No. _____

In The
Supreme Court of the United States

YSLETA DEL SUR PUEBLO, THE TRIBAL COUNCIL, THE TRIBAL GOVERNOR MICHAEL SILVAS or his SUCCESSOR,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1987, following years of negotiation and drafting, the Ysleta del Sur Pueblo (the "Pueblo") and Alabama-Coushatta Tribe of Texas (together, the "Tribes") secured restoration of their trust relationships with the federal government through the Ysleta del Sur Pueblo and Alabama-Coushatta Indian Tribes of Texas Restoration Act ("Restoration Act").

That Act includes a "Gaming Activities" provision that states in relevant part:

> (a) IN GENERAL.— All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe . . .
>
> (b) NO STATE REGULATORY JURISDICTION.—Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

In 1994, the Fifth Circuit's decision in *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994) ("*Ysleta I*") eschewed the Restoration Act's plain language, legislative history, and this Court's governing precedent to grant Texas regulatory jurisdiction over non-prohibited gaming activities on the Tribes' lands. *Ysleta I* and its progeny effectively read Section 107(b) out of the Restoration Act and deprive the Pueblo of its sovereign authority to regulate its own non-prohibited gaming.

The question presented is:

Whether the Restoration Act provides the Pueblo with sovereign authority to regulate non-prohibited

QUESTION PRESENTED – Continued

gaming activities on its lands (including bingo), as set forth in the plain language of Section 107(b), the Act's legislative history, and this Court's holding in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), or whether the Fifth Circuit's decision affirming *Ysleta I* correctly subjects the Pueblo to all Texas gaming regulations.

PARTIES TO THE PROCEEDING

The parties to the proceeding include those listed on the front cover.

STATEMENT OF RELATED PROCEEDINGS

Texas v. Ysleta del Sur Pueblo, The Tribal Council, Tribal Governor Michael Silvas or His Successor, No. 19-50400 (5th Cir.) (opinion filed and judgment entered Apr. 2, 2020; petitions for rehearing and rehearing en banc denied May 12, 2020; mandate issued May 20, 2020)

Texas v. Ysleta del Sur Pueblo, et al., No. 3:17-cv-00179 (W.D. Tex.) (memorandum opinion and order issued Feb. 14, 2019; stay pending appeal granted Mar. 28, 2019)

Ysleta del Sur Pueblo v. State of Texas, et al., Nos. 93-8477, 93-8823 and 94-50130 (5th Cir.) (opinion filed and judgment entered Oct. 24, 1994; petitions for rehearing denied Nov. 21, 1994 in Nos. 93-8477, 93-8823).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ysleta del Sur Pueblo respectfully submits this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The order denying panel rehearing and rehearing en banc (App. 96-97) is unreported. The panel opinion (App. 1-17) is reported at 918 F.3d 440. The district court's opinion and order (App. 18-55) is unreported.

JURISDICTION

The court of appeals entered its order denying rehearing on May 12, 2020. Pursuant to the Court's Miscellaneous Order dated March 19, 2020, this petition is due 150 days from the date of the petition for rehearing, making the petition due on or before October 9, 2020. The Pueblo invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Ysleta del Sur Pueblo and Alabama Coushatta Indian Tribes of Texas Restoration Act (Restoration Act), Pub. L. No. 100-89, 101 Stat. 666 (1987)

(formerly codified at 25 U.S.C. §§ 731-737, 1300g to 1300g-7), is attached in the Appendix (App. 105-20).

STATEMENT

I. The Ysleta del Sur Pueblo and the Speaking Rock Entertainment Center.

The Pueblo is one of only three federally-recognized Indian nations in Texas. In 1968, Congress passed the Tiwa Indians Act, which confirmed the Pueblo as a federally recognized Indian nation, but then transferred the federal government's trust responsibilities for the Pueblo to the State of Texas. In 1981, the Texas Attorney General chose to end the trust relationship with the Pueblo and the Alabama-Coushatta Tribe of Texas ("Alabama-Coushatta" and with the Pueblo, the "Tribes") through an opinion letter that was later rejected by the District Court in *Alabama-Coushatta Indian Tribe of Texas v. Mattox*, 605 F.Supp. 282, 284 (W.D. Tex. 1986). The Tribes sought to regain their federal trust relationship with the federal government through federal legislation.

In 1987, Congress enacted the Restoration Act. Though principally passed to restore the federal trust relationship between the federal government and the Tribes, the Restoration Act also included provisions addressing gaming on the Tribes' lands.

Though the Tribes regained recognition of their federal sovereign status, the Tribes have fought for

decades for the right to conduct their own affairs consistent with the Restoration Act and their federally recognized sovereign status, and to manage their tribes in the best interests of their members.

II. The Restoration Act.

In 1984, Congressman Ronald Coleman proposed the first version of the Restoration Act as H.R. 6391. Congress adjourned prior to any action taking place regarding the bill. There was no mention of gaming in the bill.

In 1985, the Restoration Act was resubmitted to the House, in a bill captioned H.R. 1344. Again, there was no mention of gaming in H.R. 1344, and Texas made clear that it would oppose any legislation that did not include gaming regulation. In response, Congressman Coleman submitted amendments to include prohibition of "gaming, gambling, lottery, or bingo, as defined by Texas law. . . ." Though the 1985 version of the Act passed the House, Texas remained opposed, and expressed that it would oppose the bill in the Senate.

Confronted with Texas's repeated opposition to restoration of the Pueblo's trust relationship, the Pueblo passed Tribal Resolution T.C.-02-86 (the "Tribal Resolution") to request that its congressional representatives amend H.R. 1344 to "provide that all gaming, gambling, lottery, or bingo, as defined by the laws *and administrative regulations* of the State of Texas, shall be prohibited on the Tribe's reservation or on

tribal land." (App. 123) (emphasis added). Congressman Coleman amended H.R. 1344 as requested by adding the language to Section 107(a), but the bill subsequently died in the Senate.

In 1987, Congressmen Coleman and Charlie Wilson introduced H.R. 318 in substantially similar form as H.R. 1344. The House Committee on Interior and Insular Affairs voted to amend H.R. 318 to strike the gaming language that had been requested in the Tribal Resolution. In its place, the Committee lessened the prohibition on gaming to read that "all gaming as defined by the laws of the State of Texas shall be prohibited on the tribal reservation and on tribal lands." Notably, this language intentionally omitted the reference to "administrative regulations" from the previous draft bill.

In the Senate, the Committee on Indian Affairs made three significant changes to this new language in H.R. 318: (i) it rejected the absolute prohibition on all gaming, (ii) it added a new clause, Section 107(b), that specifically codified that the Pueblo retained civil and criminal regulatory jurisdiction, and (iii) it added a third clause to Section 107 that concerned jurisdiction and enforcement.

The Senate returned H.R. 318 to the House with these additions. The House agreed to the Senate amendments to H.R. 318 by unanimous consent. On August 18, 1987, President Ronald Reagan signed H.R. 318, as amended to exclude the reliance on administrative regulations, into law as the Restoration Act.

Congress expressed the scope of gaming permitted by the Pueblo in Section 107(a), and barred the State from asserting regulatory jurisdiction in Section 107(b):

> (a) IN GENERAL.—All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation. . . .
>
> (b) NO STATE REGULATORY JURISDICTION.—Nothing in this Section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

Pub. L. No. 100-89 (Aug. 18, 1987).

The Restoration Act's gaming provisions, especially the abrogation of Texas' administrative regulations, were influenced in substantial part by this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In *Cabazon*, the Supreme Court found that California state law permitted gaming, subject to regulation, rather than prohibiting it. The Court issued its opinion in *Cabazon Band* on February 25, 1987, one month after submission of H.R. 318, and six months before finalization of the Restoration Act. The ruling had such an impact that Representative Morris Udall, then Chairman of the House Committee on Interior and Insular Affairs, specifically referenced the case on the floor of the House prior to the unanimous approval of H.R. 318:

> It is my understanding that the Senate amendments to [Section 107] are in line with

> the rational[e] of the recent Supreme Court decision in the case of *Cabazon Band of Mission Indians versus California*. This amendment in effect would codify for the tribes the holding and rational[e] adopted in the Court's opinion in the case.

Though Chairman Udall specifically referenced *Cabazon Band* in his floor statement to seek passage of the Restoration Act, the only vestige of the now defunct Tribal Resolution still remaining in the Restoration Act is the following sentence: "The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986." The language from the Tribal Resolution, however, had been removed by Congress to secure passage, a change that was unanimously approved.

On October 17, 1988, fourteen months after the Restoration Act became law, Congress passed the Indian Gaming Regulatory Act (IGRA) to establish federal standards for gaming on Indian lands, and created the National Indian Gaming Commission (NIGC) to regulate such tribal gaming. 25 U.S.C. §§ 2702(3), 2704(a). The Restoration Act and IGRA passed in the same Congress, and were considered by the same committees, including the committee chaired by Chairman Morris Udall. Notably, Congress intended for IGRA to provide "a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." *Id.* §§ 2701(4), 2702(1). Moreover, Congress specifically found that existing federal law—which

included the Restoration Act—failed to "provide clear standards or regulations of the conduct of gaming on Indian lands." *Id.* § 2701(3).

III. Ysleta I.

In 1992, the Pueblo sought to engage the governor of Texas in negotiations to permit the Pueblo to conduct Class II gaming on its lands pursuant to IGRA, but the State refused to negotiate. In 1993, the Pueblo sued Texas and, in the alternative, its governor to negotiate gaming on tribal land. The Pueblo sought a declaration that the State had failed to negotiate in good faith for a compact, and for an order granting the Tribe the specific remedies provided in IGRA.

Texas and its governor moved to dismiss the complaint, claiming, *inter alia*, that the Tenth and Eleventh Amendments barred the suit. The district court denied the motion. In cross-motions for summary judgment, the parties raised the issues of whether Texas law prohibited gaming activities on the Tribe's reservation.

The district court granted summary judgment for the Tribe, holding that the Tribe's proposed gaming activities were permitted under Texas law and thus were a proper subject for the tribal-state negotiations contemplated by IGRA. The court also concluded that the Tribe's gaming activities were "permitted" and were thus not "prohibited" by the Restoration Act. Texas and its governor appealed to the Fifth Circuit.

In *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994) ("*Ysleta I*"), the Fifth Circuit ignored the plain language of the Restoration Act, and the legislative history that finally led to its passage. *Ysleta I* winds back the clock, undoing the amendments made to H.R. 318 in 1987, and reads back into the Restoration Act the "administrative regulations" that had been specifically stricken from the final language of the Restoration Act by both the House and Senate committees governing Indian affairs. In doing so, *Ysleta I* elided the entirety of Section 107(b), a provision added after *Cabazon Band* to reaffirm the Pueblo's retention of its civil and regulatory authority.

Without any support in the text of the Restoration Act, *Ysleta I* ruled that "Texas gambling laws *and regulations* are surrogate federal law" on the Pueblo's land. *Ysleta I*, 36 F.3d at 1335. There is no such reference to Texas *regulations* in the statute—it appears only in *Ysleta I*. Not only did the Fifth Circuit disregard Section 107(b)'s preservation of regulatory jurisdiction to the Pueblo, *Ysleta I* justifies this decision by reviving the ineffective Tribal Resolution that had been rejected by Congress in 1986. In short, the Fifth Circuit resorted to extratextual considerations to bind the Pueblo to an outdated agreement with the State of Texas that Congress did not codify.

The Pueblo's petition to this Court following the ruling in *Ysleta I* was not granted. Notably, at that time, the State believed that the Restoration Act barred it from enforcing laws that merely regulated gaming activities, like the Texas Bingo Enabling Act at

issue here. *See* State's Conditional Cross-Pet. Cert., *Texas v. Ysleta del Sur Pueblo*, No. 94-1310, 1995 WL 17048828, at *7-8 (U.S. filed Jan. 30, 1995). Since *Ysleta I*, however, the State has come to adopt the Fifth Circuit's conclusion—based on the Tribal Resolution—that the Pueblo are subject to Texas regulation.

The tension between the Fifth Circuit's decision and the plain language of the Restoration Act has bred numerous disputes between the Tribes and the State of Texas concerning the scope of gaming permitted on their Indian lands. And Texas has taken this judicial fiat as permission to wrest ever more autonomy and sovereignty from the Tribes.

IV. *Ysleta I* Created Decades of Inconsistent Litigation and Confused Policy.

In the twenty-five years following *Ysleta I*, the State of Texas and the Tribes have been involved in a series of disputes about the scope of gaming permitted on the Tribes' lands. These decisions have created inconsistent interpretations—and reinterpretations—of the Restoration Act, leading to ongoing uncertainty over gaming permitted on the Tribes' lands. What is not uncertain, however, is the devastating impact that these decisions have had on the sovereign authority and self-determination of federally recognized Indian tribes in Texas.

The Pueblo operates the Speaking Rock Entertainment Center outside El Paso, Texas. Speaking Rock unquestionably enhances not only the conditions

on the Tribe's reservation, but also the economic success of the surrounding communities. The injunction sought by the State of Texas threatens this crucial economic engine, undercutting the Tribe's sovereign right to provide for its members and overcome decades of economic peril.

The district court below highlighted the decades of judicial frustration created by *Ysleta I*'s impractical, and incomplete, ruling. In granting the Pueblo's Motion to Stay enforcement of the injunction pending this appeal, the district court concluded:

> [T]he Court recognizes that a higher court—the Fifth Circuit panel, the Fifth Circuit sitting en banc, or the United States Supreme Court—may carefully consider the meaning of "regulatory jurisdiction" and determine that the Permanent Injunction subjects the Tribe to regulatory jurisdiction. **Significantly, the Court believes that the precise meaning of "regulatory jurisdiction," as used in § 107(b) of the Restoration Act remains unclear**. . . . Since § 107(b)'s practical effect is a serious legal question, the Court is of the opinion that the Tribe has a sufficient likelihood of success on the merits to support a stay.

(App. 100) (emphasis added).

In the underlying order granting summary judgment, the district court further stated:

> "Admittedly, the Restoration Act does not clearly define what 'regulatory jurisdiction' means. . . . The Court recognizes the Tribe's

> frustration that ***Ysleta I* and subsequent case law interpreting *Ysleta I* do not clearly elucidate subsection (b)'s effect on tribal gaming**." (App. 35-35) (emphasis added).

And, in previously denying the State's initial application for an injunction, the district court opined that "the Pueblo Defendants 'exist in a **twilight zone** of state, federal, and sovereign authority where **the outer legal limit of their conduct is difficult to assess with precision**.' " (App. 88) (emphasis added).

The Pueblo—a sovereign nation charged with the well-being of over 2,400 members—is entitled to consistent guidance concerning its gaming activities that is consistent with Congress's stated provisions in the Restoration Act, and should not be governed by language that was not included in the statute. The Pueblo government and its entities—including Speaking Rock—employ close to 1,200 individuals, 30 percent of whom are Pueblo members. Revenue from gaming enterprises composes approximately 60 percent of the Pueblo's total operating budget. Losing that gaming revenue to the Fifth Circuit's nonstatutory precedent would trigger massive layoffs and devastate the Pueblo's efforts to promote education, income, and employment rates.

Speaking Rock's continued operation of bingo activities causes no direct injury to the State. In fact, permitting the legal bingo gaming currently operating at Speaking Rock will have the opposite effect by

enabling those who provide for themselves to continue to do so without straining federal and state resources.

The economic consequences of discontinuing the current bingo operations on the Pueblo are severe, and will be felt by tribal members, employees, and the surrounding community. The district court recognized this fact when it granted a stay pending appeal, stating that "Speaking Rock is a primary employer for the Tribe's members and that Speaking Rock's revenue supports significant educational, governmental, and charitable initiatives." (App. 102). Hundreds of jobs at the Tribe's gaming facility will be lost—impacting not only the Tribe but the entire El Paso region. In shutting down the Tribe's bingo operations, the district court recognized that "the harm that the Tribe faces is truly irreparable." (App. 102).

Tribal sovereignty protects the critical right to self-determination—*i.e.*, the right to practice their indigenous cultures and live according to their mores. The Restoration Act, as codified, confirms the Pueblo's sovereign right to retain its own regulatory jurisdiction over non-prohibited gaming activities. The Pueblo seek review from this Court to correct the Fifth Circuit's reliance on *Ysleta I*'s erroneous construction of the Restoration Act, which deprives the Tribe of the fundamental right to govern its affairs according to its compact with Congress.

REASONS FOR GRANTING THE PETITION

Since the passage of the Restoration Act, the Pueblo has sought recognition of its sovereign right to conduct legal gaming as specifically authorized by the Act. This Court should grant the Pueblo's petition to recognize the paramount concern of tribal sovereignty involving questions of federal Indian law.

The generation of confusion and litigation concerning the Tribes' sovereignty to regulate their own gaming activities stems from the Fifth Circuit's failure in *Ysleta I* to interpret the Restoration Act consistent with the Act's plain language. Subsequent courts, including the District Court and Fifth Circuit in this case, have improperly used *Ysleta I* to create State administrative gaming regulations to gaming activities on the Tribes' lands that Congress intentionally omitted during the legislative process. As a consequence, the courts have reduced Section 107(b)'s express restriction against state regulatory jurisdiction to meaningless surplusage, progressively eroding the tribal sovereignty of both Tribes to regulate conduct on their own lands.

This Court has recently held, however, that precedent may be overturned when a case "was gravely wrong the day it was decided, [and] has been overruled in the court of history. . . ." *Trump v. Hawaii*, 138 S. Ct. 2392, 2423, 201 L. Ed. 2d 775 (2018). *Ysleta I* was likewise wrongly decided and should be overturned. *Ys leta I* grossly misread both the statute (by reviving language that was intentionally omitted) and the

legislative history (by interpreting a tribal resolution that supported a different, defunct version of the Act). That decision interpreted the Restoration Act in a manner that violates both the plain language of Section 107(a) and Section 107(b)'s preservation of the Tribe's regulatory jurisdiction over gaming activities.

This Court should accept this invitation to review and overturn *Ysleta I*, finally provide a textually correct and internally consistent interpretation of the Restoration Act, and thereby reaffirm the tribal sovereignty intended by Congress.

I. THIS COURT'S REVIEW OF *YSLETA I* IS NEEDED TO PROTECT THE TRIBAL SOVEREIGNTY CONGRESS INTENDED IN THE RESTORATION ACT.

A. Considerations of Tribal Sovereignty Are Paramount When States Seek to Restrict Tribal Affairs.

Federally recognized Indian tribes are sovereign political entities that retain "inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014); *see also*, *e.g.*, *United States v. Lara*, 541 U.S. 193, 199 (2004); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172 (1973) ("[Indian tribes'] claim to sovereignty long predates that of our own Government") (citations omitted); *Williams v. Lee*, 358 U.S. 217, 223 (1959) ("[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations"). The Tribes enjoy a

government-to-government relationship with the United States and the State of Texas. Likewise, "[a]s sovereigns, Indian tribes are subordinate only to the federal government." *Texas v. United States*, 497 F.3d 491, 493 (5th Cir. 2007).

Congress bears a unique obligation toward sovereign tribes like the Pueblo and Alabama-Coushatta, and must treat the rights of sovereign tribes as a paramount concern. *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 83-85 (1977); *Morton v. Mancari*, 417 U.S. 535, 555 (1974); *see also Bay Mills Indian Cmty.*, 572 U.S. 782, 809 (Sotomayor, J., concurring) ("A key goal of the federal government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding.").

For decades, this Court has recognized that traditional notions of tribal self-government "are so deeply engrained in our jurisprudence that they have provided an important backdrop, against which vague or ambiguous federal enactments must always be measured." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (internal citation and quotation marks omitted). This "backdrop" of tribal self-government is an important federal interest, "in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Cabazon*, 480 U.S. at 216-17. Gaming has proven essential to furthering that goal, particularly where—as here, and so many places

across the Nation—tribal lands are unfit for other purposes. *Id*. at 218-19.

B. Section 107(b) of the Restoration Act Protects the Tribes' Sovereign Authority Over Non-Prohibited Gaming Activities.

In upholding *Ysleta I*, the Fifth Circuit's decision departs from this Court's instruction against "extratextual considerations" when interpreting the plain language of a statute dealing with tribal policy and self-governance. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2469 (2020).

This Court has articulated clear principles of statutory construction that govern this dispute. "There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help 'clear up . . . not create' ambiguity about a statute's original meaning." *McGirt*, 140 S. Ct. at 2469 (quoting *Milner v. Department of Navy*, 562 U.S. 562, 574 (2011)).

In passing the final version of the Restoration Act, Congress expressed its unambiguous intention to *limit* state regulatory power over tribal gaming activities. The Restoration Act's operative gaming provisions read as follows:

> (a) IN GENERAL.—All gaming activities which are prohibited by the laws of the State

> of Texas are hereby prohibited on the reservation. . . .
>
> (b) NO STATE REGULATORY JURISDICTION.—Nothing in this Section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

Sections 107(a) and (b) reflect the compromise that Congress reached in passing the final version of the Restoration Act, with the Tribes restricted from offering any games that are "prohibited" by the laws of the State of Texas (Section 107(a)), and the Tribes retaining regulatory authority over all non-prohibited gaming activities (Section 107(b)). Section 107(b)'s preservation of Tribal sovereignty is unequivocal: Texas possesses no "regulatory jurisdiction" over the Tribes' gaming activities. And Section 107(a) makes clear that the Restoration Act only prohibits gaming activities on the Tribe's reservation that are prohibited by the laws of the State of Texas. Especially pertinent to this case, it is undisputed here that Texas law does not prohibit bingo. In fact, Texas law expressly permits it.

Any faithful construction of the Restoration Act must recognize and give full effect to Section 107(b). Critically, Section 107(b)'s regulatory restriction is fully consistent with this Court's contemporaneous holding in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which was decided six months prior to final passage of the Restoration Act. In interpreting Public Law 280's effect on bingo games offered on tribal land in California, this Court held that states

could only exercise jurisdiction over criminal (or prohibited) misconduct, and had no authority to otherwise exercise civil (or regulatory) authority over Indian tribes, including with respect to similar bingo games. *Id.* at 209-11.

When requesting that the House act on the Senate's final amendments to the Restoration Act, Chairman Morris Udall emphasized that the Act was enacting this Court's holding in *Cabazon Band*:

> It is my understanding that the Senate amendments to [Section 107] are in line with the rational[e] of the recent Supreme Court decision in the Cabazon Band of Mission Indians versus California. This amendment in effect would codify for those tribes the holding and rational[e] adopted in the Court's opinion in the case.

Accordingly, Section 107(b) reflects Congress's purposeful adoption of this Court's relevant instruction on state regulation of tribal gaming in *Cabazon Band*, with the Tribes retaining authority over non-prohibited gaming activities.

C. *Ysleta I*'s Misreading of the Restoration Act's Plain Language and Legislative History Results in Improper State Regulation of Tribal Gaming Activities.

Notwithstanding the clarity of the statutory text, *Ysleta I* provided a flawed interpretation of Section 107 that effectively reads Section 107(b) out of the Act.

Faced with the question of whether the Pueblo's then casino-like gaming activities were permitted under the Restoration Act, the Fifth Circuit side-stepped the critical interplay between Sections 107(a) and (b), relied on legislative history for a version of the statute that never passed, and erroneously concluded that "Texas' gaming laws and regulations [] operate as surrogate federal law" on the Tribes' reservations. *Ysleta I*, 36 F.3d at 1335. In the decades following *Ysleta I*, Texas has repeatedly latched onto this "surrogate federal law" language to improperly subject the Tribes to all Texas gaming regulations, thereby stripping away any possible tribal sovereignty over gaming.

Ysleta I's expansive reading of Section 107(a) as incorporating all Texas gaming laws *and regulations* fails to leave any possible meaning for Section 107(b), where Congress expressly reserved regulatory authority as to non-prohibited gaming to the Tribes. The Fifth Circuit's continued reliance on *Ysleta I* perpetuates this judicial rewriting of the Restoration Act to omit Section 107(b), which wholly destroys tribal authority to regulate non-prohibited gaming activities like Congress intended. Contrary to *Ysleta I* and the Fifth Circuit's decision below, the Restoration Act must be construed to fully reconcile both Section 107(a)'s gaming restrictions and Section 107(b)'s restriction against State regulation.

The Fifth Circuit's decision perpetuates another troublesome assumption of *Ysleta I*: that the Pueblo "agreed to the Restoration Act's gaming provisions as a condition necessary to gain the benefits of the federal

trust status." (App. 11-12). The Tribal Resolution was a nonbinding, unilateral resolution grudgingly approved by the Pueblo in March 1986 that created a total gaming ban on the Pueblo's land. A substantially different bill passed Congress in 1987, having jettisoned the language proposed in the Tribal Resolution.

Ysleta I relied heavily on the discarded Tribal Resolution to bind the Pueblo to an agreement that the government did not keep. But the Tribal Resolution is not the Restoration Act, and the Tribal Resolution is not incorporated into the Act. The Tribal Resolution was not even passed in the same year as the Act, and was specifically addressed to the language of H.R. 1344, which expired at the end of the 99th Congress. Instead, the Restoration Act adopted narrower language concerning the prohibition on tribal gaming, and in Section 107(b) ensured that the Pueblo retained its civil and criminal regulatory jurisdiction. "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1737 (2020).

Based on this misuse of the Tribal Resolution, *Ysleta I* and its progeny have reduced Section 107(b) to mere surplusage in the interest of imposing Texas's regulations as "surrogate federal law." *See Reiter v. Sonotone Corp*., 442 U.S. 330, 339 (1979). Beyond disregarding Section 107(b), *Ysleta I* also read back into the Restoration Act language that Congress omitted from the final statute. Congress generally acts

intentionally when it omits language in a statute during the legislative process. *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015).

The *Ysleta I* court's determination is inconsistent with the final intentions of Congress. *Ysleta I* improperly looked to legislative history to characterize "the 'central purpose' of § 107(a) is 'to ban gaming on the reservations as a matter of federal law.'" *Ysleta I*, 36 F.3d at 1329 (quoting S. Rep. 90 at 8). There is no support in the language codified in the Restoration Act for an outright ban on gaming. Furthermore, *Ysleta I*'s expansive reading of Section 107(a) as incorporating all Texas gaming laws and regulations ignores the express reservation of regulatory jurisdiction to the Tribes in Section 107(b), consistent with this Court's holding in *Cabazon Band*.

Ysleta I's reasoning, adopted by the Fifth Circuit and District Court in this case, misreads legislative history, relies on language from the Tribal Resolution that Congress discarded, and fails to reconcile Section 107(a)'s gaming restrictions with Section 107(b)'s restriction against State regulation. This Court should review and overturn *Ysleta I*'s faulty holding, restoring an interpretation of the Restoration Act that fully reconciles Sections 107(a) and (b), and honors the tribal sovereignty Congress intended to reserve to the Tribes.

D. *Ysleta I* Threatens Both Tribal Self-Governance and Tribal Sovereignty.

This Court has consistently recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory[.]" *Cabazon*, 480 U.S. at 207 (1987) (*quoting United States v. Mazurie*, 419 U.S. 544, 557 (1975)). The Tribes have exercised their sovereignty to overcome bleak conditions on their tribal lands by promoting bingo gaming pursuant to tribal regulations. The bingo operations offered by the Tribes indisputably support their tribal sovereignty and financial independence.

Ysleta I risks undermining a larger precedent: Congress must employ clear and unequivocal language when it terminates or restricts the sovereign authority or rights of a sovereign tribe. *See Mattz v. Arnett*, 412 U.S. 481, 504 n.22 (1973).

Federally recognized Indian tribes are sovereign political entities that retain "inherent sovereign authority." *Bay Mills Indian Cmty.*, 572 U.S. 782, 788. The Pueblo enjoys a government-to-government relationship with the United States and Texas. Likewise, "[a]s sovereigns, Indian tribes are subordinate only to the federal government." *Texas v. United States*, 497 F.3d at 493. This Court has held that statutes affecting Indian rights are to be liberally construed with doubtful expressions resolved in favor of the tribes. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 195 n.5 (1999).

Section 107(b) reinforces this deference to tribal sovereignty. *Ysleta I*'s relegation of Section 107(b) to mere surplusage grants the State regulatory authority without clear, express legislative direction. The correct interpretation of the Restoration Act recognizes that the Pueblo is subject to gaming laws for gaming activity that is prohibited by the State of Texas, consistent with the plain language of Section 107(a), while acknowledging the Pueblo is free to regulate non-prohibited games, consistent with its regulatory authority under Section 107(b).

Ysleta I failed to respect this separation of powers among the separate sovereigns that was struck between the Tribes and the State in the Restoration Act. And a significant factor in that decision was that the Fifth Circuit did not respect the Pueblo's sovereignty, relying on an extratextual, non-binding resolution that was not incorporated in the final text of the Restoration Act. The Pueblo passed that resolution—a mere request for a legislative drafting amendment extended to the Pueblo's congressional representatives, and one that has since been rescinded—before this Court reaffirmed tribal sovereignty concerning gaming on tribal lands in *Cabazon Band*. The Pueblo seek now to ensure that it can conduct its gaming with the same self-determination that this Court has recognized in tribes across the country.

E. *Ysleta I* Has Sown Confusion and Produced Inconsistent Law.

District court decisions since *Ysleta I* reveal that the opinion is unworkable when applied to subsequent disputes.

For example, in 2001, the district court enjoined the Pueblo from all gaming, imposing a total gaming ban that ran contrary to the intention of the Restoration Act. *Texas v. del Sur Pueblo* ("*Ysleta II*"), 220 F. Supp. 2d 668 (W.D. Tex. 2001) (subsequently modified and affirmed). In 2002, the district court modified the injunction to instruct the Pueblo to seek a license from the Texas Lottery Commission, even though the court "recognize[d] that Section 107(b) of the Restoration Act provides that Texas does not hold regulatory jurisdiction over the Tribe." *Id*. at 707.

In 2009, the district court rejected this licensing scheme, recognizing the "tension that existed between Chapter 2001 of the Texas Occupations Code on the one hand and [Section 107(b)], on the other," and instead required the Pueblo to obtain pre-approval from the federal courts for any gaming activities. *Texas v. Ysleta Del Sur Pueblo*, No. EP-99-CA-320-H, 2009 WL 10679419, at *1 (W.D. Tex. Aug. 4, 2009).

In 2016, the district court again changed course, concluding that the pre-approval process "transformed the Court into a quasi-regulatory body" in violation of Section 107(b), and instead held that the State could challenge any gaming activities in federal court. *State of Texas v. Ysleta del Sur Pueblo* ("*2016 Order*"), No.

EP-99-CV-320-KC, 2016 WL 3039991, at *19 (W.D. Tex. May 27, 2016).

Finally, in granting the Motion to Stay in this case below, the district court concluded:

> [T]he Court recognizes that a higher court—the Fifth Circuit panel, the Fifth Circuit sitting en banc, or the United States Supreme Court—**may carefully consider the meaning of "regulatory jurisdiction" and determine that the Permanent Injunction subjects the Tribe to regulatory jurisdiction**. Significantly, **the Court believes that the precise meaning of "regulatory jurisdiction," as used in § 107(b) of the Restoration Act remains unclear. . . .** Since § 107(b)'s practical effect is a serious legal question, the Court is of the opinion that the Tribe has a sufficient likelihood of success on the merits to support a stay.

(App. 100-01) (emphasis added). Given these inconsistent rulings, the product of precedent that does not conform to the legislation, the Pueblo "exist in a twilight zone of state, federal, and sovereign authority where the outer legal limit of their conduct is difficult to assess with precision." (App. 88).

The common thread causing inconsistency and confusion in these cases is the difficulty of reconciling: (1) *Ysleta I*'s expansive interpretation of Section 107(a) as subjecting the Pueblo to all Texas gaming regulations, and (2) Section 107(b)'s restriction against the State exercising regulatory jurisdiction over Tribal

gaming activities. The courts below have failed to reconcile this problem. The Pueblo therefore seek this Court's review to obtain an internally consistent construction of the Restoration Act, which will protect the Tribes' sovereign authority, and provide guidance to the courts charged with enforcing the gaming provisions of the Act.

II. *YSLETA I*'S DECISION IMPLICATES SIGNIFICANT ADVERSE CONSEQUENCES FOR THE PUEBLO.

In 1967, the year before the Pueblo gained federal recognition, the *San Antonio Express* reported that the living conditions for members of the Pueblo were "scandalous"; that Pueblo families earned about $400 per year, mostly from picking cotton; and that families were foraging for food by digging for roots. *Legislative Hearing on H.R. 4985 Before H. Subcomm. on Indian, Insular, and Alaska Native Affairs of the H. Comm. on Nat. Res.*, 115th Cong. 1 (Sept. 14, 2018) (statement of Governor Carlos Hisa, Ysleta del Sur Pueblo) (*citing* San Antonio Express, *El Paso's Tigua Indians Still Tribal* (Sept. 24, 1967), https://newspapers.com/image/61179238) last visited October 10, 2019). In the 1960s, members of the Pueblo averaged a fifth-grade education and the unemployment rate was 70%. *See id.* at 2. Additionally, housing comprised dirt foundations and one or two overcrowded rooms—tribal members could not afford basic furnishings like couches or mattresses, and many of the Pueblo youth were succumbing to alcoholism and substance abuse. *Id*.

After reclaiming its trust status in 1968, the Pueblo strategically and systematically improved its socio-economic status through tourism, tribally owned enterprises, and limited funding opportunities from the Texas Indian Commission. *See Legislative Hearing on H.R. 4985* (statement of Governor Hisa) at 2. But even with these drastic improvements, the Pueblo's members continued to be among the poorest citizens of Texas. That would change in 1993.

In 1993, the Pueblo opened Speaking Rock, a gaming enterprise designed to ensure the Pueblo's economic self-determination. *See Legislative Hearing on H.R. 4985* (statement of Governor Hisa) at 3. Since its inception, Speaking Rock has been the driving force in lifting the Pueblo out of extreme poverty. Speaking Rock created hundreds of jobs for the Pueblo's members—decreasing unemployment from over 40% to almost zero. *Id*. The median household income of Pueblo members has risen from $6,700 in 1983 to $29,122 in 2016 (a 200% increase even after adjusting for inflation), largely due to the success of Speaking Rock. *Id*. at 5. Additionally, Speaking Rock has facilitated not only a marked decrease in members' dependence on welfare, but also an increase in government operations and program funding, and a substantial investment in Pueblo-owned enterprises fostering self-sufficiency. *Id*. at 3-4. The funds generated from Speaking Rock have led to affordable housing opportunities, improved infrastructure, amplified cultural preservation programs, and the establishment of institutions

such as the court system, police department, and fire and emergency units. *Id*. at 5.

Speaking Rock has not only allowed the Pueblo to invest in its people, it has also created benefits for the surrounding El Paso region. Since opening Speaking Rock, the area surrounding the Pueblo has experienced: (i) over $823 million of direct and indirect regional impact, (ii) over $150 million in local expenditures injected into the region, (iii) over $50 million in payroll spent on the local economy, and (iv) the creation of hundreds of jobs for the people of El Paso. *Id* at 3. Recognizing the Pueblo's community impact, much of the El Paso business community, as well as governmental leaders, have supported Speaking Rock for decades. *See* George Kuempel, *Casino Appeal Planned: Tiguas Say Gaming Facility is Vital to El Paso's Economy*, Dallas Morning News, Sept. 29, 2001, at 33A.

The Pueblo excels at governing its lands and members. In fact, the Pueblo's efforts for rebuilding an effective and sustainable tribal nation through strategic and responsible self-governance has not only led to the dramatic improvement of its members' lives, it has also been recognized nationally. These recognitions include:

- Honored by the Harvard Project on American Indian Economic Development for the Pueblo's Economic Revitalization Project;[1]

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[1] *See* The Harvard Project on American Indian Economic Development, *Project Pueblo: Economic Development Revitalization Project* 1 (2010), http://nnigovernance.arizona.edu/sites/default/files/attachments/text/honoring_nations/2010_HN_YDSP_project_

- Honored with the Taos Blue Lake Spirit Award by the Americans for Indian Opportunity;[2] and
- Honored by the Harvard Project on American Indian Economic Development for the Pueblo's Redefining of its Citizenship.[3]

If Speaking Rock were shut down, the Pueblo people would be driven back into abject poverty. This is not conjecture; it is fact, not only for the Pueblo, but for the Alabama-Coushatta and for numerous other tribes nationwide. *See Seneca-Cayuga Tribe of Okla. v. State of Okla. ex rel. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989) (finding for the tribe in a gaming case, and recognizing the tribe stood to "lose income used to support social services for which federal funds have been reduced or are non-existent, and lose jobs employing Indians who face a [high] rate of unemployment"); *Cayuga Nation v. Tanner*, 108 F. Supp. 3d 29, 34-35 (N.D.N.Y. 2015) (holding that whether a tribe's opening of a bingo facility was "[i]ll-advised or not, the [tribe] credibly claim[ed] that not only would the

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pueblo.pdf (honoring the Pueblo's implementation of an economic development strategy and Tribal Tax Code).

[2] Americans for Indian Opportunity, *Ysleta Del Sur Honored by Americans for Indian Opportunity* (July 24, 2013), http://aio.brownrice.com/news/aio/detail/27 (honored for its commitment to promoting self-sufficiency and empowering their community to thrive in the contemporary world while preserving their cultural identity).

[3] *See* The Harvard Project on American Indian Economic Development, *Project Tiwahu: Redefining Tigua Citizenship* 43 (2016), https://hpaied.org/sites/default/files/HPAIED%20Directory%202016-2017%20FINAL.pdf.

[municipality's] enforcement of its anti-gaming ordinance be an affront to its sovereignty, its citizens also depend heavily on the facility to provide funding for public services").

When Speaking Rock closed in 2002 due to one of the many previous disputes between the Pueblo and the State of Texas, the Pueblo suffered an immediate and devastating blow to its economy and its members' lives. *See Legislative Hearing on H.R. 4985* (statement of Governor Hisa), at 4. Specifically, the 2002 closure resulted in, among other things: (i) unemployment skyrocketing from 3% to 28%, (ii) Pueblo members being forced to leave the reservation in search of work, (iii) Pueblo members being unable to pay mortgages and losing their retirement and 401K funds, (iv) budgets for Pueblo programs and services being slashed, (v) direct assistance to Pueblo members being cut, (vi) high education scholarship cutbacks, and (vii) elder meals and other programs being cancelled. *See Legislative Hearing on H.R. 4985* (statement of Governor Hisa), at 4.

This case presents a vital question of tribal sovereignty. Congress and the Pueblo worked for three years to construct a fair agreement that validates the Pueblo's sovereignty while ensuring that the Pueblo would not engage in any gaming that Texas prohibits. The Pueblo has complied with that agreement, as it was finalized and codified in the Restoration Act. The State of Texas has whittled away at that sovereignty over decades, treating the Pueblo less as a sovereign nation and more as a private entity that it can regulate

as it sees fit. Congress did not grant Texas this authority; rather, that authority comes from the faulty decision in *Ysleta I*. This is untenable. The Pueblo seek only to enforce the Restoration Act as Congress intended.

This Court's review is necessary to ensure that the Restoration Act is enforced according to its text, and that the courts responsible for that enforcement clearly respect the sovereignty left to the Tribes.

CONCLUSION

The Pueblo's petition for a writ of certiorari should be granted.

Respectfully submitted,

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