No. 12-515

In The
Supreme Court of the United States

STATE OF MICHIGAN,

Petitioner,

v.

BAY MILLS INDIAN COMMUNITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Indian Gaming Regulatory Act, 25 U.S.C. §§2701-2721, reflects a comprehensive scheme for the regulation of gaming on Indian lands. As a part of that regulatory scheme, Congress authorized limited types of claims to be brought in federal district courts between tribes and states, and abrogated tribal and state sovereign immunity in order for those claims to proceed. 25 U.S.C. §2710(d)(7)(A)(ii).

1. May a state bring a cause of action against an Indian tribe under §2710(d)(7)(A)(ii) when the jurisdictional prerequisites for such a claim under that section have not been met?

2. If a state fails to meet the jurisdictional prerequisites for suing a tribe under §2710(d)(7)(A)(ii), may a state nonetheless sue a tribe in federal district court pursuant to 28 U.S.C. §1331, notwithstanding an Indian tribe's immunity from suit, which has not otherwise been abrogated by Congress or waived by the affected Indian tribe?

PARTIES TO THE PROCEEDING

The five elected members of the Bay Mills Indian Community, in their respective official capacities, the five appointed members of the Bay Mills Tribal Gaming Commission in their respective official capacities, and the Bay Mills Tribal Gaming Commission are additional parties below who are not parties to the proceeding in this Court. *State of Michigan's Amended Complaint*, Petitioner's Appendix, 55a. Because these additional eleven defendants were joined to the case below, subsequent to Bay Mills' interlocutory appeal from the district court, the district court action continues against these defendants, despite the Sixth Circuit ruling and whether this Court grants or denies the petition for writ of certiorari.

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BRIEF IN OPPOSITION

Respondent Bay Mills Indian Community respectfully requests that the State of Michigan's petition for a writ of certiorari be denied.

OPINIONS BELOW

In addition to the opinion of the district court identified by the State, in Pet. App. at 19a-39a, Bay Mills refers the Court to the district court's subsequent opinion and order on April 14, 2011, denying Bay Mills' Motion to Stay Injunction Pending Appeal of its order to the Sixth Circuit Court of Appeals. This opinion explicitly disavows the district court's initial holding that 28 U.S.C. §1331 abrogated Bay Mills' sovereign immunity and provided subject matter jurisdiction to the court. That opinion and order is appended. Resp. App. at 1-11.

INTRODUCTION

Although the petition seeks to present questions of federal jurisdiction and tribal sovereign immunity, the underlying dispute between the Tribe and the State is whether lands purchased by the Tribe with funds made available to the Tribe under the Michigan Indian Land Claims Settlement Act are "Indian lands" as defined in the Tribal-State Compact between Bay Mills and the State. That dispute, however, continues against the Tribe's officials and its

Gaming Commission in the district court and also is the subject of a separate declaratory judgment action brought by the Tribe, in federal court, before the same district court judge, with the Governor of the State as a party, in which there are no questions of federal jurisdiction or tribal sovereign immunity. There are many reasons why the State's petition should be denied, and those are detailed below. But chief among them are the above facts. There is no need for this Court to grant certiorari review of an interlocutory ruling when the underlying dispute between the parties is being resolved in a pending action brought by the Tribe that presents none of the issues for which this Court's review is sought and while the original action proceeds against other defendants below. In addition, and contrary to the State's representations, there are no conflicts in the various circuit courts of appeal regarding whether the jurisdictional requirements of §2710(d)(7)(A)(ii) have been met in the circumstances presented by this case. The petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

The Bay Mills Indian Community is an Indian tribe located in the northern region of the State of Michigan. It has been continuously acknowledged since European contact and formally recognized in its modern governmental form since November 4, 1936. On December 15, 1997, Congress enacted the Michigan Indian Land Claims Settlement Act, P.L. 105-143

("MILCSA") for the benefit of Bay Mills and four other tribes, which allocated funds awarded to the five tribes due to inadequate compensation for land ceded by the Treaties of March 28, 1836, 7 Stat. 491, and August 2, 1855, 11 Stat. 631, by the Indian Claims Commission pursuant to the Indian Claims Commission Act of 1946, 25 U.S.C. §70, *et seq.* In the Bay Mills portion of the Act (§107), Congress established and funded a Land Trust for the benefit of Bay Mills and directed that lands purchased by Bay Mills with Land Trust funds are to be "held as Indian lands are held." MILCSA §107(a)(3).

In August 2010, pursuant to the authority in §107(a) of MILCSA, Bay Mills purchased land with funds from the Land Trust in the Village of Vanderbilt in Otsego County, Michigan ("Vanderbilt Parcel"). Accordingly, the Parcel is "Indian land," subject to the Tribe's governmental authority and available for gaming activities under the Indian Gaming Regulatory Act, 25 U.S.C. §2701, *et seq.*[1] Based on this authority, Bay Mills commenced gaming operations on the Vanderbilt Parcel on November 3, 2010, with 38 electronic games of chance, later expanding the facility to 84 electronic gaming devices.

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[1] In order to promote the economic welfare of its community, Bay Mills entered into a Class III Compact for gaming with the State of Michigan on August 20, 1993, pursuant to IGRA. (*Compact*, Pet. App. 73a-96a) Bay Mills regulates its gaming through tribal law. (*Bay Mills Gaming Ordinance, as amended*, partially reproduced in Pet. App. at 101a-170a.)

In reaction to Bay Mills' activities, the State filed suit on December 21, 2010, in the United States District Court for the Western District of Michigan arguing that Bay Mills could not conduct gaming on the Vanderbilt Parcel because it was not "Indian Lands" under its compact. Such gaming, it contended, was therefore in violation of IGRA.[2] The State thereafter supported a preliminary injunction requested in a companion case filed the following day by Little Traverse Bay Bands of Odawa Indians ("LTBB"), which also sought to end Bay Mills' gaming operations on the Vanderbilt Parcel.

On March 29, 2011, the district court issued the requested preliminary injunction ordering Bay Mills to cease its operations at the facility. (*Opinion and Order Granting Plaintiff Little Traverse Bay Bands of Odawa Indians' Motion for Preliminary Injunction,* Pet. App. 19a-39a.) Bay Mills filed an interlocutory appeal of the preliminary injunction on March 30, 2011, based primarily on jurisdictional grounds and sought a stay of the injunction from the district court pending the appeal. The court denied Bay Mills' motion for stay of the preliminary injunction by written order on April 14, 2011. Notably, in denying

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[2] The State also claimed that the Vanderbilt Parcel was ineligible for gaming under §2719 of IGRA. The Sixth Circuit summarily disposed of this claim, based on Plaintiffs' pleadings and the plain language of §2719. Pet. App. at 9a-10a. The State has raised no challenge to that portion of the order in its petition.

Bay Mills' motion, that court also amended the basis of its holdings regarding tribal sovereign immunity and jurisdiction, making it clear that 28 U.S.C. §1331 does not abrogate tribal sovereign immunity from suit and therefore does not confer subject matter jurisdiction over the Tribe. (*Order,* Resp. App. 4-5.)

On July 15, 2011, Bay Mills filed suit in the same forum (the United States District Court for the Western District of Michigan) against the Governor of the State of Michigan, Rick Snyder, in his individual and official capacities. Bay Mills' complaint seeks declaratory and injunctive relief to preclude the application of Michigan law, on the grounds that the Vanderbilt Parcel is "Indian lands" created by MILCSA, subject to the civil and criminal laws of the Tribe upon its acquisition with Land Trust Funds, and consistent with that term as defined by the Tribe's Compact and IGRA. (*Complaint, Case No. 1:11-cv-729-PLM* (W.D. Mich.), Resp. App. 12-19.) This case was assigned to the same trial judge as a related case. On that same day, the State sought leave to amend its complaint in this proceeding by adding additional defendants – the five members of the Tribe's elected governing body in their official capacities, the five appointed members of the Bay Mills Gaming Commission in their official

capacities, and the Bay Mills Tribal Gaming Commission – and additional claims for relief.[3]

With Bay Mills' appeal pending, the district court entered an order on February 24, 2012, staying all proceedings in the case "pending a decision of the Sixth Circuit Court of Appeals," over the objections of all named defendants. The Court of Appeals for the Sixth Circuit issued its opinion and judgment on Bay Mills' interlocutory appeal on August 15, 2012. (*Opinion and Judgment of United States Court of Appeals,* Pet. App. 1a-18a.) In its order, the Court vacated the preliminary injunction and remanded the case for further proceedings consistent with its opinion.

Upon return of the mandate,[4] the district court issued an order lifting its stay and directing the parties to file a status report in light of the Sixth Circuit's decision. LTBB advised that it would voluntarily seek dismissal of Case No. 1:10-cv-1278, and the district court thereafter dismissed the action with prejudice "for lack of jurisdiction." The district court then dismissed without prejudice all pending motions, which had been filed by all twelve defendants in the State's case. At the direction of the Court,

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[3] On August 9, 2011, the State's motion was granted; the Amended Complaint was docketed that same day. (*Amended Complaint*, Pet. App. 55a-72a.)

[4] The mandate was returned to the district court on September 6, 2012.

renewed motions to dismiss were subsequently filed and are pending.

The State's petition for certiorari was filed that same day, and docketed by the Clerk on October 25, 2012.

REASONS FOR DENYING THE PETITION

I. Abrogation of Tribal Sovereign Immunity Under 25 U.S.C. §2710(d)(7)(A)(ii) is Limited to its Terms.

The State's challenges to the Sixth Circuit's construction of the jurisdictional prerequisites of §2710(d)(7)(A)(ii) are based on a misunderstanding of the Court's ruling, misstatements of the holdings of other court decisions and misconstruction of the federal common law principles of sovereign immunity and statutory construction. Combined, these mischaracterizations cause the State to claim that its petition for certiorari must be granted in order to avoid on-going conflicts between states and Indian tribes throughout the country over gaming controversies. That claim is baseless, as is the legal analysis the State presents in support.

A. The Rules Regarding Tribal Sovereign Immunity and Statutory Construction are Well Established.

Any review of this proceeding must begin with acknowledgement of the status of the Bay Mills

Indian Community as a federally recognized Indian tribe. Due to that status, Bay Mills is a sovereign government, with well-recognized attributes of sovereignty. *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17 (1831). One attribute of sovereignty enjoyed by Bay Mills is sovereign immunity from unconsented suits. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). This basic principle has been restated as recently as *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001). Thus, "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies,* 523 U.S. 751, 754 (1998). Abrogation of tribal sovereign immunity by Congress must be clear and unequivocal and may not be implied. *See, e.g., Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, *supra*; and *Turner v. United States*, 248 U.S. 354, 358 (1919).

It is a well-established principle of statutory construction that "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). Accordingly, when Congress abrogates or waives sovereign immunity by way of enactment of a detailed statutory scheme, the remedies provided therein are exclusive. As recently as this month, in

considering the extent to which Congress waived the sovereign immunity of the United States in the Fair Credit Reporting Act, 15 U.S.C. §1681 *et seq.*, this Court called this tenet: a "basic proposition." *United States v. Bormes*, ___ U.S. ___, 2012 WL 5475774, *5 (U.S.) and continued, "Where a specific statutory scheme provides the accoutrements of a judicial action, the metes and bounds of the liability Congress intended to create can only be divined from the text of the statute itself." Chief Justice Roberts also cited this "well-established principle" in *Hinck v. U.S.*, 550 U.S. 501, 506 (2007), noting that the remedy provided by a statute is exclusive when Congress enacts legislation that contains a specific remedy where no remedy previously existed or where previous remedies were "problematic." *Id.*, citing *Block v. North Dakota ex rel. Board of Univ. and School Lands,* 461 U.S. 273, 285 (1983) and *Brown v. GSA*, 425 U.S. 820, 834 (1976).

These rules are no different in the context of tribal sovereign immunity. In *Santa Clara Pueblo v. Martinez, supra,* this court considered whether an implied cause of action existed against the tribe and its officials for an alleged violation of the Indian Civil Rights Act, 25 U.S.C. §1301 *et seq.* This Court held that no implied cause of action existed under the provisions of the act. It noted that respect for tribal sovereignty as well as deference for Congress' intent to structure the Indian Civil Rights Act to provide a specific remedy (here the privilege of a writ of *habeas corpus* to challenge unlawful detention by a tribe) did

not warrant an intrusion into tribal sovereignty by judicially creating a cause of action and stated, "[W]e tread lightly in the absence of clear legislative intent." 436 U.S. at 60.

Like the Indian Civil Rights Act, IGRA too is a federal statute which provides a limited abrogation of tribal sovereign immunity through the structure of a detailed statutory scheme, with specific and limited remedies. See, *State of Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1246-50 (11th Cir. 1999) (detailing the purpose, intent, structure and remedies of IGRA in making the analysis required to determine the existence of an implied cause of action under *Cort v. Ash*, 422 U.S. 66 (1975)). See also, *Tamiami Partners, Ltd. By & Through Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Florida*, 63 F.3d 1030, 1049 (11th Cir. 1995) ("In the face of these express rights of action [under IGRA], we adhere to '[a] frequently stated principle of statutory construction[:] when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.'" (citation omitted).) and *Hein v. Capitan Grande Band of Diegueno Mission Indians,* 201 F.3d 1256, 1260 (9th Cir. 2000), relying on *Tamiami*, holding that the existence of such explicit provisions authorizing suits persuaded the Eleventh Circuit that plaintiffs could not sue for other alleged violations of IGRA.

B. The Sixth Circuit's Holding Is Consistent with These Well-Established Rules.

The necessary focus for consideration of the State's petition is the meaning and scope of 25 U.S.C. §2710(d)(7)(A)(ii) of IGRA. Section 2710(d)(7)(A)(ii) contains both specific criteria for jurisdiction and a limited abrogation of tribal sovereign immunity as to when and who may file suit; it reads in pertinent part:

> (7)(A) 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 . . . that is in effect[.]

As described by the Sixth Circuit, this language:

> is conjunctive – that is, the State or tribal plaintiff must meet *all* of the provision's conditions for jurisdiction to exist, rather than just one or two of them. Thus, §2710(d)(7)(A)(ii) supplies federal jurisdiction only where all of the following are true: (1) the plaintiff is a State or an Indian tribe; (2) the cause of action seeks to enjoin a class III gaming activity; (3) the gaming activity is located on Indian lands; (4) the gaming activity is conducted in violation of a Tribal-State

> compact; and (5) the Tribal-State compact is in effect.

Opinion, (Pet. App. 7a.) Under the statute, then, the State's claims that the Bay Mills land in question is not "Indian land" place these claims outside the ambit of 2710(d)(7)(A)(ii)'s grant of jurisdiction, and its concomitant abrogation of tribal sovereign immunity.[5] In the absence of compliance with all the prerequisites of §2710(d)(7)(A)(ii) for subject matter jurisdiction, there is likewise no abrogation of Bay Mills' tribal sovereign immunity.

The Sixth Circuit's conclusion that the remedies provided in §2710(d)(7)(A)(ii) are exclusive, and do not extend to any other type of relief which the State might seek, results from application of the statutory construction principle brought to bear when regarding a comprehensive regulatory scheme, which IGRA clearly is. The State's argument that the contrary conclusion should prevail warrants the observation made by this Court in *United States v. Bormes, supra* at 6: "[t]o hold otherwise – to permit plaintiffs to remedy the absence of a waiver of sovereign immunity in specific detailed statutes by pleading general . . .

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[5] This exercise in statutory construction is exactly what this Court demands of a reviewing court when construing a statute. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (court must give effect, where possible, to every clause and word of a statute) and *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989)(starting point for construing a statue is the plain language of the statute, itself), in addition to limiting relief in such statutes to the specific remedies provided therein.

jurisdiction – would transform the sovereign-immunity landscape."[6] The Sixth Circuit declined the State's invitation and was correct in so doing.

C. Other Courts Have Likewise Construed §2710(d)(7)(A)(ii).

Other Circuits have similarly considered the jurisdictional prerequisites of §2710(d)(7)(A)(ii) as

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[6] The State relies heavily on *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010) in suggesting the alternative approach to general versus specific remedies. But that case is very different from the case at bar. There, the plaintiff challenged the constitutionality of the Oversight Board created by the Sarbanes-Oxley Act, 15 U.S.C. §7201 *et seq*. The Board argued that jurisdiction to review Board decisions was conferred by statute, that such jurisdiction was in the Court of Appeals, and that any other challenge lacked jurisdiction to be heard in federal court. The Court concluded, *inter alia*, that although a Board decision could be challenged in the appeals court, there was no reason to require the plaintiff to go through that process, incur sanctions and/or fines, etc., before raising its constitutional challenge. Thus, in *Free Enterprise Fund*, there was no issue about whether the plaintiff could raise its constitutional challenge in a federal court. It was going to be raised one way or another because of the provision in *Sarbanes-Oxley* allowing review of Board decisions. More importantly, there was no issue about sovereign immunity, unlike here. There, sovereign immunity had been waived (abrogated) because complainants could review Board action, per the statute. To allow an aggrieved party to sue under §1331 and raise its constitutional challenge, as opposed to going through the Board's processes and then seeking judicial review, which would include its constitutional challenge, is an unremarkable result. It certainly does not represent a split in the Circuits about the meaning and interpretation of IGRA and §2710(d)(7)(A)(ii).

both a predicate to subject matter jurisdiction and a resulting abrogation of tribal sovereign immunity. Their holdings are consistent with that of the Sixth Circuit in this case.

1. The Eleventh Circuit Position.

The Eleventh Circuit rejected, in a carefully worded and comprehensive opinion, the State of Florida's efforts to bring suit under §2710(d)(7)(A)(ii) against the Seminole Tribe of Florida, for engaging in Class III gaming without first concluding a Class III gaming compact with the State. In *State of Florida v. Seminole Tribe of Florida*, *supra*, that court construed §2710(d)(7)(A)(ii) as requiring a compact to be in effect in order for a cause of action to be adjudicated. The lack of a compact was a jurisdictional defect that the State could not cure. In so holding, the Eleventh Circuit expressly rejected the State of Florida's argument that §2710(d)(7)(A)(ii) should be construed to evince a broad congressional intent to abrogate tribal sovereign immunity from any state suit that seeks declaratory or injunctive relief for an alleged tribal violation of IGRA. It noted that this "broad reading" of the section:

> directly contradicts two well-established principles of statutory construction: that Congress may abrogate a sovereign's immunity only by using statutory language that makes its intention unmistakably clear, and that ambiguities in federal laws implicating

> Indian rights must be resolved in the Indians' favor. [citations and footnotes omitted]

State of Florida v. Seminole Tribe of Florida, supra at 1242.

The Eleventh Circuit similarly rejected in that case the State of Florida's alternative argument that the Seminole Tribe had waived its governmental immunity from the State's suit by electing to engage in the type of gaming – electronic games of chance – which is regulated under IGRA's provisions. It considered the State's argument to be inconsistent with the long-standing rule of this Court that "waivers of tribal sovereign immunity cannot be implied on the basis of a tribe's actions, but must be unequivocally expressed." *Seminole Tribe* at 1243 [footnote omitted].[7]

2. The Ninth Circuit Position.

Cases arising in the Ninth Circuit have likewise resulted in holdings which limit §2710(d)(7)(A)(ii) causes of action to that section's express terms. For example, the State of California's effort to shut down gaming activities which it claimed violated its Class III compact was dismissed in *Cabazon Band of Mission Indians v. Wilson,* 124 F.3d 1050, 1059-1060

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[7] The Eleventh Circuit had also previously issued an opinion that IGRA does not create implied or private causes of action for every case, simply because an Indian tribe and gaming are involved. *Tamiami Partners v. Miccosukee Tribe of Indians of Florida*, 63 F.3d 1030, 1049 (11th Cir. 1995).

(1997) (*Cabazon III*). There, the Ninth Circuit reasoned that §2710(d)(7)(A)(ii) limits federal court jurisdiction to those circumstances in which the gaming activity at issue is expressly prohibited by the applicable tribal-state compact. The compacts signed by the Tribes did not cover the slot machines and other banked and percentage games which California sought to enjoin, and the court therefore held no violation of the compacts existed.

The State's assertion at p. 10 that *Cabazon III* is in direct conflict with the Sixth Circuit decision at issue here is erroneous. That case had originally been filed by two Tribes against the State pursuant to the terms of the Class III compact; the compact provided for resolution of any dispute regarding the applicability of California's licensing fees to revenues generated at the Tribes' off-track racing simulcast facilities to be determined in federal court. In a previous decision, the Ninth Circuit held that such fees could not be assessed against the revenues generated at the Tribes' facilities. *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir. 1994) (*Cabazon II*). *Cabazon III* resulted from California's refusal to refund the fees to the Tribes on the grounds that the *Cabazon II* decision was so adverse to the State's interests as to constitute invalidation, and that California was immune from suit under the Eleventh Amendment. All these claims were considered unavailing by the Ninth Circuit, as the State of California had expressly waived its immunity by statute and in its compact. "By agreeing to judicial review by the district court of

all actions under the Compacts and of any interpretation of the Compacts, the State consented to be subject to suit in federal court for the enforcement of a [revenue dispute provision][.]" *Cabazon III supra* at 1057. Clearly, no implied cause of action was held to be derived from §2710(d)(7)(A)(ii) by that decision.[8]

3. The Seventh Circuit Position.

Strict adherence to the prerequisites of §2710(d)(7)(A)(ii) for jurisdiction to proceed in an action against an Indian Tribe has also been required by the Seventh Circuit, contrary to the State's assertions. In *State of Wisconsin v. Ho-Chunk Nation*, 463 F.3d 655 (7th Cir. 2006) (*Ho-Chunk I) rev. on other grounds, Vaden v. Discover Bank*, 556 U.S. 49 (2009), suit by that State against the Nation for ceasing revenue sharing payments was dismissed because the State based its claims on the Nation's failure to arbitrate its dispute under the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*, rather than on an alleged violation of the Tribal-State compact. The State then filed an amended complaint which alleged that the stoppage of payments by the Nation violated its

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[8] More recently, the Ninth Circuit declined to infer a private cause of action under §2710(d)(7)(A)(ii) in a suit against an Indian tribe brought by a private group of non-member Indians. *Hein v. Capitan Grande Band of Diegueno Mission Indians, supra* at 1260. "Where a statute creates a comprehensive regulatory scheme and provides for particular remedies, courts should not expand the coverage of the statute."

Compact in contravention of §2710(d)(7)(A)(ii); jurisdiction over the State's claims was then held to exist and the Tribe's sovereign immunity as to those claims was abrogated. *State of Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921 (7th Cir. 2008) *(Ho-Chunk II)*.[9]

4. The Tenth Circuit Position.

Anchoring the State's arguments for a review of the merits of the Sixth Circuit's decision is the holding in *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385 (10th Cir. 1997). That decision should not be considered in a vacuum, as it arose from a specific set of circumstances which are unique and unlikely to reoccur: a previous Class III gaming compact, signed by the Governor of the State and approved by the Secretary of the Interior, for the New Mexico Pueblos was declared invalid under state law by the New Mexico Supreme Court. Suit was initiated by the Tribes, seeking a declaration that the compacts continued to be valid, and enjoining the defendant

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[9] In so doing, the Seventh Circuit prescribed the type of violation of the Tribal-State Class III compact which was justiciable under §2710(d)(7)(A)(ii), in order to assure that only compact provisions complying with IGRA could be the subject of an enforcement action, as it was wary that a revenue sharing provision in a compact could run afoul of IGRA. *Ho-Chunk II, supra* at 932. The Seventh Circuit therefore limited the type of compact violations cognizable under §2710(d)(7)(A)(ii) to those listed in §2710(d)(3)(C). *Ho-Chunk II, supra*, at 933-934. The Seventh Circuit is the only appellate court to have addressed this issue.

United States Attorney, the United States Attorney General, and the Secretary of the Interior from taking actions to terminate the Pueblo gaming activities during the pendency of the proceedings; the State of New Mexico was joined as a party by the federal defendants. *Pueblo of Santa Ana v. Kelly,* 104 F.3d 1546 (10th Cir. 1997). The Tenth Circuit declared the compacts invalid but acknowledged the sensitivity of the situation, and admonished everyone:

> In so holding, we are acutely aware that while we have reached a decision in this case, as we must, we have by no means solved an extremely difficult and sensitive problem facing tribe members, citizens, and legislators in New Mexico. The only hope for a satisfactory solution is through dialogue and good faith negotiation between all involved parties. We hereby stay the mandate in this case, pending final resolution of this matter, either in this court or the United States Supreme Court.

Pueblo of Santa Ana v. Kelly, supra at 1559.

Several months later, the same judge wrote the Tenth Circuit's decision in the companion case, *Mescalero Apache Tribe v. New Mexico, supra.* That case was filed in 1992 by the Mescalero Apache Tribe under §2710(d)(7)(A)(i),[10] alleging that New Mexico

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[10] The section provides jurisdiction to the district courts over "any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the

(Continued on following page)

had failed to enter into good faith compact negotiations. Years later, the State sought dismissal of the case by filing a counterclaim based on the *Santa Ana* declaration that the existing compacts were void and unenforceable for not being formalized as required by New Mexico law. The State argued that, because the *Santa Ana* Tribes' compacts were void, the Mescalero compact was also void on the same grounds. The Tribe argued that such a counterclaim was not cognizable under §2710(d)(7)(A)(i) and the Tribe's sovereign immunity was not abrogated by its terms because the section only provides a cause of action to a tribe, not to a state. The Tenth Circuit sidestepped this argument and instead held it had jurisdiction under §2710(d)(7)(A)(ii) to determine the State's claims against the Tribe as to compact validity. In so holding, it pronounced that "[w]hile there is sparse case law on the issue, it appears the majority supports the view that IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought." *Mescalero, supra*, at 1385.

The Tenth Circuit did not have before it a controversy as to the existence of "Indian lands," and any assertion by the State as to what holding that Court would make regarding that issue is pure speculation.

Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith." 25 U.S.C. §2710(d)(7)(A)(i).

But the Tenth Circuit's pronouncement was based on cases which instead considered whether a tribe voluntarily waives its own sovereign immunity by engaging in gaming under IGRA. *Id.* Based on the lack of supporting authority for the *Mescalero* declaration that §2710(d)(7)(A)(ii) broadly abrogates tribal sovereign immunity, the Eleventh Circuit declined to follow suit, declaring that, "[i]n light of this absence of supporting authority, we find the *Mescalero* panel's claim difficult to credit." *Seminole Tribe, supra*, at 1242.

Since the *Mescalero* opinion was issued, no other federal appellate court decision which has considered the opinion has adopted its construction of §2710(d)(7)(A)(ii). The State's citation at p. 13 to *Lewis v. Norton*, 424 F.3d 959 (9th Cir. 2005), as in "accord" with *Mescalero* is clear error. No tribe was a party to that case; instead, individuals seeking enrollment in a particular tribe sued Department of Interior and National Indian Gaming Commission ("NIGC") officials to obtain enrollment and to have gaming per capita payments by the Tribe withheld from distribution until the individuals obtained membership status. Citing *Mescalero*, the individuals urged the Ninth Circuit to find jurisdiction over these claims and defendants under IGRA. The Court declined to do so.

The Sixth Circuit declined to follow *Mescalero* on this point for similar reasons: "But *Mescalero* offers virtually no analysis in support of its contrary reading of §2710(d)(7)(A)(ii) – a point which the State, to its credit, concedes here; and to the extent the opinion

does offer any analysis, it mistakenly cites waiver cases rather than abrogation ones." (*Opinion*, Pet. App. 13a.)

Because the *Mescalero* decision is poorly reasoned, and has been rejected by several other circuit courts, there is no need for this Court to wade into this issue. The State's efforts to characterize the Sixth Circuit's opinion as inconsistent with holdings of other Circuits concerning the necessary prudential elements of §2710(d)(7)(A)(ii) and tribal sovereign immunity do not withstand scrutiny.

II. There is no Circuit Conflict Regarding the Effect of Federal Question Jurisdiction Under 28 U.S.C. §1331 on Tribal Sovereign Immunity.

Similarly, the State's assertions regarding federal jurisdiction under the auspices of 28 U.S.C. §1331 misconstrue the Sixth Circuit's holdings and rely on inapposite court decisions. The State wrongfully conflates the possibility of subject matter jurisdiction under 28 U.S.C. §1331 with an automatic abrogation of tribal sovereign immunity. The same confusion was initially experienced by the district court, which granted a preliminary injunction against Bay Mills solely based on 28 U.S.C. §1331. (*Opinion*, Pet. App. 25a.) The district court corrected itself, by stating unequivocally that §1331 does not abrogate Bay Mills' immunity from unconsented suit; it cited with approval *Miner Elec., Inc. v. Muscogee (Creek) Nation,* 505 F.3d 1007 (10th Cir. 2007) and stated: "Where

another statute provides a waiver of tribal sovereign immunity, or when the tribe has waived its immunity, §1331 may confer subject matter jurisdiction over an action involving a federal question." (Resp. App. 5)

Applying these principles, courts faced with a claim against an Indian tribe founded solely on federal question jurisdiction under §1331 have dismissed those cases on the grounds that the provision does not clearly and unequivocally abrogate sovereign immunity. *Memphis Biofuels, L.L.C. v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2007); *Miner Elec. Inc. v. Muscogee (Creek) Nation, supra*; *High Country Citizens Alliance v. Clarke*, 454 F.3d 1177, 1181 (10th Cir. 2006), *cert. denied*, 550 U.S. 929 (2007). The Sixth Circuit in this case simply followed existing precedent on this matter of law, by acknowledging that federal question jurisdiction under 28 U.S.C. §1331 may exist, but does not provide in and of itself abrogation of Bay Mills' sovereign immunity. (*Opinion*, Pet. App. 11a-12a.)

Even more to the point, there simply does not exist any appellate court decision – and the State does not cite one – which holds that federal-question jurisdiction under §1331 by itself negates an Indian tribe's immunity from suit.

III. In Addition to the Arguments Above, Other Considerations Counsel Against Review.

The ultimate issue in the State's suit against the Tribe is its argument that the land in Vanderbilt is not "Indian lands," over which the Tribe has jurisdiction.[11] (*Amended Complaint*, Pet. App. at 55a-72a.) In its Petition to this Court, the State claims that it merely seeks a forum in which to air this grievance against the Tribe. But there are already multiple forums where the State will be heard.

First, as noted above, a related case involving the same parties and the same factual and legal issues is currently pending below; that case will resolve those issues, without the need for review by this Court of any of the questions the State seeks to present here. That case is *Bay Mills Indian Community v. Rick Snyder*, Case No. 1:11-cv-729 (W.D. Mich.). (*Bay Mills' Snyder Complaint*, Resp. App. 12-19.) There, Bay Mills seeks a declaratory judgment that the laws of the Bay Mills Indian Community apply to its Vanderbilt Parcel. (*Bay Mills' Snyder Complaint*, Resp. App. 19.)

By initiating the *Snyder* lawsuit, Bay Mills has already removed the jurisdictional hurdles to resolving this matter about which the State complains so

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[11] The State's repeated suggestions throughout its *Petition* that the status of the Vanderbilt Parcel has been determined in the courts below are inaccurate. The status of the land is an issue that remains to be resolved on the merits.

vociferously. The existence of tribal jurisdiction over the Vanderbilt parcel is, by Bay Mills' own admission, a federal question. (*Bay Mills' Snyder Complaint*, Resp. App. at 12, (citing 28 U.S.C. §1362 for federal question jurisdiction in an action brought by an Indian tribe).) The State clearly agrees as it notes at p. 2 of its petition that 28 U.S.C. §1331 justifies federal court jurisdiction over such a controversy. In addition, Bay Mills' sovereign immunity is also no longer a jurisprudential barrier prohibiting the adjudication of tribal governmental authority and jurisdiction over the Vanderbilt Parcel. Finally, because the Tribe has initiated the suit seeking declaratory relief. In such cases a tribe can be held to the result. See, *e.g.*, *United States v. State of Oregon*, 657 F.2d 1009, 1015 (9th Cir. 1989) (a tribe voluntarily entering into a lawsuit is bound by the court's orders which result.)

Thus without the issues of tribal sovereign immunity and jurisdiction for which the State seeks this Court's review, the district court, via the *Snyder* case, will be able to resolve the issue of the status of Bay Mills' Vanderbilt property as "Indian land." The resulting determination will effectively resolve the arguments by both the State and the Tribe for and against Bay Mills' gaming activities on the property. Should the court determine that the lands are not "Indian lands" under MILCSA, then the Tribe has no governmental authority over the property; its ability to regulate gaming on that property is therefore plainly foreclosed. Should the court find that Bay Mills has correctly implemented the plain language of

MILCSA, and the property is "Indian lands," the State could then clearly proceed against Bay Mills under §2710(d)(7)(A)(ii) of IGRA for any alleged compact violations which it claims have or will occur as all the jurisdictional prerequisites for abrogation of tribal sovereign immunity under that section will then be met. In either case, the matter will be conclusively resolved without the need for review by this Court.

In addition to proceeding in the *Snyder* case, the State is still able to continue its case in the district court against the additional defendants named in its Amended Complaint. An adverse judgment against them in subsequent proceedings would permanently enjoin the officials from "permitting and conducting class III gaming" just as the relief requested would have impacted the Tribe. The State's concerns expressed in its petition at p. 17 regarding the "different political ramifications" of proceeding against Bay Mills officials rather than the tribe is a laudable but unnecessary consideration. By electing to amend its complaint to add these defendants, the State has chosen to accept whatever political ramifications might result. And, as was noted above, whether the named defendant is Bay Mills or its officials, the State seeks to shut down permanently Bay Mills' economic activities in Vanderbilt; such action is "friction" enough. Further, any of the State's concerns over differing political ramifications of an *Ex parte Young* action against the Tribe's officers should have been lessened greatly when Bay Mills itself took action against its governor in the *Snyder* case.

Each of these proceedings – *Bay Mills v. Snyder* and the proceedings against the additional defendants in this action below – provides an opportunity for both parties to seek and receive complete relief on the merits of their arguments. Moving forward in either case would cause no hardship or prejudice to the State or otherwise limit its opportunity to be heard. In short, there is no reason to grant the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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