No. 19-403

In the Supreme Court of the United States

ALABAMA-COUSHATTA TRIBE OF TEXAS, PETITIONER

v.

STATE OF TEXAS

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In the mid-1980s, the Alabama-Coushatta Tribe of Texas asked Congress to grant it federally recognized status with all attendant benefits. After several failed attempts, the Tribe "request[ed] its representatives" in Congress enact a bill that would grant it that status on the condition, among other things, that "all gaming, gambling, lottery, or bingo, as defined by the laws of the State of Texas, shall be prohibited" on tribal lands. In 1987, Congress granted that request under those conditions when it enacted the Restoration Act.

Then the Tribe developed buyer's remorse. It came to rue that the legislation it asked for prevented it from operating lucrative casinos in Texas, which has long barred casinos as a matter of public policy. So the Tribe and its amici sought a do-over, and they thought they found one in the Indian Gaming Regulatory Act ("IGRA") of 1988, 25 U.S.C. §§ 2701-21. The Tribe's amici sued Texas, attempting to leverage IGRA to get out of the Restoration Act's strictures. That gambit first failed 25 years ago in *Ysleta del sur Pueblo v. Texas* ("*Ysleta I*"), 36 F.3d 1325 (5th Cir. 1994), *cert. denied*, 514 U.S. 1016 (1995), which rejected the Tribe's core theory. Multiple courts have since reaffirmed *Ysleta I*.

Now the Tribe and its amici are trying again. The question presented in this case is:

Whether the Fifth Circuit erred in standing by its 25-year-old rule that the Tribe is bound by the specific terms of the statute by which it gained federal recognition rather than the general terms of IGRA.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 918 F.3d 440. The order denying rehearing and rehearing en banc (Pet. App. 54-55) is unreported. The opinion of the district court (Pet. App. 19-53) is reported at 298 F. Supp. 3d 909.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATEMENT

This case concerns the interplay between two federal statutes that regulate Indian gaming. The first, the Indian Gaming Regulatory Act ("IGRA"), generally permits gaming on tribal lands "if the gaming activity is not specifically prohibited by" federal or state law. 25 U.S.C. § 2701(5). The second, the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act (the "Restoration Act" or the "Act"), specifically governs gaming by those two tribes. Pub. L. No. 100-89, 101 Stat. 666, 25 U.S.C. § 731 *et seq*.

A quarter-century ago, the Fifth Circuit correctly held that when it comes to gaming on Alabama Coushatta tribal land, the *specific* provisions of the Restoration Act—which speak directly the Alabama Coushatta Tribe's gaming rights—control over the *general* provisions of IGRA that apply to other tribes. *See generally Ysleta del sur Pueblo v. Texas* ("*Ysleta I*"), 36 F.3d 1325 (5th Cir. 1994), *cert. denied*, 514 U.S. 1016 (1995). This Court declined to review that decision at the time, *see id*.,

and since then has declined multiple times to review similar decisions by other courts.

This case is just another iteration of the Alabama Coushatta's decades-long refusal to accept that plainly correct result. The court below merely applies *Ysleta I*. It rejected the Tribe's latest argument, that recent letter guidance from an administrative agency now requires a different outcome. That argument misunderstands *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), which the Tribe's cert petition ignores until the end. *See* Pet. 18-19.

Instead, the bulk of the petition rehashes arguments that have been repeatedly rejected during the twenty-five years since the similarly situated Ysleta del Sur Pueblo tribe sought certiorari review of *Ysleta I*. If the issue presented in the petition is "intractable" and "continues to recur" (Pet. 16 n.2), it is only because of the two tribes' continued intransigence in the face of decisions repeatedly rejecting their attempts to circumvent the Restoration Act's gaming limitations. *See, e.g.*, *Texas v. Ysleta del sur Pueblo*, 431 F. App'x 326, 331 (5th Cir. 2011) (per curiam) ("Once again, . . . the Tribe's position on this issue is simply wrong."), *cert. denied*, 565 U.S. 1114 (2012); *see also, e.g.*, *Ysleta del sur Pueblo v. Texas*, 540 U.S. 985 (2003) (mem.) (denying certiorari); *Alabama-Coushatta Tribe of Tex. v. Texas*, 540 U.S. 882 (2003) (mem.) (denying certiorari); *Ysleta del Sur Pueblo v. Texas*, 537 U.S. 815 (2002) (mem.) (denying certiorari); *Ysleta del sur Pueblo v. Texas*, 532 U.S. 1066 (2001) (denying certiorari).

The court below properly held that *Ysleta I* conclusively resolved that the Restoration Act's specific statutory provisions apply to the two Restoration Act tribes, not IGRA's general ones. Pet. App. 12-18. *Ysleta I* construed the relevant statutory language, and its (correct) holding as to Congress's intent left no room for ambiguity to be resolved by an administrative agency. In any event, the agency on whose conflicting letter the Tribe relies—the National Indian Gaming Commission ("NIGC")—has no congressionally delegated authority to interpret, let alone to abrogate, the Restoration Act.

The Tribe's claim that it is being singled out for unfair treatment by being denied access to IGRA's permissive gaming regime ignores that it and the Pueblo are uniquely situated. Of nearly 600 federally recognized tribes, only two are governed by the Restoration Act's terms that Texas law governs gaming on reservation lands and that render inapplicable future laws inconsistent with the Restoration Act's gaming provisions. *See* Pub. L. No. 100-89, §§ 203(a), 207(a). The Tribe also ignores that IGRA, by its plain terms, provides a "uniform" regime (Pet. 3, 4, 13, 21) only to the extent that regime was not "specifically prohibited" by another "Federal law" such as the Restoration Act. 25 U.S.C. §§ 2701(5), 2710(b)(1)(A).

1. In 1987, Congress passed the Restoration Act, which restored the federal trust relationship between the United States and two specific Indian tribes in Texas—the Ysleta del Sur Pueblo Tribe (the "Pueblo") and the Alabama-Coushatta. Pub. L. No. 100-89, 25 U.S.C. § 731, *et seq.* Congress's restoration of federal status—and its attendant benefits—was dependent on

these Tribes' agreement to refrain from gaming activities that are illegal under Texas law. ROA.2516.[1] To secure the Act's passage, the Alabama-Coushatta pledged to Congress that it "remains firm in its commitment to prohibit outright any gambling or bingo in any form on its Reservation." Pet. App. 36-37 n.9; *see also* ROA.1038-41 (Tribal Council Resolution No.-T.C.-86-07). (The Pueblo did the same in a nearly identical resolution. ROA.88-89.)

Congress, in turn, explicitly relied on Resolution No.-T.C.-86-07 in adopting the Restoration Act, incorporating it by reference in the statute as the source of the Act's specific gaming prohibitions:

> 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. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No.-T.C.-86.07[.]

Pub. L. No. 100-89, § 207(a); *see also* Pet. App. 3 & n.3. Congress charged the Secretary of the Department of the Interior ("DOI") with administering the Act. Pub. L. No. 100-89, § 2, note.

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[1] "ROA" refers to the record on appeal for *Texas v. Alabama-Coushatta Tribe of Texas*, No. 18-40116 (5th Cir.).

2. Meanwhile, other tribes were conducting gaming on their reservations. Noting that "existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands," 25 U.S.C. § 2701(3), Congress enacted IGRA "to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity," *id.* § 2701(5). IGRA does not expressly repeal prior federal laws, like the Restoration Act, or preempt the field of state regulation of gambling within state borders.

For tribes whose gaming was not controlled by other federal law, IGRA created a general system for gaming divided into three classes. Class I includes traditional gaming for minimal prizes. *Id.* § 2703(6). Class II includes bingo and card games "explicitly authorized by the laws of the State" or "not explicitly prohibited." *Id.* §§ 2703(7)(A), (B). Class III includes all forms of gaming that are not Class I or II, *id.* § 2703(8), including "electronic or electromechanical facsimiles of any game of chance" that might otherwise be Class II as well as "slot machines of any kind." *Id.* §§ 2703(7)(A), (B). While tribes retain greater ability to offer Class-I and Class-II gaming, Class-III games are prohibited unless the State and tribe voluntarily enter into a compact to allow those games. *Id.* § 2710(d). IGRA created NIGC to administer this system but did not extend NIGC's authority to other tribe-specific gaming regulations. *Id.* § 2706(b)(10).

3. Since obtaining federal status, the Alabama-Coushatta and Pueblo have repeatedly conducted gaming that violates the terms of the Restoration Act, which

federalized Texas law. ROA.2518-23. The State has consistently sought to end this activity. *E.g.*, ROA.1036-57. And courts have consistently rejected the tribes' attempts to circumvent their legal obligations. *E.g.*, ROA.1041-49, 2518-19.

Ysleta I resulted from one such attempt. The Pueblo sought to force Texas to negotiate a compact that would allow the tribe to conduct Class-III gaming under IGRA. *Ysleta I*, 36 F.3d at 1335. The Fifth Circuit rejected that request, observing that "the Tribe has already made its 'compact' with the State of Texas, and the Restoration Act embodies that compact." *Id.* It unequivocally held "not only that the Restoration Act survives today but also that it—and not IGRA—would govern" whether forms of gaming proposed by the Tribe "are allowed under Texas law, which functions as surrogate federal law." *Id.* The court reached that conclusion by looking to the "plain language" of the Restoration Act and IGRA, as illuminated by the standard canons of construction. *Id.* at 1334-35.

Undeterred, the two tribes continued to pursue high-stakes gaming in violation of Texas law. ROA.1053-54. This case originally arose in 2001 when Texas sought a permanent injunction to close an illegal casino operating on Alabama-Coushatta land. ROA.20-35. The district court ordered the Tribe "to cease and desist operating, conducting, [or] engaging in . . . gambling activities on the Tribe's Reservation which violate State law." *Alabama-Coushatta Tribes of Tex. v. Texas*, 208 F. Supp. 2d 670, 681 (E.D. Tex. 2002), *aff'd*, 66 F. App'x 525 (5th Cir. 2003) (per curiam).

4. Ever persistent, the Alabama-Coushatta then passed a gaming ordinance to redefine its casino as electronic bingo and therefore (supposedly) Class-II gaming under IGRA. ROA.1493-1521. In 2015, the Tribe, along with the Pueblo, sought NIGC permission to conduct gaming under its new ordinance. Pet. App. 8. A few months later, NIGC's Chairman sent a short letter purporting to approve the Tribe's request to engage in "Class II" gaming subject to NIGC oversight. Pet. App. 173-77. The Chairman implicitly acknowledged that he lacked authority to provide such oversight under the Restoration Act but concluded that IGRA's gaming provisions "impliedly repeal[ed]" the gaming provisions in the Restoration Act notwithstanding *Ysleta I*. Pet. App. 176. In support of this conclusion, he cited an opinion letter from the then-Deputy Solicitor of DOI to NIGC's General Counsel. *See* ROA.1472-92.

Thereafter, the Alabama-Coushatta opened the Naskila Entertainment Center, Pet. App. 9-10, offering what it advertises as "800 of the hottest electronic games paying Texas-sized jackpots," https://www.naskila.com/#about (last visited December 3, 2019). A state inspection revealed that the Tribe's "electronic bingo" machines were "virtually indistinguishable from Las Vegas slots," ROA.1383, and therefore illegal, Pet. App. 10.

5. Following this inspection, the State filed a motion for civil contempt, alleging that the Tribe's machines violate longstanding Texas law, in contravention of the 2002 injunction. Pet. App. 29-30. The Tribe filed a motion seeking relief from the judgment and to dissolve or modify the injunction. *See* Pet. App. 11-12.

The district court denied the Tribe's motion and granted the State summary judgment on the issue of the Restoration Act's continued applicability. Pet. App. 19-53. The court declined the Tribe's request to defer to NIGC's assertion of jurisdiction, reasoning that Congress did not entrust NIGC with reconciling IGRA (which it administers) and the Restoration Act (which it does not). Pet. App. 43-48. The court also observed that implied repeal was a pure question of statutory law rather than a question of agency discretion, Pet. App. 44; that "the Restoration Act speaks directly to gaming by the Tribe," Pet. App. 46; and that the Tribe remains "obligated to abide by the plain language of the [Act]," Pet. App. 51. The court followed *Ysleta I*'s holding that "the Restoration Act's provisions on gaming apply" to the Alabama-Coushatta and "govern[] gaming by the Tribe." Pet. App. 46.

The Fifth Circuit affirmed. Pet. App. 1-18. It rejected the Tribe's claim that *Brand X* required deference to NIGC's contrary conclusion that IGRA, not the Restoration Act, applies to the Tribe. Pet. App. 15-18. It held that *Ysleta I* "employed traditional tools of statutory interpretation and found that Congress spoke to the precise issue," leaving no ambiguity for an agency to reach a contrary result. Pet. App. 18.

The Tribe moved for rehearing en banc, asking for the court (among other things) to overturn *Ysleta I*. Pet. App. 54-55. The Fifth Circuit unanimously denied rehearing en banc. No judge so much as requested a poll. *Id.*

SUMMARY OF ARGUMENT

Long-settled rules of statutory construction easily resolve this case. The Tribe reaches its preferred gaming-permissive result only by reading out entire sections of the Restoration Act and IGRA, and by resorting to the disfavored doctrine of repeal by implication. The Fifth Circuit reached the correct result below—just as it did a quarter-century ago in *Ysleta I*. The Tribe is wrong that the Fifth Circuit's straightforward application of *Ysleta I* conflicts with this Court's decisions and with the decision of another court of appeals. The court faithfully applies controlling law from this Court, and there is no circuit split requiring this Court's review—as it implicitly acknowledged when it denied review in *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 138 S. Ct. 639 (2018) (mem.). Finally, review is unnecessary in light of pending legislation that may definitively resolve this longstanding dispute.

REASONS FOR DENYING THE PETITION

The plain text of the Restoration Act and IGRA together with long-held canons of construction compel the decision reached by the Fifth Circuit twenty-five years ago in *Ysleta I*: For the two Restoration Act tribes, the Restoration Act's specific gaming provisions control over IGRA's general ones. And the court below correctly decided the only issue before it in this case: *Brand X* does not require departure from *Ysleta I* based on NIGC's later-in-time conclusion that the Restoration Act no longer controls. In any event, NIGC lacks jurisdiction to construe the Restoration Act, let alone deem its gaming provisions impliedly repealed by IGRA, rendering this

case a poor vehicle in which to refine *Brand X*. This Court's holding in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), and the First Circuit's in *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)* ("*Aquinnah*"), 853 F.3d 618 (1st Cir. 2017), are not to the contrary.

I. The Fifth Circuit's Decision Is Correct.

A. The Restoration Act, not the Indian Gaming Regulatory Act, controls this case.

Twenty-five years ago, the Fifth Circuit correctly concluded that the Restoration Act controls Alabama-Coushatta's gaming activities in Texas. *Ysleta I*, 36 F.3d 1325. That court looked to (1) "the plain language of § 107(a)" of the Restoration Act, (2) "the tribal resolution to which § 107(a) expressly refers," including its discussion of how previous attempts by the Tribe to gain federal status failed due to gaming regulations deemed insufficiently robust, and (3) two separate provisions in IGRA that "explicitly stated" that it "should be considered in light of other federal law." *Id.* at 1334, 1335 & n.21.

1. The Restoration Act plainly expressed Congress's intent to federalize and bind the Tribe to Texas gaming law:

First, it provides 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 tribe." Pub. L. No. 100-89, § 207(a).

Second, it adds that "[a]ny violation of the prohibition provided in this subsection shall be subject to the same

civil and criminal penalties that are provided by the laws of the State of Texas." *Id.*

Third, it states that these provisions "are enacted in accordance with the tribe's request in Tribal Resolution No.-T.C.-86-07." *Id.* Congress thus incorporated by reference the Tribe's resolution that it (a) "remains firm in its commitment to prohibit outright any gambling or bingo in any form on its Reservation;" (b) has "no interest 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;" and (c) "requests its representatives in [Congress]" enact a bill that "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 lands." ROA.121-22.

Fourth, the Act ensures that Congress cannot lightly change these restrictions by stating that only those "laws and rules of law of the United States of general application to Indians . . . *which are not inconsistent with* any specific provision contained in this title shall apply to the members of the tribe. . . ." Pub. L. No. 100-89, § 203(a) (emphasis added). That is not to say that Congress could *never* change the Restoration Act, but it could not do so by means of a law of "general application." *Id.*; *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 789 (1st Cir. 1996).

2. IGRA erected a "fundamentally different regime[]" for tribal gaming, but it did not change the Restoration Act. *Ysleta I*, 36 F.3d at 1334. IGRA did not preempt other federal gaming laws. Just the opposite: It

"explicitly states in two separate provisions . . . that [it] should be considered in light of other federal law." *Id.* at 1335. Specifically, IGRA gives tribes the "right to regulate gaming activity" on their lands—but only "if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5); *accord id.* § 2710(b)(1)(A) (allowing gaming "not otherwise specifically prohibited on Indian lands by Federal law").

Read together, the Restoration Act's specific rules govern the Tribe's gaming activities in Texas. The Restoration Act was at the time of IGRA's passage, and remains, binding federal law mandating that the Tribe obey Texas law. *See* Pet. App. 1-2 & n.1. Under the terms of the Restoration Act, IGRA is inapplicable to the Tribe because it is an act of general applicability that is "inconsistent with a[] specific provision[] contained in" the Restoration Act. Pub. L. No. 100-89, § 203(a). Likewise, the plain terms of IGRA made the Tribe ineligible for its more permissive gaming regime because gaming on its lands was already "specifically prohibited" by another federal law, namely the Restoration Act. 25 U.S.C. §§ 2701(5), 2710(b)(1)(A).

3. The Tribe's textual arguments to the contrary ignore many of the Restoration Act's provisions. In particular, the Tribe points to Section 203 of the Act, which provides that "[n]otwithstanding any other provision of law, the tribe . . . shall be eligible . . . for all benefits and services furnished to federally recognized Indian tribes." Pub. L. No. 100-89, § 203(c). The argument goes that because IGRA was passed to benefit federally recognized

tribes, IGRA is a "benefit" for which section 203(c) of the Restoration Act makes the Tribe eligible. Pet. 6, 13.

But the only reasonable reading of Section 203(c) is that it refers not to *laws* but to actual "benefits and services" (Pub. L. No. 100-89, § 203(c)) for which the Tribe became eligible by receiving federally recognized status. In other contexts, courts have interpreted this term to include benefits like "health care, housing, economic development," *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 42, 42 (D.D.C. 2001), including "eligibility for certain federal funds," *Burt Lake Band of Ottawa & Chippewa Indians v. Zinke*, 304 F. Supp. 3d 70, 80 (D.D.C. 2018).

By contrast, a different subsection of the Restoration Act governs future laws. As discussed above, Section 203(a) provides that "all laws and rules of law of the United States of general application to Indians" shall apply to the Tribe *only* if they "are not inconsistent with any specific provision contained in this title." Pub. L. No. 100-89, § 203(a). That provision gives the Indian Reorganization Act ("IRA"), 25 U.S.C. § 461, *et seq.*, as an example of a "law[]" or "rule[] of law" that applies to the Alabama-Coushatta unless inconsistent with the Restoration Act. Pub. L. No. 100-89, § 203(a). The IRA was as much a "benefit" to Indian tribes as IGRA because it conserved tribal lands, established a credit system, and granted powers of local governance. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.05, at 81 (Nell Jessup Newton ed., 2012). And yet the IRA is treated as a "law[]" or "rule[] of law" under Section 203(a), rather than a "benefit[]" or "service[]" under Section 203(c).

The Tribe's reading would result in an odd one-way ratchet: Any law beneficial to the Tribe would supersede

the Restoration Act, and any law detrimental to the Tribe would not. Nothing in the Restoration Act or IGRA suggests that this was Congress's intent. Rather, like the IRA, IGRA applies under the Restoration Act only if it is not "inconsistent with any specific provision" in that Act. Pub. L. No. 100-89, § 203(a). And the Tribe's repeated efforts to obtain coverage under IGRA's permissive gaming regime demonstrate that IGRA is, on its face, "inconsistent with" the Section 207(a) of the Restoration Act, which requires the Tribe to obey Texas law. *Ysleta I*, 36 F.3d at 1333.

4. The Tribe and its amici cannot avoid this conclusion by pointing to the so-called Indian canon of construction. Pet 20 n.4; Amicus Br. for Nat'l Cong. of Am. Indians Fund et al. 21-22. Even the case on which the Tribe's purported circuit split rests (at 14-16) recognizes that this canon "has no relevance to a conflict between two federal statutes." *Aquinnah*, 853 F.3d at 627 (quoting *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 704 (1st Cir. 1994)). Moreover, because the statutory language in both the Restoration Act and IGRA is clear, the canon cannot overcome "the intent embodied in the statute Congress wrote." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001); *accord DeCoteau v. District Cnty. Ct.*, 420 U.S. 425, 447 (1975).

5. Even were the relevant statutory provisions unclear—and they are not—IGRA still should not be read to repeal the Restoration Act. As this Court has repeatedly recognized, and the Tribe does not dispute, "[i]t is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later-enacted statute covering a more

generalized spectrum," unless (1) "the later statute expressly contradicts the original act," or (2) "such a construction is absolutely necessary in order that [the] words [of the later statute] shall have any meaning at all." *Traynor v. Turnage*, 485 U.S. 535, 547-48 (1988) (cleaned up) (collecting cases); *see also, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) ("Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute."); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) ("[A] specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").

This Court's decision in *Morton v. Mancari*, 417 U.S. 535, 551 (1974), is instructive. That case concerned the IRA, which included a preference for qualified Native Americans at the Bureau of Indian Affairs. *Id.* at 537. Congress later passed the Equal Employment Act, which prohibited racial discrimination in federal employment. *Id.* Non-Indian employees challenged the preference, claiming that the later enacted statute impliedly repealed the earlier one. *Id.* at 539. This Court rejected that claim, recognizing that where "the Indian preference statute is a specific provision applying to a very specific situation," the Equal Employment Act, "is of general application." *Id.* at 550. Without an explicit intention to do so, the general statute does not repeal the specific one, "regardless of the priority of enactment." *Id.* at 551.

The Tribe grudgingly concedes that "implied repeals are disfavored." Pet. 20. Nevertheless, its proposal would work an implied repeal of the one restriction imposed by Congress—and agreed by the Tribe—as a

condition precedent to restoring the Tribe's federal status. Pub. L. No. 100-89, § 207(a).

The Tribe's construction should be rejected because the Tribe points to no language in IGRA that "expressly contradicts" the Restoration Act, and its construction is not "absolutely necessary" to give IGRA meaning. *Traynor*, 485 U.S. at 547-48. IGRA's aim was to regulate gaming across any tribes that were not already specifically subject to restrictions in another "[f]ederal law." 25 U.S.C. § 2701(5). Applying the Restoration Act as written would not frustrate this purpose. There are currently 573 federally recognized tribes. *See* U.S. Dep't of Interior, Bureau of Indian Affairs, *Mission Statement*, https://www.bia.gov/bia (last visited December 4, 2019). Less than a tenth of them gained recognition through tribe-specific legislation. *See* Kirsten Matoy Carlson, *Congress, Tribal Recognition, and Legislative-Administrative Multiplicity*, 91 IND. L.J. 955, 981 (2016); U.S. Gov't Accountability Office, GAO-02-49, *Indian Issues: Improvements Needed in Tribal Recognition Process* 25-26 (2001), https://www.gao.gov/new.items/d0249.pdf (last visited December 4, 2019). And only about half of those gained recognition before the enactment of IGRA and could be subject to a similar rule to that of the court below. Only two are actually subject to the court's rule.

The Tribe's amici counter that IGRA is the more specific law because the Restoration Act concerns matters other than gaming, and IGRA is focused solely on gaming. Amicus Br. for Nat'l Cong. of Am. Indians Fund et al. 20. That misstates the relevant inquiry. Though the Restoration Act may address topics other than gaming, as discussed above (at 3-4), the gaming provisions were

the *sine qua non* of its passage. Thus, applying the *Mancari* framework, IGRA is a law of general applicability analogous to the Equal Employment Act. 417 U.S. at 550-51. The Restoration Act's gaming provision, like that in the IRA, is the "specific provision applying to a very specific situation" (*id.* at 550): Among the hundreds of federally recognized tribes, the Restoration Act concerns just two. *See Passamaquoddy Tribe*, 75 F.3d at 788.

In sum, adopting the rule advocated by the Alabama-Coushatta and its amici would nullify the purpose of the Restoration Act's central provision applying Texas gaming law to two specific tribes. *Contra* Pet. 15. This would be inconsistent with the language of the relevant statutes and longstanding rules of construction, including that "it is the duty of the courts, absent a clearly expressed congressional intention to the contrary," to interpret two statutes as capable of co-existence. *Mancari*, 417 U.S. at 551. The lower court's decision fulfilled that duty by holding that the Restoration Act's specific gaming provisions control over IGRA's general ones for the two tribes specifically subject to the Act, and thereby would "give effect to both" the Act and IGRA. *Id.* This Court does not need to grant review to do the same.

B. The panel correctly applies *Brand X*.

Review is also unwarranted because the Fifth Circuit correctly decided the *only* issue in the petition that it actually addressed: whether its earlier decision in *Ysleta I* or the later contrary conclusion by NIGC controlled. *See* Pet App. 11-12, 32. Moreover, even if the Fifth Circuit erred on this picayune issue of administrative law, this

would not be an appropriate vehicle for this Court to address it.

1. The Fifth Circuit's decision did not "invert[]" the analysis this Court established in *Brand X*. Pet. 18. Indeed, when the Tribe tried to take the issue en banc, not a single judge even called for a vote about whether the panel faithfully applies *Brand X* to the court's earlier decision in *Ysleta I*. Pet. App. 12-18.

Brand X addresses whether an agency action is entitled to deference where there is prior circuit-court authority interpreting an ambiguous statutory provision. It provides that "a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation" leaves "no gap for the agency to fill" and "displaces a conflicting agency construction." 545 U.S. at 982-83. *Ysleta I* was such a precedent.

Ysleta I conclusively held that the "Restoration Act's gaming provisions, and not IGRA, provide the framework for deciding the legality of any and all gaming by the Pueblo and the Tribe on their Restoration Act lands." Pet. App. 17. Reading the two statutes together, the *Ysleta I* court concluded that "Congress'[s] intention" was "explicit, clear, unambiguous, plain, and specific." 36 F.3d at 1334 n.20 (quotations omitted). And, the court stated, "the unmistakable conclusion [is] that Congress—and the Tribe—intended for Texas's gaming laws and regulations to operate as surrogate federal law on the Tribe's reservation in Texas." Pet. App. 15 (quoting *Ysleta I*, 36 F.3d at 1334).

The *Ysleta I* court reached its decision by construing the text of the relevant provisions in both the Restoration Act and IGRA. *Contra* Pet. 19. It looked to "the plain

language of § 107(a)" of the Restoration Act as well as the "the tribal resolution to which § 107(a) expressly refers," which discussed how insufficient gaming prohibitions had caused earlier versions of the statute to fail. *Ysleta I*, 36 F.3d at 1334. The court also construed IGRA's plain text, including 25 U.S.C. § 2710(b)(1)(A) upon which the Tribe's arguments regarding implied repeal turn. *Ysleta I*, 36 F.3d at 1335 & n.21. Far from being silent on the issue of earlier gaming statutes, the court held, IGRA "explicitly stated" that "IGRA should be considered in light of other federal law"—twice. *Id.*

In sum, *Ysleta I* "employed traditional tools of statutory interpretation and found that Congress spoke to the precise issue" presented in this case. Pet. App. 18. Under settled law, "judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *Brand X*, 545 U.S. at 982-83. Because *Ysleta I* already supplied the definitive answer to the Tribe's question, there was no room for a contrary agency opinion. *See, e.g.*, *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.") (quotations omitted); *see also Brand X*, 545 U.S. at 984 (citing *Lechmere* with approval).

2. The Tribe asserts (at 19) that the *Ysleta I* court *must* have found the statute was ambiguous because it did not focus solely on the literal text. But doing so did not suggest that there was a gap for an agency to fill with

a contrary interpretation. The court was just doing what courts do: employing ordinary tools of statutory construction to discern Congress's intent, including by applying longstanding canons of construction such as the presumption against implied repeal of a statute. Only if those tools do *not* reveal clear congressional intent does there remain a gap for agencies to fill. *See, e.g.*, *Epic Sys.*, 138 S. Ct. at 1630 (observing that when "traditional . . . canons supply an answer, *Chevron* leaves the stage") (quotation marks omitted); *id.* at 1627 (looking to "contextual clues" to analyze the interplay between two statutes); *see also United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 488 (2012) (plurality op.) ("If a court, *employing traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

Similarly without merit is the Tribe's assertion (at 19) that *Ysleta I* must have found ambiguity because it examined legislative history. *Ysleta I* looked to both statutory and legislative history at the express invitation of the parties, including the Pueblo (amicus here). *See Ysleta I*, 36 F.3d at 1334. The court properly found the statutory history to be relevant to help discern Congress's intent as to the relationship between the Restoration Act and IGRA. *Id.*; ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 256 (2012) ("We oppose the use of legislative history. . . . But quite separate" is "statutory history," which may be considered as "part of the context of the statute."). By contrast, the court rejected the Pueblo's argument based

on contrary legislative history. *Ysleta I*, 36 F.3d at 1334 (discussing a Representative's floor statement).

In any event, that court's reading of legislative history merely bolstered its conclusion, based on the plain language, that Congress intended the specific prohibitions in that Act to govern gaming on the two tribes' reservation lands. *See, e.g.*, S. Rep. No. 100-90 at 8 (1987) (declaring the "central purpose" of the Act's gaming provisions "to ban gaming on the reservations as a matter of federal law"). Use of legislative history for this purpose remains one of the "traditional tools of statutory construction." *PBGC v. LTV Corp.*, 496 U.S. 633, 649 (1990). Courts—including the court the Tribe cites as creating a circuit split—have long recognized that it is permissible to look to legislative history to determine whether Congress left any gap for agencies to fill under *Chevron* step one. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147 (2000); *Home Concrete*, 566 U.S. at 488-89 (plurality op.); *Castaneda v. Souza*, 810 F.3d 15, 23-24 (1st Cir. 2015) (en banc); *accord Council for Urological Interests v. Burwell*, 790 F.3d 212, 221 (D.C. Cir. 2015).

3. But even had *Ysleta I* been equivocal about whether the statutes at issue here were ambiguous—and it was not—this case would remain a poor vehicle to refine the requirements of *Brand X*. The Tribe's theory is premised on a letter from NIGC's Chairman that proceeds on two shaky premises. First, the Chairman assumes jurisdiction over the question by observing that because the Restoration Act "applies state gaming laws to the Tribe's lands," it "must be taken into consideration as part of . . . ordinance review" under IGRA. Pet. App. 174. Second, he looked to an opinion letter from the

former Deputy Solicitor of DOI "to interpret the interface between IGRA and the Restoration Act," and ultimately to conclude that "IGRA impliedly repeals the portions of the Restoration Act repugnant to IGRA." Pet. App. 175-76. The Tribe asserts that the court of appeals should have ignored the ordinary rules of stare decisis because under *Brand X*, it owes deference to this "intervening, authoritative interpretation" that IGRA impliedly repealed the Restoration Act. Pet. 4, 11-12.

In *Brand X*, the FCC unquestionably had acted within congressionally delegated authority to interpret the statutory provision at issue. *See* 545 U.S. at 980-81. There, "Congress ha[d] delegated to the Commission the authority to 'execute and enforce' the [relevant provisions of the] Communications Act, and to 'prescribe such rules and regulations as may be necessary.'" *Id.* at 980 (quoting 47 U.S.C. §§ 151, 201(b)). As a result, the Commission could "promulgate binding legal rules[, and] the Commission issued the order under review in the exercise of that authority." *Id.* at 980-81. That is not the case here for at least three reasons.

First, the Tribe offers no textual basis for NIGC regulatory jurisdiction over the Restoration Act. The Tribe instead asks this Court to infer jurisdiction from Congress's limited grant of authority under IGRA. *See* Pet. 16-17. But whatever else its "broad powers" under IGRA may include (Pet. 17), it did not provide NIGC authority to administer or interpret the Restoration Act. Congress delegated administration of the Act to DOI. *See* Pub. L. No. 100-89, § 2, note. And, of course, agency deference is warranted only when "Congress delegated authority to the agency generally to make rules carrying the force of

law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority." *Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006) (quotations omitted). Since Congress did not vest NIGC with authority to administer the Restoration Act, NIGC is not entitled to deference.

Second, neither IGRA nor the Restoration Act gives NIGC authority to adjudge statutory conflicts between different federal laws. The Tribe's argument (at 16-17) that the short letter from NIGC's Chairman (Pet. App. 173-77) represents a change in controlling law is based on a flawed premise. Whatever authority IGRA gives to NIGC to approve Class-II gaming, *see* Pet. 9, it does not give the agency power to abrogate a federal law that it is does not administer. *Cf. Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 327 (2014) (stating that agency power to interpret the law does not permit it to change the law).

This Court has rejected a similar argument in *Epic Systems*, which concerned an effort by the National Labor Relations Board ("NLRB") to construe the National Labor Relations Act ("NLRA") in a way that invalidated portions of the Federal Arbitration Act. 138 S. Ct. at 1620-21. The Court rejected the NLRB's claim for deference, holding that it has no authority effectively to abrogate portions of an act it does not administer. *Id.* at 1629. Agency deference, after all, rests on the "premise that a statutory ambiguity represents an implicit delegation to an agency to interpret a statute which it administers." *Id.* (quotations omitted). Like NIGC here, the NLRB had not sought "to interpret its statute, the NLRA, in isolation." *Id.* Rather, it "sought to interpret th[e] statute in a way that limits the work of a second statute." *Id.*

And Congress did not "implicitly delegate[] to an agency authority to address the meaning" of that second statute. *Id.*

Third, the Tribe cannot establish that NIGC had authority to abrogate the Restoration Act because it received an opinion letter from DOI's then-Deputy Solicitor. *Contra* Pet. 17. As an initial matter, the Deputy Solicitor of DOI has no more authority to "address the meaning" of IGRA, a "statute it does not administer," than does NIGC's chairman. *Epic Sys.*, 138 S. Ct. at 1629.

Moreover, the opinion letter does not qualify for deference because it was not adopted through a method permitted by Congress. *E.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Because the letter contains "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy," it falls within the Administrative Procedures Act's definition of a "rule." 5 U.S.C. § 551(4). The Restoration Act provides that DOI "may promulgate such regulations," but only "as may be necessary to carry out the provisions of this Act." Pub. L. No. 100-89, § 2, note. The Deputy Solicitor's opinion letter does not purport to be a regulation "necessary to carry out the provisions" of the Restoration Act. *Id.* The general-authority statutes on which the former Deputy Solicitor's letter relies—25 U.S.C. § 2, 9—cannot be used to issue regulations of this type. *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007), *cert. denied sub. nom.*, *Kickapoo Traditional Tribe of Tex. v. Texas*, 555 U.S. 811 (mem.).

More fundamentally, because the Secretary may decline to adopt the Solicitor's opinions, such an opinion

letter does not represent DOI's final position. *See, e.g.*, *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1147-48 (9th Cir. 2013) (discussing the interplay between Solicitor opinions and the Secretary's final determination where Secretary declined to adopt the letter); *see also Ysleta del Sur Pueblo v. Nat'l Indian Gaming Comm'n*, 731 F. Supp. 2d 36, 38 (D.D.C. 2010) (stating DOI's adopted position that the Tribe's "activities are governed by the Restoration Act and not IGRA," and that the Tribe "was not under NIGC jurisdiction").

In sum, the Fifth Circuit properly applies *Brand X* because *Yselta I* was based on the unambiguous language of the Restoration Act and IGRA. But, even if it were not, this would be a poor vehicle to address the issue because NIGC's letter was anything but an "intervening, authoritative interpretation" of either IGRA or the Restoration Act. Pet. 4.

C. The panel correctly applies *Cabazon Band*.

The Fifth Circuit similarly did not impermissibly "depart[]" (Pet. 20) from *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). *Cabazon Band* and its framework distinguishing state laws that prohibit gaming from those that merely regulate it has no applicability to this case. Moreover, even if the Court were inclined to expand *Cabazon Band*, this would be a poor vehicle to do so because Texas unequivocally prohibits the type of gaming that Alabama-Coushatta seeks to pursue.

1. The *Cabazon Band* framework does not apply in this case. There, the Court examined Public Law 280, which granted six States broad criminal and somewhat

more limited civil jurisdiction over tribal-reservation lands. *See* Pub. L. No. 280, § 2, 18 U.S.C. § 1162(a) (criminal jurisdiction); *id.*, § 4, 28 U.S.C. § 1360(a) (civil jurisdiction). Neither Public Law 280 nor this Court discussed gaming. Instead, the question before the Court was whether to read the broad criminal jurisdiction provision to cover essentially civil fines, thereby giving States nearly limitless control over conduct on tribal land. *Cabazon Band*, 480 U.S. at 210-11.

This Court has repeatedly found that States may not exercise limitless control over tribal lands. For example, in *Bryan v. Itasca County*—upon which *Cabazon Band*, 480 U.S. at 208, relied—this Court examined whether the civil jurisdiction contained in Public Law 280 "subject[ed] reservation Indians to the full sweep of state laws," including state property taxes. 426 U.S. 373, 389 (1976). The Court concluded that it did not. Instead, the Court surmised that Congress's primary concern was combating lawlessness on reservations and that Congress did not intend to subject tribes to such broad regulation. *Id.* at 383, 389.

Cabazon Band examined whether States could avoid this rule by passing what might otherwise be a civil regulation as a criminal prohibition. 480 U.S. at 211-12. Again, the Court said that they could not. *Id.* It was in this context that *Cabazon Band* drew a distinction between state laws that prohibit and regulate certain conduct. Given Public Law 280's lack of specificity in granting regulatory jurisdiction, the Court held that gaming prohibitions were permissible, but regulations were "not expressly permitted by Congress." *Id.* at 214.

Since *Cabazon Band*, this Court and others have consistently cautioned against importing the distinction between criminal/prohibitory laws and civil/regulatory laws from the Public Law 280 context to other, more specific laws governing tribal affairs. *E.g.*, *Rice v. Rehner*, 463 U.S. 713, 732 (1983). The *Cabazon Band* "line of cases" fashioned a solution unique to the facially broad grant of civil-regulatory jurisdiction in Public Law 280 "[t]o narrow the reach of that statute." *United States v. Stewart*, 205 F.3d 840, 843 (5th Cir. 2000) ("Like the Sixth and Tenth Circuits, 'we think it inappropriate to apply here the criminal/prohibitory-civil/regulatory test which was developed in a different context to address different concerns.'" (quoting *United States v. Dakota*, 796 F.2d 186, 188 (6th Cir. 1986))); *accord United States v. Hagen*, 951 F.2d 261, 264 (10th Cir. 1991).

The court below correctly applies this later, limited understanding of *Cabazon Band.* In stark contrast to Public Law 280, the Restoration Act does not grant Texas general jurisdiction to regulate all aspects of life on the Alabama-Coushatta reservation. *See* Pub. L. No. 100-89, § 207(b). Rather, Congress expressly made the Tribe subject, as a matter of federal law, to Texas's gaming restrictions, and authorized Texas to enforce violations in federal court with its "civil and criminal penalties." *Id.* § 207(a). When Congress "expressly permit[s]" specific state regulation by speaking directly to it, the distinction that *Cabazon Band* made between prohibitions and regulations of on-reservation activity is inapplicable. *Cabazon Band*, 480 U.S. at 214; *accord United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("[Tribal sovereignty] exists only at the sufferance of Congress.").

What is paramount is discerning Congress's intent—precisely the analysis the *Ysleta I* court conducted long ago.

2. But even if the Court were inclined to extend *Cabazon Band*'s framework, this would be a poor vehicle to do so because the Tribe's claim would still fail. The machines that the Tribe operates are prohibited as a matter of Texas's public policy, not merely regulated.

Under *Cabazon Band*, "the shorthand test" for whether an act is prohibited "is whether the conduct at issue violates the State's public policy." 480 U.S. at 209. Texas outlaws lotteries, other forms of gambling, and associated activities, TEX. PENAL CODE § 47.02(a), with only narrow exceptions for certain forms of charitable bingo, charitable raffles, and state lotteries, *see* TEX. CONST. art. III, § 47.

In particular, Texas's public policy has long disfavored casino-style gaming. *See, e.g.*, *Barker v. Texas*, 12 Tex. 273, 276 (1854) ("Gaming is denounced by the law as an offense against public policy."); *cf. Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 181 (1999) ("[P]rivate casino gambling is unlawful [in Texas]."). This Texas public policy stands in contrast to the circumstance in *Cabazon Band* where the State prohibited only certain games, and the games the plaintiff tribe offered "flourish in California." *Cabazon Band*, 480 U.S. at 210; *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310, 316 (5th Cir. 1981) (Florida had no "statute that specifically prohibits the act of gambling.").

This prohibition extends to the Tribe's gaming devices. The Tribe strains to call the games on offer at its Naskila Entertainment Center "bingo." Pet. i, 10, 21, 22. In reality, the Tribe operates electronic machines

"virtually indistinguishable from Las Vegas slots," ROA.1383, lined up in a "casino type atmosphere," ROA.1664. The reality of Naskila belies the Tribe's attempt to pass off its bingo-themed slot machines as anything resembling traditional bingo. *See* https://www.naskila.com/games/?_ga=2.104379204.571422360.1575326055-858240565.1575326055.

The Tribe cannot rely on the limited types of gaming that Texas *does* allow to avoid this conclusion. Gaming is not an all-or-nothing affair. *See, e.g.*, *Cabazon Band*, 480 U.S. at 210 (observing that the prohibition/regulation distinction "is not a bright-line rule"). *Contra* Pet. 4. That Texas law does not prohibit every conceivable form of bingo does not mean that bingo-themed slot machines are fair game. On this, no further review is required because the circuits are in agreement. *See, e.g.*, *United States v. Santee Sioux Tribe of Neb.*, 135 F.3d 558, 564 (8th Cir. 1998) (rejecting argument that video slot machines are permitted by Nebraska law because of "fundamental[ly] differen[t]" state-authorized Keno); *accord Carnival Leisure Indus., Ltd. v. Aubin*, 938 F.2d 624, 625-26 n.3 (5th Cir. 1991); *United States v. Cook*, 922 F.2d 1026, 1035 (2d Cir. 1991).

II. There Is No Circuit Split.

The Tribe's purported circuit split is illusory. As the case on which it relies explicitly recognizes, whether IGRA repeals an earlier tribe-specific statute depends on the specific language and history of that statute. *See Aquinnah*, 853 F.3d at 627-28 (concluding that IGRA repealed law ratifying Massachusetts agreement but not Maine). *Aquinnah*, however, never examined or even

mentioned the Restoration Act or *Ysleta I*. In fact, the only time the First Circuit has cited *Ysleta I* was *favorably*—to support upholding Maine's gaming laws against an IGRA challenge. *See Passamaquoddy Tribe*, 75 F.3d at 791. Because the Restoration Act differs in several material respects from the Aquinnah Settlement Act, the First Circuit would apply *Passamaquoddy Tribe* to uphold the Restoration Act, eliminating any supposed circuit split.

Like *Cabazon Band*, the Aquinnah Settlement Act does not single out gaming for prohibition. Instead, it provides that the tribe "shall be subject to the civil and criminal laws, ordinances, and jurisdiction" of Massachusetts. *Aquinnah*, 853 F.3d at 622. While the general grant of jurisdiction included a parenthetical that it covered "bingo or any other game of chance," *id.*, the First Circuit found this reference was insufficiently specific and that the agreement did not actually prohibit anything. *Id.* at 629.[2] Moreover, the Settlement Act in *Aquinnah* said "nothing about the effect of future federal laws on the [Act]." *Id.* at 628. Thus, the *Aquinnah* court found it "essentially identical" (*id.*) to a statute that the court had earlier held impliedly repealed by IGRA, *see Rhode Island*, 19 F.3d at 704.

By contrast, when, as here, the earlier statute contains a forward-looking provision, the First Circuit

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[2] Notably, *Aquinnah* addressed the tribe's claims on the merits, rather than deferring to NIGC. 853 F.3d at 626 n.6; *see also Passamaquoddy Tribe*, 75 F.3d at 794 (holding that nothing suggested that "Congress intended to entrust [NIGC] with reconciling [IGRA] and other statutes in the legislative firmament").

follows *Ysleta I*'s approach. In *Passamaquoddy Tribe*, that court rejected the tribe's claim that IGRA's general gaming provisions upended the Maine Settlement Act absent "explicit language" from Congress "offering a patent indication of its intent to accomplish that result, or, indeed, by first repealing [the operative section of the Act]." 75 F.3d at 789. Instead, the First Circuit in *Passamaquoddy Tribe*, like the Fifth Circuit in *Ysleta I*, harmonized the Settlement Act and IGRA: The former governs gaming on Passamaquoddy lands, the latter on other tribal lands. *Id.* at 791. As support, *Passamaquoddy Tribe* pointed to *Ysleta I*, approving its holding that IGRA "did not impliedly repeal a federal statute granting Texas jurisdiction over Indian gaming because Congress never indicated in [IGRA] that it intended to rescind the previous grant of jurisdiction." *Id.* (citing *Ysleta I*, 36 F.3d at 1335).

Unlike the Aquinnah Settlement Act, the Restoration Act does not purport to grant Texas general jurisdiction over tribal lands. Instead, it singles out and specifically applies Texas's gaming prohibitions and associated penalties. Pub. L. No. 100-89, §§ 207(a), (b). The distinction is key because IGRA permits gaming only when not "specifically prohibited by Federal law." 25 U.S.C. § 2701(5); *see Ysleta I*, 36 F.3d at 1335 & n.21. Where the two Restoration Act tribes specifically agreed as a condition for federal recognition to be "prohibited" from gaming not authorized in the State, Pub. L. No. 100-89, § 207(a), the Aquinnah did not, *Aquinnah*, 853 F.3d at 629. It is, thus, unsurprising that the First Circuit reached a different conclusion in interpreting different statutory language.

Moreover, the Restoration Act not only specifically prohibits gaming but, like the statute in *Passamaquoddy Tribe*, speaks to the effect of future federal laws on that prohibition, making only those "laws and rules of law of the United States of general application to Indians . . . which are not inconsistent with any specific provision contained in this title" applicable to the Tribe. Pub. L. No. 100-89, § 203(a). As a result, if this case had been filed in Maine rather than Texas, the First Circuit would have reached the same outcome. The petition cites no other circuit court supporting its proposed rule.

III. There Is No Need for This Court's Involvement.

In addition to touting a non-existent, one-to-one circuit split, the Tribe tries to argue that taking this case is necessary to "vindicate tribal sovereignty" and "restore nationwide uniformity on an exceedingly important question." Pet. 4. And it suggests that continuing to subject it to the gaming restrictions in the Restoration Act would leave a gaping hole in IGRA. Pet. 12-13, 21.

But, in fact, the two Restoration Act tribes are uniquely situated. As discussed above (at 16), there are nearly 600 federally recognized tribes. Of these, the Restoration Act restricts gaming for only the Alabama-Coushatta and the Pueblo. *See* Carlson, *supra*, at 988 & n.137. The fact that the Tribe is uniquely situated is amply demonstrated by the fact it has only found one case decided in the last twenty-five years that even raises the possibility of tension with *Ysleta I*.

Further belying the notion that IGRA creates a uniform system from which the Alabama-Coushatta is being unfairly excluded, many of the tribes that have been

restored to federal status in tribe-specific legislation *after* IGRA's passage are subject to specific gaming restrictions. *See, e.g.*, Carlson, *supra*, at 988. IGRA is meant to address gaming on reservation lands in the absence of such tribe-specific rules, but it simply is not intended "to be the one and only statute addressing the subject of gaming on Indian lands." *Ysleta I*, 36 F.3d at 1335 (discussing 1993 statute imposing similar restrictions on South Carolina tribe). *Contra* Pet. 3.

Ultimately, the Tribe and its amici are unhappy with the deal they struck to secure passage of the Restoration Act and the benefits of federal recognition. The Tribe's policy arguments about the economic benefits of tribal gaming to its reservation (Pet. 21-23) do not change the analysis. After all, "[i]f the effects of the law are to be alleviated, that is within the province of the Legislature." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 484 (1992).

There is no need for this Court's involvement to provide the gaming permission the Tribe seeks. The two Restoration Act tribes have a ready avenue to redress their grievances through Congress. Indeed, legislation is currently pending that would allow the Alabama-Coushatta and Pueblo to take advantage of IGRA's permissive gaming regime. House Resolution 759, introduced by the congressman in whose district the Tribe's reservation sits, would amend the Restoration Act to provide that "[n]othing in this Act shall be construed to preclude or limit the applicability of the Indian Gaming Regulatory Act." H.R. Res. 759, 116th Cong., 1st Sess. (Jan. 24, 2019). The House passed that bill in July with bipartisan support, and it is now awaiting Senate action. *Id.* (July

24, 2019). If, for whatever reason, Congress chooses *not* to adopt this legislation, the Court would have no authority to override that decision. *Estate of Cowart*, 505 U.S. at 484 ("It is Congress that has the authority to change the statute, not the courts.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2019