No. 12-515

In the Supreme Court of the United States

STATE OF MICHIGAN, PETITIONER

v.

BAY MILLS INDIAN COMMUNITY

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

SUPPLEMENTAL BRIEF FOR PETITIONER

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

Louis B. Reinwasser
Margaret Bettenhausen
Assistant Attorneys General
Environment, Natural
Resources, and Agriculture
Division

Attorneys for Petitioner

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INTRODUCTION

The federal government agrees with Michigan that the Vanderbilt Parcel is not Indian trust land eligible for gaming. U.S. Br. 7. Thus, the United States necessarily agrees that the Vanderbilt casino is an illegal gaming operation, conducted on Michigan sovereign lands. Nonetheless, the United States sides with the Tribe in recommending that the petition be denied, foreclosing Michigan's ability to enjoin the casino. Each of the Solicitor General's supporting reasons is flawed.

First, the Solicitor General suggests that the petition presents no true circuit split. U.S. Br. 12–20. In fact, there are two splits. To begin, there is a direct conflict between the Sixth Circuit decision here, Pet. App. 9a, and the Ninth Circuit's decision in *Cabazon Band of Mission Indians* v. *Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997), regarding federal-court jurisdiction over claims seeking to enforce Tribal-State compacts. The Solicitor General distinguishes *Cabazon* because the compact at issue there said that disputes could be resolved in federal court, U.S. Br. 15. But parties cannot confer federal jurisdiction by agreement. Thus, this circuit split remains. Pet. 7–12.

There is also a direct conflict between the Sixth Circuit decision here, Pet. App. 13a, and the Tenth Circuit's decision in *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379 (10th Cir. 1997), regarding tribal sovereign immunity. Like the Tribe, the Solicitor General argues that *Mescalero* was wrongly decided. U.S. Br. 18–19. But that merits argument does not in any way diminish the circuit split or the need to resolve it. Pet. Reply 7–8.

Second, the Solicitor General says that Michigan has other viable federal-court remedies: claims against individual tribal officers, and the lawsuit the Tribe filed against Michigan's Governor. U.S. Br. 21–22. The first suggestion ignores the inter-sovereign conflicts and jurisdictional pitfalls inherent in pursuing individual tribal officers through an *Ex Parte Young* action. Pet. Reply 3. And the second is inconsistent with the *amicus* brief's merits position: under the United States' view on tribal immunity, a federal court that declares the Vanderbilt casino invalid lacks the ability to enjoin the illegal gaming operation against a sovereign tribe. That cannot possibly be what Congress intended in the Indian Gaming Regulatory Act.

Finally, the Solicitor General intimates that this Court's review is unnecessary because the United States itself "has criminal and civil enforcement authority." U.S. Br. 19. But the reality is that—despite an express referral from the National Indian Gaming Commission (NIGC) to the United States Attorney for enforcement—*no enforcement action has ever been taken*. The history of this case shows that Michigan cannot rely on federal-government enforcement.

In sum, the United States *amicus* brief effectively establishes why this Court's immediate intervention is so crucial: granting the petition will allow resolution of two recurring and widening circuit splits regarding allocations of authority between states and tribes, while denial perpetuates uncertainty, results in different outcomes depending on the circuit where an illegal casino is located, and encourages the proliferation of off-reservation tribal casinos that violate federal law.

Certiorari is warranted.

SUPPLEMENTAL ARGUMENT

I. There is an undeniable split among the circuits regarding federal-court jurisdiction over tribal gaming disputes.

As Michigan demonstrated in its petition, there is an irreconcilable conflict between the Sixth Circuit decision below and previous decisions of the Ninth and Tenth Circuits regarding federal-court jurisdiction over tribal gaming disputes. Pet. 10–12. The Sixth Circuit held that federal courts have jurisdiction over such disputes only if the dispute involves "five prerequisites," including gaming activity conducted on Indian lands and in violation of a Tribal-State compact that is in effect. Pet. App. 7a. The Sixth Circuit declined to recognize that 28 U.S.C. § 1331's general grant of federal-question jurisdiction encompasses this tribal gaming dispute.

In contrast, the Ninth Circuit in *Cabazon* held that federal courts do have jurisdiction of such disputes, even where all five of the prerequisites were not present in that case. Pet. 10–11; *Cabazon*, 124 F.3d at 1056 (a "claim to enforce the Compacts arises under federal law and thus [ ] we have jurisdiction pursuant to 28 U.S.C. § 1331"). And the Tenth Circuit reached the same conclusion under § 2710 itself in *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379, 1396 (10th Cir. 1997). Accord *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").

As noted in the introduction, the United States tries to distinguish *Cabazon* because the parties there agreed in their compact to federal-court review, while Michigan and Bay Mills did not so agree here. But a federal court's subject-matter jurisdiction either exists or it does not; no agreement of the parties can confer such jurisdiction on the federal courts. *Ins. Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). The conflict thus remains.

With respect to *Mescalero*, the United States attempts to distinguish the case because it involved a compact that had been entered into but was allegedly not authorized. U.S. Br. 17. Under the Sixth Circuit's "five prerequisites" test, that would mean no federal jurisdiction. Pet. App 7a. But the Tenth Circuit held that jurisdiction *did* exist under § 2710. 131 F.3d at 1382–83, 87. The only other point the United States makes is that *Mescalero* "did not contain a detailed jurisdictional analysis." U.S. Br. 17. But again, that does not diminish the circuit split.

As the petition also explains, *Cabazon* is consistent (and the Sixth Circuit's ruling here inconsistent) with *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3150 (2010). Pet. 9. The United States asserts that *Free Enterprise Fund* is distinguishable because the facts of that case may have involved a so-called collateral attack on the statute in question. U.S. Br. 14. But that is not a distinguishing feature. *Free Enterprise Fund* held that in the absence of statutory text that "expressly limit[s] the jurisdiction that other statutes confer on district courts," plaintiffs remain free to invoke other jurisdictional statutes such as § 1331. 130 S. Ct. at 1350. The same is true here.

Perhaps recognizing that the circuits are, in fact, in conflict, the United States tries to reframe the issue entirely. The Solicitor General argues that what the Sixth Circuit *really* held was that Michigan failed to state a cause of action under § 2710(d)(7)(A)(ii). U.S. Br. 13. Of course, the Sixth Circuit never said that. And if it had, such a ruling would itself conflict with *Cabazon*, where the Ninth Circuit allowed a breach-of-compact claim to proceed even absent an allegation that the breach occurred on Indian lands. The bottom line is that the Ninth Circuit held that "IGRA necessarily confers jurisdiction onto federal courts to enforce Tribal-State compacts and the agreements contained therein." *Cabazon*, 124 F.3d at 1056, and the Sixth Circuit reached the opposite conclusion using the "five prerequisites" test. Whether framed in terms of jurisdiction or causes of action, there is a conflict requiring this Court's resolution.

Finally, as the petition explains, the Sixth Circuit should have recognized federal-court jurisdiction because illegal Class III gaming activities *did* occur on Indian lands: the Tribe's licensing of the off-reservation casino and the Tribe's ongoing supervision of the Vanderbilt operation. Pet. 12. The Solicitor General says this contention is "not properly before this Court" because the underlying facts were not alleged until the amended complaint, which post-dates this appeal. U.S. Br. 17 n.4. But Bay Mills has already admitted that the Tribe's Executive Council "made the decision to own and operate the Vanderbilt casino," Pet. App. 59a, ¶ 21; Pet. App. 43a, ¶ 21, and that this action was taken "with the approval of the Tribal [Gaming] Commission," Pet. App. 59a, ¶ 19; Pet. App. 43a, ¶ 19.

These admissions are dispositive. The Tribe, through its Executive Council, derives its governmental authority from its reservation. Const. and Bylaws of the Bay Mills Indian Community, Art. II, § 1 ("The jurisdiction of the Bay Mills Indian Community shall extend to all territory within the original confines of the Bay Mills Reservation . . . and to such other land . . . as may be added thereto . . . ."). And a tribe's reservation constitutes "Indian lands." 25 U.S.C. § 2703(4). As a result, the Tribe's authorizing, licensing, and operation of the Vanderbilt casino necessarily occurred *on Indian lands*, satisfying the jurisdictional requirements the Sixth Circuit outlined in its opinion. This reality provides an additional reason why Michigan is entitled to relief.

II. The Solicitor General concedes there is also a circuit split regarding the scope of IGRA's abrogation of tribal sovereign immunity.

With respect to the circuit split regarding IGRA and tribal sovereign immunity, Pet. 13–15, the Solicitor General's position is that *Mescalero* was incorrectly decided. U.S. Br. 18–19. If the Court grants the petition, the parties will have ample opportunity to explore which circuit got it right. But arguing the merits of the Tenth Circuit's decision does not change the reality that the Sixth and Tenth Circuits are indeed split on the issue of IGRA's abrogation of tribal sovereign immunity.

As even the United States concedes, the Tenth Circuit has a "broader view of the scope of IGRA's abrogation of tribal sovereign immunity." U.S. Br. 19. And while it is true that no other circuit has agreed

with the Tenth Circuit, U.S. Br. 19, the Tenth Circuit has continued to follow this precedent, e.g., *New Mexico* v. *Pueblo of Pojoaque*, 30 F. App'x 768, 769 (10th Cir. 2002), meaning that gaming suits brought against tribes will continue to reach different outcomes depending on the circuit where the tribe is located.

There is also an apparent conflict between the Sixth Circuit decision here and the Eleventh Circuit's decision in *Florida* v. *Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999). The Solicitor General cites *Seminole Tribe* for the proposition that IGRA "abrogates tribal sovereign immunity only in the 'narrow circumstance[s]' specified in the statute." U.S. Br. 18. But the full quote from *Seminole* is that "Congress [in IGRA] abrogated tribal immunity only in the narrow circumstance *in which a tribe conducts class III gaming in violation of an existing Tribal-State compact*." *Id.* at 1242 (emphasis added). Here, the complaint alleges that Bay Mills was conducting class III gaming in violation of its existing tribal-state compact. See also Pet. 13–15 (discussing decisions of the Seventh and Ninth Circuits which are also in conflict).

In sum, the circuit courts are in disagreement concerning the very serious question of abrogation of tribal sovereign immunity. Bringing clarity to this issue now will serve the interests of *both* states and tribes. And even if the Court ultimately adopts a narrow theory of abrogation, Michigan is entitled to relief due to the illegal activities, discussed above, in which the Tribe engaged on Indian lands. Pet. 12.

III. This case is the best, and possibly the only, vehicle to resolve the parties' dispute.

Like Bay Mills, the United States argues for denial of certiorari because Michigan was allowed to amend its complaint to seek prospective injunctive relief against various tribal officials by pursuing an *Ex parte Young*-type claim. *Ex parte Young*, 209 U.S. 123 (1908). For the reasons stated in the petition, *Ex parte Young* is a secondary, unreliable remedy at best. Right or wrong, courts have dismissed such actions when the relief requested essentially requires the sovereign's specific performance of a contract. And such individual litigation is preordained to create friction between a state and a tribe, just like the international friction present if Michigan sued a foreign leader to circumvent a country's sovereign immunity. Pet. 16–17.

As the Solicitor General notes, the tribal official defendants here have asserted immunity and numerous other defenses, some peculiar to an *Ex parte Young* case, in motions to dismiss that are pending before the district court. U.S. Br. 21. Allowing a state to sue a *tribe* in federal court, and not just its officials, alleviates unnecessary uncertainties and inter-sovereign conflict that this Court should not allow to persist.[1]

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[1] The United States cites this Court's general rule that it prefers not to exercise certiorari jurisdiction until a final order is entered, but does not address Michigan's argument that because this case implicates significant jurisdictional issues it is appropriate for this Court to grant certiorari, even though this is an appeal of an interlocutory decision. Reply Brief 5 (citations omitted).

The Solicitor also suggests that the merits issue could be resolved in the Tribe's case against Michigan Governor Rick Snyder. *Bay Mills Indian Community* v. *Rick Snyder*, Case No. 1:11-cv-729 (W.D. Mich.). In that case, Bay Mills seeks declaratory relief against Governor Snyder on many of the same issues raised by Michigan here. But the best Michigan can hope for in that proceeding is a determination with no remedy. Under the United States' view, the same federal court that made such an Indian lands declaration lacks jurisdiction when Michigan seeks to file a counterclaim for injunction against the Tribe. And Bay Mills has already ignored an unambiguous determination by NIGC that the Vanderbilt casino was not on Indian lands. A declaration without teeth is no remedy at all.

More puzzling is the United States' argument that Michigan does not need access to federal court because the Tribe could submit a "site-specific gaming ordinance describing the Vanderbilt Parcel" for approval by the NIGC, which would be subject to administrative review. U.S. Br. 22. There are numerous problems with this argument:

- Neither Michigan nor any other party can compel the Tribe to request such an amendment to its gaming ordinance;

- In fact, the Tribe *did* previously submit such a request and withdrew it before the NIGC took action, presumably because the Tribe believed the agency decision would not be favorable. There is no reason to believe that the Tribe will pursue a different course now; and

- Even if a federal court affirmed an NIGC determination rejecting the gaming ordinance amendment, this would not preclude the Tribe from operating a casino outside Indian lands because, for the reasons discussed above, the order could not—under the United States' jurisdiction argument—include an injunction prohibiting the Tribe from operating the illegal casino.

Finally, the Solicitor General says Michigan does not need a federal-court order because the United States itself has "criminal and civil enforcement authority" in this area. U.S. Br. 22. But the NIGC has already referred this matter to the United States Attorney along with NIGC's express determination that the casino was not operating on Indian lands. And yet the federal government took no action to stop the illegal activity. Michigan cannot count on the United States to enforce federal law in this area; only a federal-court injunction against the Tribe is adequate to protect Michigan's sovereign authority over its lands and to ensure the Tribe's compliance with federal law.

* * *

The Solicitor General's brief is most notable for what it does *not* say: why Congress would conceivably have wanted to allow states to bring federal actions to enjoin Indian gaming in violation of a compact when the gaming takes place on Indian land, but not when it takes place on sovereign state land. That is not what Congress intended. Pet. 8–9. Worse, the government's *amicus* arguments will inevitably push states into an undesirable position: pursuing state criminal-law remedies against individual tribal officials. This Court's immediate review is warranted.

CONCLUSION

For the foregoing reasons, and those stated in the petition and reply in support of the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

Louis B. Reinwasser
Margaret Bettenhausen
Assistant Attorneys General
Environment, Natural
Resources, and
Agriculture Division

Attorneys for Petitioner

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