No. 99-685

In the Supreme Court of the United States

MICHAEL P. KENT AND MICHELLE KENT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a taxpayer who is in the trade or business of gambling may deduct gambling losses in excess of his gambling gains or carry excess gambling losses back to a previous year.

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 1a-3a) is unpublished, but the decision is noted at 185 F.3d 867 (Table). The order of the district court (Pet. App. 6a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 1999. A petition for rehearing was denied on July 29, 1999 (Pet. App. 4a-5a). The petition for a writ of certiorari was filed on October 21, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Michael Kent is a founder and majority owner of MJM Ventures, Ltd., which is a subchapter-S company that operates a proprietary computer program designed to predict the outcome of certain sporting events (Pet. App. 7a).[1] After comparing these computer-generated predictions to the betting lines of various Las Vegas casinos, his company makes legal wagers on the outcomes of such events through the casinos. Operating this business is petitioner's sole occupation (*ibid.*).[2]

Petitioner's income tax return for 1987 showed a significant tax liability (Pet. App. 7a). On the 1990 return that he filed jointly with his wife (petitioner Michelle Kent), however, petitioner reported a significant net loss attributable to gambling losses incurred by his company in that year (*ibid.*). See note 1, *supra*. A portion of the reported net gambling losses for 1990 was applied by petitioner to offset income from other sources in that year. In addition, petitioner filed an amended return for 1987, in which he claimed a refund for that year based on a carryback of the remainder of the gambling losses from 1990 (*ibid.*).

The Internal Revenue Service disallowed both the net operating loss claimed in 1990 and the portion of that loss purportedly carried back to 1987. The Service assessed petitioners additional taxes in the amount of $71,673 for 1987 and $16,701 for 1990 (Pet. App. 7a). Petitioners paid the additional taxes plus interest and,

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[1] The income and expenses of a subchapter-S corporation pass through to, and are reported on the tax returns of, its shareholders. See 26 U.S.C. 1361 *et seq.*

[2] References to "petitioner" in this brief are to Michael Kent.

after filing an administrative claim for refund, commenced this action for a refund in district court.

2. The district court granted summary judgment to the government (Pet. App. 6a-14a). The court rejected petitioner's contention that net gambling losses could be deducted as business expenses under Section 162(a) of the Internal Revenue Code, 26 U.S.C. 162(a), or could be carried back to prior tax years as a net operating loss under Section 172 of the Code, 26 U.S.C. 172. The court noted that petitioner's attempt to deduct gambling losses in excess of his gambling income was barred by the specific provisions of Section 165(d) of the Code, 26 U.S.C. 165(d) (Pet. App. 10a-12a). The court rejected petitioner's contention that applying this statutory restriction on the deduction of gambling losses violates the Equal Protection Clause of the Constitution (*id.* at 13a-14a).

3. The court of appeals affirmed in a brief memorandum opinion (Pet. App. 1a-3a). The court noted that its decisions in *Nitzberg* v. *Commissioner*, 580 F.2d 357 (9th Cir. 1978), and *Boyd* v. *United States*, 762 F.2d 1369 (9th Cir. 1985), expressly held that 26 U.S.C. 165(d) precludes the deduction of gambling losses in excess of gambling gains for *all* gamblers, "even those who gamble professionally" (Pet. App. 3a). The court stated that, while the decision in *Commissioner* v. *Groetzinger*, 480 U.S. 23 (1987), "casts some doubt on the continued vitality of the reasoning of *Nitzberg* and *Boyd*, it did not overrule those decisions," which dispose of the issue framed in this case (Pet. App. 3a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any

other court of appeals. Further review is therefore not warranted.

1. Section 165(a) of the Internal Revenue Code establishes the general rule that "[t]here shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise." 26 U.S.C. 165(a). This general rule is subject to several specific statutory exceptions. In particular, Section 165(d) provides that "[l]osses from wagering transactions shall be allowed only to the extent of the gains from such transactions." 26 U.S.C. 165(d). As the courts below correctly held (Pet. App. 2a-12a), petitioner's attempt to claim a deduction for gambling losses in excess of "the gains from such transactions" (26 U.S.C. 165(d)), or to carry that disallowed deduction back to some earlier year, is thus precluded by the plain language of the statute.

Section 165(d) draws no distinction between gambling losses incurred by an occasional gambler and those realized by a person who engages in gambling as a livelihood. In *Boyd* v. *United States*, 762 F.2d 1369, 1372-1373 (9th Cir. 1985), and *Nitzberg* v. *Commissioner*, 580 F.2d 357, 358 (9th Cir. 1978), the court of appeals correctly concluded that the prohibition of this statute applies both to professional and non-professional gamblers. Indeed, the location of this statute in Section 165—as a limitation on deductions available both for "losses incurred in a trade or business" *and* for "losses incurred in any transaction entered into for a profit" (26 U.S.C. 162(c)(1)-(2))—confirms that the limitation applies to professional and amateur gamblers alike. The several courts that have considered this same issue have consistently reached this same conclusion. *E.g.*, *Estate of Todisco* v. *Commissioner*, 757 F.2d 1, 6-7 (1st Cir. 1985); *Humphrey* v. *Commissioner*, 162

F.2d 853, 855 (5th Cir.), cert. denied, 332 U.S. 817 (1947); *Skeeles* v. *United States*, 95 F. Supp. 242, 246-247 (Ct. Cl.), cert. denied, 341 U.S. 948 (1951); *Offutt* v. *Commissioner*, 16 T.C. 1214, 1215-1216 (1951); *Kochevar* v. *Commissioner*, 70 T.C.M. (CCH) 1627 (1995); *Valenti* v. *Commissioner*, 68 T.C.M. (CCH) 838 (1994). There is thus no conflict nor other reason warranting further review.

2. Petitioners err in asserting (Pet. 6-7) that the decisions of the Ninth Circuit in *Boyd* and *Nitzberg* "conflict with the reasoning underlying" the decision of this Court in *United States* v. *Groetzinger*, 480 U.S. 23 (1987). The issue presented in *Groetzinger* was whether a full-time gambler who made wagers solely for his own account was engaged in a trade or business for purposes of computing the taxpayer's liability for the alternative minimum tax. The Commissioner had determined in that case (i) that $70,000 in gambling winnings were to be included in the taxpayer's gross income and (ii) that, pursuant to 26 U.S.C. 165(d), the taxpayer was to be allowed a deduction for his gambling losses to the extent of the gambling gains. The Commissioner had further determined (iii) that the $70,000 allowed as a gambling loss deduction was an item of "tax preference" for purposes of the alternative minimum tax under 26 U.S.C. 56(a). Under the alternative minimum tax provisions as in effect at that time, items of "tax preference" were reduced by various specific deductions attributable to any trade or business of the taxpayer. This Court held that gambling activity that is "pursued full time, in good faith, and with regularity, to the production of income for a livelihood" qualifies as a trade or business for the purposes of the Internal Revenue Code, including the alternative minimum tax. 480 U.S. at 35.

Nothing in the Court's decision in *Groetzinger* addresses the deductibility of gambling losses in excess of gambling winnings. That decision thus lacks any direct or indirect bearing on the question presented in this case. In particular, the Court did not address or overturn the consistent holdings of the courts of appeals that the prohibition against the deduction of gambling losses in excess of gambling gains under 26 U.S.C. 165(d) applies to those who gamble as a trade or business as well as to occasional gamblers. In the present case, unlike in *Groetzinger*, there was no question that the taxpayer was involved in the "trade or business" of gambling. The question addressed, and correctly decided, below was whether the plain language of Section 165(d) applies both to gamblers engaged in a trade or business and to amateur gamblers who merely speculate for an occasional profit. The court of appeals correctly rejected petitioner's contention that the limitation on the deduction of gambling losses applies only to amateur bettors, and nothing in *Groetzinger* conflicts with (or is relevant to) that holding.

Petitioners incorrectly argue that Section 165(d) should be interpreted to apply only to the "casual or hobbyist gambler" (Pet. 12). No such limitation on the scope of the statute appears in the plain language of its text. If Congress had desired to limit the application of Section 165(d) to occasional gamblers, it could easily have done so by employing language to that effect. When, as here, the language of the statute is clear, the role of the judiciary "is to apply the statute as Congress wrote it." *Hubbard* v. *United States*, 514 U.S. 695, 703 (1995). See also *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 99 (1991).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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