No. 01-1671

In the Supreme Court of the United States

YSLETA DEL SUR PUEBLO, *ET AL.*,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent, the State of Texas, submits this brief in opposition to the petition for writ of certiorari filed by petitioners. The Fifth Circuit resolved this appeal in a one-sentence, unpublished, per curiam decision that upheld the district court's permanent injunction closing petitioners' casino as it operated in violation of both Texas and federal law. Petitioners do not identify an issue on which courts are divided, nor to they point to an important issue of federal law that demands the Court's attention. Instead, they come to the Court asking first for the review of a 1994 Fifth Circuit decision, *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (CA5 1994) ("*Ysleta I*"), *cert. denied*, 514 U.S. 1016 (1995), and second for what is essentially "error correction"—asking the Court to correct the Fifth Circuit's mistaken application, in their view, of established rules of statutory construction. For these reasons and those elaborated below, the Court should deny the writ.

STATEMENT OF THE CASE

I. THE CASINO.[1]

In 1987, Congress passed the Ysleta del Sur Pueblo and Alabama Coushatta Indian Tribes of Texas Restoration Act ("the Restoration Act"), 25 U.S.C. §1300g *et seq.*, granting to the Ysleta del Sur Pueblo Indian tribe, which resides in Texas, the status of a federally recognized American Indian tribe. As a condition of obtaining this federal recognition, the tribe agreed it would not engage in commercial gambling. *See Ysleta I*, 36 F.3d, at 1327-29 & n.2. Accordingly, during its bid to obtain federal recognition, the tribe adopted Tribal Resolution No. TC-02-86, in which it stated its firm determination not to engage in gambling on its lands. *See id.*, at 1327-28 & n.2 (setting out the resolution). The tribe requested that Congress embody its resolution in the Restoration Act to assure that there would be no bingo or high-stakes gambling on its lands:

> "The Ysleta del Sur Pueblo respectfully requests its [congressional] representatives . . . to amend §107(a) of the Restoration Act . . . [with] language which would provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, shall be prohibited in the Tribe's reservation or on tribal land." *Id.*, at 1328 n.2

1. The State objects to the argumentative approach and conclusory statements found in petitioners' statement of the case. *See* SUP. CT. R. 15.2. Because the objectionable matters are so numerous, the State includes a statement of the case, and individually addresses some specific statements in this opposition. Additionally, the State directs the Court to the district court's opinions, which include a fair recitation of the factual and procedural history of this case. *See* App., at 6a-7a, 32a-60a.

The tribe's resolution was incorporated into the Restoration Act. *Id.*, at 1329-30; *see* 25 U.S.C. §1300g-6(a) ("The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86"). Relying on the tribe's commitment, and intending to "'ban gaming on the reservation[] as a matter of federal law,'" *id.*, at 1329 (citation and quotation omitted), Congress restored the tribe's federal trust status and recognition by passing the Restoration Act, which prohibits on the "reservation and on the lands of the tribe," "[a]ll gaming activities which are prohibited by the laws of the State of Texas."[2] *See* 25 U.S.C. §1300g-6(a).

Despite the tribal resolution and the terms of the Restoration Act, in the early 1990s the tribe petitioned then-Governor Ann Richards to enter into a tribal-state compact under the Indian Gaming Regulatory Act (IGRA) to allow it to open a commercial casino. *See Ysleta I*, 36 F.3d, at 1331 & n.12; *Texas v. Ysleta del Sur Pueblo*, 79 F.Supp.2d 708, 710 (W.D. Tex. 1999) (noting that in spite of Restoration Act, tribe tried to compel the State to negotiate a compact permitting gaming under IGRA), *aff'd*, 237 F.3d 631 (CA5 2000) (unpublished), *cert. denied*, 532 U.S. 1066 (2001). When Governor Richards rejected the tribe's entreaties, the tribe sued. Pet., at 8.

On appeal, the Fifth Circuit reviewed the language and legislative history of the Restoration Act, and concluded that the

2. Petitioners misstate the purpose of the Restoration Act as enabling the State "to treat Indians differently from other citizens," Pet., at 5 (quoting S. REP. NO. 90-1070, at 1 (1968)), but the Act and its legislative history show that it was intended to restore the tribe's federal trust status while ensuring that the State's ban on commercial casino gambling remained intact. Moreover, the tribe is not treated differently than any other citizen in this regard, as no one can lawfully operate a commercial casino in Texas. *See* App., at 61a-62a & n.12.

State had no obligation to negotiate a gaming compact under IGRA because the Restoration Act, not IGRA, governs gambling by the tribe. *Ysleta I*, 36 F.3d, at 1331, 1334. The Fifth Circuit then dismissed the suit because the Restoration Act did not waive the State's Eleventh Amendment immunity *Id.*, at 1335-36.

During the pendency of *Ysleta I*, however, and despite its earlier agreement, the tribe opened the Speaking Rock Casino on its reservation in El Paso, Texas. Pet., at 10. And, in 1996, despite the Fifth Circuit's decision that the Restoration Act codified the tribe's commitment to prohibit gambling on the reservation, *id.*, at 1333-34 & n.19, the Tribal Council enacted a gaming ordinance authorizing high-stakes gambling on the tribe's lands.[3] App., at 33a & n.2.

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3. Petitioners make unsupported and incorrect assertions regarding the casino's history. Petitioners contend that the State "was aware of and did not object to NIGC's oversight of the Tribe's Class II gaming activities," without record citation; that the State "participated in activities necessary for the NIGC to approve the Class II management agreement," without citation; and that the State offered to negotiate a compact under IGRA for Class III lottery and pari-mutuel racing, again without any record citation. Pet., at 10. These assertions, which are largely new, have no relevance to the legal issues in the petition. Petitioners also assert that its "Class II" gaming (bingo) was conducted under "the auspices of the National Indian Gaming Commission," presumably referencing a 1993 letter from the NIGC Commissioner Chairman that it claims authorized the opening of the casino. The Chairman's opinion, however, is conditioned on the application of IGRA to the tribe and the tribe is *not* governed by IGRA. Moreover, his opinion carries little weight because it is not the product of an adjudication or rulemaking, and is unsupported by any analysis. *Cf.*, *e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 229-34 (2001). In any event, "no deference is due" because "Congress has spoken directly to the question" through the Restoration Act. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

From 1993 until earlier this year, when its operation was enjoined, the tribe continuously operated its 24-hour, commercial casino. *Id.*, at 33a-34a. Open to the public, the tribe advertised the casino, operated a promotional website, and distributed certificates redeemable for casino tokens. *Id.*, at 35a, 65a-66a. The casino offered high-stakes bingo with $1,000 prizes and side games awarding as high as $15,000; keno games every six minutes with possible winnings as much as $100,000; craps ("Tigua Dice"); over 1000 slot machines with payoffs ranging up to $25,000; poke games; off-track betting on horse and dog races; a "Big Six Wheel"; and Tigua 21 (blackjack). *See* App., at 33a n.2, 65a. In the year 2000, the casino enjoyed revenues in the range of $50-60 million.

II. THIS LAWSUIT.

After the State filed suit in 1999 seeking a permanent injunction against the casino's operation, the tribe, without success, sought to dismiss the case on the basis of tribal immunity. *See* App., at 5a-16a, 17a-24a; *see also Texas v. Ysleta del Sur Pueblo*, 79 F.Supp.2d 708 (W.D. Tex. 1999), *aff'd*, 237 F.3d 631 (CA5 2000) (unpublished), *cert. denied*, 532 U.S. 1066 (2001). At the close of the tribe's fruitless collateral-order appeal, the district court took up the case on cross-motions for summary judgment. After a hearing, on September 27, 2001, the court granted judgment to the State, denied the tribe's motion, and permanently enjoined the casino's operation as prohibited by Texas law.[4] App., at 25a-29a, 31a-80a.

The Fifth Circuit granted the tribe a stay which allowed the casino to remain open and expedited the tribe's subsequent appeal.

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4. Texas's anti-gambling laws are found in Chapter 47 of the Texas Penal Code. TEX. PENAL CODE §47.01 *et seq*. These provisions are not set out in this opposition because they are not implicated by petitioners' arguments.

After briefing and argument, the Fifth Circuit, in a one-line, per curiam, unpublished decision, affirmed the district court's judgment in all respects. App., at 2a; *see also id.*, at 1a. The stay was subsequently lifted, requiring the casino's closure on February 11, 2002, as the tribe's application for a stay of the mandate, which was submitted to Justice Kennedy due to Justice Scalia's unavailability, was denied that day.[5]

ARGUMENT

I. PETITIONERS HAVE PRESENTED NO REASON FOR THE COURT TO EXERCISE ITS DISCRETION AND GRANT THE PETITION FOR WRIT OF CERTIORARI IN THIS CASE.

A. Petitioners' Issues Do Not Satisfy the Court's Prerequisites for Review.

Remarkably, petitioners devote only one paragraph of their petition to challenging the Fifth Circuit's decision and judgment in this case, Pet., at 25-26, and instead devote the majority of their energy to challenging the Fifth Circuit's 1994 decision in *Ysleta I*. *See, e.g., id.*, at 4 ("The 1994 decision in *Ysleta I* is fundamentally flawed and should be corrected . . ."); *id.*, at 15 ("The Fifth Circuit committed fundamental errors in *Ysleta I*"); *id.*, at 15-25 (discussing claimed errors in *Ysleta I*). The petition is admittedly aimed at the decision in *Ysleta I*, but petitioners completely ignore the clear principle that this Court "'reviews judgments, not opinions.'" *Texas v. Hopwood*, 518 U.S. 1033, 1033 (1996) (Ginsburg & Souter, JJ., opinion on denial of petition for writ of certiorari) (quoting *Chevron*, 467 U.S., at 842).

5. The district court later modified its injunction to allow the tribe to engage in certain limited activities at the casino that the court determined did not violate Texas law. *Texas v. Ysleta del Sur Pueblo*, No. 3:99-CV-00320 (W.D. Tex. May 20, 2002) (order modifying injunction). This appeal does not implicate the district court's later order.

The proper focus of petitioners' complaint, then, should not be the 1994 opinion in *Ysleta I*, but on the Fifth Circuit's judgment in *this* case. And petitioners do not, and cannot, suggest that the issues presented in this appeal satisfy any of the Court's typical prerequisites for review. *See* SUP. CT. R. 10. The petition does not establish a conflict between federal courts of appeals on an important matter, *id.*, (a); the Fifth Circuit did not create a conflict on an important federal question with a state court of last resort; *id.*, (b); the Fifth Circuit did not abandon the straight and narrow of "the accepted and usual course of judicial proceedings" so that this Court's intervention is needed, *id.*, (a); and the court of appeals did not decide an important question of federal law that has yet to be settled by this Court, or in a way that conflicts with this Court's decisions, *id.*, (c).

In short, petitioners fail to explain why an unpublished, one-sentence decision on a statute limited to two tribes in Texas presents an important question of federal law, represents a troublesome division among courts, or implicates a question of widespread public significance. Appreciating their tenuous position, instead of attempting to meet the strictures of Rule 10, petitioners readily confess that their petition is a plea for error correction and ask for ad hoc review of their arguments, a plea the Court should resist.

B. Instead, the Tribe Asks the Court to Engage in the Extraordinary Task of Error Correction.

Petitioners, throughout, denounce *Ysleta I* as incorrectly decided and ask the Court to essentially redecide that appeal. Setting aside the fact that it is not appropriate to review *Ysleta I* seven years later, this challenge falls short of demonstrating that the case is worthy of review for two reasons. First, correcting a misstep by a court of appeals is simply not the Court's customary task. Even the example provided by petitioners in urging the Court to step into an "error correction" role did not merely require the Court

to repair a misapplication of established rules. *See* Pet., at 14. In *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), the Court considered a question having importance to far more than just the litigants in that action: whether the Interstate Commerce Act precludes a state-court action on a matter reached by the Interstate Commerce Commission. *Id.*, at 331. In any event, it is beyond doubt that "this Court is not a forum for the correction of errors." *Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting).

Second, petitioners do not contend that there has been an intervening change in the relevant law since 1995, nor that anything that has transpired in the last seven years makes the case more worthy of the Court's review that it was in 1995. The centerpiece of petitioners' arguments continues to be the patently incorrect assertions that IGRA, and not the Restoration Act, applies to gambling on their lands, and alternatively, if the Restoration Act reaches petitioners, the statute uses the term "prohibited" in a way that does *not* prohibit, but instead *permits*, their casino operation. *Compare, e.g.*, Pet., No. 01-1671, at p. i (stating as question presented: "Does the Indian Gaming Regulatory Act, instead of the Pueblo's Restoration Act, govern gaming activities on the reservation lands of the Ysleta del Sur Pueblo?") *with* Pet., No. 94-1161, at pp. i, 6 (presenting as question for review whether Fifth Circuit erred in concluding that Restoration Act governed petitioners, and not IGRA); *compare also* Pet., No. 01-1671, at p. i (posing as question for review whether Restoration Act provisions should be interpreted consistently with *Cabazon Band*) *with* Pet., No. 94-1161, at pp. 9-10 (contending that "prohibit" must be construed in light of *Cabazon Band*); *see also Ysleta I*, 36 F.3d, at 1331 ("The Tribe maintains that the term "prohibit" has special significance in federal Indian law, which is derived from *Cabazon Band*..."). In their present petition to the Court, petitioners simply repeat their assertions that the Fifth Circuit erred in 1994. These arguments were unavailing then, and equally ineffectual now.

No matter the hyperbolic statements of petitioners,[6] the actual issues of the petition belong to *Ysleta I*, and are not appropriate for the Court's review. The writ should be denied.

II. *YSLETA I* WAS CORRECTLY DECIDED.

Although there is no need for the Court to reach the question of whether *Ysleta I* was correctly decided, should that issue be reached, the merit of that decision is easily established. Petitioners assert that three mistakes occurred in *Ysleta I*: (1) that the court of appeals erred in holding that the Restoration Act, and not IGRA, governs the tribe's gaming activities; (2) that it wrongly concluded that Congress did not codify *Cabazon Band* in the Restoration Act; and (3) that the Fifth Circuit issued an "unconstitutional advisory opinion" that should be regarded as dicta. Petitioners are wrong on all counts.

A. The Fifth Circuit Correctly Decided in 1994 That IGRA Did Not Impliedly Repeal the Restoration Act.

Because fundamental differences in IGRA and the Restoration Act prevent them from being read together, the *Ysleta I* court determined which statute controlled. 36 F.3d, at 1335. It correctly rejected the argument that IGRA impliedly repealed the Restoration Act, and decided that the Restoration Act, as the more specific of the two statutes, governs the tribe's gambling, not IGRA.

Petitioners do not, and cannot, point to any indication in IGRA that Congress was expressly repealing the Restoration Act. Without

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6. *See, e.g.*, Pet., at 3 ("This case asks whether the federal courts can deny the rights and privileges accorded Indian Tribes by an express act of Congress."); *id.*, at 15 (claiming an "abuse of the opinion writing process in violation of Constitutional strictures" and that the Fifth Circuit granted the State "regulatory power" on tribal lands despite "a specific Congressional prohibition").

a clear intention, it is well-settled that "[a] specific statute will not be controlled or nullified by a general one." *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987). Petitioners' only attack on the reasoning in *Ysleta I* on this issue is that the Fifth Circuit misidentified IGRA as the more "general" of the two statutory schemes, which led in their view, to the faulty conclusion that IGRA did not impliedly repeal the Restoration Act as it regards gambling. *See* Pet., at 15-19. Petitioners' characterizations of the two statutes utterly lack merit.

Petitioners contend that the Fifth Circuit erred in calling the Restoration Act the more "specific" of the two, attributing that conclusion to a reliance on Congress's statement in IGRA that IGRA should be read in light of other federal law and the absence in IGRA of a blanket repealer clause. *See* Pet., at 16-18; *see also Ysleta I*, 36 F.3d, at 1334-35. But petitioners' effort to demonstrate error is futile. The court of appeals relied on the Restoration Act's narrow tailoring to conclude that it was the more specific of the two, and additionally noted other various indications that Congress had no intention to repeal the Restoration Act, including the absence of a repealer clause and the actual language of IGRA that it should be interpreted in light of other federal law. *Id.*, at 1334-35. Comparing the two statutory schemes, the Restoration Act is a "specific" statute, whereas IGRA is a general one. The former applies to two particular Indian tribes located in one state, and the latter applies generally to tribes across the country. A statute having nationwide application cannot be more specific than a law that specifically addresses particular tribes.

Moreover, in claiming that the Restoration Act was repealed, petitioners fail to address the central issue of legislative intent. With the interpretative canon of "implied repeal," "the primary consideration is the intent of Congress," and even indicia of detail and specificity in a statute cannot override congressional intent. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 380 (1996)

(citation and quotation omitted); *see also Chickasaw Nation v. United States*, 534 U.S. 84, 102 (2001) (canons of statutory construction are not mandatory rules, but guides to assist courts in determining legislative intent). Additionally foreclosing petitioners' argument is the strong presumption against repeal by implication. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 549, 551 (1974).

Petitioners also cite decisions in which IGRA governed, in an attempt to support the general proposition that IGRA trumps other statutes. Pet., at 18-19 (citing cases). Those decisions, however, do not illustrate any implied repeals by IGRA, as petitioners admit. *See* Pet., at 19 (each of these cases necessarily deals with . . . a *different* question of statutory reconciliation") (emphasis added). The two Public Law 280 cases—*Lac du Flambeau Band v. Wisconsin*, 743 F.Supp. 645 (W.D. Wis. 1990), and *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (CA9 1994), *cert. denied*, 516 U.S. 912 (1995)—did not concern a conflict between Public Law 280 and IGRA, nor consider a repeal by implication. In *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1180 (CA10 1991), "implicit repeal analysis [wa]s inapposite," and the Tenth Circuit explained that it was well-established that the Assimilative Crimes Act had application only when Congress leaves a topic or conduct unaddressed—it "serve[s] interstitially during congressional inaction," *id.*, so that there was no conflict between statutes.[7] Lastly, *Rhode Island v. Narragansett*

7. That court did observe in a footnote that even if the ACA had continued vitality for Indian gambling after IGRA, the explicit terms of IGRA establishing the United States's jurisdiction as "exclusive" over gambling crimes on reservation lands indicated Congress's *clear* intent to supplant the ACA's jurisdictional gap-filler. *United Keetoowah*, 927 F.2d, at 1180 n.19. Petitioners have identified no indication of any such "clear intent" in IGRA regarding the substance of the Restoration Act.

Indian Tribe, 19 F.3d 685, 694, 703-06 (CA1 1994), is easily distinguished because the pre-existing statute considered in that case lacked a specific gaming provision, and Congress eliminated from IGRA a draft provision removing the tribal lands at issue from IGRA. Conversely, the Restoration Act specifically addresses gambling by petitioners, and there is no reference to the Restoration Act in IGRA's legislative history.

Moreover, IGRA does not apply to tribes universally, as petitioners would hope, and exclusion of a tribe from IGRA's coverage does not render a court decision dubious. In fact, petitioners acknowledge that some tribes are not reached by IGRA as Congress has enacted statutes specific to particular tribes. *See* Pet., at 19 n.4 (noting 25 U.S.C. §1708(b) (provision applicable only to Narrangansett Tribe) and 25 U.S.C. §9411 (provision governing Catawba tribe)); *see also, e.g., Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1341 (CA D.C. 1998); *Akins v. Penobscot Nation*, 130 F.3d 482, 484-85 (CA1 1997); *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 787-88, 794 (CA1 1996). In a final confirmation that the Fifth Circuit rightly recognized that Congress did not impliedly repeal the Restoration Act's gambling prohibition, Congress has acquiesced to *Ysleta I* for eight years, and has not, as it has done other times, amended legislation following what it regards as an incorrect court decision. *E.g., Narragansett*, 158 F.3d, at 1335.

With no real doubts about the correctness of the Fifth Circuit on the implied repeal issue, the question lacks the claimed importance to litigants faced with conflicting federal statutes. *See* Pet., at 19. Although the application of the Restoration Act versus IGRA may be significant to the two tribes governed by the Restoration Act,[8] the issue has been settled since 1994, and has not

8. The Restoration Act also restored the trust relationship between the federal government and the Alabama-Coushatta Indian Tribes of Texas and the provisions pertaining to the Alabama-Coushatta Tribes' gambling are the same as those in 25 U.S.C. §1300g-6. *See* 25 U.S.C. §§731 *et seq.* Litigation brought by the Alabama-Coushatta Tribes against the State seeking a declaratory judgment that the federal statute does not prohibit it from running casino gambling has resulted in a recent decision adverse to the tribe and a permanent injunction enjoining its casino gambling operation. *See Ala.-Coushatta Tribes of Tex. v. Texas*, __ F.Supp. 2d __, No. 9:01-CV-299, 2002 WL 1369473 (E.D. Tex. June 25, 2002).

muddied the waters or enjoyed any recognizable significance in litigation involving implied repeals.

B. The Fifth Circuit Correctly Held That the Restoration Act Was Not Enacted with an Eye Towards *Cabazon Band*.

1. The legislative history of the Restoration Act establishes that the Act is not to be read in light of *Cabazon Band*.

Petitioners accuse the Fifth Circuit of improper statutory construction when it decided in *Ysleta I* that the Restoration Act's term "prohibited" did not codify the Court's analytical approach in *Cabazon Band*. Pet., at 20-25. The court of appeals, however, employed well-established rules of statutory interpretation in an uneventful and straightforward way to read the Restoration Act's gambling prohibition.

In petitioners' view, the term "prohibited," as in the provision, "[a]ll gaming activities which are *prohibited* by the laws of the State of Texas are hereby prohibited on the reservation and on the lands of the tribe," 25 U.S.C. §1300g-6(a) (emphasis added), carries a special meaning in the field of Indian law exemplified by the civil-regulatory/criminal-prohibitory dichotomy in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Th

distinction in that decision arose with Public Law 280, a statute that applied to six states, but not Texas. *See Ysleta I*, 36 F.3d, at 1330 n.8. In *Cabazon Band*, the Court considered California's authority to enforce its bingo statutes on a reservation under Public Law 280 (18 U.S.C. §1162(a), and 28 U.S.C. §1360(a)), which granted California authority to (1) enforce its criminal laws on reservations, and (2) hear in state courts civil cases involving a tribe member. 480 U.S., at 207-08. The critical inquiry for the Court was whether the state law at issue was "criminal," so that it applied to reservations under Public Law 280, or "civil" and therefore inapplicable. *Id.* The Court relied on the law's practical effect for the answer—it is "criminal" if it generally prohibits conduct, but "civil" if it regulates the conduct. *Id.*, at 209-10. Applying the dichotomy, the Court decided that California's bingo statute was not "criminal," because it "generally permits the conduct at issue, subject to regulation,"*id.*, at 209, and thus Public Law 280 did not authorize California to prohibit tribes from offering bingo.

Petitioners contend that *Cabazon Band*'s dichotomy informs not only the term "criminal law" in Public Law 280, but also animates the term "prohibited" in the Restoration Act so that it only means utterly forbidden.[9] *See* Pet., at 21; App., at 50a-51a. Even assuming that *Cabazon* translates to the statutory term "prohibited,"[10] petitioners' sole indication of Congress's intent to

9. Petitioners have not suggested that their gambling activities are not illegal under Texas law—their contention is that the Restoration Act has a special meaning for "prohibited" so that such activities are outlawed only if Texas law bans every single gaming activity for all persons and entities in Texas.

10. The *Cabazon Band* Court examined the meaning of the statutory phrase "criminal law," not the term "prohibited," and it considered the term in the context of deciding whether California had authority to enforce criminal laws on tribal lands. This phrase does not appear in the Restoration Act provision at issue, nor does the Act extend the State's general civil and criminal jurisdiction like Public Law 280.

import such a meaning is one congressman's floor comment during final passage of the Restoration Act—Representative Morris Udall expressed his understanding that *Cabazon Band* applied to the amended Restoration Act.[11] Pet., at 15, 24-25.

The Fifth Circuit did not "ignore" the congressman's statement, as petitioners claim, Pet., at 25, but correctly held that a single, twelfth-hour comment by a representative is insufficient to overcome the plain language and otherwise clear intent of the Restoration Act. *See Ysleta I*, 36 F.3d, at 1334. The dangers c allowing such have been well-noted:

> "To permit what we regard as clear statutory language to be materially altered by such [floor] colloquies . . . would open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President." *Regan v. Wald*, 468 U.S. 222, 237 (1984).

See also Weinberger v. Rossi, 456 U.S. 25, 35 n.15 (1982) ("Contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history."). Indeed, the construction urged by petitioners impugns the testimony of Tigua Governor Miguel Pedraza, given at a congressional hearing on the Restoration Act:

11. Petitioners point to a change in the language of the bill's gambling prohibition from the 99th to the 100th Congress to contend that Congress codified *Cabazon Band*. Pet., at 23-24. The earlier version provided that "all gaming as defined by the laws and administrative regulations of the State of Texas . . . shall be prohibited." *Ysleta I*, 36 F.3d, at 1329 (quoting 132 CONG. REC. S13634 (daily ed. Sept 25, 1986)). The change in phraseology is not suggestive of a codification of *Cabazon Band*, however, and petitioners rely on the lone floor comment to make their case.

> "[T]he new proposed section 107, . . . which would prohibit, as a matter of federal law, all gambling or bingo on our reservation. We have requested that such a prohibition be included because that accurately states our own tribal custom—we do not now nor have we ever permitted gambling in any form on our reservation. Attached to my statement is our Council's resolution that more fully states our position on this matter." *Restoration of Federal Recognition to the Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribes of Texas: Hearing on H.R. 1344 Before the Senate Select Comm. on Indian Affairs*, 99th Congress, 2d Sess. 102 (1986) (statement of Miguel Pedraza, Governor, Ysleta del Sur Pueblo).

And this construction would also disavow the tribal resolution, which is specifically referenced in the Restoration Act. *See* 25 U.S.C. §1300g-6(a).

In addition, the relevant committee report contradicts the congressman's floor comment. The Senate Committee of the 100th Congress, which was the source of the amended language of the gaming prohibition, reported that, even with the alteration in the phrasing of the gaming prohibition, "the central purpose" of these two versions, "to ban gaming on the reservations as a matter of federal law," remains unchanged. *Ysleta I*, 36 F.3d, at 1329 (quoting S. REP. NO. 100-90, at 8 (1987)). Instead of addressing the Senate Committee's explanation of the amendment—that it barred gambling on the reservation as a matter of federal law—petitioners rely exclusively on the post-amendment comment of one House member, erroneously suggesting that the Fifth Circuit should have given his floor comment decisive weight over those of the Senate

Committee that formulated the bill's language.[12]

In an effort to excise from the legislative history the tribal resolution pledging not to gamble and requesting that Congress pass the Restoration Act and its gambling prohibition, petitioners contend that in *Ysleta I*, the Fifth Circuit should not have considered legislative history related to the earlier version of the Restoration Act that was not enacted.[13] Petitioners disclaim the resolution's relevance because the resolution was presented in congressional hearings during the 99th Congress, before the language of the gambling prohibition in the bill was amended. The legislative history, however, does not support such a dismissal. The extensive testimony offered on the Restoration Act during the 99th Congress, which included the tribal resolution, was carried over to

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12. In support of their claim, petitioners also inappropriately reference extra-record testimony by congressional staff attorneys offered at a 2002 hearing in the *Alabama-Coushatta* case. Pet., at 24 n.7; *see, supra* note 8. The State lodged objections to that testimony at the hearing as improper. More importantly, petitioners offer no authority for the incredible proposition that a senate staffer's testimony—given more than fifteen years after a bill's passage–should be given any weight in the reading of a statute, let alone weight that overcomes the plain language of the statute and its documented, contemporaneous legislative history. Additionally, this testimony was ultimately unavailing as the federal district court in the *Alabama-Coushatta* case recently ordered the closure of that tribe's casino under the Restoration Act. *See Ala.-Coushatta Tribes of Tex. v. Texas*, __ F.Supp. 2d __, No. 9:01-CV-299, 2002 WL 1369473 (E.D. Tex. June 25, 2002).

13. Petitioners suggest that the district court expressed doubt about the Fifth Circuit's review of the Restoration Act's legislative history in *Ysleta I*, Pet., at 26, but fail to acknowledge that the only doubt was about the need to assess that legislative history, as the language of the statutory prohibition is plain. *See* App., at 60a (noting that the statutory "language used is clear and unambiguous").

the 100th Congress and adopted into the legislative history for the enacted version of the Restoration Act. *See* S. REP. NO. 100-90, at 7-8 (1987). Thus, the tribal resolution attached to the eventual passage of the Restoration Act.[14]

2. Petitioners' interpretation of "prohibited" is not supported by the canons of statutory construction.

Further, petitioners' interpretation of the term "prohibited" is undermined by familiar rules of statutory construction. Their reading assumes that Congress intended the term "prohibited" to mean something counterintuitive and that it chose a meaning that rendered its gambling prohibition meaningless from day one, and the rules of statutory construction do not permit robbing the prohibition of meaning, or allow absurd results. *See, e.g., United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *United States v. Turkette*, 452 U.S. 576, 580 (1981).[15] The Fifth Circuit was bound to give the statute its plain meaning, "enforce . . . according to its terms," *United States v. Ron Pair Enters., Inc*, 489 U.S. 235, 241 (1989), and construe in its "ordinary, everyday" sense, *Crane v. Commissioner*, 331 U.S. 1, 6 (1947). As a matter of common

14. Moreover, if changes in draft language are to be considered, it should be noted that Congress *rejected* an earlier proposed provision that would have allowed a means for petitioners to deviate from Texas law, *see Ysleta I*, 36 F.3d, at 1327-28, a resounding confirmation that Congress did not intend anything other than a strict prohibition. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987).

15. The tribe asserts that the term should have been construed in favor of the tribe, but that canon of statutory construction is utilized only in cases of ambiguity, *e.g., South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986), which remains unidentified, and in any event, does not trump other statutory interpretation principles. *See Chickasaw Nation*, 122 S.Ct., at 535-36.

usage, "prohibited" means forbidden, precluded, or illegal. *See, e.g.*, OXFORD ENGLISH DICTIONARY, p. 596 (2d ed. 1989); BLACK'S LAW DICTIONARY, p. 1228 (7th ed. 1999). The meaning of "prohibit" does not vary, only the object of the prohibition. With no dictionary or court decision supporting its proposed meaning, petitioners can hardly accuse the Fifth Circuit of error.

Whether considering the textual command alone, or together with legislative materials, the court of appeals correctly concluded that Congress did not import *Cabazon Band*'s reasoning into t. Restoration Act.[16] If *Cabazon Band* supplied the meaning of

16. In an effort to marginalize the solid conclusions reached by the Fifth Circuit in *Ysleta I*, petitioners cast aspersions on the appeal process in that case. They state that the Fifth Circuit "decided an issue that was never pled, briefed, or argued: that the Restoration Act, and not IGRA, governs gaming on the Pueblo's reservation" and that it "effectively denied [petitioners] [their] day in court[.]" Pet., at 10; *see also id.*, at 9, 15. That is refuted by looking at the briefing in the case, as well as the opinion's recitation of the parties' arguments. *See Ysleta I*, 36 F.3d, at 1331, 1332-35; *see also* Pet., at 9 (explaining that in *Ysleta I* parties raised issue of whether IGRA or Restoration Act governed and that State argued that Restoration Act controlled). Petitioners also complain that the Fifth Circuit considered the legislative history of the Restoration A in *Ysleta I* without providing petitioners the opportunity to present arguments regarding the Act's legislative process. Pet., at 15. Petitioners do not suggest that the Fifth Circuit somehow rebuffed such briefing, and like all parties, they had ample opportunity to address legislative history in their briefing. Moreover, petitioners admit that they were able to present their version of the legislative history to the district court in this proceeding. Pet., at 15. And although the district court determined it was bound by *Ysleta I*, petitioners also made these same legislative-history arguments both on appeal to the Fifth Circuit panel and later on petition for rehearing en banc, complaining strenuously that *Ysleta I* was incorrectly decided.

"prohibited," then the prohibition would be diluted to prohibit nothing. Congress enacted a real prohibition, as sought by the tribal resolution. Indeed, there is an absence of any indication to adopt *Cabazon Band*, aside from the comment of one member of Congress, and instead consistent signs that Congress intended to put in place a strict gambling prohibition.

> "The report's reference to both the laws and administrative regulations of Texas is clearly inconsistent with a contention that . . . the prohibitory-regulatory distinction of *Cabazon Band* would be involved in analyzing the Restoration Act. . . . Congress provided in §107(a) that '[a]ny violation of the prohibition shall be subject to *the same civil and criminal penalties* that are provided by the laws of the State of Texas.' Again, if Congress intended for the *Cabazon Band* analysis to control, why would it provide that one who violates a certain gaming prohibition is subject to a *civil* penalty? . . . . Congress was merely acceding to the tribe's request that the tribal resolution be codified." 36 F.3d, at 1333-34; *see also id.* nn.17 & 18.

The Fifth Circuit was entirely consistent with the Court's precedent and there is no sign of error on this issue.

3. *Ysleta I* is not at odds with other circuit court decisions.

Petitioners also point to decisions applying the *Cabazon Band* distinction, Pet., at 22 (citing cases), in an effort to suggest some

type of division among courts.[17] Those decisions predated the *Ysleta I* opinion, and no conflict has developed since that time.

Two of the cited decisions do not represent any division, but simply apply *Cabazon Band* to Public Law 280, the very statute examined in *Cabazon Band*, and thus are inapposite to the issue of extending the decision's analysis beyond Public Law 280. The district court decision cited likewise fails to hint at a conflict because, although it extended *Cabazon Band*'s analysis to th Assimilative Crimes Act, it did so only because, like Public Law 280, the ACA "is purely a jurisdictional statute" that "entitle[s] the states to enforce all their laws on the Indian reservations," and not a statute, like for instance, the Restoration Act, that extends "only certain gambling laws on the Indian reservation," and because "dilut[ing]" the ACA with "the criminal/prohibitory distinction" satisfied the need to "more narrowly construe[]" the ACA's "broad jurisdictional grant." *Pueblo of Santa Ana v. Hodel*, 663 F.Supp. 1300, 1311 n.15 (D. D.C. 1987). Petitioners have not unearthed any division on this point.

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17. Not surprisingly, petitioners fail to acknowledge the many decisions that, *consistent* with *Ysleta I*, have rejected an emasculated definition of "prohibit" or an extension of *Cabazon Band*'s analysis. *See United States v. Santee Sioux Tribe of Neb.*, 135 F.3d 558, 564 (CA8 1998); *Rumsey Indian Rancheria v. Wilson*, 64 F.3d 1250, 1258 (CA9 1994); *Cheyenne River Sioux Tribe v. S. Dakota*, 3 F.3d 273, 279 (CA8 1993); *see also Mo. River Servs., Inc. v. Omaha Tribe*, 267 F.3d 848, 854 (CA8 2001); *Sault Ste. Marie Tribe v. Engler*, 146 F.3d 367, 372 (CA6 1998); *United States v. Cook*, 922 F.2d 1026, 1035 (CA2 1991); *United States v. Dakota*, 796 F.2d 186, 189 & n.4 (CA6 1986); *United States v. Farris*, 624 F.2d 890, 897 (CA9 1980); *United States v. Dakota*, 666 F.Supp. 989, 998-99 (W.D. Mich. 1985), *aff'd*, 796 F.2d 186 (CA6 1986); *New Mexico v. Johnson*, 904 P.2d 11, 20-21 (N.M.1995); *Citation Bingo, Ltd. v. Otten*, 121 N.M. 205, 207 n.2 (N.M. 1995).

C. The Fifth Circuit's Holdings in *Ysleta I* Regarding the Restoration Act's Gambling Prohibition Were Neither Unconstitutional Nor Dicta.

Petitioners make a disjointed, and frankly somewhat confusing, argument challenging 1994's *Ysleta I* as an "unconstitutional advisory opinion" in its holding regarding the Restoration Act's gaming prohibition. Understanding that *Ysleta I* considered and rejected their arguments, petitioners resort to characterizing that decision as nonbinding precedent. To the extent that they are claiming that the Fifth Circuit's holding in *Ysleta I* was non-binding dicta because the court ultimately decided that the federal courts were barred from hearing the case by the Eleventh Amendment, petitioners are incorrect.

The Fifth Circuit's construction of the gaming prohibition was essential to its resolution of *Ysleta I.* Although the ultimate holding was that the Restoration Act did not waive the State's sovereign immunity and the tribe's suit had to be dismissed, *Ysleta I*, 36 F.3d, at 1336-37, the court of appeals was required to reach a series of preliminary holdings prior to that determination. Among these necessary, sequential holdings were the determination that the criminal-prohibitory/civil-regulatory dichotomy of *Cabazon Band* did not apply to the Restoration Act, the holding that Texas's gambling laws operate as surrogate federal law for petitioners' gambling, and the conclusion that the Restoration Act, and not IGRA, governs petitioners' gambling. *See Ysleta I*, 36 F.3d, at 1332-35. All this was necessary precursor to the Fifth Circuit's decision that the Restoration Act did not waive the State's sovereign immunity.

Such incremental holdings are never considered dicta, but are given the same weight and effect as the ultimate holding in a case. *See, e.g., Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) (contrasting dicta with holdings, which include the final disposition of a case as well as the preceding parts of the opinion "necessary to

that result"); *Fla. Cent. R. R. Co. v. Schutte*, 103 U.S. 118, 143 (1881) (explaining that "[i]t cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of consideration of the case, something else was found in the end which disposed of the whole matter."); *County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring and dissenting) ("the principle of stare decisis directs us to adhere not only to the holdings of our prior cases, but also to their explications of th. governing rules of law"). Thus, the Fifth Circuit's rejection of *Cabazon Band*'s analytical approach and its recognition of the governing force of the Restoration Act over the tribe's gambling activities were in no way dicta as they were necessary to its ultimate sovereign-immunity determination.

Indeed, petitioners implicitly admit as much. They do not contend that the holdings regarding the meaning of the Restoration Act were not necessary to *Ysleta I*'s ultimate holding, but instead seem to suggest, with the assertion that the Fifth Circuit "lacked jurisdiction" over the case, Pet., at 20, that the court's holdings were dicta because the court determined that jurisdiction was lacking in the case and dismissed on Eleventh Amendment grounds. That argument lacks any merit as the court clearly had jurisdiction to decide jurisdictional questions and necessary subsidiary issues. *See generally, e.g., Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 122 S.Ct. 1640 (2002).

III. THE FIFTH CIRCUIT PROPERLY REJECTED THE CHARACTERIZATION OF *YSLETA I* AS DICTA.

Petitioners do not even address the Fifth Circuit's judgment in this case until the end of their petition, and then, as already discussed, they make a plea for error correction. But the error they complain of is unrecognizable. Their sole claim to a reviewable error in this case is that the Fifth Circuit should have recognized that the portions of *Ysleta I* addressing the gambling prohibition and

Cabazon Band were impermissible dicta. Pet., at 26. The Fifth Circuit's careful analysis and holdings in *Ysleta I* simply cannot be regarded as dicta, *see* II.C *supra*, and the court of appeals rightly rejected the argument.

CONCLUSION

For these reasons, the State of Texas respectfully requests that the Court deny the petition for a writ of certiorari.

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