No. 12-515

In the Supreme Court of the United States

STATE OF MICHIGAN, PETITIONER

v.

BAY MILLS INDIAN COMMUNITY

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a federal court has jurisdiction over a State's claim brought under 25 U.S.C. 2710(d)(7)(A)(ii) seeking to enjoin gaming by an Indian tribe, where the State alleges that the gaming is not located on "Indian lands" within the meaning of the Indian Gaming Regulatory Act, 25 U.S.C. 2703(4).

2. Whether 25 U.S.C. 2710(d)(7)(A)(ii) abrogates an Indian tribe's sovereign immunity with respect to a State's claim that the tribe is gaming illegally, where the State alleges that the gaming is not located on Indian lands.

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. In 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701-2721, to provide a statutory basis for the operation of gaming by Indian tribes. 25 U.S.C. 2702(1). Gaming authorized by IGRA may occur only on "Indian lands," which are defined as: "(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against aliena-

tion and over which an Indian tribe exercises governmental power." 25 U.S.C. 2703(4).

IGRA prohibits gaming "on lands acquired by the Secretary [of the Interior] in trust for the benefit of an Indian tribe after October 17, 1988" (the effective date of IGRA), unless the land falls within a listed exception. 25 U.S.C. 2719(a). Under one exception, gaming on such lands is permitted if "[the] lands are located within or contiguous to the boundaries of the [tribe's] reservation," or if the "lands are taken into trust as part of * * * a settlement of a land claim." 25 U.S.C. 2719(a)(1) and (b)(1)(B)(i).

IGRA divides gaming into three classes, each subject to different regulation. 25 U.S.C. 2703(6)-(8). Class III gaming, at issue here, includes banking card games, casino games, slot machines, horse racing, dog racing, jai alai, and lotteries. 25 U.S.C. 2703(8); 25 C.F.R. 502.4. Class III gaming must be: (1) authorized by a tribal ordinance that satisfies the requirements of 25 U.S.C. 2710(b) and is approved by the Chairman of the National Indian Gaming Commission (NIGC or Commission); (2) located in a State that permits such gaming; and (3) conducted in conformance with a compact between the Indian tribe and the State that is approved by the Department of the Interior (Interior). 25 U.S.C. 2710(d)(1) and (8).

b. There are various administrative and judicial mechanisms for determining whether IGRA authorizes class III gaming by an Indian tribe.

The decision by Interior to approve a tribal-state compact is subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 702. Once a tribal-state compact is approved, 25 U.S.C. 2710(d)(7)(A)(ii) provides that federal district courts "shall have jurisdic-

tion" over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact * * * that is in effect."

IGRA itself authorizes judicial review of the NIGC Chairman's decision to approve or disapprove a tribal gaming ordinance. 25 U.S.C. 2710(d)(2), 2714. If the Chairman disapproves the ordinance, the tribe may also appeal that decision to the full Commission. See 25 C.F.R. 522.7; 25 C.F.R. Pt. 580; 25 C.F.R. 580.10.

If an Indian tribe engages in class III gaming on Indian lands without the required approvals, the NIGC Chairman has the authority to issue a notice of violation, 25 C.F.R. 573.3, and assess civil penalties, 25 U.S.C. 2713. Those administrative actions are subject to judicial review. 25 U.S.C. 2714. The tribe may also appeal a notice of violation to the full Commission, 25 C.F.R. Part 580, and then seek judicial review of the Commission's decision. See 25 C.F.R. 573.5, 580.10.

If an Indian tribe desires to undertake class III gaming on land that does not fit the definition of Indian lands, the tribe can request Interior to take the land into trust pursuant to 25 U.S.C. 465 for purposes of gaming if the land satisfies the criteria under 25 C.F.R. 292.4 or 292.5. When a tribe makes such a request, Interior issues an Indian lands determination along with the final land-into-trust decision that provides the tribe with Interior's legal view of whether the land is within the definition of Indian lands and is eligible for gaming. 25 C.F.R. 292.3(b). The land-into-trust decision and underlying Indian lands determination are subject to judicial review under the APA. 5 U.S.C. 702; *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S.Ct. 2199, 2209-2210 (2012).

Where an Indian tribe engages in gaming without complying with IGRA's requirements, the United States can enforce federal criminal laws and related civil enforcement provisions governing gaming. Relevant federal laws include 18 U.S.C. 1955 ("Prohibition of illegal gambling businesses"), 18 U.S.C. 1166 ("Gambling in Indian country"), and 15 U.S.C. 1172 ("[Interstate] [t]ransportation of gambling devices as unlawful"). States may also apply their laws to gaming outside of Indian country.

2. a. Respondent Bay Mills Indian Community is a federally recognized Indian tribe with a reservation located in Michigan's Upper Peninsula. 77 Fed. Reg. 47,868-47,869 (Aug. 10, 2012); Pet. App. 3a. On August 20, 1993, respondent entered into a tribal-state compact with petitioner State of Michigan pursuant to IGRA. 58 Fed. Reg. 63,262 (Nov. 30, 1993); Pet. App. 73a-96a. Shortly thereafter, the NIGC Chairman approved respondent's initial class III gaming ordinance. The ordinance provided for the establishment of a Tribal Gaming Commission as a political subdivision of respondent. Bay Mills Indian Community, Mich., Ordinance to Regulate the Operation of Gaming by the Bay Mills Indian Community (1993 Ordinance), § 4 (Aug. 31, 1993), http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances/baymills/ordappr083193.pdf. Tracking the language of IGRA, 25 U.S.C. 2719(a)(1) and (b)(1)(B), Section 5.5(A) of the ordinance provided that "[t]he proposed gaming activity is to be located on land which was held in trust for [respondent] prior to October 17, 1988," "on trust lands which were located within or contiguous to the boundaries of the Reservation on October 17, 1988," or "on lands taken into trust after October 17, 1988 as a settlement of a claim." 1993 Ordi-

nance, § 5.5(A). Pursuant to the ordinance, respondent operates class III gaming facilities on its reservation. Pet. App. 4a.

b. In 1997, Congress passed the Michigan Indian Land Claims Settlement Act (MILCSA or Act) to provide for the division, use, and distribution of judgment funds of the Ottawa and Chippewa Indians of Michigan awarded by the Indian Claims Commission. Pub. L. No. 105-143, 111 Stat. 2652. Judgment funds were distributed under MILCSA to respondent and four other Indian tribes. § 104, 111 Stat. 2653.

MILCSA directed respondent's Executive Council to establish a "Land Trust" and to deposit 20% of respondent's funds into the Land Trust. § 107(a)(1), 111 Stat. 2658. The earnings generated by the Land Trust are to be used "exclusively for improvements on tribal land or the consolidation and enhancement of tribal landholdings through purchase or exchange." § 107(a)(3), 111 Stat. 2658. The Act directs that lands acquired pursuant to this provision "shall be held as Indian lands are held." *Ibid.*

c. Respondent became interested in using earnings from its Land Trust to purchase land for a gaming facility in the Village of Vanderbilt, Michigan (Vanderbilt Parcel), approximately 125 miles from respondent's reservation. Pet. App. 22a. On May 26, 2010, respondent submitted to the NIGC an amendment to its 1993 gaming ordinance that revised Section 5.5(A) to include a site-specific description of the Vanderbilt Parcel. 1:10-cv-1273 Docket entry No. (Docket entry No.) 4, Exh. 8 (W.D. Mich. Dec. 23, 2010). Respondent's submission informed the NIGC of its position that because the Vanderbilt Parcel would be purchased with funds from its Land Trust, it would qualify as "restricted fee"

lands and on that basis would be Indian lands eligible for gaming under IGRA. *Id.* at 28-52; see 25 U.S.C. 2703(4).[1]

Respondent subsequently withdrew that amendment and submitted another one. The new amendment revised Section 5.5(A) as follows: "The Tribal [Gaming] Commission shall automatically issue the above license to any tribally-owned or tribally-operated Class II or Class III proposed gaming enterprise if: (A) The proposed gaming activity is to be located on 'Indian lands', as defined in Section 2.30 of this Ordinance, and is not prohibited by [25 U.S.C. 2719]." Pet. App. 140a. Tracking the language of IGRA, 25 U.S.C. 2703(4), respondent's revised Section 2.30 defines "Indian lands" as: "(A) All lands within the limits of the Reservation of [respondent]; and (B) Any lands title to which is either held in trust by the United States for the benefit of [respondent] or held by [respondent] subject to restriction by the United States against alienation and over which [respondent] exercises governmental power." Pet. App. 111a.

In August 2010, respondent purchased the Vanderbilt Parcel. Pet. App. 4a. On September 15, 2010, the NIGC

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[1] 25 U.S.C. 2703(4)(B) defines nonreservation Indian lands as lands held in trust by the United States *or* lands "held by any Indian tribe * * * subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." Interior and NIGC interpret the prohibition in Section 2719 against gaming on Indian lands acquired "in trust" by the Secretary after October 17, 1988, to apply only to trust, not restricted fee, Indian lands. Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354, 29,355, 29,357 (May 20, 2008). Accordingly, if lands purchased with funds from respondent's Land Trust are restricted fee Indian lands, IGRA would not prohibit gaming on those lands.

Chairwoman approved the revised amendment to respondent's gaming ordinance. Respondent established a small gaming facility on the property and commenced operations on November 3, 2010. *Ibid.*

3. a. On December 21, 2010, petitioner filed a complaint for declaratory and injunctive relief in federal court to prevent respondent from operating a class III gaming facility on the Vanderbilt Parcel. Pet. App. 4a, 19a-20a. Counts I and II asserted that the Vanderbilt Parcel did not constitute "Indian lands" as defined by IGRA; that respondent had therefore violated Section 4(H) of the tribal-state compact, which provides that "[t]he Tribe shall not conduct any Class III gaming outside of Indian lands"; and that respondent violated Section 4(C) of the tribal-state compact, which provides that "[a]ny violation of this Compact, tribal law, IGRA, or other applicable federal law shall be corrected immediately by the Tribe." *Id.* at 6a-7a, 9a-10a, 81a. Count III alleged in the alternative that even if the Vanderbilt Parcel constituted Indian lands, respondent violated 25 U.S.C. 2719 (and therefore the compact's requirement that gaming must comply with federal law) by operating a gaming facility on land acquired after October 17, 1988, that does not satisfy any of that provision's listed exceptions. Pet. App. 10a. Petitioner alleged federal jurisdiction over its claims under 25 U.S.C. 2710(d)(7)(A)(ii) and 28 U.S.C. 1331. Docket entry No. 1, paras. 1(a), 26, 38, 46.

b. On the same day petitioner filed its complaint, the Solicitor of Interior and the NIGC Office of General Counsel issued legal opinions providing their views on the status of the land. Pet. 5. The Solicitor of Interior concluded that the Vanderbilt Parcel is not restricted fee or trust land eligible for gaming. Docket entry

No. 7, Exh. 1. The NIGC Office of General Counsel deferred to that legal opinion and concluded that because the Vanderbilt Parcel is not Indian lands, NIGC has no jurisdiction over it. *Id.*, Exh. 2.

c. The next day, the Little Traverse Bay Bands of Odawa Indians (Little Traverse), which operates a casino approximately 40 miles from the Vanderbilt Parcel, filed a nearly identical complaint that alleged as an additional basis for jurisdiction 28 U.S.C. 1362, which confers jurisdiction over an action brought by an Indian tribe arising under federal law. See 1:10-cv-1278 Docket entry No. 1, paras. 15-19, 21-24, 26-29. The cases were consolidated. Pet. App. 20a.

4. Little Traverse filed a motion for a preliminary injunction and petitioner filed a brief in support of that motion. Pet. App. 5a, 20a. The district court entered a preliminary injunction. *Id*. at 19a-39a.

a. Respondent argued that the court lacked jurisdiction under Section 2710(d)(7)(A)(ii), which provides jurisdiction to "enjoin a class III gaming activity *located on Indian land* and conducted in violation of any Tribal-State compact," because Little Traverse's complaint alleged that the Vanderbilt Parcel was *not* Indian lands. Pet. App. 24a-25a. The court did not address that issue, but concluded that it had jurisdiction under 28 U.S.C. 1331 and 1362 because "the complaint * * * requires [the court] to interpret MILCSA § 107(a)(3), obviously a federal law." Pet. App. 25a.

b. The court further concluded that Little Traverse was likely to succeed on the merits because MILCSA did not authorize respondent to purchase the Vanderbilt Parcel. Pet. App. 27a-34a. The court reasoned that MILCSA requires any land purchased with Land Trust earnings to be "*both* a consolidation *and* an enhance-

ment," and therefore authorizes respondent to purchase only "land next to, or at least near, its existing tribal landholdings." *Id.* at 31a-32a. The court further concluded that Little Traverse would suffer irreparable competitive harm and that an injunction was in the public interest. *Id.* at 34a-38a.

c. Respondent appealed and moved for a stay of the injunction, which the district court denied. Resp. App. 1-11. In its stay motion, respondent argued that sovereign immunity barred the suits. The district court acknowledged that neither 28 U.S.C. 1331 nor 1362 clearly abrogated respondent's sovereign immunity. But it concluded that respondent's sovereign immunity was abrogated by 25 U.S.C. 2710(d)(7)(a)(ii), noting that a "majority of courts to consider the issue have found that the '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.'" Resp. App. 6 (quoting *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379, 1385 (10th Cir. 1997)).

d. On August 9, 2011, while respondent's appeal of the preliminary injunction was pending, petitioner amended its complaint to add three additional claims and to name as additional defendants respondent's Tribal Gaming Commission and the Commission's members in their official capacities, and members of respondent's Executive Council in their official capacities. Pet. App. 55a-72a. Count IV alleged that the defendants violated federal common law by permitting and operating a casino that exceeds the scope of their authority. *Id.* at 67a-69a. Count V alleged a violation of Michigan Compiled Laws § 432.220 (failure to obtain a state license for the gaming facility) and sought forfeiture of respondent's

gaming machines and the gross receipts from its gaming operation. Pet. App. 69a-70a. Count VI alleged that operation of the Vanderbilt casino was a public nuisance under state law. *Id.* at 70a-71a.

5. a. The court of appeals vacated the preliminary injunction. Pet. App. 1a-18a. The court concluded that Section 2710(d)(7)(A)(ii) did not provide a basis for jurisdiction over Counts I-III. The court explained that Section 2710(d)(7)(A)(ii) provides federal jurisdiction only where all of the following conditions are satisfied:

> (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.

Id. at 7a. The court concluded that the third condition was not satisfied because the complaints alleged that the Vanderbilt Parcel is *not* Indian lands. *Id.* at 7a-8a. The court also rejected the alternative claim in Count III that even if the Vanderbilt Parcel is Indian lands, gaming is prohibited by 25 U.S.C. 2719. The court explained that Section 2719 applies only to land "acquired by the Secretary in trust" after October 17, 1988, but the complaints alleged that the Vanderbilt Parcel was acquired by respondent itself. Pet. App. 10a. The court concluded that this analysis "knock[ed] out all of Little Traverse's causes of action." *Ibid.*

b. The court next held that the district court had jurisdiction over the federal common law and state law claims against respondent alleged in Counts IV-VI of

petitioner's amended complaint. Pet. App. 10a-11a.[2] Citing *Grable & Sons Metal Products, Inc.* v. *Darue Engineering*, 545 U.S. 308, 312 (2005), the court concluded that the district court had jurisdiction over those claims under 28 U.S.C. 1331. Pet. App. 11a.

The court further held, however, that the claims were barred by respondent's sovereign immunity. Pet. App. 11a-18a. The court explained that "for the same reasons that [Section] 2710(d)(7)(A)(ii) does not supply federal jurisdiction in this case," *i.e.*, because the complaints alleged that the Vanderbilt Parcel is not Indian lands, "it does not abrogate [respondent's] immunity." *Id.* at 13a.

The court of appeals remanded for the district court to address petitioner's claims against the additional defendants named in the amended complaint. Pet. App. 17a-18a. On remand, Little Traverse informed the district court that it would voluntarily seek dismissal of its action, and the court dismissed its complaint with prejudice. Br. in Opp. 6.

6. On July 15, 2011, while the appeal was pending, respondent brought an action for declaratory relief against the Governor of Michigan, seeking to adjudicate whether the Vanderbilt Parcel constitutes "Indian lands" under IGRA. Resp. App. 12-19. The case was assigned to the same district court judge who is presiding over petitioner's complaint. The Governor filed an answer to respondent's complaint asserting Eleventh

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[2] Respondent moved to strike the portions of petitioner's and Little Traverse's briefs that addressed claims that were not included in the complaints underlying the preliminary injunction. No. 11-1413, Document No. 006111102104 (6th Cir. Oct. 18, 2011). Without ruling on the motion, the court of appeals addressed Counts IV-VI alleged in petitioner's amended complaint. Pet. App. 10a-18a.

Amendment immunity as a defense. No. 1:11-cv-00729-PLM Docket entry No. 7, at 6 (W.D. Mich. Sept. 30, 2011).

DISCUSSION

The court of appeals correctly concluded that IGRA claims brought under 25 U.S.C. 2710(d)(7)(A)(ii) must be dismissed where the State alleges that the gaming is not on "Indian lands." Furthermore, although the court of appeals addressed tribal sovereign immunity in the context of claims that did not form the basis for the preliminary injunction, the court correctly concluded that Section 2710(d)(7)(A)(ii) does not abrogate respondent's sovereign immunity for claims alleging that gaming is not on Indian lands. The court's decision does not present any issue warranting review, and this case is not an appropriate vehicle for resolving the parties' underlying dispute. Certiorari should be denied.

I. THE COURT OF APPEALS CORRECLY HELD THAT COUNTS I-III MUST BE DISMISSED

A. 25 U.S.C. 2710(d)(7)(A)(ii) provides that federal district courts shall have jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact * * * that is in effect." The court of appeals correctly concluded that Counts I-III of petitioner's complaint must be dismissed.

As the court of appeals recognized, the requirements of Section 2710(d)(7)(A)(ii) are not satisfied with respect to Counts I and II because those counts allege that the Vanderbilt Parcel is *not* Indian lands. Pet. App. 7a-9a. The court also correctly rejected petitioner's alternative claim in Count III that even if the Vanderbilt Parcel

were Indian lands, gaming on that parcel is prohibited by 25 U.S.C. 2719. As the court of appeals explained, Section 2719 prohibits gaming (with listed exceptions) on land "acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988," but the complaint alleges that the Vanderbilt Parcel was acquired by respondent itself, not by the Secretary, and the land is not in trust. Pet. App. 10a.

B. Petitioner contends (Pet. 7-12) that although the requirements of Section 2710(d)(7)(A)(ii) are not satisfied with respect to Counts I-III, the court of appeals should have concluded that the district court had jurisdiction over those claims under 28 U.S.C. 1331. Although the court of appeals determined that the defects in petitioner's Section 2710(d)(7)(A)(ii) claims were jurisdictional, the court of appeals appears to have interpreted that provision as providing both a cause of action and federal jurisdiction over that cause of action. Pet. App. 7a (plaintiffs' claims "arise under 25 U.S.C. § 2710(d)(7)(A)(ii)"). The decision is therefore best viewed as also holding that petitioner necessarily failed to state a claim under Section 2710(d)(7)(A)(ii) because the elements of such a claim were not properly alleged. Thus, the claims were properly dismissed irrespective of whether jurisdiction over those claims could be based on 28 U.S.C. 1331 or 1362.

Indeed, for Counts IV-VI in petitioner's amended complaint, which were not brought under Section 2710(d)(A)(7)(ii), the court evaluated whether there was jurisdiction under 28 U.S.C. 1331 and concluded that there was. Pet. App. 10a-11a. The court's conclusion that Section 2710(d)(7)(A)(ii) did not provide jurisdiction over Counts I-III was thus based on the specific pleading requirements of a claim brought under that provi-

sion, and the court correctly held that Section 2710(d)(7)(A)(ii) does not provide an avenue for the State to challenge gaming on the Vanderbilt Parcel.[3]

C. Petitioner contends (Pet. 9) that the court of appeals' decision conflicts with this Court's decision in *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 130 S. Ct. 3138 (2010). That is incorrect. In *Free Enterprise Fund*, the Court held that the grant of jurisdiction to the courts of appeals in 15 U.S.C. 78y for challenges to final orders or rules of the Securities and Exchange Commission was not the exclusive means for challenging the constitutionality of the Public Company Accounting Oversight Board (Board) created by the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7201 *et seq.* 130 S. Ct. at 3150. The Court explained that the plaintiffs' "general challenge to the Board [was] 'collateral' to any Commission orders or rules from which review might be sought" under 15 U.S.C. 78y, and that Congress did not intend to require a plaintiff challenging the constitutionality of the Board to incur sanctions before bringing its challenge. *Ibid.* Here, in contrast, petitioner's claims that respondent is gaming on the Vanderbilt Parcel in violation of IGRA and the tribal-state compact are not collateral to the cause of action provided in Section 2710(d)(7)(A)(ii). Section 2710(d) describes the legal requirements for class III gaming under IGRA, and subsection 2710(d)(7)(A)(ii) gives the district courts jurisdiction over specific causes of action related to such gaming.

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[3] Petitioner contends (Pet. 8) that the complaint also raises the question "whether lands purchased with [MILCSA funds] constitute 'Indian lands.'" Petitioner's complaint, however, does not plead any cause of action provided by MILCSA.

D. Petitioner further contends (Pet. 10-11) that the court of appeals' decision conflicts with decisions of the Ninth and Tenth Circuits that exercised jurisdiction over tribal-state compact disputes.

In *Cabazon Band of Mission Indians* v. *Wilson*, 124 F.3d 1050 (1997), cert. denied, 524 U.S. 926 (1998), the Ninth Circuit concluded that it had jurisdiction under Section 1331 over a dispute between four Indian tribes and the State of California arising from their tribal-state compacts. *Id.* at 1055-1056. The parties agreed as a term of their compacts to submit to a federal district court the issue whether the State could lawfully require payment of licensing fees related to the gaming operations. *Id.* at 1053-1054. After a federal court concluded that the fees were not authorized under IGRA, the tribes sued the State to recover the fees. *Id.* at 1054. The court of appeals rejected the State's argument that Section 2710(d)(7)(A) limits federal court jurisdiction over compact-related actions to the types of actions specified in that subsection. *Id.* at 1056. The court explained that Section 2710(d)(3)(C)(v) authorizes compacts to include "remedies for breach of contract" and thus "invites the tribe and the state to waive their respective immunities and consent to suit in federal court." *Ibid.* The court determined that the parties had done so in their compacts by agreeing that "[j]udicial review of any action taken by either party under this Compact, or seeking any interpretation of this Compact, shall be had solely in the appropriate [federal] District Court." *Id.* at 1057.

In contrast to the compacts in *Cabazon Band*, the compact between petitioner and respondent contains no provision agreeing to federal-court review of disputes arising under the compact. Instead, the compact sets

forth an arbitration procedure for breach-of-compact claims, states that the procedure does not limit "any remedy which is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Compact," and declares that nothing in the Compact waives either party's sovereign immunity. Pet. App. 89a-90a.

In *Mescalero Apache Tribe* v. *New Mexico*, 131 F.3d 1379 (10th Cir. 1997), the Tribe sued the State of New Mexico under Section 2710(d)(7)(A)(i), for failure to engage in good-faith negotiations with the tribe to enter into a gaming compact. While the suit was pending, the Governor entered into a compact with the tribe. *Id.* at 1380. After the New Mexico Supreme Court held that the Governor lacked authority to enter into the compact, the State asserted a counterclaim against the tribe seeking a declaration that the Compact was invalid. *Id.* at 1380-1381. Citing its decision in *Pueblo of Santa Ana* v. *Kelly*, 104 F.3d 1546 (10th Cir.), cert. denied, 522 U.S. 807 (1997) another case addressing the Governor's authority to enter into tribal gaming compacts in which the court stated that a federal court "ha[s] the power to determine whether a Tribal-State compact was valid," *id.* at 1557, the court concluded that it had jurisdiction over the State's counterclaim under Section 2710(d)(7)(A)(ii). *Mescalero*, 131 F.3d at 1380-1381, 1386.

Petitioner contends (Pet. 11-12) that under the court of appeals' holding in this case, there would be no federal jurisdiction over the counterclaim in *Mescalero* because the State alleged that the tribal-state compact was *not* in effect, which is a requirement of Section 2710(d)(7)(A)(ii). Although there is disagreement between *Mescalero* and the court of appeals' decision in

that sense, *Mescalero* arose in quite different circumstances—including a compact that had been entered into but was allegedly not authorized—and did not contain a detailed jurisdictional analysis. Any tension between the court of appeals' decision and *Mescalero* is not sufficient to justify this Court's review. See also pp. 18-19, *infra*.

II. THE COURT OF APPEALS PROPERLY ANALYZED THE APPLICABLE LAW GOVERNING TRIBAL SOVEREIGN IMMUNITY

A. After the court of appeals concluded that the district court lacked jurisdiction over petitioner's IGRA claims (Counts I-III), it further considered whether the district court had jurisdiction over the federal common law and state law claims in petitioner's amended complaint (Counts IV-VI), concluded that the district court had jurisdiction over those claims under 28 U.S.C. 1331, but further concluded that tribal sovereign immunity barred those claims as to respondent. Pet. App. 10a-17a. When petitioner amended its complaint to add Counts IV-VI, the district court had already entered the preliminary injunction and the appeal of that injunction was already pending. The district court should have been afforded the opportunity to address those claims in the first instance, including whether it had jurisdiction over the claims and whether the claims were barred against one or more defendants by tribal sovereign immunity. Those claims are not properly before this Court.[4]

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[4] For this reason, petitioner's contentions that the district court had jurisdiction over Counts I-III under Section 2710(d)(7)(A)(ii) because the amended complaint alleged that the Tribal Gaming Commission and members of respondent's Executive Council licensed and supervised casino operations on the Vanderbilt Parcel from its reservation, which indisputably constitutes Indian lands (Pet. 12),

B. 1. In any event, the court of appeals properly analyzed the law governing tribal sovereign immunity. An Indian tribe is subject to suit only when Congress has authorized the suit and thus abrogated the tribe's sovereign immunity, or when the tribe has waived its immunity. *Kiowa Tribe* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998). The congressional abrogation or tribal waiver must be clear. See, *e.g.*, *C & L Enters., Inc.* v. *Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001). The court of appeals correctly concluded that "for the same reasons that [Section] 2710(d)(7)(A)(ii) does not supply federal jurisdiction in this case"—*i.e.*, because petitioner alleges that the Vanderbilt Parcel is *not* Indian lands—"it does not abrogate [respondent's] sovereign immunity." Pet. App. 13a; see *Florida* v. *Seminole Tribe*, 181 F.3d 1237, 1242 (11th Cir. 1999) (holding that IGRA abrogates tribal sovereign immunity only in the "narrow circumstance[s]" specified in the statute).

2. Petitioner contends (Pet. 13-14) that other courts of appeals have construed IGRA as providing a broader abrogation of tribal sovereign immunity than the court of appeals found here. The cases petitioner cites do not establish a conflict warranting this Court's review.

In *Mescalero*, the Tenth Circuit stated that "[w]hile there is sparse case law on the issue, it appears the majority supports the view that IGRA waived tribal sovereign immunity in the narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought." 131 F.3d at 1385. But as the court of appeals pointed

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and that respondent's sovereign immunity is abrogated because that authorization allegedly was conferred by respondent on its reservation (Pet. 15), are not properly before this Court.

out and petitioner conceded below, "*Mescalero* offers virtually no support" for its reading of Section 2710(d)(7)(A)(ii); and to the extent it did, the Tenth Circuit relied on cases addressing whether a tribe had *waived* its sovereign immunity by engaging in gaming under IGRA, not whether Congress *abrogated* tribal sovereign immunity by the terms of IGRA. Pet. App. 13a; see *Mescalero*, 131 F.3d at 1386; *Seminole Tribe*, 181 F.3d at 1242 ("[T]he cases that the [Tenth Circuit] cited * * * addressed an entirely different matter, to wit: whether a tribe voluntarily waives its own sovereign immunity by engaging in gaming under IGRA.").

In the more than 15 years since *Mescalero* was decided, no other court has adopted its broader view of the scope of IGRA's abrogation of tribal sovereign immunity. Petitioner contends (Pet. 13) that the Ninth Circuit adopted a similar view in *Lewis* v. *Norton*, 424 F.3d 959 (2005), but that is incorrect. In *Lewis*, the plaintiffs claimed that they were entitled to enrollment as tribal members, which would in turn entitle them to a share of the tribe's gaming revenue. *Id.* at 960. The court rejected the plaintiffs' argument that IGRA abrogated the tribe's sovereign immunity to tribal membership claims, stating that "IGRA waives tribal sovereign immunity in the narrow category of cases where compliance with the IGRA is at issue" and "do[es] not constitute a broad waiver of sovereign immunity covering an intra-tribal membership dispute whenever gaming revenues are at stake." *Id.* at 962-963. The former statement, written in general terms, did not constitute a holding that IGRA abrogates tribal sovereign immunity in circumstances, such as those here, that were not before the court.

In *Wisconsin* v. *Ho-Chunk Nation*, 512 F.3d 921, 933 (7th Cir.), cert. dismissed, 129 S. Ct. 28 (2008), the Sev-

enth Circuit concluded that IGRA abrogates tribal sovereign immunity only for tribal-state compact disputes that fall within the ambit of Section 2710(d)(3)(C)(i)-(vii), because the text of Section 2710(d)(7)(A)(ii) refers to causes of action for violations of a compact "entered into under Paragraph (3) [25 U.S.C. § 2710(d)(3)(C)]." 512 F.3d at 934-935. Because tribal-state revenue-sharing agreements do not expressly appear on the list of items that may be negotiated under Section 2710(d)(3)(C), the Seventh Circuit concluded that Section 2710(d)(7)(A)(ii) did not abrogate tribal sovereign immunity with respect to the State's claim that the tribe had violated a revenue-sharing provision of the compact. *Id.* at 934. Petitioner contends (Pet. 14) that its claims against respondent could proceed under the Seventh Circuit's view that tribal sovereign immunity is abrogated in disputes arising from the statutorily-permitted subjects of negotiation. But nothing in *Ho-Chunk Nation* suggests that the Seventh Circuit (or the Eleventh Circuit in *Seminole Tribe* (see Pet. 14)) would not require *all* preconditions for a suit under Section 2710(d)(7)(A)(ii) to be satisfied to abrogate tribal sovereign immunity, including the "Indian lands" requirement.

III. THIS CASE IS AN INAPPROPRIATE VEHICLE TO RESOLVE THE PARTIES' DISPUTE

The underlying dispute between the parties turns on whether the Vanderbilt Parcel, purchased by respondent with its MILCSA funds, constitutes restricted fee lands and thus "Indian lands" within the meaning of 25 U.S.C. 2703(4). As the court of appeals correctly concluded, that issue cannot be resolved in an injunctive action brought by petitioner under 25 U.S.C. 2710(d)(7)(A)(ii). Petitioner contends (Pet. 15-16) that the necessary result of the court of appeals' decision is

that petitioner "has no federal-court remedy to stop illegal tribal gaming that takes place on Michigan's own sovereign territory." That is incorrect.

A. Although the court of appeals held that all claims against respondent itself could not proceed under 25 U.S.C. 2710(d)(7)(A)(ii) or were barred by tribal sovereign immunity, it instructed the district court to consider on remand whether Counts IV-VI in petitioner's amended complaint, which are not brought under 25 U.S.C. 2710(d)(7)(A)(ii), may proceed against respondent's Tribal Gaming Commission, or against the Commission's members or the members of respondent's Executive Council in their official capacities. Pet. App. 17a-18a. It is therefore possible that the Indian lands issue will be resolved in these proceedings. The interlocutory posture of this case, and the specific terms of the court of appeals' remand order, thus weigh against this Court's review. *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916); see *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."). The remaining defendants have asserted in motions to dismiss that sovereign immunity bars petitioner's claims against them. Docket entry No. 170, at 15-16; *id.* No. 174, at 16-21. But the courts below have not passed on that question, and this Court has not held that sovereign immunity bars such an action for injunctive relief against tribal officials. See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 59 (1978).[5]

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[5] The remaining defendants in this case could waive any immunity they may have in order to obtain resolution of the Indian lands issue. That course, however, could be complicated by Count V in petition-

B. There are also other avenues for obtaining a federal-court determination of whether the Vanderbilt Parcel constitutes Indian lands. Respondent's suit against the Governor of Michigan concerning the status of the Vanderbilt Parcel is pending before the same district court judge who is presiding over petitioner's amended complaint. Resp. App. 12-19. Although the Governor has asserted Eleventh Amendment immunity in that suit (see pp. 11-12, *supra*), the district court may conclude that respondent has properly pleaded claims under *Ex parte Young*, 209 U.S. 123 (1908), because respondent seeks to prevent the State from enforcing against respondent state laws that respondent alleges are preempted by IGRA's authorization of gaming on Indian lands. See, *e.g.*, *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 367 (2008). Or the Governor could elect to waive any immunity he may have to obtain resolution of the Indian lands issue.

Furthermore, one or more of the mechanisms described above for determining whether IGRA authorizes class III gaming by an Indian tribe (pp. 2-4, *supra*) may be available here. For example, respondent could request approval from the NIGC of a site-specific gaming ordinance describing the Vanderbilt Parcel and, depending on the outcome, either petitioner or respondent could seek administrative or judicial review of the NIGC's decision. See 25 U.S.C. 2714; 25 C.F.R. 522.7; 25 C.F.R. Pt. 580; 25 C.F.R. 580.10. And, finally, the United States has criminal and civil enforcement authority. See p. 4, *supra*; Pet. App. 17a.

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er's amended complaint, which seeks forfeiture of respondent's gaming machines and the gross receipts from its gaming operations on the Vanderbilt Parcel. Pet. App. 69a-70a.

Regardless of how the issue might ultimately be resolved against other defendants or in other proceedings, the court of appeals correctly concluded that the issue cannot be resolved in an action by petitioner for injunctive relief against respondent under Section 2710(d)(7)(A)(ii).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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