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 RESPONDENT

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QUESTIONS PRESENTED

1. Whether a federal court has jurisdiction to enjoin activity that violates IGRA but takes place outside of Indian lands.

2. Whether tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from violating IGRA outside of Indian lands.

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BRIEF FOR RESPONDENT

INTRODUCTION

This is one of the rare cases before this Court that is squarely controlled by settled precedent. Michigan sued the Bay Mills Indian Community by name, seeking severe financial penalties and an injunction against the tribe. This Court has repeatedly held that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla.* v. *Mfg. Tech.*, 523 U.S. 751, 754 (1998). Neither exception applies here: Congress has not abrogated Bay Mills' immunity, and Bay Mills has not waived it. Michigan therefore cannot sue Bay Mills.

Michigan recognizes the obstacle posed by this Court's precedent and earnestly tries to evade it.

The state asks the Court either to rewrite the Indian Gaming Regulatory Act's plain language or, instead, to overturn the decades of accumulated precedent Congress has sanctioned. Just as the Court has repeatedly rejected previous entreaties to usurp Congress's role in this area, it should do so again in this case.

The underlying dispute in this case—which concerns the status of certain lands that Bay Mills owns—can and should be resolved. There are a variety of means for doing so, including following the dispute resolution procedure both parties agreed to in their gaming compact: arbitration. There is no reason for the Court to rewrite the law or discard settled doctrine simply because Michigan is now unhappy with the bargain it struck.

Because Bay Mills did not waive its immunity, and Congress did not abrogate it, the case cannot go forward against the tribe—regardless of the answers to academic questions about whether IGRA or some other statute would otherwise have provided the district court with subject matter jurisdiction. A straightforward application of the doctrine of tribal sovereign immunity thus resolves this case.

STATEMENT OF THE CASE

A. Legal Background

1. Our nation has a " 'deeply rooted' " tradition of " 'leaving Indians free from state jurisdiction and control.' " *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (citation omitted). Consistent with that tradition, states generally cannot apply their laws within Indian country without congressional authorization. *Cohen's*

Handbook of Federal Indian Law § 6.01 (2012) (hereinafter "Cohen"). However, states generally are free to apply their nondiscriminatory laws to Indians outside of Indian country. *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95, 113 (2005); *Nevada* v. *Hicks*, 533 U.S. 353, 362 (2001). The extent of states' authority over Indian affairs thus turns in large part on whether the regulated activity occurs within "Indian country"—a term of art that includes reservations and certain other Indian lands. *See Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 526-27 (1998).

Over the years, Congress has made exceptions to the general rule forbidding the exercise of state regulatory jurisdiction within Indian country. Cohen § 6.01. For example, in 1953, Congress expressly granted five states the authority to apply their criminal and civil adjudicatory laws within parts of Indian country and gave other states the opportunity to assume such authority. Pub. L. 83-280, §§ 2, 7, 67 Stat. 588, 590 (1953). The great majority of states—including Michigan—elected not to do so, evidently out of concern that the "burdens accompanying such power might be considerable." *Williams* v. *Lee*, 358 U.S. 217, 223 (1959). Most tribes thus retain a fair degree of legal autonomy on their own lands.

2. The legal separation between states and tribes has occasionally led to economic competition. The modern history of gaming is an example of just that. By the 1980s, many states had turned to legalized gaming "as a source of jobs and additional revenue." National Gambling Impact Study Commission Act, § 2(2), 110 Stat. 1482, 1482 (1996). Michigan, for instance, established a state lottery in 1972 to

support its public education system. *See* Mich. Act 239 of 1972. A few years later, the people of New Jersey voted to permit high-stakes casino gambling as a means of revitalizing Atlantic City. *See* Martin Waldron, *Atlantic City Casinos Approved*, The New York Times, Nov. 3, 1976. Today, forty-eight states permit some form of private gaming, and forty-four run lotteries. From horse tracks to slot machines to glittering new casinos, states have capitalized on the revenue and development opportunities provided by legalized gaming. *See* Pamela M. Prah, *Kansas Has Biggest Jump in Casino Tax Revenue, New Jersey Has Largest Drop*, Stateline, May 6, 2013.

Michigan has enthusiastically participated in this dramatic expansion of legalized gaming. Besides the lottery, Michigan has four horse racing tracks and three full-scale casinos that took in over $1.5 billion in 2012 alone. *See* Michigan Gaming Control Board, *2012 Annual Report to the Governor* 46-47 (Mar. 12, 2013); Michigan Gaming Control Board, *2012 Horse Racing Annual Report to the Governor* 4 (Apr. 15, 2013). The city of Detroit has become especially dependent on gaming revenues. A recent bankruptcy filing revealed that casino tax revenue accounts for roughly 30% of its total available cash on hand. *See* Chris Isidore, *Casinos, Not Cars, Are Keeping Detroit Afloat*, CNNMoney, July 19, 2013.

Indian tribes have not been oblivious to these developments. In the late 1970s, inspired by the states' financial successes and limited in their ability to raise funds through traditional means like property taxes, a few tribes began setting up bingo halls and other gaming facilities as a way to offset rapidly declining federal aid. States did not welcome

these new market entrants, however. Prodded by private gaming interests, several states that had assumed criminal jurisdiction over Indian country soon threatened to enforce their licensing and other gaming laws against the tribes. Despite claiming to be concerned about mafia infiltration of tribal gaming enterprises, the states' "true interest" in opposing Indian gaming has always been "protection of their own games from a new source of economic competition." S. Rep. No. 100-446, at 33 (1988) (additional views of Sen. McCain). When tribes resisted those anticompetitive efforts, litigation ensued.

One of those tribal-state disputes eventually came before this Court. In *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 206 (1987), two tribes had obtained a declaratory judgment that California had no authority to enforce its gambling laws within the boundaries of the tribes' reservations. This Court upheld that judgment, reaffirming the fundamental importance of tribal sovereignty. The Court first held that Congress's delegation of criminal enforcement authority to California did not extend to state laws regulating gaming. Although California had affixed criminal penalties to those laws, *id.* at 209, 211, the Court concluded that they were not "criminal" in the relevant sense because they merely regulated gaming and did not prohibit it as a matter of public policy, *id.* at 209-10 (citing *Bryan* v. *Itasca Cnty.*, 426 U.S. 373 (1976)). The Court also held that California did not have the inherent authority to apply its gaming laws within Indian country. It recognized that in some situations a state's regulatory interest might be powerful enough " 'to justify the assertion of state authority' "

within Indian country, regardless of the background presumption that state laws do not apply. *Id.* at 216 (citation omitted). But in the context of gaming, the Court found that the federal and tribal interests in tribal self-government and economic development far outweighed California's asserted interests. *Id.* at 221-22.

3. By the time of the *Cabazon* decision, Congress had been considering Indian gaming legislation for several years. States and the private gaming industry were pressuring Congress to extend state regulatory jurisdiction into Indian country or even prohibit Indian gaming outright. *See* Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 Ariz. St. L.J. 99, 112-50 (2010). But *Cabazon*, and its recognition of the importance of tribal sovereignty, reoriented the debate and prompted a compromise that became the Indian Gaming Regulatory Act of 1988 (IGRA). *Id.* at 154-56.

IGRA adopted as its foundation the *Cabazon* principle of tribal sovereignty. Congress expressly recognized that tribes have the "exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5). It then supplemented that foundation with a federal statutory framework intended to ratify and regulate gaming on Indian lands. *Id.* § 2702(1)-(2).

IGRA's regulatory scheme divides gaming into three separate classes. Class I gaming, which

includes social games and traditional tribal games, is under the exclusive regulatory jurisdiction of the tribe. *Id.* §§ 2703(6), 2710(a)(1). Class II gaming, which includes bingo and certain card games like poker, is primarily within the jurisdiction of the tribe but subject to federal oversight. *Id.* §§ 2703(7), 2706(b), 2710(a)(2). Class III gaming includes everything else, from lotteries to dog racing to slot machines. *Id.* § 2703(8); *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 48 (1996). Instead of prescribing a uniform regulatory structure for class III gaming, Congress mandated that tribes and states negotiate compacts that delineate the respective rights and responsibilities of the two sovereigns. 25 U.S.C. § 2710(d)(1)(C), (d)(3). These gaming compacts were seen as a compromise between the states and tribes, both of which had sought full regulatory control over class III gaming on Indian lands. *See* S. Rep. No. 100-446, at 4-6 (1988).

IGRA also created the National Indian Gaming Commission, a federal regulatory commission that plays an important role in overseeing Indian lands gaming. *See id.* §§ 2702(3), 2706(b). The Commission promulgates regulations, and it has substantial power to enforce IGRA and its own regulations by levying civil fines and issuing closure orders. *Id.* §§ 2706, 2713(a)-(b). In addition, Congress buttressed federal oversight by assimilating all state gambling laws into federal law within Indian country and authorizing the United States to prosecute violations of those laws. 18 U.S.C. § 1166; *cf. Lewis* v. *United States*, 523 U.S. 155, 160-61 (1998) (describing the similar Assimilative Crimes Act). Gaming authorized by

IGRA is exempt from those penalties. 18 U.S.C. § 1166(c).

States play an important role under IGRA as well. Although Congress denied them the general regulatory authority they had sought, it increased their power in two important ways. First, Congress prohibited Indian tribes from conducting class II or class III gaming on Indian lands unless their state "permits such gaming for any purpose by any person, organization or entity." 25 U.S.C. § 2710(b)(1)(A), (d)(1)(B). Indian gaming, in other words, is permissible only in states like Michigan that have legalized gaming. States are free to prohibit all gaming, which would preclude Indian gaming within their borders. Only Utah and Hawaii have chosen that option, however.

Second, by providing that tribes may engage in class III gaming on their lands only if they have entered into a gaming compact with their state, *id.* § 2710(d)(1)(C), IGRA gives states considerable leverage to set the regulatory parameters for the most lucrative types of gaming. Important compact terms include the allocation of criminal and civil enforcement jurisdiction between the tribe and the state, *id.* § 2710(d)(3)(C)(ii), and remedies for breach of contract, *id.* § 2710(d)(3)(C)(v). Some tribes have ceded enforcement jurisdiction to the states in their compacts, *see, e.g.*, Class III Gaming Compact Between the Sac & Fox Nation and the State of Oklahoma, pt. 8 (Mar. 10, 2005), whereas others, including Bay Mills, have not, *see* Pet. App. 80a-87a. Similarly, some tribes and states have expressly waived their respective sovereign immunities and consequently have authorized lawsuits for breach of

compact, *see, e.g.*, Gaming Compact between the Seminole Tribe of Florida and the State of Florida, pt. XIII(D) (Apr. 7, 2010), whereas others, including the State of Michigan and Bay Mills, have opted for arbitration and other alternative dispute resolution procedures, *see* Pet. App. 89a-90a.

Congress attempted to offset the states' superior bargaining power by imposing on them a judicially enforceable duty to negotiate gaming compacts in good faith. 25 U.S.C. § 2710(d)(3)(A), (d)(7)(A)(i). But this Court held that the Eleventh Amendment prevents tribes from suing to enforce that duty. *Seminole Tribe*, 517 U.S. at 47. After *Seminole Tribe*, many states (including Michigan), leveraged their immense bargaining power to demand a share of tribes' gaming revenues—even though IGRA contemplates that tribal gaming revenue will be used for the benefit of tribes, not states. 25 U.S.C. § 2710(b)(2), (d)(1)(A)(ii), (d)(4); *see* Steve Carmody, *Striking a New Deal with Some of Michigan's Native American Tribes on Gaming Revenue*, Michigan Radio, Aug. 13, 2013.

B. The Underlying Dispute

The Bay Mills Indian Community has lived in what is now the State of Michigan for centuries. Continuously acknowledged since the earliest European contacts with the area, Bay Mills has been federally recognized in its current form since 1936. The tribe has approximately 2,000 registered members, the majority of whom reside on or near the Bay Mills Reservation in Michigan's Upper Peninsula.

The modern-day Bay Mills Reservation, which consists of land held in trust by the federal government, covers just a fraction of the territory the tribe's ancestors originally occupied. At the turn of the nineteenth century, Bay Mills and other Indian bands inhabited a large part of what would become the State of Michigan. *See* J.A. 23-25. By 1855, however, the federal government had purchased the vast majority of this land through cession treaties, paying only a pittance for valuable property and often taking more land than it had bargained for in the treaties. *See id.*; *see also Act to Provide For and Approve the Settlement of Certain Land Claims of the Bay Mills Indian Community: Hearing on H.R. 2176 Before the H. Nat. Resource Comm.*, 110th Cong., at 63-67 (2008) (statement of Jeffrey D. Parker) (explaining how the federal government took title to thousands of acres that had been expressly reserved for Bay Mills' ancestors).

For years, Bay Mills sought fair compensation for lands it lost in these treaties. As part of that effort, the tribe filed several successful claims under the Indian Claims Commission Act of 1946, 25 U.S.C. §§ 70 *et seq.* The Indian Claims Commission recognized that the federal government had purchased much of Bay Mills' ancestral land on unconscionable terms and awarded Bay Mills money judgments for its losses. *See* U.S. Indian Claims Commission, *August 13, 1946–September 30, 1978: Final Report* 26-27, 65 (1979).

Congress appropriated funds to pay these judgments in the 1970s, but more than a quarter century passed before Bay Mills actually received the money it was owed. It was only after the tribe sued

the Department of Interior that the government began developing legislation to distribute Bay Mills' judgment awards. *See* Order, *Bay Mills Indian Cmty*. v. *Babbitt*, No. 96-0553 (D.D.C. Sept. 16, 1996). That legislation ultimately became part of the Michigan Indian Land Claims Settlement Act, which Congress passed in 1997. *See* Pub. L. No. 105-143, 111 Stat. 2652.

The Settlement Act provided for the disbursement of funds that had been awarded by the Claims Commission to Bay Mills and several other Michigan tribes. The Act distributed each tribe's funds differently, and tribes individually participated in developing the substance and form of their respective distribution plans. Bay Mills officials were deeply involved in drafting their portions of the Act. *See* Dkt. 14-5 (Decl. of Jeffrey D. Parker).[1] In its final form, the Settlement Act directed that 20% of the funds awarded to Bay Mills be deposited in a "Land Trust" and required that earnings from the Trust "be used exclusively for improvements on tribal land or the consolidation and enhancement of tribal landholdings through purchase and exchange." 111 Stat. 2658. In a critical provision, the Act specified: "Any land acquired with funds from the Land Trust shall be held as Indian lands are held." *Id*.

In the meantime, in an effort to promote the economic welfare of its members, Bay Mills negotiated and entered into an IGRA gaming

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[1] Unless otherwise noted, citations to the district court record are to the docket in Western District of Michigan case number 10-cv-1273-PLM.

compact with Michigan in 1993. Pet. App. 73a-96a. The compact, like IGRA itself, authorizes certain kinds of gaming "on Indian lands." Pet. App. 78a. The compact makes clear, however, that neither Bay Mills nor Michigan otherwise waived its sovereign immunity by entering into it. Pet. App. 90a ("Nothing in this Compact shall be deemed a waiver of the Tribe's sovereign immunity. Nothing in this Compact shall be deemed a waiver of the State's sovereign immunity."). Notably, the compact also sets out dispute resolution procedures that govern "[i]n the event either party believes that the other party has failed to comply with or has otherwise breached any provision of [the] Compact." Pet. App. 89a. The aggrieved party is to notify the other party of its grievance; representatives of both parties are to meet within thirty days to attempt to settle their differences; and if that fails, a panel of arbitrators is to resolve the dispute. Pet. App. 89a-90a.

Shortly after the compact was finalized, the National Indian Gaming Commission approved Bay Mills' gaming ordinance. *See* Pet. App. 107a-170a (as amended). Consistent with both the compact and the ordinance, Bay Mills then proceeded to establish its own Gaming Commission. Bay Mills has continuously operated one or more gaming facilities on its reservation ever since.

In August 2010, Bay Mills used funds from its Settlement Act land trust to purchase a plot of land in the economically depressed village of Vanderbilt, Michigan. Under the terms of the Settlement Act, Bay Mills holds the Vanderbilt tract "as Indian lands are held." 111 Stat. 2658. Bay Mills understands this language—which the tribe specifically

negotiated—to mean that the land qualifies as "Indian lands" within the meaning of IGRA because it is "subject to restriction by the United States against alienation" and within the tribe's regulatory jurisdiction. 25 U.S.C. § 2703(4)(B). Because IGRA, the Bay Mills-Michigan gaming compact, and the Bay Mills gaming ordinance all authorize gaming on "Indian lands," Bay Mills determined that it could open a small gaming facility on the property.

Shortly thereafter, the Bay Mills Gaming Commission issued a class III gaming license for a facility on Bay Mills' Vanderbilt property. The Vanderbilt facility opened on November 3, 2010. Though it consisted of only 84 electronic games, the facility provided much needed employment to individuals from Vanderbilt and surrounding areas. *See, e.g.*, Dkt. 17-4 (declaration attesting that Bay Mills' Vanderbilt facility was "increasing employment" and "improving the economy"). Otsego County and Bay Mills worked together to integrate the Vanderbilt facility into the local community. *See, e.g.*, Dkt. 17-1 (declaration detailing the County and Bay Mills' discussions "to facilitate the regulation" of the Vanderbilt property). And in an effort to ensure compliance with the law, Bay Mills entered into an agreement with the county sheriff's office authorizing local officers to enforce tribal law on the property. *See* J.A. 108-15.

C. Procedural History

Soon after the Vanderbilt facility opened for business, Michigan issued a letter asserting that Bay Mills' operation of the gaming facility was in violation of federal law, state law, and the Bay Mills gaming compact because the facility was outside

Indian lands. *See* Dkt. 1-2. Bay Mills disagreed with this assessment. Highlighting the language in the Settlement Act, Bay Mills countered that the land it had purchased with Settlement Act funds was, as the statute indicated, "held as Indian lands are held."

Michigan ignored the dispute resolution procedures it had negotiated in the gaming compact and filed suit in federal court in December 2010, less than a week after it sent the letter. Michigan's original complaint—which led to the preliminary injunction, Bay Mills' interlocutory appeal, and the decision below—alleged that Bay Mills violated the terms of the compact and IGRA by conducting gaming activity outside Indian lands. The Little Traverse Bay Bands of Odawa Indians, a tribe that operates a competing gaming facility, filed a separate lawsuit making substantively similar claims. Dkt. 1 in W.D. Mich. No. 1:10-cv-1278-PLM. Both complaints named Bay Mills as the sole defendant, and both sought declaratory and injunctive relief. The two suits were consolidated.

Little Traverse filed a motion for a preliminary injunction. It supplemented the motion with opinion letters from the Department of the Interior and the National Indian Gaming Commission that were issued the day after Michigan filed its suit and concluded that the Vanderbilt property is not "Indian lands" for purposes of IGRA. J.A. 69-107.[2] Michigan

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[2] Bay Mills believes these informal opinions are deeply wrong, but has been unable to challenge them because they do not qualify as final agency actions under the Administrative Procedure Act.

filed a memorandum in support of Little Traverse's motion. The district court concluded that Little Traverse was likely to succeed on the merits of its claim that the Vanderbilt property did not qualify as "Indian lands" under IGRA and that the other preliminary injunction factors favored the plaintiffs. Pet. App. 19a-39a. Accordingly, the court preliminarily enjoined Bay Mills from operating the Vanderbilt facility. Pet. App. 38a-39a.

Bay Mills filed an interlocutory appeal, J.A. 116-17, and the court of appeals unanimously reversed, Pet. App. 1a-18a. Without addressing the merits of the underlying "Indian lands" dispute, the court of appeals concluded that the district court lacked subject matter jurisdiction over the IGRA and compact-based claims raised in Michigan and Little Traverse's original complaints. Pet. App. 9a. IGRA's section 2710(d)(7)(A)(ii), the court reasoned, provides for federal jurisdiction over a specifically defined set of claims: "cause[s] of action initiated by a State or Indian tribe to enjoin a class III gaming activity *located on Indian lands*." 25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added). Because Michigan and Little Traverse alleged that the Vanderbilt facility was *not* located on Indian lands, their claims fell outside IGRA's limited jurisdictional grant.

Perhaps recognizing that its original claims did not fall within the plain language of IGRA, Michigan amended its complaint while the interlocutory appeal was pending, adding new claims under federal common law and state law and naming tribal officers as additional defendants. J.A. 118-36. Despite the fact that these claims were not part of

the case at the time of the preliminary injunction ruling, the court of appeals went on to consider them. Reasoning that Michigan's additional claims presented a significant question of federal law—namely, "whether the Vanderbilt casino is located on Indian lands"—the court of appeals found that they fell within 28 U.S.C. § 1331's grant of general federal question jurisdiction. Pet. App. 10a-11a.

Nevertheless, the court of appeals concluded that these claims suffered from a different flaw: they were barred by tribal sovereign immunity. Pet. App. 11a-17a. It rejected Michigan's argument that Congress abrogated Bay Mills' immunity through IGRA's section 2710(d)(7)(A)(ii), concluding that the provision's plain terms apply only for claims related to gaming *on* Indian lands. Pet. App. 13a. It also rejected Michigan's other abrogation arguments, Pet. App. 14a-15a, and dismissed Michigan's assertion that Bay Mills had waived tribal immunity as a "[t]endentious, junk-drawer" argument "best left out of a brief," Pet. App. 17a.

Having concluded that all of the Plaintiffs' claims against the tribe were barred either by a lack of subject matter jurisdiction or by tribal immunity, the court of appeals vacated the preliminary injunction. Pet. App. 18a. It declined to decide whether Michigan's newly added claims against tribal officers could go forward, leaving that question for the district court to decide in the first instance. Pet. App. 17a-18a.

Following the court of appeals' decision, Little Traverse advised the district court that it would file a motion to voluntarily dismiss its case. Dkt. 161.

Little Traverse declined to join Michigan in seeking this Court's review.

In addition to the pending amended complaint, a declaratory judgment suit filed by Bay Mills against Michigan Governor Rick Snyder is also pending in the Western District of Michigan. *See Bay Mills Indian Cmty.* v. *Snyder*, No. 1:11-cv-729-PLM (W.D. Mich.) (filed July 15, 2011). In that case, Bay Mills seeks a declaratory judgment that the Vanderbilt property *is* Indian land. Rather than permit that key issue to be determined, Governor Snyder, in an exercise of what some might call chutzpah, invoked state sovereign immunity as an affirmative defense. *See* Dkt. 7 in W.D. Mich. No. 1:11-cv-729-PLM. Dispositive motions have yet to be filed in that case.

Although no injunction is currently in place, Bay Mills has voluntarily refrained from reopening the Vanderbilt facility pending this Court's decision.

SUMMARY OF ARGUMENT

The curious starting point for Michigan's brief is that this case is about gaming activity on Indian lands—specifically, decisions made by tribal officials to approve the Vanderbilt facility. According to Michigan, that makes its complaint authorized by IGRA. The fundamental problem with this about-face assertion is that the argument is entirely outside the questions presented, each of which Michigan drafted to speak solely to gaming activities "*outside* of Indian lands." Pet. i (emphasis added). And even if this argument were properly before the Court, it is utterly lacking in factual and legal support. As the statute makes clear, a tribe's

decision to open a gaming facility is not itself a "class III gaming activity" under IGRA.

As to the first of the actual questions presented, Bay Mills agrees that were it not for Bay Mills' immunity, the district court would have had subject matter jurisdiction over Michigan's complaint. But the question is a red herring because Bay Mills *is* immune from suit. Tribal sovereign immunity is thus the appropriate focus of this case, and the Court should reject Michigan's suit on that ground.

Michigan's attempt to circumvent Bay Mills' sovereign immunity falls well short of its mark. Michigan argues that its claims can go forward because Congress abrogated tribal sovereign immunity in IGRA's section 2710(d)(7)(A)(ii). This argument ignores that provision's plain language. To the extent section 2710(d)(7)(A)(ii) abrogates tribal immunity at all, it applies only to suits concerning gaming "*on* Indian lands." Because the premise of Michigan's suit is that Bay Mills is conducting gaming *off* Indian lands, Michigan has simply pled itself out of court.

Facing statutory text that directly contravenes its abrogation argument, Michigan and its amici fall back on arguments that the Court should create various exceptions to the doctrine of tribal sovereign immunity. But this Court has already rejected each of the proposed exceptions. Michigan accordingly pleads for this Court to overrule its immunity precedents. Again, however, this Court has already rejected such pleas—twice in the past twenty-five years. As this Court has emphasized, it is Congress's prerogative, not the Court's, to alter the doctrine of tribal sovereign immunity if it sees fit to do so. Yet

Congress has done just the opposite: it has repeatedly reaffirmed the doctrine and has rejected broad efforts to limit it. The historical roots of tribal sovereign immunity only reinforce Congress's considered judgment. Contrary to Michigan's claim, tribal immunity has deep roots in this country's jurisprudence. There is no justification for the Court to unilaterally abrogate the doctrine now.

Despite Michigan's suggestion that affirming the decision below will leave the state remedy-less, affirmance will do no such thing. Most obviously, Michigan can invoke the dispute resolution procedure that it bargained for in its gaming compact with Bay Mills. Michigan and other states also have a wide range of other dispute resolution mechanisms at their disposal, from negotiated waivers of sovereign immunity to *Ex parte Young* suits against tribal officials. Michigan's dissatisfaction with those remedies provides no warrant for this Court to usurp Congress's role.

ARGUMENT

I. THIS CASE DOES NOT PRESENT THE QUESTION OF THE DISTRICT COURT'S AUTHORITY TO ENJOIN A GAMING ACTIVITY *ON* INDIAN LANDS.

Michigan opens its brief in a surprising fashion: It claims that its lawsuit can go forward under 25 U.S.C. § 2710(d)(7)(A)(ii) because the tribe's decisions to open and license the Vanderbilt casino were "class III gaming activities" that took place "on" Indian lands. Pet. Br. 20. This argument is flatly outside the scope of the questions Michigan asked this Court to review. And that is not all: the new

argument lacks factual support because it was not made in the district court and misconstrues IGRA.

Section 2710(d)(7)(A)(ii), on which Michigan relies, provides:

> The United States district courts shall have jurisdiction over—
>
> * * *
>
> (ii) 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[.]

25 U.S.C. § 2710(d)(7)(A)(ii).

As the court of appeals recognized, Michigan's claims fall outside the scope of this provision precisely because Michigan's theory is that gaming activity is taking place *outside* of Indian lands. Pet. App. 61a. In a late-breaking effort to conform its legal theory to its flawed claim, Michigan now asserts that it is actually seeking to "enjoin a class III gaming activity located *on* Indian lands." Pet. Br. 21. According to Michigan, the tribe's "decision to own and operate the Vanderbilt casino" constitutes "a class III gaming activity" for purposes of section 2710(d)(7)(A)(ii). Pet. Br. 20. And those actions, Michigan contends, must have "necessarily occurred 'on Indian lands.' " Pet. Br. 21.

However interesting this question may be, Michigan drafted the questions presented in a way that precludes this Court from considering it. Michigan began its Petition with the statement that

"[t]his dispute involves a federal court's authority to enjoin an Indian tribe from operating an illegal casino *off* of Indian lands." Pet. i (emphasis in original). And it then asked the Court to decide "[w]hether a federal court has jurisdiction to enjoin activity that violates IGRA but takes place *outside* of Indian lands" and "[w]hether tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from violating IGRA *outside* of Indian lands." *Id.* (emphases added). Neither of those questions implicates disputes about activity "*on* Indian lands."

This Court's rules make clear that only "the questions set out in the petition, or fairly included therein," will be considered by the Court. S. Ct. R. 14(1)(a); *see* S. Ct. R. 24.1(a) (merits brief "may not raise additional questions or change the substance of the questions already presented"). Michigan's new theory is not merely outside the questions presented; it is directly antithetical to them. The Court should thus decline to address this new theory.

Even if Michigan's argument could be shoehorned into the questions presented, the Court would not be in a position to rule on it. This Court does not engage in factfinding; nor is it a court of first impression. Michigan did not raise this argument in the district court in its complaint or preliminary-injunction papers, so no factual record on any of the relevant points was developed there. As a result, Michigan is left to simply assert that the authorization and licensing decisions must have occurred on Indian lands because the Council "derives its governmental authority from its reservation." Pet. Br. 21. The Court should decline

to address a factually undeveloped argument that is based on speculation and supposition.

Even more importantly, Michigan's new theory lacks merit. It completely misconstrues IGRA. The Executive Council's decisions are not "class III gaming activities" within the meaning of IGRA. IGRA defines "Class III gaming" as "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. § 2703(8). And the definitions of "class I gaming" and "class II gaming" demonstrate that the phrase "forms of gaming" encompasses only the games themselves. *See id.* § 2703(6) ("The term 'class I gaming' means social games * * *."); § 2703(7)(A)(i) ("The term 'class II gaming' means * * * the game of chance commonly known as bingo."). "Class III gaming activities" are thus exactly what they sound like: the activities of playing the particular games that fall within "class III."

Further, the term "class III gaming activity" appears multiple times throughout the statute, often in contexts that indicate that it does not encompass tribal management or regulation. For example, one provision refers to the "licensing and regulation" of a class III gaming activity. 25 U.S.C. § 2710(d)(3)(C). Another refers to the "operation of a class III gaming activity." *Id.* § 2710(d)(9). And a third specifies the fees that must be paid "by each gaming operation that conducts a class II or class III gaming activity." *Id.* § 2717(a)(1). Other provisions refer to "class III gaming activity" in a similar manner. *See, e.g.*, 25 U.S.C. § 2710(b)(2)(A), (b)(4), (c)(4). These provisions and others would make no sense if a "gaming activity" included the licensing and regulation of gaming.

Michigan's argument is procedurally barred and wrong. It should be rejected.

II. BAY MILLS AGREES THAT THE DISTRICT COURT WOULD HAVE HAD SUBJECT MATTER JURISDICTION IF NOT FOR BAY MILLS' IMMUNITY.

The court of appeals correctly held that any grant of subject matter jurisdiction contained in section 2710(d)(7)(A)(ii) of IGRA—like any abrogation of tribal immunity therein, *see infra* Part III—is limited to suits challenging gaming activity on Indian lands. But Bay Mills recognizes that IGRA is not the only possible source of subject matter jurisdiction in this case. Michigan has asserted that the general federal question statute, 28 U.S.C. § 1331, provides jurisdiction. Bay Mills agrees that, but for Bay Mills' sovereign immunity, the district court could have properly exercised jurisdiction under 28 U.S.C. § 1331. Pet. App. 10a-11a; Pet. Br. 18.

Were it not for tribal sovereign immunity, Michigan's complaint, at least after amendment, would fit within familiar jurisdictional precepts. The federal common law claim, for instance, "arises under" federal law and supports the exercise of federal question jurisdiction. *See National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 850 (1985); *Illinois* v. *Milwaukee*, 406 U.S. 91, 100 (1972). Michigan's IGRA claim "arises under" federal law too, since it is " 'drawn so as to claim a right to recover under' " a federal statute. *Jackson Transit Auth.* v. *Local Div. 1285*, 457 U.S. 15, 21 n.6 (1982) (citation omitted). And the remaining claims "form part of the same case or controversy," likely bringing them within the district court's

supplemental jurisdiction. 28 U.S.C. § 1367(a). Nothing in IGRA demonstrates an intent to withdraw subject matter jurisdiction that otherwise exists under sections 1331 and 1367. *Cf. Verizon Md. Inc.* v. *Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 643-44 (2002).

To be sure, the existence of subject matter jurisdiction does not mean that Michigan has stated a claim for relief or that Michigan possesses a private right of action to bring any properly pleaded claims. It is far from clear, for example, that Michigan has stated a cognizable federal common law claim. Nor is it clear that Michigan's allegations establish a "violation" of IGRA or the gaming compact. Even if Michigan could identify such a violation, it may have no right to file a complaint to enjoin that violation. *See In re Sac & Fox Tribe of Miss.*, 340 F.3d 749, 766 (8th Cir. 2003) ("IGRA provides no *general* private right of action"). And in any event, any viable claims are barred by Bay Mills' sovereign immunity. *See infra* Part III.

The first question before the Court, however, is just whether the district court had jurisdiction over this suit. And as to that the parties agree: Were it not for tribal immunity, the district court would have had federal question jurisdiction over at least some of Michigan's claims and supplemental jurisdiction over the others. This case thus hinges on sovereign immunity, not federal jurisdiction.[3]

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[3] Of course, this Court need not address federal question jurisdiction to resolve this case on immunity grounds. This Court, like all federal courts, has leeway " 'to choose among

III. BECAUSE MICHIGAN'S CLAIMS DO NOT FALL WITHIN THE PLAIN LANGUAGE OF SECTION 2710(d)(7)(A)(ii), BAY MILLS IS IMMUNE FROM THIS SUIT.

This Court recognized in *Kiowa* that it is "settled law" that an Indian tribe cannot be sued in federal court without its consent. 523 U.S. at 756. This immunity extends to all claims against a tribe, regardless of the character and location of the underlying conduct. *Id.* at 754-55. Only two exceptions exist to the broad rule of immunity. One is that a tribe may waive its immunity, and the second is that Congress may abrogate a tribe's immunity. *Id.* at 754. In either case, the dissolution of tribal immunity must be unequivocally expressed. *C&L Enterprises, Inc.* v. *Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001).

Neither exception applies here. Michigan does not contend that Bay Mills has waived its immunity. It argues only that Congress abrogated Bay Mills' immunity as to its particular claims in IGRA's section 2710(d)(7)(A)(ii). In making this argument, Michigan skips over the question whether section 2710(d)(7)(A)(ii) is actually an abrogation of tribal sovereign immunity for *any* claims, which is far from

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threshold grounds for denying audience to a case on the merits.' " *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (citation omitted). And sovereign immunity is just such a threshold ground. *See, e.g.*, *Kiowa*, 523 U.S. at 754; *Henderson* v. *United States*, 517 U.S. 654, 675 (1996).

clear-cut.[4] But even if section 2710(d)(7)(A)(ii) abrogates tribal sovereign immunity in some circumstances, that abrogation clearly does not apply here. Michigan's claims fall squarely outside the statute's plain terms—and therefore outside the scope of any possible abrogation. Bay Mills retains its immunity from suit.

1. Congress, of course, is free to set the terms of any abrogation of tribal immunity. This Court's task is to apply the " 'traditional tools of statutory construction' " to determine what Congress intended.

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[4] *Seminole Tribe* held that Congress intended to abrogate state sovereign immunity in a neighboring provision—section 2710(d)(7)(A)(i)—because that provision clearly identifies the state as the defendant in suits under it. 517 U.S. at 57. By doing so, Congress necessarily signaled that the state's sovereign immunity should not bar such suits. *Id.* Section 2710(d)(7)(A)(ii), however, stands on different analytical footing. Unlike romanette (i), romanette (ii) does not specify the defendant at all; it simply permits certain plaintiffs (tribes and states) to seek injunctions against "gaming activity located on Indian lands." 25 U.S.C. § 2710(d)(7)(A)(ii). Although tribes can certainly be named as defendants in suits under romanette (ii), so can tribal officials, states, local governments, and corporations. *See, e.g.*, *Coeur d'Alene Tribe* v. *State*, 842 F. Supp. 1268, 1282 (D. Idaho 1994) (suit to enjoin state from operating lotteries on Indian reservation). Tribes are thus merely one of several "logical defendants," which this Court has held is not enough to abrogate immunity. *Dellmuth* v. *Muth*, 491 U.S. 223, 232 (1989). Because evidence of congressional intent to abrogate immunity "must be both unequivocal and textual," a mere "permissible inference" that a sovereign *could* be sued does not meet that demanding standard. *Id.* at 230, 232.

FAA v. *Cooper*, 132 S. Ct. 1441, 1448 (2012) (citation omitted). Magic words are not necessary, but the scope of the abrogation must be "clearly discernible from the statutory text in light of traditional interpretive tools." *Id.* Any ambiguity on that score is construed in favor of the sovereign—here, the tribe. *Lane* v. *Peña*, 518 U.S. 187, 192 (1996); *see also C&L Enterprises*, 532 U.S. at 418 ("To abrogate tribal immunity, Congress must 'unequivocally' express that purpose." (citing *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 58 (1978))).

The precision of the language in section 2710(d)(7)(A)(ii) is striking. It does not create a general cause of action for any "violation" of IGRA. Nor does it authorize suit whenever a tribe or state fails to abide by the terms of a gaming compact. Instead, Congress identified a very specific kind of claim: a "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." 25 U.S.C. § 2710(d)(7)(A)(ii).

The fundamental theory of Michigan's complaint, of course, is that Bay Mills is running a gaming facility on land that is *not* "Indian land." But as Michigan seems to concede, Pet. Br. 19, section 2710(d)(7)(A)(ii) itself forecloses any application to claims arising out of activity conducted outside of Indian land. Congress established a carefully balanced judicial remedy with a number of limitations: states and tribes are the only permissible plaintiffs; an injunction is the only permissible remedy; the object of the injunction must be class III gaming activity; the gaming must

contravene a tribal-state compact; and the gaming must be conducted "*on Indian lands*." 25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added); *see also* Pet. App. 7a. Any abrogation of tribal immunity is delineated by these precise terms.

The "on Indian lands" limitation was no accidental insertion. IGRA as a whole is exclusively focused on gaming that takes place on Indian lands. After this Court confirmed in *Cabazon* that states have limited authority to regulate gaming on Indian lands, Congress established a federal regulatory regime for that specific type of gaming. The statute's core provision makes that clear enough: Class III gaming activities "*shall be lawful on Indian lands*" if, but only if, the statutory requirements are met. 25 U.S.C. § 2710(d)(1) (emphasis added). IGRA simply does not address the lawfulness of class III gaming—or any other type of gaming for that matter, *see id.* § 2710(a)—that takes place outside of Indian lands. Such gaming is, and has always been, subject to state law. *See Wagnon*, 546 U.S. at 113; *Hicks*, 533 U.S. at 362. Because IGRA itself is narrowly focused on Indian lands, it is entirely unsurprising that its remedial provision, section 2710(d)(7)(A)(ii), would be similarly focused.

An episode from Michigan's own gaming history illustrates the significance of the "Indian lands" limitation. After Michigan's voters approved casino gambling in 1996, the city of Detroit became eligible to issue three casino licenses. *Lac Vieux Desert Band* v. *Mich. Gaming Control Bd.*, 172 F.3d 397, 400-01 (6th Cir. 1999). One of those licenses went to the Sault Ste. Marie Tribe of Chippewa Indians, who subsequently opened a casino in downtown Detroit.

The casino was licensed by the state, and its operation was governed by state law, not IGRA. Surely Congress would not have intended for section 2710(d)(7)(A)(ii) to be used to enjoin the casino's operation simply because it happened to be owned by an Indian tribe. IGRA was intended to promote "tribal economic development, self-sufficiency, and strong tribal governments" by authorizing gaming *within* Indian country. 25 U.S.C. § 2702(1). It did not intend to place tribes under special disabilities *outside* Indian country.

2. Undeterred by the plain import of section 2710(d)(7)(A)(ii), Michigan tries to draw support from IGRA's criminal provision, codified at 18 U.S.C. § 1166. That provision assimilates state gambling laws into federal law within Indian country, 18 U.S.C. § 1166(a), makes violation of those laws a federal offense, *id.* § 1166(b), and gives the United States "exclusive jurisdiction" to prosecute such violations, *id.* § 1166(d). Michigan construes this provision as implicit authorization for its lawsuit. According to Michigan, section 1166 authorizes states to "bring a civil suit to enforce anti-gambling laws in Indian country." Pet. Br. 26. It then reasons that because states generally have more authority over "sovereign state lands" than over Indian lands, the "reasonable inference" is that Congress "expected states to bring civil actions" to enjoin gaming outside Indian lands as well. *Id.*

Michigan's logic is highly suspect. The "best evidence of Congress's intent is the statutory text." *NFIB* v. *Sebelius*, 132 S. Ct. 2566, 2583 (2012) (opinion of the Court). And in this case the text says nothing about gaming outside Indian lands.

Self-serving appeals to what Congress "surely" intended, *see* Pet. Br. 41, cannot substitute for what Congress actually said.

In any event, the premise of Michigan's argument is incorrect. Congress did *not* authorize states to "bring a civil suit to enforce anti-gambling laws in Indian country." Section 1166 extends state gambling laws into Indian country only "for purposes of Federal law." 18 U.S.C. § 1166(a). It is a classic assimilative act that creates new federal crimes and gives the *federal* government exclusive prosecutorial authority. Indeed, Michigan's own Supreme Court has confirmed that understanding (at the behest of Michigan's attorney general, no less). *See Taxpayers of Mich. Against Casinos* v. *State*, 685 N.W.2d 221, 229 (Mich. 2004) ("Section 1166 does *not* grant the state regulatory authority over tribal gaming; rather, it simply incorporates state laws as the federal law governing nonconforming tribal gaming."); *see also, e.g.*, *United States* v. *E.C. Invs., Inc.*, 77 F.3d 327 (9th Cir. 1996).

Construing section 1166 as a broad extension of state civil jurisdiction over Indian country would defeat IGRA's careful allocation of jurisdiction among tribes, the federal government, and states. Congress assuredly did not intend to effect a dramatic shift in tribal-state relations through this minor provision. As this Court has observed, Congress does not typically "hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). The Senate committee report confirms this point: IGRA does not "contemplate the extension of State jurisdiction or the application of State laws" to conduct in Indian

country, other than through the compact process. S. Rep. No. 100-446, at 6 (1988).

3. Michigan is thus left with no textual hook for its expansive reading of section 2710(d)(7)(A)(ii). So it resorts to a purportedly "holistic" portrayal of congressional purpose and common sense. It "makes no sense," Michigan argues, "to interpret the phrase 'on Indian lands' as a limitation on access to federal courts when gaming occurs *outside* Indian lands." Pet. Br. 27. According to Michigan, Congress surely did not intend "to give states a greater ability to deal with illegal Indian gaming *on* Indian lands than *off* of Indian lands." *Id.* at 28.

This argument misses the point. IGRA's "on Indian lands" language is not, as Michigan puts it, "a limitation on access to federal courts when gaming occurs *outside* Indian lands." Pet. Br. 27. IGRA no more imposes a bar on such suits than it abrogates immunity for them. The statute simply has nothing to do with activity that takes place outside Indian lands. With respect to such activity, it leaves the background rules untouched. And one of those background rules is tribal sovereign immunity. *See Kiowa*, 523 U.S. at 756.

In the end, Michigan seeks to "divin[e] what Congress would have wanted if it had thought of the situation before the court." *Morrison* v. *Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2881 (2010). Although IGRA says nothing about gaming activity alleged to take place outside Indian lands, Michigan believes Congress surely would not have wanted tribal sovereign immunity to bar state suits challenging such activity. But courts are not in the business of speculating about congressional intent when

sovereign immunity is at stake. That is exactly the point of the clear statement rule. *Cf. id.* In the absence of any indication to the contrary, Bay Mills thus retains its traditional immunity from suits outside the scope of section 2710(d)(7)(A)(ii).

4. Apparently recognizing the weakness of its abrogation argument in light of the statute's plain language, Michigan asks the Court to "consider overruling" the requirement of an "unequivocal expression" of intent to abrogate tribal immunity. Pet. Br. 30. The state attempts to cast this clear statement rule as some sort of unjustified jurisprudential anomaly. Acknowledging that a similar standard applies to abrogations of state and federal sovereign immunity, Michigan claims that those doctrines are distinguishable because they stem from the Constitution or implicate relations among the branches of government. Pet. Br. 30-32. According to Michigan, the Court should overrule precedent and adopt a more lenient (and mushy) abrogation standard for tribal sovereign immunity. Pet. Br. 31 (advocating that statutes affecting tribal immunity be interpreted "in the same manner as any other statute that affects the common law").

That proposal would upend decades of settled precedent. It would also undermine the "stable background against which Congress can legislate with predictable effects." *Morrison*, 130 S. Ct. at 2881. And if those are not reason enough to reject the suggestion—particularly where this Court has made clear that Congress is squarely in the driver's seat when it comes to tribal sovereign immunity, *see Kiowa*, 523 U.S. at 758-60—Michigan's argument is also wrong. Clear statement rules are not unique to

constitutionally based immunity doctrines like state sovereign immunity. The Court has long applied a clear statement rule to a wide variety of *common law* immunities, including federal sovereign immunity, *e.g.*, *United States* v. *King*, 395 U.S. 1, 4 (1969); foreign sovereign immunity, *e.g.*, *The Schooner Exchange* v. *McFaddon*, 11 U.S. 116, 137 (1812); territorial immunity, *e.g.*, *People of Porto Rico* v. *Rosaly y Castillo*, 227 U.S. 270, 276-77 (1913); and official immunity, *e.g.*, *Pulliam* v. *Allen*, 466 U.S. 522, 529 (1984). Requiring a clear expression of Congress's intent to abrogate tribal immunity is thus hardly anomalous.

Even outside the immunity context, the Court has always required a clear statement of congressional intent before construing a statute in derogation of the common law or other longstanding norms. *See, e.g.*, *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952). Thus, even Michigan's contention that laws affecting tribal immunity should be interpreted "in the same manner as any other statute that affects the common law" could not advance its argument. Michigan would still have to identify a clear statement of intent to alter the background presumption of tribal sovereign immunity. And Section 2710(d)(7)(A)(ii) contains *no* indication—clear or otherwise—that Congress intended to abrogate tribal sovereign immunity with respect to claims like Michigan's involving gaming the state asserts is occurring outside of Indian lands. That alone provides grounds for affirmance.

IV. THIS COURT SHOULD REJECT MICHIGAN'S PLEA TO OVERRULE LONGSTANDING PRECEDENT REGARDING THE SCOPE OF TRIBAL IMMUNITY.

Michigan's final attempt to overcome Bay Mills' sovereign immunity is to implore this Court to disavow long-settled precedent and create a categorical exception to immunity by judicial fiat. The exception Michigan proposes would not only contravene established law, it would also defy principled application even in this case. The categorical exception to tribal immunity suggested by the amici states fares no better. As the Court has done repeatedly when asked to narrow tribal immunity, it should reject Michigan's position as contrary to longstanding and well-founded precedents.

A. Michigan's Claims Are Squarely Foreclosed By Settled Doctrine.

The doctrine of tribal sovereign immunity bars all claims against an unconsenting tribe, regardless of the character and location of the underlying conduct. Michigan's claims fall squarely within the contours of this settled doctrine. And Michigan knew this when it entered the compact at issue here, as the explicit terms of the compact make clear. Pet. App. 90a ("Nothing in this Compact shall be deemed a waiver of the Tribe's sovereign immunity. Nothing in this Compact shall be deemed a waiver of the State's sovereign immunity."). Michigan and its amici now attempt to argue that a decision in Bay Mills' favor would amount to an "exten[sion]" of tribal sovereign immunity, Alabama Br. 8, and an

exercise in judicial activism. But in fact, the Court has already rejected each of the limitations they propose. Michigan and its amici are asking the Court to overrule these past decisions. As the Court has repeatedly emphasized, if decades of settled expectations are to be undermined, Congress—not the Court—should be the branch of government to do so.

Michigan and its amici purport to identify a laundry list of exceptions to the doctrine of tribal sovereign immunity. Michigan argues that the doctrine does not apply to claims involving off-reservation conduct and/or claims involving commercial activity and/or non-contract claims. Pet. Br. 36-42. The Alabama amici add that the doctrine does not apply to claims for injunctive relief. Alabama Br. 9-11. According to Michigan and its amici, this Court has not yet applied tribal immunity in any of these circumstances.

This argument is founded on a grossly misleading portrayal of this Court's decisions. In *Kiowa*, for example, this Court squarely rejected Michigan's proposed limitations. Just like Michigan, the respondent in that case argued that tribal immunity should be "confine[d] * * * to reservations or to noncommercial activities." 523 U.S. at 758. The Court disagreed. It observed that previous decisions had not drawn those proposed distinctions, *id.* at 754-55, and held that adopting them would contravene settled law, *id.* at 758-60. The Court therefore chose to adhere to its precedents and "defer to the role Congress may wish to exercise in this important judgment." *Id.* at 758. The Court later reaffirmed that very holding in another case

involving off-reservation commercial conduct. *See C&L Enterprises*, 532 U.S. at 418.

Michigan attempts to characterize *Kiowa* as "only a narrow, contract-based ruling," Pet. Br. 37, and thus not relevant to resolving immunity in a non-contract case. *Id.* at 38. That is a peculiar contention given the facts of this case. Michigan's core claim is that Bay Mills breached its agreement with the state to operate class III gaming only on Indian land. Pet. App. 58a-61a. And IGRA makes clear that this kind of claim is "for breach of contract." 25 U.S.C. § 2710(d)(3)(C)(v). The tribal-state compact is a special type of contract, to be sure; but it is still a contract, and this dispute is "contract-based." Pet. Br. 37. Michigan's proposed carve out for non-contract claims therefore flounders even on its own terms.

In any event, this Court has *already* applied the doctrine of tribal immunity to a non-contract suit involving off-reservation commercial activity. *Puyallup Tribe, Inc.* v. *Department of Game of Washington* involved a tribe whose members engaged in commercial fishing "both on and off its reservation." 433 U.S. 165, 167 (1977); *see also Puyallup Tribe* v. *Dep't of Game*, 391 U.S. 392, 396 (1968) ("These Indians fish not only for their own needs but commercially as well, supplying the markets with a large volume of salmon."). A state court entered an injunction against the tribe and some of its members limiting the number of fish that could be caught and requiring the tribe to make certain reports about its members. 433 U.S. at 172. This Court held that "the portions of the state-court order that involve relief against the Tribe itself must

be vacated in order to honor the Tribe's valid claim of immunity." *Id.* at 173. Michigan's uncharitable interpretation of *Kiowa* as a "narrow, contract-based ruling" is thus foreclosed by *Puyallup*. Michigan's failure to mention *Puyallup* at all is particularly perplexing given the case's prominence in the *Kiowa* opinions. *See* 523 U.S. at 754-55 (opinion of the Court); *id.* at 762-63 (Stevens, J., dissenting).

Michigan's amici purport to identify a different gap in this Court's tribal immunity precedents. In their view, no decision has yet "held that tribal immunity bars an action by a State for declaratory and injunctive relief." Alabama Br. 6. But that is precisely what *Puyallup* held. *See* 433 U.S. at 172-73. (Like Michigan, its amici entirely fail to mention *Puyallup*.) Moreover, as the amici seem to recognize, this Court held again in *Oklahoma Tax Commission* v. *Citizen Band, Potawatomi Indian Tribe of Oklahoma* that tribal sovereign immunity barred a state counterclaim for injunctive relief. *See* 498 U.S. 505, 507-08, 510 (1991). And *Santa Clara Pueblo* v. *Martinez* also involved a claim for injunctive relief, though the plaintiff in that case was an individual rather than a state. 436 U.S. 49, 58 (1978).

Amici note that the Fifth Circuit found in *TTEA* v. *Ysleta del Sur Pueblo* that tribes could be sued for injunctive relief. 181 F.3d 676, 680-81 (5th Cir. 1999). But that decision simply misapplied *Ex parte Young*, which permits suits against state *officers* but not state *governments*. *See id.* Just as the immunity of the states does not turn on the type of relief sought, *see Seminole Tribe*, 517 U.S. at 58, neither does the immunity of tribes. The amici's purported exception for injunctions, like Michigan's supposed

exceptions, is wishful thinking, foreclosed by this Court's precedent.

B. There Is No Basis For Overruling This Court's Immunity Precedents.

Recognizing the futility of its arguments under settled precedent, Michigan ultimately falls back on a plea for the Court to "adjust" that precedent. Pet. Br. 40; *see also* Oklahoma Br. 15 (urging the Court to "modify" its doctrine). But this Court has rejected the very same plea before—*twice* since 1990. Michigan and its amici are simply rehashing the same tired arguments.

1. As this Court confirmed in *Kiowa*, tribal sovereign immunity is "settled law." 523 U.S. at 756. Congress, the executive branch, and the federal courts have all recognized and reaffirmed the doctrine of tribal sovereign immunity countless times. This Court has applied the doctrine no fewer than seven times since 1940. *See C&L Enterprises*, 532 U.S. at 418; *Kiowa*, 523 U.S. at 760; *Oklahoma Tax Comm'n*, 498 U.S. at 510; *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Eng'g*, 476 U.S. 877, 890-91 (1986); *Santa Clara Pueblo*, 436 U.S. at 58; *Puyallup Tribe*, 433 U.S. at 173; *United States* v. *U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940); *see also Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997); *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 781-82 (1991). The lower federal courts and state courts have done so hundreds more times. And this Court has not retreated from its unequivocal recognition of tribal immunity over 70 years ago, despite repeated requests to do so. *See infra* at 40-41.

The judiciary has not acted alone in this area. Congress and the executive branch have both ratified the doctrine of tribal sovereign immunity on numerous occasions. Congress has done so explicitly by endorsing the doctrine in statutes like the Indian Self-Determination and Education Assistance Act. That statute provides that nothing in it should be construed as "affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe." 25 U.S.C. § 450n. This provision, and many others like it, "cannot be read except as a validation" of the doctrine of tribal sovereign immunity. *Franklin* v. *Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 72 (1992) (discussing congressional ratification of judge-made doctrine).[5]

Congress has also implicitly approved the doctrine by enacting laws that authorize only narrow categories of claims against Indian tribes, *see, e.g.*, Act of May 29, 1908, § 5, 35 Stat. 445, and by repeatedly rejecting broad efforts to limit tribal immunity, *see, e.g.*, 40 Cong. Rec. 1260 (Jan. 18, 1906) (rejecting amendment that would have authorized "any claim of any nature" against certain Indian tribes); Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law*, 37 Tulsa L. Rev. 661, 726-51 (2002) (describing a number of bills that were debated during the 105th Congress). Countless executive

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[5] Many other statutes contain similar references to tribal immunity. *See, e.g.*, 30 U.S.C. § 1733(a)(4); 30 U.S.C. § 1300(j)(3); 25 U.S.C. § 3746; 25 U.S.C. § 450f(c)(3); 25 U.S.C. § 81(d)(2); 18 U.S.C. § 2346(b)(2); 18 U.S.C. § 1716E(h)(2); 15 U.S.C. § 378(c)(1)(B).

branch regulations likewise recognize or affirm the doctrine.[6] This uniform, unwavering acknowledgement of tribal sovereign immunity by all three branches of our government puts the issue beyond dispute. *Cf. Barnes* v. *Gorman*, 536 U.S. 181, 185 (2002).

2. Not only has the Court reaffirmed tribal sovereign immunity numerous times, it has affirmatively *rejected* efforts to limit tribal immunity. It first rebuffed such an effort in *Oklahoma Tax Commission*. Oklahoma argued that "tribal business activities * * * are now so detached from traditional tribal interests that the tribal-sovereignty doctrine no longer makes sense in that context." 498 U.S. at 510. The Court, however, unanimously reaffirmed the doctrine. Chief Justice Rehnquist's opinion for the Court emphasized that "Congress has always been at liberty to dispense with * * * tribal immunity or to limit it," but has instead "consistently reiterated its approval of the immunity doctrine." *Id.* at 510. The Court accordingly chose to defer to Congress's judgment and declined "to modify the long-established principle of tribal sovereign immunity." *Id.*

Seven years later, the *Kiowa* respondent came to the Court with a similar argument. It sought to "confine [tribal immunity] to reservations or to noncommercial activities." 523 U.S. at 758. Although the *Kiowa* Court admitted to some doubt

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[6] *See, e.g.*, 42 C.F.R. §§ 136.118(a), 137.3(a), 137.310; 25 C.F.R. §§ 11.118(d), 44.102(a), 84.006(a)(2), 162.012(a)(4)(ii), 162.014(d), 273.1(d)(1), 900.4(a).

about "the wisdom of perpetuating the [tribal immunity] doctrine," it held that the time for unilateral judicial intervention had passed. *Id.* Congress, not the Court, is "in a position to weigh and accommodate the competing policy concerns and reliance interests" at stake in any decision to limit the doctrine of tribal immunity. *Id.* at 760. Accordingly, the Court declined to "revisit" its case law and deferred to Congress instead. *Id.* at 759-60.

Changing course on tribal sovereign immunity would be even less appropriate now than when this Court decided *Kiowa*. *Kiowa*'s holding was expressly reiterated several years later in *C&L Enterprises*. *See* 532 U.S. at 418. And since *Kiowa*, Congress has specifically considered—and rejected—legislation that would have significantly curtailed the scope of tribal immunity. *See, e.g.*, S. 1691, 105th Cong. (1998); *see also* Seielstad, *supra*, at 726-51. Congress was well aware of this Court's decision in *Kiowa* and chose not to overrule it. *See, e.g.*, S. 2299, 105th Cong. § 2(a)(1)-(2) (1998) (discussing *Kiowa*); S. 2302, 105th Cong. § 2(a)(1)-(3) (1998) (same). Congress's decision to stay its hand is not an invitation for this Court to act in its stead.

On the contrary, the principles of stare decisis have "special force" in a case such as this because Congress "remains free to alter" the rule of sovereign immunity to which this Court has long adhered. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989). The federal government, states, tribal governments, and private entities have all negotiated and structured their various contracts and arrangements around the settled law of tribal sovereign immunity. Overturning or limiting these

precedents now would dissolve that underpinning and force the parties to begin anew. When "the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision," this Court has always been hesitant to revisit its past decisions, "for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." *Hilton* v. *S.C. Pub. Ry. Comm'n*, 502 U.S. 197, 202 (1991).

At bottom, Michigan and its amici misconceive this Court's role in developing the federal common law. They suggest the Court is free to refashion the "judge-made" doctrine of tribal sovereign immunity as it pleases. Pet. Br. 9. But that is not how common law decision making works. When this Court articulates a common law rule, it is not simply picking a policy that strikes the fancy of a majority of this Court. Instead, the Court follows the "practices of common law courts from the most ancient times": It attempts to "interweave" the policies established by the political branches with "the inherited body of common-law principles." *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 392 (1970); *see also, e.g.*, *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 27 (1990); *Oliphant* v. *Suquamish Tribe*, 435 U.S. 191, 206 (1978). That methodology points inexorably toward the proper result in this case. Courts have long recognized, and the political branches have long approved, the doctrine of tribal sovereign immunity. There is no warrant for upsetting that collective judgment merely because a minority of states are frustrated by the doctrine.

3. Precedent and respect for the judgment of coordinate branches are not the only reasons to reject Michigan's jumbled commercial-activity-outside-Indian-lands-except-for-contracts exception to tribal immunity. Michigan identifies no sound policy justification for adopting such a strange rule.

a. Borrowing from Justice Stevens' dissent in *Kiowa*, Michigan argues that the Court should make an exception to immunity for tribes' commercial activities because the federal government and foreign nations can be sued for some of their commercial activities. Pointing to this purported anomaly, Michigan asks why tribes should enjoy broader immunity than these other sovereigns. Pet. Br. 20; *see Kiowa*, 523 U.S. at 765 (Stevens, J., dissenting). What Michigan refuses to acknowledge is that the political branches, not the judiciary, created this "anomaly" by specifically carving out exceptions to federal and foreign sovereign immunity. Congress has enacted statutes to permit suits against the federal government for breach of contract and certain other commercial activities. *See, e.g.*, 41 U.S.C. § 601. And the State Department overturned the "virtually absolute" judicial conception of foreign sovereign immunity and created a new commercial activity exception in 1952. *Verlinden BV* v. *Cent. Bank of Nigeria*, 461 US 480, 486-87 (1983). Congress later codified that exception in the Foreign Sovereign Immunities Act. *Id.* at 488; *see also Kiowa*, 523 U.S. at 759 (recounting this history).

The courts thus followed, rather than led, the political branches in limiting the doctrines of federal and foreign sovereign immunity. That approach

makes good sense. When considering sovereign immunity, Congress is capable of "address[ing] the issue by comprehensive legislation" and is better positioned "to weigh and accommodate the competing policy concerns." *Kiowa*, 523 U.S. at 759. Congress may of course draw the line wherever it chooses; it is free, in the exercise of its legislative powers, "to say 'this much and no more.' " *Miles*, 498 U.S. at 24. But this Court is "not free to go beyond those limits," strike out on its own, and craft a non-statutory exception to tribal sovereign immunity. *Id.* The fact that the political branches have specifically created commercial-activity exceptions to federal and foreign sovereign immunity while at the same time reaffirming tribal sovereign immunity without any such exceptions counsels particular caution by the judicial branch.

A commercial-activities exception also makes little sense as a matter of theory or policy. Tribal sovereign immunity is intended in part "to promote the 'goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development.' " *Oklahoma Tax Comm'n*, 498 U.S. at 510 (citation omitted). Tribes' commercial activities, of course, are key to their "economic development."

Moreover, Michigan does not explain how courts are supposed to distinguish tribes' commercial activities from their governmental activities. As this Court's foreign sovereign immunity cases illustrate, this distinction is often not self-evident. *See, e.g.*, *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993); *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607 (1992); *cf. Gonzalez* v. *Raich*, 545 U.S. 1, 59 (2005)

(Thomas, J., dissenting) (challenging the prevailing understanding of "commerce"). The difficulty is exacerbated in the tribal context, for tribes—unlike sovereigns with significant tax bases—must rely on commercial activity to support their *governmental* functions. *See Cabazon*, 480 U.S. at 218-19 ("The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services."). And Michigan's proposed exemption of commercial contracts from its commercial-activity exception would only further frustrate judicial application. Indeed, this very case is based on Michigan's compact with Bay Mills, but it apparently would not fall within the exemption for contract claims that Michigan proposes.

b. Michigan's proposed exception for activity that takes place off Indian lands would be even more difficult to apply in practice. Michigan's own brief before this Court unwittingly demonstrates the problem. In one section, Michigan argues that "it is obvious" that the relevant gaming activity took place off Indian lands in the "brick-and-mortar" Vanderbilt facility. Pet. Br. 38. But earlier in its brief, it argued that the relevant gaming activity actually took place on Indian lands. Pet. Br. 20-21. If Michigan cannot even answer the on-or-off lands question in its one-sided merits brief, it is very hard to see how courts could reach principled decisions about the scope of tribal immunity in future cases.

c. Michigan's amici's proposed exception for injunctive relief, though perhaps easier to apply, has nothing else to recommend it. It would not even resolve this case, for Michigan's amended complaint

seeks forfeiture of Bay Mills' gaming revenues in addition to injunctive relief. *See* Pet. App. 56a, 70a. Moreover, allowing states to seek injunctive relief against tribes would undermine one of the principal functions of tribal sovereignty: protecting tribes from the states. *See Three Affiliated Tribes*, 476 U.S. at 890-91; *cf. Worcester* v. *Georgia*, 31 U.S. 515 (1832). Tribal sovereign immunity is "not subject to diminution by the States," *Kiowa*, 523 U.S. at 756, and this Court should once again reject the states' effort to diminish the rights of their fellow sovereigns.

4. It bears noting that this case does not involve a tort victim or other plaintiff that did not freely choose to deal with a tribal sovereign. Such cases may present special policy considerations, if not special doctrinal considerations. *Cf. Kiowa*, 523 U.S. at 758. For that reason, many tribes have chosen to waive their immunity in tort cases. *See* Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 Ariz. St. L.J. 137, 157-61 & n.141 (2004). Indeed, as a matter of policy, Bay Mills has never rejected a personal injury claim on sovereign immunity grounds.

In contrast to an unwitting tort victim, Michigan knew precisely what it was getting into when it entered into a gaming compact with Bay Mills. It could have bargained for additional "remedies for breach of contract." 25 U.S.C. § 2710(d)(3)(C)(v). Indeed, it *did* bargain for one such remedy: the compact's arbitration provision. *See* Pet. App. 89a-90a. Unlike many other states, however, Michigan did not obtain a waiver of the tribe's sovereign immunity in its negotiations with the tribe. *Cf. infra*

at 55 (discussing sovereign immunity waivers in other gaming compacts). Its newfound dissatisfaction with the compact for which it negotiated is no basis for overturning settled precedent.

C. Tribal Sovereign Immunity Has Deep Roots In Our Legal Tradition.

In a final effort to escape the force of controlling precedent, Michigan and its amici seize on dicta in *Kiowa* to attack the provenance of tribal sovereign immunity. *See* 523 U.S. at 756-57 (suggesting that tribal immunity "developed almost by accident" when a remark in *Turner* v. *United States*, 248 U.S. 354 (1919), became an explicit holding in *U.S. Fidelity & Guaranty*). From this, they argue that the doctrine's happenstance beginning undermines its vitality and leaves the Court free to amend or reshape it to accommodate the states' current policy concerns.

That argument glosses over the actual holding in *Kiowa*. The Court categorically reaffirmed the doctrine of tribal immunity—and ruled for the tribe—notwithstanding its questions about the doctrine's origins. *Id.* at 760. If Michigan were correct that the Court could freely revisit settled law, *Kiowa*'s holding might have been different. And in any event, the premise of Michigan's argument is wrong. Tribal sovereign immunity did not suddenly blossom in 1940 from an inadvertent seed planted in 1919. The doctrine was first judicially recognized in the late nineteenth century, and its roots extend far deeper than even that.

This Court has always recognized that Indian tribes have many of the characteristics of independent sovereigns. *See*, *e.g.*, *Worcester*, 31 U.S.

at 558; *Cherokee Nation* v. *Georgia*, 30 U.S. 1, 16 (1831). Modern-day Indian tribes are "self-governing political communities that were formed long before Europeans first settled in North America." *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845, 851 (1985). Although they no longer possess " 'the full attributes of sovereignty,' " *Santa Clara Pueblo*, 436 U.S. at 55 (citation omitted), they still retain "those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978); *see* Cohen § 1.03 (discussing inherent tribal sovereignty).

Tribal sovereign immunity follows naturally from the premise of tribal sovereignty. Immunity from judicial process has long been recognized an "an incident of sovereignty." *Bonner* v. *United States*, 76 U.S. 156, 159 (1869). As Alexander Hamilton wrote in Federalist 81, 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, p. 508 (Henry Cabot Lodge ed. 1888) (emphasis omitted). This "established principle of jurisprudence in all civilized nations," *Beers* v. *Arkansas*, 61 U.S. 527, 529 (1858), has long been held to bar suits against a broad variety of sovereigns. It applies to suits against states in federal court, where immunity is constitutionally mandated. And it applies in a number of non-constitutional contexts as well, including suits against the federal government, *e.g.*, *United States* v. *Thompson*, 98 U.S. 486, 489 (1879), suits against territorial governments, *e.g.*, *Rosaly y Castillo*, 227 U.S. at 273-74, suits against foreign nations, *e.g.*, *The Schooner Exchange*, 11 U.S. at 136-37; and suits

against states in the courts of sister states, *e.g.*, *Paulus* v. *South Dakota*, 227 N.W. 52, 55 (N.D. 1929). Just as these other immunities arise from the nature of sovereignty itself, tribal sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes*, 476 U.S. at 890.

Courts recognized the doctrine of tribal sovereign immunity long before *U.S. Fidelity & Guaranty*. *See generally* William Wood, *It Wasn't An Accident: The Tribal Sovereign Immunity Story*, 62 Am. U. L. Rev. 1587, 1640-54 (2013) (discussing early tribal immunity cases). For example, this Court's decision nearly a century earlier in *Parks* v. *Ross*, 52 U.S. 362 (1851), suggests a judicial assumption of tribal immunity. That case involved a claim for breach of contract against the legendary Cherokee chief John Ross. Ross had been responsible for hiring wagons in his official capacity as superintendent of the Cherokees' westward migration. *Id.* at 373. Ross was sued for the balance allegedly owed on one of the wagon contracts. *Id.* at 374. This Court rejected the claim, based in part on the general rule that an agent is not responsible for the debts of his principal, but also based on its conclusion that Ross was immune from the Circuit Court's process. The Cherokees, the Court observed, are "in many respects a foreign and independent nation," "governed by their own laws and officers, chosen by themselves." *Id.* Although they are ultimately under the guardianship of the United States, the federal government "has delegated no power to the courts of this District to arrest the public representatives or agents of Indian nations, who may be casually within their local jurisdiction, and

compel them to pay the debts of their nation * * *." *Id.*

Parks thus recognized that Ross enjoyed a type of official immunity by virtue of his public office. And that conclusion strongly suggests the existence of tribal sovereign immunity. For as Chief Justice Marshall recognized long ago, the immunities enjoyed by public officials are an outgrowth of the "perfect equality and absolute independence of sovereigns." *The Schooner Exchange*, 11 U.S. at 137-39 (discussing head of state immunity and diplomatic immunity); *see also Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2290-91 (2010). And so by recognizing that Ross's role as a "public representative[ ]" of the Cherokee Nation gave him a privilege against judicial "arrest," 52 U.S. at 374, the Court strongly suggested that the tribe itself would have enjoyed the same immunity from compulsory process.

Other nineteenth century cases confirm tribal immunity's strong pedigree. *See, e.g.*, *Thebo* v. *Choctaw Tribe of Indians*, 66 F. 372 (8th Cir. 1895). In 1889, Congress established a Circuit Court for "Indian Territory" and assigned appellate jurisdiction to the Court of Appeals for the Eighth Circuit. Act of March 1, 1889, 25 Stat. 783. Thebo brought an action against the Choctaw Tribe in the new Circuit Court to recover fees for services rendered. 66 F. at 373. The lower court dismissed for lack of jurisdiction, and the court of appeals affirmed. In terms that mirror subsequent Supreme Court decisions, the Eighth Circuit held that "no court has ever presumed to take jurisdiction of a cause against any of the five civilized Nations in the

Indian Territory in the absence of an act of congress expressly conferring the jurisdiction in the particular case." *Id.* at 375. Because Congress had not expressly authorized Thebo's suit, it was properly dismissed. *Id.* at 376.

The Eighth Circuit repeated its holding thirteen years later, noting that "the tribes would soon be overwhelmed with civil litigation and judgments" if their immunity were disregarded. *Adams* v. *Murphy*, 165 F. 304, 308 (8th Cir. 1908). And the Supreme Court of the District of Columbia reached the same conclusion in 1894 after conducting an exhaustive analysis of this Court's decisions. *See Chadick* v. *Duncan*, No. 15,317, at 78, 80-82 (D.C. Mar. 2, 1894). As one of the attorneys noted at oral argument in *Chadick*, several district courts had previously dismissed cases on the basis of tribal sovereign immunity, and no court had ever reached the contrary conclusion. *Id.* at 70-71.

Even if *Turner* represented "at best, an assumption of sovereign immunity for the sake of argument," *Kiowa*, 523 U.S. at 757, that assumption was well-founded by *Turner*'s time. To be sure, no decision of this Court squarely recognized the doctrine of tribal immunity until 1940. But no decision rejected it either—a fact that likely reflects the widely held assumption of immunity. In fact, Bay Mills is not aware of a single pre-1940 decision in any court (and Michigan cites to nothing) permitting a lawsuit to go forward against an unconsenting Indian tribe in the absence of specific congressional authorization. This judicial silence is telling, for there was no shortage of conflict between Indian tribes and non-Indians during the nineteenth

century. If compulsory judicial process had been available, *somebody* surely would have attempted to use it against a tribe at *some point* over the course of more than a hundred years.

Congress evidently shared the view that tribes could not be sued without authorization or consent. A statute from 1796, for example, set up a circuitous procedure for resolving certain property damage claims by non-Indians against Indian tribes: The claimant would apply to the United States for compensation; the United States would then ask the tribe for satisfaction; and if the tribe did not pay, the President would determine what "further steps" should be taken. Act of May 17, 1796, § 14, 1 Stat. 469, 472. This unwieldy sovereign-to-sovereign dispute resolution procedure, which was reenacted repeatedly during the nineteenth century, strongly suggests that claimants could not sue tribes directly.

It thus appears to have been universally assumed for many years that tribes were not amenable to suit. That assumption accords with the United States' traditional treatment of tribes as wholly foreign to the U.S. legal system. For at least the first century after the founding, Indian affairs " 'were more an aspect of military and foreign policy than a subject of domestic or municipal law.' " *United States* v. *Lara*, 541 U.S. 193, 201 (2004) (citation omitted). The founders put Indian tribes on par with states and foreign nations in the Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3. And for most of the eighteenth and nineteenth centuries, the federal government dealt with tribes largely through treaties and took pains to isolate them from American society. *See* Cohen § 1.03. The founders

and their successors would have been bewildered by the notion that tribal sovereigns could be haled into court at the pleasure of any frontiersman. As John Marshall put it during the Virginia ratifying convention, " 'It is not rational to suppose that the sovereign power should be dragged before a court.' " *Alden* v. *Maine*, 527 U.S. 706, 718 (1999) (citation omitted).

In any event, tribal sovereign immunity is now firmly established in our jurisprudence. Congress, courts, and the executive branch have acknowledged and reaffirmed the doctrine on numerous occasions. There is no warrant for altering it now.

V. A WIDE VARIETY OF ENFORCEMENT OPTIONS REMAIN AVAILABLE TO STATES.

Michigan and its amici pepper their legal arguments with the doomsday scenario that without federal-court suits to enjoin "unlawful gaming," law enforcement will be hamstrung, lawlessness will abound, and safety and sovereignty will be impaired. Because immunity undoubtedly can prevent a plaintiff from "pursuing the most efficient remedy" in a given case, *Oklahoma Tax Comm'n*, 498 U.S. at 514, Michigan's complaint is in large part a complaint about the very concept of immunity. After all, the design and effect of the immunity doctrines is to limit how and where a lawsuit may be brought. The states are of course comfortable with that concept when it comes to their own immunity—a fact highlighted by Michigan's invocation of sovereign immunity against Bay Mills' lawsuit seeking a declaratory judgment that the Vanderbilt parcel was "Indian lands." *See supra* at 17. This case merely

illustrates the "continuing vitality of the venerable maxim that turnabout is fair play." *Florida* v. *Seminole Tribe of Fla.*, 181 F.3d 1237, 1239 (11th Cir. 1999).

In any event, Michigan's doomsday rhetoric is empty. States are hardly powerless to prevent "unlawful gaming." In fact, they have a broad variety of enforcement options at their disposal, none of which necessitates a radical reformulation of the doctrine of tribal sovereign immunity.

The most obvious of those remedies is specified in the gaming compact itself: Michigan can invoke the arbitration mechanism in section seven of the compact. Pet. App. 89a-90a. Other gaming compacts include similar dispute resolution mechanisms. *See, e.g.*, Tribal Gaming Compact Between the Cherokee Nation and the State of Oklahoma, pt. 12 (Dec. 28, 2004). Indeed, Congress clearly anticipated that gaming disputes would be resolved through the procedures negotiated in gaming compacts. *See* 25 U.S.C. § 2710(d)(3)(C)(v) (gaming compacts may include provisions relating to "remedies for breach of contract"). For unknown reasons, Michigan opted not to invoke the detailed arbitration procedures set forth in the Bay Mills compact. That choice by Michigan provides no justification for twisting statutory text to create a new remedy more to its liking.

Michigan is certainly free to bargain for a judicial remedy during the next round of compact renewal negotiations (which are currently taking place). States have substantial leverage in compact negotiations because tribes need their consent to conduct class III gaming and because this Court's

decision in *Seminole Tribe* bars a tribe from suing to force states to negotiate. As part of those negotiations, Michigan might insist upon a waiver of tribal immunity. Indeed, Michigan could follow the lead of other states, which have induced such waivers by agreeing to waive their own immunity. That is precisely what Florida did after this Court's decision in *Seminole Tribe* and the Eleventh Circuit's subsequent decision that tribal immunity barred Florida's suit against the Seminole Tribe. *See* Gaming Compact Between the Seminole Tribe of Florida and the State of Florida, pt. XIII (Apr. 7, 2010). Many other gaming compacts—including compacts entered into by some of Michigan's amici—likewise include mutual waivers of sovereign immunity. *See, e.g.*, Tribal State Compact Among the Iowa Tribe of Kansas and Nebraska and the State of Kansas, § 31(E)-(I) (June 23, 1995); Compact Between the Sovereign Indian Nation of the Omaha Tribe of Nebraska and the Sovereign State of Iowa, § 21 (Jan. 19, 2007). Nothing prevents Michigan from following suit. Of course, here, Michigan did the *reverse*, insisting in the compact that neither it nor the tribe waived its immunity. Pet. App. 90a. If Michigan is unhappy with those terms, it can attempt to renegotiate them instead of asking this Court to circumvent them.

But even under the terms of the existing compact, Michigan retains several potential judicial remedies. For instance, it may be able to file an *Ex parte Young*-type suit against tribal officials to enjoin them from violating the law. *See Santa Clara Pueblo*, 436 U.S. at 59. In the context of state sovereign immunity, the *Ex parte Young* doctrine provides a remedy for ongoing unlawful conduct by a

governmental official where immunity would otherwise prevent enforcement of the law. *See Virginia Office for Protection & Advocacy* v. *Stewart*, 131 S. Ct. 1632, 1638 (2011). Parallel suits against tribal officers have the advantage of enabling states like Michigan to halt unlawful conduct while still respecting tribal sovereignty. Indeed, Michigan has already named a number of Bay Mills officials as defendants in its still-pending amended complaint. Pet. App. 56a-57a. Alternatively, Michigan could seek to enforce its gambling laws against the individuals running the Vanderbilt facility, rather than against the tribe itself. *See, e.g.*, Mich. Comp. Laws § 432.220 (any person who "conducts a gambling operation without first obtaining a license to do so" is subject to a civil penalty); Mich. Comp. Laws § 432.218(3)(d) (any person who conducts gambling activities without a license is guilty of a misdemeanor).

Michigan could also call upon the federal government to intervene in the dispute. The National Indian Gaming Commission may be able to order the Vanderbilt facility's closure. *See* 25 U.S.C. § 2713(b); 25 C.F.R. § 573.4.[7] Alternatively, the U.S. Attorney General can bring various civil and criminal enforcement actions against the tribe or individuals if it believes the tribe's actions violate federal law. *See, e.g.*, 18 U.S.C. § 1955 (prohibition of

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[7] To date, the National Indian Gaming Commission has taken a narrow view of its jurisdiction. *See* J.A. 102-07. But nothing prevents it from revisiting its position, and nothing prevents Michigan and other states from challenging that position through both political and legal channels.

illegal gambling businesses); 15 U.S.C. § 1172 (interstate transportation of gambling devices). Or the Department of the Interior may be able to take a final agency action regarding the Vanderbilt property, *see, e.g.*, 5 U.S.C. § 554(e) (declaratory order), which could then be challenged in court under the Administrative Procedure Act.

Finally, Michigan retains other potent remedies. If it decides that gambling is more trouble than it is worth, it can follow the lead of Utah and Hawaii and ban gambling throughout the state. That decision would prevent everybody in Michigan—Indians and non-Indians alike—from engaging in all but the most innocuous forms of gaming. *See* 25 U.S.C. § 2710(b)(1)(A), (d)(1)(B). Michigan and its fellow states could also attempt to secure legislation to limit or abrogate tribal immunity, and do through the legislative branch what it is improperly seeking to do here through the courts.

Of course, the Court need not, and should not, give an opinion on the propriety of any of these options. *See Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) ("Ordinarily, 'we do not decide in the first instance issues not decided below.' " (citation omitted)). The point is simply that suits under section 2710(d)(7)(A)(ii) are not Michigan's only means of accomplishing its goals. There is accordingly no justification for the Court to create an entirely new remedy that Congress never envisioned.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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ADDENDUM

The United States Code, 18 U.S.C. § 1166, provides:

§ 1166. Gambling in Indian country

(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.

(c) For the purpose of this section, the term "gambling" does not include--

(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

(2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.

(d) 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, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

The United States Code, 25 U.S.C. §§ 2701 *et seq.*, provides, in pertinent part:

§ 2701. Findings

The Congress finds that--

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

§ 2702. Declaration of policy

The purpose of this chapter is--

(1) 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;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

* * *

§ 2703. Definitions

* * *

(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7) (A) The term "class II gaming" means--

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)--

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that--

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include--

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on October 17, 1988, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after October 17, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(E) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on December 17, 1991, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands in the State of Wisconsin on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requested the State, by no later than November 16, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(F) If, during the 1-year period described in subparagraph (E), there is a final judicial determination that the gaming described in subparagraph (E) is not legal as a matter of State law, then such gaming on such Indian land shall cease to operate on the date next following the date of such judicial decision.

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

* * *

§ 2710. Tribal gaming ordinances

(a) Jurisdiction over class I and class II gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if--

> (A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and
>
> (B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that--

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than--

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which--

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes--

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if--

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4) (A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B) (i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if--

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 2712 of this title,

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 2717(a)(1) of this title for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on October 17, 1988.

(iii) Within sixty days of October 17, 1988, the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming license; certificate of self-regulation

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II) of this section, the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which--

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after October 17, 1988; and

(B) has otherwise complied with the provisions of this section

may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has--

(A) conducted its gaming activity in a manner which--

(i) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for--

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation--

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 2706 (b) of this title;

(B) the tribe shall continue to submit an annual independent audit as required by subsection (b)(2)(C) of this section and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 2717 of this title in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are--

(A) authorized by an ordinance or resolution that--

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2) (A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that--

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D) (i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection--

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3) (A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to--

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that--

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7) (A) The United States district courts shall have jurisdiction over--

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) 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, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B) (i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that--

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court--

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures--

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8) (A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates--

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

(e) Approval of ordinances

For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this chapter.