No. 20-493

In The
Supreme Court of the United States

YSLETA DEL SUR PUEBLO, THE TRIBAL COUNCIL, THE TRIBAL GOVERNOR MICHAEL SILVAS OR HIS SUCCESSOR,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

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

BRIEF OF *AMICUS CURIAE* ALABAMA-COUSHATTA TRIBE OF TEXAS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE*[1]

Amicus the Alabama-Coushatta Tribe of Texas (the "Tribe") is a sovereign, self-governing tribe located near Livingston, Texas that is uniquely affected by the tribal restoration act at issue in this case. Like the Ysleta del Sur Pueblo ("Petitioner," and the "Pueblo"), the Tribe had its trust relationship with the United States restored by 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). The Restoration Act contains two, identical sections on gaming that apply to the Tribe and Petitioner (together, the "Tribes"). Accordingly, this Court's decision in this matter will directly affect the Tribe.

SUMMARY OF THE ARGUMENT

In 1876, Texas adopted a state constitution that outlawed "lotteries" (*i.e.*, gambling). A hundred years later, however, attitudes toward gambling changed. In 1980, Texas amended its constitution to except bingo from its prohibition on lotteries and enacted an extensive regulatory regime to license and regulate certain state-approved entities to conduct bingo. Since then, billions of dollars from bingo gaming have inured

[1] All parties have provided written consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

to the benefit of Texas and those entities that Texas has deemed worthy to hold a state-issued bingo license.

In 1987, this Court held that the inherent sovereignty of Indian nations—coupled with federal policies that promote tribal economic independence—foreclosed the State of California from enforcing its bingo regulations on Indian lands absent express congressional authorization. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 215–22 (1987). California, the Court then noted, was not "entitled to prefer the funding needs of its state-approved charities over the funding needs of the [t]ribes, who dedicate bingo revenues to promoting the health, education, and general welfare of tribal members." *Id*. at 221 n.25.

Six months later, the 100th Congress passed the Restoration Act. Prior to *Cabazon Band*, a draft version of that Act would have banned all gaming on lands of the Tribes by "prohibit[ing]" all "gaming, gambling, lottery or bingo *as defined by* the laws and administrative regulations of the State of Texas" (emphasis added). But that language was amended after *Cabazon Band* to "prohibit" only those "gaming activities which are *prohibited by* the laws of the State of Texas" (emphasis added). Cognizant that states had previously attempted to assert regulatory jurisdiction over tribal gaming through the application of state criminal laws, Congress also added language instructing that "nothing" in the Act's gaming activities section "shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas."

Despite that language and *Cabazon Band*, Texas seeks to enforce its bingo laws and regulations on the Tribes' reservations. It has never relied on the Restoration Act's statutory language to do so. Nor could it. The Act only "prohibits" on the Tribes' lands those gaming activities that are "prohibited by" Texas law, and Texas does not "prohibit" bingo. Bingo is widely available for play at bingo halls throughout Texas. Although Texas may license and regulate bingo operations, Congress did not include in the Act any reference to laws that "regulate" gaming operations, and it omitted any reference to "regulations" and "licensing requirements" that appeared in earlier drafts of that legislation. Congress instead commanded that "nothing" in that section should be "construed" to grant regulatory jurisdiction to Texas over on-reservation gaming, regardless of whether Texas enforces its regulatory laws by civil or criminal means.

Until now, Texas has grounded its authority to enforce its bingo regulations on imprecise language from a Fifth Circuit decision that only interpreted that Act in the context of gaming activities that Texas indisputably prohibits outright. *Ysleta del Sur Pueblo* v. *Texas*, 36 F.3d 1325 (5th Cir. 1994). *Ysleta* did not concern gaming activities that Texas permits and regulates (like bingo), nor did it purport to construe the Restoration Act to that end. At that time, everyone—including Texas—believed that the Restoration Act barred Texas from enforcing its regulatory jurisdiction over on-reservation gaming activities that Texas allows, like bingo. *See* Tex. Conditional Cross-Pet. for

Cert., *Texas* v. *Ysleta del Sur Pueblo*, No. 94–1310, 1995 WL 17048828, at *7–8 (U.S. filed Jan. 30, 1995). That follows from the Act's plain language and makes sense in context, since the same (100th) Congress enacted the Indian Gaming Regulatory Act ("IGRA") a year later to provide a uniform regulatory regime for tribal gaming.

But in the years since *Ysleta*, the Fifth Circuit's stray reference to "regulations" operating as "surrogate federal law" has been over-read to subject the Pueblo's lands to Texas bingo regulations. By contrast, the United States District Court for the Eastern District of Texas recently interpreted the Act's plain language to foreclose Texas's attempts to enforce its regulatory bingo regime on the Tribe's lands. The court there found that the Restoration Act "specifically delineates gaming activities that are *prohibited* by Texas law" and "Texas does not prohibit bingo by law *or* regulation." *Texas* v. *Alabama-Coushatta Tribe of Texas*, No. 9:01-CV-299, 2021 WL 3884172, at *11 (E.D. Tex. Aug. 31, 2021). Because "the Restoration Act bars [Texas] from exercising regulatory jurisdiction, through civil or criminal means, over gaming activities conducted on the Tribe's lands," the court concluded that the Act does not subject the Tribe's bingo gaming to Texas's laws "unless and until [Texas] prohibits that gaming activity outright." *Id*. at *12.

The Fifth Circuit's affirmance of a district court injunction compelling Petitioner to adhere to Texas's bingo regulations should be reversed as an unauthorized

grant of regulatory jurisdiction to Texas, contrary to *Cabazon Band* and the Restoration Act's text.

ARGUMENT

I. Texas Exercises Broad Regulatory Authority Over Bingo Gaming.

Texas outlawed all gambling in 1876. But attitudes toward gambling shifted over the following century, and Texas laws prohibiting gambling were gradually loosened. Texas's constitutional prohibition on lotteries was amended in 1980 to authorize bingo games and again, in 1989, to authorize charitable raffles. Texas also passed the Texas Racing Act to allow pari-mutuel betting on horse and dog races. And, in 1991, Texas joined other states in authorizing a state-run lottery.

Today, Texas still excepts bingo games from its prohibition on "lotteries." Article III, § 47(a) of the Texas Constitution requires the legislature to "pass laws prohibiting lotteries and gift enterprises in this State other than those [lotteries] authorized by Subsection[ ] (b)," which grants the legislature authority to "authorize and regulate bingo games." TEX. CONST. art. III, § 47(a)–(b); *see Dep't of Tex., Veterans of Foreign Wars* v. *Tex. Lottery Comm'n*, 760 F.3d 427, 431 (5th Cir. 2014).

The Texas legislature exercised that authority by enacting the Bingo Enabling Act. TEX. OCC. CODE

ANN. § 2001.001 *et seq*. That statute permits certain "authorized organization[s]" to receive a license to conduct bingo, *id*. §§ 2001.101, 2001.411, subject to the Texas Lottery Commission's "broad authority" to "exercise strict control and close supervision over all bingo conducted in [Texas]," *id*. § 2001.051(a); *see VFW*, 760 F.3d at 437.

Through the Bingo Enabling Act, Texas extensively regulates the manner and means by which a licensee may conduct bingo, as supplemented by the Commission's administrative rules. *See* 16 TEX. ADMIN. CODE §§ 402.100–402.709. That statute governs where and how often bingo may be conducted. *See*, *e.g.*, TEX. OCC. CODE ANN. §§ 2001.419 (licensee "may not conduct more than three bingo occasions during a calendar week" and "[a] bingo occasion may not exceed six hours"), 2001.402(a) ("Bingo may not be conducted at more than one premises on property owned or leased by a licensed authorized organization."). It proscribes the means by which a bingo operator may accept payment to play bingo or deliver a bingo prize. *See*, *e.g.*, *id*. §§ 2001.409(a)(2)–(3) (a "card-minding device" may not be used to accept "money in payment for playing the bingo card" or to dispense bingo prizes), 2001.410(a)(3) (a "pull-tab dispenser" may not be used to dispense bingo prizes). And it controls how proceeds from bingo gaming are maintained and how they may be used. *See*, *e.g.*, *id*. §§ 2001.451–2001.458.

Texas also taxes bingo operations through licensing and prize fees collected by the Commission, which are "treated" like a "tax" under the Texas Tax Code

and provide "regulatory funding" for the Commission and general revenue for Texas. *Id*. §§ 2001.512(b), 2001.003, 2001.507. To secure payment of the prize fees, Texas requires its licensees to furnish some form of security and submit sworn quarterly reports to the Commission. *See id.* §§ 2001.505, 2001.514.

To enforce its provisions, the Bingo Enabling Act grants the Commission the power to revoke an operator's license for non-compliance, *see id*. §§ 2001.353, 2001.355, 2001.554; and makes it a third-degree felony to conduct bingo without a license, *see id*. §§ 2001.551(b)–(c); *see also* TEX. PENAL CODE ANN. § 47.02(c)(1) (conducting gambling in violation of the Bingo Enabling Act is a Class C misdemeanor). The Commission thus acts like a "law enforcement agency" that "regulates all bingo-related activities" and confers "a benefit" on certain state-approved entities "in the form of a license [] to conduct bingo games" under Texas's "regulatory regime." *VFW*, 760 F.3d at 437.

II. Texas Cannot Enforce Its Regulatory Bingo Regime on the Tribes' Lands.

A. Federal Law Bars State Regulation of Gaming on Indian Lands Absent Congressional Consent.

1. As this Court has long recognized, "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975). They are "'dependent on and subordinate to,

only the Federal Government, not the States.'" *Cabazon Band*, 480 U.S. at 207 (citation omitted).

States that seek to assert "regulatory authority over tribal reservations and members" are confronted by "two independent but related barriers." *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980). "First, the exercise of such authority may be pre-empted by federal law," and "[s]econd, it may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'" *Id*. (citation omitted). "The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress." *Id*. at 143; *see Bryan* v. *Itasca Cty.*, 426 U.S. 373, 392–93 (1976).

2. Over three decades ago, this Court addressed state regulatory authority over gaming on tribal lands and concluded that California could not apply its gaming regulations to tribal lands absent express congressional authorization. *See Cabazon Band*, 480 U.S. at 214–21. There, California sought to enforce on tribal lands a penal "statute that [did] not entirely prohibit the playing of bingo" but permitted it for games operated by designated organizations with prizes not to exceed $250 per game. *Id*. at 205. This Court found California's regulatory jurisdiction preempted by important federal and tribal interests in encouraging tribal self-sufficiency and economic development,

as reflected in President Reagan's 1983 Statement on Indian Policy and the federal government's promotion of tribal bingo enterprises. *Id*. at 216–20.

Neither of the federal statutes in that case—Public Law 280 and the Organized Crime Control Act of 1970 ("OCCA")—reflected congressional consent to California's enforcement of its gaming laws on the tribes' lands.

Under Public Law 280, the Court had to determine whether California's gambling laws were "criminal in nature, and thus fully applicable to the reservation * * * , or civil in nature and applicable only as it may be relevant to private civil litigation in state court." *Id*. at 208. Rejecting California's argument that its gaming laws were "criminal" because they carried criminal penalties, the Court found the difference between laws that are "criminal" in nature and those that are "civil" in nature depends on whether the law is "prohibitory" or "regulatory." *Id*. at 208–10. Under this "criminal-prohibitory/civil-regulatory" test, only conduct that violates a state's public policy falls within the state's criminal jurisdiction and is fully applicable to Indian lands. *Id*. at 209. "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. Because California's gambling laws were regulatory in nature, and thus fell within the state's "civil" jurisdiction, Public Law 280 did not authorize

California to enforce its gambling laws on the tribes' lands. *Id*. at 212.

The Court also concluded that California could not enforce its gambling laws under the OCCA. *Id*. at 213–14. Although a gambling business that is operated "in violation of the law of a State" violates the OCCA, the Court noted that OCCA enforcement authority solely resides with the federal government, and thus precluded California from enforcing its gambling laws under that statute. *See id*.

B. The Restoration Act's Plain Text Only Subjects the Tribes' Lands to Texas Gaming Bans.

In finding state regulation of tribal gaming preempted in *Cabazon Band*, this Court highlighted the federal government's active promotion of tribal bingo enterprises as a significant source of revenue for tribal governments and employment on reservations. *Id*. at 218–19.

Those same interests are served here. The Tribe's bingo enterprise—Naskila Gaming—has proven transformative for the Tribe and its members. New residences have been built, and government buildings have been renovated and expanded. Healthcare services are now available to address medical and dental needs that the Tribe was unable to support with funding from the federal government alone. And the Tribe offers educational initiatives and opportunities

for its members that would not be possible without Naskila Gaming.

The impact on employment opportunities and benefits also cannot be overstated. With the funding and expansion of its government services, the Tribe has created 100 new tribal employment opportunities, increased wages, and expanded employment benefits for its members. Naskila Gaming itself employs over 350 people and offers a livable wage and benefits that are rare in the economically-challenged area in which it operates. Local area businesses have also expanded, and new ones have opened, creating additional employment opportunities near the Tribe's reservation. An economic impact study conducted in 2020 attributed over 700 permanent local jobs (collectively paying $19.2 million in annual wages) to Naskila Gaming.

That Texas seeks to regulate the Tribes' bingo operations—to shutter them for operating without a state-issued license—is no light matter. That regulation represents an "infringe[ment] on tribal government," because, as this Court recognized, "[s]elf determination and economic development are not within reach if the Tribes cannot raise revenue and provide employment for their members." *Cabazon Band*, 480 U.S. at 218–19, 222. This Court conditioned a state's ability to regulate bingo gaming on tribal lands on express congressional authorization. *See id*. at 214–22. The Restoration Act's text offers none.

1. Congress must "unequivocally" express when it intends to abrogate tribal sovereignty and immunity in favor of state encroachment. *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014). If Congress's expressions are ambiguous, then they 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). "That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Bay Mills*, 572 U.S. at 790. Out of "proper respect both for tribal sovereignty itself and for the plenary authority of Congress," the Court "tread[s] lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 60 (1978).

Nothing in the Restoration Act's text reflects "unequivocal," "express," or "clear" congressional intent to subject the Tribes' lands to Texas gaming regulations. It "prohibit[s]" on the Tribes' lands only those "gaming activities which are prohibited by the laws of the State of Texas," and directs that "nothing" in that language "shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." Pub. L. No. 100-89, §§ 107(a)–(b), 207(a)–(b). Reading "prohibit" according to its ordinary meaning (and consistent with that congressionally-enacted rule of construction) means the Tribes must forgo gaming activities that Texas bans outright, but Texas must

tolerate their efforts to offer gaming activities that Texas permits and regulates.

2. Recognizing the consequences of unchecked judicial forays into the legislative sphere, "the preeminent canon of statutory interpretation requires [the Court] to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *Bedroc Ltd.* v. *United States*, 541 U.S. 176, 183 (2004) (citation omitted). Statutory interpretation thus begins by reading a statute in light of the "'ordinary meaning of [its] language.'" *Engine Mfrs. Ass'n* v. *S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (citation omitted).

Subsection 107(a) twice uses the word "prohibit" to "prohibit[]" on the Pueblo's lands those gaming activities "prohibited" by Texas law. "Prohibit" means "to forbid," "to prevent from doing," to "effectively stop," or "to make impossible." Webster's Third New Int'l Dictionary 1813 (1986); *see* Black's Law Dictionary 1405 (10th ed. 2014) (defining "prohibit" to mean "1. To forbid by law. 2. To prevent, preclude, or severely hinder."). To "prohibit" a "gaming activity" means to forbid that gaming activity by law, as one would expect a state to do if it desired to make that activity impossible to conduct.

That concept starkly contrasts with laws that "regulate" gaming. To "regulate" a gaming activity necessarily means to allow it, even if a state may also "fix the time, amount, degree or rate of" that activity "according to rule[s]." Webster's Third New Int'l

Dictionary 1913 (1986); *see* Black's Law Dictionary 1475 (10th ed. 2014) (defining "regulate" to mean "1. To control (an activity or process) esp. through the implementation of rules.").

Regulation is not the same as prohibition. Where regulation implies the continuance of conduct, prohibition implies its cessation. *See Ajax* v. *Gregory*, 32 P.2d 560, 563 (Wash. 1934) ("While a prohibition of the sale of intoxicating liquor and the regulation of the sale thereof relate to the same subject-matter, they are entirely different things. To prohibit the liquor traffic implies the putting a stop to its sale as a beverage, to end it fully, completely, and indefinitely. To regulate implies that the sale of intoxicating liquor shall go on within the bounds of certain prescribed rules, restrictions, and limitations.").

3. If Congress had intended to apply all Texas gaming laws to the Tribes' lands, one would expect it to have "expressly said so," *Bryan*, 426 U.S. at 390, particularly following *Cabazon Band*. History shows that Congress understands the distinction between laws that "prohibit" conduct and laws that "regulate" conduct on Indian lands.

The same (100th) Congress expressly subjected another tribe's lands to state "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 (1987). And, in another statute, the 100th Congress drafted

language providing that "[t]he laws of Florida relating to * * * gambling * * * shall have the same force and effect within [lands transferred to the tribe] as they have elsewhere within the State." Seminole Indian Land Claims Settlement Act of 1987, Pub. L. No. 100-228, § 6(d)(1), 101 Stat. 1556, 1560 (1987); *see also* Florida Indian Land Claims Settlement Act of 1982, Pub. L. No. 97-399, § 8(b)(2)(A), 96 Stat. 2012, 2015 (1982) ("The laws of Florida relating to * * * gambling * * * shall have the same force and effect within said transferred lands as they have elsewhere within the State.").

Those statutes are "cogent proof that Congress knew well how to express its intent directly when that intent was to subject" Indian lands to the full sweep of state gaming laws. *Bryan*, 426 U.S. at 389–90. Yet, § 107(a) is conspicuously silent regarding the application of state "regulations" or laws that "regulate" or "relate to" gaming.

That the 100th Congress knew about—and knew how to draft language addressing—state laws pertaining to the "licensing, regulation, or prohibition of gambling" is also clear from IGRA's text. *See* Pub. L. No. 100-497, § 23, 102 Stat. 2467, 2487 (1988). But Congress only referred to state gaming prohibitions in § 107(a) when it "*prohibited*" on Petitioner's lands those gaming activities "*prohibited*" by Texas law and imposed penalties for violations of "the *prohibition* provided in [that] subsection" (emphasis added).

The Court "'presumes differences in language like this convey differences in meaning.'" *Wisc. Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2071 (2018) (citation omitted). Congress's decision to apply only those Texas laws that prohibit gaming activities should be "respect[ed], not disregard[ed]." *Id*. at 2072.

4. Congress also made clear that "*nothing*" in § 107 should "be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." Pub. L. No. 100-89, § 107(b) (emphasis added). That includes the "prohibition" in § 107(a).

On its face, § 107(b) reflects a congressional rule of statutory construction. But it is also a substantive jurisdictional limitation on Texas's power to usurp the Tribes' regulatory jurisdiction over gaming activities that *Cabazon Band* recognized. *See La. Public Serv. Comm'n* v. *F.C.C.*, 476 U.S. 355, 373 (1986) (interpreting statutory language that "nothing shall be construed to apply or give the [FCC] jurisdiction with respect to * * * intrastate communication service" as a "substantive jurisdictional limitation" and "rule of statutory construction" that "denie[d] the FCC the power to preempt state regulation"). That provision alone precludes Texas from subjecting on-reservation gaming to its regulatory authority. *See Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 208 (1983) (finding a nothing-shall-be-construed provision removed "any doubt" concerning statute's interpretation).

"It is a commonplace of statutory interpretation that 'Congress legislates against the backdrop of existing law.'" *Parker Drilling Mgmt. Servs.* v. *Newton*, 139 S. Ct. 1881, 1890 (2019) (citation omitted). And "[w]hen the words of the Court are used in a later statute governing the same subject matter, it is respectful of Congress and of the Court's own processes to give the words the same meaning in the absence of specific direction to the contrary." *Williams* v. *Taylor*, 529 U.S. 420, 434 (2000). This Court "presume[s] that Congress expects its statutes to be read in conformity with this Court's precedents." *United States* v. *Wells*, 519 U.S. 482, 495 (1997).

The 100th Congress here legislated against the backdrop of *Cabazon Band*'s holding "that States lacked any regulatory authority over gaming on Indian lands." *Bay Mills*, 572 U.S. at 794. Extant law also included a long line of cases in which this Court resolved disputes between states and Indian tribes over "regulatory jurisdiction" or "regulatory authority"—that is, the power to regulate, license or tax conduct—on Indian lands. *See*, *e.g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 341–43 (1983) (finding New Mexico lacked "regulatory authority" to regulate and license hunting and fishing by non-Indians on tribal lands); *Montana* v. *United States*, 450 U.S. 544, 563–67 (1981) (finding tribe lacked "regulatory power" to "regulate, through taxation, licensing or other means," hunting and fishing by non-Indians on reservation land owned by nonmembers); *White Mountain Apache Tribe*, 448 U.S. at 141–52 (resolving a dispute over a

state's "regulatory authority" to apply its motor carrier license and use fuel taxes to a business operating on an Indian reservation); *Bryan*, 426 U.S. at 387 (referring to "general state civil regulatory authority" to "include[] taxing power").

In refusing to "grant" Texas "regulatory jurisdiction," it was that power to regulate, license, and tax gaming that Congress expressly withheld from Texas and reserved to the Tribes. Although this Court's precedent generally addresses "regulatory jurisdiction" as a "civil" concept, Congress also made clear its intent that Texas not be granted "criminal" regulatory jurisdiction. By doing so, Congress sought to foreclose arguments that this Court addressed in *Cabazon Band* and the Fifth Circuit considered in *Seminole Tribe of Florida* v. *Butterworth*, 658 F.2d 310 (5th Cir. 1981).

In *Butterworth*, the State of Florida argued that it could enforce its bingo regulations under Public Law 280 because it imposed penal sanctions for regulatory violations. *See* 658 F.2d at 314. The Fifth Circuit rejected that argument, however, recognizing that, "[a]lthough the inclusion of penal sanctions makes it tempting at first glance to classify [a] statute as prohibitory, [a] statute cannot be automatically classified as such" because "[a] simplistic rule depending on whether [a] statute includes penal sanctions could result in the conversion of every regulatory statute into a prohibitory one." *Id*.

This Court adopted *Butterworth*'s reasoning in rejecting a similar argument by California, asserting

that Public Law 280 allowed it to enforce its bingo regulations because "*unregulated* bingo" was a state misdemeanor. *See Cabazon Band*, 480 U.S. at 211. That "an otherwise regulatory law is enforceable by criminal as well as civil means," this Court concluded, "does not necessarily convert it into a criminal law within the meaning of Pub. L. 280," since doing so would effectively permit total assimilation of all state laws on Indian lands. *Id*. at 211–12.

Because § 107(a) bans gaming activities "prohibited" by Texas law and adopts Texas civil and criminal penalties for violations of § 107(a)'s "prohibition," Congress anticipated that Texas (like California and Florida before it) might seek to enforce its regulatory laws on the ground that Texas "prohibits" gaming activities that do not conform to its regulations by subjecting them to penal sanctions. To guard against that possibility, Congress included a rule of construction in the very next subsection (§ 107(b)) to foreclose any construction of § 107(a) that might grant "criminal regulatory jurisdiction" to Texas. *See* S. Rep. No. 100-90, at 9 (1987) (explaining that subsection (b) was "added to make it clear that Congress does not intend, by banning gaming and adopting state penalties as federal penalties, to in any way grant civil or criminal regulatory jurisdiction to the State of Texas").

The only provision in § 107 that "speaks expressly" to Texas's attempts to regulate on-reservation gaming "speaks *against* the State." *McGirt* v. *Oklahoma*, 140 S. Ct. 2452, 2477 (2020). Although the Texas Penal Code may criminalize violations of the Bingo Enabling

Act, § 107(b) bars Texas from relying on that statute to enforce its "criminal" regulatory jurisdiction over bingo. Likewise, that subsection bars Texas from asserting "civil" regulatory jurisdiction over the Pueblo's bingo gaming by relying on Chapter 125 of the Texas Civil Practice & Remedies Code to abate bingo gaming that does not conform to the Bingo Enabling Act.

5. Other provisions in § 107 support reading the term "prohibit" according to its ordinary meaning.

Unlike Texas's position, the Tribe's interpretation "accord[s] with the tribe's request in Tribal Resolution No. T.C.–02–86," Pub. L. No. 100-89, § 107(a), which reflected a request to ban *all* gaming on Petitioner's lands, regardless of whether the gaming activities were prohibited or regulated by Texas, *see* App. 123. Interpreting § 107(a) to ban only those gaming activities that are banned (and not regulated) by Texas law "accord[s] with the tribe's request" to the extent § 107(a) imposes a narrower gaming ban than (*i.e.*, within the scope of) the absolute ban on gaming originally requested.

Imagine, instead, that the Tribes had requested that Congress adopt language banning two gaming activities—roulette and bingo—on their lands. If Congress enacted text banning roulette, it would be fair to say that the roulette ban was "enacted in accordance with the tribe's request," even if Congress declined to ban bingo. The result is no different here.

By contrast, applying all Texas laws that regulate—as opposed to ban—gaming activities does not "accord" with the Tribal Resolutions at all. The Tribes never requested, and never agreed, in the Tribal Resolutions to subject their lands to Texas's regulatory authority over gaming. The Tribal Resolutions deemed any bill that would make state laws governing gaming and bingo directly applicable to their reservations "wholly unsatisfactory * * * in that it represents a substantial infringement upon the Tribe's powers of self-government, is inconsistent 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 States to apply their law to Reservation gaming activities." App. 122. It was precisely to avoid that result, while still ensuring passage of the Act, that the Tribes requested a total ban on all gaming over a regime that would grant Texas control over gaming and bingo on their lands.[2]

In the end, Congress did not enact the total ban on gaming. Even if the Tribes then said that they "ha[d] no interest in conducting high stakes bingo or gambling" on their reservations, App. 121, as Texas likes

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[2] The Senate Report for IGRA indicates that other tribes took similar positions in connection with legislation for that statute: "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." S. Rep. No. 100-446, at 4 (1988).

to highlight, Congress left intact the Tribes' sovereign authority to change their minds (just as Texas did) to authorize gaming activities that Texas allows.

Reading § 107(a) according to its plain meaning also dovetails with § 107(c), which allows Texas to "bring[] an action in the courts of the United States to enjoin violations of the provisions of" § 107(a). It makes sense that, if the Pueblo engaged in gaming activities that Texas bans outright, Congress afforded Texas the ability to shut down those gaming activities. *See* S. Rep. No. 100-90, at 11 (noting that § 107 "authorizes the State of Texas to seek injunctive relief in Federal court to enforce the federal ban on gaming").

The remainder of § 107(c) merely specifies that federal courts have exclusive jurisdiction over any enforcement action against Petitioner or its members for violations of § 107(a) "notwithstanding" § 105(f), since § 105(f)'s incorporation of Public Law 280 might otherwise permit Texas to sue tribal members in state court. *See Cabazon Band*, 480 U.S. at 207–08; *see also N.L.R.B.* v. *SW Gen., Inc.*, 137 S. Ct. 929, 939 (2017) (Congress's use of a "notwithstanding" provision "'shows which provision prevails in the event of a clash'" (citation omitted)). That Congress was chiefly concerned with "Jurisdiction Over Enforcement Against Members" is clear from that provision's heading. *See Merit Mgmt. Grp.* v. *FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) ("Although section headings cannot limit the plain meaning of a statutory text,

'they supply cues' as to what Congress intended." (internal citations omitted)).

6. As two statutes enacted by the same legislative body, IGRA also may be regarded as a legislative interpretation of the earlier-enacted Restoration Act. *See United States* v. *Stewart*, 311 U.S. 60, 64 (1940) ("[A] later act can * * * be regarded as a legislative interpretation of the earlier act in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting." (internal citations omitted)); *Northcross* v. *Memphis Bd. of Educ.*, 412 U.S. 427, 428 (1973).

Subsection 107(a) only refers to "gaming activities" prohibited by Texas law. As this Court observed in interpreting that same term in IGRA, the phrase "gaming activity" "means just what it sounds like—the stuff involved in playing [the] games." *Bay Mills*, 572 U.S. at 792. A "gaming activity" refers to "each roll of the dice and spin of wheel"—here, the actual game of bingo—not the licensing and operation of the game. *See id*.

Construing the Restoration Act together with IGRA then, Texas laws that concern the *licensing* or *operation* of a gaming activity that Texas permits have no application to the Tribes' lands under the Restoration Act. Rather than prohibit bingo (the gaming activity), Texas restricts who may *operate* bingo by requiring bingo operators to secure a *license*, and it prohibits the *operation* of bingo that does not comply with its manner-and-means restrictions.

What Congress meant by gaming activities "prohibited" by state law also may be gleaned from IGRA's congressional finding that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity * * * 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). That finding reflects Congress's understanding that a state prohibits a gaming activity when it does so "as a matter of criminal law and public policy." *See United States* v. *Davis*, 139 S. Ct. 2319, 2329 (2019) ("[W]e normally presume that the same language in related statutes carries a consistent meaning."); *Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019) ("This Court does not lightly assume that Congress silently attaches different meanings to the same term in the same or related statutes.").

That understanding, in turn, flows from *Cabazon Band*'s discussion of "prohibitory" and "regulatory" laws. 480 U.S. at 209–12. Recognizing that a regulatory law may be enforced "by criminal as well as civil means," this Court looked to the state's "public policy" in resolving the Public-Law-280 jurisdictional analysis. *See id*.

Congress likewise referred to the state's "public policy" to determine whether a state "prohibits" a gaming activity for purposes of IGRA, 25 U.S.C. § 2701(5)—and the Restoration Act. Subsection 107(a) prohibits on the Tribes' lands those gaming activities "prohibited" by Texas law. But whether a gaming activity is prohibited by Texas law does not depend on "a

simplistic rule depending on whether the statute includes penal sanctions," since laws regulating gaming may be enforced by civil or criminal means. *Butterworth*, 658 F.2d at 314; *see Cabazon Band*, 480 U.S. at 210–12. That is what Congress made clear in § 107(b), by barring any construction of § 107 that would grant "civil or criminal regulatory jurisdiction" to Texas. Whether a Texas law concerning a gaming activity is truly "prohibitory" and enforceable under § 107(a)—or "regulatory" and barred by § 107(b)—depends on whether Texas has a public policy against the particular gaming activity at issue. As the Bingo *Enabling* Act's title transparently reflects, Texas does not have a public policy against bingo.

C. The Legislative History Does Not Reflect Any Intent to Subject Tribal Gaming to State Regulation.

The legislative history also belies Texas's efforts to subject on-reservation gaming to state regulations and licensing requirements. Resort to legislative history is unnecessary, since it assumes that an ambiguity exists, *United States* v. *R.L.C.*, 503 U.S. 291, 298 (1992), and the Indian canon of construction requires any ambiguity to "be construed liberally in favor of the [Tribes]," *Montana*, 471 U.S. at 766. But the legislative history also reflects an intent to ban on the Tribes' lands only those gaming activities that Texas bans outright, and to foreclose Texas from exercising any regulatory authority over on-reservation gaming.

1. That interpretation comports with how Congress used the term "prohibited" in prior legislative drafts. When Congress initially acceded to the Tribes' request to "*prohibit*" on the Tribes' lands all gaming "defined by" Texas law, it understood that its proposed language would "*ban*" all gaming on the Tribes' lands as expressed in the Tribal Resolution. H.R. Rep. No. 100-36 at 1, 4 (1987); 133 Cong. Rec. 9042–45 (1987). When Congress subsequently amended that language to enact text to "*prohibit*" on the Tribes' lands all gaming activities "*prohibited by*" Texas law, it used that term in the same manner: to "ban" on the Tribes' lands those gaming activities "banned by" Texas law.

Prior legislative drafts lend Texas no support. The drafters never proposed any language to authorize Texas to regulate on-reservation gaming. One draft would have subjected on-reservation gaming to "tribal gaming laws, regulations and licensing requirements" that were required to "be identical to the laws and regulations of the State of Texas regarding gambling, lottery and bingo" (while preserving the Tribes' right to subsequently amend their gaming laws with the approval of the Secretary of the Interior). 131 Cong. Rec. 36,565–67 (1985). The Texas Comptroller was not satisfied with that proposal, because it did not make state laws directly applicable to the Tribes' lands. The Tribes, in turn, resisted Texas's efforts to regulate gaming on their lands by proposing a total ban on gaming. *See* App. 123. But Congress ultimately rejected that proposal too.

Congress instead enacted language that refers only to gaming activities "prohibited" by Texas "laws" and omits any reference to Texas regulations or licensing requirements. Although Texas seeks to read those words back into the statute, "'[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.'" *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) (citation omitted); *see Doe* v. *Chao*, 540 U.S. 614, 622–23 (2004).

2. The Restoration Act's Senate Report nowhere reflects an intent to subject on-reservation gaming to Texas gaming regulations or licensing requirements. *See* S. Rep. No. 100-90, at 8–11.

In construing Public Law 280 in *Bryan*, this Court observed that nothing in that act's "legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the State should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private, voluntary organizations'—a possible result if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments." 426 U.S. at 388 (internal citation omitted).

So too here. Nothing in the Restoration Act's legislative history "remotely suggests" that Congress intended to subordinate tribal gaming to Texas's

regulatory powers. Such an "omission has significance in the application of the canons of construction applicable to statutes affecting Indian immunities, as some mention would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress," *Bryan*, 426 U.S. at 381—particularly following *Cabazon Band*'s holding that federal and tribal interests preempted state gaming regulations, which this Court characterized as an "impermissibl[e] infringe[ment] on tribal government" that would result in "the destruction of tribal institutions and values," 480 U.S. at 208, 221–22.

The Senate Report also implicitly refutes Texas's construction. Congress there explains that § 107's gaming "prohibition" applies to tribal lands taken into trust by the United States. *See* S. Rep. No. 100-90, at 10. "With regard to tribal lands *not* taken into trust and therefore not made a part of the tribe's reservation," however, the Senate Report notes that "the laws and administrative regulations of the State of Texas related to gaming, gambling, lottery or bingo shall be applicable." *Id*. (emphasis added). The Senate Report thus acknowledges that the Restoration Act treats the Tribes' trust lands *differently* from those lands not held in trust to which Texas laws and regulations "related to" gaming apply. That language also (once again) shows that Congress knew how to draft text making "the laws and administrative regulations of the State of Texas related to gaming, gambling, lottery

or bingo * * * applicable" to Petitioner's reservation if that had been its intent in § 107(a). *See id*.

To the extent the Senate Report refers to language that was ultimately omitted from the Act's text, "murky legislative history" of that kind "can't overcome a statute's clear text and structure." *Azar*, 139 S. Ct. at 1815.

3. Legislative history also includes "the pre-enactment statements of those who drafted or voted for a law; it is considered persuasive by some, not because they reflect the general understanding of the disputed terms, but because the legislators who heard or read those statements presumably voted with that understanding." *District of Columbia* v. *Heller*, 554 U.S. 570, 605 (2008).

When the Senate amendments to H.R. 318 returned to the House for a vote, Representative Morris Udall, then-Chairman of the House Committee on Interior Affairs, explained that the amendments were intended to "codify" *Cabazon Band*'s "holding and rational[e]." 133 Cong. Rec. 21,114 (1987). The language that the Senate removed—which would have barred the Tribes from engaging in *any* gaming, including bingo—was plainly contrary to federal and tribal interests in promoting tribal bingo enterprises that this Court identified in *Cabazon Band*, 480 U.S. at 217–19. The Senate adopted language that prohibited the Tribes from engaging in gaming that Texas prohibits (which, at that time, included all gaming except bingo) and instructed that "nothing" in the gaming

activities section should be "construed" to grant Texas "civil or criminal regulatory jurisdiction" over gaming activities on the Tribes' lands.

As Chairman Udall explained to the House, the Senate amendments brought the Act "in line with the rational[e] of [*Cabazon Band*]" by effectively "codify[ing] the Court's opinion" with respect to federal preemption of state "regulation of gaming on the respective reservations of the two tribes." 133 Cong. Rec. 21,114.

D. *Ysleta* Never Construed the Restoration Act to Allow State Regulation of Tribal Bingo.

Tellingly, Texas has never grounded its arguments in the Restoration Act's text, but in the Fifth Circuit's stray reference to state "regulations" operating as "surrogate federal law" in a decision that (Texas has never disputed) concerned dissimilar facts and legal issues. *Ysleta*, 36 F.3d at 1334. This case proves the maxim that Chief Justice Marshall articulated long ago: "that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens* v. *Virginia*, 19 U.S. 264, 401 (1821). The failure to heed that maxim has allowed confusion—and litigation—to abound unnecessarily by "reading a single sentence unnecessary to the [*Ysleta*] decision" over the Act's text. *Ark. Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 35 (2012).

Ysleta concerned gaming activities (baccarat, blackjack, craps, roulette, and slot machines) that were indisputably "prohibited"—*i.e.*, outright banned—in Texas. *See* 36 F.3d at 1333. The Pueblo there asserted that § 107(a) only applied Texas gaming laws to the extent Texas *criminally* "prohibited" gambling as in Public Law 280 cases. *See id*. at 1332–33. The *Ysleta* court disagreed, holding Public Law 280's "criminal-prohibitory/civil-regulatory" analysis inapplicable to § 107(a), on the ground that "§ 107(a) is *not* a restatement of Public Law 280." *Id*. at 1333–34. In closing, *Ysleta* concluded "that Congress—and the [Pueblo]—intended for Texas' gaming laws and regulations to operate as surrogate federal law on the [Pueblo's] reservation in Texas." *Id*. at 1334.

But *Ysleta* did not address gaming activities regulated by Texas, and it did not purport to construe the Restoration Act in that context. That decision simply has no bearing on the question presented here.

E. The Restoration Act Complements the Indian Gaming Regulatory Act.

In 1995, Texas "let slip" that it too read the Restoration Act's plain language to foreclose application of Texas gaming regulations to the Tribes' lands. *See Niz-Chavez* v. *Garland*, 141 S. Ct. 1474, 1484 n.5 (2021). When *Ysleta* held IGRA inapplicable to Petitioner's lands, Texas urged this Court to overturn that holding because, as Texas then argued, "it would not be possible [for Texas] to regulate [bingo] activities

since the state has no regulatory, civil or criminal jurisdiction over gaming on Tribal lands" under the Restoration Act. Tex. Conditional Cross-Pet. for Cert., 1995 WL 17048828, at *7–8. Instead, Texas believed that IGRA governs regulatory jurisdiction over gaming on Indian lands. *See id.*; *see also Bay Mills*, 572 U.S. at 795 (observing that "[e]verything—literally everything—in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands, and nowhere else").

As Texas then understood, the Restoration Act can—and should—be read to give effect to both it and IGRA. "When confronted with two Acts of Congress allegedly touching on the same topic," this Court has stated that it "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) (internal quotations and citation omitted). That rule exists for good reason: "Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*." *Id.* The Court thus "aim[s] for harmony over conflict in statutory interpretation." *Id.*

When Congress passed the Restoration Act in 1987, bingo was the only gaming activity that Texas had authorized as an exception to its constitutional prohibition on lotteries. According to the Act's plain language, subsection (a) then "prohibited" all gaming activities on the Tribes' lands with one exception: bingo. And subsection (b) barred Texas from asserting

or enforcing its "regulatory jurisdiction" over bingo conducted on the Tribes' lands.

Shortly thereafter, in IGRA, the same Congress enacted a comprehensive regulatory regime for bingo as "class II" gaming. *See* 25 U.S.C. § 2703(7)(A). Under IGRA, Indian tribes may not offer bingo if they are located in a state that bans bingo outright. *See id*. § 2710(b)(1)(A). But in states that permit bingo—like Texas—IGRA authorizes Indian tribes to conduct bingo games on their reservations, and grants Indian tribes regulatory authority over tribal bingo (subject to federal oversight) from which states are wholly excluded. *See id*. § 2710(a)(2)–(b); S. Rep. No. 100-466, at 11–12 (explaining Congress's understanding that tribes could not conduct bingo under IGRA on Indian lands in five states that banned bingo outright, but tribes in the other 45 states—including Texas—could do so without state regulation).

Given the extent to which these "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." *POM Wonderful LLC* v. *Coca-Cola Co.*, 573 U.S. 102, 115 (2014). That is precisely what Texas proposes. Its position not only does great violence to the Restoration Act's text, but also creates an unnecessary and irreconcilable conflict with the uniform federal regulatory regime for tribal bingo gaming that Congress included in IGRA. Neither statute compels such a result, and "[r]espect for Congress as drafter counsels against [so] easily finding

[an] irreconcilable conflict[ ] in" two statutes that Congress drafted concurrently. *Epic Sys.*, 138 S. Ct. at 1624.

Although Texas may wish it were otherwise, "wishes don't make for laws." *McGirt*, 140 S. Ct. at 2462. "'Congress wrote the statute it wrote'—meaning, a statute going so far and no further." *Bay Mills*, 572 U.S. at 794 (citation omitted). The Restoration Act bans on the Tribes' lands only those gaming activities that Texas bans outright. And Congress enacted IGRA to govern regulation of those gaming activities that Texas chooses to permit.

CONCLUSION

The Tribe respectfully asks that the Court protect the Tribe's and Petitioner's sovereign right to engage in bingo outside of Texas's regulatory jurisdiction—as this Court recognized in *Cabazon Band* and as Congress understood when it enacted the Restoration Act and IGRA.

Respectfully submitted,

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