No. 18-895

In the Supreme Court of the United States

THE MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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The Tribal General Welfare Exclusion Act of 2014 ("GWEA") is clear. It excludes from income "any payment" for a tribal general welfare *purpose*, regardless of the *source* of such payment. Ignoring the plain language of the GWEA, the government makes two principal arguments against certiorari. First, the government argues the Eleventh Circuit was correct in holding that the GWEA does not exclude general welfare payments where those payments can be linked to tribal gaming revenue. (Gov. Opp. 10-13.) Second, the government argues that the issue presented is not important enough to warrant review. (*Id.* at 13-14.) As discussed below, the Eleventh Circuit's decision was incorrect as it ignored the clear command of the GWEA to exempt from tax "any payment" for general welfare purposes. And contrary to the government's assertion, this case presents an issue of great importance to approximately 238 Indian tribes—as well as their members—who rely on gaming revenue to fund numerous tribal government programs, including general welfare programs. The Court should grant certiorari.[1]

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[1] The government ignores many of the Miccosukee Tribe's arguments. For example, the government fails to address the multiple U.S. Code provisions cited in the Tribe's petition confirming that the phrase "subject to" taxation is vague and, standing alone, does not mean that a particular payment must be included in gross income, or that other more specific statutory provisions cannot exclude such payments from income. (Miccosukee Pet. 10-11.)

First, the government argues that the Eleventh Circuit was correct so certiorari is unnecessary. (Gov. Opp. 10-13.) In particular, the Eleventh Circuit reasoned that because a 1988 statute, the Indian Gaming Regulatory Act ("IGRA"), specifically addresses per capita distributions of gaming revenue and the GWEA does not, the more specific statute controls over the less specific, notwithstanding the fact that Congress enacted the GWEA 25 years later with full knowledge of IGRA. *See United States of America v. Sally Jim*, 891 F.3d 1242, 1245-46 (11th Cir. 2018), *rehearing denied*, No. 16-17109-GG, 2018 U.S. App. LEXIS 22201 (11th Cir. Aug. 9, 2018). Adopting the Eleventh Circuit's logic, the government makes the same "specific must control over the general" argument. (Gov. Opp. 12).

That argument, however, is sleight of hand. Congress enacted IGRA to regulate Indian gaming and, in doing so, only generally addressed the taxability of distributions from a particular *source* (gaming revenue). In contrast, Congress enacted the GWEA specifically to exempt from taxation payments made for a specific *purpose* (general welfare), regardless of the source of such payments. Focusing on the *source* of the payments, the Eleventh Circuit, and now the government, have mischaracterized this matter as involving the taxation of payments derived from gaming revenue. Focusing on the *purpose* of the payments, however, this matter is properly characterized as involving the taxation of general welfare payments, which the GWEA specifically excludes from income. Correctly focusing on the

purpose of the payments at issue confirms that the GWEA is the more specific statute.

The GWEA's intention is clear—it makes non-taxable "any payment," *regardless of source*, that qualifies as a general welfare payment. *See* 26 U.S.C. § 139E. Under the Eleventh Circuit's reasoning, if Congress wanted the phrase "any payment" to truly mean "any payment," it must list every possible source of revenue used to make general welfare payments, and specifically state that payments from such sources are excluded from gross income. Congress, of course, should not be required to provide additional and cumbersome specificity to a statute that already is clear and unequivocal.

The government also argues that the Eleventh Circuit was correct because the GWEA merely codifies IRS guidance which states that per capita distributions of gaming revenue, no matter if they otherwise meet the criteria of a general welfare benefit, are taxable. (Gov. Opp. 12-13). But this argument fails to recognize that the IRS guidance (Rev. Proc. 2014-35, 2014-1 C.B. 1110) pre-dates the enactment of the GWEA, and that Congress chose not to include that limitation in the text of the GWEA, even though it copied verbatim multiple other portions of that same IRS guidance. The Eleventh Circuit and the government here completely ignore the effect of that omission and instead reason that the very language Congress omitted should be read into the statute. *See Iselin v. United States*, 270 U.S. 245, 251 (1926) ("To supply omissions transcends the judicial function."); *Ebert v. Poston*, 266 U.S. 548, 554 (1925) ("A casus omissus does not justify judicial legislation."); *United States v. Ron Pair Enterprises,*

Inc., 489 U.S. 235, 241 (1989) ("where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'").

Second, the government argues that certiorari is inappropriate because there is no circuit split and this case is simply not important enough to be heard now. But this argument ignores the importance of this issue to the approximately 238 tribes — and their members — who rely on gaming revenue to fund numerous tribal government programs, including general welfare programs. Undoubtedly, the Internal Revenue Service will adopt the Eleventh Circuit's incorrect interpretation of the GWEA and will apply that interpretation to all tribes throughout the country. Doing so will cause acute and irreparable harm while the issue percolates through other Federal courts. Tribes will be required to use complicated accounting and tax reporting and withholding measures in order to segregate gaming revenue from other tribal revenues when providing general welfare benefits to their members. And the IRS will require tribal members to pay tax on general welfare benefits they receive if the IRS determines those benefits are derived from gaming revenue. If this issue is not resolved now, those tribal members will lose the opportunity to seek refunds of tax overpayments resulting from the Eleventh Circuit's erroneous interpretation of the GWEA. *See* 26 U.S.C. § 6511 (requiring a claim for a tax refund or credit to be filed within 3 years of the date the tax return was required to be filed, or 2 years from the time the tax was paid, whichever period expires later.) This is precisely why the Court commonly takes tax matters at the earliest stages; it avoids the long-term

complications taxpayers face from unevenly enforced tax rules.

The Eleventh Circuit, and now the government, ignore the plain meaning of the GWEA which, without exception, excludes from income "any payment" made for general welfare purposes. Correcting this error now, rather than after years of IRS enforcement, is of great importance to Indian tribes throughout the country seeking to properly administer vital tribal general welfare programs.

Respectfully submitted,

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