In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

SANTEE SIOUX TRIBE OF NEBRASKA,
A FEDERALLY RECOGNIZED INDIAN TRIBE

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

PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

The Johnson Act, 15 U.S.C. 1171 *et seq.*, prohibits, among other things, the possession or use of "any gambling device" within Indian country. The Johnson Act defines a gambling device to include "any * * * machine or mechanical device" that is "designed and manufactured primarily for use in connection with gambling, and * * * by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property." 15 U.S.C. 1171(a)(2).

The 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.

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The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 324 F.3d 607. The opinion of the district court (App., *infra*, 18a-33a) is reported at 174 F. Supp. 2d 1001.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2003. A petition for rehearing was denied on June 25, 2003 (App., *infra*, 34a). On September 15, 2003, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including October 23, 2003, and, on October 13, 2003, Justice

Thomas extended that time to and including November 22, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Titles 15 and 25 of the United States Code are reproduced at App., *infra*, 35a-41a.

STATEMENT

This is one of two cases recently decided by the courts of appeals that concern the relationship between the Johnson Act, 15 U.S.C. 1171 *et seq.*, which prohibits the use of "any gambling device" in Indian country, and the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, which authorizes the use of gambling devices in Indian country in accordance with a tribal-state compact approved by the Secretary of the Interior. In this case, the Eighth Circuit held, in conflict with the Tenth Circuit in *Seneca-Cayuga Tribe of Oklahoma* v. *National Indian Gaming Commission*, 327 F.3d 1019 (2003), that IGRA does not provide Tribes with any exemption from the Johnson Act when they use gambling devices in the absence of an approved tribal-state compact. The Eighth Circuit then held, in conflict with the Ninth Circuit in *United States* v. *Wilson*, 475 F.2d 108 (1973), that the machine at issue in this case does not satisfy the Johnson Act's definition of gambling device. That holding has significant ramifications for federal regulation of gambling devices inside and outside Indian country. The government is also filing a certiorari petition in *Seneca-Cayuga Tribe*, presenting the question on which the Eighth and Tenth Circuits are in conflict.

1. a. The Johnson Act prohibits, among other things, the manufacture, sale, transportation, possession, or

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

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

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

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

honestly by both the operator and players," 25 U.S.C. 2702(2).

IGRA establishes three classes of Indian gaming, each of which is subject to a distinct regulatory regime. *Class I* gaming consists of social games played solely for prizes of minimal value and traditional forms of Indian gaming. Tribes have exclusive jurisdiction to regulate such games. See 25 U.S.C. 2703(6), 2710(a)(1).

Class II consists, as relevant here, of "the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) * * * including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo." 25 U.S.C. 2703(7)(A)(i)(I). Class II excludes "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. 2703(7)(B)(ii). Class II gaming is permissible "within a State that permits such gaming for any purpose by any person, organization or entity," provided that "such gaming is not otherwise specifically prohibited on Indian lands by Federal law." 25 U.S.C. 2710(b)(1)(A). Class II gaming is subject to regulation by the National Indian Gaming Commission (NIGC), see 25 U.S.C. 2706, as well as by Tribes themselves.

Class III is defined as "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. 2703(8). Such gaming is permissible only if it occurs in a State that permits it, is conducted in conformance with a tribal-state compact approved by the Secretary of the Interior, and is authorized by a tribal ordinance approved by the Chairman of the NIGC. 25 U.S.C. 2710(d). IGRA contains an express exception from the Johnson Act for gambling devices used in Class III gaming. IGRA states that "[t]he provisions of section

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

2. Beginning in early 1993, respondent Santee Sioux Tribe of Nebraska attempted unsuccessfully to negotiate a Class III gaming compact with the State of Nebraska. In early 1996, notwithstanding the absence of any such compact, the Tribe opened a Class III gaming casino on its reservation. The casino offered video slot machines, video poker machines, and video blackjack machines. App., *infra*, 2a, 19a; Gov't C.A. Br. 3.

The NIGC ordered the Tribe to close the casino, because it was engaging in Class III gaming in violation of IGRA's requirement of a tribal-state compact. The Tribe refused to comply with the closure order. App., *infra*, 2a, 19a; Gov't C.A. Br. 3.

In response, the United States filed this suit against the Tribe to enforce the closure order. Although the district court dismissed the suit, the court of appeals reversed, holding that the Tribe was operating the casino in violation of IGRA and state law and that injunctive relief was warranted. App., *infra*, 2a, 20a; *United States* v. *Santee Sioux Tribe of Nebraska*, 135 F.3d 558 (8th Cir. 1998).

The Tribe continued to operate the casino. The district court issued an order enjoining the Tribe from doing so and imposed fines for contempt of the order. Although the district court ruled that tribal officials could not be held individually liable for the contempt fines, the court of appeals reversed that ruling. App.,

infra, 2a-3a, 20a; *United States* v. *Santee Sioux Tribe of Nebraska*, 254 F.3d 728 (8th Cir. 2001).

In May 2001, the Tribe removed the existing Class III gambling devices from its casino and replaced them with Lucky Tab II devices. The Tribe was encouraged to take such action by the NIGC's Acting Chief of Staff, who took the position that Lucky Tab II is a "technologic aid" to the game of pull-tabs, and thus is a Class II device that the Tribe could use without entering into a compact with the State. After the Lucky Tab II machines were installed, the NIGC dissolved its closure order. App., *infra*, 3a, 21a, 28a.

The Lucky Tab II machine has been designed to look, sound, and play much like a video slot machine. App., *infra*, 3a (observing that Lucky Tab II machines "look and sound very much like traditional slot machines"). Lucky Tab II, like a slot machine, is housed in an illuminated cabinet. The player deposits money into the machine, presses a button to activate the machine, and views a video display and hears a sound indicating whether or not he has won. As the Tenth Circuit observed with respect to the similar Magical Irish machine, playing such devices "can be a high-stakes, high-speed affair," as a player can complete a game "every seven seconds." *Seneca-Cayuga Tribe*, 327 F.3d at 1025.

Lucky Tab II differs in its design to some extent from the typical slot machine or other gambling device. Whether the player of Lucky Tab II wins or loses is determined by the sequence of bar codes on a preprinted paper roll of pull-tabs that is inserted into the machine. (Similar paper rolls have been used to supply pull-tabs to be purchased by persons playing the traditional game of paper pull-tabs without a machine.) When the player presses a button, a machine reads the

bar code on the next pull tab on the roll, which triggers the video display and accompanying sound, and then dispenses the pull-tab to the player. The video screen depicts a grid that is similar in appearance to that of a slot machine. If the screen indicates that the pull-tab is a winner, the player may obtain money for the winning pull-tab only by presenting it to a cashier at the casino. In addition to relying on the video screen, the player is free to open the pull-tab manually to see whether it is a winner. See App., *infra*, 3a-4a.

3. The Tribe moved the district court for relief from its earlier contempt orders based upon the Tribe's replacement of its video poker, video blackjack, and video slot machines with Lucky Tab II machines. The United States countered that the Tribe was not entitled to relief, because Lucky Tab II could not lawfully be used at its casino for either of two reasons: first, Lucky Tab II is a gambling device prohibited in Indian country by the Johnson Act, and, second, Lucky Tab II is a Class III device under IGRA that cannot be operated without a tribal-state compact.

The district court, after an evidentiary hearing, granted the Tribe's motion. App., *infra*, 18a-33a. The court held that "the Johnson Act is not applicable to Class II devices" as defined in IGRA. App., *infra*, 26a. The court then held that Lucky Tab II "is a technological aid to the game of pull-tabs, and thus is a Class II device." *Id.* at 32a. The court relied on findings that, *inter alia*, the machine, as distinguished from the pull-tab roll inserted into the machine, does not determine winners and losers, the machine does not dispense money, the machine "adds to the entertainment value" of pull-tabs, and the machine is "not an exact replica of pull-tabs." *Ibid.*

4. The court of appeals affirmed. App., *infra*, 1a-17a.

At the outset, the court of appeals held, contrary to the district court, that IGRA does not provide an implied exemption from the Johnson Act for gambling devices that are used by Tribes as technologic aids to Class II gaming. App., *infra*, 6a-8a. The court of appeals explained that IGRA, by confining Class II gaming to "gaming [that] is not otherwise specifically prohibited on Indian lands by Federal law," 25 U.S.C. 2710(b)(1)(A), "clearly states that class II devices may be regulated by another federal statute—obviously the Johnson Act." App., *infra*, 7a. Accordingly, the court held that, in order for a device to be used by a Tribe in Indian country in the absence of a tribal-state compact, the device *both* must not be a "gambling device" under the Johnson Act *and* must be a "technologic aid" under IGRA. *Id.* at 7a-8a.

With respect to the Johnson Act, the court of appeals did not dispute that Lucky Tab II is "manufactured primarily for use in connection with gambling," which is one of the elements for classification as a gambling device under Section 1171(a)(2). The court held, however, that Lucky Tab II does not meet the other requirements for classification as a gambling device under either clause (A) or clause (B) of Section 1171(a)(2). The court reasoned that Lucky Tab II is not a device "which when operated may deliver, as the result of the application of an element of chance, any money or property," 15 U.S.C. 1171(a)(2)(A), because "the machines do not deliver any money or property," but instead deliver a paper pull-tab that can be redeemed for money. App., *infra*, 8a. The court also reasoned that Lucky Tab II is not a device "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), because

"[t]he 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." App., *infra*, 9a. Instead, the court reasoned that whether a player wins or loses is determined by the sequence of paper pull-tabs on the pre-printed roll inserted into the Lucky Tab II machine. *Ibid.* The court acknowledged that, "[i]f, however, the Lucky Tab II machines were computer-generated versions of the game of pull-tabs itself, or perhaps, even if it randomly chose which pull-tabs from the roll it would dispense, it could fall within" the Johnson Act. *Ibid.*

With respect to IGRA, the court of appeals held that Lucky Tab II is a permissible "technologic aid" to the game of pull-tabs, and not a prohibited "electronic or electrotechnical facsimile[]" of that game. App., *infra*, 10a-17a. The court reasoned that "the machines do not replicate pull-tabs; rather, the player using the machine *is playing* pull-tabs." *Id.* at 15a. The court also noted that the NIGC had recently promulgated a regulation that defined permissible Class II technologic aids to include "pull tab dispensers and/or readers." 25 C.F.R. 502.7(c). The court viewed the regulation as "suggesting that the NIGC has now given its imprimatur to these types of machines." App., *infra*, 16a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that the Lucky Tab II machine, although indisputably "designed and manufactured primarily for use in connection with gambling," 15 U.S.C. 1171(a)(2), is not a "gambling device" within the meaning of the Johnson Act. The court of appeals was mistaken. The Johnson Act defines the term "gambling device" in the most expansive terms possible, precisely to prevent ingenious manufacturers from slipping their

devices through some linguistic loophole. Nothing in the Johnson Act provides any basis for excluding a device such as Lucky Tab II that looks like a slot machine, sounds like a slot machine, and plays like a slot machine—simply because whether players of the device win or lose is determined not by its permanent mechanical components operating in isolation, but through a paper roll printed with bar codes that are read by the device. The Ninth Circuit, contrary to the Eighth Circuit here, has held that the Johnson Act applies to similar devices. The Eighth Circuit's decision opens the door to circumvention of the Johnson Act's prohibitions on gambling devices, not only in Indian country, but in the other places in which the Act applies, such as federal enclaves and possessions. It also impairs the United States' ability under the Johnson Act to prosecute the shipment of gambling devices into States that prohibit them, and thereby to assist the States in their own gambling regulation.

I. THE JOHNSON ACT'S DEFINITION OF "GAMBLING DEVICE" DOES NOT TURN ON ARBITRARY DISTINCTIONS ABOUT WHETHER OR NOT WINNERS ARE DETERMINED BY THE MECHANICAL OPERATIONS OF THE DEVICE

The court of appeals held that Lucky Tab II does not satisfy the Johnson Act's definition of a "gambling device," reasoning that a player "does not become entitled to receive money or property as a result of the *machine's* application of an element of chance." App., *infra*, 9a. The court considered it dispositive that winners and losers are determined by the sequence of pull-tabs on the preprinted paper roll inserted into the machine. *Ibid.* The court acknowledged that, if winners and losers were instead determined by a computer

inside the Lucky Tab II, an otherwise identical machine could qualify as a Johnson Act gambling device. *Ibid.* Contrary to the court of appeals' view, the reach of the Johnson Act does not turn on arbitrary distinctions as to whether winners and losers are determined by a fixed component of a device alone or instead through the operation of its fixed components with a removable component such as the paper roll here.

A. Lucky Tab II Satisfies The Statutory Requirements For Classification As A Gambling Device

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

> any * * * machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and * * * (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.

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

The Lucky Tab II machine falls squarely within that definition. Lucky Tab II is "designed and manufactured primarily for use in connection with gambling," and the court of appeals did not suggest otherwise. A player becomes "entitled to receive * * * money or property" when the machine dispenses a winning pull-tab, which the player can then redeem for money. Whether the machine dispenses a winning pull-tab to a given player turns on various "element[s] of chance," including the number and order of winning and losing pull-tabs on the paper roll within the machine, the number of times previous players have played the machine, and the number of times the current player chooses to play. Indeed, it is these characteristics that

render the machine a gambling device from the player's perspective, as well as from the casino operator's perspective.

Section 1171(a)(2)(B) does not require that the "element of chance" be "appli[ed]" in any particular manner to determine whether a player wins or loses. It thus does not require, as the court of appeals perceived, that winners and losers be selected "as a result of the *machine's* application of an element of chance." App., *infra*, 9a. In particular, Section 1171(a)(2)(B) does not require that winners and losers be determined through the operation of a permanent component of the device (such as a computer) standing alone, rather than in conjunction with a removable component (such as a roll of paper pull-tabs).

Perhaps, if the phrase "as the result of the application of an element of chance" were rewritten and relocated so as to modify "machine" or "operation of [the machine]," Section 1171(a)(2)(B) might be understood as requiring the machine itself or its operation to apply the element of chance. Even then, however, the definition would be satisfied, because once the pull-tab roll is inserted into the Lucky Tab II machine, it is integral to both the machine and its operation. See App., *infra*, 5a ("Without a roll of paper pull-tabs in place, the [Lucky Tab II] machine cannot function—it will not accept money or display any symbols."). But whatever the proper interpretation of that hypothetical statute, the phrase "as the result of the application of an element of chance" in Section 1171(a)(2)(B), as written, modifies the phrase "may become entitled to receive," the clause that it immediately follows, not "machine" or "operation of [the machine]." See *Barnhart* v. *Thomas*, No. 02-763, slip op. 6-7 (Nov. 12, 2003) (discussing the rule of the last antecedent). As explained above, there is no question that there is an "element of chance" in whether a player of Lucky Tab II "become[s] entitled" to receive money.

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

B. Construing The Johnson Act, Consistent With Its Broad Definition, To Encompass Devices Such as Lucky Tab II Advances The Act's Purposes

When Congress amended the Johnson Act in 1962 to add the definition of gambling device at issue here, Congress intended to reach *all* machines designed and manufactured for use in gambling that enabled players to win money or property through an element of chance, without drawing fine distinctions about how those devices operate.

As explained in the House Report, eleven years of experience under the Johnson Act had demonstrated the inadequacy of the existing gambling device definition, which was confined to traditional slot machines, "an essential part of which is a drum or reel," and to machines that "operate by means of insertion of a coin, token, or similar object." H.R. Rep. No. 1828, 87th Cong., 2d Sess. 5-6 (1962). The Committee noted that "[n]ew gambling machines have been developed which are controlled by syndicated crime, but which are not subject to the provisions of the Johnson Act because

they are not coin-operated, do not pay off directly or indirectly, and do not have a drum or reel as in the conventional slot machine." *Id.* at 6. In particular, the Committee noted the introduction of a species of pinball machine, not covered by the existing definition, that enabled a player to earn numerous free games that could be redeemed for money. *Ibid.*

Attorney General Kennedy, in congressional testimony in support of the 1962 amendment to the Johnson Act, also emphasized the need for a comprehensive definition of gambling device that manufacturers could not circumvent:

> If you specify according to how they are operating now, they will, in my judgment, within a year think of new ways to operate which would not be covered by the [Johnson Act]. I think the provision against machines made primarily for use in connection with gambling, with the burden of proof on the Government, will allow us to cover not only pinball machines, primarily used for gambling, but also to cover different kinds of machines that might be devised later.

Hearings on H.R. 3024, H.R. 8410 and S. 1658 Before the House Comm. on Interstate and Foreign Commerce, 87th Cong., 2d Sess. 22 (1962).

In response to such concerns, the House Report explained that the 1962 legislation would "broaden[] the definition of the term 'gambling device'" to reach pinball machines and other machines designed for gambling that "when operated may deliver as a result of the application of the element of chance any money or property, either directly or indirectly." H.R. Rep. No. 1828, *supra*, at 7. As the D.C. Circuit contemporaneously observed, therefore, Section 1171(a)(2)'s expansive definition of gambling device "proceeded from a conscious purpose on the part of Congress to anticipate the ingeniousness of gambling machine designers." *Lion Mfg. Corp.* v. *Kennedy*, 330 F.2d 833, 837 (D.C. Cir. 1964).

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

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

satisfy the definition of a gambling device under Section 1171(a)(2)(B).[1]

II. THE NINTH CIRCUIT HAS HELD, CONTRARY TO THE EIGHTH CIRCUIT HERE, THAT THE JOHNSON ACT APPLIES TO DEVICES SIMILAR TO LUCKY TAB II

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

The "Bonanza" machine in *Wilson*, much like the Lucky Tab II machine, incorporated into its design a removable roll of paper coupons of varying values. Before inserting a coin into the machine, the player could view the next coupon to be dispensed. After that

[1] The Eighth Circuit also stated that Lucky Tab II could not qualify as a gambling device under Section 1171(a)(2)(A) because the device itself does not dispense money or property directly to a winning player. See App., *infra*, 8a; 15 U.S.C. 1171(a)(2)(A) (defining gambling device as, *inter alia*, a machine that "when operated may deliver, as the result of the application of an element of chance, any money or property"). The Eighth Circuit was mistaken, because a winning pull-tab, when dispensed by a Lucky Tab II machine, constitutes property. In any event, Section 1171(a)(2)(B), the provision discussed in the text, requires only that a winning player become "entitled to receive" money or property, not that the machine itself deliver that money or property. See H.R. Rep. No. 1828, *supra*, at 6 (observing that the expanded definition of gambling device in 15 U.S.C. 1171(a)(2) applies to devices that "deliver * * * any money or property, either directly or indirectly").

coupon was dispensed, the next coupon was exposed, and the player could decide whether to insert another coin. A player could redeem a winning coupon at the establishment where the machine was located. See 355 F. Supp. at 1396.

The question on appeal was whether a winning player of the Bonanza machine became entitled to money or property through the operation of an "element of chance" even though he could see the coupon that would be dispensed to him. The Ninth Circuit answered that question in the affirmative. The court explained that "most players put their first 25 cents in the 'Bonanza' machine because of the 'element of chance' that the next coupon, thus exposed, would entitle them, for another 25 cents, to a guaranteed payment of 50 cents to $31.00." 475 F.2d at 109. It is thus evident in the Ninth Circuit's holding that the "element of chance" in the playing of the Bonanza machine could arise in significant part from the order of coupons on the paper roll.[2]

In the Ninth Circuit, therefore, the Johnson Act would apply to a machine, such as Bonanza or Lucky

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

Tab II, that enables a player to gamble on whether the next item (*e.g.*, coupon, ticket, or pull-tab) that a machine dispenses from a preprinted paper roll will be a winner. In the Eighth Circuit, the Johnson Act would not apply to such a machine. That disagreement warrants this Court's resolution.

III. THE QUESTION WHETHER THE JOHNSON ACT CAN BE CIRCUMVENTED BY DEVICES SUCH AS LUCKY TAB II IS IMPORTANT BOTH INSIDE AND OUTSIDE INDIAN COUNTRY

The question whether machines such as Lucky Tab II satisfy the Johnson Act's definition of "any gambling device" has important ramifications outside as well as inside Indian country. As noted above, the Johnson Act prohibits the manufacture, sale, transportation, possession, or use of gambling devices not only within Indian country, but also within the District of Columbia, federal enclaves, and federal possessions. See 15 U.S.C. 1175(a). It also prohibits the interstate shipment of gambling devices to and from places in which they are prohibited under local law. See 15 U.S.C. 1172(a).

If, therefore, the Johnson Act were understood not to apply to devices such as Lucky Tab II, such devices could be introduced not only into additional areas of Indian country, but also into the other areas of federal jurisdiction identified in Section 1175(a). Moreover, although the possession or use of such devices might be prohibited under a State's own laws, the United States would be unable to prosecute the shipment of the devices into the State under Section 1172(a). As a result, the important role that Congress intended for the Johnson Act in reinforcing state prohibitions of gambling devices would be thwarted. See H.R. Rep. No. 1828, *supra*, at 6 (noting the Johnson Act's purpose of

"assist[ing] the States to enforce their laws and to combat organized crime").

The ramifications of the technical and narrow definition of a Johnson Act gambling device applied by the Eighth Circuit would not necessarily be confined to devices similar in design to Lucky Tab II. If, as the Eighth Circuit's reasoning suggests, a gambling device must deliver the element of chance through the operation of an internal electronic or mechanical component, "the ingeniousness of gambling machine designers," *Lion Mfg. Corp.*, 330 F.2d at 837, could be expected to produce an array of devices that deliver the element of chance through other means. Plainly, then, the court of appeals' holding that the Johnson Act does not apply to devices such as Lucky Tab II threatens to undermine the effectiveness of the Johnson Act both inside and outside Indian country.[3]

[3] For the reasons stated in the government's certiorari petition in *Seneca-Cayuga Tribe* (at 21-22 n.7), there is no occasion in this case to decide whether the Lucky Tab II device could qualify as a "technologic aid" within IGRA's definition of Class II gaming in 25 U.S.C. 2703(7)(A) standing alone, because the use of that device is, in any event, prohibited by the Johnson Act.

CONCLUSION

The petition for a writ of certiorari should be granted and the case should be consolidated for argument with *Ashcroft* v. *Seneca-Cayuga Tribe of Oklahoma*, in which the government is also filing a petition for certiorari.

Respectfully submitted.

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