

No. 15-\_\_\_

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In the  
**Supreme Court of the United States**

————— ◆ —————  
STATE OF WISCONSIN,

*Petitioner,*

v.

HO-CHUNK NATION,

*Respondent.*

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

————— ◆ —————  
**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

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

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

The question presented is:

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

## **LIST OF PARTIES**

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

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

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## PETITION FOR A WRIT OF CERTIORARI

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### OPINIONS BELOW

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

### JURISDICTION

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

### STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

#### 25 U.S.C. § 2703(7):

(7)(A) The term “class II gaming” means--

....

(ii) card games that--

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

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

**25 U.S.C. § 2703(8):**

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

**25 U.S.C. § 2710(b):**

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

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

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

....

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

## STATEMENT OF THE CASE

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

This case involves a significant decision under IGRA in which the appellate court’s analysis contravened basic principles of statutory interpretation. Rather than adhere to the plain language definitions of Class II and Class III gaming in IGRA, the Seventh Circuit relied upon legislative history, Indian law canons of construction, and a test from a Supreme Court case that pre-dated IGRA. This case presents an opportunity for the Court to reaffirm traditional principles of statutory interpretation that are based on plain meaning and context, not on legislative history or other extrinsic aids to statutory interpretation.

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

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

## **I. Background facts**

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

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<sup>1</sup>*See* <http://www.multimediasgames.com/pokerpro> (last visited July 20, 2015).



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

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

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

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

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

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

## II. Proceedings below

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

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

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

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

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

- Wisconsin law does not “explicitly authorize” the playing of non-banked, electronic poker under 25 U.S.C. § 2703(7)(A)(ii)(I), App. 8a;
- 25 U.S.C. § 2703(7)(A), defining “Class II gaming,” should be read in conjunction with § 2710(b)(1) (a provision that the district court found irrelevant), which states: “A tribe may engage in Class II gaming if the state ‘permits such gaming for any purpose by any person, organization or entity,’” App. 8a (quoting 25 U.S.C. § 2710(b)(1));
- Whether a game fits the definition of Class II gaming under 25 U.S.C. § 2703(7)(A) depends upon whether a state “permits” the game under § 2710(b)(1), and whether a state “permits” a game requires a court to apply *Cabazon*'s “regulatory/prohibitory” test, App. 8a-14a;
- Because this case involves IGRA, the court of appeals must apply a canon of statutory interpretation that all ambiguities in the law

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

- By consulting legislative history, the proper conclusion is that Congress intended IGRA to incorporate *Cabazon's* "regulatory/prohibitory" test, App. 12a-13a;
- Applying *Cabazon* and 25 U.S.C. § 2710(b)(1)(A), the question in this case is whether Wisconsin "permits" poker for any purpose by any person, organization, or entity, App. 13a;
- The Wisconsin Constitution explicitly prohibits poker, but the fact that the parties' tribal-state gaming compact allowed for poker to be played in Madison if a referendum passed shows that Wisconsin does not treat its prohibition on poker as "an insurmountable obstacle to Indian gaming," App. 18a;

## REASONS FOR GRANTING THE PETITION

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

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

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

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

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

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

(7)(A) The term “class II gaming” means--

....

(ii) card games that--

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

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

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

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

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

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

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

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

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

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

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

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

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

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

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

To import *Cabazon's* “regulatory/prohibitory” test into the IGRA analysis, the Seventh Circuit relied upon 25 U.S.C. § 2710(b)(1)(A), which states: “An Indian tribe may engage in . . . class II gaming on Indian lands . . . if . . . such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity.” App. 8a, 12a-15a. This was a fundamental error.

As the district court correctly held:

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

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

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

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

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

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

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

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

### 1. The Indian law canons

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

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

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

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

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

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

For one thing, canons are not mandatory rules. They are guides that ‘need not be conclusive.’” *Id.* (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)). The Court determined that accepting “as conclusive the canons on which the Tribes rely would produce an interpretation that we conclude would conflict with the intent embodied in the statute Congress wrote.” *Id.* The Court held that the Indian law canons were “offset” by “the canon that warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed.” *Id.* at 95. The Court concluded that one cannot say that the “pro-Indian canon” is stronger than the clearly-expressed-tax-exemption canon, “particularly where the interpretation of a congressional statute rather than an Indian treaty is at issue.” *Id.* One commentator has described *Chickasaw* as sounding an implied “death-knell” for the Indian law canons.<sup>3</sup>

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

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

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

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

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

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

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

## 2. Legislative history

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

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

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

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

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

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

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

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

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

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

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

Importantly, the Ninth Circuit rejected the application of the Indian law canons to determine whether a game is Class II or Class III gaming under IGRA. It held:

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

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

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

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

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

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

\* \* \*

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

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

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

**CONCLUSION**

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

Respectfully submitted,

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July 27, 2015

## **APPENDIX**

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**APPENDIX A**

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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No. 14-2529

STATE OF WISCONSIN,

*Plaintiff-Appellee*

*v.*

HO-CHUNK NATION,

*Defendant-Appellant.*

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Appeal from the United States District Court  
for the Western District of Wisconsin.  
No. 13-cv-334 — **Barbara B. Crabb**, *Judge*.

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ARGUED DECEMBER 2, 2014 —  
DECIDED APRIL 29, 2015

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Before WOOD, *Chief Judge*, and WILLIAMS and  
TINDER, *Circuit Judges*.

WOOD, *Chief Judge*. The State of Wisconsin sued the Ho-Chunk Nation of Wisconsin to stop the tribe from offering electronic poker at its Madison gaming facility. The state maintained that the tribe was violating its agreement with the state to refrain from conducting Class III gaming at that location. The tribe responded that its poker is a Class II game that is permitted by law. The state prevailed in the district court, and the Ho-Chunk Nation now appeals. We reverse.

## I

The Ho-Chunk Nation (the Nation) is a federally recognized Indian tribe with land located in fourteen counties in Wisconsin. That land is held in trust for the tribe by the United States. Like a number of tribes, the Nation has pursued gaming as a catalyst for economic development. The Nation established its first bingo hall in 1983 following a judicial ruling that a 1973 amendment to the state constitution legalizing bingo games had the effect of ending the state's authority to restrict and regulate bingo on tribal reservations. By 1992, pursuant to Wis. Stat. § 14.035, the Governor of Wisconsin had entered into gaming compacts with all of the state's tribes, including the Nation. The Nation adopted a gaming ordinance, which it later amended four times, authorizing the tribe to "conduct all forms of Class I and Class II gaming on the Nation's lands."

The gaming classes to which these compacts and ordinances refer are defined in the Indian Gaming Regulatory Act (IGRA), at 25 U.S.C. § 2703(6), (7), and (8). Class I gaming includes social

games and traditional Indian gaming; it is regulated exclusively by Indian tribes. 25 U.S.C. §§ 2703(6), 2710(a)(1). Class II gaming includes bingo and certain nonbanked card games that are “explicitly authorized by the laws of the State, or ... are not explicitly prohibited by the laws of the State and are played at any location in the State.” 25 U.S.C. §§ 2703(7)(A)(ii), 2710(b)(1). (Wisconsin’s Legislative Reference Bureau defines nonbanked games as those “in which players compete against one another as opposed to playing against the house.” See Wis. Legislative Reference Bureau, *The Evolution of Legalized Gambling in Wisconsin*, Informational Bull. 12-2 at 24 (Nov 2012) <http://legis.wisconsin.gov/lrb/pubs/ib/12ib2.pdf>.)

Class III gaming is a residual category that covers “all forms of gaming that are not class I gaming or class II gaming.” 25 U.S.C. § 2703(8). This case hinges on the fact that Class II gaming is enforced exclusively by the tribes and the National Indian Gaming Commission (Gaming Commission), 25 U.S.C. § 2710(b), whereas Class III gaming is regulated pursuant to tribal-state compacts, 25 U.S.C. § 2710(d).

The Nation operates several gaming facilities, including one in Madison, now called Ho-Chunk Gaming Madison. On April 25, 2003, the Nation and Wisconsin executed a document referred to as the Second Amendment to the Compact, which authorized the Nation to conduct Class III gaming at the Madison facility, provided Dane County authorized it to do so. But Dane County withheld its authorization after the voters rejected by a margin

of nearly two to one a referendum to that effect held on February 17, 2004.

The current Compact, as amended on September 16, 2008, does not restrict the ability of the Nation to offer Class II gaming on its tribal lands, including the Madison facility (nor could it as a matter of federal law). Since November 2010, the Nation has offered nonbanked poker at Ho-Chunk Gaming Madison. (The parties' Joint Statement of Stipulated Facts explicitly recognizes that the type of poker offered at the Madison facility is nonbanked.<sup>1</sup>) Wisconsin considers this nonbanked

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<sup>1</sup> Paragraphs 25 and 26 of the Joint Stipulation contain the most information about the type of poker involved here and the parties' agreement that it is nonbanked:

"25. E-Poker does not use live dealers or paper or plastic cards and gaming chips. Instead, cards are shuffled and dealt in an electronic medium, with each player viewing his or her cards at their respective player stations located around the table. Gaming chips are also maintained in an electronic medium, and players can view their chip balance on their individual player stations, which contain touch screens for the players to view their cards, chips, and other game information. The players also use the touch screen to input game decisions (*e.g.*, to bet, to check, to fold, etc.). A large video screen in the center of the table displays wagers made by each player, the community cards dealt, and other game information, including the pot total for each hand. Player accounts are maintained at the cashier's cage or other secure location where players must conduct cash-in and cash-out functions.

26. E-Poker is not house banked. HCG Madison collects a "rake" from the player's wagers and places all bets in a common pool or pot from which all player winnings and the rake are paid. All player funds are tracked and accounted for by the e-Poker table system's automated accounting function."

poker to be a Class III game. It accordingly sought an injunction in federal court to stop the poker, which if properly classified as Class III would violate the Nation's compact with the state. Both the state and the tribe filed motions for summary judgment based on the stipulated facts. The district court ruled that the electronic poker was, as the state had contended, a Class III game, and so it granted the state's motion for summary judgment and denied the tribe's motion. The court enjoined the Nation from offering poker at the Madison facility, but stayed the injunction pending the Nation's appeal to this Court.

## II

We review a district court's grant of summary judgment *de novo*. *Prestwick Capital Mgmt. v. Peregrine Fin. Grp.*, 727 F.3d 646, 655 (7th Cir. 2013). We also review *de novo* any legal questions, including those involving statutory interpretation. *Tradesman Int'l, Inc. v. Black*, 724 F.3d 1004, 1009 (7th Cir. 2013). If the version of poker the Nation offers at its Madison facility is a Class II game under the statute, the Nation has the authority to offer the game without securing Wisconsin's permission. If it is a Class III game, the Nation may not offer it at the Madison facility under the current compact with Wisconsin.

To decide which is the proper classification, we begin with IGRA, 25 U.S.C. §§ 2701–2721. The Act's "stated goals were to create a comprehensive regulatory framework 'for the operation of gaming

by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments,' to 'shield [tribes] from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players.'" *Wells Fargo Bank v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 687 (7th Cir. 2011) (quoting 25 U.S.C. § 2702(1)–(2)).

As we noted earlier, IGRA divides all Indian gaming (that is, gambling run by federally recognized tribes) into three classes, each subject to different levels of tribal, federal, and state regulation. As we have noted, we are concerned with Classes II and III. Class II gaming includes bingo, bingo-like games (such as pull tabs), and nonbanked card games allowed under state law. In a nonbanked game, players bet against one another, and the house has no monetary stake in the bets. In a banked game, such as blackjack, players bet against the house. Among Class II games, IGRA includes

card games that—

- (I) are explicitly authorized by the laws of the State, or
  - (II) are not explicitly prohibited by the laws of the State and are played at any location in the State,
- but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of

operation of such card games or limitations on wagers or pot sizes in such card games.

25 U.S.C. § 2703(7)(A)(ii).

Class II gaming is within the control of the tribes, but it is also subject to regulation by the Gaming Commission, which has the power to bring enforcement actions against tribes. The Commission must oversee a tribe's Class II gaming unless it has granted the tribe a certificate of self-regulation.

Class III gaming (the residual category) includes the types of games that most would associate with casinos: slot machines, craps, roulette, and banked card games like black-jack. It is permitted if three conditions are met: 1) the tribe has eligible trust lands in the state, 2) the state permits the gaming for any purpose, and 3) the gaming is governed by a state-tribe compact. Notably, the first two are identical to the requirements for Class II gaming. To meet the third requirement, a tribe must enter a compact with the state, and the compact must take effect before the casino opens. *Id.* § 2710(d)(1). These compacts sometimes involve extensive negotiation and litigation. See, e.g., *In Re Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003). A state must “negotiate in good faith” with a tribe when it requests a compact, but a state cannot be forced through litigation to negotiate. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). If the parties succeed in concluding a compact and the Secretary of the Interior approves it, she must publish notice of the approval in the Federal Register. 25 U.S.C. § 2710(d)(8)(D). The Secretary

may disapprove a compact, if it violates IGRA, any other federal law, or the trust obligations of the United States to Indians. *Id.* § 2710(d)(8)(B). If the Secretary takes no action within 45 days of the date when the compact is submitted for approval, the compact is considered approved. *Id.* § 2710(d)(8)(C).

Wisconsin law does not explicitly authorize the Nation to offer nonbanked poker, and so the Nation cannot rely on section 2703(7)(A)(ii)(I). It can prevail, if at all, only under section 2703(7)(A)(ii)(II)—that is, if the games are not explicitly prohibited by the laws of the state and are played at any location in the state. One other provision of IGRA is relevant: section 2710(b)(1), which says that a tribe may engage in Class II gaming if the state “permits such gaming for any purpose by any person, organization or entity.” *Id.* In other words, Class II gaming “is permitted only on tribal lands in states that do not entirely prohibit such gaming and only where the tribal resolution authorizing the operation is approved by the Chairman of the Commission.” *Wells Fargo Bank*, 658 F.3d at 687 (citing 25 U.S.C. § 2710(b)(1)(A)–(B)).

The parties dispute how sections 2703(7)(A)(ii) and 2710(b)(1) should be understood. The debate arises out of the Supreme Court’s decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which drew a distinction between regulatory and prohibitory measures and held that only prohibitory measures can negate the permission

required by section 2710(b)(1). In *Cabazon*, the Supreme Court held that California could not impose its gaming regulations on tribal gaming operations because the state's gaming laws were regulatory, not criminal. *Id.* at 220–22. This was important because California is one of the states covered by a statute commonly known as Public Law 280; that law takes away the federal government's authority under 18 U.S.C. §§ 1152–53 to prosecute Indian country crimes and turns that power over to the listed states. See Pub. L. No. 83-280, 67 Stat. 588 (1953). Had the gaming regulations been classified as criminal, California would have been entitled to impose its rules on the tribe's operations. *Cabazon* concluded that since Congress had not explicitly granted the state regulatory authority over gaming, the state's laws were preempted in light of the profound federal interests in tribal self-government. The Court's decision in *Cabazon* led to a flood of activity, and states and tribes clamored for Congress to bring some order to tribal gaming.

Wisconsin is also a state listed in Public Law 280. The immediate question before the district court was whether it was necessary to go through the analysis required by *Cabazon*, or if section 2710(b)(1) leaves no room whatsoever for questioning whether the Wisconsin regime is regulatory or prohibitory. The court decided that "*Cabazon* had nothing to do [with] § 2703 or the meaning of 'class II gaming.'" It concluded that the Nation's nonbanked poker game was "explicitly prohibited by the laws of the state" and therefore

was a Class III game. 25 U.S.C. § 2703(7)(A)(ii)(II). There was no point in consulting the legislative history of IGRA or Supreme Court precedent on Indian gaming, the court thought, because it understood Wisconsin to have an explicit prohibition of nonbanked poker for purposes of IGRA.

Our own review of the statutory scheme convinces us that it was error to put the Supreme Court's *Cabazon* decision to one side. The reference in section 2703(7)(A)(ii)(II) to "card games that ... are not explicitly prohibited by the laws of the State" must be read not just in light of the language itself, but also with attention to "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). Just as Montana did in its litigation with the Blackfeet Tribe thirty years ago, Wisconsin "fails to appreciate ... that the standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Oneida Cnty. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985); see also *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2032 (2014) ("Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-governance." (citations omitted)). The leading treatise in the field summarizes the canons that the

Supreme Court follows in cases construing laws affecting Indians as follows:

[T]reaties, agreements, statutes, and Executive Orders [must] be liberally construed in favor of Indians, and ... all ambiguities resolved in their favor. In addition, treaties and agreements are to be construed as Indians would have understood them, and tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1] (2012 ed.). See *Oneida Cnty.*, 470 U.S. at 247–48 ; see also *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 528 (1832) (McLean, J., concurring).

These canons have been widely accepted. This court has acknowledged the special approach to statutory construction that Indian law demands. See, e.g., *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 351 (7th Cir. 1983) (reviewing canons and stating that “these canons mandate that we adopt a liberal interpretation in favor of the Indians”). Our sister circuits are in accord. See, e.g., *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1191–92 (10th Cir. 2002); *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1030 (2d Cir. 1990) (“We deem this legislative history instructive with respect to the meaning of the identical language in section

2710(d)(1)(B), regarding class III gaming, which we must interpret.”). *Cf. Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015) (declining to apply the Indian law canon in light of competing deference required by *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), but reaffirming that the Indian canon “appli[es] when there is a choice between interpretations that would favor Indians on the one hand and state or private actors on the other”).

Wisconsin offers a second argument for finding *Cabazon* inapplicable here: because that case predates IGRA, it asserts, the Court’s reasoning does not illuminate the statute. We find this unpersuasive. It makes more sense to read the statutory language knowing that Congress was legislating against the background of the Supreme Court’s decisions. See, e.g., *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991). Nothing in the text of IGRA supports an inference that Congress was disapproving or limiting *Cabazon*. That is reason enough to reject the state’s position.

The history of the legislation provides further support for the use of *Cabazon*. Other courts have found that the legislative history leaves no doubt that Congress intended the “permit” language for both Class II and Class III gaming in 25 U.S.C. § 2710 to incorporate the *Cabazon* regulatory/prohibitory distinction. See, e.g., *Mashantucket Pequot Tribe*, 913 F.2d at 1029 (“[T]he Senate Report specifically adopted the *Cabazon* rationale as interpretive of the

requirement in section 2710(b)(1)(A) that class II gaming be ‘located within a State that permits such gaming for any purpose by any person, organization or entity.’”); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480, 485 (W.D. Wis. 1991) (“The Senate committee stated that it anticipated that the federal courts would rely on the *Cabazon* distinction between regulatory gaming schemes and prohibitory laws.”). A leading scholar in the field has also urged that this is the best reading of the statute. See WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 338 (2009) (“This restriction [of § 2710(b)(1)] is reflective of the rationale in *Cabazon Band*; if a state permits bingo or un-banked card games for any purpose, its public policy cannot be offended by this type of gambling.”). We decline Wisconsin’s invitation to break new ground here. *Cabazon*’s regulatory/prohibitory distinction applies when determining whether state law permits (or does not prohibit) gambling for the purposes of IGRA.

We turn now to our inquiry under *Cabazon*: does Wisconsin “permit[] such gaming for any purpose by any person, organization or entity.” 25 U.S.C. § 2710(b)(1)(a); see also *Cabazon*, 480 U.S. at 211 n. 10 (“The applicable state laws governing an activity must be examined in detail before they can be characterized as regulatory or prohibitory.”); CONF. OF W. ATT’YS GEN., *AMERICAN INDIAN LAW DESKBOOK* § 12.16 (2014 ed.) (“The status of nonbanking card games as class II must be determined by reference to state law ...

where state law is silent as to the validity of nonbanking card games, they will be valid even if played only on Indian lands.”). Just as they took different positions on the applicability of *Cabazon*, the parties dispute the proper sources of state law to consult when determining whether Wisconsin “permits” poker within the meaning of section 2710(b)(1)(a). We think it best to begin with Wisconsin’s Constitution, and then consult its statutes and compacts with the tribes. After that, we discuss the Nation’s suggestion that we should place some weight on the state’s allegedly lax enforcement of video-poker laws and its poker advertising.

The parties disagree about the level of generality we ought to adopt as we examine whether Wisconsin prohibits poker. A general approach, which takes into account Wisconsin’s approval of pari-mutuel horse and dog betting, strengthens the Nation’s argument that Wisconsin has departed from its nineteenth-century constitutional prohibition on gambling and permits gambling conducted in compliance with regulations. The Eighth and Ninth Circuits have held that for Class II gaming under IGRA, “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, 539 (9th Cir. 1994); see also *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 368 (8th Cir. 1990). The Second Circuit has taken the same approach in an analysis of Class III gaming. See, e.g., *Mashantucket Pequot*

*Tribe* 913 F.2d at 1031–32 (“So here, the district court concluded, after a careful review of pertinent Connecticut law regarding ‘Las Vegas nights,’ that Connecticut ‘permits’ games of chance, albeit in a highly regulated form. Thus, such gaming is not totally repugnant to the State’s public policy. Connecticut permits other forms of gambling, such as a state-operated lottery, bingo, jai alai and other forms of pari-mutuel betting.”).

Some question has been raised about the relevance of decisions involving Class III gaming to our analysis here. Given the fact that Class III is defined as “not” Class I or II, we have no reason to refuse to look at the Class III decisions. Class III gaming incorporates the same state-law analysis used for Class II. Compare 25 U.S.C. § 2710(b)(1)(a) with § 2710(d)(1)(B). Moreover, Class II gaming is less regulated than Class III gaming. If Wisconsin is a regulatory state for purposes of Class III gaming, it would be anomalous to conclude that it somehow becomes prohibitory for purposes of Class II games. What we held a decade ago still applies: “Wisconsin has not been willing to sacrifice its lucrative lottery and to criminalize all gambling in order to obtain authority under *Cabazon* and § 2710(d)(1)(b) to prohibit gambling on Indian lands.” *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States*, 367 F.3d 650, 665 (7th Cir. 2004).

Even if we were to adopt a more exacting level of generality, our result would be the same. That would involve an analysis of Wisconsin law

specifically for poker, not for gambling in general. The question would then be whether poker is “explicitly authorized by the laws of the State” or “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). As we noted earlier, the Nation cannot point to any law that suggests Wisconsin explicitly authorizes the game, and so it must establish the latter.

Wisconsin’s original 1848 constitution prohibited “any lottery.” This provision had been interpreted as prohibiting all gambling. But the state abandoned that absolute position starting in the 1960s, when it legalized various forms of gaming (including promotional contests in 1965, charitable bingo in 1973, raffles in 1977, on-track pari-mutuel betting on horseracing in 1987, and a state lottery in 1987) through constitutional amendments. See Wis. Legislative Reference Bureau, *Decriminalization of Video Gambling*, Budget Br. 99-6 (Nov. 1999); see also *Oneida Tribe of Indians of Wisconsin v. Wisconsin*, 518 F. Supp. 712, 719 (W.D. Wis. 1981) (citing the 1973 constitutional amendment as evidence that “Wisconsin’s bingo laws are civil-regulatory and ... not enforceable by the state in Indian country”). When the Wisconsin Legislature’s non-partisan research service described the state’s approach to gambling two years ago, it had this to say: “The story of gambling in Wisconsin is an evolution from absolute legal prohibition to the present situation in which the state and certain organizations and entities, including Indian tribes, may

conduct a wide variety of gaming activities.” Wis. Legislative Reference Bureau, *The Evolution of Legalized Gambling in Wisconsin*, Informational Bull. 12-2 at 1 (Nov. 2012) <http://legis.wisconsin.gov/lrb/pubs/ib/12ib2.pdf>.

We acknowledged these developments in an earlier IGRA dispute between a different tribe and Wisconsin: “The establishment of a state lottery signals Wisconsin’s broader public policy of tolerating gaming on Indian lands .... [B]ecause IGRA permits gaming on Indian lands only if they are ‘located in a State that permits such gaming for any purpose by any person, organization or entity,’ the lottery’s continued existence demonstrates Wisconsin’s amenability to Indian gaming.” *Lac Courte Oreilles Band*, 367 F.3d at 664 (citing *Cabazon* and quoting 25 U.S.C. § 2710(d)(1)(b)).

That does not mean that Wisconsin has become a free-for-all with respect to gambling. It amended its constitution in 1993 to restrict the types of gambling that could be authorized by the legislature. The state correctly points out that the 1993 constitutional amendment explicitly prohibited “poker.” It hopes, by relying on that amendment, to avoid the otherwise clear implication of the constitutional and statutory changes from the previous three decades. The 1993 amendment reads, in relevant part, “Except as provided in this section, the legislature may not authorize gambling in any form.” Wis. Const. art. IV, § 24(1). The article goes on to “provide otherwise” in several respects: it permits certain bingo games licensed

by the state (§ 24(3)); it permits specified raffle games (§ 24(4)); it forbids the legislature from prohibiting pari-mutuel on-track betting (§ 24(5)); and it permits a lottery (§ 24(6)), although it then excludes from the definition of the state-operated lottery several casino-style games, including poker. *Id.* art. IV, § 24(6)(c).

But Wisconsin cannot overcome two snags in the argument based on the 1993 constitutional amendment. First, the state itself does not treat the prohibition against poker as an insurmountable obstacle to Indian gaming. If poker were flatly prohibited as a matter of state constitutional and criminal law, a municipal referendum could not undo that constitutional prohibition. Yet that is what the state proposed to do in 2004, when the state and the Nation amended their compact to allow Class III gaming at the Madison facility if the voters of Dane County approved the arrangement in a referendum. The logical inference is that if the voters had said yes, then the Nation could have added poker to the games offered in the Madison casino. IGRA was designed to avoid precisely that kind of patchwork prohibition, in which the state banishes gaming in one county or situation and allows it in another. Wisconsin might argue that poker is not prohibited as a matter of state law in a Class III game, but there is no language in the state constitution that supports that position. As we discussed earlier, Class II and Class III games are subject to identical “permit” language in IGRA. Nor can Wisconsin explain, in light of its reading of IGRA, why the Governor himself was not flouting

the state's criminal law when he contracted with the Nation to have them provide poker on other tribal lands.

The second problem with Wisconsin's position arises out of legislative action in 1999. Act 9, the budget passed by the Legislature that year, decriminalized (though did not fully legalize) the possession of five or fewer video gambling machines, including video poker, provided that the establishment was licensed to serve alcohol. See Wis. Stat. §§ 945.03(2m) and 945.04(2m); see also Wis. Legislative Reference Bureau, *Decriminalization of Video Gambling*, Budget Br. 99-6 (Nov. 1999). Describing Act 9, the Legislative Reference Bureau noted that "[t]he new law decriminalized possession of five or fewer video gambling machines ... reducing the penalty to a civil offense, subject to a forfeiture of up to \$500 per machine. It also removed the threat that a tavern could have its alcohol beverage license revoked solely because of the machines." Wis. Legislative Reference Bureau, *The Evolution of Legalized Gambling in Wisconsin*, Research Bull. 00-1 (May 2000). Wisconsin rightly points out that Act 9 retained the criminal penalties for a patron to gamble using a video machine, but the Ho-Chunk Nation is in the position of the tavern proprietor, not the tavern patron.

Wisconsin cannot have it both ways. The state must entirely prohibit poker within its borders if it wants to prevent the Nation or any other Indian tribe from offering poker on the tribe's sovereign

lands. See *Lake of the Torches* 658 F.3d at 687. When the state decriminalized hosting poker for taverns, it could no longer deny that game to tribes as a matter of federal law.

Wisconsin argues that the Wisconsin Supreme Court's decision in *Dairyland Greyhound Park v. Doyle*, 719 N.W.2d 408, 428 (Wis. 2006), reinforces its position that the state prohibits poker, but that case simply stands for the proposition that "based on the 1993 Amendment's history and the earliest legislative interpretations of that Amendment, we conclude that the 1993 Amendment was not intended to preclude the Tribes from conducting Class III games pursuant to the Original Compacts." *Id.* at 428. In other words, *Dairyland* confirms that the 1993 amendment to the state constitution did not affect the legality of Wisconsin's gaming compacts with the tribes. Justice Prosser's separate opinion, which both parties cite extensively, is of no help, because a majority of his colleagues explicitly rejected his reasoning. *Id.* at 441 ("Justice Prosser's arguments regarding the scope of gaming are structurally unsound.").

Finally, in the interest of completeness we add a few words about the remaining arguments the parties have advanced. We reject the Nation's suggestion that we should place some weight on the extent to which Wisconsin enforces its criminal law (or does not do so). The fact that the state delegates to its Department of Revenue the task of enforcing some criminal laws tells us exactly

nothing. We have no intention of getting into the business of scrutinizing the vigor of enforcement for every gambling infraction in every case. Nothing in IGRA suggests the Class II or Class III gaming analysis demands anything beyond positive law. Nor do we rely on the fact that Wisconsin advertises poker on its tourism websites. To be sure, it would be odd for a state's tourism bureau to advertise an industry it regards as criminal or as against public policy. Nonetheless, it is quite unlikely that the people drafting advertising messages can dictate law enforcement policy to the state. This is best left out of the calculus.

Only one thing remains. In a letter dated February 26, 2009, the Gaming Commission concluded that the poker the Nation offers in Madison is Class II gaming because Wisconsin does not “wholly prohibit[]” poker. When a federal court interprets a statute, it should consider the interpretation of the expert agency charged with implementing that statute. IGRA is the organic statute for the Gaming Commission. The Commission has expertise in classifying Indian gaming, and it issues regulations that further clarify what constitutes Class II gaming. 25 C.F.R. § 502.3(c); see also COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 12.02[3][a] (“The NIGC plays a very important role in the determination of whether proposed gaming is class II or class III ... [and] is frequently called upon to determine whether a particular form of gaming falls within class II or class III.”).

Wisconsin suggests that this letter has only persuasive value. It notes that the D.C. Circuit held that the Gaming Commission lacked authority to mandate operating procedures for Class III gaming. *Colo. River Indian Tribes v. NIGC*, 466 F.3d 134 (D.C. Cir. 2006). An agency that lacks the power to promulgate regulations for an area of economic activity might not enjoy much deference on classifying that activity. But see *Diamond Game Enter. v. Reno*, 230 F.3d 365, 369 (D.C. Cir. 2000) (discussing that court's frustration with the Gaming Commission's unwillingness to weigh in on a gaming classification issue and complaining "we have no choice but to proceed without the benefit of a Commission position, a situation we expect Congress neither anticipated nor would appreciate."). We will assume for the sake of argument that the letter of the Gaming Commission is too informal to trigger *Chevron* deference. The possibility of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), remains, however. In light of the system IGRA establishes and the evidence that Wisconsin does not prohibit poker as a matter of criminal law, the Gaming Commission's opinion is one item on the scale in favor of the Nation.

### III

IGRA creates a regulatory scheme that respects tribal sovereignty while carving out a regulatory role for the states on only the most lucrative forms of casino gambling and hence the forms of gambling most susceptible to organized crime. States may choose to bypass this regulatory scheme

if they are willing to ban gaming across the board. But the states lack statutory authority to deny an Indian tribe the ability to offer gaming that is roughly equivalent to what the state allows for its residents. A state must criminalize a gambling activity in order to prohibit the tribe from engaging in it. Wisconsin does not criminalize nonbanked poker; it decriminalized that type of gaming in 1999. IGRA thus does not permit it to interfere with Class II poker on tribal land. This means that the Ho-Chunk Nation has the right to continue to offer nonbanked poker at its Madison facility.

The district court's judgment is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

**APPENDIX B**

**UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

**FINAL JUDGMENT**

April 29, 2015

Before: DIANE P. WOOD, Chief Judge

ANN CLAIRE WILLIAMS, Circuit Judge

JOHN DANIEL TINDER, Circuit Judge

No.: 14-2529	STATE OF WISCONSIN,  Plaintiff – Appellee  <i>v.</i>  HO-CHUNK NATION,  Defendant - Appellant
<b>Originating Case Information:</b>	
District Court No: 3:13-cv-00334-bbc, Western District of Wisconsin District Judge Barbara B. Crabb	

25a

The judgment of the District Court is REVERSED, with costs, and the case is REMANDED for further proceedings consistent with the opinion, in accordance with the decision of this court entered on this date.

**APPENDIX C**

IN THE  
UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WISCONSIN

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STATE OF WISCONSIN,

OPINION AND ORDER

Plaintiff,

13-cv-334-bbc

v.

HO-CHUNK NATION,

Defendant.

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The state of Wisconsin has brought this case to enjoin defendant Ho-Chunk Nation from offering electronic poker at Ho-Chunk Gaming Madison (formerly DeJope), the Ho-Chunk Nation's gaming facility in Madison, Wisconsin. The question raised in the parties' cross motions for summary judgment is whether Ho-Chunk Nation's poker game violates a compact with the state. The answer to that question turns on whether electronic poker qualifies as a "class II" or "class III" game under the Indian Gaming Regulatory Act. Class III games are prohibited by the compact except under certain conditions not present in this case, but class II games are permitted. Because I conclude that Ho-Chunk Nation's electronic poker game is a class III

game, I am granting the state's motion for summary judgment and denying Ho-Chunk Nation's motion.

The following facts are taken from the stipulation submitted by the parties. Dkt. #17.

#### UNDISPUTED FACTS

Defendant Ho-Chunk Nation owns a gaming facility in Madison, Wisconsin, called Ho-Chunk Gaming Madison. Games that are classified as "class II" under the Indian Gaming Regulatory Act are permitted at the facility but "class III" games are not permitted.

In 1992, the state and Ho-Chunk Nation entered into a gaming compact. In 2003, the parties executed an amendment to the compact that authorized Ho-Chunk Nation to offer poker at its class III gaming facilities (which do not include Madison). In addition, the compact permitted Ho-Chunk Nation to offer class III gaming at the Madison facility if a referendum authorizing Ho-Chunk Nation to do so was passed by voters in Dane County in 2004. Although the referendum was held, it did not succeed. Approximately 94,000 people voted against allowing class III gaming; approximately 52,000 voted for it. Since that time, neither the state nor Ho-Chunk Nation has taken any action to approve or authorize class III gaming at the Madison facility.

In November 2010, Ho-Chunk Nation began offering a "non-banked" electronic poker game called PokerPro at the Madison facility. In non-banked

card games, the house has no monetary stake in the game itself, the house does not place bets and the players play and bet against one another. Playing PokerPro is virtually identical to playing poker on a traditional table, except the cards and chips are maintained in an electronic medium and there is no live, human dealer.

### OPINION

The Indian Gaming Regulatory Act divides gaming into three categories. “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.” 25 U.S.C. § 2703(6). “Class II” gaming includes certain kinds of bingo as well as “card games” that are (1) “explicitly authorized by the laws of the State” or (2) “not explicitly prohibited by the laws of the State and are played at any location in the State.” 25 U.S.C. § 2703(7). “Class III” gaming encompasses all forms of gaming that do not qualify as “class I” or “class II” gaming. 25 U.S.C. § 2703(8). “Class III” games must be authorized by a compact between a state and a tribe. 25 U.S.C. § 2710(d)(1)(C).

The state makes a straightforward argument in support of its view that Ho-Chunk Nation’s electronic poker game at the Madison facility is a “class III” card game. (The parties do not dispute that the electronic poker at issue in this case qualifies as a “card game” within the meaning of § 2703(7).) In particular, the state cites art. IV, § 24 of the Wisconsin Constitution, which states that the

“legislature may not authorize gambling in any form” except for the games listed in the amendment. Because poker is not one of the listed exceptions, the state says that poker is prohibited under state law, so it cannot meet either definition of card games that qualify as class II gaming under § 2703(7).

Ho-Chunk Nation argues that its electronic poker game is a “class II” game, but it arrives at that conclusion through a more circuitous route. In fact, in its opening brief, Ho-Chunk Nation all but ignores § 2703(7) and focuses instead on a number of other issues with little explanation of how those issues are relevant to the legal questions before the court. However, from a review of both of its briefs, I understand Ho-Chunk Nation to be making the following arguments:

- First, Ho-Chunk Nation says that the meaning of “explicitly authorized” and “not explicitly prohibited” in § 2703(7)(A)(ii) must be read “in conjunction with” 25 U.S.C. § 2710(b)(1), which permits a tribe to engage in class II gaming if it “is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law).”
- Second, Ho-Chunk Nation says that, read together, § 2703 and § 2710, along with relevant legislative history, require courts to apply the standard from California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987),

to determine whether a particular game qualifies under class II. In particular, Cabazon stands for the proposition that a tribe may engage in gaming if the state's "general policy towards gambling is regulatory or prohibitory." Dft.'s Resp. Br., dkt. #33, at 8.

- Third, Ho-Chunk Nation says that, because Wisconsin does not prohibit *all* gaming, it follows that the state takes a "regulatory" approach, which means that it cannot prohibit poker either. Alternatively, Ho-Chunk Nation must be allowed to offer electronic poker because Wisconsin allows poker in other contexts and does not enforce its laws that restrict poker.
- Finally, Ho-Chunk Nation says that the Wisconsin Constitution does not "explicitly prohibit" the poker at its Madison gaming facility.

Having reviewed both parties' briefs and the legal authorities they cite, I am persuaded that the state has the better argument. In law, as in many things, the simplest answer is often the best one.

A. Effect of § 2710 on § 2703

Ho-Chunk Nation's argument regarding the proper interpretation of § 2703(7)(A)(ii) is simply untenable. Ho-Chunk Nation says that § 2703(7)(A)(ii) must be read "in conjunction with" 25 U.S.C. § 2710(b)(1), but the statutes serve a

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

Distilled, Ho-Chunk Nation's argument is not that the two statutes should be read "in conjunction" with each other, but that § 2710(b)(1) should *supplant* § 2703(7)(A)(ii). In other words, Ho-Chunk Nation's position is that the questions whether a game is "explicitly authorized by the laws of the State" or "not explicitly prohibited by the laws of the State" in § 2703(7)(A)(ii) should be the same as the question whether the state "permits such gaming for any purpose" in § 2710(b)(1). However, if that were the case, § 2703(7)(A)(ii) would serve no purpose and would be read out of the United States Code. Ho-Chunk Nation's "reading is thus at odds with one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." Corley v. United States, 556 U.S. 303, 314 (2009) (alterations and internal quotations omitted). Why would Congress provide an express definition of a term if it believed it already had defined the term in another provision? Ho-Chunk Nation does not answer that question. Particularly because § 2710(b)(1) does not purport to

be a definition, I see no reason to conflate the two provisions.

In support of its interpretation, Ho-Chunk Nation cites a Senate committee report for the Indian Gaming Regulatory Act. Dft.'s Br., dkt. #26, at 19-20. This report includes the same language Ho-Chunk Nation has been using, which is that § 2703(7)(A)(ii) and § 2710(b)(1) should be read "in conjunction" with each other. The meaning of the phrase "in conjunction" in this context is not clear, but even if I assume that it means what Ho-Chunk Nation says it does, that piece of legislative history would not be enough to overcome the plain language of the statute.

Ho-Chunk Nation cites Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 10 (1976), for the proposition that, "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law which forbids its use, however clear the words may appear on superficial examination." However, since Train, both the Supreme Court and the Court of Appeals for the Seventh Circuit have stated repeatedly that a federal court has no discretion to rely on other indicia of legislative intent when the language of a statute is unambiguous. Boyle v. United States, 556 U.S. 938, 950 (2009) ("Because the statutory language is clear, there is no need to reach petitioner's remaining arguments based on statutory purpose, legislative history, or the rule of lenity."); Lamie v. U.S. Trustee, 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.”); 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.”); Patriotic Veterans, Inc. v. Indiana, 736 F.3d 1041, 1046-47 (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, citations and alterations omitted); Shlahtichman v. 1-800 Contacts, Inc., 615 F.3d 794, 802 (7th Cir. 2010) (“We need not explore [the statute’s] legislative history in view of the unambiguous terms of the statute.”); United States v. Hayward, 6 F.3d 1241, 1245 (7th Cir. 1993) (“[W]hen the language of a statute is clear and unambiguous, no need exists for the court to examine the legislative history, and the court must give effect to the plain meaning of the statute.”). See also American Hospital Association v. NLRB, 499 U.S. 606 (1991) (affirming federal agency’s interpretation of statute even though it was inconsistent with committee report).

Even if I assume that Train has not been implicitly overruled by later cases, that case is not controlling. First, the Court did not hold that the statute was unambiguous in that case, so the statement Ho-Chunk Nation cites is dicta. Second, the legislative history at issue in Train was not simply a committee report. Rather, the Court relied

on the entire history of the law, including proposed amendments, multiple reports and a number of different statements by legislators. Train, 426 U.S. at 11-23. Finally, the Court stated that the lower court's interpretation was not just inconsistent with legislative history but also "would have marked a significant alteration of the pervasive regulatory scheme embodied in the" statute at issue. Id. at 23-24. None of these things apply in this case.

Ho-Chunk Nation cites a number of cases in which a court cited with approval the same committee report on which it is relying, but in none of these cases did the court rely on the report as justification for ignoring unambiguous statutory text. United States v. 103 Electric Gambling Devices, 223 F.3d 1091, 1099-1100 (9th Cir. 2000) (relying on report to determine "[t]he distinction under IGRA between an electronic 'aid' and an electronic 'facsimile' "); Mashantucket Pequot Tribe v. State of Connecticut, 913 F.2d 1024, 1029 (2d Cir. 1990) (relying on report to aid in interpreting § 2710; court did not consider meaning of "class II gaming" under § 2703); United States v. Sisseton-Wahpeton Sioux Tribe, 897 F.2d 358, 359 (8th Cir. 1990) (relying on report to determine the meaning of phrase "nature and scope" in § 2703(7)(C)); Crosby Lodge, Inc. v. National Indian Gaming Commission, 803 F. Supp. 2d 1198, 1205 (D. Nev. 2011) (relying on report to determine role of National Indian Gaming Commission); Shakopee Mdewakanton Sioux Community v. Hope, 798 F. Supp. 1399, 1407 (D. Minn. 1992), aff'd, 16 F.3d 261 (8th Cir. 1994) (relying on report to distinguish bingo from "high-stakes casino gambling" that must be classified as a

class III game). Accordingly, none of these cases are instructive.

B. “Regulatory” versus “Prohibitory” Treatment of Gaming

The Nation cites California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), as providing the standard for determining whether a type of gaming is a class II game. In particular, it says that the distinction in Cabazon between a “prohibitory” and “regulatory” approach to gaming should apply and that its electronic poker must be permitted under the standard in Cabazon because Wisconsin takes a “regulatory” approach to gaming.

This argument is misguided. Cabazon had nothing to do § 2703 or the meaning of “class II gaming.” Rather, the question in Cabazon was whether a particular federal statute not at issue in this case gave the California government authority to prohibit certain kinds of gaming conducted by tribes. When the Court concluded that the statute did not give the state such authority, Congress enacted the Indian Gaming Regulatory Act to address the vacuum. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 58 (1996) (“[T]he [Indian Gaming Regulatory] Act grants the States a power that they would not otherwise have, viz., some measure of authority over gaming on Indian lands.”). See also Michigan v. Bay Mills Indian Community, No. 12-515, — U.S. —, 2014 WL 2178337 (U.S. May 27, 2014) (“[T]he problem Congress set out to address in IGRA (Cabazon's ouster of state

authority) arose in Indian lands alone. And the solution Congress devised, naturally enough, reflected that fact.”); Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States, 367 F.3d 650, 654-55 (7th Cir. 2004) (“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.”). Because the Act created new state authority over tribal gaming, it makes little sense to interpret the Act using a standard that was applied before the states had that authority.

Ho-Chunk Nation also cites Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin, 770 F. Supp. 480 (W.D. Wis. 1991), for the proposition that Wisconsin is a “regulatory” state, but Lac du Flambeau is not helpful because it was about class III gaming, not class II. Thus, by relying on that case, the Nation is asking the court to eliminate any distinction between class II and class III games. If anything, the 1991 decision undermines that position because the decision emphasizes that “[t]he essential feature of the [Indian Gaming Regulatory] Act is the tribal-state compact process.” Id. at 481. In this case, it is Ho-Chunk Nation, not the state, that is attempting to do an end-run around the compact process.

In arguing that the state must allow the Nation

to offer poker at the Madison gaming facility because the state allows *some* forms of gaming both at that facility and elsewhere, the state relies entirely on the “regulatory/prohibitory” distinction made in cases such as Cabazon and Lac du Flambeau. Because I have concluded that Cabazon and Lac du Flambeau are not instructive, that argument cannot prevail.

C. Explicitly Authorized” or “Not Explicitly Prohibited” by “the Laws of the State”

Art. IV, § 24(1) of the Wisconsin Constitution states, “Except as provided in this section, the legislature may not authorize gambling in any form.” Neither poker generally nor electronic poker in particular is listed in the provision as something the legislature may authorize. As a result, the state says, the electronic poker at Ho-Chunk Nation’s Madison gaming facility is “explicitly prohibited” by the Wisconsin Constitution.

In response, the Nation raises several arguments. First, “the ‘explicit language [in art. IV, § 24] precludes the legislature from authorizing any gambling not within the exceptions in § 24, [but] it ‘explicitly prohibits’ only one thing: the State conducting poker or simulated poker as part of the lottery.” Dft.’s Br., dkt. #33, at 20. Ho-Chunk Nation cites art. IV, § 24(6)(c), which allows the legislature to create a lottery, but excludes poker as a game that may be part of the lottery.

The point the Nation is trying to make is not

immediately clear. To the extent it means to argue that poker is “not explicitly prohibited” by the state constitution because it is not listed individually as a prohibited game, I disagree. The state constitution “explicitly prohibits” *all* gambling unless it falls within a listed exception. Ho-Chunk Nation cites no authority for the view that a state must “itemize” all the games it prohibits.

The Nation may be arguing that there is some significance to the way that art. IV, § 24 is worded. It compares the phrase “the legislature may not authorize gambling” in art. IV, § 24 with the Idaho Constitution, which states that “[g]ambling is . . . strictly prohibited” before listing a number of exceptions. Idaho Const. art. III, § 20. Ho-Chunk Nation seems to believe that there is something more permissive about the language in the Wisconsin Constitution, but it never explains the practical difference between prohibiting the legislature from authorizing an activity and prohibiting the activity directly. Because all gambling is prohibited in Wisconsin without an act of the legislature authorizing it, I see no relevant difference.

Alternatively, Ho-Chunk Nation says that electronic poker is “authorized” under Wisconsin law because compacts with the state allow tribes to offer poker games in some contexts. E.g., Dairyland Greyhound Park, Inc. v. Doyle, 2006 WI 107, ¶ 82, 295 Wis. 2d 1, 719 N.W.2d 408 (because compacts were entered into before amendment to art. IV, § 24 was enacted and compacts anticipated that tribe and state could “allow new games should the parties

agree to amend the scope of gaming,” state constitution did not prohibit governor from agreeing with tribe to expand scope of gaming as anticipated by compacts). The National Indian Gaming Commission relied on a similar argument in concluding in an opinion that electronic poker is “explicitly authorized” or “not explicitly prohibited” by state law. Dkt.#17-7.

There are two problems with this argument. First, gaming compacts are meant to address *class III* gaming, not class II. 25 U.S.C. § 2710(d); Lac du Flambeau, 770 F. Supp. at 484. If permission to engage in gaming under a compact qualified as “explici[t] authoriz[ation]” under § 2703, it would significantly blur the distinction between class II and class III gaming by making it impossible for the state to allow gaming for a limited purpose in the context of a compact. In other words, once the state allowed class III gaming through a compact, that game necessarily would become a class II game that the state could not prohibit in other contexts. If that were the law, it is likely that the state would be much less willing to negotiate compacts.

Second, under § 2703(7), a game qualifies as a class II game if it is authorized or not prohibited “by the laws of the State.” Ho-Chunk Nation cites no authority for the proposition that a compact qualifies as a state law for the purpose of § 2703(7).

#### D. Lack of Enforcement

Ho-Chunk Nation devotes much of its briefs to

arguing that poker is being played in Wisconsin in various contexts, such as in taverns and at charity events. The state disputes many of these allegations, but even if they are true, they cannot carry the day for the Nation. The question whether the state is failing to fully enforce its own laws against playing poker might be relevant in determining whether poker is a game subject to compact negotiations, Lac du Flambeau, 770 F. Supp. at 485, or it might be relevant to determining whether a game is “played at any location in the State” under § 2703(7)(A)(ii). However, Ho-Chunk Nation 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.” On its face, § 2703(7) does not permit an inquiry into enforcement practices.

Many laws suffer from some amount of underenforcement, but that does not mean that they are no longer “laws.” I agree with the state that Ho-Chunk Nation has proposed an unworkable standard because it would require courts to determine the particular degree of enforcement or underenforcement that would qualify as “prohibiting” or “authorizing” a game. Particularly because there is no basis in the statutory text for making that determination, I decline to adopt that interpretation of the statute.

In sum, I conclude that the electronic poker Ho-Chunk Nation is offering at the Madison gaming facility qualifies as a “class III” game under the Indian Gaming Regulatory Act. Because it is undisputed that the compact between the parties prohibits class III games under the circumstances of

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this case, I am granting the state's motion for summary judgment and enjoining Ho-Chunk Nation from offering electronic poker at the Madison gaming facility.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by plaintiff state of Wisconsin, dkt. #16, is GRANTED, and the motion for summary judgment filed by defendant Ho-Chunk Nation, dkt. #23, is DENIED.

2. Ho-Chunk Nation is ENJOINED 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.

3. The clerk of court is directed to enter judgment in favor of the state and close this case.

Entered this 12th day of June, 2014.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge

IN THE  
UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WISCONSIN

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STATE OF WISCONSIN,

Plaintiff,

v.

HO-CHUNK NATION,

Defendant.

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ORDER

13-cv-334-bbc

It has come to my attention that the June 12, 2014 order granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment contains a typographical error. On page 10, in the third sentence of the second full paragraph, the word "state" should be replaced with the word "Nation."

In all other respects, the order entered on June 12, 2014, remains unchanged.

Entered this 18th day of June, 2014.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge

**APPENDIX D**

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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STATE OF WISCONSIN,

Plaintiff,                      JUDGMENT IN A CIVIL CASE

v.                                      Case No. 13-cv-334-bbc

HO-CHUNK NATION,

Defendant.

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This action came for consideration before the court with District Judge Barbara B. Crabb presiding. The issues have been considered and a decision has been rendered.

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IT IS ORDERED AND ADJUDGED that judgment is entered in favor of plaintiff State of Wisconsin against defendant Ho-Chunk Nation granting plaintiff's motion for summary judgment.

IT IS FURTHER ORDERED AND ADJUDGED that Ho-Chunk Nation is ENJOINED from offering electronic poker at Ho-Chunk Gaming Madison in the absence of a compact between the parties that permits

