NO. 19-50400

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS,
Plaintiff – Appellee

v.

YSLETA DEL SUR PUEBLO, THE TRIBAL COUNCIL, TRIBAL GOVERNOR MICHAEL SILVAS or his SUCCESSOR,
Defendants – Appellants.

On Appeal from the United States District Court for the
Western District of Texas, El Paso Division
Civil Action No. 03:17-CV-00179-PRM

APPELLANTS' REPLY BRIEF

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I. The State Ignores the Central Question of this Appeal.

While the State's Response goes to great lengths to contend that all relevant issues have been settled by *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994) ("*Ysleta I*"), the State fails to actually address, much less answer, the question at the heart of the Pueblo's brief: the meaning and application of the restriction against the State of Texas exercising regulatory jurisdiction over the Pueblo's gaming activities codified in Section 107(b) of the Restoration Act. This question has confused and troubled the district courts for over a decade, causing changing legal approaches to regulating Tribal gaming. The district court below acknowledged this confusion, especially as it pertains to Section 107(b), expressly acknowledging the need for clarity from this Court during this Appeal. The State chooses to ignore this reality in its Response, which is largely a recitation of the *Ysleta I* opinion because it knows that any reasonable construction of Section 107(b) will curtail its powers to continue regulating Tribal gaming. But at some point, the unambiguous intent of Congress to restrict the State from exercising regulatory authority over sovereign Tribal affairs must be given practical meaning.

Rather than provide a coherent explanation for the meaning of Section 107(b)—which the State cannot do without undermining its impermissible regulatory efforts—the State attempts to reframe this Appeal as a referendum on

precedent. But the State's refusal to engage with the central question before the Court highlights that the State cannot offer a construction of Section 107(b) that is consistent with the statute's plain language and legislative history. When properly construed and applied to the facts of this case, the district court's Order No. 183 must be reversed as an improper exercise of State regulatory jurisdiction over the Pueblo's bingo operations.

A. The State fails to provide a coherent interpretation of Section 107(b).

As set forth in the Pueblo's Questions Presented, this Appeal centers on the meaning and application of Section 107(b) to the Pueblo's recent bingo activities. Uncomfortable with this question, the State attempts to reframe the case through its own questions, all designed to fit this dispute into the precedential impact of *Ysleta I*. But, contrary to the State's position that precedent has fully resolved the questions raised in this Appeal, the courts remain deeply confused concerning Section 107(b)'s meaning.

Judge Martinez, who entered the Injunction below, opined that the Pueblo exists in a "twilight zone of state, federal, and sovereign authority where the outer legal limit of their conduct is difficult to assess with precision." ROA.943. In granting the Pueblo's Motion to Stay enforcement of the Injunction pending this Appeal, Judge Martinez further articulated what each prior district judge has expressed when grappling with these very issues: "Significantly, the Court believes

that the precise meaning of 'regulatory jurisdiction,' as used in Section 107(b) of the Restoration Act remains unclear." ROA.3027-28. This confusion led the district courts charged with resolving these disputes to experiment with ever-changing approaches to monitoring Tribal gaming, causing shifting procedural requirements and legal standards. In short, *Ysleta I* has proven an imperfect guide for resolving future gaming disputes, particularly in the face of changing Tribal activities and ever-expanding State regulatory approaches. Much of this confusion may be attributed to the lack of a clear understanding of the import and effect of Section 107(b).

The State's Response wholly fails to address the proper construction of Section 107(b), or offer analysis grounded in statutory text or legislative history concerning the meaning of "regulatory jurisdiction." Indeed, the State's *only* attempted explanation for the meaning of Section 107(b) falls in a footnote, where the State tersely comments that Section 107(b)'s "disavowal" of civil or criminal regulatory jurisdiction to the State of Texas "just means that Texas cannot enforce its gaming laws in *Texas courts*." Resp. 17 n.11. Without any support from the statutory text, legislative history, or contemporaneous law, the State simply concludes that Congress only intended for the State to regulate Tribal gaming in *federal* rather than *state* courts. But is this really what Congress intended by adding Section 107(b) as a standalone section of the Restoration Act? Or is the State instead

attempting to render Section 107(b) as mere surplusage in its attempt to justify decades of improper regulatory authority over sovereign Tribal affairs?

Section 107(b) makes no distinction between *state* or *federal* courts, or otherwise references *where* the State can regulate Tribal affairs. Instead, Section 107(b) clearly focuses on *what the State is forbidden from doing*: exercising regulatory jurisdiction over Tribal gaming activities. If left unchecked, the State would be free to exercise "regulatory jurisdiction" through the federal courts, as it has for years. The Restoration Act provides no support for the idea that Congress intended to permit State regulation through federal courts, and disallow such regulation in state court. Indeed, in modifying a prior injunction, Judge Cardone aptly noted that "nothing in the Restoration Act operates as a grant of civil or criminal regulatory jurisdiction to the federal courts," and proceeded to remove the prior district court's judicially created mechanism requiring the Tribes to obtain pre-approval for any gaming activities. *State of Texas v. Ysleta del Sur Pueblo*, No. EP-99-CV-320-KC, 2016 WL 3039991, at *20 (W.D. Tex. May 27, 2016). Accordingly, the State's sole attempt at construing Section 107(b), in a brief footnote, is inconsistent with the plain language of the text, illogical, and lacks legislative support.

Moreover, the State acknowledges that Section 107(b) is not so narrow, and instead operates to limit the State's regulatory powers in ways that have nothing to

do with judicial limitations. In addressing the State's troublesome habit of encroaching on the Pueblo's lands to conduct clandestine inspections, "the district court has declined to read *Ysleta I* 'as standing for the proposition that, by extension, Texas criminal procedure ***and civil investigatory powers also serve as surrogate federal law***. To the contrary, '[n]othing in [§ 1300g-6] shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.'" Resp. 20. (quoting *Texas v. Ysleta del Sur Pueblo, et al*., No. EP-99 CA-320-H, ECF No. 483 at 3-4 (August 24, 2014) [*sic*] (quoting 25 U.S.C. § 1300g-6(b)) (emphasis added).

The State understands that Section 107(b) is not merely an instruction to seek enforcement of gaming laws through federal courts, as opposed to Texas courts. That it takes this unsupported stance in its Response is a perfect illustration of the current confusion regarding Section 107(b), and the danger posed to the Pueblo through the State's unmoored interpretation of the Section.

B. The consequences of the lack of guidance concerning Section 107(b) frustrate legislative intent and result in the State asserting unauthorized power.

The State's myopic interpretation of the Restoration Act, particularly as to the restrictions imposed by Section 107(b), flies in the face of legislative history, and has resulted in the State of Texas asserting jurisdiction over the Pueblo that was never envisioned by the Restoration Act. The Pueblo gave a comprehensive presentation of the Restoration Act's legislative history in its opening brief, Br. 8-

11, but will focus here to focus on a particularly troubling misinterpretation of that history. The Pueblo will also show the Court the danger inherent in permitting the State to interpret its own regulatory authority in the absence of clear judicial direction concerning Section 107(b)'s preclusion of regulatory jurisdiction to the State.

i. The State's position concerning Section 107(b) ignores legislative intent.

The State believes it possesses regulatory authority over the Pueblo because of a resolution passed by the Pueblo in 1986—a resolution that was never incorporated into federal law. Resp. 12. The State overstates the importance of Tribal Resolution T.C.–02–86 (the "1986 Resolution"). Congress did not adopt or incorporate the 1986 Resolution into the Restoration Act, while previous drafts intended to do exactly that.

The Restoration Act went through several iterations before it was passed by Congress. *See* Br. 8-11. Following failures in 1984, 1985, and 1986, the Restoration Act was again brought to the House as H.R. 318. Br. 10. Pertaining to the 1986 Resolution, H.R. 318 included the following language:

> Pursuant to Tribal Resolution No. T.C.-02-86, which was approved and certified on March 12, 1986, all gaming as defined by the laws of the State of Texas shall be prohibited on the tribal reservation and on tribal lands.

This language clearly references and incorporates the 1986 Resolution. But this language was soon jettisoned following the Supreme Court's ruling in *Cabazon Band*. The Senate replaced the previous language in H.R. 318 with the following:

> 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.

133 Cong. Rec. 20,957 (1987). The Senate Committee also added what are now Sections 107(b) and 107(c).

Rather than incorporating the 1986 Resolution, the new form of Section 107(a) merely states that it is enacted "in accordance with the tribe's request in [the 1986 Resolution]." The "request" in the 1986 Resolution asks Congress to insert language into the 1985 draft of the Restoration Act to read "provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, shall be prohibited on the Tribe's reservation or on tribal land." ROA.2839. But Congress ignored this request, and instead specifically omitted the words "***administrative regulations***" from the Restoration Act when it eventually passed in 1987. The deletion of a provision from bill in conference committee "strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Copp Paving Co., Inc*., 419 U.S. 186,

200 (1974). Moreover, a word omitted by Congress must not be revived by a court. *West Virginia Univ. Hosp. Inc. v. Casey*, 499 U.S. 83 (1991) ("To supply omissions transcends the judicial function.").

This omission is directly pertinent to this Court's understanding of the Restoration Act, especially when coupled with the legislative history that explains the intentional omission of "administrative regulations" from the Restoration Act. During the debate over H.R. 318, the Supreme Court released its decision in *Cabazon Band*. In suggesting that the House pass the Restoration Act as amended by the Senate to exclude "administrative regulations" from the text, Congressman Morris Udall of the House Committee on Interior and Insular Affairs clearly stated the influence of *Cabazon Band* on the Restoration Act:

> It is my understanding that the Senate amendments to [Section 107] are in line with the rational[e] of the recent Supreme Court decision in the case of Cabazon Band of Mission Indians versus California. This amendment in effect would codify for the tribes the holding and rational[e] adopted in the Court's opinion in the case.

133 Cong. Rec. H6972-05, 1987 WL 943894 (Aug. 3, 1987) (Statements of Reps. Vento and Udall). Importantly, the Senate's amendments to Section 107 included the insertion of Section 107(b). The State argues that the uncodified 1986 Resolution—which does not reflect Section 107(b)—should govern the interpretation of the Restoration Act, rather than the codified holding in *Cabazon Band*. Resp. 15.

The State again gives short shrift to the legislative intent explained by statements on the floor made by Congressman Udall because the intent of these statements so unambiguously supports the Pueblo's position. Resp. 21. The State diminishes the import of Congressman Udall's instructive statement as merely "a single floor statement." Resp. 21. But Congressman Udall was not merely a member of the House of Representatives, he was Chairman of the House Interior and Insular Affairs Committee, the House committee having exclusive jurisdiction over all Indian gaming legislation. Far from "a single floor statement" of an uninitiated member of Congress, Chairman Udall's statement directly preceding the passage of the Restoration Act is more in the vein of "explanatory statements . . . made by the committee member in charge of a bill in course of passage" which are understood to be "in the nature of a supplemental report" and "may be regarded as an exposition of the legislative intent." *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474-75 (1921); *see also United States v. St. Paul, M. & M. Ry. Co.*, 247 U.S. 310, 318, (1918) (statements of the committee chairman in charge of a bill stand upon a different footing than debates in Congress and may be resorted to); *Mississippi Poultry Ass 'n v. Madigan*, 31 F.3d 293, 306 (5th Cir. 1994); *Cooper v. Gen. Dynamics, Convair Aerospace Div., Ft. Worth Operation* , 533 F.2d 163, 168 n.9 (5th Cir. 1976) cert. denied 433 U.S. 908 (1977).

Consequently, the State's repeated reliance on the 1986 Resolution is misplaced. The Restoration Act, absent "administrative regulations" and including Section 107(b), is the law, not the 1986 Resolution. The Pueblo should not be subjected to language that was never enacted into law.

ii. The Pueblo's sovereign bingo operation is not illegal, and the State is not authorized to employ investigative power to violate the Pueblo's sovereignty.

For bingo offered on the Pueblo's lands pursuant to the Restoration Act, Texas's laws are limited to the Constitution and those portions of the enabling act that are not part of the constitutional directive that the legislature "regulate" bingo games. *Texas v. Ysleta Del Sur Pueblo*, No. EP-99-CA-320-H, 2009 WL 10679419, at *3 (W.D. Tex. Aug. 4, 2009) ("In 2002, Judge Eisele recognized the tension that existed between Chapter 2001 of the Texas Occupations Code on the one hand and the Restoration Act, 25 U.S.C. § 1300g, on the other."). The Pueblo's bingo operations are legal under these laws.

The Attorney General of Texas has issued a decision confirming that there is no authority to regulate bingo on Indian reservations. Tex. Att'y Gen. Op. No. JM-1040 (1989). Indeed, this Court in *Alabama-Coushatta* recognized, contrary to what the State argues, that the Restoration Act "bars Texas from asserting regulatory control over otherwise legal gaming on the [Restoration Tribes'] reservation and lands." *Texas v. Alabama-Coushatta Tribe of Texas*, 918 F.3d 440, 443 (5th Cir.

2019) *petition for cert. filed* (U.S. Sept. 25, 2019) (No. 19-403) ("*Alabama-Coushatta*") (citing to Restoration Act § 207(b), 101 Stat. at 672, the mirror-image to § 107(b)). Bingo is legal in Texas. And Texas cannot regulate legal gaming on Pueblo land.

At the State's insistence, however, the court below found that two sets of regulations determine the legitimacy of the Pueblo's bingo operation: the Bingo Enabling Act and Texas's Charitable Bingo Administrative Rules. ROA.2860. Absent the application of these two regulatory schemes, the Pueblo's bingo gaming is entirely legal.

The Bingo Enabling Act expressly authorizes bingo with a detailed regulatory scheme overseen by the Texas Lottery Commission. *See* TEX. OCC. CODE ANN. § 2001.001 *et seq*.; *see also* TEX. ADMIN. CODE § 402.200; *see also Dep't of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm'n*, 760 F.3d 427, 437 (5th Cir. 2014) ("[W]e hold that the Bingo [Enabling] Act creates a regulatory regime that grants the Charities a benefit—in the form of a license—to conduct bingo games . . ."). Importantly, this Court has held that the Bingo Act "***regulates*** all bingo-related activities, including the types of games played, game frequency and times, and bingo-employee qualifications." 760 F.3d at 437. (emphasis added).

Absent the regulations imposed by the Bingo Enabling Act, the Pueblo violates no Texas law. The State argues only that "public-policy has long disfavored

casino-style gaming." Resp. 18. But the State's characterization of the bingo gaming at Speaking Rock as "casino-style" is of no force because "Texas law does not focus on how bingo equipment looks and sounds to determine whether it is legal." ROA.2863. The State, however, brought this lawsuit to enjoin what it believed to be games that look and sound like "casino-style" games after a clandestine inspection of Speaking Rock that intruded on the Pueblo's sovereignty and imposed civil investigatory powers not authorized by the Restoration Act.

This Court has acknowledged that the Texas Lottery Commission is the "state agency responsible for bingo licensing and regulation." *Texas Lottery Com'n*, 760 F.3d at 431. The State admits that it "regulates bingo through the Texas Lottery Commission's Charitable Bingo Operations Division…." ROA.1877. The Charitable Bingo Operations Division is a law-enforcement agency. *Texas Lottery Com'n*, 760 F.3d at 437 (quoting Tex. Att'y Gen., Informal Letter Ruling No. OR2012–14155, 2012 WL 4041287, at *2 (Sept. 6, 2012) ("This office has determined the [C]ommission is a law enforcement agency.") (citations omitted). Consequently, the imposition of Texas regulations on the Pueblo's operations also opens the Pueblo up to impermissible law-enforcement infringement on Pueblo land.

As the State acknowledges, "the district court has declined to read *Ysleta I* 'as standing for the proposition that, by extension, Texas criminal procedure ***and civil investigatory powers also serve as surrogate federal law***." Resp. 20. (quoting *Texas*

v. Ysleta del Sur Pueblo, et al., No. EP-99 CA-320-H, ECF No. 483 at 3-4 (emphasis added). But the State's interpretation of Section 107(b) to be merely a choice of venue clause, rather than a ban on regulatory jurisdiction, has operated as a Trojan Horse the State uses to justify increasing regulatory oversight wielded by an administrative law-enforcement agency, in direct affront to the Pueblo's sovereignty.

The Pueblo did not consent to this imposition, and the State cannot simply assume this power as inherent absent a clear mandate. Congress is required to employ clear and unequivocal language when it terminates Tribal sovereign rights. *See Mattz v. Arnett*, 412 U.S. 481, 504 n.22 (1973). In addition, all statutes affecting Indian rights are to be liberally construed with doubtful expressions resolved in favor of the tribes. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 195 n.5 (1999); *Williams v. Lee*, 358 U.S. 217, 223 (1959) ("[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations").

The State will continue to chip away at the Pueblo's sovereignty in the absence of clear guidance concerning the effect of Section 107(b)'s ban on Texas regulatory jurisdiction.

II. *Ysleta I* and *Alabama-Coushatta* Do Not Preclude this Court from Determining the Issues Raised in this Appeal.

The State's dogged reliance on precedent is misplaced here. This matter brings distinct issues to the Court's attention that have not been addressed in either *Ysleta I* or *Alabama-Coushatta*: the Pueblo's legal Class II gaming and the interpretation and effect of Section 107(b) of the Restoration Act. Because this Court has not addressed these issues, the Rule of Orderliness does not apply as the State asserts. Resp. 11. This Court need not "upend *Ysleta I* and *Alabama-Coushatta*" (Resp. 14) to rule on the issues raised in this appeal.

A. *Alabama-Coushatta* did not address Section 107(b).

The State states in conclusory fashion that the Court need not conduct any further analysis concerning the Restoration Act's prohibition on Tribal gaming in Texas, based in part on the Court's ruling in *Alabama-Coushatta*. Resp. 12 and 14. This is simply not the case, especially concerning the Pueblo's chief question presented herein: the correct meaning and application of Section 107(b)'s restriction against the State of Texas exercising "regulatory jurisdiction" over the Pueblo's gaming activities.

The Court did not address Section 107(b) in *Alabama-Coushatta*, and the Alabama-Coushatta did not present argument to the Court concerning the proper interpretation of Section 107(b). Here, the Pueblo appeal, in part, an order that specifically states that "the Court believes that the precise meaning of 'regulatory

jurisdiction,' as used in Section 107(b) of the Restoration Act remains unclear." ROA.3027-28.

In order to present the impression that *Alabama-Coushatta* controls this case, the State conflates the proceedings in the Alabama-Coushatta matter as the "Proceedings Below." Resp. 8. But as much as the interest of the Pueblo and the Alabama-Coushatta are aligned, their cases are distinct, and the issues dealt with in the Alabama-Coushatta appeal are not the same as those before the Court in the instant matter.

The Pueblo urge the Court to correct decades of disparate interpretations of the Restoration Act stemming from a lack of guidance as to the interpretation of Section 107(b). In the proper proceedings below, the district court "recognize[d] the Tribe's frustration that *Ysleta I* and subsequent case law interpreting *Ysleta I* do not clearly elucidate subsection [107] (b)'s effect on tribal gaming." ROA.3028. The State offers no cure for this confusion, relying entirely on the source of that confusion—*Ysleta I*—and the Court's inapposite ruling in *Alabama-Coushatta*.

The Court did not have the opportunity to correct this lack of clarity in *Alabama-Coushatta*. Accordingly, more analysis is indeed required, and the Court is not precluded from addressing this issue by dint of *Alabama-Coushatta*.

B. *Ysleta I* did not address Class II gaming.

The State relies heavily on this Court's decision in *Ysleta I* to argue that the Pueblo cannot engage in Class II gaming on its lands. *See, e.g.,* Resp. at 12. *Ysleta I*, however, examined whether the Pueblo could engage in Class III gaming—not Class II gaming—and determined that Section 107(a) of the Restoration Act prohibited such gaming. *See Ysleta I*, 36 F.3d at 1332. As such, the State's reliance on *Ysleta I* is misguided because it ignores the fact that Texas does not prohibit bingo and, thus, that the Court must review the perceived conflict between the Restoration Act and IGRA as it relates to the Pueblo's Class II gaming.

The Indian Gaming Regulatory Act ("IGRA") divides gaming into three classes of gaming activities: Class I, Class II, and Class III. 25 U.S.C. § 2703(6)-(8). Class II gaming—the gaming relevant to this case—includes bingo and limited card games explicitly authorized or not "explicitly prohibited" by state law. *Id.* § 2703(7). A tribe may offer Class II gaming 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).

In *Ysleta I*, the Pueblo argued that Texas did not prohibit its Class III gaming because the gaming fell under Texas's broad definition of a "lottery." *Ysleta I*, 36 F.3d at 1332. The Pueblo's proposed Class III gaming included baccarat, blackjack, craps, roulette, and slot machines. *Id.* In determining that such gaming was

prohibited, the Court in *Ysleta I* examined the Restoration Act specifically as it pertained to the Pueblo's proposed Class III gaming, and not in regard to any other class of IGRA gaming. *See Ysleta I*, 36 F.3d at 1332-34. Thus, the Class II gaming at issue in this case has not been examined by this Court.

Importantly, unlike Class III gaming, Texas does not prohibit Class II gaming (*i.e.*, bingo). On the contrary, Texas established the Bingo Enabling Act which expressly authorizes bingo through a regulatory scheme. *See* TEX. OCC. CODE ANN. § 2001.001 *et seq*.; *see also* TEX. ADMIN. CODE § 402.200. Thus, Texas regulates, but does not prohibit bingo. The Fifth Circuit has also determined that a state permitting bingo operations constitutes a regulatory scheme and not a prohibition on such activity. *See Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310, 316 (5th Cir. 1981). As such, the Court's review of the Pueblo's Class II gaming involves different facts and analyses than those in front of the Court in *Ysleta I*. Accordingly, the State cannot rely on *Ysleta I* to enjoin the Pueblo's Class II gaming.

The State also points to a footnote in this Court's recent opinion in *Alabama-Coushatta* to argue that *Ysleta I* applies with equal force to Class II gaming. Resp. 9. In *Alabama-Coushatta*, the Court noted that "[t]hough *Ysleta I* arose in the context of the Pueblo's trying to conduct IGRA class III gaming, *Ysleta I* does not suggest that the conflict between the Restoration Act and IGRA is limited to class III gaming." 918 F.3d at 444, n.5. But this footnote does not take into account the

interpretation of Section 107(b) the Pueblo present in this case, or the influence of *Cabazon Band* on Class II gaming.

Moreover, *Ysleta I* does not operate to foreclose the coexistence of the Restoration Act and IGRA as they pertain to Class II gaming. The *Ysleta I* court acknowledged that Congress, in passing IGRA, was specific as to *Cabazon Band*'s application to Class II gaming." *Ysleta I*, 36 F.3d at 1333 n.17. That application should be applied here to harmonize IGRA and the Restoration Act pertaining to the Pueblo's Class II gaming.

Supreme Court precedent instructs that "when two acts of Congress touch upon the same subject matter the courts should give effect to both, if that is feasible. In other words, so long as the two statutes, fairly construed, are capable of coexistence, courts should regard each as effective." *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 703 (1st Cir. 1994) (citing *Pipefitters Local 562 v. United States*, 407 U.S. 385, 432 n.43 (1972) *cert. denied* 513 U.S. 919 (1994); *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 92, 20 L.Ed. 153 (1871); *Traynor v. Turnage*, 485 U.S. 535, 547-48 (1988)). The Pueblo argue for the same treatment here concerning its Class II gaming. IGRA supplements the Restoration Act by providing a regulatory structure that is forbidden to the State of Texas by operation of Section 107(b). Harmonization of the Restoration Act's prohibition on illegal gaming and IGRA's regulatory scheme would not "gut the one restriction [the Pueblo] agreed

to…." Resp. 27. It would finally give appropriate recognition of the meaning of Section 107(b), which the State agreed to, but conveniently ignores.

III. The Texas Attorney General Does Not Have the Capacity to Bring this Action.

Another matter not addressed in previous Fifth Circuit precedent is the State's inability to bring this lawsuit in the first place.

"Texas courts have consistently held that the Texas AG is powerless to act in the absence of explicit statutory or constitutional authorization." *Texas v. Ysleta del Sur Pueblo*, 79 F. Supp. 2d 708, 712 (W.D. Tex. 1999), *aff'd sub nom. State v. Ysleta del Sur*, 237 F.3d 631 (5th Cir. 2000). Additionally, "[t]he burden of proof rests with the AG to identify a source of power authorizing him [to bring a lawsuit] on behalf of the state." *See id.* at 714. The district court has unequivocally held that the existence of any such power cannot rest on federal law, including the Restoration Act. *See id.* ("Although the AG attempts to characterize § 1300g–6(c) of the Restoration Act as providing him with authority to sue, such a reading would in effect transform Congress into the Texas legislature"). Thus, the State must identify an explicit statutory or constitutional source of power authorizing the Attorney General to bring this lawsuit outside of the Restoration Act.

The State, as it has in previous litigation between the parties, relies on Texas Civil Practice & Remedies Code § 125.002 (the "Nuisance Statute") for its statutory source authorizing the Texas Attorney General to bring this lawsuit. *See* Resp. at 30.

What the State ignores, however, is the 2017 amendment to the Nuisance Statute providing that "[t]his section does not apply to an activity exempted, authorized, or otherwise lawful activity regulated by federal law." TEX. CIV. PRAC. & REM. CODE § 125.0015(e). The State claims that the amendment to the Nuisance Statute is irrelevant because the Pueblo's Class II gaming is not exempted, authorized, or otherwise lawful activity under the Restoration Act. *See* Resp. at 31-32. The State begs the question by bootstrapping its capacity to sue on a presumed finding that the Pueblo's bingo gaming is prohibited.[1] Br. 42-51. Although the State argues that a nuisance claim is not essential to the Attorney General's capacity to sue under the Restoration Act, the district court specifically stated "that the state common nuisance statute is the ***only basis*** on which the AG's capacity to bring suit rests." ROA.901. Accordingly, if the Attorney General cannot bring a claim under the Nuisance Statute, then it lacks capacity to bring this lawsuit.

The Nuisance Statute does not apply to the Pueblo's Class II gaming, and the Attorney General does not have the contingent capacity to bring a lawsuit under that statute. Accordingly, because the Attorney General does not have capacity to bring this lawsuit under the Nuisance Statute ("the ***only basis*** on which the AG's capacity

[1] The district court denied the Pueblo's Motion to Dismiss because it determined that in order to decide whether the Texas Attorney General had capacity under the Nuisance Statute, it must decide the merits of the case. ROA.902. This appeal requires the Court to resolve whether the Pueblo's Class II gaming activity is prohibited by federal law under the Restoration Act and, thus, the Court can determine that the State lacks capacity to bring this suit.

to bring suit rests" ROA.901), the district court's Order No. 76, ROA.894.906, should be reversed, and the case should be dismissed.

CONCLUSION

The Pueblo respectfully request that the Court reverse the district court's Order No. 183, dissolve the Permanent Injunction, and remand for further proceedings in the district court.

The Pueblo further request that the Court reverse the district court's Order No. 76 denying the Pueblo's Motion to Dismiss, and render judgment of dismissal, or remand for the district court to render such appropriate orders.

DATED: October 31, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 31, 2019, the foregoing document was filed with the Clerk of the United States Court of Appeals for the Fifth Circuit, and that all counsel of record were served by electronic means on that same date.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Fifth Circuit Rule 32 because, according to the Microsoft Word 2016 word count function, it contains 4,934 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6), and Fifth Circuit Rule 32, because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 software in Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes.

3. I further certify that I have made all privacy redactions 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.

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