No. 20-493

In The
Supreme Court of the United States

YSLETA DEL SUR PUEBLO, THE TRIBAL COUNCIL, THE TRIBAL GOVERNOR MICHAEL SILVAS OR HIS SUCCESSOR,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

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

BRIEF OF *AMICI CURIAE* ALABAMA-COUSHATTA TRIBE OF TEXAS, NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL INDIAN GAMING ASSOCIATION, and USET SOVEREIGNTY PROTECTION FUND IN SUPPORT OF PETITION FOR CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Amici each have expertise in the interpretation of Indian statutes and gaming laws or are uniquely affected by the tribal restoration act at issue in this case.

Amicus the Alabama-Coushatta Tribe of Texas (the "Tribe") is a sovereign, self-governing tribe located near Livingston, Texas that, like the Ysleta del Sur Pueblo ("Petitioner," and the "Pueblo"), had its trust relationship with the United States restored by 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). The Restoration Act contains two identical sections on gaming that apply to the Tribe and the Pueblo. As a result, judicial interpretations of the Restoration Act provision applicable to gaming by the Pueblo affect the interpretation of the identical provision for the Tribe.

Amicus the National Congress of American Indians ("NCAI") is the oldest and largest organization made up of American Indian and Alaska Native tribal governments and their citizens to advocate on their behalf. NCAI's mission is to advocate for the protection of treaty rights, inherent rights, and other rights guaranteed to tribes through agreements with the United

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[1] All parties have consented to the filing of this brief by *amici curiae*. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party to this proceeding authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than *amici* contributed money that was intended to fund preparing or submitting this brief. The parties were timely notified of *amici*'s intent to file this brief.

States and under federal law; to promote the common welfare of American Indians and Alaska Natives; and to promote a better understanding of Indian peoples.

Amicus National Indian Gaming Association ("NIGA") is an inter-Tribal association of 184 Indian Tribes. Its mission is to protect Tribal sovereignty and the ability of Tribes to achieve economic self-sufficiency through gaming and other forms of economic development. NIGA has an interest in ensuring that the gaming provisions of the Restoration Act and other Federal gaming laws—as express protections of tribal sovereignty—are implemented uniformly nationwide for the benefit of all Tribes.

Amicus the USET Sovereignty Protection Fund ("USET SPF") is a non-profit, inter-Tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico. USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's decision condones Texas's attempts to abrogate tribal sovereignty through its charitable bingo laws and regulations, in direct contravention of this Court's precedent and the Restoration

Act's text. The Fifth Circuit reached that decision by applying its precedent (that relied on draft language omitted from the Restoration Act); Petitioner and the Tribe are within the Fifth Circuit; and Petitioner and the Tribe are the only two Restoration Act tribes. Accordingly, this Court must intervene to correct the balance between federal, state, and tribal sovereignty as to bingo.

Over three decades ago, this Court held that the inherent sovereignty of Indian nations—coupled with federal policies that promote tribal economic independence via bingo gaming—foreclosed the State of California from enforcing its charitable bingo laws and regulations on Indian lands absent express congressional consent. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 210–22 (1987).

Nearly six months after *Cabazon Band* issued, Congress passed the Restoration Act. App. 105–20. A draft version of the Act would have barred Petitioner and the Tribe from offering all "gaming, gambling, lottery or bingo *as defined by the laws and administrative regulations* of the State of Texas." S. Rep. No. 99-470 (1986). But the Senate amended that language after *Cabazon Band*, so that the two tribes were barred only from offering those "gaming activities *which are prohibited by the laws* of the State of Texas." App. 112, 119–20 (emphasis added).

As the Chair of the House Interior and Insular Affairs Committee and a key drafter of the bill explained when the House unanimously concurred in the Senate

amendments, the enacted version of the Restoration Act fully incorporated and codified the "holding and rational[e] of *Cabazon Band*." 133 Cong. Rec. H6972-05, 1987 WL 943894 (Aug. 3, 1987) (Statement of Rep. Udall). That is, Texas could prohibit gaming activities on the two tribes' lands by banning those gaming activities outright, but federal and tribal interests in encouraging tribal self-sufficiency and economic development through tribal gaming preempted the state's interest in regulating non-prohibited gaming activities on tribal lands.

The Restoration Act's text unambiguously reflects that view. As to "Gaming Activities," Congress *expressly withheld* from Texas any "civil or criminal regulatory jurisdiction" over "gaming activities" of Petitioner and the Tribe, and cautioned that "[n]othing in" the Restoration Act's gaming sections "shall be construed" to the contrary. App. 112, 119–20. The Restoration Act abrogates the tribes' sovereignty over gaming only to the extent they offer "gaming activities which are prohibited by" Texas law. App. 112, 119.

Despite that language and *Cabazon Band*, Texas seeks to enforce its charitable bingo laws and regulations against Petitioner and the Tribe. It relies on no express statutory language or holding of this Court. It instead looks to a flawed Fifth Circuit decision that concerned the Indian Gaming Regulatory Act ("IGRA") and gaming activities that Texas indisputably prohibits outright—not bingo. *Ysleta del Sur Pueblo* v. *Texas*, 36 F.3d 1325 (5th Cir. 1994). Among other things, *Ysleta* incorrectly relied on extra-statutory

documents and legislative history to purportedly subject the Tribes to Texas laws "and regulations," though the Act's final language omits any reference to Texas's regulations. *Id.* at 1333–34.

But setting aside *Ysleta*'s flaws, that decision does not support the State's efforts to regulate tribal *bingo* under the Restoration Act. Texas does not prohibit bingo. It allows charitable bingo subject to regulation, under a licensing regime overseen by the Texas Lottery Commission. The Restoration Act therefore prevents Texas from forcing the Pueblo and the Tribe to comply with its charitable bingo laws and regulations.

Amici respectfully request that the Court grant the Petition to ensure that Texas follows this Court's only Indian-gaming precedent addressing the ability of Indian tribes to offer bingo in states that permit charitable bingo, as Congress intended when it passed the Restoration Act.

ARGUMENT

I. The Fifth Circuit's Decision Threatens Tribal Sovereignty and Self-Sufficiency.

This Court has "consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory,' and that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.'" *Cabazon Band*, 480 U.S. at 207 (citations omitted); *see also Williams* v.

Lee, 358 U.S. 217, 223 (1959) ("The cases in this Court have consistently guarded the authority of Indian governments over their reservations."). "A key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions[.]" *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 810 (2014) (Sotomayor, J., concurring). "In part as a necessary implication of this broad federal commitment," this Court "[has] held that tribes have the power to manage the use of their territory and resources by both members and nonmembers, to undertake and regulate economic activity within the reservation, and to defray the cost of governmental services by levying taxes." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 335 & n.17 (1983) (citations omitted; collecting federal statutes reflecting federal government's goal of promoting tribal self-government). Tribal gaming on Indian reservations has proven essential to furthering those goals.

This federal interest in strengthening tribes through gaming led this Court to long ago conclude in *Cabazon Band* that a state could not apply state laws that seek to regulate gaming to tribal lands absent express congressional permission. *See* 480 U.S. at 214–21. There, California sought to enforce on tribal lands a penal "statute that [did] not entirely prohibit the playing of bingo" but permitted it if the games were operated by designated charitable organizations with prizes not to exceed $250 per game. *Id*. at 205. However, this Court found that "important" federal and

tribal interests in "Indian self-government, including [Congress's] 'overriding goal' of encouraging tribal self-sufficiency and economic development," preempted the state's assertion of regulatory jurisdiction over tribal bingo conducted on Indian reservations. *Id*. at 216–17 (citations omitted).

In support, the Court noted the Department of the Interior's promotion of tribal bingo enterprises as important revenue-producing activities for resource-strapped tribes. It also looked to a policy statement in which the Department said it "would 'strongly oppose any proposed legislation that would subject tribes or tribal members to state gambling regulation," which it considered to be inconsistent with President Reagan's 1983 Indian Policy Statement. *Id*. at 217 & n.21. Moreover, the federal government's approval and active promotion of tribal bingo enterprises had particular relevance there, the Court found, since the reservations in that case contained no natural resources to exploit, making tribal gaming "the sole source of revenues for the tribal governments and the provision of tribal services," as well as a major source of employment on the reservation. *Id*. at 218–19. "Self-determination and economic development," the Court emphasized, "are not within reach if the Tribes cannot raise revenues and provide employment for their members." *Id*. at 219.

And yet that is what the Fifth Circuit's decision wrests from the two Restoration Act tribes. It is not an exaggeration to say that Petitioner's and the Tribe's prospects as self-sufficient people depend on the

continued operation of their electronic bingo facilities. Just like the tribes in *Cabazon Band*, Petitioner and the Tribe rely on bingo gaming as the principal "source of revenues for the operation of the[ir] tribal governments and the provision of tribal services." 480 U.S. at 218–19. The bingo enterprises here also provide tribal members and residents in surrounding communities with well-paying jobs with good benefits, in areas of Texas with historically high poverty rates and unemployment. *See, e.g.*, Pet. at 26–28.

Petitioner and the Tribe cannot possibly obtain enough revenue to support their governments and people under Texas's charitable bingo laws and regulations, and application of those laws would directly lead to thousands of tribal and community members applying for government benefits. *See* Pet. at 30. As in *Cabazon Band*, this Court must step in to prevent an untoward "infringe[ment] on tribal government" and to vindicate "compelling federal and tribal interests" against congressionally unauthorized state encroachment into tribal gaming. *See* 480 U.S. at 222.

II. The Fifth Circuit Abdicated Its Responsibility to Interpret the Law.

Six months after this Court concluded in *Cabazon Band* that important federal and tribal interests preempted state interests in regulating bingo gaming on tribal lands, *see* 480 U.S. at 221–22, Congress passed the Restoration Act to "prohibit" on the Tribes' lands those "gaming activities that are prohibited by

the laws of the State of Texas." Pub. L. No. 100-89, §§ 107(a), 207(a). In addition, Congress made explicit its desire that "nothing in [the gaming activities] section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." *Id*. §§ 107(b), 207(b).

The Fifth Circuit's affirmance here not only strays from the ordinary meaning of "prohibit" in § 107(a), it ignores the express and unambiguous withholding of state regulatory jurisdiction in § 107(b). Basic statutory-construction principles confirm that the Restoration Act only prohibits a gaming activity on the Tribes' lands if it is "prohibited" by Texas law—*i.e.*, it is actually banned and not merely subject to time, manner, and means restrictions. Under the ordinary meaning of "prohibit," Texas does not prohibit bingo. Rather, like the California bingo laws in *Cabazon Band*, Texas permits, licenses, and regulates bingo throughout the state. The Restoration Act therefore does not "prohibit" Petitioner's on-reservation bingo gaming under § 107(a). To conclude otherwise would impermissibly grant the state regulatory jurisdiction over on-reservation bingo gaming, contrary to Congress's explicit withholding of such regulatory authority in § 107(b).

How then did the Fifth Circuit affirm a district court injunction that applies Texas charitable bingo laws and regulations to the Pueblo's on-reservation gaming? First, by studiously ignoring § 107(b), the construction of which was the chief issue raised by Petitioner. And second, by overextending imprecise language from *Ysleta* that addressed different factual

circumstances and legal issues than those presented here. It is fundamental, however, that the judiciary has the ultimate responsibility to construe legislative language to determine the law. *See Bankers Tr. N.Y. Corp.* v. *United States*, 225 F.3d 1368, 1376 (Fed. Cir. 2000). This Court's intervention is necessary to rectify the Fifth Circuit's abdication of its obligation to faithfully interpret the Restoration Act.

A. The Fifth Circuit Did Not Address Petitioner's Principal Statutory-Construction Argument.

Section 107(b)'s construction was squarely placed at issue, and yet the Fifth Circuit made no mention of the Restoration Act's proscription against state regulatory jurisdiction in affirming the district court's application of Texas regulatory bingo laws to Petitioner's lands. That omission is particularly glaring because § 107(b)'s construction was the focus of Petitioner's briefing. In its Statement of Issues Presented, the Pueblo argued that the "district court erroneously failed to apply Section 107(b) of the Restoration Act, which bars the State of Texas from exercising 'regulatory jurisdiction' over the Pueblo." Appellant's Br. at 2.

The district court's approach is unsurprising because it expressly struggled with how to reconcile Texas's attempts to apply its bingo regulations to Petitioner given § 107(b)'s restriction on state regulatory jurisdiction. As the Pueblo noted to the Fifth Circuit,

the district court below had "expressed concern that Section 107(b) remained 'unclear,' that 'the Restoration Act does not clearly define what regulatory jurisdiction means,' and that '*Ysleta* and subsequent case law interpreting *Ysleta* do not clearly elucidate subsection (b)'s effect on tribal gaming.'" *Id*. at 16. Moreover, the district court described a "twilight zone of state, federal, and sovereign authority where the outer legal limit of [tribal gaming] conduct is difficult to assess with precision." *Id*. at 21 (quotations and citation omitted). The Pueblo thus requested that the Fifth Circuit "finally construe Section 107(b) as Congress intended to mean that the State has no authority to regulate Tribal gaming activities that are not prohibited by Texas law." *Id*. at 6.

That request was met with silence. Instead of addressing § 107(b), the Fifth Circuit focused on another argument that—as its Opinion notes—was foreclosed by *Ysleta* and, for that reason, was solely raised by Petitioner for *en banc* review. *See* App. 11–13 (concluding that *Ysleta* foreclosed Petitioner's argument that § 107(a) incorporates the *Cabazon Band* criminal-prohibitory/civil-regulatory analysis applied in Public Law 280 cases).

B. The Fifth Circuit Applied Flawed Analysis from Inapplicable Precedent Over Statutory Text.

The Opinion further reasons that imprecise language from *Ysleta* somehow controls the outcome here.

Id. It does not. That case presented dissimilar facts and legal issues from those presented by the Pueblo's bingo gaming. To start, the gaming activities at issue in *Ysleta* were prohibited outright (and not regulated) by Texas law. Consequently, the *Ysleta* court never addressed whether the Restoration Act applies Texas laws that "regulate" gaming activities to the Tribes' lands.

Ysleta only considered whether the term "prohibit" in § 107(a) meant "criminally" prohibit as derived from the *Cabazon Band* analysis applied in Public Law 280 cases. *Id*. at 1333. Public Law 280, Pub. L. No. 83-280 (1953), grants certain states the authority to enforce state criminal laws on Indian reservations (*i.e.*, criminal jurisdiction); it does not permit states to apply state civil laws on Indian reservations. *See Cabazon Band*, 480 U.S. at 207–08.

To that end, this Court adopted a framework for classifying state laws as "criminal" or "civil." *See id*. at 209. Only conduct prohibited outright as a matter of state public policy falls within the state's "criminal jurisdiction" and therefore is prohibited on Indian reservations under Public Law 280. *See id*. at 209–10. Applying this framework in *Cabazon Band*, this Court determined that California's gambling laws were not "criminal" in nature because California did not prohibit all gambling outright as a matter of public policy. *See id*. at 211. Rather, California's gambling laws were considered "civil-regulatory" because California permitted some gaming activities—such as a state lottery, pari-mutuel horse-race betting, and bingo—while

prohibiting other gaming activities. *See id*. at 210–11. Thus, California's gambling laws fell within the state's civil jurisdiction and were not enforceable on tribal lands under Public Law 280—including California's charitable bingo laws that provided for criminal sanctions. *See id*. at 211–12.

Because the Pueblo were then engaged in gaming activities that were indisputably "prohibited"—*i.e.*, outright banned—by the laws of the State of Texas, the Pueblo argued at that time for an interpretation of "prohibit" beyond that term's ordinary meaning. *See Ysleta*, 36 F.3d 1333. The Pueblo asserted that the term "prohibit" in § 107(a) had "special significance in federal Indian law"—that the Restoration Act only applied Texas gaming laws to the extent Texas "*criminally* prohibited" gaming activities—as in Public-Law 280 cases. *See id*. Relying on *Cabazon Band*, the Pueblo contended that Texas gaming laws prohibiting baccarat, blackjack, craps, roulette, and slot machines were not "criminal" in nature because Texas did not prohibit *all* gambling outright as a matter of public policy; it only prohibited some forms of gambling while permitting others. *Id.* at 1332. Therefore, the Pueblo concluded, Texas's "civil" gaming prohibitions did not apply to the Pueblo's tribal lands. *See id*.

The *Ysleta* court disagreed and held the Public Law 280 "criminal-prohibitory/civil-regulatory" analysis inapplicable to § 107(a). It reasoned that § 107(a) applies Texas gaming prohibitions *regardless* of whether they fall within the state's criminal or civil jurisdiction. *Id*. at 1333–34. Where Public Law 280

makes only state prohibitions that are *criminal* in nature applicable to tribal lands, *Ysleta* concluded that § 107(a) necessarily went further because its text referenced both criminal *and* civil laws and its legislative history mentioned regulations. *See id*. at 1333. Thus, rather than incorporate *Cabazon Band*'s definition of "criminal" prohibitions, *Ysleta* concluded that "prohibit" in § 107(a) retained its "ordinary meaning" to "prohibit" the Pueblo "from engaging in any gaming activity prohibited by Texas state law." *See Alabama-Coushatta Tribe of Tex.* v. *Texas*, 66 F. App'x 525 (5th Cir. 2003).

Although *Ysleta* never addressed "regulated" gaming activities, the Fifth Circuit and Texas continue to rely on that case because it says that "Texas laws *and regulations*" are "surrogate federal law" on the Tribe's lands. 36 F.3d at 1334 (emphasis added). The problem with that position is three-fold.

First, *Ysleta*'s reference to "laws *and regulations*" finds no support in the Restoration Act's text; it is derived entirely from extra-statutory documents that the Act references, but does not incorporate. As discussed in *Ysleta*, the Tribes approved—on threat of not obtaining the restoration of their federal rights—Tribal Resolutions requesting that Congress include language in the Restoration Act "which would provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, shall be prohibited on the Tribe's reservation or on tribal lands." *Id*. at 1327–28.

Although Congress initially acceded to the Tribe's requested language to ban all gaming on their lands, Congress ultimately removed that draft language following this Court's decision in *Cabazon Band*. The language actually adopted by Congress prohibits on the Tribes' lands *only* those "gaming activities that are prohibited by the laws of the State of Texas." *Id*. at 1329. Nevertheless, the Fifth Circuit and the State take the incredible (and incorrect) position that language found in extra-statutory—and long repealed—Tribal Resolutions control over the express language that Congress approved in the Act's text.

But even accepting *Ysleta*'s pronouncement that Texas laws and regulations apply as surrogate federal law, that hardly resolves the issues raised by Petitioner. By its plain language, the Restoration Act only applies those laws and regulations that "prohibit," as opposed to "regulate," a gaming activity. The Act bars the State from exercising "civil or criminal regulatory jurisdiction" over the tribes' "gaming activities." App. 112, 120. Implicitly (re-)inserting "regulations" into § 107(a) answers nothing. It perpetuates the very confusion that Petitioner and the district court noted below, and it judicially amends the Restoration Act with language that Congress intentionally removed from the statute.

Second, application of that imprecise language violates *stare decisis* principles. *Stare decisis* is limited to only legal determinations made in prior precedential opinions. It does not apply to factual or legal issues that were not part of a holding in a prior decision.

Deckers Corp. v. *United States*, 752 F.3d 949, 956 (Fed. Cir. 2014). Because *Ysleta* did not concern regulated gaming activities, that opinion should be limited to, and construed in light of, the particular facts and issues involved in that case concerning gaming that was unquestionably prohibited by Texas law. *See Mut. Benefit Health & Accident Ass'n* v. *Bowman*, 99 F.2d 856, 858 (8th Cir. 1938). Imprecise language concerning the application of Texas laws "and regulations" should not be extended for any purpose of authority in this case concerning regulated gaming activities. *See id*.

III. The Fifth Circuit's Decision to Affirm Is Not Supported by Principles of Statutory Construction.

The Fifth Circuit failed to consider the specific issue that Petitioner raised on appeal, but under this Court's precedent, the result is clear: Texas cannot enforce its regulatory charitable bingo laws against the Tribes' on-reservation gaming activities. States lack regulatory authority over gaming activities on tribal lands absent express congressional permission. *Cabazon Band*, 480 U.S. at 214–21. The Restoration Act does not confer such authority to the State. Rather, in banning gaming activities on the Tribes' lands that are banned by Texas law, Congress made clear that it did not intend to grant the State "regulatory jurisdiction" over gaming activities on the Tribes' lands. To the extent the Fifth Circuit's decision allows Texas to apply laws that regulate and license—and thus do not

prohibit—bingo to the Tribes' lands, it violates fundamental principles of statutory construction.

A. The Restoration Act's Plain Text Prevents the State from Forcing the Tribes to Follow Its Charitable Bingo Regime.

Recognizing the consequences of unchecked judicial forays into the legislative sphere, this Court has emphasized "the preeminent canon of statutory interpretation requires [courts] to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *Bedroc Ltd.* v. *United States*, 541 U.S. 176, 183 (2004) (quoting *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253–54 (1992)).

Section 107(a) applies only Texas laws that "prohibit" a "gaming activity." The ordinary meaning of "prohibit" is unambiguous. It means "to forbid," "to prevent from doing," to "effectively stop," or "to make impossible." Webster's Third New Int'l Dictionary 1813 (1986); *see also* Black's Law Dictionary 1405 (10th ed. 2014) (defining "prohibit" to mean "1. To forbid by law. 2. To prevent, preclude, or severely hinder.").

That concept starkly contrasts with "regulate." By definition, to "regulate" a gaming activity necessarily means to allow it, even if the State may also "fix the time, amount, degree or rate of" that activity "according to rule[s]." Webster's Third New Int'l Dictionary 1913 (1986); *see also* Black's Law Dictionary 1475 (10th ed. 2014) (defining "regulate" to mean "1. To

control (an activity or process) esp. through the implementation of rules.").

Congress understands the distinction between laws that "prohibit" conduct and laws that "regulate" conduct. The same day that it passed the Restoration Act, Congress passed another settlement act that addressed gaming by the Wampanoag Tribe of Gay Head (the "Aquinnah") in Massachusetts. In contrast to the Restoration Act—which prohibits on the Tribes' lands "[a]ll gaming activities prohibited by the laws of the State of Texas"—Congress subjected the Aquinnah's lands to "those *laws and regulations which prohibit or regulate* the conduct of bingo or any other game of chance." Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. No. 100-95, § 9, 101 Stat. 704, 709-10 (1987) (emphasis added).[2]

Congress thus knew how to subject the Tribes' lands to the full panoply of Texas gaming laws and regulations in far more exacting language if that had been its intent.[3] *See, e.g.*, Seminole Indian Land Claims Settlement Act of 1987, Pub. L. No. 100-228, § 6(d)(1), 101 Stat. 1556, 1560 (1987) ("The laws of Florida relating to * * * gambling * * * shall have the same force

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[2] The First Circuit has held that IGRA impliedly repealed this language. *Massachusetts* v. *Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618, 622, 628–29 (1st Cir. 2017).

[3] In fact, the House proposed language in a prior bill that would have required the Tribe's "tribal gaming laws, regulations, and licensing requirements to be identical to the laws and regulations of the State of Texas regarding gambling, lottery and bingo." 131 Cong. Rec. H12012, 1985 WL 205091 (Dec. 16, 1985). But that language also was ultimately rejected.

and effect within said transferred lands as they have elsewhere within the State."); Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. No. 103-116, § 14(b), 107 Stat. 1118, 1136 (1993) ("[A]ll laws, ordinances, and regulations of the State, and its political subdivisions, shall govern the regulation of gambling devices and the conduct of gambling or wagering by the Tribe on and off the Reservation."). Construing the Restoration Act *in pari materia* with these acts shows that if Congress had intended for gaming activities on the Tribes' lands to be subject to all Texas laws concerning gaming activities, "it would have expressly said so." *Bryan* v. *Itasca Cty.*, 426 U.S. 373, 390 (1976). It did not.

That the term "prohibit" in § 107(a) retains its ordinary meaning also finds support from its neighboring provisions consistent with the "cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (citations omitted); *see also United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371 (1988) ("Statutory construction * * * is a holistic endeavor."). Section 105(f) grants Texas general "civil and criminal jurisdiction within [the Pueblo's] reservation" over non-gaming matters. App. 110. Section 107, however, separately addresses "Gaming Activities," with § 107(b) instructing that "[n]othing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." App. 112.

When given its ordinary meaning, then, § 107(a) complements § 107(b) by forbidding on the Tribes'

lands those gaming activities banned by Texas law, without giving the State any say over gaming activities conducted on the Tribes' lands that the State permits elsewhere in a regulated format. *Cf. Bay Mills*, 572 U.S. at 792 (interpreting "gaming activity" to mean the type of gambling offered—not the "licensing and operation of the games"). To interpret § 107(a) otherwise would essentially nullify the jurisdictional exclusion in § 107(b) and, in light of § 105(f), render almost all of § 107 unnecessary.

Indeed, Texas held that view in the *Ysleta* proceedings. At that time, Texas *agreed* that the Restoration Act precluded it from applying gaming regulations to gaming activities conducted on the Tribes' lands that were not banned outright by state law, expressly citing Texas's Bingo Enabling Act and its associated regulatory scheme as an example. *See* State's Cond. Cross-Pet. for Cert., *Texas* v. *Ysleta del Sur Pueblo*, No. 94-1310, 1995 WL 17048828, at *7–8 (U.S. filed Jan. 30, 1995). For that very reason, Texas urged this Court to overturn *Ysleta*'s determination that IGRA did not apply to the Pueblo. "[W]ithout the framework provided by IGRA," the State then said, "it would not be possible to regulate those [bingo] activities since the state has no regulatory, civil or criminal jurisdiction over gaming on Tribal lands." *Id*. at *8.

The construction of § 107(a) advanced by the State in the years after *Ysleta* makes little sense in combination with § 107(b). Section 107(b) expressly bars the State from exercising regulatory jurisdiction over gaming on the Tribes' lands, but that is the precise

result of the State's position that § 107(a) requires application of *all* Texas gaming laws and regulations concerning *every* gaming activity on the Tribes' lands. Moreover, application of Texas's bingo licensing regime to the Tribes effectively precludes them from gaming on their lands, since the Tribes do not qualify as charitable organizations within the letter of that statute, even if they fall within the spirit of its permissive intent. *See* TEX. OCC. CODE § 2001.101(a) (limiting definition of "an authorized organization eligible for a license to conduct bingo" to religious societies, qualified non-profit organizations, fraternal organizations, veterans organizations, volunteer fire departments, and volunteer emergency medical services providers); *cf. Seminole Tribe of Fla.* v. *Butterworth*, 658 F.2d 310, 315 n.7 (5th Cir. 1981) (noting that the Florida tribe did not qualify as a charitable organization within the letter of Florida's bingo statute but fell "within the spirit of its permissive intent" (reasoning expressly adopted by *Cabazon Band*, 480 U.S. at 211–12)).

B. Legislative History Confirms Only State Laws Banning, Not Regulating, Gaming Activities Apply.

Because the plain text of the Restoration Act's gaming provisions forecloses the State's position, the Court's inquiry should "begin" and "end" there. *Bedroc*, 541 U.S. at 183. Yet the Restoration Act's legislative history also supports an interpretation consistent with § 107(a)'s ordinary meaning. The legislative reports contain no hint of a congressional intent to subject the

Tribes' lands to state laws regulating gaming activities otherwise permitted by Texas law. Such an omission, as this Court has observed, "has significance in the application of the canons of construction applicable to statutes affecting Indian immunities, as some mention would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress." *Bryan*, 426 U.S. at 381.

Consistent with the ordinary meaning of "prohibit," the legislative history speaks only in terms of enforcing a gaming "ban" or "banning" gaming activities—not regulating, controlling, or overseeing gaming activities—on the Tribes' lands. *See, e.g.*, S. Rep. No. 90-100 (1987). The Senate Report states that "anyone who violates the federal *ban* on gaming contained in Sections 107 and 207 will be subject to the same civil and criminal penalties that are provided under Texas law." *Id*. at 8–9 (emphasis added). And, the Report explains, § 107(b) was "added to make it clear that Congress does not intend, by *banning* gaming and adopting state penalties as federal penalties, to in any way grant civil or criminal regulatory jurisdiction to the State of Texas." *Id*. at 9 (emphasis added). Similarly, the Report says that § 107(c) "grant[s] to the federal courts exclusive jurisdiction over offenses committed in violation of the federal gaming *ban* and make[s] it clear that the State of Texas may seek injunctive relief in federal courts *to enforce the gaming ban*." *Id*. (emphasis added).

That the Restoration Act applies Texas laws to *ban*, as opposed to *regulate*, gaming activities on the Tribes' lands also accords with the Tribal Resolutions passed by the Tribes. Section 107(a) says that its provisions were "enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86," which requested an absolute gaming ban that would have prohibited on the Tribes' lands "all gaming, gambling, lottery, or bingo, *as defined by* the laws and administrative regulations of the State of Texas." *Ysleta*, 36 F.3d at 1328 n.2 (emphasis added). Although Congress initially included that absolute gaming ban in an early version of the Restoration Act, Congress ultimately removed that language in favor of the narrower gaming ban now found in § 107(a). *See Texas* v. *Alabama-Coushatta Tribe of Tex.*, 918 F.3d 440, 443 n.3 (5th Cir. 2019) (noting that "the stringent prohibition proposed by the resolution was not included" in the Restoration Act).[4] In doing so, the Senate Report notes, the "central purpose" of §§ 107 and 207 "*to ban gaming* on the reservations as a matter of federal law" remained "unchanged." S. Rep. No. 90-100, at 8 (emphasis added).

As such, the gaming ban enacted into the Restoration Act "accord[s] with the tribe's request" to the extent it imposes a gaming ban narrower than (*i.e.*, within the scope of) the absolute gaming ban originally

[4] The Senate Report's reference to the absolute gaming ban that was ultimately omitted from the Act almost certainly is a scrivener's error. *Implementation of the Tex. Restoration Act: Hr'g Before the S. Comm. on Indian Affairs*, 107th Cong. 7–9 (June 18, 2002) (statement of Alex Skibine, Professor of Law, Univ. of Utah).

requested. By contrast, applying all Texas laws that regulate—as opposed to ban—gaming activities on the Tribes' lands does not. The Tribes never requested, and never agreed, in their Tribal Resolutions—adopted before *Cabazon Band*—to subject their lands to the State's regulatory jurisdiction with respect to gaming activities that Texas allows non-Indians to conduct.

If any ambiguity remains—and *amici* respectfully submit that there is none—it must be resolved in favor of the Tribes. This Court has long stated that state laws may be applied to tribal lands only "if Congress has expressly so provided." *Cabazon Band*, 460 U.S. at 207. If Congress's expressions are ambiguous, they must "be construed liberally in favor of the Indians." *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). That Congress must "unequivocally" express when it intends to abrogate tribal sovereignty and immunity in favor of state encroachment "reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Id*.

CONCLUSION

Amici respectfully ask the Court to grant the Pueblo's Petition for Certiorari and protect the Tribe's and the Pueblo's sovereign right to engage in bingo

outside of Texas's regulatory jurisdiction—as this Court authorized in *Cabazon Band* and as Congress understood when it enacted the Restoration Act.

Respectfully submitted,

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