No. 13-1438

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,

Defendant-Appellant.

Appeal from the United States District Court
Western District of Michigan, Southern Division
Honorable Robert J. Jonker

STATE OF MICHIGAN'S PETITION FOR PANEL REHEARING WITH A SUGGESTION FOR REHEARING EN BANC

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STATEMENT IN SUPPORT OF PETITION FOR PANEL RE-HEARING WITH A SUGGESTION FOR REHEARING EN BANC

The panel's decision upholding tribal immunity suffers from the same flaw found in *Michigan v. Bay Mills*, 695 F.3d 406 (6th Cir. 2012), in which the Supreme Court has granted certiorari: it assumes that the common-law doctrine of tribal immunity overrides the authority of a constitutional sovereign—a State—the same way the doctrine prevents suits by ordinary plaintiffs. That assumption is wrong. It was wrong in *Bay Mills*, where a tribe contended tribal immunity prevents a sovereign state from enjoining illegal gaming occurring on land under the State's jurisdiction, and it is wrong here, where a tribe argues that its immunity prevents Michigan from enforcing its tribal-state compact.

The panel decision furthers the same circuit split identified in *Bay Mills*, for it conflicts with Ninth, Tenth, and Eleventh Circuit decisions that determined that tribal immunity does *not* bar a state from enforcing a compact. Because the Supreme Court has granted certiorari, has already held oral argument, and will soon be ruling on the scope of tribal immunity, the panel or the en banc court should grant rehearing and hold the case in abeyance until *Bay Mills* is decided.

The panel also misapprehended the scope both of the State's requested relief and of IGRA. As to the first, the State requested other appropriate relief, which includes a request for an injunction against gaming and so removes the supposed immunity problem. As to the latter, applying to take land into trust for gaming purposes *is* gaming activity, and in any event, the Tribe's material compact violation warrants enjoining gaming at its existing casinos.

Alternatively, the significant consequences of the decision warrant its en banc review. If the State can't obtain a remedy for these compact violations, then the Tribe can apply to have land taken into trust for gaming virtually *anywhere* in the State, as long as it uses money from its Michigan Indian Land Claims Settlement Act fund, even though applying without a revenue-sharing agreement violates its gaming compact. If land is automatically taken into trust, as the Tribe asserts, whenever Settlement Act funds are used, that would allow casinos anywhere in Michigan. Just as important, it will render the gaming compacts meaningless by allowing tribes to violate them with impunity.

These are admittedly difficult issues; they deserve another look. The State respectfully requests rehearing or rehearing en banc.

STATEMENT OF FACTS

In 1993, the State and Tribe entered into a tribal-state gaming compact pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*. (Compact, RE 1-1, Page ID # 19.) Consistent with IGRA, the Compact generally establishes the rights and responsibilities of the parties concerning the operation of casino gaming by the Tribe in Michigan. Under the Compact, the Tribe has conducted gaming in five casinos it operates on Indian lands in Michigan's Upper Peninsula, where its reservation is located. (Opinion, RE 37, Page ID # 843–44.)

In § 9 of the Compact, the Tribe expressly promised not to submit an application to take off-reservation land into trust for gaming purposes unless it first executed a revenue-sharing agreement with the other Michigan tribes:

> **Off-Reservation Gaming.** An application to take land in trust for gaming purposes pursuant to § 20 of IGRA (25 U.S.C. § 2719) shall not be submitted to the Secretary of the Interior in the absence of a prior written agreement between the Tribe and the State's other federally recognized Indian Tribes that provides for each of the other Tribes to share in the revenue of the off-reservation gaming facility that is the subject of the § 20 application. [Compact, RE 1-1, Page ID # 30.]

In January 2012, the Tribe announced its intent to take land into trust without securing a revenue-sharing agreement. It adopted

Resolution 2012-11, which stated that the Tribe intended to open a casino in the City of Lansing on land that is not part of the Tribe's reservation—land, in fact, more than 200 miles from the Tribe's reservation. After the State learned of the proposed Lansing casino through media reports and realized the Tribe had not entered into a revenue-sharing agreement with the other Michigan tribes, it warned the Tribe that this plan violated the Compact. When the Tribe ignored the warnings, the State filed the instant lawsuit. The State also filed a motion to preliminarily enjoin the Tribe from applying to take land into trust, because that application would violate the Compact. (Panel Decision, attached as Exhibit A.)

The Tribe's counsel indicated on the record below (1) that the Tribe in fact plans to apply to the Secretary of the Interior to have this land taken into trust as soon as possible (Transcript Dec. 5, 2012, RE 33, Page ID # 770, 774) and (2) that the Tribe does not intend to obtain a § 9 revenue-sharing agreement with the other Michigan tribes. (Transcript Dec. 5, 2012, RE 33, Page ID #778.) The Tribe has thus conceded that it will take actions that violate § 9 of the Compact. The

district court found that it is undisputed that the Lansing property is "off-reservation" land. (Opinion, RE 37, Page ID # 845.)

PROCEEDINGS AND DISPOSITION BELOW

The State filed a motion for a preliminary injunction along with its complaint. Instead of answering the complaint, the Tribe filed a motion to dismiss. Two other Michigan tribes, the Saginaw Chippewa Indian Tribe of Michigan and the Nottawaseppi Huron Band of Potawatomi Indians, filed amicus briefs supporting the preliminary injunction and opposing the Sault Tribe's motion to dismiss.

After oral argument, the district court enforced the Compact by preliminarily enjoining the Sault Tribe from filing an application to take the Lansing Property into trust for gaming purposes unless the Tribe first obtained a revenue-sharing agreement with the other tribes. The district court denied the motion to dismiss, except that it granted, without prejudice, the motion to dismiss tribal officials who were named in their official capacity, as the court determined that the Tribe itself could be sued. It also dismissed, without prejudice, Counts V and VI of the complaint, finding they were not ripe. The Tribe then filed its answer and appealed the preliminary injunction. The panel decision

vacated the preliminary injunction on the ground that the Tribe was immune from suit concerning its violation of the Compact.

ARGUMENT FOR REHEARING

I. This case should be held in abeyance pending *Bay Mills*.

A. The Supreme Court could abolish tribal immunity for commercial activities like casino gaming.

The panel assumed that the Supreme Court's tribal-immunity analysis would address only the five-part abrogation test this Court applied in *Bay Mills* when interpreting 25 U.S.C. § 2710(d)(7)(A)(ii). 695 F.3d 406 (6th Cir. 2012). But tribal immunity is not governed solely by statute; no statute, including IGRA, creates or codifies tribal immunity. To the contrary, tribal immunity is a judicial creation, one that "developed almost by accident." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 752 (1998). As Justice Ginsburg observed in the *Bay Mills* oral argument, "The doctrine of tribal immunity is something that was announced by this Court. Congress never passed a law that said the tribes have immunity." (*Bay Mills* Tr. at 47, attached as Exhibit B.) And because the common-law tribal-immunity doctrine never extended so far as to allow tribes to violate their compacts with

States, the question of statutory abrogation does not even arise. That may be why the 65-page transcript shows the only questions about § 2710 were directed to the Tribe, not the State. (*Id.* at 35, 42.)

The questions asked by the Justices make it clear that the Supreme Court is considering modifying tribal immunity itself so it doesn't protect tribal actions taken in commercial settings, such as casino gaming. For example, Justice Kennedy said that "maybe this whole idea of immunity doesn't work very well in the context of gaming." (Ex. B at 47–48.) Justice Ginsburg expressed similar questions about the scope of tribal immunity, "Why couldn't the Court . . . say, [just as] it makes sense in the foreign country context, it also makes sense in the context of the tribes, to distinguish commercial from governmental?" (*Id.* at 59.)

More fundamentally, States are different. Justice Breyer, for example, considered distinguishing *Kiowa*, which allowed tribal immunity for a commercial transaction, because "Kiowa is about . . . individuals who are not the State." (*Id.* at 42.) These quotes directly reflect the relief requested in the State's merits brief. (*See* Brief for Petitioner, attached as Exhibit C, at 41.) If the Supreme Court

abolishes tribal immunity for commercial actions or for suits by States, it would resolve this appeal. This court should therefore grant rehearing and hold the case in abeyance pending the Supreme Court's decision in *Bay Mills*. *Cf.* Order, *Oklahoma v. Hobia*, No. 12-5134 (10th Cir., Sept. 5, 2013) (attached as Exhibit D) (holding in abeyance a case where a tribe relied on this Court's *Bay Mills* sovereign-immunity test).

This overlap of issues between *Bay Mills* and this case is further confirmed by the fact that this case implicates the same circuit split that the Supreme Court granted certiorari in *Bay Mills* to resolve. This case would likely have come out differently in the Ninth, Tenth, or Eleventh Circuits, because each has held that "IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought." *Mescalero Apache Tribe v. State of N.M.*, 131 F.3d 1379, 1385 (10th Cir. 1997); *accord Lewis v. Norton*, 424 F.3d 959, 962–63 (9th Cir. 2005) ("IGRA waives tribal sovereign immunity in the narrow category of cases where compliance with the IGRA is at issue."); *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1242 (11th Cir. 1999) ("Congress abrogated tribal immunity only in the narrow

circumstance in which a tribe conducts class III gaming in violation of an existing Tribal–State compact."). Michigan's claim falls comfortably within the scope of those rulings. Because IGRA allows tribes to conduct Class III gaming activities "only if such activities are . . . conducted in conformance with a Tribal-State compact," 25 U.S.C. § 2710(d)(1)(C), a tribe in those circuits would likely not be immune from a claim based on a compact violation.

B. The Supreme Court could reject this court's five-part test for abrogation of tribal immunity under IGRA.

The State also asked the Supreme Court to modify the strict "unequivocal expression" test for abrogating tribal immunity. (Ex. C at 30–33.) The panel expressly relied on the strict test. (Panel Decision at 5.) A *Bay Mills* decision that modifies that test could change the outcome of this case.

II. This action abrogates Tribal immunity for the § 9 violation, and a preliminary injunction is necessary to maintain the status quo.

The panel ruled that because the complaint sought to enjoin the trust application instead of gaming activity, the Tribe's immunity was not abrogated by 25 U.S.C. § 2710(d)(7)(A)(ii). (Panel Decision at 2.) The trust application *is* gaming activity (see § III below), but even if it

isn't, immunity is still no barrier to *this action*. The panel held both that an injunction of gaming was a proper final remedy for a violation of § 9, and that immunity *would* be abrogated if the State sought such an injunction. (Panel Decision at 8.) While the panel was likely thinking of a future action, the current action includes a request for "other" appropriate relief (Complaint, RE 1, Page ID # 9), and that includes an injunction of gaming. This one small point removes the perceived immunity problem. And ripeness is not an issue as there is no question that the § 9 violation is imminent; the Tribe admits it is proceeding with the application.

Thus, the only question is whether the *preliminary* injunction should remain. That injunction does not need a separate immunity abrogation since § 2710(d)(7)(A)(ii) abrogates immunity for an *action* to enjoin gaming, which, as discussed above, this can be. The preliminary injunction is merely a procedural mechanism *in this action* that the trial court used to preserve the status quo. *See Southern Milk Sales, Inc. v. Martin*, 924 F.2d 98, 102 (6th Cir. 1991) ("[T]he issue in question is procedural. . . . [T]he purpose of a preliminary injunction, in contrast

to one that is final, 'is merely to preserve the relative positions of the parties until a trial on the merits can be held.'").

The question becomes, then, whether the State's motion satisfied the equitable injunction requirements. Because it found immunity, the panel did not analyze the injunction factors. But with immunity abrogated, the trial court's analysis should stand because it was not an "abuse of discretion." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 540-41 (6th Cir. 2007) (the appeal court is "highly deferential" to the trial court's weighing of the factors). As the trial court found, it is undeniable that the trust application will change the status quo. Under the panel's decision, the State loses the benefit of the bargain it struck with the Tribe when the Tribe agreed not to *even apply* to have land taken into trust. If the land is taken into trust, the State may face challenging a final agency decision, and maybe a lawsuit under 25 U.S.C. § 2719, all circumstances the parties to the compact intended would not occur absent a revenue-sharing agreement.

Perhaps the State will prevail at some juncture, but § 9 was intended to nip off-reservation gaming in the bud for good reason. If the Tribe complies with its § 9 promise, then the State does not have to

challenge each step that the Tribe takes to pursue its goal of opening a casino. These challenges will be costly, yet the State could not get a money judgment against the Tribe for damages arising from the breach. Maintaining the status quo makes sense. The parties knew this when they agreed to § 9, a fact that should inform the equitable balancing.

III. Alternatively, the panel should have found that applying to have land taken into trust is a gaming activity.

The panel concluded that enjoining a tribe from applying to have land taken into trust *for gaming purposes* is not enjoining a "gaming activity" as that term is used in 25 U.S.C. § 2710(d)(7)(A)(ii). The panel decision asserts, with little explanation, that a Settlement Act trust application is not a gaming activity. But the trust taking authority is irrelevant to whether this is a gaming activity.

What is relevant is the purpose for which the land will be used, and there is no dispute that the sole purpose here is for gaming. Obtaining a prerequisite trust status for the land is every bit as much a "gaming activity" as maintaining or licensing a casino building, the latter being explicitly blessed by IGRA as an appropriate subject for a gaming compact. 25 U.S.C. § 2710(d)(3)(C)(vi). Given that actions alleging violations of compact provisions concerning maintenance and

licensing of a gaming facility abrogate tribal immunity, *see Wisconsin v. Ho-Chunk*, 512 F.3d 921, 933–34 (7th Cir. 2008), it is reasonable to believe that Congress intended abrogation for violations of a compact provision like § 9 that imposes preconditions on taking land into trust for gaming purposes. *See* 25 U.S.C. § 2710(d)(3)(C)(vii) (concerning subjects related to gaming). There is no practical difference between a compact provision requiring licensing standards for a casino and a provision imposing standards for seeking trust status for the property on which the casino sits.

Moreover, denying the enforcement of a provision like § 9 needlessly restricts the options available to states *and tribes* for controlling the expansion of off-reservation gaming. The court should encourage the parties to regulate such gaming in the manner they see fit; after all, IGRA ensconced gaming compacts as the mechanism for tribes and states to regulate tribal gaming. Ignoring the parties' express intentions here based on an unnecessarily cramped IGRA interpretation defeats that purpose.

IV. Current gaming may be enjoined for § 9 violations.

The trial court held that tribal immunity was also abrogated by the State's action alleging violation of § 9, if the State sought alternatively to enjoin gaming conducted by the Tribe (instead of the trust application) in its existing casinos. The trial court expressly applied this court's five-part test for abrogation. (Opinion, RE 37, Page ID # 852.) The panel, however, rejected this analysis and has effectively added a *sixth* requirement to the abrogation test: not only must the action seek to enjoin existing gaming, that gaming must occur at a site "related" to the compact violation. (Panel Decision at 8.) But the compact regulates the Tribe's gaming the same *wherever it occurs*, without distinguishing between different locations.

Finally, the panel misapplied *Ho-Chunk*. The Seventh Circuit explicitly rejected the argument that only a compact violation specifically related to gaming would abrogate immunity. Instead the court said "so long as the alleged compact violation relates to one of these seven items [listed in 25 U.S.C. § 2710(d)(3)(C)], a federal court has jurisdiction over a suit by a state to enjoin a class III gaming activity." *Id.* at 934. Here, § 9 directly relates to the "operation of

gaming activities" (§ 2710(d)(3)(C)(vii)) because it expressly restricts such gaming. Thus, alleging a violation of § 9 satisfies the *Ho-Chunk* test for abrogation. As noted by the Seventh Circuit, this test ensures that jurisdiction or abrogation is not conferred for alleged violations of provisions "ancillary" to IGRA's purposes. *Id.* In other words, limiting abrogation to violations of the listed provisions ensures that those violations are *material* breaches.

Why should the Tribe continue to enjoy the benefits of its compact when it has committed a material breach? The State respectfully submits that such conduct must have consequences, or the compacting regime will be in danger of becoming a joke. The courts will protect the tribes if they haven't broken the law, but if they have, more roadblocks should not be constructed to keep the states *from even getting to court*. The *Ho-Chunk* abrogation analysis makes sense and should apply here.

CONCLUSION

Michigan respectfully submits that the panel (or the en banc court) should grant rehearing, vacate the decision, and either hold the case in abeyance pending the Supreme Court's decision in *Bay Mills* or reverse its decision for the reasons discussed above.

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Dated: January 16, 2014

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Page Limitation, Typeface Requirements, and Type Style Requirements

1. This petition for panel rehearing complies with the page limitation of Federal Rule of Appellate Procedure 35(b) because the petition does not exceed 15 pages.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14 point Century Schoolbook.

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CERTIFICATE OF SERVICE

I certify that on January 16, 2014, 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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EXHIBIT A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 13a0350p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,
Defendant-Appellant.

No. 13-1438

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.
No. 1:12-cv-00962—Robert J. Jonker, District Judge.

Argued: October 2, 2013

Decided and Filed: December 18, 2013

Before: ROGERS, STRANCH, and DONALD, Circuit Judges.

COUNSEL

ARGUED: Edward C. DuMont, WILMER CUTLER PICKERING HALE AND DORR LLP, Washington, D.C., for Appellant. Louis B. Reinwasser, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF:** Edward C. DuMont, Seth P. Waxman, WILMER CUTLER PICKERING HALE AND DORR LLP, Washington, D.C., for Appellant. Louis B. Reinwasser, Kelly M. Drake, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee. John F. Petoskey, FREDERICKS PEEBLES & MORGAN LLP, Peshawbestown, Michigan, William A. Szotkowski, Jessica Intermill, Andrew Adams III, HOGEN & HALLORAN, P.C., St. Paul, Minnesota, for Amici Curiae.

OPINION

ROGERS, Circuit Judge. The State of Michigan sued to enjoin the Sault Ste. Marie Tribe of Chippewa Indians from applying to have land taken into trust by the

Secretary of the Interior pursuant to the Michigan Indian Land Claims Settlement Act (MILCSA). The Tribe bought land from the City of Lansing, Michigan for the purpose of building a class III gaming facility. To purchase the property, the Tribe used funds appropriated by Congress for the benefit of certain Michigan tribes; MILCSA provides that land acquired with the income on these funds shall be held in trust by the United States. The district court enjoined the Tribe from making a trust submission under MILCSA on the theory that the submission would violate a compact between the State of Michigan and the Tribe. The compact requires that a tribe seeking to have land taken into trust for gaming purposes under the Indian Gaming Regulatory Act (IGRA) secure a revenue-sharing agreement with other tribes. Because the State is not suing to enjoin a class III gaming activity, but instead a trust submission under MILCSA, § 2710(d)(7)(A)(ii) of IGRA does not abrogate the Tribe's sovereign immunity, and the district court lacked jurisdiction. The issue of whether class III gaming on the casino property will violate IGRA if the Tribe's MILCSA trust submission is successful is not ripe for adjudication because it depends on contingent future events that may never occur. The injunction was therefore not properly entered.

I.

IGRA provides a framework for government regulation of gaming activities on Indian lands, which include "any lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe." 25 U.S.C. § 2703(4)(B). IGRA generally prohibits gaming on land taken into trust after October 17, 1988, unless it falls under one of four exceptions provided for in § 20(a). *See* 25 U.S.C. § 2719(a). Two of these exceptions are relevant to this case: one for lands taken into trust as part of "a settlement of a land claim," 25 U.S.C. § 2719(b)(1)(B)(i), and an exception that permits gaming by any tribe on any land if the Secretary determines, subject to the Governor's approval, that a gaming establishment would be in the best interest of the tribe and its members, and not detrimental to the surrounding community, 25 U.S.C. § 2719(b)(1)(A). In addition, IGRA divides gaming into three categories. Class I consists of traditional Indian games or social games for prizes of minimal value, and is regulated exclusively

by tribal governments; class II includes activities like bingo, and is regulated by tribes and the National Indian Gaming Commission, but not by the State; and class III, casino-style gambling, requires a tribal gaming ordinance, approval from the National Indian Gaming Commission, and an IGRA "compact" between the tribe and the State in which the gaming will occur. 25 U.S.C. § 2710(a), (d).

In 1993, the Tribe signed a compact with the State of Michigan to permit class III gaming on tribal lands, pursuant to § 2710(d) of IGRA. Six other Michigan tribes signed virtually identical compacts at the same time. *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Att'y for W.D. of Mich.*, 369 F.3d 960, 962 (6th Cir. 2004). Section 9 of the Tribal-State compact is titled "Off-Reservation Gaming," and provides the following:

> An application to take land into trust for gaming purposes pursuant to § 20 of IGRA (25 U.S.C. § 2719) shall not be submitted to the Secretary of the Interior in the absence of a prior written agreement between the Tribe and the State's other federally recognized Indian Tribes that provides for each of the other Tribes to share in the revenue of the off-reservation gaming facility that is the subject of the § 20 application.

The Tribe currently operates five class III casinos on tribal lands in the Upper Peninsula of Michigan.

The Tribe entered into a Comprehensive Development Agreement with the City of Lansing, Michigan to purchase two parcels of land for the purpose of building gaming facilities. Under the Agreement, the Tribe may choose to conduct either class II or class III gaming. The Tribe acquired the first parcel using earnings from a tribal Self-Sufficiency Fund created for the Tribe under the Michigan Indian Land Claims Settlement Act, or MILCSA. Such a purchase requires that the Tribe tender title to the Secretary to have the land taken into trust pursuant to § 108(f) of MILCSA. Pub. L. 105-143, § 108, 111 Stat. 2652, 2660–62 (1997). The State anticipates that the Tribe will argue that taking land into trust under MILCSA would permit class III gaming to occur on the land without a revenue-sharing agreement.

The State filed suit against the Tribe, seeking a preliminary injunction prohibiting the Tribe from making a trust submission to the Secretary. Counts 1–3 alleged that a MILCSA trust submission would violate § 9 of the Tribal-State compact because the Tribe failed to obtain a revenue-sharing agreement with other Indian tribes. Count 4 alleged that the Lansing property, if acquired in trust, would not come within any exception for land taken into trust after 1988, and that if the Tribe were to conduct class III gaming on the property, it would violate IGRA.[1] The district court issued a preliminary injunction barring the Tribe from applying to have the Casino property taken into trust without a written revenue-sharing agreement with the other federally recognized Indian tribes in Michigan. The court found that it had jurisdiction over the claim because Section 2710(d)(7)(A)(ii) of IGRA abrogates the Tribe's immunity from suit by allowing a State to sue "to stop prospective class III gaming on prospective Indian lands." The district court likewise accepted the State's proposed alternative basis for jurisdiction, holding that because the Tribe "proposes to violate the forward looking provisions of Section 9 of the Compact" (with a MILCSA trust submission), Section 2710(d)(7)(A)(ii) of IGRA permits the court to enjoin *existing* class III gaming activity at the Tribe's other casinos in the Upper Peninsula of Michigan, even where those operations are not themselves unlawful. In addition, the court held Count 4 "ripe to the extent it puts directly at issue a current controversy between the parties over the possible application of an IGRA Section 20 exception to the Casino property that the Sault Tribe intends to have taken into trust."

The district court concluded that the four traditional factors a court must balance in deciding whether to grant a preliminary injunction weighed in favor of prohibiting the Tribe from making a trust submission to the Secretary of the Interior. First, the court reasoned that the State was likely to succeed on the merits because, in the absence of a revenue-sharing agreement, "the Sault Tribe would inevitably violate § 9 of the Compact by submitting its trust application" under MILCSA. The court reasoned that, without

[1]The State also filed suit against members of the Tribe's Board of Directors, but the district court dismissed these claims without prejudice. The district court also dismissed as unripe Counts 5 and 6, which alleged that any class III gaming on the Lansing property would violate the Michigan Gaming Control and Revenue Act, and would be a nuisance. None of these claims is on appeal.

dispute, the Sault Tribe intends to use the property for class III gaming and does not intend to secure a revenue sharing agreement. The court also reasoned that, in the Tribe's view, trust acquisition would trigger the land claim settlement exception to IGRA's prohibition on gaming on lands taken into trust after 1988. Second, the court found that the State would suffer irreparable injury without the preliminary injunction because the harm to the State "is in no way compensable by monetary damages." Third, the court decided that the risk of harm to others weighed in favor of granting the injunction because the other Tribes that § 9 of the Compact protects would be harmed by the trust submission without a revenue-sharing agreement. Finally, the court determined that the requested injunction would serve the public interest because the public benefits from enforcing all the terms of the Compact, including § 9.

The Tribe now appeals the order.

II.

Counts 1–3

With respect to the first three counts of the complaint, the State's suit to enjoin the trust submission is barred because the Sault Tribe is immune from suit. A tribe's sovereign immunity is abrogated "only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). In addition, "Congress may abrogate a sovereign's immunity only by using statutory language that makes its intention unmistakably clear." *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1242 (11th Cir. 1999). The compact between the Sault Ste. Marie Tribe and the State of Michigan expressly reserves the sovereign immunity of both parties.

Although the Tribe's immunity is subject to statutory exceptions, the asserted statutory exception does not apply. Section 2710(d)(7)(A)(ii) of IGRA, relied upon by Michigan as a statutory basis for abrogating tribal sovereign immunity, does not apply because this suit to enjoin taking land into trust is not a suit "to enjoin a class III gaming activity." 25 U.S.C. § 2710(d)(7)(A)(ii) grants federal jurisdiction over "any cause of

action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact . . . that is in effect." In other words, a federal court has jurisdiction under this provision only where (1) the plaintiff is a State or an Indian tribe; (2) *the cause of action seeks to enjoin a class III gaming activity*; (3) the gaming activity is located on Indian lands; (4) the gaming activity is conducted in violation of a Tribal-State compact; and (5) the Tribal-State compact is in effect. *See Michigan v. Bay Mills Indian Cmty.*, 695 F.3d 406, 412 (6th Cir. 2012), *cert. granted*, 133 S. Ct. 2850 (U.S., June 24, 2013) (No. 12-515) (emphasis added). Only the presence of elements 2 and 3 is disputed. Because enjoining a mandatory trust submission under MILCSA does not qualify as enjoining "a class III gaming activity" under § 2710(d)(7)(A)(ii) of IGRA, we need not reach the issue of whether the Lansing property is on "Indian lands."[2]

Enjoining a MILCSA trust submission is not the same as enjoining a class III gaming activity. Section 108(f) of MILCSA states that land purchased using the income on the Self-Sufficiency Fund (as it was in this case) "shall be held in trust by the Secretary for the benefit of the tribe." § 108(f), 111 Stat. at 2661–62. This submission to the Secretary to have the land taken into trust is triggered by the nature of the funds used to purchase the property, not by the prospective purpose (explicit or otherwise) for which the property was acquired. Because stopping the Tribe's trust application to the Secretary is not the same as stopping a "gaming *activity*" under § 2710(d)(7)(A)(ii) of IGRA, the provision on its face does not apply.

The State argues that it does apply because the Tribe has committed itself to a path that will result in conducting class III gaming activities in violation of the compact; in other words, the Tribe's sovereign immunity is abrogated so long as the State's

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[2]This Court in *Bay Mills* held that there was no abrogation of sovereign immunity in that case by virtue of the third requirement of § 2710(d)(7)(A)(ii) in part because, except for one claim, plaintiff alleged that the gaming in question was *not* on Indian lands. *Id.* at 412–13. For the remaining claim, we held that the fourth requirement (conduct in violation of a Tribal-State compact) was not met. *Id.* at 413. Because the *second* requirement of § 2710(d)(7)(A)(ii) is not met in this case (suit to enjoin gaming activity), it is not necessary for us to determine the applicability of the third and fourth requirements. We therefore decline to hold this appeal in abeyance in anticipation of the Supreme Court's decision in *Bay Mills*, which presumably will address the reasoning of our court regarding the third and fourth requirements.

objective is to stop prospective class III gaming. Such a broad interpretation would unduly constrict a tribe's immunity. Any injunction would be permitted by means of a mere allegation that the challenged action might facilitate gaming activity. There is no support for such a wholesale abrogation of tribal immunity. The State relies on *Arizona v. Tohono O'odham Nation*, 2011 WL 2357833 (D. Ariz. June 15, 2011), where a district court enjoined a tribe from building a casino on property it had purchased, in violation of a Tribal-State compact. *Tohono* involved whether the land in question had yet become "Indian lands," and not whether the suit was to enjoin gaming. Indeed, the court stated explicitly that the nature of the claim asserted by the plaintiffs was "to enjoin gaming on Indian lands." *Id*. at *4. Here, the State seeks to enjoin the Tribe from asking the Secretary to take land into trust pursuant to a separate statute; it is not asking the court to enjoin class III gaming activity, or "the planned casino."[3]

The State moreover cannot get over this hurdle by suing to enjoin the class III gaming already occurring on tribal land if the alleged violation of the compact occurs independently of that pre-existing gaming. The State argues that even if a MILCSA trust submission is not a class III gaming activity, and even if the Lansing property is not Indian lands for the purposes of § 2710(d)(7)(A)(ii), the court nevertheless has jurisdiction to "enjoin existing gaming at the Sault Tribe's casinos in the Upper Peninsula of Michigan" because "all elements necessary for jurisdiction would be present." The convoluted logic of this argument depends on the idea that if a tribe even threatens to violate its compact (by applying to have land taken into trust), it loses the right to conduct class III gaming anywhere. Nothing in the Tribal-State compact or IGRA provides support for such a sweeping proposition, and the State's reliance on *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921 (7th Cir. 2008) is misplaced. There, the Seventh Circuit upheld jurisdiction over a suit to enjoin a tribe's class III gaming on the basis of its alleged violation of the dispute resolution provision of the compact. *Id*. at 927-40. *Ho-Chunk* supports the proposition that a court may enjoin class III gaming

[3] In Count 4, the State does ask the court to "enter an Order enjoining the operation of [Class III] games on [the Casino] property," which would qualify as a "class III gaming activity" under IGRA, but for the reasons set forth in Part III, *infra*, this issue is not ripe for adjudication.

when a compact violation arises out of the particular gaming to be enjoined; it does not provide authority for enjoining class III gaming at sites unrelated to the alleged compact violation. Accordingly, this alternative rationale provides no basis for abrogating the Tribe's sovereign immunity under § 2710(d)(7)(A)(ii) of IGRA.

Our decision today does not affect the legal viability of a later suit to enjoin, as a violation of either § 9 of the Compact or § 2710(d)(7)(A)(ii) of IGRA, *class III gaming* on the land taken into trust. The Tribe conceded as much at oral argument.[4] Nor does a suit to enjoin class III gaming have to wait until such gaming is already occurring.

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[4]The following exchange about § 2710(d)(7)(A)(ii) took place during oral argument:

MR. DUMONT: [W]e have never questioned that there will be a time for the State to bring this action, and to get adjudication if we are conducting class III gaming on this property, and even perhaps before we start conducting class III gaming once the property is in trust.

JUDGE: But you've clearly at the outset though expressed the intent to do class III gaming. That's front and center.

MR. DUMONT: If it is legally possible. And if I can say . . . as a practical matter, the Tribe will want that question resolved. So I think you can be confident that the Tribe will tee that question up, . . . which we would do either by going to the Interior Secretary or to the National Indian Gaming Commission and seeking an opinion that we are right about the "Indian lands" issue, and if that opinion is rendered, then it will be challengeable in federal court by the State or others under the APA.

During rebuttal, the Tribe's counsel discussed § 9 of the Tribal-State compact:

MR. DUMONT: Let's assume the State is correct about what Section 9 prohibits, which as you know, we believe they are not. What it entitles them to do is to bar class III gaming on that property at the end of the day.

JUDGE: What they say is the literal terms say it bars taking into trust.

MR. DUMONT: And they've made the argument now that . . . the mechanism it uses is to bar the trust at the beginning, but I want to be clear that—

JUDGE: You would be clear that you would not argue that because it has been taken into trust, that there's no longer any issue under Section 9.

MR. DUMONT: That is correct.

JUDGE: You would not argue that?

MR. DUMONT: We would not argue that.

JUDGE: Instead you would say, it either applies or it doesn't, and if it does, then we can't do class III gaming.

MR. DUMONT: If we applied for the property improperly, and we don't have a revenue-sharing agreement, and if that provision applies, then we can't do class III gaming. That would be our position.

Injunctive relief can, and often is, brought before the challenged action occurs. *See, e.g.*, *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) ("The purpose of an injunction is to prevent future violations." (quoting *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928))).

Count 4

Count 4 is not barred by sovereign immunity because the State does challenge class III gaming on Indian lands. However, this claim is not ripe for adjudication, and should have been dismissed.

Under each of the three relevant considerations in a ripeness analysis, the legal issues presented in the challenge to class III gaming in this case are not ripe for review. *See, generally*, *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967); *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158 (1967); *Ammex, Inc. v. Cox*, 351 F.3d 697, 706 (6th Cir. 2003). First, the legal analysis would benefit from a more concrete factual context. Second, the actions of the Tribe and the federal government that the plaintiff State seeks to enjoin are subject to modification and have not been sufficiently finalized. Third, the State is not faced with the type of practical quandary that militates in favor of ripeness.

1. Benefit to court of a concrete factual context.

The court would benefit from a more concrete factual context before deciding whether class III gaming on the casino property would violate IGRA or § 9 of the Tribal-State compact if conducted without a revenue-sharing agreement. The issues are indeed legal. Essentially, they are (1) whether the exception in IGRA (to the prohibition on gaming on land taken into trust after 1988) for land "taken into trust as part of . . . a settlement of a land claim" applies to land taken into trust under MILCSA; and (2) whether Section 9 of the Compact, in the absence of a revenue-sharing agreement, prohibits gaming on land taken into trust under MILCSA. 25 U.S.C. § 2719(b)(1)(B)(i). These issues can best be analyzed if the circumstances of the taking into trust are known to the reviewing court. In particular, will the Secretary take the land into trust? What kinds of undertakings and qualifications, especially with regard to gaming, have been

made in connection with the taking into trust? As the Tribe points out, there is even the possibility of judicial review of the Secretary's determination to take the land into trust. The reviewing court will be in a much better position to rule on the legal issues if it has before it the concrete circumstances under which the land has been taken into trust. In contrast, the district court in the *Tohono O'odhom Nation* case found some aspects of the case to be ripe, relying in part on the fact that the Interior Department had already made a final decision to take the land in question into trust. 2011 WL 2357833, at *5.

Our concern in this regard is similar to that of the Supreme Court in *Toilet Goods*, which involved the legality of finalized rules providing for decertifying drug company employees who denied FDA inspectors access to manufacturing facilities. 387 U.S. at 158. The challenge was not ripe where no decertification had occurred because the legal inquiry depended on a number of factors, including practical ones that could stand on a surer footing in the context of a specific application. *Id*. at 165–66. Similarly, in *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726 (1998), the Supreme Court held that a challenge to a U.S. Forest Service management plan was not ripe because even though the plan set logging goals, selected the areas suited to timber production, and determined which probable methods of timber harvest were appropriate, "review would have to take place without benefit of the focus that a particular logging proposal could provide." *Id*. at 736; *see also Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003); *Ammex*, 351 F.3d at 706–08. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)). The State's best argument is that the groundwork for class III gaming is being laid; but no class III gaming is currently occurring on the property, and indeed, it may never occur. The Tribe has not been able even to make a trust submission under MILCSA, a process that involves its own contingencies (e.g., whether the Secretary agrees with the Tribe that she is required to hold the land in trust). Even if the land is taken into trust, under the terms of the development agreement with the City of Lansing, however unlikely, the Tribe could choose to offer only class II, not class III, gaming.

Count 4 involves contingent, future events that may never occur; a more concrete factual context would therefore benefit the resolution of this claim.

2. Uncertainty that class III gaming will occur.

The second aspect of ripeness has to do with whether the defendant will actually carry out what is sought to be enjoined, and if so, how. Here, there are intervening steps required before gaming will come to pass. Most importantly, the land has to be actually taken into trust, and that action has to be finally approved administratively in the Department of the Interior. The Tribe will have to consider making concessions to avoid objections made by the State and other tribes in connection with this administrative determination. Moreover, the Tribe asserts the conceivable (albeit probably entirely impracticable) possibility that it will only offer class II gaming (i.e., essentially bingo). In any event, it is not sufficiently clear that class III gaming will ever be imminent. In *Toilet Goods* the Supreme Court relied on the consideration that "[a]t this juncture we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order." 387 U.S. at 163. Similarly, we have no clear idea whether or when the land will be taken into trust, and what reasons will underlie the administrative decision. Our reasoning in *Ammex* was similar. The suit in *Ammex* arose out of an action for injunctive relief in which Ammex, a seller of duty-free merchandise, including fuel, sought to bar the Michigan Attorney General from enforcing the Michigan Consumer Protection Act (MCPA) against Ammex. *Ammex*, 351 F.3d at 700. The claim was not ripe because Ammex had been granted the right to sell gas tax-free, so there was "no basis for assuming that the Attorney General [would] enforce the MCPA against Ammex." *Id*. at 709. Even if Ammex were ultimately forbidden from selling gasoline tax-free, it was still "far from clear what the Attorney General's policy would be with respect to enforcement of the MCPA against Ammex." *Id*. Like Ammex, the State in this case is suing to enjoin the Tribe from taking what the State alleges will be illegal action under IGRA. However, like the Attorney General's predicted course of action in *Ammex*, the course of action the State anticipates the Tribe will take here may never come to pass because the Secretary may refuse to hold the land

in trust, or the Tribe may choose (or indeed, be required) to conduct only class II gaming on the property. This consideration weighs strongly against ripeness. *See also Ohio Forestry*, 523 U.S. at 735.

3. Hardship to the State in waiting for enforcement.

Finally, the State is not subject to the type of hardship that can outweigh other concerns in a ripeness analysis. Any hardship the State might incur by waiting to bring this claim against the Tribe is not significant enough to offset the other factors that weigh against ripeness. This is not a situation where, as in *Abbott Labs*, "the claim was ripe in part because the challenged regulation had a direct and immediate impact on the day-to-day operations of the plaintiff drug company." *Ammex*, 351 F.3d at 709. The State will not be harmed because it will have the opportunity to bring this claim against the Tribe at a later time, and will not suffer any immediate consequences as a result of the delay.

The State is understandably concerned that if it must wait until the Tribe begins operating its casino before the State can assert abrogation of the Tribe's immunity under § 2710(d)(7)(A)(ii), the Tribe will then claim that the balance of harm swings decidedly in its favor, and that a permanent injunction should not be entered. This concern is not weighty because an ultimate determination that the challenged gaming is prohibited by IGRA or by the Compact will require an injunction regardless of the hardship to the Tribe from, for instance, wasted investment. A balance of equities of course strongly affects the exercise of discretion in deciding whether *preliminary* injunctive relief is warranted, where the legal issue has not yet been finally determined; but, in contrast, a final determination of illegality will necessarily trump equitable interests that can be accommodated only by violations of the law.

We do not now presume to determine the exact point at which a suit would be ripe to challenge class III gaming by the Tribe, when such a challenge is based on the theory that such gaming is prohibited by § 9 of the revenue-sharing agreement of the Compact, or by the limits on gaming on lands taken into trust after 1988. At some point the State must be able to obtain a judicial determination of whether one of these

provisions prohibits class III gaming at the Lansing location, before the gaming starts. It is sufficient to conclude that the limited statutory abrogation of sovereign immunity does not permit the issue to be litigated by means of an injunction to prevent purchased land from being taken into trust under MILCSA, and that a suit to enjoin class III gaming is presently not ripe.

III.

The district court's preliminary injunction is reversed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 13-1438

FILED
Dec 18, 2013
DEBORAH S. HUNT, Clerk

STATE OF MICHIGAN,
Plaintiff - Appellee,

v.

THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,
Defendant - Appellant.

Before: ROGERS, STRANCH, and DONALD, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's preliminary injunction is REVERSED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

EXHIBIT B

IN THE SUPREME COURT OF THE UNITED STATES

- x

MICHIGAN, :

Petitioner : No. 12-515

v. :

BAY MILLS INDIAN COMMUNITY, ET AL.:

- x

Washington, D.C.

Monday, December 2, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

JOHN J. BURSCH, ESQ., Michigan Solicitor General, Lansing, Michigan; on behalf of Petitioner.

NEAL KUMAR KATYAL, ESQ., Washington, D.C.; on behalf of Respondents.

EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Respondents.

C O N T E N T S

P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 12-515, Michigan v. Bay Mills Indian Community.

Mr. Bursch.

ORAL ARGUMENT OF JOHN J. BURSCH

ON BEHALF OF THE PETITIONER

MR. BURSCH: Thank you, Mr. Chief Justice, and may it please the Court:

After Bay Mills' concession on the first question presented, the only issue is whether Bay Mills enjoys blanket immunity from suit when it engages in illegal, off-reservation, commercial conduct. And the answer is no, for at least two reasons.

First, it makes no sense that Congress intended States to have a Federal injunctive remedy for illegal gaming on reservation, but no injunctive remedy if that gaming takes place on land that is subject to the State's exclusive jurisdiction.

Second, a tribe should not have greater immunity than foreign nations. There's no dispute that, if France opened up an illegal business in Michigan, casino or otherwise, it would have no blanket immunity.

JUSTICE SOTOMAYOR: Counsel, before you go

on, could you address the jurisdiction question for me? I'm not sure why you're here. The only injunction that I see was entered on behalf of Little -- Little Traverse's and not on behalf of the State.

But -- and so, the counts that you're arguing about were added after the injunction was issued. How do you have jurisdiction to act -- to argue someone else's injunction?

MR. BURSCH: That's not quite correct, Justice Sotomayor. Originally, this case was filed as two separate lawsuits. Michigan was a plaintiff, and then the other tribe was a plaintiff in the separate case. Those cases were consolidated, and then when the motion for injunction was filed, Michigan joined in that motion, filed a brief supporting it, and everyone proceeded under the assumption that both the tribe and the State were asking for the injunction.

JUSTICE SOTOMAYOR: That, in fact, is not what the district court said. The district court explicitly said in its order granting the injunction that the State hadn't filed an injunction, hadn't intervened, and had only filed supporting papers in support of Little Traverse's case.

I'm a little -- I'm very, very confused as I look at what the district court said. It explicitly

said you weren't part of the order.

MR. BURSCH: Well, again, they were consolidated cases. We were supporting the injunction --

JUSTICE SOTOMAYOR: I think "consolidated" can have two meanings and -- and -- to be heard together or to be joined together. I don't think the district court understood that this was going to be joined together. Why did it say what it did?

MR. BURSCH: Well, I think it was everybody's understanding that these were joined together because the parties were pursuing the exact same issues. And so then, once this went up to the Sixth Circuit, there was no question in the Sixth Circuit's mind --

JUSTICE SOTOMAYOR: So why did you file an injunction -- why does your brief say that you filed it only in support of Little Traverse and not on your own behalf?

MR. BURSCH: Because, once the cases were consolidated -- and at that point, we were even using the same docket entries, there was already a motion on file, so there was no need to have a second motion. It was clear to everyone that the State of Michigan and the tribe were both pursuing that injunctive relief

together. And that's exactly the way the Sixth Circuit treated it.

JUSTICE SOTOMAYOR: I'll ask -- I'll ask your opposition, but I don't see why the district court would have made the point it did, if it believed that it was dealing with both of you as parties.

MR. BURSCH: Well, everyone has proceeded up the chain, including in the Sixth Circuit opinion, on the assumption that it was consolidated, that Michigan was requesting an injunction and, in fact, that kind of a procedural objection has never been raised by anybody, certainly not at the petition stage.

JUSTICE SOTOMAYOR: No, but we have to -- we have to, if we're not sure, raise any jurisdictional issue.

MR. BURSCH: Sure. But I think it was eminently clear to the Sixth Circuit, if you read its opinion --

JUSTICE SOTOMAYOR: Well, it wasn't eminently clear to the district court who entered the order.

CHIEF JUSTICE ROBERTS: Is that a jurisdictional objection or a procedural one?

MR. BURSCH: Your Honor, it's a procedural objection. The only jurisdictional question in this

case is whether there's Federal question jurisdiction under 1331, which has been conceded, and the United States agrees to that, and so I'm not going to spend my time on that. Where I would like to spend my time is on the scope of tribal immunity.

JUSTICE GINSBURG: Before you do that, can you tell -- tell us why Michigan didn't resort to the dispute resolution means that the compact provided? The compact said, if there's a dispute, it'll be decided by arbitration. Michigan bypassed that.

MR. BURSCH: That's correct, Justice Ginsburg, and there were two reasons for that. The first is that that provision was only discretionary, as we explain in our reply brief. But even more important, the compact also makes clear that the tribe did not waive its sovereign immunity for purposes of arbitration.

So if we had gone to arbitration and prevailed, if the arbitrator had reached the same result as the Federal government did, as to the status of these lands being not Indian lands, then --

JUSTICE KAGAN: I'm sorry. Could you explain that? Because I thought that the purpose -- that the whole point of the C&L Enterprises case is to say that when a tribe agrees to arbitration, it has

waived its sovereign immunity for that purpose in that proceeding. Are you saying that there was something special in this agreement?

MR. BURSCH: I am, Justice Kagan, and I'm glad you brought up C&L because, there, you had a construction contract where there was invocation of an arbitration remedy and it didn't specifically preserve tribal immunity.

Here, we have the exact opposite. In the same paragraph 7 of the compact where we have the arbitration provision, the tribe and the State agree that, notwithstanding the arbitration provision, both parties' sovereign immunity is not waived and that it's -- it's preserved.

So, if we took a successful arbitration judgment and then tried to reduce that to a Federal judgment in court, they would have asserted immunity and we would be in the exact same procedural posture that we are right now, talking about the scope of tribal immunity involving illegal off-reservation gaming.

CHIEF JUSTICE ROBERTS: Why -- why did -- along the same lines, why did you assert sovereign immunity as a defense when the tribe brought a declaratory judgment action concerning the status of those lands?

MR. BURSCH: Because, again, it wouldn't have done any good for us to stipulate to jurisdiction on the tribe's claim about the status of the lands because simply having a declaratory judgment wouldn't have given us any relief. We would have had to file a counterclaim for injunctive relief and the tribe, undoubtedly, would have filed -- or I would have asserted a tribal immunity there as well.

So, really, all roads lead to tribal immunity, no matter how --

JUSTICE SOTOMAYOR: All roads lead to one issue, I think. If you had gotten a declaratory judgment, they would have had to stop their gaming activity.

MR. BURSCH: No --

JUSTICE SOTOMAYOR: But you wouldn't have gotten their property; isn't that what this suit is about, you trying to take over the -- the casino?

MR. BURSCH: No, we don't want to take over the casino. We want to stop illegal gaming on lands, subject to Michigan's exclusive jurisdiction.

JUSTICE SOTOMAYOR: So why not Ex Parte Young? You point to one or two cases in the lower courts that suggest there not might be Ex Parte Young jurisdiction, but those cases are distinguishable. So

why not go after just the officials?

MR. BURSCH: Two responses to that, Justice Sotomayor, one kind of a practical consideration and then one a broader federalism principle that I -- that I want to emphasize. The narrow practical point is that Ex Parte Young is an imperfect remedy for lots of reasons, as we express in the brief.

It's well settled that you can't get specific performance on the contract, you can't enforce a State law in Federal court, you can't get money or seize assets in an Ex Parte Young action. And that's why lower courts --

JUSTICE SOTOMAYOR: But all you wanted to do was stop them from doing the gaming casino.

MR. BURSCH: Well, it's not clear --

JUSTICE SOTOMAYOR: You would have gotten that.

MR. BURSCH: It's not clear at all to us that we would be able to get that relief, based on the lower court holdings.

Now, the bigger sovereignty point is that, if a foreign country, if France or Haiti came in and opened the same casino, the State would have the full panoply of remedies available to it. And it should have those remedies because any additional immunity you give

to the tribe, when it's engaging in illegal conduct on lands subject to Michigan's exclusive jurisdiction, you are necessarily taking away from the sovereign authority of the State of Michigan. That's a lesser remedy.

JUSTICE GINSBURG: That's -- all that -- the enigma that you pointed out -- or the anomaly is -- is certainly clear. But what about Kiowa? This Court seemed to say that the tribe is immune on reservation, off reservation, commercial activity, government activity, it is immune, blanket immunity.

So how can you prevail without having this Court modify Kiowa.

MR. BURSCH: Here's how, Justice Ginsburg: Because Kiowa involved a private party plaintiff. It did not involve a sovereign State. And this Court has stated, repeatedly, that States are different. We are constitutional sovereigns, and so we aren't treated like ordinary business plaintiffs.

In that case, the fact that the plaintiff could not enforce his promissory note did not directly implicate a State police power. Here --

JUSTICE KENNEDY: What's your best authority -- what's your best case for that proposition?

MR. BURSCH: For the proposition that States are different?

JUSTICE KENNEDY: That -- that States have a lesser burden when they're faced with a sovereign immunity defense?

MR. BURSCH: I wouldn't say that it's a lesser burden, but I think you need to analyze this as a zero sum gain, that when you're talking about activity taking place on sovereign State land and you're not allowing the State to have its whole panoply of remedies, that you've taken away an attribute of sovereignty that -- that would have existed.

JUSTICE KENNEDY: What's your best case for that?

MR. BURSCH: I would basically just cite all of the cases this Court has decided over the last quarter century involving the ADA, the ADEA, where this Court has consistently recognized that States are different. Sovereigns --

JUSTICE KENNEDY: You know, that's -- that's a big reading assignment.

(Laughter.)

JUSTICE BREYER: The question is this: Three situations -- I think it's the same question Justice Kennedy was driving at. One, France opens up a casino.

MR. BURSCH: Yes.

JUSTICE BREYER: Two, California opens up a casino.
MR. BURSCH: Yes.
JUSTICE BREYER: Three, an Indian tribe opens up a casino, okay?
MR. BURSCH: Correct.
JUSTICE BREYER: Now, what is it that says that the State where the casino is located can sue France? What is it that says it can sue California? All -- they all object. What is it that says it can sue the Indian tribe?
MR. BURSCH: Thank you, Justice Breyer. And, Justice Kennedy, hopefully, this will reduce the reading assignment.
The case that says we can sue France is Alfred Dunhill, which was this Court's decision that first recognized the commercial distinction for foreign nation immunity. Now --
JUSTICE BREYER: Now, was that a statute or common law?
MR. BURSCH: That was common law, common law development in Alfred Dunhill.
Now, shortly after that, Congress did enact the Foreign Sovereign Immunities Act, which essentially codified this Court's common law rule, and once that

happens, then the common law developed --

JUSTICE BREYER: Okay. California?

MR. BURSCH: So California, the case is Nevada v. Hall in which -- this case said that a State's sovereign immunity from suit does not extend when it's got actors in another State. There, Nevada's agent was acting in California, and the Court held that that actor could be liable for suit in California.

JUSTICE BREYER: Okay. All those are common law. Both --

MR. BURSCH: All common law.

JUSTICE BREYER: Then what do you do about Kiowa?

MR. BURSCH: Well, that's the thing. Kiowa or Kiowa did not involve a State as sovereign. It involved a private business plaintiff, and it's distinguishable on that basis.

And if you disagree with me and you think that sovereign States should be treated the same way as private party plaintiffs, then we would ask you to overrule that part of Kiowa which suggested that tribes can engage in illegal commercial conduct on land subject to exclusive State jurisdiction without any --

JUSTICE KAGAN: But I think this is what Justice Kennedy was -- was getting at, when he asked you

for a case, because what you're saying now is that when the State is the plaintiff --

MR. BURSCH: Yes.

JUSTICE KAGAN: -- the sovereign immunity of the tribe disappears, so --

MR. BURSCH: Well, not disappears. But it -- it disappears when they move off reservation and they're acting in a commercial capacity.

JUSTICE KAGAN: Okay. So what -- I guess what's -- what's -- what's the case that would suggest that, when the plaintiff shifts, the sovereign immunity is -- goes away?

MR. BURSCH: This Court's case that would suggest that is the Oklahoma Tax Commission case because that was a case where a State, not exercising a police power, but one of its lesser powers, the power of taxation, was attempting to tax cigarettes that were being sold on Indian trust land by a tribe.

And in that case, the Court acknowledged that, even on trust lands -- so this isn't on land that's subject to State exclusive jurisdiction, that the State would be able to tax those cigarettes being sold to non-tribal members. It's not --

JUSTICE BREYER: You know, but the question specifically then -- I think we're driving at the same

thing -- is, remember, you just cited to me two cases --

MR. BURSCH: Yes.

JUSTICE BREYER: -- one involving France and one involving California.

MR. BURSCH: Yes.

JUSTICE BREYER: And I had assumed -- but maybe I was wrong to assume -- that when I read those cases, I will see, although a State can sue France, although Nevada can sue California, a private individual could not. Am I going to find that when I read those two cases?

MR. BURSCH: Well --

JUSTICE BREYER: Now, I think the answer to Justice Kagan is I'm not going to find it. So we're looking for authority, back to Justice Kennedy, that will support your proposition that the State could sue France, Nevada could sue California, but a private individual could not.

MR. BURSCH: I think the Oklahoma Tax Commission case would be the closest because, even if you have a private individual who was trying to sue a tribe for conduct that was taking place on trust land, they would not be able to do it. What --

JUSTICE BREYER: Now, what you're asking us to do then, if the answer is what I now think you're

saying, is to say it's awfully complicated that, although a State could sue an Indian tribe for something that is outside the reservation, the State -- it's so complicated that I'd like some good authority for it, because a private person couldn't, but a State could sue, and it's only in certain places.

MR. BURSCH: Well, there -- there's lots of places that you could draw the line in this case.

JUSTICE BREYER: How about drawing the line with Kiowa?

MR. BURSCH: Here's what I'm going to suggest: Nine justices in Kiowa, both the majority and the dissent, recognized that there were substantial issues with applying tribal immunity on or off reservation in the commercial context.

This Court had done away with that for foreign nations in Alfred Dunhill. It decided to give Congress one more chance in -- in Kiowa, but -- but left the question open for further common law development.

JUSTICE GINSBURG: But once the Congress didn't respond, the majority opinion in Kiowa -- I don't know whether it's "Kiowa" or "Kiowa" -- said -- you know, this is an unfortunate result, but Congress can do something about it. Well, now Congress hasn't done anything about it, and you are asking this Court,

essentially, to modify the -- that precedent.

MR. BURSCH: I am. I mean, I don't think you need to modify it. I think you could distinguish it based on the fact that there's a private party plaintiff there. But if you feel otherwise, that you need to modify it in order to rule in our favor, it's -- it's totally within your power.

As we explained, at length in the context of foreign nation sovereign immunity, it's a body of common law that this Court is free to modify as appropriate.

JUSTICE ALITO: Well, why is the -- why is that important? Why is the issue that you've brought before us important? In addition to the possibility of an Ex Parte Young action, you could certainly arrest people who are running what you believe is an illegal casino in the State, can't you?

MR. BURSCH: Well, there are -- there are at least two reasons why that is also an imperfect remedy. The most obvious one is that it creates exactly the kind of inter-sovereign conflict that Congress was trying to avoid when it allowed, under IGRA, for States to get injunctions, even for on-reservation conduct.

JUSTICE ALITO: But, in addition to that, couldn't you have stopped this before it even started by insisting in the compact that the tribe waive sovereign

immunity?

MR. BURSCH: Well, that's -- that's a great question, and the answer to that is twofold. First, when the compact was negotiated back in 1993, this Court had not decided Kiowa. That came five years later in 1998. And so Congress and the States reasonably assumed at that time that, if a tribe was engaged in illegal commercial conduct off reservation, that, of course, a State would have the ability --

JUSTICE ALITO: Going forward then --

JUSTICE KENNEDY: Why couldn't you at least -- I think this is Justice Alito's question. I don't mean to interrupt. But why couldn't you say that it's a matter of compact interpretation whether these are Indian lands?

MR. BURSCH: A matter of compact interpretation whether these are Indian lands?

JUSTICE KENNEDY: Right. So you go to Federal court to interpret the contract. There's no -- immunity has been waived, and you say these are not Indian lands. I think that's what Justice Alito was asking. I didn't mean to interrupt him.

MR. BURSCH: I -- I didn't get quite the same question from Justice Alito.

JUSTICE ALITO: Well, that's a more

sophisticated version of my question.

(Laughter.)

JUSTICE ALITO: No. Seriously, it gets into a more -- more difficult issue.

MR. BURSCH: Right. Well, if I can finish answering Justice Alito's question. You asked why we can't just go in and arrest. And -- and the second answer to that, besides the -- the conflict of going in with armed police guards and arresting tribal officials and hauling them off to county jail, which Congress tried to avoid when it enacted IGRA in the first place, it's what everybody wanted.

Again, it's limiting State sovereignty --

JUSTICE ALITO: Well, I understand that.

MR. BURSCH: -- any time you take out our --

JUSTICE ALITO: But going forward, is this of any importance? Why --

MR. BURSCH: Oh, this is of tremendous importance.

JUSTICE ALITO: It seems to me, if a tribe wants to open a casino and the State has to -- it has to have a compact with the State, isn't all the bargaining power on the -- on the side of the State? So the State says, fine, if you want to do that, you have to waive

sovereign immunity?

MR. BURSCH: Well, we had a compact in place in 1993 that limited their casinos, so that this wouldn't happen. Going forward --

JUSTICE ALITO: Well, I -- but I mean, when will -- when will this compact expire?

MR. BURSCH: Right. Let me give you a very practical answer to that question. This compact, in 1993, had a 20-year term on it. And so it essentially expired at the end of -- of November, just a few days ago, although it has an evergreen clause that allows it to continue while the parties try to negotiate a new compact.

And, as you would imagine, the very first thing Michigan asked for in its proposed amended compact was to waive tribal sovereign immunity to deal with issues like this. And, unsurprisingly, the tribe said, we're really not interested in that; we kind of like the way the sovereignty issue is preserved in the existing compact.

Now, the question about whether this has an impact beyond tribal gaming, the answer is --

JUSTICE ALITO: If I could just pursue that?

MR. BURSCH: Sure.

JUSTICE ALITO: So the compact has expired,

and there's -- so then how can they operate the casino?

MR. BURSCH: Well, it hasn't expired. Until the parties --

JUSTICE ALITO: Until they reach a new compact, it continues.

MR. BURSCH: Until they reach a new compact, it continues in effect.

CHIEF JUSTICE ROBERTS: Is the status of the land as Indian lands determined by the compact?

MR. BURSCH: No, it's not determined by the compact. It would be determined as a matter of Federal law. That's the Federal question in this case. And --

JUSTICE SOTOMAYOR: Could I ask you a question?

JUSTICE KENNEDY: But the compact refers to Indian lands. Surely, you could take the position that there is a waiver of immunity to determine whether or not these are Indian lands under the compact.

MR. BURSCH: I don't think we could, respectfully, Justice Kennedy, because the compact does not envision that the tribe has waived immunity for any purposes. If you look at Section 7 of the compact, it's -- it's really unequivocal about the tribe not waiving immunity.

JUSTICE SOTOMAYOR: Could I ask you a

question? What -- what would happen if this were Indian lands, and they went ahead and did exactly what they did? They -- there was no dispute that these were Indian lands.

Would you have had grounds to object to them building a casino on these lands.

MR. BURSCH: We would not.

JUSTICE SOTOMAYOR: You would not?

MR. BURSCH: Correct. If these are Indian lands, then it's permissible under IGRA and under the compact for them to have and operate a casino.

JUSTICE SOTOMAYOR: All right. The issue of what constitutes Indian lands is between the Federal government and the Indians, pursuant to the Land Trust Settlement, correct?

MR. BURSCH: I disagree with that because --

JUSTICE SOTOMAYOR: Well, I know you do, and I know why you do. But -- but what defines the lands is the Settlement Trust, correct?

MR. BURSCH: Federal court interpretation of the Michigan Indian Land Claims Settlement Act, yes, would determine the status of these lands. The reason why it's not just between the tribe and the Federal government is because Michigan has a huge interest in having lands that aren't currently under its exclusive

sovereign jurisdiction be determined to be Indian lands --

JUSTICE SOTOMAYOR: Put -- put this aside of gambling. Let's assume that it was just their buying this land.

MR. BURSCH: Yes.

JUSTICE SOTOMAYOR: Could you have stopped the buying of this land or unravelled it? Didn't we have a recent decision that said no?

MR. BURSCH: If you're referring to the -- the Patchak case --

JUSTICE SOTOMAYOR: Yes.

MR. BURSCH: In that case, you held that the plaintiff could, quite a bit after the fact, file a lawsuit to unravel that transaction, if the lands were not eligible for Indian gaming, if I'm remembering the holding correctly. And -- and Michigan does have a substantial interest, not just in the gaming context.

JUSTICE SOTOMAYOR: Well, wouldn't you have had to follow -- if you were going to object to this land being taken into the land trust, wouldn't you have had to follow the administrative process?

MR. BURSCH: We would, but the land has never been taken in trust. Even the Federal government, the National Indian Gaming Commission, has concluded

that these are not Indian lands for purposes of the Settlement Act. And so we never got to the point where they got in Patchak, where they went through the administrative process to take the lands in trust.

JUSTICE KAGAN: General, if -- if I could assume that this is not Indian lands and just ask why you need for sovereign immunity to go away? And -- so you have the ability to arrest people. You have the ability to bring Ex Parte Young actions.

Presumably, you have the ability on non-Indian lands simply to shut down a casino. Presumably, you have the ability on non-Indian lands to condition any licensing of the casino on whatever you want.

I guess the question is: On non-Indian lands, you have a thousand ways to stop a casino that you don't want. Why do you need the abrogation of sovereign immunity?

MR. BURSCH: Because we tried to take the least intrusive means necessary to stop the casino, to not go in with the billy clubs and the guns and to arrest tribal members, but to ask for a Federal civil injunction.

JUSTICE KAGAN: Well, I think that all of our cases suggest that sovereign immunity is quite

important to a sovereign's dignity and that it's not nothing to abrogate sovereign immunity. And so you can say, well -- you know, that would be less intrusive than all these other things, bringing Ex Parte Young suits, arresting people, just -- you know, conditioning the -- a license, stopping the casino from operating.

But -- you know, I suspect that the sovereign tribe here would say that, no, it's -- it's an affront to their sovereignty to take -- to strip them of sovereign immunity, and -- and none of these other options that you have are that.

MR. BURSCH: Right. But, again, arresting the other sovereign's officers is, with all respect, not respectful to the tribe, which is why that's the course we've pursued. And the change we're asking for here is not as big as the tribe makes it seem because, in IGRA, Section 2710, we have the ability to get an injunction to stop illegal gaming taking place on reservation.

And so it's really not that big a leap to say, if they're engaging in illegal gaming off reservation, likewise, there, we should be able to get the least intrusive remedy, the one that is most respectful of the tribe's sovereignty.

And, frankly, we're kind of surprised that the United States would take the position that we're

better off going in and arresting or suing individual officers because that's not the way sovereigns are supposed to interact.

And it would be a big deal if France opened up a casino in Michigan and, rather than seeking a civil injunction, we tried to arrest the French president and throw them in a Michigan County jail.

JUSTICE ALITO: I mean, is -- is it not correct that the people who work in these casinos are just employees? They have no other connection with the tribe? Am I wrong on that?

MR. BURSCH: I believe some of the employees are tribal members, some are not. And we cite a number of cases in our reply brief where tribal immunity has been extended to tribal employees whether they are members of the tribe or not.

CHIEF JUSTICE ROBERTS: Can you prosecute people who frequent this illegal casino?

MR. BURSCH: Michigan citizens?

CHIEF JUSTICE ROBERTS: Yes.

MR. BURSCH: Yes, we could do that. But -- you know, again, I want you to understand the scope of the invasion of the State's sovereignty here. If any other entity, foreign nation, another State, an individual, set up an illegal business, whether it's

prostitution, underage drinking, gaming, you name it, we would have the full panoply of State civil and criminal regulatory remedies available to us and could pick the most appropriate one.

And, somehow, because this is a tribe, even though they are operating on Michigan's land, where we have exclusive regulatory jurisdiction, somehow, all those remedies are circumscribed to imperfect remedies, like Ex parte Young, which may or may not be successful, or arresting our own citizens, and that's not respecting the constitutional sovereign that Michigan represents in this case.

And to get back to a question a number of you had about the implications of this aside from gaming, this happens in all kinds of other contexts off reservation. You just had a case in 2011 involving the Oneida tribe in New York, where they failed to pay their property taxes in New York. And so the State moved in to foreclose for nonpayment of taxes those off-reservation properties.

And the Second Circuit, interpreting Kiowa, reluctantly concluded that the State did not have ability to enforce by foreclosing on that property because the tribe had immunity and invited this Court to review Kiowa. This Court granted cert. Eventually,

cert was dismissed because the tribe waived immunity, and they were able to go forward and pursue that remedy.

But -- you know, whether it's in the tax context, whether it's the gaming context, whether it's the criminal context -- you know, the amici briefs of Oklahoma and Alabama are replete with the issues that they are having as sovereigns in running up against the tribal sovereign immunity when it comes to these contexts.

If there are no further questions, I will reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Katyal.

ORAL ARGUMENT OF NEAL KUMAR KATYAL

ON BEHALF OF THE RESPONDENTS

MR. KATYAL: Thank you, Mr. Chief Justice, and may it please the Court:

I would like to begin where my friend did not, with the text of the statute. Congress enacted Subsection (A)(ii), like the rest of IGRA, to address gaming solely on Indian lands. In fact, Congress used that phrase "on Indian lands" a whopping 24 times in IGRA. By contrast, IGRA says not a word about off-Indian-lands activity.

JUSTICE SCALIA: So you think Congress

really wanted the States to have power to stop illegal gambling on Indian lands, but not to have the power to stop illegal gaming on State lands? Is that -- is that the law you think Congress wrote?

MR. KATYAL: I do think so, and if I could say first of all --

JUSTICE SCALIA: Why would anybody want such a -- such a disposition?

MR. KATYAL: Two reasons, Your Honor, why I think Congress made the choice they did. But, even before that, I don't think that's the proper inquiry for this Court. The proper inquiry for this Court, as C&L and other cases have said, is it requires an unequivocal expression of purpose of Congress before tribal immunity is abrogated, and we don't get into this kind of question of what Congress might have thought, which creates a guessing game.

But, just to answer your question, why would Congress have thought that --

JUSTICE SCALIA: Well, you think that rule would apply even when, at the time the statute in question was enacted, there was no belief that there was tribal immunity on State lands?

MR. KATYAL: Well, Your Honor, I know my friend on the other side has said that. That is just

flatly wrong. Puyallup, in 1977, Your Honor, precisely said that it involved both on- and off-reservation activity, it was commercial activity, it was fishing, and this Court said that tribal immunity protected against that.

And so -- so I do think --

JUSTICE SCALIA: I thought that was just on reservation. You think that was off reservation as well?

MR. KATYAL: It is. At page 167, Your Honor, it says that the injunction was both on and off reservation. And then, in Kiowa, at page 754, this Court made clear that that's how it read --

JUSTICE SCALIA: Kiowa was later, of course.

MR. KATYAL: Of course, but I think that Congress, in enacting IGRA in 1988, certainly was under the same set of assumptions as this Court in 19 -- in the Kiowa --

JUSTICE SCALIA: You think they read Puyallup that closely?

MR. KATYAL: I -- well, I think it's several places in Puyallup, and certainly, that's what this Court in Kiowa said.

JUSTICE SCALIA: I see.

MR. KATYAL: And I do think the text is the

best guide to what Congress wanted, and the text uses "on Indian lands" 24 times. And the reason for that, the reason why there's not an absurdity, is twofold: First, Congress, in IGRA, was reacting to this Court's decision in Cabazon the year earlier, which had ousted State court -- State regulatory jurisdiction entirely from on-Indian-lands activity, so it changed the game entirely.

Cabazon did nothing with respect to off-Indian-lands activity and left entirely intact all the remedies we've been talking about, Justice Alito's remedy about criminal sanctions --

JUSTICE GINSBURG: You agree with that, that they could -- the State could go in and arrest all the customers that are gambling there? Could it seize the slot machines?

MR. KATYAL: Well, it certainly could arrest the customers, the employees, and so on. And that's why we would not operate this casino without a square ruling. It is shuttered, Justice Alito, right now, because we need a square ruling that says this is on-Indian-lands activity. And we would --

CHIEF JUSTICE ROBERTS: Well, you don't it -- You don't have a square ruling, so I want to make clear, because both you and the Solicitor General have

suggested this as an option: You think it is all right for the State to go in and arrest every employee, management -- you know, labor, who is participating in this casino and subject them to criminal sanctions, civil penalties and an injunction. You have got no problem with that?

MR. KATYAL: We think that that's a consequence of tribal immunity, that when you -- when they are seeking relief qua tribe, that's a different thing, and that's, I think, a standard principle --

CHIEF JUSTICE ROBERTS: You, as a tribe -- you, as a tribe, would have no objection to that action?

MR. KATYAL: Well, Your Honor, I think, if that sort of circumstance unfolded, we might say let's try and figure out a different way to deal with that. First, of course, the most primary way is the compact itself, and many compacts, for example, have arbitration clauses --

CHIEF JUSTICE ROBERTS: Well, I know, you could suggest different ways, and the State could tell you -- you know, go fly a kite, we are prosecuting these people. And you'd have no objection to that?

MR. KATYAL: Absolutely. We are not here, trying to say that we want to evade the law. We want a ruling -- a definitive ruling. We believe, very

squarely, that this is on-Indian-lands activity.

CHIEF JUSTICE ROBERTS: Okay. What about Ex Parte Young? Are you willing to waive the tribe's sovereign immunity in an Ex Parte Young action? Because, in your opposition to the complaint in this case, you raised sovereign immunity as an objection to the Ex Parte Young --

MR. KATYAL: Sure. Sure. As part in the district court, as part of ordinary -- as part of ordinary litigation, we said that Ex Parte Young wasn't applicable. But we do think -- and our brief in opposition says this, our merits brief says this, the United States' brief says this, that Ex Parte Young actions are available against tribes, just as --

CHIEF JUSTICE ROBERTS: Not just are available; that you would not assert sovereign immunity if they brought an Ex Parte Young action.

MR. KATYAL: Well, Your Honor, we would not assert it to the limits of Ex Parte Young. So, for example, Ex Parte Young doesn't -- doesn't permit reaching into the State coffers, and here, Count 5 of the complaint tries to reach into the tribe's coffers. So we do think that that type of Ex Parte Young -- that is not permitted by Ex Parte Young, and that would be impermissible.

If I could return to the second reason why I think what Congress did wasn't -- wasn't -- you know, creating any sort of anomaly like my friend says, the reason is this: All IGRA did in (A)(ii) is empower compacts. It didn't abrogate immunity by itself directly; it requires the tribe to affirmatively buy into the idea of State law applying on the reservation.

So if we could, just imagine a casino, Justice Scalia, opened blatantly on a reservation, a casino without a compact that was absolutely illegal. We will call it "Casino Red." (A)(ii) would not abrogate immunity in that circumstance. The State would have no remedy.

JUSTICE KENNEDY: I thought the statute says that there is Federal court jurisdiction over any cause of action initiated by a State or Indian tribe to enjoin gaming activity that is conducted in violation of the compact.

MR. KATYAL: Yeah, on Indian lands, exactly. And so my example of the casino here would be --

JUSTICE KAGAN: Why couldn't this --

MR. KATYAL: If there is no compact, Justice Kennedy, there is no abrogation. And so what (A)(ii) does is it empowers the tribe and the compact, and it requires the tribe affirmatively to come in. And

that's why, off Indian land, there is standard tribal immunity because the tribe hasn't said anything one way or the other.

JUSTICE KENNEDY: And you don't think that 1166 abrogates the immunity, which provides that, for purposes of Federal law, all State laws are applicable?

MR. KATYAL: Yeah, not at all, Your Honor. All 1166 does is bring Federal -- that's about Federal enforcement, not at all about State enforcement. Indeed, Michigan's own position and Michigan's supreme court said 1166 does says nothing with respect to States --

JUSTICE KENNEDY: And you do not take the position that this casino in this case is part of a compact?

MR. KATYAL: Which casino?

JUSTICE KENNEDY: The casino in this case, in your view, is not subject to any -- is not covered by any compact?

MR. KATYAL: No, we do. We think that the proper remedy here, if they had an objection, would have been to arbitrate and say this is not Indian lands. Petition Appendix 77A and 78A lay out the terms of the compact and what gaming is allowed.

JUSTICE SCALIA: But he says that, if they

arbitrated, when they tried to enforce the arbitral judgment, you would assert sovereign immunity.

MR. KATYAL: Well, two responses to that, Your Honor. First, of course, that is the remedy they agreed to in the compact itself, and, of course, they should try. And second --

JUSTICE SCALIA: Well, I mean, that's not an answer.

MR. KATYAL: Well, it is an answer in the sense that, Your Honor, had they asked we -- and I can tell you I've discussed this with the tribe -- that they would, of course, not -- they would, of course, not assert sovereign immunity to enforce the arbitration agreement. We have --

JUSTICE SOTOMAYOR: How do you win in an arbitration when the gaming commission has said it's not Indian lands? I mean, I actually am not sure that the ruling of the district court was right on this, okay? But putting my own beliefs -- or questions about that ruling, how do you win as the Federal government has said it's not Indian lands?

MR. KATYAL: Well, we think that that isn't a final decision and is wrong for any number of reasons on the merits that -- you know, laid out in the Joint Appendix, and so we do think that would be the argument

that we would make to the arbitration board. That should have --

JUSTICE SOTOMAYOR: But how does the arbitration board change the mind of the gaming commission? Aren't they the final deciders of whether this is trust land or not?

MR. KATYAL: Well -- no, I think that -- I think that that isn't, itself, a final decision, and there are any number of mechanisms that may be available to try and get the issue properly teed up to the NIGC.

CHIEF JUSTICE ROBERTS: I don't see how an arbitration works. The Federal government has a very keen interest in whether this is Indian land or not. And the arbitrator is going to decide that in a way that's going to bind anybody?

MR. KATYAL: Well, it would bind, I think, the parties before it, and that's what the parties agreed to. In many compacts --

CHIEF JUSTICE ROBERTS: So ongoing, as far as the tribe and the State is concerned, they proceed from then on as if this is Indian lands, even though the Federal government is saying, no, it's not.

MR. KATYAL: Well, I think that we would still have to persuade the Federal government in one way, shape, or form because of the NIGC's authority in

this area, so I think that's two separate questions.

CHIEF JUSTICE ROBERTS: Yes. So the arbitration doesn't get -- so the arbitration doesn't get you anywhere at all.

MR. KATYAL: Well, it at least resolves the issue with respect to Michigan. Our central point here is that there's lots of different ways to deal with this question, including the question you asked earlier, the declaratory judgment action, which we brought against Michigan. There's lots of ways to resolve the underlying Indian lands question.

The last thing I think this Court needs to do is entirely change the rules of the game with respect to tribal immunity.

JUSTICE SOTOMAYOR: Just so we understand --

JUSTICE GINSBURG: What would be the big -- what would be the big change, other than modifying Kiowa, which is a divided opinion, and was dealing with a money claim. It wasn't dealing with injunctive relief.

MR. KATYAL: Well, certainly, this Court's decision in Puyallup, as well as Oklahoma -- Oklahoma Tax Commission, both did deal with injunctive relief, and both were against States, to deal with his argument.

Now, he has said -- my friend on the other

side has said, we'll look to the foreign sovereign immunity context, and that's what's giving him his reason for saying that it wouldn't be such a big change, and we think that's wrong for two reasons.

Number one, Kiowa itself, at page 759, dealt with this and said that it was the political branches that led the change on commercial immunity, not this Court. And, number two, my friend has quoted Alfred Dunhill, and I think that everything --

JUSTICE GINSBURG: Well -- well, is that right? The distinction between commercial and governmental, it was court made in the first instance, and then the Foreign Sovereign Immunities Act codified law that was court made. So it was the courts that made the distinction between acting in a commercial capacity and acting in a governmental capacity.

MR. KATYAL: Justice Ginsburg, the majority of Kiowa, on page 759, responds to that and says that it was actually the political branches that led with the --

JUSTICE BREYER: Yes, but he was wrong on that, apparently, if that's what he says. He was wrong, that, if we look at the cases, what we will see is it was the courts that said there's a common law abrogation of France's sovereign immunity, when they go into business in downtown Iowa somewhere.

MR. KATYAL: And Justice Breyer --

JUSTICE BREYER: The same thing -- same thing with the State, he says in Nevada and California, and then he says it would be totally anomalous to think that an Indian tribe could go into downtown Des Moines and open up a clearly illegal business, and you could sue France -- the State, which was not Kiowa -- they could sue -- France could -- the State could sue France, it could sue California, but it couldn't sue the Indian tribe.

MR. KATYAL: Justice Breyer, we would encourage the Court to look at precisely the case he is citing for this proposition, which is Alfred Dunhill, because, as the case was vigorously argued by a Justice Department attorney, and what -- and what my friend doesn't tell you is that the pages he is citing actually don't command a majority of the Court.

They're about not commercial -- they're not about foreign sovereign immunity. They are about active State immunity.

JUSTICE BREYER: All right. What about the California and Nevada?

MR. KATYAL: In the California v. Nevada, I think this Court dealt with in Kiowa itself because in Kiowa -- because that's about basically the State --

JUSTICE BREYER: Now, Kiowa is about -- is it Kiowa? -- is about individuals who are not the State.

MR. KATYAL: Yes, exactly. But I think this Court has recognized in Blatchford and in Kiowa that, in Nevada v. Hall situations, which is what the dissenting Kiowa raised and what my friend is trying to resuscitate, that's a difference in circumstance because there was a mutuality of concession.

JUSTICE BREYER: All right. I'll look at those with care. But, now, assuming you are right on that, is the question in front of us, on the assumption that these are Indian lands, does the Indian tribe have sovereign immunity? Is that the question you want answered?

MR. KATYAL: We think that --

JUSTICE BREYER: Yes or no?

MR. KATYAL: -- that if they are on Indian lands, yes, there is --

JUSTICE BREYER: Do you want us to say on that assumption -- now, on that assumption, I look at i and number ii under a, 7(a), and a quick reading of them suggests to me that they're in parallel, that the Indian tribe can sue the State when the State won't open negotiations, and the State or an Indian tribe can sue the Indian tribe when the Indian tribe refuses to follow

the compact.

Now, what's your answer to that?

MR. KATYAL: When it's on Indian lands, exactly.

JUSTICE BREYER: Well, I know, but you said to decide this on the assumption that it's on Indian lands. If I make that assumption and then I look over and read i and ii, it sounds as if, as I said, i, the tribe can sue the State to get the compact; ii, the State can sue the tribe when it violates the compact.

MR. KATYAL: Your Honor, I may have misunderstood your earlier question, but, certainly, our position is that you can look to our answer to determine whether or not there is tribal immunity in the case. That is not something my friend has argued. It's outside of the questions presented entirely, which both proceed on the assumption that this is off of Indian lands.

JUSTICE ALITO: Well, for purposes of sovereign immunity, does it make any difference that you have at least a colorable claim that this is on Indian lands?

MR. KATYAL: Well, I think that it -- I -- I don't think it matters either way. Our position is one way or the other.

JUSTICE ALITO: Yes. So if your -- if your client or another tribe just decided to go into the gaming business all over the country and began opening casinos in places that clearly are not Indian lands, you still would have sovereign immunity.

MR. KATYAL: Right, there would be tribal immunity for that, just as if the blatant casino on Indian lands opened a casino -- a tribe opened a casino without a compact, the State would not have an A2 injunctive remedy, and that's why there is no anomaly.

JUSTICE BREYER: That's why I want to -- I'm trying to get what question I'm supposed to answer. If I'm supposed to answer the sovereign immunity question on the assumption that these are Indian lands, contrary to what was decided below, I might get one answer. But if I'm -- supposed to do it on the assumption that they're not Indian lands, I might get a different answer. What assumption am I supposed to make?

MR. KATYAL: The latter, Your Honor, for two reasons. Number one, that's what the questions presented say; and number two, one of the most venerable precedence of this Court is the -- is Justice Holmes' opinion -- which says you don't look to our answer to determine --

JUSTICE SOTOMAYOR: What happens if you

can't convince the Federal government that these are Indian lands, and despite the gaming commission's final ruling, there is no other way to overturn it, you decide to operate the casino, it's not Indian lands by the Federal government, you haven't convinced them otherwise, what occurs at that moment?

MR. KATYAL: Well, I suppose --

JUSTICE SOTOMAYOR: Who can stop you and using what mechanisms?

MR. KATYAL: The Federal government has a variety of mechanisms available to it in that circumstance, including closure orders and the like, and I suppose even the State may have any number of actions, both -- you know, many States will have this worked out in the compact, but, if they don't have it worked out in the compact, then there may be the possibility of criminal prosecutions.

JUSTICE SOTOMAYOR: Well, the compact only comes into play if it's Indian lands. But, if the Federal government has said it's not Indian lands, that's what I'm asking.

MR. KATYAL: Right. I think that, still, the State may have any number of criminal or civil remedies available to it. That is, off Indian lands -- and this is why there isn't an anomaly in A2 -- off

Indian lands, the State has vast regulatory power. IGRA was reacting to a circumstance in which this Court ousted State regulatory jurisdiction on Indian lands. And so the State has a whole bunch of mechanisms available to it.

JUSTICE KAGAN: Mr. Katyal, what is the difference -- the State can really -- it can shut down these gambling operations easily if it's off Indian lands. What the State can't do is get any kind of damages or money remedies; isn't that really the difference?

MR. KATYAL: I do think so. I think that that's -- I think that that's underlying some of this, absolutely.

JUSTICE KAGAN: Maybe that's an important difference. I mean, maybe we should give the State the ability to collect damages.

MR. KATYAL: Well -- well, I certainly would disagree with the idea that you, the Court, should. I think the proper response would be exactly what this Court said in Kiowa, which is, if there's a dispute about the contours of immunity, commercial, off land, State is plaintiff, all of that, those are all things that Congress is well-suited for dealing with.

JUSTICE GINSBURG: Mr. Katyal, isn't it odd

to say that when this is the Court -- the doctrine of tribal immunity is something that was announced by this Court. Congress never passed a law that said the tribes have immunity. It's all this Court. And then you say, what this Court made, only Congress can unmake. That seems strange to me.

MR. KATYAL: Justice Ginsburg, that was precisely the argument that was made in Kiowa, was accepted by the dissent in Kiowa. But what the majority said is, really, Congress is best able to balance the rights, remedies, and reliance interests on the parties. And I'd note, picking up on your question to my friend earlier, that, after Kiowa, Congress hasn't been silent.

Congress has reaffirmed tribal immunity in the Patriot Act extension in 2005 and the SIGR Act of 2009. They've cut it back in the Arizona Water Act and the Zuni Acts of 2003. This is not a circumstance in which --

JUSTICE KENNEDY: But, if the tribe takes such an obscure position -- such a changing position, as to whether or not we are dealing with Federal lands here -- or pardon me, with Indian land, maybe that's a reason that we should confine and limit Kiowa so that it doesn't apply to Indian gaming, and we won't have this problem.

MR. KATYAL: Well, I think that's --
JUSTICE KENNEDY: Because I wanted to get the answer to Justice Breyer's question, is it your position that these are Indian lands? And I still don't understand your position.
MR. KATYAL: Our position is --
JUSTICE KENNEDY: And if that's true, then maybe this whole idea of immunity doesn't work very well in the context of gaming.
MR. KATYAL: Our position, Justice Kennedy, is that they are Indian lands, and there is lots of different remedies available, both on and off Indian lands, and that this Court in Kiowa set out a way to deal with any sort of cutting back, which is to leave it to Congress.
JUSTICE ALITO: What remedy --
CHIEF JUSTICE ROBERTS: If we get -- go ahead.
JUSTICE ALITO: What remedy would a private person have? Suppose a patron of a casino was beaten up by casino employees. What remedy could that person have?
MR. KATYAL: I think what the Court should do is the same thing it did in Kiowa, which is bracket that question because this is as far away from that as

you can possibly get. Here, the State entered into a contract with its eyes open that, not just -- it didn't say anything about tribal immunity, it reaffirmed tribal immunity, at Petition Appendix Page 90.

Now, Michigan doesn't like the terms of that deal, and so they are coming and trying to renegotiate that now, So there may be -- for the tort plaintiff, I understand there may be any number of arguments available, but this is so far from that.

CHIEF JUSTICE ROBERTS: We've talked about this prosecuting the employees. I suppose, if you bring a criminal action against one of the employees, the State would have to prove, beyond a reasonable doubt, that this was not Indian lands?

MR. KATYAL: They would.

CHIEF JUSTICE ROBERTS: That's not much of a --

MR. KATYAL: I'm not sure, for an element of that crime, whether that piece of it would be beyond a reasonable doubt. It would be an attendant circumstance and not subject to beyond reasonable doubt.

CHIEF JUSTICE ROBERTS: That makes it a much more different remedy than the typical injunction action.

MR. KATYAL: But there is still civil

remedies and other things going.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Not yet. We are going to hear from Mr. Kneedler first.

(Laughter.)

CHIEF JUSTICE ROBERTS: He might have something you would like to respond to.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER,

FOR UNITED STATES, AS AMICUS CURIAE,

SUPPORTING the RESPONDENTS

MR. KNEEDLER: Mr. Chief Justice and may it please the Court:

I would like to respond, at the outset, to the suggestion that this Court might modify the categorical rule in Kiowa that an Indian tribe is subject to suit only if Congress unequivocally consents in order to allow suits by States.

First of all, both Puyallup and Pottawatomi were suits by States for prospective injunctive relief, and the Court found them barred. Puyallup was off reservation.

But there's another point that I think ties in with the questions about foreign sovereign immunity. In this Court's decision in Blatchford, the Court held

that the State of Alaska could not be sued by an Indian tribe complaining about the distribution of State -- some State funds in Alaska, which does not have Indian country. The Court held that the suit was barred.

In doing so, the Court recognized that the Eleventh Amendment had originally been understood to bar suits only by individuals. But relying on this Court's decision in Principality of Monaco, the Court said that the Eleventh Amendment also barred suits by foreign sovereigns.

And the Court's rationale in Principality of Monaco was that foreign sovereigns were not parties to the convention. There was no reciprocal abrogation of immunity between foreign sovereigns and States. And, in fact, the Court specifically pointed out that the State of Mississippi could not sue Monaco, and, in this case, Monaco could not sue Mississippi.

The Court applied that very same reasoning in Blatchford to an Indian tribe. The Court said, we have held in the past that Indian tribes may not be sued. And they cited Puyallup, which was a suit by a State. And the Court said, logically, it follows that a tribe may not sue a State --

JUSTICE BREYER: So you are prepared to live with the following: Is it the case that if California

opens a business in a commercial activity in 20 other States, at least one of which it is totally illegal, this other State, say, Utah, cannot -- can sue California or not? What's the answer?

MR. KNEEDLER: The State where that gaming occurs can be, but that's because of Nevada v. Hall where the Court -- where the Court drew a distinction between -- for States. In the States --

JUSTICE BREYER: So what the opposition says, in your view, is absolutely correct, that a foreign nation opens up an illegal business in a State. The State can sue them, now, because of a treaty, but previously, because of the common law.

If California opens up an illegal business, the State can put them out of business by bringing a suit. But an Indian tribe, they can't? That's the United States' view?

MR. KNEEDLER: California -- in the State-to-State situation, it's because of the reciprocity --

JUSTICE BREYER: But I'm saying that is your view, though? I just want the bottom line.

MR. KNEEDLER: Yes, but let me -- if I may explain to you? It's important to understand the reasoning. The reasoning why a suit by a State against

the sovereign would now be okay is because of the Foreign Sovereign Immunities Act. As I mentioned with the Principality of Monaco, part of what the Court said there is the State could not sue the Principality of Monaco because, at the time, there was no abrogation of immunity.

Foreign sovereign immunity --

JUSTICE SCALIA: That -- that statute was based upon judicial decisions that had -- had already held that.

MR. KNEEDLER: With all respect, Justice Scalia, it was based upon the Executive Branch's determination in the Tate letter. In this Court's decision in Republic of Mexico v. Hoffman. The Court said it is not for the Courts to deny an immunity that the government recognizes.

Prior to 1952, when the United States adopted the restrictive theory of sovereign immunity, foreign sovereigns were absolutely immune from suit, unless the political branches said otherwise.

In the Tate letter, the Executive Branch adopted what was the developing body of international law for foreign sovereign immunity and said that commercial activities could be the subject of suit. That was codified, but the Court did not take it upon

itself to modify that foreign sovereign immunity. And this is -- this is the point that the Court made.

JUSTICE SCALIA: Took it upon itself to accept the Executive's determination of how it ought to play out?

MR. KNEEDLER: Well, yes, but it didn't treat it just as a matter of common law, like a maritime common law claim or something like that. It treated it as structural under the Constitution, and the same thing is true of Indian tribes.

The Constitution refers to Indian tribes -- Worcester v. Georgia announced that Indian tribes are sovereigns. We make treaties with sovereigns.

CHIEF JUSTICE ROBERTS: But they are quasi -- quasi-sovereigns, which means --

JUSTICE GINSBURG: Dependent sovereigns.

CHIEF JUSTICE ROBERTS: Dependent sovereigns, which means the -- it is surprising that the scope of their immunity exceeds that of States or foreign sovereigns.

MR. KNEEDLER: They -- they are dependent sovereigns, but they are dependent upon the plenary power of Congress, not the plenary power of this Court.

CHIEF JUSTICE ROBERTS: So the -- so the Federal government can certainly take enforcement action

against this casino.

MR. KNEEDLER: Yes.

CHIEF JUSTICE ROBERTS: The Federal government, the Solicitor of Interior has said these are not Indian lands, the NIGC has adopted that interpretation. The NIGC had said, but we can't do anything because they are not Indian lands, and we work on Indian lands. And then they've referred, as I understand, the matter to the United States Attorney who has, thus far, not done anything, right?

MR. KNEEDLER: Well --

CHIEF JUSTICE ROBERTS: So, basically, as I see it, the Federal government is saying, States, you can't take action against this illegal casino. We're the only ones who can. We agree that it's illegal, but we are not going to do anything.

MR. KNEEDLER: We are -- first of all, by -- the casino was promptly closed. And whether it would have been a prudent exercise of Federal criminal prosecutorial authority or civil action under 1955, is committed to the ordinary prosecutorial discretion of the United States government.

JUSTICE SCALIA: Who made these Indian tribe sovereign? Was it Congress?

MR. KNEEDLER: The Constitution.

JUSTICE SCALIA: I mean, you are appealing to -- you know, other branches' determination. Who decided that Indian tribes are sovereign?

MR. KNEEDLER: The Constitution by the --

JUSTICE SCALIA: Who pronounced them to be sovereign?

MR. KNEEDLER: This -- this Court.

JUSTICE SCALIA: This Court.

MR. KNEEDLER: But --

JUSTICE SCALIA: So I assume that this Court could also determine the scope of their sovereignty.

MR. KNEEDLER: But this Court didn't do it as a matter of common law. It did it by looking at the Constitution. We have treaties with Indian tribes, we have the Commerce Clause --

JUSTICE SCALIA: We do virtually nothing as a matter of common law. We do virtually everything on the basis of the Constitution or statutes. I don't think that that's much of an exception.

MR. KNEEDLER: As this Court said in Lara, it's a general proposition that diminishment of tribal sovereignty is for the political branches. The Court said that --

JUSTICE BREYER: Why? Because you are representing the United States. You have -- you

understand Indian policy. This case has tremendous implications, if we follow your approach. It seems to me well beyond anything to do with gaming. My belief is Indian tribes all over the country operate businesses off the reservation, and businesses all over the country are regulated.

And does the State, I guess, in your view, does not have the power to enforce the regulation against the Indian tribe.

MR. KNEEDLER: Not against --

JUSTICE BREYER: Why is that -- not against the tribe itself. Why is that in the Indian tribe's interest? And is it a trap for the unwary lawyer? And how is this supposed to work out, in your view?

MR. KNEEDLER: Well, Congress has addressed this problem in numerous ways. For example, the -- and in deciding whether to abrogate immunity, they're complex decisions. Should it be under tribal law? Should it be under State law? Should it be under Federal law? Should the suit be in Federal court? Should it be in State court?

JUSTICE ALITO: What about -- what about private individuals who may have a claim against -- as a result of the operation of the casino? Vendors who want to be paid, somebody who slips and falls. That's all

barred by sovereign immunity?

MR. KNEEDLER: Unless -- unless the tribe consents. As the -- as two of the amicus briefs point out, a number of the tribal compacts provide for waivers of sovereign immunity for tort claims that may arise out of -- out of the gaming operation.

Contract claims could be -- could be brought in tribal court --

JUSTICE GINSBURG: Justice Alito's question was the Kiowa case. It was off reservation, the tribe owed money on a contract, which it refused to pay, and the Court said sovereign immunity.

MR. KNEEDLER: Exactly. And I should also point out that the Court said in Kiowa, in addition to reaffirming this analysis that I described from Blatchford and Coeur d'Alene Tribe v. Idaho, the Court reaffirmed that reciprocity and Principality of Monaco point.

But it also pointed out the tremendous reliance interests that have grown up on -- the basis of foreign sovereign immunity. It pointed out that, for example, 450n of Title 25, which specifically preserves immunity, something that was reiterated in the No Child Left Behind Act.

But it also specifically pointed out that

Congress has sometimes created narrow exceptions to the immunity. And critically, one of the ones it cited was the very one on which Michigan is relying in this case, 2710(d)(7)(A)(ii), that is a limited exception for injunctive actions by a State against a tribe. Congress addressed --

JUSTICE GINSBURG: Mr. Kneedler, you went through the development of the foreign sovereign immunity and whether the courts were influenced by the government. It was the courts that recognized this distinction between commercial activity and governmental activity.

Why couldn't the Court extend that same distinction to Indian tribes and say, it makes sense in the foreign country context, it also makes sense in the context of the tribes, to distinguish commercial from governmental?

MR. KNEEDLER: It may well not make sense, or it may not lend itself to one answer, for the reasons that I said. Congress, for example, when it comes to tort claims against tribes, adopted a provision making the United States liable for tort claims and not -- and not others.

It may not lend itself to one principal answer, which is why the Court, in Kiowa, said it's up

to the legislature, the Congress, to weigh the various pros and cons or up to the tribe itself in deciding whether to weigh it.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Kneedler.

Mr. Bursch, you have five minutes left.

REBUTTAL ARGUMENT OF JOHN J. BURSCH
ON BEHALF OF THE PETITIONER

MR. BURSCH: Thank you, Mr. Chief Justice.

I want to clarify just two things about the Court's precedent and then get back to the remedies issue, which has taken up so much of our time this morning.

First, the state of the law, when IGRA was adopted in 1988 -- again, that was before Kiowa, I heard my friend on the other side talk about Puyallup and how that was an off-reservation case. And what you need to understand was that Puyallup was the third in a series of three opinions that this Court issued. And it's true that some of the earlier cases involved on- and off-reservation conduct.

But as we point out in our reply brief -- this is at pages 167 to 68 of that opinion -- here, the tribe's contention was that the fishing activities on its reservation were immune, and Justice Stevens wrote

that opinion, and then, only a few short years later, in Kiowa, wrote his dissent, where he said we've never before drawn that on/off-reservation distinction. So that's what Puyallup says.

With respect to Alfred Dunhill and the evolution of foreign sovereign immunity as a common law doctrine, four Justices agreed -- or signed on to the entire opinion where that discussion was held.

One Justice agreed only with parts one and two, but part two, on page 694, draws the commercial line and says the problem here is that the district court found the only evidence of an active state, as opposed to a commercial act, was a statement by counsel that the Cuban government and the intervenors denied liability, and that's not enough.

And -- and the Court did reference the Tate letter, but that's not why the Court changed the common law of foreign nation sovereign immunity. It -- it gave respectful consideration to the Executive Branch's views, and then it reached its own conclusion about what the common law should say.

And, Justice Ginsburg, you are exactly right to say, if it makes sense in the foreign nation context and it makes sense here, apply it to both.

JUSTICE SCALIA: If we modified it to make

an exception for commercial activities off reservation, could Congress reinstitute sovereign immunity if they wanted?

MR. BURSCH: No question it could. Just like when this Court in Cabazon said that States didn't have the regulatory authority they thought they did to regulate illegal gaming on reservation, and this Court said -- you know, States can't really touch that. Congress immediately jumped in and corrected course.

You know, conversely, with Alfred Dunhill, when this Court drew the line at commercial conduct, Congress immediately jumped in. And it put its stamp of approval on that, and essentially adopted the line --

JUSTICE KAGAN: Well, there seems something sort of strange about that, General, because as I read Kiowa, what it was, was an invitation to Congress. It was saying -- you know, we have some concerns about this, we're not sure it makes sense, we are dropping a very broad hint that Congress should change it.

And, 15 years later, Congress has done nothing. And then to come back 15 years later and to say -- you know, Congress didn't really accept our hint, so we'll just do it ourselves and make Congress reverse it. Wouldn't you think that that's a strange procedure to use?

MR. BURSCH: Actually, Justice Kagan, I think that's the way that the common law works, that the Court does extend invitations to the Legislative And Executive Branches.

JUSTICE SCALIA: Maybe we've learned something in 15 years, such as the fact that --

(Laughter.)

JUSTICE KAGAN: Or that Congress thought that this did make sense.

MR. BURSCH: I think you could draw the conclusion either way. And the suggestion by the tribe and the government that somehow this Court lacks the power to define common law tribal immunity, we think, doesn't hold water.

JUSTICE KAGAN: But I would have thought, General Bursch, that one of the principles behind Indian law in this country goes something like this: Congress can do pretty much whatever it wants with respect to Indian tribes, but we will not likely assume that Congress means to undermine tribal sovereignty. We will -- we will insist that Congress says that before we put it into effect.

And, here, it's not just -- I mean, Congress has given every indication that it does not wish to change this, notwithstanding our hints that it should.

MR. BURSCH: I respectfully disagree. And the best evidence of that congressional intent is in IGRA itself, where Congress abrogated immunity, even for on-reservation conduct.

Think about what an extraordinary remedy that is, that, even on the reservation, a State would have the ability to go into court and get a Federal injunction, rather than send in police to arrest --

JUSTICE BREYER: He's adding one thing, which is, as you've just heard, that the Indian tribes are in the same Eleventh Amendment type position as the Principality of Monaco before the treaty.

MR. BURSCH: Right, but --

JUSTICE BREYER: They didn't participate in the convention and the Principality of Monaco was held to be immune, presumably, even from commercial activity. Let Congress change it. That's what Kiowa says. And that, I think, is their basic argument.

And if it's a wash -- I mean, I hate to put it this way because it sounds like a joke, but it isn't meant to be -- in this case, if it's a wash, follow the precedent.

MR. BURSCH: I think Alfred Dunhill makes clear that this Court can change the stream of the common law when it comes to -- to immunity.

Really quickly on -- on these remedies --

JUSTICE SOTOMAYOR: Then go back to the beginning question. You have remedies you don't like, but the waiver under IGRA is not for damages. It's only for injunctive relief. You have that in Ex Parte Young. Why are you asking us to waive sovereign immunity with respect to damages?

MR. BURSCH: I'll explain why, if I may answer the question. With respect to arresting, Ex Parte Young remedies, enforcing the arbitration and having them waive immunity, all these things are unclear whether they're available to us. And if this Court issued a definitive opinion that said, we have each one of those remedies, that would do great good in this area.

But the reason why we think that you should go farther than that is because, if sovereignty means anything, it means allowing people to define what is illegal on their own lands, whether it's prostitution, gaming, or underage drinking, and being able to use the full enforcement power of the sovereign State, civil and criminal, to enforce those laws.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:06 a.m., the case in the

above-entitled matter was submitted.)

EXHIBIT C

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

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

The Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*. (IGRA), authorizes an Indian tribe to conduct class III gaming under limited circumstances and only on "Indian lands." 25 U.S.C. § 2710(d)(1). This dispute involves a federal court's authority to enjoin an Indian tribe from operating an illegal casino located *off* of "Indian lands" (i.e., on sovereign *state* lands) and presents two questions:

1. Whether a federal court has jurisdiction to enjoin activity that violates IGRA but takes place outside of Indian lands.

2. Whether tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from violating IGRA outside of Indian lands.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. Petitioner is the State of Michigan. Respondent is the Bay Mills Indian Community, a federally recognized Indian tribe. Appellee below but not appearing here is the Little Traverse Bay Bands of Odawa Indians, a federally recognized Indian tribe that brought an action seeking to enjoin Respondent's off-reservation gaming activities.

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OPINIONS BELOW

The opinion of the Sixth Circuit court of appeals, Pet. App. 1a–18a, is reported at 695 F.3d 406 (6th Cir. 2012). The opinion of the district court, Pet. App. 19a–39a, is not reported.

JURISDICTION

The judgment of the Sixth Circuit was entered on August 15, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

25 U.S.C. § 2710(d)(7)(A)(ii):

> (7)(A) The United States district courts shall have jurisdiction over—
>
> (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect . . . .

INTRODUCTION

In October 2010, Bay Mills Indian Community opened a casino some 100 miles from the Tribe's reservation. The federal government has determined that the casino is *not* located on "Indian lands" as defined by IGRA, the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*. Thus, the property is subject to Michigan's sovereign authority, and the casino is illegal under both Michigan and federal law. The district court preliminarily enjoined the casino. Bay Mills appealed, and the Sixth Circuit reversed.

Bay Mills concedes Michigan could enjoin an illegal casino on Indian lands but says Michigan cannot enjoin the same casino on sovereign state lands. According to Bay Mills' topsy-turvy view, IGRA created federal-court jurisdiction and abrogated tribal immunity for Indian-land suits only, leaving states to their own devices when tribes engage in illegal gaming on lands under state jurisdiction.

Bay Mills is wrong. To begin, the Tribe admits it licensed and supervised the illegal casino, and it has not denied that these activities occurred *from the Tribe's reservation*. These facts alone create federal-court jurisdiction and abrogate tribal immunity under IGRA. 25 U.S.C. § 2710(d)(7)(A)(ii).

In any event, Michigan's allegations that Bay Mills is violating IGRA raise federal questions that fall comfortably within 28 U.S.C. § 1331's broad grant of federal-court jurisdiction. And this Court has never expressly held that tribal immunity extends to illegal, off-reservation, commercial conduct. Accordingly, the Sixth Circuit should be reversed.

STATEMENT OF THE CASE

A. The nature of tribal sovereign immunity

Indian tribes have no rights under the United States Constitution to any attributes of sovereignty. Congress therefore has plenary authority to prescribe the limits of—or eliminate entirely—tribal powers of local self-government. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978). So tribes have no federal constitutional right to sovereign immunity from suit. *United States* v. *Jicarilla Apache Nation*, __ U.S. __; 131 S. Ct. 2313, 2323 (2011). As a result, Congress has the authority to override the judicially created doctrine of tribal sovereign immunity.

The tribal-immunity doctrine developed "almost by accident." *Kiowa Tribe* v. *Mfg. Techs.*, 523 U.S. 751, 756 (1998). The doctrine's oft-cited source, *Turner* v. *United States*, 248 U.S. 354 (1919), "simply does not stand for that proposition." *Kiowa*, 523 U.S. at 756. *Turner* is "at best, an assumption of immunity for the sake of argument, not a reasoned statement of doctrine." *Id.* at 757. And though the doctrine is now part of this Court's settled precedent, e.g., *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940) (citing *Turner*), this Court has expressed skepticism about the wisdom of applying it to commercial activity:

> At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is

> needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims. [*Kiowa*, 523 U.S. at 758 (citations omitted).]

Before this Court's 1998 decision in *Kiowa*, discussed in more detail below, the Court's precedent sustained tribal immunity "without drawing a distinction based on where the tribal activities occurred," or drawing "a distinction between governmental and commercial activities of a tribe." *Kiowa*, 523 U.S. at 754–55 (numerous citations omitted). And while the Court treated tribal sovereign immunity as settled law, none of its decisions had "applied the doctrine to purely off-reservation conduct." *Id.* at 764 (Stevens, J., dissenting). Against this backdrop, Congress adopted IGRA in 1988.

B. The Indian Gaming Regulatory Act

In *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), this Court confirmed that states could not regulate gaming activities that occur *in Indian country*. Only one year later, Congress responded by passing IGRA to "provide a statutory basis for the operation and regulation of gaming by Indian tribes." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 48 (1996).

IGRA allows tribes to conduct gaming only on "Indian lands," *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, __ U.S. __; 132 S. Ct. 2199, 2203 (2012), and only certain Indian lands are eligible for gaming. "After–acquired" or "newly acquired" Indian lands—those lands taken in trust for the benefit of the tribe after the date IGRA was enacted—are ineligible for tribal gaming unless they satisfy an enumerated statutory exception. 25 U.S.C. § 2719(a).

Jurisdiction over tribal gaming is allocated based on the "class" of gaming involved. There are three classes: class I (traditional forms of tribal gaming), class II (bingo and certain card games) and class III (all other gaming not class I or II). 25 U.S.C. § 2703(6), (7) & (8). Class I gaming is the only type of gaming "within the exclusive jurisdiction of the Indian tribes." 25 U.S.C. § 2710(a)(1). Conversely, class III gaming, which includes high-stakes, Vegas-style casino gaming, is the most heavily regulated. *Seminole Tribe*, 517 U.S. at 48–49. This heavy regulation is appropriate because the opening of casinos has been linked to an increase in crime[1] and problem gambling.[2] Thus, class III gaming is subject to regulatory controls beyond those a tribe imposes.

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[1] Earl L. Grinols & David B. Mustard, *Casinos, Crime, and Community Costs*, 88 Rev. Econ. & Stat. 28 (2006).

[2] Dean Gerstein et al., Nat'l Opinion Research Ctr. at the Univ. of Chi., *Gambling Impact and Behavior Study: Report to the National Gambling Impact Study Commission* (Apr. 1, 1999), available at: http://www.norc.org/PDFs/Publications/GIBSFinalReportApril1999.pdf.

The most significant regulatory barrier for Class III gaming (the gaming at issue here) is the tribal-state gaming compact. In a state like Michigan that has authorized only limited casino gaming, a tribe may conduct class III gaming on Indian lands only with the state's permission through a compact. 25 U.S.C. § 2710(d)(1)(C); *Seminole Tribe*, 517 U.S. at 47. Gaming compacts address any number of issues, including the allocation of state and tribal civil and criminal jurisdiction over class III gaming activities, reimbursement to the state of associated regulatory costs, standards for the operation of gaming facilities, and other related matters. 25 U.S.C. § 2710(d)(3)(C).

IGRA also assimilates all state laws pertaining to the licensing, regulation, or prohibition of gambling and makes them applicable "in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." 18 U.S.C. § 1166(a). Although IGRA reserves to the United States exclusive authority over criminal prosecutions for violations of these assimilated state laws, 18 U.S.C. § 1166(d), states and the federal government have concurrent authority to pursue civil claims.

When Congress enacted IGRA in 1988, there was no reason to believe that tribal sovereign immunity extended to off-reservation, commercial activity. Moreover, *Cabazon* had made it clear that states could not regulate gaming that occurred *in* Indian country. Unsurprisingly, then, IGRA targets illegal gaming activity *on* Indian lands when it nominally grants federal-court jurisdiction and abrogates tribal immunity for a state seeking to enjoin the activity:

> (7)(A) The United States district courts shall have jurisdiction over—
>
> > (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity *located on Indian lands* and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect . . . . [25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added).]

In other words, the problem of illegal gaming was so grave that Congress authorized state suits against tribes *even for on-reservation gaming*. There was no need to address off-reservation gaming, because tribes presumably lacked immunity off reservation.

C. *Kiowa*

Ten years after IGRA's enactment, this Court issued its opinion in *Kiowa*. The Kiowa Tribe is federally recognized and has land holdings in Oklahoma. 523 U.S. at 753. The Tribe's economic development corporation agreed to purchase stock from a non-tribal company, and the chairman of the Tribe's business committee signed a $285,000 promissory note in the Tribe's name. *Id*. The parties disputed where the note was signed; the Tribe claimed execution on trust land, the creditor claimed execution off reservation. *Id*. at 753–54. The Tribe defaulted on the note, the creditor sued, and the Tribe moved to dismiss for lack of jurisdiction, relying in part on its sovereign immunity from suit. *Id*. at 754. In sustaining the Tribe's position, the Court's immunity holding was arguably limited to suits involving tribal contracts:

> Tribes enjoy immunity from suits *on contracts*, whether those contracts involved governmental or commercial activities and whether they were made on or off a reservation. [*Id*. at 760 (emphasis added).]

Later, this Court again characterized its *Kiowa* decision in terms of contract: "Tribal immunity, we ruled in *Kiowa*, extends to suits on *off-reservation commercial contracts*." *C & L Enterprises, Inc.* v. *Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) (emphasis added).

In the context of its facts, the *Kiowa* holding makes perfect sense. The *locus* of a commercial contract can be elusive. Was the Kiowa Tribe's conduct on reservation because that was where payments were supposed to originate? Was it *off* reservation because that was where payments were supposed to be made? Was it on- or off-reservation based on the disputed question of where the contract was signed? The Court reasonably rejected these unruly factors as grounds for determining whether tribal immunity exists.

No such concerns arise here. The present case alleges conduct—the operation of a brick-and-mortar casino—that is indisputably off-reservation, i.e., on lands subject to state jurisdiction.

D. The explosion of tribal gaming

Since tribal immunity is judge-made law, it is subject to evolutionary changes like any other common law, based on reason and experience. *Jaffee* v. *Redmond*, 518 U.S. 1, 8 (1996). Courts may influence the development of tribal immunity directly by altering the scope of that immunity, or indirectly through the interpretation of statutes that abrogate or otherwise impact tribal immunity.

In *Kiowa*, this Court voiced considerable skepticism about "the wisdom of perpetuating" tribal immunity at all. 523 U.S. at 758. But rather than taking immediate action, the Court stayed its hand and gave Congress an opportunity to act. "The capacity of the Legislative Branch to address this issue by comprehensive legislation counsels some caution by us in this area. . . . [W]e decline to revisit our case law and choose to defer to Congress." *Id*. at 759–60.

In the 15 years since *Kiowa*, Congress has not acted to address the problems created by blanket tribal immunity. Meanwhile, the growth in tribal commercial enterprises—gaming in particular—has been exponential. In 1998, combined tribal gaming revenues were $8.5 billion.[3] In 2011, the revenues had tripled, to $27.2 billion.[4] That amount exceeds

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[3] National Indian Gaming Commission gaming revenue report viewable at:
http://www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Data/19962006revenues.pdf (last accessed July 17, 2013).

[4] National Indian Gaming Commission gaming revenue report viewable at:

the GDP of more than 70 countries[5] and approaches that of the private U.S. commercial gaming sector.[6] There is no reason to believe that this growth trend will reverse any time soon.

The number of tribal gaming establishments has also increased dramatically. In 1986—two years before IGRA's passage—only 80 gaming operations existed, mostly simple bingo halls. H.R. Rep. No. 99-488, at 9 (1986). In 2011, 240 tribes were operating approximately 460 gaming facilities.[7]

Blanket tribal immunity is not a boon to all tribes, as this case shows. Soon after Michigan filed its complaint seeking to enjoin operation of the Vanderbilt casino, the Little Traverse Bay Bands of Odawa Indians filed a similar lawsuit, also seeking an injunction. According to the Little Traverse Bay Tribe, the Vanderbilt casino posed a competitive threat to the casino that the Little Traverse Bay Tribe operated on its reservation less than 40 miles away. 12/23/10 Little Traverse Bay Tribe Br. in Support of Mot. for Prelim. Inj., Case 1:10-cv-01273-PLM, at 7.

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http://www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Data/GrowthinIndianGamingGraph20022011.pdf (last accessed July 17, 2013).

[5] http://en.wikipedia.org/wiki/List_of_countries_by_GDP_(PPP).

[6] The American Gaming Association reported that commercial gaming revenues in 2011 were $34.6 billion: http://www.americangaming.org/industry-resources/research/fact-sheets/gaming-revenue-10-year-trends (last accessed July 17, 2013).

[7] National Indian Gaming Commission, *Gaming Tribe Report*, viewable at: http://www.nigc.gov/LinkClick.aspx?fileticket=0J7Yk1QNgX0%3d&tabid=943 (last accessed July 17, 2013).

Despite Bay Mills' illegal competition, the Little Traverse Bay Tribe's action was dismissed with prejudice by the Sixth Circuit based on that court's view of tribal immunity. If Bay Mills is allowed to break the law by opening casinos outside Indian lands, tribes that follow the law will be unfairly disadvantaged by illegal, competing casinos, or even encouraged to engage in the same unlawful behavior.

E. The State's historic role in regulation of gaming

Gaming is a unique industry imbued with social, economic, and moral implications. Americans' opinions towards gambling are reflected in the laws prohibiting, legalizing, and regulating gaming enterprises. For most of the 20th century, Nevada was the only state that allowed casino-style gambling, and it is still the only state that allows it statewide. In 1978, New Jersey passed a law authorizing casinos in Atlantic City, and since then, other states have allowed limited casino gambling restricted to specific locations (e.g., Michigan voters approved an initiative in 1996 that allowed three commercial casinos in Detroit). As a general matter, casino gaming at the state level is still either generally prohibited or tightly regulated.

States remain wary of casinos for good reason. A comprehensive report prepared for the National Gambling Impact Study Commission concluded that the opening of casinos has negative economic and social impacts.[8] Using criteria developed by the American Psychiatric Association, the authors

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[8] See Gerstein et al., *Gambling Impact and Behavior Study*.

estimated that 2.5 million adults are pathological gamblers and another 3 million adults are considered problem gamblers.[9] The toll such gamblers have on their community, and on the general public, is significant. They are more likely to have been on welfare, declared bankruptcy, and been arrested or incarcerated. Moreover, the study shows that the availability of a casino within 50 miles (versus 50 to 250 miles) nearly doubles the prevalence of problem and pathological gamblers.[10]

Crime associated with casinos has also been a concern of the states. Congress recognized the attraction to organized crime that casinos present when it adopted IGRA. 25 U.S.C. § 2702(2).

Casinos have also been linked to an increase in crime in general. Possibly the most comprehensive study on the topic covered all 3,165 United States counties and analyzed FBI Uniform Crime Reports from 1977 to 1996.[11] The authors concluded that casinos increased all but one of seven FBI Index I crimes. *Id*. at 44.

F. Bay Mills' Vanderbilt casino

Bay Mills is a federally recognized Indian tribe with a reservation in Michigan's Upper Peninsula in Chippewa County, near the town of Brimley. Pet. App. 3a. The Tribe's offices are located on the reservation.

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[9] *Id*. at viii.

[10] *Id*. at ix.

[11] See Grinols et al., *Casinos, Crime, and Community Costs*, 88 Rev. Econ. & Stat. at 29.

In 1993, Bay Mills entered into a tribal-state compact with Michigan—a compact governed by IGRA—and thereafter has continuously operated at least one casino on its reservation. As IGRA requires, Bay Mills also adopted a gaming ordinance that the National Indian Gaming Commission approved. Pet. App. 4a. The ordinance created a tribal gaming commission charged with regulating all casinos the Tribe owned, including issuing licenses to those casinos. Pet. App. 15a. Both the compact and the gaming ordinance prohibited the Tribe from operating a casino outside of Indian lands. Pet. App. 5a, 15a.

On October 29, 2010, the tribal gaming commission issued a license to the Tribe to open a new, off-reservation casino on property the Tribe owned near Vanderbilt, Michigan, approximately 100 miles from its reservation. The Tribe opened the casino on November 3, 2010, even though it had not obtained confirmation from either the United States Department of the Interior or the National Indian Gaming Commission that the Vanderbilt property was eligible for casino gaming.

G. Proceedings below

On December 16, 2010, Michigan's Attorney General sent a letter to Bay Mills ordering it to immediately close the Vanderbilt casino because it violated state and federal gaming laws. Bay Mills refused, so the State filed this lawsuit seeking to enjoin any further operation of the casino. The State alleged that the court had jurisdiction under 28 U.S.C. § 1331, federal common law, 25 U.S.C. § 2701 *et seq.*, 25 U.S.C. § 2710(d)(7)(A)(ii), 28 U.S.C. § 1367, and 28 U.S.C. § 2201.

A short time later, the Little Traverse Bay Tribe filed its own lawsuit against Bay Mills, seeking an injunction against further operation of the Vanderbilt casino. The district court consolidated the two lawsuits.

Within hours of these filings, both the Department of the Interior and the National Indian Gaming Commission issued letters formally determining that the Vanderbilt casino was *not* located on Indian lands as defined by IGRA. Letter from Hillary C. Tompkins, Solicitor, Department of Interior, to Michael Gross, Associate General Counsel, National Indian Gaming Commission (Dec. 21, 2010), J.A. 69; Memorandum from Michael Gross (Dec. 21, 2010), J.A. 102. On March 29, 2011, the district court filed a 20-page opinion and order that preliminarily enjoined Bay Mills' operation of the casino. Pet. App. 19a–39a.

The district court began by addressing its jurisdiction. Although § 2710(d)(7)(A)(ii) authorizes a district court to enjoin class III gaming activity "located on Indian land" (and in violation of a compact), the district court recognized its broad subject-matter jurisdiction under 28 U.S.C. § 1331 to resolve *any* civil action arising under federal law. Pet. App. 25a. Though not dispositive, the district court also noted that Bay Mills had, in 1999, successfully made the exact same § 2710 request for injunctive relief against another tribe. Pet. App. 26a. Concluding the relevant property was not "Indian land" as a matter of federal law, Pet. App. 29a, the court preliminarily enjoined Bay Mills' operation of its Vanderbilt casino. Pet. App. 39a.

Bay Mills appealed, and the Sixth Circuit vacated the injunction, ruling that the federal courts lacked jurisdiction to enjoin Bay Mills from illegal gaming outside Indian lands, and that Bay Mills had sovereign immunity from the State's common-law and other statutory claims.

With respect to jurisdiction, the Sixth Circuit declined to apply § 1331 to Michigan's IGRA claims. Rather, the court looked solely to § 2710 and concluded that the provision did not apply because Michigan alleged that illegal gaming was taking place off reservation, not *on* Indian lands, as § 2710's language contemplated. Pet. App. 9a. And, consistent with the narrow scope it ascribed to § 2710, the Sixth Circuit also concluded that Bay Mills was protected by sovereign immunity. Pet. App. 13a.

The net result of the Sixth Circuit's approach is that states may sue in federal court to enjoin a tribe's illegal operation of a casino on Indian lands. But states must resort to much more intrusive individual civil actions and criminal prosecutions to stop a tribe's illegal operation of a casino on lands under state jurisdiction. Suing tribal officials and sending in law-enforcement officials to seize equipment and arrest tribal employees is the type of inter-sovereign friction that IGRA is supposed to avoid.

H. Proliferation of the *Bay Mills* decision

Michigan is already aware of at least three additional lawsuits where parties have cited the Sixth Circuit's decision here in support of a tribe's operation (or planned operation) of a casino in violation of IGRA or tribal-state gaming compacts.

One such case involves the Sault Ste. Marie Tribe of Chippewa Indians, which, like Bay Mills, is a tribe whose reservation is entirely in Michigan's Upper Peninsula. *State of Michigan* v. *Sault Ste. Marie Tribe of Chippewa Indians, et al.*, U.S. Dist. Ct. W.D. Mich. No. 1:12-CV-962. The Sault Tribe is seeking to obtain Indian lands status for off-reservation property it purchased hundreds of miles away in the Lower Peninsula where it intends to operate a casino. The Tribe relies on the Sixth Circuit decision in this case for the proposition that, because the land has not been taken into trust (though the Sault Tribe intends to seek such status) and is not yet Indian lands, it cannot be sued in federal court.

Similarly, in *Oklahoma* v. *Tiger Hobia*, 2012 U.S. Dist. LEXIS 100793 (N.D. Ok. 2012), the district court entered a preliminary injunction prohibiting the defendants Kialegee Tribal Town, a federally chartered corporation, and certain tribal officials from proceeding with the development of a casino on lands which the National Indian Gaming Commission had determined were not Indian lands under IGRA. The defendants appealed, citing the *Bay Mills* decision in support of their argument that the court did not have subject-matter jurisdiction, and that the defendants' sovereign immunity had not been abrogated because the lawsuit sought to prohibit gaming on lands that the State of Oklahoma had alleged were not Indian lands. Michigan has filed an *amicus* brief in support of Oklahoma's position that the court has jurisdiction and defendants' sovereign immunity has been abrogated.

Finally, in *State of Alabama* v. *PCI Gaming Authority*, *et al.*, U.S. Dist. Ct. M.D. Ala. No. 2:13-cv-00178-WKW-WC, the State of Alabama has sued a tribal gaming authority and its officials to enjoin operation of casino-style gaming that is prohibited under state law and is not authorized by any gaming compact. Alabama brought a claim under IGRA, specifically 18 U.S.C. § 1166 (which assimilates state anti-gambling laws into federal law). In an *amicus* brief supporting the tribal defendants, the United States relied on the *Bay Mills* decision to support its assertion that IGRA does not abrogate tribal sovereign immunity, even for claims under state law assimilated by § 1166. Michigan filed an *amicus* brief in support of Alabama's position that Congress intended to allow states to pursue civil claims under state anti-gambling laws in federal court, and that IGRA provided an abrogation of tribal sovereign immunity for that purpose.

These suits are just the tip of the proverbial iceberg. As tribes continue to look for better casino locations (as in Michigan and Oklahoma) or new ways to profit from the explosion of casino gaming (as in Alabama), the friction between state authority and tribal immunity will inevitably increase.

SUMMARY OF ARGUMENT

The Sixth Circuit erred in two ways when it held that Michigan could enjoin an illegal tribal casino located on Indian lands but not on lands subject to the State's own sovereign jurisdiction.

To begin, the Tribe authorized, licensed, and operated the Vanderbilt casino from the Tribe's reservation near Brimley, Michigan. By definition, the reservation constitutes "Indian lands." 25 U.S.C. § 2703(4). Because the Tribe's authorization, licensing, and operation of the casino from Indian lands are all "activities" necessary for the casino's existence, this lawsuit fulfills all of § 2710's prerequisites for suit, even as the Sixth Circuit identified them. Pet. App. 7a (citing 25 U.S.C. § 2710(d)(7)(A)(ii) and holding that federal district courts have jurisdiction over any cause of action where "(1) the plaintiff is a State or an Indian tribe; (2) the cause of the action seeks to enjoin a class III gaming *activity*; (3) the gaming activity is located on Indian lands; (4) the gaming activity is conducted in violation of a Tribal-State compact; and (5) the Tribal-State compact is in effect.") (emphasis added).

Moreover, this suit should proceed even if one ignores the on-reservation conduct that is necessary to gaming in Vanderbilt. The federal courts have jurisdiction over this matter because the State's complaint alleged violations of IGRA, a federal statute. 28 U.S.C. § 1331; *Cabazon Band of Mission Indians* v. *Wilson*, 124 F.3d 1050, 1056 (9th Cir 1997) (a "claim to enforce the Compacts arises under federal law and thus [ ] we have jurisdiction pursuant to 28 U.S.C. § 1331."); *Pueblo of Santa Ana* v. *Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997) ("IGRA is a federal statute, the interpretation of which presents a federal question suitable for determination by a federal court.").

Section 1331's expansive federal-question jurisdiction is restricted only when Congress "expressly limit[s]" it through a statute creating limited federal-court jurisdiction. *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3150 (2010). And IGRA contains no such limiting language.

Tribal sovereign immunity also does not bar this action, for two separate reasons. First, in *Seminole Tribe*, this Court endorsed a more holistic approach to analyzing statutory abrogation of sovereign immunity, an approach that considers the statutory scheme as a whole. 517 U.S. at 57. When examining IGRA as a whole (i.e., not focusing exclusively on § 2710), it is immediately apparent that Congress understood and expected that a state could enforce its gaming laws in federal court against a tribe engaged in off-reservation gaming. It cannot be the case that Congress intended in IGRA to allow a state the least provocative remedy (a federal-court injunction) to stop illegal tribal gaming on Indians lands, while prohibiting injunctions of the exact same illegal conduct on sovereign state lands, thus forcing a state to send in police to seize and arrest.

In the alternative, the Court should confirm that tribes have no sovereign immunity from suits alleging illegal commercial gaming occurring on state lands. Aside from *Kiowa*'s commercial-paper context, this Court has never expressly held that tribal immunity applies to illegal, off-reservation, commercial conduct. *Kiowa*, 523 U.S. at 764 ("in none of our cases have we applied to doctrine to purely off-reservation conduct.") (Stevens, J., dissenting).

Given the tribal-immunity doctrine's dubious foundation, the Court should hesitate to extend the doctrine now that the question is squarely presented. There is no good reason a tribe should enjoy broader immunity than the federal government and foreign nations, entities which are undeniably subject to suit for their commercial activities.

ARGUMENT

I. This lawsuit satisfies 25 U.S.C. § 2710.

Section 2710(d)(7)(A)(ii) says the United States district courts have jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect." Bay Mills has not disputed that § 2710 both vests jurisdiction in federal courts and abrogates tribal sovereign immunity when the provision's requirements are satisfied. Instead, Bay Mills contends Michigan's lawsuit does not satisfy § 2710 because the illegal conduct is not "located on Indian lands."

But Bay Mills admitted that it's Executive Council "made the decision to own and operate the Vanderbilt casino," Pet. App. 59a, ¶ 21; Pet. App. 43a, ¶ 21, and that this action was taken "with the approval of the Tribal [Gaming] Commission," Pet. App. 59a, ¶19; Pet. App. 43a, ¶ 19. In other words, the Tribe authorized, licensed, and operated the Vanderbilt casino. These facts are dispositive of the § 2710 issue.

The Tribe, through its Executive Council, derives its governmental authority from its reservation. Const. and Bylaws of the Bay Mills Indian Community, Art. II, § 1 ("The jurisdiction of the Bay Mills Indian Community shall extend to all territory within the original confines of the Bay Mills Reservation . . . and to such other land . . . as may be added thereto . . . .").[12] By definition, a tribe's reservation is "Indian land." 25 U.S.C. § 2703(4). As a result, Bay Mills' authorizing, licensing, and operation of the Vanderbilt casino necessarily occurred "on Indian lands," satisfying § 2710 even under the Sixth Circuit's analysis. Accordingly, this Court should reverse the Sixth Circuit and reinstate the preliminary injunction.

Such a conclusion is consistent with IGRA's language and congressional intent. Congress did not limit federal-court authority to enjoining just the gaming itself. Section 2710(d)(7)(A)(ii) specifically says that a court can enjoin all unlawful "class III gaming *activity*." (Emphasis added.) Authorizing, licensing, and operating a class III gaming facility are undeniably "class III gaming activities" for purposes of the statute. Thus, these activities provide a natural basis for a federal court to exercise jurisdiction and enter an injunction. And without authorization, licensure, and operation, the associated casino, regardless of where it is located, must close.

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[12] http://www.baymills.org/tribal-constitution.php.

Shielding such decisions from federal-court review would thwart Congress's clear intent to provide federal-court jurisdiction over state or tribal lawsuits asserting violations of tribal-state gaming compacts. And doing so would violate § 2710's plain language, including the expansive meaning of the term "activity."[13]

II. Alternatively, states are entitled to federal-court injunctions even when illegal tribal casinos are off reservation.

A. The federal courts have jurisdiction under 28 U.S.C. § 1331 for alleged IGRA violations.

In its complaint, the State asserted that the district court had jurisdiction pursuant to "28 U.S.C. § 1331, as this Complaint alleges violations of [IGRA] and federal common law." Pet. App. 56a. Section 1331 unambiguously provides federal court jurisdiction over "*all* civil actions arising under the Constitution, laws, or treaties of the United States." (Emphasis added.) Michigan's complaint alleges violations of IGRA, a federal law. Accordingly, federal courts have jurisdiction under § 1331.

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[13] At the petition stage, the Solicitor General asserted in his brief opposing the petition that the argument set forth above is "not properly before this Court" because the underlying facts were not alleged until the amended complaint, which post-dated the appeal. U.S. Br. 17 n.4. But Bay Mills has already admitted those facts. Pet. App. 43a, ¶ 21; Pet. App. 43a, ¶ 19. And the Tribe waived any procedural objections by failing to raise them in its brief opposing Michigan's petition for certiorari. Sup. Ct. R. 15.2; *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Protection*, 130 S. Ct. 2592, 2610 (2010).

There is nothing in § 2710's plain language that suggests Congress intended to oust federal courts of their § 1331 jurisdiction over illegal tribal casinos simply because the casinos are located off reservation. This Court has made clear that in the absence of statutory text that "expressly limit[s] the jurisdiction that other statutes confer on district courts," plaintiffs remain free to invoke other jurisdictional statutes, such as § 1331. *Free Enterprise Fund*, 130 S. Ct. at 3150. Section 2710 does not purport to remove this federal-question jurisdiction.

Both the Ninth and Tenth Circuits have reached the result for which Michigan advocates here. In *Cabazon Band of Mission Indians* v. *Wilson*, 124 F.3d 1050 (9th Cir. 1997), several Tribes sued California to force the State to remit amounts it had collected as license fees from horse racing associations that had received payments pursuant to an off-track betting regime established in a compact between the State and the Tribes. That compact included a provision obligating the State to turn the money over to the Tribes if a federal court determined that the payments were illegal. A court made that determination, but the State refused to remit the money to the Tribes, who then sued.

California argued that the federal courts did not have jurisdiction because § 2710(d)(7)(A)(i–iii) conferred jurisdiction in only limited circumstances, and the Tribes' lawsuit did not satisfy the statutory prerequisites. The Ninth Circuit rejected California's position. 124 F.3d at 1056. Noting "the importance of the federal issue in federal-question jurisdiction" under § 1331, *id.* (quoting *Merrell Dow Pharm. Inc.*

v. *Thompson*, 478 U.S. 804, 814 n.12 (1986)), the Ninth Circuit agreed with the Tribes that "IGRA necessarily confers jurisdiction onto federal courts to enforce Tribal-State compacts and the agreements contained therein." *Id*.

Similarly, in *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379 (10th Cir. 1997), New Mexico brought a § 2710(d)(7)(a)(ii) counterclaim alleging that the tribal-state compact at issue was invalid because New Mexico's governor did not have authority to sign it. The Mescalero Apache Tribe argued that the federal court lacked jurisdiction because § 2710 applies only when a tribe allegedly violates a compact that is "in effect."

Relying on *Pueblo of Santa Ana* v. *Kelly*, 104 F.3d 1546 (10th Cir. 1997), the Tenth Circuit concluded that it had jurisdiction to answer the question of compact validity. *Mescalero*, 131 F.3d at 1386. And the Tenth Circuit's reasoning in *Pueblo* applies equally here: "IGRA is a federal statute, the interpretation of which presents a federal question suitable for determination by a federal court." *Pueblo of Santa Ana*, 104 F.3d at 1557.[14]

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[14] Even the United States does not appear to disagree with this point. In the Solicitor General's invitation brief, the United States recasts the Sixth Circuit's opinion as holding that Michigan failed to state a § 2710(d)(7)(A)(ii) claim, rather than holding that Michigan's claim does not satisfy § 1331 federal-question jurisdiction. U.S. Br. 13. Of course, Michigan claims that the Vanderbilt casino violates the parties' compact and numerous IGRA provisions, not just § 2710. Regardless, the United States did not take the position that federal courts lack § 1331 jurisdiction over IGRA disputes.

In sum, allowing a state or a tribe to proceed in federal court to address a compact breach is consistent with Congress's desire to balance the interests of tribes and states and to protect the integrity of tribal gaming. The federal courts have jurisdiction under § 1331 to decide the numerous federal questions this case presents.

B. Bay Mills does not have sovereign immunity from a state suit seeking to enjoin the Tribe's illegal gaming on lands subject to Michigan jurisdiction.

1. IGRA abrogates tribes' sovereign immunity for illegal gaming activity on sovereign state lands.

a. Congressional intent

Congress enacted IGRA pre-*Kiowa*, with the understanding and expectation that states could enforce state law in federal court against tribes engaged in illegal, off-reservation gaming. That understanding manifests itself in IGRA's text and structure in at least three ways.

First, 18 U.S.C. § 1166 assimilates all state anti-gambling laws into federal law and makes then applicable to violations of those anti-gambling laws that occur in Indian country and do not involve gambling that is authorized under a tribal-state compact:

> (a) Subject to subsection (c), for purposes of Federal law, *all State laws pertaining to the licensing, regulation, or prohibition of gambling*, including but not limited to

> criminal sanctions applicable thereto, shall apply in Indian country *in the same manner* and to the same extent as such laws apply elsewhere in the State.
>
> (b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not *conducted* or sanctioned *by an Indian tribe*, which, although not made punishable by any enactment of Congress, *would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred*, under the laws governing the licensing, regulation or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment. [18 U.S.C. § 1166 (emphasis added).]

It is not plausible that Congress intended that a state would be able to invoke § 1166 as a basis to bring a civil suit to enforce anti-gambling laws in Indian country but be unable to do so on sovereign state lands, even when the defendant is an Indian tribe. The reasonable inference from § 1166 is that Congress expected states to bring civil actions in the latter context as well.

In fact, Congress assumed as much in § 1166 when it specifically stated that acts of tribes would be punishable under the assimilated laws, just as they "would be punishable if committed within the jurisdiction of the State in which the act . . . occurred . . . ." If there was no punishment for a tribe guilty of illegal, off-reservation gaming under state law, § 1166 itself would have no teeth.

Second, when Congress enacted IGRA, it was acutely aware of this Court's then recent decision in *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which confirmed that states could not regulate tribal gaming activities that occur *in Indian country* unless Congress passed a law that allowed such regulation. *Id*. at 207. Congress specifically made a legislative finding on this point, limited to conduct "on Indian lands":

> (5) Indian tribes have the exclusive right to regulate gaming activity *on Indian lands* if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity. [25 U.S.C. § 2701 (emphasis added).]

Given this precedent (i.e., that a state could not seek a remedy for unlawful gaming that occurred *on Indian lands*), it would make complete sense for Congress, when rewriting the law to give States *more* authority to enforce their public policies against gaming, to unequivocally express its intention to allow states to obtain an injunctuion for unlawful gaming *even when occurring on Indian lands*, a place where such a remedy was previously unavailable.

Conversely, it makes no sense to interpret the phrase "on Indian lands" as a limitation on access to federal courts when gaming occurs *outside* Indian lands. Such a conclusion ignores the significance of a state's sovereignty over lands within its own jurisdiction. And it disregards the reality that the NIGC, the agency primarily charged with keeping

tribal gaming honest,[15] cannot exercise jurisdiction over a tribe's illegal gaming if such gaming takes place outside Indian lands. J.A. 102–07. It just doesn't add up that Congress would have structured IGRA in a way that bars states and the NIGC—the two parties best situated to remedy unlawful gaming—from federal court, merely because unlawful gaming takes place outside Indian lands.

Third, it is inconceivable that Congress intended to give states a greater ability to deal with illegal Indian gaming *on* Indian lands than *off* of Indian lands. If state sovereignty means anything, it must include the ability to stop illegal conduct on lands under state jurisdiction.

b. *Seminole*'s holistic approach

It is appropriate for this Court to view IGRA's text and structure as a whole to discern whether Congress intended to abrogate tribal sovereign immunity in the context of illegal, off-reservation gaming. That is the same approach the Court followed in *Seminole Tribe*, when the question of abrogation under 25 U.S.C. § 2710(d)(7)(A)(i) (rather than subdivision (ii)) was at issue.

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[15] E.g., 26 U.S.C. §§ 2704 (establishing the NIGC), 2706 (defining powers of NIGC, including monitoring and inspecting tribal gaming operations, conducting background investigations, and promulgating regulations to implement IGRA), 2710 (subjecting tribal gaming ordinances and resolutions to NIGC approval), 2711 (subjecting tribal gaming management contracts to NIGC approval) and 2713 (authorizing NIGC to impose civil penalties and close tribal games for violations of IGRA).

In *Seminole*, the Tribe sued the State of Florida, alleging that the State had failed to negotiate in good faith for a gaming compact. For such an action to proceed in federal court, the Court needed to conclude that Congress had unequivocally expressed an intention to abrogate the State's Eleventh Amendment immunity when it passed IGRA. 517 U.S. at 55.

The Court considered the possibility that § 2710(d)(7)(A)(i) did not unequivocally express an intention to abrogate a state's immunity because the provision does not identify *who* can be sued when a state fails to negotiate in good faith. But by consulting the rest of IGRA, the Court easily inferred a congressional intent to abrogate:

> Any conceivable doubt as to the identity of the defendant in an action under § 2710(d)(7)(A)(i) is dispelled when one looks to the various provisions of § 2710(d)(7)(B), which describe the remedial scheme available to a tribe that files suit under § 2710(d)(7)(A)(i). Section 2710(d)(7)(B)(ii)(II) provides that if a suing tribe meets its burden of proof, then the "burden of proof shall be upon the State . . ."; § 2710(d)(7)(B)(iii) states that if the court "finds that the State has failed to negotiate in good faith . . ., the court shall order the State . . ."; § 2710(d)(7)(B)(iv) provides that "the State shall . . . submit to a mediator appointed by the court" and subsection (B)(v) of § 2710(d)(7) states that the mediator "shall submit to the State." Sections

> 2710(d)(7)(B)(vi) and (vii) also refer to the "State" in a context that makes it clear that the State is the defendant to the suit brought by an Indian tribe under § 2710(d)(7)(A)(i). In sum, we think that the numerous references to the "State" in the text of § 2710(d)(7)(B) make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit. [*Seminole Tribe*, 517 U.S. at 57.]

Applying *Seminole Tribe*'s holistic method of determining IGRA abrogation here, the Court should similarly conclude that Congress abrogated tribal immunity for illegal gaming occurring both on and off reservation. The statutory structure and context "make it indubitable" that Congress intended to empower states with the authority to prevent or halt illegal Indian gaming.

If IGRA's provisions are insufficient to show that abrogation is "unequivocally expressed" in the statute under the approach this Court endorsed in *Seminole Tribe*, then the Court should consider overruling *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978). In *Santa Clara Pueblo*, the Court adopted essentially the same test for finding abrogation of tribal immunity (a non-constitutional, common-law immunity) as for finding abrogation of states' Eleventh Amendment immunity and waiver of the United States' own immunity. The test is that such abrogation or waiver must be "unequivocally expressed" in the statute in question. *Santa Clara Pueblo*, 436 U.S. at 58; *Seminole Tribe*, 517 U.S. at 55.

Michigan has been unable to find a case that describes the logic of applying the same test for abrogation of tribal immunity as for abrogation of Eleventh Amendment immunity. And indeed, there are good reasons to distinguish between these circumstances.

For example, it is logical to scrutinize any statute that purports to abrogate state immunity because state immunity is constitutional and courts should not lightly presume that Congress intends to attempt to abrogate it. U.S. Const. amend XI; *Seminole Tribe*, 517 U.S. at 55. But tribal immunity has no constitutional dimension and is solely a creature of the common law. As a result, when Congress passes a statute that abrogates tribal immunity, it would be reasonable to interpret it in the same manner as any other statute that affects the common law.

Moreover, while the sovereignty of tribes deserves respect, there is no dispute that tribes' status is entirely dependent on the will of Congress. *Jicarilla Apache Nation*, 131 S. Ct. at 2323. This is the exact opposite of the relationship of Congress and the states. The only authority that Congress has over the states is the power the states themselves transferred to Congress in the Constitution. U.S. Const. amend. X. In light of the distinct differences in the relationships of states and tribes to the United States, there is good reason to think that a different test for discerning the intent of Congress to abrogate the respective immunities of states and tribes–specifically, a less strict standard when considering abrogation of tribal immunity–would make sense.

Likewise, there is an obvious distinction between the act of the federal sovereign waiving its own immunity from suit and when it abrogates the immunity of a dependent nation, particularly where a court is interpreting the legislation that effects the abrogation. As one of the three coordinate branches of government, courts properly hesitate to subject the other branches of government directly to the court's authority. E.g., *U.S. Fire Ins. Co.* v. *United States*, 806 F.2d 1529, 1534–1535 (11th Cir. 1986); *Tucson Airport Auth.* v. *General Dynamics Corp.*, 136 F.3d 641, 644 (9th Cir. 1998). Thus, looking for a congressional expression of intent to allow the government to be sued in court respects the constitutional separation of powers and is a reasonable approach to interpreting legislation that may waive federal immunity.

Since tribes are subject to the plenary authority of Congress, there is no reason for courts to exercise the same caution when considering an abrogation of a tribe's common-law immunity from litigation. Legislation abrogating common-law immunity raises no separation of powers issues—"Congress plainly can override" "common-law adjudicatory principles," *Mohamad* v. *Palestinian Auth.*, 132 S. Ct. 1702, 1709 (2012)—and should be interpreted in the usual way, without any heightened standard.

In sum, when construed in an ordinary manner, IGRA (e.g., 18 U.S.C. § 1166) makes clear that if Congress believed that tribal immunity existed in the context of illegal, off-reservation gaming at all, Congress must have intended to abrogate that immunity. Indeed, keeping in mind that this Court

defers to Congress when it comes to limiting the scope of tribal sovereign immunity, *Kiowa*, 523 U.S. at 759–60, it would be passing strange for the Court to hold—in the name of deferring to Congress—that tribes have full immunity from suit in this context. Such a holding would undermine all of Congress' expectations and assumptions about tribal immunity at the time of IGRA's enactment, at least with regard to tribes' illegal, off-reservation activity.

c. Comparison to foreign immunity

There is also a direct analogy here to the law of foreign sovereign immunities. When courts interpret legislation to determine whether it abrogates the common-law immunity of foreign nations, they do not require an unequivocal congressional expression.

For example, in *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), this Court interpreted the Foreign Sovereign Immunities Act to allow an abrogation of Austria's immunity to suit for conduct that occurred before the statute was enacted, even though the Court acknowledged that the language on which the abrogation was based wasn't unequivocal: "Although the FSIA's preamble *suggests* that it applies to preenactment conduct, . . . that statement by itself falls short of an "expres[s] prescri[ption of] the statute's proper reach." *Id*. at 694 (emphasis added). The Court said that while the abrogation provision was unambiguous, it was "perhaps not sufficient to satisfy [an] 'express command' requirement." In short, the Court did *not* require a clear-statement rule to determine whether Congress intended to abrogate foreign sovereign immunity, but instead applied ordinary rules of construction.

In a similar vein, in *Republic of Argentina* v. *Weltover*, *Inc.*, 504 U.S. 607 (1992), this Court did not require a clear statement to abrogate foreign sovereign immunity. Instead, the Court consulted the customary practices at the State Department prior to enactment of the FSIA to determine what the term "commercial" meant in the statute. *Id.* at 612–13. Noting that the statute itself did not define this critical term, the Court held that Congress had intended to abrogate the foreign sovereign immunity where the foreign government was not acting as a regulator in the marketplace, but rather as a player. *Id.* at 614. To come up with this test, the Court did not require an unequivocal expression from Congress. Rather, it relied on evidence from other court decisions of what the so-called "restrictive" theory of foreign sovereign immunity would have permitted, as the Court believed that this was what Congress intended to codify when it adopted the FSIA. *Id.* at 612–13.

As noted in *Altmann*, the law of foreign sovereign immunity resulted from a pragmatic political concern: since there would be times when the United States might be sued in the courts of foreign nations, honoring such nations' sovereignty when sued here could be the difference between getting cases against the United States dismissed or having to defend them in a foreign court. 541 U.S. at 696. So there could be serious consequences to the United States' own sovereignty flowing directly from any decision to abrogate the sovereignty of another country. Under these circumstances, a good argument could be made for requiring a stricter than usual standard for construing Congress's words.

Yet, as evidenced by *Altmann* and *Weltover*, no such standard has evolved for determining whether Congress abrogated the immunity of foreign nations. If courts are free to employ a traditional standard for construing language abrogating *foreign* sovereign immunity, they should be able to do so when *tribal* immunity is at issue.

Although not stated in precisely these terms, the Seventh, Ninth, Tenth, and Eleventh Circuits all appear to follow this less-strict approach to abrogation. When confronted with a lawsuit alleging an IGRA or tribal-state compact violation, none of these circuits parsed § 2710 as did the Sixth Circuit here. Instead, these circuits looked at IGRA *in toto* and held there is abrogation whenever IGRA or compact compliance is at issue. E.g., *Wisconsin* v. *Ho-Chunk Nation*, 512 F.3d 921, 933 (7th Cir. 2008) (IGRA abrogates tribal sovereign immunity for any claim alleging a violation of a gaming compact arising from the § 2710(d)(3)(C) list of compact-negotiation subjects); *Lewis* v. *Norton*, 424 F.3d 959, 962–63 (9th Cir. 2005) ("The IGRA waives tribal sovereign immunity in the narrow category of cases where compliance with the IGRA is at issue."); *Mescalero Apache Tribe*, 131 F.3d at 1385–86 ("IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought."); *Florida* v. *Seminole Tribe of Florida*, 181 F.3d 1237, 1242 (11th Cir. 1999) ("Congress abrogated tribal immunity only in the narrow circumstance in which a tribe conducts class III gaming in violation of an existing Tribal-State compact.").

In sum, whether viewed from a strict or more lenient standard, IGRA as a whole demonstrates a congressional intent to abrogate tribal immunity from suit whenever a tribe engages in illegal gaming, whether on- or off-reservation. In tandem with § 1331 federal-question jurisdiction, federal jurisdiction authorized and tribal immunity did not prohibit the preliminary-injunction order.

2. Alternatively, the Court should confirm that tribes do not have sovereign immunity with respect to illegal commercial activity on lands under state jurisdiction.

The scope of tribal immunity is a bit muddled after *Kiowa*. In his *Kiowa* dissent, Justice Stevens observed that the Court had never expressly "applied the [tribal immunity] doctrine to purely off-reservation conduct . . .", nor had the Court ever "considered whether a tribe is immune from a suit that has no meaningful nexus to the Tribe's land or its sovereign function." *Kiowa*, 523 U.S. 764. In response, the *Kiowa* majority acknowledged that the Court's cases had "sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred," nor had the Court "yet drawn a distinction between governmental and commercial activities of a tribe." *Id*. at 754–55 (numerous citations omitted). Ultimately, the *Kiowa* majority appeared to resolve the case on the narrow ground that the suit involved a commercial contract: "Tribes enjoy immunity from suit *on contracts*, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Id*. at 760 (emphasis added).

The dialogue between the *Kiowa* majority and dissent can be read in either of two ways. The majority could have been saying that tribal immunity extends even to commercial, off-reservation conduct. Or the majority could have been saying that it was leaving open the question whether tribal immunity applies to commercial, off-reservation conduct.

Two factors support the view that the majority was issuing only a narrow, contract-based ruling and *not* resolving the on/off reservation and commercial/government dilemmas. First, the *Kiowa* majority expressly deferred to "the role Congress may wish to exercise in this important judgment." 523 U.S. 758. It would have been unnecessary to issue a definitive ruling regarding the scope of tribal immunity in such a circumstance.

Second, the Court in *C & L Enterprises* characterized *Kiowa*'s holding as being only narrow and contract-based: "Tribal immunity, we ruled in *Kiowa*, extends to suits on off-reservation commercial contracts." 532 U.S. at 418. If *Kiowa* stood for a much broader proposition, one would expect the Court in *C & L Enterprises* to have said so.

A narrow reading of *Kiowa* makes perfect sense in the context of that case, i.e., commercial contracts. For purposes of the serious question of whether sovereign immunity bars a claim, it can be difficult to determine "where" a contract takes place. Assuming the place of execution can even be determined, is that dispositive? Or should a court consider where the parties performed the contract? Or the law the parties chose to govern the contract?

Given the vagaries associated with determining whether a commercial-paper contract was on or off reservation, or predominantly commercial or governmental, it was reasonable for the Court not to rule that these issues were dispositive either way. Doing so could have created problems for future, unanticipated fact scenarios.

But when a tribe opens an illegal brick-and-mortar casino, as Bay Mills did here, it is obvious illegal activity is taking place there (as well as the location where that illegal casino was authorized and is supervised). So regardless of what the Court said or meant in *Kiowa*, the Court should take the opportunity presented by the facts here and confirm that tribes do *not* have sovereign immunity from suits based on illegal, off-reservation, commercial conduct. Numerous reasons support that result.

To begin, *Kiowa* acknowledged that, even 15 years ago, developments in tribal commercial activities, whether on or off reservation, weighed *against* granting sovereign immunity protection from suit. 523 U.S. at 758. Since *Kiowa*, tribal gaming revenues have more than tripled, to the point where such gaming is presenting a serious challenge even to private commercial gaming enterprises. If there was a "need to abrogate tribal immunity" for commercial activities, as the Court seemed to suggest in 1998, *Kiowa*, 523 U.S. at 758, surely that need is much greater today. Gaming tribes in particular no longer have "nascent tribal governments" that need protection "from encroachments by States." *Id*. Leveling the playing field makes sense.

In addition, Congress has failed (and is unlikely) to act. This reality does not mean that Congress prefers to leave things as they are, or that it opposes action by this Court clarifying the scope of tribal immunity. *Girouard* v. *United States*, 328 U.S. 61, 69 (1946) ("'It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines.' It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law.") (quotation omitted). There are many reasons why Congress does not pass new laws. Obtaining agreement of both bodies of Congress and the President on new legislation seems to be getting increasingly difficult as time passes. *Zuber* v. *Allen*, 396 U.S. 168, 185 (1969). This is particularly so with regard to comprehensive legislation of the sort *Kiowa* recommended.

Nor will limiting immunity to a tribe's governmental, on-reservation functions deprive the tribe of sufficient protection of its sovereign interests. In fact, immunity from suit is not the primary economic advantage tribes have enjoyed in the area of gaming. Even without immunity, tribes would still have the benefit of their own jurisdiction to generally regulate their own conduct within Indian country, at least to the extent not pre-empted by federal law. This provides them with a major economic advantage in areas such as gaming that most of their potential competitors, whose casinos are subject to state regulation, do not have. This advantage promotes the aim of Congress to provide for tribes' economic security, whether they are immune from suit or not.

Add to this the fact that a party dealing with a tribe in contract negotiations has the power to protect itself by refusing to deal absent the tribe's waiver of sovereign immunity from suit. The victim of a tort that takes place at an off-reservation casino does not have the same negotiating leverage as a commercial party that possesses something of value that a tribe would like to have.[16]

In the end, tribal immunity is a federal common-law doctrine that this Court has created and is empowered to adjust. There are ample reasons why, when it comes to illegal commercial conduct occurring on lands under state jurisdiction, tribes should not be immune from suit. Michigan respectfully requests that the Court so hold here.

Such a holding would mirror the common-law development in the area of foreign-nation immunity. As noted in *Kiowa*, foreign sovereign immunity began as a judicial doctrine, just like tribal immunity. 523 U.S. at 759. Before Congress finally stepped in and adopted the Foreign Sovereign Immunities Act, U.S. courts developed their own body of law that evolved from nearly universal immunity to immunity limited to only the governmental activities of a foreign nation.

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[16] Notably, Michigan tried to protect itself here. Consistent with federal law, the State negotiated a compact that forbade Bay Mills from opening an off-reservation casino. At the time of the compact's 1993 execution, Michigan had no need to negotiate an immunity waiver, because this Court had issued no decision suggesting that Michigan could not enjoin illegal conduct occurring on lands under Michigan's own jurisdiction.

The commercial enterprises of foreign nations eventually became fully subject to litigation in United States courts. *Kiowa*, 532 U.S. at 759. The test which courts developed and Congress eventually codified in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq*., distinguishes between commercial and governmental acts based on the "nature" of those acts. 28 U.S.C. § 1603(d). This same test could be applied to tribal commercial activities (especially illegal, off-reservation conduct). If France opened an illegal casino in Michigan, the State could enjoin it, rather than arresting French workers or suing President François Hollande. Surely domestic tribes are not entitled to greater immunity than foreign sovereign nations.[17]

Allowing states to obtain injunctions against illegal, off-reservation gaming increases the chances that states' interests will be protected. This is certainly true where states seek injunctive relief to prohibit public nuisances created by unlawful gaming. The evolution of tribal gaming warrants a similar evolution in the common law of tribal immunity, and this Court should hold that tribes have no immunity from suit regarding illegal casino gaming, whether on- or off-reservation.

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[17] Although this Court has declined to apply the "commercial" test to states' Eleventh Amendment immunity, it did so because that immunity, unlike foreign sovereign immunity, is "a constitutional doctrine that is meant to be both immutable by Congress and resistant to trends." *College Sa*v. *Bank* v. *Florida Prepaidpostsecondary Ed. Expense Bd*., 527 U.S. 666, 686 (1999). Of course, as discussed above, tribal immunity is not constitutionally based and, as an entirely common-law doctrine, is mutable, just like foreign sovereign immunity.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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EXHIBIT D

FILED
United States Court of Appeals
Tenth Circuit

September 5, 2013

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA,

Plaintiff - Appellee,

v.

TIGER HOBIA, as Town King and member of the Kialegee Tribal Town Business Committee, et al.,

Defendants - Appellants,

and

FLORENCE DEVELOPMENT PARTNERS, LLC, as Oklahoma limited liability company,

Defendant.

THE STATE OF NEW MEXICO, et al.,

Amici Curiae.

No. 12-5134

STATE OF OKLAHOMA,

Plaintiff - Appellee,

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FLORENCE DEVELOPMENT PARTNERS, LLC, as Oklahoma limited liability company,

Defendant - Appellant,

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and

TIGER HOBIA, as Town King and member of the Kialegee Tribal Town Business Committee, et al.,

Defendants.

THE STATE OF NEW MEXICO, et al.,

Amici Curiae.

ORDER

At the direction of the panel assigned to this appeal, the court hereby abates these appeals pending the Supreme Court's resolution of Michigan v. Bay Mills Indian Community, 695 F.3d 406 (6th Cir. 2012), cert. granted, 133 S. Ct. 2850 (2013). Status reports shall be filed with the clerk every 60 days or within ten days of a decision by the Supreme Court.

Arguments scheduled for Wednesday, September 25, 2013 are vacated. All counsel scheduled to appear are excused from attendance at oral argument in Denver, Colorado.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER
Clerk of Court