against 'their place in the overall statutory scheme.'" Pet. App. 36a-37a.

The Tribe's assertion that the court of appeals's decision conflicts with *United States* v. *Spokane Tribe of Indians*, 139 F.3d 1297, 1301-02 (CA9 1998), is incorrect. In *Spokane Tribe*, the Ninth Circuit did not pass upon the validity of the Secretary's 1999 gaming regulations; indeed, those regulations did not exist at the time of the Ninth Circuit's decision. Rather, the Ninth Circuit merely noted that at some point in the future, secretarial regulations might "be able to patch up the situation." *Id.*, at 1302.

Nor does *Seminole Tribe of Florida* v. *Florida*, 11 F.3d 1016 (CA11 1994), address the validity of the 1999 gaming regulations. Instead, the Eleventh Circuit simply acknowledged—five years before the Secretary's challenged regulations were implemented—that the federal government "may prescribe regulations governing class III gaming on the tribe's lands." *Id.*, at 1029. Although the Eleventh Circuit did embrace the concept of secretarial regulations playing a role in gaming on tribal lands, *ibid.*, it did not—and could not—embrace any particular, not-yet-existent set of regulations.

Like the Ninth Circuit's *Spokane Tribe* decision, the Eleventh Circuit's *Seminole Tribe* decision does not analyze the 1999 gaming regulations at issue in this

appeal. Neither decision discusses, examines, upholds, invalidates, or even mentions the Secretary's 1999 regulations because the regulations were not in existence at the time. Accordingly, there is no concrete split between the circuit courts for this Court to resolve. The Court should permit the issues to percolate in the courts of appeals until—if ever—a concrete disagreement presents itself.

Moreover, the issue is of minimal practical importance because, as previously explained, see *supra* at 8-9, the Tribe will be unable to lawfully operate casinos in Texas even if the Court granted its petition and upheld the validity of the challenged regulations. Because both IGRA and the invalidated regulations permit only gaming that is otherwise legal in a State—and because casinos are prohibited in Texas—the Tribe cannot reach its ultimate goal of operating casinos even if the Court renders judgment in its favor. *Ibid.*

B. The Tribe's Alternative Issue Also Does Not Warrant the Court's Attention.

1. The Tribe waived its alternative argument by not appealing the district court's judgment against it.

In its motion for summary judgment, the Tribe asked the district court to strike the provisions of IGRA requiring tribal-state compacts. See Pet. 25 n.64. The district court did not grant the Tribe's request, instead dismissing Texas's suit, without prejudice, on the basis of ripeness. Pet. App. 89a. The court denied all other requested relief, *ibid.*—such as the Tribe's request to strike provisions of IGRA.

Texas appealed the district court's judgment, but the Tribe did not cross-appeal—thereby waiving its opportunity to request greater relief on appeal than it obtained in the district court. As recently reaffirmed in *Greenlaw* v. *United States*, No. 07-330, 2008 WL 2484861, at *6-8 (U.S. June 23, 2008), the Court has consistently applied the "'inveterate and certain'" rule that, "[a]bsent a cross-appeal, an appellee . . . may not 'attack the [lower court's] decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary,'" *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 479 (1999) (quoting *Morley Constr. Co.* v. *Md. Cas. Co.*, 300 U.S. 185, 191 (1937); *United States* v. *Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924)). The Tribe's failure to appeal the district court's judgment forecloses consideration of the additional relief requested through the Tribe's alternative issue.

2. The Tribe's claims of conflicts are incorrect.

The Tribe asserts that the court of appeals's decision not to address its alternative argument conflicts with this Court's precedent. Pet. i-ii, 20-26. However, the court of appeals's silence on the severability issue is consistent with this Court's decision in *Seminole Tribe*—which likewise declined to reach the issue. Nor does the court of appeals's decision conflict with that of other courts of appeals.

Although the Tribe's severability argument was reached—and rejected—by the Eleventh Circuit in *Seminole Tribe*, 11 F.3d, at 1016 (dismissing the same argument based on *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678 (1987), that the Tribe asserts here), this Court did not

engage in severability analysis upon review of the Eleventh Circuit's judgment. See *Spokane Tribe*, 139 F.3d, at 1299 (noting that the *Seminole Tribe* Court "did not consider whether the rest of IGRA survives"). The Court's silence on this issue in *Seminole Tribe* essentially forecloses the Tribe's argument that courts must pass on severability in the context of IGRA. Pet. Reply to Fed. Br. in Opp. 3. If the Tribe were correct that IGRA cannot operate consistent with congressional intent after its judicial-remedy provisions had been invalidated, then this Court itself erred in *Seminole Tribe* by failing to conduct the same severability analysis that its earlier decision in *Alaska Airlines* purportedly required.[6]

The Tribe's assertion that the court of appeals's failure to conduct severability analysis conflicts with the Eleventh Circuit's decision in *Seminole Tribe* and the Ninth Circuit's decision in *Spokane Tribe*, Pet. 23-24, is also unpersuasive. In *Seminole Tribe*, the Eleventh Circuit summarily *rejected* the Tribe's severability argument. 11 F.3d, at 1029. Likewise, the Ninth Circuit's decision in *Spokane Tribe* declined to invalidate any portion of IGRA. 139 F.3d, at 1301. Given that no circuit has struck any portions of IGRA that remain after this Court's *Seminole Tribe* decision, the court of appeals's election not to do so does not create a split.

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6. The Court should also note that *Seminole Tribe* was decided not only after *Alaska Airlines*, but also *before* the Secretary's 1999 gaming regulations were effected. If, as the Tribe insists, the absence of the 1999 regulations requires the Court to strike portions of IGRA based on *Alaska Airlines*, then the absence of the regulations back in 1996 would have also required the Court to strike those portions of IGRA in *Seminole Tribe*.

3. The court of appeals did not pass upon severability.

Just as the Court frequently postpones its review of issues on which only a nascent split of authority exists in the courts of appeals, the Court also does "not ordinarily consider questions not specifically passed upon by the lower court." *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); see *United States* v. *Williams*, 504 U.S. 36, 41-43 (1992) (countenancing review of issues not pressed below so long as they were passed upon—but not *vice versa*); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927) ("This court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed."). The Court observes this rule, among other reasons, to enable less drastic or intrusive resolutions than a Supreme Court decision carries with it and to ensure that its own review proceeds with "the benefit of a well-developed record and a reasoned opinion on the merits" by the court below. *Bankers Life & Cas.Co.* v. *Crenshaw*, 486 U.S. 71, 79 (1988); cf. *Spokane Tribe*, 139 F.3d, at 1302 (noting multiple ways in which the post-*Seminole Tribe* version of IGRA could be enforced or amended in response to tribes' criticisms of its current operation).

In this case, the court of appeals did not address the Tribe's severability argument. At most, Judge King's concurrence suggests that the severability question was not adequately presented. Pet. App. 44a. Accordingly, if the Court granted review of the Tribe's alternative issue, it would lack the benefit of any analysis from the court of appeals. Given the drastic nature of the Tribe's requested

relief—that the Court should strike portions of a federal statute that, even under the Tribe's argument, are not unconstitutional—the Court should deny review of this issue as well.

III. JURISDICTIONAL CONCERNS RENDER THE TRIBE'S PETITION AN UNATTRACTIVE VEHICLE FOR ANALYZING THE ISSUES PRESENTED.

Although the State maintains that its challenge to the Secretary's 1999 gaming regulations is ripe and otherwise justiciable, both the Tribe and the United States vigorously asserted that the State's claim was not ripe and that the State lacked standing to challenge the regulations. See, e.g., R.373, 415, 670, 804. If the Tribe and the United States were correct, this Court would have no jurisdiction to reach either of the issues presented. Cf. *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11-12 (2004); *Nat'l Park Hospitality Ass'n* v. *Dep't of Interior*, 538 U.S. 803, 807-08 (2003). This potential jurisdictional barrier militates against granting the petition.

IV. THE COURT OF APPEALS'S JUDGMENT IS CORRECT.

Finally, the Court should deny the Tribe's petition because the court of appeals's decision is correct. The court of appeals correctly concluded that by permitting gaming in Texas without either the State's consent or a judicial finding of bad faith, the Secretary's 1999 regulations "violate the unambiguous language of IGRA and congressional intent." Pet. App. 40a; see also *id.*, at 42a-43a. Where, as in IGRA, the stated intent of Congress is not ambiguous, the courts, "as well as the agency, must give effect to the unambiguously expressed intent of

Congress." *Id.*, at 41a (quoting *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). Because the Secretary's 1999 regulations contravened the intent of Congress, the court of appeals appropriately invalidated them.

In addition, the Secretary's attempt to rewrite IGRA violated the separation-of-powers and non-delegation doctrines by usurping Congress's authority to prescribe federal law. Cf. *Touby* v. *United States*, 500 U.S. 160, 164-65 (1991) ("Congress may not constitutionally delegate its legislative powers to another branch of Government."); *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987) (per curiam) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice."). Like the Court, the Secretary is not "free to rewrite the statutory scheme in order to approximate what [he thinks] Congress might have wanted had it known" that it was not able to subject States to tribal suits under IGRA. Cf. *Seminole Tribe*, 517 U.S., at 76. "If that effort is to be made, it should be made by Congress." *Ibid.*[7]

CONCLUSION

The Court should deny the petition for a writ of certiorari.

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7. The Tribe's severability argument likewise fails on its merits. IGRA continues to function as Congress intended—without the 1999 regulations—because IGRA does not permit gaming procedures that are inconsistent with state law, 25 U.S.C. §§2701(5), 2710(d)(7)(vii)(B)(I), and Texas state law prohibits casino gaming, see *supra*, at 8-9.

Respectfully submitted,

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