No. 20-493

In The Supreme Court of the United States

YSLETA DEL SUR PUEBLO, ET AL.,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

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

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

The Restoration Act, enacted shortly after this Court's decision in *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), codifies that decision's prohibitory/regulatory framework for determining permissible gaming activities on the Tribes' lands in Texas. Section 105(f) expressly incorporates the Public Law 280 jurisdictional regime. And section 107, which specifically addresses tribal gaming, tracks *Cabazon*'s prohibitory/regulatory distinction, prohibiting on tribal lands only those "gaming activities which are *prohibited* by the laws of the State of Texas," while expressly providing that nothing in section 107 grants any "civil or criminal *regulatory jurisdiction* to the State of Texas" (emphases added). The Act represents a compromise whereby Texas may prevent the Tribes from conducting prohibited gaming activities while the Tribes' regulatory sovereignty is protected. The Act's text, structure, and history confirm that it incorporates *Cabazon*'s framework. Established canons of statutory construction support the Pueblo as well: Its interpretation harmonizes the Act with the Indian Gaming Regulatory Act ("IGRA"), rather than displacing it; and, even if the Act were ambiguous, the Pueblo's interpretation supports rather than undermines tribal sovereignty as the Indian canon teaches.

In response, Texas presses a "plain meaning" reading of the Act that cannot be reconciled with its text, applicable principles of statutory interpretation, the chronology of its enactment, or its legislative history. The outcome the State seeks would give it regulatory

jurisdiction over gaming activities on tribal lands, precisely the outcome the plain text of the Act prohibits. As shown below, all of Texas's arguments lack merit.

ARGUMENT

I. THE ACT'S PLAIN TEXT SUPPORTS THE PUEBLO'S READING, NOT TEXAS'S.

1. Texas's principal argument is that the plain meaning of the word "prohibit" in section 107(a)—providing that "[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited" on tribal lands—"federalizes the *entire body* of Texas's gaming law as applicable to the Pueblo." Br. 20–21 (emphasis added). That is wrong for multiple reasons.

First, even viewed in isolation (as is plainly inappropriate here), section 107(a)'s text bars only those "gaming activities" that themselves are "prohibited," and not activities that Texas subjects to time, place, and manner regulation. See U.S. Br. 20. Bingo, for example, is a "gaming activit[y]" that is not "prohibited by the laws of the State of Texas," but rather is permitted by Texas law subject to the State's regulatory scheme. See Pueblo Br. 49–53; see also Texas Br. 5 ("The Texas Constitution currently authorizes bingo. . . .").

Second, the statute closely tracks the distinction *Cabazon* drew between gaming activities that are "prohibited" and those that are merely "regulated." Texas

nonetheless asserts that "prohibit" should be read without reference to *Cabazon*, *e.g.*, Br. 27, arguing that the word "prohibit" is not "a term of art," *id.* at 24. But that is a straw man. No one contends that the word "prohibit" incorporates the *Cabazon* framework in each of the 8,030 provisions returned in Texas's Westlaw search. See *id.* at 24 n.6. The question, rather, is how a statute governing state regulation of Indian gaming should be read when it draws a prohibitory/regulatory distinction by requiring tribes to comply with state laws "prohibit[ing]" gaming activities while denying the state "regulatory jurisdiction."

This Court's precedents supply the answer: "When the words of the Court are used in a later statute governing the same subject matter, it is respectful of Congress and of the Court's own processes to give the words the same meaning in the absence of specific direction to the contrary." *Williams* v. *Taylor*, 529 U.S. 420, 434 (2000); accord *Stokeling* v. *United States*, 139 S. Ct. 544, 551 (2019) ("[I]f a word is obviously transplanted from another legal source, . . . it brings the old soil with it." (alteration in original)); *United States* v. *Wells*, 519 U.S. 482, 495 (1997); *N. Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34 (1995); *Cottage Sav. Ass'n* v. *Comm'r*, 499 U.S. 554, 562 (1991).[1]

[1] Texas argues that its reading is supported by section 107(a)'s provision that violations are subject to Texas's civil as well as criminal penalties. Br. 22. But this sheds no light on the scope of section 107(a)'s gaming prohibition. Pueblo Br. 39–40; U.S. Br. 22–23. It simply means that if Texas imposes civil

Third, and relatedly, section 107(a)'s use of "prohibited" cannot be read in isolation. See, *e.g.*, *Star Athletica, L.L.C.* v. *Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) ("[I]nterpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning."). Both section 107(b) and section 107(c) demonstrate that section 107(a) incorporates *Cabazon*'s terminology and its limits on state regulatory authority.

Section 107(b), entitled "NO STATE REGULATORY JURISDICTION," states categorically that "Nothing in this section"—including section 107(a)—"shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." That textual connection between section 107(a) and (b)—essentially ignored by Texas—is significant both because it clearly embraces the distinction *Cabazon* drew between prohibitory and regulatory gaming laws and because it makes clear that Texas may not "regulat[e]," *i.e.*, determine the rules governing, gaming conducted on tribal lands. See Pueblo Br. 27–31.

Texas itself has correctly conceded that section 107(b) "restates the limits of Public Law 280." Suppl. Cert. Br. 6. Those limits in Public Law 280, which foreclose state civil and criminal regulatory authority, are drawn directly from *Cabazon*'s interpretation of Public Law 280. And because section 107(b) provides that

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penalties (like forfeiture or fines) for violating a prohibitory gaming law, the Tribe's violations are subject to those same penalties.

section 107(a)—like all of section 107—"shall [not] be construed" to grant "civil or criminal regulatory jurisdiction" to the State, Texas has effectively conceded that section 107 incorporates the *Cabazon* framework. See U.S. Br. 24–25. Texas simply ignores the necessary consequence of its concession.

Moreover, Texas's position provides *no meaning* to section 107(b)'s command that nothing in section 107 "shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." If Texas were correct that it can prescribe the rules governing the Tribe's on-reservation gaming activities, then it would possess "regulatory jurisdiction" over those activities in violation of section 107(b). See Pueblo Br. 28, 30.

Texas argues in response that although Congress denied Texas regulatory *jurisdiction* in section 107(b), that does not mean that Congress denied Texas authority to regulate. Br. 38. Instead, it simply prevents the Texas Lottery Commission and local district attorneys from bringing enforcement actions against the Tribes. *Id.* at 38–39. That is not a natural or reasonable reading of the text; it confuses regulation with enforcement, and would permit Texas to regulate the Tribe's non-prohibited gaming activities by prescribing the rules governing them. Viewing sections 107(b) and (c) together, they make clear that *subsection (c)* deals with enforcement jurisdiction, providing that such jurisdiction lies only with the federal courts, while subsection (b) deals with a substantive restriction on the State's jurisdiction—specifically denying Texas jurisdiction to regulate. Reading the phrase "regulatory

jurisdiction" to address enforcement both deprives subsection (b) of meaning and makes it redundant of subsection (c), which already makes clear that the State lacks enforcement jurisdiction.

Texas contends that section 107(c) is not evidence that sections 107(a) and (b) adopted the *Cabazon* framework. But the statutory text vesting exclusive enforcement jurisdiction in the federal courts begins by saying "[n]otwithstanding section 105(f)"—clearly signaling that section 107 departs from the Public Law 280 regime regarding enforcement. Congress included no such signal regarding the substantive content of the law that would bind the Tribe, but instead tracked *Cabazon*'s prohibitory/regulatory framework. Texas's argument (Br. 38–39) that section 107(c)'s departure from Public Law 280 means that section 107(b) also must do so is not only a non sequitur; it is inconsistent with the plain meaning of "regulatory jurisdiction" and ignores section 107(c)'s "[n]otwithstanding" language.

Finally, Texas has no persuasive answer to the Pueblo's demonstration that, contemporaneously with its enactment of the Restoration Act, Congress enacted statutes that expressly authorized states to prohibit *or* regulate gaming on tribal lands. Compare Pueblo Br. 28–30, with Texas Br. 40. These statutes are "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 [gaming] laws." *Bryan* v. *Itasca Cnty.*, 426 U.S. 373, 389 (1976).

Texas responds that the Restoration Act is different because it federalizes state law, rather than applying it directly, Br. 40, but this misses the point. These statutes reveal that, *e.g.*, the same day it enacted the Restoration Act denying Texas power to regulate gaming on tribal lands, Congress also specifically authorized Massachusetts not only to "prohibit," but also to "regulate" tribal gaming. See Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. No. 100-95, § 9, 101 Stat. 704, 709–10 (subjecting tribal lands to "those laws and regulations which prohibit *or regulate* the conduct of bingo or any other game of chance" (emphasis added)). Congress's reference to regulation in this Act would be meaningless if an authorization to "prohibit" gaming activities included authority to regulate. Likewise, the Seminole and Catawba settlement statutes show that when Congress applied all state laws "relating to" or "regulat[ing]" gaming, it used those terms rather than *Cabazon*'s term, "prohibit." See Pueblo Br. 29.

2. Texas further contends that section 107(a) must be read broadly to apply all of Texas gaming law to the Tribe because it says the provision was "enacted in accordance with the tribe's request in Tribal Resolution No., T.C.-02-86," which Texas then quotes selectively to argue that section 107(a) simply incorporates Texas law and applies it on tribal land. Br. 22–23. Texas misconstrues both the Act and the Resolution.

Initially, the Restoration Act does not "incorporat[e]" the Tribal Resolution. Texas Br. 18. Instead, the Act states that it was enacted "in accordance with" the

Tribe's request in the Resolution. The Act thus does not import the terms of the Resolution into the statute. Congress knows how to incorporate the terms of another writing by reference when it wants to. See, *e.g.*, 25 U.S.C. § 5396(b) (providing that if certain provisions are included in a tribal funding agreement or compact, then such provision "shall have the same force and effect as if it were set out in full in this subchapter"). Congress used different language here, indicating only that section 107(a) was enacted "in a way that agrees with or follows" the Tribe's request.[2]

The Pueblo's interpretation is consistent with this language. An action taken "in accordance with" a person's request need not do everything the person requested. The Tribe requested a total ban on all gaming activities to ensure the Act's passage without subjecting its lands to state regulation. And Congress, "in accordance with" that request, responded by banning some but not all gaming activities on tribal lands—namely, those activities that are "prohibited," but not those that are "regulat[ed]," by Texas. See Pueblo Br. 41; U.S. Br. 30; Alabama-Coushatta Br. 20–21.[3]

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[2] *In accordance with*, *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/in%20accordance%20with (last visited Jan. 20, 2022).

[3] That the Tribe did not withdraw the Resolution is therefore irrelevant. Properly understood, the Restoration Act accords with both the Resolution and the Pueblo's overriding goals in passing it—to ensure passage of the Act while avoiding Texas's regulatory jurisdiction over its on-reservation gaming activities.

This is the *only* reading that comports with the text of both the Act and the Resolution. The Resolution requested a ban on all gaming "as defined by" Texas law, App. 123, not a ban on all gaming "that does not comply with" Texas law. Thus, if the Tribe's requested language had been enacted, the Pueblo would be prohibited from conducting any activity that qualifies as "bingo" as defined by Texas law, see *infra*, p. 23, even if the Tribe complied with all of Texas's bingo laws and regulations. But the statutory text cannot bear that meaning, because bingo played in compliance with Texas's laws and regulations is not "prohibited" by Texas law under any understanding of section 107(a). That is why neither Texas nor any court or party believes Congress enacted a total gaming ban. Instead, all agree that Congress *rejected* the total gaming ban when it significantly amended the text that became the Restoration Act after *Cabazon* was decided.

Nor does it matter that the Tribe at the time expressed a "commitment to prohibit outright any gambling or bingo in any form on its reservation." App. 123. A brief timeline illustrates the disconnect between the Resolution and the Restoration Act:

- March 12, 1986: Tribal Resolution passed.
- June 25, 1986: H.R. 1344 amended as requested.
- September 25, 1986: H.R. 1344 died in Senate.
- January 6, 1987: H.R. 318 introduced.
- February 25, 1987: *Cabazon* decided.

- June 17, 1987: H.R. 318 amended to current language.
- August 18, 1987: Restoration Act passed.

After *Cabazon*, Congress changed the text to preserve "the Tribes' sovereign authority to change their minds (just as Texas did) to authorize gaming activities that Texas allows." Alabama-Coushatta Br. 22. This is not surprising; "[a]fter the Supreme Court's *Cabazon* decision, congressional efforts to pass legislation regarding Indian gaming that had been ongoing since 1983 gained momentum, with Indian tribes' position strengthened." William Wood, *The (Potential) Legal History of Indian Gaming*, 63 Ariz. L. Rev. 969, 1027 & n.353 (2021) (citing numerous scholars).

Texas relies heavily on the Tribal Resolution and subsequent Senate Report, which, it argues, show that Congress intended 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 tribal lands. See Br. 22–23, 42. Texas, however, ignores that Congress specifically deleted the quoted text from the relevant bill in *Cabazon*'s wake, thereby materially altering the statutory text to eschew that proposed prohibition. As the Pueblo (Br. 44–45) and the United States (Br. 29) explained, "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987);

accord *Doe* v. *Chao*, 540 U.S. 614, 622–23 (2004); *Smith* v. *United States*, 507 U.S. 197, 202 n.4 (1993).

Against all this, Texas identifies no language in the pre-*Cabazon* Resolution supporting Texas's reading that the Act applies all Texas gaming laws and regulations to the Tribe. Like the Fifth Circuit before it, Texas simply assumes without analysis that this is the import of the Tribe's proposed ban on all gaming "as defined by" Texas law. See Br. 23. But, as explained above, that is wrong. Under the Pueblo's reading, moreover, the Restoration Act accords with the Pueblo's primary request that Congress *not* make Texas gaming laws generally applicable on the reservation by clarifying that nothing in section 107 gives Texas regulatory jurisdiction on tribal lands. In contrast, applying all Texas laws regulating gaming on the reservation—as Texas argues—would contradict rather than "accor[d] with" the Resolution.

Thus, Texas's argument (Br. 23) that "the Fifth Circuit has consistently applied the Restoration Act" as implementing the "operative request" in the Tribal Resolution is wrong in multiple respects:

(i) The Restoration Act does not incorporate the Tribal Resolution. It declines to impose a ban on all gaming on tribal lands, instead prohibiting both gaming activities Texas forbids *and* regulatory jurisdiction. Both Texas and the Tribes received half a loaf in the Act.

(ii) The Tribal Resolution does *not* suggest that Texas has regulatory jurisdiction on tribal

lands as the Fifth Circuit has held. The Resolution desperately offers to eschew all gaming precisely to avoid that outcome.

(iii) The Fifth Circuit has never held that the Restoration Act imposes a ban on all gaming, the "operative request" of the Tribal Resolution, Texas Br. 23; instead, that court has incorrectly read the Act's reference to the Tribal Resolution as agreeing to the application of all state gaming laws and regulations on tribal lands—directly contravening the Resolution.

3. Texas further argues that had Congress wanted to apply the *Cabazon* framework in the Restoration Act, it could have "stopped at section 105(f)," rather than adding section 107. Br. 37. While this argument correctly assumes that section 105(f) incorporates the *Cabazon* framework, it misunderstands section 107. Section 107, like section 105(f), incorporates the *Cabazon* framework for determining which Texas laws bind the Tribe. But it departs from the Public Law 280 regime by (i) applying Texas's prohibitory gaming laws as federal law rather than directly, and (ii) limiting Texas's enforcement jurisdiction. Congress therefore could not simply have "stopped at section 105(f)" and achieved what it enacted in section 107. The Pueblo's reading, unlike Texas's, renders nothing superfluous.

4. The Pueblo's interpretation of the Restoration Act's plain language is the best reading of the text. And, as Texas recognizes, Br. 34, if the Act were ambiguous, the Indian canon would require resolution of that

ambiguity in the Tribe's favor. At the very least, the Pueblo's reading is permissible, and the Act should thus be construed not to diminish tribal sovereignty. See Pueblo Br. 37–38; U.S. Br. 30–31.

II. TEXAS CANNOT WISH AWAY THE IMPORT OF *CABAZON* OR THE HISTORY OF THE RESTORATION ACT'S PASSAGE AND THE EVOLUTION OF ITS TEXT.

Ignoring both the text of the Restoration Act and the chronology of legislative acts leading to its enactment, Texas argues that *Cabazon* has no relevance to this Court's interpretation of the Act. None of its arguments is persuasive.

1. Texas first argues that *Cabazon* itself made clear that the prohibitory/regulatory distinction applies only to federal statutes that authorize *direct* state regulation of Indian tribes and not to statutes "federalizing" state law. Texas misreads the decision.

In *Cabazon*, this Court not only interpreted Public Law 280 and adopted the prohibitory/regulatory distinction; it also addressed California's argument that it could enforce its gambling laws against the tribe under the Organized Crime Control Act ("OCCA"), which makes certain violations of state gambling laws violations of federal law. 480 U.S. at 212. This Court rejected the State's argument, explaining that under OCCA, states have no "part in enforcing federal criminal laws or . . . authori[ty] to make arrests on Indian reservations that in the absence of OCCA they could not

effect." *Id.* at 213–14. Thus, the Court held that OCCA did not give California authority to enforce its gaming laws on tribal lands. *Id.* at 214.

Texas tries to use this holding to argue that the prohibitory/regulatory distinction does not apply when state law is adopted as federal law. But *Cabazon* expressly declined to address that question: It noted that the Sixth Circuit had so held, that the Ninth Circuit had held the opposite, and said "[w]hether or not, then, the Sixth Circuit is right and the Ninth Circuit wrong about the coverage of OCCA, *a matter that we do not decide*, there is no warrant for California to make arrests on reservations." *Id.* (emphasis added).

Further, OCCA's text differs from that of the Restoration Act. OCCA makes it unlawful to conduct an "illegal gambling business," and defines that term to include a gambling business that "is a violation of the law of a State or political subdivision in which it is conducted." 18 U.S.C. § 1955(a), (b)(1)(i); see *Cabazon*, 480 U.S. at 212 n.12. The Restoration Act, by contrast, does not prohibit the Tribes from engaging in any gaming activity that "is a violation of Texas law." It instead speaks of activities that are "prohibited by" Texas law, using the same word *Cabazon* used in construing Public Law 280. Given that Congress incorporated Public Law 280 into the Restoration Act in section 105(f), and created a prohibitory/regulatory distinction in section 107, *Cabazon*'s interpretation of Public Law 280 is a much better guide to the interpretation of the Restoration Act than its non-decision as to OCCA's scope.

Relatedly, Texas argues that because the Restoration Act adopts Texas law as federal law and gives federal courts exclusive jurisdiction over suits to enforce it, enforcement of the Act "is an exercise of federal rather than state authority," and "there is no danger of state encroachment on Indian tribal sovereignty." Br. 26–27 (quoting *Cabazon*, 480 U.S. at 213). But with regard to the substance of the rules governing the Tribes' gaming activities, there is no meaningful difference between applying Texas law directly and applying Texas law as federal law. Either way, Texas sets the rules, exercising regulatory jurisdiction on tribal lands—indisputably an infringement of tribal sovereignty.

2. Texas next argues that, in any event, the Restoration Act does not adopt the *Cabazon* framework. It contends that the Act does not use the "criminal-prohibitory/civil-regulatory" phrasing, and therefore that Congress must use the case name (*Cabazon*) to adopt that case's framework. Br. 28. This is simply wrong.

Although Texas recognizes the principle that Congress is presumed to apply a prior Supreme Court interpretation of a federal statute in enacting a second statute governing the same or similar subject matter, it argues that the canon does not apply to a single word like "prohibit." Br. 28. This is a caricature of the Pueblo's prior-interpretation argument, which is that where, as here, Congress expressly incorporates the terms of one statute (Public Law 280) into another statute (the Restoration Act), and where the latter statute uses terms that this Court used in construing

the earlier statute (prohibit vs. regulate), those terms should, absent contrary indication, be read consistently with the way this Court used them. See *supra*, p. 3. That is especially so given the similarity of the contexts (state authority over tribal gaming), the timing of enactment (on the heels of *Cabazon*), and the legislative history (discussing and approving the *Cabazon* regime). See Pueblo Br. 9–12. It is Texas's strained interpretation of the Restoration Act—not the Pueblo's application of the prior-interpretation canon—that ignores the Act's relevant "context." Texas Br. 28.[4]

3. Relying principally on the *Cabazon* dissent, Texas asserts that the decision is "unworkable." Br. 29. This argument is both irrelevant and wrong.

It is irrelevant because the question presented is whether Congress adopted the *Cabazon* framework mere months after the decision was announced. The prior-interpretation canon rests on inferences about the public meaning of statutory terms. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 324 (2012) ("When [a] term has been authoritatively interpreted by a high court . . . , the members of the bar practicing in that field reasonably enough assume that, in statutes pertaining to that field, the term bears this same meaning."). It does

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[4] Texas cites cases declining to adopt *Cabazon*'s prohibitory/regulatory distinction. Br. 29. All involve OCCA, and distinguish Public Law 280 (as interpreted in *Cabazon*) based on its context. See *United States* v. *Stewart*, 205 F.3d 840, 843 (5th Cir. 2000); *United States* v. *Hagen*, 951 F.2d 261, 263–64 (10th Cir. 1991); *United States* v. *Dakota*, 796 F.2d 186, 188 (6th Cir. 1986).

not turn on whether the decision represents good policy or whether federal courts post-hoc conclude that Congress should not have adopted the Court's decision.

It is wrong because for decades courts have been applying the *Cabazon* prohibitory/regulatory distinction under both Public Law 280 and IGRA. See *Cabazon*, 480 U.S. at 209–10; Pueblo Br. 14.[5] Texas's short memory is, of course, ironic considering the decades of difficulties federal district courts in Texas have had applying Texas laws and regulations to the Tribes' gaming activities. See Pueblo Br. 16–17; U.S. Br. 27. Texas briefly argues that district courts have not struggled with application of its regulatory regime on tribal lands, Br. 31, but this is refuted by any fair review of the Tribes' district court litigation with the State. See, *e.g.*, *Texas* v. *Ysleta del Sur Pueblo*, No. EP-99-CV-320-KC, 2016 WL 3039991, at *19 (W.D. Tex. May 27, 2016) (expressing frustration at serving as "a quasi-regulatory body overseeing and monitoring the minutiae of the Pueblo Defendants' gaming-related conduct"); *Texas* v. *Ysleta del Sur Pueblo*, No. EP-99-CA-320-H, 2009 WL 10679419, at *3 (W.D. Tex. Aug. 4, 2009) (characterizing prior ruling as a "noble experiment [that] has not worked in practice," and concluding "[i]t is time for a new approach to resolving the

[5] Texas cites *Doe* v. *Mann*, 415 F.3d 1038, 1056 (9th Cir. 2005), for the proposition that the prohibitory/regulatory distinction is "impossible to apply consistently." Br. 29. But the cited passage does not say the distinction is generally unworkable. It merely states it is unproductive to reconcile case-specific distinctions across different areas such as gaming, driving, and fireworks, and advocates context-specific application of the test.

obvious tension between federal law and state law in relation to the conduct of charitable bingo").

4. Texas next argues without elaboration that the Fifth Circuit's view of the Act is consistent with courts' and commentators' view of the interaction between *Cabazon* and IGRA. Br. 32. Its argument appears to be that IGRA differs from Public Law 280 because it provides states with some additional leverage (*e.g.*, under IGRA, to engage in Class III gaming permitted to others in a state, tribes must first negotiate compacts with the state). But IGRA, like the Restoration Act, embraces the prohibitory/regulatory distinction to determine whether a state prohibits a gaming activity. See Pueblo Br. 13–14. IGRA thus provides another example of a statute incorporating *Cabazon*'s prohibitory/regulatory framework without importing the Public Law 280 regime wholesale—just as Congress did in section 107 of the Restoration Act.

5. Texas also claims that legislative history supports its position. Br. 41. The opposite is true. See Pueblo Br. 33. Texas has no persuasive response to (i) Chairman Udall's statement that the Restoration Act as it emerged from the Senate was "in line with the rational[e] of the recent Supreme Court decision in the case of Cabazon Band of Mission Indians versus California" and would "codify for these tribes the holding and rational[e] adopted in the Court's opinion in the case," 133 Cong. Rec. 22,114 (1987), or (ii) the Senate Report's confirmation that section 107(b) "is a restatement of the law as provided in [Public Law 280], and

should be read in the context of the provisions of Section 105(f),'' S. Rep. No. 100-90, at 10–11 (1987).

Instead, Texas argues that it opposed legislation that did not make state gaming laws directly applicable on tribal lands. This goal, of course, became significantly more difficult to achieve after *Cabazon*, which strengthened the Tribes' position. See *supra*, p. 10.

6. Finally, Texas argues that Congress has acquiesced in *Ysleta I*'s interpretation of the Restoration Act. Br. 43–45. Yet "[w]hat [Texas] refers to as 'Congress' deliberate acquiescence' should more appropriately be called Congress's failure to express any opinion," *Rapanos* v. *United States*, 547 U.S. 715, 750 (2006) (plurality opinion). Congress has never amended the Restoration Act since its passage. "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency of N. Cook Cnty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001) ("*SWANCC*"). Accordingly, "[f]ailed legislative proposals," such as those Texas cites, "are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.' " *Id.* at 169–70 (quoting *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994)).

To be sure, in rare instances, this Court has suggested that if a construction "has been brought to Congress' attention through legislation specifically designed to supplant it," Congress's failure to overturn it can be "some evidence of the reasonableness of that construction." *United States* v. *Riverside Bayview*

Homes, Inc., 474 U.S. 121, 137 (1985). But this Court has also warned that this principle must be applied "with extreme care," and only when there is "overwhelming evidence of acquiescence." *SWANCC*, 531 U.S. at 169 & n.5. This usually entails Congress having chosen not to overturn a prior construction even though it "amended the [relevant] statute in other respects." *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979). Here, Congress has never amended the Restoration Act. A handful of bills and hearings regarding a statute that has never been amended does not constitute the "overwhelming evidence of acquiescence" required to "overcom[e] the plain text and import" of the Act. *SWANCC*, 531 U.S. at 169–70 & n.5.

III. THE RESTORATION ACT AND IGRA CAN AND SHOULD BE HARMONIZED.

IGRA and the Restoration Act should be interpreted to preserve the effectiveness of both where possible, under the canon favoring the harmonization of federal statutes over displacement. Pueblo Br. 34–36.[6]

Texas argues that the relevant statutory-interpretation principle is that the specific statute (the

[6] Texas says "the Pueblo . . . asks the Court to resolve whether the NIGC should regulate Class-II gaming on the Pueblo's reservation," and it is "unclear" this issue is before the Court. Br. 33. In fact, the Pueblo merely observed that IGRA's application to the Pueblo's gaming activities comports with IGRA's plain terms if it is not displaced by the Restoration Act. See Pueblo Br. 34–35; see also U.S. Br. 31–33. Texas offers no reason to think otherwise.

Restoration Act), not the general, later-enacted statute (IGRA), controls. Br. 33. But "[a] party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing 'a clearly expressed congressional intention' that such a result should follow." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1624 (2018). Texas cannot carry this burden because it has not shown that the Restoration Act and IGRA conflict in all, or even any, respects. On the Pueblo's interpretation, the statutes comfortably coexist. See Pueblo Br. 35–36, 48–49.

Texas's further argument—that "the Fifth Circuit *did* harmonize the Restoration Act and IGRA" by finding them "inconsistent," Br. 34–35—misunderstands harmonization.[7] The Fifth Circuit displaced IGRA entirely based on its finding of an inconsistency; and it did so without any "clearly expressed congressional intention" that IGRA does not apply to the Pueblo's gaming activities. Indeed, IGRA's legislative history reflects Congress's expectation that IGRA would apply to tribes generally, including in Texas. Pueblo Br. 36. And the Restoration Act itself reflects Congress's intent to confer on the Pueblo the benefits flowing from other federal laws supporting Indian tribes. *Id.* at 36–37. Texas addresses neither of these points.[8]

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[7] Texas also misunderstands the specific-governs-the-general canon. See Br. 34. It is not a tool for resolving ambiguity, but a rule of priority "when conflicting provisions simply cannot be reconciled." Scalia & Garner, *supra*, at 183.

[8] Texas tries to minimize its prior concession that IGRA and the Restoration Act should be harmonized. It claims it said only

IV. TEXAS LACKS AUTHORITY TO REGULATE BINGO ON THE TRIBES' RESERVATIONS.

Texas makes two final arguments. First, it contends that because the Tribe's bingo activities "violat[e] Texas statutory law," Texas can apply those laws to the Tribe. Br. 45. Second, it suggests the Tribe is really offering "casino-style gaming" rather than "bingo," such that the Tribe's activities are prohibited. Br. 19. Both arguments are wrong.

First, it makes no difference whether Texas's restrictions on bingo are found in statutes or regulations. What matters is that Texas's laws are regulatory—permitting bingo, subject to certain restrictions—rather than prohibitory. See Pueblo Br. 49–53. As Texas acknowledges, Texas permits some forms of bingo. To be sure, Texas limits how, when, and where bingo is played, but Texas's characterization of these exceptions as "narrow," Br. 5, does not make bingo "against public policy."[9] That a state's bingo laws limit bingo to charitable organizations and charitable purposes, or

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that the statutes should be harmonized, but that the key question is "how." Br. 35. In fact, the State said: "[W]ithout the framework provided by IGRA it would not be possible to regulate" the tribal gaming the Restoration Act permits "since the state has no regulatory, civil or criminal jurisdiction over gaming on Tribal lands." Conditional Cross-Petition for Writ of Certiorari at 8, *Texas* v. *Ysleta del Sur Pueblo*, No. 94-1310 (U.S. Jan. 30, 1995). That is consistent with the Pueblo's interpretation.

[9] Contrary to Texas's assertion that "gambling remains contrary to the State's public policy" (Br. 3), Texas promotes a statewide lottery, permits parimutuel horse and dog racing (including off-track betting), and allows county governments to license game rooms. Tex. Loc. Gov't Code Ann. § 234.131 *et seq*.

that violation of those laws carries criminal penalties, does not make the laws prohibitory. See Pueblo Br. 49–53. Texas makes no effort to distinguish its bingo laws and regulations from those that this Court (in *Cabazon*) and the Fifth Circuit (in *Seminole Tribe of Fla.* v. *Butterworth*, 658 F.2d 310 (5th Cir. Unit B 1981)), found regulatory—rather than prohibitory.

Second, Texas implies that the Tribe's games are not "bingo"—and therefore are subject to Texas's general prohibition on "casino-style gambling," Br. 5—because they take place in a "dimly lit, cavernous hall" using machines that "look and sound" like slot machines. Br. 15–16. But Texas's definition of "bingo" does not depend on whether a building is "dimly lit" or "cavernous" or on how machines "look and sound." Instead, Texas law defines bingo as "a specific game of chance, commonly known as bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols conforming to randomly selected numbers or symbols." Tex. Occ. Code Ann. § 2001.002(4).

The Tribe's gaming activities at Speaking Rock satisfy this definition. See *Texas* v. *Alabama-Coushatta Tribe of Tex.*, No. 9:01-CV-299, 2021 WL 3884172, at *12 (E.D. Tex. Aug. 31, 2021) (holding Alabama-Coushatta's essentially identical gaming activities "are not subject to the State's restrictions governing bingo unless and until the State of Texas prohibits that gaming activity by law outright, as it has done with other gaming activities"), *appeal docketed*, No. 21-40722 (5th Cir.

Sept. 30, 2021). As to the Tribe's one-touch machines, "the underlying game is run by using historical bingo draws." App. 30.[10] "Players are assigned a bingo card based on an electronically maintained stack of cards," *id.*, and then "[t]o determine if a player wins, the software applies a preset, historical ball draw to the card on the screen. If the player's card would have achieved a bingo based on the ball draw retrieved by the machine's software, then the player wins his session of play," *id.* at 31 (citation omitted).

In other words, the machines determine whether "designated numbers or symbols"—those appearing on the player's assigned card—"confor[m] to randomly selected numbers or symbols"—those selected in a historical bingo draw. The machines therefore fall within Texas's definition of bingo. While Texas may disapprove of their "look and sound," the machines are a form of bingo, and Texas law does not prohibit bingo. Although Texas imposes some regulatory restrictions on bingo, the Restoration Act prevents Texas from applying those restrictions on the Pueblo's reservation. Texas's arguments here only confirm that *Ysleta I*'s erroneous bestowal of regulatory authority that Congress denied to the State continues to infect district court review of the Tribe's gaming activities. Because

[10] There is no serious question that the Tribe's "live call bingo" is bingo. Texas's only complaint is that the Tribe's card-minding devices do not comply with Texas regulations, and that the Tribe offers bingo more often than Texas law would allow. See App. 45.

Texas permits some bingo to others in the State, the Tribe is free to conduct bingo on its sovereign land without interference by Texas.[11]

CONCLUSION

For the foregoing reasons and those set forth in the opening brief, the Court should reverse.

Respectfully submitted,

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[11] The provisions cited by Texas at Br. 45–46 played no role in the district court's grant of summary judgment, see App. 43–45, and do not show that Texas prohibits rather than regulates bingo.