No. 19–403

IN THE

Supreme Court of the United States

ALABAMA-COUSHATTA TRIBE OF TEXAS,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

After spending nearly thirty pages discussing the merits of this "easily resolve[d]" case (at 9), the State perfunctorily deems a multi-sovereign, multi-circuit split "illusory." It is real to the federal government, two agencies of which have expressly permitted gaming that the Fifth Circuit expressly prohibits. It is real to the First and Fifth Circuits, which have come to opposite conclusions regarding materially similar statutes. It is even real for the State, which, its extensive merits defense notwithstanding, previously adopted the same position it now criticizes the First Circuit, the Department of the Interior, and the National Indian Gaming Commission for taking. Tex. Att'y Gen. Op. No. DM-32, 1991 WL 527442, at *5 (Aug. 6, 1991) (assuming IGRA applies to all three Texas tribes); Conditional Cross-Pet. at 7-8, *Texas* v. *Ysleta del Sur Pueblo*, 514 U.S. 1019 (1995) (No. 94-1310), 1995 WL 17048828 (not challenging IGRA's application to Restoration Act tribes).

But the conflict is most real to the sovereign Indian tribes, whose interests the State does not deign to address. Many tribes, including the Alabama-Coushatta, depend on the revenue and jobs associated with gaming for their economic survival. Before opening gaming facilities, members of the Alabama-Coushatta and the Ysleta tribes had a household income of less than half the median American's. Pet. 21-22. Revenue from gaming has paid for tribal emergency services, infrastructure, housing, schools, and cultural institutions. Ysleta Amicus Br. 9. Effective tribal sovereignty depends on tribal access to gaming, as Congress provided. Tribes like the Alabama-

Coushatta and the Ysleta may *not* do so because they are in the Fifth Circuit. Those like the Wampanoag *may* do so because they are in the First Circuit. The conflict is intolerable.

This Court's review is needed to break the logjam, resolve the conflicts, and empower Texas's tribes to flourish, which is exactly what Congress intended all along. Only this Court can restore nationwide uniformity on an exceedingly important question of federal Indian law and policy, vindicate tribal sovereignty, and enforce the "enduring principle of Indian law" that "courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014). Absent review, the State's efforts will be catastrophic for the tribes, undercutting "the necessity of giving uniform protection to a dependent people." *Williams* v. *Lee*, 358 U.S. 217, 220 n.4 (1959). The petition should be granted.

I. THE STATE'S MERITS-BASED OPPOSITION CONFIRMS THE MULTI-SOVEREIGN, MULTI-CIRCUIT CONFLICTS IN THIS CASE.

Multiple clean splits have developed over the proper scope and interpretation of the Indian Gaming Regulatory Act (IGRA). Compare BIO 29-32, with Pet. 13-21. The First and Fifth Circuits disagree about IGRA's application to tribes in indistinguishable positions. The State disagrees with multiple federal regulators about the application of federal law. And the Fifth Circuit's holding departs from this Court's precedents. The State's merits-based response all but ignores each of these conflicts.

A. The Fifth And First Circuits Are Irreconcilably Divided.

The First and Fifth Circuits squarely conflict regarding IGRA's application to similarly situated tribes. The Wampanoag's Settlement Act in *Massachusetts* v. *Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618 (1st Cir. 2017), and the Alabama-Coushatta's Restoration Act in this case each prohibit gaming when prohibited by the laws of the state where each tribe's lands are located—Massachusetts for the Wampanoag; Texas for the Alabama-Coushatta. The First Circuit permits tribal bingo under IGRA; the Fifth Circuit prohibits it. The State's arguments (at 29-32) do nothing to alleviate that clean split.

As the petition notes (at 14-16), the First Circuit would authorize the Alabama-Coushatta Tribe to operate its Naskila gaming facility. The Wampanoag's Settlement Act—signed into law the same day as the Alabama-Coushatta's Restoration Act—permitted Massachusetts to prohibit bingo on tribal lands. *Aquinnah*, 853 F.3d at 626-29. The First Circuit—directly contrary to the Fifth Circuit—concluded that IGRA "trumped" the prior legislation that parallels the Restoration Act here. *Ibid.*

The State first responds (at 30) by asserting that the Wampanoag's Settlement Act differs from the Restoration Act because it "does not single out gaming for prohibition." But the Wampanoag's Settlement Act directly contradicts the State's assertion. The Act expressly provides that the Wampanoag "shall be subject" to the laws of Massachusetts—"including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance."

Aquinnah, 853 F.3d at 628 n.7 (quoting 25 U.S.C. § 1771g). Indeed, the Wampanoag's Settlement Act expressly cites Massachusetts's ability to prohibit the precise type of gaming (bingo) that both the Wampanoag and the Alabama-Coushatta seek to offer on their tribal lands.

Next, the State tries to hand-wave *Aquinnah* away altogether (at 31), claiming that if the First Circuit applied a different precedent—*Passamaquoddy Tribe* v. *Maine*, 75 F.3d 784 (1st Cir. 1996)—it would reach the Fifth Circuit's result. This distinction likewise ignores relevant statutory text.

In *Passamaquoddy*, the First Circuit recognized that the Passamaquoddy's Settlement Act *explicitly disallowed* the application of future federal statutes unless those statutes explicitly applied to Maine. 75 F.3d at 787-89. By its terms, the clause was *explicitly* forward looking—"any Federal law *enacted after*" the Passamaquoddy's Settlement Act "*shall not* apply" unless "specifically made applicable within the State of Maine." *Id.* at 787 (quoting 25 U.S.C. § 1735(b)) (emphases altered).

The Alabama-Coushatta's Restoration Act contains no analogous clause. Nor does the Wampanoag's Settlement Act. That is why the First Circuit in *Aquinnah* reversed the district court's decision that relied on *Ysleta del Sur Pueblo* v. *Texas*, 36 F.3d 1325 (5th Cir. 1994). See *Aquinnah*, 853 F.3d at 626-29 ("Unlike the savings clause in *Passamaquoddy*, the parenthetical in the [Wampanoag's] Act *says nothing about the effect of future federal laws* on the [Wampanoag's] Act. Rather, the parenthetical merely clarifies that, at the time of [its] enactment * * * state and local

gaming law applied.") (emphasis added). Because the Alabama-Coushatta's Act similarly lacks an explicitly forward-looking prohibition on Indian benefit statutes, the State is wrong that the First Circuit would prohibit the Alabama-Coushatta from tribal gaming. See App. 145 (Restoration Act does not "expressly insulate its provisions from subsequently enacted contrary legislation").

In its final attempt to erase the circuit split, the State compounds its errors with the faulty assertion that, "[u]nlike the Aquinnah Settlement Act, the Restoration Act does not purport to grant Texas general jurisdiction over tribal lands." BIO 31. Again, the State's assertion is belied by statutory text. Section 206(f) of the Restoration Act provides that the "State shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction * * * under [Public Law 280]." App. 70 (citing 25 U.S.C. §§ 1321-1322). This reference to Public Law 280 and the federal provisions that permit states to assume jurisdiction over Indian tribes, see *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164, 178 n.17 (1973), makes clear that, like the Wampanoag's Settlement Act, the Restoration Act granted the State "general jurisdiction over tribal lands." Compare BIO 31, with App. 174 ("The Restoration Act * * * provides a general grant of state jurisdiction over the Alabama-Coushatta's lands, through Public Law 280.").

The only thing "illusory" here is the State's claim that no split exists. That the State must resort to easily disproved assertions regarding plain statutory text only highlights how concrete the split between the First and Fifth Circuits truly is.

B. The Fifth Circuit And Texas Irreconcilably Conflict With Federal Regulators Regarding Federal Law.

The State devotes page after page to arguing that the Fifth Circuit's (and its own) interpretation of IGRA and the Restoration Act is right, and the Department and the Commission's interpretation is wrong. BIO 10-21. The Alabama-Coushatta disagree with the State's arguments, but agree that they deserve merits briefing.

These arguments aside, the State wishes away the conflict with federal regulators by asserting that neither the Commission nor the Department has spoken authoritatively regarding the Tribe. The State says that the Commission has no such authority; the Department does, the State says, but hasn't properly exercised it. Neither claim is tenable, and neither accounts for the conflict with the Fifth Circuit that independently warrants review.

As the petition explained (at 16-17), the Commission and Department are authorized to interpret IGRA and the Restoration Act, respectively. Both agencies disagree with *Ysleta* and, by extension, the Fifth Circuit's opinion here.

The State denies the Commission's authority by repackaging its merits argument: because the Restoration Act, rather than IGRA, controls, the Chairman's opinion authorizing the Alabama-Coushatta's gaming carries no special weight. BIO 21-22. That argument misses the mark in two ways.

First, IGRA—which the State agrees the Chairman is entitled to enforce—contemplates that the

Chairman will analyze other federal laws when interpreting IGRA's provisions. IGRA expressly provides for Class II gaming when it "is not otherwise specifically prohibited on Indian lands by Federal law." 25 U.S.C. § 2710(b)(1)(A). Applying this provision necessarily requires the Chairman to account for other federal law. 25 U.S.C. § 2710(e). Under the State's logic, an agency that the State agrees is responsible for administering IGRA could *never* offer an authoritative interpretation of IGRA's Class II gaming provision, because every interpretation has to take account of some other agency's or court's interpretation of other federal law. That cannot be right.

Second, this Court has already instructed that an agency entitled to deference does not forfeit that deference by considering another federal statute in the course of its interpretation—particularly where, as here, Congress instructs the agency to consider other federal laws. *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392 (1996). The State's reliance (at 23) on *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612 (2018), is thus misplaced. There, the Court held that Congress did not give the National Labor Relations Board authority to interpret the Federal Arbitration Act because nothing in the National Labor Relations Act instructs the Board to interpret the FAA, and the Board's expertise does not extend to arbitration. *Id.* at 1629. Here, the Commission *must* consider other federal laws to administer IGRA, and the Restoration Act—administered by the Commission's parent agency—is certainly within the purview and expertise of the Commission, which Congress charged with establishing "Federal standards for gaming on Indian lands." 25 U.S.C. § 2702(3).

Unable to deny that the Department is entitled to interpret the Restoration Act, the State argues (at 24) that the Department did not actually interpret it in the first place. Per the State, the Department's opinion letter is not authoritative because the Secretary could have rejected that position—notwithstanding that the Secretary did not.

This curious inversion, by which an agency position is not authoritative unless affirmatively adopted by an agency's principal, is a bold theory of administrative law. But it has no basis in actual administrative practice or this Court's precedent, which likely explains why the State cites neither. It certainly contradicts the understanding of the Department, which stated that it was "interpreting a statute that [it is] charged with administering" in evaluating the Restoration Act's applicability. App. 145. And the Department concluded that "IGRA, and not the Restoration Act, governs gaming on the Tribe's reservation and tribal lands." App. 147.

The Fifth Circuit and the State ignore the conclusive interpretation of IGRA and the Restoration Act that the Department and Commission have promulgated. Only this Court can resolve this multi-sovereign conflict.

C. The Fifth Circuit's Decision Conflicts With This Court's Precedent.

As demonstrated in the petition (at 18-21), the Fifth Circuit's approach conflicts with this Court's decisions in *Brand X* and *Cabazon*.

1. The panel opinion disregards this Court's instructions in *National Cable & Telecommunications Ass'n* v. *Brand X*, 545 U.S. 967 (2005), in two ways.

First, rather than determining whether its prior opinion in *Ysleta* was based on the "unambiguous terms of the statute," as *Brand X* requires, 545 U.S. at 982-84, the Fifth Circuit asked whether that "decision called the statute 'ambiguous.'" App. 14-15 (citing *Ysleta*'s "unmistakable conclusion" reached "after applying canons of construction and legislative history"). But that is the same approach this Court rejected in *Brand X* itself. Compare *Brand X Internet Servs.* v. *FCC*, 345 F.3d 1120, 1131 (9th Cir. 2003) (denying deference because prior decision "never said * * * the Act w[as] ambiguous"), with *Brand X*, 545 U.S. at 982 ("That reasoning was incorrect.").

Second, by focusing on whether its prior holding in *Ysleta* seemed sufficiently certain, the Fifth Circuit ignored that *Ysleta* did not rely on the "unambiguous terms" of either IGRA or the Restoration Act. Instead, the Fifth Circuit explained, *Ysleta* announced "the unmistakable conclusion that Congress—and the Tribe—intended for Texas' gaming laws *and regulations* to operate as surrogate federal law on the Tribe's reservation in Texas." App. 15 (emphasis added). That conclusion, however, omits Restoration Act terms and was reached in spite of the statutory text by cherry-picking legislative history. Convinced by the legislative history, the court set aside the Tribe's "appealing" argument based on the actual text of the Restoration Act. *Ysleta*, 36 F.3d at 1333. That was error then, and it remains error today.[1]

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[1] The State's contention (at 4, 10-11, 19) that the Restoration Act "incorporated by reference" the Tribe's pre-*Cabazon* resolution is curious, because "the stringent prohibition proposed by the resolution"—barring "all gaming, gambling, lottery, or bingo

Failure to engage with the plain text of the Restoration Act and IGRA explains why the Fifth Circuit couldn't reconcile the two statutes. Under Restoration Act § 207(a), tribal gaming is prohibited only if the State otherwise prohibits such gaming. But the State cannot *regulate* tribal bingo under § 207(a), because § 207(b) explicitly denies the State any "regulatory jurisdiction" over the Tribe. App. 71. Because this is also true of IGRA, the two texts can be read in harmony.

Additionally, it is irrelevant that the *Ysleta panel* believed Congress's intent was "explicit, clear, unambiguous, plain, and specific." BIO 18. *Brand X* instructs courts to look to statutory text to determine Congress's intent. *Ysleta*, in contrast, relied extensively on a "wealth of legislative history." 36 F.3d at 1334. While this Court has resorted to legislative history in other contexts, that is not what *Brand X* instructs. Under *Brand X*, once a court goes beyond the text, the game is up, and the agency's interpretation prevails.

2. *Ysleta* itself cannot be squared with this Court's decision in *California* v. *Cabazon Band of Mission Indians*, which emphasized the "overriding goal" of "tribal self-sufficiency and economic development." 480 U.S. 202, 216-17 (1987).

The State's attempt (at 27) to reconcile *Ysleta* and *Cabazon* hinges on the faulty assumption that *Ysleta* could apply a "limited understanding of *Cabazon*" because "the Restoration Act does not grant Texas general jurisdiction" over the Tribe. But contrary to the

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as defined by the [State's] laws and administrative regulations"—"was ultimately deleted" from the enrolled bill. App. 3 n.3.

State's repeated assertions (at 27, 31), Restoration Act § 206(f) grants Texas general jurisdiction over the tribes. See p. 5, *supra*; App. 174.

As a result, the Restoration Act's gaming provisions incorporated *Cabazon* fully—in both § 207(a) and § 207(b)—not in the "limited" manner *Ysleta* posited. 36 F.3d at 1334 (overlooking § 206(f)'s jurisdictional grant—as the State does—and holding that § 207(b) incorporates *Cabazon*, but § 207(a) does not). Ultimately, to accept the State's (and *Ysleta*'s) argument about *Cabazon* is to read multiple provisions out of the Restoration Act altogether in conflict with this Court's teachings in *Cabazon*.

II. THE STATE'S ARGUMENTS DO NOTHING TO UNDERMINE THE IMPORTANCE OF THE QUESTION PRESENTED.

The foundations of tribal sovereignty—"[s]elf-determination and economic development"—will be severely undermined if the Fifth Circuit's decision is permitted to stand and the Alabama-Coushatta Tribe "cannot raise revenues and provide employment for [its] members." *Cabazon*, 480 U.S. at 219. While the State may view the question presented as a "picayune issue of administrative law," BIO 17, the Alabama-Coushatta Tribe regards it as fundamental to its sovereignty and to its members' well-being.

As *amici* have highlighted, the Tribe is not alone in this belief. For the Ysleta, gaming has reduced unemployment from over 40 percent to nearly zero, has quadrupled nominal median household income since 1983, and has reduced tribal members' dependence on welfare. Ysleta Amicus Br. 9. Without gaming, many

tribes "may never be able to achieve economic self-sufficiency." Nat'l Cong. of Am. Indians Fund Amicus Br. 14. And for the Alabama-Coushatta, the question presented implicates tribal sovereignty, the rule of law, thousands of jobs, millions of dollars, and the ability of tribes in Texas to enjoy the same opportunity for a future that is afforded their counterparts in Massachusetts.

The State downplays (at 32-33) the significance of the case by stressing the number of tribes unaffected by the Fifth Circuit's ruling. Of course, a split of authority among sovereigns and circuits implicates all tribes, as they cannot organize their affairs with certainty. This instability foists an especially heavy burden on economically depressed tribes—heavier still after a tribe has already made a multimillion-dollar investment in its only hope for economic sovereignty. The question presented thus carries nationwide implications, as this Court recognized when expressing the need for "uniform protection" for Indian tribes. *Williams*, 358 U.S. at 220 n.4. The Alabama-Coushatta need that protection.

Without a hint of irony, the State proposes the same solution today it did over thirty-five years ago: "The two Restoration Act tribes have a ready avenue to address their grievances through Congress." BIO 33 (declining to mention the State's active opposition to the pending legislation). But what's needed isn't more legislation. What's needed is the proper interpretation of legislation the tribes fought for (and got) thirty years ago—an interpretation adopted by the federal government, the First Circuit, and the Tribes, but rejected by Texas and the Fifth Circuit.

Only this Court can resolve the multi-sovereign, multi-circuit conflict presented here. Certiorari is warranted to do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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