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No. 02-

IN THE

Supreme Court of the United States

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

TAMIAMI PARTNERS, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the *Tamiami* decisions which interpret the Federal Arbitration Act as allowing courts "to look through" an arbitration to the underlying federal claims to find jurisdiction, and which find a substantial federal question based on a federal statute that provides no private right of action, represent an unprecedented expansion of federal question jurisdiction that conflicts with the majority of circuits that have decided the issues.

2. Whether the Eleventh Circuit's rejection of the Miccosukee Tribal Court orders, which stayed the arbitration and vacated the award, conflicts with an unbroken line of Supreme Court precedent requiring deference to tribal courts, and precluding relitigation of issues resolved in tribal court, and whether this Court should grant certiorari to decide the unresolved question in *Nevada v. Hicks*, regarding the scope of tribal court jurisdiction over non-members.

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Petitioner Miccosukee Tribe of Indians of Florida respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit has issued four opinions in this dispute, including three published opinions following interlocutory appeals, and one unpublished opinion affirming a final summary judgment.

The final judgment of the United States Court of Appeals for the Eleventh Circuit is found at *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida* ("*Tamiami IV*"), No. 01-12356 (11th Cir. April 15, 2002) (unpublished). Petitioner's Appendix A (hereinafter "App."). The orders appealed from are found at App. B, C and D.

The three interlocutory Eleventh Circuit Opinions are reported at: *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 177 F.3d 1212 (11th Cir. 1999) ("*Tamiami III*"), *cert. denied*, 529 U.S. 1018 (2000), App. H; *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 63 F.3d 1030 (11th Cir. 1995) ("*Tamiami II*"), App. J; *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 999 F.2d 503 (11th Cir. 1993) ("*Tamiami I*"), App. L.

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STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on April 15, 2002. App. A. The court denied Rehearing and Rehearing En Banc, on June 24, 2002. App. O. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant portions of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq.*, and the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, can be found at App. P and App. Q, respectively.

STATEMENT OF THE CASE

This action arose from a dispute between the Miccosukee Tribe of Indians of Florida ("Tribe"), and Tamiami Partners, Ltd. ("TPL") regarding provisions in a Management and Economic Development Agreement ("Agreement") entered into between the Tribe and Tamiami Development Corp. ("TDC").[1] The Tribe is federally recognized and organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 461, *et seq.*, with a Constitution and by-laws approved pursuant to that Act. The Tribe was the owner of Miccosukee

1. The published *Tamiami* opinions contain some of the facts. However, these decisions were issued following interlocutory appeals and, therefore, the facts were based on allegations in TPL's complaints.

Indian Bingo ("MIB"), and TDC was the managing company which assigned the Agreement to TPL.

The litigation leading to the arbitration began after the Tribe gave notice of its intent to terminate the Agreement based on numerous breaches by TPL and TPL requested arbitration. The Tribe filed a Statement of Claim in Miccosukee Tribal Court ("Tribal Court") alleging that TPL had repeatedly violated its contractual obligations in the Agreement. Some of these breaches included failure to comply with Indian preference laws, failure to submit a proposed budget to the Tribe, failure to submit a plan for hiring and training tribal members, denying the Chairman of the Tribe access to tribal records, and selection of a program director for MIB without consulting the Tribe. Approximately five months after the action was filed, the Tribal Court ordered arbitration.

The day after the Tribe filed its claims in Tribal Court, TPL filed a complaint in federal court requesting injunctive relief and arbitration of the dispute. Under Article 23 of the Agreement, the Tribe waived sovereign immunity for a suit brought by TDC to compel arbitration, or to enforce the arbitration award. App. 76a-77a. The Tribe did not waive sovereign immunity to any claims under IGRA.

Following the district court's denial of TPL's motion for injunctive relief, TPL appealed to the Eleventh Circuit. While TPL's appeal was pending, the district court issued another order, this time granting injunctive relief to TPL, after the Tribal Gaming Agency denied licenses to TPL, TDC and two principals. The Tribe, and the MIB conservator appointed by the Tribe, appealed; the appeals were consolidated. The United States Department of Justice filed an amicus brief

in support of the Tribe asserting that "the district court did not have subject matter jurisdiction because contract interpretation does not arise under federal law." App. 207a.

On August 16, 1993, the Eleventh Circuit issued its first of four decisions. *Tamiami I* found that the court lacked subject matter jurisdiction because TPL's complaint did not assert any claims arising under federal law, the parties could not, by consent, expand the jurisdiction of federal courts, and the federal court only had jurisdiction to hear challenges to the Tribal Court's jurisdiction after a full opportunity for Tribal Court determination of jurisdictional questions. App. 210a-212a. The case was remanded to the district court. App. 213a.

The arbitration panel, selected pursuant to the Tribal Court's order to arbitrate, conducted preliminary arbitration proceedings. Both the Tribe and TPL filed their claims in the arbitration. Before the final arbitration hearing was held, TPL filed an Amended Complaint in federal district court that sought alternative relief over the same subject matter that the Tribal Court had ordered to arbitration. The Amended Complaint relied on IGRA, the Commerce Clause, and unspecified federal law.

Two days after TPL filed the Amended Complaint in federal district court, the Tribe requested and obtained a stay of the arbitration from the Tribal Court. App. E. Notwithstanding the stay, and in direct violation of notice, jurisdictional and other requirements of Florida Statutes § 682.02, *et seq.*, two of the three arbitrators proceeded to hold an *ex parte* arbitration hearing. Following that hearing, the two arbitrators issued an "award" in favor of TPL. App. G.

The only claim "adjudicated" by the two arbitrators was TPL's claim 4, a claim alleging that David Ingenito, an employee of MIB, was improperly terminated. App. 65a. TPL and/or the arbitrators had dismissed all other TPL claims. Claim 4 did not request reinstatement of TPL or any TPL principals involved with MIB, nor did it request damages for any refusal by the Tribe to reinstate TPL. The two arbitrators denied the Tribe's claims. App. 65a-66a. The Tribe obeyed the Tribal Court stay and did not participate in the hearing. In the "award" the two arbitrators made a non-binding suggestion to the Tribe to pay TPL $9.5 million to resolve the dispute. App. 66a-67a. The "award" did not purport to give TPL $9.5 million because the arbitrators did not have any such claim for resolution. App. G. The non-participating arbitrator filed objections to the award ("the Dissent"). App. 69a-73a.

On October 11, 1993, the Tribal Court vacated the "award" on the grounds that it was rendered in violation of the Tribal Court's stay order and in violation of Florida law. App. F. TPL did not seek review of the Tribal Court order.

The Tribe took a second interlocutory appeal to the Eleventh Circuit and on August 16, 1995, the Eleventh Circuit issued a second opinion. App. J. *Tamiami II* concluded that the district court had subject matter jurisdiction on all three claims because each claim arose under the laws of the United States. App. 155a-157a. The court dismissed two of the three claims in the Amended Complaint. App. 153a-154a, 158a-165a. The panel in *Tamiami II* concluded that the breach of contract claim arose under federal law because "the Agreement incorporates — by operation of law if not by reference — the provisions of IGRA

and the NIGC's regulations that govern MIB's operations," App. 155a and remanded the claim against the individual defendants cautioning that TPL had to show IGRA provided a cause of action. App. 166a. After remand, TPL did not show such a cause of action under IGRA and instead filed the Second Amended Complaint.

The Second Amended Complaint asserted six claims against the Tribe. An interlocutory appeal followed the denial of the Tribe's motion to dismiss that complaint.[2] In *Tamiami III*, the Eleventh Circuit dismissed all counts except Count II (seeking enforcement of the arbitration award) and Count III (seeking to compel the Tribe to engage in further arbitration). Count I remained only to the extent TPL sought a declaration that disputes relating to the Agreement were arbitrable. App. 98a-99a. *Tamiami III* found that there was subject matter jurisdiction because, just as the claims arose under federal law in *Tamiami II* by incorporation of IGRA into the Agreement, App. 93a-94a, federal law was "equally implicated when the claims were presented in the arbitration context." *Id.* Relying on section 4 of the FAA in particular, the court stated:

> The Federal Arbitration Act empowers a district court to issue an order compelling arbitration if the court, "save for [the arbitration] agreement, would have jurisdiction under title 28, in a civil action . . . of the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4 (1994). Thus, it is appropriate for us

2. The opinions in *Tamiami III* and *IV* both involved TPL's Second Amended Complaint. *Tamiami III* was an interlocutory appeal, and *Tamiami IV* was the appeal from the grant of summary judgment by the district court.

> to "look through" Tamiami's arbitration request at the underlying licensing dispute in order to determine whether Tamiami's complaint states a federal question.

App. 94a, n.11. The case was again remanded to the district court.

The Tribe filed a Petition for Writ of Certiorari from the decision in *Tamiami III*. In its brief in opposition to the Tribe's petition, TPL argued that certiorari review from an interlocutory appeal was "greatly disfavored" and that this Court should not grant certiorari because the case was not ripe for review. App. R. This Court denied the Tribe's request for certiorari in *Tamiami III*. The case is now ripe for review. This Petition is from a final order granting summary judgment on Count II of the Second Amended Complaint [TPL's request to enforce the "award"] in which the district court ordered the Tribe to pay TPL approximately $18 million in damages and interest, App. B, C and D, even though no claim for damages was ever adjudicated in arbitration.[3]

3. This Court can review all interlocutory decisions for errors, even those where certiorari was previously denied. *See Mercer v. Theriot*, 377 U.S. 152, 153-54 (1964); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973); *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 74-75 (1941). This Court has the authority to consider questions determined in earlier stages of litigation where certiorari is sought from the most recent of the judgments of the court of appeals. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001), citing *Mercer supra*, 377 U.S. 152 and *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). This Petition for Certiorari seeks to review the published opinions in *Tamiami II and III* as well as the unpublished opinion in *Tamiami IV*. The decisions in *Tamiami* represent an unprecedent expansion of federal question jurisdiction, they present a direct conflict with decisions in other circuits and they incorrectly interpret binding precedent from this Court.

The district court's order not only misinterpreted the "award" but fashioned its own award. App. 37a. *Tamiami IV* affirmed the district court concluding the federal court had subject matter jurisdiction:

> This Court has twice ruled that the district court has jurisdiction to hear this case because it implicates the Indian Gaming Regulatory Act. *See Tamiami II*, 63 F.3d at 1048; and *Tamiami III*, 177 F.3d at 1223-24. There have been no changes to this case which would divest the district court of jurisdiction.

App. 3a. *Tamiami IV* rejected the Tribal Court's orders staying arbitration and vacating the award, App. 35a, and found that the Tribe's waiver of sovereign immunity subjected the Tribe to the jurisdiction of the federal court.

REASONS FOR GRANTING THE WRIT

This case presents important questions relating to the jurisdiction of federal and tribal courts, as well as the permissible scope of federal judicial review of tribal court's adjudications. Whether federal jurisdiction can be determined by looking through an arbitration to the underlying dispute is an issue that has divided the circuits and should be resolved by this Court. The majority of circuits have found that the federal nature of the claims submitted to arbitration is not a sufficient basis for subject matter jurisdiction under 28 U.S.C. § 1331 because the rights asserted in arbitration are actually based on a contract to arbitrate rather than the underlying substantive claims. The Eleventh Circuit's decisions in *Tamiami III* and *IV* have held that it is permissible to look through to the underlying claim in arbitration to establish

federal question jurisdiction. The holdings in the *Tamiami* decisions establish a direct conflict in the circuits and this Court should grant certiorari to resolve this conflict.

The conflict among the circuits regarding whether a court may look to the underlying claim to determine jurisdiction, derives in part from certain language in this Court's opinion in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983). Language in *Moses H. Cone* suggests that FAA § 4 would provide federal jurisdiction if the underlying dispute gives the court jurisdiction. The clear weight of authority rejects such an interpretation, but the Eleventh Circuit in the *Tamiami* decisions interpreted FAA § 4 as providing jurisdiction if there is an underlying federal claim in the arbitration. This Court should grant certiorari to clarify the confusion which is compounded by the Eleventh Circuit's decisions in *Tamiami*.

The decisions in *Tamiami II, III* and *IV* also present the Court with the opportunity to decide whether invoking a federal statute that provides no private right of action can provide a federal question which is sufficiently substantial to confer jurisdiction. Courts of appeals are divided as to whether this Court's decision in *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808 (1986) states a bright line rule that a Congressional determination that there should be no remedy under a federal statute is tantamount to a conclusion that the presence of a federal claim as an element of a state cause of action is insufficiently substantial to confer federal question jurisdiction. The language in *Merrell Dow* should be clarified. Granting the Petition will also resolve an intra-circuit conflict in the Eleventh Circuit regarding the interpretation of *Merrell Dow*.

Another important reason why certiorari should issue is to address the scope of deference that is due rulings by Tribal Courts and their jurisdiction over non-Indians in cases involving tribal lands. The arbitrators and TPL ignored an order of the Tribal Court staying the arbitration and the district court disregarded the Tribal Court's order vacating the "award." On more than one occasion, this Court has strongly suggested that the power to regulate consensual relationships includes the power to adjudicate claims by tribal members against non-members. The extent of tribal court jurisdiction over non-members is an important issue which should be addressed by this Court.

I. THE DECISIONS IN *TAMIAMI III* AND *TAMIAMI IV* ARE IN DIRECT CONFLICT WITH SUPREME COURT AND CIRCUIT COURT DECISIONS ON THE SCOPE OF FEDERAL QUESTION JURISDICTION.

A. The Court Should Resolve The Conflict In The Circuits On Whether The Presence Of A Federal Question In The Underlying Claims In Arbitration Is Sufficient To Confer Jurisdiction.

The Eleventh Circuit erroneously concluded that the district court had jurisdiction over TPL's claims requesting arbitration and requesting to enforce the "award" because the underlying arbitral dispute "implicate[] the Indian Gaming Regulatory Act." *Tamiami IV*, App. 3a, citing *Tamiami III*, 177 F.3d at 1223. The Eleventh Circuit's decisions in *Tamiami III* and *IV* conflict with the majority of circuits, which have decided that the nature of the underlying arbitral dispute is irrelevant for purposes of determining subject matter jurisdiction under the FAA.

In *Tamiami III* the court held that the first three counts of the Second Amended Complaint "state[d] a federal question insofar as they relate[d] to the Tribe's rejection of gaming license applications." App. H.[4] In doing so, the court determined that "it is appropriate for us to 'look through' *Tamiami's* arbitration request at the underlying licensing dispute in order to determine whether *Tamiami*'s complaint states a federal question." App. H n.11. *Tamiami IV* relied on *Tamiami II* and *III* finding subject matter jurisdiction because "it implicates the Indian Gaming Regulatory Act." App. 3a.

The Circuit courts are split on whether FAA § 4, relating to claims to compel or enjoin arbitration proceedings, allows courts to premise federal subject matter jurisdiction on the presence of a federal question in the underlying claims in arbitration. The majority of the circuits which have addressed the issue with reference to FAA § 4, have held that courts may not consider a federal question in the underlying claims. *See Westmoreland Capital Corp. v. Findlay*, 100 F.3d 263, 268 (2d Cir. 1996) ("In sum, we find that the text of FAA § 4 should not be interpreted to mean that a federal court has subject matter jurisdiction over an action to compel or stay arbitration merely because the underlying claim raises a federal question."); *Prudential-Bache Sec., Inc. v. Fitch*, 966 F.2d 981, 989 (5th Cir. 1992) ("Federal jurisdiction did not

4. The first three counts of the Second Amended Complaint were: a claim to compel further arbitration, a claim to enforce the award, and a claim requesting a declaration that disputes over the Agreement were subject to arbitration. App. H.

vest over this action based on the federal character of the underlying [arbitration] claims of federal securities law violations."); *Smith Barney, Inc. v. Sarver*, 108 F.3d 92, 94 (6th Cir. 1997) ("the Federal Arbitration Act does not supply an independent basis for federal jurisdiction, nor does the federal nature of the underlying claims that were submitted to arbitration"); *Smith Barney, Inc. v. Weinhold*, 124 F.3d 199, 1997 WL561427, at *2 (6th Cir. 1997) (unpublished table decision) ("the federal nature of the [appellees'] RICO claims is not sufficient to establish federal question jurisdiction over [appellant's] petition to enjoin arbitration"); *see also Drexel Burnham Lambert, Inc. v. Valenzuela Bock*, 696 F. Supp. 957, 965 (S.D.N.Y. 1988) (Section 4 of FAA does not provide jurisdiction based on underlying arbitral dispute); *Smith Barney, Inc. v. Painters Local Union No. 109 Pension Fund*, 976 F. Supp. 1293, 1297 (D. Neb. 1996) ("Analyzing the propriety of federal question jurisdiction in this context does not permit the court to inquire as to the substantive nature of the underlying dispute."). Only one circuit court, the Fourth Circuit, has agreed with the Eleventh Circuit's decisions in *Tamiami III* and *Tamiami IV*. *See Gibraltar, P.R., Inc. v. Otoki Group, Inc.*, 104 F.3d 616, 618-19 (4th Cir. 1997) (considering the underlying arbitral claim but ultimately concluding that the underlying claim did not present a federal question); *see also Dean Witter Reynolds, Inc. v. Sanchez Espada*, 959 F. Supp. 73, 76 (D.P.R. 1997) ("because the underlying dispute involves claims under the Securities and Exchange Act, 15 U.S.C. § 78, the Court has federal question jurisdiction").

The Eleventh Circuit is the only court which has interpreted FAA §§ 9, 10, or 11[5] as permitting federal question jurisdiction based on the underlying claim in arbitration. App. 93a-95a. *See Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 26 (2d Cir. 2000) ("Simply raising federal-law claims in the underlying arbitration is insufficient to supply this 'independent basis [of jurisdiction].'"); *Virgin Islands Hous. Auth. v. Coastal Gen. Constr. Servs. Corp.*, 27 F.3d 911, 915 (3d Cir. 1994) (for jurisdictional purposes, it is not permissible "to look beyond the complaint to the substance of the arbitrated dispute between the parties"); *Collins v. Blue Cross Blue Shield*, 103 F.3d 35, 38 (6th Cir. 1996) ("neither the FAA nor the underlying arbitrated claim provide an independent basis of federal jurisdiction in an action to confirm or vacate an arbitration award"); *City of Detroit Pension Fund v. Prudential Sec., Inc.*, 91 F.3d 26, 29 (6th Cir. 1996) ("the federal nature of the claims submitted to arbitration would not appear to be a sufficient basis for jurisdiction under 28 U.S.C. § 1331"); *Minor v. Prudential Sec., Inc.*, 94 F.3d 1103, 1106 (7th Cir. 1996) (rejecting the plaintiff's argument "that the federal character of the underlying [arbitrated] claims is sufficient to establish jurisdiction for purposes of [9 U.S.C.] § 10"); *Kasap v. Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1247 (D.C. Cir. 1999) ("[9 U.S.C.] § 10 does not create federal question jurisdiction, even when the underlying arbitration involves federal law).

The *Tamiami* decisions conflict with the majority of circuits which reject the argument that the federal character of the underlying claims in arbitration is sufficient to establish

5. Because, for current purposes, the language of FAA §§ 9, 10, and 11 is identical, courts have applied the same analysis to all three sections.

jurisdiction under the FAA. The Court should grant the Petition for Writ of Certiorari to resolve the conflict in the circuits.

1. *This Court Should Clarify Its Decision In Moses H. Cone And Resolve The Confusion That Exists As To Whether FAA § 4 Confers Jurisdiction If There Is An Underlying Federal Claim.*

The conflict in the circuits with regard to FAA § 4 has arisen, in large part, from confusion over language in this Court's decision in *Moses H. Cone*. In that case, this Court stated that FAA § 4 allows an order compelling arbitration only when the federal district court would have jurisdiction over the underlying dispute. *Id.* at 25 n.32. The language in footnote 32 has been used by some courts to support the proposition that one can look to the underlying claim in arbitration to establish jurisdiction. Most courts have rejected this reading of FAA § 4 but, at least one court which rejected that interpretation, concluded that *Moses H. Cone* suggested as much:

> The first difficulty with appellant's argument is that *despite § 4's language, it is not at all clear that even that wording creates a basis for federal question jurisdiction. Admittedly, the Supreme Court suggested as much, see Moses H. Cone*, 460 U.S. at [25] n.32, 103 S.Ct. 927 ("Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute. . . ."), but the clear weight of authority rejects that proposition.

Kasap, 166 F.3d at 1246 (emphasis supplied). The confusion exists because FAA § 4 "includes language that specifically refers to what appears to be the basis for federal question jurisdiction." *Kasap v. Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1246 (D.C. Cir. 1999). At the time the D.C. Circuit decided *Kasap*, *Tamiami III* had not been decided. The court in *Kasap* stated that only the Fourth Circuit, and several district courts, had construed FAA § 4 as creating a basis for federal question jurisdiction.[6] *Id.* at 1247. Now, both *Tamiami III* and *IV* have clearly construed Section 4 as creating such a basis and this Court should grant certiorari to resolve the direct conflict in the circuits, and to clarify the confusion arising from the language in *Moses H. Cone.*

2. *The Tamiami Decisions' Drastic Expansion Of Federal Jurisdiction Is An Important Issue Of Federal Law That Should Be Reviewed By This Court.*

The court in *Drexel* noted that if the FAA is "construed to provide for a federal forum whenever the underlying dispute involves a federal question, it must be seen as overturning the well-established rule that under § 1331 federal question jurisdiction must be determined based on the face of the 'well-pleaded complaint.' " 696 F. Supp. at 963.

As this Court stated in *Merrell Dow*, "[u]nder our long standing interpretation of the current statutory scheme, the

6. In a footnote in *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466, 1472 n.15 (11th Cir. 1997), the Eleventh Circuit, in dicta, stated that Section 4 "appear[] *to confer jurisdiction on a federal court to issue . . . [an order] to compel arbitration. . . .*"

question of whether a claim 'arises under' federal law must be determined by reference to the 'well-pleaded complaint.' " *Id.* at 808. The *Tamiami* decisions conflict with *Merrell Dow* and represent a drastic change in the scope of federal court activity by allowing federal question jurisdiction to be established by looking beyond the face of Plaintiff's well-pleaded complaint to the merits of the arbitration. Certiorari should be granted to review this expansion of federal jurisdiction.

Moreover, to construe FAA § 4 as conferring jurisdiction because of its unique language, but construing all other sections of the FAA as not providing jurisdiction, results in an incomprehensible distinction. *Drexel*, 696 F. Supp. at 963. This Court should grant certiorari to resolve the confusion which has resulted from conflicting interpretations of the various sections of the FAA.

This case also offers the Court an opportunity to review the scope and role of district courts in enforcing arbitration awards pursuant to FAA § 9. The district court reviewed the merits of the award and fashioned its own relief. The award issued by the two arbitrators did not give TPL $9.5 million. It simply reinstated an employee of MIB. The award made a suggestion that the Tribe could offer TPL the sum of $9.5 million to resolve the Tribe's claim for termination of the Agreement. The district court created its own award and gave TPL approximately $18 million. Such a review is contrary to precedent from this Court which precludes district courts from resolving the merits of a dispute and impermissibly expands the scope of federal activity with regard to FAA § 9. *See Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001) (established law precludes a court from resolving the merits of a dispute on the basis of its own factual

determinations, no matter how erroneous the arbitrator's decisions) and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598-99 (1960) (courts cannot review merits of arbitrator's decision). This Court should clarify its decisions in *Garvey* and *Steelworkers* regarding the scope of the district court's authority under FAA § 9.

B. Even Assuming The Underlying Claim In Arbitration Was Relevant To The Jurisdictional Inquiry, The Eleventh Circuit's Decisions Incorrectly Found A Substantial Federal Question Based On A Statute That Confers No Express Or Implied Right Of Action.

1. *Because The Indian Gaming Regulatory Act Provides No Express Or Implied Right Of Action To Management Contractors Against Indian Tribes, There Is No Federal Question Jurisdiction.*

Even if it were permissible to look beyond the complaint to the substance of the arbitration, no federal question is present here because the federal statute invoked, IGRA, does not give TPL a private right of action against the Tribe. The Eleventh Circuit concluded that there was subject matter jurisdiction because federal law was implicated by the underlying IGRA claim. *Tamiami IV* App. 3a and *Tamiami III*, App. 94a, citing *Tamiami II*, 63 F.3d at 1047. Significantly, none of the *Tamiami* opinions specify what provision of IGRA gives TPL a claim against the Tribe.[7]

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7. Every court that has reviewed the issue, including the Eleventh Circuit in *Tamiami II* with regard to the individual defendants, has found no private right of action under IGRA. *See, e.g., Tamiami II*, 63 F.3d at 1049; *Hartman v. Kickapoo Tribe* (Cont'd)

TPL is not the proper party to bring a suit under IGRA against the Tribe, *see, e.g.*, *Wilderness Soc'y v. Alcock*, 83 F.3d 386 (11th Cir. 1996), and cannot rely on IGRA to confer federal question jurisdiction. There can be no federal question because IGRA does not provide any party with a claim against the Tribe.

The *Tamiami* decisions conflict with *Merrell Dow*'s holding that Congress' decision to provide no private remedy "is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." *Merrell Dow*, 478 U.S. at 814; *see also PCS 2000 LP v. Romulus Telecomm., Inc.*, 148 F.3d

(Cont'd)
Gaming Comm'n, 176 F. Supp. 2d 1168, 1175 (D. Kan. 2001); *Jimi Dev. Corp. v Ute Mountain Ute Indian Tribe*, 930 F. Supp. 493 (D. Colo. 1996). Indeed, nothing in the face of IGRA, gives management contractors a claim against tribes. IGRA provides a remedial scheme for gaming compacts between tribes and states. 25 U.S.C. § 2710. IGRA's regulatory scheme was intended to protect tribes' pre-existing rights, *see California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), but there is no provision in the scheme for a private right of action for management contractors to seek review of a tribe's decisions on gaming licenses. There is also nothing in IGRA's legislative history to indicate that Congress intended to create a private right of action against tribes. *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979). IGRA was enacted for the benefit of tribes to promote tribal economic prosperity, tribal self-sufficiency and strong tribal governments. 25 U.S.C. § 2701(4). The legislative history of IGRA discusses the governmental interests of the tribes and the benefits to tribes of negotiations with states for gaming. *See* S. Rep. 100 Cong., No. 100-446, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083-84. TPL has never argued, and would have no basis to argue, that it has a private right of action against the Tribe under IGRA.

32, 35 (1st Cir. 1998) (holding that underlying state law dispute would not confer federal jurisdiction in action to stay arbitration where federal statute did not provide a private right of action).

An action under 28 U.S.C. § 1331(a) arises only if the complaint seeks a remedy expressly granted by federal law or if the action requires construction of a federal statute, or at least a distinctive policy of a federal statute requires the application of federal legal principles. *Virgin Islands Hous. Auth.*, 27 F.3d at 916 (citing *Lindy v. Lynn*, 501 F.2d 1367, 1369 (3d Cir. 1974)). The fact that a contract is subject to federal regulation does not mean that Congress intended all aspects of its performance or nonperformance to be governed by federal law. The Eleventh Circuit's opinions conflict with the decisions in *Merrell Dow* and *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983).

In *Franchise Tax Board*, the questions in dispute encompassed an interpretation of federal law. *Id.* at 15. Here, the request to enforce the award and to compel further arbitration do not encompass any interpretation of federal law. Simply referencing IGRA in a complaint which seeks contract remedies fails to create subject matter jurisdiction where none exists. The fact that no private right of action exists against tribes under IGRA is conclusive to a determination that the federal claim is insubstantial.

2. *The Tamiami Decisions Compound An Existing Intra-Circuit Conflict And Conflict With This Court's Decision In Merrel Dow.*

In *City of Huntsville v. City of Madison*, 24 F.3d 169 (11th Cir. 1994) the Eleventh Circuit concluded that *Merrell Dow*'s language that a "Congressional decision to preclude

a federal private remedy 'is tantamount' to a Congressional conclusion that a claimed violation of that statute does not present a federal interest substantial enough to confer federal question jurisdiction" could not be read as establishing a bright line rule that federal courts should not exercise federal question jurisdiction where a federal statute without a private remedy is incorporated in a state cause of action:

> According to the Court [in *Merrell Dow*], a Congressional decision to preclude a federal private remedy "is tantamount" to a Congressional conclusion that a claimed violation of that statute does not present a federal interest substantial enough to confer federal question jurisdiction. *Nonetheless, the Supreme Court did not expressly retreat from Franchise Tax Board in Merrell Dow, and we are unwilling to read Merrell Dow so broadly as to do what the Supreme Court did not expressly do.* We conclude that it will be only the exceptional federal statute that does not provide for a private remedy but still raises a federal question substantial enough to confer federal question jurisdiction when it is an element of a state cause of action.

24 F.3d at 174 (citations omitted) (emphasis supplied).

In contrast, in *Ayres v. General Motors*, 234 F.3d 514 (11th Cir. 2000) the court stated:

> Plaintiffs are correct that *Merrell Dow* holds that a claim does not arise under federal law where "a complaint alleg[es] a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation."
> ("The significance of the necessary assumption that there is no federal cause of action thus cannot be overstated.").

Id. at 519 n.8 (citations omitted). *Ayres* found that the statutes at issue there did provide a private right of action.

The *Tamiami* decisions compound the intra-circuit conflict and improperly expand federal question jurisdiction. This Court should grant certiorari to resolve the issue of whether *Merrell Dow* establishes a bright line rule that federal courts should not exercise federal question jurisdiction where a federal statute without a private remedy is incorporated in a state cause of action and whether such a bright line rule would "retreat" from *Franchise Tax Board*. Even if such a bright line rule was not set by *Merrell Dow*, the Court should offer guidance as to what "exceptional" statute would provide federal jurisdiction where no private right of action exists.

3. *The waiver of sovereign immunity did not confer jurisdiction*

Relying on *C & L Enters. Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001), *Tamiami IV* found that the Tribe's waiver of immunity in the Agreement subjected the Tribe to the jurisdiction of the federal court. App. 3a.

Potawatomi establishes that a waiver of sovereign immunity would permit a tribe to be sued in a state or federal court that otherwise has jurisdiction over the subject matter in dispute. 532 U.S. at 412-13. As explained above, TPL's action to compel arbitration and to enforce an arbitration award regarding a state law breach of contract claim does

not give rise to federal question jurisdiction irrespective of whether sovereign immunity has been waived. *See Okla. Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989) (finding that state-law tax claims do not arise under federal law, and thus there is no independent basis for original federal jurisdiction even though the asserted tribal immunity in that case, a federal defense, is governed under federal law); *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 18 n.17 (1951) (finding that the consent of the parties cannot expand the jurisdiction of federal courts because it would allow federal courts to become the "common resort of persons who have no right, either under the Constitution or the laws of the United States, to litigate in those courts"). *Tamiami I* held that the Tribe's waiver of sovereign immunity was of no import with regard to federal jurisdiction. App. L. "Even though the parties' agreement contains a limited waiver of the Tribe's sovereign immunity, this waiver cannot grant federal question jurisdiction where it otherwise would not exist — that is, this state law breach of contract claim is not appropriate for federal court jurisdiction." App. L. Because there is no diversity of parties, or the presence of a federal question, there is no basis for federal jurisdiction.[8]

8. Moreover, irrespective of the issue of federal question jurisdiction, the Tribe's waiver here was only a limited waiver to contract claims and not to any possible federal claims under IGRA.

II. THE ELEVENTH CIRCUIT'S REJECTION OF THE TRIBAL COURT'S ORDERS STAYING THE ARBITRATION, AND SUBSEQUENTLY VACATING AN ARBITRATION AWARD, CONFLICTS WITH AN UNBROKEN LINE OF SUPREME COURT PRECEDENT REQUIRING DEFERENCE TO TRIBAL LEGAL INSTITUTIONS.

This Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government," as well as the "vital role played by tribal courts in tribal self-government." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987). For this reason, this Court held that tribal court remedies must be exhausted before a tribal court decision can be challenged in federal court. *Id.* at 16-17. Furthermore, once tribal remedies are exhausted, a federal court challenge to a tribal court ruling is limited to the claim that the tribal court lacked jurisdiction; the decision cannot be challenged on the merits. *Id.* at 19.

This Court should review the decision below because it directly conflicts with precedent from this Court regarding tribal exhaustion requirements. The court exercised jurisdiction over TPL's challenge to the Tribal Court's orders which stayed the arbitration and then vacated the arbitration award, App. 35a-36a, even though TPL had not first exhausted its Tribal Court remedies. The lower court compounded this error by not limiting its review to whether the Tribal Court had jurisdiction, but instead addressing and rejecting the Tribal Court's rulings on the merits. App. 35a.

This Court should also review this case because it presents an important question regarding the fundamental relationship between the authority of the Tribal Court of a

sovereign Indian tribe and the jurisdiction of the federal courts. The authority of tribes to regulate consensual commercial transactions with non-Indians on tribal lands is of fundamental importance to Tribes. Disputes between Indians and non-Indians are occurring with greater frequency because Indian gaming has greatly increased business transactions with tribes. This Court should provide guidance regarding these important issues.

A. TPL Should Have Been Required To Exhaust Its Tribal Court Remedies Before Challenging Tribal Court Jurisdiction In Federal Court.

In *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985), this Court explained that the question of tribal court jurisdiction should be examined in the first instance in the tribal court itself:

> Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.

Id. at 857. As this Court explained in *Iowa Mutual*, "the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.' " *Id.* at 16. The Fifth Circuit Court of Appeals has correctly recognized that this tribal exhaustion requirement applies with equal force to tribal court rulings regarding arbitration. *See Bank One v. Shumake*, 281 F.3d 507, 514-15 (5th Cir. 2002) (holding that the tribal exhaustion doctrine applies to suits to compel arbitration under the Federal Arbitration Act).

In this case, the Tribal Court entered orders staying the arbitration and vacating the ex parte arbitration award, which was rendered in violation of the Tribal Court's stay order. App. E and F. TPL did not challenge these rulings in the Tribal Courts, nor did it appeal these decisions. Instead TPL filed an action in federal court. The Eleventh Circuit violated the clear mandate of *National Farmers* and *Iowa Mutual* by entertaining TPL's challenges to Tribal Court jurisdiction without giving the Tribal Court a "full opportunity to determine its own jurisdiction."

B. The Eleventh Circuit Erred By Considering And Rejecting The Merits Of The Tribal Court Orders Staying Arbitration And Vacating The Arbitration Awards.

On July 16, 1992 the Tribal Court ordered the Tribe and TPL to arbitrate the disputes arising from the Tribe's Statement of Claim. App. 79a. The Tribal Court stayed the arbitration on September 16, 1993 and, on October 11, 1993, the Tribal Court vacated the October 6, 1993 *ex parte* arbitration award. App. E and F. In *Iowa Mutual*, this Court held that unless a federal court determines that the tribal court lacked jurisdiction, proper deference to the tribal court system precludes relitigation of issues resolved in the tribal courts. *Iowa Mutual*, 480 U.S. at 19; *see also Tamiami I*, 999 F.2d at 508 n.12.[9] The district

9. There is also a conflict between *Tamiami I*'s conclusion that proper deference should be given to the Tribal Court's decisions and the other *Tamiami* decisions which allow review of an arbitration "award" issued after the Tribal Court had stayed the arbitration and vacated the "award."

court ignored the doctrine in *Iowa Mutual* by ignoring the Tribal Court's orders and purporting to enforce an award.

Until the Eleventh Circuit's decision, the lower federal courts uniformly followed this Court's holding that tribal court rulings on the merits should not be disturbed as long as the tribal court had jurisdiction to entertain the suit. *See, e.g., Wilson v. Marchington*, 127 F.3d 805, 809-10 (9th Cir. 1997) (holding that principles of comity not full faith and credit require recognition of tribal court judgments);[10] *AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 903-04 (9th Cir. 2002) ("Unless the district court finds the tribal court lacked jurisdiction or withholds comity for some other valid reason, it must enforce the tribal court judgment without reconsidering issues decided by the tribal court.").

The Tribal Court vacated the ex-parte arbitration award because: it was rendered in defiance of the Tribal Court stay; the arbitration was conducted *ex parte* by only two of the three arbitrators; there was insufficient notice; and the arbitrators held the hearing after their jurisdiction had expired. App. F. The district court and the Eleventh Circuit revisited these precise issues and concluded that the Tribal Court erred in vacating the arbitration award on these grounds. App. A. This Court should review this decision because it squarely conflicts with *Iowa Mutual* and fails to accord the proper deference and respect to the Tribal Court ruling.

10. Although this Court's holding in *Iowa Mutual* is clear, the rationale for the decision is not set forth. This case presents an excellent opportunity for this court to explain the basis and contours of the *Iowa Mutual* doctrine.

Moreover, the Tribal Court was correct in its rulings even if the merits were subject to review. Not only was the arbitration conducted beyond the jurisdictional time limits but it was contrary to Florida law which requires proper notice and the presence of three arbitrators. TPL had also waived any right to arbitration, under Florida law, by filing the Amended Complaint which sought money damages and injunctive relief. ("Tamiami's first claim, however, is simply a breach of contract claim for which it seeks money damages and injunctive relief." *Tamiami II*, 63 F.3d at 1048). A complaint that does not simply seek to preserve the *status quo* is a direct repudiation of arbitration and a waiver. *Saxon Fin. Group, Inc. v. Goodman*, 728 So. 2d 365, 365-66 (Fla. 4th DCA 1999); *Bonner v. RCC Assoc., Inc.*, 679 So. 2d 794, 795 (Fla. 3d DCA 1996).

C. This Case Affords This Court An Excellent Opportunity To Decide Whether A Tribal Court Clearly Has Jurisdiction To Adjudicate Tribal Member's Claims Against Non-Members Who Enter Into Consensual Business Relationships With The Tribe.

It is undisputed that Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." *Montana v. United States*, 450 U.S. 544, 563 (1981) (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)); *see also Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851 (1985) ("The tribes also retain some of the inherent powers of self-governing political communities that were formed long before Europeans first settled North America."). This Court has squarely held that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of

nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements." *Id.* at 565; *see also Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997) (same). "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566.

On more than one occasion, this Court has strongly suggested that the power to regulate consensual relationships includes the power to adjudicate claims by tribal members against non-members arising out of such transactions. *Strate*, 520 U.S. at 453 ("where tribes possess authority to regulate the activities of nonmembers, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.' . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."); *Iowa Mutual*, 480 U.S. at 18

> Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. 'Because the tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.'

National Farmers Union Ins. Co., 471 U.S. at 854 (suggesting that tribal courts may have jurisdiction to adjudicate civil disputes involving non-Indians which entered into consensual business relationships with Tribes). In *Nevada v. Hicks*, 533

U.S. 353 (2001), this Court declined to reach the issue and expressly left "open the question of tribal court jurisdiction over nonmember defendants in general." This case affords this Court an excellent opportunity to answer this important question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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