No. 13-1372

IN THE

Supreme Court of the United States

STATE OF MICHIGAN,

Petitioner,

v.

THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the State of Michigan's suit to enjoin the Sault Ste. Marie Tribe of Chippewa Indians from submitting an application to the Secretary of the Interior seeking to have land taken into trust under the Michigan Indian Land Claims Settlement Act was not a suit "to enjoin a class III gaming activity" within the meaning of the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7)(A)(ii).

2. Whether the court of appeals correctly held that Michigan could not obtain an injunction shutting down all of the Sault Tribe's gaming facilities as a remedy for an alleged violation of its tribal-state gaming compact relating only to one specific site.

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STATEMENT

Michigan's petition for a writ of certiorari asks this Court to review the court of appeals' unexceptional—and plainly correct—holding that Michigan's suit to enjoin the Sault Tribe from applying to have land taken into trust by the Secretary of the Interior under the Michigan Indian Land Claims Settlement Act is not a suit "to enjoin a class III gaming activity" within the meaning of the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7)(A)(ii). Michigan also complains of the court of appeals' common-sense determination that Michigan could not obtain an injunction shutting down *all* the Tribe's gaming facilities, everywhere in the

State, as a remedy for an alleged compact violation that related to one specific location. No circuit has ever held to the contrary on either question, and neither ruling implicates any split of authority among the circuits at any level of generality. Moreover, those questions are specific to the Sault Tribe and its compact and lack any broader significance. Nor will this Court's decision in *Michigan* v. *Bay Mills Indian Community*—however that case is resolved—have any effect on the court of appeals' judgment in this case.

Michigan's attempt to persuade this Court to review the court of appeals' narrow, case-specific holdings is replete with misleading rhetoric. For instance, Michigan claims that the court of appeals' decision "invites tribes to violate material promises made in their gaming compacts with impunity," leaving States with no remedy. Pet. 3. The decision does nothing of the kind. To the contrary, the court repeatedly stated in the plainest terms—and, indeed, the Tribe never disputed—that Michigan *does* have a remedy under IGRA in the event of an alleged compact violation: It could sue to enjoin class III gaming activity on the land in question. Pet. App. 11a-13a & n.4. While the court held that such a claim was not yet ripe—a holding Michigan does not challenge before this Court—it made plain that "the State must be able to obtain a judicial determination" of that claim "before the gaming starts." *Id.* 18a.

This case thus involves a completely different statutory issue than that raised in *Bay Mills*, which presents the question whether a State may *ever* bring suit under Section 2710(d)(7)(A)(ii) of IGRA to enjoin class III gaming activity that is not on Indian lands. Unlike in *Bay Mills*, the question here is not *whether*, but only *when*, the State can bring its suit. Michigan's belated

attempt to leverage the broader question in *Bay Mills* about the scope of common-law tribal sovereign immunity into a grant of certiorari in this case should also be rejected. Having represented to the court of appeals that this case would be unaffected by *Bay Mills*, and having failed until the rehearing stage to argue that the Tribe lacked common-law immunity from a breach-of-compact suit, Michigan has waived that argument and should not be heard to make it here. The petition for a writ of certiorari should be denied.

A. Factual And Legal Background

1. The Sault Ste. Marie Tribe of Chippewa Indians "'is the modern day political organization of the Chippewa bands which inhabited the eastern portion of the Upper Peninsula of Michigan since before the coming of Europeans.'" *Sault Ste. Marie Tribe of Chippewa Indians* v. *United States*, 576 F. Supp. 2d 838, 840 (W.D. Mich. 2008). The Tribe is the "'successor to distinct historic bands of Ojibwe peoples, who occupied five disparate geographic locations in the Upper Peninsula of Michigan,'" and it currently exercises governmental authority over land in the Upper Peninsula that is held in trust for the Tribe by the United States. *Id.* at 841. The Tribe is the largest in Michigan, with over 40,000 enrolled members. A substantial number of the Tribe's members now live in lower Michigan, outside the Upper Peninsula.

2. The Tribe currently operates several modest class III gaming facilities in relatively remote areas of the Upper Peninsula. *See* Pet. App. 4a. "Class III" is a term of art under IGRA, which Congress enacted in 1988 "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." 25 U.S.C. § 2702(1).

IGRA defines three classes of gaming, each of which is regulated differently. Class I includes social games with prizes of minimal value; it is regulated exclusively by tribes. *See* 25 U.S.C. §§ 2703(6), 2710(a)(1). Class II includes bingo and certain card games. *Id.* § 2703(7)(A), (B). It is regulated by tribes, via tribal gaming ordinances, and by the National Indian Gaming Commission. *See id.* § 2710(a)(2), (b)-(c). Class III includes everything else—typically, slot machines and other "casino-style" gaming. *Id.* § 2703(8). In contrast to class II gaming, class III gaming requires not only a tribal gaming ordinance and approval from the NIGC, but also a compact between the tribe and the State in which the gaming will occur. *See id.* § 2710(d).

The Sault Tribe and the State of Michigan entered into a class III gaming compact in 1993. Pet. App. 67a-90a. All of the Tribe's current class III facilities are operated in accordance with the compact.

IGRA also specifies the lands on which Indian gaming may occur. The Act recognizes tribes' authority to conduct and regulate gaming on "Indian lands," 25 U.S.C. § 2710(a)(1)-(2), (d)(1), defined to include "any lands title to which is ... held in trust by the United States for the benefit of any Indian tribe," *id.* § 2703(4)(B). However, Section 20 of the Act generally prohibits gaming on "after-acquired" trust lands—that is, "lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988," when IGRA was enacted. *Id.* § 2719(a).

Section 20 of IGRA sets forth several important exceptions to this general prohibition on gaming on after-acquired trust lands. Three of the statutory excep-

tions address situations in which it would be inequitable to apply the general prohibition because some legal anomaly prevented a tribe from having land recognized as part of its reservation lands in 1988. As relevant here, one of those exceptions applies when land is taken into trust as part of the settlement of a tribal land claim. 25 U.S.C. § 2719(b)(1)(B)(i).

Section 20 also contains a quite different exception, commonly known as the "two-part determination." Unlike the other exceptions, the two-part determination exception may be invoked by any tribe to permit gaming on any land, not part of or contiguous to a previously recognized reservation, that the Secretary is willing to take into trust. The two-part determination exception applies only if (1) the Secretary determines that using the off-reservation land for gaming "would be in the best interest of the Indian tribe and its members" and "would not be detrimental to the surrounding community," and (2) the governor of the State in which the land is located "concurs in the Secretary's determination." 25 U.S.C. § 2719(b)(1)(A).

3. In January 2012, the Sault Tribe entered into a comprehensive development agreement with the City of Lansing, Michigan. Pet. App. 24a. Under the agreement, the Tribe is to acquire, in two stages, parcels of land within the City. *See id.* The agreement requires the Tribe to take all steps necessary to establish its right to conduct gaming on the Lansing property under IGRA. *Id.* 4a-5a. It permits the Tribe and its development partners to choose to conduct either class II or class III gaming on the property. *Id.*

The Tribe acquired the first parcel of the Lansing property in November 2012. Pet. App. 24a. It did so using income from a tribal Self-Sufficiency Fund creat-

ed by Congress in the Michigan Indian Land Claims Settlement Act, Pub. L. No. 105-143, 111 Stat. 2652 (1997) (excerpted at App. 1a-5a). The Tribe has announced plans to acquire the second parcel in the same manner.

The Tribe's decision to proceed under MILCSA is significant. Congress enacted MILCSA "to provide for the fair and equitable division of ... funds" appropriated to satisfy judgments rendered against the United States in land-claims litigation brought by the Sault Tribe and other Michigan tribes. § 102(b), 111 Stat. at 2653. Section 108(a) authorizes the establishment of the Self-Sufficiency Fund to receive the Tribe's share of the settlement funds, and Section 108(c) permits the Sault Tribe's Board of Directors to expend the Fund's income for a variety of purposes, including "consolidation or enhancement of tribal lands." *Id.* at 2660-2661. Section 108(f) mandates that any land purchased by the Tribe using Fund income "shall be held in trust by the Secretary [of the Interior] for the benefit of the tribe." *Id.* at 2662.[1]

When the Tribe's Board of Directors adopted a resolution approving the Lansing development agreement, the Board recognized that MILCSA "create[d] a valuable and unique opportunity for the Tribe to engage in economic development opportunities that will be of substantial benefit to the Tribe and to the tribal com-

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[1] The Tribe believes that trust lands acquired using the Self-Sufficiency Fund created by MILCSA are eligible for gaming under the exception to IGRA's bar on gaming on after-acquired lands for lands acquired as part of "a settlement of a land claim." 25 U.S.C. § 2719(b)(1)(B)(i); *see supra* pp. 4-5. The current litigation has prevented the Tribe from presenting that legal theory to the Secretary or the NIGC.

munity." Pet. App. 93a. The Tribe will lose its contractual right (and default on its obligation) to pursue that opportunity if it cannot establish its gaming rights and close on the second Lansing parcel by January 1, 2017. *See* Comprehensive Development Agreement § 5.1.1 (Dkt. 1-4).[2] As described below, however, as a result of an injunction entered in this litigation, the Tribe has been barred from asking the Secretary to take the Lansing parcel into trust under MILCSA.

B. Proceedings Below

1. On September 12, 2012, after the Tribe and the City of Lansing announced their development plans, the State filed the present suit. Pet. App. 25a. The first three counts of the State's complaint alleged, in substance, that submission of the Tribe's planned application to the Secretary to take the Lansing parcel into trust would violate Section 9 of the Tribe's class III gaming compact. *Id.* 5a.[3] Count 4 of the complaint alleged that class III gaming activity at the Lansing property would violate IGRA. *Id.* Counts 5 and 6 alleged that class III gaming activity at the Lansing property would violate state law. *Id.* n.1. The State also sought a preliminary injunction "prohibiting Defendants from applying in violation of the compact to

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[2] Citations to docket entries are to the district court docket, No. 12-cv-962 (W.D. Mich.), unless otherwise noted.

[3] Section 9, entitled "Off-Reservation Gaming," provides: "An application to take land in trust for gaming purposes pursuant to § 20 of IGRA (25 U.S.C. § 2719) shall not be submitted to the Secretary of the Interior in the absence of a prior written agreement between the Tribe and the State's other federally recognized Indian Tribes that provides for each of the other Tribes to share in the revenue of the off-reservation gaming facility that is the subject of the § 20 application." Pet. App. 86a.

have the property in Lansing taken into trust for gaming purposes." Pl. Mot. for Prelim. Inj. 3 (Dkt. 2); *see also* Pet. App. 26a.

The State's complaint recognized that the Tribe, as a sovereign entity, is ordinarily immune from suit. Compl. ¶¶ 32-33 (Dkt. 1). Indeed, the class III gaming compact to which the State had agreed is emphatic on this point: "Nothing in this Compact shall be deemed a waiver of the Tribe's sovereign immunity." Pet. App. 85a. Although IGRA permits tribes and States, as sovereign parties, to agree to "remedies for breach of contract," 25 U.S.C. § 2710(d)(3)(C)(v), and the parties had done so here, the State chose not to invoke the arbitration remedy included in the compact. *See* Pet. App. 83a-85a. It argued, instead, that Congress had abrogated the Tribe's sovereign immunity from this particular suit under the following provision of IGRA, addressed to class III gaming:

> 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)(7)(A).

The Tribe opposed the State's request for a preliminary injunction and moved to dismiss the case. Pet. App. 26a. In pertinent part, the Tribe argued that Section 2710(d)(7)(A)(ii) abrogates tribal sovereign immunity only for suits "to enjoin a class III gaming activity"

and that filing an application to have land taken into trust under MILCSA is not "a class III gaming activity." The Tribe also argued that the State was not entitled to a preliminary injunction because it was unlikely to succeed on the merits of its breach-of-compact claim.[4]

2. In March 2013, the district court dismissed all claims against the individual defendants and dismissed all state-law claims as unripe. Pet. App. 33a-34a. It declined to dismiss Counts 1-4 against the Tribe, and it entered the State's requested preliminary injunction. *Id.* 28a-33a, 35a-44a. The court found the terms of Section 2710(d)(7)(A)(ii) satisfied but also suggested that, if necessary, the State could pursue an "alternative path"

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[4] The State misrepresents the Tribe's position in asserting that "the Tribe [has] candidly admitted it intends to engage immediately in the conduct prohibited by the compact." Pet. 2. The merits of the parties' compact dispute are not before the Court. But, in the Tribe's view, Section 9 of the compact, which refers to "[a]n application to take land in trust for gaming purposes pursuant to § 20 of IGRA" (Pet. App. 86a), does not apply to the Tribe's proposed application to have land taken into trust under MILCSA. Section 9 was intended to apply only to an application to the Secretary to take land into trust pursuant to a two-part determination for off-reservation gaming under 25 U.S.C. § 2719(b)(1)(A), as indicated by the compact's references to "*off-reservation*" gaming and as confirmed by other intrinsic and extrinsic evidence of the parties' contractual intent—including, for example, congressional testimony by legal representatives of the State. *See* Defs.-Appellants C.A. Br. 38-43 (CA6 Dkt. 19). At a minimum, Section 9 was not intended to apply to the Tribe's trust submission under MILCSA, which had not been enacted at the time of the gaming compact and which requires the Secretary to take eligible land into trust without considering the purpose for which it might be used. Such a submission is not a "§ 20 application" and is not an application to take land into trust "for gaming purposes," and certainly not for class III gaming. *See id.* 43-46.

(*id.* 32a) to abrogating tribal sovereign immunity that the State had offered in its motion papers—namely, that the State could bring its suit into compliance with the terms of Section 2710(d)(7)(A)(ii) by amending its complaint to seek an injunction of "ongoing gaming that is occurring now at the tribe's existing casinos" (12/5/12 Hr'g Tr. 8:17-18 (Dkt. 33)), which the State did not argue was otherwise unlawful. *See* Pl. Opp. to Mot. to Dismiss 14-15 (Dkt. 22). The State has not thus far sought to amend its complaint.

3. On an interlocutory appeal, the court of appeals reversed the preliminary injunction. Pet. App. 1a-19a. The court held that Counts 1-3 of the State's complaint are "barred because the Sault Tribe is immune from suit." *Id.* 7a. The Sixth Circuit recognized that, under IGRA, "the Tribe's [sovereign] immunity is subject to statutory exceptions." *Id.* 8a. But the court held that the exception invoked by the State did not apply because "enjoining a mandatory trust submission under MILCSA does not qualify as enjoining 'a class III gaming activity' under § 2710(d)(7)(A)(ii) of IGRA." *Id.*

The court of appeals also rejected the State's alternative theory for an abrogation of the Tribe's sovereign immunity. Pet. App. 10a-11a. The court held that "[n]othing in the Tribal-State compact or IGRA provides support" for the State's "sweeping proposition" that the State could "enjoin[] class III gaming at sites unrelated to the alleged compact violation." *Id.* 11a.

Importantly, the Court held that Count 4—under which the State sought to enjoin class III gaming at the Lansing property and which accordingly was "not barred by sovereign immunity"—was "not ripe for adjudication." Pet. App. 13a. The court was clear, however, that nothing in its decision affected the State's

ability to sue to enjoin class III gaming activity on the Lansing property at an appropriate time in the future. Specifically, the court stated that its decision "does not affect the legal viability of a later suit to enjoin, as a violation of ... § 9 of the Compact ... *class III gaming* on the land" if the land is taken into trust and if class III gaming activity is imminent. *Id.* 11a. "At some point," the court explained, "the State must be able to obtain a judicial determination of whether [Section 9 of the compact or IGRA] prohibits class III gaming at the Lansing location, before the gaming starts." *Id.* 18a. But such a suit was premature now, when the Tribe had not yet even sought to have the land taken into trust, let alone reached the point where gaming might begin. *Id.* 16a-17a.

4. The State petitioned for panel rehearing and rehearing en banc. For the first time, it contended that the appeal should be held in abeyance pending this Court's decision in *Michigan* v. *Bay Mills Indian Community*, 695 F.3d 406 (6th Cir. 2012), *cert. granted*, 133 S. Ct. 2850 (2013) (argued Dec. 2, 2013). The State had always before been of the view that *Bay Mills* was inapposite. *See, e.g.*, Pl.-Appellee C.A. Br. 25, 27 (CA6 Dkt. 22); 12/5/12 Hr'g Tr. 12:24-13:25 (Dkt. 33). The panel had agreed and had held that abeyance was unnecessary because *Bay Mills* would not address the narrow statutory question whether a suit to enjoin a trust submission under MILCSA is a "suit to enjoin gaming activity." Pet. App. 9a n.2. The full court denied rehearing on February 13, 2014. *Id.* 47a.

The court later granted the State's motion to stay issuance of the appellate mandate pending this Court's disposition of the present petition. As a result, the unlawful preliminary injunction remains in effect. The

Tribe has now been enjoined from filing its proposed trust submission for nearly a year and a half.

REASONS FOR DENYING THE PETITION

The court of appeals decided two narrow questions arising under IGRA and the parties' gaming compact: first, that filing a MILCSA trust submission is not "class III gaming activity" under IGRA and, second, that neither the gaming compact nor IGRA permits the State to sue to shutter existing gaming operations in the Upper Peninsula of Michigan based on an alleged compact violation relating to a completely different site. Those holdings do not come close to satisfying this Court's standards for certiorari. *See* S. Ct. R. 10. Each legal issue was decided correctly. Neither holding creates or deepens any conflict among the circuits. And neither decision raises any issue worthy of this Court's review given, among other things, the highly unusual factual and statutory context in which this dispute arises.

The State's central complaint in its petition—that the Sixth Circuit has rendered the gaming compact all but unenforceable—seriously mischaracterizes the court's decision, which expressly recognized that the State will be able to sue to enforce the compact at an appropriate time. Finally, the State's belated effort to take advantage in this case of any narrowing of common-law sovereign immunity in *Bay Mills* should be rejected.

I. THE QUESTION WHETHER MICHIGAN'S SUIT TO ENJOIN THE FILING OF A MILCSA TRUST SUBMISSION IS A SUIT TO ENJOIN "CLASS III GAMING ACTIVITY" UNDER IGRA DOES NOT MERIT THIS COURT'S REVIEW

The Sixth Circuit's principal holding was that filing a MILCSA trust submission is not "class III gaming activity," and thus that the congressional abrogation of immunity in Section 2710(d)(7)(A)(ii) does not apply. Pet. App. 8a. There is no good reason for this Court to review that narrow and case-specific statutory question. The decision was plainly correct, it implicates no split among the circuits, and it raises no issue warranting certiorari.

A. The Sixth Circuit's Interpretation Of IGRA Is Correct

In enacting IGRA, Congress abrogated tribal sovereign immunity for "any cause of action initiated by a State ... to enjoin a class III gaming activity located on Indians lands and conducted in violation of any Tribal-State compact." 25 U.S.C. § 2710(d)(7)(A)(ii). Relying on that provision, the State filed suit in district court seeking in relevant part (1) a declaration that "any submission ... of an application to the United States to have the [Lansing] property taken into trust violates the Compact" and (2) an injunction barring the Tribe "from submitting such an application until ... the Tribe has complied with § 9 of its compact." Compl. 9 (Dkt. 1).

The court of appeals had little difficulty concluding, based on the plain meaning of IGRA's text, that "[e]njoining a MILCSA trust submission is not the same as enjoining a class III gaming activity" and that the statutory abrogation of tribal immunity in Section 2710(d)(7)(A)(ii) thus did not apply. Pet. App. 9a.

The Sixth Circuit's resolution of that narrow statutory question was correct. As a matter of statutory text and context, an application to the Secretary of the Interior seeking to have land held in trust is not a "class III gaming activity," any more than it is "class III gaming." The term "class III gaming" is expressly defined in IGRA as "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. § 2703(8). IGRA does not separately define "a class III gaming activity," but it uses the phrase "gaming activity" more than 30 times, in each case to refer to the *conduct* of class III gaming—as distinguished from "gaming" alone, which refers to *types of games*. *See, e.g., id.* §§ 2701(1), 2710(d)(9), 2717(a)(1). Thus, read in context, "class III gaming activity" naturally means the activity of conducting or operating class III games—a reading that is bolstered by the separate reference in Section 2710(d)(7)(A)(ii) to suits to enjoin "a class III gaming activity ... *conducted* in violation" of a class III gaming compact. It would stretch the statutory text beyond its breaking point to suggest that filing a MILCSA trust submission is "gaming activity ... conducted" in violation of a compact.[5]

In its petition (at 15-16), the State insists that the court of appeals erred in declining to read IGRA's reference to "class III gaming activity" broadly to include the filing of a trust submission. But the State makes no serious effort to engage the actual words of the statute,

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[5] Even if the scope of "class III gaming activity" were ambiguous, the Tribe's reading must prevail under well-established canons of construction—namely, the rules that abrogations of tribal immunity must be "'unequivocally expressed,'" *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978), and that ambiguities in federal law must be resolved in favor of a tribe, *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

preferring instead to speculate on what Congress must have intended (*e.g.*, Pet. 3, 16). IGRA's text makes plain that, in referring to "gaming activity," Congress was referring to the actual conduct of the various games authorized by IGRA. In any event, even if the phrase "class III gaming activity" could ever encompass the filing of a trust submission, it could not do so here for two reasons.

First, as the court of appeals correctly held, whatever the scope of the term "class III gaming activity," and even if it could ever be stretched to include the filing of a trust submission, that theory could not apply here, where the Tribe intends to file a trust submission *under MILCSA*. MILCSA imposes a mandatory duty on the Secretary to hold land purchased with income from the Self-Sufficiency Fund in trust, and that duty is "triggered by the nature of the funds used to purchase the property, not by the prospective purpose ... for which the property was acquired." Pet. App. 9a; *see also* 25 C.F.R. § 151.11 (no statement of purpose required when "the [trust] acquisition is ... mandated").

Second, the State's broad and atextual reading of "class III gaming activity" is particularly unsupportable given that the Tribe may very well choose to conduct only *class II* gaming on the Lansing property. It simply makes no sense to call a mandatory trust submission that might lead only to class II gaming "class III gaming activity" that may be enjoined under IGRA.

B. The Sixth Circuit's Interpretation Of IGRA Does Not Conflict With The Decision Of Any Other Court Of Appeals

Certiorari is also unwarranted because the Sixth Circuit's unremarkable conclusion that filing a MILCSA trust submission is not "class III gaming ac-

tivity" does not remotely conflict with the decision of any other court of appeals. The two decisions the State relies upon are not to the contrary. *See* Pet. 9-10, 12. Neither decision construed the relevant statutory phrase "class III gaming activity" or applied that phrase to a trust submission.

In *Mescalero Apache Tribe* v. *New Mexico*, the Tenth Circuit held that Section 2710(d)(7)(A)(ii) abrogated tribal immunity where a State sought a declaratory judgment that the gaming compact under which a tribe's class III gaming activities were authorized had not been properly approved under state law. *See* 131 F.3d 1379, 1381, 1385-1386 (10th Cir. 1997). The court's statement that "IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue," *id.* at 1385, did not purport to be a comprehensive "test," nor was it even the court's holding. *Contra* Pet. 9-10. Instead, the court properly understood the "clear and unmistakable" intent of Congress in Section 2710(d)(7)(A)(ii) to be "to abrogate tribal sovereign immunity ... when a state seeks to 'enjoin' *gaming activities* 'conducted in violation of any Tribal-State compact.'" 131 F.3d at 1385 (emphasis added).

Thus, under *Mescalero*, a State may challenge class III gaming activities that are conducted pursuant to an allegedly invalid class III gaming compact. The Tenth Circuit's implicit reasoning—that a suit to declare invalid a compact under which a tribe conducts class III gaming activities is a suit to enjoin "gaming activity" because a valid compact is a prerequisite to lawful class III gaming activity, 25 U.S.C. § 2710(d)(1)(C)—has nothing to do with the Sixth Circuit's decision here, where the State does not challenge the validity of the compact but instead seeks to enjoin a trust submission.

The State's reliance on *Lewis* v. *Norton*, 424 F.3d 959 (9th Cir. 2005), is even farther afield. The plaintiffs there sued the Secretary of the Interior and other federal officials over an intra-tribal membership dispute, arguing that the federal officials should order a tribe to recognize the plaintiffs' membership (and thus their stake in tribal gaming revenues). *Id.* at 960-961. In affirming the dismissal of the complaint on tribal sovereign immunity grounds, the Ninth Circuit rejected the argument that IGRA conferred federal jurisdiction over any suit in which "gaming revenues are at stake." *Id.* at 963. The court's statement in passing that "IGRA waives tribal sovereign immunity in the narrow category of cases where compliance with the IGRA is at issue," *id.* at 962, is neither a holding nor a suggestion that courts should ignore the actual terms of Section 2710(d)(7)(A)(ii) in determining whether Congress has abrogated tribal immunity.

C. The Narrow Statutory Question Is Unlikely To Recur And Is Of Little Practical Consequence

Finally, this Court's review is unnecessary because the Sixth Circuit's interpretation of IGRA was set against a highly specific factual and legal background that is unlikely to recur. In particular, the court of appeal's conclusion that a MILCSA trust submission is not "class III gaming activity" turned at least in part on specific statutory provisions that apply *only* to the Sault Tribe. *See* MILCSA § 108(a)(1), 111 Stat. at 2660 (setting forth the plan and procedures for use of the "Sault Ste. Marie Tribe of Chippewa Indians"); *id.* § 108(f), 111 Stat. at 2661-2662 ("Any lands acquired using amounts from interest or other income of the Self-Sufficiency Fund shall be held in trust by the Secretary

for the benefit of the tribe."). It is highly unlikely that any court will ever confront again the question of whether a mandatory MILCSA trust submission is "a class III gaming activity" under IGRA. Indeed, in the decades since IGRA was enacted, no court of which the Tribe is aware has ever passed on the question of whether any type of trust submission could be considered "a class III gaming activity." This one-off question does not warrant the Court's review.

In an effort to manufacture a question worthy of this Court's attention, the State contends (repeatedly, and in various ways) that "allowing the Sixth Circuit decision to stand invites tribes to violate material promises made in their gaming compacts with impunity." Pet. 3; *see also id.* 2, 8-9, 16-17, 19, 21. But the State's charged rhetoric simply ignores what the Sixth Circuit actually held. The court was clear that its "decision ... does not affect the legal viability of a later suit to enjoin, as a violation of either § 9 of the Compact or § 2710(d)(7)(A)(ii) of IGRA, *class III gaming* on the land taken into trust." Pet. App. 11a. The court was equally clear that such an action would not "have to wait until such gaming is already occurring." *Id.* 13a. The court of appeals simply concluded that a suit to enjoin class III gaming on the Lansing property (which is potentially years away) was not yet ripe—a holding the State does not challenge in its petition. *See id.* 13a-19a.

The State, of course, would prefer to have the merits of the parties' dispute over the meaning of Section 9 of the compact resolved now. But the State's complaints (at 21) that the Sixth Circuit's decision to enforce the plain meaning of Section 2710(d)(7)(A)(ii) will improperly "[l]imit[] a State's ... ability to seek a remedy in federal court for violation of a compact provision" or "seriously complicate negotiations for all future gam-

ing compacts" are meritless. IGRA expressly authorizes compacting parties to bargain over "remedies for breach of contract." 25 U.S.C. § 2710(d)(3)(C)(v). The compact at issue here, far from providing specific enforcement mechanisms for any compact breach, expressly reserves the sovereign immunity of each party. *See* Pet. App. 85a (Compact § 7(B)). As to judicial enforcement, the State thus voluntarily limited itself to the specific abrogation of immunity provided by IGRA. There is no inequity in affording the State the remedies it bargained for in the compact. And, in any event, as the court of appeals made plain, IGRA will permit the State to sue to enjoin class III gaming activity on the parcel at issue at a later date, if and when the question becomes ripe for decision. Nothing in the court of appeals' ruling presents a question warranting this Court's review.

II. THE QUESTION WHETHER MICHIGAN MAY SUE TO ENJOIN UNRELATED GAMING ACTIVITY ON OTHER TRIBAL LANDS UNDER THE PARTIES' GAMING COMPACT AND IGRA DOES NOT MERIT THIS COURT'S REVIEW

The court of appeals' rejection of the State's alternative theory—that IGRA and the compact permit the State to sue to enjoin "gaming activity" at the Tribe's Upper Peninsula casinos here—likewise raises no issue worthy of this Court's review. *See* Pet. 17-21. That compact-specific holding is correct and implicates no circuit conflict.

A. The Court Of Appeals Correctly Rejected The State's Alternative Theory

The Sixth Circuit held that the State could not evade the strictures of Section 2710(d)(7)(A)(ii) by suing to enjoin class III gaming activity occurring at the

Tribe's casinos in the Upper Peninsula based on an alleged compact violation relating only to a different location. The court concluded that "[n]othing in the Tribal-State Compact or IGRA" supports the "convoluted logic" that the Tribe "loses the right to conduct class III gaming anywhere" based on a compact violation at an unrelated gaming site. Pet. App. 11a.

That decision was correct. Section 2710(d)(7)(A)(ii) abrogates tribal sovereign immunity from suits to enjoin class III gaming activity "conducted in violation of" a gaming compact. The "gaming activity" at the Tribe's Upper Peninsula casinos is being conducted in conformance with the compact, and thus IGRA supplies no right to sue to enjoin that gaming activity. No provision of the compact states that a violation of a compact provision at one gaming site divests the Tribe of any right to game anywhere. Indeed, the State has never even attempted to identify a provision of the gaming compact supporting that strange result. The Sixth Circuit thus appropriately held that the State's legal theory had no anchor in the text of the compact, or in IGRA. *Compare* Pet. 18 ("[w]hen the Tribe violates § 9," "any gaming that occurs" anywhere in the State "will be in violation of the compact"), *with* Pet. App. 11a ("[n]othing in the Tribal-State compact or IGRA provides support for such a sweeping proposition").

B. The Sixth Circuit's Decision Does Not Conflict With That Of Any Court Of Appeals

The court of appeals' holding does not implicate any division of authority among the circuits. The State's claim (at 13-14, 19-20) that the court's decision conflicts with *Wisconsin* v. *Ho-Chunk Nation*, 512 F.3d 921 (7th Cir. 2008), is easily rejected.

In *Ho-Chunk*, the court held that Section 2710(d)(7)(A)(ii) was satisfied where Wisconsin sought to enjoin class III gaming activities conducted in alleged violation of a compact's "revenue-sharing agreement" and a provision purportedly requiring arbitration over that revenue-sharing dispute. 512 F.3d at 930. The State thus alleged that the Tribe had failed to arbitrate disputes *about the gaming activity* that the State sought to enjoin. Those circumstances are inapposite here. As the Sixth Circuit recognized, "*Ho-Chunk* supports the proposition that a court may enjoin class III gaming when a compact violation arises out of the particular gaming to be enjoined." Pet. App. 11a. The Seventh Circuit's decision provides no support for the State's theory here that it may sue to enjoin all gaming activity anywhere in the State based on an alleged compact violation at a different site.

At bottom, the Sixth Circuit's rejection of the State's alternative theory turned on the State's inability to identify any provision in the parties' compact to support its view. *See* Pet. App. 11a. That compact-specific question will be unlikely ever to generate a conflict with a court decision interpreting different gaming compacts between distinct parties. And the question is certainly not worthy of this Court's review now given the absence of any conflict or divide in the lower courts, particularly in light of the Sixth Circuit's recognition that the State may seek to vindicate its alleged rights under Section 9 of the compact at an appropriate time.

III. *BAY MILLS* WILL NOT REQUIRE A GVR

Finally, based on speculation that this Court will narrow the underlying scope of "common-law tribal immunity" in *Bay Mills*, the State argues that the Court should "grant this petition, vacate the Sixth Cir-

cuit's decision, and remand the matter." Pet. 11. The disposition of *Bay Mills*—whether on statutory or common-law grounds—should have no bearing on this case.

From a statutory perspective, the questions presented in the two cases are worlds apart, as the court of appeals held. Pet. App. 8a n.2. The question presented in *Bay Mills* is whether Section 2710(d)(7)(A)(ii) permits a State to sue to enjoin class III gaming activity that is conducted in what the State alleges is "an illegal casino located *off* of 'Indian lands' (i.e., on sovereign *state* lands)." Pet. Br. i, *Bay Mills*, No. 12-515 (Aug. 30, 2013); *see also id.* 25-33. This Court's resolution of that question will have no bearing on whether a trust submission is "class III gaming activity."

This case also does not "present[] the same basic circumstance" as *Bay Mills*. Pet. 9. In *Bay Mills*, the State maintains that, if it is not permitted to sue to enjoin class III gaming activity under Section 2710(d)(7)(A)(ii), the State will have no remedy with respect to an unlawful casino operating "on sovereign state lands." *Bay Mills* Pet. Br. 2; *see also* Reply Br. 18-24, *Bay Mills*, No. 12-515 (Nov. 22, 2013) (arguing that other remedies to address an illegal casino on State lands are inadequate if State cannot sue under Section 2710(d)(7)(A)(ii)). Here, the Sixth Circuit was clear that the State "will have the opportunity to bring [its] claim against the Tribe at a later time" under Section 2710(d)(7)(A)(ii), if and when its claim becomes ripe. Pet. App. 17a-18a. The question is *when*, not *if*, the State may pursue that remedy.

Finally, the State's position (at 10) that a decision by this Court in *Bay Mills* to "reexamin[e] the framework of tribal immunity" will require a GVR is deeply

flawed. To begin with, the State has either waived or forfeited that argument in this litigation. From the outset of this case, the State has litigated on the theory that Section 2710(d)(7)(A)(ii) applies and abrogates tribal immunity. *E.g.*, Compl. ¶ 33 (Dkt. 1) ("The Sault Tribe's sovereign immunity was abrogated by Congress for purposes of this legal action when Congress adopted IGRA.").

Until its petition for rehearing in the court of appeals, the State never argued, or even suggested, that the meaning of Section 2710(d)(7)(A)(ii) was irrelevant because "there is no need to abrogate something that never existed in the first place." Pet. 11. Indeed, its position prior to the panel's decision was that nothing decided in *Bay Mills* would be relevant to this case. *See* 10/12/13 Oral Arg. 21:36-22:55 ("Q: Why don't you think the Supreme Court's decision in *Bay Mills* is going to be instructive for this case? A: For the same reasons that [counsel for the Tribe] said. ... We are distinguishing it. We believe it doesn't apply.").[6] It was only after losing on the sovereign immunity issue under IGRA before the panel that the State abruptly changed course and argued that *Bay Mills* might be relevant here because the Court might alter the contours of the

[6] The oral argument in the court of appeals was not transcribed, but the audio recording referenced here is available on the court's website at http://www.ca6.uscourts.gov/internet/court_audio/audSearch.htm. *See also* Pl.-Appellee C.A. Br. 25, 26, 27 (CA6 Dkt. 22) (arguing that this case is "distinguishable from *Bay Mills*," in that *Bay Mills* concerned lands that "would never be trust lands," whereas here "if the Tribe succeeds in its plans" the Lansing property will "become Indian lands" and the question is only whether the State must wait until the future to enjoin gaming that is not "*presently occurring*"); Pl. Prelim. Inj. Reply Br. 3 n.4 (Dkt. 16) (same); Pl. Opp. to Mot. to Dismiss 8 n.3 (Dkt. 22) (same); 12/5/12 Hr'g Tr. 13:25 (Dkt. 33) ("This is not that case.").

underlying common-law tribal sovereign immunity. This Court should not grant certiorari to permit the State to benefit from such gamesmanship. *E.g.*, *Baltimore & Ohio R.R. Co.* v. *United States*, 298 U.S. 349, 388 (1936) (Brandeis, J., concurring) ("an objection first presented in a petition for rehearing" is not "seasonably presented").

Even if the State had not forfeited any argument that common-law tribal immunity does not apply here, that argument would fail. In its petition, the State argues (at 2) that the Sixth Circuit improperly "assumed that the doctrine [of tribal sovereign immunity] extended to a suit by a State to enjoin a tribe from violating its tribal-state compact." This position makes little sense. IGRA abrogates tribal immunity for a "cause of action initiated by a State ... to enjoin a class III gaming activity located on Indian lands *and conducted in violation of any Tribal-State [class III gaming] compact.*" 25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added). That provision would be surplusage if, as the State argues (at 2), abrogation of tribal immunity is "beside the point" because an Indian tribe has no common-law immunity from breach-of-compact suits.

In seeking a stay of the appellate mandate, the State also argued that this Court was likely to recognize in *Bay Mills* a new exception to tribal sovereign immunity for suits concerning "tribal actions taken in commercial settings." Pl.-Appellee Mot. to Stay Issuance of Mandate 6 (CA6 Dkt. 87). The State does not clearly renew that argument here. Because the State has never developed that argument in this litigation, it has forfeited or waived it. In any event, any such exception to tribal immunity would be inapplicable: Tendering a claim to the Secretary of the Interior asserting that she is required to take land into trust for the bene-

fit of the Tribe under a federal statute (MILCSA) that by its terms has nothing to do with gaming is manifestly *not* a "commercial activity." It is a core exercise of sovereign, governmental authority. Any new exception for commercial activity accordingly would be of no help to the State here.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] Indeed, even if this Court were to abolish tribal sovereign immunity entirely in *Bay Mills*, the preliminary injunction could not stand in its current form. The Tribe is entitled to file a trust submission under MILCSA and to use the land taken into trust for class II gaming—gaming that would not implicate the tribal-state gaming compact on which the State bases its suit here. *See* Pet. App. 13a-14a, 15a (recognizing that suit over "whether class III gaming on the [Lansing] property would violate IGRA or § 9 of the Tribal-State compact" is premature in part because "Tribe could choose to offer only class II, not class III, gaming").

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