No. 12-515

In the Supreme Court of the United States

STATE OF MICHIGAN, PETITIONER

v.

BAY MILLS INDIAN COMMUNITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether a federal court has jurisdiction over a State's claim brought under 25 U.S.C. 2710(d)(7)(A)(ii) seeking to enjoin gaming by an Indian tribe, where the State alleges that the gaming is not located on "Indian lands" within the meaning of the Indian Gaming Regulatory Act, 25 U.S.C. 2703(4).

2. Whether Congress abrogated an Indian tribe's sovereign immunity with respect to a State's claim that the tribe is gaming illegally outside of Indian lands.

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INTEREST OF THE UNITED STATES

This case involves the interpretation of a section of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701-2721, that provides for suits in federal court by a State to enjoin a class III gaming activity located on Indian lands and conducted in violation of a Tribal-State compact that is in effect. 25 U.S.C. 2701(d)(7)(A)(ii). The case also involves the question whether Congress has abrogated tribal sovereign immunity with respect to a State's claim that a tribe is gaming illegally outside of Indian lands. The Secretary of the Interior has under IGRA the authority to approve or disapprove Tribal-State gaming compacts. 25 U.S.C. 2710(d)(8). The National Indian Gaming Commission (NIGC) also has substantial responsibilities under IGRA, including the approval of tribal

gaming ordinances and enforcement authority. 25 U.S.C. 2710(d)(1) and 2713. More generally, the United States has a substantial interest in the continued recognition of tribal sovereign immunity from suit, which furthers Congress's policy of encouraging tribal self-determination and economic development. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. a. In 1987, this Court held that California could not enforce its gaming laws against Indian tribes operating bingo and poker games on their reservations, when such games were not prohibited by state law. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 221. That decision left much Indian gaming unregulated by the States, but federal law did not provide "clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. 2701(3). In 1988, Congress enacted IGRA, 25 U.S.C. 2701-2721, "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1).

IGRA regulates gaming only on "Indian lands," which are defined as: "(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is 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 and over which an Indian tribe exercises governmental power." 25 U.S.C. 2703(4); 25 C.F.R. 502.12. Even on Indian lands as so defined, IGRA provides that gaming shall not be conducted "on lands acquired by the Secretary

[of the Interior] in trust for the benefit of an Indian tribe after October 17, 1988," unless the land satisfies a listed exception. 25 U.S.C. 2719(a). When gaming occurs outside of Indian lands, it is outside of IGRA's regulatory framework and is instead governed by state law.

IGRA divides gaming into three classes, each subject to different regulation. 25 U.S.C. 2703(6)-(8). Class III gaming, at issue here, includes banking card games, casino games, slot machines, horse racing, dog racing, jai alai, and lotteries. 25 U.S.C. 2703(8); 25 C.F.R. 502.4. Class III gaming must be: (1) authorized by a tribal ordinance that satisfies the requirements in 25 U.S.C. 2710(b) and is approved by the Chairman of the NIGC; (2) located in a State that permits such gaming; and (3) conducted in conformance with a compact between the Indian tribe and the State that is approved by the Department of the Interior (Interior). 25 U.S.C. 2710(d)(1).

b. The federal government may enforce federal gaming laws against Indian tribes. If a tribe engages in class III gaming on Indian lands in violation of IGRA or a tribal ordinance, the NIGC Chairman has the authority to assess civil penalties or issue a closure order. 25 C.F.R. 573.3; 25 U.S.C. 2713. In addition, IGRA makes state laws "pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto," applicable in "Indian country"[1] as federal law, and

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[1] "Indian country" includes all lands within the limits of any Indian reservation, all dependent Indian communities set aside by the federal government for the use of Indians as Indian lands, and all Indian allotments, whether held in trust or restricted fee. 18 U.S.C. 1151.

provides that the United States shall have exclusive jurisdiction over criminal prosecutions for violations of such laws "unless an Indian tribe pursuant to a Tribal-State compact * * * has consented to the transfer to the State of criminal jurisdiction." 18 U.S.C. 1166(a) and (d). Outside of Indian country, the United States may enforce against gambling conducted by Indian tribes the generally applicable federal criminal laws and related civil enforcement provisions governing gambling. See 18 U.S.C. 1955 ("Prohibition of illegal gambling businesses"); 15 U.S.C. 1172 ("Transportation of gambling devices").

The States also have authority to institute judicial proceedings regarding Indian gaming in certain circumstances. IGRA provides that a State may sue in federal district court "to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact * * * that is in effect." 25 U.S.C. 2710(d)(7)(A)(ii). IGRA further allows a Tribal-State compact to provide for the allocation to the State of criminal and civil enforcement authority with respect to class III gaming, 25 U.S.C. 2710(d)(3)(C)(i) and (ii); 18 U.S.C. 1166(d), as well as "remedies for breach of contract," 25 U.S.C. 2710(d)(3)(C)(v). And subject to the limitations of tribal sovereign immunity, the States have authority to enforce applicable state laws in state courts with respect to gambling that occurs outside of Indian country.

2. a. Respondent Bay Mills Indian Community is a federally recognized Indian tribe with a reservation located in Michigan's Upper Peninsula. 77 Fed. Reg. 47,868-47,869 (Aug. 10, 2012); Pet. App. 3a. On August 20, 1993, respondent entered into a Tribal-State

compact with petitioner State of Michigan pursuant to IGRA. 58 Fed. Reg. 63,262 (Nov. 30, 1993); Pet. App. 73a-96a. Shortly thereafter, the NIGC Chairman approved respondent's initial class III gaming ordinance. Tracking the language of IGRA, 25 U.S.C. 2719(a)(1) and (b)(1)(B), Section 5.5A of the ordinance provided that the proposed gaming activity would be located on, *inter alia*, "trust lands which [were] located within or contiguous to the boundaries of the Reservation on October 17, 1988." Bay Mills Indian Community, Mich., Ordinance to Regulate the Operation of Gaming by the Bay Mills Indian Community (1993 Ordinance), § 5.5(A) (Aug. 31, 1993), http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances/baymills/ordappr083193.pdf. Pursuant to the ordinance, respondent operates class III gaming facilities on its reservation. Pet. App. 4a.

b. In 1997, Congress passed the Michigan Indian Land Claims Settlement Act (MILCSA) to provide for the use of judgment funds of the Ottawa and Chippewa Indians of Michigan awarded by the Indian Claims Commission. Pub. L. No. 105-143, 111 Stat. 2652. Judgment funds were distributed under MILCSA to respondent and four other tribes. § 104, 111 Stat. 2653.

MILCSA directed respondent's Executive Council to establish a "Land Trust" and to deposit 20% of respondent's judgment funds into the Land Trust. § 107(a)(1), 111 Stat. 2658. The earnings from the Land Trust are to be used "exclusively for improvements on tribal land or the consolidation and enhancement of tribal landholdings through purchase or exchange." § 107(a)(3), 111 Stat. 2658. The Act di-

rects that lands acquired pursuant to this provision "shall be held as Indian lands are held." *Ibid.*

c. In August 2010, respondent used Land Trust earnings to purchase land for a gaming facility in the Village of Vanderbilt, Michigan (Vanderbilt Parcel), approximately 125 miles from respondent's reservation. Pet. App. 4a, 22a. Respondent commenced operation of a small gaming facility there on November 3, 2010. *Id.* at 4a.[2]

3. a. On December 21, 2010, petitioner filed a complaint for declaratory and injunctive relief in federal district court to enjoin respondent from operating a class III gaming facility on the Vanderbilt Parcel. J.A. 8-18. Counts I and II alleged that the Vanderbilt Parcel did not constitute "Indian lands" as defined by IGRA; that respondent had therefore violated Section 4(H) of the compact, which provides that "[t]he Tribe shall not conduct any Class III gaming outside of Indian lands"; and that respondent further violated Section 4(C) of the compact, which provides that "[a]ny violation of this Compact, tribal law, IGRA, or other applicable federal law shall be corrected immediately by the Tribe." J.A. 12-15 (emphasis omitted). Count III alleged that respondent violated IGRA by conducting gaming outside of Indian lands and that even if the Vanderbilt Parcel constituted "Indian lands," respondent violated 25 U.S.C. 2719 (and therefore the compact's requirement that gaming comply

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[2] On September 15, 2010, the NIGC Chairwoman approved an amendment to respondent's gaming ordinance (Pet. App. 101a-170a), which respondent submitted after withdrawing a proposed amendment that would have included a site-specific description of the Vanderbilt Parcel in Section 5.5A (J.A. 19-68). See U.S. Invitation Br. 4-6.

with federal law) by operating a gaming facility on land acquired after October 17, 1988 that does not satisfy any of that provision's listed exceptions. J.A. 15-17. Petitioner alleged federal jurisdiction under 25 U.S.C. 2710(d)(7)(A)(ii) and 28 U.S.C. 1331. J.A. 9, 13, 15, 17 (paras. 1(a), 26, 38, 46)).

b. On the same day petitioner filed its complaint, the Solicitor of the Interior issued a legal opinion concluding that the Vanderbilt Parcel is not restricted-fee land eligible for gaming under IGRA and that even if the parcel were held in restricted fee, respondent would still need to demonstrate that it exercised governmental power over the parcel for it to constitute Indian lands. J.A. 69-101; see 25 U.S.C. 2703(4)(B). The Associate General Counsel of the NIGC also issued an opinion, which deferred to the Solicitor's opinion and concluded that because the Vanderbilt Parcel is not Indian lands, the NIGC has no jurisdiction over it. J.A. 102-107. The NIGC accordingly referred the matter to the Governor and Attorney General of Michigan, and to the U.S. Attorney for the Eastern District of Michigan. J.A. 102; see 25 U.S.C. 2716(b); 25 C.F.R. 571.3.

c. The next day, the Little Traverse Bay Bands of Odawa Indians (Little Traverse), which operate a casino approximately 40 miles from the Vanderbilt Parcel, filed a similar complaint that alleged as an additional basis for jurisdiction 28 U.S.C. 1362, which confers jurisdiction over actions brought by Indian tribes arising under federal law. See 1:10-cv-1278 Docket entry No. 1, paras. 15-19, 21-24, 26-29 (W.D. Mich. Dec. 22, 2010). The cases were consolidated. Pet. App. 20a.

4. a. Little Traverse moved for a preliminary injunction, and petitioner filed a brief in support of that motion. Pet. App. 5a, 20a. The district court entered a preliminary injunction. *Id.* at 19a-39a.

Respondent argued that the district court lacked jurisdiction under Section 2710(d)(7)(A)(ii), which provides jurisdiction to "enjoin a class III gaming activity *located on Indian land* and conducted in violation of any Tribal-State compact," because Little Traverse's complaint alleged that the Vanderbilt Parcel was *not* Indian lands. Pet. App. 24a-25a. The district court did not address that issue, but held that it had jurisdiction under 28 U.S.C. 1331 and 1362 because "the complaint * * * requires [the court] to interpret MILCSA § 107(a)(3), obviously a federal law." Pet. App. 25a.

The district court then concluded that Little Traverse was likely to succeed on the merits because MILCSA did not authorize respondent to purchase the Vanderbilt Parcel. Pet. App. 27a-34a. The court further concluded that Little Traverse established that it would suffer irreparable competitive harm and that an injunction was in the public interest. *Id.* at 34a-38a.

b. Respondent appealed and moved for a stay of the injunction, which the district court denied. Br. in Opp. App. 1-11. In its stay motion, respondent argued that sovereign immunity barred the suits. The court acknowledged that neither 28 U.S.C. 1331 nor 28 U.S.C. 1362 clearly abrogated respondent's sovereign immunity. But it concluded that respondent's sovereign immunity was abrogated by 25 U.S.C. 2710(d)(7)(a)(ii), noting that a "majority of courts to consider the issue have found that the 'IGRA waived

tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions [is] at issue and where only declaratory or injunctive relief is sought.'" Br. in Opp. App. 6 (quoting *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379, 1385-1386 (10th Cir. 1997)).

c. On August 9, 2011, while respondent's appeal of the preliminary injunction was pending, petitioner amended its complaint to add three additional claims and to name as additional defendants respondent's Tribal Gaming Commission, the Commission's members in their official capacities, and the members of respondent's Executive Council in their official capacities. Pet. App. 55a-72a. Count IV alleged that the defendants violated federal common law by permitting and operating a casino that exceeds the scope of their authority. *Id.* at 67a-69a. Count V alleged a violation of Mich. Comp. Laws Ann. § 432.220 (West 2001) (failure to obtain a state license for the gaming facility) and sought forfeiture of respondent's gaming machines and the gross receipts from its gaming operation on the Vanderbilt Parcel. Pet. App. 69a-70a. Count VI alleged that operation of the Vanderbilt casino was a public nuisance under state law. *Id.* at 70a-71a.

5. a. The court of appeals vacated the preliminary injunction. Pet. App. 1a-18a. The court concluded that Section 2710(d)(7)(A)(ii) did not provide a basis for jurisdiction. The court explained that Section 2710(d)(7)(A)(ii) provides federal jurisdiction only where all of the following conditions are satisfied:

> (1) the plaintiff is a State or an Indian tribe; (2) the cause of action seeks to enjoin a class III gaming 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.

Id. at 7a. The court concluded that the third condition was not satisfied because the complaints alleged that the Vanderbilt Parcel is *not* Indian lands. *Ibid.*

The court of appeals also rejected petitioner's alternative claim that even if the Vanderbilt Parcel is Indian lands, gaming is prohibited by 25 U.S.C. 2719, which prohibits gaming on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, subject to listed exceptions. The court explained that "for the casino's operation to violate [Section] 2719—and for federal jurisdiction to exist as to this claim—the casino's operations must be conducted on lands * * * acquired by the Secretary." Pet. App. 10a. The complaints alleged, however, that the Vanderbilt Parcel was acquired by respondent itself, not the Secretary. *Ibid.*

b. The court of appeals next held that the district court had jurisdiction under 28 U.S.C. 1331 over the federal common law and state law claims against respondent alleged in Counts IV-VI of petitioner's amended complaint because each count presented a question of federal law—whether the Vanderbilt Parcel is "Indian lands" under IGRA. Pet. App. 10a-11a (citing *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005)). The court further held, however, that petitioner's claims against respondent are barred by tribal sovereign immunity. *Id.* at 11a-18a. The court explained that "for the same reasons that [Section] 2710(d)(7)(A)(ii) does not supply federal jurisdiction in this case," *i.e.*, because the complaints alleged that the Vanderbilt Parcel is not

Indian lands, "it does not abrogate [respondent's] immunity either." *Id.* at 13a.

The court of appeals remanded for the district court to address petitioner's Counts IV-VI against the additional defendants named in the amended complaint. Pet. App. 17a-18a. Little Traverse's complaint was dismissed with prejudice. Br. in Opp. 6. Although the preliminary injunction was lifted, the United States understands that respondent is not presently gaming on the Vanderbilt Parcel.

SUMMARY OF ARGUMENT

I. Section 2710(d)(7)(A)(ii) provides that federal district courts shall have jurisdiction over "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 * * * that is in effect." (emphasis added). The statute does not authorize a suit against a tribe to enjoin gaming that takes place off Indian lands.

A. Petitioner tries to bring Counts I-III of its amended complaint within the limited scope of Section 2710(d)(7)(A)(ii) by contending that tribal officials authorized and supervised gaming at the Vanderbilt Parcel while they were on respondent's reservation and that those actions constitute "class III gaming activities on Indian lands." Numerous provisions of IGRA demonstrate, however, that the term "class III gaming activities" refers to the games themselves.

B. Petitioner also invokes the district court's jurisdiction under 28 U.S.C. 1331. Petitioner's claims in Counts I-III, however, do not come within the cause of action contemplated by Section 2710(d)(7)(A)(ii). Furthermore, although IGRA authorizes a State and tribe to include other remedies for breach of contract

in their Tribal-State compacts, 25 U.S.C. 2710(d)(3)(C)(v), and pursuit of those remedies would presumably arise under federal law for purposes of 28 U.S.C. 1331, the compact between petitioner and respondent contains no provision agreeing to federal-court review of disputes arising under the compact. Nor does petitioner contend that IGRA confers an implied right of action by a State against a tribe to enforce IGRA or a compact outside the express provisions of 25 U.S.C. 2710(d)(7)(A)(ii) and (3)(C)(v).

II. A. Petitioner has in any event failed to establish that Congress has abrogated tribal sovereign immunity for any of its claims against respondent. Indian tribes are subject to suit only when Congress abrogates (or the tribe waives) sovereign immunity, and Congress must do so unequivocally.

Because petitioner alleges that the Vanderbilt Parcel is not Indian lands, Section 2710(d)(7)(A)(ii) does not abrogate sovereign immunity for petitioner's suit against respondent. Nor does 18 U.S.C. 1166 abrogate tribal immunity from injunctive suits brought by a State. Section 1166 gives the federal government—not the States—enforcement authority in Indian country for violations of assimilated state gambling laws. It does not allow a State to invoke the jurisdiction of the federal courts to enforce state gambling laws *outside* of Indian country, much less authorize it to sue the tribe itself. Petitioner's further contention that the Court should abandon the unequivocal statement rule for congressional abrogation of sovereign immunity is unfounded.

B. The Court should not create an exception to tribal sovereign immunity for off-reservation commercial activities. The Court's settled precedents recog-

nize that Indian tribes have immunity from suit, including suits for injunctive relief and for their commercial activities, regardless of where those activities take place. Congress, which has carefully balanced the interests of tribes and States and provided a comprehensive statutory foundation for gaming under IGRA, is better equipped to weigh and accommodate the competing policy and reliance concerns in this area. The Court should continue to defer to Congress to make the necessarily complex legislative judgments in this case.

III. There are various ways for the parties to obtain judicial resolution of their underlying dispute. The parties could agree to have a federal court determine the status of the Vanderbilt Parcel through mutual waivers of sovereign immunity. Alternatively, the tribe could pursue an action brought against state officers under *Ex parte Young*, 209 U.S. 123 (1908), or the State could seek injunctive relief against the individuals, including tribal officials, responsible for operating the gaming facility. Such claims in fact are already pending below.

Respondent could also request approval from the NIGC of a site-specific gaming ordinance describing the Vanderbilt Parcel. The NIGC then would decide whether the parcel is eligible for gaming and approve or deny the ordinance, and its decision would be subject to judicial review. Finally, petitioner retains its police powers outside of Indian country and can enforce its state gaming laws against the individuals involved in gaming on the Vanderbilt Parcel in its state courts. There is no need to diminish the important doctrine of tribal sovereign immunity to resolve the parties' dispute.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT COUNTS I-III IN PETITIONER'S COMPLAINT MUST BE DISMISSED

A. Petitioner's Claims Do Not Fall Within Section 2710(d)(7)(A)(ii)

1. Section 2710(d)(7)(A)(ii) provides that federal district courts shall have jurisdiction over "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 entered into under paragraph (3) that is in effect."

That provision covers a range of disputes that may arise between a State and a tribe under a gaming compact negotiated pursuant to Section 2710(d)(3)(C). But it does not cover all disputes between a State and tribe related to gaming. Section 2710(d)(7)(A)(ii) does not authorize a suit to enjoin a tribe that undertakes gaming without a Tribal-State compact. Nor could a State sue under that provision to enjoin a class I or class II gaming activity. Similarly, the plain text of the statute does not authorize a suit against a tribe to enjoin gaming that takes place outside of "Indian lands." That limitation reflects the fact that IGRA, including its compacting provisions, was enacted to provide "clear standards [and] regulations for the conduct of gaming *on Indian lands*," 25 U.S.C. 2701(3) (emphasis added), and does not regulate gaming outside of Indian lands. Any such gaming is instead subject to state law, see *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95, 113 (2005), just as it was prior to IGRA's enactment, and to generally applicable federal laws such as 18 U.S.C. 1955.

2. Petitioner does not challenge the court of appeals' conclusion that its request for an injunction barring operation of the Vanderbilt facility is not within the scope of Section 2710(d)(7)(A)(ii) because petitioner alleges that the facility is not on "Indian lands." In a belated effort to come within Section 2710(d)(7)(A)(ii), however, petitioner contends (Br. 20-22) that its amended complaint (filed while respondent's appeal of the preliminary injunction was pending) alleges that respondent, through its Executive Council and Tribal Gaming Commission, "authorized, licensed, and operated" the Vanderbilt casino from within its reservation, which is Indian lands. Petitioner contends that those actions are "class III gaming activit[ies] located on Indian lands" that can be enjoined under Section 2710(d)(7)(A)(ii). The provision cannot bear petitioner's interpretation.

Numerous provisions of IGRA demonstrate that the term "class III gaming activity" in Section 2710(d)(7)(A)(ii) refers to the games themselves. For example, Section 2706(a)(5) gives the NIGC authority "to make permanent a temporary order of the Chairman closing a gaming activity," *i.e.*, a temporary order to close "an Indian game" due to substantial violations of IGRA, see 25 U.S.C. 2713(b)(1). Furthermore, Section 2710(b)(4)(A) gives a tribe authority to license and regulate "class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands." And in discussing class III gaming, Section 2710(d)(9) provides that "[a]n Indian tribe may enter into a management contract for the operation of a class III gaming activity." More generally IGRA's regulations and prohibitions are directed to actual gaming activity conducted on Indian lands,

see, *e.g.*, 25 U.S.C. 2701(3); 2702(3), and 2710(d)(1), irrespective of the location of the tribal officials who may authorize or direct it. The authorization or supervision of gaming on the Vanderbilt Parcel by tribal officials while they are on respondent's reservation is not itself "a class III gaming activity located on Indian lands" that may be enjoined under Section 2710(d)(7)(A)(ii).

B. Even If There Is Jurisdiction Over Counts I-III Under 28 U.S.C. 1331, The Claims Were Properly Dismissed

1. Petitioner contends (Br. 22-25) that even if the "Indian lands" requirement of Section 2710(d)(7)(A)(ii) is not satisfied, the district court nevertheless had jurisdiction over Counts I-III under 28 U.S.C. 1331.[3] Petitioner is correct that Section 2710(d)(7)(A)(ii) does not eliminate jurisdiction that federal courts may have under other federal statutes, such as 28 U.S.C. 1331. See, *e.g.*, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 90 (1998); *Verizon Md. Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 643-644 (2002). Indeed, for Counts IV-VI in petitioner's amended complaint, which were not brought under

[3] Petitioner properly does not challenge the court of appeals' dismissal of Count III insofar as it alleged that even if the Vanderbilt Parcel is Indian lands, respondent violated 25 U.S.C. 2719 by operating a gaming facility on land acquired after October 17, 1988, that does not satisfy a listed exception. J.A. 15-17. Section 2719 prohibits gaming on land "acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988," but the complaint alleges that the Vanderbilt Parcel was acquired by respondent itself, not by the Secretary, and the land is not held in trust. Pet. App. 10a; Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354, 29,355, 29,357 (May 20, 2008) (Interior's interpretation that Section 2719's prohibition applies only to trust, not to restricted-fee, Indian lands).

Section 2710(d)(7)(A)(ii), the court evaluated whether there was jurisdiction under 28 U.S.C. 1331 and concluded that there was. Pet. App. 10a-11a. The court's conclusion that Section 2710(d)(7)(A)(ii) did not provide a basis for Counts I-III turned on the specific pleading requirements of a claim brought under that provision.[4]

2. Beyond the injunctive suit provided for in Section 2710(d)(7)(A)(ii), IGRA authorizes a State and tribe to include in their compact other "remedies for breach of contract." 25 U.S.C. 2710(d)(3)(C)(v). A suit seeking such further remedies for breach of the compact presumably would arise under federal law for purposes of 28 U.S.C. 1331, at least insofar as it concerned activities on Indian lands and therefore within the scope of IGRA. Congress has thus "invite[d] the tribe and State to waive their respective immunities and consent to suit in federal court." *Cabazon Band of Mission Indians* v. *Wilson*, 124 F.3d 1050 (9th Cir. 1997), cert. denied, 524 U.S. 926 (1998). That is why the court in *Cabazon Band*, on which petitioner relies (Br. 23-24), could resolve a suit by four Indian tribes against California for monetary relief—recovery of licensing fees that the State had agreed in its compacts to pay over to the tribes. *Id.* at 1053-1054. Those parties had agreed in their compacts that

[4] Although the court of appeals determined that the defects in petitioner's Section 2710(d)(7)(A)(ii) claims were jurisdictional, the court appears to have interpreted that provision both as conferring a cause of action for violation of the compact and granting federal jurisdiction over that cause of action. Pet. App. 7a (plaintiffs' claims "arise under 25 U.S.C. § 2710(d)(7)(A)(ii)"). The decision therefore may be understood as also holding that petitioner failed to state a claim for purposes of Section 2710(d)(7)(A)(ii) because the elements of such a claim were not properly alleged.

"[j]udicial review of any action taken by either party under this Compact, or seeking an interpretation of this Compact, shall be had solely in the appropriate [federal] District Court." *Id.* at 1057.

The compact between petitioner and respondent, in contrast, contains no provision agreeing to federal court review of disputes arising under the compact or waiving sovereign immunity with respect to such disputes. The compact sets forth an arbitration procedure that the parties may invoke for breach-of-compact claims, states that the procedure does not limit "any remedy which is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Compact," and declares that nothing in the compact waives either party's sovereign immunity. Pet. App. 89a-90a. Thus, although petitioner and respondent could have invoked 25 U.S.C. 2710(d)(3)(C)(v) to include in their compact additional remedial provisions that could trigger federal-court proceedings beyond those authorized by 25 U.S.C. 2710(d)(7)(A)(ii), they have not done so.[5] Nor does

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[5] Petitioner also relies (Br. 24) on the Tenth Circuit's decisions in *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379 (1997), and *Pueblo of Santa Ana* v. *Kelly*, 104 F.3d 1546, cert. denied, 522 U.S. 807 (1997). In *Pueblo of Santa Ana*, the tribes sued the United States for a declaration that their compacts with New Mexico, approved by the Secretary, were in effect under federal law notwithstanding the state supreme court's holding that the Governor lacked authority to enter the compacts. The tribe was not suing to enjoin gaming, and the court of appeals did not address the scope of Section 2710(d)(7)(A)(ii). In *Mescalero*, the court concluded that it had jurisdiction over the State's counterclaim, brought under Section 2710(d)(7)(A)(ii), seeking to enjoin the tribe's gaming on the ground that, under *Pueblo of Santa Ana*, the compact was invalid. 131 F.3d at 1381. The court read IGRA

petitioner contend that IGRA confers an implied private right of action by a State against a tribe to enforce a compact or IGRA itself outside the express provisions of 25 U.S.C. 2710(d)(7)(A)(ii) and (3)(C)(v).

Petitioner's claims were thus properly dismissed irrespective of whether jurisdiction over those claims could be based on 28 U.S.C. 1331.

II. PETITIONER'S CLAIMS AGAINST RESPONDENT ARE BARRED BY TRIBAL SOVEREIGN IMMUNITY

In any event, all of petitioner's claims against respondent, which fall outside the scope of Section 2710(d)(7)(A)(ii), are barred by tribal sovereign immunity.

This Court has long recognized that an Indian tribe is subject to suit only when Congress has authorized the suit and thus abrogated the tribe's sovereign immunity, or when the tribe has waived its immunity. *Kiowa Tribe* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998); *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 268 (1997); *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 782 (1991); *Oklahoma Tax Comm'n* v. *Citizens Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Three Affiliated Tribes* v. *Wold Eng'g*, 476 U.S. 877, 890-891 (1986); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978); *Puyallup Tribe, Inc.* v. *Department of Game*, 433 U.S. 165, 172-173 (1977); *United States* v. *United States Fid. & Guar. Co.*, 309

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to have abrogated tribal sovereign immunity where compliance with IGRA is at issue and only injunctive or declaratory relief is sought. *Id.* at 1386. The court did not address the text of Section 2710(d)(7)(A)(ii) that limits suits to violations of a compact that is "in effect," or provide any further analysis. We do not believe the State's counterclaim in *Mescalero* fell within the scope of Section 2710(d)(7)(A)(ii).

U.S. 506, 512-513 (1940). The Court has also long required Congress to "unequivocally" express its purpose to abrogate tribal sovereign immunity. See, *e.g.*, *Santa Clara Pueblo*, 436 U.S. at 58; accord *C & L Enters.* v. *Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001). Petitioner has failed to identify any statute that abrogates sovereign immunity for its claims against respondent, and petitioner's arguments that this Court should abrogate tribal sovereign immunity should be rejected.

A. IGRA Does Not Abrogate Respondent's Sovereign Immunity With Respect To Petitioner's Claims

1. As the court of appeals correctly concluded, Section 2710(d)(7)(A)(ii) does not abrogate tribal sovereign immunity for petitioner's claims because petitioner alleges that the Vanderbilt Parcel is *not* Indian lands. Pet. App. 13a; *Florida* v. *Seminole Tribe*, 181 F.3d 1237, 1242 (11th Cir. 1999) (IGRA abrogates tribal sovereign immunity only in the "narrow circumstance[s]" specified in the statute).

Recognizing that Section 2710(d)(7)(A)(ii) does not contain the requisite abrogation, petitioner contends (Br. 25-28) that 18 U.S.C. 1166(a), which was enacted in Section 23 of IGRA, 102 Stat. 2487, and assimilates state gambling laws into federal law in Indian country, reflects an assumption on the part of Congress that the States already had authority to invoke the jurisdiction of federal courts to enforce state gambling laws directly against an Indian tribe for violations outside of Indian country. That argument is wrong in several respects.

First, petitioner's argument is based on the flawed assumption that Section 1166 authorizes a State to bring an injunctive action against an Indian tribe

itself for violations of state gambling laws even in Indian country. It does not. Section 1166 assimilates into federal law in Indian country state laws concerning the licensing, regulation, and prohibition of gambling "including but not limited to criminal sanctions applicable thereto." 18 U.S.C. 1166(a). Section 1166(d) provides that the United States has "exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact * * * has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe." Although Section 1166(d) does not expressly address the enforcement of civil enforcement provisions provided under state law, that authority also falls exclusively to the United States absent a tribe's consent to State jurisdiction in a Tribal-State compact.

Primary jurisdiction over Indian country rests with the United States absent an Act of Congress affirmatively conferring jurisdiction on the State. See *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998); *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (There is "a deeply rooted policy in our Nation's history of 'leaving Indians free from state jurisdiction and control.'") (internal quotation marks and citation omitted). Section 1166 contains no language affirmatively conferring civil enforcement authority on a State even as against individuals, much less the requisite clear expression of congressional intent to abrogate tribal sovereign immunity and permit a State to enforce state gaming laws against the tribe itself. "Nowhere does [Section

1166] indicate that the State may, on its own or on behalf of the federal government, seek to impose criminal or other sanctions" against an Indian tribe for conduct that violates state gambling laws in Indian country without the tribe's consent. *United Keetoowah Band of Cherokee Indians* v. *Oklahoma*, 927 F.2d 1170, 1177 (10th Cir. 1991). The Michigan Supreme Court agrees. See *Taxpayers of Mich. Against Casinos* v. *State*, 685 N.W.2d 221, 229 (2004) ("[The] federalization of state law regulating gambling does not give a state enforcement power over violations of state gambling laws on tribal lands because the power to enforce the incorporated laws rests solely with the United States.") (internal quotation marks and citation omitted), cert. denied, 543 U.S. 1146 (2005).

The legislative history of Section 1166 confirms that Congress did not intend for the States to have civil enforcement authority in Indian country except to the extent specifically agreed to in Tribal-State compacts. See S. Rep. No. 446, 100th Cong., 2d Sess. 5-6 (1988) (recognizing that tribal governments retain sovereign rights and stating that "[c]onsistent with these principles, * * * unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities").

Furthermore, even if Section 1166 did give the States authority to enforce state laws in federal court for violations that take place *in* Indian country (which it did not), that would not reflect an assumption on the part of Congress that the States already could invoke the jurisdiction of the federal courts to enforce state gambling laws *outside* of Indian country. Congress

has never authorized suits by the States against Indian tribes in federal court for violations of state gambling (or other) laws outside of Indian country, and it does not appear that any such suit would, without more, arise under federal law for purposes of 28 U.S.C. 1331. Rather, the obvious background assumption is that the States would invoke the jurisdiction of their own courts to address such violations, through civil or criminal proceedings under state law against the responsible individuals or corporations.

2. Petitioner further contends (Br. 30-36) that if the provisions of IGRA it has identified are insufficient to show an unequivocal expression of congressional intent to abrogate tribal sovereign immunity for injunctive suits directly against a tribe for illegal gaming outside of Indian country, then the Court should abandon the rule articulated in *Santa Clara Pueblo*, 436 U.S. at 58, that such an abrogation must be unequivocally expressed. Petitioner contends (Br. 31-32) that because the States' sovereign immunity is grounded in the Constitution and the United States' sovereign immunity is grounded in separation of powers, those forms of immunity warrant a clear statement rule while tribal sovereign immunity does not. That argument should be rejected.

The immunity afforded Indian tribes under federal law is a central attribute of the "self-governing political communities that were formed long before Europeans first settled in North America." *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). From the beginning of European settlement, Indian tribes were commonly recognized as separate "states" or "nations." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831);

Worcester v. *Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). That inherent sovereignty is reflected in the Constitution, which gives the federal government "exclusive authority over relations with Indian tribes." *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985); see Art. I, § 10, Cl. 1; Art. II, § 2, Cl. 2 (power to make treaties); Art. I, § 8, Cl. 3 (power to regulate commerce with Indian tribes).

It is "inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent." The Federalist No. 81, at 548 (Alexander Hamilton) (Jacob Ernest Cooke ed. 1961) (emphasis omitted). As this Court has recognized, "a weaker power does not surrender * * * its right to self government, by associating with a stronger, and taking its protection." *Worcester*, 31 U.S. at 561. The tribes thus did not lose their inherent sovereignty, including their immunity from suit, when they were brought under the dominant sovereignty and protection of the United States. *Ibid.*; *Cohen's Handbook of Federal Indian Law* § 4.01, at 208 (2005).

Because the sovereignty of Indian tribes is subject to the control of the United States, Congress is "at liberty to dispense with * * * tribal immunity or to limit it." *Potawatomi*, 498 U.S. at 510. That is no reason, however, to require anything less than an unequivocal statement that Congress has done so. Petitioner presents no compelling reason to depart from this Court's longstanding precedent in that regard, which has furnished a background rule against which Congress has enacted many laws.[6]

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[6] Petitioner contends (Br. 33-35) that tribal sovereign immunity should be evaluated similar to foreign sovereign immunity, which petitioner contends is not subject to a clear statement rule for

Petitioner contends (Br. 35) that the courts of appeals have effectively abandoned the unequivocal statement rule and instead have found that Congress abrogated tribal sovereign immunity "whenever IGRA or compact compliance is at issue." See also Alabama *et. al* Amicus Br. (States' Amicus Br.) 19-24. The cases petitioner cites do not support that contention.

In *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379 (1997), the Tenth Circuit stated that "IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought." *Id.* at 1385. But as the court of appeals pointed out and as petitioner conceded below, "*Mescalero* offers virtually no analysis in support" of its reading of Section 2710(d)(7)(A)(ii); and to the extent it did, the Tenth Circuit relied on cases addressing whether a tribe had *waived* its immunity by engaging in gaming under IGRA, not whether Congress had *abrogated* tribal sovereign immunity by the

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abrogation. Petitioner cites *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), but the Court in *Altmann* made clear that it was discussing the standard for determining whether a statute is retroactive, not whether sovereign immunity is abrogated. See *id.* at 686-687 ("The District Court * * * conclud[ed] both that the [Foreign Sovereign Immunities Act (FSIA)] applies retroactively to pre-1976 actions and that the Act's expropriation exception extends to respondent's specific claims. Only the former conclusion concerns us here."). In *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607 (1992), the Court looked to prior case law to interpret the term "commercial" in the FSIA in conjunction with the "restrictive" theory of foreign sovereign immunity. That is because the FSIA "was not written on a clean slate" but codified pre-existing principles adopted by the Executive. *Id.* at 612-613. Here, there is no such underlying abrogation of sovereign immunity by the political Branches.

terms of IGRA. Pet. App. 13a. The Ninth Circuit's statement in *Lewis* v. *Norton*, 424 F.3d 959 (2005), that "IGRA waives tribal sovereign immunity in the narrow category of cases where compliance with IGRA is at issue," was not a holding but a description of IGRA used to refute the plaintiffs' contention that IGRA contains "a broad waiver of sovereign immunity covering an intra-tribal membership dispute whenever gaming revenues are at stake." *Id.* at 962-963.

The Seventh Circuit in *Wisconsin* v. *Ho-Chunk Nation*, 512 F.3d 921, 933, cert. dismissed, 554 U.S. 944 (2008), *followed* the unequivocal statement rule and concluded that Section 2710(d)(7)(A)(ii) abrogates tribal sovereign immunity only for Tribal-State compact disputes that fall within the ambit of Section 2710(d)(3)(C)(i)-(iv). The court thus concluded that a tribe's immunity was not abrogated with respect to a State's claim that the tribe violated a revenue-sharing provision of the parties' compact because that is not a subject expressly authorized to be negotiated under IGRA. 512 F.3d at 934. And in *Seminole Tribe*, the Eleventh Circuit rejected the notion that Section 2710(d)(7)(A)(ii) "evinces a broad congressional intent to abrogate tribal immunity from any state suit that seeks declaratory or injunctive relief for an alleged tribal violation of IGRA." 181 F.3d at 1242.

In any event, this case would be an unsuitable vehicle for considering whether some expression of congressional intent short of an unequivocal abrogation could ever suffice, because there is *no* indication in any of the provisions of IGRA petitioner identifies that Congress abrogated tribal sovereign immunity for suits against an Indian tribe itself for gaming that

takes place outside of Indian lands. IGRA does not address such gaming at all.

B. There Is No Basis For This Court To Create An Exception To Tribal Sovereign Immunity For Off-Reservation Commercial Activities

Petitioner contends (Br. 36-41) that the Court should itself create an exception to tribal sovereign immunity for off-reservation commercial activities of an Indian tribe. This Court has consistently deferred to Congress on whether to abrogate tribal sovereign immunity in appropriate circumstances, and it should not depart from that course here.

1. To begin with, petitioner is wrong to suggest (Br. 36-37) that the Court's decisions are ambiguous regarding whether tribal sovereign immunity extends to off-reservation conduct or to commercial activities. The Court explained in *Kiowa* that it had previously "sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred," 523 U.S. 754, and the Court held in that case that tribes "enjoy immunity from suits on contracts, * * * whether they were made on or off a reservation," *id.* at 760. Similarly, in *Puyallup Tribe*, the courts of Washington had concluded that they had jurisdiction to enforce state laws against an Indian tribe for fishing activities "both on and off its reservation." 433 U.S. at 167. This Court concluded, however, that the fishing regulations at issue could not be enforced in a suit against the tribe itself—for activities both on and off the tribe's reservation. *Id.* at 171-173. The Court has thus recognized that although a State "may have authority to tax or regulate tribal activities occurring within the State but outside Indian country," a tribe nevertheless has immunity from

an enforcement suit. *Kiowa*, 523 U.S. at 755; *ibid.* ("There is a difference between the right to demand compliance with state laws and the means available to enforce them."); cf. *Potawatomi*, 498 U.S. at 514 ("sovereign immunity [can] bar[] the State from pursuing the most efficient remedy").

Furthermore, many of the Court's decisions upholding tribal sovereign immunity have involved commercial activity, including activity that was not contractual in nature. See *Potawatomi*, 498 U.S. at 507 (taxation of cigarette sales); *Puyallup Tribe*, 433 U.S. at 168 (fishing); *United States Fid. & Guar.*, 309 U.S. at 509 (coal mining). The Court's decisions also refute amici's contention (States' Amici Br. 5-11) that tribal sovereign immunity does not extend to suits for injunctive relief. See *Puyallup Tribe*, 433 U.S. at 167 (upholding tribal sovereign immunity to "a temporary restraining order enjoining [the tribe and other defendants] from netting fish in the Puyallup River"). Respondent's immunity from a suit for injunctive relief based on gaming outside of Indian lands is thus established under this Court's precedents.

2. The Court should reject petitioner's invitation to depart from those well-established principles of tribal sovereign immunity. The Constitution vests the power to abrogate or diminish Indian tribes' sovereignty in the political Branches of the national government. See, *e.g.*, *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974) ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself."); *United States* v. *Lara*, 541 U.S. 193, 200-207 (2004). Tribal sovereignty thus retains its full vitality except to the extent that it has been divested through the national

political process. See *Washington* v. *Confederated Tribes*, 447 U.S. 134, 153-154 (1980); *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978).

This Court consistently has adhered to that rule. See, *e.g.*, *Kiowa*, 523 U.S. at 754; *Potawatomi*, 498 U.S. at 510 (describing Congress's primary role in defining tribal sovereign immunity). In *Kiowa*, the Court acknowledged petitioner's and amici's concerns (Pet. Br. 38; States' Amicus Br. 11-16) that there may be good reason to modify or abrogate sovereign immunity for a tribe's commercial activities, given the tribes' expanding participation "in the Nation's commerce." 523 U.S. at 758.[7] The Court nevertheless rejected the respondent's request that the Court "confine [tribal sovereign immunity] to reservations or to noncommercial activities." *Ibid.* As the Court explained, "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests," and "[t]he capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by [the Court] in this area." *Id.* at 759. Indeed, the Court has recognized that Congress' consistent "approval of the immunity doctrine * * * reflect[s] Congress' desire to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency

[7] Tribal gaming under IGRA is not just ordinary commercial activity. IGRA was enacted to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. 2702(1), and IGRA requires that tribal gaming revenues be used only to fund tribal government operations and programs, for the general welfare of the tribe, to promote tribal economic development, and for charitable and local purposes. 25 U.S.C. 2710(b)(2)(B).

and economic development.'" *Potawatomi*, 498 U.S. at 510 (citation omitted).

Petitioner suggests (Br. 39) that it would be appropriate for the Court to displace Congress's traditional primacy in this area because "[o]btaining agreement of both bodies of Congress and the President on new legislation" is becoming increasingly difficult. But Congress has continued to exercise its preeminent authority over tribal sovereign immunity since *Kiowa*. Congress expressly preserved immunity in the Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111-154, § 2(e), 124 Stat. 1101; and the No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1043, 115 Stat. 2076. Congress abrogated sovereign immunity in the Arizona Water Settlements Act, Pub. L. No. 108-451, §§ 213(a)(2), 301, 118 Stat. 3531, 3551, and the Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. No. 108-34, § 8(a)(1), 117 Stat. 795. Congress has required tribes to waive immunity in order to exercise regulatory authority under the Surface Mining Control and Reclamation Act Amendments of 2006, Pub. L. No. 109-432, § 209(a), 120 Stat. 3019. And it has required tribes to either disclose or waive sovereign immunity in certain contracts in the Indian Tribal Economic Development and Contract Encouragement Act of 2000, Pub. L. No. 106-179, § 2, 114 Stat. 46-47.

Furthermore, while *Kiowa* was pending, Congress considered, but ultimately declined to enact broad waivers of tribal immunity parallel to the Tucker Act and the Federal Tort Claims Act. See American Indian Equal Justice Act, S. 1691, 105th Cong., 2d Sess. (1998); see also *Sovereign Immunity: Hearing before the S. Comm. On Indian Affairs*, 105th Cong., 2d

Sess. Pts. 1-3 (1998); S. Rep. No. 150, 106th Cong. 1st Sess. 11 (1999). The decision of Congress not to enact such legislation weighs heavily *against* petitioner's suggestion that the Court should take it upon itself to carve out exceptions to tribal sovereign immunity for commercial activities or off-reservation conduct. Doing so would upset the reliance interests of Congress, which has legislated against this Court's longstanding background principles, and of the tribes, that have structured their affairs accordingly.

III. THERE ARE ALTERNATIVE WAYS TO ADJUDICATE THE STATUS OF THE VANDERBILT PARCEL

The underlying dispute between the parties turns on whether the Vanderbilt Parcel constitutes restricted-fee lands and thus "Indian lands" within the meaning of 25 U.S.C. 2703(4). For the reasons described above, that question cannot be resolved in an injunctive action brought directly against the tribe itself, whether under 25 U.S.C. 2710(d)(7)(A)(ii) or otherwise. That does not mean there is no way to resolve the parties' dispute, or that petitioner is left with no way to address gambling conducted by Indian tribes outside of Indian lands and in violation of state law.

The parties could agree to have a federal court determine the status of the land in an action for declaratory or injunctive relief, after agreeing to any necessary waivers of sovereign immunity. Even without such a waiver, injunctive or declaratory relief may also be available against the officers of either party. In that respect, Counts IV-VI in petitioner's amended complaint, raising claims under federal common law and state law, remain pending in the district court against respondent's Tribal Gaming Commission, the Commission's members, and the members of respond-

ent's Executive Council. Pet. App. 17a-18a. Those defendants have asserted in motions to dismiss that sovereign immunity bars petitioner's claims against them. Docket entry No. 171, at 15-16; *id.* No. 174, at 16-21. But the courts below have not passed on that question, and this Court has not held (nor is it the position of the United States) that tribal sovereign immunity would bar an action for injunctive relief against the responsible individuals, including tribal officials, see *Santa Clara Pueblo*, 436 U.S. at 59; *Department of Taxation & Fin.* v. *Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 72 (1994), at least for conduct outside of Indian country.[8] Petitioner is of the view that it would be less respectful to proceed against individual tribal officers. See Pet. Br. 15. Petitioner's desire to avoid acrimony is commendable. But it would stand principles of sovereign immunity on their head to dispense with the immunity of the sovereign itself in order to avoid pursuing available remedies against its officers or other individuals.

Conversely, while respondent's appeal of the preliminary injunction was pending, respondent brought a separate action for declaratory relief against the Governor of Michigan, seeking to adjudicate whether the Vanderbilt Parcel constitutes "Indian lands" under IGRA. Br. in Opp. App. 12-19. That case and this case are before the same district judge. The Governor

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[8] Sovereign immunity could pose an obstacle to proceeding against tribal officials under Count V, which seeks forfeiture of the tribe's gaming machines and the tribe's gross receipts from its gaming operations on the Vanderbilt Parcel. Pet. App. 69a-70a. Relief on that count would run against money in the tribal treasury and other tribal property. Cf. *Edelman* v. *Jordan*, 415 U.S. 651, 666 (1974).

has asserted Eleventh Amendment immunity as a defense. No. 1:11-cv-00729-PLM Docket entry No. 7, at 6 (W.D. Mich. Sept. 30, 2011). The district court may conclude, however, that respondent has properly pleaded claims under the theory of *Ex parte Young*, 209 U.S. 123 (1908), because respondent seeks in that suit to prevent the Governor from enforcing against respondent state laws that respondent alleges are preempted by IGRA's authorization of gaming on Indian lands, which (respondent alleges) include the Vanderbilt Parcel. See, *e.g.*, *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 367 (2008).

Alternatively, respondent could request approval from the NIGC of a site-specific gaming ordinance describing the Vanderbilt Parcel. The NIGC Chairman would decide whether the parcel is eligible for gaming and approve or disapprove the ordinance accordingly. Depending on the outcome, either petitioner or respondent could seek administrative or judicial review of the NIGC's decision. See 25 U.S.C. 2714; 5 U.S.C. 701 *et seq.*; 25 C.F.R. 522.7; 25 C.F.R. Pt. 580; 25 C.F.R. 580.10.

Petitioner could also seek to enforce applicable state laws in state court against the individuals directly involved in gaming on the Vanderbilt Parcel, presenting to the state court its argument that the parcel is outside Indian country and that state law therefore applies to the conduct of the tribal or non-Indian defendants. See, *e.g.*, *Hagen* v. *Utah*, 510 U.S. 399, 401-402 (1994). Michigan law provides for criminal sanctions against those who maintain gaming rooms, Mich. Comp. Laws Ann. § 750.303(1) (West 2004); civil and criminal penalties against those who conduct gambling operations without a license, *id.* §§ 432.218-432.220

(West 2001); and injunctive relief against use of a building for gambling, *id.* § 600.3801 (West Supp. 2013). Although the tribe itself would remain immune from suit brought under those provisions, see *Puyallup Tribe*, 433 U.S. at 172-173, individual tribal officers or members (and of course non-members) would not be protected by sovereign immunity. See *id.* at 171; *Michigan United Conservations Clubs* v. *Anthony*, 280 N.W.2d 883, 889 (Mich. Ct. App. 1979) (tribal sovereign immunity does not extend to individual members for off-reservation activities).[9]

There are thus various ways for the parties' dispute to be resolved without resorting to drastic alterations of this Court's settled precedent holding that tribal sovereign immunity extends outside of Indian country and to commercial activities, absent waiver or congressional abrogation.

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[9] Petitioner also has available a dispute resolution provision that the parties negotiated in their Tribal-State compact. Pet. App. 89a-90a.

CONCLUSION

The court of appeals decision should be affirmed.

Respectfully submitted.

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