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

BRIEF FOR RESPONDENT

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Lanora.Pettit@oag.texas.gov
(512) 936-1700

LANORA C. PETTIT
Principal Deputy Solicitor General
Counsel of Record

BILL DAVIS
Deputy Solicitor General

MICHAEL R. ABRAMS
KATHRYN M. CHERRY
Assistant Solicitors General

CHRISTOPHER J.F. GALIARDO
Assistant Attorney General

QUESTION PRESENTED

The Ysleta del Sur Pueblo and Alabama-Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 666 (1987) (the "Restoration Act"), precludes petitioners from engaging in any gaming activities that are "prohibited by the laws of the State of Texas." *Id.* § 107(a). In 1994, the Fifth Circuit concluded that this language unambiguously applies to *all* Texas laws, including those that curtail gaming activities as well as those that ban them in all circumstances. *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1334 (5th Cir. 1994). In the intervening 27 years, Congress has repeatedly declined to disturb that interpretation notwithstanding the repeated insistence of petitioners and their amici that the Fifth Circuit had misunderstood what the Restoration Act meant.

In 2019, after extensive litigation, undisputed evidence showed that operation of the putative bingo devices at the Ysleta del Sur Pueblo's ("Pueblo") Speaking Rock Entertainment Center violates the Texas Constitution's prohibition on lotteries, the Texas Penal Code's prohibitions on gambling, and the Texas Civil Practice and Remedies Code's prohibition on common nuisances. The district court's and Fifth Circuit's judgments are consistent with that evidence.

The question presented is whether the lower courts correctly found that operation of the Pueblo's putative bingo hall thus violates the Restoration Act.

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INTRODUCTION

In the 1980s, the Pueblo and the Alabama-Coushatta Tribe of Texas, which appears here as an amicus curiae, traded the sovereignty they now demand for federal funding. The Alabama-Coushatta had seen its federal-trust status stripped away in the 1950s as part of an aggressive congressional policy of assimilation; the Pueblo had never obtained such status. At Congress's direction, Texas had held a trust relationship with both tribes for decades until its then-Attorney General concluded that the status discriminated based on national origin in violation of the State's equal-protection guarantee. The Pueblo's subsequent efforts to obtain federal-trust status initially foundered because state officials saw it as the first step toward casino-style gambling. Such gambling, which in many localities had close ties to organized crime, violated longstanding Texas law.

Recognizing that federal funds would not otherwise be forthcoming, the Pueblo sought compromise: having no significant cultural associations with gaming, it "request[ed] its representatives in the United States" to "provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, shall be prohibited on the Tribe's reservation." Pet. App. 123. Congress—including the Texas delegation that had resisted earlier bills—accepted the offer, leading to the passage of the Restoration Act. The ink on the Restoration Act was barely dry when the Pueblo began to experience buyers' remorse and to look for ways to operate a casino under the more permissive regime subsequently erected in the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701, *et seq.* ("IGRA").

For nearly thirty years, however, the Fifth Circuit has consistently held that the Pueblo's gaming activities

are not controlled by either IGRA or this Court's interpretation of Public Law 280 in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Based on the text of the Restoration Act, its structure, its history, and its interaction with *Cabazon Band*, the Fifth Circuit concluded that the Restoration Act incorporates all of Texas gaming law as "surrogate federal law" on the Pueblo's reservation. *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1334 (5th Cir. 1994) ("*Ysleta I*").

The Pueblo and its allies have repeatedly asked Congress to supersede *Ysleta I*. Congress has not done so. Absent a congressional change of course, this Court should uphold the rule that has existed in Texas for a generation: the Pueblo may operate gaming facilities only if they fully comply with Texas law.

STATEMENT

I. Texas's Longstanding Public Policy Against Gambling

A. "For as long as the State of Texas has been the State of Texas, its citizens have elected to constitutionally outlaw most types of 'lotteries.'" *City of Fort Worth v. Rylie*, 602 S.W.3d 459, 460 (Tex. 2020). Indeed, the policy predates Texas's statehood: "the legislature of the newly formed Republic of Texas [first] passed an act to criminalize various forms of gambling, including 'faro, roulette, monte, rouge et noir, and all other games of chance'" in 1837. Joshua C. Tate, *Gambling and the Law in the Nineteenth Century South: Evidence from Nacogdoches County, Texas, 1838-1839*, 15 J. OF S. LEGAL HIST. 131, 131 (2007) (quoting Act of June 25, 1837 (An Act to Suppress Gambling), § 1).

Although early statutes prohibited specific games, they eventually expanded to preclude nearly all forms of gambling, *id.* at 134—likely due to the deleterious effects

on public order that were observed in American States and England as they loosened their restrictions on legalized gambling.[1] Thus, in the State's first constitution, Texas strictly prohibited even the types of public lotteries upon which many other States relied. *Compare* Tex. Const. of 1845 art. VII, § 17, *with* CORNELL INSTITUTE ON ORGANIZED CRIME, THE DEVELOPMENT OF THE LAW OF GAMBLING 1776-1976, at 74-79, 240-41, 270-71, 312-13, 325-26 (1976).[2]

Texas has consistently maintained its view that gaming is to be "denounced by the law as an offense against public policy." *Barker v. Texas*, 12 Tex. 273, 276 (1854); *see also, e.g.*, *Rylie*, 602 S.W.3d at 460 n.1 (collecting constitutional provisions that have outlawed gaming across time); *City of Wink v. Griffith Amusement Co.*, 100 S.W.2d 695, 701 (Tex. 1936) (defining lotteries). And this Court has recognized that "private casino gambling is unlawful [in Texas]." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 181 (1999).

In its most recent regular session, the Texas Legislature reaffirmed that gambling remains contrary to the State's public policy. Several state legislators proposed a constitutional amendment that would have authorized casino-style gaming at designated resorts across Texas.

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[1] *See* CORNELL INSTITUTE ON ORGANIZED CRIME, *supra*, at 79-82, 269-73, 321; Paul Langford, *A Polite and Commercial People: England 1727-1783*, 6 NEW OXFORD HIST. OF ENG. 296-97, 571-74 (J.M. Roberts ed., 1966); *cf.* Tate, *supra*, at 137 (discussing the significance of maintaining public order in period gambling legislation).

[2] When Texas ratified its 1845 constitution, only New Jersey constitutionally prohibited public lotteries. N.J. Const. art. IV, § 7, ¶ 2 (1844). Only four other States even *statutorily* prohibited public lotteries. 1843 Iowa Rev. Stat. ch. 49, § 36[N.H. Rev. Stat. ch. 220 (1842); 1822 R.I. Public Laws 408; Vt. Stat. tit. 28, §§ 5-6 (1839).

Tex. H.R. Con. Res. 133, 87th Leg., R.S. (2021) (introduced Apr. 14, 2021). The bill did not even receive a committee vote. *Actions*, Tex. H.R. Con. Res. 133, 87th Leg., R.S. (2021), https://tinyurl.com/2p8aksnr (last visited Jan. 8, 2022).

B. "Since its ratification in 1876, [the State's] current constitution has affirmatively required the legislature to 'pass laws prohibiting' lotteries." *Rylie*, 602 S.W.3d at 461 (quoting Tex. Const. art. III, § 47). Pursuant to that constitutional mandate, the Texas Legislature enacted Chapter 47 of the Texas Penal Code. Codified in Title X of the Code, which addresses "Offenses Against Public Health, Safety, and Morals," Chapter 47 attaches criminal penalties to: lotteries, Tex. Penal Code § 47.01(7); making bets on the outcome of any game or contest (including political contests), *id.* § 47.02(a)-(b); making bets at "any game played with cards, dice, balls, or any other gambling device," *id.* § 47.02(a)(3); operating a gambling promotion, *id.* § 47.03(a)(1), (5); keeping a gambling place, *id.* § 47.04(a); and possessing gambling devices, equipment, or paraphernalia, *id.* § 47.06(a), (c). Additionally, "gambling, gambling promotion, or communicating gambling information as prohibited by the Penal Code" constitutes a common nuisance under a separate Texas statute. Tex. Civ. Prac. & Rem. Code § 125.0015; Pet. App. 52-53.

C. Texas's Constitution exempts from its ban on gambling only certain, limited forms of charitable bingo, charitable raffles, and state lotteries. Tex. Const. art. III, § 47. These narrow carveouts arose after *State v. Amvets Post No. 80* held a bingo game operated by a veterans' organization unlawful because it fell within the statutory definition of a "lottery." 541 S.W.2d 481, 482 (Tex. App.—Dallas 1976, no writ). In response to that

decision, the Legislature proposed, and the voters adopted, an amendment to the Texas Constitution allowing the Legislature to authorize limited forms of bingo games subject to specific constitutional requirements. Tex. S.J. Res. 18, 66th Leg., R.S., 1979 Tex. Gen. Laws 3221; Amendments Adopted in 1979 and 1980, 1981 Tex. Gen. Laws 4227. The Texas Constitution currently authorizes bingo hosted only by a church, synagogue, religious society, volunteer fire department, nonprofit veterans' organization, fraternal organization, or nonprofit organization supporting medical research or treatment programs. Tex. Const. art. III, § 47(b).

In 1981, pursuant to this new authority, the Texas Legislature adopted the Bingo Enabling Act to authorize the limited permissible forms of charitable bingo that voters had sanctioned. Act of Aug. 11, 1981, 67th Leg., 1st C.S., ch. 11, 1981 Tex. Gen. Laws 85 (current version at Tex. Occ. Code §§ 2001.001 *et seq.*). Because bingo is still a form of gambling, *see City of Wink*, 100 S.W.2d at 701, it is legal only when conducted in accordance with the narrow terms of the Bingo Enabling Act, Tex. Occ. Code § 2001.051. In a Chapter 47 prosecution, the criminal defendant must therefore assert, as an affirmative defense, that his gambling activities are consistent with the Act. Tex. Penal Code §§ 47.02(c)(1), 47.09(a)(1)(A). Unlawful bingo remains prosecutable under Chapter 47.

II. The "Trust Relationship" Among the Restoration Act Tribes, Texas, and Congress

Unlike its bedrock public policy against casino-style gambling, Texas's relationship with the Pueblo and Alabama-Coushatta has fluctuated with Congress's changing treatment of Indian tribes. The Restoration Act is one of a number of tribe-specific statutes negotiated after a period of aggressive congressional de-recognition.

Unique aspects of Texas's relationship to the Pueblo, necessitated by this congressional choice, allowed Texas to require different terms than may exist between other States and other tribes.

A. Since European immigrants first arrived on this continent, their leaders have adopted evolving policies towards indigenous peoples. Americans fought for independence in part because England impeded their westward advance into Indian lands. THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776); *see* Robert Middlekauff, *The Glorious Cause: The American Revolution, 1763-1789*, 3 OXFORD HIST. OF THE UNITED STATES 59-60, 154 (David M. Kennedy ed., 2005). When that advance began in earnest, the United States ratified treaties and agreements with tribes to exchange land for other land and assorted federal benefits, privileges, and protections. *See* 25 U.S.C. § 5601; FELIX S. COHEN, HANDBOOK OF INDIAN LAW § 1.03[1], [8]-[9] (2019). Congressional respect for those treaties, however, ebbed and flowed. *E.g.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020). In more recent years, ensuring that the parties to such agreements get the benefit of their bargains (absent contrary instruction from Congress) has become a central feature of this area of law. *Id.*; *see also* COHEN, *supra*, at §§ 2.02[1], 5.05-.06.

One means of safeguarding many of these protections and privileges was the federal government's system of Indian trust accounts overseen, managed, and invested by the Department of the Interior. 25 U.S.C. §§ 152-62a; *see* COHEN, *supra*, §§ 5.03[3], 5.04[3], 5.05[2], 15.03, 15.06, 15.08. And this Court has repeatedly recognized that this system created a special relationship with the tribes, who sometimes have been described as "wards" of the federal government. *E.g.*, *United States v.*

Candelaria, 271 U.S. 432, 441-44 (1926); *United States v. Sandoval*, 231 U.S. 28 (1913).

Yet the United States abruptly abdicated this trust responsibility when, between 1953 and 1961, it withdrew federal recognition from over one hundred tribes. *See* H.R. Con. Res. 103, 83d Cong., 1st Sess. (1953), 67 Stat. B132 (initiating a policy of terminating federal recognition); Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 150-65 (1977). During this period, it was congressional policy to, "as rapidly as possible," "make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship." H.R. Con. Res. 103, *supra*.

B. The Alabama-Coushatta, which appears before the Court as amicus curiae, was one of the tribes over which Congress disclaimed responsibility. In 1928, Congress had purchased a tract of 3,071 acres for the tribe pursuant to a "trust relationship." *See Bryan v. Itasca County*, 426 U.S. 373, 389 n.15 (1976). From 1928 to 1954, Texas and the United States maintained a joint trust responsibility for the tribe. ROA.623.[3] In 1955, under the federal government's termination policy, the Interior Department announced that federal supervision of the Alabama-Coushatta would be terminated, and Texas would assume responsibility for all services previously provided to the tribe by the federal government.

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

DONALD L. FIXICO, TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY 1945-1960 at 122 (1990).

Unlike the Alabama-Coushatta, the Pueblo did not see its trust relationship terminated by the federal government in 1955 because, at that time, the Pueblo was not an officially recognized tribe. ROA.623. It was not until 1968 that "the federal government first recognized the tribe," then known as the Tiwa or Tigua, but "simultaneously transferred responsibility for the Indians to the State of Texas." *Texas v. Ysleta del Sur Pueblo*, 220 F. Supp. 2d 668, 676 (W.D. Tex. 2001) ("*Ysleta II*"). The Pueblo had not been subject to federal supervision before 1968, and that status held after the Tiwa Act's enactment. ROA.623. Texas held the Pueblo's 100-acre reservation near El Paso in trust for the tribe from then until 1983. ROA.623. During that period, the existence of the Pueblo was recognized by federal law, but its members did not receive federal benefits. *Ysleta II*, 220 F. Supp. 2d at 676. Its members "enjoy[ed] all rights, privileges, and immunities" of "citizens of the State of Texas and of the United States," Tiwa Indians Act, Pub. L. No. 90-287, 82 Stat. 93 (1968), and were "subject to all obligations and duties under the laws of the State of Texas," *Ysleta II*, 220 F. Supp. 2d at 676 (cleaned up).

C. In 1983, the Texas Attorney General issued an opinion letter concluding that Texas's trust relationship with the Alabama-Coushatta violated Texas's Constitution because (1) it provided a benefit to members of the tribe based on national origin, and (2) tribal members "occupy no status under state law that" parallels their relationship with the federal government and thus "would authorize the state to single them out in a constitutionally offensive manner." Tex. Att'y Gen. Op. No. JM-17 (1983); *see* Tex. Const. art. IV, § 22 (authorizing

the Texas Attorney General to "give legal advice in writing to the Governor and other executive officers, when requested by them"). That opinion letter cast doubt on the continuation of the state-tribal trust relationship with the Pueblo as well and ultimately led to this case. ROA.623.

III. Statutory Background

The three statutes that feature heavily in the briefs of the Pueblo and their amici were born out of this historical context: Public Law 280, the Restoration Act, and IGRA.

A. Public Law 280

Congress's "primary concern" in enacting Public Law 280 during the de-recognition period "was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." *Bryan*, 426 U.S. at 379. For recognized tribes, it has long been established that absent congressional consent, they are not subject to the laws of another sovereign (here, a State)—including either state laws, *In re Kansas Indians*, 72 U.S. (5 Wall.) 737, 755-57 (1866); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559-60 (1832); *see also* COHEN, *supra*, at § 6.01[1]-[4], or state courts, *Cabazon Band*, 480 U.S. at 207. Although Congress had provided for federal enforcement of a limited number of serious felonies, *see* 18 U.S.C. § 1153, there remained insufficient enforcement of criminal laws and a "lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens," *Bryan*, 426 U.S. at 383.

Public Law 280 set out terms under which some state courts could exercise civil and criminal jurisdiction in Indian country. *Cabazon Band*, 480 U.S. at 208. Public Law

280 initially covered six States but allowed other States to opt into its framework without the consent of affected tribes. U.S. Br. App. 6a-7a. Although petitioners now strongly advocate for its framework to apply to their gaming activities, Public Law 280 was enacted over "strenuous" opposition from Indian tribes. *S. Comm. on the Interior & Insular Affairs*, 94th Cong., Rep. on Public Law 280 (Comm. Print 1975) (statement of Sen. Henry M. Jackson, Chairman). It was amended in 1968 to require consent for new States to assume jurisdiction over tribes within their borders. 25 U.S.C. §§ 1321(a), 1322(a).

B. The Restoration Act

Texas, which is currently home to only three federally recognized Indian tribes, *Brackeen v. Haaland*, 994 F.3d 249, 288 n.9 (5th Cir. 2021) (en banc), did not opt to assume jurisdiction under Public Law 280 until the Restoration Act was enacted. The Texas Attorney General's 1983 conclusion that a state-trust relationship was unconstitutional spurred efforts to establish a federal-trust relationship between the Pueblo and the federal government. A key sticking point of subsequent negotiations was if, and under what conditions, the tribe would be permitted to offer on-reservation gaming.

In 1985, a bill was 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. That law failed to pass 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. Like officials in many States, they were concerned that organized crime would follow casino-style gambling. *Cf. Cabazon*

Band, 480 U.S. at 220-21; CORNELL INSTITUTE ON ORGANIZED CRIME, *supra*.

Because the end of state-trust status precipitated the loss of state funding, ROA.507, the Pueblo viewed federal-trust status as essential to survival, given a lack of alternate sources of revenue sufficient to maintain tribal operations. Pet. App. 123. Gaming had never formed an essential part of the Pueblo's life, culture, or religion (either before or after its dislocation from New Mexico in 1680). *See* ALFONSO ORTIZ, THE TEWA WORLD: SPACE, TIME, BEING, AND BECOMING IN A PUEBLO SOCIETY 111-14 (1972). So when the tribe again sought recognition in 1986, it refused to let "the controversy over gaming . . . jeopardize this important legislation," and the Pueblo Council adopted Resolution No. T.C.-02-86, Pet. App. 121-24.

In that Resolution, the tribe disclaimed any "[i]nterest [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). Although the Pueblo has dismissed this Resolution as "defunct," it does not claim that its Tribal Council withdrew the Resolution before the award of federal-trust status. *See* Pet. 6.

Nor did Congress consider Resolution No. T.C.-02-86 defunct. For most matters, Texas would be treated as if

it had assumed jurisdiction under Public Law 280 as amended in 1968. Pub. L. No. 100-89, § 105(f). For gaming, however, Congress provided a different regime:

> 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.*

Id. § 107(a) (emphasis added). The statute then clarifies that this ban on gaming should not "be construed as a grant of civil or criminal regulatory jurisdiction" more broadly, *id.* § 107(b), which consequently limited the jurisdiction of both state regulatory agencies and state courts, *Bryan*, 426 U.S. at 383. But Congress provided 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 that the "central purpose" of section 107 was to federalize Texas's general ban on gaming and thereby "to ban gaming on the [Pueblo and Alabama-Coushatta's] reservations as a matter of federal law." ROA.624. As the report explained, the only difference between the House and Senate versions of 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, thus ensuring that "gambling, lottery or bingo as defined by the laws and administrative regulations of the State of Texas is prohibited on the tribe's reservation and on tribal lands." ROA.626.

C. The Indian Gaming Regulatory Act

Although the Restoration Act is not unique in creating tribe-specific gaming regulation,[4] most tribes are subject to the third statute discussed in the Pueblo's brief: IGRA. 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 shortly after the Restoration Act. 25 U.S.C. § 2701(3). IGRA sought to establish standards to "regulate gaming activity on Indian lands" where such activity was not otherwise controlled 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 that are "explicitly authorized"—or at least "not explicitly prohibited"—by state law. *Id.* § 2703(7)(A)(ii). A tribe may regulate Class-II gaming on its reservation so long as it issues a self-regulatory ordinance that obtains approval by the National Indian Gaming Commission ("NIGC"). *Id.* § 2710(b). Class-III gaming includes

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[4] *See* Kirsten Matoy Carlson, *Congress, Tribal Recognition, and Legislative-Administrative Multiplicity*, 91 IND. L.J. 955, 981 (2016); U.S. Gen. Accounting Off., GAO-02-49, *Indian Issues: Improvements Needed in Tribal Recognition Process* 25-26 (Nov. 2001), https://tinyurl.com/GA0249.

all other forms of gaming—including, as particularly relevant here, "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." *Id.* § 2703(7)(B)(ii), (8). Class-III gaming is prohibited unless a tribe and the State enter into a voluntary compact to allow it. *Id.* § 2710(d).

IV. Litigation over Gaming on Pueblo Lands

A. The Pueblo's prior efforts to evade the limits of the Restoration Act

Almost from the time the tribe received federal-trust status, the Pueblo has sought to engage in gaming activities under IGRA rather than the Restoration Act. And courts have consistently rejected those efforts. *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 III*").

In 1993, the Pueblo 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 Pueblo continued to offer high-stakes gaming in violation of Texas law at facilities on tribal lands. In 1999, Texas sued the Pueblo to enjoin

prohibited gaming on its reservation. ROA.2844-45. The district court concluded that the Pueblo "ha[d] not even attempted to qualify under the rules" established by Texas. *Ysleta II*, 220 F. Supp. 2d at 690. Instead, the Pueblo relied (as it does here) on its status as a sovereign to pass its own gaming regulations. *E.g.*, *id.* at 689. The district court rejected that argument because the Pueblo partially "waived" its sovereign status "in order to obtain federal trust status." *Id.* at 690. 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, 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).

Further litigation over the ensuing years resulted in two contempt findings after the tribe claimed a right to operate "eight-liner" gaming devices and high-stakes sweepstakes machines. *See Ysleta III*, 431 F. App'x at 331; *Texas v. Ysleta del Sur Pueblo*, No. EP-99-cv-320-KC, 2015 WL 1003879, at *4 (W.D. Tex. Mar. 6, 2015); *Texas v. Ysleta del Sur Pueblo*, No. EP-99-cv-320-KC, 2016 WL 3039991, at *21 (W.D. Tex. May 27, 2016) ("*Ysleta IV*").

B. This litigation

In 2016, the district court ordered the Pueblo to shut down its unlawful sweepstakes operations. *Ysleta IV*, 2016 WL 3039991, at *26-27. The Pueblo promptly announced a "transition[] to bingo." JA.39. Concerned that these putative bingo games were noncompliant with the Restoration Act, the State sought to inspect the tribe's facilities. Following negotiations, and with the consent of the Pueblo, Texas inspected the Speaking Rock facility, finding a dimly lit, cavernous hall with over two-thousand 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); Pet. App. 28 n.6 (reflecting that the Pueblo operates similar machines at the Socorro Tobacco Outlet). A licensed Texas peace officer joined in the inspection and later issued a report finding that the games violate Texas laws against, among other things, gambling devices, which Texas defines to include "gambling device versions of bingo." Tex. Penal Code § 47.01(4)(A); ROA.110.

The district court termed these devices "one-touch machines" because gameplay requires one touch: once a player inserts cash or a ticket into the machine, the player then presses a button, which activates large spinning reels and other displays in the player's direct line of vision. Pet. App. 30-31. The district court found that the machines resemble slot machines. *Id.* at 30, 43. But rather than run on randomly generated numbers, they use historical bingo draws. *Id.* If a player wins a prize after pressing the button, he can cash out his winnings, obtain a voucher to play on another machine, or continue playing the same game. *Id.* at 31-32.

Texas filed suit to enjoin the Pueblo from continuing to operate its bingo-themed casino. Texas contended that the tribe's gaming activities violate various provisions in Chapter 47 of the Texas Penal Code. *See* JA.40-41. The State explained that those violations of Chapter 47 also constitute violations of the Texas Civil Practice and Remedies Code, which prohibits common nuisances, including the gambling activities proscribed by Chapter 47. Tex. Civ. Prac. & Rem. Code § 125.0015(a)(5); ROA.81.

Following lengthy discovery, the district court granted Texas summary judgment, concluding that the

Pueblo's activities violated Texas law as federalized in the Restoration Act. Pet. App. 43-46. The tribe's own expert admitted that certain aspects of the "functionality" of the "one-touch machines" "would not be allowed "[u]nder Texas statute *and* under regulations." ROA.3609-10 (emphasis added). The court rejected the Pueblo's assertion that this was nonetheless permissible because Texas does not prohibit bingo. The court reasoned that it "cannot accurately assert that Texas laws 'do not prohibit' bingo"; rather, charitable bingo is allowable in some circumstances but "is illegal when it fails to conform with Texas's complex statutory and regulatory scheme." Pet. App. 40 n.8. After denying reconsideration, *id.* at 8, the district court stayed the effect of its injunction to allow the Pueblo another opportunity to convince 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 should be read with this Court's decision in *Cabazon Band* to prevent the State from enforcing its restrictions on bingo. *Id.* at 11-12 & nn.35-37.

The Fifth Circuit denied rehearing en banc without a poll or dissent, *id.* at 96-97, and this Court granted certiorari.

SUMMARY OF ARGUMENT

I. The Fifth Circuit was correct in 1994 when it said that the plain language of the Restoration Act federalizes *all* of Texas's gaming laws—not just those provisions that ban a type of game in all circumstances. Section 107(a) speaks broadly in terms of the state laws that fall within its scope, and it incorporates a tribal resolution that even the Pueblo admits (*e.g.*, at 43) speaks at least as broadly. Ordinary rules of statutory interpretation require that this language be applied according to its terms, which is precisely what the lower courts did.

Petitioners and their allies ask this Court to reverse course because "[s]ection 107(a) twice uses the word 'prohibited,'" U.S. Br. 20, which this Court interpreted in the Public Law 280 context as an outright ban based on public policy, *Cabazon Band*, 480 U.S. at 209. But this Court interprets statutes in their entirety—not one word at a time, stripped of their context. The Court adopted the limited view of the term "prohibited" in *Cabazon Band* out of concern that Congress may have inadvertently granted States the ability to arrogate to themselves complete control over all tribal matters. *Id.* at 211-12. Section 107 of the Restoration Act, by contrast, federalizes one aspect of Texas law and gives the federal courts jurisdiction to enforce it. Whatever the merits of or difficulties with *Cabazon Band*, its interpretation does not translate to the Restoration Act just because they share a word.

II. The structure and history—both pre- and post-enactment—of the Restoration Act confirm that *Ysleta I* got it right. Texas does not dispute that section 105(f) of the Restoration Act incorporates Public Law 280 for purposes other than gaming. But by including section 107 specifically to cover gaming, Congress treated gaming

under a different framework. This is underscored by the negotiating history of the Restoration Act, which demonstrates that the extent to which the affected tribes would be able to operate casino-style gaming was a focal point of the entire bill. And it is confirmed by the fact that Congress has repeatedly rejected requests by the tribes, their allies, and even the Executive branch to supersede *Ysleta I* for the last 27 years.

III. Finally, the Fifth Circuit correctly applied its longstanding rule from *Ysleta I* to affirm the district court's injunction prohibiting the use of the Pueblo's one-touch machines. Indeed, the Pueblo does not seem to dispute that if *Ysleta I* was correctly decided, its conduct is unlawful. For good reason: Texas law bans "gambling device versions of bingo . . . or similar electronic, electromechanical, or mechanical games, or facsimiles thereof." Tex. Penal Code § 47.01(4)(A); *accord* 25 U.S.C. § 2703(7)(B)(ii) (excluding "electronic or electromechanical facsimiles of any game of chance" from the definition of Class-II gaming). Because one-touch machines are not on the bingo side of that line, they violate the Texas Penal Code, and therefore the Restoration Act.

ARGUMENT

I. The Fifth Circuit Correctly Interpreted the Plain Language of the Restoration Act.

The Fifth Circuit reached the correct outcome—just as it did over a quarter-century ago in *Ysleta I*—when it determined that the plain language of section 107(a) federalizes all of Texas's gaming law. It correctly rejected the notion that *Cabazon Band* transformed the ordinary term "prohibit" into a term of art for Indian law. And it properly applied both ordinary rules of construction and the text of IGRA to conclude that the Restoration Act controls gaming in Texas. Because the Pueblo does not

seriously contest that the Fifth Circuit correctly applied its rule—only whether the rule is correct—these conclusions are enough to support the judgment below.

A. The plain language of section 107(a) federalizes all of Texas's gaming laws.

In reaching its longstanding conclusion that the Restoration Act binds the Pueblo to Texas gaming law as a matter of federal law, the Fifth Circuit correctly applied at least three fundamental rules of statutory construction: that courts must (1) look at every word in context, *e.g.*, *Env't Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (recognizing that "[m]ost words have different shades of meaning"); (2) give each word its ordinary meaning unless otherwise defined, *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012); and (3) "give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Section 107(a) of the Restoration Act, which has three main components, plainly expresses Congress's intent to federalize and bind the Pueblo to *all* of Texas's gaming laws.

First, the Act starts by providing that "[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe." Pub. L. No. 100-89, § 107(a). None of those terms is defined in the Restoration Act. As such, each bears "its ordinary meaning." *Taniguchi*, 566 U.S. at 566. And unless the word is accompanied by some form of modifier, courts will give it the full breadth of its ordinary meaning. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020) (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 101 (2012)).

Applying these rules, the Restoration Act federalizes the entire body of Texas's gaming law as applicable to

the Pueblo. "Law" is a general and expansive term the principal meaning of which is "the principles and regulations established in a community by some authority and applicable to its people, whether in the form of legislation or of custom and policies recognized and enforced by judicial decision." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1089 (1987) (defining "law"). "Prohibit" is similarly general: it means "to forbid (an action, activity, etc.) by authority of law"; "to forbid the action of (a person)"; or "to prevent; hinder." *Id.* at 1546 (defining "prohibit"). Because neither term has a delimiting modifier, the phrase "prohibited by the laws of the State of Texas" includes all of Texas's rules of conduct regarding gaming.

The Pueblo counters (at 28) that "prohibit" should be defined as to "forbid . . . by law." But this does not answer the question at issue: *which* law.[5] To fill that gap, the United States points (at 23) to *Department of Homeland Security v. MacLean*, which limited the term "law" in 5 U.S.C. § 2302(b)(8)(A) to statutory law. 574 U.S. 383, 393 (2015). Well before the Restoration Act, however, it "ha[d] been established in a variety of contexts" that, absent specific textual clues, the term "law" can and usually does include both statutes and regulations. *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 & n.18 (1979) (collecting cases). In *MacLean*, that clue came from the statute's differentiation between different types of law in different places. 574 U.S. at 392. *MacLean* thus stands for the unremarkable proposition that "a statute that referred to 'laws' in one section and 'law, rule, or regulation' in another 'cannot, unless we abandon all pretense

[5] It also assumes that the Court agrees that the Restoration Act adopts *Cabazon Band*'s narrowing of "prohibit." For the reasons discussed below (at I.B.2), the Court should reject that proposition.

at precise communication, be deemed to mean the same thing in both places.'" *Id.* Because the text of the Restoration Act does not have any such limitations on the term, "law" presumptively extends to statutes and regulations. *Chrysler Corp.*, 441 U.S. at 295.

Second, that section 107(a) is to be read broadly is confirmed by its statement 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." Texas agrees with the United States (at 22) that this phrase includes civil forfeitures that apply in criminal cases. But civil penalties generally result from civil infractions, *United States v. Ward*, 448 U.S. 242, 249 (1980), and nothing in section 107(a) indicates a departure from that ordinary understanding. Absent a textual limitation, this Court does not apply such a cramped meaning to Congress's language. *Bostock*, 140 S. Ct. at 1749.

Third, section 107(a) further demonstrates that Congress intended to speak broadly by stating that this provision was "enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86," which: (1) stated that the tribe "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 (2) asked the Pueblo's representatives to enact a bill "which would provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas shall be prohibited" on tribal lands. Pet. App. 123.

Both the Pueblo and the United States try to dismiss the language referencing the Tribal Resolution because it "was explicitly addressed to a bill that failed in the Senate in September 1986." Pueblo Br. 41; U.S. Br. 28-29.

Conspicuously missing from the Pueblo's discussion, however, is any assertion that the Resolution was withdrawn between the day it was promulgated in 1986 and the day 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). 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 Pueblo could conduct high-stakes gambling on tribal lands. *E.g.*, *King v. Burwell*, 576 U.S. 473, 492-93 (2015) (citing *N.Y. State 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.")).

The Pueblo also asserts (at 42) that the Resolution cannot be interpreted in this manner because it expresses the tribe's opposition to state regulation. This mistakes what Congress did. The prefatory clauses of the Resolution offer to ban gaming "outright," Pet. App. 123, and state that the Pueblo should be treated like other tribes, *id.* at 122. But Congress did not say that it was adopting all of the prefatory language; it said that section 107 was "enacted in accordance with the tribe's *request* in Tribal Resolution No. T.C.-02-86." Pub. L. No. 100-89, § 107(a) (emphasis added). That operative request asked that Congress ban "all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas." Pet. App. 123. And that is how the Fifth Circuit has consistently applied the Restoration Act for the last 27 years.

B. *Cabazon Band* does not change this outcome.

To establish that section 107 does not mean what it says—and what the Pueblo asked it to say—the Pueblo repeatedly insists (*e.g.*, at 20-23) that *Cabazon Band* made the otherwise commonplace term "prohibit" into a term of art in Indian law. The Fifth Circuit properly rejected that argument. Pet. App. at 12 & n.37. *Cabazon Band* interprets a statute permitting a State to apply its law to Indian tribes, but it specifically distinguishes statutes like the Restoration Act, that federalize state laws. Moreover, *Cabazon Band* did not purport to transform the word "prohibit," which appears in the U.S. Code thousands of times, into a term of art.[6] And its reasoning, which has been widely criticized as unworkable, should not be extended to new statutes absent a clear congressional mandate—which does not exist here.

1. Assuming *Cabazon Band* applies, its prohibitory/regulatory distinction does not when tribes are subject to federal law.

Assuming petitioners are right that the Restoration Act incorporates *Cabazon Band*, it would not help them. Their argument depends on the prohibitory/regulatory distinction that *Cabazon Band* applied only to direct state regulation of Indian tribes—not the federalization of state law.

Cabazon Band involved two tribes that sought to offer bingo, poker, and other card games on their reservations, but California permitted bingo only if the games were operated and staffed by unpaid members of

[6] A Westlaw search of the U.S. Code Annotated for "prohibit!" performed on January 4, 2022, returned 8,030 hits in currently enacted, numbered statutory titles, 109 of which are in Title 25. Filtering for the House version of the U.S. Code returns 4,319 hits.

designated charitable organizations. 480 U.S. at 205 (citing Cal. Penal Code § 326.5 (1987)). The profits could be used only for charitable purposes, and prizes could not exceed $250 per game. *Id.*

The Court concluded that California could not apply its rules on charitable bingo due to the unique structure of Public Law 280, which "granted broad criminal jurisdiction over offenses committed by or against Indians" but whose "grant of civil jurisdiction was more limited." *Id.* at 207. The Court had previously examined the same language in *Bryan*, which compared Public Law 280 to the termination acts passed in the same era. 426 U.S. at 389-90. Where Congress terminates a tribe's status, state law clearly replaces tribal law. *Id.* But the Court saw no indication in the "sparse legislative history" of the civil provisions of Public Law 280 that Congress sought to similarly replace tribal law. *Id.* at 379.[7]

Building on *Bryan*, *Cabazon Band* concluded that respecting Congress's decision to give States subject to Public Law 280 greater criminal jurisdiction than civil jurisdiction required the Court to "determine[] whether [a state] law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court." 480 U.S. at 208. Although bingo operated by a non-charitable or listed organization carried misdemeanor penalties under California law, the Court held that because California "law generally permits the conduct at issue, subject to regulation, it must be classified as civil-regulatory and Pub. L. 280 does not authorize its

[7] In light of *Cabazon Band* and *Bryan*'s dependence on legislative history, the Pueblo's complaint (at 22) that the Fifth Circuit "elevated legislative history over statutory text" falls flat. It is also wrong for the reasons discussed in Part I.A.

enforcement on an Indian reservation." *Id.* at 209. The "shorthand test" the Court adopted to determine whether a law was "criminal-prohibitory" or "civil-regulatory" was "whether the conduct at issue violates the State's public policy." *Id.*

Cabazon Band, however, distinguished between a law allowing a State to directly apply its own laws and one adopting state law as federal law. Specifically, the Court distinguished Public Law 280 from the Organized Crime Control Act ("OCCA"), which "makes certain violations of state and local gambling laws violations of federal law." *Id.* at 212-13. The Court observed that "[s]ince the OCCA standard is simply whether the gambling business is being operated in 'violation of the law of a State,' there is no basis for the regulatory/prohibitory distinction that . . . is suitable in construing and applying Pub. L. 280." *Id.* at 213 (citing *United States v. Dakota*, 796 F.2d 186, 188 (6th Cir. 1986)). The OCCA "is indeed a federal law that, among other things, defines certain federal crimes over which the district courts have exclusive jurisdiction," and "[t]here is nothing in OCCA indicating that the States are to have any part in enforcing federal criminal laws or are authorized to make arrests on Indian reservations that in the absence of OCCA they could not effect." *Id.* at 213-14.

The Restoration Act avoids the issues that underlay *Cabazon Band* by incorporating Texas's law as federal law and granting federal courts exclusive jurisdiction over suits to enforce the Act. *See* Pub. L. No. 100-89, § 107. Texas cannot enforce federal criminal law on the Pueblo's reservation. Instead, the State may pursue injunctive relief when the tribe violates federalized Texas gaming laws. *Id.* § 107(c). "And because enforcement of [the Restoration Act] is an exercise of federal rather

than state authority, there is no danger of state encroachment on Indian tribal sovereignty." *Cabazon Band*, 480 U.S. at 213 (citing *Dakota*, 796 F.2d at 188).

The Pueblo argues (at 27) that if Congress meant to avoid the prohibitory/regulatory framework of *Cabazon Band*, it would have clearly signaled that intent. But as discussed in greater detail below (at II.A), Congress did just that by incorporating Public Law 280 into section 105(f), separately adopting all of the State's gaming law as federal law in section 107(a), and channeling disputes over compliance out of state administrative bodies and courts and into federal court under sections 107(b) and (c) respectively.

2. Congress did not incorporate *Cabazon Band* into the gaming provisions of the Restoration Act.

Congress confirmed that it did not intend to incorporate *Cabazon Band* into the Restoration Act's gaming provisions. Indeed, the Restoration Act never mentioned *Cabazon Band*'s distinct "criminal-prohibitory/civil-regulatory" phrasing. When Congress wants a statute to respond to a case from this Court, it 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 Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001)). It did not do so here. Without those indicia, the Court must presume that "prohibited" means "prohibited."

Citing the prior-interpretation canon, the Pueblo nonetheless insists (at 21) that Congress meant to apply the meaning of the word adopted in *Cabazon Band*. That

canon, however, "teaches that if courts have settled the meaning of an existing *provision*, the enactment of a new provision that mirrors the existing statutory text indicates, as a general matter, that the new provision has that same meaning." *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 563 (2017) (emphasis added). The tribe points to no authority applying that canon to a single word within a provision—particularly a common statutory term like "prohibit."

Such an application would ignore the more fundamental canon of statutory construction that "the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Auto., Aerospace, Agric. Implement Workers of Am., Int'l Union*, 523 U.S. 653, 657 (1998). That exhortation is particularly important in the Indian-law context, where the Court has noted that "[e]ach tribe's" relations with state and federal governments arose from their own unique history and "must be considered on their own terms." *McGirt*, 140 S. Ct. at 2479.

Taken in context, the term "prohibit" does not translate from Public Law 280 to the Restoration Act. As discussed above (at 25-26), *Cabazon Band*'s definition of "prohibit" was developed to maintain the distinction between civil and criminal jurisdiction demanded by Public Law 280's unique structure. By contrast, the Restoration Act's operative gaming provision applies equally to "civil and criminal penalties" imposed by state law. Pub. L. No. 100-89, § 107(a). In *Cabazon Band*, "civil" was treated as a synonym of "regulatory." 480 U.S. at 208-09. Congress also expressly referenced the "request" in Tribal Resolution No. T.C.-02-86, which itself reflected the expectation that the tribe would be subject to the entire array of

Texas's gaming laws. *Supra* at 11-12. Where, as here, "[t]he language of the two provisions is nowhere near identical," the prior-construction canon "has no application"—even if a word might happen to appear in both. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 330 (2015).

Declining to extend *Cabazon Band* to the Restoration Act would be consistent with how this Court has treated more specific laws governing tribal affairs. *E.g.*, *Rice v. Rehner*, 463 U.S. 713, 732 (1983). And it would avoid disturbing other lower court decisions, which have interpreted "prohibit" based on its ordinary meaning and held that the *Cabazon Band* "line of cases" fashioned a solution unique to the facially broad grant of civil-regulatory jurisdiction in Public Law 280 "[t]o narrow the reach of that statute." *United States v. Stewart*, 205 F.3d 840, 843 (5th Cir. 2000); *see also United States v. Hagen*, 951 F.2d 261, 263-64 (10th Cir. 1991); *Dakota*, 796 F.2d at 188.

3. The "public policy" test from *Cabazon Band* should not be expanded because it is unworkable.

Extending *Cabazon Band* to new contexts would be particularly problematic because, as Justice Stevens noted in his dissent, the majority's "approach to 'public policy' [is] curious, to say the least." 480 U.S. at 224. Indeed, even the majority acknowledged that the "prohibitory/regulatory distinction . . . . is not a bright-line rule," allowing even the losing party to make "an argument of some weight." *Id.* at 210. In practice, the ambiguous test has proven nearly impossible to apply consistently. *Doe v. Mann*, 415 F.3d 1038, 1056 (9th Cir. 2005) (noting that "reconciling the many distinctions and finding a common, consistent thread of analysis is neither an easy task nor a productive one"). Although it is unnecessary to

determine whether this confusion requires reconsideration of the test as applied to Public Law 280, it counsels against extending that test here.

As Justice Stevens observed, the *Cabazon Band* majority adopted a view of "public policy" that is contrary to how that phrase is used in almost any other context. Specifically, the majority's approach would allow litigants to argue that "tribal bingo games comply with the public policy of California because the State permits some other gambling," which "is tantamount to arguing that driving over 60 miles an hour is consistent with public policy because the State allows driving at speeds of up to 55 miles an hour." 480 U.S. at 224-25. And litigants have done precisely that, resulting in confusion and conflicting results across States. Timothy J. Droske, *The New Battleground for Public Law 280 Jurisdiction: Sex Offender Registration in Indian Country*, 101 NW. U.L. REV. 897, 905-06 (2007).

In *Cabazon Band*, Justice Stevens explained California's public "policy concerning gambling"—like that of many States—was "to authorize certain specific gambling activities that comply with carefully defined regulation and that provide revenues either for the State itself or for certain charitable purposes, and to prohibit all unregulated commercial lotteries that are operated for private profit." 480 U.S. at 224 (Stevens, J., dissenting). Thus, California's state policy was not to regulate gaming; it was to prohibit gaming subject to limited exceptions.

Because our system of laws presumes that behavior that is not prohibited is permitted, prohibition combined with limited exceptions is a common way to legislate. It occurs in criminal contexts such as homicide, *e.g.*, 10 U.S.C. § 918 (requiring two conditions to be absent and

one of four conditions to be present for homicide to constitute murder), and assault, *e.g.*, *id.* § 920b(d), (f) (providing defenses for statutory rape). Yet no one would think that such conduct is merely "regulated." *Contra* U.S. Br. 13 (asserting that a State "simply 'regulates'" any activity that it does not ban in all circumstances). Indeed, not even the United States previously adopted that position. When discussing the meaning of the Johnson Act, the United States argued that a statutory ban "prohibits, among other things, the possession or use of 'any gambling device' within Indian country"—even though IGRA creates a specific exception for a tribe that has entered into a compact with its resident State. Petition for Writ of Certiorari, *Ashcroft v. Seneca-Cayuga Tribe of Ok.*, No. 03-740, 2003 WL 22873066 (U.S. 2004) (emphasis omitted).

The Pueblo complains (at 16) that adopting this view has led to nothing but litigation. This complaint is ill-founded. Because the "public policy" test has proven difficult even in the Public Law 280 context, where it was first recognized, *Mann*, 415 F.3d at 1056, it is doubtful that extending the *Cabazon Band* framework would be more satisfactory than applying the framework that Congress crafted in the Restoration Act. It would merely change the question being litigated.

Indeed, contrary to the Pueblo's assertion, the district court that had the unenviable task of overseeing the Pueblo's (non)compliance with the original 2001 injunction did not hold 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 IV*, 2016 WL 3039991, at *2-5, 19. Rather than attempting to assess compliance with an injunction, many parts of which were obsolete, the

court directed Texas 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").

If anything, affirming the Fifth Circuit's rule would be more straightforward than what the Pueblo and its amici propose. Either way, a future court will have to decide whether the gaming activity at issue complies with Texas law. The only difference is whether the court will *also* have to apply the public-policy balancing act mandated by *Cabazon Band*—a task that is best reserved for legislatures. *E.g.*, *Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1082-83 (7th Cir. 2015) (determining that how *Cabazon Band* applies depends on how broadly "poker" is defined).

The Fifth Circuit's view is also consistent with how other lower courts and commentators have viewed the interaction between *Cabazon Band* and IGRA. The United States is correct (at 31) that IGRA was passed in response to *Cabazon Band.* But IGRA's statutory history "make[s] clear that" its "application of the prohibitory/regulatory distinction is markedly different from the application of the distinction in the context of Public Law 83-280." S. Rep. No. 100-446, at 6 (1988). And decades of scholarship has demonstrated that IGRA did *not* intend to codify *Cabazon Band* but to "dilute[] the potency of the principles" it recognized following strong pushback from States. ANTHONY N. CABOT & KEITH C. MILLER, THE LAW OF GAMBLING AND REGULATED GAMING 324 (3d ed. 2021).[8] A circuit split has thus developed

[8] *See also, e.g.*, ROBERT GOODMAN, LEGALIZED GAMBLING AS A STRATEGY FOR ECONOMIC DEVELOPMENT 178 (1994); Paul H.

on the question of the degree to which IGRA can be seen to codify *Cabazon Band*. *Compare, e.g.*, *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1096 (9th Cir. 2003), *with Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 546 (8th Cir. 1996). As petitioners did not ask the Court to resolve that split, it should refrain from doing so in analyzing this case.

C. Because IGRA is inconsistent with the Restoration Act, the Restoration Act controls.

In a departure from its position in seeking certiorari, Cert. Rep. 7, the Pueblo now asks the Court to resolve whether the NIGC should regulate Class-II gaming on the Pueblo's reservation consistent with IGRA. Pueblo Br. 23; *see also* Alabama-Coushatta Br. 34; U.S. Br. 14. It is unclear whether such an argument is even properly before the Court. *See, e.g.*, *Visa Inc. v. Osborn*, 137 S. Ct. 289, 289-90 (2016) (mem.); *Fry v. Pliler*, 551 U.S. 112, 120-21 (2007). In any event, it fails.

The Pueblo does not dispute the Fifth Circuit's conclusion that IGRA erected a "fundamentally different regime[]" for tribal gaming. *Ysleta I*, 36 F.3d at 1334. Indeed, that is the very premise of its petition. Whether examined under the ordinary rules of statutory construction or under the particular terms of the statutes in question, the Restoration Act governs the gaming activities of the Pueblo and Alabama-Coushatta.

1. Under ordinary rules of statutory construction, the Restoration Act, rather than IGRA, governs this case. As a representative of the Interior Department has admitted to Congress, the gaming provisions of the Restoration Act (which cover two tribes) are more specific to

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Brietzke & Teresa L. Kline, *The Law and Economics of Native American Casinos*, 78 NEB. L. REV. 263, 303 (1999).

the question at issue in this litigation than is IGRA (which covers approximately 500 tribes). *See H.R. 4985, The "Ysleta del Sur Pueblo and Alabama-Coushatta Tribes of Texas Equal and Fair Opportunity Settlement Act" Before the H. Sub-Comm. on Indian, Insular, & Alaska Native Affairs*, 115th Cong. (2018) (statement of Darryl Lacounte, Acting Director, Bureau of Indian Affairs). "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (applying this principle in Indian-law context). *Contra* Pueblo Br. 15-16, 35 (asserting that the Fifth Circuit should have applied IGRA as the later statute).

The Pueblo counters (at 37-38) by pointing to the so-called Indian canon of construction. That canon, however, applies only to ambiguous statutes. *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001); *accord DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 447 (1975). By contrast, the rule that the specific governs the general is used to determine *whether* the statute is ambiguous. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). After applying that canon, the Fifth Circuit concluded that the Restoration Act contained no "ambiguities [to be] resolved in favor of the Indians," *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019). The so-called Indian canon affords the Pueblo nothing.

2. Equally off-base is the Pueblo's insistence (at 35) that the Fifth Circuit "needlessly" failed to apply the rule that federal statutes are to be harmonized when possible. But the Fifth Circuit *did* harmonize the Restoration Act and IGRA by applying each according to its terms. Under the terms of the Restoration Act, IGRA is inapplicable because it is an act of general applicability that is

"inconsistent with a[] specific provision contained in" the Restoration Act. Pub. L. No. 100-89, § 103(a). Likewise, the plain terms of IGRA made the Pueblo ineligible for its more permissive gaming regime because gaming on its lands was already "specifically prohibited" by the Restoration Act. 25 U.S.C. §§ 2701(5), 2710(b)(1)(A).

Contrary to the Pueblo's insistence (at 36), this does not create an "untenable result" by "exclud[ing]" the Pueblo and Alabama-Coushatta "from IGRA's otherwise comprehensive regulatory framework," because IGRA does not create a "comprehensive" framework applicable to all tribes. Just the opposite: it "explicitly stated in two separate provisions . . . that [it] should be considered in light of other federal law." *Ysleta I*, 36 F.3d at 1335. Specifically, IGRA gives tribes the "right to regulate gaming activity" on their lands—but only "if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5); *accord id.* § 2710(b)(1)(A) (allowing gaming "not otherwise specifically prohibited on Indian lands by Federal law").

3. The Pueblo cannot avoid this conclusion by pointing (at 16, 28) to the State's cross-petition for a writ of certiorari in *Ysleta I*, which asked the Court to "harmonize" the Restoration Act and IGRA. That the statutes should be harmonized is not in dispute—only how. There, as here, Texas argued that the way to harmonize the provisions is to hold that the Restoration Act "govern[ed] the substantive question regarding which gaming activities were allowed" under Texas law. Cross-Petition for Writ of Certiorari at *2, *Texas v. Ysleta del Sur Pueblo*,

No. 94-1310, 1995 WL 17048828 (U.S. 1995).[9] By contrast, Texas explained, the Pueblo's "version of harmonizing does not give meaning to the provisions of each Act, but reduces the Restoration Act to the mirror image of IGRA." *Id.* at *2 n.2. Neither position has changed, and the Fifth Circuit was correct to conclude that the Pueblo's view of how to harmonize the two statutes is inconsistent with the plain text of the Restoration Act.

II. The Restoration Act's Structure and History Confirm the Fifth Circuit's View.

The Fifth Circuit's holding is also consistent with the two other main sources that this Court uses to interpret agreements with Indian tribes: their structure and negotiating history. *McGirt*, 140 S. Ct. at 2468-69. To the extent that any doubt remained on the question, Congress has reinforced that the Fifth Circuit correctly interpreted the Restoration Act by rejecting numerous efforts to amend or repeal it over the last 27 years.

A. The structure of the Restoration Act is consistent with *Ysleta I*'s interpretation of section 107(a).

In addition to relying on the prior-interpretation canon, the Pueblo and their amici point to three provisions of the Restoration Act to demonstrate that Congress must have intended to incorporate the *Cabazon Band* framework into the Restoration Act's gaming provisions: sections 105(f), 107(b), and 107(c). *E.g.*, Pueblo Br. 27-33; U.S. Br. 16-18, 24-27; Alabama-Coushatta Br.

[9] The cross-petition did ask the Court to resolve the question of what IGRA required (if anything) *after* the conclusion was made that certain activity violated Texas law. *Id.* at *8-9. That question is not presented here because the Pueblo does not challenge the scope of the district court's injunction.

21-23. Their arguments are often inconsistent with one another but always violate this Court's longstanding presumption that Congress does not lightly include surplus language, *City of Chicago v. Fulton*, 141 S. Ct. 585, 591 (2021), particularly when a provision was central to the passage of the entire bill, *cf. Chickasaw*, 534 U.S. at 94 (stating that the canon against surplusage may not apply where words are "inadvertently inserted").

1. *Section 105(f)*. The Pueblo argues (at 20) that the Restoration Act's reference to Public Law 280 in section 105(f) signals an intent to incorporate *Cabazon Band*. But that does not mean what the tribe thinks it means: as the United States notes (at 18), "the scope of that Public Law 280 authority would have been clear to Congress in 1987." As *Cabazon Band* itself involved the ability of California to regulate gaming, *supra* I.B.1, Congress could have stopped at section 105(f) if it wanted the *Cabazon Band* framework to govern gaming on the Pueblo's lands. It did not.

Moreover, the Pueblo's argument ignores that *Bryan* and *Cabazon Band* responded to what this Court viewed as an unintentionally broad grant of civil jurisdiction over Indian tribes in Public Law 280. *Cabazon Band*, 480 U.S. at 208. But there was nothing unintentional in section 107. As discussed below (at II.B), the scope of gaming that would be permitted on tribal lands was the predominant dispute of the entire negotiation. Indeed, both the Pueblo (at 7) and the United States (at 3) admit that Texas's congressional delegation would have blocked the Restoration Act had it remained unsatisfied that the tribes would be forbidden from opening casinos in Texas. It would be illogical—if not improper—to assume that the negotiation was unnecessary given another provision

already in the Act. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013).

2. *Section 107(b).* The Pueblo next insists (at 27, 30-31) that section 107(b) incorporates the *Cabazon Band* framework and thus forbids Texas from seeking to enjoin any gaming that Texas does not "flatly prohibit" at all times, by all people, and in all manners. This is a non-sequitur. As Congress observed in its Senate Report on IGRA, "the adoption of State law is not tantamount to an accession to State jurisdiction," S. Rep. No. 100-446 at 13-14; law can be incorporated without jurisdiction to enforce it, and vice versa, *e.g.*, 25 U.S.C. § 1915(c) (incorporating tribal law to determine federal law). Congress's withholding of regulatory *jurisdiction* from Texas in section 107(b) does not mean, given all of the evidence to the contrary, that Congress meant to exempt federalization of state *regulations*.

By taking gaming outside the framework that applies to other substantive areas of law established in section 105(f), section 107(a) creates a substantive rule of decision, *supra* at 20-21, but leaves a procedural gap. *Ysleta I*, 36 F.3d at 1334. As the United States notes (at 5-6), the civil provisions of "Public Law 280 [also] granted state courts jurisdiction over private civil litigation involving reservation Indians."

Section 107(b) closes that gap in three separate ways. *First*, it adopts the same jurisdictional rules applied to state courts in *Bryan*, 426 U.S. at 384-90 & n.11. *Second*, it precludes the Texas Lottery Commission, which oversees compliance with the terms of Bingo Enabling Act, Tex. Occ. Code § 2001.051, from exercising jurisdiction on the Tribe's reservation. Pub. L. No. 100-89, § 107(b). And *third*, it prevents local district attorneys from bringing criminal enforcement actions against the Pueblo in

state court for violations of what has been adopted as federal law. *Id.*

Section 107(b) thus, in many ways, serves to prevent the "direct application of . . . state law" that the Pueblo and its amici insist was "wholly unsatisfactory to the Tribe." U.S. Br. 22 n.4. But it is not framed, and does not serve, as a *substantive* limit on the remedies available to Texas. It cannot; it does not "refer in any way to the jurisdiction of the district courts." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1983).

3. *Section 107(c)*. Finally, the Pueblo insists (at 21) that because section 107(c) provides an exception to section 105(f), it must be the only subsection that departs from the *Cabazon Band* framework. Not so. *Cabazon Band* did not address how to enforce state law incorporated as federal law. In section 107(c), Congress did so by allowing the federal courts to enforce the terms of the Act. Congress has not hesitated to grant parties other than the federal government the power to vindicate an interest in federal law, *see, e.g.*, 31 U.S.C. § 3730(b) (False Claims Act); 33 U.S.C. § 1365 (Clean Water Act); 42 U.S.C. § 7604 (Clean Air Act), and section 107(c) fits comfortably within that historical practice. Moreover, section 107(c)'s allocation of jurisdiction makes any judgment by an enforcing court "an exercise of federal rather than state authority," thus alleviating the sovereignty concerns that were at the heart of *Cabazon Band*. *See* 480 U.S. at 213.

This argument shows, however, the United States's error in asserting (at 13, 24) that section 107(a) must incorporate *Cabazon Band* because section 107(b) does. As the Pueblo admits (at 21), section 107(c) expressly departs from *Cabazon Band.* If section 107(b)'s adherence to the *Cabazon Band* framework requires that other

sections do the same, then so too does section 107(c)'s departure from that framework. As that cannot be true, each must be read based on its own language, and section 107(a)'s language does not track the *Cabazon Band* prohibitory/regulatory distinction.

The Pueblo makes two primary arguments in response. Neither has merit.

First, the Pueblo points (at 28-29) to contemporaneous settlements that expressly allow "regulations" to have "the same force and effect" on the reservation as elsewhere in the State. *See* Seminole Indian Land Claims Settlement Act of 1987, Pub. L. 100-228, 101 Stat. 1556, 1560 (1987); Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. 100-95, 101 Stat. 704, 709-10 (1987). But Texas's gaming laws do *not* have the same force and effect on the Pueblo's reservation as elsewhere in Texas because they are not enforced through standard civil or criminal means. Apart from potential prosecution by the local U.S. Attorney, they are enforceable only through an injunction in federal court. Thus, to the extent those settlement acts are relevant, it is to demonstrate that Congress did *not* find anything anomalous about subjecting some tribes to a tribe-specific gaming regime.

Second, the Pueblo and the United States assert that Congress could not have intended to burden federal courts with enforcing the "minutia" of state gaming law, a process that "has proved to be burdensome and unsatisfactory for all parties involved." U.S. Br. 27; *accord* Pueblo Br. 21. This argument ignores the Pueblo's repeated representations that it was not interested in operating high-stakes gaming. Pet. App. 121-23. If the tribe had kept to that pledge, there would have been no burden on the federal courts at all. The possibility of

changing circumstances is one of the reasons that this Court eschews hindsight as a guide to original intent. *See, e.g.*, *Bostock*, 140 S. Ct. at 1738; *accord BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1542 (2021) (declining to choose interpretation based on what "produces the least mischief"). And the language of the Restoration Act makes clear that Congress intended to federalize state regulations, which under *Cabazon Band* would not be subject to the prohibitory/regulatory distinction that the Pueblo demands.

B. The negotiating history of the Restoration Act demonstrates that Congress federalized Texas gaming law.

The negotiating history of the Restoration Act also shows that Congress intended to federalize all of Texas gaming law as applied to the Pueblo and the Alabama-Coushatta. As this Court has recently admonished, while legislative history never trumps statutory text, negotiating history can be important to understand what a statute addressing Indian relations means. *McGirt*, 140 S. Ct. at 2468-69 (discussing *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)). In this instance, the Restoration Act's history bolsters the conclusion that the two tribes are subject to all of Texas gaming law.

The Restoration Act, like IGRA, was "the outgrowth of several years of discussions and negotiations between gaming tribes, [the State], the gaming industry, the administration, and the Congress, in an attempt to formulate a system for regulating gaming on Indian lands." S. Rep. No. 100-446, at 1. For that reason, any interpretation of the Restoration Act must take into account not just the tribes' requests but what Texas and its congressional delegation would accommodate. As the Pueblo admits (at 7), Texas "oppose[d] any legislation that did not

make state gaming laws directly applicable on the Tribe's reservation." It would have made little sense for Texas to support legislation that adopted *Cabazon Band*'s amorphous standard and thus could embroil Texas in disputes about the exact kind of high-stakes gaming that Texas fought for years to prevent. And the evidence is that it did not.

Although the bill that became the Restoration Act originated in the House and was based on a prior version that had failed to pass, Pueblo Br. 7-21, the final version of section 107 was proposed in the Senate "in response to concerns raised by the State of Texas and Senators Gramm and Bentsen," ROA.624. As the accompanying report makes clear, the Senate's changes only strengthened the provisions regarding gaming:

> [T]he central purpose of these two sections—to ban gaming on the reservations as a matter of federal law—remains unchanged .... The Committee's amendments simply expand on the House version to provide that anyone who violates the federal ban on gaming ... will be subject to the same civil and criminal penalties that are provided under Texas law.

ROA.624-25. The Report further explains that the gaming prohibition extends to "gambling, lottery or bingo as defined by the laws and administrative regulations of the State of Texas." ROA.626.

The Report also reinforces that Congress's intent was to ban gaming as a matter of federal law by explaining that section 107(c) "make[s] it clear that the State of Texas may seek injunctive relief in federal courts to enforce the gaming ban." ROA.625; Pub. L. No. 100-89, § 107(c). It states that "[f]ederal courts shall have exclusive jurisdiction over violations of the federal ban on gaming established by this section." ROA.628.

The Pueblo counters by pointing (at 33) to Representative Udall's floor statement that section 107(b) is "in line with the rational[e]" of *Cabazon Band*, 133 Cong. Rec. 22,114 (1987), but brushes aside (at 46) as "outdated" the Senate Report's reference to state administrative regulations. As an initial matter, Senator Udall's use of "in line with" is far from clear. It might mean that section 107(b) adopts *Cabazon Band* or that it sufficiently addresses *Cabazon Band*'s concern about States arrogating jurisdiction to themselves by limiting its application to gaming. Regardless, a floor statement from an individual legislator is 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. SCALIA, *supra*, at 377; *see also Advoc. Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1661 (2017). Assuming that Representative Udall's statement can be interpreted as the Pueblo suggests, by repeatedly declining to amend the Restoration Act, Congress demonstrated that his colleagues did not agree with him that the Restoration Act adopted *Cabazon Band* wholesale.

C. Congress has reconfirmed *Ysleta I* by acquiescing in its interpretation of the Restoration Act.

In the quarter-century since *Ysleta I* held that the Restoration Act federalized Texas gaming law, the Pueblo, the Alabama-Coushatta, and the federal government have all repeatedly asked Congress to overrule *Ysleta I*. They have explained why, in their view, the Fifth Circuit was "wrong on the facts and . . . wrong on the

law,"[10] and they have made their case that allowing the Pueblo and Alabama-Coushatta to take advantage of IGRA would promote consistency, fairness, and economic development.[11] At least two of these bills would have specifically 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. 759, 116th Cong. (2019); H.R. 4372, 117th Cong. (2021). And at least three bills to overturn *Ysleta I* are currently pending.[12]

To date, none of these bills has passed because Texas opposes casinos as a matter of public policy. *Cf. Sen. Cornyn sends letter opposing Alabama-Coushatta Tribe's gaming facility*, KTRE (Oct. 16, 2019), 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). In such circumstances, the Court considers Congress to have acquiesced to the prevailing interpretation.

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[10] *Implementation of the Texas Restoration Act: Hearing Before the S. Comm. on Indian Affairs*, 107th Cong. 7 (2002); *see also, e.g.*, *Indian Gaming: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. 40 (2010) (describing *Ysleta I* as "egregious"); H.R. 4985, 115th Cong. (2018).

[11] H.R. 759, 116th Cong. (2019); S. 3654, 112th Cong. (2012).

[12] H.R. 4502, 117th Cong. (2021); H.R. 4372, 117th Cong. (2021); H.R. 2208, 117th Cong. (2021).

Id. (citing *Bob Jones Univ. v. United States*, 461 U.S. 574, 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.

III. The Lower Courts Correctly Concluded that the Pueblo's Activities Violate Texas Law.

Finally, reversal would be inappropriate because the Pueblo has violated Texas statutory law. The Pueblo has not challenged the correctness of the district court's factual findings or the scope of its injunction—only whether *Ysleta I*, upon which its legal conclusions rest, was correctly decided. As a result, the Pueblo can prevail only if the thousands of one-touch machines in use at Speaking Rock and the Socorro Tobacco Outlet 24 hours a day, 7 days a week are "electronic bingo machines," Pueblo Br. 17—even though they were designed to be indistinguishable to the consumer from slot machines, Pet. App. 30.

The Pueblo cannot meet this burden. Texas indisputably prohibits electronic facsimiles of bingo. Tex. Penal Code § 47.01(4)(A) (including "gambling device versions of bingo" within the definition of illegal gambling devices). And it has excluded one-touch machines from the

definition of traditional "bingo." Texas Lottery Commission Order No. 14-0056 (Aug. 12, 2014), at 3.[13]

Because the one-touch machines violate Texas's gambling statutes, their use carries criminal penalties, *see* Tex. Penal Code § 12.01; ROA.110, 1891-92, as well as potential civil contempt fines under Texas's common nuisance statute, *see* Tex. Civ. Prac. & Rem. Code § 125.002(d). And the district court's uncontested legal and factual findings establish that the tribe's gaming does not comply with several of the Bingo Enabling Act's provisions, ROA.2860-62, which include civil and criminal penalties, *e.g.*, Tex. Occ. Code § 2001.551(c). For all of these reasons, the district court correctly found the Pueblo in violation of section 107(a) and enjoined those activities under section 107(c). JA.47-50.

[13] It is unclear that these machines even qualify as Class-II bingo under federal law. In 2008, one NIGC commissioner concluded that such machines do not "meet the definition of bingo under IGRA." *See* Philip N. Hogen, Letter to Mayor Karl S. Cook, Jr., Metlakatla Indian Community, at 1 (June 4, 2008). In 2013, NIGC proposed, but never finalized, a rule that would have changed that conclusion. 78 Fed. Reg. 37,998.

CONCLUSION

The judgment of the Fifth Circuit should be affirmed.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Lanora.Pettit@oag.texas.gov
(512) 936-1700

LANORA C. PETTIT
Principal Deputy Solicitor General
Counsel of Record

BILL DAVIS
Deputy Solicitor General

MICHAEL R. ABRAMS
KATHRYN M. CHERRY
Assistant Solicitors General

CHRISTOPHER J.F. GALIARDO
Assistant Attorney General

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