No. 12-515

IN THE

Supreme Court of the United States

STATE OF MICHIGAN,
Petitioner,
v.
BAY MILLS INDIAN COMMUNITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* SEMINOLE TRIBE OF FLORIDA, *ET AL.*, IN SUPPORT OF RESPONDENT
(Additional Amici Listed on Inside Cover)

WILLIAM R. NORMAN
HOBBS, STRAUS, DEAN & WALKER, LLP
101 Park Ave., Suite 700
Oklahoma City, OK 73102
(405) 602-9425

JOSEPH H. WEBSTER
Counsel of Record
CAROLINE P. MAYHEW
HOBBS, STRAUS, DEAN & WALKER, LLP
2120 L St. NW, Suite 700
Washington, DC 20037
(202) 822-8282
JWebster@hobbsstraus.com

October 31, 2013

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

ADDITIONAL *AMICI*:

Lytton Rancheria
Coeur d'Alene Tribe
Kickapoo Traditional Tribe of Texas
Pueblo of Acoma
Absentee Shawnee Tribe
Navajo Nation
Wichita and Affiliated Tribes
Cherokee Nation
Seminole Nation of Oklahoma
Sault Ste. Marie Tribe of Chippewa Indians
Jamestown S'Klallam Tribe

QUESTIONS PRESENTED

1. Whether a federal court has jurisdiction to enjoin activity that violates the Indian Gaming Regulatory Act ("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.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

INTEREST OF *AMICI CURIAE*

Amici Seminole Tribe of Florida, Lytton Rancheria, Coeur d'Alene Tribe, Kickapoo Traditional Tribe of Texas, Pueblo of Acoma, Absentee Shawnee Tribe, Navajo Nation, Wichita and Affiliated Tribes, Cherokee Nation, Seminole Nation of Oklahoma, Sault Ste. Marie Tribe of Chippewa Indians, and Jamestown S'Klallam Tribe are federally recognized Indian tribes that conduct gaming pursuant to the Indian Gaming Regulatory Act ("IGRA"), and that regularly enter into agreements with states and other entities – gaming and non-gaming related – that define the scope of enforcement remedies available to the parties, including sovereign immunity waivers. As such, *amici* tribes have a strong interest in the outcome of this case.[1] *Amici* believe that this brief will aid the Court by clarifying both the central role of Tribal-State compacts in providing enforcement remedies under the IGRA, and the importance of preserving the ability of tribes to negotiate the scope and extent of sovereign immunity waivers when entering into agreements with non-tribal parties.

Like the Bay Mills Indian Community ("Bay Mills" or "Tribe"), several of the *amici* tribes have entered into IGRA Tribal-State compacts, all of which include specific negotiated dispute resolution provisions. The State of Michigan (the "State") bargained for and

---

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3, counsel of record for the Petitioner has consented to the filing of this brief, and written notification of that consent accompanies this filing. The Respondent has filed blanket consent for the filing of amicus curiae briefs in support of either or neither party.

entered into a similar dispute resolution provision in its compact with the Tribe. But rather than invoke that provision, the State seeks to obtain a judicial remedy from this Court – one that would have negative implications for the continued vitality of the dispute resolution provisions in *amici's* existing IGRA compacts. There is no need for this Court to create a remedy that would interfere with a fairly negotiated agreement and give the State the benefit of a bargain it failed to make for itself, especially when doing so would require the Court to make sweeping changes to settled law and threaten the proper functioning of the IGRA. Further, intervention by this Court is particularly inappropriate since the State and the Tribe are currently renegotiating the Compact and the dispute resolution provision is one of the issues on the table.

In addition, contrary to the landmark decisions of this Court in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978), and *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751 (1998), the State has advanced arguments calling for a drastic revision of the scope of tribal sovereign immunity that, if adopted by this Court, would have significant repercussions well beyond the IGRA context. The State has provided no justification for the Court to make such a sweeping change in long-settled principles of Indian law.

SUMMARY OF ARGUMENT

The State asks this Court to overturn a judgment by the Sixth Circuit Court of Appeals, holding: 1) that the plain language of the IGRA does not supply federal court jurisdiction to hear the State's claim against Bay Mills; and 2) that tribal sovereign immunity bars the claim absent tribal consent. The claim alleges that Bay Mills has violated its IGRA Tribal-State compact

by engaging in Class III gaming outside of Indian lands.

In making its case, the State repeatedly asserts that the failure of this Court to overturn the Sixth Circuit's decision will leave the State without a remedy to address the alleged compact violations absent resort to extreme measures sure to provoke needless acrimony between the Tribe and the State. *See, e.g.*, Pet. Br. at 15, 19, 28. The State asserts that this Court must intervene to provide a judicially created remedy and bridge a supposed gap in the IGRA.

To the contrary, there is no need for this Court to intervene to provide the State with the sort of civil remedy and dispute resolution opportunity it seeks. The State, like the states with which *amici* tribes have compacted under the IGRA, negotiated and agreed to a detailed dispute resolution provision in its compact with Bay Mills – a provision that the State may invoke at any time. The negotiated remedy would require the Tribe, upon final notice from the State, to either cease the conduct to which the State objects or initiate arbitration to resolve the dispute. The State failed to invoke its dispute resolution rights under the compact it negotiated, and the State's brief does not explain why it failed to do so. It seeks instead to persuade the Court that judicial action is desperately needed to curtail the supposedly devastating effects of Bay Mills' assertion of tribal sovereign immunity.

The State's arguments do not reflect the reality of tribal sovereign immunity or account for dispute resolution under negotiated IGRA Class III compacts. Tribes, like other sovereigns, routinely waive their immunity in a wide variety of circumstances, including IGRA compacts. As is also true of other sovereigns, tribes need the ability to define the extent of their

waivers in a manner that allows them to enter into agreements with other willing entities to develop tribal economies while at the same time protecting limited tribal assets and preserving core governmental functions. Consistent with these needs, and after a careful balancing of state and tribal concerns, Congress intentionally elected a cooperative, intergovernmental, and case-by-case regulatory scheme for Class III gaming, utilizing Tribal-State compacts rather than a broad and inflexible grant of jurisdiction to the states.

Were this Court to adopt the State's position, the result would not only contravene the language and intent of the IGRA, but it would also allow the State to circumvent its negotiated agreement with Bay Mills (as memorialized in its Tribal-State compact) and reward the State with the benefit of a bargain that it failed to make for itself at the negotiating table. It would also disrupt the legitimate, settled, and often investment-backed expectations of the parties to countless IGRA compacts, intergovernmental agreements, and commercial contracts involving Indian tribes – all of which assume the validity of settled law governing tribal sovereign immunity. For these reasons, the Court should affirm the Sixth Circuit's ruling.

ARGUMENT

I. By failing to invoke the dispute resolution clause in its IGRA compact, the State has failed to avail itself of the civil remedy provided by the IGRA in this case, even as it claims none was available outside of federal court.

The State claims the Sixth Circuit's approach has left it without a reasonable remedy or alternative to "intrusive individual civil actions and criminal prosecutions" to address any alleged compact violations occurring outside of Indian lands. Pet. Br. 15. This claim is false and ignores the explicit, bargained-for dispute resolution mechanism agreed to in the State's compact with Bay Mills. These kinds of dispute resolution provisions are an intended feature of the IGRA compacting scheme, selected by Congress as the best method of regulating Class III Indian gaming while protecting both state and tribal interests.

A. The dispute resolution provision in the Bay Mills compact provides the State with a mechanism and forum for resolving disagreements or conflicts with the Tribe.

As required by the IGRA, 25 U.S.C. § 2710(d)(1), Bay Mills negotiated and entered into a Tribal-State compact with the State of Michigan as a prerequisite to its conduct of Class III gaming. *See* A Compact Between the Bay Mills Indian Community and the State of Michigan Providing for the Conduct of Tribal Class III Gaming by the Bay Mills Indian Community, Pet. App. Ex. A, 73a-96a (hereinafter "Compact").[2]

[2] In the same year, the State entered into essentially the same compact with *amicus* Sault Ste. Marie Tribe of Chippewa Indians.

The Compact governs such topics as which games are authorized to be conducted; standards for the regulation of those games; standards for providers of equipment and supplies; regulations applicable to the sale of alcoholic beverages in gaming facilities; and other topics relevant to the conduct of Class III gaming by Bay Mills.

Section 7 of the Compact is entitled "Dispute Resolution." It begins with a meet-and-confer requirement:

> (A) In the event either party believes that the other party has failed to comply with or has otherwise breached any provision of this Compact, such party may invoke the following procedure:
>
> (1) The party asserting noncompliance shall serve written notice on the other party. The notice shall identify the specific Compact provision alleged to have been violated and shall specify the factual and legal basis for the alleged noncompliance. The notice shall specifically identify the type of game or games, their location, and the date and time of the alleged noncompliance. Representatives of the State and Tribe shall thereafter meet within thirty (30) days in an effort to resolve the dispute.

Pet. App. 89a. If the State is not satisfied with the outcome of the meeting, it may invoke further rights under the Compact provision:

See 58 Fed. Reg. 63,262 (Nov. 30, 1993) (approving both the Bay Mills and the Sault Ste. Marie compacts). The Sault Ste. Marie compact is available from the National Indian Gaming Commission website at http://www.nigc.gov/Reading_Room/Compacts.aspx.

(2) In the event an allegation by the State is not resolved to the satisfaction of the State within ninety (90) days after service of the notice set forth in Section 7(A)(1), the party may serve upon the office of the tribal Chairperson a notice to cease conduct of the particular game(s) or activities alleged by the State to be in noncompliance. Upon receipt of such notice, the Tribe may elect to stop the game(s) or activities specified in the notice or invoke arbitration and continue the game(s) or activities pending the results of arbitration. The Tribe shall act upon one of the foregoing options within thirty (30) days of receipt of notice from the State. Any arbitration under this authority shall be conducted under the Commercial Arbitration rules of the American Arbitration Association except that the arbitrators shall be attorneys who are licensed members of the State Bar of Michigan, or of the bar of another state, in good standing, and will be selected by the State picking one arbitrator, the Tribe a second arbitrator, and the two so chosen shall pick a third arbitrator. If the third arbitrator is not chosen in this manner within ten (10) days after the second arbitrator is picked, the third arbitrator will be chosen in accordance with the rules of the American Arbitration Association. In the event an allegation by the Tribe is not resolved to the satisfaction of the Tribe within ninety (90) days after service of the notice set forth in Section 7(A)(1), the Tribe may invoke arbitration as specified above.

(3) All parties shall bear their own costs of arbitration and attorney fees.

Pet. App. 89a-90a.

Finally, as part of the agreement, the State and Bay Mills preserved certain rights, including each party's sovereign immunity:

> (B) Nothing in Section 7(A) shall be construed to waive, limit or restrict any remedy which is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Compact. Nothing in this Compact shall be deemed a waiver of the Tribe's sovereign immunity. Nothing in this Compact shall be deemed a waiver of the State's sovereign immunity.

Pet. App. 90a. The State, like the Tribe, is protected by the reservation of rights but entitled to the remedies provided in Section 7.

Section 7 applies by its terms to any alleged breach of the Compact. It is also specifically made applicable to the type of breach that the State alleges here – the conduct of Class III gaming by Bay Mills outside of Indian lands – through Section 4 of the Compact.

Section 4 of the Compact provides standards for the regulation of Class III gaming conducted by Bay Mills. Pet. App. 80a-87a. Those standards include the stipulation, set out in subsection (H) of Section 4, that "The Tribe shall not conduct any Class III gaming outside of Indian lands." Pet. App. 83a. Section 4(K) governs administration and enforcement of the standards set forth in Section 4, and provides, in subsubsection (6): "In the event the State believes that the Tribe is not administering and enforcing the regulatory requirements set forth herein, it may invoke the procedures set forth in Section 7 of this Compact." Pet. App. 87a.

Accordingly, the State's Compact with Bay Mills, negotiated and entered into pursuant to the IGRA, provides the State with a civil remedy to resolve this dispute. No separate grant of federal court jurisdiction or waiver of tribal sovereign immunity need be invented for that purpose, and this Court should not feel compelled to rule otherwise simply because the State has failed to exercise its Compact rights.[3]

B. The IGRA contemplates that dispute resolution will be a subject of negotiation between the Tribe and the State, as occurred here.

It is the design and intent of the IGRA that dispute resolution and waivers of sovereign immunity (if considered necessary or desirable by the parties) will be the subject of negotiation between the Tribe and State, as they were here. Class III gaming is lawful under the IGRA only when "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . that is in effect." 25 U.S.C. § 2710(d)(1)(C).[4] Accordingly, any tribe wishing to conduct Class III gaming must "request the State in

---

[3] Precisely because the State failed to pursue dispute resolution under Section 7 of the Compact, there is no way of knowing what the result would have been. Given that the Tribe closed its Vanderbilt facility after the district court issued its preliminary injunction in March of 2011, however, there is no reason to believe that the State could not have achieved its desired result through recourse to Section 7. *See* Resp't's Br. at 17 (noting Bay Mills has not reopened the Vanderbilt facility); Appellant's Br. at 1, *State of Michigan v. Bay Mills Indian Community*, 695 F.3d 406 (6th Cir. 2012) (No. 11-1413), 2011 WL 3662445 at *1 (describing closing of the Vanderbilt facility).

[4] Congress included a remedial framework for tribes faced with states that refused to negotiate a Class III gaming compact in good faith. 25 U.S.C. §§ 2710(d)(7)(A)(i) & (B)(i) - (B)(vii).

which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities." 25 U.S.C. § 2710(d)(3)(A). The IGRA further provides that such Tribal-State compacts may include provisions relating to certain enumerated subjects, specifically including "remedies for breach of contract[.]" 25 U.S.C. § 2710(d)(3)(C)(v). Once a compact has been negotiated, it must be submitted to the Secretary of Interior for review and approval. 25 U.S.C. § 2710(d)(3)(B).

The IGRA's primary civil remedy for Class III compact violations, then, is the remedy elected by the parties in their IGRA Tribal-State compact.[5] It is not, as the State claims, a broad and indiscriminate grant of federal court jurisdiction and implied abrogation of tribal sovereign immunity. *See, e.g., Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1248 (11th Cir. 1999) (citing the "carefully-struck congressional balance of federal, state, and tribal interests and objectives" in the IGRA Class III context and refusing to upset that balance by reading an implied right of action that would allow a state to sue in federal court to enjoin a tribe from conducting allegedly illegal Class III gaming).

The central role of Tribal-State compacts in defining IGRA's remedies for Class III violations is a direct result of Congress' deliberate selection of the compacting system over other, more rigid and intrusive approaches to state regulation of Indian gaming. S. REP. NO. 100-446, at 13-14 (1988), *reprinted in* 1988

[5] Therefore, though 25 U.S.C. § 2710(d)(7)(A)(ii) provides an additional federal court remedy where an alleged compact violation occurs on Indian lands, the limited scope of that provision does not leave any gaps in enforcement of the statute.

U.S.C.C.A.N. 3071, 3083-84.[6] In the words of the Senate Committee of jurisdiction, "[The IGRA] is intended to provide a means by which tribal and State governments can realize their unique and individual governmental objectives, while at the same time, work together to develop a regulatory and jurisdictional pattern that will foster a consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied." *Id*. at 6, 3076.

In crafting the IGRA, Congress determined that the Class III compacting approach was more than adequate to protect state interests. Under that system, states have the opportunity to bargain for their preferred method of dispute resolution, and leverage to seek waivers of tribal sovereign immunity if they believe that is necessary for effective dispute resolution. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that state sovereign immunity shields states against suits by Indian tribes seeking to compel the states to negotiate a compact to allow Class III Indian gaming under the IGRA).[7] IGRA therefore

---

[6] The Senate Committee report explains that, after "lengthy hearings, negotiations and discussions" balancing state law enforcement concerns against tribal opposition to the imposition of State jurisdiction, "the Committee concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of [Class III gaming]." *Id*. at 13, 3083. Under *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), states had no authority to regulate Indian gaming. *See also*, 25 U.S.C. § 2701(5).

[7] It should be noted that the State's leverage in such negotiations has been strengthened by the decision of the Supreme Court in *Seminole Tribe*, where this Court determined that Congress had violated the 11th Amendment in providing for tribal suits

ensures that states have a meaningful opportunity to protect their legitimate interests in the regulation of Class III gaming by Indian tribes, and to define the scope of enforcement of that regulation through intergovernmental negotiations and agreement.

II. Dispute resolution provisions and waivers of tribal sovereign immunity are properly and routinely negotiated as part of IGRA compacts, providing states with an array of enforcement options.

Tribes and states across the United States have used IGRA's Class III provisions to work together to create positive economic benefits for both Indians and non-Indians in their communities. As envisioned by Congress (*see* 25 U.S.C. § 2710(d)(3)(C)(v)), this collaborative effort has included crafting mechanisms to resolve disputes in a manner that reflects the particular circumstances and goals of the parties. These mechanisms may include limited waivers of immunity.

Because the dispute resolution forum and scope of immunity waivers (if any) agreed to in Class III gaming compacts are the result of a bargained-for agreement, they may vary considerably from compact to compact. This flexibility is an intentional feature of the IGRA compacting scheme. *See* S. REP. NO. 100-446, at 14, 3084 ("The terms of each compact may vary extensively depending on the type of gaming, the location, the previous relationship of the tribe and State, etc."). This approach grants states the ability to seek a broad range of dispute resolution options in

---

against states which failed to negotiate for a compact in good faith.

their negotiations with tribes, while also strengthening intergovernmental relationships by respecting the dignity and sovereign status of both parties. Indeed, a brief survey of dispute resolution provisions in some of *amici's* gaming compacts illustrates that states have successfully secured a variety of different dispute resolution and immunity waiver agreements to ensure effective enforcement options.[8]

A. Gaming Compact Between the Seminole Tribe of Florida and the State of Florida.

In April 2010, *amicus* Seminole Tribe and the State of Florida agreed to a gaming compact under the IGRA which resolved an impasse that had existed for nearly two decades over the scope of games available to the Tribe. *See* Gaming Compact Between the Seminole Tribe of Florida and the State of Florida (hereinafter "Seminole Compact");[9] 75 Fed. Reg. 38,833 (July 6, 2010) (notice by the Department of the Interior approving the compact). It was ultimately the government-to-government negotiation and agreement facilitated by the IGRA that allowed the parties to work through their respective concerns and reach a

---

[8] If a state is unwilling to negotiate a compact, then it does not receive the regulatory benefits of a compact, including a negotiated dispute resolution provision. *See, e.g.*, *Florida v. Seminole Tribe*, 181 F.3d 1237. For example, the State of Texas has refused to negotiate a compact with *amicus* Kickapoo Traditional Tribe of Texas, and successfully asserted its sovereign immunity in a good faith suit filed by the Tribe. Order on Def.'s Mot. to Dismiss, *Kickapoo Traditional Tribe of Texas v. State of Texas,* No. P-95-CA-66 (W.D. Tex. Apr. 2, 1996).

[9] The approved Seminole Compact is available from the National Indian Gaming Commission website at http://www.nigc.gov/Reading_Room/Compacts.aspx.

stable and mutually beneficial arrangement, including a mechanism for future dispute resolution.

Initially, the Tribe and the State had turned to the courts seeking to resolve the dispute between them. However, this Court ruled in 1996 that the Seminole Tribe could not force the State of Florida to negotiate a gaming compact because the State was immune from suit. *Seminole Tribe*, 517 U.S. at 47 ("We hold that notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power, and therefore § 2710(d)(7) cannot grant jurisdiction over a State that does not consent to be sued.") Then, in a subsequent action by the State against the Tribe to close what it alleged were unauthorized games in the absence of a compact, the Eleventh Circuit held that the Tribe was also immune from suit, in part because one of the threshold requirements of the 25 U.S.C. § 2710(d)(7)(A)(ii) abrogation was not met. *Florida v. Seminole Tribe*, 181 F.3d at 1242.[10]

---

[10] The Eleventh Circuit noted the equity of the result:

> This case . . . demonstrates the continuing vitality of the venerable maxim that turnabout is fair play. In 1994, we held that the principle of state sovereign immunity embodied in the Eleventh Amendment barred the Seminole Tribe . . . from suing the State of Florida under [the IGRA] for the State's alleged failure to negotiate in good faith regarding the formation of a Tribal-State compact to regulate class III gaming. *See Seminole Tribe v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994), *aff'd*, 517 U.S. 44 [] (1996). In this case, the State has sued the Tribe . . . for both a declaration that the Tribe is conducting unauthorized class III gaming operations and an injunction preventing such operations in the absence of a Tribal-State compact. The district court granted the Tribe's motion to dismiss on the ground of tribal sovereign immunity . . . . We affirm.

Faced with the inability to force one another into federal court to seek a ruling in their respective favors, the governments of both sovereigns eventually came together and negotiated a gaming agreement on a government-to-government basis, addressing the concerns of both parties. The final agreement incorporated limited waivers of immunity that were carefully crafted to balance the interests of the Tribe and the State, including a mutual waiver of immunity so that both parties would have the ability to enforce their respective rights under the agreement should a meet-and-confer approach fail:

> For purposes of actions based on disputes between the State and the Tribe that arise under this Compact and the enforcement of any judgment resulting therefrom, the Tribe and the State each expressly waives its right to assert sovereign immunity from suit and from enforcement of any ensuing judgment, and further consents to be sued in federal or state court, including the rights of appeal specified above, as the case may be, provided that [certain agreed conditions are satisfied].

Seminole Compact at 45 (Part XIII.D). The conditions limit the waiver to disputes arising under the compact, do not allow claims for money damages except as provided, and explicitly preserve sovereign immunity with respect to third party intervenors. *Id*. The Tribe also agrees to waive its immunity to the same extent as the State for patron tort claims in order to provide a reasonable remedy for the Tribe's patrons, while also protecting the Tribe's governmental assets. *Id*. at 21 (Part VI.D.5).

---

181 F.3d at 1239.

In the case of *amicus* Seminole Tribe, then, judicial respect for the sovereign status of both parties ultimately facilitated a balanced and respectful resolution of the issues between the Tribe and the State. The result has been a marked improvement in the Tribal-State relationship, which in turn has facilitated new strides in tribal economic development that benefit not only the Tribe and its citizens, but the State of Florida as a whole.

B. Class III Gaming Compact By and Between the Coeur d'Alene Tribe and the State of Idaho.

In 1992, *amicus* Coeur d'Alene Tribe entered into a Class III gaming compact with the State of Idaho. *See* Class III Gaming Compact By and Between the Coeur d'Alene Tribe and the State of Idaho ("Coeur d'Alene Compact");[11] 58 Fed. Reg. 5,478 (Feb. 12, 1993) (approving the Coeur d'Alene Compact). Article 21 of the Coeur d'Alene Compact governs dispute resolution.[12]

---

[11] The approved Coeur d'Alene Compact is available from the National Indian Gaming Commission website at http://www.nigc.gov/Reading_Room/Compacts.aspx.

[12] In addition to the dispute resolution provisions under Article 21, the State and the Tribe negotiated separate provisions, included in Article 6, to govern specific, unresolved disputes between the parties at the time of the compact. Because the parties agreed that these were "ultimately questions of law[,]" they negotiated and agreed to a judicial remedy – specifically, the right of either party to seek declaratory relief in federal district court – to resolve those specific questions. Coeur d'Alene Compact at 10 (Art. 6.4). The Tribe invoked that right and the federal district court entered judgment on the questions. *Coeur d'Alene Tribe v. State*, 842 F. Supp. 1268 (D. Idaho 1994) *aff'd*, 51 F.3d 876 (9th Cir. 1995). Several years later, the parties renegotiated and amended Article 6 of the compact. *See*

Article 21 requires the parties to meet within 10 days of service of written notice by either party in an effort to resolve the dispute. If the dispute is not resolved within sixty days, either party may invoke binding arbitration "to enforce or resolve disputes concerning the provisions of [the] Compact." Coeur d'Alene Compact at 27 (Art. 21.2). Further, "[o]nce a party has given notice of intent to pursue binding arbitration and the notice has been sent to the non-complaining party, the matter in controversy may not be litigated in court proceedings." *Id*. at 27-28 (Art. 21.3). Judicial review of the arbitration decision is specifically prohibited by the compact. *Id*. Finally, arbitration decisions are deemed to "have the same effect as if a part of [the] Compact, incorporated in full [t]herein." *Id*.

C. Tribal-State Compact Between the Pueblo of Acoma and the State of New Mexico.

In 2001, *amicus* Pueblo of Acoma was one of several federally recognized tribes to enter into Class III compacts with the State of New Mexico. *See* Tribal-State Class III Gaming Compact (the "Acoma Compact");[13] 66 Fed. Reg. 64,856 (Dec. 14, 2001) (notice of compact approval). Under Section 7 of the Acoma Compact, either party may serve written notice of any alleged noncompliance, identifying the compact

---

Amendment, available at: http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/compacts/coeurdAleneTribe/coeurdaleneamend12.19.02.pdf; 68 Fed. Reg. 1,068 (Jan. 8, 2003) (approving amendment).

[13] The approved Acoma Compact is available from the National Indian Gaming Commission Website at http://www.nigc.gov/Reading_Room/Compacts.aspx.

provision alleged to have been breached and the factual and legal basis for the allegation. The provision then outlines a procedure that may be invoked if the alleged noncompliance is not resolved within twenty days of the notice. Acoma Compact at 14-15 (§ 7(A)(2)). The provision further identifies rules and procedures for arbitration and provides that the results "shall be final and binding, and shall be enforceable by an action for injunctive or mandatory injunctive relief against the State and the Tribe in any court of competent jurisdiction." *Id*. at 15 (§§ 7(A)(3)-(5)).

In the case of the Acoma Compact, the parties determined that sovereign immunity waivers were not necessary for effective resolution of disputes between the Pueblo and the State.[14] Instead, the parties agreed that, for purposes of arbitration pursuant to the compact, "any action or failure to act on the part of any agent or employee of the State or the Tribe, contrary to a decision of the arbitrators in an arbitration proceeding conducted under the provisions of this section, occurring after such decision, shall be wholly unauthorized and ultra vires acts, not protected by the sovereign immunity of the State or the Tribe." *Id*.(§ 7(A)(5)).

D. Gaming Compact between the Navajo Nation and the State of Arizona.

Several federally recognized tribes, including *amicus* Navajo Nation, have entered into identical Tribal-State Compacts with the State of Arizona (the

[14] In a separate provision of the compact, the Pueblo agreed to a limited waiver of sovereign immunity for the resolution of claims by visitors to the Pueblo's gaming facility for bodily injury or property damage. Acoma Compact at 16-18 (§ 8).

"Arizona Compact").[15] *See* 68 Fed. Reg. 5,912 (Feb. 5, 2003) (notice of compact approval). The Arizona Compact includes a relatively lengthy and detailed dispute resolution provision in Section 15 of the compact.

Section 15 begins with a detailed and specific, two-stage meet-and-confer requirement. Arizona Compact at 43 (§ 15(a)). If the parties are unable to resolve the dispute, within 30 days of the original notice either party may request non-binding mediation. *Id*. (§ 15(b)). If at the close of 30 days after the initial notice the dispute has not been resolved through negotiation or mediation, either party may demand binding arbitration. *Id*. at 43-47 (§ 15(c)). The rules preclude the arbitration tribunal from awarding money damages against either party. *Id*. at 47 (§ 15(c)(11)).

In conjunction with arbitration pursuant to the compact provision, either party may seek, in a court of competent jurisdiction, any of the following: (1) preliminary injunctive relief pending the arbitration outcome; (2) entry of judgment upon the award; or (3) injunctive relief to enforce an award. *Id*. at 45 & 47

---

[15] The Arizona Tribal-State Compact, along with amendments and appendices, is available from the Arizona Department of Gaming website, at: http://www.azgaming.gov/content/tribal-state-compacts. The model compact is available at http://www.azgaming.gov/content/arizona-tribalstate-compact-2003. In addition, the Navajo Nation has entered into a Tribal-State Compact with the State of New Mexico. *See* 69 Fed. Reg. 2,617 (Jan. 16, 2004) (notice of compact approval). The dispute resolution provision (Section 7) of that compact is similar to the dispute resolution provision inthe Pueblo of Acoma's compact described above. The Navajo Nation – New Mexico compact is available from the National Indian Gaming Commission website at http://www.nigc.gov/ Reading_Room/Compacts.aspx.

(§§ 15(c)(8) & 15(c)(12)). The compact names specific courts of competent jurisdiction for actions by either the Tribe or the State. *Id*. at 47 (§ 15(d)). With regard to sovereign immunity, Section 15(c)(11) provides that "Title 9 of the United States Code (the United States Arbitration Act) and the Rules shall govern the interpretation and enforcement of Section 15(c), but nothing in Section 15(c) shall be interpreted as a waiver of the State's Tenth Amendment or Eleventh Amendment immunity or as a waiver of the Tribe's sovereign immunity." *Id*.

E. State of Oklahoma Gaming Compact (Absentee Shawnee Tribe, Wichita and Affiliated Tribes, Cherokee Nation, and Seminole Nation of Oklahoma).

Like Arizona and other states, Oklahoma has entered into a "model compact" (the "Oklahoma Compact") with several tribes, including *amici* Absentee Shawnee Tribe, Wichita and Affiliated Tribes, Cherokee Nation, and Seminole Nation of Oklahoma.[16] *See* 70 Fed. Reg. 3,942 (Jan. 27, 2005) (approving the Absentee Shawnee Tribe and Cherokee Nation compacts); 71 Fed. Reg. 53,706 (Sept. 12, 2006) (approving the Wichita and Affiliated Tribes compact); 70 Fed. Reg. 21,440 (Apr. 26, 2005) (approving the

[16] The model Oklahoma Compact is available at the Oklahoma Office of Management and Enterprise Services' Gaming Management Unit website at http://ok.gov/OSF/documents/ModelCompact.pdf. The approved Absentee Shawnee, Wichita and Affiliated Tribes, Cherokee Nation, and Seminole Nation of Oklahoma compacts are available from the National Indian Gaming Commission website at http://www.nigc.gov/Reading_Room/Compacts.aspx. For a full listing of compacted tribes in Oklahoma, see http://www.ok.gov/OSF/Tribal_Gaming/Compacted_Tribes.html.

Seminole Nation of Oklahoma compact). In addition to a meet-and-confer requirement, the Compact includes limited waivers of sovereign immunity for specific purposes and a specific good faith requirement for invoking the clause.

Part 12 of the Oklahoma Compact governs dispute resolution. The State and Tribe agreed to specific waivers of sovereign immunity as part of the arbitration component of the dispute resolution provision, agreeing: "The parties consent to the jurisdiction of such arbitration forum and court for such limited purposes and no other, and each waives immunity with respect thereto." Oklahoma Compact Part 12. Part 12, paragraph 3 further provides:

> Notwithstanding any provision of law, either party to the Compact may bring an action against the other in a federal district court for the de novo review of any arbitration award under paragraph 2 of this Part. The decision of the court shall be subject to appeal. Each of the parties hereto waives immunity and consents to suit therein for such limited purposes, and agrees not to raise the Eleventh Amendment to the United States Constitution or comparable defense to the validity of such waiver.

Id. The waivers are limited, however, as follows: "Nothing herein shall be construed to authorize a money judgment other than for damages for failure to comply with an arbitration decision requiring the payment of monies."[17] *Id*. In 2010, Part 12 was

[17] In addition to the Tribal-State dispute resolution provision discussed in the following paragraphs, the Oklahoma Compact at Part 6(A) effects a limited waiver of tribal sovereign immunity for purposes of judicial review of denials of tort and prize claims filed

invoked to resolve a dispute between *amicus* Wichita and Affiliated Tribes, other tribal signatories to the Oklahoma Compact, and the State regarding the scope of state court jurisdiction under certain compact terms. The parties proceeded to arbitration, and judgment was entered on the award in federal district court. *See* Judgment, *Comanche Nation v. State of Oklahoma*, No. 10-cv-1339-W (W.D. Okla., Dec. 28, 2010), ECF No. 16.

The dispute resolution schemes in the Oklahoma Compact, like the varied dispute resolution provisions in above *amici's* compacts,[18] were calibrated to the needs of the parties and arrived at through government-to-government negotiations.[19] The very existence of these compact provisions undermines the State's assertion that a reversal of the Sixth Circuit's decision is necessary to provide an adequate means of resolving intergovernmental conflicts related to Class III gaming. *See, e.g.*, Pet. Br. 15.

---

with the tribal gaming enterprise in accordance with Compact provisions.

[18] Many Tribal-State compacts aside from those to which *amici* tribes are parties also illustrate the range of negotiated dispute resolution mechanisms that states may invoke pursuant to agreements with Class III gaming tribes. Copies of Tribal-State compacts can be viewed on the National Indian Gaming Commission's website, at http://www.nigc.gov/Reading_Room/Compacts.aspx.

[19] Though *amici* Lytton Rancheria and Kickapoo Traditional Tribe of Texas have not been able to obtain Tribal-State gaming compacts under the IGRA, they have entered into numerous commercial and intergovernmental agreements requiring negotiated dispute resolution and sovereign immunity waiver provisions. Like each Tribal-State compact under the IGRA, each agreement is unique, and its provisions must be designed and negotiated to serve the specific needs at hand.

III. The Court should not interfere with a fairly negotiated agreement in order to give the State the benefit of a bargain it failed to make for itself.

Congress, in enacting the IGRA, provided states with limited authority to regulate Indian gaming on Indian lands through the compacting process. That process has provided ample opportunity for states to protect their sovereign interests and ensure opportunities for dispute resolution and enforcement. Like Florida, Idaho, New Mexico, Arizona, and Oklahoma did in their compact negotiations with *amici* and other tribes, Michigan benefitted from opportunities inherent in IGRA's Class III compacting scheme that allowed it to negotiate with Bay Mills for a suitable dispute resolution provision. Compact at § 7, Pet. App. 89a. The State negotiated the same dispute resolution provision with six other tribes in 1993 (including *amicus* Sault Ste. Marie Tribe of Chippewa Indians), four additional tribes in 1998, and again agreed to the same provision in another compact in 2007.[20]

---

[20] In addition to the Bay Mills Indian Community, in 1993 the State of Michigan signed Class III Tribal-State compacts with the Grand Traverse Band of Ottawa & Chippewa Indians; the Hannahville Indian Community; the Keweenaw Bay Indian Community; the Lac Vieux Desert Band of Lake Superior Chippewa Indians; the Saginaw Chippewa Indian Tribe; and the Sault Ste. Marie Tribe of Chippewa Indians. In 1998, the State entered into additional compacts with the Little Traverse Bay Bands of Odawa Indians; the Nottawaseppi Huron Band of Potawatomi; the Pokagon Band of Potawatomi Indians; and the Little River Band of Ottawa Indians. The 1993 and 1998 compacts are available on the Michigan Gaming Control Board's website at: https://www.michigan.gov/mgcb/1,1607,7-120-1380_1414_2182---,00.html. In 2007, the State entered into a compact with the Match-E-Be-Nash-She-Wish Band of Pottawatomi

Nevertheless, it is undisputed that the State never invoked that dispute resolution provision. Instead, without any showing of necessity, the State asks this Court to provide it with a different remedy altogether that would overturn settled law of tribal sovereign immunity, and fundamentally alter the foundations upon which countless gaming and non-gaming agreements have been reached between tribes, states, and other entities. The Court should not grant that remedy.

If Michigan is unsatisfied with the current dispute resolution provision in its Compact, it may seek to negotiate a different provision as part of the compact renewal process. In fact, negotiations are currently taking place to renew the compact.[21] The State is no doubt cognizant of the fact that the remedy it seeks in this Court would artificially tip the balance in these negotiations in its favor. The Court should not interfere in these negotiations, but should allow the Parties to determine the most appropriate method of dispute resolution as Congress intended when it adopted the compacting process for Class III gaming under the IGRA.

Indians. That compact is also available at: http://www.michigan.gov/documents/mgcb/Gunlake_Compact_276443_7.pdf.

[21] The Compact, which became effective on November 30, 1993 (*see* 58 Fed. Reg. 63,262 (Nov. 30, 1993)), provides that "At least one year prior to the expiration of twenty (20) years after the Compact becomes effective, and thereafter at least one year prior to the expiration of each subsequent five (5) year period, either party may serve written notice on the other of its right to renegotiate the Compact." Compact § 12(B), Pet. App. 93a.

IV. The Court should not disrupt well-settled, investment-backed expectations by reconsidering established law governing tribal sovereign immunity.

The State further asks this Court to rewrite existing law to allow for the remedy it now seeks. Such a step would disrupt the balance reached in *amici's* and other Tribal-State IGRA compacts, and produce similar effects in numerous other contexts involving Indian tribes and their commercial and inter-governmental partners.

Tribal sovereign immunity has long been recognized as established law. *See, e.g.*, *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978); *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751 (1998); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §7.05 at 636 (Nell Jessup Newton, ed., 2012) [hereinafter, COHEN'S HANDBOOK]. Moreover, Congress has explicitly ratified the doctrine. 25 U.S.C. § 81(d) (prohibiting the Secretary of the Interior from approving any agreement or contract requiring approval under that provision unless it includes reference to "a tribal code, ordinance, or ruling of a court of competent jurisdiction that discloses the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe" or otherwise addresses tribal sovereign immunity).[22] As a result,

[22] The legislative history of this provision shows that, following "extensive hearings on tribal sovereign immunity," Congress declined to legislatively overturn the doctrine, and instead chose to "[build] on an apparent agreement that Indian tribes and their contracting partners are generally best served if questions of immunity are addressed, resolved, or at least disclosed when a contract is executed." S. REP. NO. 106-150, at 11 (1999). The Senate Report also noted, "Any uncertainty about whether tribal

tribal sovereign immunity is a fundamental assumption embedded not only in the deals struck in IGRA Class III gaming compacts across the country, but in countless other commercial contracts, agreements, and arrangements in which tribal governments are involved. Any change to existing law governing tribal sovereign immunity would disrupt the reasonable, settled, and often investment-backed expectations embodied in those arrangements.

The State argues that tribal sovereign immunity is an outdated concept that should be reconsidered due to "developments in tribal commercial activities." Pet. Br. at 38. This view is simplistic and unfounded in its attempt to separate tribal economic success from the governmental interests of Indian tribes and to obscure legitimate modern reliance on tribal sovereign immunity. Unlike assets held by commercial entities, tribal assets are governmental assets that are used to provide services to tribal members. Indeed, Congress has tethered tribal economic development to tribal sovereignty in the IGRA itself: by statutory command, revenues from tribal economic development through gaming must be utilized for specific and limited purposes, including "to fund tribal government operations or programs." 25 U.S.C. § 2710(b)(2)(B)(i).[23] Gaming may often provide "[t]he sole source of revenues for the operation of the tribal governments

---

immunity will prevent the enforcement of an agreement with an Indian tribe can be addressed and eliminated through the terms of an agreement with the tribe or by some other means." *Id*. at 7.

[23] Congress also declared that a central purpose of the IGRA was "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).

and the provision of tribal services." *Cabazon*, 480 U.S. at 218-219.

Accordingly, just as state sovereign immunity is invoked to protect the fiscal purse and preserve core governmental functions, existing law preserves the ability of tribes to define the extent of tribal waivers through negotiations. This in turn allows tribes to enter into the agreements necessary to develop their economies, participate in economic ventures, and operate their governments while at the same time protecting their limited tribal assets. The baseline protection afforded by sovereign immunity, therefore, is a core assumption underlying these agreements and the legitimate expectations formed by all parties to them.

Of course, Indian tribes realize that they must work with other governments and with commercial entities in order to succeed in their goals, and that reflexive assertions of tribal sovereign immunity in disputes with third parties may jeopardize those relationships. For this reason, tribes are generally judicious in asserting their immunity and frequently negotiate limited waivers so that legitimate disputes can be resolved by a neutral forum. Nor are non-tribal parties unfairly disadvantaged; as the State itself points out, "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." Pet. Br. 40.

In line with these realities, commercial contracts, intergovernmental agreements, corporate charters, and other tribal business ventures and partnerships throughout the country have been formed in reliance on existing sovereign immunity law. Immunity waivers, where made, have been carefully calibrated

to account for the competing interests at stake in a balanced and effective manner according to the relevant circumstances. Often, significant investments have been made on the basis, at least in part, of the protection and opportunities provided by the preservation or waiver of tribal sovereign immunity. The IGRA compacts discussed in this brief, along with the management agreements, equipment contracts, business arrangements, tribal governmental programs and more that hinge on their success, are but a few examples. [24]

---

[24] *See e.g.* COHEN'S HANDBOOK, § 6.05 at 588 (discussing Tribal-State Cooperative Agreements, as well as the role of dispute resolution provisions in their enforcement). Cohen's Handbook notes that, despite the many potential benefits, there are reasons why an Indian tribe (often perceived as the weaker party to the negotiations) might hesitate to enter into an intergovernmental agreement. The expectation that the Tribe will have the ability to negotiate the scope of remedies available should a dispute arise over interpretation or implementation of an agreement could be a significant factor when the Tribe weighs its options in this regard. Cohen's Handbook also notes that Tribal-State Cooperative Agreements can "create a stable legal environment conducive to economic development, [and therefore] may appeal to the common interests of tribes and states." *Id*. at 588-589. This important effect of cooperative agreements is in large part contingent on expectations formed by existing sovereign immunity law that allows each governmental party to protect its legitimate interests while bargaining for appropriate relief. Further, where agreements involve resource sharing, the non-tribal party benefits from expectations that tribal resources will be generally protected. *See id*. (noting that tribal-state agreements "offer both sets of governments the opportunity to coordinate the exercise of authority, share resources, reduce administrative costs," and more). *See also* Paul Spruhan, *Standard Clauses in State-Tribal Agreements: The Navajo Nation Experience*, 47 TULSA L. REV. 503 (2012) (discussing a variety of

The State invites this Court to disrupt the settled expectations of all of the parties involved in these myriad agreements – not to mention tribal expectations in the protection of their governmental resources – by reconsidering established law governing tribal sovereign immunity. However, the State offers no compelling reason for the Court to take that step in light of the contractual rights it has but failed to exercise. Accordingly, the Court should decline to overturn the Sixth Circuit's ruling.

CONCLUSION

The dispute resolution clause in the State's Tribal-State Compact with Bay Mills, entered pursuant to the IGRA and for the express purpose of resolving disputes between the parties, provides the State with a civil remedy for the Class III violation the State alleges in this case. The Court should not interfere with that agreement or with existing, settled law to give the State judicial remedies it did not negotiate for itself. Accordingly, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

WILLIAM R. NORMAN
HOBBS, STRAUS, DEAN & WALKER, LLP
101 Park Ave., Suite 700
Oklahoma City, OK 73102
(405) 602-9425

JOSEPH H. WEBSTER
Counsel of Record
CAROLINE P. MAYHEW
HOBBS, STRAUS, DEAN & WALKER, LLP
2120 L St. NW, Suite 700
Washington, DC 20037
(202) 822-8282
JWebster@hobbsstraus.com

October 31, 2013

---

intergovernmental agreements to which the Navajo Nation is a party).