No. 20-493

# In the Supreme Court of the United States

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

*v.*

THE STATE OF TEXAS

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

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

In the mid-1980s, the Ysleta del Sur Pueblo Tribe of Texas (the "Pueblo" or the "Tribe") wanted federal-trust status with all its attendant benefits. Texas wanted to prevent tribal casinos within its borders. After years of failed negotiations, the Tribe "requested its representatives" in Congress to enact a bill that would grant it federal-trust status on condition that "all gaming, gambling, lottery or bingo" that was prohibited under Texas law "shall be prohibited . . . on tribal land." Pet. App. 123. In 1987, Congress acceded to that request, expressly referencing the terms laid out by the Tribe.

Almost immediately, the Pueblo and its amici developed buyer's remorse and sought to take advantage of the pro-gambling terms of the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701-21. And, "for a generation," Pet. App. 1, Texas has been trying to enforce the terms of the original bargain between the Pueblo and the State. That litigation started with *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994), *cert. denied*, 514 U.S. 1016 (1995) ("*Ysleta I*"). It has continued through multiple injunctions, multiple findings of contempt, and even a complete shutdown of the Speaking Rock Entertainment Center (the Tribe's casino in El Paso) because the Tribe had not even *attempted* to comply with the terms under which it received federal-trust status.

The question presented in the most recent chapter in this legal saga is whether the lower courts correctly held that the Tribe violated Texas public policy by operating a casino that offers thousands of "bingo" devices that are designed to be virtually indistinguishable from Las-Vegas-style slot machines as well as 24-hour high-stakes, live-call bingo.

## RELATED PROCEEDINGS

Though they do not all technically fall within the definition of Supreme Court Rule 14.1(b)(iii), the below cases should be considered to be related proceedings as they involve the same parties and the same legal issues:

*Ysleta del Sur Pueblo v. Texas*, No. P-93-CA-29, U.S. District Court for the Western District of Texas. Judgment entered on November 1, 1993.

*Ysleta del Sur Pueblo v. Texas*, Nos. 93-8477, 93-8823, and 94-50130, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on October 24, 1994. Rehearing denied on November 21, 1994 in 93-8477 and 93-8823.

*Texas v. Ysleta del Sur Pueblo*, No. 94-1310, Supreme Court of the United States. Petition for writ of certiorari denied March 20, 1995.

*Texas v. Ysleta del Sur Pueblo*, No. EP-99-CA-320-H, U.S. District Court for the Western District of Texas. Order denying motion to dismiss entered December 3, 1999.

*Texas v. Ysleta del Sur Pueblo*, No. 00-50014, U.S. Court of Appeals for the Fifth Circuit. Judgment entered October 31, 2000.

*Ysleta del Sur Pueblo v. Texas*, No. 00-1413, Supreme Court of the United States. Petition for writ of certiorari denied June 4, 2001.

*Texas v. Ysleta del Sur Pueblo*, No. 3:99-CV-00320, U.S. District Court for the Western District of Texas. Injunction entered on September 27, 2001.

*Texas v. Ysleta del Sur Pueblo*, No. 01-51129, U.S. Court of Appeals for the Fifth Circuit. Judgment entered January 17, 2002.

*Texas v. Ysleta del Sur Pueblo*, No. 3:99-CV-00320, U.S. District Court for the Western District of Texas.

Order modifying injunction entered May 17, 2002. Reconsideration of modified order denied June 24, 2002.

*Ysleta del Sur Pueblo v. Texas*, No. 01-1671, Supreme Court of the United States. Petition for writ of certiorari denied October 7, 2002.

*Texas v. Ysleta del Sur Pueblo*, No. 02-50711, U.S. Court of Appeals for the Fifth Circuit. Judgment entered May 29, 2003.

*Texas v. Ysleta del Sur Pueblo*, No. 3:99-CV-00320, U.S. District Court for the Western District of Texas. Order denying modification of injunction entered on October 20, 2003.

*Ysleta del Sur Pueblo v Texas*, No. 03-461, Supreme Court of the United States. Petition for writ of certiorari denied November 3, 2003.

*Texas v. Ysleta del Sur Pueblo*, No. 3:99-CV-00320, U.S. District Court for the Western District of Texas. Order denying modification of Injunction entered March 6, 2007.

*Texas v. Ysleta del Sur Pueblo*, No. 3:99-CV-00320, U.S. District Court for the Western District of Texas. Order holding defendants in contempt entered August 3, 2009.

*Texas v. Ysleta del Sur Pueblo*, No. 3:99-CV-00320, U.S. District Court for the Western District of Texas. Order modifying injunction entered August 4, 2009.

*Texas v. Ysleta del Sur Pueblo*, No. 10-50804, U.S. Court of Appeals for the Fifth Circuit. Judgment entered June 30, 2011.

*Ysleta del Sur Pueblo v. Texas*, No. 11-553, Supreme Court of the United States. Petition for writ of certiorari denied January 9, 2012.

*Texas v. Ysleta del Sur Pueblo*, No. 3:99-CV-00320, U.S. District Court for the Western District of Texas.

Order holding defendants in contempt entered March 6, 2015.

*Texas v. Ysleta del Sur Pueblo*, No. 3:99-CV-00320, U.S. District Court for the Western District of Texas. Order denying vacatur of injunction and holding defendants in contempt entered May 27, 2016.

*Texas v. Ysleta del Sur Pueblo*, No. 3:17-CV-00179, U.S. District Court for the Western District of Texas. Order granting summary judgment entered February 14, 2019. Motion for reconsideration denied March 28, 2019.

*Texas v. Ysleta del Sur Pueblo*, No. 19-50400, U.S. Court of Appeals for the Fifth Circuit. Judgment entered April 3, 2020.

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## BRIEF IN OPPOSITION

Compared to other Indian Tribes, the Pueblo is a relative newcomer to the benefits and burdens of federal-trust status. Indeed, the Tribe effectively received that status for the first time with the 1987 passage of the Ysleta del Sur Pueblo and Alabama-Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 666, 25 U.S.C. § 731, *et seq.* (the "Restoration Act"). Litigation over the terms under which the Tribe was awarded federal-trust status is almost as old as the status itself.

In seeking federal-trust status, the Pueblo asked its representatives in Congress to adopt legislation that would bind the Tribe to Texas gaming laws and regulations. Pet. App. 123. That request was made part of the Restoration Act section 107(a). As a result, the Restoration Act federalized Texas's general ban on nearly all forms of gambling—especially casinos.

The ink on the Restoration Act was barely dry before the Tribe began its decades-long crusade to be allowed to run a casino under the terms of IGRA. More than a quarter-century ago, the Fifth Circuit correctly held that the specific provisions of the Restoration Act control over the general provisions of IGRA. *Ysleta I*, 36 F.3d 1325. This Court declined to review that decision at that time, 514 U.S. 1015, and it has done so many times since.[1]

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[1] *See, e.g.*, *Texas v. Alabama-Coushatta Tribe of Tex.*, 918 F.3d 440 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 855 (2020); *Ysleta del Sur Pueblo v. Texas*, 565 U.S. 1114 (2012) (mem.) (denying certiorari); *Ysleta del Sur Pueblo of Tex. v. Texas*, 540 U.S. 985 (2003) (mem.) (same); *Alabama-Coushatta Tribe of Tex. v. Texas*, 540 U.S. 882 (2003) (mem.) (same); *Ysleta del Sur Pueblo v. Texas*, 537 U.S. 815

This case is yet another attempt to relitigate *Ysleta I*, rehashing arguments that have been repeatedly rejected over the last twenty-six years. The Tribe asserts that these disputes result from "confusion" caused by the Fifth Circuit's allegedly atextual reading of the Restoration Act. Pet. 24. In reality, they arose because the Tribe either "has not even attempted" to obey the law as set out in *Ysleta I*, *Texas v. del Sur Pueblo*, 220 F. Supp. 2d 668, 690 (W.D. Tex. 2001) ("*Ysleta II*"), or it has engaged in a series of small, cosmetic fixes to avoid contempt fines, "transform[ing] the Court into a quasi-regulatory body," *Texas v. Ysleta del Sur Pueblo*, No. EP-99-CV-320-KC, 2016 WL 3039991, at *19 (W.D. Tex. May 27, 2016) ("*Ysleta III*"). Every time the Pueblo has appealed, it has sought to overturn or evade *Ysleta I*. And every time it has failed. In this case, the Fifth Circuit simply "re-reaffirm[ed]" that decision. Pet. App. 11. This Court should summarily affirm as well.

## STATEMENT

### I. Negotiation and Passage of the Restoration Act

"In 1968, the federal government first recognized the [T]ribe," then known as the Tiwa, but "simultaneously transferred responsibility for the Indians to the State of Texas." *Ysleta II*, 220 F. Supp. 2d at 676. Texas held the Pueblo's 100-acre reservation near El Paso in trust for the Tribe from then until 1983. At that time, the Texas Attorney General concluded that the relationship discriminated on the basis of national origin in violation of the state constitution. Tex. Att'y Gen. Op. No. JM-17 (1983). During that period, the existence of the Pueblo was recognized by federal law, but the Tribe did not

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(2002) (mem.) (same); *Ysleta del Sur Pueblo v. Texas*, 532 U.S. 1066 (2001) (mem.) (same).

receive federal benefits. *Ysleta II*, 220 F. Supp. 2d at 676. And its members "were subject to all obligations and duties under the laws of the State of Texas." *Id.* (cleaned up) (quoting Tiwa Indians Act, Pub. L. No. 90-287, 82 Stat. 93 (1968)).

In 1987, "following years of negotiation" (Pet. i), Congress passed the Restoration Act, which created the current trust relationship between the United States and two specific tribes: the Pueblo and one of its amici, the Alabama-Coushatta Tribe of Texas. Pub. L. No. 100-89. Congress's provision of federal-trust status (and all its attendant benefits) depended on these tribes' agreement to refrain from gaming activities that are impermissible in Texas.

In 1985, a bill had been proposed that would have granted the Pueblo federal-trust status and allowed "[g]aming, lottery or bingo" on the Tribe's land to "be conducted pursuant to a tribal ordinance or law . . . approved by the Secretary of the Interior." ROA.466, 496.[2] That law failed to gain sufficient support to pass largely because Texas's congressional delegation expressed concern that it "did not provide adequate protection against high stakes gaming operations on the Tribe's reservation." *Ysleta II*, 220 F. Supp. 2d at 677.

The Tribe again sought recognition in 1986. Considering the receipt of federal-trust status to be important "to ensur[ing] the Tribe's survival" and not wanting "the controversy over gaming . . . to jeopardize this important legislation," Pet. App. 123, the Ysleta del Sur Pueblo Council adopted Resolution No. T.C.-02-86, *id.* at 121-24. In that resolution, the Tribe disclaimed any "[i]nterest

[2] "ROA" refers to the electronic record on appeal in *Texas v. Ysleta del Sur Pueblo*, No. 19-50400 (5th Cir.).

[i]n 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." *Id.* at 121. And the Pueblo asked "its representatives in the United States" to adopt a statute that "provid[ed] that all gaming, gambling, lottery, or bingo as defined by the laws and administrative regulations of the State of Texas, shall be prohibited . . . on tribal land." *Id.* at 123. The Alabama-Coushatta passed a nearly identical resolution. *Texas v. Alabama-Coushatta Tribe of Tex.*, 918 F.3d 440, 443 n.3 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 855 (2020). Though the Pueblo now dismiss this Resolution as "defunct," it does not claim that its Tribal Council withdrew the Resolution prior to the award of federal-trust status. *See* Pet. 6.

And Congress clearly did not consider Resolution No. T.C.-02-86 defunct. It explicitly relied on the Resolution in adopting the Restoration Act, stating:

> 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 tribe's request in Tribal Resolution No. T.C.-02-86.*

Pub. L. No. 100-89, § 107(a) (emphasis added). The statute goes on to clarify that this ban on gaming should not "be construed as a grant of civil or criminal regulatory jurisdiction" more broadly. *Id.* § 107(b). And it provides that the State's remedy "to enjoin violations of the provisions of" section 107 would be an action "br[ought in] the courts of the United States." *Id.* § 107(c).

To the extent this language was unclear, the Senate Report accompanying the legislation explicitly stated the "central purpose" of the Restoration Act was to federalize Texas's general ban on gaming and thereby "to ban gaming on the reservations as a matter of federal law." ROA.624. As the Report explained, the only difference between the House and Senate versions of Restoration Act section 107 was that the Senate version "expand[ed] on the House version to provide that anyone who violates the federal ban on gaming contained in [section 107(a)] will be subject to the same civil and criminal penalties that are provided under Texas law." ROA.624-25.

## II. Indian Gaming Regulatory Act

While Texas, the Pueblo, and the Alabama-Coushatta were negotiating with Congress regarding the conditions of the tribes' receipt of federal-trust status, other tribes were conducting gaming on their reservations. Noting that, as a general matter, "existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands," Congress enacted IGRA. 25 U.S.C. § 2701(3). IGRA sought to establish uniform standards to "regulate gaming activity on Indian lands" where such activity was not otherwise prohibited by state or federal law. *Id.* § 2701(5).

For tribes whose gaming is not controlled by tribe-specific statutes such as the Restoration Act, IGRA divides gaming into three classes. Tribes subject to IGRA have exclusive jurisdiction over Class-I gaming, which includes social or ceremonial games for minimal prizes. *Id.* § 2703(6). Class-II gaming includes bingo and card games which are "explicitly authorized"—or at least "not explicitly prohibited"—by state law. *Id.* § 2703(7)(A). Tribes may regulate Class-II gaming so long as they issue a self-regulatory ordinance, which obtains approval

by the National Indian Gaming Commission. *Id.* § 2710(b). Class-III gaming includes all forms of gaming that are not Class-I or -II, including "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." *Id.* §§ 2703(7)(B), 2703(8). Class-III gaming is prohibited unless the Tribe and the State enter into a voluntary compact to allow such gaming. *Id.* § 2710(d).

## III. The Pueblo's Efforts to Obtain Status under IGRA Through Obstruction and Litigation

Almost from the time they received federal-trust status, the Pueblo has engaged in gaming activities that violate Texas law and the terms of the Restoration Act. The State has consistently sought to end this activity. And courts have consistently rejected the Pueblo and Alabama-Coushatta's efforts to circumvent their legal obligations. *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).

*Ysleta I*, which is the focus of the Tribe's Petition, resulted from one such attempt. The Tribe sought to force Texas to negotiate a compact that would allow it 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 [S]tate of Texas, and the Restoration Act embodies that compact." *Id.* It held "not only that the Restoration Act survives today but also that it—and not IGRA—would govern the determination of whether gaming activities proposed by the Ysleta del Sur Pueblo are allowed under Texas law, which functions as surrogate federal law." *Id.* The court reached that conclusion by looking at the "plain language" of the Restoration Act and IGRA as

illuminated by standard canons of construction. *Id.* at 1334-35.

Undeterred, the Tribe continued to offer high-stakes gaming in violation of Texas law at facilities on tribal lands. In 1999, Texas sued the Tribe to enjoin prohibited gaming on the reservation. ROA.2844-45. The district court concluded that the Tribe "ha[d] not even attempted to qualify under the rules" established by Texas. *Ysleta II*, 220 F. Supp. 2d at 690. Instead, the Tribe relied (as it does here) on its status as a sovereign to pass its own gaming regulations. The district court rejected that argument because the Pueblo partially "waived" that status "in order to obtain federal trust status." *Id.* at 689. The court explained that "[t]he Tribe simply does not, as regards to gambling, share a parallel . . . status with the State of Texas." *Id.* The Fifth Circuit affirmed that conclusion and injunction, and this Court denied review. *Texas v. del Sur Pueblo*, 31 F. App'x 835 (5th Cir. 2002), *cert. denied*, 537 U.S. 815 (2002).

**IV. This Litigation**

The Tribe then spent the next twenty years trying to redefine its casino in various ways—most recently as electronic bingo—to avoid being held in contempt of the district court's original 2001 injunction. ROA.1625, 1689. In 2017, Texas inspected the Speaking Rock facility, finding thousands of machines that "look and sound like Las-Vegas-style slot machines" as well as live-call bingo on offer to the public 24 hours per day. Pet. App. 7; *see also* ROA.2848-51 (providing images).[3]

Texas filed this lawsuit to enjoin the Pueblo from continuing to operate its bingo-themed casino. Following

[3] The State also found similar machines at a smaller facility known as the Socorro Tobacco Outlet. Pet. App. 28 n.6.

lengthy discovery, the district court granted Texas summary judgment on February 14, 2019, concluding that the Pueblo's activities violated Texas law as federalized in the Restoration Act. ROA.2836-37. The Tribe sought reconsideration, which was denied following the Fifth Circuit's ruling in the nearly identical *Alabama-Coushatta*, 918 F.3d at 449. Pet. App. 8. The trial court, however, stayed the effect of its injunction to allow the Pueblo to take yet another shot at convincing the Fifth Circuit that *Ysleta I* was wrongly decided. *Id.* at 98-104.

The Fifth Circuit declined that request, "re-reaffirm[ing]" its conclusion that *Ysleta I* properly interpreted the terms of the Restoration Act. *Id.* at 11. The court gave due consideration to the Pueblo's status as a sovereign. But, like the district court, the Fifth Circuit concluded that the Pueblo had ceded some of that sovereignty when it "agreed that its gaming activities would comply with Texas law." *Id.* at 3. It also rejected the Tribe's argument that section 107(b) should be read in light of this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), to prevent the State from enforcing its restrictions on bingo. Pet. App. 11-12 & nn.35-37.

The Tribe moved for rehearing en banc, asking for the court (among other things) to overturn *Ysleta I*. *Id.* at 96-97. The Fifth Circuit denied rehearing en banc. No judge requested a poll or dissented. *Id.*

## SUMMARY OF ARGUMENT

The Fifth Circuit reached the correct decision below—just as it did over a quarter-century ago in *Ysleta I*. It applied long-settled rules of statutory construction and even anticipated this Court's recent admonition to look to the original meaning of the Restoration Act in light of its negotiating history. *McGirt v. Oklahoma*, 140

S. Ct. 2452, 2468-69 (2020) (discussing *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)). The Pueblo is wrong that the Fifth Circuit's straightforward interpretation of subsection 107 renders subsection 107(b) surplusage or conflicts with *Cabazon Band*. Nor has *Ysleta I* proved "unworkable." Pet. 24. The Pueblo and the Alabama-Coushatta have simply proven themselves unwilling to accept *Ysleta I*, notwithstanding repeated refusals by both this Court and Congress to revisit it. The ongoing refusal of the two tribes to accept the decision in *Ysleta I* counsels in favor of summarily affirming the decision below.

In the alternative, the Court should deny plenary review. This case presents a fact-bound dispute about whether the particular gaming that the Tribe wishes to undertake complies with Texas law. The decision below does not present a question of national importance and cannot create a division of authority because it interprets a statute that applies to only two Indian tribes, both of whom reside in the same circuit. And those tribes' complaints about the economic impact of requiring them to abide by the terms of the Restoration Act are properly addressed to the federal government's political branches, not this Court.

## ARGUMENT

The plain text of the Restoration Act together with long-held canons of construction compelled the Fifth Circuit's decision in *Ysleta I* twenty-six years ago: For the two Restoration Act tribes, the Restoration Act both controls over IGRA's more general terms and acts to federalize Texas's gaming laws and regulations. The Pueblo has pointed to no reason for this Court's intervention other than its continued insistence that *Ysleta I* was wrong and harmful to its financial interests. The Court should end this perpetual cycle of litigation and

summarily affirm the decision below. If not, it should deny review on the merits.

## I. The Fifth Circuit's Decision Was Correct and Should Be Summarily Affirmed.

### A. The Restoration Act controls the Tribe's gaming and federalizes Texas Law.

Twenty-six years ago, the Fifth Circuit correctly concluded that the Restoration Act controls the Tribe'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-trust status failed due to gaming regulations deemed insufficiently robust, and (3) two separate provisions of IGRA that "expressly stated" that it "should be considered in light of other federal law." *Id.* at 1334, 1335 & n.21.

The Tribe does not presently argue that IGRA should apply to its gaming activity. Instead, it maintains that the Fifth Circuit's ruling misinterprets the Restoration Act itself by leaving subsection 107(b) without meaning, Pet. 8, 13; misapplies *Cabazon Band*, *id.* at 17; and ignores a floor statement by Senator Udall, *id.* at 18. These arguments are not new. Pet. App. 1; *see also Ysleta I*, 36 F.3d at 1334. And they have grown no more persuasive with age.

**1.** The Restoration Act plainly expresses Congress's intent to federalize and bind the Pueblo to Texas's gaming laws. *First*, the Act provides that "[a]ll gaming activities which are prohibited by laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe." Pub. L. 100-89, § 107(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.-02-86." *Id.* That resolution stated that the Tribe (a) "remains firm in its commitment to prohibit outright any gambling or bingo in any form on its Reservation" regardless of what law would govern such activities, and (b) wanted its representatives to 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 tribal lands. Pet. App. 123.

The Pueblo and its amici try to dismiss this particular language as "defunct," Pet. 6, or even "long repealed," Am. Br. 15. Conspicuously missing from this discussion, however, is any assertion that the Resolution was withdrawn between the time that it was promulgated in 1986 and when the Restoration Act was passed in 1987.

This Court does not lightly presume congressional carelessness. To the contrary, it presumes that Congress includes each word in a statute for a purpose, and that words not included were purposefully omitted. *E.g.*, *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 530-31 (2013). And, "courts must give effect, if possible, to every clause and word of a statute." *Liu v. SEC*, 140 S. Ct. 1936, 1948 (2020) (quoting *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019)). These presumptions are particularly important here where the clause in question goes to the central debate behind the passage of the entire statute—namely, whether and to what extent the Tribe would be permitted to conduct high-stakes gambling on tribal lands. *E.g.*, *King v. Burwell*, 576 U.S. 473, 492-93 (2015) (citing *N.Y.*

*Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 419-20 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.")).

*Finally*, the Restoration Act ensures that Congress cannot lightly change these restrictions by stating that only "laws and rules of law of the United States . . . which are not inconsistent with the specific provision contained in this title shall apply" to the two Restoration Act tribes. Pub. L. 100-89, §§ 103(a), 203(a). That is not to say that Congress could *never* change the terms of the Restoration Act, but "it must clearly express its intent to do so." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999). And it cannot do so by means of an act of "general application." Pub. L. No. 100-89, § 103(a); *see Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 789 (1st Cir. 1996). As discussed below (at I.C), Congress has rejected any effort to amend the Restoration Act to permit the type of gaming in which the Tribe wishes to engage.

Taken together, these provisions of the Restoration Act grant the Pueblo "status as a federally recognized tribe and limit[] its gaming operations according to state law." *Alabama-Coushatta*, 918 F.3d at 442.

**2.** The Pueblo's primary textual argument does not change this outcome. The Tribe argues (at 13-18) that section 107(b) incorporates this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), and requires the Court to distinguish between laws that regulate gaming from those that criminally prohibit it. The reasoning goes like this: *Cabazon Band*, 480 U.S. at 214-21, recognized a general principle that "States lack regulatory authority over gaming activity on tribal lands absent express congressional permission." Am. Br. 16; *see also* Pet. 17. Section 107(b)

provides that section 107 "shall [not] be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." Because the Restoration Act was passed after *Cabazon Band*, the Pueblo insists, this provision reflects an "unambiguous intention to *limit* state regulatory power over tribal gaming activities" in the way described by *Cabazon Band*. Pet. 16. That is, the federalization of Texas law provided in section 107(a) must be limited only to those laws *banning* gaming—not laws *regulating* gaming by limiting its time, place, and manner. *Id.* at 17. There are many problems with this syllogism, two of which are of particular note.

*First*, unlike Tribal Resolution No. T.C.-02-86, the Restoration Act makes no mention of *Cabazon Band*. When Congress wants a statute to respond to a case from this Court—whether to extend its reasoning or to contract it—Congress knows how to say so. *E.g.*, Openness Promotes Effectiveness in our National Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, 5 U.S.C. § 552 (2007) (citing three separate opinions and inserting language to prevent application of *Buckhannon Bd. & Care Home, Inc. v. W.V. Dep't of Health & Human Res.*, 532 U.S. 598 (2001)). It did not do so here.

The only evidence that Congress was even considering *Cabazon Band* to which the Tribe and its amici can point is a statement by Senator Udall that section 107(b) is "in line with the rational[e]" of *Cabazon Band*. Pet. 5-6 (quoting 133 Cong. Rec. H6972-05, 1987 WL 943894 (Aug. 3, 1987)); Am. Br. 3-4 (same). It is not clear what that statement means. But, more fundamentally, of all forms of legislative history, floor statements from individual legislators are considered to be the least reliable guide to legislative meaning because a legislator may "engage in floor colloquies . . . before an empty house[]

precisely to induce courts to accept [his] views about how the statute works" regardless of whether his colleagues agree with him. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 377 (2012) (cleaned up). In light of "substantial legislative history to the contrary," Senator Udall's ambiguous statement cannot be read to eliminate the express incorporation of Resolution T.C.-02-86. *Ysleta I*, 36 F.3d at 1334.

*Second*, even if section 107(b) is an oblique reference to *Cabazon Band*, that does not aid the Pueblo because the Fifth Circuit's reasoning is—to borrow Senator Udall's phrase—"in line" with that case. In *Cabazon Band*, this Court examined Public Law 83-280, which granted six States broad criminal and somewhat more limited civil jurisdiction over tribal lands. *Compare* Pub. L. No. 83-280, § 2, 18 U.S.C. § 1162 (criminal jurisdiction); *with id.* § 4, 28 U.S.C. § 1362 (civil jurisdiction). Neither Public Law 83-280 nor this Court's discussion in *Cabazon Band* was specific to gaming. Instead, the question presented was whether to read the State's broad criminal jurisdiction to allow the State to impose civil fines, thereby giving the State nearly limitless control over conduct on tribal lands. *Cabazon Band*, 480 U.S. at 210-11.

This Court has repeatedly held that States may not exercise limitless control over tribal lands of federally recognized tribes absent congressional consent. 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 83-280 "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. *Id.*

Instead, the Court surmised that Congress's primary concern was combatting lawlessness on reservations, *not* to subject tribes to such broad regulation. *Id.* at 383, 389.

*Cabazon Band* examined whether States could avoid the rule established in *Bryan* by passing what might otherwise be a civil regulation as a criminal prohibition. 480 U.S. at 211-12. It was in *this* context that *Cabazon Band* drew the distinction between prohibitions and regulations. Contrary to the suggestions of the Pueblo before the Fifth Circuit and its amici here, the Court did *not* adopt a specialized definition of the term "prohibit" for Indian-law purposes. *See* Pet. App. 12; Am. Br. 17-18. Instead, because Public Law 83-280 distinguished between a State's criminal and civil jurisdiction, the Court drew a line between criminal and civil fines. *See Cabazon Band*, 480 U.S. at 214 (noting that civil fines were "not expressly permitted by Congress").

This Court has repeatedly cautioned that, in the Indian-law context, the interpretation of one statute, treaty, or Executive Order, does not necessarily translate to another. Instead, "[e]ach tribe's" relations with state and federal governments "must be considered on their own terms." *McGirt*, 140 S. Ct. at 2479. And, since *Cabazon Band*, this Court and others have consistently refused to import the criminal-prohibitory/civil-regulatory distinction from the Public Law 83-280 context to other, more specific laws governing tribal affairs. *E.g.*, *Rice v. Rehner*, 463 U.S. 713, 732 (1983). Put another way, the *Cabazon Band* "line of cases" fashioned a solution unique to the facially broad grant of civil-regulatory jurisdiction in Public Law 83-280 "[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 lower courts correctly applied this later, limited understanding of *Cabazon Band*—as the Fifth Circuit did in *Ysleta I*. In stark contrast to Public Law 83-280, the Restoration Act does *not* grant general jurisdiction to regulate all aspects of life on the Pueblo's reservation. Indeed, that is the purpose of the language upon which the Pueblo rely. *See* Pub. L. No. 100-89, § 107(b). Rather, section 107 expressly makes the Tribe subject only to Texas's gaming restrictions. *Id.* § 107(a). Also in contrast to Public Law 83-280, the Restoration Act does *not* distinguish between Texas's ability to impose "civil and criminal" rules regarding gaming; it allows Texas to enforce both. *Id.* When Congress "expressly permit[s]" specific state regulations, any distinction that *Cabazon Band* drew 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.").

**3.** As a fallback, the Pueblo and its amici repeatedly point to the so-called Indian canon of construction that any ambiguity in a statute should be resolved in favor of the tribe. *E.g.*, Pet. 15 (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980)); Am. Br. 24 (citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). But such arguments presume there is an ambiguity. The Fifth Circuit confirmed in *Alabama-Coushatta* that its interpretation of the Restoration Act is based on that statute's unambiguous language.

*Alabama-Coushatta*, 918 F.3d at 447-48 (rejecting the application of *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), in the absence of ambiguous language). In the face of unambiguous language, the so-called Indian canon of construction has no role to play, and the Pueblo's supposedly textualist defense of its position fails. *See Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (holding that so-called Indian canon cannot overcome "the intent embodied in the statute Congress wrote"); *accord DeCoteau v. Dist. Cty. Ct. for Tenth Judicial Dist.*, 420 U.S. 425, 447 (1975).

### B. The Tribe's refusal to obey the Fifth Circuit's ruling does not make it "unworkable."

To buttress its faulty textual argument, the Pueblo asserts (at 24-26) that the Fifth Circuit's approach has proven "unworkable when applied to subsequent disputes." Specifically, the Tribe complains that in 2001, the district court imposed a "total gaming ban that ran contrary" to the Restoration Act, *id.* at 24, which the court subsequently modified through a series of orders before ultimately abandoning it, *id.* at 24-25. The Tribe's description is an exercise in revisionist history that does not justify this Court's review.

The district court did not impose a total ban on gaming in 2001 because *Ysleta I* misconstrued what the Restoration Act required. Since *Ysleta I*, the lower courts have "recognized that the [Pueblo is] *not* prohibited from participating in all gaming activities, only those gaming activities that are prohibited to private citizens and organizations under Texas law." *Ysleta II*, 220 F. Supp. 2d at 698-99 (emphasis added). But in 2001, the Tribe was not even attempting to comply with the limitations that the Restoration Act placed on its gaming activities. *Id.* at 699. In the face of such intransigence, the district court

issued a broad prophylactic injunction because it concluded that doing so was the only way to halt the illegal activity. *Id.* "After the illegal operations cease[d]," the court invited the Tribe to "petition the Court for a modification of . . . the terms of the injunction." *Id.* at 701.

Instead of undertaking a comprehensive effort to bring their behavior into full compliance, the Pueblo and the Alabama-Coushatta made a series of minor changes to test the outer limits of Texas's gaming laws. The result of this deliberate choice was that the tribes' respective injunctions underwent seriatim alterations as they tweaked their behavior to avoid massive fines associated with multiple contempt citations. *Ysleta III*, 2016 WL 3039991, at *25-26; *Texas v. Ysleta del Sur Pueblo*, No. EP-99-CV-320-KC, 2015 WL 1003879 (W.D. Tex. Mar. 6, 2015); *Texas v. Ysleta del Sur Pueblo*, No. EP-99-CA-320-H, 2009 WL 10679428, at *4 (W.D. Tex. Aug. 3, 2009).

Contrary to the Pueblo's assertion (at 24-25), the district court that has had the unenviable task of overseeing the Pueblo's (non)compliance with the original 2001 injunction has *not* held that the *Ysleta I* standard is unworkable. That court simply stated that by 2016, the original 2001 injunction had become unwieldy due to 15 years of accumulated changes. *Ysleta III*, 2016 WL 3039991, at *2-5 (describing evolution of the order); *id.* at *19 (noting that "the Original Injunction has morphed" to require the Court to "oversee[] and monitor[] the minutiae of the Pueblo Defendants' gaming-related conduct"). Rather than attempting to assess compliance with an injunction, many parts of which were obsolete, the court directed the State to bring a new lawsuit and seek a new injunction the next time it concluded that the Tribe was violating the terms of the Restoration Act. *Id.* at *19-21 ("explain[ing] how disputes . . . shall proceed

from this point forward"). The State did so. And, working from this clean slate, the district court agreed that the Tribe *still* was not in compliance with the Restoration Act. Pet. App. 19.

This history, properly understood, does not reflect that "*Ysleta I* has sown confusion and produced inconsistent law," requiring the Court to intervene to correct the Fifth Circuit's interpretation of the Restoration Act. Pet. 24 (capitalization altered). Indeed, notwithstanding the purported confusion, the petition does not seriously contest that the lower courts misapplied the *Ysleta I* rule here—only that the rule is wrong. To the extent that argument merits the Court's attention, the Court should summarily affirm that *Ysleta I* was correctly decided twenty-six years ago.

### C. Congress has confirmed the Fifth Circuit's rule by acquiescing to it.

After twenty-six years, any change to the Fifth Circuit's clear rule that the Restoration Act federalizes Texas gaming law must come from Congress. *Ysleta I* is, at its core, a decision about the meaning of language that Congress wrote. *E.g.*, 36 F.3d at 1332 (assessing whether "the term 'prohibit' has special significance in federal Indian law, which is derived from *Cabazon Band*"). If Congress thinks that the Fifth Circuit misunderstood its intent back in 1987, Congress is free to amend the law at any time. *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 456 (2015); *see also, e.g.*, Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317, 1480-1514 (2014) (listing instances where Congress has overridden court opinions through statutory amendment).

In the quarter-century since *Ysleta I* held that the Restoration Act federalized Texas gaming law, the Tribe and its allies have repeatedly requested that Congress override the Fifth Circuit.[4] Indeed, one such request was made just last congressional term: House Resolution 759, introduced by the congressman in whose district one of the Restoration Act tribes' reservation sits, would have amended the Restoration Act to override *Ysleta I* by providing 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 2019 with bipartisan support, but it stalled in the Senate. *Cf. Sen. Cornyn sends letter opposing Alabama-Coushatta Tribe's gaming facility*, KTRE (Oct. 17, 2020), https://tinyurl.com/y8bmjwp3 (reproducing letter from Sen. John Cornyn and response thereto).

Ordinarily, this Court does not give much interpretive weight to failed legislation. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). But here, the Fifth Circuit's longstanding "construction has been brought to Congress' attention through legislation specifically designed to supplant it," and that legislation has been rejected. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985). Under those circumstances, the Court considers Congress to have acquiesced to that interpretation. *Id.* (citing *Bob Jones Univ. v. United States*, 461 U.S. 574,

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[4] *E.g.*, Indian Gaming: Hearing before the S. Comm. on Indian Affairs, 111th Cong. 40 (July 2010) (describing Fifth Circuit's ruling as "egregious"); Oversight Hearing on Implementation of the Texas Restoration Act before the S. Comm. on Indian Affairs, 107th Cong. 7 (June 2002) (describing *Ysleta I* as "wrong on the facts and . . . wrong on the law").

599-601 (1983); *United States v. Rutherford*, 442 U.S. 544, 554 & n.10 (1979)).

This Court has repeatedly stated that "judicial respect for Congress's primary role in defining the contours of tribal sovereignty" vis-à-vis the States is a "fundamental commitment of Indian law." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 803 (2014). Reversing *Ysleta I* "in these circumstances would scale the heights of presumption" by replacing "Congress's considered judgment" to leave *Ysleta I* in place with the Court's "contrary opinion." *Id.*; *see also McGirt*, 140 S. Ct. at 2462 (noting that "courts have no proper role in the adjustment" of State-tribe relations).

Because Congress has chosen *not* to upset *Ysleta I*, litigation over the validity of that decision should end. As the Tribe does not appear to dispute that the Fifth Circuit properly applied *Ysleta I*, the Court should summarily affirm.

## II. In the Alternative, the Court Should Deny Review.

If the Court chooses not to summarily affirm the decision below, it should deny the petition. This is not a good vehicle to examine whether *Cabazon Band* should be extended to contexts outside Public Law 83-280 because this case turns on a fact-bound dispute over whether Texas has prohibited the gaming activities in which the Tribe seeks to engage as a matter of public policy, or has merely regulated those activities. The case does not present a question of national importance because it involves the interpretation of a statute that affects only two tribes, both of whom reside in the same circuit. And this is not the right forum for the Restoration Act tribes to bring their grievances about the

economic impact of the bargain they struck to achieve federal-trust status all those years ago.

### A. This is a poor vehicle to consider any lingering questions about the scope of *Cabazon Band*.

As discussed above (at 14-16), the Tribe is wrong to insist that this case is directly controlled by the civil-regulatory/criminal-prohibition distinction recognized in *Cabazon Band*. To the extent that the Court were inclined to consider whether to expand that distinction to new contexts, this case would be a poor vehicle to do so. Because the Fifth Circuit's *Ysleta I* decision controlled, the lower courts never reached the question whether Texas prohibits the Pueblo's activities as a matter of public policy or merely regulates the time, place, and manner in which the Pueblo may undertake them. This Court typically does not decide such questions in the first instance. *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592, 595 (2020) (per curiam) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7 (2005) ("[W]e are a court of review, not of first view.")). And it should not do so here as the dispute is highly fact-bound.

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. As a general matter, Texas outlaws lotteries, TEX. PENAL CODE § 47.01; gambling, *id.* § 47.02; operating a gambling promotion, *id.* § 47.03(a)(1), (5); keeping a gambling place, *id.* § 47.04(a); or possessing gambling devices, equipment or paraphernalia, *id.* § 47.06(a), (c). The only narrow exceptions are for certain forms of charitable bingo, charitable raffles, and state lotteries. TEX. CONST. art. III, § 47.

This is not an instance where the State is trying to evade the limits of its civil jurisdiction by passing a

statute that is criminal in name only: As a general matter, gambling is a criminal offense in Texas. TEX. PENAL CODE ch. 47. A defendant can raise that his gambling activities are authorized under the narrow terms of the Bingo Enabling Act as an affirmative defense to prosecution. *Id.* §§ 47.09(a)(1)(A), 47.02(c)(1). Indeed, since the earliest days of its existence, Texas has considered casino-style gambling to be "an offense against public policy." *Barker v. Texas*, 12 Tex. 273, 276 (1854); *see also City of Fort Worth v. Rylie*, 602 S.W.3d 459, 460-61 (Tex. 2020); *cf. Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 181 (1999) (noting that "private casino gambling is unlawful" in Texas).

This well-established Texas policy stands in sharp contrast to the circumstances in *Cabazon Band* where the State prohibited only certain games, and the games the plaintiff tribe offered "flourished in California." 480 U.S. at 210; *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310, 316 (5th Cir. 1981) (observing that Florida has no "statute that specifically prohibits the act of gambling").

The lower courts correctly concluded that Texas's general prohibition against gambling extends to the Tribe's gaming activities. The petition strains to call the games on offer at the Speaking Rock Entertainment Center "bingo." *E.g.*, Pet. ii, 11-12, 17. In reality, while the Tribe does offer "live-called bingo," the primary draws are "thousands of machines that 'look and sound like Las-Vegas-style slot machines' available to the public around the clock." Pet. App. 7. These machines have names like "'Big Texas Payday,' 'Welcome to Fabulous Las Vegas,' 'Kitty City,' and 'Lucky Duck,'" and they "display lights, sounds, and graphics" that bear little or no resemblance to traditional bingo. *Id.* at 30; *see also*

Cindy Ramirez, *Speaking Rock to reopen Monday*, EL PASO INC. (May 8, 2020), https://tinyurl.com/yc6m44go (describing the facility as "[o]ffering video slot machines, large screen TVs, and music" without mention of live-call bingo).

The Pueblo cannot rely on the limited types of gaming that Texas *does* allow to avoid this conclusion. Even under *Cabazon Band*, the civil-regulatory/criminal-prohibition distinction "is not a bright-line rule." 480 U.S. at 210. That Texas law does not prohibit every conceivable form of bingo does not mean that bingo-themed machines that are designed to be indistinguishable from slot machines are fair game. *Cf.* 25 U.S.C. § 2703(7)(B). On this, no further review is required because—as the Pueblo and its amici do not dispute—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).

As a result, this petition boils down to (at most) a fact-bound dispute over whether the activities at the Speaking Rock Entertainment Center are prohibited by Texas law. The district court correctly concluded (Pet. App. 39-46), and the Fifth Circuit affirmed (*id.* at 17), that these activities do not fall within the narrow affirmative defense created by Texas's Bingo Enabling Act. But even if this conclusion were incorrect, this Court does not take cases merely to correct errors in the interpretation of state or federal law. Sup. Ct. R. 10. And nowhere does the petition maintain that the lower courts have made the type of "egregious error" leading to a "gross miscarriage

of justice" in which the Court may make an exception. STEPHEN M. SHAPIRO, ET AL., SUPREME COURT PRACTICE § 4.17 (10th ed. 2013).

### B. This case does not present a division of authority on a question of national importance.

Error correction is all that the Court would achieve if it were to take this case because the lower courts' rulings do not and *cannot* create a circuit split. Like the Alabama-Coushatta did little more than a year ago, the Pueblo insists that taking this case is necessary to vindicate larger questions of "tribal sovereignty." Pet. 14-16; Petition for Writ of Certiorari at 21-24, *Alabama-Coushatta*, 140 S. Ct. 855 (No. 19-403), 2019 WL 4689142 (Sept. 23, 2019). But, in fact, the two Restoration Act tribes are uniquely situated, and the Fifth Circuit's interpretation of that Act affects gambling activity at two primary facilities: the Pueblo's casino at Speaking Rock, and the Alabama-Coushatta's at Naskila.

Applying the Restoration Act as it is written and as it has been consistently interpreted for twenty-six years will not frustrate any national policy to promote tribal independence. *Contra* Pet. 23; Am. Br. 3. There are currently 574 federally recognized tribes. *See* U.S. Dep't of Interior, Bureau of Indian Affairs, *Mission Statement*, https://www.bia.gov/bia (last visited Dec. 19, 2020). Less than one tenth of them gained recognition through tribe-specific legislation similar to the Restoration Act. *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://tinyurl.com/GA0249. And only about half of those gained

recognition before the enactment of IGRA and could even theoretically be subject to a rule similar to that adopted in *Ysleta I* and applied below. Only two actually are subject to that rule, and both of them are located in the Fifth Circuit. Carlson, *supra*, at 988 & n.137.

As a result, the petition does not even attempt to claim that this Court's review is necessary to correct a circuit split. And any claim that the opinion below effects more than just the Pueblo and the Alabama-Coushatta falls flat.

### C. This is the wrong forum to address the Pueblo's complaints about the economic impact of the Restoration Act.

Ultimately, the Pueblo and its amici are unhappy with the deal that they struck to secure passage of the Restoration Act and the benefits of federal-trust status. Much of the petition is a naked appeal to policy, including the impact of *Ysleta I* on the Tribe's sovereignty, Pet. 14-16, 22-23, and its pocketbook, *id.* at 26-30. *See also* Am. Br. 5-8. While those concerns are certainly of importance to the Tribe, this is simply not the right forum to address them.

Contrary to the repeated assertions of the Pueblo, this Court has not recognized a rule that "Congress . . . must treat the rights of sovereign tribes as a paramount concern." Pet. 15. To the contrary, it has repeatedly held that "Congress may abrogate Indian treaty rights" if and when it chooses, so long as it "clearly express[es] its intent to do so." *Mille Lacs Band*, 526 U.S. at 202; *see also, e.g.*, *McGirt*, 140 S. Ct. at 2462 (reiterating that Congress has "the authority to breach its own promises and treaties").

What this Court *has* held is that, "[a]s dependents, the tribes are subject to plenary control by Congress"—

not the courts. *Bay Mills*, 572 U.S. at 788. Indeed, the Court has described "judicial respect for Congress's primary role in defining the contours of tribal sovereignty" as a "fundamental commitment of Indian law." *Id.* at 803.

This commitment flows in part from "[t]he special brand of sovereignty the tribes retain," vis-à-vis the state and federal governments. *Id.* at 800. After all, the State of Texas is a sovereign too. *Printz v. United States*, 521 U.S. 898, 918-19 (1997). And this Court has recognized that "[s]tate sovereignty is not just an end in itself," but "secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992); *see also Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers))). The people of Texas have long decided that they do not want to have casino-style gambling in Texas. *Supra* at III.A. When a court issues a ruling that provides a tribe with an exception from state law, it is necessarily making a value judgment about which sovereign's interests are more important.

This Court has recognized that Congress should be the entity making such judgments about how to balance the interests of multiple sovereigns who must occupy the same geographic space. Congress is the entity with the "great[est] capacity 'to weigh and accommodate the competing policy concerns and reliance interests' involved." *Bay Mills*, 572 U.S. at 801 (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998)). This process can be slow and ultimately unsatisfactory to one

party. But "[m]ustering the broad social consensus required to pass new legislation is a deliberately hard business under our Constitution." *McGirt*, 140 S. Ct. at 2462. Our Founders considered it to be the best—if not the only—way to ensure fairness to all sides in important policy debates. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919, 949-51 (1983) (collecting Founding-era documents regarding the importance of bicameralism and presentment).

As discussed above, the Tribe has been pursuing a remedy through legislative means—albeit unsuccessfully. The Pueblo and its amici are attempting to short-circuit that debate because they have not yet convinced the Senate, and they may have to close their highly lucrative casinos. Pet. 26-30; Am. Br. 5-8. But in Indian law—as in any other context—the Court should not "be taken by the 'practical advantages' of ignoring the written law." *McGirt*, 140 S. Ct. at 2474. "If 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). "It is Congress that has the authority to change the statute." *Id.* To date, Congress has chosen not to adopt legislation relieving the Pueblo and the Alabama-Coushatta from the consequences of the Restoration Act. *Supra* at I.C. The Pueblo have not provided any legal reason that requires or policy reason that empowers the Court to override that decision.

## CONCLUSION

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

Respectfully submitted.

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