No. 19____

IN THE

Supreme Court of the United States

ALABAMA-COUSHATTA TRIBE OF TEXAS,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

On August 18, 1987, Congress passed acts codifying relationships with two distinct, sovereign Indian tribes: the Wampanoag Tribe of Gay Head of Massachusetts and the Alabama-Coushatta Indian Tribe of Texas. Each Act—the Settlement Act for the Wampanoag, and the Restoration Act for the Alabama-Coushatta—prohibited gaming on tribal lands to the same extent it was prohibited by the States in which those tribal lands were located.

In 1988, Congress passed the Indian Gaming Regulatory Act (IGRA), which "provide[d] a statutory basis for the operation of gaming by Indian tribes" and established "Federal standards for gaming on Indian lands." 25 U.S.C. §§ 2701–2721. The National Indian Gaming Commission, the agency entitled to interpret IGRA, concluded that IGRA permitted both the Wampanoag and Alabama-Coushatta to conduct bingo operations on each Tribe's lands.

The question presented is:

Whether IGRA authorizes gaming on tribal lands previously governed by trust statutes that prohibited gaming, as the National Indian Gaming Commission, the Department of the Interior, and the First Circuit have concluded, or not, as the Fifth Circuit has held.

PARTIES TO THE PROCEEDING

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

STATEMENT OF RELATED PROCEEDINGS

Texas v. *Alabama-Coushatta Tribe of Texas*, No. 18-40116 (5th Cir.) (opinion filed and judgment entered Mar. 14, 2019; petitions for rehearing and rehearing en banc denied May 24, 2019; mandate issued June 3, 2019)

Texas v. *Alabama Coushatta Tribe of Texas*, No. 9:01-cv-299 (E.D. Tex.) (memorandum opinion and order issued Feb. 6, 2018; stay pending appeal granted Feb. 26, 2018)

Alabama-Coushatta Tribe of Texas v. *Texas*, No.03-270 (U.S.) (certiorari denied Oct. 6, 2003)

Alabama Coushatta Tribe of Texas v. *Texas*, No. 02-41030 (5th Cir.) (opinion filed and judgment entered Apr. 16, 2003; petition for rehearing en banc denied May 22, 2003; mandate issued May 30, 2003)

Alabama Coushatta Tribes of Texas v. *Texas*, No. 9:01-cv-299 (E.D. Tex.) (memorandum opinion and order granting preliminary injunction issued June 25, 2002; order dismissing complaint issued June 28, 2002; final judgment entered July 17, 2002)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Alabama-Coushatta Tribe of Texas 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. 54–55) is unreported. The panel opinion (App. 1–18) is reported at 918 F.3d 440. The district court's opinion and order (App. 19–53) is reported at 298 F. Supp. 3d 909.

JURISDICTION

The court of appeals entered its order denying rehearing on May 24, 2019. An application to extend the time to file a petition for a writ of certiorari was granted on August 14, 2019, making the petition due on or before September 23, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Ysleta del Sur Pueblo and Alabama and 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. 56–71).

The Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100–497, 120 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701–2721), is attached in the Appendix (App. 179–231).

STATEMENT

This Court has long recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory." *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (quoting *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975)). Tribal sovereignty is deeply rooted in our Nation's history of recognizing tribes' inherent rights as independent nations.

These sovereign nations historically have had some of the worst living conditions in the United States. See Steven Andrew Light & Kathryn R.L. Rand, *Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy*, 4 Nev. L.J. 262, 267 & n.25 (2004). The economic opportunities available to tribes are dictated in large part by the resources available on reservation land, which are often woefully insufficient to support the tribe's members. *Id.* at 278–79. Often, these lands provide scant capacity for grazing cattle, growing crops, or developing other natural resources like oil, gas, or minerals. *Ibid.* Consequently, tribes today often have little, if any, opportunity to engage in commercial enterprises on their reservations—and few opportunities to market goods or services produced on a reservation to communities outside it. *Ibid.*

Hence the foundation of federal Indian law and policy is assisting these sovereign nations to achieve the "overriding goal" of "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.

When Congress passed the Indian Gaming Regulatory Act (IGRA) in 1989, it recognized that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(4). Though previous tribe-specific statutes took inconsistent positions on whether tribes could conduct gaming operations on tribal land, IGRA set out a uniform, nationwide standard, regulating Indian gaming to shield both tribes and gaming from organized crime, ensure that tribes are its primary beneficiaries, and assure fair and honest gaming—all while "promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1)–(2).

IGRA thus affords sovereign tribes a reasonable opportunity to support themselves as independent, self-sufficient sovereigns despite the bleak condition of their tribal lands. The roughly 30 states with Indian gaming operations have realized extensive economic and social benefits from tribal gaming—from increased tax revenues to decreased public entitlement payments. See Light & Rand, 4 Nev. L.J. at 267 & n.29. IGRA plays a critical role in helping tribes chart a path toward economic self-sufficiency through their resource-depleted tribal lands.

The National Indian Gaming Commission (the Commission)—an agency within the Department of the Interior charged with interpreting and enforcing IGRA, see 25 U.S.C. §§ 2704–2716—has concluded that IGRA governs tribal gaming across the Nation, regardless of prior conflicting, tribe-specific laws. The

Department of the Interior, numerous sovereign tribes, and the First Circuit agree. *Massachusetts* v. *Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618, 626–29 (1st Cir. 2017). The Fifth Circuit instead adheres to its prior precedent—erroneously believing itself bound by *stare decisis*, rather than the Commission's intervening, authoritative interpretation, as this Court's decision in *National Cable & Telecommunications Association* v. *Brand X Internet Services*, 545 U.S. 967, 982 (2005), teaches.

As a result, two sovereign tribes—each with materially similar tribe-specific statutes preceding IGRA, and each with the Commission's authorization to offer gaming—have experienced opposite outcomes solely because of the circuits in which they are located.

That disparity is intolerable. This Court's review is necessary to restore nationwide uniformity on an exceedingly important question of federal Indian law and policy, vindicate tribal sovereignty, and enforce the "enduring principle of Indian law" that "courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014).

1. The Alabama-Coushatta Tribe is a sovereign, self-governing Indian tribe. Its people have been acknowledged as a distinct Indian culture for hundreds of years. Beginning as the separate and independent Alabama Tribe and Coushatta Tribe in the Southeastern United States, the Alabama-Coushatta migrated to east Texas in the 1800s and settled on lands near the Tribe's current reservation. Sheri Marie Schuck-Hall, *Journey to the West: The Alabama and Coushatta Indians* 8 (2008).

Today, the Tribe has a trust relationship with the United States, through which the Tribe receives limited funding from the Bureau of Indian Affairs and other benefits. But it was not always so. For a time, the State of Texas had trust responsibility for the Tribe. In 1983, however, the Texas Attorney General called into doubt the validity of the trust relationship between the Tribe and the State, App. 91, 111, triggering a years-long effort in Congress to "restore" the Tribe's federal trust status.

2. While those efforts were underway, this Court decided *Cabazon*, which articulated a broad principle of deference to tribal sovereignty where gaming activities were concerned. There, California prohibited the same kind of gaming at issue here—a sovereign tribe's "bingo enterprises"—in the interest of "preventing the infiltration of the tribal bingo enterprises by organized crime." 480 U.S. at 221. Justice White's opinion for the Court acknowledged the weightiness of that interest, but held that it could "not justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting them." *Id.* at 221–22.

The Court highlighted both the federal government's and tribes' interests in tribal gaming as a tool for tribal self-rule. *Ibid.* With "no natural resources which can be exploited," bingo "provide[d] the sole source of revenues for the operation of the tribal governments and the provision of tribal services." *Id.* at 218–19. And "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." *Id.* at 219. The Court concluded that "State regulation would impermissibly infringe on

tribal government" and held that California could not bar tribes from offering bingo on tribal lands. *Id.* at 222.

3. Six months after *Cabazon*, efforts to restore the Alabama-Coushatta's federal trust status culminated in the Restoration Act. That Act not only reestablished the trust relationship between the Tribe and the federal government, but also restored various federal legal rights that the Tribe had enjoyed decades earlier and recognized the Tribe's Constitution and governing Council. See Restoration Act §§ 203–04, 206, 101 Stat. at 670–72. Congress anticipated that it would enact future laws favorable to Indian tribes, and made the Tribe eligible for "all" such "benefits and services." Restoration Act § 203(c), 101 Stat. at 670.

The Restoration Act also included provisions related to gaming on tribal lands. Section 207(a) provided that "[a]ll gaming activities which are *prohibited* by the laws of the State of Texas are hereby *prohibited* on the reservation and on lands of the [Alabama-Coushatta] tribe." Restoration Act § 207(a), 101 Stat. at 672 (emphases added). And Section 207(b) clarified that "[n]othing in this section shall be construed as a grant of civil or criminal *regulatory* jurisdiction to the State of Texas." Restoration Act § 207(b), 101 Stat. at 672 (emphasis added).

4. Congress passed IGRA a mere 14 months after the Restoration Act was signed into law, in part because laws like the Restoration Act did not take proper account of *Cabazon*'s meaning and implications. Pub. L. No. 100–497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701–2721). Congress recognized, in light of *Cabazon*, that "Indian tribes [should]

have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and [the State] does not * * * prohibit such gaming activity." 25 U.S.C. § 2701(5). IGRA sought "to promote tribal economic development, tribal self-sufficiency, and strong tribal government" by establishing "Federal standards for gaming on Indian lands." 25 U.S.C. §§ 2701(4), 2702(2)–(3).

IGRA created a three-tiered regulatory framework for Indian gaming. 25 U.S.C. § 2703(6)–(8). "Class I Gaming"—traditional forms of Indian gaming for small prizes—falls within the tribes' exclusive jurisdiction. 25 U.S.C. §§ 2703(6), 2710(a)(1). "Class II Gaming"—bingo and card games—is permitted when there is a tribal gaming ordinance approved by the Commission and the State permits anyone else to engage in that type of gaming. 25 U.S.C. §§ 2703(7)(A), 2710(b). "Class III Gaming" covers all other gaming and is permitted only pursuant to a State-Tribe compact. 25 U.S.C. §§ 2703(8), 2710(d).

5. Following *Cabazon*'s broad affirmation of Indian gaming rights (and the passage of IGRA), the Ysleta del Sur Pueblo Tribe—whose reservation is near El Paso—tried to negotiate a compact with the State so that the Ysleta could offer Class III gaming in 1993. *Ysleta del Sur Pueblo* v. *Texas*, 36 F.3d 1325 (5th Cir. 1994). The State refused to negotiate, relying on the Restoration Act's language that "gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the [Ysleta] tribe." *Id.* at 1329 (quoting Restoration Act § 107(a), 101 Stat. at 668–69). The Ysleta sued to compel the State to negotiate. *Id.* at 1331–32. The

district court agreed with the Tribe and directed the State to negotiate. *Ibid.*

The Fifth Circuit reversed. *Id.* at 1334. Declining to apply *Cabazon*'s framework, the Fifth Circuit determined that the Restoration Act conflicted with IGRA because the former authorized the State to sue the Ysleta, while the latter permitted the Ysleta to sue the State. *Id.* at 1332–37 ("We find it significant that § 107(c) of the Restoration Act establishes a procedure for enforcement of § 107(a) which is fundamentally at odds with the concepts of IGRA."). The court ultimately held that the Restoration Act controlled—not IGRA. *Id.* at 1334. In reaching that conclusion, the Fifth Circuit adopted a position that was neither briefed nor argued by the parties—that IGRA's three-tier system did not apply at all to the Ysleta's gaming activities. See *ibid.*

6. The Alabama-Coushatta quickly felt *Ysleta*'s effect. In 2002, the State sought and obtained a permanent injunction against the Tribe's nascent gaming facility. Relying on *Ysleta*, the district court ordered the Tribe to cease "gaming and gambling activities on the Tribe's Reservation which violate State law." *Alabama-Coushatta Tribes of Tex.* v. *Texas*, 208 F. Supp. 2d 670, 674–78, 681 (E.D. Tex. 2002). The Fifth Circuit affirmed, observing that "[h]owever sympathetic we may be to the Tribe's argument" that *Ysleta* was wrong, "we may not reconsider *Ysleta*, even if we believed that the case was wrongly decided." *Alabama Coushatta Tribe of Tex.* v. *Texas*, 66 F. App'x 525 (5th Cir. 2003). The Tribe ceased all gaming on its lands. App. 8.

7. After a decade of "[l]imited economic development" and "dwindling government funding" left the Tribe "struggling to provide basic services to [its] people," the Alabama-Coushatta sought approval from the Commission to pursue its "right to engage in gaming pursuant to IGRA." *Legislative Hearing on H.R. 2684 Before the H. Subcomm. on Indian, Insular, and Alaska Native Affairs of the H. Comm. on Nat. Res.*, 114th Cong. 7 (July 15, 2015) (statement of Ronnie Thomas, Alabama-Coushatta Tribal Council Vice-Chairman), https://docs.house.gov/meetings/ii/ii24/20150715/103740/hhrg-114-ii24-wstate-battisen-20150715.pdf (without gaming the Tribe will face "a reduction in essential services and an increase in unemployment").[1]

As IGRA requires, the Tribe adopted an ordinance authorizing Class II bingo and submitted it to the Chairman of the Commission for approval. App. 8; see 25 U.S.C. §§ 2705(a)(3), 2710(b)(1)(B), 2710(b)(2), 2710(e). The Chairman approved the Tribe's request, explaining that "[n]othing in the IGRA's language or its legislative history indicates that the Tribe is outside the scope of NIGC's jurisdiction." App. 175.

In coming to that conclusion, the Commission consulted with the Department of the Interior (the agency charged with administering the Restoration Act). The

[1] As Vice-Chairman Thomas explained, "Federally-recognized tribes throughout the United States with gaming operations as a source of revenue have the means to offset these dwindling government funding sources. This permits these tribes to continue to provide for the housing, healthcare, education, and other needs of their members. This type of economic self-sufficiency is what our Tribe is seeking." *Ibid*.

Department concurred. App. 126–27, 171–72. Employing "the standard rules of statutory construction," "the Department interpret[ed] the IGRA as impliedly repealing the gaming provisions of the Restoration Act" because they were "repugnant to the IGRA." App. 147.

8. After receiving the Commission's approval, the Tribe opened its Class II bingo gaming facility in conformance with IGRA's requirements. App. 27. Upon inspection of the facility, however, the State determined that the Tribe's Class II bingo violated Texas gaming laws and regulations, IGRA notwithstanding. App. 10, 29–30. In August 2016, the State moved to hold the Tribe in contempt for violating the 2002 injunction, which prohibited "gaming and gambling activities on the Tribe's Reservation which violate State law." App. 25, 29 (citing 208 F. Supp. 2d at 682); see App. 10.

The Tribe moved for relief from the injunction under this Court's decision in *Brand X*. There, this Court held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only* if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." 545 U.S. at 982 (emphasis added). The Tribe argued that *Ysleta* was not such a decision. App. 15, 49; *Ysleta*, 36 F.3d at 1333 ("The Tribe's argument is appealing only because § 107(a) of the Restoration Act uses the word 'prohibit.' But our analysis of the legislative history of both the Restoration Act and IGRA leads us to a conclusion contrary to that sought by the Tribe."). As a result, the Tribe argued, under *Brand X* the Commission's authoritative

interpretation of IGRA constituted a change in the law that required modifying the injunction to permit Class II gaming. App. 10, 30–31.

9. After the State filed its contempt motion, but before the district court ruled, the First Circuit decided a case involving the Wampanoag Tribe's Settlement Act—enacted on the same day at the Alabama-Coushatta's Restoration Act—and its relationship to IGRA. *Aquinnah*, 853 F.3d at 621–29. Unlike the Fifth Circuit in *Ysleta*, the First Circuit in *Aquinnah* held that IGRA permitted the Wampanoag's proposed Class II gaming operations. *Id.* at 626–29. The court explained:

> [R]eading the two statutes to restrict state jurisdiction over gaming honors [IGRA] and, at the same time, leaves the heart of the * * * Settlement Act untouched. Taking the opposite tack—reading the two statutes in such a way as to defeat tribal jurisdiction over gaming on the settlement lands—would honor the Settlement Act, but would do great violence to the essential structure and purpose of [IGRA].

Id. at 627 (second and fourth alterations in original) (quoting *Rhode Island* v. *Narragansett Indian Tribe*, 19 F.3d 685, 704–05 (1st Cir. 1994)).

10. Thereafter, the district court denied the Alabama-Coushatta's motion for relief from the injunction, concluding it was bound by *Ysleta*'s expansive holding that the Restoration Act—not IGRA—applied to the Tribe's gaming. App. 11, 44, 50.

The Fifth Circuit affirmed. App. 12–18. Notwithstanding *Ysleta*'s explicit reliance on legislative history rather than statutory text, 36 F.3d at 1333, the

panel concluded that it was bound by *Ysleta* because, in the panel's view, that decision held "that its construction follows from the *unambiguous terms of the statute* and thus leaves no room for agency discretion." App. 12–13 (quoting *Brand X*, 545 U.S. at 982). The panel thus held that *Ysleta* controlled and trumped the Commission's Class II gaming decision. App. 18.

11. The Tribe sought rehearing en banc, asking the full court to revisit and overrule its 1994 *Ysleta* decision or, alternatively, to correct the panel's erroneous application of *Brand X*. The court denied rehearing. See App. 54–55.

REASONS FOR GRANTING THE PETITION

Multiple sovereigns—the federal government, the State of Texas, and the Alabama-Coushatta Tribe—along with multiple courts of appeals disagree on a cleanly presented, crucial question of Indian law. While the First Circuit holds (in agreement with the Department of the Interior) that IGRA authorizes gaming by a tribe with a materially similar trust statute as the Alabama-Coushatta, the Fifth Circuit holds the opposite. Compare *Aquinnah*, 853 F.3d at 626–29, with App. 15–18. In reaching its conflicting decision, the Fifth Circuit also departed from this Court's decisions in *Cabazon* and *Brand X*. This split among the circuits results in the intolerable situation that tribes are subject to one legal regime in one part of the Nation, and an entirely different regime elsewhere in the Nation.

The lack of uniformity is particularly intolerable because "[t]he Federal Government's power over Indians is derived from Art. I, § 8, cl. 3, of the United States Constitution, *and from the necessity of giving*

uniform protection to a dependent people." *Williams* v. *Lee*, 358 U.S. 217, 219 n.4 (1959) (emphasis added; citation omitted). The practical consequences of the decision below are devastating. Unless this Court intervenes, federally recognized tribes will be deprived of their ability to engage in federally approved economic activity that is undeniably critical to tribal economic development, self-sufficiency, and self-government—returning the tribes to an era of 50 percent unemployment and a median household income well below the poverty line. See *Cabazon*, 480 U.S. at 219 ("Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members."). This Court should intervene, as it did in *Cabazon*, to prevent these dire consequences and restore "uniform protection" to the tribes.

I. THIS COURT'S REVIEW IS NEEDED TO RESOLVE A MULTI-SOVEREIGN, MULTI-CIRCUIT CONFLICT OVER THE PROPER INTERPRETATION OF THE INDIAN GAMING REGULATORY ACT.

In *Ysleta*, the Fifth Circuit determined that:

(1) The Restoration Act and IGRA establish "fundamentally different regimes," and

(2) IGRA, enacted after the Restoration Act, does not apply to the tribes at all (even though the Restoration Act itself anticipated that Congress would enact future laws for the tribes' benefit).

See 36 F.3d at 1334–35. The Fifth Circuit panel in this case—believing itself bound by *Ysleta*'s construction of the statute (notwithstanding the federal gov-

ernment's contrary intervening determination)—applied *Ysleta* to hold that "IGRA does not apply to the Tribe, and the NIGC does not have jurisdiction over the Tribe." App. 18.

That conclusion sharply conflicts with the First Circuit's decision in *Aquinnah* holding just the opposite. It conflicts with the federal government's determination that it has jurisdiction (through the Commission) over the Tribe's gaming, and with the Department of Interior's determination as to the scope of the Restoration Act. And it conflicts with this Court's decisions in *Cabazon* and *Brand X*. The resulting disparate treatment of Indian rights—based solely on the location of a tribe's ancestral lands—has extraordinarily severe consequences and warrants this Court's review.

A. The Fifth Circuit's Interpretation Of IGRA Irreconcilably Conflicts With The First Circuit's.

In *Aquinnah*, the First Circuit held that IGRA applied notwithstanding provisions in a Settlement Act—signed into law the same day as the Restoration Act—subjecting a tribe to "the civil and criminal laws, ordinances, and jurisdiction" of Massachusetts, "including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance." 853 F.3d at 622, 626–29. The First Circuit concluded that IGRA "trumped" the prior legislation to the extent of any gaming repugnancy—especially in the absence of a provision that would expressly preclude IGRA's application. *Id.* at 626–29.

In doing so, the First Circuit rejected the same position the Fifth Circuit has embraced. The district

court in *Aquinnah*—in the decision the First Circuit reversed—relied on *Ysleta* to conclude that IGRA did *not* trump the prior statutes, which barred the Wampanoag Tribe from offering gaming on its land. See *Massachusetts* v. *Wampanoag Tribe of Gay Head (Aquinnah)*, 144 F. Supp. 3d 152, 157–58, 167, 171 (D. Mass. 2015), rev'd and remanded, 853 F.3d 618 (1st Cir. 2017).

The First Circuit explained that the provisions making state gaming law applicable to the tribe there were added to the Settlement Act in response to *Cabazon*: "Approximately six months before Congress passed the [Settlement Act], the Supreme Court decided *Cabazon*, which created considerable uncertainty about Indian law, specifically with respect to gaming." 853 F.3d at 628 (citation omitted); but see *Ysleta*, 36 F.3d at 1333–34 (rejecting tribe's argument that the Restoration Act—which became law the same day as the Settlement Act—incorporated *Cabazon*).

The Settlement Act's gaming provision was thus a stopgap measure that allowed state gaming law to apply on tribal lands, but "said nothing about the effect of future federal law." *Aquinnah*, 853 F.3d at 628–29. That gaming language was impliedly repealed by IGRA, the First Circuit held, because when two statutes "are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first." *Id.* at 627 (quoting *United States* v. *Tynen*, 78 U.S. (11 Wall.) 88, 92 (1870)).

As a result, under the First Circuit's decision in *Aquinnah*, IGRA would apply to the Alabama-Coushatta. The conflict with the Fifth Circuit—which has held the exact opposite—could not be more stark.[2]

B. The Fifth Circuit's Interpretation Conflicts With Interpretations By The Agencies Empowered To Interpret IGRA And The Restoration Act.

Congress passed IGRA in the wake of *Cabazon* to displace "existing Federal law" that failed to "provide clear standards or regulations of the conduct of gaming on Indian lands." 25 U.S.C. § 2701(3). IGRA's purpose was to establish "Federal standards for gaming on Indian lands" and it created the Commission to administer the Act. 25 U.S.C. §§ 2702(3), 2704(a). To achieve its nationwide goals, the Act was written broadly to encompass any federally recognized tribe that exercises self-governance. 25 U.S.C. § 2703(5). And, of course, nothing in IGRA exempts the Tribe from its coverage. This was the basis for the Commission's determination that it has jurisdiction over the Tribe. App. 175.

The Commission, which is part of the Department of the Interior, is the "independent Federal regulatory authority for gaming on Indian lands." 25 U.S.C. § 2702(3). Congress gave the Commission and its

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[2] The denials of certiorari in *Ysleta, Alabama Coushatta*, and *Aquinnah* do not militate against review here. The circuit split is now entrenched and intractable, the issue continues to recur, and the conflict has only widened as the Commission and the Department of Interior have weighed in to support the position taken by the Tribe (and the First Circuit).

Chairman broad powers over Indian gaming, including the authority to promulgate regulations under IGRA, 25 U.S.C. § 2706(b)(10), to close Indian gaming facilities for violating IGRA, 25 U.S.C. § 2713(b)(1), and to impose civil fines for violating IGRA, its regulations, or tribal gaming regulations. 25 U.S.C. § 2713(a)(1); see App. 5 ("IGRA created the [Commission] to administer its provisions, instructing the [Commission] to 'promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter.'"). As courts across the Nation have noted, the Commission's determinations pursuant to IGRA are authoritative. See, e.g., *Seneca-Cayuga Tribe of Okla.* v. *Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1036–42 (10th Cir. 2003); *Shakopee Mdewakanton Sioux Cmty.* v. *Hope*, 16 F.3d 261, 264–65 (8th Cir. 1994).

The Department of the Interior has confirmed that IGRA applies to the Tribe. App. 144–72; see Restoration Act § 2, 101 Stat. at 666. In direct conflict with the Fifth Circuit, the Department applied "the standard rules of statutory construction * * * [to] interpret the IGRA as impliedly repealing the gaming provisions of the Restoration Act" because they were "repugnant to the IGRA." App. 146–47. Both the Commission and the Department of the Interior interpret the statutes to permit gaming on Alabama-Coushatta tribal lands; the State of Texas and Fifth Circuit do not. This Court's review is needed not only to resolve an entrenched circuit split, but also to provide guidance on a question affecting multiple administrative agencies, multiple sovereign tribes, and a sovereign State.

C. The Fifth Circuit's Decision Conflicts With This Court's Precedent.

By upholding *Ysleta* despite intervening agency action authoritatively interpreting both IGRA and the Restoration Act, the Fifth Circuit departed from this Court's precedent in two ways. First, it created a conflict with this Court's decision in *Brand X*, which precisely answers which interpretation prevails in a conflict between a prior judicial interpretation and a contrary administrative interpretation—the administrative interpretation. Second, it cannot be reconciled with this Court's decision in *Cabazon*. Both departures underscore the need for this Court to resolve this multi-sovereign, multi-circuit conflict.

Brand X is clear: an agency's interpretation overrides a prior, contrary court decision unless "the prior court decision holds that its construction follows from the *unambiguous terms of the statute*." 545 U.S. at 982, 984 (emphasis added); *id*. at 985 ("the court must hold that the statute unambiguously requires the court's construction"). The Fifth Circuit ignored this mandate by "look[ing] for the contrary—whether the decision called the statute 'ambiguous.'" App. 14–15.[3]

But this inverts what *Brand X* demands. Indeed, this was the approach taken by the Ninth Circuit, which this Court reversed in *Brand X* itself. See 545 U.S. at 982. Rather than presuming that the administrative decision controlled and then determining whether any inconsistent prior precedent held that

[3] This Court need not reach the panel's *Brand X* determination to review (and reverse) *Ysleta*'s statutory-construction holding, which of course does not bind this Court.

the statute unambiguously demanded a particular result, the Fifth Circuit looked only to whether it had previously acknowledged that IGRA was ambiguous. App. 15. *Ysleta* did no such thing, as the Fifth Circuit noted. But that proves the opposite of the Fifth Circuit's holding. Because *Ysleta* did not state whether IGRA was ambiguous, under *Brand X* the *agency's* decision should have controlled—not the Fifth Circuit's prior determination.

In addition to inverting the *Brand X* presumption, the Fifth Circuit ignored the only arguable basis for upholding *Ysleta* in the first place: IGRA's unambiguous text. *Ysleta* relied on anything but. There, the Fifth Circuit thoughtfully discussed the legislative history of the Restoration Act, 36 F.3d at 1327–28, the Senate Report about prior versions of the Restoration Act, *id.* at 1329, this Court's decision in *Cabazon*, *id.* at 1330–31, other circuits' holdings under IGRA, *id.* at 1332–33, and a floor statement of Representative Udall about the interaction of the Restoration Act and *Cabazon*. *Id.* at 1334.

But the *Ysleta* court made little effort to reconcile the *text* of IGRA with the *text* of the Restoration Act—let alone conclude that either led to an unambiguous result. But as *Brand X* made clear, "[b]efore a judicial construction of a statute * * * may trump an agency's, the court must hold that the statute unambiguously requires the court's construction." *Brand X*, 545 U.S. at 985. *Ysleta* "did not do so." *Ibid.* Absent that basis, the Fifth Circuit had no warrant to ignore the contrary determinations by the Commission and the Department of the Interior.

In rejecting IGRA's application, *Ysleta* also departed from this Court's teachings in *Cabazon*. IGRA adopted the central holding of *Cabazon*—that Indian tribes are subject to state gaming *prohibitions*, but not state *regulations*. *Bay Mills*, 572 U.S. at 794. That same rule appears in the text of the Restoration Act (enacted six months after *Cabazon*). App. 70–71. The plain text of the Restoration Act thus allows it to be read in harmony with IGRA. *Traynor* v. *Turnage*, 485 U.S. 535, 548 (1988) ("when two statutes are capable of co-existence, it is the duty of the courts * * * to regard each as effective"); *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 432 n.43 (1972) ("When there are two acts on the same subject the rule is to give effect to both if possible."); see also *Aquinnah*, 853 F.3d at 627 (same).

Alternatively, if the statutes truly could not be harmonized, the Fifth Circuit should have heeded Congress's intent that IGRA prevail to the extent it conflicts with the Restoration Act. App. 167–71 (Dep't of the Interior Letter). While implied repeals are disfavored, to the extent two statutes must be read in conflict, the later in time should control (as the First Circuit held). See *Aquinnah*, 853 F.3d at 626–29. Either approach would resolve the *Ysleta* conflict.[4]

By denying the Tribe the protection of both IGRA and *Cabazon*, however, the Fifth Circuit undermined tribal sovereignty without any textual basis for doing

[4] The Fifth Circuit also ignored the "Indian canon" of interpretation, which provides that "statutes passed for the benefit of dependent Indian tribes * * * are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan* v. *Itasca Cty.*, 426 U.S. 373, 392 (1976) (alteration in original).

so. As a result, the Alabama-Coushatta cannot engage in the commercial activity this Court determined was an essential, powerful interest in *Cabazon*. IGRA and the agency decisions interpreting it supply the controlling federal law that governs gaming on Indian land—and that law permits the Tribe to proceed with gaming, an opportunity critical to tribal sovereignty and economic self-sufficiency. Only this Court's intervention can bring the Fifth Circuit back into alignment with these key principles.

II. THE UNIFORM INTERPRETATION OF FEDERAL INDIAN GAMING LAW IS UNQUESTIONABLY IMPORTANT.

The Fifth Circuit's now-entrenched position impacts every Indian tribe by destroying national uniformity on important, recurring issues of Indian law—the scope of IGRA's authority over tribal gaming on Indian lands and the extent of the Commission's jurisdiction over Indian tribes. The purely legal questions here are cleanly presented and require no factual development, so there is no impediment to this Court's review. And the need to resolve these multi-sovereign conflicts is especially pressing because the foundations of tribal sovereignty—"[s]elf-determination and economic development"—will be severely undermined if the Fifth Circuit's decision is permitted to stand and the Tribe "cannot raise revenues and provide employment for [its] members." *Cabazon*, 480 U.S. at 219.

This case exemplifies the stakes. Before the Tribe opened its Class II bingo facility, nearly half the Tribe's members were unemployed, and the median household income was $10,809. App. 20. Those dire

circumstances—regrettably common in Indian country—stem from the wrongful dispossession of over two million acres of the Tribe's original reservation, leaving the Tribe with fewer than 4600 acres, none of which is suitable for farming or ranching. App. 20.

The Tribe's bingo facility—which the district court permitted to remain open pending final disposition of this litigation—is the Tribe's only promising opportunity. It is projected to generate nearly $120 million in operating revenue, and to have a nearly $140 million impact on the economy of the surrounding community, in one year alone. *Naskila Important for Regional Economy, Report Says*, Lufkin Daily News (Oct. 12, 2018), http://lufkindailynews.com/news/community/article_c1812488-c8c5-59e7-b496-d3acea3636e6.html. The facility has generated over 550 permanent jobs that pay over $15 million in annual wages. *Ibid*. It is no exaggeration to say that the Alabama-Coushatta's prospects as a people are entirely dependent on the facility's continued operation.

So too with the Ysleta. Nearly 50 percent of the tribe's members live below the federal poverty line, and the median household income is half that nationwide. *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. 5 (Sept. 14, 2018) (statement of Governor Carlos Hisa, Ysleta del Sur Pueblo), https://docs.house.gov/meetings/ii/ii24/20180913/108701/hhrg-115-ii24-wstate-hisac-20180913.pdf.

The Ysleta's Speaking Rock gaming facility is critical to the Tribe's "efforts to regain control of its eco-

nomic sovereignty." *Id.* at 3. The facility has generated over $150 million in local expenditures and created more than 785 jobs—making it the largest employer of the tribe's members. *Ibid*. Indeed, it was responsible for a 35 percent decrease in the tribe's unemployment rate. *Ibid*. When the facility was forced to close for several years as a result of litigation with the State (which is still ongoing), unemployment jumped from 3 to 28 percent, and funding for tribal services had to be slashed. *Id.* at 4.

Just as in *Cabazon*, the Alabama-Coushatta and the Ysleta have "no natural resources which can be exploited"—they rely on gaming as "the sole source of revenues for the operation of the tribal government[] and the provision of tribal services." 480 U.S. at 218–19. Just as in *Cabazon*, the loss of gaming means the loss of hundreds of jobs, millions of dollars, and any hope of economic self-sufficiency. *Ibid.* And just as in *Cabazon*, this Court should step in to prevent an untoward "infringe[ment] on tribal government" and to vindicate "compelling federal and tribal interests." *Id.* at 222. This Court's review is needed to restore these foundational principles and give "uniform protection to a dependent people." *Williams*, 358 U.S. at 219 n.4.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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