No. 14-1177

In The
Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

TIGER HOBIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

BLANK PAGE

REPLY BRIEF FOR PETITIONER

This Court granted certiorari in *Michigan* v. *Bay Mills Indian Community*, 134 S.Ct. 2024 (2014), to decide a question of great importance for States that allow Indian casino gaming. This case presents equally important questions that cut to the heart of those States' ability to enforce compacts and prevent illegal gaming within their borders.

Rather than chill future attempts to open blatantly illegal casinos like the one at issue here, the decision below encourages such attempts by rendering the prescription of *Bay Mills* for gaining access to federal courts a dead letter. The problems engendered by the decision are real and are not going away – particularly not in a state and circuit that are hotbeds of Indian gaming.[1] On this point, the brief in opposition speaks louder by its silence than by its words.

Respondents instead focus their opposition on various vehicle concerns and inaccurately suggest that the decision below is really just a straightforward application of *Bay Mills* to a case involving similar factual and legal issues. Beyond that, Respondents offer little in the way of arguments as to

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[1] Oklahoma "far outpace[s] other states on the number of tribal gambling facilities" and is home to the second-largest Indian gaming market, at nearly $4 billion per year in revenues. Kristi Eaton, *Report: Oklahoma tribal gambling revenue rises*, WASH. TIMES (Mar. 26, 2014), available at bit.ly/1Mj82O2.

why the questions presented do not warrant review,[2] relying instead on a defense of the decision below. None of these contentions has merit. The vehicle concerns are contrived. The case is factually distinct from *Bay Mills*. The decision below was erroneous. And the case presents important questions that warrant this Court's attention.

I. The Court should grant review to clarify that IGRA provides a statutory cause of action for illegal casino gaming on Indian lands that are not the Indian lands of the tribe attempting to game on them.

Bay Mills did not slam the federal courthouse doors in the faces of States seeking to prevent illegal

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[2] Respondents assert that "[t]he petition does not assert that the denial conflicts with a ruling of this or any other court." Br. in Opp. 1. But that claim cannot be squared with the petition and questions presented, the crux of which are that the decision below conflicts with this Court's recent decision in *Bay Mills* by foreclosing the very judicial review that *Bay Mills* itself prescribed. See, *e.g.*, Pet. 18 (arguing first and primarily that the petition should be granted because "[t]he Tenth Circuit significantly misapplied [*Bay Mills*]."). The petition likewise argues that, to the extent *Bay Mills* left open the question whether tribal officials could be sued for injunctive relief (it did not), the decision below squarely conflicts with a host of circuit court decisions allowing such suits. *Id.* at 28-30. Magnifying this point, the brief in opposition embraces the view that "the *Young* exception to sovereign immunity" does not apply "at all in the present context." Br. in Opp. 16. This alone illustrates the need for this Court to clarify the scope of *Ex parte Young*-like suits when tribal officials oversee illegal casino gaming.

tribal gaming within their borders. Rather, it was a roadmap for how States can properly gain access to federal court to prevent that illegality. Yet the Tenth Circuit read *Bay Mills* as foreclosing virtually all avenues for federal judicial review of claims of illegal tribal gaming. This conclusion cannot be squared with *Bay Mills*.

1. Respondents claim that the panel's reliance on *Bay Mills* to dismiss Oklahoma's case was correct because the cases involve "similar facts." Br. in Opp. 1. But *Bay Mills* was a case about whether sovereign immunity prevented a suit against a tribe. *Bay Mills*, 134 S.Ct. at 2028.

Here, Oklahoma – in line with *Bay Mills'* description of the proper way to pursue federal court remedies against illegal gaming – sued tribal officials on an *Ex parte Young*-like theory. See *id.* at 2035. Additionally, *Bay Mills* involved a site that was undisputedly not Indian land (nor even Indian country, for that matter), see *id.* at 2032 ("[T]he very premise of this suit . . . is that the . . . casino is *outside* Indian lands."), while the site at issue here undisputedly *is* Indian country. Respondents have in fact argued at every turn in this litigation that the parcel is the Indian land of a different tribe, the Muscogee Creek Nation – a concession that should be binding on them here. See Defs.' Court-Requested Br. on *United Keetowah* Decision and the Issue of "Shared Jurisdiction," *Oklahoma* v. *Hobia*, No. 12-cv-54 (N.D. Okla. May 18, 2012), ECF No. 123 (arguing Muscogee Creek Nation had "shared jurisdiction" over land);

Joint Consolidated Supplemental Br. of Appellants 9-10 & n.6, *Oklahoma* v. *Hobia*, 775 F.3d 1204 (10th Cir. 2014) (Nos. 12-5134, 12-5136) (arguing "shared jurisdiction" rendered Muscogee Creek Nation indispensible party).

2. In *Bay Mills*, this Court described the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.*, as creating "a framework for regulating gaming activity on Indian lands," 134 S.Ct. at 2028, and defined "Indian lands" as Congress did – including all lands either "held in trust by the United States for the benefit of any Indian tribe or individual" or "held by any Indian tribe or individual subject to restriction by the United States against alienation" so long as "an Indian tribe exercises governmental power" over the land. *Id.* at 2028 n.1 (quoting 25 U.S.C. § 2703(4)(B)).

In other words, *Bay Mills* quite clearly described IGRA's regulatory framework as applying to gaming occurring on "Indian land," not just the Indian land of the tribe attempting to game on it, a view that makes perfect sense in light of (1) IGRA's history and design and (2) the perverse incentive created by a contrary rule, which would allow a federal court to enjoin a tribe illegally gaming on its own Indian land but not to so enjoin when it is illegally gaming on the Indian land of another tribe.

As *Bay Mills* explains, IGRA is best understood in light of its origins. See *id.* at 2034. Congress adopted IGRA in response to this Court's decision in *California* v. *Cabazon Band of Mission Indians*, 480 U.S.

202 (1987), which held that States lacked any regulatory authority over gaming on Indian lands while leaving "fully intact a State's regulatory power over tribal gaming *outside* Indian territory," *Bay Mills*, 134 S.Ct. at 2034 (emphasis added). IGRA aimed to solve this problem by providing state officials with tools to curb illegal gaming on all Indian lands, not just the Indian lands of a particular tribe.

Bay Mills described "a State's regulatory power over tribal gaming outside Indian territory" and on state lands as "capacious," *id.* at 2034, and rationalized its holding limiting the States' federal remedies against a tribe by noting that, "a State, on its own lands, has many other powers over tribal gaming that it does not possess (absent consent) in Indian territory." *Ibid.* Indeed, the *Bay Mills* majority said, the "panoply of tools" that a state "can use to enforce its law *on its own lands* . . . can shutter, quickly and permanently, an illegal casino." *Id.* at 2035.

But when the gaming occurs outside of state lands – in Indian country – that "panoply" of tools becomes a paucity. A suit against tribal officials for injunctive relief? Not available, according to the Tenth Circuit and Respondents. See pp. 8-9, *infra*; Br. in Opp. 16. A criminal prosecution against tribal officials? Impossible, as the opposition admits, because under 18 U.S.C. § 1166(d), "[w]hen they occur within Indian country, violations of state gambling laws fall within the federal government's jurisdiction." Br. in Opp. 20. It may make sense to base access to federal remedies on a dichotomy between

Indian and state lands. Basing access on a dichotomy between Indian land and the Indian land of another tribe does not.

3. Respondents make the specious claim that this case is a poor vehicle for resolving this important question because, in their words, "the State's eleventh-hour attempt to re-plead its lawsuit as alleging unlawful gaming activity occurring in 'Indian country' is both tardy and fruitless." Br. in Opp. 8.

This is demonstrably untrue. For example, during oral argument before the Tenth Circuit panel below, counsel of record for Respondents specifically admitted that Oklahoma pled violations occurring in Indian country:

> [I]f the alleged violation is occurring off Indian land and in Indian country which in theory is what the situation is that Oklahoma has pled – Oklahoma has said these are not Indian lands of Kialegee. There is no dispute that we are in Indian country because the parcel in question is a restricted Indian allotment.

Oral Argument at 14:57, *Oklahoma* v. *Hobia*, 775 F.3d 1204 (10th Cir. 2014) (Nos. 12-5134, 12-5136). In the Petition for Rehearing or Rehearing En Banc, Oklahoma likewise pointed out that Respondents had, at all stages of the litigation, agreed (indeed, vociferously argued) that the parcel in question was Indian land of the Muscogee Creek Nation:

> [T]he Panel Decision misread the Complaint and overlooked the record and the decision below in concluding the alleged gaming would occur "off Indian lands." This conclusion ignores that Oklahoma's Complaint alleged, the district court found, and all parties agree the Property is a restricted allotment over which the Muscogee Creek Nation has governmental power, *see* Conclusion of Law, ¶ 35, and thus is "Indian land" as defined by § 2703(4)(B). Instead, the dispute was whether, given that the allotment is held by members of a different tribe, the Property is the "Indian lands" of the Tribal Town, as IGRA and the compact require. *See* Reply Brief for Defendants-Appellants at 10-11 ("The State concedes that the Property is Indian Country. . . ."); Complaint, ¶¶ 32-43; Findings of Fact, ¶¶ 47-54, Conclusions of Law, ¶¶ 31, 37. Unquestionably, Appellants sought to conduct Class III gaming in violation of IGRA and their Gaming Compact on "Indian lands," as defined by § 2703(4)(B) ("lands . . . under a restriction . . . on alienation and over which an Indian tribe exercises governmental power"), but not the category of lands required to conduct Class III gaming under IGRA and the Compact (lands "*of the Indian tribe having jurisdiction over such lands.*"). *See* § 2710(d)(1)(A)(i).

Pet. for Rehearing 6-7 (some citations omitted). Respondents' grasping claim that this issue was raised for the first time in the petition – and thus not preserved for review – provides no basis for denying the petition.

II. The Court should grant review to clarify that sovereign immunity does not bar suits against tribal officials for prospective injunctive relief, even where the alleged illegal activity is gaming in violation of a state-tribal gaming compact.

1. In *Bay Mills*, this Court, "analogizing to *Ex parte Young*," noted that "tribal immunity does not bar" claims seeking "injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct." *Bay Mills*, 134 S.Ct. at 2035.

Here, Oklahoma sued tribal officials on an *Ex parte Young*-like claim seeking prospective injunctive relief preventing them from violating IGRA and their gaming compact with the State. Yet the Tenth Circuit read *Bay Mills* as only permitting such a suit when seeking an injunction to prevent a violation of *state* law. Pet. App. 26-27. The Tenth Circuit viewed this Court's supposed silence on the point of whether "a state could file suit against individual tribal officers for violating an IGRA-mandated tribal-state gaming compact" as an indication that the State was foreclosed by sovereign immunity from bringing such a suit. *Ibid.* This is flatly contrary to *Bay Mills* and its sweepingly permissive language regarding *Ex parte Young*-like suits against tribal officials.

2. Respondents misleadingly claim that this case does not raise the scope of *Ex parte Young*-like suits against tribal officers because "the Tenth Circuit's rejection of the Compact claim was not based on

an application of the *Young* doctrine." Br. in Opp. 1-2. This is untrue. The Tenth Circuit held that Oklahoma was "precluded . . . from suing the defendant tribal officials in federal court for purported violations of the Tribal-State Gaming Compact" for two reasons. Pet. App. 26.

"First," said the panel, "when the Supreme Court in *Bay Mills* discussed the *Ex parte Young* doctrine, it did so in the context of noting that 'Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) . . . for' violations of Michigan state law." Pet. App. 26. The Supreme Court did not say, the panel claimed, that violations of "an IGRA-mandated tribal-state gaming compact" could be remedied by a suit against tribal officials responsible for the violation. *Id.* at 26-27. "Second," said the panel, "the Tribal-State Gaming Compact at issue in this case effectively forbids such a suit . . . [by] strictly limit[ing] the remedies available." *Id.* at 27.

The Tenth Circuit thus relied *first* on its inexplicably narrow reading of *Bay Mills* with regard to whether sovereign immunity barred suit against tribal officials for violations of gaming compacts, and it relied *second* on the permissive arbitration provision in finding the court was "precluded" from entertaining a cause of action arising out of the gaming compact. The sovereign immunity issue is thus squarely presented for this Court's review.

III. The Court should grant review to determine whether a permissive arbitration provision in a state-tribal gaming compact deprives a federal court of subject-matter jurisdiction over IGRA- and compact-based causes of action.

In any event, the Tenth Circuit's alternative holding – that the compact's permissive arbitration provision "precluded" the district court from entertaining Oklahoma's suit – presents an important question worthy of this Court's review.

Bay Mills certainly discussed the arbitration provision contained in the gaming compact at issue in that case, but it did so in the context of determining whether Michigan's arbitration provision amounted to an explicit waiver of a tribe's sovereign immunity from suit.

Here, the tribe's sovereign immunity was not an issue because the tribe was not sued. The district court clearly had subject-matter jurisdiction, and Oklahoma certainly stated a claim when it alleged that the terms of the gaming compact had been violated. Thus, the arbitration provision was completely irrelevant unless it constituted a binding agreement by the parties to resolve disputes in arbitration – and nowhere else. "Either party may refer a dispute arising under this Compact to arbitration" cannot bear that weight, as the district court correctly ruled. Respondents never appealed that decision, and the issue was neither briefed nor argued on appeal. Yet the panel ambushed Oklahoma with its

conclusion that the provision "precluded" federal court review of an allegation of a compact violation.

It is unclear why the permissive arbitration provision has this purported preclusive effect on federal court review. The panel simply did not explain itself other than to say the compact "effectively forbids" a suit in federal court. But unlike other compacts with arbitration provisions, Oklahoma's compacts state that either party "may" invoke the agreement's dispute resolution process by sending a notice of dispute and even after that "may" arbitrate.[3] If the Tenth Circuit's holding is correct, this permissive arbitration provision precludes Oklahoma from suing the tribe in federal court and even blocks suit against tribal officials who are not parties to the compact. This cannot be the case.

IV. The case is not moot, and it presents a good vehicle through which this Court can confirm that States have access to federal courts to enjoin tribal officials from engaging in illegal gaming on Indian lands.

Respondents argued to the Tenth Circuit that the case had become moot because they – in response to

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[3] Compare, *e.g.*, Tribal-State Compact for the Conduct of Class III Gaming Between the Tunica-Biloxi Indian Tribe of Louisiana and the State of Louisiana 37-38 (2001), available at on.doi.gov/1gMnIwm with Okla. Stat. tit. 3A, § 281(12).

the NIGC sending them an opinion letter stating that the parcel in question was not their Indian land – made the unilateral, non-binding decision to abandon pursuit of a casino on this site.[4] The Tenth Circuit rejected that argument, holding that an NIGC opinion letter is not final agency action, has no binding effect, and therefore did not provide Oklahoma with the relief it sought, Pet. App. 19-20 – Respondents' promises of good behavior notwithstanding. Respondents did not appeal that holding and should be precluded from raising it here.

In any event, the case is not moot. The only rationales Respondents offer are that (1) they do not plan on having "a change of heart" with regard to this parcel, Br. in Opp. 17, and (2) even if they did, the NIGC would probably tell them to close their casino. *Id.* at 17-18. Some comfort that is to Oklahoma. An order from a federal court enjoining Respondents from engaging in blatantly illegal gaming, however, is relief that is meaningful and which actually resolves this controversy.

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[4] The brief in opposition refuses to acknowledge Respondents' continued pursuit of a casino in Oklahoma, instead merely noting that Respondents have cut their losses and moved on from *this particular parcel*. Compare Br. in Opp. 17 ("[N]o gaming facility is being – or will be – built on the Property.") with Ziva Branstetter & Curtis Killman, *Broken Arrow casino developer says project will resume at undisclosed Tulsa County location*, TULSA WORLD (Mar. 7, 2015), available at bit.ly/1Gu5a92.

When pressed by the appeals court as to why – if Respondents had truly abandoned their pursuit of a casino after the injunction issued – the tribal officials prosecuted an appeal, counsel of record for Respondents answered that the tribe was "concerned about the holdings that the district court entered" and about the precedential value of those holdings with regard to the important legal questions presented. Oral Argument at 37:39, *Oklahoma* v. *Hobia*, 775 F.3d 1204 (10th Cir. 2014) (Nos. 12-5134, 12-5136). The same is no less true now than it was then.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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