UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CAYUGA NATION, a federally recognized Indian Nation,

Plaintiff,

Case No. 5:24cv537

v.

NEW YORK STATE GAMING COMMISSION, et al.

Defendants.

MEMORANDUM OF LAW IN OPPOSITION TO STATE DEFENDANTS' MOTION TO DISMISS

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Plaintiff Cayuga Nation ("Nation"), through undersigned counsel, respectfully submits this memorandum of law in opposition to Defendants' New York State Gaming Commission ("Commission") and the Commission's Commissioners, sued in their official capacities, John Crotty, Sylvia Hamer, Martin Mack, Peter Moschetti, Jr., Brian O'Dwyer, and Marissa Shorenstein ("Commissioners") (collectively "State Defendants") motion to dismiss the Nation's First Amended Complaint ("Amended Complaint"). Dkt. Nos. 30, 37.

INTRODUCTION

As a Federally Recognized Indian Nation, the Nation enjoys exclusive gaming rights on its sovereign reservation granted to it by the Federal Government ("Reservation") in the 1794 Treaty of Canandaigua. In an effort to recognize the sovereignty of Indian land and exclusivity of Indian regulation of gaming on such land, the United States enacted the Indian Gaming Regulatory Act ("IGRA"). IGRA carves out Indian land, including the Reservation, for exclusive gaming by federally recognized Indian nations to the exclusion of all others from engaging in gaming operations within Indian land.

Pursuant to IGRA, Class III gaming, like the State lottery, is only lawful on Indian land only if it meets IGRA requirements. For Class III gaming, IGRA requires that the Nation allow Class III gaming in its ordinance as approved by the National Indian Gaming Commission (the sole federal regulator) and enter into a Tribal-State compact. The Nation, however, has chosen only to allow Class I and II gaming within its Reservation under its gaming ordinance (which was approved by the NIGC), and the Nation has no Tribal-State compact nor any present intention to negotiate one with the State.

The Nation has brought this suit to stop State Defendants' ongoing violations of IGRA by the lottery terminals they maintain on the Reservation and current license they provided to

Jackpocket, Inc. ("Jackpocket") allowing them to operate a mobile gaming app selling lottery and other State licensed draw games on the Reservation.

State Defendants moved to dismiss the Amended Complaint arguing State Defendants are entitled to sovereign immunity pursuant to the Eleventh Amendment, and that the Nation failed to state a cause of action because (1) IGRA does not give the Nation a private cause of action to enjoin on-reservation gaming, and (2) IGRA does not regulate state-operated lotteries. State Defendants ignore the applicability of the Ex Parte Young doctrine as an exception to Eleventh Amendment immunity. They also fundamentally mischaracterize the requirements of IGRA and the Nation's claims. No basis for dismissal applies, and the motion should be denied.

BACKGROUND

I. THE CAYUGA RESERVATION

In 1794, the United States entered the Treaty of Canandaigua with the Cayuga Nation recognizing a 64,015-acre federal Reservation located in what is now Seneca and Cayuga Counties. Dkt. No. 30 ¶¶ 29-30. In the years following the Treaty of Canandaigua, New York State claimed to enter into two treaties directly with the Cayuga Nation reducing the acreage, but because they were never approved through the federal treaty-ratification procedures and congress never disestablished the Reservation, the Reservation remains fully intact. *Id.* at ¶¶ 32-34 citing *Cayuga Indian Nation of N.Y. v. Seneca Cnty.*, 260 F. Supp. 3d 290, 309–10 (W.D.N.Y. 2017) (collecting cases) and *Cayuga Indian Nation of N.Y. v. Gould,* 14 N.Y.3d 614, 639 (2010) (collecting cases).

II. IGRA

Gaming on Indian lands is within the jurisdiction of the Indian tribes and regulated by the provisions of IGRA. *Id.* at ¶ 30 citing 25 U.S.C. § 2701, et seq. Various portions of IGRA outlined in the Amended Complaint are relevant to this motion to dismiss. "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." *Id.* at ¶ 22 citing 25 U.S.C. § 2701(5). Class III Gaming is defined as "all forms of gaming that are not class I gaming or class II gaming" including:

> (a) Any house banking game, including but not limited to—
>
> (1) Card games such as baccarat, chemin de fer, blackjack (21), and pai gow (if played as house banking games);
>
> (2) Casino games such as roulette, scraps, and keno;
>
> (b) Any slot machines as defined in 15 U.S.C. 1171(a)(1) and electronic or electromechanical facsimiles of any game of chance;
>
> (c) Any sports betting and parimutuel wagering including but not limited to wagering on horse racing, dog racing or jai alai; or
>
> (d) Lotteries.

Id. at ¶ 23 citing 25 C.F.R. § 502.4 and 25 U.S.C. § 2703(8).

Class III Gaming is lawful on Indian lands only if such activities are authorized by an ordinance or resolution that is adopted by the governing body of an Indian tribe having jurisdiction over such lands, meets the requirements of 25 U.S.C. § 2710(b), and is approved by the Chairman of the National Indian Gaming Commission ("NIGC"). *Id.* at ¶ 24 citing 25 U.S.C. § 2710(d)(1)(A). Pursuant to 25 U.S.C. § 2710(b), the Chairman approves the ordinance or resolution if it meets the following requirements:

> (A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;
>
> (B) net revenues from any tribal gaming are not to be used for purposes other than—
>
> (i) to fund tribal government operations or programs;
>
> (ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which—

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes—

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

Id. at ¶ 25 citing 25 U.S.C. § 2710(b)(2).

The tribal ordinance or resolution may also provide for the licensing or regulation of Class III gaming activities owned by any person or entity other than the Indian tribe. *Id.* at ¶ 26 citing 25 U.S.C. § 2710(b)(4). This is only true if: (1) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by NIGC in accordance with 25 U.S.C. § 2712; (2) income to the Indian tribe from such gaming are not to be used for purposes other than to fund tribal government operations or programs, to provide for the general welfare of the Indian tribe and its members, to promote tribal economic development, to donate to charitable organizations, or to help fund operations of local government agencies; (3) not less than *60 percent* of the net revenues is income to the Indian tribe; and (4) the owner of such gaming operation pays an appropriate assessment to the NIGC under 25 U.S.C. § 2717(a)(1) for regulation of such gaming. *Id.* at ¶ 26. Therefore, IGRA was created to provide Indian Nations a portion of the revenue for gaming on their lands to provide or enhance the financial abilities of tribes and their members.

III. NEW YORK DOES NOT HAVE AUTHORITY TO CONDUCT CLASS III GAMING ON THE NATION'S RESERVATION

Although the Nation has a Class II gaming ordinance, it has not adopted any ordinance permitting Class III gaming on its Reservation; therefore, Class III gaming cannot be legally conducted by any other entity, person, or governmental body other than the Nation on its Reservation. *Id.* at ¶¶ 36-37, 39. IGRA requires that any Class III gaming activities authorized by an ordinance must be conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State. *Id.* at ¶ 43 citing 25 U.S.C. § 2710(d)(1)(C). Any such Tribal-State compact must meet the requirements under 25 U.S.C. § 2710(d)(3)(C), be approved by the Secretary of Interior, and published in the Federal Register. *Id.* citing 2325 U.S.C. § 2710(d)(3).

"Indian lands" under IGRA are defined as "all lands within the limits of any Indian reservation." *Id.* at ¶ 28 citing 25 U.S.C. § 2703(4)(A). New York does not have a compact with the Nation, and therefore New York has no authority over gaming, or to conduct gaming, on the Nation's Reservation. *Id.* at ¶ 43.

IV. NEW YORK STATE'S LOTTERY MACHINES AND THE JACKPOCKET MOBILE APPLICATION

A. New York Gaming on Reservation Land

The Commission administers the New York State Lottery, including the licensing of lottery sales agents, use of vending machines, safekeeping operations and control, and distribution of lottery tickets. *Id.* at ¶ 45 citing 9 NYCRR § 5000.1. There are seven authorized Commission members authorized to operate and carry out these duties. *See* N.Y. Rac., Pari-Mut. Wag. & Breed. L. §§ 102(1), 103(2)(a).

New York offers two types of gaming on the Nation's Reservation. *Id.* at ¶ 46. First, New York State lottery vending machines provide access to play a type of game known as an instant lottery game established under N.Y. Comp. Codes R. & Regs. ("NYCRR") tit. 9, § 5006.1. *Id.* at ¶ 47. Such games are commonly known as "scratch-off games." *See* https://nylottery.ny.gov/scratch-off-games/. *Id.* The lottery vending machines are currently operating within the Nation's Reservation and qualify as Class III gaming. *Id.* at ¶¶ 5, 47, 49, 50-60, 66-69, 47-77, 80-84, 88-90.

Second, New York State lottery terminals are operating within the Nation's Reservation and dispense tickets for various "draw games" such as New York Lotto, New York PowerBall, New York Mega Millions, and several other similar games constituting Class III gaming. *See* https://nylottery.ny.gov/draw-games/. *Id.* at ¶ 51. Operating the vending machines and terminals without a compact violates IGRA. *Id.* at ¶¶ 50, 53.

B. License to Jackpocket to Operate on Reservation Land

The Commission issues Lottery Courier Service Licenses to Jackpocket. *Id.* at ¶¶ 45-56. The most recent license was issued May 23, 2024 and has an expiration date of May 23, 2029. *Id.* at ¶ 56. By way of the license, Jackpocket currently offers access to users to play the New York Lotto and other commissioned licensed draw games from the Jackpocket mobile application which is being utilized on the Nation's Reservation. *Id.* at ¶ 57. The New York Lotto and other draw games are class III gaming, and therefore Jackpocket's operations as a mobile seller of the draw game tickets (pursuant to the license issued by State Defendants) violates IGRA. *Id.* at ¶ 60.

V. DEMANDS TO STOP

On or around November 22, 2023, Counsel for the Nation sent a letter to Edmund Burns, General Counsel of the Commission, demanding the lottery terminals be removed and that Jackpocket exclude the Nation's Reservation from its mobile operations. *Id.* at ¶¶ 61-62. After receiving no response, Counsel sent another letter on or around December 28, 2023, to which no response was received. *Id.* at ¶¶ 63-64. With no other option, the Nation commenced this action on April 18, 2024 and filed an Amended Complaint on July 19, 2024. Dkt. Nos. 1, 30.

ARGUMENT

The motion to dismiss fails because State Defendants misapply the principles of state sovereign immunity, ignore the applicability of the Ex Parte Young doctrine, and neglect the federal legal framework designed to protect the gaming rights of Indian tribes on their lands.

I. DEFENDANTS ARE NOT ENTITLED TO ELEVENTH AMENDMENT IMMUNITY AND THE COMMISSIONERS ARE PROPER DEFENDANTS

A. The Commissioners are Proper Defendants Under the Ex Parte Young Doctrine

State sovereign immunity is not absolute and exceptions apply. *Ex parte Young*, 209 U.S. 123 (1908), authorizes actions against individual state officers for prospective relief to prevent

ongoing violations of federal law, which is precisely what the Nation seeks. State Defendants' arguments mischaracterize the Nation's suit. The Court has jurisdiction over the Commissioners because the Ex parte Young doctrine explicitly permits suits against state officials to stop ongoing violations of federal law where the relief sought can be characterized as prospective.

i. Ex Parte Young is Available for Certain Violations of IGRA

State Defendants wrongly argue that the Ex Parte Young exception is unavailable for all IGRA claims because Congress prescribed remedies for such violations. Dkt. No. 37, p. 8. State Defendants detrimentally rely on *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) for this proposition. However, *Seminole Tribe* did not limit the availability of Ex Parte Young for all violations of IGRA, rather, it held that "Ex Parte Young, may not be used to enforce 25 U.S.C. § 2710(d)(3) against a state official." *Id.* 47. The Court reasoned that Ex Parte Young should not be used to displace or supplement the remedial scheme that Congress created in enacting IGRA, and that the Seminole Tribe could not sue Florida officials to obtain the relief it could not obtain from Florida itself, namely, an order compelling the State to negotiate a gaming compact under IGRA. *Id.* at 25. This logic makes sense as § 2710(d)(3) states "any Indian tribe having jurisdiction over the lands upon which Class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located . . . enter into a compact governing the conduct of gaming activities" to be approved by the Secretary. 25 U.S.C. § 2710(d)(3)(a).

Section 2710(7)(b) provides that an Indian tribe can commence an action if a compact was not entered, the State did not respond to the request to enter into a compact, or did not respond in good faith; and if a court finds that the state failed to negotiate in good faith, they shall issue an order directing the State and Tribe to conclude such a compact within 60 days. *See* § 2710(7)(b)(i-vii) (further outlining the process to submit proposed compacts to a mediatory if an agreed compact could not be agreed upon within 60 days). The Cayuga Nation's case is very different. Here, the

Nation does not allege there were bad faith negotiations with the State, or that the Nation had a desire to compel negotiations for a compact.

Unlike *Seminole Tribe*, the Nation alleged in the Amended Complaint, attaching the cease-and-desist demand letters to the Commission, that it demanded State Defendants to stop the operation of the lottery terminals and conveyed authority to Jackpocket to permit mobile gaming on the Nation's Reservation lands. Dkt. No. 30, Exhibits E and F, ¶¶ 61, 63. The letters offered to discuss the cease-and-desist demands so the Nation's Counsel could simply explain the concerns and demand, not to negotiate a compact the Nation did not want. Dkt. No. 30, Exhibits E and F, ¶¶ 61, 63. The Amended Complaint does not allege the Nation sought to negotiate a compact under IGRA or that there were bad faith negotiations on behalf of the state. IGRA does not contemplate a regulatory scheme, or provide any guidance for recourse, when Indian nations do not wish to negotiate a compact or where the State has not requested to negotiate a compact, but rather request the violations stop. *See* § 2710(d)(7). Even in *Yakama*, the Court noticed this distinction and performed an Ex Parte Young analysis to see if the governor was a proper defendant. *Locke*, 176 F.3d at 469-470. The same should be done here.

In summary, *Seminole Tribe* does not bar Ex Parte Young availability for all IGRA violations. The holding of *Seminole Tribe* cannot be generalized to halt Ex Parte Young actions where there are no bad faith negotiation or attempts to compel an agency to negotiate the compact where the statute provides. *See e.g. Cayuga Nation v. Tanner*, 6 F.4th 361 (2d Cir. 2021) (adjudicating and holding IGRA preempted village's ordinance regulating gaming as it applied to the Nation's operation of a bingo parlor on a parcel of land located in the village and reservation because it was on Indian lands). If that was the case, States could begin gaming operations on sovereign Indian lands, violating IGRA, without ever seeking a compact by using Eleventh

Amendment immunity as a shield. Surely, that was not Congress's intent when they created the statute designed to provide a portion of gaming revenue to Indian tribes for their welfare. 25 U.S.C. § 2710(b)(4). Since Congress did not include or broaden the narrow remedial scheme, the Amended Complaint is not barred under the precedent the State Defendants cite.

ii. The Nation seeks prospective relief

In a final attempt to argue Ex Parte Young does not apply, State Defendants contend the claims against State Defendants must be dismissed because the Nation seeks retrospective relief. Dkt. No. 37, pp. 10-12. Ex Parte Young permits prospective injunctive relief that enjoins state officials from engaging in ongoing violations of federal law and provides prospective relief. *Green v. Mansour*, 474 U.S. 64, 68 (1985) citing *Ex parte Young*, 209 U.S. at 123.

To determine if a complaint seeks prospective relief, "a court need only conduct a straight forward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Virginia Off. for Protection & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) (citations omitted) (reversing appellate court's decision, in part, because plaintiff sought prospective relief). The Nation clearly seeks prospective relief.

As a preliminary matter, State Defendants cite language from the original complaint in an attempt to argue the Amended Complaint simply changes verbs to make the relief prospective. Dkt. No. 37, p. 11. First, the motion to dismiss is to only be decided on the allegations in the Amended Complaint. *See generally D'Jamoos v. Griffith*, U.S. Dist. LEXIS 17595 *11 (E.D.N.Y. 2001); *see also* Dkt. No. 27. Although irrelevant for this motion to dismiss, the Nation changed the language in the Amended Complaint out of an abundance of caution to clearly outline the prospective relief sought. The focus on verb tense does not negate the actual relief being sought. Instead, "prospective relief is defined as relief that is not 'retrospective or designed to compensate for a past violation of federal law. . . . In Short, 'there must be a possible effectual remedy for the

violations . . . and the remedy must be prospective relief that would address an ongoing violation of federal law.'" *Allco Fin. Ltd. v Roisman*, U.S. App. LEXIS 18179 *4 (2d Cir. 2023) (quotations omitted). The Amended Complaint alleges State Defendants' violations of IGRA are ongoing (the lottery instrumentalities and Jackpocket's mobile application providing access to the lottery and other New York licensed draw games are currently operating as ongoing violations of IGRA). *See* Dkt. No. 30 ¶¶ 5, 47, 50-60, 66-69, 47-77, 80-84, 88-90.

More specifically, the Amended Complaint requests "(a) declaration that Defendants, excluding Jackpocket, *are currently violating* IGRA by operating New York State lottery vending machines within the Nation's Reservation; (b) an injunction directing Defendants, excluding Jackpocket, *to cease operating* any New York State lottery vending machines within the Nation's Reservation; (c) a declaration that Defendants, excluding Jackpocket, violate IGRA by allowing the issued Lottery Courier Service License to Jackpocket *to be in effect currently* without excluding the Nation's Reservation and continue to violate the law with the License in effect; and (d) a declaration that that portion of the current Lottery Courier Service License issued to Jackpocket (License Number COURIER-005), *which NYSGC allows to currently stay valid*, allowing Jackpocket to operate within the Nation's Reservation is invalid. Dkt. No. 37, p. 18, ¶ 5 (emphasis added). The Nation clearly seeks prospective relief in (a) and (b) requesting a declaration that State Defendants are currently violating IGRA by operating the vending machines within the Nation's reservation and an injunction directing them to cease the current operations. The Amended Complaint alleges that the license to Jackpocket enabling them to operate their mobile application selling lottery and other draw game tickets on the Reservation is active as well as the lottery terminals. Dkt. No. 30 ¶¶ 6, 47, 51, 58, 68-69, 74-75, 84, 90. The relief requested in (c) and (d) regarding the license to Jackpocket is also prospective because State Defendants allow

Jackpocket, and continue to reissue the licenses, to allow them to sell New York State lottery games through their mobile app on Reservation land by way of the license. Dkt. No. 37, p. 18, ¶ 5. The Amended Complaint explains how the violations will continue into the future[1] if the violations are not cured. *See e.g.* Dkt. No. 30 ¶¶ 66, 75. Assuming *arguendo*, the court agrees with State Defendants on the relief sought as to the licenses for Jackpocket versus the lottery operation by the Commission, the Court should only deny the claims that do not seek prospective relief, not all claims. *Ryan v. Volpone Stamp Co.*, 107 F. Supp. 2d 369 (S.D.N.Y. 2000). Furthermore, the Court could also issue an order disallowing State Defendants to issue any further licenses to Jackpocket. *Hernández-Castrodad v. Steidel-Figueroa*, U.S. Dist. LEXIS 255027 *8 (U.S. Dist. Ct. for Puerto Rico, 2021) (quotations omitted).

State Defendants' reliance on *Ward v. Thomas* is misplaced. *Ward v. Thomas*, 207 F.3d 114 (2d Cir. 2000); Dkt. No. 37, p. 11. In *Ward*, the Second Circuit stated that "remedies designed to end a continuing violation on federal law are necessary to vindicate the federal interest in assuring the supremacy of that law, whereas compensatory or deterrence interests are insufficient to overcome the Eleventh Amendment." *Id.* at 118. Unlike *Ward*, the Nation does not seek compensatory damages against the State Defendants. *See also Hernández-Castrodad*, U.S. Dist. LEXIS 255027 *8. (quotations omitted) (finding plaintiff alleged prospective relief for a portion of the requested relief alleging an ongoing violation of federal law and a portion of the relief requested was retrospective where it required Puerto Rico to pay funds from its treasury for past harm which was not fatal because "the final judgment should grant the relief to which each party was entitled, even if the party did not demand the relief in its pleadings"). Furthermore, in *Ward*,

[1] To further illustrate this, while the original complaint (Dkt. No. 1) was pending, the Commission issued a new five-year Lottery Courier Service license to Jackpocket on May 23, 2024 which expires May 23, 2029. *See* Dkt. No. 30, Exhibit D. This seems to have been in response to this litigation filed April 18, 2024 because prior published Lottery Courier Licenses to Jackpocket were issued for just one-year to one-month terms. See *Id.*, Exhibits B and C.

the Court declined to provide the declaratory relief requested because "there was no claimed continued violation of federal law or threat of state officials violating the repealed law in the future." *Id.* at 120. IGRA was not repealed like the law in *Ward*. Unlike *Ward*, the Amended Complaint alleges how prospective relief is sought by stating how State Defendants' operation of the lottery vending machines is ongoing, the lottery courier service license is currently active which is allowing Jackpocket to currently operate the mobile gaming application on Reservation land, and the license has been renewed (indicating IGRA will continue to be violated without the relief requested). Dkt. No. 30 ¶¶ 5, 47, 50-60, 66-69, 47-77, 80-84, 88-90. The other cases State Defendants cite do not support their argument for the same reasons. Dkt. No. 37, pp. 10-12.

The Nation's claims do not require the Court to find that past licenses or instances of the lottery operation were invalid retrospectively. State Defendants argue an injunction against the continued operation of the lottery instrumentalities would reverse prior determinations the Commission made. Dkt. No. 37, p. 11. This simply cannot be the standard, as such a standard would allow the state and state officials to escape accountability for ongoing harm after they took a similar action in the past. The Nation seeks redress for ongoing violations of IGRA because no compact was negotiated, and the Nation need not use the mechanisms for redress in IGRA regulations because they do not wish to negotiate at all.[2] If State Defendants' position were accepted, official-action suits against government officials for ongoing violations stemming from their decisions would have to be routinely dismissed thwarting any attempts to seek redress for

[2] The Nation has significant gaming operations. By way of the lottery machines and mobile gaming application providing access to the lottery and other draw games, it is believed those activities decrease business for the Nation. This is the reason the Nation enacted a Class II gaming ordinance and did not provide a license for Class III gaming on its Reservation. Dkt. No. 30 ¶ 39, Exhibit A. The Nation did not wish to negotiate a compact. If the State did, they should have contacted the Nation and complied with the provisions of IGRA mandating a revenue share of proceeds with the Nation. Absent any agreement or contact, it is the Nation's right to request the State stop the gaming activities and enabling others such as Jackpocket to do the same.

decisions resulting in ongoing violations of federal law. Accordingly, State Defendants' motion to dismiss must be denied because State Defendants are proper parties given the relief sought.

B. The New York State Gaming Commission is Not Immune from Suit

Eleventh Amendment immunity is not absolute, and the Commission is not immune from suit because the Commissioners are sued in their official capacities pursuant to the Ex Parte Young doctrine. The Commission argues the Eleventh Amendment bars this suit because they are an arm of the State that did not consent to suits regarding IGRA violations. Dkt. No. 37, p. 6. The Eleventh Amendment does not bar suit against a state in federal court if (1) a state waives its immunity; (2) Congress clearly abrogates state sovereign immunity; or (3) the suit is against a state official and seeks prospective relief. *Unkechaug Indian Nation v. N.Y. State Dep't of Env't Conservation*, 677 F. Supp. 3d 137, 147 (E.D.N.Y. 2023) citing *Va. Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 254-55 (2011). The Nation does not contest that the Commission is an arm of the State or that they did not expressly consent to suits for IGRA violations. However, while the Commission acts under the State's authority, its actions violating federal law are not protected by sovereign immunity because this action is against state officials for prospective relief.

i. The Commission is not entitled to Eleventh Amendment Immunity because the Commissioners are sued herein

The Commission is not entitled to sovereign immunity because this suit seeks the allowed relief against the Commissioners as explained in Section B below. Given the Ex Parte Young exception to Eleventh Amendment immunity, the Commission should not be dismissed. "[W]hen officials sued in their capacity leave office, their successors automatically assume their role in the litigation [and] the real party interest is the government entity, not the named official." *See generally Malek v. NY Unified Ct. Sys.*, U.S. Dist. LEXIS 40167 (E.D.N.Y. 2023). Where "the suit binds the government entity just as would a suit against the entity itself [, and] in such suits the

government in question stands behind the official as being the real party in interest." *Vann v. United States DOI*, 701 F.3d 927, 929 (2012) (quoting *Davis v. Gray*, 83 U.S. (16 Wall.) 203, 220 (1872)). Therefore, the Commission is a proper background party that must remain in this case.

Without any regard for the *Ex Parte Young* doctrine, State Defendants argue all claims should be dismissed against the Commission because of the *Yakama Indian Nation* decision. Dkt. No. 37, p. 8. However, in *Yakama*, the Court dismissed the lawsuit to recover damages from the State's operation of the lottery on reservation lands where the state did not consent to suit and the governor, as the only official sued, could not be sued under Ex Parte Young. *Confederated Tribes & Bands of the Yakama Nation v. Locke*, 176 F.3d 467 (9th Cir. 1999). Although the Court found the state could not be sued for the failure to negotiate a compact under IGRA, the Court stated the Governor was not a proper official because the governor was not charged with operating the state lottery, did not control the lottery or the placement of terminals, but instead the Washington State lottery was operated by a Commission and appointed members who did, and because any judgment would be paid by the State's treasury. *Id.* at 469-470. Here, unlike *Yakama*, the Nation sued the correct Defendants—the Commission and each Commissioner—who have control over the actions alleged and have the power to provide the relief requested and the Nation does not seek monetary damages against the Defendants. *See* N.Y. Rac., Pari-Mut. Wag. & Breed. L. § 102(1) (showing there are seven statutorily authorized Commission members) and § 103(2)(a) (showing the Commission, through its Division of Lottery, operates and administers New York Lottery). Therefore, *Yakama* is clearly distinguishable, and, in fact, supports the Nation's Ex Parte Young argument because the officials sued here have a clear "connection with the enforcement of the act [requested] . . . ." *Id.* at 469 (citations omitted).

II. THE NATION ADEQUATELY PLEAD CLAIMS FOR IGRA VIOLATIONS

A. The Nation Stated a Claim for Equitable Relief

State Defendants argue that the Nation failed to state a claim because IGRA allegedly "does not confer upon the Nation a private right of action to enforce the rights they assert." Dkt. No. 37, p. 12. This argument ignores the nature of relief the Nation seeks and the Court's broad powers to provide redress for ongoing violations of federal law.

Although federal courts have been reluctant to recognize new causes of action seeking damages for violations of the constitution and federal statutes, they have repeatedly emphasized the distinction between damages and injunctive relief, reaffirming the traditional availability of injunctive relief in actions to enforce the Constitution, which "[do] not ask the Court to imply a new cause of action." *United States v. Stanley*, 483 U.S. 669, 683 (1987) (claims for injunctive relief, unlike claims for money damages, are "designed to halt or prevent the constitutional violation . . . [, seek] traditional forms of relief, and '[do] not ask the Court to imply a new cause of action.'") (*quoting Chappell v. Wallace*, 462 U.S. 296, 305 n.2 (1983)); *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001). The distinction between suits for damages and those seeking equitable relief reflects the historical grounding of the latter in the federal courts' traditional equitable powers. *See Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925) ("[p]revention of impending injury by unlawful action is a well-recognized function of courts of equity"). Courts have recognized this power exists for proper Ex Parte Young actions for declaratory injunctive relief against state officials to stop ongoing violations of federal law and conduct the Ex Parte Young analysis. *NY State Police Investigators Assn. v. New York*, U.S. Dist. LEXIS 174028 (N.D.N.Y. 2012); *see generally Confederated Tribes & Bands of the Yakama Nation,* 176 F.3d at 467.

Indeed, federal courts have long been open to suits by private litigants seeking to enjoin ongoing violations of federal law. Surely, the Nation's suit to enforce its federally approved Gaming Ordinance under IGRA is no different. The Nation has a right to bring an injunctive suit against the State for violating IGRA—an act Congress made to benefit Indian nations by providing revenue for gaming on their sovereign lands. There is nothing in IGRA noting there is no private right to an action, and therefore case law instructs that there is an available remedy to enjoin the IGRA violations. *See e.g. Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (claim to enforce State to negotiate a compact pursuant to IGRA was not dismissed or disregarded because IGRA did not provide for a private right of claim, but only because IGRA provided for a statutory scheme to compel the State to negotiate and provided a blue print on how to proceed when they would not negotiate a compact).

Here, the Nation alleges that State Defendants' operation of the New York State lottery and issuance of license allowing Jackpocket to operate their mobile lottery app within the Nation's federally recognized Reservation, without entering into a compact with the Nation, are in direct contravention of IGRA, which preempts any state regulation or control of gaming on Indian lands. Dkt. No. 30 ¶¶ 3, 35-60. The Nation's equitable claims fall squarely within the well-established constitutional cause of action available in federal courts to enjoin the implementation of ongoing violations of federal law. *See e.g. Ex parte Young*, 209 U.S. at 123; *see generally McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819) (holding that "the unavoidable consequence of that supremacy which the constitution has declared" is that state laws that act "to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress" are "unconstitutional and void").

In the present case, the Nation has alleged facts sufficient to show that State Defendants' actions violate IGRA, which recognizes that "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." Dkt. No. 30 ¶ 22 citing 25 U.S.C. § 2701(5). By operating the New York State lottery and permitting the Jackpocket mobile lottery app within the Nation's Reservation without entering into a compact, State Defendants have acted in direct conflict with a federal law that "preempts the all state and local legislation and regulation relating to gambling conducted on 'Indian lands,' as defined in the [IGRA]." *Cayuga Nation,* 6 F.4th at 377.

State Defendants' argument that IGRA does not confer a private right of action on the Nation misapplies the jurisprudence on express/implied statutory rights of action, which primarily developed in the context of actions against private parties for damages—cases that bear no connection to the relief sought in this action. *See, e.g. Cort v. Ash*, 422 U.S. 66, 68 (1975) (defining a four-factor approach to implied causes of action in a shareholder derivative action for damages against corporate directors).[3] This line of authority does not apply here, as this case involves traditional equitable relief against government officials under Ex Parte Young. All Fourth Circuit court opinions State Defendants cited to support their position are unpersuasive and factually distinguishable.

State Defendants first rely on *Alabama v. PCI Gaming Authority*, 801 F.3d 1278, 1293-1300 (11th Cir. 2015), where the State of Alabama sued an Indian tribe to enforce state gambling

[3] *See also, e.g., Cannon v. Univ. of Chicago*, 441 U.S. 677, 730 (1979) (damages action against private universities); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (damages action against accounting firm); *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 13-16, 19-24 (1979) (shareholder derivative damages action against investment advisor); *Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 82, 91-95 (1981) (employer's action for contribution against union); *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 762-64, 770-73 (1981) (employee's damages action against universities).

laws. The Eleventh Circuit held that 18 U.S.C. § 1166—a provision under IGRA codified in the federal criminal code—does not create an implied right of action for states to sue tribal officials to enforce state gambling laws. This makes sense, and further illustrates the Nation's position because IGRA aims to protect Indian nations sovereign lands by mandating compacts for Class III gaming on Indian lands, not a mechanism for states to use to force Indian nations to enforce State gaming laws. The State Defendants' attempt to generalize *Alabama* which held the state did not have an implied right of action to sue the tribes cannot be generalized to argue Indian nations do not have a private right of action.

The other cases cited by State Defendants—*Hartman v. Kickapoo Tribal Gaming Commission*, 319 F.3d 1230, 1232-33 (10th Cir. 2003), *Hein v. Capitan Grand Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260 (9th Cir. 2000), and *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1049 (11th Cir. 1995)—similarly fail to support State Defendants' argument. Each of these cases involved private parties seeking damages or statutory enforcement against Indian nations, none of which implicate a State's violation of IGRA or claims for injunctive or declaratory relief. The Nation's claim rests on a fundamentally different legal basis, namely, the authority of federal courts to stop ongoing violations of federal law.

In sum, the Nation's claims fall squarely within the federal courts' long-established authority to enjoin ongoing violation of federal law, and the Nation has alleged sufficient facts to state a plausible claim for relief.

B. IGRA Preempts All Gaming Activity on Indian Lands, Not Just Indian Gaming on Indian Lands

State Defendants alternatively argue that the Nation's claims fail because IGRA regulates only Indian gaming on Indian lands and does not preempt state-operated gaming activities on Indian lands. Dkt. No. 37, pp. 14-19. To support this position, they rely exclusively on the *Yakama*

District Court decision, which held that IGRA does not preempt a state-run lottery on Indian reservations, reasoning that IGRA applies solely to Indian gaming activities, not all gaming activities on Indian lands. Dkt. No. 37, pp. 14-18 citing *Confederated Tribes & Bands of the Y v. Locke*, 968 F. Supp. 531 (E.D. Wash. 1997), *vacated* 176 F.3d 467. *Yakama* was vacated by the Ninth Circuit, and its analysis and position were never adopted by the appellate court. And, the reasoning in the District Court level *Yakama* decision is directly contrary to a prior decision from the Ninth Circuit which affirmed a District of Idaho decision holding that: "in the absence of a tribal gaming ordinance and a compact, neither the Tribe nor any non-tribal entity, including the State of Idaho, may conduct Class III gaming on the reservation." *Coeur d'Alene Tribe*, 842 F. Supp. at 1268, *aff'd sub nom.* 51 F.3d 876 (9th Cir. 1995).

In any event, the precedential cases in the Second Circuit consistently and unequivocally holds that IGRA preempts all state and local legislation and regulation related to gaming conducted on Indian lands, not just Indian gaming activities on Indian lands. The Second Circuit states:

> As we and our sister circuits have held, *IGRA preempts all state and local legislation and regulation relating to gambling conducted on "Indian lands,"* as defined in that statute. *See Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 469-70 (2d Cir. 2013) (noting that IGRA "*was intended to expressly preempt the field in the governance of gaming activity on Indian lands*"), quoting *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996); *see also, e.g.*, *Pueblo of Pojoaque v. New Mexico*, 863 F.3d 1226, 1235 (10th Cir. 2017) (IGRA "expressly preempt[s] state regulation of gaming activity that occurs on Indian lands") (emphasis omitted).

Cayuga Nation, 6 F.4th at 377 (emphasis added).

Effectively, the Second Circuit adopted the Eighth Circuit's analysis for its holding that IGRA preempts all state and local regulation of gaming activities on Indian lands. *See Mashantucket Pequot Tribe*, 722 F.3d 457, 469-70 (quoting *Gaming Corp.*, 88 F.3d at 544). In its analysis on the issue of whether IGRA completely preempts state laws regulating gaming on Indian

lands, the Eighth Circuit thoroughly examined IGRA's text, structure, legislative history, and jurisdictional framework and reasoned as follows.

First, as noted by the Eighth Circuit, one of the stated purposes of IGRA is "the establishment of Federal standards for *gaming on Indian lands*." *Gaming Corp.*, 88 F.3d at 544 quoting 25 U.S.C. § 2702(3) (emphasis added). The statue's express language further declares that "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." *Id.* quoting 25 U.S.C. § 2701(5). "In interpreting a statute, we look first to the language of the statute itself. . . . When the language of the statute is unambiguous, judicial inquiry is complete." *Marvel Characters v. Simon*, 310 F.3d 280, 290 (2d Cir. 2002) (internal citation and quotation marks omitted). The plain language of IGRA unambiguously establishes federal authority and tribal exclusivity over "gaming on Indian lands," without limitation as to whether the gaming activities are conducted by Indians or non-Indians on Indian lands.

Second, in its analysis of IGRA's legislative history, the Eight Circuit highlighted that the Senate committee report contains a strong statement about its preemptive force: "S. 555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands." *Id.* quoting S. Rep. No. 446, 100th Cong., 2d Sess. 6 (1988). Indeed, this statement demonstrates Congress's intent that IGRA have extraordinary preemptive power.

Third, as the Eighth Circuit observed, Congress left states with no regulatory role over gaming conducted on Indian lands except as expressly authorized by IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact. IGRA's legislative history contains numerous other statements by the drafter of the bill, clarifying

the Legislature's intent that state law regulating gaming activities would not be applicable *on Indian lands* unless explicitly authorized through a tribal-state compact. For example, in the proceedings and debates regarding S. 555, Senator Daniel Inouye, one of the primary drafters of the bill, explained:

> - It is a long- and well-established principle of Federal-Indian law as expressed in the United States Constitution, reflected in Federal statutes, and articulated in decisions of the Supreme Court, that unless authorized by an Act of Congress, the jurisdiction of State governments and the application of State laws do not extend to Indian lands (134 Cong. Rec. S. 12643, 24022).
>
> - Consistent with these principles, the committee has developed a framework for the regulation of gaming activities on Indian lands . . . The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of State laws to activities conducted on Indian land is a tribal-State compact (*id.* at 24023).
>
> - . . . under S. 555, there is no blanket transfer to any State of any jurisdiction over Indian lands. Indian tribes are sovereign governments and exercise rights of self-government over their lands and members. This bill does not seek to invade or diminish that sovereignty (*Id.*);
>
> - [T]he bill is intended to leave intact the tribe's regulatory authority over all lands within the reservation boundaries and upon trust or restricted lands outside the boundaries (*id.* at 24025).

Similarly, Senator Evans stated during the debate:

> I wish to make it very clear that the committee has only provided for a mechanism to permit the transfer of limited State jurisdiction over Indian lands where an Indian tribe requests such a transfer as part of a tribal-State gaming compact for class III gaming. We intend that the two sovereigns -- the tribes and the States -- will sit down together in negotiations on equal terms and come up with a recommended methodology for regulating class III gaming on Indian lands. Permitting the States even this limited say in matters that are usually in the exclusive domain of tribal government has been permitted only with extreme reluctance.

Id. at 24024. These statements of legislative intent make it abundantly clear that the focus of the statute is on the nature of the activity on Indian lands, not the identity of who is conducting those activities. The legislative history repeatedly underscores that state jurisdiction over gaming activities on Indian lands can only be extended through a tribal-State compact. Nowhere in the text or legislative history does IGRA distinguish between Indian-conducted and non-Indian-conducted gaming activities on Indian lands. The statute's intent was to establish a comprehensive federal and tribal framework governing all gaming on Indian lands, regardless of who is involved.

Finally, State Defendants' reliance on 18 U.S.C. § 1166 to argue that New York state law governing the state-operated lottery applies on the Nation's Reservation in the same manner, and to the same extent as elsewhere in the state, is unpersuasive. Section 1166 is a criminal statute making it a federal crime to commit an act or omission involving gambling where the conduct would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the state's laws governing the licensing, regulation, or prohibition of gambling. *See United States v. Cook*, 922 F.2d 1026, 1034 (2d Cir. 1991). It does not subject Indian lands to the broad application of state civil regulatory laws, nor does it authorize the application of state laws governing state-operated gaming, such as lotteries, on Indian reservations. If State Defendants' interpretation of § 1166 were correct—that all state laws and regulations governing gambling, including the licensing of commercial casinos, for example, apply equally on Indian lands— the state would have the unilateral authority to grant a commercial casino license to any applicant seeking to operate on the Nation's Reservation. This absurd result would effectively allow New York State to bypass any requirement of IGRA entirely, imposing its own licensing scheme and regulatory framework on tribal lands without the Nation's participation or consent. Such an interpretation directly contradicts IGRA's intent to protect tribal sovereignty and to ensure

that gaming on Indian lands is regulated by tribal governments or through mutually negotiated Tribal-State compacts. Granting the state unilateral control over gaming on Indian lands would not only undermine tribal self-governance but would also violate the clear legislative framework Congress set forth in IGRA. Such a broad and unchecked extension of state power onto Indian lands is precisely what IGRA was designed to prevent, and State Defendants' interpretation must be rejected as contrary to both the letter and spirit of the law.

In sum, IGRA clearly preempts all state regulation of gaming activities on Indian lands, regardless of whether such activities are conducted by Indians or non-Indians. State Defendants' attempt to carve out an exception for state-operated lotteries is unsupported by the text, structure, or legislative history of IGRA. The Nation has sufficiently alleged that State Defendants' actions violate IGRA's preemptive framework, and State Defendants' motion to dismiss should be denied.

III. LEAVE TO AMEND

As set forth above, the Amended Complaint conveys subject matter jurisdiction and viable claims for relief. Should the Court determine that the motion to dismiss has merit, the Nation respectfully requests the opportunity to further amend the complaint. Leave to amend should be freely given "[i]n the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Highland Capital Mgt., L.P. v. Schneider*, U.S. Dist. LEXIS 18131 *9 (S.D.N.Y. 2004) ("Rule 15(a) permits a party to amend its complaint upon leave of the court, and such 'leave shall be freely given when justice so requires." (quotations omitted)); *Cooper v. City of NY*, U.S. Dist. LEXIS 142922 *18 (S.D.N.Y. 2013) (stating leave to amend is in the sound discretion of the court.).

The Nation is the only party harmed by the delay in this case given the illegal gaming operations occurring on its Reservation land. State Defendants would not be prejudiced by any delay an amended complaint may bring. Furthermore, there is no bad faith, unfair prejudice, or repeated failure to cure deficiencies here. Because none of those circumstances are present, the Nation should be granted leave to replead any claims found to be deficiently pleaded or to restate the relief sought.

CONCLUSION

For the reasons set forth in this memorandum, and any other reasons that may appear to the Court or be presented at any hearing on the motion, Plaintiff respectfully requests that the Court deny State Defendants' motion to dismiss.

Dated: September 6, 2024

BARCLAY DAMON LLP

By: _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 6, 2024, he filed the foregoing document by electronically filing with the Clerk of the Court herein, using the CM/ECF system, which sent notification of such filing electronically to all counsel of record.

By: 
David G. Burch, Jr.