No. 14-2529

In the
United States Court of Appeals
for the Seventh Circuit

STATE OF WISCONSIN,

Plaintiff-Appellee,

v.

HO-CHUNK NATION,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin, No. 3:13-cv-00334.
The Honorable **Barbara B. Crabb**, Judge Presiding.

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SUMMARY OF THE ARGUMENT

The Plaintiff State of Wisconsin ("State") insists that poker is not a Class II game for purposes of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* ("IGRA"), and the Ho-Chunk Nation ("Nation") may not offer non-banked poker through the PokerPro® table system ("e-Poker") at the Nation's Ho-Chunk Gaming Madison ("HCG Madison") facility, claiming poker is "explicitly prohibited" by Wisconsin law. Brief of Plaintiff-Appellee State of Wisconsin ("State's Brief" or "State's Br."), at 17-20. However, it is indisputable that poker is being played in Wisconsin. The Wisconsin Department of Tourism advertises poker events on its website to attract visitors to the State and tell them where to go to play poker. ECF No. 24, ¶¶ 4-5; ECF No. 28, ¶¶ 5 and Ex. 2. Simulated poker is offered by the State as part of the lottery. ECF No. 17, ¶ 33 and Exh. F. Poker is being conducted for charitable purposes under State-regulated raffle licensing laws ("Charity Poker"). ECF No. 17, ¶ 35; ECF No. 24, ¶¶ 1-5; ECF No. 28, ¶¶ 2-5 and Exs. 1-3. Video poker machines may be installed at any of the 12,698 Class B licensed taverns located in the State without violating a criminal law, and video poker is widely offered and played in taverns. ECF No. 17, ¶¶ 36-40; ECF No. 24, ¶ 15; ECF No. 28, ¶ 8. Texas Hold'em poker tournaments and cash games are easily located, readily accessible and conducted at establishments open to the public. ECF No. 24, ¶¶ 16-20; ECF No. 28, ¶¶ 9 and 10. Poker is also being played at the gaming facilities of Wisconsin's tribes on tribal reservations and trust lands. ECF No. 17, ¶ 20. Indeed, the

State has published reference materials for at least 14 years in which it describes poker as a Class II game, ECF No. 17, ¶¶ 45-46 and Exh. I at 21 and Exh. J at 24; ECF No. 24, ¶ 21; ECF No. 27, ¶ 2 and Ex. 1., and the National Indian Gaming Commission ("NIGC") has already concluded that e-Poker played at HCG Madison is a Class II game, ECF No. 17, ¶ 42 and Exh. G.

Class II games are defined by IGRA to include non-banked card games that "are explicitly authorized by the laws of the State," or "are not explicitly prohibited by the laws of the State and are played at any location in the State." IGRA §§ 2703(7)(A)(ii)(I) and (II). According to the State, poker is "explicitly prohibited" by the Wisconsin Constitution and criminal statutes, and, therefore, the Court's analysis ends and e-Poker must be declared to be a Class III game. State's Br., pp. 17-20. The argument suffers fatal legal errors and hinges on ignoring that Wisconsin law is interpreted and applied by the State to authorize, permit and regulate a wide variety of poker.

First, the State proposes a rigid three-step test for determining whether a game is Class II or Class III gaming. State's Br., pp. 14. The State's rigid test has never been utilized by a court or NIGC, renders portions of IGRA superfluous and does violence to the intent and purpose of IGRA. Caselaw and Congressional legislative history require that whether a card game is "explicitly authorized by the laws of the State" or "not explicitly prohibited by the laws of the State and are played at any location in the State," IGRA §§ 2703(7)(A)(ii)(I) and (II), be analyzed in conjunction with both the

regulatory/prohibitory test articulated in *California v. Cabazon Band of Missions Indians,* 480 U.S. 202 (1987) and the requirement that Indian Tribes may engage in Class II gaming if such gaming is "located within a State that permits such gaming for any purpose by any person, organization or entity," IGRA § 2710(b)(1)(A). *Sycuan Band of Mission Indians v. Roache,* 54 F.3d 535, 539 (9th Cir. 1994); *Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1023 (10th Cir. 2003); Senate Report No. 100-446 at 6 (1988) (hereinafter the "Committee Report"). Applying the proper legal framework, it is plain Wisconsin regulates, and does not explicitly prohibit, gaming in general or poker in particular.

Second, the State's assertion that Wisconsin law "explicitly prohibits" poker is erroneous. 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. The Wisconsin Constitution explicitly authorizes charity bingo and raffles under which Charity Poker is being played. The State also argues that the specific type of poker played at HCG Madison involves placing a "bet," and, therefore e-Poker is "explicitly prohibited" by the allegedly unambiguous language of Wis. Stat. §§ 945.01(1) and 945.02. Nowhere in the Wisconsin criminal gambling statutes relied on by the State is poker even referenced, and the statutory section relied on by the State is far from unambiguous.

Even if the style of poker played at HCG Madison through e-Poker were illegal under Wis. Stat. §§ 945.01(1) and 945.02, the State regulates, it does not prohibit, poker generally. The State attempts to distinguish one form of poker from another, claiming that poker as a lottery, Charity Poker or video poker are not "real" poker and downplay the widespread and public play of Texas Hold'em poker as errant purportedly illegal games. State's Br., pp. 31-40. Yet, the State cannot authorize poker in one format (e.g., Charity Poker, lottery and video poker), or assert poker is illegal under Wisconsin laws but willfully fail to enforce the laws against non-Indians and then preclude Indian tribes from offering poker at Class II gaming facilities. *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996); *Roache,* 54 F.3d at 539. Such legal gymnastics by a State would thwart the very purposes of IGRA, which is to promote Indian self-governance and independence through Indian gaming free from interference by the States. IGRA §§ 2701(5) and 2702(1) and (3).

Finally, the State's argument that the parties' tribal-state compact ("Compact") impacts whether e-Poker is a Class II game is legally erroneous. State's Br., pp. 22-23. Congress, through IGRA, defined classes of gaming. The Compact may not, as a matter of law, define what constitutes Class II or III games or alter IGRA in any manner.

ARGUMENT

I. IGRA § 2703(7) Must Be Interpreted Consistently With The Congressional Intent That The *Cabazon* Regulatory/Prohibitory Test Be Used To Determine Whether A Particular Game Is Class II Gaming.

As set forth in detail in the Appellant's Brief ("Initial Brief"), pp. 15-32, Congress adopted the basic holding of *Cabazon, supra,* into its legislative findings of IGRA. IGRA § 2701(5). Congress adoption of the *Cabazon* regulatory/prohibitory test is consistent with the well-established rule that Indian Tribes are sovereigns that are free to operate without State interference. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985).

That Congress intended to incorporate the *Cabazon* regulatory/prohibitory test into IGRA is plain not only from IGRA's explicit legislative finding, IGRA § 2701(5), but also from the legislative history that directed courts to utilize the *Cabazon* regulatory/prohibitory test to "determine whether class II games are allowed in certain States." S. Rep at 6. *See also Forest Cnty Potawatomi Cmty. of Wis. v. Norquist*, 45 F.3d 1079, 1084 (7th Cir. 1995). The State's assertion that the *Cabazon* regulatory/prohibitory test has no applicability to IGRA, *see* State's Br., pp. 23-30, is not credible in light of IGRA § 2701(5), the Committee Report, this Court's holding in *Forest Cnty Potawatomi, supra,* and the other federal cases utilizing the *Cabazon* regulatory/prohibitory test to interpret IGRA. *See* Initial Brief, pp. 15-32.

In tacit acknowledgment that the *Cabazon* regulatory/prohibitory test is generally applicable to the interpretation and application of IGRA, the State also argues that the

test has no applicability to the ***definition*** of Class II game, IGRA § 2703(7). State's Br., pp. 25-27. Instead, the State proposes a rigid three part test. State's Br., p. 14. According to the State, if a particular card game is "explicitly authorized" by the laws of the State, IGRA § 2703(7)(A)(ii)(I), the legal inquiry ends and the game is Class II that may be played at Indian casinos. If a particular game is not "explicitly authorized" by the laws of the State, the State suggests the second step is to determine whether a particular card game is "explicitly prohibited by the laws of the State," IGRA § 2703(7)(A)(ii)(II). State's Br., p. 14. If the answer is yes, the State argues that the legal inquiry ends and the game is Class III gaming requiring a tribal-state compact. According to the State, only if the answer to the second question is no, should a Court analyze whether the game is "played at any location in the State." State's Br., pp. 14 and 25. Only after passing this three-part test should a court look to IGRA § 2710, and the State claims the section imposes an "additional requirement" for Class II games. State's Br., pp. 14 and 25. The State's analysis suffers from multiple flaws.

First, the State's proposed three-part test has never been adopted or utilized by a court or the NIGC, the agency charged with enforcing Class II gaming violations and authorized to issue opinions on gaming classifications. Indeed, there is not a single case where a court has determined whether a particular game is Class II or Class III wholly divorced from IGRA § 2710 and without reliance on the *Cabazon* regulatory/prohibitory test. If this Court were to adopt the State's test, it would represent a significant

deviation from IGRA jurisprudence and NIGC administrative law.[1] Initial Brief, pp. 15-32.

Second, the foundation of the State's Brief violates the well-established principle that a court's analysis of IGRA "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 51 (1987). The State's interpretation also creates ambiguity and inconsistency among the applicable IGRA sections. If poker is either "explicitly authorized" or "not expressly prohibited … but played in the state," then poker by definition is being "permitted" by the State. Yet, then why would IGRA § 2710(b)(1)(A) include "permitted in the state" as "an additional" test for Class II non-banked card games if it is not intended to cover circumstances where the other two standards may not apply? Congress must have intended the phrase to mean something with respect to all Class II games, including card games. Had Congress intended IGRA

[1] The State urges this Court to reject NIGC's opinion that e-Poker is a Class II game, claiming the NIGC erroneously concluded that poker played at Indian casinos satisfies IGRA §§ 2703(7)(A)(ii) and 2710(b). State's Br., pp. 28-29. As set forth below, Part II.C.3., *infra*, and in the Nation's Initial Brief, pp. 44-47, the NIGC properly concluded that poker play at Indian casinos proves that poker is not explicitly prohibited by the laws of the State. Additionally, the State's proposed interpretation of IGRA is contrary not only to the NIGC opinion involving e-Poker, but an ***entire body*** of NIGC administrative law classifying games by analyzing IGRA § 2703(7)(A)(ii) in conjunction with IGRA § 2710. Initial Brief, pp. 31-31 (citing multiple NIGC opinions). The State fails to justify disregarding NIGC's nearly 20-year application of the same basic legal framework. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The NIGC has developed significant expertise in gaming classifications, and wholesale departure from the NIGC legal framework should not be undertaken flippantly as urged by the State.

§ 2710(b) not to apply to Class II card games, it would have specifically excluded card games from the "permits" and *Cabazon* regulatory/prohibitory analyses. The State's proposed construction of Class II card games would render IGRA § 2710(b)(1)(A) meaningless and superfluous in the context of card games, an interpretation that must be rejected. *In re Merchants Grain, Inc.*, 93 F.3d 1347, 1353-54 (7th Cir. 1996).

Third, the State's proposed interpretation of IGRA is contrary to Congressional intent. 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. S. Rep. at 9. Congress advised, contrary to the State's argument (State's Br., p. 25), that ***"no additional restrictions are intended by these subparagraphs."*** *Id.* But by reading the "permits" language out of the analysis and then finding the "authorized" and "not prohibited" language to be unambiguous, the State is able to ignore what Congress intended. The State cites to a litany of cases, none of which involved IGRA or any other Indian law, claiming resort to legislative history where a statute is "plain and unambiguous" is improper. State's Br., pp. 26-27. However, the "standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana*, 471 U.S. at 766. "[S]tatutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Failure to consider legislative history is judicial error when the legislative history shows that the "plain meaning" interpretation

is contrary to the legislative intent shown by the legislative history. *Train v. Colo. Pub. Interest Research Grp., Inc.*, 426 U.S. 1, 10 (1976); *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 361 (8th Cir. 1990); *Civil Aeronautics Bd. v. United Airlines, Inc.*, 542 F.2d 394, 399 (7th Cir. 1976); *Citizens Against Casino Gambling in Erie Cnty. v. Hogen*, 2008 WL 2746566, at *53 (W.D. N.Y. July 8, 2008). Indeed, since *Cabazon, supra,* the word "prohibit" is ambiguous – it cannot mean merely "regulated" by a state – and that ambiguity makes resorting to the Senate Report to determine legislative intent entirely appropriate.

If reading a statutory definition in a mechanical fashion, such as proposed by the State, would defeat the purpose of the legislation at issue, which is what occurs under the State's interpretation, the "statutory definition should not be applied in such a manner." *Philko Aviation, Inc. v. Shacket*, 462 U.S. 406, 412 (1983), citing *Lawson v. Suwannee Fruit & Steamship Co.*, 336 U.S. 198 (1949). *See also Cole v. U.S. Capital*, 389 F.3d 719, 726 (7th Cir. 2004) (concluding that a statutory definition should not "eviscerate" the purpose of the statutory scheme).

There is not a single case or NIGC opinion interpreting IGRA in accordance with the State's alleged "plain meaning" three-part test. Instead, consistent with the Senate Report, caselaw and NIGC decisions, IGRA § 2703 must be analyzed in conjunction with IGRA § 2710 and the definitions together must be analyzed under the *Cabazon* regulatory/prohibitory test. *See* Initial Brief, pp. 15-32. This Court must reject the

State's mechanical application of the statutory definition to preserve the Congressional intent and purpose of IGRA.

II. Poker Is Either "Explicitly Authorized" Or "Not Explicitly Prohibited" By Wisconsin Law And Played In Wisconsin For Purposes Of IGRA § 2703(7)(A)(ii).

As set forth in the Nation's Initial Brief, Wisconsin regulates, and does not prohibit, gambling generally and poker in particular, as the Western District of Wisconsin and the Seventh Circuit have previously determined. *See* Initial Brief, pp. 33-38, citing *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States*, 367 F.3d 650, 664 (7th Cir. 2004); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wis.*, 770 F. Supp. 480, 486 (W.D. Wis. 1991). Because IGRA did not give Wisconsin "the right to make particularized decisions regarding a specific class II gaming operation," only a complete ban on such gaming would give Wisconsin any ability to control Class II gaming as it is attempting to do with e-Poker. *Gaming Corp. of Am.*, 88 F.3d at 544; *Roache,* 54 F.3d at 539. Even if, however, the State's mechanical application of the definition of Class II gaming were appropriate the undisputed facts demonstrate that Wisconsin law, as interpreted and applied by the State, does not explicitly prohibit poker.

A. The Wisconsin Constitution Does Not Explicitly Prohibit Non-Banked Poker.

Wis. Const. Art. IV, § 24(1) is a constitutional limitation on the power of the legislature to *authorize* gambling:

> Except as provided in this section, the legislature *may not authorize* gambling in any form.

Wis. Const. Art. IV, § 24(1) (emphasis added). The only reference to poker provides that the State shall not offer poker as part of the State lottery. Wis. Const. Art. IV, § 24(6)(c)(3).

Under the explicit Wisconsin Constitutional authorization, which the State asserts is an explicit prohibition,[2] poker is played to raise money for nonprofit organizations or charitable purposes. ECF No. 24, ¶¶ 1-5; ECF No. 28, ¶ 4 and Exs. 1-2; Wis. Const. Art. IV, §§ 24(5)-(6). 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. ECF No. 24, ¶ 4; ECF No. 28, ¶ 5 and Ex. 3. The State does not dispute that Charity Poker is being played with the explicit authorization of the legislature to authorize raffles and bingo. Wis. Const. Art. IV, §§ 24(5)-(6). Instead, they disingenuously argue

[2] Multiple times the State relies on an arbitration decision that was the subject of another proceeding, *State v. Ho-Chunk Nation*, 12-cv-505-bbc. State's Br., pp. 17, n. 3 and 30. In the previous proceeding, the district court vacated the arbitration decision. *See* Opinion and Order, *State v. Ho-Chunk Nation*, No. 12-cv-505-bbc, ECF No. 12, Dec. 5, 2012. Arbitration decisions are not binding on courts. *Scott v. Riley Co.*, 645 F.2d 565, 568 n.4 (7th Cir. 1981). More importantly, "a decision that has been *vacated* has no precedential authority whatsoever." *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991) (*citing O'Connor v. Donaldson*, 422 U.S. 563, 578 n.2 (1975)). The State's citation to the arbitration decision is improper.

Charity Poker is not "real" poker because all proceeds go to charity.[3] State's Br., n. 7. Allowing charitable and other organizations to conduct non-banked poker is an explicit authorization by Wisconsin for the playing of non-banked poker. *Sisseton-Wahpeton Sioux Tribe*, 897 F.2d at 365. *See also Lac du Flambeau*, 770 F. Supp. at 488 (holding a state "permits" gaming even by allowing "gaming activity to be carried out by small charitable groups on very limited occasions"); *Mashantucket Pequot Tribe v. Conn.*, 913 F.2d 1024 (2nd Cir. 1990) (Tribe allowed to conduct casino type gaming because charitable organizations allowed to do so). This fact alone ends the legal inquiry under the State's rigid three-part test.[4] State's Br., p. 14.

[3] The State implies that Charity Poker is illegal by making a passing reference at the end of its Brief, p. 40, but the State never addresses the undisputed record evidence that Charity Poker is occurring under the raffle exemption. *See Johnson v. McCaughtry*, 92 F.3d 585, n.19 (7th Cir. 1996) (failure to develop argument or respond to arguments raised by the opposing party results in waiver).

[4] Citing to *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408, the State asserts that the Wisconsin Supreme Court has determined that poker is illegal under the Wisconsin Constitution and is Class III gaming under IGRA. State's Br., pp. 19-21. The *Dairyland* Court did not hold that poker is explicitly prohibited by the Constitution and did not interpret IGRA to conclude that poker is Class III gaming. The majority opinion includes five references to poker. The first four merely quote from the various versions of Wis. Const. Art. IV, § 24 prohibiting the State from offering poker as part of the State lottery. *Dairyland*, 2006 WI 107, ¶ 20, n. 25, n.44 and n. 68. The only other reference lists the games added by the amended compacts entered into by the Governor, one of which was poker. *Dairyland*, 2006 WI 107, ¶ 68. While the *Dairyland* Court states, in *dicta*, that the games listed are Class III, the Court was not making a legal determination; it was merely listing the expanded gaming provided for in the Compacts. As set forth in Part III, *infra*, IGRA, not the compacts, is conclusive as to what is Class II or III gaming.

B. Wis. Stat. §§ 945.01(1) And 945.02 Do Not Explicitly Prohibit e-Poker.

The State argues that non-banked e-Poker is explicitly prohibited in Wisconsin for purposes of IGRA because anyone who plays such poker is guilty of a Class B misdemeanor for placing a "bet," pursuant to Wis. Stat. § 945.02(1). State's Br., pp. 12-13 and 18-19. However, Wisconsin criminal statues "must be strictly construed in favor of [an] accused." *Wis. Elec. Power Co. v. Pub. Serv. Comm'n of Wis.*, 110 Wis. 2d 530, 535, 329 N.W.2d 178 (1983). *See also, State v. Cole,* 2003 WI 59, ¶ 13, 262 Wis. 2d 167, 663 N.W.2d 700. Moreover, "[w]hen construing statutes, meaning should be given to every word, clause and sentence in the statute, and a construction which would make part of the statute superfluous should be avoided wherever possible." *Hutson v. Wis. Personnel Comm'n,* 2003 WI 97, ¶ 49, 263 Wis. 2d 612, 665 N.W.2d 212. *See also IBM Credit Corp. v. Vill. of Allouez,* 188 Wis. 2d 143, 153, 524 N.W.2d 132 (1994).

Wis. Stat. Ch. 945 is the portion of the Wisconsin Criminal Code governing "Gambling." No explicit reference can be found anywhere in ch. 945 to poker. Instead, Wis. Stat. § 945.02 makes placing a "bet" a Class B misdemeanor. The word "bet" is expressly defined as follows:

> A bet is a bargain in which the parties agree that, dependent upon chance even though accompanied by some skill, one stands to win or lose something of value specified in the agreement.

Wis. Stat. § 945.01(1).

The phrase "determined by chance, even though accompanied by some skill" has been construed to mean "chance rather than skill must ... be the dominant factor controlling the award...." *State v. Hahn*, 221 Wis. 2d 670, 679, 586 N.W.2d 5 (Ct. App. 1998) (quotation omitted).[5] For the Court to conclude that playing poker satisfies the definition of "bet" such as to be a Class B misdemeanor, it must be able to conclude based on the record that "chance rather than skill is the predominant factor" controlling whether one stands to win or lose something of value in a poker game. Nothing in the record would support such a conclusion. It is not the cards drawn by chance that predominantly determines who wins at poker but rather the skill in how the cards drawn are played. In that instance, skill would certainly predominate over chance. Thus, construing the statute strictly in favor of a person playing non-banked e-Poker at HCG Madison, nothing in the record supports the State's conclusion that such play violates the criminal statute.[6]

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[5] The State's sole caselaw reference to support its argument that poker is illegal under Wis. Stat. §§ 945.01 and .02 is *State v. Morrissy*, 25 Wis. 2d 638, 131 N.W.2d 366 (1964), a 50 year old case. State's Br., p. 17. The Court in *Morrissy* did not address the question of whether playing poker satisfied the definition for placing a bet as defined in Wis. Stat. § 945.01(1). Instead, the question was whether a tavern owner's weekly poker games made the playing of poker a "principal use" of the tavern such that it constituted a "gambling place" for purposes of the statute prohibiting the operating of a "gambling place" under Wis. Stat. § 945.03(1m)(a). The *Morrissy* Court did not reach the issue of whether "chance rather than skill [is]…the dominant factor controlling the award" in the game of poker.

[6] Moreover, even if poker play violated Wis. Stat. §§ 945.01 and .02, that would not mean that the State has "explicitly prohibited" poker. The fact that gambling law violations are (footnote continued)

C. The Form Of Poker Is Irrelevant To Whether Poker Is Bring Played In This State.

1. Simulated Poker Is Being Played As Part Of The State Lottery.

The State has offered at least 23 scratch-off lottery poker games, including Five Card Stud, Straight Poker, Badger Hold'em and a variety of other poker games. ECF No. 17, Exh. F. The State contends that scratch-off tickets with "poker themes" do not fall within the dictionary definition of poker because there is no interactive play and the player plays against the house, *i.e.*, the game is banked.[7] State's Br., pp. 31-33.

The game descriptions provided by the State demonstrate that the lottery games are simulations of poker. ECF No. 17, Exh. F. For example, the description of Championship Poker lottery scratch-off is much like Texas Hold'em poker played at HCG Madison. *See* ECF No. 17, ¶ 34. Just like poker offered at HCG Madison,

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enforceable by criminal as well as civil penalties is not dispositive. *Cabazon,* 480 U.S. at 211; *Roache,* 54 F.3d at 539, *Mashantuckett Pequot Tribe,* 913 F.2d at 1029. The decriminalization of video poker and the abundance of gambling activities in Wisconsin mean that the State regulates rather than prohibits gambling such as poker. *Lac Courte Oreilles,* 367 F.3d at 664; *Lac du Flambeau,* 770 F. Supp. at 485-87.

[7] The State's chosen dictionary definitions of "poker" suit its arguments. Other definitions and common reference materials make it plain that "poker" is a generic word to describe "countless variants" of the game, including: 1) non-banked games, such as draw poker, five or seven card stud and community poker (*e.g.*, Texas Hold'em), all of which involve interactive play between two or more players; 2) banked poker where a single or multiple players play against the house and not each other, such as let it ride, pai-gow poker and three card poker, where there is no interactive play or bluffing; and 3) video poker, a form of banked poker that is likewise not interactive and does not involve bluffing. *See* Encyclopedia Britannica, Poker, authored by William N. Thompson (2013), avail. at *http://www.britannica.com/EBchecked/topic/466636/poker,* last visited March 10, 2014.

Championship Poker uses two "hole cards" and five "community cards" displayed on the "flop," "turn" and "river." Just like poker offered at HCG Madison, Championship Poker allows players to create their best five-card hand. Just like poker offered at HCG Madison, Championship Poker utilizes traditional poker hands to determine winning players. *Id*. The State's offering of simulated poker scratch-off lottery tickets demonstrates that it is "not ... willing to sacrifice its lucrative lottery ... in order to obtain authority under *Cabazon*" to prohibit Class II gaming on Indian lands. *Lac Courte Oreilles*, 367 F.3d at 664.

The State also asserts that poker lottery tickets do not involve betting and winnings are determined solely by chance. State's Br., p. 32. "Bet" in Wisconsin is defined as "a bargain in which the parties agree that, dependent upon chance … one stands to win or lose something of value specified in the agreement." Wis. Stat. § 945.01(1). Each scratch-off game comes with a set of rules, including top dollar prizes, odds of winning and what constitutes a winning poker hand. ECF No. 17, Exh. F. The person who plays a poker lottery ticket must pay the ticket price for a chance to win, *e.g.*, make a bet. *Id.* The player stands to win the specified prizes or loose the ticket price according to the rules of the game. *Id.* There is no record support for the State's assertion that a poker lottery ticket does not involve a bet.

The State contends that the issue of whether an Indian tribe is entitled to conduct casino gaming because the State lottery used games with casino gaming themes was

addressed in *Coeur d'Alene Tribe v. Idaho*, 842 F. Supp. 1268, 1280 (D. Idaho 1994), aff'd 51 F.3d 876 (9th Cir. 1995). The issue in the case was whether the tribe could conduct all forms of Class III gaming because Idaho permits or does not prohibit certain forms of Class III gaming. Contrary to the law in the Seventh Circuit, the court found that permitting one type of Class III gaming did not permit the tribe to conduct other types of Class III gaming. The court did not address the question of whether casino themed lottery games permitted casino game playing by the tribe nor was there any factual discussion that the Idaho lottery offered games with casino themes.

The State attempts to distinguish State-authorized play of poker, such as poker lottery tickets, Charity Poker and video poker, from the form of poker being offered through e-Poker at HCG Madison. Focusing on those different attributes, however, misses the mark. It is indisputable that the State has authorized the legal play of several forms of Class III poker. By doing so, "at least insofar as the State's argument is directed at Class II-type gaming, of the sort engaged in by the Tribes in *Cabazon Band* [*i.e.*, poker], the state cannot regulate and prohibit, alternately, game by game and device by device, turning its public policy off and on by minute degrees." *Roache*, 54 F.3d at 539. The State is offering simulated poker such as the lottery and permitting the play of Charity Poker, poker in Class III gaming facilities and video poker. Thus, the State has opened the door for Indian tribes to offer poker at Class II facilities.

2. *Video Poker Is Regulated By The State.*

Video poker is also commonly played in taverns throughout Wisconsin. Possession of five or fewer video gambling machines in Class B taverns, including video poker, is not a crime. ECF No. 17, ¶¶ 36-39. Video gambling machines, including video poker, may also be used by players for amusement purposes under certain circumstances without violating any criminal laws. *See State v. Hahn*, 203 Wis. 2d 450, 553 N.W.2d 292 (Ct. App. 1996).

The State does not actively enforce the statutes that make possession of five or fewer video gambling machines subject to civil, regulatory forfeitures. ECF No. 20, ¶¶ 1-10. The State claims, with no citation to any legal authority, that only "legal" play of poker may be considered in determining whether poker is played at any location for purposes of IGRA § 2703(7)(A)(ii)(II). State's Br., p. 35. The argument is another way of saying that Wisconsin must "explicitly authorize" poker in order for it to be a Class II game. However, nowhere in IGRA's definition of Class II gaming does the word "legal" appear. If the State must specifically legalize the play of non-banked card games, only IGRA § 2703(7)(A)(ii)(I)—requiring the state to "explicitly authorize" the game—would have been included or would be needed in the definition of Class II card games, rendering IGRA § 2703(7)(A)(ii)(II) superfluous. *In re Merchants Grain, Inc.*, 93 F.3d at 1353-54.

The State has decriminalized possession of video poker machines and fails to meaningfully enforce video gambling laws as it relates to video poker. The fact that gambling law violations are enforceable by criminal as well as civil penalties is not dispositive. *Cabazon*, 480 U.S. at 211; *Roache*, 54 F.3d at 539; *Mashantuckett Pequot Tribe*, 913 F.2d at 1029. The decriminalization of video poker and the abundance of gambling activities in Wisconsin mean that it regulates rather than prohibits gambling such as poker. *Lac du Flambeau*, 770 F. Supp. at 485-87; *Lac Courte Oreilles*, 367 F.3d at 664. The Wisconsin legislature decriminalized possession of five or fewer video poker machines to allow taverns to compete with Indian gaming without fear of criminal prosecution. ECF No. 17, Ex. H. at p. 2. Video poker is not explicitly prohibited for purposes of IGRA.

Like poker lottery tickets, the State asserts that video poker is not "real" poker. State's Br., p. 34, n. 6. Video poker is an electronic facsimile of banked poker, which means the player competes against the house rather than other players. The State has stipulated that poker exists in banked and non-banked format. ECF No. 17, ¶¶ 6, 16 and 21. Like e-Poker, the player has to place a wager in order to play video poker. ECF No. 17, ¶¶ 24-30 and 39. Like e-Poker, but wholly unlike slot machines, video poker requires the player to make strategic decisions regarding the cards (*e.g.*, which cards to hold in video poker and whether to fold a hand in e-Poker). *Id.* Like e-Poker, video poker involves the random drawing of electronic cards. *Id.* Like e-Poker, a winning

hand is determined using traditional poker hands, such as a straight, flush, three of a kind, etc. *Id.*

It is irrelevant that e-Poker and video poker have slightly different rules. This "identical types of games" argument was made by the State and rejected by the district court in *Lac du Flambeau*, 770 F. Supp. at 487. The State is attempting to create artificial distinctions between types of poker in an attempt to "impose their gaming regulatory schemes on the tribes," which is contrary to the intent of IGRA. *Id.*

3. Poker Is Being Played At Tribal Casinos.

Both banked and non-banked poker are permitted in tribes' Class III gaming facilities pursuant to the tribal-state compacts. ECF No. 17, ¶¶ 20-21. The State argues such poker play does not mean that the State is "permitting" or "authorizing" its play for purposes of IGRA. State's Br., pp. 15-17 and 36-38. The State asserts that *Dairyland* merely grandfathered preexisting contract rights. State's Br., pp. 36-38. As set forth in the Nation's Initial Brief, pp. 44-47, the Governor was given the authority to negotiate the terms of the Compact with the Nation under Wis. Stat. § 14.035. It was within the Governor's statutory authority, acting on behalf of the State, to decide whether to authorize or permit poker to be played at Class III facilities. The *Dairyland* Court found only that the Governor's exercise of his authority to permit poker under the Compacts gave the tribe protection under the Contract Clause. When the Governor exercised his statutory authority and chose to authorize expanded gaming to include poker at Class

III facilities, he was acting on behalf of the State pursuant to one if its laws. Wisconsin therefore "permits" the play of poker for "any purpose by any person" within the meaning of IGRA § 2710(b) and poker is not "explicitly prohibited" and is being played in Wisconsin, IGRA § 2703(7)(A)(ii). *See Artichoke Joe's Calif. Grand Casino v. Norton*, 353 F.3d 712, 720-31 (9th Cir. 2003).

4. The State Does Not Enforce Its Gambling Laws Against Poker Play.

Even if the play of poker involves the placing of a "bet," *see* Part II.B., *supra,* the indisputable evidence demonstrates that the laws are not enforced. Video poker is prevalent in Wisconsin taverns. ECF No. 17, ¶¶ 36-40; ECF No. 24, ¶15; ECF No. 28, ¶ 8. Poker Leagues are advertised online and league organizers are operating games on a nightly basis in south central and southeastern Wisconsin. ECF No. 24, ¶¶ 6-14; ECF No. 28, ¶¶ 6-8. The Poker Leagues award cash prizes to winners, publicly boast that thousands of dollars are paid out, and send winners to out-of-state poker tournaments such as the World Series of Poker as a prize to top winners. *Id.* Cash poker tournaments are also common and played openly in establishments serving the public. *Id.*

Feigning ignorance as to what level of enforcement would allow the State to show that it does not "permit" poker to be played, the State claims under enforcement is simply too subjective to be a workable standard. State's Br., pp. 38-40. However, the State could have, but did not, dispute the findings of the Nation's private investigator.

ECF No. 30. The State could have, but did not, submit evidence that it prosecutes video poker possession or play or prosecutes poker tournaments and games held in taverns and public establishments. ECF No. 30. The Nation is not suggesting that a single incident of an illegal but undiscovered basement poker game would result in poker being a Class II game under IGRA. Here, however, the undisputed facts demonstrate that even though the State claims poker is illegal, it is advertised and promoted by the Wisconsin Department of Tourism and played openly without fear of prosecution. Under such circumstances, even purportedly illegal play is relevant to determining whether poker is a Class II game. *See Lac du Flambeau*, 770 F. Supp. at 488; *Artichoke Joe's*, 353 F.3d at 722.

If the State had submitted any evidence of enforcement, perhaps the "under" enforcement argument would be apt. However, the evidence demonstrates the wholesale failure of the State to enforce its gambling laws with respect to poker. To ignore such willful un-enforcement would allow the State to permit its citizens to play poker but prohibit the Nation's tribal members from doing so on tribal land in violation of IGRA's clear intent. *See Lac du Flambeau*, 770 F. Supp. at 488; *Artichoke Joe's*, 353 F.3d at 722.

III. Reference To Poker In The Compact Is Irrelevant.

IGRA contains "a list of seven items which '[a]ny Tribal-State compact … may include provisions relat[ed] to.'" *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 932 (7th

Cir. 2008); *see* IGRA § 2710(d)(3)(C). "Significantly, what compels a limited reading of the permitted topics [in IGRA § 2710(d)(3)(C)] is the canon of construction obligating [courts] to construe a statute abrogating tribal rights narrowly and most favorably towards tribal interests." *Rincon Band of Luiseno Mission Indians of the Rincon Res. v. Schwarzenegger*, 602 F.3d 1019, n.9 (9th Cir. 2010). Absent from the list is giving a state any control over Class II Indian gaming facilities, defining or limiting what constitutes Class II gaming, or in any way ceding regulation or enforcement of Class II gaming to a state under a compact. Nor could the Compact do so because "Class II games are 'regulated by the [NIGC],'" not the states. *Seneca-Cayuga Tribe of Okla.*, 327 F.3d at 1023. The Compact does not, and legally cannot, define what constitutes Class II or Class III gaming, only IGRA does.

Nonetheless, the State asserts that reference to "[a]ll forms of poker" as games that may be played at Class III gaming facilities in the Compact "reflects [the parties'] understanding and interpretation as to what kind of gaming would require a tribal-state compact." State's Br., pp. 22-23. Yet, the parties simply cannot alter the definitions of Class II and Class III gaming set forth in IGRA §§ 2703(7) and (8) through compacting. All the parties can do by compact is negotiate what games can be played at a Class III facility, not what games constitute Class II and III games. IGRA §§ 2703, 2710(a) and (d)(3)(A); *Ho-Chunk Nation*, 512 F.3d at 933. The Court cannot conclude, as a matter of law, that the parties intended the Compact to include non-banked e-Poker as

a "form" of Class III gaming notwithstanding IGRA's express inclusion of non-banked card games under the statutory definition of Class II games. IGRA §§ 2703(7)(A) and (B). All the Compact does is show that the parties intended to allow all forms of poker to be played at Class III facilities, not that non-banked poker required a tribal-state compact because it was a Class III game. Only the Class II and III gaming definitions of IGRA govern what can be played at a Class II facility such as HCG Madison.

CONCLUSION

For the reasons set forth herein and in the Nation's Initial Brief, e-Poker is Class II gaming that may be offered at HCG Madison. The District Court's June 12, 2014 Opinion and Order and June 13, 2014 Judgment should be reversed and the permanent injunction, which is not yet in effect, should be vacated.

Dated this 3rd day of October, 2014.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Reply Brief of Defendant-Appellant complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,622 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The undersigned further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 97-2003 in 12 point Palatino Linotype font.

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2014 the Reply Brief of Defendant-Appellant was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

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