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A Rejection of State Efforts to Enforce Gaming Laws on Indian Lands in the Absence of a Tribal-State Compact

*Mark H. Reeves**

Ever since the Seminole Tribe of Florida opened the United States' first Indian bingo hall on its reservation lands near Hollywood, Florida on December 14, 1979,¹ state and municipal governments have attempted to assert jurisdiction over and enforce their own laws against gaming activity in Indian country. Such efforts, along with the resulting litigation and judicial decisions, quickly drew the attention of Congress. In 1988, after concluding that "existing federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands,"² Congress enacted the Indian Gaming Regulatory Act (IGRA) to "provide a statutory basis for the regulation of gaming by an Indian tribe."³

IGRA was intended, *inter alia*, to establish the primacy of tribal control and federal oversight of on-reservation gaming.⁴ At the same time, it was designed to provide an opportunity for states to play a limited role in the regulation of certain types of gaming and enforcement of the Act by successfully negotiating compacts with gaming tribes.⁵ In many instances, IGRA's regulatory framework and compacting process have worked well, if not seamlessly. Not all states, however, have proven willing to accept their necessarily and statutorily limited role in Indian country gaming. This includes states within the Eleventh Circuit, which are of particular interest to this symposium. The State of Florida agreed to a compact with the Seminole Tribe only after protracted litigation,⁶ and no compact is in place between the state and the Miccosukee Tribe. The State of Alabama has refused to enter into a compact with the Poarch Band of Creek Indians, choosing instead to file suit in an effort to apply state laws to gaming

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¹ *History—Seminoles Today*, SEMINOLE TRIBE FLA., <http://www.semtribe.com/History/SeminolesToday.aspx> (last visited Nov. 24, 2013) ("The opening of the Tribe's first high-stake bingo hall in Hollywood . . . was a national first.").

² 25 U.S.C. § 2701(3) (2014).

³ 25 U.S.C. § 2702(2) (2014).

⁴ *See* 25 U.S.C. § 2702 (2014).

⁵ *See* 25 U.S.C. § 2710(d) (2014).

⁶ *See* Part II. A, *infra*.

activity on the Tribe's trust lands without agreeing to a compact.⁷

This article examines the role that Congress envisioned and intended for states in the regulation of gaming activity in Indian country and the enforcement of gaming laws under IGRA. Part I provides a brief overview of the development of Indian gaming prior to IGRA and of IGRA itself. Part II discusses the post-IGRA experiences of the Seminole Tribe of Florida and the Poarch Band of Creek Indians, two federally-recognized Indian tribes based within the Eleventh Circuit, and some of the efforts by the states of Florida and Alabama to regulate or limit Indian country gaming activity post-IGRA. Part III analyzes IGRA's text, legislative history, and rationale to support the argument that Congress did not intend for IGRA to give states any role in enforcing gaming laws or regulating gaming activity on Indian lands beyond that expressly agreed to by tribes in the context of tribal-state compacts.

I. INDIAN COUNTRY GAMING AND RESULTING LITIGATION LEADS TO THE PASSAGE OF IGRA

A. Pre-IGRA Indian Gaming and Resulting Litigation

1. Litigation Over the Seminole Tribe's Florida Gaming Facility Sets the Stage.

Indian gaming, at least in the context that it generally is thought of today, began on December 14, 1979, when the Seminole Tribe opened a bingo hall on reservation lands near Hollywood, Florida, just south of Fort Lauderdale.⁸ Operating in the wake of recent Supreme Court decisions rejecting state taxing and civil regulatory authority over the on-reservation activities of Indians and Indian tribes,⁹ the Seminole Tribe openly disregarded Florida's statutory restrictions on the operation of bingo halls.¹⁰

When the Broward County sheriff threatened to make arrests for these violations of Florida's bingo statute, the Seminole Tribe filed suit in the United States District Court for the Southern District of Florida seeking to permanently enjoin the enforcement of Florida's bingo laws on the Tribe's

⁷ See generally Complaint, *Alabama v. PCI Gaming Auth.*, No. 29-CV-900057.00 (Cir. Ct. Elmore Cnty., Ala., Feb. 19, 2013).

⁸ See, e.g., *History—Seminole Today*, *supra* note 1.

⁹ See, e.g., *Bryan v. Itasca Cnty.*, 426 U.S. 373, 376-77 (1976); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 165 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

¹⁰ See *Seminole Tribe of Fla. v. Butterworth*, 491 F. Supp. 1015, 1016-17 (S.D. Fla. 1980), *aff'd*, 658 F.2d 310 (5th Cir. Unit B Oct. 1981).

reservation lands.¹¹ After satisfying itself as to the existence of jurisdiction, the District Court held that Florida's bingo statute imposed a civil regulatory scheme that was unenforceable on Indian lands under the rule set forth by the Supreme Court in *Bryan v. Itasca County*.¹² Accordingly, it granted the Tribe's motion for summary judgment and enjoined the sheriff's office from enforcing the state's bingo statute on Seminole reservation lands.¹³ The Eleventh Circuit affirmed, declaring that "states lack jurisdiction over Indian reservation activity until granted that authority by the federal government" and that the state had failed to identify any such grant of authority vis-à-vis the Seminole Tribe's on-reservation gaming activity.¹⁴

2. Indian Gaming Litigation Reaches the Supreme Court.

The Seminole Tribe's case was not the only Indian gaming litigation winding its way through the federal court system in the early 1980s. Several other tribes opened gaming facilities shortly after the Seminole Tribe's Hollywood-area bingo hall went into operation.¹⁵ Opening such facilities frequently led to litigation between tribes and state or local authorities.¹⁶ The most significant piece of this litigation in terms of legal precedent involved the Cabazon and Morongo Bands of Mission Indians in

¹¹ *Id.*

¹² *Id.* at 1020.

¹³ *Id.*

¹⁴ *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310, 312 (5th Cir. Unit B Oct. 1981). The focal point of the first round of litigation over the Seminole Tribe's gaming operations was whether Public Law 280, 67 Stat. 588, codified at 28 U.S.C. § 1360, 18 U.S.C. § 1162, constituted a congressional grant of authority for Florida to regulate the Tribe's on-reservation gaming. See *Seminole Tribe*, 658 F.2d at 312-13; *Seminole Tribe*, 491 F. Supp. at 1020. Public Law 280 is a federal statute allowing certain states, including Florida, to exercise criminal jurisdiction and very limited civil jurisdiction over conduct on Indian reservations. *Seminole Tribe*, 658 F.2d at 312-13. The Supreme Court held in *Bryan* that Public Law 280 does not "confer general state civil regulatory control over Indian reservations," so the question left for the district court and the Eleventh Circuit in the early Seminole cases was whether the Florida bingo statute was a civil regulatory law or a criminal one. See *Bryan*, 426 U.S. at 384; *Seminole Tribe*, 658 F.2d at 313. Both courts agreed that Florida's law was a civil regulatory one, and thus it was inapplicable on the Seminole Tribe's reservation lands. See *Seminole Tribe*, 658 F.2d at 314-15.

¹⁵ See, e.g., *Cabazon Band of Mission Indians v. Cnty. of Riverside*, 783 F.2d 900 (9th Cir. 1986) (holding that California's bingo statute was a civil regulatory law that did not apply to on-reservation tribal gaming), *aff'd*, 480 U.S. 202 (1987); *Barona Grp. of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982) (holding that California state and local laws governing bingo were civil regulatory statutes that were inapplicable to on-reservation gaming); *Oneida Tribe of Indians of Wis. v. Wisconsin*, 518 F. Supp. 712 (W.D. Wis. 1981) (holding that Wisconsin's bingo laws could not be enforced on the Oneida Tribe's reservation).

¹⁶ See *Bryan v. Itasca Cnty.*, 426 U.S. 373, 376-77 (1976); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 165 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); see also Section I. A (1) *infra*.

California. Like the Seminole Tribe, both the Cabazon and Morongo Bands (“the Bands”) opened gaming facilities on their reservation lands and operated them in a manner that was non-compliant with state and local laws regulating gambling.¹⁷ Facing the threat of legal action, the Bands filed suit in the United States District Court for the Central District of California seeking declaratory and injunctive relief to prevent Riverside County from enforcing a local ordinance ostensibly prohibiting the Bands’ gaming activities.¹⁸ The State of California intervened, arguing that the Bands’ gaming also violated state laws regulating bingo games, and the parties filed cross-motions for summary judgment.¹⁹ Both the District Court and the Ninth Circuit sided with the Bands, issuing and affirming a permanent injunction against the enforcement of state and local gaming laws on the Bands’ reservations.²⁰

Through the Ninth Circuit’s decision, the *Cabazon* litigation closely resembled the Seminole Tribe’s case and other, contemporary litigation over state and local governmental efforts to regulate on-reservation gaming activity.²¹ It became a landmark case, however, when the Supreme Court granted *certiorari* to definitively address the rising tide of tribal gaming litigation.²² Like the lower federal courts, the Supreme Court started from the foundational principles that “Indian tribes retain attributes of sovereignty over both their members and their territory . . . that tribal sovereignty is dependent on, and subordinate to, only the federal government, not the States . . . [and] that state laws may be applied to tribal Indians on their reservations [only] if Congress has expressly so provided.”²³ The Court rejected arguments by both the state and county that Congress had authorized state and local regulation of on-reservation tribal gaming either through Public Law 280²⁴ or the Organized Crime Control Act of 1970.²⁵ It also rejected the argument that the state’s interest in regulation of tribal bingo games—ostensibly to prevent the infiltration of organized crime—outweighed the compelling federal and tribal interests in

¹⁷ See *Cabazon Band*, 783 F.2d at 901.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 906.

²¹ See *Bryan v. Itasca Cnty.*, 426 U.S. 373, 376-77 (1976); *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 165 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); see also Section I. A (1) *infra*.

²² *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

²³ *Id.* (internal citations and quotations omitted).

²⁴ See *Bryan v. Itasca Cnty.*, 426 U.S. 373, 376-77 (1976); *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 165 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); see also Section I. A (1) *infra*.

²⁵ Pub. L. No. 91-452, 84 Stat. 937 (codified as amended at 18 U.S.C.A. § 1955). See *Cabazon Band*, 480 U.S. at 207.

tribal self-determination and economic development, such that it justified state regulation of the Bands' on-reservation gaming.²⁶ In the Court's view, the application of settled principles of federal Indian law inescapably led to the conclusion that state regulation of on-reservation gaming "would impermissibly infringe on tribal government"²⁷

B. IGRA—The Congressional Response to *Cabazon*

The Supreme Court's decision in *Cabazon* definitively established that on-reservation tribal gaming was a lawful and legitimate exercise of tribal sovereignty that escaped the reach of state and local regulatory laws, unless and until Congress expressly provided to the contrary. Congress already had considered comprehensive Indian gaming regulation well in advance of the *Cabazon* decision;²⁸ the Supreme Court's holding raised the profile of Indian gaming even higher. It was thus unsurprising when IGRA became law less than two years after the Supreme Court handed down *Cabazon*.²⁹

The opening section of IGRA set forth a number of important congressional findings underlying the Act. Congress found that federal law, as it existed post-*Cabazon*, did "not provide clear standards or regulations for the conduct of gaming on Indian lands."³⁰ It also affirmed that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal governments."³¹ Finally, Congress reaffirmed that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."³²

Based on these findings, Congress codified several purposes for IGRA. One was 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."³³ Another was "to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands [and] the establishment of Federal standards for gaming on

²⁶ *Cabazon Band*, 480 U.S. at 215-22.

²⁷ *Id.* at 222.

²⁸ See, e.g., H.R. REP. NO. 99-1920 (1985); H.R. REP. NO. 99-3130 (1985); Alex Tallchief Skibine, *The Indian Gaming Regulatory Act at 25: Successes, Shortcomings, and Dilemmas*, 60-APR FED. LAW. 35, 36 (2013).

²⁹ The Supreme Court handed down *Cabazon* on February 25, 1987; IGRA, Pub. L. 100-497, 102 Stat. 2467 (codified at 25 U.S.C. § 2701, *et seq.*), was enacted on October 17, 1988.

³⁰ 25 U.S.C. § 2701(3) (2014).

³¹ 25 U.S.C. § 2701(4) (2014).

³² 25 U.S.C.A. § 2701(5) (West, Westlaw Next through 2014 legislation).

³³ 25 U.S.C.A. § 2702(1) (West, Westlaw Next through 2014 legislation).

Indian lands . . . are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.”³⁴ Congress also declared the need and its intent to create a National Indian Gaming Commission (NIGC) to fulfill the federal government’s role in overseeing gaming in Indian country and implementing IGRA.³⁵

IGRA divides gaming on “Indian lands” into three classes, each of which is subject to a different level of extra-tribal oversight or regulation.³⁶ Class I gaming, which consists of “social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations,”³⁷ is left to the exclusive jurisdiction of tribes and is not even subject to IGRA.³⁸ Class II gaming, which IGRA defines as “the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith),” as well as certain card games when played in conformity with state laws allowing those card games, remains under tribal jurisdiction, but is subject to IGRA.³⁹ IGRA provisions applicable to Class II gaming provide for NIGC monitoring of gaming, mandate NIGC-approved tribal gaming ordinances, and restrict the use of net gaming revenues, among other things.⁴⁰ Class III gaming, a catch-all category is defined by IGRA as “all forms of gaming that are not Class I gaming or Class II gaming,” is subject to the most extensive regulation, including a limited level of state oversight.⁴¹ IGRA limits lawful Class III gaming to Indian country lands that are “located in a State that permits such gaming for any purpose by any person, organization, or entity,” and even then, such gaming must be “conducted in conformance with a tribal-state compact entered into by the Indian Tribe and the State.”⁴²

³⁴ 25 U.S.C.A. § 2702(3) (West, Westlaw Next through 2014 legislation).

³⁵ 25 U.S.C.A. § 2702(3) (West, Westlaw Next through 2014 legislation).

³⁶ IGRA defines “Indian lands” as “all lands within the limits of any Indian reservation; and . . . any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.” 25 U.S.C. § 2703(4) (West through 2014 legislation). The term “Indian country,” as used throughout this article, should be understood to have the same definition.

³⁷ 25 U.S.C.A. § 2703(6) (West, Westlaw Next through 2014 legislation).

³⁸ 25 U.S.C.A. § 2710(a)(1) (West, Westlaw Next through 2014 legislation).

³⁹ 25 U.S.C.A. § 2703(7)(A) (West, Westlaw through 2014 legislation). IGRA expressly excludes certain games, including “any banking card games, including baccarat, chemin de fer, or blackjack (21)” as well as “slot machines of any kind,” from its definition of Class II gaming. 25 U.S.C.A. § 2703(7)(B) (West, Westlaw Next through 2014 legislation).

⁴⁰ See 25 U.S.C.A. §§ 2706(b), 2710(a)(2)-(b) (West, Westlaw through 2014 legislation).

⁴¹ 25 U.S.C.A. § 2703(8) (West, Westlaw Next through 2014 legislation).

⁴² 25 U.S.C.A. §§ 2710(d)(1)(B)-(C) (West, Westlaw Next through 2014 legislation). IGRA also

By requiring tribes to successfully negotiate tribal-state compacts in order to conduct lawful Class III gaming, IGRA provides a limited opportunity for states to participate in the regulation of gaming activity on Indian lands. For example, the Act expressly provides that tribal-state compacts may include provisions relating to, *inter alia*, the application of state civil and criminal gaming laws on tribal lands and the allocation of state and tribal criminal and civil jurisdiction necessary to enforce those laws.⁴³ Importantly, however, IGRA seeks to preserve a balance of power between tribes and states. It imposes an obligation for states to negotiate in good faith when a tribe requests a compact, and it provides federal court jurisdiction over state actions to enjoin Class III tribal gaming on Indian lands only when such gaming is “conducted in violation of any tribal-state compact . . . that is in effect.”⁴⁴

Outside of enforcing mutually agreed-upon tribal-state compacts, IGRA does not articulate any role for states in Indian country gaming. Gaming tribes retain much authority,⁴⁵ and the remainder is vested in the federal government of the United States. Specifically, IGRA grants the NIGC a significant regulatory and enforcement role that includes the ability to level a wide panoply of civil fines and other penalties,⁴⁶ and it also includes a separately codified penal provision that incorporates state gambling laws “for purposes of federal law” and grants the United States Attorney General exclusive authority over the prosecution of criminal violations of IGRA.⁴⁷

While IGRA’s delegation and division of authority between tribes, states, and the federal government may seem straightforward, it has not proven so in practice. As discussed below, some states have fiercely resisted IGRA’s limitations on their role in Indian country gaming, and they have done so with varying degrees of success and legitimacy.

II. STATES ATTEMPT TO REGULATE INDIAN GAMING WITHOUT COMPACTS AFTER IGRA

The passage of IGRA did not end disputes between tribes and states over gaming in Indian country. It merely marked a new chapter with a new

imposes other prerequisites on tribes that would conduct Class III gaming, including, *inter alia*, the adoption of a tribal gaming ordinance or resolution that must be approved by the NIGC and the approval of any tribal-state compact by the Secretary of the Interior. *See* 25 U.S.C.A. §§ 2710(d)(2)(A), (d)(3)(B) (West, Westlaw Next through 2014 legislation).

⁴³ 25 U.S.C.A. §§ 2710(d)(3)(C)(i)-(ii) (West, Westlaw Next through 2014 legislation).

⁴⁴ 25 U.S.C.A. § 2710(d)(3)(A), (7)(A)(ii) (West, Westlaw Next through 2014 legislation).

⁴⁵ *See, e.g.*, 25 U.S.C.A. §§ 2710(a), 2713(d) (West, Westlaw Next through 2014 legislation).

⁴⁶ *See* 25 U.S.C.A. §§ 2706(a)(2), 2713(a)(1) (West, Westlaw Next through 2014 legislation).

⁴⁷ 18 U.S.C.A. §§ 1166(a), (d) (West, Westlaw Next through 2014 legislation).

set of rules to govern those disputes. While the experiences of various tribes throughout the United States in negotiating tribal-state compacts and conducting post-IGRA gaming are as varied and diverse as Indian country itself, this paper focuses on the experiences of those tribes based within the Eleventh Circuit states of Florida and Alabama.⁴⁸

A. Florida and Alabama Resist Compacting with Tribes

Shortly after the passage of IGRA, both the Seminole Tribe in Florida and the Poarch Band of Creek Indians in Alabama sought to negotiate Class III gaming compacts with their respective states. When neither tribe was able to successfully consummate an agreement, both filed suit in Federal Court seeking to enforce IGRA's mandate that states negotiate with tribes in good faith over Class III gaming.⁴⁹ Both states moved to dismiss, arguing that Congress lacked the authority to abrogate the states' Eleventh Amendment immunity from suit through IGRA.⁵⁰ The United States District Court for the Southern District of Alabama agreed and dismissed the Poarch Band's suit;⁵¹ the United States District Court for the Southern District of Florida held that Congress could and did abrogate Eleventh Amendment immunity through IGRA, so it denied Florida's motion to dismiss the Seminole Tribe's suit.⁵²

Unsurprisingly, both *Seminole Tribe* and *Poarch Band* made their way to the Eleventh Circuit, which consolidated the appeals.⁵³ The Appellate Court sided with the states, holding that: (1) they had not consented to the suit; (2) the Constitution's Indian commerce clause, pursuant to which Congress enacted IGRA, does not authorize Congress to abrogate a state's Eleventh Amendment immunity; and (3) the *Ex parte Young* doctrine, which creates a limited exception to sovereign immunity for certain suits against government officials, was inapplicable to the tribes' claims.⁵⁴ The Seminole Tribe sought and received *certiorari* from the Supreme Court, which affirmed the Eleventh Circuit's holdings.⁵⁵ The upshot of this

⁴⁸ There are no Indian country lands within the exterior boundaries of the State of Georgia. See BUREAU OF INDIAN AFFAIRS, INDIAN RESERVATIONS IN THE CONTINENTAL UNITED STATES, available at www.nps.gov/nagpra/documents/RESERV.PDF.

⁴⁹ See *Poarch Band of Creek Indians v. State*, 784 F. Supp. 1549, 1550 (S.D. Ala. 1992); *Seminole Tribe of Fla. v. State*, 801 F. Supp. 655, 656 (S.D. Fla. 1992); *Poarch Band of Creek Indians v. State*, 776 F. Supp. 550, 552 (S.D. Ala. 1991).

⁵⁰ See *Poarch Band*, 784 F. Supp. at 1550; *Seminole Tribe*, 801 F. Supp. at 656; *Poarch Band*, 776 F. Supp. at 553.

⁵¹ *Poarch Band*, 776 F. Supp. at 563.

⁵² *Seminole Tribe*, 801 F. Supp. at 657-58.

⁵³ *Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016, 1018 (11th Cir. 1994).

⁵⁴ *Id.* at 1022-29.

⁵⁵ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996). Interestingly, the Supreme Court's

litigation was that while tribes had a statutory right to enter into compacts with states, and states had a statutory obligation to negotiate with compact-seeking tribes in good faith, a tribe's ability to enforce these rights and obligations in federal court as Congress intended was severely curtailed, and states could refuse to enter into compacts with relative impunity.⁵⁶

B. Early Efforts by the State of Florida to Control Tribal Gaming Without Agreeing to a Compact

For years after the Supreme Court's *Seminole Tribe* decision, the Seminole Tribe and the State of Florida continued sporadic and largely unsuccessful discussions regarding a possible Tribal-State gaming compact.⁵⁷ At the same time, the Tribe carried on with gaming activities on its reservation lands. In 1996, despite not having agreed to a compact, the State of Florida filed suit in federal district court seeking to enjoin alleged Class III gaming on the Tribe's reservation on the grounds that such gaming violated both state and federal law.⁵⁸ Its complaint named as defendants both the Tribe itself and, seeking to take advantage of the *Ex parte Young* doctrine, the Tribe's Chairman, James Billie.⁵⁹ The State contended that the Tribe was operating Class III slot machines without a compact, in violation of IGRA, and in violation of state anti-gambling laws that were applicable in Indian country pursuant to IGRA's penal provision, 18 U.S.C. § 1166.⁶⁰

The Seminole Tribe and Chairman Billie moved to dismiss, arguing, *inter alia*, that they enjoyed sovereign immunity from the State's claims and that the state had failed to state a claim because IGRA did not grant it an implied right of action to enforce the Act against uncompacted, on-

analysis of the *Ex parte Young* doctrine differed materially from the Eleventh Circuit's, with the Supreme Court holding that such a remedy was displaced by the "detailed remedial scheme" that Congress created, as a part of IGRA, for the enforcement of IGRA's statutory rights and obligations. *See id.* at 73-76.

⁵⁶ States do not operate with complete impunity because regulations promulgated by the Secretary of the Interior pursuant to IGRA and in the wake of *Seminole Tribe*, 517 U.S. 44, provide a framework for the Secretary to issue gaming procedures ("Secretarial procedures") allowing a tribe to conduct Class III gaming in appropriate cases after a state has refused to enter into a compact and has asserted its sovereign immunity to obtain dismissal of a suit brought by the tribe under 25 U.S.C. § 2710(d)(7)(B). *See* FTC Class III Gaming Procedures Rule, 25 C.F.R. § 291.3(b), (d) (West, Westlaw Next through 2014 legislation). *But see* *Texas v. United States*, 497 F.3d 493, 511 (5th Cir. 2007) (holding that the Secretarial procedures regulations constitute an invalid exercise of authority and an unreasonable interpretation of IGRA, and are thus invalid and unenforceable). An in-depth discussion of the Secretarial procedures regulations is beyond the scope of this article.

⁵⁷ For a brief overview of the unhappy negotiations process, see Fla. H. of Rep. v. Crist, 999 So. 2d 601, 605-06 (Fla. 2008).

⁵⁸ *See* *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1239 (11th Cir. 1999).

⁵⁹ *Id.*

⁶⁰ *Id.* at 1239-40.

reservation gaming.⁶¹ The district court granted the motion, the State appealed, and the Eleventh Circuit affirmed.⁶² In so doing, the Court reiterated the settled law that tribes possess sovereign immunity from suit unless they waive such immunity or it is expressly abrogated by Congress.⁶³ Closely reading IGRA, the Court held that the Act included only a limited abrogation of tribal sovereign immunity from suits by states; one that applied “only in the narrow circumstance in which a tribe conducts class III gaming in violation of an existing tribal-state compact.”⁶⁴ Because Florida had not entered into a compact with the Seminole Tribe, it could not avail itself of IGRA’s limited abrogation of tribal sovereign immunity.⁶⁵ The Court further held that the Tribe had not waived its sovereign immunity, and that the *Ex parte Young* doctrine was inapplicable to a suit against the Tribe *qua* Tribe, so the State’s claims against the Tribe were properly dismissed.⁶⁶

With regard to the State’s claims against Chairman Billie, the Eleventh Circuit affirmed the district court’s dismissal due to the lack of an implied right of action under IGRA for a state to sue to enjoin alleged unlawful Class III gaming being conducted on Indian lands in the absence of a compact.⁶⁷ The Court, however, did not close the door completely on the idea of states suing to enjoin uncompact Class III gaming in Indian country. Instead, it noted the possibility that, as alleged in the State’s amended complaint, IGRA’s penal provision could be read to create an *express* right of action for states to sue to enjoin such gaming activity if it violated existing state laws.⁶⁸ The Court expressed skepticism of this reading of § 1166, noting that existing case law “engender[ed] some doubt about whether it would permit a state to bring an action in federal court” seeking to enforce state laws against a tribe’s on-reservation gaming activity, but it declined to rule on the question because the State had abandoned the argument.⁶⁹

⁶¹ *Id.* at 1240. The irony of the Seminole Tribe asserting sovereign immunity from the State of Florida’s IGRA-based claim was not lost on the Court, which opened its opinion by observing that “[t]his case . . . demonstrates the continuing vitality of the venerable maxim that turnabout is fair play.” *Id.* at 1239.

⁶² *Id.* at 1239.

⁶³ *Id.* at 1241.

⁶⁴ *Id.* at 1242.

⁶⁵ *Id.*

⁶⁶ *Id.* at 1243-45.

⁶⁷ *Id.* at 1245-46, 1250. The Court did not address whether Chairman Billie possessed sovereign immunity from the State’s suit or whether he would be subject to suit under the *Ex parte Young* doctrine because Chairman Billie did not assert a sovereign immunity defense on appeal. *See id.* at 1245 n.12.

⁶⁸ *See id.* at 1246 n.13 (citing 18 U.S.C. § 1166).

⁶⁹ *Id.* at 1246 n.13.

The Eleventh Circuit's ruling in *Seminole Tribe* comported with congressional intent for both tribes and states to have strong motivation to participate in the compacting process in good faith. There is reason to question whether the protracted negotiating process that culminated in a final tribal-state compact in 2010 would have taken place had the Court eviscerated the Tribe's negotiating position by effectively allowing the State to regulate the Tribe's on-reservation gaming activity without first agreeing to a compact.⁷⁰

C. Ongoing Efforts by the State of Alabama to Limit Tribal Gaming Without Agreeing to a Compact⁷¹

By and large, the Eleventh Circuit's 1999 *Seminole Tribe* decision constituted a resounding rejection of state efforts to control on-reservation tribal gaming activity in the absence of a tribal-state compact. But by leaving the door ever so slightly open to the possibility of state suits against tribes under 18 U.S.C. § 1166, the Court likely made further litigation inevitable.

In February of 2013, the State of Alabama picked up where Florida left off, filing suit in its own state court seeking to enjoin the Poarch Band of Creek Indians from conducting gaming on Indian lands based on a state law public nuisance theory.⁷² The Poarch Band promptly removed the case to federal court, at which point the State filed an amended complaint alleging, *inter alia*, that § 1166 made state laws applicable to gaming on Indian lands.⁷³ Accordingly, the State claimed, § 1166 gave it state and federal causes of action to enjoin gaming on Indian lands, even in the absence of a

⁷⁰ The Seminole Tribe and Florida Governor Charlie Crist first came to terms on a compact in 2007, but the State's House of Representatives brought a successful action challenging the governor's authority to enter into the compact without the state legislature's approval. *See* Fla. H. of Rep. v. Crist, 999 So. 2d 601, 603 (Fla. 2008). The final compact, bearing the approval of both the Florida legislature and the Secretary of the Interior, went into effect in 2010. *See* Notice of Approved Tribal-State Class III Gaming Compact, 75 Fed. Reg. 38,833 (July 6, 2010).

⁷¹ The author should disclose that he is one of the attorneys representing the Poarch Band of Creek Indians in its ongoing litigation with the State of Alabama. Any opinions expressed herein are the author's own, and should not be attributed to the Poarch Band of Creek Indians or any of the other attorneys representing that Tribe. *Id.*

⁷² *See* Complaint Alabama v. PCI Gaming Auth., No. 29-CV-900057.00 (Cir. Ct. Elmore Cnty., Ala., Feb. 19, 2013). Like the State of Florida when it filed suit against the Seminole Tribe, the State of Alabama had not entered into a tribal-state compact with the Poarch Band.

⁷³ *See* First Amended Complaint, State v. PCI Gaming Auth., Civil Action No. 2:13-CV-00178-WKW-WC, at 3-4 (M.D. Ala. Apr. 11, 2013), available at <http://ftpcontent4.worldnow.com/wsfa/linkedwebdocs/PCIGaming.pdf>. The State also alleged, in a separate line of argument, that the lands on which the Poarch Band of Creek Indians conducts its gaming activities should not have been taken into trust by the United States for the benefit of the Poarch band, and therefore should not be considered Indian lands for purposes of IGRA. *See id.* at 7. This argument raises additional issues that are beyond the scope of this article.

tribal-state compact, if that gaming activity would violate Alabama state law if it took place on state lands.⁷⁴

The Poarch Band moved to dismiss the State's amended complaint, arguing that IGRA leaves no room for the applicability of state laws to gaming activity on Indian lands and gives states no cause of action or any other vehicle for enforcing IGRA in the absence of a valid tribal-state compact.⁷⁵ On April 10, 2014, the United States District Court for the Middle District of Alabama dismissed the State's case in its entirety.⁷⁶ This case, which remains subject to appeal as of the date of this writing, should mark the last gasp of state efforts to control tribal gaming on Indian lands in the absence of a tribal-state compact, at least in the states encompassed within the Eleventh Circuit. As discussed in detail below, and as reflected in the district court's well-reasoned opinion in *PCI Gaming*, a thorough, contextual analysis of IGRA unequivocally establishes that, outside the context of a mutually agreed-upon compact, Congress intended for the regulation of gaming on Indian lands and the enforcement of IGRA (or other gaming laws) in Indian country to be left exclusively to gaming tribes and the federal government.

III. CONGRESS DID NOT INTEND FOR 18 U.S.C. § 1166, OR ANY OTHER PROVISION OF IGRA, TO AUTHORIZE STATES TO TAKE ACTION AGAINST INDIAN COUNTRY GAMING WITHOUT ENTERING INTO A TRIBAL-STATE COMPACT.

Numerous states, including those discussed *infra*, have tried to enjoin or otherwise regulate gaming activity in Indian country outside the context

⁷⁴ See generally *id.*

⁷⁵ See Consolidated Reply Brief in Support of Motion to Dismiss First Amended Complaint, *State v. PCI Gaming Auth.*, Civil Action No. 2:13-CV-00178-WKW-WC (July 22, 2013); Brief in Support of Tribal Defendants' Motion to Dismiss First Amended Complaint, *State v. PCI Gaming Auth.*, Civil Action No. 2:13-CV-00178-WKW-WC (M.D. Ala. May 9, 2013). See also United States *Amicus Curiae* Brief in Support of Tribal Defendants' Motion to Dismiss, *State v. PCI Gaming Auth.*, Civil Action No. 2:13-CV-00178-WKW-WC (June 5, 2013). Copies of these pleadings may be obtained through PACER or from the author. The Poarch Band raised additional arguments in its briefing, including a sovereign immunity defense, that are beyond the scope of this article. However, it is important to note that tribal sovereign immunity could bar state claims against tribes even if IGRA created a right of action that would encompass such claims. *Accord* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73-76 (1996); *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1239 (11th Cir. 1999).

⁷⁶ See *Alabama v. PCI Gaming Auth., Inc.*, 2014 WL 1400232 (M.D. Ala. April 10, 2014). The district court issued its decision during the interval between the submission of this article and its publication. As of the press date, the State of Alabama's appeal of the district court's decision is pending before the Eleventh Circuit Court of Appeals. See *Alabama v. PCI gaming Auth., Inc.*, No. 14-12004-DD (11th Cir. 2014). See Josh Moon, *Judge's Ruling Favors Creek Casinos*, MONTGOMERY ADVISOR, Apr. 12, 2014, available at <http://www.montgomeryadvertiser.com/article/20140412/NEWS02/304120030/Judge-s-ruling-favors-Creek-casinos>.

of tribal-state compacts since the enactment of IGRA. Such efforts are inconsistent with the statutory text of and congressional intent for the Act, and disrespect underlying principles of tribal sovereignty.

When it enacted IGRA, Congress was fully aware of the Supreme Court's longstanding recognition of tribal sovereignty and its recent reaffirmation of tribal authority—and the concomitant lack of state authority—over gaming on Indian lands in *Cabazon*. Against this backdrop, it goes without saying that Congress would have spoken very clearly where it intended to create new authority for states to control tribal gaming or otherwise exercise authority over tribal conduct on Indian lands. Indeed, Congress did speak clearly regarding states' limited ability to regulate tribal gaming through the compacting process that IGRA created.⁷⁷ It also spoke to states' ability to bring suit in Federal Court to enjoin Class III gaming activity on Indian lands when such activity violated an existing tribal-state compact.⁷⁸ But a close, contextual reading of IGRA's penal provision, the Act as a whole, and the Act's legislative history reveals no evidence of congressional intent to empower states to enjoin uncompact gaming or otherwise enforce gaming laws in Indian country; in fact, the opposite is true.

A. An Overview of 18 U.S.C. § 1166.

States seeking to establish enforcement authority over uncompact gaming on Indian lands often ground their arguments on IGRA's penal provision, 18 U.S.C. § 1166. Section 1166 provides that “for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.”⁷⁹ It then declares that the United States has “exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country”⁸⁰

Proponents of state enforcement authority over gaming on Indian lands contend that § 1166 allows states to bring a state law cause of action and/or creates a private, federal right of action to enjoin uncompact Class III gaming activity that would violate state laws if conducted on state lands. As explained *infra*, it does neither. Instead, § 1166 creates a body of

⁷⁷ See 25 U.S.C. § 2710(d) (2012).

⁷⁸ 25 U.S.C. § 2710(d)(7)(A)(ii) (2012).

⁷⁹ 18 U.S.C. § 1166(a) (2012). By its own express terms, § 1166 excludes from its definition of “gambling” all types of gaming except for uncompact, Class III gaming. See *id.* at § 1166(c).

⁸⁰ See *id.* § 1166(d) (2012).

federal law for the United States to enforce if it determines that a tribe is engaged in unlawful Class III gaming on Indian lands that are beyond the reach of state enforcement authority.

B. 18 U.S.C. § 1166 Does Not Authorize States to Enforce State Laws in Indian Country.

Even a cursory review of § 1166 gives lie to the notion that the statute allows states to enforce their own laws in Indian country or creates any state law cause of action to enforce IGRA. To the extent that § 1166 renders state law applicable to tribal gaming at all, it does so only “for purposes of Federal law.”⁸¹ Arguing that § 1166 makes state law *qua* state law applicable to gaming on Indian lands impermissibly reads this phrase out of the statute.

The better understanding of Congress’s incorporation of state gambling laws “for purposes of Federal law” in IGRA’s penal provision is that Congress intended to establish and delineate a body of federal criminal law governing uncompacted Class III gaming on Indian lands.⁸² Section § 1166, thus understood, perfectly complements the federal civil laws and enforcement authority set forth elsewhere in IGRA.⁸³ Taken together, IGRA’s penal and civil provisions give the United States the ability to take federal civil or criminal action against unlawful Class III gaming on Indian lands as it deems necessary and appropriate. Neither § 1166 nor any other provision of IGRA envisions or allows a state law cause of action against any Indian country gaming activity unless such a cause of action is provided for in a negotiated tribal-state compact.

C. The Text and Legislative History of IGRA as a Whole, Including 18 U.S.C. § 1166, Reveal No Congressional Intent to Create any Private, Federal Right of Action for Enforcement of the Act in the Absence of a Tribal-State Compact.

The claim that 18 U.S.C. § 1166 gives rise to a private, federal right of

⁸¹ 18 U.S.C. § 1166(a) (2012).

⁸² This comports with the well-settled understanding that IGRA preempts and displaces state laws with respect to gaming in Indian country. *See, e.g.,* Florida v. Seminole Tribe of Fla., 181 F.3d 1237, 1247-48, 1248 n.16 (11th Cir. 1999); Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla., 63 F.3d 1030, 1047 n.59 (11th Cir. 1995) (recognizing “the fact that Congress, by enacting IGRA, has expressly preempted the field in the governance of gaming activities on Indian lands”) (internal quotation and punctuation omitted); Gaming Corp. of America v. Dorsey & Whitney, 88 F.3d 536, 543-44 (8th Cir. 1996); United Keetoowah Band of Cherokee Indians v. Oklahoma, 927 F.2d 1170, 1181 (10th Cir. 1991) (“Congress has clearly occupied the regulatory field on Indian gaming.”). Any proposed reading of § 1166 that would create a purely state law cause of action to regulate gaming on Indian lands would be wholly inconsistent with this principle.

⁸³ *See, e.g.,* 25 U.S.C. §§ 2710, 2713 (2012).

action to enjoin allegedly unlawful, uncompacted gaming on Indian lands when such an action would be available under state law vis-à-vis gaming on state lands is also unpersuasive. This argument goes as follows: § 1166 incorporates state gambling laws “including but not limited to criminal sanctions” for purposes of federal law and makes those laws applicable in Indian country “in the same manner and to the same extent” that they apply elsewhere in the relevant state.⁸⁴ It then grants the United States the exclusive authority to bring criminal prosecutions for violations of those incorporated laws.⁸⁵ Therefore, proponents argue, § 1166 necessarily (but tacitly) creates an express, private right of action for states to enforce their civil gaming laws on Indian lands regardless of whether they have entered into a tribal-state compact.⁸⁶ This argument runs counter to the text, purpose, and legislative history of IGRA.

The text of § 1166 itself, even when read in isolation and apart from the remainder of IGRA, is silent on the matter of civil enforcement. The statute’s only express grant of enforcement authority is to the federal government, and then only for criminal prosecutions.⁸⁷ Section 1166 certainly does not explicitly identify a private, civil right of action for states to enjoin gaming on Indian lands outside the context of an enforceable tribal-state compact or to otherwise enforce IGRA.⁸⁸ Even the fiercest proponent of such a putative right must concede that it exists, if at all, by inference. But the remaining provisions of IGRA, as well as the Act’s legislative history, reflect a careful congressional balancing of power between states and tribes and provide a compelling argument against drawing such an inference.

The text and substance of IGRA as a whole demonstrate that Congress intended to empower and respect tribes, and to provide states with an extremely limited role in enforcing the Act.⁸⁹ Congress explicitly grounded

⁸⁴ 18 U.S.C. § 1166(a) (2012).

⁸⁵ 18 U.S.C. § 1166(d) (2012).

⁸⁶ 18 U.S.C. § 1166(a), (d) (2012). There is inherent contradiction in the idea of a tacit yet express right of action. The Eleventh Circuit’s definitive rejection of any implied right of action under IGRA to enjoin non-compact gaming forces proponents of a private right of action to enforce state gaming laws in Indian country to espouse this flawed construct at least within that Circuit. See *Seminole Tribe*, 181 F.3d at 1248.

⁸⁷ See 18 U.S.C. § 1166(d) (2012).

⁸⁸ *Accord* *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1059 (9th Cir. 1997) (“Outside the express provisions of a compact, the enforcement of IGRA’s prohibitions on Class III gaming remains the exclusive province of the federal government.”) (internal citations omitted); *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1177 (10th Cir. 1991).

⁸⁹ It is well-settled that courts, when interpreting statutory provisions, must “look to the provisions of the whole law, and to its policy.” *Durr v. Shinseki*, 638 F.3d 1342, 1349 (11th Cir. 2011) (“[I]n construing a statute, we do not look at one word or term in isolation, but instead we look to the entire statutory context.”) (internal quotations omitted). Accordingly, it is entirely appropriate to

IGRA on the inherent tribal authority to regulate gaming activity on Indian lands and the congressional intent to promote, *inter alia*, “strong tribal governments.”⁹⁰ It also declared that the purposes of IGRA included “the establishment of independent *Federal* regulatory authority for gaming on Indian lands [and] the establishment of *Federal* standards for gaming on Indian lands.”⁹¹ On the other hand, outside of the narrow context of suing to enforce agreed upon tribal-state compacts,⁹² Congress did not explicitly identify any role for states to play in enforcing the Act.

Interpreting one isolated section of IGRA as giving states unchecked authority to enforce their gaming laws in Indian country would undermine the declared purposes and obvious aims of the Act. It would weaken tribal governments by making them subject to state jurisdiction on their own lands without their consent, and it would allow for the inconsistent enforcement of non-federal gaming standards in Indian country. It would also destabilize the compacting process that IGRA plainly encourages; states with unfettered authority to enact whatever laws they choose, and to enforce those laws on Indian lands in the absence of a compact, would have less reason to participate in the compacting process in good faith.⁹³ The idea of a private, civil right of action for states to enforce their gaming laws on Indian lands in the absence of a compact is thus wholly inconsistent with IGRA’s statutory scheme as a whole.

IGRA’s legislative history further supports the idea that Congress did not intend for states to assume an enforcement role without first agreeing to a compact. As the Eleventh Circuit has observed, IGRA’s legislative history shows that Congress “struck a careful balance among federal, state, and tribal interests.”⁹⁴ This “careful balance” is reflected, *inter alia*, in the compacting process and in the reservation of IGRA enforcement authority to the federal government in the absence of a compact. The legislative

consider the other provisions of IGRA and the Act’s legislative history when attempting to divine the congressional intent behind 18 U.S.C. § 1166.

⁹⁰ See 25 U.S.C. §§ 2701(5), 2702(1) (2012).

⁹¹ 25 U.S.C. § 2702(3) (2012) (emphasis added).

⁹² 25 U.S.C. § 2710(d)(7)(A)(ii) (2012).

⁹³ Indeed, interpreting IGRA as giving states a private right of action to enforce their gaming laws on Indian lands without entering into a tribal-state compact would disincentivize state participation in the compacting process. A state’s enforcement authority under a tribal-state compact is necessarily limited to whatever is mutually agreeable to the compacting parties. If states enjoyed unchecked authority to enforce their gaming laws without entering into a compact, then doing so could only limit or, at best, maintain their preexisting authority. It is true that states could have other reasons for seeking a compact, but a misinterpretation of § 1166 would skew the balance of power and weaken tribes’ negotiation position even in those cases where states are amenable to a compact.

⁹⁴ *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1247 (11th Cir. 1991) (citing S. Rep. no. 100-446, at 5-6 (1988)). See generally *id.* at 1247-48 (discussing IGRA’s legislative history and the manifest congressional intent to limit state authority over gaming in Indian country).

history further shows that Congress was committed to respecting the rights and inherent authority of “two equal sovereigns”⁹⁵ and to the principle that it would not “unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities . . . unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands.”⁹⁶ It is simply impossible to square these congressional statements with the idea that § 1166, or any other provision of IGRA, created a private right of action for states to enforce their own, idiosyncratic civil gaming laws on Indian lands without tribal consent.

The text and legislative history of IGRA show Congress enacted both: (1) a federally administered civil and criminal enforcement scheme to address allegedly unlawful, non-compact gaming, and (2) a detailed compacting process that allows states to obtain regulatory and enforcement authority over gaming on Indian lands only with tribal consent.⁹⁷ Interpreting § 1166 to allow states to enforce their civil gaming laws on Indian lands without first entering into a tribal-state compact would marginalize the compacting process and reject entirely Congress’s carefully crafted, balanced approach. IGRA, taken in its entirety, compels the conclusion that states have no right of action to enforce gaming laws in Indian country outside the context of a tribal-state compact.

D. The Codification of § 1166 in Title 18 of the United States Code Further Indicates that Congress Did Not Intend for the Statute to Create Any Civil Right of Action.

As discussed *infra*, proponents of a private, civil right of action under 18 U.S.C. § 1166 seek support from the statute’s declaration that the United States has exclusive jurisdiction to bring criminal prosecutions for violations of federally incorporated state laws.⁹⁸ But the codification of § 1166 in the criminal title of the United States Code undermines any effort to infer a civil right of action; in addition to misconstruing the text of § 1166, this argument misapprehends the nature of the provision.

The placement of § 1166 in the criminal title of the United States Code

⁹⁵ S. REP. NO. 100-446, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083 (quoted in *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1248 (11th Cir. 1999)).

⁹⁶ *Id.* at 5-6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3077.

⁹⁷ See 25 U.S.C. §§ 2710, 2713 (1988). IGRA’s civil enforcement scheme is further, important evidence of congressional intent. While the Act does not evince any intent to allow state enforcement of the Act, it also does not envision a world in which gaming tribes can flaunt the law with impunity. Instead, the Act provides a number of ways in which the United States—as the superior sovereign to both tribes and states—can address unlawful gaming activities on Indian lands, including via criminal prosecution under applicable federal laws and civil fines and penalties, up to and including facility closure, levied by the NIGC. See 18 U.S.C. § 1166(d) (1988); 25 U.S.C. §§ 2710(d)(6), 2713 (1988).

⁹⁸ 18 U.S.C. § 1166(d) (1988).

reflects a conscious choice by Congress. All other provisions of IGRA, which include extensive civil remedies for violations of the Act, are codified in Title 25 of the Code.⁹⁹ As the Supreme Court has explained, a provision's placement in the civil code rather than the criminal code is evidence of "the legislature's manifest intent" that can be overcome only by "the clearest proof" of a contrary purpose.¹⁰⁰ Accordingly, absent "clearest proof" that Congress intended for § 1166 to create a civil right of action—of which there is none—the provision's placement in the criminal code is properly understood as evincing a congressional intent for the provision to be exclusively criminal in nature.¹⁰¹

In light of Congress's designation and understanding of § 1166 as a criminal statute, it makes perfect sense that it would refer to authority "over criminal prosecutions" when expressing its intent for the United States to have the exclusive authority to enforce the statute. The lack of a reference to civil enforcement authority constitutes not a tacit yet massive grant of authority to states, but rather an entirely predictable silence in a provision that Congress viewed as a federal criminal statute that would work in tandem with other, civil provisions of IGRA. This certainly is more logical than engaging in the mental gymnastics necessary to infer congressional intent to implicitly create a private, civil right of action for states to enforce a federal penal statute; particularly when such a right of action would fly in the face of Congress's expressed intent to respect tribal sovereignty, and to limit states' control over gaming on Indian lands absent tribal agreement.

E. Applicable Principles of Statutory Interpretation Support the Conclusion that There is No Private Right of Action to Enforce IGRA or State Gaming Laws in Indian Country.

As discussed *infra*, IGRA as a whole and § 1166 in particular cannot fairly be read as creating a private right of action for states to enforce

⁹⁹ See 25 U.S.C. §§ 2701-2721 (1988).

¹⁰⁰ *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (citations omitted) (internal quotations omitted); see also *Avila-Santoyo v. U.S. Att'y Gen.*, 713 F.3d 1357, 1360-61 (11th Cir. 2013). Additional evidence of congressional intent and understanding is drawn from Congress's labeling of the provisions in the bill that became IGRA. Section 23, which includes the provision now codified as § 1166, was labeled "Criminal Sanctions," while Section 14, which sets forth the NIGC's civil enforcement powers, was labeled "Civil Sanctions." See IGRA, Pub. L. No. 100-497, 102 Stat. 2467, 2482, 2487 (1988). When Congress applies such labels to provisions of a bill, the labels constitute "quite clear" evidence of legislative intent regarding the nature of those provisions. *United States v. Ward*, 448 U.S. 242, 248-49 (1980); see also *Sanders v. Allison Engine Co.*, 703 F.3d 930, 943 (6th Cir. 2012).

¹⁰¹ The statute's incorporation into federal law of state laws "including but not limited to criminal sanctions" does not constitute clear proof of a congressional intent for § 1166 to create a civil right of action. That language is better understood as incorporating into federal law a state's prescribed criminal penalties in addition to its other substantive criminal laws, such as the definitions of offenses.

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gaming laws on Indian lands outside the context of a tribal-state compact. To the extent that the text and statutory history of IGRA leave any room for doubt, however, such doubts are easily resolved by applying the widely recognized Indian canons of statutory construction.

When interpreting statutes pertaining to Indians, it is well-settled that “[] traditional notions of Indian sovereignty provide a crucial backdrop against which any assertion of State authority must be assessed.”¹⁰² In this case, the backdrop of tribal sovereignty is particularly relevant, as IGRA was enacted in the immediate aftermath of the Supreme Court’s holding that gaming on Indian lands constitutes a valid exercise of tribal sovereignty over which states have no inherent authority.¹⁰³ While Congress had the power to change the status quo by authorizing private civil actions against Indian tribes, it provided no “clear indication[] of legislative intent” to do so.¹⁰⁴ Accordingly, the backdrop of tribal sovereignty should give considerable pause to any court that is asked to infer a tacit right of action for states to enforce gaming laws on Indian lands outside the scope of a tribal-state compact.

The backdrop of tribal sovereignty is not the only tool of statutory interpretation that compels a pro-tribe reading of § 1166. Another universally recognized and uniquely applicable canon of construction mandates that any ambiguity in statutes enacted for the benefit of Indians be resolved in favor of Indians.¹⁰⁵ IGRA is such a statute.¹⁰⁶ Accordingly, even if § 1166 were vague, and subject to multiple fair interpretations, any ambiguity must be resolved in favor of the Act’s intended Indian beneficiaries, and against the existence of a private right of action for states to enforce gaming laws on Indian lands.

IV. CONCLUSION

The proper role of states in regulating gaming activity on Indian lands

¹⁰² *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) (citations omitted) (internal quotation marks omitted).

¹⁰³ *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-22 (1987); *see also infra*, Part I.B.

¹⁰⁴ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). In fact, as discussed *infra*, the Act’s statutory text as a whole, its legislative history, and the codification of § 1166 within the criminal code overwhelmingly indicate Congress’s intent not to allow such actions.

¹⁰⁵ *See, e.g., Artichoke Joe’s Cal. Grand Casino v. Norton*, 353 F.3d 712, 730 (9th Cir. 2003) (applying the Indian canons of construction to IGRA); *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1179 (10th Cir. 1991); *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 366-67 (8th Cir. 1990) (citing legislative history indicating that this Indian canon of statutory construction should apply in any IGRA-related litigation).

¹⁰⁶ *See e.g., Artichoke Joe’s Cal. Grand Casino*, 353 F.3d at 730; *United Keetoowah Band of Cherokee Indians*, 927 F.2d at 1179; *Sisseton Wahpeton Sioux Tribe*, 897 F.2d at 366-67.

has been a source of struggle and controversy since the very first days of modern tribal gaming. Through IGRA, Congress intended to put that controversy to rest, or at least to create a framework through which states and tribes, as equal sovereigns, could respectfully resolve it. Congress most certainly did not intend, as some states in effect have argued, for IGRA to undercut tribal authority by subjecting sovereign tribal lands to state laws and state enforcement jurisdiction without tribal consent.

At best, any argument supporting a supposed private right of action for states to enforce their gaming laws in Indian country without tribal consent relies on inferences that are inconsistent with the text, structure, and legislative intent of IGRA. Such inferences also would be at odds with a sizeable body of federal case law and the rules of statutory construction mandating that IGRA be construed in the light most favorable to Indian tribes and against the backdrop of inherent tribal sovereignty. More plainly stated, such arguments rely on inferences that are unsupportable. States that wish to enforce their laws with respect to gaming activity on Indian lands may do so with tribal consent and agreement or not at all.