No. 12-5134 & 12-5136

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA,

Appellee/Plaintiff,

v.

Tiger Hobia, as Town King and member of the Kialegee Tribal Town Business Committee; Thomas Givens, as 1st Warrior and member of the Kialegee Tribal Town Business Committee; John Doe No. 1, as 2nd Warrior and member of the Kialegee Tribal Business Committee; John Does Nos. 2-7, as members of the Kialegee Tribal Town Business Committee; Florence Development Partners, LLC; and Kialegee Tribal Town, a federally chartered corporation,

Appellants/Defendants.

Appeal from the United States District Court
Northern District of Oklahoma, (Frizzell, C.J.)
Case No. 4:12-cv-00054-GFK-TLW

BRIEF OF *AMICUS CURIAE* STATE OF MICHIGAN IN SUPPORT OF PLAINTIFF-APPELLEE STATE OF OKLAHOMA

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STATEMENT OF INTEREST OF *AMICUS CURIAE* STATE OF MICHIGAN

Congress enacted IGRA, the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, in response to conflicts between certain states and tribes over tribal gaming operations. S. Rep. No. 100-446, at 2 (1988). As New Mexico explains in its *amicus* brief (Dkt. # 01018990262 at 4), the federal government has plenary authority over Indian tribes and could have determined that tribal gaming regulation would lie solely with the federal government. Instead, by enacting IGRA, Congress gave states a role in determining tribal gaming's parameters.

To do this, Congress established a framework where such gaming is governed by agreements reached between states and tribes that are memorialized in gaming compacts that IGRA specifically authorizes. 25 U.S.C. § 2710(d)(3). Beginning in 1993, Michigan has entered into such compacts with each of its 12 federally recognized tribes.

The question now before this Court is whether, after inviting states to participate in the compacting process, Congress intended to provide the states with no meaningful federal forum to enjoin a tribe that opens a casino off Indian lands and in violation of its compact. This Court's prior decisions suggest that the answer is "no."

Michigan is now facing similar jurisdictional challenges in a case it has brought against a tribe in federal court.[1] In that case, the tribal defendant — like the tribe in the case before this Court — is seeking to open a casino far from its tribal headquarters, on property that is not "Indian lands" as defined by IGRA. And, in the Michigan lawsuit — just as in this case — the tribal defendant asserts that the federal court lacks subject matter jurisdiction because § 2710(d)(7)(A)(ii) only authorizes federal courts to consider claims where it is alleged that gaming activities are taking place *on* Indian lands in violation of a gaming compact. The Sixth Circuit agreed, rejecting this Court's related § 2710(d)(7)(A)(ii) analysis and failing to analyze § 1331 jurisdiction over IGRA claims altogether. *Michigan v. Bay Mills Indian Community, et al.*, 695 F.3d 406, 415 (6th Cir. 2012) ("We agree with the Eleventh Circuit, therefore, that *Mescalero's* [*Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379 (10th Cir. 1997)] reasoning is 'muddled' rather than persuasive.").[2]

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[1] The tribe is the Bay Mills Indian Community, whose reservation is located in Michigan's Upper Peninsula.

[2] The State filed a petition for certiorari (No. 12-515), and the Supreme Court recently invited the views of the U.S. Solicitor General.

Michigan's case involves other significant issues this Court will have to decide. Like Oklahoma, Michigan seeks prospective injunctive relief from the tribe's officials through an *Ex Parte Young*-type claim. And like Oklahoma, Michigan faces the argument that the tribe is an indispensable party that cannot be sued because it has sovereign immunity. This argument, which would effectively neutralize the entire *Ex Parte Young* doctrine, contradicts both reason and overwhelming precedent and should be rejected.[3]

The expansion of unlawful tribal gaming to locations distant from a tribe's reservation raises serious concerns for Michigan particularly where the lands in question are not Indian lands and the gaming violates the tribe's compact. Michigan's experience can provide this Court with a unique perspective on these issues that will inform its decision.

The *Amicus Curiae* Brief of the State of Michigan is being filed pursuant to Fed. R. App. P. 29(a).

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[3] This issue has not yet been decided in the *Bay Mills* case. The Sixth Circuit expressly declined to opine regarding the viability of Michigan's claims against tribal officers.

INTRODUCTION

If the Court adopts Appellants' argument that the District Court did not have jurisdiction because the alleged unlawful gaming is not occurring on Indian lands, the consequences could be far reaching. Effectively, the Court will have raised a shield that will protect a tribe involved in such unlawful gaming from any state action brought in federal court under IGRA to enjoin the illegal activity. This creates the incongruous situation where a state can seek a remedy in federal court when unlawful tribal gaming takes place *on* Indian lands, but is barred from federal court if that same gaming occurs *outside* Indian lands. Neither logic nor IGRA's text support such an outcome.

Appellants rely on the Sixth Circuit's stilted reading of § 2710(d)(7)(A)(ii), which unearthed a list of five distinct prerequisites to federal court jurisdiction in the single sentence fragment that makes up this provision. This approach ignores both traditional federal question jurisdiction (the Sixth Circuit never explained why § 1331 failed to confer jurisdiction over IGRA claims against tribes in the *Bay Mills* case) and the obvious intention of Congress to expand the role of states in regulating tribal gaming through passage of IGRA.

Michigan believes the Sixth Circuit got it wrong and that the *Bay Mills* decision should be disregarded. This Court has established a sound body of IGRA jurisdiction jurisprudence. Appellants have presented no good reason why Tenth Circuit legal precedent recognizing that questions arising under IGRA are manifestly federal in nature should be ignored in favor of the Sixth Circuit's crabbed view that federal courts have the power to address IGRA claims against tribes *only* where the complaint walks a tightrope of factors as prescribed in the *Bay Mills* ruling. Under this regime, one misstep — such as alleging that unlawful tribal gaming is occurring outside Indian lands — is fatal to the court's jurisdiction. This cannot be what Congress intended when it enacted IGRA.

ARGUMENT

I. The trial court correctly determined that it had subject matter jurisdiction under 28 U.S.C. § 1331.

The trial court directly addressed its jurisdiction: "This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331. . ." *Oklahoma v. Hobia*, 2012 U.S. Dist. LEXIS 100793 (N.D. Okla. July 20, 2012). Michigan agrees with the arguments presented by

Appellee State of Oklahoma and Amicus Curiae State of New Mexico, which support the trial court's decision and analysis. These arguments are based on this Court's prior rulings which have consistently recognized federal-court subject matter jurisdiction to hear and consider questions arising under IGRA.

In their brief, Appellants never explain why a case alleging a violation of IGRA and a tribal-state gaming compact would not present federal questions that satisfy the requirements of § 1331, nor do they attempt to distinguish this Court's relevant jurisdictional decisions. Instead, Appellants rely primarily on the Sixth Circuit's decision in *Bay Mills*. But *Bay Mills* was wrongly decided. A proper analysis of the law leads to a conclusion that whether particular property is Indian lands under IGRA is a federal question that vests federal courts with § 1331 jurisdiction, just as the trial court determined here.

The *Bay Mills* ruling presents states with a serious dilemma. Now, if a tribe opens a casino somewhere in the Sixth Circuit, but *not on Indian lands*, a state cannot seek to enjoin the tribe in federal court. This is precisely the situation Michigan finds itself in as a result of the *Bay Mills* decision.

The Bay Mills tribe bought a piece of property more than a hundred miles from its reservation and did not have it taken into trust. It secretly built and equipped a modest casino, which it opened for business a few days after announcing its intention to do so, in spite of the objections of the State and other neighboring tribes. The State and one other tribe quickly filed actions in federal court asserting violations of Bay Mills' compact and IGRA. The trial court entered a preliminary injunction shutting down the casino. Bay Mills appealed and the Sixth Circuit vacated the injunction, ruling that the district court did not have jurisdiction over an action alleging that unlawful tribal gaming was occurring outside Indian lands.

The Court should not follow the *Bay Mills* decision, in part because, as expressly noted by the Sixth Circuit, that decision conflicts with the ruling of this Court in *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379 (10th Cir. 1997), as well as the other decisions of this Court discussed in Oklahoma and New Mexico's briefs. Moreover, the *Bay Mills* decision offers no good reason for this Court to deviate from its established precedent when determining its jurisdiction to enforce IGRA and tribal-state gaming compacts.

The Sixth Circuit limited its analysis to whether federal courts have jurisdiction under 25 U.S.C. § 2710(d)(7)(A)(ii), concluding they did not because, in the court's opinion, one of the jurisdictional "prerequisites" listed in this provision – unlawful gaming activity on Indian lands – had not been alleged in the complaint. *Bay Mills Indian Community*, 695 F.3d at 412. The Sixth Circuit failed to analyze whether the district court had jurisdiction of the State's IGRA claims against the tribe under § 1331, even though Michigan had asserted § 1331 as a basis for jurisdiction. The practical effect of this ruling was to affirmatively *prohibit* federal courts from exercising § 1331 jurisdiction over IGRA claims against tribes, even where federal questions are involved. In sum, the court determined that, by enacting § 2710(d)(7)(A)(ii), Congress somehow intended to *deprive* federal courts of subject-matter jurisdiction they would otherwise have.

This is a dubious conclusion. There is good reason to believe that, despite its use of the word "jurisdiction" in the statute, Congress never intended § 2710(d)(7)(A)(ii) to be an *exclusive* grant of such jurisdiction, as effectively determined by the Sixth Circuit.

The United States Supreme Court's opinion in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), is instructive on this point. There, the Court noted that "jurisdiction . . . is a word of many, too many, meanings . . ." *Id.* at 90. The statute at issue in *Steel Co.*, much like § 2710(d)(7)(A)(ii), said the federal courts have "jurisdiction" in actions based on violations of its provisions.[4] Yet the Court had no trouble determining that this statement did not require that all the elements of the cause of action arising under EPCRA be alleged before the court could exercise jurisdiction:

> It is unreasonable to read this as making all the elements of the cause of action under subsection (a) jurisdictional, rather than as merely specifying the *remedial powers* of the court, viz., to enforce the violated requirement and to impose civil penalties. [*Id.*]

This reasoning applies equally to § 2710(d)(7)(A)(ii). There is nothing in IGRA that would suggest that Congress intended to limit the federal court's traditional jurisdictional authority. It is much more likely that Congress used the word "jurisdiction" in § 2710(d)(7)(A)(ii) in

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[4] The Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), 42 U.S.C. § 11001 *et seq.*, states in relevant part: "The district court shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement." 42 U.S.C. § 11046(c).

the same way it used it in EPCRA (and the other similar statutes quoted in *Steel Co.*, *id.* at 90-91), merely denoting a federal court's power to grant certain remedies, but not its power to actually adjudicate the underlying dispute, which is the essence of subject-matter jurisdiction. *Id.* at 89.

It was thus contrary to Congress' intent for the Sixth Circuit to make the laundry list of factors listed in § 2710(d)(7)(A)(ii) "jurisdictional." *Steel Co., id.* at 90. And there is certainly no evidence that Congress intended § 2710(d)(7)(A)(ii) to displace § 1331 jurisdiction. A more reasonable interpretation of § 2710(d)(7)(A)(ii) is that Congress merely wanted to make it clear that states could obtain a remedy in federal court, even where the unlawful conduct occurred on Indian lands. The state of the law at the time IGRA was passed would have excluded such a remedy. *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987). Given this intent to broaden state's remedies for unlawful tribal gaming activities, it is extremely doubtful Congress would have simultaneously sought to deprive states of a federal-court remedy when unlawful gaming occurred off Indian lands.

In sum, Michigan encourages the Court to follow its own precedent and reject the Sixth Circuit's *Bay Mills* analysis.

II. Even if the non-party Kialegee Tribal Town is immune from suit, Federal Rule of Civil Procedure 19 does not require dismissal of this lawsuit.

A. The Kialegee Tribal Town is not a required party because, even if it claims an interest in the litigation, its chief executive officer will be as effective in protecting the claimed interest as the Tribe itself.

Rule 19 requires that a person be joined as a party to litigation: (1) if complete relief cannot be accorded in that person's absence; or (2) when a person *as a practical matter* cannot protect a claimed interest if not a party to the lawsuit. The Appellants argue here that the Kialegee Tribal Town must be joined because it has interests in this litigation that it cannot protect as it is not a party. The Court should reject that argument.

As the trial court noted, the defendants in this action include the "Tribal Town King" who would adequately protect any interest of the Tribal Town: "[T]he Kialegee Tribal Town's interests are so closely aligned with Hobia, its Tribal Town King, that there is virtually no risk

the tribe's interests will be impaired or impeded." *Oklahoma v. Hobia*, 2012 U.S. Dist. LEXIS 58211 (N.D. Okla. Apr. 26, 2012).

Appellants have not and cannot point to any legitimate impediment to the protection of the Tribal Town's claimed interest arising from the absence of the Tribal Town from the litigation where the chief executive of the Tribal Town is a defendant. Furthermore, Rule 19 makes it clear that mere legal distinctions do not govern, and that the question of impediment must be assessed "as a practical matter." As a practical matter, the Tribal Town's ability to protect its interest has not been impaired *at all*.

This Court recognized the same concept in a similar case involving a Tribe that claimed sovereign immunity:

> Finally, and most importantly, the potential for prejudice to the Miami Tribe is largely nonexistent due to the presence in this suit of not only the NIGC and other Federal Defendants, *but also the tribal officials* and Butler National. These Defendants' interests, considered together, are substantially similar, if not identical, to the Tribe's interests in upholding the NIGC's decision. [Footnote omitted.] Accordingly, we reject the Miami Tribe's claim that it is a necessary and indispensable party to this action under Fed. R. Civ. P. 19. [*Kansas v. U.S.*, 249 F.3d 1213, 1226-27 (10th Cir. 2001) (emphasis added).]

See also *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1258-59 (10th Cir. 2001) ("The potential of prejudice to the Wyandotte Tribe's interests is greatly reduced, however, by the presence of the Secretary as a party defendant. As a practical matter, the Secretary's interest in defending his determinations is "virtually identical" to the interests of the Wyandotte Tribe.")

If the presence of the Secretary of the Interior is deemed to be adequate to protect the interest of a non-party tribe, certainly the presence of the tribe's own chief executive would likewise be sufficient "as a practical matter" to protect the interest of the tribe itself. Accord, e.g., *Vann v. United States DOI*, 701 F.3d 927 (D.C. Cir. 2012). ("As a practical matter, therefore, the Cherokee Nation and the Principal Chief in his official capacity are one and the same in an *Ex parte Young* suit for declaratory and injunctive relief. As a result, the Principal Chief can adequately represent the Cherokee Nation in this suit, meaning that the Cherokee Nation itself is not a required party for purposes of Rule 19.")

The Kialegee Tribal Town is not even a required party, let alone a party that must be joined for the lawsuit to continue.

B. This action can proceed in "equity and good conscience" without the Tribal Town.

Rule 19 sets out a two-step process for determining whether a case should be dismissed because a required party cannot be joined. The question of indispensability is not even an issue unless it is first determined that a party is "required" under subdivision (a) of the Rule. Subsection (b) itself makes this clear: "If a person *who is required to be joined* if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed . . ." See also *Local 670, United Rubber v. Int'l Union, United Rubber*, 822 F.2d 613, 618 (6th Cir. 1987) ("If the court determines that the person or entity does not fall within one of these [Rule 19(a)] provisions, joinder, *as well as further analysis*, is unnecessary.") (emphasis added). Thus, because the Kialegee Tribal Town is not a required party, the Court should not even take the second step of assessing whether the action should be dismissed in the Tribal Town's absence.

Appellants seem to argue this analysis need not even occur, because, according to them, the Tribal Town's sovereign immunity alone

makes it an indispensable party.[5] The fallacy with this argument is that it ignores the complete analysis that Rule 19 requires and jumps immediately to the second step, which addresses the question whether the case can proceed if a required party cannot be joined.

Moreover, if, as Appellants assert, an entity's sovereign immunity alone requires dismissal of an *Ex parte Young* action against its government official defendants, then the doctrine of *Ex parte Young* will be completely eviscerated because every *Ex parte Young* action involves claims against government officials for the very reason that the government entity is itself immune from suit. So, in each and every *Ex parte Young* case, under Appellants' theory, the government entity would merely claim an interest and then assert that its immunity automatically requires dismissal against the government official defendants. The D.C. Circuit recognized this absurdity in *Vann*:

> By contrast, if we accepted the Cherokee Nation's position, official-action suits against government officials would have to be routinely dismissed, at least absent some statutory exception to Rule 19, because the government entity in question would be a required party yet would be immune from suit and so could not be joined. But that is not how the

[5] Appellants' brief, p. 16. Michigan takes no position regarding whether the Kialegee Tribal Town is actually immune from suit under the circumstances of this case.

> *Ex parte Young* doctrine and Rule 19 case law has developed. [*Vann*, 701 F.3d at 930.]

The Court should reject Appellants' attempts to thwart the *Ex parte Young* doctrine by employing Rule 19.

CONCLUSION AND RELIEF REQUESTED

The District Court's exercise of jurisdiction over this action falls squarely within this Court's prior decisions determining the scope of the federal court's jurisdiction over IGRA claims. This Court's decisions are consistent not only with general principles of federal question jurisdiction, they properly determined that it was not Congress's intent in adopting IGRA to restrict federal jurisdiction over core questions concerning the state-tribal relationship created by the statute. Adoption of the Appellants' position, based on the *Bay Mills* decision, would import the dysfunctional system created by the Sixth Circuit where federal courts have jurisdiction over tribal gaming that occurs *on* Indian lands, but denies that jurisdiction when such gaming occurs *off* Indian lands.

Of equal concern is Appellants' attempt to avoid application of the *Ex parte Young* doctrine to tribal officials. This Court has rejected such attempts in the past and should do so here.

For these, and the other reasons discussed above, the State of Michigan respectfully requests that the Court affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains no more than 7,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). There are a total of 3,257 words.

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CERTIFICATE OF SERVICE

I certify that on February 1, 2013, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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Certification

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