No. 07-1402

IN THE
Supreme Court of the United States

HO-CHUNK NATION,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

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

REPLY BRIEF

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TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Cited Authorities

Blank Page

INTRODUCTION

Supreme Court Rule 15(6) permits a petitioner to file a reply brief responding to any new points brought up in a brief in opposition to a petition for writ of certiorari. In its brief ("Opposition Brief") in opposition to the Ho-Chunk Nation's ("Nation") Petition for Writ of Certiorari ("Petition"), the State of Wisconsin ("State") made four arguments that were not raised in the Nation's Petition and two arguments that were based on misrepresentations of the state of the law. The Nation is compelled to respond to each of these new and misleading arguments.

I.

THE ISSUE ON APPEAL IS COMPELLING WHETHER OR NOT THERE IS AN ALTERNATIVE BASIS FOR DISTRICT COURT JURISDICTION.

In its Opposition Brief, the State argues that because the Seventh Circuit found an alternative basis for jurisdiction, the issues raised in the Nation's petition are not compelling. Supreme Court Rule 10 ("Rule 10") states that the Court will only grant a petition for writ of certiorari for "compelling reasons." Rule 10's criteria include a split among the federal circuits on an important issue (Rule 10(a)) and a decision of a federal court on an important question of federal law that has not been, but should be, settled by the Court (Rule 10(c)). Rule 10 does not include any suggestion that a petition should be denied because there is an alternative basis for ruling in the case.

The Seventh Circuit concluded that the Declaratory Judgment Act (28 U.S.C. Section 2201) combined with the Indian Gaming Regulatory Act's[1] grant of jurisdiction over a tribe's claim that a governor has failed to negotiate a compact in good faith (25 U.S.C. § 2710(d)(7)(A)(i)) and the waiver of the Nation's sovereign immunity in the Nation's Compact, provided the District Court with jurisdiction over this suit. That conclusion does not alter the fact that the reasons for granting the Petition are compelling.

In the Petition, the Nation argued that a decision by this Court on the scope of Section 2710(d)(7)(A)(ii)'s grant of jurisdiction has profound implications for every gaming tribe and state in the country in which tribal gaming is being conducted. Petition, pp. 15-17. The significance of this issue arises largely from the nature of the remedy set forth in Section 2710(d)(7)(A)(ii)'s grant of jurisdiction.

Section 2710(d)(7)(A)(ii) grants to district courts the authority to enjoin tribal class III gaming. That is the exclusive remedy provided for in the Section. Under the plain language of the provision, a district court does not have the authority to award damages, revise the terms of the compact, order the parties to negotiate, order arbitration, or take any other action. Thus, the moment a district court asserts jurisdiction over a claim based on Section 2710(d)(7)(A)(ii), the tribe conducting the class III gaming is facing the prospect of an order enjoining that gaming.

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1. 25 U.S.C. § 2701, *et seq.* ("IGRA").

The remedy provided for in Section 2710(d)(7)(A)(ii) is consistent with a narrow interpretation of the grant of jurisdiction. In enacting Section 2710(d)(7)(A)(ii), Congress intended to grant district courts jurisdiction to stop "illegal gaming." Senate Report No. 446, 100th Cong. 2d Sess. p. 18 (1988), reprinted at 1988 U.S.C.C.A.N. 3071, 3088. Illegal gaming is the focus, so enjoining the gaming is the remedy.

An injunction is inconsistent with a broad interpretation of the grant of jurisdiction. If this grant is interpreted to permit jurisdiction over any cause of action arising from a compact, or even any cause of action arising from the subjects of negotiation listed in the IGRA, states will have an influence over tribal gaming that is entirely in conflict with the purposes of the IGRA. The Seventh Circuit's interpretation puts states in a position to disrupt tribal economies and extort concessions from tribes by threatening tribes with an injunction against their gaming whenever there is a dispute that can be related to a compact.

A decision by this Court that defines the limits of the claims that can be used as a basis for enjoining tribal gaming is, thus, of fundamental significance to tribes. The scope of Section 2710(d)(7)(A)(ii)'s grant of jurisdiction and waiver of tribal sovereign immunity is a question of federal law that has not been, but should be, settled by the Court, regardless of whether the District Court can assert jurisdiction over this case based on a different provision of the IGRA.

The State's argument also fails because a ruling by this Court that Section 2710(d)(7)(A)(ii)'s grant of

jurisdiction and waiver of tribal sovereign immunity does not encompass any of the State's claims would prevent the District Court from providing the State with the remedy that it is seeking in its second cause of action, namely, an order enjoining the Nation's gaming. State of Wisconsin's Appendix, Vol. I, pp. 11A-20A. That is because Section 2710(d)(7)(A)(ii) is not only a grant of jurisdiction to the district courts, but also a limitation on the district court's authority to grant injunctive relief. Section 2710(d)(7)(A)(ii); *Kokkonen v. Guardian Life Insurance Company of America*, 511 U.S. 375, 377 (1994) ["Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, . . ."].

Section 2710(d)(7)(A)(i), coupled with 28 U.S.C. Sections 2201 and 1367(a), thus, grants to the District Court the authority to afford the relief requested by the State in its Amended Complaint, except its request for an order enjoining the Nation's gaming. If the Court grants the Petition and rules in favor of the Nation, the District Court would be prevented from granting the State one of the fundamental remedies it seeks.

The existence of an alternative basis for the District Court exercising jurisdiction in this case, thus, does not make the issues presented in the Petition less compelling.

II.

THE SEVENTH CIRCUIT'S RULING ON THE SCOPE OF SECTION 2710(d)(7)(A)(II) IS IN CONFLICT WITH THE RULINGS OF OTHER FEDERAL CIRCUITS.

The State asserts that the Seventh Circuit's decision is not in conflict with rulings of other federal circuits. Opposition Brief, p. 18. This is simply not true.

The Seventh Circuit concluded:

> "a proper interpretation of § 2710(d)(7)(A)(ii) is not that federal jurisdiction exists over a suit to enjoin class III gaming whenever *any* clause in a Tribal-State compact is violated, but rather that jurisdiction exists only when the alleged violation relates to a compact provision agreed upon pursuant to the IGRA negotiation process."

Ho-Chunk II, 512 F.3d at 933, PA p. 22a-23a. (Emphasis in original.) This interpretation is unique to the Seventh Circuit. No other federal court has concluded that 25 U.S.C. Section 2710(d)(3)(C) ("Section 2710(d)(3)(C)") limits Section 2710(d)(7)(A)(ii)'s grant of jurisdiction.

The Seventh Circuit's ruling is in direct conflict with decisions of the Tenth Circuit Court of Appeals. In *State of New Mexico v. Pueblo of Pojoaque*, 30 Fed. Appx. 768 (10th Cir. 2002) ("*Pojoaque*"), the Tenth Circuit upheld the reasoning of the district court, which had concluded that it had jurisdiction over New Mexico's claims to

enforce revenue sharing agreements between the tribes and the state. The district court's ruling leaves no question that the Tenth Circuit did not interpret the provision to be limited to the subjects of negotiation listed in Section 2710(d)(3)(C):

> Case law makes it clear that the IGRA recognizes the existence of federal question jurisdiction when the issue before the Court is the scope and validity of a tribal-state gaming compact. *Pueblo of Santa Ana v. Kelly*, 104 F.3d at 1557; *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1055-56 (9th Cir. 1997).

New Mexico v. Jicarilla Apache Tribe, 2000 U.S. Dist. LEXIS 20666, *15 (D.N.M. 2000) ("*Jicarilla*").

The *Jicarilla* decision placed no limits on the grant of jurisdiction and abrogation of tribal sovereign immunity contained in Section 2710(d)(7)(A)(ii) based on the subjects of compact negotiation listed in Section 2710(d)(3)(C). *Jicarilla* also suggests that the Seventh Circuit's decision in *Ho-Chunk II* is in conflict with the Ninth Circuit Court of Appeals' decision in *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050 (9th Cir. 1997) ("*Cabazon*").

In *Cabazon*, the Ninth Circuit rejected the State of California's argument that the IGRA's grant of jurisdiction was limited to the three specific causes of action listed in Section 2710(d)(7)(A)(i)-(iii): "IGRA necessarily confers jurisdiction onto federal courts to enforce Tribal-State compacts and the agreements

contained therein." *Cabazon*, 124 F.3d at 1056. The Ninth Circuit's ruling that the district court has the authority to enforce any claim by a tribe to enforce a gaming compact is far broader than that of the Seventh Circuit.[2]

When the rulings in *Pojoaque*, *Jicarilla*, and *Cabazon* are compared to the holding in *Ho-Chunk II*, the existence of a split between the Seventh Circuit Court of Appeals and the Ninth and Tenth Circuit Courts of Appeal is obvious.

III.

WHETHER THE DECISIONS OF OTHER CIRCUITS AGREE WITH THE NATION'S INTERPRETATION OF SECTION 2710(d)(7)(A)(II) IS IRRELEVANT TO THE ISSUE OF WHETHER A SPLIT EXISTS AMONG THE CIRCUITS.

The State argues that, assuming that there is a split, the Petition should still not be granted, because none of the circuits has adopted the Nation's interpretation of the provision. Opposition Brief, p. 19. The State cites no legal authority to support this argument, and the Nation is aware of none. There is nothing in the Court's rules that even suggests that a petitioner's interpretation of a statute must be reflected in a court of appeals' ruling in order for there to exist a split in the circuits on the issue. The Nation's interpretation

2. There is no textual basis for concluding that any of the three grants of jurisdiction under the IGRA permit a district court to order a State to make payments to a tribe pursuant to a gaming compact, yet that is precisely what the Ninth Circuit did in *Cabazon*.

was sufficiently well supported to compel the Seventh Circuit to establish an entirely new analysis of the provision, one with more in common with the Nation's analysis than with that of the Ninth or Tenth Circuits.

IV.

THE FACT THAT SECTION 2710(d)(7)(A)(II) GRANTS JURISDICTION OVER TRIBAL CLAIMS SUPPORTS THE NATION'S INTERPRETATION OF THE SECTION.

In its Opposition Brief, the State cites as support for its interpretation the Seventh Circuit's suggestion that the inclusion of a tribal right to sue in Section 2710(d)(7)(A)(ii) had the effect of broadening the subjects that fall within the grant of jurisdiction. *Ho-Chunk II*, 512 F.3d at 931.

There are only three situations in which a tribe would seek a court order enjoining class III gaming: when the gaming is conducted under a management contract (25 U.S.C. § 2711); when the gaming is conducted by an individual or entity on tribal lands authorized by the tribe under a tribal ordinance or a resolution (25 U.S.C. § 2710(b)(4)(B)); and when, as part of an intra-tribal power struggle, a tribal group other than the federally recognized government seizes control of the gaming, (*In re Sac & Fox Tribe of the Miss. in Iowa/Meskwaki Casino Lit.*, 340 F.3d 749 (8th Cir. 2003)[3]).

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3. *In re Sac & Fox Tribe*, does not support a broader interpretation of Section 2710(d)(7)(A)(ii). In reversing the (Cont'd)

A tribe would never need to seek a court order enjoining the gaming that the tribe itself conducts. It would always be able to stop such gaming by simply ordering a halt to the gaming. A tribe would only file an action under Section 2710(d)(7)(A)(ii) based on a claim that the entity conducting the gaming was doing so in a manner that violated the tribe's compact.[4] The conduct of the gaming is the only matter arising under a class III gaming compact over which a management contractor or an entity or individual conducting gaming on tribal land would have authority to act. An unrecognized tribal government group would have no authority to act on behalf of a tribe, and any gaming the group conducted would be, by definition, illegal gaming, because it would not be authorized by the tribal government that was party to the compact. *In re Sac & Fox Tribe*, 340 F.3d at 760-761.

The only interest that a tribe would have that could be protected through Section 2710(d)(7)(A)(ii) would be its interest in the proper regulation of the gaming being

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(Cont'd)
district court, the Eighth Circuit focused on the limited nature of that grant of jurisdiction: "25 U.S.C. § 2710(d)(7)(A)(ii) expressly provides jurisdiction for the court to enjoin illegal gaming." *Id.*, 340 F.3d at 763.

4. A management company, individual or entities would not be authorized to act on behalf of the tribe in any other matter related to a compact, because any other actions taken pursuant to a compact can only be taken by the parties: states and tribes. 25 U.S.C. § 2710(d)(3). Such entities also lack the authority to negotiate or make payments to a state under a revenue sharing agreement.

conducted by an entity on behalf of the tribe. There is no basis, therefore, for concluding that including Indian tribes as potential plaintiffs in Section 2710(d)(7)(A)(ii) broadens the scope of that grant of jurisdiction beyond matters directly related to the gaming itself.

V.

THE SEVENTH CIRCUIT FOUND THE STATUTE TO BE AMBIGUOUS.

The State's assertion that "the Seventh Circuit did not find the statutory text ambiguous" (Opposition Brief, p. 21) is a misrepresentation of the Seventh Circuit's ruling. For the language of a statute to be considered ambiguous, "it must be 'susceptible to more than one reasonable interpretation' or 'more than one accepted meaning.'" *Carrieri v. Jobs.com, Inc.*, 393 F.3d 508, 519 (5th Cir. 2004). The Seventh Circuit analyzed the District Court's interpretation of Section 2710(d)(7)(A)(ii) and found it, along with the State's interpretation, to be too broad. *Ho-Chunk II*, 512 F.3d at 931-932, PA p. 18-19. It found the Nation's interpretation to be too narrow. *Ho-Chunk II*, 512 F.3d at 930-931. In concluding that its own interpretation was superior to both, however, the Seventh Circuit did not state or even suggest that either the Nation's or the State's interpretation was unreasonable. The Court's acknowledgment that there are at least three possible reasonable interpretations of Section 2710(d)(7)(A)(ii) was an implicit recognition by the Seventh Circuit that the provision is ambiguous. *Carrieri*, 393 F.3d at 519.

Because, in fact, Section 2710(d)(7)(A)(ii) is ambiguous, the Seventh Circuit was compelled to apply the canons of construction applicable to statutes passed for the benefit of Indians. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). Its failure to do so violated the Court's prior decisions and was a clear error of law.

VI.

THE SCOPE OF SECTION 2710(d)(7)(A)(II) WILL BE A SUBJECT OF INCREASING AMOUNTS OF LITIGATION IN THE FUTURE AND NUMEROUS COURTS ARE DEALING WITH IT NOW.

Finally, the State's argument that uncertainty about the scope of Section 2710(d)(7)(A)(ii) is not an issue that will lead to a significant amount of litigation in the future is not supported by the facts. Opposition Brief, p. 25-26.

States and tribes have engaged in litigation to enforce gaming compacts regularly since the IGRA was enacted. See, e.g., *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997); *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050 (9th Cir. 1997); *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999); *State of New Mexico v. Pueblo of Pojoaque*, 30 Fed. Appx. 768 (10th Cir. 2002); *Coyote Valley Band of Pomo Indians v. California (In re Indian Gaming Related Cases Chemehuevi Indian Tribe)*, 331 F.3d 1094 (9th Cir. 2003); *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095 (9th Cir. 2006). Just this year, disputes over

revenue sharing agreements were litigated in at least three federal circuits: (1) the present case in the Seventh Circuit; (2) *State of Michigan v. Little River Band of Ottawa Indians*, 2007 U.S. Dist. LEXIS 31213 (S.D. MI 2007) in the Sixth Circuit, cited by the State in its brief; and (3) *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Arnold Schwarzenegger*, United States District Court for the Southern District of California, Case No. 04cv1151 Wmc, in the Ninth Circuit. District Court jurisdiction in two of those cases, the present case and *Little River Band,* was based on Section 2710(d)(7)(A)(ii).

In light of the increasing number of gaming compacts that are being entered into, the increasingly common inclusion of revenue sharing agreements in gaming compacts, and states' increasing dependence on revenues from revenue sharing agreements, more litigation is inevitable. As a result, the scope of Section 2710(d)(7)(A)(ii) will be an even more significant and contentious issue until this Court has issued a definitive ruling.

CONCLUSION

The Nation seeks review by the Court of highly significant issues of federal law that have not been, but should be, ruled on by the Court. The State has not presented any convincing argument as to why the Court should not grant the Petition. The Nation, therefore, respectfully requests that the Petition be granted.

Respectfully submitted,

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