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.

ON APPEAL FROM THE UNITED STATED DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN,
CASE NO. 13-CV-334,
THE HONORABLE BARBARA B. CRABB, PRESIDING

BRIEF OF PLAINTIFF-APPELLEE STATE OF WISCONSIN

J.B. VAN HOLLEN
Attorney General

CHRISTOPHER J. BLYTHE
Assistant Attorney General
State Bar #1026147

CLAYTON P. KAWSKI*
Assistant Attorney General
State Bar #1066228

Attorneys for Plaintiff-Appellee

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0180 (Blythe)
(608) 266-7477 (Kawski)
(608) 267-2223 (Fax)
blythecj@doj.state.wi.us
kawskicp@doj.state.wi.us

**Counsel of record*

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases Cited

Page

Page

Page

Federal Statutes Cited

Page

Wisconsin Statutes Cited

Page

Other Authorities Cited

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.

ON APPEAL FROM THE UNITED STATED DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN,
CASE NO. 13-CV-334,
THE HONORABLE BARBARA B. CRABB, PRESIDING

BRIEF OF PLAINTIFF-APPELLEE STATE OF WISCONSIN

INTRODUCTION

Defendant-appellant Ho-Chunk Nation[1] offers a form of electronic poker at its Ho-Chunk Gaming casino in Madison, Wisconsin ("HCG Madison"). The dispute in this case is whether such poker is a Class II or a Class III game under the Indian Gaming Regulatory Act ("IGRA"). If it is a Class II game, it

[1]Defendant-appellant Ho-Chunk Nation will be referred to as "the Nation." Plaintiff-appellee State of Wisconsin will be referred to as "the State."

is not subject to regulation by the State. If it is a Class III game, it must be conducted consistent with the parties' tribal-state gaming compact, which does not permit Class III gaming at HCG Madison.

The Nation asserts that the electronic poker it is offering is a Class II game under IGRA, while the State asserts that it is a Class III game. Because the parties' compact does not authorize Class III gaming at HCG Madison, the State's position is that this activity is a violation of the compact.

The district court agreed with the State that the electronic poker being offered at HCG Madison is a Class III game. It granted the State's summary judgment motion and permanently enjoined the Nation from offering electronic poker at HCG Madison because the parties' compact does not permit Class III gaming at HCG Madison. The injunction goes into effect 30 days after the conclusion of this appeal if the district court is affirmed.

This Court should affirm the district court's judgment. Poker is explicitly prohibited by Wisconsin law, and the electronic poker being offered at HCG Madison is a Class III game.

JURISDICTIONAL STATEMENT

The Nation's jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUE

Is the non-banked electronic poker that is offered by the Nation at its casino in Madison, Wisconsin a Class III game under IGRA?

Answer by the district court: Yes.

This Court should answer: Yes.

STATEMENT OF THE CASE

I. Statement of Facts

In 1992, the parties entered into a compact ("the Compact") regarding conducting certain types of gambling (specifically, Class III gaming) on tribal lands. (Dist. Ct. Dkt. #17, Joint Statement of Stipulated Facts, *hereinafter* "JSOSF", ¶ 13). The Compact authorized the Nation to conduct Class III gaming on the Nation's lands in Sauk, Jackson, and Wood counties and at a fourth location as specified by the parties. *Id.*

In 1993, an amendment to the Wisconsin Constitution took effect that limited the types of gambling that could be authorized by the Wisconsin Legislature. (JSOSF, ¶ 15); *see also* Wis. Const. art. IV, § 24.

In 2003, the Nation and the State executed the Second Amendment to the Compact, which authorized the Nation to offer both banked and non-banked poker at some of the Nation's casinos. (JSOSF, ¶ 16). The amended Compact

also permitted the Nation to conduct Class III gaming at HCG Madison if Dane County voters passed a referendum authorizing the Nation to do so. (*Id.*, ¶ 17). The referendum held on February 17, 2004, failed by a wide margin, and no subsequent action has been taken to approve Class III gaming at HCG Madison by referendum. (*Id.*). Thus, Class III gaming is not currently authorized at HCG Madison under the Compact.

The Compact, as amended, describes the playing of "All forms of Poker" as a Class III game. The Compact states:

> IV. AUTHORIZED CLASS III GAMING. The States of Illinois, Iowa and Michigan authorize within their borders a full range of casino games. In order to make Wisconsin Indian gaming facilities competitive with these surrounding States, the Parties have agreed that the Nation can offer for play the games authorized by this Section IV. . . .
>
> A. The Tribe shall have the right to operate the following Class III games during the term of this Compact *but only as provided in this Compact*:
>
> 1. Electronic games of chance with video facsimile displays;
> 2. Electronic games of chance with mechanical displays;
> 3. Blackjack;
> 4. Pull-tabs or break-open tickets when not played at the same location where bingo is being played;
> 5. All other banking, percentage and pari-mutuel card games;
> 6. *All forms of Poker*, to the extent that these games are not included in the previous subsection;
> . . . .
> 15. Any other game, whether played as a table game or played on an electronic or mechanical device, including devices that operate like slot machines, which consist of the elements of prize, chance and consideration[.]

(Dist. Ct. Dkt. #17-4 at 1 (emphasis added) (Compact, § IV. A., as amended in 2003); *see also* JSOSF, ¶ 15 & Ex. D).

In November 2010, the Nation began offering a form of electronic poker ("e-poker") at HCG Madison. (JSOSF, ¶ 23). The specific system used for e-poker is the PokerPro® table system. (*Id.*); *see also* PokerTek | PokerPro®, *http://www.pokertek.com/pokerpro/* (last visited Sept. 19, 2014). The mechanics of how this form of e-poker is played are described in the parties' Joint Statement of Stipulated Facts at paragraphs 24 through 30. E-poker is not house-banked; therefore, players bet against each other but not against the house. (JSOSF, ¶ 23). HCG Madison (the house) collects a "rake" from the players' wagers (the pot) for each hand. (*Id.*).

II. Procedural History

Prior to the instant case, the State and the Nation were parties to a related case, *State of Wisconsin v. Ho-Chunk Nation*, No. 12-CV-505 (W.D. Wis.), also before U.S. District Judge Barbara B. Crabb. (*See* Dist. Ct. Dkt. #18-2). The State petitioned the district court to confirm an arbitration award that enjoined the Nation from offering e-poker at HCG Madison. (*Id.* at 1). The arbitrator, retired U.S. Circuit Judge William A. Norris of the Ninth Circuit, determined that the e-poker offered at HCG Madison is a Class III game under IGRA. (Dist. Ct. Dkt. #18-1). 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. (Dist. Ct. Dkt. #18-2:7).

On May 14, 2014, the State filed its Complaint for Declaratory and Injunctive Relief in district court. (Dist. Ct. Dkt. #1). The State alleged that the Nation is conducting a Class III game at its Madison casino, namely e-poker, in violation of the parties' Compact. (*Id.* at 1-5). The State requested that the district court declare that the e-poker being offered at HCG Madison is a Class III game under IGRA and that offering such e-poker should be permanently enjoined. (*Id.* at 5-6).

On February 12, 2014, the parties filed their Joint Statement of Stipulated Facts, along with a number of exhibits, including the Compact. (Dist. Ct. Dkts. #17 through 17-11). The parties then filed cross-motions for summary judgment, along with briefs and other supporting papers. (Dist. Ct. Dkts. #18 through 33).

On June 12, 2014, the district court entered its Opinion and Order ("Opinion"), which granted the State's summary judgment motion. (Dist. Ct. Dkt. #35). The district court concluded that the e-poker offered at HCG Madison is a Class III game under IGRA. (*Id.* at 1, 13-14). The district court held that the Wisconsin Constitution explicitly prohibits "*all* gambling unless it falls within a listed exception." (*Id.* at 11). "[A]ll gambling is prohibited in Wisconsin without an act of the legislature authorizing it[.]" (*Id.*).

Because the parties' Compact does not permit Class III gaming to be played at HCG Madison, the district court granted the State's summary judgment motion. (Opinion at 14). The district court enjoined the Nation "from offering electronic poker at Ho-Chunk Gaming Madison in the absence of a compact between the parties that permits electronic poker at the Madison facility. The injunction shall take effect 30 days after the conclusion of any appeals filed by Ho-Chunk Nation or 30 days after the expiration of Ho-Chunk Nation's deadline for filing an appeal, whichever is later." (*Id.*).

On June 13, 2014, the district court entered judgment in the State's favor. (Dist. Ckt. Dkt. #36).

On June 18, 2014, the district court entered an order correcting a typographical error in its Opinion. (Dist. Ct. Dkt. #38).

On July 11, 2014, the Nation filed its Notice of Appeal. (Dist. Ct. Dkt. #40).

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's judgment. The district court correctly held that the electronic poker being offered by the Nation at HCG Madison is a Class III game under IGRA. The e-poker that the Nation offers at HCG Madison is being offered in violation of the parties' Compact.

IGRA defines Class II card games as those 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).[2] IGRA defines Class III games as "all forms of gaming that are not class I . . . and class II gaming." IGRA § 2703(8). The poker being offered at HCG Madison is a Class III game under IGRA because: (1) is it not explicitly authorized by Wisconsin law; and (2) it is explicitly prohibited by article IV, section 24(1) of the Wisconsin Constitution. Poker is also explicitly prohibited by the Wisconsin Statutes, which criminalize betting. Wis. Stat. § 945.02(1).

The Compact between the parties defines "All forms of Poker" as Class III gaming. The Nation's attempt to unilaterally alter the terms of the Compact after it agreed more than a decade ago to the designation of poker as a Class III game should be rejected.

[2]Throughout this brief IGRA will be cited as "IGRA § ___" rather than "25 U.S.C. § ___."

None of the examples provided by the Nation demonstrates that e-poker is a Class II game. Scratch-off lottery tickets are not poker under anyone's understanding of what constitutes poker. The Nation's other examples, even if accepted, fail to show that poker is explicitly authorized by Wisconsin law or that Wisconsin permits poker for purposes of IGRA § 2710.

The Nation is conducting Class III gaming in violation of its Compact with the State. The Compact permits Class III gaming only at certain locations, and those locations do not include HCG Madison. The district court correctly held that the e-poker being offered at HCG Madison must be enjoined.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *Fluker v. Cnty. of Kankakee*, 741 F.3d 787, 791 (7th Cir. 2013).

ARGUMENT

I. The Electronic Poker That The Nation Offers At HCG Madison Is A Class III Game Under IGRA.

The electronic poker that the Nation offers at HCG Madison is a Class III game under IGRA. Wisconsin law does not authorize the playing of poker. Instead, the Wisconsin Constitution and the Wisconsin Statutes explicitly prohibit the playing of poker. Poker is a Class III game in Wisconsin.

A. IGRA, The Relevant Wisconsin Laws, And The Statutory Inquiry Under IGRA

1. IGRA

IGRA, 25 U.S.C. § 2701, *et seq.*, was enacted by Congress in October 1988. IGRA creates three classes of gaming that an Indian tribe may conduct on Indian lands, each with differing regulatory roles for tribal, federal, and state governments. Class I gaming includes "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." IGRA § 2703(6). Class I gaming is regulated exclusively by Indian tribes. IGRA § 2710(a)(1).

Class II gaming includes bingo and certain card games that otherwise satisfy the requirements of IGRA, but excludes any banked card games, electronic games of chance, and slot machines:

> (A) The term "class II gaming" means–
>
> (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)–
>
> . . . .
>
> (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.
>
> (B) The term "class II gaming" does not include–
>
> (i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or
>
> (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

IGRA § 2703(7). If a card game falls within this controlling definition of Class II gaming, it must also meet the requirements of IGRA § 2710(b)(1)(A), which is applicable to card games and all other Class II games. This statute requires that the gaming be "located within a State that permits such gaming for any purpose by any person, organization or entity." IGRA § 2710(b)(1)(A).

Class III gaming includes "all forms of gaming that are not class I . . . and class II gaming." IGRA § 2703(8). Class III gaming is legal only if conducted pursuant to a tribal-state gaming compact negotiated with the state, and it is

subject to regulation by both the tribe and the state to the extent defined in the parties' compact. IGRA § 2710(d)(1)(C).

2. The Relevant Wisconsin Laws

A few Wisconsin laws are relevant to the question presented. The most relevant is article IV, section 24(1) of the Wisconsin Constitution, which states: "Except as provided in this section, the legislature may not authorize gambling in any form." As the district court held, the Wisconsin Constitution explicitly prohibits all gambling in the State unless it falls within the listed exceptions. (Opinion at 11). Poker is not among the listed exceptions.

Wisconsin Stat. § 945.02 states, in relevant part: "Whoever does any of the following is guilty of a Class B misdemeanor: (1) Makes a bet." Wis. Stat. § 945.02(1). Wisconsin law defines a "bet" 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. § 945.01(1).

Wisconsin Stat. § 945.02(2) makes it a Class B misdemeanor to "enter or remain[] in a gambling place with the intent to make a bet, to participate in a lottery, or to play a gambling machine."

Wisconsin law is clear regarding the fact that the use of video gambling machines is illegal:

> (1m) Except as provided in sub. (2m), whoever intentionally does any of the following is guilty of a Class A misdemeanor:
>
> (a) Permits any real estate owned or occupied by him or her or under his or her control to be used as a gambling place; or
>
> (b) Permits a gambling machine to be set up for use for the purpose of gambling in a place under his or her control.
>
> (2m) If the violation of sub. (1m) involves the setup or use of not more than 5 video gambling machines on premises for which a Class "B" or "Class B" license or permit has been issued under ch. 125, the person may be penalized as follows:
>
> (a) If the violation involves one video gambling machine, the person may be required to forfeit not more than $500.
>
> (b) If the violation involves 2 video gambling machines, the person may be required to forfeit not more than $1,000[.]
>
> (c) If the violation involves 3 video gambling machines, the person may be required to forfeit not more than $1,500.
>
> (d) If the violation involves 4 video gambling machines, the person may be required to forfeit not more than $2,000[.]
>
> (e) If the violation involves 5 video gambling machines, the person may be required to forfeit not more than $2,500.

Wis. Stat. § 945.04; *see also* Wis. Stat. § 945.03 (prohibiting commercial gambling).

3. The Three-Step Inquiry Under IGRA

The Nation's brief contains an erroneous analysis of the process for determining whether a gaming activity is a Class II or Class III game under IGRA. (*See* Nation's Br. at 18-32). Section 2703 of IGRA establishes a

three-step process for determining whether an activity is a Class II or Class III game. That process is:

STEP ONE
Is the gaming activity "explicitly authorized by the laws of the State"? IGRA § 2703(7)(A)(ii)(I). If the answer is "*yes*," the analysis ends. The activity is a Class II game. If the answer is "*no*," proceed to Step Two.
STEP TWO
Is the gaming activity "explicitly prohibited by the laws of the State"? IGRA § 2703(7)(A)(ii)(II). If answer is "*yes*," the analysis ends. The activity is a Class III game. If the answer is "*no*," proceed to Step Three.
STEP THREE
Is the gaming activity "played at any location in the State"? IGRA § 2703(7)(A)(ii)(II). If the answer is "*yes*," the activity is a Class II game, as long as it is "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." (*Id.*). If the answer is "*no*," the activity is a Class III game.

The process above is straightforward, is not ambiguous, and is consistent with the plain language meaning of IGRA's gaming classifications. As the

district court noted, "[i]n law, as in many things, the simplest answer is often the best one." (Opinion at 4).

The Nation asserts that an additional step must be engrafted onto the process described above, claiming that the statutory definitions in IGRA § 2703 must be analyzed in conjunction with IGRA § 2710. (Nation's Br. at 21-32). IGRA § 2710, however, does not define what is a Class II or a Class III game. Rather, it sets out the conditions under which tribes can conduct Class II or Class III gaming and the extent to which such activities can be regulated by a state. It is not a substitute for the specific definitional provisions of IGRA § 2703.

The State's position with respect to the above-described three-step process is that the answer to step 1 is "no," the answer the step 2 is "yes," and that the analysis ends there, resulting in the conclusion that poker is a Class III game. In the alternative, the State's position is that even if the answer to step 2 is "no," the answer to step 3 is "no," which still results in the conclusion that poker is a Class III game. A discussion of the steps follows.

B. Wisconsin Law Does Not Explicitly Authorize The Playing Of Poker.

Wisconsin law does not "explicitly authorize[]" the playing of poker. IGRA § 2703(7)(A)(ii)(I). The Nation has directed this Court to no Wisconsin law that explicitly authorizes the playing of poker. The Nation asserts that the

parties' Compact demonstrates that Wisconsin law "permits" or "authorizes" the playing of poker. (*See* Nation's Br. at 45-47). The Nation is incorrect.

A tribal-state gaming compact is not a state law. Statutes, administrative rules, and constitutions are laws. A tribal-state compact is a contract and is interpreted using state law contract principles. *See State of Wis. v. Ho-Chunk Nation*, 512 F.3d 921, 939 (7th Cir. 2008) (a compact is interpreted pursuant to state law contract principles); *Cachil Dehe Band of Wintun Indians v. Cal.*, 618 F.3d 1066, 1073 (9th Cir. 2010) (compacts are interpreted pursuant to general contract law principles); *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1080-81 (D. Ariz. 2001) (a compact pertaining to tribal land is not a treaty or state law), *vacated on other grounds*, 305 F.3d 1015 (9th Cir. 2002); s*ee also Citizen Band Potawatomi Tribe of Okla. v. Green*, 995 F.2d 179, 181 (6th Cir. 1993) (where Oklahoma law makes electronic games illegal, authorization to conduct electronic games in a compact does not make Oklahoma a "State in which gambling devices are legal" for purposes of IGRA § 2710(d)(6)).

The fact that Wisconsin's Governor negotiates tribal-state gaming compacts pursuant to Wis. Stat. § 14.035 does not make a compact a state law. (*See* Nation's Br. at 45, 47.) As the district court pointed out, the Nation has cited "no authority for the proposition that a compact qualifies as a state law for purposes of § 2703(7)." (Opinion at 13). No such authority exists.

Accordingly, Wisconsin law does not "explicitly authorize[]" the playing of poker. IGRA § 2703(7)(A)(ii)(I).

C. Wisconsin Law Explicitly Prohibits The Playing Of Poker.

Wisconsin law "explicitly prohibit[s]" the playing of poker. IGRA § 2703(7)(A)(ii)(II). Specifically, the Wisconsin Constitution and the Wisconsin Statutes explicitly prohibit gambling and poker.

Article IV, section 24 of the Wisconsin Constitution explicitly prohibits gambling:

> Gambling. SECTION 24. (1) Except as provided in this section, the legislature may not authorize gambling in any form.

Wis. Const. art. IV, § 24(1). It is undisputed that the e-poker that the Nation offers at HCG Madison is gambling. Poker has long been regarded by Wisconsin as a form of gambling. *See State v. Morrissy*, 25 Wis. 2d 638, 131 N.W.2d 366 (1964) (Wisconsin Supreme Court decision affirming a conviction for commercial gambling in a case where a tavern owner was conducting poker games). Poker is, therefore, explicitly and unambiguously prohibited by the Wisconsin Constitution.[3]

[3]Retired U.S. Circuit Judge William A. Norris found that Wisconsin law explicitly prohibits poker. He said in his arbitration decision that, "[e]ven if poker was being played in some form in the State, Wisconsin law nevertheless 'explicitly prohibit[s]' it." (Dist. Ct. Dkt. #18-1:6).

The exceptions listed in the Wisconsin Constitution do not include poker. The exceptions include certain bingo games and types of raffles, pari-mutuel on-track betting, and the state lottery. Wis. Const. art. IV, § 24(3), (4), (5), (6). The Wisconsin Constitution anticipates efforts to circumvent the prohibition on gambling card games (such as poker) by specifying that such games (including a specific reference to poker) cannot be conducted under the guise of being a "lottery." Wis. Const. art. IV, § 24(6)(c).

The state constitutional prohibition on the playing of poker is reinforced by Wis. Stat. § 945.02(1), a criminal statute that proscribes betting. It is undisputed that the e-poker being offered at HCG Madison involves betting. (*See* JSOSF, ¶¶ 24-30). Because e-poker involves betting it is, therefore, explicitly prohibited by the Wisconsin Statutes.

Furthermore, poker in any form, *by definition*, involves betting. Webster's New Collegiate Dictionary defines "poker" as "one of several card games in which a player bets that the value of his hand is greater than that of the hands held by others, in which each subsequent player must either equal or raise the bet or drop out, and in which the player holding the highest hand at the end of the betting wins the pot." Webster's New Collegiate Dictionary 881 (1979).

Likewise, Merriam-Webster Dictionary Online[4] defines "poker" as "any of several card games in which a player bets that the value of his or her hand is greater than that of the hands held by others, in which each subsequent player must either equal or raise the bet or drop out, and in which the player holding the highest hand at the end of the betting wins the pot." "Poker." *Merriam-Webster.com*. Merriam-Webster, n. d. Web. 19 Sept. 2014. <*http://www.merriam-webster.com/dictionary/poker*>. There is no question that Wisconsin's prohibition on betting in Wis. Stat. § 945.02(1) explicitly prohibits the playing of games like poker, which, by definition, involve betting.

Consistent with the conclusion that poker is explicitly prohibited by Wisconsin law, the Wisconsin Supreme Court has described non-banked poker as a Class III game under IGRA:

> We note that the *Class III games* added in 2003 include: roulette, big wheel and other wheel games, craps, *poker and similar non-house banked card games.*

Dairyland Greyhound Park, Inc. v. Doyle, 2006 WI 107, ¶ 80 n.61, 295 Wis. 2d 1, 719 N.W.2d 408 (emphasis added); *see also id.*, ¶ 88 (emphasis added to the word "poker"; other emphases in original):

---

[4]The Court has cited this dictionary in recent decisions. *See, e.g.*, *Aeroground, Inc. v. CenterPoint Properties Trust*, 738 F.3d 810, 814 (7th Cir. 2013); *GE Betz, Inc. v. Zee Co., Inc.*, 718 F.3d 615, 629 (7th Cir. 2013); *EEOC v. Thrivent Fin. for Lutherans*, 700 F.3d 1044, 1050 (7th Cir. 2012).

> [T]he Wisconsin Constitution prohibits blackjack, slot machines, and video gaming machines, art. IV, sec. 24(6)(c),[FN68] . . . blackjack, slot machines, and video gaming machines are also explicitly prohibited by the Constitution.
>
> [FN68] The Wisconsin Constitution, as amended, reads, in relevant part, "Except as provided in this section, the legislature may not authorize gambling in any form." Wis. Const. art. IV, § 24. Clauses 3 through 6 list exceptions to the broad prohibition, including: 1) bingo games operated by charitable and religious organizations; 2) raffle games operated by charitable and religious organizations; 3) pari-mutuel ontrack betting; and 4) the state-operated lottery. *Id.* Furthermore, as amended, Clause 6 specifically defines the state-operated lottery to *exclude* casino-style games, including *blackjack, poker*, roulette, craps, keno, *slot machines,* and *video gaming*. *Id.*

In a concurring and dissenting opinion in *Dairyland*, Justice Prosser indicated that the Wisconsin Constitution explicitly prohibits poker:

> Focusing on the language of the amended section, there can be no doubt that the amendment established a sweeping limitation on the legislature's power to authorize "gambling in any form." The text lists several exceptions to this barrier, but it specifically denies the state operated lottery any authority to conduct *poker*, roulette, craps, keno, and many other forms of gambling. *Because these enumerated gaming activities are specifically excluded, they constitute forms of gambling that the legislature may not authorize.*

Dairyland, 295 Wis. 2d 1, ¶ 223 (Prosser, J., concurring in part, dissenting in part) (emphasis added).

> This brings us to the issue that was decided in *Panzer*, namely, whether the Governor had authority to approve amendments to the original Indian gaming compacts to add new games of *poker*, roulette, craps, and keno, *which are explicitly prohibited by the Wisconsin Constitution.*

Id., ¶ 240 (emphasis added).

A state's highest court is the final arbiter regarding interpretations of that

state's constitutional provisions and its statutes:

> The construction by the courts of a state of its constitution and statutes is, as a general rule, binding on the federal courts. We may think that the supreme court of a state has misconstrued its constitution or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions.

Forsyth v. City of Hammond, 166 U.S. 506, 518-19 (1897); *see also State v. Forbush*, 2011 WI 25, ¶ 69, 332 Wis. 2d 620, 796 N.W.2d 741 (Abrahamson, C.J., concurring) ("It is axiomatic that a state's highest court is the final arbiter of the meaning of the state constitution."). Given that the Wisconsin Supreme Court views poker as a Class III game (and one that is explicitly prohibited by the Wisconsin Constitution), this Court should hold the same.

In summary, the plain language of IGRA, the plain language of the Wisconsin Constitution, and the plain language of the Wisconsin Statutes are all unambiguous. Under IGRA, Class II games include non-banking card games that "are not explicitly prohibited by the laws of the State." IGRA § 2703(7)(A)(ii)(II). Given the express and unambiguous prohibition on betting in the Wisconsin Statutes and the express and unambiguous prohibition in the Wisconsin Constitution that precludes "the legislature [from] authoriz[ing] gambling *in any form*," poker in *any* form cannot satisfy IGRA's requirement that a Class II game is "not explicitly prohibited by the laws of the State." IGRA § 2703(7)(A)(ii)(II). As the district court correctly held, poker is explicitly prohibited by Wisconsin law. (Opinion at 11).

D. The Parties' Compact Expressly Designates "All forms of Poker" As Class III Games.

The parties' Compact expressly designates "All forms of Poker" as Class III games. The Nation's position in this case is an attempt to unilaterally alter the terms of the Compact a decade after the Nation agreed to the designation of poker as a Class III game.

Tellingly, the Nation does not include in its opening appeal brief a quotation of the Compact language that defines "All forms of Poker" as Class III games. The Compact states:

> IV. AUTHORIZED CLASS III GAMING. The States of Illinois, Iowa and Michigan authorize within their borders a full range of casino games. In order to make Wisconsin Indian gaming facilities competitive with these surrounding States, the Parties have agreed that the Nation can offer for play the games authorized by this Section IV. . . .
>
> A. The Tribe shall have the right to operate the following Class III games during the term of this Compact *but only as provided in this Compact*:
>
> 1. Electronic games of chance with video facsimile displays;
> 2. Electronic games of chance with mechanical displays;
> 3. Blackjack;
> 4. Pull-tabs or break-open tickets when not played at the same location where bingo is being played;
> 5. All other banking, percentage and pari-mutuel card games;
> 6. *All forms of Poker*, to the extent that these games are not included in the previous subsection;
>
> . . . .
>
> 15. Any other game, whether played as a table game or played on an electronic or mechanical device, including devices that operate like slot machines, which consist of the elements of prize, chance and consideration[.]

(Dist. Ct. Dkt. #17-4 at 1 (emphasis added) (Compact, § IV. A., as amended in 2003); *see also* JSOSF, ¶ 15 & Ex. D).

The Compact is not dispositive as to what is a Class III game under IGRA, but the language that the parties agreed to reflects their understanding and interpretation as to what kind of gaming activities would require a tribal-state gaming compact. *See, e.g.*, *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1060 (9th Cir. 1997) ("Outside *the express provisions of a compact*, the enforcement of IGRA's prohibitions on [C]lass III gaming remains the exclusive province of the federal government.") (emphasis added). Under the express provisions of the Compact, the Nation undoubtedly regarded "All forms of Poker" as Class III games until it decided that it wanted to offer e-poker at HCG Madison. The Nation cannot have it both ways. (*See* Opinion at 10 ("In this case, it is Ho-Chunk Nation, not the state, that is attempting to do an end-run around the compact process.")).

E. *Cabazon* Is Not Applicable To Determining Whether Poker Is A Class III Game In Wisconsin.

The Nation asserts that IGRA § 2703(7) must be interpreted to include the "regulatory/prohibitory" test created by the U.S. Supreme Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). (Nation's Br. at 15-18, 21-32). The Nation also asserts that the words "explicitly authorized" and "not explicitly prohibited" in IGRA § 2703(7) are ambiguous. (Nation's

Br. at 27). The Nation argues that IGRA § 2703(7) must be read "in conjunction with" IGRA § 2710 because of legislative history, and that this reading somehow imports the *Cabazon* "regulatory/prohibitory" test into the analysis. (*See* Nation's Br. at 28-29).

As an initial matter, *Cabazon* does not address the classification of games, such as Class II or Class III. *Cabazon* is about whether the State of California was authorized by federal law to exercise state criminal jurisdiction on Indian lands to enforce a statute governing bingo. *See Cabazon*, 480 U.S. at 205, 207-08. The U.S. Supreme Court determined that the federal statutes that granted California jurisdiction to enforce its laws on Indian lands were limited to those state laws that were "criminal in nature." *Id.* at 208.

The Court then went on to determine whether California's bingo statute was criminal in nature by evaluating whether the law could be characterized as "criminal/prohibitory" or "civil/regulatory" in nature. *Cabazon*, 480 U.S. at 209-10. The Court determined that California's bingo statute could not be enforced on Indian lands 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. *Id.* at 212, 214. The salient question in *Cabazon* was whether federal laws—which provided limited authority for a

state to enforce its laws on Indian lands—permitted California to enforce a particular bingo statute on Indian reservations in Riverside County, California.

Cabazon is irrelevant to the question of whether poker is a Class III game in Wisconsin, and the Nation's interpretation of IGRA § 2703(7) and § 2710 is wrong for several reasons.

First, the language of IGRA § 2703(7) is plain and unambiguous. The district court held that IGRA § 2703(7) is unambiguous and concluded that IGRA § 2710 does not change that fact. (Opinion at 6-8). Reading these provisions "in conjunction with" each other (as the Nation argues) does not change that IGRA § 2703(7) is the *only* IGRA provision that defines what is a Class II game. IGRA § 2710 is *not* a definition; it creates an additional requirement for Class II games in that they must be "located within a State that permits such gaming for any purpose by any person, organization or entity." IGRA § 2710(b)(1)(A). IGRA § 2710 creates no ambiguity in IGRA § 2703, which is plain on its face.

Second, *Cabazon* does not interpret IGRA, let alone interpret the definition of a Class II game under IGRA. (*See* Opinion at 9). IGRA was enacted in response to *Cabazon*:

> Following the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which held that Congress had not yet expressly granted the States jurisdiction to enforce state civil

> gaming regulations on Indian reservation land, Congress passed IGRA for the purpose of creating a federal regulatory scheme for the operation of gaming on Indian lands.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. U.S., 367 F.3d 650, 654-55 (7th Cir. 2004). Since *Cabazon* preceded Congress' enactment of IGRA, it is peculiar for the Nation to assert that the case would shine light upon the meaning of the plain language of IGRA.

Third, the Nation's resort to *Cabazon* is based upon legislative history. (Nation's Br. at 19-26). Because the language of IGRA § 2703(7) is unambiguous, it is unnecessary and inappropriate under controlling precedent to consult legislative history. *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."); *BedRoc Ltd. v. U.S.,* 541 U.S. 176, 183 (2004) (a court's inquiry "begins with the statutory text, and ends there as well if the text is unambiguous"); *Holder v. Hall*, 512 U.S. 874, 932 n.28 (1994) ("Resort to legislative history is only justified where the face of the [statute] is inescapably ambiguous."); *U.S. v. Rand*, 482 F.3d 943, 947 (7th Cir. 2007) ("When a statute is clear, any consideration of legislative history is

improper.").[5] The district court agreed that consulting legislative history is unhelpful here. (*See* Opinion at 7-8).

Fourth, if one assumes that the Nation's reliance upon legislative history is correct and that the *Cabazon* "regulatory/prohibitory" test must be used to determine whether state law explicitly authorizes or explicitly prohibits a certain game, a state's general public policy regarding regulating gaming would either authorize *all* card games or *none*. There would be no need to analyze *particular* games under IGRA § 2703(7) and (8). The Nation's approach would effectively replace the IGRA § 2703(7) definition of Class II

---

[5]*See also 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."); *Ratzlaf v. U.S.*, 510 U.S. 135, 147-48 (1994) ("But we do not resort to legislative history to cloud a statutory text that is clear."); *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992) ("we note that appeals to statutory history are well taken only to resolve statutory ambiguity") (citation and internal quotation marks omitted); *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 808 n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute."); *U.S. 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); *Patriotic Veterans, Inc. v. Ind.*, 736 F.3d 1041, 1047 (7th Cir. 2013) ("The preeminent canon of statutory interpretation requires that courts presume that the legislature says in a statute what it means and means in a statute what it says there. If Congress determines later that the plain language of the statute does not accurately reflect the true intent of Congress, it is for Congress to amend the statute.") (internal quotations marks, citations, and alterations omitted); *Shlahtichman v. 1-800 Contacts, Inc.*, 615 F.3d 794, 802 n.3 (7th Cir. 2010) ("We need not explore [the statute's] legislative history in view of the unambiguous terms of the statute."); *U.S. v. Henderson*, 376 F.3d 730, 732 (7th Cir. 2004) ("In reviewing the district court's interpretation, we first look to the actual language of the statute. If we find the terms of the statute unambiguous, judicial inquiry is complete.") (citation and internal quotation marks omitted).

card games with the "permits such gaming" standard in IGRA § 2710(b)(1)(A). This cannot be right. It is inconsistent with the plain language of IGRA.

The Nation proposes an unsound construction of IGRA § 2703(7) based upon the Statement of Policy to the Senate Report that accompanied the bill that became IGRA. (*See* Nation's Br. at 22-23). The Nation's resort to legislative history creates more questions as to the meaning of IGRA than it resolves and is a good example of why unclear legislative history is no substitute for clear statutory language. *See Garcia v. U.S.*, 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"). In the event of a perceived conflict between the statute and its legislative history, "the statute must prevail." *In re Sinclair*, 870 F.2d 1340, 1341 (7th Cir. 1989).

Fifth, the Nation's reliance upon a February 26, 2009, National Indian Gaming Commission ("NIGC") advisory opinion letter is misplaced. (*See* Nation's Br. at 10-11, 29-30). The NIGC letter finds that the e-poker in question is a Class II game based, in part, on its conclusion that poker is not explicitly prohibited under Wisconsin law because it is a game offered by Indian tribes in the state pursuant to the Wisconsin Supreme Court's *Dairyland* decision and tribal-state gaming compacts. (*See* Dist. Ct. Dkt.

#17-7:1, 4-5). *Dairyland* held only that Wisconsin is required to honor its tribal-state gaming compacts, even after the Wisconsin Constitution had been amended in 2003 to outlaw gambling. *See Dairyland*, 295 Wis. 2d 1, ¶¶ 2-3. This result was mandated by the Contracts Clauses in the United States and Wisconsin Constitutions. *See id.*

Not only is the NIGC's analysis regarding Class II games and IGRA § 2703(7) wrong, but the opinion is purely advisory and is not entitled to the deference that accompanies a formal agency action. It is entitled to deference only to the extent it has the power to persuade. *See Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 547 F.3d 115, 127 (2d Cir. 2008) (rejecting the conclusions of a NIGC opinion letter in part because it was "inconsistent with congressional design" and citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), and *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)). The NIGC advisory opinion letter has no power to persuade; it is wrong and inconsistent with the plain language of the Wisconsin Constitution and IGRA § 2703.

Sixth, the Nation emphasizes that "canons of Indian law construction must be applied when interpreting IGRA." (Nation's Br. at 18). What this means here is not clear from the Nation's opening appeal brief. What it *cannot* mean is that the plain language of an unambiguous statute (IGRA § 2703(7)) should be disregarded in favor of a "regulatory/prohibitory" test

that was created in a case (*i.e.*, *Cabazon*) that was decided *before* IGRA was enacted. No so-called "canon of Indian law construction" that the Nation cites in its brief can overcome the "preeminent" canon of statutory construction, namely: the plain language meaning of an unambiguous statute. *Patriotic Veterans*, 736 F.3d at 1047; *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("We presume that Congress means in a statute what it says there") (citation and internal quotation marks omitted).

Finally, retired U.S. Circuit Judge William A. Norris concluded that the Nation's "strained" *Cabazon* argument cannot overcome the unambiguous language of IGRA § 2703(7) and the Wisconsin Constitution. In his arbitration decision he summarized his view as follows:

> Yet neither the cases the Nation cites, nor its strained statutory interpretation argument, can overcome either IGRA's express language or the express prohibition in the Wisconsin Constitution. As discussed above, the express language of the Class II definition requires an inquiry into whether the game is "explicitly prohibited by the laws of the State" and Wisconsin law contains just such an explicit prohibition. The Nation provides no authority for how the language of Section 2710(b) or *Cabazon's* analysis alters the express statutory language of the Class II definition in Section 2703(7). The Nation has cited no case that applies *Cabazon's* analysis to determine whether a game is "explicitly prohibited by the laws of the State." This statutory interpretation argument thus cannot overcome the unambiguous statutory language.

(Dist. Ct. Dkt. #18-1 at 8). While Judge Norris's decision is not precedent, it is persuasive reasoning that is consistent with the district court's Opinion.

The district court got it right when it rejected importing the *Cabazon* "regulatory/prohibitory" test into interpreting the plain language of IGRA § 2703(7). This Court should follow the district court's logic and reject the Nation's invitation to consider *Cabazon*.

F. The Nation's Examples Of Wisconsin Allegedly "Permitting" Poker Playing Are Not Poker, Are Illegal, And They Are Not Analogous To The E-Poker That The Nation Offers At HCG Madison.

The Nation argues that poker is being played openly in Wisconsin without legal consequences for players or those offering the game, such as when poker is played at taverns or at charity events. (*See* Nation's Br. at 41-47). This argument is an attempt to demonstrate that Wisconsin has a public policy that regulates, but does not prohibit, the playing of poker under *Cabazon*. (*See id.* at 50).

As noted above, *Cabazon* is not relevant to the IGRA analysis. Even assuming that *Cabazon* informs the analysis, the Nation is still incorrect. The Nation's examples of Wisconsin "permitting" poker playing are not poker, are illegal, and they are not analogous to the e-poker that the Nation offers at HCG Madison.

1. Wisconsin Lottery scratch-off games are not poker.

Wisconsin Lottery scratch-off games are not poker. (*See* Nation's Br. at 41-43). As noted in the parties' Joint Statement of Stipulated Facts, the

Wisconsin Lottery has offered a number of scratch-off games with a poker theme. (JSOSF, ¶ 33). Scratch-off games with a poker theme do not constitute the playing of poker any more than a scratch-off lottery ticket with a football theme constitutes the playing of football. The scratch-off games do not come close to representing the dictionary definitions of poker, or for that matter, the e-poker being offered at HCG Madison. Poker, by definition, involves betting. (*See* Argument Section I. A., above). A scratch-off lottery ticket does not involve betting by a player, only scratching.

In a scratch-off poker-themed game, a person's winnings are simply determined by what hand is revealed when the person scratches off a limited number of hidden cards. These games are all played in fundamentally the same way—the consumer buys a card with pre-printed symbols and uncovers these symbols to determine if he or she qualifies for a prize by matching pre-designated combinations. These games do not use a deck of cards, so there is no interactive element of chance to determine winners. Rather, winners and odds are pre-determined when the scratch-off cards are printed. There are no strategic decisions made by players regarding wagers, folding, et cetera, and the amount to be won is pre-determined by the Wisconsin Lottery, not wagering interaction amongst the players. There is no 52-card deck involved, there is no playing one's hand against the hands of other players, there is no draw of cards, and there is no placing of bets.

One can imagine the outrage a high-stakes gambler might display if he or she sat down at a poker table and, instead of being dealt cards, was handed a scratch-off Wisconsin Lottery poker-themed ticket. Poker-themed scratch-off games do not constitute the playing of poker under even the most liberal reading of the term.

This issue was considered in *Coeur d'Alene Tribe v. State of Idaho*, 842 F. Supp. 1268 (D. Idaho 1994), *aff'd*, 51 F.3d 876 (9th Cir. 1995). The tribe argued that because the state lottery used games with casino gaming themes that the tribe was entitled to conduct casino games, a proposition the district court dismissed due to the differing nature of the lottery games and proposed activities, which were prohibited by Idaho law. *Id.* at 1279-80. The same analysis applies here. Wisconsin Lottery scratch-off games do not constitute the playing of poker, so they are irrelevant to whether Wisconsin "permits" poker for purposes of IGRA § 2710 or *Cabazon*.

2. Wisconsin Does Not "Merely Regulate" Video Poker—It Is Illegal.

Citing the example of video poker machines that are being played illegally at Wisconsin taverns, the Nation asserts that video poker "is not explicitly prohibited by the laws of the State" and that "video poker is played at a location in the State." (Nation's Br. at 44). The Nation is incorrect. The use of video poker machines is explicitly prohibited by the Wisconsin Statutes

and Wisconsin Constitution, as discussed above, and, if played in taverns, it is being played illegally.

The possession and operation of video poker machines is illegal in Wisconsin.[6] Despite the Wisconsin Legislature's decision in 1999 to reduce the penalties for possession of five or fewer gambling machines, *see* 1999 Wis. Act. 9, § 3191f, it is still a crime to play a video gambling machine, Wis. Stat. § 945.02, the machines are still subject to seizure or removal, Wis. Stat. § 66.051 and 968.13, and all other penalties in Wis. Stat. § 945.03 and 945.04 remain in place.

It is a Class A misdemeanor for a person to permit "a gambling machine to be set up for use for the purpose of gambling in a place under his or her control." Wis. Stat. § 945.04(1m)(b). Under Wis. Stat. § 945.02(1) and (2), it is a Class B misdemeanor to make a bet or to play a gambling machine. Playing video poker is a crime.

Likewise, it is illegal in Wisconsin and subject to monetary forfeitures to possess, operate, set up, use, collect proceeds from, and participate in earnings or maintenance from video poker machines. Wis. Stat. § 945.03(2m); Wis. Stat. § 945.04(2m). Penalties for possessing or operating

[6]As an initial matter, the use of a poker-themed video gambling machine does not meet the dictionary definition of poker referenced in this brief based upon the facts stipulated by the parties. (*See* JSOSF, ¶ 39).

one video poker machine start at $500 and go up to $2,500 for five machines. Wis. Stat. § 945.03(2m)(a)-(e); Wis. Stat. § 945.04(2m)(a)-(e).

Accepting the Nation's argument regarding video poker being allegedly "played" in Wisconsin taverns for purposes of IGRA § 2703(7)(A)(ii)(II) would require an absurd construction of IGRA. The reference to the "playing" of video poker under IGRA § 2703(A)(ii)(II) cannot include the *illegal* playing of video poker, and the Nation cites no authority for this proposition. It is nonsensical to argue that the illegal playing of video poker somewhere in Wisconsin would satisfy this statutory criterion so as to render the game of poker a Class II game statewide.

Courts will not construe a statute in a way that leads to absurd results. "It is an elementary rule of construction that 'the act cannot be held to destroy itself.'" *Zbaraz v. Madigan*, 572 F.3d 370, 387 (7th Cir. 2009) (quoting *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 20 (1995)); *see also Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 976 (7th Cir. 2004) ("'Nonsensical interpretations of contracts, as of statutes, are disfavored . . . [n]ot because of a judicial aversion to nonsense as such, but because people are unlikely to make contracts, or legislators statutes, that they believe will have absurd consequences.'") (quoting *FutureSource L.L.C. v. Reuters Ltd.*, 312 F.3d 281, 284-85 (7th Cir. 2002)). This Court should reject the Nation's argument that video poker being played

illegally at Wisconsin taverns results in the conclusion that e-poker is a Class II game under IGRA § 2703(7).

3. The Fact That Poker Is Being Played At Tribal Casinos Is Not Relevant To Whether Wisconsin Law "Authorize[s]" Or "Permits" Poker For Purposes Of IGRA § 2703(7)(A)(ii) And IGRA § 2710(b)(1).

The Nation asserts that poker is being played at tribal casinos in Wisconsin pursuant to tribal-state compacts and that this fact makes poker a Class II game under IGRA § 2703(7). (*See* Nation's Br. at 44-47). The thrust of the Nation's argument is that the playing of compacted-for poker at tribal casinos shows that Wisconsin "authorize[s]" or "permits" poker for purposes of IGRA § 2703(7)(A)(ii) and IGRA § 2710(b)(1), which would make it a Class II game. (*See id.* at 47).

The Nation is wrong. Its argument side-steps the important fact that poker is played in Wisconsin only pursuant to tribal-state compacts that: (a) pre-dated the Wisconsin constitutional amendment proscribing gambling; and (b) govern the play of Class III games, not Class II games.

Tribal-state compacts govern Class III games. Class III gaming cannot be conducted without an authorizing tribal-state gaming compact. IGRA § 2710(d)(1)(C). As the Nation points out, "the Compact only governs Class III gaming at the Class III facilities identified in the Compact." (Nation's Br. at 3); *see also id.* at 17 ("Class III gaming is regulated by Indian tribes and

states pursuant to tribal-state compacting. IGRA § 2710(d)"); (7th Cir. Dkt. #12:2 ("In order for a tribe to offer Class III gaming, it must execute a gaming compact with the pertinent state government addressing how much gaming is to be regulated.")). Subsection C of Section IV of the parties' Compact states that: "The Tribe may not operate any Class III gaming not expressly enumerated in this section of this Compact unless this Compact is amended pursuant to section XXX." (JSOSF, ¶ 13; Dist. Ct. Dkt. #17-2:7; *see also* Dist. Ct. Dkt. #17-2:43-44). Section IV of the Compact states that "All forms of Poker" are Class III games. (Dist. Ct. Dkt. #17-4 at 1 (emphasis added) (Compact, § IV. A., as amended in 2003); *see also* JSOSF, ¶ 15 & Ex. D). The Nation could not offer *any* form of poker in Wisconsin if not for its Compact with the State, which does not allow poker to be played at HCG Madison.

The Nation is effectively asking this Court to ignore the fact that tribal-state gaming compacts govern only Class III games. To accept the Nation's argument, the Court would also have to conclude that the poker being played at tribal casinos in Wisconsin is *not* governed by the State's Class III tribal-state gaming compacts. This reasoning is fundamentally wrong, contradicts the parties' Compact and other tribal-state gaming compacts in Wisconsin, and is inconsistent with IGRA.

The Nation's argument suggests that the State, by compacting to allow Class III gaming (in this instance, poker), has converted that Class III

gaming into Class II gaming in that it is now "permitted" in Wisconsin. This sort of alchemy is prohibited by the plain language of IGRA, which defines Class III gaming as "all forms of gaming that are not class I gaming or class II gaming." IGRA § U.S.C. 2703(8). The clear directive of Congress is that the classes are mutually exclusive. If poker is a Class II game, it cannot properly be included in a Class III tribal-state gaming compact. The Nation's circular reasoning is at odds with the plain language of IGRA and is the type of absurd, anomalous result that is to be avoided in the construction of statutes. *See Consol. Bank, N.A., Hialeah, Fla. v. U.S. Dep't of Treasury*, 118 F.3d 1461, 1463-64 (11th Cir. 1997).

The district court correctly concluded that tribal-state compacts cannot be used to demonstrate that Wisconsin "authorize[s]" or "permits" the playing of poker because compacts "are meant to address *class III* gaming, not class II gaming. (Opinion at 12). This Court should follow suit.

4. The State's Alleged "Under-Enforcement" Of Its Gambling Laws Does Not Mean That Poker Is A Class II Game Under IGRA § 2703(7).

The Nation's final argument is that the State does not take an active enough role in enforcing its gambling laws. (Nation's Br. at 47-51). The Nation asserts that "[w]hile Wisconsin's gambling laws may prohibit some forms of poker and regulate others, it is certainly not the policy of the State to prohibit all such gaming activity by everyone under all circumstances."

(*Id.* at 51). The gist of the Nation's argument is that Wisconsin "permits" poker for purposes of IGRA § 2710 and the *Cabazon* test when Wisconsin does not do what the Nation believes is an adequate job of policing illegal poker playing. (*See id.* at 50). The Nation is wrong.

The district court correctly rejected the Nation's argument. (*See* Opinion at 13-14). "On its face, [IGRA] § 2703(7) does not permit an inquiry into enforcement practices." (*Id.* at 13). Fundamentally, the Nation's "lack of enforcement" argument "does not explain how a lack of enforcement is relevant to the question whether poker is prohibited or authorized 'by the laws of the State.'" (*Id.*).

Furthermore, if one accepts, for the sake of argument, the Nation's proposition that Wisconsin "permits" poker due to the State's lax or inadequate policing of the game, that subjective conclusion threatens to open a Pandora's Box of new issues. For example, to what extent must Wisconsin enforce its laws with respect to poker (or any other gaming activity) in order to meet the threshold that Wisconsin does not "permit" it for purposes of IGRA § 2710? Must Wisconsin employ legions of jack-booted vice squads to bust up every bar or basement poker game to avoid a legal conclusion that it "permits" poker? If Wisconsin were to increase its enforcement efforts with

respect to video poker, poker leagues, or charity poker,[7] would the State at some point attain a level of "adequate" enforcement, so as not to be considered to be "permit[ting]" such activity for purposes of IGRA § 2710? Could that increased enforcement effort then result in poker being "upgraded" from a Class II game to a Class III game under IGRA?

This Court does not need to grapple with any of these issues. As the district court held, there is no basis in the statutory text of IGRA for making a determination regarding what level of "under-enforcement" would tip the scale to poker being classified as a Class II game. (Opinion at 13). The Nation proposes an "unworkable standard" that is inherently subjective, is not tied to the plain language of IGRA, and is wrong as a matter of law. (*Id.*).

Objectively, Wisconsin law prohibits gambling and betting, and poker is gambling and, by definition, involves betting. No one would argue that Wisconsin "permits" speeding, drunk driving, and underage drinking because the State has not the resources to categorically stamp out these illegal activities. "Many laws suffer from some amount of underenforcement, but that does not mean that they are no longer 'laws'." (Opinion at 13). This Court should reject the Nation's "lack of enforcement" argument.

---

[7]The State does not concede that the Nation's examples of poker being "played" in Wisconsin even meet the dictionary definition of poker. For example, in the "charity poker" example cited at page 7 of the Nation's brief "all proceeds went to the charity." (Nation's Br. at 7). That is not gambling.

II. Response To National Indian Gaming Association's Amicus Curiae Brief

The amicus curiae brief filed by the National Indian Gaming Association ("NIGA") should not persuade this Court. (*See* 7th Cir. Dkt. #12, *hereinafter* "NIGA Br."). The brief largely restates the Nation's arguments and adds little.

First, NIGA's brief asserts that IGRA § 2703(7)(A)(ii) is ambiguous. (NIGA Br. at 7-10). As argued in Argument Section I. E. of this brief, IGRA § 2703(7)(A)(ii) is not ambiguous. The district court agrees. (Opinion at 6).

To determine whether a statute is ambiguous, "[i]t is not enough that there is a disagreement about the statutory meaning." *State ex rel. Kalal v. Circuit Court for Dane Cnty*., 271 Wis. 2d 633, 681 N.W.2d 110, 124 (2004). The test for ambiguity considers "whether the statute . . . *reasonably* gives rise to different meanings." *Id.* (emphasis in original; citation and internal quotation marks omitted). NIGA does not identify competing reasonable interpretations of IGRA § 2703(7)(A)(ii).

NIGA's interpretation of IGRA § 2703(7)(A)(ii) is not reasonable because NIGA asserts that there is a distinction between "the gambling form of poker" and the game of poker being played in "different contexts, some of which may or may not involve the traditional elements of gambling." (NIGA Br. at 9-10). NIGA argues that IGRA § 2703(7)(A)(ii) refers to the "'card

game' generally," which suggests that Congress might have meant non-gambling forms of poker. (NIGA Br. at 10). This interpretation is unreasonable because poker, by definition, involves betting. (*See* Argument Section I. C., above). Betting is proscribed by Wis. Stat. § 945.02(1). Similarly, the Wisconsin Constitution explicitly prohibits all forms of gambling. Wis. Const. art. IV, § 24(1).

Second, NIGA relies upon a statement made by Justice Prosser regarding "whether the state has enacted criminal laws that *prohibit* [the] activity as to *everyone*." (NIGA Br. at 10 (quoting *Dairyland*, 719 N.W.2d at 468 (Prosser, J., concurring in part, dissenting in part))). Even if this Court gives weight to Justice Prosser's statement in his *Dairyland* concurrence/dissent, the State has enacted criminal laws that prohibit the playing of poker as to *everyone*. Poker, by definition, involves betting. Betting is a crime under Wisconsin law. Wis. Stat. § 945.02(1). Playing poker is a crime in Wisconsin.

Third, NIGA argues that *Cabazon* is applicable and controlling. (NIGA Br. at 14-17). *Cabazon* is inapplicable, as argued in Argument Section I. E. of this brief. Importantly, as the NIGA brief concedes, *Cabazon* did not involve IGRA—"it involved a different statute[.]" (NIGA Br. at 16).

Fourth, NIGA relies upon the legislative history of IGRA and points out language that bolsters the State's arguments. Specifically, NIGA's brief quotes the following: "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." (NIGA Br. at 16-17 (quoting S. Rep. No. 100-446, 100th Cong., 2d Sess., at 12 (1988)).

Wisconsin criminally prohibits the playing of poker, which, by definition, involves betting. Wis. Stat. § 945.02(1). Video poker is also a crime: if a person "[p]ermits a gambling machine to be set up for use for the purpose of gambling in a place under his or her control," he or she is "guilty of a Class A misdemeanor." Wis. Stat. § 945.04(1m), (1m)(b).

Fifth, NIGA relies upon the decision in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480 (W.D. Wis. 1991), to support its *Cabazon* argument. (NIGA Br. at 21-22). The *Lac du Flambeau* decision is inapposite. The issue before the district court in *Lac du Flambeau* was whether the State was required to negotiate with tribes regarding Class III gaming. *Lac du Flambeau*, 770 F. Supp. at 482. The decision did not analyze the provisions of IGRA that define whether a specific game is a Class II or a Class III game, namely, IGRA § 2703(7)—the definitional provision that is the subject of this case. The *Lac du Flambeau* court noted that the case before it "relates only to the interpretation of § 2710(d)(1) of the Indian Gaming Regulatory Act." *Id.* at 484. The case was *not* about the definitions of classes of games under IGRA.

Finally, NIGA's brief misinterprets this Court's decision in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*, 367 F.3d 650 (7th Cir. 2004). (*See* NIGA Br. at 21-22). NIGA's brief implies that if Wisconsin is labeled a so-called "regulatory state under the *Cabazon* test" that Wisconsin cannot regulate poker on Indian lands. (*See id.* at 22.) NIGA's argument ignores the required analysis under IGRA of whether a state "explicitly prohibit[s]" a card game (as Wisconsin does with poker). IGRA § 2703(7)(A)(ii)(II). NIGA's argument presumes that if Wisconsin is labeled a so-called "regulatory state" with regard to its general policy as to *all* forms of gaming, then poker is a Class II game without regard to consideration of IGRA § 2703(7)(A)(ii)(II). Taken to its logical conclusion, NIGA's argument would essentially lead to the conclusion that all forms of gambling are Class II games and cannot be regulated by Wisconsin.

NIGA's concept of IGRA flies in the face of the carefully negotiated tribal-state compacts between the State and the tribes, which govern where Class III games may be played. The parties' Compact states that "All forms of Poker" are Class III games. (Dist. Ct. Dkt. #17-4 at 1 (emphasis added) (Compact, § IV. A., as amended in 2003); *see also* JSOSF, ¶ 15 & Ex. D). Why would the parties need to negotiate their Compact if the mere label of "*Cabazon* regulatory state" that NIGA cites from *Lac Courte Oreilles* and pins

on Wisconsin apparently prohibits Wisconsin from regulating *any* gaming on Indian lands? NIGA's brief offers no explanation.

III. The Nation Is Conducting Class III Gaming In Violation Of Its Compact With The State.

The Compact between the State and the Nation does not authorize the conduct of Class III games at HCG Madison. (JSOSF, ¶¶ 12-13, 17). Cognizant of the requirement under IGRA § 2710(d)(1)(C) that Class III gaming cannot be conducted without an authorizing tribal-state gaming compact, the Nation entered into negotiations with the State to authorize Class III gaming at certain locations in Wisconsin. (JSOSF, ¶ 13). The resulting compact between the parties authorized Class III gaming at three locations, but not at HCG Madison. (*Id.*, ¶¶ 12-13, 17).

Following additional negotiations and litigation over the issue, the parties executed the Second Amendment to the Compact in 2003. (JSOSF, ¶ 16). That amendment specified that Class III gaming could be conducted at HCG Madison only if a Dane County referendum authorizing the Nation to do so was passed by Dane County voters in 2004. (*Id.*, ¶ 17; *see also* Dist. Ct. Dkt. #17-4:5). The State and the Nation amended the Compact to allow the Nation to conduct Class III gaming at HCG Madison if approved by the voters of Dane County. (*Id.*). The voters rejected this proposition by a

margin of almost two to one. (*Id.*). Thus, the Nation is without authority under the Compact to conduct Class III gaming at HCG Madison.

Subsection C of Section IV of the Compact explicitly states that: "The Tribe *may not operate any Class III gaming not expressly enumerated in this section of this Compact* unless this Compact is amended pursuant to section XXX." (JSOSF, ¶ 13; Dist. Ct. Dkt. #17-2:7 (emphasis added); *see also* Dist. Ct. Dkt. #17-2:43-44). Therefore, the Nation's offering of a Class III game at HCG Madison violates the terms of the Compact.

In addition, this Court has held that the Compact between the parties "controls gaming not only at the locations specifically named, but also at other locations including the Dane County site." *Wis. Winnebago Nation v. Thompson*, 22 F.3d 719, 724 (7th Cir. 1994).

The Compact governs the Nation's ability to conduct Class III gaming at HCG Madison, and its language could not be more clear: "Given these facts, the Parties agree that, rather than pursue an off-reservation site, at this time, as its fourth location, the Nation's Site at [HCG Madison] can be the Nation's fourth location for conducting Class III gaming, subject to the following conditions[.]"[8] (JSOSF, ¶ 16; Dist. Ct. Dkt. #17-4:5). It is clear from its language that the Compact constitutes an agreement between the

[8]Those conditions, as noted above, were never satisfied. The 2004 Dane County authorizing referendum failed. (JSOSF, ¶ 17).

parties specifying where Class III games can be played, and that the necessary conditions for the conducting of Class III games at HCG Madison have not been met.

The Nation's offering of e-poker, a Class III game, at a location not authorized by the Compact violates the Compact. The district court was correct to enjoin the Nation from offering e-poker at HCG Madison.

CONCLUSION

The e-poker played at the Nation's Madison, Wisconsin casino is a Class III game under IGRA. The district court's judgment should be affirmed.

Dated this 19th day of September, 2014.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

/s/ Clayton P. Kawski
CHRISTOPHER J. BLYTHE
Assistant Attorney General
State Bar #1026147

CLAYTON P. KAWSKI*
Assistant Attorney General
State Bar #1066228

Attorneys for Plaintiff-Appellee

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0180 (Blythe)
(608) 266-7477 (Kawski)
(608) 267-2223 (Fax)
blythecj@doj.state.wi.us
kawskicp@doj.state.wi.us

**Counsel of record*

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

X this brief contains 10,890 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

__ this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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:

X this brief has been prepared in a proportionally spaced typeface using **Microsoft Word 2007** in **13 point Century Schoolbook**, or

___ this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

Dated this 19th day of September, 2014.

/s/ Clayton P. Kawski

CLAYTON P. KAWSKI
Assistant Attorney General
WI State Bar #1066228

Attorney for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I certify that on September 19, 2014, I electronically filed the foregoing Brief of Plaintiff-Appellee State of Wisconsin with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for the following participants in the cases, who are registered CM/ECF users:

Cynthia L. Buchko

Sheila Corbine

Michael P. Murphy

Thomas M. Pyper

Dated this 19th day of September, 2014.

/s/ Clayton P. Kawski

CLAYTON P. KAWSKI
Assistant Attorney General
WI State Bar #1066228

Attorney for Plaintiff-Appellee