No. 15-114

In the Supreme Court of the United States

STATE OF WISCONSIN,
Petitioner,

v.

HO-CHUNK NATION,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Seventh Circuit erred when it ruled that Wisconsin does not explicitly prohibit poker from being played in the State and, accordingly, the Ho-Chunk Nation ("Nation") is entitled to offer electronic poker ("e-Poker") to be played at its Ho-Chunk Gaming Madison ("HCG Madison") casino in Madison, Wisconsin, as Class II gaming under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* ("IGRA").

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Introduction

The case before the Seventh Circuit Court of Appeals required the court to construe several IGRA sections together and apply them to Wisconsin law. Class II gaming is defined in two interrelated sections of IGRA, Sections 2703(7)(A)(ii)(II) and 2710(a)(1)(B). These sections, taken together, allow the Nation to play poker as a Class II game if non-banked "card games" "are not explicitly prohibited" by state law and the State "permits such gaming for any purpose by any person, organization or entity." Also, IGRA § 2701(5) provides that a state can regulate gaming on Indian land only if both its criminal laws and its general public policy prohibit gaming on state land. In construing these IGRA sections, the Seventh Circuit concluded that the statutory context as a whole is ambiguous. It therefore looked to this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (*"Cabazon")* for guidance as virtually every federal court called upon to interpret IGRA has done. It also turned to the legislative history of IGRA for the context in which the drafters of IGRA were putting the IGRA statutory language sections together, as federal courts have likewise done when construing IGRA. Finally, it relied on well established, and correctly stated, Indian law canons of statutory construction to resolve any ambiguities in IGRA in favor of the Nation. Nothing in the Seventh Circuit's reasoning or holding is in conflict with any decision by this Court or other federal courts that have interpreted IGRA in reliance on the *Cabazon* test and its legislative history. In short, this was a mine-run statutory

construction case before the Seventh Circuit and presented no broad national interest issue warranting this Court's attention. Even if the Seventh Circuit had misapplied correctly stated and well recognized legal principles to the exclusively Wisconsin specific facts and law, which is not the case, such errors arising out of an individual case would not warrant this Court's review. Sup.Ct.R. 10.

Statement Of The Case

A. *Cabazon* and IGRA Background.

Cabazon is "the seminal Indian gaming case that ultimately led to the passage of IGRA." *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1254 (9th Cir. 1994), *as amended on denial of reh'g* 99 F.3d 321 (9th Cir. 1996). In *Cabazon*, the state of California prohibited the play of bingo other than as a charitable event and Riverside County prohibited poker. *Cabazon,* 480 at 205-06. California and Riverside County sought to prohibit the play of bingo and poker on the Tribe's land as a violation of the state law prohibiting non-charitable bingo and the Riverside County ordinance explicitly prohibiting poker. *Cabazon*, 480 U.S. at 210-11. This Court concluded that whether gaming may be conducted by an Indian tribe turns on whether the state's general policy towards gambling is regulatory or prohibitory. *Id.* The Court then found that, because California law allowed several types of gaming to take place, such as the California lottery, charity bingo and pari-mutuel horse race betting, it regulated rather than prohibited gaming. *Id.* at 210-11. Accordingly, the Court ruled that the Tribe was allowed to offer both bingo and poker on its land despite what appeared to be

prohibitions against the play of both under California law and the Riverside County Ordinance. *Id.*

The Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* ("IGRA"), enacted following *Cabazon*, created three classes of gaming with varying regulatory oversight: 1) Class I gaming includes social games and traditional Indian gaming conducted at tribal ceremonies or celebrations and is regulated exclusively by Indian tribes, IGRA §§ 2701(6) and 2710(a)(1); 2) Class II gaming includes bingo and certain non-banked card games that are "explicitly authorized" or "not explicitly prohibited" by the laws of the state, and Class II gaming is enforced exclusively by tribes and the National Indian Gaming Commission ("NIGC"), IGRA §§ 2703(7), 2710(b) and 2713;[1] and 3) Class III

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[1] IGRA defines Class II gaming in part as follows:

> (7)(A) The term "class II gaming" means —
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> * * *
>
> (ii) card games that —
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> (I) are explicitly authorized by the laws of the State, or
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> (II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

IGRA § 2703(7); ECF No. 17, ¶ 5. "An Indian tribe may engage in . . . class II gaming on Indian lands" if "such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity." IGRA § 2710(b)(1).

gaming includes all gaming that is not Class I or II, and Class III gaming is regulated by Indian tribes and states pursuant to tribal-state compacting, IGRA §§ 2703(8) and 2710(d). On February 26, 2009, the NIGC general counsel issued an opinion that the Nation is authorized to offer e-Poker at HCG Madison as Class II gaming under IGRA. ECF No. 17, ¶ 42 and Ex. 6 and ¶ 43.[2]

B. The State's Arguments That The Seventh Circuit Erred In Its Application Of Well Established Legal Principles And Its Analysis Of Wisconsin Public Policy Toward Gaming Are Not Worthy of Certiorari Review.

The petition for writ of *certiorari* should be denied because it presents no issues worthy of this Court's attention. The Seventh Circuit created no new law and did not err in its application of *Cabazon* or in its statutory interpretation. Moreover, the State's attempt to manufacture a split between the Ninth Circuit and the other circuits as to reliance on *Cabazon* in IGRA cases is unavailing. There simply is no circuit split for the Court to resolve.

Congress enacted IGRA in 1988, shortly after – and in response to – *Cabazon*. In doing so, Congress incorporated *Cabazon's* "regulatory/prohibitory" test into its Congressional Findings, 28 U.S.C. § 2701(5), and explained in S. Rep. No. 100-446 (1988) ("Senate Report"), that "Class II gaming is defined . . .

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[2] The "ECF No." is the document number assigned by the District Court.

[c]onsistent with tribal rights that were recognized and affirmed in the Cabazon decision." Senate Report at 9. While the Ninth Circuit rejected *Cabazon's* applicability to the determination of the meaning of the word "permits" for purposes of Class III gaming, it stated that the *Cabazon* regulatory/prohibitory test is applicable to a determination of what games qualify as Class II gaming. *See Rumsey*, 64 F.3d at 1257-60. The State's representation that the *Rumsey* court "rejected that IGRA codified *Cabazon's* 'criminal/regulatory' test" for Class II gaming and, thus, has created a conflict with decisions from the Second and Eighth Circuits is simply a failed attempt to manufacture a non-existent split among the circuits. (Pet., p. 23.)

The State also attempts to manufacture a split between the Seventh Circuit's decision and the Ninth Circuit's decision in *Idaho v. Coeur d'Alene Tribe,* No. 14-35753, 2015 WL 4461055 (9th Cir. July 22, 2015), where none exists. (Pet., p. 25.) Both the Seventh and the Ninth Circuits applied the IGRA Class II definition. The Seventh Circuit then interpreted Wisconsin law whereas the Ninth Circuit interpreted Idaho law. While the results differed, they did so because of the material difference between Idaho's and Wisconsin's public policies toward gambling and each state's treatment of gambling under its laws. The Ninth Circuit's decision in *Coeur d'Alene Tribe* does not constitute a circuit split giving rise to a "compelling reason" for the Court's *certiorari* review.

Nor was the Seventh Circuit's reliance on Indian canons of statutory interpretation error as the State contends. It is well established that "statutes passed for the benefit of dependent Indian tribes . . . are to be

liberally construed, [with] doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca Cnty., Minn.,* 426 U.S. 373, 392 (1976) (citation omitted). "[IGRA] is legislation enacted basically for [Indian tribes'] benefit. [Congress] . . . expect[ed] that the Federal courts, in any litigation arising out [of] this legislation, would apply the Supreme Court's time-honor[ed] rule of construction that any ambiguities in legislation enacted for the benefit of Indians will be construed in their favor." *United States v. Sisseton-Wahpeton Sioux Tribe,* 897 F.2d 358, 366-67 (8th Cir. 1990). The Seventh Circuit did not err when it applied this well recognized Indian law canon to interpret IGRA and concluded that *Cabazon's* regulatory/prohibitory test should be applied in determining that the e-Poker being played at HCG Madison is Class II gaming. Despite the State's suggestion to the contrary, the Seventh Circuit did not apply the Indian law canon to interpret Wisconsin law. It applied it to the definitional language of Class II gaming, determined that the *Cabazon* test should apply and then applied the *Cabazon* test to Wisconsin law.

Finally, the State's assertion that the Seventh Circuit erred by considering the IGRA Senate Report when construing IGRA for purposes of Class II gaming is incorrect. Its argument that "[t]his case presents an opportunity for the Court to reaffirm traditional principles of statutory interpretation that are based on plain meaning and context, not on legislative history or other extrinsic aids to statutory interpretation" (Pet., p. 3) ignores the fact that this Court just "clarified" the appropriate application of statutory interpretation principles this term.

> [O]ftentimes the "meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." . . . Our duty, after all, is "to construe statutes, not isolated provisions."
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> [W]e "must do our best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."

King v. Burwell, ___ U.S. ___, 135 S. Ct. 2480, 2489, 2492 (2015) (citations omitted). The Senate Report is consistently used by federal courts to interpret IGRA and the Seventh Circuit did not err in using it for the context underlying the phrase "explicitly prohibited" in IGRA, § 2703(7)(A)(ii)(II). The Senate Report just confirms that the context of the *Cabazon* "regulatory/prohibitory" test must be used to understand how a state may "explicitly prohibit" poker. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 243 (1989) ("[In] cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters . . . the intention of the drafters, rather than the strict language, controls."). Reading the phrase "explicitly prohibited" without regard to the *Cabazon* test would be "demonstrably at odds with the intent of [IGRA's] drafters" as shown by both the legislative finding expressly set forth in IGRA § 2701(5) and the Senate Report. *Id.*

C. Factual Background.

1. Gaming In Wisconsin.

Gaming in general, and poker particularly, are prevalently being played in Wisconsin. Wisconsin permits pari-mutuel horse and dog race betting. Wis. Const. Art. IV, § 24(5); ECF No. 17, ¶ 35. Any bona fide religious, charitable, service, fraternal or veteran organization may offer bingo or conduct raffles. ECF No. 17, ¶ 35; Wis. Const. Art. IV, §§ 24(3)-(4). Wisconsin also has a State-run lottery. ECF No. 17, ¶ 33; Wis. Const. Art. IV, § 24(6).

Although the Wisconsin Constitution was amended in 1993 to prohibit the State from offering poker or simulated poker as a lottery game, Wis. Const., Art. IV, § 26(6)(c), between 1993 and the present, the State lottery has offered at least twenty-three poker scratch-off games. ECF No. 17, ¶ 33 and Ex. F. Some of the game descriptions closely follow the rules of traditional Texas Hold'em poker played as e-Poker at HCG Madison. *See, e.g.,* ECF No. 17, Ex. F at p. 14; *compare with* ECF No. 17, ¶ 34.

The Nation operates the HCG Madison Class II gaming facility in Madison, Wisconsin. ECF No. 17, ¶ 12. The State of Wisconsin ("State" or "Wisconsin") and the Nation entered into a tribal-state Class III Gaming Compact ("Compact") on June 11, 1992, which was subsequently amended on three occasions. ECF No. 17, ¶¶ 13-18 and Exs. B-E. Class II gaming at HCG Madison is not governed by the Compact because the Compact only governs Class III gaming at the Class III facilities identified in the Compact. ECF No. 17, ¶ 22 and Exs. B-E.

Pursuant to Wis. Stat. § 14.035, the State entered into tribal-state Class III gaming compacts with all eleven Wisconsin Indian tribes, including the Compact with the Nation. ECF No. 17, ¶¶ 15 and 20. Pursuant to the compacts, the playing of banked and non-banked poker occurs at Tribal Casinos located throughout the State. ECF No. 17, ¶¶ 16 and 21. After the 1993 amendment to the Wisconsin Constitution that prohibited the State from offering poker or simulated poker as part of the State lottery, the Compact between the Nation and the State was amended in 2003 to allow the Nation to offer poker at its Class III casinos. ECF No. 17, ¶ 16. The Compact was also amended to allow the Nation to offer poker and other additional gaming at its HCG Madison casino by converting it to a Class III facility had Dane County agreed by referendum. App. 3a-4a.

On October 27, 1999, the possession and operation of up to five (5) video gambling machines, which include video poker machines, by Wisconsin businesses that hold Class B liquor licenses, such as taverns, was changed from a felony to a civil offense subject to a fine of up to $500 per machine per incident. ECF No. 17, ¶ 36. Liquor license holders are no longer at risk of having their liquor licenses revoked solely for the possession of five or fewer video gambling machines. ECF No. 17, ¶¶ 37, 39-40, 44 and Ex. H; Wis. Stat. § 945.041(11). In May 2000, and again in November 2012, the Wisconsin Legislative Reference Bureau ("LRB") issued a bulletin, titled "The Evolution of Legalized Gambling in Wisconsin," that provides: "Class II includes bingo or bingo-type games, pull-tabs and punch-boards, and certain non-banking card

games, such as poker." ECF No. 17, ¶¶ 45-46 and Ex. I at p. 21 and Ex. J at p. 24.

Traditional Texas Hold'em poker is played in Wisconsin.[3] Poker is played to raise money for nonprofit organizations or charitable purposes. ECF No. 24, ¶¶ 1-5; ECF No. 28, ¶¶ 4-5 and Exs. 1-3. A variety of poker events held throughout Wisconsin are advertised on the State of Wisconsin Department of Tourism website, www.travelwisconsin.com (search "poker"), some of which appear to be charity poker and others of which appear to be non-charity poker tournaments. ECF No. 24, ¶ 4; ECF No. 28, ¶ 5 and Ex. 3. The events advertised on the Wisconsin Department of Tourism website include poker tournaments being held at taverns or restaurants and video poker. *Id*. The website even advertises the "electronic poker tables" at HCG Madison. *Id*.

NIGC is responsible for regulating the playing of Class II gaming. 25 U.S.C. § 2706. The NIGC has the authority to commence an enforcement action against the Nation to prevent HCG Madison from conducting e-Poker if it believes that e-Poker is Class III gaming. ECF No 17, ¶ 41. On February 26, 2009, the NIGC general counsel issued an opinion that "non-banked poker games such as the Nation proposes to offer [at HCG Madison] are Class II under IGRA . . . ." ECF No. 17, ¶ 42 and Ex. G and ¶ 43.

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[3] The LRB has reported that private gambling such as "low-stakes poker games" are "common and generally perceived to cause little harm," and, therefore, Wisconsin's "local law enforcement authorities rarely prosecute noncommercial betting activities." ECF No. 17-9, Ex. I at p. 17; ECF No. 28, ¶¶ 6-11.

2. Proceedings Below.

On May 14, 2013, the State filed a Complaint in the United States District Court for the Western District of Wisconsin alleging that e-Poker is a Class III game. ECF No. 1. The parties filed cross motions for summary judgment. ECF Nos. 16-28. The District Court issued an Opinion and Order on June 12, 2014, granting the State's motion for summary judgment, denying the Nation's motion for summary judgment, entering a permanent injunction prohibiting the play of e-Poker at HCG Madison and staying entry of the injunction pending the expiration of the time to appeal or final disposition on appeal, whichever is later. App. 41a. The district court made a minor correction to the Opinion and Order, by Order entered June 18, 2014. App. 42a.

The Nation timely appealed. In an opinion authored by Chief Judge Diane Wood, the Seventh Circuit unanimously reversed, finding that e-Poker constitutes Class II gaming under IGRA. App. 22a-23a. The Seventh Circuit held that "it was error to put the Supreme Court's *Cabazon* decision to one side" and that the "reference in [IGRA] section 2703(7)(A)(ii)(II) to 'card games that . . . are not explicitly prohibited by the laws of the State' must be read not just in light of the language itself, but also with attention to 'the specific context in which that language is used, and the broader context of the statute as a whole.'" App. 10a. The court also observed that the "history of the [IGRA] legislation provides *further* support for the use of *Cabazon*" and proceeded to analyze the question of whether e-Poker was a Class II game consistent with *Cabazon's* "regulatory/prohibitory" test and the "widely

accepted" canons of statutory construction applicable to Indian law. App. 11a-12a (emphasis added). In construing the "statute as a whole," including the language of IGRA §§ 2703(7)(A)(ii)(II), 2710(b)(1), and 2701(5), the court properly resorted to the Indian law canons of statutory construction to resolve the question of the applicability of the *Cabazon* test in favor of the Nation. App. 10a-12a. Finally, the Court noted that its resort to legislative history as "further support" of its application of *Cabazon* was consistent with other courts. App. 12a.

Under the *Cabazon* framework, the Seventh Circuit held that e-Poker is a Class II game in light of Wisconsin's long history of permitting various forms of gambling for its own residents, its failure to treat a purported state "prohibition against poker as an insurmountable obstacle to Indian gaming," and its decriminalization of video poker. App. 18a. In support of its decision, the court expressly relied upon:

- Wisconsin's history of tolerating gaming, including the legalization of "promotional contests in 1965, charitable bingo in 1973, raffles in 1977, on-track pari-mutuel betting on horseracing in 1987, and a state lottery in 1987[.]" App. 16a.

- The fact that "the Wisconsin Legislature's non-partisan research service" described the state's approach to gambling two years ago as follows: "The story of gambling in Wisconsin is an evolution from absolute legal prohibition to the present situation in which the state and certain organizations and entities, including Indian

tribes, may conduct a wide variety of gaming activities." App. 16a-17a.

- The court's 2004 decision in which it recognized "Wisconsin's broader public policy of tolerating gaming on Indian lands" and "Wisconsin's amenability to Indian gaming." App. 17a.
- The court's reasoning that if Wisconsin's constitution truly prohibited poker under *Cabazon*, the state would not have amended the Compact with the Nation to allow poker to be played at the HCG Madison facility by changing it to a Class III facility if the voters of Dane County approved the arrangement in a 2004 referendum. App. 18a.
- If Wisconsin's constitution truly prohibited poker, it could not have "decriminalized . . . the possession of five or fewer video gambling machines, including video poker[.]" App. 19a.

The court ultimately held that "[t]he State must entirely prohibit poker within its borders if it wants to prevent the Nation or any other Indian tribe from offering poker on the tribe's sovereign lands." App. 19a-20a. "When the state decriminalized poker for taverns, it could no longer deny that game to tribes as a matter of federal law." App. 20a. The court's decision was in accordance with the purposes of IGRA, which "was designed to avoid precisely th[e] kind of patchwork prohibition [advanced by the State in this case], in which the state banishes gaming in one county or situation and allows it in another." App. 18a.

REASONS FOR DENYING THE PETITION

I. THE STATE'S ATTEMPT TO MANUFACTURE A CONFLICT BETWEEN THE NINTH CIRCUIT'S *RUMSEY* AND *COEUR D'ALENE TRIBE* CASES AND THE SEVENTH CIRCUIT'S DECISION WHERE NONE EXISTS IS NOT WORTHY OF THIS COURT'S REVIEW.

A. No Circuit Split Exists Regarding *Cabazon's* Applicability to Class II Gaming.

Following this Court's adoption of the regulatory/prohibitory gaming test in *Cabazon*, Congress was understandably concerned about the lack of "clear standards or regulations for the conduct of gaming in Indian lands." IGRA, § 2701(4). It therefore enacted IGRA to provide a clearer structure and regulatory framework for Indian gaming. In doing so, it adopted the basic holding of *Cabazon* into its legislative findings at IGRA § 2701(5): "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law *and public policy*, prohibit such gaming activity." (Emphasis added.)

In the Statement of Policy to the Senate Report that accompanied S. 555, which became IGRA, Congress made it plain that the *Cabazon* regulatory/prohibitory test was to be used by Federal courts to determine whether Class II gaming is allowed in a state:

> Finally, the Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities

> and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States. This distinction has been discussed by the Federal courts many times, most recently and notably by the Supreme Court in Cabazon . . . . [U]nder S. 555 . . . the courts will consider the distinction between a State's civil and criminal laws to determine whether a body of law is applicable, as a matter of Federal law, to either allow or prohibit certain activities.

Senate Report at 6.

Consistent with Congress's general Statement of Policy in its explanatory notes to the definition of Class II gaming, Congress explained that it intended the definition of Class II card games in IGRA §§ 2703(7)(A)(ii)(I) and (II) to be read in conjunction with the "permits" language set forth in IGRA § 2710(b)(1)(A), meaning that *Cabazon* would be applied collectively to both:

> Section (4)(8)(A)(ii) provides that certain card games are regulated as class II games, with the rest being set apart and defined as class III games under section 4(9) and regulated pursuant to section 11(d). The distinction is between those games where players play against each other rather than the house and those games where players play against the house and the house acts as banker. The former games, such as those conducted by the Cabazon Band of Mission Indians, are also referred to as non-banking games, and are subject to the class II

> regulatory provisions pursuant to section 11(a)(2). *Subparagraphs (I) and (II)* [§ 2703(7)(A)(ii)(I) and (II)] *are to be read in conjunction with sections 11(a)(2) and (b)(1)(A)* [§ 2710(a)(2) and (b)(1)(A)] *to determine which particular card games are within the scope of class II. No additional restrictions are intended by these subparagraphs.*

Senate Report at 9 (emphases added).[4]

After acknowledging that both the Second and Eighth circuits "have determined that legislative history shows that 25 U.S.C. § 2710 incorporates the *Cabazon* test, the State wrongly contends that "[t]he [*Rumsey*] Ninth Circuit rejected that IGRA codified *Cabazon's* 'criminal/regulatory' test." (Pet., p. 23.) Review of the *Rumsey* case makes clear that it did not reject *Cabazon's* applicability to Class II gaming.

Most notably, Class II gaming was not at issue in *Rumsey*. Rather, the Ninth Circuit was tasked with determining whether the State of California was required to negotiate with tribes regarding proposed *Class III* gaming activities. *Rumsey,* 64 F.3d at 1255-56. In holding that California was not required to bargain with respect to certain banked, Class III card games, the Court "f[ou]nd the plain meaning of the word 'permit' [in IGRA § 2710(d)(1)(B) – a provision not at issue here] to be unambiguous" and concluded that the *Cabazon* test did not alter its analysis. *Id.* at 1258.

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[4] The State asserts that the applicability of *Cabazon* to IGRA § 2710 is irrelevant to its applicability to the definition of Class II gaming, IGRA § 2703(7). (Pet., pp.22-23.) As the Senate Report confirms, that is not the case.

However, the court made clear that its decision was limited to Class III gaming and that Congress intended courts to rely on *Cabazon* when determining what games constitute Class II gaming:

> The Senate Report repeatedly links the *Cabazon* test to Class II gaming while remaining silent as to Class III gaming—a fact itself that suggests that Class II and III provisions should be treated differently. . . . Further, Congress envisioned different roles for Class II and Class III gaming. It intended that tribes have "maximum flexibility to utilize [Class II] games such as bingo and lotto for tribal economic development," S. Rep. No. 466, 1988 U.S.C.C.A.N. at 3079, and indicated that Class II gaming would be conducted largely free of state regulatory laws.

Id. at 1259 (internal citation omitted).

Nor is reliance on the *Cabazon* regulatory/prohibitory test to interpret IGRA, as scores of federal courts have done (*see* Part II, B., *infra*), a resort to legislative history. Federal courts can assuredly reference published decisions by this Court when construing IGRA, particularly when the *Cabazon* test has expressly been made part of IGRA in § 2701(5). All the Senate Report does is confirm Congress's intent that IGRA be interpreted in accordance with this Court's *Cabazon* decision. Simply reading IGRA in

light of § 2701(5) leads to the same result without relying on the Senate Report.[5]

Thus, with respect to Class II gaming, *Rumsey* supports the Nation's position, and the Seventh Circuit's holding, that applying the *Cabazon* test for Class II purposes is appropriate. *Id.* No circuit split

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[5] Even in the absence of the *Cabazon* regulatory/prohibitory test, Wisconsin does not prohibit, and indeed expressly allows poker to be played in Wisconsin. The only reference to poker in the Constitution prohibits *the State* from offering poker or simulated poker as a lottery; it does not expressly prohibit other poker play. Yet, the State is offering simulated poker as a lottery in the form of 23 different poker scratch-off games. The Wisconsin Constitution explicitly authorizes charity bingo and raffles under which charity poker is being played in Wisconsin. Video poker is widely played at Class B taverns throughout Wisconsin. Eleven years after the 1993 amendment to the Wisconsin Constitution prohibiting the State from offering poker or simulated poker as part of the State lottery, the Seventh Circuit held that Wisconsin remains a regulatory state because of its "broader public policy of tolerating gaming on Indian lands" and its unwillingness "to sacrifice its lucrative lottery and to criminalize all gambling in order to . . . prohibit gambling on Indian lands . . . ." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States*, 367 F.3d 650, 664 (7th Cir. 2004). In 2003, the Wisconsin Governor negotiated an amendment to the Compact and exercised his authority to permit banked and non-banked poker to be played at the Nation's Class III casinos despite the 1993 Constitutional Amendment precluding the State from offering poker as part of the State lottery. ECF No. 17, ¶ 16. The Compact was further amended with the State agreeing that the Nation could offer poker and other types of gaming at its HCG Madison casino by converting it to a Class III facility if Dane County approved by referendum. App. 3a-4a. The State can hardly contend that Wisconsin prohibits poker being played in the state with this factual history of its permissive play.

exists on the Class II issue addressed by the Seventh Circuit based on the *Rumsey* decision.

B. The Seventh Circuit's Decision is Not in Conflict with the Ninth Circuit's Decision in *Coeur d'Alene Tribe*.

In a final attempt to manufacture a circuit split, the State contends that the Seventh Circuit's decision is "in direct conflict" with the Ninth Circuit's decision in *Coeur d'Alene Tribe*, *supra*. But the Ninth Circuit's interpretation of Idaho law and the Seventh Circuit's interpretation of Wisconsin law does not create the type of circuit court split meriting this Court's *certiorari* review. If anything, the *Coeur d'Alene* case demonstrates the material difference between Idaho and Wisconsin's public policy toward gambling and each state's treatment of gambling within its borders.

The Ninth Circuit relied on a prior ruling, in which it affirmed the District Court of Idaho's holding that:

> Idaho law *and public policy* clearly prohibit all other forms of Class III gaming, including the casino gambling activities which the Tribes have sought to include in compact negotiations with the State.

Coeur d'Alene Tribe, 2015 WL 4461055, at *1 (citing *Coeur d'Alene Tribe v. State*, 842 F. Supp. 1268, 1283 (D. Idaho 1994), *aff'd sub nom. Coeur D'Alene Tribe v. State of Idaho*, 51 F.3d 876 (9th Cir. 1995)). (Emphasis added.) In contrast, the Seventh Circuit found that Wisconsin's public policy – unlike Idaho's – is amenable to various forms of gaming:

> We acknowledged these developments in an earlier IGRA dispute between a different tribe and Wisconsin: "The establishment of a state lottery signals Wisconsin's broader public policy of tolerating gaming on Indian lands . . . . [B]ecause IGRA permits gaming on Indian lands only if they are 'located in a State that permits such gaming for any purpose by any person, organization or entity,' the lottery's continued existence demonstrates Wisconsin's amenability to Indian gaming."

App. 17a (citing *Lac Courte Oreilles*, 367 F.3d at 664, which held, eleven years after the 1993 amendment to the Wisconsin Constitution prohibiting the State from offering poker or simulated poker as part of the State lottery, that Wisconsin remains a regulatory state because of its unwillingness "to sacrifice its lucrative lottery and to criminalize all gambling in order to obtain authority under *Cabazon* and § 2710(d)(1)(b) to prohibit gambling on Indian lands[.]"). *Id.*

Additionally, the Ninth Circuit found that Idaho does not permit poker to be played for charitable purposes. *Coeur d'Alene Tribe,* 2015 WL 4461055, at *3. It recognized that "[i]n a handful of clearly distinguishable cases, courts have determined that gaming statutes permitting casino nights for charitable purposes establish that gaming is 'explicitly authorized by the laws of the State' and that a Tribe may thus offer those games." *Id.* (citations omitted). In direct contrast, Wisconsin allows poker to be played for charitable purposes at just such casino night charitable events. ECF No. 24, ¶¶ 1-5; ECF No. 28, ¶¶ 4-5 and Exs. 1-3. Thus, the Seventh and Ninth Circuit

decisions are not in conflict and are easily reconciled. The reason for different outcomes in the two cases is due to each state's respective treatment and public policy toward gambling, the very type of analysis embodied in *Cabazon's* regulatory/prohibitory test. *See* IGRA § 2701(5). At bottom, Idaho prohibits gaming as offensive to its public policy, while Wisconsin merely regulates gaming, which is not offensive to its public policy. Although the Ninth Circuit did not cite to this Court's opinion in *Cabazon*, the *Coeur d'Alene Tribe* opinion is entirely consistent with the *Cabazon* regulatory/prohibitory test.

Lastly, the State's argument that "the Ninth Circuit rejected the application of the Indian law canons to determine whether a game is Class II or Class III gaming under IGRA" is wrong. (Pet., p. 25.) The Ninth Circuit simply acknowledged, in a footnote, that the Indian law canons applicable to statutory interpretation do not apply to an unambiguous Idaho *state* law. *Coeur d'Alene Tribe*, 2015 WL 4461055, at *3, n.4. In this case, the Seventh Circuit relied on the Indian law canons to interpret IGRA, not Wisconsin state law. App. 10a-12a. The Ninth Circuit's decision in *Coeur d'Alene Tribe* is readily distinguishable and does not constitute a circuit split, let alone a circuit split giving rise to a "compelling reason" for granting *certiorari* review under Sup. Ct. R. 10.

II. THE SEVENTH CIRCUIT COMMITTED NO ERROR BY APPLYING WELL RECOGNIZED INDIAN LAW CANONS OF STATUTORY CONSTRUCTION AND REFERENCING THE SENATE REPORT, AND ITS DECISION PRESENTS NO ISSUE OF NATIONAL IMPORTANCE DESERVING OF THIS COURT'S REVIEW.

The Seventh Circuit appropriately applied the *Cabazon* regulatory/prohibitory test in determining that e-Poker offered at HCG Madison constitutes Class II gaming under IGRA. In reaching this result, the Seventh Circuit implicitly ruled that the definition of "class II gaming" in IGRA §2703(7)(A)(ii)(II) is ambiguous in light of "the specific context in which that language is used, and the broader context of the statute as a whole." App. 10a. (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)); *see also King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("the meaning of statutory language, plain or not, depends on context")). Recognizing this ambiguity, and in an effort to reconcile the language of IGRA §§ 2703(7)(A)(ii)(II), 2710(b)(1), and 2701(5), the court properly resorted to well established Indian law canons of statutory construction routinely used to interpret IGRA. The court then found "further support for the use of *Cabazon*" in the Senate Report, noting that "[o]ther courts have found that the legislative history leaves no doubt that Congress intended . . . to incorporate the *Cabazon* regulatory/prohibitory distinction" for purposes of Class II gaming determinations. App. 12a. This approach is entirely consistent with principles of statutory interpretation generally, and Indian law canons specifically. Even if it were not, "misapplication

of a properly stated rule of law" is not the type of issue warranting this Court's review. Sup. Ct. Rule 10.

A. The Seventh Circuit Committed No Error By Using The Canons Of Indian Law Statutory Construction To Interpret IGRA.

Indian tribes are sovereign Nations that, in the absence of federal preemption, are free to operate without State interference. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985). As a result, the "standard principles of statutory construction do not have their usual force in cases involving Indian law." *Id.* at 766. The "canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Id.* (citation and internal quotations omitted). *Itasca Cnty., Minn.*, 426 U.S. at 392.

Federal courts have expressly recognized the applicability of these canons to IGRA, which "is legislation enacted basically for [Indian tribes'] benefit. [Congress] . . . expect[ed] that the Federal courts, in any litigation arising out [of] this legislation, would apply the Supreme Court's time-honor[ed] rule of construction that any ambiguities in legislation enacted for the benefit of Indians will be construed in their favor." *Sisseton-Wahpeton Sioux Tribe*, 897 F.2d at 366-67; *see also Artichoke Joe's Calif. Grand Casino v. Norton*, 353 F.3d 712, 730 (9th Cir. 2003).

The State argues that this Court's decision in *Chickasaw Nation v. United States*, 534 U.S. 84 (2001) calls into question the continued viability of the Indian law canons. (Pet., p. 20.) However, the reasoning underlying the *Chickasaw* opinion is consistent with,

and actually supports, the Nation's position that IGRA must be interpreted consistently with Congressional intent. The *Chickasaw* Court declined to employ the Indian law canons because "to accept as conclusive the canons on which the Tribes rely would produce an interpretation that we conclude would *conflict with* the intent embodied in the statute Congress wrote." *Chickasaw Nation*, 534 U.S. 84 at 94 (emphasis added). The Court further explained that interpretive canons "are designed to help judges determine the Legislature's intent as embodied in particular statutory language" and that "other circumstances evidencing congressional intent can overcome their force." *Id*. In this specific context – where Indian law canons would yield a result contrary to Congressional intent – the Court held that "the canon that assumes Congress intends its statutes to benefit the tribes is offset by the canon that warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed." *Id.* at 95.

The same cannot be said, however, when resorting to the Indian canons would yield a result consistent with legislative intent. Indeed, this Court has held that the Indian law canons should be used when doing so results in an interpretation consistent with Congressional intent. *Squire v. Capoeman*, 351 U.S. 1, 6 (1956) (Indian canon offsetting tax canon when related statutory provision and history make clear that language freeing Indian land "of all charge or incumbrance whatsoever" includes tax); *see also Choate v. Trapp*, 224 U.S. 665, 675 (1912) (Indian canons applied despite conflicting tax canon). More recently, the Court has found that the "general presumption about the legality of executive action" may be overcome

by the Indian canons. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194, n.5 (1999).

This case does not present a situation where resorting to Indian law canons would do violence to Congressional intent. To the contrary, the utilization of Indian law canons as advanced by the Nation and employed by the Seventh Circuit furthers Congress's clear, express intent that "[f]ederal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States." Senate Report at 6 and IGRA § 2701(5); (*infra*, Section II. B.)

The Seventh Circuit's reliance on the Indian law canons in this case is in accordance with the goal identified in *Chickasaw* of "help[ing] judges determine the Legislature's intent as embodied in particular statutory language." The force of these canons is not overcome when applying them furthers, rather than impedes, legislative intent. Against this backdrop, it is clear that the Indian law canons were properly applied by the Seventh Circuit when interpreting IGRA's definition of Class II gaming. Moreover, even if the Seventh Circuit had erred by misapplying the properly stated Indian law canon of construction, no national issue warranting this Court's review arises out of the Court's application of such canon in this single, fact specific case.

B. Federal Courts Routinely Reference The Senate Report For The Context Underlying IGRA To Aid Them In Interpreting Its Provisions And The Seventh Circuit Did Not Err By Doing So.

The Seventh Circuit's reliance on the Senate Report for its interpretation of IGRA is also consistent with the Court's 2015 decision in *King v. Burwell*, *supra*, in which the Court reaffirmed the tenet that "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Id.* at 2492. According to the *King* court, "[the Court] must do our best, bearing in mind the fundamental canon of statutory construction that the words of the statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* at 2492.

Even if the phrase "explicitly prohibited" in IGRA § 2703(7)A)(ii)(II) appeared to be unambiguous in isolation, the Seventh Circuit violated no canon of statutory construction by resorting to the Senate Report for the *Cabazon* context underlying its use. When "the literal application of a statute" produces "a result demonstrably at odds with the intention of its drafters . . . the intention of the drafters, rather than the strict language, controls." *Ron Pair Enters., Inc.*, 489 U.S. at 242; *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citing *Ron Pair Enters.,* 489 U.S. at 241 with approval).

The phrase "explicitly prohibited" used in IGRA's definition of Class II gaming, § 2703(7)(A)(ii)(II) is not,

however, unambiguous. While the words "explicitly prohibited" or "permits" used in IGRA §§ 2703(7)(A)(ii)(I) and (II) and 2710(b)(1)(A) (Class II) and 2710(d) (Class III) may appear to be "words with a denotation 'clear' to an outsider," they are "terms of art, with an equally 'clear' but different meaning to an insider." *Matter of Sinclair*, 870 F.2d 1340, 1342 (7th Cir. 1989); *see also Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 284 (1987). The phrases "explicitly authorized" and "not explicitly prohibited" are ambiguous given the historical context of *Cabazon*. Indeed, this Court held in *Cabazon* that a state does not "prohibit" poker but instead authorizes it to be played when it merely regulates gaming in general under the state's public policy. Congress expressly incorporated the *Cabazon* test into IGRA when it stated that a state cannot prohibit gaming on Tribal land unless both the state's criminal laws *and* its general state public policy prevent its play on state land. IGRA § 2701(5). Thus the phrase "explicitly prohibited" can only be read in this context, which makes the literal words ambiguous unless read in the *Cabazon* context.

The IGRA Senate Report is routinely consulted, relied on and quoted by federal courts when interpreting IGRA, including cases determining whether a particular game is Class II or Class III gaming. *See, e.g., United States v. 103 Elec. Gambling Devices,* 223 F.3d 1091, 1099-1100 (9th Cir. 2000) (relying on the Senate Report to decide whether MegaMania was a Class II bingo game); *Shakopee Mdewakanton Sioux Cmty. v. Hope*, 798 F. Supp. 1399, 1406-1408 (D. Minn 1992) (relying on the Senate Report to determine whether keno was a Class III

game); *Ysleta del Sur Pueblo v. State of Tex.*, 36 F.3d 1325, 1334, n.17 (5th Cir. 1994) (citing to Senate Report for statement that "Congress was specific as to *Cabazon Band*'s application to Class II gaming"); *Mashantucket Pequot Tribe v. Conn.*, 913 F.2d 1024, 1029-30 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991) (relying on the Senate Report to conclude that the *Cabazon* regulatory/prohibitory test was to be used to determine whether the state had an obligation to negotiate a compact); *Crosby Lodge, Inc. v. Nat'l Indian Gaming Comm'n*, 803 F. Supp. 2d 1198, 1205 (D. Nev. 2011) (relying on Senate Report to determine the scope of NIGC authority); *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1247 (11th Cir. 1999) (relying on Senate Report to decide whether IGRA § 2710(d)(1) allowed a state to sue a tribe to prohibit Class III gaming in the absence of a tribal-state compact); *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 546 (8th Cir. 1996) (citing Senate Report after remarking "IGRA incorporated *Cabazon's* distinction between prohibition and regulation").[6]

Congress intended courts to "consider the distinction between a State's civil and criminal laws to

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[6] *See also Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1027 (9th Cir. 2010); *Texas v. United States*, 497 F.3d 491, 507 (5th Cir. 2007); *Kansas v. United States*, 249 F.3d 1213, 1223 (10th Cir. 2001); *Muhammad v. Comanche Nation Casino*, No. CIV-09-968-D, 2010 WL 4365568, at *4 (W.D. Okla. Oct. 27, 2010); *Fort Independence Indian Cmty. v. California*, 679 F. Supp. 2d 1159, 1172 (E.D. Cal. 2009); *Chemehuevi Indian Tribe v. Wilson*, 987 F. Supp. 804, 809 (N.D. Cal. 1997); *State ex rel. Dewberry v. Kitzhaber*, 259 Or. App. 389, 397, 313 P.3d 1135, 1141 (2013) *review denied,* 354 Or. 838, 325 P.3d 739 (2014).

determine whether a body of law is applicable, as a matter of federal law, to either allow or prohibit certain activities." Senate Report at 6; *see also* IGRA § 2710(5). Congress intended that IGRA § 2703(7)(A)(ii)(I) and (II) be read in conjunction with IGRA § 2710(a)(2) and (b)(1)(A) "to determine which particular card games are within the scope of class II." Senate Report at 9. Contrary to the State's assertion that IGRA § 2710(b)(1) imposes an "additional condition" on Class II gaming, (Pet., p. 16), "[n]o additional restrictions [were] intended by these subparagraphs." *Id.* Instead, to determine whether the laws of the State "explicitly authorize" or "not explicitly prohibit" poker and, therefore, "permits such gaming for any purpose by any person" for purposes of Class II non-banked poker, a court must apply the *Cabazon* regulatory/prohibitory test. Senate Report at 6.

Consistent with the Senate Report, federal courts analyze IGRA § 2703 in conjunction with IGRA § 2710. *See, e.g., Sisseton-Wahpeton Sioux Tribe*, 897 F.2d at 365-66; *Sycuan Band of Mission Indians v. Roache,* 54 F.3d 535 (9th Cir. 1994). The same approach is utilized by the NIGC. In its February 26, 2009 opinion to the Nation concerning the play of e-Poker at HCG Madison, the NIGC analyzed the definition of Class II card games in IGRA § 2703(7)(A)(ii) in conjunction with IGRA § 2710(b)(1)(A) and utilized the *Cabazon* regulatory/prohibitory test. ECF No. 17, Ex. F at p. 6. The NIGC concluded that non-banked e-Poker at HCG Madison falls within IGRA's definition of Class II gaming because Wisconsin does not "wholly prohibit[]" the play of poker and poker is being played in the State. *Id.* The NIGC has taken the same approach in

other Class II card game advisory opinions, *i.e.*, examining a state's Constitutional and statutory limitations (or prohibitions on gaming) in conjunction with IGRA § 2710 and the Congressional intent and legislative history of IGRA.[7] *See, e.g., Advisory Opinion—Asian Bingo* issued July 14, 1998 to Salt River Pima-Maricopa Indian Community (quoting, Senate Report at 9, "Subparagraphs (I) and (II) [of § 2703(7)(A)(ii)] are to be read in conjunction with sections 11(a)(2) and (b)(1)(A) [of § 2710] to determine which particular card games are within the scope of class II. No additional restrictions are intended by these subparagraphs."), avail. at http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gameopinions/bingo/asianbingo.pdf; *Game Classification Opinion – "Poker Club"* issued June 17, 1999 to the Oneida Indian Nation ("States can influence class II gaming on Indian lands within their borders only if they prohibit those games for everyone under all circumstances . . . . New York 'regulates' rather than 'prohibits' gambling in general.") (citations omitted), avail. at http://www.nigc.gov/Portals/0/NIGC%20Uploads/read

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[7] "The fact that the [NIGC's] policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Informal rulings "provide a practical guide . . . as to how the office representing the public interest in its enforcement will seek to apply" the law. *Id.* at 138. Resorting to NIGC opinions for guidance is appropriate. *Id.* Indeed, the NIGC has developed significant expertise in gaming classifications because it "is frequently called upon to determine whether a particular form of gambling is within class II or class III." Cohen's Handbook § 12.02[3][a], p. 879. As the Seventh Circuit acknowledged, "the Gaming Commission's opinion is one item on the scale in favor of the Nation." App. 22a.

ingroom/gameopinions/Card%20Games/poker%20club%20061799.pdf; *Game Classification Opinion – "Double Hand High-Low"* issued September 9, 1999 to Maverick Gaming Enterprises, avail. at http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gameopinions/card%20games/doublehandhighlow.pdf; *Request for Game Classification Decision – Non-banked Poker* issued May 29, 2013 to the Mohegan Tribal Gaming Commission (Connecticut's exception for social games to its criminal gambling laws meant that poker was class II gaming: "The social exception to the prohibition indicates that poker, in all of its forms, is not explicitly prohibited by Connecticut law. It is not a criminal violation if played socially."), *available at* http://www.nigc.gov/LinkClick.aspx?fileticket=3tF4Otkkf5c%3d&tabid=789.

The Seventh Circuit reviewed the Senate Report only as "further support" for its appropriate application of this Court's *Cabazon* opinion. Doing so to understand the context in which the IGRA drafters were operating was not error. Even had it been error, however, it would have been harmless error since the court only relied on the Senate Report as "further support" for its decision to apply *Cabazon*. Harmless error by a court would not merit this Court's review.

CONCLUSION

The Seventh Circuit did not err when it determined that the *Cabazon* regulatory/prohibitory test must be applied when determining whether a particular game is Class II gaming under IGRA. The court applied the properly stated rule of law to reach the correct decision, consistent with federal case law, NIGC precedent, and Congressional intent. No issue of national importance

was created by the Seventh Circuit decision. No circuit split exists with regard to the narrow issues presented by this case. Nor was the Seventh Circuit in error in applying the Indian law canon of statutory construction or in referencing the Senate Report. The State has failed to show any compelling reason why this Court should grant review. Accordingly, the Court should deny the petition for a writ of *certiorari*.

Respectfully Submitted,

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