No. 19-403

In The Supreme Court of the United States

ALABAMA-COUSHATTA TRIBE OF TEXAS,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The U.S. Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS FUND, NATIONAL INDIAN GAMING ASSOCIATION, AND USET SOVEREIGNTY PROTECTION FUND IN SUPPORT OF PETITION FOR CERTIORARI

DANIEL LEWERENZ
Counsel of Record
JOEL WEST WILLIAMS
NATIVE AMERICAN RIGHTS FUND
1514 P Street NW, Suite D
Washington, DC 20005
Telephone: (202) 785-4166
E-mail: lewerenz@narf.org
E-mail: williams@narf.org

STEVEN J. GUNN
1301 Hollins Street
St. Louis, MO 63135
Telephone: (314) 920-9129
E-mail: sjgunn@wulaw.wustl.edu
Counsel for National Indian Gaming Association

DERRICK BEETSO
NCAI FUND
1516 P Street NW
Washington, DC 20005
Telephone: (202) 466-7767
E-mail: dbeetso@ncai.org

GREGORY A. SMITH
HOBBS STRAUS DEAN & WALKER, LLP
1899 L Street NW, Suite 1200
Washington, DC 20037
Telephone: (202) 822-8282
E-mail: gsmith@hobbsstraus.com
Counsel for USET SPF

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether, as Congress intended and the Department of the Interior, the National Indian Gaming Commission, and the First Circuit all agree, the Indian Gaming Regulatory Act ("IGRA") establishes a uniform national framework for the regulation of Tribal gaming, superseding earlier-enacted statutes that applied to individual reservations; or, as the Fifth Circuit has held, a single earlier-enacted statute remains in effect notwithstanding IGRA.

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INTERESTS OF *AMICI CURIAE*[1]

Amicus NCAI Fund is the nonprofit public-education arm of the National Congress of American Indians, the Nation's oldest and largest organization of Alaska Native and American Indian Tribal governments and their citizens. NCAI Fund's mission is to educate the general public, and Tribal, Federal, and State government officials about Tribal self-government, treaty rights, and policy issues affecting Indian Tribes, including the interpretation of Indian statutes.

Amicus National Indian Gaming Association ("NIGA") is an inter-Tribal association of 184 Indian Tribes. Its mission is to protect Tribal sovereignty and the ability of Tribes to achieve economic self-sufficiency through gaming and other forms of economic development. NIGA has an interest in ensuring that the Indian Gaming Regulatory Act, Pub. L. 100-497, 102 Stat. 2467 (1988) ("IGRA"), *codified at* 25 U.S.C. §§ 2701 *et seq.*, and other Federal gaming laws are implemented uniformly nationwide, for the benefit of all Tribes.

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[1] In accordance with Rule 37.2 of the Rules of the Supreme Court, counsel of record for all parties received timely notice of this brief and provided their written consent. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

Amicus USET Sovereignty Protection Fund ("USET SPF") is a nonprofit organization representing 27 Federally recognized Tribal nations in 13 States from Texas to Maine. USET SPF educates Federal, State, and local governments about the unique historic and political status of its member Tribal nations.

Amici are uniquely suited to assist the Court. *Amicus* NCAI Fund has expertise in the interpretation of Indian statutes; *amicus* NIGA has expertise in the development, interpretation, and application of Indian gaming laws; and *amicus* USET SPF has expertise in the interpretation of statutes acknowledging Indian Tribes, whether by land claims settlement, Tribal restoration, or otherwise. *Amici* share an interest in preserving the unique government-to-government relationship between the United States and Tribes, including the "duty of protection" the United States owes to Tribes, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556 (1832), and in ensuring that statutes enacted in furtherance of that duty are fully implemented.

SUMMARY OF ARGUMENT

This Court should grant the Petition for three reasons. First, the Petition presents a question of national importance because the Fifth Circuit's decisions frustrate Congress's intention that IGRA allow Tribes nationwide to build strong Tribal governments and achieve economic self-sufficiency through Tribal gaming. This intent is borne out by both IGRA's text, which

makes no exception for any Tribes, and by IGRA's legislative history, which evinces Congress's intent to establish a uniform, national regulatory scheme. Second, the decision below conflicts with *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), this Court's leading decision interpreting Public Law 83-280, 67 Stat. 588 (1953) ("PL-280"), in the context of Indian gaming, and it ignores Congress's clear intent to apply the framework set forth in PL-280 and *Cabazon* to the Ysleta del Sur Pueblo and Alabama-Coushatta Tribe of Texas. In doing so, the decision violates fundamental canons of statutory construction articulated by this Court. Finally, the decision creates a split in authority among the Circuit Courts concerning the interplay between IGRA and earlier-enacted statutes.

BACKGROUND

1. In PL-280, Congress granted certain States authority to enforce their criminal law over Indian lands, while reserving to Tribes civil regulatory authority over Indian lands. PL-280 granted certain States jurisdiction over criminal acts and civil causes of action arising on Indian lands. 18 U.S.C. § 1162 (criminal jurisdiction), 28 U.S.C. § 1360(a) (civil jurisdiction). However, PL-280 **did not** contain "anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations." *Bryan v. Itasca County*, 426 U.S. 373, 384 (1976).

In *Cabazon*, this Court concluded that PL-280 States could not impose their regulatory schemes upon Tribal gaming, even where those regulatory schemes included criminal penalties. 480 U.S. at 211. In *Cabazon*, two Tribes operated bingo pursuant to ordinances approved by the Secretary of the Interior. *Id.* at 204-05. California contended that these operations violated the State's charitable bingo laws, which were enforced, in part, through criminal sanctions. *Id.* at 205-06. The Court noted that California "[did] not entirely prohibit the playing of bingo," but instead limited its operation to charitable organizations and limited prizes to $250 per game. *Id.* at 205. The Court drew a distinction between "criminal/prohibitory" and "civil/regulatory" State laws:

> [I]f 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. The shorthand test is whether the conduct at issue violates the State's public policy.

Id. at 209. The Court concluded that because California "regulates rather than prohibits gambling in general and bingo in particular," its charitable bingo laws did not apply on Indian lands under PL-280. *Id.* at 211.[2]

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[2] The Fifth Circuit previously reached the same conclusion, *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310, 311 (5th

Cabazon recognized the inherent right of Indian Tribes to promote self-government, economic development, and self-sufficiency through Indian gaming. *Cabazon* makes clear that, even in PL-280 States, Indian Tribes retain their inherent right of self-government and States cannot apply their regulatory laws to Tribal gaming.

2. Congress incorporated the criminal/prohibitory versus civil/regulatory framework into the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act ("Restoration Act").[3] During this same period, Congress was considering the Federal status of two Tribes in Texas: the Alabama-Coushatta Tribe of Texas, and the Ysleta del Sur Pueblo (together, "Restoration Act Tribes"). Congress had terminated the Federal trust relationship with the Alabama-Coushatta Tribe in 1954, and transferred the Tribe's lands to the State to be held in trust.[4] Congress did not acknowledge a formal trust relationship with the Ysleta del Sur Pueblo, but nevertheless in 1968 transferred to the State "[r]esponsibility, if any, for the Tiwa

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Cir. 1981). So did the Ninth Circuit. *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982).

[3] Pub. L. 100-89, 101 Stat. 666 (1987), *previously codified at* 25 U.S.C. §§ 1300g *et seq.* (Ysleta del Sur Pueblo), §§ 731 *et seq.* (Alabama-Coushatta Tribe).

[4] Act of August 23, 1954, Pub. L. 83-627, 68 Stat. 768 (1954), *repealed by* Restoration Act, § 203.

Indians of Ysleta del Sur."[5] When Texas determined that it could no longer carry out its trust responsibilities to the Tribes, Congress began to consider reassuming that trust relationship. S. Rep. No. 100-90, at 7 (1987) ("Restoration Act Senate Report").

The first version of the Restoration Act was introduced in February 1985. H.R. 1344, 99th Cong. (1985). H.R. 1344 was silent on the issue of Tribal gaming, but an amendment would have allowed gaming on the Restoration Act Tribes' lands only if it complied with the State's laws and regulations. 131 Cong. Rec. H12012, H12017 (daily ed. Dec. 16, 1985).[6] Another version of the Restoration Act—H.R. 318—would have prohibited gaming on the Tribes' lands altogether. H.R. 318, 100th Cong. (1987); 133 Cong. Rec. 9042, 9043 (Apr. 21, 1987).

Cabazon was decided in 1987, while Congress was still considering H.R. 318. In the area of Indian gaming, *Cabazon* is the cornerstone. After the case was decided, Congress rejected the gaming prohibition in H.R. 318 and, instead, incorporated the rationale and holding of the *Cabazon* into the Restoration Act.[7] As

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[5] Act of April 12, 1968, Pub. L. 90-287, 82 Stat. 93 (1968), *repealed by* Restoration Act § 106.

[6] That amended version of H.R. 1344 passed the House in late 1985, *id.*, and a further amended version passed the Senate the following year. 132 Cong. Rec. S13634 (daily ed. Sept. 25, 1986). However, before the versions could be reconciled, the Senate vitiated its passage of the bill. 132 Cong. Rec. 26188 (Sept. 25, 1986).

[7] H.R. 318 passed the House. 133 Cong. Rec. 9042, 9043 (Apr. 21, 1987). The Senate, however, deleted the gaming prohibition after *Cabazon* was decided and inserted the language enacted in

enacted, the bill expressly granted Texas the same criminal and civil adjudicatory jurisdiction over the Restoration Act Tribes' lands that PL-280 States have over Indian lands, and at the same time recognized the authority of the Restoration Act Tribes to engage in Tribal gaming to the same extent as other Tribes in PL-280 States.

The text of the Restoration Act makes clear that Congress intended for PL-280's criminal/prohibitory versus civil/regulatory framework to apply to the Restoration Act Tribes. The Restoration Act confers upon Texas criminal and civil adjudicatory jurisdiction over the lands of the Restoration Act Tribes "as if such state had assumed jurisdiction" under PL-280. Restoration Act, §§ 105(f), 206(f). The Act specifically prohibits on the Tribes' lands any gaming that is "prohibited by the laws of the State of Texas." *Id.* §§ 107(a), 207(a). However, the Act provides, specifically with respect to gaming, "**[n]othing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas**." *Id.* at §§ 107(b), 207(b) (emphasis added). In other words, if a form of gaming is prohibited by the State of Texas, the Restoration Act Tribes may not conduct such gaming on their lands; but if a form of gaming is merely regulated by the State, the Tribes may conduct such gaming without State regulation—just as this Court held in *Cabazon*.

Sections 107 and 207 of the Restoration Act. Restoration Act Senate Report at 7.

The Restoration Act's legislative history also confirms that Congress intended PL-280's criminal/prohibitory versus civil/regulatory framework, as articulated by this Court in *Cabazon*, to apply on the Restoration Act Tribes' lands. When the bill was returned to the House with the Senate's (ultimately enacted) amendments, Rep. Morris Udall, the chairman of the committee in charge of the bill, explained:

> The Senate amendment makes changes to sections 107 and 207 of the bill. These sections deal with the regulation of gaming on the respective reservations of the two tribes. **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. H6975 (daily ed. Aug. 3, 1987) (emphasis added).

Thus, both the Restoration Act's text and its legislative history demonstrate Congress's intent that PL-280's criminal/prohibitory versus civil/regulatory framework would apply to the Restoration Act Tribes' lands.

3. Congress codified the criminal/prohibitory versus civil/regulatory framework nationwide when it enacted IGRA. In 1988, Congress enacted

IGRA. Congress's primary purpose in enacting IGRA was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1); *see also* 25 U.S.C. § 2701(4) ("a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government"); S. Rep. No. 100-446, 100th Cong., 2d Sess. 2 (1988) ("IGRA Senate Report"), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3072 ("Indian tribal elected officials demonstrated to the Committee that bingo revenues have enabled tribes, like lotteries and other games have done for State and local governments, to provide a wider range of government services to tribal citizens and reservation residents than would otherwise have been possible.").[8]

This Court, too, has recognized the importance of tribal self-sufficiency and economic development in enacting IGRA. *Lewis v. Clarke*, 137 S. Ct. 1285, 1290 (2017) (describing Tribe's IGRA gaming as "one means of maintaining its economic self-sufficiency"); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 810 (2014) (Sotomayor, J., concurring) (noting "Congress' purpose in enacting IGRA" was promoting Tribal economic development); *see also Cabazon*, 480 U.S. at 218-19 (even

[8] IGRA is one of many statutes Congress has enacted to advance "the general federal policy of encouraging tribes 'to revitalize their self-government' and to assume control over their 'business and economic affairs.'" *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 149 (1980) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973)).

before IGRA, tribal gaming provided "the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members.").

The regulatory framework established in IGRA is based on the criminal/prohibitory versus civil/regulatory framework established in PL-280 and recognized by this Court in *Cabazon*. IGRA allows Tribes to engage in gaming that is not prohibited by State law—that is, gaming that is permitted by a State for any purpose by any person or entity. 25 U.S.C. § 2710(b)(1)(A). Class II gaming is subject to regulation by Tribes and the National Indian Gaming Commission—**not** by the States. *Id.* § 2710(b). As the IGRA Senate Report explains, under IGRA,

> the courts will consider the distinction between a State's civil and criminal laws to determine whether a body of law is applicable, as a matter of Federal law, to either allow or prohibit certain activities. The Committee does not intend for [IGRA] to be used in any way to subject Indian tribes or their members who engage in class II games to the criminal jurisdiction of States in which criminal laws prohibit class II games.

IGRA Senate Report at 6.

ARGUMENT

I. The Petition presents a question of national importance: Whether IGRA will be implemented uniformly nationwide, as Congress intended.

A. Congress intended that IGRA would apply uniformly nationwide; the statute contains no exceptions.

IGRA's text confirms that Congress intended the Act to apply nationwide. IGRA defines "Indian tribe" to include all Federally recognized Tribes. 25 U.S.C. § 2703(5). Likewise, IGRA defines "Indian land" to include all land within the boundaries of any Indian reservation and tribal or individual Indian trust or restricted fee land "over which an Indian tribe exercises governmental power." *Id.* at § 2703(4). Neither of these definitions excludes the Restoration Act Tribes or their lands from IGRA.

Congress has excluded some Tribes from IGRA, but it has done so through clear language **in a later statute**.[9] In contrast, **IGRA has never excluded any**

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[9] Rhode Island Indian Claims Settlement Act, Pub. L. 104-208, § 330, 110 Stat. 3009, 3009-228 (1996) ("Rhode Island Act"), *previously codified at* 25 U.S.C. §§ 1701 *et seq.* (amending the Rhode Island Indian Claims Settlement Act to provide that the Narragansett Indian Tribe's "settlement lands shall not be treated as Indian lands"); Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. 103-116, § 14(a), 107 Stat. 1118, 1136 (1993) ("Catawba Act"), *previously codified at* 25 U.S.C. § 941*l* (providing that IGRA "shall not apply" to the Catawba Tribe of Indians, State gaming laws generally apply); *see also* Maine Indian Claims Settlement Act, Pub. L. 96-420, § 16(b),

Tribe from its scope—not as enacted, not by any amendment. Moreover, no Act of Congress excludes the Restoration Act Tribes from IGRA.

IGRA's legislative history further demonstrates Congress's intent that the Act would apply uniformly nationwide. The IGRA Senate Report explains that IGRA was "intended to expressly preempt the field in the governance of gaming activities on Indian lands." IGRA Senate Report at 6; *see also Tamiami Partners v. Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030, 1033 (11th Cir. 1995) (noting that "[t]he occupation of this field by [IGRA] is evidenced by the broad reach of the statute's regulatory and enforcement provisions and is underscored by the comprehensive regulations promulgated under the statute"). The IGRA Senate Report identifies only five states where gaming was prohibited as a matter of public policy—Texas was not, and is not, one of them—and expressly states that IGRA applies everywhere else: "In the other 45 States, some forms of bingo are permitted and **tribes with Indian lands in those States are free to operate bingo on Indian**

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94 Stat. 1785, 1797 (1980), *previously codified at* 25 U.S.C. § 1735(b) (laws enacted for the benefit of Indians or Indian tribes after the date of this Act "which would affect or preempt the application of the laws of the State of Maine . . . shall not apply within the State of Maine unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine"); *see also Passamaquoddy Tribe v. Maine*, 75 F.3d 784 (1st Cir. 1996) (holding that Congress did not specifically make IGRA applicable within the State of Maine).

lands, subject to the regulatory scheme set forth in the bill." IGRA Senate Report at 11-12 (emphasis added).[10]

This Court has recognized IGRA's broad scope. *Bay Mills Indian Cmty.*, 572 U.S. at 791 (noting that the definition of "Indian lands" in IGRA is "repeated some two dozen times in the statute" and "reflect[s] IGRA's overall scope"). Circuit Courts, too, have described IGRA as "creat[ing] a comprehensive regulatory framework for the operation of gaming by Indian tribes." *Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1079 (7th Cir. 2015) (internal quotations and citations omitted); *see also Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1548 (10th Cir. 1997) (IGRA creates a "comprehensive regulatory framework for gaming activities on Indian lands"); *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996) (describing IGRA's "comprehensive treatment of issues affecting the regulation of Indian gaming"); *Tamiami Partners*, 63 F.3d at 1032-33 (IGRA was intended to preempt the field, describing IGRA as "a comprehensive statute governing the operation of gaming facilities on Indian lands").

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[10] *See also id.* at 17 (explaining that IGRA "[p]ermits class II gaming on Indian lands if the gaming is located in a State that allows the gaming for any purpose by any person or entity. . . .").

B. The decision below frustrates Congress's intent, excluding some Tribes from IGRA's scope when Congress evinced no intent to do so.

The decision below concluded that while IGRA's "stated purpose is broad, IGRA does not specifically preempt the field of Indian gaming law," *Texas v. Alabama-Coushatta Tribe of Texas*, 918 F.3d 440, 443 (5th Cir. 2019), notwithstanding the statute's express application to **all** Indian tribes and **all** Indian lands, 25 U.S.C. §§ 2703(4), 2703(5), 2710, and notwithstanding the explicit statement in the legislative history that IGRA **was** intended to preempt the field. IGRA Senate Report at 6. In *Ysleta del Sur Pueblo v. Texas*, the panel found support for its conclusion in the Catawba Act, 36 F.3d 1325, 1335 n.22 (5th Cir. 1994), and the *Alabama-Coushatta* panel followed. 918 F.3d at 447 n.20. But the Catawba Act was enacted *after* IGRA, by the 103rd Congress, and says nothing about the intentions of the 100th Congress, which enacted IGRA.

The essential liberty interests of the Restoration Act Tribes in their own self-government is at issue. The United States has a trust responsibility to protect Indian Tribes, and Congress enacted IGRA to promote Indian self-government and economic self-sufficiency through gaming. 25 U.S.C. § 2702(1). If the Restoration Act Tribes are denied the right to engage in Tribal gaming under IGRA, they may never be able to achieve economic self-sufficiency.

Certiorari is necessary to ensure that IGRA's and the Restoration Act's plain text and Congress's intent are faithfully carried out nationwide.

II. The decision below conflicts with *Cabazon*, this Court's leading decision on PL-280 and Indian gaming, and violates fundamental canons of statutory construction.

In *Ysleta*, the court reached "the unmistakable conclusion that Congress . . . intended for Texas' gaming laws and regulations to operate as surrogate federal law on the Tribe's reservation in Texas." 36 F.3d at 1334. The decision below reached the same conclusion. *Alabama-Coushatta*, 918 F.3d at 448. But their "unmistakable" conclusion is mistaken—it disregards the plain language, structure, and dispositive legislative history of the Restoration Act, and it conflicts with *Cabazon*, the Court's leading decision on PL-280 and Indian gaming.

The Restoration Act's text proves definitively that Congress had no intention of importing the State's regulatory laws—civil or criminal—onto the Restoration Act Tribes' lands. The Act **expressly** grants PL-280 jurisdiction on the Tribes' lands, **expressly** references the application of the State's criminal/prohibitory laws, *id.* and **expressly** prohibits Texas exercising any regulatory jurisdiction over the Tribes' lands. Restoration Act §§ 105(f) and 206(f) (PL-280 jurisdiction), §§ 107(a) and 207(a) (State criminal/prohibitory law),

§§ 107(b) and 207(b) (barring State regulation). When Congress enacted the Restoration Act, it was "presumed to have had knowledge of the interpretation given" by this Court to PL-280, including the criminal/prohibitory versus civil/regulatory distinction articulated in *Bryan* and *Cabazon*, and it was presumed to have "adopt[ed] that interpretation" when it incorporated PL-280 in the Restoration Act. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

The Restoration Act's structure makes clear Congress's intent to apply PL-280's criminal/prohibitory versus civil/regulatory framework. The statute's overall scheme is to apply PL-280 to the Tribe's lands. Restoration Act §§ 105(f) and 206(f). The statute's gaming provisions adopt the criminal/prohibitory versus civil/regulatory framework by giving force to the State's laws "prohibit[ing]" gaming, while simultaneously denying the State any "civil or criminal regulatory jurisdiction" over Tribal gaming. *Id*. at §§ 107(a)-(b), 207(a)-(b). The terms "prohibited" and "regulatory jurisdiction" are terms of art, and when Congress used them in the Restoration Act, it intended them to have their "established meaning[s]." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991). The decision below ignores what this Court has called "a fundamental canon of statutory construction": "[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (internal citation omitted). "A court must therefore interpret the statute as a symmetrical and coherent regulatory

scheme, and fit, if possible, all parts into an harmonious whole." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (internal quotations and citations omitted).

The legislative history also makes clear Congress's intent to apply PL-280's criminal/prohibitory versus civil/regulatory framework. When the Senate amended the gaming provisions in H.R. 318—the bill that became the Restoration Act—it explained that the provision denying "civil or criminal regulatory jurisdiction to the State of Texas," was a "restatement of the law" in PL-280. Restoration Act Senate Report at 10-11, 12. If that wasn't enough, Chairman Udall said it plainly on the floor of the House: the Restoration Act codified the criminal/prohibitory versus civil/regulatory framework recognized by this Court in *Cabazon*. 133 Cong. Rec. H6975 (Aug. 3, 1987).

The *Ysleta* court dismissed Chairman Udall's explanation as "the floor statement of just one representative that was recited at the twelfth hour of the bill's consideration." 36 F.3d at 1334. This Court, however, has held that "explanatory statements . . . made by the committee member in charge of a bill in course of passage" are "in the nature of a supplemental report" and "may be regarded as an exposition of the legislative intent." *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474-75 (1921); *see also* 2A Norman Singer and Shambie Singer, *Sutherland Statutory Construction* § 48:14 (7th ed. 2018) (citations omitted). The fact that the statement was made immediately before the House adopted the bill, *see* 133 Cong. Rec. at H6972-75, only

adds to its significance. In considering the floor statements of House members, this Court has given "the greatest weight" to statements of "House members who had the last word on the bill . . . [and who] explained the final version of the statute to the House at large immediately prior to passage. . . ." *Bhd. of Maint. of Way Emp. v. United States*, 366 U.S. 169, 175 (1961).

In addition, the same Congress that enacted the Restoration Act also enacted IGRA,[11] and the two statutes must be construed *in pari materia*. *See Bryan*, 426 U.S. at 389-90 (contemporaneous acts addressing the same subject "are *in pari materia*"). Congress intended that both would apply the criminal/prohibitory versus civil/regulatory framework: both permit Tribes to engage in gaming that is not "prohibited" by State law. *Compare* Restoration Act, §§ 107(a), 207(a), *with* 25 U.S.C. §§ 2710(b)(1)(A), (d)(1)(B). The legislative histories of both statutes refer to the PL-280-*Cabazon* framework. *Compare* Restoration Act Senate Report at 10-11 (1987), *and* 133 Cong. Rec. at H6975 (statement of Committee Chairman Udall), *with* IGRA Senate Report at 6. Likewise, both statutes exempt Tribal gaming from State "regulatory jurisdiction." *Compare* Restoration Act §§ 107(b), 207(b), *with* 25 U.S.C. § 2710(a)(2).

Aside from dismissing Chairman Udall's statement, what did the Fifth Circuit rely on to reach its "unmistakable" conclusion? It cited legislative history

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[11] The bill that became IGRA, was introduced in the Senate on February 19, 1987, approximately six months before the Restoration Act was adopted. *See* IGRA Senate Report at 4.

that referred exclusively to early versions of the Restoration Act that failed to pass Congress. *Ysleta*, 36 F.3d at 1329. References to unenacted versions of the Act "can hardly be considered authoritative" when they are "expressly contradicted without challenge on the floor of the House by a ranking member of the committee." *Chicago, Milwaukee, St. P. & P. R.R. Co. v. Acme Fast Freight*, 336 U.S. 465, 475 (1949).

The court referred to an Ysleta del Sur Pueblo Tribal Council Resolution acquiescing to the limitations included in those earlier versions of the bill. *Ysleta*, 36 F.3d at 1333-34. But the limitations the Tribe agreed to were stripped from the bill by the Senate and (although the Restoration Act retained references to the Tribes' resolutions) never were enacted. This Court "cannot ignore plain language that, viewed in historical context and given a fair appraisal, clearly runs counter to . . . later claims." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 346 (1998) (quoting *Or. Dep't of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753, 774 (1985)).

The court claimed that the reference in Section 107(a) (and 207(a)) to the State's "civil . . . penalties" proved that Congress intended for the State's regulatory laws to apply. *Ysleta*, 36 F.3d at 1333-34. But this Court in *Cabazon* made clear that the form of penalty provided by law is not dispositive of gaming's criminal/prohibitory or civil/regulatory status. 480 U.S. at 211-12.

The court claimed that the canon of construction that the specific controls as against the general compels the conclusion that the (Texas-specific) Restoration Act prevails as against the (national) IGRA. *Ysleta*, 36 F.3d at 1335. This fails for two reasons. First, the Restoration Act is a general statute that addresses not just gaming, but restoration of the Federal trust relationship and Federal programs, services and benefits, establishment and restoration of reservations and Tribal lands, and relative State and Tribal authority over criminal offenses and other matters. Restoration Act §§ 103-105, 203-204, 206. IGRA addresses **only** Tribal gaming. *See Rhode Island v. Narragansett Tribe of Indians*, 816 F. Supp. 796, 804 (D.R.I. 1993) ("the [Rhode Island Act] is the *general* statute and [IGRA] the *specific* statute" (emphasis in original)). Second, even if the Restoration Act applies, it adopts the same PL-280 framework as IGRA and, like IGRA, it does not authorize State regulation of Tribal gaming. Simply put, none of the "unmistakable" reasons in the decisions below survives scrutiny.

Finally, the decision below failed to employ the Indian canon of construction when interpreting either the Restoration Act or IGRA. This Court repeatedly has held "that 'statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit.'" *Chickasaw Nation v. United States*, 534 U.S. 84, 93-94 (2001) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)); *see also Choate v. Trapp*, 224 U.S. 665, 675 (1912). The Indian canon of statutory construction is "rooted in the

unique trust relationship between the United States and the Indians." *Cty. of Oneida v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 247 (1985); *accord Fletcher v. United States*, 730 F.3d 1206, 1210-11 (10th Cir. 2013) (Gorsuch, J.).

Where there are ambiguities, both IGRA and the Restoration Act must be interpreted in light of the Indian canon: "because Congress has chosen gaming as a means of enabling the [Indian] Nations to achieve self-sufficiency, the Indian canon rightly dictates that Congress should be presumed to have intended" for Tribes to benefit from IGRA.[12] *Chickasaw*, 534 U.S. at 99-100 (O'Connor, J., dissenting). The Courts of Appeals for the Second, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits agree.[13] The Indian canon is equally applicable to the Restoration Act—which, no less than IGRA, was enacted for the benefit of Indians. *See Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior*, 228

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[12] The Supreme Court has even held that, in the arena of taxation, where the Indian canon and alternative canons of construction suggest different outcomes, the Indian canon should prevail. *Chickasaw*, 534 U.S. at 100 (citing *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164 (1973); *Squire v. Capoeman*, 351 U.S. 1 (1956); *Choate*, 224 U.S. 665) (O'Connor, J., dissenting).

[13] *Citizens Against Casino Gambling in Erie Cty. v. Chaudhuri*, 802 F.3d 267, 288 (2d Cir. 2015); *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Attorney for W. Dist. of Mich.*, 369 F.3d 960, 971 (6th Cir. 2004); *Ho-Chunk*, 784 F.3d at 1081; *Gaming Corp.*, 88 F.3d at 547; *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 729-30 (9th Cir. 2003); *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 718 (10th Cir. 2000); *City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003).

F.3d 82, 92-93 (2d Cir. 2000) (Indian canon applies to interpretation of statute settling Connecticut Indian land claims); *Roseville*, 348 F.3d at 1032 (Indian canon applies to statute restoring terminated California tribe).

The Fifth Circuit avoided the Indian canon by asserting that there was no ambiguity in the Restoration Act. *Ysleta*, 36 F.3d at 1334 n.20; *Alabama-Coushatta*, 918 F.3d at 448-49 (affirming *Ysleta*'s finding of no ambiguity).[14] But that assertion is belied by the court's interpretive methods. As the *Alabama-Coushatta* panel observed, *Ysleta* "appl[ied] canons of construction and legislative history" to interpret the Restoration Act and used later-enacted statutes to interpret IGRA without regard to the Indian canon. *Alabama-Coushatta*, 918 F.3d at 448; *see Ysleta*, 36 F.3d at 1332-35.[15]

The Restoration Act is clear about the legal framework it establishes for the Tribes—its text expressly

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[14] A court need not employ the Indian canon—or any canon—if it can discern a statute's meaning from the plain text. *South Carolina v. Catawba Tribe, Inc.*, 476 U.S. 498, 506-07 (1986).

[15] The Fifth Circuit's failure to employ the Indian canon is all the more confounding because that court has described the Indian canon as a "settled principle of statutory construction." *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1219 (5th Cir. 1991); *see also Tonkawa Tribe of Okla. v. Richards*, 75 F.3d 1039, 1043-44 (5th Cir. 1996). In fact, the Fifth Circuit applied the Indian canon in a seminal pre-IGRA Indian gaming case that ultimately supported the Supreme Court's decision in *Cabazon*. *Butterworth*, 658 F.2d at 316 ("Although the [State's] regulatory bingo statute may arguably be interpreted as prohibitory, [in light of the Indian canon] the resolution must be in favor of the Indian tribe.").

invokes PL-280, extends any State prohibition against gaming to the Tribes' lands, and denies the State any regulatory authority, and its legislative history confirms that it imposes the same framework this Court affirmed in *Cabazon*. *Ysleta* erred by reading the Restoration Act as if it still contained the proposed gaming ban that Congress rejected after *Cabazon*. The court relied on references in the act and legislative history to Tribal Council Resolutions touching on the rejected gaming ban. Restoration Act §§ 107(a) & 207(a). To the extent those references created ambiguity for the court, it should have relied on the Indian canon of construction. Its failure to do so places *Ysleta* in conflict with precedent from this Court.

Certiorari is necessary to ensure compliance with *Cabazon* and to ensure proper interpretation of IGRA and the Restoration Act.

III. The decision below creates a circuit split concerning the scope of IGRA.

The Fifth Circuit is not the only Circuit Court that has wrestled with the application of IGRA on lands that, pursuant to an earlier statute, were subject to a different regulatory scheme. The results could not be more different.

In *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir. 1994) ("*Narragansett*")—decided just months before *Ysleta*—the First Circuit had to determine whether the grant of jurisdiction to the Rhode Island Act served as a bar against IGRA's operation. The

Rhode Island Act generally provided that the Narragansett Tribe's "land shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." Rhode Island Act § 9. The First Circuit held that this Section **did** confer upon Rhode Island a grant of regulatory jurisdiction. *Narragansett*, 19 F.3d at 695-96. Nevertheless, that grant of jurisdiction to the State **did not** displace the Tribe's inherent jurisdiction, *id.* at 701-02, and the Tribe demonstrated that it exercised governmental power, thus qualifying the Tribe's lands for gaming under IGRA. *Id.* at 703. Having determined that IGRA applied, the court next determined that where the two Acts were in conflict, IGRA must prevail, both because it was the later-enacted statute, *id.* at 704, and because limiting Rhode Island's jurisdiction over gaming still leaves most of the Rhode Island Act intact, while preventing the Narragansett from reaping the benefits of IGRA "would do great violence to the essential structure and purpose of [IGRA]." *Id.* at 704-05. Consequently, the court concluded that the Narragansett could engage in IGRA gaming on their settlement lands. *Id.* at 705.

Two years ago, the First Circuit affirmed those principles in *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618 (1st Cir. 2017). The court affirmed the core analysis from *Narragansett*. *Id.* at 627. Massachusetts and the Town of Gay Head (Aquinnah) argued their settlement act with the Wampanoag Tribe of Gay Head (Aquinnah)—specifically, a parenthetical subjecting the Tribe's lands to the State's and Town's laws governing "bingo and game[s] of

chance"—expressly provided them with jurisdiction over gaming on the Tribe's lands. *Id.* at 628. The court noted the timing of the settlement act (enacted the same day as the Restoration Act):

> [A]t that time, there was a reason for adding this clarification. . . . Approximately six months before Congress passed the [Settlement] Act on August 18, 1987, the Supreme Court decided *Cabazon*, which created considerable uncertainty about Indian law, specifically with respect to gaming. . . . The parenthetical served to decrease that uncertainty by clarifying that, when the Act was enacted, Commonwealth gaming law applied to the Settlement Lands, but—just like the [Rhode Island Act] nine years before it—it said nothing about the effect of future federal law.

Id. at 628-29. The court further found that the Tribe both had jurisdiction over its lands, *id.* at 624-25, and exercised sufficient governmental authority over those lands to fall within IGRA's ambit. *Id.* at 625-26. Thus, the court concluded that IGRA governed gaming on the Tribe's lands. *Id.* at 629.

The Fifth Circuit's decisions conflict with the First Circuit's decisions. **Certiorari is necessary to resolve this split**.

CONCLUSION

For the foregoing reasons, *Amici* join the Alabama-Coushatta Tribe of Texas in respectfully urging the Court to grant the Petition for Certiorari.

Respectfully submitted,

DANIEL LEWERENZ
Counsel of Record
JOEL WEST WILLIAMS
NATIVE AMERICAN RIGHTS FUND
1514 P Street NW, Suite D
Washington, DC 20005
Telephone: (202) 785-4166
E-mail: lewerenz@narf.org
E-mail: williams@narf.org

STEVEN J. GUNN
1301 Hollins Street
St. Louis, MO 63135
Telephone: (314) 920-9129
E-mail: sjgunn@wulaw.wustl.edu
Counsel for National Indian Gaming Association

DERRICK BEETSO
NCAI FUND
1516 P Street NW
Washington, DC 20005
Telephone: (202) 466-7767
E-mail: dbeetso@ncai.org

GREGORY A. SMITH
HOBBS STRAUS DEAN & WALKER, LLP
1899 L Street NW, Suite 1200
Washington, DC 20037
Telephone: (202) 822-8282
E-mail: gsmith@hobbsstraus.com
Counsel for USET SPF