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 FOR THE NATIONAL CONGRESS OF AMERICAN INDIANS, THE NATIONAL INDIAN GAMING ASSOCIATION, THE AFFILIATED TRIBES OF NORTHWEST INDIANS, THE COUNCIL FOR ATHABASCAN TRIBAL GOVERNMENTS, AND 51 FEDERALLY RECOGNIZED INDIAN TRIBES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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AMICI CURIAE LISTED INDIVIDUALLY INSIDE COVER

TRIBAL ORGANIZATIONS

National Congress of American Indians
National Indian Gaming Association
Affiliated Tribes of Northwest Indians
Council of Athabascan Tribal Governments

FEDERALLY RECOGNIZED TRIBES

Alturas Indian Rancheria
Big Sandy Rancheria of Mono Indians of California
Bois Forte Band of Chippewa
Buena Vista Rancheria of Me-Wuk Indians-Historical of California
Cabazon Band of Mission Indians
Confederated Salish and Kootenai Tribes of the Flathead Reservation
Elk Valley Rancheria, California
Ewiiaapaayp Band of Kumeyaay Indians
Flandreau Santee Sioux Tribe
Grand Traverse Band of Ottawa and Chippewa Indians
Greenville Rancheria
Ho-Chunk Nation
Kialegee Tribal Town
Kootenai Tribe of Idaho
Little River Band of Ottawa Indians
Little Traverse Bay Bands of Odawa Indians
Lower Elwha Klallam Tribe
Mandan, Hidatsa & Arikara Nation (Three Affiliated Tribes of Fort Berthold Reservation)
Match-e-be-nash-she-wish Band of Pottawatomi Indians
Miami Tribe of Oklahoma
Mississippi Band of Choctaw Indians
Modoc Tribe of Oklahoma
Nez Perce Tribe
Nottawaseppi Huron Band of Potawatomi
Paskenta Band of Nomlaki Indians
Pechanga Band of Luiseño Indians
Picayune Rancheria of the Chukchansi Indians
Pokagon Band of Potawatomi Indians
Prairie Band Potawatomi Nation
Pueblo of Laguna
Puyallup Tribe of Indians
Quapaw Tribe of Oklahoma (the O-Gah-Pah)

Red Lake Band of Chippewa Indians
Redding Rancheria
Saginaw Chippewa Indian Tribe of Michigan
San Manuel Band of Mission Indians
San Pasqual Band of Mission Indians
Santee Sioux Nation
Scotts Valley Band of Pomo Indians
Shakopee Mdewakanton Sioux Community
Sisseton Wahpeton Sioux Oyate
Southern Ute Indian Tribe
Spokane Tribe of Indians
Suquamish Tribe
Swinomish Indian Tribal Community
Tejon Indian Tribe
The Confederated Tribes of the Warm Springs Reservation of Oregon
Walker River Paiute Tribe
Wampanoag Tribe of Gay Head (Aquinnah)
White Mountain Apache Tribe
Winnebago Tribe of Nebraska

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INTEREST OF *AMICI CURIAE*

Amici Curiae are leading national and regional Indian organizations and 51 recognized Tribes from throughout Indian country.[1] The National Congress of American Indians is the oldest and largest American Indian organization, representing more than 250 Indian Tribes and Alaskan Native Villages, and is devoted to protecting and enhancing tribal sovereignty. The National Indian Gaming Association includes 184 Indian Nations as members. Its mission is to protect the sovereign interests of Tribes striving for economic self-sufficiency through gaming. The Council of Athabascan Tribal Governments is a consortium of Alaska Native Villages that promotes tribal self-governance. The Affiliated Tribes of Northwest Indians represents 57 tribal governments from Oregon, Washington, Idaho, California, Alaska, and Montana, and is dedicated to promoting tribal sovereignty and self-determination. *Amici* organizations and Tribes have a strong interest in opposing the abandonment of time-honored principles of Indian law and the drastic curtailment of tribal sovereign immunity advocated for in this matter.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a remarkable case. Michigan and its *amici* urge this Court to revisit the fundamental contours of tribal sovereign immunity. They feel justified in doing so because of an imperfect storm in which various decisions by the parties and the federal government have

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[1] No counsel for any party authored this brief in whole or part. No one other than *amici curiae* made a monetary contribution to fund the preparation or submission of this brief. The parties have consented to the filing of the brief, and letters of consent have been filed with the Clerk.

seemingly put the doctrine at issue. The State and the Bay Mills Indian Community ("Bay Mills") have interposed sovereign immunity defenses in suits that each has brought against the other, thereby preventing resolution of the merits of Bay Mills' claim that its Vanderbilt facility is on Indian lands. Meanwhile, the National Indian Gaming Commission ("NIGC") has concluded that the site does not so qualify, but has misapprehended the Indian Gaming Regulatory Act ("IGRA") as denying it enforcement authority.

Against the pressure to reconsider tribal immunity root and branch stand the principles of judicial caution firmly adhered to by this Court on matters of jurisdiction and remedy. At issue here is whether section 2710(d)(7)(A)(ii) of IGRA applies under the present facts to abrogate Bay Mills' sovereign immunity. If so, the case presumably will proceed to judgment. If not, then subject matter jurisdiction does not exist to proceed further.

Section 2710(d)(7)(A)(ii) is a carefully delineated jurisdictional provision. With its precise identification of claimants, forum, and remedies, it displaces general federal question jurisdiction over the State's causes of action. *See, e.g.*, *Hinck v. United States*, 550 U.S. 501, 506 (2007); *EC Term of Years Trust v. United States*, 550 U.S. 429, 433-34 (2007). The cases cited by the parties in support of section 1331 jurisdiction are not to the contrary, and the balance of the statutory scheme, which would provide for judicial review even on the court of appeals' narrow construction of section 2710(d)(7)(A)(ii), confirms the displacement.

The Vanderbilt facility has been shuttered since the district court issued its injunction. Under NIGC regulations, Bay Mills would have to issue a new facili-

ty license and submit it to the NIGC before the facility could re-open. At that point, the NIGC would have ample tools against an operation that it and the Interior Department have deemed illegal. IGRA allows for tribal gaming only pursuant to NIGC-approved ordinances, and consistent with IGRA's terms, those ordinances (as in the case of Bay Mills') can provide for gaming only on Indian lands. Congress has expressly authorized the NIGC to bring enforcement actions for ordinance violations, including ordering the closure of facilities regardless of their location. 25 U.S.C. § 2713(b). When previously confronted with a Vanderbilt facility that, under its interpretation of "Indian lands," constituted a significant ordinance violation, the NIGC overlooked this enforcement authority. Armed with a proper construction of the statute by this Court, it presumably would not make that mistake again. Bay Mills could then seek judicial review of resulting NIGC enforcement under 25 U.S.C. §§ 2713(c) and 2714 and the APA. The State could seek to intervene. And the merits of Bay Mills' position would be fully addressed. Section 1331 jurisdiction does not exist under these circumstances.

Even if this Court disagrees, two additional, insuperable obstacles (again grounded in principles of judicial caution) defeat any suggestion that this Court perform radical surgery on the immunity doctrine. Such an exercise would directly contradict this Court's holding in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73-74 (1996), that IGRA's "carefully crafted and intricate remedial scheme" precludes additional, judicially fashioned inroads into immunity. It would also fly in the face of the deference to Congress that informed *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). In the wake of *Kiowa*,

Congress deliberated carefully about the wisdom of maintaining the tribal immunity doctrine, choosing ultimately to place certain limits on it while rejecting the drastic curtailments proposed here. And Congress had sound reason for acting as it did, for each of the suggested modifications would invite endless line-drawing and engender drastic policy consequences. As frustrating as the course here has been, it provides no warrant for this Court to abandon its considered approach to issues of jurisdiction and remedy.

ARGUMENT

I. SUBJECT MATTER JURISDICTION DOES NOT EXIST TO CONSIDER MICHIGAN'S BROAD ATTACKS ON TRIBAL IMMUNITY.

A. Congress Has Defined The Scope Of Tribal Immunity In This Case.

IGRA provides a comprehensive statutory framework for "the operation and regulation of gaming by Indian tribes." *Seminole Tribe*, 517 U.S. at 48. In doing so, it vests the district courts with "jurisdiction over … any cause of action initiated by a State … to enjoin 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). This case concerns the scope of that provision.

The court of appeals held that the provision does not reach Michigan's claims because the State "expressly allege[s] that the Vanderbilt casino is not located on Indian lands." Petition for Certiorari Appendix ("Pet. App.") 7a. The court construed the statute to apply only to gaming in fact taking place on such lands, and hence concluded that the State's "own pleadings defeat [its] argument." *Id.* If this Court agrees, then

the legality of the Vanderbilt facility can be tested through other review and enforcement mechanisms under IGRA, as discussed in Part IC. below.

Alternatively, as the court of appeals recognized, Bay Mills alleges that it can game at Vanderbilt precisely because that operation "*is* located on 'Indian lands.'" Pet. App. 9a. This Court might construe IGRA's abrogation provision to permit suit where the lawfulness of the challenged activity turns on the validity of the operating Tribe's claim that the gaming site is "Indian lands." On that construction, this suit would proceed.

Either way, the statutory determination should resolve the dispute before the Court. The State and its *amici* ask the Court to go further, reconsidering tribal immunity itself. But there is no basis—either jurisdictional or substantive—for such reconsideration in a case that turns on what Congress intended when it enacted a statutory provision: (1) vesting jurisdiction in the district courts over certain claims; (2) abrogating an immunity that Congress plainly understood to otherwise exist; and (3) establishing a detailed remedial scheme that, properly administered, amply addresses other situations. Where Congress has carefully framed such an integrated scheme and expressly exercised its prerogative to limit tribal immunity in some, but only some, circumstances, the sole question for the courts is whether that limitation applies to particular facts.

B. IGRA's Specific Grant Of Jurisdiction In Section 2710(d)(7)(A)(ii) Displaces General Federal Question Jurisdiction.

Michigan offers scant argument that this case falls within section 2710(d)(7)(A)(ii), *see* Brief for Petitioner ("Pet. Br.") 20-22, the jurisdictional basis that the court of appeals rejected for the first three counts of the

State's original and amended complaints (alleging IGRA and compact violations). Instead, it moves quickly to asserting that jurisdiction exists under the general grant of 28 U.S.C. § 1331. Michigan pled this basis for the fourth through sixth counts of its amended complaint, purporting to raise federal common law and state law causes of action. *See id.* at 22-25. The State then argues that a "holistic" interpretation of IGRA demonstrates Congress's intent to abrogate Bay Mills' immunity, *see*, *e.g.*, *id.* at 25-33, and alternatively that the Court should revisit the principle of tribal immunity if that is what is required for the State's suit to proceed, *id.* at 36-41. If, however, this Court construes section 2710(d)(7)(A)(ii) contrary to the State's interpretation, it should end its analysis there, as subject matter jurisdiction does not lie to proceed further. That result would not deny the State recourse were Bay Mills to re-open its Vanderbilt facility; the statutory scheme provides for agency and then judicial review in that circumstance.

Section 2710(d)(7)(A) provides that the federal district courts "shall have jurisdiction over" three categories of claims, including potentially the type presently at issue. IGRA additionally provides that tribal gaming compacts may include "remedies for breach of contract," 25 U.S.C. § 2710(d)(3)(C)(v), and a State and Tribe accordingly may negotiate for a waiver of immunity and the right to bring suit in federal court over which federal question jurisdiction would lie.[2] But the

[2] Given the "express authorization of a compact to provide remedies for breach of contract," and given that "the Compacts quite clearly are a creation of federal law," such negotiated provisions supply a jurisdictionally cognizable federal claim. *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997).

parties did not negotiate such a provision here (they negotiated for other remedies instead). And the State's purported federal common law and state law causes of action—turning on whether the Vanderbilt site qualifies as Indian lands—attempt to raise issues squarely within the domain of section 2710(d)(7)(A)(ii) while eliding that provision's "on Indian lands" requirement. This the State could not do.

Under the "well-established principle that, in most contexts, a precisely drawn, detailed statute pre-empts more general remedies," *Hinck*, 550 U.S. at 506 (internal quotation marks omitted), a statute establishing jurisdiction over claims in specified circumstances precludes reliance on broader sources of law to supply jurisdiction absent those conditions. Hence, in *Hinck*, the Court held that 26 U.S.C. § 6404(h)(1), which expressly provided for review of interest abatement claims in the Tax Court, was the taxpayer's exclusive route to relief for such a claim, even though the statute did not specify that its terms, and hence jurisdiction in the Tax Court, were exclusive. 550 U.S. at 506. Because it was "a precisely drawn, detailed statute that, in a single sentence, provide[d] a forum for adjudication, a limited class of potential plaintiffs, a statute of limitations, a standard of review, and authorization for judicial relief," *id.* (internal quotation marks omitted), those restrictions controlled and displaced the broader jurisdiction-granting provisions relied on by the plaintiffs. *See also EC Term of Years Trust*, 550 U.S. at 434 (plaintiff could not "avail [itself] of the general tax-refund jurisdiction of [28 U.S.C.] §1346(a)(1)" in district or federal claims court where Congress tailored a separate provision for jurisdiction (in the same courts) over third-party claims of wrongful levy).

Section 2710(d)(7)(A) similarly provides—and also in a single sentence—for jurisdiction over three categories of claims. It specifies the forum for adjudication (federal district court) and the potential plaintiffs (States, Tribes, and/or the Secretary of the Interior) and authorizes judicial relief (including, under subpart (ii), injunctive relief). Neighboring provisions specify certain statutes of limitations. 25 U.S.C. § 2710(d)(7)(B)(i). The State, understandably, invoked subpart (ii) in challenging the legality of the Vanderbilt site. But it could not, in light of that provision, also posit jurisdiction under section 1331 for purported federal common and state law claims centering on the same issue.[3]

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[3] If Michigan argues that its amended and original claims are jurisdictionally distinct, a serious question of interlocutory jurisdiction would arise. When the Little Traverse Bay Bands of Odawa Indians sought the preliminary injunction underlying these proceedings, it and the State had "nearly identical," District Court Order (Pet. App. 20a), original complaints on record. Those complaints pled three causes of action, all premised solely on section 2710(d)(7)(A)(ii). The State filed its Amended Complaint on August 9, 2011, four months after the district court entered the injunction at issue here and a notice of appeal had been filed. Civil Docket for Case #: 1:10-cv-01273-PLM Nos. 33, 39, 74. Thus, the State's amended claims were not before the district court at the time it issued the injunction and were not addressed in that order or any other order of the district court.

In discussing interlocutory jurisdiction under 28 U.S.C. § 1292(b), this Court has explained that "because the statute brings [an] 'order' … before the court … jurisdiction is confined to the particular order appealed from." *United States v. Stanley*, 483 U.S. 669, 677 (1987) (emphasis omitted). The Court has applied *Stanley* to other interlocutory review, *see Swint v. Chambers County Comm'n*, 514 U.S. 35, 49 (1995), and its holding applies squarely to section 1292(a)(1), which also brings injunctive "orders" before the appellate courts. *See In re BankAmerica Corp. Sec. Litig.*, 263 F.3d 795, 804 (8th Cir. 2001); *Lytle v. Griffith*, 240 F.3d 404, 411 n.5 (4th Cir. 2001).

The State cites *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3150 (2010), for the proposition that unless statutory text expressly limits section 1331 jurisdiction, plaintiffs may invoke that provision. Pet. Br. 23. *Free Enterprise Fund* does not say this. Instead, it carefully considered whether the statute at issue expressly or "implicitly" displaced such jurisdiction. 130 S. Ct. at 3150. And, as discussed below, the factors the Court found to weigh against a holding of displacement call for the opposite conclusion here.

Bay Mills correctly frames the question as whether anything "in IGRA demonstrates an intent to withdraw subject matter jurisdiction that otherwise exists under section[] 1331," Brief for Respondent ("Resp. Br.") 24, but then simply cites *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 643-44 (2002). In *Verizon*, the Court held that 47 U.S.C. § 252(e)(6), which enables review of certain telecommunications determinations made by state utilities, does not implicitly displace section 1331 jurisdiction with respect to the review of other actions by those utilities. The Court emphasized several features of section 252(e)(6) that contrast starkly with section 2710(d)(7)(A)(ii). Most significantly, the former "does

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Review may extend to "rulings … inextricably intertwined" with an interlocutory order, *Swint*, 514 U.S. at 51, including dispositive legal issues on which an injunction is predicated. *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 757 (1986) (*overruled on other grounds by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)); *Smith v. Vulcan Iron Works*, 165 U.S. 518, 524-25 (1897). If the State's original and amended claims are distinct enough to permit invocation of section 1331 jurisdiction over the latter, the same analysis would suggest the claims not to be inextricably intertwined, and interlocutory jurisdiction hence to be lacking over the amended claims.

not even mention subject-matter jurisdiction, but reads like the conferral of a private right of action," *id.* at 644, which is of course a central distinction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). In addition, while section 252(e)(6) "does not distinctively limit the substantive relief available," 535 U.S. at 644, section 2710(d)(7)(A)(ii) jurisdiction is confined to the granting of injunctive relief. Finally, while the Court found that "none of the other provisions of the Act evince any intent to preclude federal review of a commission determination," *id.*, the same cannot be said of IGRA. It is to that issue that this brief turns next.

C. IGRA's Detailed Remedial And Enforcement Scheme Confirms The Proper Jurisdictional Path In This Case.

In *Free Enterprise Fund*, this Court held that section 78y of the Sarbanes-Oxley Act, providing for judicial review of certain actions by the SEC, did not preclude section 1331 jurisdiction over constitutional challenges to the Public Company Accounting Oversight Board, established by the Act under the SEC's oversight. The Court found that such challenges could not be meaningfully pursued under section 78y, because the provision allowed for judicial review of SEC rather than Board action, and because the constitutional claims fell "outside the Commission's competence and expertise." 130 S. Ct. at 3151.

The present situation is different, for even if this Court adopts a restrictive view of section 2710(d)(7)(A)(ii), judicial review of the Bay Mills facility would still obtain under IGRA's scheme. IGRA establishes as a critical prerequisite to tribal gaming the adoption (and federal approval) of a gaming ordinance. Section 2710(d)(2)(A) provides that

> [i]f any Indian tribe proposes to engage in … a class III gaming activity on Indian lands … 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) of this section.

Under subsection (b), an approved ordinance must mandate "[a] separate license issued by the Indian tribe … for each … [facility] on Indian lands at which … gaming is conducted." 25 U.S.C. § 2710(b)(1)(B). And 25 U.S.C. § 2710(e) requires the NIGC Chairman to "approve [a submitted ordinance] if it meets the requirements of this section." Thus, every IGRA gaming facility must be licensed by a tribe under a federally approved tribal gaming ordinance.

Bay Mills submitted an amended gaming ordinance for NIGC approval on August 2, 2010, Pet. App. 103a, describing a Bay Mills Gaming Commission responsible for issuing the required facilities licenses. Ordinance §§ 4 and 5 (Pet. App. 118a-146a). The ordinance provides that the Commission shall issue a facility license only where "[t]he proposed gaming activity is to be located on 'Indian lands,' as defined in Section 2.30 of this Ordinance [tracking the IGRA definition]." *Id.* § 5.5(A).

The NIGC Chairwoman approved the ordinance on September 15, 2010. Pet. App. 101a. In doing so, she underscored that "[i]t is important to note that approval is granted only for gaming on Indian lands as defined by IGRA over which the Community has jurisdiction." *Id.* The tribal Commission then issued a license for the Vanderbilt facility on October 29, 2010. *See* Class III Facility Gaming License, Doc. 1278 No. 22 Ex. K. On November 9, 2010, the NIGC requested a legal opinion from the Solicitor of the Interior regarding the Indian

land status of the facility, and on December 21, 2010, the Solicitor concluded in a detailed analysis that it was not on Indian lands. Joint Appendix 69-101. In a letter of the same day, the NIGC concurred but declined to take enforcement action, asserting that because the facility was not on Indian lands, it could not pursue the matter further. *Id.* at 102.

But this was not so. Section 2713 authorizes the Commission to "order a permanent closure of [a] gaming operation" (without reference to its location), and to take other enforcement action "for substantial violation of the provisions of this chapter … or of tribal … ordinances or resolutions approved under section 2710." 25 U.S.C. § 2713(b). Such an order is subject to federal court review. *Id.* §§ 2713(c) and 2714.

Accordingly, once the NIGC concluded that Bay Mills was operating the Vanderbilt facility outside of Indian lands in contravention of its NIGC-approved gaming ordinance, the agency had the power to take enforcement action. In construing its authority otherwise, the NIGC undermined the statutory scheme. Tribes have frequently challenged the Commission for overstepping its regulatory bounds. *See, e.g.*, *Colo. River Indian Tribes v. NIGC*, 466 F.3d 134 (D.C. Cir. 2006).[4] It is, however, fundamentally inconsistent with the structure and purposes of IGRA for the Commission to disclaim the authority Congress gave it to enforce the terms of a tribal gaming ordinance when a

[4] The State *amici's* argument that the Commission is derelict in monitoring Indian gaming, issuing only ten closure orders in twenty-five years, is highly misleading. In that same period, the Commission entered 117 settlements with tribes, often containing stringent conditions, and issued numerous notices of violation and fines. *See* http://www.nigc.gov/Reading_Room/Enforcement_Actions.aspx.

tribe has opened a gaming facility that it claims complies with IGRA, but that the Commission has concluded is not on Indian lands. That abdication of express regulatory authority disserves both state and tribal interests.

Had the NIGC exercised its statutory authority, Bay Mills could have sought judicial review, the State could have intervened, and the parties could have litigated Bay Mills' MILCSA theory with the benefit of the Interior and NIGC assessments of that theory, and without wading into fundamental issues of tribal immunity. This remains the proper and available course.

The Bay Mills facility has been shuttered since the district court issued its preliminary injunction. *See* Resp. Br. 17. Under NIGC regulations, 25 C.F.R. Part 559, Bay Mills cannot re-open that facility without issuing a new license and so notifying the Commission. The NIGC could then take enforcement action, from which judicial review would lie. No jurisdictional basis exists in the meantime for the far-reaching re-examination of tribal immunity urged by Michigan and its *amici*.

Seminole Tribe held that the "carefully crafted and intricate remedial scheme set forth in §2710(d)(7)," 517 U.S. at 73-74, precluded judicial supplementation of that scheme through the imposition of an *Ex Parte Young* cause of action. *Id.* at 74. Likewise, no warrant exists for the supplementation of the detailed jurisdictional scheme of section 2710. This Court can return this dispute to its proper path by clarifying that, should Bay Mills re-open the Vanderbilt facility, the NIGC will have enforcement authority from which judicial review will lie.

II. THE CALLS TO EVISCERATE TRIBAL SOVEREIGN IMMUNITY ARE UNFOUNDED AND COULD DO SIGNIFICANT HARM.

A. IGRA's Carefully Tailored Abrogation Of Tribal Immunity Precludes The Creation Of Additional Non-Textual Remedies.

Even if this Court disagrees with this jurisdictional map, it should decline to embark on a free-form reassessment of tribal immunity. Two decisions of this Court counsel squarely—for independent and sufficient reasons—against such a reassessment. The first is *Seminole Tribe.*

As noted, the Court there held that the "carefully crafted and intricate remedial scheme set forth in §2710(d)(7)," 517 U.S. at 73-74, precluded judicial establishment of an *Ex Parte Young* cause of action against State officers for refusing to engage in good faith compact negotiations. *Id.* at 74. Because Congress had thoroughly considered the extent to which it wished to abrogate state immunity, and had forged a specific path to effect that abrogation, the Court declined to widen or lengthen the path, even though it deemed much of it off-limits under the Eleventh Amendment. *Id.* at 74-76.

This reasoning fully applies to the suggestions to curtail tribal immunity. IGRA partially abrogates tribal immunity and provides for remedies against tribes through several mechanisms: the abrogation clauses of section 2710(d)(7)(A)(ii) and (iii), NIGC enforcement in sections 2711-2714, and section 2710(d)(3)(C)(v)'s authorization of negotiated remedies. Congress's delineation of specific avenues of recourse against tribes counsels heavily against "casting aside those limitations," 517 U.S. at 74, in favor of the unbounded abrogation of tribal immunity now urged upon this Court.

Michigan and its *amici* ignore the statutory framework in which this case arises and the Court's interpretation of it. But this Court does not take doctrinal approaches only for certain classes of litigants. The Court's reluctance to craft additional inroads into sovereign immunity where Congress carefully mapped the extent of those inroads applies as squarely to tribal immunity under IGRA as it does to state immunity, and the arguments of Michigan and its *amici* founder for their failure to so recognize.[5]

The incongruity of those arguments is particularly stark given the extent to which the states have benefited from *Seminole Tribe*. This Court's dual holdings that Congress could not authorize Tribes to sue States directly for failure to engage in compact negotiations, and that an *Ex Parte Young* cause of action is unavailable against responsible state officers, have left many Tribes unable to secure the gaming compacts contem-

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[5] Michigan and its *amici* suggest that tribal immunity is less deserving of protection than state immunity because the former derives from the common law, while the latter is of constitutional dimension. *See*, *e.g.*, Pet. Br. 30-31. This argument misapprehends the nature of state immunity. *See Alden v. Maine*, 527 U.S. 706, 712-13 (1999) ("[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, … the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution."). It also stands basic principles of federal Indian law on their head. This Court has long stated that the combination of Congress's trust responsibility towards tribes and its expansive power to abrogate tribal rights imposes on Congress the obligation to make manifest any intention to engage in such abrogation. *See*, *e.g*, *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17-18 (1987); *United States v. Dion*, 476 U.S. 734, 739-40 (1986). Congress's considered, limited abrogation of both state and tribal immunity in IGRA defeats any argument that it countenanced the wholesale evisceration of the latter.

plated by IGRA, or able to do so only by ceding to states significant portions of their gaming revenues. *See, e.g.*, *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1026 n.8 (9th Cir. 2010) (discussing the "prevalence of compacts containing revenue sharing provisions" in the wake of *Seminole Tribe*). Alabama itself was a party to the lower court proceedings in *Seminole Tribe*, *see, e.g.*, 11 F.3d 1016, 1020-21 (11th Cir. 1994), and since then has steadfastly refused to negotiate a compact with the one recognized tribe within its borders. *See, e.g.*, *Alabama v. United States*, 630 F. Supp. 2d 1320, 1323-25 (S.D. Ala. 2008). Alabama nowhere suggests that this Court revisit *Seminole Tribe*, and the evident inconsistency in its position may partially explain why a distinct majority of States (including those with significant Indian country) declined to join Alabama's or any other *amicus* effort in support of Michigan's position.

Should this Court adhere to the approach taken in *Seminole Tribe*, Michigan would have ample recourse regarding the Vanderbilt facility. In addition to the agency enforcement and judicial review detailed above, Michigan could withdraw its assertion of immunity in the declaratory judgment action brought by Bay Mills against its Governor (with such safeguards as it sees fit; the same could be suggested of Bay Mills in the State's action). *Bay Mills Indian Community v. Snyder*, Civ. Dock. No. 1:11-cv-00729-PLM (W.D. Mich. 2011). Moreover, the Bay Mills compact is being renegotiated and, as many of its counterparts have done, the State could negotiate for effective remedies as part of that process. *See* Brief for *Amicus* Seminole Tribe, et al. 13-24.

The United States, moreover, has significant authority in addition to that discussed above to prevent

unlawful tribal gaming within and outside of Indian Country. *See, e.g.*, 15 U.S.C. §§ 1175-77 (prohibiting unlawful gaming devices in Indian Country); 18 U.S.C. § 1166 (authorizing federal enforcement against unlawful gaming within Indian Country); 18 U.S.C. § 1955 (authorizing federal enforcement of state gambling laws within state's jurisdiction). Federal prosecutors bring many tools to bear in such situations and, as a condition of non-prosecution, could require Bay Mills to cease operations, admit fault, and pay restitution or civil fines.

In sum, no reason exists to depart from *Seminole Tribe*. Congress's considered attention in IGRA to a limited abrogation of tribal immunity, and to the mechanisms for effectuating that abrogation, precludes sweeping revisions to the doctrine here.

B. Congress's Consideration Of Tribal Immunity In The Wake Of *Kiowa* Likewise Counsels Against A Broad Re-Examination Of The Doctrine.

Even if this Court were to entertain the calls to reexamine tribal immunity without regard to the statutory context in which this case arises, those calls would run headlong into *Kiowa*. The *Kiowa* Court questioned "the wisdom of perpetuating the [immunity] doctrine," 523 U.S. at 758, but ultimately rejected invitations to judicially "confine [immunity] to reservations or to noncommercial activities" for asserted policy reasons. *Id.* Congress, the Court explained, has legislated against a settled background rule of tribal immunity. It "has restricted tribal immunity from suit in limited circumstances," and "in other statutes it has declared an intention not to alter it." *Id.* (collecting examples). And Congress is "position[ed] to weigh and accommodate

the competing policy concerns and reliance interests" implicated by any alteration of immunity. *Id.* at 759. Accordingly, the Court "defer[red] to the role Congress may wish to exercise in this important judgment." *Id.* at 758.

Michigan and its *amici* barely acknowledge this holding, arguing instead that, after *Kiowa*, Congress simply failed to reconsider tribal immunity, so that the Court should play this role. In truth, Congress actively re-examined tribal sovereign immunity while *Kiowa* was pending and continued to do so with greater intensity after the opinion issued. *See* Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law*, 37 Tulsa L. Rev. 661, 729 n.320, 729-51 (Spring 2002).

Senator Slade Gorton introduced several bills in the years immediately preceding *Kiowa* proposing to broadly eviscerate tribal immunity. *See id.* at 726-27. Congress heard testimony on the bills from witnesses opposing and supporting tribal immunity, *see id.* at 729-42, including those of the view that such immunity had outlived its usefulness in light of tribal economic development, *id.* at 733.

Senator Ben Nighthorse Campbell responded with far more limited measures addressing tribal immunity. *See id.* at 727-29. Senator Campbell did

> not agree with those who suggest that the doctrine of tribal sovereign immunity is an anachronism .... I call on the quiet, thoughtful, and reasonable people on both sides of these issues to craft solutions that respect[] Indian tribal governments and yet provide[] reasonable solutions for legitimate problems that do exist.

144 Cong. Rec. S5218-01 (daily ed. May 20, 1998) (Statement of Sen. Campbell).

On the heels of *Kiowa*, Senator Gorton introduced two additional bills, the "Findings" sections of which directly invoked this Court's observation that "immunity 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." *Kiowa*, 523 U.S. at 758. With this statement as their premise, Senator Gorton's bills proposed to broadly abrogate tribal sovereign immunity in the contract and tort contexts. *See* S. 2299 and S. 2302, 105th Cong. (1998).

Thus, in the wake of *Kiowa*, Congress had before it approaches to tribal immunity ranging from targeted reform to wholesale abrogation, and accepted the Court's invitation to "weigh and accommodate the competing policy concerns and reliance interests." 523 U.S. at 759. It chose to adopt Senator Campbell's more limited approach to abrogation in enacting the Indian Tribal Economic Development and Contracts Encouragement Act of 2000.[6] The Act addressed directly this Court's concerns that "immunity can harm those who … do not know of tribal immunity," *Kiowa*, 523 U.S. at 758, by mandating that contracts with Indian tribes requiring federal approval include provisions either disclosing or waiving immunity, and forbidding federal approval otherwise. 25 U.S.C. § 81(d)(2). The Senate report accompanying the legislation notes that over the course of "extensive hearings," Congress had considered "divergent views about the value, effect,

[6] Pub. L. No. 106-179, 114 Stat. 46 (2000) (codified at 25 U.S.C. § 81).

and even the purpose and justification for the [immunity] doctrine." S. Rep. No. 106-150, at 11-12 (1999).

In the torts context, Congress again rejected Senator Gorton's sweeping proposals, choosing instead to amend the Indian Self-Determination and Education Assistance Act of 1975 to direct the Secretary of the Interior to produce legislative recommendations. *See* 25 U.S.C. § 450f (note).[7] Notably, Congress left undisturbed that Act's express preservation of tribal immunity, 25 U.S.C. § 450n, which had been cited in *Kiowa* as an example of Congress's affirmation of the doctrine. 523 U.S. at 758.[8]

In sum, the suggestion that this Court must act with respect to tribal immunity because Congress "has failed" to do so, Pet. Br. 39, is without basis. *Kiowa*'s

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[7] Pub. L. No. 105-277, § 101(e), 112 Stat. 2681-335 to 2681-337 (1998) (codified at 25 U.S.C. § 450f (note) (2000)).

[8] Congress's caution in the torts context was a reasoned approach considering ongoing development at the state and tribal levels. States and tribes have negotiated compact provisions addressing immunity and tort claims. *See*, *e.g.*, July 6, 2010 Compact, Seminole Tribe of Florida—State of Florida, Part VI(D) (providing for tort claims "against the Tribe in any court of competent jurisdiction … [and waiving] tribal sovereign immunity to the same extent as the State [waiver]"); June 26, 1995 Compact, Prairie Band Potawatomi Nation in Kansas—State of Kansas, § 3(D) and (E) ("Tort claims … shall be subject to disposition as if the Tribe was the State, pursuant to the Kansas Tort Claims Act … which is hereby adopted by the Tribe in its entirety."). Cited compacts available at http://www.nigc.gov/Reading_Room/Compacts.aspx. In addition, numerous tribes have, as responsible governments, enacted codes providing for limited waivers of immunity to compensate tort victims without bankrupting the public fisc. *See*, *e.g.*, March 18, 2000, Siletz Tribal Code § 3.200, *available at* http://www.ctsi.nsn.us/uploads/downloads/TribalOrdinances/3-200_Torts_and_Indian_Civil_Rights_Act.pdf.

holding of deference to Congress was presumably not a veiled command to upend the immunity doctrine. This Court rightly left to Congress the appropriate contours of the doctrine, and Congress has deliberated and legislated accordingly. If Michigan and its *amici* do not like the results, their recourse is with Congress alone.

Adherence to *Kiowa* is particularly appropriate here. *Kiowa* cites section 2710(d)(7)(A)(ii) as an example of Congress, legislating against the background principle of immunity, deciding to effect a limited abrogation. 523 U.S. at 758. Where Congress has so acted, the proper question for the courts is not whether Congress's judgment should be ignored, as urged by Michigan and its *amici*, but rather how to apply that judgment to the facts of this case.

C. Congress Has Wisely Chosen Not To Curtail Tribal Sovereign Immunity In the Ways Suggested By Michigan And Its *Amici*.

Michigan and its *amici* advance several ways to curtail tribal immunity. These approaches run directly counter to this Court's precedents, they would invite endless litigation over elusive distinctions, and are unsound as public policy. Congress has wisely rejected them.

1. No sound basis exists to confine sovereign immunity to "on-reservation" functions.

Michigan and Oklahoma suggest restricting immunity to a tribe's "governmental, on-reservation functions." Pet. Br. 39. This would require retreating not only from *Kiowa* but also from *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165 (1977), which upheld immunity with respect to a tribe's fishing activities "both on and off its reservation." *Id.* at 167;

see also Kiowa, 523 U.S. at 754 (stating that "[t]o date, our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred," and discussing *Puyallup*).[9]

Such a restriction would also engender endless litigation over whether a tribe's challenged activities were sufficiently "off-reservation" to justify withdrawal of immunity. This controversy is a case in point, given Michigan's argument that while the Vanderbilt facility is outside of Bay Mills' Indian country, Bay Mills' authorization of the facility occurred at the tribe's reservation. Pet. Br. 21. How a court is supposed to apply an Indian country-based distinction in such a situation is nowhere made clear. But sovereign immunity "does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit." *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 766 (2002). A proposed distinction that would invite endless controversy offends the principle that immunity protects governments from the burdens and embarrassment of litigation. *Id.* at 765.

The distinction is also unsound as a matter of policy. Tribes engage in a wide variety of cooperative, sovereign endeavors outside of their Indian country. Federal law specifically recognizes their authority to do so, including with respect to federally protected resource rights. To safeguard such rights, tribes undertake regulatory, conservation and law enforcement activities well beyond their borders, frequently coordinating with federal and state governments. Such is the

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[9] Thus, Michigan's suggestion that Congress could not have known that tribal immunity extended off-reservation at the time of IGRA, Pet. Br. 25-28, is misplaced.

case in Michigan, and the fact that the Michigan tribes' immunity extends beyond their territories has helped make this beneficial cooperation possible.[10]

The Michigan Tribes (including Bay Mills) party to the 1836 Treaty of Washington, 7 Stat. 491 (1836), enjoy fishing, hunting and gathering rights extending to large swaths of ceded land outside of their Indian country, as well as the ceded waters of the Great Lakes and Michigan's inland lakes and streams. *United States v. Michigan*, 471 F. Supp. 192, 212-13 (W.D. Mich. 1979). The State and the Tribes share regulatory jurisdiction over many of the resources, *United States v. Michigan*, 653 F.2d 277, 278-79 (6th Cir. 1981), and have accordingly entered consent decrees governing resource management and conservation.[11] Under these agreements, the treaty Tribes exercise considerable governmental authority beyond their Indian country. For example, through bodies including the Great Lakes Fisheries Commission, the tribes share responsibility with Michigan, Ontario, and the federal government in making fisheries management decisions for ceded waters.[12]

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[10] This discussion focuses on Michigan because of its situs as the genesis of this dispute. The *amici* tribes are engaged in constructive, off-reservation conduct in all different parts of the country, and with respect to many forms of activity going beyond resource rights.

[11] *See*, *e.g.*, 2000 Consent Decree, http://www.michigan.gov/dnr/0,4570,7-153-10364_36925-177786--,00.html); 2007 Inland Consent Decree, http://www.michigan.gov/dnr/0,1607,7-153-10364_47864---,00.html.

[12] *See* http://www.1836cora.org/Home.php; http://www.glfc.org/boardcomm/cglfa/cglfahome.php; http://www.michigan.gov/documents/dnr/2007-status-report_275666_7.pdf.

These Tribes also participate in substantial resource enhancement activities. In August 2013, for example, Little Traverse opened a fish hatchery and research facility near Pellston, Michigan. State Natural Resources Fisheries Director Jim Dexter has described the facility as "exceptional[,] state of the art" and "a testament to the [Little Traverse] vision of protecting and relocating fish back to important areas."[13] The Grand Traverse Band has likewise partnered with the State and federal government in the "largest dam removal project in Michigan's history."[14] Michigan's Department of Natural Resources has praised this project as "a model for how diverse organizations can collaborate effectively to work through complex issues that span multiple jurisdictional boundaries. The project actively engages local, state, federal and tribal units of government."[15]

The Tribes' off-reservation responsibilities also encompass law enforcement. For example, under a Limited Appointment Agreement, officers of the Little River Band of Ottawa Indians enforce Michigan's hunting and fishing license requirements against both non-Indians and tribal members. Limited Appointment Agreement Between the Michigan Department of State Police and the Little River Band of Ottawa Indians § 2 (January 16, 2009).

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[13] http://articles.petoskeynews.com/2013-08-02/fish-hatchery_41013582.

[14] http://www.theboardman.org/dam-project/; http://www.theboardman.org/participation/.

[15] http://www.michigan.gov/dnr/0,4570,7-153-10366_46403_63473-308057--,00.html.

Without immunity, the treaty Tribes would be chilled in discharging these important responsibilities, to the detriment of Michigan and its citizens as well as the Tribes. The threat of onerous litigation and ruinous liability would hamper joint endeavors to protect off-reservation rights and resources,[16] because stereotypical notions of rich gaming tribes are just that—stereotypes. In truth, "[t]he fragile finances of many tribes … give [protection of the public fisc] added force in the tribal context. One large judgment [can] threaten a tribe's existence." Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity and the Construction of Tribal Sovereignty*, 51 B.C. L. Rev. 595, 629 (May 2010) (footnotes omitted).[17] This could explain why Michigan is ambivalent regarding the extent to which it thinks tribal immunity should be curtailed for off-reservation activities. *Compare* Pet. Br. 39 (advocating limiting immunity to a tribe's on-reservation functions) *with id.* at 40 (immunity should

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[16] Tribes may, of course, waive immunity in whole or in part as circumstances warrant. Hence, in the Limited Appointment Agreement, Little River "agree[d] to a limited waiver of its immunity," such that the Tribe is liable for its officers' torts to the same extent that the State is liable for its. *Id.*, § 12(a).

[17] In 2011, less than one-fifth of Indian gaming facilities in the United States accounted for more than 70% of Indian gaming revenues. *See* NIGC, Tribal Gaming Revenues, fiscal year 2011, *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Data/GamingRevenues20072011.pdf. By contrast, more than half of such facilities accounted for less than 8% of revenues, and roughly one-third of facilities accounted for less than 2% of all revenues. *Id.* As the majority of tribes are not gaming tribes, the distribution of revenue among all tribes is even more disparate than these numbers suggest, "giving lie to the widely held notion that Indian gaming is making all Indians wealthy." *The State of the Native Nations*, Harvard Project on American Indian Economic Development, 149 (Oxford Univ. Press 2008).

not extend to "commercial conduct occurring on lands under state jurisdiction").

Alaska provides another instructive example. There exist over 200 federally recognized Alaska Native tribes. *See* 78 Fed. Reg. 26,384-02 (May 6, 2013). However, as a result of the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§ 1601-1629h, and this Court's decision in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), Alaska Native tribes generally have no Indian country within the meaning of 25 U.S.C. § 1151.[18] *See* Natalie Landreth and Erin Dougherty, *The Use of the Alaskan Native Claims Settlement Act to Justify Disparate Treatment of Alaska's Tribes*, 36 Am. Indian L. Rev. 321, 336 (2012).

Until now, these tribes' immunity from suit has been unquestioned. *See Runyon v. Ass'n of Village Council Presidents*, 84 P.3d 437, 439 (Alaska 2004). Limiting the doctrine to Indian country would all but eliminate it for them. And the consequences would be dire. Alaska Native tribes exercise the sovereign "power of regulating [members'] internal and social relations." *John v. Baker*, 982 P.2d 738, 755 (Alaska 1999) (internal quotation marks and citation omitted). In addition, many tribes function as local governments and provide important social services. For example, the Akiachak Native village maintains police and fire departments. Veronica E. Velarde Tiller, *Tiller's Guide to Indian Country: Economic Profiles of American Indian Reservations* 45 (Bow Arrow Pub. Co. 2005). The

[18] *Venetie* was careful to note, however, that Indian allotments in Alaska can still qualify as Indian country. *See* 522 U.S. at 527 n.2. And ANCSA spared one reservation from disestablishment. 43 U.S.C. § 1618(a).

unincorporated Native villages of Gulkana and Igiugig own health clinics leased to the United States Public Health Service. *Id.* at 116, 124. Relying on federal aid, Alaska Native tribes provide vital health care, housing and infrastructure; and nearly all tribes contract with the federal government to provide services to their members. *See* http://www.gao.gov/new.items/d05719.pdf; Geoffrey D. Strommer & Stephen D. Osborne, "*Indian Country" and the Nature and Scope of Tribal Self-Government in Alaska*, 22 Alaska L. Rev. 1, 12 & n.60 (June 2005).

The removal of immunity could preclude the Alaska tribes from fulfilling these functions. For if the notion of a rich gaming tribe is a stereotype in the lower 48 states, it is utter myth in Alaska, where only two remote gaming facilities exist in the entire state.[19]

To restrict tribal sovereign immunity to Indian country, then, would contravene any sensible notion of public policy. Congress has wisely chosen not to travel that path.

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[19] NIGC, *Gaming Tribe Report*, *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/listandlocationoftribalgamingops/statecc.pdf. Alaska Natives' economic conditions "fall considerably below averages among other Alaskans and other Americans." Stephanie Martin & Alexandra Hill, *The Changing Economic Status of Alaska Natives, 1970-2007*, Note No. 5, Inst. of Social and Econ. Research, Univ. of Alaska Anchorage, July 2009, at 1, *available at* http://www.iser.uaa.alaska.edu/Publications/webnote/WebNote5.pdf (last visited Oct. 30, 2013). Alaska Native tribes are separate from the Regional Corporations that ANCSA envisioned as engines of economic development, and they have highly limited resources. *See* Tiller, *supra*.

2. No sound basis exists to confine sovereign immunity to "governmental" as opposed to "commercial" functions.

Congress likewise has had compelling reasons to reject the suggestion that tribal immunity be curtailed for "commercial" functions. First, this Court has upheld tribal immunity in a variety of contexts that Michigan and its *amici* might term commercial, *see*, *e.g.*, *Kiowa*, 523 U.S. at 760 (commercial contracts), *Puyallup*, 433 U.S. at 167 (commercial fishing), and *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940) (coal-mining lease), and has declined to draw that distinction regarding sovereign immunity more generally. Hence, in *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), the Court rejected the argument that state sovereign immunity is "any less robust" for conduct "that is undertaken for profit [and] that is traditionally performed by private citizens and corporations," *id.* at 684. It declared emphatically that "it is hard to say that that limitation has any more support in text or tradition than, say, limiting abrogation or constructive waiver to the last Friday of the month" not because of factors specific to the Eleventh Amendment, but because "sovereign immunity itself was not traditionally limited by these factors." *Id.*

The contention also raises serious problems of line-drawing, as this case again illustrates. Michigan and Oklahoma posit, without discussion, that tribal gaming is "commercial" rather than "governmental," and in doing so ignore the genesis of tribal gaming in the modern era. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), considered whether states had authority over tribal gaming. "The inquiry," the Court stated, "is to proceed in light of traditional notions of

Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Id.* at 216. The Court held that the federal interest in fostering strong tribal governments, as expressed in President Reagan's declaration that "[i]t is important to the concept of self-government that tribes reduce their dependence on Federal funds," *id.* at 217 n.20, precluded state authority in all but the rare instances where a State prohibits gaming categorically. In sum, the tribes' conduct of gaming in their governmental capacity led this Court to sustain tribal gaming, as its landmark conclusion in *Cabazon* makes clear. "State regulation [of tribal gaming] would impermissibly infringe on tribal government." *Id.* at 222.

IGRA confirms tribal gaming as a governmental activity. The IGRA Congress found that a "principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government," 25 U.S.C. § 2701(4), and declared the first purpose of IGRA to be "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Thus, even if Congress or this Court were to adopt a "governmental" versus "commercial" dichotomy, tribal gaming would clearly qualify as the former. "Formal gaming in Indian country is a governmental activity." Stephen Cornell, *The Political Economy of American Indian Gaming*, Ann. Rev. L. & Soc. Sci. 63, 64 (2008).

The distinction also fails as public policy. A modern hallmark of federal policy has been to foster economic development as a means for tribal governments to provide for the health and welfare of their citizens. Tribal governments have extremely limited tax bases. Their

small numbers of members already pay federal and often state income taxes. *Choteau v. Burnet*, 283 U.S. 691 (1931) (federal); *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 462-67 (1995) (state). And this Court has upheld the ability of states to tax economic activity with a strong nexus to Indian country in a way that has, as a practical matter, precluded tribal taxation of the same activity. *See*, *e.g.*, *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175-76 (1989). To minimize their dependence on federal funds, then, tribes must engage in revenue-generating activities, much as States have relied on lotteries and other enterprises to fortify their own revenue stream. Congress has wisely chosen not to chill economic development by stripping Tribes of the ability to control their exposure to ruinous litigation while engaged in these pursuits.

3. No sound basis exists to give Alabama the hammer it seeks to bludgeon tribal governments.

Alabama argues that tribal immunity should not bar suits for prospective relief. Michigan and Oklahoma do not make this argument, for good reason. It defies the very concept of sovereign immunity, which "does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit." *Fed. Maritime Comm'n*, 535 U.S. at 766; *see also Seminole Tribe*, 517 U.S. at 58. Accordingly, this Court has flatly rejected Alabama's argument. *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 514 (1991) ("there is no doubt that sovereign immunity bars the State from" suing tribes prospectively to require collection of State sales taxes); *Puyallup Tribe*, 433 U.S. at 167-68.

Alabama reveals the animus towards tribal sovereignty underlying its position: "Given the federal government's plenary power to create, destroy, and otherwise control the tribes, notions of inherent sovereignty do not justify immunity from litigation. A federal court, no less than the federal Congress, can coerce an Indian tribe's obedience without diminishing the tribe's uniquely 'dependent' sovereignty." Brief for Alabama ("Ala. Br.") 10. This is a gross misstatement of federal law. "[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States," *Cabazon*, 480 U.S. at 207 (internal quotation marks omitted), and this Court has never sanctioned a state's ability to "coerce an Indian tribe's obedience" through the federal courts.[20]

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[20] Alabama's purported justifications for such coercion—gaming device classification, consumer lending, and campaign finance, Ala. Br. 13-16—are unconvincing. The NIGC has primary authority to distinguish between Class II and Class III devices, and has issued over 100 opinions on that issue. *See* http://www.nigc.gov/Reading_Room/Game_Classification_Opinions.aspx. Judicial review of such determinations is often available. *See*, *e.g.*, *Diamond Game Enters. Inc. v. Reno*, 230 F.3d 365 (D.C. Cir. 2000) (Tribes and States, including Alabama, intervene in suit over game classification). States may also compact with Tribes over these issues. Alabama has steadfastly refused to do so, and should not be heard now to complain of the consequences of its election.

Federal regulators closely scrutinize consumer lending issues, *see*, *e.g.*, *FTC v. Payday Financial LLC*, 2013 WL 5442387 (D.S.D. Sept. 30, 2013); CFPB Order (Sept. 26, 2013) (investigating tribal lenders), *available at* http://www.cfpbmonitor.com/files/2013/09/201309_cfpb_decision-on-petition_great-plains-lending-to-set-aside-civil-investigative-demands1.pdf, and, as Alabama's brief makes clear, States are not bereft of means to address the issue either. *See* Ala. Br. 13. Regarding campaign finance, Alabama has not demonstrated that a problem exists, *see id.* at 14 (cit-

To its credit, Michigan does not take this position. This litigation has undoubtedly been frustrating for Michigan, but there are far better ways, as canvassed above, to address those frustrations than to upend the centuries-old understanding of the relationship between states and tribes, as Alabama urges here. Michigan's own experience illustrates well how states and tribes can cooperate for the common good when they respect one another's sovereignty and negotiate issues including immunity.

Michigan has consistently recognized tribal sovereignty and immunity. In 2001, then-Governor John Engler issued a Policy Statement on State-Tribal Affairs, Executive Directive No. 2001-2, which recognized that

> [l]ike the State of Michigan, the twelve tribes are sovereign governments, recognized by the Constitution of the United States of America, decisions of the United States Supreme Court and acts of Congress.
>
> …
>
> As sovereign governments living together, it is nevertheless inevitable that the State and

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ing only cases decided in the State's favor), or that available remedies are inadequate. *See, e.g.*, *Agua Caliente Band v. Superior Court*, 10 Cal. Rptr. 3d 679, 695 (Cal. Ct. App. 2004) (dissent). By contrast, examples abound of States—including Alabama—invoking Eleventh Amendment immunity to avoid federal legal obligations. *See, e.g.*, *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Alabama invoking immunity against ADA suit for money damages); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (same, ADEA suit for damages and prospective relief); *see also Poarch Band of Creek Indians v. State of Alabama*, 776 F. Supp. 550, 552 (S.D. Ala. 1991) (same, tribal suit for prospective relief under IGRA).

> tribes sometime come into discord. In such cases, the appropriate means for governments to resolve differences is through a process of discussion and negotiation, resorting to litigation only when this course is unavoidable.

Available at http://www.michigan.gov/documents/som/2002_Tribal-State_Accord_195712_7.pdf. This Directive was incorporated into a 2002 State-Tribal Accord, *see id.*, which "provid[ed] a framework for a government-to-government relationship," *id.* at Preamble, and reiterated that the Tribes and State "respect the sovereignty of each other," *id.* at Section III. Accordingly, the Accord expressly preserved the parties' sovereign immunity. *Id.* at Section VI ("In executing this accord, no party waives any rights (including treaty rights), immunities (including sovereign immunities), or jurisdiction.").

Under the 2002 Accord, the State and Tribes have negotiated numerous agreements regarding taxation, law enforcement, economic development, and environmental preservation. *See* http://www.michigan.gov/som/0,1607, 7-192-29701_41909---,00.html (collecting Tribal-State Accords). A number of these accords expressly address sovereign immunity. For instance, the taxation accords contain an arbitration provision favoring voluntary dispute resolution over mandatory process. *See* Bay Mills Tax Agreement Section XIV. If negotiations fail, the Tribes consent to suit in tribal court by the State to compel arbitration, *see id.* Section (G)(1)(B), while the State does the same in state court for that purpose, *see id.* Section (G)(2).

Thus, Michigan and the Tribes within its borders have consistently recognized and respected each other's sovereignty and immunities. They have favored

negotiation and voluntary dispute resolution over litigation, and have crafted narrow remedies for specific concerns. This approach has worked well, and is far superior to that which Alabama urges upon the Court.

CONCLUSION

If the Court concludes that Section 2710(d)(7)(A)(ii) does not extend to the State's claims, no jurisdictional or substantive basis exists for the broad reconsideration of tribal sovereign immunity urged by Michigan and its *amici*.

Respectfully submitted.

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