No. 19-50400

In the 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
No. 3:17-CV-179-PRM

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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.

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STATEMENT REGARDING ORAL ARGUMENT

This case represents another in a series of repeated attempts by the Ysleta del Sur Pueblo Tribe of Texas ("Pueblo" or "Tribe")[1] to operate gaming outside the laws of both Texas and the United States. In enjoining the Pueblo from this unlawful activity, the district court correctly applied this Court's settled and straightforward precedent to the undisputed facts in the record. Because this precedent conclusively resolves this matter and the Court is bound by the rule of orderliness, Appellee submits that oral discussion of the caselaw and factual record would not aid the decisional process. But should the Court determine that oral argument would assist it in reaching a decision, Appellee respectfully requests the opportunity to be heard.

[1] The Pueblo is also referred to as the Tiwa or Tigua. *See Ysleta del sur Pueblo v. Texas* ("*Ysleta I*"), 36 F.3d 1325 (5th Cir. 1994), *cert. denied*, 514 U.S. 1016 (1995). References herein to gaming by "the Pueblo" refer to Appellants and those acting in privity with them.

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STATEMENT OF ISSUE PRESENTED

1. Does the Restoration Act prohibit the Pueblo from gaming that is impermissible in Texas, as this Court held in *Ysleta I* and reaffirmed in *Alabama-Coushatta*?
2. Was this Court correct when it held in *Ysleta I* and *Alabama-Coushatta* that the Restoration Act's gaming provisions are incompatible with IGRA?
3. Was it proper for the district court to grant Texas—through its Attorney General acting in an official capacity—injunctive relief against gaming by the Pueblo that is impermissible in Texas?

STATEMENT OF THE CASE

I. Introduction

This Court has foreclosed the arguments Appellants urge in this appeal.

The Pueblo is one of two tribes subject to the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act ("Restoration Act" or "Act"), Pub. L. 100-89; 25 U.S.C. § 1300g *et seq*.. This Court has conclusively held that the Act's gaming provisions—agreed to by the Pueblo as a condition necessary to gain the benefits that came with restoration of its federal trust status—federalize Texas gaming laws and regulations on the Pueblo's reservation. *Ysleta del sur Pueblo v. Texas* ("*Ysleta I*"), 36 F.3d 1325 (5th Cir. 1994), *cert. denied*, 514 U.S. 1016 (1995). In so holding, this Court also conclusively determined that the Restoration Act's specific provisions are inconsistent with—and therefore control over—the more general gaming provisions in the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq*..

Nevertheless, the Restoration Act tribes—throughout decades of constitutional challenges, injunctions, contempt proceedings, requests for rehearing, and so on—have persistently insisted that *Ysleta I* was wrongly decided.[2] So persistently, in fact, that this Court recently found it appropriate to "reaffirm that the Restoration Act and the Texas law it invokes—and not IGRA—govern the permissibility of gaming operations" on the lands of Restoration Act tribes. *Texas v.*

[2] *See, e.g., Texas v. Ysleta del sur Pueblo*, 431 F. App'x 326, 331 (5th Cir. 2011) (per curiam) ("Once again, . . . the Tribe's position on this issue is simply wrong."), *cert. denied*, 565 U.S. 1114 (2012).

Alabama-Coushatta Tribe of Texas ("*Alabama-Coushatta*"), 918 F.3d 440, 449 (5th Cir. 2019), *petition for cert. filed* (U.S. Sept. 25, 2019) (No. 19-403). This Court also emphasized 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." *Id.* at 444, n.5. On receipt of the panel's decision in *Alabama-Coushatta*, the Alabama-Coushatta Tribe specifically asked the *en banc* Court to overturn *Ysleta I*, and that request was resoundingly rejected.[3]

Thus, if Appellants' arguments in this case were not squarely foreclosed by *Ysleta I*, they undoubtedly are now, in the wake of *Alabama-Coushatta*.

II. Factual Background

a. The Restoration Act

In 1987, Congress passed the Restoration Act, which restored the federal trust relationship between the United States and two Indian tribes in Texas—the Pueblo and the Alabama-Coushatta Tribe of Texas. ROA.909-10; Pub. L. 100-89, 101 Stat 666 (1987); 25 U.S.C. § 1300g *et seq.*.[4] Congress's restoration of federal trust status—and the attendant benefits—depended upon these tribes' agreement to refrain from gaming activities that are impermissible in Texas. Indeed, a 1985 bill which would

[3] Order, *Alabama-Coushatta Tribe of Texas v. Texas*, (No. 18-40116) (5th Cir. May 24, 2019).

[4] The United States Code now omits the Restoration Act. "Though no longer codified, the Restoration Act is still in effect." *Alabama-Coushatta*, 918 F.3d at 442 n.1. The Act is appended to the Brief of Appellants and available at https://www.govinfo.gov/content/pkg/STATUTE-101/pdf/STATUTE-101-Pg666.pdf.

have restored the tribes' federal trust status and given the Secretary of the Interior oversight over the tribes' gaming failed to gain Congress's approval.[5]

In 1987, the US House of Representatives passed a bill to restore federal trust status to the Pueblo and the Alabama-Coushatta. To secure passage of this law—which would become today's Restoration Act—the Pueblo disavowed gaming and made the following pledge to Congress:

> the Ysleta del Sur Pueblo remains firm in its commitment to prohibit outright any gambling or bingo in any form on its reservation . . . the Ysleta del Sur Pueblo respectfully requests its representatives in the United States [Senate] and House of Representatives to amend [§ 107(a) of the Restoration Act] by striking all of that section as passed by the House of Representatives and substituting in its place language which would 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 (Tribal Resolution No. T.C.-02-86).[6]

Restoration Act § 107 governs the Pueblo's "gaming activities." In enacting § 107, Congress explicitly relied upon Tribal Resolution No. T.C.-02-86 as the source of the prohibition on gaming by the Pueblo:

> 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[.]

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[5] This failed bill provided that "Gaming, lottery or bingo" on the tribes' reservations "shall only be conducted pursuant to a tribal ordinance or law approved by the Secretary of the Interior." ROA.496.

[6] The Alabama-Coushatta made a similar pledge in a nearly identical resolution. *See* 25 U.S.C. § 737(a) (citing Alabama-Coushatta Tribal Resolution No. T.C.-86-07).

Pub. L. 100-89, § 107(a); 25 U.S.C. § 1300g-6(a). According to the Senate Report accompanying the legislation, the only difference between the Senate and House versions of Restoration Act § 107 was that the Senate version "expand[s] on the House version to provide that anyone who violates the federal ban on gaming contained in [§ 107(a)] will be subject to the same civil and criminal penalties that are provided under Texas law." ROA.624-25 (S. REP. NO. 100-90, at 8-9 (1987)); ROA.928-29; *Ysleta del Sur Pueblo v. State of Texas*, 36 F.3d 1325, 1329 (5th Cir. 1994), *cert. denied*, 514 U.S. 1016 (1995) ("*Ysleta I*"). "Otherwise, the report stated, the 'central purpose' of the two versions was the same: 'to ban gaming on the reservations as a matter of federal law.'" *Ysleta I*, 36 F.3d at 1329; ROA.624 (S. REP. NO. 100-90, at 8 (1987)). Thus, the Restoration Act "restored" each covered tribe's "status as a federally-recognized tribe and limited its gaming operations according to state law." *Alabama-Coushatta*, 918 F.3d at 442.

Restoration Act § 107 contains two subsections in addition to subsection (a)'s gaming prohibition. Pub. L. 100-89, § 107(a); 25 U.S.C. § 1300g-6(a). Under § 107(b), "[n]othing in [§ 107] shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." Pub. L. 100-89, § 107(b); 25 U.S.C. § 1300g-6(b). Section 107(c)—entitled "enforcement against members"—gives the "United States . . . exclusive jurisdiction over any offense in violation of subsection (a)," and provides a mechanism for Texas to enforce the federal gaming ban: "bringing an action in the courts of the United States to enjoin violations of the provisions of [§ 107]." Pub. L. 100-89, § 107(c); 25 U.S.C. § 1300g-6(c).

b. IGRA

Meanwhile, Indian tribes not subject to the Restoration Act (or another settlement act addressing gaming) were operating gaming on their various reservations throughout the United States. *See* ROA.603-04. Noting that, as a general matter, "existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands," Congress enacted the Indian Gaming Regulatory Act ("IGRA"). 25 U.S.C. § 2701(3). IGRA sought to establish uniform standards "to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." *Id.* § 2701(5).

IGRA established the National Indian Gaming Commission ("NIGC") and charged it with administering IGRA. *Id.* § 2706(b)(10). IGRA defines three classes of tribal gaming and regulates each differently. IGRA tribes have "exclusive jurisdiction" over class I gaming, which consists of social or ceremonial games for prizes of minimal value. *Id.* §§ 2703(6), 2710(a)(1). Class II gaming includes bingo and card games "explicitly authorized by the laws of the State" or "not explicitly prohibited," but excludes "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." *Id.* § 2703(7)(A), (B). IGRA tribes may regulate class II gaming so long as they issue a self-regulatory ordinance, subject to NIGC approval. *Id.* § 2710(b). And class III includes all forms of gaming that are not class I or II. *Id.* § 2703(8). Class III games are prohibited unless the tribe and the state where the Indian lands are located voluntarily enter a compact allowing such games. *Id.*

c. The Pueblo's Activities

Since obtaining federal status under the Restoration Act, both the Alabama-Coushatta and the Pueblo have pursued gaming on their reservations in violation of Texas law and the Restoration Act. In 1993, the Pueblo sued Texas seeking to force the State to negotiate a compact allowing the Pueblo to engage in class III gaming under IGRA. ROA.2841; *see Ysleta I*, 36 F.3d 1325. In rejecting that request, the Court observed that "the Tribe has already made its 'compact' with the State of Texas, and the Restoration Act embodies that compact." ROA.2842; *Ysleta I* at 1335. And it unequivocally held "not only that the Restoration Act survives today but also that it—and not IGRA—would govern the determination of whether gaming activities proposed by the Ysleta del Sur Pueblo are allowed under Texas law, which functions as surrogate federal law" on the lands of Restoration Act tribes. *Id.*

In 1999, Texas sued the Pueblo to enjoin prohibited gaming on the Tribe's reservation. ROA.2844-45; *Texas v. del Sur Pueblo* ("*Ysleta II*"), 220 F. Supp. 2d 668, 687 (W.D. Tex. 2001), *modified* (May 17, 2002), *aff'd sub nom. State v. del sur Pueblo,* 31 F. App'x 835 (5th Cir.), *cert. denied*, 537 U.S. 815 (2002). The *Ysleta II* Memorandum Opinion determined that the Pueblo's gaming did not comply with Texas's laws and regulations and ordered that the Pueblo cannot engage in "'regulated' gaming activities unless it complies with the pertinent regulations." ROA.2845; *Ysleta II*, 220 F. Supp. 2d at 690, 695-96. Accordingly, the court permanently enjoined the Pueblo from continuing its gaming operations. *Id.* This Court upheld the injunction. 69 F. App'x 659 (5th Cir. 2003), *cert. denied*, 537 U.S.

815, *and order clarified sub nom. Texas v. Ysleta Del Sur Pueblo*, No. EP-99-CA-320-H, 2009 WL 10679419 (W.D. Tex. Aug. 4, 2009).

Nevertheless, further litigation, including two findings that the Pueblo was in contempt of the injunction, ensued. *See Texas v. Ysleta del Sur Pueblo*, 431 F. App'x 326 ; *State of Texas v. Ysleta del sur Pueblo*, 2015 WL 1003879 (W.D. Tex. Mar. 6, 2015); *State of Texas v. Ysleta del Sur Pueblo*, 2016 WL 3039991 (W.D. Tex. May 27, 2016). In 2016, after the Pueblo's illegal "sweepstakes" gaming scheme was enjoined, *see* 2016 WL 3039991, at *26–27, the Pueblo revealed that it was "transitioning to bingo." ROA.1869. Texas inspected the Pueblo's Speaking Rock Entertainment Center, finding live-called bingo, as well as thousands of machines that "look and sound like Las-Vegas-style slot machines" on offer to the public 24 hours per day. ROA.1869-73; 2848-51; 2863.[7]

III. Proceedings Below

After the inspection, Texas filed this lawsuit to enjoin the Pueblo from continuing to operate its latest iteration of gaming activities prohibited in the State. ROA.28-38; 73-84. On February 14, 2019, the district court granted Texas's motion for summary judgment, finding the Pueblo's gaming activities violative of Texas gaming laws and regulations. ROA.2836-77. On March 1, 2019, Appellants moved for reconsideration. ROA.3015. On March 14, 2019, this Court issued its opinion in *Alabama-Coushatta*, "reaffirm[ing] that the Restoration Act and the Texas law it invokes—and not IGRA—govern the permissibility of gaming operations" on the

[7] Images of these machines appear at ROA.2848, 2850.

lands of Restoration Act tribes. 918 F.3d at 449; ROA.2966. *Alabama-Coushatta* also observed 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; ROA.2966.

On March 28, 2019, the district court denied the Pueblo's motion for reconsideration and permanently enjoined the Pueblo from continuing its gaming activities in violation of Texas gaming laws and regulations. ROA.3015-20; 3021-24. The district court granted the Pueblo's motion to stay the injunction pending appeal, ordering that its permanent injunction "shall become effective ninety (90) days after all opportunities for appeal have been exhausted." ROA.3031.

SUMMARY OF THE ARGUMENT

This Court has conclusively held that the Restoration Act's gaming provisions—agreed to by the Restoration Act tribes as a condition necessary to gain the benefits of federal trust status—federalize Texas gaming laws and regulations on the lands of Restoration Act tribes. *Ysleta I*, 36 F.3d 1325. This Court has also conclusively held that the Restoration Act's specific provisions are inconsistent with—and therefore control over—IGRA's more general gaming provisions. *See id.* This Court reaffirmed these holdings in *Alabama-Coushatta.* 918 F.3d at 449, 444 n.5. And the legislative and enforcement history make clear that Congress intended Texas—through its Attorney General acting in an official capacity—to have authority to enforce the Restoration Act's gaming ban by filing suit in federal court.

Appellants identify no basis to upset the injunction entered below, which is based upon these settled precedents. Appellants instead simply re-urge arguments that this and other courts have rejected numerous times.

The judgement of the district court should be affirmed.

STANDARD OF REVIEW

This Court reviews a trial court's grant or denial of a permanent injunction for abuse of discretion. *Peaches Entm't Corp. v. Entm't Repertoire Assocs., Inc.*, 62 F.3d 690, 693 (5th Cir. 1995). A district court abuses its discretion if it (1) relies on clearly erroneous factual findings when deciding to grant or deny the injunction, (2) relies on erroneous conclusions of law when deciding to grant or deny the injunction, or (3) misapplies the factual or legal conclusions when fashioning its injunctive relief. *Id.*

This circuit follows a consistently applied rule of orderliness. Under this "well-settled Fifth Circuit rule," a panel "may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or [the] *en banc* court." *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008). "For a Supreme Court decision to satisfy [the] rule of orderliness, it must be unequivocal, not a mere 'hint' of how the Court might rule in the future." *Mercado v. Lynch*, 823 F.3d 276, 279 (5th Cir. 2016) (quoting *United States v. Alcantar*, 733 F.3d 143, 146 (5th Cir. 2013)). And it "must be more than merely illuminating with respect to the case before" this Court. *In re Texas Grand Prairie Hotel Realty, L.L.C.*, 710 F.3d 324, 331 (5th Cir. 2013).

ARGUMENT

I. Texas's gaming laws and regulations are surrogate federal law on the Pueblo's reservation.

a. As this Court held in *Ysleta I*, all of Texas's gaming restrictions operate as federal law on the Pueblo's reservation.

The Restoration Act prohibits all gaming that is impermissible in Texas. This Court has twice held as much. *Ysleta I*, 36 F.3d at 1334-35; *Alabama-Coushatta*, 918 F.3d at 442; *see also supra*, Introduction; citations therein. But if further analysis were required, the Restoration Act's text, the legislative history, and the context of Public Law 280 and *Cabazon Band* all support this result.

As noted *supra*, 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 the lands of the tribe." 25 U.S.C. § 1300g-6(a). The Act does not limit itself to criminal provisions: "[a]ny 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." *Id.* Thus, the Act's prohibition encompasses all gaming illegal under "the laws of the State of Texas," regardless of the penalties or enforcement mechanism. *Id.*

The legislative history confirms that Congress intended for the Restoration Act to ban—as a matter of federal law—all gaming activity that violates Texas gaming laws or regulations. Congress was clear that it drafted § 107(a) "in accordance with the tribe's request in tribal Resolution No. T.C.-02-86." 25 U.S.C. § 1300g–6(a). And that tribal resolution leaves no room for ambiguity in its request that Congress pass "language which would 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." Tribal Resolution No. T.C.-02-86 (reprinted at *Ysleta I*, 36 F.3rd at 1328, n.2) (emphasis added).

The Senate Report accompanying the legislation is also clear regarding the intent of § 107(a): "[t]his section provides that gambling, lottery or bingo as defined by the laws *and administrative regulations* of the State of Texas is prohibited on the tribe's reservation and on tribal lands." ROA.626 (S. REP. NO. 100-90, at 10 (1987)) (emphasis added). *See also* ROA.624 (S. REP. NO. 100-90, at 8 (1987)) (noting that "the central purpose" of § 107 is "to ban gaming on the [Restoration Act tribes'] reservations as a matter of federal law," and that "[b]oth Tribes, by formal tribal resolution, requested that this legislation incorporate their existing law and custom that forbids gambling.")

After reviewing the legislative history, this Court was left with "the unmistakable conclusion that Congress—and the Tribe—intended for Texas' gaming laws and regulations to operate as surrogate federal law on the Tribe's reservation in Texas." *Ysleta I*, 36 F.3d at 1334. "Congress' intention" in passing the Restoration Act was "explicit, clear, unambiguous, plain, and specific." *Id.* at 1334 n.20 (quotation marks omitted). Thus, this Court concluded, "Texas gambling laws and regulations are surrogate federal law" on the Pueblo's reservation. *Id.* at 1335. And, when asked to overrule *Ysleta I*, this *en banc* Court declined. Order, *Alabama-Coushatta Tribe of Texas v. Texas*, (No. 18-40116) (5th Cir. May 24, 2019).

There is no occasion to upend *Ysleta I* and *Alabama-Coushatta*. *See, e.g., Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d at 378 ("It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law[.]"); *Alabama-Coushatta* at 445 (citing *Alabama Coushatta Tribe of Texas v. Texas*, 66 F. App'x 525 (5th Cir. Apr. 16, 2003) (per curiam) (discussing rule of orderliness and concluding that the court is bound by *Ysleta I*'s holding that the Restoration Act, not IGRA, applies to Restoration Act tribes, precluding gaming activities impermissible in Texas on tribal lands).

b. *Cabazon Band* is irrelevant to this appeal.

Still, Appellants attempt to elide the Restoration Act's federalization of Texas's gaming law and regulations based upon a confused reading of *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987);[8] Br. 27. This, too, is foreclosed by *Ysleta I* and *Alabama-Coushatta*. *Ysleta I*, 36 F.3d at 1333-34; *Alabama-Coushatta*, 918 F.3d at 449, n.21.

Cabazon Band—like *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. Unit B 1981)—concerned Public Law 280, a 1953 statute attempting to set out general terms under which states may exercise civil and criminal jurisdiction in Indian country. Public Law 280 grants certain states jurisdiction to prosecute certain crimes on Indian lands. *Cabazon Band*, 480 U.S. at 208 (citations omitted). In the civil context, Public Law 280 is more limited—it permits "[s]tates jurisdiction over private civil litigation involving reservation Indians in state court," but does not grant

[8] Superseded by statute as stated in *Mich. v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014).

states "general civil regulatory authority." *Id.* *Cabazon Band* explained the distinction between Public Law 280's civil and criminal jurisdictional grants as follows: "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 [Public Law 280's broad grant of criminal authority], or civil in nature, and applicable only as it may be relevant to private civil litigation in state court." *Id.* at 207-08.[9]

i. As *Ysleta I* squarely held and *Alabama-Coushatta* reaffirmed, *Cabazon Band* is immaterial to the Restoration Act's gaming prohibition.

This Court unequivocally held that *Cabazon Band* is irrelevant to the gaming prohibition in § 107(a) of the Restoration Act. Appellants protest this holding, emphasizing a statement in the Restoration Act's legislative history "that § 107(b) 'is a restatement of the law as provided in [Public Law 280].'" *Ysleta I*, 36 F.3d at 1334 (citation omitted) (alteration in *Ysleta I*). Based upon this, Appellants insist that "Congress did not intend to subject the Tribes to the 'administrative regulations' of Texas." Br. 38. But *Ysleta I* rejected this argument, since "it is § 107(a) that determines whether Texas 'prohibits' certain gaming activities, and § 107(a) is not a restatement of Public Law 280." *Ysleta I*, 36 F.3d at 1334. The Court noted that "§ 107(b), as opposed to § 107(a), states only that the Restoration Act is not to be construed as a grant of civil or criminal regulatory jurisdiction to the State. *In that*

[9] In *Butterworth*, this Court simply "enunciated the dichotomy" between civil and criminal jurisdiction under Public Law 280 that *Cabazon Band* later found. *Ysleta I*, 36 F.3d at 1330, n.9 (citing *Butterworth*, 658 F.3d 310).

sense only, § 107(b) is a restatement of Public Law 280." *Id.* (emphasis added).[10] Thus, *Ysleta I* rejected the argument that "Congress incorporated *Cabazon Band* into § 107(a) of the [Restoration] Act." *Id.* at 1334; Br. 22. Thus, neither *Butterworth* nor *Cabazon Band* is helpful to Appellants.

This year, the Alabama-Coushatta Tribe pushed this Court to revisit this argument, and again, this Court rejected it:

> The Tribe suggests that the Restoration Act's application of Texas laws to the Tribe's gambling is somewhat empty because Texas does not "prohibit" gaming as defined in [*Cabazon Band*]. This court expressly rejected that theory in *Ysleta I*, holding that "Congress did not enact the Restoration Act with an eye toward Cabazon Band." Instead, we were "left with the unmistakable conclusion that Congress—and the [Pueblo]—intended for Texas' gaming laws and regulations to operate as surrogate federal law on the [Pueblo's] reservation in Texas."

Alabama-Coushatta, 918 F.3d at 449, n.21 (quoting *Ysleta I*, 36 F.3d at 1333-34). This Court denied the Tribe's request for rehearing *en banc*. Order, *Alabama-Coushatta Tribe of Texas v. Texas*, (No. 18-40116) (5th Cir. May 24, 2019).

This should be the end of the matter.

ii. In any event, Appellants misunderstand *Cabazon Band*.

Even if further analysis were warranted, it would only confirm what this Court has twice held. Indeed, Public Law 280 did not even discuss gaming. Its jurisdictional grants did not "prohibit" anything and mentioned "regulation" only incidentally; the state laws that could be applied to tribes under the Public Law 280 framework were nearly limitless. Limitless state control over tribal lands was too much for the Court. In *Bryan v. Itasca County*—the seminal Public Law 280 case upon which *Cabazon*

[10] *See also id.* at 1327-29, 1333-34 (discussing the legislative history).

Band and *Butterworth* relied—the Court bristled at the purported grant of broad civil jurisdiction in Public Law 280, which "subject[ed] reservation Indians to the full sweep of state laws and state taxation," including the state property taxes at issue there, without so much as mentioning them. 426 U.S. 373, 389 (1976). The Court looked to Public Law 280's legislative history, surmised that Congress's concern was combating lawlessness on reservations, and concluded that Congress did not intend to subject tribes to such regulations. *Id.* at 383, 389.

It was in this context of broad jurisdictional grants that *Cabazon Band* drew a distinction between state laws that prohibit and regulate certain conduct. Given Public Law 280's lack of specificity, the laws states sought to apply (taxes in *Bryan* and gaming regulations in *Cabazon Band* and *Butterworth*) were "not expressly permitted by Congress." *Cabazon Band*, 480 U.S. at 214. By contrast, the Restoration Act disavows granting Texas generalized jurisdiction. *See* Pub. L. 100-89, § 107(b).[11] Unlike with Public Law 280, Congress's aim is clear on the face of the Restoration Act: to make the Restoration Act tribes subject, as a matter of federal law, to Texas's gaming restrictions, and to authorize Texas to enforce violations in federal court with its "civil and criminal penalties." *Id.* § 107. When Congress expressly permit[s]" specific state regulation by speaking directly to it, the criminal/prohibitory-civil/regulatory distinction is inapplicable. *Cabazon Band*, 480 U.S. at 214; *accord*

[11] This disavowal does not, of course, prohibit the application of Texas gaming law. It just means that Texas cannot enforce its gaming laws *in Texas courts*; rather, the "State would have to return to the [federal] district court for further action." *Texas v. Ysleta del Sur Pueblo*, 431 F. App'x at 331.

United States v. Wheeler, 435 U.S. 313, 323 (1978) ("[tribal sovereignty] exists only at the sufferance of Congress").[12] What is paramount is discerning Congress's intent—precisely the analysis conducted in *Ysleta I* and reaffirmed in *Alabama-Coushatta*.

Ultimately, the Pueblo's *Cabazon Band* argument is academic. Even if *Cabazon Band*'s reasoning were erroneously grafted onto the Restoration Act's specific gaming provisions, the Pueblo still offer no basis to upset the district court's injunction. After all, under *Cabazon Band*, "the shorthand test" for whether an act is prohibited "is whether the conduct at issue violates the State's public policy." 480 U.S. at 209. Texas's public policy has long disfavored casino-style gaming. *See, e.g., Barker v. Texas*, 12 Tex. 273, 276 (1854) ("Gaming is denounced by the law as an offense against public policy."); *cf. Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 181 (1999) ("private casino gambling is unlawful [in Texas]"). Texas outlaws lotteries, other forms of gambling, and associated activities, *see* TEX. PENAL CODE § 47.02(a); *see also id.* §§ 47.04(a) (prohibiting knowing use of gambling facility); 47.06(a) (outlawing gambling devices), with only narrow exceptions for

[12] The Supreme Court has cautioned against importing the criminal/prohibitory-civil/regulatory reasoning from the Public Law 280 context to other laws governing tribal affairs. *E.g., Rice v. Rehner*, 463 U.S. 713, 732 (1983). This Court, too, has recognized that the *Cabazon Band-Butterworth-Bryan* "line of cases" fashioned a solution unique to the facially broad grant of civil jurisdiction in Public Law 280 "[t]o narrow the reach of that statute." *United States v. Stewart*, 205 F.3d 840, 843 (5th Cir. 2000) ("[T]he criminal/prohibitory-civil/regulatory test . . . was developed in a different context to address different concerns.").

certain forms of charitable bingo, charitable raffles, and state lotteries, *see* TEX. CONST. art. III, § 47.[13]

It is beyond cavil that Texas law prohibits the Pueblo's gaming activities—the district court found as much, and Appellants do not contest this finding on appeal. ROA.3015-20; 3021-24. Gaming is not an all-or-nothing affair. *See, e.g., Cabazon Band*, 480 U.S. at 210 (observing that the line between prohibition and regulation "is not a bright-line rule"). That Texas law does not prohibit every conceivable form of bingo does not mean that the Pueblo's casino-style "bingo" machines are fair game. This Court and others have repeatedly rejected that equivocation. *See, e.g., Carnival Leisure Indus., Ltd. v. Aubin*, 938 F.2d 624, 625-26 n.3 (5th Cir. 1991) (rejecting argument that "the Texas legislature's enactment of narrow, limited exceptions to its statute criminalizing gambling"—like a state-run lottery—"removes the public policy against the sort of gambling . . . that continues to be illegal"); *cf. United States v. Santee Sioux Tribe of Neb.*, 135 F.3d 558, 564 (8th Cir. 1998) (rejecting argument that video slot machines are permitted by Nebraska law because of "fundamental[ly] differen[t]" state-authorized Keno); *United States v. Cook*, 922 F.2d 1026, 1035 (2d Cir. 1991) (rejecting argument that because "some gambling activity is permitted" slot machines are allowed).

[13] *Cf. Cabazon Band*, 480 U.S. at 210 (California, by contrast, only prohibited enumerated games and that the games the Tribe offered "flourish in California"); *Butterworth*, 658 F.2d at 316 (Florida had no "statute that specifically prohibits the act of gambling").

Still, Appellants argue that following the holding in *Ysleta I* and respecting the distinction between subsections (a) and (b) "renders § 107(b) 'mere surplusage.'" Br. 22. But as *Ysleta I* recognized, Texas gaming law "functions as surrogate federal law" to the extent that it "govern[s] the determination of whether gaming activities proposed by the Ysleta del Sur Pueblo" are legal under the Restoration Act. *See Ysleta I*, 36 F.3d at 1335. Consequently, 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.'" *Texas v. Ysleta del Sur Pueblo, et al.*, No. EP-99 CA-320-H, ECF No. 483 at 3-4 (August 24, 2014) (quoting 25 U.S.C. § 1300g-6(b)).

iii. The legislative history further confirms this result.

As this Court noted in *Ysleta I*, the legislative history and tribal resolution references

> to both the laws and administrative regulations of Texas [are] clearly inconsistent with a contention that the Tribe and Congress contemplated that the prohibitory-regulatory distinction of *Cabazon Band* would be involved in analyzing the Restoration Act. Furthermore, as a means of enforcing those laws and regulations, Congress provided in § 107(a) that "[a]ny 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." Again, if Congress intended for the *Cabazon Band* analysis to control, why would it provide that one who violates a certain gaming prohibition is subject to a civil penalty? We thus conclude that Congress did not enact the Restoration Act with an eye towards *Cabazon Band*. Congress was merely acceding to the Tribe's request that the tribal resolution be codified.

Ysleta I, 36 F.3d at 1333-34 (quoting 25 U.S.C. § 1300g–6(a)) (emphasis in *Ysleta I*) (footnotes omitted).

Thus, this Court has already examined legislative history to determine Congress's intent as to the relationship between the Restoration Act and Public Law 280. Just as they did in *Ysleta I*, the Pueblo attempt to upset this result based upon a single floor statement by Representative Morris Udall. Br. 28 (citing 133 Cong. Rec. H6972-05, 1987 WL 943894 (Aug. 3, 1987));[14] *Ysleta I*, 36 F.3d at 1334 (discussing, and rejecting, the Pueblo's argument that Udall's floor statement expressing an "understanding" of what § 107 of the Restoration Act did overrides the "plain language of § 107(a)"). This cannot overcome the "substantial legislative history to the contrary, including the plain language of § 107(a), its accompanying report language, and the tribal resolution to which § 107(a) expressly refers." *Id.*

Indeed, this Court "cannot set aside this wealth of legislative history simply to give meaning to the floor statement of just one representative that was recited at the twelfth hour of the bill's consideration." *Id.* (citing *Fort Stewart Schools v. Federal Labor Relations Auth.*, 495 U.S. 641, 648–50 (1990)). And, in any event, courts "are wary of relying on individual legislators' statements, because individual statements are often contradicted or at least undermined by other statements in the legislative record." *Isle Royale Boaters Ass'n v. Norton*, 330 F.3d 777, 784–85 (6th Cir. 2003).

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[14] Of course, not all legislative history is created equal. *See, e.g.*, *Simpson v. United States*, 435 U.S. 6, 17 (1978) (Rehnquist, J., dissenting) ("[S]ome types of legislative history are substantially more reliable than others. The report of a joint conference committee of both Houses of Congress, for example . . . is accorded a good deal more weight than the remarks . . . on the floor of the chamber."). The *Ysleta I* court found a Senate Report persuasive when construing the "plain language" of the Restoration Act. *See* 36 F.3d at 1329, 1333-34 & n.19 (discussing S. REP. NO. 100-90, at 8-10 (1987)). By contrast—as they did in *Ysleta I*—the Pueblo point to a floor statement of an individual legislator. *See id.* at 1334; Br. 28.

Appellants' argument that *Ysleta I* "relied on legislative history for versions of the Act that were never enacted into law," Br. 34-36, is misguided. Rather, *Ysleta I* simply summarized the Restoration Act's history, which included a failed bill to restore federal status to the Restoration Act tribes. *See Ysleta I*, 36 F.3d at 1327-29. While the Pueblo passed the tribal resolution incorporated into § 107(a) during the 99th Congress, the 100th Congress explicitly incorporated that resolution into the Restoration Act that became law. Pub. L. 100-89, § 107(a); 25 U.S.C. § 1300g-6(a).

c. Because the Restoration Act and IGRA are incompatible, only the Restoration Act governs the Pueblo's gaming activities.

i. The Restoration Act's gaming provisions are fundamentally incompatible with IGRA.

As both *Ysleta I* and *Alabama-Coushatta* reiterate, there is no construction under which "the Restoration Act fully harmonizes with IGRA as compatible regimes that Congress intended to work together." Br. 43. In concluding as much, *Ysleta I* found "it significant that § 107(c) of the Restoration Act establishes a procedure for enforcement of § 107(a) which is fundamentally at odds with the concepts of IGRA." 36 F.3d at 1334. Thus, it reached "the unmistakable conclusion that Congress—and the Tribe—intended for Texas' gaming laws and regulations"—and not IGRA—"to operate as surrogate federal law on the Tribe's reservation in Texas." *Id.* There is no basis to upset this reasoned holding.

Indeed, two provisions in IGRA "explicitly stated" that "IGRA should be considered in light of other federal law." *Id.* at 1334, 1335 & n.21 (citing 25 U.S.C. §§ 2701(5) ("[t]he Congress finds that . . .Indian tribes have the exclusive right to regulate gaming activity on Indian lands *if the gaming activity is not specifically*

prohibited by federal law") (emphasis added); 2710(b)(1)(A) (tribes may engage in class II gaming if, *inter alia*, "such gaming is not otherwise specifically prohibited on Indian lands by Federal law")). Congress specifically established what law would apply to gaming by the Pueblo: "[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe." 25 U.S.C. § 1300g-6(a). To further showcase its intent, Congress included a reference to Tribal Resolution No. 86-07 and stated that this prohibition "was enacted in accordance with the tribe's request." *Id.*; *see also Ysleta I*, 36 F.3d at 1328. And, to establish the Restoration Act's relationship to future legislation, Congress added a savings provision in § 103(a) of the Restoration Act expressing its intent that "all laws and rules of law of the United States of general application to 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." Pub. L. 100-89, § 103(a), 25 U.S.C. § 1300g-2 (emphasis added).

Congress also chose not to include a general repealer clause in IGRA. *See generally* 25 U.S.C. § 2701 *et seq.*. Just the opposite: In establishing that general gaming regime, Congress went out of its way to say that Indian tribes have the right to regulate gaming on their lands only if "*not specifically prohibited* by Federal law." 25 U.S.C. § 2701(5). The Restoration Act remains federal law. *See generally* Pub. L. 100-89 §§ 101-08; 25 U.S.C. §§ 1300g *et seq.*.[15] And, as noted in the context of Public

[15] "[T]he Pueblo here do not argue that IGRA impliedly repeals the Restoration Act," Br. 43. But even if they did, this Court already rejected that notion in *Ysleta I*. 36 F.3d at 1334-35. *See also, e.g.*, *Rodriguez v. United States*, 480 U.S. 522, 524 (1987)

Law 280, "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). Thus, the (specific) gaming prohibition and enforcement mechanism applicable to the Pueblo under the Restoration Act cannot be "controlled or nullified" by IGRA. *See id; Ysleta I*, 36 F.3d at 1335.

"In other words, this court summarized, '(1) the Restoration Act and IGRA establish different regulatory regimes with regard to gaming, [and] (2) the Restoration Act prevails over IGRA when gaming activities proposed by [the Pueblo or Tribe] are at issue.'" *Alabama-Coushatta*, 918 F.3d at 448 (quoting *Ysleta I* at 1332) (alteration in *Alabama-Coushatta*). Appellants offer no basis to upset this holding.

ii. The First Circuit's opinion in *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)* does not undermine this result.

Appellants cite *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, for the proposition that the Court can "harmonize the Restoration Act with IGRA." Br. 47-49 (citing 853 F.3d 618 (1st Cir. 2017)). But *Aquinnah* never addressed or even mentioned *Ysleta I*. In fact, the only time the First Circuit has cited *Ysleta I* was favorably, to support upholding state gaming laws against an IGRA challenge. *See Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 791 (1st Cir. 1996).

(per curiam) (quotations omitted) (holding that any doubts should be resolved against repeals by implication, which "are not favored and will not be found unless an intent to repeal is clear and manifest.")

The Restoration Act differs in several material respects from the Aquinnah Settlement Act. The First Circuit observed that the act there did not "prohibit anything" but, like Public Law 280 in *Cabazon Band*, "merely grants Massachusetts jurisdiction." *Aquinnah*, 853 F.3d at 629. The act did not single out gaming for prohibition: It simply provided that the tribe "shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth," with a parenthetical adding that this broad jurisdictional grant included "bingo or any other game of chance." *Id.* at 622. Ultimately, the court found the parenthetical gaming reference to be insufficiently specific and prohibitory. *Id.* at 629.

By contrast, the Restoration Act does not purport to grant Texas Public-Law-280-like jurisdiction. Instead, it specifically prohibits gaming, applies Texas penalties, and reinforces it all by incorporating tribal resolutions disavowing gaming. Pub. L. No. 100-89, § 107(a)-(b). This distinction is key because even IGRA permits a gaming regime only when not "specifically prohibited by Federal law." 25 U.S.C. § 2701(5); *see Ysleta I*, 36 F.3d at 1335 & n.21. Where the two Restoration Act tribes specifically agreed as a condition of obtaining federal trust status to be "prohibited" from gaming not authorized in the State, Pub. L. 100-89, § 107(a), the Aquinnah did not. *Aquinnah*, 853 F.3d at 629.

Moreover, the Settlement Act said "nothing about the effect of future federal laws on the [Act]." *Id.* at 628. Thus, the *Aquinnah* court found it "essentially identical" (*id.*) to a statute held impliedly repealed by IGRA, before *Ysleta I*, that provided broad

jurisdiction unspecific to gaming and did not address future federal law. *See Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 704 (1st Cir. 1994).

By contrast, the Restoration Act not only specifically prohibits gaming but speaks to the effect of future federal laws on that prohibition: making only those "laws and rules of law of the United States of general application to Indians . . . or to Indian reservations which are not inconsistent with any specific provisions contained in this title" applicable to the Pueblo. Pub. L. 100-89, § 103(a).

When this feature is present, the First Circuit follows *Ysleta I*'s approach. In *Passamaquoddy*, the First Circuit rejected that Tribe's claim that IGRA's general gaming provisions upended the Maine Settlement Act absent "explicit language" from Congress "offering a patent indication of its intent to accomplish that result, or, indeed, by first repealing [the operative section of the Act]." 75 F.3d at 789, 791; *cf. Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 659-60 (1974) (penalties in earlier statute not repealed "unless the repealing Act shall so expressly provide"). Instead, the court harmonized the Settlement Act and IGRA: the former governs gaming on Passamaquoddy lands, the latter on other tribal lands. 75 F.3d at 791. As support, *Passamaquoddy* pointed to *Ysleta I*, approving its holding that IGRA "did not impliedly repeal a federal statute granting Texas jurisdiction over Indian gaming because Congress never indicated in [IGRA] that it intended to rescind the previous grant of jurisdiction." 75 F.3d at 791 (citing *Ysleta I*, 36 F.3d at 1335).

In any event, applying *Aquinnah*'s reasoning here would lead to absurd results. It would not do more "violence" (Br.48) to IGRA's purpose if the two Indian tribes

specifically subject to restrictions in another "[f]ederal law" (25 U.S.C. § 2701(5)) were exempted from its coverage than it would to the Restoration Act's purpose if its central provision applying Texas gaming law were effectively nullified. It is a longstanding "cardinal rule" that "specific legislation in relation to a particular class" is "not affected by general legislation in regard to many classes"; special and "general legislation must stand together, the former as the law of the particular class or subject, and the latter as the general law upon other subjects or classes within its terms." *Harris v. Bell*, 250 F. 209, 216 (8th Cir. 1918); *accord Marrero*, 417 U.S. at 659-60. The Pueblo's proposal to "harmonize[]" (Br.49) IGRA and the Restoration Act would gut the one restriction it agreed to in order to secure federal restoration. Pub. L. 100-89, § 107(a).

iii. Appellants' other citations do not suggest a different result.

Appellants point to a US House of Representatives resolution, which they contend is currently before the Senate and would address issues in this case. Br. 49-51. It is axiomatic that, until a bill becomes a law, it has no impact on the work of this Court. *See, e.g.*, *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) (Recognizing that unenacted bills "are not reliable indicators of congressional intent.")

Finally, the Pueblo's invocation of an opinion by a former Texas Attorney General is unhelpful. Br. 44-45 (citing Tex. Att'y Gen. Op. DM-32 (1991)). "In the absence of any dispositive state-court jurisprudence on an issue of state law, a federal court should 'closely examine the opinions of the [State] Attorney General.'" *Brown v. Alabama Dep't of Transp.*, 597 F.3d 1160, 1188 (11th Cir. 2010) (quoting *Kneeland v.*

Nat'l Collegiate Athletic Ass'n, 850 F.2d 224, 228 (5th Cir. 1988)). But Appellants cite Attorney General Opinion DM-32 on a question of federal law answered by directly applicable precedent from this Court—whether IGRA or the Restoration Act controls gaming by Restoration Act tribes. *See* Br. 44-45; *Alabama-Coushatta*, 918 F.3d at 442 (citing *Ysleta I*, 36 F.3d at 1335). *See also* ROA.938 (acknowledging that Texas Attorney General opinions—even on questions of State law—do not bind courts.).

And, even if entitled to any weight, Opinion DM-32 is inapplicable to Restoration Act tribes, as it was based solely upon the conclusion that the last-in-time "rule would support a construction that Congress intended the Indian Gaming Regulatory Act to apply to all Indian tribes *that would otherwise fall within the ambit of the act*." Tex. Att'y Gen. Op. DM-32 at *5 (1991) (emphasis added). Restoration Act tribes do not "otherwise" fall within the ambit of IGRA. *Ysleta I*, 36 F.3d at 1335.

II. The district court's injunction was a natural result of the Restoration Act's specific enforcement mechanism.

a. Texas—through its Attorney General acting in an official capacity—unquestionably has the capacity to pursue Texas's remedy under § 107(c) of the Restoration Act.

The Restoration Act could not have been upheld and enforced by the federal courts time and again if Texas's Attorney General lacked capacity to pursue the

remedy provided by the Act.[16] Yet Appellants contend that Texas lacks capacity[17] to pursue this case, relying upon a district court order denying the Pueblo's motion to dismiss a previous suit by Texas under the Restoration Act. Br. 53 (citing *Texas v. Ysleta del sur Pueblo*, 79 F. Supp. 2d 708, 714 (W.D. Tex. 1999), *aff'd sub nom. State v. Ysleta del Sur*, 237 F.3d 631 (5th Cir. 2000)). The court rejected the Pueblo's arguments that Congress never waived its immunity under the Restoration Act and that the United States was an indispensable party to the suit. *Id.* at 710-12. After analyzing state law on the scope of the Texas Attorney General's authority, the court stated "[t]hus far, the AG has not met his burden" of identifying "a source of power authorizing him to exercise this option on behalf of the state." *Id.* at 713.

Rather than granting the Pueblo's motion to dismiss, however, the district court ordered Texas to amend its complaint to demonstrate a "source of authority, under Texas law, to bring this suit." *Id.* at 714. In doing so, the court strongly

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[16] *See, e.g.*, *Texas v. Ysleta del Sur Pueblo*, 79 F. Supp. 2d 708, 710 (W.D. Tex. 1999) ("the Restoration Act allows the State of Texas to bring suit in federal court to enjoin any such violations [of the Restoration Act]"); *Alabama-Coushatta Tribes of Texas v. Texas*, 208 F. Supp. 2d 670, 680 (E.D. Tex. 2002) ("The injunction sought by the State of Texas is authorized by both state and federal statutes.") *Texas v. Ysleta del Sur Pueblo*, 69 F. App'x 659, reported in full at 2003 U.S. App. LEXIS 29101 (5th Cir. May 29, 2003), *cert. denied*, 540 U.S. 985 (2003); Order, *Texas v. Ysleta del Sur Pueblo*, 2016 WL 3039991, at *27 (W.D. Tex. May 27, 2016).

[17] Appellants also refer to this contention as an argument that the Texas Attorney General lacks "standing" to pursue this case, Br. 53. This confuses the concept of standing with the concept of capacity. *See generally Texas v. Ysleta del Sur Pueblo*, 79 F. Supp. 2d at 712 ("'Lack of capacity' (i.e. a party's right to initiate a suit on behalf of another) should not be confused with 'standing' insofar as standing refers to whether a party has a 'personal stake in the outcome.'") (citing *Board of Educ. v. Illinois State Bd. of Educ.*, 810 F.2d 707, 709–10 n. 3 (7th Cir. 1987)).

suggested that Texas explicitly incorporate Texas law nuisance claims into its suit. *Id.* at 713 n.13. Texas obliged. The court denied the Pueblo's subsequent motion to dismiss, concluding that the Attorney General had the authority under both Texas and federal law to enjoin violations of the Restoration Act. *Ysleta II*, 220 F. Supp. 2d at 676 ("After the Attorney General filed an Amended Complaint, the district court, by its order of January 13, 2002, overruled another motion to dismiss, concluding that the Attorney General had the authority to bring this action.").[18]

Thus, the Attorney General is decidedly *not* "barred from bringing this case under the principle of res judicata." Br. 54. The district court in *Ysleta II* expressly declined to rule on the motion to dismiss pending review of Texas's amended complaint. 79 F. Supp. 2d at 714. Once that complaint included a nuisance claim, the Court denied the renewed motion to dismiss. *See Ysleta II*, 220 F. Supp. 2d at 676. The court's discussion of capacity to sue in the absence of a nuisance claim was therefore dicta that was not incorporated into the final judgment and is not entitled to preclusive effect. *See Miller v. Nationwide Life Ins. Co.*, No. 06-31178, 2008 WL 3086783, at *5 n.9 (5th Cir. 2008) ("[D]icta has no res judicata effect."); *Int'l Truck and Engine Corp. v. Bray*, 372 F.3d 717, 721 (5th Cir. 2004) ("A statement is dictum if it could have been deleted without seriously impairing the analytical foundations

[18] *See also Ysleta II* at 695 ("In this case, . . . the AG is only using the Civil Practice Code provisions as they pertain to gambling. Under the Restoration Act, these provisions function as federal laws; they empower the AG, as the representative of the State of Texas, to bring a suit in federal court to enjoin gambling on the reservation.").

of the holding and being peripheral, may not have received the full and careful consideration of the court that uttered it.").

Moreover, the district court's opinion, even if it were entitled to res judicata effect, did not hold that a nuisance claim is essential to the Attorney General's capacity to sue under the Restoration Act. *See* 79 F. Supp. 2d at 714 and n.13 ("*arguably*, the AG could characterize Speaking Rock as a 'common nuisance'. . . The AG has authority to bring suit to abate or enjoin such a nuisance…these statutes *appear* to confer the necessary authority.) (citations omitted) (emphasis supplied). And, in any event, Texas invoked state nuisance laws in pursuing this case against the Pueblo. ROA.73-84. The district court's 1999 order would therefore be unhelpful even if it stood for the proposition Appellants contend.

Finally, 2017 amendments to Texas nuisance law providing that "[t]his section does not apply to an activity exempted, authorized, or otherwise lawful activity regulated by federal law," do not change this result. *Cf.* Br. 24 (quoting TEX. CIV. PRAC. & REM. CODE § 125.0015(e)). This provision was added to Texas's Civil Practice and Remedies Code as part of an overhaul to Texas nuisance law that *expanded* the law to reach web-based operations connected to certain types of criminal activity (such as prostitution). *See id.* § 125.0015(c). The new provision is unrelated to whether gambling is common nuisance and therefore immaterial.

Even assuming that the Texas Legislature intended for this provision to apply to gambling violations, it remains irrelevant here, as the Pueblo's gaming activities are not "exempted, authorized, or otherwise lawful activity regulated by federal law."

Id. § 125.0015(e). The Pueblo's gambling activities are not "exempted" from federal law—quite to the contrary, they are expressly subject to injunctive action in federal court to the extent they are impermissible in Texas. 25 U.S.C. §1300g-6(a), (c). Nor is gaming by the Pueblo "authorized" by federal law. The exact opposite is true. The Restoration Act explicitly bars the Pueblo's gambling activities, providing that "[a]ll gaming activities which are prohibited by the laws of the state of Texas are hereby prohibited on the reservation and lands of the tribe." 25 U.S.C. §1300g-6(a).

Finally, gaming by the Pueblo is not "regulated" by federal law, nor is it somehow "otherwise lawful." Instead, as just discussed, the Pueblo's gaming activities are prohibited by Texas law, which has been federalized through the Restoration Act. *Id.* And to the extent the Appellants argue that illegal gaming by the Pueblo is somehow "exempted" but also "authorized," by law, Br. 54, their position is nonsensical, and does not undermine Texas's viable claim under the Restoration Act and Texas nuisance law.

The legislative history confirms that Congress intended for Texas to have a right to sue in federal court to enjoin violations of the Restoration Act. The Senate Select Committee on Indian Affairs explained that the Restoration Act "provides that the Federal courts shall have exclusive jurisdiction over violations of the federal ban on gaming established by this section *and further authorizes the State of Texas to seek injunctive relief in Federal court to enforce the federal ban on gaming*." ROA.628 (S. REP. NO. 100-90, at 12 (1987)) (emphasis added). *See also* ROA.625 (S. REP. NO. 100-90, at 9 (1987)) ("New subsection[] 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*.") (emphasis added); *Alabama-Coushatta Tribes of Texas v. Texas*, 208 F. Supp. 2d 670, 680 (E.D. Tex. 2002) ("The injunction sought by the State of Texas is authorized by both state and federal statutes.").

Texas's capacity to sue is so plain that even the Pueblo have conceded it in prior litigation. ROA.664 (contending that Congress limited Texas's remedies to "the right to bring an action in federal court to enjoin alleged violations of the 'gaming activities' section of the Restoration Act."); ROA.692 (acknowledging that "[t]he State of Texas may bring an action in the courts of the United States to enjoin gaming activities of the Pueblo under the Restoration Act").

b. The district court did not grant Texas any "regulatory jurisdiction" over the Pueblo.

Appellants complain that the judgment below impermissibly vests Texas with "regulatory jurisdiction" over the Pueblo. They ask—"how can the Pueblo be subject to 'the State's regulations' if the State cannot exercise 'regulatory jurisdiction' over the Pueblo?" Br. 25-26. The answer lies on the face of the Restoration Act: "the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a)." 25 U.S.C. §1300g-6. That is all that has occurred here.

Unsurprisingly, Appellants offer no support for the novel proposition that—by concluding that Texas's gaming regulations apply to the Pueblo and are enforceable through a suit under the Restoration Act—the district court somehow vested Texas with "regulatory *jurisdiction*" over the Tribe. And, although § 107(b) provides that

Texas does not have "regulatory jurisdiction," it does *not* provide that Texas's regulations are thus unenforceable against the Pueblo in federal court—a contention rejected in *Ysleta I*. 36 F.3d at 1334 (holding that, while Restoration Act § 107(b) is a limited restatement of Public Law 280, "it is § 107(a) that determines whether Texas 'prohibits' certain gaming activities, and § 107(a) is not a restatement of Public Law 280.").

Moreover, the Court did not order a proposal process like the one discontinued in 2016, and which Appellants liken to "the NIGC's responsibilities under IGRA." Br. 16 (quoting *State of Texas v. Ysleta del Sur Pueblo*, No. EP-99-CV-320-KC, 2016 WL 3039991, at *1 (W.D. Tex. May 27, 2016)). Instead, the district court ordered a remedy—a permanent injunction—under Restoration Act § 107(c), against the Pueblo's violations of § 107(a). This does not convert any court into regulatory body. Instead, once the injunction below takes effect, the Pueblo must comply with it. If the Pueblo is in violation of the specific terms of the injunction, Texas may elect to seek contempt remedies. If Texas has reason to believe that the Tribe is in violation of the Restoration Act, but that those violations do not fall within the scope of the permanent injunction, Texas can file a new lawsuit to enjoin those violations of law. Nothing in that process grants Texas any "regulatory jurisdiction." (Indeed, federal courts can only exercise federal court jurisdiction—they are not regulators. *See generally,* U.S. CONST. art III §2, cl. 1). Instead, the Restoration Act would be functioning just as Congress contemplated.

Even if filing a federal lawsuit to enjoin violations of Texas's gaming regulations were an exercise of State "regulatory jurisdiction" (it is not), the injunction should still be affirmed, because it enjoined the Pueblo from violating Texas gambling *law*. Regardless of the meaning of the term "regulatory jurisdiction" in §107(b), Appellants do not (and could not) suggest that the Restoration Act does not federalize Texas gambling *law* on the Pueblo's reservation. *E.g.*, 25 U.S.C. § 1300g-6(a). And the district court found violations not only of Texas gaming regulations, but of Texas law, concluding that the Pueblo's one-touch machines and live-called bingo violate both the Bingo Enabling Act and the Texas Administrative Rules. ROA.2863-66. Appellants raise no disagreement with the district court's conclusion that "[t]he facts in this case are undisputed," ROA.2847, or with the Court's determination that those facts give rise to violations of Texas law. Thus, it is unclear to some extent what specific provisions of the injunction Appellants ask the Court to overturn, and it should decline this ambiguous invitation.

III. The district court properly balanced the equities.

Appellants argue that the balance of equities did not support entry of a permanent injunction, given the economic impact of the gaming operations at Speaking Rock. Br. 51. But "although the Tribe has an interest in self-governance, the Tribe cannot satisfy that interest by engaging in illegal activity." ROA.2871, .2874. And, where "'[a]llowing the Tribe to continue to offer [gaming] would permit ongoing violations of . . . federal law' the 'balance of hardships tip[s] decidedly in the State's favor and [] the public interest support[s] granting injunctive relief.'" *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015). The Pueblo's economic

interest in continuing impermissible gaming does not change that result where "the primary public interest that would be served by denying the motion for injunctive relief—the economic benefits to be gained by offering [gaming]—would only accrue by permitting unlawful gaming." *Id.* at 1046. The district court in *Ysleta II* also considered equitable factors and concluded that "[t]he fruits of [the Pueblo's] unlawful enterprise are tainted by the illegal means by which those benefits have been obtained." *Ysleta II*, 220 F. Sup. at 697. This Court summarily affirmed. 31 F. App'x 835 (5th Cir. 2002), *cert. denied*, 537 U.S. 815 (2002).

"Accordingly, because the Tribe's operations run contrary to Texas's gaming law, the balance of equities weighs in favor of the State." ROA.2875.

CONCLUSION

The Court should affirm the district court's judgment.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on October 9, 2019 the foregoing instruction was filed electronically via the Court's CM/ECF system, causing electronic service upon all counsel of record.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-column limitations of Fed. R. App. 32(a)(7) and 5th Cir. R. 32.3 because this brief contains approximately 9,640 words according to Microsoft Word, excluding the parts of the brief exempt by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type face style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 12-point type face.

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