No. _____

In the Supreme Court of the United States

STATE OF MICHIGAN, PETITIONER

v.

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should an Indian tribe that operates commercial gaming casinos under the authority of a tribal-state compact be protected by tribal immunity from a State's effort to enforce the compact in federal litigation arising out of those gaming activities?

2. Even if tribal immunity exists as a matter of federal common law, under what circumstances does the Indian Gaming Regulatory Act abrogate that immunity for lawsuits in federal court seeking to enjoin a tribe's conduct that violates a material provision in its gaming compact with a State?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. Petitioner is the State of Michigan. Respondent is the Sault Ste. Marie Tribe of Chippewa Indians, a federally recognized Indian tribe.

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The opinion of the Sixth Circuit court of appeals, App. 1a–19a, is reported at 737 F.3d 1075. The opinion of the district court, App. 20a–46a, is not reported.

JURISDICTION

The Sixth Circuit entered its judgment on December 18, 2013, and denied rehearing on February 13, 2014. App. 47a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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 . . . .

INTRODUCTION

This Court granted certiorari in *Michigan* v. *Bay Mills*, No. 12-515, and so is already addressing a circuit split about whether the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*. (IGRA), abrogated tribal immunity. This case implicates the same circuit split. And the Sixth Circuit made the same type of error here that it made in *Bay Mills*. There, it assumed that the common-law doctrine of tribal immunity extended to a suit by a constitutional sovereign—a State—to enjoin a tribe from conducting illegal off-reservation gaming; here, it assumed that the doctrine extended to a suit by a State to enjoin a tribe from violating its tribal-state compact. Based on that incorrect assumption, it addressed whether IGRA abrogated that immunity. But abrogation is beside the point if tribal immunity never extended so far in the first place.

Here, the Sault Tribe had agreed it would not apply to have land taken into trust *for gaming purposes* unless it first obtained a revenue-sharing agreement with the State's other tribes. Even though the Tribe candidly admitted it intends to engage immediately in the conduct prohibited by the compact, and even though IGRA requires gaming activities to be conducted in conformance with a tribal-state compact, the Sixth Circuit barred the State's suit. In so doing, the court refused to enforce the very compact that creates the Tribe's opportunity to conduct gaming in the first place. Granting certiorari will ensure that the Court's pending decision on the scope of tribal immunity will govern the outcome of this case too.

If the Court resolves *Bay Mills* by concluding that the common-law doctrine of tribal immunity *does* extend to these situations, the circuit split about whether IGRA abrogates that immunity could still remain, and if it does, that split will still warrant review. Michigan believes Congress intended that both States and tribes could be enjoined from breaching *any* material provision of their IGRA-authorized gaming compacts, not just provisions that directly govern the actual conduct of casino games. And so do other circuits: the Tenth and Ninth Circuits allow remedies for such violations under IGRA, and the Seventh Circuit also would have allowed this case to proceed despite the claim of immunity.

This circuit split presents jurisprudential issues of great significance to Michigan as well as other States and tribes across the country. The circuit split allows opposite outcomes for sovereign States, dependent solely on the federal circuit where the parties happen to be located. In addition, allowing the Sixth Circuit decision to stand invites tribes to violate material promises made in their gaming compacts with impunity. And it leads States to wonder why they should bother to enter into compacts that authorize gaming if they cannot enforce the compacts on issues directly relating to gaming. This cannot have been the intent of Congress when it adopted IGRA. The petition for a writ of certiorari should be granted.

STATEMENT OF THE CASE

A. The Sault Tribe commits to develop and operate an off-reservation casino that violates its gaming compact.

In 1993, the State and the Sault Tribe entered into a tribal-state gaming compact. App. 62a–91a. The compact generally establishes the rights and responsibilities of the parties concerning the operation of class III gaming—essentially casino-style gaming—in Michigan. Pursuant to the compact, the Tribe has conducted class III gaming in five casinos it operates on Indian lands in the Upper Peninsula of Michigan, where the Tribe's headquarters and reservation are located. App 4a, 21a.

Section 9 of the compact expressly requires the Tribe to reach a revenue-sharing agreement *before* it can apply to have land taken into trust:

> Off-Reservation Gaming.
>
> 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. [App. 86a.]

In January 2012, the Sault Tribe Board of Directors approved Resolution 2012-11, which stated

that the Tribe intended to open a casino in the City of Lansing on land that is not part of the Tribe's reservation. App. 92a. To that end, the Tribe and the City executed a comprehensive development agreement. The agreement provided that the City or the Lansing Economic Development Corporation (or both) would sell to the Tribe certain parcels of property in the City on which the Tribe would build and operate two casinos. (Development Agreement, RE 1-4, Page ID # 89.)

Representatives of the State first learned of the proposed Lansing casino through media reports. After gathering as much information as it could, the State sent a letter on February 7, 2012, to the Tribe, warning it that the operation of class III gaming at a casino in Lansing would be unlawful and that if it proceeded with its plans, the Tribe would do so at its own risk. (Letter, RE 1-5, Page ID #149.) Because it appeared from the Tribe's public statements and actions that it was ignoring this warning, the State filed the instant lawsuit and a motion for preliminary injunction to enjoin the Tribe from violating § 9 of the compact by applying to take land into trust where it has not obtained a revenue-sharing agreement with the other Michigan tribes.

Despite the lawsuit, the Tribe purchased a parcel of real property in Lansing pursuant to the Development Agreement. App. 24a. The Tribe's counsel indicated on the record below that the Tribe in fact plans to apply to the U.S. Department of Interior to have this land taken into trust as soon as possible, App 50a & 54a, and that the Tribe does not intend to obtain a § 9 revenue-sharing agreement with the other

Michigan tribes. App. 58a ("we do not" "intend to seek a revenue-sharing agreement with the other tribes"). The district court found that it is undisputed that the Lansing property is "off-reservation" land. App. 24a.

B. Proceedings in the district court

The State filed a motion for a preliminary injunction along with its complaint. Instead of answering the complaint, the Tribe filed a motion to dismiss. Two other Michigan tribes, the Saginaw Chippewa Indian Tribe of Michigan and the Nottawaseppi Huron Band of Potawatomi Indians, filed amicus briefs supporting the preliminary injunction and opposing the Sault Tribe's motion to dismiss.

After oral argument, the district court granted the State's motion for a preliminary injunction that prohibited the Sault Tribe from filing an application to take the Lansing property into trust for gaming purposes unless the Tribe first obtained a revenue-sharing agreement with the other Michigan tribes. App. 46a. The court held that it had jurisdiction and that the Tribe's immunity was abrogated whether the State sought to enjoin the application to take land into trust, or alternatively, to enjoin gaming at the Tribe's existing casinos. App. 33a. The district court therefore denied the motion to dismiss, except that it granted, without prejudice, the motion to dismiss tribal officials named in their official capacity, as the court determined that the Tribe itself could be sued. App. 34a. It also granted the motion to dismiss, without prejudice, as to Counts V and VI of the complaint, which sought an injunction under IGRA against

gaming and asserted a nuisance claim against gaming, finding those claims were not ripe for adjudication. App. 34a. The Tribe then answered the complaint and appealed the order granting the preliminary injunction.

C. Sixth Circuit ruling

The Sixth Circuit vacated the injunction. The court ruled that the Tribe was immune from the State's claims, reiterating the five-part test it had first employed in the *Bay Mills* case: "a federal court has jurisdiction under this provision only where (1) the plaintiff is a State or an Indian tribe; (2) *the cause of action seeks to enjoin a class III gaming activity*; (3) the gaming activity is located on Indian lands; (4) the gaming activity is conducted in violation of a Tribal-State compact; and (5) the Tribal-State compact is in effect." App. 8a. More specifically, the court ruled that suing to enjoin the Tribe from applying to take land into trust for gaming in violation of § 9 was not an action to enjoin "gaming activity" and therefore Congress never intended that such a compact violation could be pursued in federal court. App. 8a.

In response to the State's alternative request for relief—relief that sought to enjoin class III gaming then taking place at the Tribe's existing casinos and that was specifically tailored to address any concern that element 2 of the *Bay Mills* test had not been met—the Sixth Circuit moved the target. The court said this still was not an action to enjoin "gaming activity" because the gaming activity was "unrelated" to the compact violation, App. 11a, even though the

Tribe has only one compact for all its gaming, wherever it occurs.

The initial Sixth Circuit panel chose not to hold the case in abeyance while this Court decides *Bay Mills*, focusing narrowly on whether the relevant IGRA provision, § 2710(d)(7)(A)(ii), abrogated tribal immunity. App. 8a–9a n.2. The State filed a petition for rehearing and rehearing en banc, explaining that this Court's pending decision in *Bay Mills* is not likely to turn on the narrow text of that statute. In *Bay Mills*, Michigan's primary argument has been that tribal immunity is a common-law doctrine that has never extended so far as to grant tribes immunity for conduct such as operating an illegal casino off-reservation or violating their tribal-state compacts; because tribal immunity has never extended that far in the first place, the question of statutory abrogation does not even arise. But the Sixth Circuit denied the petition and thereby again declined to hold the case in abeyance pending this Court's decision in *Bay Mills*, necessitating the filing of this petition.

The net result of the Sixth Circuit's approach is that States may not sue in federal, or any other court, to enjoin a tribe's imminent violation of significant provisions of its gaming compact. This ruling not only thwarts the State's bargained-for ability to limit off-reservation gaming, it has a negative impact on Michigan's other tribes, many of which signed compacts with identical language barring trust applications for off-reservation gaming. These tribes also oppose unfettered off-reservation gaming that violates § 9 of the compact.

REASONS FOR GRANTING THE PETITION

This case involves important and recurring issues of federal law involving tribal immunity in the context of commercial tribal gaming that violates a gaming compact or IGRA. There is disagreement among the circuits concerning the scope of such immunity. This Court's clarification of these issues is much needed.

I. The decision below furthers the circuit split underlying *Bay Mills*.

This case presents the same basic circumstance as the *Bay Mills* case pending before this Court: a tribe enters into a tribal-state agreement governing a commercial enterprise and then violates the agreement with the assumption that it is protected from suit by tribal immunity. By concluding that tribal immunity precluded Michigan from using IGRA to enforce its tribal-state compact, the Sixth Circuit's decision continued the circuit split identified by Michigan in *Bay Mills*.

Specifically, this case would have come out differently in the Tenth Circuit. In *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379 (10th Cir. 1997), the Tenth Circuit recognized that Congress's "intent to abrogate tribal sovereign immunity by section 2710(d)(7)(A)(ii) [of IGRA] when a state seeks to 'enjoin' gaming activities 'conducted in violation of any Tribal–State compact entered into' " was "clear and unmistakable." *Id*. 1385. It held that "IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought." *Id*. at 1385.

This case satisfies the Tenth Circuit's test. First, compliance with IGRA's provisions is at issue. IGRA states that "Class III gaming activities shall be lawful on Indian lands only if . . . conducted in conformance with a Tribal-State compact," 25 U.S.C. § 2710(d)(1)(C), and the Tribe here admits it is not abiding by its compact's requirement that it enter into a revenue-sharing agreement before applying to take land into trust for gaming purposes. Second, Michigan seeks only declaratory and injunctive relief. App. 25a–26a. If Michigan were part of the Tenth Circuit, its suit to enjoin the Tribe's violation of its compact would not have been barred by tribal immunity.

Tribal immunity also would not have barred Michigan's suit in the Ninth Circuit. Following the Tenth Circuit, the Ninth Circuit has also recognized that "IGRA waives tribal sovereign immunity in the narrow category of cases where compliance with the IGRA is at issue." *Lewis* v. *Norton*, 424 F.3d 959, 962–63 (9th Cir. 2005) (citing *Mescalero*, 131 F.3d at 1385).

The circuit split arose because the circuits took different views about when IGRA abrogated tribal immunity. But in *Bay Mills*, Michigan has argued that this circuit split should be resolved not by focusing on the text of IGRA, but by reexamining the framework of tribal immunity in general. Tribal immunity is a judicially created doctrine, see *Kiowa Tribe of Oklahoma* v. *Mfg. Techs., Inc.*, 523 U.S. 751, 756–758 (1998) (describing it as having "developed almost by accident"), and one that Congress has never codified. Because this Court has never extended the common-law doctrine of tribal immunity so far as to hold that a tribe is immune from a suit to enforce a tribal-state

compact, the question of abrogating immunity never comes up—there is no need to abrogate something that never existed in the first place.

The Court will likely decide *Bay Mills* before considering this petition. If this Court agrees in *Bay Mills* that common-law tribal immunity should be clarified, then the Court should grant this petition, vacate the Sixth Circuit's decision, and remand the matter so that the Sixth Circuit can reconsider this case in light of *Bay Mills* and its clarification of the source and scope of tribal immunity. This approach will ensure that the same rule of law applies to the tribal-immunity issues presented by both cases.

II. The circuits are split about the scope of tribal immunity under IGRA.

Even if this Court were to decide in *Bay Mills* that the abrogation of tribal immunity turns on the statutory text of IGRA, not on the scope of the common law, the circuit split in this case could still remain and would still warrant the Court's review.

A. The Sixth Circuit disagrees with other circuits about whether IGRA abrogates immunity for compact breaches.

The second question presented involves the scope of Congress's abrogation (assuming such abrogation is necessary) of tribal immunity through IGRA's enactment. The Sixth Circuit held that while § 2710(d)(7)(A)(ii) abrogates tribal immunity, this complaint does not seek to enjoin class III gaming that

violates a gaming compact, so the abrogation in § 2710 does not apply. App. 9a.

In so holding, the Sixth Circuit drove its wedge deeper into the widening circuit split. As noted above, the Tenth Circuit has held that "IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought." *Mescalero*, 131 F.3d at 1385–86. In finding that immunity did not protect the tribe in *Mescalero*, the Tenth Circuit did not insist that abrogation depend on a complaint seeking to enjoin class III gaming that violated a compact that was in effect. In fact, the sole purpose of the State's action in *Mescalero* was to obtain a declaration that the compact was *not* in effect. *Mescalero*, 131 F.3d at 1381 ("[T]he State filed . . . a counterclaim against the Tribe, seeking a declaration that the Compact was invalid."). Nor was any injunction of class III gaming even sought. Nonetheless, the Tenth Circuit upheld the trial court's denial of the tribe's immunity-based motion to dismiss the counterclaim. Michigan's claim here falls comfortably within the scope of the Tenth Circuit's abrogation standard.

On the other hand, were the Sixth Circuit presented with the *Mescalero* facts, it certainly would have dismissed New Mexico's counterclaim for failing to satisfy the court's five-part abrogation test because the action: (1) did not seek to enjoin class III gaming and (2) alleged the compact was not in effect. Under Sixth Circuit law, New Mexico's counterclaim would thus have been barred by tribal immunity.

The Seventh Circuit has pronounced yet a third perspective, extending the abrogation of tribal immunity to *any* claim alleging a violation of a gaming compact arising from the subjects of compact negotiation listed in § 2710(d)(3)(C). *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 934 (7th Cir. 2008) ("Therefore, so long as the alleged compact violation relates to one of these seven items, a federal court has jurisdiction over a suit by a state to enjoin a class III gaming activity."); see also *id.* at 929 (treating the jurisdiction and abrogation questions as congruent). A violation of a compact provision regulating off-reservation gaming falls within the scope of that seven-item list, specifically § 2710(d)(3)(C)(vii), which authorizes *any* subject directly related to gaming activities, off-reservation or otherwise. After all, filing an application to have land taken into trust for gaming purposes directly relates to gaming activities. While this regime may be more restrictive than the Tenth Circuit's standards for finding abrogation, it is less restrictive than the five-part test employed by the Sixth Circuit in this case.

The split with the Seventh Circuit was further magnified by the Sixth Circuit's refusal to find an abrogation, even when the relief sought by the State was an injunction of the Tribe's ongoing gaming at its currently operating casinos in other locations in Michigan. The State sought this alternative relief in an effort to address any argument that its action alleging a violation of § 9 did not seek to enjoin class III gaming. The trial court held that tribal immunity was abrogated for this alternative relief as well.

The Sixth Circuit, however, rejected this analysis and effectively added a *sixth* requirement, without citing any authority, to its abrogation test: not only must the action seek to enjoin existing gaming, that gaming must occur at a site related to the compact violation. App. 11a. This conclusion ignores the fact that the parties' compact regulates the Tribe's gaming *wherever it occurs*, without distinguishing between different locations. In other words, the compact views gaming as monolithic: it does not dictate how many casinos the Sault Tribe can operate or where they can be located as long as they comply with IGRA. If there is a material breach of the compact, it affects the Tribe's right to game, period.

The State relied on *Ho-Chunk*, which blessed Wisconsin's action to enjoin ongoing gaming even though the particular alleged compact violation related not to the conduct of gaming but to the tribe's refusal to go to arbitration as it had promised elsewhere in the compact. The Seventh Circuit said "so long as the alleged compact violation relates to one of these seven items [listed in 25 U.S.C. § 2710(d)(3)(C)], a federal court has jurisdiction over a suit by a state to enjoin a class III gaming activity." *Id*. at 934. There is no requirement that the compact violation occur in the same location that the gaming to be enjoined takes place.

The Sixth Circuit's opinion here creates more roadblocks for States and tribes seeking to enforce IGRA compacts than any other circuit. Certiorari is warranted.

B. The Sixth Circuit opinion improperly prohibits States and other tribes from enjoining conduct that violates gaming compact provisions that directly relate to tribal gaming.

The Sixth Circuit concluded that enjoining a tribe from applying to have land taken into trust for gaming purposes is not enjoining a "gaming activity" as that term is used in 25 U.S.C. § 2710(d)(7)(A)(ii). The scope of the term "gaming activity" is significant because, as this case shows, an unnecessarily narrow interpretation will enable tribes to ignore material provisions of their compacts to which they agreed, because they know they are immune from suit. This Court has not settled this important question.

The Sixth Circuit adopted an improperly narrow view of what "gaming activity" includes, and did not explain its conclusion that applying to take land into trust for gaming is not a gaming activity. It ignores the important fact here that the Tribe's *only* reason for having the land taken into trust is so it can operate a casino on it. See App. 94a (tribal resolution stating the Tribe's reason for acquiring the land in Lansing: "to construct and operate a casino gaming enterprise on those lands"). While the Sixth Circuit did not explain why it concluded that obtaining trust status—a statutory requirement for *any* gaming—is not a gaming activity within the contemplation of § 2710(d)(7)(A)(ii), its decision implies that it would find an abrogation of tribal immunity *only* where an action seeks to enjoin the actual conduct of gaming.

The language of IGRA, however, does not support this narrow interpretation of § 2710(d)(7)(A)(ii). If

Congress intended to limit abrogation to actions seeking to enjoin the conduct of the games themselves, it would have drafted this section to allow actions "initiated by a State or Indian tribe to enjoin . . . class III gaming . . . located on Indian lands." Instead, Congress elected to allow actions brought to enjoin "a class III gaming *activity*," an obvious and logical intent to allow all actions to enjoin violations of compact provisions that concern gaming, even if they do not directly regulate the games themselves.

And there is good reason to believe that Congress intended provisions like § 9 to be enforceable in federal court. Seeking trust status for the sole purpose of making land eligible for gaming is every bit as much a "gaming activity" as maintaining or licensing a casino building, the latter being explicitly blessed by IGRA as an appropriate subject for a gaming compact. 25 U.S.C. § 2710(d)(3)(C)(vi) ("Any Tribal-State compact . . . may include provisions relating to . . . standards for the operation of such activity . . . , including licensing."). Surely Congress intended that a federal court could enforce compact provisions relating to licensing and maintaining a casino; why else include it in the list of permissible compact provisions?

Under Sixth Circuit law, a federal court could not do so, or at best, a court could enforce such provisions only if the plaintiff sought to enjoin gaming that was taking place at that facility. If no gaming was taking place, or if a plaintiff preferred only to enjoin the violative conduct without seeking a draconian remedy that shuts down the casino itself, there would be no abrogation and a State or other tribe would be barred from seeking to enforce the compact provision. This

Rube Goldberg scheme for enforceability—one that finds *abrogation* based not on the nature of the compact violation, but rather on the nature of the relief requested—could not have been what Congress wanted. And it forces a State or tribe to effectively shut down a casino, unnecessarily affecting business and jobs, when a less intrusive injunction would remedy the compact violation.

Moreover, denying the enforcement of a provision like § 9 needlessly restricts the options available to States and tribes for controlling the expansion of off-reservation gaming. Courts should encourage States and tribes to regulate such gaming jointly in the manner they see fit; after all, IGRA ensconced gaming compacts as the mechanism for tribes and States to regulate tribal gaming. Ignoring the parties' express intention here to restrict off-reservation gaming based on an unnecessarily cramped IGRA interpretation defeats that purpose.

C. Alternatively, the State's action to enjoin gaming at the Tribe's existing on-reservation casinos abrogated tribal immunity under IGRA.

The State alternatively sought to enjoin the Tribe's gaming at its existing casinos, based on the Tribe's planned actions that would violate § 9. This alternative relief was a direct response to arguments made by the Tribe that (1) IGRA abrogated tribal immunity only for actions seeking to enjoin class III gaming, and (2) an action seeking to enjoin an application to take land into trust did not satisfy that prerequisite. While the State disagrees with this analysis, as discussed above, and

would be satisfied if it could merely stop the Tribe from applying to have land in Lansing taken into trust, if necessary, it will pursue the alternative relief that enjoins *all* gaming by the Tribe conducted pursuant to the compact. The trial court agreed that it had jurisdiction of this claim as well.

The Sixth Circuit, however, was not persuaded by the State's argument. It gave little explanation for rejecting the State's claim, other than asserting that "[n]othing in the Tribal-State compact or IGRA provides support for such a sweeping proposition" and that to satisfy § 2710(d)(7)(A)(ii), the gaming to be enjoined cannot be at "sites unrelated to the alleged compact violation." App. 11a.

Contrary to the Sixth Circuit's assertion, the support for the State's alternative argument comes directly from IGRA and the court's own five-part test. Nowhere does IGRA say that the gaming to be enjoined has to be at a "site" related to a compact violation. The only "site" requirement in § 2710(d)(7)(A)(ii) is that the gaming occur on Indian lands, and there is no question that the Tribe's ongoing casino operations here are on Indian lands.

The only other relevant § 2710(d)(7)(A)(ii) requirement is that the gaming be conducted in violation of the compact. The Tribe has only one compact, and it includes the provision at issue here, § 9, which is a material provision of the compact. When the Tribe violates § 9 by applying to have off-reservation land taken into trust, without first obtaining a revenue-sharing agreement, any gaming that occurs will be in violation of the compact. Given that § 9 provides substantial value to the State—it

effectively prohibits off-reservation gaming, placing strict geographic limitations on the ability of tribes to open casinos—its breach would entitle the State to a remedy. *Mobil Oil Exploration & Producing Southeast* v. *United States*, 530 U.S. 604, 608 (2000) ("If the Government said it would break, or did break, an important contractual promise, thereby 'substantially impairing the value of the contracts' to the companies . . . then (unless the companies waived their rights to restitution) the Government must give the companies their money back."). In this case, since the State cannot seek damages, its remedy is an injunction of the gaming that was authorized once the State executed the compact.

Indeed, this case proves the value of provisions like § 9. The Tribe has proceeded on a theory that would allow it to purchase land anywhere in the State with specific trust funds, and have that land declared Indian lands, eligible for class III gaming, with no limitation on where or how many such casinos it can open. If the Tribe is correct, § 9 may be the last defense the State has against unlimited proliferation of casino gambling in Michigan, a State that has allowed only three state-licensed casinos (i.e., non-Indian casinos) to operate.

The State's request for an injunction is also consistent with the decision of the Seventh Circuit in *Ho-Chunk*. In that case, the State of Wisconsin sued, claiming that the tribe there had stopped making revenue-sharing payments and had refused to arbitrate the issue as required by the compact. Based on the tribe's refusal to arbitrate in violation of the compact, the State sought to enjoin class III gaming.

The court said the § 2710(d)(7)(A)(ii) claim could proceed: "Congress abrogated the Nation's sovereign immunity[ ] with respect to the State's claim pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii) to enjoin the Nation's class III gaming due to its alleged refusal to submit to binding arbitration." *Id*. at 935. Thus, the Seventh Circuit ruled that the tribe's *gaming activities* were being "conducted in violation"—the phrase that appears in § 2710(d)(7)(A)(ii)—of the compact because the tribe was *refusing to go to arbitration*, which was required by the compact.

Here, the Sault Tribe is threatening to violate its compact by applying to have land taken into trust without entering a revenue-sharing agreement. There is no reason to distinguish this from the compact violation (the refusal to arbitrate) in *Ho-Chunk*. Since the court there allowed the State to pursue an injunction of class III gaming based on the refusal to arbitrate, the State here can seek an injunction of ongoing gaming if the Tribe violates § 9 by applying to have land taken into trust. This alternative request for relief satisfies the requirements for pleading an abrogation of the Tribe's sovereign immunity, specifically elements 2 and 3 of the Sixth Circuit's §2710(d)(7)(A)(ii) test.

The Sixth Circuit's attempt to distinguish *Ho-Chunk* falls far short. There is nothing in the Seventh Circuit decision that remotely suggests that the location of the gaming to be enjoined has any relevance to the question of its jurisdiction. This is a requirement—effectively a *sixth* factor the court has added to its test—that was created by the Sixth Circuit

without any legal support. This additional hurdle to abrogation should not be condoned.

* * *

This petition raises serious issues about an important question: would Congress have intended to protect tribes from suit when they have blatantly violated their gaming compacts, particularly where that violation is material to the Tribe's conduct of gaming in the State? This case presents an especially stark example: a State and a tribe reached agreement on an aspect of their gaming relationship, believing it would regulate the extremely important issue of off-reservation gaming, only to be told that the provision is unenforceable because it does not actually regulate a "gaming activity." Limiting a State's (or even another tribe's) ability to seek a remedy in federal court for a violation of a compact provision that directly impacts tribal gaming, but does not fit the Sixth Circuit's narrow definition of gaming activity, will affect not only existing compacts, but will also seriously complicate negotiations for all future gaming compacts across the country.

Certiorari is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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