**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**EL PASO DIVISION**

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| **STATE OF TEXAS,** | § | |
| | § | |
| **Plaintiff,** | § | |
| | § | |
| **v.** | § | |
| | § | **No. EP-99-CA-0320-KC** |
| **YSLETA DEL SUR PUEBLO, TIGUA GAMING AGENCY, THE TRIBAL COUNCIL, TRIBAL GOVERNOR CARLOS HISA OR HIS SUCCESSOR,** | § | |
| | § | |
| **Defendants.** | § | |
| | § | |

***AMICUS CURIAE* BRIEF OF THE ALABAMA-COUSHATTA TRIBE OF TEXAS IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND FOR ALTERNATIVE RELIEF**

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The Alabama-Coushatta Tribe of Texas ("Alabama-Coushatta") submits this brief as *amicus curiae* in support of Defendant's Motion to Dismiss and for Alternative Relief, to provide additional authority and analysis on claims which affect both this litigation and the Alabama-Coushatta.

## I. PRELIMINARY STATEMENT

The Ysleta del Sur Pueblo ("Ysleta") and the Alabama-Coushatta (collectively the "Texas Tribes") are subject to an entirely unique Restoration Act that provided both tribes with federal recognition and also addressed their ability to conduct gaming.

In October 2015, the National Indian Gaming Commission ("NIGC") exercised its Congressionally-authorized regulatory role and approved bingo gaming ordinances submitted by both the Ysleta and the Alabama-Coushatta. ECF No. 524 [hereinafter the "NIGC Letter"]. In reaching this conclusion, the NIGC "concurred with" and incorporated into its final agency action a formal opinion of the Department of Interior ("DOI") that the Indian Gaming Regulatory Act ("IGRA"), and not the Restoration Act, controls the gaming rights of the Ysleta and the Alabama-Coushatta. *Id*. at 2 and Attachment A. NIGC's conclusion, supported by the DOI opinion, conflicts with the Fifth Circuit's ruling in *Ysleta Del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994), which in turn was applied to the Alabama-Coushatta in *Alabama-Coushatta Tribes of Tex. v. Texas*, 208 F. Supp. 2d 670 (E.D. Tex. 2002), *aff'd*, 66 F. App'x 525 (5th Cir. 2003).

Under administrative law precedent, the NIGC's considered resolution of uncertainty in the statute that Congress charged it with administering controls here—even over the Fifth Circuit's prior decision resolving the same uncertainty and reaching the opposite conclusion. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). By failing to directly speak to the precise question at issue here, Congress conferred a range of

discretion to resolve the uncertainty in IGRA on the agency charged with rendering adjudications and issuing regulations under that scheme—not the federal courts. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013). Because the NIGC Letter articulates a construction of IGRA that falls within that realm of permitted discretion, it is authoritative and binding on the federal courts.

Further, separate from the NIGC Letter, the Ysleta correctly argue in the alternative that IGRA's Class II gaming provisions—which explicitly provide for Indian bingo in states like Texas—supersede any inconsistent provisions of the Restoration Act, requiring modification of the injunction. This issue is one of first impression, on which there is no binding authority, and the plain text of the statute supports the Ysleta's argument.

Much ink is spilled by the State of Texas (the "State") and the *amici curiae* brief of American Legion Post 312, *et al*. (hereinafter collectively the "Bingo Amici") on tangents and red herrings. In the process, they misstate much of the history of the Texas Tribes, the passage of the Restoration Act, and the plain meaning of the Restoration Act. Without conceding the accuracy of these spurious claims, this Brief seeks mainly to inform the court's analysis of the NIGC Letter.[1]

## II. THE NIGC'S EXERCISE OF AUTHORITY OVER THE TEXAS TRIBES' BINGO APPLICATIONS WAS REASONABLE, AND THEREFORE THIS CASE SHOULD BE DISMISSED

### A. Congress Vested Authority Over Indian Gaming in the NIGC

Congress invoked the full breadth of its authority in crafting IGRA. It declared that "existing Federal law" was deficient, 25 U.S.C. § 2701(3), and that IGRA was "intended to expressly preempt the field in the governance of gaming activities on Indian lands." S. REP. NO.

[1] Of course, the Alabama-Coushatta would be pleased to provide additional briefing on any other issue raised in the briefs of the parties or the *amici* that concerns the court.

100-446, at 6 (1988), *available at* 1988 WL 169811. It sought to "foster a consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied." *Id*. IGRA explicitly applies to "any" tribe. 25 U.S.C. § 2703(5). Having crafted a universal framework, Congress asserted that "the Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed." *Id*. Several courts have held that the effect of IGRA was complete preemption of state law and jurisdiction over tribal gaming. *See Alabama v. PCI Gaming Auth.*, 15 F. Supp. 3d 1161, 1171 (M.D. Ala. 2014), *aff'd*, 801 F.3d 1278 (11th Cir. 2015); *Casino Res. Corp. v. Harrah's Entm't, Inc.*, 243 F.3d 435, 437 (8th Cir. 2001).

To implement this statute and administer its regulatory scheme, Congress created the NIGC. By statute, the NIGC is charged with broad powers to issue regulations and adjudicatory decisions on Indian gaming. *See, e.g.*, 25 U.S.C. §§ 2705, 2706. NIGC's regulations are found at 25 C.F.R. part 501, *et seq*. The NIGC has explicit statutory authority to approve gaming ordinances for both Class II and Class III Indian gaming. 25 U.S.C. § 2710 (b)(1)(B) & (d)(1)(A)(iii). The NIGC oversees all tribal gaming ordinances and tribal gaming management contracts.[2] It annually oversees compliance with compacts, ordinances, licensing, and auditing for 250 tribal gaming operations.[3] Since 1999, NIGC has issued 328 enforcement actions against tribal gaming operations.[4] In the process of exercising all these functions, the NIGC constantly is called upon to interpret the scope, meaning, and Congressional intent behind IGRA, and resolve conflicts between IGRA and other statutory schemes.

[2] *See* http://www.nigc.gov/commission/commission-final-decisions.

[3] *See* http://www.nigc.gov/images/uploads/reports/dec2013complrpt2015050715093400.pdf.

[4] *See* http://www.nigc.gov/commission/enforcement-actions.

### B. NIGC's Exercise of Its Congressionally Mandated Authority Over Indian Gaming Ordinances Is Entitled to Deference

The question before the Court is a deceptively simple one: does IGRA or the Restoration Act control the scope of permissible gaming on the Pueblo's tribal lands? As the extensive briefing before the Court on this motion has made clear, the answer to this binary question depends upon which of two competing, purportedly authoritative, precedents controls here: (1) the Fifth Circuit's 1994 opinion holding that the Restoration Act controls in *Ysleta I*, as the State and the Bingo Amici argue, or (2) the NIGC's Letter of this fall holding that IGRA controls, as the Pueblo argue.

Applying the Supreme Court's and Fifth Circuit's administrative law precedent to the facts of this case, the NIGC Letter governs. The NIGC Letter represents the authoritative construction of an uncertain statute by the agency charged with that statute's administration and therefore controls over prior contrary judicial precedent. *See Brand X*, 545 U.S. at 982. This conclusion follows from the administrative-deference principles announced in *Chevron*, and refined by subsequent case law. As the Supreme Court summarized those principles in *City of Arlington*:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions." First, applying the ordinary tools of statutory construction, the court must determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

133 S. Ct. at 1868 (citing *Chevron*, 467 U.S. at 842–43) (internal citations omitted). Because (1) IGRA does not directly speak to the precise question at issue, (2) the NIGC has the authority to

interpret IGRA, and (3) the NIGC Letter's interpretation is reasonable, the NIGC Letter is entitled to deference.

### C. IGRA Does Not Directly Speak to the Question at Issue.

#### *1. The Plain Text of IGRA Leaves Uncertainty As to Its Applicability to Restoration Act Tribes*

There are several elements to this analysis, but they begin with the statutory text. It is a prerequisite to *Chevron* deference that the text of the statute be "silent or ambiguous with respect to the specific issue" in dispute. *See* 467 U.S. at 843. The question presented here, whether IGRA supersedes the Restoration Act, surely meets this test.

IGRA covers every federally-recognized "Indian tribe"[5] and permits covered tribes to engage in Class II gaming, including the bingo operations at issue here. The State does not dispute that, on the face of the statute, the Ysleta are a covered "Indian tribe" within the definitional scope of IGRA. Rather, the State contends that (1) the provision of IGRA authorizing Class II gaming and (2) a broad incorporation provision (which the State denominates the "savings provision") of the Restoration Act together preclude IGRA's application to the Ysleta. These two provisions read:

> An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction if—
>
> (A) such Indian gaming is located within a state that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law) . . .

25 U.S.C. § 2710(b)(1) (IGRA).

[5] *See* 25 U.S.C. § 2703(5) ("The term 'Indian tribe' means any Indian tribe, band, nation, or other organized group or community of Indians which — (A) is recognized as eligible by the Secretary [of the Interior] for special programs and services provided by the United States to Indians because of their status as Indians, and (B) is recognized as possessing powers of self-government.").

> The Federal trust relationship between the United States and the tribe is hereby restored. The Act of June 18, 1934 (48 Stat. 984), as amended, and all laws and rules of law of the United States of general application to Indians, to nations, tribes, or bands of Indians, or to Indian reservations which are not inconsistent with any specific provision contained in this subchapter shall apply to the members of the tribe, the tribe, and the reservation.

25 U.S.C. § 1300g-2 (Restoration Act).

Neither IGRA nor the Restoration Act expressly refers to the other. The putative "savings provision" upon which the State places great weight does not—unlike the statutes at issue in the cases the State cites—address future legislation;[6] it is plainly aimed at incorporating historical legislation already in force. Nor does IGRA include or except the Ysleta (or the Alabama-Coushatta) from the statute's reach.[7] The legislative history clarifies that the reference to "otherwise specifically prohibited" gaming in § 2710(b)(1), on which the State also relies, operates only to ensure that IGRA did not repeal other federal gambling statutes that impose a *per se* ban on certain gaming devices, *see* S. REP. NO. 100-446, at 12 ("The phrase 'not otherwise prohibited by Federal Law' refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. 1175."); it is not an oblique reference to the Restoration Act.

The answer to the core statutory interpretation question posed—whether IGRA's gaming regulatory scheme supersedes that imposed by the Restoration Act—therefore does not lie solely

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[6] *See Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 787 (1st Cir. 1996) ("The provisions of any federal law enacted after October 10, 1980 [the effective date of the Settlement Act], for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, . . . shall not apply within the State of Maine, unless such provision of such *subsequently enacted* Federal law is specifically made applicable within the State of Maine." (emphasis added)) (quoting 25 U.S.C. § 1735(b)).

[7] Although the statute itself does not contain any such specific references, in the Legislative History, Congress indicated its intent to include some tribes, S. REP. NO. 100-446, at 10-11 (Lummi tribe of Washington's card room included in "grandfather" provision; grace period for application applied to Menominee tribe of Wisconsin), and exclude others, *id*. at 12 (excluding tribes subject to Maine and Rhode Island Settlement Acts).

within the statute's unambiguous text. As the Fifth Circuit concluded in attempting to reconcile these two laws, construing the scope of IGRA in light of the Restoration Act requires resort to the legislative history and a series of competing canons of construction. *See Ysleta I*, 36 F.3d at 1334–35. Those canons do not provide a definitive answer: some counsel in favor of giving the Restoration Act precedence over IGRA, *see, e.g.*, *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987) ("Repeals by implication are not favored."); some support the conclusion that IGRA superseded the Restoration Act, *see, e.g.*, *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936) ("There are two well-settled categories of repeals by implication: (1) Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act."); *Alaska Pac. Fisheries Cos. v. United States*, 248 U.S. 78, 89 (1918) ("[S]tatutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians."); and still others are equivocal, *see, e.g.*, *Crawford Fitting*, 482 U.S. at 445 ("[W]here 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.").[8]

To avoid application of *Chevron*, the State must show that "Congress has directly spoken to the precise question at issue." *See* 467 U.S. at 843. The lengths to which the State and Bingo

[8] Whether IGRA or the Restoration Act is the "specific" statute is itself unclear: the Fifth Circuit in *Ysleta I* concluded that the Restoration Act was the specific statute and IGRA the general one, *see* 36 F.3d at 1335, whereas the First Circuit in *Rhode Island v. Narragansett Indian Tribe* suggested that it agreed with the district court that IGRA was the specific statute and the tribe's settlement act the general one, *see* 19 F.3d 685, 704 n.21 (1st Cir. 1994). Further, as the First Circuit observed, this canon has little application when, as here, "the enacting Congress is demonstrably aware of the earlier law at the time of the later law's enactment." *Id.*

Amici must go—reaching far beyond the plain statutory text—to support their preferred reading of the statute only illustrates that it has not. Where the language of the statute leaves this demonstrable uncertainty over the breadth of its coverage, the agency charged with its administration is authorized to resolve that uncertainty: "'Congress, when it left ambiguity in a statute' administered by an agency, 'understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" *City of Arlington*, 133 S. Ct. at 1868 (*quoting Smiley v. Citibank (S.D.), N. A.*, 517 U.S. 735, 740–741 (1996)).

*2.* Ysleta I *Does Not Hold to the Contrary*

In *Brand X*, the Supreme Court recognized one exception to the usual rule that subsequent agency interpretations control over otherwise-binding prior judicial interpretations: "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." 545 U.S. at 982. The Bingo Amici contend that this exception applies here because the Fifth Circuit's opinion in *Ysleta I* held that the statutory text of IGRA unambiguously compelled the conclusion that the Restoration Act controls over IGRA. That is not the case.

First, *Ysleta I* acknowledges that the two statutes "establish . . . fundamentally different regimes." 36 F.3d at 1334. To determine which applied, the Court rested its holding upon the *absence* of clear direction from Congress, which the Court concluded required it to presumptively apply the Restoration Act as the "more specific" of the two statutes. *See id.* at 1335. Such a conclusion is not the kind of judicial precedent that "unambiguously forecloses the agency's interpretation" or "displaces a conflicting agency construction." *Brand X*, 545 U.S. at 982–83.

Second, the language upon which the Bingo Amici rely in asserting that the Fifth Circuit's reading of the relationship of IGRA to the Restoration Act derives from the unambiguous text of the statute comes from an entirely different section of the opinion and has no relevance here. Discussing whether the Restoration Act—*as originally enacted*, that is, before IGRA—subjected the Ysleta to Texas's gaming laws and regulations or instead incorporated the prohibited-versus-regulated distinction at issue in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209–10 (1987), the Fifth Circuit acknowledged that, to impose state gaming laws on the Ysleta, "Congress' intention must be 'explicit,' 'clear,' 'unambiguous,' 'plain,' and 'specific.'" 36 F.3d at 1334 n.20. The Court held that "[t]he *Restoration Act* satisfies these requirements." *Id.* (emphasis added). The sentence the Bingo Amici cite has nothing to do with the uncertainty over IGRA's effect on the Restoration Act and does not support the conclusion that the Fifth Circuit's reading of IGRA in *Ysleta I* was premised on the unambiguous statutory text.

**D. The NIGC Has the Power to Fill the Gap in IGRA**

The uncertainty as to the effect of IGRA on the Restoration Act gives the NIGC the power to clarify it—a power that the NIGC has properly exercised by issuing the NIGC Letter. In simultaneously leaving IGRA uncertain as to this issue and giving the NIGC broad authority to administer the statute through rulemaking and adjudication,[9] Congress conferred on the NIGC

[9] *See* 25 U.S.C. §§ 2706(b)(10) ("The Commission . . . shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter."); 2705(a)(3) ("The Chairman, on behalf of the Commission, shall have power, subject to an appeal to the Commission, to . . . approve tribal ordinances or resolutions regulating class II gaming and class II gaming . . . ."). Courts have routinely held that similar language in other statutes gives rise to *Chevron* deference. *Cf. City of Arlington*, 133 S. Ct. at 1874 ("It suffices to decide this case that the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority.").

the authority to conclusively resolve the uncertainty. *See, e.g.*, *City of Arlington*, 133 S. Ct. at 1868 ("*Chevron* is rooted in a background presumption of congressional intent: namely, that Congress, when it left ambiguity in a statute administered by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." (quotation marks omitted)).

In response, the State asserts that allowing the NIGC to resolve the question posed here violates non-delegation principles by improperly conferring on an administrative agency the authority to reconcile the scope of IGRA with other statutes. The Supreme Court's 2013 decision in *City of Arlington* rejects this objection. Whether the NIGC had authority to act on the Ysleta's proposed ordinance is a question of the reach of the agency's jurisdiction posed by the presentation of the ordinance to the NIGC for review. *City of Arlington* explains that such questions are an inherent part of an administrative agency's statutory scheme and, when the answer is uncertain, no less the proper subject of *Chevron* deference than any other gap in the statute administered by the agency:

> The question here is whether a court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority (that is, its jurisdiction). The argument against deference rests on the premise that there exist two distinct classes of agency interpretations: Some interpretations—the big, important ones, presumably—define the agency's "jurisdiction." Others—humdrum, run-of-the-mill stuff—are simply applications of jurisdiction the agency plainly has. That premise is false, because the distinction between "jurisdictional" and "nonjurisdictional" interpretations is a mirage. No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority.

133 S. Ct. at 1868. Emphasizing the breadth of this rule, the Court observed that there "is [not] a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field." *Id.* at 1874.

The Bingo Amici attempt to argue that the NIGC had no authority to construe IGRA here because that construction entails some incidental analysis of the Restoration Act. The issue presented here is the scope of IGRA—specifically, the scope of the agency's jurisdiction under the statute. Under *City of Arlington*, the authority to answer that question is inherently vested in the NIGC. *See* 133 S. Ct. at 1868.

As the Bingo Amici note, the First Circuit in *Passamaquoddy* agreed with their contention in declining to defer to the NIGC's interpretation of IGRA together with the Passamaquoddy Tribe's Settlement Act. *See* 75 F.3d at 794 ("Though the [NIGC] may have expertise in the conduct of gaming activities on tribal lands, we cannot take it upon ourselves to assume, without any evidence, that Congress intended to entrust the Commission with reconciling the [IGRA] and other statutes in the legislative firmament." (citation omitted)). There are two reasons why the Court should not abide by the logic of *Passamaquoddy*. First, the language is dicta from another circuit, addressing an entirely different statutory context: before making this observation, the First Circuit understandably held that the statutory text gave "a clear and unambiguous expression of congressional intent" that the Passamaquoddy Tribe's Settlement Act should control over the later IGRA, which precludes any agency deference in the first instance. *See id.* at 793.[10] Second, *Passamaquoddy* predates the Supreme Court's holding in

[10] As discussed above, *see* note 6 *supra*, the Passamaquoddy Tribe's Settlement Act included the kind of unquestionably explicit savings provision that is absent from the Restoration Act: "The provisions of any federal law enacted after October 10, 1980 [the effective date of the Settlement

*City of Arlington*, and the premise of the *Passamaquoddy* dicta relies in part on the First Circuit's parsing of the appropriate relative roles of courts and agencies faced with an ambiguous statute based on the sources that must be consulted to resolve the distinction. *See* 75 F.3d at 794. *City of Arlington* rejects this competency-focused analysis in favor of a pragmatic one grounded in the principles of congressional intent that follow from *Chevron*: "Congress, when it left ambiguity in a statute administered by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." 133 S. Ct. at 1868 (quotation marks omitted). In consequence, "[s]tatutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency." *Id.* In leaving uncertainty concerning the scope of IGRA in relation to the Restoration Act and charging the NIGC with the power to render adjudications and issue regulations under IGRA, *City of Arlington* compels the conclusion that the NIGC has the statutory authority to resolve that uncertainty as a necessary incident of its administration of IGRA's scheme.

The NIGC had the power to render a decision as to whether IGRA, the statute it administers, applies to the Ysleta.

### C. The NIGC's Determination Was Reasonable

The final step in the *Chevron* analysis asks whether the agency's interpretation was "reasonable," that is, whether it represents a "permissible construction of the statute." *City of Arlington*, 133 S. Ct. at 1868. Here, the question presented is binary: does IGRA control over

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Act], for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, . . . shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine." *Id.* at 787 (quoting 25 U.S.C. § 1735(b)) (alterations in *Passamaquoddy*).

the Restoration Act, or does the Restoration Act control over IGRA? It follows as a matter of logic from the conclusion that IGRA is uncertain on this point that the NIGC's selection of one of these two competing interpretations must be a "permissible construction."

The State and the Bingo Amici attempt to collaterally attack the NIGC's ruling as arbitrary and capricious[11] because they contend it (1) is a reversal of the agency's prior position and (2) made in the course of litigation. The State and Bingo Amici have the argument reversed. The NIGC Letter represents the first time that the agency has taken a position on the relationship between IGRA and the Restoration Act *other than* as a party to litigation. The Bingo Amici are entirely correct that agency "interpretations advanced . . . during . . . litigation may be construed as offered for the purpose of 'provid[ing] a convenient litigating position'" and therefore not entitled to deference. *See R&W Tech. Servs. Ltd. v. CFTC*, 205 F.3d 165, 171 (5th Cir. 2000) (quoting *United States v. Food, 2,998 Cases*, 64 F.3d 984, 987 n.5 (5th Cir. 1995)). That is precisely why, in the course of the exercise of its adjudication of ordinance approval, the NIGC owes no explanation for diverging from a prior *litigation position* that its lawyers may have taken for strategic reasons. By contrast, the NIGC is not a party to this litigation, and its reasoned position outlined in the NIGC Letter is not a "litigation position." The NIGC Letter is the *only* formal agency action, *see* 25 U.S.C. §§ 2705(a), 2714, that the NIGC has taken on the question of whether IGRA applies to the Ysleta. In any event, a change in policy is not a ground, standing alone, for declining deference: *Chevron* itself deferred to an agency interpretation that was a reversal of recent policy. *See* 467 U.S. at 857-858.

[11] The proper forum for raising such a complaint would be, as the Pueblo's motion explains, through the administrative process, not through litigation to which the NIGC is not a party. *See* 25 U.S.C. §§ 2705(a) (providing for appeal from Chairman to NIGC for actions on ordinance approvals); 2714 (providing that decisions by the NIGC are "final agency action[s]" appealable to the federal courts under the Administrative Procedures Act).

The NIGC Letter is therefore formal agency action that represents the authoritative interpretation of IGRA by the NIGC, the agency charged with administration of the statute. Because (1) the NIGC Letter reasonably resolves an uncertainty within IGRA and (2) the Fifth Circuit's prior precedent on this question did not stem from the unambiguous text of the statute but rather an effort by the court to resolve that same uncertainty, the NIGC Letter controls here and compels dismissal of this proceeding.

## III. IGRA PERMITS CLASS II GAMING BY THE TEXAS TRIBES

In order to grant the Ysleta's request for alternative relief, this court need not go to the same lengths as the NIGC Letter, and may distinguish prior Fifth Circuit rulings, which only addressed Class III gaming. In IGRA, Congress explicitly provided a different framework for Class II gaming, forbidding states from any role in controlling, regulating, or administering Class II games including bingo. In fact, the legislative history declares that tribes in states like Texas should conduct bingo under federal, not state regulatory control. As a result, *Ysleta I* does not apply when an Indian tribe seeks to conduct Class II gaming, and IGRA must control.

### A. Application of IGRA's Class II Provisions to the Texas Tribes Is a Matter of First Impression

This litigation has focused on Class III gaming. The Fifth Circuit ruled that Ysleta's Restoration Act, and not IGRA, governed the "Class III games in which the Tribe was seeking to engage." *Ysleta I*, 36 F.3d at 1331–35. After the Ysleta opened a Class III gaming Casino, and because of the "scope and nature" of those operations, this Court issued an injunction prohibiting the Ysleta from conducting *any* gaming, both legal and illegal. *Texas v. Del Sur Pueblo*, 220 F. Supp. 2d 668, 673 & n.2, 707 (W.D. Tex. 2001). Along with a lengthy list of every other imaginable type of gaming, the Court enjoined the Ysleta from conducting bingo. *Id*. at 697-98. But there was no separate discussion of Class II gaming. The Fifth Circuit affirmed imposition

of this injunction without discussion. *See Texas v. Ysleta del Sur Pueblo*, Case No. 3:99-cv-00320-KC (W.D. Tex.), ECF No. 159 (Fifth Circuit Mandate) (Feb. 11, 2002).

Thereafter, the Ysleta moved to modify the injunction so that it could conduct several specific games, one of which was "charitable bingo." *Id*. at 698, 706-08. The court acknowledged that the Ysleta was not subject to the "regulatory jurisdiction" of the state, but, nonetheless concluded that under *Ysleta I,* the Ysleta had to follow Texas law which required it to file a bingo application with the Texas Lottery Commission. *Id*. at 707. On appeal, the Fifth Circuit concluded the district court had not abused its discretion in refusing to modify the injunction, without addressing the legal ruling regarding bingo. *Texas v. Pueblo*, 69 F. App'x 659 (5th Cir. 2003) (citing *Rolex Watch USA, Inc. v. Meece*, 158 F.3d 816, 823 (5th Cir. 1998) (abuse of discretion standard only applies to "scope and form" of an injunction; legal issues require de novo review)). Seven years later, the District Court finally denied Ysleta's bingo application, and that decision was not appealed. *See Texas v. Ysleta del Sur Pueblo*, Case No. 3:99-cv-00320-KC (W.D. Tex. Aug. 3, 2010), ECF No. 323 (Order Denying Interim Bingo Petition). This litigation did not address the issue now before the court, namely, whether *Ysleta I* applies to Class II gaming.

In any event, the court's discretionary exercise of its injunctive authority in 2003 and 2010 is worthy of review. *See* Pueblo Defendant's Motion, ECF No. 531, at 14-20 (filed Nov. 9, 2015). The ruling that Ysleta is free from state regulatory jurisdiction, yet must seek a state regulator's permission to open a bingo operation, warrants further consideration. It effectively negates an important principle established by both the Restoration Act and IGRA, specifically, that the states have no role in controlling or regulating Class II Indian gaming, including bingo.

### B. IGRA Created Different Statutory Schemes for Class II and Class III Gaming

Congress spent nearly six years balancing Indian sovereignty and states' rights before passing IGRA. *See* S. REP. NO. 100-446, at 1-7. Congress recognized that "the extension of State jurisdiction on Indian lands has traditionally been inimical to Indian interests." *Id*. at 5. It sought "to preserve the principles which have guided the evolution of Federal-Indian law for over 150 years." *Id*. Specifically, Congress sought to balance the need for law enforcement with "the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian land." *Id*.

Central to this debate was the distinction between Class II and Class III gaming. From the outset, DOI and the United States Department of Justice opposed permitting Class III gaming, except under state jurisdiction. *Id*. at 3. Recognizing the "strong concern of states that state laws and regulations relating to sophisticated forms of Class III gaming be respected on Indian lands," *id*. at 13, Congress provided that Class III gaming on Indian lands would occur only if a tribe "affirmatively elects to have State laws and State jurisdiction extend to tribal lands," through the mechanism of tribal-state compacts. *Id*.

In sharp contrast, Class II gaming was non-controversial. Congress recognized that tribes "retain all rights that were not expressly relinquished," and that "class II gaming has not been expressly addressed by Federal statute and thus there has heretofore been no divestment or transfer of such inherent tribal government powers by Congress." *Id*. at 5, 11. As a result, in passing IGRA, Congress declared that "class II gaming on Indian lands shall *continue to be within the jurisdiction of the Indian tribes*" subject to oversight and regulation by the NIGC. 25 U.S.C. § 2710(a)(2) (emphasis added). In short, states were given no regulatory control whatsoever over Indian bingo. Congress declared that tribes should have "maximum flexibility

to use games such as bingo and lotto for tribal economic development," and would be free of state limitations on such gaming. S. REP. NO. 100-446 at 9, 12.

Thus, shortly after passage of the Restoration Act, Congress declared a new national policy that states would have no jurisdiction whatsoever over Indian bingo. No court has addressed how this distinct and clearly-stated national policy affects the Texas Tribes.

**C. Congress Intended That IGRA Would Govern Class II Gaming in Texas**

In passing IGRA, Congress, for the first time, established a uniform, nationwide framework for regulating Class II Indian gaming. IGRA provides that:

> (1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—
>
> (A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise prohibited on Indian lands by Federal law), and
>
> (B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

25 U.S.C. § 2710(a)(1)(A) and (B).

There is no question here that the Ysleta is an "Indian tribe" that seeks to game on "Indian lands," and that its ordinance has been approved by the Chairman of the NIGC. Hence, its authority to operate a Class II facility under IGRA turns on two questions: (1) whether it is "located within a State that permits such gaming for any purpose, by any person, organization or entity," and (2) whether the gaming is "otherwise prohibited by Federal law."

The plain language of IGRA permits Indian bingo in all states, like Texas, that permit bingo "for any purpose, by any person, organization or entity." Congress intended that this

statute apply regardless whether states imposed limitations and regulations on the operation of bingo. As the legislative history of IGRA explains:

> There are five States (Arkansas, Hawaii, Indiana, Mississippi, and Utah) that criminally prohibit any type of gaming, including bingo. [IGRA] bars any tribe within those States, as a matter of Federal law, from operating bingo or any other type of gaming. *In the other 45 States, some forms of bingo are permitted and tribes with Indian lands in those States are free to operate bingo on Indian lands, subject to the regulatory scheme set forth in the bill.* The card games regulated as class II gaming are permitted by far fewer States and are subject to requirements set forth in section 4(8). *The phrase "for any purpose by any person, organization or entity" makes no distinction between State laws that allow class II gaming for charitable, commercial, or governmental purposes, or the nature of the entity conducting the gaming. If such gaming is not criminally prohibited by the State in which tribes are located, then tribes, as governments, are free to engage in such gaming.*

S. Rep. No. 100-446 at 11-12 (emphasis added).

The "45 States" in which Congress declared that Indians would be free to operate bingo games clearly included Texas. It is not listed among the five states where all gambling was prohibited and, in fact, at the time this language was written Texas already permitted bingo for "any purpose." Congress expressly superseded limitations imposed by states like Texas, such as restricting bingo to charitable purposes. As discussed at length above, IGRA was passed shortly after passage of the Restoration Act, when Congress was well aware of the legal status of the Texas Tribes. Clearly, Congress intended IGRA to apply to Class II gaming in Texas, and no court has held otherwise.

No such clarifying language accompanies the legislative history of IGRA's Class III language. On the contrary, it assumes that the formulation of tribal-state compacts will "make use of existing State regulatory systems," that may include restrictions on matters such as hours

of operation, wage and pot limits, and size and capacity of a proposed facility. *Id*. at 13-14. Thus, the analysis in *Ysleta I*, which only addressed Class III gaming, is inapplicable.

In *Ysleta I*, the court's analysis turned on the Restoration Act language that states: "gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on the lands of the tribe." 25 U.S.C. § 1300g-6(a). According to the Fifth Circuit, this prohibitory language made Texas law "surrogate federal law," and made the Ysleta subject to Texas' laws and regulations. *Ysleta I*, 36 F.3d at 1332-35. Whatever may be the continuing force of this holding in the Class III context, *see* Argument II, *supra*, it cannot be applied to Class II gaming. Congress made clear in IGRA that to "prohibit" Class II gaming, a state would have to ban it entirely. A state that permits charitable bingo, thereby permits an Indian tribe to conduct bingo pursuant to federal regulation on Indian lands.

Congress also explained the specific meaning attached to the phrase "not otherwise prohibited by Federal Law" in the Class II context. In so doing, Congress made clear that generally applicable federal anti-gambling statutes would *not* apply to bingo machines in Indian country. The legislative history explains that this phrase:

> . . . refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. 1175. That section prohibits gambling devices on Indian lands but *does not apply to devices used in connection with bingo and lotto.* It is the Committee's intent that with the passage of this act, *no other Federal statute, such as those listed below, will preclude the use of otherwise legal devices used solely in aid of or in conjunction with bingo or lotto* or other such gaming on or off Indian lands . . . .

S. REP. NO. 100-446 at 12 (citations omitted; emphasis added). Thus, the reference to other federal statutes supports, rather than detracts from, the argument that Congress intended to make bingo freely available on Indian lands.

The legislative history continues:

> However, it is the intention of the Committee that nothing in the provision of this section or in this act will supersede any specific restriction or specific grant of Federal authority or jurisdiction to a State which may be encompassed in another Federal statute, including the Rhode Island Claims Settlement Act (Act of September 30, 1978, 92 Stat. 813; P.L. 95–395) and the Maine Indian Claim Settlement Act (Act of October 10, 1980; 94 Stat. 1785; P.L. 96–420).

*Id*.

This provision is plainly not applicable to the Ysleta. The Restoration Act does not "grant . . . jurisdiction to" Texas. Instead, it affirmatively *disclaims* such a grant of civil or criminal regulatory jurisdiction, and assigns "exclusive jurisdiction" over enforcement matters to the federal courts. 25 U.S.C. § 1300g-6(c). In contrast, the specific settlement acts referred to by Congress grant regulatory jurisdiction to the States. *See, e.g.*, Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, § 9, 92 Stat. 813 (1978).

More significantly, at the time it passed IGRA, Congress clearly did not believe that the Restoration Act applied to bingo. As detailed above, it declared there had been no previous federal statute addressing Indian bingo, that there had been no federal divestment of Indians' inherent authority to conduct such gaming, and that bingo would remain under Indian control. And it included Texas among the states governed by IGRA.

It thus is not surprising that, at an early stage in this litigation, Texas took the position that "Federal law, 'for the purpose of promoting tribal economic development, tribal self-sufficiency, and strong tribal government' has pre-empted the state law in the area of Bingo." *See* Defendant's Motion, Exhibit 1, ECF No. 531-1 at 7. This is a correct statement of the plain meaning of the law, and the clear intent of Congress.

**D. IGRA's Class II Provisions Control**

In passing the Restoration Act, Congress clearly wrestled with the same tension between state's rights and Indian sovereignty that it was debating in the context of IGRA. In both

statutory frameworks, Congress recognized the importance of state substantive gambling laws, but also preserved Indian sovereignty with respect to the regulation of gaming, particularly in the Class II context. Congress could have subjected the Ysleta to state civil and criminal regulatory jurisdiction, as it did with other tribes.[12] Instead, Congress made clear that the Restoration Act did not provide civil or criminal regulatory jurisdiction over the Ysleta. This preservation of Indian sovereignty cannot be easily dismissed.

IGRA complimented, rather than conflicted with, this principle of the Restoration Act. It reaffirmed that Texas had no regulatory jurisdiction over the Ysleta's Class II gaming, but took an important additional step. It provided for exclusively federal regulation of Class II gaming. The two statutes therefore should be interpreted as consistent, at least in the Class II context: the federal government regulates activity that Texas expressly cannot.

While both the Fifth Circuit and DOI have concluded that IGRA and the enforcement provisions of the Restoration Act are repugnant, those conclusions need not extend to Class II gaming. Under IGRA, Texas retains the right to completely ban bingo within the state. Should it do so, it can enforce such a prohibition in a federal injunctive action under § 1300g-6(c) of the Restoration Act. All IGRA did was make clear that, once Texas made bingo in any form available to Texans, it could not then exercise regulatory jurisdiction over how that game was played on Indian lands. This limitation is consistent with a proper construction of the Restoration Act, which deprived Texas of regulatory jurisdiction. Thus, IGRA's enforcement provisions, not the Restoration Act, must apply.

*Ysleta I*'s interpretation of these statutes left the district court in an odd and unaccustomed regulatory role—implementing state regulations in a manner ordinarily left to an

[12] *See, e.g.*, Narragansett Settlement Act, 25 U.S.C. § 1771e (restricting Narragansett's exercise of jurisdiction over its tribal lands).

administrative law judge. As this court has seen in the context of Class III litigation, the line between Texas's substantive law and its regulatory jurisdiction is often difficult to parse. But this anomalous structure, and confusion about what regulations should apply, should not exist for Class II gaming. IGRA established a precise and comprehensive federal regulatory framework. And it clearly became the Executive Branch's job to administer those regulations, not the district court's.

Any interpretation of the Restoration Act that makes the Ysleta subject to Texas bingo regulations would be repugnant to IGRA. In fact, now that the NIGC has approved gaming ordinances for the Ysleta and the Alabama-Coushatta, both are required to conduct business in compliance with federal, not state regulations. Obviously, the Texas Tribes cannot answer to two conflicting regulatory authorities. In such circumstances, IGRA's explicit preemption of state law must control.

As DOI's letter correctly states, IGRA is both the more recent and the more specific statute, and therefore impliedly repeals any inconsistent provision of the Restoration Act. NIGC Letter, Attachment A, at 19-21. That is particularly true with respect to Class II gaming. As discussed above, IGRA declared a new, specific national policy, and established a comprehensive regulatory scheme, for Class II gaming. There is no recognition of different classes of gaming in the Restoration Act. Under these circumstances, IGRA must control.

*Ysleta I* noted the absence of any specific reference to the Restoration Act in IGRA in reaching its conclusion that IGRA did not supersede the earlier act. *See Ysleta I,* 36 F.3d at 1335. But the absence of such a specific reference was not necessary. The two statutes were simultaneously under review by the same Congressional committees, and even the same

Congressmen.[13] Congress made it abundantly clear, as discussed above, that IGRA was the first, comprehensive federal statute affecting Indian bingo. It defies logic to conclude that Congress intended its prior statute to accomplish an opposite result. Rather, Congress must have intended that IGRA's Class II regulations would fill the void created when the Restoration Act deprived Texas of regulatory authority over the tribal Class II gaming. [14]

## IV. TEXAS'S REGULATION OF BINGO HAS FAILED TO PROTECT INDIAN SOVEREIGNTY

Nearly thirty years have elapsed since the passage of the Restoration Act and IGRA. During that time, Texas has systematically suppressed Indian bingo, while permitting non-Indian bingo to flourish into a big business throughout the state. In fact, it is impossible for an Indian Tribe, a separate sovereign, to qualify as "fraternal organization" or a "501(c)(3)" charitable organization under the Texas scheme.

During 2014, the Charitable Bingo Operations Division of the Texas Lottery Commission licensed 1,025 organizations to conduct bingo. *See* 2014 Annual Report, Charitable Bingo Operations Division, Texas Lottery Commission, at 12.[15] Between 2004 and 2013, the gross receipts of Texas charitable bingo operations totaled more than $6.8 billion, while charitable distributions totaled only $312 million. *See* Report to the 84th Legislature by the Legislative

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[13] On May 27, 1987 Congressman Udall introduced H.R. 2507 which became the House vehicle for Indian gaming and ultimately produced IGRA. S. REP. NO. 100-446, at 4-5. H.R. 318, which became the Restoration Act, was sent to the Senate on April 22, 1987 and reported out of committee on June 26, 1987. On August 3, 1987, Congressman Udall, discussed the scope of the Restoration Act at the time of its passage in the House. *See* 133 Cong. Recd. H6972, 6975 (Aug. 3, 1987).

[14] As noted above, the Restoration Act is best viewed as a placeholder, a necessary part of the Restoration Act at a time before IGRA was passed, but made obsolete by the subsequent passage of IGRA. *See* NIGC Letter, Attachment A, at 19-21.

[15] *Available at* http://www.txbingo.org/export/sites/bingo/Documents/2014_BINGO_ANNUAL_REPORT.pdf

Committee to Review the Texas Lottery and Charitable Bingo in Texas, at 13 (2014).[16] In 2013, for example, out of $549 million in gross receipts from charitable bingo, 76% was paid in prizes. *Id*. The remaining funds were distributed as follows:

- $26.5 million (or 3.7% of the gross) was distributed to charitable organizations.
- $27.5 million (or 3.8% of the gross) was paid to state and local governments.
- $49 million (or 6.8% of the gross) was paid in bingo workers' salaries.
- $67 million (or 9.3% of the gross) was paid in fees and costs to bingo hall operators.

*Id*.

It is not an exaggeration to say that Texas "charitable" bingo is a business, operated primarily for the benefit of the bingo hall operators and their employees. In 2013, the net gaming revenue (gross receipts minus prizes) of "charitable" bingo operations was $170 million. Of that amount, 39.41% went to bingo hall operators, and another 28.82% went to salaries, for a total of 68.23%. In contrast, only 15.58% went to charity. Even state and local governments took a larger share. Not surprisingly, in 2013, nearly thirty-percent of 1,095 licensed bingo charities in Texas received $1,000 or less—in many cases nothing at all—in charitable distributions from bingo.[17]

The Bingo Amici are a good illustration of this. Their financial reports are available on-line.[18] While the Elks Lodge and Post 312 conduct relatively small scale bingo operations in their own facilities, the remaining Amici—along with many additional "charities"—operate out

[16] *Available at* http://www.senate.state.tx.us/75r/Senate/commit/c895/downloads/c895.InterimReport84th.pdf

[17] 189 of the 1,095 received $1,000 or less; 131 bingo charities had negative net proceeds from charitable bingo. *See*, note 15, *supra*.

[18] The Texas Lottery Commission maintains a Charitable Bingo website, on which there is a bingo service portal. *See* http://www.txbingo.org/export/sites/bingo/index.html.

of four massive bingo facilities in Harris and Galveston counties. The following chart shows their 2014 financial performance.[19] The large facilities file consolidated reports; the Bingo Amici operating in those facilities are referenced in footnotes.

| **Amici** | **Gross Receipts** | **Net Gaming (Gross - Prizes)** | **Total Expenses (Rent, salaries, etc.)** | **Charitable Distributions** | **Charitable Distributions % Gross Receipts** | **Charitable Distributions % Net Receipts** |
|---|---|---|---|---|---|---|
| American Legion Post 312 | $1,100,156 | $189,336 | $137,096 | $33,033 | 3.0% | 17.0% |
| Elks Lodge 126 | $31,769 | $10,190 | $4,949 | $7,900 | 24.9% | 78.0% |
| Humble Bingo[20] | $5,624,792 | $1,412,917 | $1,387,392 | $42,000 | 0.7% | 3.0% |
| Big Tex Unit[21] | $7,507,550 | $1,714,659 | $1,576,231 | $128,994 | 1.7% | 8.0% |
| Kings Bingo[22] | $3,685,882 | $1,154,925 | $949,606 | $113,194 | 3.1% | 9.8% |
| Boot Kikkers Bingo, Inc.[23] | $5,909,642 | $1,835,939 | $1,368,012 | $500,630 | 8.5% | 27.3% |
| | | | | | | |
| **TOTAL** | **$23,859,791** | **$6,317,966** | **$5,423,286** | **$825,751** | **3.4%** | **13.0%** |

The Bingo Amici, and the charities housed in the same bingo halls, grossed $23.85 million dollars, spent $5.42 million on expenses, and had only $825,000 left over for charity. The "expenses" of these facilities show where the money is going. For example, Humble Bingo, which houses five "charitable sponsors" in addition to Amicus Fine Arts Foundation,[24] offered bingo gaming on 625 occasions in 2014, attended by 82,706 persons, and grossed $5.62 million. It spent more than $490,000 in rent and "premises" costs, more than $363,000 in employee

[19] The chart in the text was derived by accessing the "Conductor and Unit Quarterly Reports Detail Line Items" reports, and running a report for each organization. *See supra* note 18.

[20] Fine Arts Foundation, Inc. (Humble Bingo)

[21] Living History Studies, Inc. (Big Tex Unit)

[22] Texas New Community Alliance (Kings Bingo); Habitat for Horses, Inc. (Kings Bingo); Young Americans Here on Operation, Inc. (Kings Bingo)

[23] Galveston County Detachment Marine Corps League (Boot Kikkers); Hitchcock Volunteer Fire Department, Inc. (Boot Kikkers); Knights of Columbus 10393 (Boot Kikkers); Mark Kilroy Foundation (Boot Kikkers).

[24] *See* http://www.humblebingo.com/.

expenses, and $83,000 in "security, legal, and accounting" costs. After all that, only $42,000 was distributed to charity

Meanwhile, Indian tribes have been completely shut out of this thriving industry. Instead of profiting from commercial operations, IGRA mandates devotion of Class II gaming revenues to essential governmental services. 25 U.S.C. § 2710(b)(2)(B). In accordance with this requirement, both of the Texas Tribes' ordinances direct bingo revenue to health care, housing, education, nutrition and other vital tribal functions. And while the creation of jobs by charitable bingo is a laudable accomplishment, Indian reservations—which have some of the worst unemployment rates in the state—need job opportunities as well.

While Indians are shut out, the "Improved Order of Red Men," a non-profit organization purportedly devoted to keeping the customs and legends of a vanishing race alive,[25] but which is not affiliated with any actual Native American Tribes, conducts "charitable" bingo at 37 locations in Texas.[26] During 2013 and 2014, these operations had gross receipts of $32 million, and made charitable distributions of $1.3 million, or roughly 4% of the gross, while making rent payments of $2.3 million.[27]

Thus, from the perspective of the Alabama-Coushatta, in Texas, you are allowed to conduct "charitable" bingo, devoting minimal proceeds to actual charity, if you pretend you're an Indian and misappropriate Indian culture for your benefit—while real Indians cannot conduct bingo operations to fund essential tribal services. As applied to the Ysleta and the Alabama-

[25] *See* http://www.redmen.org/redmen/info/

[26] *See* https://bsc.txbingo.org/bsp/faces/bspBingoHallLocator.jsf.

[27] *See* http://www.txbingo.org/export/sites/bingo/index.html. The numbers in the text were derived by accessing the "Conductor and Unit Quarterly Reports Detail Line Items" reports, and running a report for all organizations whose names include the words "Red Men" for the eight quarters of 2013 and 2014.

Coushatta, this present state of Texas's bingo "regulation" patently undermines the purposes of IGRA and represents to the Texas Tribes precisely the sort of exploitation and suppression of Indian culture which is anathema to federal policy.[28] The federal government should be regulating Indian bingo in Texas, not the State, and IGRA is the means by it should be doing so.

## V. CONCLUSION

For the foregoing reasons, the Alabama-Coushatta Tribe of Texas respectfully submits that the Court should either dismiss the case or grant Defendant alternative relief by modifying the injunction to permit Class II gaming subject to federal regulation.

DATED this 23rd day of December, 2015.

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

*/s/ Danny S. Ashby*

Danny S. Ashby
Texas Bar No. 01370960
danny.ashby@morganlewis.com
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, TX 75201
(214) 466-4000 (telephone)
(214) 466-4001 (facsimile)

and

Frederick R. Petti*
Kent Robinson*
Patricia Lane Briones*
PETTI AND BRIONES PLLC
5090 North 40th Street
Phoenix, AZ 85018
(602) 396-4890 (telephone)
(602) 954-5245 (facsimile)
* *Application for admission* pro hac vice *to be submitted*

**Attorneys for Amicus Curiae**
**Alabama-Coushatta Tribe of Texas**

[28] Whether this system violates due process and equal protection is a significant question but is beyond the scope of the issues presently before the Court.