No. 03-762

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

SANTEE SIOUX TRIBE OF NEBRASKA,
A FEDERALLY RECOGNIZED INDIAN TRIBE,

Respondent.

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

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The Opinion of the Court of Appeals for the Eighth Circuit is reported at 324 F.3d 607 (8th Cir. 2003), and is reproduced in Petitioner's Appendix ("Pet. App.") at 1a-17a. The Opinion of the District Court (Pet. App. 18a-33a) is reported at 174 F.Supp.2d 1001 (D. Neb. 2001).

JURISDICTION

The Court of Appeals for the Eighth Circuit entered its judgment on March 20, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. Introduction

The Petition fails to satisfy any of the criteria traditionally employed by this Court for issuance of the writ. The Department of Justice (the "Department") asks this Court to engage only in correction of an alleged legal error: its sole question presented simply contests the Court of Appeals' application of the Johnson Act's definition of a gambling device to dispensers of paper pull-tabs. 15 U.S.C. 1171, *et seq.* This inquiry does not implicate any conflict in authority. Indeed, the only conflict here is an inter-agency one between the Department and the National Indian Gaming Commission (the "NIGC"), the federal agency that Congress has charged with regulating gaming activities on Indian lands. The NIGC has taken the view that Indian tribes that may lawfully sell pull-tabs may sell those same pull-tabs with the use of an electronic

dispenser, and its expert view underscores the stark shortcomings in the Department's claim of error. In fact, the NIGC encouraged Respondent Santee Sioux Tribe to install the very electronic pull-tab dispensers that the Department now claims are unlawful. This intramural squabble between two federal agencies is not the sort of dispute that this Court sits to resolve.

The Department's rote allegations about the significance of this case, moreover, are purely speculative in nature and likewise do not present a valid basis for issuance of the writ. The Department does not dispute that Congress has expressly authorized Indian tribes to sell "pull-tabs." Whether tribes may do so through the use of electronic dispensers is hardly the type of compelling federal issue that might warrant this Court's intervention even in the absence of a conflict in authority below. The Petition should be denied.

B. Factual Background

1. This case involves two federal statutes: the Johnson Act, 15 U.S.C. §§ 1171-1178, and the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721. First enacted in 1951, the Johnson Act prohibits the manufacture, sale, or use of "any gambling device" in federal territory, including Indian country. *See* 15 U.S.C. § 1175(a). The Johnson Act also prohibits the interstate transportation of any gambling device into or out of a state in which the device is banned. *See* 15 U.S.C. § 1172(a). The Johnson Act defines a "gambling device" to specifically include "slot machine[s]," *see* 15 U.S.C. § 1171(a)(1), "roulette wheels," and "any other machine or mechanical device * * * 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).

For nearly four decades after the Johnson Act was enacted, there was no comprehensive federal scheme regulating gaming on Indian lands. Some states sought to regulate Indian gaming by exercising their delegated criminal jurisdiction over Indian lands. In 1987, however, this Court refused to allow California to apply a generally applicable statute regulating bingo to Indian gaming. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207-14 (1987).

With *Cabazon* providing the impetus, Congress passed IGRA a year later. Congress enacted IGRA with the express purpose of "provid[ing] 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); *see City of Roseville*, 348 F.3d 1020, 1029 (CADC 2003). Congress specifically found that "existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands," 25 U.S.C. § 2701(3), and added that one of IGRA's purposes was "the *establishment* of federal standards for gaming on Indian lands," in order to "protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3) (emphasis added). IGRA not only created standards for the regulation of Indian gaming, but also set up a new federal agency, the NIGC, to approve and oversee such gaming and to promulgate any necessary regulations and guidelines. *See* 25 U.S.C. §§ 2704-2708.

IGRA creates three classes of gaming. Class I gaming is defined to include social games played solely for small prizes and traditional forms of Indian gaming. *See* 25 U.S.C. § 2703(6). Class I gaming is regulated solely by Tribes, and is subject to neither federal nor state regulation. *See* 25 U.S.C. § 2710(a)(1).

Class II gaming comprises two categories of games. First, it includes "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* * * * *and other games similar to bingo.*" 25 U.S.C. § 2703(7)(A)(i) (emphasis added). Second, it includes certain types of "non-banking" card games (in which players compete against each other). *See* 25 U.S.C. §§ 2703(7)(A)(ii), 2703(7)(B)(ii). Class II gaming is permissible if the state in which an Indian tribe is located "permits such gaming for any purpose by any person, organization or entity," and if "such gaming is not otherwise *specifically prohibited on Indian lands* by federal law." 25 U.S.C. § 2710(b)(1)(A) (emphasis added). Class II gaming is regulated by tribes, subject to approval and oversight by the NIGC. *See* 25 U.S.C. § 2710(b).

Class III gaming consists of all other forms of gaming, including roulette, slot machines, and "banking" card games such as blackjack and baccarat (in which players compete against the "house"). *See* 25 U.S.C. §§ 2703(7)(B)(ii), 2703(8). Class III gaming also covers "electronic or electromechanical facsimiles of any game of chance." 25 U.S.C. § 2703(7)(B)(ii). Class III gaming is permissible only if a tribe enters into a formal compact with the state in which it is located, and the compact is approved by the Secretary of the Interior. *See* 25 U.S.C. § 2710(d)(1).

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). In 2002, after notice-and-comment rulemaking, the NIGC issued a regulation listing "pull tab dispensers and/or readers" as examples of permissible "technologic aids" to Class II gaming. 25 C.F.R. § 502.7.

2. Respondent Santee Sioux Tribe of Nebraska (hereinafter "Santee Sioux" or "Tribe") is a federally recognized Indian tribe whose reservation is located in rural north-central Nebraska, where employment and economic opportunities are sparse. The Santee Sioux suffer from a 74% unemployment rate and a chronic lack of funding for essential governmental programs. *See*, Resp't App. 2a-3a.

Shortly after the enactment of IGRA, the Santee Sioux sought, in accordance with the purposes animating the passage of the statute, to develop a gaming operation in order to strengthen its tribal government and to provide its members with the rarest of commodities in rural north-central Nebraska: employment. The Tribe requested that the State of Nebraska negotiate a compact for Class III gaming activities, as Congress had authorized under IGRA. *See* 25 U.S.C. § 2710(d). While the Tribe made good faith efforts over the course of the next several years to negotiate such an agreement, the State steadfastly refused to enter into any gaming compact. This was

despite the fact that the State of Nebraska permits a wide array of non-Indian gambling activities.[1]

As authorized by IGRA, *see* 25 U.S.C. § 2710(d)(7), the Tribe sued the State in an effort to force it to engage in good faith negotiations. However, in the wake of this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Tribe's suit was dismissed based on the State's Eleventh Amendment immunity. *Santee Sioux Tribe of Nebraska v. State of Nebraska*, 121 F.3d 427 (8th Cir. 1997). The Secretary of the Interior subsequently enacted regulations designed to remedy the impasse between tribes and states where states refuse to compact for Class III gaming and raise their Eleventh Amendment immunity as a barrier to suit. *Class III Gaming Procedures*, 25 C.F.R. § 291.1, *et seq.* The Santee Sioux promptly applied for these Class III Gaming Procedures, but after nearly five years, the Secretary of the Interior has yet to issue a decision on the Tribe's application.

[1] Such activities include online and electronic lotteries, Neb. Rev. Stat. § 9-801, *et seq.*; lotteries through the sale of pull-tabs (including the use of pull-tab dispensing devices), Neb. Rev. Stat. §§ 9-301, *et seq.*; video keno, Neb. Rev. Stat. §§ 9-601, *et seq.* (including online video keno) with devices that display results on a video screen "in a slot-machine like fashion with the use of symbols (cherries, bars, etc.)", Pet. App. 13a-14a (quoting Neb. Op. Atty. Gen. No. 95074); pari-mutuel horserace wagering (including simulcast and telephonic wagering), Neb. Rev. Stat. §§ 2-1201, *et seq.*; and bingo, Neb. Rev. Stat. §§ 9-201, *et seq.*

Meanwhile, after the Santee Sioux's largest non-governmental employer closed its doors in early 1996, the Tribe sought to replace some of the lost jobs by opening a very small gaming facility that offered approximately 30 Class III gaming devices, and employed approximately 12 tribal members who had families to support. Because the Tribe lacked a gaming compact with the State, the Chairman of the NIGC issued an order directing the Tribe to close its gaming facility. The Department of Justice thereafter filed this suit against the Tribe to enforce the NIGC order and close the facility. While the district court dismissed the suit, *United States v. Santee Sioux Tribe*, No. 8:96-367 (D. Neb. July 10, 1996) (unpublished) the Court of Appeals ultimately reversed. *U.S. v. Santee Sioux Tribe of Nebraska*, 135 F.3d 558 (8th Cir. 1998), *cert. denied*, 525 U.S. 813 (1998). The Department subsequently obtained a district court order holding the Tribe in contempt for its alleged failure to comply, and seized and garnished bank accounts held by the Tribe and its individual members as a means of enforcing the order. *United States v. Santee Sioux Tribe of Nebraska*, 254 F.3d 728 (8th Cir. 2001).

The Tribe then requested a meeting with the NIGC to determine, in the face of the State's intransigence and the Interior Department's inaction, what options remained available to it to realize, at least in some small part, IGRA's promise. The meeting, which took place in February of 2001, included the Chairman of the NIGC and the United States Attorney for the District of Nebraska. Resp't App. 5a-6a. At the meeting, the NIGC Chairman encouraged the Santee Sioux to operate a pull-tab game using electronic dispensers known as "Lucky Tab II" dispensers. *Id.* The D.C. Circuit had by then squarely held that these dispensers were lawful technologic aids for Class II gaming,

and that Indian tribes could accordingly operate these dispensers without a tribal-state compact. *Diamond Game Enterprises, Inc. v. Reno*, 230 F.3d 365, 369-70 (D.C. Cir. 2000).[2]

The NIGC Chairman's advice to the Tribe was repeated in March 2001, when the NIGC's Acting Chief of Staff wrote a letter to the Tribe's legal counsel in which he stated as follows:

> *We encourage the Tribe to take advantage of the judicial sanction given to Lucky Tab II* or to seek out other machines that are identical to the Lucky Tab II in all material respects. We will be glad to work with you to identify available alternatives.

Pet. App. 28a; Resp't App. 7a-8a, (emphasis added). Acting on this written and oral advice from the NIGC, the Santee Sioux acquired Lucky Tab II pull-tab dispensers and began selling pull-tabs using the dispensers.

As described by the courts below, the Lucky Tab II "is merely a high-tech dispenser of pull-tabs." Pet. App. 9a. Pull-tabs are preprinted, two-layer paper cards. In their traditional form, a player peels back the top layer and uncovers symbols that indicate a winning or losing card. Pet. App. 4a. With the Lucky Tab II, a roll of paper pull-tabs is loaded into a dispenser by a tribal attendant. When a player inserts money into the dispenser, it simply

[2] The Department had argued in *Diamond Game Enterprises*, as it does here, that the Lucky Tab II is a prohibited "gambling device" under the Johnson Act. *See Diamond Game Enterprises, Inc. v. Reno*, 9 F.Supp.2d 13 (D.D.C. 1998).

scans the next pull-tab to be dispensed, dispenses the paper pull-tab to the player, then flashes an animated display depicting the contents of the pull-tab. *Id.* If a winning pull tab is dispensed, the player must still take it to a cashier for verification and to redeem any winnings. *Id.* The dispensers themselves do not disburse any cash, or accumulate credits for winning pull-tabs. Pet. App. 4a, 32a. And, unlike slot machines, the Lucky Tab II dispensers have nothing to do with determining winner or loser status – that comes simply from the pre-determined order of pull-tabs on the paper roll that is placed into the dispenser. Pet. App. 8a, 32a. "Lucky Tab II machines are not slot machines as apparently contemplated by 15 U.S.C. § 1171(a)(1) because they do not randomly generate patterns displayed on a screen, pay out money or otherwise determine the outcome of a game of chance." Pet. App. 8a.

After the Santee Sioux installed the pull-tab dispensers, the NIGC inspected the facility and dissolved the closure order that had been pending against the Tribe's gaming facility and that was the original basis for this lawsuit. Resp't App. 9a-11a. The NIGC predicated its action on its view "that the Lucky Tab II is not a class III gaming device." Pet. App. 21a. In June 2002, after an extensive notice-and-comment process, the NIGC embodied the legal basis for that view in formal regulations. *See* 25 C.F.R. 502.7(c); 67 Fed. Reg. 41166 (2002).

C. Proceedings Below

After receiving the NIGC's blessing for the installation of its Lucky Tab II machines, and after the NIGC dissolved its underlying closure order, the Santee Sioux moved the

district court for relief from its pending order holding the Tribe in contempt for operating Class III games without a tribal-state compact. Remarkably, the Department of Justice opposed the Tribe's motion. Contrary to (1) the NIGC's decision to dissolve the underlying closure order, (2) the express opinions and advice of the NIGC that had led the Santee Sioux to install the Lucky Tab II in the first place (and to the agency's subsequently promulgated regulations, which were published in final form while this case was pending on appeal), and (3) the decision of the D.C. Circuit in *Diamond Game Enterprises v. Reno*, 230 F.3d 365 (D.C. Cir. 2000), the Department argued that the Lucky Tab II dispensers were unlawful Class III gaming devices, and were further prohibited by the Johnson Act, 15 U.S.C. § 1171, *et seq.* The Department essentially claimed that the Tribe should be sanctioned for following the advice of the NIGC, the federal agency charged by Congress with regulating tribal gaming, and for adhering to the sole appellate court precedent on the issue. Pet. App. 19a.

The district court held an evidentiary hearing on the Tribe's motion for relief from contempt, and ruled in the Tribe's favor. Pet. App. 33a. The court first concluded that the proscriptions of the Johnson Act do not apply to technologic aids to Class II gaming under IGRA. Pet. App. 26a. After evaluating the extensive evidence presented to it regarding the nature of the Lucky Tab II dispenser, it then held that the dispenser is properly classified as a Class II aid, and granted the Tribe's motion for relief. Pet. App. 33a.

The Court of Appeals affirmed. Pet. App. 17a. Unlike the district court, and a number of other courts to have considered the issue, the court first held that the Johnson Act's proscription of "gambling devices" continues to apply

even to those technologic aids that fall with IGRA's definition of legal Class II gaming. That erroneous conclusion (which favored the government, and hence is not and could not be a subject of the petition), required the court to then pursue an avenue of inquiry that none of its sister courts have needed to undertake: whether the Lucky Tab II dispenser is a prohibited "gambling device" under the Johnson Act's definition of the term.

Although the court asked a different question, its answer returned it to the same place as its sister courts: an affirmation of the Tribe's right to use the Lucky Tab II. While the court stated that "the instruments look and sound very much like traditional slot machines," Pet. App. 3a, it went on to reject any notion that the Lucky Tab II dispensers in fact qualify as "slot machines" under the Johnson Act: "they do not randomly generate patterns displayed on a screen, pay out money or otherwise determine the outcome of a game of chance." Pet. App. 8a. The Department has not sought certiorari on that aspect of the Eighth Circuit decision.[3]

The court also rejected the government's argument that the Lucky Tab II dispensers satisfy the Johnson Act's alternative definition of a gambling device as a machine "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).

[3] The government nonetheless continues to assert before this Court that the Lucky Tab II "looks like a slot machine, sounds like a slot machine, *and plays like a slot machine*," Pet. at 10 (emphasis added). That claim cannot be squared with the conclusion of the Court of Appeals, which tracked the findings of the district court. Pet. App. 14a-15a.

That is the only holding challenged by the present petition.

The court found this definition inapposite to the Lucky Tab II dispensers, as they do not apply an element of chance in their operation, but simply dispense pull-tabs in a pre-determined order – there being no question that, under IGRA, the Tribe is able to sell pull-tabs legally in a State like Nebraska (which, indeed, sells pull-tabs itself):

> As the trial testimony indicates, these machines do not generate random patterns with an element of chance. They simply distribute the pull-tab tickets and display the contents of the tickets on a screen for the user. The user of the machine does not become entitled to receive money or property as a result of the machine's application of an element of chance, which is what the statute clearly contemplates . . . The Johnson Act does not bar this type of machine, because it is merely a high-tech dispenser of pull-tabs . . . [The machines] dispense, in identical order from the roll as physically placed in the machine, pull-tabs from that roll. The machines, as noted, have a cutting device which separate the tabs from the roll, and then feed the pull-tab to the player. This action does not describe the "application of the element of chance."

Pet. App. 9a.

Finally, the court affirmed the district court's conclusion that the Lucky Tab II dispensers qualify as Class II gaming aids that the Tribe may properly operate under IGRA. Pet. App. 17a. The Department's petition does not challenge that conclusion (Pet. at 19 n.3), which accords with the NIGC's regulations, and the decisions of the D.C. Circuit in *Diamond Game Enterprises,* and the Tenth

Circuit in *Seneca-Cayuga v NIGC*, 327 F.3d 1019 (10th Cir. 2003), petition for cert. pending, No. 03-740.

REASONS FOR DENYING THE PETITION

A. The Petition Seeks Nothing More than Error Correction On An Issue Where the Holding Below Was Demonstrably Correct.

The Department of Justice raises only one question in its petition:

> 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 question presented in this case is whether the Lucky Tab II machine is excluded from that definition because 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.

Pet. at (i).

To state the question is also to answer why it does not satisfy this Court's criteria for issuance of the writ. The Department of Justice simply seeks correction of what it claims to be the Court of Appeals' error in applying the Johnson Act's definition of a "gambling device" to the Lucky Tab II dispenser. The Department devotes the bulk of its argument to quarrelling with the Court of Appeals'

conclusion that, because the dispenser at issue does not itself apply an element of chance, it does not qualify as a gambling device under § 1171(a)(2) of the Johnson Act. *See* Pet. at 10-16. However, as the Solicitor General well knows, such a naked claim of error is not the stuff of certiorari.

Moreover, the Department's argument does not withstand scrutiny. While this is not the place for a full argument on the merits, even a brief discussion serves to underscore the flaws in the Department's position. Section 1171(a)(2) extends to those machines "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). The Department would read the italicized language out of the statute. It claims that because an element of chance is involved in the game of pull-tabs, section 1171(a)(2) necessarily sweeps in any mechanical aid associated with that game. However, the emphasized language makes it clear that, in order for the definition to pertain, there must exist the application of an element of chance, and the only statutory referent that can potentially serve to effectuate such an application is a "device" or "machine." Hence, as the Court of Appeals correctly held, the sensible reading of the statute is that a machine must apply an element of chance in order for the Johnson Act definition to come into play.

The Department's contrary argument not only does violence to the language of section 1171(a)(2), but also would eviscerate IGRA's express authorization of "technologic aids" in connection with Class II gaming, 25 U.S.C. § 2703(7)(A)(i). All Class II gaming, of course, involves an element of chance, and thus all technologic aids to such

gaming (including the communications devices that the government claims, without explanation, are immune from its sweeping approach) enable individuals to receive money or property as the result of such chance. If this were all that were required, the technologic aid provisions of IGRA would be a dead letter, and so too would be Congress's clear intent that Class II gaming not be "restrict[ed] to existing game sizes, levels or participation, or current technology," but that tribes instead "be given the opportunity to take advantage of modern methods of conducting Class II games." Sen. Rep. No. 100-446, reprinted in 1988 U.S.C.C.A.N. 3071, at 3075 (Aug. 3, 1988).

The weakness of the Department's position is further underscored by the fact that the NIGC, the agency expressly charged by Congress to administer IGRA's provisions and oversee gaming in Indian country, does not share in it. As discussed above, the Santee Sioux first installed the Lucky Tab II dispensers at the urging of the NIGC, and the NIGC has since promulgated regulations (pursuant to notice and comment rulemaking) sanctioning the use by tribes of the Lucky Tab II as a Class II technological aid in Indian country. It is impossible for the Solicitor General to maintain a strong claim of error in the face of the expert agency's views to the contrary, and the fact that the government cannot present a unified position to the Court itself constitutes a compelling reason to deny the petition.

This case indeed began as the result of a closure order issued by the NIGC. Since the time of that order, the NIGC, in response to decisions from the Courts of Appeals, has made clear its view that Indian tribes may legally operate pull-tab dispensers in states, like Nebraska, that

allow for Class II gaming. *See* 25 C.F.R. § 502.7(c) (specifically including such machines within the definition of permissible technologic aids to Class II gaming); 67 Fed. Reg. 41166 (2002) (adopting new regulations, and explaining background and reasoning, including extensive public comment process and consultation with the Department of Justice).[4] The Santee Sioux, in turn, has transformed its gaming operation into one that relies on the pull-tab dispensers expressly approved – indeed specifically suggested – by the NIGC, which has led the NIGC to dissolve its closure order. In other words, the Tribe and the agency charged with the regulation of gaming in Indian country have arrived at a sensible consensus concerning the Tribe's gaming operations. The lower courts appropriately ratified that achievement by lifting the harsh sanctions that had been imposed on the Tribe and its officers during the earlier phases of these proceedings. There exists no warrant for intervention by this Court.

B. The Court of Appeals' Application of the Johnson Act Did Not Create A Conflict in Authority.

In an effort to salvage the Department's position, the Solicitor General tacks on to the end of the petition an argument that the Court of Appeals' application of the Johnson Act to the Lucky Tab II conflicts with a 30-year old, per curiam opinion of the Ninth Circuit concerning an entirely different type of machine. *See United States v.*

[4] In appropriating funds for the NIGC in 2003, Congress specifically adverted to these regulations, and "directed" the Commission to "consult with tribal governments" concerning them. H.R. Conf. ep. 108-10, 143 Cong. Red. H707, H1062 (daily ed. Feb. 12, 2003).

Wilson, 475 F.2d 108 (CA9 1973). But even a cursory review of the *Wilson* decision undermines any suggestion of a conflict in authority.

Wilson addressed a device known as the "Bonanza" machine. When individuals placed 25 cents into the machine, they were able to purchase a coupon, the value of which was already visible to them through a viewing window in the machine. They would also get the chance to view the next coupon, which they could then purchase 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.

Neither the majority nor the dissent in *Wilson* remotely addressed the conclusion reached by the Court of Appeals here: that a technologic aid like the Lucky Tab II that does not, by itself, supply an element of chance, but simply reads and dispenses *otherwise lawful* pull-tabs in a predetermined fashion, is not a gambling device under the Johnson Act (nor did the district court decision in that case, *see* 355 F.Supp. 1394 (D. Mont. 1971)). This may have been because the *Wilson* court proceeded on a premise that does not exist in this case: that any sale of chances to win a prize constituted illegal gambling. Unlike in *Wilson*, it is undisputed here that the sale of pull-tabs by the Tribe is a lawful activity in Nebraska, where the State itself sells such chances. Neb. Rev. Stat. §§ 9-301, *et seq.* Moreover, *Wilson* did not involve Indian country, and was decided

fourteen years before the enactment of IGRA. Under these circumstances, the Department's suggested conflict is entirely illusory.

More recent case law in the Ninth Circuit further undercuts the Department's allegation of a certworthy conflict. The Department's bald assertion that "in the Ninth Circuit . . . the Johnson Act would apply to a machine, such as . . . Lucky Tab II," Pet. at 17-18, simply ignores that court's decision in *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000). There, the Ninth Circuit held that the prohibitions of the Johnson Act do not apply at all to Class II aids under IGRA. *Id.* at 1102. The Lucky Tab II and other Class II aids are therefore no more illegal in the Ninth Circuit than they are in the Eighth Circuit. Once again, then, the Department's allegation of a conflict does not withstand scrutiny.

C. The Department's Inflated Claims of Importance Do Not Warrant Issuance of the Writ.

As its final ground for granting the petition, the Department of Justice claims 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. However, the Department's rote arguments about the potential effects of the decision below are purely speculative, and ignore the reality on the ground. As discussed above, the Court of Appeals' decision was hardly pathbreaking in its result. Over three years ago, the District of Columbia Court of Appeals rejected the Department's claim that Lucky Tab II dispensers are prohibited by the

Johnson Act, *see Diamond Game Enterprises v. Reno*, 230 F.3d 365 (D.C. Cir. 2000). Yet the Department has not cited to a single instance where that decision, let alone the decision below, has been applied outside of Indian Country, or where it has led to detrimental effects within Indian country.

At bottom, the decisions below and in *Diamond Game Enterprises* simply allow tribes that can already sell pull-tabs legally to do so with the aid of electronic dispensers, as the NIGC has specifically encouraged them to do. Nothing about that result remotely justifies review by this Court in the absence of any material conflict of authority in the lower courts.

D. The Existence of the Petition in No. 03-762 Should Not Affect the Disposition of the Petition In This Matter.

In No. 03-762, the Department has sought review of the Tenth Circuit's recent decision in *Seneca-Cayuga Tribe of Oklahoma v. NIGC*, 327 F.3d 1019 (10th Cir. 2003), that IGRA and the Johnson Act must be read together so as to preclude any interpretation of the latter that would forbid the use of the Class II technologic aids that IGRA expressly permits. For the reasons discussed in the Brief in Opposition in that case, that issue is not certworthy. Moreover, and of specific relevance here, that issue is not presented by the instant petition (the Department having prevailed on it below), and its existence should not have any effect on the disposition of the instant petition. For even if the Court were to grant certiorari on that question in *Seneca-Cayuga* and ultimately reverse, there would be no impact on the result below. There accordingly exists no warrant for holding this petition pending the outcome in *Seneca-Cayuga*.

In what is perhaps an attempt to bring the two cases closer together in this Court's view, the Department has also raised as a second question in *Seneca-Cayuga* the question presented for review here. But that question is no more certworthy in the context of *Seneca-Cayuga* than it is here. In fact, it is less so, as the Tenth Circuit had no occasion to pass on the issue. Hence, even if this Court were inclined to grant the petition on the Department's first question in *Seneca-Cayuga*, it should deny on the second and likewise deny the petition here.

CONCLUSION

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

Respectfully submitted this 26 day of January, 2004.

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Ref. No. CO-96-01

DECISION OF THE CHAIRMAN
ON EXPEDITED REVIEW

On April 25, 1996, the National Indian Gaming Commission (Commission) issued a Notice of Violation and an Order of Temporary Closure to the Santee Sioux of Niobrara, Nebraska (hereafter referred to as the "Respondent" or the "Tribe"). The Notice of Violation alleged that the Respondent had violated the Indian Gaming Regulatory Act and the regulations of the Commission by offering Class III video games in its casino. There is no compact between the Tribe and the State of Nebraska which authorizes the playing of such video games. The Temporary Closure Order directed the Respondent to cease all Class III gaming activities in its casino by 12 o'clock, noon, on May 1, 1996.

Following the issuance of these documents, the Respondent requested, both orally and in writing an informal, expedited review of this matter pursuant to Section 573.6(c) of the Commission's regulations. Such a review was conducted in the Commission's offices on Wednesday, May 1, 1996. The Respondent was represented by its Chairman and Vice-Chairman, numerous members of its tribal council, the manager of its casino and attorneys from the law firm of Peebles and Evans. At the review the Respondent presented a number of arguments and submitted a substantial number of documents in support of its request to rescind the closure order. At