No. 20-493

In The
Supreme Court of the United States

YSLETA DEL SUR PUEBLO, ET AL.,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

BRIEF OF PETITIONERS

BRANT C. MARTIN*
WICK PHILLIPS GOULD & MARTIN, LLP
100 Throckmorton Street
Suite 1500
Fort Worth, TX 76102
Telephone: (817) 332-7788
brant.martin@wickphillips.com

JOSEPH CALLISTER
ETHAN A. MINSHULL
JEFFREY W. HELLBERG, JR.
WICK PHILLIPS GOULD & MARTIN, LLP
3131 McKinney Avenue
Suite 500
Dallas, TX 75204

CARTER G. PHILLIPS
VIRGINIA A. SEITZ
ERIC D. MCARTHUR
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005

CHELSEA A. PRIEST
SIDLEY AUSTIN LLP
2021 McKinney Avenue
Dallas, TX 75201

*Counsel of Record

December 2, 2021

QUESTION PRESENTED

The Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 666 (Aug. 18, 1987) ("Restoration Act"), prohibits the Tribes from conducting "[a]ll gaming activities which are prohibited by the laws of the State of Texas," but makes clear that this prohibition is not "a grant of civil or criminal regulatory jurisdiction to the State of Texas." The question presented is:

Whether the Restoration Act subjects the Tribes to the entire body of Texas gaming statutes and regulations or, consistent with the framework of *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), prohibits only those gaming activities that the State flatly prohibits rather than merely regulates.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were the Ysleta del Sur Pueblo, the Tribal Council, the Tribal Governor Michael Silvas, and the State of Texas.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 3

STATEMENT OF THE CASE 5

A. The Ysleta del Sur Pueblo 5

B. The Restoration Act 7

C. The Indian Gaming Regulatory Act 12

D. *Ysleta I* And Its Aftermath 14

E. Proceedings Below 17

SUMMARY OF THE ARGUMENT 19

ARGUMENT 23

I. THE RESTORATION ACT INCORPORATES *CABAZON BAND* AND PROHIBITS THE TRIBES FROM CONDUCTING ONLY THOSE GAMING ACTIVITIES THAT TEXAS FLATLY PROHIBITS RATHER THAN MERELY REGULATES 23

A. By Incorporating The Public Law 280 Jurisdictional Regime Into The Restoration Act, Congress Adopted The *Cabazon Band* Framework 23

TABLE OF CONTENTS—Continued

Page

B. The Text, Structure, And History Of Section 107 Confirm That Congress Incorporated The *Cabazon Band* Framework 27

C. Interpretive Presumptions Compel Resolution Of Any Ambiguity In Favor Of The Tribes' Interpretation.................. 34

D. *Ysleta I* Misread The Restoration Act 38

II. UNDER THE *CABAZON BAND* FRAMEWORK, TEXAS LACKS AUTHORITY TO REGULATE BINGO ON THE TRIBES' RESERVATIONS....................................... 49

CONCLUSION.. 53

TABLE OF AUTHORITIES

Page

CASES

14 Penn Plaza LLC v. *Pyett*, 556 U.S. 247 (2009).......45

Ala.-Coushatta Indian Tribe of Tex. v. *Mattox*, 650 F. Supp. 282 (W.D. Tex. 1986)............................6

Bennett v. *Spear*, 520 U.S. 154 (1997).........................30

Bragdon v. *Abbott*, 524 U.S. 624 (1998)................26, 27

Bryan v. *Itasca Cnty.*, 426 U.S. 373 (1976).......*passim*

California v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) ....*passim*

Corley v. *United States*, 556 U.S. 303 (2009).............46

Dep't of Rev. of Or. v. *ACF Indus., Inc.*, 510 U.S. 332 (1994)...31

Epic Sys. Corp. v. *Lewis*, 138 S. Ct. 1612 (2018)....34, 36

Lagos v. *United States*, 138 S. Ct. 1684 (2018) 30

Life Techs. Corp. v. *Promega Corp.*, 137 S. Ct. 734 (2017)..30

Liteky v. *United States*, 510 U.S. 540 (1994) 30

Lorillard v. *Pons*, 434 U.S. 575 (1978)..................26, 32

Mashantucket Pequot Tribe v. *Connecticut*, 913 F.2d 1024 (2d Cir. 1990) 14

Massachusetts v. *Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618 (1st Cir. 2017)................48

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Curran*, 456 U.S. 353 (1982) 26

TABLE OF AUTHORITIES—Continued

Page

Michigan v. *Bay Mills Indian Cmty.*, 572 U.S. 782 (2014) 37

Montana v. *Blackfeet Tribe of Indians*, 471 U.S. 759 (1985) 37

POM Wonderful LLC v. *Coca-Cola Co.*, 573 U.S. 102 (2014) 34

Seminole Tribe of Fla. v. *Butterworth*, 658 F.2d 310 (5th Cir. Unit B 1981) 10, 50, 51, 52

Shaughnessy v. *Pedreiro*, 349 U.S. 48 (1955) 45

Stokeling v. *United States*, 139 S. Ct. 544 (2019) 47

Texas v. *Ysleta del Sur Pueblo*, 220 F. Supp. 2d 668 (W.D. Tex. 2001), *aff'd*, 31 F. App'x 835 (5th Cir. 2002), *and aff'd per curiam*, 69 F. App'x 659 (5th Cir. 2003) 17

Texas v. *Ysleta del Sur Pueblo*, 514 U.S. 1016 (1995) 17

Texas v. *Ysleta del Sur Pueblo*, No. EP-99-CA-320-H, 2009 WL 10679419 (W.D. Tex. Aug. 4, 2009) 17

Texas v. *Ysleta del Sur Pueblo*, No. EP-99-CV-320-KC, 2016 WL 3039991 (W.D. Tex. May 27, 2016) 17

U.S. Dep't of Energy v. *Ohio*, 503 U.S. 607 (1992) 26

United States v. *Lopez*, 514 U.S. 549 (1995) 28

United States v. *Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990) 14

TABLE OF AUTHORITIES—Continued

Page

Wisconsin v. *Ho-Chunk Nation*, 784 F.3d 1076 (7th Cir. 2015)..14, 47

Ysleta del Sur Pueblo v. *Texas*, 36 F.3d 1325 (5th Cir. 1994) ....*passim*

Ysleta del Sur Pueblo v. *Texas*, 852 F. Supp. 587 (W.D. Tex. 1993), *rev'd*, 36 F.3d 1325 (5th Cir. 1994) 14

STATUTES

18 U.S.C. § 1166(d)..33

25 U.S.C. §§ 731–737 7
§§ 1300g–1300g-7..7
§ 2701...12, 49
§ 2702...12, 13
§ 2703..13
§ 2704..13
§ 2710(a) 13, 36
§ 2710(b) 13, 36, 49
§ 2710(d) 13, 36

Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. No. 103-116, 107 Stat. 1118..29

Seminole Indian Land Claims Settlement Act of 1987, Pub. L. No. 100-228, 101 Stat. 1556.............29

Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. No. 100-95, 101 Stat. 704..29

TABLE OF AUTHORITIES—Continued

Page

Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 666 (1987) ....*passim*

Act of Apr. 12, 1968, Pub. L. No. 90-287, 82 Stat. 93 6

Indian Civil Rights Act of 1968, Pub. L. No. 90-284, tit. II–VII, 82 Stat. 73, 77–81 9

Act of Aug. 23, 1954, Pub. L. No. 627, ch. 831, 68 Stat. 768 ....6, 7

Act. of Aug. 15, 1953, ch. 505, 67 Stat. 588 9

Charitable Raffle Enabling Act, Tex. Occ. Code Ann. § 2002.001 *et seq.* 52

State Lottery Act, Tex. Gov't Code Ann. § 466.001 *et seq.* 52

Texas Racing Act, Tex. Occ. Code Ann. § 2021.001 *et seq.* 52

Tex. Occ. Code Ann. § 2001.001 *et seq.* 50
§ 2001.101 50
§ 2001.404 51
§ 2001.411 50
§ 2001.419 51
§ 2001.420 51
§§ 2001.451–.459 51
§ 2001.551(c) 51

TABLE OF AUTHORITIES—Continued

Page

LEGISLATIVE MATERIALS

S. Rep. No. 100-446 (1988) .... *passim*

S. Rep. No. 100-90 (1987) 6

S. Rep. No. 99-470 (1986) 9

H.R. Rep. No. 100-36 (1987) 9

H.R. Rep. No. 99-440 (1985) 8

Legislative Hearing on H.R. 4985 Before the Subcomm. on Indian, Insular & Alaska Native Affs. of the H. Comm. on Nat. Res., 115th Cong. (2018) (statement of Carlos Hisa, Governor, Ysleta del Sur Pueblo), https://docs.house.gov/meetings/II/II24/20180913/108701/HHRG-115-II24-Wstate-HisaC-20180913.pdf........18

Gaming Activities on Indian Reservations and Lands: Hearing on S. 555 and S. 1303 Before the S. Select Comm. on Indian Affs., 100th Cong. (1987) 11

Restoration of Federal Recognition to the Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribes of Texas: Hearing on H.R. 1344 Before the S. Select Comm. on Indian Affs., 99th Cong. (1986) 8

133 Cong. Rec. 22,114 (1987) 12, 33

133 Cong. Rec. 22,111–14 (1987) 12

133 Cong. Rec. 20,956–59 (1987) 12

133 Cong. Rec. 9042–45 (1987) 9

131 Cong. Rec. 36,565–70 (1985) 8

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITY

Black's Law Dictionary (11th ed. 2019).....................28

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 918 F.3d 440 and is reproduced at Petition Appendix ("App.") 1–17. The Fifth Circuit's order denying panel rehearing and rehearing en banc is unreported and is reproduced at App. 96–97. The district court's opinion and order are unreported and are reproduced at App. 18–55.

JURISDICTION

The court of appeals entered judgment on April 2, 2020, App. 1, and denied timely petitions for panel rehearing and rehearing en banc on May 12, 2020, App. 96. The petition for certiorari was timely filed on October 9, 2020, and granted on October 18, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 666 (1987) ("Restoration Act"), is set forth in full at App. 105–20. Two provisions of the Act that are central to this case—section 105(f) and section 107—are reproduced below.

> SEC. 105. PROVISIONS RELATING TO TRIBAL RESERVATION.

* * *

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

SEC. 107. GAMING ACTIVITIES.

(a) IN GENERAL.—All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.

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

(c) JURISDICTION OVER ENFORCEMENT AGAINST MEMBERS.—Notwithstanding section 105(f), the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe, or by any

> member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

INTRODUCTION

In the Restoration Act, Congress restored the federal government's trust relationship with two Indian tribes in Texas, the Ysleta del Sur Pueblo ("the Pueblo" or "the Tribe") and the Alabama-Coushatta Indian Tribe of Texas ("the Alabama-Coushatta," and together, "the Tribes"). While Congress was considering the bill that would ultimately become the Restoration Act, this Court issued its landmark decision in *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), holding that states exercising jurisdiction over Indian lands under Public Law 280 could apply their laws *prohibiting* gaming on Indian lands, but lacked authority to *regulate* tribes' non-prohibited games.

Enacted on the heels of *Cabazon Band*, the Restoration Act clearly codifies the prohibitory/regulatory framework from this Court's decision. Section 105(f) of the Act expressly incorporates the Public Law 280 jurisdictional regime into the Act. And section 107, which specifically addresses tribal gaming, prohibits on the reservation and tribal lands only those "gaming activities which are *prohibited* by the laws of the State of Texas," while expressly providing that nothing in

section 107 grants any "civil or criminal *regulatory jurisdiction* to the State of Texas" (emphases added). Congress's purposeful incorporation of terms that had previously been construed by this Court triggers a strong presumption that, absent clear contrary evidence, those terms bear the same meaning in the Restoration Act. And, far from supplying contrary evidence, the Act's text, structure, and history all confirm that Congress incorporated *Cabazon Band*.

In 1994, however, the Fifth Circuit took a wrong turn in interpreting the Act, setting off decades of conflict between the Tribes and Texas over the Tribes' on-reservation gaming activities. Relying almost exclusively on outdated legislative history that did not reflect the final set of changes Congress made to the legislation following *Cabazon Band*, the court erroneously held that the Restoration Act subjects the Tribes to *all* of Texas's gaming laws and regulations. The court further held that the Restoration Act is inconsistent with and displaces the national framework for Indian gaming that Congress enacted the following year in the Indian Gaming Regulatory Act ("IGRA"), depriving these two small Tribes in Texas of the benefit of IGRA's framework and instead subjecting their on-reservation gaming to state regulation.

The Fifth Circuit's decision was fundamentally unsound. The court made virtually no effort to construe the Restoration Act in accordance with basic interpretive principles, including: the presumption that Congress incorporates the settled meaning of terms of art; the presumption that federal statutes should,

where possible, be harmonized rather than read to conflict; and the presumption that statutes should not be read to infringe upon tribal sovereignty absent a clear and manifest expression of Congress's intent to do so. The text, legislative chronology and history, and established rules and presumptions all demonstrate that the Restoration Act incorporates the *Cabazon Band* framework, subjecting the Tribes only to Texas gaming laws that prohibit certain gaming activities. In authorizing Texas to regulate the Tribes' non-prohibited on-reservation gaming activities, contrary to *Cabazon Band*, the Fifth Circuit misread the Restoration Act, and that misreading has infected every decision it has issued regarding the Tribes' gaming activities for almost three decades, continuing to the instant case. The result has been enormous damage to the Tribes' efforts to govern themselves, fund their essential operations, and provide much-needed services for their members.

This Court should reverse and restore to the Tribes the sovereignty over their on-reservation gaming activities they for too long have been wrongfully denied.

STATEMENT OF THE CASE

A. The Ysleta del Sur Pueblo

The Ysleta del Sur Pueblo is one of three federally recognized Indian nations in Texas; its 100-acre reservation is near El Paso, Texas. App. 1, 19. The Tribe traces its roots back to Indian refugees who fled from New Mexico during the 1680 Pueblo Revolt against the

Spanish. See S. Rep. No. 100-90, at 6 (1987) ("S. Rep."). "The revolt forced the Spanish to retreat from Santa Fe to El Paso, and the Spanish forced a large number of Tiwa Indians from Ysleta Pueblo to accompany them." *Id.* In 1751, Spain granted the land of Ysleta Pueblo to its inhabitants, but after the Texas legislature incorporated the Town of Ysleta in 1871, nearly all of the 23,000 acres of the Spanish grant were patented to non-Indians. *Id.* at 6–7.

In 1968, Congress enacted the Tiwa Indians Act, confirming the Pueblo as a federally recognized tribe, but transferring the federal government's trust responsibility for the Tribe to the State of Texas. Act of Apr. 12, 1968, Pub. L. No. 90-287, 82 Stat. 93.[1] In 1983, however, Texas terminated its trust responsibilities for both Tribes, on the ground that Congress's assignment of the trust obligation violated the Texas Constitution. App. 19–20.[2]

Both Tribes thereafter sought to regain their trust relationships with the federal government through legislation. They succeeded in 1987 when Congress enacted the Restoration Act.

---

[1] On August 23, 1954, President Eisenhower signed Public Law 627, terminating the trust relationship between the Alabama-Coushatta and the United States and transferring all trust responsibility for the Alabama-Coushatta to Texas. See Act of Aug. 23, 1954, Pub. L. No. 627, ch. 831, 68 Stat. 768.

[2] The State's view was subsequently rejected in *Alabama-Coushatta Indian Tribe of Texas* v. *Mattox*, 650 F. Supp. 282, 284, 289 (W.D. Tex. 1986).

B. The Restoration Act

The Restoration Act restored the federal government's trust relationship with the Tribes and includes provisions addressing state and tribal authority, as well as a provision addressing tribal gaming.[3]

The terms of the Act addressing tribal gaming, however, changed significantly between the legislation's 1984 introduction and its enactment in 1987. The chronology of Congress's consideration of the evolving versions of what became the Restoration Act is central to this case. The first bill, H.R. 6391, was proposed in 1984. It did not mention gaming, App. 3; and Congress adjourned without acting on it.

In 1985, a similar bill, H.R. 1344, was submitted; it, too, did not mention gaming. On behalf of the State, the Texas Comptroller of Public Accounts, testifying before the House Committee on Interior and Insular Affairs, objected, making clear that Texas would oppose any legislation that did not make state gaming laws directly applicable on the Tribes' reservations. App. 121. The State was concerned that tribal gaming would have a detrimental effect on "existing charitable bingo operations in the State of Texas." *Id.*

In response, the House Committee added a provision—section 107—stating that tribal gaming could

[3] Title I of the Act addresses the Pueblo; Title II, the Alabama-Coushatta. The Act was formerly codified at 25 U.S.C. §§ 731–737 and §§ 1300g–1300g-7. This brief refers to the sections in Title I of the Public Law. The relevant provisions of Title II are identical.

only be conducted pursuant to a tribal ordinance or law approved by the Secretary of Interior, and that until amendments were approved by the Secretary and submitted to Congress, "the tribal gaming laws, regulations and licensing requirements shall be identical to the laws and regulations of the State of Texas regarding gambling, lottery and bingo." H.R. Rep. No. 99-440, at 2–3 (1985). The House passed the bill as amended. See 131 Cong. Rec. 36,565–70 (1985). Some Texas officials nevertheless continued to oppose it because it did "not provide adequate protection against high stakes gaming operations on the reservation." App. 20–21, 122.

To address Texas's opposition and secure restoration of its trust relationship, the Pueblo passed a Tribal Resolution. See App. 121–24. The Resolution expressed the Tribe's opposition to the "proposal that H. R. 1344 be amended to make state gaming law applicable on the reservation," stating that such an infringement of the Tribe's sovereignty was "wholly unsatisfactory to the Tribe." App. 122. Although the Tribe saw "no justification for singling out the Texas Tribes for treatment different than that accorded other Tribes in this country," it did not want the controversy over gaming to jeopardize the restoration of the trust relationship with the United States. App. 123.

Accordingly, "to quiet the controversy," *Restoration of Federal Recognition to the Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribes of Texas: Hearing on H.R. 1344 Before the S. Select Comm. on Indian Affs.*, 99th Cong. 23 (1986) (statement of Don

B. Miller, Att'y, Native American Rights Fund), the Pueblo asked its congressional representatives to amend H.R. 1344 to prohibit on the reservation and tribal lands "all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas." App. 123. The Senate Select Committee amended H.R. 1344 as requested by adding that language, S. Rep. No. 99-470, at 4 (1986), but the bill nonetheless died in the Senate. App. 22.

In January 1987, the Tribes' congressional representatives introduced H.R. 318 in the House; its language was substantially similar to that in H.R. 1344. The House Committee on Interior and Insular Affairs thereafter voted to amend H.R. 318 by stating that "[p]ursuant to Tribal Resolution No. T.C-02-86 . . . , all gaming as defined by the laws of the State of Texas shall be prohibited on the tribal reservation and on tribal lands." H.R. Rep. No. 100-36, at 1 (1987) ("H. Rep."). The House passed amended H.R. 318. See 133 Cong. Rec. 9042–45 (1987).

While Congress was considering these earlier versions of the Restoration Act, the legal framework generally governing state regulation of Indian gaming was changing. At that time, states seeking to limit gaming on Indian lands could do so only if they were covered by Public Law No. 83-280, Act. of Aug. 15, 1953, ch. 505, 67 Stat. 588 ("Public Law 280"), or the Indian Civil Rights Act of 1968, Pub. L. No. 90-284, tit. II–VII, 82 Stat. 73, 77–81. Public Law 280 granted specified states criminal jurisdiction over offenses committed by or against Indians within Indian country, but did *not*

grant those states general civil regulatory authority there. See *Bryan* v. *Itasca Cnty.*, 426 U.S. 373 (1976). The Indian Civil Rights Act extended the same jurisdiction granted in Public Law 280 to any other state, subject to tribal consent.

In February 1987, this Court issued its decision in *Cabazon Band*, clarifying how the Public Law 280 jurisdictional regime applies to tribal gaming. Agreeing with the "prohibitory/regulatory" framework originally adopted by the Fifth Circuit in *Seminole Tribe of Florida* v. *Butterworth*, 658 F.2d 310 (5th Cir. Unit B 1981), and applied by the Ninth Circuit in the decision under review, the Court held that "if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation." 480 U.S. at 209. "The shorthand test is whether the conduct at issue violates the State's public policy." *Id.*

Applying this framework, the Court held that California's laws governing bingo were regulatory rather than prohibitory and thus California could not enforce them on Indian reservations. *Id.* at 210–12. "In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery," the Court concluded that "California regulates rather than prohibits gambling in general and bingo in particular." *Id.* at 211. The Court rejected California's argument that

the State's imposition of criminal penalties for unregulated bingo made its bingo laws prohibitory: "that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub. L. 280." *Id.*

In the wake of *Cabazon Band*, Congress began considering bills to provide a national framework for regulation of Indian gaming. See, *e.g.*, *Gaming Activities on Indian Reservations and Lands: Hearing on S. 555 and S. 1303 Before the S. Select Comm. on Indian Affs.*, 100th Cong. (1987) (discussing *Cabazon Band*).

Simultaneously, Congress continued considering what to do with the Restoration Act. In the Senate, the Committee on Indian Affairs revised the text of H.R. 318. It carried forward a provision stating that Texas "shall exercise civil and criminal jurisdiction" on the Tribe's reservation "as if such State had assumed such jurisdiction with the consent of the tribe" under the Indian Civil Rights Act. S. Rep. at 3. In addition, the bill specifically and significantly amended section 107: (i) it struck the prohibition on all gaming, prohibiting instead only the "gaming activities which are prohibited by the laws of the State of Texas" on the Tribe's lands, which is precisely the line *Cabazon Band* had drawn; (ii) it also expressly stated that "[n]othing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas"; and (iii) it gave federal courts "exclusive jurisdiction" over violations committed by the Tribe or its members. *Id.*

The Senate then returned H.R. 318 to the House, which agreed to the Senate's amendments by unanimous consent. See 133 Cong. Rec. 20,956–59 (1987); 133 Cong. Rec. 22,111–14 (1987). Representative Udall, Chairman of the House Committee on Interior and Insular Affairs, explained that the Senate's amendments codified the *Cabazon Band* framework:

> It is my understanding that the Senate amendments to these sections 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 these tribes the holding and rational[e] adopted in the Court's opinion in the case.

133 Cong. Rec. 22,114 (1987).

In August 1987, President Reagan signed that bill, which is the Restoration Act.

C. The Indian Gaming Regulatory Act

The very next year Congress enacted IGRA to provide a national framework for Indian gaming and thus to provide "a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1); see *id.* § 2701(4). IGRA creates a comprehensive framework designed "to balance the need for sound enforcement of gaming laws and regulations, with the strong Federal interest in preserving the sovereign rights of tribal governments

to regulate activities and enforce laws on Indian land." S. Rep. No. 100-446, at 5 (1988) ("IGRA S. Rep.").

Consistent with the strong interest in tribal sovereignty, IGRA affirmed Indian tribes' right "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." 25 U.S.C. § 2701(5). IGRA also created the National Indian Gaming Commission ("NIGC") to regulate tribal gaming. *Id.* §§ 2702(3), 2704(a).

Under IGRA, tribal gaming is divided into three classes:

- Class I gaming, which includes social games for prizes of small value and traditional forms of Indian gaming, and is exclusively within the tribes' jurisdiction, *id.* §§ 2703(6), 2710(a)(1);
- Class II gaming, which includes bingo (including with electronic or other technological aids), and similar games, and is regulated by the NIGC, *id.* §§ 2703(7)(A)(i), 2710(a)(2); and
- Class III gaming, which is casino-style gaming, such as slot machines and roulette, and which is permitted only pursuant to tribal-state compacts, *id.* §§ 2703(8), 2710(d).

Both Class II and III gaming activities are authorized if the state "permits such gaming for any purpose by any person, organization or entity." *Id.* § 2710(b)(1)(A); see *id.* § 2710(d)(1)(B).

IGRA thus incorporates the *Cabazon Band* approach—that is, Class II and III gaming are permitted if the relevant state permits such gaming to others in the state, and the state cannot regulate non-prohibited games on tribal lands unless the tribe consents. See, *e.g.*, IGRA S. Rep. at 6 ("[T]he Committee anticipates that Federal courts will rely on" the "prohibitory/regulatory distinction" recognized "by the Supreme Court in *Cabazon*."); *Wisconsin* v. *Ho-Chunk Nation*, 784 F.3d 1076, 1082 (7th Cir. 2015) ("*Cabazon's* regulatory/prohibitory distinction applies when determining whether state law permits (or does not prohibit) gambling for the purposes of IGRA."); *Mashantucket Pequot Tribe* v. *Connecticut*, 913 F.2d 1024, 1031–32 (2d Cir. 1990); *United States* v. *Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 367 (8th Cir. 1990).

D. *Ysleta I* And Its Aftermath

In 1992, the Pueblo sought to obtain the Texas Governor's negotiated agreement to permit Class III gaming on its lands under IGRA; the State refused. *Ysleta del Sur Pueblo* v. *Texas*, 852 F. Supp. 587, 588–89 (W.D. Tex. 1993). The Pueblo sued, alleging that the State had refused to negotiate in good faith and seeking remedies under IGRA. *Id.* at 589–90. The district court granted summary judgment to the Pueblo. It held that IGRA had incorporated the *Cabazon Band* prohibitory/regulatory framework, *id.* at 592–93; that gaming was not prohibited in Texas because the State had legalized gambling, such as bingo, and had established a lottery, *id.* at 593; that IGRA, and not the Restoration

Act, controlled the analysis, *id.* at 597; and that, in any event, the Tribe's Class III gaming was not "prohibited by the laws of the State of Texas" under the Restoration Act, *id.*

The Fifth Circuit reversed. Its decision in *Ysleta del Sur Pueblo* v. *Texas*, 36 F.3d 1325 (5th Cir. 1994) ("*Ysleta I*"), established the legal framework for Texas's efforts to address the Tribes' gaming thereafter and resulted in decades of litigation in federal district court about specific aspects of the Tribes' gaming activities.

Ysleta I held that the Eleventh Amendment barred the Pueblo's suit because the Restoration Act—not IGRA—controlled the analysis and that Act did not abrogate Texas's immunity from suit. In deciding that the Restoration Act controlled, the court interpreted section 107(a) to provide that the entirety of "Texas' gaming laws and regulations" would "operate as surrogate federal law on the Tribe's reservation in Texas." *Id.* at 1334. The court based its conclusion on "analysis of the legislative history of both the Restoration Act and IGRA." *Id.* at 1333. In particular, the court relied heavily on the 1986 Tribal Resolution in interpreting the Restoration Act, stating that the Tribe's proposal to ban all gaming rather than accepting Texas's regulation on Indian lands meant that "any threat to tribal sovereignty is of the Tribe's own making." *Id.* at 1335. The court declined to consider IGRA because it found an irreconcilable conflict between it and the Restoration Act, which it resolved by holding that the specific statute (the Restoration Act) governed over the general statute (IGRA), rather than finding that the later

statute trumped the earlier statute or attempting to harmonize the two statutes. *Id.* at 1334–35.

The Pueblo petitioned this Court for review. Texas opposed but filed a conditional cross-petition in which it urged the Court to "harmoniz[e]" the Restoration Act and IGRA. See Conditional Cross-Petition for Writ of Certiorari at 9, *Texas* v. *Ysleta del Sur Pueblo*, No. 94-1310 (U.S. Jan. 30, 1995). As the State explained, "without the framework provided by IGRA it would not be possible to regulate" tribal gaming not prohibited by the Restoration Act, "since the state has no regulatory, civil or criminal jurisdiction over gaming on Tribal lands." *Id.* at 8. This Court denied review. *Texas* v. *Ysleta del Sur Pueblo*, 514 U.S. 1016 (1995) (mem.).

Ysleta I was followed by a quarter-century of disputes and litigation between Texas and the Tribes about the scope of Texas's legal authority to regulate games on tribal lands and the meaning of Texas state laws and regulations addressing gaming. See, *e.g.*, Brief in Opposition ("BIO") at II–IV ("Related Proceedings"), 1 n.1, 16–17. In struggling to implement *Ysleta I*, the lower courts have experimented with a variety of unsatisfactory approaches, from enjoining all gaming on the Pueblo's reservation, to instructing the Pueblo to seek a license from Texas regulators, to requiring the Pueblo to obtain pre-approval from the federal courts for any gaming, to most recently allowing Texas to challenge the Tribe's gaming activities in federal court after concluding that the pre-approval approach had improperly "transformed the Court into a quasi-regulatory body overseeing and monitoring the

minutiae of the Pueblo Defendants' gaming-related conduct." *Texas* v. *Ysleta del Sur Pueblo*, No. EP-99-CV-320-KC, 2016 WL 3039991, at *19 (W.D. Tex. May 27, 2016); see also App. 26–28; *Texas* v. *Ysleta del Sur Pueblo*, 220 F. Supp. 2d 668 (W.D. Tex. 2001), *aff'd*, 31 F. App'x 835 (5th Cir. 2002), *and aff'd per curiam*, 69 F. App'x 659 (5th Cir. 2003); *Texas* v. *Ysleta del Sur Pueblo*, No. EP-99-CA-320-H, 2009 WL 10679419 (W.D. Tex. Aug. 4, 2009).

E. Proceedings Below

This case involves the Pueblo's gaming activities at the Speaking Rock Entertainment Center near El Paso, Texas. App. 28. The Pueblo government and its associated entities, including Speaking Rock, employ roughly 1,200 individuals, 30 percent of whom are tribal members. Speaking Rock revenues are approximately 60 percent of the Pueblo's operating budget. The loss of those revenues would result in mass layoffs, devasting the Tribe's efforts to promote education and employment, among other activities. See, *e.g.*, App. 102 ("Speaking Rock is a primary employer for the Tribe's members and . . . Speaking Rock's revenue supports significant educational, governmental, and charitable initiatives.").

In 2017, Texas government agents decided that Speaking Rock's electronic bingo machines and live-call bingo did not comply with Texas's bingo laws and regulations. The State sought injunctive relief in federal district court. App. 7, 29–32. The district court

granted summary judgment to the State and enjoined the Pueblo's gaming at Speaking Rock. App. 18–55. But the court stayed the injunction pending appeal, because it thought that either the Fifth Circuit or this Court might wish to consider whether Texas was exercising "regulatory jurisdiction" over the Tribe's gaming activities in violation of the Restoration Act. App. 100–01. As the district court observed, *Ysleta I* and its progeny created "a twilight zone of state, federal, and sovereign authority," with "the extensive litigation over gaming at Speaking Rock as a sort of trial-and-error process to test the limits of Texas law, with federal courts serving as an arbiter of those limits." App. 88.

In granting the Pueblo's stay request, the district court also emphasized that the harm to the Tribe from the injunction would be "truly irreparable." App. 102. If Speaking Rock were shut down, the Pueblo would be driven back into abject poverty. When Speaking Rock closed due to one of the many previous disputes, the Tribe was economically devastated, with unemployment skyrocketing from 3 percent to 28 percent. See *Legislative Hearing on H.R. 4985 Before the Subcomm. on Indian, Insular & Alaska Native Affs. of the H. Comm. on Nat. Res.*, 115th Cong. 4 (2018) (statement of Carlos Hisa, Governor, Ysleta del Sur Pueblo). Pueblo members were forced to leave the reservation in search of work, were unable to pay mortgages, and lost their retirement savings; and budgets for Pueblo programs and services were slashed. See *id.*

On appeal, the Fifth Circuit reaffirmed *Ysleta I*, stating that "settled precedent resolves this dispute." App.

17. The court recited its previous conclusion that under the Restoration Act, "Texas' gaming laws *and regulations* . . . operate as surrogate federal law on the Tribe's reservation." App. 12. And it confirmed its prior holding that "[t]he Restoration Act and IGRA erect fundamentally different regimes, and the Restoration Act—plus the Texas gaming laws and regulations it federalizes—provides the framework for determining the legality of gaming activities on [tribal] lands." App. 11. The court thus affirmed the injunction. App. 17.

After the Pueblo filed a petition for certiorari, this Court called for the views of the Solicitor General. The United States recommended granting review, explaining that "the Restoration Act is better construed to prohibit gaming on Indian lands only to the extent that the particular gaming activity is properly determined under the framework of [*Cabazon Band*] to be 'prohibited' by state law rather than 'regulated' under it." Brief for the United States as Amicus Curiae 10 ("CVSG Br."). The United States concluded that the Tribes' "[n]on-prohibited gaming activities, including bingo, should accordingly be subject to regulation under IGRA," and that the Fifth Circuit's contrary decision "implicates important tribal sovereignty interests and undermines IGRA's key objectives." *Id.* at 10–11.

SUMMARY OF THE ARGUMENT

I. The Restoration Act codifies *Cabazon Band*'s prohibitory/regulatory framework. Thus, Texas's

prohibitory gaming laws are binding on the Tribes, but Texas may not regulate gaming on tribal lands.

A. To begin, in section 105(f), Congress expressly incorporated the Public Law 280 jurisdictional regime into the Restoration Act. In granting Texas the same criminal and civil jurisdiction over tribal lands that this Court had previously construed in *Bryan* and *Cabazon Band*, Congress is presumed to have incorporated this Court's interpretation of Public Law 280. The analysis thus begins with the presumption that Congress incorporated the *Cabazon Band* framework.

B. The text, structure, and history of section 107 confirm that Congress codified *Cabazon Band*. The statute prohibits to the Tribes only those games "which are prohibited" by Texas law, while making clear that Texas lacks "regulatory jurisdiction" over activities on tribal lands. This language exactly tracks *Cabazon Band's* prohibitory/regulatory distinction, and contrasts sharply with other contemporaneous enactments in which Congress granted states authority to "prohibit *or regulate*" tribal gaming or expressly subjected tribal gaming to all state gaming laws.

The Tribe's reading is also the only one that gives effect to section 107(b). If, as the Fifth Circuit held, Texas had authority under section 107(a) to prescribe the rules governing the Tribe's non-prohibited gaming activities, then Texas would have "regulatory jurisdiction" over those activities—directly contravening section 107(b)'s command that nothing in section 107 "shall be construed as a grant of civil or criminal

regulatory jurisdiction to the State of Texas." This Court has consistently rejected interpretations that would create this sort of statutory contradiction, refusing to read general language in one provision to nullify limitations Congress included in a neighboring provision.

Section 107(c)—which departs from Public Law 280 by granting federal courts exclusive enforcement jurisdiction—further confirms that Congress codified *Cabazon Band*. Section 107(c) shows that when Congress intended to depart from the Public Law 280 regime, it made its intent to do so clear by creating an express exception to section 105(f). Congress included no such exception in defining the substantive law governing tribal gaming activities in sections 107(a) and 107(b), further confirming that those sections should be read and applied consistently with Public Law 280. Moreover, it is hard to imagine why Congress would grant *federal courts* exclusive jurisdiction over the Tribes' compliance with the minutiae of Texas's gaming laws and regulations, while creating a void in which neither the NIGC nor Texas's gaming commission would have authority to enforce regulatory requirements.

Finally, the legislative history makes clear that Congress codified *Cabazon Band*. The Senate Report states expressly that section 107(b) is a restatement of the law as provided in Public Law 280. And Chairman Udall explained that the amendments made by the Senate in the wake of *Cabazon Band* were intended

to codify the Court's decision for the benefit of the Tribes.

C. If any doubt remained, two additional interpretive presumptions would require that it be resolved in favor of the Tribes. First, one federal statute will not be read to displace another absent a clear and manifest congressional intent. Unlike the Fifth Circuit, which found an irreconcilable conflict between the Restoration Act and IGRA, the Tribes' reading properly harmonizes the two statutes, allowing both to be given full effect. Second, under longstanding law, any ambiguities in laws affecting tribal sovereignty must be resolved in favor of the tribe. And the Restoration Act clearly does not manifest an unequivocal intent to impair the Tribes' sovereignty by subjecting their on-reservation gaming activities to state regulation.

D. The Fifth Circuit in *Ysleta I* badly misconstrued the Restoration Act. The court elevated legislative history over statutory text, giving dispositive effect to language from a committee report likely addressing a previous version of the bill that Congress did not enact into law. Moreover, the court misread the Tribal Resolution, wrongly treating it as reflecting the Tribe's *consent* to state regulation of tribal gaming activities, when in fact the Resolution states on its face that the Tribe emphatically *opposed* state regulation, and proposed a total ban of all gaming on tribal lands precisely to avoid state regulation on its lands. In other words, the court interpreted the Restoration Act to embody an outcome both the Tribe and Congress clearly rejected.

II. Under *Cabazon Band*, Texas lacks authority to regulate bingo on the Tribes' reservations. Texas does not prohibit bingo as a matter of state public policy, but rather permits others to play bingo in the State subject to its regulatory scheme. Accordingly, Texas's bingo laws are regulatory, not prohibitory, and they do not apply on the Tribes' reservations. The Tribes' bingo activities are instead regulated under IGRA, which leaves the regulation of Class II games like bingo to the Tribes themselves, subject to supervision by the NIGC, and does not authorize state regulation.

ARGUMENT

I. THE RESTORATION ACT INCORPORATES *CABAZON BAND* AND PROHIBITS THE TRIBES FROM CONDUCTING ONLY THOSE GAMING ACTIVITIES THAT TEXAS FLATLY PROHIBITS RATHER THAN MERELY REGULATES.

A. By Incorporating The Public Law 280 Jurisdictional Regime Into The Restoration Act, Congress Adopted The *Cabazon Band* Framework.

1. Section 105(f) of the Restoration Act incorporates the terms of Public Law 280 into the Act. As a result, the Restoration Act incorporates this Court's interpretation of the Public Law 280 regime laid out in *Bryan* and *Cabazon Band*, prohibiting the Tribes from conducting the type of gaming that Texas prohibits,

but denying Texas regulatory authority over the type of gaming on tribal lands that occurs elsewhere in Texas.

Specifically, section 105(f) authorizes Texas to exercise "civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under Sections 401 and 402" of the Indian Civil Rights Act. Sections 401 and 402 of the Indian Civil Rights Act, in turn, extended the same criminal and civil jurisdiction granted in Public Law 280—which had previously applied only to certain states enumerated in Public Law 280—to any other state, subject to tribal consent. Compare *Cabazon Band*, 480 U.S. at 207–08 nn.6–7 (quoting Public Law 280's grants of criminal and civil jurisdiction), with 82 Stat. at 78–79, §§ 401(a), 402(a) (using the same operative terms to grant civil and criminal jurisdiction to other states with tribal consent).

As a result, section 105(f) grants Texas criminal jurisdiction over "offenses committed by or against Indians" on the Pueblo's reservation "to the same extent that [Texas] has jurisdiction over any such offense committed elsewhere within the State," and "the criminal laws of [Texas] shall have the same force and effect" on the Pueblo's reservation "as they have elsewhere within th[e] State." 82 Stat. at 78, § 401(a). And as to "civil causes of action between Indians or to which Indians are parties" arising on the reservation, section 105(f) authorizes Texas to exercise jurisdiction "to the same extent that [it] has jurisdiction over other

civil causes of action," and "those civil laws of [Texas] that are of general application to private persons or private property shall have the same force and effect" to claims on the reservation involving Indians "as they have elsewhere within th[e] State." *Id.* at 79, § 402(a). But section 105(f) does not grant Texas "*general civil regulatory authority*" on tribal lands. See *Cabazon Band*, 480 U.S. at 207–08 & nn.6–7 (emphasis added) (citing *Bryan*, 426 U.S. at 380) (construing the same statutory language in Public Law 280).

Section 105(f) thus grants Texas the same jurisdiction, using the same statutory terms, that Congress granted to California and other states in Public Law 280 and that this Court construed in *Bryan* and *Cabazon Band*. See *id.* Put differently, through its express incorporation of sections 401 and 402 of the Indian Civil Rights Act, section 105(f) of the Restoration Act incorporates the Public Law 280 jurisdictional regime into Texas's jurisdiction over the Tribe's reservation—a regime that, this Court has held, does not authorize states to exercise general regulatory jurisdiction on tribal lands.

2. Congress's incorporation of a preexisting statutory scheme that had already been construed by this Court is significant. It triggers a strong presumption that the Restoration Act should be construed consistently with this Court's interpretation of Public Law 280. "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar

as it affects the new statute." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 382 n.66 (1982) (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 580–81 (1978)). And when "judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well." *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998); see also, *e.g.*, *U.S. Dep't of Energy* v. *Ohio*, 503 U.S. 607, 626 (1992) ("Congress' use of the same language . . . indicates a likely adoption of our prior interpretation of that language.") (citing cases). This presumption is particularly powerful here because the Restoration Act followed directly on the heels of *Cabazon Band* and the legislative history indicates that members, including the Chairman of the responsible House Committee, were aware of and intended to codify this Court's decision. See *supra*, p. 10.

Absent any contrary indication in the statute, therefore, section 105(f) means that, consistent with *Cabazon Band*, when Texas "regulates rather than prohibits" a particular activity, 480 U.S. at 211, its law "must be classified as civil/regulatory and [the Restoration Act] does not authorize its enforcement on [the Pueblo's] reservation," *id.* at 209.

The question, then, is whether anything in section 107 rebuts the presumption that Congress adopted the *Cabazon Band* framework and indicates that Congress carved out gaming activities from the Public Law 280 regime that otherwise governs Texas's jurisdiction over the Tribe's on-reservation activities under section

105(f). As shown next, section 107 uniformly supports this presumption—its text, structure, and history powerfully combine to confirm that Congress incorporated the *Cabazon Band* framework. In defining the substantive law that governs the Tribe's on-reservation gaming activities in sections 107(a) and 107(b), Congress carefully tracked *Cabazon Band*'s prohibitory/regulatory framework. Moreover, when Congress wanted to depart from the Public Law 280 regime, as it did with regard to enforcement jurisdiction in section 107(c), it clearly signaled its intent to do so by creating an express exception to section 105(f).

B. The Text, Structure, And History Of Section 107 Confirm That Congress Incorporated The *Cabazon Band* Framework.

1. The analysis of section 107 begins, of course, with its text and the ordinary meaning of the words Congress used. Under section 107(a), the only "gaming activities" that are "prohibited on the reservation and on lands of the tribe" are those "which are *prohibited* by the laws of the State of Texas." 101 Stat. at 668–69, § 107(a) (emphasis added). Section 107(b), moreover, confirms that nothing in section 107 is "a grant of civil or criminal *regulatory* jurisdiction to the State of Texas." *Id.* at 669, § 107(b) (emphasis added).

Employing terms of art that *Cabazon Band* had recently clarified, section 107 distinguishes between laws that *prohibit* gaming activities and laws that

regulate them, with only the former binding the Tribe under section 107(a). To "prohibit" an activity is to "forbid [it] by law." *Black's Law Dictionary* (11th ed. 2019). To "regulate," by contrast, is to "control (an activity or process) esp. through the implementation of rules," *id.*; in other words, to "prescribe the rule" by which an activity "is to be governed." *United States* v. *Lopez*, 514 U.S. 549, 553 (1995) (quoting *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824)).

Particularly as framed by *Cabazon Band*, the most natural way to read these terms and to harmonize sections 107(a) and 107(b) is by reading the statute to prohibit gaming activities that Texas law forbids altogether. But if Texas permits a type of gaming (here, bingo) to occur outside the reservation, then it must allow those same gaming activities to take place on tribal land, subject to the Tribe's (and the federal government's) "regulatory jurisdiction," not Texas's. Notably, Texas previously conceded as much to this Court, stating clearly that it has "no regulatory, civil or criminal jurisdiction over gaming on Tribal lands." Conditional Cross-Petition, *supra*, at 8.

2. This reading is further confirmed by contemporaneous enactments—including other laws passed during the gap period between *Cabazon Band* and the enactment of IGRA—which show that Congress understood the distinction between prohibition and regulation, and knew how to grant a state regulatory jurisdiction over a tribe's gaming activities when that was its intent. The same day that it passed the Restoration Act, Congress passed another settlement act

that addressed gaming by the Wampanoag Tribe of Gay Head (the "Aquinnah") in Massachusetts. In contrast to the Restoration Act, Congress subjected the Aquinnah's lands to "those laws and regulations which prohibit *or regulate* the conduct of bingo or any other game of chance." Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. No. 100-95, § 9, 101 Stat. 704, 709–10 (emphasis added).

Similarly, in the Seminole Indian Land Claims Settlement Act of 1987, Pub. L. No. 100-228, § 6(d)(1), 101 Stat. 1556, 1560, Congress provided that "[t]he laws of Florida relating to . . . gambling . . . shall have the same force and effect [on tribal] lands as they have elsewhere within the State." And in the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. No. 103-116, § 14(b), 107 Stat. 1118, 1136, Congress provided that "all laws, ordinances, and regulations of the State, and its political subdivisions, shall govern the regulation of gambling devices and the conduct of gambling or wagering by the Tribe on and off the Reservation."

In marked contrast to these laws, the Restoration Act does *not* subject the Tribes to all Texas laws that "prohibit or regulate" gaming or that "relate to gaming." Nor does it provide that all Texas gaming laws "shall have the same force and effect on tribal land" or "shall govern the regulation of gambling" on the Tribes' reservations. Instead, the Act federalizes on tribal lands only those Texas laws that "prohibit" gaming, while expressly providing that section 107 grants

Texas no "regulatory jurisdiction" over tribal lands. Had Congress intended to subject the Tribes to all of Texas's gaming laws and regulations, it would have used the kind of language it employed in other contemporaneous acts governing tribes, and not the narrowly tailored language it chose in section 107. See, *e.g.*, *Lagos* v. *United States*, 138 S. Ct. 1684, 1689–90 (2018) (construing statute in light of textual differences with other statutes addressing similar subject).

3. The Pueblo's reading is also the only one that gives effect to section 107(b). See *Life Techs. Corp.* v. *Promega Corp.*, 137 S. Ct. 734, 740 (2017) ("Whenever possible . . . we should favor an interpretation that gives meaning to each statutory provision."). Construing section 107(a) to require the Tribe to comply with all of Texas's gaming laws and regulations "would cause the statute, in a significant sense, to contradict itself." *Liteky* v. *United States*, 510 U.S. 540, 552–53 (1994). If Texas had authority to determine the rules governing the Tribe's non-prohibited gaming activities under section 107(a), then Texas would be exercising "regulatory jurisdiction" over those activities, directly contrary to section 107(b)'s command that "[n]othing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." 101 Stat. at 669, § 107(b).

The Fifth Circuit's interpretation thus violates a court's "duty to give effect, if possible, to every clause and word of a statute rather than to emasculate an entire section." *Bennett* v. *Spear*, 520 U.S. 154, 173 (1997) (cleaned up); see also *Liteky*, 510 U.S. at 552–53 & n.2

(concluding it would be "poor statutory construction" to construe one provision as "implicitly eliminating a limitation explicitly set forth in" another provision); *Dep't of Rev. of Or.* v. *ACF Indus., Inc.*, 510 U.S. 332, 340 (1994) (refusing to "subvert the statutory plan" by interpreting one subsection to contradict another). Section 107(a) cannot be construed to grant Texas authority that section 107(b) expressly denies it.

Below, Texas tried to account for section 107(b) by arguing that it prevents application of Texas criminal procedure and civil investigatory powers. See Brief of Appellee at 20, 33–34, *Texas* v. *Ysleta del Sur Pueblo*, No. 19-50400 (5th Cir. Oct. 10, 2019). But this does not answer the statutory contradiction that would result if Texas could regulate the Tribe's non-prohibited gaming activities by prescribing the rules governing them. Moreover, Texas confuses regulation with enforcement. Congress addressed "[j]urisdiction over [e]nforcement" separately, in section 107(c), which vests "exclusive jurisdiction over any offense in violation of section (a)" in "the courts of the United States." By vesting exclusive enforcement jurisdiction in the federal courts, section 107(c) already makes clear that Texas cannot apply its criminal or civil enforcement regime to the Tribe's gaming activities. Texas thus has no explanation for the inclusion of section 107(b).

4. Section 107(c) is also a significant piece of the statutory puzzle in its own right. Unlike sections 107(a) and 107(b)—which exactly track the *Cabazon Band* framework—section 107(c) departs dramatically from the Public Law 280 regime. Public Law 280 does

not limit state enforcement jurisdiction in the way section 107(c) does. That is why Congress needed to specify that the limitation on Texas's enforcement jurisdiction in section 107(c) applies "[n]otwithstanding section 105(f)." 101 Stat. at 669, § 107(c). That Congress included this qualification only for section 107(c), which departs from the Public Law 280 regime, and not for sections 107(a) and 107(b), further strikingly confirms that sections 107(a) and 107(b) should be read consistently with Public Law 280. Cf. *Lorillard*, 434 U.S. at 582 ("This selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA.").

Section 107(c) bears on the interpretation of section 107(a) in another respect. It is highly unlikely that Congress intended *federal courts* to superintend compliance with the intricacies of Texas's regulatory regime for non-prohibited games like bingo, and to create a vacuum in which neither Texas's gaming commission nor federal regulators would have authority to act. See CVSG Br. 21–22 (explaining the NIGC's role in ensuring the integrity of tribal gaming). Neither Texas nor the Fifth Circuit has identified any comparable regime anywhere in the country, and the Pueblo is aware of none. The history of litigation and federal district court superintendence of tribal gaming that followed *Ysleta I* highlights the unworkability of the interpretation that led to that regime. See *supra*, p. 14. Even Texas

once agreed, urging this Court for that reason to harmonize the Restoration Act and IGRA. See *id.* It is far more plausible to conclude that Congress vested federal courts with exclusive jurisdiction only over violations of the State's prohibitory gaming laws. Cf. 18 U.S.C. § 1166(d) (creating exclusive federal jurisdiction over prosecutions for violations of state gaming laws that apply in Indian country under IGRA).

5. The statute's text and structure thus make clear that, in sections 107(a) and 107(b), Congress codified the prohibitory/regulatory framework this Court applied to Public Law 280 in *Cabazon Band*. If more evidence were needed, the legislative history makes this explicit. The Senate Report explained that section 107(b) "is a restatement of the law as provided in [Public Law 280], and should be read in the context of the provisions of Section 105(f)." S. Rep. at 10–11. And Representative Morris Udall—the Chairman of the House Committee on Interior and Insular Affairs responsible for the House version of the bill—explained that the bill as it emerged from the Senate was "in line with the rational[e] of the recent Supreme Court decision in the case of Cabazon Band of Mission Indians versus California" and would "codify for these tribes the holding and rational[e] adopted in the Court's opinion in the case." 133 Cong. Rec. 22,114 (1987).

C. Interpretive Presumptions Compel Resolution Of Any Ambiguity In Favor Of The Tribes' Interpretation.

To the extent the statute's text, structure, and history leave any ambiguity, which they do not, two additional interpretive presumptions confirm it should be resolved in favor of the Tribes—the presumption that federal statutes should be read harmoniously and the presumption in favor of Indian sovereignty.

1. "When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both.'" *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1624 (2018) (quoting *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974)); see *POM Wonderful LLC* v. *Coca-Cola Co.*, 573 U.S. 102, 115 (2014) ("When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other."). Accordingly, "[a] party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing 'a clearly expressed congressional intention' that such a result should follow." *Epic*, 138 S. Ct. at 1624 (quoting *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 533 (1995)). "The intention must be 'clear and manifest.'" *Id.* (quoting *Morton*, 417 U.S. at 551).

No one disputes that, absent another federal statute precluding IGRA's application, IGRA by its terms

applies to the Tribes' gaming activities. The Fifth Circuit in *Ysleta I*, however, found an irreconcilable conflict between the Restoration Act and IGRA (which it resolved by applying the specific-controls-the-general canon rather than the later-in-time rule). See 36 F.3d at 1334–35. The Tribes' interpretation, by contrast, harmonizes the statutes, giving full effect to each. Under the Tribes' reading, if a gaming activity is prohibited outright as a matter of Texas public policy, then it is prohibited on the Tribes' reservations under both the Restoration Act and IGRA. See 25 U.S.C. § 2710(b), (d) (Class II and III gaming activities are lawful on Indian lands under IGRA only if the state permits such gaming for others). But if a gaming activity is permitted for others in the State, subject only to regulation, then it is likewise permitted to the Tribes, and the Restoration Act does not grant Texas authority to regulate that activity on the Tribes' reservations. The Tribes' gaming activities are instead governed by IGRA, under which they are subject to the Tribes' own regulatory jurisdiction and that of the NIGC for Class II games, *id.* § 2710(a)(2), and to tribal-state compacts for Class III games, *id.* § 2710(d)(1), (7)(B)(vii); see CVSG Br. 10–11 (concluding that the Tribes' "[n]on-prohibited gaming activities, including bingo, should . . . be subject to regulation under IGRA").

The Fifth Circuit's interpretation, by contrast, needlessly creates a conflict between the Restoration Act and IGRA. Under IGRA, if a state permits others to engage in a Class II game like bingo, then a tribe may engage in that game on its reservation free of state

regulation and subject only to regulation by the NIGC. And a state may not regulate Class III gaming on a tribe's reservation unless the tribe consents pursuant to a tribal-state compact. See IGRA S. Rep. at 5–6 (under IGRA, "unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not uni[l]aterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities"). IGRA's legislative history reflects Congress's expectation that this regime would apply to tribes throughout the country, including in Texas. See *id.* at 6 (stating that IGRA "is intended to expressly preempt the field in the governance of gaming activities on Indian lands"); *id.* at 11–12 (stating that in the 45 states that did not criminally prohibit all gaming—including Texas—"tribes with Indian lands in those States are free to operate bingo on Indian lands, subject to [IGRA's] regulatory scheme").

The Fifth Circuit's reading of the Restoration Act thus denies the Tribes the benefit of IGRA's shield from state regulation. And it produces the untenable result that the Pueblo and the Alabama-Coushatta would be excluded from IGRA's otherwise comprehensive regulatory framework. See CVSG Br. 20–21. Nothing in the Restoration Act supports, much less compels, this statutory clash, or reflects a "clear and manifest" intent to exempt the Tribes' gaming activities from IGRA. See *Epic*, 138 S. Ct. at 1624.

Quite to the contrary, in fact. Section 103(a) provides that "all laws and rules of law of the United States of general application to Indians, to nations, tribes, or

bands of Indians, or to Indian reservations which are not inconsistent with any specific provision contained in this title shall apply to the members of the tribe, the tribe, and the reservation." 101 Stat. at 667, § 103(a). And section 103(c) provides that, "[n]otwithstanding any other provision of law, the tribe and the members of the tribe shall be eligible, on and after the date of the enactment of this title, for all benefits and services furnished to federally recognized Indian tribes." *Id.* § 103(c). These provisions clearly reflect Congress's intent that the Pueblo be afforded the benefit of other federal laws benefiting Indian tribes.

2. The established presumption that Congress does not intend to undermine tribal sovereignty also requires any ambiguity to be resolved in the Tribes' favor. This Court has long held that state laws may be applied to tribal lands only "if Congress has expressly so provided." *Cabazon Band*, 460 U.S. at 207. "Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Id.*; see also *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) ("[U]nless and 'until Congress acts, the tribes retain' their historic sovereign authority.") (quoting *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978)). Thus, statutes affecting tribal sovereignty must "be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); accord *Bryan*, 426 U.S. at 392 (applying presumption to Public Law 280).

For all the reasons discussed above, the Restoration Act is best read to preserve the Tribes' autonomy from state regulation of gaming activities that Texas permits to others in the State subject to regulation. But if any doubt remained, the presumption described above requires adoption of the Tribes' interpretation. Nothing in the Restoration Act constitutes an unequivocal expression of congressional intent to subject the Tribes' on-reservation gaming activities to all of Texas's gaming laws and regulations, with the significant incursion on tribal sovereignty that entails.

D. *Ysleta I* Misread The Restoration Act.

Ysleta I badly misinterpreted the Restoration Act in concluding that the Restoration Act does not incorporate the *Cabazon Band* framework and instead federalizes all of Texas's gaming laws and regulations on tribal lands. The court's analysis is wrong at every turn.

1. First, and most fundamentally, the court failed meaningfully to engage with the statute's text and structure, instead privileging its (selective) reading of legislative history. See 36 F.3d at 1333 ("The Tribe's argument is appealing only because § 107(a) of the Restoration Act uses the word 'prohibit.' But our analysis of the legislative history . . . leads us to a [different] conclusion. . . ."). The court did not analyze section 105(f) or the strong presumption that Congress incorporates the settled judicial construction of terms when it incorporates them into a new statute. The court

did not parse the meaning of the terms "prohibit" or "regulatory jurisdiction," or compare the language Congress used in the Restoration Act with contemporaneous enactments authorizing state regulation of tribal gaming. And the court failed to give any independent meaning or effect to section 107(b) or to explain why only section 107(c) required a textual exception to section 105(f). The court's analysis reflects a bygone era of statutory interpretation.

The one textual point the court did make, moreover, is clearly wrong. The court concluded that "Congress did not enact the Restoration Act with an eye towards *Cabazon*" because section 107(a) provides that violations are subject to the same civil and criminal penalties provided by Texas law. See *id.* ("[I]f 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?"). This misunderstands *Cabazon Band*. The distinction under *Cabazon Band* is between "State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities." IGRA S. Rep. at 6. The Court's opinion in *Cabazon Band* made clear that it is the nature of the *law*—not the *penalties* for violations—that matters. As the Court explained, "that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub. L. 280." 480 U.S. at 211. By the same token, that an otherwise prohibitory law may be enforced by civil penalties (such as civil forfeiture or

fines) as well as criminal penalties does not convert it into a regulatory law. That Congress provided for civil penalties for violations of section 107(a) thus does not mean that section 107(a) sweeps beyond laws that are prohibitory under *Cabazon Band*.

In sum, consistent with *Cabazon Band*, if Texas law prohibits a gaming activity under the *Cabazon Band* framework, then it is likewise prohibited to the Tribes, and subject to the same criminal and civil penalties that otherwise apply under Texas law. But if Texas law imposes a regulatory scheme on a gaming activity, then the Tribes may engage in that activity free from Texas regulation, regardless of what criminal or civil penalties attach to violations of Texas's regulatory scheme. Nothing about section 107(a)'s mention of civil penalties suggests Congress departed from the *Cabazon Band* framework. Accord CVSG Br. 13.

2. Equally misplaced was the court's reliance on the Tribal Resolution. See 36 F.3d at 1333–34. Far from supporting the court's interpretation of the Restoration Act, the Tribal Resolution refutes it.

According to the *Ysleta I* court, Congress "acquiesced" in the Tribe's request in the Resolution to ban on tribal land "all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas." 36 F.3d at 1333. There is just one problem with that conclusion—it is manifestly not what Congress did. No one—not Texas, not the Fifth Circuit—thinks the Restoration Act bans all on-reservation gaming activities. All agree that if the Tribes'

gaming activities comply with Texas's laws and regulations, they are permitted under the Restoration Act. That is because no language in the Act can even arguably be read to erect the total ban on gaming that the Pueblo had reluctantly proposed in the Resolution as a quid pro quo to restore the trust relationship and to prevent Texas regulation of gaming on tribal land.

It is thus clear that Congress did not accept the Pueblo's offer to ban all tribal gaming—because *Cabazon Band* intervened and changed the entire legal context. The Tribal Resolution was explicitly addressed to a bill that failed in the Senate in September 1986. See *supra*, pp. 7–8. Although the bill introduced by the House in January 1987—a month before *Cabazon Band* was decided—included language incorporating the Pueblo's proposed total ban, that draft bill did not pass into law. Almost a full year after the Pueblo passed the Tribal Resolution, and after the relevant bill once again failed to become law, the Senate later *amended* the bill in the wake of *Cabazon Band* to delete the total ban and substitute the very different language that was ultimately enacted. See *supra*, p. 10.

Ysleta I's conclusion that the Act federalizes all of Texas's gaming laws and regulations, far from being "in accordance with" the Resolution, 36 F.3d at 1333, could not be more contrary to it. The Pueblo's proposed total ban was a response to an effort by Texas's congressional delegation "to provide for direct application of state laws governing gaming and bingo on the reservation." App. 121. The Pueblo strongly objected, stating that any bill that would "make state gaming law

applicable on the reservation" was "wholly unsatisfactory to the Tribe in that [i]t represents a substantial infringement upon the Tribes' power of self government, is [i]nconsistent with the central purposes of restoration of the federal trust relationship, and would set a potentially dangerous precedent for other tribes who desire to operate gaming facilities and are presently resisting attempts by State[s] to apply their law to reservation gaming activities." App. 122.

Thus, it was precisely to *avoid* regulation by Texas, while still ensuring restoration of the trust relationship, that the Tribe suggested a total gaming ban. The Pueblo evidently preferred a total ban on gaming to a regime in which some gaming would be permitted subject to Texas regulation. Cf. IGRA S. Rep. at 4 ("Tribes generally opposed any effort by the Congress to unilaterally confer jurisdiction over gaming activities on Indian lands to States and voiced a preference for an outright ban of class III games to any direct grant of jurisdiction to States."). That is because subjecting a tribe to state regulation is a significant affront to its sovereignty. The longstanding presumption of Indian law is that only *Congress* has the power to regulate Indian tribes. See *Bryan*, 426 U.S. at 376 n.2 (describing how "[t]he policy of leaving Indians free from state jurisdiction and control . . . is deeply rooted in the Nation's history," and "Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation" (alteration and omission in original) (quoting

McClanahan v. *State Tax Comm'n*, 411 U.S. 164, 168 (1973) and *Williams* v. *Lee*, 358 U.S. 217, 220 (1959)).

Ysleta I's conclusion that the infringement of the Pueblo's sovereignty was "of the Tribe's own making" because the Tribe had "already made its 'compact' with the State of Texas," 36 F.3d at 1335, thus rests on a gross misreading of both the text and chronology of the Restoration Act and the Tribal Resolution. While Congress originally entertained the Pueblo's compromise proposal to ban all gaming on tribal lands, it ultimately charted a different course in response to this Court's intervening decision in *Cabazon Band*. There is no basis in either the statutory text or the Tribal Resolution to conclude that Congress rejected the Pueblo's proposed total gaming ban and in its place substituted the very regime the Pueblo had rejected as "a substantial infringement upon the Tribes' power of self government." App. 122.

Instead, Congress incorporated the *Cabazon Band* framework, with its much more limited infringement on tribal sovereignty. And while Congress chose to ban only those games prohibited by Texas, not all gaming, section 107 is still "in accordance with the tribe's request in [the] Tribal Resolution." 101 Stat. at 668–69, § 107(a). That language reflects that Congress acted with the Pueblo's consent and in response to its request to limit tribal gaming activities because it was necessary to secure passage of the legislation and obtain trust status without giving Texas authority to regulate on tribal lands. See H. Rep. at 6 (explaining that an earlier bill's reference to the Resolution was

intended to show that gaming restrictions were "not based on unilateral Congressional action against the wishes of the tribes"); cf. IGRA S. Rep. at 5 ("In modern times, even when Congress has enacted laws to allow a limited application of State law on Indian lands, the Congress has required the consent of tribal governments before State jurisdiction can be extended to tribal lands."). Section 107(a)'s "in accordance with" language does not—and, given the statute's text, cannot—mean that the Restoration Act banned all gaming on tribal lands. And it certainly does not mean that Congress enacted the very regime of Texas regulation the Pueblo had emphatically rejected as "wholly unsatisfactory." App. 122.

3. The *Ysleta I* court committed a similar error in its reading of the legislative history. It concluded that Congress could not have codified the *Cabazon Band* framework because the Senate Report states that section 107(a) "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." 36 F.3d at 1333 (quoting S. Rep. at 10). But that is not the text Congress enacted into law—not even close. For one, the statute Congress enacted pointedly does not include the words "administrative regulations." More importantly, the language from the Senate Report would have created a total gaming ban; if the activity qualified as "gambling, lottery or bingo" as those terms were defined by Texas laws and regulations, then it would be "prohibited on the tribe's reservation and on tribal lands."

Again, no one thinks that is what section 107(a) does, because its text cannot bear that meaning. Section 107(a) prohibits on tribal lands only those "gaming activities which are prohibited by the laws of the State of Texas," *not* all gaming "as defined by" Texas. Otherwise, any gaming on the reservation would be unlawful even if it complied with every jot and tittle of Texas law. The language of the Senate Report to that effect appears to be a holdover from a previous version of the bill before it was amended in the wake of *Cabazon Band*. See CVSG Br. 17. But whatever the explanation for it, it cannot be given effect over the very different text that Congress enacted into law. See, *e.g.*, *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 259–60 n.6 (2009) (in a contest between text and contrary language in a committee report, "the text must prevail").

Further, proving the adage that reliance on legislative history can be like "looking over a crowd and picking out your friends," the court dismissed the legislative history showing that Congress codified *Cabazon Band*. The court recognized that Representative Udall's statement "supports the Tribe's argument that Congress intended to incorporate *Cabazon Band* into the Restoration Act," but dismissed it as a "statement of just one representative that was recited at the twelfth hour of the bill's consideration." 36 F.3d at 1334. But Representative Udall was not just "one representative." He was the Chairman of the House Committee on Interior and Insular Affairs who was responsible for the House version of the bill. See *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 52 (1955) (floor

statements of the committee chairmen in charge of the bills were not mere "isolated statements"); cf. *Corley* v. *United States*, 556 U.S. 303, 318 (2009) ("a sponsor's statement" has "considerable weight"). And, unlike the outdated Senate Report, his statement reflected the significant changes to the bill's text that were made "at the twelfth hour" in response to *Cabazon Band*.

Similarly, the court erred in dismissing the Senate Report's statement that section 107(b) "is a restatement of the law as provided in [Public Law 280], and should be read in the context of the provisions of Section 105(f)." S. Rep. at 10–11. The court found this statement irrelevant because it showed only that "§ 107(b) is a restatement of Public Law 280," but the prohibition on gaming activities appears in section 107(a), "and § 107(a) is *not* a restatement of Public Law 280." 36 F.3d at 1334. This simply begs the question. Section 107(b) sets forth a rule of construction that informs the meaning of section 107(a). If section 107(b) is a restatement of Public Law 280, that means (as the provision itself plainly says) that Texas lacks regulatory jurisdiction over the Tribe's non-prohibited gaming activities. See *supra*, Part I.A. And if that is so, then section 107(a) cannot be construed to grant Texas such jurisdiction without violating section 107(b). The fact is that Congress codified the *Cabazon Band* framework through *both* section 107(a) *and* section 107(b), by federalizing Texas's prohibitory gaming laws in section 107(a), while confirming in section 107(b) that section 107(a) grants Texas no authority to regulate the Tribe's non-prohibited games.

The court also found it significant that, unlike with IGRA's legislative history, there was no "express recognition of *Cabazon* . . . in the committee reports accompanying the Restoration Act." 36 F.3d at 1333.[4] But no principle of interpretation requires an express reference to a case in a committee report to trigger the presumption that when Congress incorporates language from a preexisting statutory scheme, the incorporated text "brings the old soil with it." *Stokeling* v. *United States*, 139 S. Ct. 544, 551 (2019) (quoting *Hall* v. *Hall*, 138 S. Ct. 1118, 1128 (2018)). Here, Congress's intent to incorporate *Cabazon Band* is manifest on the face of the statute, in both section 105(f) and in the text and structure of section 107. In these circumstances, the absence of any contrary indication in the statute—not the absence of a reference to *Cabazon Band* in the committee report—is dispositive.

4. Finally, the court erred in rushing to find conflict between the Restoration Act and IGRA and failing to apply the Indian law presumption described above. See 36 F.3d at 1334–35 & n.20. Nothing in the Restoration Act remotely approaches the clear and manifest

[4] Citing the IGRA Senate Report, the court also asserted that "IGRA's reference to *Cabazon Band* [is] evidence that Congress knew how to incorporate the case when it so intended." 36 F.3d at 1334 n.18. This is symptomatic of the court's conflation of legislative history with statutory text. IGRA itself does not mention *Cabazon Band* any more than the Restoration Act does. But IGRA has been construed to incorporate *Cabazon Band* for reasons similar to those advanced by the Pueblo here. See *supra*, p. 12; *Ho-Chunk Nation*, 784 F.3d at 1082 ("It makes more sense to read the statutory language knowing that Congress was legislating against the background of the Supreme Court's decisions.").

expression of congressional intent that would be needed to conclude that one federal statute displaces another or to overcome the longstanding presumption in favor of Indian sovereignty. See *supra*, Part I.C.

The court's analysis was also flawed on its own terms. As to the purported conflict with IGRA, the court pointed to the statutes' different enforcement mechanisms. See 36 F.3d at 1334. But the issue here is the substantive law governing the Tribes' gaming activities. And in that regard there is no conflict between the Restoration Act, properly read, and IGRA—both incorporate the *Cabazon Band* framework.

The court also pointed to provisions in IGRA indicating that IGRA does not authorize tribal gaming activities that are otherwise "specifically prohibited" by federal law. See 36 F.3d at 1335 & n.21 (quoting 25 U.S.C. §§ 2701(5) & 2710(b)(1)(A)). But the only gaming activities that are even arguably "specifically prohibited" by the Restoration Act are those "which are prohibited by the laws of the State of Texas." 101 Stat. at 668–69, § 107(a); cf. *Massachusetts* v. *Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618, 629 (1st Cir. 2017) (holding that a federal law making Massachusetts gaming law applicable on tribal lands was "not the type of specific prohibition that Congress had in mind" in IGRA). Gaming activities like bingo, which Texas permits others in the State to operate, subject to a regulatory scheme, are not "specifically prohibited" to the Tribes under the Restoration Act. They are instead shielded from state regulatory jurisdiction, just as they are under IGRA.

Nor does it support the court's decision that "Congress expressly stated that IGRA is *not* applicable to one Indian Tribe in South Carolina." 36 F.3d at 1335 & n.22 (citing 25 U.S.C. § 941*l*(a) (1994)). In fact, the opposite is true. This shows that Congress knows how to exempt a tribe from IGRA when it wants to, and there is no such indication in the Restoration Act (or any subsequent exclusion of the Tribes from IGRA). To the contrary, section 103(a) provides that other federal laws generally affecting Indians "shall apply" to the Pueblo unless they are "inconsistent with [a] specific provision" of the Act. And section 103(c) provides that the Pueblo are entitled to "all benefits" furnished to federally recognized Indian tribes "[n]othwithstanding any other provision of law." Nothing in IGRA is inconsistent with a "specific provision" of the Restoration Act, and there is no warrant for reading the Restoration Act to deny the Tribes the benefit of IGRA. Properly construed, the statutes can peaceably coexist.

II. UNDER THE *CABAZON BAND* FRAMEWORK, TEXAS LACKS AUTHORITY TO REGULATE BINGO ON THE TRIBES' RESERVATIONS.

Texas's bingo laws are regulatory, not prohibitory, under the *Cabazon Band* framework, and thus do not apply on the reservation or tribal lands under section 107(a) of the Restoration Act. "[I]f the intent of a state law is generally to prohibit certain conduct," it is criminal/prohibitory, "but if the state law generally permits the conduct at issue, subject to regulation, it must be

classified as civil/regulatory." *Cabazon Band*, 480 U.S. at 209. "The shorthand test is whether the conduct at issue violates the State's public policy." *Id.*

Texas does not prohibit all bingo. To the contrary, Texas enacted a statute known as the "Bingo Enabling Act," and allows bingo under certain circumstances. Tex. Occ. Code Ann. § 2001.001 *et seq*. Because Texas does not prohibit bingo as a matter of state public policy, but instead allows it subject to a regulatory scheme, Texas's bingo laws cannot apply on the Tribes' reservations. See *Cabazon Band*, 480 U.S. at 211.

Texas argues that its bingo laws are prohibitory, claiming that it generally outlaws lotteries and gambling, with "only narrow exceptions." BIO 22. But those "narrow exceptions" are exactly the types of laws this Court and others previously addressed and held to be regulatory. This Court examined California's bingo law in *Cabazon Band*, and the Fifth Circuit examined Florida's bingo law in *Seminole Tribe*, which this Court cited approvingly in *Cabazon Band*. In both instances, the State's bingo laws were held to be regulatory. See *Cabazon Band*, 480 U.S. at 210–11; *Seminole Tribe*, 658 F.2d at 314–15. Given Texas law's similarity to the laws examined in *Cabazon Band* and *Seminole Tribe*, Texas's bingo laws are also regulatory.

For example, all three States restrict who may operate bingo games (generally, charitable organizations),[5] limit how proceeds may be used (generally, only

[5] Tex. Occ. Code Ann. §§ 2001.101, 2001.411; *Cabazon Band*, 480 U.S. at 205; *Seminole Tribe*, 658 F.2d at 311 n.1, 314.

for charitable purposes),[6] cap the value of prizes,[7] and impose criminal sanctions for violations.[8] Texas, like Florida, also limits the number of occasions on which an operator may offer bingo,[9] and the locations in which bingo may be played.[10] That California and Florida allowed bingo in only these "narrow" circumstances and imposed criminal sanctions for violations did not make their laws prohibitory. Rather, this Court and the Fifth Circuit held them to be regulatory. See *Cabazon Band*, 480 U.S. at 210–12; *Seminole Tribe*, 658 F.2d at 314–15. Likewise, Texas's similar bingo laws regulate—but do not prohibit—bingo.

---

[6] Tex. Occ. Code Ann. §§ 2001.451–.459; *Cabazon Band*, 480 U.S. at 205; *Seminole Tribe*, 658 F.2d at 311 n.1, 314.

[7] Tex. Occ. Code Ann. § 2001.420 (generally capped at $750 per game and $2500 per occasion); *Cabazon Band*, 480 U.S. at 205 ($250 per game cap); *Seminole Tribe*, 658 F.2d at 311 n.1 ($100 maximum jackpot, with only one jackpot per night; all other prizes subject to $25 per game cap).

[8] Tex. Occ. Code Ann. § 2001.551(c) (third-degree felony); *Cabazon Band*, 480 U.S. at 209 (misdemeanor); *Seminole Tribe*, 658 F.2d at 311 n.1 (misdemeanor for first violation, third-degree felony for subsequent violations).

[9] Tex. Occ. Code Ann. § 2001.419 (no more than three occasions per week, no more than six hours per occasion, no more than two occasions per day); *Seminole Tribe*, 658 F.2d at 311 n.1 (no more than two days per week).

[10] Tex. Occ. Code Ann. § 2001.404 (only in the county where the authorized organization has its primary business office or a contiguous county; or if there is no business office, in the county of the principal residence of the chief executive officer or a contiguous county); *Seminole Tribe*, 658 F.2d at 311 n.1 (land owned or leased by a qualified organization or a municipality or county).

Texas nevertheless contends that "well-established Texas policy stands in sharp contrast to the circumstances in *Cabazon Band* where the State prohibited only certain games." BIO 23. But Texas allows many of the types of gambling this Court pointed to in *Cabazon Band* as evidence that gambling did not violate state public policy. This Court emphasized that California operated a state lottery, allowed parimutuel horse-race betting, and permitted gambling games not specifically enumerated as prohibited. 480 U.S. at 210. Texas similarly allows dog and horse racing, charitable raffles, and certain lotteries (such as Powerball and MegaMillions). See generally State Lottery Act, Tex. Gov't Code Ann. § 466.001 *et seq.*; Texas Racing Act, Tex. Occ. Code Ann. § 2021.001 *et seq.*; Charitable Raffle Enabling Act, Tex. Occ. Code Ann. § 2002.001 *et seq.* The same is true of Florida, where the state Constitution prohibits lotteries, but state law allows bingo and some other types of gambling (such as parimutuel pools) only in narrow circumstances. See *Seminole Tribe*, 658 F.2d at 314.

At bottom, playing bingo is not contrary to Texas public policy, because rather than banning the game altogether, Texas allows bingo subject to restrictions on how, when, and where it is played. That is not prohibition; it is regulation. If Texas's public policy really condemns bingo, then the State can enact a law that prohibits operating a bingo game throughout Texas. Absent that categorical prohibition, Texas lacks jurisdiction under the Restoration Act to regulate the playing of bingo on the Tribes' reservations. The Tribes are

instead free to conduct bingo subject to their own "regulatory jurisdiction," under the regulatory framework established by Congress in IGRA.

CONCLUSION

For the foregoing reasons, the Court should reverse.

Respectfully submitted,

BRANT C. MARTIN*
WICK PHILLIPS GOULD
& MARTIN, LLP
100 Throckmorton Street
Suite 1500
Fort Worth, TX 76102
Telephone: (817) 332-7788
brant.martin@wickphillips.com

JOSEPH CALLISTER
ETHAN A. MINSHULL
JEFFREY W. HELLBERG, JR.
WICK PHILLIPS GOULD
& MARTIN, LLP
3131 McKinney Avenue
Suite 500
Dallas, TX 75204

CARTER G. PHILLIPS
VIRGINIA A. SEITZ
ERIC D. MCARTHUR
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005

CHELSEA A. PRIEST
SIDLEY AUSTIN LLP
2021 McKinney Avenue
Dallas, TX 75201

December 2, 2021

Counsel of Record