No. 24-6221

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Comanche Nation,

Plaintiff/Appellee,

v.

Lori Gooday Ware, et al.,

Defendants/Appellants.

On Appeal from the United States District Court
for the Western District of Oklahoma
The Honorable Charles B. Goodwin
Case No. CIV-22-00425-G

ANSWER BRIEF OF COMANCHE NATION, PLAINTIFF/APPELLEE

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ORAL ARGUMENT NOT REQUESTED

April 29, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

Other Authorities

GLOSSARY

Nation: Comanche Nation, which is the only remaining plaintiff. The other original plaintiff, Kiowa Tribe, dismissed its claims early pursuant to settlement on February 28, 2023 (App. Vol. 3 at 136, 139, and 146), as discussed in the Statement of the Case.

FSA Defendants: the tribal official defendants identified by the district court in the appealed order, App. Vol. 3 at 235 n.1: Lori Gooday Ware, Fort Sill Apache Tribe ("FSAT") Chairwoman; Pamela Eagleshield, FSAT Vice-Chairman; James Dempsey, FSAT Secretary-Treasurer; FSAT Committee Members Jeanette Mann, Jennifer Heminokeky, and Dolly Loretta Buckner; Philip Koszarek, FSAGC ("Fort Sill Apache Gaming Commission") Chairman; Naomi Hartford, FSAGC Vice-Chairman; and FSAGC Commissioners Michael Crump, Lauren Pinola, and Debbie Baker.

FSAT: Fort Sill Apache Tribe.

IGRA: Indian Gaming Regulatory Act, 25 U.S.C. §§2701 *et seq.*

NIGC: National Indian Gaming Commission, established by 25 U.S.C. §2704.

RICO: Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §1961, *et seq.*

PRIOR OR RELATED APPEALS

There are no prior or related appeals.

STATEMENT OF JURISDICTION

The district court possesses jurisdiction under 28 U.S.C. §1331 (federal question) and §1362 (Indian tribes in controversies arising under federal law). Comanche Nation (sometimes "Nation")[1] asserted claims under an Indian treaty (First Treaty of Medicine Lodge), under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§2701 *et seq.*, and under the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961, *et seq.* Only the federal Acts are involved in this appeal.

This Court has appellate jurisdiction over a collateral order to review strictly the legal issues related to sovereign immunity that were raised below.[2] FSA Defendants[3] seek to raise numerous sovereign immunity issues that they forfeited by failing to raise them below. By failing to raise them, the District Court did not address them, and no appealable "collateral order" exists as to them.[4] Therefore this

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[1] *See* Glossary. Although Comanche Nation joined with Kiowa Tribe in commencing this action, the Kiowa Tribe entered a settlement and dismissed its claims early, on February 28, 2023. App. Vol. 3 at 136, 139, and 146.

[2] *E.g., Paugh v. Uintah Cnty.*, 47 F.4th 1139, 1152 (10th Cir. 2022); *Vette v. K-9 Unit Deputy Sanders,* 989 F.3d 1154, 1162 (10th Cir. 2021); *Timpanogos Tribe v. Conway,* 286 F.3d 1195, 1199 (10th Cir. 2002).

[3] "FSA Defendants" is defined in the Glossary and in the district court's order appealed herein, App. Vol. 3 at 235 n.1.

[4] *Watkins v. Healy,* 986 F.3d 648, 658-59 (6th Cir. 2021) ("The collateral-order doctrine does not permit us … to consider Healy's five other issues. Healy did not raise his civil conspiracy and due-process arguments … to the district court; his

Court lacks jurisdiction to consider FSA Defendants' new arguments. Additionally, the collateral order doctrine does not entitle FSA Defendants to raise other issues which are not collateral, such as whether Comanche Nation has stated a claim for injunctive relief under RICO.[5]

STATEMENT OF THE ISSUES

The district court denied a motion to dismiss Comanche Nation's claims to enjoin FSA Defendants' operation of an illegal casino that is draining essential revenues from Comanche Nation's nearby lawful casinos, in violation of IGRA and RICO, and for related damages under RICO. In their motion to dismiss FSA Defendants did not raise virtually any of the sovereign immunity arguments they press on appeal, which are forfeited and waived by their failure to argue for "plain error" review, as discussed below. In addition to forfeiture and waiver, the issues presented are:

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forfeiture means that the district court issued no determination regarding these issues that could be considered collateral.").

[5] *E.g., Tachias v. Sanders,* 130 F.4th 836, 842 (10th Cir. 2025) ("Appellate jurisdiction based on the collateral-order doctrine is limited to the questions of law necessary to determine the interlocutory issue;…."); *Watkins v. Healy,* 986 F.3d 648, 659 (6th Cir. 2021) (collateral order review does not extend to other issues); *Tamiami Partners, Ltd. ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212, 1221–22 (11th Cir. 1999) (same, refusing to consider "failure to state a claim" for IGRA-related tribal claims of sovereign immunity).

1. Has the IGRA, 25 U.S.C. §§2701 *et seq.* ("IGRA") abrogated FSAT's tribal immunity which FSA Defendants invoke as their basis for avoiding Comanche Nation's claim for an injunction against their ongoing violations of IGRA?

2. Does the *Ex parte Young* doctrine apply to Comanche Nation's claims against FSA Defendants in their official capacities to enjoin them from ongoing violations of IGRA and RICO?

3. On Comanche Nation's damages claim against FSA Defendants in their individual capacities, is FSAT (the tribe) the "real party in interest"?

4. In addition to FSA Defendants' forfeiture and waiver of the defense of qualified immunity to Comanche Nation's damages claim against them in their individual capacities, is that defense inapplicable because the federal law provisions that Comanche Nation alleges the FSA Defendants violated are unambiguous and thus "clearly established"?

STATEMENT OF THE CASE

Briefly, as documented below: FSA Defendants are officials of the Fort Sill Apache Tribe ("FSAT"), which has never had a reservation in Oklahoma, but instead has a reservation in New Mexico. In 2022 FSA Defendants opened, and are continuing to operate a casino in southwestern Oklahoma in clear violation of, *inter alia*, 25 U.S.C. §2719(a) of IGRA, which prohibits new casinos on land acquired after IGRA's enactment on October 17, 1988 (with exceptions inapplicable here).

Comanche Nation is an Oklahoma tribe with nearby lawful casinos on its Oklahoma reservation, and FSAT's illegal casino is draining significant revenues from the Nation's lawful ones.

Comanche Nation brought this action asserting claims to enjoin FSA Defendants from continuing to operate their casino in violation of IGRA and RICO and for damages against them in their individual capacities under RICO. The district court denied FSAT Defendants' motion to dismiss those claims, and they now assert a variety of contentions of sovereign immunity for the first time on appeal.

Factual and Procedural Background: Comanche Nation joined with Kiowa Tribe in bringing this action on May 24, 2022 to prevent operation of the FSAT's Warm Springs Casino, which is unlawfully operated by FSA Defendants, draining revenues from Comanche Nation's lawful nearby casinos. App. Vol. 1 at 34.[6] The two tribes also sought a temporary restraining order (App. Vol. 1 at 62), which was denied (App. Vol. 1 at 220). The Warm Springs Casino was then opened on June 15, 2022 (App. Vol. 2 at 17, ¶53), which (as discussed in argument) violates, *inter alia,* 25 U.S.C. §2719(a) (prohibiting new casinos on land acquired after IGRA's enactment on October 17, 1988).

[6] As to a tribe's procedural right to protect its lawful casinos from competition by allegedly unlawful ones, *see, e.g., Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt,* 331 F.R.D. 5, 12 (D.D.C. 2019), and authorities cited therein.

The next day on June 16, 2022, the two tribes filed a First Amended Complaint (App. Vol. 2 at 3), alleging claims against the FSA Defendants in Counts III-V.[7] They concurrently filed a motion for preliminary injunction against the FSA Defendants (App. Vol. 2 at 202). On July 7, 2022, the FSA Defendants filed a motion to dismiss the First Amended Complaint under Fed.R.Civ.P. 12(b)(6) (failure to state a claim for relief) and 12(b)(7) (failure to join necessary parties). App. Vol. 2 at 237. FSA Defendants also responded to the motion for preliminary injunction. App. Vol. 3 at 4. The district court denied the motion for a preliminary injunction (App. Vol. 3 at 254-57), and that denial is not the subject of this appeal.

Comanche Nation's two pending claims which are the subject of this appeal are set forth in its Amended Complaint, App. Vol. 2 at 3, Counts IV and V. Comanche Nation will discuss the necessary details of those claims below, but for context, Comanche Nation briefly summarizes all of its claims against both sets of Defendants (federal and FSAT), with their dispositions:

Count I: Fed. Defs.	The U.S. unlawfully transferred the Tsalote Allotment in Trust to FSAT without Comanche Nation's written consent as required by 25 C.F.R. §151.7 (formerly §151.8).	Dismissed, holding claim is barred by the statute of limitations.

[7] In its appendix FSA Defendants have overwritten the page numbers of Plaintiff's First Amended Complaint with appendix number references.

Count II: Fed. Defs.	Warm Springs Casino is unlawfully placed on the KCA Reservation in violation of the First Treaty of Medicine Lodge.	Dismissed, holding the KCA Reservation is disestablished.
Count III: FSAT Defs.	Liability for violation of the First Treaty of Medicine Lodge	Dismissed, for same reasons as Count II
Count IV: FSAT Defs.	Warm Springs Casino violates IGRA for two independent reasons: (1) it is constructed on the KCA Reservation, and (2) IGRA prohibits gaming on lands acquired by the U.S. for a tribe after October 17, 1988, with exceptions inapplicable here (25 U.S.C. §2719).	Dismissal denied because Comanche Nation has "adequately stated a claim to enjoin the casino's class III gaming due to its being conducted in violation of the [Oklahoma tribal] Compact"
Count V: FSAT Defs.	FSA Defendants are violating RICO by engaging in an illegal gambling business under 18 U.S.C. §1955 and money laundering under 18 U.S.C. §§1956 and 1957 because the Warm Springs Casino violates IGRA and is unauthorized under Oklahoma law.	Dismissal denied because Comanche Nation has plausibly plead a RICO claim against the FSA Defendants.
Count VI: Fed Defs.	To Compel NIGC to enforce the IGRA's prohibition against maintaining an unauthorized casino on Indian lands	Dismissed, holding that Comanche Nation's relief would only speculatively redress the harm alleged.

App. Vol. 3 at 204-34 (federal defendants); App. Vol. 3 at 239-57 (FSAT Defendants).[8]

[8] Comanche Nation may later appeal the interlocutory dismissal of its claims against the federal defendants, which derive from FSAT's exploitation of the same kind of failures by NIGC to perform its statutory decision-making duties -- thus preventing an appealable final order -- of which FSAT itself complained in *Fort Sill Apache*

Most relevant here, the court denied FSA Defendants' motion to dismiss Comanche Nation's Counts IV and V for violations of IGRA and RICO, respectively. App. Vol. 3 at 257. Comanche Nation discusses those two claims in depth below. Comanche Nation notes that the district court also held that a portion of the Kiowa-Comanche-Apache ("KCA") Reservation was disestablished (App. Vol. 3 at 242-45), on which basis the court dismissed Count III of Comanche Nation's claims against FSA Defendants. App. Vol. 3 at 239-45. That interlocutory ruling is not involved in this appeal, although Comanche Nation may separately appeal it later. However, even if KCA Reservation was disestablished, it is still recognized as Comanche Nation's "reservation" within Oklahoma under 25 C.F.R. §151.2, as the district court recognized (App. Vol. 3 at 205 n.3), and also has significance as a "former reservation" under important IGRA provisions, including, for example, 25 U.S.C. §2719(a)(2)(A)(i).

Sovereign immunity contentions: With respect to Comanche Nation's two claims from which FSA Defendants assert sovereign immunity in this appeal -- i.e., Comanche Nation's Counts IV and V of its First Amended Complaint: In their motion to dismiss those claims, FSA Defendants argued only: (i) that they are immune from RICO claims because they were acting in their official capacities and

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Tribe v. Nat'l Indian Gaming Comm'n, 103 F. Supp. 3d 113, 121 (D.D.C. 2015).

FSAT is not a "person" under RICO (App. Vol. 2 at 259-60), and (ii) that tribal officials share the tribe's sovereign immunity, and *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908) ("*Ex parte Young*") did not apply because it requires a "non-frivolous" claim and "there is no factual or legal basis for the claims" asserted in the Amended Complaint. App. Vol. 2 at 261-62.[9] FSA Defendants did not make the other sovereign immunity arguments raised in their Opening Brief, including but not limited to an assertion of qualified immunity, which they appear to admit they are raising for the first time on appeal (notably without arguing for "plain error" review). Open. Br. at 31.[10]

On February 28, 2023 (long before the district court's September 30, 2024 rulings on defendants' motions to dismiss), Kiowa Tribe entered a settlement agreement and dismissed its claims with prejudice. App. Vol. 3 at 136, 139, and 146.

[9] FSA Defendants also asserted immunity by citing *Gingras v. Rosette,* 2016 WL 2932163, at *28 (D. Vt. May 18, 2016), *aff'd*, 922 F.3d 112 (2d Cir. 2019), but the district court there only held that a tribe is not a "person" under RICO, while repeatedly recognizing that *Ex parte Young* deprived tribal officials from immunity against the RICO claims for injunctive relief. *Id*. at *5, *6, *7, *8, *20, and *28. The Second Circuit affirmed that *Ex parte Young* holding and extended it to claims for injunctive relief against violations of state law. *Gingras v. Think Fin., Inc.,* 922 F.3d 112, 121 (2d Cir. 2019).

[10] FSA Defendants also argued for sovereign immunity in their response to the motion for preliminary injunction, which was denied on other grounds without addressing immunity. In that response FSA Defendants did not assert qualified immunity or most of their other arguments herein, which in any event were not made in their motion to dismiss Comanche Nation's Counts IV and V.

Following Kiowa Tribe's settlement and dismissal, the FSA Defendants on March 21, 2023 filed a "Supplemental" motion to dismiss Comanche Nation's Amended Complaint, to object to Comanche Nation's standing and again assert that Comanche Nation had failed to state a claim for relief. App. Vol. 3 at 147. In their Supplemental motion, FSA Defendants did not raise sovereign immunity as a defense at all, in any form.

Turning to Comanche Nation's specific allegations against FSA Defendants, the Nation alleges in its First Amended Complaint that FSA Defendants have installed and are operating illegally FSAT's Warm Springs Casino, which is diverting substantial revenues from the Nation's lawfully operated nearby casinos, upon which the Nation depends for most of its important and essential public services. App. Vol. 2 at 18-19 (¶¶56-59).

Comanche Nation's factual allegations set forth the indisputable illegality of the Warm Springs Casino.[11] Comanche Nation alleged that the parcel of land on which the Warm Springs Casino is built was formerly allotted by the U.S. to George Tsalote, a Kiowa Tribe member; it is thus known as the "Tsalote Allotment," and has never been part of FSAT's reservation, which is located exclusively in New Mexico.

[11] Comanche Nation's factual allegations are assumed to be true for purposes of review on a motion to dismiss. *McAuliffe v. Vail Corp.,* 69 F.4th 1130, 1143 (10th Cir. 2023).

App. Vol. 2 at 11-12 (¶¶27-28), 13 (¶¶35-36), 14 (¶38), and 15 (¶43). Prior litigation between the Comanche Nation, the FSAT, and the BIA in the Western District of Oklahoma resulted in a court-approved settlement agreement between the parties that FSAT has no title or jurisdiction within the former KCA Reservation in which the Tsalote Allotment is located. App. Vol. 2 at 13-15 (¶¶37-43) (Case No. 05-CV-328-F). It is undisputed that FSAT has never had a reservation within the State of Oklahoma; its only reservation is located in New Mexico. App. Vol. 2 at 15 (¶43).

On June 26, 2001, the U.S. deeded the Tsalote Allotment to the FSAT, which FSAT held for more than 20 years until February 2022, when it announced its intent to build the Warm Springs Casino on it. App. Vol. 2 at 16-17 (¶¶46-47). IGRA prohibits a new casino on lands acquired by the U.S. for a tribe after the date of its enactment on October 17, 1988 (25 U.S.C. §2719(a)), and requires a separate license with NIGC review before opening the casino on a new site (25 U.S.C. §2710(b) and (d), 25 C.F.R. Part 559). FSAT informed NIGC of its intent to build Warm Springs Casino and requested a "60-day [e]xpedited review pursuant to 25 C.F.R. §559.2(a)(1)." App. Vol. 2 at 17 (¶49). NIGC's Chair was required to "respond to the tribe's request, either granting or denying the expedited review, within 30 days." 25 C.F.R. §559.2(a)(1). However, NIGC neither granted nor denied FSAT's request within 30 days, or ever, and has still never purported to approve the casino notwithstanding its violation of 25 U.S.C. §2719(a). App. Vol. 2 at 17 (¶¶49-52).

FSA Defendants caused Warm Springs Casino to be built anyway, and opened the casino for Class II and Class III gaming (App. Vol. 2 at 17 (¶53)), in violation of 25 U.S.C. §2719(a) and 25 C.F.R. Part 559. App. Vol. 2 at 17 (¶¶49-53). The casino's violation of IGRA also violate FSAT's Oklahoma-tribal compact. App. Vol. 2 at 26-27 (¶¶94-99). FSA Defendants continue to illegally operate Warm Springs Casino, offering both Class II and Class III gaming in competition with Comanche Nation's *lawfully* established facilities, diverting substantial revenues from Comanche Nation's government programs and public services. App. Vol. 2 at 17-18 (¶¶53-56).

As Comanche Nation alleged in its First Amended Complaint, NIGC is statutorily required to disapprove FSAT's Warm Springs Casino application under the unambiguous provision of 25 U.S.C. §2719(a), which prohibits construction of a casino on Indian lands acquired in trust after October 17, 1988 (the date of IGRA's enactment), with exceptions inapplicable here. App. Vol. 2 at 25-26 (¶¶88, 90-93). Section 2719(a) provides in relevant part:

> Except as provided in subsection (b), gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—
>
> > (1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

> (2) the Indian tribe has no reservation on October 17, 1988, and--
>
> (A) such lands are located in Oklahoma and--
>
> (i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or
>
> (ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or
>
> (B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

See Addendum B, *infra*. The Warm Springs Casino indisputably falls within this prohibition; FSAT has no current or former reservation in Oklahoma, nor does the U.S. hold land for it in trust or restricted status contiguous to the Tsalote Allotment. 25 U.S.C. § 2719(b) (not quoted above) lists other exceptions that indisputably do not apply, since *inter alia* the Governor of Oklahoma has not approved the Warms Springs Casino. The reference in §2719(a) to "gaming regulated by this chapter" includes class I, class II, and class III gaming. 25 U.S.C. §2703(6), (7), and (8).

Comanche Nation along with a multi-tribal committee for the KCA Reservation demanded that NIGC act on FSAT's application to build and operate the Warm Springs Casino on the Tsalote Allotment. App. Vol. 2 at 17 (¶¶48-52).[12] The NIGC has trust and fiduciary duties to affected tribes to ensure that such casinos are

[12] FSA Defendants wrongly assert without authority that by failing to respond the NIGC "implicitly" disagrees that Warm Springs Casino is illegally operating in violation of 25 U.S.C. §2719(a). Open.Br. at 4.

built and operated in conformity with IGRA's mandates. App. Vol. 2 at 36-37 (¶137 quoting *Felix S. Cohen, Handbook of Federal Indian Law* at 225 (1982 ed.)).[13] If a casino like Warm Springs Casino is built and/or operated illegally, NIGC has the responsibility of enforcing NIGC's provisions by ordering closure of the casino and imposing applicable fines. App. Vol. 2 at 36 (¶136, citing 25 U.S.C. §2705(a)(1), (2) and 25 U.S.C. §2706(a)(5)). NIGC is also required to report the unlawful casino to appropriate law enforcement officials. App. Vol. 2 at 36 (¶135, citing 25 U.S.C. §2716(b)).

Comanche Nation claims in its Count IV that FSA Defendants are continually violating IGRA and are subject to prospective injunctive relief against further Class III gaming on the Tsalote Allotment, because the Warm Springs Casino's violations also violate the FSAT-Oklahoma Tribal Compact (Ex. 7 to the First Amended Complaint). App. Vol. 2 at 25-28 (¶¶87-101). Comanche Nation alleges that *inter alia* the "tribal-state compact between the FSA Tribe and Oklahoma [its Exhibit 7] incorporates [the] location restrictions found in IGRA" (App. Vol. 2 at 26 (¶94)); that the U.S. transfer of the Tsalote Allotment in trust to FSAT violated 25 C.F.R. §151.7 (then §151.8); and that: "The FSA Tribe also acquired the Tsalote Allotment

[13] *E.g., United States v. 1020 Elec. Gambling Machines,* 38 F. Supp. 2d 1219, 1223 (E.D. Wash. 1999) ("When the government manages a tribal resource, and the government's responsibilities are defined by statute or regulation, a fiduciary relationship arises.").

after October 17, 1988, does not meet an exception, and therefore the FSA Tribe has no authority under IGRA to conduct gaming there." App. Vol. 2 at 27 (¶¶98-99). In Count V, Comanche Nation claims that FSA Defendants are liable under RICO for their continuing violations of federal law by illegal gambling under 18 U.S.C. §1955, money laundering under 18 U.S.C. §§1956 and 1957, and illegal gambling under Oklahoma criminal law, 21 O.S. §§982-87. App. Vol. 2 at 28-36 (¶¶102-131).[14]

Thus FSA Defendants invoke sovereign immunity with respect to Comanche Nation's claim under IGRA for injunctive relief (Count IV), and under RICO for injunctive relief and damages (Count V). The district court addressed these two counts in its September 30, 2024 Order, App. Vol. 3 at 245-53. As to Comanche Nation's IGRA claim (Count IV), the court cited, *inter alia,* Comanche Nation's allegations that "operation of the Warm Springs Casino is violative of 25 U.S.C. §2719(a), which prohibits gaming on lands acquired in trust after October 17, 1988." App. Vol. 3 at 246-47. The court quoted IGRA's remedial provision (25 U.S.C. §2710(d)(7)(A)(ii)) which expressly authorizes a tribe to seek injunctive relief against unlawful class III gaming activity on Indian lands in violation of a tribal-state compact (App. Vol. 3 at 246). The district court summarized in part the basis

[14] Illegal gambling businesses fall squarely within RICO. *E.g., United States v. Useni,* 516 F.3d 634 (7th Cir. 2008) (unlawfully conducted bingo and pull-tab games); *United States v. Aucoin,* 964 F.2d 1492, 1494 (5th Cir. 1992) (illegal gambling business).

of Comanche Nation's allegations that the Warm Springs Casino violates the FSAT-Oklahoma Compact (App. Vol. 3 at 247); those allegations are more fully summarized above, and include, importantly, the Compact's incorporation of IGRA's location prohibition and the acquisition by FSAT of the Tsalote Allotment after the IGRA enactment cutoff date of October 17, 1988, disqualifying it for gaming under IGRA pursuant to 25 U.S.C. §2719(a). The district court held that Comanche Nation had stated a plausible claim for relief and rejected FSA Defendants' procedural objections. App. Vol. 3 at 248-51. The district court also addressed Comanche Nation's RICO claim (Count V), finding that Comanche Nation has plausibly stated a claim for relief that FSA Defendants were knowingly operating Warm Springs Casino as an "enterprise" for an illegal gambling business in violation of federal and Oklahoma law. App. Vol. 3 at 251-53. The court rejected FSA Defendants' assertion that they are not "persons" subject to RICO liability, and held that Comanche Nation had sufficiently alleged FSA Defendants had violated RICO under its four elements. App. Vol. 3 at 252-53.

SUMMARY OF THE ARGUMENT

FSA Defendants are indisputably operating the Warm Springs Casino illegally. The casino violates 25 U.S.C. §2719(a) because it is built on the Tsalote Allotment which FSAT purports to have acquired from the U.S. in trust *after* October 17, 1988, the date of IGRA's enactment. This violation causes the casino to also

violate the Oklahoma-FSAT Compact, as alleged in App. Vol. 2 at 26-27 (¶¶94-99). The Warm Springs Casino is draining crucial revenues from Comanche Nation's nearby, lawfully operated casinos. Comanche Nation seeks injunctive relief against ongoing violations of federal law and damages for Comanche Nation's losses. The district court denied the FSA Defendants' motion to dismiss the Comanche Nation's IGRA and RICO claims, and the district court's decision should be affirmed for at least the following reasons: forfeiture and waiver; IGRA abrogates tribal sovereign immunity in this case; the *Ex parte Young* doctrine provides an exception to tribal officials' immunity; and tribal officials are not immune for damages claims against them in their individual capacities.

Forfeiture and waiver: FSA Defendants do not comply with this Court's requirement in 10th Cir. R. 28.1 that they "cite the precise references in the record" where the issues they argue on appeal were "raised and ruled on." This appears intentional because they did not raise their current arguments for sovereign immunity below, which were accordingly not ruled on in the district court's order denying their motion to dismiss. App. Vol. 2 at 259-62 (motion to dismiss). Nor have FSA Defendants argued for "plain error" review in this Court for the issues they forfeited below. Comanche Nation identifies below their forfeitures with specific arguments which include, but are not limited to, their assertion of "qualified immunity" for the first time on appeal.

Injunction against violating IGRA: FSA Defendants claim they are protected by FSAT's *tribal* immunity for their violations of IGRA, but there is no such tribal immunity as to Comanche Nation's injunction claim under 25 U.S.C. §2710(d)(7)(A)(ii), which expressly authorizes a suit to enjoin unlawful class III gaming on Indian lands in violation of a state-tribal compact. *Michigan v. Bay Mills Indian Community,* 572 U.S. 782, 791, 134 S. Ct. 2024, 2032 (2014). FSA Defendants incorrectly assert that Comanche Nation has alleged the Tsalote Allotment (on which Warm Springs Casino resides) is not "Indian lands" under IGRA. Comanche Nation expressly alleged that the Tsalote Allotment is "Indian lands" -- *just not FSAT's "Indian lands"* (App. Vol. 2 at 27, ¶98) -- and FSA Defendants' contrary contention here is forfeited and waived since they not only failed to make it but argued just the *opposite* to the district court. Finally, since the district court may rule that the Tsalote Allotment was validly transferred to FSAT, Comanche Nation is entitled to seek relief on that alternative basis in any event under Fed.R.Civ.P. 8(d)(2). FSA Defendants also argue for the first time on appeal that §2710(d)(7)(A)(ii) applies only to a suit by a tribe with a compact covering the challenged class III gaming to enjoin its own gaming, rather than "neighboring tribes" seeking to prevent another tribe's unlawful casino from draining their revenues from their lawful nearby casinos. That contention is forfeited and waived since it was not raised below and FSA Defendants have not sought "plain error"

review. It is also contrary to the unambiguous statutory language, as cogently held by the only federal court to address that contention. FSA Defendants also assert that Comanche Nation inadequately alleges violation of a tribal-state compact, but that contention relies on their invalid "Indian lands" argument discussed above. *See* Prop. I(A).

Ex parte Young: Comanche Nation's claims for an injunction to prohibit ongoing violations of federal law (under both IGRA and RICO) fall within *Ex parte Young,* which this Court recognizes to apply to suits against tribal officials. FSA Defendants argue that FSAT (the tribe) is the "real party in interest," but that contention has been repeatedly rejected by federal courts on claims for prospective injunctive relief under *Ex parte Young*. FSA Defendants also argue that injunctive relief against violating IGRA is contrary to its "detailed remedial scheme" as described in *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S. Ct. 1114, 1117 (1996) -- another contention that FSA Defendants forfeited below and waived here, and which is meritless is any event. *Seminole Tribe* is limited to claims for injunctive relief to require a state to negotiate a compact in good faith, which is subject to intricate IGRA procedures described in that decision. Its holding has been distinguished by numerous courts from other claims for injunctive relief which are not governed by similar intricate procedures, including a claim for an injunction as authorized by 25 U.S.C. §2710(d)(7)(A)(ii). Finally, FSA Defendants argue that

there is a split of authority on whether RICO provides for a claim for injunctive relief asserted by a private party. Comanche Nation discusses the split of authority in case the Court deems it advisable to reach the question, but the Court need not do so for two reasons: (i) the issue is forfeited and waived like others discussed above, and (ii) whether Comanche Nation has failed to state a claim for relief under RICO is not presented in this appeal from a collateral order on sovereign immunity. *See* Prop. I(B).

Comanche Nation's RICO damages claim: FSA Defendants make two arguments for sovereign immunity against Comanche Nation's RICO damages claim. First, they argue that FSAT (the tribe) is the "real party in interest" on that claim (Open. Br. at 31), which is incorrect since they are sued in their individual capacities. Courts virtually always relegate officials sued in either individual capacities to assertions of the affirmative defense of "qualified immunity." But FSA Defendants did not raise that defense in the district court, which accordingly did not rule on it. Then FSA Defendants failed to seek "plain error" review here, thus waiving the defense. This Court does not ordinarily allow a defendant to assert qualified immunity on appeal for the first time even when the defendant does argue for "plain error" review, unlike FSA Defendants here. Moreover, FSA Defendants are wrong that they could have successfully asserted that defense. Comanche Nation alleged continuing violations of federal law based on unambiguous statutory

provisions. Federal courts recognize that unambiguous statutory provisions are a sufficient basis for finding "clearly established" federal law under qualified immunity analysis. Comanche Nation has alleged violations of "clearly established" federal law, and FSA Defendants could not have successfully pressed qualified immunity against those claims. *See* Prop. II.

STANDARD OF REVIEW

Review of the *Ex parte Young* exception to official immunity is *de novo*, with deference to Comanche Nation's allegations of violations by FSA Defendants of IGRA and RICO. This Court conducts only a "straightforward inquiry," which "'does not turn on whether the complaint states a valid cause of action,'" and "'does not include an analysis of the merits of the claim.'" *Columbian Fin. Corp. v. Stork,* 702 Fed. Appx. 717, 720 (10th Cir. 2017).[15]

A district court's pretrial denial of a claim of qualified immunity (when one is made and ruled on, unlike this case) is reviewed *de novo* because the interlocutory order is reviewed only to the extent it resolves an abstract issue of law. *Works v. Byers,* 128 F.4th 1156, 1161 (10th Cir. 2025).

[15] *See also In re Deposit Ins. Agency,* 482 F.3d 612, 623 (2d Cir. 2007) ("When a court reviews the legal merits of a claim for purposes of *Ex parte Young*, it reviews only whether a violation of federal law is alleged; appellate review of allegations is necessarily deferential, and only frivolous and insubstantial claims will not survive its scrutiny.").

FORFEITURE AND WAIVER

FSA Defendants do not "cite the precise references in the record" where the issues they argue herein were "raised and ruled on." 10th Cir. R. 28.1(A). Their failure to comply with Rule 28.1 alone waives the affected grounds asserted for reversal.[16] More important, virtually none of the issues they raise here were raised and ruled on below. This Court normally will not consider issues raised here for the first time,[17] or that were inadequately presented to the district court,[18] which are deemed forfeited. Although this Court can consider forfeited arguments under the "plain error" standard, if as in this case the forfeiting party *fails* to argue for "plain error" this Court deems the issue waived.[19] These rules are designed to conserve

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[16] *E.g., United States v. Pinder*, 121 F.4th 1367, 1374 (10th Cir. 2024); *BonBeck Parker, LLC v. Travelers Indem. Co. of Am.,* 14 F.4th 1169, 1177 n.4 (10th Cir. 2021); *Burke v. Regalado,* 935 F.3d 960, 990 n.8 (10th Cir. 2019); *United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019).

[17] *Ave. Capital Mgmt. II, L.P. v. Schaden*, 843 F.3d 876, 884 (10th Cir. 2016); *Wilson v. State Farm Mutual Auto. Ins. Co.*, 934 F.2d 261, 262 n. 1 (10th Cir. 1991).

[18] *Robert v. Austin*, 72 F.4th 1160, 1165 (10th Cir. 2023). In determining whether an argument was raised below, "what matters are the theories presented in district court, not 'the overarching claims or legal rubrics that provide the foundation for them.'" *Ave Capital Mgmt. II,* 843 F.3d at 885. *See also Utah Animal Rights Coalition v. Salt Lake County,* 566 F.3d 1236, 1244 (10th Cir. 2009).

[19] *Alex W. v. Poudre Sch. Dist. R-1*, 94 F.4th 1176, 1186 (10th Cir. 2024); *United States v. Pinder*, *supra,* 121 F.4th at 1374; *Hayes v. SkyWest Airlines, Inc.*, 12 F.4th 1186, 1201 (10th Cir. 2021) ("When the appellant fails to argue for plain error, we consider the theory waived and not entitled to review."); *Bonbeck Parker, supra,* 14 F.4th at 1177 n.4; *In re Rumsey Land Co., LLC*, 944 F.3d 1259, 1271 (10th Cir. 2019) ("If an appellant does not explain how its forfeited arguments survive the plain error

judicial resources, promote important judicial values, and preserve the integrity of the appellate structure, among other things.[20]

ARGUMENT AND AUTHORITIES

FSA Defendants are operating the Warm Springs Casino in clear violation of 25 U.S.C. §2519(a) (Addendum B), since it is located on land purportedly acquired in trust for FSAT after October 17, 1988. In the face of this clear violation, FSA Defendants are also operating the casino notwithstanding NIGC's failure to respond to their request to open it under 25 C.F.R. §559.2. FSA Defendants are also operating the casino in violation of the Oklahoma-FSAT Compact, for reasons alleged in Count IV of Comanche Nation's First Amended Complaint, summarized above.

As discussed in Prop. I, FSA Defendants are subject to *prospective injunctive relief* because:

> (i) as to IGRA, not even the tribe possesses immunity from an injunction, so its officials have no derivative tribal immunity; and
>
> (ii) as to both IGRA and RICO, the *Ex parte Young* exception applies to a tribal official invoking tribal sovereign immunity.

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standard, it effectively waives those arguments on appeal."); *Bishop v. Smith*, 760 F.3d 1070, 1095 (10th Cir. 2014) ("[W]here a litigant attempts to rely upon a forfeited theory, '"the failure to argue for plain error and its application on appeal … surely marks the end of the road for an argument for reversal not first presented to the district court."'").

[20] *Tele-Communications, Inc. v. Commissioner of Internal Revenue,* 104 F.3d 1229, 1232-33 (10th Cir. 1997).

As discussed in Prop. II, FSA Defendants are subject to Plaintiff's claims for *damages under RICO* because:

(i) they are sued in their individual capacities; and

(ii) their contention of qualified immunity (which is waived) is meritless because they are violating unambiguous, and therefore "clearly established" statutory provisions of federal law.

I. TRIBAL OFFICIALS HAVE NO SOVEREIGN IMMUNITY FROM INJUNCTIVE RELIEF TO PROHIBIT THEIR CONTINUING OPERATION OF AN ILLEGAL CASINO

FSA Defendants have no sovereign immunity from Comanche Nation's claims for prospective injunctive relief against ongoing violations of federal law. First, as FSA Defendants recognize, any immunity they possess as tribal officials must derive from FSAT's *tribal* immunity. With respect to Comanche Nation's claim for an injunction against further violations of IGRA, that tribal immunity has been abrogated by 25 U.S.C. §2710(d)(7)(A)(ii), as discussed in Subpart A, *infra*.[21] Second, with respect to Comanche Nation's claims for an injunction against further violations of *both* IGRA and RICO, the *Ex parte Young* doctrine applies to FSAT Defendants, who have no sovereign immunity from a claim to enjoin ongoing violations of these federal laws, as discussed in Subpart B, *infra.*

[21] RICO contains no similar statutory abrogation of tribal immunity, and Comanche Nation does not rely on this ground to enjoin FSA Defendants from violating RICO.

A. IGRA Has Abrogated Immunity For Tribal Claims To Enjoin Its Violation

FSA Defendants principally rely on the settled proposition that tribal officials who are sued in their official capacities may invoke the tribe's sovereign immunity unless Congress has abrogated that immunity. Open. Br. at 9. Without distinguishing between Comanche Nation's claims for injunctive and monetary relief, or IGRA and RICO claims, FSA Defendants devote most of their argument to their assertion that FSAT is the "real party in interest" on all of Comanche Nation's claims.

Claims against government officials in their *official* capacities engage only derivative sovereign immunity, regardless of the "real party in interest," so "the only immunities available to the defendant in an official-capacity action are those that the governmental entity possesses." *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 362 (1991). With respect to Comanche Nation's claim to enjoin IGRA violations, IGRA has abrogated FSAT's sovereign immunity, so FSA Defendants possess no derivative sovereign immunity. IGRA expressly abrogates tribal immunity for an injunction against class III gaming activity located on Indian lands and conducted in violation of any tribal-state compact. 25 U.S.C. §2710(d)(7)(A)(ii); *Michigan v. Bay Mills Indian Community,* 572 U.S. 782, 791, 134 S. Ct. 2024, 2032 (2014). FSA Defendants make three arguments against this abrogation.

First, FSA Defendants argue that the abrogation of tribal immunity in §2710(d)(7)(A)(ii) applies only to a tribe with a compact that allows the challenged class III gaming, rather than "neighboring tribes" seeking to prevent an unlawful casino from draining revenues generated by their lawful ones. See Open. Br. at 20.

FSA Defendants did not argue below that 25 U.S.C. §2710(d)(7)(A)(ii) applies only to a tribe seeking to enjoin its own unlawful class III gaming activity, nor did it ask for "plain error" review of that contention. This argument is therefore forfeited and waived. *See* "*Forfeiture and Waiver*," *supra*. In any event, FSA Defendants are incorrect. This Court (like others) applies unambiguous statutory language according to its plain terms.[22] 25 U.S.C. §2710(d)(7)(A)(ii) does not contain the qualification argued by FSA Defendants, but unambiguously states that a federal district court possesses jurisdiction over:

> (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, ….

FSAT's urged construction of this provision has not been endorsed by any court to our knowledge, and was expressly rejected in *Bay Mills Indian Community v. Little*

[22] *United Keetoowah Band of Cherokee Indians of Oklahoma v. U.S. Dep't of Hous. & Urban Dev.,* 567 F.3d 1235, 1241 (10th Cir. 2009) ("We must assume that the ordinary meaning of the words Congress uses conveys its intent. … Therefore, we turn first to the precise language of the statute and, finding that language to be unambiguous, our inquiry will end there.").

Traverse Bay Bands of Odawa Indians, 1999 U.S. Dist. LEXIS 20314, at *10-11 (W.D. Mich. Aug. 30, 1999), with the following analysis:

> In the alternative, Defendant LTBB argues that § 2710(d)(7)(A)(ii) does not mean what it says. LTBB claims that the statute should not be read so broadly as to authorize one tribe to sue another tribe for operation of a gaming facility in violation of its compact. … Defendant LTBB contends that the statute should be read to apply only to an action by a tribe with jurisdiction over the Indian lands on which class III gaming is being conducted in violation of a compact to which that Tribe is a party. Whatever the wisdom of Defendant LTBB's interpretation, that is not what the statute says. There is nothing in the language of § 2710(d)(7)(A)(ii) that renders it ambiguous. The statute clearly confers on Indian tribes the authority to file suit in district court to enjoin a class III gaming activity located on Indian lands and conducted in violation of "any" Tribal-State compact. … The Court is bound to apply the laws as set forth by Congress.

The statute unambiguously gives another tribe the right to sue for an injunction to prohibit class III gaming in violation of FSAT's tribal-gaming compact.

Second, FSA Defendants argue that IGRA cannot apply based on an assertion that Comanche Nation alleged the Warm Springs Casino is not situated on "Indian lands" as defined by IGRA, a predicate to IGRA's applicability. Open. Br. at 17-18. Initially, FSA Defendants have also forfeited and waived this inaccurate argument. *See* "*Forfeiture and Waiver,*" *supra*. Not only did they fail to make this argument below, they argued just the *opposite* in their response to Comanche Nation's motion for a preliminary injunction. *See* App. Vol. 3 at 27. In that filing, FSA Defendants argued that Comanche Nation could not succeed in showing that FSAT violated a

state-tribal compact under §2710(d)(7)(A)(ii) *because* Comanche Nation acknowledged that the Warm Springs Casino was built and operating on "Indian lands." App. Vol. 3 at 27-28.[23]

FSAT's assertion about Comanche Nation's allegations regarding whether the Tsalote Allotment is on "Indian lands" is both false and meritless. First, contrary to FSA Defendants' new assertion to this Court, Comanche Nation's allegations expressly recognize that the Tsalote Allotment is "Indian lands" under any scenario. As Comanche Nation alleged in its Amended Complaint, ¶98: "*The Tsalote Allotment is 'Indian land,' but is not the FSA Tribe's Indian land*." App. Vol. 2 at 27, ¶98 (emphasis added).[24] Second, Comanche Nation's claim for an injunction to prevent FSA Defendants from continuing to operate an unlawful casino in competition with Comanche Nation's lawful ones does not turn on whether the Tsalote Allotment is held by the U.S. in trust for individual Kiowa tribal members, or for the FSAT. In *either* event, the casino is operating on "Indian lands" as defined by IGRA, 25 U.S.C. §2703(4). That is presumably why FSA Defendants expressly

[23] Although the district court's denial of a preliminary injunction is not involved here, FSA Defendants made several inaccurate statements in that filing. For example, they argued that the Tsalote Allotment would satisfy §2719(a) if FSAT validly owned it, although it is undisputed the Allotment is not contiguous to a former FSAT reservation or other land held in trust for FSAT. *See* 25 C.F.R. §292.2 and §292.4(b).

[24] This is because Comanche Nation alleges the U.S. deed in trust to FSAT violated 25 C.F.R. §151.7 (formerly §151.8). App. Vol. 2 at 19-20 (¶¶61 and 64).

urged to the district court that Comanche Nation acknowledged the casino is operating on "Indian lands" (App. Vol. 3 at 27), contrary to their representations to this Court about Comanche Nation's position. "Indian lands" is defined by 25 U.S.C. §2703(4), quoted in *Bay Mills*, 572 U.S. at 785 n.1 (emphasizing the *disjunctive* statutory definition):

> The Act defines "Indian lands" as "(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual[,] or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." §2703(4).[25]

The Warm Springs Casino is located on the Tsalote Allotment, which was held in trust by the BIA for the benefit of the heirs of George Tsalote, a Kiowa Tribe member, until the U.S. purported to deed the property in trust to FSAT without complying with 25 C.F.R. §151.7 (formerly §151.8). App. Vol. 3 at 204-205. Regardless of whether the U.S. holds the Tsalote Allotment in trust for individual Indians (George Tsalote's heirs), or for the FSAT (an Indian tribe), the Allotment remains "Indian lands" as defined by 25 U.S.C. §2703(4), and subject to IGRA's abrogation of sovereign immunity. *Bay Mills*, 572 U.S. at 791.

[25] The bracketed comma is in the original, reflecting the Supreme Court's construction which clearly conflicts with FSA Defendants' new (and forfeited) suggestion on appeal that an Indian tribe must exercise "governmental power" over land held in trust for an individual Indian.

Finally, even if Comanche Nation had plead that the Tsalote Allotment was *not* Indian land as FSA Defendants inaccurately assert in their Opening Brief, that would not preclude Comanche Nation from enforcing the IGRA on the alternative premise that the district court may reject Comanche Nation's challenge to the validity of the FSAT deed and hold that the FSAT owns the Tsalote Allotment. Fed.R.Civ.P. 8(d) allows a party to state "alternative" and/or "inconsistent" claims, and pleadings are construed liberally thereunder. Even if it were necessary for FSAT to own the Tsalote Allotment and it was only *possible* that the district court would hold valid the U.S. deed in trust for FSAT, Comanche Nation's claim would still remain viable under Fed.R.Civ.P. 8(d).

Finally, FSA Defendants also argue that because the Warm Springs Casino purportedly cannot be on "Indian lands" under Comanche Nation's allegations, Comanche Nation cannot validly allege a violation of FSAT's tribal-state gaming compact. Open. Br. at 19. This is not an independent argument but facially depends on the preceding one regarding "Indian lands," refuted above.

Congress abrogated tribal immunity for a claim for injunctive relief against unlawful class III gaming in violation of a tribal-State gaming compact, as the district court held. FSA Defendants therefore have no derivative immunity.

B. *Ex parte Young* Applies To Comanche Nation's Claims For Prospective Injunctive Relief To Prohibit FSA Defendants From Continuing To Violate Either IGRA or RICO

Regardless of tribal immunity, under *Ex parte Young* FSAT Defendants have no sovereign immunity from claims for injunctive relief against them in their official capacities to prohibit ongoing violations of federal law.

The Supreme Court has long recognized, "analogizing to *Ex parte Young*," 209 U.S. 123, 28 S.Ct. 441 (1908), that tribal immunity does not shield tribal officials from a suit for an injunction to prevent their operation of an illegal casino. *Michigan v. Bay Mills Indian Community,* 572 U.S. 782, 796, 134 S. Ct. 2024, 2035 (2014) ("tribal immunity does not bar such a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct."). This Court has thus recognized that "tribal sovereign immunity is subject to the *Ex parte Young* exception for suits against tribal officials 'seeking to enjoin alleged ongoing violations of federal law.'" *Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 862 F.3d 1236, 1251 (10th Cir. 2017), quoting *Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1140, 1155 (10th Cir. 2011), where this Court "join[ed] its sister circuits in expressly recognizing *Ex parte Young* as an exception not just to state sovereign immunity but also to tribal sovereign immunity." As this Court recited in *Stidham,* "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.'" *Id.,* 640 F.3d at 1155. *See also Gingras v. Think Fin., Inc.,* 922 F.3d 112, 117 (2d Cir. 2019) (under *Ex parte Young*, tribal officials had no sovereign immunity from claims for prospective injunctive relief against continuing violations of either federal or state law); *Alabama v. PCI Gaming Auth.,* 801 F.3d 1278, 1288-89 (11th Cir. 2015) (under *Ex parte Young,* tribal officials had no sovereign immunity from claims for injunctive relief for operating casinos on Indian lands in violation of IGRA); *Fitzgerald v. Wildcat*, 687 F. Supp. 3d 756, 778 (W.D. Va. 2023) (tribal sovereign "immunity does not bar 'a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct'"). [26] *Gingras* and *Fitzgerald* both involved RICO claims against the tribal official defendants. *Gingras,* 922 F3d at 124-25; *Fitzgerald,* 687 F. Supp. 3d at 772.

FSA Defendants argue that *Ex parte Young* does not apply for several reasons, most of which they failed to raise below and then waived here.[27]

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[26] Further, tribal officials have no sovereign immunity for injunctive relief regardless of whether they are sued in their official or individual capacities. *Gingras, supra,* 922 F.3d at 123-24 (as to suits for injunctive relief, "official capacity suits are available against tribal officials, individual capacity suits are also available to be brought, and tribal sovereign immunity bars only suits against the Tribe itself."). Here, of course, Comanche Nation sued Appellants in both capacities.

[27] Their contention regarding *Ex parte Young* to the district court in their motion to dismiss is at App. Vol. 2 at 261-62. And in their response to Comanche Nation's motion for preliminary injunction (App. Vol. 3 at 4), which is not the subject of this appeal, they failed to cite *Ex parte Young* at all.

"*Real party in interest*": First, FSA Defendants contend that the FSAT is the "real party in interest" rather than FSA Defendants. Open. Br. at 9, Prop. II. But FSA Defendants do not deny that Comanche Nation is seeking prospective, injunctive relief against them in their official capacities to prohibit ongoing violations of federal law. App. Vol. 2 at 261.[28] Their only answer to this in the district court was to assert that Comanche Nation's claim of a federal law violation lacked a "factual or legal basis." App. Vol. 2 at 262. FSA Defendants accordingly forfeited and waived their current argument that the governmental entity is the "real party in interest" if it will be affected by an injunction claim against its governmental official under *Ex parte Young*. *See* "*Forfeiture and Waiver,*" *supra*.

In any event, that contention is incorrect. Affecting the governmental entity by an action against the official is the whole point of *Ex parte Young*, as courts uniformly recognize in both tribal and non-tribal suits. This Court rejected the same contention in *Elephant Butte Irr. Dist. of New Mexico v. Dep't of Interior*, 160 F.3d 602, 609 (10th Cir. 1998):

[28] In their motion to the district court, although FSA Defendants did not mention "real party in interest" they cited a civil rights damages case for the contention that sovereign immunity can apply if relief is sought "nominally" against an official. App. Vol. 2 at 261, citing *Kentucky v. Graham*, 473 U.S. 159, 105 S. Ct. 3099 (1985). *Kentucky* expressly recognizes the *Ex parte Young* exception for injunction claims against government officials. 473 U.S. at 169 n.18. *See Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 631 (10th Cir. 1998), discussing this.

> The state officials argue the State of New Mexico is the real party in interest because the lease the district court intends to reform was entered into between the United States and an agency of the State of New Mexico. … [T]he state officials fail to accurately understand and apply the *Ex parte Young* exception. Because the states cannot authorize any act that violates federal law, the Supreme Court has established that an action seeking to prospectively enjoin a state official's ongoing violation of federal law is not barred by the Eleventh Amendment. … The state is not the real party in interest because the state cannot "authorize" the officials to violate federal law.

See also Norton v. Parsons, 2024 WL 358239, at *3 (10th Cir. 2024) (holding the "real party in interest" rule "has an important exception," which is that "'official-capacity actions for prospective relief are not treated as actions against the State.'"); *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 631 (10th Cir. 1998) ("[A] suit against a state official in his or her official capacity seeking prospective injunctive relief is not considered a suit against the state for Eleventh Amendment purposes."); *Vann v. Kempthorne*, 534 F.3d 741, 754–55 (D.C. Cir. 2008) ("The tribe imagines a world where *Ex parte Young* suits cannot proceed if they will have any effect on a sovereign. But that is what *Ex parte Young* suits have always done.").

FSA Defendants also appear to challenge the sufficiency of Comanche Nation's allegations that FSA Defendants are responsible for the continuing operation of Warm Springs Casino. However, FSA Defendants admit that their actions are responsible (*e.g.,* Open. Br. at 12-13), and in any event Comanche Nation alleged in detail their official duties and unlawful conduct (App. Vol. 2 at 6-8 and

29-34). Moreover, pleadings are construed liberally under the "notice" pleading regimen of Fed.R.Civ.P. 8(a) and (e). *E.g., Tomlinson v. El Paso Corp.,* 653 F.3d 1281, 1286 n.5 (10th Cir. 2011). Finally, this is another argument that FSA Defendants forfeited by failing to raise it below, and waived here by failing to argue for reversal based on "plain error." *See* "*Forfeiture and Waiver,*" *supra*.

IGRA and Ex parte Young: FSA Defendants argue that *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S. Ct. 1114, 1117 (1996) makes *Ex parte Young* "unavailable" for purposes of Comanche Nation's claim for injunctive relief under 25 U.S.C. §2710(d)(7)(A)(ii) (discussed at length above, Prop. I(A)). FSA Defendants never made this argument or even cited *Seminole Tribe* in their motion to dismiss, nor do they seek "plain error" review now. The argument is therefore both forfeited and waived. *See* "*Forfeiture and Waiver,*" *supra*. It is also incorrect.

In *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S. Ct. 1114, 1117 (1996), the Supreme Court held that the Governor of Florida had Eleventh Amendment immunity from a tribal action under IGRA seeking to compel Florida to negotiate a tribal-state compact in good faith under 25 U.S.C. §2710(d)(3)(A). The Court held that *Ex parte Young* did not allow the suit because Congress had adopted "a detailed remedial scheme for the enforcement" of a State's duty to negotiate a tribal gaming compact in good faith under 25 U.S.C. §2710(d)(3). The Court held that the duty was enforceable under §2710(d)(7)(A)(i), which does *not*

provide for an injunction, and "the intricate procedures set forth in that provision show that Congress intended therein not only to define, but also to limit significantly, the duty imposed by §2710(d)(3)." *Id*., 517 U.S. at 74, 116 S.Ct. at 1132. The Court summarized those "intricate procedures"– *i.e.,* that if a State fails to negotiate a compact in good faith, a court may order the State and the tribe to conclude a compact within 60 days, and if the parties disregard that order "the only sanction is that each party then must submit a proposed compact to a mediator who selects the one which best embodies the terms of the [IGRA];" if the State refuses to accept the mediator's selected compact, the only sanction is that the mediator "shall notify the Secretary of the Interior who then must prescribe regulations governing class III gaming on the tribal lands at issue." 517 U.S. at 74, 116 S.Ct. at 1132. Given the specificity of this "intricate scheme," the Court held it was exclusive of a claim for injunctive relief against a state officer to enforce the duty to negotiate a compact in good faith. *Id*.

Federal appellate and district courts, including the Supreme Court itself, have distinguished this holding from other kinds of claims, under IGRA or otherwise, not involving a similar intricate remedial scheme. In *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland,* 535 U.S. 635, 647, 122 S. Ct. 1753, 1761 (2002), a non-IGRA case, the Supreme Court distinguished its holding from *Seminole Tribe* by repeating its prior summary of IGRA's detailed remedial scheme to enforce a state's

obligation to negotiate a tribal-state gaming compact in good faith. In *Alabama v. PCI Gaming Auth.,* 801 F.3d 1278, 1288-89 (11th Cir. 2015), the Eleventh Circuit addressed whether the Supreme Court's holding in *Seminole Tribe* would apply to a claim for injunctive relief against tribal officials under 25 U.S.C. §2710(d)(7)(A)(ii) for violating IGRA, the same kind of claim at issue here. The court contrasted the Supreme Court's extensive citations to IGRA's detailed remedial scheme for failing to negotiate a tribal gaming compact, and observed that no comparable remedial scheme was adopted for claims under §2710(d)(7)(A)(ii), which expressly provide for an injunction, the same kind of relief to which *Ex parte Young* has always applied. Since in that case a state was seeking to enjoin tribal officers from violating federal gaming laws, the *Ex parte Young* exception applied. *Alabama v. PCI Gaming Auth.,* 801 F.3d at 1289.[29]

Other courts have held likewise. *E.g., Pueblo of Pojoaque v. New Mexico,* 2015 WL 10818855, at *7 (D.N.M. 2015), *aff'd sub nom. New Mexico v. Trujillo,* 813 F.3d 1308 (10th Cir. 2016) (holding tribe's claim for injunction against state officials to prevent state enforcement of regulations on class III gaming on Comanche Nation's Indian lands fell within the *Ex parte Young* exception and

[29] However, Alabama was suing to enjoin class III gaming without a compact, which did not satisfy that condition of §2710(d)(7)(A)(ii), so the court held Alabama failed to state a claim for relief under IGRA. *Id*., 801 F.3d at 1299.

Seminole Tribe was inapplicable, stating: "*Seminole Tribe I* neither addressed nor decided whether state and tribal officials are immune from other IGRA-based claims to enforce rights for which the statute does not set forth such a detailed, limited remedial scheme," and citing similar holdings by courts throughout the nation); *Tohono O'odham Nation v. Ducey,* 130 F. Supp. 3d 1301, 1312 (D. Ariz. 2015) (tribe's claim for injunction against state officials regarding state regulations of gaming pursuant to 25 U.S.C. §2710(d)(3)(C) did not fall within *Seminole Tribe* limitation on *Ex parte Young,* because "§2710(d)(3)(C) contains nothing like the detailed remedial scheme considered in *Seminole Tribe.*"); *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1110 (E.D. Cal. 2002), *aff'd sub nom. Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 1110 n.34 (9th Cir. 2003) (state officials had no sovereign immunity for claims with respect to compacts between California and Indian tribes allowing tribes to exercise exclusive class III gaming rights on Indian lands, holding: "Congress did not create a detailed remedial scheme to enforce section 2710(d)(1), which permits class III gaming on certain conditions, unlike the provisions of IGRA which the Court held could not be enforced by an *Ex parte Young* action in *Seminole Tribe*"); *Friends of Amador Cnty. v. Salazar*, 2010 WL 4069473, at *4 (E.D. Cal. 2010) (citizens' claims against state Governor seeking to enforce IGRA provisions under state-tribal compacts for class III gaming fell within *Ex parte Young* exception and *Seminole Tribe* was inapplicable since "IGRA

does not provide a specific method for citizens to challenge the legitimacy of determinations of eligibility for class III gaming and the State Defendants do not identify any section of IGRA that contains the sort of detailed remedial scheme provided in § 2710(d)(7).").

One district court in this Circuit cited *Seminole Tribe's* holding for the proposition that it would apply to a claim for an injunction to enforce IGRA as provided in 25 U.S.C. §2710(d)(7)(A)(ii). *State v. Nat'l Indian Gaming Comm'n,* 151 F. Supp. 3d 1199, 1224 (D. Kan. 2015), *aff'd only on other appealed issues sub nom. Kansas ex rel. Schmidt v. Zinke*, 861 F.3d 1024 (10th Cir. 2017). That holding was neither raised nor involved in the appeal by other parties (*non*-government officials) to this Court, which raised a different challenge (regarding the appealability of an opinion letter of NIGA's Office of General Counsel). The lower court's holding is aberrational and incorrect, as shown above.

RICO and Ex parte Young: With respect to Comanche Nation's claim to enjoin continuing violations of RICO, FSA Defendants argue that RICO permits injunctive relief only on a claim by the Attorney General, citing a split of authority. Open. Br. at 30, cross-referencing their Section III.C. This is a "failure to state a claim" defense, which FSA Defendants did not argue to the district court. FSA Defendants instead argued that FSAT is not a "person" under RICO. App. Vol. 2 at 259-60. Even if this were an appeal on whether Comanche Nation failed to state a

claim, FSA Defendants have waived their contention on the question of whether RICO allows a private claim for injunctive relief, since they neither made the argument below nor asked for "plain error" review here. *See* "*Forfeiture and Waiver*" *supra*.

Moreover, FSA Defendants' discussion of the split of authority in their brief at Section III.C does not concern *Ex parte Young*; it relates to FSA Defendants' contention that RICO has not abrogated *FSAT's* sovereign immunity. Open. Br. at 22. However, Comanche Nation is not contending that RICO abrogated FSAT's sovereign immunity. As to RICO, Comanche Nation relies *solely* on *Ex parte Young* to seek injunctive relief against FSAT Defendants. Whether Comanche Nation has stated a claim for relief under RICO is not involved in this appeal from a collateral order on the issue of sovereign immunity from a RICO claim. *See Columbian Fin. Corp. v. Stork,* 702 Fed. Appx. 717, 720 (10th Cir. 2017) (whether *Ex parte Young* applies does not turn on whether the complaint "'states a valid cause of action'" or involve analysis of the "'merits of the claim'"); *Tamiami Partners, Ltd. ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Fla*., 177 F.3d 1212, 1221–22 (11th Cir. 1999) (refusing to consider "failure to state a claim" or a request to exercise pendent appellate jurisdiction for IGRA-related tribal claims of sovereign

immunity).[30] FSA Defendants can raise after final judgment their assertion that Comanche Nation failed to state a claim for injunctive relief under RICO.

Although this Court need not reach the division of authority on whether RICO allows a claim for injunctive relief by anyone other than the Attorney General, Comanche Nation refers the Court to a balanced presentation of the relevant authorities on the subject. *Annot., Equitable Relief for Private Plaintiffs Under Racketeer Influenced and Corrupt Organization Act's (RICO) Remedial Provision, 18 U.S.C.A. § 1964*, 78 A.L.R. Fed. 3d Art. 2. *See also* a recent discussion of the split of authority in *City of Boston v. Express Scripts, Inc.,* 2025 WL 457794, at *8 (D. Mass. Feb. 11, 2025). The analysis of the Second and Seventh Circuits is particularly thorough and cogent. *Chevron Corp. v. Donziger,* 833 F.3d 74, 137 (2d Cir. 2016);[31] *Nat'l Org. For Women, Inc. v. Scheidler*, 267 F.3d 687, 695-700 (7th Cir. 2001), *rev'd, on other grounds*, 537 U.S. 393, 123 S. Ct. 1057 (2003). If this

[30] Nor have FSA Defendants argued for "pendent" appellate jurisdiction, which is discretionary and "generally disfavored." *Brock v. Flowers Foods, Inc.*, 121 F.4th 753, 771 (10th Cir. 2024) (discretionary); *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1200 (10th Cir. 2002) (generally disfavored). Whether *Ex parte Young* applies to Comanche Nation's claim for injunctive relief is not "inextricably intertwined" with and does not depend on whether RICO provides a claim for injunctive relief.

[31] FSA Defendants' baselessly suggest that because *Gingras v. Think Fin., Inc.,* 922 F.3d 112, 124 (2d Cir. 2019) found it sufficient to quote and summarily follow its precedent in *Chevron Corp.*, it must have disagreed with that prior analysis. There was no hint of such a disagreement in *Gingras,* which also went on to hold that "RICO applies substantively to the Tribe." *Id*. at 124.

Court deems it necessary to reach the issue, Comanche Nation urges the same analysis. Notably, the most recent federal court decision to discuss the split of authority concurs that the Second and Seventh Circuit holdings are the most persuasive. *City of Boston v. Express Scripts, Inc.,* 2025 WL 457794, at *9.

II. TRIBAL OFFICIALS HAVE NO SOVEREIGN IMMUNITY AS TO RICO DAMAGES CLAIMS ASSERTED AGAINST THEM IN THEIR INDIVIDUAL CAPACITIES

Comanche Nation has asserted a RICO claim for damages against FSA Defendants in their individual capacities. App. Vol. 2 at 4-5 (¶1) and 39 (¶9). FSA Defendants wrongly argue that the tribe (FSAT) is the "real party interest" (Open. Br. at 31). When tribal officials are sued for damages, they share the tribe's sovereign immunity only when they are sued in their "*official*" capacities. *Lewis v. Clarke,* 581 U.S. 155, 162-63, 137 S. Ct. 1285, 1291 (2017). "[I]n a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated." *Id*., 581 U.S. at 158. Thus tribal officers do not share tribal sovereign immunity when they are sued in their individual capacities. *Id.* Tribal officers sued in their individual capacities come to court "as individuals," and "the real party in interest is the individual, not the sovereign." *Lewis*, 581 U.S. at 162–63. Even a tribal obligation to indemnify the tribal officer does not clothe the officer with immunity in an individual capacity suit. *Lewis*, 581 U.S. at 158. *See also Native Am. Distrib.*

v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288, 1296–97 (10th Cir. 2008) ("The general bar against official-capacity claims … does not mean that tribal officials are immunized from individual-capacity suits arising out of actions they took in their official capacities, as the district court held. [Citation omitted.] '[S]tate officials may ... be sued in their individual capacities for actions performed in the course of their official duties and are personally liable for damages awarded.'").[32] Where the plaintiffs' suit seeks money damages from the officer in his individual capacity, sovereign immunity does not bar the suit so long as the claim seeks relief from the officer individually rather than from the sovereign's treasury. *Id.* at 1297.[33]

Tribal officials who are sued in their individual capacities for damages may also seek to invoke individual immunity defenses of "absolute" or "qualified" immunity. *Harlow v. Fitzgerald,* 457 U.S. 800, 807, 813, 102 S. Ct. 2732, 2736 (1982)*; Fitzgerald,* 687 F. Supp. 3d at 780. Absolute immunity is rarely recognized, and necessitates that a high-level official discharge the procedural burden of showing that exceptional circumstances exist requiring an exemption from suit as a matter of

[32] As seen by this quotation, courts use the terms "individual" and "personal" interchangeably in this context.

[33] *See also JW Gaming Development, LLC v James,* 778 Fed.Appx. 545 (9th Cir. 2019) (tribal officials were real parties in interest on RICO claim and lacked sovereign immunity); *Fitzgerald v. Wildcat*, 687 F. Supp. 3d 756, 779 (W.D.Va. 2023) (tribal officials lacked sovereign immunity from RICO claims for either injunctive relief or damages).

public policy. *Harlow*, 457 U.S. at 808-13, 102 S.Ct. at 2733-36; *Fitzgerald,* 687 F.Supp. 3d at 780. Defendants did not assert absolute immunity, nor attempt to discharge this heavy burden, and do not assert absolute immunity here (an argument that would be both forfeited and waived). Rather, they briefly assert that the tribe (FSAT) is the "real party in interest" on Comanche Nation's damages claim (Open. Br. at 31), a contention refuted above.

FSA Defendants also argue that they should have "qualified immunity," although they failed to even raise that defense below, which the district court accordingly did not address.[34] FSA Defendants appear to admit that they failed to raise the defense below, but *still* fail to either request "plain error" review or show how they satisfy the rigorous criteria under the "plain error" standard of review. Open. Br. at 31. Comanche Nation has discussed "*Forfeiture and Waiver*" generally above, and adds the following authorities focused particularly on qualified immunity. Although FSA Defendants did not raise qualified immunity below at all, even when qualified immunity is raised below, this Court will hold that specific arguments not presented to the district court are forfeited. *Montoya v. City & Cnty.*

[34] FSA Defendant incorrectly imply that the district court only failed to rule "directly" on qualified immunity. *Id*. FSA Defendants did not invoke qualified immunity at all, and the district court did not rule on it at all, directly or indirectly; hence FSA Defendants do not cite to this Court "where the issue was raised and ruled on" (10th Cir. R. 28.1).

of Denver, 2022 WL 1837828, at *8 (10th Cir. 2022). Further, this Court applies the same standards to the affirmative defense of qualified immunity as other issues discussed under "*Forfeiture and Waiver,*" *supra*. Qualified immunity must be raised in the district court or the issue is forfeited,[35] in which event appellant must at least argue for "plain error" review in this Court or the issue will be deemed waived on appeal.[36] Other circuits hold likewise.[37]

However, Comanche Nation also discusses below why FSA Defendants could not prevail on the defense of qualified immunity had they not forfeited and waived it.

"Qualified immunity" of a government official may be applied when it is properly raised unless plaintiff shows that its claim is for violation of a constitutional or statutory right, and "that right was clearly established at the time of the defendant's complained-of conduct." *Truman v. Orem City,* 1 F.4th 1227, 1235 (10th

[35] *Greer v. Dowling,* 947 F.3d 1297, 1303 (10th Cir. 2020) (qualified immunity is an affirmative defense that must be invoked in district court); *Evans v. Fogarty,* 241 Fed. Appx. 542, 550 n.9 (10th Cir. 2007) (qualified immunity waived).

[36] *A Brighter Day, Inc. v. Barnes*, 860 Fed. Appx. 569, 575–76 (10th Cir. 2021) (holding qualified immunity defense forfeited on this ground and refusing to exercise discretionary review because defendants failed to argue for "plain error").

[37] *E.g., Henry v. Hulett*, 969 F.3d 769, 785 (7th Cir. 2020) ("Because Defendants failed to raise their qualified immunity defense in their summary judgment motion before the district court, and instead raised it for the first time in their appellate brief, they have waived it for purposes of this appeal.").

Cir. 2021). The defense of qualified immunity requires "objective" good faith, as discussed in *Harlow,* 457 U.S. at 815-17, 102 S.Ct. at 2736-38 (holding that the defense does not apply to discretionary acts that violate "clearly established statutory or constitutional rights of which a reasonable person would have known").

Here Comanche Nation has asserted the violation of unambiguous statutory prohibitions under federal laws (IGRA and RICO). FSA Defendants' belated invocation of qualified immunity must turn on the meaning of "clearly established" in this analysis, as is usually the case.[38] That dispositive phrase has evolved with case law. This Court elaborated at length on the meaning of the term "clearly established" in *Truman,* explaining that a right is "clearly established" if there is judicial authority showing the right is sufficiently clear that a reasonable official would understand that what he is doing violates that right, *or* where the "unlawfulness of the officer's conduct is *sufficiently clear even though existing precedent does not address similar circumstances.*" *Truman, supra,* 1 F.4th at 1235 (emphasis added). *See also Baca v. Cosper,* 128 F.4th 1319, 1325 (10th Cir. 2025). Federal courts, including this one, agree that an *unambiguous* statute presents no further need to examine judicial decisions to determine whether a statutory right is

[38] As the Supreme Court stated in *Harlow*: "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Harlow,* 457 U.S. at 819, 102 S.Ct. at 2739.

"clearly established." This Court addressed the issue in *Lutz v. Weld Cnty. Sch. Dist. No. 6*, 784 F.2d 340, 344 (10th Cir. 1986). This Court held that a statutory right in that case was "clearly established" because the statute was unambiguous, explaining the meaning of "clearly established":

> There are, of course, instances where the state of the law is developing, as is the case often with constitutional rights, and a good faith defense depends on that uncertainty in the law. … In such a case the court should determine whether the law "was clearly established at the time an action occurred." *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738. However, that was not the case here. *A simple statutory provision was involved which presented no controversy or ambiguity.*

(Emphasis added.) The Ninth Circuit similarly stated this same precept as to the meaning of "clearly established":

> Ordinarily, courts begin by attempting to determine whether the statutory or constitutional provision creating the right is unambiguous. Where the existence of the right is clear from the face of the provision, courts usually need go no further.

Gutierrez v. Mun. Court of Se. Judicial Dist., Los Angeles Cnty., 838 F.2d 1031, 1048 (9th Cir. 1988), *judgment vacated on ground of mootness,* 490 U.S. 1016, 109 S. Ct. 1736 (1989). *See also Gardner v. Williams,* 56 Fed. Appx. 700, 704 (6th Cir. 2003) (holding statutory language relied upon by plaintiff alleging unlawful arrest was "unambiguous and not reasonably open to an alternative interpretation" so that it was "clearly established").[39]

[39] *Cf., Greene v. Barrett,* 174 F.3d 1136, 1143 (10th Cir. 1999) (finding relevant

Here, a reasonable tribal official would understand that an IGRA-regulated casino cannot be constructed and operated in violation of IGRA's clear statutory mandates and implementing regulations. There is no ambiguity in the prohibition of 25 U.S.C. §2719(a) against conducting regulated gaming on Indian lands acquired by the U.S. for the benefit of an Indian tribe "after October 17, 1988" with exceptions facially inapplicable here. There is no ambiguity in the state-tribal compact prohibiting gaming when it violates IGRA's location requirements, or the illegal gambling provisions of federal and state laws cited above.

FSA Defendants proceeded to construct and operate the Warm Springs Casino notwithstanding the clear prohibition of 25 U.S.C. §2719(a), and additionally without awaiting NIGC's response to a written request to open the illegal casino. NIGC could not lawfully grant that request under 25 U.S.C. §2719(a), and has not done so, explicitly, implicitly, or otherwise. FSA Defendants flouted "clearly established" rights under IGRA and RICO, and are not protected by qualified immunity from the Nation's damages claims.[40]

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statute "ambiguous" and thus not a sufficient predicate for a "clearly established" right for purposes of qualified immunity); *Sorenson v. Ferrie*, 134 F.3d 325, 330 (5th Cir. 1998) (holding "the ambiguity of the statute and the surrounding caselaw" showed defendants did not violate a "clearly established right").

[40] *Compare Fitzgerald v. Wildcat*, 687 F. Supp. 3d 756 at 780 (where court could not determine at preliminary stage whether tribal officials possessed sovereign immunity from damages for RICO claim of unlawful lending scheme, since it depended on whether "they reasonably should have had notice that tribal lending

CONCLUSION

The Court should affirm the district court's order denying FSA Defendants' motion to dismiss. FSA Defendants' forfeited their arguments for sovereign immunity, then waived them here by failing to seek "plain error" review. Regardless, those arguments are meritless. As to Comanche Nation's claim to enjoin IGRA violations, IGRA divests FSAT of sovereign immunity, so FSA Defendants have no derivative immunity to borrow. As to both IGRA and RICO, FSA Defendants are subject to suit for prospective injunctive relief under *Ex parte Young* for their ongoing violations of federal law. FSA Defendants may not raise the defense of "failure to state a claim" as to Comanche Nation's RICO claim for injunctive relief against them in this interlocutory appeal. Finally, aside from having forfeited and waived reliance on the affirmative defense of qualified immunity, FSA Defendants could not invoke that defense here because Comanche Nation has alleged violation of an unambiguous, and thus "clearly established" federal statutory prohibition against building and operating an NIGA-regulated casino on Indian lands purportedly acquired in trust for FSAT after October 17, 1988.

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practices violated state usury laws").

Respectfully submitted,

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Date: April 29, 2025.

/s/ Harvey D. Ellis
Harvey D. Ellis

ADDENDUM A

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 29. Indian Gaming Regulation (Refs & Annos)

25 U.S.C.A. § 2710

§ 2710. Tribal gaming ordinances

Currentness

(a) Jurisdiction over class I and class II gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if--

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that--

(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;

ADDENDUM A

(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.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if--

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4)(A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B)(i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if--

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 2712 of this title,

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 2717(a)(1) of this title for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on October 17, 1988.

(iii) Within sixty days of October 17, 1988, the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming license; certificate of self-regulation

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II), the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which--

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after October 17, 1988; and

(B) has otherwise complied with the provisions of this section [1]

may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has--

(A) conducted its gaming activity in a manner which--

(i) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for--

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation--

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 2706(b) of this title;

(B) the tribe shall continue to submit an annual independent audit as required by subsection (b)(2)(C) and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 2717 of this title in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are--

(A) authorized by an ordinance or resolution that--

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b), and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b).

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that--

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection--

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to--

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that--

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over--

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that--

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe[2] to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court--

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures--

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates--

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

(e) Approval of ordinances

For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this chapter.

CREDIT(S)

(Pub.L. 100-497, § 11, Oct. 17, 1988, 102 Stat. 2472.)

VALIDITY

<The United States Supreme Court has held that the grant of federal court jurisdiction in provision of the Indian Gaming Regulatory Act, section 11(d)(7) of Pub.L. 100-497, abrogating the States' Eleventh Amendment sovereign immunity, was unconstitutional. Seminole Tribe of Florida v. Florida, U.S.Fla.1996, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252.>

Notes of Decisions (361)

Footnotes

1 So in original. Probably should be followed by a comma.

2 So in original. Probably should not be capitalized.

25 U.S.C.A. § 2710, 25 USCA § 2710
Current through P.L. 119-4. Some statute sections may be more current, see credits for details.

End of Document

ADDENDUM B

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 29. Indian Gaming Regulation (Refs & Annos)

25 U.S.C.A. § 2719

§ 2719. Gaming on lands acquired after October 17, 1988

Currentness

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b), gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless--

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and--

(A) such lands are located in Oklahoma and--

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions

(1) Subsection (a) will not apply when--

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of--

ADDENDUM B

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(2) Subsection (a) shall not apply to--

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86-2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 5108 and 5110 of this title, subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

(c) Authority of Secretary not affected

Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

(d) Application of Title 26

(1) The provisions of Title 26 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such title) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

CREDIT(S)

(Pub.L. 100-497, § 20, Oct. 17, 1988, 102 Stat. 2485.)

