No. 07-1402

IN THE
SUPREME COURT OF THE UNITED STATES

HO-CHUNK NATION,
Petitioner,

vs.

STATE OF WISCONSIN,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether certiorari is warranted to review the Court of Appeals decision on interlocutory appeal, when the Court of Appeals decided the question of sovereign immunity on alternative grounds that are not challenged on this petition for review, the decision does not conflict with any Circuit Court or Supreme Court precedent and the decision is a straightforward application of well-settled principles of statutory construction.

2. Whether the plain language of 25 U.S.C. §2710(d)(7)(A)(ii), which provides district court jurisdiction to enjoin Class III gaming when it is conducted in violation of a tribal-state gaming compact, limits the type of compact violation giving rise to jurisdiction to violations of the hours of operation or specific rules of each game.

3. Whether canons of construction for ambiguous statutes should be applied to statutes the Court of Appeals found to be unambiguous.

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The opinion of the United States Court of Appeals for the Seventh Circuit on this interlocutory appeal is reported at 512 F.3d 921 (7th Cir. 2008)(Nation's App. A at 1a). The opinion of the United States District Court for the Western District of Wisconsin is reported at 478 F.Supp.2d 1093 (W.D. Wis. 2007)(Nation's App. C at 44a).

STATEMENT ON JURISDICTION

Petitioner Ho-Chunk Nation's ("Nation") statement of jurisdiction is not complete and correct. The District Court has subject matter jurisdiction over the Amended Complaint, but the State maintains that the Seventh Circuit did not have jurisdiction over the Nation's interlocutory appeal. A complete and correct statement of jurisdiction is as follows:

A. The District Court has subject matter jurisdiction over Respondent State of Wisconsin's ("State") Amended Complaint pursuant to 28 U.S.C. § 1331, the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710(d)(7)(A)(i) and (ii), and 28 U.S.C. § 1367(a). The Nation's Statement on Jurisdiction only mentions 25 U.S.C. § 2710(d)(7)(A)(ii), and fails to mention that the Seventh Circuit affirmed that the State's fourth cause of action for declaratory judgment also provides jurisdiction under 28 U.S.C. § 1331.

B. The Nation's interlocutory appeal does not meet the requirements of the narrow collateral order exception to 28 U.S.C. § 1291. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985); *Good v.*

Voest-Alpine Industries, Inc., 398 F.3d 918, 925 (7th Cir. 2005).[1] Resolution of the issue of the Congressional abrogation of sovereign immunity does not impact a right of the Nation that would be lost without immediate appeal, and is not "effectively unreviewable" on appeal from a final judgment, *see id.*, because the Congressional abrogation of immunity that is the sole basis for the interlocutory appeal in this case is not the only grounds for waiver of the Nation's tribal immunity. The Nation expressly waived sovereign immunity in its gaming Compact for Compact disputes.

C. The District Court did not "conclusively determine" the other issues raised by the Nation on appeal, so the collateral order exception to § 1291 does not apply. *Richardson-Merrell*, 472 U.S. 424; *Good*, 398 F.3d at 925. The District Court decision did not address the Nation's express waiver of sovereign immunity in the gaming Compact, and did not address the Nation's conclusory assertion that this express waiver was somehow revoked.

D. The District Court denied the Nation's Motion to Dismiss or in the Alternative for Summary Judgment on March 9, 2007. The Nation filed a Notice of Appeal on March 14, 2007. The Court of Appeals affirmed in part and vacated in part to remand to the District Court for a determination of arbitrability on January 14, 2008. The Nation

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[1] The State has not filed a cross petition for certiorari on the issue of appellate jurisdiction. The Seventh Circuit remanded the case to the District Court for a determination of the arbitrablity of the claims in this case. Review of interlocutory decisions are premature as all issues will be reviewable on a complete record.

petitioned for rehearing on January 28, 2008, and the Court of Appeals denied the petition on February 8, 2008. The Nation filed this petition for certiorari on May 8, 2008.

STATUTES INVOLVED

25 U.S.C. § 2710(d)(1)(C):

Class III gaming activities shall be lawful on Indian lands only if such activities are ... conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

25 U.S.C. § 2710(d)(2)(C):

Class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

25 U.S.C. § 2710(d)(7)(A)(ii):

The United States district courts shall have jurisdiction over-...

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect ...

STATEMENT OF THE CASE

This case is a dispute about the Nation's compliance with the terms of the tribal-state gaming Compact negotiated and entered into by the State and the Nation pursuant to the IGRA.

On June 11, 1992, the State and the Nation entered into a Gaming Compact which enabled the

Nation to conduct certain "casino style" Class III gaming activities as defined within the IGRA. (State's App. 159A, Am. Compl. Ex. B). The Compact was amended in 1998 and again in 2003 ("the Second Amendment"). (State's App. 260A, Am. Compl. Ex. D). In the Second Amendment, the parties agreed to a number of changes including new Class III games, extension of the duration of the Compact, a provision for binding arbitration to resolve disputes, waiver of sovereign immunity for claims to enforce the Compact, and increased annual payments to the State.

The Second Amendment also included a provision relieving the Nation of its obligation to continue to make the agreed payments if Paragraph 7 of the Second Amendment, the duration provision, is held to be invalid. (State's App. 287A, Second Amendment ¶ 15(A)). If Paragraph 7 of the Second Amendment was found to be invalid, then the parties would be required to negotiate for substitute duration and payment provisions. If a satisfactory solution was not achieved within 60 days after the court decision, the parties would be required to arbitrate the dispute. *Id.* The arbitration proceedings to implement the payment and duration provision must be completed within 180 days. (State's App. 274A-275A, Second Amendment ¶ 11, Section XXIII.B).

This dispute was prompted by the Nation's invocation of the payment relief provision. The Nation has refused to make payments since 2005, but has also refused to submit to binding arbitration

to resolve this dispute.[2] The Nation has raised every manner of objection to any court's jurisdiction to compel it to arbitrate.

After the Wisconsin Supreme Court decided *Panzer v. Doyle*, 271 Wis.2d 295, 680 N.W.2d 666 (2004), invalidating certain provisions of a compact with another tribe, the Forest County Potawatomi, the Nation invoked the payment relief provision of the Second Amendment on its own initiative and (as it turns out, only for a limited period of time) ceased administering the additional games authorized in Paragraph 2 of the Second Amendment, but continued to offer other Class III games at its casinos. (State's App. 6A-7A, Am. Compl. ¶¶ 11-15). After the Wisconsin Supreme Court's subsequent decision in *Dairyland Greyhound Park, Inc. v. Doyle*, 295 Wis.2d 1, 719 N.W.2d 408, which overruled *Panzer v. Doyle* in part, the Nation resumed offering the games it had voluntarily discontinued. The Nation continues to refuse to make any payment to the State, despite the fact that it continues to reap all of the benefits provided under the Amended Compact. (State's App. 7A, Am. Compl. ¶¶ 15-16).

After the Nation announced its intention to repudiate its payment obligations under the Compact, the State and the Nation engaged in extensive negotiations concerning whether and how

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[2] While the Nation made one $30,000,000 payment in 2006, it continued to assert that it has no payment obligations under the Compact given the *Panzer* decision. The 2006 payment was made in connection with a stipulation to stay the arbitration proceedings in this case pending the Seventh Circuit's decision in *Ho-Chunk I*, described below. Since *Ho-Chunk I* was decided, the Nation has refused to resume the arbitration proceedings it commenced. (State's App. 14A, Am. Compl. ¶¶ 57-59).

to amend certain provisions in the Second Amendment. (State's App. 7A, Am. Compl. ¶ 16). On June 16, 2005, the Nation sent the State a Complaint in Arbitration invoking Section XXIII of the Second Amendment. (State's App. 315A, Am. Compl. Ex. F). The State denied all of the Nation's claims and filed counterclaims. (State's App. 332A, Am. Compl. Ex. G).

After four months of discussions, the parties were unable to reach an agreement as to the selection of an arbitrator. (State's App. 9A, Am. Compl. ¶ 22). As a result, on October 28, 2005, the State filed the initial Complaint in this action, asking the District Court to appoint an arbitrator from one of the lists of arbitrators provided by the parties pursuant to the Second Amendment and 9 U.S.C. § 5. (R. 2). On December 8, 2005, the District Court granted the State's motion and appointed the Hon. William Norris, Retired Judge of the Ninth Circuit Court of Appeals, from the Nation's list of proposed arbitrators. (R. 51); *State of Wisconsin v. Ho-Chunk Nation*, 402 F.Supp. 2d 1008 (W.D. Wis. 2005).

Even though the District Court appointed an arbitrator selected by the Nation, the Nation appealed the decision. (R. 52). The Nation challenged the District Court's jurisdiction to compel arbitration and argued that the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*, does not apply to Indian tribes, even though the Nation specifically agreed in the Second Amendment that the FAA would govern such disputes to enforce the Second Amendment's arbitration agreement. (*Id.*; State's App. 277A, Second Amendment ¶ 11, Section XXIII.B)

On September 11, 2006, in *State of Wisconsin v. Ho-Chunk*, 463 F.3d 655 (7th Cir. 2006) ("*Ho-Chunk I*"), the Seventh Circuit vacated the December 8, 2005 order, not on the merits, but on the grounds that the State's original Complaint did not properly plead federal subject matter jurisdiction.

Thereafter, the District Court granted leave to file an Amended Complaint. The State filed its Amended Complaint in accordance with the directives in *Ho-Chunk I*, and added new claims, including claims for violations of the IGRA. The Amended Complaint alleged that the Nation violated its Compact agreements to make required payments or to arbitrate the dispute and that continuing to conduct Class III gaming while repudiating the Compact violates the IGRA. The State requested declaratory judgment, damages, an injunction of Class III gaming, and an order compelling arbitration and appointment of an arbitrator. (State's App. 1A, Am. Compl.)

The Nation filed counterclaims alleging breach of the Compact and seeking declaratory judgment under 25 U.S.C. § 2710(d)(7)(A)(i). The Nation unsuccessfully attempted to dismiss the Amended Complaint for lack of subject matter jurisdiction and had moved in the alternative for summary judgment. In its decision, the District Court concluded that the State's Amended Complaint invoked the Court's subject matter jurisdiction and Congress' limited abrogation of tribal sovereign immunity under 25 U.S.C. § 2710(d)(7)(A)(ii). (Nation's App. C at 48a). The court exercised supplemental jurisdiction under 28 U.S.C. § 1367(a) over the remaining claims. (Nation's App. C at 51a). The District Court also

denied the Nation's motion for summary judgment, in part, concluding that the Nation was not relieved of its payment obligations after *Panzer* based on the language of the payment relief provision. (Nation's App. C at 54a-55a).

The Nation filed an interlocutory appeal invoking sovereign immunity, claiming that Congress did not abrogate tribal immunity under 25 U.S.C. § 2710(d)(7)(A)(ii) for the cause of action to enjoin Class III gaming alleged in the Amended Complaint. The Nation did so even though it expressly agreed in the Compact that it waived sovereign immunity, (State's App. 279A, Second Am. ¶ 11, Section XXIV.B), and separately agreed that it would not assert sovereign immunity against the State, (State's App. 280A-281A, Second Am. ¶ 11, Section XXIV.C).

The Seventh Circuit affirmed that the District Court had jurisdiction over the suit and that the Nation's sovereign immunity was abrogated by Congress and waived by the Nation. *State of Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921 (7th Cir. 2008) (*"Ho-Chunk II"*)(Nation's App. A at 39a). The Seventh Circuit held that federal subject matter jurisdiction existed over the Amended Complaint because (1) there is federal subject matter jurisdiction pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii) over the State's claim to enjoin Class III gaming due to the Nation's refusal to submit to binding arbitration, *id.* at 935 (Nation's App. A at 27a); (2) there is federal subject matter jurisdiction over the States claim for a declaratory judgment that the State negotiated in good faith in accordance with 25 U.S.C. § 2710(d)(7)(A)(i) and the Declaratory

Judgment Act, *id.* at 935 (Nation's App. A at 28a-29a); and (3) the District Court may exercise supplemental jurisdiction over the remaining claims pursuant to 28 U.S.C. § 1367(a), *id.* at 936 (Nation's App. A at 29a-30a). The Seventh Circuit rejected the Nation's assertions of sovereign immunity for two reasons: the Nation expressly waived sovereign immunity in the Compact and Congress abrogated tribal immunity in 25 U.S.C. § 2710(d)(7)(A)(ii). *Id.* at 935, 937-38 (Nation's App. A at 27a and 31a-34a).

However, the Seventh Circuit vacated the District Court's rulings on the merits of the Nation's motion for summary judgment on the grounds that the District Court must first consider the arbitrability of the claims in the State's Amended Complaint. The court remanded the action "to determine which of the State's causes of action are subject to arbitration." *Id.* at 940 (Nation's App. A at 39a).

On remand, the District Court ordered the parties to submit briefs on the arbitrability of the State's claims. The State submitted a motion to compel arbitration of all claims the parties submitted to arbitration in 2005 and to stay the remaining claims, including the claim to enjoin Class III gaming under 25 U.S.C. § 2710(d)(7)(A)(ii). The Nation filed a motion for summary judgment arguing for the first time that it did not agree to arbitrate the claims in the arbitration proceeding it commenced in June 2005. The State's Motion to Compel Arbitration and the Nation's third Motion for Summary Judgment are now pending in the District Court before Hon. Barbara B. Crabb.

REASONS FOR DENYING THE PETITION

There is no compelling reason for this Court to review the Seventh Circuit Court of Appeals' decision on an interlocutory appeal.

First, review of the Seventh Circuit's interpretation of the Congressional grant of federal subject matter jurisdiction and abrogation of tribal immunity in 25 U.S.C. § 2710(d)(7)(A)(ii) will not impact federal jurisdiction over the claims in this case. The Seventh Circuit also found federal jurisdiction on alternate grounds independent of its construction of 25 U.S.C. § 2710(d)(7)(A)(ii). The Seventh Circuit concluded that the State's fourth cause of action for a declaration that the State negotiated with the Nation in good faith and did not violate the IGRA provides independent grounds for federal subject matter jurisdiction. And, the Seventh Circuit held that the Nation expressly waived tribal immunity in the Compact. Since there are alternate grounds for federal jurisdiction, there is no compelling reason to review this Seventh Circuit decision rendered on interlocutory review of the Nation's invocation of sovereign immunity.

Second, there is no genuine conflict among the Circuit Courts of Appeals that warrants review. The purported "split" among the Courts of Appeals is based in the first instance on the Nation's mischaracterization of the Seventh Circuit decision. The Seventh Circuit specifically declined to decide whether or not an alleged violation of a revenue sharing provision of an IGRA compact gives rise to jurisdiction under § 2710(d)(7)(A)(ii). *Ho-Chunk II*,

512 F.3d at 934 (Nation's App. A 26a-27a). The Seventh Circuit decided that the Nation's breach of the arbitration provision gave rise to federal jurisdiction and an abrogation of tribal immunity for the State's cause of action pursuant to 25 U.S.C. §2710(d)(7)(A)(ii). *Id.*

In any event, the few courts that have considered the scope of § 2710(d)(7)(A)(ii)'s grant of jurisdiction and abrogation of immunity have uniformly rejected the Nation's interpretation of the statute. Every federal court to consider the scope of § 2710(d)(7)(A)(ii) has concluded that jurisdiction exists over claims for compact violations indistinguishable from the State's clams for Compact violations in the Amended Complaint. *See State of New Mexico v. Jicarilla Apache Tribe,* 2000 U.S. Dist. LEXIS 20666 (D. N.M. Dec. 6, 2000); *State of New Mexico v. Pueblo of Pojoaque*, 30 Fed. Appx. 768 (10th Cir. 2002); *State of Michigan v. Little River Band of Ottawa Indians*, 2007 WL 1238907 (W.D. Mich. 2007). Because there is no genuine conflict among the Courts of Appeals, review is not warranted under S. Ct. R. 10(a).

Third, the Seventh Circuit decision is not inconsistent with Supreme Court decisions relating to construction of ambiguous statutes for the benefit of Indian tribes because those canons are inapplicable here. Section 2710 is not ambiguous and the Seventh Circuit interpretation of the statute is not detrimental to tribal interests. The Seventh Circuit reached its decision based on the plain language of the statue. Section 2710(d)(7)(A)(ii) is not ambiguous so the Court had no need to look to canons of construction that apply to ambiguous

provisions. Furthermore, the Seventh Circuit expressly noted that § 2710(d)(7)(A)(ii) provides federal jurisdiction over causes of action "initiated by a State *or Indian tribe*." 512 F.3d at 931(emphasis in original)(Nation's App. A at 18a). The excessively narrow construction of § 2710(d) that the Nation urges would limit other Indian tribes' access to a federal forum. Thus, the Nation is incorrect that its interpretation would benefit Indian tribes over other interests.

Finally, review is not warranted under S. Ct. R. 10(c) because the Nation overstates the call for further review of a rarely invoked jurisdictional provision. The dearth of decisions in the District Courts and the Courts of Appeal interpreting the scope of 25 U.S.C. § 2710(d)(7)(A)(ii) confirms that the Nation exaggerates the national import of its petition. Section § 2710(d)(7)(A)(ii) provides a federal district court forum to resolve disputes over violations of the agreed terms of a tribal-State compact, providing injunctive relief as an available remedy. This provision does not and has not opened the floodgates for litigation as the Nation suggests. Instead, District Courts, capable of considering the materiality of violations and reasonable limits on entering injunctions, have jurisdiction to resolve claims for injunctions based on IGRA compact violations.

A. Review of the Seventh Circuit interpretation of §2710(d)(7)(A)(ii) on an interlocutory appeal would not hasten resolution of this case because federal jurisdiction is established on alternative grounds.

The Seventh Circuit found alternative grounds for finding subject matter jurisdiction and the Nation's express waiver of sovereign immunity independent of any construction of 25 U.S.C. §2710(d)(7)(A)(ii). Review of the Seventh Circuit's construction of 25 U.S.C. § 2710(d)(7)(A)(ii) on this interlocutory appeal will not dispose of these proceedings because the District Court has additional grounds to exercise jurisdiction over the claims in the Amended Complaint.

The Seventh Circuit concluded that 25 U.S.C. § 2710(d)(7)(A)(ii) is not the only basis for federal subject matter jurisdiction or waiver of the Nation's sovereign immunity. *Ho-Chunk II,* 512 F.3d at 935 (Nation's App. A at 28a-29a). The State's fourth cause of action for a declaratory judgment that the State negotiated in good faith in accordance with 25 U.S.C. § 2710 and the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq*, provides an additional basis for federal question jurisdiction.[3]

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[3] In its Complaint in Arbitration, the Nation had alleged that the State breached its common law and IGRA duties to negotiate Compact provisions in good faith. (State's App. 329A, Nation's Complaint in Arbitration). The State's fourth cause of action seeks declaratory judgment that the State did not violate any IGRA obligation to negotiate in good faith. (State's App. 15A).

The Seventh Circuit also found that the congressional abrogation of sovereign immunity in the IGRA was not the sole basis for finding the Nation's tribal sovereign immunity waived. The Nation expressly waived sovereign immunity in Paragraph 11, Section XXIV.B of the Second Amendment to the Compact, which provides:

> The Nation and the State expressly waive, to the extent the State or the Tribe may do so pursuant to law, any and all sovereign immunity with respect to any claim brought by the State or the Nation to enforce any provision of this Compact, as amended.

512 F.3d at 937, (Nation's App. A at 31a-34a; State's App. 279A, Second Amendment ¶ 11, Section XXIV.B). The Seventh Circuit went on to note that the Nation's contention that its express waiver of tribal immunity was somehow revoked by virtue of the Wisconsin Supreme Court's decision in *Panzer v. Doyle*, was meritless because the Nation agreed in the Compact to specifically limit the circumstances in which this waiver of immunity could be revoked. The Nation's express waiver of immunity in the Compact remained intact because those events have not occurred:

> [T]he only provisions to explicitly address the Nation's ability to revoke its sovereign immunity waiver, Paragraph 11, Section XXIV.E & F in the Second Amendment, in both cases provide that such a revocation may only occur when the Nation is unable to obtain a judicial remedy or resolution as a result of the State's immunity from suit. At no point during the course of this ongoing

> litigation between the parties has the State invoked its sovereign immunity. Therefore, even if the *Panzer* decision did serve to invalidate the State's sovereign immunity waiver in the Compact, the Nation's waiver of its immunity remains intact since the State has never invoked its immunity from suit during the course of litigation with the Nation.

512 F.3d at 937-938 (Nation's App. A at 33a-34a); (State's App. 291A-283A, Second Amendment ¶ 11, Sections XXIV.E and F) .

Thus, the District Court's jurisdiction to act on the Seventh Circuit's mandate to determine the arbitrability of the claims in this action is not dependent on its construction of 25 U.S.C. §2710(d)(7)(A)(ii). A different construction of that provision by this Court will not expedite the resolution of these proceedings.

B. There is no genuine conflict among the Courts of Appeals for this Court to resolve.

The Nation mischaracterizes the decision below in its contention that the Courts of Appeals are split on the scope of 25 U.S.C. § 2710(d)(7)(A)(ii)'s grant of jurisdiction. The Nation's assertion that the Seventh Circuit "specifically found that §2710(d)(7)(A)(ii)'s grant of jurisdiction and abrogation of tribal sovereign immunity *does not* extend to claims to enforce gaming revenue sharing agreements entered into in conjunction with Indian gaming compacts" is incorrect. *See* Petition p. 15(emphasis in original). Instead, the Seventh

Circuit specifically declined to reach the issue of whether an alleged violation of a compact's revenue sharing provision was a basis for federal jurisdiction under 25 U.S.C. § 2710(d)(7)(A)(ii). *Ho-Chunk II,* 512 F.3d at 935 (Nation's App. A 26a-27a).

The Seventh Circuit held that federal jurisdiction under 25 U.S.C. § 2710(d)(7)(A)(ii) existed for alleged violations of compact provisions listed in 25 U.S.C. § 2710(d)(3)(C)(i-vii). *Id.* at 934 (Nation's App. A at 22a-26a). The Court declined to reach the issue of whether revenue sharing agreements fall under the catchall for provisions related to "any other subjects that are directly related to the operation of gaming activities," citing 25 U.S.C. § 2710(d)(3)(C)(vii):

> Federal jurisdiction under 25 U.S.C. §2710(d)(7)(A)(ii) in this case however, does not hinge solely upon whether the revenue-sharing agreement can be deemed to be a "subject[ ] ... directly related to the operation of gaming activities." *See* 25 U.S.C. §2710(d)(3)(C)(vii). In its amended complaint, the State also sought an injunction pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii) due to the Nation's alleged breach of the Compact's Dispute Resolution provision. The Second Amendment's inclusion of a Dispute Resolution provision, compelling the parties to submit to binding arbitration for "any dispute ... regarding the interpretation or enforcement of the Compact," falls under the ambit of 25 U.S.C. § 2710(d)(3)(C)(v), which provides that "Tribal-State compact[s] ... may include provisions relating to-... remedies for

> breach of contract." Therefore, the district court properly had jurisdiction, and Congress abrogated the Nation's sovereign immunity, with respect to the State's claim pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii) to enjoin the Nation's class III gaming due to its alleged refusal to submit to binding arbitration.

Id. (Nation's App. A at 27a). Because the Amended Complaint also alleged that the Nation violated the Compact's Dispute Resolution provision, the Seventh Circuit found that the District Court properly had subject matter jurisdiction, and Congress abrogated the Nation's sovereign immunity, with respect to the State's claim pursuant to 25 U.S.C. §2710(d)(7)(A)(ii) to enjoin the Nation's Class III gaming due to its refusal to submit to binding arbitration. *Id.*

Thus, the Seventh Circuit decision does not conflict with the only other circuit court and the lower court decisions that have found jurisdiction under § 2710(d)(7)(A)(ii) based on violations of a compact's revenue sharing provision. *See Pueblo of Pojoaque*, 30 Fed. Appx. at 769, *affirming State of New Mexico v. Jicarilla Apache Tribe, et al.*, 2000 U.S. Dist. LEXIS 20666 (D.N.M. Dec. 6, 2000); *Little River Band of Ottawa Indians*, 2007 WL 1238907, *1. (W.D. Mich. 2007). Because the Seventh Circuit never "specifically found that § 2710(d)(7)(A)(ii)'s grant of jurisdiction and abrogation of tribal sovereign immunity *does not* extend to claims to enforce gaming revenue sharing agreements entered into in conjunction with Indian gaming compacts," this petition is based on an entirely false premise. *See* Petition p. 15.

Moreover, no court has ever adopted the Nation's interpretation of § 2710(d)(7)(A)(ii). No court has ever construed this provision to create a federal forum available solely for actions to police disputes over the minutiae of gaming rules or hours of operation. The Nation cites *State of Florida v. Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999) in support of its interpretation, but that case is inapposite. In *Seminole Tribe*, the Eleventh Circuit addressed whether a state could seek to enjoin gaming when a tribe conducts Class III gaming without a compact. The court looked to the language of § 2710 that provides jurisdiction for violations of a compact "that is in effect." Because there was no compact in effect between Florida and the Seminole Tribe, the court found that § 2710(d)(7)(A)(ii) did not provide federal jurisdiction. The Eleventh Circuit did not address any questions at issue in this appeal.

C. The Seventh Circuit found jurisdiction based on the plain language of the IGRA without need to resort to canons of construction for ambiguous statutes.

The Nation's contention that the Seventh Circuit decision is at odds with decisions of this Court relating to canons of construction for interpretation of ambiguous statutes passed for the benefit of Indians is also based on a mischaracterization of the Seventh Circuit decision. The Seventh Circuit did not find that §2710(d)(7)(A)(ii) is ambiguous. *Ho-Chunk II*, 512 F.3d at 933-934 (Nation's App. A at 22a-25a). *Cf.* Petition p. 28. Its interpretation of the scope of

§2710(d)(7)(A)(ii) relied solely on the text of § 2710. *Id.*

It is only by virtue of its Compact with the State that the Nation is authorized to conduct Class III games. Section 2710(d)(1)(C) provides that "Class III gaming activities shall be lawful on Indian lands only if such activities are ... conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect." Section 2710(d)(2)(C) provides that "Class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect."

Section 2710(d)(7)(A)(ii) grants federal courts jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect . . . ."

In the District Court and on appeal, the State submitted that jurisdiction exists because the Nation violated material terms and conditions of the Compact. For its part, the Nation proffered an exceedingly narrow reading of the statute, arguing that jurisdiction only exists when mechanical features of gaming operations are conducted in violation of Compact provisions, such as violating the rules of the games or playing games during unauthorized times. The State has maintained that it requires a strained reading to interpret the jurisdictional provision to so restrict the types of violations giving rise to the District Court's

authority, without any language in the statute guiding such a limitation.

After considering these arguments, the Seventh Circuit did not find the statutory text ambiguous.[4] Rather, the Seventh Circuit focused on the text of the statute that references compacts "entered into under paragraph (3)," referring to 25 U.S.C. § 2710(d)(3)(C). *Id.* at 933 (Nation's App. A at 22a-25a). That section lists the types of provisions which a compact negotiated under the IGRA might address. The Seventh Circuit held that a federal court has jurisdiction over a suit alleging a violation of any of the types of provisions listed in §2710(d)(3)(C). *Id.* Here, the State's allegation that the Nation violated the Compact's dispute resolution provision meets this requirement because §2710(d)(3)(C)(v) provides that IGRA compacts may include remedies for breach of the compact. *Id.* at 935 (Nation's App. A at 26a).

Because the Seventh Circuit did not find the statute ambiguous, it had no need to resort to any of the extrinsic aids or canons of construction the Nation urges this Court to impose, such as the Congressional purpose or legislative history. *See United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 865 (7th Cir. 1998) (quoting *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524 (1981)). Only when the text of a statute is not clear should courts examine extrinsic aids such as congressional intent

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[4] That two parties offer differing interpretations of a text does not automatically render that text ambiguous. *Emergency Medical Care, Inc. v. Marion Mem'l Hosp.*, 94 F.3d 1059, 1061 (7th Cir. 1996).

and legislative history, *see id.*, and such is not the case here.

The Nation attempts to invoke additional canons of construction that, according to the Nation, dictate that ambiguous provisions of the IGRA be read to the full benefit of tribes. The tribal interpretation of a federal statute, however, is not correct merely because it is argued by a tribe in its own self-interest. No canon of construction trumps the plain meaning of a congressionally enacted statute.

Indeed, as this Court held in *Chickasaw Nation v. United States*, 534 U.S. 84, 122 S.Ct. 528, 535 (2001), a tribe's interpretation of a federal statute cannot be accepted if it produces an interpretation of a statute that Congress did not intend. "These canons [concerning deference] do not determine how to read a statute . . . canons are not mandatory rules . . . they are guides that 'need not be conclusive'." *Id.* (citations omitted). The so-called "pro-Indian canon" is not inevitably stronger than another canon, "particularly where the interpretation of a congressional statute rather than an Indian treaty is at issue." *Id.* at 535-536. Far from ignoring the Nation's interpretation, the Seventh Circuit simply rejected it and reached its own conclusions based on its reading of the plain language of the statute. *Ho-Chunk II*, 512 F.3d at 933.

Furthermore, the Seventh Circuit interpretation of the statute does not favor a State's interest to the detriment of tribal interests. The Seventh Circuit expressly noted that §2710(d)(7)(A)(ii) provides federal jurisdiction over

causes of action initiated by States and causes of action initiated by Indian tribes. *Ho-Chunk II*, 512 F.3d at 931 (Nation's App. A at 18a). The narrow construction of § 2710(d) that the Ho-Chunk Nation proffers would limit other Indian tribes' access to a federal forum to enjoin Class III gaming conducted in violation of a compact. Thus, the Nation is incorrect that its interpretation would benefit Indian tribes over other interests.

In addition, the IGRA is not a statute passed solely for the benefit of Indian tribes. The legislative history shows that Congress looked to the compacting process primarily as a means of balancing state and tribal interests. *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 726 (9th Cir. 2003). In *Artichoke Joe's*, the Court of Appeals looked to the Committee reports to discern these respective interests:

> In the Committee's view, both State and tribal governments have significant governmental interests in the conduct of class III gaming ... A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders. A State's governmental interests with respect to class III gaming on Indian lands include

> the interplay of such gaming with the State's public policy, safety, law and other interests, as well as *impacts on the State's* regulatory system, including its *economic interest in raising revenue for its citizens.*

Id. (emphasis in original), quoting S.Rep. No. 100-446, at 5-6 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3075-76.

The Nation points to language in the legislative history of the IGRA that states that the jurisdictional grant authorizes injunction of "illegal gaming" activity. (Petition at 26.) The Nation contends that this is somehow indicative of an intent to restrict federal courts' authority to enforce the terms and conditions of a tribal-State compact to enforcement of the list of games authorized, or playing a game in violation of rules of a game, or outside the hours of operation.

That interpretation is in direct conflict with the language of the statute that makes all Class III gaming activity unlawful unless it is conducted in accordance with the terms of the Compact. 25 U.S.C. § 2710(d)(1)(C). Even if a court were to consider the statutory text in connection with the legislative history, a straightforward reading would equate "illegal" with "unlawful" and conclude that Congress intended for a District Court to have the authority to halt Class III gaming when a tribe willfully violates the compact that permits legal gaming.

Furthermore, the legislative history also states that "Class III gaming is lawful only when conducted in conformance with a tribal-State

Compact," and that Class III gaming "shall be subject to the terms and conditions of a tribal-State Compact." S.Rep. 100-446, 18, reprinted at 1988 U.S.C.C.A.N. 3071, 3088. Congress is clear – all Class III gaming is unlawful when a tribe fails to conform to the terms and conditions it agreed to in a tribal-State compact. *Id.*; 25 U.S.C. § 2710(d)(1)(C). It is apparent that Congress did not intend to impose any specific limitations on the sort of compact violations that give rise to jurisdiction.

Congress did not create a cause of action against a tribe to enforce only unspecified minor violations of a card game, while prohibiting enforcement of the material terms of the tribal-State compact. Congress intended that IGRA compacts would include a broad range of public policy related provisions to address both state and tribal interests, and there is no indication that Congress intended to limit the compact enforcement mechanisms to a particular subset of those provisions.

D. The petition does not raise a compelling issue of national importance.

The Nation's claims of the of the national significance of reviewing the Seventh Circuit's decision construing § 2710(d)(7)(A)(ii) are overstated. Putting aside the fact that the Seventh Circuit decision did not create a split among circuits, and that a contrary reading of the statute would not impact the alternate grounds for federal jurisdiction in this case, a contrary reading of the statute would not have an impact of national significance. The fact that only a few courts have even considered the issue

of the scope of § 2710(d)(7)(A)(ii) suggests that the this particular grant of subject matter jurisdiction and waiver of sovereign immunity is invoked infrequently. This provision does not and has not opened the floodgates for litigation as the Nation suggests.

Furthermore, the prevailing interpretations of § 2710(d)(7)(A)(ii) do not result in "state attempts to exert control over Indian gaming" beyond what Congress intended. Indeed a tribe must appear to be in breach of the agreed terms of its Compact for jurisdiction to arise in the first place. Congress allowed for jurisdiction without specifically limiting the types of Compact violations that give rise to jurisdiction.

The Nation's suggestion that states will obtain injunctions for just "any violation" is also unfounded. District Courts have long had the capacity to consider materiality of contract breaches before providing a remedy. In cases of requests for injunctions, District Courts have long considered reasonable limits when exercising discretion to enter injunctions. There is nothing in this record that makes this case suitable for review on the question of trial court discretion to issue injunctions.

CONCLUSION

WHEREFORE, based upon the foregoing this Court should deny the Petitioner's request for *certiorari* review.

Dated this 11th day of June, 2008.

Respectfully submitted,

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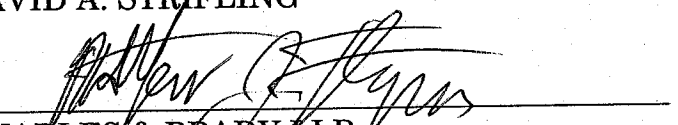

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