No. 24-6221

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Comanche Nation,

Plaintiff/Appellee,

v.

Lori Gooday Ware, et al.,

Defendants/Appellants.

Appeal from the United States District Court for the Western District of Oklahoma,
Case No. 22-CV-00425-G (Hon. Charles B. Goodwin)

APPELLANTS' REPLY BRIEF

Oral Argument Requested

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INTRODUCTION

Comanche Nation's claims fail because sovereign immunity applies, and none of its arguments—including waiver, statutory abrogation, or *Ex parte Young*—defeat that jurisdictional bar. This Court should reverse the district court's partial denial of the Tribal Officials' motion to dismiss.

ARGUMENT AND AUTHORITIES

I. The Tribal Officials' Immunity-Based Appeal Is Proper.

Comanche seeks to avoid any ruling on immunity by claiming that the Tribal Officials "forfeited and waived" most of their appellate arguments. But forfeiture and waiver—distinct terms that Comanche blurs[1]—do not apply here.

First, the Tribal Officials raised sovereign immunity throughout the proceedings below. App. Vol. 1 at 103 n.1, 110–11, 134 n.1, 140–41, 157, 177–82; App. Vol. 2 at 252, 259–62; App. Vol. 3 at 22–25, 31–32. The district court acknowledged the argument as "well taken," App. Vol. 1 at 212–15, but ultimately—and erroneously—allowed certain claims to proceed. App. Vol. 3 at 257. Comanche

[1] Forfeiture arises from failure to timely assert a known right, such as omitting an affirmative defense or failing to make evidentiary objections. *Hamer v. Neighborhood Hous. Servs. of Chicago*, 583 U.S. 17, 20 n.1 (2017); *Wood v. Milyard*, 566 U.S. 463, 470 (2012); *Burke v. Regalado*, 935 F.3d 960, 1014 (10th Cir. 2019). Waiver occurs when an issue is raised but then abandoned. *BonBeck Parker, LLC v. Travelers Indem. Co. of Am.*, 14 F.4th 1169, 1174 (10th Cir. 2021); *Burke*, 935 F.3d at 1014.

contends that immunity was not properly preserved because it was emphasized in the briefing opposing a preliminary injunction, rather than in the motion to dismiss. *See* Resp. Br., ECF 26 at 21 n.10. But the Tribal Officials briefed their motion to dismiss and their opposition to Comanche's request for preliminary injunction concurrently; they did not make and then abandon the sovereign immunity argument.[2] App. Vol. 1 at 22–23 (Dkt. 59 (motion to dismiss) and Dkt. 60 (response to motion for preliminary injunction) both filed on July 7, 2022); *cf. BonBeck Parker, LLC v. Travelers Indem. Co. of Am.*, 14 F.4th 1169, 1174 (10th Cir. 2021) (no waiver where a party raised an issue below and then, after the trial court rejected it, accepted the court's conclusion for purposes of subsequent filings until it could appeal).

Second, and more importantly, tribal sovereign immunity is jurisdictional. *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155, 1158 (10th Cir. 2014); *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007). Jurisdiction and immunity implicate the very legitimacy of a lawsuit and a court's authority over a defendant; they are therefore among the rare issues that may be considered for the first time on appeal. *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970 (10th Cir. 1991); *Garcia v. Bd. of Educ. of Socorro Consol. Sch. Dist.*, 777 F.2d 1403,

[2] As discussed below, even if they had, that would not preclude them from raising this jurisdictional issue again. *See Ramey Constr. Co. v. Apache Tribe of Mescalero Rsrv.*, 673 F.2d 315, 318 (10th Cir. 1982).

1405–06 (10th Cir. 1985). Indeed, "[s]o long as a case is pending, the issue of federal court jurisdiction"—including the question of tribal sovereign immunity—"may be raised at any stage of the proceedings either by the parties or by the court on its own motion." *Ramey Constr. Co. v. Apache Tribe of Mescalero Rsrv.*, 673 F.2d 315, 318 (10th Cir. 1982); *cf. Upper Skagit Indian Tribe v. Lundgren,*, 584 U.S. 554, 560 (2018) (declining to address but remanding for further consideration a tribal sovereign immunity argument first raised in an appellate *amicus* brief).

Qualified immunity also remains available. It is an affirmative defense that cannot be forfeited before the answer stage (and the Tribal Officials have not answered).[3] *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 645 (10th Cir. 1988); *see also Ahmad v. Furlong*, 435 F.3d 1196, 1201 (10th Cir. 2006)

[3] The single published Tenth Circuit case cited by Comanche to show forfeiture of qualified immunity involved a failure to raise qualified immunity at summary judgment. *Greer v. Dowling,* 947 F.3d 1297, 1303 (10th Cir. 2020). Comanche's cited nonprecedential cases are similarly distinguishable. *See Montoya v. City & Cty. of Denver*, 2022 WL 1837828, at *8 (10th Cir. June 3, 2022) (unpublished) (not deciding whether a clearly-established-law argument for qualified immunity was forfeited because appellants waived review of a predicate factual finding); *Evans v. Fogarty,* 241 F. App'x 542, 550 n.9 (10th Cir. 2007) (unpublished) (qualified immunity was waived where defendants did not raise it on summary judgment, in pretrial order, or in oral motions for JMOL); *Henry v. Hulett*, 969 F.3d 769, 785 (7th Cir. 2020) (qualified immunity not argued on summary judgment). Besides, while this Court *may* decline review when qualified immunity is not raised below, this Court also retains the discretion to accept review. *A Brighter Day, Inc. v. Barnes*, 860 F. App'x 569, 575–76 n.7 (10th Cir. 2021) (unpublished). Comanche notably ignores the authority cited by the Tribal Officials to this effect. Open. Br., ECF 23 at 38.

(qualified immunity defense can be raised for the first time in a summary judgment motion).

None of Comanche's cited cases about forfeiture and waiver address questions of jurisdiction or sovereign immunity.[4] And for good reason: once a party is immune from suit, the court lacks jurisdiction and cannot proceed. *See, e.g.*, *Fletcher v. United States*, 116 F.3d 1315, 1326 (10th Cir. 1997) (tribal defendants' immunity

[4] *United States v. Pinder*, 121 F.4th 1367, 1374 (10th Cir. 2024) (new argument for interpreting precedent about evidence suppression in criminal case); *Alex W. v. Poudre Sch. Dist. R-1*, 94 F.4th 1176, 1184–86 (10th Cir. 2024) (statute of limitations defense first asserted on appeal after entry of dispositive judgment); *Robert v. Austin*, 72 F.4th 1160, 1165 (10th Cir. 2023) (new arguments about back pay and attorneys' fees); *Hayes v. SkyWest Airlines, Inc.*, 12 F.4th 1186, 1201 (10th Cir. 2021) (identifying categories of new evidence in support of overturning trial that weren't identified in motion for new trial); *BonBeck,* 14 F.4th at 1174–75 (new contractual interpretation argument raised on appeal from summary judgment); *United States v. Leffler*, 942 F.3d 1192, 1197 (10th Cir. 2019) (new argument on appeal as to why evidence was insufficient to support criminal conviction); *Burke,* 935 F.3d 960, 995 (evidentiary objections not raised at trial and municipal liability theory neither presented below nor expressly argued on appeal); *In re Rumsey Land Co., LLC*, 944 F.3d 1259, 1273–74 (10th Cir. 2019) (new argument about a defendant's legal duty); *Ave. Capital Mgmt. II, L.P. v. Schaden*, 843 F.3d 876, 885–86 (10th Cir. 2016) (new factual argument, plus new legal argument about whether interests at issue were stocks or securities); *Bishop v. Smith*, 760 F.3d 1070, 1095 (10th Cir. 2014) (new severability argument for interpreting state statute); *Utah Animal Rights Coal. v. Salt Lake Cty.*, 566 F.3d 1236, 1244 (10th Cir. 2009) (new theory as to causal chain in liability analysis); *Wilson v. State Farm Mutual Auto. Ins. Co.*, 934 F.2d 261, 262 n.1 (10th Cir. 1991) (challenge to post-judgment interest rate); *Tele-Commc'ns, Inc. v. Comm'r of Internal Revenue*, 104 F.3d 1229, 1234 (10th Cir. 1997) (argument about how to account for depreciation recapture in corporate tax filing).

from suit deprived the district court of jurisdiction over the case). Comanche argues that some of the Tribal Officials' immunity arguments were waived by the "failure to argue for 'plain error' review," Resp Br., ECF 26 at 15, but immunity is not subject to forfeiture or waiver, so there was no such requirement. The procedural doctrines of waiver and forfeiture assume jurisdiction exists when holding litigants to the burden of preserving arguments. They aim to promote orderly litigation—not to confer jurisdiction where none exists or to abrogate a sovereign's immunity. *See Tele-Commc'ns*, 104 F.3d at 1232–33 (discussing the judicial values at play when an issue is presented for the first time on appeal).

The same principles that generally counsel against considering newly raised arguments on appeal counsel in favor of resolving the immunity questions presented here. Sovereign immunity is a pure question of law; the district court is not more equipped than this court to decide whether there has been a congressional abrogation, or tribal waiver, of sovereign immunity. *See Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1063 (10th Cir. 1995). The same is true of qualified immunity: whether clearly established law barred the Tribal Officials' actions is a pure legal question. *See Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985); *Cox v. Glanz*, 800 F.3d 1231, 1246 n.7 (10th Cir. 2015). As discussed in the opening brief (ECF 23 at 41–42) and in Section III(D) below, law barring gaming activities on the Tsalote Allotment is hardly "clearly established."

Both sovereign and qualified immunity exist to shield defendants not merely from liability, but from the burdens of litigation itself, and they should be resolved "at the earliest possible stage in litigation." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (quoting *Hunter v. Bryant,* 502 U.S. 224, 227 (1991)); *Osage Tribal Council ex rel. Osage Tribe of Indians v. U.S. Dep't of Lab.*, 187 F.3d 1174, 1179–80 (10th Cir. 1999) (tribal immunity guarantees immunity from suit, and not merely a defense to liability, so denial of tribal immunity is immediately appealable). While the Court could follow *Upper Skagit* and remand for further briefing, *see* 584 U.S. 554, doing so would waste judicial resources and undercut the very purpose of immunity.

The Tribal Officials' immunity defenses can and should be decided now.

II. Any Abrogation of Tribal Sovereign Immunity in IGRA Is Exceptionally Limited and Does Not Apply to Comanche's Claims.

Even if 25 U.S.C. § 2710(d)(7)(A)(ii) abrogates sovereign immunity in some cases, there is no abrogation applicable to Comanche's claims.[5] The Supreme Court has made clear that the abrogation in § 2710(d)(7)(A)(ii) is very limited; it "does not even cover all suits to enjoin gaming on Indian lands." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 795 n.6 (2014).

[5] Comanche recognizes that RICO does not abrogate the Tribe's sovereign immunity. Resp. Br., ECF 26 at 52 (Comanche "is not contending that RICO abrogated FSAT's sovereign immunity").

A. Courts may find abrogation of sovereign immunity only where Congress's intent is "unequivocal."

Under settled law, Congress must express any intent to abrogate tribal sovereign immunity in "unequivocal terms." *Lac du Flambeau Band v. Coughlin*, 599 U.S. 382, 385 (2023). The Supreme Court recently described this standard as "a high bar" and a "demanding standard," one which is not met if there is a plausible reading of the statute that preserves immunity. *Id*. at 385, 388.

That "high bar" is met where, for instance, a statute expressly states that "sovereign immunity is abrogated." *Id*. at 386–88. IGRA's § 2710(d)(7)(A)(ii), by contrast, provides only that the "United States district courts shall have jurisdiction" over a specified, narrow class of claims. 25 U.S.C. § 2710(d)(7)(A)(ii). Jurisdiction and sovereign immunity, however, are distinct. *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 786 n.4 (1991); *Osage Nation v. Oklahoma*, 260 F. App'x 13, 17 (10th Cir. 2007) (unpublished). Courts have consistently held that language conferring jurisdiction does not waive immunity. *White v. Univ. of Cal.*, 765 F.3d 1010, 1024–25 (9th Cir. 2014) (statutory language stating that district court "shall have jurisdiction" does not abrogate tribal sovereign immunity); *Miner*, 505 F.3d at 1011 (statutory language giving district courts "original jurisdiction over all civil actions" did not abrogate tribal sovereign immunity); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59 (1978) (Indian Civil Rights Act provision authorizing habeas actions was not an abrogation of tribal sovereign immunity).

While the Supreme Court nonetheless concluded in *Bay Mills* that § 2710(d)(7)(A)(ii) provides a "partial" abrogation of immunity, it emphasized that the abrogation was "limited." 572 U.S. at 791, 795 n.6, 801. It specifically concluded that § 2710(d)(7)(A)(ii) does *not* abrogate immunity as to claims that fall outside of the provision's specific terms—such as claims regarding gaming *off* Indian lands. *Id*.; *see also United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992) (a waiver of immunity "must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires").

B. Section 2710(d)(7)(A)(ii) does not allow Comanche's requested relief.

Any abrogation under § 2710(d)(7)(A)(ii) is exceedingly narrow—that provision authorizes only actions to "*enjoin* a *class III* gaming activity located *on Indian lands* and *conducted in violation of any Tribal-State compact* entered into under paragraph (3) that is in effect." 25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added); *see also Bay Mills*, 572 U.S. at 804. But Comanche seeks broader relief, including declaratory and monetary remedies. App. Vol. 2 at 38–39. Even Comanche's requests for injunctive relief, *id*., are too broad, as they extend beyond "a class III gaming activity" to include class II gaming and casino operations in general. That is impermissible. "Nothing in IGRA indicates that Congress abrogated

the sovereign immunity of tribes that elect to engage in class II gaming…." *Tamiami Partners, Ltd. v. Miccosukee Tr.*, 63 F.3d 1030, 1048 (11th Cir. 1995).

C. Comanche's arguments about whose "Indian lands" the Tsalote Allotment is foreclose § 2710(d)(7)(A)(ii) jurisdiction.

Because § 2710(d)(7)(A)(ii) applies only to suits to enjoin gaming "on Indian lands" as defined by IGRA (assuming other requirements are met), any federal cause of action under the provision must allege and establish that the gaming "is located on Indian lands." *Oklahoma v. Hobia*, 775 F.3d 1204, 1205–06 (10th Cir. 2014).

Comanche insists that the Tsalote Allotment "is not the FSA Tribe's Indian land" and is instead the Kiowa Tribe's Indian lands. Resp. Br., ECF 26 at 40. Accepting *arguendo* Comanche's premise, the lands would not be "Indian lands" *under IGRA*. A tribe must "exercise[] governmental power" over land for it to be "Indian lands" for purposes of IGRA. 25 U.S.C. § 2703(4)(B). The Kiowa Tribe relinquished any claim it had to the Tsalote Allotment when it dismissed with prejudice its claims in this case. App Vol. 3 at 136. Its relinquished claim to the land, and absence of governmental power over it, is insufficient to establish the land as "Indian lands" under IGRA.[6]

[6] Comanche's alternative argument that the Tsalote Allotment may still be held in trust for members of the Kiowa Tribe is frivolous. *See* Resp. Br., ECF 26 at 40–41. Comanche itself admits that "BIA deeded the land in trust to the FSA Tribe." App. Vol. 2 at 16, ¶46.

Similar reasoning applies to Comanche's contradictory argument that the Tsalote Allotment is held in trust for the Fort Sill Apache Tribe, but that IGRA nonetheless bars the Tribe from conducting gaming on the land. Resp. Br., ECF 26 at 24–25. As the Seventh Circuit aptly expressed, "[b]y insisting that the land" was not validly transferred and/or "was not in federal trust as of October 17, 1988, the [plaintiff] has not found a reason why the casino must close; it has instead identified a reason why [IGRA] does not regulate the gambling." *Stockbridge-Munsee Cmty. v. Wisconsin*, 922 F.3d 818, 822 (7th Cir. 2019).

Finally, a Tribal-State compact for Class III gaming under IGRA applies only to the "Indian lands" of the "tribe having jurisdiction over the Indian lands" where the gaming is conducted. 25 U.S.C. § 2710(d)(3); *see also Wisconsin v. Ho-Chunk*, 512 F.3d 921 (7th Cir. 2008) (federal jurisdiction exists only where the alleged violation relates to a compact provision negotiated under IGRA); American Indian Law Deskbook § 12:56 (tribal gaming on land other than the tribe's Indian lands, "even if purportedly conducted pursuant to tribal-state compact, is governed not by IGRA but by state law."). If, as Comanche asserts, the Tsalote Allotment is *not* the "Indian lands" of the Fort Sill Apache Tribe, then § 2710(d)(7)(A)(ii) cannot apply because that provision requires violation of a compact entered into under § 2710(d)(3). *See Bay Mills*, 572 U.S. at 792; *Hobia*, 775 F.3d at 1205–06. There can be no violation of a compact which is simply inapplicable. *California v.*

Picayune Rancheria of Chukchansi Indians of Cal., No. 1:14-CV-01593-LJO-SAB, 2015 WL 9304835, at *6–9 (E.D. Cal. Dec. 22, 2015) (unpublished), *aff'd*, 725 F. App'x 591 (9th Cir. 2018) ("Nothing…suggests that the Court may exercise jurisdiction over sovereign Tribal territory that does not fall within the scope of the Compact itself.").

Ultimately, Comanche's position that the Tsalote Allotment could be Indian lands of another tribe is completely baseless. The Fort Sill Apache Tribe received the entire beneficiary interest to the Tsalote Allotment in 2001, making it Indian lands of the Fort Sill Apache Tribe—not the Kiowa Tribe. *See* 25 U.S.C. § 2703(4). Comanche's collateral attack on Interior's 2001 decision to approve the transfer of the beneficiary interest in the Tsalote Allotment must be rejected. And because the Tsalote Allotment is the Fort Sill Apache Tribe's Indian lands, Comanche identifies no compact violation, so § 2710(d)(7)(A)(ii) still cannot apply. *See* Open. Br., ECF 23 at 26–27.

III. The *Ex parte Young* Doctrine Does Not Apply to Comanche's Claims.

Comanche invokes *Ex parte Young* to bypass tribal sovereign immunity, but the doctrine does not apply here. As the Supreme Court and this Court have emphasized, *Young* is a "very narrow" exception to sovereign immunity. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145–46 (1993); *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 495 (10th Cir. 1998). Courts

may apply *Young* only to vindicate federal rights and ensure federal supremacy. *See Papasan v. Allain*, 478 U.S. 265, 278–79 (1986); *Ex parte Young*, 209 U.S. 123, 159–60 (1908); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1156 (10th Cir. 2011).

The *Young* doctrine originated to allow suits against state officials acting unconstitutionally, on the theory that an unconstitutional act strips the individual actor of any entitlement to the state's immunity. *Young*, 209 U.S. at 160 (enjoining a state attorney general from bringing suit to enforce a statute that allegedly violated the Fourteenth Amendment); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 104–105 (1984). But to ensure "that sovereign immunity remains meaningful," *Young* must be applied only to the extent necessary to preserve federal supremacy. *Hill v. Kemp*, 478 F.3d 1236, 1256 (10th Cir. 2007); *Pennhurst*, 465 U.S. at 105. Courts cannot "rotely" allow claims framed against state or tribal officials. *Hill*, 478 F.3d at 1256.

Comanche bears the burden to "show" that *Young* applies. *See Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1167 (10th Cir. 2012). It fails because *Young* has limits that bar its application here. First, *Young* does not apply when the real party in interest is the sovereign itself or the named officials lack authority to enforce the challenged conduct. *See Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254–55 (2011); *Barrett v. Univ. of N.M. Bd. of Regents*, 562 F. App'x 692, 694

(10th Cir. 2014) (unpublished). Second, it does not apply when there is a comprehensive statutory remedial scheme. *See Seminole Tr. of Fla. v. Florida*, 517 U.S. 44, 74–76 (1996). Third, it applies only to the extent necessary to vindicate federal rights. *See Papasan*, 478 U.S. at 278; *Pennhurst*, 465 U.S. at 106. Fourth, it is not available unless there is a violation of controlling federal law. *See Papasan*, 478 U.S. at 277–78. And finally, it applies only to ongoing or imminent violations. *Id*.

Comanche fails on every front because it is attempting to force *Young* into a role it was never meant to play—like fitting a square peg into a round hole.

A. *Young* Is Unavailable Where Officials Lack Individual Enforcement Authority.

The Supreme Court has made clear that the *Young* doctrine is unavailable where "the [sovereign] is the real, substantial party in interest, as when the judgment sought would expend itself on the public treasury or domain, or interfere with public administration." *Stewart,* 563 U.S. at 255 (quoting *Pennhurst*, 465 U.S. at 101, n.11) (internal quotations omitted). This Court has thus held tribal officials immune where the requested relief would operate directly against the tribe. *Fletcher*, 116 F.3d at 1324; *see also Kenai Oil & Gas, Inc. v. Dep't of Interior*, 522 F. Supp. 521, 531 (D. Utah 1981), *aff'd* 671 F.2d 383 (10th Cir. 1982) (claims against the members of the

Business Committee were essentially against the Tribe when the relief would require Business Committee action).

Every one of Comanche's allegations under IGRA and RICO centers on gaming "conducted by the Fort Sill Apache Tribe." *See* App. Vol. 2 at 4, ¶1. Alleged violations of IGRA are based upon the *Tribe*'s operation of the Warm Springs Casino[7] and the RICO allegations are based on the Tribe, Business Committee, or Gaming Commission being an "Enterprise" under RICO.[8] The alleged violations involve *collective* decisions made by tribal *institutions*, not personal conduct.[9]

That is a fatal flaw. *Young* does not apply unless a named official has independent authority to enforce the challenged action. *See Chamber of Commerce v. Edmondson*, 594 F.3d 742, 760 (10th Cir. 2010); *Barrett*, 562 F. App'x at 694 (*Young* exception was inapplicable because individual Board members were not

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[7] *See, e.g.*, App. Vol. 2 at 4, ¶1; *id*. at 27, ¶98 ("the *FSA Tribe* did not validly acquire the Tsalote Allotment"; "The *FSA Tribe* also acquired the Tsalote Allotment after October 17, 1988, does not meet an exception, and therefore the *FSA Tribe* has no authority under IGRA to conduct gaming there." (emphasis added)); *id*. at 28, ¶100–¶101.

[8] *See, e.g.*, App. Vol. 2 at 28, ¶103 ("The FSA Tribe is an Enterprise as defined by 18 U.S.C. § 1961(4)…. In the alternative, the Enterprise is a division or department of the FSA Tribe…."); *id*. at 29, ¶110; *id*. at 31–34 ¶118–¶124.

[9] *See, e.g.*, App Vol. 2 at 16–17, ¶47, ¶49 ("the *FSA Tribe* submitted a letter to the [NIGC]" (emphasis added)); *id*. at 28, ¶104; *id*. at 31, ¶116 ("The FSA Defendants *jointly* conduct, manage, supervise, and direct the Warm Springs Casino operations…." (emphasis added)); *id*. at 35–36, ¶131; *id*. at 38–39.

empowered to act individually). The requirement that plaintiffs allege individual enforcement action is consistent with the broader principle that *Young* applies only where the defendant-official has the authority to stop to alleged violation of law; it does not apply where the requested remedy would require affirmative action by the sovereign itself or the disposition of sovereign property. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 (1949); *see also Vann v. Kempthorne*, 534 F.3d 741, 752–54 (D.C. Cir. 2008) (distinguishing between claims that would impose on an official a duty to act on behalf of the sovereign and claims seeking to prevent the official from acting).

Comanche's cited cases rejecting arguments that the sovereign was the real party in interest all involve officials who had individual authority to enforce an unlawful act, not political bodies or officials acting collectively. Resp. Br., ECF 26 at 45–46 (citing *Elephant Butte Irr. Dist. of N.M. v. Dep't of Interior*, 160 F.3d 602 (10th Cir. 1998) (claim against state executives with authority to enter into and collect profits from land lease agreements); *Norton v. Parsons*, 2024 WL 358239 (10th Cir. 2024) (unpublished) (claim against prison officials alleged to be denying medical treatment); *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 631 (10th Cir. 1998) (suit against governor and commissioners with specific statutory authority to implement and enforce challenged spending provision); *Vann*, 534 F.3d 741 (suit

against tribal chief to prevent him from exercising authority to conduct future unlawful elections)).

This Circuit's precedent is clear that one does not satisfy *Young* simply by identifying a high-level official or board member; the plaintiff must allege facts showing that the official is personally enforcing the alleged violation of federal law. *Peterson v. Martinez*, 707 F.3d 1197, 1205 (10th Cir. 2013); *Hakeem v. Kansas Dep't of Human Servs.*, 2022 WL 16642268, at *5 (10th Cir. Nov. 3, 2022) (unpublished). Comanche, however, identifies no action by a Tribal Official taking unlawful enforcement action. Instead, it challenges official actions taken by governing bodies—such as a resolution from the Business Committee and a license issued by the Gaming Commission. *See* App. Vol. 2 at 50–51; App. Vol. 3 at 42. The requested relief would require action by those same collective bodies to shut down gaming operations—something no individual tribal official has authority to do. That kind of institutional reversal is legislative and administrative in nature—not enforcement—and thus falls outside the scope of *Young*. *See e.g., Barrett*, 562 F. App'x at 694; *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 828 (10th Cir. 2007) ("The essence of an *Ex parte Young* action is seeking relief against the state officials who are responsible for enforcing the violative state laws, not against the state officials who drafted the violative legislation."); *Imperial Grante Co. v Pala Band*

of Mission Indians, 940 F.2d 1269, 1271–72 (9th Cir.1991) (*Young* inapplicable when the only action taken by officials was a governing body vote).

Because Comanche seeks to undo decisions made by sovereign governing bodies rather than enjoin individual officials from violating federal law, *Young* cannot be used to circumvent the bar of sovereign immunity.

B. IGRA and RICO Contain Comprehensive Remedial Schemes That Foreclose *Young*.

Young is inapplicable here for another fundamental reason: Congress already provided the exclusive remedies for compact violations. Where a statute contains a detailed remedial scheme—as IGRA and RICO do—courts may not supplement it with judicially created doctrines. *Seminole Tr.*, 517 U.S. at 74–76; *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 647 (2002); *Hill*, 478 F.3d at 1256. The Supreme Court has already plainly held that IGRA sets out a detailed remedial scheme in § 2710(d)(7). *Seminole Tr.*, 517 U.S. at 74–76. That structure forecloses alternative paths of relief as to the matters addressed within that provision.

Comanche contends *Seminole Tribe*'s reasoning applies only in the context of suits by tribes against states under § 2710(d)(3), but that misreads the decision. The Supreme Court emphasized "the intricate procedures" and "quite modest set of sanctions" available under § 2710(d)(7), and concluded that a *Young* claim would exceed the remedies carefully prescribed by Congress. *Id.* at 75 & n.17. Though the

case arose out of one particular facet of the compacting process, the Court plainly regarded all of § 2710(d)(7), and not just § 2710(d)(7)(A)(i), as the remedial scheme available to ensure that states and tribes negotiate in good faith—and then comply with—IGRA gaming compacts. *Id*. at 73–76.

Comanche also misreads *Alabama v. PCI Gaming Authority*, 801 F.3d 1278 (11th Cir. 2015). There, the Eleventh Circuit concluded that *Young* permitted a State's suit against a tribal official under 18 U.S.C. § 1166—not § 2710(d)(7)(A)(ii), as Comanche contends. *Id*. at 1289. The Eleventh Circuit further recognized that *Young* could *not* be used to get around IGRA's remedial scheme in § 2710(d)(7)—and it specifically identified § 2710(d)(7)(A)(ii) as a place where Congress created an express remedy. *Id*. at 1289, 1299. The Court went on to state that "[b]ecause IGRA expressly provides these remedies, we should not expand coverage of the statute to subsume other remedies." *Id*. (internal marks omitted).[10]

[10] The district court cases Comanche cites that recognize *Young* exceptions to IGRA all similarly involve provisions other than § 2710(d)(7)(A)(ii); none stand for the proposition that one tribe may sue to challenge another tribe's gaming activity under § 2710(d)(7)(A)(ii). *See* Resp. Br., ECF 26 at 49–51 (citing *Pueblo of Pojoaque v. New Mexico,* 2015 WL 10818855 (D.N.M. 2015) (unpublished) (claim under § 1166); *Tohono O'Odham Nation v. Ducey,* 130 F. Supp. 3d 1301 (D. Ariz. 2015) (finding that § 2710(d)(1) and § 2710(d)(3)(C) do not contain anything comparable to the remedial scheme of § 2710(d)(7)); *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084 (E.D. Cal. 2002) (evaluating action under § 2710(d)(1)); *Friends of Amador Cnty. v. Salazar*, 2010 WL 4069473 (E.D. Cal. Oct. 18, 2010) (unpublished) (claims regarding § 2710(d)(1))). And Comanche's citation of *Verizon* is inapposite because *Verizon* is not an IGRA case. 535 U.S. at 647.

The § 2710(d)(7) remedial scheme is just one part of the "multitude of express remedies" Congress provided in IGRA, as recognized by an earlier Eleventh Circuit decision, *Florida v. Seminole Tribe*. 181 F. 3d 1237, 1248 (11th Cir. 1999). Other remedies include: 18 U.S.C. § 1166 (providing for criminal enforcement); 25 U.S.C. § 2711(d) (authorizing tribal suit to compel Chairman of NIGC either to approve or to disapprove management contract); 25 U.S.C. § 2713(a)(2), (b)(2) (creating right to NIGC hearing on fines or temporary closures); and 25 U.S.C. § 2713(c), § 2714 (authorizing appeal to district court of NIGC fines, permanent closure orders, and certain other decisions). *Id*. Given the "modest" relief Congress specifically authorized under § 2710(d)(7)(A)(ii), Comanche cannot use *Young* to obtain relief Congress did not provide.

RICO adds to the specific, congressionally-determined remedial scheme available to combat unlawful gaming by providing criminal enforcement provisions in 18 U.S.C. § 1963 and civil remedies in 18 U.S.C. § 1964. While the United States Attorney General's Office may seek injunctive relief under § 1964(b), numerous courts have held RICO does not provide that remedy to private plaintiffs. *See Hengle v. Treppa*, 19 F.4th 324, 354 (4th Cir. 2021); *In re Fredeman Litigation*, 843 F.2d 821, 830 (5th Cir. 1988); *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1084 (9th Cir. 1986); *see also Switzer v. Coan*, 261 F.3d 985, 992, n.14 (10th Cir. 2001) (expressing "considerable doubt that equitable relief is available to private RICO

litigants under any circumstances."); *DeMauro v. DeMauro*, 115 F.3d 94, 98 (1st Cir. 1997) (same); *City of Boston v. Express Scripts, Inc.,* 2025 WL 457794, at *8–*9 (D. Mass. Feb. 11, 2025) (unpublished) (describing a split in authority on whether equitable relief is available but declining to reach the issue).

Comanche's RICO claim is especially problematic because it seeks to enforce criminal laws regarding Indian gaming, though enforcement is already governed by IGRA. In *Florida v. Seminole Tribe*, the Eleventh Circuit warned that such private enforcement of criminal laws would disrupt IGRA's remedial framework, deprive tribes of procedural protections, and interfere with federal prosecutorial discretion. 181 F.3d at 1249. These concerns reflect the longstanding rule that equity—the tool of *Young*—"will not enjoin commission of a crime." *Id.*

C. *Young* Requires Infringement of a Federal Right, Which Is Absent Here.

The foundation of *Young* is the need to vindicate a federal right. *See, e.g., Pennhurst*, 465 U.S. at 105 ("Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights."). Absent violation of a specific federal right conferred by the Constitution or Congress, the doctrine does not apply. *See Stewart,* 563 U.S. at 261 n.8; *Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 87–88 (2nd Cir. 2001); *Stidham*, 640 F.3d at 1156.

The only right Comanche specifically asserts is the supposed "right [of one tribe] to sue for an injunction to prohibit class III gaming in violation of [a third-party tribe's] tribal-gaming compact." Resp. Br., ECF 26 at 39. But no such right exists. Section 2710(d)(7)(A)(ii) gives a right only to *compacting parties* to ensure compliance with a duly negotiated compact. Through IGRA, Congress sought to encourage cooperation between states and tribes in approaching "the controversial subject of regulating tribal gaming." *Florida v. Seminole Tr.*, 181 F.3d at 1240. The "intricate" remedies of § 2710(d)(7)—including § 2710(d)(7)(A)(ii)—reflected Congress's "careful balance" of states' and tribes' competing interests and power imbalances by ensuring that gaming compacts negotiated under IGRA would be enforceable. *Id*.; *see also United States v. Spokane Tr.*, 139 F.3d 1297, 1300 (9th Cir. 1998) ("It is quite clear from the structure of the statute that the tribe's right to sue the state is a key part of a carefully-crafted scheme balancing the interest of the tribes and the states.").

Multiple federal courts have confirmed that only the compacting parties have rights under § 2710(d)(7)(A)(ii). As one court explained:

> the language of 25 U.S.C. § 2710(d)(7)(A)(ii) confers federal court jurisdiction over disputes arising between two parties to a specific gaming Compact. Nothing in IGRA confers federal jurisdiction or waives tribal immunity from claims of *third-party tribes* seeking to invalidate another tribe's Compact with the State.

Rincon Band of Luiseno Mission Indians v. Schwarzenegger, No. 04-CV-1151, 2004 WL 7340689, at *5 (S.D. Cal. Sept. 21, 2004) (unpublished), *aff'd in part and rev'd in part on other grounds*, 290 F. App'x 60 (9th Cir. 2008); s*ee also Stockbridge-Munsee*, 922 F.3d at 821–24; *Picayune Rancheria*, 2015 WL 9304836, at *2 ("The plain language of § 2710(d)(7)(A)(ii) provides a federal forum in which either party to a Tribal-State compact may challenge operation of class III gaming conducted in violation of a compact."). Here, because Comanche is not a party to the Tribal-State gaming compact between the Fort Sill Apache Tribe and the State of Oklahoma, it cannot invoke § 2710(d)(7)(A)(ii) to challenge gaming operations under that compact.

Comanche alleges no other federal rights under IGRA or RICO, nor could it. Neither IGRA nor RICO creates enforceable rights for one tribe to sue another over gaming operations. *See Hartman v. Kickapoo Tr. Gaming Comm'n*, 319 F.3d 1230, 1233 (10th Cir. 2003) ("[W]e hold that IGRA contains no implied private right of action in favor of an individual seeking to enforce compliance with the statute's provisions."); *Tamiami*, 63 F.3d at 1049; *Hengle*, 19 F.4th at 343 (no private RICO right of action for equitable relief).

Without a federal right, Comanche cannot invoke *Young* to vindicate federal law.

D. Comanche Has Not Alleged a Violation of Controlling Law by the Tribal Officials.

When this Court previously held, in *Crowe & Dunlevy v. Stidham*, that the *Young* doctrine applies in the context of tribal immunity, this Court recognized that the action being challenged needs to allegedly violate "*controlling* federal law," namely, federal constitutional, statutory, or common law "*recognized* as the supreme law of the United States." 640 F.3d at 1155–56 (emphasis added). Without controlling federal law, this case lacks the need to "vindicate federal rights" and "ensure the supremacy of federal law." *Id*.

Comanche's argument centers on the idea that the Warm Springs Casino is unlawfully operating on lands "acquired by the Secretary" after October 17, 1988, in violation of 25 U.S.C. § 2719. But its legal theory would require a novel interpretation of federal law. The Tsalote Allotment has been held in trust by the United States since 1901 and legal title has not been relinquished by the Secretary since then. App. Vol. 3 at 237; App. Vol. 2 at 11 ¶¶ 25, 28. Thus, despite beneficiary interests changing over time, the Secretary did not "acquire" the tract after 1988. Further, the NIGC—the federal agency with the statutory power to enforce IGRA's provisions—holds the position that § 2719 is not triggered when the beneficiaries of a parcel change after 1988, even if a tribe becomes a beneficiary for the first time. *See, e.g.*, Memorandum from Jo Ann M. Shyloski, Senior Attorney, to Philip N.

Hogen, Chairman, *re: Kiowa Indian Tribe of Oklahoma – Gaming Site* (Nov. 15, 2005), *available at* Dist. Ct. Dkt. 26-1.

Comanche's reliance on 25 C.F.R. § 559.2(a)(1) cuts against its own position. While the regulation directs the Chair to grant or deny a tribe's request for expedited review within 30 days, it does not *require* action approving the license. 25 C.F.R. § 559.2(a)(1). The NIGC declined to provide expedited review, App. Vol. 1 at 218 n.7, but it took no action to stop the gaming operations before or after the review period expired despite having clear enforcement powers to do so under 25 U.S.C. § 2705(a).

The NIGC's consistent position, and its absence of any enforcement action against the Warm Springs Casino, confirm that Comanche's interpretation of § 2719 is not controlling federal law. Inaction by the federal agency charged with enforcement is powerful evidence that no violation of federal law exists. *Compare to Hobia*, 775 F.3d at 1208 (describing several actions taken by the NIGC in response to a tribe's notice of intent to license a new gaming facility on a property that was not owned or governed by the tribe).

Young exists to "vindicate federal rights" and "ensure the supremacy of federal law," *Stidham*, 640 F.3d at 1155–56, but the law Comanche attempts to invoke is far from "clearly established" or "controlling."[11]

[11] Comanche's allegations that the Tribal Officials are violating a Tribal-State compact face a similar problem: Tribal-State compacts are not the "supreme

E. The Actions of the Tribal Officials Are Not Ongoing.

Even if Comanche could identify a violation of controlling law, *Young* is still unavailable because it applies only to ongoing violations of federal law by individual officers—not the sovereign itself. The only conduct Comanche identifies by the Tribal Officials are historical acts conducted by committee: a vote by the Business Committee, and a facility license issued by the Gaming Commission. Both are discrete, completed acts that do not give rise to any continuing obligation or unlawful enforcement. *Young* requires a current and enforceable duty on the part of an official to act unlawfully. *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Peterson*, 707 F.3d at 1206; *see also Free Speech Coal., Inc. v. Anderson*, 119 F.4th 732, 736 (10th Cir. 2024) (official must have both "a particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty" (internal quotations omitted)). That does not exist here.

Moreover, the allegedly unlawful gaming is, by Comanche's own admission, "conducted by the Fort Sill Apache Tribe"—not the Tribal Officials. App. Vol. 2 at 4 ¶1. Comanche's reliance on general tribal governance functions and the *Tribe*'s unlawful gaming operations does not establish any ongoing enforcement actions by

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law" of the United States. *Young* accordingly does not authorize suit to challenge such alleged violations. *Cf. Penn. Fed'n of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 323–24 (3d Cir. 2002).

individual officials. That is insufficient to qualify for *Young*'s narrow exception to sovereign immunity.

CONCLUSION

Comanche's claims do not satisfy any recognized exception to sovereign immunity and therefore cannot proceed. The Tribal Officials respectfully request that this Court reverse the district court's order denying, in part, their motion to dismiss and remand with instruction to dismiss all claims against them.

Respectfully submitted this 20th day of May, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2025, I electronically filed the foregoing using the Court's CM/ECF system, which will send notification of such filing to the following:

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