CERTIFICATE OF INTERESTED PERSONS

As a governmental party, Intervenor-Defendant-Appellee Kickapoo Traditional Tribe of Texas is not required to furnish a Certificate of Interested Persons pursuant to Fifth Circuit Local Rule 28.2.1.

STATEMENT PURSUANT TO RULE 35(b)(1), FED. R. APP. P.

On August 17, 2007, a three-judge panel of this Circuit issued a ruling involving several interrelated questions of exceptional importance regarding the Indian Gaming Regulatory Act ("IGRA") and administrative law. The Court's ruling lacks a majority opinion on the substantive issues, is inconsistent with decisions of other circuits and the Supreme Court, and denies the tribe a key tool for becoming economically self-sufficient.

First, the ruling leaves unclear the Fifth Circuit's position on a key doctrine of administrative law: whether a federal agency with delegated authority under a statute may fill a gap in that statute that was unintended by Congress. Chief Judge Jones' opinion on this point is contrary to well-established Supreme Court administrative law (*Chevron v. Natural Resources Defense Council,* 467 U.S. 837 (1984) and *United States v. Mead Corp.*, 533 U.S. 218 (2001)).

Second, the ruling is contrary to the two other circuits that have held that Congress intended for tribes to have a remedy against states that refuse to participate in the IGRA statutory process and that the continued availability of the Procedures remedy is necessary to effectuate Congress's intent where the judicial remedy is declared void as applied to an unconsenting state (*see Seminole Tribe of Florida v. Florida*, 11 F.3d 1016,

1029 (11th Cir. 1994); *United States v. Spokane Tribe*, 139 F.3d 1297, 1301-02 (9th Cir. 1998)). The panel's reasoning and result stand in direct contrast to the Supreme Court's well-established severance doctrine (set out in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987)), which required the Court to either hold that the Secretary was authorized under IGRA or 25 U.S.C. §§ 2 and 9 to fill the resulting gap, or, if finding that he was not, to declare void the IGRA requirement that a tribe must have a compact with a state to conduct class III gaming.

Negating the remedial framework while leaving the compact requirement in effect – the result of the panel's decision – would leave the statute operating in a manner fundamentally at odds with the intent of Congress. The panel's failure to meet its obligation under the *Alaska Airlines* severance doctrine has, impermissibly, resulted in a judicial rewrite of the statute. The ruling leaves Indian tribes without any remedy against states who choose to not act in "good faith" as required by IGRA, creating an unintended state veto power over Indian class III gaming and depriving tribes of a pre-existing right the statute intended to protect.

Rehearing *en banc* is necessary in these circumstances.

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STATEMENT OF THE ISSUES MERITING REHEARING *EN BANC*

The central issue in this case is the ability of an agency charged with administering a statute to fill a gap unintentionally left by Congress in that statute, particularly where, as here, the agency's means of filling that gap is a reasonable and necessary saving construction of the statute. The gap in the statute at issue, the Indian Gaming Regulatory Act (IGRA), concerns Congress's remedial framework, and specifically the Secretary of Interior's ability to give meaning to a distinct component of that remedial framework (Secretarial "procedures" to govern Indian class III gaming) when a separate component of that framework (a judicially mandated compact) is declared void as applied to an unconsenting state. Moreover, if the Court finds that the Secretary is not able to fill that gap so that the Secretarial procedures, remains available as a remedy, then the Court is obliged, under the Supreme Court's severance doctrine, to strike down the entirety of the statute's class III requirements that tribes must have a compact with a state to conduct such gaming, since keeping such a requirement while negating the tribes' remedy against states that refuse to negotiate or negotiate in good faith wholly undermines Congress's intent in providing for a balanced scheme of facilitating and regulating Indian gaming.

The panel's decision implicates the following issues that merit *en banc* review: (1) whether an agency with delegated authority under a statute may fill an unintended gap revealed by a subsequent court decision; (2) whether the Department of the Interior, the federal agency with delegated authority under IGRA's statutory scheme as well as under statutes giving the agency general authority to regulate Indian affairs (25 U.S.C. §§ 2, 9), may fill a gap in that statute to ensure that IGRA functions as Congress intended, consistent with the reasoning of the two other circuit courts that have addressed the same underlying questions[1]; and (3) if the agency cannot do so, whether the panel, consistent with the Supreme Court's severance analysis,[2] should have declared void IGRA's imposition of a tribal-state compact as a prerequisite to tribes exercising their right to conduct class III gaming.

STATEMENT OF COURSE OF PROCEEDINGS

The State filed this case seeking a declaration and injunction against the IGRA Procedures Regulations promulgated by the Secretary. 25 C.F.R. Pt. 291 (2007). The Tribe intervened as a party defendant. On March 30, 2005, the District Court held that the State's case was not ripe and that the

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1 *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994); *United States v. Spokane Tribe*, 139 F.3d 1297, 1301-02 (9th Cir. 1998).

2 *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987).

Secretary had the authority to promulgate the Regulations, dismissing the State's case without prejudice. *Texas v. United States*, 362 F. Supp. 2d 765 (W.D. Tex. 2005). The State appealed. On August 17, 2007, this Court issued a decision, with all three panel judges writing separately. *Texas v. United States,* 497 F.3d 491 (5th Cir. 2007). Chief Judge Jones delivered the opinion of the Court holding that the State's cause of action was justiciable, but there was no majority opinion to explain the panel's decision that the Secretary lacked authority to promulgate the Regulations. Judge King wrote separately to join the ruling but materially differed with Judge Jones' reasoning. Judge Dennis wrote a comprehensive dissent. This petition has been timely filed.

STATEMENT OF FACTS

In 1987, the Supreme Court affirmed the longstanding judicial precedent that states lack regulatory authority over Indian tribes absent a specific congressional grant of such authority and held that Congress had never granted such authority to states over gaming on Indian lands.[3] Congress enacted IGRA in 1988, codifying the *Cabazon* analysis and fashioning a carefully balanced regulatory compromise between Indian tribes' pre-existing right to conduct gaming free of state regulation and the

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[3] *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

states' desire to exercise authority in this area. 25 U.S.C. § 2701 *et seq.* (2000). IGRA contains a limited opportunity for states to participate in the regulation of what the Act defines as "Class III" Indian gaming.[4] This opportunity is expressly conditioned upon a state's participation in IGRA's statutory scheme, which requires the state to negotiate a compact in good faith with the tribe. 25 U.S.C. § 2710(d).

Congress included a remedial framework for tribes faced with states that refused to negotiate or negotiate in good faith. 25 U.S.C. § 2710(d)(7)(A)(i), (B)(i). The remedial framework involves two distinct and sequential components. The first component authorizes the tribe to sue the state in federal court, in which the state has the burden of demonstrating that it negotiated in good faith; if the state fails to meet its burden, mediation and negotiation of a compact is mandated. 25 U.S.C. § 2710(d)(7)(B)(iii - vi). The second component is triggered when the state refuses to consent to the compact chosen at the conclusion of the litigation process, at which point the statute *requires* the Secretary of the Interior to prescribe "procedures" in lieu of a compact under which the tribe can conduct class III gaming. 25 U.S.C. § 2710(d)(7)(B)(vii).

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[4] Under IGRA, Class III gaming includes lotteries, casino-style games, pari-mutuel wagering on dogs and horses, and certain types of gambling devices. *See* 25 U.S.C. § 2703(6)-(8).

The Kickapoo Tribe sought to exercise its rights under IGRA to offer those forms of class III gaming permitted by the State of Texas. 25 U.S.C. § 2710(d)(1)(B).[5] In 1995, the State rejected the Tribe's request to negotiate a class III compact, and the Tribe filed suit pursuant to IGRA on October 13, 1995. *See Texas*, 362 F. Supp. 2d at 767. Rather than attempt to demonstrate that its refusal to negotiate was in "good faith," the State had the Tribe's lawsuit dismissed on sovereign immunity grounds pursuant to *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996) (holding that IGRA's judicial remedy provisions waiving state sovereign immunity could not be constitutionally applied to an unconsenting state).

The *Seminole* decision revealed an unintended gap in IGRA: where a state refuses to participate in the statutory framework by affirmatively blocking – through its Eleventh Amendment immunity – the operation of the judicial remedy component. This gap could have resulted in an unintended state veto over tribal gaming, directly at odds with the letter and intent of IGRA, a result the ultimate statutory remedy component of Secretarial procedures was intended to prevent. The Secretary, however, responded to

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[5] Both the court below and the Secretary of Interior have found that Texas permits a broad range of class III gaming. *Texas v. United States,* 362 F.Supp.2d 765, 772, n. 8; U.S. Department of the Interior, May 24, 2007, Preliminary Scope of Gaming Decision, George Skibine, Acting Principal Assistant Secretary – Indian Affairs, to Juan Garza, Jr., Kickapoo Tribal Chairman, submitted to the court on June 18, 2007. The scope of class III gaming that should be allowed to the Tribe is not at issue in this case.

this gap by promulgating the Procedures Regulations at issue, consistent with the Eleventh Circuit's saving construction of IGRA in the *Seminole* case. 11 F.3d 1016, 1029 (11th Cir. 1994). The Procedures Regulations (which closely follow the process Congress established to provide thorough opportunity for the state to participate and protect its position regarding state law) are available to a tribe if, *and only if*, the State refuses to consent to the "good faith" suit and has the suit dismissed on sovereign immunity grounds. 25 C.F.R. §291.3(d), (e).

On December 11, 2003, the Tribe applied for Secretarial Procedures. (3 ROA 00448.) On January 12, 2004, the Secretary invited the State to comment on the Tribe's proposal and submit an alternative. (5 ROA 00970; 3 ROA 00450, 00459, 00461.) The State rejected the offer to participate, and instead filed this lawsuit.

ARGUMENT AND AUTHORITIES

The panel's decision strikes down the saving construction of IGRA's class III provisions but, incongruously, leaves the tribal-state compact requirement standing, giving the state an unintended absolute veto over tribal gaming. The ruling is inconsistent with the decisions of the two other circuits to have considered the issue, and is inconsistent with both other circuits and the Supreme Court on the underlying issues of administrative

law. The panel's ruling is flawed and, with three separate opinions on the merits, creates confusion about the Circuit's position on critical legal points.

1. <u>The Panel's Ruling Conflicts with *Chevron* and its Progeny</u>.

The panel's ruling, and in particular the Chief Judge's opinion, creates a split among the circuits and diverges substantially from existing Supreme Court authority on an agency's ability to fill an unintended statutory gap. As both Judge King and Judge Dennis accurately note, four other Circuits have rejected the assertion, which forms the basis of the Chief Judge's opinion, that a judicial interpretation of a statute cannot lead to an ambiguity or gap subject to the *Chevron* step-two analysis.[6] This assertion is also inconsistent with Supreme Court doctrine on the ability of a court to declare a gap in a statute which an agency can fill under *Chevron.* As Judge Dennis accurately notes, "Under the prevailing Supreme Court view, the ambiguity or gap in the IGRA was created by Congress when it unintentionally chose and enacted a constitutionally ineffectual tribal remedy, and not by the Court in the *Seminole* decision." Dissent, 497 F.3d at 515 (*citing Harper v. Va. Dep't*

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[6] *See, e.g., Pittston Co. v. United States*, 368 F.3d 385, 403-04 (4th Cir. 2004); *Sidney Coal Co., Inc. v. Soc. Sec. Admin.*, 427 F.3d 336, 346- 48 (6th Cir. 2005); *Elgin Nat'l Indus., Inc. v. Barnhart,* Nos. 04-5243, 04-7094, 2005 U.S. App. LEXIS 7361, at *1 (D.C. Cir. Apr. 27, 2005) (unpublished); *A.T. Massey Coal Co. v. Holland*, 472 F.3d 148, 168 (4th Cir. 2006); *United States Steel Corp. v. Astrue*, 495 F.3d 1272,1288-89 (11th Cir. 2007).

of Taxation, 509 U.S. 86, 97 (1993)); *see also Hulin v. Fibreboard Corp.*, 178 F.3d 316, 329-33 (5th Cir. 1999).

Chief Judge Jones also incorrectly asserts that Congress must be able to envision a future gap or ambiguity, as well as the particular approach the agency may employ in response, before it can be considered to come within the scope of the agency's rulemaking authority. This assertion directly contradicts *Mead* and *Chevron*.[7]

As the Supreme Court has noted, "[t]he power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, *implicitly* or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (emphasis added). The Court must accept the Secretary's interpretation if: (1) Congress has not previously spoken directly to the issue; (2) if the agency has been delegated authority under the statute and (3) the agency's interpretation is reasonable. *Mead*, 533 U.S. at 229.[8]

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[7] *See* Dissent, 497 F.3d at 516 (*citing Mead*, 533 U.S. at 229, and *Chevron*, 467 U.S. at 843-44). *See also Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 169 (2003) (noting a "case unprovided for" could render a portion of a statute ambiguous or meaningless, requiring an agency to exercise its policy making function to remedy that ambiguity).

[8] The Fifth Circuit has recently held that where an agency fills a gap in a statute that serves to advance the statute's "remedial purpose," the agency's construction "must be given considerable weight." *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 740 and n. 6 (5th Cir. 2005). Here, the Secretary's Procedures Regulations are necessary to

In this case, Congress did not speak directly to the issue because it did not foresee a state's ability to assert Eleventh Amendment immunity to avoid its burden of demonstrating that its refusal to participate in IGRA was in "good faith." 25 U.S.C. § 2710(d)(7)(B)(ii).[9] Congress's imposition of this burden on the state is an integral part of a remedial framework specifically designed to avoid state veto power over tribal class III gaming. *Spokane*, 139 F.3d at 1302; S. REP. NO. 100-446, at 13 (1988); (4 ROA 00741.) Part of the substantial authority delegated to the Secretary under IGRA, however, is the authority to issue the ultimate remedy of class III gaming procedures where a state fails to participate in the IGRA framework. Moreover, such authority is consistent with the general authority delegated to the Secretary to regulate Indian affairs. 25 U.S.C. §§ 2, 9. The Secretary's exercise of this authority by promulgating the Procedures Regulations to fill the unintended gap was reasonable, since by refusing to participate at all in the judicial remedy, the State fails *per se* to meet its burden of demonstrating that it has acted in "good faith." The Court's rejection of the Procedures Regulations fails to give proper deference to the "reasonable interpretation" made by the

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advance the remedial provisions of IGRA but his construction of the statute has been given no weight by the panel decision.

[9] *See Spokane*, 139 F.3d at 1300 (quoting Senator Inouye, one of IGRA's sponsors, as stating "if we had known that this proposal of tribal state compacts that came from the States and was strongly supported by the States, would later be rendered virtually meaningless by the action of those states . . . we would not have gone down this path").

Secretary to fill the statutory gap exposed by the Supreme Court's *Seminole* decision. *Chevron*, 467 U.S. at 844.

2. The Panel's Ruling Fails to Apply the Judicial Severance Doctrine, Thus Destroying the Tribe's Ability to Conduct Class III Gaming When Faced with a Recalcitrant State, Directly Contrary to Congress' Intent.

The panel's decision also fails to meet the obligation placed upon the Court by the Supreme Court's severance doctrine. As articulated in *Alaska Airlines*, 480 U.S. at 685, where a statute is judicially severed it must be done in such a way to ensure that "the statute will function in a *manner* consistent with the intent of Congress" (emphasis in original); if this cannot be done, the statute must be declared invalid. By failing to meet this obligation, the Court's ruling conflicts with the other circuit courts that have addressed this issue, and thus warrants *en banc* review. Fed. R. App. P. 35(b)(1)(B).

The IGRA granted states a limited, conditional opportunity to participate in the regulation of Indian gaming they previously lacked. The IGRA's legislative history demonstrates that Congress did not intend for states to have a veto over tribal gaming. For this reason Congress enacted the remedial provisions of the IGRA, including the ultimate remedy of Secretarial procedures, to ensure that tribal rights would be protected:

> 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 or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.

See S. REP. NO. 100-446, at 13; (4 ROA 00741.)

Therefore, under the severance doctrine, when one component of the remedial process – the "good faith" lawsuit – is declared void where the state refuses to participate, the remedy of Secretarial procedures must remain in place as a saving construction of the statute to ensure that the statute continues to operate in the manner intended by Congress. The Eleventh Circuit has already expressly held, in severing the judicial remedy provision of IGRA, that the Secretary has both the power and the duty to issue procedures under the circumstances provided for in the Regulations at issue:

> The answer, gleaned from the statute, is simple. One hundred and eighty days after the tribe first requests negotiations with the state, the tribe may file suit in district court. If the state pleads an Eleventh Amendment defense, the suit is dismissed, and the tribe, pursuant to 25 U.S.C. Sec. 2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state. The Secretary then may prescribe regulations governing class III gaming on the tribe's lands. This solution conforms with IGRA and serves to achieve Congress' goals, as delineated in Secs. 2701-02.

Seminole, 11 F.3d at 1029. Only by determining that a tribe could go directly to the Secretary for procedures did the court find that the class III compact requirements could stand under a traditional severance analysis.

Id.[10] It thus recognized the ultimate remedy of Secretarial procedures as a saving construction necessary to preserve congressional intent.[11]

The Ninth Circuit Court of Appeals ultimately agreed with the Eleventh Circuit's rationale in the *Spokane* case, rejecting its earlier criticism. *Spokane Tribe*, 139 F.3d at 1302 ("the Eleventh Circuit's suggestion is a lot closer to Congress's intent than mechanically enforcing IGRA against tribes even when states refuse to negotiate"). Thus, the two circuit courts which have previously addressed the issue both agree that it is proper to sever the unsound portions of IGRA with a saving construction that maintains the Secretary's authority to fill the gap in IGRA's remedial framework. *See also Santee Sioux Nation v. Norton,* No. 8:05 CV147, 2006 WL 2792734 at *6 (D. Neb. Sept. 26, 2006).

Furthermore, the panel's decision failed to address the severance doctrine and the impact of its ruling on the validity of the remaining

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[10] Although requested to do so by the States of Florida and Alabama, the Supreme Court did not address the decision of the Eleventh Circuit on this issue, and it thus remains the law of that Circuit. *Seminole Tribe of Florida*, 517 U.S. at 76, n.18. *See also Florida v. Seminole Tribe of Florida*, 517 U.S. 1133 (1996) (rejecting separate certiorari petition on this issue).

[11] Contrary to a previous assertion by the State of Texas, the Eleventh Circuit's determination that the Secretary has the authority to issue procedures was not *dictum* since it was a central and necessary part of the court's decision. *See Gochicoa v. Johnson,* 238 F.3d 278, 286 n.11 (5th Cir. 2000)(a statement is *dictum* only if it "could have been deleted without seriously impairing the analytical foundations of the holding"). As noted by the court: "The final *question we must resolve* is whether all provisions for state involvement in class III gaming also fail, as the tribes contend. We *hold* that they do not." *Seminole*, 11 F.3d at 1029 (emphases added).

provisions of IGRA, even though the Tribe has consistently argued throughout this case that *Seminole's* limited severance of IGRA's judicial remedy mechanism requires the continued availability of the procedures remedy as a saving construction of the statute.[12] In the alternative, and as a necessary corollary to this argument, the Tribe also argued that if the Secretary cannot fill the gap in IGRA's remedial framework for tribes that face unconsenting states, then the entirety of IGRA's class III requirements must be declared void as applied when the state refuses to participate in the IGRA remedial process. The panel, however, failed to address these well-established and long-standing severance principles set forth by the Supreme Court and to discharge its obligation under those principles.

The most relevant inquiry in evaluating severability is whether the statute will continue to function in a manner consistent with the intent of Congress. *Alaska Airlines*, 480 U.S. at 685. If IGRA were left without a remedy for tribes (which, as the Chief Judge and Judge King both acknowledge, is the result of the panel's ruling)[13], the statute will no longer

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[12] *See* Tribe's Brief in Opposition to Preliminary Injunction (March 26, 2004) at 8 – 9 (ROA 00220 – 21); Tribe's Brief in Support of Motion to Dismiss and for Summary Judgment (August 18, 2004) at 31 – 39 (ROA "Document #50"); Tribe's Response to State's Motion for Summary Judgment (August 18, 2004) at 10 (ROA 00809); Tribe's Summary Judgment Reply Brief (September 7, 2004) at 3 (ROA (00877); Transcript of Summary Judgment Hearing (October 26, 2004) at 52:22 – 58:16 (ROA Volume 7); Tribe's Fifth Circuit Appellate Brief (August 23, 2005), at 46 – 50.

[13] *See* Chief Judge Opinion, 497 F.3d at 504; Judge King's Concurrence, *id.* at 512.

function in the manner intended by Congress, as the Ninth and Eleventh Circuits have already held. *Spokane Tribe*, 139 F.3d at 1301-02; *Seminole*, 11 F.3d at 1029.

After the Supreme Court's *Seminole* decision, the continuing availability of the Secretarial procedures remedy is the only thread holding IGRA's class III provisions together when a state refuses to negotiate and refuses to consent to a tribe's suit. Removing this remedy would result in the statute no longer functioning in the manner intended by Congress, and therefore the remedy cannot be removed from the statute without its class III provisions being held invalid. *Alaska Airlines,* 480 U.S. at 684; *Seminole*, 11 F.3d at 1029.[14] The Court's decision therefore failed to meet the obligation to declare that IGRA's class III provisions are invalid because an essential component of this delicately balanced and intricate remedial framework (the judicial remedy) is unconstitutional, or, in the alternative, remand this question to the District Court for further proceedings. Doing so

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[14] While IGRA has a severability clause (25 U.S.C. § 2721) that clause merely creates a rebuttable presumption against the need to declare the entire statute invalid, *Alaska Airlines, Inc.* 480 U.S. at 686, and does not address the issue here, which is the need to strike down a portion of the statute. Moreover, this presumption of severability, even if applicable, would be overcome here because the limited severance by the panel will result in a statutory scheme (1) that no longer functions in the manner Congress intended, (2) that bears little resemblance to the scheme enacted by Congress, and (3) that would not be fully operative as a law. *Id.* at 684-85. *See also Confederated Tribes of Colville Reservation v. Washington,* No. CS-92-0426, slip op. at 4-5 (E.D. Wash. June 4, 1993); (ROA, Attachments to Doc. #50, Exh. 11) (striking down IGRA class III provisions in absence of remedy for tribes).

would return tribal gaming to the bright line analysis existing under *Cabazon*, 480 U.S. 202, and the State would have no regulatory authority over Indian gaming unless and until Congress grants it. The Court must address this issue.

CONCLUSION

The panel has issued a fractured decision, with no majority opinion on an issue of exceptional importance. The decision deprives the Tribe of its pre-existing right, codified by IGRA, to use class III gaming as a means of developing economic self-sufficiency, contrary to the letter and spirit of IGRA, and contrary to the decisions of the other Circuits to have considered the question. Further, the panel has not addressed the fundamental statutory severance issue placed directly before it. The Tribe respectfully requests that the Fifth Circuit rehear this matter *en banc*.

Respectfully Submitted,

November 8th, 2007

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I hereby certify that two true and correct paper copies of the foregoing Petition have been sent via regular mail to the following parties on this the 8th day of November, 2007.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

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Dated: November 8, 2007