E-Filed
01/24/2013 @ 11:03:05 AM
Honorable Robert Esdale
Clerk Of The Court

No. 1111250

IN THE SUPREME COURT OF ALABAMA

JERRY RAPE,

Appellant,

v.

POARCH BAND OF CREEK INDIANS, ET AL.,

Appellees.

BRIEF OF THE STATE OF ALABAMA AS AMICUS CURIAE IN SUPPORT OF APPELLANT JERRY RAPE AND REVERSAL

On appeal from the Circuit Court of Montgomery County
(CV-2011-901485, Hon. Eugene W. Reese presiding)

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

"POWER! That is what this appeal is about." Ex parte Weaver, 570 So. 2d 675, 684 (Ala. 1990) (Houston, J., dissenting). The underlying lawsuit in this case may, or may not, have merit, and the State of Alabama takes no position on that. But the State has an interest of the highest order in two separate questions before this Court. The first is whether Alabama's courts have subject-matter jurisdiction over disputes that arise from activities on land owned by the Poarch Band of Creek Indians, or whether the Band's territory is instead an independent state over which this Court and Alabama law have no power. The second question is whether, above and beyond the initial issue of subject-matter jurisdiction, effectively anyone that is connected with any Indian tribe has a defense of sovereign immunity to any lawsuit brought in an Alabama court -- even when the activities are commercial in nature and have effects that go beyond Indian lands.

The State of Alabama and its Attorneys General have also been involved in in-court and out-of-court disputes with federal officials and the Poarch Band over related issues in the past. See, e.g., Alabama v. United States,

630 F. Supp. 2d 1320 (S.D. Ala. 2008). For example, Attorney General Strange has twice asked the National Indian Gaming Commission to make it clear that "Native American Indian tribes located in Alabama cannot engage in gambling activities that are patently illegal under Alabama law." Letter from Attorney General Luther Strange to the National Indian Gaming Commission (Feb. 11, 2011) (**Exhibit A**); Letter from Attorney General Luther Strange to the National Indian Gaming Commission (Apr. 25, 2012) (**Exhibit B**). The State wants Alabama courts to be open to resolving disputes like these in the future. This case presents a vehicle for clarifying that the courts can, in fact, resolve disputes between Alabama citizens and the Poarch Band.

SUMMARY OF ARGUMENT

On the two procedural questions presented here -- the first pertaining to subject-matter jurisdiction, and the second to sovereign immunity -- the State asks the Court to issue two holdings.

First, the threshold question pertains to the Alabama courts' subject-matter jurisdiction over this dispute. On that front, this Court should hold that in light of the U.S. Supreme Court's decision in Carcieri v. Salazar, 555 U.S. 379 (2009), the Poarch Band did not establish that the circuit court lacked subject-matter jurisdiction to entertain Mr. Rape's claim. The upshot of Carcieri is that the Secretary of the U.S. Department of the Interior never had the authority to remove lands from the State's control on behalf of tribes that were not "under federal jurisdiction" in 1934. Id. at 391. Absent a showing that the Poarch Band was "under federal jurisdiction" in 1934, Alabama courts should treat activities that occur on Poarch Band property just like activities that occur on any other land within the State's jurisdiction.

Second, the other question before this Court, which it should consider only after first determining whether the

lower court had subject-matter jurisdiction, is whether the defendants here have a waivable tribal-immunity defense to the complaint filed here. On this issue, this Court should hold that, at the very least, Alabama courts have authority to hold individuals and businesses, whether Indian or non-Indian, liable for the tortious or other wrongful acts that they commit against Alabama citizens. Regardless of whether the Indian tribe itself has immunity from suit, it is important that the actual persons and businesses who are charged with wrongful conduct have no sovereign-immunity defense in state court.

ARGUMENT

In resolving this suit, this Court should start by resolving questions of subject-matter jurisdiction and only afterwards address the defendants' immunity defenses. Subject-matter jurisdiction "cannot be created by waiver or consent," so a court must always be certain of its subject-matter jurisdiction before resolving the other questions in a case. Ex parte V.S., 918 So. 2d 908, 912 (Ala. 2005) (citation and internal quotation marks omitted). A court without subject-matter jurisdiction "may take no action other than to exercise its power to dismiss the action." State v. Property at 2018 Rainbow Drive, 740 So.2d 1025, 1029 (Ala. 1999) (citation and internal quotation marks omitted). Unlike the question of the State's authority over the Tribe's land, however, the question of whether these defendants have tribal immunity to these claims is not jurisdictional. This is so because a tribal defendant who is otherwise entitled to assert tribal immunity may forego it with a "waiver by the tribe." Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509 (1991). These principles mean that this Court must determine whether the circuit court had subject-matter

jurisdiction regardless of how this Court ultimately rules on the merits of the immunity-based defense. See generally Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998); cf. Tyson v. Jones, 60 So. 3d 831, 842-43 (2010) (holding that the trial court had subject-matter jurisdiction to consider the plaintiff's claim but rejecting that claim on the merits). The Court should resolve both the subject-matter jurisdiction and immunity questions in favor of Mr. Rape.

I. On this record, the Poarch Band's landholdings are not properly recognized "Indian Lands" such that they are outside the State's jurisdiction.

Although this dispute arose from activities that occurred on land owned by the Poarch Band of Creek Indians, that land was part of the State of Alabama at the time of the State's founding. In light of Carcieri v. Salazar, 555 U.S. 379 (2009), the federal government had the power to remove that land from the State's jurisdiction only if the Poarch Band was "under federal jurisdiction" in 1934, when the applicable federal statute was enacted. The Poarch Band failed to introduce evidence that it was under federal jurisdiction in 1934, and no judicial or administrative proceeding has determined that the Poarch Band was under

federal jurisdiction in 1934. Accordingly, on this record, the trial court had subject-matter jurisdiction.

The defendants' argument against subject-matter jurisdiction in this case is premised on the notion that the federal government has taken the land at issue into trust and thus converted it into what the federal code refers to as "Indian Lands." Federal law prohibits state and local governments from affecting much of what happens on "Indian Lands" that the federal government has taken into "trust" for the benefit of a tribe or an individual Indian. See 25 U.S.C. § 465. Such a trust designation can have serious effects on the surrounding community and the State's citizens. A tribal government, which can be established only on Indian Lands, is not constrained by the Bill of Rights. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). The land becomes exempt from local zoning and regulatory requirements. See 25 C.F.R. § 1.4(a). The State's civil and criminal laws are generally not enforceable on Indian Lands. See 25 U.S.C. §§ 1321(a), 1322(a). And, of course, the designation of land as "Indian Lands" is a necessary precondition to that land being used

for casino gambling under the Indian Gaming Regulatory Act. See 25 U.S.C. §§ 2710(b)(1), (2); 2710(d)(1), (2).

The Poarch Band has not established that the property on which the alleged incident occurred here is properly recognized "Indian Lands." To be sure, the United States recognized the Poarch Band of Creek Indians in June of 1984, and the Secretary of the Interior purported to take certain lands into trust on the Tribe's behalf, including the property at issue here, in the years since 1984. See 49 Fed. Reg. 24083 (June 11, 1984). But, unless the Poarch Band was "under federal jurisdiction" as of 1934, the Secretary had no authority under federal law to take the Poarch Band's landholdings into trust, and its actions were null and void.

The U.S. Supreme Court held as much in Carcieri v. Salazar, 555 U.S. 379 (2009). In Carcieri, the State of Rhode Island challenged the Secretary's decision to accept land into trust on behalf of an Indian tribe that the federal government first recognized in 1983. See Carcieri, 555 U.S. at 395 (citing 48 Fed. Reg. 6177 (Feb. 10, 1983)). The U.S. Supreme Court held that the Secretary had no authority to take the land into trust because the tribe was

admittedly not "under federal jurisdiction" when Congress passed the Indian Reorganization Act in 1934:

> We agree with petitioners and hold that, for purposes of § 479 [of the Indian Reorganization Act], the phrase "now under Federal jurisdiction" refers to a tribe that was under federal jurisdiction at the time of the statute's enactment. As a result, § 479 limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934.

Carcieri, 555 U.S. at 382; cf. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2212 (2012) (litigants may challenge Secretary's trust decisions as violating Carcieri).

Carcieri was a critical decision. The State of Alabama filed an amicus brief in Carcieri, which argued for the result that the U.S. Supreme Court ultimately reached. It explained that the Secretary's decision to take land into trust can "change the entire character of a state, particularly when the Secretary uses it in coordination with modern Tribes." Brief of the States of Alabama et al., 2008 WL 2445505, at *2 (June 13, 2008). The State explained that many modern tribes, unlike those recognized by the federal government before 1934, "have developed substantial wealth, through Indian gaming or otherwise, and

are located in populated areas and existing communities." Id. By imposing a temporal limitation on the Secretary's power to take land into trust, Carcieri limited the ability of tribes to remove whole swaths of territory from State jurisdiction. Unsurprisingly, modern Tribes like the Poarch Band have lobbied Congress to "fix" Carcieri and retroactively validate the Secretary's prior ultra vires decisions to take land into trust; at the urging of Alabama officials, Congress has refused to do so. See Letter from Luther Strange to Alabama Congressional Delegation (Oct. 30, 2012) (**Exhibit C**).

The upshot of Carcieri is that the Poarch Band should be treated just like any other landowner for the purposes of state-court subject-matter jurisdiction, unless it was "under federal jurisdiction" in 1934. The Poarch Band has never established in any administrative or judicial forum that it was "recognized" and "under federal jurisdiction" in 1934. And there is no evidence in the record here that the Poarch Band's lands at issue here were properly recognized "Indian Lands." To the contrary, it is undisputed that the United States recognized the Poarch Band of Creek Indians as a tribe in June of 1984 -- 50

years too late for the Secretary to be able to take land into trust on the tribe's behalf. See 49 Fed. Reg. 24083 (June 11, 1984). That fact by itself "rais[es] the serious issue of whether the Secretary ha[d] any authority, absent Congressional action, to take lands into trust for [the] tribe." KG Urban Enter., LLC v. Patrick, 693 F.3d 1, 11 (1st Cir. 2012).

In short, on this record, the trial court had subject matter jurisdiction. The complaint alleges that the incident occurred on property within the jurisdiction of the State of Alabama, Compl. ¶2, and there is no evidence in the record to rebut that allegation. This Court should either declare that, on this record, the trial court had subject-matter jurisdiction or remand so that the lower court can hold an evidentiary hearing on the Poarch Band's status in 1934.

II. The individual and corporate defendants are not immune from suit.

After this Court determines whether Alabama courts have subject-matter jurisdiction over disputes that arise on these lands, it should consider which defendants in this action have a waivable defense based on tribal sovereign

immunity. At the very least, the Court should hold that tribal businesses, officers, and employees cannot invoke tribal sovereign immunity. Tribal immunity does not protect commercial enterprises like defendants PCI Gaming, Creek Indian Enterprises, and Creek Casino Montgomery and individuals like James Ingram, Lorenzo Teague, and the fictitious defendants.

There is no doubt that, under current law, properly recognized Indian tribes enjoy immunity from suit except where Congress has abrogated it or they choose to waive it. Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751, 754 (1998). This doctrine means that tribes generally cannot be held liable for torts and other wrongful acts that they commit, even through activities that have nothing to do with tribal self-governance and even when those wrongs are committed off of Indian Lands. Id. Unlike the doctrine of tribal immunity, the doctrines of state sovereign immunity and Eleventh Amendment immunity arise from the federal and state constitutions. The doctrine of tribal immunity, by contrast, "developed almost by accident" and is not suited for a world in which tribes operate everything from "ski resorts" to "gambling" halls, both on and off of Indian

Lands. Id. at 756-58. The U.S. Supreme Court has recognized that, at the very least, "[t]here are reasons to doubt the wisdom of perpetuating" tribal immunity. Id. at 758.

This Court may not be able to completely reverse the advance of tribal sovereign immunity, but it can and should hold that, at the very least, a tribe's sovereign immunity does not make individuals and business entities immune from liability for their wrongful acts. The U.S. Supreme Court has "never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State." Okla. Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 514 (1991). And, under certain circumstances, lower federal courts have held that tribal officers and agents are not protected by immunity. See, e.g., Burrell v. Armijo, 456 F.3d 1159, 1174 (10th Cir. 2006)(liable for damages for stealing crops, terminating lease, and racial discrimination); Comstock Oil & Gas Inc. v. Ala. and Coushatta Indian Tribes of Tex., 261 F.3d 567, 570 (5th Cir. 2001) (injunction to comply with oil lease). This Court should go even further and hold that tribal immunity does not prevent tribal officers and agents, including business entities, from being found

liable in state courts for violations of state law. This is the right result for several reasons.

First, it would go a long way toward equalizing state and tribal sovereign immunity. Unlike tribes, States generally do not engage in commercial activities that affect other States' citizens. But, if a State does, a State that harms the citizens of another State can lawfully be haled into the courts of the second State and be found liable for damages. In Nevada v. Hall, the Supreme Court held that Nevada's sovereign immunity did not bar the courts of California from holding a Nevada university liable for the tortious actions of one its employees, which severely injured two California citizens. 440 U.S. 410 (1979). The Court explained that the doctrine of sovereign immunity means that "no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts." Id. at 416. This same reciprocity does not currently exist between Indian tribes and States; tribal immunity currently bars unconsented-to state-court suits against the tribes themselves, even if it would not bar a suit against a sister State. See Kiowa, 523 U.S. at 754. By holding tribal

individuals and businesses liable for their actions, state courts would at least minimize this disparity; tribal businesses and related individuals should not be able to injure a State's citizens without consequences.

Second, as a purely practical matter, state courts cannot leave it to tribal courts to remedy wrongs that are committed against non-Indians by the agents and officers of Indian Tribes. Consider the facts of Young v. Fitzpatrick, No. 11-1485, a case that is currently pending at the certiorari stage in the U.S. Supreme Court. In that case, a lower court held that the estate of a person who was killed by tribal police officers within the city limits of Tacoma, Washington, could not sue those officers because of sovereign immunity. See Young v. Duenas, 262 P.3d 527 (Wash. Ct. App. 2011). The petition for certiorari, which the U.S. Supreme Court has directed the United States Solicitor General to evaluate, highlights the failings of tribal courts. The tribal court in which the Young plaintiff initially attempted to litigate his wrongful death claim dismissed it sua sponte. "[D]uring the time period that [the deceased's estate] was attempting to litigate in tribal court, the court did not maintain a

written record of decisions." Petition for Writ of Certiorari at 16, Young v. Fitzpatrick, No. 11-1485 (June 4, 2012), 2012 WL 2109662. The entire "tribal code consisted of one three-ring binder, two and one-half inches thick." Id. And the tribal code did not "establish, or even mention, any tribal-law analogue to any [of plaintiff's] U.S. civil rights claims or his state-law tort claims." Id.; see also Burrell v. Armijo, 456 F.3d 1159, 1170 (10th Cir. 2006) (refusing to defer to a tribal court because it "lack[ed] a regular code of laws" and the judges "serve entirely at the whim of tribal officials"). In short, although the record does not include facts specific to the Poarch Band's tribal courts, Mr. Rape very likely has no remedy against the corporate and individual defendants that can be litigated there.

Finally, a rule that tribal sovereign immunity does not extend to officers, agents, and business entities would allow injured persons at least some possible remedy, where none would otherwise exist. States obviously have an interest in providing some remedy for their citizens in circumstances when they are injured through commercial activities, regardless of who the defendants are. The best

way, and the way contemplated by the U.S. Supreme Court in Okla. Tax Comm'n, 498 U.S. at 514, is for state courts to hold the individual officers and agents liable. This would at least provide some remedy, and it is proper and just that the individuals and businesses responsible for an injury be held liable, even if the Tribe is not.

Unlike the sovereign immunity that protects state and federal governments from suit, tribal immunity is a historical accident that has developed through federal common law. This Court can, and should, develop that body of law in another direction. That new direction should recognize that the purpose of immunity -- to allow Indian tribes to govern themselves -- is not served by immunizing associated individuals and businesses from liability when they breach contracts and commit torts in their non-governmental, commercial ventures.

CONCLUSION

For all of these reasons, this Court should hold (1) that, on this record, the state court had jurisdiction over the subject matter of this action and (2) that the individual and corporate defendants do not enjoy tribal

immunity from suit. Based on those two holdings, this Court should reverse the circuit court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served on this 24th day of January, 2013 to the following by email as noted:

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Exhibit A

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February 11, 2011

The National Indian Gaming Commission
1441 L Street, NW Suite 9100
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Dear Commission Members:

Thank you for the opportunity to provide comment to the National Indian Gaming Commission as the Commission conducts a comprehensive review of all regulations promulgated to implement the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq*. Any changes made to the rules that regulate Native American Indian tribal gaming could have a definite impact on the State of Alabama and its citizens. I urge you to make clear that Native American Indian tribes located in Alabama cannot engage in gambling activities that are patently illegal under Alabama law. It is out of this concern that I write this letter so that you will know, without any doubt, what the law is in Alabama.

The Alabama Constitution of 1901 imposes a strict prohibition against gambling in the State. Article IV, § 65 of the Alabama Constitution of 1901, provides:

> The legislature shall have no power to authorize lotteries or gift enterprises for any purposes, and shall pass laws to prohibit the sale in this state of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; and all acts, or parts of acts heretofore passed by the legislature of this state, authorizing a lottery or lotteries, and all acts amendatory thereof, or supplemental thereto, are hereby avoided.

ALA. CONST., art IV, § 65.

Slot machines and other gambling devices, as defined in Ala. Code § 13A-12-20 (1975), are also patently illegal in all 67 Alabama counties under § 13A-12-27 of the Code of Alabama and § 65 of the Alabama Constitution.[1] While several local constitutional amendments have authorized "charity bingo" in certain Alabama counties, absolutely no amendment to the Alabama Constitution has authorized slot machines or other illegal gambling devices in any county. Machines that accept cash or credit and then dispense cash value prizes based upon chance are slot machines under Alabama law

[1] *See State ex rel. Tyson v. Ted's Game Enterprises*, 893 So. 2d 376, 380 (Ala. 2004) ("[W]e hold that Article IV, § 65, means what it says, and *prohibits the Legislature from authorizing* 'lotteries or gift enterprises' that involve games *or devices* in which chance predominates the outcome of the game, even if 'some skill' is involved" (emphasis added)).

and are not made legal by any bingo amendment. Likewise, no local bingo rule, regulation or ordinance can legally authorize slot machines. Two trial judges in Alabama have issued rulings holding as much in the last two years.[2] For reasons of their own, the gambling interests consciously chose not to appeal the rulings in either case.

Moreover, even putting aside the question of the slot-machine statute, the Alabama courts have repeatedly held, in no uncertain terms, that the term "bingo" in these local constitutional amendments references only the game commonly or traditionally known as bingo. The Court's ruling in the recent *Barber v. Cornerstone*[3] case considered the application of that principle to the "electronic bingo" issue. The Court laid out six factors that, at a minimum, a game must possess to be considered legal "bingo" for purposes of these amendments. These factors include the following:

> 1. Each player uses one or more cards with spaces arranged in five columns and five rows, with an alphanumeric or similar designation assigned to each space.
>
> 2. Alphanumeric or similar designations are randomly drawn and announced *one by one*.
>
> 3. In order to play, each player *must pay attention* to the values announced; if one of the values matches a value on one or more of the player's cards, the player *must physically act by marking his or her card accordingly*.
>
> 4. A player can fail to pay proper attention or to properly mark his or her card, and thereby miss an opportunity to be declared a winner.
>
> 5. A player must recognize that his or her card has a "bingo," i.e., a predetermined pattern of matching values, and in turn *announce to the other players* and the announcer that this is the case before any other player does so.
>
> 6. The game of bingo contemplates a group activity in which multiple players compete against each other to be the first to properly mark a card with the predetermined winning pattern and announce that fact.[4]

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[2] *See State v. American Gaming Sys.*, No. CV 08-1837 (Jefferson Cnty. Cir. Ct. Oct. 26, 2009) (Vowell, P.J.) (slip op. at 9–12); *Dep't of Tex. Veterans v. Dorning*, No. 07-S-2144-NE (N.D. Ala. Sept. 28, 2009) (Smith, J.) (slip op. at 29–52). Copies of these opinions can be provided if necessary.
[3] See *Barber v. Cornerstone Community Outreach, Inc.*, 42 So. 3d 65 (Ala. 2009).
[4] *Id.* at 86.

The Supreme Court also held that "the bingo amendments are exceptions to the lottery prohibition, and the exception should be narrowly construed."[5] These factors cannot be changed, diluted, waived, redefined or reinterpreted by local rule, local regulation, or local definitions. As the emphasized portions of those factors indicate, it appears to be impossible that the fully automated game called "electronic bingo" can be legal "bingo" for these purposes of these amendments. Indeed, in *Cornerstone* itself, the Alabama Supreme Court found that gambling interests had not even established a reasonable probability of showing that "electronic bingo" was in fact the game of bingo that is authorized in certain localities under Alabama law.

Because these machines are illegal under Alabama law, they are illegal under IGRA. Section 2701 of the IGRA provides "The Congress finds that...(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands *if* the gaming activity ... is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." (Emphasis added.) The Commission should make clear that Native American Indian tribes located in Alabama cannot operate so-called "electronic bingo machines" and other gambling devices which look like, sound like, and attract the same class of customers as conventional slot machines, but play a six second game of "bingo" in cyberspace using software that allows card-minders and auto daub features that are specifically designed to recreate a slot machine experience for the player with little to no human interaction.[6]

I would also ask that any regulations make clear that the mere fact that traditional bingo is allowed in certain parts of this State does not mean that "electronic bingo" is legal on Indian lands in this State. As the Alabama Supreme Court made clear in the *Cornerstone* case, the traditional game of bingo, with all its qualities of human interaction and skill, is qualitatively different from the game that has come to be called "electronic bingo." The most obvious difference between the two games is in the costs they impose on society. In light of the speed at which "electronic bingo" is played, it is much more likely to lead to addiction, severe economic losses, and the other societal harms traditionally associated with gambling. In contrast, the traditional game of bingo cannot be played so swiftly as to cause serious debts and gambling addiction. Indeed, it

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[5] *Id.* at 78.

[6] In *Barber v. Jefferson County Racing Association*, 960 So. 2d 599 (Ala. 2006), the Supreme Court addressed a system of terminals linked by a server that, instead of purporting to play "bingo," purported to run a "sweepstakes." The court nonetheless held that the game was illegal under a common-sense application of the term "slot machine." *See id.* at 614. The court looked to "the substance and not the semblance of things, so as to prevent evasions of the law." *Id.* at 611 (internal quotation marks omitted). The court focused on whether the machines "are slot machines as to those who pay to play them." *Id.* at 615. Employing this realistic approach, the court found illegal "a system composed of what were formerly slot machines, which look like, sound like, and attract the same class of customers as conventional slot machines, and, when integrated with the servers, serve essentially the same function as did the slot machines." *Id.* at 616.

is precisely for that reason that gambling interests prefer to offer so-called "electronic bingo" to their customers: "electronic bingo" is much more profitable to casinos than bona fide traditional game of bingo. It would make no sense for federal law to provide that the fundamentally different game of "electronic bingo" is legal on Indian land simply because Alabama law allows the traditional game of bingo to be played for certain charitable purposes on certain non-Indian lands.

With the gambling interests constantly looking for loopholes and ambiguities to exploit, it is essential that this Commission maintain a consistent and cohesive posture in enforcing and clarifying Native American Indian gambling laws in a way that clearly demarcates legal and illegal gambling activities. These laws must be strictly written and enforced without exception. Any other alternative is simply unacceptable.

If this Commission needs any further comment or information related to this matter, do not hesitate to contact my office.

Sincerely,

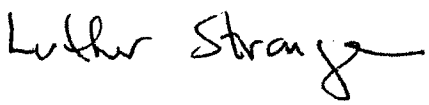

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Exhibit B

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April 25, 2012

The National Indian Gaming Commission
1441 L Street, NW Suite 9100
Washington, DC 20005

Dear Commission Members:

Thank you for the opportunity to provide comment to the National Indian Gaming Commission concerning the Commission's proposed revisions to 25 CFR Part 543 Minimum Internal Control Standards for Class II Games and Part 547 Minimum Technical Standards for Gaming Equipment Used in the Play of Class II Games. On February 11, 2011, I urged you to use your comprehensive review of existing regulations to "make clear that Native American Indian tribes located in Alabama cannot engage in gambling activities that are patently illegal under Alabama law." After reviewing the discussion drafts for Part 543 and Part 547, I fear that the Commission may miss an important opportunity to do just that.

Slot machines cannot be operated by a Native American Indian tribe on land located in a State like Alabama that has not agreed to a compact with that tribe. As you know, when Congress enacted the Indian Gaming Regulatory Act ("IGRA"), it envisioned two distinct types of gaming – the traditional game of bingo on the one hand and casino halls filled with slot machines on the other. *See, e.g.*, Disapproval Letter from Commissioner Philip Hogen to Mayor Karl S. Cook at 7 (June 4, 2008). That is why IGRA distinguishes between "technological aids" that may be used with Class II games like bingo, which can be operated without a compact, and Class III games such as "slot machines," which cannot be operated without a compact. In fact, IGRA expressly provides in no uncertain terms that "'class II gaming' does not include . . . electronic or electromechanical facsimiles of any game of chance or slot machines *of any kind*." 25 U.S.C. § 2703(7)(b)(2) (emphasis added).

After IGRA was enacted, slot machine manufacturers and tribes went to great lengths to conflate Class III slot machines with *bona fide* "technological aids" used to play the traditional game of Class II bingo. By 2006, this Commission was rightly "concerned that the industry is dangerously close to obscuring the line between Class II and III" altogether. *See* Proposed Rule, 25 CFR Part 502 and 546, Classification Standards, Class II Gaming, Bingo, Lotto, et al., 71 Fed. Reg. 30238 (May 25, 2006). For that reason, the Commission proposed the regulations that eventually became Part 543 and Part 547 as part of a package of reforms designed to enforce the

statutory distinction between Class II and Class III games. *Id.* Although I do not agree with each and every element of those proposed reforms, I do agree with the Commission's original goal of enforcing IGRA's clear line between Class II and Class III games.

Unfortunately, the Commission gutted those reforms. It abandoned any effort to enforce the statutory line between "technological aids" and "facsimiles" of games of chance through a meaningful regulation. Instead, the Part 543 and Part 547 that were ultimately enacted "do not attempt to draw such a line" between Class II and Class III gambling devices, but simply "assume that such a line already exists." 73 Fed. Reg. 60523 (Oct. 10, 2008). When it failed to adopt the proposed regulation, the Commission promised to "address . . . classification issues through a combination of training, technical assistance, and enforcement actions." *See* Withdrawal of Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using ''Electronic, Computer, or Other Technologic Aids," 73 Fed. Reg. 60490, 60491 (Oct. 10 2008).

Given this background, I have four specific comments on the Commission's current discussion drafts of Part 543 and Part 547.

First, the Commission's minor edits to Part 543 and Part 547 do nothing to give teeth to the important distinction between Class II "technological aids" and Class III slot machines. The main problem when these regulations were first proposed was the proliferation of Class III slot machines under the guise of Class II "technological aids," but Part 543 and Part 547 as they presently exist have done little to solve it. In Alabama, the Poarch Band of Creek Indians operate three Indian casinos that offer ostensibly Class II gambling that approximates the same kind of slot machine gambling that one might find in Las Vegas or Atlantic City.[1] The Tribe's ability to "obscure[] the line between Class II and III" makes it harder for my office to enforce Alabama law outside of Indian land. Alabama citizens are understandably confused when Indian tribes are allowed to call their Class III slot machines "bingo," but gambling promoters within the State's jurisdiction cannot use the same gimmick. The solution to this problem is *not* for my office to relax or disregard the State of Alabama's gambling laws; the solution is for the Commission to strictly enforce federal law on Indian lands.

Instead of the minor changes that the Commission has proposed, I believe that the Commission should consider returning to the Class II classification standards that were originally proposed as a complement to Part 543 and Part 547. When the Commission withdrew the classification standards from its 2006 rulemaking proposal, the Commission believed that it could compel compliance with IGRA through enforcement actions instead. But, after reviewing the Commission's enforcement actions since 2006 on the Commission's website, my office has not uncovered a single action related to the difference between Class II and Class III games or

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[1] The State concedes neither that the Poarch Band of Creek Indians is a proper-recognized tribe nor that the Department of the Interior had authority to take land into trust for the Tribe. *See Carcieri v. Salazar*, 555 U.S. 379, 387-388 (2009). But those issues are outside the scope of this comment.

the use of "technological aids." The Commission's lax enforcement is particularly troubling because, in 2008, the Commission warned that the problems arising from tribes' "exploitation of technology [that] erases, or is perceived to erase" the Class II/Class III distinction could be serious enough to compel action by the Department of Justice or Congress or both. *See* 73 Fed. Reg. at 60491. Were the Commission strictly enforcing the already-existing statutory distinction between "technological aids" and "electronic or electromechanical facsimiles," I would agree that regulatory classification standards would be unnecessary. But the Commission is not strictly enforcing IGRA.

Second, the Commission's reasons for withdrawing its classification standards from the original reform package were based on inaccurate information about Alabama. In withdrawing the previously proposed classification standards, the Commission cited the "terrific economic costs" that its reform would have on Indian gaming, "as set out in its two economic impact reports." 73 Fed. Reg. at 60491. But the Commission's economic impact report wrongly concluded that requiring the Poarch Band of Creek Indians to comply with IGRA would make the Tribe's gambling devices "inferior" to other gambling devices that, the Commission believed, were legal in Alabama, such as "electronic bingo machines at greyhound racetracks and sweepstakes machines." Alan Meister, *The Potential Economic Impact of the October 2007 Proposed Class II Gaming Regulations* 27 (Feb. 1, 2008) at http://www.nigc.gov/Portals /0/NIGC%20Uploads/lawsregulations/proposedamendments/MeisterReport2FINAL2108.pdf. *See also* 73 Fed. Reg. at 60491 (erroneously stating that the State of Alabama has "expand[ed] legalized gaming within [its] own borders"). In fact, the Alabama Supreme Court has held that so-called sweepstakes machines and electronic bingo machines are *illegal*. *See Barber v. Jefferson County Racing Ass'n, Inc.*, 960 So. 2d 599 (Ala. 2006) (so-called sweepstakes machines); *Barber v. Cornerstone Community Outreach, Inc.*, 42 So. 3d 65 (Ala. 2009) (so-called electronic bingo machines). So enforcing the distinction between Class II and Class III gambling would not disadvantage the Poarch Band of Creek Indians in comparison with other Alabama residents.

Third, the discussion draft of Part 547 continues to state that "[n]othing in this part shall be construed to grant to a state jurisdiction over Class II gaming." But IGRA intended to grant the States considerable influence over Class II gaming. In fact, IGRA expressly conditions the legality of Class II gaming on whether that gaming is allowed under state law. As I made clear in my February 11th letter, "[i]t would make no sense for federal law to provide that the fundamentally different game of 'electronic bingo' is legal on Indian land simply because Alabama law allows the traditional game of bingo to be played for certain charitable purposes on certain non-Indian lands." The Commission should consider incorporating State standards and enforcement mechanisms into Part 543 and Part 547. If the Commission gave the States authority to enforce IGRA on Indian lands, I would put a stop to Class III slot machines masquerading as Class II "technological aids."

Fourth, at the very least, the Commission's regulations should not actively engender confusion between slot machines and Class II "technological aids." Unfortunately, that is what the discussion draft of Part 547 does when it contemplates that Class II "technological aids" will

be materially indistinguishable from slot machines. The Commission's "Minimum Technical Standards for Gaming Equipment Used in the Play of Class II Games" apply to a Class III slot machine just as naturally as they apply to a Class II bingo ball blower. For example, Part 547 allows Class II gambling devices to accept and dispense bills and coins into the face of the gambling device, *see* 547.7(g) & (k), defines "player interface" to include a "terminal" through which a player interacts with the automated game, *see* 547.2, and contemplates that the player may be notified of the results of the game through an "entertaining display," 547.9(d)(1). These are elements of slot machine gambling. *See, e.g.,* Ala. Code 13A-12-20(10)(defining slot machine as "[a] gambling device that, as a result of the insertion of a coin or other object, operates, either completely automatically or with the aid of some physical act by the player, in such a manner that, depending upon elements of chance, it may eject something of value."); *MDS Investments, L.L.C. v. State*, 65 P.3d 197, 203 (Idaho 2003) ("Considering the technological changes, a slot machine is a gambling device which, upon payment by a player of required consideration in any form, may be played or operated, and which, upon being played or operated, may, solely by chance, deliver or entitle the player to receive something of value, with the outcome being shown by spinning reels or by a video or other representation of reels."). To the extent Part 547 authorizes or has been interpreted by the Commission to authorize the play of slot machines "of any kind" under the guise of Class II bingo, it exceeds the Commission's authority under IGRA.

In short, the status quo is unacceptable. Because the Commission has previously told me that I do not have authority over gambling conducted on Indian lands, I am requesting that the Commission act to enforce the bright line between Class II and Class III gambling that already exists in federal law. The Commission's regulations should either give me the authority to enforce the law or make clear that gambling devices that look and operate like slot machines are "facsimiles" of games of chance under IGRA, regardless of whether they purport to aid in playing the game of "bingo."

If the Commission needs any further comment or information related to this matter, do not hesitate to contact my office.

Sincerely,

LUTHER STRANGE
ATTORNEY GENERAL

LS/mrh

Exhibit C

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The Honorable Richard Shelby
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The Honorable Senator Jeff Sessions
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The Honorable Robert Aderholt
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The Honorable Spencer Bachus
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The Honorable Martha Roby
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The Honorable Mike Rogers
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The Honorable Terri Sewell
House of Representatives
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Dear Members of the Alabama Congressional Delegation:

I understand that Sen. Daniel Akaka, chairman of the Senate Committee on Indian Affairs, intends to advocate in the lame-duck session for a so-called "*Carcieri* fix" -- legislation to overturn the U.S. Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009). I urge you to oppose Sen. Akaka's legislation.

The 8-1 decision in *Carcieri* held that the U.S. Secretary of the Interior does not have legal authority to carve out land within a State's borders, put it into a tax-exempt federal trust, and set it aside as reservation land for Indian Tribes that were not "recognized Indian tribe[s] ... under federal jurisdiction" by 1934, the year Congress passed the Indian Reorganization Act. The proposed "*Carcieri* fix" legislation would ratify *ultra vires* actions that the Interior Secretary has

taken in the past and give the Interior Secretary new authority going forward. The Interior Secretary could then take an unlimited amount of additional land into trust for Tribes that were not recognized until well after 1934, such as the Poarch Band of Creek Indians in Alabama.

A "*Carcieri* fix" would be bad for the people of the State of Alabama. Taking land into trust deprives the local units of government and the State of the ability to tax the land and calls into question the power of state and local government to enforce civil and criminal laws on the land. That is why 21 States, including Alabama, urged the U.S. Supreme Court in *Carcieri* to limit the power of the Secretary to take land into trust:

> Land taken into trust for Indians by the Secretary is removed from state authority in several significant respects (including taxation, land use restrictions and certain environmental regulations), thereby limiting the States' ability to exercise their sovereign powers to protect the public on the trust land. 25 C.F.R. § 1.4(a). Thus, the result of the Secretary's taking land into trust is the creation of an area largely controlled by a competing sovereign within a state's borders without its consent, contrary to core principles of federalism.
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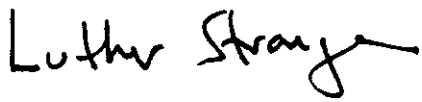
> ...
>
> The Secretary's power to take land into trust pursuant to the IRA enables him to administratively create areas within a state's borders at the behest of an Indian tribe that are, in many key respects, outside that state's jurisdiction. Consequently, the exercise of that power has substantial, and permanent, consequences for the impacted state and local communities. Indeed, that power gives the Secretary the capacity to change the entire character of a state, particularly when the Secretary uses it in coordination with modern Tribes, some of which have developed substantial wealth, through Indian gaming or otherwise, and are located in populated areas and existing communities. Given the repercussions of the power to take land into trust and the Secretary's guardianship relationship with the tribes on whose behalf he exercises it, it is incumbent on the courts to vigilantly enforce the limits Congress has placed on the Secretary's power in order to maintain the proper separation of powers.

Brief of the States of Alabama, et al., *Carcieri v. Kempthorne*, at 1-2 (U.S. No. 07-526). The Supreme Court agreed with the States in *Carcieri*, and that decision does not need a "fix."

Instead of "fixing" *Carcieri*, I urge you to enact legislation that would provide States a remedy when the Interior Secretary and Indian Tribes flout the law. Despite *Carcieri*, the Interior Secretary purports to hold thousands of acres of land in tax-exempt federal trust for Tribes that were not recognized until after 1934. After the Secretary takes land into trust, there is no procedure available for States to challenge the Secretary's assertion of federal authority over the land. Moreover, because of erroneous rulings, the States have no remedy when Tribes violate state and federal law. The Eleventh Circuit Court of Appeals has held that States cannot sue tribes that violate the Indian Gaming Regulatory Act on reservation land, and the Sixth Circuit Court of Appeals has held that States cannot sue Tribes that engage in illegal activities *even outside of the reservation and in the State's own sovereign territory. See Florida v. Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999); *Michigan v. Bay Mills Indian Community*, --- F.3d ----, 2012 WL 3326596 (6th Cir. August 15, 2012). If you enact legislation to give me and my fellow Attorneys General authority to enforce the law, we will do it.

I respectfully ask you to oppose any "*Carcieri* fix."

Sincerely,



Luther Strange
Attorney General

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