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.

THE STATE OF TEXAS

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

SUPPLEMENTAL BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

Page

Introduction..1
Argument..2
I. *Cabazon Band* Should Not Guide Analysis of the Restoration Act. 2
II. If Congress Intended IGRA to Govern the Pueblo, It Would Have Said So—and Still Could. 9
Conclusion 11

TABLE OF AUTHORITIES

Page(s)

Cases:

Bryan v. Itasca County, 426 U.S. 373 (1976)..2, 10
California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).......................... *passim*
Chickasaw Nation v. United States, 534 U.S. 84 (2001)..8
Garcia v. United States, 469 U.S. 70 (1984)...7
Liu v. SEC, 140 S. Ct. 1936 (2020) 8-9
McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) 9, 10
Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368 (2012)...7

Cases—Continued: Page(s)

Montana v. Blackfeet Tribe of Indians,
471 U.S. 759 (1985)..8

Morissette v. United States,
342 U.S. 246 (1952)..8

Nat'l Ass'n of Greeting Card Publishers v. U.S. Postal Serv., 462 U.S. 810 (1983)....................7

NLRB v. SW Gen., Inc.,
137 S. Ct. 929 (2017)..7

Stokeling v. United States,
139 S. Ct. 544 (2019)..8

Texas v. Ysleta del Sur Pueblo,
220 F. Supp. 2d 668 (W.D. Tex. 2001)..................6-7

U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837 (2020)..........................9

Washington v. Miller,
235 U.S. 422 (1914)..9

White Mountain Apache Tribe v. Bracker,
448 U.S. 136 (1980)..9

Ysleta del Sur Pueblo v. Texas,
36 F.3d 1325 (5th Cir. 1994).........................1-2, 4, 10

Statutes:

Deep Seabed Hard Mineral Resources Act,
30 U.S.C. §§ 1462-63, 1466..4

Indian Civil Rights Act of 1968, Pub. L. No. 90-284, Tit. II, 82 Stat. 77-78....................................1

Indian Gaming Regulatory Act,
25 U.S.C. § 2701 *et seq*................................1, 6, 9, 10

Statutes—Continued: Page(s)

Lacey Act Amendments of 1981, 16 U.S.C. §§ 3372-74 4

Openness Promotes Effectiveness in our National Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, 5 U.S.C. § 552 (2007) 3

Public Law No. 83-280, 67 Stat. 588 (1953) .... *passim*

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

§ 105(f) 2, 6, 8

§ 107 .... 2, 5, 6

§ 107(a) .... *passim*

§ 107(b) 5, 6

§ 107(c) 6, 8

Miscellaneous:

1 Cohen's Handbook of Federal Indian Law §§ 1.03-1.07 (2019) 9

S. Rep. No. 90, 100th Cong., 1st Sess. (1987) 5-6, 7

Ysleta del Sur Pueblo Council, Tribal Resolution No. T.C.-02-86 (Mar. 12, 1986) 4, 5

In accordance with Supreme Court Rule 15.8, Texas respectfully submits this supplemental brief in response to the United States' invited amicus brief of August 25, 2021, supporting a grant of certiorari.

INTRODUCTION

This case involves the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act (the "Restoration Act"), Pub. L. No. 100-89, 101 Stat. 666, a statute that applies to just two Indian tribes in Texas. The United States contends that the true meaning of the Restoration Act derives not from its plain language, but rather from an opinion of this Court construing a different statute governing a broader subset of tribes and States[1] and the policy embodied in a third statute governing yet other tribes.[2]

That view is mistaken. If Congress had wanted to incorporate the reasoning of *Cabazon Band* into the text of the Restoration Act, it would have done so. It instead used language that distinguished the provisions of the Restoration Act most relevant here from the view of Public Law 280 espoused in *Cabazon Band*. And if Congress had decided that IGRA's reach should be extended to the Restoration Act tribes, it would have repealed the Restoration Act or amended it to make IGRA applicable to them. It could still do so. Yet in the quarter-century since the Fifth Circuit construed the Restoration Act in accordance with its text in *Ysleta del Sur Pueblo v.*

[1] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), addressing Public Law No. 83-280 ("Public Law 280"), 67 Stat. 588 (1953), as amended by the Indian Civil Rights Act of 1968, Pub. L. No. 90-284, Tit. II, 82 Stat. 77-78.

[2] Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq*.

Texas, 36 F.3d 1325 (5th Cir. 1994) ("*Ysleta I*"), *cert. denied*, 514 U.S. 1016 (1995), Congress has declined to act in contravention of *Ysleta I* while numerous other judicial opinions have followed its reading of the Act. *See* Br. in Opp. II-IV.

That is a strong indication that the United States' views are not shared by either the current Congress or any past Congress that could have given the Pueblo the relief it asks this Court to provide. The court of appeals' judgment should be summarily affirmed, or the petition for a writ of certiorari should be denied.

ARGUMENT

I. *Cabazon Band* Should Not Guide Analysis of the Restoration Act.

As the United States correctly explains (at 3-6), *Cabazon Band* predated the enactment of the Restoration Act and involved Public Law 280, an amendment to which is mentioned in section 105(f) of the Act. But the language of the Restoration Act that controls this dispute is not section 105(f)'s general extension to Texas of civil and criminal jurisdiction within the boundaries of the Pueblo's reservation, but rather section 107's treatment of tribal gaming activities in particular. *Cabazon Band* is not instructive on the meaning of the dispositive language in section 107.

As previously explained, neither Public Law 280 nor this Court's discussion of it in *Cabazon Band* was specific to gaming. Br. in Opp. 14. After noting the limitation on States' civil jurisdiction under Public Law 280 discussed in *Bryan v. Itasca County*, 426 U.S. 373 (1976), the Court considered whether the State of California could avoid that limitation by imposing what might otherwise be a civil regulation as a criminal prohibition. 480 U.S. at 211-12.

In the view of both the Pueblo and the United States, Congress incorporated that analytical framework into the Restoration Act, which was enacted on the heels of *Cabazon Band*. *See* U.S. Br. 10-13. For the reasons Texas has already noted, that view is incorrect. *See* Br. in Opp. 13-17. The United States' present contentions fail to demonstrate otherwise.

A. 1. The first sentence of Restoration Act section 107(a) provides: "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." If Congress had intended the word "prohibited" in that sentence to be colored by the reasoning of *Cabazon Band*, *see* U.S. Br. 11, it would have said so, referencing *Cabazon Band* expressly. *See* Br. in Opp. 13 (citing Openness Promotes Effectiveness in our National Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, 5 U.S.C. § 552 (2007)). And even assuming the word "laws" in that sentence is limited in the way the United States suggests (at 12-13), the gaming activity at issue here would still be prohibited by statute. *See* Br. in Opp. 22-23.

2. The second sentence of section 107(a) only confirms the Restoration Act's deviation from *Cabazon Band*. The question the Court addressed in that case was "whether the [California] law is criminal in nature, and thus fully applicable to the reservation under § 2 [of Public Law 280], *or* civil in nature, and applicable only as it may be relevant to private civil litigation in state court" under § 4 of Public Law 280. *Cabazon Band*, 480 U.S. at 208 (emphasis added). But the second sentence of section 107(a) makes that distinction irrelevant for Restoration Act purposes. It states that "[a]ny violation of the prohibition provided in [the first sentence of section 107(a)] shall be subject to the same civil *and* criminal penalties

that are provided by the laws of the State of Texas" (emphasis added). As the *Ysleta I* court queried, "if Congress intended for the *Cabazon Band* analysis to control, why would it provide that one who violates a certain gaming prohibition is subject to a *civil* penalty?" Pet. App. 12 n.37.

The United States tries to avoid this problem by suggesting (at 13) that Congress "could have contemplated civil penalties such as forfeiture for criminal gambling prohibitions." But had that been its intent, Congress—as it has in other contexts—would have mentioned civil forfeiture specifically, not used only the broader phrase "civil . . . penalties." *See, e.g.*, Lacey Act Amendments of 1981, 16 U.S.C. §§ 3372-74 (separately authorizing civil penalties and civil forfeitures); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. §§ 1462-63, 1466 (same).

3. The third sentence of section 107(a) further undermines the United States' position. That sentence states that "[t]he provisions of this subsection"—that is, section 107(a)—"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." That tribal resolution could not have been clearer. It stated that the Pueblo "ha[d] no [i]nterest in conducting high stakes bingo or other gambling operations on its reservation, regardless of whether such activities would be governed by tribal law, state law or federal law," Pet. App. 121; "remain[ed] firm in its commitment to prohibit outright any gambling or bingo in any form on its reservation," *id.* at 123; and asked Congress to add language "which would 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," *id.*

The United States strains to make the third sentence of section 107(a) fit its theory, asserting (at 18) that Congress's express incorporation of T.C.-02-86 "is reasonably read to reflect that Section 107 respects the Tribe's strong opposition to direct application and enforcement of state law, and conforms to the resolution to the extent of barring gaming that state law prohibits outright." But as already noted, Congress stated that T.C.-02-86 informs "[t]he provisions of this subsection." Restoration Act § 107(a). No language in subsection (a) suggests opposition to application and enforcement of state law or singles out any one type of state law. In accordance with T.C.-02-86, the first two sentences embrace state law without qualification. And the fact that "Section 107(a) does not prohibit *all* gaming, as the resolution offered to do," U.S. Br. 18-19, does not mean that the first two sentences of section 107(a) were not, in fact, "enacted in accordance with the tribe's request in . . . T.C.-02-86." Restoration Act § 107(a). Although the resolution stated the Pueblo's anti-gaming position in absolute terms, it specifically asked Congress to prohibit all gaming "as defined by the laws and administrative regulations of the State of Texas." Pet. App. 123.

B. The remaining provisions of section 107 reflect how Texas may and may not enforce the language of section 107(a), and those provisions likewise fail to track the criminal/civil distinction drawn in *Cabazon Band*, 480 U.S. at 208. Under section 107(b), the State may not recover either civil *or* criminal penalties through an enforcement action brought by a state agency because "[n]othing in [section 107] shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of

Texas." That provision restates the limits of Public Law 280. *See* S. Rep. No. 90 ("Senate Report"), 100th Cong., 1st Sess. 10-11 (1987) (ROA.626-27) (making this observation and stating that section 107(b) should be read in the context of section 105(f), the provision that expressly references an amendment to Public Law 280). But the final sentence of the next provision, section 107(c), is specific to gaming, has no counterpart in Public Law 280, and was not considered in *Cabazon Band*. Through that sentence, Congress abrogated the Pueblo's tribal immunity as to federal-court suits brought by Texas "to enjoin violations of the provisions of [section 107]." Restoration Act § 107(c). That abrogation informs the meaning of "civil and criminal penalties" in section 107(a), reflecting that Texas may enjoin any gaming activity that would ordinarily give rise to penalties of any variety.

The United States calls this understanding of section 107(c) "burdensome and unsatisfactory," and thus not what Congress likely intended. U.S. Br. 15. It would make more sense, in the United States' view, to apply the *Cabazon Band* framework to the Restoration Act, allowing the State to request injunctive relief only to "bar[] tribal gaming activities that are prohibited outright by state law" and leaving regulation of tribal gaming to the National Indian Gaming Commission under IGRA. *Id.* at 16.

What the United States says now, however, sheds no light on what the 100th Congress intended when it enacted the Restoration Act. But in any event, the United States' view overlooks the fact that in 1999, Texas sued the Pueblo to enjoin a high-stakes casino operation that offered slot machines, card games, and dice games that the district court found to be prohibited by the Texas Penal Code. *Texas v. Ysleta del Sur Pueblo*, 220 F. Supp. 2d

668, 672-74, 695 (W.D. Tex. 2001). Even then, the Pueblo contended that its gaming was not "prohibited" because Texas allows some forms of gambling. *Id.* at 682, 689. That illustrates what *Cabazon Band* acknowledged: the "prohibitory/regulatory distinction . . . is not a bright-line rule," allowing even the losing party to make "an argument of some weight." 480 U.S. at 210. For that reason, it is doubtful that importing the *Cabazon Band* framework would be more "[]satisfactory," U.S. Br. 15, than applying the framework that Congress crafted in the Restoration Act.

C. The United States next reveals (at 16-17) that its understanding of the Restoration Act is informed, in part, by a statement of a single Member of Congress. But as this Court has explained, "[w]hat Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators," and "floor statements by individual legislators rank among the least illuminating forms of legislative history." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 942, 943 (2017). For that reason, "the views of a single legislator, even a bill's sponsor, are not controlling." *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 385 (2012).

To the extent recourse to legislative history is appropriate here, "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill," not statements by individual Members of Congress. *Garcia v. United States*, 469 U.S. 70, 76 (1984); *see Nat'l Ass'n of Greeting Card Publishers v. U.S. Postal Serv.*, 462 U.S. 810, 832 n.28 (1983). *Contra* U.S. Br. 17 (dismissing a statement in the Senate Report with which it disagrees as a "mistake[]"). And here, the Senate Report stated (at 8) that the Act's "central purpose" was to federalize Texas's general ban on gaming and thereby "ban

gaming on the reservations as a matter of federal law." ROA.624. The report also confirms that congressional staff "worked closely with the Department of Interior and with the tribes" when finalizing the Restoration Act. *Id.*

D. Finally, the United States cites *Montana v. Blackfeet Tribe of Indians* for the proposition that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." 471 U.S. 759, 766 (1985) (quoted in U.S. Br. 19). Regardless of how forceful the Court may deem that canon, *see, e.g.*, *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001), its application unquestionably requires a predicate finding of ambiguity, *Blackfeet Tribe*, 471 U.S. at 766.

But as already noted, there is no ambiguity here. *See* Br. in Opp. 16-17. Instead of incorporating *Cabazon Band*'s criminal/civil dichotomy, section 107(a) uses the word "prohibited" in its ordinary sense and makes the Pueblo "subject to the same civil *and* criminal penalties that are provided by the laws of the State of Texas" (emphasis added). And "[n]otwithstanding section 105(f)," section 107(c) authorizes gaming-specific injunctive relief foreign to anything in Public Law 280. Contrary to the United States' contention (at 12), this is therefore not a scenario in which Congress "obviously transplanted" a word and its "old soil" from one context to another, *Stokeling v. United States*, 139 S. Ct. 544, 551 (2019), or imported a "cluster of ideas" along with a "borrowed word," *Morissette v. United States*, 342 U.S. 246, 263 (1952). As is sometimes the case, the new soil is noticeably different from the old. *See, e.g.*, *Liu v. SEC*, 140 S. Ct.

1936, 1947 (2020); *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1847 n.5 (2020).[3]

II. If Congress Intended IGRA to Govern the Pueblo, It Would Have Said So—and Still Could.

The United States ends its brief with a discussion of IGRA and the policy it effectuates, asserting that Congress intended the Pueblo to be governed by the general terms of that statute. U.S. Br. 19-22. Yet the Pueblo itself does not presently argue that IGRA should apply to its gaming activity, and neither it nor the United States argue that IGRA impliedly repealed the Restoration Act. *Cf. id*. at 21 n.3 (citing a First Circuit decision finding that IGRA impliedly repealed a different tribe-specific statute); *see also Washington v. Miller*, 235 U.S. 422, 428 (1914) (noting that implied repeals are disfavored).

If Congress had intended IGRA to displace the Restoration Act, it would have said so. Although the United States' brief asserts (at 22) "a strong interest in supporting 'Indian self-government' by encouraging 'tribal self-sufficiency and economic development'" (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980)), the federal government's policies toward Indians, as expressed through congressional enactments, have varied widely over the years, *see* 1 Cohen's Handbook of Federal Indian Law §§ 1.03-1.07 (2019). If Congress had deemed the Fifth Circuit's interpretation of

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[3] To the extent the United States' overbroad reading of *Cabazon Band* were correct (and it is not), the Court should either limit *Cabazon Band* to its facts or reconsider it entirely. That reading is premised on an atextual understanding of the commonly used term "prohibit" that is inconsistent with how this Court currently construes statutes in this realm. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2468 (2020) (emphasizing the importance of finding a term's original meaning).

the Restoration Act in *Ysleta I* out of step with federal policy, it could have repealed the Restoration Act or amended it to make the tribes it governs subject to IGRA. *Cf. Bryan*, 426 U.S. at 389 (finding the fact that "the same Congress that enacted [Public Law] 280 also enacted several termination Acts legislation . . . cogent proof that Congress knew well how to express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws and state taxation" (footnote omitted)). It did not—notwithstanding numerous attempts to override *Yselta I*. *See* Br. in Opp. 19-21, 27-28.

And Congress could still take that step. Until then, the Restoration Act as consistently interpreted for a generation is the most accurate reflection of congressional policy with respect to the two tribes within its scope. *See McGirt*, 140 S. Ct. at 2459 ("Because Congress has not said otherwise, we hold the government to its word.").

CONCLUSION

The judgment of the Fifth Circuit should be summarily affirmed. In the alternative, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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