No. 14-12004-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF ALABAMA,
Plaintiff/Appellant

v.

PCI GAMING AUTHORITY, ET AL.,
Defendants/Appellees

On Appeal from the United States District Court
for the Middle District of Alabama
Case No. 2:13-cv-00178-WKW-WC

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STATEMENT REGARDING ORAL ARGUMENT

Officers of the Poarch Band of Creek Indians, a federally recognized Indian tribe in Alabama, are alleged to be violating federal and state law on lands that the United States putatively holds in trust for the tribe. At three casinos in Alabama, the Poarch Band's officers operate thousands of slot machines through a commercial entity. The State seeks to enjoin this activity or, at the very least, test its legality in court. This case is important to both the people of the State of Alabama and the officers of the Poarch Band. As the district court recognized, "[t]he legality of the gaming" at issue in this case is "a hotly contested public issue in Alabama and elsewhere." Doc. 43 at 11. This case also raises "novel issue[s]" of statutory interpretation and questions of first impression about whether the State can enforce generally applicable law on purported "Indian lands." Doc. 43 at 49. Accordingly, the Court should set this case for oral argument.

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STATEMENT OF JURISDICTION

The Court has jurisdiction over this appeal. This lawsuit began in state court, the Defendants removed it to federal court, and the State thereafter amended the complaint to add a count plainly arising under federal law. *See* Doc. 1, 10. On April 10, 2014, the district court dismissed the amended complaint under Rule 12(b) of the Federal Rules of Civil Procedure and entered a final judgment. *See* Doc. 43, 44. The State appealed less than 30 days later on May 5, 2014. *See* Doc. 45.

QUESTIONS PRESENTED

The State of Alabama filed suit against PCI Gaming Authority, a commercial entity owned by the Poarch Band of Creek Indians, and the officers involved in operating the Authority's gambling facilities. Alabama law has long provided that slot-machine gambling of the type engaged in by the Authority's officers is a public nuisance enjoinable in a suit by the State. *E.g.*, Ala. Code § 6-5-120. The State's amended complaint alleges that these gambling activities should be enjoined under Alabama nuisance law (Count 1) or, in the alternative, enjoined under the Indian Gaming Regulatory Act (Count 2). Doc. 10 ¶¶ 19-37.

This appeal presents the following three questions:

1. COUNT 1—STATE LAW. The district court held that federal law preempts Alabama nuisance law because the gambling at issue here occurs on "Indian Lands" putatively held in trust for the benefit of the Poarch Band by the U.S. Secretary of the Interior. In *Carcieri v. Salazar*, 555 U.S. 379, 129 S.Ct. 1058 (2009), the Supreme Court held that the Secretary has no authority "to acquire land and hold it in trust" for tribes that were not "under federal jurisdiction when the I[ndian] R[eorganization] A[ct] was enacted in June 1934." *Id.* at 381-83, 129 S.Ct. at 1060-61. The federal government first recognized the Poarch Band in the 1980s. Can the State litigate the issue of whether the Poarch Band was "under federal jurisdiction" in 1934 in response to the Defendants' argument that their

gambling activities are on "Indian lands" such that federal law preempts the state-law claim?

2. COUNT 2—IGRA. Assuming *contra* to Count 1 that the gambling takes place on properly constituted "Indian Lands," it is governed by the Indian Gaming Regulatory Act ("IGRA"). IGRA provides that a State must consent before a tribe offers "class III" games, which include "slot machines of any kind." 25 U.S.C. § 2703(7)(B). Section 1166 of IGRA provides that, for class III games, "for the purposes of Federal law, all State laws pertaining to the . . . prohibition of gambling . . . shall apply 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). Can the State bring an action under Section 1166 to enforce its state-law prohibition on slot-machine gambling on Indian Lands?

3. AFFIRMATIVE DEFENSE—TRIBAL IMMUNITY. This lawsuit seeks an injunction to compel PCI Gaming Authority and its officers to conform their actions to state and federal law. Does tribal immunity bar either Count 1 or Count 2 of this suit with respect to any defendant?

STATEMENT OF THE CASE

I. Legal Background

A. The licensing, regulation, and prohibition of gambling under Alabama law

There are two aspects of Alabama gambling law at issue in this case.

First, gambling is generally illegal in Alabama, and slot machines are particularly so. The State's general prohibition on gambling is so fundamental that the People enshrined it in the Constitution. *See* ALA. CONST. art. IV, § 65. The Legislature has specifically criminalized possession of slot machines and other gambling devices. Ala. Code § 13A-12-27. Nevertheless, because of the immense profits associated with organized gambling, the industry frequently has tried to "evade[]" these prohibitions, as the Alabama Supreme Court put it in *Barber v. Jefferson Cnty. Racing Ass'n*, 960 So. 2d 599 (Ala. 2006), by asserting that "loophole[s]" in Alabama law were much larger than they in fact were. *Id.* at 614. For example, in 2006, the Alabama Supreme Court rejected the industry's attempt to pass off what were really slot machines as machines that were playing a legal "sweepstakes." *Id.* at 603-15. The Supreme Court held that substance is more important than legal technicality; accordingly, gambling devices are illegal if they "look like, sound like, and attract the same class of customers as conventional slot machines" and "serve essentially the same function as did the slot machines." *Id.* at 616.

Several years ago, the Alabama Supreme Court similarly headed off the industry's attempt to evade the law through "electronic bingo." "Electronic bingo" devices are slot machines that, allegedly, play a split-second game of "bingo" on their servers. These slot machines are legal, some claimed, because constitutional amendments make non-profit paper "bingo" legal in certain localities in Alabama. In a case regarding "electronic bingo" machines, the Supreme Court held that these amendments create only a "narrowly construed" exception to the State's general prohibition on gambling. *Barber v. Cornerstone Cmty. Outreach*, 42 So. 3d 65, 78 (Ala. 2009). The Supreme Court then defined "bingo" in a way that clarified that the fast-paced, highly profitable game the gambling interests were trying to promote was not in fact the "bingo" game the local amendments legalized. *Id.* at 86.

Second, Alabama law provides that the Attorney General may sue in the name of the State to enjoin unlawful gambling as a public nuisance if normal law-enforcement tactics will not work. "[A] 'nuisance' is anything that works hurt, inconvenience or damage to another," Ala. Code §§ 6-5-120 & 6-5-121, and a *public* nuisance (as opposed to a *private* nuisance) is an "interference with a right common to the general public," Restatement (Second) of Torts § 821B (1979). Activities are likely to rise to the level of a public nuisance if they are "proscribed by a statute, ordinance or administrative regulation." *Id.* As a procedural matter, "a

public nuisance ... must be abated by a process instituted in the name of the state" by the Attorney General. Ala. Code § 6-5-121.

The Alabama Supreme Court first endorsed the use of a public nuisance lawsuit to enjoin unlawful gambling in 1938 in *Try-Me Bottling Co. v. State*, 178 So. 231 (Ala. 1938). There, the State filed a civil action seeking "injunctive relief against defendants charged with conducting, in connection with their legitimate soft drink business, a lottery or gift enterprise in the nature of a lottery in disregard of the laws of this State." *Id.* at 232. After noting that the Attorney General was the proper officer to bring a suit of this variety and that the defendants' gambling violated state laws, the Court held that the trial court properly enjoined the gambling activities as a public nuisance. *See id.* at 233 ("The bill . . . rest[ed] for its equity upon the well-recognized and ancient jurisdiction of equity courts to restrain by injunction public nuisances."). In the years since *Try-Me*, the Alabama Supreme Court has approved several similar nuisance actions. *See McGee v. State ex rel. Sivley*, 179 So. 259 (Ala. 1938); *Young v. State ex rel. Almon*, 45 So. 2d 29 (Ala. 1950); *Carlisle v. State ex rel. Trammell*, 163 So. 2d 596 (Ala. 1964); *Walker v. State ex rel. Baxley*, 231 So. 2d 882, 884 (Ala. 1970).[1]

[1] Several other States have the same rule. *See, e.g.*, *Masterson v. State ex rel. Bryant*, 949 S.W.2d 63, 65-66 (Ark. 1997); *State ex rel. Prosecuting Attorney v. Alray Northcrest Plaza*, 381 N.W.2d 731, 733 (Mich. App. 1985); *State ex rel. Spire v. Strawberries, Inc.*, 473 N.W.2d 428, 435 (Neb. 1991); *State v. Opelousas Charity Bingo, Inc*., 462 So. 2d 1380, 1385 (La. App. 1985).

B. The Indian Gaming Regulatory Act

The federal Indian Gaming Regulatory Act ("IGRA") was enacted by Congress to regulate gambling on Indian lands after the Supreme Court held in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22, 107 S.Ct. 1083, 1094-95 (1987), that states could not regulate the activity without an express grant of authority from Congress. This case implicates three aspects of IGRA.

First, IGRA governs gambling only if that gambling is conducted on "Indian Lands." *See* 25 U.S.C. § 2710(b)(1) & (2), (d)(1) & (2). As relevant here, IGRA defines the term "Indian Lands" as land within an Indian reservation or "any lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe or individual." 25 U.S.C. § 2703(4).

Second, IGRA provides for three classes of gambling, which the statute defines and treats differently. "'[C]lass I gaming' means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Class II includes bingo, but not slot machines "of any kind":

> The term "class II gaming" means –
>
> > (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)
> >
> > (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

> (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and
>
> (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards . . .

Id. § 2703(7)(A). "The term 'class II gaming' does not include . . . (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." *Id.* § 2703(7)(B). "The term 'class III gaming' means all forms of gaming that are not class I gaming or class II gaming." *Id.* § 2703(8).

Third, IGRA provides that Indian Tribes must strictly comply with state law with respect to any gambling that is not class I or class II. Class III gambling is allowed only if the tribe negotiates a "compact" with the State, in which the State expressly consents to the gambling. 25 U.S.C. § 2710(d). As the district court explained, "[t]he State of Alabama prohibits class III gaming, and, therefore, under IGRA, the State is not required to negotiate a tribal-state compact that would permit the Poarch Band to engage in class III gaming on Indian Lands." Doc. 43 at 8.

IGRA also broadly states that "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." 18 U.S.C. § 1166(a) (enacted as Section 23 of IGRA, Pub. L. 100-497, 102 Stat. 2467 (Oct. 17, 1988). IGRA sets out two caveats. First, state law applies only to class III gaming: Tribes do not need to comply with state laws "pertaining to the licensing, regulation, or prohibition of gambling" if the gambling at issue is "class I gaming or class II gaming." *Id.* § 1166(c). Second, States may only enforce state law with respect to class III operations through civil and regulatory actions; the United States has the exclusive right to bring "criminal prosecutions" against tribal members for violating state gambling laws on Indian Land. *Id.* § 1166(d).

II. The State's Allegations

Because "slot machines of any kind" cannot be operated without a state's consent under IGRA, slot machine manufacturers and Indian tribes have gone to great lengths to conflate class III slot machines with "technological aids" used to play the class II game of bingo. By 2006, the National Indian Gaming Commission, which regulates class II games, admitted "that the industry is dangerously close to obscuring the line between Class II and III" altogether. *See* Proposed Rule, 25 CFR Part 502 and 546, *Classification standards for bingo, Lotto, [et al.] as class II gaming when played through an electronic medium using electronic, computer, or other technological aids*, 71 Fed. Reg. 30238, 30239 (May 25, 2006). By recasting class III slot machines as class II "technological aids,"

tribal gambling officers have avoided the necessity of negotiating a compact with the surrounding state. *See generally* Alex Tallchief Skibine, *The Indian Gaming Regulatory Act at 25: Successes, Shortcomings, and Dilemmas*, 60 Fed. Lawyer 35, 38 (April 2013) (explaining that tribes classify gambling devices as "class II" so they do "not need to be approved by a state pursuant to a tribal state compact."). Tribal gambling officers have also recast their slot machines as class II "technological aids" to avoid complying with the terms of previously negotiated compacts. *See, e.g.*, *Wisconsin v. Ho-Chunk Nation*, No. 3:13-cv-334, Doc. 1 (Complaint), (W.D. Wis. May 14, 2013) (lawsuit over whether tribe's "electronic poker" is class III game that is governed by parties' compact).

The State's Amended Complaint explains that the Defendants have crossed the "line between Class II and III" and are operating class III slot machines without a compact. The Defendants "operate, administer, and control" three casinos in Alabama in a way that violates state and federal laws. Doc. 10 ¶ 9. Specifically, the Defendants "operate hundreds of slot machines and other gambling devices in open, continuous, and notorious use." Doc. 10 ¶ 9. The Defendants do not have a "compact" with the State that would allow them to operate Class III games like slot machines. And, as explained in the Amended Complaint, they are operating these gambling devices on lands that are not properly constituted "Indian lands" under IGRA. Doc. 10 ¶ 25. The Amended Complaint explains in great detail that

Defendants' gambling devices are just like acknowledged slot machines. Doc. 10 ¶¶ 13-18. Someone who wants to play one of these gambling devices can insert money directly into the face of the machine or load money onto a swipe card that the player inserts into the machine. The player then presses a button to bet a certain amount of money. Once the bet is in, the player presses a button or pulls a slot-machine arm or handle to start the spinning of slot reels that appear on the gambling devices. Some machines have digital slot reels; others, mechanical. Approximately six seconds later, the machine displays the game's result, which either increases or decreases the customer's credits. The customer can cash out at any time.

The Defendants' gambling devices play like, look like, sound like, and attract the same class of customers as acknowledged slot machines. The Amended Complaint includes, as exhibits, photographs of the Defendants' gambling devices. The following is one such photograph of the Defendants' casino (Doc. 10-2):

The Amended Complaint also explains that slot-machine manufacturers market the machines used in the Defendants' casinos as acknowledged slot machines for use in other jurisdictions. The following is a "Red Hot Fusion" device marketed as a slot machine side-by-side with a "Red Hot Fusion" device marketed as an "electronic bingo" machine. They are obviously the same machine.

"bingo machine"

acknowledged slot machine

The complete marketing materials for these gambling devices and other copycat devices were attached as exhibits to the State's Amended Complaint (Doc. 10-1). Perhaps in light of the overwhelming evidence, the Defendants have never

meaningfully argued that their gambling devices are legal under either federal or state law.

The Defendants' gambling devices are illegal under the United States' understanding of the law. The State's Amended Complaint explains that "[a]ll it takes to operate some of the gambling devices at Defendants' casinos is a single touch of a button." Doc. 10 ¶ 14. This feature makes these machines illegal under the National Indian Gaming Commission's *own* long-standing interpretation of the law. *See, e.g.*, Disapproval Letter from National Indian Gaming Commissioner Philip Hogen to Mayor Karl S. Cook 1, 3 (June 4, 2008) ("The players' only responsibility in this type of game is touching a button once to start the game"; a "fully automated game based on bingo . . . is a facsimile of a game of chance" and "is therefore Class III and cannot be operated without a compact").[2] In response to this lawsuit, however, the United States as amicus curiae filed a "Notice of Publication of a Request for Comments" (Doc. 24) that proposes to "reinterpet[]" the law so that these gambling devices would be *legal* instead.[3] Doc. 24. That proposed "reinterpretation" has not been adopted.

[2] This letter is available at http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances/Metlakatla/1%20Metlakatla.Ord.Amnd.Disapproval.6.4.08.pdf (last visited Jul. 1, 2014)

[3] That the United States supports the defendants' activities is not surprising. The National Indian Gaming Commission is funded almost exclusively by fees on the aggregate amount of class II gambling, *see* 25 U.S.C. § 2717a, so growth in gambling that is characterized as "class II" necessarily increases the Commission's funding. The National Indian Gaming

III. Proceedings Below

The State filed a lawsuit in state court seeking declaratory and injunctive relief to abate the public nuisance of unlawful gambling. The lawsuit was removed to federal court, and the State later amended its complaint. *See* Doc. 10.

The Amended Complaint names two kinds of parties: PCI Gaming Authority, a business entity wholly-owned by the Poarch Band of Creek Indians, and individual defendants who are responsible for the Authority's gambling operations.[4] Doc. 10 ¶¶4-7.

The Amended Complaint asserts that the gambling devices at use in the Defendants' casinos are unlawful under Alabama law and are unlawful for use on Indian Lands without a compact under federal law. *See* Doc. 10; *see* Ala. Code § 13A-12-20(10); 25 U.S.C. § 2703(7)(B)(2). The Amended Complaint asserts two related causes of action to enjoin Defendants from continuing this unlawful gambling activity. First, the Amended Complaint asserts a cause of action for public nuisance *under state law*. Doc. 10 ¶¶ 19-30. The Amended Complaint explains that Defendants must comply with Alabama law despite IGRA because the gambling activity is not being conducted on properly recognized "Indian Lands." Second, and in the alternative, the Amended Complaint asserts a cause of

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Commission has effectively no role in regulating class III gaming; that falls on the states to regulate or to the U.S. Attorney's Office to bring criminal actions. *See* 18 U.S.C. § 1166(a), (d).

[4] Some of the named defendants have changed offices since the lawsuit was filed. Because these persons were sued in their official capacity, the new holders of the offices have been substituted by operation of law.

action for public nuisance *under federal law* if the land at issue is "Indian land[]." Doc. 10 ¶¶ 31-37. IGRA provides that "for purposes of Federal law, all State laws pertaining to the . . . prohibition of gambling" apply to gambling on Indian lands. As the Eighth Circuit has held in a materially identical case, Section 1166(a) incorporates into federal law state laws that allow the filing of a public nuisance suit to enjoin unlawful gambling. *See United States v. Santee Sioux Tribe*, 135 F.3d 558, 565 (8th Cir. 1998). Accordingly, the Amended Complaint explains that, in a State with laws like Alabama's, Section 1166(a) creates a federal public nuisance cause of action. *See* Doc. 10 ¶¶ 31-37.

The Defendants moved to dismiss on, essentially, three grounds. They argued that (1) the State's lawsuit was barred by tribal immunity, (2) the State had no cause of action against them under state law that was not preempted by IGRA, and (3) the State had no cause of action against them for illegal gambling under federal law. Doc. 14.

The United States filed an amicus brief in support of the motion to dismiss, which argued that the State could not litigate the status of the purported "Indian lands." Doc. 21.

The State responded to the Defendants and the United States in separate filings. Doc. 17 & Doc. 31. The State of Michigan filed an amicus brief in opposition to the motion to dismiss. Doc. 33.

The district court granted the motion to dismiss. Doc. 43. The district court held that IGRA completely preempted the State's state-law claim because IGRA preempts all causes of action that would interfere with the tribe's ability to govern gaming on Indian Lands. The district court concluded that the State could not challenge the designation of Poarch Creek land as "Indian lands." Alternatively, the district court concluded that tribal immunity barred the state-law claim. Doc. 43 at 21-46. Although the district court held that tribal immunity does not bar the State's federal-law claim, the district court held that federal law does not provide the State a cause of action against an Indian tribe for illegal gambling. Doc. 43 at 46-59.

This appeal followed.

STANDARD OF REVIEW

The standard of review is de novo. For purposes of ruling on a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff, and all well-pleaded facts alleged by the plaintiff are accepted as true. *Lotierzo v. Woman's World Med. Ctr., Inc.*, 278 F.3d 1180, 1182 (11th Cir. 2002). Questions of statutory interpretation are also reviewed de novo. *United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234, 1236 (11th Cir. 1999). In addition, all reasonable inferences should be drawn in favor of the plaintiff. *Randall v. Scott*, 610 F.3d 701, 705 (11th Cir. 2010).

SUMMARY OF ARGUMENT

This lawsuit is the State's good-faith attempt to invoke the State's express authority under state and federal law to regulate class III slot-machine gambling on its land and on any "Indian lands" within its territory. Congress expressly reserved this power for the states when it enacted the Indian Gaming Regulatory Act ("IGRA"), and it is the fulcrum upon which the other provisions in IGRA turn. The State sued the officers of the Poarch Band who are responsible for operating the Band's gambling operations under two causes of action in its Amended Complaint. The district court erred when it dismissed these causes of action for failure to state a claim under Rule 12(b)(6).

First, although it is undisputed that the State has a cause of action for public nuisance under Alabama law, the district court erroneously held that IGRA preempts this cause of action. IGRA does not preempt the State's cause of action because the gambling is not alleged to be occurring on "Indian Lands." IGRA only governs gambling on "Indian lands" "held in trust by the United States for the benefit of any Indian tribe," 25 U.S.C. § 2703(4), and the United States cannot "hold" land in trust for a tribe unless that tribe was under federal jurisdiction when the IRA was passed in June 1934. *Carcieri*, 555 U.S. at 382 (2012). The Poarch Band was not recognized until 1983. Although there may be some way for the Poarch Band to establish that it was "under federal jurisdiction" in 1934, despite

the late date that it was officially recognized, the Poarch Band has not attempted to make that showing. Accordingly, at this stage of the case, Count 1 states a claim under Alabama law upon which relief may be granted: illegal gambling off of Indian Lands.

The District Court erroneously held that the State could not litigate the issue of whether the Poarch Band's lands are "Indian Lands" under IGRA without suing the United States or Secretary of the Department of Interior under the Administrative Procedure Act. But this ruling contradicts common sense, fundamental fairness, and the only other circuit-level case to address a similar issue. When a private party invokes the benefits of a federal statute in the course of litigation, the opposing litigant must have the opportunity to argue that the federal statute does not actually apply. But, even if the District Court were correct that this issue can only be litigated in an action against the United States or Secretary, the Court should remand to allow the State to amend its complaint to bring that claim.

Second, even assuming that this gambling is governed by IGRA, the State has a cause of action under federal law. IGRA expressly provides that "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 they do everywhere else in

the state. 18 U.S.C. § 1166(a). This provision unambiguously and expressly incorporates the state's public-nuisance law into federal law. Although the statute expressly reserves to the United States the right to bring "criminal prosecutions" under this provision, 18 U.S.C. § 1166(d), the plain language and the statute's structure illustrate that the state is a proper party to bring civil and regulatory actions.

The district court did not even address the plain language of Section 1166(a), which expressly incorporates "all state laws" and makes them apply to Indian country "in the same manner and to the same extent" as they apply everywhere else in the state. But, even if the statute were ambiguous, canons of interpretation confirm a state's right to sue under Section 1166. The primary purpose of IGRA was to allow States to regulate class III gambling, a right they did not have before. The central grant of authority that Congress gave to the States was that a tribe may conduct class III gambling on Indian lands only pursuant to, and in compliance with, a compact it has negotiated with the surrounding State. But an Indian tribe would have no reason to negotiate a compact with the surrounding State if the State cannot stop tribal officials and tribal members from conducting class III gambling in the absence of a compact. Section 1166(a) fills that vacuum and allows the State to compel tribal officers and tribal members to follow state laws pertaining to class III gambling in the absence of a compact.

Finally, tribal immunity does not bar the state from bringing its claims against these individual tribal members and officers under either federal or state law. It is axiomatic that tribal officers may be sued in their official capacity to enjoin an ongoing violation of federal law. The doctrine of *Ex Parte Young* applies just as equally to enjoin ongoing violations of state law where state law, instead of federal law, governs the officer's conduct. Moreover, the officers have waived their immunity in federal court by removing the lawsuit from state court. Tribal immunity presents no bar to either the state-law claim or federal-law claim.

ARGUMENT

Congress enacted IGRA in part to protect the general public's interest in regulating casino gambling activity on Indian Lands, but the district court's decision deprives the State of any benefit from the statute. Congress in IGRA expressly found that tribal businesses should be able to conduct gambling only "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(5) (emphasis added). IGRA removed class II gambling from state regulation because Congress considered such gambling to be "readily distinguishable from" slot machines or other "electronic facsimiles in which a single participant plays a game with or against a machine." S. Rep. 100-446 at 9, reprinted in 1988 U.S.C.C.A.N. 3071 at 3079. But Congress preserved the states' power to regulate slot machines. It provided that, even on Indian lands, tribal businesses could not engage in these activities without a compact with a state. And Congress further provided that "all State laws pertaining to the licensing, regulation, or prohibition of gambling" apply to gambling on Indian Lands "in the same manner and to the same extent" as they do everywhere else in the state. 18 U.S.C. § 1166(a). The district court's decision effectively reads these provisions out of IGRA and allows gambling in contravention of state laws.

The district court's decision also leaves the State powerless to litigate the issue of whether these lands are actually Indian Lands. The Supreme Court in *Carcieri* expressly held, over the objection of the tribes and the United States, that the United States could not "hold" land in trust for tribes if those tribes were not "under federal jurisdiction" in the 1930s. 555 U.S. at 382-83, 129 S.Ct. at 1061. When the United States purports to "hold" land "in trust," it is serious business. In many instances, it undermines the state's ability to regulate activities or to prosecute crimes that occur on that land. The district court's decision guts *Carcieri* by holding that even when tribes put purported "Indian lands" to new uses to the detriment of surrounding areas and in violation of state and federal law, the State can do nothing to litigate that land's status as "Indian Lands."

The district court held that the State has no remedy when gambling interests build multi-million dollar slot-machine casinos that are illegal under state and federal law. Neither IGRA nor the case law compel results so clearly at odds with the public interest. The district court should be reversed.

I. The State has a cause of action for public nuisance under state law.

The district court incorrectly dismissed Count 1 of the Complaint, which is the State's claim for public nuisance under state law. Neither the Defendants nor the district court deny that state law provides the State a cause of action to enjoin unlawful gambling activity as a public nuisance. *See* Doc. 14 at 6. Instead, the

Defendants and their amicus, the United States, raise two federal-law defenses. For their part, the Defendants argued that IGRA occupies the field and completely preempts all state-law causes of action with respect to gambling on Indian Lands. The United States as amicus curiae further argued that the State cannot litigate the status of these specific lands as "Indian Lands." The district court erroneously agreed with both of these propositions. The correct understanding of the law is that IGRA preempts the state-law cause of action only to the extent that the Defendants are operating on lands the Secretary of the Interior can "hold" as "Indian Lands." At the very least, the State should be able to litigate whether these lands are properly being "held" as Indian Lands in response to the Defendants' preemption argument.

A. The state-law nuisance claim is not preempted if the gambling is not on Indian Lands.

IGRA governs gambling only if that gambling is conducted on "Indian Lands," which requires that land be a "reservation" or held "in trust by the United States for the benefit of any Indian tribe." 25 U.S.C. § 2703(4). If IGRA does not apply to the lands, then there is no question that the Amended Complaint states a claim upon which relief can be granted. The Supreme Court contemplated just such a claim in its recent decision in *Michigan v. Bay Mills Indian Community*, 572 U.S. ___, 134 S.Ct. 2024 (2014). There, the State of Michigan sued an Indian tribe for operating a casino on lands that Michigan alleged were not "Indian Lands"; the

tribe argued that the lands were "Indian Lands." *See id.* at ___, 134 S.Ct. at 2029. For reasons of tribal immunity, the Court held that the State could not sue the tribe directly, but the Court nonetheless explained that the State could bring lawsuits or criminal prosecutions against the tribe's officers under state law. *See id.* at ___, 134 S.Ct. at 2035. As the Court explained, IGRA "left fully intact a State's regulatory power over tribal gambling outside Indian territory." *See id.* at ___, 134 S.Ct. at 2034.

Defendants have not shown that the United States "holds" in trust the land at issue such that IGRA preempts the state-law nuisance claim. To be sure, the United States recognized the Poarch Band of Creek Indians as a tribe in June of 1984, and the Secretary of the Interior has purported to hold certain lands in trust on the Tribe's behalf in the years since 1984. *See* 49 Fed. Reg. 24083 (June 11, 1984); Exhibit A to Doc. 1. But, unless the Poarch Band was "under federal jurisdiction" as of 1934, the Secretary has no power to "hold" the Poarch Band's landholdings in trust such that they would be "Indian lands."

The Supreme Court held as much in *Carcieri*. In *Carcieri*, the State of Rhode Island challenged the Secretary's decision to hold land in trust on behalf of an Indian tribe that the federal government first recognized in 1983. *See Carcieri*, 555 U.S. at 395, 129 S.Ct. at 1068 (citing 48 Fed. Reg. 6177 (Feb. 10, 1983)). The Supreme Court held that the Secretary had no authority to take the land into trust

because the tribe was not "under federal jurisdiction" when Congress passed the Indian Reorganization Act in 1934:

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

Carcieri, 555 U.S. at 382, 129 S.Ct. at 1061; c*f. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. __, ___, 132 S.Ct. 2199, 2212 (2012) (litigants may challenge Secretary's trust decisions as violating *Carcieri*).

Until *Carcieri*, the Secretary had purported to hold lands in trust for any tribe, regardless of its status in 1934. Accordingly, the Poarch Band has never established in any administrative or judicial forum that it was "recognized" and "under federal jurisdiction" in 1934, and Defendants have not attempted to make that showing in this case. To the contrary, it is undisputed that the United States first recognized the Poarch Band of Creek Indians as a tribe in June of 1984 -- 50 years too late for the Secretary to be able to hold land in trust on the tribe's behalf. *See* 49 Fed. Reg. 24083 (June 11, 1984). And the Amended Complaint expressly alleges that the lands are not Indian Lands under IGRA. *See* Doc. 10 ¶ 24. Although there may be some way for the Defendants to establish that the Poarch Band was "under federal jurisdiction" in 1934 (e.g. through evidence of

correspondence with federal officers, etc.), no court has ever considered the question. Without answering that question, the district court's ruling that IGRA preempts the State's state-law cause of action was premature.

B. The State can litigate the status of the purported Indian Lands in this case.

The district court declined to decide how *Carcieri* applies to the purported Indian Lands at issue here. Instead, the district court held that, "[e]ven if *Carcieri* casts a cloud over the validity of the land-into-trust deeds," the State could not litigate the *Carcieri* issue in the context of this lawsuit. Doc. 43 at 38. The district court cited, effectively, two rationales for this ruling: (1) the Administrative Procedures Act "provides a proper framework for challenging the Secretary's land-into-trust decisions" and (2) this case cannot "proceed without the Secretary" as a party. Doc. 43 at 38-39. Both of these propositions are incorrect.

1. The status of purported "Indian lands" can be litigated in contexts outside of the APA.

First, the State can litigate over the legal status of the land in the context of this lawsuit. The State's lawsuit does not seek to divest the United States of title to any lands that it has acquired nor does it seek to unwind the decisions of the Secretary of the Interior. Instead, the State's lawsuit seeks to enjoin the officers of an Indian tribe from operating an open and notorious public nuisance. Doc. 10. The only reason the trust status of this land is implicated by this lawsuit is that the

Defendants injected it into the suit. Doc. 14. They claim to have the right to operate their casinos because of the status of this land under federal law. But Defendants' preemption defense does not morph this lawsuit into a lawsuit about the title of land.

A panel of the Ninth Circuit recently considered a similar claim in *Big Lagoon Rancheria v. California*, 741 F.3d 1032 (9th Cir. 2014), *en banc rehearing granted*, 2014 WL 2609714, (9th Cir. Jun. 11, 2014). In that case, like this one, a state was involved in litigation with an Indian tribe, and the United States was not a party. In that case, like this one, the State of California raised the issue of whether the tribe's land was properly taken into trust by the Secretary of the Interior in response to the tribe's attempt to invoke the benefits of the Indian Gaming Regulatory Act. *See Big Lagoon*, 741 F.3d at 1042 ("[W]e are called upon to decide whether a *past* entrustment qualifies if it turns out to have been invalid"). In *Big Lagoon*, just as the Defendants have done here, the tribe argued that California could not challenge the trust-status of the land because California had not filed suit against the Secretary of the Interior under the Administrative Procedures Act. *See id.* ("[The tribe] and the dissent argue that a timely suit under the APA is the sole means by which to challenge agency action as unauthorized"). The Ninth Circuit rejected these arguments and ruled in favor of California:

> The concerns we raised in [a previous Ninth Circuit case] are present here. The 1994 entrustment, standing alone, might not have caused

> the State any concern. One might even question whether the State had standing at that time to challenge the BIA's action under the APA.

Id. at 1043 (citations and internal references omitted). Likewise, the State here may not have suffered any concrete harm from the Secretary's purported land-into-trust decision. And it certainly did not suffer the harms complained about in this lawsuit; those occurred only when the Defendants decided to build multi-million dollar casinos and fill them with slot machines.

For these reasons, the Ninth Circuit rejected the tribe's argument that California's only remedy was to bring suit against the Secretary under the APA. Instead, the Ninth Circuit held that California could raise the status of the tribe's land in defense to the tribe's assertion in litigation that it could invoke the benefits of IGRA:

> Once again bearing in mind that there is no direct agency involvement in this case, we think the most apt analogue to application/enforcement of the 1994 entrustment is [the tribe's] suit to compel negotiations. As noted above, the State promptly challenged the entrustment in response to that suit.

Id. (internal reference omitted). The same reasoning applies here. The Defendants cannot rely on the purported status of their lands as "Indian Lands" as a defense against the State's state-law claim without allowing the State to litigate the issue. If the Defendants want to raise IGRA as a bar to the State's public nuisance claim, then the State must have an opportunity to challenge that defense.

After concluding that California could litigate the issue, the Ninth Circuit in *Big Lagoon* continued on to apply the substantive holding in *Carcieri* to the specific facts of that case. The Court explained that *Carcieri* had held that "the BIA's authority to take lands in trust for a tribe extends only to tribes under federal jurisdiction in 1934." *Id.* at 1045. The Court then evaluated the history of the tribe at issue there, concluded that the tribe was not "under federal jurisdiction in 1934," and held that the tribe could not take advantage of IGRA. *See id.* Here, because the district court held that the State could not contest the status of these lands, it did not reach the question of whether the Poarch Band was "under federal jurisdiction in 1934" such that it can benefit from IGRA. This Court need not resolve that question either: it need only remand to the district court to allow the State and the Defendants to litigate over how *Carcieri*'s holding applies to the Poarch Band.

The Ninth Circuit has granted en banc review in *Big Lagoon*. *See* 2014 WL 2609714 (June 11, 2014). But, as the district court noted, it is the "only" case that has addressed how *Carcieri*'s holding applies outside of the context of an APA lawsuit. Doc. 43 at 43. And the persuasive reasoning from *Big Lagoon* applies here as well. The district court's reasons for disagreeing with the Ninth Circuit panel are not persuasive.

The district court's chief criticism was that the *Big Lagoon* decision "essentially undid a federal agency's final decision." Doc. 43 at 44. But it had no

such effect. The decision in *Big Lagoon* merely prevented a private party—the tribe—from wielding the agency's prior action as a sword or shield in its litigation with California. It is one thing to void an agency action because the agency did not have the authority to take the action; it is quite another to hold that a private party cannot *rely* on the agency's action in litigation with a third party. The district court's other reasons for disagreeing with *Big Lagoon* go to the issue of how a court decides whether a tribe was "under federal jurisdiction" in 1934, not whether the issue can be litigated at all. *See* Doc. 43 at 44-45 (criticizing the Ninth Circuit for its failure to apply the Secretary's newly-announced "two-part standard for analyzing 'under federal jurisdiction' after *Carcieri*"). These concerns are beside-the-point. Because the district court held that it could not adjudicate the *Carcieri* question—whether the tribe was actually "under federal jurisdiction" in 1934—it never addressed how *Carcieri*'s holding applied to the Poarch Band, and, as a result, never considered whether the land at issue here is "Indian land." Even if the district court was right to disagree with the manner in which the Ninth Circuit decided whether the tribe was "under federal jurisdiction" in 1934, that is no grounds to reject the court's conclusion in *Big Lagoon* that the issue can at least be litigated. The only relief the State is requesting on appeal is a chance to litigate the issue.

2. Even if the district court was right, the State should have been allowed to amend its complaint to add an APA claim against the Secretary.

Finally, and at the very least, the State should be allowed to amend its complaint to add an APA claim against the Secretary if these issues can only be litigated in the context of an APA lawsuit. The district court cited no authority or reasoning for its proposition that the "state cannot avoid the APA's procedures for reviewing the Secretary's decision" by raising *Carcieri* in the context of this lawsuit. Doc. 43 at 40. But, even if the district court were correct that this issue can only be raised in an APA claim against the Secretary, dismissal was not the right result. In its response to the United States' amicus brief in which this issue was first raised, the State expressly asked that "if this Court believes that the United States is a necessary party, the State of Alabama should be allowed to sue it." Doc. 31 at 10. Amendment, not dismissal, is the proper result. *See Focus on the Family v. Pinellas Suncoast Transit Authority*, 344 F.3d 1263, 1279-81 (11th Cir. 2003) (after agreeing with the defendant that the plaintiff could not obtain complete relief without a non-party, the court remanded so that the plaintiff could "join [the non-party] as a party defendant in this action.").

The United States has previously said that it cannot be joined to a lawsuit because a claim under the APA, for which it has waived sovereign immunity,[5] would be time-barred. Doc. 21 at 8. But there are exceptions to the statute of limitations when an old agency action affects a party anew. This is especially true where, as in this case, the allegation is that the agency acted *ultra vires* such that the challenged agency action is void *ab initio*. *See Legal Envtl. Assistance Found., Inc. v. U.S. Envtl. Prot. Agency*, 118 F.3d 1467, 1473 (11th Cir. 1997) (allowing plaintiffs to challenge regulations contrary to a statute in claim brought outside statutory period); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991) (holding "the government should not be permitted to avoid . . . challenges to its actions, even if *ultra vires*, simply because the agency took the action long before anyone discovered the true state of affairs"); *Oppenheim v. Coleman*, 571 F.2d 660, 663 (D.C. Cir. 1978) (permitting challenge to 30 year old agency decision). If the State can only challenge the Defendants' preemption argument by suing the United States or Secretary under the APA, then the proper result is to remand so that the State can add those claims. *See Focus on the Family*, 344 F.3d at 1279-81.

[5] The U.S. Supreme Court recently held in *Match-E-Be-Nash-She-Wish Band of Pottwami Indians*, 567 U.S. at ___, 132 S. Ct. at 2212, that the United States has waived sovereign immunity to APA claims about the status of land that it has taken into trust. Presumably for this reason, the United States claims to have a statute of limitations defense instead of a sovereign immunity defense.

* * *

Even though the Defendants contend that the land at issue is "Indian Lands," that is not a foregone conclusion. Instead, just as in *Michigan v. Bay Mills* and *Big Lagoon*, the status of these lands is an issue that must actually be litigated in response to the State's state-law claim. The case should be remanded so that the district court can decide whether the land at issue is actual "Indian lands," such that federal law applies, or not Indian lands, such that state law applies.

II. The State has a cause of action for public nuisance under federal law.

Assuming the lands at issue are "Indian Lands," the State can bring a claim for public nuisance under Section 1166 of IGRA, as it has done in Count 2 of the Amended Complaint. The text of IGRA explains that Indian tribes are able to conduct gambling only "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(5). To that end, IGRA expressly requires Indian casinos to comply with state laws "pertaining to the licensing, regulation or prohibition of gambling." It does so in 18 U.S.C. § 1166, the actual text of which the district court does not meaningfully discuss:

> **(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)** [discussing how criminal penalties will work]
>
> **(c)** For the purpose of this section, the term "gambling" does not include--
>
> > **(1)** class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or
> >
> > **(2)** class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.
>
> **(d) The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country**, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

18 U.S.C. § 1166 (emphasis added). The Defendants concede that Section 1166 "was a part of the bill that became IGRA and was passed by Congress as a constituent part of the larger Act." Doc. 14 at p. 13 n.10.

A. IGRA incorporates the state-law public nuisance action into federal law.

The plain meaning of Section 1166 is that state-law civil and regulatory remedies for class III gambling apply just as much on Indian Land as they do within the state's own sovereign territory. That is the only way to read the statute's command that "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*." 18 U.S.C. § 1166(a). In the Eleventh Circuit, "[t]he language of our laws is the law." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1227 (11th Cir. 2001). Accordingly, Section 1166 authorizes the filing of a suit to enjoin illegal gmabling as a matter of federal law because that kind of suit is recognized by Alabama gambling law.

This has been the United States' consistent reading of Section 1166. In the 1990s, the United States invoked Section 1166 to file several civil actions to enjoin unlawful tribal gambling. *See Santee Sioux Tribe*, 135 F.3d 558; *United States v. Seminole Tribe*, 45 F. Supp. 2d 1330 (M.D. Fla. 1999). Although the defendants in those cases argued that "the only authorized federal remedies [were] a civil enforcement by the National Indian Gaming Commission (NIGC) under 25 U.S.C. § 2713, or criminal prosecution and/or seizures under IGRA, the Johnson Act, and/or [other federal laws]," *Seminole Tribe of Florida*, 45 F.Supp.2d at 1331, the courts rejected those arguments and enjoined the unlawful gambling under a Section-1166 theory. They found that the state law that Section 1166 incorporated allowed the state to enjoin unlawful gambling in a civil action. *Id.*; 135 F.3d at 565. The Eighth Circuit in *Santee Sioux Tribe*, for example, explained that Section 1166

allowed for civil enforcement through a civil action because such an action was allowed under Nebraska law:

> The government argues that the language of 18 U.S.C. § 1166(a), which makes "all State laws" pertaining to gambling applicable in Indian country, encompasses the State's civil and criminal statutory and case law. According to the government, **"all State laws" necessarily includes Nebraska civil case law authorizing injunctive relief to effectuate the closure of gambling establishments determined under State law to be public nuisances**. We agree.
>
> The IGRA incorporates by reference "all State laws pertaining to the licensing, regulation, or prohibition of gambling ... in the same manner and to the same extent as such laws apply elsewhere in the State," 18 U.S.C. § 1166(a), and does not distinguish between case law and statutory law. The Rules of Decision Act, 28 U.S.C. § 1652 (1994), provides that the "laws of the several states ... shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." The United States Supreme Court has pronounced that "judicial decisions" are laws of the state within the meaning of the Rules of Decision Act. **We hold that the IGRA's incorporation of "all State laws" includes both state statutory and case law**.

Id. at 565 (emphasis added, some citations omitted). Similarly, a Florida district court explained that "[t]he scope of section 1166 is clearly broad, assimilating all state laws governing regulation of gambling, including those which are civil, as well as those which are criminal." *Seminole Tribe of Florida*, 45 F. Supp. 2d at 1331.

Section 1166(a) expressly says that Indian gambling is subject to "all State laws . . . including *but not limited to* criminal sanctions." As this Court held many

years ago in interpreting a federal statute, "[a]ll means all." *Kennedy v. Lynd*, 306 F.2d 222, 230 (5th Cir.1962). *Accord Awuah v. Coverall North America, Inc*., 703 F.3d 36, 43 (1st Cir. 2012) ("'All' means 'all'); *Sander v. Alexander Richardson Inv.*, 334 F.3d 712, 716 (8th Cir.2003) ("In short, 'all' means all"). It is impossible to read this unambiguous statutory text as incorporating anything less than all a state's civil, regulatory, statutory, and case law "pertaining" to gambling and to provide that those laws "apply 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)(emphasis added).

No one has ever argued that Alabama law, as incorporated by Section 1166, does not provide a cause of action to enjoin illegal slot-machine gambling. It quite clearly does. *E.g.*, *Try-Me Bottling Co.*, 178 So. 231. Because Alabama law indisputably provides a cause of action through which the State can enjoin unlawful gambling, the State can file that cause of action to enjoin unlawful gambling on Indian Lands as well.

B. The federal government does not have the exclusive right to file civil actions under Section 1166.

The district court did not meaningfully contest the reasoning of the Eighth Circuit in *Santee Sioux Tribe* nor did the district court address the plain language of the statute. Instead, the crux of the district court's reasoning was that, although Section 1166 may allow the *federal* government to sue Indian tribes based on a

state-law cause of action, it does not allow a state to sue Indian tribes under such a theory. That erroneous conclusion is unsupported by the text of IGRA and the policies that motivated the passage of Section 1166.

1. Section 1166 is unambiguous.

The text of Section 1166 unambiguously states that the United States has exclusive jurisdiction only over criminal prosecutions, not civil actions like this one. In contrast to the broad language of Section 1166(a), which incorporates *all* civil, regulatory, and prohibitory laws "including *but not limited to criminal sanctions*," Section 1166(d) gives the United States a limited degree of "exclusive jurisdiction over *criminal prosecutions* of violations of State gambling laws." 18 U.S.C. § 1166(d) (emphasis added). The plain meaning of the term "criminal prosecutions" does not extend to cover civil enforcement actions like this one; a "criminal prosecution" is "[a]n action or proceeding . . . for the purpose of securing the conviction and punishment of one accused of crime." Black's Law Dictionary "Criminal Prosecution" (6th ed. 1990). "[A]bsent the need to avoid absurd consequences, we generally may not reinterpret the plain meaning of a statute." *United States v. Keen*, 676 F.3d 981, 990 (11th Cir. 2012). *See also Stansell v. Revolutionary Armed Forces of Colombia*, 704 F.3d 910, 916 (11th Cir. 2013) (A "statute's legislative history may not be used to create an ambiguity where none exists."); *Iberiabank v. Beneva 41-I, LLC*, 701 F.3d 916, 924 (11th Cir.

2012) ("If the text of the statute is unambiguous, we need look no further."); *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225 (11th Cir. 2001) ("Where the clear and unambiguous language of a statute provides a bridge to Congress' intent, we need not and will not wade into the brackish waters of legislative history.").

The text of Section 1166 is unambiguous in other ways as well. Section 1166 expressly incorporates state "licensing" laws. The district court does not attempt to explain how Congress could have contemplated that the United States would have exclusive jurisdiction to enforce a state-law "licensing" regime on Indian Lands. Does Section 1166 intend for the local U.S. Attorney's Office to review applications and issue state-law gambling licenses? Of course not. By including "licensing" laws within Section 1166, Congress plainly contemplated that persons seeking to operate class III gambling facilities on Indian Lands would apply for state licenses from the same state regulatory authorities they would contact for gambling anywhere else in the state. The only way to make sense of this language is to read Section 1166 as meaning what it plainly says: to allow the enforcement of "all State laws pertaining to the licensing, regulation, or prohibition" of class III gambling on Indian Lands "in the same manner and to the same extent" as those laws are enforced "elsewhere in the State."

Based on these and other important elements of the statute's text, one district court persuasively reasoned that *states* have exclusive authority to bring civil actions under Section 1166(a). "The plain language and the structure of § 1166 . . . illustrate that the state, not the United States, is the proper party plaintiff." *United States. v. Santa Ynez Band of Chumash Mission Indians of Santa Ynez Reservation*, 983 F.Supp. 1317, 1319 (C.D.Cal. 1997). The "natural inference to be drawn from Congress' decision to make state law applicable, as such, in § 1166(a), rather than to convert it to federal law as in [the criminal penalties provision] § 1166(b), is that Congress intended to divide the enforcement of the two subsections between the states and the United States," with the United States able to enforce the criminal penalties in Section 1166(b) and the states to enforce civil and regulatory laws made applicable in Section 1166(a). *Id.* This conclusion is further supported by the statute's express reservation of criminal prosecutions to the United States: "clarification as to criminal prosecutions would have been completely unnecessary if Congress had not intended to grant any enforcement power to the states under § 1166(a)." *Id.* at 1323.

In three somewhat analogous cases, the Supreme Court, this Court, and the Sixth Circuit all expressly recognized the *possibility* of state lawsuits against tribal officers or other individuals pursuant to Section 1166, but did not decide the issue. In *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999)

("*Seminole II*"), this Court held that IGRA did not provide a freestanding *implied* right of action that would allow a State to sue to compel tribal officials to comply with IGRA. *Id.* at 1245-46. But the Court noted that IGRA might provide an "*express* right to sue" individuals under Section 1166. *See id.* at 1246 n.13. The Court observed in a footnote that, like Alabama law, "Florida law expressly provides that an action may be brought in state court to enjoin the continuation of a 'common nuisance'" and that the district court could potentially "entertain an action for injunctive relief pursuant to this provision 'as incorporated into federal law by 18 U.S.C. § 1166.'" *Id.* Because Florida did not pursue its Section 1166 claim on appeal, the Court in *Seminole II* did not resolve the issue. *Id.* (The United States later filed a public nuisance suit under Section 1166 to enjoin the same activity in *United States v. Seminole Tribe*, 45 F. Supp. 2d 1330 (M.D. Fla. 1999), which explains why the Florida dropped that claim.)

Similarly, in *Michigan v. Bay Mills*, the Supreme Court and the Sixth Circuit noted, but did not decide, the issue of whether Section 1166 would allow a state to pursue a civil remedy for unlawful gambling on Indian Lands. *See Bay Mills*,572 U.S. at ___, 134 S.Ct. at 2033 n.5 (noting Michigan's argument that § 1166 "gives a State the power 'to bring a civil suit to enforce its anti-gambling law in Indian country'" but declining to address the "irrelevant" issue because Michigan's claim alleged "that illegal gaming occurred on *state* lands"); *Michigan v. Bay Mills*

Indian Community, 695 F.3d 406, 415 (6th Cir. 2012) (acknowledging that "Michigan's statute authorizing civil suits to abate a nuisance is a 'State law[] pertaining to the . . . regulation . . . of gambling" (quoting 18 U.S.C. 1166(a)). The only question in *Michigan v. Bay Mills* was whether Section 1166 should be read to create a cause of action *against a tribe* and abrogate the tribe's immunity—a question not present in this case. These courts held that any Section 1166 cause of action would not abrogate tribal immunity, but these courts did not reach the issue here: whether Section 1166 allows the state to pursue civil remedies against *officers and individuals* who are violating state gambling laws on Indian lands. Instead, the Sixth Circuit expressly reserved that question for another day; it noted that "the State has already amended its complaint" to avoid tribal immunity by suing "various Bay Mills tribal officers as defendants" and expressly held that its decision on tribal immunity "express[es] no opinion as to whether, or under what circumstances, those officers may be sued." *Id.* at 416.

The text of Section 1166 grants the United States exclusive authority to bring criminal prosecutions, but it does not grant it similar exclusive authority for civil lawsuits, licensing actions, or regulatory proceedings. Accordingly, the federal government does not have the exclusive right to a civil remedy under Section 1166.

2. *Even if Section 1166 were ambiguous, the best reading is that it allows this cause of action.*

Even if the text of Section 1166 were ambiguous, rules of statutory construction would point to the same result.

First, this reading of the statute would merely make Section 1166 consistent with other federal laws that grant the federal government exclusive jurisdiction to prosecute crimes, but not an exclusive right to civil enforcement. The United States almost always has exclusive authority to bring criminal prosecutions under federal laws, but that does not mean other parties are prevented from bringing *civil actions* when those same federal laws allow for one. *E.g.* Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (private right of action in § 1964); Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2522 (private right of action in § 2520); Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §§ 401-426p (private right of action in § 406 for violations of §§ 401 and 403); Antitrust Laws, 15 U.S.C. §§ 1-38 (private right of action in § 15); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78pp (private right of action in § 78t-1); Professional Boxing Safety Act of 1996, 15 U.S.C. §§ 6301-6313 (private right of action in § 6309; same provision explicitly protects states' rights to enforce the Act on behalf of their residents); Migrant and Seasonal Agricultural Worker Protection, 29 U.S.C. §§ 1851-1856 (private right of action in § 1854); National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg-1973gg-10 (private right of

action in § 1973gg-9); 47 U.S.C. § 227 (providing private right of action, as well as civil and criminal penalties, for unlawful use of telephone equipment).

Second, the import of *expressio unius est exclusio alterius* could not be stronger. By specifying that the United States would have exclusive jurisdiction over "criminal prosecutions," Congress necessarily implied that the United States would *not* have "exclusive jurisdiction" to bring other kinds of state-law actions incorporated into federal law by Section 1166. *See United States v. Castro*, 837 F.2d 441, 442 (11th Cir.1988) ("the mention of one thing implies the exclusion of another; *expressio unius est exclusio alterius*") (quotation marks omitted). As one district court put it, the "structure of §1166 suggests strongly that Congress intended to distinguish civil enforcement to prevent future acts of non-conforming gaming from criminal enforcement efforts to punish past acts." *United States v. Santa Ynez Band of Chumash Mission Indians of Santa Ynez Reservation*, 983 F. Supp. 1317, 1322 (C.D. Cal. 1997). Because Congress broadly provided that *all* state laws apply to Indian gambling and then narrowly provided the United States exclusive jurisdiction over "criminal prosecutions" *only*, it stands to reason that Congress envisioned state involvement in civil cases even though it wanted to prevent states from putting members of an Indian tribe in jail.

Third, this reading is most consistent with Congress's goal in enacting IGRA. In IGRA, Congress expressly found that Indian tribes should "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(5). Section 1166 does not extend state law to class I or class II gambling—only the kind of class III gambling where the Defendants have admitted that states "have a larger role." Doc. 14 at 11. The best reading of Section 1166 – which comports with Congress's intent to treat class III gambling differently from class I and class II gambling – is that states cannot bring criminal prosecutions based on past unauthorized gambling, but can bring civil suits to enjoin unlawful class III gambling going forward.

The district court read Section 1166 the wrong way for essentially three reasons. First, the district court misunderstood the purpose of IGRA as applied to class III gambling. *See* Doc. 43 at 52 (concluding that the State's claim finds "no support" in the "broader context of IGRA."). The "problem Congress set out to address in IGRA" was *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22, 107 S.Ct. 1083, 1094-95 (1987), which held that a state could not regulate gambling on Indian lands. *Bay Mills*, 572 U.S. at ___, 134 S.Ct. at 2034. Accordingly, "[e]verything—literally everything—in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands." *Id.* That is why the extension of state law to class III gambling under Section 1166 is such an

important part of the statutory scheme: if the surrounding state cannot enforce its law on Indian lands, then that state has returned to the world of *California v. Cabazon Band of Mission Indians*. Section 1166(a) is "purposely intended to remove the *Cabazon* bar to state enforcement of gambling laws." *Santa Ynez*, 983 F.Supp. at 1323. The central grant of authority that Congress gave to the states was that a "tribe may conduct [class III gambling] on Indian lands only pursuant to, and in compliance with, a compact it has negotiated with the surrounding State." *Bay Mills*, 572 U.S. at ___, 134 S.Ct. at 2028. But Indian tribes have no reason to negotiate a compact with the surrounding state if the state cannot stop tribal officials from conducting class III gambling in the absence of a compact. .

Second, the district court erroneously invoked the canon of interpretation that "statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit." *See* Doc. 43 at 52 (quotation marks omitted). Even if Section 1166 were ambiguous—and it is not—that canon of construction does not resolve this question. As the Supreme Court held in a recent Indian law case, "canons are not mandatory rules. They are guides that 'need not be conclusive.'" *Chickasaw Nation v. United States*, 534 U.S. 84, 93, 122 S.Ct. 528, 535 (2001). Accordingly, if "other circumstances evidencing congressional intent" contradict the Indian-benefit canon or if the Indian-benefit canon is "offset" by another canon, then "those can overcome [the Indian-benefit canon's] force."

Id. Here, Congress expressly made state laws applicable to class III gambling on Indian lands. In light of Congress's decision to apply state law to Indian lands, "allowing states to enforce their gambling laws through civil litigation in federal courts has no bearing upon Indian sovereignty." *Santa Ynez*, 983 F.Supp. 1317 at 1323.

Moreover, it does not diminish tribal sovereignty one iota to read Section 1166 as authorizing state civil enforcement of "state laws pertaining to the licensing, regulation, or prohibition of gambling" at least to the same extent that the *federal government* can civilly enforce those laws. 18 U.S.C. §1166(a). The Indian-benefit canon applies against the federal government too. *E.g.*, *Chickasaw Nation*, 534 U.S. at 93, 122 S.Ct. at 535. It would support the district court's decision only if the court had held that no sovereign—neither the state nor the federal government—could enforce state laws as incorporated by Section 1166(a). But that reading would make Section 1166(a) meaningless. It would also contradict the United States' longstanding position that Section 1166(a) allows it to enforce state civil and regulatory laws as well as criminal laws. *See, e.g.*, United States Amicus Brief, Doc. 21 (arguing that the United States can "utilize Section 1166 to enforce Alabama's civil anti-gambling laws"); *Santee Sioux Tribe*, 135 F.3d at 565 (agreeing with United States that Section 1166 incorporates civil laws).

Lastly, the district court supported its reading with snippets of legislative history from the Congressional reports on IGRA. *See* Doc. 43 at 58. Those snippets are irrelevant. They expressly address the compact process through which a state can choose to allow class III gambling and expand its criminal jurisdiction over Indian Lands, not Section 1166. In fact, if those snippets concerned Section 1166, they would be expressly contradicted by its text, which plainly states that "all State laws pertaining to the licensing, regulation, or prohibition of gambling . . . shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." *See* 18 U.S.C. § 1166(a).

* * *

Although Section 1166 says that state laws do not apply to class II gambling, IGRA unequivocally states that "[t]he term 'class II gaming' does not include . . . (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7)(B). Here, the State has alleged in great detail that the Defendants are operating slot machines and other unlawful gambling devices. *See* Doc. 10 ¶¶ 13-18. It may be that the Defendants can prove that they are not operating class III slot machines at summary judgment or trial. But they did not even attempt to argue that their gambling devices are legal in the trial court. The district court erred in dismissing the Second Count in the Amended Complaint.

III. Tribal immunity does not bar the state-law or federal-law cause of action.

The district court correctly held that the State's federal-law claim could not be dismissed on the theory of "tribal immunity," but incorrectly dismissed the state-law claim for that reason. Tribal immunity is similar to, but "not congruent with," the sovereign immunity enjoyed by the federal government and the states. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890–91, 106 S.Ct. 2305, 2313 (1986). There are two types of defendants in this case, and the analysis differs as to each of them: (1) individual officers and members of the Poarch Band and (2) a corporation that is wholly owned by the Poarch Band. As to the individual defendants, the state-law and federal-law claims may proceed under the legal fiction of *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908). As to the wholly owned corporation, PCI Gaming Authority, Inc., this Court's precedents appear to require that all claims must be dismissed. Accordingly, both the state-law and federal-law claim should go forward against the individual defendants.

A. The district court correctly held that the individual defendants are not immune from the State's federal-law claim.

The Amended Complaint seeks declaratory and injunctive relief, and it is axiomatic that tribal officers such as the individual defendants can be sued in their official capacity to enjoin ongoing violations of federal law. In *Tamiami*, a

business sued a tribe's officers over the tribe's gambling activity, and this Court held that the district court properly rejected the tribal officers' claim of immunity. *See Tamiami Partners, Ltd. By and Through Tamiami Development Corp. v. Miccosukee Tribe of Indians of Florida*, 63 F.3d 1030, 1050-51 (11th Cir. 1995). *See also Okla. Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514, 111 S.Ct. 905, 912 (1991) ("We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State."). The Court expressly held that the doctrine of *Ex parte Young* "applies in suits brought against tribal authorities in their official capacities." 63 F.3d at 1050. *Accord Vann v. U.S. Dept. of Interior*, 701 F.3d 927, 928-29 (D.C. Cir. 2012).

As the district court explained, the State's Amended Complaint pleaded all the facts that are necessary to invoke *Ex parte Young*. The Supreme Court has held that, in determining whether the doctrine of *Ex parte Young* applies, "a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645, 122 S.Ct. 1753, 1760 (2002) (internal quotation marks omitted) (alteration in original). The Amended Complaint alleges that three casinos under the Defendants' control are committing notorious ongoing violations of federal law, and the Amended Complaint seeks declaratory and injunctive relief to stop those violations. That is

all that is required under this Court's and the Supreme Court's precedents. *See id.*; *Luckey v. Harris*, 860 F.2d 1012, 1015-16 (11th Cir. 1988) ("All that is required is that the official be responsible for the challenged action"); *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 828 (10th Cir. 2007) ("Defendants are not required to have a 'special connection' to the unconstitutional act or conduct," just "some connection."). The district court was correct to hold that tribal immunity poses no bar to the State's federal-law claim.

B. The district court erroneously held that the individual defendants are immune from the State's state-law claim.

The district court erroneously held that, even though the individual defendants were not immune from the federal-law claim, the individual defendants had tribal immunity from the State's state-law claim. This conclusion was erroneous for two reasons.

1. *In the context of tribal immunity, the fiction of Ex parte Young applies just as much to state-law claims as to federal-law claims.*

The underlying principles of *Ex parte Young* apply just as much to state-law claims against tribal officers as to federal-law claims against those officers. The underlying theory of *Young* is that an officer who acts in contravention of the law that governs him is "stripped of his official or representative character and is subjected to the consequences of his official conduct." *Ex parte Young*, 209 U.S. at 160, 28 S.Ct. at 454. The Supreme Court has held that tribal officers must comply

with nondiscriminatory state laws unless there is a federal law to the contrary. *See, e.g., Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165, 175-177, 97 S.Ct. 2616, 2622-23 (1977) (holding tribe must comply with state law and enjoining tribal members to do so); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S.Ct. 1267, 1270 (1973) ("Absent express federal law to the contrary," tribes are "subject to non-discriminatory state law otherwise applicable to all citizens of the State"). Accordingly, the *Ex Parte Young* fiction should allow state-law claims against tribal officers just as it does with respect to federal-law claims.

The reasons for limiting the *Ex parte Young* fiction to federal-law claims are not present here. The Court in *Ex parte Young* spoke only to federal law claims because it was speaking specifically to lawsuits against *state* officers. And a litigant cannot bring a state-law claim against a state officer in federal court. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106, 104 S.Ct. 900, 911 (1984). Instead, for reasons of comity between the federal and state governments, the litigant must bring a state-law claim against a state officer in state court. *See id* ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law").

There is obviously no similar comity bar to litigating state-law claims against *tribal* officers in federal court. Instead, the parallel problem would arise only if the State were suing the tribal officers to compel them to comply with tribal law. For these reasons, in *Michigan v. Bay Mills*, the Supreme Court expressly held that the *Ex parte Young* doctrine applies to claims for injunctive relief against tribal officers arising under state law. *See Bay Mills*, 572 U.S. ___, 134 S.Ct. 2024. There, the Supreme Court explained that a State has "a panoply of tools" to address tribal gambling if that gambling is not on Indian Lands, including a lawsuit against tribal officials under a state-law public nuisance law:

> So, for example, Michigan could, in the first instance, deny a license to Bay Mills for an off-reservation casino. *See* Mich. Comp. Laws Ann. §§ 432.206–432.206a (West 2001). And if Bay Mills went ahead anyway, **Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license. *See* § 432.220; *see also* § 600.3801(1)(a) (West 2013) (designating illegal gambling facilities as public nuisances).** As this Court has stated before, analogizing to *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), tribal immunity does not bar such a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct.

Id. at ___, 134 S.Ct. at 2032, 2035. Accordingly, *unless the state-law claim is preempted by federal law (which is addressed in Section I above)*,[6] the State can bring its state-law claim for injunctive relief against the tribal officers.

[6] Although the district court answered this question incorrectly, its analysis properly focused on the question of preemption and not tribal immunity *per se*. If federal law governs the

2. The defendants waived tribal immunity by removing.

Second, had this lawsuit remained in state court where it was originally filed, the tribal officers would not have been immune to the State's suit for declaratory or injunctive relief under state law. This is so because the State originally filed this action in state court, and it could have proceeded with a claim against the Defendants under Alabama's equivalent of *Ex parte Young* which manifestly applies to state-law claims. *See Alabama Dep't of Transp. v. Harbert Int'l, Inc.*, 990 So. 2d 831, 840 (Ala.2008), *abrogated on other grounds by Ex parte Moulton*, 116 So. 3d 1119 (Ala. 2013) (explaining that governmental immunity does not apply, in Alabama state court, to a plaintiff's suit seeking a declaratory judgment about the meaning of state law). When governmental officers remove a case from state court (where they would have no sovereign immunity) to a federal court, they waive any immunity they otherwise would have had in federal court but for the removal. *See Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 619-20, 122 S.Ct. 1640, 1643-44 (2002). Although the Court held that a tribe does not necessarily waive its immunity from a suit for damages by removing to federal court in *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida*, 692 F.3d 1200 (11th Cir. 2012), the tribe in that case had immunity

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tribal officers' conduct, then no suit under state-law can be brought as a matter of preemption. But, if state law governs, then a state-law claim may be brought under the fiction of *Ex parte Young* just like a federal law claim could be.

from damages in *both* state and federal court. The Court did not address the issue of whether removal affected the lawsuit against a *tribal officer* because that issue was not "challenged by Contour on appeal" and the Court "ha[d] no occasion to revisit the issue of whether Chairman Cypress is protected by the Tribe's immunity from suit." *Id.* at 1210 n.4. Here, because of the state-law equivalent of *Ex parte Young*, the tribal officers would not have immunity in state court from a state-law claim for injunctive or declaratory relief. The tribal officers cannot obtain a strategic advantage with respect to state-law claims for injunctive relief under Alabama's equivalent of *Ex parte Young*—to which the Defendants would be subject in state court—by removing those claims to federal court.

C. It appears that PCI Authority is immune from all claims under this Court's precedents.

This Court held that PCI Gaming Authority shares in the Poarch Band's tribal immunity in *Freemanville Water Sys., Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205 (11th Cir. 2009). The issue of PCI Gaming Authority's tribal immunity was not fully litigated in *Freemanville* because the parties did "not dispute that these entities share whatever immunity the Poarch Band enjoys." *Id*. at 1207 n.1. As it did in the district court, the State contends that this Court should clarify that tribal immunity does not extend to business entities like PCI Gaming Authority, which have nothing to do with tribal self-government. If a state engages in economic activities that harm the citizens of another state, the law allows it to be

haled into the courts of the second state and be found liable for damages. *See Nevada v. Hall*, 440 U.S. 410, 416, 99 S.Ct. 1182, 1186 (1979). *See also Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488, 103 S.Ct. 1962, 1968 (1983) (foreign sovereign immunity does not extend to "actions based upon commercial activities of the foreign sovereign"). By holding tribal businesses liable for their actions, courts would eliminate the unprincipled disparity in the treatment of tribal immunity, state sovereign immunity, and foreign sovereign immunity. Nonetheless, it appears that under the currently prevailing case law in this circuit, PCI Gaming Authority's immunity is coextensive with the Poarch Band's. This suit should proceed against the tribal officials.

CONCLUSION

The District court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13, 427 words, excluding the parts of the brief exempted by 11th Circuit Rule 32-4. I have relied upon Microsoft Word 2007 to determine the word count.

This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

Dated: July 7, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and service will be perfected via electronic mail upon the following counsel of record on this day the 7th of July, 2014:

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