No. 12-515

IN THE

Supreme Court of the United States

STATE OF MICHIGAN,

Petitioner,

v.

BAY MILLS INDIAN COMMUNITY,

Respondent.

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

BRIEF FOR SCHOLARS OF AMERICAN INDIAN LAW AS *AMICI CURIAE* ON TRIBAL SOVEREIGN IMMUNITY IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici curiae are experienced teachers and scholars of American Indian law. Professor Charles Wilkinson is Distinguished Professor and Moses Lasky Professor of Law at the University of Colorado Law School. Professor Alexander Tallchief Skibine is S.J. Quinney Professor of Law at the S.J. Quinney College of Law at the University of Utah. Professor Richard B. Collins and Professor Sarah A. Krakoff are Professors of Law at the University of Colorado Law School. *Amici* offer this brief to clarify the doctrine of tribal sovereign immunity as it applies to this case.[1]

SUMMARY OF ARGUMENT

The Questions Presented ask only whether the District Court can decide whether Bay Mills' Vanderbilt gaming facility is located on "Indian lands," as that term appears in the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1), and can enjoin the facility if it is illegal. The established rules of this Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), make it clear that had Michigan simply sued relevant tribal officials, the District Court could have addressed the merits of those questions. Instead, in an apparent attempt to get this Court to restrict tribal immunity in a case where that is not properly at issue, Michigan sued only the Bay Mills tribe by name, which *Santa Clara* held it cannot do.

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[1] No counsel for a party authored this brief in whole or in part, and no party or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. The parties' written consents are on file with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

Michigan's amended complaint names tribal officials, so that the Questions Presented can be fully addressed by simply remanding to the District Court to proceed against them under *Santa Clara*. However, Michigan's amended complaint also adds a claim for damages against Bay Mills. If the Court elects to decide whether that claim is valid, it should be rejected. Federal courts have consistently upheld the policy of tribal immunity from the earliest relevant decisions in the nineteenth century. To modify immunity retroactively in this case would be manifestly unfair to Bay Mills. Moreover, modern policy concerns about the doctrine are currently being addressed by tribes and Congress and are not presented by the facts of this case.

ARGUMENT

I. THE DISTRICT COURT'S JURISDICTION IS LIMITED TO THE ESTABLISHED REMEDY OF PROSPECTIVE RELIEF AGAINST TRIBAL OFFICERS.

Michigan's compact with the Bay Mills Indian Community provides for arbitration of disputes, and several briefs in this Court argue that remedy is exclusive. Other briefs argue that the Indian Gaming Regulatory Act ("IGRA") provides exclusive remedies, as this Court held in a different context in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). In the alternative, the State has an established federal remedy against tribal officers and no basis for suit against the Bay Mills Indian Community.

The Court of Appeals decided that the question whether Bay Mills' Vanderbilt land is "Indian lands" as that term is used in IGRA, 25 U.S.C. § 2710(d)(1), arises under federal law so that 28 U.S.C.

§ 1331 provides federal district court jurisdiction. 695 F.3d 406, 413. That court also held that the claim against the tribe is barred by the tribe's governmental immunity from suit. *Id.* at 413–16. The court did not address the question whether prospective relief can be obtained against an appropriate executive officer of the Bay Mills tribe, although it remanded to allow such a claim to be made. *Id.* at 416–17. As explained below, such relief can be granted based on this Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), and that is the State's only remedy.

Michigan claims that the District Court had subject matter jurisdiction under IGRA's jurisdictional provision, 25 U.S.C. § 2710(d)(7)(A)(ii), which grants federal district courts jurisdiction over claims "to enjoin a class III gaming activity . . . conducted in violation of any Tribal-State compact . . . that is in effect." Pet'r Br. 20–21. The State further claims that this statute implicitly abrogates tribal immunity from suit. *Id.* at 30. Relying on the latter claim, the State's initial complaint named only the Bay Mills Indian Community as a party defendant. 695 F.3d at 410. While the State's interlocutory appeal was pending in the Court of Appeals, the State moved to amend its complaint to seek relief against tribal officials, and the District Court granted the motion. *See id.* at 416; J.A. 120.

Lower courts have differed in their interpretations of § 2710(d)(7)(A)(ii), as the Court of Appeals noted. 695 F.3d at 414–15. Some courts have opined that when the provision applies, it implicitly overrides tribal immunity for injunctive actions brought under the statute. *See id.* However, this view is mistaken for two reasons. First and most important, the statute's purpose can be fully achieved by the estab-

lished remedy of suits against tribal officials, as this Court held in *Santa Clara*. *Santa Clara* involved a claim for prospective, equitable relief. 436 U.S. at 51. The Court held that the Pueblo's immunity barred suit against it by name. *Id.* at 58–59. But the Court also upheld federal jurisdiction to grant prospective, equitable relief against the Pueblo's governor, its chief executive officer. *Id.* at 59.[2]

Second, because § 2710(d)(7)(A)(ii) does not explicitly override tribal immunity and its purpose can be fully achieved without an override, none should be implied under the established rule that overrides and waivers of immunity should be clearly expressed or necessarily implied. *See id*. at 58–59.

For these reasons, whether or not Michigan's claim comes within § 2710(d)(7)(A)(ii), the District Court had subject matter jurisdiction and authority to grant prospective relief over tribal officials that would bind the Tribe based on well-established law. That is all that Michigan's questions presented in this Court seek. Therefore the case should be remanded to the District Court with instructions to proceed against tribal officials based on Michigan's amended complaint. Claims against the Bay Mills Indian Community by name should be dismissed.

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[2] Since *Santa Clara*, many other suits against tribal officers for prospective relief to determine the boundaries of tribal authority have been reported. *E.g.*, *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *South Dakota v. Bourland*, 508 U.S. 679 (1993).

II. TRIBAL SOVEREIGN IMMUNITY BARS DAMAGES CLAIMS AGAINST THE BAY MILLS INDIAN COMMUNITY.

The State's brief to this Court states its questions presented to seek only equitable relief, Pet'r Br. at i, and the brief cites *Santa Clara*, *see id.* at 3, 30. But the State carefully avoids any mention of the availability of prospective relief against tribal officials under the *Santa Clara* holding. Instead, the State mounts a general attack on tribal sovereign immunity, asking the Court to reverse decisions that recognize tribal immunity.

For these reasons, the State's brief read in isolation appears to be an attempt to get this Court to open up tribes to judgments for damages in a case where that is not at issue. However, an aspect of the case not disclosed by the State's brief in this Court is the claim in its amended complaint to recover damages from Bay Mills measured by its profits at the Vanderbilt facility. J.A. 132–34.

To the extent that the State relies on § 2710(d)(7)(A)(ii), there is clearly no basis to award damages. The statute authorizes only injunctive relief, and it does not explicitly say anything about tribal immunity. The State's broader claim to overturn tribal immunity *in toto* should be rejected as explained below.

A. Since Early Decisions, Tribal Sovereign Immunity Has Been Recognized by Federal Courts *In Pari Materia* with Federal and State Immunity.[3]

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[3] This part of the brief is based on research in William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 Am. U. L. Rev. 1587 (2013); Katherine Florey, *Sove-*

(1) The doctrine of governmental immunity from suits for damages was, from the outset, treated as received law by American courts. The initial understanding was expressed in The Federalist No. 81: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union." It was further illustrated by the reaction to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which promptly led to the adoption of the Eleventh Amendment, U.S. Const. amend. XI. In *Hans v. Louisiana*, 134 U.S. 1 (1890), this Court exhaustively reviewed the doctrine, concluding:

> It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a State represents its polity and its will; and is called upon by the highest demands of natural and political law to preserve justice and judg-

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reign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine, 43 Wake Forest L. Rev. 765 (2008); Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 Ariz. St. L.J. 137 (2004); and Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 Tulsa L. Rev. 661 (2002).

> ment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent, (of which the legislature, and not the courts, is the judge,) never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself. But to deprive the legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause.

Id. at 21.

To the limited extent that courts reviewed the policy, it was sustained based on precedent and on the doctrine of separation of powers: the theory that government payments must originate in the legislative branch absent express consent in a statute, as the *Hans* opinion stated. It was further backed by rules of international law.

Received law also included writ practice, which allowed prospective relief against government officers in certain cases. That concept was extended to enforcement of federal law against state officers in *Ex parte Young*, 209 U.S. 123 (1908). Over time the division between forbidden suits against governments by name and suits for prospective relief against officers became the general rule that is in force today. *See, e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 664 (1974).

(2) Indian tribes were brought into this pattern of received law as soon as the issue reached federal courts. The first stage was this Court's recogni-

tion of the governmental status of tribes in constitutional law, a contested issue in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). As Chief Justice Marshall stated for the Court:

> Is the Cherokee nation a foreign state in the sense in which that term is used in the constitution? . . . So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

Id. at 16.[4]

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[4] Chief Justice Marshall's reference to "a majority of the judges" referred to himself, Justice McLean who joined his opinion, and Justices Story and Thompson, whose opinion agreed with the quoted language but dissented on the ultimate ques-

The point was strongly restated in the Court's opinion (for a 6-1 majority) in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832): "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights . . . ." *Id.* at 519.

A variation of the issue arose later, when the Federal Government argued, in *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919), that *Cherokee Nation* had held that tribes lacked sovereign capacity to sue. This Court unanimously rejected the claim:

> The case of *Cherokee Nation v. Georgia*, on which the defendants place some reliance, is not in point. The question there was not whether the Cherokee tribe had the requisite capacity to sue in a court of general jurisdiction, but whether it was a "foreign state" in the sense of the judiciary article of the Constitution and therefore entitled to maintain an original suit in this court against the State of Georgia. The court held that the tribe, although uniformly treated as a distinct political society capable of engaging in treaty stipulations, was not a "foreign state" in the sense

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tion whether the Cherokee Nation was a foreign state as that term appears in Article III. *See Cherokee Nation*, 30 U.S. at 53–54, 80 (Thompson, J., dissenting). Justices Baldwin and Johnson concurred in the judgment, agreeing with Chief Justice Marshall that the Cherokee Nation was not a foreign state but disagreeing with his quoted language. *See id.* at 21–22, 27 (opinion of Johnson, J.); *id.* at 47, 49–50 (opinion of Baldwin, J.). Justice Duvall was absent. Thus, Chief Justice Marshall's majority was a 4-2 vote for the quoted language.

> intended, and so could not maintain such a suit.

Id. at 112–13 (internal citation omitted).

(3) Tribes were seldom sued in federal courts until modern times, but in the few instances when they were, courts consistently held that governmental immunity protected them from unconsented lawsuits. The issue first arose in this Court indirectly in *Parks v. Ross*, 52 U.S. (11 How.) 362 (1851). George Parks sued John Ross, Principal Chief of the Cherokee Nation, for debts allegedly incurred for Cherokee removal in the late 1830s, the event commonly called the Trail of Tears. *Id.* at 373–74. The Court held that Ross had acted as an officer of the Cherokee Nation, which precluded personal liability against him. *Id.* at 374. The opinion invoked language traditionally used to describe state sovereign immunity, *see id.*, and it paralleled principles in the Judiciary Act of 1789, 1 Stat. 73, which prohibited federal court jurisdiction over foreign diplomats even though jurisdiction seemingly exists under Article III. *See* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1590 (2002).

Chadick v. Duncan, No. 15,317 (D.C. Mar. 3, 1894), was the first recorded instance of a direct decision on tribal immunity, although the argument in the case referred to three earlier, unrecorded rulings dismissing suits against a tribe based on immunity from suit. The decision of the Supreme Court for the District of Columbia is unreported but recorded in the National Archives.[5] Edwin Chadick alleged that

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[5] No. 15,317 (D.C. Mar. 3, 1894) (available at Nat'l Archives & Records Admin. Record Group No. 376, Case File No. 314). For a detailed description of the case with page citations

the Cherokee Nation had breached a contract with him to sell its bonds. He sought an injunction to compel the Cherokee Nation, its principal chief and treasurer, and its delegates in Washington, D.C., to deliver the bonds to him.

The court dismissed the action based on tribal immunity from suit. The court relied on state and foreign sovereign immunity jurisprudence, which had developed substantially in the years after *Parks v. Ross*. These cases held that sovereign immunity applies to claims for injunctive relief as well as those seeking damages. The court concluded that tribes "are not amenable to suit anywhere at the instance of any private individual." The court cited and relied on this Court's contemporaneous immunity cases regarding actions against States and their officials arising out of bond defaults, particularly *In re Ayers*, 123 U.S. 443 (1887).[6]

The first reported decision in a suit against a tribe by name was *Thebo v. Choctaw Tribe of Indians*, 66 F. 372 (8th Cir. 1895). George Thebo sued the Choctaw Nation and its principal chief and treasurer to recover attorney's fees allegedly owed to him. *Id.* at 373. The court upheld dismissal of the claim, citing this Court's decision in *Beers v. Arkan-*

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to the Archives record, *see* Wood, *supra* note 3, at 1641–45. For reference to the earlier, unreported rulings dismissing suits based on immunity, *see id.* at 1642 n.316.

[6] Chadick later appealed this decision to the Court of Appeals for the District of Columbia. A few days later, a bill to abrogate the Cherokees' immunity was introduced in the House of Representatives. It did not become law, however, and Chadick's appeal was dismissed for failure to print the transcript of records. But the case garnered media attention: the Washington Post wrote about it at least four times.

sas, 61 U.S. (20 How.) 527, 529 (1857), for the "well-established" principle that a sovereign cannot be sued without its consent. *Thebo*, 66 F. at 375. The *Thebo* court also relied on a public policy reason for the doctrine: protecting the government fisc. *Id.* at 376. For these reasons Congress had "sparingly exercised" its power to authorize suits against tribes, reflecting "the settled policy of the United States not to authorize . . . suits [against tribes] except in a few cases." *Id.* at 375. Moreover, the "settled policy" of tribal immunity extended not just to suits on contracts but to "other causes of action" as well. *Id.* at 376. Because Congress had not authorized suits against the Choctaw Nation or its officials in the legislation establishing the U.S. court in Indian Territory or otherwise, the Choctaws' immunity barred Thebo's lawsuit. *Id.* at 373–74.

In *Adams v. Murphy*, 165 F. 304 (8th Cir. 1908), the court held that the Creek Nation and its principal chief were exempt from suit on a contract. *Id.* at 308. The court explained that tribal immunity, like state immunity, barred both actions for damages and actions seeking prospective relief. *Id.* at 308, 310–11 (citing *In re Ayers*, 123 U.S. at 502, 504). The court cited its earlier decision in *Thebo*, noting that this rule "has been the settled doctrine of the government from the beginning." *Id.* at 308–09. As in *Thebo*, the court relied on the policy of protecting the tribal treasury, arguing that without immunity, the tribes would be "overwhelmed" by litigation, with "disastrous consequences." *Id.*

In 1908 Congress showed its recognition of tribal immunity by expressly authorizing specific suits against six Indian tribes. Act of May 29, 1908, ch. 216, § 2, 35 Stat. 444, 444–45 (Menominee); *id.* § 5, 35 Stat. at 445 (Choctaw); *id.* § 16, 35 Stat. at 451

(Choctaw and Chickasaw); *id.* § 26, 35 Stat. at 457 (Creek); *id.* § 27, 35 Stat. at 457 (Mississippi Choctaw). Section 26 allowed Clarence Turner to sue the Creek Nation for damages resulting from an 1890 incident in which a group of Creek citizens destroyed his fence.

The Court of Claims held against Turner, and this Court affirmed. *Turner v. United States*, 51 Ct. Cl. 125, 155 (1916), *aff'd*, 248 U.S. 354 (1919). The Court recognized that the statute had overridden the tribe's immunity but affirmed for lack of a cause of action. 248 U.S. at 357–59. It first noted that under general law, like "other governments, municipal as well as state, the Creek Nation was free from liability for injuries to persons or property due to mob violence or failure to keep the peace." *Id.* at 357–58. Second, although the 1908 legislation overrode immunity, it did not create any right for him to recover damages for mob violence since "[n]o such liability existed by the general law." *Id.* Turner thus failed to allege a cause of action. *Id.*

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), this Court sustained tribal immunity from suit, but the Court said that its own prior decisions had mistakenly opined that tribal immunity originated in *Turner v. United States*. *Id.* at 756. We agree, though with respect not for the reason the Court stated. As the *Kiowa* Court noted, the *Turner* Court assumed without discussion that tribes had immunity. *Id.* at 757. However, immunity was not at issue because Congress had overridden it by statute. Based on the consistent and uncontradicted decisions of federal courts and actions of Congress, tribal immunity was a settled rule by the time of *Turner*, so it was natural for the Court to assume it. However, the basis for hold-

ing against *Turner*, that he had no cause of action, depended on the governmental character of the Creeks. To that extent, the *Turner* Court expressly recognized tribal sovereignty.

This Court first squarely relied on tribal immunity as a rule of decision in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940). The Court stated, "These Indian Nations are exempt from suit without Congressional authorization," citing the Eighth Circuit decisions in *Thebo v. Choctaw Tribe* and *Adams v. Murphy*, as well as *Turner v. United States*. 309 U.S. at 512 & n.11. The Court did not discuss the issue, but the reason for that is apparent from the argument for respondents, which did not contest tribal immunity (as we have noted, all the precedents supported immunity) but argued that "Congress ha[d] consented to an affirmative judgment against the Tribes," and that the issue had been waived by failure to assert it in a former action in Missouri that had gone to judgment without assertion of the defense. *Id.* at 508–09.

Whether tribal immunity could be waived in that manner was a novel issue in the case; it had not been determined in any reported decision about tribal immunity. This Court held that the prior judgment was

> void in so far as it undertakes to fix a credit against the Indian Nations. . . . The Congress has made provision for cross-suits against the Indian Nations by defendants. This provision, however, is applicable only to "any United States court in the Indian Territory." Against this conclusion respondents urge that as the right to file the

> claim against the debtor [in Missouri] was transitory, the right to set up the cross-claim properly followed the main proceeding. The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity.

Id. at 512–13. In other words, the Court held tribal immunity to be jurisdictional, as is immunity of the United States and of the States.

The review above covers all known decisions on tribal immunity prior to World War II, and as noted, tribal immunity was sustained in all of them. In modern times, tribes have undertaken all manner of direct activities, and lawsuits in general have proliferated, so suits against tribes have become common. Since 1977, this Court has upheld immunity six times. *See C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001); *see also Kiowa Tribe*, 523 U.S. at 754–55 (collecting cases). However, the doctrine of governmental immunity has come under attack in modern legal discourse, as reflected in this Court's *Kiowa Tribe* opinions. We address this policy question in part II.C. below.

B. Stripping Immunity in this Action to Saddle the Bay Mills Indian Community with a Damages Judgment Would Be Manifestly Unfair.

As explained above, federal courts have repeatedly affirmed the doctrine of tribal sovereign immunity, while allowing prospective relief against tribal officials. This accords with counterpart rulings for suits against state officers under *Ex parte Young*

and against federal officers.[7] This unbroken line of precedent has guided Indian tribes, States, and Congress in dealings with one another. Under these circumstances, substantial interests of reliance, in accordance with the doctrine of *stare decisis*, weigh against narrowing tribal immunity. *Stare decisis* "carries such persuasive force that [this Court] ha[s] always required a departure from precedent to be supported by some special justification." *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (quoting *United States v. IBM Corp.*, 517 U.S. 843, 856 (1996)). This principle has "particular force" in areas where public and private entities have engaged in economic activity based on the Court's prior decisions. *United States v. Maine*, 420 U.S. 515, 527–28 & n.9 (1975).

The Court has applied this principle to protect sovereign immunity; when urged to overrule *Hans v. Louisiana*, it declined. *Welch v. Tex. Dep't of Highways & Public Transp.*, 483 U.S. 468, 478, 486–87 (1987) (plurality opinion); *id.* at 496 (Scalia, J., concurring in part and concurring in the judgment) ("Congress has enacted many statutes . . . on the assumption that States were immune from suits by individuals"). The same conclusion is warranted here; Congress has repeatedly legislated based on a like premise regarding tribes. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991).

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[7] *E.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584, 589 (1952). In cases covered by the Administrative Procedure Act, plaintiffs can now seek prospective relief against the United States by name. 5 U.S.C. § 702.

C. This Case Presents No Occasion to Review Immunity Policy.

This Court in *Kiowa Tribe* expressed concern about the doctrine of tribal sovereign immunity, noting that "tribes take part in the Nation's commerce" and "[t]ribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians." 523 U.S. at 758. The Court stated that "[i]n this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.* The dissenting Justices similarly criticized the rule of immunity as "unjust," "especially" in view of "tort victims who have no opportunity to negotiate for a waiver of sovereign immunity." *Id.* at 766 (Stevens, J., dissenting).

By invoking the cases of tort victims, the *Kiowa* Court echoed the sentiments that many state courts expressed when, beginning in the late 1950s, they abrogated or limited state tort immunity.[8] However, this Court has sustained the right of States to retain immunity, *Alden v. Maine*, 527 U.S. 706, 754 (1999), and the Court has sustained state immunity in other contexts. *E.g.*, *Seminole Tribe*, 517 U.S. at 47; *Pennhurst State Sch. & Hosp. v.*

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[8] The move to abrogate immunity for state and local governments began in 1957, with *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957). *See* William L. Prosser et al., *Cases and Materials on Torts* 662 (7th ed. 1982). The change reached the majority of jurisdictions by 1977. *See Whitney v. Worcester*, 366 N.E.2d 1210, 1213 (Mass. 1977) ("Forty-five States have modified and at least partly eliminated the defense of immunity in tort actions against municipal corporations. All except thirteen States have abolished or limited the defense in suits against the State.").

Halderman, 465 U.S. 89, 117 (1984). The Court has steadfastly retained the immunity of the United States. *E.g.*, *Navajo Nation v. United States*, 537 U.S. 488, 502–03, 514 (2003). And while it is true that tort immunity has generally been waived, it is often done on terms more restrictive than for private defendants. Thus the Federal Tort Claims Act denies civil juries, 28 U.S.C. § 2402, and a number of state laws have damages caps against governments that do not apply against private defendants. *E.g.*, Colo. Rev. Stat. §§ 24-10-114(1),(4)(a) (2013).

Tribal governments have not ignored the policy issues raised by immunity. State-tribal compacts, on gaming and other matters, often include defined waivers of tribal immunity. *See Cohen's Handbook of Federal Indian Law* §§ 6.05, 12.05[2] & 21.02[2] (2012). Consents to arbitration have been made and enforced. *E.g.*, *C & L Enters.*, 532 U.S. at 414. Tribes may lag the States by a few years, but they are reaching similar adjustments to immunity. Moreover, tribes should have the freedom enjoyed by the United States and the States to waive immunity without juries or with damages limits.

Nor has Congress ignored the issue. Immunity waivers by state and local governments are often limited by the available insurance coverage. The basic self-determination statute for tribes includes a similar provision for waiver determined by insurance. 25 U.S.C. § 450f(c). Secretarial approval of many agreements with tribes is conditioned on waiver or disclosure of immunity. *Id.* § 81(d)(2).

Concerns about tort victims are not applicable in the instant case. Michigan and the Bay Mills Indian Community are parties to a gaming compact, a contract that is the basis for the lawsuit. As noted,

Michigan's original complaint, and its questions presented to this Court, seek only prospective relief that can be obtained by suit against tribal officers. Its amended claim seeking damages presents no important policy issue with which to question governmental immunity. Were Michigan concerned about tort victims, it could have sought protection for them in its compact, as New Mexico did. *See Doe v. Santa Clara Pueblo*, 154 P.3d 644, 647 (N.M. 2007).

CONCLUSION

For the reasons stated, this case should be remanded to the District Court with instructions to proceed against tribal officials under Michigan's amended complaint. The Bay Mills Indian Community should be dismissed based on tribal immunity from suit.

Respectfully Submitted,

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October 31, 2013