No. 14-12004-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF ALABAMA,

Plaintiff-Appellant,

v.

PCI GAMING AUTHORITY, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
For the Middle District of Alabama
Case No. 2:13-cv-00178-WKW-WC

BRIEF OF MICHIGAN, ARIZONA, KANSAS, SOUTH DAKOTA, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

Bill Schuette
Attorney General

Aaron D. Lindstrom
Solicitor General
Co-Counsel of Record

Margaret A. Bettenhausen
Assistant Attorney General
Co-Counsel of Record
Attorneys for Amicus Curiae
Environment, Natural Resources, and
Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540

Dated: July 14, 2014

[additional counsel listed at the end of the brief]

CERTIFICATE OF INTERESTED PERSONS

Amicus State of Michigan, in support of Plaintiff/Appellant State of Alabama, certifies that in addition to the interested parties identified by Appellant State of Alabama, the following states have an interest in the outcome of this case:

States of Arizona – Amicus Curiae

State of Kansas – Amicus Curiae

State of South Dakota – Amicus Curiae

State of Utah – Amicus Curiae

Respectfully submitted,

/s/ Margaret A. Bettenhausen
Assistant Attorney General
State of Michigan
Attorney for Amicus Curiae
Environment, Natural Resources, and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540
bettenhausenm@michigan.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF THE ISSUES

The issues relevant to this appeal are those stated in Alabama's Appellant's Brief. The issues will not be fully restated here as *amici* generally adopt Alabama's description of the issues set forth in its brief.

STATEMENT OF INTEREST OF THE *AMICI CURIAE* STATES

The *amici curiae* States have an interest in preventing unlawful gambling within their sovereign borders. Recently, tribes in Michigan and elsewhere have sought to grow their revenues and market share by opening an increasing number of off-reservation casinos and offering a wider variety of casino games. Many of these casinos and games are not authorized under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710 *et seq.*, and violate state law, resulting in a growing number of disputes with states seeking to stop the tribes. This case poses two important questions implicating States' interest in preventing the proliferation of illegal gambling:

- whether a court can determine if land is "Indian lands" eligible for gaming under IGRA within the context of a lawsuit to enforce anti-gambling laws; and
- whether a state can enforce its civil anti-gambling laws in federal court under 18 U.S.C. § 1166, which is part of IGRA.

Amici are interested in the outcome of this case because they have confronted similar issues. As a result of the spread of tribal gaming, *amici* have good reason to believe these problems will multiply. Affirming the decision below has the potential to impede the *amici curiae* States', as well as other states', efforts to prevent illegal gaming within their sovereign borders.

The *Amici Curiae* Brief is being filed pursuant to Federal Rule of Appellate Procedure 29(a).

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court held that Alabama's state-law claim premised on illegal gaming taking place off Indian lands should be dismissed because it is untimely. According to the court, it is too late to raise the issue of whether the Secretary of the Interior had authority to take lands into trust for the Tribe, thereby making them "Indian lands" eligible for gaming. Such claims, the court said, must be made within the Administrative Procedures Act's six-year statute of limitations. Adopting the district court's position, however, means that even if the Secretary acted contrary to or without statutory authority when taking the subject land into trust, Alabama has no remedy to address illegal gambling occurring on its sovereign lands.

The district court's ruling contravenes the "well-worn rule" that "administrative actions taken in violation of statutory authorization or requirement

are of no effect." *Big Lagoon Rancheria v. California*, 741 F.3d 1032, 1042 (9th Cir. 2014), *reh'g en banc granted*, No. 10-17803, 2014 WL 2609714 (9th Cir. June 11, 2014) (quoting *Santa Clara v. Andrus*, 572 F.2d 660, 677 (9th Cir. 1978)) (citing, *inter alia*, *Utah Power & Light Co. v. United States*, 243 U.S. 389, 392 (1917)). Clearly, if the Secretary lacked authority to take lands into trust on behalf of the Tribe, then Alabama has stated a claim upon which relief should be granted.

In the alternative to its claim that the Tribe's casinos are illegal because they are not on Indian lands, Alabama asserts that even if the casinos are located on Indian lands, the State should be able to obtain an injunction for conducting illegal non-compacted class III gaming in violation of 18 U.S.C. § 1166 of IGRA. The district court concluded that Alabama's position lacks support in the language of § 1166. According to the district court, § 1166 does not provide Alabama a cause of action and only the federal government has authority to enforce anti-gambling laws that are assimilated into federal law under § 1166. Section 1166, however, unambiguously provides otherwise:

> [F]or purposes of Federal law, *all State laws* pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, *shall apply* in Indian country *in the same manner* and to the same extent *as such laws apply elsewhere in the State* . . . The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, . . . [Emphasis added.]

Although it consigns exclusive jurisdiction for prosecuting *criminal* law violations to the federal government, nowhere does § 1166 say that a state has no authority to obtain remedies under assimilated *civil* anti-gambling laws. The district court does not explain how the above-quoted language can be interpreted to mean anything other than what it clearly says: that *all State laws* shall apply in Indian country *in the same manner* as they apply elsewhere in the state. Since there is no dispute that Alabama law permits it to bring a civil action to enjoin a public nuisance, there can be no question that § 1166 permits the State to do just that in federal court. Alabama's complaint clearly states a cause of action.

For the foregoing reasons, the decision of the district court should be reversed.

ARGUMENT

I. The question of whether a casino is located on "Indian lands" for purposes of IGRA should be answered in the context of a challenge to tribal gaming.

IGRA restricts the location of tribal gaming to "Indian lands," which includes "any lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe . . . ." 25 U.S.C. § 2703 (4)(B). The Indian Reorganization Act (IRA) authorizes the Secretary of the Interior to take lands into trust on behalf of tribes. 25 U.S.C. § 465. This land-into-trust authority, however, is not unbounded. Rather, it extends only to those tribes that were under federal

jurisdiction as of June 1934, when the IRA was enacted. *Carcieri v. Salazar*, 555 U.S. 379 (2009).

In this case, Alabama has asserted that the Poarch Band's casinos are an illegal public nuisance because they are not located on "Indian lands" and otherwise violate state law. The Tribal Officials maintain, however, that their casinos are on "Indian lands" because the land was taken into trust by the United States for the benefit of the Tribe. The problem with the Officials' assertion is that the Tribe was not under federal jurisdiction until 1984 – 50 years after the IRA was enacted.

Despite evidence that the Tribe cannot meet the cut-off date established in *Carcieri*, the district court refused to examine whether, at the time of taking the lands into trust, the Secretary had the authority to do so. Instead, it rejected Alabama's claim concluding that it amounted to an untimely challenge to the Secretary's land-into-trust decision under the APA. Thus, although the Secretary acted *ultra vires*, the Tribal Officials now have a green light to continue gaming on lands in violation of federal and state law.

The district court should be reversed. The distinction between Indian lands and non-Indian lands is critical to determining a state's authority to regulate gaming within its sovereign borders. But for the district court's decision, Alabama would have a state law claim against the Tribal Officials. By refusing to examine

the issue in the context of a tribal gaming dispute, the district court has effectively removed lands from a state's regulatory reach, a decision that should not be taken lightly.

Although a rehearing *en banc* was recently granted, *amici* submit that a panel of the Ninth Circuit has taken a better approach – which the district court opted to directly contradict – in *Big Lagoon Rancheria v. California*, 741 F.3d 1032 (9th Cir. 2014), *reh'g en banc granted*, No. 10-17803, 2014 WL 2609714 (9th Cir. June 11, 2014). In *Big Lagoon* the panel addressed the exact same problem here – deciding whether land was "Indian lands" within the context of a tribal gaming dispute. And just as in this case, California claimed the Secretary did not have authority to take lands into trust for the tribe because it had not been federally recognized in 1934, as required under *Carcieri*. Instead of rejecting California's claim as an untimely challenge to agency action under the APA, the panel felt compelled to examine the Secretary's land-into-trust decision because "[t]he law treats an unauthorized agency action as if it never existed." *Big Lagoon*, 741 F.3d at 1042. The court relied upon *Utah Power & Light Co. v. United States*, 243 U.S. 389, 392 (1917), which held that when an agency acts beyond its authority, such action is void and should be disregarded. The panel went on to find that the tribe was not under federal jurisdiction in 1934, therefore, the Secretary

had no authority to take the lands into trust and the lands were not "Indian lands" for purposes of IGRA. This makes complete sense.

In addition to refusing to sanction unauthorized agency action, there are two other reasons the Eleventh Circuit should follow the panel's approach in *Big Lagoon*. First, it is consistent with Justice Kagan's recent majority opinion in *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014). In that case, Michigan sued a tribe for opening a casino within the state's sovereign territory. The Supreme Court held that tribal immunity barred Michigan's civil anti-gambling lawsuit brought against the tribe directly (as opposed to tribal officials). But the Supreme Court was quick to point out that states were not left without remedies to address the threat posed by off-reservation gaming. To the contrary, the Supreme Court preserved tribal immunity in part because states *could* seek injunctive relief against tribal officials for engaging in unlawful conduct outside Indian country. *Id.* at 2034-35. Given the critical relevance of the Indian lands question to each case where a court will need to decide if states in fact have the remedy the Supreme Court identified in *Bay Mills*, depriving such states the ability to even raise the issue of Interior's authority based on procedural grounds could upset the jurisdictional balance struck by the Supreme Court.

Here, the parties do not dispute that the Poarch Band was not under federal jurisdiction until 1984. Yet the district court refused to even consider Alabama's

claim that the casinos were outside of Indian lands. The district court merely rubber-stamped the Secretary's decision despite the clear lack of authority to take lands into trust for the benefit of the Tribe. But for this decision, the state would be able to assert a state law claim against the Tribal Officials – a remedy the Supreme Court has unequivocally supported. Alabama's state law claim should not be dismissed.

Second, refusing to address the question of whether lands are "Indian lands" within the context of tribal gaming may have unfortunate practical repercussions. Land is taken into trust by the Secretary for the benefit of tribes for a variety of reasons, some of which have nothing to do with gaming. It is not always possible, at the time the land is taken into trust, to determine whether it will be used for a reason that violates state law. The upshot of courts' refusal to address the "Indian lands" question in the context of tribal gaming disputes is that states will be forced to bring *Carceiri* or other challenges to most, if not all, land-into-trust decisions when they are made as a hedge against the risk of future illegal gaming.

And if states must sue at the time of the trust decision to preempt the risk of future illegal gaming, three other problems will result. It will waste judicial resources, drain the coffers of those states forced to increase the number of challenges to the Secretary's authority, and likely strain tribal-state relations.

These problems can be avoided by addressing the Indian lands question in the context of an anti-gambling lawsuit.

II. 18 U.S.C. § 1166 expressly and unambiguously authorizes a state to seek enforcement of its civil gambling laws in federal court.

Amici agree with Alabama's argument that a state can bring a public nuisance action against tribal officials under 18 U.S.C. § 1166 to enjoin unlawful gambling. Section 1166 assimilates all state anti-gambling laws into federal law if the violations of those anti-gambling laws occur in Indian country and do not involve gambling that is authorized under a tribal-state compact. That would include all class III gambling activities alleged in the amended complaint because Alabama and the Poarch Band (whose officials have been sued here) have no tribal-state compact.

The assimilative language in § 1166 is very broad:

> (a) Subject to subsection (c), for purposes of Federal law, *all State laws pertaining to the licensing, regulation, or prohibition of gambling*, including *but not limited to criminal sanctions* applicable thereto, shall apply in Indian country *in the same manner* and to the same extent as such laws apply elsewhere in the State.
>
> (b) Whoever in Indian country is guilty of *any act or omission involving gambling*, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment. [Emphasis added.]

This statute has been correctly interpreted to assimilate state civil common law. *United States v. Santee Sioux Tribe*, 135 F.3d 558, 565 (8th Cir. 1998) ("According to the government, 'all State laws' necessarily includes Nebraska civil case law authorizing injunctive relief to effectuate the closure of gambling establishments determined under State law to be public nuisances. We agree.") Similarly, the reference in the statute to "all State laws . . . including but not limited to criminal sanctions" makes it clear that § 1166 assimilates state civil anti-gambling *statutory* law as well.

Despite acknowledging that it expressly requires tribes to comply with state anti-gambling laws, the district court held that the plain language of § 1166 does not provide Alabama a right of action, even where such suits are recognized under state law.

This argument ignores the express mandate in § 1166(a) that state laws be applied in Indian country "in the same manner" as they are applied outside Indian country. The Alabama Code specifically creates a cause of action for the State to seek an injunction of a public nuisance. Ala. Code § 6-5-120 *et seq.* To honor the "in the same manner" mandate, this cause of action should be assimilated whole cloth into federal law, including that aspect of the cause of action providing for the State to be the plaintiff. Writing this cause of action out of the books, or even substituting the United States as the only party plaintiff, is inconsistent with

Congress's intent to have this state law applied in Indian country just as it would be anywhere else. The district court's contrary decision should be vacated.

CONCLUSION AND RELIEF REQUESTED

No one disputes that conducting class III games outside of Indian lands and without a compact is illegal under IGRA. Yet the district court has refused to examine whether the Tribe's casinos are located on "Indian lands" for the purposes of IGRA. Further, the district court ignores the plain language of § 1166 that unambiguously creates a cause of action for the state to bring claims against the Tribe for gaming without a compact. In effect, Alabama is left without a remedy (other than hoping the federal government will act) to prevent illegal gaming on the State's sovereign territory.

Amici respectfully request that the district court's ruling be reversed so that the issues raised in this action can be fully addressed and resolved.

Respectfully submitted,

Bill Schuette
Attorney General

Aaron D. Lindstrom
Solicitor General
Co-Counsel of Record

/s/ Margaret A. Bettenhausen
Assistant Attorney General
Co-Counsel of Record
Attorneys for Amicus Curiae
Environment, Natural Resources, and
Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540
bettenhausenm@michigan.gov

Dated: July 14, 2014

ADDITIONAL COUNSEL

Thomas C. Horne
Attorney General
Arizona Office of the Attorney General
1275 West Washington Street
Phoenix, Arizona 85007-2926
Tel: (602) 542-5025
Counsel for the State of Arizona

Derek Schmidt
Attorney General of Kansas
Jeffrey A. Chanay
Deputy Attorney General
Memorial Building, 3rd Floor
120 SW Tenth Avenue
Topeka, Kansas 66612-1597
Tel: (785) 296-2215
Counsel for the State of Kansas

Marty J. Jackley
Attorney General
State of South Dakota
1303 E. Highway 14, Suite 1
Pierre, DS 57501-8501
Tel: (605) 773-3215
Counsel for the State of South Dakota

Sean D. Reyes
Utah Attorney General
Utah State Capitol Suite #230
P.O. Box 142320
Salt Lake City, Utah 84114-2320
Tel: (801) 538-9600
Counsel for the State of Utah

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains no more than 7,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). There are a total of 2,600 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14 point Times New Roman.

/s/ Margaret A. Bettenhausen
Assistant Attorney General
Co-Counsel of Record
Attorneys for Amicus Curiae
Environment, Natural Resources, and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540
bettenhausenm@michigan.gov

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the clerk of the Court using the CM/ECF system and service will be perfected via electronic mail upon the following counsel of record on this 14th day of July, 2014:

Robin G. Laurie
rlaurie@balch.com
Kelly F. pate
kpate@balch.com
Balch & Bingham LLP
Post Office Box 78
Montgomery, AL 36101-0078

Mark H. Reeves
mreeves@kilpatricktownsend.com
Kilpatrick Townsend & Stockton LLP
699 Broad Street, Suite 1400
Augusta, GA 30901-1453

Adam H. Charnes
acharnes@kilpatricktownsend.com
Kilpatrick Townsend & Stockton LLP
1001 West Fourth Street
Winston-Salem, NC 27101-2411

Andrew Lynn Brasher
abrasher@ago.state.al.us
Megan Arys Kirkpatrick
mkirkpatrick@ago.state.al.us
Henry Theodore Reagan II
sreagan@ago.state.al.us
Luther J. Strange III
docketroom@ago.state.al.us
Alabama Attorney General's Office
501 Washington Avenue
P.O. Box 300152
Montgomery, AL 36130-0152

David C. Smith
dcsmith@kilpatricktownsend.com
Kilpatrick Townsend & Stockton LLP
607 14th Street, Suite 900
Washington, DC 20005-2018

/s/ Margaret A. Bettenhausen
Assistant Attorney General
Co-Counsel of Record
Attorney for Amicus Curiae

LF: Alabama v PCI Gaming Authority USCOA AG#2013-0047086-B/Brief – Amici Curiae 2014-07-14