No. 15-___

In the

Supreme Court of the United States

STATE OF WISCONSIN,

Petitioner,

v.

HO-CHUNK NATION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Indian Gaming Regulatory Act (IGRA) defines authorized Indian gaming as Class I, Class II, or Class III. 25 U.S.C. § 2703. Unlike Class III gaming, Class II is not subject to tribal-state gaming compacts. 25 U.S.C. § 2710. Class II gaming includes card games that "are not explicitly prohibited by the laws of the State." 25 U.S.C. § 2703(7)(A)(ii)(II). Wisconsin's Constitution prohibits the state legislature from authorizing any form of gambling, including poker. *See* Wis. Const., art. IV, § 24(1).

Prior to Congress enacting IGRA, the Court held that a state cannot enforce its gambling laws on Indian land when its policy toward gambling is civil and regulatory, rather than criminal and prohibitory. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 210 (1987). Here, the Seventh Circuit applied *Cabazon* to interpret IGRA. It concluded that the electronic poker offered by the Ho-Chunk Nation is Class II, not Class III, when Wisconsin's policy toward gambling and poker is regulatory, rather than prohibitory. Under this approach, the Nation can offer e-poker in Madison, Wisconsin despite the parties' compact, which does not authorize Class III gaming in Madison.

The question presented is:

Whether *Cabazon*'s "regulatory/prohibitory" test that pre-dates IGRA applies to determine whether a game is Class II or Class III gaming under IGRA?

LIST OF PARTIES

The petitioner is the State of Wisconsin. The State of Wisconsin was the appellee in the court of appeals and the plaintiff in the district court.

The respondent is Ho-Chunk Nation. Ho-Chunk Nation was the appellant in the court of appeals and the defendant in the district court.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Seventh Circuit is reported at 784 F.3d 1076 (7th Cir. 2015). App. 1a. The opinion and order of the district court is reprinted in the appendix at App. 26a.

JURISDICTION

The Seventh Circuit entered final judgment on April 29, 2015. App. 24a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

25 U.S.C. § 2703(7):

(7)(A) The term "class II gaming" means--

. . . .

(ii) card games that--

(I) are explicitly authorized by the laws of the State, or

(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.

25 U.S.C. § 2703(8):

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

25 U.S.C. § 2710(b):

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if--

> (A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law) . . . .

Wis. Const., art. IV, § 24(1): Except as provided in this section, the legislature may not authorize gambling in any form.

STATEMENT OF THE CASE

At issue is whether the Ho-Chunk Nation ("the Nation") can offer electronic, non-banked poker ("e-poker") at its Madison, Wisconsin casino. The Nation's ability to lawfully offer e-poker depends upon the proper interpretation of the definitions of "Class II" and "Class III" gaming in the Indian Gaming Regulatory Act (IGRA).

This case involves a significant decision under IGRA in which the appellate court's analysis contravened basic principles of statutory interpretation. Rather than adhere to the plain language definitions of Class II and Class III gaming in IGRA, the Seventh Circuit relied upon legislative history, Indian law canons of construction, and a test from a Supreme Court case that pre-dated IGRA. This 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.

The basic issue is straightforward: If e-poker is a Class III game under IGRA, its operation must be in accordance with the parties' tribal-state gaming compact. That compact does not permit Class III games at the Nation's casino unless voters approve a referendum. A referendum failed in 2004. If e-poker is a Class II game, however, the Nation can offer it because Class II games are not subject to tribal-state gaming compacts. *See* 25 U.S.C. § 2710.

The Court should clarify the importance of basic statutory interpretation principles in Indian law cases and resolve the vexing question of whether a test from a pre-IGRA Supreme Court decision should be used to determine gaming classifications under IGRA. The State's position is that the answer to that question is "No" and that the Seventh Circuit erred in concluding otherwise. The Seventh Circuit's decision here conflicts with a recent decision from the Ninth Circuit. The Court should grant the petition for a writ of certiorari to answer the important question presented and to resolve a circuit split.

I. Background facts

Starting in November 2010, the Nation offered e-poker to players at its Madison, Wisconsin casino. *See* App. 4a. The easiest way to understand the casino game at issue is by viewing a picture of the system that was offered by the Nation, a PokerPro® gaming system.[1]

[1] *See http://www.multimediagames.com/pokerpro* (last visited July 20, 2015).

To play e-poker, each player sits in front of an iPad-like touch screen. The game does not use live dealers or physical cards and gaming chips. App. 4a. Instead, the game shuffles and deals cards and maintains gaming chips in an electronic medium. *Id.* Players view their cards and chip balance and input game decisions (*e.g.*, to bet, to check, to fold, etc.) at their respective player stations. *Id.*

A large video screen in the center of the table displays wagers made by each player, the community cards dealt, and other game information, including the pot total for each hand. App. 4a. Player accounts are maintained at the cashier's cage or other secure location where players must conduct cash-in and cash-out functions. *Id.*

E-poker is not house-banked, which means that the dealer does not participate in betting, winning, or losing. App. 4a. The casino collects a "rake" from

the player's wagers and places all bets in a common pool or pot from which all player winnings and the rake are paid. *Id.* All player funds are tracked and accounted for by the e-poker table system's automated accounting function. *Id.*

In 1992, the State of Wisconsin and the Nation entered into a tribal-state gaming compact. App. 2a; *see also* 25 U.S.C. § 2710(d). In 1993, the Wisconsin Constitution was amended to include the following language: "Except as provided in this section, the legislature may not authorize gambling in any form." Wis. Const., art. IV, § 24(1). Poker is not one of the provided exceptions in this section of the Wisconsin Constitution; poker is prohibited by Wisconsin law. *Id.*

In 2003, the parties entered into an agreement to amend their compact. App. 3a. As amended, the compact authorizes the Nation to conduct Class III gaming at its Madison casino, but only if the relevant county, Dane County, Wisconsin, authorized it to do so. *Id.* Dane County withheld its authorization in 2004 after voters rejected Class III gaming by a margin of nearly two to one. App. 3a-4a.

II. Proceedings below

The State of Wisconsin considers e-poker to be Class III gaming under IGRA. Class III gaming is not authorized at the Nation's Madison casino under the parties' compact. The State filed an action in the Western District of Wisconsin seeking an injunction to stop e-poker. App. 4a-5a.[2] The parties filed cross-motions for summary judgment based upon stipulated facts. App. 5a.

The district court granted summary judgment to the State and entered an injunction preventing the Nation from offering e-poker. App. 5a. It held that the game is Class III gaming, not Class II, because the Wisconsin Constitution explicitly prohibits gambling and poker. App. 38a; *see also* 25 U.S.C. § 2703(7)(A)(ii)(II) ("card games that . . . are not explicitly prohibited by the laws of the State" are Class II). The district court found that 25 U.S.C. § 2710(b)(1) is not relevant to whether a card game is Class II gaming because that provision of IGRA does not define Class II gaming, but instead imposes an additional condition for offering Class II games. App.

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[2]Prior to the instant case, the State and the Nation were opposing parties in a related case, *Wisconsin v. Ho-Chunk Nation*, No. 12-CV-505 (W.D. Wis.). In that case, the State petitioned the district court to confirm an arbitration award, which determined that the Nation cannot offer e-poker at its Madison casino. The arbitrator held that e-poker is a Class III game that is not authorized by the parties' compact. On December 5, 2012, the district court held that the arbitrator exceeded his authority to interpret the terms of the compact and vacated the arbitration award. *Id.*, Dkt. 12.

30a-31a. The district court stayed its injunction to allow for an appeal. App. 41a.

The Nation appealed. In an opinion by Chief Judge Diane Wood, the Seventh Circuit reversed, finding that Wisconsin permits e-poker and holding that e-poker is thus a Class II game in Wisconsin not subject to tribal-state gaming compacts. *See* App. 23a. The Seventh Circuit's analysis focused on the following points:

- Wisconsin law does not "explicitly authorize" the playing of non-banked, electronic poker under 25 U.S.C. § 2703(7)(A)(ii)(I), App. 8a;

- 25 U.S.C. § 2703(7)(A), defining "Class II gaming," should be read in conjunction with § 2710(b)(1) (a provision that the district court found irrelevant), which states: "A tribe may engage in Class II gaming if the state 'permits such gaming for any purpose by any person, organization or entity,'" App. 8a (quoting 25 U.S.C. § 2710(b)(1));

- Whether a game fits the definition of Class II gaming under 25 U.S.C. § 2703(7)(A) depends upon whether a state "permits" the game under § 2710(b)(1), and whether a state "permits" a game requires a court to apply *Cabazon*'s "regulatory/prohibitory" test, App. 8a-14a;

- Because this case involves IGRA, the court of appeals must apply a canon of statutory interpretation that all ambiguities in the law

must be resolved in the Nation's favor, App. 10a-12a;

- By consulting legislative history, the proper conclusion is that Congress intended IGRA to incorporate *Cabazon*'s "regulatory/prohibitory" test, App. 12a-13a;

- Applying *Cabazon* and 25 U.S.C. § 2710(b)(1)(A), the question in this case is whether Wisconsin "permits" poker for any purpose by any person, organization, or entity, App. 13a;

- The Wisconsin Constitution explicitly prohibits poker, but the fact that the parties' tribal-state gaming compact allowed for poker to be played in Madison if a referendum passed shows that Wisconsin does not treat its prohibition on poker as "an insurmountable obstacle to Indian gaming," App. 18a;

REASONS FOR GRANTING THE PETITION

I. This case raises an important and unresolved question under IGRA.

This case raises "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). The question is: Does *Cabazon*'s "regulatory/prohibitory" test apply to determine whether a game is Class II or Class III gaming under IGRA?

A. *Cabazon*'s "regulatory/prohibitory" test should not apply to interpret the definitions of Class II and Class III gaming in IGRA.

The *Cabazon* Court interpreted a federal law, Public Law 280, which is not at issue here. Rather, a later law, IGRA, is what matters. *Cabazon*'s analysis, turning on whether state laws were civil and regulatory versus criminal and prohibitory, is not appropriate to resolve questions under IGRA because the *Cabazon* Court was not interpreting IGRA.

Whether a game is Class I, Class II, or Class III under IGRA depends upon the definitions in IGRA. No one contends that the card game in this case is Class I; it is either Class II or Class III. The definition of "Class III gaming" is a residual category that includes all games that are not defined as Class I or Class II. 25 U.S.C. § 2703(8).

The Class II gaming definition in IGRA is key to resolving this case. It states, in pertinent part:

> (7)(A) The term "class II gaming" means--
>
> . . . .
>
> (ii) card games that--
>
> > (I) are explicitly authorized by the laws of the State, or
> >
> > (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.

25 U.S.C. § 2703(7)(A)(ii). As the Seventh Circuit found, this case hinges upon whether e-poker is "explicitly prohibited by the laws of [Wisconsin]." 25 U.S.C. § 2703(7)(A)(ii)(II). *See* App. 8a ("[The Nation] can prevail, if at all, only under section 2703(7)(A)(ii)(II)—that is, if the games are not explicitly prohibited by the laws of the state and are played at any location in the state.").

The Seventh Circuit's decision states: "The state correctly points out that the 1993 [Wisconsin] constitutional amendment explicitly prohibited 'poker.'" App. 17a. That should have ended the court's analysis. E-poker is not a Class II game in Wisconsin because it is explicitly prohibited by state law. No one contends that e-poker is a Class I game; therefore, it is a Class III game. *See* 25 U.S.C. §§ 2703(7)(A)(ii)(II) and 2703(8). This analysis is straightforward and consistent with the plain language of IGRA.

The Seventh Circuit erred in interpreting 25 U.S.C. § 2703(7). The court found that "the state itself does not treat the prohibition on poker as an insurmountable obstacle to Indian gaming" because the parties' gaming compact allowed for poker to be played if voters passed a referendum. App. 18a. This analysis is flawed because 25 U.S.C. § 2703(7)(A)(ii)(II) considers whether the card game in question is "explicitly prohibited by the *laws* of the State." (Emphasis added.) A tribal-state gaming compact is not a state law.

Next, the Seventh Circuit determined that poker is not absolutely prohibited in Wisconsin because in 1999 the Wisconsin State Legislature decriminalized the possession of five or fewer video gambling machines, including video poker. App. 19a. This analysis is faulty because: (1) it is a crime to make a bet under Wisconsin law, *see* Wis. Stat. § 945.02(1), and poker, by definition, involves betting; and (2) the limited number of video poker machines that are

authorized by state law in taverns are nothing like the electronic, non-banked poker at issue in this case.

The parties stipulated in district court that tavern video poker machines are house-banked games that are not the same as the e-poker offered at the Nation's casino. *Wisconsin v. Ho-Chunk Nation*, No. 13-cv-334 (W.D. Wis.), Dkt. 17 ¶ 39 (joint statement of stipulated facts). The house does not participate in e-poker. Unlike in e-poker, in tavern video poker machines the player's hand is not matched against or compared to other players' hands to determine whether the player wins. *Id.* Tavern video poker machines are materially different from e-poker; therefore, the Seventh Circuit fundamentally erred in its analysis. *See* App. 19a.

Instead of adhering to the plain meaning of the definition of Class II gaming, the Seventh Circuit mistakenly turned to *Cabazon*. In *Cabazon*, the Court held that a state cannot enforce its gambling laws on Indian land when its policy toward gambling is civil (regulatory), rather than criminal (prohibitory). *Cabazon*, 480 U.S. at 210. In Public Law 83-280 ("P.L. 280"), 67 Stat. 588, *as amended*, 18 U.S.C. § 1162 and 28 U.S.C. § 1360, "Congress expressly granted six States . . . jurisdiction over specified areas of Indian country within the States and provided for the assumption of jurisdiction by other States." *Cabazon*, 480 U.S. at 207 (footnote omitted). *Cabazon* focused on P.L. 280.

Cabazon does not apply here because it was about whether P.L. 280—which provided limited authority for a state to enforce its laws on Indian lands—permitted California to exercise its jurisdiction on Indian lands to enforce a state statute governing bingo. *See Cabazon*, 480 U.S. at 205, 207-08. The Court determined that P.L. 280 was limited to authorizing California to enforce those state laws that were "criminal in nature." *Id.* at 208. "The shorthand test" to determine whether P.L. 280 authorizes a state to enforce its laws on tribal land is "whether the conduct at issue violates the State's public policy." *Id.* at 209.

The Court determined whether California's bingo statute was criminal in nature by evaluating if it could be characterized as "criminal/prohibitory" or "civil/regulatory." *Cabazon*, 480 U.S. at 210-11. The Court found that California's bingo statute could not be enforced on Indian land in the state because California permitted "a substantial amount of gambling activity, including bingo[.]" *Id.* at 211. California could not point to a federal law that would enable it to enforce the bingo statute on Indian lands, as P.L. 280 did not do so under the test the Court determined was applicable. *Id.* at 212, 214.

Needless to say, *Cabazon* did not interpret IGRA. "Congress adopted IGRA in response to this Court's decision in" *Cabazon*. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014). The application of *Cabazon* here has superficial appeal because, as the Seventh Circuit noted, Wisconsin is "a state

listed in Public Law 280." App. 9a. But *this* case is about interpreting IGRA. *Cabazon*'s "regulatory/prohibitory" test for interpreting P.L. 280 should not apply to interpret the definitions of Class II and Class III gaming in IGRA.

The Seventh Circuit based its analysis on *Cabazon*'s "regulatory/prohibitory" test, 25 U.S.C. § 2710(b)(1), P.L. 280, the Indian law canons, and legislative history. App. 8a-14a. This interpretive methodology was wholly inconsistent with the plain language of the gaming classifications in IGRA.

Cabazon pre-dates IGRA, and the plain language of the gaming classifications in IGRA does not incorporate *Cabazon*'s "regulatory/prohibitory" test at all. The Seventh Circuit found this argument "unpersuasive" because "it makes more sense to read the statutory language knowing that Congress was legislating against the background of the Supreme Court's decisions." App. 12a (citing *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)). But Congress' awareness of *Cabazon* or other decisions that the Seventh Circuit did not identify does not permit a court to disregard the plain language of an unambiguous statute. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms.").

To import *Cabazon*'s "regulatory/prohibitory" test into the IGRA analysis, the Seventh Circuit relied upon 25 U.S.C. § 2710(b)(1)(A), which states: "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." App. 8a, 12a-15a. This was a fundamental error.

As the district court correctly held:

> Section 2703(7)(A)(ii) *defines* class II gaming; section 2710(b)(1) imposes an *additional condition* on class II gaming. In other words, it must be determined first whether a particular game meets the definition for a class II game under § 2703(7)(A)(ii). If the game meets that definition, then the game must meet the requirements in § 2710(b)(1) before it can be offered by the tribe. On its face, § 2710(b)(1) does not purport to expand or contract the meaning of a class II game under § 2703(7)(A)(ii).

App. 30a-31a. The Seventh Circuit's analysis placed cart before horse and used § 2710(b)(1) to determine *whether* a game is Class II.

The proposition that *Cabazon*'s "regulatory/prohibitory" test was incorporated into the word "permits" in 25 U.S.C. § 2710 (and that this guides the analysis of what is Class II gaming, *see* App. 12a) makes no sense when one considers that

the "permits" language in 25 U.S.C. § 2710 applies to both Class II *and* Class III games. *Compare* 25 U.S.C. § 2710(b)(1)(A) *with* 25 U.S.C. § 2710(d)(1)(B). These provisions do not alter the gaming definitions in 25 U.S.C. § 2703(7) and (8). They only provide additional conditions upon Class II and Class III games.

In sum, the Seventh Circuit erred when it held that *Cabazon*'s "regulatory/prohibitory" test should be used to determine whether a game is Class II or Class III under IGRA. The Court should review this case to clarify that the Seventh Circuit's methodology was faulty because *Cabazon* does not apply to determine whether a game is Class II or Class III under IGRA. Furthermore, the Court should grant certiorari because the Seventh Circuit's decision conflicts with this Court's jurisprudence regarding the Indian law canons and the use of legislative history in the face of an unambiguous statute.

B. The Seventh Circuit's application of the Indian law canons and its use of legislative history in the face of an unambiguous statute conflicts with this Court's precedents.

This Court should grant the petition for a writ of certiorari because the Seventh Circuit "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). The Seventh Circuit's application of the Indian

law canons and its use of legislative history conflicts with this Court's precedent regarding interpretive canons and unambiguous statutes.

1. The Indian law canons

In *Chickasaw Nation v. United States*, 534 U.S. 84 (2001), the Court reviewed the Chickasaw and Choctaw Nations' tax refund claims relating to their gaming activities. *Id.* at 87. The Court refused to apply the Indian law canons because they conflicted with the plain language of the statute at issue and were countered by other interpretive canons. The Seventh Circuit's decision here conflicts with *Chickasaw*.

The *Chickasaw* Court was asked to interpret 25 U.S.C. § 2719(d)(1), an IGRA provision that the tribes argued exempted them from paying gambling-related taxes found in chapter 35 of the Internal Revenue Code. *Chickasaw*, 534 U.S. at 86. 25 U.S.C. § 2719(d)(1) referenced statutory provisions "concerning the reporting and withholding of taxes," but chapter 35 was not such a provision. *Id.* at 87. Instead, chapter 35 *imposed* excise taxes relating to gambling, and then exempted state-operated gambling operations from those taxes. *Id.* (citing 26 U.S.C. §§ 4401(a), 4411, and 4402(3)). The tribes believed that 25 U.S.C. § 2719(d)(1) should be interpreted to exempt them from paying the chapter 35 taxes from which States were exempt. *Id.*

The tribes' argument was based on a parenthetical reference in the statute that stated

examples of reporting and withholding as "including . . . chapter 35." *Chickasaw*, 534 U.S. at 87. In support of their argument, the tribes asserted that the reference to "chapter 35" in 25 U.S.C. § 2719(d)(1) "must serve some purpose," that chapter 35 has nothing to do with "reporting and withholding," and the only logical purpose of this language was to expand the scope of IGRA's subsection beyond reporting and withholding provisions to the tax-imposing provisions that chapter 35 does contain. *Id* at 88. The tribes also asserted that the reference to "chapter 35" makes 25 U.S.C. § 2719(d)(1) ambiguous and that the ambiguity should be resolved by applying "a special Indian-related interpretive canon, namely, 'statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit.'" *Id.* (citations omitted).

The Court rejected the tribes' argument in light of the plain meaning of the statutory language. *Chickasaw*, 534 U.S. at 89. The word "including" in 25 U.S.C. § 2719(d)(1), followed by parenthetical references to examples, "[was] meant to be illustrative," and the phrase "chapter 35" was not an example of reporting and withholding provisions. *See id.* The Court observed that the inclusion of the words "chapter 35" in the statute was likely an inadvertent drafting error. *Id.* at 90-91.

As for the Indian law canons, the Court rejected their application. *Chickasaw*, 534 U.S. at 94. "[T]hese canons do not determine how to read this statute.

For one thing, canons are not mandatory rules. They are guides that 'need not be conclusive.'" *Id.* (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)). The Court determined that accepting "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." *Id.* The Court held that the Indian law canons were "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 Court concluded that one cannot say that the "pro-Indian canon" is stronger than the clearly-expressed-tax-exemption canon, "particularly where the interpretation of a congressional statute rather than an Indian treaty is at issue." *Id.* One commentator has described *Chickasaw* as sounding an implied "death-knell" for the Indian law canons.[3]

The Seventh Circuit's use of the Indian law canons conflicts with *Chickasaw*. First, the Seventh Circuit applied the Indian law canons in the absence of an ambiguous statute. App. 10a-12a. In *Chickasaw*, the Court was presented with a similar situation, and it applied the plain language of the statute and rejected the Indian law canons. *See Chickasaw*, 534 U.S. at 88-89, 93-95. Where there is

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[3]Matthew L.M. Fletcher, *Sawnawgezewog: "The Indian Problem" and the Lost Art of Survival*, 28 Am. Indian L. Rev. 35, 62 (2004); *see also* George Jackson III, *Chickasaw Nation v. United States and the Potential Demise of the Indian Canon of Construction*, 27 Am. Indian L. Rev. 399 (2003).

no statutory ambiguity, there is no valid reason for the Indian law canons trumping the plain language of IGRA.

Second, the Seventh Circuit's use of the Indian law canons is "thus at odds with one of the most basic interpretive canons, that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (alteration in original) (citation omitted) (internal quotation marks omitted); *see also Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (quoting another source). The Seventh Circuit's use of the Indian law canons to give 25 U.S.C. § 2710 precedence over the basic definition of Class II gaming in 25 U.S.C. § 2703(7) is at odds with the plain language of IGRA and makes Congress' controlling definition surplusage. The *Chickasaw* Court emphasized that the statute at issue was not "fairly capable of two interpretations," nor was the tribes' interpretation "fairly possible." *Chickasaw*, 534 U.S. at 94 (internal quotation marks omitted). That is precisely the case here with regard to 25 U.S.C. § 2703(7).

Third, like in *Chickasaw*, the use of the Indian law canons arose in the context of interpreting a congressional statute, not a treaty; therefore, one cannot "say that the pro-Indian canon is inevitably

stronger" than other interpretive canons. *Chickasaw*, 534 U.S. at 95.

The Seventh Circuit's use of the Indian law canons in the face of the unambiguous text of the Class II gaming definition in 25 U.S.C. § 2703(7) was erroneous and conflicts with this Court's precedents. The Court should review this case to clarify under what circumstances the Indian law canons apply.

2. Legislative history

The Seventh Circuit did not conclude that the language of IGRA is ambiguous, yet the court relied upon cases that used legislative history to interpret 25 U.S.C. § 2710. App. 12a-13a. This approach, too, conflicts with this Court's precedents.

Importantly, the Seventh Circuit's use of legislative history was not made in an effort to ascertain congressional intent as to the Class II gaming definition in 25 U.S.C. § 2703(7). *See* App. 13a. Instead, the Seventh Circuit relied upon legislative history to bolster its interpretation of 25 U.S.C. § 2710(b)(1), a provision that *presumes* a Class II game is at issue. The Seventh Circuit's use of wholly irrelevant legislative history is inconsistent with precedent. *See Garcia v. United States*, 469 U.S. 70, 75 (1984) ("[O]nly the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the 'plain meaning' of the statutory language"). 25 U.S.C. § 2710 is not relevant to the analysis of whether a

game is Class II under § 2703(7); therefore, legislative history about § 2710 is also irrelevant.

Even if 25 U.S.C. § 2710 played a role in the analysis, the Ninth Circuit has determined that *Cabazon* and legislative history are irrelevant to interpreting the unambiguous language of 25 U.S.C. § 2710. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1257-60 (9th Cir. 1994), *as amended on denial of rehearing by* 99 F.3d 321 (9th Cir. 1996). The Ninth Circuit rejected that IGRA codified *Cabazon's* "criminal/regulatory" test. *See id.*

The Second and Eighth Circuits, on the other hand, have determined that legislative history shows that 25 U.S.C. § 2710 incorporates the *Cabazon* test. *See United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990) (relying upon S. Rep. No. 446, 100th Cong., 2d Sess. 10, *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071 and 3076, to determine that *Cabazon*'s "regulatory/prohibitory" test applies); *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1031 (2d Cir. 1990) (citing *Sisseston-Wahpeton*). Here, the Seventh Circuit's reliance upon 25 U.S.C. § 2710, irrelevant legislative history, and *Cabazon* to determine whether a card game is Class II exacerbates lingering circuit confusion regarding the relevance of *Cabazon* to interpreting IGRA.

The Class II gaming definition in 25 U.S.C. § 2703(7) is unambiguous. The Court has emphasized that reading legislative history to interpret the

words of an unambiguous statue is unnecessary, and even inappropriate. A court's inquiry "begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd. v. United States,* 541 U.S. 176, 183 (2004); *see also Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). "[R]esort to legislative history is only justified where the face of the [statute] is inescapably ambiguous." *Holder v. Hall*, 512 U.S. 874, 932 n.28 (1994) (quoting another source). "[W]e do not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). "Legislative history is irrelevant to the interpretation of an unambiguous statute." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 808 n.3 (1989); *see also United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("where . . . the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms'") (internal quotation marks omitted).

What the Seventh Circuit did to provide "further support" for its interpretation of 25 U.S.C. § 2710—while simultaneously relying upon *Cabazon*—was inconsistent with this Court's precedent. App. 12a. The district court concluded that the relevant provision, 25 U.S.C. § 2703(7), was unambiguous. App. 33a-34a. The Seventh Circuit's decision identified no ambiguity in *any* provision of IGRA. The Court should review this case to hold that, where a statute is unambiguous, resorting to legislative history is inappropriate.

II. The Seventh Circuit's decision conflicts with a recent decision from the Ninth Circuit.

Finally, this Court should grant the petition for a writ of certiorari because the Seventh Circuit "has entered a decision in conflict with a decision from another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). The Seventh Circuit's decision conflicts with a July 22, 2015, decision from the Ninth Circuit.

In *Idaho v. Coeur d'Alene Tribe*, No. 14-35753, 2015 WL 4461055 (9th Cir. July 22, 2015), the Ninth Circuit affirmed a district court decision preliminarily enjoining the Coeur d'Alene Tribe from offering Texas Hold'em poker. *Id.*, at *6. The court of appeals held that the district court properly found that Texas Hold'em is not a Class II game under IGRA because the Idaho Constitution and gaming statute explicitly prohibit poker. *Id.*, at *3-4.

Importantly, 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. It held:

> The canon of statutory interpretation that ambiguities in federal statutes enacted to benefit Indians should be resolved in their favor, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985), does not apply here

> because Idaho law is at issue and, regardless, the statute is unambiguous.

Coeur d'Alene Tribe, 2015 WL 4461055, at *3 n.4.

Unlike the Seventh Circuit, the Ninth Circuit did not apply *Cabazon's* "regulatory/prohibitory" test to determine whether Texas Hold'em is explicitly prohibited by Idaho law for purposes of 25 U.S.C. § 2703(7)(A)(ii). *Coeur d'Alene Tribe,* 2015 WL 4461055, at *3. There is no reference in the Ninth Circuit's decision to this Court's *Cabazon* decision.

Moreover, unlike the Seventh Circuit, the Ninth Circuit did not apply 25 U.S.C. § 2710(b) to determine whether a game is Class II or Class III gaming under 25 U.S.C. § 2703. *Compare Coeur d'Alene Tribe,* 2015 WL 4461055, at *3-4 *with* App. 8a-14a. The Ninth Circuit properly focused its attention on the definition of Class II gaming in 25 U.S.C. § 2703(7)(A)(ii). *Coeur d'Alene Tribe*, 2015 WL 4461055, at *3.

In sum, the Seventh Circuit's decision is in direct conflict with the Ninth Circuit's decision in *Coeur d'Alene Tribe*. The Seventh Circuit applied the Indian law canons; the Ninth Circuit did not. The Seventh Circuit applied *Cabazon's* "regulatory/prohibitory" test; the Ninth Circuit did not. The Seventh Circuit relied heavily upon 25 U.S.C. § 2710(b); the Ninth Circuit did not rely upon 25 U.S.C. § 2710(b) at all. This Court should grant the petition to resolve this recent circuit split.

* * *

The Court should grant the petition for a writ of certiorari to resolve an important question under IGRA. Whether *Cabazon*'s "regulatory/prohibitory" test applies to interpret IGRA is a question of national importance that is likely to rear its head over and over again in tribal gaming cases. The *Cabazon* test was used to interpret P.L. 280. IGRA was enacted *after Cabazon* was decided. This case is an IGRA case, not a P.L. 280 case. The Seventh Circuit's use of *Cabazon* here sets a bad precedent and muddles federal Indian gaming law.

The Court should also grant the petition to resolve important issues of statutory interpretation in Indian law cases. Whether and how the Indian law canons apply in the face of an unambiguous statute is a significant question. Likewise, whether it is appropriate to consult legislative history to interpret an unambiguous statute is a question likely to recur with regularity in IGRA and other contexts.

Finally, the Seventh Circuit's decision directly conflicts with a recent Ninth Circuit decision. The Seventh and Ninth Circuit's decisions were issued only months apart, but they take starkly different approaches to interpreting IGRA. The Court should take this case to resolve a circuit split and answer the important question presented.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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