No. 12-515

In the Supreme Court of the United States

MICHIGAN,

Petitioner,

v.

BAY MILLS INDIAN COMMUNITY, ET AL.,

Respondents.

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

BRIEF OF ALABAMA, ALASKA, ARIZONA, COLORADO, CONNECTICUT, GEORGIA, HAWAII, IDAHO, KANSAS, LOUISIANA, MONTANA, NEBRASKA, NORTH DAKOTA, RHODE ISLAND, SOUTH DAKOTA, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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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.

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INTRODUCTION AND INTEREST OF AMICI CURIAE

The *amici curiae* States have a sovereign interest in the integrity of their territory and the application of their laws within their borders. The *amici* States also have an interest in protecting their citizens from unlawful gambling, unregulated payday lending, and similar activities. These state interests would be served by a decision reversing the lower court on both questions presented.

The States' interest here does not arise only from the presence of Indian land within their borders. It arises from tribal activities *outside of Indian land within their borders*. The two governments with sovereignty over the land at issue here—the State of Michigan and the United States—have notified the Bay Mills tribe that its gambling activities are unlawful. But the tribe has continued those activities within Michigan's own sovereign territory. When a tribe engages in unlawful activity within a State's own territory, States must have some forum in which to hold tribes accountable, and official-capacity suits and criminal prosecutions are not sufficient.

The Court should allow States to sue tribes for declaratory and injunctive relief, notwithstanding tribal immunity. This dispute is not an isolated occurrence, and the problem is not limited to gambling. According to the Bureau of Indian Affairs, "there are 566 federally recognized American Indian and Alaska Native tribes and villages." *Frequently Asked Questions*, U.S. DEP'T INTERIOR, BUREAU INDIAN AFF., http://www.bia.gov/FAQs/index.htm (last visited Sept. 6, 2013). These tribes have a "unique status" as federal protectorates, and they

can invoke that status to engage in commercial activities in any of the 50 States. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851-52 (1985). They have built everything from brick-and-mortar casinos to Internet-based banks, based on the perception that they can evade federal and state regulations within state territory.

No efficient dispute-resolution system would deprive States a forum for resolving disputes concerning actions tribes take on state land. And Congress did not create such an inefficient system. It expressly provided that the federal courts would have jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin" unlawful gambling under IGRA. 25 U.S.C. § 2710(d)(7)(A)(ii). The lower court's reading of this provision—holding that it applied to suits only for violations that are indisputably on Indian land—makes no sense. By ensuring that States would have a federal-court remedy for unlawful gambling on Indian land, Congress did not eliminate the States' remedy for the much more serious issue of unlawful gambling within the State's own territory.

The *amici* States ask the Court to adopt a commonsense application of IGRA and to clarify the limits of tribal immunity. Unlike state sovereign immunity and Eleventh Amendment immunity, the doctrine of tribal immunity "developed almost by accident" through federal common law. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998). The Court should not extend the "slender reed" of tribal immunity any further. *Id.* at 757. It should resolve this case by reversing the court of appeals

and holding that federal courts can enjoin tribal activities that violate state and federal law.

SUMMARY OF THE ARGUMENT

The Court should reverse the lower court for three reasons, in addition to those highlighted by Michigan's brief.

1. The Court has held that tribes are immune from suits for damages, but the Court has not extended tribal immunity to bar suits filed by States for prospective relief. The closest the Court has come to extending tribal immunity to suits for prospective relief was in a case about tribal membership. That case raised special considerations of tribal sovereignty that are not present in all cases for declaratory and injunctive relief, especially when the challenged conduct occurs off of Indian lands. The Court should not now extend tribal immunity to categorically bar suits for prospective relief. The lower courts have not uniformly done so. Indeed, the Fifth Circuit has rightly recognized that the two principles that underlie tribal immunity—conservation of resources and inherent sovereignty—do not justify tribal immunity when the requested relief is prospective only.

2. The Court should decline to extend tribal immunity to suits for prospective relief so that the judiciary can resolve serious conflicts between States and tribes. The Court has held that tribes must comply with generally applicable state and federal laws. But tribal immunity is often raised as a

defense to lawsuits seeking to compel tribal compliance. This has led to unresolved disputes over Internet-based tribal payday lending, disputes over tribal compliance with state campaign-finance laws, and disputes about unlawful gambling like the case at hand. There are no good options for resolving these lingering disputes. Federal authorities have failed to act when tribes and tribal businesses have violated the law, as evidenced by the federal authorities' lack of meaningful response in this case. Likewise, state criminal prosecutions and official-capacity lawsuits are lesser remedies that do not always resolve the underlying legal dispute.

3. Even if the Court does extend tribal immunity to suits for prospective relief as a general matter, the Court should hold that Congress waived tribal immunity for state lawsuits to compel a tribe's compliance with IGRA. The structure of IGRA makes it clear that IGRA broadly waived tribal immunity for such suits. This is also the most practical reading of IGRA's grant of federal jurisdiction. The lower court's decision would anomalously provide a federal remedy for lesser violations of IGRA (such as gambling that is barred by a compact), while denying a federal remedy for much more serious violations (such as gambling without a compact at all). The best reading of IGRA is that Congress provided for federal jurisdiction and waived tribal immunity for all suits where compliance with IGRA's provisions is at issue.

ARGUMENT

The lower court's approach to tribal immunity, IGRA, and federal jurisdiction finds no purchase in this Court's precedents. The Court has recognized that, even in the absence of an express federal statute, "a federal court may determine under § 1331 whether a [tribe] has exceeded the lawful limits" of its power under federal law. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853 (1985). And this Court has never applied tribal immunity to bar an action like the one at issue here for purely injunctive and declaratory relief. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 516 (1991) (Stevens, J., concurring). For reasons relating to tribal immunity in general and IGRA in particular, this Court should reverse.

I. Tribal immunity does not bar lawsuits brought against tribes for declaratory and injunctive relief.

As a general matter, tribal immunity should not extend to suits by States against tribes for declaratory and injunctive relief. There is a tension in this Court's jurisprudence concerning the respective powers of Indian tribes and States. On the one hand, the Court has rightly concluded that Indian tribes and their members must comply with nondiscriminatory state laws when their conduct occurs off of Indian lands. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); *Okla. Tax*

Comm'n, 498 U.S. at 510-11. On the other hand, this Court has held that tribes are immune from civil suits for damages based on their activities off of Indian lands. *See Kiowa*, 523 U.S. at 760. Many lower courts have extended this rule, as the lower court did here, to encompass suits for declaratory and injunctive relief. The upshot is that, although this Court has held that States have the power to regulate tribes' conduct off of Indian lands, States are, in practice, prohibited from doing so. The way to fix this stalemate is to allow suits against tribes for prospective relief.

A. The Court has never held that tribes are immune from State lawsuits for declaratory and injunctive relief.

There is no doubt that, under current law, properly recognized Indian tribes enjoy immunity from damages suits except where Congress has abrogated it or the tribes choose to waive it. *See Kiowa*, 523 U.S. at 754. But this is not a case for damages, and it is not brought by an individual plaintiff. In holding that tribes have immunity from suits brought by States for declaratory and injunctive relief, the lower court extended tribal immunity further than is warranted by this Court's precedents.

This Court has never held that tribal immunity bars an action by a State for declaratory and injunctive relief. In fact, as Justice Stevens noted in his concurrence in *Oklahoma Tax Commission*, the Court has implicitly rejected that premise. There, an

Indian tribe sought an injunction to prevent Oklahoma from enforcing a judgment of $2.7 million for a past-due tax on cigarette sales. Oklahoma then counterclaimed for the $2.7 million in past-due cigarette tax. The Court held that Oklahoma could not sue for the past-due tax because tribal immunity barred the counterclaim. *See Okla. Tax Comm'n*, 498 U.S. at 509-11. That decision could have resolved the case. But the Court went on to determine whether the tribe had an obligation to pay the tax and declared that the State could impose a cigarette tax on the Indians' sales to nonmembers of the Tribe even if the sales took place on Indian land. *Id.* at 513. Justice Stevens' concurring opinion emphasized, without comment by the majority, that "[b]y addressing the substance of the tax commission's claim for prospective injunctive relief against the Tribe, the Court today recognizes that a tribe's sovereign immunity from actions seeking money damages does not necessarily extend to actions seeking equitable relief." *Id.* at 516 (Stevens, J., concurring).

The closest this Court has come to extending tribal immunity to suits for prospective relief is *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). In *Santa Clara Pueblo*, a female tribal member brought suit under the Indian Civil Rights Act to compel the tribe to grant her children tribal membership on the same terms as children of male tribal members. *Id.* at 51. The Court held that the tribe had immunity from suit because "[n]othing on the face" of "the ICRA" provides federal jurisdiction "in civil actions for injunctive or declaratory relief." *Id.* at 59. But the Court arrived at that holding by

examining the specifics of the ICRA in the context of the facts of that case.

The immunity discussion in *Santa Clara Pueblo* does not stand for the general proposition that tribes are immune from suit for prospective injunctive relief. The Court there did not consider the issue outside of the context of the ICRA. The immunity holding was also unnecessary to the decision, because the Court went on to hold that the plaintiff had no express or implied cause of action to enforce the ICRA anyway. *Id.* at 69. And the Court's decision was driven by the lawsuit's presumed effect on the tribe's internal and social relations. *See id.* at 59 ("[S]ubject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves, may . . . infringe on the right of the indians to govern themselves." (internal quotation marks and citations omitted)). The Court did not consider whether tribal immunity extended to other contexts where a tribe could not reasonably be said to be exercising its sovereign authority or was subject to pervasive state and federal regulation as in *Oklahoma Tax Commission*.

The Court reaffirmed tribal immunity in *Kiowa*, but again had no occasion to extend the doctrine to suits about prospective relief. *Kiowa* held that "the immunity possessed by Indian tribes is not coextensive with that of the States." *Kiowa*, 523 U.S. at 756. Unlike States, as the Fifth Circuit has explained, a tribe "has sovereign immunity from an award of damages only." *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 680 (5th Cir. 1999). The court noted that *Kiowa* "was an action for damages, not a

suit for declaratory or injunctive relief. This difference matters." *Id.* "The distinction between a suit for damages and one for declaratory or injunctive relief," the Fifth Circuit reasoned, "is eminently sensible, and nothing in *Kiowa* undermines the relevant logic." *Id.*; *accord Comstock Oil & Gas v. Ala. & Coushatta Indian Tribes of Tex.*, 261 F.3d 567, 571-72 (5th Cir. 2001) ("[T]he district court erroneously concluded that the Tribe was entitled to sovereign immunity against oil companies' claims for equitable relief."); *New York v. Shinnecock Indian Nation*, 686 F.3d 133, 147 (2d Cir. 2012) (Hall, J., dissenting) ("There is nothing in the factual record of *Kiowa* that would require the holding be extended to suits by states seeking prospective relief against a tribe."). *Cf.*, *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418, 121 S.Ct. 1589, 1594 (2001) ("Tribal immunity, we ruled in *Kiowa*, extends to suits on off-reservation commercial contracts.").

B. The Court should not extend tribal immunity to prevent States from filing actions for injunctive and declaratory relief.

The Court should not extend tribal immunity to suits for prospective relief. There are two rationales for tribal immunity: (1) the conservation of tribal resources and (2) tribes' inherent sovereignty. *See* Thomas P. McLish, *Note*, *Tribal Sovereign Immunity: Searching for Sensible Limits*, 88 Colum. L. Rev. 173,

178-79 (1988) (collecting cases). Neither of these rationales justifies extending tribal immunity to suits brought by States for declaratory and injunctive relief.

To the extent tribal immunity protects a tribe's resources, there is no reason to apply tribal immunity to an action for declaratory and injunctive relief brought by a State. This case, for example, does not request that the Tribe pay anything to Michigan. Instead, Michigan merely seeks an injunction that compels the tribe to comply with applicable federal and state law going forward.

The sovereignty rationale also does not support tribal immunity against a declaratory or injunctive action brought by a State. Unlike States, tribes are *dependent* sovereigns under the "[p]lenary authority" of the federal government. *See Okla. Tax Comm'n*, 498 U.S. at 509 ("Indian tribes are 'domestic dependent nations.'"); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) ("plenary authority"). Their sovereignty is neither directly addressed nor guaranteed in the Constitution. Instead, "[u]pon incorporation into the territory of the United States, the Indian tribes thereby c[a]me under the territorial sovereignty of the United States." *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 209 (1978). Given the federal government's plenary power to create, destroy, and otherwise control the tribes, notions of inherent sovereignty do not justify immunity from litigation. A federal court, no less than the federal Congress, can coerce an Indian tribe's obedience without diminishing the tribe's uniquely "dependent" sovereignty.

The sovereignty rationale is especially lacking when, as here, a State is the plaintiff. The Court has recognized that sovereign suits are inherently different from private suits because they are the result of a political process. As the Court explained in *Alden v. Maine*, suits by one sovereign against another are preferred as "an alternative to extralegal measures," such as war, and "require the exercise of political responsibility for each suit prosecuted . . . which is absent from a broad delegation to private persons to sue." 527 U.S. 706, 756 (1999). Moreover, the Court has held that States can regulate tribal activity—even on the reservation itself—when that activity affects non-Indians. *See Okla. Tax Comm'n*, 498 U.S. at 513. It does not undermine tribal sovereignty to subject tribes to actions for declaratory and injunctive relief in federal court.

II. The federal courts should be open to resolve disputes between States and Indian tribes.

It has been 15 years since the Court reaffirmed tribal immunity in *Kiowa*, and state-tribal disputes have swelled and intensified in the meantime. The best way to resolve these and other areas of persistent state-tribe conflict is for the Court to hold that tribal immunity does not bar suits brought by States for declaratory and injunctive relief.

A. Disputes have proliferated.

Because many lower courts have extended this Court's grant of immunity in *Kiowa* to lawsuits for

declaratory and injunctive relief, the number of unresolved controversies between states and tribes has grown. The following examples are some of the more serious areas of conflict that could be alleviated if a federal judicial forum were available.

1. Payday lending. Payday lending over the Internet is one of the biggest areas of contention between States and tribes. Tribal ownership of an online payday lending company purportedly limits state control, allowing tribal lenders to escape regulation and market products to consumers nationwide. In 2010, tribal payday lenders made up "[m]ore than 35 of the 300" Internet payday lenders and made "about $420 million in payday loans." Jessica Silver-Greenberg, *Payday Lenders Join with Indian Tribes*, WALL ST. J. (Feb. 10, 2011). "Some observers predict that the number of tribes with payday-loan operations eventually could climb close to the 400 that now have casinos." *Id.* And there is good evidence that tribal lenders are organized under "rent-a-tribe" schemes solely for the anti-regulatory benefits of tribal ownership. Under those schemes, existing nontribal lenders affiliate with tribes to evade laws and oversight. *See* Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?* 69 WASH. & LEE L. REV. 751, 766-67, 783 (2012).

The conflict between States and tribal payday lenders has exploded into litigation in several States with uncertain results. Several years ago, the Attorney General of Colorado issued investigative subpoenas to two out-of-state Internet payday

lenders, Cash Advance and Preferred Cash Loans. *See Cash Advance & Preferred Cash Loans v. Colorado*, 242 P.3d 1099, 1102 (Colo. 2010). Two tribal entities appeared in the case, claimed that they were related to the lenders being investigated by Colorado, and asserted tribal immunity on behalf of the lenders as "arms" of their respective tribes. *Id.* The trial court found that an existing payday lender had recruited the tribes and continued to make 99% of the profits from the lending, but the court nonetheless dismissed Colorado's investigation on the grounds of tribal immunity. *See* Amended Order, *Colorado et al. v. Cash Advance et al.*, No. 05CV1143 (Denver Dist. Ct. Feb. 18, 2012).[1]

More recently, in August of 2013, the New York Department of Financial Services sent cease-and-desist letters to online tribal payday lenders and warned third-party banks not to process payments to them. *See* Complaint for Declaratory and Injunctive Relief (Doc. 1), *Otoa-Missouria Tribe of Indians, et. al. v. N.Y. State Dep't of Fin. Servs., et. al.*, No. 1:13-cv-05930-RJS (S.D.N.Y. Aug. 21, 2013). The dispute has spawned two lawsuits. The Attorney General of New York has sued a subset of purported tribal lenders in state court, and another subset of tribal payday lenders has sued the Department in federal court for an injunction against the Department's actions. *See id.; New York Attorney General Files Lawsuit Against Payday Lenders*, WALL ST. J. (Aug. 12, 2013).

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[1] *Available at* http://www.nclc.org/images/pdf/unreported/Co_v_Cash_Advance.pdf. (last visited Sept. 6, 2013)

2. Campaign Finance. Well-financed Indian tribes are significant contributors to political campaigns, and some have claimed authority to disregard state campaign-finance disclosure laws. *See* Gary Goldsmith, *Big Spenders in State Elections—Has Financial Participation by Indian Tribes Defined the Limits of Tribal Sovereign Immunity from Suit?*, 34 WM. MITCHELL L. REV. 659, 660 (2008). In the 2000s, California's Fair Political Practices Commission sued the Agua Caliente Band of Cahuilla Indians over $7,500,000 in alleged unreported campaign contributions to state politicians. *See Fair Political Practices Comm'n v. Agua Caliente Band of Cahuilla Indians*, 148 P.3d 1126, 1128-29 (Cal. 2006). Other tribes had similarly been flouting California's campaign-finance reporting system. *E.g.*, *Fair Political Practices Comm'n v. Santa Rosa Indian Cmty. of Santa Rosa Rancheria*, 20 Cal. Rptr. 3d 292 (Cal. App. 2004). The Band moved to dismiss the suit on the grounds of tribal immunity, arguing that the State could not compel disclosure nor impose fines. *Id.* Although the California Supreme Court rejected the claim of immunity based on reasoning specific to campaign finance, *id.*, the court's decision is in substantial tension with the precedents of several federal courts of appeals.[2]

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[2] *See* Mary-Beth Moylan, *Sovereign Rules of the Games: Requiring Campaign Finance Disclosure in the Face of Tribal Sovereign Immunity*, 20 B.U. PUB. INT. L.J. 1, 13 (2010) (arguing that "the distinction" between campaign finance and other areas "is a thin one" and proposing federal legislation to abrogate immunity); Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond the Reservations Borders*, 12 LEWIS & CLARK L. REV. 1003, 1036 (2008) (criticizing California courts as "overreaching").

3. Gambling. "[A] substantial amount of litigation" has been filed about the "difference between Class II and Class III gaming." Alex Tallchief Skibine, *The Indian Gaming Regulatory Act at 25: Successes, Shortcomings, and Dilemmas*, 60 Fed. Lawyer 35, 38 (April 2013). The issue is important because gambling devices that "can be classified as Class II" under IGRA "do[] not need to be approved by a state pursuant to a tribal state compact." *Id.* For this reason, States prefer a narrow reading of Class II, and tribes prefer a broader one. The federal courts are the right forum to resolve this dispute, and there are at least two pending lawsuits by States against tribes over the question. Both suits face hurdles of tribal immunity.

Alabama has sued officials of a tribe that operates gambling devices that are materially identical to Las Vegas slot machines. *See* Amended Complaint (Doc. 10), *Alabama v. PCI Gaming, et al.*, No. 2:13-cv-178 (M.D. Ala. Apr. 11, 2013). Alabama's complaint alleges that these machines are unlawful Class III slot-machine gambling, rather than lawful Class II bingo. But Alabama has been forced by Eleventh Circuit caselaw to name a laundry-list of tribal officials as defendants instead of the tribe itself. *See Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1242 (11th Cir. 1999). Even so, the individual defendants have raised tribal immunity in a motion to dismiss. *See* Brief in Support of Motion to Dismiss (Doc. 14), *Alabama v. PCI Gaming, et al.*, No. 2:13-cv-178 (M.D. Ala. May 9, 2013).

Similarly, the State of Wisconsin has sued a tribe for operating illegal electronic-poker games. *See*

Complaint (Doc. 1), *Wisconsin v. Ho-Chunk Nation*, No. 3:13-cv-334 (W.D. Wis. May 14, 2013). Although Wisconsin has a compact with its defendant-tribe, that compact by definition does not provide for the tribe's unlawful gambling. For this reason, a federal district court held that Wisconsin could not invoke the compact's arbitration clause. *See* Order Denying Motion to Confirm Arbitration Award and Granting Motion to Vacate (Doc. 12), *Wisconsin v Ho-Chunk Nation*, No. 3:12-cv-505 (W.D. Wis. Dec. 5, 2012). Similarly, the defendant-tribe has argued that Wisconsin's lawsuit is outside the scope of federal jurisdiction because it does not seek to "enjoin a class III gaming activity located on Indian lands *and conducted in violation of any Tribal-State compact*." *See* Answer (Doc. 9), *Wisconsin v. Ho-Chunk Nation*, No. 3:13-cv-334 (W.D. Wis. Aug. 7, 2013) (emphasis added).

B. Suits against tribes are the only realistic means to resolve these disputes.

The lower court acknowledged the serious consequences of denying a federal forum to States seeking to ensure compliance with federal and state law within their own territory. Pet. App. 17a. *Accord Seminole Tribe*, 181 F.3d at 1243 (recognizing that its "holding will effectively nullify [the State's] rights under IGRA by leaving it with no forum in which it can prevent the Tribe from violating IGRA with impunity"). But the lower court purported to identify three possible ways in which States could compel the

tribes to comply with the law apart from federal lawsuits. None is a realistic alternative.

1. *Relying on the federal government*. First, the lower court suggested that Michigan "ask the United States to sue Bay Mills, since tribes are not immune from suits brought by the federal government." Pet. App. 17a. Unfortunately, federal authorities are notoriously unwilling to act in this area. Surveys suggest that U.S. Attorneys decline to prosecute approximately 85% of felony cases arising on Indian lands. *See* Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and* United States v. Lara, 42 U. MICH. J. L. REFORM 651, 691 (2009). Gambling crimes, in particular, are "rarely prosecuted." Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 715 n.20 (2006). Similarly, the National Indian Gaming Commission only rarely invokes its authority to enforce the law against Indian tribes. Although hundreds of tribes operate gambling establishments with varying degrees of compliance, the NIGC reports ordering only ten temporary closures over its 25-year history. *See* National Indian Gaming Commission, Enforcement Actions, at http://www.nigc.gov/Reading_Room/Enforcement_Actions.aspx (last visited Sept. 6, 2013). The most recent was seven years ago, in 2006.

The facts of this case underscore why States cannot rely on federal authorities. The NIGC and the Department of the Interior have both determined that the Bay Mills tribe is engaged in unlawful gambling. JA 101a-102a. But the federal government has not joined Michigan's lawsuit as a plaintiff.

Instead, incredibly, the federal government has taken the opposite tack; it has appeared as an *amicus curiae* in support of the tribe. *See* Br. of USA as Amicus Curiae.

2. *Criminal prosecutions against individuals*. The lower court also suggested that Michigan "apply non-discriminatory laws against Indians who go beyond the boundaries of Indian country, so long as there is no federal law to the contrary." Pet. App. 17a. In other words, the lower court suggested that Michigan arrest and prosecute the casino's patrons, serve warrants to seize the casino's gambling devices, or initiate state-court enforcement proceedings to stop the Tribe's unlawful gambling.

This suggestion suffers from two serious problems. First, law-enforcement measures necessarily transform good-faith legal disagreements into court proceedings about *mens rea*, criminal procedure, and other side issues. The upshot is that a State could be correct that a tribe's activities are unlawful, but could still lose a criminal case against a particular tribe-member. Second, even if the State were able to litigate a prosecution or forfeiture proceeding against specific contraband to a judgment, it would still lack a binding judgment against the tribes and tribal businesses that are the driving force behind the activity. For these reasons, state law-enforcement tactics have provided clarity in the past only when they have provoked a tribe into waiving its immunity and suing a State. *See, e.g., Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1995).

3. *Official-capacity lawsuits.* Finally, the lower court suggested that "a State may bring claims against tribal officers in their official capacity." Pet. App. 17a. Michigan has convincingly explained why these official-capacity lawsuits are a secondary and uncertain remedy. Suppl. Br. on Pet. for Cert. at 8. Moreover, because of the way in which tribes and tribal businesses are organized, it is often not apparent which official should be named. Unlike States and the federal government, tribal governments and businesses tend to be governed by committees and commissions, not individual executive officers. *See, e.g.*, *Hollywood Mobile Estates Ltd. v. Cypress*, 415 Fed. App'x 207 (11th Cir. 2011) (rejecting the argument that a tribal official could not be enjoined because he was only a constituent member of a tribe's governing council).

III. IGRA provides for federal jurisdiction and abrogates tribal immunity.

Regardless of whether States can sue tribes for declaratory and injunctive relief as a general matter, IGRA specifically gave States the power to sue to stop unlawful Class III gambling. Section 2710(d)(7)(A)(ii) provides that the federal courts can hear "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact." 25 U.S.C. § 2710(d)(7)(A)(ii). This provision, by its terms, waives tribal immunity and authorizes federal jurisdiction in at least some state-tribal confrontations over

Indian gaming. That is beyond dispute. And for the reasons described below, the best reading of this section, and of IGRA as a whole, is that it abrogates "tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue." *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385 (10th Cir. 1997).

A. Michigan's reading of Section 2710(d)(7)(A)(ii) is consistent with IGRA's overall statutory scheme.

As an initial matter, the lower court's narrower reading of Section 2710 is inconsistent with IGRA's statutory scheme. Statutory construction "is a holistic endeavor," such that a provision in isolation "is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

Michigan's brief explains IGRA's balance between three different "classes" of gambling. Pet. Br. 3-7. IGRA authorizes gambling only if that gambling is conducted on "Indian Lands." *See* 25 U.S.C. §§ 2710(b)(1), (2); 2710(d)(1), (2). IGRA exempted Indian tribes from preexisting prohibitions on gambling, but only if the tribes met certain conditions. *See* Johnson Act, 15 U.S.C. §§ 1171-1178 (prohibiting gambling devices on Indian lands); Organized Crime Control Act, 18 U.S.C. § 1955 (making most organized gambling activity a federal

crime); Assimilative Crimes Act, 18 U.S.C. § 13 (making it a crime to violate most state laws on federal lands). Under IGRA, Indian tribes can engage in Class II gambling if the activities are (1) "located within a State that permits such gaming for any purpose by any person, organization or entity" and (2) not "otherwise specifically prohibited on Indian lands by Federal law." 25 U.S.C. § 2710(b)(1). Tribes can engage in Class III gambling if (1) there is an approved tribal ordinance, (2) the activities are "located in a State that permits such gaming for any purpose," and (3) the tribe and State "enter[] into" a compact. 25 U.S.C. § 2710(d)(1)(A)-(C).

These limitations "balance the states' interest in regulating high stakes gambling within their borders and the Indians' resistance to state intrusions on their sovereignty." *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1289 (D.N.M. 1996); *see also* S. Rep. No. 100–446, at 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076. Congress tied the legality of both classes of gambling to state law and state permission. Against this backdrop, it stands to reason that the best reading of Section 2710(d)(7)(A)(ii) is that, when a tribe invokes its right to conduct gambling under IGRA, a State can sue to ensure that the tribe complies with the terms of the Act.[3]

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[3] *See Calvello v. Yankton Sioux Tribe*, 899 F. Supp. 431, 438 (D.S.D. 1995) ("Federal courts may find a waiver of tribal sovereign immunity for the purpose of enforcing the provisions of the IGRA where prospective injunctive relief, and not monetary relief, is sought."); *Maxam v. Lower Sioux Indian Cmty. of Minn.*, 829 F. Supp. 277 (D. Minn. 1993) ("Any tribe which elects to reap the benefits of gaming authority created by

The structure and text of IGRA evidences that a tribe's immunity from suit is waived "where compliance with IGRA's provisions is at issue." *Mescalero*, 131 F.3d at 1385. In *Santa Clara Pueblo*, there was "nothing on the face" of the civil rights act that even "purport[ed]" to subject tribes to suit other than through habeas corpus. The same cannot be said here. Instead, IGRA creates a regulatory regime that imposes real limits on tribal gambling and requires meaningful State consent—through a compact—before Class III gambling is allowed.

B. Michigan's reading of IGRA makes the most practical sense.

This Court has held that the scope of tribal-immunity waivers must be evaluated in light of "the real world end" they are meant to achieve. *See C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 422 (2001). But the lower court's "heads-I-win-tails-you-lose" style of reasoning would eliminate the usefulness of Section 2710(d)(7)(A)(ii) as a means of dispute resolution.

The lower court held that States can only sue to enforce IGRA if their lawsuit meets five conditions: "(1) the plaintiff is a State or an Indian tribe; (2) the cause of action seeks to enjoin a class III gaming

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the IGRA must comply with the Act's requirements."); *Ross v. Flandreau Santee Sioux Tribe*, 809 F. Supp. 738 (D.S.D. 1992) ("[T]he Tribe cannot reap the benefits of the IGRA and simultaneously refuse to comply with the statutorily mandated provisions relating to the distribution of Indian gaming revenues.").

activity; (3) the gaming activity is located on Indian lands; (4) the gaming activity is conducted in violation of a Tribal–State compact; and (5) the Tribal–State compact is in effect." Pet. App. 7a. Under the lower courts' rule, federal courts would not be able to resolve lawsuits in which any of these five elements are disputed by the plaintiff. Although federal courts would be able to resolve less consequential and clear-cut disputes, there would be no judicial forum to resolve serious foundational disputes such as tribal gambling without a compact, the use of certain land for gambling, the *ab initio* validity of a state-tribe compact, or the enforceability of revenue-sharing agreements under the compact. *Compare Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997) (under the correct rule, courts can determine whether a state compact is void or in effect) *with Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 933 (7th Cir. 2008) (under an erroneous rule, courts cannot determine whether a tribe is complying with a revenue-sharing agreement under a compact). There is no reason that Congress would have wanted courts to resolve lesser disputes—about gambling clearly covered by a valid compact, and occurring on Indian Lands—but not the more foundational ones that would be excluded by the lower court's five-part test.

Moreover, the lower court's rule would anomalously give States no remedy for the most egregious violations of IGRA *for the very reason that they are egregious violations*. For example, perhaps the most serious violation of IGRA is for a tribe to engage in Class III gambling without a compact. But under those circumstances, the lower court would

leave the State without a remedy for the very reason that the tribe's gambling is unlawful—the absence of a compact. *See* Pet. App. 7a (requiring that a "Tribal–State compact [be] in effect" for federal jurisdiction).

Similarly, Michigan is left without a remedy to stop the Bay Mills tribe from gambling outside of Indian lands for the very reason that the gambling is illegal in the first place—because it is outside of Indian lands. This outcome makes no sense; a tribe should not be able to defeat a lawsuit to enforce IGRA on the grounds that the tribe is so far out of compliance with IGRA that the resulting lawsuit is not within the literal terms of Section 2710(d)(7)(A)(ii). *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510 (1989) (reading statute to avoid "unfathomable" and absurd result).

* * *

The Court should adopt a pragmatic approach to tribal immunity and IGRA that allows courts to resolve serious disputes about the limits of tribal authority and a tribe's compliance with generally applicable law. The lower court has extended the common law of tribal immunity further than this Court's precedents warrant or that the principles that undergird the doctrine allow. A tribe "has sovereign immunity from an award of damages only." *TTEA*, 181 F.3d at 680. And IGRA, at the very least, evinces Congress's intent that federal courts resolve disputes "where compliance with IGRA's provisions is at issue." *Mescalero*, 131 F. 3d at 1385.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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