IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

STATE OF TEXAS, *Plaintiff,* v. ALABAMA-COUSHATTA TRIBE OF TEXAS, *Defendant*.	§ § § § § § § § § § § § §	NO. 9:01-CV-00299

MOTION FOR RELIEF FROM JUDGMENT

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I. PRELIMINARY STATEMENT

The Alabama-Coushatta Tribe of Texas (the "Tribe") respectfully moves to dissolve the 2002 injunction barring the Tribe from virtually any gaming to permit the Tribe to operate a bingo facility that the federal agency overseeing Indian gaming has authorized the Tribe to open. That agency's authoritative interpretation in the Tribe's favor—which is entitled to controlling weight under Supreme Court precedent—both constitutes a change in law and eliminates the sole legal basis for the injunction. Continued application of the injunction in its broad form is no longer equitable or appropriate, and the permanent injunction entered against the Tribe should therefore be dissolved under Federal Rule of Civil Procedure 60(b)(5).

In 2015, the Tribe sought and secured the approval of the National Indian Gaming Commission (the "NIGC"), a federal agency, to open and operate an electronic bingo facility on the Tribe's trust lands. The NIGC was created by a 1988 congressional enactment intended to address the issue of unregulated Indian gaming—the Indian Gaming Regulatory Act ("IGRA"). *See* 25 U.S.C. § 2701 *et seq.* IGRA was "intended to expressly preempt the field in the governance of gaming activities on Indian lands." *See* S. Rep. No. 100-446, at 6 (1988). Among its many responsibilities in implementing and administering IGRA's regulatory scheme, the NIGC reviews and approves tribal gaming ordinances for all gaming conducted on Indian lands.

In granting its approval of the Tribe's bingo gaming ordinance in 2015, the NIGC considered and rejected the 1994 Fifth Circuit precedent on which the injunction against the Tribe depends. That decision, *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994), held that IGRA did not cover the Tribe—placing the Tribe outside the NIGC's jurisdiction. *See Alabama-Coushatta Tribes of Tex. v. Texas*, 66 F. App'x 525 (5th Cir. 2003). Resolving unclear provisions in IGRA to reach the opposite conclusion from *Ysleta*, the NIGC held that the Tribe

fell within IGRA's coverage—that is, within the NIGC's jurisdiction—and approved the Tribe's electronic bingo ordinance authorizing the opening of the Tribe's bingo facility.

Under Supreme Court precedent, the NIGC's reasonable interpretation of IGRA is entitled to judicial deference, supersedes otherwise controlling Fifth Circuit precedent, and justifies relief from the injunction in this case. This Court should therefore grant this Motion for Relief From Judgment and dissolve the permanent injunction to permit the Tribe to continue operating its bingo facility.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Restoration Act

Texas and the United States have recognized the Alabama-Coushatta Tribe of Texas as a sovereign, self-governing Indian tribe for nearly two centuries. During that time, the two governments have alternated in maintaining a trust relationship with the Tribe. The last of these trust relationship transfers, from Texas to the federal government, was the least orderly. In 1983, then-State Attorney General Jim Mattox unexpectedly called into doubt the validity of the trust relationship between the Tribe and the State. *See* Tex. Att'y Gen. Op. No. JM-17 (Mar. 22, 1983). This development prompted the need for congressional action to reassume the federal trust relationship with the Tribe. In response, in 1987 Congress restored the federal government's trust relationship with the Tribe.[1]

The Restoration Act reestablished the trust relationship between the Tribe and the federal government, restored various federal legal rights that the Tribe enjoyed decades earlier that had been abrogated, and recognized the Tribe's Constitution and Council. *See* 25 U.S.C. § 733–734.

[1] In addition to the Alabama-Coushatta Tribe, the Restoration Act also reestablished the trust relationship between the United States and the Ysleta del Sur Pueblo (the "Ysleta") located in El Paso, Texas. *See* Pub. L. No. 100-89, 101 Stat. 666.

Regarding the issue of gaming on the Tribe's trust lands, the Restoration Act provided that "[a]ll gaming activities prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe." *Id.* § 737(a). At the same time, it prohibited Texas from asserting either criminal or civil regulatory control over legal gaming occurring on the Tribe's lands. *Id.* § 737(b). The Restoration Act also vested exclusive jurisdiction over violations of the State's gaming laws on the Tribe's land or by its members in federal courts, while limiting the State to pursuing an injunction for violations of its gaming laws. *Id.* § 737(c).

B. The Indian Gaming Regulatory Act

In February 1987, six months before Congress enacted the Restoration Act, the Supreme Court decided *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Interpreting Public Law 83-280, 67 Stat. 588 (1953) ("Public Law 280"), a federal law granting limited criminal law enforcement authority to states on certain Indian lands, the Supreme Court held that—despite nominal criminal enforcement provisions—California state law "regulated" gaming, rather than prohibiting it. *Cabazon Band*, 480 U.S. at 209. Therefore, the Court ruled that California could not rely on Public Law 280 to prohibit tribes from offering gaming activities on tribal lands. *Id.* at 211.

The *Cabazon Band* decision left Indian gaming broadly unregulated on tribal lands in states that regulated rather than prohibited gaming. States grew concerned that unregulated Indian gaming could result in crime or other social ills. In response to this concern, Congress enacted IGRA to govern Indian gaming on tribal lands.

IGRA "establish[ed] Federal standards for gaming on Indian lands" and created the NIGC to administer the act. 25 U.S.C. §§ 2702(3), 2704(a). IGRA defined three separate classifications of gaming that federally recognized tribes may offer on trust lands, denominated Class I, Class II, and Class III gaming. *See* 25 U.S.C. § 2703(4).

Class I gaming is defined as social gaming and includes traditional Indian games played as part of tribal ceremonies and celebrations. *See* U.S.C. § 2703(6). Tribes have exclusive authority to regulate Class I gaming. *See* 25 U.S.C. § 2710(a).

Class II gaming is defined as the game commonly known as bingo. *See* 25 U.S.C. § 2703(7). A tribe may offer bingo so long as the tribe is located in a state that permits bingo for any purpose, by any person, organization or entity. *See* 25 U.S.C. §§ 2710(b). Tribes have the authority to regulate Class II gaming under the jurisdiction of the NIGC, which must approve a tribe's self-regulatory ordinance. *See* 25 U.S.C. § 2710(b).

Class III gaming includes all forms of gaming that are not included under Class I or Class II. *See* 25 U.S.C. § 2703(8). A tribe may only offer Class III gaming if it is located in a state where such games are permitted by the state for any purpose, by any person, organization or entity, and the tribe and state enter into a tribal-state gaming compact that governs how the games are to be played and regulated. *See* 25 U.S.C. § 2710(d).

C. *Ysleta del Sur Pueblo v. Texas* And The 2002 Injunction

In 1993, the Ysleta tried to negotiate a compact with Texas to permit Class III gaming under IGRA. The State refused, and the Ysleta sued to compel the State to negotiate a compact. The district court agreed with the Ysleta and directed Texas to negotiate. On appeal, Texas advanced numerous theories as to why IGRA did not allow the Tribe to sue the State for failure to negotiate a gaming compact.

As relevant here, the Fifth Circuit viewed IGRA and the Restoration Act as in irreconcilable conflict, and concluded that the Restoration Act—and *not* IGRA—governed the Ysleta's ability to organize and conduct gaming on its lands. *Ysleta del Sur Pueblo*, 36 F.3d at 1334–35. The Fifth Circuit construed the Restoration Act's remedial provision, which authorized Texas to sue to enjoin violations of Texas gaming laws by Ysleta, as forcing the court

to choose between the two laws. *Id*. at 1335. Invoking the canons against implied repeal (as IGRA followed the Restoration Act), and of a specific statute controlling a general one (reasoning that the Restoration Act applied only to two tribes, and IGRA applied broadly), the court held that IGRA did not apply to the Ysleta. *Id*. at 1336. In reaching this conclusion, the court also rejected the Ysleta's argument that the Restoration Act provision prohibiting "[a]ll gaming activities which are prohibited by the laws of the State of Texas" must be read to extend only to gaming activities wholly prohibited, as opposed to merely regulated, in light of the Supreme Court's decision in *Cabazon Band*. *Id.* at 1333–34.

Although the Alabama-Coushatta Tribe was not party to the *Ysleta* litigation, as the only other tribe covered by the Restoration Act, it quickly felt *Ysleta*'s effects. In 2002, the State sought and received a permanent injunction based on *Ysleta* that ordered the Tribe to cease "gaming and gambling activities on the Tribe's Reservation which violate State law." The Fifth Circuit affirmed, observing that "[h]owever sympathetic [the court] may be to the Tribe's argument" that *Ysleta* was wrong, "[the court] may not reconsider *Ysleta*, even if [it] believed that the case was wrongly decided." *Alabama-Coushatta Tribe of Tex.*, 66 F. App'x at 525.

D. Subsequent Administrative Guidance

In 2015, the Tribe sought and secured the NIGC's formal administrative determination of whether, contrary to the Fifth Circuit's *Ysleta* decision, the Tribe fell within IGRA's scope. As required by IGRA, the Tribe's Council passed an ordinance authorizing Class II bingo gaming on the Tribe's lands, and the Tribe submitted its ordinance to the NIGC for approval.

The NIGC determined that IGRA applied to the Tribe—bringing the Tribe within the NIGC's jurisdiction—and that the Restoration Act did not bar the Tribe from conducting gaming

on its lands pursuant to IGRA.[2] *See* Nat'l Indian Gaming Comm'n, Approval of Alabama-Coushatta Tribe of Texas Class II Gaming Ordinance and Resolution No. 2015-038, at 2–3 (Oct. 8, 2015).[3] The NIGC first examined the scope of IGRA to determine whether it has jurisdiction over the Tribe's lands, and, reviewing other circumstances where Congress explicitly ousted the NIGC's jurisdiction, concluded that it retained jurisdiction over the Tribe. *Id.* at 2. In reaching this conclusion, the NIGC adopted a determination by the Department of the Interior—charged with administering the Restoration Act—that IGRA applied to the Tribe. *Id.* From there the NIGC determined that the Tribe was an "Indian tribe" proposing to conduct gaming on "Indian land" within the meaning of IGRA, and approved the Tribe's gaming ordinance. *Id.* at 2–3.

With the NIGC's approval, the Tribe began development of Naskila Entertainment ("Naskila") to establish its Class II gaming facility on its trust lands. The Tribe and State negotiated regarding Naskila's opening, and the State agreed to permit the Tribe to operate Naskila pending this Court's determination of the impact of the NIGC's final agency decision on the injunction and, if necessary, whether the gaming at Naskila qualifies as Class II gaming under IGRA.

III. ARGUMENT

A. The NIGC Is Entitled To *Chevron* Deference Over The Scope Of Its Regulatory Jurisdiction

Chevron deference reflects the judgment that gaps or inconsistencies in statutes reflect delegations of legislative power to administering agencies, rather than courts. *See Chevron,*

[2] The NIGC resolved materially identical inquiries from the Ysleta del Sur Pueblo and the Alabama-Coushatta Tribes in the same way, through two letters. The determination regarding the Alabama-Coushatta ordinance largely adopts and incorporates the NIGC's reasoning in approving the Ysleta ordinance; for convenience's sake, we do the same.

[3] The NIGC's ruling is attached as **Exhibit A**.

U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). The NIGC is such an agency, and whether IGRA applies to the Tribe in the light of the Restoration Act—in other words, whether the NIGC has jurisdiction over the Tribe—is such a gap.

The NIGC is the agency entitled to administer IGRA; indeed, Congress created it for that purpose—to act as an "independent Federal regulatory authority for gaming on Indian lands." 25 U.S.C. § 2702(3). To that end, Congress empowered the NIGC and its Chairman with broad regulatory powers over Indian gaming, including the power to promulgate regulations under the Act, *id*. § 2706(b)(10), to close Indian gaming facilities for substantial violations of IGRA, *id*. § 2713(b)(1), to impose substantial civil fines for violations of either the Act, regulations prescribed pursuant to the Act, or tribal regulations, *id*. § 2713(a)(1), and, as relevant here, to approve tribal ordinances as required to permit Class II gaming under the Act. *Id*. §§ 2705(a)(3), 2710(b)(1)(A)–(B), 2710(d)(1)(A). Numerous courts have determined that the NIGC is due *Chevron* deference in statutory gaps within IGRA, as should this Court. *See, e.g.*, *Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1037 (10th Cir. 2003); *Diamond Game Enters., Inc. v. Reno*, 230 F.3d 365, 368–69 (D.C. Cir. 2000) (noting that Congress created the NIGC for its expertise on Indian gaming affairs and lamenting that the NIGC had not taken a position to which the Court might defer under *Chevron*); *Shakopee Mdewakanton Sioux Cmty. v. Hope*, 16 F.3d 261, 263–64 (8th Cir. 1994) (applying *Chevron* to NIGC's determination of whether a particular game fell within Class II or Class III gaming in Section 2710). These cases all demonstrate that Congress has delegated to the NIGC the authority to interpret contradictory, indefinite, or ambiguous provisions in IGRA in the service of its mission.

Such a gap exists here: whether the Tribe falls within IGRA's scope, and thus the NIGC's jurisdiction. The gap arises from the broad provisions of IGRA: the procedures for approving Indian gaming apply, with one exception (relevant here), to all "Indian lands," defined as all reservations and all Indian lands held in trust, and all "Indian tribes," which include all recognized tribes retaining the right of self-government. 25 U.S.C. §§ 2703(4), (5). The Chairman of the NIGC is authorized to approve tribal gaming ordinances—and thus permit Class II gaming on Indian lands by Indian tribes—if, as relevant here, the gaming is located within a "State that permits such gaming for any purpose by any person, organization or entity," (which Texas does) and "such gaming is not otherwise specifically prohibited on Indian lands by federal law." *Id*. at § 2710(b)(1)(A). Because IGRA does not define what constitutes a "specific prohibi[tion] on Indian lands by Federal law," it is at least debatable whether § 207(a) of the Restoration Act imposes such a prohibition. *See* 25 U.S.C. § 737(a). If it does, the NIGC's jurisdiction is ousted under IGRA; if not, the NIGC may monitor and regulate the Tribe's gaming at Naskila.

The NIGC's decision reflects a judgment regarding the scope of its own authority—its "regulatory jurisdiction." As the Supreme Court has made clear, this type of decision is unequivocally entitled to *Chevron* deference. Just this question arose in *City of Arlington v. F.C.C.*, 133 S. Ct. 1863 (2013), where the Federal Communications Commission interpreted two provisions of the Telecommunications Act of 1996. *Id*. at 1866–67. The provisions included a savings clause, which broadly reserved siting decisions over wireless towers to States and localities, and a provision that obligated localities to act on siting applications within a reasonable period of time. *Id*. The FCC determined in a ruling that a reasonable period of time was no longer than 90 or 150 days, depending on the type of application. The City of Arlington

argued that the Court owed the FCC no deference on whether its rule improperly expanded one of the narrow exceptions to localities' reserved powers, because this question involved the FCC's authority to regulate the localities at all—its jurisdiction. *Id*. at 1868. The Court briskly rejected the notion that a threshold question about an agency's power to rule differed from any other question under *Chevron*; indeed, the Court held, "the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not." *Id.* at 1871. Where the text does not foreclose an agency's interpretation, that space reflects a delegation by Congress—here, to the Commission.

These delegation-by-Congress principles of *Chevron* fit the NIGC not merely in theory, but in practice. The NIGC enjoys unique expertise in administering Indian gaming laws. Its members are appointed by the Department of the Interior, the agency typically charged with administering many other laws regarding Indian tribes and their welfare—giving the NIGC's members a general expertise in how IGRA interacts with other laws concerning Indian affairs. To the extent that the Court left any uncertainty regarding *Chevron*'s scope—and that seems doubtful—whether IGRA applies involves important, complex administrative questions over which the NIGC's expertise is critical. *See generally Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (discussing various bases for evaluating the propriety of *Chevron* deference).[4] *Chevron*

[4] Whatever force *Barnhart* and its kin once had in developing the scope of *Chevron*, the Court's recent guidance leaves little doubt that *Chevron* always applies when an agency entitled to administer a statute interprets a textual gap left in that statute. *See generally Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (Kagan, J.) (plurality) ("Under *Chevron*, the statute's plain meaning controls . . . . But if the law does not speak clearly to the question at issue, a court must defer . . . rather than substitute its own reading."); *E.P.A. v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1603 (2014) ("We routinely accord dispositive effect to an agency's reasonable interpretation of ambiguous statutory language."); *City of Arlington*, 133 S. Ct. at 1874 ("[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."). This rule is ultimately sensible: a rule of

deference therefore requires this Court to defer to the NIGC's interpretation—provided only that the interpretation is reasonable. It is.

B. The NIGC's Interpretation Of IGRA Is Reasonable, And Therefore Entitled To Deference Under *Chevron*

The NIGC determined that, Restoration Act notwithstanding, the Tribe fell within IGRA's scope. IGRA's text and history confirm that this is not only a reasonable interpretation, but the best understanding of how these two laws interact. Subsequent enactments and background principles informing law touching on Indian concerns further confirm the NIGC's interpretation.

1. The Text and Structure of the Act Confirm The NIGC's Interpretation

IGRA's text—its general rule—plainly includes the Tribe. IGRA provides that "An Indian tribe may engage in, or license and regulate, Class II gaming on Indian lands within such tribe's jurisdiction, if" four conditions are met. 25 U.S.C. § 2710(b)(1). First, the State in which the gaming is to occur must allow that gaming for *some* individual in the State; in other words, a State is entitled to enforce an absolute ban, but not merely a selective or conditional one. 25 U.S.C. § 2710(b)(1)(A). The gaming that the Tribe proposes to engage in must not be "otherwise specifically prohibited on Indian lands by Federal law." *Id*. The Tribe must adopt an ordinance allowing for such gaming, *id*. § 2710(b)(1)(B), and, finally, the Chairman must approve that ordinance pursuant to certain statutory criteria. *Id*.; *see also id*. § 2710(2)–(4). Virtually none of these criteria or conditions is subject to serious question: the Alabama-Coushatta is an "Indian tribe" under the Act; Naskila is on "Indian lands"; Texas allows bingo within the State; the Tribe has passed an ordinance permitting bingo; the NIGC has approved

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deference if and only if a reviewing court first believes an agency is worthy of deference is no rule of deference at all.

that ordinance. *See* NIGC Ruling at 1–3; Alabama-Coushatta Tribal Council Resolution No. 2015-038 (July 10, 2015).[5] The only plausible textual basis for excluding the Tribe from IGRA's clear terms lay in the second of its four conditions: that the Restoration Act "otherwise specifically prohibit[s]" the gaming "on Indian lands by Federal law."

But this interpretation fails on close scrutiny. As relevant here, the Restoration Act provides 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." 25 U.S.C. § 737(a). This is not a provision where "such gaming [bingo] is . . . otherwise specifically prohibited on Indian lands by Federal law" because it is neither specific, a specific prohibition, a "prohibit[ion] on Indian lands," nor under—in the most obvious sense—Federal law. *First*, it is not specific: it does not refer to bingo or Class II gaming in any granular way, but instead refers generally to "all gaming activities." *Second*, it is not a specific prohibition: a reader cannot discern whether *anything* is prohibited without resort to a separate body of law. *Third*, it is not a "prohibit[ion] on Indian lands." Read naturally, the phrase "prohibit[ion] on Indian lands" implies a prohibition on *all* Indian lands, rather than on *any* Indian lands.[6] *Finally*, nor is it plainly under "Federal law," with any prohibition in the Restoration Act expressly dependent upon Texas *state* law. Put another way, the Restoration Act is a contingent, general regulation of all gaming on some Indian lands under state law referenced in a Federal law. That is not a "specific[] prohibit[ion]" of "such gaming" "on Indian lands by Federal law"—and so IGRA applies to the Tribe.

[5] The full text of the Class II gaming ordinance is appended to the NIGC's ruling, reflected at pages 25 through 53 of Exhibit A.

[6] This reading comports best with ordinary English usage. The absence of a modifier before "Indian lands" in the phrase "prohibited on Indian lands" implies the *entire* set of "Indian lands," not merely one element of the set (*e.g.* just the Tribe's lands). An ordinary speaker would not describe a rule prohibiting Great Danes from entering Yellowstone as a rule "prohibiting pets in national parks."

The NIGC's interpretation also harmonizes both IGRA and the Restoration Act. This is a strong suggestion that its interpretation is correct—or at least reasonable. *See generally Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177-78 (2013) (discussing canon against superfluity and observing the canon "is strongest when an interpretation would render superfluous another part of the same statutory scheme"). Under the NIGC's interpretation, the Tribe may conduct Class II gaming at Naskila so long as it complies with IGRA's requirements, and its permission under that Act is not revoked. *See generally N. Cnty. Comm. Alliance, Inc. v. Salazar*, 573 F.3d 738, 748 (9th Cir. 2009) (noting that gaming undertaken off of Indian lands—and thus outside of IGRA—is subject to other, general regulation). If it fails to fulfill IGRA's requirements, then the Restoration Act's application of state law again controls, and the State may seek an injunction under the Restoration Act for a violation of those provisions. 25 U.S.C. § 737(c). Similarly, if the Tribe commences Class III gaming without fulfilling IGRA's requirements, the State may seek an injunction under the Restoration Act to the extent that gaming violates State law.

But the opposite interpretation simply dismisses IGRA as inapplicable to the Tribe. It wreaks avoidable textual violence on multiple provisions of IGRA, and it includes a restriction on two particular Indian tribes found nowhere in IGRA's text. An interpretation that avoids these problems—and that harmonizes IGRA and Restoration Act—is surely at least reasonable, and thus is due this Court's deference.

2. Legislative History and Subsequent Enactments Confirm The NIGC's Interpretation

The NIGC's interpretation—that the Restoration Act is not a specific prohibition in the meaning of IGRA—comports not only with IGRA's text, but also with its legislative history and with subsequent enactments.

IGRA's legislative history explains the effect of the "otherwise prohibited" condition in terms that confirm the analysis above. As the Senate Report explains, it "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 statute . . . will preclude the use of otherwise legal devices . . . [for] gaming on or off Indian lands." S. Rep. No. 100-446 at 12 (citations omitted). Section 1175 is a paradigm example of a law that is federal, specific, a specific prohibition, and a prohibition on Indian lands: the statute makes it "unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device [a defined term] in the District of Columbia, in any possession of the United States, *within Indian country* . . . or within the special maritime and territorial jurisdiction of the United States . . . ." 15 U.S.C. § 1175(a) (emphasis added). That language stands in sharp contrast to the indirect, general, and ultimately non-federal prohibition in the Restoration Act.

It was also "the intention of the Committee that nothing in the provision will supersede any *specific* restriction . . . which may be encompassed in another Federal statute, including the Rhode Island Claims Settlement Act . . . and the Maine Indian Claim Settlement Act." S. Rep. No. 100-446 at 12 (emphasis added). But here, too, the NIGC's interpretation proves correct. The key provision in the Rhode Island Indian Claims Settlement Act gave Rhode Island plenary regulatory jurisdiction over lands settled by the Narragansett Tribe: "Except as otherwise provided in this Act . . . the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." Pub. L. No. 95-395, § 9, 92 Stat. 813, 817 (1978). A similar provision in the Maine Indian Claim Settlement Act, applied to all Indian tribes in Maine but two, subjects those tribes "to the civil and criminal jurisdiction of the State, the laws of the

State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein." Pub. L. No. 96-420, § 6(a), 94 Stat. 1785, 1793 (1980). But the Restoration Act contains a flatly opposite provision, entitled "No State regulatory jurisdiction": "Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." 25 U.S.C. § 737(b). To the extent that Congress understood IGRA as not returning gaming authority to tribes subjected to the general criminal jurisdiction of the States in which they resided, then the NIGC's interpretation captures this intent: the Restoration Act did not subject the Alabama-Coushatta to Texas's general regulatory authority.

The legislative history therefore clearly denotes the sort of law that would suffice to displace IGRA: federal laws that in unequivocal terms prohibit either a specific form of gaming on all Indian lands, or that specifically granted the states regulatory jurisdiction over Indian lands.[7]

Further, IGRA's legislative history clearly demonstrates that Congress anticipated that Act would apply in Texas. As the Senate Report stated: "There are five States (Arkansas, Hawaii, Indiana, Mississippi, and Utah) that criminally prohibit any type of gaming, including bingo. [The Act] 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

[7] The First Circuit ultimately held that the language in the Rhode Island Indian Claims Settlement Act was too weak—legislative history notwithstanding—to avoid application of IGRA, and that IGRA therefore *did* apply to the Narragansett tribe. *See State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 705 (1st Cir. 1994). By contrast, the First Circuit declined to apply IGRA in Maine, but only because the Maine statute expressly excluded application of "any federal law enacted after October 10, 1980 . . . 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 . . . unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine." *See Passamaquoddy Tribe v. State of Maine*, 75 F.3d 784, 787, 791 (1st Cir. 1996) (quoting 25 U.S.C. § 1735(b)).

regulatory scheme set forth in the bill." S. Rep. No. 100-446 at 11-12. But as of the passage of IGRA, the Restoration Act covered two of the only three *possible* tribes in Texas to which IGRA could be applicable; thus the anticipation in the legislative history that IGRA would apply in Texas as one of "the other 45 States" strongly indicates that Congress contemplated its application to the Alabama-Coushatta and Ysleta del Sur Pueblo.

Subsequent enactments demonstrate that Congress spoke as one might expect when it intended to pass an "otherwise specific prohibition" within the meaning of IGRA. For example, the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993 leaves the matter in no uncertain terms. It provides, under a heading entitled "INAPPLICABILITY OF INDIAN GAMING REGULATORY ACT," that the "Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) shall not apply to the [Catawba] Tribe." Pub. L. No. 103-116, § 14, 107 Stat. 1118, 1136 (1993). Likewise, the Native American Technical Corrections Act of 2004 declares that a certain parcel of land was held in trust for the Barona Band of Mission Indians of California "shall neither be considered to have been taken into trust for gaming, nor be used for gaming (as that term is used in the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.))." Pub. L. No. 108-204, § 121(c), 118 Stat. 542, 545 (2004). And an extension of leases for the Mashantucket Pequot (Western) Tribe expressly states that "No entity may conduct any gaming activity (within the meaning of section 4 of the Indian Gaming Regulatory Act (25 U.S.C. 2703) pursuant to a claim of inherent authority or any Federal law (including the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) . . . on any land that is leased . . . in accordance with this section." 25 U.S.C. § 1757a(c). There has been no such enactment as to the Tribe.

This degree of clarity is especially appropriate in the context of legislation related to Indian governance. "The baseline position," as the Supreme Court "ha[s] often held," is that

tribes are entitled to self-government, because "[a]lthough Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031–32 (2014). And so Congress, from time to time, passes a specific prohibition, typically naming IGRA. The Restoration Act is not such a prohibition. Congress did not expect that its patchwork system of references to state law—preceding IGRA's comprehensive solution—would inadvertently displace Texas Tribes' rights under IGRA. Congress did not, as it never does, intend to hide an issue of elephantine importance in the mousehole of a cross-reference to state law. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

IGRA's text, history, and subsequent legislative enactments not only support the NIGC's interpretation as a permissible one—but as the correct one. Yet this Court need not go so far: if the NIGC's position is simply reasonable, then the *Chevron* analysis is complete, and this Court should defer to the NIGC's interpretation.

C. Supreme Court Precedent Requires This Court To Defer To The NIGC, Notwithstanding The Fifth Circuit's Decision In *Ysleta*

Prior precedent is also no obstacle to this Court deferring to the NIGC's eminently reasonable interpretation of IGRA. Indeed, the Supreme Court and Fifth Circuit have held that courts generally must follow agencies' reasonable interpretations—and not judicial precedent—when the two conflict.

Chevron deference reflects a delegation of interpretative authority because it reflects a delegation of *policymaking* authority: when Congress passes a law, it delegates discretion to agencies by enacting terms in broad or vague language, and constrains agencies by using narrow

or specific language. *City of Arlington*, 133 S. Ct. at 1868. The necessary corollary of the power to make policy is the power to change policy—to "consider varying interpretations and the wisdom of its policy on a continuing basis," including by re-interpreting (or newly interpreting) provisions in the statute the agency administers. *Nat'l Cable & Telecommc'ns. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984)). And therefore "a court's prior judicial construction of a statute trumps an agency construction *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute." *Brand X*, 545 U.S. at 982 (emphasis added). The Fifth Circuit acknowledges the same: its interpretations control over a *Chevron*-entitled agency only where they follow from the statute's unambiguous text. *E.g.*, *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 397–98 (5th Cir. 2014).

Ysleta is not a decision about IGRA's text—much less one about its *unambiguous* text. The *Ysleta* court described the history surrounding *Cabazon Band*, how it led to IGRA, and IGRA itself only in general outlines. *See Ysleta*, 36 F.3d at 1329–31. The court rejected the argument that the Restoration Act incorporated *Cabazon Band* by diverging from the statutory text and instead analyzing the Restoration Act's legislative history in substantial detail. *Id*. at 1333 ("The Tribe's argument is appealing only because § 107 uses the word 'prohibit.' But our analysis of the legislative history of both the Restoration Act and [IGRA] leads us to a conclusion contrary to that sought by the Tribe."). And the court described the Restoration Act as "fundamentally at odds with the concepts of" IGRA. *Id*. at 1335. But the court mentioned the controlling provision of IGRA, § 2710(b)(1)(A), in a footnote, *Ysleta*, 36 F.3d at 1335 n.21, as part of an observation that Congress had not expressed a "clear intention" to repeal the Restoration Act. *Id*. at 1334–35.

Though surely binding precedent and entitled to *stare decisis* in any other context, a decision by the Fifth Circuit predicated on legislative history and the statute's "concepts" (per *Ysleta*) is not a "holding that its construction follows from the unambiguous" text of IGRA (per *Brand X*). Indeed, under "traditional canons of interpretation," legislative history is "irrelevant to an unambiguous statute." *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 199 (1977); *see also Direct Auto Imports Ass'n v. Townsley*, 804 F.2d 1408, 1411 (5th Cir. 1986) (observing that "no resort is made" to canons of construction and legislative history "where the statutory language is clear and unambiguous"). *Brand X* therefore warrants this Court following the NIGC's determination—not *Ysleta*.

D. The NIGC's Interpretation Is A Significant Change In Law That Precludes The Injunction's Prospective Application

And this Court can do so. This Court's 2002 injunction continues in force against the Tribe; this Court therefore has the power under Rule 60(b)(5) to relieve the Tribe of the injunction's prospective effects. Fed. R. Civ. P. 60(b)(5). The Court should exercise that power here: the change in law vis-à-vis the Tribe could not be more absolute.

A significant change in law permits a court to grant relief from an injunction. "If the relief sought is dissolution . . . of an injunction, the district court may grant a Rule 60(b)(5) motion when the party seeking relief . . . can show a significant change in . . . law." *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 741 (5th Cir. 2016) (internal quotation marks omitted). An agency interpretation is such a change. *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147, 1153 (8th Cir. 2013).

And a controlling change in law requires that relief. In *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), the Supreme Court directed a bridge's owner to remove it as an unlawful obstruction of the Ohio River, and prohibited the owner from

rebuilding it. *Id*. at 429. But Congress intervened, explicitly declaring the bridge lawful—and the Court declared itself obligated to dissolve the injunction:

> But that part of the decree . . . [that] is executory . . . enjoins the defendants against any reconstruction or continuance. . . . If, in the meantime, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain that the decree of the court cannot be enforced. There is no longer any interference with the enjoyment of the public right inconsistent with law . . . . Suppose the decree had been executed, and after that the passage of the law in question, can it be doubted that defendants would have had a right to reconstruct it? And is it not equally clear that the right to maintain it, if not abated, existed from the moment of the enactment?

Id. at 431–32.

Just so here. Put in modern language, "[i]t is well established that an injunction must be set aside when the legal basis for it has ceased to exist." *ePlus, Inc. v. Lawson Software, Inc.*, 789 F.3d 1349, 1354 (Fed. Cir. 2015) (citing *Wheeling & Belmont Bridge*). An agency, and not Congress, has changed the law; the Tribe maintains an entertainment center, not a bridge. All else is the same. This Court should end the prospective application of this injunction just as the Supreme Court did in *Wheeling & Belmont Bridge*. The injunction should be dissolved to permit the Tribe to conduct Class II gaming with the NIGC's oversight.

IV. CONCLUSION

The 2002 injunction against the Tribe should be dissolved to permit the Tribe to continue conducting Class II gaming—bingo—in light of the NIGC's ruling. The NIGC is the federal agency charged with administering IGRA, and its decisions interpreting gaps in that statute are entitled to conclusive deference by the courts, provided only that they are reasonable. The NIGC's reading of the statute as bringing the Alabama-Coushatta within the agency's jurisdiction is reasonable: in addition to its logical appeal, it is the only interpretation of IGRA's

interplay with the Restoration Act that allows both statutes to have continuing effect. Therefore the NIGC's ruling approving the Tribe's Class II gaming ordinance effectively overrules the Fifth Circuit's decision in *Ysleta* and eliminates the sole legal basis for the injunction.

Dated: August 19, 2016

Respectfully submitted,

By: */s/ Danny S. Ashby*

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CERTIFICATE OF SERVICE

I, Danny S. Ashby, hereby certify that on August 19, 2016, I caused a true and correct copy of the foregoing *Motion for Relief from Judgment* to be served on all counsel of record by email through the Court's CM/ECF system.

Dated: August 19, 2016

By: */s/ Danny S. Ashby*
Danny S. Ashby

CERTIFICATE OF CONFERENCE

I hereby certify that Frederick R. Petti and I, as counsel for the Alabama-Coushatta Tribe of Texas, have conferred with Assistant Attorney General Bill Deane, counsel for the State of Texas, on multiple occasions between June 2016 and August 2016 regarding the subject matter of this motion, including at in-person meetings and by telephone. Despite those efforts, counsel could not reach agreement on the relief sought, and Mr. Deane advised me that the State of Texas is opposed to the relief sought in this motion.

Dated: August 19, 2016

By: */s/ Danny S. Ashby*
Danny S. Ashby