No. 03-740

In The
Supreme Court of the United States

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

Petitioners,

v.

SENECA-CAYUGA TRIBE OF OKLAHOMA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this case is moot because Respondent Indian tribes no longer use the Magical Irish pull-tab dispenser/display system and Respondent Diamond Game Enterprises, Inc. no longer distributes the system?

Whether the court of appeals, having concluded that the Magical Irish pull-tab dispenser/display is a class II "technological aid" under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, was therefore correct in holding that it may be used at an Indian gaming facility in Indian country subject only to the regulatory regime for class II Indian gaming?

STATEMENT PURSUANT TO RULE 29.6

Diamond Game Enterprises, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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COUNTERSTATEMENT OF THE CASE

A. Introduction.

Three federal courts of appeals have now considered whether Indian tribes, in exercising their sovereign rights federally recognized in the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA"), to conduct the class II game known as "pull-tabs," may lawfully employ a mechanical pull-tab reader/dispenser like the one at issue in this case. The judgment of these three courts has been unanimous. Without a single dissenting voice, they have concluded that tribes may lawfully employ such pull-tab reader/dispensers in their gaming operations.

In the face of these uniform results, Petitioners seek review in this Court because one of the three federal courts (the 8th Circuit), in the course of reaching the same conclusion as the other two (the D.C. and 10th Circuits), adopted a modestly different methodology. This non-determinative difference in approach does not warrant this Court's intervention.

As a threshold matter, this case presents a poor (indeed probably impossible) vehicle for considering the Petitioners' appeal, even if the case were otherwise worthy of review (which it is not). The declaratory judgment action originally filed by Respondents is moot. As reflected in uncontested sworn declarations that accompanied Respondents' motion to dismiss the case as moot and vacate the district court judgment in their favor, Respondent tribes no longer use the Magical Irish Instant Bingo Dispenser System ("Magical Irish") at issue here and have no intention of using Magical Irish in the

future. Respondent Diamond Game Enterprises no longer manufactures or distributes Magical Irish and it, too, has no intention of doing so in the future. In concluding on these facts that a live case or controversy still exists, the 10th Circuit clearly misapplied this Court's mootness jurisprudence. Accordingly, for this Court even to reach the questions presented in the petition, it will necessarily first have to traverse a thorny jurisprudential thicket just to satisfy itself (as is highly doubtful) that it has jurisdiction to hear the case.

In any event, Petitioners' case for certiorari rests on two separate alleged circuit splits, one of which is illusory and both of which are of doubtful significance. Petitioners cannot prevail in this case unless it can show: first, that the 10th Circuit erred in ruling that the scope of the Johnson Act, 15 U.S.C. § 1171 *et seq.*, as it operates in Indian country, should be read in consonance with (rather than independently from) IGRA's authorization of technological aids for use in class II gaming; and, second, that, even if the Johnson Act applies independently, Magical Irish is a prohibited "gambling device" under that Act.

The Department of Justice's position on both points has met with near complete disfavor and, remarkably, is at odds with the position of the National Indian Gaming Commission ("NIGC"), the agency responsible for overseeing IGRA, and with the position advanced by the Department of Justice's own Office of Legal Counsel. There is good reason for the loneliness of Petitioners' position. As the 9th, 10th, and D.C. Circuits have all concluded, the Petitioners' approach to the relationship between the Johnson Act and IGRA's provisions governing class II gaming defies the relevant legislative history and the well-established canon of statutory construction that seeks to maximize the continuing effect of potentially conflicting federal laws.

With respect to the definition of "gambling devices" under the Johnson Act, moreover, Petitioners' argument that Magical Irish and the "Lucky Tab" reader/dispenser at issue in the 8th Circuit case are prohibited gambling devices depends on an inaccurate and unsupported description of the reader/dispensers, has no grounding in case law, defies the statutory text, and flies in the face of the 8th Circuit's analysis as well as that of the district court in this case. In addition, Petitioners' claim of a Johnson Act circuit split rests on its interpretation of an isolated 28 year-old per curiam Ninth Circuit decision involving both scant analysis of the Johnson Act and a device that is readily distinguishable in this intrinsically factbound area of law.

But even supposing, despite the uniform contrary authority, that the Johnson Act is best read as proscribing the transportation of pull-tab reader/dispensers into Indian country, this case still does not merit this Court's attention. As the 10th Circuit was careful to emphasize, its ruling leaves the scope of the Johnson Act completely unchanged outside Indian country. It is also uncontested that IGRA authorizes tribes to play the gambling game known as pull-tabs, regardless of the Johnson Act. Thus, this instant dispute boils down to nothing more than whether, in lawfully playing the game of paper pull tabs, the tribes are limited to selling the tabs "over-the-counter" through gambling hall clerks as opposed to out of a particular type of dispenser unit. This argument poses no threat to Petitioners' ability to stop unlawful gaming activity and is simply not the stuff from which Supreme Court review is made.

B. The Statutory Framework

1. IGRA

In the 1980s, as Indian tribes began to administer more and more governmental programs, they began to exercise their inherent sovereign right to develop their economies by conducting gaming activities on their lands. Tribal gaming activity triggered a variety of conflicts between the interests of three sets of sovereigns – the tribes, the states, and the federal government. Enacted in 1988, IGRA was Congress's response to these conflicts and the statute both promotes and regulates Indian gaming as a means to advance tribal development, self-sufficiency and strong tribal governments. 25 U.S.C. §§ 2701-2719.

Under IGRA, Congress recognized the right of tribes exclusively to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited on Indian lands by federal law and is conducted within a State that does not, as a matter of criminal law and public policy, prohibit such gaming activity. *Id.* § 2701. To this end, IGRA divides Indian gaming into three classes, each subject to a different level of regulation.

Class I games consist of traditional forms of Indian gaming and social games played solely for prizes of minimal value. 25 U.S.C. § 2703(6). Tribes maintain exclusive jurisdiction over class I gaming. *Id.* § 2710(a)(1).

IGRA defines class II gaming, in pertinent part, as follows:

> 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, and tip jars, instant bingo, and other games similar to bingo.

Id. § 2703(7)(A) (emphasis added). IGRA authorizes such class II gaming on Indian land if: 1) the state in which the gaming is located permits such gaming for any purpose by any person; 2) "such gaming is not otherwise specifically prohibited on Indian lands by Federal law;" and 3) the tribe adopts an ordinance approved by the Chairman of the Commission. *Id.* Thus, IGRA explicitly reserves this category of named games for tribal play with tribes as the primary regulatory authority and, further, explicitly authorizes tribes to use "electronic, computer, or other technological aids" in conjunction with playing these games. By contrast, in the absence of a criminal prohibition, states play no role in regulating class II gaming.

Although IGRA itself does not explicitly discuss the relationship between technological aids used to play class II games and the Johnson Act, the Senate Report accompanying the passage of IGRA reveals Congress's view that the Johnson Act should not be read to preclude the use of technological aids in the play of class II games. "It is the Committee's intent," the Senate Report states, "*that with the passage of this act, no other Federal statute, such as [the Johnson Act] 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.*" *Indian Affairs Committee Report*, S. Rep. No. 100-446 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3082 ("Senate Report") (emphasis added).

In discussing what technological aids tribes might employ in conducting class II gaming, the Senate Report further emphasized that Congress intended:

> that Tribes have maximum flexibility to utilizes games such as bingo and lotto for tribal economic development. . . . The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games

> and the language regarding technology is designed to provide maximum flexibility.

Id. at 3079. This flexible approach was meant to advance IGRA's central goal of encouraging "tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

Importantly, IGRA does draw a line between technological aids to class II games and electronic games that in fact constitute class III games, which can only be played pursuant to a negotiated tribal-state compact. 25 U.S.C. § 2710(d)(1). In particular, IGRA excludes from use as a class II game "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7)(B). In this way, IGRA distinguishes between authorized games and those prohibited by the Johnson Act with language specifically defining slot machine-like devices as class III games. IGRA further defines class III games as consisting of all forms of gaming that are not class I or class II. 25 U.S.C. § 2703(8). Through the compacting requirement for class III gaming, IGRA also recognizes a significant role for states in regulating this type of gaming.

2. The Johnson Act

Pre-dating IGRA by more than 30 years, the Johnson Act prohibits the manufacture, sale, transportation, possession, and use of any "gambling device" on federal lands or in Indian country. 15 U.S.C. § 1175. The Johnson Act, which was designed to curb the proliferation of slot machines and similar devices, originally defined a "gambling device" to include slot machines and other coin operated devices. In 1962, Congress amended the statute to slightly expand this definition. A Johnson Act "gambling device" is now defined as:

> any . . . machine or mechanical device . . . 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) (emphasis added).

C. The Magical Irish Dispenser/Display

Contrary to the Petitioners' claim, Magical Irish is not a slot machine and bears no meaningful resemblance to a slot machine. Rather, Magical Irish is a dispensing mechanism for the game of paper pull-tabs (an enumerated class II game) that, when activated, will visually display the paper pull-tab result. (App. 38a.)

In the game of pull-tabs, players compete against one another to obtain winning paper cards from a set of cards containing a pre-determined number of winners arranged in a random but pre-determined order. Each complete set of cards is known as a "deal," and may contain more than 100,000 individual cards. An individual card (or pull-tab) is a small paper wafer. When the top layer of the card is removed, the bottom layer reveals a pattern of symbols indicating whether the player has won a prize. In order to redeem the prize, a player must present a paper tab showing a winning set of symbols to a gaming hall clerk. When the game of pull-tabs is played, the very large pre-arranged deal is divided into smaller rolls (or boxes), each of which can be played separately. (App. 8a.)

To participate in the game of pull-tabs, a player must purchase an individual tab from a clerk or a dispenser. The clerk or dispenser takes the next tab in the preprinted roll and delivers it to the player. The player must then open the tab to see if it contains a winning combination and redeem any winning tabs with a gaming hall clerk.

Each Magical Irish system delivers paper pull-tabs from a single roll of 7,500 tabs. Other rolls from the same pull-tab deal may be dispensed either through other Magical Irish units or "over-the-counter" from bingo hall clerks. (App. 8a.) In this way, players who purchase pull-tabs from one Magical Irish device compete for winning tickets against other players who purchase pull-tabs from other devices or, face-to-face, from bingo hall clerks.

When a player inserts money into a Magical Irish device and presses the button marked "DISPENSE," the unit cuts a paper pull-tab from the preprinted roll and drops it into a tray. (App. 8a, 38a.) If the "verify" feature is enabled, a scanner inside the device reads a bar code printed on the back of the paper tab as the tab is dispensed. The device then displays the contents of the pull-tab on a video screen approximately seven seconds after the paper tab has been dispensed. The player can enable or disable the "verify" feature by pressing a button. On either side of the button marked "VERIFY," the following message appears: "Video images may vary from actual images on pull-tabs. Each tab must be opened to verify." In other words, regardless of whether a player is using the "verify" feature, that player can redeem winning pull-tabs only by presenting the *paper tab* to a gaming hall clerk, who in turn must confirm that the paper tab contains a

winning combination of symbols. (App. 8a, 38a.)[1] Magical Irish does not pay the player for a winning ticket, nor does it convert a winning ticket into credit for additional play.

Furthermore, Magical Irish does not select the winners of the pull-tab game. Rather, the winning pull-tabs are prearranged in the randomly located preprinted rolls that make up the pull-tab deal. Magical Irish simply dispenses the next tab in the roll being played. (App. 8a.) Thus, in contrast to a slot machine or variations on a slot machine, Magical Irish does not contain a random number generator, does not affect the outcome of the paper pull-tab game, and is not itself a game of chance. (App. 38a, 42a.) The game, including the entitlement to money, is always in the paper pull-tabs, and (as three courts of appeals have separately concluded) Magical Irish is nothing more than an entertaining way to dispense those paper tabs into the hands of consumers who would like to play the paper game coupled with a visual aid for identifying winning paper tabs.[2]

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[1] The Petitioners are simply wrong when it asserts that a barcode on each tab determines the winners and losers. On the contrary, the symbols on the paper tab always govern and the play of the game, regardless of whether the display function is activated, remains at all times in the paper.

[2] The "Lucky Tab" dispenser/display at issue in *United States v. Santee Sioux, Tribe of Nebraska*, 324 F.3d 607 (8th Cir. 2003), and *Diamond Game Enterprises, Inc. v. Reno*, 230 F.3d 365 (D.C. Cir. 2000) differs from Magical Irish in two respects. First, the optional "verify" feature of Magical Irish works automatically on Lucky Tab. Second, Magical Irish consists of three separate component parts, the dispenser, the verifier, and a base. Lucky Tab integrates these components into a single unit.

1. Procedural History and Decisions Below.

a. The District Court's Decision

On July 25, 2000, Respondents[3] filed a complaint in district court against the NIGC and the other federal government defendants, seeking a judicial declaration that Magical Irish is a class II aid under IGRA and is not prohibited by the Johnson Act. Respondents' complaint was prompted by an NIGC opinion that Magical Irish was a class III game under IGRA and, therefore could not be played without a tribal-state compact. This NIGC opinion, which raised the threat of criminal prosecution against Respondents, was based on a district court opinion regarding the Lucky Tab dispenser/display that was later reversed by the D.C. Circuit. *See 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).

On August 30, 2000, the district court held an evidentiary hearing on Respondents' motion for a preliminary injunction. Ruling from the bench, the district court held that Magical Irish is a class II technological aid under IGRA, not a class III gaming device, and that Magical Irish is also not a Johnson Act gambling device. The court reasoned that Magical Irish simply acts as a dispenser of paper pull-tabs, because it takes a preprinted roll of paper pull-tabs and dispenses them in a pre-determined order, just as a clerk does at a pull-tab ticket window. The court

[3] Respondents include three federally recognized Indian Tribes, the Seneca-Cayuga Tribe of Oklahoma, the Fort Sill Apache Tribe of Oklahoma, and the Northern Arapaho Tribe of Wyoming, each of which operates a class II gaming facility, as well as Diamond Game Enterprises, Inc., the manufacturer of Magical Irish.

emphasized that Magical Irish does not determine what is printed on the tickets, does not select the order of dispensing the tickets, and does not contain a random number generator or any other mechanism for choosing a winner. In the court's words, "It wouldn't change the outcome of the game, whether [the pull-tabs tickets] were sold over-the-counter or put out by the dispenser." The court further noted that Magical Irish does not accumulate winnings or make change of any kind. (App. 11a-12a.)

On February 20, 2001, reaffirmed its conclusions from the preliminary injunction hearing both that Magical Irish is a class II aid under IGRA and that it is not a Johnson Act gambling device. With respect to the Johnson Act issue specifically, the court reasoned that Magical Irish did not qualify as a Johnson Act gambling device because it does not meet the statutory requirement that the machine in question involve an "application of the element of chance." As the court concluded, "[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]." (App. 12a.)

b. The NIGC Amended Regulations and Accompanying Comments

IGRA gives the NIGC authority to "promulgate such regulations and guidelines as it deems appropriate to implement [IGRA's] provisions." 25 U.S.C. § 2706(b)(10). On June 17, 2002, the NIGC (a party to this case) issued new regulations defining permissible class II aids under IGRA. These new regulations explicitly recognized "pull tab dispensers and/or readers" – such as Magical Irish – to be permissible class II aids. 25 C.F.R. § 502.7. In so doing, the NIGC flatly rejected the most recent Department of Justice view, repeated by Petitioners, that Magical Irish (and such dispenser/readers) should not be designated

class II aids because they resemble slot machines (which are a class III game).

Moreover, in its comments accompanying the new regulations, the NIGC set forth its unequivocal view that class II aids under IGRA are not subject to the prohibitions of the Johnson Act. As the NIGC reasoned, the plain language of IGRA expressly permits the use of electronics and technology in aid of class II gaming on Indian lands, yet application of the Johnson Act, if broadly construed, would prohibit the use of the same aids on Indian lands. 67 Fed. Reg. at 41167. The NIGC also noted that the legislative history behind IGRA indicates that Congress did not intend the Johnson Act to apply to at least one category of class II aids: bingo blowers and other devices used in connection with bingo or lotto. 67 Fed. Reg. at 41169 (citing S. Rep. No.100-446, at 12 (1988). The NIGC further reasoned that there is no textual support for the proposition that IGRA still requires a tribal-state compact for operation of a class II aid if the aid meets the definition of a Johnson Act gambling device, and that there is no indication Congress intended for the compacting process to apply in any way to class II gaming. 67 Fed. Reg. at 41170 (citing S. Rep. No. 100-446, at 1 (1988)).

In addition, the NIGC considered the competing purposes behind the Johnson Act and IGRA in concluding that the Johnson Act does not apply to class II aids under IGRA. The NIGC noted that the Johnson Act is a criminal statute intended to restrict the possession, use, and transportation of gambling devices, so the courts have interpreted the Johnson Act broadly to "anticipate the ingeniousness of gambling machine designers." 67 Fed. Reg. at 41167 (quoting *Lion Manufacturing Corp. v. Kennedy*, 330 F.2d 833, 836-837 (D.C. Cir. 1964)). In contrast, IGRA was intended to give tribes "the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is

designed to provide maximum flexibility." 67 Fed. Reg. at 41168 (quoting S. Rep. No. 100-446, at 9 (1988)). Thus, the NIGC concluded, "the ingenuity of gaming designers, which was designed to be constrained by the Johnson Act, is arguably intended to be given freer rein by IGRA in the context of class II gaming." 67 Fed. Reg. at 41168.

c. The Court of Appeals' Decision

On April 17, 2003, the 10th Circuit affirmed the district court. The Court denied Respondents' motion to dismiss on mootness grounds, even though the tribes had long since stopped using Magical Irish, Diamond Game no longer distributed Magical Irish to any tribes, and neither party has any intention of using or distributing Magical Irish in the future. (App. 14a-17a.)

On the merits, the 10th Circuit ruled that users of class II technological aids under IGRA may not be subjected to separate liability under the Johnson Act. Contrary to the Petitioners' contention, in reaching this conclusion, the Court did not rule that IGRA impliedly repealed or created an implied exception to the Johnson Act. Instead, the Court applied the sound and familiar canon of construction that two co-existing statutes should be reconciled so as to "'give each enacting Congress's legislation the maximum continuing effect.'" (App. 21a-22a.) Applying this canon, the Court recognized that, in IGRA, Congress had expressly authorized technological aids for use in conjunction with class II games. In light of that carefully crafted scheme, the Court declined to eviscerate this provision of IGRA (as Petitioners would) by subjecting those aids to Johnson Act liability. At the same time, the Court gave the Johnson Act maximum continuing effect by limiting its holding to IGRA authorized gaming within Indian Country. (App. 22a-28a.)

As the 10th Circuit emphasized, its approach to the interplay of IGRA and the Johnson Act also reflected Congress's clearly expressed intent when enacting IGRA. The key committee report specifically indicates Congress's intent that the Johnson Act *not* "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." Furthermore, the Court noted that its approach accorded with that of other courts of appeal, with the most recent views expressed by the NIGC, and even the previous authoritative view emanating from the Office of Legal Counsel within the Department of Justice.[4] (App. 23a-26a.)

Having reached the modest conclusion that the Johnson Act should not be read to prohibit IGRA class II technological aids in Indian country, the Court then concluded that Magical Irish fits IGRA's definition of a class II technological aid. In so holding, the Court rejected Petitioners' comparison of Magical Irish to a slot machine, finding the resemblance only "superficial." It also rejected Petitioners' argument that Magical Irish was an electronic version of the game of pull-tabs. Instead, the 10th Circuit, following the lead of the D.C. Circuit in *Diamond Game*, found that Magical Irish merely "facilitates" the play of paper pull-tabs, a specifically authorized class II game. (App. 37a-44a.)

[4] As the Office of Legal Counsel concluded, the Senate Report indicates Congress's intention both that class II technological aids not be subject to Johnson Act liability and that this category of "technological aids" be broadly construed. (App. 26a n.22.)

REASONS FOR DENYING THE WRIT

I. THIS CASE HAS A SERIOUS MOOTNESS PROBLEM AND, THEREFORE, PRESENTS A POOR VEHICLE FOR SUPREME COURT REVIEW.

Even if the questions presented here were worthy of review, this case would be an inappropriate vehicle for resolving them because changed factual circumstances have rendered the parties' dispute moot. At the time they initiated their declaratory judgment action, the Respondent Tribes were using (or had contracts to use) Magical Irish in their gaming activities and Respondent Diamond Game was providing Magical Irish to Native-American tribes. However, in sworn affidavits (which were uncontroverted) submitted to the Tenth Circuit in support of a motion to dismiss the case as moot and to vacate the district court judgment in their favor, Respondents attested to the following changed factual circumstances: (a) none of the Tribes presently uses Magical Irish in their gaming activities; (b) Diamond Game no longer provides Magical Irish to any tribe; (c) Respondents have no intention of resuming Magical Irish activities; and (d) Respondents are focusing their present and future gaming activities on other IGRA class II pull-tab games. Respondents argued (App. 14a) that, in light of these changed factual circumstances, they no longer have a legally cognizable interest in whether Magical Irish is an IGRA class II game or a lawful device under the Johnson Act, and therefore the case is now moot. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (case is moot when plaintiff no longer has "a legally cognizable interest in the outcome") (internal quotations omitted).

The Tenth Circuit denied the motion. On its face, however, the Tenth Circuit's analysis departed from this Court's established mootness principles.

For one, the Tenth Circuit applied the incorrect mootness standard. It ruled that dismissal for mootness was unjustified because it remains "technically possible" for Respondents to resume Magical Irish activities, and thus "it is not 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" (App. 15a) (quoting *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000)). But whether allegedly wrongful behavior could reasonably be expected to recur is the stringent mootness standard that is applied when the **defendant** says that it has voluntarily ceased the conduct gave rise to the litigation. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) ("the standard . . . for determining [whether] a case has been mooted by the defendant's voluntary conduct . . . is whether subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."). This "heavy burden," *Adarand*, 528 U.S. at 222, is imposed by mootness doctrine to "protect[ ] plaintiffs from defendants who seek to evade sanction by predictable protestations of repentance and reform." *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001) (internal quotations omitted).

The standard the Tenth Circuit applied has no bearing on the mootness equation, however, when, as is the case here, it is the **plaintiffs** who have halted the conduct that gave rise to litigation. *See id.* Therefore, Respondents were not required to satisfy the '"heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again,'" (App. 15a, quoting *Adarand*, 528 U.S. at 222), and the "technical possibility" (App. 15a) that Respondents could resume Magical Irish activities is of no consequence in light of the unrefuted affidavits that Respondents are not engaged in Magical Irish activities and have no future intention of doing so.

Second, relying on *City of Erie*, the Tenth Circuit said that it denied the mootness motion because of its perception that Respondents were engaged in "strategic manipulation . . . to seal a favorable decision from review." (App. 16a.) The Tenth Circuit's reliance on *City of Erie* was mistaken. In *City of Erie*, this Court declined to dismiss the defendant's petition for certiorari to the Pennsylvania Supreme Court as moot, citing concerns that the plaintiff was using its asserted voluntary cessation of the disputed conduct to manipulate jurisdiction and insulate from review the state court judgment in its favor. Those concerns were real in *City of Erie* because the Court's practice in disposing of state cases that become moot pending review is to dismiss the petition for certiorari, but to leave the state court judgment in tact. 529 U.S. at 288-89; *id.* at 305 (Scalia, J., concurring). Thus, in *City of Erie*, dismissal on mootness grounds would not have led to the vacatur of the state court victory for the plaintiff.

The concerns that drove the Court's decision to decline to dismiss for mootness in *City of Erie* are absent here. When a federal case becomes moot on appeal as a result of voluntary action taken by the prevailing party below, the general practice is to dismiss the case as moot and vacate the lower court judgment that was favorable to the prevailing party. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 72 (1997); *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 23 (1994). Under that practice, dismissal of this case on mootness grounds would not have insulated from judicial review the favorable ruling that the Respondents obtained in the district court – it would have stripped them of that win.

Finally, the Tenth Circuit said that the cessation of Magical Irish activities did not render the case moot because Respondents still could be prosecuted under the Johnson Act for their prior Magical Irish activities, and therefore they retain a legally cognizable interest in the

outcome of the litigation. (App. 14-15a.) But until its threat to prosecute for past use of Magical Irish (which was uttered for the first time in response to the mootness motion), the Department of Justice had only threatened to prosecute if Respondents did not stop their Magical Irish activities. (App. 1-2a, 10a.) In short, what prompted Respondents to bring their declaratory judgment action was a threat of Johnson Act prosecution if they continued to use Magical Irish going forward, not a threat of prosecution for their past use of Magical Irish.

II. CLASS II TECHNOLOGICAL AIDS UNDER IGRA ARE NOT SUBJECT TO SEPARATE LIABILITY AS JOHNSON ACT GAMBLING DEVICES AND THE PURPORTED CIRCUIT SPLIT ON THIS ISSUE IS INSUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S REVIEW

Four Courts of Appeals have now addressed the interrelationship of the Johnson Act and the use of class II technological aids under IGRA. Three of those courts (the 9th, 10th, and D.C. Circuits) agree that Congress did not intend for class II technological aids to be subject to Johnson Act liability. Although the 8th Circuit disagrees on this point (holding that the Johnson Act theoretically may apply to class II gaming under IGRA), the divergence is completely academic because that Court concluded that pull-tab dispenser/displays, like Magical Irish, are not Johnson Act gambling devices.[5] Given the uniform result

[5] In a particularly strained passage, Petitioners suggest that the D.C. Circuit actually agrees with the 8th Circuit's approach to the Johnson Act, citing to a line in *Cabazon Band of Mission Indians v. NIGC*, 14 F.3d 633, 635 n.3 (D.C. Cir.), *cert. denied*, 512 U.S. 1221 (1994), regarding the extent to which IGRA repealed the Johnson Act.

(Continued on following page)

reached by all four courts of appeal, and the inconsequential nature of the 8th Circuit's minor doctrinal variation, this Court should deny the petition for certiorari.

A. The Tenth Circuit Decision Properly Reconciled IGRA and the Johnson Act

Reserving for the moment, the "how many angels dance on the head of a pin" quality of the purported split among the circuits, as is apparent from the thorough analysis in both the 10th Circuit opinion here and the 9th Circuit opinion in *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000), there is no reason to revisit the majority view. These opinions are deeply grounded in both statutory language and legislative history and apply two well-established canons of statutory construction. First, "When there are two acts upon the same subject, the rule is to give effect to both if possible." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)); *see*

Cert. Pet. at 18. Petitioners have the D.C. Circuit's approach quite wrong. In *Diamond Game*, the D.C. Circuit explicitly stated, citing to the very passage from *Cabazon* that the Petitioners quote selectively, that the Circuit already had "interpreted IGRA as limiting the Johnson Act prohibition to devices that are neither Class II games approved by the Commission nor Class III games covered by tribal-state compacts." *Diamond Game*, 230 F.3d 365, 367, (2000). Indeed, in its parenthetical describing the passage in question from *Cabazon*, the panel in *Diamond Game* described it as "implying that Class II aids, permitted under IGRA, do not run afoul of the Johnson Act." *Id.* It is true, as the Petitioners claim, that the D.C. Circuit rejected the concept of an implied repeal of the Johnson Act with respect to class II technological aids. But the 9th and 10th Circuits do not speak in terms of implied repeal either. They talk about maximizing the effect of two co-existing statutes by recognizing that class II technological aids should not be deemed prohibited by the Johnson Act. On this key point, the D.C., 9th, and 10th Circuits are clearly in accord.

also FCC v. NextWave Personal Communications, Inc., 537 U.S. 293, 304 (2003). And, second, a specific statute governs over a more a general one. *Morton*, 417 U.S. at 551; *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (specific preemption provision governs over general saving clause); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (specific provision on expert witness fees controls over general costs provision), *superseded on other grounds by* the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

In this case, interpreting the Johnson Act to generally prohibit the use of gambling devices in federal territories, while construing IGRA to authorize class II gaming using technological aids in Indian country, gives maximum effect to both statutes. Allowing class II gaming on Indian lands would not unduly interfere with the operation of the Johnson Act. To the contrary, giving full effect to the class II gaming provisions of IGRA would have only a minimal effect on the Johnson Act, which would still prohibit class III gaming on Indian lands in the absence of a tribal-state compact, and the use of all gambling devices in other federal territories. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 156 (1972) (specific venue provision of the National Bank Act controls over general venue provision of the Securities Exchange Act, in part because giving effect to the National Bank Act provision would not unduly interfere with the operation of the Securities Exchange Act, and would have no impact on the vast majority of lawsuits brought under the Securities Exchange Act). Moreover, to the extent there is any conflict in the application of the Johnson Act and IGRA to class II gaming, IGRA must control as the specific, later-enacted statute. As with the Indian preference statute in *Morton*, IGRA is "a specific provision applied to a very specific situation," and "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one. . . . " *Morton*, 417 U.S. at 550-51.

Respondents will not repeat here all the substantial evidence that Congressional intent is best served by defining "gambling devices" under the Johnson Act as not including class II technological aids used in Indian country. Suffice it to say, as explained by both the 9th and 10th Circuits, that the Senate Report and the explicit statutory provision in IGRA providing for the use of class II technological aids both provide powerful support for this approach. Indeed, the Department of Justice itself, when litigating this issue in the 9th Circuit, conceded the point, telling the court that it should "read the two acts harmoniously; if it's a bingo aid, it's not a Johnson Act gambling device." *United States v. 103 Electronic Gambling Devices*, 223 F.3d at 1102 n.13.

Petitioners' approach, by contrast, cannot be reconciled with either the text or the manifest intent of IGRA. Petitioners claim that class II gaming devices are subject to the proscriptions of the Johnson Act because IGRA states that a tribe may engage in class II gaming only if "such gaming is not otherwise *specifically* prohibited on Indian lands by Federal law." (Pet. at 10-11 (citing 25 U.S.C. § 2710(b)(1)(A)) (emphasis added).) According to the Petitioners, the Senate report reveals that the "specific prohibition" referred to in the savings clause is the Johnson Act. (Pet. 10-13.)

But the text and the legislative history actually provide scant support for this view. As a textual matter, IGRA's "savings clause" – the one strand of text on which Petitioners rely – references statutes that "specifically" prohibit gaming "on Indian land." Congress included these limiting principles deliberately. Earlier versions of the law that became IGRA had a much broader savings clause, permitting class II gaming only if "such gaming is not prohibited by federal law." S. Rep. No. 446, at 12 (1988), *reprinted* in 1988 U.S.C.C.A.N. 3071, 3082. By limiting IGRA's savings clause to statutes that specifically prohibit

gaming on Indian land, Congress excluded the Johnson Act, which is a statute of *general* application passed decades before the advent of modern Indian gaming (albeit on that applies in Indian country), while still reserving to Congress leeway to impose specific bans if necessary.

The Senate Report confirms the point. In explaining the meaning of the very phrase on which Petitioners rely, the Senate Report explicitly states that Congress did intend for class II technological AIDS to be relieved of potential Johnson Act liability. Hence, the Senate Report declares that, under IGRA, the Johnson Act does not apply to "devices used solely in aid of or in conjunction with bingo or lotto . . . ." Petitioners ask this Court either to ignore this declaration of congressional intent or limit it to "bingo blowers," even though, ironically, these devices (unlike Magical Irish) clearly do meet the definition of "gambling devices" under the Johnson Act.[6] Such a cramped approach to the use of class II technological aids, moreover, would conflict with Congress's manifest intent "that tribes be given the opportunity to take advantage of modern methods of conducting class II games[,] and the language regarding technology is *designed to provide maximum flexibility*." S. Rep. No. 100-446, at 9, 1988 U.S.C.C.A.N. at 3079.[7]

[6] Bingo blowers, which randomly select the numbers to be called, would seem surely to qualify as Johnson Act gambling devices because they are designed primarily for use in gambling, involve the application of an element of chance, and render a person entitled to receive money or property.

[7] In their discussion of the legislative history, Petitioners focus on the sentence of the Senate Report which states that the language of the savings clause "not otherwise prohibited by federal law" refers to the Johnson Act. But, as noted above, Congress amended the savings clause to read "not otherwise specifically prohibited on Indian land by federal

(Continued on following page)

Rather than adhere to the flexible approach mandated by Congress, Petitioners also argue that IGRA's express exemption from the Johnson Act for gambling devices used in class III gaming indicates that Congress did not intend to exempt class II aids from the Johnson Act. (Pet. 13-14.) The principle of negative implication, however, is only an aid in discovering legislative intent when it is not otherwise manifest. *United States v. Barnes*, 222 U.S. 513, 519 (1912). Here, as discussed above, the Senate Report clearly indicates that Congress did not intend the Johnson Act to apply to class II aids. In addition, when there is no reason for the legislature to have included a provision in a statute, the omission of that provision means nothing at all. *United Dominion Ind., Inc. v. United States*, 532 U.S. 822, 836 (2001). The Senate Report indicates that Congress did not believe the Johnson Act applied to class II aids. S. Rep. No. 446, 100th Cong., 2d Sess. 12 (1988) ("[The Johnson Act] prohibits gambling devices on Indian lands but does not apply to devices used in connection with bingo and lotto.") Congress' failure to include an express exemption from the Johnson Act for class II gaming devices that Congress did not believe were covered by the Johnson Act in the first place simply has no significance.

B. The Purported Circuit Split over the Reconciliation of IGRA and the Johnson Act Does Not Implicate Any Significant State or Federal Interest

Petitioners insist that this Court should resolve the purported circuit split over whether class II technological

law." Thus, the snippet of legislative history on which Petitioners stake their claim is directed at language that was meaningfully superceded.

aids may be subject to Johnson Act liability, but its reasons for seeking this resolution are insubstantial.

As a threshold matter, Petitioners will achieve nothing by having this Court resolve the alleged circuit split unless it also prevails on its view, rejected by the two courts to consider the issue, that pull-tab dispenser/displays are Johnson Act gambling devices. As discussed below, Petitioners' position is weak on both issues. Indeed, if there were any substantial merit to Petitioners' view, it would be expected that at least one court of appeal would take the Petitioners' side. Surely, in the absence of a single ruling for Petitioners, and in the face of the opposing view of the NIGC (the government agency charged with administering IGRA and a party to this case), as well as the Department of Justice's Office of Legal Counsel, there is no compelling reason for this Court to invest its scarce resources in such a one-sided dispute.

Even assuming, however, that Petitioners are right on every point, the issue is too insubstantial to warrant this Court's attention. According to Petitioners, the 10th Circuit's approach to the Johnson Act opens the door to class III casino style gaming in Indian country, which, in turn, undermines IGRA's regime for guarding against organized crime, and denigrates the role of states in regulating Indian gaming within their borders. (Pet. 15-21.)

These concerns are baseless. The 10th Circuit approach to the scope of the Johnson Act in no way opens the door for class III gaming in the absence of a compact precisely because, as the D.C., 8th, and 10th Circuit's have unanimously held (consistent with NIGC regulations), the devices at issue here are aids to class II gaming and *not* class III games. Absolutely nothing about the 10th Circuit opinion (or *Santee Sioux*, or *Diamond Game*, or *103 Gambling Devices*) changes the uncontested fact that class III gaming – including the slot machine devices at which

the Johnson Act takes aim – may be conducted only pursuant to a tribal-state compact. And because this limit on class III gaming remains wholly unaffected, IGRA's protections against organized crime[8] and its preservation of a regulatory role for the states remain vibrant.

Reading between the lines, Petitioners' real complaint seems to be that, in light of the proliferation of different types of class II gaming, courts are classifying too many devices as class II technological aids, thereby restricting state control over gaming. Whatever the merits of this view, Petitioners have not sought certiorari on the issue of whether Magical Irish is properly classified as a class II technological aid. If, as Petitioners seem to suggest, the category of class II aids has become too broad, the problem is certainly not raised by Magical Irish (which is a low-tech dispenser and visual aid that clearly received the proper classification). Moreover, this alleged problem, if it is really a problem at all, is one that Congress has the power to address at any time.

III. THE QUESTION OF WHETHER, INDEPENDENT OF IGRA, MAGICAL IRISH IS A GAMBLING DEVICE UNDER THE JOHNSON ACT IS NOT PRESENTED IN THIS CASE AND, IN ANY EVENT, DOES NOT MERIT THIS COURT'S REVIEW

The 10th Circuit never addressed the issue of whether, assuming the class II technological aids may be subject to Johnson Act liability, Magical Irish or other similar pull-tab dispensers in fact qualify as Johnson Act

[8] It must also be observed that the record contains not a scintilla of evidence that the use of Magical Irish, Lucky Tab, or any other class II technological aid invites any law enforcement problems whatsoever.

"gambling devices." Accordingly, this issue is not properly presented in this case.

In any event, the particularities of how to define a Johnson Act gambling device is not an issue worthy of review. Whether a mechanism for playing a game of chance qualifies as a Johnson Act gambling device is an intrinsically factbound, case-by-case inquiry – in short, the kind of inquiry that this Court does not generally undertake, even if a lower court is in error. *See* S. Ct. Rule 10. The merits of the Petition, moreover, are not enhanced by its exaggerated claim of a circuit split between the 8th Circuit's decision in *Santee Sioux* and a 28-year old Ninth Circuit per curiam in *United States v. Wilson*, 475 F.2d 108 (9th Cir. 1973), involving a unrelated machine.

The "Bonanza" machine at issue in *Wilson* worked as follows: When an individual placed 25 cents into the machine, he would receive a coupon, the value of which was already visible in the viewing window of the machine. As a result of buying the first coupon, the player would also get a chance to see the next coupon in line, as it would replace the first coupon in the viewing window. The player could then decide whether or not to purchase the second coupon as well as a chance to view the third coupon in exchange for another 25 cents. *Wilson,* 475 F.2d at 108. The entire focus of both the majority opinion and the dissent in *Wilson* was "on whether playing a device that allowed the player to see what he was going to get before he deposited his money involved an 'element of chance.'" *Wilson,* 475 F.2d at 109. The majority concluded that it did, because in its view the user of the machine was really paying for the opportunity to view and purchase a subsequent, potentially more valuable, coupon.

The differences between the Bonanza machine and pull-tab dispensers like Magical Irish and Lucky Tab are legion. First, in contrast to pull-tab dispensers, the design

of the Bonanza device itself was an essential aspect of the game of chance being played. The lure of the game depended entirely on the viewing window – and the chance that a valuable coupon would pop into view after a relatively worthless coupon was purchased and gotten out of the way. Magical Irish and Lucky Tab, by contrast, simply dispense a ticket after money has been paid. The apparatus itself adds nothing substantive to the game. Second, while the underlying game of pull-tabs being played by Magical Irish and Lucky Tab is completely legal, the analysis in *Wilson*, sketchy as it is, proceeds from the assumption that the sale of chances to win a prize constituted *illegal* gambling. Thus, *Wilson* never addresses one key issue here, namely whether a device that dispenses the ticket of a lawful game can ever be deemed a Johnson Act device. Third, a person using the Bonanza machine plays against the machine itself, which contains all the winning and losing tabs. A person using Magical Irish or Lucky Tab, by contrast, is playing only a portion of a paper pull-tab deal and is, in fact, competing not against the machine but against other players of the same deal to find the winning paper tickets. In this regard, the play of the Bonanza machine much more closely resembles a slot machine (the target of the Johnson Act) than does Magical Irish or Lucky Tab.[9]

In any event, on the merits of whether Magical Irish and similar pull-tab dispenser/displays are Johnson Act gambling devices even without regard to IGRA, there can be little doubt that the 8th Circuit and the district court correctly concluded that they are not. The Johnson Act

[9] In assessing the similarity between the Bonanza machine and a slot machine, moreover, the *Wilson* opinion is unclear on a key question for assessing Johnson Act status: whether the Bonanza machine itself randomly selects the next coupon or whether the coupons, as in Magical Irish and Lucky Tab, are pre-arranged.

definition of a gambling device is limited to machines or mechanical devices which involve "the *application* of an element of chance." 15 U.S.C. § 1171(a) (emphasis added). As both courts to have considered the matter agree, Magical Irish and similar pull-tab dispenser/readers do not *apply* any element of chance – they merely dispense pull-tabs from rolls in which the element of chance is pre-packaged – and, thus, they do not meet the Johnson Act definition of gambling devices. Indeed, another factor counseling against review in this Court is the detailed and substantial dispute between Petitioners and Respondents regarding the actual play of Magical Irish. To decide the Johnson Act issue posed by Petitioners, this Court would find it embroiled in a host of factual disputes about bar codes, software, and casino operations – disputes that, notably, the district court here resolved against Petitioners.

Petitioners deride the 8th Circuit's focus on the "application of an element of chance," as arbitrary, but it is both textually compelled and sound. "[T]he application of an element of chance" is an active construct. Something must apply the element of chance and, in the context of the Johnson Act, that "something" is most naturally read to be the machine or device that is to be proscribed. Petitioners construction has at least two glaring weaknesses. First, it would read the word "application" out of the statute (violating the canon of giving every word meaning). Second, it would lead to absurd results. If the device is not required to "apply" the element of chance, then every class II technological aid would be a prohibited Johnson Act device because they all are used in gaming that includes an "element of chance." Such a construction, of course, would render this aspect of IGRA a nullity.

Courts interpreting IGRA have neatly avoided this error by using the criteria of whether a device actually applies the element of chance as a basis for distinguishing between class II technological aids, which do not generate

the element of chance, and class III electronic facsimiles, which do. On this basis, for example, the 9th Circuit ruled that computerized pull-tab dispensers *which also contain a random number generator to create the pull-tab deal*, are, in contrast to Magical Irish, class III facsimiles that could only be played pursuant to a tribal-state compact. *See Sycuan Band of Mission Indians v. Raoche*, 54 F.3d 535 (9th Cir. 1995).

By recognizing that Johnson Act gambling devices must apply an element of chance to the game being played, the 8th Circuit (like the district court here) effectively harmonized the Johnson Act with IGRA's allowance of class II technological aids. Under this approach, a device that applies an element of chance cannot qualify as an class II technological aid, but may constitute a Johnson Act gambling device assuming that it meets the statute's other definitional elements. In the last analysis, the 8th Circuit has simply taken a different route for reaching the same result as the 10th Circuit here, namely to give both IGRA and the Johnson Act their greatest possible effect by ruling that the Johnson Act does not reach class II technological aids.

Finally, Petitioners claim that the question of whether the Lucky Tab II dispenser is a "gambling device" under the Johnson Act may have important "ramifications outside as well as inside Indian Country." (Pet. at 18.) But Petitioners' boilerplate arguments about the potential effects of the 8th Circuit decision are purely speculative. Petitioners have presented no evidence that anyone has attempted to introduce pull-tab dispensers or similar machines in another federal territory or that interstate shipment of such machines is a matter of serious national concern. As the Petitioners recognize, states can impose their own restrictions on the use of pull-tab dispensers within their own borders. At the end of the day, the 8th and 10th Circuit decisions below, and the D.C. Circuit's

decision in *Diamond Game Enterprises*, simply let tribes that can already sell pull-tabs legally use electronic dispensers as a method of sale, much like selling aspirin in a vending machine instead of over-the-counter. Refereeing the dynamics of a vending machine is hardly an enterprise worthy of this Court's time.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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