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Nos. 20-1062 (L), 20-1063, 20-1358, 20-1359

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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GEORGE HENGLE, *et al.*,  
*Plaintiffs-Appellees*,

v.

SHERRY TREPPA, *et al.*,  
*Defendants-Appellants*

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APPEAL FROM AN ORDER OF THE U. S. DISTRICT  
COURT FOR THE EASTERN DISTRICT OF VIRGINIA

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BRIEF OF THE STATE OF NEW MEXICO  
AS AMICUS CURIAE  
IN SUPPORT OF THE TRIBAL OFFICIAL  
DEFENDANTS-APPELLANTS

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This brief *amicus curiae* is submitted by the Attorney General of the State of New Mexico (the “*Amicus*”) in support of those Defendants-Appellants sued as tribal officials of the Habematolel Pomo of Upper Lake (the “Tribal Officials” and “Upper Lake Tribe”),<sup>1</sup> and in opposition to the district court’s unwarranted expansion of the doctrine of *Ex parte Young*.

### INTERESTS OF THE AMICUS

New Mexico submits this brief because of its deep commitment to sovereignty as a key component of the American legal system. New Mexico notes that “our Constitution establishes a system of dual sovereignty between the States and the Federal Government.” *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

Sovereignty under American law is not limited, however, to these two classes of government – the participants in the 1787 constitutional convention and their creation. There are older sovereigns among us. The Indian Tribes did not participate in that convention, and just as the Supreme Court speaks of federal-state “dual sovereignty,” it also acknowledges the sovereignty of federally recognized Indian

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<sup>1</sup> The Tribal Officials each hold positions in the Habematolel Pomo of Upper Lake Executive Council. They are Sherry Treppa (Chairperson), Tracey Treppa, (Vice-Chairperson), Kathleen Treppa (Treasurer), Iris Picton (Secretary), Sam Icaay (Member-At-Large), Aimee Jackson-Penn (Member-At-Large) and Amber Jackson (Member-At-Large). J.A. 1706-07. The Habematolel Pomo of Upper Lake is a federally recognized Tribe in Lake County, in northwestern California. J.A. 1704, 1707.

Tribes. Indeed, “their claim to sovereignty long predates that of our own Government.” *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 172 (1973).

While state sovereignty and tribal sovereignty are not identical, they share certain common attributes, including a fundamental immunity from suit. “It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*.” *FMC v. S.C. State Ports Auth.*, 535 U.S. 743, 751-52 (2002) (quoting *The Federalist*, No. 81, p 487-88 (C. Rossiter ed. 1961) (A. Hamilton) (emphasis in original)). While tribal immunity is not viewed as inviolable, “[i]t is Congress—not the courts—that has the power to abrogate tribal immunity.” *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 185 (4th Cir. 2019).

Although this appeal presents an array of important issues, the issue that brings the *Amicus* into this case is the district court’s use of *Ex parte Young* to justify the issuance of injunctions against tribal officials, acting in their official capacity, to compel compliance with state law in a suit brought by private individuals. *See* J.A. 1762 (“Tribal Sovereign Immunity Does Not Shield the Tribal Officials from Plaintiffs’ *Ex parte Young*-Style Claims Under State Law.”). This abrogation of tribal sovereignty is unwarranted, and it implicates the interests of the New Mexico in three ways:

First, as the guardian of its own state sovereignty – and, hence, concerned about sovereignty more generally – New Mexico is wary of theories that expand

federal court jurisdiction at the expense of immunity. The decision of the district court is flawed and undermines the fundamental principle that immunity from suit is an inherent aspect of all sovereignty. Thus, unless overturned, that decision against the Tribal Officials will create an unwelcome precedent that could also lead to the erosion of state sovereign immunity. Such erosion could occur, for example, in cases seeking an injunction against officials of one State, based on an allegation that they violated the laws of another State.

Second, the relationship between state sovereigns and tribal sovereigns is a matter of great importance and delicacy. This concern has special force where the State shares territory with Tribes;<sup>2</sup> however, it is also a concern where the State and Tribes engage with each other at a distance. Allegations that tribal sovereigns have trespassed laws enacted by state sovereigns must be resolved between the sovereigns, without individuals taking it upon themselves to resolve the matter by private litigation. This concern is especially acute where, as here, plaintiffs' counsel in a putative class action case seek to act in a role tantamount to that of "private

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<sup>2</sup> For example, in December 2014, the State of New Mexico entered into a Memorandum of Understanding ("MOU") with the Upper Lake Tribe, recognizing its sovereign authority to engage in the very activity at issue here, online short-term lending. The MOU also acknowledges that the legislation enacted by the Upper Lake Tribe effectively regulates transactions between consumers and licensed lenders that occur on Tribal land. *See* J.A. 141 (Affidavit of S. Treppa, at ¶ 241).



attorneys general” without the benefit of any state statute authorizing private parties to act in such a capacity.

Third, New Mexico is mindful of the history of mistreatment and injustice suffered by Native Americans at the hands of our larger society. While historical efforts by the federal government to eradicate tribal identity have been replaced by more beneficent policies, the foundational cornerstone of that identity – tribal sovereignty – is in danger of erosion by litigation like the case at bar, which seeks to circumvent the immunity that is a vital aspect of that sovereignty. As the Eighth Circuit has observed:

Indian tribes enjoy immunity because they are sovereigns predating the Constitution, and *because immunity is thought necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy.*

*Am. Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1377-78 (8th Cir. 1985) (emphasis added) (citations omitted). While none of us can right the old wrongs committed against the Indian Tribes, we can step forward to object to the commission of new wrongs that threaten tribal self-determination, economic development, and cultural autonomy. New Mexico seeks to do so here.

## QUESTION PRESENTED

The question addressed by this brief is as follows:

Do federal courts have jurisdiction to issue injunctions against the officials of federally-recognized – and, hence, sovereign – Indian Tribes in lawsuits brought by private plaintiffs to seek compliance with state law, even where there is no allegation of physical entry into the State by the Tribe?

## STATEMENT OF FACTS

The *Amicus* will not seek to improve upon the Statement of Facts presented by the Tribal Officials in their own brief; however, a few facts merit highlighting:

- The Tribal Officials are officials of a federally-recognized Indian Tribe, the Habematolel Pomo of Upper Lake, and are sued solely in their official capacities, thereby squarely implicating the sovereignty of the Upper Lake Tribe.

- Alleging violations of state law, the Plaintiffs-Appellees seek injunctions against the Tribal Officials prohibiting them from collecting funds owed by consumers to various lending businesses owned by the Upper Lake Tribe (the “Tribal Lending Entities”).<sup>3</sup>

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<sup>3</sup> Plaintiffs-Appellees also sought injunctions against the Tribal Officials based on alleged violations of RICO, 18 U.S.C. §§ 1961 *et seq.*. Although the district court ruled that RICO does not provide private plaintiffs with a right to injunctive or declaratory relief, J.A. 74-85, that ruling is also an issue in this interlocutory appeal. *See* ECF # 32 (April 2, 2020 Order).

- The Tribal Lending Entities are not named as defendants and monetary damages are not being sought against the Tribal Officials; however, the injunctive relief sought by the Plaintiffs-Appellees would nevertheless injure the economic well-being of the Upper Lake Tribe.<sup>4</sup>

- The Tribal Lending Entities conducted their business with Plaintiffs-Appellees over the internet and without establishing any physical presence in Virginia, the State where Plaintiffs-Appellees reside and whose laws allegedly have been violated.

### **SUMMARY OF ARGUMENT**

This lawsuit has been brought against the Tribal Officials by private parties seeking an injunction to prevent what they allege are violations of state law; however, as officials of a sovereign, the Tribal Officials have immunity from that suit.

The starting point for the analysis is that sovereigns and their officials have immunity from suit and, in order to overcome that bar, there must be either a valid

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<sup>4</sup> As explained by the Chairperson of the Upper Lake Tribe: “The lending business has been the engine for all of the economic, social, and educational progress our Tribe has made over the past decade. ... The vast majority of the Tribe’s governmental operating budget comes from revenue from our lending portfolios.” J.A. 153 (Affidavit of S. Treppa, at ¶¶ 273, 274).

abrogation of that immunity by Congress or a waiver of the immunity by the sovereign. Neither occurred here, nor is any such abrogation or waiver alleged.

*Ex parte Young*, 209 U.S. 123 (1908), provides an exception to sovereign immunity for state officials, when sued for injunctive relief based on alleged violation of federal law. The same exception would apply in suits brought against tribal officials for alleged violation of federal law. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). But, the exception cannot apply when the relief sought against the Tribal Officials is for the alleged violation of *state* law.

*Ex parte Young* is clear in the reasons for – and, hence, the limits of – the exception it provides. There must be an alleged violation of *federal* law in order for *Ex parte Young* to apply. Moreover, those limits were underscored in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984), where the Court rejected an attempt to expand *Ex parte Young* to cover alleged violations of state law. The fact that the defendants in *Pennhurst* were state officials – rather than tribal officials – is of no consequence because the case did not turn on the type of officials being sued; it turned on the type of law at issue. Where federal law is not at issue, there is no *Ex parte Young* exception.

Notwithstanding the rationale for *Ex parte Young* and the binding precedent of *Pennhurst*, the district court dispensed with the requirement that federal law be at issue. Instead, the district court ruled that tribal officials have no immunity against

a lawsuit brought by private parties seeking an injunction based on alleged violations of state law. The district court sought to justify such a result based on dictum appearing in *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014), as applied in *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 121 (2d Cir. 2019). In so doing, the district court erred. The dictum in *Bay Mills* followed that Tribe's express waiver of its immunity defense against *Ex parte Young*-type lawsuits. To the extent that the dictum is read as addressing suits against the officials of other Tribes, it is limited by its express reference to suits brought by a *State* and, in any event, it cannot overcome the express holding of *Pennhurst* that federal law must be at issue in order for *Ex parte Young* to apply.

## **ARGUMENT**

### **A. Tribes and Tribal Officials Have Sovereign Immunity.**

Like every federally-recognized Indian Tribe, the Upper Lake Tribe, whose officials are being sued here, is a sovereign. As this Court recently noted: “Indian tribes are “domestic dependent nations” that exercise inherent sovereign authority over their members and territories.” *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 176 (4th Cir. 2019) (quoting *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, (1991) (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831)); see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)

(“Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.”).

A Tribe’s immunity continues even when its commercial activities occur *outside* of tribal territories. As the Supreme Court has explained:

Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case.

*Kiowa Tribe of Okla. v. Manufacturing Tech. Inc.*, 523 U.S. 751, 760 (1998).

Indeed, “an Indian tribe is subject to suit *only* where Congress has authorized the suit or the tribe has waived its immunity.” *Id.* at 754. Plaintiffs do not claim congressional authorization or waiver, and none occurred.

Just as sovereigns are immune from suit, so are their officials. *E.g.*, *Alden v. Maine*, 527 U.S. 706, 747 (1999) (“[A]s a State can only perform its functions through its officers, *a restraint upon them is a restraint upon its sovereignty from which it is exempt without its consent....*”) (quoting *General Oil Co. v. Crain*, 209 U.S. 211 (1908))(emphasis added); *see also Worcester County Trust Co. v. Riley*, 302 U.S. 292, 296 (1937) (“[A] suit nominally against individuals, but restraining or otherwise affecting their action as state officers, may be in substance a suit against the State, which the Constitution forbids.”). Because the immunity of the sovereign’s

officials is a necessary component of sovereign immunity, that immunity applies here not only to the Upper Lake Tribe, but also to the Tribal Officials.

**B. Sovereign Immunity Should Not Be Diminished Absent a Clear Expression of Congressional Intent.**

As discussed in detail below (*infra* at 16), the district court based its decision on a misunderstanding of the Supreme Court’s 2014 ruling in *Bay Mills*; however, it should be noted at the outset that the most salient portion of the *Bay Mills* decision *supports* tribal sovereignty. As the Court explained, “it is fundamentally Congress’s job, not ours, to determine whether or how to limit tribal immunity.” 572 U.S. at 800. This refusal to countenance judicial diminishment of *tribal* sovereignty is reminiscent of the Supreme Court’s reluctance to permit intrusions into *state* sovereignty. *E.g.*, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (“Congress may abrogate the States’ constitutionally secured immunity from suit in federal court only by making its intention *unmistakably clear* in the language of the statute.”) (emphasis added).<sup>5</sup>

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<sup>5</sup> For other examples of the Supreme Court’s solicitude for state sovereignty, see *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (“In the face of such ambiguity, we will not attribute to Congress an intent to intrude on state government functions...”); *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) (“[E]vidence of congressional intent [to abrogate Eleventh Amendment Immunity] must be both unequivocal and textual.”); *United States v. Bass*, 404 U.S. 336, 349 (1971) (“In traditionally sensitive areas, such as legislation affecting the federal balance, *the requirement of clear statement* assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.”) (emphasis added); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“[W]e

The Eleventh Amendment gives States a measure of protection having no constitutional counterpart for Tribes; however, New Mexico is concerned that loosening the jurisprudential rules that restrict intrusion into *tribal* sovereignty may nevertheless lead to more casual intrusions into *state* sovereignty. Both must be protected. Just as courts should find no federal intrusion into the domain of States absent a clear statement by Congress, so too should lower courts find no diminishment of tribal immunity absent a clear statement by Congress – or, at least, by the Supreme Court. Courts should not diminish sovereign immunity – whether state or tribal – based on broad readings of dictum appearing in statements that are, at best, ambiguous. Unfortunately, that is what happened here. *See infra* at 17 (discussing the *Bay Mills* dictum).

Before turning to *Bay Mills* and its misuse by the district court, it will be helpful to lay the foundation by reviewing the specific rationale for *Ex parte Young* and the Supreme Court’s refusal to expand *Ex parte Young* beyond the limits dictated by that rationale.

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start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest* purpose of Congress.”) (emphasis added).



**C. *Ex parte Young* Does Not Support the Decision Below.**

The district court viewed the immunity issue here as analogous to the situation in *Ex parte Young*, 209 U.S. 123 (1908), and ruled that tribal officials do not have immunity against a private plaintiff's suit for an injunction to enforce state law. But, where there is no *federal* law at issue, the analogy fails, and immunity prevails.

In *Ex parte Young*, two fundamental principles of American law came into conflict, creating a constitutional dilemma:

- On the one hand, there was the well-recognized immunity of the sovereign, which is shared by the officials through whom the sovereign acts.
- On the other hand, there was the Supremacy Clause, which makes federal law “the supreme Law of the Land.” U.S. Const. art. VI, § 2.

To pose the problem in terms of a familiar philosophical paradox: the *irresistible force* of federal law came into conflict with the *immovable object* of state sovereign immunity. To solve this paradox, the Supreme Court “creat[ed] a legal fiction: a state official stops being a state official when he does something contrary to federal law.” *Gibson v. Ark. Dep’t of Corr.*, 265 F.3d 718, 719-20 (8th Cir. 2001).<sup>6</sup>

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<sup>6</sup> See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (referring to “the *fiction* of [*Ex parte*] *Young*”) (emphasis added).

In *Ex parte Young*, even though the state official was carrying out laws enacted by the state legislature, the Court said that, because of federal supremacy, he was not acting as a representative of the sovereign:

If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case *stripped of his official or representative character* and is subjected in his person to the consequences of his individual conduct. *The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.*

*Ex parte Young*, 209 U.S. at 159-60 (emphasis added). Based on this rationale, the Court ruled that the issuance of a federal court injunction against the state Attorney General, prohibiting him from enforcing a statute in violation of the federal constitution, was not barred by sovereign immunity.

Plainly, the purpose of *Ex parte Young* is to vindicate the supremacy of federal law, as provided by the Constitution. Where the enforcement of federal law is not the reason for the requested injunction, there is no irresistible force of the Supremacy Clause to contend with the immovable object of sovereign immunity. Thus, the rule from *Ex parte Young* simply does not apply. Sovereign immunity – including immunity for the sovereign’s officials – remains intact. *See United States v. Chambers*, 291 U.S. 217, 226 (1934) (“It is a familiar maxim of the common law that when the reason of a rule ceases the rule also ceases.”); *United States v. Dudley*,

739 F.2d 175, 177 (4th Cir. 1984) (“It is an old and respected doctrine of the common law that a rule ceases to apply when the reason for it dissipates”).

**D. *Pennhurst* Confirms the Limits on *Ex parte Young*.**

It is not necessary, however, to rely solely on legal maxims to make the point that *Ex parte Young* has no application where federal law is not at issue. The Supreme Court made the same point expressly in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984). In that case, private plaintiffs asked a federal court to enter an injunction requiring state officials to comply with state law. The Supreme Court thoroughly rejected the notion: “Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of *federal rights*.” 465 U.S. at 105 (emphasis added). Indeed,”[a] federal court’s grant of relief against state officials on the basis of *state law*, whether prospective or retroactive, does not vindicate the supreme authority of *federal law*.” *Id.* at 106 (emphasis added). “*Young*... [is] inapplicable in a suit against state officials on the basis of *state law*.” *Id.* While the Court naturally referred to “state officials” – the defendants then before it – the Court plainly insisted that “federal rights” must be at stake in order to invoke *Ex parte Young*. There is no room for a different outcome where tribal officials are being sued.

In an effort to avoid this result, the district court followed the path taken by the Second Circuit in *Gingras*, stating that *Pennhurst* “[does] not apply to suits

seeking to hold tribal officials responsible to the laws of a state.” J.A. 1767. There are two problems with this statement.

First, although *Pennhurst* involved a lawsuit against state officials, not tribal officials, the broad principle that dictated the outcome there is that *Ex parte Young* is intended to provide a means for vindicating *federal rights*. 465 U.S. at 105. This principle is applicable regardless of which sort of sovereign officials are being sued. If federal law is not implicated, *Ex parte Young* does not apply.

Second, the district court and *Gingras* treat *Pennhurst* as if it were somehow the *source* of sovereign immunity for state officials, so that immunity for state officials would not imply immunity for tribal officials. But, *Pennhurst* is not the *source* of anyone’s immunity – not the States’ and not the Tribes’. Instead, sovereign immunity pre-dates both *Pennhurst* and *Ex parte Young*. For both States and Tribes, immunity is the baseline, the starting point for the analysis. *E.g.*, *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014) (“The baseline position, we have often held, is tribal immunity...”). Then, *Ex parte Young* recognized an *exception* to sovereign immunity where federal law is implicated. Then, *Pennhurst* rejected an attempt to expand that exception and, in the process, emphasized that the exception *only* applies where federal rights are involved. Thus, in cases where federal rights are *not* implicated, we are still at the baseline, where

the operative rule is immunity for sovereigns – both States and Tribes – including their officials.<sup>7</sup>

**E. *Bay Mills* Does Not Support the Expansion of *Ex parte Young*.**

The case on which the district court primarily depends is *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014), as interpreted by the Second Circuit in *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 121 (2d Cir. 2019). But, *Gingras* has it wrong, and so does the district court.

*Bay Mills* involved a Michigan-based an Indian Tribe known as the Bay Mills Indian Community. This Tribe bought a parcel of land outside its reservation and built a casino there. The State of Michigan objected, and its Attorney General brought suit against the Tribe to shut the casino down. When the case reached the Supreme Court, the suit was thrown out based on tribal sovereign immunity.

Having reached that result, which effectively ended the case, the Court then commented on alternative means that Michigan might use to force the casino to close. Listing some possibilities, the Court said:

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<sup>7</sup> In another misplaced attempt to distinguish *Pennhurst* from the case at bar, the district court quotes *Gingras* for the proposition that “tribes cannot empower their officials to violate state law the way a state can interpret its own laws to permit a state official’s challenged conduct.” J.A. 64 (quoting 922 F.3d at 122-23). But, the quoted statement is about the *merits* of the case, not about the threshold issue of immunity. Besides, the result in *Pennhurst* was not based on the ability of a state to “interpret its own laws,” but on the absence of any federal law claim.

If Bay Mills went ahead [operating the casino on off reservation, state land], **Michigan** could bring suit against tribal officials or employees (rather than the Tribe itself ) seeking an injunction for, say, gambling without a license.... As this Court has stated before, analogizing to *Ex parte Young*, ..., tribal immunity does not bar **such a suit** for injunctive relief against **individuals**, including tribal officers, responsible for unlawful conduct. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978)]. And to the extent civil remedies **proved inadequate**, Michigan could resort to its criminal law, prosecuting anyone who maintains—or even frequents—an unlawful gambling establishment.

*Bay Mills*, at 796 (third emphasis in original, other emphases added). But, there is a long leap between this statement and the use that *Gingras* and the district court would make of it. This brief will not repeat all the arguments made by the Defendants about this *Bay Mills* dictum, but will make a few key points:

First, the Supreme Court’s comment about a potential suit against tribal officials must be understood in the context of the case where it was made. In *Bay Mills*, the Tribe expressly and deliberately waived any objection it might to Michigan’s use of an *Ex parte Young*-style suit against its own officials. This is shown by the following colloquy between the Chief Justice and counsel for the Tribe:

CHIEF JUSTICE ROBERTS: Okay. What about *Ex parte Young*? Are you willing to waive the tribe’s sovereign immunity in an *Ex parte Young* action? Because, in your opposition to the complaint in this case, you raised sovereign immunity as an objection to the *Ex parte Young* —

BAY MILLS COUNSEL: Sure. Sure. As part in the district court, as part of ordinary — as part of ordinary litigation, we said that *Ex parte Young* wasn’t applicable. But we do think — and our brief in

opposition says this, our merits brief says this, the United States' brief says this, that *Ex parte Young* actions are available against tribes, just as —

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

BAY MILLS COUNSEL: Well, Your Honor, we would not assert it to the limits of *Ex parte Young*. So, for example, *Ex parte Young* doesn't — doesn't permit reaching into the State coffers....

Transcript of Oral Argument at 34, *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014) (No. 12-515). Given this waiver, it is easy to understand why the Court would have said that “Michigan could bring suit against tribal officials.” But, that waiver only binds Bay Mills, not other Tribes.

Second, if the statement is read as applying to tribal officials generally (not just to officials of the Bay Mills tribe), it is still not as broad as the Second Circuit and district court believe it to be. The Supreme Court did not say that tribal officials would be categorically foreclosed from using tribal immunity as a defense. It said that “Michigan *could bring* suit against tribal officials.” This is not the same thing as saying that the officials could not successfully assert immunity, a distinction illustrated by the Chief Justice when he distinguished between an *Ex parte Young* lawsuit being “available” and sovereign immunity being foreclosed as a defense. *See supra* at 17-18 (quoting oral argument transcript). Indeed, the Court

acknowledged the possibility that a lawsuit against tribal officials might “prove inadequate.” 572 U.S. at 796.

Third, *Bay Mills* involved a Tribe that ventured physically out of Indian country and onto Michigan land to construct and operate a casino there. The interests of a sovereign are at the highest when another sovereign has come physically into its territory. In the case at bar, however, there is no suggestion that any officials of the Upper Lake Tribe ever set foot in Virginia to conduct their lending businesses, or that they ever directed anyone to do so. Instead, the contracts between the Tribal Lending Entities and plaintiffs were formed over the internet, which has no particular physical location. In such circumstances, it is particularly troublesome to abrogate immunity. If arms of the *State* engage in interstate activities over the internet, as they sometimes do,<sup>8</sup> their sovereign immunity – including the immunity of their officials – should be preserved. The district court’s approach would

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<sup>8</sup> Examples include higher education “distance learning” where residents of one State can pay tuition and take classes over the internet from a public university located in another State. *See, e.g.*, <https://online.unm.edu/online-programs/programs-by-state.html> (describing interstate online courses offered by the University of New Mexico); <https://online.virginia.edu> (University of Virginia “online courses, certificates and degrees”); <https://www.unc.edu/academics/online-education/> (University of North Carolina online courses); [https://sc.edu/study/academic\\_overview/online\\_education/index.php](https://sc.edu/study/academic_overview/online_education/index.php) (University of South Carolina online courses); <https://oes.umd.edu> (University of Maryland online courses); <https://online.wvu.edu> (West Virginia University online courses). While many state universities operated such programs before Covid-19, the practice has become even more prevalent as a result of the pandemic.



undermine that immunity and expose those state officials to *Ex parte Young*-style actions. Such a precedent should be avoided.

Fourth, one of the reasons assigned by the district court for extending *Ex parte Young* to the case at bar is actually a reason *not* to do so. According to the district court:

[A]llowing *Ex parte Young*-style suits against tribal officials for violations of state law aligns with ‘the federal government’s strong interest in providing a neutral forum for the peaceful resolution of disputes ***between domestic sovereigns***,’ because such suits would fall within the jurisdiction of the federal courts, who already serve as the constitutionally designated arbiter of disputes between the states.

J.A. 1768 (emphasis added) (citing *Gingras*, 922 F. 3d 124). Contrary to the district court’s description, this case is *not* a dispute “between domestic sovereigns.” While the meaning and application of state law may be an issue here, the *dispute* is between a tribal sovereign and *private* litigants.<sup>9</sup> When it comes to disputes between two sovereigns, it is the prerogative of one sovereign to deal with the other, without

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<sup>9</sup> Given its failure to note this critical distinction, the district court again misses the mark by citing *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1290 (11th Cir. 2015), which said that “tribal officials may be subject to suit in federal court for violations of state law under the fiction of *Ex parte Young* when their conduct occurs outside of Indian lands.” See J.A. 65, n. 12. The dispute in *PCI Gaming* was between *two sovereigns*, the State of Alabama and the Poarch Band of Creek Indians. It was not a suit brought against tribal officials by private individuals. Moreover, despite its broad statement about *Ex parte Young*, the Eleventh Circuit ultimately ruled that tribal immunity blocked Alabama’s suit because the gaming activities in question occurred on tribal land, 801 F.3d at 1291, thereby making that court’s broad statement unnecessary to the result.

private individuals taking it upon themselves to assume that role. For New Mexico and other States having Tribes within their borders, it is especially important that private parties not presume to displace the state sovereign in these matters. By ruling that state law injunctions may be issued against tribal officials at the behest of private litigants, the district court would diminish the role of the States. Even in *Bay Mills*, the Tribe’s waiver of immunity and the associated dictum only contemplated an action brought against tribal officials by “Michigan,” not by private parties.<sup>10</sup>

Finally, the district court’s reference to federal adjudication of disputes between domestic sovereigns fails for another reason. The Supreme Court (not “federal courts” generally) is, in the words of the district court, “the constitutionally designated arbiter of disputes between the states.” J.A.1768. By adoption of the Constitution, state immunity against such lawsuits was abrogated. *See Franchise Tax Bd. v. Hyatt*, \_\_\_ U.S. \_\_\_, \_\_\_, 139 S. Ct. 1485, 1495 (2019) (discussing effect of Art. III, § 2, in abrogating sovereign immunity for suits between States in Supreme Court). But, there is no constitutional provision that provides federal court jurisdiction over disputes between States and Tribes.<sup>11</sup> And, for the district court to

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<sup>10</sup> Whether an Attorney General or other state officials could bring a lawsuit against tribal officials to enforce state law is a question where there is likely to be disagreement between Tribes and States, or even among the States. But, that delicate issue is not presented here, and the Court need not reach it.

<sup>11</sup> Indeed, “it would be absurd to suggest that the tribes surrendered immunity in a [constitutional] convention to which they were not even parties.” *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991).

claim such broad jurisdiction opens the doors not just for suits *against* Tribes, but also for suits *by* Tribes against States – a prospect that New Mexico finds very troublesome. To reject the district court’s reasoning is not to say that tribal immunity can never be abrogated. But, again, as this Court has recognized, “[i]t is Congress—not the courts—that has the power to abrogate tribal immunity.” *Williams*, 929 F.3d at 185.

### Conclusion

The Court should rule that, because tribal sovereign immunity has not been waived by the Upper Lake Tribe or abrogated by Congress, the Tribal Officials have immunity against private plaintiffs’ suit for an injunction to prevent alleged violations of state law – and that *Ex parte Young*-style lawsuits are not available in such circumstances.

The district court’s ruling should be reversed, and the state law claims against the Tribal Officials of the Habematolel Pomo of Upper Lake should be dismissed.

Respectfully submitted,

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\_\_\_\_\_/s/ William H. Hurd

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