No. 12-515

In the Supreme Court of the United States

STATE OF MICHIGAN, PETITIONER

v.

BAY MILLS INDIAN COMMUNITY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

INTRODUCTION

The Bay Mills Tribe now agrees that the federal courts have subject-matter jurisdiction to enjoin illegal, off-reservation tribal gaming, thus mooting the first issue presented. The only remaining question is whether the Tribe has sovereign immunity from such a suit. In their briefs, Bay Mills and its *amici* fail to address the fundamental enigma this question presents—why would Congress authorize a state to obtain a federal injunction against illegal tribal gaming on Indian lands, but not on lands subject to the state's own sovereign jurisdiction?

The answer is simple: Congress did *not* intend such an anomaly. When Congress enacted IGRA in 1988—a decade before this Court decided *Kiowa Tribe* v. *Manufacturing Technologies*, 523 U.S. 751, 756 (1998)—Congress either (1) believed that tribes had *no* immunity for illegal, off-reservation, commercial conduct, or (2) intended to abrogate any such immunity through IGRA's comprehensive scheme. Either way, this lawsuit should proceed.

In trying to shield its illegal casino from federal-court review, Bay Mills makes multiple errors, but three stand out. First, Bay Mills is wrong to assert that this Court lacks authority to alter the scope of tribal immunity. Bay Mills Br. 2, 18–19, 32, 47. Tribal immunity is a common-law doctrine that this Court created. At no time has Congress felt a need to codify the doctrine or its reach, or to place limits on the Court's authority to do so. Congress's inaction firmly commits the doctrine's further development to the common law.

Second, there is an urgent need for this Court to revisit the holding in *Kiowa*. Contra Bay Mills Br. 34–38. Lower courts—including the Sixth Circuit here—have applied *Kiowa* to insulate tribes from all manner of lawsuits, encouraging more aggressive commercial conduct seeking to exploit the immunity doctrine, including the expansion of illegal gaming. As confirmed by the continuing negative effects on states, businesses, and individuals, "[t]here are reasons to doubt the wisdom of perpetuating the doctrine" of tribal immunity. *Kiowa*, 523 U.S. at 758.

Third, Michigan has no adequate alternative remedies. Contra Bay Mills Br. 53–57. Some of Bay Mills' suggestions—arbitration, an *Ex parte Young*-type suit, or a counterclaim in the Tribe's suit against Michigan's Governor—likewise face a tribal-immunity defense. Others require the State to rely on federal enforcement by the same agencies that have already declined requests by Michigan and the greater Indian community to stop Bay Mills' illegal conduct. And while perhaps the Michigan State Police could arrest tribal officials at the Vanderbilt casino site—something Michigan has done everything it can to avoid, given the potential inter-sovereign conflict—sovereign immunity may ultimately bar that action, too.

For the IGRA structure to work, tribes cannot be allowed to engage in illegal, off-reservation gaming, i.e., on lands subject to a state's exclusive jurisdiction. The federal courts should enjoin such illegal conduct, just as they would if a foreign nation or another state tried to open an illegal casino in Michigan. The Sixth Circuit should be reversed.

ARGUMENT

I. Bay Mills concedes that the federal courts have subject-matter jurisdiction over this action.

Bay Mills now accepts that the federal district court below had subject-matter jurisdiction to decide this suit and issue an injunction. Bay Mills Br. 23–24. The United States agrees. U.S. Br. 16 (acknowledging § 2710 does not displace § 1331 jurisdiction).

Amicus National Congress of American Indians continues to assert that there is no federal subject-matter jurisdiction here. NCAI Br. 4–13. But that assertion is not well founded. This Court has made clear that in the absence of statutory text "expressly limiting the jurisdiction that other statutes confer on district courts," plaintiffs remain free to invoke other jurisdictional statutes, such as § 1331. Michigan Br. 23 (discussing *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3150 (2010).) No such express limitation appears in § 2710, so that is the end of the analysis.

The Tribe's concession narrows the dispute to a single question—whether sovereign immunity shields a tribe from federal-court review of illegal, commercial activity that takes place not on tribal lands, but on lands subject to a state's jurisdiction. Michigan respectfully requests that the Court answer that question "no" and reinstate the district court's injunction.

II. Tribal immunity should not extend to illegal activity on a state's sovereign lands.

A. The most effective remedy in this case is to clarify or reform the common-law doctrine of tribal immunity.

1. This Court has authority to adapt the common law of tribal immunity.

The Tribe says only Congress can modify tribal immunity, Bay Mills Br. 2, 18–19, 32, 44, 47, despite the doctrine's undisputed common-law origin. *Kiowa*, 523 U.S. at 756–58. But until Congress enacts a statute that codifies tribal immunity, it will continue to be a common-law doctrine that the courts can modify. And one thing is undeniable: Congress has never codified tribal immunity.

This does not mean that Congress hasn't weighed in; Congress has at times taken action regarding tribal immunity. But that action is almost always *abrogating* immunity in specific situations, or requiring a tribe to waive it. See U.S. Br. 30 (citing statutes). A reasonable conclusion to draw is that Congress is not a big fan of tribal immunity.

Michigan's opponents point to another breed of statute that neither creates nor abrogates tribal immunity but declares Congress's intent not to have any effect on it. E.g., the Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111-154, § 2(E). These sorts of statutes declare that they shall not "be deemed to abrogate or constitute a waiver of any sovereign immunity" or "otherwise to restrict, expand, or modify any sovereign immunity." 15 U.S.C. § 378(c)(1)(B).

Michigan's opponents characterize this language as stripping this Court of its authority to modify common-law immunity. But a fairer reading is that Congress was disclaiming any intent to change common-law immunity. This is no more a ratification of tribal immunity than if Congress had been completely silent.

In their fruitless search to find evidence that Congress has embraced tribal immunity, Bay Mills and its *amici* also point to bills that Congress never even enacted. For example, Senator Gorton offered a bill in 1998 that would have significantly scaled back the common law of tribal immunity. American Indian Equal Justice Act, S. 1691, 105th Cong., 2d Sess. (1998). Congress never acted, and from this fact the Tribe asks the Court to conclude that Congress is opposed to any changes to common-law tribal immunity. Bay Mills Br. 41.

Of course, there are many reasons why any particular bill does not get enacted, and there are hundreds of such bills in each Congress. These include a counterpoint bill which would have found that tribes' sovereignty "predates the formation of the United States," which is another way to assert that this sovereignty is inherent. Indian Tribal Conflict Resolution and Tort Claims and Risk Management Act of 1998, S. 2097, 105th Cong., 2d Sess. (1998). This bill was never enacted either. Based on Bay Mills' theory—that the rejection by Congress of statutory language means that its disapproval becomes the law—courts should not base any decisions on the notion that tribes enjoy inherent sovereignty.

In sum, congressional inaction doesn't mean Congress likes where the common law is; it means Congress is content with the Court drawing the common-law line. And when there is an anomaly in the common law, "in the absence of legislation, . . . it is hard to see how the judiciary can wash its hands of a problem it created." *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 507 (2008) (modifying federal maritime common law). There can be no real dispute that this Court has the authority to define the scope of common-law tribal immunity.

2. Until Congress codifies tribal immunity, courts should develop it.

What the Tribe and its *amici* fail to explain is why, if Congress was so enamored with tribal immunity, it didn't take the logical step of passing a law that defines and preserves that immunity. Congress frequently codifies aspects of the common law, including immunity. For example, foreign sovereigns enjoyed a nearly blanket immunity from lawsuits in the United States for many years. But as early as the 19th Century, courts began chipping away at that blanket immunity. In *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976), this Court employed the restrictive theory of foreign sovereign immunity that allowed immunity only for foreign sovereigns' non-commercial activities. Congress liked that development and essentially codified the restrictive theory in the Foreign Sovereign Immunities Act. *Samantar* v. *Yousuf*, 560 U.S. 305, 313 (2010) ("Section 1602 describes the Act's two primary purposes: (1) *to endorse and codify* the restrictive theory of sovereign immunity. . .") (emphasis added).

Bay Mills has offered an explanation of FSIA's adoption that includes the surprising assertion that "the State Department overturned the 'virtually absolute' judicial conception of foreign sovereign immunity and created a new commercial activity exception in 1952." Bay Mills Br. 43. The Tribe appears to be saying that only the political branches are authorized to modify sovereign immunity, and that the courts just follow along. Not so. Long before 1952, courts employed the restrictive theory of foreign sovereign immunity. See *Alfred Dunhill*, 425 U.S. at 695–706 (1976) (describing history and noting cases drawing commercial-activity distinction as early as 1824).

In truth, the development of foreign-sovereign-immunity law followed a traditional path. And while courts may have considered the State Department's views, it was undeniably the *courts* that created and adapted common-law foreign immunity until Congress codified it in 1976. In other words, until Congress acts, courts should. And if Congress doesn't favor the course the Court takes, it can always choose a different path, just like Congress did when enacting IGRA in response to *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

Michigan's reading of Congress's preference is confirmed by Congress's continued refusal to codify tribal immunity, even after it was publicly invited to do so by the Court in *Kiowa*. Congress has once again refused to pass any such law, leaving this Court to address the problems it identified in *Kiowa* if it believes that is an appropriate course. Michigan respectfully suggests that it is.

3. It is time to revisit *Kiowa*.

Whether by limiting *Kiowa* to its facts, Michigan Br. 36–38, or revisiting *Kiowa*'s holding, Michigan Br. 38–41, the Court should reasonably limit tribal immunity. Lower courts have applied *Kiowa* to shield all manner of for-profit tribal businesses that perform no government function other than revenue production. E.g., *Native Am. Distrib.* v. *Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008) (immunity for tribal tobacco business); *Florida Paraplegic Assoc.* v. *Miccosukee Tribe of Indians*, 166 F.3d 1126 (11th Cir. 1999) (tribal restaurant and entertainment facility immune from Americans with Disabilities Act); *Trudgeon* v. *Fantasy Springs Casino*, 71 Cal. App. 4th 632 (Cal. Ct. App. 1999) (tribal casino immune from patron's suit for injury).

Courts have also extended tribal immunity to employees. E.g., *Chayoon* v. *Chado*, 355 F.3d 141 (2d Cir. 2004) (tribal-casino employee immune from FMLA claim); *Cook* v. *AVI Casino Enterprises*, 548 F.3d 718 (9th Cir. 2008) (tribal-casino employee immune from claim by man catastrophically injured as a result of employee serving alcohol at a casino party); *Allen* v. *Mayhew*, 2009 WL 426091 (E.D. Cal. Feb. 20, 2009) (tribal-casino managers immune from employment-discrimination claims).

Oklahoma's *amicus* brief (pp. 13–14 n.4 (citing 18 Oklahoma cases)) and Alabama's 16-state *amici* brief (pp. 11–16 (citing numerous additional cases)) further amplify the concerns this Court voiced in *Kiowa*.

This case is a perfect example. Not only will Michigan be forced out of court if the Tribe has its way, tribal immunity has already deprived a separate tribe—one that lawfully operates a competing casino on Indian lands near Vanderbilt—of a remedy for Bay Mills' illegal competition.

Given tribes' forays into these numerous commercial ventures, leveling the playing field makes sense. This reality has already been imposed on foreign governments that conduct business in the United States—first by the courts, then by Congress. Michigan Br. 33–35. The sky will not fall if blanket tribal immunity goes away; there are plenty of foreign companies that operate successfully in the United States though subject to suit. And tribes will still have the competitive advantage of paying limited taxes and avoiding state regulation for their businesses conducted *in* Indian country.

In fact, as established by the Tribe and its *amici*, a number of tribes have already waived immunity for their gaming operations to no ill-effect. Bay Mills Br. 8, 9, 55; NCAI Br. 20, n.8. And while it is understandable why tribes desire blanket immunity, the negative consequences for other parties, both tribal and non-tribal, are too high a price to pay.

All nine Justices in *Kiowa* noted "reasons to doubt the wisdom of perpetuating" tribal immunity. 523 U.S. at 758; *id.* at 764–66 (Stevens, J., dissenting). Michigan is not asking the Court to abolish the doctrine. But the Court should limit blanket immunity to reflect modern commercial realities and to bring tribal immunity in line with foreign-nation and state immunity.

4. Just like other sovereigns, tribes should have no immunity for illegal commercial activity outside their sovereign territory.

Alfred Dunhill explained why courts adopted the restrictive theory of foreign sovereign immunity: "The potential injury to private businessmen—and ultimately to international trade itself—from a system in which some of the participants in the international market are not subject to the rule of law has . . . increased." 425 U.S. at 703. "[S]ubjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty . . . ." *Id.* at 703–04.

So too here. There is little reason to insulate tribes from litigation as a means to promote economic self-sufficiency, given the "modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities." *Kiowa*, 523 U.S. at 757. Tribal gaming in particular has grown exponentially, approaching private-gaming-sector size. Michigan Br. 9–10. Just as with blanket foreign immunity, there are dangers in a system that allows some participants in commerce to avoid the law.

And the cost to leveling the playing field is not high. Like foreign sovereigns, when tribes act in their commercial capacities they "do not exercise powers peculiar to sovereigns." *Alfred Dunhill*, 425 U.S. at 704. Treating tribal commercial activity like that of foreign nations is "unlikely to touch very sharply" on legitimate sovereign interests. *Id.*

In addition, there is no reason why tribes with common-law immunity should receive more protection from suit than constitutionally-immune states. This Court has authorized suits against a state arising out of conduct taking place in another state and filed in the courts where the conduct occurred. E.g., *Nevada* v. *Hall*, 440 U.S. 410 (1979). Particularly when the effect is to diminish a state's regulatory jurisdiction over its own lands, a state should not be denied an adequate remedy for illegal, off-reservation, commercial conduct.

5. The Tribes have no reliance interest in conducting illegal off-reservation activity free from federal-court scrutiny.

The Tribe urges the Court to deny Michigan's request to revise the common law of tribal immunity because "[w]hen the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision," the Court should hesitate to revisit that decision. Bay Mills Br. 42. While there may be circumstances where this logic would have force, this case is not one of them.

As explained above, Congress has not relied on the doctrine of tribal immunity in any statute it has passed. And when Congress has acknowledged that immunity, it has typically done away with it—hardly the stuff of reliance. Likewise, in statutes where Congress has stated its intent not to change immunity by abrogating it or expanding it, it has never incorporated the substance of such immunity into the statutory fabric.

In addition, there is no reliance interest here comparable to the one the Court identified in *Hilton* v. *South Carolina Public Railways Commission*, 502 U.S. 197 (1991). Bay Mills Br. 42. There, the Court affirmed its 30-year-old precedent that allowed railroad workers to sue states for money damages under the Federal Employees Liability Act. The Court explained that many states had excluded railroad workers from their workers compensation systems in reliance on the precedent. *Id.* at 202. The Court was also concerned about questioning whether the entire federal scheme of railroad regulation applied to state-owned railroads. *Id.* at 203. Overruling its earlier precedent would have also put at risk countless railroad employees who had acted in the belief that they were protected for injuries occurring on the job. *Id.*

In contrast here, tribes are trying to protect an unfair advantage in their business dealings. Tribes want to shield themselves from lawsuits, even if the plaintiff has a valid claim. While this may provide some economic benefit to tribes, it harms those with legitimate claims, and it harms tribes by discouraging non-tribal members from doing business with tribes.

Moreover, granting blanket immunity from suit does not create a healthy "reliance." An entity that can't be sued will be encouraged to take unwarranted risks because there is no fear of judicial review. And reliance is an equitable doctrine. *CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866, 1881 (2011). Allowing a party to engage in illegal conduct is never equitable.

Finally, if sovereign immunity creates such a powerful reliance interest, it would have discouraged the courts from adopting the restrictive theory of foreign sovereign immunity. That did not happen, nor should it here.

B. Alternatively, the Court should hold that tribes have no immunity under IGRA for illegal, off-reservation gaming.

IGRA was enacted to address this Court's decision in *Cabazon*, which held that states could not regulate gaming activities in Indian country. Viewing IGRA's text and structure as a whole, as this Court did in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), it is apparent that Congress intended states and tribes would be able to obtain a federal-court remedy for illegal gaming taking place either on or off Indian lands. The phrase "on Indian lands" in § 2710(d)(7)(A)(ii) was not a *limitation* on tribal-immunity abrogation but in fact an *expansion* of state authority into Indian country. Michigan Br. 25.

There was no federal law in 1988 that prohibited states from enjoining illegal gaming on lands subject to a state's exclusive jurisdiction. If there had been such a prohibition, Congress never would have provided an off-reservation "loophole" by limiting IGRA to "Indian lands." Congress reasonably believed that states already had authority to adequately remedy illegal acts on lands subject to exclusive state jurisdiction, whether those acts were performed by state citizens, foreign governments, or tribes.

Bay Mills' only contrary authority is *Puyallup Tribe* v. *Department of Game*, 433 U.S. 165 (1977), but in *Puyallup*, the Court's holding was limited to on-reservation conduct. *Id*. at 167–68 ("The Tribe . . . contends in this Court that the doctrine of sovereign immunity requires that the judgment be vacated, and that the state courts of Washington are without jurisdiction to regulate fishing activities *on its reservation*. . . . We hold that insofar as the claim of sovereign immunity is advanced on behalf of the Tribe, . . . it is well founded.") (emphasis added). Indeed, Justice Stevens authored *Puyallup*, yet wrote in his *Kiowa* dissent that the Court had never before expressly "applied the [tribal immunity] doctrine to purely off-reservation conduct." *Kiowa*, 523 U.S. at 764 (Stevens, J., dissenting).

In addition, IGRA provides that state anti-gaming laws and punishments apply equally in Indian country as elsewhere in a state, 18 U.S.C. § 1166(a), and that the United States has exclusive jurisdiction *only* over "criminal prosecutions" for violations of those laws. 18 U.S.C. § 1166(d). States therefore have concurrent on-reservation jurisdiction and exclusive off-reservation jurisdiction to pursue civil remedies involving illegal gaming. Michigan Br. 25–26. Congress intended to provide states (and other tribes) a remedy for illegal tribal gaming *wherever* it occurred. See *United States* v. *Santee Sioux Tribe*, 135 F.3d 558, 565 (8th Cir. 1998) ("According to the government, 'all State laws' necessarily includes Nebraska civil case law authorizing injunctive relief to effectuate the closure of gambling establishments determined under State law to be public nuisances. We agree.").

These truths are confirmed by the fact that Congress authorized tribal gaming only on "Indian lands." 25 U.S.C. § 2710(a)(1) (Class I), (b)(1) (Class II), and (d)(1) (Class III); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S. Ct. 2199, 2203, n.1 (2012). By restricting Indian gaming to Indian lands, IGRA reflected Congress's understanding in 1988 that in the absence of any off-reservation immunity for tribes, states could enjoin illegal gaming taking place on lands subject to state sovereign jurisdiction.

In that sense, IGRA was not a true "abrogation" at all; it did not change common-law tribal immunity but rather maintained the status quo. Cf. Bay Mills Br. 31 ("The statute simply has nothing to do with activity that takes place outside Indian lands."). Accordingly, it is subject to standard statutory rules of construction rather than the heightened standard typically used for abrogation.

But even under a heightened "unequivocal expression" test for abrogation, Michigan's construction of IGRA is the only reasonable one. Michigan Br. 25–30. Bay Mills and its *amici* offer no explanation why Congress would give states the power to enjoin illegal gaming on tribal reservations while simultaneously withholding the same power for illegal gaming taking place on land subject exclusively to state jurisdiction. Construing IGRA the opposite way, out of deference to an unequivocal-expression canon of construction, would defeat congressional intent, which is forbidden. *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001).

Finally, as Michigan explained in its initial brief, the Court should consider whether an "unequivocal expression" test is the correct barometer for measuring congressional intent to abrogate tribal immunity. Michigan Br. 30–33. Unlike states, tribal sovereignty has no constitutional dimension, warranting a lesser standard. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978), did not consider that distinction, and simply adopted the abrogation test articulated in *United States* v. *Testan*, 424 U.S. 392, 399 (1976), and *United States* v. *King*, 395 U.S. 1, 4 (1969). But those cases involved the entirely different question of whether the United States waived its immunity in the Court of Claims. There is no explanation or logic for why the same waiver/abrogation test should apply to tribes.

III. Under IGRA, licensing and operating a casino is "class III gaming activity."

Bay Mills argues that its *on*-reservation activities of licensing and operating the Vanderbilt casino do not qualify as "class III gaming activity" under IGRA § 2710. Bay Mills Br. 22. The Tribe is wrong.

As the Tribe acknowledges, "class III gaming" is a defined term. 25 U.S.C. § 2703(8). If Congress wanted to limit § 2710(d)(7)(A)(ii) injunctions to the actual conduct of games, it would not have made § 2710 applicable to "class III gaming *activity*," a much broader concept that naturally includes conduct necessary for gaming, i.e., licensing and operation.

The Tribe selectively focuses on IGRA provisions that may contemplate only games themselves. But that doesn't mean the phrase can't extend to other matters depending on the context. For example, § 2710(d)(3)(B) and (C) say that a state and tribe may enter into a compact "governing gaming activities," *including* "standards for the operation of such activity and maintenance of the gaming facility, including licensing." The phrase "gaming activities" thus includes more than just the games themselves.

The same is true where IGRA contemplates a compact that governs how the parties allocate criminal and civil jurisdiction, and how they remedy breaches of contract. 25 U.S.C. § 2710(d)(3)(C). If these provisions govern "gaming activities," as IGRA demands, then such activities must be broader than just the games themselves. So interpreting the phrase "gaming activities" to include activities directly related to gaming more accurately reflects IGRA's structure and logic.

Bay Mills is also wrong to assert that the Court cannot consider the legality of the Tribe's on-reservation conduct because that issue is "new" and "outside the scope of the questions." Bay Mills Br. 19. Michigan raised this very argument in its petition as an alternative form of relief, Pet. 12, 15, a remedy the Court could have granted through a summary reversal. Bay Mills did not protest, thus waiving any procedural objection. Sup. Ct. R. 15.2; *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Protection*, 130 S. Ct. 2592, 2610 (2010).

IV. There is no adequate forum outside the federal courts for states to stop illegal, off-reservation tribal gaming.

Bay Mills identifies a "wide variety of enforcement options" that it says remain available to states who wish to stop illegal gaming on sovereign state lands. Bay Mills Br. 53–57. These options are problematic at best.

A. Arbitration is not a viable option.

The Tribe accuses Michigan of avoiding arbitration "for unknown reasons." Bay Mills. Br. 54. There were, however, very good reasons.

The arbitration provision is not mandatory. Compact § 7(A) says that either party "may" invoke arbitration, Pet. App. 89a, and § 7(B) says that nothing in § 7(A) limits any remedy otherwise available to a party, Pet. App. 90a.

More important, Michigan didn't exercise its voluntary arbitration remedy because it had no assurance that the Tribe would abide by the arbitrator's ruling. Section 7(B) makes clear that nothing in the compact—including the § 7 arbitration provision—waives either party's sovereign immunity. Pet. App. 90a. If Michigan attempted to enforce a favorable award by reducing it to a federal-court judgment, the Tribe would have asserted its immunity. Indeed, the Tribe has already ignored the determination by the Department of the Interior and the National Indian Gaming Commission that the Vanderbilt property was not Indian lands—the same issue that would have been presented to the arbitrator.

The Tribe asserts that Michigan should have negotiated a waiver of the Tribe's immunity. Bay Mills Br. 54–55. But Michigan had no power to make the Tribe waive its immunity, and at the time of negotiation (1993), this Court had not yet decided *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996) (holding that tribes cannot sue states to force compact negotiation). Given the one-sided negotiating posture—IGRA required Michigan to negotiate in good-faith a gaming compact, 25 U.S.C. § 2710(d)(3)(A), and authorized Bay Mills to sue in federal court to compel performance of that duty, 25 U.S.C. § 2710(d)(7))—Bay Mills had little incentive to waive immunity.

Furthermore, obtaining a waiver was not a high priority. When Michigan was negotiating in 1993—five years before *Kiowa*—this Court had not suggested that a tribe might have immunity when engaged in illegal, off-reservation gaming.

B. An *Ex parte Young*-type suit is an inadequate remedy.

The Tribe next argues that Michigan "may be able to file an *Ex parte Young*-type suit against tribal officials" or the individual tribal members running the Vanderbilt casino. Bay Mills Br. 55–56. But there are limitations on this remedy, including an inability to seize tribal gaming machines. U.S. Br. at 21–22 n.5. A state should not have to rely on a less comprehensive remedy when the subject matter is illegal commercial conduct taking place on lands subject to that state's exclusive jurisdiction.

More problematic, federal courts have held that *Ex parte Young*-type claims alleging IGRA violations are often barred by sovereign immunity. E.g., *Tamiami Partners, Ltd. Ex rel. Tamiami Development Corp.* v. *Miccosukee Tribe of Florida*, 177 F.3d 1212, 1225–26 (11th Cir. 1999) (rejecting IGRA claims against a tribal official because it "is well established that *Ex parte Young* does not permit individual officers of a sovereign to be sued when the relief requested would, in effect, require the sovereign's specific performance of a contract."); *Crosby Lodge, Inc.* v. *Nat'l Indian Gaming Ass'n*, 2007 WL 2318581, at *4 (D. Nev. Aug. 10, 2007) ("Crosby may not bring a private cause of action [asserting *Ex parte Young* relief] against Tribal Defendants for alleged non-compliance with IGRA"); *Davids* v. *Coyhis*, 869 F. Supp. 1401 (E.D. Wis. 1994) ("I will not . . . permit the intrusion on tribal sovereignty that adjudication of this [*Ex parte Young* IGRA] action would present.").

And even if Michigan is successful in bringing an *Ex parte Young* action, such litigation is preordained to create friction between a state and a tribe. An *Ex parte Young* suit brought by one sovereign against another sovereign's officials has very different political ramifications than a citizen bringing such a suit against her government. No one flinches when a Michigan citizen brings an *Ex parte Young* action against a Michigan official, but imagine the international uproar if Michigan tried to circumvent the United Kingdom's sovereign immunity by suing Prime Minister David Cameron. That type of inter-sovereign friction is precisely what Congress was trying to avoid when it enacted IGRA.

Bay Mills seems to forget it has filed its own motion to dismiss Michigan's *Ex Parte Young*-type claims against the tribal officials in the underlying action. In that motion, Bay Mills argues that Michigan's claims against its officials must be dismissed because:

- Bay Mills council members are covered by Bay Mills' sovereign immunity, as they are elected officials of Bay Mills. 10/23/12 Bay Mills Br. in Support of Mot. to Dismiss 16–17.

- Michigan's *Ex parte Young* claims do not overcome Bay Mills' special sovereignty interests in exercising governmental power over its land. *Id*. at 17–20.

- *Ex parte Young*-type claims do not apply to IGRA-violation claims. *Id*. at 20–22.

- Bay Mills is a required party that cannot be joined because it is immune from suit. *Id*. at 22–28.

- And any judgment rendered in the Tribe's absence would be prejudicial and inadequate. *Id*.

Such defenses in the court below belie Bay Mills' remedy suggestion to this Court.

C. If Bay Mills prevails, Michigan cannot enforce a counterclaim in the suit against Michigan's Governor.

The United States suggests that Michigan could simply litigate the separate federal-court action that the Tribe has filed against Michigan's Governor, *Bay Mills Indian Community* v. *Rick Snyder*, Case No. 1:11-cv-729 (W.D. Mich.). U.S. Br. 32–33. There, Bay Mills seeks declaratory relief against the Governor on many of the same issues raised in this litigation. But Bay Mills has not waived its immunity with regard to any counterclaim Michigan might bring in that action, such as a claim to enjoin Bay Mills from gaming outside Indian lands. See *Oklahoma Tax Comm'n* v. *Citizen Band*, *Potawatomi Tribe of Okla.*, 498 U.S. 505, 509–10 (1991) (tribe does not waive its sovereign immunity by filing action for injunctive relief). So *Snyder* is of no practical value to Michigan in stopping Bay Mills' illegal casino.

D. States cannot rely on the executive branch to shutter illegal, off-reservation casinos.

The United States also says Michigan could request approval from the NIGC of a site-specific gaming ordinance describing the Vanderbilt Parcel and seek judicial review of an adverse decision. U.S. Br. 33. That is a puzzling suggestion for several reasons:

- Neither Michigan nor any other party can compel the Tribe to request such an amendment to its gaming ordinance.

- The Tribe *did* twice submit such a request and withdrew it before the NIGC took action, presumably because the Tribe believed the agency decision would not be favorable. There is no reason to believe that the Tribe will pursue a different course now.

- And even if a federal court affirmed an NIGC determination rejecting the gaming ordinance amendment, this would not preclude the Tribe from operating a casino outside Indian lands because the order could not—under the United States' own argument—include an injunction prohibiting the Tribe from operating the illegal casino.

It is also no answer for Michigan to rely on the executive branch's criminal and civil enforcement authority. Bay Mills Br. 56–57. The NIGC has already referred this matter to the United States Attorney along with NIGC's express determination that the casino was not operating on Indian lands. Yet no action was taken to stop the illegal activity. Michigan cannot count on the executive branch to enforce federal law in this area; only a federal-court injunction against the Tribe is adequate to protect Michigan's sovereign authority over its lands and to ensure the Tribe's compliance with state and federal law.

E. Prosecuting tribal officials and employees is a last—and highly questionable—resort.

Finally, Bay Mills and the United States urge Michigan to send in the state police to arrest tribal officials and employees. Bay Mills Br. 56; U.S. Br. 33–34. So instead of pursuing the least intrusive remedy—a federal civil injunction—Michigan should treat Tribal officials like common criminals. That is a recipe for inter-sovereign conflict.

Bay Mills' implicit suggestion is that Michigan's criminal arrest of tribal officials is preferable to eviscerating tribal immunity. But when IGRA already abrogates immunity for illegal gaming *on* Indian lands, how does it eviscerate immunity merely to allow civil injunctive remedies for illegal, *off*-reservation conduct?

And while the United States says its position is that such tribal officials are not protected by tribal immunity, neither the Tribe, nor the *amici* have concurred. Michigan agrees with the United States that immunity should not protect such officials. But if forced to pursue such a remedy, there is little doubt those officials will assert they are acting merely as a tribe's agents, they were at all times acting within the scope of their agency or employment, and that the tribe's immunity protects them from prosecution. There is authority that supports this claim. *Tamiami Partners*, 177 F.3d at 1225–26; *Murgia* v. *Reed*, 338 F. App'x 614, 616 (9th Cir. 2009).

Michigan believes that prosecuting tribal officials should be a last resort and has strived to treat the Tribe and its officials with the respect a sovereign deserves. But disagreements cannot always be resolved through negotiation, and Congress intended that tribal-gaming disputes be resolved in federal court. It does not make sense to force Michigan to pursue throw-a-dart remedies of uncertain validity and scope that create inter-sovereign friction.

CONCLUSION

The court of appeals should be reversed.

Respectfully submitted,

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