No. 12-515

In the Supreme Court of the United States

STATE OF MICHIGAN, PETITIONER

v.

BAY MILLS INDIAN COMMUNITY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

The State of Michigan seeks review of a Sixth Circuit decision that presents a pair of recurring and widening circuit splits regarding how states and tribes can assert federal claims related to tribal gaming under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (IGRA). Bay Mills says that certiorari is not warranted because the issues presented will be resolved through other claims still pending between the parties and because the asserted circuit splits do not actually exist. Bay Mills is wrong on both counts.

Bay Mills' main objection is that this Court should not review the substantial and unsettled questions presented because the State will be able to vindicate its interests through either the *Ex Parte Young* action filed by the State against individual tribal members, or through Bay Mills' *largesse* in filing a lawsuit against the State. Br. in Opp. 1–2, 24–27. But as explained in detail below, Bay Mills' arguments in both of those actions contradict its representations here.

Bay Mills also says there are no circuit conflicts. Not so. The first issue is whether a federal court has *subject-matter jurisdiction* to enjoin actions that violate IGRA but take place outside of Indian lands. Pet. i. The Sixth Circuit said no, but the Ninth and Tenth Circuits would say yes under 28 U.S.C. § 1331. Pet. 7–12. Bay Mills erects and then knocks down the classic straw man, arguing that 28 U.S.C. § 1331 does not abrogate *tribal sovereign immunity*. Br. in Opp. 22–23. But that is not the State's argument. Bay Mills' silence regarding the issue the State actually presents is thus an admission that a circuit split does exist.

The second issue presented is whether tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from violating IGRA outside of Indian lands. Pet. i. Here, the Sixth Circuit acknowledged that it was furthering a circuit split with the Tenth Circuit, App. 13a, a split that Bay Mills scorns because, according to Bay Mills, the Tenth Circuit decision "is poorly reasoned." Pet. 22. That characterization does not dispel the circuit conflict. And it fails to recognize that the split is even deeper than the Sixth Circuit appreciated, Pet. 13–15.

In sum, rhetoric cannot hide the fact that Bay Mills implicitly concedes a circuit split with respect to the first question, and expressly acknowledges a split regarding the second. And Bay Mills' assertion that there are alternative forums to resolve these disputed issues cannot be reconciled with Bay Mills' representations in those other forums. Certiorari is warranted.

REPLY ARGUMENT

I. There is no other forum through which the State can vindicate its opposition to Bay Mills' illegal, off-reservation casino.

Chief among Bay Mills' arguments for denying certiorari is that this dispute "continues against the Tribe's officials and its Gaming Commission in the district court and also is the subject of a separate declaratory judgment action brought by the Tribe." Br. in Opp. 1–2. What Bay Mills fails to say is that it is simultaneously disclaiming the State's right to relief in those very proceedings.

As noted in the Petition, federal courts have only inconsistently allowed *Ex Parte Young*-type claims where a plaintiff has alleged IGRA violations. Pet. Br. 16. Bay Mills chooses not to discuss this looming roadblock even though it has filed its own motion to dismiss the State's *Ex Parte Young*-type claims against the tribal officials in the underlying action. In that motion, Bay Mills argues that the State's claims against its officials must be dismissed because:

- Bay Mills council members are covered by Bay Mills' sovereign immunity, as they are elected officials of Bay Mills. 10/23/12 Bay Mills Br. in Support of Mot. to Dismiss 16–17.

- The State's *Ex Parte Young* claims do not overcome Bay Mills' special sovereignty interests in exercising governmental power over its land. *Id.* at 17–20.

- *Ex Parte Young*-type claims do not apply to IGRA-violation claims. *Id.* at 20–22.

- And Bay Mills is a required party that cannot be joined because it is immune from suit, and any judgment rendered in the Tribe's absence would be prejudicial and inadequate. *Id.* at 22–28.

Bay Mills' arguments contradict its representation here that the State can vindicate fully its interests through an *Ex Parte Young*-type action. Br. in Opp. 1–2, 24–27. And such arguments do not lessen the political tension of forcing one sovereign to sue another's officials. Pet. 17 (noting the tumult if Michigan sued Prime Minister David Cameron to circumvent the United Kingdom's sovereign immunity).

Similarly, Bay Mills contends that all of the issues raised in this suit can be resolved in the case the Tribe brought against Michigan Governor Rick Snyder, *Bay Mills Indian Community* v. *Rick Snyder*, Case No. 1:11-cv-729 (W.D.Mich.). There, Bay Mills is seeking declaratory relief against Governor Snyder on many of the same issues raised by the State related to its Vanderbilt casino. But Bay Mills is wrong to say that its "sovereign immunity is [ ] no longer a jurisdictional barrier prohibiting the adjudication of tribal governmental authority and jurisdiction." Br. in Opp. 25. That is because Bay Mills has not waived its immunity with regard to any counterclaim the State might bring in that action, such as a claim to enjoin Bay Mills from gaming outside of Indian lands. If the State seeks to bring such a claim, Bay Mills will undoubtedly respond with the Sixth Circuit's subject-matter-jurisdiction and sovereign-immunity rulings in this case.

And while Bay Mills implies that it would voluntarily comply with an adverse ruling in the case against Governor Snyder, Br. in Opp. 25, the State would have no ability to compel compliance with that result in federal court given the Sixth Circuit's ruling. If the Sixth Circuit is correct, the district court in the *Snyder* case lacks jurisdiction to enjoin Bay Mills from conducting gaming on non-Indian lands regardless of the Tribe's waiver of immunity. So *Snyder* is of no practical value to the State. Even if Bay Mills decided to re-open the Vanderbilt casino in the face of a district court ruling that the lands are not Indian lands, the Sixth Circuit has already barred the State from obtaining any remedy in federal court. The instant case is the best vehicle for resolving the disputed questions.

Incidentally, although this Court generally does not review cases in an interlocutory posture, it does review such cases when, as here, a court of appeals has finally decided an important legal issue that otherwise warrants examination by the Court. See, e.g., *Shinseki* v. *Sanders*, 556 U.S. 396 (2009); *Morgan Stanley Capital Group Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527 (2008); *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004).

In particular, the Court often reviews jurisdictional rulings, even when they come before the Court in an interlocutory posture. Only two Terms ago, for example, the Court granted the petition in *United States* v. *Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011), to review the Federal Circuit's reversal of a dismissal for lack of jurisdiction under 28 U.S.C. § 1500.

And just last Term, the Court granted the petition in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S. Ct. 2199 (2012), to review the D.C. Circuit's conclusion that federal courts had jurisdiction notwithstanding the Quiet Title Act, 28 U.S.C. § 2409a, to review the federal government's decision to take land in trust for a Tribe seeking to construct a casino.

The issues in this case similarly warrant review. As noted in the Petition, the questions of federal jurisdiction and tribal sovereign immunity under IGRA extend far beyond the case of illegal, off-reservation casinos. The recurring issues this case presents warrant this Court's immediate intervention and resolution.

II. Bay Mills does not contest that there is a mature circuit split regarding the first question, i.e., whether federal subject-matter jurisdiction exists under 28 U.S.C. § 1331 to adjudicate an IGRA violation.

In the Petition, the State explained at length why § 1331 vests the federal courts with jurisdiction to resolve an alleged IGRA violation, and how the Sixth Circuit's opposite conclusion conflicts with the Ninth and Tenth Circuits. Pet. 7–12. Bay Mills ignores the question actually presented and raises a new one instead: "the effect of federal question jurisdiction under 28 U.S.C. § 1331 on *tribal sovereign immunity*." Br. in Opp. 22–23 (emphasis added). Bay Mills then accuses the State of "wrongly conflat[ing] the possibility of subject matter jurisdiction under 28 U.S.C. § 1331 with an automatic abrogation of tribal sovereign immunity." Br. in Opp. 22. And Bay Mills says that there simply is no appellate-court decision "which holds that federal-question jurisdiction under § 1331 by itself negates an Indian tribe's immunity from suit." Br. in Opp. 23.

But the State has never argued that § 1331 abrogates tribal sovereign immunity. The question whether IGRA abrogates Tribal sovereign immunity in this context (the second question presented) is a very different issue from whether the federal courts have subject-matter jurisdiction to hear IGRA disputes. In other words, Bay Mills has created a straw-man argument so that it can avoid discussing the § 1331 question altogether. That fact is telling and amounts to a concession that the circuits are indeed divided on the first question presented.

Finally, Bay Mills failed to respond at all to Michigan's argument that "the Sixth Circuit should have recognized federal-court jurisdiction" because illegal class III gaming activities "*did* occur on Indian lands, such as the Tribe's licensing of the off-reservation casino and the Tribe's ongoing supervision [from Indian lands] of the casino's operations." Pet. 12.

III. Bay Mills concedes that there is also a circuit split regarding the second question presented, i.e., the scope of IGRA's abrogation of tribal sovereign immunity.

Bay Mills concedes that the opinion below conflicts with the Tenth Circuit's decision in *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379 (10th Cir. 1997). Br. in Opp. 21. Bay Mills also acknowledges that the Eleventh Circuit rejected *Mescalero*. Br. in Opp. 21. Nonetheless, Bay Mills argues the Court should ignore the circuit conflict because, in Bay Mills' view, *Mescalero* is unpersuasive. That argument does not diminish the circuit conflict. It also fails to account for the other conflicting circuit cases in this area.

As explained in the Petition, Pet. 14, the Seventh Circuit in *Wisconsin* v. *Ho-Chunk Nation*, 512 F.3d 921, 933 (7th Cir. 2008), interpreted IGRA as abrogating tribal sovereign immunity with respect to *any* claim alleging a violation of a gaming compact arising from the subjects of compact negotiation in § 2710(d)(3)(C). That list includes "any [ ] subjects that are directly related to the operation of gaming activities," 25 U.S.C. §2710(d)(3)(C)(vii), such as the allowed venues for a gaming operation. Bay Mills does not disagree. Br. in Opp. 17–18.

Similarly, the Eleventh Circuit in *Florida* v. *Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999), held that "Congress [in IGRA] abrogated tribal immunity only in the narrow circumstance in which a tribe conducts class III gaming in violation of an existing Tribal-State compact." *Id.* at 1242. That circumstance is precisely what the State alleges here.

Bay Mills describes the Eleventh Circuit's holding as rejecting a "broad reading" of IGRA's abrogation of tribal sovereign immunity. Br. in Opp. 14–15. But Bay Mills fails to explain why the State's action here—suing a tribe for conducting gaming in violation of an existing compact—fails to fall within the plain scope of the Eleventh Circuit's rule.

And as with jurisdiction, Bay Mills failed to respond to Michigan's argument that Bay Mills' illegal class III gaming activities (such as licensing and ongoing supervision of casino operations) "undeniably took place on Indian lands—the Bay Mills reservation itself." Pet. 15. "Thus, even were the Court to adopt the Sixth Circuit's approach [to abrogation of tribal sovereign immunity] . . ., the Sixth Circuit should be reversed, and the district court's grant of an injunction against Bay Mills should be sustained." *Ibid.*

* * *

Bay Mills response says nothing to dispel the actuality that the Petition presents two questions of substantial jurisprudential and practical significance, both involving mature conflicts among the circuits. Nor does the response explain why a state has plenary power to enjoin a tribe's illegal casino located *on* a reservation, but no power to enjoin the same illegal

casino when located *off* reservation, i.e., on Michigan's own sovereign lands. The recurring nature of the questions presented—as well as the importance of providing clear guidance to lower courts and the states regarding the proper sovereignty boundaries when litigating class III gaming disputes—counsels strongly in favor of granting the petition.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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Dated: DECEMBER 2012

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