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IN THE SUPREME COURT OF THE UNITED STATES
- - - - - x
MICHIGAN, :
Petitioner : No. 12-515
v. :
BAY MILLS INDIAN COMMUNITY, ET AL. :
- - - - - x

Washington, D.C.
Monday, December 2, 2013

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:04 a.m.

APPEARANCES:
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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 12-515, Michigan v. Bay Mills Indian Community.

Mr. Bursch.

ORAL ARGUMENT OF JOHN J. BURSCH

ON BEHALF OF THE PETITIONER

MR. BURSCH: Thank you, Mr. Chief Justice, and may it please the Court:

After Bay Mills' concession on the first question presented, the only issue is whether Bay Mills enjoys blanket immunity from suit when it engages in illegal, off-reservation, commercial conduct. And the answer is no for at least two reasons.

First, it makes no sense that Congress intended States to have a Federal injunctive remedy for illegal gaming on reservation, but no injunctive remedy if that gaming takes place on land that is subject to the State's exclusive jurisdiction.

Second, a tribe should not have greater immunity than foreign nations. There's no dispute that if France opened up an illegal business in Michigan, casino or otherwise, it would have no blanket immunity.

JUSTICE SOTOMAYOR: Counsel, before you go

1 on, could you address the jurisdiction question for me?
2 I'm not sure why you're here. The only injunction that
3 I see was entered on behalf of Little -- Little
4 Traverse's and not on behalf of the State. And so, the
5 counts that you're arguing about were added after the
6 injunction was issued. How do you have jurisdiction to
7 act -- to argue someone else's injunction?

8 MR. BURSCH: That's not quite correct,
9 Justice Sotomayor. Originally, this case was filed as
10 two separate lawsuits. Michigan was a plaintiff, and
11 then the other tribe was a plaintiff in the separate
12 case. Those cases were consolidated and then when the
13 motion for injunction was filed, Michigan joined in that
14 motion, filed a brief supporting it and everyone
15 proceeded under the assumption that both the tribe and
16 the State were asking for the injunction.

17 JUSTICE SOTOMAYOR: That, in fact, is not
18 what the district court said. The district court
19 explicitly said in its order granting the injunction
20 that the State hadn't filed an injunction, hadn't
21 intervened and had only filed supporting papers in
22 support of Little Traverse's case.

23 I'm a little -- I'm very, very confused as I
24 looked at what the district court said. It explicitly
25 said you weren't part of the order.

1 MR. BURSCH: Well, again, they were
2 consolidated cases. We were supporting the
3 injunction --

4 JUSTICE SOTOMAYOR: I think "consolidated"
5 can have two meanings and -- and -- to be heard together
6 or to be joined together. I don't think the district
7 court understood that this was going to be joined
8 together. Why did it say what it did?

9 MR. BURSCH: Well, I think it was
10 everybody's understanding that these were joined
11 together because the parties were pursuing the exact
12 same issues. And so then once this went up to the Sixth
13 Circuit, there was no question in the Sixth Circuit's
14 mind --

15 JUSTICE SOTOMAYOR: So why didn't you file
16 an injunction -- why does your brief say that you filed
17 it only in support of Little Traverse and not on your
18 own behalf?

19 MR. BURSCH: Because once the cases were
20 consolidated, and at that point we were even using the
21 same docket entries, there was already a motion on file.
22 So there was no need to have a second motion. It was
23 clear to everyone that the State of Michigan and the
24 tribe were both pursuing that injunctive relief
25 together. And that's exactly the way the Sixth Circuit

1 treated it.

2 JUSTICE SOTOMAYOR: I'll ask -- I'll ask
3 your opposition, but I don't see why the district court
4 would have made the point it did if it believed that it
5 was dealing with both of you as parties.

6 MR. BURSCH: Well, everyone has proceeded up
7 the chain, including in the Sixth Circuit opinion, on
8 the assumption that it was consolidated, that Michigan
9 was requesting an injunction and, in fact, that kind of
10 a procedural objection has never been raised by anybody,
11 certainly not at the petition stage.

12 JUSTICE SOTOMAYOR: No, but we have to -- we
13 have to, if we're not sure, raise any jurisdictional
14 issue.

15 MR. BURSCH: Sure. But I think it was
16 eminently clear to the Sixth Circuit, if you read its
17 opinion --

18 JUSTICE SOTOMAYOR: Well, it wasn't
19 eminently clear to the district court who entered the
20 order.

21 CHIEF JUSTICE ROBERTS: Is that a
22 jurisdictional objection or a procedural one?

23 MR. BURSCH: Your Honor, it's a procedural
24 objection. The only jurisdictional question in this
25 case is whether there's Federal question jurisdiction

1 under 1331, which has been conceded and the United
2 States agrees to that. And so I'm not going to spend my
3 time on that. Where I would like to spend my time is on
4 the scope of tribal immunity.

5 JUSTICE GINSBURG: Before you do that, can
6 you tell -- tell us why Michigan didn't resort to the
7 dispute resolution means that the compact provided? The
8 compact said if there's a dispute it'll be decided by
9 arbitration. Michigan bypassed that.

10 MR. BURSCH: That's correct, Justice
11 Ginsburg. And there were two reasons for that. The
12 first is that that provision was only discretionary, as
13 we explain in our reply brief. But even more important,
14 the compact also makes clear that the tribe did not
15 waive its sovereign immunity for purposes of
16 arbitration. So if we had gone to arbitration and
17 prevailed, if the arbitrator had reached the same result
18 as the Federal government did as to the status of these
19 lands being not Indian lands, then --

20 JUSTICE KAGAN: I'm sorry. Could you
21 explain that? Because I thought that the purpose --
22 that the whole point of the C&L Enterprises case is to
23 say that when a tribe agrees to arbitration, it has
24 waived its sovereign immunity for that purpose in that
25 proceeding. Are you saying that there was something

1 special in this agreement?

2 MR. BURSCH: I am, Justice Kagan, and I'm
3 glad you brought up C&L, because there you had a
4 construction contract where there was invocation of an
5 arbitration remedy and it didn't specifically preserve
6 tribal immunity.

7 Here we have the exact opposite. In the
8 same paragraph 7 of the compact where we have the
9 arbitration provision, the tribe and the State agree
10 that, notwithstanding the arbitration provision, both
11 parties' sovereign immunity is not waived and that
12 it's -- it's preserved.

13 So if we took a successful arbitration
14 judgment and then tried to reduce that to a Federal
15 judgment in court, they would have asserted immunity and
16 we would be in the exact same procedural posture that we
17 are right now, talking about the scope of tribal
18 immunity involving illegal off-reservation gaming.

19 CHIEF JUSTICE ROBERTS: Why -- why did --
20 along the same lines, why did you assert sovereign
21 immunity as a defense when the tribe brought a
22 declaratory judgment action concerning the status of
23 those lands?

24 MR. BURSCH: Because, again, it wouldn't
25 have done any good for us to stipulate to jurisdiction

1 on the tribe's claim about the status of the lands,
2 because simply having a declaratory judgment wouldn't
3 have given us any relief. We would have had to file a
4 counterclaim for injunctive relief and the tribe,
5 undoubtedly, would have filed or I would have asserted a
6 tribal immunity there as well. So really, all roads
7 lead to tribal immunity no matter how --

8 JUSTICE SOTOMAYOR: All roads lead to one
9 issue, I think. If you had gotten a declaratory
10 judgment, they would have had to stop their gaming
11 activity.

12 MR. BURSCH: No.

13 JUSTICE SOTOMAYOR: But you wouldn't have
14 gotten their property; isn't that what this suit is
15 about, you trying to take over the -- the casino?

16 MR. BURSCH: No, we don't want to take over
17 the casino. We want to stop illegal gaming on lands
18 subject to Michigan's exclusive jurisdiction.

19 JUSTICE SOTOMAYOR: So why not Ex Parte
20 Young? You point to one or two cases in the lower
21 courts that suggest there not might be Ex Parte Younger
22 jurisdiction, but those cases are distinguishable. So
23 why not go after just the officials?

24 MR. BURSCH: Two responses to that, Justice
25 Sotomayor, one kind of a practical consideration and

1 then one a broader federalism principle that I -- that I
2 want to emphasize. The narrow practical point is that
3 Ex Parte Young is an imperfect remedy for lots of
4 reasons, as we express in the brief. It's well settled
5 that you can't get specific performance on the contract,
6 you can't enforce a State law in Federal court, you
7 can't get money or seize assets in an Ex Parte Young
8 action. And that's why lower courts --

9 JUSTICE SOTOMAYOR: But all you wanted to do
10 was stop them from doing the gaming casino.

11 MR. BURSCH: Well, it's not clear --

12 JUSTICE SOTOMAYOR: You would have gotten
13 that.

14 MR. BURSCH: It's not clear at all to us
15 that we would be able to get that relief based on the
16 lower court holdings.

17 Now, the bigger sovereignty point is that if
18 a foreign country, if France or Haiti came in and opened
19 the same casino, the State would have the full panoply
20 of remedies available to it. And it should have those
21 remedies because any additional immunity you give to the
22 tribe when it's engaging in illegal conduct on lands
23 subject to Michigan's exclusive jurisdiction, you are
24 necessarily taking away from the sovereign authority of
25 the State of Michigan. That's a lesser remedy.

1 JUSTICE GINSBURG: That's -- all that -- the
2 enigma that you pointed out, or the anomaly is -- is
3 certainly clear. But what about Kiowa? This Court
4 seemed to say that the tribe is immune on reservation,
5 off reservation, commercial activity, government
6 activity, it is immune, blanket immunity. So how can
7 you prevail without having this Court modify Kiowa?

8 MR. BURSCH: Here's how, Justice Ginsburg.
9 Because Kiowa involved a private party plaintiff. It
10 did not involve a sovereign State. And this Court has
11 stated repeatedly that States are different. We are
12 constitutional sovereigns and so we aren't treated like
13 ordinary business plaintiffs.

14 In that case, the fact that the plaintiff
15 could not enforce his promissory note did not directly
16 implicate a State police power.

17 JUSTICE KENNEDY: What's your best
18 authority -- what's your best case for that proposition?

19 MR. BURSCH: For the proposition that States
20 are different?

21 JUSTICE KENNEDY: That -- that States have a
22 lesser burden when they're faced with a sovereign
23 immunity defense?

24 MR. BURSCH: I wouldn't say that it's a
25 lesser burden, but I think you need to analyze this as a

1 zero sum gain. That when you're talking about activity
2 taking place on sovereign State land and you're not
3 allowing the State to have its whole panoply of
4 remedies, that you've taken away an attribute of
5 sovereignty that -- that would have existed.

6 JUSTICE KENNEDY: What's your best case for
7 that?

8 MR. BURSCH: I would basically just cite all
9 of the cases this Court has decided over the last
10 quarter century involving the ADA, the ADEA where this
11 Court has consistently recognized that States are
12 different. Sovereigns --

13 JUSTICE KENNEDY: That's -- that's a big
14 reading assignment.

15 (Laughter.)

16 JUSTICE BREYER: The question is this:
17 Three situations. I think it's the same question
18 Justice Kennedy was driving at. One, France opens up a
19 casino.

20 MR. BURSCH: Yes.

21 JUSTICE BREYER: Two, California opens up a
22 casino.

23 MR. BURSCH: Yes.

24 JUSTICE BREYER: Three, an Indian tribe
25 opens up a casino, okay?

1 MR. BURSCH: Correct.

2 JUSTICE BREYER: Now, what is it that says
3 that the State where the casino is located can sue
4 France? What is it that says it can sue California?
5 All -- they all object. What is it that says it can sue
6 the Indian tribe?

7 MR. BURSCH: Thank you, Justice Breyer. And
8 Justice Kennedy, hopefully, this will reduce the reading
9 assignment.

10 The case that says we can sue France is
11 Alfred Dunhill, which was this Court's decision that
12 first recognized the commercial distinction for foreign
13 nation immunity. Now --

14 JUSTICE BREYER: Was that a statute or
15 common law?

16 MR. BURSCH: That was common law, common law
17 development in Alfred Dunhill.

18 Now, shortly after that Congress did enact
19 the Foreign Sovereign Immunities Act which essentially
20 codified this Court's common law rule and once that
21 happens, then the common law developed --

22 JUSTICE BREYER: Okay. California?

23 MR. BURSCH: So California, the case is
24 Nevada v. Hall in which this case said that a State's
25 sovereign immunity from suit does not extend when it's

1 got actors in another State. There, Nevada's agent was
2 acting in California and the Court held that that actor
3 could be liable for suit in California.

4 JUSTICE BREYER: Okay. All those are common
5 law. Both --

6 MR. BURSCH: All common law.

7 JUSTICE BREYER: Then what do you do about
8 Kiowa?

9 MR. BURSCH: Well, that's the thing. Kiowa
10 or Kiowa did not involve a State as sovereign. It
11 involved a private business plaintiff and it's
12 distinguishable on that basis. And if you disagree with
13 me and you think that sovereign States should be treated
14 the same way as private party plaintiffs, then we would
15 ask you to overrule that part of Kiowa which suggested
16 that tribes can engage in illegal commercial conduct on
17 land subject to exclusive State jurisdiction without
18 any --

19 JUSTICE KAGAN: But I think this is what
20 Justice Kennedy was -- was getting at when he asked you
21 for a case, because what you're saying now is that when
22 the State is the plaintiff --

23 MR. BURSCH: Yes.

24 JUSTICE KAGAN: -- the sovereign immunity of
25 the tribe disappears, so --

1 MR. BURSCH: Well, not disappears. But
2 it -- it disappears when they move off reservation and
3 they're acting in a commercial capacity.

4 JUSTICE KAGAN: Okay. So what -- I guess
5 what's -- what's -- what's the case that would suggest
6 that when the plaintiff shifts the sovereign immunity
7 is -- goes away?

8 MR. BURSCH: This Court's case that would
9 suggest that is the Oklahoma Tax Commission case,
10 because that was a case where a State, not exercising a
11 police power, but one of its lesser powers, the power of
12 taxation, was attempting to tax cigarettes that were
13 being sold on Indian trust land by a tribe.

14 And in that case, the Court acknowledged
15 that even on trust lands, so this isn't on land that's
16 subject to State exclusive jurisdiction, that the State
17 would be able to tax those cigarettes being sold to
18 non-tribal members.

19 JUSTICE BREYER: You know, but the question
20 specifically then -- I think we're driving at the same
21 thing -- is, remember, you just cited to me two cases --

22 MR. BURSCH: Yes.

23 JUSTICE BREYER: -- one involving France and
24 one involving California.

25 MR. BURSCH: Yes.

1 JUSTICE BREYER: And I had assumed -- but
2 maybe I was wrong to assume -- that when I read those
3 cases, I will see, although a State can sue France,
4 although Nevada can sue California, a private individual
5 could not. Am I going to find that when I read those
6 two cases?

7 MR. BURSCH: Well --

8 JUSTICE BREYER: Now I think the answer to
9 Justice Kagan is I'm not going to find it. So we're
10 looking for authority, back to Justice Kennedy, that
11 will support your proposition that the State could sue
12 France, Nevada could sue California, but a private
13 individual could not.

14 MR. BURSCH: I think the Oklahoma Tax
15 Commission case would be the closest, because even if
16 you have a private individual who was trying to sue a
17 tribe for conduct that was taking place on trust land,
18 they would not be able to do it.

19 JUSTICE BREYER: Now, what you're asking us
20 to do then, if the answer is what I now think you're
21 saying, is to say it's awfully complicated that although
22 a State could sue an Indian tribe for something that is
23 outside the reservation, the
24 State -- it's so complicated that I'd like some good
25 authority for it, because a private person couldn't, but

1 a State could sue and it's only in certain places.

2 MR. BURSCH: Well, there -- there's lots of
3 places that you could draw the line in this case.

4 JUSTICE BREYER: How about drawing the line
5 with Kiowa?

6 MR. BURSCH: Here's what I'm going to
7 suggest. Nine justices in Kiowa, both the majority and
8 the dissent, recognized that there were substantial
9 issues with applying tribal immunity on or off
10 reservation in the commercial context. This Court had
11 done away with that for foreign nations in Alfred
12 Dunhill. It decided to give Congress one more chance
13 in -- in Kiowa, but -- but left the question open for
14 further common law development.

15 JUSTICE GINSBURG: But once the Congress
16 didn't respond, the majority opinion in Kiowa -- I don't
17 know whether it's "Kiowas" or "Kiowa" -- said, you know,
18 this is an unfortunate result, but Congress can do
19 something about it. Well, now Congress hasn't done
20 anything about it, and you are asking this Court
21 essentially to modify the -- that precedent.

22 MR. BURSCH: I am. I mean, I don't think
23 you need to modify it. I think you could distinguish it
24 based on the fact that there's a private party plaintiff
25 there. But if you feel otherwise that you need to

1 modify it in order to rule in our favor, it's -- it's
2 totally within your power.

3 As we explained at length in the context of
4 foreign nation sovereign immunity, it's a body of common
5 law that this Court is free to modify as appropriate.

6 JUSTICE ALITO: Well, why is the -- why is
7 that important? Why is the issue that you've brought
8 before us important? In addition to the possibility of
9 an Ex Parte Young action, you could certainly arrest
10 people who are running what you believe is an illegal
11 casino in the State, can't you?

12 MR. BURSCH: Well, there are -- there are at
13 least two reasons why that is also an imperfect remedy.
14 The most obvious one is that it creates exactly the kind
15 of inter-sovereign conflict that Congress was trying to
16 avoid when it allowed under IGRA for States to get
17 injunctions even for on-reservation conduct.

18 JUSTICE ALITO: But in addition to that,
19 couldn't you have stopped this before it even started by
20 insisting in the compact that the tribe waive sovereign
21 immunity?

22 MR. BURSCH: Well, that's -- that's a great
23 question and the answer to that is twofold. First, when
24 the compact was negotiated back in 1993, this Court had
25 not decided Kiowa. That came five years later in 1998.

1 And so Congress and the States reasonably assumed at
2 that time that if a tribe was engaged in illegal
3 commercial conduct off reservation, that, of course, a
4 State would have the ability --

5 JUSTICE ALITO: Going forward then --

6 JUSTICE KENNEDY: Why couldn't you at least
7 -- I think this is Justice Alito's question. I don't
8 mean to interrupt. But why couldn't you say that it's a
9 matter of compact interpretation whether these are
10 Indian lands?

11 MR. BURSCH: A matter of compact
12 interpretation whether these are Indian lands.

13 JUSTICE KENNEDY: Right. So you go to
14 Federal court to interpret the contract. There's no --
15 immunity has been waived, and you say these are not
16 Indian lands. I think that's what Justice Alito was
17 asking. I didn't mean to interrupt him.

18 MR. BURSCH: I -- I didn't get quite the
19 same question from Justice Alito.

20 JUSTICE ALITO: Well, that's a more
21 sophisticated version of my question.

22 (Laughter.)

23 JUSTICE ALITO: No. Seriously, it gets into
24 a more -- more difficult issue.

25 MR. BURSCH: Right. Well, if I can finish

1 answering Justice Alito's question. You asked why we
2 can't just go in and arrest. And -- and the second
3 answer to that, besides the -- the conflict of going in
4 with armed police guards and arresting tribal officials
5 and hauling them off to county jail, which Congress
6 tried to avoid when it enacted IGRA in the first place.
7 It's what everybody wanted. Again, it's limiting State
8 sovereignty --

9 JUSTICE ALITO: Well, I understand that.

10 MR. BURSCH: -- any time you take out
11 our --

12 JUSTICE ALITO: But going forward, is this
13 of any importance? Why --

14 MR. BURSCH: Oh, this is of tremendous
15 importance.

16 JUSTICE ALITO: It seems to me if a tribe
17 wants to open a casino and the State has to -- it has to
18 have a compact with the State. Isn't all the bargaining
19 power on the -- on the side of the State? So the State
20 says, fine, if you want to do that, you have to waive
21 sovereign immunity.

22 MR. BURSCH: Well, we had a compact in place
23 in 1993 that limited their casinos so that this wouldn't
24 happen.

25 JUSTICE ALITO: Well, I -- but I mean, when

1 will -- when will this compact expire?

2 MR. BURSCH: Right. Let me give you a very
3 practical answer to that question. This compact in 1993
4 had a 20-year term on it. And so it essentially expired
5 at the end of -- of November, just a few days ago,
6 although it has an evergreen clause that allows it to
7 continue while the parties try to negotiate a new
8 compact.

9 And As you would imagine, the very first
10 thing Michigan asked for in its proposed amended compact
11 was to waive tribal sovereign immunity to deal with
12 issues like this. And, unsurprisingly, the tribe said:
13 We're really not interested in that; we kind of like the
14 way the sovereignty issue is preserved in the existing
15 compact.

16 Now, the question about whether this has an
17 impact beyond tribal gaming, the answer is --

18 JUSTICE ALITO: If I could just pursue that.

19 MR. BURSCH: Sure.

20 JUSTICE ALITO: So the compact has expired
21 and there's -- so then how can they operate the casino?

22 MR. BURSCH: Well, it hasn't expired. Until
23 the parties --

24 JUSTICE ALITO: Until they reach a new
25 compact, it continues.

1 MR. BURSCH: Until they reach a new compact,
2 it continues in effect.

3 CHIEF JUSTICE ROBERTS: Is the status of the
4 land as Indian lands determined by the compact?

5 MR. BURSCH: No, it's not determined by the
6 compact. It would be determined as a matter of Federal
7 law. That's the Federal question in this case. And --

8 JUSTICE SOTOMAYOR: Could I ask you a
9 question?

10 JUSTICE KENNEDY: But the compact refers to
11 Indian lands. Surely, you could take the position that
12 there is a waiver of immunity to determine whether or
13 not these are Indian lands under the compact.

14 MR. BURSCH: I don't think we could,
15 respectfully, Justice Kennedy, because the compact does
16 not envision that the tribe has waived immunity for any
17 purposes. If you look at Section 7 of the compact,
18 it's -- it's really unequivocal about the tribe not
19 waiving immunity.

20 JUSTICE SOTOMAYOR: Could I ask you a
21 question? What -- what would happen if this were Indian
22 lands, and they went ahead and did exactly what they
23 did? They -- there was no dispute that these were
24 Indian lands. Would you have had grounds to object to
25 them building a casino on these lands?

1 MR. BURSCH: We would not.

2 JUSTICE SOTOMAYOR: You would not.

3 MR. BURSCH: Correct. If these are Indian
4 lands, then it's permissible under IGRA and under the
5 compact for them to have and operate a casino.

6 JUSTICE SOTOMAYOR: All right. The issue of
7 what constitutes Indian lands is between the Federal
8 government and the Indians pursuant to the land trust
9 settlement, correct?

10 MR. BURSCH: I disagree with that because --

11 JUSTICE SOTOMAYOR: Well, I know you do and
12 I know why you do. But -- but what defines the lands is
13 the settlement trust, correct?

14 MR. BURSCH: Federal court interpretation of
15 the Michigan Indian Land Claims Settlement Act, yes,
16 would determine the status of these lands. The reason
17 why it's not just between the tribe and the Federal
18 government is because Michigan has a huge interest in
19 having lands that aren't currently under its exclusive
20 sovereign jurisdiction be determined to be Indian
21 lands --

22 JUSTICE SOTOMAYOR: Put -- put this aside of
23 gambling. Let's assume that it was just their buying
24 this land.

25 MR. BURSCH: Yes.

1 JUSTICE SOTOMAYOR: Could you have stopped
2 the buying of this land or unravelled it? Didn't we
3 have a recent decision that said no?

4 MR. BURSCH: If you're referring to the --
5 the Patchak case.

6 JUSTICE SOTOMAYOR: Yes.

7 MR. BURSCH: In that case, you held that the
8 plaintiff could, quite a bit after the fact, file a
9 lawsuit to unravel that transaction if the lands were
10 not eligible for Indian gaming, if I'm remembering the
11 holding correctly. And -- and Michigan does have a
12 substantial interest, not just in the gaming context.

13 JUSTICE SOTOMAYOR: Well, wouldn't you have
14 had to follow -- if you were going to object to this
15 land being taken into the land trust, wouldn't you have
16 had to follow the administrative process?

17 MR. BURSCH: We would, but the land has
18 never been taken in trust. Even the Federal government,
19 the National Indian Gaming Commission, has concluded
20 that these are not Indian lands for purposes of the
21 Settlement Act. And so we never got to the point where
22 they got in Patchak, where they went through the
23 administrative process to take the lands in trust.

24 JUSTICE KAGAN: General, if -- if I could
25 assume that this is not Indian lands and just ask why

1 you need for sovereign immunity to go away? So you have
2 the ability to arrest people. You have the ability to
3 bring Ex Parte Young actions. Presumably, you have the
4 ability on non-Indian lands simply to shut down a
5 casino. Presumably, you have the ability on non-Indian
6 lands to condition any licensing of the casino on
7 whatever you want.

8 I guess the question is: On non-Indian
9 lands, you have a thousand ways to stop a casino that
10 you don't want. Why do you need the abrogation of
11 sovereign immunity?

12 MR. BURSCH: Because we tried to take the
13 least intrusive means necessary to stop the casino, to
14 not go in with the billy clubs and the guns and to
15 arrest tribal members, but to ask for a Federal civil
16 injunction.

17 JUSTICE KAGAN: Well, I think that all of
18 our cases suggest that sovereign immunity is quite
19 important to a sovereign's dignity and that it's not
20 nothing to abrogate sovereign immunity. And so you can
21 say, well, you know, that would be less intrusive than
22 all these other things, bringing Ex Parte Young suits,
23 arresting people, just, you know, conditioning the -- a
24 license, stopping the casino from operating.

25 But, you know, I suspect that the sovereign

1 tribe here would say that, no, it's -- it's an affront
2 to their sovereignty to take -- to strip them of
3 sovereign immunity, and -- and none of these other
4 options that you have are that.

5 MR. BURSCH: Right. But, again, arresting
6 the other sovereign's officers is, with all respect, not
7 respectful to the tribe, which is why that's the course
8 we've pursued. And the change we're asking for here is
9 not as big as the tribe makes it seem, because in IGRA,
10 Section 2710, we have the ability to get an injunction
11 to stop illegal gaming taking place on reservation. And
12 so it's really not that big a leap to say if they're
13 engaging in illegal gaming off reservation, likewise
14 there, we should be able to get the least intrusive
15 remedy, the one that is most respectful of the tribe's
16 sovereignty.

17 And frankly, we're kind of surprised that
18 the United States would take the position that we're
19 better off going in and arresting or suing individual
20 officers, because that's not the way sovereigns are
21 supposed to interact. And it would be a big deal if
22 France opened up a casino in Michigan and rather than
23 seeking a civil injunction, we tried to arrest the
24 French president and throw them in a Michigan County
25 jail.

1 JUSTICE ALITO: I mean, is -- is it not
2 correct that the people who work in these casinos are
3 just employees? They have no other connection with the
4 tribe? Am I wrong on that?

5 MR. BURSCH: I believe some of the employees
6 are tribal members, some are not. And we cite a number
7 of cases in our reply brief where tribal immunity has
8 been extended to tribal employees whether they are
9 members of the tribe or not.

10 CHIEF JUSTICE ROBERTS: Can you prosecute
11 people who frequent this illegal casino?

12 MR. BURSCH: Michigan citizens?

13 CHIEF JUSTICE ROBERTS: Yes.

14 MR. BURSCH: Yes, we could do that. But
15 again, I want you to understand the scope of the
16 invasion of the State's sovereignty here. If any other
17 entity, foreign nation, another State, an individual,
18 set up an illegal business, whether it's prostitution,
19 underage drinking, gaming, you name it, we would have
20 the full panoply of State civil and criminal regulatory
21 remedies available to us and could pick the most
22 appropriate one.

23 And somehow because this is a tribe, even
24 though they are operating on Michigan's land where we
25 have exclusive regulatory jurisdiction, somehow all

1 those remedies are circumscribed to imperfect remedies
2 like *Ex parte Young*, which may or may not be successful,
3 or arresting our own citizens, and that's not respecting
4 the constitutional sovereign that Michigan represents in
5 this case.

6 And to get back to a question a number of
7 you had about the implications of this aside from
8 gaming, this happens in all kinds of other contexts off
9 reservation. You just had a case in 2011 involving the
10 Oneida tribe in New York where they failed to pay their
11 property taxes in New York. So the State moved in to
12 foreclose for nonpayment of taxes those off-reservation
13 properties.

14 And the Second Circuit, interpreting *Kiowa*,
15 reluctantly concluded that the State did not have
16 ability to enforce by foreclosing on that property
17 because the tribe had immunity and invited this Court to
18 review *Kiowa*. This Court granted cert. Eventually cert
19 was dismissed because the tribe waived immunity and they
20 were able to go forward and pursue that remedy.

21 But whether it's in the tax context, whether
22 it's the gaming context, whether it's the criminal
23 context -- you know, the amici briefs of Oklahoma and
24 Alabama are replete with the issues that they are having
25 as sovereigns in running up against the tribal sovereign

1 immunity when it comes to these contexts.

2 If there are no further questions, I will
3 reserve the balance of my time.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Katyal.

6 ORAL ARGUMENT OF NEAL KUMAR KATYAL

7 ON BEHALF OF THE RESPONDENTS

8 MR. KATYAL: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 I would like to begin where my friend did
11 not, with the text of the statute. Congress enacted
12 subsection (A)(ii), like the rest of IGRA, to address
13 gaming solely on Indian lands. In fact, Congress used
14 that phrase "on Indian lands" a whopping 24 times in
15 IGRA. By contrast, IGRA says not a word about
16 off-Indian-lands activity.

17 JUSTICE SCALIA: So you think Congress
18 really wanted the States to have power to stop illegal
19 gambling on Indian lands, but not to have the power to
20 stop illegal gaming on State lands? Is that -- is that
21 the law you think Congress wrote?

22 MR. KATYAL: I do think so, and if I could
23 say first of all --

24 JUSTICE SCALIA: Why would anybody want such
25 a disposition?

1 MR. KATYAL: Two reasons, Your Honor, why I
2 think Congress made the choice they did. But even
3 before that, I don't think that's the proper inquiry for
4 this Court. The proper inquiry for this Court, as C&L
5 and other cases have said, is it requires an unequivocal
6 expression of purpose of Congress before tribal immunity
7 is abrogated, and we don't get into this kind of
8 question of what Congress might have thought, which
9 creates a guessing game.

10 But just to answer your question, why would
11 Congress have thought that --

12 JUSTICE SCALIA: Well, you think that rule
13 would apply even when at the time the statute in
14 question was enacted there was no belief that there was
15 tribal immunity on State lands?

16 MR. KATYAL: Well, Your Honor, I know my
17 friend on the other side has said that. That is just
18 flatly wrong. Puyallup in 1977, Your Honor, precisely
19 said that it involved both on- and off-reservation
20 activity, it was commercial activity, it was fishing,
21 and this Court said that tribal immunity protected
22 against that.

23 So I do think --

24 JUSTICE SCALIA: I thought that was just on
25 reservation. You think that was off reservation as

1 well?

2 MR. KATYAL: It is. At page 167, Your
3 Honor, it says that the injunction was both on and off
4 reservation. And then in Kiowa at page 754 this Court
5 made clear that that's how it read --

6 JUSTICE SCALIA: Kiowa was later, of course.

7 MR. KATYAL: Of course, but I think that
8 Congress in enacting IGRA in 1988 certainly was under
9 the same set of assumptions as this Court in 19 -- in
10 the Kiowa --

11 JUSTICE SCALIA: You think they read
12 Puyallup that closely?

13 MR. KATYAL: I think it's several places in
14 Puyallup and certainly that's what this Court in Kiowa
15 said.

16 JUSTICE SCALIA: I see.

17 MR. KATYAL: And I do think the text is the
18 best guide to what Congress wanted, and the text uses
19 "on Indian lands" 24 times. And the reason for that,
20 the reason why there's not an absurdity, is twofold:
21 First, Congress in IGRA was reacting to this Court's
22 decision in Cabazon the year earlier, which had ousted
23 State court -- State regulatory jurisdiction entirely
24 from on-Indian-lands activity. So it changed the game
25 entirely.

1 Cabazon did nothing with respect to
2 off-Indian-lands activity and left entirely intact all
3 the remedies we've been talking about, Justice Alito's
4 remedy about criminal sanctions --

5 JUSTICE GINSBURG: You agree with that, that
6 they could -- the State could go in and arrest all the
7 customers that are gambling there? Could it seize the
8 slot machines --

9 MR. KATYAL: Well, it certainly could arrest
10 the customers, the employees, and so on. And that's why
11 we would not operate this casino without a square
12 ruling. It is shuttered, Justice Alito, right now
13 because we need a square ruling that says this is
14 on-Indian-lands activity. And we would --

15 CHIEF JUSTICE ROBERTS: Well, you don't it.
16 You don't have a square ruling, so I want to make clear,
17 because both you and the Solicitor General have
18 suggested this as an option. You think it is all right
19 for the State to go in and arrest every employee,
20 management, labor, who is participating in this casino
21 and subject them to criminal sanctions, civil penalties
22 and an injunction. You have got no problem with that.

23 MR. KATYAL: We think that that's a
24 consequence of tribal immunity, that when they are
25 seeking relief qua tribe, that's a different thing, and

1 that's I think a standard principle --

2 CHIEF JUSTICE ROBERTS: You as a tribe, you
3 as a tribe would have no objection to that action?

4 MR. KATYAL: Well, Your Honor, I think if
5 that sort of circumstance unfolded we might say let's
6 try and figure out a different way to deal with that.
7 First, of course, the most primary way is the compact
8 itself, and many compacts, for example, have arbitration
9 clauses --

10 CHIEF JUSTICE ROBERTS: Well, I know, you
11 could suggest different ways and the State could tell
12 you, you know, go fly a kite, we are prosecuting these
13 people. And you'd have no objection to that?

14 MR. KATYAL: Absolutely. We are not here
15 trying to say that we want to evade the law. We want a
16 ruling, a definitive ruling. We believe very squarely
17 that this is on-Indian-lands activity.

18 CHIEF JUSTICE ROBERTS: What about Ex parte
19 Young? Are you willing to waive the tribe's sovereign
20 immunity in an Ex parte Young action? Because in your
21 opposition to the complaint in this case you raised
22 sovereign immunity as an objection to the Ex parte Young
23 count.

24 MR. KATYAL: Sure. As part in the district
25 court, as part of ordinary discovery, as part of

1 ordinary litigation, we said that Ex parte Young wasn't
2 applicable. But we do think, and our brief in
3 opposition says this, our merits brief says this, the
4 United States' brief says this, that Ex parte Young
5 actions are available against tribes, just as --

6 CHIEF JUSTICE ROBERTS: Not just are
7 available; that you would not assert sovereign immunity
8 if they brought an Ex parte Young action.

9 MR. KATYAL: Well, Your Honor, we would not
10 assert it to the limits of Ex parte Young. So, for
11 example, Ex parte Young doesn't -- doesn't permit
12 reaching into the State coffers, and here Count 5 of the
13 complaint tries to reach into the tribe's coffers. So
14 we do think that that type of Ex parte Young -- that is
15 not permitted by Ex parte Young and that would be
16 impermissible.

17 If I could return to the second reason why I
18 think what Congress did wasn't, you know, creating any
19 sort of anomaly like my friend says, the reason is this:
20 All IGRA did in (A)(ii) is empower compacts. It didn't
21 abrogate immunity by itself directly; it requires the
22 tribe to affirmatively buy into the idea of State law
23 applying on the reservation.

24 So if we could, just imagine a casino,
25 Justice Scalia, opened blatantly on a reservation, a

1 casino without a compact that was absolutely illegal.
2 We will call it Casino Rhett. (A)(ii) would not
3 abrogate immunity in that circumstance. The State would
4 have no remedy.

5 JUSTICE KENNEDY: I thought the statute says
6 that there is Federal court jurisdiction over any cause
7 of action initiated by a State or Indian tribe to enjoin
8 gaming activity that is conducted in violation of the
9 compact.

10 MR. KATYAL: Yeah, on Indian lands, exactly.
11 And so my example of the casino here would be --

12 JUSTICE KAGAN: Why couldn't this --

13 MR. KATYAL: If there is no compact,
14 Justice Kennedy, there is no abrogation. And so what
15 (A)(ii) does is it empowers the tribe and the compact,
16 and it requires the tribe affirmatively to come in. And
17 that's why off Indian land there is standard tribal
18 immunity because the tribe hasn't said anything one way
19 or the other.

20 JUSTICE KENNEDY: You don't think that 1166
21 abrogates the immunity, which provides that for purposes
22 of Federal law all State laws are applicable?

23 MR. KATYAL: Yeah, not at all, Your Honor.
24 All 1166 does is bring Federal -- that's about Federal
25 enforcement, not at all about State enforcement.

1 Indeed, Michigan's own position and Michigan's Supreme
2 Court said 1166 does says nothing with respect to
3 States --

4 JUSTICE KENNEDY: And you do not take the
5 position that this casino in this case is part of a
6 compact?

7 MR. KATYAL: Which casino?

8 JUSTICE KENNEDY: The casino in this case in
9 your view is not subject to any compact, is not covered
10 by any compact?

11 MR. KATYAL: No, we do. We think that the
12 proper remedy here, if they had an objection, would have
13 been to arbitrate and say this is not Indian lands.
14 Petition appendix 77A and 78A lay out the terms of the
15 compact and what gaming is allowed.

16 JUSTICE SCALIA: But he says that if they
17 arbitrated, when they tried to enforce the arbitral
18 judgment, you would assert sovereign immunity.

19 MR. KATYAL: Well, two responses to that,
20 Your Honor. First, of course that is the remedy they
21 agreed to in the compact itself, and of course they
22 should try. And second --

23 JUSTICE SCALIA: Well, I mean, that's not an
24 answer.

25 MR. KATYAL: Well, it is an answer in the

1 sense that, Your Honor, had they asked we -- and I can
2 tell you I've discussed this with the tribe -- that they
3 of course not -- they would of course not assert
4 sovereign immunity to enforce the arbitration agreement.

5 JUSTICE SOTOMAYOR: How do you win in an
6 arbitration when the gaming commission has said it's not
7 Indian lands? I mean, I actually am not sure that the
8 ruling of the district court was right on this, okay?
9 But putting my own beliefs or questions about that
10 ruling, how do you win as the Federal government has
11 said it's not Indian lands?

12 MR. KATYAL: Well, we think that that isn't
13 a final decision and is wrong for any number of reasons
14 on the merits that, you know, laid out in the Joint
15 Appendix, and so we do think that would be the argument
16 that we would make to the arbitration board. That
17 should have --

18 JUSTICE SOTOMAYOR: But how does the
19 arbitration board change the mind of the gaming
20 commission? Aren't they the final deciders of whether
21 this is trust land or not?

22 MR. KATYAL: Well -- no, I think that -- I
23 think that that isn't itself a final decision and there
24 are any number of mechanisms that may be available to
25 try and get the issue properly teed up to the NIGC.

1 CHIEF JUSTICE ROBERTS: I don't see how an
2 arbitration works. The Federal government has a very
3 keen interest in whether this is Indian land or not.
4 And the arbitrator is going to decide that in a way
5 that's going to bind anybody?

6 MR. KATYAL: Well, it would bind, I think,
7 the parties before it, and that's what the parties
8 agreed to. In many compacts --

9 CHIEF JUSTICE ROBERTS: So ongoing, as far
10 as the tribe and the State is concerned, they proceed
11 from then on as if this is Indian lands, even though the
12 Federal government is saying, no, it's not.

13 MR. KATYAL: Well, I think that we would
14 still have to persuade the Federal government in one
15 way, shape, or form because of the NIGC's authority in
16 this area. So I think that's two separate questions.

17 CHIEF JUSTICE ROBERTS: Yes. So the
18 arbitration doesn't get -- so the arbitration doesn't
19 get you anywhere at all.

20 MR. KATYAL: Well, it at least resolves the
21 issue with respect to Michigan. Our central point here
22 is that there's lots of different ways to deal with this
23 question, including the question you asked earlier, the
24 declaratory judgment action, which we brought against
25 Michigan. There's lots of ways to resolve the

1 underlying Indian lands question.

2 The last thing I think this Court needs to
3 do is entirely change the rules of the game with respect
4 to tribal immunity.

5 JUSTICE SOTOMAYOR: Just so we understand --

6 JUSTICE GINSBURG: What would be the big --
7 what would be the big change, other than modifying
8 Kiowa, which is a divided opinion, and was dealing with
9 a money claim. It wasn't dealing with injunctive
10 relief.

11 MR. KATYAL: Well, certainly this Court's
12 decision in Puyallup as well as Oklahoma -- Oklahoma Tax
13 Commission both did deal with injunctive relief and both
14 were against States to deal with his argument.

15 Now, he has said -- my friend on the other
16 side has said we'll look to the foreign sovereign
17 immunity context and that's what's giving him his reason
18 for saying that it wouldn't be such a big change, and we
19 think that's wrong for two reasons.

20 Number one, Kiowa itself, at page 759, dealt
21 with this and said that it was the political branches
22 that led the change on commercial immunity, not this
23 Court.

24 And number two, my friend has quoted Alfred
25 Dunhill, and I think that everything --

1 JUSTICE GINSBURG: Well, is that right? The
2 distinction between commercial and governmental, it was
3 court made in the first instance. And then the Foreign
4 Sovereign Immunities Act codified law that was court
5 made. So it was the courts that made the distinction
6 between acting in a commercial capacity and acting in a
7 governmental capacity.

8 MR. KATYAL: Justice Ginsburg, the majority
9 of *Kiowa*, on page 759, responds to that and says that it
10 was actually the political branches that led with the --

11 JUSTICE BREYER: Yes, but he was wrong on
12 that apparently if that's what he says. He was wrong.
13 That if we look at the cases, what we will see is it was
14 the courts that said there's a common law abrogation of
15 France's sovereign immunity when they go into business
16 in downtown Iowa somewhere.

17 MR. KATYAL: And, Justice Breyer --

18 JUSTICE BREYER: The same thing -- same
19 thing with the State he says in Nevada and California
20 and then he says it would be totally anomalous to think
21 that an Indian tribe could go into downtown Des Moines
22 and open up a clearly illegal business, and you could
23 sue France -- the State, which was not *Kiowa* -- they
24 could sue -- France could -- the State could sue France,
25 it could sue California, but it couldn't sue the Indian

1 tribe.

2 MR. KATYAL: Justice Breyer, we would
3 encourage the Court to look at precisely the case he is
4 citing for this proposition, which is Alfred Dunhill,
5 because as the case was vigorously argued by a Justice
6 Department attorney, and what -- and what my friend
7 doesn't tell you is that the pages he is citing actually
8 don't command a majority of the court. They're about
9 not commercial -- they're not about foreign sovereign
10 immunity. They are about active State immunity.

11 JUSTICE BREYER: All right. What about the
12 California and Nevada?

13 MR. KATYAL: In the California v. Nevada, I
14 think this Court dealt with in Kiowa itself because in
15 Kiowa -- because that's about basically the State --

16 JUSTICE BREYER: Kiowa is about -- Kiowa is
17 about individuals who are not the State.

18 MR. KATYAL: Yes. Exactly. But I think
19 this Court has recognized in Blatchford and in Kiowa
20 that in Nevada v. Hall situations, which is what the
21 dissenting Kiowa raised, and what my friend is trying to
22 resuscitate, that's a difference in circumstance because
23 there was a mutuality of concession.

24 JUSTICE BREYER: All right. I'll look at
25 those with care. But now, assuming you are right on

1 that, is the question in front of us, on the assumption
2 that these are Indian lands, does the Indian tribe have
3 sovereign immunity? Is that the question you want
4 answered?

5 MR. KATYAL: We think that --

6 JUSTICE BREYER: Yes or no?

7 MR. KATYAL: -- that if they are on Indian
8 lands, yes, there is --

9 JUSTICE BREYER: Do you want us to say on
10 that assumption -- now, on that assumption, I look at i
11 and number ii under a, 7(a), and a quick reading of them
12 suggests to me that they're in parallel. That the
13 Indian tribe can sue the State when the State won't open
14 negotiations and the State or an Indian tribe can sue
15 the Indian tribe when the Indian tribe refuses to follow
16 the compact.

17 Now, what's your answer to that?

18 MR. KATYAL: When it's on Indian lands,
19 exactly.

20 JUSTICE BREYER: Well, I know. But you said
21 to decide this on the assumption that it's on Indian
22 lands. If I make that assumption and then I look over
23 and read Romanette i and Romanette ii, it sounds as if,
24 as I said, Romanette i, the tribe can sue the State to
25 get the compact.

1 Romanette ii, the State can sue the tribe
2 when it violates the compact.

3 MR. KATYAL: Your Honor, I may have
4 misunderstood your earlier question, but certainly our
5 position is that you can look to our answer to determine
6 whether or not there is tribal immunity in the case.
7 That is not something my friend has argued. It's
8 outside of the questions presented entirely, which both
9 proceed on the assumption that this is off of Indian
10 lands.

11 JUSTICE ALITO: Well, for purposes of
12 sovereign immunity, does it make any difference that you
13 have at least a colorable claim if this is on Indian
14 lands?

15 MR. KATYAL: Well, I think that it -- I -- I
16 don't think it matters either way. Our position is one
17 way or the other.

18 JUSTICE ALITO: Yes. So if your -- if your
19 client or another tribe just decided to go into the
20 gaming business all over the country and began opening
21 casinos in places that clearly are not Indian lands, you
22 still would have sovereign immunity.

23 MR. KATYAL: Right. There would be tribal
24 immunity for that. Just as if the blatant casino on
25 Indian lands opened a casino -- a tribe opened a casino

1 without a compact, the State would not have an A2
2 injunctive remedy. And that's why there is no anomaly.

3 JUSTICE BREYER: That's why I want to -- I'm
4 trying to get what question I'm supposed to answer. If
5 I'm supposed to answer the sovereign immunity question
6 on the assumption that these are Indian lands contrary
7 to what was decided below, I might get one answer. But
8 if I'm decide -- supposed to do it on the assumption
9 that they're not Indian lands, I might get a different
10 answer. What assumption am I supposed to make?

11 MR. KATYAL: The latter, Your Honor, for two
12 reasons. Number one, that's what the questions
13 presented say.

14 And number two, one of the most venerable
15 precedence of this Court is the -- is Justice Holmes'
16 opinion -- which says you don't look to our answer to
17 determine --

18 JUSTICE SOTOMAYOR: What happens if you
19 can't convince the Federal government that these are
20 Indian lands, and despite the gaming commission's final
21 ruling, there is no other way to overturn it, you decide
22 to operate the casino. It's not Indian lands by the
23 Federal government. You haven't convinced them
24 otherwise. What occurs at that moment?

25 MR. KATYAL: Well, I suppose --

1 JUSTICE SOTOMAYOR: Who can stop you and
2 using what mechanisms?

3 MR. KATYAL: The Federal government has a
4 variety of mechanisms available to it in that
5 circumstance, including closure orders and the like.
6 And I suppose even the State may have any number of
7 actions, both -- many States will have this worked out
8 in the compact, but if they don't have it worked out in
9 the compact, then there may be the possibility of
10 criminal prosecutions.

11 JUSTICE SOTOMAYOR: Well, the compact only
12 comes into play if it's Indian lands. But if the
13 Federal government has said it's not Indian lands,
14 that's what I'm asking.

15 MR. KATYAL: Right. I think that still, the
16 State may have any number of criminal or civil remedies
17 available to it. That is, off Indian lands -- and this
18 is why there isn't an anomaly in A2 -- off Indian lands,
19 the State has vast regulatory power. IGRA was reacting
20 to a circumstance in which this Court ousted State
21 regulatory jurisdiction on Indian lands. And so the
22 State has a whole bunch of mechanisms available to it.

23 JUSTICE KAGAN: Mr. Katyal, what is the
24 difference -- the State can really -- it can shut down
25 these gambling operations easily if it's off Indian

1 lands. What the State can't do is get any kind of
2 damages or money remedies; isn't that really the
3 difference?

4 MR. KATYAL: I do think so. I think that
5 that's -- I think that that's underlying some of this,
6 absolutely.

7 JUSTICE KAGAN: Maybe that's an important
8 difference. I mean, maybe we should give the State the
9 ability to collect damages.

10 MR. KATYAL: Well -- well, I certainly would
11 disagree with the idea that you, the Court, should. I
12 think the proper response would be exactly what this
13 Court said in *Kiowa*, which is if there's a dispute about
14 the contours of immunity, commercial, off land, State is
15 plaintiff, all of that, those are all things that
16 Congress is well-suited for dealing with.

17 JUSTICE GINSBURG: Mr. Katyal, isn't it odd
18 to say that when this is the Court -- the doctrine of
19 tribal immunity is something that was announced by this
20 Court. Congress never passed a law that said the tribes
21 have immunity. It's all this Court. And then you say
22 what this Court made only Congress can unmake. That
23 seems strange to me.

24 MR. KATYAL: Justice Ginsburg, that was
25 precisely the argument that was made in *Kiowa*, was

1 accepted by the dissent in Kiowa. But what the majority
2 said is really Congress is best able to balance the
3 rights, remedies and reliance interests on the parties.
4 And I'd note, picking up on your question to my friend
5 earlier, that after Kiowa Congress hasn't been silent.
6 Congress has reaffirmed tribal immunity in the Patriot
7 Act extension in 2005 and the SIGR Act of 2009. They've
8 cut it back in the Arizona Water Act and the Zuni Acts
9 of 2003. This is not a circumstance in which --

10 JUSTICE KENNEDY: But if the tribe takes
11 such an obscure position, such a changing position, as
12 to whether or not we are dealing with Federal lands
13 here, or pardon me, with Indian land, maybe that's a
14 reason why we should confine and limit Kiowa so that it
15 doesn't apply to Indian gaming and we won't have this
16 problem.

17 MR. KATYAL: Well, I think that's --

18 JUSTICE KENNEDY: Because I wanted to get
19 the answer to Justice Breyer's question, is it your
20 position that these are Indian lands? And I still don't
21 understand your position.

22 MR. KATYAL: Our position is --

23 JUSTICE KENNEDY: And if that's true, then
24 maybe this whole idea of immunity doesn't work very well
25 in the context of gaming.

1 MR. KATYAL: Our position, Justice Kennedy,
2 is that they are Indian lands and there is lots of
3 different remedies available both on and off Indian
4 lands, and that this Court in Kiowa set out a way to
5 deal with any sort of cutting back, which is to leave it
6 to Congress.

7 JUSTICE ALITO: What remedy --

8 CHIEF JUSTICE ROBERTS: If we get -- go
9 ahead.

10 JUSTICE ALITO: What remedy would a private
11 person have? Suppose a patron of a casino was beaten up
12 by casino employees. What remedy could that person
13 have?

14 MR. KATYAL: I think what the Court should
15 do is the same thing it did in Kiowa, which is bracket
16 that question, because this is as far away from that as
17 you can possibly get. Here the State entered into a
18 contract with its eyes open that not just it didn't say
19 anything about tribal immunity, it reaffirmed tribal
20 immunity, at Petition Appendix Page 90.

21 Now, Michigan doesn't like the terms of that
22 deal and so they are coming and trying to renegotiate
23 that now. So there may be -- for the tort plaintiff, I
24 understand there may be any number of arguments
25 available, but this is so far from that.

1 CHIEF JUSTICE ROBERTS: We've talked about
2 this prosecuting the employees. I suppose if you bring
3 a criminal action against one of the employees, the
4 State would have to prove beyond a reasonable doubt that
5 this was not Indian lands?

6 MR. KATYAL: They would.

7 CHIEF JUSTICE ROBERTS: That's not much of
8 a --

9 MR. KATYAL: I'm not sure for an element of
10 that crime whether that piece of it would be beyond a
11 reasonable doubt. It would be an attendant circumstance
12 and not subject to beyond reasonable doubt.

13 CHIEF JUSTICE ROBERTS: That makes it a much
14 more different remedy than the typical injunction
15 action.

16 MR. KATYAL: But there is still civil
17 remedies and other things going.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Not yet. We are going to hear from
20 Mr. Kneedler first.

21 (Laughter.)

22 CHIEF JUSTICE ROBERTS: He might have
23 something you would like to respond to.

24 Mr. Kneedler.

25 ORAL ARGUMENT OF EDWIN S. KNEEDLER,

1 FOR UNITED STATES, AS AMICUS CURIAE,
2 SUPPORTING the RESPONDENTS

3 MR. KNEEDLER: Mr. Chief Justice and may it
4 please the Court:

5 I would like to respond at the outset to the
6 suggestion that this Court might modify the categorical
7 rule in *Kiowa* that an Indian tribe is subject to suit
8 only if Congress unequivocally consents in order to
9 allow suits by States.

10 First of all, both *Puyallup* and *Pottawatomi*
11 were suits by States for prospective injunctive relief
12 and the Court found them barred. *Puyallup* was off
13 reservation. But there's another point that I think
14 ties in with the questions about foreign sovereign
15 immunity. In this Court's decision in *Blatchford*, the
16 Court held that the State of Alaska could not be sued by
17 an Indian tribe complaining about the distribution of
18 some State funds in Alaska, which does not have Indian
19 country. The Court held that the suit was barred. In
20 doing so, the Court recognized that the Eleventh
21 Amendment had originally been understood to bar suits
22 only by individuals. But relying on this Court's
23 decision in *Principality of Monaco*, the Court said that
24 the 11th Amendment also barred suits by foreign
25 sovereigns.

1 And the Court's rationale in *Principality of*
2 *Monaco* was that foreign sovereigns were not parties to
3 the convention. There was no reciprocal abrogation of
4 immunity between foreign sovereigns and States. And, in
5 fact, the Court specifically pointed out that the State
6 of Mississippi could not sue Monaco, and in this case
7 Monaco could not sue Mississippi.

8 The Court applied that very same reasoning
9 in *Blatchford* to an Indian tribe. The Court said: We
10 have held in the past that Indian tribes may not be
11 sued, and they cited *Puyallup*, which was a suit by a
12 State, and the Court said: Logically it follows that a
13 tribe may not sue a State.

14 JUSTICE BREYER: So you are prepared to live
15 with the following. Is it the case that if California
16 opens a business in a commercial activity in 20 other
17 States, at least one of which it is totally illegal,
18 this other State, say Utah, cannot -- can sue California
19 or not, what's the answer?

20 MR. KNEEDLER: The State where that gaming
21 occurs can be, but that's because of *Nevada vs. Hall*
22 where the Court drew a distinction between -- for
23 States. In the States --

24 JUSTICE BREYER: So what the opposition says
25 in your view is absolutely correct, that a foreign

1 nation opens up an illegal business in a State. The
2 State can sue them now because of a treaty, but
3 previously because of the common law. California opens
4 up an illegal business, the State can put them out of
5 business by bringing a suit. Bust an Indian tribe, they
6 can't? That's the United States view.

7 MR. KNEEDLER: California in the
8 State-to-State situation, it's because of the
9 reciprocity.

10 JUSTICE BREYER: I'm saying that is your
11 view, I just want the bottom line.

12 MR. KNEEDLER: Yes, but if I may explain.
13 It's important to understand the reasoning. The
14 reasoning why a suit by a State against the sovereign
15 would now be okay is because of the Foreign Sovereign
16 Immunities Act. As I mentioned with the Principality of
17 Monaco, what the Court said there is the State could not
18 sue the Principality of Monaco because at the time there
19 was no abrogation of immunity. Foreign sovereign
20 immunity --

21 JUSTICE SCALIA: That statute was based upon
22 judicial decisions that had already held that.

23 MR. KNEEDLER: With all respect,
24 Justice Scalia, it was based upon the executive branch's
25 determination in the Tate letter. In this Court's

1 decision in Republic of Mexico vs. Hoffman. The Court
2 said it is not for the Courts to deny an immunity that
3 the government recognizes. Prior to 1952, when the
4 United States adopted the restrictive theory of
5 sovereign immunity, foreign sovereigns were absolutely
6 immune from suit, unless the political branches said
7 otherwise.

8 In the Tate letter, the executive branch
9 adopted what was the developing body of international
10 law for foreign sovereign immunity and said that
11 commercial activities could be the subject of suit.
12 That was codified, but the Court did not take it upon
13 itself to modify that foreign sovereign immunity. This
14 is the point that the Court made.

15 JUSTICE SCALIA: Took it upon itself to
16 accept the executive's determination of how it ought to
17 play out.

18 MR. KNEEDLER: Yes. But it didn't treat it
19 just as a matter of common law, like a maritime common
20 law claim or something like that. It treated it as
21 structural under the Constitution. And the same thing
22 is true of Indian tribes. The Constitution refers to
23 Indian tribes -- Worcester v. Georgia announced that
24 Indian tribes are sovereigns. We make treaties with
25 sovereigns.

1 CHIEF JUSTICE ROBERTS: They are quasi
2 sovereigns. Which means --

3 JUSTICE GINSBURG: Dependent sovereigns.

4 CHIEF JUSTICE ROBERTS: Dependent sovereigns
5 which is surprising that the scope of their immunity
6 exceeds that of States or foreign sovereigns.

7 MR. KNEEDLER: They are dependent
8 sovereigns, but they are dependent upon the plenary
9 power of Congress, not the plenary power of this Court.

10 CHIEF JUSTICE ROBERTS: So the federal
11 government can certainly take enforcement action against
12 this casino.

13 MR. KNEEDLER: Yes.

14 CHIEF JUSTICE ROBERTS: The Federal
15 Government, the Solicitor of Interior has said these are
16 not Indian lands, the NIGC has adopted that
17 interpretation. The NIGC had said, But we can't do
18 anything because they are not Indian lands. And we work
19 on Indian lands. And then they've referred, as I
20 understand, the matter to the United States Attorney who
21 has, thus far, not done anything, right?

22 So basically as I see it, the Federal
23 Government is saying, States, you can't take action
24 against this illegal casino. We're the only ones who
25 can. We agree that it's illegal, but we are not going

1 to do anything.

2 MR. KNEEDLER: First of all, by -- the
3 casino is promptly closed. Whether it would have been a
4 prudent exercise of federal criminal prosecutorial
5 authority or Civil Action under 1955, is committed to
6 the ordinary prosecutorial discretion of the United
7 States Government.

8 JUSTICE SCALIA: Who made these Indian tribe
9 sovereign, was it Congress?

10 MR. KNEEDLER: The Constitution.

11 JUSTICE SCALIA: I mean, you are appealing
12 to, you know, other branches' determination. Who
13 decided that Indian tribes are sovereign?

14 MR. KNEEDLER: The Constitution --

15 JUSTICE SCALIA: Who pronounced them to be
16 sovereign?

17 MR. KNEEDLER: This Court.

18 JUSTICE SCALIA: This Court.

19 MR. KNEEDLER: But --

20 JUSTICE SCALIA: So I assume that this Court
21 could also determine the scope of their sovereignty.

22 MR. KNEEDLER: But this Court didn't do it
23 as a matter of common law. It did it by looking at the
24 Constitution. We have treaties with Indian tribes, we
25 have the --

1 JUSTICE SCALIA: We do virtually nothing as
2 a matter of common law. We do virtually everything on
3 the basis of the Constitution or statutes. I don't
4 think that that's much of an exception.

5 MR. KNEEDLER: As this Court said, it's a
6 general proposition that diminishment of tribal
7 sovereignty is for the political branches. The Court
8 said that --

9 JUSTICE BREYER: Why? Because you are
10 representing the United States. You understand Indian
11 policy. This case has tremendous implications if we
12 follow your approach. It seems to me well beyond
13 anything to do with gaming. My belief is Indian tribes
14 all over the country, operate businesses off the
15 reservation, and businesses all over the country are
16 regulated. And does the State, I guess, in your view
17 does not have the power to enforce the regulation
18 against the Indian tribe.

19 MR. KNEEDLER: Not against --

20 JUSTICE BREYER: Not against the tribe
21 itself. Why is that in the Indian tribe's interest?
22 And is it a trap for the unwary lawyer? And how is this
23 supposed to work out in your view?

24 MR. KNEEDLER: Well, Congress has addressed
25 this problem in numerous ways. For example, the -- and

1 in deciding whether to abrogate immunity, they're
2 complex decisions. Should it be under tribal law?
3 Should it be under State law? Should it be under
4 Federal law? Should the suit be in Federal court?
5 Should it be in State court?

6 JUSTICE ALITO: What about -- what about
7 private individuals who may have a claim against -- as a
8 result of the operation of the casino? Vendors who want
9 to be paid, somebody who slips and falls. That's all
10 barred by sovereign immunity?

11 MR. KNEEDLER: Unless -- unless the tribe
12 consents. As the -- as two of the amicus briefs point
13 out, a number of the tribal compacts provide for waivers
14 of sovereign immunity for tort claims that may arise out
15 of -- out of the gaming operation. Contract claims
16 could be -- could be brought in tribal court.

17 JUSTICE GINSBURG: Justice Alito's question
18 was the Kiowa case. It was off reservation, the tribe
19 owed money on a contract which it refused to pay, and
20 the court said sovereign immunity.

21 MR. KNEEDLER: Exactly. And I should also
22 point out that the court said in Kiowa, in addition to
23 reaffirming this analysis that I described from
24 Blatchford and Coeur d'Alene Tribe v. Idaho, the court
25 reaffirmed that reciprocity and principality of Monaco

1 point. But it also pointed out the tremendous reliance
2 interests that have grown up on -- the basis of foreign
3 sovereign immunity. It pointed out that, for example,
4 450 N of Title 25 which specifically preserves immunity,
5 something that was reiterated in the No Child Left
6 Behind Act.

7 But it also specifically pointed out that
8 Congress has sometimes created narrow exceptions to the
9 immunity. And critically, one of the ones it cited was
10 the very one on which Michigan is relying in this case,
11 2710(d)(7)(A)(ii). That is a limited exception for
12 injunctive actions by a State against a tribe. Congress
13 addressed --

14 JUSTICE GINSBURG: Mr. Kneedler, you went
15 through the development of the foreign sovereign
16 immunity, and whether the courts were influenced by the
17 government, it was the courts that recognized this
18 distinction between commercial activity and governmental
19 activity.

20 Why couldn't the court extend that same
21 distinction to Indian tribes and say it makes sense in
22 the foreign country context, it also makes sense in the
23 context of the tribes, to distinguish commercial from
24 governmental?

25 MR. KNEEDLER: It may well not make sense or

1 it may not lend itself to one answer for the reasons
2 that I said. Congress, for example, when it comes to
3 tort claims against tribes, adopted a provision making
4 the United States liable for tort claims and not -- and
5 not others. It may not lend itself to one principal
6 answer, which is why the Court said in *Kiowa* said it's
7 up to the legislature, the Congress, to weigh the
8 various pros and cons or up to the tribe itself in
9 deciding whether to weigh it.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 Mr. Kneedler.

12 Mr. Bursch, you have five minutes left.

13 REBUTTAL ARGUMENT OF JOHN J. BURSCH

14 ON BEHALF OF THE PETITIONER

15 MR. BURSCH: Thank you, Mr. Chief Justice.

16 I want to clarify just two things about
17 Court's precedent and then get back to the remedies
18 issue, which has taken up so much of our time this
19 morning.

20 First, the state of the law when IGRA was
21 adopted in 1988; again, that was before *Kiowa*. I heard
22 my friend on the other side talk about *Puyallup* and how
23 that was an off-reservation case. And what you need to
24 understand was that *Puyallup* was the third in a series
25 of three opinions that this Court issued. And it's true

1 that some of the earlier cases involved on- and
2 off-reservation conduct. But as we point out in our
3 reply brief -- this is at pages 167 to 68 of that
4 opinion -- here the tribe's contention was that the
5 fishing activities on its reservation were immune. And
6 Justice Stevens wrote that opinion, and then only a few
7 short years later in *Kiowa* wrote his dissent where he
8 said we've never before drawn that on/off-reservation
9 distinction. So that's what Puyallup says.

10 With respect to Alfred Dunhill and the
11 evolution of foreign sovereign immunity as a common law
12 doctrine, four Justices agreed or signed on to the
13 entire opinion where that discussion was held. One
14 Justice agreed only with parts one and two, but part
15 two, on page 694, draws the commercial line and says the
16 problem here is that the district court found the only
17 evidence of an active state, as opposed to a commercial
18 act, was a statement by counsel that the Cuban
19 government and the intervenors denied liability and
20 that's not enough.

21 And -- and the Court did reference the Tate
22 letter, but that's not why the Court changed the common
23 law of foreign nation sovereign immunity. It -- it gave
24 respectful consideration to the Executive Branch's
25 views, and then it reached its own conclusion about what

1 the common law should say.

2 And, Justice Ginsburg, you are exactly right
3 to say if it makes sense in the foreign nation context
4 and it makes sense here, apply it to both.

5 JUSTICE SCALIA: If we modified it to make
6 an exception for commercial activities off reservation,
7 could Congress reinstitute sovereign immunity if they
8 wanted?

9 MR. BURSCH: No question they could. Just
10 like when this Court in Cabazon said that States didn't
11 have the regulatory authority they thought they did to
12 regulate illegal gaming on reservation, and this Court
13 said, you know, States can't really touch that.
14 Congress immediately jumped in and corrected course.

15 You know, conversely, with Alfred Dunhill,
16 when this Court drew the line at commercial conduct,
17 Congress immediately jumped in and it put its stamp of
18 approval on that, and essentially adopted the line --

19 JUSTICE KAGAN: Well, there seems something
20 sort of strange about that, General, because as I read
21 Kiowa, what it was, was an invitation to Congress. It
22 was saying, you know, we have some concerns about this,
23 we're not sure it makes sense. We are dropping a very
24 broad hint that Congress should change it. And 15 years
25 later, Congress has done nothing. And then to come back

1 15 years later and to say, you know, Congress didn't
2 really accept our hint, so we'll just do it ourselves
3 and make Congress reverse it, wouldn't you think that
4 that's a strange procedure to use?

5 MR. BURSCH: Actually, Justice Kagan, I
6 think that's the way that the common law works, that the
7 Court does extend invitations to the legislative and
8 executive branches.

9 JUSTICE SCALIA: Maybe we've learned
10 something in 15 years, such as the fact that --

11 JUSTICE KAGAN: Or that Congress thought
12 that this did make sense.

13 MR. BURSCH: I think you could draw the
14 conclusion either way. And the suggestion by the tribe
15 and the government that somehow this Court lacks the
16 power to define common law tribal immunity, we think,
17 doesn't hold water.

18 JUSTICE KAGAN: But I would have thought,
19 General Bursch, that one of the principles behind Indian
20 law in this country goes something like this: Congress
21 can do pretty much whatever it wants with respect to
22 Indian tribes, but we will not likely assume that
23 Congress means to undermine tribal sovereignty. We
24 will -- we will insist that Congress says that before we
25 put it into effect.

1 And here, it's not just -- I mean, Congress
2 has given every indication that it does not wish to
3 change this, notwithstanding our hints that it should.

4 MR. BURSCH: I respectfully disagree. And
5 the best evidence of that congressional intent is in
6 IGRA itself where Congress abrogated immunity even for
7 on-reservation conduct. Think about what an
8 extraordinary remedy that is, that even on the
9 reservation, a State would have the ability to go into
10 court and get a Federal injunction rather than send in
11 police to arrest --

12 JUSTICE BREYER: He's adding one thing,
13 which is as you've just heard, that the Indian tribes
14 are in the same Eleventh Amendment type position as the
15 principality of Monaco before the treaty.

16 MR. BURSCH: Right, but --

17 JUSTICE BREYER: They didn't participate in
18 the convention and the principality of Monaco was held
19 to be immune, presumably, even from commercial activity.
20 Let Congress change it. That's what Kiowa says. And
21 that I think is their basic argument. And if it's a
22 wash -- I mean, I hate to put it this way because it
23 sounds like a joke, but it isn't meant to be -- in this
24 case, if it's a wash, follow the precedent.

25 MR. BURSCH: I think Alfred Dunhill makes

1 clear that this Court can change the stream of the
2 common law when it comes to -- to immunity.

3 Really quickly on -- on these remedies.

4 JUSTICE SOTOMAYOR: Then go back to the
5 beginning question. You have remedies you don't like,
6 but the waiver under IGRA is not for damages. It's only
7 for injunctive relief. You have that in Ex parte Young.
8 Why are you asking us to waive sovereign immunity with
9 respect to damages?

10 MR. BURSCH: I'll explain why, if I may
11 answer the question. With respect to arresting, Ex
12 Parte Young remedies, enforcing the arbitration and
13 having them waive immunity, all these things are unclear
14 whether they're available to us. And if this Court
15 issued a definitive opinion that said we have each one
16 of those remedies, that would do great good in this
17 area.

18 But the reason why we think that you should
19 go farther than that is because if sovereignty means
20 anything, it means allowing people to define what is
21 illegal on their own lands, whether it's prostitution,
22 gaming or underage drinking, and being able to use the
23 full enforcement power of the sovereign State, civil and
24 criminal, to enforce those laws.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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The case is submitted.

(Whereupon, at 11:06 a.m., the case in the
above-entitled matter was submitted.)

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