No. 20-493

In the Supreme Court of the United States

YSLETA DEL SUR PUEBLO, ET AL., PETITIONERS

v.

STATE OF TEXAS

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, § 107(a), 101 Stat. 668-669, prohibits petitioner from conducting "[a]ll gaming activities which are prohibited by the laws of the State of Texas." The question presented is:

Whether the Act subjects petitioner to the entire body of Texas gaming statutes and regulations or, consistent with the framework of *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), prohibits only those gaming activities that the State bars rather than regulates.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to this Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. a. Petitioner Ysleta del Sur Pueblo (petitioner) is a federally recognized Indian tribe with a reservation near El Paso, Texas. Pet. App. 1. In 1968, Congress recognized petitioner as an Indian tribe and simultaneously transferred federal trust responsibility, if any, to the State of Texas. Act of Apr. 12, 1968, Pub. L. No. 90-287, § 2, 82 Stat. 93. In 1983, however, the Texas Attorney General concluded that the Texas constitution forbids the State from entering into a trust relationship with a tribe.

Pet. App. 19-20. In response, Congress enacted the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act (Restoration Act or Act), Pub. L. No. 100-89, 101 Stat. 666, "to establish a federal trust relationship" between the federal government and petitioner and the Alabama-Coushatta Indian Tribe. Pet. App. 20.[1]

b. The Restoration Act contains provisions addressing gaming on tribal land. Pet. App. 2-3. Those provisions changed significantly between the legislation's 1985 introduction and its 1987 enactment. See *id.* at 19-23.

The bill originally did not mention gaming. Pet. App. 3. In October 1985, at a hearing before the House Committee on Interior and Insular Affairs, the Texas Comptroller of Public Accounts expressed opposition to the bill unless it was amended to make state laws governing gaming directly applicable on petitioner's reservation. Ysleta del Sur Pueblo Council, Tribal Resolution T.C.-02-86 (Mar. 12, 1986) (1986 Tribal Resolution); see Pet. App. 121-124. The House Committee thereafter added a provision—Section 107—which stated that, unless amended by the Secretary of the Interior and submitted to Congress, "the tribal gaming laws, regulations and licensing requirements shall be identical to the laws and regulations of the State of Texas regarding gambling, lottery and bingo." H.R. Rep. No. 440, 99th Cong., 1st Sess. 2-3 (1985). Petitioner agreed to that provision, see Pet. App. 122, and the House of Representatives passed the bill as amended, see 131 Cong. Rec. 36,565-36,567 (1985).

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[1] The Restoration Act was formerly codified at 25 U.S.C. 731-737, and 1300g to 1300g-7. References herein are to the Public Law, not the U.S. Code.

The State, however, continued to oppose the bill because it did not provide for the direct application of state laws governing gaming. See Pet. App. 20-21, 121. In response, petitioner passed the 1986 Tribal Resolution, cited above, which expressed petitioner's lack of interest in "conducting high stakes bingo or other gambling operations on its reservation"; its opposition to the "proposal that H. R. 1344 be amended to make state gaming law applicable on the reservation"; and its preference that "any gambling or bingo in any form on its reservation" instead be "prohibit[ed] outright." *Id.* at 121-123. Petitioner's counsel explained at a Senate hearing that, "[i]n order to quiet the controversy that surrounds this issue, the tribe is simply requesting that the legislation be amended to prohibit gambling altogether." *Restoration of Federal Recognition to the Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribes of Texas: Hearing on H.R. 1344 Before the Senate Select Comm. on Indian Affairs*, 99th Cong., 2d Sess. 23 (1986) (statement of Don B. Miller). Consistent with that request, the Senate Select Committee amended Section 107 to prohibit all gaming on petitioner's reservation. S. Rep. No. 470, 99th Cong., 2d Sess. 4 (1986). Congress took no further action on that bill. Pet. App. 22.

In January 1987, H.R. 318, 100th Cong., 1st Sess. (Jan. 6, 1987)—a bill substantially identical to the Senate version of the Restoration Act—was introduced in the House. Pet. App. 4. The House Committee on Interior and Insular Affairs then amended Section 107 to state that, "[p]ursuant to Tribal Resolution No. T.C-02-86 * * * , all gaming as defined by the laws of the State of Texas shall be prohibited on the tribal reservation and on tribal lands." H.R. Rep. No. 36, 100th Cong., 1st

Sess. 1 (1987) (House Report). The House passed the amended H.R. 318. 133 Cong. Rec. 9042-9045 (1987).

c. While Congress was fashioning the Restoration Act, significant legal shifts were occurring in the regulation of Indian gaming generally.

As of 1987, the federal government had successfully prosecuted operators of casino-style gaming on Indian reservations. See *United States* v. *Sosseur*, 181 F.2d 873 (7th Cir. 1950) (prosecution under the Assimilative Crimes Act, 18 U.S.C. 13); *United States* v. *Farris*, 624 F.2d 890 (9th Cir. 1980) (prosecution under the Organized Crime Control Act of 1970, 18 U.S.C. 1955), cert. denied, 449 U.S. 1111 (1981); *United States* v. *Dakota*, 796 F.2d 186 (6th Cir. 1986) (same). But States seeking to limit gaming on Indian reservations could do so only if they were covered by Public Law No. 83-280 (Public Law 280), 67 Stat. 588 (1953), as amended by the Indian Civil Rights Act of 1968, Pub. L. No. 90-284, Tit. II, 82 Stat. 77-78.

Public Law 280 granted specified States criminal jurisdiction over offenses committed by or against Indians within Indian country in those States. 18 U.S.C. 1162(a). In *Bryan* v. *Itasca County*, 426 U.S. 373 (1976), this Court held that Public Law 280 granted state courts jurisdiction over private civil litigation involving reservation Indians, see 28 U.S.C. 1360(a), but did not grant the States general civil regulatory authority. As a result, state efforts to regulate bingo within Indian country under Public Law 280 had been largely unsuccessful. See, *e.g.*, *Cabazon Band of Mission Indians* v. *County of Riverside*, 783 F.2d 900 (9th Cir. 1986) (concluding that California could not enforce its gaming restrictions because California law regulated but did not prohibit bingo), aff'd and remanded, 480 U.S. 202

(1987); *The Barona Grp. of the Capitan Grande Band of Mission Indians* v. *Duffy*, 694 F.2d 1185 (9th Cir. 1982) (same), cert. denied, 461 U.S. 929 (1983); *Seminole Tribe* v. *Butterworth*, 658 F.2d 310 (5th Cir. Unit B Oct. 1981) (same under Florida law), cert. denied, 455 U.S. 1020 (1982).

In February 1987, this Court affirmed the Ninth Circuit's decision in *Cabazon*, holding that Public Law 280 did not authorize state regulation of tribal bingo operations in California. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 212 (1987). The Court applied a distinction between "criminal/prohibitory" laws, which a State could enforce on Indian lands, and "civil/regulatory" restrictions, which it could not. *Id.* at 209; see *id.* at 207-212. As the Court explained, "[t]he shorthand test is whether the conduct at issue violates the State's public policy." *Id.* at 209. The Court reasoned that, because "California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, * * * California regulates rather than prohibits gambling in general and bingo in particular." *Id.* at 211.

After this Court's *Cabazon* decision and at the same time that the Senate was considering the proposed Restoration Act, the relevant Senate committee was also considering bills to provide for the federal regulation of Indian gaming nationwide in light of *Cabazon*. See, *e.g.*, *Gaming Activities on Indian Reservations and Lands: Hearing on S. 555 and S. 1303 Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 1st Sess. (1987) (repeatedly discussing *Cabazon*).

Shortly thereafter, the Senate Select Committee on Indian Affairs reported the proposed Restoration Act. Section 105(f) of that bill carried forward a section from

prior versions providing that Texas "shall exercise civil and criminal jurisdiction" on the Tribe's reservation "as if the State had assumed jurisdiction" under the amendments to Public Law 280 made by the Indian Civil Rights Act of 1968. S. Rep. No. 90, 100th Cong., 1st Sess. 3 (1987) (Senate Report). The reported bill also made significant amendments to Section 107 of the proposed Restoration Act. *Ibid.* The amended Section 107—which Congress ultimately enacted—states:

> SEC. 107. GAMING ACTIVITIES.
>
> (a) IN GENERAL.—All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.
>
> (b) NO STATE REGULATORY JURISDICTION.—Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.
>
> (c) JURISDICTION OVER ENFORCEMENT AGAINST MEMBERS.—Notwithstanding section 105(f), the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be con-

> strued as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

Restoration Act § 107, 101 Stat. 668-669; see Senate Report 3.

Congress passed the amended bill. See 133 Cong. Rec. 20,956-20,959 (1987); 133 Cong. Rec. 22,111-22,114 (1987). Just before passage, the Chairman of the House Committee on Interior and Insular Affairs explained that Section 107, as redrafted by the Senate, incorporated the *Cabazon* framework: "[T]he Senate amendments to these sections are in line with the rational[e] of the recent Supreme Court decision in the case of Cabazon Band of Mission Indians versus California. This amendment in effect would codify for these tribes the holding and rational[e] adopted in the Court's opinion in the case." 133 Cong. Rec. 22,114 (Rep. Udall).

d. The next year, Congress enacted the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, to establish a nationwide regulatory framework for tribal gaming on Indian lands. IGRA confirmed the right of Indian tribes to undertake and "to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. 2701(5).

IGRA divides Indian gaming into three "classes." See 25 U.S.C. 2703. Tribes have exclusive jurisdiction over Class I gaming, which includes both social games for prizes of minimal value and traditional forms of Indian gaming. 25 U.S.C. 2703(6), 2710(a)(1). Class II gaming includes bingo (including with electronic, computer or technologic aids) and other games similar to

bingo. 25 U.S.C. 2703(7)(A)(i). The National Indian Gaming Commission (NIGC) and tribes regulate all Class II gaming and have enforcement authority. 25 U.S.C. 2710(a)(2). Class III gaming includes casino-style gaming (*e.g.*, slot machines, roulette, and house-banked card games). 25 U.S.C. 2703(8). Class III gaming must be conducted pursuant to a compact between the State and tribe or relevant Class III procedures. 25 U.S.C. 2710(d)(1) and (7)(B)(vii). Both Class II and Class III gaming activities are permissible if the State "permits such gaming for any purpose by any person, organization or entity." 25 U.S.C. 2710(b)(1)(A); see 25 U.S.C. 2710(d)(1)(B).

2. Since 1993, petitioner and the Alabama-Coushatta Tribe have been involved in litigation with Texas relating to tribal gaming. See Pet. App. 5-7. The earliest court of appeals decision, *Ysleta del Sur Pueblo* v. *Texas*, 36 F.3d 1325 (5th Cir. 1994) (*Ysleta I*), cert. denied, 514 U.S. 1016 (1995), has affected the outcome of many subsequent decisions, including the decision here.

In *Ysleta I*, petitioner sued Texas under IGRA, seeking to compel it to negotiate a compact for Class III gaming. See *Ysleta del Sur Pueblo* v. *Texas*, 852 F. Supp. 587, 588-589 (W.D. Tex. 1993). The district court concluded that IGRA had incorporated *Cabazon*'s prohibitory/regulatory framework; that gaming was not prohibited in Texas because the State had expanded legalized gaming to include bingo and the Texas Lottery; that IGRA, rather than the earlier-enacted Restoration Act, controlled the court's analysis; and that, in any event, the Class III gaming activities petitioner had requested were not "prohibited by the laws of the State of Texas" under Section 107 of the Restoration Act. See *id.* at 592-597.

The court of appeals reversed, holding that the Eleventh Amendment barred petitioner's suit because the Restoration Act controlled and did not abrogate a State's immunity from suit. *Ysleta I*, 36 F.3d at 1332. As part of determining which statutory framework controlled, the court construed Section 107(a) of the Restoration Act to provide that all of "Texas' gaming laws and regulations" would "operate as surrogate federal law on the Tribe's reservation in Texas." *Id.* at 1334. The court reached that conclusion based on its "analysis of the legislative history of both the Restoration Act and IGRA," *id.* at 1333, and its assessment that "any threat to tribal sovereignty is of the Tribe's own making," given the 1986 Tribal Resolution proposing to ban all tribal gaming, *id.* at 1335.

Since *Ysleta I*, federal courts have repeatedly been called upon to adjudicate gaming disputes under the Restoration Act. See Br. in Opp. II-IV, 1 n.1, 16-17 (identifying cases).

3. The particular dispute here involves gaming activities at the Speaking Rock Entertainment Center (Speaking Rock), the primary location of petitioner's gaming operations. Pet. App. 28. After Texas agents concluded in 2017 that the casino's electronic machines and live-called bingo did not comply with state law and bingo regulations, the State sought injunctive relief in federal district court. See *id.* at 7, 29-32.

The district court granted summary judgment to the State and enjoined petitioner's gaming operations. Pet. App. 18-55. The court, however, stayed the injunction, observing that, although it believed that it had "accurately applie[d]" *Ysleta I*, "a higher court—the Fifth Circuit panel, the Fifth Circuit sitting en banc, or the United States Supreme Court—may carefully consider

the meaning of 'regulatory jurisdiction'" in Section 107(b) and might conclude that the State had impermissibly exercised such jurisdiction here. *Id.* at 100.

4. The court of appeals affirmed. Pet. App. 1-17. The court concluded that "settled precedent resolves this dispute." *Id.* at 17. It explained that, in *Ysleta I*, it had concluded that "Congress—and [petitioner]—intended for Texas' gaming laws *and regulations* to operate as surrogate federal law on the Tribe's reservation in Texas." *Id.* at 12 (quoting *Ysleta I*, 36 F.3d at 1334). The court observed that it had recently "reaffirmed [*Ysleta I*'s] reasoning and conclusion." *Id.* at 11 (citation omitted). And the court "re-reaffirm[ed]" that "[t]he Restoration Act and IGRA erect fundamentally different regimes, and the Restoration Act—plus the Texas gaming laws and regulations it federalizes—provides the framework for determining the legality of gaming activities on [petitioner's] lands." *Ibid.*

DISCUSSION

In its 1994 decision in *Ysleta I*—and in various decisions over the subsequent decades, including the decision below—the court of appeals has erroneously construed the Restoration Act to broadly permit application of state standards to tribal gaming operations on Indian lands, even where the State *regulates* forms of gaming rather than *prohibiting* them outright. In the view of the United States, the Restoration Act is better construed to prohibit gaming on Indian lands only to the extent that the particular gaming activity is properly determined under the framework of *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), to be "prohibited" by state law rather than "regulated" under it. Non-prohibited gaming activities, including

bingo, should accordingly be subject to regulation under IGRA. The court's contrary decision implicates important tribal sovereignty interests and undermines IGRA's key objectives. This Court's review is therefore warranted.

A. The Court Of Appeals' Decision Is Incorrect

The Restoration Act prohibits on tribal lands those gaming activities "prohibited by the laws of the State of Texas." § 107(a), 101 Stat. 668-669. That language in Section 107(a), the broader statutory context, and the Act's drafting history make clear that the Act prohibits any form of gambling that is banned by state law, but does not prohibit gaming that the State regulates rather than prohibits. And to the extent any doubt remains, Indian law canons require construing the Act in a manner favorable to petitioner.

1. The phrase "prohibited by the laws of the State of Texas" in Section 107(a) of the Restoration Act should be construed consistently with *Cabazon*'s prohibitory/regulatory framework. The court of appeals erred in reaching the contrary conclusion that the Act provides for the application (as federal law) of state regulatory provisions governing gaming that is not prohibited by state law.

a. i. The Restoration Act defines the scope of state involvement in tribal gaming by twice using the word "prohibited": "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." § 107(a), 101 Stat. 668-669. That word choice is significant. This Court decided *Cabazon* in February 1987, rejecting the application of a state law to tribal gaming operations because the law was "regulatory" rather than "prohibitory," 480 U.S. at 210; see *id.* at 211-212,

and affirming a line of lower-court decisions that had endorsed that dichotomy for years, see *id.* at 209. When Congress passed the Restoration Act six months later, it would have understood that its use of the term "prohibited" would incorporate the *Cabazon* framework. That term, after all, had just received close judicial scrutiny in the specific context of tribal gaming, and Congress "presumably kn[ew] and adopt[ed] the cluster of ideas that were attached" to that "borrowed word in the body of learning from which it was taken." *Morissette* v. *United States*, 342 U.S. 246, 263 (1952); see *Stokeling* v. *United States*, 139 S. Ct. 544, 551 (2019) ("If a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.") (brackets and citation omitted).

Moreover, the phrase "prohibited by the laws of the State of Texas" underscores Section 107(a)'s focus on statutory prohibitions rather than regulations. Congress could have rejected the *Cabazon* framework by specifying that regulations count too—as a pre-*Cabazon*, unenacted version of Section 107 once did by prohibiting all gaming as defined by state "regulations" as well as "laws." See 132 Cong. Rec. 25,874 (1986) (prohibiting "[g]aming, gambling, lottery or bingo as defined by the laws *and administrative regulations* of the State of Texas," on tribal lands) (emphasis added). But Congress instead proscribed only gaming "'prohibited by the laws of the State.'" Restoration Act § 107(a), 101 Stat. 668-669. In another context, this Court has explained that a statute discussing actions "'prohibited by law'" does not reach actions merely "prohibited by regulation." *Department of Homeland Sec.* v. *MacLean*,

574 U.S. 383, 391 (2015) (emphasis omitted). Particularly because the statute at issue in *MacLean*—like the Restoration Act, see, *e.g.*, §§ 102, 105(d), 206(d), 101 Stat. 667-668, 671—elsewhere mentioned regulations, the Court reasoned that "Congress's choice to say 'specifically prohibited by law' rather than 'specifically prohibited by law, rule, or regulation' suggests that Congress meant to exclude rules and regulations." *MacLean*, 574 U.S. at 391.

ii. The court of appeals, by contrast, focused on the next sentence in Section 107(a), which provides that any violation of its prohibition is subject to "the same civil and criminal penalties that are provided by the laws of the State of Texas," § 107(a), 101 Stat. 668-669, and reasoned that state civil regulations must apply in order for civil penalties to be available. See *Ysleta del Sur Pueblo* v. *Texas*, 36 F.3d 1325, 1333 (5th Cir. 1994), cert. denied, 514 U.S. 1016 (1995); see also Pet. App. 12 n.37. That inference is unwarranted. At the time of the Restoration Act, civil forfeiture was an important tool for enforcing state prohibitions on gaming. Article 18.18 of the Texas Code of Criminal Procedure authorized the forfeiture of gambling devices and gambling proceeds, and Texas considered such forfeiture an in rem proceeding "against the property itself," which was a "proceeding of a civil nature." *State* v. *Rumfolo*, 545 S.W.2d 752, 754 (Tex. 1977); see Tex. Code Crim. Proc. Ann. art. 18.18 (West Supp. 1987). The Restoration Act's reference to "civil penalties" accordingly could have contemplated civil penalties such as forfeiture for criminal gambling prohibitions and, standing alone, reflects no departure from *Cabazon*'s prohibitory/regulatory framework.

b. That interpretation of Section 107(a) is consistent with the wording of Section 107(b). Section 107(b) states that "[n]othing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." § 107(b), 101 Stat. 669. Section 107(b) fits logically if—consistent with *Cabazon*—only state statutory *prohibitions* on gaming, not broader "regulatory jurisdiction," apply on tribal land, through incorporation into federal law: Under that reading, Subsection (b) supports the conclusion that Subsection (a)'s reference to gaming activities "prohibited" by state "laws"—not "regulations"—was intentional and that no such regulatory jurisdiction exists.

c. Construing Section 107(a) and (b) in line with the *Cabazon* prohibitory/regulatory framework is also consistent with other portions of the Restoration Act. See *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

First, Section 105(f) of the Act expressly incorporates the framework of Public Law 280, as amended by the Indian Civil Rights Act: "The State shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under [Sections 401 and 402 of the Indian Civil Rights Act of 1968, Pub. L. No. 90-284, Tit. IV, 82 Stat. 78-79]." § 105(f), 101 Stat. 668. By extending state jurisdiction to petitioner's reservation consistent with Public Law 280, the Restoration Act thus directly incorporates this Court's *Cabazon* framework, which governs the exercise of state jurisdiction under Public Law 280. See *Lorillard* v. *Pons*, 434

U.S. 575, 581 (1978) (explaining that when "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law"). Section 107(a)'s use of the term "prohibited" and Section 107(b)'s disavowal of state regulatory jurisdiction over tribal gaming are properly construed consistently with Section 105(f)'s general incorporation of Public Law 280 and the *Cabazon* framework.

Second, the Restoration Act's enforcement provision —Section 107(c)—also supports the conclusion that the prohibition on gaming activities in Section 107(a) does not incorporate state regulation of gaming that is not itself prohibited. Section 107(c) grants federal courts "exclusive jurisdiction over any offense in violation of subsection (a)" and permits the State to "bring[] an action in the courts of the United States to enjoin violations of the provisions of this section." 101 Stat. 669. Section 107(c) thus prevents state prosecutors from seeking fines or imprisonment in either state or federal court, under either state or federal law, instead reserving any such actions to the United States as a matter of federal law. As a result, under the court of appeals' theory, the State may enforce the full range of its gaming regulations, but only through federal-court litigation seeking injunctive relief—a process that has proved to be burdensome and unsatisfactory for all parties involved. See, *e.g.*, *Texas* v. *Ysleta del Sur Pueblo*, No. 99-cv-320, 2016 WL 3039991, at *19 (W.D. Tex. May 27, 2016) (lamenting that "this litigation has transformed the [district court] into a quasi-regulatory body overseeing and monitoring the minutiae of [petitioner's] gaming-related conduct"). It is unlikely that Congress adopted a regulatory regime under which federal courts

would take the place of administrative agencies and enforce the full panoply of state regulatory restrictions, through injunctive suits concerning, *e.g.*, the prominence of displays of historical bingo cards or the number of bingo cards that can be simultaneously played on an electronic cardminding machine. See Pet. App. 29-32. By contrast, a proper construction of Section 107(a) and (c) allows the State only to seek an injunction barring tribal gaming activities that are prohibited outright by state law, and for the application of IGRA to bingo and other Class II gaming activities that are not so prohibited, thus leaving such matters to the NIGC's regulatory authority.

2. The Restoration Act's drafting history further supports construing Section 107(a) and (b) to incorporate the *Cabazon* framework.

a. The Restoration Act underwent significant change between its initial 1985 introduction and its 1987 enactment. In particular, in the final version of the unenacted H.R. 1344, Section 107 would have prohibited all "[g]aming, gambling, lottery or bingo as defined by the laws and administrative regulations of the State of Texas," on tribal lands. 132 Cong. Rec. at 25,874. When H.R. 318 was initially introduced in January 1987, it included the same language. Pet. App. 22. But before the Senate acted, this Court decided *Cabazon*, and Congress began to grapple with its impact. By June 1987, the Senate had reworked Section 107 to reflect its current text. See Senate Report 3. As explained by the Chairman of the House Committee on Interior and Insular Affairs—which had responsibility for both H.R. 318 and the broader bills governing Indian gaming—the revised language "in effect would codify for these tribes

the holding and rational[e] adopted in the Court's opinion in [*Cabazon*]." 133 Cong. Rec. 22,114 (Rep. Udall).

b. The court of appeals in *Ysleta I* reached a different conclusion by focusing on isolated aspects of the legislative history and disregarding the surrounding legal landscape.

First, the court of appeals determined that the 1987 Senate Report itself foreclosed the application of the *Cabazon* framework because the report mentioned "administrative regulations" in describing Section 107(a) as prohibiting on tribal lands "gambling, lottery or bingo *as defined by the laws and administrative regulations* of the State of Texas" *Ysleta I*, 36 F.3d at 1333 (quoting Senate Report 10). But the far likelier explanation is that the Senate Report mistakenly retained that language from an earlier Senate report, S. Rep. No. 470, 99th Cong., 2d Sess. 4 (1986), and thus left in place a description of Section 107's superseded text as passed by the Senate in September 1986, rather than the amended text as it appeared in H.R. 318—which eliminated the prohibition of all gaming in the prior version as well as any reference to "administrative regulations," "lottery," or "bingo." See pp. 2-7, *supra*. The court accordingly erred in construing the Restoration Act to conform to its introduced-but-unenacted text, based on an outdated description in a committee report. Cf. *Brnovich* v. *Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2341 (2021) (rejecting statutory construction that would have replicated a prior unenacted bill).

Second, the court of appeals observed that a committee report accompanying IGRA had specifically stated that the *Cabazon* framework would apply under IGRA, whereas the Senate Report accompanying the Restoration Act made no such reference. See *Ysleta I*, 36 F.3d

at 1333-1334 & nn.17-18. But again, the Senate Report did not reflect all of the post-*Cabazon* revisions to Section 107 as enacted. And in all events, the court did not need to parse committee reports for a reference to *Cabazon*, because Section 105(f) expressly incorporates the Public Law 280 framework and Section 107 conforms to that framework. See pp. 14-15, *supra*.

Third, the court of appeals appeared to hold petitioner to a bargain that was never adopted. The court observed that the 1986 Tribal Resolution was "crystal clear" in requesting that all gaming be prohibited on tribal land. *Ysleta I*, 36 F.3d at 1333. But while petitioner in 1986 offered to forgo all gaming, in part to avoid direct state regulation, Congress did not accept that offer. See pp. 3-7, *supra*. In June 1987, the Senate Select Committee rejected a no-gaming approach and substantially revised Section 107. Although Section 107(a) still notes that it was enacted "in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86," Restoration Act § 107(a), 101 Stat. 668-669, that reference to the resolution is reasonably read to reflect that Section 107 respects the Tribe's strong opposition to direct application and enforcement of state law, and conforms to the resolution to the extent of barring gaming that state law prohibits outright. The reference also explains why Congress included a limitation on tribal gaming. Cf. House Report 6 (observing that a prior reference to the resolution had been designed to show that gaming restrictions were "not based on unilateral Congressional action against the wishes of the tribes"). In any event, the reference cannot reasonably be construed as incorporating the terms of the 1986 Tribal Resolution, because it is undisputed that Section 107(a)

does not prohibit *all* gaming, as the resolution offered to do.

3. Finally, to the extent any ambiguity remains, the Restoration Act should be construed in favor of petitioner. Indian tribes are subject to Congress's "plenary control," but "unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978)). This Court has accordingly made clear that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); see *Bryan* v. *Itasca Cnty.*, 426 U.S. 373, 392 (1976) (applying canon in interpreting Public Law 280).

B. This Court's Review Is Warranted

This Court's review is warranted to correct the court of appeals' erroneous construction of the Restoration Act, which has persisted since its 1994 decision in *Ysleta I*. That error has impaired the uniformity of a federal regulatory scheme, has uniquely disadvantaged two Indian tribes, and has generated repeated litigation and substantial confusion for nearly three decades.

1. The federal government has significant interests in the appropriate construction of the Restoration Act. If the Act is properly construed to prohibit only gaming that is "prohibited" under the *Cabazon* framework, then its prohibitions align with IGRA, because both statutes look to the permissibility of gaming activities under state law. See § 107(a), 101 Stat. 668-669; 25 U.S.C. 2710(b)(1)(A). And if bingo is permitted but regulated in Texas, then bingo conducted on petitioner's reservation would be regulated under IGRA as Class II gam-

ing. See 25 U.S.C. 2703(7)(A)(i), 2710(b)(1)(A).[2] Petitioner and the NIGC would be responsible for such regulation. See 25 U.S.C. 2710(a)(2); see also 25 U.S.C. 2713. Under the court of appeals' theory, by contrast, IGRA and the Restoration Act conflict, and the State rather than the NIGC may exercise regulatory authority over petitioner's Class II gaming activities—though, under Section 107(c), it may do so only through the unwieldly mechanism of an injunctive action in federal court. See *Ysleta I*, 36 F.3d at 1334-1335; Pet. App. 9-11 & n.30.

a. Congress enacted IGRA to provide a nationwide regulatory framework for Indian gaming, including establishing the NIGC to implement and enforce IGRA. See 25 U.S.C. 2702(3). In 2015, the NIGC approved petitioner's Class II Tribal Gaming Ordinance, after determining under 25 U.S.C. 2710(e) that it complied with IGRA and other federal laws. See Letter from Jonodev O. Chaudhuri, Chairman, NIGC, to Governor Hisa, Ysleta del Sur Pueblo (Oct. 5, 2015), https://go.usa.gov/xF7bq. But the NIGC has been precluded from exercising its regulatory authority by the court of appeals' holding in *Ysleta I*, which held that IGRA has no application to petitioner. Instead, *Ysleta I* provides for all state regulatory measures to be incorporated into federal law and enforced through the Restoration Act.

That holding has resulted in substantial disuniformity. Although other Indian tribes may engage in Class II gaming under tribal and federal regulation, only petitioner and the Alabama-Coushatta Tribe are subject —under *Ysleta I*'s reading of the Restoration Act—to

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[2] In its current posture, this case does not present the question whether the gaming activities that occur at Speaking Rock in fact constitute "bingo" rather than Class III gaming.

state regulatory measures for on-reservation Class II gaming activities.[3] They are also the only tribes that operate gaming on Indian lands outside of IGRA's regulatory structure.[4] That has resulted in decades of litigation over sensitive government-to-government issues. See Pet. App. 23-29; *id.* at 88 (observing that petitioner "exist[s] in a twilight zone of state, federal, and sovereign authority").

In addition to creating that disruption, the court of appeals' construction of the Restoration Act creates a regulatory void that Congress did not intend. As the State previously recognized in the *Ysleta I* litigation, state bingo regulations "would be difficult to apply to an Indian tribe," and IGRA erects a more appropriate "regulatory scheme under the supervision of [the NIGC]." Conditional Cross-Petition at 7-8, *Texas* v. *Ysleta del Sur Pueblo*, No. 94-1310 (Jan. 30, 1995). A key objective of IGRA is to "shield [tribal gaming] from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and

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[3] One other Indian tribe was the subject of a tribe-specific statute, passed shortly before IGRA, that subjected the tribe to state and local "laws *and regulations* which prohibit *or regulate* the conduct of bingo or any other game of chance." *Massachusetts* v. *Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618, 622 (1st Cir. 2017) (citation omitted; emphases added), cert. denied, 138 S. Ct. 639 (2018). But because the First Circuit concluded that IGRA had impliedly repealed that tribe-specific statute, *id.* at 626-629, the Aquinnah are no longer subject to state regulation of on-reservation gaming.

[4] The third federally recognized Indian tribe in Texas, the Kickapoo Traditional Tribe of Texas, operates Class II gaming pursuant to an ordinance approved by the NIGC.

players." 25 U.S.C. 2702(2). IGRA thus requires, for example, background investigations and licensing of all primary management officials, key employees, and third-party management officials at Indian gaming operations. 25 U.S.C. 2710(b)(2)(F)(i), 2711(a). Yet because of *Ysleta I*, petitioner and the Alabama-Coushatta Tribe have operated gaming on Indian lands without such regulation by the NIGC.

b. The federal government also has a strong interest in supporting "Indian self-government" by encouraging "tribal self-sufficiency and economic development." *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980). Congress's fundamental purpose in IGRA was to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1). The Fifth Circuit's construction of the Restoration Act has impaired that interest by limiting petitioner's and the Alabama-Coushatta Tribe's ability to participate in Class II gaming. See Pet. App. 102; Pet. 11, 27-28.

2. The State responds (Br. in Opp. 25-26) that this case does not warrant the Court's review because it involves merely "[e]rror correction" rather than a "circuit split." But because the Restoration Act applies only to petitioner and the Alabama-Coushatta Tribe, no division among the courts of appeals is possible. This Court has reviewed other important court of appeals decisions involving statutes or treaties that apply to particular tribes. See, *e.g.*, *McGirt* v. *Oklahoma*, 140 S. Ct. 2452 (2020); *Herrera* v. *Wyoming*, 139 S. Ct. 1686 (2019); *Washington State Dep't of Licensing* v. *Cougar Den, Inc.*, 139 S. Ct. 1000 (2019). The same course is appropriate here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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