Case No. 19-50400

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS,

Plaintiff – Appellee,

vs.

YSLETA DEL SUR PUEBLO, THE TRIBAL COUNCIL, THE TRIBAL GOVERNOR MICHAEL SILVAS or his SUCCESSOR,

Defendants – Appellants.

BRIEF OF AMICUS CURIAE THE ALABAMA-COUSHATTA TRIBE OF TEXAS IN SUPPORT OF APPELLANTS

Appeal from the United States District Court
for the Western District of Texas
U.S.D.C. No. 3:17-CV-179-PRM

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rules of Appellate Procedure 29.2 and 28.2.1, the undersigned counsel of record certifies that, in addition to the persons and entities disclosed in Appellants' opening brief, the following listed persons or entities have an interest in this amicus brief. These representations are made so that the Judges of this Court may evaluate possible disqualification or recusal.

1. The Alabama-Coushatta Tribe of Texas is Amicus Curiae.
2. Danny S. Ashby, David I. Monteiro, Justin R. Chapa, and Megan R. Whisler, of the law firm of Morgan, Lewis & Bockius LLP, serve as counsel to the Alabama-Coushatta Tribe of Texas.
3. Frederick R. Petti and Patricia L. Briones, of the law firm Petti and Briones PLLC, serve as counsel to the Alabama-Coushatta Tribe of Texas.

/s/ Danny S. Ashby
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STATEMENT OF IDENTITY, INTEREST IN THE CASE, AND AUTHORITY TO FILE

The Alabama-Coushatta Tribe of Texas (the "Alabama-Coushatta") is a sovereign, self-governing tribe located near Livingston, Texas that, like the Ysleta del Sur Pueblo (the "Pueblo" and with the Alabama-Coushatta, the "Tribes"), had its trust relationship with the United States restored pursuant to the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act ("Restoration Act"), Public Law No. 100-89, 101 Stat. 666 (1987). The Restoration Act contains two, identical sections on gaming that apply respectively to each of the Tribes. As a result, although the Alabama-Coushatta Tribe is not a party here, history has shown that judicial interpretations of the Restoration Act provision applicable to gaming by the Pueblo will effectively bind the interpretations of the identical provision for the Alabama-Coushatta. The Alabama-Coushatta thus have an exceptional interest in the outcome of this appeal.

Specifically, the Alabama-Coushatta write to address the State's misinterpretation of this Court's precedent, which has given rise to the perceived conflict within the Restoration Act's text. While this Court's decision in *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994) ("*Ysleta I*"), is the law, the State has never explained what happens to Restoration Act § 107(b)–(c) under its interpretation of *Ysleta I* and § 107(a). That is because the State's position over reads *Ysleta I*'s discussion of § 107(a) while jettisoning the other parts of the Act's

text. But *Ysleta I* does not mandate violence to the text of the statute, and thus the State's position must be rejected. The Alabama-Coushatta is well-positioned to offer this Court an alternative that accounts for its precedent and all of the Restoration Act's gaming provisions—not just one.

The Alabama-Coushatta have sought, and obtained, consent from both Appellants and Appellee to the filing of this Brief. In doing so, the Alabama-Coushatta note that this Brief was not authored in whole or in part by counsel for any party, nor did any party, party's counsel, or person—other than amicus curiae, its members, or its counsel—fund the preparation or submission of this Brief. *See* FED. R. APP. P. 29(a)(4)(E).

PRELIMINARY STATEMENT

As the Pueblo's brief makes clear, courts have struggled to apply the Restoration Act to gaming on the Tribes' lands since this Court's decision in *Ysleta I*. However, that struggle does not stem from *Ysleta I* itself, but from a fundamental misinterpretation of *Ysleta I* to require application of all Texas laws *controlling* gaming activities to the Pueblo's lands under Restoration Act § 107(a). *See Texas v. Ysleta del Sur Pueblo*, No. EP-17-CV-179-PRM, 2019 WL 639971, at *7 (W.D. Tex. Feb. 14, 2019) ("[T]he Court is bound by Fifth Circuit precedent and understands Fifth Circuit case law to require that the Tribe follow Texas gaming regulations."). At the same time, courts have recognized that such an interpretation conflicts with the very next section, § 107(b), which forbids Texas from exercising regulatory jurisdiction over gaming on the Tribes' lands. *See id.* ("Admittedly, the Restoration Act does not clearly define what 'regulatory jurisdiction' means.").

Acknowledging that *Ysleta I* binds district courts and subsequent panels of this Court, this case presents an opportunity to resolve—or at minimum provide guidance on—the perceived conflict between *Ysleta I*'s interpretation of the Restoration Act and the text of the Restoration Act. The Court may do so without disturbing *Ysleta I*'s holdings by simply reading *Ysleta I* and the Restoration Act at face value.

Ysleta I did not hold that all Texas gaming laws and regulations concerning gaming activities apply to the Tribes. It instead preserved Texas gaming laws and regulations that *prohibit* gaming activities from the effects of the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Relying on *Cabazon Band*, the Pueblo argued in *Ysleta I* that Texas's decision to allow *some* gaming activities like bingo and a state lottery—rather than prohibiting *all* gaming activities as a matter of public policy—precluded Texas from enforcing *any* state gaming laws on the Tribes' lands, regardless of whether state law selectively allowed or barred individual gaming activities. By holding *Cabazon Band*'s analysis inapplicable to the Restoration Act, however, *Ysleta I* resisted that expansive view and preserved the "ordinary meaning" of "prohibit" in § 107(a) so that the gaming activities "prohibited" on the Tribes' lands would be the same as those banned by Texas law. *See* 36 F.3d at 1332–36. And in this light, *Ysleta I* gives effect to the plain language of § 107(a) by making applicable only those Texas laws that *prohibit* gaming activities.

Freed then from the State's incorrect interpretation of *Ysleta I*, basic principles of statutory construction confirm that the Restoration Act only prohibits gaming activities that are *banned*—not controlled—by Texas law. That construction finds harmony in (1) the plain meaning of the phrase "prohibited" by state law in § 107(a), (2) the restriction on state regulatory jurisdiction found in § 107(b), and (3) the

injunctive remedy granted the State in § 107(c). By contrast, the State's effort to read into § 107(a) the right to enforce all Texas laws *controlling* gaming activities otherwise permitted by Texas creates the very conflict with which courts have struggled below. The Court should therefore reject the State's approach in favor of a conflict-free construction that gives meaning to all the Restoration Act's provisions.

Alternatively, the Court should independently enforce § 107(b) to foreclose the State's assertion of regulatory jurisdiction over the Tribes vis-à-vis its bingo licensing regime. Subjecting the Tribes to this state licensing regime would confer upon the State a form of regulatory control antithetical to (1) the Restoration Act's restriction on state regulatory jurisdiction and (2) the single remedy it affords the State to "enjoin" violations of its provisions.

ARGUMENT

I. *Ysleta I* Does Not Subject the Tribes to All Gaming Laws and Regulations for Gaming Activities Allowed by Texas Law.

In *Ysleta I*, the Pueblo argued that the term "prohibit" in § 107(a) had "special significance in federal Indian law"—that it meant *criminally* "prohibit"—as derived from the *Cabazon Band* analysis applied in Public-Law 280 cases. 36 F.3d at 1333. Public Law 280, Pub. L. No. 83-280 (1953), grants certain states the authority to enforce state criminal laws on Indian reservations (*i.e.*, criminal jurisdiction) and adjudicate civil causes of action in which an Indian is a party; it does not permit states to apply state civil laws on Indian reservations. *See Cabazon Band*, 480 U.S. at 207–08. As the Supreme Court explained in *Cabazon Band*, "when a State seeks to enforce a law within an Indian reservation under the authority of Pub.L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court." *Id*. at 208. To that end, the Supreme Court adopted a framework for classifying state laws as "criminal" or civil" depending on the law's practical effect. *See id*. at 209. Only conduct prohibited outright as a matter of state public policy falls within the state's "criminal

jurisdiction" and therefore is prohibited on Indian reservations under Public Law 280.[1] *See id*. at 209–10.

Applying Public Law 280 in *Cabazon Band*, the Supreme Court held that California could not enforce its gambling laws against an Indian tribe, reasoning that California's gambling laws were not "criminal" in nature because California did not prohibit all gambling outright as a matter of public policy. *See id*. at 210–11. Rather, California regulated gambling by permitting some gaming activities—such as a state lottery, pari-mutuel horse-race betting, and bingo—while prohibiting other gaming activities. *See id*.

Applying the *Cabazon Band* analysis to the Restoration Act, the Pueblo argued in *Ysleta I* that, like California, Texas's gaming prohibitions were not criminal in nature because Texas did not prohibit all gambling outright as a matter of public policy; it only prohibited some forms of gambling while permitting others:

> The Tribe contends that its proposed gaming activities fall within the State's definition of lottery. That is, like a lottery, the Tribe's proposed gaming activities (i.e., baccarat, blackjack, craps, roulette and slot machines) are all games of prize, chance, and consideration. Because the State permits one type of game where the elements are prize, chance

[1] For example, statutes that penalize fraud and theft are considered "criminal" in nature because all forms of fraud and theft are prohibited outright as a matter of public policy. States do not permit some forms of theft or fraud while prohibiting others. Likewise, a state can treat gambling criminally by prohibiting outright all gambling activities, or it can treat gambling as a regulatory matter, by permitting some gaming activities, while prohibiting others.

> and consideration, the State no longer prohibits any other games with the same elements. The State, instead, merely regulates them. Consequently, according to the Tribe, § 107(a) of the Restoration Act does not act as an independent bar to the Tribe's proposed gaming activities.

Ysleta I, 36 F.3d at 1333.[2] The district court there agreed, finding that "[b]y allowing pari-mutuel gambling at horse and dog tracks, various bingo games, and promoting a multi-billion dollar lottery, Texas can no longer assert that it has a broad public policy against gambling…." *Ysleta del Sur Pueblo v. Texas*, 852 F. Supp. 587, 593 (W.D. Tex. 1993).

Ysleta I disagreed, however, holding *Cabazon Band* inapplicable on the ground that § 107(a) applies Texas gaming prohibitions *regardless* of whether they are deemed criminal or civil in nature. 36 F.3d at 1333–34. Where Public Law 280 makes only state prohibitions that are *criminal* in nature applicable to tribal lands, *Ysleta I* concluded that § 107(a) necessarily went further, because its text referenced both criminal *and* civil laws and its legislative history mentioned regulations. *See id*. at 1333 ("[I]f Congress intended for the *Cabazon Band* analysis to control, why

[2] Because Texas prohibited these specific gaming activities, the Pueblo's argument necessarily hinged on showing that (1) the Restoration Act incorporated *Cabazon Band* and (2) Texas's gaming prohibitions were not criminal in nature because Texas permitted some gaming activities and prohibited others. In short, if the Pueblo prevailed under *Cabazon Band*, then Texas laws prohibiting baccarat, blackjack, craps, roulette, and slots were not enforceable on the Pueblo's lands. If *Cabazon Band* did not apply, then Texas laws prohibiting those gaming activities—even if deemed civil in nature—would prohibit them on the Pueblo's lands.

would it provide that one who violates a certain gaming prohibition is subject to a *civil* penalty?"). In the Court's view, the *Cabazon Band* analysis—aimed at identifying and enforcing only *criminal* state-law prohibitions—could not apply to a federal statute that incorporated Texas's criminal *and* civil prohibitions on gaming activities. *See id*. at 1333–34. Thus, rather than incorporate *Cabazon Band*'s definition of "prohibit," *Ysleta I* held that "prohibit" in § 107(a) retained its "ordinary meaning" to "prohibit" the Pueblo "from engaging in any gaming activity prohibited by Texas state law." *See Alabama Coushatta Tribe of Tex. v. Texas*, 66 F. App'x 525 (5th Cir. 2003).

But *Ysleta I* left unanswered what it means for Texas gaming laws and regulations to actually "prohibit" a "gaming activity" under §§ 107(a) and 207(a). And for good reason. In that proceeding, the State sought only to enforce Texas laws that banned gaming activities, *not* laws controlling gaming activities otherwise permitted by Texas law. Notably, the State believed that the Restoration Act barred it from enforcing laws that merely regulated gaming activities on the Tribes' lands, like the Texas Bingo Enabling Act at issue here. *See* State's Conditional Cross-Pet. for Cert., *Texas v. Ysleta del Sur Pueblo*, No. 94-1310, 1995 WL 17048828, at *7–8 (U.S. filed Jan. 30, 1995). Contrary to the district court's determination here, *Ysleta I* never said that the Restoration Act makes the Tribes subject to all Texas

laws governing gaming activities otherwise permitted by Texas law. The Court should decline to perpetuate that misreading here.

Instead, the Court should hold that *Ysleta I* meant only what it said: that the Restoration Act keeps the Tribes from engaging in gaming activities "prohibited" by Texas laws and regulations, using the ordinary meaning of that term. Under that reading, Texas can bar the Tribes from offering only those gaming activities that it bans outright.

II. The Restoration Act Only Prohibits Gaming Activities on the Tribes' Lands That are Truly Banned, Not Permitted Subject to Various Restrictions.

Basic statutory-construction principles confirm that the Restoration Act only prohibits a gaming activity on the Tribes' lands if it is "prohibited" by Texas law and regulations—*i.e.*, is actually forbidden and not merely subject to time, manner, and means restrictions. Under the ordinary meaning of "prohibit," Texas does not prohibit bingo; it regulates it. The Restoration Act therefore does not prohibit bingo on the Tribe's lands. And to the extent the State asks the Court to allow it to apply Texas laws that control—but do not prohibit—bingo, it not only strays from the ordinary meaning of "prohibit," it ignores the express and unambiguous withholding of such regulatory jurisdiction in § 107(b).

A. As a Matter of Plain Text, § 107(a) Bars the Tribes from Offering Only Those Gaming Activities That Are "Prohibited" by Texas Law.

Statutory interpretation begins by reading a statute in light of the "'ordinary meaning of [its] language.'" *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt Dist.*, 541 U.S. 246, 252 (2004) (citation omitted). And given its ordinary meaning, the plain language of § 107(a) does not allow Texas to enforce laws and regulations that merely control gaming activities on tribal lands. Instead, the State may enjoin gaming activities only if they are banned by Texas law.

As discussed further below, Congress understands the difference between laws that "prohibit" conduct and laws that "regulate" conduct. The ordinary meaning of the word "prohibit" is unambiguous. It means "to forbid," "to prevent from doing," to "effectively stop," or "to make impossible." Webster's Third New Int'l Dictionary 1813 (1986); *see also* Black's Law Dictionary 1405 (10th ed. 2014) (defining "prohibit" to mean "1. To forbid by law. 2. To prevent, preclude, or severely hinder."). Accordingly, to "prohibit" a "gaming activity" under the Restoration Act means to forbid that gaming activity by law, as one would expect a state to do if it desired to make that activity impossible to conduct.

That concept starkly contrasts with "regulate." By definition, to "regulate" a gaming activity necessarily means to allow it, even if the State may also "fix the time, amount, degree or rate of" that activity "according to rule[s]." Webster's Third New Int'l Dictionary 1913 (1986); *see also* Black's Law Dictionary 1475 (10th ed.

2014) (defining "regulate" to mean "1. To control (an activity or process) esp. through the implementation of rules.").

By the Restoration Act's plain terms and consistent with *Ysleta I*, the Tribes therefore may engage in gaming activities so long as they are not prohibited by Texas law. *See* 36 F.3d at 1335 (The Restoration Act "govern[s] the determination of whether gaming activities proposed by the [Pueblo] are *allowed* under Texas law, which functions as surrogate federal law." (emphasis added)). If the State allows a gaming activity, however, nothing in the Restoration Act permits Texas to apply all laws and regulations controlling those gaming activities on the Tribes' lands.[3]

If that had been Congress's intent—to subject the Tribes' lands to the full panoply of Texas gaming laws and regulations applicable anywhere else in Texas—Congress knew how to do so and has done so in far more exacting language than that found in § 107(a). *See Bryan v. Itasca County*, 426 U.S. 373, 389–90 (1976) (pointing to several termination acts as "cogent proof that Congress knew well how to express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws and state taxation"). For example, Congress did just that

[3] In advancing this distinction, the Alabama-Coushatta are not arguing here that the Restoration Act incorporates *Cabazon Band* (though it believes it does) or that the Court should apply the *Cabazon Band* criminal-prohibitory/civil-regulatory framework. Instead, its argument is premised on the statute's plain language as used by a legislative body that understands the difference between laws that "prohibit" conduct and laws that "regulate" conduct.

in the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987 (the "Aquinnah Settlement Act")—passed the same day as the Restoration Act—and in other similar restoration and settlement acts enacted both before and after the Restoration Act:

> **Aquinnah Settlement Act**
>
> (g) APPLICATION.—The terms of this section shall apply to land in the town of Gay Head. Any land acquired by the Wampanoag Tribal Council of Gay Head, Inc. that is located outside the town of Gay Head shall be subject to all the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts.
>
> Sec. 9. APPLICABILITY OF STATE LAW.
>
> Except as otherwise expressly provided in this Act or in the State Implementing Act, the settlement lands and any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts, shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance).

Pub. L. No. 100-95, §§ 6(g), 9, 101 Stat. 704, 707, 709–10 (1987) (emphasis added).

> **Rhode Island Indian Claims Settlement Act**
>
> Sec. 9. 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) (emphasis added).

> **Maine Indian Claims Settlement Act of 1980**
>
> Sec. 6. (a) Except as provided in section 8(e) and section 5(d)(4), all Indians, Indian nations, or tribes or bands of Indians in the State of

> Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members, and any lands or natural resources owned by any such Indian, Indian nation, tribe or band of Indians and any lands or natural resources held in trust by the United States, or by any other person or entity, for any such Indian, Indian nation, tribe, or band of Indians shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.

Pub. L. No. 96-420, § 6(a), 94 Stat. 1785, 1793 (1980) (emphasis added).

> **Florida Indian Land Claims Settlement Act of 1982**
>
> (2)(A) The laws of Florida relating to alcoholic beverages, gambling, sale of cigarettes, and their successor laws, shall have the same force and effect within said transferred lands as they have elsewhere within the State and the State shall have jurisdiction over offenses committed by or against Indians under said laws to the same extent the State has jurisdiction over said offenses committed elsewhere within the State.

Pub. L. No. 97-399, § 8(b)(2)(A), 96 Stat. 2012, 2015 (1982) (internal citations omitted; emphasis added).

> **Seminole Indian Land Claims Settlement Act of 1987**
>
> (d)(1) … The laws of Florida relating to alcoholic beverages, gambling, sale of cigarettes, and their successor laws, shall have the same force and effect within said transferred lands as they have elsewhere within the State.

Pub. L. No. 100-228, § 6(d)(1), 101 Stat. 1556, 1560 (1987) (emphasis added).

> **Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993**
>
> (b) GAMES OF CHANCE GENERALLY.—The Tribe shall have the rights and responsibilities set forth in the Settlement Agreement and the State Act with respect to the conduct of games of chance. Except as specifically set forth in the Settlement Agreement and the State Act, all

> laws, ordinances, and regulations of the State, and its political subdivisions, shall govern the regulation of gambling devices and the conduct of gambling or wagering by the Tribe on and off the Reservation.

Pub. L. No. 103-116, § 14(b), 107 Stat. 1118, 1136 (1993) (emphasis added).

Construing the Restoration Act *in pari materia* with these acts shows that if Congress had intended for gaming activities on the Tribes' lands to be subject to all Texas laws concerning gaming activities, "it would have expressly said so." *Bryan*, 426 U.S. at 390.

For when Congress enacts laws affecting Indian tribes, it does so against the backdrop of Supreme Court precedent that requires Congress to "unequivocally" express when it intends to abrogate tribal sovereignty and immunity in favor of state encroachment. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014). "That rule of construction," the Supreme Court recently noted, "reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Id*. "Indian tribes retain 'attributes of sovereignty over both their members and their territory,' and that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.'" *Cabazon Band*, 480 U.S. at 207 (citations omitted).

Thus, state laws may be applied to tribal lands only "if Congress has expressly so provided," *id*., and if Congress's expressions are ambiguous, then they must "be

construed liberally in favor of the Indians," *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Here, the only language in the Restoration Act that speaks to the types of gaming activities that the Tribes may conduct appears in §§ 107(a) and 207(a). And that language says 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." Applying *Ysleta I*'s "ordinary meaning" requirement to that language means that the State can demand that the Tribes forego gaming activities that it bans, but that it must tolerate the Tribes' efforts to offer gaming activities that it allows subject to various rules.

B. Interpreting § 107(a) to Allow State Control Over the Tribes' Gaming Conflicts with the Other Gaming Provisions in the Restoration Act.

That the term "prohibit" in § 107(a) retains its ordinary meaning finds further support from its neighboring provisions consistent with the "cardinal rule that a statute is to be read as a whole, in order not to render portions of it inconsistent or devoid of meaning." *In re Burnett*, 635 F.3d 169, 172 (5th Cir. 2011) (quotations and citations omitted). Read as a whole, the Restoration Act's gaming provisions reflect an unambiguous intent to forbid gaming activities on the Tribes' lands that are forbidden by Texas law. *See Atchison v. Collins*, 288 F.3d 177, 181 (5th Cir. 2002) (reading together two provisions as "part of a coherent scheme, given that they appear next to each other in the same section of the statute").

First, § 107(b) instructs that "[n]othing in [§ 107] shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." When given its ordinary meaning, § 107(a) complements § 107(b) by forbidding on the Tribes' lands those gaming activities banned by Texas law, without giving the State any say over gaming activities conducted on the Tribes' lands that the State permits elsewhere, albeit regulated. To interpret § 107(a) otherwise would essentially nullify the jurisdictional exclusion in §107(b).

Indeed, the State held that view in the *Ysleta I* proceedings. At that time, the State *agreed* that the Restoration Act precluded it from applying gaming regulations to gaming activities conducted on the Tribes' lands that were not banned outright by state law, expressly citing Texas's Bingo Enabling Act and its associated regulatory scheme as an example. *See* State's Cross-Pet. for Cert., 1995 WL 17048828, at *7–8. For that very reason, the State urged the Supreme Court to overturn *Ysleta I*'s determination that the Indian Gaming Regulatory Act did not apply to the Tribes. "[W]ithout the framework provided by IGRA," the State then-said, "it would not be possible to regulate those [bingo] activities since the state has no regulatory, civil or criminal jurisdiction over gaming on Tribal lands." *Id*. at *8.

The plain and ordinary meaning of § 107(a) also dovetails with the remedy provided to the State in § 107(c), which only gives the State the right to "bring[] an action in the courts of the United States to enjoin violations of the provisions of

[section 107]." It makes sense that, if the Tribes engage in gaming activities prohibited by Texas law in violation of § 107(a), Congress afforded the State the ability to apply for an injunction to shut down those gaming activities, consistent with Texas's gaming bans.[4]

By contrast, the construction of § 107(a) advanced by the State in the years after *Ysleta I* makes little sense in combination with the rest of § 107. Section 107(b) expressly bars the State from exercising regulatory jurisdiction over gaming on the Tribes' lands, but that is the precise result of the State's position that § 107(a) requires application of *all* Texas gaming laws and regulations concerning *every* gaming activity on the Tribes' lands. That approach also converts the injunctive remedy in § 107(c) into a unwieldy regulatory tool of the State, as recognized by a prior district court considering a dispute between the State and the Pueblo. *See Texas v. Ysleta del Sur Pueblo*, No. EP-99-CV-320-KC, 2016 WL 3039991, at *19–21 (W.D. Tex. filed May 27, 2016).

An example best illustrates the inherent difficulty in the State's position. Of note, the Texas Bingo Enabling Act essentially imposes a tax on bingo: first, by imposing a fee to obtain, renew, or amend a bingo license, TEX. OCC. CODE

[4] While the Restoration Act only accords the State injunctive relief to enjoin violations of § 107(a), it grants the United States authority to seek any applicable state civil or criminal penalties for violations of Texas's gaming bans. *See id.*

§§ 2001.158–159, 2001.306, and, second, by imposing a "prize fee" that must be collected and remitted to the Texas Lottery Commission, *id.* § 2001.502–504. As this Court recognized in *Ysleta I*, however, § 107(b) of the Restoration Act is "a restatement of Public Law 280" in the sense that it withholds state regulatory jurisdiction. 36 F.3d at 1334. And in *Bryan*, the Supreme Court held that the imposition of a state tax violates Public Law 280's proscription on state regulatory jurisdiction. *See* 426 U.S. at 387–89.

The State's construction of § 107(a) thus creates an inevitable conflict with §107(b) because imposing taxes on bingo conducted on the Tribes' lands constitutes (1) a quintessential assertion of state "regulatory jurisdiction" foreclosed by § 107(b), and (2) an abrogation of tribal sovereign immunity not expressly found in the Restoration Act's text. In addition, the remedy Congress provided in § 107(c) to "enjoin" violations of § 107(a) would prove a poor, if not outright unmanageable, form of relief. Because a court could not compel the Tribes' payment, its only recourse might be to enjoin the Tribes from engaging in further bingo pending payment of the required fees. However, that too would violate § 107(c) because the court would not be "enjoin[ing]" the "violation" itself (*i.e.*, the non-payment); instead, it would be using the injunctive remedy to coerce the Tribes' payment.

The Court therefore should reject the State's interpretation and instead adopt a construction of the Restoration Act that gives meaning to all of its provisions.

Ysleta I points to such a construction. The Court can interpret § 107(a) to ban gaming activities on the Tribes' lands that are forbidden, not controlled, by Texas laws. *Cf. Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 622 (5th Cir. 2013) ("[I]f possible, we interpret provisions of a statute in a manner that renders them compatible, not contradictory.").

C. The Legislative History Confirms That Congress Only Intended to Impose Texas Gaming "Bans" on the Tribes' Lands.

Because the plain text of the Restoration Act's gaming provisions foreclose the State's position, the Court's inquiry may end there. *See Asadi*, 720 F.3d at 622. Yet the Restoration Act's legislative history also supports an interpretation consistent with § 107(a)'s ordinary meaning. Indeed, the legislative reports conspicuously omit any mention of a congressional intent to subject the Tribes' lands to state laws controlling gaming activities otherwise permitted by Texas law. And such an omission, as the Supreme Court has observed, "has significance in the application of the canons of construction applicable to statutes affecting Indian immunities, as some mention would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress." *Bryan*, 426 U.S. at 381.

Instead, and consistent with the ordinary meaning of "prohibit," the legislative history speaks only in terms of enforcing a gaming "ban" or "banning" gaming activities—not controlling or overseeing gaming activities—on the Tribes' lands.

See, e.g., S. Rep. No. 90, 100th Cong., 1st Sess. (1987). The Senate Report states that "anyone who violates the federal *ban* on gaming contained in Sections 107 and 207 will be subject to the same civil and criminal penalties that are provided under Texas law." *Id*. at 8–9 (emphasis added). And, the Report explains, § 107(b) was "added to make it clear that Congress does not intend, by *banning* gaming and adopting state penalties as federal penalties, to in any way grant civil or criminal regulatory jurisdiction to the State of Texas." *Id*. at 9 (emphasis added). Similarly, the Report says that § 107(c) "grant[s] to the federal courts exclusive jurisdiction over offenses committed in violation of the federal gaming *ban* and make[s] it clear that the State of Texas may seek injunctive relief in federal courts *to enforce the gaming ban*." *Id*. (emphasis added).

That the Restoration Act applies Texas laws to *ban*, as opposed to *control*, gaming activities on the Tribes' lands also accords with the Tribal Resolutions passed by the Tribes, where the State's preferred construction does not. Section 107(a) says that its provisions were "enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86," which requested an absolute gaming ban that would have prohibited on the Tribes' lands "all gaming, gambling, lottery, or bingo, *as defined by* the laws and administrative regulations of the State of Texas." *Ysleta I*, 36 F.3d at 1328 n.2 (emphasis added). Although Congress initially included that absolute gaming ban in an early version of the Restoration Act, Congress ultimately

removed that language in favor of the language now found in §107(a). *See Texas v. Alabama-Coushatta Tribe of Tex.*, 918 F.3d 440, 443 n.3 (5th Cir. 2019) (noting that "the stringent prohibition proposed by the resolution was not included" in the Restoration Act).[5]

Instead of prohibiting "all gaming, gambling, lottery or bingo, *as defined by* the laws and administrative regulations of the State of Texas," the enacted version of § 107(a) prohibits only those "gaming activities *which are prohibited by* the laws of the State of Texas."[6] *See Ysleta*, 36 F.3d at 1328–29. In doing so, the Senate Report notes, the "central purpose" of §§ 107 and 207 "*to ban gaming* on the reservations as a matter of federal law" remained "unchanged." S. Rep. No. 90 at 8 (emphasis added). As such, the gaming ban enacted into the Restoration Act "accord[s] with the tribe's request" to the extent it imposes a gaming ban narrower than (*i.e.*, within the scope of) the absolute gaming ban originally requested. By

[5] The Senate Report's reference to the absolute gaming ban that was ultimately omitted from the Act almost certainly is a scrivener's error. *Implementation of the Tex. Restoration Act: Hr'g Before the S. Comm. on Indian Affairs*, 107th Cong. 7–9 (June 18, 2002) (statement of Alex Skibine, Professor of Law, Univ. of Utah).

[6] As one court noted, "[t]he 'as defined' versus 'which are prohibited' difference could have been significant because if Texas law 'defined' certain gaming or gambling activities but the[n] legalized same (i.e., did not 'prohibit' such activities) then the prior version of § 107(a) would have prevented the Tribe from engaging in such activities on its reservation even though everyone else in Texas could engage in those activities." *Texas v. Ysleta del Sur Pueblo*, 220 F. Supp. 2d 668, 685 n.9 (W.D. Tex. 2001).

contrast, applying all Texas laws that control—as opposed to ban—gaming activities on the Tribes' lands does not.

D. Texas's Laws and Regulations Do Not Prohibit Bingo.

Turning to the facts here, the Restoration Act cannot support the decision reached by the district court. The State cannot prohibit bingo on the Tribe's lands because—applying the "ordinary meaning" of "prohibit" per *Ysleta I*—Texas's laws and regulations do not forbid the gaming activity of bingo. Instead, Texas permits bingo subject to a "complex statutory and regulatory scheme," *Ysleta*, 2019 WL 639971, at *9 n.8, that specifies various rules for bingo, including the who, when, where, why and how one may engage in bingo.

That is, the Texas Bingo Enabling Act restricts *who* may conduct bingo to religious societies, certain nonprofit organizations, fraternal organizations, veterans organizations, volunteer fire departments, and volunteer emergency medical service providers—and even then those groups must obtain a license from the Texas Lottery Commission after completing an application and paying a licensing fee. TEX. OCC. CODE § 2001.101. The Bingo Enabling Act restricts *when* one may play bingo by limiting the frequency and duration of "bingo occasions" to three bingo occasions per week, each occasion not to exceed four hours, and no more than two bingo occasions per day. *Id*. § 2001.419. It restricts *where* one may play bingo. *See, e.g.*, *id*. § 2001.402 ("Bingo may not be conducted at more than one premise on property

owned or leased by a licensed authorized organization."). And it restricts *how* one may play bingo by, for example, regulating the form of bingo cards, *id*. § 2001.506, the use of bingo aids and equipment, *see, e.g.*, *id*. §§ 2001.407–409, and the kinds of prizes that may be awarded for a bingo, *id*. § 2001.420. It also restricts the reasons for which one may conduct a bingo game, and the use of funds derived from bingo. *Id*. § 2001.454.

Because such manner and means laws merely control—and do not forbid—the gaming activity of bingo, the district court's application of such restrictions to enjoin bingo conducted on the Pueblo's lands is inconsistent with the plain language of § 107(a), violates the proscription on state regulatory jurisdiction contained in § 107(b), and constitutes an abuse of the injunctive remedy provided in § 107(c) of the Restoration Act.

III. Alternatively, § 107(b) Independently Precludes Texas from Enforcing a Licensing Regime to Gaming Activities on the Tribes' Lands.

The Alabama-Coushatta maintain that the Restoration Act's terms should be accorded their plain and ordinary meaning to foreclose application of Texas laws that merely control, but do not prohibit, gaming activities on the Tribes' lands. But even if the Court interprets § 107(a) to apply all Texas laws and regulations governing gaming activities to the Tribes' lands, the Court should still effectuate § 107(b)'s proscription on state regulatory jurisdiction by foreclosing application of the State's bingo licensing regime to the Tribes.

A permitting or licensing regime is an enforcement mechanism that constitutes a quintessential assertion of "regulatory jurisdiction" proscribed by § 107(b). *See, e.g.*, *Hancock v. Train*, 96 S. Ct. 2006, 2013–15 (1976) (state permit requirements were "enforcement mechanism" that impermissibly asserted "state regulation and control" over federal facilities). Through its ability to grant, deny, revoke, or amend licenses, the State can effectively exert control over bingo on the Tribes' lands to compel compliance with State gaming laws in a manner inconsistent with Congress's intent that the State (1) not exercise such regulatory jurisdiction per § 107(b) and (2) enforce its laws only via the injunctive remedy in § 107(c).

Furthermore, a licensing regime is a form of State interference and control distinct from laws that simply require individuals to self-regulate their conduct consistent with state law. A hypothetical illustrates the difference. If the State wished to restrict fishing on a lake, it could do so in one of two ways: by passing laws that fishers must follow (self-regulate) or subjecting fishing on the lake to a licensing scheme (state-regulate). With respect to the former, the State could, for example, pass a law that restricts fishing to striped bass, in which case all fishers would have to regulate their conduct accordingly by only fishing for striped bass as provided by law. Alternatively, the State could pass a law that only permits fishing on the lake subject to a state-issued license that, in turn, only permits fishing for striped bass. In contrast to the former scenario, the State exercises active control

over individuals that wish to fish on the lake through its ability to grant, deny, suspend or revoke the license and, alternatively, to place restrictions on an individual's license.

With respect to bingo, Texas has chosen the latter path. It only permits parties to conduct bingo pursuant to a license issued by the Texas Lottery Commission. *See* TEX. OCC. CODE §§ 2001.101–102, 2001.411. Texas laws and regulations in turn impose manner and means restrictions on bingo licensees. *See, e.g., id.* §§ 2001.106(3) (licensee must specify "address of the premises where and the time when bingo is to be conducted"), 2001.407 ("A licensed authorized organization may lease or purchase electronic or mechanical card-mind devices . . . directly from a licensed distributer"), 2001.419 (precluding a "licensed authorized organization" from conduct[ing] more than three bingo occasions during a calendar week"). The failure to adhere to those restrictions may result in the revocation or suspension of the bingo license. *See id.* § 2001.353 (permitting the commission to suspend, revoke, or refuse to renew a license for failure to comply with laws, regulations, or rules).

Texas could have structured its bingo laws to permit bingo in a form that is self-regulated as opposed to the state-regulated licensing regime that it chose. *Cf., e.g., Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310, 315 (5th Cir. 1981) (noting that horse-race betting was self-regulated in Florida, whereas bingo was state-regulated through licensing). In choosing the latter, however, the State adopted a

regulatory scheme that cannot be applied to the Tribes in light of §107(b)'s proscription on state regulatory jurisdiction. The district court's application of Texas laws respecting bingo to the Pueblo's lands therefore violates the Restoration Act for this additional reason.

CONCLUSION

The order and permanent injunction entered by the district court should be reversed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on August 23, 2019, the foregoing Brief of Amicus Curiae The Alabama-Coushatta Tribe of Texas was filed via the Court's Electronic Case Filing System and, through that system, notice and service of filing were made upon all counsel of record, including the following:

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I certify that Counsel for Amicus Curiae conferred with Counsel for Appellants and Counsel for Appellee, and both Parties consented to the Alabama-Coushatta Tribe of Texas's submission of this Brief as amicus curiae.

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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 29 and 32 and Fifth Circuit Rule 32. *See* FED. R. APP. P. 29(a)(4), 29(b)(4), 32(g)(1). Excluding the parts exempted by the Federal Rules of Appellate Procedure 32, this Brief contains 6,482 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 and that the electronic submission of this Brief is an exact copy of any paper document filed pursuant to Fifth Circuit Rule 25.2.1.

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