In the Supreme Court of the United States

No.

JOHN D. ASHCROFT, ATTORNEY GENERAL,
ET AL., PETITIONERS

v.

SENECA-CAYUGA TRIBE OF OKLAHOMA, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

The Johnson Act, 15 U.S.C. 1171 *et seq.*, prohibits, among other things, the possession or use of "any gambling device" within Indian country. The Johnson Act defines a gambling device to include "any * * * machine or mechanical device" that is "designed and manufactured primarily for use in connection with gambling, and * * * by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property." 15 U.S.C. 1171(a)(2). The Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*, expressly exempts Indian Tribes from the prohibitions of the Johnson Act when a Tribe and a State have entered into a gaming compact approved by the Secretary of the Interior. 25 U.S.C. 2710(d)(6). In the absence of such a compact, the Indian Gaming Regulatory Act provides that tribal gaming is permissible only to the extent that it is "not otherwise specifically prohibited on Indian lands by Federal law." 25 U.S.C. 2710(b)(1)(A). The questions presented are:

1. Whether the Indian Gaming Regulatory Act creates an implied exemption from the Johnson Act for certain gambling devices used at tribal gaming facilities in Indian country in the absence of a tribal-state gaming compact; and, if not,

2. Whether a machine can qualify as a gambling device under the Johnson Act when a player becomes entitled to receive money as a result of the sequence of winning and losing pull-tabs on a pre-printed paper roll inserted into the machine.

In the Supreme Court of the United States

No.

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL., PETITIONERS

v.

SENECA-CAYUGA TRIBE OF OKLAHOMA, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States and the other federal parties, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-45a) is reported at 327 F.3d 1019. The judgment of the district court (App., *infra*, 46a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 2003. A petition for rehearing was denied on June 24, 2003 (App., *infra*, 47a-48a). On September 15, 2003, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including October 22, 2003, and, on October 10, 2003, Justice Breyer extended that time to and including November 21, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Titles 15 and 25 of the United States Code are reproduced at App., *infra*, 49a-54a.

STATEMENT

This is one of two cases recently decided by the courts of appeals that address the relationship between the Johnson Act, 15 U.S.C. 1171 *et seq.*, which prohibits the use of "any gambling device" in Indian country, and the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, which authorizes the use of gambling devices in Indian country under certain circumstances. IGRA provides an *express* exemption from the Johnson Act for tribal gaming conducted pursuant to a compact entered into between a State and a Tribe and approved by the Secretary of the Interior. 25 U.S.C. 2710(d)(6). The Tenth Circuit held in this case that IGRA also provides an *implied* exemption from the Johnson Act for certain gambling devices used at tribal casinos even in the absence of such a compact. The Eighth Circuit recently reached the opposite conclusion in *United States* v. *Santee Sioux Tribe of Nebraska*, 324 F.3d 607 (2003), a case that involves a device that is virtually identical to the one involved in this case. The United States is filing a certiorari petition in that case as well, presenting a question, also raised in this case, concerning the scope of the Johnson Act.

1. a. The Johnson Act prohibits, among other things, the manufacture, sale, transportation, possession, or use of "any gambling device" within the District of Columbia, federal enclaves and possessions, and, as relevant here, "Indian country." 15 U.S.C. 1175(a). The Johnson Act also prohibits the transportation of gambling devices in interstate commerce to or from any place in which their operation is unlawful. 15 U.S.C. 1172(a). The Johnson Act defines a "gambling device" to include not only a slot machine, see 15 U.S.C. 1171(a)(1), but also any other machine or mechanical device that is:

> designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.

15 U.S.C. 1171(a)(2).

b. In 1987, this Court held in *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, that a State cannot prohibit bingo and card games on Indian reservations if the State allows such games elsewhere. In the wake of that decision, Congress enacted IGRA in 1988 "to provide a statutory basis for the operation and regulation of gaming by Indian tribes." *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 48 (1996) (citing 25 U.S.C. 2702). The purposes of IGRA include enabling Tribes to conduct gaming to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. 2702(1), and providing a regulatory structure adequate to "shield [tribal gaming] from organized crime and other corrupting influences * * * and to assure that gaming is conducted fairly and honestly by both the operator and players," 25 U.S.C. 2702(2).

IGRA establishes three classes of Indian gaming, each of which is subject to a distinct regulatory regime. *Class I* gaming, which is not at issue in this case, consists of social games played solely for prizes of minimal value and traditional forms of Indian gaming. Tribes have exclusive jurisdiction to regulate such games. See 25 U.S.C. 2703(6), 2710(a)(1).

Class II consists, as relevant here, of "the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) * * * including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other

games similar to bingo." 25 U.S.C. 2703(7)(A)(i). Class II excludes "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. 2703(7)(B)(ii). Class II gaming is permissible "within a State that permits such gaming for any purpose by any person, organization or entity," provided that "such gaming is not otherwise specifically prohibited on Indian lands by Federal law." 25 U.S.C. 2710(b)(1)(A). Class II gaming is subject to regulation by the National Indian Gaming Commission (NIGC), see 25 U.S.C. 2706(b), as well as by Tribes themselves.

Class III is defined as "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. 2703(8). Such gaming is permissible only if it occurs in a State that permits it, is conducted in conformance with a tribal-state compact approved by the Secretary of the Interior, and is authorized by a tribal ordinance approved by the Chairman of the NIGC. 25 U.S.C. 2710(d).

IGRA contains an express exception from the Johnson Act for gambling devices used in Class III gaming. IGRA states that "[t]he provisions of section 1175 of title 15 [the Johnson Act] shall not apply to any gaming conducted under a Tribal-State compact that—(A) is entered into under [25 U.S.C. 2710(d)(3)] by a State in which gambling devices are legal, and (B) is in effect." 25 U.S.C. 2710(d)(6). IGRA contains no comparable exemption for gambling devices used in Class II gaming.

2. Respondents are Diamond Game Enterprises, Inc., the manufacturer of the Magical Irish Instant Bingo Dispenser System (Magical Irish), and three Indian Tribes, the Seneca-Cayuga Tribe of Oklahoma, the Fort Sill Apache Tribe of Oklahoma, and the Northern Arapaho Tribe of Wyoming. The Tribes, having not entered into gaming compacts with their respective States, cannot engage in Class III gaming under IGRA. The Tribes have been authorized by the NIGC to operate Class II gaming facilities, and the Tribes have

used, or sought to use, Magical Irish machines at those facilities. See App., *infra*, 9a.

a. From the player's perspective, Magical Irish resembles, in both appearance and play, a slot machine or other casino gambling device. Magical Irish, like other such machines, is housed in an illuminated cabinet. The player deposits money into the Magical Irish machine, presses a button to activate the machine, and views a video display that indicates whether or not he has won. The Magical Irish game "can be a high-stakes, high-speed affair," as a player can complete a game "every seven seconds." See App., *infra*, 8a-9a; see *Santee Sioux Tribe*, 324 F.3d at 610 (noting that the similar Lucky Tab II machines in that case "look and sound very much like traditional slot machines").

Magical Irish differs in its design to some extent from more common gambling devices. Whether a player of Magical Irish wins or loses is determined by the sequence of bar codes on a pre-printed paper roll of pull-tabs that is inserted into the machine. (Similar paper rolls have been used to supply pull-tabs to be purchased by persons playing the traditional game of paper pull-tabs without a machine.) When the player presses a button, the machine reads the next pull tab on the roll, which triggers the video display, and dispenses the pull-tab to the player. The video screen depicts a grid that is similar in appearance to that of a video slot machine. If the screen indicates that the pull-tab is a winner, the player may obtain money for the winning pull-tab only by presenting it to a cashier at the casino. In addition to relying on the video screen, the player is free to open the pull-tab manually to see whether it is a winner. See App., *infra*, 8a-9a.

b. In January 2000, respondents asked the NIGC whether Magical Irish qualifies under IGRA as a Class II "electronic, computer, or other technologic aid[]" to playing the game of pull-tabs, as distinguished from a Class III game. In response, the NIGC issued an advisory opinion finding

Magical Irish to be a Class III game. The NIGC's opinion relied on a district court decision, subsequently reversed on appeal, which held that a similar device, called Lucky Tab II, was a Class III game under IGRA. See App., *infra*, 9a-10a; *Diamond Game Enters., Inc.* v. *Reno*, 9 F. Supp. 2d 13 (D.D.C. 1998), rev'd, 230 F.3d 365 (D.C. Cir. 2000). Neither the NIGC's advisory opinion nor the decisions in *Diamond Game* determined whether Lucky Tab II was a gambling device within the meaning of the Johnson Act.

c. After the NIGC issued its advisory opinion, respondents commenced this suit in the United States District Court for the Northern District of Oklahoma against the Attorney General, the Department of Justice, the United States Attorney, and the NIGC. Respondents sought a declaratory judgment that (1) Magical Irish is not a "gambling device" under the Johnson Act, and (2) Magical Irish is a Class II "aid" under IGRA. Respondents also sought to enjoin the federal authorities from taking enforcement action against them with respect to Magical Irish. See App., *infra*, 10a.

d. The district court, after conducting an evidentiary hearing, held that Magical Irish "is not a gam[bl]ing device under the Johnson Act" and "is a permissible Class II aid under [IGRA]." App., *infra*, 11a-13a, 46a.

In an oral ruling addressing the Johnson Act question, the district court stated that, "[w]hile the game of pull-tabs itself, by its nature, contains an element of chance, no additional element of chance is applied by the [Magical Irish device]." The court reasoned that the device "cannot change the outcome of the game," but only "dispenses preprinted prearranged pull-tabs" and "make[s] the play of the game more enjoyable." The court added that "a participant cannot win anything without first taking [the paper pull-tab] to a cashier." App., *infra*, 12a; Gov't C.A. Br. 8.

The district court relied on similar reasoning in concluding that Magical Irish is "*a technologic aid to dispensing Pull-Tabs*" under IGRA. The court stated that Magical Irish "doesn't determine who the winner is"; rather, the winner "is predetermined when the Pull-Tabs are printed at some other location before the game is ever played." App., *infra*, 11a-12a; Gov't C.A. Br. 7-8.

3. The court of appeals affirmed. App., *infra*, 1a-45a.

The court of appeals held that IGRA provides an implied exemption from the Johnson Act for gambling devices used by Tribes as "electronic, computer, or other technologic aids" to Class II games such as bingo, lotto, and pull-tabs. App., *infra*, 19a-29a; see 25 U.S.C. 2703(7)(A)(i). The court perceived that Congress had not spoken in IGRA to "the relationship between the Johnson Act and IGRA Class II technological aids." App., *infra*, 20a. Proceeding on that premise, the court then refused, "[a]bsent clear evidence to the contrary," to "ascribe to Congress the intent both to carefully craft through IGRA th[e] protection afforded to users of Class II technologic aids and to simultaneously eviscerate those protections by exposing users of Class II technologic aids to Johnson Act liability." *Id.* at 22a. Although the court acknowledged that IGRA expressly exempts gambling devices from the Johnson Act when they are used in Class III gaming pursuant to an approved tribal-state compact, see 25 U.S.C. 2710(d)(6), the court declined to draw the inference that IGRA was not intended to exempt gambling devices from the Johnson Act in other circumstances. App., *infra*, 26a-27a.

The court of appeals read the Senate Select Committee on Indian Affairs' Report on IGRA as supporting the view that Class II technologic aids are exempt from the Johnson Act. The court noted that the Committee had expressed its intent that "no other Federal statute"—which the court understood to include the Johnson Act—would "preclude the use of otherwise legal devices used solely in aid of or in conjunction with bingo or lotto or other such gaming on or off Indian lands." App., *infra*, 23a (quoting S. Rep. No. 446, 100th

Cong., 2d Sess. 12 (1988)). The court viewed that statement as "direct evidence that Congress did not intend the Johnson Act to apply to the use of Class II technologic aids in Indian country." *Ibid.*

The court of appeals then held that Magical Irish is a permissible "technologic aid" to Class II gaming under IGRA. App., *infra*, 29a-44a. The court concluded that IGRA permits technologic aids not only to bingo, but also to other Class II games, including pull-tabs. *Id.* at 29a-37a. In analyzing whether Magical Irish qualifies as a technologic aid, the court deferred to the NIGC's definition of an "aid," which considers whether the device at issue "[a]ssists a player or the playing of a game," "[i]s not an electronic or electromechanical facsimile," and "[is] operated in accordance with applicable Federal communications law." *Id.* at 37a-44a; 25 C.F.R. 502.7. The court concluded that Magical Irish qualifies as a technologic aid because it "facilitates the playing of pull-tabs," and "is not a 'computerized version' of pull tabs." App., *infra*, 44a.

Having held that the Johnson Act does not apply to any gambling device that satisfies IGRA's definition of a Class II technologic aid, the court of appeals did not address whether Magical Irish also satisfies the Johnson Act's definition of a gambling device. See App., *infra*, 28a ("If a piece of equipment is an IGRA Class II technologic aid, a court need not assess whether, independently of IGRA, that piece of equipment is a 'gambling device' proscribed by the Johnson Act.").

REASONS FOR GRANTING THE PETITION

The court of appeals has eviscerated the Johnson Act as a tool for policing casino-style gaming in Indian country. The court of appeals held that the Indian Gaming Regulatory Act (IGRA)—which provides an express exemption from the Johnson Act for gambling devices used in Class III gaming pursuant to approved tribal-state compacts—also provides an implied exemption for gambling devices even in the absence of such compacts when they are used as purported "technologic aids" to Class II gaming. The court of appeals' holding cannot be squared with IGRA's text, history, and purposes. IGRA explicitly confines Class II gaming to "gaming [that] is not otherwise specifically prohibited on Indian lands by Federal law," 25 U.S.C. 2710(b)(1)(A), and the Johnson Act is just such a specific prohibition against the possession or use of gambling devices in Indian country. The legislative history confirms that IGRA was designed to leave the Johnson Act in full force in Indian country except when gambling devices are used in accordance with a valid tribal-state compact. The continued application of the Johnson Act is essential to fulfilling Congress's purpose in enacting IGRA to ensure the existence of a regulatory regime for lucrative casino-style gaming that is sufficient to protect against corruption. The Tenth Circuit's decision conflicts on this question with the recent decision of the Eighth Circuit in *United States* v. *Santee Sioux Tribe of Nebraska*, 324 F.3d 607 (2003).

Both this case and *Santee Sioux Tribe* raise the additional question whether machines such as Magical Irish, although "designed and manufactured primarily for use in connection with gambling," 15 U.S.C. 1171(a)(2), are nonetheless outside the Johnson Act's definition of a gambling device. The Eighth Circuit in *Santee Sioux Tribe*, like the district court in this case, held that such machines do not fall within that definition, because whether a player wins or loses is determined not by a computer or other permanent component of the machine, but instead by the sequence of pull-tabs on a paper roll that is inserted into the machine. That conclusion is without support in the text or history of the Johnson Act, is contrary to its purpose, conflicts with a decision of the Ninth Circuit, and opens a broad loophole in the Johnson Act both inside and outside Indian country.

A. IGRA Does Not Provide An Implied Exemption From The Johnson Act For Gambling Devices Used Without A Tribal-State Compact As Purported "Technologic Aids" To Class II Gaming

The court of appeals perceived that Congress was "silen[t] * * * regarding the relationship between the Johnson Act and IGRA Class II technologic aids." App., *infra*, 20a. The court of appeals was entirely mistaken. IGRA makes clear that Congress was creating one, and *only* one, exemption from the Johnson Act for tribal gaming: the exemption for gambling devices used in accordance with a tribal-state gaming compact approved by the Secretary of the Interior. In the absence of such a compact, as Congress made clear in 25 U.S.C. 2710(b)(1)(A), tribal gaming operations must conform to the Johnson Act.

1. The Text And History Of IGRA Make Clear That Congress Intended That The Johnson Act Would Bar Any Use Of Gambling Devices In Class II Gaming

a. IGRA states that a Tribe may engage in Class II gaming only if, *inter alia*, "such gaming is not otherwise specifically prohibited on Indian lands by Federal law." 25 U.S.C. 2710(b)(1)(A). The Johnson Act specifically prohibits "within Indian country" the possession or use of "any gambling device." 15 U.S.C. 1175(a). Accordingly, as the Eighth Circuit recognized, "Section 2710(b)(1)(A) clearly states that class II devices may be regulated by another federal statute —obviously the Johnson Act." *Santee Sioux Tribe*, 324 F.3d at 611.

The Senate Select Committee on Indian Affairs Report on IGRA confirms that the Johnson Act is the "specific[] prohibit[ion]" mentioned in Section 2710(b)(1)(A). In discussing Section 2710(b)(1)(A), the Report explains:

> *The phrase "not otherwise prohibited by Federal Law" refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. 1175 [the Johnson Act].* That section prohibits gambling devices on Indian lands but does not apply to devices used in connection with bingo and lotto. It is the Committee's intent that with the passage of this act, no other Federal statute, such as those listed below, will preclude the use of *otherwise legal* devices used solely in aid of or in conjunction with bingo or lotto or other such gaming on or off Indian lands. The Committee specifically notes the following sections in connection with this paragraph: 18 U.S.C. section 13, 371, 1084, 1303-1307, 1952-1955 and 1961-1968; 39 U.S.C. 3005; and *except as noted above*, 15 U.S.C. 1171-1178.

S. Rep. No. 446, 100th Cong., 2d Sess. 12 (1988) (emphases added). Plainly, then, the Committee intended that IGRA would *not* permit Tribes to use gambling devices prohibited under the Johnson Act as technologic aids to Class II gaming.[1]

The court of appeals' contrary holding rests principally on its reading of a single sentence from the Senate Committee Report quoted above, which expresses the Committee's intent that "no other Federal statute * * * will preclude the use of otherwise legal devices" as Class II aids. See App., *infra*, 23a (quoting S. Rep. No. 446, *supra*, at 12); see also *id.* at 27a. The court believed that this sentence constitutes "direct evidence" that Congress did not intend the Johnson Act to apply to the use of Class II technologic aids. *Id.* at 23a. That is simply incorrect.

In the first place, the textual savings clause of 25 U.S.C. 2710(b)(1)(A) makes clear that the Johnson Act's prohibitions *do* apply in the absence of a tribal-state compact, and so makes resort to the legislative history unnecessary. In any event, the opening sentence of the quoted paragraph of the Senate Report confirms that Congress intended the statutory reference in 25 U.S.C. 2710(b)(1)(A) to gaming other-

[1] There was no Conference Report or House Committee Report on IGRA.

wise prohibited by Federal law to refer to "gaming that utilizes mechanical devices as defined in 15 U.S.C. 1175," the Johnson Act. S. Rep. No. 446, *supra*, at 12. Class II gaming that utilizes a Johnson Act gambling device, whether as a purported technologic aid or in some other manner, falls squarely within that expression of congressional intent. The sentence in the Senate Report on which the court of appeals relied expresses the Committee's intent that no other federal statute "will preclude the use of *otherwise legal devices* used solely in aid of or in conjunction with bingo or lotto or other such gaming." *Ibid.* (emphasis added). The requirement that the devices be "otherwise legal" clearly means that the devices must not be among those that the Johnson Act prohibits to be used in Indian country.[2]

[2] The intervening sentence in the quoted paragraph of the Senate Committee Report states that Section 1175 "prohibits gambling devices on Indian lands," and then expresses the view that the Johnson Act does not apply to unspecified "devices used in connection with bingo and lotto." Although the Report does not elaborate on the point, the Committee presumably had in mind "bingo blowers"—mechanisms that are separate from the player's station and are used to select the numbers to be announced so that bingo players can, in turn, mark their cards. *Cabazon Band of Mission Indians* v. *NIGC*, 827 F. Supp. 26, 31 (D.D.C. 1993), aff'd on other grounds, 14 F.3d 633 (D.C. Cir.), cert. denied, 512 U.S. 1221 (1994); see 25 U.S.C. 2703(7)(A)(i)(II) (specifying as one of the required elements of the Class II game "commonly known as bingo" that "the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or *electronically determined*") (emphasis added). There is no suggestion that the Committee believed that wholly different machines such as Magical Irish were permitted by the Johnson Act, and any such view by a committee of Congress in 1988 about the meaning of the Johnson Act, which was enacted in 1951 and amended in 1962 to expand the definition of "gambling device," would not be entitled to weight here. In any event, the sentence of the Senate Report stating the Committee's understanding of what might be *permitted* by the Johnson Act, whatever that precise understanding might have been, in no way suggests an intent that a device (such as Magical Irish) that is *prohibited* by the Johnson Act on Indian lands could nonetheless be used as a technologic aid to Class II gaming. To the contrary, as explained in the text, the Report makes clear that any such aid must be "otherwise legal" under the Johnson Act.

Such an understanding leaves a wide variety of devices—albeit not Johnson Act gambling devices—within the category of permissible technologic aids to Class II gaming. The Senate Report, for instance, offers examples of the use of permissible Class II aids:

> [T]he Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take. Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games and as long as such games are otherwise operated in accordance with applicable Federal communications law.

S. Rep. No. 446, *supra*, at 9. The sorts of aids discussed in that provision would not constitute Johnson Act gambling devices.

b. IGRA's text and legislative history confirm in other respects that Congress intended the Johnson Act to prohibit the use of any gambling devices in Class II gaming.

IGRA contains an express exemption from the Johnson Act for gambling devices used in Class III gaming "conducted under a Tribal-State compact." 25 U.S.C. 2710(d)(6). Even in the absence of Section 2710(b)(1)(A), discussed above, Section 2710(d)(6) would provide a strong indication that Congress did not intend for courts to read additional Johnson Act exemptions into IGRA, such as an exemption for purported "technologic aids" to Class II gaming. See,

e.g., *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

If any uncertainty were to remain about whether Congress intended in IGRA to exempt Class II technologic aids from the prohibitions of the Johnson Act, it would be resolved by the Senate colloquy between Senator Inouye of Hawaii, the chairman of the Senate Select Committee on Indian Affairs and the floor manager of IGRA, and Senator Reid of Nevada. Senator Reid asked Senator Inouye whether IGRA's express exemption of compacted Class III gaming from the Johnson Act "is the only respect in which [IGRA] would modify the scope and effect of the Johnson Act." 134 Cong. Rec. 24,024 (1988). Senator Inouye confirmed that IGRA "would not alter the effect of the Johnson Act except to provide for a waiver of its application in the case of gambling devices operated pursuant to a compact." *Ibid.* He added that IGRA "is not intended to amend or otherwise alter the Johnson Act in any way." *Ibid.* Senator Inouye's unequivocal and uncontroverted assurances that the Johnson Act would continue to apply to tribal gaming conducted without a compact, necessarily including Class II gaming, confirm that Congress did not intend to exempt Class II technologic aids from the Johnson Act. See *Begier* v. *Internal Revenue Serv.*, 496 U.S. 53, 64 n.5 (1990) (noting that statements of floor managers can constitute "persuasive evidence of congressional intent").[3]

[3] As the court of appeals noted, a 1996 memorandum prepared by the Department of Justice's Office of Legal Counsel concluded that IGRA permits the use of some Johnson Act gambling devices as Class II technologic aids. App., *infra*, 26a n.22. That is not, however, the position of the United States. See *ibid.* (noting that the government has "disavowed" that position).

2. Construing IGRA, Consistent With Its Text And History, As Not Exempting Class II Aids From The Johnson Act Comports With IGRA's Twin Purposes Of Promoting Tribal Economic Development And Protecting Against Corruption

The understanding that IGRA preserves the Johnson Act's prohibition against gambling devices in Indian country, except under an approved tribal-state gaming compact, advances Congress's purposes in enacting IGRA. Although Congress sought in IGRA to promote tribal economic development by authorizing gaming on Indian lands, Congress also sought to protect the integrity of such gaming. Both goals are advanced and accommodated by permitting Tribes to engage in lucrative casino-style gaming—gaming that uses gambling devices as defined in the Johnson Act—but only when the safeguards of a tribal-state compact approved by the Secretary of the Interior are in place.

Congress identified multiple purposes to be served by IGRA. One purpose, as the court of appeals noted (App., *infra*, 24a), is 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). An equally important purpose, however, is

> to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players.

25 U.S.C. 2702(2); see 25 U.S.C. 2702(3) (stating that a third purpose of IGRA is to establish the NIGC "to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue").

A principal means that Congress chose to protect tribal gaming against corruption was to give States a role, through the compacting process, in regulating what is potentially the most profitable, and thus most problematic, form of tribal gaming, *i.e.*, casino-type gaming. The Senate Committee Report explained that "existing State regulatory systems" provided the best mechanism for regulating such gaming, because "there is no adequate Federal regulatory system in place for class III gaming, nor do tribes have such systems for the regulation of class III gaming currently in place." S. Rep. No. 446, *supra*, at 13. The compacting requirement was a central component of IGRA. Indeed, Representative Udall of Arizona, the House floor manager, stated that "the core of the compromise" that produced IGRA was the requirement that "class III gaming activities, generally defined to be casino gaming and parimutuel betting, will hereafter be legal on Indian reservations only if conducted under a compact between the tribe and the State." 134 Cong. Rec. 25376 (1988).[4]

The compacting requirement would be significantly undermined by reading an exemption into IGRA for Johnson Act gambling devices that are used as purported technologic aids to Class II games. A Tribe could then engage in what is, in practical effect, Class III casino gaming without a tribal-state compact, and thus without the state regulatory involvement that Congress considered vital to protecting the integrity of such gaming. It follows that construing IGRA, consistent with its text and history, as exempting gambling devices from the Johnson Act only when they are used in accordance with a tribal-state compact, thus substantially advances Congress's purpose of "shield[ing] [tribal gaming]

[4] Some members of Congress announced that they, like many Tribes, opposed IGRA precisely because it would allow States a regulatory role with regard to Class III gaming. See, *e.g.*, 134 Cong. Rec. 24,029 (Sen. Burdick); *id.* at 24,030 (Sen. Daschle); *id.* at 25,379-25,380 (Rep. Sikorski); *Id.* at 25,380 (Rep. Frenzel).

from organized crime and other corrupting influences" and "ensur[ing] that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. 2702(2).

This construction of IGRA also is consistent with the framework of the Johnson Act itself. The Johnson Act, in addition to its absolute prohibition on the use or possession of gambling devices in Indian country and other places subject to federal jurisdiction, see 15 U.S.C. 1175(a), also prohibits the shipment of gambling devices into any State unless the State has enacted a law exempting itself from that provision, see 15 U.S.C. 1172(a). The Johnson Act thus defers to a State's own laws with respect to the legality of gambling devices in that State. Similarly, under IGRA, a tribal-state compact may authorize Class III gaming using Johnson Act devices only if such gaming is permitted by state law. 25 U.S.C. 2710(d)(1)(B). The construction of IGRA adopted by the Eighth Circuit in *Santee Sioux Tribe*, in marked contrast to that adopted by the Tenth Circuit in this case, therefore preserves the role for state law and regulatory authority that Congress envisioned when it enacted both IGRA and the Johnson Act.

The court of appeals reasoned that interpreting IGRA to exempt Class II technologic aids from the Johnson Act would advance Congress's purpose of promoting tribal economic development through gaming. App., *infra*, 24a. The court of appeals, however, ignored that IGRA has multiple purposes, including to provide a regulatory scheme sufficient to protect tribal gaming and gaming revenue against corruption. As this Court has recognized, moreover, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *PBGC* v. *LTV Corp.*, 496 U.S. 633, 647 (1990) (quoting *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987)).

3. The Three Circuits That Contain Most Of The Nation's Indian Country Are In Conflict As To Whether IGRA Exempts Class II Technologic Aids From The Johnson Act

As noted above, the Eighth Circuit recently held that IGRA does not provide an implied exemption from the Johnson Act for gambling devices used as purported technologic aids to Class II gaming. *Santee Sioux Tribe*, 324 F.3d at 611-612. The Eighth Circuit concluded that 25 U.S.C. 2510(b)(1)(A) "clearly" and "obviously" provides that Class II aids are subject to the Johnson Act. 324 F.3d at 611. The Eighth Circuit further concluded that "IGRA and the Johnson Act can be read together, are not irreconcilable, and [a] Tribe must not violate either act" when it engages in gaming without a tribal-state compact. *Id.* at 612. The D.C. Circuit has similarly recognized (although not as part of a legal holding) that, aside from IGRA's express exemption of compacted Class III gaming from the Johnson Act, "[t]here is no other repeal of the Johnson Act, either expressed or by implication, in [IGRA]," so that "the Johnson Act remain[s] 'fully operative' with respect to class II gaming on Indian lands." *Cabazon Band of Mission Indians* v. *NIGC*, 14 F.3d 633, 635 n.3 (D.C. Cir.), cert. denied, 512 U.S. 1221 (1994); but see *Diamond Game Enters., Inc.* v. *Reno*, 230 F.3d 365, 367 (D.C. Cir. 2000) (stating in dicta that the Johnson Act applies after IGRA to "devices that are neither Class II games approved by the [NIGC] nor Class III games covered by tribal-state compacts").

In contrast, the Ninth Circuit has held, consistent with the Tenth Circuit here, that IGRA exempts technologic aids to bingo from the Johnson Act. *United States* v. *103 Electronic Gambling Devices*, 223 F.3d 1091, 1101-1102 (2000). The Ninth Circuit's rationale would appear to extend to technologic aids to other Class II games, such as pull-tabs, although the Ninth Circuit has not yet had occasion to consider that question.

The Tenth Circuit's decision in this case and the Ninth Circuit's decision in *103 Electronic Gambling Devices* cannot be reconciled with *Santee Sioux Tribe* on this question. In the Eighth Circuit, in order for a device to be used in tribal gaming in the absence of an approved tribal-state compact, the device not only must satisfy IGRA's definition of an "electronic, computer, or other technologic aid[ ]" to Class II gaming, but also must *not* fall within the Johnson Act's definition of a "gambling device." In the Tenth Circuit and (presumably) the Ninth Circuit, however, such a device may be used in tribal gaming, even if it is a gambling device within the meaning of the Johnson Act. Because the vast majority of the Nation's Indian country lies within the Eighth, Ninth, and Tenth Circuits, there is particular reason for the Court to resolve the conflict in this case without awaiting still further cases from other circuits. See *United States* v. *Lara*, No. 03-107 (petition for cert. granted Sept. 30, 2003) (granting review on a question of Indian law on which the Eighth and Ninth Circuits are in conflict).

4. The Question Whether Tribes May Use Johnson Act Gambling Devices In The Absence Of A Tribal-State Compact Has Important Ramifications For The IGRA Regulatory Scheme

The question whether IGRA creates an exemption from the Johnson Act for gambling devices used in Class II gaming is one of considerable importance to gambling regulation in Indian country. As explained above, acting in response to concerns that tribal gaming could be infiltrated by organized crime or otherwise corrupted, Congress adopted a distinct regulatory approach to casino-style Class III gaming. In particular, Congress directed that Tribes could engage in such gaming only if they entered into compacts with States, which were viewed as possessing regulatory expertise with respect to such gambling, and only if those compacts were approved by the Secretary of the Inte-

rior. Congress's regulatory approach would be seriously compromised if Tribes could use Johnson Act gambling devices in Class II gaming, and thus without a tribal-state compact.

This question has particular significance when, as in this case and *Santee Sioux Tribe*, a Tribe and a State are unwilling or unable to enter into a Class III gaming compact. This Office has been informed that Tribes in a number of States have used Lucky Tab II or other Class II gaming devices without a tribal-state compact. The question can also have significance even when a Tribe and a State *have* entered into a compact. Some compacts, including many in California and Montana, limit the number of slot machines or other Class III gambling devices that the Tribe may install. Under the decision below and the Ninth Circuit's decision in *103 Electronic Gambling Devices*, a Tribe could circumvent those limits by installing slot-machine-type devices or other gambling devices on the theory that they are mere "technologic aids" to Class II gaming.[5] Similarly some compacts, including those in Arizona, Michigan, Wisconsin, California, and New Mexico, require Tribes to share a portion of their Class III gaming revenue with the State. A Tribe could attempt to evade such requirements by replacing some, or all, of its Class III gambling devices with comparable machines of the sort at issue here, characterizing them as mere

[5] See, *e.g.*, Steve Wiegand, *Casinos could hold cards in talks*, Sacramento Bee (Nov. 17, 2003) (noting the potential attractiveness of Class II devices for gaming Tribes in California, where "15 [Tribes] are at or near the 2,000-machine limit" for Class III devices under their compacts with the State, and quoting the NIGC Chairman as stating that "we're going to see a significant number of Class II machines at California casinos in the near future"); Marian Green, *Class II Games Come of Age*, SlotManager (Sept. 2003) (*http://www.gemcomm.com/Publications/currentpubs/slotmanager*, visited Nov. 19, 2003) ("Gaming demand is so great in California that often all the Class III games are occupied by players. Operators sometimes will add Class II games, which don't fall under tribal state compact regulations, to pick up the slack.").

"technologic aids" to the playing of traditional bingo, paper pull- tabs, or other Class II games.[6]

* * *

In sum, because the Tenth Circuit's holding on the applicability of the Johnson Act to Class II technologic aids is contrary to the text, history, and purposes of IGRA, conflicts with the Eighth Circuit's holding in *Santee Sioux Tribe*, and has significant implications for Indian gaming regulation, this Court's review is clearly warranted.[7]

[6] See, *e.g.*, John Simerman, *Casinos far from likely to pay more*, Contra Costa Times (Oct. 19, 2003) (noting that Tribes may turn to Class II games to avoid compact provisions requiring revenue sharing with States).

[7] There is no occasion in this case for the Court to decide whether the Magical Irish machine could qualify as a permissible technologic aid for the playing of paper pull-tabs within the meaning of the definition of Class II gaming in 25 U.S.C. 2703(7)(A) standing alone, because any Class II gaming using such a purported aid would, in any event, be prohibited by the Johnson Act and by 25 U.S.C. 2710(b)(1)(A), which makes the Johnson Act applicable to Class II gaming on Indian lands. We note, however, that there is no indication in IGRA's legislative history that Congress contemplated that devices such as Magical Irish were to be included within the scope of aids to Class II gaming. To the contrary, as explained above (see pp. 10-14, *supra*), the legislative history of IGRA, like the text of Section 2710(b)(1)(A), makes clear that devices may be used as electronic, computer, or other technologic aids only if they are "otherwise legal" under federal law, specifically including the Johnson Act. See S. Rep. No. 466, *supra*, at 12. Moreover, as also noted above (see p. 13, *supra*), the only specific example of aids discussed in the Senate Report involved the connection of gaming sites operated by different Tribes through the use of computers and telecommunications technology that clearly would not constitute gambling devices—and that, as the Report pointed out, would "not change the fundamental characteristics of the bingo or lotto games" and would be "readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players." S. Rep. No. 466, *supra*, at 9. The same cannot be said of Magical Irish—a machine designed to resemble a slot machine—when compared to the traditional game of paper pull-tabs.

Consistent with this understanding, the regulations first promulgated by the NIGC after passage of IGRA made clear that Johnson Act gambling devices were excluded from the definition of Class II aids. See 25

B. The Johnson Act's Definition Of "Gambling Device" Does Not Exclude Devices Such As Magical Irish That Read, Display, and Dispense Winning Receipts From A Removable Paper Roll

Because the Tenth Circuit held that the Johnson Act does not apply to Class II technologic aids and that Magical Irish is a technologic aid, it did not reach the question whether Magical Irish is a Johnson Act gambling device, although the question was decided by the district court and raised by the government on appeal. See App., *infra*, 49a; Gov't C.A. Br. 13-21. The Eighth Circuit, given its contrary holding in *Santee Sioux* with respect to the relationship between IGRA and the Johnson Act, did reach the question whether the Lucky Tab II machine in that case is a Johnson Act gambling device, and held that it is not. See 324 F.3d at 612-613. The government is seeking this Court's review of the Eighth Circuit's holding on that question and suggests that the two cases be consolidated for purposes of argument. In view of the similarity of the Magical Irish and Lucky Tab II machines, as well as the similarity of the lower courts' reasoning on the question whether they satisfy the Johnson Act's

C.F.R. 502.7(b) (1993) (requiring that an aid be "readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile"); 25 C.F.R. 502.8 (1993) (defining "electronic or electromechanical facsimile" to mean "any gambling device as defined in 15 U.S.C. 1171(a)(2) and (3)"). As revised in July 2002, the NIGC's regulations no longer define "electronic or electromechanical facsimile" by reference to the Johnson Act and add "pull tab dispensers and/or readers" to the examples of "electronic, computer, or other technologic aids." See 67 Fed. Reg. 41,168, 41,172 (promulgating 25 C.F.R. 502.7(c) and 502.8). To the extent that those regulatory changes reflect a view that the Johnson Act does not apply to gambling devices used as purported aids to Class II gaming, see *id.* at 41,169-41,171; but see *id.* at 41,173-41,174 (dissenting views of NIGC Chairman Deer), that view is contrary to the text and history of IGRA and does not represent the position of the United States. The Johnson Act is a federal criminal statute enforced by the Department of Justice, not the NIGC, and for that reason the court of appeals declined to accord deference to the NIGC's views regarding its application. See App., *infra*, 21a.

definition of a gambling device, the Court may wish to resolve that question in this case as well as *Santee Sioux Tribe*, rather than remanding the case to the Tenth Circuit if the Court holds that IGRA does not provide an implied exemption from the Johnson Act.

1. The Applicability Of The Johnson Act Does Not Turn On Arbitrary Distinctions About Whether Or Not A Player's Entitlement To Money Is Determined Solely By The Mechanical Operations Of The Machine

In *Santee Sioux Tribe*, the Eighth Circuit held that Lucky Tab II, which operates essentially like Magical Irish, does not satisfy the Johnson Act's definition of a "gambling device," reasoning that a player "does not become entitled to receive money or property as a result of the *machine*'s application of an element of chance." 324 F.3d at 612. The Eighth Circuit considered it dispositive that winners and losers are determined by the sequence of pull-tabs on the preprinted paper roll inserted into the machine. *Ibid.* The Eighth Circuit acknowledged that, if the winners and losers were instead determined by a computer inside the Lucky Tab II, an otherwise identical machine could qualify as a Johnson Act gambling device. *Ibid.* Similarly here, the district court held that Magical Irish is not a Johnson Act gambling device because it "dispenses preprinted prearranged pull tabs" and "cannot change the outcome of the game." App., *infra*, 13a. Contrary to those courts' view, the reach of the Johnson Act does not turn on arbitrary distinctions as to whether winners and losers are determined by a fixed component of a device as opposed to a removable component.

a. As noted above, the Johnson Act defines a "gambling device" to include:

> any * * * machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection

> with gambling, and * * * (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.

15 U.S.C. 1171(a)(2).

The Magical Irish and Lucky Tab II machines fall squarely within that definition. The lower courts did not question that those machines are "designed and manufactured primarily for use in connection with gambling." A player becomes "entitled to receive * * * money or property" when the machine dispenses a winning pull-tab, which can be redeemed for money. Whether the machine dispenses a winning pull-tab to a given player turns on various "element[s] of chance," including the number and order of winning and losing pull-tabs on the paper roll within the machine, the number of times previous players have played the machine, and the number of times the current player chooses to play. Indeed, it is those characteristics that render the machine a gambling device from the player's perspective as well as the casino operator's perspective.

b. Nothing in Section 1171(a)(2)(B) requires the "element of chance" to be "appli[ed]" in any particular manner to determine whether a player wins or loses. Section 1171(a)(2)(B) thus does not require, as the lower courts supposed, that winners and losers be determined through the operation of a permanent component of the device (such as a computer), as distinguished from a removable component (such as a roll of paper pull-tabs). Perhaps, if the phrase "as the result of the application of an element of chance" were rewritten and relocated so as to modify the phrase "operation of [the machine]," Section 1171(a)(2)(B) might be understood as requiring the machine itself or its operation to apply the element of chance. Even then, however, the definition would be satisfied, because once the pull-tab roll is inserted into the Magical Irish or Lucky Tab II

machine, it is integral to both the machine and its operation. See *Santee Sioux Tribe*, 324 F.3d at 610 ("Without a roll of paper pull-tabs in place, the [Lucky Tab II] machine cannot function —it will not accept money or display any symbols."). But whatever the proper interpretation of that hypothetical statute, the phrase "as the result of the application of an element of chance" in Section 1171(a)(2)(B), as written, modifies the phrase "may become entitled to receive," the clause that it immediately follows, not "machine" or "operation of [the machine]." See *Barnhart* v. *Thomas*, No. 02-763, slip op. 6-7 (Nov. 12, 2003) (discussing the rule of the last antecedent). As explained above, there is no question that there is an "element of chance" in whether a player of Magical Irish or Lucky Tab II "become[s] entitled" to receive money.

Any requirement that winners and losers be determined by something intrinsic to the mechanical features of device would also be inconsistent with the statutory example of "roulette wheels and similar devices." 15 U.S.C. 1171(a)(2). A roulette wheel, in and of itself, does not generate the numbers that determine whether a player has won or lost a game of roulette. Rather, those numbers are produced only with the addition of the external components of a roulette ball and an operator who spins the roulette wheel.

c. The legislative history of the Johnson Act, as amended in 1962 with the definition section at issue here, does not evince any congressional intent to confine its scope to devices that select winners and losers through some permanently installed component such as a computer. To the contrary, the House Report explains that Section 1171(a)(2) was designed to encompass an array of "[n]ew gambling machines" that did not satisfy the existing statutory definition. H.R. Rep. No. 1828, 87th Cong. 2d Sess. 6 (1962); see *ibid.* (expressing concern that racketeering interests were developing gambling devices not covered by the existing definition). As the D.C. Circuit contemporaneously observed, Section 1711(a)(2)'s broad definition of gambling

devices "proceeded from a conscious purpose on the part of Congress to anticipate the ingeniousness of gambling machine designers." *Lion Mfg. Corp.* v. *Kennedy*, 330 F.2d 833, 837 (D.C. Cir. 1964).

Consistent with that purpose, the language of Section 1171(a)(2) serves to ensure that the Johnson Act, while comprehensive in the field that it regulates, reaches only *gambling* devices, not other types of machines that accept or dispense money or property. The requirements that the machine be "designed and manufactured primarily for use in connection with gambling" and that a player receive, or become entitled to receive, money or property "as the result of the application of an element of chance" distinguish gambling devices subject to the Johnson Act from both (1) change-making or vending machines, in which the user enters into a transaction that entitles him to receive money or property of comparable value to that which he has deposited, and (2) machines that enable a person to receive money or property as a result not of chance, but of his skill in playing a game, such as "a coin-operated bowling alley, shuffleboard, marble machine (a so-called pinball machine), or mechanical gun," 15 U.S.C. 1178(2).

It would be inconsistent with the congressional purpose underlying Section 1171(a)(2) to conclude that Magical Irish and Lucky Tab II are not gambling devices based on distinctions that are not even suggested, much less compelled, by the statutory text. Those machines are indisputably designed and manufactured primarily for use in gambling, and they indisputably entitle a winning player to receive money as the result of the application of an element of chance. Nothing more is required to satisfy the definition of a gambling device under Section 1171(a)(2)(B).[8]

[8] The Eighth Circuit also stated that Lucky Tab II could not qualify as a gambling device under Section 1171(a)(2)(A) because the device itself does not dispense money or property directly to a winning player. See 324 F.3d at 612; 15 U.S.C. 1171(a)(2)(A) (defining gambling device as, *inter alia*, a machine that "when operated may deliver, as the result of the application of an element of chance, any money or property"). The Eighth Circuit was mistaken, because a winning pull-tab, when dispensed by a Magical Irish or Lucky Tab II machine, constitutes property. In any event, Section 1171(a)(2)(B), the provision discussed in the text, requires only that a winning player become entitled to receive money or property, not that the machine itself deliver that money or property.

2. The Ninth Circuit Has Held That The Johnson Act Applies To Devices Similar To Magical Irish And Lucky Tab II

The lower courts' holdings that Magical Irish and Lucky Tab II are not Johnson Act gambling devices cannot be reconciled with the Ninth Circuit's decision in *United States* v. *Wilson*, 475 F.2d 108 (1973) (per curiam), aff'g 355 F. Supp. 1394 (D. Mont. 1971). In *Wilson*, the court of appeals upheld the application of the Johnson Act to a device that was similar in relevant respects to Magical Irish and Lucky Tab II.

The "Bonanza" machine in *Wilson*, like Magical Irish and Lucky Tab II, incorporated into its design a removable paper roll of preprinted coupons of varying values. Before inserting a coin into the machine, the player could view the next coupon to be dispensed. After that coupon was dispensed, the next coupon was exposed, and the player could decide whether to insert another coin. A player could redeem a winning coupon at the establishment where the machine was located. See 355 F. Supp. at 1396.

The question on appeal was whether a winning player of the Bonanza machine became entitled to money or property through the operation of an "element of chance" even though he could see the coupon that would be dispensed to him. The Ninth Circuit answered that question in the affirmative. The court explained that "most players put their first 25 cents in the 'Bonanza' machine because of the 'element of chance' that the next coupon, thus exposed, would entitle them, for another 25 cents, to a guaranteed payment of 50

cents to $31.00." 475 F.2d at 109. It is thus evident in the Ninth Circuit's holding that the "element of chance" in the playing of the Bonanza machine could arise in part from the order of coupons on the paper roll.[9]

In the Ninth Circuit, therefore, the Johnson Act would apply to a machine, such as Bonanza, Magical Irish, or Lucky Tab II, that enables a player to gamble on whether the next item (*e.g.*, coupon, ticket, or pull-tab) that a machine dispenses from a preprinted paper roll will be a winner. In the Eighth Circuit, as well as under the district court's decision in this case, the Johnson Act would not apply to such a machine. As explained below, that disagreement warrants this Court's resolution.

3. The Question Whether The Johnson Act Can Be Circumvented By Devices Such As Magical Irish And Lucky Tab II Is Important Both Inside And Outside Indian Country

The question whether machines such as Magical Irish and Lucky Tab II satisfy the Johnson Act's definition of a gambling device has important ramifications outside as well as inside Indian country. As noted above, the Johnson Act prohibits the manufacture, sale, transportation, possession, or use of gambling devices not only within Indian country, but also within the District of Columbia, federal enclaves,

[9] The Ninth Circuit in *Wilson* also affirmed the district court's determination that the Johnson Act's definition of a gambling device was satisfied by a "bead ball" machine. See 475 F.2d at 109. That machine dispensed plastic beads, each of which contained a piece of paper bearing a combination of numbers. A player would insert a coin into the machine, turn a handle on the machine until a ball was dispensed, open the ball to retrieve the paper, and compare the number with a list of winning numbers posted on the machine. If the player received a winning number, he would be paid by the establishment where the machine was located. See 355 F. Supp. at 1395. Whether a player won or lost was determined not by the mechanical features of the machine in isolation, but by the preprinted paper inside each bead and by the order in which the beads were dispensed.

and federal possessions. See 15 U.S.C. 1175(a). It also prohibits the interstate shipment of gambling devices to and from places in which they are illegal under local law. See 15 U.S.C. 1172(a).

If, therefore, the Johnson Act were understood not to apply to devices such as Magical Irish and Lucky Tab II, such devices could be introduced not only into additional areas of Indian country, but also into other areas of federal jurisdiction identified in Section 1175(a). Moreover, although the possession or use of such devices might be prohibited under a State's own laws, the United States would be unable to prosecute the shipment of the devices into the State under Section 1172(a). As a result, the important role that Congress intended for the Johnson Act in reinforcing state prohibitions of gambling devices could be thwarted.

The ramifications of the technical and narrow definition of a Johnson Act gambling device applied by the Eighth Circuit in *Santee Sioux Tribe* and the district court in this case would not be confined to devices similar in design to Magical Irish and Lucky Tab II. If, as those courts' reasoning suggests, a gambling device must deliver the element of chance solely through an internal computer or another such permanent component, "the ingeniousness of gambling machine designers," *Lion Mfg. Corp.*, 330 F.2d at 837, could be expected to produce an array of devices in which the element of chance is supplied through other means. Accordingly, the lower courts' decisions holding that the Johnson Act does not apply to devices such as Magical Irish and Lucky Tab II threaten to undermine the effectiveness of the Johnson Act both inside and outside Indian country.

CONCLUSION

The petition for a writ of certiorari should be granted and the case should be consolidated for argument with *United States* v. *Santee Sioux Tribe of Nebraska*, in which the government is also filing a petition for a writ of certiorari.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
CHRISTOPHER A. WRAY
THOMAS L. SANSONETTI
Assistant Attorneys General
EDWIN S. KNEEDLER
Deputy Solicitor General
BARBARA MCDOWELL
Assistant to the Solicitor General
RICHARD A. FRIEDMAN
Attorney

NOVEMBER 2003