No. 18-894

IN THE
Supreme Court of the United States

HAROLD MCNEAL ET UX.,
Petitioners,
v.

NAVAJO NATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

DOREEN MCPAUL
Attorney General
PAUL SPRUHAN
NAVAJO NATION
DEPARTMENT OF JUSTICE
Post Office Drawer 2010
Window Rock, AZ 86515
(928) 871-6229
dmcpaul@nndoj.org

CATHERINE E. STETSON
Counsel of Record
HILARY TOMPKINS
COLLEEN E. ROH SINZDAK
MATTHEW J. HIGGINS
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
cate.stetson@hoganlovells.com

Counsel for Respondents

Additional counsel listed on inside cover

Additional Counsel:

PATRICK T. MASON
MASON & ISAACSON, P.A.
104 East Aztec
Gallup, NM 87301
p.mason@milawfirm.com

Counsel for Respondents

QUESTION PRESENTED

Whether the Tenth Circuit correctly held that the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*, precluded New Mexico from demanding a provision in their unique gaming compact with the Navajo Nation allocating jurisdiction over a tort suit arising from a slip-and-fall accident in the restroom of a casino located on the Nation's reservation?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT 3

A. The Indian Gaming Regulatory Act 3

B. The Navajo Nation's Compact With New Mexico 6

C. The McNeals' Suit 8

ARGUMENT 12

I. THE TENTH CIRCUIT'S NARROW HOLDING IS CONSISTENT WITH THIS COURT'S PRECEDENT AND PRESENTS NO ISSUE WORTHY OF CERTIORARI 12

A. The Tenth Circuit's Decision Vindicates Congress's Intent Under IGRA To Protect Tribal Sovereignty Without Unduly Impinging On State Interests 12

B. The Tenth Circuit's Narrow Holding Does Not Create A Conflict Necessitating This Court's Review 19

II. THE DECISION BELOW IS CORRECT 22

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES:

Bank of Am., N.A. v. *Caulkett*,
135 S. Ct. 1995 (2015) 23

Bonnette v. *Tunica-Biloxi Indians*,
873 So. 2d 1 (La. Ct. App. 2003) 22

Bryan v. *Itasca County*,
426 U.S. 373 (1976) 25

C&L Enterprises, Inc. v. *Citizen Band Potawatomi Indian Tribe of Okla.*,
532 U.S. 411 (2001) 16

California v. *Cabazon Band of Mission Indians*,
480 U.S. 202 (1987) 3, 13

Colo. River Indian Tribes v. *Nat'l Indian Gaming Comm'n*,
383 F. Supp. 2d 123 (D.D.C. 2005), *aff'd*,
466 F.3d 134 (D.C. Cir. 2006) 19

Cutter v. *Wilkinson*,
544 U.S. 709 (2005) 16

Diepenbrock v. *Merkel*,
97 P.3d 1063 (Kan. Ct. App. 2004) 22

Doe v. *Santa Clara Pueblo*,
154 P.3d 644 (N.M. 2007) ..... *passim*

Exxon Mobil Corp. v. *Allapattah Servs., Inc.*,
545 U.S. 546 (2005) 19

Gallegos v. *Pueblo of Tesuque*,
46 P.3d 668 (N.M. 2002) 22

Iowa Mut. Ins. Co. v. *LaPlante*,
480 U.S. 9 (1987) 6

TABLE OF AUTHORITIES—Continued

Page(s)

Kiowa Tribe of Okla. v. *Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998) 16

Kizis v. *Morse Diesel Int'l Inc.*, 794 A.2d 498 (Conn. 2002) 22

Michigan v. *Bay Mills Indian Community*, 572 U.S. 782 (2014) ..... *passim*

New Mexico v. *Dep't of Interior*, 854 F.3d 1207 (10th Cir. 2017) 5

Pueblo of Santa Ana v. *Kelly*, 104 F.3d 1546 (10th Cir. 1997) 7

Pueblo of Santa Ana v. *Nash*, 972 F. Supp. 2d 1254 (D.N.M. 2013) . 13, 14, 17, 23

Rincon Band of Luiseno Mission Indians of Rincon Reservation v. *Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010) 13, 17

Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978) 6, 26

Seminole Tribe of Fla. v. *Florida*, 517 U.S. 44 (1996) 4, 5

Sheffer v. *Buffalo Run Casino, PTE, Inc.*, 315 P.3d 359 (Okla. 2013) 22

TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 24

United States v. *Wheeler*, 435 U.S. 313 (1978) 6

Williams v. *Lee*, 358 U.S. 217 (1959) 6, 17

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL PROVISION:

U.S. Const. amend. XI 5

STATUTES:

Indian Gaming Regulatory Act,
25 U.S.C. § 2701 *et seq.* ..... *passim*
25 U.S.C. § 2702(1) 3
25 U.S.C. § 2703(8) 3
25 U.S.C. § 2710(b)(2)(B) 6
25 U.S.C. § 2710(d)(1)(C) 3, 5
25 U.S.C. § 2710(d)(3)(A) 4, 13
25 U.S.C. § 2710(d)(3)(C) 4, 13, 20
25 U.S.C. § 2710(d)(3)(C)(i) ..... *passim*
25 U.S.C. § 2710(d)(3)(C)(ii) ..... *passim*
25 U.S.C. § 2710(d)(3)(C)(vii) ..... *passim*
25 U.S.C. § 2710(d)(7) 5
25 U.S.C. § 2710(d)(7)(A)(ii) 23
25 U.S.C. § 2710(d)(7)(B)(ii)-(vii) 4
25 U.S.C. § 2710(d)(8) 7

Compact Negotiation Act,
N.M. Stat. Ann. § 11-13A-1 *et seq.* (1999) 7

7 Navajo Nation Code Ann. § 201 6

12 Navajo Nation Code Ann. § 2202(B) 6

12 Navajo Nation Code Ann. § 2204 6

12 Navajo Nation Code Ann. § 2205 6

TABLE OF AUTHORITIES—Continued

Page(s)

LEGISLATIVE MATERIAL:

BFAP-05-16, 23d Navajo Nation Council, Budget & Fin. Comm. (Navajo Nation 2016), *available at* https://tinyurl.com/yxqzmuhw 6

REGULATIONS:

Indian Gaming, 69 Fed. Reg. 2617 (Jan. 16, 2004) 7, 25

Indian Gaming, 80 Fed. Reg. 35668 (June 22, 2015) 8

OTHER AUTHORITIES:

Cohen's Handbook of Federal Indian Law (Nell Jessup Newton ed., 2017) 8, 24

Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 Ariz. St. L.J. 99 (2010) 4

Indian Gaming Compact Between the State of New Mexico and the Navajo Nation (rev. Feb. 2015), *available at* https://tinyurl.com/y2jdue5u 8

Letter from George T. Skibine, Dir., Office of Indian Gaming Mgmt., U.S. Dep't of the Interior, to Hon. John Arthur Smith, Chairman, Legislative Comm. on Compacts, New Mexico State Legislature (Jan. 28, 2000) 25

IN THE

Supreme Court of the United States

HAROLD MCNEAL ET UX.,

Petitioners,

v.

NAVAJO NATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

INTRODUCTION

Petitioners Harold and Michelle McNeal seek review of a Tenth Circuit opinion that announces a "limited procedural holding," based on "the circumstances presented" in this case, relating "solely to whether [the Indian Gaming Regulatory Act (IGRA)] authorizes tribes to allocate jurisdiction over tort claims like the McNeals' to state courts." Pet. App. 25a n.7, 40a (emphasis omitted).

Petitioners are members of the Navajo Nation. They brought a tort claim against the Nation based on a slip-and-fall in the bathroom of a casino located on tribal land. Rather than filing in tribal court, petitioners attempted to file in state court, citing a unique provision in the Navajo Nation's gaming

compact with New Mexico. That provision allows casino patrons to bring personal injury suits in state court, with the express caveat that the provision does not apply in the event a court rules it is unlawful under IGRA. In the decision below, the Tenth Circuit did just that, holding that the McNeals may not press their suit in state court.

There is no reason to review this fact-bound determination. Indeed, the two parties that entered into the gaming compact, the State of New Mexico and the Navajo Nation, have not sought review of the Tenth Circuit's decision. The McNeals are free to pursue relief in their own tribe's court system. Where neither the affected tribe nor the affected state has asked this Court to grant certiorari, and petitioners have a forum to adjudicate their claim, this Court should deny the petition for review.

Petitioners, however, assert that review is necessary because the Tenth Circuit's decision runs contrary to principles of federal law that foster tribal sovereignty. The Navajo Nation, a sovereign tribe, disagrees. The broad principles petitioners cite are not threatened by the decision below. The Tenth Circuit's narrow holding is predicated directly on this Court's decision in *Michigan* v. *Bay Mills Indian Community*, 572 U.S. 782, 785 (2014), and it is expressly limited to the particular circumstances of this case, Pet. App. 25a n.7. Moreover, the court of appeals' decision does not conflict with any post-*Bay Mills* precedent of the lower courts; the IGRA gaming compact provision at issue is unique to New Mexico; and the Tenth Circuit's decision plainly is correct. Certiorari should be denied.

STATEMENT

A. The Indian Gaming Regulatory Act

"The Indian Gaming Regulatory Act [IGRA], 25 U.S.C. § 2701 *et seq.*, creates a framework for regulating gaming activities on Indian lands." *Bay Mills*, 572 U.S. at 785. Congress passed IGRA in response to this Court's decision in *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which had held that absent Congressional action, "States lack[ ] any regulatory authority over gaming on Indian lands." *Bay Mills*, 572 U.S. at 794; *see* Pet. App. 5a. Through IGRA's "carefully crafted" scheme, Congress gave the states some power in this arena, while ensuring that tribes also retain a broad measure of authority over gaming activity on their own lands. *Bay Mills*, 572 U.S. at 795 n.6 (internal quotation marks omitted).

IGRA "divides gaming into three classes." *Id.* at 785. Class III gaming "includes casino games, slot machines, and horse racing." *Id.* (citing 25 U.S.C. § 2703(8)). Because this form of gaming is the "most lucrative," Pet. App. 6a (internal quotation marks omitted), it is essential to achieving IGRA's primary goal: "the operation of gaming by Indian tribes as a means of promoting tribal economic development[ ] [and] self-sufficiency." 25 U.S.C. § 2702(1); *see also* Pet. App. 49a-50a, 121a.

Under IGRA, tribes may offer class III gaming on tribal lands only if that gaming is "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." 25 U.S.C. § 2710(d)(1)(C); *see also Bay Mills*, 572 U.S. at 785. Congress recognized, however, that "this provision standing alone would put tribes at the mercy of

hostile states" that might make unfair demands as a condition of compacting or refuse to enter into compacts altogether. Pet. App. 54a (quoting Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 Ariz. St. L.J. 99, 176 (2010)). Congress therefore put in place multiple safeguards to protect tribal rights and interests.

First, Congress enacted measures designed to prevent states from taking unfair advantage of tribes through the compact bargaining process. IGRA explicitly mandates that a state must "negotiate with the Indian tribe in good faith to enter into [a gaming] compact," 25 U.S.C. § 2710(d)(3)(A), and the statute contains "an elaborate remedial scheme designed to" enforce that mandate, including the right to sue a state. *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 50 (1996) (citing 25 U.S.C. § 2710(d)(7)(B)(ii)-(vii)). Congress further provided that when a state refuses to accept a mediator's proposed compact, the Secretary of Interior shall dictate the "procedures * * * under which class III gaming may be conducted on the Indian lands * * * ." *Id.* (quoting § 2710(d)(7)(B)(vii)).

Second, Congress protected the tribes by including a provision governing the permissible contents of a tribal-state compact. Section 2710(d)(3)(C) of IGRA sets out precisely what types of "provisions" a tribal-state compact "may include." Its seven subsections each specify a discrete set of issues that the parties are authorized to include in a compact. 25 U.S.C. § 2710(d)(3)(C). As relevant here, subsection (i) allows IGRA compacts to contain provisions "relating to" "the application of the criminal and civil laws and regulations of the Indian tribe or the State that are

directly related to, and necessary for, the licensing and regulation of [class III gaming] activity." *Id.* § 2710(d)(3)(C)(i). Subsection (ii) permits "the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations." *Id.* § 2710(d)(3)(C)(ii). And subsection (vii) allows for contractual provisions "relating to" "any other subjects that are directly related to the operation of gaming activities." *Id.* § 2710(d)(3)(C)(vii).

Eight years after IGRA was passed, this latter set of protections for the tribes became far more important because this Court invalidated the former. In *Seminole Tribe*, the Court held that IGRA's "intricate" remedial scheme for ensuring good-faith negotiations by the states infringed on state sovereign immunity under the Eleventh Amendment. 517 U.S. at 75-76.

In the years since, the federal government has attempted without success to replace the invalidated remedial scheme. For example, the Tenth Circuit recently struck down an attempt by the Department of the Interior to issue regulations "to provide an alternative administrative remedial scheme that applies when a state asserts sovereign immunity in a § 2710(d)(7) suit." *New Mexico* v. *Dep't of Interior*, 854 F.3d 1207, 1213-14 (10th Cir. 2017). *Seminole Tribe* thus greatly strengthened the states' powers at the bargaining table. *See Bay Mills*, 572 U.S. at 796-797 (observing that "States have more than enough leverage to obtain" favorable terms in tribal-state compacts "because a tribe cannot conduct class III gaming on its lands without a compact, see § 2710(d)(1)(C), and cannot sue to enforce a State's duty to negotiate a compact in good faith").

B. The Navajo Nation's Compact With New Mexico

The Navajo Nation is a federally recognized tribe. Its vast territory spans New Mexico, Arizona, and Utah. The Nation possesses a "separate sovereign[ty] pre-existing the Constitution." *Bay Mills*, 572 U.S. at 788 (quoting *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978)); *see also Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 14 (1987); *United States* v. *Wheeler*, 435 U.S. 313 (1978). A core element of that sovereignty is the Nation's jurisdiction over suits brought by tribal members against tribal entities regarding activities on tribal land. *Williams* v. *Lee*, 358 U.S. 217, 223 (1959); 7 Navajo Nation Code Ann. § 201 (establishing the judicial branch of the Navajo Nation, which consists of eleven district courts and a Supreme Court).

Like many tribes, the Navajo Nation operates gaming facilities that generate critical revenue used "to fund tribal government operations," "provide for the general welfare of the Indian tribe and its members," "promote tribal economic development," and to fund charitable projects or "operations of local government agencies." 25 U.S.C. § 2710(b)(2)(B).[1]

In 2003, the Nation and the State of New Mexico "conducted negotiations pursuant to IGRA" and entered into a formal tribal-state gaming compact. Pet. App. 57a. As part of those negotiations, New

[1] *See also* 12 Navajo Nation Code Ann. §§ 2202(B), 2204, 2205 (setting out the authorized uses and distribution of gaming revenue); BFAP-05-16, 23d Navajo Nation Council, Budget & Fin. Comm. (Navajo Nation 2016), *available at* https://tinyurl.com/yxqzmuhw.

Mexico insisted that the Nation agree to a provision granting state courts jurisdiction over personal injury suits "arising on tribal land." Pet. App. 59a (quoting Section 8(A) of the compact). The Nation was reluctant to accept this infringement on its adjudicative authority, and questioned whether such a provision could lawfully be exacted as part of an IGRA compact. Indeed, the Department of Interior had previously informed the New Mexico Legislature that a similar jurisdiction shifting provision was unlawful under IGRA. *See Doe* v. *Santa Clara Pueblo*, 154 P.3d 644, 655 n.7 (N.M. 2007) (quoting the Department's January 2000 letter, which stated: Section 8(A)'s "authorization for the allocation of civil jurisdiction would not extend to a patron's tort claim because it is an area that is not directly related to, and necessary for, the licensing and regulation of class III gaming activity."). Nonetheless, New Mexico made jurisdiction shifting a condition of compacting, and the parties therefore included language specifying that personal injury suits "may be brought in state district court, including claims arising on tribal land, unless it is finally determined by a state or federal court that IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court." Pet. App. 59a (quoting Section 8(A)).

As required by New Mexico law, the state legislature approved the compact in 2003. *See* Compact Negotiation Act, N.M. Stat. Ann. § 11-13A-1 *et seq*. (1999); *Pueblo of Santa Ana* v. *Kelly*, 104 F.3d 1546 (10th Cir. 1997). The Department of the Interior also approved the compact in January of 2004. *See* Indian Gaming, 69 Fed. Reg. 2617, 2617-18 (Jan. 16, 2004); 25 U.S.C. § 2710(d)(8). In 2015, the Compact

was updated, but the relevant jurisdiction allocation provision remains the same. *See* Indian Gaming Compact Between the State of New Mexico and the Navajo Nation, Section 8(A) (rev. Feb. 2015), *available at* https://tinyurl.com/y2jdue5u; *see also* Indian Gaming, 80 Fed. Reg. 35,668, 35,688 (June 22, 2015) (approving the compact).

C. The McNeals' Suit

Petitioners Harold and Michelle McNeal are enrolled members of the Navajo Nation. *See* Mot. for Summ. J. at 3, *Navajo Nation* v. *Dalley*, No. 1:15-cv-00799-MV-KK (D.N.M. Feb. 8, 2016). In July 2012, petitioners visited the Northern Edge Navajo Casino, a Navajo-run operation on Navajo land. Pet. App. 60a. They allege that while Mr. McNeal was in the casino's bathroom, he slipped on a wet floor and was injured. Pet. App. 9a, 60a. Although suits brought by tribal members against tribal entities are typically heard by tribal courts, *see* Cohen's Handbook of Federal Indian Law § 7.02 (Nell Jessup Newton ed., 2017), petitioners filed a personal injury suit in New Mexico state court, *see* Pet. App. 9a. They asserted that the Nation's "consent[ ]," as expressed in the IGRA compact, provided state court jurisdiction over the tribal members' tort claim for injuries Mr. McNeal sustained at a casino located on tribal land. *See* Complaint for Personal Injuries, *McNeal* v. *Navajo Nation*, No. D-1116-CV-2014-00786 (N.M. Dist. Ct. July 1, 2014) (attached as Ex. 2 to First Amended Complaint for Declaration, No. 1:15-cv-00799-MV-KK (D.N.M. Sept. 21, 2015)). The Nation

moved to dismiss the state court action,[2] arguing that "IGRA does not contemplate that the shifting of jurisdiction over [personal injury] claims is a permissible subject of compact negotiations." Pet. App. 9a.

The state court denied the Nation's motion. Pet. App. 9a-10a. It ruled that the Nation's argument was foreclosed by the New Mexico Supreme Court's decision in *Santa Clara Pueblo*, which held that IGRA permits "state courts [to] have jurisdiction over personal injury actions filed against [the tribes] arising from negligent acts alleged against casinos owned and operated by the [tribes] and occurring on the [tribes'] land." 154 P.3d at 646. The *Santa Clara Pueblo* decision was the sole basis for the state court's ruling. Pet. App. 9a-10a.

The New Mexico state court then stayed its proceedings so that respondents could file a declaratory-judgment action in New Mexico federal district court. There, respondents sought a judgment declaring that IGRA "does not permit the shifting of jurisdiction from tribal courts to state courts over personal injury lawsuits brought against tribes or tribal gaming enterprises." Pet. App. 10a. The District Court dismissed the case. The court ruled that subsections 2710(d)(3)(C)(i) and (ii), when read together, permit an IGRA compact to shift jurisdiction over personal injury suits to state court. Pet. App. 10a, 78a-81a.

---

[2] Throughout this litigation, the Nation has "fully acknowledge[d] that [its] sovereign immunity is waived for tort claims arising at gaming facilities," and that any such tort action against the Nation may be heard in tribal court. *See* Br. of Appellants at 21, *Navajo Nation* v. *Dalley*, No. 16-2205 (10th Cir. Oct. 17, 2016).

Moreover, the District Court ruled that subsection 2710(d)(3)(C)(vii)'s catch-all provision provides an alternative basis for treating jurisdiction-shifting as a permissible negotiating term. Pet. App. 10a, 81a.

Respondents appealed that ruling to the Tenth Circuit, which reversed. The court explained that the question before it was "whether IGRA authorizes tribes to enter into gaming compacts with states that allocate jurisdiction to state courts with respect to state-law tort claims." Pet. App. 15a. The court then noted that the only basis that either party suggested for shifting jurisdiction under IGRA was subsections 2710(d)(3)(C)(i) and (ii), read together, or subsection (vii). Pet. App. 17a. Subsections (i) and (ii), the court explained, allow for compact provisions that shift jurisdiction for the enforcement of laws and regulations "directly related to, and necessary for, the licensing and regulation of [class III gaming] activity." Pet. App. 16a (quoting 25 U.S.C. § 2710(d)(3)(C)(i)). Subsection (vii), in turn, allows for "other" compact provisions "that are directly related to the operation of [class III] gaming." *Id.* (quoting 25 U.S.C. § 2710(d)(3)(C)(vii)). "At bottom," then, "the parties' dispute relate[d] to the scope of the term 'class III gaming activity.' " Pet. App. 18a.

Analyzing subsections (i) and (ii), the Tenth Circuit held that this Court's 2014 decision in *Bay Mills* leads to only one "clear conclusion." Pet. App. 19a. "In *Bay Mills*, the Supreme Court construed 'class III gaming activity' to mean 'just what it sounds like—the stuff involved in *playing* class III games,' and in doing so, expressly interpreted § 2710(d)(3)(C)(i)." Pet. App. 18a (quoting *Bay Mills*, 572 U.S. at 792). Under that definition, the Tenth Circuit held personal injury lawsuits like the McNeals' are not

" 'directly related to, and necessary for the licensing and regulation,' § 2710(d)(3)(C)(i), of Class III gaming activity." Pet. App. 23a. While the court of appeals was "comfortable assuming that tort, and more specifically personal-injury lawsuits, constitute a type of regulation," *id.*, it noted that the McNeals' suit involves an allegation that the Nation and its gaming entity are responsible for a slip-and-fall in a casino restroom. Tort regulations governing the proper maintenance of a bathroom have "nothing to do with the actual regulation or licensing of Class III gaming, *viz.*, 'each roll of the dice and spin of the wheel.' " *Id.* (quoting *Bay Mills*, 572 U.S. at 792). It therefore "necessarily follows" that jurisdiction over personal injury lawsuits like the McNeals' cannot be allocated under subsection 2710(d)(3)(C)(ii). Pet. App. 25a.

Next, the Tenth Circuit held that jurisdiction shifting is also impermissible under subsection (vii)'s catch-all provision, which permits compact terms "relating to" "any other subjects that are directly related to the operation of gaming activities." Pet. App. 28a. The court ruled that the "key word" in subsection (vii) was "other." Pet. App. 30a. By using that word, Congress made clear that it "did not intend for that clause to address the 'subjects' covered in the preceding clauses of subsection (C)." *Id.* And "clause (ii)'s specific textual expression" of matters amenable to jurisdictional allocation shows Congress did not envision subsection (vii) to permit *additional* jurisdiction shifting outside those parameters. Pet. App. 32a-33a. A contrary reading "would wholly swallow clause (ii)'s specific and narrow allowance for jurisdictional allocations." Pet. App. 35a. The court summarized its holding thus: "IGRA,

under its plain terms, does not authorize tribes to allocate to states jurisdiction over tort claims like those brought by McNeal here." Pet. App. 41a.

ARGUMENT

I. THE TENTH CIRCUIT'S NARROW HOLDING IS CONSISTENT WITH THIS COURT'S PRECEDENT AND PRESENTS NO ISSUE WORTHY OF CERTIORARI.

The Tenth Circuit's narrow holding in this case is based on a straightforward application of this Court's decision in *Bay Mills*; it does not conflict with any post-*Bay Mills* precedent of the lower courts; and it does not raise an important question worthy of this Court's review. There is therefore no reason for this Court to grant certiorari. Petitioners' arguments to the contrary universally fail.

A. The Tenth Circuit's Decision Vindicates Congress's Intent Under IGRA To Protect Tribal Sovereignty Without Unduly Impinging On State Interests.

Petitioners primarily argue that certiorari is necessary because the Tenth Circuit's opinion interferes with the "inherent sovereign power of the Navajo Nation." Pet. 8. But petitioners are not the defenders of the Nation's sovereignty. The Nation is. And far from undermining broad principles of tribal sovereignty, the Tenth Circuit's opinion enforces the careful balance of state and tribal authority over gaming activity on tribal lands that Congress established in IGRA.

1. Petitioners' argument to the contrary is predicated on a mischaracterization of the decision below. As petitioners describe it, the Tenth Circuit held that

tribes lack the authority to enter into jurisdiction-shifting agreements without an "express congressional grant of [that] power." *Id.* But the Tenth Circuit did not base its holding on the tribes' inherent power (or lack thereof) to agree to jurisdiction shifting in the face of congressional silence; after all, Congress has *not* been silent with respect to tribal-state gaming compacts.

In IGRA, Congress enacted a comprehensive statutory framework governing state and tribal authority with respect to gaming. *Bay Mills*, 572 U.S. at 795. As the *Bay Mills* Court explained, "[e]verything—literally everything—in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands, and nowhere else." *Id.* Given this comprehensive scheme, a state may not stray beyond what IGRA authorizes. *Id.*; *see also Cabazon Band of Mission Indians*, 480 U.S. at 220-221 (holding that states lack inherent authority to regulate gaming activities on tribal lands).

In particular, IGRA places clear limits on the scope of the states' and the tribes' authority to enter into tribal-state gaming compacts. By specifying the seven topics that a gaming compact "may include," 25 U.S.C. § 2710(d)(3)(C), Congress explicitly restricted the "permissible subjects of negotiation in order to ensure that tribal-state compacts cover only those topics that are related to gaming." *Rincon Band of Luiseno Mission Indians of Rincon Reservation* v. *Schwarzenegger*, 602 F.3d 1019, 1028-29 (9th Cir. 2010) (footnotes omitted); *see also* Pet. App. 16a ("Tribal-State compact[s] govern[ ] the conduct of *gaming activities*." (quoting 25 U.S.C. § 2710(d)(3)(A)); *Pueblo of Santa Ana* v. *Nash*, 972 F. Supp. 2d 1254, 1266 (D.N.M. 2013) ("Simply put, the

negotiated terms of the Compact cannot exceed what is authorized by the IGRA.").

Accordingly, when the McNeals and the Nation briefed this case below, they did not focus on the broad question whether a tribe may *ever* agree to jurisdiction in state court without congressional authorization. *See* Br. of Appellants at 9-18, *Navajo Nation* v. *Dalley*, No. 16-2205 (10th Cir. Oct. 17, 2016); Br. of Appellees Harold McNeal and Michelle McNeal at 5-25, *Navajo Nation*, No. 16-2205 (10th Cir. Jan. 3, 2017); Reply Br. of Appellants at 6, *Navajo Nation*, No. 16-2205 (10th Cir. Jan. 20, 2017) ("[T]his is a case in which the Nation is purported to have consented to a shift in jurisdiction under a specific act of Congress, i.e., IGRA.").

They instead disputed a far more limited issue: whether "IGRA * * * contemplate[s] that the shifting of jurisdiction over [personal injury] claims is a permissible subject of compact negotiations." Pet. App. 9a; *see also* Br. of Appellants, *supra*, at 14 ("Congress could have worded subparagraph (ii) in a way that obviously or necessarily included a shifting of jurisdiction over such claims as the one in the underlying state court litigation [of personal injury claims], as a permissible topic for negotiations of compacts. *It did not do so*." (quoting *Nash*, 972 F. Supp. 2d at 1265) (emphasis altered)); Br. of Appellees Harold McNeal and Michelle McNeal, *supra*, at 15 ("The District Court correctly ruled that this agreement was valid under the authority of IGRA and therefore the agreement must be respected.").

Thus, when the Tenth Circuit framed the question before it, the court articulated a similarly narrow issue: "whether IGRA authorizes tribes to enter into

gaming compacts with states that allocate jurisdiction to state courts with respect to state-law tort claims." Pet. App. 15a.

In other words, the parties and the lower courts saw this as a suit about the proper construction of the specific Navajo-New Mexico compact under IGRA, not a case concerning the tribes' inherent authority in the absence of congressional authorization. *See* Br. of Appellants, *supra*, at 14 ("[T]he language in Section 8 of the Compact cannot bootstrap the claims in the underlying state court litigation as coming within the scope of § 2710(d)(3)(C)(i), (ii), or (vii))." (internal quotation marks omitted)); Br. of Appellees Harold McNeal and Michelle McNeal, *supra*, at 3 ("The core of this case involves the proper interpretation and application of IGRA—how its provisions operate *in the context of Section 8 of the Navajo-State Compact*." (emphasis added)). Petitioners suggest otherwise by pointing to some broader statements regarding tribal authority that the Tenth Circuit included in setting the background context for its opinion. *See* Pet. App. 14a-15a. But by the Tenth Circuit's own account, these statements are mere dicta, provided to give "background" before the court of appeals addressed the actual question presented and explained its actual holding. *Id.* This dicta certainly is not an authoritative expression of the court's stance on a tribe's sovereign powers outside of the realm of IGRA. Indeed, the Tenth Circuit repeatedly emphasized the narrowness of its decision, expressly stating that it was making only a "limited procedural holding that relates solely to whether IGRA authorizes tribes to allocate jurisdiction over tort claims like the McNeals' to state courts." Pet. App. 40a (emphasis omitted); *see also*

Pet. App. 25a n.7 ("We pause to highlight that our holding only pertains to the circumstances presented here.").

Further, as petitioners themselves acknowledge, Pet. 8, the Tenth Circuit did not pay any "focused attention" to important precedents like *Kiowa Tribe of Oklahoma* v. *Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), and *C&L Enterprises, Inc.* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001). Such cursory treatment is typical of a court of appeal's summary discussion of an issue that has not been fully briefed by the parties, and that is not squarely presented.

This is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). The parties did not dispute, and the court below did not issue a holding, as to whether tribes generally possess the authority to agree to state jurisdiction *without* congressional permission. This Court should not consider that question in the first instance.

2. While petitioners attempt to bolster their case for certiorari by asserting that the Court needs to consider this question in order to protect tribal sovereignty, the Tenth Circuit's opinion already strikes the correct balance in protecting the sovereign rights of tribes and states alike. In summarizing its *actual* holding, the Tenth Circuit stated, "we conclude that IGRA, under its plain terms, does not authorize tribes to allocate to states jurisdiction over tort claims like those brought by the McNeals here." Pet. App. 41a.

That holding reinforces tribal sovereignty in two ways. *First*, in recognizing that IGRA restricts the terms over which states and tribes may bargain, the

Tenth Circuit properly policed the boundaries that Congress drew with respect to state authority over gaming on tribal lands. *Bay Mills*, 572 U.S. at 800-803 (recognizing the Court's repeated deference to Congress in defining the parameters of tribal sovereign authority based on policy concerns and reliance interests). By insisting that IGRA compacts include only certain enumerated terms, Congress limited the concessions that a state may extract from a tribe as a condition for operating class III gaming facilities on tribal lands. *See Rincon Band*, 602 F.3d at 1031; *Nash*, 972 F. Supp. 2d at 1265 ("[T]he fact that this statutory language does not expressly *prohibit* jurisdiction-shifting[ ] is irrelevant."). The Tenth Circuit's decision hews to those limits.

Second, by enforcing IGRA's restrictions on jurisdiction-shifting provisions in particular, the Tenth Circuit's decision protects the tribes' historic power to adjudicate suits against tribal entities that arise on tribal land. This Court has long recognized that the tribes' authority to adjudicate such suits is essential to their "right * * * to govern themselves." *Williams*, 358 U.S. at 223.

Nor does this protection of tribal sovereignty come at an undue cost to the states or prospective personal injury plaintiffs. As *Williams* makes clear, states' adjudicative authority has long been limited when it comes to suits against the tribes on tribal land. *Id.* And states maintain ample means of vindicating their interests with respect to the tribes. *See Bay Mills*, 572 U.S. at 794-795 (enumerating states' powers and rejecting an argument that a faithful interpretation of IGRA will unduly impinge on states' rights). Casino patrons, meanwhile, can have their tort claims heard by tribal courts, *see supra* n.2,

which are best-suited to adjudicate claims that often implicate tribal law. *See* Pet. App. 76a ("[T]his Court is relatively unfamiliar with [Navajo] law * * * , and * * * recognizes that its interpretation of Navajo law could be in error."). And, because the livelihood of the tribes often depends on the viability of their casinos, they will have every incentive to maintain safe facilities and to enter into settlements to compensate patrons that raise legitimate claims. The Tenth Circuit decision, like IGRA itself, maintains that status quo.

Further, petitioners do not even attempt to assert that the states' sovereignty is impeded by the Tenth Circuit's decision—and the states themselves have been conspicuously silent before this Court. Neither the State of New Mexico, nor any other state, has asked this Court to grant certiorari. That is not for lack of notice: multiple representatives of the State of New Mexico participated in the proceedings below. A New Mexico state-court judge was an active party, and he was represented by the State's Attorney General. Pet. App. 2a, 44a. The New Mexico Attorney General even sought an extension of time to file a certiorari petition with this Court. Pet. 1 n.1. Yet, ultimately, only the individual plaintiffs have asked this Court to grant review; the State did not even file an amicus brief in support of that petition. This issue primarily affects tribes and states—and neither the affected Tribe nor the State has sought certiorari.

Nor is any *other* tribe or state likely impacted by this ruling. Petitioners do not point to any similar terms in gaming compacts from other states, and the Nation has not been able to locate any. And the Tenth Circuit itself repeatedly and expressly dis-

claimed any implications of its decision outside the narrow circumstances of this case. Pet. App. 25a n.7; 41a. The Tenth Circuit's decision thus settled a limited question regarding the appropriate scope of a particular tribal-state compact under IGRA, in a way that respects tribal and state sovereignty. Certiorari is unwarranted.

B. The Tenth Circuit's Narrow Holding Does Not Create A Conflict Necessitating This Court's Review.

1. Petitioners make two other attempts to explain why certiorari is warranted. *First*, in their primary (and their only fully developed) argument about IGRA, petitioners object to the Tenth Circuit's treatment of IGRA's legislative history. Pet. 9-13. They contend that the court's interpretation of IGRA's plain text was flawed because it did not account for various committee reports and statements from legislators. *Id.* That contention fails out of the gate. As this Court has "repeatedly held," Congress's "authoritative statement is the statutory text, not the legislative history." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). The Tenth Circuit held that "IGRA, under its plain terms, does not authorize tribes to allocate to states jurisdiction over tort claims like" the McNeals'. Pet. App. 41a; *see also Colo. River Indian Tribes* v. *Nat'l Indian Gaming Comm'n*, 383 F. Supp. 2d 123, 139 (D.D.C. 2005) ("The statutory language and the structure of the IGRA are clear, and so resort to the legislative history of the statute is unnecessary."), *aff'd*, 466 F.3d 134 (D.C. Cir. 2006). The court therefore had no cause to look beyond those plain terms to discern Congress's intent. *See Bay Mills*, 572 U.S. at

794 (courts have "no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that * * * Congress must have intended something broader." (internal quotation marks omitted)).

Second, petitioners briefly assert that the Tenth Circuit's decision conflicts with the holding of the New Mexico Supreme Court in *Santa Clara Pueblo*, 154 P.3d 644. *See* Pet. 13. The conflict is attributable to timing, not substance, however: the New Mexico Supreme Court's 2007 ruling lacked the benefit of this Court's decision seven years later in *Bay Mills*. And it was *Bay Mills* that formed the centerpiece of the Tenth Circuit's opinion below.

The relevant analysis of the New Mexico Supreme Court and the Tenth Circuit begins at the same point. In *Santa Clara Pueblo*, the New Mexico Supreme Court assumed that because IGRA "provides a comprehensive scheme governing tribal gaming," tribes and states may agree to jurisdiction shifting in an IGRA compact only if "IGRA authorizes" it. 154 P.3d at 652; *see also id.* (asking "whether jurisdiction over visitors' personal injury suits is something that tribes and states may negotiate in a gaming compact"). The Tenth Circuit similarly held that parties may include a jurisdiction-shifting provision in an IGRA compact only if such provisions are encompassed within Section 2710(d)(3)(C)'s list of terms that "may [be] include[d]" in a tribal-state gaming compact. Pet. App. 15a-17a; *see* Pet. App. 15a n.4 ("[T]he negotiated terms of the Compact cannot exceed what is authorized by the IGRA." (internal quotation marks omitted)).

Each court then considered whether broad jurisdiction shifting provisions are permitted under subsections (i) and (ii) of Section 2710(d)(3)(C). This is where the analyses diverge. Without the aid of *Bay Mills*, the *Santa Clara Pueblo* Court engaged in its own examination of IGRA and its legislative history, and determined that subsection 2710(d)(3)(C)(ii) should be understood to permit terms allocating jurisdiction over suits involving torts occurring on the premises of a gaming facility, even if the torts have no direct relationship to the gambling itself. 154 P.3d at 648, 655-656.

The Tenth Circuit, *with* the benefit of *Bay Mills*, conducted a very different analysis. The *Bay Mills* Court squarely held that class III "gaming activity is the gambling in the poker hall, not the proceedings of the offsite administrative authority." 572 U.S. at 792. It is "the stuff involved in playing class III games." *Id.* Adopting this narrower understanding of IGRA's scope, the Tenth Circuit held that "[c]lass III gaming activity relates only to activities actually involved in the *playing* of the game, and not activities occurring in proximity to, but not inextricably intertwined with, the betting of chips, the folding of a hand, or suchlike." Pet. App. 19a. Personal injury torts that merely occur on the premises of a casino without any relationship to the gambling itself are therefore outside the reach of an IGRA compact. Pet. App. 20a.

There is no reason to think that with the benefit of *Bay Mills*, the New Mexico Supreme Court will continue to follow *Santa Clara Pueblo*'s outmoded analysis of IGRA. At a minimum, this Court should not grant review to resolve the asserted split until the New Mexico Supreme Court has a chance to

reconsider the issue itself, with the same benefit of *Bay Mills* the Tenth Circuit had.

The District Court below also pointed to a host of other state court cases considering assertions that a state could exercise jurisdiction over a tort suit like this one. *See* Pet. App. 84a-85a. In *every* case, the state court—like the Tenth Circuit here—rejected the assertion that an IGRA compact permitted it to assume jurisdiction over personal injury torts like the McNeals'. Several such suits were dismissed on the basis of tribal immunity, even though the plaintiff argued that the terms of an IGRA compact allowed for jurisdiction shifting. *See Bonnette* v. *Tunica-Biloxi Indians*, 873 So. 2d 1, 5-7 (La. Ct. App. 2003); *Gallegos* v. *Pueblo of Tesuque*, 46 P.3d 668, 679 (N.M. 2002). The other cases concerned gaming compacts that explicitly—and correctly—acknowledged tribal courts retain exclusive jurisdiction over personal injury torts occurring at casinos. *See Sheffer* v. *Buffalo Run Casino, PTE, Inc.*, 315 P.3d 359, 365-366 (Okla. 2013); *Kizis* v. *Morse Diesel Int'l Inc.*, 794 A.2d 498, 505 (Conn. 2002); *Diepenbrock* v. *Merkel*, 97 P.3d 1063, 1067-68 (Kan. Ct. App. 2004). There is no need to review a decision of the court of appeals that fits comfortably within this body of precedent.

II. THE DECISION BELOW IS CORRECT.

Petitioners never directly assert that the Tenth Circuit's interpretation of IGRA is wrong. That is likely because there is no basis for such an attack: IGRA simply does not permit broad jurisdiction-shifting in gaming compacts. Congress carefully considered the terms that may be negotiated under a gaming compact and mandated that all "topics" must

be directly "related to the conduct of gaming activities." *Nash*, 972 F. Supp. 2d at 1264; *see also* Pet. App. 15a-17a. Subsections (i), (ii), and (vii) therefore cannot be interpreted to authorize the inclusion of terms shifting jurisdiction for personal injury torts suits that seek to regulate conduct (such as bathroom maintenance) that has nothing to do with the gambling itself. That conclusion is compelled by *Bay Mills* and basic canons of statutory construction.

The Tenth Circuit correctly interpreted *Bay Mills* to constrain the jurisdiction shifting permitted by subsections (i) and (ii). Pet. App. 17a-28a. Those provisions permit state court jurisdiction only for criminal and civil laws "directly related to, and necessary for, the licensing and regulation of [class III] gaming activities." 25 U.S.C. § 2710(d)(3)(C)(i). In *Bay Mills*, this Court narrowly interpreted the term "class III gaming activity" contained in subsection 2710(d)(7)(A)(ii)'s grant of federal court jurisdiction. 572 U.S. at 792. The Court looked to "numerous" *other* provisions of IGRA that show " 'class III gaming activity' means just what it sounds like—the stuff involved in playing class III games." *Id.* Those numerous provisions apply with equal force to the "class III gaming" referenced in subsections 2710(d)(3)(C)(i) and (ii). *See Bank of Am., N.A.* v. *Caulkett*, 135 S. Ct. 1995, 2000 (2015) ("We are generally reluctant to give the same words a different meaning when construing statutes * * * ." (internal quotation marks omitted)). The Tenth Circuit therefore correctly applied *Bay Mills* to hold that subsections (i) and (ii) do not permit IGRA compacts to shift jurisdiction over tort suits arising from bathroom slip and falls because those laws have "nothing to do with the actual regulation or licensing

of Class III gaming, *viz*., 'each roll of the dice and spin of the wheel.' " Pet. App. 23a (quoting *Bay Mills*, 572 U.S. at 792).

The Tenth Circuit's interpretation of subsection (vii) was also correct. *See* Pet. App. 28a-36a. Designed as a catch-all provision, subsection (vii) permits "a wide variety of subjects" relating to class III gaming activities to be included in IGRA compacts. Cohen's Handbook of Federal Indian Law § 12.05[2]. States and tribes may negotiate over topics such as the "size of gaming operations; which games are authorized; technical requirements of electronic gaming devices; state inspection, testing, and approval of gaming devices and facilities; tribal payment of state regulatory costs; casino security and monitoring; tribal and state reciprocal access to records and reports; alcohol regulation; [and] day-to-day rules of operation." *Id.* But the provision does not allow for the shifting of jurisdiction for torts *unrelated* to gaming activities. *See* 25 U.S.C. § 2710(d)(3)(C)(vii). And it should not be interpreted to interfere with the specific and express limitations set out in subsections (i) and (ii). To allow subsection (vii) to bear on topics contained in the first six subsections would impermissibly render the word "other" "void[ ] or insignificant." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted); *see* 25 U.S.C. § 2710(d)(3)(C)(vii) (permitting "*other* subjects that are directly related" to class III gaming to be included in IGRA compacts (emphasis added)). Thus, the Tenth Circuit properly held that it could not adopt an interpretation of subsection (vii) that "would wholly swallow clause (ii)'s specific and narrow allowance for jurisdictional allocations." Pet. App. 35a.

Moreover, the Tenth Circuit's decision accords with that of the U.S. Department of Interior's Office of Gaming Management. That office has issued an opinion letter sent to the New Mexico Legislature concluding that IGRA's jurisdiction shifting provision does not extend to a tort claim that is in an area outside of class III gaming regulation and licensing. *See* Letter from George T. Skibine, Dir., Office of Indian Gaming Mgmt., U.S. Dep't of Interior, to Hon. John Arthur Smith, Chairman, Legislative Comm. on Compacts, New Mexico State Legislature 3 (Jan. 28, 2000) (cited in *Santa Clara Pueblo*, 154 P.3d at 655 n.7).[3] Significantly, that opinion was rendered in connection with New Mexico gaming compacts that were "identical in substance" to the IGRA agreement at issue here. Indian Gaming, 69 Fed. Reg. at 2618. Indeed, when New Mexico and the Nation entered into the 2003 compact, the Interior Department had already stated its belief that Section 8(A)'s jurisdiction shifting provision violated IGRA. *See Santa Clara Pueblo*, 154 P.3d at 655 n.7.

Finally, the Tenth Circuit's opinion also accords with the basic principle that even "doubtful expressions" in statutes must be "resolved in favor of the Indians." *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976) (internal quotation marks omitted). That rule

---

[3] Although the New Mexico Supreme Court gave the Department's opinion the "consideration as it deserves," it stopped short of affording it "*Chevron*-style deference." *Santa Clara Pueblo*, 154 P.3d at 655 n.7. The level of deference the opinion letter deserves is immaterial. The Department of the Interior is the agency responsible for interpreting IGRA, *id.*, and its construction of "class III" gaming aligned perfectly with this Court's subsequent interpretation in *Bay Mills*.

aligns with this Court's requirement that Congress must "make[ ] clear its intention" to divest tribal courts of their traditional adjudicative authority. *Martinez*, 436 U.S. at 72. The Tenth Circuit expressly disclaimed reliance on *Bryan*'s rule of statutory interpretation because it held that IGRA's terms are sufficiently clear to eschew the need for such cannons. Pet. App. 41a n.11. But, if there were any ambiguity as to whether IGRA limits the states' ability to force tribes' to accept broad jurisdiction shifting provisions as a condition of gaming, the cannon would require the adoption of the interpretation the Nation advocates.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

DOREEN MCPAUL
Attorney General
PAUL SPRUHAN
NAVAJO NATION
DEPARTMENT OF JUSTICE
Post Office Drawer 2010
Window Rock, AZ 86515
(928) 871-6229
dmcpaul@nndoj.org

PATRICK T. MASON
MASON & ISAACSON, P.A.
104 East Aztec
Gallup, NM 87301
p.mason@milawfirm.com

CATHERINE E. STETSON
Counsel of Record
HILARY TOMPKINS
COLLEEN E. ROH SINZDAK
MATTHEW J. HIGGINS
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
cate.stetson@hoganlovells.com

Counsel for Respondents

March 2019