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

BRIEF OF *AMICUS CURIAE* YSLETA DEL SUR PUEBLO TRIBE OF TEXAS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The 1987 Restoration Act restored the federal government's trust relationship with both the Ysleta del Sur Pueblo (the "Pueblo") and the Alabama-Coushatta Tribe of Texas (the "Alabama-Coushatta" and with the Pueblo, the "Tribes"). As such, the Fifth Circuit's ruling that the Alabama-Coushatta cannot conduct gaming on its tribal lands because the Restoration Act, rather than the Indian Gaming Regulatory Act, controls such determination has a direct impact on the Pueblo.

Specifically, the Pueblo government and its entities—including the Speaking Rock Entertainment Center—employ close to 1,200 individuals, 30 percent of whom are Pueblo members. Revenue from gaming enterprises composes approximately 60 percent of the Pueblo's total operating budget. Losing that gaming revenue would trigger massive layoffs and devastate the Pueblo's efforts to promote education, income, and employment rates. Accordingly, the Pueblo has a very strong interest in the outcome of this case. This *Amicus* Brief is filed under the authority of the Pueblo's Governor and Tribal Council.

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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.

The Pueblo respectfully submits that the petition for writ of certiorari should be granted, and the judgment below reversed.

SUMMARY OF ARGUMENT

The Pueblo and the Alabama-Coushatta have fought for decades for the right to conduct their own affairs consistent with their federally recognized sovereign status. In 1987, Congress enacted the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act ("Restoration Act"), Public Law No. 100–89, 101 Stat. 666 (1987). Though principally passed to restore the federal trust relationship between the federal government and the Tribes, the Restoration Act also included provisions governing gaming on the Tribes' lands, included to quell Texas's concerns over illegal gambling following decisions by the Fifth Circuit Court of Appeals and this Court.[2]

The Restoration Act's gaming provisions were influenced, in substantial part, by this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), interpreting Public Law 280's grant of criminal jurisdiction—but not civil regulatory jurisdiction—to the states to preclude application of state gaming laws to tribal lands unless the state prohibited gaming outright as a matter of public policy. Though

[2] *See* Amy Head, *The Death of the New Buffalo: The Fifth Circuit Slays Indian Gaming in Texas*, 34 Tex. Tech. L. Rev. 377, 397–401 (2003).

an early version of the Restoration Act would have precluded the Tribes from engaging in *any* gaming (by prohibiting gaming "as defined by" Texas laws and regulations), the Senate Committee on Indian Affairs amended the gaming provision to conform the language to this Court's decision in *Cabazon* by prohibiting gaming on the Tribes' lands that is "prohibited by" Texas laws. It was that version of the Restoration Act that Congress later enacted.

Yet the Fifth Circuit ignored the plain language of the Restoration Act and its legislative history when it refused to interpret the Restoration Act consistent with *Cabazon Band*'s teachings. It then rebuked the Indian Gaming Regulatory Act's ("IGRA") application to the Tribe's lands, despite clear evidence that that statute was enacted first, to bring federal uniformity and standards to tribal gaming and second, to resolve issues over federal, state, and tribal jurisdiction over Indian gaming following *Cabazon Band*. The tension between the Fifth Circuit's decision and the plain language of those two statutes has, in turn, bred numerous disputes between the Tribes and the State of Texas concerning the scope of gaming permitted on their Indian lands. *See Ysleta del Sur Pueblo v. State of Tex.*, 852 F. Supp. 587, 588 (W.D. Tex. 1993), *rev'd*, 36 F.3d 1325 (5th Cir. 1994) ("*Ysleta I*").

In the twenty-five years following *Ysleta I*, the State of Texas and the Tribes have been involved in a series of disputes about the scope of gaming permitted under the Restoration Act and the Indian Gaming Regulatory Act. In its latest iteration, the Fifth Circuit

compounded *Ysleta I*'s errors by expanding that decision to preclude the Tribes from engaging in Class II gaming under IGRA—contrary to determinations reached by the National Indian Gaming Commission, the Department of Interior, and the First Circuit Court of Appeals. These decisions have created inconsistent interpretations—and reinterpretations—of both the Restoration Act and IGRA, leading to ongoing uncertainty over gaming permitted on the Tribes' lands. What is not uncertain, however, is the devastating impact that these decisions have had on the sovereign authority and self-determination of federally recognized Indian tribes in Texas.

ARGUMENT

I. Considerations of Tribal Sovereignty Are Paramount When States Seek to Restrict Tribal Affairs.

Federally recognized Indian tribes are sovereign political entities that retain "inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014); *see also*, *e.g.*, *United States v. Lara*, 541 U.S. 193, 199 (2004); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172 (1973) ("[Indian tribes'] claim to sovereignty long predates that of our own Government") (citations omitted); *Williams v. Lee*, 358 U.S. 217, 223 (1959) ("[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations"). The Tribes enjoy a government-to-government relationship with the United

States and the State of Texas. Likewise, "[a]s sovereigns, Indian tribes are subordinate only to the federal government." *Texas v. United States*, 497 F.3d 491, 493 (5th Cir. 2007).

Congress bears a unique obligation toward sovereign tribes like the Pueblo and Alabama-Coushatta, and must treat the rights of sovereign tribes as a paramount concern. *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 83–85 (1977); *Morton v. Mancari*, 417 U.S. 535, 555 (1974); *see also Bay Mills Indian Cmty.*, 134 S. Ct. at 2043 (2014) (Sotomayor, J., concurring) ("A key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding.").

For decades, this Court has recognized that traditional notions of tribal self-government "are so deeply engrained in our jurisprudence that they have provided an important backdrop, against which vague or ambiguous federal enactments must always be measured." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (internal citation and quotation marks omitted). This "backdrop" of tribal self-government is an important federal interest, "in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development. *Cabazon*, 480 U.S. at 216–17. Gaming has proven essential to furthering that goal, particularly where—as here, and so many places across the

Nation—tribal lands are unfit for other purposes. *Id*. at 218–19.

Congress passed the Indian Gaming Regulatory Act to establish federal standards for gaming on Indian lands, and created the National Indian Gaming Commission ("NIGC") to regulate such tribal gaming. 25 U.S.C. §§ 2702(3), 2704(a). Notably, Congress intended for IGRA to provide "a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." *Id.* §§ 2701(4), 2702(1). Moreover, Congress specifically found that existing federal law—which included the Restoration Act—failed to "provide clear standards or regulations of the conduct of gaming on Indian lands." *Id.* § 2701(3).

The Tribes here—and for decades since the passage of the Restoration Act—seek recognition of their sovereign right to conduct legal gaming under IGRA. This Court should grant the Alabama-Coushatta's petition for writ of certiorari to recognize the paramount concern of tribal sovereignty involving questions of federal Indian law.

II. The Fifth Circuit's Decisions Threaten Both Tribal Self-Governance and Tribal Sovereignty.

This Court has consistently recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory[.]" *Cabazon*, 480 U.S. at 207 (1987) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)). The Tribes have exercised their

sovereignty to overcome bleak conditions on their tribal lands by promoting legal, Class II gaming under IGRA (as defined in 25 U.S.C. § 2703(7)). The gaming offered by the Tribes indisputably supports their tribal sovereignty and financial independence.

The Alabama-Coushatta operates the Naskila gaming facility outside Livingston, Texas. The Pueblo operates the Speaking Rock gaming facility outside El Paso, Texas. Naskila and Speaking Rock unquestionably enhance not only the conditions on the Tribes' reservations, but also the economic success of the surrounding communities. The injunctions sought by the State of Texas threaten these flourishing facilities, undercutting the Tribes' sovereign right to provide for their members and overcome decades of economic peril. *See Seneca-Cayuga Tribe of Okla. v. State of Okla. ex rel. Thompson*, 87 4 F.2d 709, 716 (10th Cir. 1989) (finding for the tribe in a gaming case because the tribe stood to "lose income used to support social services for which federal funds have been reduced or are nonexistent, and lose jobs employing Indians who face a [high] rate of unemployment"); *Cayuga Nation v. Tanner*, 108 F. Supp. 3d 29, 34–35 (N.D.N.Y. 2015) (Holding that whether a tribe's opening of a bingo facility was "[i]ll-advised or not, the [tribe] credibly claim[ed] that not only would the [municipality's] enforcement of its anti-gaming ordinance be an affront to its sovereignty, its citizens also depend heavily on the facility to provide funding for public services").

A. The Pueblo's Speaking Rock Facility Promotes the Pueblo's Economic, Social, and Humanitarian Goals.

In 1967, the year before the Pueblo gained federal recognition, the *San Antonio Express* reported that the living conditions for members of the Pueblo were "scandalous"; that Pueblo families earned about $400 per year, mostly from picking cotton; and that families were foraging for food by digging for roots. *Legislative Hearing on H.R. 4985 Before H. Subcomm. on Indian, Insular, and Alaska Native Affairs of the H. Comm. on Nat. Res.*, 115th Cong. 1 (Sept. 14, 2018) (statement of Governor Carlos Hisa, Ysleta del Sur Pueblo) (citing San Antonio Express, *El Paso's Tigua Indians Still Tribal* (Sept. 24, 1967), https://newspapers.com/image/61179238 (last visited October 10, 2019)). In fact, in the 1960s, members of the Pueblo averaged a fifth-grade education and the unemployment rate was 70 percent. *See id.* at 2. Additionally, housing comprised dirt foundations and one or two overcrowded rooms—tribal members could not afford basic furnishings like couches or mattresses, and many of the Pueblo youth were succumbing to alcoholism and substance abuse. *Id*.

After its recognition in 1968, the Pueblo strategically and systematically improved its socio-economic status through tourism, tribally owned enterprises, and limited funding opportunities from the Texas Indian Commission. *See Legislative Hearing on H.R. 4985* (statement of Governor Hisa) at 2. But even with these drastic improvements, the Pueblo's members

continued to be among the poorest citizens of Texas. *See* Head, at 420. That would change in 1993.

In 1993, the Pueblo opened the Speaking Rock Entertainment Center, a gaming enterprise designed to ensure the Pueblo's economic self-determination. *See Legislative Hearing on H.R. 4985* (statement of Governor Hisa) at 3. Since its inception, Speaking Rock has been the driving force in lifting the Pueblo out of extreme poverty. Speaking Rock created hundreds of jobs for the Pueblo's members—decreasing unemployment from over 40% to almost zero. *Id*. The median household income of Pueblo members has risen from $6,700 in 1983 to $29,122 in 2016 (a 200% increase even after adjusting for inflation), largely due to the success of Speaking Rock. *Id*. at 5. Additionally, Speaking Rock has facilitated not only a marked decrease in members' dependence on welfare, but also an increase in government operations and program funding, and a substantial investment in Pueblo-owned enterprises fostering self-sufficiency. *Id*. at 3–4. The funds generated from Speaking Rock have led to affordable housing opportunities, improved infrastructure, amplified cultural preservation programs, and the establishment of institutions such as the court system, police department, and fire and emergency units. *Id*. at 5.

Speaking Rock has not only allowed the Pueblo to invest in its people, it has also created benefits for the surrounding El Paso region. Since opening Speaking Rock, the area surrounding the Pueblo has experienced: (i) over $823 million of direct and indirect regional impact; (ii) over $150 million in local

expenditures injected into the region; (iii) over $50 million in payroll spent on the local economy; and (iv) the creation of hundreds of jobs for the people of El Paso. *Id.* at 3. Recognizing the Pueblo's community impact, much of the El Paso business community, as well as governmental leaders, have supported Speaking Rock for decades. *See* George Kuempel, *Casino Appeal Planned: Tiguas Say Gaming Facility is Vital to El Paso's Economy*, Dallas Morning News, Sept. 29, 2001, at 33A.

The Pueblo excels at governing its lands and members. In fact, the Pueblo's efforts for rebuilding an effective and sustainable tribal nation through strategic and responsible self-governance has not only led to the dramatic improvement of its members' lives, it has also been recognized nationally. These recognitions include:

- Honored by the Harvard Project on American Indian Economic Development for the Pueblo's Economic Revitalization Project;[3]
- Achieving Self-Governance contracting status with the Department of the Interior;[4]

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[3] *See* The Harvard Project on American Indian Economic Development, *Project Pueblo: Economic Development Revitalization Project* 1 (2010), http://nnigovernance.arizona.edu/sites/default/files/attachments/text/honoring_nations/2010_HN_YDSP_project_pueblo.pdf (honoring the Pueblo's implementation of an economic development strategy and Tribal Tax Code).

[4] *See Legislative Hearing on H.R. 4985* (statement of Governor Hisa) at 6.

- Honored with the Taos Blue Lake Spirit Award by the Americans for Indian Opportunity;[5]
- Honored by the Harvard Project on American Indian Economic Development for the Pueblo's Redefining of its Citizenship;[6] and
- Invitation to testify to the Senate Committee of Indian Affairs regarding the Pueblo's data management philosophy.[7]

The NIGC—the agency within the Department of the Interior specifically created to regulate tribal gaming—understood the importance of permitting the Pueblo to responsibly exercise its sovereign prerogative to conduct gaming activities at Speaking Rock. The NIGC determined that the Pueblo, as a sovereign tribe, fall under IGRA's jurisdiction, and may conduct Class II gaming regulated by IGRA. *See* Letter from Janodev O. Chaudhuri, Chairman, Nat'l Indian Gaming

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[5] Americans for Indian Opportunity, *Ysleta del Sur Honored by Americans for Indian Opportunity* (July 24, 2013), http://aio.brownrice.com/news/aio/detail/27 (honored for its commitment to promoting self-sufficiency and empowering their community to thrive in the contemporary world while preserving their cultural identity).

[6] *See* The Harvard Project on American Indian Economic Development, *Project Tiwahu: Redefining Tigua Citizenship* 43 (2016), https://hpaied.org/sites/default/files/HPAIED%20Directory%202016-2017%20FINAL.pdf.

[7] *Legislative Hearing on the 30th Anniversary of Tribal Self-Governance: Successes in Self-Governance and an Outlook for the Next 30 Years Before S. Subcomm. on Indian Affairs*, 115th Cong. 2 (Apr. 18, 2018) (statement of Governor Carlos Hisa, Ysleta del Sur Pueblo).

Comm'n, to Carlos Hisa, Governor, Ysleta del Sur Pueblo (Oct. 5, 2015) https://www.nigc.gov/images/uploads/gamingordinances/20151005Ysleta2.pdf. This Court should defer to the NIGC's determination that IGRA applies to the Pueblo, and ensure that the Pueblo is permitted to pursue its sovereign right to provide for its members through legal gaming on its land.

If Speaking Rock were shut down, the Pueblo people would be driven back into abject poverty. This is not conjecture; it is fact. When Speaking Rock closed in 2002 due to one of the many previous disputes between the Pueblo and the State of Texas, the Pueblo suffered an immediate and devastating blow to its economy and its members' lives. *See Legislative Hearing on H.R. 4985* (statement of Governor Hisa), at 4. Specifically, the 2002 closure resulted in, among other things: (i) unemployment skyrocketing from 3% to 28%; (ii) Pueblo members being forced to leave the reservation in search of work; (iii) Pueblo members being unable to pay mortgages and losing their retirement and 401k funds; (iv) budgets for Pueblo programs and services being slashed; (v) direct assistance to Pueblo members being cut; (vi) high education scholarship cutbacks; and (vii) elder meals and other programs being cancelled. *See Legislative Hearing on H.R. 4985* (statement of Governor Hisa), at 4.

B. The Alabama-Coushatta's Federally Approved Naskila Facility Promotes Tribal Welfare.

Likewise, "[i]t is no exaggeration to say that the Alabama-Coushatta's prospects as a people are entirely dependent on the [Naskila] facility's continued operation." Pet. at 22. In fact, the Alabama-Coushatta's Naskila facility is its only promising economic opportunity, given the bleak condition of the land on which its 500 members reside. *Id*.

The Alabama-Coushatta has done an admirable job in creating value on its Deep East Texas lands. It is undisputed that the Alabama-Coushatta's 4,593-acre Reservation lies in the "Big Thicket" area of Deep East Texas and is not "suitable for farming or ranching." *Id*. IGRA is designed to afford tribes, including the Alabama-Coushatta, a reasonable opportunity to make money to support themselves as independent, self-sufficient, sovereign nations despite the condition of their tribal lands. But the State of Texas seeks to strip the Alabama-Coushatta of the opportunity to conduct Class II gaming under IGRA, despite the NIGC's determination that the tribe is authorized to do so. Pet. at 9. Wresting gaming from the Alabama-Coushatta will eliminate 550 permanent jobs that pay over $15 million annually in wages, forcing the Tribe to provide for its members through lands of limited economic value that are not, by themselves, adequate to provide the Tribe and its members economic stability.

Indian gaming is the federally endorsed remedy for the economic and demographic issues plaguing reservations like the Alabama-Coushatta's. Indeed, in *Cabazon*, the Supreme Court explained the increased importance of gaming to tribal sovereignty where the tribal lands are unfit for other purposes:

> The Cabazon and Morongo Reservations contain no natural resources which can be exploited. The tribal games at present provide 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.

480 U.S. at 218–19. The roughly thirty states with Indian gaming operations, as well as numerous non-reservation communities located near tribal gaming facilities, have realized extensive economic and social benefits from tribal gaming operations, ranging from increased tax revenues to decreased public entitlement payments to the disadvantaged. Steven Andrew Light & Kathryn R.L. Rand, *Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy*, 4 Nev. L.J. 262, 267, n.29 (2004).

The Alabama-Coushatta has historically faced chronic underemployment. At the time the Alabama-Coushatta filed suit in November 2001 (seeking injunctive relief to allow gaming activities on its lands), it

suffered from a 46% unemployment rate, poor health conditions, and a median household income of only $10,809. *Texas v. Alabama-Coushatta Tribe of Tex.*, 298 F. Supp. 3d 909, 911 (E.D. Tex. 2018), *aff'd sub nom. Texas v. Alabama-Coushatta Tribe of Tex.*, 918 F.3d 440 (5th Cir. 2019). The Alabama-Coushatta expect—in 2019 alone—to generate nearly $120 million in operating revenue from the Naskila facility, which will also create nearly $140 million in economic impact on the surrounding community. Pet. at 22.

Ignoring the NIGC's determination that the Alabama-Coushatta may conduct Class II gaming on its reservation will set the tribe back decades—drastically affecting not only the tribe, but the larger community of Deep East Texas. The Tribes accordingly urge this Court to correct a flawed interpretation of the Restoration Act, validate the NIGC's interpretation of the Tribes' right to conduct gaming under IGRA, and facilitate the Tribes' sovereign right to promote the health and welfare of their tribal members.

CONCLUSION

For the foregoing additional reasons, this Court should grant the petition for writ of certiorari brought by the Alabama-Coushatta Tribe of Texas.

Respectfully submitted,

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