What Might the Supreme Court Have in Store for Indian Gaming?

Robert T. Anderson

Professor of Law and
Director, Native American Law Center
University of Washington School of Law

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Introduction

This presentation covers the *Michigan v. Bay Mills Indian Community* case that was argued in the Supreme Court on December 2, 2013. Because Professor Eberhard and I were explicitly asked to speculate on the outcome, it is useful to review the summaries of arguments presented in the case by the parties and the amicus. Of course, the Supreme Court has been known to decide cases based on theories not presented to the Court. I have not been involved in any of the briefing of what many on the tribal side of the case have called “a disaster waiting to happen,” but will be happy to speculate once I review the transcript of the oral argument. That will be after this material is due to the sponsor.

Set out below is the Bay Mills version of the dispute, followed by what has been served up to the Supreme Court in the eight briefs.

Facts

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.

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. Michigan 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.
The Briefs

Eight merits briefs are before the court (not including reply briefs). Six of those are amicus briefs filed by the U.S., Seminole Tribe of Florida NCAI and NIGA, and Law Professors (generally supporting Bay Mills), and two briefs by Alabama, and Oklahoma, respectively (supporting Michigan).

1. Michigan:

Questions Presented:

The Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. (IGRA), authorizes an Indian tribe to conduct class III gaming under limited circumstances and only on “Indian lands.” 25 U.S.C. § 2710(d)(1). This dispute involves a federal court’s authority to enjoin an Indian tribe from operating an illegal casino located off of “Indian lands” (i.e., on sovereign state lands) and presents two questions:

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.

SUMMARY OF ARGUMENT

The Sixth Circuit erred in two ways when it held that Michigan could enjoin an illegal tribal casino located on Indian lands but not on lands subject to the State’s own sovereign jurisdiction.

To begin, the Tribe authorized, licensed, and operated the Vanderbilt casino from the Tribe’s reservation near Brimley, Michigan. By definition, the reservation constitutes “Indian lands.” 25 U.S.C. § 2703(4). Because the Tribe’s authorization, licensing, and operation of the casino from Indian lands are all “activities” necessary for the casino’s existence, this lawsuit fulfills all of § 2710’s prerequisites for suit, even as the Sixth Circuit identified them. Pet. App. 7a (citing 25 U.S.C. § 2710(d)(7)(A)(ii) and holding that federal district courts have jurisdiction over any cause of action where “(1) the plaintiff is a State or an Indian tribe; (2) the cause of the action seeks to enjoin a class III gaming activity; (3) the gaming activity is located on Indian lands; (4) the gaming activity is conducted in violation of a Tribal-State compact; and (5) the Tribal-State compact is in effect.”) (emphasis added).

Moreover, this suit should proceed even if one ignores the on-reservation conduct that is necessary to gaming in Vanderbilt. The federal courts have jurisdiction over this matter because the State’s complaint alleged violations of IGRA, a federal statute. 28 U.S.C. § 1331; Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050, 1056 (9th Cir 1997)
(a “claim to enforce the Compacts arises under federal law and thus [] we have jurisdiction pursuant to 28 U.S.C. § 1331.”); Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1557 (10th Cir. 1997) (“IGRA is a federal statute, the interpretation of which presents a federal question suitable for determination by a federal court.”)

Section 1331’s expansive federal-question jurisdiction is restricted only when Congress “expressly limit[s]” it through a statute creating limited federal-court jurisdiction. Free Enterprise Fund v. Public Company Accounting Oversight Board, 130 S. Ct. 3138, 3150 (2010). And IGRA contains no such limiting language.

Tribal sovereign immunity also does not bar this action, for two separate reasons. First, in Seminole Tribe, this Court endorsed a more holistic approach to analyzing statutory abrogation of sovereign immunity, an approach that considers the statutory scheme as a whole. 517 U.S. at 57. When examining IGRA as a whole (i.e., not focusing exclusively on § 2710), it is immediately apparent that Congress understood and expected that a state could enforce its gaming laws in federal court against a tribe engaged in off-reservation gaming. It cannot be the case that Congress intended in IGRA to allow a state the least provocative remedy (a federal-court injunction) to stop illegal tribal gaming on Indians lands, while prohibiting injunctions of the exact same illegal conduct on sovereign state lands, thus forcing a state to send in police to seize and arrest.

In the alternative, the Court should confirm that tribes have no sovereign immunity from suits alleging illegal commercial gaming occurring on state lands. Aside from Kiowa’s commercial-paper context, this Court has never expressly held that tribal immunity applies to illegal, off-reservation, commercial conduct. Kiowa, 523 U.S. at 764 (“in none of our cases have we applied to doctrine to purely off-reservation conduct.”) (Stevens, J., dissenting).

Given the tribal-immunity doctrine’s dubious foundation, the Court should hesitate to extend the doctrine now that the question is squarely presented. There is no good reason a tribe should enjoy broader immunity than the federal government and foreign nations, entities which are undeniably subject to suit for their commercial activities.

2. Bay Mills

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.

3. United States

SUMMARY OF ARGUMENT

Section 2710(d)(7)(A)(ii) provides that federal district courts shall have jurisdiction over “any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact * * that is in effect.” (emphasis added). The statute does not authorize a suit against a tribe to enjoin gaming that takes place off Indian lands.
Petitioner tries to bring Counts I-III of its amended complaint within the limited scope of Section 2710(d)(7)(A)(ii) by contending that tribal officials authorized and supervised gaming at the Vanderbilt Parcel while they were on respondent’s reservation and that those actions constitute “class III gaming activities on Indian lands.” Numerous provisions of IGRA demonstrate, however, that the term “class III gaming activities” refers to the games themselves.

Petitioner also invokes the district court’s jurisdiction under 28 U.S.C. 1331. Petitioner’s claims in Counts I-III, however, do not come within the cause of action contemplated by Section 2710(d)(7)(A)(ii). Furthermore, although IGRA authorizes a State and tribe to include other remedies for breach of contract in their Tribal-State compacts, 25 U.S.C. 2710(d)(3)(C)(v), and pursuit of those remedies would presumably arise under federal law for purposes of 28 U.S.C. 1331, the compact between petitioner and respondent contains no provision agreeing to federal-court review of disputes arising under the compact. Nor does petitioner contend that IGRA confers an implied right of action by a State against a tribe to enforce IGRA or a compact outside the express provisions of 25 U.S.C. 2710(d)(7)(A)(ii) and (3)(C)(v).

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

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

B. The Court should not create an exception to tribal sovereign immunity for off-reservation commercial activities. The Court’s settled precedents recognize that Indian tribes have immunity from suit, including suits for injunctive relief and for their commercial activities, regardless of where those activities take place. Congress, which has carefully balanced the interests of tribes and States and provided a comprehensive statutory foundation for gaming under IGRA, is better equipped to weigh and accommodate the competing policy and reliance concerns in this area. The Court should continue to defer to Congress to make the necessarily complex legislative judgments in this case.

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

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

4. NCAI/NIGA

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a remarkable case. Michigan and its amici urge this Court to revisit the fundamental contours of tribal sovereign immunity. They feel justified in doing so because of an imperfect storm in which various decisions by the parties and the federal government have seemingly put the doctrine at issue. The State and the Bay Mills Indian Community (“Bay Mills”) have interposed sovereign immunity defenses in suits that each has brought against the other, thereby preventing resolution of the merits of Bay Mills’ claim that its Vanderbilt facility is on Indian lands. Meanwhile, the National Indian Gaming Commission (“NIGC”) has concluded that the site does not so qualify, but has misapprehended the Indian Gaming Regulatory Act (“IGRA”) as denying it enforcement authority.

Against the pressure to reconsider tribal immunity root and branch stand the principles of judicial caution firmly adhered to by this Court on matters of jurisdiction and remedy. At issue here is whether section 2710(d)(7)(A)(ii) of IGRA applies under the present facts to abrogate Bay Mills’ sovereign immunity. If so, the case presumably will proceed to judgment. If not, then subject matter jurisdiction does not exist to proceed further.

Section 2710(d)(7)(A)(ii) is a carefully delineated jurisdictional provision. With its precise identification of claimants, forum, and remedies, it displaces general federal question jurisdiction over the State’s causes of action. See, e.g., Hinck v. United States, 550 U.S. 501, 506 (2007); EC Term of Years Trust v. United States, 550 U.S. 429, 433-34 (2007). The cases cited by the parties in support of section 1331 jurisdiction are not to the contrary, and the balance of the statutory scheme, which would provide for judicial review even on the court of appeals’ narrow construction of section 2710(d)(7)(A)(ii), confirms the displacement.

The Vanderbilt facility has been shuttered since the district court issued its injunction. Under NIGC regulations, Bay Mills would have to issue a new facility license and submit it to the NIGC before the facility could re-open. At that point, the NIGC would have
ample tools against an operation that it and the Interior Department have deemed illegal. IGRA allows for tribal gaming only pursuant to NIGC-approved ordinances, and consistent with IGRA’s terms, those ordinances (as in the case of Bay Mills’s) can provide for gaming only on Indian lands. Congress has expressly authorized the NIGC to bring enforcement actions for ordinance violations, including ordering the closure of facilities regardless of their location. 25 U.S.C. § 2713(b). When previously confronted with a Vanderbilt facility that, under its interpretation of “Indian lands,” constituted a significant ordinance violation, the NIGC overlooked this enforcement authority. Armed with a proper construction of the statute by this Court, it presumably would not make that mistake again. Bay Mills could then seek judicial review of resulting NIGC enforcement under 25 U.S.C. §§ 2713(c) and 2714 and the APA. The State could seek to intervene. And the merits of Bay Mills’ position would be fully addressed. Section 1331 jurisdiction does not exist under these circumstances.

Even if this Court disagrees, two additional, insuperable obstacles (again grounded in principles of judicial caution) defeat any suggestion that this Court perform radical surgery on the immunity doctrine. Such an exercise would directly contradict this Court’s holding in Seminole Tribe of Florida v. Florida, 517 U.S. 44, 73-74 (1996), that IGRA’s “carefully crafted and intricate remedial scheme” precludes additional, judicially fashioned inroads into immunity. It would also fly in the face of the deference to Congress that informed Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998). In the wake of Kiowa Congress deliberated carefully about the wisdom of maintaining the tribal immunity doctrine, choosing ultimately to place certain limits on it while rejecting the drastic curtailments proposed here. And Congress had sound reason for acting as it did, for each of the suggested modifications would invite endless line-drawing and engender drastic policy consequences. As frustrating as the course here has been, it provides no warrant for this Court to abandon its considered approach to issues of jurisdiction and remedy.

5. Law Professors

SUMMARY OF ARGUMENT

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

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

6. Seminole Tribe

SUMMARY OF ARGUMENT

The State asks this Court to overturn a judgment by the Sixth Circuit Court of Appeals, holding: 1) that the plain language of the IGRA does not supply federal court jurisdiction to hear the State’s claim against Bay Mills; and 2) that tribal sovereign immunity bars the claim absent tribal consent. The claim alleges that Bay Mills has violated its IGRA Tribal-State compact by engaging in Class III gaming outside of Indian lands.

In making its case, the State repeatedly asserts that the failure of this Court to overturn the Sixth Circuit’s decision will leave the State without a remedy to address the alleged compact violations absent resort to extreme measures sure to provoke needless acrimony between the Tribe and the State. See, e.g., Pet. Br. at 15, 19, 28. The State asserts that this Court must intervene to provide a judicially created remedy and bridge a supposed gap in the IGRA.

To the contrary, there is no need for this Court to intervene to provide the State with the sort of civil remedy and dispute resolution opportunity it seeks. The State, like the states with which amici tribes have compacted under the IGRA, negotiated and agreed to a detailed dispute resolution provision in its compact with Bay Mills – a provision that the State may invoke at any time. The negotiated remedy would require the Tribe, upon final notice from the State, to either cease the conduct to which the State objects or initiate arbitration to resolve the dispute. The State failed to invoke its dispute resolution rights under the compact it negotiated, and the State’s brief does not explain why it failed to do so. It seeks instead to persuade the Court that judicial action is desperately needed to curtail the supposedly devastating effects of Bay Mills’ assertion of tribal sovereign immunity.

The State’s arguments do not reflect the reality of tribal sovereign immunity or account for dispute resolution under negotiated IGRA Class III compacts. Tribes, like other sovereigns, routinely waive their immunity in a wide variety of circumstances, including IGRA compacts. As is also true of other sovereigns, tribes need the ability to define the extent of their waivers in a manner that allows them to enter into agreements with other willing entities to develop tribal economies while at the same time protecting limited tribal assets and preserving core governmental functions. Consistent with these needs, and after a careful balancing of state and tribal concerns, Congress intentionally elected a cooperative, intergovernmental, and case-by-case regulatory scheme for Class III gaming, utilizing Tribal-State compacts rather than a broad and inflexible grant of jurisdiction to the states.
Were this Court to adopt the State’s position, the result would not only contravene the language and intent of the IGRA, but it would also allow the State to circumvent its negotiated agreement with Bay Mills (as memorialized in its Tribal-State compact) and reward the State with the benefit of a bargain that it failed to make for itself at the negotiating table. It would also disrupt the legitimate, settled, and often investment-backed expectations of the parties to countless IGRA compacts, intergovernmental agreements, and commercial contracts involving Indian tribes – all of which assume the validity of settled law governing tribal sovereign immunity. For these reasons, the Court should affirm the Sixth Circuit’s ruling.


SUMMARY OF THE ARGUMENT

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

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

2. The Court should decline to extend tribal immunity to suits for prospective relief so that the judiciary can resolve serious conflicts between States and tribes. The Court has held that tribes must comply with generally applicable state and federal laws. But tribal immunity is often raised as a defense to lawsuits seeking to compel tribal compliance. This has led to unresolved disputes over Internet-based tribal payday lending, disputes over tribal compliance with state campaign-finance laws, and disputes about unlawful gambling like the case at hand. There are no good options for resolving these lingering disputes. Federal authorities have failed to act when tribes and tribal businesses have violated the law, as evidenced by the federal authorities’ lack of meaningful response in this case. Likewise, state criminal prosecutions and official-capacity lawsuits are lesser remedies that do not always resolve the underlying legal dispute.

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

8. Oklahoma

SUMMARY OF THE ARGUMENT

Federal courts have general federal question jurisdiction to resolve disputes over whether a tribe’s Class III facility is authorized by IGRA.

IGRA separately provides federal courts with jurisdiction to resolve disputes over whether a tribe’s Class III facility is authorized by IGRA. The Sixth Circuit’s decision to the contrary defied congressional intent to provide states with a federal court forum to resolve such disputes, and puts the incentives in all the wrong places, by giving tribes a reason to move Class III gaming activities off of their Indian lands. Tribal sovereign immunity from suits brought by states is inappropriate in the modern age of commercial tribal activity, and it provides tribes with greater immunity from suit than that enjoyed by the states, the United States, and foreign nations. The Court should revisit its holding in Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 762 (1998), and abolish tribal sovereign immunity in the context of suits brought by states to enjoin unlawful commercial activity occurring outside of a tribe’s Indian land.

END