No. 14-2529

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

STATE OF WISCONSIN,

Plaintiff-Appellee,

vs.

HO-CHUNK NATION,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Wisconsin
Case No. 13-cv-335
Judge Barbara B. Crabb

BRIEF OF THE NATIONAL INDIAN GAMING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT HO-CHUNK NATION AND REVERSAL

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Appellate Court No: 14-2529

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State of Wisconsin v. Ho-Chunk Nation

(1) The full name of every party that the attorney represents in the case:

National Indian Gaming Association

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear before the party in this court:

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IDENTITY AND INTEREST OF AMICUS CURIAE

The National Indian Gaming Association ("NIGA") is an intertribal association of 184 federally recognized Indian Tribes established to support Indian gaming and, in doing so, to advance and defend the sovereignty of American Indian tribal governments. NIGA's member tribes are located throughout Indian Country and conduct Class I, II, and III gaming activities pursuant to the Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C. § 2701 *et seq*., a statute enacted by the United States Congress as a means of strengthening tribal self-governance, advancing the goals of tribal economic self-sufficiency, and improving the well-being of tribal communities through the expansion and delivery of tribal governmental services in the areas of health, education, law enforcement, fire protection, and other social services programs.

NIGA's primary mission is to protect and preserve the right of tribal governments to promote tribal economic development, self-sufficiency, and strong tribal governments by means of the lawful conduct of tribal gaming activities in accordance with the provisions of IGRA. In the pursuit of these goals, NIGA operates as an information clearinghouse and educational, legal, regulatory, and public policy resource for tribal governments, policymakers and the public concerning Indian gaming issues and tribal community development.

The question presented in this case is of considerable interest to NIGA and its member tribes because it involves an Indian tribe's right to conduct a particular Class II gaming activity pursuant to IGRA. The proper classification of a game has significant legal, political, regulatory, and financial implications for tribal governments, tribal gaming enterprises, and tribal communities. To appreciate fully the importance of game classification and the distinction between Class II and Class III gaming, one must begin

with an understanding that the classification system established in IGRA represents a hard-fought compromise between competing tribal, state, and federal interests over the authority to regulate gaming activities in Indian Country.

IGRA divides Indian gaming activities into three classes, each of which determines the applicable regulatory framework within which a gaming activity is conducted. Class I gaming includes social games played solely for prizes of minimal value or traditional forms of Indian gaming played in connection with tribal ceremonies or celebrations. 25 U.S.C. § 2703(6). Tribal governments have exclusive regulatory jurisdiction over Class I gaming. *Id.* Class II gaming, which includes lottery-style games, including bingo, lotto, pull tabs, games similar to bingo, certain non-banking card games, and several other enumerated games, comes within the primary regulatory jurisdiction of tribal governments with federal oversight provided by the National Indian Gaming Commission ("NIGC"). 25 U.S.C. § 2703(7)(A).

Class III gaming includes all games of chance that do not come within Class I or II gaming, including slot machines and roulette, pari-mutuel wagering, and banking card games, as well as electro-mechanical facsimiles of any game of chance. In order for a tribe to offer Class III gaming, it must execute a gaming compact with the pertinent state government addressing how such gaming is to be regulated.

In contrast, because Class II gaming is within the exclusive jurisdiction of Indian tribes and not subject to any compacting requirements, tribal governments can conduct and expand their Class II gaming subject only to regulation by tribal gaming regulatory agencies and federal oversight by the NIGC. Class II gaming, thus, represents an important and strategic alternative to Class III gaming, particularly for those tribal

governments that rely heavily, and in some instances, exclusively, on Class II gaming as a critical source of governmental revenue.

In providing this system of classification, Congress intended to strike a careful balance between, on the one hand, the sovereign rights of tribal governments to engage in gaming free of state jurisdiction, and on the other hand, state interests with respect to gaming activities taking place within their boundaries. If this Court were to affirm the District Court's ruling that a non-banked poker game is a Class III game requiring a tribal-state compact, it would disrupt the careful balance of IGRA's statutory scheme of shared regulatory authority and undermine the beneficial impacts of Indian gaming and federal policy goals of IGRA to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

The NIGA submits this *amicus curiae* brief in support of the Defendant-Appellant Ho-Chunk Nation and in support of reversal of the District Court's ruling in this case. This brief is accompanied by a motion for leave to file it. No party's counsel authored this brief in whole or in part. With the exception of *amicus*' counsel, no one, including any party or party's counsel, contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

This is an appeal from the District Court's judgment that an electronic non-banked poker game is a Class III game requiring a tribal-state compact. The resolution of this case depends on whether the non-banked game of poker conducted by the Ho-Chunk Nation ("Nation") constitutes a lawful Class II gaming activity under IGRA, specifically, § 2703(7)(A)(ii) of the statute, which defines "class II gaming" to include certain bingo

games as well as non-banking card games that "are explicitly authorized by the laws of the State" or "are not *explicitly prohibited by the laws of the State* and played at any location in the State." 25 U.S.C. § 2703(7)(A)(ii) (emphasis added).

Based on a provision in the Wisconsin Constitution limiting the types of gambling authorized by the state legislature, the District Court concluded that the Nation's non-banking poker game was "explicitly prohibited by the laws of the state," and therefore outside the scope of the Class II gaming definition in § 2703(7)(A)(ii). The District Court, however, erred in its analysis by adopting a strict, plain meaning approach to § 2703(7)(A)(ii) in contravention of clear legislative history and intent.

The District Court found that because the language of § 2703(7)(A)(ii) was plain and unambiguous, there was no need to consult legislative history to ascertain Congress' intent with respect to the standards for determining whether a game is "explicitly prohibited by the laws of the State." 25 U.S.C. § 2703(7)(A)(ii). The relevant statutory text, however, does not have the plain and unambiguous meaning assigned to it by the District Court and is in fact susceptible to more than one reasonable interpretation.

As the Supreme Court has explained, the "plainness or ambiguity of statutory language" is not determined in isolation; it is determined by "reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). Here, when referencing "the language itself," an ambiguity emerges as to whether the "explicitly prohibited" language of § 2703(7)(A)(ii) should be confined to prohibitions on the gambling form of poker only. Since the text of § 2703(7)(A)(ii) refers to the "card game" generally, Congress could have intended the language "explicitly prohibited" to mean

that the game must be prohibited to everyone under *all* circumstances, including in a non-gambling format in which consideration and prizes are not involved.

Moreover, an ambiguity emerges when the relevant statutory language is construed in the context of IGRA. First, it is unclear whether Congress intended for § 2703(7)(A)(ii) or § 2710(b)(1)(A) to operate exclusively in determining the lawfulness of a Class II gaming activity, or if Congress intended to harmonize § 2703(7)(A)(ii) with § 2710(b)(1)(A) to give § 2703(7)(A)(ii) its proper interpretation and effect.

Second, there is, at a minimum, an uncomfortable fit between § 2703(7)(A)(ii) and the Congressional findings of IGRA, which provide that "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." 25 U.S.C. § 2701(5) (emphasis added).

Because the meaning of § 2703(7)(A)(ii) is ambiguous, this Court is "left to resolve that ambiguity" *Robinson*, 529 U.S. at 345. In so doing, this Court may consult legislative history for indicia of Congress' intent with respect to the meaning and application of the ambiguous provision. The legislative history here reveals an explicit congressional intent for § 2703(7)(A)(ii) to be read in conjunction with § 2710(b)(1)(A) for purposes of determining whether a game is "explicitly prohibited by the laws of the State." 25 U.S.C. § 2703(7)(A)(ii). The legislative history further provides that the proper judicial test for determining whether a gaming activity qualifies as Class II gaming is the prohibitory/regulatory test developed in *California v. Cabazon Band of Mission Indians*. 480 U.S. 202 (1987).

Further, where statutory language is ambiguous as it is here, the Nation is entitled to the more favorable construction consistent with the Indian canons of construction, which require ambiguities to be resolved "liberally in favor of the Indians." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). In the instant case, under a reading most favorable to the Nation, the *Cabazon* prohibitory/regulatory test must be applied because it results in an outcome that promotes, rather than limits, the Nation's gaming activities.

The application of the *Cabazon* test to the facts of this case is straightforward and not in dispute. It has already been determined that Wisconsin is a regulatory state in *Luc du Flambeau Band of Lake Superior Chippewa Indians v. Wis.*, 770 F. Supp. 480 (W.D. Wis. 1991). This determination was subsequently affirmed by this Court in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin*, 367 F.3d 650 (7th Cir. 2004). Because Wisconsin regulates and does not prohibit gaming in general, and poker in particular, Wisconsin "permits such gaming" for purposes of § 2710(b)(1)(A) and does not "explicitly prohibit" the game of poker for purposes of § 2703(7)(A)(ii).

ARGUMENT

A. The District Court Should Have Considered the Legislative History of IGRA Because the Definition of "Class II Gaming" Contains an Ambiguity With Respect to the Meaning of Whether a Card Game Is "Explicitly Prohibited By the Laws of the State."

The issue in the instant case is ultimately one of statutory interpretation. Section 2703(7)(A)(ii) of IGRA provides that "class II gaming" includes certain bingo games as well as non-banking card games that "are explicitly authorized by the laws of the State" or "are not *explicitly prohibited by the laws of the State* and played at any location in the State" 25 U.S.C.§ 2703(7)(A)(ii) (emphasis added). The District Court found that under

the plain language of 25 U.S.C. § 2703(7)(A)(ii), the Nation's non-banked game of poker did not qualify as a Class II game because the game was "explicitly prohibited" under Wisconsin law, specifically Article IV, § 24 of the Wisconsin Constitution, which states that "[e]xcept as provided in this section, the legislature may not authorize gambling in any form." Wis. Const. Art. IV, § 24(1).

The District Court reasoned that because the language of § 2703(7)(A)(ii) was plain and unambiguous, there was no need to consult legislative history to ascertain Congress' intent with respect to the standards for card games that are "explicitly prohibited by the laws of the State." 25 U.S.C. § 2703(7)(A)(ii). The District Court, however, erred in ignoring legislative history because the language of § 2703(7)(A)(ii) does not have a plain and unambiguous meaning and is in fact susceptible to more than one interpretation.

Where there are at least two plausible, yet different interpretations of statutory language, there is ambiguity, and outside considerations may be used to determine the legislative intent behind the use of the language. *See Firstar Bank v. Faul*, 253 F.3d 982, 987-90 (7th Cir. 2001). If the meaning of a statutory provision is ambiguous and examining the statutory context and structure as a whole does not result in a clarified meaning, then legislative history may be consulted to inform the meaning of statutory language. *See United States v. Miscellaneous Firearms, Explosives, Destructive Devices and Ammunition*, 376 F.3d 709, 712 (7th Cir. 2004); *United States v. Turcotte*, 405 F.3d 515, 522-23 (7th Cir. 2005), *cert denied*, 546 U.S. 1089 (2006).

Because the relevant statutory language is ambiguous, the District Court should have considered the legislative history of IGRA to determine the proper meaning and

application of § 2703(7)(A)(ii). As noted by this Court, the "ultimate objective" of the Court is to "give effect to the congressional intent embodied in the entire statute." *Mach Min., LLC v. Secretary of Labor, Mine Safety and Health Administration*, 728 F.3d 643, 648 (7th Cir. 2013).

1. The Plain Language of § 2703(7)(A)(ii) Is Susceptible to More Than One Interpretation.

In matters of statutory construction, "the beginning point must be the language of the statute." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). If "the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case," then that meaning controls and the court's "inquiry must cease." *Robinson*, 519 U.S. at 340. As the Supreme Court has explained, however, the "plainness or ambiguity of statutory language" is not determined in isolation; it is determined by "reference to the *language itself*, the *specific context* in which that language is used, and the *broader context* of the statute as a whole." *Id.* at 34 (emphasis added).

In the instant case, the District Court ruled that the general prohibition on gambling found in Article IV, § 24 of the Wisconsin Constitution amounted to an explicit prohibition of the non-banked game of poker for purposes of § 2703(7)(A)(ii). While it is possible to read the relevant state constitutional provision in such light, the fundamental issue here is not whether such interpretation is a permissible reading of the statute, nor even whether this is the more "natural" reading of the statute. *See McCarthy v. Bronson*, 500 U.S. 136, 139 (1991) (because "statutory language must always be read in its proper context," the "most natural reading" of the statutory language, "when viewed in isolation," does not always control).

Rather, the issue here is whether the definition is so plain and unambiguous that it forecloses any consideration of congressional intent, history, and purpose. If the language at issue, when read in its proper context, has a plain and unambiguous meaning, that language controls and the court's "inquiry must cease." *Robinson*, 519 U.S. at 340. On the other hand, if an ambiguity arises from the statutory language, a reviewing court is free to consult external indications of congressional intent such as legislative history. *See Turcotte*, 415 F.3d at 522-23.

The term "explicitly prohibited by the laws of the State," as used in § 2703(7)(a)(ii), does not have the plain and unambiguous meaning assigned to it by the District Court and is susceptible to more than one reasonable interpretation. The District Court ruled that, "[b]ecause all gambling is prohibited in Wisconsin without an act of the legislature authorizing it," the game of non-banked poker is "explicitly prohibited by the laws of the State" and therefore outside the scope of § 2703(7)(A)(ii). *State of Wisconsin v. Ho-Chunk Nation*, 2014 WL 2615422, *5 (W.D. Wis. 2014). The District Court's ruling was based on the assumption that the *only* possible meaning of the language "explicitly prohibited by the laws of the State," 25 U.S.C. § 2703(7)(A)(ii), is that a card game is explicitly prohibited when state laws prohibit the game from being played in the gambling context. In other words, under the District Court's interpretation, the determination of whether a particular card game is "explicitly prohibited by the laws of the State" for purposes of § 2703(7)(A)(ii) turns solely on whether the game at issue can be played for gambling purposes.

The text of § 2703(7)(A)(ii), however, does not indicate, or even suggest, that the meaning of "explicitly prohibited" should be confined to prohibitions on the gambling

form of poker. The game of poker can be played in a number of different contexts, some of which may or may not involve the traditional elements of gambling.[1] For instance, one could conceive of a poker tournament where entry fees are not required and prizes of nominal value such as trophies are awarded. The game played at such tournament would not cease to be a game of poker simply because it was played in a non-gambling context. The game of poker is in the underlying gaming activity and remains the same game regardless of whether consideration or prizes are involved.

Since the language of § 2703(7)(A)(ii) refers to the "card game" generally, Congress could have intended the term "explicitly prohibited" to mean that the card game must be prohibited to everyone under *all* circumstances, including in a non-gambling format in which consideration and prizes are not involved. Under this interpretation, the relevant inquiry would be whether a particular card game can be played for *any* purpose, not just for gambling purposes.

In fact, this is the precise interpretation adopted by Judge Prosser of the Wisconsin Supreme Court in his concurring opinion in *Dairyland Greyhound Park, Inc. v. Doyle*, 719 N.W.2d 408 (Wis. 2006). Judge Prosser observed that:

> Consequently, when a dispute arises over whether a certain Class II gaming activity is lawful on Indian land, the answer does not depend on whether the state has agreed to that activity in a formal way. The answer depends on whether the state has enacted criminal laws that *prohibit* that activity to *everyone*.

Id. at 468.

Ambiguity exists when a statute is capable of being understood by reasonably

[1] Although the term "gambling" is not defined in the Wisconsin statutes, there is a specific statute that proscribes betting. A "bet" is defined as "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. § 945.02(1).

well-informed persons in two or more different senses. *See* Norman J. Singer & J.D. Shambie Singer, 2A *Sutherland Statutes and Statutory Construction*, § 45:2 (7th ed. 2007). Here, there is evidence of two different interpretations of the "explicitly prohibited" standard in § 2703(7)(A)(ii). On the one hand, based on the District Court's opinion, a prohibition on the gambling form of a card game will suffice in meeting the standard of an "explicitly prohibited" game in § 2703(7)(A)(ii). However, on the other hand, Judge Prosser's opinion indicates that the prohibition must not only be criminal in nature, but also be applicable to *everyone*, not just to those playing the game in the gambling context.

Where the plain language of a statutory term can lead to more than one permissible interpretation, as is the case here, that term is ambiguous. *See Robinson*, 519 U.S. at 340-41. The Court should have therefore consulted legislative history to discern Congress' meaning with respect to the "explicitly prohibited" standard in § 2703(7)(A)(ii).

2. When Construed in Context, the Definition of "Class II Gaming" Is Ambiguous as to When a Non-Banking Card Game Is "Explicitly Prohibited By the Laws of the State."

Even assuming that there is no ambiguity in the language itself, this Court, in determining the "plainness or ambiguity of statutory language," must still look to "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341. It is well-settled that in interpreting statutes, statutory language "must always be read in its proper context," *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991), because "[t]he meaning – or ambiguity – of certain words or phrases may only become evidence when placed in context." *Food & Drug Admin. v.*

Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000). As affirmed by this Court, the plain language rule of statutory construction cannot be applied "to selected words divorced from the context in which they appear." *Mach Min.*, 728 F.3d at 647.

A statutory provision that seems clear in isolation may, in fact, be ambiguous when construed in the larger context of the statutory scheme of which it is a part. *See Robinson*, 519 U.S. 341 (noting that, although the term "employees" appears "[a]t first blush" to mean current employees, "[t]his initial impression . . . [did] not withstand scrutiny in the context of" the section at issue in light of the larger statutory scheme). Courts must accordingly examine the "language and design of the statute as a whole." *United States v. Berkos*, 543 F.3d 392, 396 (7th Cir. 2008), and bear 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." *Brown & Williamson*, 529 U.S. 120, 133 (2000).

In the instant case, an ambiguity emerges when the definition of Class II gaming is considered within the context of § 2710(b)(1)(A), which provides that a Class II gaming activity is lawful on Indian lands so long as the activity "is located within a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(b)(1)(A). The Wisconsin Supreme Court has interpreted this Section 2710(b)(1)(A) as the judicial test for determining whether a tribe can lawfully conduct a particular Class II game. *See Dairyland Greyhound Park*, 719 N.W.2d at 467 ("A tribe's right to a Class II gaming activity is determined by whether the state permits that gaming activity "for any purpose by any person, organization, or entity").

The District Court, however, adopted a different approach by rejecting the

standard in § 2710(b)(1)(A) and relying exclusively on § 2703(7)(A)(ii) to determine whether the Nation's non-banked poker game could be played as a Class II game. In this specific context, it is unclear whether Congress intended for § 2703(7)(A)(ii) or § 2710(b)(1)(A) to operate exclusively in determining the lawfulness of a Class II gaming activity, or if Congress intended to harmonize the two provisions to give § 2703(7)(A)(ii) its proper interpretation and effect. The meaning and application of § 2703(7)(A)(ii) is therefore ambiguous and not susceptible to a plain and ordinary meaning.

Further, when § 2703(7)(A)(ii) is considered in "the broader context of the [IGRA] as a whole," *Robinson*, 519 U.S. at 341, an ambiguity emerges as to whether Congress intended the definition to be read in the manner employed by the District Court. "In determining the meaning of [a] statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990) (citations omitted).

The stated purpose of IGRA is "to provide a statutory basis for the operation of gaming by Indian tribes." 25 U.S.C. § 2702(2). Congress enacted IGRA upon a finding that "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." 25 U.S.C. § 2701(5) (emphasis added). This Congressional finding plainly states Congress' intent to give tribes *exclusive* regulatory authority over gaming activities that are not prohibited by criminal law and public policy.

When reading this Congressional finding together with § 2703(7)(A)(ii), one possible interpretation is that Congress intended for all non-banking card games to

qualify as Class II games so long as the games were not prohibited "as a matter of criminal law and public policy." 25 U.S.C. § 2701(5). In other words, the "explicitly prohibited" standard in § 2703(7)(A)(ii) could be interpreted to mean that the game must be "prohibited by criminal law and public policy." *Id.* Such a reading would be consistent with this Congressional finding and the statutory scheme of IGRA as a whole.

Where, as here, the use of a statutory term in a particular context can lead to more than one permissible meaning, there is ambiguity. Under these circumstances, the Court is free to look beyond the plain text of the statute and consult legislative history to determine the proper meaning and application of the "explicitly prohibited" standard in § 2703(7)(A)(ii).

B. The Cabazon Criminal/Prohibitory – Civil/Regulatory Test Is the Proper Test for Determining Whether a Non-Banking Card Game Is "Explicitly Prohibited By the Laws of the State" For Purposes of § 2703(7)(A)(ii).

Because the meaning of § 2703(7)(A)(ii) is ambiguous when determined "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole," *Robinson*, 519 U.S. at 341, this Court is "left to resolve that ambiguity." *Id*. At 345. In so doing, the Court may consult legislative history for indicia of Congress' intent with respect to the meaning and application of the ambiguous provision. *See Emergency Services Billing Corp, Inc. v. Allstate Ins. Co.*, 668 F.3d 459, 465 (7th Cir. 2012) ("When the plain meaning of a statutory term is unclear, outside considerations can be used in an attempt to glean the legislative intent behind the use of the term. These can include the legislative history . . . .") (citations omitted). The legislative history here is instructive regarding the meaning and application of § 2703(7)(A)(ii).

1. Legislative History Reveals an Explicit Congressional Intent for Federal Courts to Apply the *Cabazon* Prohibitory/Regulatory Test.

A review of the legislative history of IGRA necessarily begins with *California v. Cabazon Band of Mission Indians*. 480 U.S. 202 (1987). IGRA was enacted in response to *Cabazon*, a case addressing the applicability of state laws over bingo games operated by Indian tribes on Indian lands. In *Cabazon*, the Supreme Court reaffirmed the long-standing principle that "Indian tribes retain attributes of sovereignty over both their members and their territory . . . and that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Id*. at 207 (internal quotation marks and citations omitted). Nevertheless, the Court explained that state law may apply if Congress expressly so provides or, in the absence of express congressional consent, where state law is not preempted. *See id.* at 215-16.

In spite of the state's prohibition on bingo for commercial purposes, the Court ruled that the statute at issue, Public Law 280, was not applicable to bingo conducted on Indian lands because "California *regulates* rather than *prohibits* gambling in general and bingo in particular." *Id.* at 211 (emphasis added). In describing the distinction between "prohibitory" laws and "regulatory" state laws, the Court explained:

> If the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the [s]tate's public policy.

Id. at 209. The Court found that California was a regulatory state because it "permits a substantial amount of gambling activity" such as the state lottery and pari-mutuel horse betting. *See id.* at 211.

Despite the fact that it involved a different statute, *Cabazon* remains instructive. Contrary to the District Court's assertion that "*Cabazon* had nothing to do [sic] § 2703 or the meaning of "class II gaming," *Ho-Chunk*, WL 2615422 at *4, the meaning of Class II gaming is not only directly related to *Cabazon*, but actually premised on the prohibitory/regulatory test developed from that case. When drafting IGRA, Congress specifically considered *Cabazon* and was specific as to *Cabazon*'s application to Class II gaming, particularly with respect to § 2710(b)(1)(A) of IGRA, which provides that a Class II gaming activity is permitted if it "is located within a [s]tate that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(b)(1)(A).

In the Statement of Policy prefacing the Senate Report that accompanied S. 555, which became IGRA, Congress expressly approved the reliance of the *Cabazon* test by federal courts in determining whether a state "permits such gaming" for purposes of § 2710(b)(1)(A):

> 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. . . . Here, 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.

S. Rep. No. 100-446, 100th Cong., 2d Sess., at 6 (1988).

In the same Report, Congress also clarified the meaning of the language "any purpose by any person, organization or entity":

> The phrase 'for any purpose by any person, organization or entity' makes no distinction between State laws that allow class II gaming for charitable, commercial or governmental purposes, or the nature of the entity conducting the gaming. ***If such gaming is not criminally***

> ***prohibited by the State in which tribes are located, then tribes, as governments, are free to engage in such gaming.***

Id. at 12 (emphasis added).

The legislative history therefore demonstrates clear legislative intent "to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity" under the *Cabazon* prohibitory/regulatory test. *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 (1990).

Nevertheless, the District Court rejected the applicability of § 2710(b)(1)(A) on the basis that the "Section 2703(7)(A)(ii) *defines* class II gaming; section 2710(b)(1) imposes an *additional condition* on class II gaming." *Ho-Chunk Nation*, WL 2615422, at *2. Such a reading, however, is contary to clear legislative intent and unsupported by any precedent. In the Explanatory Notes to the definition of Class II gaming, Congress clarified the connection between § 2710(b)(1)(A) and § 2703(7)(A)(ii):

> 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.

S. Rep. No. 100-446 at 12 (emphasis added).

In devising the definition of Class II gaming in § 2703(7)(A)(ii), Congress intended for the standard in § 2710(b)(1)(A) to govern whether a "particular card game

[is] within the scope of class II," and for the two statutory provisions to be read together in making that determination. Congress did not intend for the definition in § 2703(7)(A)(ii), standing alone, to have an operative effect on the issue of permissible Class II games.

Based on the foregoing review of IGRA's legislative history, the determination of whether a game is "explicitly prohibited by the laws of the state" under § 2703(7)(A)(ii) should be guided by the same standards used to determine whether a game is "permitted" by the state under § 2710(b)(1)(A). As evidenced in the legislative history, the determination of whether a game is "permitted" by the state turns on whether the state has a prohibitory or regulatory policy towards gaming under the *Cabazon* test. *See Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1257 (9th Cir. 1994). IGRA's legislative history, which the District Court erroneously failed to consider, therefore confirms that the *Cabazon* prohibitory/regulatory test is the proper judicial test in determining whether a card game is "explicitly prohibited by the laws of the state" under § 2703(7)(A)(ii).

2. The Indian Canons of Construction Compel this Court to Adopt the Cabazon Criminal/Prohibitory – Civil/Regulatory Test.

Ambiguity in a federal statute enacted for the benefit of Indian tribes implicates the Indian canons of construction, which "are rooted in the unique trust relationship between the United States and the Indians.'" *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). As recognized by the Supreme Court, "the standard principles of statutory construction do not have their usual force in cases involving Indian law." *Id.* Where there is doubt as to the proper interpretation of a federal statute enacted for the benefit of Indian tribes, "statutes are to be construed liberally in favor of the Indians, with

ambiguous provisions interpreted to their benefit" *Montana*, 471 U.S. at 766, "in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982).

The Indian canons of construction must be applied here to resolve the ambiguity of § 2703(7)(A)(ii). Without question, "IGRA is undoubtedly a statute passed for the benefit of Indian tribes." *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 730 (9th Cir. 2003). One of the stated purposes of IGRA is to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2701(1).

Moreover, Congress has given clear instructions to the judiciary as to how ambiguities in IGRA should be resolved. In presenting S.555, the bill which ultimately became IGRA, Representative Morris Udall, Chairman of the House Committee on Interior and Insular Affairs, explained in his remarks:

> Mr. Speaker, while this legislation does impose new restrictions on tribes and their members, it is legislation enacted basically for their benefit. ***I would expect that the Federal Courts, in any litigation arising out [sic] this legislation, would apply the Supreme Court's time-honoring rule of construction that any ambiguities in legislation enacted for the benefit of Indians will be construed in their favor.***

134 Cong. Rec. H25377 (Sept. 26, 1988) (statement of Rep. Udall) (emphasis added).

This same instruction was memorialized in the Senate Committee Report preceding IGRA, which explicitly states that courts should "interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes." S. Rep. No. 100-446, at 15.

Thus, to ignore the canons when interpreting the "explicitly prohibited by the laws of the State" language of § 2703(7)(A)(ii) of IGRA is to ignore congressional intent. In choosing between two possible constructions, this Court must employ the Indian canons of construction and resolve the ambiguity in favor of the Nation. Here, there are two different yet plausible constructions of § 2730(7)(A)(ii), One possible construction clearly favors Indian tribes by allowing the Nation to conduct a gaming activity that is permitted by Wisconsin law under § 2710(b)(1)(A).

On the other hand, the other construction, which interprets § 2703(7)(A)(ii) in isolation from the rest of IGRA, precludes the Tribe from conducting a card game that is both permitted by Wisconsin and played legally in other contexts throughout the state. Even if the first construction is not necessarily the better reading, such construction must be adopted because it favors Indian tribes by promoting rather than limiting the games that may be used to fulfill IGRA's statutory purpose of "promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

C. The Non-Banked Game of Poker Is a Class II Game Because It Is Not Explicitly Prohibited and Is Played In the State For Purposes of § 2710(7)(A)(ii).

For a non-banked game of poker to qualify as Class II gaming, Wisconsin state law must explicitly authorize or not explicitly prohibit its play, and such game must be played legally somewhere in the state. *See* 25 U.S.C. § 2703(7)(A)(ii). A gaming activity is "not explicitly prohibited by the State" for purposes of § 2703(7)(A)(ii) if it is played in "a State that permits such gaming for any purpose by any person, organization or entity." 25 U.S.C. § 2710(b)(1)(A). A determination of whether a gaming activity is "permitted" by the state for purposes of 2710(b)(1)(A) depends on whether the state is a

regulatory or prohibitory state under the test developed in the *Cabazon* case.

Under the *Cabazon* test, "if the intent of a state law is generally to prohibit certain conduct," it falls within the state's grant of criminal jurisdiction over Indian lands; "but if the state law generally permits the conduct at issue, subject to regulation," it does not fall within the state's authority over regulation on Indian lands. *Cabazon*, 480 U.S. at 209. In order to enforce state gaming laws on tribal lands, a reviewing court must determine "whether the law is criminal in nature, and thus fully applicable to" tribal land, or civil in nature, and therefore not applicable to tribal land. *Id.* at 208. The mere fact that "an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law." *Id.* at 21.

Here, the question of whether Wisconsin is a prohibitory or regulatory state under the *Cabazon* test has already been resolved. In *Luc du Flambeau Band of Lake Superior Chippewa Indians v. Wis.*, 770 F. Supp. 480 (W.D. Wis. 1991), the district court ruled that the Wisconsin Constitution "evidence[s] a state policy toward gaming that is now regulatory rather than prohibitory in nature." *Id.* at 486. The *Luc du Flambeau* court clarified that "[t]he fact that Wisconsin continues to prohibit commercial gambling and unlicensed gaming activities does not make its policy prohibitory." *Id.* at 487. Key to the district court's analysis was the fact that at least some form of gambling has been authorized throughout most of the state's history. *See id*. at 486.

The *Luc du Flambeau* court's decision regarding the regulatory nature of Wisconsin's gaming policy was affirmed by this Court in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin*, 367 F.3d 650 (7th Cir. 2004). In the *Lac Courte* decision, this Court clarified that:

> The establishment of a state lottery signals Wisconsin's broader public policy of tolerating gaming on Indian lands. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083, 94 L.Ed. 2d 244 (1987). In *Cabazon*, the Supreme Court held that a state has no authority to enforce its gaming laws on Indian lands if it permits any gaming activity under state law. *Id.* at 211, 107 S.Ct. 1083. Further, because 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,' 25 U.S.C. § 2710(d)(1)(b), the lottery's continued existence demonstrates Wisconsin's amenability to Indian gaming.

Lac Courte, 367 F.3d 664.

Since Wisconsin is a regulatory state under the *Cabazon* test, the game of poker is permitted in the state "for any purpose, by any person, organization, or entity." 25 U.S.C. § 2710(b)(1)(A). Because "the state cannot regulate and prohibit, alternately, game by game and device by device, turning its public policy off and on by minute degrees," *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994), the game of non-banked poker is unequivocally "permitted" in a regulatory state such as Wisconsin.

In order to qualify as a Class II game, the game must not only be permitted by the state, but also "played at any location in the state." 25 U.S.C. § 2703(7)(A)(ii). There is no serious dispute that poker is played in the State of Wisconsin, including in tribal casinos pursuant to tribal-state compacts. *See Dairyland Greyhound Park, Inc. v. Doyle*, 719 N.W.2d 408 (Wis. 2006) (ruling that the 1993 Wisconsin Constitution amendments prohibiting gambling in general could not be applied to compacts authorizing games otherwise prohibited under the Constitution). The game of non-banked of poker therefore satisfies all of the requirements of a Class II game under § 2703(7)(A)(ii) of IGRA.

CONCLUSION

For the foregoing reasons, the non-banked game of poker is not explicitly prohibited by Wisconsin law and is a Class II game within the meaning of § 2703(7)(A)(ii). The judgment of the District Court should therefore be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P 32(A)

I, Elizabeth L. Homer, certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7), as it contains 6,715 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii).

I further certify 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), as qualified by Circuit Rule 32(b), as it has been prepared in a 12-point, proportionally spaced typeface, Times New Roman, with footnotes in 11-point type.

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CERTIFICATE OF SERVICE

I, Elizabeth Lohah Homer, certify that on August 26, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system on the following counsel:

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