No. 12-515

# In The Supreme Court of the United States

STATE OF MICHIGAN,

*Petitioner,*

v.

BAY MILLS INDIAN COMMUNITY, et al.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF OF THE STATE OF OKLAHOMA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

E. SCOTT PRUITT
Attorney General of Oklahoma

*PATRICK R. WYRICK, OBA #21874
Solicitor General
OKLAHOMA ATTORNEY GENERAL'S OFFICE
313 NE 21st Street
Oklahoma City, Oklahoma 73105
(405) 522-4448
(405) 522-4534 FAX
patrick.wyrick@oag.ok.gov
*Attorneys for Amici Curiae State of Oklahoma*

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

## STATEMENT OF THE IDENTITY, INTEREST, AND AUTHORITY OF AMICUS TO FILE[1]

The State of Oklahoma as amicus has an interest in the decision because the State is home to 38 federally-recognized Indian tribes, the large majority of which have entered into gaming compacts with the State, as authorized by the Indian Gaming Regulatory Act (IGRA). The State of Oklahoma fully supports the arguments made by Michigan in its opening brief, but writes this brief to offer its unique perspective as the state that is home to more Indian casinos than any other state, and where Indian gaming is a $3.48 billion/year business.

The State sometimes must take action against tribes conducting gaming not authorized by their compacts, including taking action in federal court under IGRA. If the decision below is affirmed, the State's ability to prevent harmful illegal gaming will be hampered.

[1] Pursuant to Rule 37.6, the State of Oklahoma affirms that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than the State of Oklahoma or its counsel made such a monetary contribution.

## STATEMENT

When the State of Oklahoma learns that an Indian tribe is conducting illegal Class III gaming within its border, it has several options to remedy the problem.

First, it could charge the culpable individual tribal members with crimes under state law. *See*, *e.g.*, 21 O.S. § 941 (criminalizing gaming and providing for penalties and a minimum one-year prison sentence for those conducting illegal gaming). Second, it could bring a state law-based *in rem* action to seize the illegal gaming machines. *See*, *e.g.*, 21 O.S. § 973 (authorizing seizure of illegal gaming machines). Third, it could seek to enjoin the tribe from continuing the illegal gaming – the tribe, however, will almost certainly claim that it is immune from suit. Fourth, it could bring an *Ex Parte Young* action seeking to enjoin the individual tribal officials responsible for the illegal gaming – although this too usually results in a claim of sovereign immunity.[2]

As counterintuitive as it may seem, it is this latter option – the least drastic of the lot – that the Bay Mills Indian Community seeks to abolish. As a matter of policy, this is a terrible idea. First, it invites tribes to open illegal casinos and then claim sovereign

[2] This has been Oklahoma's experience even in a circuit like the Tenth, which has correctly recognized that *Ex Parte Young* actions against tribal officials are permissible, *see*, *e.g.*, *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011).

immunity and lack of jurisdiction when a State asks a federal court to step in and enjoin the illegal gaming – something Oklahoma knows all too well as a party to a pending case where exactly that is happening. Second, it forces States like Michigan and Oklahoma to in the future jump directly to the more aggressive options available to them – most likely the filing of criminal charges against tribal officials and seizing of gaming equipment.

These concerns are particularly troubling to States because they effectively bear sole responsibility for policing illegal tribal gaming within their borders. The National Indian Gaming Commission (NIGC) in fact self-reports a role that is largely deferential to the tribes it purports to regulate: "tribal gaming commissions are the primary regulators of gaming operations. The role of the Commission is to monitor and validate the work of tribal gaming regulators." NIGC, "Frequently Asked Questions," http://www.nigc.gov/Portals/0/NIGC%20Uploads/aboutus/FAQ06032013vs2.pdf (last visited on August 30, 2013).

So while the United States may have intimated in its invitation brief that review was unnecessary because the United States itself "has criminal and civil enforcement Authority," U.S. Cert. Br. 19, Oklahoma, like Michigan, knows from experience that when tribes illegally game, it is the States who must act to stop them – even when the NIGC has properly declared tribal gambling illegal it has declined to

initiate enforcement. Waiting on the federal government to act has not proved a viable option.[3]

Thus, because it involves the availability of a valuable remedy used by States to prevent illegal gaming, the importance of this case and the need for reversal cannot be overstated. Indian gaming is an ever expanding, multi-billion dollar business and it exists because of IGRA. When an Indian tribe purports to rely on IGRA to conduct gaming, but is actually flaunting IGRA's requirement that the gaming occur on the tribe's Indian land, surely federal

[3] Three recent examples bear this out. First, a dispute with the Kialegee Tribal Town that has prompted litigation currently pending before the Tenth Circuit. *See Oklahoma v. Hobia*, 12-CV-054-GKF-TLW, 2012 WL 2995044 (N.D. Okla. July 20, 2012). There, the National Indian Gaming Commission (NIGC) determined that the land on which the Kialegee tribe was building a Class III gaming facility was not the tribe's "Indian land" because the tribe did not have legal jurisdiction over the land, but the NIGC merely threatened enforcement action if gaming occurred – something the State had been successful in enjoining *before* the NIGC issued its opinion. The second involves a dispute with the United Keetoowah Band where the tribe was operating a Class III facility that the NIGC determined was not on "Indian lands," yet the NIGC disavowed jurisdiction over the casino site – allowing the casino to continue to operate with impunity from federal enforcement action. The third involves a dispute with the Alabama-Quassarte Tribe, where the NIGC told the tribe that it had no lands upon which it could lawfully game under IGRA, yet stood idly by when the tribe nonetheless opened a Class III facility.

courts have jurisdiction to enjoin that illegal gaming. The Sixth Circuit's decision should be reversed.

## SUMMARY OF THE ARGUMENT

1. Federal courts have general federal question jurisdiction to resolve disputes over whether a tribe's Class III facility is authorized by IGRA.

2. IGRA separately provides federal courts with jurisdiction to resolve disputes over whether a tribe's Class III facility is authorized by IGRA. The Sixth Circuit's decision to the contrary defied congressional intent to provide states with a federal court forum to resolve such disputes, and puts the incentives in all the wrong places, by giving tribes a reason to move Class III gaming activities off of their Indian lands.

3. Tribal sovereign immunity from suits brought by states is inappropriate in the modern age of commercial tribal activity, and it provides tribes with greater immunity from suit than that enjoyed by the states, the United States, and foreign nations. The Court should revisit its holding in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 762 (1998), and abolish tribal sovereign immunity in the context of suits brought by states to enjoin unlawful commercial activity occurring outside of a tribe's Indian land.

## ARGUMENT

### I. Federal Courts Have Federal Question Jurisdiction To Determine Whether Tribal Gaming Complies With IGRA.

The legality of the Class III gaming conducted by the Bay Mills tribe depends on whether that gaming is authorized by IGRA. If it is, the tribe's gaming compact with the State of Michigan allows the gaming. Any enforcement action taken by Michigan would thus begin with a threshold question of federal law.

So when Michigan sued seeking a determination that the gaming is not authorized by IGRA, the suit necessarily arose "under the . . . laws . . . of the United States." 28 U.S.C. § 1331. This is so because Section 1331 provides jurisdiction when the "complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 690 (2006).

The district court could not resolve Michigan's claims without answering the substantial federal law question of whether Bay Mills' gaming violated IGRA and the tribe's federally-approved gaming compact. As a result, Michigan's allegation in the complaint that the Bay Mills casino was not on Indian land and thus not authorized by IGRA supported the court's jurisdiction because to resolve the case the district court *had* to apply IGRA to the facts to determine whether the gaming was federally authorized. There

was no avoiding the substantial threshold federal question that triggered the district court's jurisdiction under Section 1331.

## II. IGRA Separately Supplies Federal Courts With Subject Matter Jurisdiction Over IGRA-Based Disputes.

The Sixth Circuit should also have concluded that the district court had jurisdiction based on a provision in IGRA that provides that federal district courts shall have jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact" entered into pursuant to IGRA. 25 U.S.C. § 2710(d)(7)(A)(ii).

By taking the narrow view that the reference to a violation "on Indian lands," was intended as a limitation on federal court jurisdiction, *see Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3150 (2010) (only when Congress "expressly limits" Section 1331's expansive grant of federal question jurisdiction should a statute be read as narrowing the scope of that jurisdiction), the Sixth Circuit reached a counterintuitive result that ignored IGRA's intent to provide federal court jurisdiction for a State or Tribe to remedy IGRA compact violations.

Indeed, Congress couldn't have intended the absurdities that result when the Sixth Circuit's illogic

is applied. For example, if a tribe opened a 100-machine casino on Indian land, and complied with IGRA in all respects until one day it began using a single machine that was not authorized under the tribe's compact with the state, a federal court would have the power to enjoin the tribe from using that lone machine. But if the tribe moved its *entire casino* off Indian land, the federal court would suddenly be deprived of jurisdiction. In other words, federal courts would have jurisdiction to enjoin a gaming operation that was 1% out of compliance, but not a gaming operation that was 100% out of compliance. Section 2710(d)(7)(A)(ii) was surely intended as a means by which states could utilize the federal courts to prevent illegal gaming that a tribe purports to conduct under IGRA, rather than as a perverse incentive for tribes to ratchet up the egregiousness of their IGRA violations.

This is of particular concern to a state like Oklahoma, which despite its significant Indian population, has no Indian reservations. Indian lands make up a tiny percentage of the state's total land mass, and those Indian lands are fragmented throughout the state in a patchwork fashion. Because of this and tribes' desire to conduct gaming near population centers, the likelihood is magnified that a casino's illegality will be based on the operating tribe's failure to comply with IGRA's requirement that it be on the tribe's Indian land. History has borne this out, as Oklahoma's last three significant State/tribal gaming disputes have involved tribes attempting to operate casinos off their Indian land. *See* infra fn. 4.

*Oklahoma v. Hobia* is a particularly noteworthy example, and it illustrates how tribes are attempting to use the Sixth Circuit's decision to evade State enforcement of IGRA. 12-CV-054-GKF-TLW, 2012 WL 2995044 (N.D. Okla. July 20, 2012). *Hobia* was prompted by the Kialegee Tribal Town's construction of a Class III gaming facility in a suburb of Tulsa some 70 miles from the tribe's historic land base, and on a parcel of land owned by members of a different Indian tribe that was adjacent to residential neighborhoods, a vocational school, and a proposed elementary school. The State of Oklahoma sought a declaration that the casino was not authorized by IGRA because it was not located on the "Indian land" of the Kialegee Tribal Town, as well as an injunction prohibiting tribal officials and a gaming corporation from conducting Class III gaming at the site. The district court granted declaratory and injunctive relief in Oklahoma's favor, and the tribal defendants appealed. The NIGC subsequently confirmed that the parcel was not the Tribal Town's "Indian land" and was thus not land upon which the tribe could game under IGRA. On appeal, the tribal defendants rely heavily on the Sixth Circuit's opinion, arguing that the court did not have subject-matter jurisdiction, and that the defendants' sovereign immunity had not been abrogated because the lawsuit sought to prohibit gaming on lands that the State of Oklahoma had alleged were not the tribe's Indian lands. In other words, the tribal defendants argue that the Sixth Circuit's decision stands for the proposition that federal courts lack jurisdiction over IGRA cases such

as this, *even when it is undisputed that the illegal gaming is occurring on Indian lands* (just not the Indian lands of the tribe seeking to game upon it).

The Sixth Circuit's decision thus needs to be reversed both because of its illogic and its unintended practical effects.

## III. Indian Tribes Should Not Be Entitled To Sovereign Immunity From Suits Brought By States.

The Sixth Circuit correctly concluded that Section 1331 conferred federal question jurisdiction over Michigan's state- and federal-common law-based claims, but the court incorrectly concluded that the tribe was immune from suit on those claims. That holding opened the door for this Court to revisit its opinion in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 762 (1998), and the Court should do just that.

As an initial matter, while "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), tribal officials, engaging in continuing violations of federal law, are not immune from suit under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). The Tenth Circuit has correctly recognized the doctrine's applicability to tribal disputes, *see*, *e.g.*, *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011). But as Michigan points

out, other courts have been inconsistent in applying this exception to sovereign immunity. As a result, states cannot confidently rely on *Ex Parte Young* actions as a viable vehicle for obtaining declaratory and injunctive relief. Even in states in circuits with precedent supporting such suits, tribal officials reflexively argue that tribal sovereign immunity defeats jurisdiction. *See*, *e.g.*, *Oklahoma v. Hobia*, 12-CV-054-GKF-TLW, 2012 WL 2995044 (N.D. Okla. July 20, 2012) (where the defendant tribal officials argued that tribal sovereign immunity precluded the court from enjoining even the officials).

In other words, the *Ex Parte Young* option *should* be available to states like Michigan, but the unreliability of that option cuts in favor of recognition that, as a general matter, tribal sovereign immunity should not apply in suits brought by sovereign states to enjoin commercial activities occurring off a tribe's Indian lands:

> Why should an Indian tribe enjoy broader immunity than the States, the Federal Government, and foreign nations? As a matter of national policy, the United States has waived its immunity from tort liability and from liability arising out of its commercial activities. *See* 28 U.S.C. §§ 1346(b), 2674 (Federal Tort Claims Act); §§ 1346(a)(2), 1491 (Tucker Act). Congress has also decided in the Foreign Sovereign Immunities Act of 1976 that foreign states may be sued in the federal and state courts for claims based upon commercial activities carried on in the United

> States, or such activities elsewhere that have a "direct effect in the United States." § 1605(a)(2). And a State may be sued in the courts of another State. *Nevada v. Hall*, 440 U.S. 410 (1979).

*Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc*., 523 U.S. 751, 762 (1998) (Stevens, J., dissenting).

Why so, indeed. Tribal sovereign immunity was "developed almost by accident," *id*. at 756, "extends beyond what is needed to safeguard tribal self-governance," *id*. at 758, is "inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities," *id*., and "can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id*. Remarkably, those were the words of the six-justice majority that chose to "defer to Congress" and affirmed the continuing validity of the doctrine.

Regardless of whether the *Kiowa* majority's decision to "defer" was correct then, the 15 years of congressional inaction that have followed – all the while the concerns that the majority voiced have been magnified in every respect by the explosion in purely

commercial tribal activity[4] – counsel that deference is no longer appropriate. Congress may have failed to

[4] Oklahoma's experience with the recent explosion in its tribes' gaming revenues and use of those revenues to diversify into complex commercial entities bears out this point. As Oklahoma tribes have expanded into enterprises as diverse as chocolate making, filmmaking, hotels, restaurants, defense contracting, etc., sovereign immunity has been increasingly used as a defense in suits of a commercial, rather than sovereign/governmental nature. *See*, *e.g.*, *Swanda Brothers, Inc. v. Chasco Constructors, Ltd., L.L.P.*, No. CIV-08-199-D, 2012 WL 4382612, at *1 (W.D. Okla. Sept. 25, 2012) (discussing tribe's attempt to advance sovereign immunity in commercial contract dispute); *New Gaming Systems, Inc. v. National Indian Gaming Comm'n*, 896 F.Supp.2d 1093, 1098 (W.D. Okla. 2012) (noting tribal court's application of sovereign immunity in commercial contract dispute); *Waltrip v. Osage Million Dollar Elm Casino*, 2012 OK 65, ¶ 1, 290 P.3d 741, 742 (noting tribe's and insurance company's argument that sovereign immunity blocked employee's worker's compensation claim); *Harris v. Muscogee (Creek) Nation*, No. 11-CV-654-GKF-FHM, 2012 WL 2279340, at *1 (N.D. Okla. June 18, 2012) (noting tribe's argument that sovereign immunity would block negligence claim by patron of tribal business); *Wells Fargo Bank, N.A. v. Maynahonah*, No. CV-11-648-D, 2011 WL 3876255, at *2-3 (W.D. Okla. Sept. 2, 2011) (noting tribe's argument that sovereign immunity should block suit over lease dispute); *Dilliner v. Seneca-Cayuga Tribe*, 2011 OK 61, ¶ 1, 258 P.3d 516, 517 (noting tribe's argument against waiver of sovereign immunity in employment contract dispute); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1153-56 (10th Cir. 2011) (reasoning that sovereign immunity did not block suit to enjoin tribal judge from refusing payment of lawyer fees); *United States ex rel. Morgan Bldgs. & Spas, Inc. v. Iowa Tribe of Oklahoma*, No. CIV-09-730-M, 2011 WL 308889, at *1 (W.D. Okla. Jan. 26, 2011) (noting a tribe's sovereign immunity argument meant to block a breach-of-contract suit in commercial dispute); *Brown v. Cheyenne Arapaho Tribes, Okla.*, No. CIV-10-970-R, 2010 WL 9473334, at *1-2 (W.D. Okla. Nov. 3, 2010)

(Continued on following page)

act, but that does not mean we are stuck with a doctrine so poorly fitted to the realities of modern tribal activity. The doctrine of tribal sovereign immunity is judge-made federal common law that this Court has the power to modify based on changed

---

(granting tribe's motion to dismiss because tribal sovereign immunity blocked former business employees' suit); *State ex rel. Edmondson v. Native Wholesale Supply*, 2010 OK 58, ¶ 31-32, 237 P.3d 199, 210 (noting business's argument that its association with tribe blocked state regulation of cigarette distribution because of tribal sovereign immunity); *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1290 (10th Cir. 2008) (holding that tribal sovereign immunity blocked suit against tribal tobacco business by distributor in commercial contract suit); *Bittle v. Bahe*, 2008 OK 10, ¶ 1, 192 P.3d 810, 812 (noting tribe's argument that sovereign immunity prevented suit arising from state alcoholic beverage sale laws); *Comanche Indian Tribe of Oklahoma v. 49, L.L.C.*, 391 F.3d 1129, 1130-31 (10th Cir. 2004) (noting tribe's arguments that sovereign immunity should prevent arbitration clause enforcement in commercial litigation initiated by tribe); *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 414 (2001) (rejecting tribe's argument that sovereign immunity blocked enforcement of arbitration award); *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F.Supp.2d 1131, 1133-34 (N.D. Okla. 2001) (noting tribe's argument that sovereign immunity blocked copyright infringement and other claims arising from commercial dispute); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 753-54 (1998) (chronicling tribe's assertion of sovereign immunity in commercial contract dispute); *Citizens Potawatomi Nation v. Freeman*, 113 F.3d 1245 (10th Cir. 1997) (noting tribe's attempt to assert sovereign immunity in collateral attack on state court judgment); *United States ex rel. Citizen Band Potawatomi Indian Tribe of Oklahoma v. Enterprise Management Consultants, Inc.*, 883 F.2d 886, 887-88 (10th Cir. 1989) (noting tribe's argument that sovereign immunity allowed it to void commercial contract).

circumstances. *See Jaffee v. Redmond*, 518 U.S. 1, 8 (1996) ("[T]he common law is not immutable but flexible, and by its own principles adapts itself to varying conditions."); quoting *Funk v. United States*, 290 U.S. 371, 383 (1933).

The Court should exercise that power and modify the doctrine. There is simply no good reason that tribes should be entitled to sovereign immunity from suits brought by states to enjoin commercial activity happening off of the tribe's Indian land. As Michigan points out, the United States came to this realization with regard to foreign nations *decades ago*, when the judicially-created foreign sovereign immunity doctrine was narrowed to exclude immunity for the commercial acts of foreign nations. 28 U.S.C. § 1602 *et seq*. ("Foreign Services Immunities Act of 1976"). The explosion in commercial activity by tribes warrants a similar evolution in the common law of tribal immunity.

## CONCLUSION

For these reasons, the judgment below should be reversed.

Respectfully submitted,

E. SCOTT PRUITT
Attorney General of Oklahoma

*PATRICK R. WYRICK, OBA #21874
Solicitor General
OKLAHOMA ATTORNEY
GENERAL'S OFFICE
313 NE 21st Street
Oklahoma City, Oklahoma 73105
(405) 522-4448
(405) 522-4534 FAX
patrick.wyrick@oag.ok.gov
*Attorneys for Amicus Curiae*
*State of Oklahoma*

**Counsel of Record*