No. 20-493

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JEFFREY W. HELLBERG, JR.
JOSEPH CALLISTER
ETHAN A. MINSHULL
WICK PHILLIPS GOULD & MARTIN, LLP
3131 McKinney Avenue, Suite 100
Dallas, Texas 75204
Telephone: (214) 692-6200
Facsimile: (214) 692-6255
jeff.hellberg@wickphillips.com
joseph.callister@wickphillips.com
ethan.minshull@wickphillips.com

BRANT C. MARTIN*
WICK PHILLIPS GOULD & MARTIN, LLP
100 Throckmorton Street, Suite 1500
Fort Worth, Texas 76102
Telephone: (817) 332-7788
Facsimile: (817) 332-7789
brant.martin@wickphillips.com
**Counsel of Record*

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTRODUCTION

The Pueblo seeks review of a Fifth Circuit decision that was wrongly decided, and has been further warped by the State to justify increasing encroachment on tribal sovereignty.

Although the State argues this Court should summarily affirm the Fifth Circuit's decision, Texas still offers no explanation for how it can enforce its bingo regulations against the Pueblo's gaming when the Restoration Act bars it from exercising "regulatory jurisdiction." And though Texas spins the Restoration Act as a "bargain" struck between the Pueblo and the State (Opp. 21-22), Texas has shown itself unwilling to uphold its end by continuing to read Section 107(b) out of the Restoration Act.

The State instead continues to rely on imprecise language from an inapplicable Fifth Circuit decision that concluded the Pueblo's gaming is governed by the Restoration Act rather than the Indian Gaming Regulatory Act ("IGRA"). When that same decision reached this Court, Texas criticized it as flawed *precisely because* the State believed that it lacked authority to regulate bingo under the Restoration Act. *See* Texas'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).

In its latest decision, the Fifth Circuit does not *once* mention Section 107(b)'s bar against state regulatory jurisdiction in affirming Texas's enforcement of its bingo regulations. In doing so, the Fifth Circuit ignored

the question presented by the Pueblo and failed to provide the clarity sought by the District Court. That abdication of judicial duty to interpret and apply the law enacted by Congress calls for an exercise of this Court's supervisory power—as does the conflict the decision necessarily creates with this Court's precedent.

The State contends that certiorari is unwarranted because this case concerns a statute that applies only to two tribes in Texas, and thus cannot be of "national importance." But this Court routinely reviews questions that affect only certain Indian tribes, including when those tribes are in one state. Such cases concern the sovereignty of tribal nations and the ability of those sovereigns to engage in self-government and to ensure the future economic success of their people. Those considerations *are* issues of national importance, and merit certiorari.

Texas's argument that the Tribes must seek relief through Congress does not counsel against this Court's intervention. Under that rationale, no case involving a federal statute would warrant the Court's review, since Congress would always be an available forum for redress. There is no legislation pending to address the Restoration Act's language or interpretation. The bill cited by the State would have subjected the Pueblo to IGRA. In the meantime, "[s]elf-determination and economic development are not within reach if the [Tribes] cannot raise revenues and provide employment for their members" through tribal gaming. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987).

"[J]udicial respect for Congress's primary role in defining the contours of tribal sovereignty" (Opp. 27) calls for faithful interpretation of the words Congress employed in the Restoration Act—not language found in extra-statutory documents aimed at a substantively different version of the Act that never passed.

Accordingly, the Pueblo respectfully requests that the Court reject Texas's manifold distractions, and instead apply this Court's precedents to resolve the "twilight zone" over tribal sovereignty that the Fifth Circuit has created, and to clarify that the Pueblo has the right to offer bingo absent an express and unequivocal abrogation of that sovereignty.

ARGUMENT

I. TEXAS ASKS FOR SUMMARY AFFIRMANCE WITHOUT OFFERING AN INTERPRETATION OF SECTION 107(b)'S PROSCRIPTION AGAINST STATE "REGULATORY JURISDICTION."

Texas has never explained, and cannot explain, how it can enforce its bingo regulations against the Pueblo's gaming when (1) bingo is not a gaming activity that is "prohibited" in the State, and (2) the Restoration Act bars Texas from asserting regulatory jurisdiction over non-prohibited forms of gaming offered by the Pueblo. Instead, it employs a now familiar sleight of hand.

A. Texas Obfuscates by Portraying the Pueblo as a Bad Actor Seeking to Renege on a Bargain.

Texas misrepresents the Pueblo as a litigious bad actor "rehashing arguments that have been repeatedly rejected over the last twenty-six years." (Opp. 2). But notably absent from the Opposition is a single decision that interprets Section 107(b), let alone one applying it to regulated gaming activities like bingo.

As amici explain, *Ysleta I* concerned gaming activities prohibited by Texas law and must be construed in that context. *See* Am. Br. 11-12. And *Texas v. Alabama-Coushatta Tribe of Texas*, 918 F.3d 440 (5th Cir. 2019) addressed a *Brand X* argument over IGRA's application following the National Indian Gaming Commission's assertion of jurisdiction under that statute—not the Restoration Act. *See id*. at 442. No case has considered whether Texas can enforce its bingo regulations under the Restoration Act.

Accordingly, as the District Court below observed, "the precise meaning of 'regulatory jurisdiction,' as used in Section 107(b) remains unclear," leaving the Pueblo "in a twilight zone of state, federal, and sovereign authority where the outer legal limit of [its] conduct is difficult to assess." (App. 88, 100-101). If the Pueblo were engaged in the sort of gamesmanship Texas suggests in its recitation of procedural history, the District Court could have held the Pueblo in contempt; it did not. Instead, it determined that the Pueblo had a sufficient likelihood of success on the

merits of its Section 107(b) argument to support a stay pending appeal. (App. 101).

B. The Pueblo Seek Enforcement of—Not Relief from—the Restoration Act's Text.

Texas misdirects by focusing on the parties' prior disputes over IGRA's application to the Pueblo's gaming. But, as Texas itself recognizes, "[t]he Tribe does not presently argue that IGRA should apply to its gaming activity." (Opp. 10). Nor does the Pueblo dispute that the Restoration Act "federalize[s] and bind[s] the Pueblo to Texas's gaming laws." *Cf., e.g.*, Opp. 10-12.

It is the *scope* of Texas gaming laws "federalized" by the Restoration Act that forms the basis of the parties' dispute. The Pueblo contends that the Restoration Act's text defines that scope: Section 107(a) "federalizes" only those laws that "*prohibit*"—as opposed to "*regulate*"—a gaming activity consistent with Section 107(b)'s proscription against state regulatory jurisdiction. Texas, on the other hand, reads Section 107(a) to "federalize" State laws that prohibit *or regulate* a gaming activity despite Section 107(b)'s proscription against State regulatory jurisdiction.

C. Texas Does Not Apply the Statutory Principles It Cites.

Texas cites various principles of statutory construction, but fails to faithfully apply them. It notes, for example, that " 'courts must give effect, if possible,

to every clause and word of a statute.'" (Opp. 11) (quoting *Liu v. SEC*, 140 S. Ct. 1936, 1948 (2020)). Texas then discusses various parts of the Restoration Act's gaming provisions, (Opp. 10-11), but "gives no effect to" the prohibition against State regulatory jurisdiction in Section 107(b). Similarly, Texas argues that "Congress includes each word in a statute for a purpose, and that words not included were purposefully omitted." (Opp. 11). Yet Texas fails to ascribe any purpose to Section 107(b) and relies on language omitted from the Restoration Act to apply State regulations against the Pueblo.

Texas cites no precedent of this Court to support its reliance on language found only in extra-statutory Tribal Resolutions that reference a prior bill. Though Congress initially considered language that would have prohibited gaming activities "defined by" Texas "laws and regulations," as requested in the Tribal Resolutions, Congress substituted that provision for language that (1) only restricts those gaming activities "prohibited by"—not "defined by"—Texas state law and (2) omits any reference to state "regulations." In doing so, Congress acted "in accordance with" the Tribal Resolutions but passed narrower restrictions than a total gaming ban Texas previously sought.

D. Texas Mischaracterizes the Pueblo's Statutory Argument.

Texas mischaracterizes the Pueblo's reliance on *Cabazon Band* as arguing for the application of the

criminal-prohibitory/civil-regulatory "public policy" analysis applied to Public Law 280 cases. *See*, *e.g.*, Opp. 21 (arguing that this case "is not a good vehicle to examine whether *Cabazon Band* should be extended to contexts outside Public Law 83-280").

That is not the Pueblo's position. The Pueblo does not argue for an analysis of whether Texas's gaming laws fall within the State's "civil" or "criminal" jurisdiction or whether bingo violates Texas "public policy." Those are strawmen arguments created by Texas to make it appear that the Pueblo is advancing arguments rejected in *Ysleta I*.

Rather, the Pueblo grounds its argument in the Restoration Act's plain language and, specifically, Congress's directive that "nothing in [Section 107] shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." Construing Section 107(a) to apply state gaming regulations, as Texas prefers, finds no support in Section 107(a)'s text and directly contravenes Section 107(b)'s proscription against State regulatory jurisdiction.

II. THE FIFTH CIRCUIT DEPARTED FROM SUPREME COURT PRECEDENT WHEN IT FAILED TO INTERPRET STATUTORY TEXT INVOLVING AN ISSUE OF INDIAN SOVEREIGNTY.

The Fifth Circuit declined to analyze Section 107(b)'s bar against State regulatory jurisdiction, essentially authorizing the State's *ultra vires* regulation

of the Pueblo's bingo gaming—including inapplicable licensing requirements. In doing so, the Fifth Circuit affirmed a decision in conflict with long-established Supreme Court precedent and the Restoration Act's text. *See* Sup. Ct. Rule 10(c). It also departed from the accepted and usual course of judicial proceedings by ignoring the principal question raised by the Pueblo—a question over which the District Court also expressed concern and confusion. That alone calls for an exercise of this Court's supervisory power over a decision that threatens the sovereignty and self-sufficiency of two federally recognized tribes. *See* Sup. Ct. Rule 10(a).

The Fifth Circuit should have determined whether the Restoration Act's language reflects express congressional consent to Texas's regulation of the Pueblo's gaming. It does not. The Restoration Act, enacted after *Cabazon Band*, includes a "Gaming Activities" section that states (1) "[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and lands of the tribe" and (2) "nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas."

Although Texas argues that "the Restoration Act makes no mention of *Cabazon Band*," (Opp. 13), this Court nonetheless "presume[s] that Congress expects its statutes to be read in conformity with this Court's precedents." *United States v. Wells*, 519 U.S. 482, 495 (1997). By expressly reserving "regulatory jurisdiction" to the Tribes, Congress understood it foreclosed Texas from regulating, licensing, or taxing the

Tribes' on-reservation gaming. *See*, *e.g.*, *Nevada v. Hicks*, 533 U.S. 353, 374 (2001) (discussing tribe's authority "to restrict, condition, or otherwise regulate" activity as an exercise of "regulatory jurisdiction"); *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997) (discussing "regulatory governance" as the authority to "govern the conduct of" others); *South Dakota v. Bourland*, 508 U.S. 679, 689-93 (1993) (concluding that Congress "eliminated . . . the incidental regulatory jurisdiction formerly enjoyed by the [t]ribe" and thus abrogated the tribe's "authority to regulate entry onto or use of th[o]se lands" by non-Indians). And because penal statutes may be designed (as here) to enforce a regulatory system by making penal any conduct undertaken outside that regulatory regime, *see*, *e.g.*, *Cabazon Band*, 480 U.S. at 211-12 (noting that a regulatory law may be enforced through civil or criminal means), Congress also made clear its intent that Texas not exercise "civil *or criminal* regulatory jurisdiction" over the Tribes' on-reservation gaming.

As this Court has repeated for over two hundred years, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Congress performed its role by enacting statutory text. But the Fifth Circuit abdicated its judicial duty to construe the language Congress employed as a "check" on the state. *See Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 125 (2015) (Thomas, J., concurring) ("The Framers expected Article III judges to . . . apply[ ] the law as a 'check' " on the political branches, and "if a case involved an executive

effort to extend a law beyond its meaning, judges would have a duty to adhere to the law that had been properly promulgated under the Constitution."). "Article III judges cannot opt out of exercising their check. As [this Court has] long recognized, '[t]he Judiciary has a responsibility to decide cases properly before it, even those it "would gladly avoid."'" *Id*. at 125-26 (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012)). "When courts refuse even to decide what the best interpretation is under the law, they abandon the judicial check." *Id*. at 126.

The Fifth Circuit—for twenty-six years—has refused to interpret Section 107(b), allowing the State to chip away at the Pueblo's sovereignty. This is untenable and contravenes clear precedent from this Court.

III. THIS CASE PRESENTS A SIGNIFICANT ISSUE CONCERNING TRIBAL SOVEREIGNTY AND SELF-SUFFICIENCY THAT IS RIPE FOR REVIEW AND WILL EVADE CORRECTION ABSENT THIS COURT'S INTERVENTION.

Alternatively, Texas argues that the Court should deny review of the Fifth Circuit's enforcement of State gaming regulations against the Pueblo because it is not of "national importance" and may be redressed through Congress. Neither argument is persuasive.

A. That This Case Over Tribal Sovereignty Could Never Present a Circuit Split Favors Review.

Although this case may apply only to two tribes, tribal sovereignty—and Texas's unauthorized encroachment on that sovereignty—presents an important issue meriting this Court's intervention. Indeed, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945). As this Court said long ago:

> It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government. . . . "They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."

McClanahan v. Ariz. Tax Comm'n, 411 U.S. 164, 172-73 (1973) (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)). For that reason, this Court has granted certiorari on questions concerning state encroachment into areas of tribal sovereignty on numerous occasions, regardless of the number of tribes involved. *See*, *e.g.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (resolving

the scope of Indian country belonging to the Creek Nation over which Oklahoma state courts lack jurisdiction); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (resolving dispute over Arizona's regulation of hunting and fishing on Indian lands). And in *Cabazon Band*, this Court held that "important tribal interests" of self-governance concerning only two California tribes foreclosed state regulatory jurisdiction over on-reservation gaming absent express congressional consent. *Cabazon Band*, 480 U.S. at 214-22.

Texas is simply wrong to argue that this case does not warrant review because it concerns only two Indian tribes in Texas. That counsels in *favor* of granting certiorari because the Fifth Circuit's decision concerning these two tribes' sovereignty will continue to evade correction unless the Court intervenes.

B. Congress Already Intervened to Define the Pueblo's and State's Regulatory Roles Over Indian Gaming in the Restoration Act.

Texas also incorrectly urges the Court to deny certiorari in favor of congressional intervention, citing "'judicial respect for Congress's primary role in defining the contours of tribal sovereignty.'" (Opp. 27) (citation omitted). But Congress already performed that role. It exercised its "judgment[] about how to balance the interests of [these] sovereigns," (Opp. 27), when it included language in the Restoration Act to bar Texas from exercising regulatory jurisdiction. As the

chairman of the House committee responsible for the Restoration Act contemporaneously explained, the as-enacted version of the statute was intended to "codify" the "holding and rational[e]" of *Cabazon Band*. *See* 133 Cong. Rec. H6972-05, 1987 WL 943894 (Aug. 3, 1987) (Statement of Rep. Udall). It is judicial respect for *that* statutory text that the Pueblo seeks.

C. There is No Pending Legislation Concerning the Restoration Act.

Texas contends that "the Tribe has been pursuing a remedy through legislative means," (Opp. 28), which may suggest to the Court that there is pending legislation that seeks to address the Restoration Act's interpretation. There is not. The referenced legislation seeks to apply *IGRA* to the Tribes' lands (and, again, the Pueblo does not ask this Court to apply IGRA or "relieve" it from the Restoration Act, as Texas contends (Opp. 28)). That Texas believes that legislation is likely to be unsuccessful (Opp. 28) further counsels in favor of this Court's intervention.

D. The Issue Presented Is One of Law, Not Fact.

Resolution of this issue is ripe for review. The District Court entered a permanent injunction that enforces state bingo regulations—including licensing requirements—against the Pueblo. Whether that injunction contravenes the Restoration Act's withholding

of state "regulatory jurisdiction" presents a pure question of law. Texas's attempt to manufacture a "highly fact-bound dispute," (Opp. 22), should be summarily rejected.

CONCLUSION

The Pueblo and the District Court seek a full analysis of the Restoration Act that honors its legislative history and incorporates a clear understanding of the reservation of regulatory jurisdiction in Section 107(b). Although Texas prefers to benefit from *Ysleta I*'s imprecise language, the Restoration Act's text defines the "bargain" that Congress struck between these two sovereigns. And that bargain—such as it is—goes both ways. The Restoration Act prohibits the Tribes from offering games banned outright by state law, *and* it bars Texas from regulating the Tribes' operation of games that Texas decided to permit and regulate.

For the foregoing reasons, and those stated in the Petition, the Petition should be granted.

Respectfully submitted,

JEFFREY W. HELLBERG, JR.
JOSEPH CALLISTER
ETHAN A. MINSHULL
WICK PHILLIPS GOULD & MARTIN, LLP
3131 McKinney Avenue, Suite 100
Dallas, Texas 75204
Telephone: (214) 692-6200
Facsimile: (214) 692-6255
jeff.hellberg@wickphillips.com
joseph.callister@wickphillips.com
ethan.minshull@wickphillips.com

BRANT C. MARTIN*
WICK PHILLIPS GOULD & MARTIN, LLP
100 Throckmorton Street, Suite 1500
Fort Worth, Texas 76102
Telephone: (817) 332-7788
Facsimile: (817) 332-7789
brant.martin@wickphillips.com
**Counsel of Record*

Counsel for Petitioners