No. 12-515

In the Supreme Court of the United States

STATE OF MICHIGAN, PETITIONER

v.

BAY MILLS INDIAN COMMUNITY

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

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

The Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*. (IGRA), authorizes an Indian tribe to conduct class III gaming under limited circumstances and only on "Indian lands." 25 U.S.C. § 2710(d)(1). This dispute involves a federal court's authority to enjoin an Indian tribe from operating an illegal casino located *off* of "Indian lands" (i.e., on sovereign *state* lands) and presents two questions:

1. Whether a federal court has jurisdiction to enjoin activity that violates IGRA but takes place outside of Indian lands.

2. Whether tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from violating IGRA outside of Indian lands.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. Petitioner is the State of Michigan. Respondent is the Bay Mills Indian Community, a federally recognized Indian tribe. Appellee below but not appearing here is the Little Traverse Bay Bands of Odawa Indians, a federally recognized Indian tribe that brought an action seeking to enjoin Respondent's off-reservation gaming activities.

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The opinion of the Sixth Circuit court of appeals, Pet. App. 1a–18a, is reported at 695 F.3d 406 (6th Cir. 2012). The opinion of the district court, Pet. App. 19a–39a, is not reported.

JURISDICTION

The judgment of the Sixth Circuit was entered on August 15, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

25 U.S.C. § 2710(d)(7)(A)(ii):

> (7)(A) The United States district courts shall have jurisdiction over—
>
> (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect . . . .

INTRODUCTION

In October 2010, Bay Mills Indian Community opened a casino some 100 miles from the Tribe's reservation. The federal government has determined that the casino is *not* located on "Indian lands" as defined by IGRA, the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*. Thus, the property is subject to Michigan's sovereign authority, and the casino is illegal under both Michigan and federal law. The district court preliminarily enjoined the casino. Bay Mills appealed, and the Sixth Circuit reversed.

Bay Mills concedes Michigan could enjoin an illegal casino on Indian lands but says Michigan cannot enjoin the same casino on sovereign state lands. According to Bay Mills' topsy-turvy view, IGRA created federal-court jurisdiction and abrogated tribal immunity for Indian-land suits only, leaving states to their own devices when tribes engage in illegal gaming on lands under state jurisdiction.

Bay Mills is wrong. To begin, the Tribe admits it licensed and supervised the illegal casino, and it has not denied that these activities occurred *from the Tribe's reservation*. These facts alone create federal-court jurisdiction and abrogate tribal immunity under IGRA. 25 U.S.C. § 2710(d)(7)(A)(ii).

In any event, Michigan's allegations that Bay Mills is violating IGRA raise federal questions that fall comfortably within 28 U.S.C. § 1331's broad grant of federal-court jurisdiction. And this Court has never expressly held that tribal immunity extends to illegal, off-reservation, commercial conduct. Accordingly, the Sixth Circuit should be reversed.

STATEMENT OF THE CASE

A. The nature of tribal sovereign immunity

Indian tribes have no rights under the United States Constitution to any attributes of sovereignty. Congress therefore has plenary authority to prescribe the limits of—or eliminate entirely—tribal powers of local self-government. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978). So tribes have no federal constitutional right to sovereign immunity from suit. *United States* v. *Jicarilla Apache Nation*, __ U.S. __; 131 S. Ct. 2313, 2323 (2011). As a result, Congress has the authority to override the judicially created doctrine of tribal sovereign immunity.

The tribal-immunity doctrine developed "almost by accident." *Kiowa Tribe* v. *Mfg. Techs.*, 523 U.S. 751, 756 (1998). The doctrine's oft-cited source, *Turner* v. *United States*, 248 U.S. 354 (1919), "simply does not stand for that proposition." *Kiowa*, 523 U.S. at 756. *Turner* is "at best, an assumption of immunity for the sake of argument, not a reasoned statement of doctrine." *Id.* at 757. And though the doctrine is now part of this Court's settled precedent, e.g., *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940) (citing *Turner*), this Court has expressed skepticism about the wisdom of applying it to commercial activity:

> At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is

> needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. In this economic context, 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 (citations omitted).]

Before this Court's 1998 decision in *Kiowa*, discussed in more detail below, the Court's precedent sustained tribal immunity "without drawing a distinction based on where the tribal activities occurred," or drawing "a distinction between governmental and commercial activities of a tribe." *Kiowa*, 523 U.S. at 754–55 (numerous citations omitted). And while the Court treated tribal sovereign immunity as settled law, none of its decisions had "applied the doctrine to purely off-reservation conduct." *Id.* at 764 (Stevens, J., dissenting). Against this backdrop, Congress adopted IGRA in 1988.

B. The Indian Gaming Regulatory Act

In *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), this Court confirmed that states could not regulate gaming activities that occur *in Indian country*. Only one year later, Congress responded by passing IGRA to "provide a statutory basis for the operation and regulation of gaming by Indian tribes." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 48 (1996).

IGRA allows tribes to conduct gaming only on "Indian lands," *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, __ U.S. __; 132 S. Ct. 2199, 2203 (2012), and only certain Indian lands are eligible for gaming. "After–acquired" or "newly acquired" Indian lands—those lands taken in trust for the benefit of the tribe after the date IGRA was enacted—are ineligible for tribal gaming unless they satisfy an enumerated statutory exception. 25 U.S.C. § 2719(a).

Jurisdiction over tribal gaming is allocated based on the "class" of gaming involved. There are three classes: class I (traditional forms of tribal gaming), class II (bingo and certain card games) and class III (all other gaming not class I or II). 25 U.S.C. § 2703(6), (7) & (8). Class I gaming is the only type of gaming "within the exclusive jurisdiction of the Indian tribes." 25 U.S.C. § 2710(a)(1). Conversely, class III gaming, which includes high-stakes, Vegas-style casino gaming, is the most heavily regulated. *Seminole Tribe*, 517 U.S. at 48–49. This heavy regulation is appropriate because the opening of casinos has been linked to an increase in crime[1] and problem gambling.[2] Thus, class III gaming is subject to regulatory controls beyond those a tribe imposes.

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[1] Earl L. Grinols & David B. Mustard, *Casinos, Crime, and Community Costs*, 88 Rev. Econ. & Stat. 28 (2006).

[2] Dean Gerstein et al., Nat'l Opinion Research Ctr. at the Univ. of Chi., *Gambling Impact and Behavior Study: Report to the National Gambling Impact Study Commission* (Apr. 1, 1999), available at: http://www.norc.org/PDFs/Publications/GIBSFinalReportApril1999.pdf.

The most significant regulatory barrier for Class III gaming (the gaming at issue here) is the tribal-state gaming compact. In a state like Michigan that has authorized only limited casino gaming, a tribe may conduct class III gaming on Indian lands only with the state's permission through a compact. 25 U.S.C. § 2710(d)(1)(C); *Seminole Tribe*, 517 U.S. at 47. Gaming compacts address any number of issues, including the allocation of state and tribal civil and criminal jurisdiction over class III gaming activities, reimbursement to the state of associated regulatory costs, standards for the operation of gaming facilities, and other related matters. 25 U.S.C. § 2710(d)(3)(C).

IGRA also assimilates all state laws pertaining to the licensing, regulation, or prohibition of gambling and makes them applicable "in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." 18 U.S.C. § 1166(a). Although IGRA reserves to the United States exclusive authority over criminal prosecutions for violations of these assimilated state laws, 18 U.S.C. § 1166(d), states and the federal government have concurrent authority to pursue civil claims.

When Congress enacted IGRA in 1988, there was no reason to believe that tribal sovereign immunity extended to off-reservation, commercial activity. Moreover, *Cabazon* had made it clear that states could not regulate gaming that occurred *in* Indian country. Unsurprisingly, then, IGRA targets illegal gaming activity *on* Indian lands when it nominally grants federal-court jurisdiction and abrogates tribal immunity for a state seeking to enjoin the activity:

> (7)(A) The United States district courts shall have jurisdiction over—
>
> > (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity *located on Indian lands* and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect . . . . [25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added).]

In other words, the problem of illegal gaming was so grave that Congress authorized state suits against tribes *even for on-reservation gaming*. There was no need to address off-reservation gaming, because tribes presumably lacked immunity off reservation.

C. *Kiowa*

Ten years after IGRA's enactment, this Court issued its opinion in *Kiowa*. The Kiowa Tribe is federally recognized and has land holdings in Oklahoma. 523 U.S. at 753. The Tribe's economic development corporation agreed to purchase stock from a non-tribal company, and the chairman of the Tribe's business committee signed a $285,000 promissory note in the Tribe's name. *Id*. The parties disputed where the note was signed; the Tribe claimed execution on trust land, the creditor claimed execution off reservation. *Id*. at 753–54. The Tribe defaulted on the note, the creditor sued, and the Tribe moved to dismiss for lack of jurisdiction, relying in part on its sovereign immunity from suit. *Id*. at 754. In sustaining the Tribe's position, the Court's immunity holding was arguably limited to suits involving tribal contracts:

> Tribes enjoy immunity from suits *on contracts*, whether those contracts involved governmental or commercial activities and whether they were made on or off a reservation. [*Id*. at 760 (emphasis added).]

Later, this Court again characterized its *Kiowa* decision in terms of contract: "Tribal immunity, we ruled in *Kiowa*, extends to suits on *off-reservation commercial contracts*." *C & L Enterprises*, *Inc*. v. *Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) (emphasis added).

In the context of its facts, the *Kiowa* holding makes perfect sense. The *locus* of a commercial contract can be elusive. Was the Kiowa Tribe's conduct on reservation because that was where payments were supposed to originate? Was it *off* reservation because that was where payments were supposed to be made? Was it on- or off-reservation based on the disputed question of where the contract was signed? The Court reasonably rejected these unruly factors as grounds for determining whether tribal immunity exists.

No such concerns arise here. The present case alleges conduct—the operation of a brick-and-mortar casino—that is indisputably off-reservation, i.e., on lands subject to state jurisdiction.

D. The explosion of tribal gaming

Since tribal immunity is judge-made law, it is subject to evolutionary changes like any other common law, based on reason and experience. *Jaffee* v. *Redmond*, 518 U.S. 1, 8 (1996). Courts may influence the development of tribal immunity directly by altering the scope of that immunity, or indirectly through the interpretation of statutes that abrogate or otherwise impact tribal immunity.

In *Kiowa*, this Court voiced considerable skepticism about "the wisdom of perpetuating" tribal immunity at all. 523 U.S. at 758. But rather than taking immediate action, the Court stayed its hand and gave Congress an opportunity to act. "The capacity of the Legislative Branch to address this issue by comprehensive legislation counsels some caution by us in this area. . . . [W]e decline to revisit our case law and choose to defer to Congress." *Id*. at 759–60.

In the 15 years since *Kiowa*, Congress has not acted to address the problems created by blanket tribal immunity. Meanwhile, the growth in tribal commercial enterprises—gaming in particular—has been exponential. In 1998, combined tribal gaming revenues were $8.5 billion.[3] In 2011, the revenues had tripled, to $27.2 billion.[4] That amount exceeds

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[3] National Indian Gaming Commission gaming revenue report viewable at:
http://www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Data/19962006revenues.pdf (last accessed July 17, 2013).

[4] National Indian Gaming Commission gaming revenue report viewable at:

the GDP of more than 70 countries[5] and approaches that of the private U.S. commercial gaming sector.[6] There is no reason to believe that this growth trend will reverse any time soon.

The number of tribal gaming establishments has also increased dramatically. In 1986—two years before IGRA's passage—only 80 gaming operations existed, mostly simple bingo halls. H.R. Rep. No. 99-488, at 9 (1986). In 2011, 240 tribes were operating approximately 460 gaming facilities.[7]

Blanket tribal immunity is not a boon to all tribes, as this case shows. Soon after Michigan filed its complaint seeking to enjoin operation of the Vanderbilt casino, the Little Traverse Bay Bands of Odawa Indians filed a similar lawsuit, also seeking an injunction. According to the Little Traverse Bay Tribe, the Vanderbilt casino posed a competitive threat to the casino that the Little Traverse Bay Tribe operated on its reservation less than 40 miles away. 12/23/10 Little Traverse Bay Tribe Br. in Support of Mot. for Prelim. Inj., Case 1:10-cv-01273-PLM, at 7.

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http://www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Data/GrowthinIndianGamingGraph20022011.pdf (last accessed July 17, 2013).

[5] http://en.wikipedia.org/wiki/List_of_countries_by_GDP_(PPP).

[6] The American Gaming Association reported that commercial gaming revenues in 2011 were $34.6 billion: http://www.americangaming.org/industry-resources/research/fact-sheets/gaming-revenue-10-year-trends (last accessed July 17, 2013).

[7] National Indian Gaming Commission, *Gaming Tribe Report*, viewable at: http://www.nigc.gov/LinkClick.aspx?fileticket=0J7Yk1QNgX0%3d&tabid=943 (last accessed July 17, 2013).

Despite Bay Mills' illegal competition, the Little Traverse Bay Tribe's action was dismissed with prejudice by the Sixth Circuit based on that court's view of tribal immunity. If Bay Mills is allowed to break the law by opening casinos outside Indian lands, tribes that follow the law will be unfairly disadvantaged by illegal, competing casinos, or even encouraged to engage in the same unlawful behavior.

E. The State's historic role in regulation of gaming

Gaming is a unique industry imbued with social, economic, and moral implications. Americans' opinions towards gambling are reflected in the laws prohibiting, legalizing, and regulating gaming enterprises. For most of the 20th century, Nevada was the only state that allowed casino-style gambling, and it is still the only state that allows it statewide. In 1978, New Jersey passed a law authorizing casinos in Atlantic City, and since then, other states have allowed limited casino gambling restricted to specific locations (e.g., Michigan voters approved an initiative in 1996 that allowed three commercial casinos in Detroit). As a general matter, casino gaming at the state level is still either generally prohibited or tightly regulated.

States remain wary of casinos for good reason. A comprehensive report prepared for the National Gambling Impact Study Commission concluded that the opening of casinos has negative economic and social impacts.[8] Using criteria developed by the American Psychiatric Association, the authors

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[8] See Gerstein et al., *Gambling Impact and Behavior Study*.

estimated that 2.5 million adults are pathological gamblers and another 3 million adults are considered problem gamblers.[9] The toll such gamblers have on their community, and on the general public, is significant. They are more likely to have been on welfare, declared bankruptcy, and been arrested or incarcerated. Moreover, the study shows that the availability of a casino within 50 miles (versus 50 to 250 miles) nearly doubles the prevalence of problem and pathological gamblers.[10]

Crime associated with casinos has also been a concern of the states. Congress recognized the attraction to organized crime that casinos present when it adopted IGRA. 25 U.S.C. § 2702(2).

Casinos have also been linked to an increase in crime in general. Possibly the most comprehensive study on the topic covered all 3,165 United States counties and analyzed FBI Uniform Crime Reports from 1977 to 1996.[11] The authors concluded that casinos increased all but one of seven FBI Index I crimes. *Id*. at 44.

F. Bay Mills' Vanderbilt casino

Bay Mills is a federally recognized Indian tribe with a reservation in Michigan's Upper Peninsula in Chippewa County, near the town of Brimley. Pet. App. 3a. The Tribe's offices are located on the reservation.

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[9] *Id*. at viii.

[10] *Id*. at ix.

[11] See Grinols et al., *Casinos, Crime, and Community Costs*, 88 Rev. Econ. & Stat. at 29.

In 1993, Bay Mills entered into a tribal-state compact with Michigan—a compact governed by IGRA—and thereafter has continuously operated at least one casino on its reservation. As IGRA requires, Bay Mills also adopted a gaming ordinance that the National Indian Gaming Commission approved. Pet. App. 4a. The ordinance created a tribal gaming commission charged with regulating all casinos the Tribe owned, including issuing licenses to those casinos. Pet. App. 15a. Both the compact and the gaming ordinance prohibited the Tribe from operating a casino outside of Indian lands. Pet. App. 5a, 15a.

On October 29, 2010, the tribal gaming commission issued a license to the Tribe to open a new, off-reservation casino on property the Tribe owned near Vanderbilt, Michigan, approximately 100 miles from its reservation. The Tribe opened the casino on November 3, 2010, even though it had not obtained confirmation from either the United States Department of the Interior or the National Indian Gaming Commission that the Vanderbilt property was eligible for casino gaming.

G. Proceedings below

On December 16, 2010, Michigan's Attorney General sent a letter to Bay Mills ordering it to immediately close the Vanderbilt casino because it violated state and federal gaming laws. Bay Mills refused, so the State filed this lawsuit seeking to enjoin any further operation of the casino. The State alleged that the court had jurisdiction under 28 U.S.C. § 1331, federal common law, 25 U.S.C. § 2701 *et seq*., 25 U.S.C. § 2710(d)(7)(A)(ii), 28 U.S.C. § 1367, and 28 U.S.C. § 2201.

A short time later, the Little Traverse Bay Tribe filed its own lawsuit against Bay Mills, seeking an injunction against further operation of the Vanderbilt casino. The district court consolidated the two lawsuits.

Within hours of these filings, both the Department of the Interior and the National Indian Gaming Commission issued letters formally determining that the Vanderbilt casino was *not* located on Indian lands as defined by IGRA. Letter from Hillary C. Tompkins, Solicitor, Department of Interior, to Michael Gross, Associate General Counsel, National Indian Gaming Commission (Dec. 21, 2010), J.A. 69; Memorandum from Michael Gross (Dec. 21, 2010), J.A. 102. On March 29, 2011, the district court filed a 20-page opinion and order that preliminarily enjoined Bay Mills' operation of the casino. Pet. App. 19a–39a.

The district court began by addressing its jurisdiction. Although § 2710(d)(7)(A)(ii) authorizes a district court to enjoin class III gaming activity "located on Indian land" (and in violation of a compact), the district court recognized its broad subject-matter jurisdiction under 28 U.S.C. § 1331 to resolve *any* civil action arising under federal law. Pet. App. 25a. Though not dispositive, the district court also noted that Bay Mills had, in 1999, successfully made the exact same § 2710 request for injunctive relief against another tribe. Pet. App. 26a. Concluding the relevant property was not "Indian land" as a matter of federal law, Pet. App. 29a, the court preliminarily enjoined Bay Mills' operation of its Vanderbilt casino. Pet. App. 39a.

Bay Mills appealed, and the Sixth Circuit vacated the injunction, ruling that the federal courts lacked jurisdiction to enjoin Bay Mills from illegal gaming outside Indian lands, and that Bay Mills had sovereign immunity from the State's common-law and other statutory claims.

With respect to jurisdiction, the Sixth Circuit declined to apply § 1331 to Michigan's IGRA claims. Rather, the court looked solely to § 2710 and concluded that the provision did not apply because Michigan alleged that illegal gaming was taking place off reservation, not *on* Indian lands, as § 2710's language contemplated. Pet. App. 9a. And, consistent with the narrow scope it ascribed to § 2710, the Sixth Circuit also concluded that Bay Mills was protected by sovereign immunity. Pet. App. 13a.

The net result of the Sixth Circuit's approach is that states may sue in federal court to enjoin a tribe's illegal operation of a casino on Indian lands. But states must resort to much more intrusive individual civil actions and criminal prosecutions to stop a tribe's illegal operation of a casino on lands under state jurisdiction. Suing tribal officials and sending in law-enforcement officials to seize equipment and arrest tribal employees is the type of inter-sovereign friction that IGRA is supposed to avoid.

H. Proliferation of the *Bay Mills* decision

Michigan is already aware of at least three additional lawsuits where parties have cited the Sixth Circuit's decision here in support of a tribe's operation (or planned operation) of a casino in violation of IGRA or tribal-state gaming compacts.

One such case involves the Sault Ste. Marie Tribe of Chippewa Indians, which, like Bay Mills, is a tribe whose reservation is entirely in Michigan's Upper Peninsula. *State of Michigan* v. *Sault Ste. Marie Tribe of Chippewa Indians, et al.*, U.S. Dist. Ct. W.D. Mich. No. 1:12-CV-962. The Sault Tribe is seeking to obtain Indian lands status for off-reservation property it purchased hundreds of miles away in the Lower Peninsula where it intends to operate a casino. The Tribe relies on the Sixth Circuit decision in this case for the proposition that, because the land has not been taken into trust (though the Sault Tribe intends to seek such status) and is not yet Indian lands, it cannot be sued in federal court.

Similarly, in *Oklahoma* v. *Tiger Hobia*, 2012 U.S. Dist. LEXIS 100793 (N.D. Ok. 2012), the district court entered a preliminary injunction prohibiting the defendants Kialegee Tribal Town, a federally chartered corporation, and certain tribal officials from proceeding with the development of a casino on lands which the National Indian Gaming Commission had determined were not Indian lands under IGRA. The defendants appealed, citing the *Bay Mills* decision in support of their argument 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 Indian lands. Michigan has filed an *amicus* brief in support of Oklahoma's position that the court has jurisdiction and defendants' sovereign immunity has been abrogated.

Finally, in *State of Alabama* v. *PCI Gaming Authority*, *et al.*, U.S. Dist. Ct. M.D. Ala. No. 2:13-cv-00178-WKW-WC, the State of Alabama has sued a tribal gaming authority and its officials to enjoin operation of casino-style gaming that is prohibited under state law and is not authorized by any gaming compact. Alabama brought a claim under IGRA, specifically 18 U.S.C. § 1166 (which assimilates state anti-gambling laws into federal law). In an *amicus* brief supporting the tribal defendants, the United States relied on the *Bay Mills* decision to support its assertion that IGRA does not abrogate tribal sovereign immunity, even for claims under state law assimilated by § 1166. Michigan filed an *amicus* brief in support of Alabama's position that Congress intended to allow states to pursue civil claims under state anti-gambling laws in federal court, and that IGRA provided an abrogation of tribal sovereign immunity for that purpose.

These suits are just the tip of the proverbial iceberg. As tribes continue to look for better casino locations (as in Michigan and Oklahoma) or new ways to profit from the explosion of casino gaming (as in Alabama), the friction between state authority and tribal immunity will inevitably increase.

SUMMARY OF ARGUMENT

The Sixth Circuit erred in two ways when it held that Michigan could enjoin an illegal tribal casino located on Indian lands but not on lands subject to the State's own sovereign jurisdiction.

To begin, the Tribe authorized, licensed, and operated the Vanderbilt casino from the Tribe's reservation near Brimley, Michigan. By definition, the reservation constitutes "Indian lands." 25 U.S.C. § 2703(4). Because the Tribe's authorization, licensing, and operation of the casino from Indian lands are all "activities" necessary for the casino's existence, this lawsuit fulfills all of § 2710's prerequisites for suit, even as the Sixth Circuit identified them. Pet. App. 7a (citing 25 U.S.C. § 2710(d)(7)(A)(ii) and holding that federal district courts have jurisdiction over any cause of action where "(1) the plaintiff is a State or an Indian tribe; (2) the cause of the action seeks to enjoin a class III gaming *activity*; (3) the gaming activity is located on Indian lands; (4) the gaming activity is conducted in violation of a Tribal-State compact; and (5) the Tribal-State compact is in effect.") (emphasis added).

Moreover, this suit should proceed even if one ignores the on-reservation conduct that is necessary to gaming in Vanderbilt. The federal courts have jurisdiction over this matter because the State's complaint alleged violations of IGRA, a federal statute. 28 U.S.C. § 1331; *Cabazon Band of Mission Indians* v. *Wilson*, 124 F.3d 1050, 1056 (9th Cir 1997) (a "claim to enforce the Compacts arises under federal law and thus [ ] we have jurisdiction pursuant to 28 U.S.C. § 1331."); *Pueblo of Santa Ana* v. *Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997) ("IGRA is a federal statute, the interpretation of which presents a federal question suitable for determination by a federal court.").

Section 1331's expansive federal-question jurisdiction is restricted only when Congress "expressly limit[s]" it through a statute creating limited federal-court jurisdiction. *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3150 (2010). And IGRA contains no such limiting language.

Tribal sovereign immunity also does not bar this action, for two separate reasons. First, in *Seminole Tribe*, this Court endorsed a more holistic approach to analyzing statutory abrogation of sovereign immunity, an approach that considers the statutory scheme as a whole. 517 U.S. at 57. When examining IGRA as a whole (i.e., not focusing exclusively on § 2710), it is immediately apparent that Congress understood and expected that a state could enforce its gaming laws in federal court against a tribe engaged in off-reservation gaming. It cannot be the case that Congress intended in IGRA to allow a state the least provocative remedy (a federal-court injunction) to stop illegal tribal gaming on Indians lands, while prohibiting injunctions of the exact same illegal conduct on sovereign state lands, thus forcing a state to send in police to seize and arrest.

In the alternative, the Court should confirm that tribes have no sovereign immunity from suits alleging illegal commercial gaming occurring on state lands. Aside from *Kiowa*'s commercial-paper context, this Court has never expressly held that tribal immunity applies to illegal, off-reservation, commercial conduct. *Kiowa*, 523 U.S. at 764 ("in none of our cases have we applied to doctrine to purely off-reservation conduct.") (Stevens, J., dissenting).

Given the tribal-immunity doctrine's dubious foundation, the Court should hesitate to extend the doctrine now that the question is squarely presented. There is no good reason a tribe should enjoy broader immunity than the federal government and foreign nations, entities which are undeniably subject to suit for their commercial activities.

ARGUMENT

I. This lawsuit satisfies 25 U.S.C. § 2710.

Section 2710(d)(7)(A)(ii) says the United States district courts 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 under paragraph (3) that is in effect." Bay Mills has not disputed that § 2710 both vests jurisdiction in federal courts and abrogates tribal sovereign immunity when the provision's requirements are satisfied. Instead, Bay Mills contends Michigan's lawsuit does not satisfy § 2710 because the illegal conduct is not "located on Indian lands."

But Bay Mills admitted that it's Executive Council "made the decision to own and operate the Vanderbilt casino," Pet. App. 59a, ¶ 21; Pet. App. 43a, ¶ 21, and that this action was taken "with the approval of the Tribal [Gaming] Commission," Pet. App. 59a, ¶19; Pet. App. 43a, ¶ 19. In other words, the Tribe authorized, licensed, and operated the Vanderbilt casino. These facts are dispositive of the § 2710 issue.

The Tribe, through its Executive Council, derives its governmental authority from its reservation. Const. and Bylaws of the Bay Mills Indian Community, Art. II, § 1 ("The jurisdiction of the Bay Mills Indian Community shall extend to all territory within the original confines of the Bay Mills Reservation . . . and to such other land . . . as may be added thereto . . . .").[12] By definition, a tribe's reservation is "Indian land." 25 U.S.C. § 2703(4). As a result, Bay Mills' authorizing, licensing, and operation of the Vanderbilt casino necessarily occurred "on Indian lands," satisfying § 2710 even under the Sixth Circuit's analysis. Accordingly, this Court should reverse the Sixth Circuit and reinstate the preliminary injunction.

Such a conclusion is consistent with IGRA's language and congressional intent. Congress did not limit federal-court authority to enjoining just the gaming itself. Section 2710(d)(7)(A)(ii) specifically says that a court can enjoin all unlawful "class III gaming *activity*." (Emphasis added.) Authorizing, licensing, and operating a class III gaming facility are undeniably "class III gaming activities" for purposes of the statute. Thus, these activities provide a natural basis for a federal court to exercise jurisdiction and enter an injunction. And without authorization, licensure, and operation, the associated casino, regardless of where it is located, must close.

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[12] http://www.baymills.org/tribal-constitution.php.

Shielding such decisions from federal-court review would thwart Congress's clear intent to provide federal-court jurisdiction over state or tribal lawsuits asserting violations of tribal-state gaming compacts. And doing so would violate § 2710's plain language, including the expansive meaning of the term "activity."[13]

II. Alternatively, states are entitled to federal-court injunctions even when illegal tribal casinos are off reservation.

A. The federal courts have jurisdiction under 28 U.S.C. § 1331 for alleged IGRA violations.

In its complaint, the State asserted that the district court had jurisdiction pursuant to "28 U.S.C. § 1331, as this Complaint alleges violations of [IGRA] and federal common law." Pet. App. 56a. Section 1331 unambiguously provides federal court jurisdiction over "*all* civil actions arising under the Constitution, laws, or treaties of the United States." (Emphasis added.) Michigan's complaint alleges violations of IGRA, a federal law. Accordingly, federal courts have jurisdiction under § 1331.

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[13] At the petition stage, the Solicitor General asserted in his brief opposing the petition that the argument set forth above is "not properly before this Court" because the underlying facts were not alleged until the amended complaint, which post-dated the appeal. U.S. Br. 17 n.4. But Bay Mills has already admitted those facts. Pet. App. 43a, ¶ 21; Pet. App. 43a, ¶ 19. And the Tribe waived any procedural objections by failing to raise them in its brief opposing Michigan's petition for certiorari. Sup. Ct. R. 15.2; *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Protection*, 130 S. Ct. 2592, 2610 (2010).

There is nothing in § 2710's plain language that suggests Congress intended to oust federal courts of their § 1331 jurisdiction over illegal tribal casinos simply because the casinos are located off reservation. This Court has made clear that in the absence of statutory text that "expressly limit[s] the jurisdiction that other statutes confer on district courts," plaintiffs remain free to invoke other jurisdictional statutes, such as § 1331. *Free Enterprise Fund*, 130 S. Ct. at 3150. Section 2710 does not purport to remove this federal-question jurisdiction.

Both the Ninth and Tenth Circuits have reached the result for which Michigan advocates here. In *Cabazon Band of Mission Indians* v. *Wilson*, 124 F.3d 1050 (9th Cir. 1997), several Tribes sued California to force the State to remit amounts it had collected as license fees from horse racing associations that had received payments pursuant to an off-track betting regime established in a compact between the State and the Tribes. That compact included a provision obligating the State to turn the money over to the Tribes if a federal court determined that the payments were illegal. A court made that determination, but the State refused to remit the money to the Tribes, who then sued.

California argued that the federal courts did not have jurisdiction because § 2710(d)(7)(A)(i–iii) conferred jurisdiction in only limited circumstances, and the Tribes' lawsuit did not satisfy the statutory prerequisites. The Ninth Circuit rejected California's position. 124 F.3d at 1056. Noting "the importance of the federal issue in federal-question jurisdiction" under § 1331, *id.* (quoting *Merrell Dow Pharm. Inc.*

v. *Thompson*, 478 U.S. 804, 814 n.12 (1986)), the Ninth Circuit agreed with the Tribes that "IGRA necessarily confers jurisdiction onto federal courts to enforce Tribal-State compacts and the agreements contained therein." *Id*.

Similarly, in *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379 (10th Cir. 1997), New Mexico brought a § 2710(d)(7)(a)(ii) counterclaim alleging that the tribal-state compact at issue was invalid because New Mexico's governor did not have authority to sign it. The Mescalero Apache Tribe argued that the federal court lacked jurisdiction because § 2710 applies only when a tribe allegedly violates a compact that is "in effect."

Relying on *Pueblo of Santa Ana* v. *Kelly*, 104 F.3d 1546 (10th Cir. 1997), the Tenth Circuit concluded that it had jurisdiction to answer the question of compact validity. *Mescalero*, 131 F.3d at 1386. And the Tenth Circuit's reasoning in *Pueblo* applies equally here: "IGRA is a federal statute, the interpretation of which presents a federal question suitable for determination by a federal court." *Pueblo of Santa Ana*, 104 F.3d at 1557.[14]

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[14] Even the United States does not appear to disagree with this point. In the Solicitor General's invitation brief, the United States recasts the Sixth Circuit's opinion as holding that Michigan failed to state a § 2710(d)(7)(A)(ii) claim, rather than holding that Michigan's claim does not satisfy § 1331 federal-question jurisdiction. U.S. Br. 13. Of course, Michigan claims that the Vanderbilt casino violates the parties' compact and numerous IGRA provisions, not just § 2710. Regardless, the United States did not take the position that federal courts lack § 1331 jurisdiction over IGRA disputes.

In sum, allowing a state or a tribe to proceed in federal court to address a compact breach is consistent with Congress's desire to balance the interests of tribes and states and to protect the integrity of tribal gaming. The federal courts have jurisdiction under § 1331 to decide the numerous federal questions this case presents.

B. Bay Mills does not have sovereign immunity from a state suit seeking to enjoin the Tribe's illegal gaming on lands subject to Michigan jurisdiction.

1. IGRA abrogates tribes' sovereign immunity for illegal gaming activity on sovereign state lands.

a. Congressional intent

Congress enacted IGRA pre-*Kiowa*, with the understanding and expectation that states could enforce state law in federal court against tribes engaged in illegal, off-reservation gaming. That understanding manifests itself in IGRA's text and structure in at least three ways.

First, 18 U.S.C. § 1166 assimilates all state anti-gambling laws into federal law and makes then applicable to violations of those anti-gambling laws that occur in Indian country and do not involve gambling that is authorized under a tribal-state compact:

> (a) Subject to subsection (c), for purposes of Federal law, *all State laws pertaining to the licensing*, *regulation*, *or prohibition of gambling*, including but not limited to

> criminal sanctions applicable thereto, shall apply in Indian country *in the same manner* and to the same extent as such laws apply elsewhere in the State.
>
> (b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not *conducted* or sanctioned *by an Indian tribe*, which, although not made punishable by any enactment of Congress, *would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred*, under the laws governing the licensing, regulation or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment. [18 U.S.C. § 1166 (emphasis added).]

It is not plausible that Congress intended that a state would be able to invoke § 1166 as a basis to bring a civil suit to enforce anti-gambling laws in Indian country but be unable to do so on sovereign state lands, even when the defendant is an Indian tribe. The reasonable inference from § 1166 is that Congress expected states to bring civil actions in the latter context as well.

In fact, Congress assumed as much in § 1166 when it specifically stated that acts of tribes would be punishable under the assimilated laws, just as they "would be punishable if committed within the jurisdiction of the State in which the act . . . occurred . . . ." If there was no punishment for a tribe guilty of illegal, off-reservation gaming under state law, § 1166 itself would have no teeth.

Second, when Congress enacted IGRA, it was acutely aware of this Court's then recent decision in *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which confirmed that states could not regulate tribal gaming activities that occur *in Indian country* unless Congress passed a law that allowed such regulation. *Id*. at 207. Congress specifically made a legislative finding on this point, limited to conduct "on Indian lands":

> (5) Indian tribes have the exclusive right to regulate gaming activity *on Indian lands* if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity. [25 U.S.C. § 2701 (emphasis added).]

Given this precedent (i.e., that a state could not seek a remedy for unlawful gaming that occurred *on Indian lands*), it would make complete sense for Congress, when rewriting the law to give States *more* authority to enforce their public policies against gaming, to unequivocally express its intention to allow states to obtain an injunctuion for unlawful gaming *even when occurring on Indian lands*, a place where such a remedy was previously unavailable.

Conversely, it makes no sense to interpret the phrase "on Indian lands" as a limitation on access to federal courts when gaming occurs *outside* Indian lands. Such a conclusion ignores the significance of a state's sovereignty over lands within its own jurisdiction. And it disregards the reality that the NIGC, the agency primarily charged with keeping

tribal gaming honest,[15] cannot exercise jurisdiction over a tribe's illegal gaming if such gaming takes place outside Indian lands. J.A. 102–07. It just doesn't add up that Congress would have structured IGRA in a way that bars states and the NIGC—the two parties best situated to remedy unlawful gaming—from federal court, merely because unlawful gaming takes place outside Indian lands.

Third, it is inconceivable that Congress intended to give states a greater ability to deal with illegal Indian gaming *on* Indian lands than *off* of Indian lands. If state sovereignty means anything, it must include the ability to stop illegal conduct on lands under state jurisdiction.

b. *Seminole*'s holistic approach

It is appropriate for this Court to view IGRA's text and structure as a whole to discern whether Congress intended to abrogate tribal sovereign immunity in the context of illegal, off-reservation gaming. That is the same approach the Court followed in *Seminole Tribe*, when the question of abrogation under 25 U.S.C. § 2710(d)(7)(A)(i) (rather than subdivision (ii)) was at issue.

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[15] E.g., 26 U.S.C. §§ 2704 (establishing the NIGC), 2706 (defining powers of NIGC, including monitoring and inspecting tribal gaming operations, conducting background investigations, and promulgating regulations to implement IGRA), 2710 (subjecting tribal gaming ordinances and resolutions to NIGC approval), 2711 (subjecting tribal gaming management contracts to NIGC approval) and 2713 (authorizing NIGC to impose civil penalties and close tribal games for violations of IGRA).

In *Seminole*, the Tribe sued the State of Florida, alleging that the State had failed to negotiate in good faith for a gaming compact. For such an action to proceed in federal court, the Court needed to conclude that Congress had unequivocally expressed an intention to abrogate the State's Eleventh Amendment immunity when it passed IGRA. 517 U.S. at 55.

The Court considered the possibility that § 2710(d)(7)(A)(i) did not unequivocally express an intention to abrogate a state's immunity because the provision does not identify *who* can be sued when a state fails to negotiate in good faith. But by consulting the rest of IGRA, the Court easily inferred a congressional intent to abrogate:

> Any conceivable doubt as to the identity of the defendant in an action under § 2710(d)(7)(A)(i) is dispelled when one looks to the various provisions of § 2710(d)(7)(B), which describe the remedial scheme available to a tribe that files suit under § 2710(d)(7)(A)(i). Section 2710(d)(7)(B)(ii)(II) provides that if a suing tribe meets its burden of proof, then the "burden of proof shall be upon the State . . ."; § 2710(d)(7)(B)(iii) states that if the court "finds that the State has failed to negotiate in good faith . . ., the court shall order the State . . ."; § 2710(d)(7)(B)(iv) provides that "the State shall . . . submit to a mediator appointed by the court" and subsection (B)(v) of § 2710(d)(7) states that the mediator "shall submit to the State." Sections

> 2710(d)(7)(B)(vi) and (vii) also refer to the "State" in a context that makes it clear that the State is the defendant to the suit brought by an Indian tribe under § 2710(d)(7)(A)(i). In sum, we think that the numerous references to the "State" in the text of § 2710(d)(7)(B) make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit. [*Seminole Tribe*, 517 U.S. at 57.]

Applying *Seminole Tribe*'s holistic method of determining IGRA abrogation here, the Court should similarly conclude that Congress abrogated tribal immunity for illegal gaming occurring both on and off reservation. The statutory structure and context "make it indubitable" that Congress intended to empower states with the authority to prevent or halt illegal Indian gaming.

If IGRA's provisions are insufficient to show that abrogation is "unequivocally expressed" in the statute under the approach this Court endorsed in *Seminole Tribe*, then the Court should consider overruling *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978). In *Santa Clara Pueblo*, the Court adopted essentially the same test for finding abrogation of tribal immunity (a non-constitutional, common-law immunity) as for finding abrogation of states' Eleventh Amendment immunity and waiver of the United States' own immunity. The test is that such abrogation or waiver must be "unequivocally expressed" in the statute in question. *Santa Clara Pueblo*, 436 U.S. at 58; *Seminole Tribe*, 517 U.S. at 55.

Michigan has been unable to find a case that describes the logic of applying the same test for abrogation of tribal immunity as for abrogation of Eleventh Amendment immunity. And indeed, there are good reasons to distinguish between these circumstances.

For example, it is logical to scrutinize any statute that purports to abrogate state immunity because state immunity is constitutional and courts should not lightly presume that Congress intends to attempt to abrogate it. U.S. Const. amend XI; *Seminole Tribe*, 517 U.S. at 55. But tribal immunity has no constitutional dimension and is solely a creature of the common law. As a result, when Congress passes a statute that abrogates tribal immunity, it would be reasonable to interpret it in the same manner as any other statute that affects the common law.

Moreover, while the sovereignty of tribes deserves respect, there is no dispute that tribes' status is entirely dependent on the will of Congress. *Jicarilla Apache Nation*, 131 S. Ct. at 2323. This is the exact opposite of the relationship of Congress and the states. The only authority that Congress has over the states is the power the states themselves transferred to Congress in the Constitution. U.S. Const. amend. X. In light of the distinct differences in the relationships of states and tribes to the United States, there is good reason to think that a different test for discerning the intent of Congress to abrogate the respective immunities of states and tribes–specifically, a less strict standard when considering abrogation of tribal immunity–would make sense.

Likewise, there is an obvious distinction between the act of the federal sovereign waiving its own immunity from suit and when it abrogates the immunity of a dependent nation, particularly where a court is interpreting the legislation that effects the abrogation. As one of the three coordinate branches of government, courts properly hesitate to subject the other branches of government directly to the court's authority. E.g., *U.S. Fire Ins. Co.* v. *United States*, 806 F.2d 1529, 1534–1535 (11th Cir. 1986); *Tucson Airport Auth.* v. *General Dynamics Corp.*, 136 F.3d 641, 644 (9th Cir. 1998). Thus, looking for a congressional expression of intent to allow the government to be sued in court respects the constitutional separation of powers and is a reasonable approach to interpreting legislation that may waive federal immunity.

Since tribes are subject to the plenary authority of Congress, there is no reason for courts to exercise the same caution when considering an abrogation of a tribe's common-law immunity from litigation. Legislation abrogating common-law immunity raises no separation of powers issues—"Congress plainly can override" "common-law adjudicatory principles," *Mohamad* v. *Palestinian Auth.*, 132 S. Ct. 1702, 1709 (2012)—and should be interpreted in the usual way, without any heightened standard.

In sum, when construed in an ordinary manner, IGRA (e.g., 18 U.S.C. § 1166) makes clear that if Congress believed that tribal immunity existed in the context of illegal, off-reservation gaming at all, Congress must have intended to abrogate that immunity. Indeed, keeping in mind that this Court

defers to Congress when it comes to limiting the scope of tribal sovereign immunity, *Kiowa*, 523 U.S. at 759–60, it would be passing strange for the Court to hold—in the name of deferring to Congress—that tribes have full immunity from suit in this context. Such a holding would undermine all of Congress' expectations and assumptions about tribal immunity at the time of IGRA's enactment, at least with regard to tribes' illegal, off-reservation activity.

c. Comparison to foreign immunity

There is also a direct analogy here to the law of foreign sovereign immunities. When courts interpret legislation to determine whether it abrogates the common-law immunity of foreign nations, they do not require an unequivocal congressional expression.

For example, in *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), this Court interpreted the Foreign Sovereign Immunities Act to allow an abrogation of Austria's immunity to suit for conduct that occurred before the statute was enacted, even though the Court acknowledged that the language on which the abrogation was based wasn't unequivocal: "Although the FSIA's preamble *suggests* that it applies to preenactment conduct, . . . that statement by itself falls short of an "expres[s] prescri[ption of] the statute's proper reach." *Id*. at 694 (emphasis added). The Court said that while the abrogation provision was unambiguous, it was "perhaps not sufficient to satisfy [an] 'express command' requirement." In short, the Court did *not* require a clear-statement rule to determine whether Congress intended to abrogate foreign sovereign immunity, but instead applied ordinary rules of construction.

In a similar vein, in *Republic of Argentina* v. *Weltover*, *Inc.*, 504 U.S. 607 (1992), this Court did not require a clear statement to abrogate foreign sovereign immunity. Instead, the Court consulted the customary practices at the State Department prior to enactment of the FSIA to determine what the term "commercial" meant in the statute. *Id.* at 612–13. Noting that the statute itself did not define this critical term, the Court held that Congress had intended to abrogate the foreign sovereign immunity where the foreign government was not acting as a regulator in the marketplace, but rather as a player. *Id.* at 614. To come up with this test, the Court did not require an unequivocal expression from Congress. Rather, it relied on evidence from other court decisions of what the so-called "restrictive" theory of foreign sovereign immunity would have permitted, as the Court believed that this was what Congress intended to codify when it adopted the FSIA. *Id.* at 612–13.

As noted in *Altmann*, the law of foreign sovereign immunity resulted from a pragmatic political concern: since there would be times when the United States might be sued in the courts of foreign nations, honoring such nations' sovereignty when sued here could be the difference between getting cases against the United States dismissed or having to defend them in a foreign court. 541 U.S. at 696. So there could be serious consequences to the United States' own sovereignty flowing directly from any decision to abrogate the sovereignty of another country. Under these circumstances, a good argument could be made for requiring a stricter than usual standard for construing Congress's words.

Yet, as evidenced by *Altmann* and *Weltover*, no such standard has evolved for determining whether Congress abrogated the immunity of foreign nations. If courts are free to employ a traditional standard for construing language abrogating *foreign* sovereign immunity, they should be able to do so when *tribal* immunity is at issue.

Although not stated in precisely these terms, the Seventh, Ninth, Tenth, and Eleventh Circuits all appear to follow this less-strict approach to abrogation. When confronted with a lawsuit alleging an IGRA or tribal-state compact violation, none of these circuits parsed § 2710 as did the Sixth Circuit here. Instead, these circuits looked at IGRA *in toto* and held there is abrogation whenever IGRA or compact compliance is at issue. E.g., *Wisconsin* v. *Ho-Chunk Nation*, 512 F.3d 921, 933 (7th Cir. 2008) (IGRA abrogates tribal sovereign immunity for any claim alleging a violation of a gaming compact arising from the § 2710(d)(3)(C) list of compact-negotiation subjects); *Lewis* v. *Norton*, 424 F.3d 959, 962–63 (9th Cir. 2005) ("The IGRA waives tribal sovereign immunity in the narrow category of cases where compliance with the IGRA is at issue."); *Mescalero Apache Tribe*, 131 F.3d at 1385–86 ("IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought."); *Florida* v. *Seminole Tribe of Florida*, 181 F.3d 1237, 1242 (11th Cir. 1999) ("Congress abrogated tribal immunity only in the narrow circumstance in which a tribe conducts class III gaming in violation of an existing Tribal-State compact.").

In sum, whether viewed from a strict or more lenient standard, IGRA as a whole demonstrates a congressional intent to abrogate tribal immunity from suit whenever a tribe engages in illegal gaming, whether on- or off-reservation. In tandem with § 1331 federal-question jurisdiction, federal jurisdiction authorized and tribal immunity did not prohibit the preliminary-injunction order.

2. Alternatively, the Court should confirm that tribes do not have sovereign immunity with respect to illegal commercial activity on lands under state jurisdiction.

The scope of tribal immunity is a bit muddled after *Kiowa*. In his *Kiowa* dissent, Justice Stevens observed that the Court had never expressly "applied the [tribal immunity] doctrine to purely off-reservation conduct . . .", nor had the Court ever "considered whether a tribe is immune from a suit that has no meaningful nexus to the Tribe's land or its sovereign function." *Kiowa*, 523 U.S. 764. In response, the *Kiowa* majority acknowledged that the Court's cases had "sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred," nor had the Court "yet drawn a distinction between governmental and commercial activities of a tribe." *Id*. at 754–55 (numerous citations omitted). Ultimately, the *Kiowa* majority appeared to resolve the case on the narrow ground that the suit involved a commercial contract: "Tribes enjoy immunity from suit *on contracts*, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Id*. at 760 (emphasis added).

The dialogue between the *Kiowa* majority and dissent can be read in either of two ways. The majority could have been saying that tribal immunity extends even to commercial, off-reservation conduct. Or the majority could have been saying that it was leaving open the question whether tribal immunity applies to commercial, off-reservation conduct.

Two factors support the view that the majority was issuing only a narrow, contract-based ruling and *not* resolving the on/off reservation and commercial/government dilemmas. First, the *Kiowa* majority expressly deferred to "the role Congress may wish to exercise in this important judgment." 523 U.S. 758. It would have been unnecessary to issue a definitive ruling regarding the scope of tribal immunity in such a circumstance.

Second, the Court in *C & L Enterprises* characterized *Kiowa*'s holding as being only narrow and contract-based: "Tribal immunity, we ruled in *Kiowa*, extends to suits on off-reservation commercial contracts." 532 U.S. at 418. If *Kiowa* stood for a much broader proposition, one would expect the Court in *C & L Enterprises* to have said so.

A narrow reading of *Kiowa* makes perfect sense in the context of that case, i.e., commercial contracts. For purposes of the serious question of whether sovereign immunity bars a claim, it can be difficult to determine "where" a contract takes place. Assuming the place of execution can even be determined, is that dispositive? Or should a court consider where the parties performed the contract? Or the law the parties chose to govern the contract?

Given the vagaries associated with determining whether a commercial-paper contract was on or off reservation, or predominantly commercial or governmental, it was reasonable for the Court not to rule that these issues were dispositive either way. Doing so could have created problems for future, unanticipated fact scenarios.

But when a tribe opens an illegal brick-and-mortar casino, as Bay Mills did here, it is obvious illegal activity is taking place there (as well as the location where that illegal casino was authorized and is supervised). So regardless of what the Court said or meant in *Kiowa*, the Court should take the opportunity presented by the facts here and confirm that tribes do *not* have sovereign immunity from suits based on illegal, off-reservation, commercial conduct. Numerous reasons support that result.

To begin, *Kiowa* acknowledged that, even 15 years ago, developments in tribal commercial activities, whether on or off reservation, weighed *against* granting sovereign immunity protection from suit. 523 U.S. at 758. Since *Kiowa*, tribal gaming revenues have more than tripled, to the point where such gaming is presenting a serious challenge even to private commercial gaming enterprises. If there was a "need to abrogate tribal immunity" for commercial activities, as the Court seemed to suggest in 1998, *Kiowa*, 523 U.S. at 758, surely that need is much greater today. Gaming tribes in particular no longer have "nascent tribal governments" that need protection "from encroachments by States." *Id*. Leveling the playing field makes sense.

In addition, Congress has failed (and is unlikely) to act. This reality does not mean that Congress prefers to leave things as they are, or that it opposes action by this Court clarifying the scope of tribal immunity. *Girouard* v. *United States*, 328 U.S. 61, 69 (1946) ("'It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines.' It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law.") (quotation omitted). There are many reasons why Congress does not pass new laws. Obtaining agreement of both bodies of Congress and the President on new legislation seems to be getting increasingly difficult as time passes. *Zuber* v. *Allen*, 396 U.S. 168, 185 (1969). This is particularly so with regard to comprehensive legislation of the sort *Kiowa* recommended.

Nor will limiting immunity to a tribe's governmental, on-reservation functions deprive the tribe of sufficient protection of its sovereign interests. In fact, immunity from suit is not the primary economic advantage tribes have enjoyed in the area of gaming. Even without immunity, tribes would still have the benefit of their own jurisdiction to generally regulate their own conduct within Indian country, at least to the extent not pre-empted by federal law. This provides them with a major economic advantage in areas such as gaming that most of their potential competitors, whose casinos are subject to state regulation, do not have. This advantage promotes the aim of Congress to provide for tribes' economic security, whether they are immune from suit or not.

Add to this the fact that a party dealing with a tribe in contract negotiations has the power to protect itself by refusing to deal absent the tribe's waiver of sovereign immunity from suit. The victim of a tort that takes place at an off-reservation casino does not have the same negotiating leverage as a commercial party that possesses something of value that a tribe would like to have.[16]

In the end, tribal immunity is a federal common-law doctrine that this Court has created and is empowered to adjust. There are ample reasons why, when it comes to illegal commercial conduct occurring on lands under state jurisdiction, tribes should not be immune from suit. Michigan respectfully requests that the Court so hold here.

Such a holding would mirror the common-law development in the area of foreign-nation immunity. As noted in *Kiowa*, foreign sovereign immunity began as a judicial doctrine, just like tribal immunity. 523 U.S. at 759. Before Congress finally stepped in and adopted the Foreign Sovereign Immunities Act, U.S. courts developed their own body of law that evolved from nearly universal immunity to immunity limited to only the governmental activities of a foreign nation.

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[16] Notably, Michigan tried to protect itself here. Consistent with federal law, the State negotiated a compact that forbade Bay Mills from opening an off-reservation casino. At the time of the compact's 1993 execution, Michigan had no need to negotiate an immunity waiver, because this Court had issued no decision suggesting that Michigan could not enjoin illegal conduct occurring on lands under Michigan's own jurisdiction.

The commercial enterprises of foreign nations eventually became fully subject to litigation in United States courts. *Kiowa*, 532 U.S. at 759. The test which courts developed and Congress eventually codified in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq*., distinguishes between commercial and governmental acts based on the "nature" of those acts. 28 U.S.C. § 1603(d). This same test could be applied to tribal commercial activities (especially illegal, off-reservation conduct). If France opened an illegal casino in Michigan, the State could enjoin it, rather than arresting French workers or suing President François Hollande. Surely domestic tribes are not entitled to greater immunity than foreign sovereign nations.[17]

Allowing states to obtain injunctions against illegal, off-reservation gaming increases the chances that states' interests will be protected. This is certainly true where states seek injunctive relief to prohibit public nuisances created by unlawful gaming. The evolution of tribal gaming warrants a similar evolution in the common law of tribal immunity, and this Court should hold that tribes have no immunity from suit regarding illegal casino gaming, whether on- or off-reservation.

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[17] Although this Court has declined to apply the "commercial" test to states' Eleventh Amendment immunity, it did so because that immunity, unlike foreign sovereign immunity, is "a constitutional doctrine that is meant to be both immutable by Congress and resistant to trends." *College Sa*v. *Bank* v. *Florida Prepaidpostsecondary Ed. Expense Bd*., 527 U.S. 666, 686 (1999). Of course, as discussed above, tribal immunity is not constitutionally based and, as an entirely common-law doctrine, is mutable, just like foreign sovereign immunity.

CONCLUSION

The judgment of the court of appeals should be reversed.

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Dated: AUGUST 2013