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1 P R O C E E D I N G S

2 (10:04 a.m.)

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

6 Mr. Bursch.

7 ORAL ARGUMENT OF JOHN J. BURSCH

8 ON BEHALF OF THE PETITIONER

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

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

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

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

25 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.

5 But -- and so, the counts that you're  
6 arguing about were added after the injunction was  
7 issued. How do you have jurisdiction to act -- to argue  
8 someone else's injunction?

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

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

24 I'm a little -- I'm very, very confused as I  
25 look at what the district court said. It explicitly

1 said you weren't part of the order.

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

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

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

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

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

1 together. And that's exactly the way the Sixth Circuit  
2 treated it.

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

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

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

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

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

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

24 MR. BURSCH: Your Honor, it's a procedural  
25 objection. The only jurisdictional question in this

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

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

11 MR. BURSCH: That's correct, Justice  
12 Ginsburg, and there were two reasons for that. The  
13 first is that that provision was only discretionary, as  
14 we explain in our reply brief. But even more important,  
15 the compact also makes clear that the tribe did not  
16 waive its sovereign immunity for purposes of  
17 arbitration.

18 So if we had gone to arbitration and  
19 prevailed, if the arbitrator had reached the same result  
20 as the Federal government did, as to the status of these  
21 lands being not Indian lands, then --

22 JUSTICE KAGAN: I'm sorry. Could you  
23 explain that? Because I thought that the purpose --  
24 that the whole point of the C&L Enterprises case is to  
25 say that when a tribe agrees to arbitration, it has

1 waived its sovereign immunity for that purpose in that  
2 proceeding. Are you saying that there was something  
3 special in this agreement?

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

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

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

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



1           MR. BURSCH:           Because, again, it wouldn't  
2     have done any good for us to stipulate to jurisdiction  
3     on the tribe's claim about the status of the lands  
4     because simply having a declaratory judgment wouldn't  
5     have given us any relief. We would have had to file a  
6     counterclaim for injunctive relief and the tribe,  
7     undoubtedly, would have filed -- or  
8                         would have  
9     asserted a tribal immunity there as well.

10          So, really, all roads lead to tribal  
11     immunity, no matter how --

12          JUSTICE SOTOMAYOR:           All roads lead to one  
13     issue, I think. If you had gotten a declaratory  
14     judgment, they would have had to stop their gaming  
15     activity.

16          MR. BURSCH:           No --

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

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

23          JUSTICE SOTOMAYOR:           So why not Ex Parte  
24     Young? You point to one or two cases in the lower  
25     courts that suggest there not might be Ex Parte Young  
26     jurisdiction, but those cases are distinguishable. So

1     why not go after just the officials?

2             MR. BURSCH:             Two responses to that, Justice  
3     Sotomayor, one, kind of a practical consideration and  
4     then one a broader federalism principle that I -- that I  
5     want to emphasize. The narrow practical point is that  
6     Ex Parte Young is an imperfect remedy for lots of  
7     reasons, as we express in the brief.

8             It's well settled that you can't get  
9     specific performance on the contract, you can't enforce  
10    a State law in Federal court, you can't get money or  
11    seize assets in an Ex Parte Young action. And that's  
12    why lower courts --

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

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

16            JUSTICE SOTOMAYOR:         You would have gotten  
17    that.

18            MR. BURSCH:             It's not clear at all to us  
19    that we would be able to get that relief, based on the  
20    lower court holdings.

21            Now, the bigger sovereignty point is that,  
22    if a foreign country, if France or Haiti came in and  
23    opened the same casino, the State would have the full  
24    panoply of remedies available to it. And it should have  
25    those remedies because any additional immunity you give

1 to the tribe, when it's engaging in illegal conduct on  
2 lands subject to Michigan's exclusive jurisdiction, you  
3 are necessarily taking away from the sovereign authority  
4 of the State of Michigan. That's a lesser remedy.

5 JUSTICE GINSBURG: That's -- all that -- the  
6 enigma that you pointed out -- or the anomaly is -- is  
7 certainly clear. But what about Kiowa? This Court  
8 seemed to say that the tribe is immune on reservation,  
9 off reservation, commercial activity, government  
10 activity, it is immune, blanket immunity.

11 So how can you prevail without having this  
12 Court modify Kiowa.

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

19 In that case, the fact that the plaintiff  
20 could not enforce his promissory note did not directly  
21 implicate a State police power. Here --

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

24 MR. BURSCH: For the proposition that States  
25 are different?

1 JUSTICE KENNEDY: That -- that States have a  
2 lesser burden when they're faced with a sovereign  
3 immunity defense?

4 MR. BURSCH: I wouldn't say that it's a  
5 lesser burden, but I think you need to analyze this as a  
6 zero sum gain, that when you're talking about activity  
7 taking place on sovereign State land and you're not  
8 allowing the State to have its whole panoply of  
9 remedies, that you've taken away an attribute of  
10 sovereignty that -- that would have existed.

11 JUSTICE KENNEDY: What's your best case for  
12 that?

13 MR. BURSCH: I would basically just cite all  
14 of the cases this Court has decided over the last  
15 quarter century involving the ADA, the ADEA, where this  
16 Court has consistently recognized that States are  
17 different. Sovereigns --

18 JUSTICE KENNEDY: You know, that's -- that's  
19 a big reading assignment.

20 (Laughter.)

21 JUSTICE BREYER: The question is this:  
22 Three situations -- I think it's the same question  
23 Justice Kennedy was driving at. One, France opens up a  
24 casino.

25 MR. BURSCH: Yes.

1 JUSTICE BREYER: Two, California opens up a  
2 casino.

3 MR. BURSCH: Yes.

4 JUSTICE BREYER: Three, an Indian tribe  
5 opens up a casino, okay?

6 MR. BURSCH: Correct.

7 JUSTICE BREYER: Now, what is it that says  
8 that the State where the casino is located can sue  
9 France? What is it that says it can sue California?  
10 All -- they all object. What is it that says it can sue  
11 the Indian tribe?

12 MR. BURSCH: Thank you, Justice Breyer.  
13 And, Justice Kennedy, hopefully, this will reduce the  
14 reading assignment.

15 The case that says we can sue France is  
16 Alfred Dunhill, which was this Court's decision that  
17 first recognized the commercial distinction for foreign  
18 nation immunity. Now --

19 JUSTICE BREYER: Now, was that a statute or  
20 common law?

21 MR. BURSCH: That was common law, common law  
22 development in Alfred Dunhill.

23 Now, shortly after that, Congress did enact  
24 the Foreign Sovereign Immunities Act, which essentially  
25 codified this Court's common law rule, and once that

1 happens, then the common law development --

2 JUSTICE BREYER: Okay. California?

3 MR. BURSCH: So California, the case is  
4 Nevada v. Hall in which -- this case said that a State's  
5 sovereign immunity from suit does not extend when it's  
6 got actors in another State. There, Nevada's agent was  
7 acting in California, and the Court held that that actor  
8 could be liable for suit in California.

9 JUSTICE BREYER: Okay. All those are common  
10 law. Both --

11 MR. BURSCH: All common law.

12 JUSTICE BREYER: Then what do you do about  
13 Kiowa?

14 MR. BURSCH: Well, that's the thing. Kiowa  
15 or Kiowa did not involve a State as sovereign. It  
16 involved a private business plaintiff, and it's  
17 distinguishable on that basis.

18 And if you disagree with me and you think  
19 that sovereign States should be treated the same way as  
20 private party plaintiffs, then we would ask you to  
21 overrule that part of Kiowa which suggested that tribes  
22 can engage in illegal commercial conduct on land subject  
23 to exclusive State jurisdiction without any --

24 JUSTICE KAGAN: But I think this is what  
25 Justice Kennedy was -- was getting at, when he asked you

1 for a case, because what you're saying now is that when  
2 the State is the plaintiff --

3 MR. BURSCH: Yes.

4 JUSTICE KAGAN: -- the sovereign immunity of  
5 the tribe disappears, so --

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

9 JUSTICE KAGAN: Okay. So what -- I guess  
10 what's -- what's -- what's the case that would suggest  
11 that, when the plaintiff shifts, the sovereign immunity  
12 is -- goes away?

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

19 And in that case, the Court acknowledged  
20 that, even on trust lands -- so this isn't on land  
21 that's subject to State exclusive jurisdiction, that the  
22 State would be able to tax those cigarettes being sold  
23 to non-tribal members. It's not --

24 JUSTICE BREYER: You know, but the question  
25 specifically then -- I think we're driving at the same

1     thing -- is, remember, you just cited to me two cases --

2             MR. BURSCH:             Yes.

3             JUSTICE BREYER:             -- one involving France and  
4     one involving California.

5             MR. BURSCH:             Yes.

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

12            MR. BURSCH:            Well --

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

19            MR. BURSCH:            I think the Oklahoma Tax  
20    Commission case would be the closest because, even if  
21    you had a private individual who was trying to sue a  
22    tribe for conduct that was taking place on trust land,  
23    they would not be able to do it. What --

24            JUSTICE BREYER:            Now, what you're asking us  
25    to do then, if the answer is what I now think you're



1 saying, is to say it's awfully complicated that,  
2 although a State could sue an Indian tribe for something  
3 that is outside the reservation, the State -- it's so  
4 complicated that I'd like some good authority for it,  
5 because a private person couldn't, but a State could  
6 sue, and it's only in certain places.

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

9 JUSTICE BREYER: How about drawing the line  
10 with Kiowa?

11 MR. BURSCH: Here's what I'm going to  
12 suggest: Nine justices in Kiowa, both the majority and  
13 the dissent, recognized that there were substantial  
14 issues with applying tribal immunity on or off  
15 reservation in the commercial context.

16 This Court had done away with that for  
17 foreign nations in Alfred Dunhill. It decided to give  
18 Congress one more chance in -- in Kiowa, but -- but left  
19 the question open for further common law development.

20 JUSTICE GINSBURG: But once the Congress  
21 didn't respond, the majority opinion in Kiowa -- I don't  
22 know whether it's "Kiowa" or "Kiowa" -- said -- you  
23 know, this is an unfortunate result, but Congress can do  
24 something about it. Well, now Congress hasn't done  
25 anything about it, and you are asking this Court,

1 essentially, to modify the -- that precedent.

2 MR. BURSCH: I am. I mean, I don't think  
3 you need to modify it. I think you could distinguish it  
4 based on the fact that there's a private party plaintiff  
5 there. But if you feel otherwise, that you need to  
6 modify it in order to rule in our favor, it's -- it's  
7 totally within your power.

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

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

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

23 JUSTICE ALITO: But, in addition to that,  
24 couldn't you have stopped this before it even started by  
25 insisting in the compact that the tribe waive sovereign

1 immunity?

2 MR. BURSCH: Well, that's -- that's a great  
3 question, and the answer to that is twofold. First,  
4 when the compact was negotiated back in 1993, this Court  
5 had not decided Kiowa. That came five years later in  
6 1998. And so Congress and the States reasonably assumed  
7 at that time that, if a tribe was engaged in illegal  
8 commercial conduct off reservation, that, of course, a  
9 State would have the ability --

10 JUSTICE ALITO: Going forward then --

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

16 MR. BURSCH: A matter of compact  
17 interpretation whether these are Indian lands?

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

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

25 JUSTICE ALITO: Well, that's a more

1 sophisticated version of my question.

2 (Laughter.)

3 JUSTICE ALITO: No. Seriously, it gets into  
4 a more -- more difficult issue.

5 MR. BURSCH: Right. Well, if I can finish  
6 answering Justice Alito's question. You asked why we  
7 can't just go in and arrest. And -- and the second  
8 answer to that, besides the -- the conflict of going in  
9 with armed police guards and arresting tribal officials  
10 and hauling them off to county jail, which Congress  
11 tried to avoid when it enacted IGRA in the first place,  
12 it's what everybody wanted.

13 Again, it's limiting State sovereignty --

14 JUSTICE ALITO: Well, I understand that.

15 MR. BURSCH: -- any time you take out  
16 our --

17 JUSTICE ALITO: But going forward, is this  
18 of any importance? Why --

19 MR. BURSCH: Oh, this is of tremendous  
20 importance.

21 JUSTICE ALITO: It seems to me, if a tribe  
22 wants to open a casino and the State has to -- it has to  
23 have a compact with the State, isn't all the bargaining  
24 power on the -- on the side of the State? So the State  
25 says, fine, if you want to do that, you have to waive

1 sovereign immunity?

2 MR. BURSCH: Well, we had a compact in place  
3 in 1993 that limited their casinos, so that this  
4 wouldn't happen. Going forward --

5 JUSTICE ALITO: Well, I -- but I mean, when  
6 will -- when will this compact expire?

7 MR. BURSCH: Right. Let me give you a very  
8 practical answer to that question. This compact, in  
9 1993, had a 20-year term on it. And so it essentially  
10 expired at the end of -- of November, just a few days  
11 ago, although it has an evergreen clause that allows it  
12 to continue while the parties try to negotiate a new  
13 compact.

14 And, as you would imagine, the very first  
15 thing Michigan asked for in its proposed amended compact  
16 was to waive tribal sovereign immunity to deal with  
17 issues like this. And, unsurprisingly, the tribe said,  
18 we're really not interested in that; we kind of like the  
19 way the sovereignty issue is preserved in the existing  
20 compact.

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

23 JUSTICE ALITO: If I could just pursue that?

24 MR. BURSCH: Sure.

25 JUSTICE ALITO: So the compact has expired,

1 and there's -- so then how can they operate the casino?

2 MR. BURSCH: Well, it hasn't expired. Until  
3 the parties --

4 JUSTICE ALITO: Until they reach a new  
5 compact, it continues.

6 MR. BURSCH: Until they reach a new compact,  
7 it continues in effect.

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

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

13 JUSTICE SOTOMAYOR: Could I ask you a  
14 question?

15 JUSTICE KENNEDY: But the compact refers to  
16 Indian lands. Surely, you could take the position that  
17 there is a waiver of immunity to determine whether or  
18 not these are Indian lands under the compact.

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

25 JUSTICE SOTOMAYOR: Could I ask you a

1 question? What -- what would happen if this were Indian  
2 lands, and they went ahead and did exactly what they  
3 did? They -- there was no dispute that these were  
4 Indian lands.

5 Would you have had grounds to object to them  
6 building a casino on these lands.

7 MR. BURSCH: We would not.

8 JUSTICE SOTOMAYOR: You would not?

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

12 JUSTICE SOTOMAYOR: All right. The issue of  
13 what constitutes Indian lands is between the Federal  
14 government and the Indians, pursuant to the Land Trust  
15 Settlement, correct?

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

17 JUSTICE SOTOMAYOR: Well, I know you do, and  
18 I know why you do. But -- but what defines the lands is  
19 the Settlement Trust, correct?

20 MR. BURSCH: Federal court interpretation of  
21 the Michigan Indian Land Claims Settlement Act, yes,  
22 would determine the status of these lands. The reason  
23 why it's not just between the tribe and the Federal  
24 government is because Michigan has a huge interest in  
25 having lands that are currently under its exclusive

1 sovereign jurisdiction be determined to be Indian  
2 lands --

3 JUSTICE SOTOMAYOR: Put -- put this aside of  
4 gambling. Let's assume that it was just their buying  
5 this land.

6 MR. BURSCH: Yes.

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

10 MR. BURSCH: If you're referring to the --  
11 the Patchak case --

12 JUSTICE SOTOMAYOR: Yes.

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

19 JUSTICE SOTOMAYOR: Well, wouldn't you have  
20 had to follow -- if you were going to object to this  
21 land being taken into the land trust, wouldn't you have  
22 had to follow the administrative process?

23 MR. BURSCH: We would, but the land has  
24 never been taken in trust. Even the Federal government,  
25 the National Indian Gaming Commission, has concluded



1     that these are not Indian lands for purposes of the  
2     Settlement Act. And so we never got to the point where  
3     they got in Patchak, where they went through the  
4     administrative process to take the lands in trust.

5             JUSTICE KAGAN:             General, if -- if I could  
6     assume that this is not Indian lands and just ask why  
7     you need for sovereign immunity to go away? And -- so  
8     you have the ability to arrest people. You have the  
9     ability to bring Ex Parte Young actions.

10            Presumably, you have the ability on  
11   non-Indian lands simply to shut down a casino.  
12   Presumably, you have the ability on non-Indian lands to  
13   condition any licensing of the casino on whatever you  
14   want.

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

19            MR. BURSCH:            Because we tried to take the  
20   least intrusive means necessary to stop the casino, to  
21   not go in with the billy clubs and the guns and to  
22   arrest tribal members, but to ask for a Federal civil  
23   injunction.

24            JUSTICE KAGAN:            Well, I think that all of  
25   our cases suggest that sovereign immunity is quite

1 important to a sovereign's dignity and that it's not  
2 nothing to abrogate sovereign immunity. And so you can  
3 say, well -- you know, that would be less intrusive than  
4 all these other things, bringing Ex Parte Young suits,  
5 arresting people, just -- you know, conditioning the --  
6 a license, stopping the casino from operating.

7 But -- you know, I suspect that the  
8 sovereign tribe here would say that, no, it's -- it's an  
9 affront to their sovereignty to take -- to strip them of  
10 sovereign immunity, and -- and none of these other  
11 options that you have are that.

12 MR. BURSCH: Right. But, again, arresting  
13 the other sovereign's officers is, with all respect, not  
14 respectful to the tribe, which is why that's the course  
15 we've pursued. And the change we're asking for here is  
16 not as big as the tribe makes it seem because, in IGRA,  
17 Section 2710, we have the ability to get an injunction  
18 to stop illegal gaming taking place on reservation.

19 And so it's really not that big a leap to  
20 say, if they're engaging in illegal gaming off  
21 reservation, likewise, there, we should be able to get  
22 the least intrusive remedy, the one that is most  
23 respectful of the tribe's sovereignty.

24 And, frankly, we're kind of surprised that  
25 the United States would take the position that we're

1 better off going in and arresting or suing individual  
2 officers because that's not the way sovereigns are  
3 supposed to interact.

4 And it would be a big deal if France opened  
5 up a casino in Michigan and, rather than seeking a civil  
6 injunction, we tried to arrest the French president and  
7 throw them in a Michigan County jail.

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

12 MR. BURSCH: I believe some of the employees  
13 are tribal members, some are not. And we cite a number  
14 of cases in our reply brief where tribal immunity has  
15 been extended to tribal employees whether they are  
16 members of the tribe or not.

17 CHIEF JUSTICE ROBERTS: Can you prosecute  
18 people who frequent this illegal casino?

19 MR. BURSCH: Sue Michigan citizens?

20 CHIEF JUSTICE ROBERTS: Yes.

21 MR. BURSCH: Yes, we could do that. But --  
22 you know, again, I want you to understand the scope of  
23 the invasion of the State's sovereignty here. If any  
24 other entity, foreign nation, another State, an  
25 individual, set up an illegal business, whether it's

1 prostitution, underage drinking, gaming, you name it, we  
2 would have the full panoply of State civil and criminal  
3 regulatory remedies available to us and could pick the  
4 most appropriate one.

5 And, somehow, because this is a tribe, even  
6 though they are operating on Michigan's land, where we  
7 have exclusive regulatory jurisdiction, somehow, all  
8 those remedies are circumscribed to imperfect remedies,  
9 like *Ex parte Young*, which may or may not be successful,  
10 or arresting our own citizens, and that's not respecting  
11 the constitutional sovereign that Michigan represents in  
12 this case.

13 And to get back to a question a number of  
14 you had about the implications of this aside from  
15 gaming, this happens in all kinds of other contexts off  
16 reservation. You just had a case in 2011 involving the  
17 Oneida tribe in New York, where they failed to pay their  
18 property taxes in New York. And so the State moved in  
19 to foreclose for nonpayment of taxes those  
20 off-reservation properties.

21 And the Second Circuit, interpreting *Kiowa*,  
22 reluctantly concluded that the State did not have  
23 ability to enforce by foreclosing on that property  
24 because the tribe had immunity and invited this Court to  
25 review *Kiowa*. This Court granted cert. Eventually,

1 cert was dismissed because the tribe waived immunity,  
2 and they were able to go forward and pursue that remedy.

3 But -- you know, whether it's in the tax  
4 context, whether it's the gaming context, whether it's  
5 the criminal context -- you know, the amici briefs of  
6 Oklahoma and Alabama are replete with the issues that  
7 they are having as sovereigns in running up against the  
8 tribal sovereign immunity when it comes to these  
9 contexts.

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

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
13 Mr. Katyal.

14 ORAL ARGUMENT OF NEAL KUMAR KATYAL

15 ON BEHALF OF THE RESPONDENTS

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

18 I would like to begin where my friend did  
19 not, with the text of the statute. Congress enacted  
20 Subsection (A)(ii), like the rest of IGRA, to address  
21 gaming solely on Indian lands. In fact, Congress used  
22 that phrase "on Indian lands" a whopping 24 times in  
23 IGRA. By contrast, IGRA says not a word about  
24 off-Indian-lands activity.

25 JUSTICE SCALIA: So you think Congress

1 really wanted the States to have power to stop illegal  
2 gambling on Indian lands, but not to have the power to  
3 stop illegal gaming on State lands? Is that -- is that  
4 the law you think Congress wrote?

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

7 JUSTICE SCALIA: Why would anybody want such  
8 a -- such a disposition?

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

18 But, just to answer your question, why would  
19 Congress have thought that --

20 JUSTICE SCALIA: Well, you think that rule  
21 would apply even when, at the time the statute in  
22 question was enacted, there was no belief that there was  
23 tribal immunity on State lands?

24 MR. KATYAL: Well, Your Honor, I know my  
25 friend on the other side has said that. That is just

1 flatly wrong. Puyallup, in 1977, Your Honor, precisely  
2 said that it involved both on- and off-reservation  
3 activity, it was commercial activity, it was fishing,  
4 and this Court said that tribal immunity protected  
5 against that.

6 And so -- so I do think --

7 JUSTICE SCALIA: I thought that was just on  
8 reservation. You think that was off reservation as  
9 well?

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

14 JUSTICE SCALIA: Kiowa was later, of course.

15 MR. KATYAL: Of course, but I think that  
16 Congress, in enacting IGRA in 1988, certainly was under  
17 the same set of assumptions as this Court in 19 -- in  
18 the Kiowa --

19 JUSTICE SCALIA: You think they read  
20 Puyallup that closely?

21 MR. KATYAL: I -- well, I think it's several  
22 places in Puyallup, and certainly, that's what this  
23 Court in Kiowa said.

24 JUSTICE SCALIA: I see.

25 MR. KATYAL: And I do think the text is the

1 best guide to what Congress wanted, and the text uses  
2 "on Indian lands" 24 times. And the reason for that,  
3 the reason why there's not an absurdity, is twofold:  
4 First, Congress, in IGRA, was reacting to this Court's  
5 decision in Cabazon the year earlier, which had ousted  
6 State court -- State regulatory jurisdiction entirely  
7 from on-Indian-lands activity, so it changed the game  
8 entirely.

9 Cabazon did nothing with respect to  
10 off-Indian-lands activity. It left entirely intact all  
11 the remedies we've been talking about, Justice Alito's  
12 remedy about criminal sanctions --

13 JUSTICE GINSBURG: You agree with that, that  
14 they could -- the State could go in and arrest all the  
15 customers that are gambling there? Could it seize the  
16 slot machines?

17 MR. KATYAL: Well, it certainly could arrest  
18 the customers, the employees, and so on. And that's why  
19 we would not operate this casino without a square  
20 ruling. It is shuttered, Justice Alito, right now,  
21 because we need a square ruling that says this is  
22 on-Indian-lands activity. And we would like that --

23 CHIEF JUSTICE ROBERTS: Well, you don't  
24 it -- You don't have a square ruling, so I want to make  
25 clear, because both you and the Solicitor General have



1 suggested this as an option: You think it is all right  
2 for the State to go in and arrest every employee,  
3 management -- you know, labor, who is participating in  
4 this casino and subject them to criminal sanctions,  
5 civil penalties and an injunction. You have got no  
6 problem with that?

7 MR. KATYAL: We think that that's a  
8 consequence of tribal immunity, that when you -- when  
9 they are seeking relief qua tribe, that's a different  
10 thing, and that's, I think, a standard principle --

11 CHIEF JUSTICE ROBERTS: You, as a tribe --  
12 you, as a tribe, would have no objection to that action?

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

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

23 MR. KATYAL: Absolutely. We are not here,  
24 trying to say that we want to evade the law. We want a  
25 ruling -- a definitive ruling. We believe, very

1 squarely, that this is on-Indian-lands activity.

2 CHIEF JUSTICE ROBERTS: Okay. What about Ex  
3 Parte Young? Are you willing to waive the tribe's  
4 sovereign immunity in an Ex Parte Young action?  
5 Because, in your opposition to the complaint in this  
6 case, you raised sovereign immunity as an objection to  
7 the Ex Parte Young --

8 MR. KATYAL: Sure. Sure. As part in the  
9 district court, as part of ordinary -- as part of  
10 ordinary litigation, we said that Ex Parte Young wasn't  
11 applicable. But we do think -- and our brief in  
12 opposition says this, our merits brief says this, the  
13 United States' brief says this, that Ex Parte Young  
14 actions are available against tribes, just as --

15 CHIEF JUSTICE ROBERTS: Not just are  
16 available; that you would not assert sovereign immunity  
17 if they brought an Ex Parte Young action.

18 MR. KATYAL: Well, Your Honor, we would not  
19 assert it to the limits of Ex Parte Young. So, for  
20 example, Ex Parte Young doesn't -- doesn't permit  
21 reaching into the State coffers, and here, Count 5 of  
22 the complaint tries to reach into the tribe's coffers.  
23 So we do think that that type of Ex Parte Young -- that  
24 is not permitted by Ex Parte Young, and that would be  
25 impermissible.

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

8           So if we could, just imagine a casino,  
9   Justice Scalia, opened blatantly on a reservation, a  
10   casino without a compact that was absolutely illegal.  
11   We will call it "Casino Red." (A)(ii) would not  
12   abrogate immunity in that circumstance. The State would  
13   have no remedy.

14           JUSTICE KENNEDY:           I thought the statute says  
15   that there is Federal court jurisdiction over any cause  
16   of action initiated by a State or Indian tribe to enjoin  
17   gaming activity that is conducted in violation of the  
18   compact.

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

21           JUSTICE KENNEDY:           Why couldn't this --

22           MR. KATYAL:           If there is no compact,  
23   Justice Kennedy, there is no abrogation. And so what  
24   (A)(ii) does is it empowers the tribe and the compact,  
25   and it requires the tribe affirmatively to come in. And

1     that's why, off Indian land, there is standard tribal  
2     immunity because the tribe hasn't said anything one way  
3     or the other.

4             JUSTICE KENNEDY:             And you don't think that  
5     1166 abrogates the immunity, which provides that, for  
6     purposes of Federal law, all State laws are applicable?

7             MR. KATYAL:             Yeah, not at all, Your Honor.  
8     All 1166 does is bring Federal -- that's about Federal  
9     enforcement, not at all about State enforcement.  
10    Indeed, Michigan's own position and Michigan's supreme  
11    court said 1166 does says nothing with respect to  
12    States --

13            JUSTICE KENNEDY:            And you do not take the  
14    position that this casino in this case is part of a  
15    compact?

16            MR. KATYAL:            Which casino?

17            JUSTICE KENNEDY:            The casino in this case,  
18    in your view, is not subject to any -- is not covered by  
19    any compact?

20            MR. KATYAL:            No, we do. We think that the  
21    proper remedy here, if they had an objection, would have  
22    been to arbitrate and say this is not Indian lands.  
23    Petition Appendix 77A and 78A lay out the terms of the  
24    compact and what gaming is allowed.

25            JUSTICE SCALIA:            But he says that, if they

1 arbitrated, when they tried to enforce the arbitral  
2 judgment, you would assert sovereign immunity.

3 MR. KATYAL: Well, two responses to that,  
4 Your Honor. First, of course, that is the remedy they  
5 agreed to in the compact itself, and, of course, they  
6 should try. And second --

7 JUSTICE SCALIA: Well, I mean, that's not an  
8 answer.

9 MR. KATYAL: Well, it is an answer in the  
10 sense that, Your Honor, had they asked we -- and I can  
11 tell you I've discussed this with the tribe -- that they  
12 would, of course, not -- they would, of course, not  
13 assert sovereign immunity to enforce the arbitration  
14 agreement. We have --

15 JUSTICE SOTOMAYOR: How do you win in an  
16 arbitration when the gaming commission has said it's not  
17 Indian lands? I mean, I actually am not sure that the  
18 ruling of the district court was right on this, okay?  
19 But putting my own beliefs -- or questions about that  
20 ruling, how do you win if the Federal government has  
21 said it's not Indian lands?

22 MR. KATYAL: Well, we think that that isn't  
23 a final decision and is wrong for any number of reasons  
24 on the merits that -- you know, laid out in the Joint  
25 Appendix, and so we do think that would be the argument

1     that we would make to the arbitration board.  That  
2     should have been the remedy --

3             JUSTICE SOTOMAYOR:             But how does the  
4     arbitration board change the mind of the gaming  
5     commission?  Aren't they the final deciders of whether  
6     this is trust land or not?

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

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

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

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

23            MR. KATYAL:             Well, I think that we would  
24    still have to persuade the Federal government in one  
25    way, shape, or form because of the NIGC's authority in

1 this area, so I think that's two separate questions.

2 CHIEF JUSTICE ROBERTS: Yes. So the  
3 arbitration doesn't get -- so the arbitration doesn't  
4 get you anywhere at all.

5 MR. KATYAL: Well, it at least resolves the  
6 issue with respect to Michigan. Our central point here  
7 is that there's lots of different ways to deal with this  
8 question, including the question you asked earlier, the  
9 declaratory judgment action, which we brought against  
10 Michigan. There's lots of ways to resolve the  
11 underlying Indian lands question.

12 The last thing I think this Court needs to  
13 do is entirely change the rules of the game with respect  
14 to tribal immunity.

15 JUSTICE SOTOMAYOR: Just so we understand --

16 JUSTICE GINSBURG: What would be the big --  
17 what would be the big change, other than modifying  
18 Kiowa, which is a divided opinion, and was dealing with  
19 a money claim. It wasn't dealing with injunctive  
20 relief.

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

25 Now, he has said -- my friend on the other

1 side has said, we'll look to the foreign sovereign  
2 immunity context, and that's what's giving him his  
3 reason for saying that it wouldn't be such a big change,  
4 and we think that's wrong for two reasons.

5 Number one, Kiowa itself, at page 759, dealt  
6 with this and said that it was the political branches  
7 that led the change on commercial immunity, not this  
8 Court. And, number two, my friend has quoted Alfred  
9 Dunhill, and I think that everything --

10 JUSTICE GINSBURG: But - Mr. Katyal, is that  
11 right? The distinction between commercial and  
12 governmental, it was court made in the first instance,  
13 and then the Foreign Sovereign Immunities Act codified  
14 law that was court made. So it was the courts that made  
15 the distinction between acting in a commercial capacity  
16 and acting in a governmental capacity.

17 MR. KATYAL: Justice Ginsburg, the majority  
18 of Kiowa, on page 759, responds to that and says that it  
19 was actually the political branches that led with the --

20 JUSTICE BREYER: Yes, but he was wrong on  
21 that, apparently, if that's what he says. He was wrong,  
22 that, if we look at the cases, what we will see is it  
23 was the courts that said there's a common law abrogation  
24 of France's sovereign immunity, when they go into  
25 business in downtown Iowa somewhere.



1 MR. KATYAL: And Justice Breyer --

2 JUSTICE BREYER: The same thing -- same  
3 thing with the State, he says in Nevada and California,  
4 and then he says it would be totally anomalous to think  
5 that an Indian tribe could go into downtown Des Moines  
6 and open up a clearly illegal business, and you could  
7 sue France -- the State, which was not Kiowa -- they  
8 could sue -- France could -- the State could sue France,  
9 it could sue California, but it couldn't sue the Indian  
10 tribe.

11 MR. KATYAL: Justice Breyer, we would  
12 encourage the Court to look at precisely the case he is  
13 citing for this proposition, which is Alfred Dunhill,  
14 because, as the case was vigorously argued by a Justice  
15 Department attorney, and what -- and what my friend  
16 doesn't tell you is that the pages he is citing actually  
17 don't command a majority of the Court.

18 They're about not commercial -- they're not  
19 about foreign sovereign immunity. They are about active  
20 State immunity.

21 JUSTICE BREYER: All right. What about the  
22 California and Nevada?

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

1 JUSTICE BREYER: Now, Kiowa is about -- is  
2 it Kiowa? -- is about individuals who are not the State.

3 MR. KATYAL: Yes, exactly. But I think this  
4 Court has recognized in Blatchford and in Kiowa that, in  
5 Nevada v. Hall situations, which is what the dissent in  
6 Kiowa raised and what my friend is trying to  
7 resuscitate, that's a difference in circumstance because  
8 there was a mutuality of concession.

9 JUSTICE BREYER: All right. I'll look at  
10 those with care. But, now, assuming you are right on  
11 that, is the question in front of us, on the assumption  
12 that these are Indian lands, does the Indian tribe have  
13 sovereign immunity? Is that the question you want  
14 answered?

15 MR. KATYAL: We think that --

16 JUSTICE BREYER: Yes or no?

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

19 JUSTICE BREYER: Do you want us to say on  
20 that assumption -- now, on that assumption, I look at i  
21 and number ii under a, 7(a), and a quick reading of them  
22 suggests to me that they're in parallel, that the Indian  
23 tribe can sue the State when the State won't open  
24 negotiations, and the State or an Indian tribe can sue  
25 the Indian tribe when the Indian tribe refuses to follow

1 the compact.

2 Now, what's your answer to that?

3 MR. KATYAL: When it's on Indian lands,  
4 exactly.

5 JUSTICE BREYER: Well, I know, but you said  
6 to decide this on the assumption that it's on Indian  
7 lands. If I make that assumption and then I look over  
8 and read i and ii, it sounds as if, as I said, i, the  
9 tribe can sue the State to get the compact; ii, the  
10 State can sue the tribe when it violates the compact.

11 MR. KATYAL: Your Honor, I may have  
12 misunderstood your earlier question, but, certainly, our  
13 position is that you can look to our answer to determine  
14 whether or not there is tribal immunity in the case.  
15 That is not something my friend has argued. It's  
16 outside of the questions presented entirely, which both  
17 proceed on the assumption that this is off of Indian  
18 lands.

19 JUSTICE ALITO: Well, for purposes of  
20 sovereign immunity, does it make any difference that you  
21 have at least a colorable claim that this is on Indian  
22 lands?

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

Official

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

6 MR. KATYAL: Right, there would be tribal  
7 immunity for that, just as if the blatant casino on  
8 Indian lands opened a casino -- a tribe opened a casino  
9 without a compact, the State would not have an A2  
10 injunctive remedy, and that's why there is no anomaly.

11 JUSTICE BREYER: That's why I want to -- I'm  
12 trying to get what question I'm supposed to answer. If  
13 I'm supposed to answer the sovereign immunity question  
14 on the assumption that these are Indian lands, contrary  
15 to what was decided below, I might get one answer. But  
16 if I'm -- supposed to do it on the assumption that  
17 they're not Indian lands, I might get a different  
18 answer. What assumption am I supposed to make?

19 MR. KATYAL: The latter, Your Honor, for two  
20 reasons. Number one, that's what the questions  
21 presented say; and number two, one of the most venerable  
22 precedences of this Court is the -- is Justice Holmes'  
23 opinion in *Kohler Die* -- which says you don't look to our answer to  
24 determine --

25 JUSTICE SOTOMAYOR: What happens if you

1     can't convince the Federal government that these are  
2     Indian lands, and despite the gaming commission's final  
3     ruling, there is no other way to overturn it, you decide  
4     to operate the casino, it's not Indian lands by the  
5     Federal government, you haven't convinced them  
6     otherwise, what occurs at that moment?

7             MR. KATYAL:             Well, I suppose --

8             JUSTICE SOTOMAYOR:         Who can stop you and  
9     using what mechanisms?

10            MR. KATYAL:            The Federal government has a  
11     variety of mechanisms available to it in that  
12     circumstance, including closure orders and the like, and  
13     I suppose even the State may have any number of actions,  
14     both -- you know, many States will have this worked out  
15     in the compact, but, if they don't have it worked out in  
16     the compact, then there may be the possibility of  
17     criminal prosecutions.

18            JUSTICE SOTOMAYOR:         Well, the compact only  
19     comes into play if it's Indian lands. But, if the  
20     Federal government has said it's not Indian lands,  
21     that's what I'm asking.

22            MR. KATYAL:            Right. I think that, still,  
23     the State may have any number of criminal or civil  
24     remedies available to it. That is, off Indian lands --  
25     and this is why there isn't an anomaly in A2 -- off

1 Indian lands, the State has vast regulatory power. IGRA  
2 was reacting to a circumstance in which this Court  
3 ousted State regulatory jurisdiction on Indian lands.  
4 And so the State has a whole bunch of mechanisms  
5 available to it.

6 JUSTICE KAGAN: Mr. Katyal, isn't the  
7 difference -- the State can really -- it can shut down  
8 these gambling operations easily if it's off Indian  
9 lands. What the State can't do is get any kind of  
10 damages or money remedies; isn't that really the  
11 difference?

12 MR. KATYAL: I do think so. I think that  
13 that's -- I think that that's underlying some of this,  
14 absolutely.

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

18 MR. KATYAL: Well -- well, I certainly would  
19 disagree with the idea that you, the Court, should. I  
20 think the proper response would be exactly what this  
21 Court said in Kiowa, which is, if there's a dispute  
22 about the contours of immunity, commercial, off land,  
23 State is plaintiff, all of that, those are all things  
24 that Congress is well-suited for dealing with.

25 JUSTICE GINSBURG: Mr. Katyal, isn't it odd

1 to say that when this is the Court -- the doctrine of  
2 tribal immunity is something that was announced by this  
3 Court. Congress never passed a law that said the tribes  
4 have immunity. It's all this Court. And then you say,  
5 what this Court made, only Congress can unmake. That  
6 seems strange to me.

7 MR. KATYAL: Justice Ginsburg, that was  
8 precisely the argument that was made in Kiowa, was  
9 accepted by the dissent in Kiowa. But what the majority  
10 said is, really, Congress is best able to balance the  
11 rights, remedies, and reliance interests on the parties.  
12 And I'd note, picking up on your question to my friend  
13 earlier, that, after Kiowa, Congress hasn't been silent.

14 Congress has reaffirmed tribal immunity in  
15 the Patriot Act extension in 2005 and the SIGR Act of  
16 2009. They've cut it back in the Arizona Water Act and  
17 the Zuni Acts of 2003. This is not a circumstance in  
18 which --

19 JUSTICE KENNEDY: But, if the tribe takes  
20 such an obscure position -- such a changing position, as  
21 to whether or not we are dealing with Federal lands  
22 here -- or pardon me, with Indian land, maybe that's a  
23 reason that we should confine and limit Kiowa so that it  
24 doesn't apply to Indian gaming, and we won't have this  
25 problem.

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

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

6 MR. KATYAL: Our position is --

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

10 MR. KATYAL: Our position, Justice Kennedy,  
11 is that they are Indian lands, and there is lots of  
12 different remedies available, both on and off Indian  
13 lands, and that this Court in Kiowa set out a way to  
14 deal with any sort of cutting back, which is to leave it  
15 to Congress.

16 JUSTICE ALITO: What remedy --

17 CHIEF JUSTICE ROBERTS: If we get -- go  
18 ahead.

19 JUSTICE ALITO: What remedy would a private  
20 person have? Suppose a patron of a casino was beaten up  
21 by casino employees. What remedy could that person  
22 have?

23 MR. KATYAL: I think what the Court should  
24 do is the same thing it did in Kiowa, which is bracket  
25 that question because this is as far away from that as



1     you can possibly get. Here, the State entered into a  
2     contract with its eyes open that, not just -- it didn't  
3     say anything about tribal immunity, it reaffirmed tribal  
4     immunity, at Petition Appendix Page 90.

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

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

15            MR. KATYAL:                    They would.

16            CHIEF JUSTICE ROBERTS:           That's not much of  
17     a --

18            MR. KATYAL:                    I'm not sure, for an element of  
19     that crime, whether that piece of it would be beyond a  
20     reasonable doubt. It would be an attendant circumstance  
21     and not subject to beyond reasonable doubt.

22            CHIEF JUSTICE ROBERTS:           That makes it a much  
23     more difficult remedy than the typical injunction  
24     action.

25            MR. KATYAL:                    But there is still civil

1 remedies and other things going.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Not yet. We are going to hear from

4 Mr. Kneedler first.

5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: He might have

7 something you would like to respond to.

8 Mr. Kneedler.

9 ORAL ARGUMENT OF EDWIN S. KNEEDLER,

10 FOR UNITED STATES, AS AMICUS CURIAE,

11 SUPPORTING the RESPONDENTS

12 MR. KNEEDLER: Mr. Chief Justice and may it

13 please the Court:

14 I would like to respond, at the outset, to the  
15 suggestion that this Court might modify the categorical  
16 rule in Kiowa that an Indian tribe is subject to suit  
17 only if Congress unequivocally consents in order to  
18 allow suits by States.

19 First of all, both Puyallup and Pottawatomi  
20 were suits by States for prospective injunctive relief,  
21 and the Court found them barred. Puyallup was off  
22 reservation.

23 But there's another point that I think ties  
24 in with the questions about foreign sovereign immunity.  
25 In this Court's decision in Blatchford, the Court held

1     that the State of Alaska could not be sued by an Indian  
2     tribe complaining about the distribution of State --  
3     some State funds in Alaska, which does not have Indian  
4     country. The Court held that the suit was barred.

5             In doing so, the Court recognized that the  
6     Eleventh Amendment had originally been understood to bar  
7     suits only by individuals. But relying on this Court's  
8     decision in *Principality of Monaco*, the Court said that  
9     the Eleventh Amendment also barred suits by foreign  
10    sovereigns.

11            And the Court's rationale in *Principality of*  
12    *Monaco* was that foreign sovereigns were not parties to  
13    the convention. There was no reciprocal abrogation of  
14    immunity between foreign sovereigns and States. And, in  
15    fact, the Court specifically pointed out that the State  
16    of Mississippi could not sue Monaco, and, in this case,  
17    Monaco could not sue Mississippi.

18            The Court applied that very same reasoning  
19    in *Blatchford* to an Indian tribe. The Court said, we  
20    have held in the past that Indian tribes may not be  
21    sued. And they cited *Puyallup*, which was a suit by a  
22    State. And the Court said, logically, it follows that a  
23    tribe may not sue a State --

24            JUSTICE BREYER:            So you are prepared to live  
25    with the following: Is it the case that if California

1 opens a business in a commercial activity in 20 other  
2 States, at least one of which it is totally illegal,  
3 this other State, say, Utah, cannot -- can sue  
4 California or not? What's the answer?

5 MR. KNEEDLER: The State where that gaming  
6 occurs can be, but that's because of Nevada v. Hall  
7 where the Court -- where the Court drew a distinction  
8 between -- for States. In the States there was a --

9 JUSTICE BREYER: So what the opposition  
10 says, in your view, is absolutely correct, that a  
11 foreign nation opens up an illegal business in a State.  
12 The State can sue them, now, because of a treaty, but  
13 previously, because of the common law.

14 If California opens up an illegal business,  
15 the State can put them out of business by bringing a  
16 suit. But an Indian tribe, they can't? That's the  
17 United States' view?

18 MR. KNEEDLER: California -- in the  
19 State-to-State situation, it's because of the  
20 reciprocity --

21 JUSTICE BREYER: But I'm saying that is your  
22 view, though? I just want the bottom line.

23 MR. KNEEDLER: Yes, but let me -- if I may  
24 explain? It's important to understand the  
25 reasoning. The reasoning why a suit by a State against

1 the sovereign would now be okay is because of the  
2 Foreign Sovereign Immunities Act. As I mentioned with  
3 the Principality of Monaco, part of what the Court said  
4 there is the State could not sue the Principality of  
5 Monaco because, at the time, there was no abrogation of  
6 immunity.

7 Foreign sovereign immunity --

8 JUSTICE SCALIA: That -- that statute was  
9 based upon judicial decisions that had -- had already  
10 held that.

11 MR. KNEEDLER: With all respect,  
12 Justice Scalia, it was based upon the Executive Branch's  
13 determination in the Tate letter. In this Court's  
14 decision in Republic of Mexico v. Hoffman. The Court  
15 said it is not for the Courts to deny an immunity that  
16 the government recognizes.

17 Prior to 1952, when the United States  
18 adopted the restrictive theory of sovereign immunity,  
19 foreign sovereigns were absolutely immune from suit,  
20 unless the political branches said otherwise.

21 In the Tate letter, the Executive Branch  
22 adopted what was the developing body of international  
23 law for foreign sovereign immunity and said that  
24 commercial activities could be the subject of suit.  
25 That was codified, but the Court did not take it upon

1     itself to modify that foreign sovereign immunity. And  
2     this is -- this is the point that the Court made in Kiowa.

3             JUSTICE SCALIA:             Took it upon itself to  
4     accept the Executive's determination of how it ought to  
5     play out?

6             MR. KNEEDLER:             Well, yes, but it didn't  
7     treat it just as a matter of common law, like a maritime  
8     common law claim or something like that. It treated it  
9     as structural under the Constitution, and the same thing  
10    is true of Indian tribes.

11            The Constitution refers to Indian tribes --  
12    Worcester v. Georgia announced that Indian tribes are  
13    sovereigns. We've made treaties with sovereigns.

14            CHIEF JUSTICE ROBERTS:         But they are  
15    quasi -- quasi-sovereigns, which means --

16            JUSTICE GINSBURG:            Dependent sovereigns.

17            CHIEF JUSTICE ROBERTS:         Dependent  
18    sovereigns, which means the -- it is surprising that the  
19    scope of their immunity exceeds that of States or  
20    foreign sovereigns.

21            MR. KNEEDLER:             They -- they are dependent  
22    sovereigns, but they are dependent upon the plenary  
23    power of Congress, not the plenary power of this Court.

24            CHIEF JUSTICE ROBERTS:         So the -- so the  
25    Federal government can certainly take enforcement action

1     against this casino.

2             MR. KNEEDLER:             Yes.

3             CHIEF JUSTICE ROBERTS:             The Federal  
4     government, the Solicitor of Interior has said these are  
5     not Indian lands, the NIGC has adopted that  
6     interpretation. The NIGC has said, but we can't do  
7     anything because they are not Indian lands, and we work  
8     on Indian lands. And then they've referred, as I  
9     understand, the matter to the United States Attorney who  
10    has, thus far, not done anything, right?

11            MR. KNEEDLER:            Well --

12            CHIEF JUSTICE ROBERTS:            So, basically, as I  
13    see it, the Federal government is saying, States, you  
14    can't take action against this illegal casino. We're  
15    the only ones who can. We agree that it's illegal, but  
16    we are not going to do anything.

17            MR. KNEEDLER:            We are -- first of all, by --  
18    the casino was promptly closed. And whether it would  
19    have been a prudent exercise of Federal criminal  
20    prosecutorial authority or civil action under 1955, is  
21    committed to the ordinary prosecutorial discretion of  
22    the United States government.

23            JUSTICE SCALIA:            Who made these Indian tribe  
24    sovereign? Was it Congress?

25            MR. KNEEDLER:            The Constitution.

Official

1 JUSTICE SCALIA: I mean, you are appealing  
2 to -- you know, other branches' determination. Who  
3 decided that Indian tribes are sovereign?

4 MR. KNEEDLER: The Constitution by in the Commerce clause --

5 JUSTICE SCALIA: Who pronounced them to be  
6 sovereign?

7 MR. KNEEDLER: This -- this Court.

8 JUSTICE SCALIA: This Court.

9 MR. KNEEDLER: But --

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

12 MR. KNEEDLER: But this Court didn't do it  
13 as a matter of common law. It did it by looking at the  
14 Constitution. We have treaties with Indian tribes, we  
15 have the Commerce Clause --

16 JUSTICE SCALIA: We do virtually nothing as  
17 a matter of common law. We do virtually everything on  
18 the basis of the Constitution or statutes. I don't  
19 think that that's much of an exception.

20 MR. KNEEDLER: As this Court said in Lara,  
21 it's a general proposition that diminishment of tribal  
22 sovereignty is for the political branches. The Court  
23 said that --

24 JUSTICE BREYER: Why? Because you are  
25 representing the United States. You have -- you



1 understand Indian policy. This case has tremendous  
2 implications, if we follow your approach. It seems to  
3 me well beyond anything to do with gaming. My belief is  
4 Indian tribes all over the country operate businesses  
5 off the reservation, and businesses all over the country  
6 are regulated.

7 And does the State, I guess, in your view,  
8 does not have the power to enforce the regulation  
9 against the Indian tribe.

10 MR. KNEEDLER: Not against --

11 JUSTICE BREYER: Why is that -- not against  
12 the tribe itself. Why is that in the Indian tribe's  
13 interest? And is it a trap for the unwary lawyer? And  
14 how is this supposed to work out, in your view?

15 MR. KNEEDLER: Well, Congress has addressed  
16 this problem in numerous ways. For example, the -- and  
17 in deciding whether to abrogate immunity, they're  
18 complex decisions. Should it be under tribal law?  
19 Should it be under State law? Should it be under  
20 Federal law? Should the suit be in Federal court?  
21 Should it be in State court?

22 JUSTICE ALITO: What about -- what about  
23 private individuals who may have a claim against -- as a  
24 result of the operation of the casino? Vendors who want  
25 to be paid, somebody who slips and falls. That's all

1 barred by sovereign immunity?

2 MR. KNEEDLER: Unless -- unless the tribe  
3 consents. As the -- as two of the amicus briefs point  
4 out, a number of the tribal compacts provide for waivers  
5 of sovereign immunity for tort claims that may arise out  
6 of -- out of the gaming operation.

7 Contract claims could be -- could be brought  
8 in tribal court --

9 JUSTICE GINSBURG: Justice Alito's question  
10 was the Kiowa case. It was off reservation, the tribe  
11 owed money on a contract, which it refused to pay, and  
12 the Court said sovereign immunity.

13 MR. KNEEDLER: Exactly. And I should also  
14 point out that the Court said in Kiowa, in addition to  
15 reaffirming this analysis that I described from  
16 Blatchford and Coeur d'Alene Tribe v. Idaho, the Court  
17 reaffirmed that reciprocity and Principality of Monaco  
18 point.

19 But it also pointed out the tremendous  
20 reliance interests that have grown up on -- the basis of  
21 foreign sovereign immunity. It pointed out that, for  
22 example, 450n of Title 25, which specifically preserves  
23 immunity, something that was reiterated in the No Child  
24 Left Behind Act.

25 But it also specifically pointed out that

1 Congress has sometimes created narrow exceptions to the  
2 immunity. And critically, one of the ones it cited was  
3 the very one on which Michigan is relying in this case,  
4 2710(d)(7)(A)(ii), that is a limited exception for  
5 injunctive actions by a State against a tribe. Congress  
6 addressed --

7 JUSTICE GINSBURG: Mr. Kneedler, you went  
8 through the development of the foreign sovereign  
9 immunity and whether the courts were influenced by the  
10 government. It was the courts that recognized this  
11 distinction between commercial activity and governmental  
12 activity.

13 Why couldn't the Court extend that same  
14 distinction to Indian tribes and say, it makes sense in  
15 the foreign country context, it also makes sense in the  
16 context of the tribes, to distinguish commercial from  
17 governmental?

18 MR. KNEEDLER: It may well not make sense,  
19 or it may not lend itself to one answer, for the reasons  
20 that I said. Congress, for example, when it comes to  
21 tort claims against tribes, adopted a provision making  
22 the United States liable for tort claims and not -- and  
23 not others.

24 It may not lend itself to one principal  
25 answer, which is why the Court, in Kiowa, said it's up

1 to the legislature, the Congress, to weigh the various  
2 pros and cons or up to the tribe itself in deciding  
3 whether to weigh it.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 Mr. Kneedler.

6 Mr. Bursch, you have five minutes left.

7 REBUTTAL ARGUMENT OF JOHN J. BURSCH

8 ON BEHALF OF THE PETITIONER

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

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

14 First, the state of the law, when IGRA was  
15 adopted in 1988 -- again, that was before Kiowa, I heard  
16 my friend on the other side talk about Puyallup and how  
17 that was an off-reservation case. And what you need to  
18 understand was that Puyallup was the third in a series  
19 of three opinions that this Court issued. And it's true  
20 that some of the earlier cases involved on- and  
21 off-reservation conduct.

22 But as we point out in our reply brief --  
23 this is at pages 167 to 68 of that opinion -- here, the  
24 tribe's contention was that the fishing activities on  
25 its reservation were immune, and Justice Stevens wrote

1    that opinion, and then, only a few short years later, in  
2    Kiowa, wrote his dissent, where he said we've never  
3    before drawn that on/off-reservation distinction.  So  
4    that's what Puyallup says.

5           With respect to Alfred Dunhill and the  
6    evolution of foreign sovereign immunity as a common law  
7    doctrine, four Justices agreed -- or signed on to the  
8    entire opinion where that discussion was held.

9           One Justice agreed only with parts one and  
10   two, but part two, on page 694, draws the commercial  
11   line and says the problem here is that the district  
12   court found the only evidence of an active state, as  
13   opposed to a commercial act, was a statement by counsel  
14   that the Cuban government and the intervenors denied  
15   liability, and that's not enough.

16          And -- and the Court did reference the Tate  
17   letter, but that's not why the Court changed the common  
18   law of foreign nation sovereign immunity.  It -- it gave  
19   respectful consideration to the Executive Branch's  
20   views, and then it reached its own conclusion about what  
21   the common law should say.

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

25          JUSTICE SCALIA:           If we modified it to make

1 an exception for commercial activities off reservation,  
2 could Congress reinstitute sovereign immunity if they  
3 wanted?

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

10 You know, conversely, with Alfred Dunhill,  
11 when this Court drew the line at commercial conduct,  
12 Congress immediately jumped in. And it put its stamp of  
13 approval on that, and essentially adopted the line --

14 JUSTICE KAGAN: Well, there seems something  
15 sort of strange about that, General, because as I read  
16 Kiowa, what it was, was an invitation to Congress. It  
17 was saying -- you know, we have some concerns about  
18 this, we're not sure it makes sense, we are dropping a  
19 very broad hint that Congress should change it.

20 And, 15 years later, Congress has done  
21 nothing. And then to come back 15 years later and to  
22 say -- you know, Congress didn't really accept our hint,  
23 so we'll just do it ourselves and make Congress reverse  
24 it. Wouldn't you think that that's a strange procedure  
25 to use?

1           MR. BURSCH:           Actually, Justice Kagan, I  
2    think that's the way that the common law works, that the  
3    Court does extend invitations to the Legislative And  
4    Executive Branches.

5           JUSTICE SCALIA:        Maybe we've learned  
6    something in 15 years, such as the fact that --  
7           (Laughter.)

8           JUSTICE KAGAN:        Maybe we learned that Congress thought  
9    that this did make sense.

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

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

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

1           MR. BURSCH:           I respectfully disagree. And  
2   the best evidence of that congressional intent is in  
3   IGRA itself, where Congress abrogated immunity, even for  
4   on-reservation conduct.

5           Think about what an extraordinary remedy  
6   that is, that, even on the reservation, a State would  
7   have the ability to go into court and get a Federal  
8   injunction, rather than send in police to arrest --

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

13          MR. BURSCH:           Right, but --

14          JUSTICE BREYER:           They didn't participate in  
15   the convention and the Principality of Monaco was held  
16   to be immune, presumably, even from commercial activity.  
17   Let Congress change it. That's what Kiowa says. And  
18   that, I think, is their basic argument.

19          And if it's a wash -- I mean, I hate to put  
20   it this way because it sounds like a joke, but it isn't  
21   meant to be -- in this case, if it's a wash, follow the  
22   precedent.

23          MR. BURSCH:           I think Alfred Dunhill makes  
24   clear that this Court can change the stream of the  
25   common law when it comes to -- to immunity.



1           Really quickly on -- on these remedies --

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

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

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

23           CHIEF JUSTICE ROBERTS:           Thank you, counsel.

24           The case is submitted.

25           (Whereupon, at 11:06 a.m., the case in the

1   above-entitled matter was submitted.)  
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