No. 00-507

In the Supreme Court of the United States

THE CHICKASAW NATION AND
THE CHOCTAW NATION OF OKLAHOMA, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Section 20(d) of the Indian Gaming Regulatory Act, 25 U.S.C. 2719(d), exempts Native American Tribes from the wagering excise and occupational taxes imposed by Sections 4401 and 4411 of the Internal Revenue Code.

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OPINIONS BELOW

The opinion of the court of appeals in *Chickasaw Nation* v. *United States* (Pet. App. 1a-28a) is reported at 208 F.3d 871. The order of the court of appeals in *Choctaw Nation* v. *United States* (Pet. App. 29a-32a) is unpublished, but the decision is noted at 210 F.3d 389 (Table). The opinions of the district court in *Chickasaw Nation* v. *United States* (Pet. App. 47a-65a), and *Choctaw Nation* v. *United States* (Pet. App. 33a-46a), are unreported.

JURISDICTION

The judgment of the court of appeals in each of these cases was entered on April 5, 2000. The petitions for rehearing were denied on July 5, 2000 (Pet. App. 66a-

67a). The petition for a writ of certiorari was filed on October 3, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are Native American Tribes in Oklahoma who operate gaming activities, including the sale of pull-tabs. Pet. App. 2a, 30a. Pull-tab cards are manufactured in sets of 24,000, and each set has a predetermined number of cash prize winners. *Id.* at 3a, 31a. A player peels back the tabs on a pull-tab card to see whether he has won a prize. *Id.* at 2a, 30a.

Section 4401(a) of the Internal Revenue Code (I.R.C. or Code) imposes an excise tax on all wagers, and Section 4411 imposes an occupational tax on each person liable for the wagering excise tax (hereinafter referred to jointly as "wagering taxes"). 26 U.S.C. 4401(a), 4411. The term "wager" includes any lottery that involves pull-tabs. I.R.C. § 4421; Rev. Rul. 57-258, 1957-1 C.B. 418. Section 4402(3) of the Code grants a wagering excise tax exemption for state-conducted lotteries, but there is no such exemption for tribe-conducted lotteries. There is also no exemption for tribe-conducted lotteries in I.R.C. § 7871(a), 26 U.S.C. 7871(a), a provision that treats Tribes as States for purposes of certain excise tax exemptions, but does not include wagering excise taxes.

Petitioners filed refund suits in the district court to recover wagering excise taxes paid for July 1993 and occupational taxes paid for 1993, and the government counterclaimed for unpaid wagering taxes from January 1993 through September 1994. Pet. App. 4a, 31a. Petitioners advanced the following arguments to support their claim that they were not liable for the taxes: (1) pull-tabs are not taxable "wagers" as defined

by I.R.C. § 4421; (2) petitioners are not "persons" as defined by I.R.C. § 7701(a); and (3) Section 20(d) of the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2485 (25 U.S.C. 2719(d)) (IGRA § 2719(d)) indicates that Congress did not intend to tax gaming governed by that Act. The district court rejected each of those claims, and granted summary judgment for the government. Pet. App. 33a-46a, 47a-65a.

2. The court of appeals affirmed. Pet. App. 1a-28a, 29a-32a. The court directly addressed and rejected petitioners' contention that IGRA § 2719(d) grants tribes the same exemption from the wagering taxes afforded States under I.R.C. § 4402(3). IGRA § 2719(d), in pertinent part, provides as follows:

> The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

Pet. App. 90a. The court rejected petitioners' argument that the parenthetical reference in IGRA § 2719(d) to Chapter 35 meant that Congress specifically intended to provide Indian Tribes with the same exemption specified for States from the wagering excise tax (found in IRC § 4402(3) in Chapter 35). Pet. App. 19a-26a. The court of appeals observed that "it is clear that [IGRA] § 2719(d) does not expressly prohibit the imposition of federal wagering excise or federal

occupational taxes on Indian gaming activities." *Id.* at 22a. Rather, that Section "provides that Indian gaming operations, like state gaming operations, must report certain player winnings to the federal government, and must likewise withhold federal taxes if players' winnings exceed a certain level." *Ibid.* The court of appeals further observed that the original version of the bill that became IGRA § 2719(d) had an explicit exemption for Indian gaming from the federal wagering excise tax, but that exemption had been deleted prior to passage. *Id.* at 23a.

The court found unpersuasive petitioners' reliance on a letter from Senator Daniel Inouye to the Commissioner of Internal Revenue, written three years after IGRA was enacted, in which Senator Inouye maintained that "it was the intention of Congress that the tax treatment of wagers conducted by Tribal governments be the same as that for wagers conducted by state governments under Chapter 35 of the Internal Revenue Code." Pet. App. 25a. The court stated that: (1) "the comments of a single senator, made years after the statute at issue was enacted, are of little value in interpreting [IGRA § 2719(d)]"; and (2) in all events, the Senator's interpretation "is inconsistent with both the language and the legislative history of the statute." *Ibid.* The court of appeals concluded:

> Although it is true that [IGRA] § 2719(d)'s reference to Chapter 35 is somewhat cryptic (since Chapter 35 pertains solely to wagering excise taxes and has nothing to do with the reporting and withholding of taxes on wagering winnings), we believe the most reasonable conclusion is that the reference was included in order to incorporate Chapter 35's definitions of the terms "wager" and "lottery." In any

> event, we are unwilling to assume, based solely upon the inclusion of this parenthetical reference to Chapter 35, that Congress intended to provide tribes with the exemption from federal wagering excise taxes enjoyed by the states. Such an assumption would fly directly in the face of § 2719(d)'s express reference to "the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations." Had Congress intended to provide tribes with an exemption from the federal wagering excise taxes, it clearly knew how to draft such an exemption.

Id. at 25a-26a. The court of appeals subsequently denied petitioners' request for rehearing and for rehearing en banc. *Id.* at 66a-67a.

DISCUSSION

The court of appeals correctly held that IGRA § 2719(d)(1) does not grant Indian Tribes an exemption from the federal wagering taxes imposed by I.R.C. §§ 4401 and 4411. That holding, however, directly conflicts with the Federal Circuit's decision in *Little Six, Inc.* v. *United States*, 210 F.3d 1361, petition for rehearing denied, 229 F.3d 1383 (2000) (three judges dissenting).[1] The taxability of tribal gaming operations is an important federal issue that is likely to recur as the Indian gaming industry continues to expand. Resolution by this Court of the conflict in the circuits on the taxability of tribe-operated lotteries is appropriate to enable the United States to administer the tax laws consistently to all Indian gaming operators. We

[1] A copy of the order denying rehearing en banc, with a dissenting opinion by Judge Dyk, is in App., *infra*, 1a-9a.

therefore agree that the petition for a writ of certiorari should be granted.

1. a. The text, structure, legislative history, and purpose of IGRA § 2719(d) establish that it does not exempt petitioners from federal wagering taxes. Section 2719(d) states that all provisions of the Internal Revenue Code—including (but not limited to) several specified Internal Revenue Code provisions (including Chapter 35)—apply to tribes in the same manner as States *with respect to the reporting and withholding of winnings from gaming and wagering operations*. The court of appeals properly observed that, in context, "the most reasonable conclusion is that the reference [to Chapter 35] was included in order to incorporate Chapter 35's definitions of the terms 'wager' and 'lottery.'" Pet. App. 25a. Because Chapter 35 (in I.R.C. § 4421) provides definitions of "wager" and "lottery," the reference to Chapter 35 insures that all forms of wagers and lotteries falling within those terms are within the scope of the "gaming and wagering operations" from which winnings are to be reported and withheld under IGRA § 2719(d), just as winnings from more traditional, well-known gaming operations would be subject to these reporting and withholding requirements. Properly understood, the reference to Chapter 35, which occurs only in parentheses, thus harmonizes with the overall text of IGRA § 2719(d).

Even apart from the court of appeals' explanation of the parenthetical reference to Chapter 35, the statutory text and structure would not support reading that reference as constituting a conferral of a tax exemption merely because Chapter 35 contains a single provision dealing with exemptions. See I.R.C. § 4402. Nothing in the text of IGRA § 2719(d) suggests that the reference was intended to refer to the exemptions in I.R.C.

§ 4402(3), rather than to other provisions in that Chapter that deal with matters of tax administration akin to reporting and withholding. See I.R.C. § 4403 (requiring a taxpayer to keep record of gross amount of all wagers); I.R.C. § 4412 (registration provision for occupational tax). Further, reading the parenthetical reference to Chapter 35 as a tax exemption would contradict the statute's express limitation to provisions "concerning the reporting and withholding of taxes." See *Little Six*, 229 F.3d at 1385 (Dyk, J., dissenting) ("It is far easier to make sense out of the statute if the inconsistent specific examples are read out of the statute because they conflict with the limitation.").

b. The drafting history also establishes that Congress did not intend for IGRA § 2719(d) to confer on Indian Tribes an exemption from wagering excise taxes. Congress deleted language contained in the originally proposed version of S. 555 (the bill that ultimately was enacted as IGRA), that would have exempted tribes from the wagering excise tax. The Senate Bill, as originally proposed (S. 555, 100th Cong., 1st Sess. (1987)), provided that:

> Provisions of the Internal Revenue Code of 1986, *concerning the taxation and the reporting and withholding of taxes with respect to gambling or wagering operations* shall apply to Indian gaming operations conducted pursuant to this Act the same as they apply to State operations.

S. 555, *supra*, at 37 (emphasis added). That language would have expressly extended to Tribes the same exemptions allowed to States with respect to any and all taxes related to "gambling or wagering." But the version of S. 555, as reported by the Senate Committee, and ultimately enacted, omitted the word "taxation,"

and instead provided that Tribes would be treated as States only for purposes of the Internal Revenue Code provisions dealing with the "reporting and withholding of taxes with respect to the winnings from gaming or wagering operations." 25 U.S.C. 2719(d)(1).

Consistent with the language of IGRA § 2719(d) as enacted, the Senate Report indicates that this provision "applies the Internal Revenue Code to winnings from Indian gaming operations." S. Rep. No. 446, 100th Cong., 2d Sess. 20 (1988). There is no suggestion in that report that the inclusion of the parenthetical language in the revised provision was intended to exempt Tribes from excise taxes otherwise applicable to such operations. The deletion of the express exemption in the original proposal is strong evidence of Congress's intent not to provide such an exemption. See, *e.g.*, *INS* v. *Cardozo-Fonseca*, 480 U.S. 421, 442-443 (1987); *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974); see also *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 157 (1973) (noting tax immunity provisions were dropped from bills preceding enactment of Indian Reorganization Act (25 U.S.C. 461 *et seq.*)). Because petitioners' interpretation of the reference to "Chapter 35" in IGRA § 2719(d) would give effect to a statutory result that Congress explicitly declined to enact when it deleted the language expressly exempting tribes from the wagering tax, the court below was correct to reject it. See *South Carolina* v. *Catawba Indian Tribe*, 476 U.S. 498, 506 (1986).

c. The purposes and policies of IGRA do not evidence congressional intent to create an implicit tax exemption outside of the Internal Revenue Code, and certainly not in a parenthetical reference without any substantive discussion in the legislative history. In *Little Six*, the Federal Circuit erred in concluding that

it should treat Tribes as States for tax exemption purposes in reliance on IGRA's overall goal of fostering tribal economic development and self-sufficiency. Pet. App. 110a-111a. That court read the general policy of IGRA too broadly to create an implied exemption from taxation. See *United States* v. *Anderson*, 625 F.2d 910, 917 (9th Cir. 1980) ("[i]f federal courts were free to create federal tax exemptions for Indians based on policy alone, the federal policy of Indian economic advancement, implicit in almost all of the many federal enactments regarding Indians, would soon have the unintended effect of exempting all Indians from all federal taxation"), cert. denied, 450 U.S. 920 (1981); *Little Six*, 229 F.3d at 1385-1386 (Dyk, J., dissenting) ("[t]he fact that a statute confers a set of benefits on tribes cannot mean that the statute should be extended beyond its terms to grant additional benefits to the tribes").

Congress can, and has, passed legislation that seeks to encourage tribal economic development, while retaining certain aspects of tax liability. In I.R.C. § 7871(a)(2), 26 U.S.C. 7871(a)(2), Congress expressed an intent to promote tribal economic development by granting certain excise tax exemptions enjoyed by States, but extended to Tribes only specific exemptions that involved "the exercise of an essential governmental function." See 26 U.S.C. 7871(b); S. Rep. No. 646, 97th Cong., 2d Sess. 11-13 (1982); Rev. Rul. 94-81, 1994-2 C.B. 412. If Congress had intended to create an excise tax exemption for Tribes, it could easily have done so within two existing statutory frameworks. Section 4402 of the Internal Revenue Code provides explicit wagering excise tax exemptions (but not to Tribes), and I.R.C. § 7871(a), 26 U.S.C. 7871(a), treats Tribes as States for purposes of specified excise tax

exemptions (but not the wagering excise tax). See Rev. Rul. 94-81, *supra*, at 413 ("The taxes imposed under chapter 35 are not included under § 7871(a)(2) and, therefore, Indian tribal governments are not treated as states under § 7871 with respect to wagering taxes.").

2. Petitioner contends that the court below erred in not applying the canon of construction that statutes are to be construed liberally in favor of Indians to recognize an exemption from the federal wagering taxes. That contention is incorrect. It is well settled that "exemptions from taxation are not to be implied; they must be unambiguously proved." *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 354-355 (1988). See also *United States Trust Co.* v. *Helvering*, 307 U.S. 57, 60 (1939). This Court has applied that rule to deny Indians implied exemptions from both federal income taxes, *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. 418, 419-420 (1935); *Choteau* v. *Burnet*, 283 U.S. 691, 696-697 (1931), and federal excise taxes, *Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620 (1870); see also *Confederated Tribes of the Warm Springs Reservation* v. *Kurtz*, 691 F.2d 878, 883 (9th Cir. 1982), cert. denied, 460 U.S. 1040 (1983). Section 4401(c) of the Internal Revenue Code, 26 U.S.C. 4401(c), imposes a wagering excise tax on "[e]ach person who is engaged in the business of accepting wagers." There is no express language in IGRA § 2719(d) that exempts Tribes from that tax. Indeed, on its face, that Section says nothing about either liability for wagering taxes or exemptions therefrom. Nor is there any indication in the legislative history of an intent to confer such an exemption.

Where a taxing authority of a State or one of its subdivisions seeks to impose a tax on Indians, this Court has regularly applied two related canons of construction

that are "rooted in the unique trust relationship between the United States and the Indians." *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 247 (1985). "[F]irst, the States may tax Indians only when Congress has manifested clearly its consent to such taxation; second, statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (citation omitted); see also *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 455, 458 (1995).

The situation is much different, however, in federal taxation cases such as this one. Unlike state governments, Congress has plenary authority to legislate over Indian affairs,[2] and such authority unquestionably includes the power to impose federal taxes. See *Choteau*, 283 U.S. at 697. Although this Court has relied on the United States' special relationship with Indians to require that Congress use explicit statutory language when abrogating Indian treaty rights,[3] this Court does not require that Congress use explicit language to extend general federal tax statutes to

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[2] U.S. Const. Art. I, § 8, Cl. 3; Art. II, § 2, Cl. 2; *Montana*, 471 U.S. at 764-765; *County of Oneida*, 470 U.S. at 234; *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980); *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974).

[3] See, *e.g.*, *County of Oneida*, 470 U.S. at 247 ("'Absent explicit statutory language,' this Court accordingly has refused to find that Congress has abrogated Indian treaty rights.") (quoting *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979)); *Solem* v. *Bartlett*, 465 U.S. 463, 470 (1984) (Congress must "clearly evince" an intent to diminish reservation boundaries); *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 346 (1941) (congressional intent to extinguish Indian land title must be "plain and unambiguous").

Indians. *Superintendent of Five Civilized Tribes*, 295 U.S. at 419-420 (rejecting rule in *Blackbird* v. *Commissioner*, 38 F.2d 976, 977 (10th Cir.), cert. granted, 281 U.S. 714 (1930), that federal income tax laws must manifest a specific intent to apply to Indians). Instead, where a federal tax statute is broad enough to cover the subject matter, any exemption for Indians "must be definitely expressed." *Superintendent of Five Civilized Tribes*, 295 U.S. at 419-420 (quoting *Choteau*, 283 U.S. at 696-697); accord *Squire* v. *Capoeman*, 351 U.S. 1, 6 (1956) ("should be clearly expressed"); *Cherokee Tobacco*, 78 U.S. (11 Wall.) at 620.[4]

3. In addition, courts must insure that application of the canon of construction that ambiguities in federal statutes are to be resolved in favor of Indians does not violate Congress's intent. See, *e.g.*, *South Carolina*, 476 U.S. at 506 & n.16; *DeCoteau* v. *District County Court*, 420 U.S. 425, 447 (1975). Like other canons of statutory construction, the Indian canon should be used to resolve, rather than to create, doubt. This Court regularly consults the structure, history, and purpose of the

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[4] Petitioners rely (Pet. 4 n.2, 23) on this Court's statement that "although tax exemptions generally are to be construed narrowly, in 'the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal.'" *Montana* v. *Blackfeet Tribe*, 471 U.S. at 766 n.4 (quoting *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912)). But both *Montana* and *Choate* concerned whether Congress had authorized state taxation of Indians, and, therefore, this Court had no occasion to consider, much less overrule, its prior precedents requiring that, in federal tax cases, Indians must show that a federal statute or treaty expressly exempts them from the tax. Further, in *Choate*, unlike in this case, there was no dispute that an exemption existed on the face of the statute (Curtis Act, 30 Stat. 505); rather, that case concerned whether the exemption conferred a property right protected by the Fifth Amendment. 225 U.S. at 671.

statute to decipher congressional intent, and has refused to apply the Indian canon where it would yield a contrary interpretation. See, *e.g.*, *Hagen* v. *Utah*, 510 U.S. 399, 412-422 (1994); *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 177-178 (1989); *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 774 (1985).

By contrast, the Court has concluded in one case that other statutory indicators of congressional intent support an exemption for Indians from a federal tax. See *Squire* v. *Capoeman*, 351 U.S. at 3-10. In that case, the Court analyzed the structure and purposes of the Indian General Allotment Act, a proviso in the 1906 amendment to the Act, legislative history, and a series of "relatively contemporaneous official and unofficial writings" to conclude that Congress intended to exempt certain Indians from a capital gains tax on the sale of timber from a restricted allotment of land (*i.e.*, land allotted to an Indian, but whose fee title was held in trust by the United States for a specified period in which the land was subject to restrictions on alienation and encumbrance). After reiterating the general, if not competing, principles that "exemptions to tax laws should be clearly expressed," and that ambiguities are construed liberally in favor of Indians, this Court found that the "literal language" of a proviso in a 1906 amendment to the Act "evince[d] a congressional intent" that the income would not be taxable until the government removed the restrictions from the land. *Id.* at 6-8. *Squire* reflects this Court's practice of using traditional tools of statutory construction to insure that it reaches a result consistent with congressional intent, as opposed to reflexively resorting to the Indian canon of construction in interpreting federal tax statutes to reach a result contrary to congressional intent. See

Little Six, 229 F.3d at 1384 (Dyk, J., dissenting) (contending that panel had applied the Indian canon too "quickly" in interpreting IGRA § 2719(d)).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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DECEMBER 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 99-5083

LITTLE SIX, INC. AND SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY, PLAINTIFFS-APPELLANTS

v.

UNITED STATES, DEFENDANT-APPELLEE

Oct. 12, 2000

ORDER

Circuit Judge DYK, with whom Circuit Judges NEWMAN and PLAGER join, dissents in a separate opinion.

A petition for rehearing en banc having been filed by the Appellee, and a response thereto having been invited by the Court and filed by the Appellants, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges authorized to request a poll whether to rehear the appeal en banc, and a poll having been requested, taken, and failed,

IT IS ORDERED THAT:

(1) The petition for rehearing is denied.

(2) The petition for rehearing en banc is denied.

The mandate of the Court will issue on October 19, 2000.

DYK, Circuit Judge, with whom Circuit Judges NEWMAN and PLAGER join, dissenting from the Order denying the petition for rehearing en banc.

This case raises important questions concerning the use and effect of the "Indian canon" of construction in interpreting a significant federal statute. The panel decision conflicts with a recent decision of the United States Court of Appeals for the Tenth Circuit. *See Chickasaw Nation v. United States*, 208 F.3d 871 (10th Cir. 2000).

The statute at issue here states: "The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter . . . in the same manner as such provisions apply to State gaming and wagering operations." 25 U.S.C. § 2719(d)(1) (West Supp. 2000). The panel held that the parenthetical reference to chapter 35—the chapter of the Internal Revenue Code that imposes a tax on wagers—exempts Indian pull-tab games from taxation. *See Little Six, Inc. v. United States*, 210 F.3d 1361, 1366 (Fed. Cir. 2000). However, this construction cannot be

reconciled with the other language of the statute, which applies only to provisions "concerning the reporting and withholding of taxes with respect to the winnings." Chapter 35 is not such a provision.

As I read the panel opinion, it finds a facial ambiguity in the statute because of the conflict and resorts immediately to the Indian canon to resolve that ambiguity in favor of the tribe. However, in my view, the panel should not have invoked the Indian canon of construction so quickly. Instead, it should have utilized all available tools of statutory construction before declaring the statute ambiguous and resorting to a default rule designed for exceptional cases where, despite the court's best efforts, an ambiguity in the statute remains.

I agree that making sense of 25 U.S.C. § 2719(d) here is not an easy task. Despite the government's efforts, there is no way to reconcile § 2719(d)'s literal limitation to provisions of the Internal Revenue Code "concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations" with its parenthetical reference to chapter 35. I do not find persuasive the government's argument (adopted by the United States Court of Appeals for the Tenth Circuit) that the reference to chapter 35 was designed to incorporate § 4421's definitions of wagers and lotteries. *See Chickasaw Nation*, 208 F.3d at 883; 26 U.S.C. § 4421. For example, chapter 35 itself explicitly states that its definitions of wagers and lotteries apply only "for purposes of [chapter 35]," 26 U.S.C. § 4421, and its definitions are thus irrelevant for purposes of the other sections of the Code referenced by § 2719(d). I thus agree with the panel that confining § 2719(d)(1) to

provisions "concerning the reporting and withholding of taxes" does in fact render the statute's reference to chapter 35 superfluous. *See Little Six, Inc.*, 210 F.3d at 1365.

In my view, we are confronted with a situation in which it is impossible to give effect to all the language of the statute without rendering the statute self-contradictory. However, this does not create an ambiguity in the statute that justifies immediate resort to a canon designed to resolve ambiguities. Rather, a court under such circumstances should examine the statute's structure, purpose, and history in order to produce an interpretation that makes the statute coherent. The choice here is to accept the statute's limitation to provisions "concerning the reporting and withholding of taxes with respect to . . . winnings," thereby rendering *superfluous* the parenthetical reference to chapter 35, or to accept that the reference to chapter 35 exempts Indian gaming from taxation, thereby *contradicting* the statute's limitation to provisions "concerning the reporting and withholding of taxes with respect to . . . winnings."

While the general rule is that meaning should be afforded to all language in a statute, statutory language inadvertently included can be disregarded if it is found to be contrary to legislative intent. *See United States v. Colon-Ortiz*, 866 F.2d 6, 10 (1st Cir. 1989); *American Radio Relay League, Inc. v. FCC*, 617 F.2d 875, 879 (D.C. Cir. 1980); 2A Norman J. Singer, *Statutes and Statutory Construction* § 46.06, pp. 192-93 (6th ed. 2000) (stating that "words and clauses which are present in a statute only through inadvertence can be disregarded if they are repugnant to what is found, on the basis of

other indicia, to be the legislative intent"). Furthermore, the rule against superfluity has limited force when the alternative is to create even greater problems. In *Church of Scientology v. IRS*, 792 F.2d 153, 163 (D.C. Cir. 1986) (en banc), *aff'd* 484 U.S. 9, 108 S. Ct. 271, 98 L. Ed.2d 228 (1987), Judge (now Justice) Scalia noted that the court's interpretation of the Haskel Amendment, which caused two statutory provisions to become superfluous, was "nothing beside the textual and policy absurdities produced" by a contrary interpretation. That situation seems similar to the case here.

First, I cannot see how an erroneous parenthetical reference to a supposed example can trump the clear limiting language adjacent to the parenthetical. Moreover, as the government points out, it is unlikely that Congress would create a significant tax exemption through a parenthetical reference, and it seems exceedingly unlikely that Congress would do so in a sentence which by its terms is restricted to reporting and withholding of taxes on winnings.

Second, a court should adopt a construction of the statute that makes it coherent. The panel's interpretation of the statute here may resolve this particular case, but it leaves the interpretation of the limitation ("provisions . . . concerning the reporting and withholding of taxes with respect to . . . winnings") unresolved. Is the effect of the panel decision somehow to modify the limitation to make it consistent with the specific examples? If so, what does the limitation now mean? Or does the panel's opinion eliminate the limitation because it is inconsistent with the specific examples? If so, not only would the panel be rendering

the limitation superfluous, but also it would have the effect of making all provisions of the Internal Revenue Code "apply to Indian gaming operations . . . in the same manner as such provisions apply to State gaming and wagering operations." There is no claim that Congress intended this result. It is far easier to make sense out of the statute if the inconsistent specific examples are read out of the statute because they conflict with the limitation.

Third, the legislative history does not support the result rendered by the panel. Early versions of the bill that ultimately became the Indian Gaming Regulatory Act ("IGRA") (of which § 2719(d) is a part) would have exempted tribes from the wagering tax. H.R. 1920, passed by the House in 1986, provided: "Provisions of the Internal Revenue Code of 1954, as amended, concerning the *taxation* and the reporting and withholding of taxes pursuant to the operation of a gambling or wagering operation shall apply to the operations in accord with the Indian Gaming Regulatory Act the same as they apply to State operations." H.R. 1920, 99th Cong. § 4 (1986) (emphasis added). The accompanying House report explicitly linked chapter 35 with the bill's reference to taxation. It noted that "Section 4 provides that relevant provisions of the Internal Revenue Code, such as section 3402(q) and chapter 35, 26 U.S.C., concerning taxation and the reporting and withholding of taxes relating to the operation of gaming activities shall apply to tribal gaming activities as they apply to State operated gaming activities." H.R. Rep. No. 99-488, at 13 (1986).

The Senate bill as originally proposed continued to include the reference to "taxation." S. 555, 100th Cong.

§ 20(D) (Feb. 19, 1987). However, in the version of the bill reported out of Committee and ultimately enacted, the reference to "taxation" was removed. The fact that the committee at the same time added a parenthetical including examples of both "reporting and withholding" provisions and "taxation" provisions hardly evidences a decision to have the specific taxation examples substitute for the general "taxation" exclusion. If the specific examples were a substitute for the general exclusions, how can the retention of the "reporting and withholding" language be explained? The legislative history here provides no clear guidance. The language of the provision has all the earmarks of a simple mistake in legislative drafting. The better explanation for the reference to chapter 35 is therefore that it was included inadvertently after Congress had decided to eliminate the reference to "taxation."

Fourth, I disagree with the panel's analysis of the purpose of § 2719(d). The panel seeks further support from the stated purposes of the IGRA, noting that the IGRA was intended "to promote tribal economic development and self-sufficiency." *Little Six, Inc.*, 210 F.3d at 1366; 25 U.S.C. § 2702. This policy strikes me as too open-ended to support the result here. The fact that a statute confers a set of benefits on tribes cannot mean that the statute should be extended beyond its terms to grant additional benefits to the tribes.

I find that the statute's structure, purpose, and history all support the conclusion that the statute's reference to chapter 35 is superfluous. Thus, I think the panel here places more weight on the canon of construction regarding resolving ambiguities in favor of the Native Americans than that canon can bear. The

Supreme Court has stated that the canon is not a license to adopt a "contorted construction" of a statute. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506, 106 S. Ct. 2039, 90 L. Ed.2d 490 (1986) (citing various cases noting that the canon is not license to disregard congressional intent). Nor can the canon properly be invoked to avoid the traditional analysis required for statutory construction. For example, in *Hagen* v. *Utah*, 510 U.S. 399, 114 S. Ct. 958, 127 L.Ed. 2d 252 (1994), the Supreme Court analyzed whether Congress had diminished a reservation. Although the Court recognized that it must "resolve any ambiguities in favor of the Indians," *id.* at 411, 114 S. Ct. 958, it did not shrink from applying the usual tools of statutory construction: the Court considered the language of the relevant Acts, their legislative history, contemporary historical evidence, and the Court's past precedents. *See id.* at 412-21, 114 S. Ct. 958. Despite the existence of the Indian canon, the Court concluded that the evidence demonstrated that the reservation had in fact been diminished by Congress, a result which led the dissent to complain that the Court was purporting to apply the Indian canon but "ignores [it] in practice." *Hagen*, 510 U.S. at 424, 114 S. Ct. 958 (Blackmun, J., dissenting). The panel's approach here appears to be inconsistent with the Supreme Court's approach in *Hagen*.

To be sure, fairness to our Native American population has been a quality in very short supply during much of our history. But we have not been assigned the task of redressing past wrongs by expanding the scope of federal statutes.

For the above stated reasons, I respectfully dissent from this Court's refusal to grant the United States' petition for rehearing en banc.