No. 14-1177

IN THE
Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

TIGER HOBIA, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The State's petition presents two questions:

1. Whether the Tenth Circuit properly concluded, consistently with *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014), that the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA"), is concerned only with class III gaming "on Indian lands," and "[c]onsequently, the State's complaint in this case … fails on its face to state a valid claim for relief under IGRA," App. 26.

2. Whether the Tenth Circuit properly concluded, again consistently with *Bay Mills*, that the arbitration provision in the Tribal-State Gaming Compact ("Compact") between the State and the Kialegee Tribal Town precludes the State from suing tribal officials for purported violations of that agreement's terms. App. 27.

CORPORATE DISCLOSURE STATEMENT

Respondent Florence Development Partners, LLC ("Florence Development") is an Oklahoma limited liability company doing business in the State of Oklahoma. Florence Development's members are Golden Canyon Partners, LLC, a Nevada limited liability company, and two individuals. No publicly held company holds 10% or more of Florence Development's stock, and Florence Development has no parent corporations.

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INTRODUCTION

In the decision below, the court of appeals applied this Court's recent ruling in *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014), to similar facts and came to the same conclusion: A state complaint filed in federal district court to stop a casino from being built off "Indian lands" fails to state a claim for relief under IGRA. As the State acknowledges, the Tenth Circuit's decision does not conflict with that of any other court, and for good reason: *Bay Mills* was decided little more than a year ago, and no other court has yet applied its holdings to a claim for relief against tribal officials under IGRA.

Unable to point to a division in authority, the State argues instead that the decision below will cause "confusion" regarding the remedies states have when confronting alleged unlawful gaming. But as in *Bay Mills*, the principle upon which the Tenth Circuit based its decision is perfectly clear: IGRA does not address gaming activities occurring off Indian lands. The State cannot avoid this simple truth by now asserting that the Tribe sought to build the disputed casino in "Indian country." The State waived that argument by failing to present it to the courts below, and it is unavailing in any event, as the term "Indian country" does not appear in the relevant statutory text.

The Tenth Circuit's denial of the State's alternative claim for relief—that the casino project violated the Compact—also does not warrant review. The petition does not assert that the denial conflicts with a ruling of this or any other court. In fact, this case does not even raise the issue the State urges this

Court to address—the scope of tribal officer suits under *Ex parte Young*, 209 U.S. 123 (1908)—as the Tenth Circuit's rejection of the Compact claim was not based on an application of the *Young* doctrine. And as the State acknowledges, every court of appeals that has addressed whether tribal officers can be sued in their official capacities for violations of federal law agrees that, under the appropriate circumstances, they can be. Instead, the State simply asks this Court to overturn a lower court's construction of an arbitration provision that is entirely consistent with this Court's reading of a similar provision in *Bay Mills* and implicates no dispute beyond the bounds of this case.

Finally, the State asks this Court for relief it does not need. The gaming project the State sought to enjoin has been definitively abandoned, and in light of the National Indian Gaming Commission's ruling that the project is impermissible, there is no possibility that it will resume. Furthermore, as this Court explained in *Bay Mills*, the State has a number of remedies available to address any alleged violations in the future.

For these reasons, the Court should deny the petition.

STATEMENT OF THE CASE

1. The Kialegee Tribal Town ("Tribe") is a federally recognized Indian tribe, organized under the Oklahoma Indian Welfare Act ("OIWA"), 25 U.S.C. § 501 *et seq*. The Tribe's constitution and by-laws were approved by the Secretary of the Interior and ratified by the Tribe in 1941. Under the Tribe's con-

stitution, the Kialegee Tribal Town Business Committee is the Tribe's governing body. App. 8-9.

Respondent Jeremiah Hobia is the Tribe's Mekko (or "Town King") and a member of the Business Committee.[1] Respondent Thomas Givens is the Tribe's First Warrior and also a member of the Business Committee. Respondent Kialegee Tribal Town Corporation ("Town Corporation") is a federally chartered corporation under OIWA. Florence Development Partners, LLC is an Oklahoma limited liability company. App. 9.

2. IGRA was established by Congress in 1988 to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. § 2702(1), and it provides a comprehensive statutory framework for governing gaming activities on Indian lands. The National Indian Gaming Commission ("Commission") is the federal agency responsible for implementing IGRA. Among its powers, the Commission has the authority to levy fines and issue closure orders against gaming activities that violate IGRA's provisions. *Id.* §§ 2705(a), 2713.

As relevant here, IGRA regulates certain gaming activities when conducted on Indian lands. *Id.* § 2710(d)(1). The statute provides for tribes and states to enter into compacts governing the conduct of tribal gaming activities. *Id.* § 2710(d)(3). IGRA also gives the federal district courts jurisdiction over

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[1] As Respondents informed the Court by letter dated July 7, 2015, former lead respondent Tiger Hobia is no longer Mekko of the Tribe.

any action in which a state seeks to enjoin gaming activity "located on Indian lands" and conducted in violation of a tribal-state gaming compact. *Id.* § 2710(d)(7)(A)(ii).

3. The Tribe and the State are parties to the "Kialegee Tribal Town and State of Oklahoma Gaming Compact," a standard form agreement offered by the State to tribes in Oklahoma and here approved by the Secretary of the Interior. Appellants' Appendix at 687, *Oklahoma v. Hobia*, 775 F.3d 1204 (10th Cir. 2014) (No. 12-5134) ("Appellants' App."). Explicitly acknowledging that the Tribe has a "federally recognized tribal government possessing sovereign powers" and that the benefits of gaming will "extend beyond the [Tribe's] lands" to the entire State, the Compact authorizes the Tribe to conduct gaming operations in accordance with IGRA. *Id.* at 692. In addition to specifying the respective rights and duties of both the Tribe and the State, the Compact establishes a comprehensive dispute resolution procedure, which directs the parties to resolve disputes via negotiation or arbitration. *Id.* at 715-16.

4. In 2010 the Town Corporation entered into a lease for a parcel of land located in Broken Arrow, Oklahoma ("Property") with its owners, who are presently enrolled members of the Tribe. In 2011 the Tribe, the owners, and a development company entered into a second lease and established a joint venture to build and operate a casino on the Property. Preliminary site preparation began in December 2011. App. 10-13.

In February 2012 the State filed a complaint against Respondents in federal district court, seek-

ing "declaratory and injunctive relief to prevent [Respondents] from proceeding with construction or operation of the proposed [casino]." Complaint at 2, *Oklahoma v. Hobia*, No. 12-CV-054-GKF-TLW (N.D. Okla. Feb. 8, 2012), Dkt. 1 ("Compl."). The complaint alleged that because "[t]he Broken Arrow Property is not 'Indian land' for purposes of … IGRA," the proposed casino violated federal law. *Id.* at 17-18; *see also id.* at 13 ("The Broken Arrow Property does not meet the [IGRA] definition of 'Indian land' …."). The complaint also alleged that the casino project violated the Compact. *Id.* at 18. The State requested a preliminary injunction preventing Respondents from taking any action to construct or operate a gaming facility on the Property. App. 16.

Respondents moved to dismiss the complaint on several grounds, including failure to state a claim upon which relief could be granted. The district court denied Respondents' motions and granted the State's motion for a preliminary injunction. The court subsequently denied Respondents' motion to reconsider. Respondents appealed. App. 16-17.

5. Shortly after the district court granted the State's preliminary injunction motion in May 2012, the Commission informed the Tribe of its conclusion that the Property did not qualify as the Tribe's "Indian lands" eligible for gaming under IGRA. The Commission made clear that if Respondents proceeded with construction and operation of the planned casino, the agency would take enforcement action and institute a closure order under 25 U.S.C. § 2713. App. 13-14; *see also* Letter from Tracie L. Stevens to Tiger Hobia (May 25, 2012), at 1-2 ("Stevens Letter"), *Oklahoma v. Hobia*, No. 12-CV-054-

GKF-TLW (N.D. Okla. May 30, 2012), Dkt. 134-1.[2] The Commission denied the Tribe's request for reconsideration of this ruling. App. 14. Subsequent to the district court's preliminary injunction order and the Commission's letter, construction work on the casino came to a halt.

6. While appeal was pending before the Tenth Circuit, this Court issued its opinion in *Bay Mills*. The State of Michigan had sought and received an injunction preventing an Indian tribe from operating a gaming facility located on land that was not part of the tribe's reservation. 134 S. Ct. at 2029. This Court affirmed the Sixth Circuit's vacatur of the injunction, holding that IGRA's partial abrogation of tribal sovereign immunity to suit under 25 U.S.C. § 2710(d)(7)(A)(ii) for gaming activities "on Indian lands" did not extend to activities conducted *off* such lands. 134 S. Ct. at 2032-33, 2039. The Court found the statutory text indisputably clear; in repeatedly referring to gaming conducted "on Indian lands," IGRA unambiguously limited the federal courts' jurisdiction to those activities. *Id.* at 2032-33. And the Court emphasized that, despite this ruling, the State had a number of other means by which it could prevent an Indian tribe from operating an illegal casino off Indian lands. *Id.* at 2034-35.

7. After receiving supplemental briefing from the parties regarding the impact of *Bay Mills* and the Commission's ruling, the Tenth Circuit concluded

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[2] The Stevens Letter is also available online at http://www.nigc.gov/LinkClick.aspx?link=NIGC%20Uploads/readingroom/gameopinions/kialegeetribaltownopinion52412.pdf.

that this case was not rendered moot by that ruling, and proceeded to reverse the district court and remand with instructions to vacate the preliminary injunction order and dismiss the State's suit with prejudice. App. 17-18, 20, 28.

The court of appeals noted this Court's conclusion in *Bay Mills* that "IGRA is concerned only with class III gaming on Indian lands." App. 26 (citing 134 S. Ct. at 2032). As a result, the Tenth Circuit concluded, the State's allegation in its complaint that Respondents' purported gaming violations occurred off Indian lands failed to state a claim for relief under IGRA. *Id.* In addition, the Court held that the arbitration clause in the Compact's dispute resolution provision precluded the State from suing tribal officials in federal court for purported violations of its terms. App. 26-27. After the State's motion for rehearing en banc was denied, it filed the present petition for certiorari to this Court.

REASONS TO DENY CERTIORARI

The petition should be denied because: (I) the Tenth Circuit's conclusion that the State failed to state a claim for relief under IGRA was a straightforward application of *Bay Mills* and does not conflict with any decision of another court; (II) the Tenth Circuit correctly concluded that the State's suit was improper under the Compact, and that decision does not create "confusion" regarding a state's ability to sue tribal officials for alleged violations of federal law; and (III) the State has already secured the relief it seeks and has alternative modes of recourse for future alleged violations.

I. The State Is Not Entitled To Relief Under IGRA.

In light of *Bay Mills*, the Tenth Circuit's conclusion that the State failed to state a claim for relief under IGRA is both correct and uncontroversial. And the State's eleventh-hour attempt to replead its lawsuit as alleging unlawful gaming activity occurring in "Indian country" is both tardy and fruitless; it is not what the State argued below, and it is not the basis for the federal courts' jurisdiction under IGRA.

1. This Court's opinion in *Bay Mills* could not have been more direct: IGRA does not address gaming activities off tribal lands. Instead, "[e]verything—literally everything—in IGRA affords tools … to regulate gaming on Indian lands, and nowhere else." 134 S. Ct. at 2034; *see also id.* at 2032 ("A State's suit to enjoin gaming activity on Indian lands … falls within § 2710(d)(7)(A)(ii); a similar suit to stop gaming activity *off* Indian lands does not."). This exclusive focus is plain on the face of the statute itself. *See* 25 U.S.C. § 2701(3) (IGRA prompted in part by Congressional finding that "Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands …."); *id.* § 2710(a), (b), (d) (establishing regulations for gaming activities occurring "on Indian lands"); *id.* § 2706(b)(1) (authorizing Commission to "monitor … gaming conducted on Indian lands"). Indeed, Congress enacted IGRA specifically to afford the states a measure of regulatory authority over gaming activities occurring on Indian lands that the Constitution does not by itself provide. *See Bay Mills*, 134 S. Ct. at 2034 ("[T]he problem Congress set out to address in IGRA … arose in Indian lands

alone."); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996) ("[IGRA] extends to the States a power withheld from them by the Constitution."); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22 (1987) (states lack constitutional authority over gaming on Indian lands).

As the Tenth Circuit noted, the basis for relief the State's complaint identified under IGRA is § 2710(d)(7). App. 21 n.2; *see also* Compl. 4, 6, 7. Consistent with the statutory scheme as a whole, that provision authorizes a cause of action initiated by a State "to enjoin a class III gaming activity located on Indian lands." 25 U.S.C. § 2710(d)(7)(A)(ii). Here, however, as the court of appeals noted, App. 25-26 & n.3, the State's entire suit is premised on the notion that "[t]he Broken Arrow Property is *not 'Indian land'* for purposes of … IGRA," Compl. 17 (emphasis added); *see also id.* at 13 ("The Broken Arrow Property does not meet the [IGRA] definition of 'Indian land' …."). Accordingly, the Tenth Circuit was entirely correct in concluding that the State's complaint—like Michigan's complaint in *Bay Mills*—"fails on its face to state a valid claim for relief under IGRA." App. 26.[3]

[3] It is also doubtful whether the activity the State seeks to enjoin—construction of a facility that might someday accommodate gambling—falls within IGRA's terms at all. As this Court explained in *Bay Mills*, the phrase "class III gaming activity" under 25 U.S.C. § 2710(d) refers to "what goes on in a casino—each roll of the dice and spin of the wheel," not ancillary activities that simply facilitate that gaming. 134 S. Ct. at 2032.

The Tenth Circuit's ruling also creates no division of authority warranting this Court's intervention. None of the cases the State cites in which courts of appeals have applied this Court's decision in *Young* in the tribal context involved a suit under IGRA. *See* Pet. 18, 28-30. And no court has applied *Bay Mills* to address the questions presented by the State's petition, let alone come to a conclusion contrary to the decision below. In fact, the available evidence suggests that courts will have no difficulty following *Bay Mills*'s teachings. *See, e.g.*, *California v. Iipay Nation of Santa Ysabel*, No. 14-CV-2724 AJB (NLS), 2015 WL 2449527, at *3-5 (S.D. Cal. May 22, 2015) (noting that neither *Bay Mills* nor the Tenth Circuit's decision in this case preclude a state from suing a tribe for gaming activities occurring *on* Indian land).

2. Recognizing the deficiencies in its allegations, the State attempts to recharacterize its suit as "one against tribal officials for gaming *on Indian country*." Pet. 18 (emphasis added); *see also id.* at 22 ("[T]his case … involve[s] gaming in Indian country …."). In so doing, the State apparently hopes to persuade the Court that, notwithstanding the statutory text and *Bay Mills*, its suit comes within IGRA's ambit.

The State's misdirection effort suffers from two significant flaws. First, the complaint it filed in the district court never alleged that the Broken Arrow Property lies in "Indian country" and therefore qualifies as "Indian lands" for the purposes of § 2710(d)(7)(A)(ii). In fact, as the State admits, the term "Indian country" is not found in the complaint at all. *See* Pet. 22 n.5. Nor did the State make this

argument to the Tenth Circuit; indeed, it suggested just the opposite. *See* Brief of Appellee at 43 n.13, *Oklahoma v. Hobia*, 775 F.3d 1204 (10th Cir. 2014) (No. 12-5134) (noting that the definition of "Indian Country" in 18 U.S.C. § 1151 "does not define the lands available for gaming under IGRA."). Accordingly, the State has forfeited any argument it might now wish to make that gaming activities occurring in "Indian country" are within the federal courts' jurisdiction under § 2710(d)(7)(A)(ii). *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002).[4]

Second, the State's argument is a statutory non sequitur: The term "Indian country" is not found in Chapter 29 of Title 25 of the United States Code, which addresses federal regulation of Indian gaming, *see* 25 U.S.C. § 2701 *et seq.*, let alone in the provision defining the term "Indian lands," *see id.* § 2703(4). The State instead cites to other provisions of the Code that use the term "Indian country." *See* Pet. 21; 18 U.S.C. § 1151 (defining the term "Indian country" for purposes of Chapter 53 of Title 18); *id.* § 1166 (subject to certain restrictions, state laws pertaining to gambling apply in "Indian country"). But those provisions have nothing to do with the question presented here. Whether or not the Broken Arrow Property qualifies as "Indian country" under some other

[4] To the extent the State now means to argue that the Broken Arrow Property qualifies as the "Indian lands" of a different tribe, that argument is similarly waived. *See* Pet. 21 ("[T]he casino … sit[s] in 'Indian country' and arguably on the 'Indian lands' under IGRA of another tribe.").

statutory definition simply has no bearing on the federal courts' jurisdiction under § 2710(d)(7).

II. The State Is Not Entitled To Relief Under The Compact.

In urging review of the court of appeals' conclusion that the Compact precludes the State from suing tribal officials for alleged violations of its terms, the petition merely disputes the court's commonsense interpretation of ordinary contract language. That objection to the decision below does not call for this Court's involvement. The decision also presents no conflict with any decision of another court. As the State admits, every court of appeals to have addressed the question has held that, under the appropriate circumstances, tribal officers can be sued in their official capacities for violations of federal law. The Tenth Circuit's conclusion that such relief is not available under the terms of the Compact does not implicate any division in authority, nor does it threaten to cause "confusion" among the courts below.

1. In holding that the Compact "effectively forbids" the State's suit, the Tenth Circuit correctly interpreted the terms of that agreement. App. 27. As the court noted, Part 12 of the Compact mandates that disputes arising "hereunder" are to be resolved "amicably and voluntarily whenever possible," by requiring the parties to confer about any disagreements. Appellants' App. 715. If such discussions fail to achieve resolution, the Compact then instructs either party to refer the dispute to arbitration, subject to review by a federal district court. *Id.* As the Tenth Circuit held, this well-defined dispute resolution

mechanism "clearly preclude[s]" the State from suing tribal officials for purported violations of the Compact's terms. App. 27; *see also Choctaw Nation of Okla. v. Oklahoma*, 724 F. Supp. 2d 1182, 1186 (W.D. Okla. 2010) (under Part 12 of the Oklahoma Model Tribal Gaming Compact, "arbitration [is] the proper forum" for resolution of disputes regarding the Compact's terms).

The State's only response is to point to what it terms "the permissive language in the agreement," Pet. 23-24 (emphasis removed)—i.e., the phrase in the Compact that "either party may refer a dispute … to arbitration," Appellants' App. 715. But the inclusion of the word "may" in the Compact's dispute resolution provision does not mean that an aggrieved party can unilaterally dispense with its deliberately crafted procedures. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 204 n.1 (1985) ("The use of the permissive 'may' is not sufficient to overcome the presumption that parties are not free to avoid [a] contract's arbitration procedures."); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 658-59 (1965) ("Use of the permissive 'may' does not of itself reveal a clear understanding between the contracting parties that [complainants] … are free to avoid the contract procedure … in favor of a judicial suit.").

This is all the more true given that the Compact elsewhere provides for express, but limited, waivers of both parties' sovereign immunity to suit. *See* Appellants' App. 701-07 (providing the Tribe's "limited consent to suit" for certain tort claims); *id.* at 716 (noting that each party waives immunity for the "limited purpose[]" of allowing federal court review of arbitration awards). Had the parties intended that

either side could bypass Part 12 and seek judicial redress for perceived wrongs at will, they would have said so. *See Sossamon v. Texas*, 131 S. Ct. 1651, 1658 (2011) ("A State's consent to suit must be unequivocally expressed …." (internal quotation marks omitted)); *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) ("[T]o relinquish its immunity, a tribe's waiver must be clear." (internal quotation marks omitted)).

The State also ignores that in *Bay Mills* this Court read a similar dispute resolution provision consistently with the Tenth Circuit's interpretation here. Notably, while the *Bay Mills* compact also states that either party "may" invoke its procedures, this Court did not read that language as "authorizing judicial remedies." 134 S. Ct. at 2029, 2035 (citing App. to Pet. for Cert. 89a–90a). Instead, the Court concluded that the compact "sends disputes to arbitration and expressly retains each party's sovereign immunity." *Id.* at 2035. So while the State's petition accuses the Tenth Circuit of ignoring purportedly salient differences between this case and *Bay Mills*, "[a]ny level of detailed analysis" of the respective dispute resolution provisions in fact demonstrates that the State's suit in this case is likewise impermissible. Pet. 24.

2. Contrary to the Petition's repeated assertions, the Tenth Circuit's conclusion that the State could not sue tribal officials for alleged Compact violations does not threaten any "confusion" regarding the scope of official capacity suits under *Young*. To begin with, the court below did not base its ruling on an application of *Young*; as explained above, it found

that the Compact itself precluded the State from suing. App. 27; *see supra* 12-14.

Nor is there any broader disagreement on this issue. As the State admits, every court of appeals to address the question has concluded that—under appropriate circumstances—tribal officers accused of violating federal law are amenable to suit in their official capacities for prospective relief. *See* Pet. 18, 28-30 (citing *Vann v. Kempthorne*, 534 F.3d 741, 750 (D.C. Cir. 2008); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 177 F. 3d 1212, 1225 (11th Cir. 1999); *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Comm.*, 991 F.3d 458, 460 (1993); *Burlington N. R.R. Co. v. Blackfeet Tribe of Blackfeet Indian Reservation*, 924 F.2d 899, 901-02 (9th Cir. 1991); *Wisconsin v. Baker*, 698 F.2d 1323, 1332-33 (7th Cir. 1983)).[5] And the Tenth Circuit itself has repeatedly held the same. *See* Pet. 29-30; *Crowe & Dunlevy, P. C. v. Stidham*, 640 F. 3d 1140, 1154-1155 (10th Cir. 2011); *Burrell v. Armijo*, 603 F.3d 825, 832 (10th Cir. 2010); *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 576 n.1 (10th Cir. 1984). The court of appeals did not even dispute this point in the decision below. App. 26. Accordingly, the fact that the court disallowed the State's attempt to sue tribal officials in *this* case—on a different ground—does not indicate any divergence of views among the lower courts or within the Tenth Circuit itself. *See* App. 3 (no judge of the court of ap-

[5] This Court has suggested as much as well. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Puyallup Tribe, Inc. v. Dep't of Game of Wash.*, 433 U.S. 165, 171-72 (1977).

peals requested polling for rehearing en banc in this case).

And even if the ruling below could be construed to involve a *sub silentio* application of *Young*, it was correct. Under *Young* and its progeny relief is only available against state officials for an "ongoing violation of federal law." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 294 (1997) (O'Connor, J., concurring in part and concurring in judgment) (emphasis omitted); *see also Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). The petition points to no decision of this or any other court suggesting that an alleged violation of a contract between sovereign entities constitutes a violation of federal law for purposes of suit under *Young*. And it is doubtful whether the *Young* exception to sovereign immunity applies at all in the present context.[6]

[6] An officer suit under *Young* is not always available to a complainant alleging a sovereign violation of federal law. *Coeur d'Alene Tribe*, 521 U.S. at 270. In particular, when Congress has created a "detailed remedial scheme" that limits the relief available, it may be inappropriate for a court to supplement that scheme by allowing an officer suit to proceed. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996); *see also Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). As this Court has already recognized, IGRA presents just such a limited and exclusive remedial scheme. *See Seminole Tribe*, 517 U.S. at 75 (contrasting the "modest" sanctions allowable under § 2710(d)(7) with the "full remedi[es]" available under *Young*).

III. This Court's Intervention Is Not Needed To Provide The State The Relief It Seeks.

Even if the Court believes that the petition presents a question worthy of its attention, certiorari is not warranted, because the relief the State seeks is already available.

1. In its complaint the State asked the district court to preclude Respondents from "taking any action to construct or operate a Class III gaming facility on the Broken Arrow Property." Compl. 20, 21. But no gaming facility is being—or will be—built on the Property. Indeed, the Tribe and the developer of the casino have definitively relinquished all efforts to continue the project on the Property. *See Supreme Court Asked to Hear Kialegee Tribal Town Gaming Case* (March 27, 2015), http://www.indianz.com/IndianGaming/2015/03/27/supreme-court-asked-to-hear-ki.asp (noting that "the Tribe no longer plans to use the [site] for a casino").[7]

Moreover, even if Respondents had a sudden change of heart and decided to resume the project, they would not be able to do so without a change in the position taken by the Commission. In its 2012 letter the Commission made it clear that it would take enforcement action and institute a closure order

[7] The State also sought a declaratory judgment that Respondents lack the authority to construct or operate a class III gaming facility on the Property and that the Tribe does not have jurisdiction over it. Compl. 20. Because the Tribe and developer have renounced any intention to continue with the casino project, such relief is also not needed.

preventing Respondents from proceeding with the project. Stevens Letter 1-2; *see also* 25 U.S.C. § 2713(b) (authorizing the Commission to order closure of impermissible Indian gaming activities). The Commission subsequently denied the Tribe's request for reconsideration of the ruling. App. 14. Accordingly, with no reasonable possibility that a decision from this Court will change the facts on the ground, there is no warrant for this Court's review of the Tenth Circuit's decision. *See Camreta v. Greene*, 131 S. Ct. 2020, 2034 (2011) ("When 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,' we have no live controversy to review." (quoting *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968)); *Alvarez v. Smith*, 558 U.S. 87, 93 (2009) ("[A] dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words 'Cases' and 'Controversies.'").

2. This Court's intervention is also not needed to ensure that Oklahoma—or any other state—can prevent tribes from engaging in illegal gaming activities off Indian land in the future.[8] As this Court recog-

[8] Despite the State's attempt to raise the issue of whether sovereign immunity should shield Indian tribes from suit over their commercial activities, Pet. 25-26, this case does not present that question. The Tenth Circuit did not dismiss the State's suit on grounds of tribal sovereign immunity; it dismissed the suit because the State failed to state a claim for relief under IGRA and was precluded from filing suit under the Compact. App. 25-27. In any event, in *Bay Mills* this Court

nized in *Bay Mills*, a state seeking to prevent an Indian tribe from engaging in illegal gaming off Indian lands has other avenues of recourse. 134 S. Ct. at 2034-35. In particular, a state can condition its acceptance of a tribal-state gaming compact on the tribe's waiver of sovereign immunity to suit. *See id.* at 2035 ("[I]f a State really wants to sue a tribe for gaming outside Indian lands, the State need only bargain for a waiver of immunity."). This is not merely a theoretical remedy, as states "have more than enough leverage to obtain such terms." *Id.*; *see also id.* (noting that "a tribe cannot conduct class III gaming on its lands without a compact" and "cannot sue to enforce a State's duty to negotiate a compact in good faith"). In fact, the Compact between the State and Tribe in this case allows for tort suits against the Tribe under certain conditions. Appellants' App. 701-07. Had the State wanted the Compact to include an immunity waiver broad enough to encompass the State's present suit, it could have simply required one.

The State can also seek to institute criminal proceedings against tribal officials who engage in illegal gambling. *See, e.g.*, Okla. Stat. tit. 21, § 941 (a person who "carries on" gambling activities such as poker, roulette, and craps is guilty of a felony punishable by up to ten years in prison). When those activities occur outside Indian country, the State indisputably has jurisdiction. *See Bay Mills*, 134 S. Ct. at 2034-35 (noting that a state can seek criminal

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reaffirmed that tribes do enjoy such immunity. 134 S. Ct. at 2036-39.

penalties for gaming off Indian reservations). When they occur within Indian country, violations of state gambling laws fall within the federal government's jurisdiction, and the State can either secure prosecutorial authority by agreement with the Tribe or ask the federal government to exercise its authority to seek criminal sanctions. *See* 18 U.S.C. § 1166(d).

Finally, the State had remedies available to it in this very case. As already discussed, the State could have—indeed, should have—sought to oppose the Broken Arrow casino project via the Compact's dispute resolution mechanism, including by instituting arbitration proceedings. *See supra* 12-14. Alternatively, to the extent the State is correct in belatedly asserting that the Property is within the jurisdiction of the Muscogee (Creek) Nation, *see* Pet. 21-22, and that officials of that tribe entered into "questionable" and "lucrative" arrangements enabling development of what the State believes to be an unlawful gaming operation, Pet. 1, the State could reasonably have sought relief under its compact with the Muscogee (Creek) Nation, *see* Tribal Gaming Compact Between the Muscogee (Creek) Nation and the State of Oklahoma, Pt. 7.A (2005) ("The tribe … shall be responsible for regulating activities pursuant to this Compact."); *id.* Pt. 7.A.3 (tribe shall "promptly notify law enforcement authorities of persons who may be involved in illegal acts …."); *id.* Pt. 7.B (tribal authorities shall investigate "any … suspected or reported violation of this Compact").[9]

[9] The State-Muscogee gaming compact is available online at

The State, however, elected to pursue none of the remedies readily available to it. Instead, it chose to seek relief the federal district court was not competent to provide. Because the Tenth Circuit decision so holding was correct on the merits and presents no conflict with any decision of this Court or the other courts of appeals, there is no warrant for review.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/compacts/Muscogee%20Creek%20Nation%20of%20Oklahoma/muscogeecomp031605.pdf.