Case No. 18-40116

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS,

Plaintiff – Appellee,

vs.

ALABAMA-COUSHATTA TRIBE OF TEXAS,

Defendant – Appellant.

APPELLANT'S BRIEF

Appeal from the United States District Court
for the Eastern District of Texas
U.S.D.C. No. 9:01-CV-299

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. The Alabama-Coushatta Tribe of Texas was Defendant in the district court and is Appellant in this Court.
2. The Alabama-Coushatta Tribe of Texas is a federally recognized Indian tribe with its reservation in the vicinity of Livingston, Texas.
3. Danny S. Ashby, David I. Monteiro, Justin R. Chapa, and Megan R. Whisler, of the law firm Morgan, Lewis & Bockius LLP, serve as counsel to Defendant in the district court and are counsel to Appellant in this Court.
4. Frederick R. Petti, of the law firm Petti and Briones PLLC, serves as counsel to Defendant in the district court and is counsel to Appellant in this Court.
5. Patricia L. Briones, of the law firm Petti and Briones PLLC, serves as counsel to Appellant in this Court.
6. The State of Texas was Plaintiff in the district court and is Appellee in this Court.
7. Eric A. White and Anne Marie Mackin, of the Texas Attorney General's Office, serve as counsel to Appellee in this Court.
8. William T. Deane, Anne Marie Mackin, Michael R. Abrams, and Benjamin Lyles, all of the Texas Attorney General's Office, serve as counsel to Plaintiff in the district court.

/s/ Danny S. Ashby
Danny S. Ashby
Counsel for Appellant

STATEMENT REGARDING ORAL ARGUMENT

Appellant the Alabama-Coushatta Tribe of Texas (the "Tribe") respectfully requests oral argument. This appeal implicates important administrative- and Indian-law issues against the backdrop of a decades-old dispute between the Tribe, the State of Texas (the "State"), and the federal government as to the Tribe's ability to offer limited forms of gaming on its sovereign Indian lands. Oral argument will allow the Parties to further explain those issues and background to the Court and provide the Court with an opportunity to ask the Parties any questions it may have about the lengthy and procedurally complex proceedings that led to this appeal.

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JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of Texas had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1362. The district court entered final judgment against the Tribe and issued a permanent injunction on June 25, 2002. ROA.1036-1057, 1060; *see also Alabama-Coushatta Tribe of Tex. v. Texas*, 66 F. App'x 525 (5th Cir. 2003).

The State reopened this case on June 27, 2016. ROA.1282. With the Parties' consent, the district court referred it to Magistrate Judge Keith F. Giblin. ROA.1563. The Parties jointly moved for, and the court granted, realignment such that the State became Plaintiff and the Tribe Defendant. ROA.1301, 1346. The Parties also jointly requested entry of a scheduling order under which each would file, respectively, a motion for contempt and to enforce the injunction and a motion for relief from judgment. ROA.1308. The district court denied the Tribe's motion for relief from judgment, which sought to dissolve or modify the 2002 injunction, on February 6, 2018. ROA.2514-2539.

The Tribe filed a notice of appeal the same day. ROA.2540-2541. This Court has jurisdiction over the Tribe's appeal under 28 U.S.C. § 1292(a)(1), which allows for an immediate, as-of-right appeal of interlocutory orders "refusing to dissolve or modify injunctions." With its notice of appeal, the Tribe moved to stay the district

court proceedings pending appeal. ROA.2542-2581. The District Court granted the Tribe's motion and stayed the case on February 26, 2018. ROA.2657-2661.

STATEMENT OF THE ISSUES

This appeal is fundamentally an administrative-law case. Despite its long history and complex background, the core question presented can be resolved by the application of established Supreme Court precedent concerning judicial deference to an administrative agency's interpretation of a statute it administers under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). The Parties' dispute turns on whether the predicates for deference are present. They are.

In 2015, the Tribe sought and received permission from the National Indian Gaming Commission ("NIGC"), the federal agency that administers the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701–2721, to conduct bingo gaming on its reservation under IGRA. IGRA mandates that the NIGC's Chairman approve an Indian tribe's "Class II" gaming ordinance if certain conditions are met. *Id.* §§ 2705(a)(3); 2710(b)(1)–(2). Among those conditions is the requirement that the proposed gaming be "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)." *Id.* § 2710(b)(1)(A).

In approving the Tribe's Class II gaming ordinance, the NIGC's Chairman concluded that the gaming provisions in the law governing the restoral of the Tribe's

federal recognition (the "Restoration Act")[1] did not constitute a "specific[] prohibit[ion]" within the meaning of § 2710(b)(1)(A); that the NIGC had jurisdiction over the Tribe; and that IGRA applied to the Tribe's proposed bingo operations. ROA.1469-1471. IGRA expressly makes the approval of a Class II tribal ordinance final agency action. 25 U.S.C. § 2714.

The questions presented are:

1. Did the district court abuse its discretion in declining to give controlling weight to the NIGC's conclusion that IGRA applies to the Tribe's gaming after the Supreme Court's decisions in *National Cable and Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), and *City of Arlington v. FCC*, 569 U.S. 290 (2013)?

2. Alternatively, and for the purposes of en banc review, should this Court overrule its decision in *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994) (*Ysleta I*)?

[1] Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, §§ 201–07, 101 Stat. 666 (Aug. 18, 1987). As reflected in the record, the Restoration Act provisions for the Tribe were formerly found at 25 U.S.C. §§ 731, *et seq.* Because the United States Code was updated to omit the Restoration Act while this case was pending in the district court, the Tribe cites to the Public Law version of the Restoration Act here.

PRELIMINARY STATEMENT

Two federal statutes, IGRA and the Restoration Act, enacted within months of each other, apply to gaming on the Tribe's reservation. The interaction of those two statutes has been the subject of nearly thirty years of litigation by the two tribes covered by the Restoration Act—the Alabama-Coushatta and the Ysleta del Sur Pueblo (the "Pueblo")—culminating in this appeal. But the dispositive event in this long history occurred fewer than three years ago: On October 8, 2015, the NIGC, acting pursuant to express statutory direction, held definitively that the Restoration Act does not constitute a "specific[] prohibit[ion]" of bingo or other gaming "on Indian lands by Federal law" within the meaning of IGRA § 2710(b)(1)(A). On that basis, the NIGC concluded that the Tribe is subject to IGRA, and thus within the NIGC's jurisdiction and permitted to conduct Class II gaming. The Tribe's position is that the NIGC's ruling—as a reasonable interpretation of IGRA, undertaken by express statutory delegation, that carries the force of law—is entitled to controlling deference under *Chevron* and represents a change in the law requiring dissolution of the injunction.

The dispute between the State and the Tribe, as reflected in the district court's order, concerns whether the prerequisites for *Chevron* deference are met here. The district court concluded that they are not. The text of IGRA itself and the Supreme Court's decision in *City of Arlington* show that they are. The scope of IGRA

§ 2710(b)(1)(A)'s "specifically prohibited" clause is an ambiguous question of the NIGC's jurisdiction that the statute structurally directs the NIGC to resolve. There is no real question about *Chevron*'s remaining element: that the Court of Appeals for the First Circuit recently interpreted similar language in a law governing a Massachusetts tribe in line with the NIGC's ruling dispels any question about the reasonableness of the agency's analysis. *See Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618, 629 (1st Cir. 2017), *cert. denied*, 138 S. Ct. 639 (Jan. 8, 2018).

Finally, *Brand X* makes the NIGC's interpretation of IGRA's reach conclusive and binding notwithstanding *Ysleta I*, which considered the same question and reached the opposite answer. As the Supreme Court explained in that case, the principles of *Chevron* mean that "[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. *Ysleta I* is not such a decision. The opinion itself explains that its conclusions rest heavily on the legislative history of IGRA and the Restoration Act. *See, e.g.*, 36 F.3d at 1333 ("[O]ur analysis of the legislative history of both the Restoration Act and IGRA leads us to a conclusion contrary to that sought by the [Pueblo] Tribe."). *Aquinnah* and other authorities demonstrate that IGRA could reasonably be interpreted more

than one way. *See United Servs. Auto. Ass'n v. Perry*, 102 F.3d 144, 146 (5th Cir. 1996) ("A statute is ambiguous [under *Chevron*] if it is susceptible to more than one accepted meaning.").

The district court's decision follows *Ysleta I*. Because the NIGC's conclusion that the Tribe is permitted to engage in Class II gaming under IGRA is entitled to deference notwithstanding *Ysleta I*, the Tribe respectfully requests that the Court reverse the district court's order to the contrary and remand this case with instructions to dissolve the permanent injunction.

STATEMENT OF THE CASE

I. The Tribe and the Restoration Act

The Alabama-Coushatta Tribe is a sovereign, self-governing Indian tribe. Its peoples have been acknowledged as a distinct, identifiable Indian culture for hundreds of years. Beginning as the separate and independent Alabama and Coushatta Tribes in the Southeastern United States, the Alabama-Coushatta migrated to Texas in the 1800s and settled on lands near its current federally-recognized reservation close to Livingston, Texas. *See generally* SHERI MARIE SHUCK-HALL, JOURNEY TO THE WEST: THE ALABAMA & COUSHATTA INDIANS (2008); JONATHAN B. HOOK, THE ALABAMA-COUSHATTA INDIANS (1997).

Today, the Tribe has a trust relationship with the United States, through which the Tribe receives limited funding from the Bureau of Indian Affairs and other

benefits. But that was not always so. For a time in the mid-20th century, the State of Texas had trust responsibility for the Tribe. In 1983, however, the Texas Attorney General called into doubt the validity of the trust relationship between the Tribe and the State, ROA.565-570, setting off a years-long effort in Congress to "restore" the Tribe's federal trust status.

While those efforts were underway, 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 "prohibited" it. *Cabazon Band*, 480 U.S. at 210. The Court found this distinction dispositive and ruled that California could not rely on Public Law 280 to bar tribes from offering gaming activities on tribal lands. *Id.* at 211–12. *Cabazon Band* left Indian gaming virtually unregulated on tribal lands in states that, like Texas, did not prohibit gaming outright.

Six months after *Cabazon Band* issued, Congress's various attempts to restore the Tribe's status under federal law culminated in passage of the Restoration Act.[2] The Restoration Act reestablished the trust relationship between the Tribe and the

[2] The Restoration Act also reestablished the trust relationship between the United States and the Pueblo. *See* Pub. L. No. 100-89, §§ 101-08, 101 Stat. 666.

federal government, restored various federal legal rights that the Tribe had enjoyed decades earlier that had been abrogated, and recognized the Tribe's Constitution and governing Council. *See* Pub. L. No. 100-89, §§ 203–04, 206. Congress notably anticipated that it would enact future laws favorable to Indian tribes, and it made the Tribe eligible for "all" such "benefits and services." *Id.* § 203(c).

Regarding the issue of gaming on the Tribe's trust lands, 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."[3] *Id*. § 207(a). At the same time, it prohibits Texas from asserting either criminal or civil

[3] Section 207(a) states that it was "enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-86-07 which was approved and certified on March 10, 1986." That Resolution mentions the Tribe's "commitment to prohibit outright any gambling or bingo in any form on its Reservation." ROA.121-122. The district court and prior courts have read that language as evincing a *quid pro quo* in which the Tribe agreed to foreswear gaming for all time "in exchange for passage of the Restoration Act." *See, e.g.*, ROA.2538; *see also* ROA.2527-2528.

The Resolution, however, responded to never-enacted legislation that was pending eighteen months before Congress passed the Restoration Act and that would have imposed a total gaming ban on the Tribe's reservation. *See, e.g.*, ROA.121-122; *see also* ROA.576 (quoting language for amendment to H.R. 1344). When Congress passed the Restoration Act, it replaced the gaming ban with language that *permitted* gaming consonant with Texas law and that embodied the prohibitory/regulatory distinction from *Cabazon Band*, but it held over the reference to T.C.-86-07. Pub. L. No. 100-89, § 207(a); *see also* ROA.2910-2970; *Implementation of the Tex. Restoration Act: Hr'g Before the S. Comm. on Indian Affairs*, 107th Cong. (June 18, 2002) (statement of Alex Skibine, Professor of Law, Univ. of Utah). The Tribe later repealed the Resolution. ROA.730-731; *see also* ROA.2730-2736 (discussing T.C.-2001-22, which rescinded T.C.-86-07).

regulatory control over legal gaming occurring on the Tribe's lands. *Id.* § 207(b). The Restoration Act also vests 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*. § 207(c).

II. The Indian Gaming Regulatory Act

Indian gaming proliferated after *Cabazon Band*, and calls grew for its regulation by the federal government. As a result—and almost fourteen months after the Restoration Act—Congress enacted IGRA to comprehensively regulate Indian gaming on tribal lands. *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996) (explaining that IGRA "completely preempt[s]" the field)

Among other things, 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). Congress intended for it to provide "a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," *id.* §§ 2701(4), 2702(1), and saw it as a replacement for "existing Federal law," which Congress specifically found failed to "provide clear standards or regulations of the conduct of gaming on Indian lands," *id.* § 2701(3). The "Federal law" on Indian gaming that was extant at the time of IGRA's passage included the Restoration Act.

IGRA defines three classifications of gaming that federally recognized tribes may offer, denominated Class I, Class II, and Class III gaming. *Id.* § 2703(6)–(8).

Class I gaming is defined as "social" gaming and includes "traditional" Indian games played as part of tribal "ceremonies or celebrations." *Id.* § 2703(6). Tribes have "exclusive jurisdiction" to regulate Class I gaming. *Id.* § 2710(a).

Class II gaming includes "the game of chance commonly known as bingo" and limited types of "card games" that are "explicitly authorized" or at least not "explicitly prohibited" by state law. *Id.* § 2703(7). Relevant here, 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 (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law)." *Id.* § 2710(b)(1)(A). Tribes have the authority to regulate Class II gaming under the jurisdiction of the NIGC, which must approve a tribe's self-regulatory ordinance if it meets various statutory criteria. *Id.* § 2710(a)(2)–(b).

Class III gaming "means all forms of gaming that" do not qualify as Class I or Class II. *See* 25 U.S.C. § 2703(8). A tribe may offer Class III gaming only if (1) it adopts a gaming ordinance that complies with IGRA's requirements and is approved by the NIGC's Chairman; (2) it is located in a state where such games are allowed "for any purpose by any person, organization, or entity,"; *and* (3) the tribe and state enter into a "Tribal-State compact" that governs how the games are to be played and regulated. *See* 25 U.S.C. § 2710(d).

III. *Ysleta del Sur Pueblo v. Texas* and the 2002 Injunction

In 1993, the Pueblo tried to negotiate a compact with Texas to permit Class III gaming under IGRA. The State refused, and the Pueblo sued to compel the State to negotiate a compact. The district court agreed with the Pueblo and directed Texas to negotiate. On appeal, Texas advanced numerous theories as to why IGRA did not allow the Pueblo to sue the State for failure to negotiate a gaming compact. *See Ysleta I*, 36 F.3d at 1332.

As relevant here, the *Ysleta I* court viewed IGRA and the Restoration Act as in irreconcilable conflict, and concluded that the Restoration Act—and *not* IGRA—governed the Pueblo's ability to organize and conduct gaming on its lands. *Ysleta I*, 36 F.3d at 1334–35. The court construed the Restoration Act's remedial provision, which authorized Texas to sue to enjoin violations of Texas gaming laws by the Pueblo, as forcing the court to choose between the two laws. *Id*. The court ultimately held that IGRA did not apply to the Pueblo. *Id.* It did so by invoking the canons against implied repeal (as IGRA followed the Restoration Act), and of a specific statute controlling over a general one (reasoning that the Restoration Act applied only to two tribes, and IGRA applied broadly). *Id.* It also engaged extensively with competing arguments about the two statutes' legislative history. *Id*. In reaching its conclusion, the court also rejected the Pueblo'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 1332–34.

Although the Alabama-Coushatta Tribe was not party to the *Ysleta I* litigation, its Restoration Act is virtually identical to the Pueblo's, and it quickly felt *Ysleta I*'s effect. In 2002, the State sought and received a permanent injunction against the Tribe's nascent gaming facility. Basing the injunction on *Ysleta I*, the district court ordered the Tribe to cease "gaming and gambling activities on the Tribe's Reservation which violate State law." ROA.1057. This Court affirmed, observing that, "[h]owever sympathetic [it] may be to the Tribe's argument" that *Ysleta I* was wrong, "[it could] not reconsider *Ysleta*, even if [it] believed that the case was wrongly decided." *Alabama-Coushatta Tribe*, 66 F. App'x at 525.

In compliance with the injunction, the Tribe ceased all gaming.

IV. Subsequent Administrative Guidance

In 2015, the Tribe sought and secured the NIGC's formal administrative determination of whether, contrary to *Ysleta I*, 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. ROA.1494, 1910.

The NIGC[4] 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. *See* ROA.1469. The NIGC first "examine[d] the scope of IGRA to determine whether [it] has jurisdiction over the Tribe's Restoration Act lands." ROA.1470. Reasoning that "[n]othing in the IGRA's language or its legislative history indicat[e] that the Tribe is outside the scope of [its] jurisdiction," the NIGC found that it "has broad jurisdiction over the Tribe's land," citing its decision days earlier on the Pueblo's parallel application.[5] ROA.1470. The NIGC's Pueblo decision explained that the agency had concluded that the Restoration Act did not satisfy the test for exclusion from IGRA set forth in § 2710(b)(1)(A):

> However, Congress can prohibit tribes from gaming under IGRA by exempting them from IGRA's scope. For instance, Congress explicitly stated IGRA did not apply to the Catawba Indian Tribe of South Carolina when it ratified its settlement agreement with the Catawba. And Congress amended the Narragansett Tribe's

[4] IGRA assigns responsibility for action on Class II ordinance applications to the Chairman of the NIGC, *see* 25 U.S.C. §§ 2705(a)(3), 2710(b)(1)(B), 2710(b)(2), subject to a right of appeal to the full Commission, *id.* § 2705(a); *see also* 25 C.F.R. pt. 582. Here, consistent with IGRA, the NIGC approved the Tribe's Class II ordinance by action of the Chairman. ROA.1469-1471.

[5] The NIGC resolved materially identical inquiries from the Pueblo and the Tribe in the same way and within days of each other. ROA.2368, 2395. The determination regarding the Alabama-Coushatta's request looks to the NIGC's reasoning in approving the Pueblo's ordinance, and the Pueblo's Restoration Act is virtually identical to the Tribe's. The two rulings thus must be read together for context.

> settlement act to specifically exclude its settlement lands from IGRA, after the First Circuit found IGRA applied. Finally, Congress exempted the Maine Tribes – Passamaquoddy, Penobscot, and Maliseet – from all federal Indian legislation enacted after their settlement act, including IGRA, unless Congress makes those laws specifically applicable, which IGRA did not. In contrast to those examples, the Pueblo's Restoration Act does not explicitly prohibit IGRA's authority over the Pueblo. Further, nothing in IGRA's legislative history indicates that the Pueblo is outside the scope of NIGC's jurisdiction. As such, the NIGC has broad jurisdiction over the Pueblo.

ROA.2369-2370 (footnotes omitted).

In its decision, the NIGC noted that the Department of the Interior—the agency charged with administering the Restoration Act—had "concurred with [the NIGC's] conclusion" that IGRA applied to the Pueblo, and thus the Tribe, ROA.1470, in a formal opinion letter written by the Department's Deputy Solicitor for Indian Affairs, ROA.1472-1492. The NIGC then confirmed 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. ROA.1471.

With the NIGC's approval, the Tribe began development of the Naskila Entertainment Center ("Naskila") to establish a Class II gaming facility on its reservation to offer electronic bingo. The Tribe and State negotiated a prelitigation agreement regarding Naskila's opening, ROA.2334-2335, pursuant to which the State agreed that the Tribe could open and operate Naskila pending an inspection, while reserving the State's right to later seek various forms of relief, ROA.1650-

1651. Pursuant to that agreement, the Tribe opened Naskila and the State conducted an inspection of Naskila's bingo operations. After the inspection, the State decided to move forward with proceedings to close Naskila.

V. Reopening of the 2002 Proceedings

In seeking to enjoin the bingo operations at Naskila, the State opted to reopen this long-dormant case, rather than file a new proceeding seeking preliminary injunctive relief as contemplated by the Restoration Act. The State first moved to realign the Parties, ROA.1282-1286, to which the Tribe agreed, ROA.1301-1307. The Parties then jointly requested entry of a proposed scheduling order that provided for a seven-month window in which the Parties would file various briefs and conduct discovery. ROA.1308-1312, 1391-1401. The State filed a motion for contempt, amended shortly after, arguing that the Tribe had violated the permanent injunction by offering bingo at Naskila. ROA.1402-1443. The Tribe, for its part, filed a motion for relief from judgment, arguing that changes in controlling law made continuing application of the permanent injunction inequitable. ROA.1445-1552. The State later moved for summary judgment on various contempt-related issues, ROA.1612-1752, and the Tribe moved for partial summary judgment that its bingo operations constitute Class II gaming under IGRA, ROA.1821-2159.[6]

[6] The district court did not reach the question of whether the gaming conducted at Naskila is Class II or Class III, denying the Tribe's motion as moot in light of its conclusion that IGRA does not apply to the Tribe. ROA.2539.

The district court denied the Tribe's motion for relief from judgment. ROA.2514-2539. After discussing the factual and procedural background of the Parties' underlying dispute and the genesis of the Restoration Act and IGRA, the district court largely followed the reasoning of a prior district-court decision involving the Pueblo in the Western District of Texas in concluding that the NIGC's interpretation of IGRA did not implicate *Chevron* and was not entitled to deference.[7] ROA.2532-2539. On the same day, the Tribe filed a notice of appeal and moved to stay the case pending appeal, ROA.2540-2581, which the district court granted, ROA.2657-2661.

SUMMARY OF THE ARGUMENT

The district court denied the Tribe's motion for relief from judgment based on the premise that courts owe no deference to administrative action that requires an agency to engage in "pure" statutory construction or to analyze the interplay between multiple, potentially competing, statutory regimes. *See, e.g.*, ROA.2533. The Supreme Court conclusively rejected this mode of analysis in affirming this Court's decision in *City of Arlington*, expressly relying on cases giving deference where agencies had looked outside of the four corners of the statutes they administered in

[7] *Texas v. Ysleta del Sur Pueblo*, No. 99-CV-320-KC, 2016 WL 3039991 (W.D. Tex. May 27, 2016). The Tribe filed an amicus brief in that case that raised many of the administrative-law arguments presented in the district court and here. ROA.1687-1717.

taking final agency action. *See* 569 U.S. at 301–03. As Justice Scalia succinctly summarized the law in *City of Arlington*, "the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not." *Id.* at 301. Here, not only does IGRA *not* "foreclose" the NIGC from asserting jurisdiction over gaming on the Tribe's reservation, Congress affirmatively *required* the agency to look at extrinsic laws in order to adjudicate Class II gaming ordinances. *See* 25 U.S.C. § 2710(b)(1)(A). As administrative law scholars have observed, rather than "abdicating" judicial authority, "a court doing anything other than deferring" to reasonable interpretations reached pursuant to such express delegations of authority "fail[s] to honor the law itself." Cary Coglianese, Chevron*'s Interstitial Steps*, 85 GEO. WASH. L. REV. 1339, 1349 (2017).

When a statute grants "a general conferral of rulemaking or adjudicative authority" to an agency, *Chevron* deference virtually always applies to "an exercise of that authority within the agency's substantive field." *City of Arlington*, 569 U.S. at 306. That is exactly what the NIGC did here. The NIGC reasonably interpreted IGRA to extend to the Tribe. Under *Brand X*, that interpretation supersedes *Ysleta I* because *Ysleta I* did not reach its conclusion based on IGRA's unambiguous text. *See* 545 U.S. at 982. The Tribe respectfully requests that the Court reverse the district court's order and remand with instructions to dissolve the permanent injunction.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 60(b)(5) allows district courts to "relieve a party or its legal representative from a final judgment, order, or proceeding" when "applying [the judgment or order] prospectively is no longer equitable." A "significant change" in law supplies adequate grounds upon which to grant Rule 60(b)(5) relief. *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 741 (5th Cir. 2016). And 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).

An abuse of discretion standard applies to the district court's order denying the Tribe's Rule 60(b)(5) motion for relief from judgment. *Flowers v. S. Reg'l Physicians Servs.*, 286 F.3d 798, 800 (5th Cir. 2002). "'A district court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts.'" *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 310 (5th Cir. 2008) (en banc) (citation omitted). "Under this standard, the district court's ruling is 'entitled to deference,' but [the Court] review[s] *de novo* 'any questions of law underlying the district court's decision.'" *Frew v. Janek*, 780 F.3d 320, 326 (5th Cir. 2015) (citation omitted). "The party seeking relief bears the burden of establishing that changed circumstances warrant relief, but once a party carries this burden, a court abuses its discretion 'when it

refuses to modify an injunction or consent decree in light of such changes.'" *Horne v. Flores*, 557 U.S. 433, 447 (2009) (citations omitted).

ARGUMENT

I. The *Chevron* Framework Applies to the NIGC's Adjudication.

This appeal presents a single dispositive question: whether IGRA applies to the Tribe in the light of the Restoration Act. This question necessarily is jurisdictional because fundamentally it asks whether the NIGC has authority over gaming on the Tribe's reservation. It also ultimately is one of agency deference because neither IGRA nor the Restoration Act expressly addresses which controls over the other. Under *Chevron*, a statutory "gap" or ambiguity reflects delegations of legislative power to agencies, rather than courts, especially when Congress expressly directs an agency to "elucidate a specific provision of the statute" via a specified administrative process. *See Chevron*, 467 U.S. at 843–44; Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 28 (1983) (explaining that it "violate[s] legislative supremacy" for courts to "fail[] to defer to the interpretation of an agency to the extent that the agency ha[s] been delegated law-making authority").

The NIGC's assertion of jurisdiction over the Tribe deserves deference. The NIGC formally adjudicated the Tribe's Class II Ordinance pursuant to an express delegation of legislative authority; it administers IGRA; and its construction of the

scope of its authority is a reasonable interpretation of the statute. That interpretation controls over *Ysleta I* because the Court's 1994 decision was based on nontextual cues from legislative history and canons of construction.

A. The NIGC Interpreted Its Jurisdiction Under *City of Arlington*.

Whether the Tribe falls within IGRA's scope—and thus the NIGC's jurisdiction—presents an issue of statutory ambiguity. As an initial matter, the NIGC indisputably administers IGRA. It is the "independent Federal regulatory authority for gaming on Indian lands." 25 U.S.C. § 2702(3). Congress empowered the NIGC and its Chairman with broad powers over Indian gaming, including the power to promulgate regulations under IGRA, *id*. § 2706(b)(10), to close Indian gaming facilities for violating IGRA, *id*. § 2713(b)(1), and to impose civil fines for violating IGRA, its regulations, or tribal gaming regulations, *id*. § 2713(a)(1). Relevant here, the NIGC's Chairman *must* approve tribal ordinances to permit Class II gaming if certain conditions are met, *id*. §§ 2705(a)(3), 2710(b)(1)(A)–(B), and IGRA makes such adjudications final agency action for purposes of judicial review, *id.* § 2714. Courts routinely review these and other NIGC actions through the lens of *Chevron*. *See, e.g.*, *City of Duluth v. NIGC*, 89 F. Supp. 3d 56, 64–65 (D.D.C. 2015) (giving *Chevron* deference to NIGC conclusion reached in a "notice of violation" of a Class II gaming requirement that overturned prior judicial consent decree and that directly contradicted the NIGC's position reached 17 years earlier);

see also Seneca-Cayuga Tribe of Okla. v. NIGC, 327 F.3d 1019, 1036–42 (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, 264–65 (8th Cir. 1994) (applying *Chevron* to NIGC's determination of whether a game was Class II or Class III gaming).

Turning to the statutory text, IGRA does not mention the Tribe, but the Tribe meets the relevant statutory definitions that define IGRA's scope. IGRA's gaming provisions generally apply 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. *See* 25 U.S.C. §§ 2703(4)–(5). The NIGC concluded—and the State has not disputed—that the Tribe is an "Indian tribe" with a reservation that qualifies as "Indian lands" as defined in IGRA, ROA.1469-1471, bringing the Tribe facially within IGRA's ambit.

Nothing in IGRA expressly removes the Tribe from its reach or suggests that the Tribe should be treated differently than any other Indian tribe under its purview. IGRA broadly excludes "lands" taken into trust by the federal government "for the benefit of an Indian tribe after" its effective date "unless" certain conditions are met. 25 U.S.C. § 2719(a)–(b). Congress also granularly addressed specific Indian tribes

and lands directly in IGRA's text. For example, the statute carves out two narrow exceptions to its general "after-acquired lands" rule for specific lands subject to litigation over a single tribe's trust petition and a small, 25-acre parcel of land "located within one mile" of a specific intersection in Dade County, Florida. *Id.* § 2719(b)(2). IGRA's after-acquired lands exception does not apply to the Tribe's reservation, and it makes no mention of the Tribe or its Restoration Act lands.

Section 2710(b)(2) of IGRA requires that the Chairman of the NIGC "shall" approve tribal gaming ordinances—and thus permit Class II gaming on Indian lands by Indian tribes—if an ordinance complies with a list of statutory conditions. But before the NIGC Chairman can approve a Class II gaming ordinance, he must confirm that the proposed gaming comports with state and federal law. Section 2710(b)(1)(A) allows "[a]n Indian tribe [to] engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if"—and only if—(1) "such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity," and (2) "such gaming is not otherwise specifically prohibited on Indian lands by federal law." The Tribe's Class II Ordinance concerns bingo gaming, ROA.1497, and no one disputes that Texas permits and regulates the playing of various forms of bingo, *see, e.g.*, 16 TEX. ADMIN. CODE §§ 402.100-.709.

The district court, however, held that the NIGC acted outside the scope of its authority in approving the Tribe's Class II Ordinance because the Restoration Act ostensibly satisfies the second exclusion by generally incorporating provisions of Texas gaming law. ROA.2535. The district court also declined to engage in a *Chevron* analysis at all, refusing "'to assume, without any evidence, that Congress intended to entrust the NIGC with reconciling IGRA and the Restoration Act.'" ROA.2533 (citation omitted). This reasoning rested at least in part on the district court's belief that "'agency expertise'" is irrelevant whenever an issue implicates "pure" statutory construction. ROA.2533.

But Congress expressly required the agency to undertake that analysis. And the NIGC's decision reflects a judgment regarding the scope of its own authority—its "regulatory jurisdiction." *City of Arlington*, 569 U.S. at 300. As the Supreme Court made clear in *City of Arlington*, an agency's jurisdictional interpretation must be analyzed under the "*Chevron* framework" just like any other agency decision about an ambiguous statutory provision. *Id.* The Supreme Court disavowed "that there exist two distinct classes of agency interpretations:" those that concern "big, important" issues about "the scope of the agency's statutory authority" and those that address "humdrum, run-of-the-mill stuff" related to "applications of jurisdiction the agency plainly has." *Id.* at 297. Rather, when it comes to an agency's interpretation of the scope of its jurisdiction, "the question in every case is, simply,

whether the *statutory text forecloses* the agency's assertion of authority, or not." *Id.* at 301 (emphasis added).

Contrary to the district court's approach, then, a threshold question about an agency's power to rule is no different from any other question under *Chevron*. Where the statutory text does not compel a particular interpretation, that ambiguity represents a permissible delegation of lawmaking authority from Congress to the agency. *See Chevron*, 467 U.S. at 843 ("[I]f 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."). This rule applies even where the issue involves an agency's construction of its own authority precisely to "prevent" the "transfer of any number of interpretive decisions—archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests—from the agencies that administer the statutes to federal courts." *City of Arlington*, 569 U.S. at 304–05.

B. IGRA Expressly Requires the NIGC to Evaluate Extrinsic Law.

The district court short-circuited a *Chevron* analysis and held *City of Arlington* inapplicable because it believed that, to come within the sweep of those cases, the NIGC was required to "establish that Congress intended for the NIGC to interpret the Restoration Act." ROA.2536. In the district court's view, courts owe deference only to agency interpretations that stay within the statute "from which it derives its

statutory authority," ROA.2535, unless Congress has expressed a clear "inten[t] to entrust" the agency "with reconciling" that statute with another, ROA.2533.

But this view overlooks that Congress *has* specifically authorized the NIGC to consult other laws in interpreting the scope of its jurisdiction under IGRA and to determine whether state or federal law precludes the approval of a tribe's Class II ordinance. Again, two preconditions require the NIGC to look outside of IGRA. The NIGC cannot approve a Class II ordinance unless (1) the gaming is "located within a State that permits such gaming for any purpose by any person, organization or entity"—and here there is no question that Texas allows bingo for at least charitable purposes—and (2) "such gaming is not otherwise specifically prohibited on Indian lands by Federal law." 25 U.S.C. § 2710(b)(1)(A). Analyzed through the lens of *City of Arlington*, these preconditions on Class II gaming properly represent potential curbs on the NIGC's jurisdiction.

The NIGC's determination that the Tribe's Class II gaming is not "specifically prohibited on Indian lands by Federal law" thus is a quintessential assertion of agency jurisdiction sufficient to satisfy "Step One" of the *Chevron* analysis. *See, e.g.*, Coglianese *supra* at 1348–49, 1361–63. In essence, the NIGC held that the Restoration Act does not constitute a jurisdictional exclusion under IGRA. That ruling represents the culmination of an adjudicative process expressly authorized by statute and carries the force of law. *See* 25 U.S.C. §§ 2705(a)(3), 2710(b), 2714.

And as the Supreme Court has explained, "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings" are "very good indicator[s] of delegation meriting *Chevron* treatment." *United States v. Mead Corp*, 533 U.S. 218, 229 (2001).

The consequences of the alternative would be distinctly at odds with *City of Arlington*. If evaluating a federal law for purposes of adjudicating a Class II gaming ordinance constitutes interpreting that federal law—and *not* IGRA—then the NIGC never interprets its own jurisdiction under IGRA; it always, by necessity, interprets the other law. Such an approach would foreclose the NIGC's interpretations of its jurisdiction under § 2710(b)(1)(A) from ever qualifying for *Chevron* deference, despite an express delegation of authority to engage in the statutory construction required to make such determinations in the first instance. That result finds no support in the case law outside of the district courts' rulings here and in the most recent episode of the *Ysleta* litigation. It also directly conflicts with the Eighth Circuit's decision in *United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607, 611–16 (8th Cir. 2003), which deferred to the NIGC's determination that a particular Class II gaming device did not violate the Johnson Act, 15 U.S.C. §§ 1171–78—and thus was not "specifically prohibited on Indian lands by Federal law" within the meaning of § 2710(b)(1)(A). Followed to its logical conclusion, under the district court's approach, no agency would ever be entitled to deference when its jurisdiction

depends on a determination about which—or both—of two federal laws applies, unless it administers both.

The district court's approach also misunderstands the limits *Chevron* places on agencies to consult extrinsic law in general. *Chevron* is not nullified simply because the NIGC discussed the Restoration Act in adjudicating the Tribe's Class II Ordinance. Although agencies generally do not receive deference for broadly interpreting statutes outside of their administrative purview, *Chevron* principles presume that statutory silence *permits* agency action and that reasonable agency action merits deference, especially where an agency resolves an ambiguity via a specific "process of rulemaking or adjudication" entrusted to it by Congress. *Mead Corp.*, 533 U.S. at 229.

That remains true even when an agency consults law outside the statute it formally administers, so long as the agency's "actions derive principally from its interpretation of [a statute] which it *does* administer." *Am.'s Cmty. Bankers v. FDIC*, 200 F.3d 822, 833 (D.C. Cir. 2000) (emphasis added). Courts routinely defer to agency decisions that require resort to extrinsic bodies of law, such as deciding whether "conflicting state rules" are preempted or whether state-law counterclaims are viable. *See City of Arlington*, 569 U.S. at 301–02 (citing *CFTC v. Schor*, 478 U.S. 833, 844–45 (1986) (counterclaims); *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (rules)). Notably, the D.C. Circuit recently affirmed various interpretations

and conclusions by the Department of the Interior regarding the interplay of IGRA, the Indian Reorganization Act, the Clean Air Act, and various EPA regulations as those authorities related to the opening and operation of a tribal casino. *See Stand Up for Cal.! v. U.S. Dep't of the Interior*, 879 F.3d 1177, 1181, 1192 (D.C. Cir. 2018) ("affording the appropriate measure of deference to the Department's supportable judgments").

The NIGC therefore appropriately asserted jurisdiction over the Tribe's gaming within the bounds of its express grant of authority to do so. It based its ruling almost exclusively on IGRA's text and legislative history, and noted that the Department of the Interior Solicitor's Office "concur[red]" with a decision the NIGC had independently reached. ROA.1470. That the Department of the Interior Letter "further opined" on Restoration Act matters, ROA.1470, does not mean that the *NIGC* approved the Tribe's Ordinance based "principally" on its reading of the Restoration Act. And that the Department of the Interior—the agency that formally administers the Restoration Act—also agrees that IGRA applies to the Tribe's gaming indicates that the NIGC's interpretation of its authority is the correct one.

Tellingly, neither the district court nor the State has identified any language in IGRA that "forecloses"—unambiguously or otherwise—the NIGC's assertion of jurisdiction. The failure to do so is fatal to the State's argument against applying the *Chevron* framework after *City of Arlington*. *See* 569 U.S. at 301 ("[T]he question in

every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not. . . . . [N]o 'exception exists to the normal [deferential] standard of review' for 'jurisdictional or legal question[s] concerning the coverage' of an Act." (latter alteration in original) (citations omitted)). *Chevron* therefore requires deference to the NIGC's interpretation of its authority, so long as it is reasonable. *EPA 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.").

II. The NIGC's Assertion of Jurisdiction Is Reasonable and Due Deference.

The NIGC's determination that the Tribe falls within IGRA's scope is both reasonable and the best reading of the law that governs gaming on the Tribe's reservation. Subsequent case law, legislative enactments, and background Indian-law principles further confirm the reasonableness—and substantive correctness—of the NIGC's interpretation.

A. IGRA's Text and Structure Confirm the NIGC's Interpretation.

IGRA's text plainly includes the Tribe. IGRA provides that "[a]n 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(b)(2)–(4).

Only one of these criteria or conditions is even in dispute. The Alabama-Coushatta is an "Indian tribe" under IGRA, 25 U.S.C. § 2703(5); Naskila is on "Indian lands," *id.* § 2703(4); Texas allows bingo within the State, TEX. OCC. CODE §§ 2001.001–.657; 16 TEX. ADMIN. CODE §§ 402.100–.709; the Tribe has passed an ordinance permitting bingo, ROA.1493-1521; and the NIGC has approved that ordinance, ROA.1469-1471. The sole point of debate is whether the Restoration Act "otherwise specifically prohibit[s]" the gaming at issue "on Indian lands by Federal law."

It does not. IGRA does not define what constitutes a "specific[] prohibi[tion] on Indian lands by Federal law." 25 U.S.C. § 2710(b)(1)(A). The relevant provision of the Restoration Act provides only that "[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe." Pub. L. No. 100-89, § 207(a).

Section 207(a) does not fit the § 2710(b)(1)(A) exclusion because it is neither specific, a specific prohibition, a "prohibit[ion] on Indian lands," nor clearly

"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.[8] *Finally*, it is not plainly under "Federal law" because any prohibition in the Restoration Act expressly depends upon the contours of Texas *state* law—and, in all events, bingo is not *prohibited* by Texas law. Put another way, the Restoration Act is a contingent, general regulation of all gaming on one tribe's Indian lands pursuant to unspecified state law referenced in a Federal law; its gaming provisions contain no "specific[] prohibit[ion]" against bingo "on Indian lands" that derives from "Federal law."

In the Tribe's view, this interpretation is the correct reading of IGRA. But that is not the test *Chevron* demands. The case law requires only that the NIGC's interpretation be a reasonable one to be entitled to controlling deference. *See, e.g.*, *Coastal Conservation Ass'n v. U.S. Dep't of Comm.*, 846 F.3d 99, 106–07 (5th Cir. 2017).

[8] 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).

The reasonableness of this analysis is bolstered by the First Circuit's virtually identical construction of a Massachusetts tribe's "settlement" act that was passed by Congress on the same day as the Tribe's Restoration Act. *See Aquinnah*, 853 F.3d at 628–29. In *Aquinnah*, the First Circuit was asked to determine whether IGRA preempted the regulatory authority conferred on the Commonwealth of Massachusetts in the Indian Lands Settlement Act of 1987 (the "Aquinnah Settlement Act"). *Id.* at 623. There, as here, the NIGC approved a tribe to conduct Class II gaming on tribal lands based on its authority under IGRA, a decision that Massachusetts argued—and that the *Aquinnah* district court held—the NIGC could not make because the Aquinnah Settlement Act was a "specific prohibition" against gaming "on Indian lands by Federal law." *See id.* at 623–24.

The First Circuit reversed. Although it acknowledged that implied repeals are disfavored, it nonetheless concluded that IGRA impliedly repealed the gaming provisions of the Aquinnah Settlement Act. *Id.* at 627–29. The First Circuit drew on prior precedent explaining that "a repeal may be implied in cases where the later statute covers the entire subject and embraces new provisions, plainly showing that it was intended as a substitute for the first act." *Id.* at 627 (citation and internal quotation marks omitted). In applying this rule to IGRA and the Aquinnah Settlement Act, the First Circuit found that giving effect to IGRA proved to be the least disruptive interpretation of the interplay between the two conflicting statutes.

> Here, reading the two statutes to restrict state jurisdiction over gaming honors [IGRA] and, at the same time, leaves the heart of the . . . Settlement Act untouched. Taking the opposite tack—reading the two statutes in such a way as to defeat tribal jurisdiction over gaming on the settlement lands—would honor the Settlement Act, but would do great violence to the essential structure and purpose of [IGRA].

Id. (quoting *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 704–05 (1st Cir. 1994)). Additionally, the First Circuit concluded that statutes of general application usually control over conflicting portions of a previously enacted statute unless the prior statute contains express statutory language that preserves it against the effect of subsequently enacted laws. *See id.* at 628–29 (discussing the express "savings clause" in the Maine Indian Claims Settlement Act of 1980 ("Maine Settlement Act"), Pub. L. No. 96-420, § 16(b), 94 Stat. 1785 (Oct. 10, 1980)).

These considerations apply here. The NIGC's interpretation harmonizes IGRA and the Restoration Act. *See generally Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385–86 (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 if the Tribe complies with IGRA's requirements and the NIGC does not revoke its approval. *See generally N. Cnty. Cmty. 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).

But it leaves the gaming provisions of the Restoration Act otherwise intact. If, for example, the Tribe commences Class III gaming without fulfilling IGRA's requirements, the State may resort to the Restoration Act for any gaming that violates State law. *See* Pub. L. No. 100-89, § 207(c). But forcing a choice between IGRA and the Restoration Act necessarily renders all of IGRA or part of the Restoration Act inapplicable to the Tribe, wreaking what the *Aquinnah* court described as—otherwise avoidable—"'violence to the essential structure and purpose of'" one or the other statute. *Aquinnah*, 853 F.3d at 627 (citation omitted). Construing an ambiguity to "harmonize[]" rather than "override" potentially conflicting provisions indicates that an interpretation is reasonable and deserving of deference. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007).

The Restoration Act's text also provides no reason to believe that Congress intended for it to forever supplant a forthcoming comprehensive Indian gaming statute like IGRA. *See Aquinnah*, 853 F.3d at 628–29. The Restoration Act contains no savings clause like that in the Maine Settlement Act, which makes most tribes in Maine ineligible for "any federal law enacted after" October 10, 1980 "for the benefit of Indians, Indian nations, or tribes or bands of Indians" unless expressly made applicable in Maine. Pub. L. No. 96-420, § 16(b). The Restoration Act reflects precisely the opposite sentiment, providing that the Tribe "*shall* be eligible" for "*all* benefits and services furnished to federally recognized Indian Tribes" "on *and after*"

the Restoration Act's effective date "[n]otwithstanding any other provision of law." Pub. L. No. 100-89, § 203(c) (emphasis added). And "IGRA is undoubtedly a statute passed for the benefit of Indian tribes." *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 730 (9th Cir. 2003); *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 789 (1st Cir. 1994) (same).

The Restoration Act's use of terms of art also supports the reasonableness of the NIGC's position. The Restoration Act's gaming provisions concern gaming "prohibited by the laws of the State of Texas" and Texas's "regulatory jurisdiction." This language makes sense only when viewed as a stop-gap response to the prohibitory-regulatory dichotomy drawn in *Cabazon Band*, *see, e.g.*, ROA.2954-2955, a distinction subsequently embodied in IGRA's provision that permits Class II gaming only if "located within a State that permits such gaming for any purpose by any person, organization or entity," 25 U.S.C. § 2710(b)(1)(A); *see also id.* § 2701(5). After all—and entirely consonant with *Cabazon Band*—Congress intended for IGRA to preserve "the exclusive right" of "Indian tribes" to "regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law," *id.* § 2701(5), and it also considered IGRA as a comprehensive replacement for then "existing Federal law," which Congress viewed as failing to "provide clear standards or regulations for the conduct of gaming on Indian lands, *id.* § 2701(3).

B. Legislative History and Subsequent Enactments Confirm the NIGC's Interpretation Is Both Reasonable and Correct.

The NIGC's interpretation comports not only with IGRA's text, but also with its legislative history and with subsequent enactments. As an initial matter, IGRA's legislative history confirms that the analysis above dovetails with Congress's understanding of the types of laws that would fall within the "otherwise specifically prohibited on Indian lands by Federal law" requirement in § 2710(b)(1)(A). As the Senate Report explains, that language

> 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 [IGRA], no other Federal statute . . . will preclude the use of otherwise legal devices . . . [for] gaming on or off Indian lands.

S. REP. NO. 100-446 at 12.

Section 1175 exemplifies a law that is federal, specific, a specific prohibition, and a prohibition on Indian lands. *See Aquinnah*, 853 F.3d at 628–29. 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 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 . . . and the [Maine] Indian Claim Settlement Act."[9] S. REP. NO. 100-446 at 12 (emphasis added) (citations omitted). The NIGC's interpretation satisfies this condition too. The key provision in the Rhode Island Indian Claims Settlement Act (the "Rhode Island Settlement Act") gives Rhode Island plenary regulatory jurisdiction for all purposes 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 Settlement Act applies to all but two Indian tribes in Maine and subjects those tribes generally "to the civil and criminal jurisdiction of the State,

[9] The First Circuit ultimately held that the language in the Rhode Island Settlement Act was too weak—legislative history notwithstanding—to avoid application of IGRA, and that IGRA therefore *did* apply to the Narragansett tribe. *See Narragansett*, 19 F.3d at 705. By contrast, the First Circuit declined to apply IGRA in Maine because the Maine Settlement Act 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*." *Passamaquoddy*, 75 F.3d at 787, 791 (quoting Pub. L. No. 96-420, § 16(b)). IGRA lacks language making it applicable specifically in Maine.

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).

But the Restoration Act contains a flatly opposite provision when it comes to gaming, 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." Pub. L. No. 100-89, § 207(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 Tribe to Texas's general regulatory authority over gaming. *Id.* Nor does it contain the kind of "saving" language present in the Maine Settlement Act intended to exclude its gaming provisions from the effect of subsequently enacted federal laws. *See* Pub. L. No. 96-420, § 16(b); *Aquinnah*, 853 F.3d at 627–29. Rather, the Restoration Act says the opposite: it makes the Tribe "eligible" for "all benefits" provided to Indian tribes after its passage, Pub. L. No. 100-89, § 203(c)—and the Congress that enacted the Restoration Act unmistakably intended for those benefits to include future federal gaming laws, *see* 133 Cong. Rec. H2050-03, 1987 WL 935391 (Apr. 21, 1987) (Statement of Rep. Udall) ("[G]ambling would remain prohibited *unless allowed by a future act of Congress*." (emphasis added)); *see also* 133 Cong. Rec. H6972-05, 1987 WL 943894 (Aug. 3, 1987) (Statements of Reps. Vento and Udall) (explaining

that the Restoration Act "codif[ied] . . . the holding and rational[e] adopted" by the Supreme Court in *Cabazon Band*).

IGRA's legislative history also demonstrates that Congress intended IGRA to apply to all tribal bingo 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 regulatory scheme set forth in the bill.

S. REP. NO. 100-446 at 11–12 (emphasis added). At the time Congress passed IGRA, the Restoration Act covered two of the only three *possible* tribes in Texas to which IGRA could apply. The legislative history therefore reflects that Congress anticipated IGRA's application to the Alabama-Coushatta and Ysleta del Sur Pueblo because Texas was not one of the five enumerated states with blanket prohibitions against gaming, but rather was one of "the other 45 States" where some form of bingo was permitted.

Consistent with its statutory text, IGRA's legislative history thus identifies three categories of laws that suffice to displace IGRA: laws, like the Johnson Act, that in unequivocal terms prohibit a specific form of gaming on all Indian lands; laws, like the Rhode Island Settlement Act, that specifically grant states regulatory jurisdiction over gaming on Indian lands; and laws, like the Maine Settlement Act,

that contain express "savings" clauses that preserve state gaming restrictions against abrogation by subsequently enacted federal laws generally applicable to Indian gaming. The Restoration Act does none of these things.

Further, after IGRA, Congress has spoken in unequivocal terms when it intends to create "specific prohibitions" designed to foreclose IGRA's application. 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(a), 107 Stat. 1118, 1136 (1993). Likewise, the Native American Technical Corrections Act of 2004 declares that a certain parcel of land 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). 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 [IGRA] (25 U.S.C. 2703)) pursuant to a claim of inherent authority or any Federal law (including [IGRA] . . .) on any land that is leased . . . in accordance with this section." Pub. L. No. 110-228, § 1(c), 122 Stat. 753 (May 8, 2008). And after the

First Circuit held that the Rhode Island Settlement Act's gaming prohibitions did not survive IGRA, *see Narragansett*, 19 F.3d at 703–05, Congress amended that act to add an express savings clause that reads: "Treatment of Settlement Lands Under [IGRA]. For purposes of [IGRA], settlement lands shall not be treated as Indian lands." Pub. L. No. 104-208, § 330(b), 110 Stat. 3009 (Sept. 30, 1996).

It is especially appropriate to require that specific prohibitions against gaming meet this degree of clarity before given effect under IGRA because matters affecting tribal gaming necessarily implicate tribal sovereignty and self-determination. "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). Rather, courts have required Congress to "'unequivocally' express" limitations on tribal sovereignty, including prohibitions against tribal gaming. *See id*. at 2031–32 (citation omitted).

The Restoration Act is not such a prohibition. Its generic reference to state gaming law—predating IGRA's comprehensive solution—should not impliedly displace the Tribe's rights under IGRA. IGRA's text, history, and subsequent legislative enactments establish that conclusion as the correct reading of the statutory scheme at issue. Yet this Court need not go so far to conclude that the district court's

order should be reversed. So long as the NIGC's position is simply reasonable, then *Chevron* applies, and this Court should defer to the NIGC's interpretation. *See, e.g.*, 467 U.S. at 844 (holding that, even when a "legislative delegation to an agency on a particular question is implicit rather than explicit," a reviewing "court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency").

III. Under *Brand X*, the NIGC's Adjudication of the Tribe's Class II Gaming Ordinance Abrogates *Ysleta I*.

Ysleta I presents the only remaining obstacle to this Court doing so, but another change in the law abrogates that otherwise binding precedent. ROA.2536. Nearly eleven years after *Ysleta I* and three years after *Alabama-Coushatta*, the Supreme Court held in *Brand X* that "[o]nly a judicial precedent holding that the statute *unambiguously forecloses* the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction," 545 U.S. at 982–83 (emphasis added), even if the judicial precedent issued first, *id.* at 983. That rule stems from the idea that, 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*, 569 U.S. at 296. 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. *Brand X*, 545 U.S. at 981 (citation omitted); *see also, e.g.*, *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 397–98 (5th Cir. 2014). Since *Brand X* was decided, numerous courts have applied this rule to give controlling deference to agency interpretations of ambiguous statutory provisions over contrary circuit court and even Supreme Court authority. *See, e.g.*, *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1245–49 (10th Cir. 2008) (holding that *Brand X* rule applies even to Supreme Court authority and giving Chevron deference to agency interpretation that resolved ambiguity differently than two prior Supreme Court decisions); *Ore. Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080, 1086–89 (9th Cir. 2016); *Rush Univ. Med. Ctr. v. Burwell*, 763 F.3d 754, 758–62 (7th Cir. 2014) (citing *Brand X* in declining to follow otherwise-binding prior circuit precedent); *Metropolitan Hosp. v. U.S. Dep't of Health & Human Servs.*, 712 F.3d 248, 255–59 (6th Cir. 2013) (same); *Fernandez v. Keisler*, 502 F.3d 337, 348 (4th Cir. 2007) (same); *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 17 (1st Cir. 2006) (same).

The question, then, is whether the holding in *Ysleta I* was compelled by unambiguous language in IGRA. It was not. The *Ysleta I* opinion turns almost entirely on the use of legislative history and various canons of statutory interpretation, virtually conceding the ambiguity of the statutory text. Courts need not "resort" to canons of construction and legislative history "where the statutory language is clear and unambiguous." *Direct Auto. Imports Ass'n v. Townsley*, 804

F.2d 1408, 1411 (5th Cir. 1986); *see also United Air Lines, Inc. v. McMann*, 434 U.S. 192, 199 (1977) (reasoning that, under "traditional canons of interpretation," legislative history is "irrelevant to an unambiguous statute").

For example, *Ysleta I* 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. 36 F.3d at 1333 ("The Tribe's argument is appealing only because § 107(a) of the Restoration Act 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."). The opinion characterizes the Restoration Act as "fundamentally at odds with the concepts of" IGRA, *id.* at 1334, and relies on language from a Supreme Court case noting that the more specific statute controls "'where there is no *clear* intention otherwise.'" *id.* at 1335 (citation omitted). The opinion also notes IGRA's reference to other federal law, omission of a provision that specifically repealed the Restoration Act, lack of a "blanket repealer clause," temporal proximity to the Restoration Act, and a 1993 amendment to exclude a tribe in South Carolina. *Id.* The court also emphasized representations made in an extrinsic tribal ordinance that was not incorporated into any statute. *Id.* at 1328 n.2.

Although *Ysleta I* portrays the Restoration Act as reflecting "unambiguous" congressional intent and supported by a "wealth of legislative history," *id.* at 1334

& n.20, all of the above factors are merely contextual clues—not statutory commands—that indicate that the opinion's ultimate holding does not derive from the plain text *of IGRA*. Indeed, there is virtually no discussion of IGRA's text in the sections of the opinion that evaluate the interaction of the two statutes. Precedent predicated on legislative history and a statute's "concepts," *id.* at 1334, is not based on a "holding that its construction follows from the unambiguous" text, as required to void the NIGC's assertion of regulatory jurisdiction here, *Brand X*, 545 U.S. at 982. Accordingly, *Brand X* mandates that the NIGC's reasonable determination control over *Ysleta I*.

IV. The Permanent Injunction Must Be Dissolved Because Its Continued Application Is Inequitable Due to Changes in the Law Upon Which It Was Based.

The district court abused its discretion by failing to apply *City of Arlington* and *Brand X* to the Tribe's motion for relief from judgment under Rule 60(b)(5). The legal basis for the permanent injunction fundamentally has changed. The Supreme Court has since held that administrative agencies are due *Chevron* deference for reasonable interpretations of their statutory authority. The NIGC's construction of IGRA is at minimum a reasonable interpretation of the agency's jurisdiction that is not foreclosed by the statute's unambiguous text. No more is required for *Chevron* deference. *See, e.g.*, *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) ("[The agency's] view governs if it is a reasonable

interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts."). And the Supreme Court has further held in the intervening time that such constructions abrogate prior judicial precedent if that precedent is not based on a holding compelled by unambiguous statutory language.

"It 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). That is the case here. The Tribe respectfully asks the Court to reverse the district court's order and end the prospective application of the permanent injunction.

V. In the Alternative, and to Preserve the Issue for En Banc Consideration, *Ysleta I* Should Be Overturned.

The Tribe acknowledges that the panel is foreclosed from overruling *Ysleta I* under this Court's adherence to the rule of orderliness. *See, e.g.*, *Mercado v. Lynch*, 823 F.3d 276, 279 (5th Cir. 2016). The Tribe nonetheless briefly addresses *Ysleta I*'s continuing viability to preserve the issue for further review. *See Nassar v. Univ. of Tex. Sw. Med. Ctr.*, 688 F.3d 211, 211–12 (5th Cir. 2012) (Elrod, J., concurring) (reasoning, in jury-instruction context, that party failed to adequately preserve argument for en banc review "even where the objection would have been futile in light of controlling precedent" (citation omitted)), *vacated on other grounds*, 570 U.S. 338 (2013).

This Court decided *Ysleta I* when the legal landscape around IGRA was still emerging. In the nearly quarter-century since, developments in the law have shown that the interpretation reached by the *Ysleta I* panel is not the correct reading of IGRA or the Restoration Act. Among other things, the First Circuit recently created a direct circuit split with *Ysleta I*'s reasoning in holding that IGRA impliedly repealed substantially similar provisions in the Aquinnah Settlement Act. *See Aquinnah*, 853 F.3d at 626–29. For the reasons discussed at length above, the NIGC's reading of IGRA represents the correct interpretation of that statute and the Tribe's place in its regulatory scheme.

Additionally, Indian gaming has become only more prevalent since *Ysleta I*. This places the Tribe in the increasingly inequitable position of being subject to state gaming law—an infringement on its fundamental right to self-government and tribal sovereignty—while other Indian tribes flourish under the regulatory protection of the NIGC and IGRA. That disparate treatment makes little sense when (1) Congress expressly intended IGRA to promote tribal self-sufficiency and sovereignty, *see* 25 U.S.C. § 2701(4)–(5); (2) the Tribe facially falls within IGRA's regulatory scheme; (3) no express statutory provision provides otherwise; and (4) the legislative history indicates that Congress acted under the assumption that Texas was one of 45 states in which tribal bingo would be permitted under IGRA. Accordingly, the Court should reconsider *Ysleta I* if given the opportunity.

CONCLUSION

The Tribe respectfully requests that the Court reverse the district court's order and remand for the district court to dissolve the Permanent Injunction.

Dated: May 23, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on May 23, 2018, the foregoing Appellant's Brief was filed via the Court's Electronic Case Filing System and, through that system, notice and service of filing were made upon the following counsel of record:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face, type-style, and type-volume limitations of Federal Rules of Appellate Procedure 32(a)(5), 32(a)(6), and 32(a)(7)(B), as well as Fifth Circuit Rule 32. Excluding the parts exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 11,691 words in proportionately-spaced, size-14, Times New Roman font, as determined by the word-processing program Microsoft Word 2010.

I further certify that all privacy redactions have been made pursuant to Fifth Circuit Rule 25.2.13, that the electronic submission of this brief is an exact copy of any paper document filed pursuant to Fifth Circuit Rule 25.2.1, and that this document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Danny S. Ashby
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Case No. 18-40116

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS,

Plaintiff – Appellee,

vs.

ALABAMA-COUSHATTA TRIBE OF TEXAS,

Defendant – Appellant.

ADDENDUM TO APPELLANT'S BRIEF

Pursuant to Federal Rule of Appellate Procedure 28(f), this Addendum contains a copy of the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Public Law 100-89, 101 Stat. 666 (Aug. 18, 1987) (the "Restoration Act"). The Restoration Act was formerly codified in the United States Code at 25 U.S.C. § 1300g, *et seq.* for the Ysleta del Sur Pueblo, and at 25 U.S.C. § 731 *et seq.* for the Alabama-Coushatta Tribe. Those portions of the United States Code were omitted during the Code's last publication, and thus are no longer available using that citation format. The Public Law version is provided here for the Court's convenience.

Public Law 100-89
100th Congress

An Act

Aug. 18, 1987
[H.R. 818]

To provide for the restoration of the Federal trust relationship and Federal services and assistance to the Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribes of Texas, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act.
25 USC 731 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act".

25 USC 731 note.

SEC. 2. REGULATIONS.

The Secretary of the Interior or his designated representative may promulgate such regulations as may be necessary to carry out the provisions of this Act.

TITLE I—YSLETA DEL SUR PUEBLO RESTORATION

25 USC 1300g.

SEC. 101. DEFINITIONS.

For purposes of this title—

(1) the term "tribe" means the Ysleta del Sur Pueblo (as so designated by section 102);

(2) the term "Secretary" means the Secretary of the Interior or his designated representative;

(3) the term "reservation" means lands within El Paso and Hudspeth Counties, Texas—

(A) held by the tribe on the date of the enactment of this title;

(B) held in trust by the State or by the Texas Indian Commission for the benefit of the tribe on such date;

(C) held in trust for the benefit of the tribe by the Secretary under section 105(g)(2); and

(D) subsequently acquired and held in trust by the Secretary for the benefit of the tribe.

(4) the term "State" means the State of Texas;

(5) the term "Tribal Council" means the governing body of the tribe as recognized by the Texas Indian Commission on the date of enactment of this Act, and such tribal council's successors; and

(6) the term "Tiwa Indians Act" means the Act entitled "An Act relating to the Tiwa Indians of Texas." and approved April 12, 1968 (82 Stat. 93).

25 USC 1300g-1.

SEC. 102. REDESIGNATION OF TRIBE.

The Indians designated as the Tiwa Indians of Ysleta, Texas, by the Tiwa Indians Act shall, on and after the date of the enactment of this title, be known and designated as the Ysleta del Sur Pueblo.

Any reference in any law, map, regulation, document, record, or other paper of the United States to the Tiwa Indians of Ysleta, Texas, shall be deemed to be a reference to the Ysleta del Sur Pueblo.

SEC. 103. RESTORATION OF THE FEDERAL TRUST RELATIONSHIP; FEDERAL SERVICES AND ASSISTANCE. 25 USC 1300g-2.

(a) FEDERAL TRUST RELATIONSHIP.—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 title shall apply to the members of the tribe, the tribe, and the reservation. 25 USC 461.

(b) RESTORATION OF RIGHTS AND PRIVILEGES.—All rights and privileges of the tribe and members of the tribe under any Federal treaty, statute, Executive order, agreement, or under any other authority of the United States which may have been diminished or lost under the Tiwa Indians Act are hereby restored.

(c) FEDERAL SERVICES AND BENEFITS.—Notwithstanding any other provision of law, the tribe and the members of the tribe shall be eligible, on and after the date of the enactment of this title, for all benefits and services furnished to federally recognized Indian tribes.

(d) EFFECT ON PROPERTY RIGHTS AND OTHER OBLIGATIONS.—Except as otherwise specifically provided in this title, the enactment of this title shall not affect any property right or obligation or any contractual right or obligation in existence before the date of the enactment of this title or any obligation for taxes levied before such date.

SEC. 104. STATE AND TRIBAL AUTHORITY. 25 USC 1300g-3.

(a) STATE AUTHORITY.—Nothing in this Act shall affect the power of the State of Texas to enact special legislation benefiting the tribe, and the State is authorized to perform any services benefiting the tribe that are not inconsistent with the provisions of this Act.

(b) TRIBAL AUTHORITY.—The Tribal Council shall represent the tribe and its members in the implementation of this title and shall have full authority and capacity— Contracts. Grants.

(1) to enter into contracts, grant agreements, and other arrangements with any Federal department or agency, and

(2) to administer or operate any program or activity under or in connection with any such contract, agreement, or arrangement, to enter into subcontracts or award grants to provide for the administration of any such program or activity, or to conduct any other activity under or in connection with any such contract, agreement, or arrangement.

SEC. 105. PROVISIONS RELATING TO TRIBAL RESERVATION. 25 USC 1300g-4.

(a) FEDERAL RESERVATION ESTABLISHED.—The reservation is hereby declared to be a Federal Indian reservation for the use and benefit of the tribe without regard to whether legal title to such lands is held in trust by the Secretary.

(b) CONVEYANCE OF LAND BY STATE.—The Secretary shall—

(1) accept any offer from the State to convey title to any land within the reservation held in trust on the date of enactment of this Act by the State or by the Texas Indian Commission for the benefit of the tribe to the Secretary, and

(2) hold such title, upon conveyance by the State, in trust for the benefit of the tribe.

(c) CONVEYANCE OF LAND BY TRIBE.—At the written request of the Tribal Council, the Secretary shall—

(1) accept conveyance by the tribe of title to any land within the reservation held by the tribe on the date of enactment of this Act to the Secretary, and

(2) hold such title, upon such conveyance by the tribe, in trust for the benefit of the tribe.

(d) APPROVAL OF DEED BY ATTORNEY GENERAL.—Notwithstanding any other provision of law or regulation, the Attorney General of the United States shall approve any deed or other instrument which conveys title to land within El Paso or Hudspeth Counties, Texas, to the United States to be held in trust by the Secretary for the benefit of the tribe.

(e) PERMANENT IMPROVEMENTS AUTHORIZED.—Notwithstanding any other provision of law or rule of law, the Secretary or the tribe may erect permanent improvements, improvements of substantial value, or any other improvement authorized by law on the reservation without regard to whether legal title to such lands has been conveyed to the Secretary by the State or the tribe.

(f) CIVIL AND CRIMINAL JURISDICTION WITHIN RESERVATION.—The State shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under sections 401 and 402 of the Act entitled "An Act to prescribe penalties for certain acts of violence or intimidation, and for other purposes." and approved April 11, 1968 (25 U.S.C. 1321, 1322).

(g) ACQUISITION OF LAND BY THE TRIBE AFTER ENACTMENT.—

(1) Notwithstanding any other provision of law, the Tribal Council may, on behalf of the tribe—

(A) acquire land located within El Paso County, or Hudspeth County, Texas, after the date of enactment of this Act and take title to such land in fee simple, and

(B) lease, sell, or otherwise dispose of such land in the same manner in which a private person may do so under the laws of the State.

(2) At the written request of the Tribal Council, the Secretary may—

(A) accept conveyance to the Secretary by the Tribal Council (on behalf of the tribe) of title to any land located within El Paso County, or Hudspeth County, Texas, that is acquired by the Tribal Council in fee simple after the date of enactment of this Act, and

(B) hold such title, upon such conveyance by the Tribal Council, in trust for the benefit of the tribe.

25 USC 1300g-5.

SEC. 106. TIWA INDIANS ACT REPEALED.

82 Stat. 93.

The Tiwa Indians Act is hereby repealed.

25 USC 1300g-6.

SEC. 107. GAMING ACTIVITIES.

(a) IN GENERAL.—All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance

with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.

(b) NO STATE REGULATORY JURISDICTION.—Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

(c) JURISDICTION OVER ENFORCEMENT AGAINST MEMBERS.—Notwithstanding section 105(f), the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

SEC. 108. TRIBAL MEMBERSHIP. 25 USC 1300g-7.

(a) IN GENERAL.—The membership of the tribe shall consist of—

(1) the individuals listed on the Tribal Membership Roll approved by the tribe's Resolution No. TC-5-84 approved December 18, 1984, and approved by the Texas Indian Commission's Resolution No. TIC-85-005 adopted on January 16, 1985; and

(2) a descendant of an individual listed on that Roll if the descendant—

(i) has ⅛ degree or more of Tigua-Ysleta del Sur Pueblo Indian blood, and

(ii) is enrolled by the tribe.

(b) REMOVAL FROM TRIBAL ROLL.—Notwithstanding subsection (a)—

(1) the tribe may remove an individual from tribal membership if it determines that the individual's enrollment was improper; and

(2) the Secretary, in consultation with the tribe, may review the Tribal Membership Roll.

TITLE II—ALABAMA AND COUSHATTA INDIAN TRIBES OF TEXAS

SEC. 201. DEFINITIONS. 25 USC 731.

For purposes of this title—

(1) the term "tribe" means the Alabama and Coushatta Indian Tribes of Texas (considered as one tribe in accordance with section 202);

(2) the term "Secretary" means the Secretary of the Interior or his designated representative;

(3) the term "reservation" means the Alabama and Coushatta Indian Reservation in Polk County, Texas, comprised of—

(A) the lands and other natural resources conveyed to the State of Texas by the Secretary pursuant to the provisions of section 1 of the Act entitled "An Act to provide for the termination of Federal supervision over the property of the Alabama and Coushatta Tribes of Indians of Texas, and the individual members thereof; and for other purposes." and approved August 23, 1954 (25 U.S.C. 721);

(B) the lands and other natural resources purchased for and deeded to the Alabama Indians in accordance with an

act of the legislature of the State of Texas approved February 3, 1854; and

(C) lands subsequently acquired and held in trust by the Secretary for the benefit of the tribe;

(4) the term "State" means the State of Texas;

(5) the term "constitution and bylaws" means the constitution and bylaws of the tribe which were adopted on June 16, 1971; and

(6) the term "Tribal Council" means the governing body of the tribe under the constitution and bylaws.

25 USC 732.

SEC. 202. ALABAMA AND COUSHATTA INDIAN TRIBES OF TEXAS CONSIDERED AS ONE TRIBE.

The Alabama and Coushatta Indian Tribes of Texas shall be considered as one tribal unit for purposes of this title and any other law or rule of law of the United States.

25 USC 733.

SEC. 203. RESTORATION OF THE FEDERAL TRUST RELATIONSHIP; FEDERAL SERVICES AND ASSISTANCE.

(a) FEDERAL TRUST RELATIONSHIP.—The Federal recognition of the tribe and of the 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 title shall apply to the members of the tribe, the tribe, and the reservation.

25 USC 461.

(b) RESTORATION OF RIGHTS AND PRIVILEGES.—All rights and privileges of the tribe and members of the tribe under any Federal treaty, Executive order, agreement, statute, or under any other authority of the United States which may have been diminished or lost under the Act entitled "An Act to provide for the termination of Federal supervision over the property of the Alabama and Coushatta Tribes of Indians of Texas, and the individual members thereof; and for other purposes" and approved August 23, 1954, are hereby restored and such Act shall not apply to the tribe or to members of the tribe after the date of the enactment of this title.

25 USC 721.

(c) FEDERAL BENEFITS AND SERVICES.—Notwithstanding any other provision of law, the tribe and the members of the tribe shall be eligible, on and after the date of the enactment of this title, for all benefits and services furnished to federally recognized Indian tribes.

(d) EFFECT ON PROPERTY RIGHTS AND OTHER OBLIGATIONS.—Except as otherwise specifically provided in this title, the enactment of this title shall not affect any property right or obligation or any contractual right or obligation in existence before the date of the enactment of this title or any obligation for taxes levied before such date.

25 USC 734.

SEC. 204. STATE AND TRIBAL AUTHORITY.

(a) STATE AUTHORITY.—Nothing in this Act shall affect the power of the State of Texas to enact special legislation benefitting the tribe, and the State is authorized to perform any services benefitting the tribe that are not inconsistent with the provisions of this Act.

(b) CURRENT CONSTITUTION AND BYLAWS TO REMAIN IN EFFECT.—Subject to the provisions of section 203(a) of this Act, the constitution and bylaws of the tribe on file with the Committee on Interior and Insular Affairs is hereby declared to be approved for the purposes of section 16 of the Act of June 18, 1934 (48 Stat. 987; 25

U.S.C. 476) except that all reference to the Texas Indian Commission shall be considered as reference to the Secretary of the Interior.

(c) AUTHORITY AND CAPACITY OF TRIBAL COUNCIL.—No provision contained in this title shall affect the power of the Tribal Council to take any action under the constitution and bylaws described in subsection (b). The Tribal Council shall represent the tribe and its members in the implementation of this title and shall have full authority and capacity— Contracts. Grants.

(1) to enter into contracts, grant agreements, and other arrangements with any Federal department or agency;

(2) to administer or operate any program or activity under or in connection with any such contract, agreement, or arrangement, to enter into subcontracts or award grants to provide for the administration of any such program or activity, or to conduct any other activity under or in connection with any such contract, agreement, or arrangement; and

(3) to bind any tribal governing body selected under any new constitution adopted in accordance with section 205 as the successor in interest to the Tribal Council.

SEC. 205. ADOPTION OF NEW CONSTITUTION AND BYLAWS. 25 USC 735.

Upon written request of the tribal council, the Secretary shall hold an election for the members of the tribe for the purpose of adopting a new constitution and bylaws in accordance with section 16 of the Act of June 18, 1934 (25 U.S.C. 476).

SEC. 206. PROVISIONS RELATING TO TRIBAL RESERVATION. 25 USC 736.

(a) FEDERAL RESERVATION ESTABLISHED.—The reservation is hereby declared to be a Federal Indian reservation for the use and benefit of the tribe without regard to whether legal title to such lands is held in trust by the Secretary.

(b) CONVEYANCE OF LAND BY STATE.—The Secretary shall—

(1) accept any offer from the State to convey title to any lands held in trust by the State or the Texas Indian Commission for the benefit of the tribe to the Secretary, and

(2) shall hold such title, upon conveyance by the State, in trust for the benefit of the tribe.

(c) CONVEYANCE OF LAND BY TRIBE.—At the written request of the Tribal Council, the Secretary shall—

(1) accept conveyance by the tribe of title to any lands within the reservation which are held by the tribe to the Secretary, and

(2) hold such title, upon such conveyance by the tribe, in trust for the benefit of the tribe.

(d) APPROVAL OF DEED BY ATTORNEY GENERAL.—Notwithstanding any other provision of law or regulation, the Attorney General of the United States shall approve any deed or other instrument from the State or the tribe which conveys title to lands within the reservation to the United States.

(e) PERMANENT IMPROVEMENTS AUTHORIZED.—Notwithstanding any other provision of law or rule of law, the Secretary or the tribe may erect permanent improvements, improvements of substantial value, or any other improvement authorized by law on the reservation without regard to whether legal title to such lands has been conveyed to the Secretary by the State or the tribe.

(f) CIVIL AND CRIMINAL JURISDICTION WITHIN RESERVATION.—The State shall exercise civil and criminal jurisdiction within the bound-

aries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under sections 401 and 402 of the Act entitled "An Act to prescribe penalties for certain acts of violence or intimidation, and for other purposes" and approved April 11, 1968 (25 U.S.C. 1321, 1322).

25 USC 737.

SEC. 207. GAMING ACTIVITIES.

(a) IN GENERAL.—All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-86-07 which was approved and certified on March 10, 1986.

(b) NO STATE REGULATORY JURISDICTION.—Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

(c) JURISDICTION OVER ENFORCEMENT AGAINST MEMBERS.—Notwithstanding section 206(f), the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

Approved August 18, 1987.

LEGISLATIVE HISTORY—H.R. 318:

HOUSE REPORTS: No. 100-36 (Comm. on Interior and Insular Affairs).
SENATE REPORTS: No. 100-90 (Select Comm. on Indian Affairs).
CONGRESSIONAL RECORD, Vol. 133 (1987):
Apr. 21, considered and passed House.
July 23, considered and passed Senate, amended.
Aug. 3, House concurred in Senate amendments.