A TRADITION OF SOVEREIGNTY: EXAMINING TRIBAL SOVEREIGN IMMUNITY IN *BAY MILLS INDIAN COMMUNITY V. MICHIGAN*

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I. INTRODUCTION

Tribal sovereign immunity has been a core principle of Indian law and United States-tribal interactions since first contact between European and native peoples.[1] For centuries, this principle has dictated that Indian tribes, like sovereign nations, are immune from legal action as "distinct, independent, political communities retaining their original rights."[2] In *Bay Mills Indian Community v. Michigan*,[3] the Supreme Court will determine whether tribal sovereign immunity prevents the State of Michigan from seeking an injunction in federal court against a federally recognized Indian tribe for alleged violations of the Indian Gaming Regulation Act occurring outside of "Indian lands."[4] In answering this question the Court can comport with long-standing precedent by finding that tribal sovereign immunity bars the desired action. Alternatively, the Court could find that tribal sovereign immunity does not protect the Bay Mills tribe from Michigan's suit, marking a shift in judicial approach on the issue—a

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1. *See* Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 683 (2002) ("[Sovereign immunity] emerged from a tradition of early European contact in which discourse, commercial trade and intercourse, negotiation, and treaty-making regulated interactions and relationships between Indian nations and their people, on the one hand, and European nations and their colonial settlers, on the other hand.").

2. *See id.* at 689 (citation omitted).

3. Michigan v. Bay Mills Indian Cmty., No. 12-515 (U.S. argued Dec. 2, 2013).

4. *See* Brief for Petitioner at i, Michigan v. Bay Mills Indian Cmty., No. 12-515 (U.S. Aug. 30, 2013).

shift which could ripple through a variety of tribal concerns. For both legal and policy reasons, the Court should uphold the ruling of the Sixth Circuit and determine that tribal sovereign immunity bars Michigan's desired injunction.

II. FACTUAL BACKGROUND

A. Background

The Bay Mills Indian Community (Bay Mills) is a federally recognized American Indian tribe with a reservation and tribal offices in Michigan's Upper Peninsula.[5] Bay Mills entered into a Tribal-State compact with Michigan in 1993 pursuant to the requirements of the Indian Gaming Regulatory Act (IGRA).[6] The Tribal-State compact contractually outlined the types of gambling in which Bay Mills would engage and the manner in which its casinos would be staffed and operated.[7] In that same year, Bay Mills adopted a tribal gaming ordinance and created a Tribal Gaming Commission both issue licenses to license and regulate casinos operated by the Tribe.[8] Since that time, Bay Mills has "continuously operated at least one casino on its reservation."[9]

In 1997, Congress passed the Michigan Indian Land Claims Settlement Act[10] to compensate Michigan Indian tribes for lands ceded to Michigan for which the tribes did not receive fair compensation.[11] The Act distributed funds to tribes in a variety of ways.[12] Bay Mills divided its compensation, placing twenty percent into a land trust, the earnings from which would "be used exclusively for improvements on tribal land or the consolidation and enhancement of tribal landholdings."[13] With earnings from this trust,

5. *Id.* at 12.
6. *Id.* at 13.
7. A Compact Between the Bay Mills Indian Community and the State of Michigan Providing for the Conduct of Tribal Class III Gaming by the Bay Mills Indian Community (Aug. 20, 1993), http://www.baymills.org/resources/BMIC-MI%20Compact.pdf.
8. Brief for Petitioner, *supra* note 4, at 13.
9. *Id.*
10. Michigan v. Bay Mills Indian Cmty., 695 F.3d 406, 410 (6th Cir. 2012), *cert. granted*, 133 S. Ct. 2850 (June 24, 2013) (No. 12-515).
11. Brief for Respondent at 10–11, Michigan v. Bay Mills Indian Cmty., No. 12-515 (U.S. Oct. 24, 2013).
12. *See id.* at 11 ("The [Michigan Indian Land Claims Settlement] Act distributed each tribe's funds differently, and tribes individually participated in developing the substance and form of their respective distribution plans.").
13. *Id.* (citation omitted).

in August 2010, Bay Mills purchased forty acres of land in Vanderbilt, Michigan.[14] In the following months, Bay Mills erected a casino on this land.[15] On October 29, 2010, the Bay Mills Gaming Commission granted a license for class III gaming activities to the Vanderbilt casino.[16] Class III gaming covers all gambling not specified in class I (traditional tribal games) or class II (bingo and some card games).[17] On November 3, Bay Mills began class III gaming activity in the form of electronic gaming devices at the Vanderbilt casino.[18]

B. Procedural History

On December 16, 2010, the Michigan State Attorney General ordered Bay Mills to close the Vanderbilt casino on the ground that it was operating in violation of Michigan's gambling laws.[19] On December 21, Michigan filed suit against Bay Mills in the Western District of Michigan for violation of the Michigan-Bay Mills compact and state gambling laws.[20] One day later, another Michigan tribe, the Little Traverse Bay Bands of Odawa Indians (Little Traverse), filed suit against Bay Mills for violation of the Tribal-State compact.[21] Little Traverse, supported by Michigan, moved for a preliminary injunction against the operation of the Vanderbilt casino.[22] The district court granted this preliminary injunction,[23] and Bay Mills filed an interlocutory appeal to the Sixth Circuit.[24]

On August 15, 2012, the Sixth Circuit ruled that tribal sovereign immunity barred the State's action, vacating the preliminary injunction, and remanding the case to the district court.[25] At this point, Little Traverse voluntarily sought dismissal of its claim while Michigan filed a petition for certiorari to the United States Supreme Court.[26] On June 24, 2013, the petition for certiorari was granted[27] and

14. *Bay Mills Indian Cmty.*, 695 F.3d at 410.
15. Brief for Respondent *supra* note 11, at 11.
16. *Id.* at 13.
17. Brief for Petitioner, *supra* note 4, at 5.
18. Brief for Respondent, *supra* note 11, at 13.
19. Brief for Petitioner, *supra* note 4, at 13.
20. Michigan v. Bay Mills Indian Cmty., 695 F.3d 406, 410 (6th Cir. 2012).
21. *Id.*
22. *Id.*
23. Brief for Petitioner, *supra* note 4, at 14.
24. Brief for Respondent, *supra* note 11, at 15.
25. *Bay Mills Indian Cmty.*, 695 F.3d at 416.
26. *See* Brief for Respondent, *supra* note 11, at 16–17.
27. Michigan v. Bay Mills Indian Cmty., 133 S. Ct. 2850 (2013).

oral argument was held on December 2, 2013.[28]

III. LEGAL BACKGROUND

A. Tribal Sovereign Immunity

The origin of the doctrine of tribal sovereign immunity predates the European arrival to North America, when Native American tribes conducted affairs as independent nations.[29] Throughout colonization and the early years of the American Republic, Britain, and subsequently the United States, interacted with the tribes as sovereigns through "nation-to-nation diplomacy and treaty-making."[30] This meant that tribes, like a state or the federal government, enjoyed immunity from almost all forms of legal action.[31] Despite this long historical understanding of the sovereignty of American Indian tribes, the legal basis of tribal sovereign immunity comes not from the Constitution, but from judicial decisions.[32] The basic framework of tribal sovereign immunity was laid down in a trilogy of opinions from the Marshall Court, which, when taken together, recognizes the tribes as "domestic dependent nations" not subject to the authority of the state in which they reside and whose land rights can only be abrogated by federal authority.[33]

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28. *See* Transcript of Oral Argument at 1, Michigan v. Bay Mills Indian Cmty., No. 12-515 (U.S. Dec. 2, 2013).

29. *See* Seielstad, *supra* note 1, at 683 ("[T]he concept of tribal sovereignty predates the ratification of the Constitution and formation of the United States. It arose out of a history in which distinct communities of American Indian peoples lived, created institutions and systems, and governed themselves, sharing territories within North America prior to European contact.").

30. *Id.* at 684.

31. *See id.* at 662–63 ("[Sovereign immunity] protects the federal government as well as the states from nonconsensual suit, except in certain narrowly prescribed circumstances. Sovereign immunity also has been recognized under federal law with respect to foreign nation-states and American Indian nation-tribes, entities that are external to the constitutional system of government.").

32. *See* Brief for Petitioner, *supra* note 4, at 3 ("Indian tribes have no rights under the Unites States Constitution to any attributes of sovereignty. . . . As a result, Congress has the authority to override the judicially created doctrine of tribal sovereign immunity.").

33. *See* Seielstad, *supra* note 1, at 685–88. Seielstad discusses three cases which hold respectively: (1) that Native American tribes are domestic, dependent nations with sovereign control of land subject to only federal abrogation, *Worcester v. Georgia*, 30 U.S. 515, 561 (1832), (2) that Native American tribes are not subject to the jurisdiction of the states in which they are located, *Cherokee Nation v. Georgia*, 30 U.S. 1, 19–20 (1831), and (3) that Native American tribes have the "legal and moral right to retain possession and occupancy of tribal land." *Johnson v. MacIntosh*, 21 U.S. 543, 574 (1823).

From this origin, during the second half of the 20th century, the courts developed a strong federal common law regarding tribal sovereign immunity.[34] The core principle of this common law is: "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."[35] For Congress to abrogate tribal sovereign immunity, it "must 'unequivocally' express that purpose."[36] Similarly, a tribal waiver of sovereign immunity must be "clear."[37] Thus, tribal sovereign immunity bars all suits against Indian tribes except for the limited circumstances where the tribe itself waives immunity or Congress clearly and expressly abrogates such immunity.

B. The Indian Gaming Regulation Act

1. Origins of Federal Regulation of Indian Gaming

In the 1960s and '70s, Indian tribes across the nation began to take advantage of their immunity from state regulation by opening gambling establishments.[38] Some states went to great lengths to shut down these tribal gaming operations, even arresting people suspected of gambling as they left tribal territory in an attempt to dissuade patronage.[39] In 1987, the question of states' ability "to shut down or regulate Indian bingo halls and casinos"[40] was taken up by the Supreme Court in *California v. Cabazon Band of Mission Indians*.[41] In *Cabazon*, the Court determined that states could not regulate tribal gambling operations because of "compelling federal and tribal interests" in the activities.[42]

34. *See* Seielstad, *supra* note 1, at 694 ("Between 1940 and 1998, the Supreme Court first named, then clarified, refined and firmly established, the doctrine of tribal immunity as a principle of federal common law.").

35. Kiowa Tribe of Okla. v. Mfg. Techs, Inc., 523 U.S. 751, 754 (1998).

36. C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 418 (2001) (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)) (citation omitted).

37. Okla. Tax Comm'n. v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509 (1991).

38. Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming* 44 HARV. J. ON LEGIS. 39, 45 (2007) (specifically identifying California, Florida, Maine, New York, and Wisconsin as the first locations for Indian gaming parlors).

39. *Id.* at 46.

40. *Id.* at 47.

41. 480 U.S. 202 (1987).

42. *Id.* at 221–22.

In response, the following year Congress passed the IGRA in an attempt to provide a consistent, stable framework for state regulation of Indian gaming activity.[43] First, the IGRA created the National Indian Gaming Commission (NIGC) to serve as a federal regulator of tribal gaming activities and enforcer of the IGRA.[44] Second, the IGRA defined three classes of Indian gaming.[45] Class I includes traditional Indian games of chance over which the tribes have exclusive regulatory authority.[46] Class II gaming includes high-stakes bingo for which the NIGC must issue licenses without further regulation.[47] Class III gaming activity includes all other gaming, such as slot machines and card games.[48] No tribe can participate in class III gaming activity unless they have entered into a Tribal-State compact with the state in which the tribal lands are located and such activity is legal in that state.[49]

2. Finding Jurisdiction Under the Provisions of the IGRA

The provisions of the IGRA most important to *Bay Mills* are § 2710,[50] the gaming ordinance that covers class III gaming activity, and § 1166, which explains application of state law and enforcement authority under the IGRA.[51] Under § 2710(d)(7)(A)(ii), "[t]he United States 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."[52]

The Sixth, Tenth, and Eleventh circuits are divided over the limits of jurisdiction provided by this provision has created a three-way circuit split between the Sixth, Tenth, and Eleventh Circuits.[53] Two

43. *See* Fletcher, *supra* note 38, at 45–51 (giving a brief history of the fragmented nature of Indian gaming regulation prior to the IGRA and a synopsis of congressional intent in passing the Act).

44. *Id.* at 53.

45. *Id.* at 51.

46. *Id.*

47. *Id.*

48. *Id.* at 52.

49. *See* Brief for Respondent, *supra* note 11, at 7 (citing 25 U.S.C. § 2710(d)(1)(C), (d)(3)) (2006)).

50. 25 U.S.C.A. § 2710(d)(7)(A)(ii) (West 2014).

51. 18 U.S.C.A. § 1166 (West 2014).

52. 25 U.S.C.A. § 2710(d)(7)(A)(ii).

53. *See* Michigan v. Bay Mills Indian Cmty., 695 F.3d 406, 415 (6th Cir. 2012) (holding that § 2710 of the IGRA only waives tribal sovereign immunity when all of its textual prerequisites are satisfied), *cert. granted*, 133 S. Ct. 2850 (June 24, 2013); Mescalero Apache Tribe v. New Mexico, 131 F.3d 1379, 1385 (10th Cir. 1997) ("IGRA waived tribal sovereign immunity in the

jurisdictional questions stem from § 2710(d)(7)(A)(ii): (1) whether the language of the provision itself confers broad subject matter jurisdiction to the courts, and (2) whether any dispute arising under the IGRA would be a matter for federal question jurisdiction. These two jurisdictional questions, though important in lower court analysis of the case at bar, has been conceded by the Respondent and therefore will not be considered by the Supreme Court or further addressed in this analysis.[54]

Section 1166 reads in relevant part that under federal law, "all State laws pertaining to the licensing, regulation, or prohibition of gambling . . . shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State."[55] It continues, "[w]hoever in Indian country is guilty of an act or omission involving gambling . . . which . . . would be punishable if committed or omitted within the jurisdiction of the State . . . shall be guilty of a like offense and subject to a like punishment."[56]

Finally, § 1166 grants the United States "exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country."[57] This statute provides an important jurisdictional hook for the federal government in applying state gambling laws to Indian lands and subsuming power over criminal prosecutions for violations of the IGRA.

3. Tribal Sovereign Immunity under the IGRA

Following the enactment of the IGRA, a three-way circuit split developed around the issue of whether or not the statute abrogates tribal sovereign immunity and thus, the ability of states to regulate gambling activities of sovereign Indian tribes. The most cautious approach has been taken by the Sixth and Eleventh Circuits, which have determined that the IGRA only abrogates sovereign immunity when the situation at issue is covered by an express provision of the

narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought."); Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050, 1056 (9th Cir. 1997) (holding that the "IGRA necessarily confers jurisdiction to the federal courts [to enforce Tribal-State compacts]").

54. *See* Brief for Respondent, *supra* note 11, at 23 ("Bay Mills agrees that, but for Bay Mills' sovereign immunity, the district court could have properly exercised jurisdiction under 28 U.S.C.A. § 1331.").

55. 18 U.S.C.A. § 1166(a).

56. *Id.* § 1166(b).

57. *Id.* § 1166(d).

statute.[58]

The Tenth Circuit has adopted a broader interpretation, finding that tribal sovereign immunity is abrogated for all cases "where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought."[59] In applying this standard, the Tenth Circuit has allowed a state's claim that a Tribal-State compact was invalid to proceed after finding that the tribe's sovereign immunity had been abrogated by the IGRA.[60]

A middle position, taken by the Seventh Circuit, holds that the IGRA abrogates tribal sovereign immunity "so long as the alleged [violation of the Tribal-State compact] relates to one of [the] seven items [listed in § 2710(d)(3)(C)(i–vii)]."[61] In this way, the Seventh Circuit captures the middle ground between the wide reach of the Tenth Circuits and the restrictive approach of the Sixth and Eleventh Circuits.[62]

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58. *Bay Mills* broadly held that immunity is abrogated by § 2710(d)(7)(A)(ii) only when "all of its textual pre-requisites" are met, *Bay Mills Indian Cmty.*, 695 F.3d at 414, namely: (1) the plaintiff is a state or Indian tribe; (2) the suit seeks to enjoin class III gaming activity; (3) the gaming activity is located on Indian lands; (4) the gaming activity violates the Tribal-State compact; and (5) the Tribal-State compact is in effect, *see* 25 U.S.C.A. § 2710(d)(7)(A)(ii) (West 2014); s*ee also* Florida v. Seminole Tribe of Fla., 181 F.3d 1237, 1242 (11th Cir. 1999) ("Congress abrogated tribal immunity only in the narrow circumstance in which a tribe conducts class III gaming in violation of an existing Tribal–State compact.").

59. Mescalero Apache Tribe v. New Mexico, 131 F.3d 1379, 1385 (10th Cir. 1997).

60. *Id.* at 1380–86.

61. *See* Wisconsin v. Ho-Chunk Nation, 512 F.3d 921, 933–34 (7th Cir. 2008) (holding that abrogation of tribal sovereign immunity under the IGRA reached claims regarding any of the seven issues that can be discussed in the Tribal-State compact). The seven issues, as provided by statute, are:

> "(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 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."

Id. (citing 25 U.S.C. § 2710(d)(3)(C)(i-vii) (2006)).

62. *See Bays Mills Indian Cmty.*, 695 F.3d at 414; *Ho-Chunk Nation*, 512 F.3d at 933–34; Florida v. Seminole Tribe of Fla., 181 F.3d 1237, 1242 (11th Cir. 1999); *Mescalero Apache Tribe*, 131 F.3d at 1385–86; *see also supra* note 58 and accompanying text.

IV. APPELLATE COURT HOLDING

The Sixth Circuit divided consideration of the case into two issues: (1) whether the federal courts have subject matter jurisdiction to issue an injunction against a tribal casino located off of Indian lands,[63] and (2) whether tribal sovereign immunity prevents suit against a tribe for gambling activity occurring off of Indian lands.[64] But before considering either of these questions, the court noted the central conflict of the underlying case is whether the Vanderbilt casino is located on Indian lands.[65] The court noted the irony of making this determination: if the casino is on Indian lands, then Michigan will have standing but will not be able to show injury; if the casino is not on Indian lands, the merit of the claim is clear but jurisdiction is arguably invalidated.[66] Because the trier of fact must determine this issue,[67] the appellate court proceeded assuming the plaintiffs' claim that the casino is not located on Indian land.[68]

A. Subject Matter Jurisdiction

To determine whether the federal courts have subject matter jurisdiction over Bay Mills, the court examined Michigan's argument that there are two possible jurisdictional hooks: (1) § 2710(d)(7)(A)(ii) of the IGRA[69] and (2) federal question jurisdiction per 28 U.S.C.A. § 1331.[70]

The jurisdictional element of the IGRA gives the federal courts 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."[71] The court broke this requirement down into five necessary elements: (1) the plaintiff is a state or Indian tribe; (2) the suit seeks to enjoin class III gaming activity; (3) the gaming activity is located on Indian lands; (4) the gaming activity violates the Tribal-State compact;

63. *Bay Mills Indian Cmty.*, 695 F.3d at 411–12.
64. *Id.* at 413–14.
65. *Id.* at 412.
66. *See id.* at 412 ("[I]f the Vanderbilt casino is not located on Indian lands, there is no jurisdiction for the plaintiffs' claims; if the casino is located on Indian lands, its operation does not violate the compact, which means the claims are meritless.").
67. *Id.*
68. *Id.* at 413.
69. *Id.* at 411.
70. *Id.* at 412.
71. 25 U.S.C.A. § 2710(d)(7)(A)(ii) (West 2014).

and (5) the Tribal-State compact is in effect.[72]

The Sixth Circuit found that Michigan's allegations do not fulfill the third requirement—that the gaming activity is located on Indian lands.[73] However, the court determined that federal question jurisdiction attaches as "the claims 'arise under' federal law because they 'implicate significant federal issues.'"[74] According to the court, this jurisdictional hook is appropriate because there is no reason to believe that Congress would prefer that state courts dispose of these issues.[75]

B. Tribal Sovereign Immunity

Despite holding that federal question jurisdiction applies,[76] the Sixth Circuit determined that tribal sovereign immunity barred the district court from issuing an injunction.[77] The court began its analysis with the general maxim that "as a matter of federal law, Indian tribes are immune from suit except in specific, limited circumstances."[78] Then the court discussed the very limited circumstances in which immunity can be abrogated, leaning heavily on the requirements of an "unequivocal" expression of Congress and "clear" waiver by the tribe itself.[79]

With this analytical mindset and framework in place, the court dismantled Michigan's three arguments, presented as follows: (1) Congress abrogated tribal immunity in § 2710(d)(7)(A)(ii) of the IGRA or alternatively, in § 1166;[80] (2) Bay Mills waived immunity through its own gaming ordinance;[81] and (3) without an abrogation of immunity the state will have no remedy against Bay Mills.[82]

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72. *Bay Mills Indian Cmty.*, 695 F.3d at 412.
73. *Id.*
74. *Id.* at 413 (quoting Grable & Sons Metal Prods., Inc. v. Darue Eng'g, 545 U.S. 308, 312 (2005)).
75. *Id.*
76. *Id.*
77. *See id.* at 413–17 (determining that Bay Mill's tribal sovereign immunity as to this kind of action has not been abrogated by either Congress or the tribe itself).
78. *Id.* at 413–14 (citing Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998)).
79. *Id.* at 414.
80. *Id*. at 414–15.
81. *Id.* at 415–16.
82. *Id.* at 416.

As to the first argument, the court relied on its earlier determination that § 2710 requires five necessary elements. The panel determined that Congress intended to abrogate tribal sovereign immunity only in situations when all five elements are met. Thus, where one or more of the elements is not met, no abrogation is implied.[83] This clearly aligns with the Eleventh Circuit, which determined in *Florida v. Seminole Tribe of Florida*[84] that Congress does not broadly abrogate tribal sovereign immunity in the IGRA.[85]

Second, the court dismissed Michigan's claim that Bay Mills waived immunity in the Tribal-State compact as a "junk drawer argument."[86] The opinion points out that the waiver contained in the compact only applies to the Bay Mills Gaming Commission, not the actual tribe. Furthermore, another provision of the compact expressly maintains tribal sovereign immunity.[87]

Finally, the court addressed the fear expressed by Michigan that, without the ability to enjoin Bay Mills in federal court, the State would be left without a remedy for behavior it believes violates state and federal law.[88] The court indicates three courses of action available to the State: (1) requesting that the federal government bring an action against the tribe; (2) applying non-discriminatory laws to Bay Mills members at the Vanderbilt casino; (3) and bringing an action against the tribal officers in their official capacity.[89]

83. *Id.* at 414.
84. 181 F.3d 1237 (11th Cir. 1999).
85. *Id.* at 1241–42. (observing that congressional abrogation of sovereign immunity occurs only where statutory language expresses an intent to subject a tribe to suit and that IGRA authorizes such suits "to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact") (citations omitted).
86. *Bay Mills Indian Cmty.*, 695 F.3d at 416.
87. *Id.*
88. *Id.*
89. *Id.*

V. ARGUMENTS

A. The State of Michigan's Arguments

Michigan principally argues[90] that Bay Mills is not shielded by tribal sovereign immunity for two reasons.[91] First, that under IGRA Congress intended to abrogate tribal sovereign immunity regardless of the location of the class III gaming activity.[92] In support of this argument Michigan claims that the inclusion of § 1166 in the IGRA, providing that "all State laws pertaining to . . . gambling . . . shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State,"[93] indicates that Congress wanted the states to be able to seek injunctive action against illegal class III gaming on either Indian or state lands.[94]

Furthermore, Michigan argues that interpreting the term "Indian lands" in § 2710(d)(7)(A)(ii) as excluding any regulation of gambling occurring on lands over which a state has jurisdiction is problematic. Michigan claims this interpretation would limit state control over Indian gaming by removing a state's authority over gaming occurring off of Indian lands.[95] Michigan argues this result is contrary to the intent of Congress in passing the IGRA, which was to give states authority over Indian gambling in the wake of the *Cabazon* decision.[96] The final point Michigan makes as to Congress's intent is that in passing the IGRA, it would be "inconceivable that Congress intended to give states a greater ability to deal with illegal gaming *on* Indian lands than *off* of Indian lands."[97]

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90. Michigan makes two additional arguments: (1) the district court has jurisdiction to issue an injunction through either § 2710(d)(7)(A)(ii) or federal question jurisdiction, and (2) the gaming activity in question occurred on Indian lands as the Vanderbilt casino was administered from tribal offices on the Bay Mills reservation. However, neither argument will be considered in this commentary as they do not cut to the core question about tribal sovereign immunity.

91. Brief for Petitioner, *supra* note 4, at 25–27.

92. *Id.* at 25.

93. 18 U.S.C.A. § 1166 (West 2014).

94. *See* Brief for Petitioner, *supra* note 4, at 26 ("It is not plausible that Congress intended that a state would be able to bring a civil suit to enforce anti-gambling laws in Indian country but be unable to do so on sovereign state lands.").

95. *Id.* at 27.

96. *See id.* ("Given [the *Cabazon*] precedent, it would make complete sense for Congress . . . to give States *more* authority to enforce their public policies against gaming.").

97. *Id.* at 28.

Michigan's second argument as to why tribal sovereign immunity does not bar an injunction is that a holistic appraisal of the statute clearly indicates congressional intent to abrogate tribal sovereign immunity.[98] This argument springs from the reasoning used in *Seminole Tribe*, in which the Court determined that Congress intended to abrogate tribal sovereign immunity against suit from Indian tribes through a contextual analysis of the statute.[99]

Alternatively, Michigan argues that the Court should find that tribal sovereign immunity does not protect tribes participating in illegal commercial activities on lands under state jurisdiction.[100] This argument is based on the fact that the Court has never "considered whether a tribe is immune from a suit that has no meaningful nexus to the Tribe's land or its sovereign function."[101] Michigan argues that limiting tribal sovereign immunity in this way would align tribal sovereign immunity with the development of foreign immunity.[102]

B. Bay Mills's Arguments

Bay Mills stands on a single fundamental argument:[103] tribal sovereign immunity bars Michigan's desired injunction.[104] Bay Mills frames this argument around the central principle from *Kiowa* that tribal sovereign immunity bars legal action against the tribe unless the tribe clearly waives the immunity or Congress expressly abrogates it.[105]

Bay Mills's first key point is that it has not waived its tribal sovereign immunity in this case.[106] This claim is uncontested by

98. *Id.* at 28–29.

99. *Id.* at 29–30 (citing Seminole Tribe of Florida v. Fla., 517 U.S. 44, 57 (1996)).

100. *Id.* at 36.

101. Kiowa Tribe of Okla. v. Mfg. Techs. Inc., 523 U.S. 751, 764 (1998) (Stevens, J., dissenting).

102. Brief for Petitioner, *supra* note 4, at 40.

103. Bay Mills raises two arguments before moving to its discussion of tribal sovereign immunity: (1) Bay Mills refutes Michigan's ability to argue that the Vanderbilt casino is in fact a class III gaming activity on Indian lands based on its administration from the tribal offices on the reservation; and (2) Bay Mills concedes the district court does in fact have federal question jurisdiction that, but for tribal sovereign immunity, would give it the power to issue an injunction against the Vanderbilt casino. Neither of these arguments will be considered in this commentary as neither is probative of the fundamental question regarding tribal sovereign immunity.

104. *See* Brief for Respondent, *supra* note 11, at 18 ("Bay Mills *is* immune from suit.").

105. *See Kiowa Tribe of Okla.*, 523 U.S. at 751 ("As a matter of federal law, a tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.").

106. Brief for Respondent, *supra* note 11, at 25.

Michigan.[107] The second key point is that § 2710 of the IGRA does not abrogate Bay Mills's sovereign immunity in this, or any, scenario.[108] The activities alleged in this case, that Bay Mills engaged in class III gambling outside Indian lands, "fall squarely outside the statute's plain terms—and therefore outside the scope of possible abrogation."[109] Bay Mills zeros in on the precise, plain language of § 2710,[110] arguing that the provision cannot be treated as a general grant of jurisdiction or waiver of immunity.[111] This is confirmed by the principle that a congressional abrogation of tribal sovereign immunity must be "clearly discernable from the statutory text."[112] Bay Mills therefore argues that § 2710 can only be seen as waiving or abrogating immunity in "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."[113] Bay Mills argues that the "'on Indian lands' limitation was no accidental insertion" by Congress. Rather, Congress intended the IGRA to deal with the issue of gambling occurring on Indian lands because any other gaming is a matter for state rather than federal law.[114]

Bay Mills concludes its argument with two important considerations for the Court. First, abrogating tribal sovereign immunity here would be a departure from longstanding precedent, which squarely favors maintaining tribal sovereign immunity.[115] Second, a wide variety of enforcement mechanisms remain open to Michigan, including arbitration under the terms of the Tribal-State compact.[116]

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107. *Id.*
108. *Id.* at 25–26.
109. *Id.* at 26.
110. *See id.* ("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 the IGRA.").
111. *Id.*
112. *Id.* at 27 (citing FAA v. Cooper, 132 S. Ct. 1441, 1448 (2012)).
113. *Id.*
114. *Id.* at 28.
115. *See id.* at 34–53 (explaining that the integrity of tribal sovereign immunity doctrine was confirmed by the Court as recently as 1998 in *Kiowa*, as well as giving an overview of the deep historical and legal roots of tribal sovereign immunity reaching back to the colonial period and the Marshall Court).
116. *Id.* at 53–54.

VI. ANALYSIS

It is clear, from a conservative, textual, or doctrinal approach that Bay Mills has managed to present the much more compelling argument. By turning to the text and construction of § 2710(d)(7)(A)(ii), Bay Mills's analysis stays faithful to the language of the statute.[117] Bay Mills finds justification for this approach in the established interpretive method traditionally required for the analysis of tribal sovereign immunity issues—that a congressional abrogation of immunity must be express and cannot be implied.[118] Through this analysis, Bay Mills shows that, in this case, it has retained tribal sovereign immunity.[119] This starkly contrasts with Michigan's arguments, which request the Court to turn to unsupported ideas about congressional intent and adopt a broad interpretation of IGRA.[120] Such a request on an issue that has consistently merited such a careful and cautious approach as tribal sovereign immunity is indicative of Michigan's overall lack of textual, precedential, or legislative support for stronger claims. Furthermore, the argument for a broad reading of the statute is undermined by both the requirement of express abrogation or waiver,[121] and the Court's continued deference to the legislative power of Congress on this issue.[122] Rather than taking stabs at Congress's intent, it would be far better for the Court to take a plain-meaning approach to interpreting the IGRA and leave it to Congress to speak on the issue if it desires a different outcome.

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117. *See id.* at 25–27 (making an argument for a plain language interpretation of § 2710(d)(7)(A)(ii)).

118. *See id.* ("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. In either case, the dissolution of tribal immunity must be unequivocally expressed . . . .").

119. *See id.* at 25–26 ("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.").

120. *See* Brief for Petitioner, *supra* note 4, at 19 ("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.") (citation omitted).

121. Federal Aviation Administration v. Cooper, 132 S. Ct. 1441, 1448 (2012).

122. *See* Seielstad, *supra* note 1, at 665–66 ("In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies Inc.*, the Court . . . 'deffer[ed] to the role Congress may wish to exercise in this important judgment' . . . . The Supreme Court has not altered the Court's fundamental position regarding tribal immunity even as is addressed the issue in context of a specific contractual provision.").

With Michigan's arguments largely meritless, the Court's only option for finding in favor of Michigan would be to override precedent and hold that "tribes have no sovereign immunity from suits alleging illegal commercial gaming occurring on state lands."[123] Although this argument seems to gain traction in terms of the public policy—it seems strange that a state cannot enjoin gambling on land within its jurisdiction—the argument is not compelling enough to override nearly two centuries of precedent on tribal sovereign immunity.[124] The public policy considerations are further diminished when considering that Congress is the traditional speaker on tribal sovereign immunity and it remains free to act on the issue.[125] The public policy risk for Michigan does not rise to such a level that the Court should subsume the exclusive power of Congress in legislating on tribal sovereign immunity.

Considering the statutory, precedential, and legislative issues in play, the Court should find in favor of Bay Mills.

VII. CONCLUSION

Bay Mills is an example of the long arm of history, reaching from the very origins of the United States into modern jurisprudence and molding modern cases. It is readily apparent from Bay Mills's arguments that tribal sovereign immunity bars the district court from issuing an injunction in this case. The only question is whether the Supreme Court will embrace Michigan's argument—abandoning precedent and abrogating tribal sovereign immunity in a new manner.[126] Administrative inconvenience for Michigan, even if in pursuit of a legitimate interest, is not reason enough to truncate the doctrine of tribal sovereign immunity.

123. Brief for Petitioner, *supra* note 4, at 19.

124. *See* Seielstad, *supra* note 1, at 675 ("[T]he United States generally granted foreign sovereigns immunity from suit in the courts of this country. As with states and the federal government, the federal judiciary and Congress also have recognized the doctrine of sovereign immunity with respect to foreign nations and the American Indian tribes.").

125. *See id.* at 684 ("The Constitution granted to Congress—and only to Congress—the power to 'regulate Commerce with the Indian tribes.'").

126. *See* Brief for Petitioner, *supra* note 4, at 19 ("In the alternative, the Court should confirm that tribes have no sovereign immunity from suits alleging illegal commercial gaming occurring on state lands.").