No. 07-

IN THE
Supreme Court of the United States

HO-CHUNK NATION,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

THOMAS M. PYPER
WHYTE HIRSCHBOECK DUDEK S.C.
33 East Main Street
Suite 300
Madison, WI 53703
(608) 258-7122

LESTER J. MARSTON
Counsel of Record
RAPPORT AND MARSTON
405 W. Perkins Street
Ukiah, CA 95482
(707) 462-6846

Attorneys for Petitioner

215708

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Did Congress, when it enacted 25 U.S.C. § 2710(d)(7)(A)(ii), grant jurisdiction to the district courts to enjoin Indian tribes from engaging in class III gaming for any violation of a Tribal-State Compact?

2. Did the grant of jurisdiction to the district courts contained in 25 U.S.C. § 2710(d)(7)(A)(ii) waive the sovereign immunity of Indian tribes to allow the tribes to be sued by a state for any violation of a Tribal-State Compact as opposed to only those violations that pertain to the playing of class III games?

3. Where a court has concluded that a statute passed for the benefit of Indians and Indian tribes is ambiguous, is the court compelled by the canons of construction established by this Court to construe the statute in the manner most favorable to the Indians?

4. Where a court has concluded that a federal statute that abrogates tribal sovereign immunity is ambiguous, is the court compelled by the canons of construction established by this Court for abrogations and waivers of tribal sovereign immunity to construe the abrogation narrowly?

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The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 512 F.3d 921 (7th Cir. 2008) (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) (App. C at 44a).

STATEMENT OF JURISDICTION

1. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1), in that the Nation is seeking review, by petition for writ of certiorari, of a judgment of a United States Court of Appeals in a civil case.

2. The Seventh Circuit Court of Appeals had jurisdiction over the Nation's appeal of the District Court's ruling pursuant to the collateral order doctrine. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). The District Court's denial of a claim of sovereign immunity, to the extent that it turned on an issue of law, was an appealable "final decision" within the meaning of 28 U.S.C. § 1291, notwithstanding the absence of a final judgment. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Lojack v. Johnson*, 770 F.2d 619, 621 (7th Cir. 1985).

3. The District Court ruled that it had jurisdiction over the State of Wisconsin's claims set forth in its Amended Complaint ("Amended Complaint") pursuant to 28 U.S.C. § 1331 and 25 U.S.C. § 2710(d)(7)(A)(ii), which is part of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* ("IGRA"). The Nation contends

that there is no federal court jurisdiction because the claims set forth in the Amended Complaint do not fall within 25 U.S.C. § 2710(d)(7)(A)(ii)'s abrogation of Indian tribes' sovereign immunity or its grant of jurisdiction to district courts.

4. The District Court's Memorandum and Order ("Order") denying the Nation's Motion To Dismiss or, In The Alternative, for Summary Judgment was entered on March 9, 2007.

5. The Nation filed a timely Notice of Appeal of that Order with the Clerk of the District Court on March 14, 2007.

6. The Court of Appeals ruling that is the subject of this petition was issued on January 14, 2008. The Nation filed a timely petition for rehearing and petition for rehearing en banc on January 28, 2007, which the Court of Appeals denied on February 8, 2008.

7. This petition is timely in that it was filed within 90 days of the Court of Appeals' February 8, 2008, denial of the Nation's petition for rehearing and petition for rehearing en banc.

STATUTORY PROVISIONS AT ISSUE

The following provisions of the Indian Gaming Regulatory Act are at issue in this case:

25 U.S.C. § 2710(d)(7)(A)(ii):

> (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 entered into under paragraph (3) that is in effect, ...

25 U.S.C. § 2710(d)(3)(C):

> (C) Any Tribal–State compact negotiated under subparagraph (A) may include provisions relating to—
>
> (i) 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 such activity;
>
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(4):

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

25 U.S.C. § 2710(d)(7)(B)(iii)(II):

> (iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal–State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe [tribe] to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—
>
> (II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

STATEMENT OF CASE

1. In 1992, the Ho-Chunk Nation ("Nation") negotiated and entered into a Tribal–State gaming compact with the State of Wisconsin ("Original Compact"), which permitted the Nation to engage in certain class III gaming activities,[1]

1. Under the IGRA, tribal gaming is divided into three categories, class I, class II and class III gaming, each of which is subject to a different level of regulation. Class I gaming covers "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Class II gaming includes bingo and card games that are explicitly authorized by a State or "not explicitly prohibited by the laws of the State and are played at any location in the (Cont'd)

pursuant to the requirements of the IGRA. The Original Compact was subsequently amended in 1998 ("First Amendment"), and again in 2003 ("Second Amendment").

2. Under the terms of the Original Compact, the Nation did not pay any money to the State of Wisconsin ("State") other than to reimburse the State for the costs that it incurred in regulating gaming under the Original Compact. The Nation first began paying the State a revenue-sharing fee under the First Amendment for the exclusive right to engage in gaming within the State.

3. The Second Amendment included a number of significant changes from the Original Compact and First Amendment.[2] It provided that the term of the Compact was perpetual. It waived both the Nation's and the State's sovereign immunity from suit to allow either party to enforce the terms of the Compact. It also significantly increased the amount of money that the Nation agreed to pay to the State as consideration for: (1) the exclusive right to engage in class III gaming within a 65-mile radius of the Nation's existing gaming

(Cont'd)

State." § 2703(7)(A)(ii). Class II gaming specifically excludes banked card games and slot machines. Class III gaming includes "all forms of gaming that are not class I gaming or class II gaming. 25 U.S.C. § 2703(8). It includes games usually associated with casino- style gambling, slot machines, and parimutuel horserace wagering. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 12 (Matthew Bender & Company 2005).

2. The Original Compact as amended by the First and Second Amendments shall collectively be referred to as the "Compact."

facilities; (2) an indemnification provision that provided the Nation with some market protection against off-reservation gaming by other tribes, and (3) the Wisconsin State Governor's ("Governor") concurrence to allow the Nation to pursue gaming at a fourth site.

4. Having a compact with a perpetual duration provision, which could not be terminated by the State, greatly increased the value of these changes in the Compact to the Nation. Because of the importance of the duration provision, and because the Nation was aware that a number of the provisions of the Second Amendment, including the duration provision, were likely to be challenged by political opponents of the Governor, the Nation specifically sought and received the State's agreement that, if a court of competent jurisdiction determined that the perpetual term of the Compact was found to be invalid or unenforceable, the Nation would be relieved of its obligation to pay revenue sharing fees to the State unless and until the parties reached agreement on new duration and fee payment provisions to substitute for those determined invalid by the court.

5. On May 13, 2004, the Wisconsin Supreme Court decided *Panzer v. Doyle*, 2004 WI 52, 271 Wis. 2d 295, 680 N.W.2d 666 ("*Panzer*"), which addressed the validity of several provisions of the second amendment to the Forest County Potawatomi ("FCP") gaming compact with the State. The Supreme Court ruled that the Governor of Wisconsin did not have the authority to agree to compact amendments that: (1) allowed a full range of Las Vegas style gaming; (2) granted a compact term in perpetuity, and (3) waived the State's sovereign

immunity. The *Panzer* Court then indicated that it expected that the parties would renegotiate the amendments to the compact voided by the Court's decision. *Id.*

6. The provisions of the FCP compact amendments invalidated by the *Panzer* decision were, for all practical purposes, identical to the provisions agreed to by the Nation and the State in the Second Amendment to the Nation's Compact.

7. In order to comply with the *Panzer* decision, the Nation ceased engaging in gaming beyond what was agreed to under its 1992 Compact, as amended in the First Amendment, and contacted the State with regard to renegotiating the terms of the Second Amendment that were rendered unenforceable and invalid by the *Panzer* decision. At that time, the Nation also informed the State that the Nation would not make the fee payments to the State required under Paragraph 12 of the Second Amendment because, pursuant to Paragraph 15(A) of the Second Amendment, the invalidation by the *Panzer* Court of the Governor's authority to agree to a compact term in perpetuity had the effect of relieving the Nation of its obligation to pay any revenue-sharing fees to the State until substitute duration and fee provisions were agreed to by the parties.

8. Shortly thereafter, the Nation and the State began to renegotiate the Second Amendment provisions implicated by *Panzer*. Negotiation of substitute provisions for the invalid provisions of the Second Amendment continued, on and off, for a period of nine months. Throughout the negotiations, the State took

the position that, the *Panzer* decision notwithstanding, the Nation was obligated to pay the full amount of the revenue–sharing payments required by Paragraph 12 of the Second Amendment. The State refused to agree to any amendments unless and until the Nation agreed to pay the full amount of those payments.

9. On January 31, 2005, the Nation made a final offer to the State. On or about February 1, 2005, the State rejected the Nation's final offer, based on the Nation's refusal to agree to pay the full amount of the revenue–sharing fees originally required by the Second Amendment.

10. Having been frustrated in its efforts to negotiate amendments to substitute for the invalidated provisions of the Second Amendment, the Nation informed the State that, pursuant to Paragraphs 11 and 15 of the Second Amendment, it would seek arbitration to resolve the issues arising from the *Panzer* decision. On June 15, 2005, the Nation served upon the State a complaint in arbitration.

11. On October 28, 2005, the State filed the present lawsuit in the United States District Court for the Western District of Wisconsin, asserting that a lapse had occurred in the negotiations to appoint an arbitrator. The Nation filed a Motion to Dismiss or, in the Alternative, a Motion for Summary Judgment, which the District Court denied. The District Court issued an order appointing William Norris, retired Judge of the Ninth Circuit Court of Appeals, as the arbitrator. *State of Wisconsin v. Ho-Chunk Nation*, 402 F. Supp. 2d 1008 (W.D. Wis. 2005).

12. The Nation filed an appeal of the District Court's denial of the Nation's motion. While the appeal was pending, the parties, pursuant to the District Court's order, began arbitrating the dispute before Judge Norris.

13. In May, 2006, the parties entered into a stipulation in which they agreed to stay arbitration proceedings in anticipation of both the decision of the Court of Appeals in the Nation's appeal and of the Wisconsin Supreme Court's decision in *Dairyland v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W. 2d 408 ("*Dairyland*"). As part of that stipulation, the Nation paid the State 30 Million Dollars as an act of good faith to promote the negotiations and mediation proceedings between the parties.

14. On July 14, 2006, the Wisconsin Supreme Court decided *Dairyland*. The *Dairyland* court found that nothing barred the State from negotiating with tribes over class III gaming so long as the original compact pre-dated the 1993 Amendment to the Wisconsin Constitution. *Id.* at 443. The court thereby overturned the *Panzer* decision to the extent that it ruled that the Governor had the authority to agree that the State's gaming tribes could engage in Las Vegas style gaming. As a result of that decision, the Nation reinstated the class III games it had stopped operating after the *Panzer* decision.

15. On September 11, 2006, the Court of Appeals reversed the District Court, ruling that the District Court did not have jurisdiction over the State's claims seeking appointment of an arbitrator.

State of Wisconsin v. Ho-Chunk Nation, 463 F.3d 655, 661 (7th Cir. 2006).

16. In its decision, the Court of Appeals noted that the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"), did not itself provide a basis for jurisdiction, and further determined that there was no independent basis for federal jurisdiction in this case since none of the three instances in the IGRA where Congress explicitly conferred federal jurisdiction were pled. The State's suit, thus, could not be said to be a case arising under federal law. *Id.* at 659-61.

17. On remand, the State then filed the Amended Complaint at issue in this appeal. The Amended Complaint included eight causes of action related to the Nation's alleged withholding of revenue-sharing payments and failure to arbitrate. Unlike the State's initial complaint, the Amended Complaint included a claim pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii) of the IGRA, one of the three specific instances where the IGRA grants federal courts jurisdiction. Under this cause of action the State sought to enjoin the Nation's class III gaming on the basis of its alleged Compact violations. The Amended Complaint also included a claim for breach of contract and sought declarations that the Nation was in violation of the IGRA, that the State had complied with the IGRA by negotiating in good faith, and that the Nation must pay all current and future amounts due under the Compact's revenue-sharing provision. Finally, the State brought claims to compel arbitration for all arbitrable claims, reappoint Judge Norris as arbitrator, and stay the action pending the arbitrator's award.

18. The Nation brought counterclaims against the State for breach of contract and violations of the IGRA, requesting that the court order the parties to engage in negotiations according to the procedures set forth in the IGRA. The Nation then brought a motion to dismiss or, alternatively, for summary judgment regarding the State's Amended Complaint. In that motion, the Nation contended that 25 U.S.C. § 2710(d)(7)(A)(ii), which grants federal courts jurisdiction over a claim by a State to "enjoin a class III gaming activity . . . conducted in violation of any Tribal–State compact," was inapplicable in this case and that the Nation's sovereign immunity barred the district court from hearing the case on any other basis. In the alternative, the Nation moved for summary judgment, claiming that in light of the *Panzer* and *Dairyland* decisions, it was not acting in violation of the Compact. The Nation also contested the State's efforts to compel arbitration, claiming that the Compact's Dispute Resolution provision was preempted by the IGRA and was not covered by the FAA.

19. On March 9, 2006, the District Court issued its Memorandum and Order ("Order") on the Nation's motion. *State of Wisconsin v. Ho-Chunk Nation*, 478 F. Supp. 2d 1093 (W.D. Wis. 2007) (App. C at 44a). The District Court adopted the State's interpretation of 25 U.S.C. § 2710(d)(7)(A)(ii). *Id.*, at 1097 (App. C at 50a-51a). It found that it had jurisdiction over the State's claim to enjoin the Nation's class III gaming activity. *Id.* The District Court then exercised supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over the State's remaining claims. *Id.*, at 1100 (App. C at 56a-57a). With respect to the *Panzer* decision's effect on the Compact, the District Court determined that the

Wisconsin Supreme Court's decision did not serve as a finding "by a court of competent jurisdiction" that the Second Amendment's duration provision was invalid or unenforceable. *Id.*, at 1099 (App. C at 55a). This finding served to moot the Nation's preemption claim regarding renegotiation under the IGRA, since it was unnecessary for the parties to renegotiate any of the Compact's provisions. *Id.* The District Court also concluded that federal jurisdiction did exist for the State's claim seeking a declaration it acted in good faith and denied the Nation's claim that the FAA was inapplicable. *Id.*, at 1100-1101 (App. C at 56a-59a). The District Court, however, granted the Nation's motion for summary judgment on the ground that the State had failed to provide sufficient evidence to support a finding that the Nation had refused to negotiate or arbitrate under the terms of the Compact. *Id.*, at 1100 (App. C at 56a).

20. The Nation filed a timely appeal from the District Court's Order under the collateral order doctrine to the Seventh Circuit Court of Appeals, claiming: (1) that 25 U.S.C. § 2710(d)(7)(A)(ii) did not grant the District Court jurisdiction or abrogate the Nation's sovereign immunity, and (2) that the District Court erred in finding that the *Panzer* decision did not affect the Compact's terms.

21. On January 14, 2008, the Court of Appeals for the Seventh Circuit issued its ruling in this case, *State of Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 933 (7th Cir. 2008) ("*Ho-Chunk II*") (App. A at 1a), which the Nation now petitions this Court to review.

REASONS FOR GRANTING THE PETITION

The Ho-Chunk Nation seeks review of the United State's Court of Appeals for the Seventh Circuit's January 14, 2008 ruling that the United States District Court for the Western District of Wisconsin has jurisdiction over the State of Wisconsin's claim, filed pursuant to the IGRA, that the Ho-Chunk Nation refused to comply with the arbitration provision of the Nation's class III gaming compact. The Nation maintains that the Court of Appeals erred, as a matter of law, by interpreting § 2710(d)(7)(A)(ii) too broadly and by failing to apply this Court's prior precedents in making that interpretation. It is the Nation's position that § 2710(d)(7)(A)(ii)'s grant of jurisdiction extends only to claims that are based on alleged violations of a class III Tribal-State compact that relate to the actual operation and regulation of the gaming conducted under the Compact, not to matters that are unrelated to the conduct of gaming, including an agreement to arbitrate or to pay a revenue sharing fee to a state for the exclusive right to engage in gaming.

The Court of Appeals' decision in *Ho-Chunk II* is appropriate for review by this Court for four reasons.

First, there exists a split between federal circuits on the breadth of § 2710(d)(7)(A)(ii)'s grant of jurisdiction and abrogation of sovereign immunity. The Seventh Circuit interpreted § 2710(d)(7)(A)(ii)'s grant of jurisdiction and abrogation of tribal sovereign immunity to extend to any claim alleging a violation of a gaming compact arising from the subjects of compact negotiation listed in § 2710(d)(3)(C). As part of that

ruling, 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. That ruling is in conflict with decisions of the United State's Court of Appeals for the Tenth Circuit, which has ruled that § 2710(d)(7)(A)(ii)'s grant of jurisdiction extends to any claim alleging any violation of a Tribal-State compact, including claims to enforce gaming revenue sharing agreements entered into between Indian tribes and states, *State of New Mexico v. Pueblo of Pojoaque*, 30 Fed. Appx. 768 (10th Cir. 2002)[3] and that § 2710(d)(7)(A)(ii)'s abrogation of tribal sovereign immunity extends to cases in which compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought. *Mescalero Apache Tribe v. State of New Mexico*, 131 F.3d 1379 (10th Cir. 1997). The Eleventh Circuit has also rejected the Tenth Circuit's interpretation of § 2710(d)(7)(A)(ii)'s abrogation of tribal sovereignty as too broad, although the Eleventh Circuit has not stated specifically what is meant by a tribe conducting class III gaming in violation of an existing Tribal-State compact. *State of Florida v. Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999).

Second, the question of what claims are encompassed by § 2710(d)(7)(A)(ii)'s grant of jurisdiction

3. The Tenth Circuit's decision, approving the district court's broad interpretation of § 2710(d)(7)(A)(ii)'s grant of jurisdiction (*New Mexico v. Jicarilla Apache Tribe*, 2000 U.S. Dist. LEXIS 20666 (D.N.M. Dec. 6, 2000)) was an unpublished opinion. It was, nevertheless, cited by the District Court as a basis for its interpretation of § 2710(d)(7)(A)(ii) in this case.

and abrogation of sovereign immunity is a matter of national significance. A decision by this Court defining § 2710(d)(7)(A)(ii)'s limits will affect literally every Indian tribe that is engaging in class III gaming and every state in which such gaming is being conducted. A ruling by this Court setting the limits to § 2710(d)(7)(A)(ii)'s grant of jurisdiction and abrogation of tribal sovereign immunity will define what claims a state can bring against an Indian tribe arising from a Tribal-State compact and thereby define how future disputes between states and Indian tribes will be resolved.

A ruling by this Court interpreting § 2710(d)(7)(A)(ii) will have a significant effect on gaming tribes and states because it is not simply a grant of jurisdiction and an implied abrogation of tribal sovereign immunity. It is a grant of jurisdiction that authorizes courts to enjoin tribal class III gaming. For nearly all gaming tribes, gaming is the main source of governmental revenue. In both this litigation and in the Tenth Circuit litigation, states have argued that § 2710(d)(7)(A)(ii) grants federal courts jurisdiction to hear any claim against an Indian tribe that alleges *any violation* of a gaming compact. If § 2710(d)(7)(A)(ii) is interpreted to allow a state to seek to enjoin tribal gaming every time the state alleges that there is a dispute arising from a gaming compact, states will be able to hold tribal gaming operations and tribal revenues hostage over even minor, peripheral violations, including violations of provisions that are negotiable outside the IGRA process. This will allow states to exert control over tribal gaming far beyond the limited role that Congress intended for states when it enacted § 2710(d)(7)(A)(ii) as part of the IGRA.

Third, if § 2710(d)(7)(A)(ii)'s grant of jurisdiction is not clearly defined by this Court, Indian tribes and states will almost certainly engage in even more frequent litigation.[4] Indian tribes and states are entering into progressively greater numbers of revenue sharing agreements involving increasingly greater amounts of money.[5] Many states have become dependent on those revenues. State attempts to exert control over Indian gaming will become more and more common as states' dependance on revenue from tribal gaming increases. It is an issue that this Court will inevitably have to address. A resolution of this issue at this time will allow states and tribes to clarify their relationships and to avoid unnecessary litigation in the future.

Finally, in concluding that § 2710(d)(7)(A)(ii)'s grant of jurisdiction extended to the proper subjects of negotiation set forth in 25 U.S.C. § 2710(d)(3)(C), the Seventh Circuit failed to apply the mandatory canons of construction established by this Court for statutes

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4. In its decision in *Ho-Chunk II*, the Seventh Circuit recognized that "the legitimacy of these revenue-sharing provisions is far from a settled issue." *Ho-Chunk II*, 512 F.3d at 932 (App. A at 20a-21a). *See* Gatsby Contreras, Note, *Exclusivity Agreements in Tribal-State Compacts: Mutual Benefit Revenue-Sharing or Illegal State Taxation?*, 5 J. GENDER RACE & JUST. 487, 494-95 (2002); Matthew L. M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS. 39 (2007).

5. For example, recently approved amendments to the gaming compacts of five California tribes obligate those tribes alone to pay an additional $100 million annually to the State of California. *2000–2009 Analysis*, Office of the Legislative Analyst, p. F-45.

passed for the benefit of Indians that contain ambiguous provisions. This aspect of the dispute is also a matter of nationwide significance. If those canons of construction are not applied by courts, every tribe will be affected. They are a pillar of support for the interests of Indians and Indian tribes. Without those canons of construction, tribal interests will be threatened where they had previously been protected by the canons of construction.

I.

THE COURT OF APPEALS ERRED BY HOLDING THAT SECTION 2710(d)(7)(A)(ii)'S GRANT OF JURISDICTION IS NOT LIMITED TO CLAIMS ARISING FROM THE CONDUCT AND REGULATION OF CLASS III GAMING.

"Interpretation of a statute must begin with the statute's language." *Mallard v. United States Dist. Ct. for the So. Dist. of Iowa*, 490 U.S. 296, 301 (1989). "The plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters." *United States v. Ron Pair Enters.*, 489 U.S. 235, 243 (1989).

The IGRA permits tribes to engage in class III gaming through two mechanisms. The first, and by far the more common, is a Tribal–State compact negotiated between a tribe and a state ("Negotiated Compact"). The second is a set of procedures for conducting gaming established by the Secretary of the Interior where the tribal–state negotiation process has failed ("Secretarial Procedures"). Section 2710(d)(7)(A) provides federal district court jurisdiction to enforce these mechanisms.

Section 2710(d)(7)(A) grants district courts jurisdiction over three causes of action arising under the IGRA:

> The United States district courts shall have jurisdiction over—
>
> (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact **under paragraph (3)** or to conduct such negotiations in good faith,
>
> (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, and
>
> (iii) any cause of action initiated by the Secretary to enforce the procedures **prescribed under subparagraph (B)(vii).**

25 U.S.C. § 2710(d)(7)(A) (emphasis added).

Section 2710(d)(7)(A)(ii), the provision at issue in this case, states that federal district courts have jurisdiction over claims by a state "to enjoin *a class III gaming activity* . . . *conducted* in violation of any Tribal-State compact entered into under paragraph (3) that is in effect." The term "class III gaming" is defined by the IGRA as "any banking card games . . . or electronic or

electromechanical facsimiles of any game of chance or slot machines of any kind * * * * [and] all forms of gaming that are not Class I . . . or Class II gaming." 25 U.S.C. § 2703(7)(B) and (8). Class III gaming includes "all house banking card games, slot machines, and all Las Vegas style gambling such as roulette and craps, parimutuel betting, and lotteries." *See* 25 C.F.R. § 502.4.

The words "activity" and "conduct" are not specifically defined in the statute. It is, therefore, appropriate to use the words' ordinary dictionary definition in interpreting the statute. *Rumsey v. Wilson*, 64 F.3d 1250, 1257 (9th Cir. 1994). Oxford's English Dictionary defines "activity" as "a condition in which things are happening or being done." Concise Oxford English Dictionary, Eleventh Edition 2006, p. 13. Black's Law Dictionary defines "conduct" as "to manage; direct; lead; have direction; carry on; regulate; do business." Black's Law Dictionary, Abridged 6th Edition, p. 204.

Applying these definitions to § 2710(d)(7)(A)(ii), the phrase "class III gaming activities . . . conducted in violation of" a compact means the specific action of conducting or carrying on class III gaming in a manner that violates a compact. Thus, § 2710(d)(7)(A)(ii) grants federal district courts jurisdiction over states' claims seeking to enjoin class III gaming where that gaming is being conducted by Indian tribes in a manner that violates those provisions of a tribal-state gaming compact that prescribe how the games are to be played.

Examples of matters that would provide a basis for a claim that a class III gaming activity is being conducted in violation of a compact would be: the playing

of class III games that are prohibited by the compact, the playing of class III games at locations not authorized by the compact, the playing of a game in violation of the rules of that game or of the minimum internal control standards agreed to in the compact, the playing of a game outside of the hours of operation, or the placing of a wager that exceeds the betting limits agreed to in the compact.

This interpretation of § 2710(d)(7)(A)(ii) is consistent with the purposes for which the IGRA was enacted:

> The purpose of this Act is–
>
> (1) to provide a statutory basis for the *operation of gaming* by Indian tribes *as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments*;
>
> (2) to provide a statutory basis for the *regulation of gaming* by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and *to assure that gaming is conducted fairly and honestly by both the operator and players*[.]

25 U.S.C. § 2702 (emphasis added).

The Congressional purposes of the IGRA are focused on the economic and governmental benefits to tribes arising from the operation and regulation of tribal

gaming. To the extent that the stated purposes reflect a concern for any state interest, that interest is the regulation of the gaming to ensure that the gaming is conducted fairly and without the influence of organized crime. The states' acknowledged interests do not include matters peripheral to the conduct of the gaming.

In its decision in *Ho-Chunk II*, the Court of Appeals concluded that the foregoing interpretation was too narrow. *Ho-Chunk II*, *supra*, 512 F.3d at 931 (App. A at 18a). The Court of Appeals found that the critical language for interpreting what constitutes a "violation" of a "Tribal–State compact" within the meaning of § 2710(d)(7)(A)(ii) was the phrase "entered into under paragraph (3) that is in effect":

> Paragraph (3) of the IGRA, the reference to which was ignored by both parties, governs the negotiation process tribes and states are to enter into for compacting under the Act. 25 U.S.C. § 2710(d)(3). Therefore, a proper interpretation of § 2710(d)(7)(A)(ii) is not that federal jurisdiction exists over a suit to enjoin class III gaming whenever *any* clause in a Tribal-State compact is violated, but rather that jurisdiction exists only when the alleged violation relates to a compact provision agreed upon pursuant to the IGRA negotiation process.

Id., at 933 (App. A at 22a-23a).

The manifest purpose of the inclusion of the phrase "entered into under paragraph (3) that is in effect,"

however, is to distinguish the grant of jurisdiction under § 2710(d)(7)(A)(i) and (ii) from the grant of jurisdiction under § 2710(d)(7)(A)(iii), not to define the scope of the claims encompassed by the grant of jurisdiction. The juxtaposition of the three grants makes it clear that the reference to "paragraph (3)" in § 2710(d)(7)(A)(i) and (ii) was intended by Congress to distinguish those provisions' grant of federal court jurisdiction over disputes arising from Negotiated Compacts from § 2710(d)(7)(A)(iii)'s grant of federal court jurisdiction over disputes arising from Secretarial Procedures.

The inclusion of the phrase "that is in effect" is consistent with this interpretation. It refers to the required approval of Negotiated Compacts by the Secretary of the Interior. Without that approval, such compacts would be unenforceable, that is, not "in effect." Thus, the entire phrase "entered into under paragraph (3) that is in effect," refers to all of the elements that are required in order for a Negotiated Compact to be enforceable: it must be entered into by the parties after good faith negotiations, as required by § 2710(d)(3) and it must then be approved by the Secretary in order to be in effect. On the other hand, Secretarial Procedures prescribed under subparagraph (B)(vii) are not the result of negotiations under § 2710(d)(3) and do not require separate approval by the Secretary.

The reason that this distinction is necessary is because the scope of the grants of jurisdiction contained in § 2710(d)(7)(A) differ. The grants in § 2710(d)(7)(A)(i) and (ii) are narrower and more specific than that in

§ 2710(d)(7)(A)(iii). Section 2710(d)(7)(A)(i)'s grant is restricted to one specific category of claims: that the state failed to negotiate a Negotiated Compact in good faith. Section 2710(d)(7)(A)(ii)'s grant is restricted to claims to enjoin a class III gaming activity conducted in violation of the gaming provisions of any Tribal-State compact. Section 2710(d)(7)(A)(iii)'s grant is unrestricted. It applies to any cause of action initiated by the Secretary to enforce any provision of a tribe's Secretarial Procedures.

The differences between the grants of jurisdiction reflect the Congressional purposes in enacting the IGRA. Section 2710(d)(7)(A)(i) reflects Congress' desire to ensure that the Tribal–State compact negotiation process be a fair one. Congress expressly acknowledged that there was an "unequal balance" in the power possessed by states as compared with tribes, and that if states were not compelled to negotiate in good faith, many would not do so. Senate Report No. 446, 100th Cong. 2d Sess., p. 13-14(1988), reprinted at 1988 U.S.C.C.A.N 3071, 3084.

Section 2710(d)(7)(A)(ii) reflects Congress' intention that the gaming be conducted fairly and honestly, and provides states and tribes a mechanism to halt "illegal gaming." Senate Report No. 446, 100th Cong. 2d Sess., p. 17, (1988) reprinted at 1988 U.S.C.C.A.N. 3088. This grant of jurisdiction was also narrowly drawn to ensure that states do not have too much power over tribal gaming. It allows states to enforce only those aspects of the compact that Congress

considered legitimate interests of the state—the regulation of class III gaming.[6]

The third has no such restrictions because the party granted the authority to bring the claim, the Secretary of the Interior, is the trustee for Indian tribes. The grant of jurisdiction allows the Secretary to enforce all of the provisions of the Secretarial procedures because Congress had no concern that the Secretary would treat the tribes, or the states, unfairly. There was no need to include safeguards in the grant of jurisdiction.

Other cross references to § 2710(d)(3) in § 2710 provide further support for this interpretation. *See* § 2710(d)(1)(C), (d)(2)(C), (d)(2)(D)(iii)(I), (d)(4), (d)(5), (d)(6), (d)(7)(A)(i), (d)(7)(B)(i), (d)(7)(B)(ii)(I), and (d)(7)(B)(vi). The reference to § 2710(d)(3) in § 2710(d)(7)(B)(vi) is particularly revealing of Congress' intent to distinguish between Negotiated Compacts and Secretarial Procedures:

> If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), **the proposed compact shall be**

6. Thus, for example, if a tribe, in violation of the terms of the compact, rigged its slot machines so only the casino could win, or had its blackjack dealers dealing from the bottom of the deck, Congress abrogated the tribes' sovereign immunity and allowed the states to bring an action in district court to enjoin the illegal gaming.

> **treated as a Tribal-State compact entered into under paragraph (3).**

25 U.S.C. § 2710(d)(7)(B)(vi) (emphasis added).

Had Congress intended the phrase "entered into under paragraph (3)" in § 2710(d)(7)(A)(ii) to be a specific reference to the proper subjects of negotiation, it would have included a specific citation to the subparagraph in which those subjects are listed, (§ 2710(d)(3)(C)), rather than a general reference to the entire subsection. Congress did that in other subsections of § 2710. See, for example, § 2710(d)(4), ("Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection . . ."). The general reference to the entire subsection relating to negotiation of gaming compacts is more consistent with an intention to distinguish between Negotiated Compacts and Secretarial Procedures.

The legislative history of the IGRA also supports the Nation's interpretation. The Senate Report on the IGRA states: "(7)(A) Grants United States district courts jurisdiction over actions by: A tribe against a State for failure to enter into negotiations or to negotiate in good faith; a tribe or state to enjoin illegal gaming on Indians lands; and by the Secretary to enforce procedures prescribed in (7)(B)." Senate Report No. 446, 100th Cong. 2d Sess., p. 18 (1988), reprinted at 1988 U.S.C.C.A.N. 3071, 3088. Nothing in this statement suggests that the references to § 2710(d)(3) were intended to provide a basis for interpreting the scope of the district court's grant of jurisdiction.

Finally, the Nation has not found a single federal or state court case in which a court has identified the phrase, "entered into under paragraph (3) that is in effect" as a basis for interpreting the district court's grant of jurisdiction contained in § 2710(d)(7)(A)(ii).

There is, thus, nothing in the text or the legislative history of the IGRA that suggests that Congress intended the reference to § 2710(d)(3) in § 2710(d)(7)(A)(ii) to provide a definition of the matters that constitute a violation of a compact in the IGRA's grant of district court jurisdiction. The Court of Appeals' ruling that the Nation's interpretation of § 2710(d)(7)(A)(ii) was too narrow is simply wrong and must be overruled.

II.

BECAUSE THE COURT OF APPEALS FOUND § 2710(d)(7)(A)(ii) TO BE AMBIGUOUS, THE COURT WAS REQUIRED TO APPLY THE CANONS OF CONSTRUCTION APPLICABLE TO STATUTES PASSED FOR THE BENEFIT OF INDIANS, BUT IT FAILED TO DO SO AND THEREBY COMMITTED AN ERROR OF LAW.

A. The Court of Appeals Failed to Follow This Court's Prior Precedent By Failing to Apply the Canons of Construction Applicable to Statutes Passed for the Benefit of Indian Tribes in Rendering its Ruling.

In *Ho-Chunk II*, the Court of Appeals analyzed the interpretation of § 2710(d)(7)(A)(ii) set forth in the District Court's decision (and adopted by the State) and that presented by the Nation. The Court of Appeals concluded that the State's interpretation was too broad and the Nation's too narrow. *Ho-Chunk II*, at 931 (App. A at 18a). It rejected them both. "Turning again to the language of the statute, it is evident that this Court is not compelled by the plain text of 25 U.S.C. § 2710(d)(7)(A)(ii) to adopt either of the interpretations offered by the parties to this suit." *Ho-Chunk II*, at 933 (App. A at 22a). The Court then presented its own interpretation of the provision, and ruled on the basis of that interpretation. *Id.*, at 933-935 (App. A at 22a-25a). Once the Court of Appeals recognized that § 2710(d)(7)(A)(ii) was subject to more than one interpretation, however, it was required by the decisions of this Court relating to the interpretation of statutes passed for the benefit of Indians to interpret the statute

in favor of the Nation. "When we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: 'Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992), citing *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

The Court of Appeals was required to apply these canons of construction even though it had concluded that the interpretation favoring the Indians was not the best interpretation. "We adopt Defendants' construction [of the IGRA], not because it is necessarily the better reading, but because it favors Indian tribes and the statute at issue is both ambiguous and intended to benefit those tribes." *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 730 (9th Cir. 2003) (holding that ambiguous provisions in the IGRA should be construed in favor of tribes). Courts are required to adopt the interpretation that is most favorable to tribes because of the importance of tribal sovereignty: "Ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache v. Braker*, 448 U.S. 136, 143-144 (1980).

The rules for construing federal statutes dealing with Indians and Indian tribes are variously phrased in different contexts, but, generally, they provide for a broad construction when the issue is whether Indian

rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (narrowly construing waiver of sovereign immunity in Indian Civil Rights Act, 25 U.S.C. § 1301, *et seq.*, to limit jurisdiction of federal courts to habeas corpus review of tribal action); *Bryan v. Itasca County*, 426 U.S. 373 (1976) (narrowly construing P.L. 280, 28 U.S.C. § 1360, by refusing to find Congressional abrogation of Indian immunity from state taxation); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1195–1196 (10th Cir. 2002) ("[W]e. . . do not lightly construe federal laws as working a divestment of tribal sovereignty and will do so only where Congress had made its intent clear that we do so"); *Maryland Cas. Co. v. Citizens Nat'l Bank*, 361 F.2d 517, 521 (5th Cir.), *cert denied*, 385 U.S. 918 (1966) (Congressional abrogations of tribal sovereign immunity must be clearly expressed and strictly construed); *Colorado River Tribes v. Nat'l Indian Gaming Comm'n*, 383 F. Supp. 2d 123, 146 (D.D.C. 2005) (ambiguous statutes, such as the IGRA, should be interpreted to preserve "tribal independence or sovereignty").

The Supreme Court precedent requiring that ambiguities in statutes enacted for the benefit of Indians be resolved in favor of Indians is long standing and extensive. *County of Yakima*, *supra*; *Montana v. Blackfeet Tribe*; *supra*; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982); *White Mountain Apache v. Braker*, 448 U.S. 136, 143-144 (1980); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Alaska Pacific Fisheries Co. v. United* States, 248 U.S. 78, 89 (1918).

There is no question that these canons of construction apply to the IGRA. *Artichoke Joe's*, 353 F.3d at 731 (9th Cir. 2003). It is self-evident that the statute was passed for the benefit of Indians, given that the purpose of the statute was to ensure that Indian tribes' right to engage in gaming was protected and tribal interests promoted. 25 U.S.C. § 2702. The Senate, furthermore, expressly recognized the applicability of these canons of construction to the IGRA. The Senate Report states, with reference to 25 U.S.C. § 2710(d)(7). "The [Senate] Committee [on Indian Affairs] . . . trusts that courts will interpret any ambiguities on these issues in a manner that **will be most favorable to tribal interests** consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes." Senate Report No. 446, 100th Cong. 2d Sess., p. 15 (1988), reprinted at 1988 U.S.C.C.A.N. 3071, 3085 (emphasis added).

Despite the mandatory nature of these canons of construction and the Nation's discussion of the canons in its briefs, the Court of Appeals did not make a single reference to the canons in *Ho-Chunk II* or give any indication that it had considered the canons in ruling on the appeal. Had the Court of Appeals applied those canons of construction, it would have been compelled to adopt the Nation's interpretation of the statute.

The decisions of this Court cited above makes it clear that the failure to apply the canons was a clear error of law.

B. The Nation's Narrow Interpretation, Rather than the Court of Appeals' Broad Interpretation, of § 2710(d)(7)(A)(ii), Is Consistent with the Decisions of this Court and Lower Federal Courts with Regard to Abrogations of Tribal Sovereign Immunity.

In the specific context of interpreting asserted Congressional abrogations of tribal sovereign immunity, rules of construction are particularly strict. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 59-60; *Maryland Cas. Co. v. Citizens Nat'l Bank*, 361 F.2d at 521-522.

The IGRA contains no explicit abrogation of tribal sovereign immunity. Federal courts have, however, concluded that the IGRA abrogated tribal sovereign immunity, even though it does not include an express state abrogation, because it authorized states to sue tribes under § 2710(d)(7(A)(ii). *State of Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1242 (11th Cir. 1999). In reaching this conclusion, however, the Eleventh Circuit was careful to state that § 2710(d)(7)(A)(ii)'s abrogation of tribal sovereign immunity must be construed narrowly and in conformity with the rules of construction for legislation passed for the benefit of Indians:

> [T]he State's argument in favor of a broad reading of section 2710(d)(7)(A)(ii) — 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.

Id.

Thus, § 2710(d)(7)(A)(ii)'s abrogation must be construed as narrowly as possible. *Santa Clara Pueblo* 436 U.S. at 59-60; *Maryland Cas. Co.*, 361 F.2d at 521-522. The statute should be construed to abrogate only as much of a tribe's immunity from suit as is necessary to carry out the purposes of the IGRA as it pertains to class III gaming. Such an interpretation would limit the abrogation of sovereign immunity and, because they are coextensive, the grant of jurisdiction in § 2710(d)(7)(A)(ii) to ensuring that the games themselves are not played illegally. 25 U.S.C. § 2702(2).

The Court of Appeals rejected the Nation's interpretation of § 2710(d)(7)(A)(ii) on the ground that the Nation's interpretation was too "narrow in scope." *Ho-Chunk II*, at 932 (App. A at 18a). Yet, the Court of Appeals failed to explain why, consistent with this Court's prior precedent, a statute that abrogates tribes' sovereign immunity from suit should not be narrowly construed.

The Court of Appeals erred in rejecting the Nation's narrow construction of the statute's abrogation of tribal sovereign immunity, by failing to apply the canons of construction applicable to abrogations of tribal sovereign immunity. For this reason alone, the Court of Appeals decision must be reversed.

CONCLUSION

The Seventh Circuit erred as a matter of law in concluding that § 2710(d)(7)(A)(ii)'s grant of jurisdiction and abrogation of sovereign immunity extends broadly to the potential subjects of compact negotiation set forth in § 2710(d)(3)(C). The Seventh Circuit's decision is not consistent with the plain wording of those sections, the other provisions of the Indian Gaming Regulatory Act, or its legislative history. The Seventh Circuit's failure to apply the mandatory canons of construction for statutes passed for the benefit of Indian tribes and for abrogations of tribal sovereign immunity, after ruling that the provision is ambiguous, is also a clear error of law. Because decisions of three federal circuits are in conflict as to the scope of § 2710(d)(7)(A)(ii)'s grant of jurisdiction and abrogation of sovereign immunity, and because the legal issues arising from the Seventh Circuit's decision are matters of national significance, this matter is appropriate for review by this Court. The Ho–Chunk Nation, therefore, respectfully requests that the Court grant its petition for writ of certiorari.

Respectfully submitted,

THOMAS M. PYPER
WHYTE HIRSCHBOECK
DUDEK S.C.
33 East Main Street
Suite 300
Madison, WI 53703
(608) 258-7122

LESTER J. MARSTON
Counsel of Record
RAPPORT AND MARSTON
405 W. Perkins Street
Ukiah, CA 95482
(707) 462-6846

Counsel for Petitioner