No. 18-40116

In the United States Court of Appeals
For the Fifth Circuit

STATE OF TEXAS,

Plaintiff – Appellee,

v.

ALABAMA-COUSHATTA TRIBE OF TEXAS,

Defendant – Appellant

On Appeal from the United States District Court for the Eastern District of Texas, Lufkin Division, No. 9:01-cv-299

BRIEF OF *AMICI CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS AND USET SOVEREIGNTY PROTECTION FUND IN SUPPORT OF PLAINTFF-APPELLANT'S PETITION FOR REHEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS

State of Texas v. Alabama-Coushatta Tribe of Texas, No. 18-40116

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. R. 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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***Amicus* National Congress of American Indians** ("NCAI"), established in 1944, is the oldest and largest national membership organization comprised of Alaska Native and American Indian tribal governments and individuals to address their unique interests. As part of its efforts, NCAI works closely with state governments and private organizations to develop productive models of state-tribal cooperation, including the interpretation of Indian statutes.

***Amicus* USET Sovereignty Protection Fund** ("USET SPF") is a non-profit organization representing 27 federally recognized tribal nations in 13 states stretching from Texas to Maine. USET SPF works at the regional and national level to educate federal, state, and local governments about the unique historic and political status of its member tribal nations.

None of *Amici Curiae* on this brief has a parent corporation. No publicly held company owns more than 10% of stock in any of *Amici Curiae* on this brief.

By: /s/
Daniel Lewerenz

April 18, 2019

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INTEREST OF *AMICI CURIAE*[1]

Amicus National Congress of American Indians ("NCAI"), established in 1944, is the oldest and largest national membership organization comprised of Alaska Native and American Indian tribal governments and individuals to address their unique interests. NCAI has advised Tribal, Federal, and State governments on a wide range of Indian issues, including the interpretation of Indian statutes.

Amicus USET Sovereignty Protection Fund ("USET SPF") is a non-profit organization representing 27 federally recognized tribal nations in 13 states from Texas to Maine. USET SPF works at the regional and national level to educate Federal, State, and local governments about the unique historic and political status of its member tribal nations.

NCAI and USET SPF are uniquely suited to serve as *Amici*. NCAI frequently participates in the courts of the United States, and has particular expertise in the interpretation of Indian statutes. USET SPF has expertise in the interpretation of statutes acknowledging Indian Tribes—by land claims settlement, tribal restoration, or otherwise—due to its members' locations in the South and Eastern United States. *Amici* share a substantial interest in preserving the unique government-to-

[1] Undersigned counsel hereby certifies that: all parties have consented to *Amici's* submission of this brief; no counsel for a party authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person or entity—other than *amici curiae*, their members, or their counsel—contributed money intended to fund the preparation or submission of this brief.

government relationship between the United States and Indian Tribes, including the "duty of protection" the United States owes to Tribes, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556 (1832) (Marshall, C.J.), and in ensuring that statutes enacted in furtherance of that duty are fully implemented.

INTRODUCTION

This case concerns concurrent efforts by Congress to restore to Federal recognition two Indian Tribes in Texas, and to create a uniform framework for the regulation of gaming on Indian lands. In 1987, the U.S. Supreme Court affirmed Indian Tribes' authority to operate gaming enterprises within their tribal territories. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). For years, Congress had weighed legislation to regulate Tribal gaming, but no bill had yet passed. S. Rep. No. 100-446, 100th Cong., 2d Sess. 3-5 (1988) ("Senate Report"), *reprinted in* 1988 U.S.C.C.A.N 3071, 3073-74. After *Cabazon*, "states and tribes clamored for Congress to bring some order to tribal gaming." *Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1080 (7th Cir. 2015).

Just months after *Cabazon*, and with no comprehensive Indian gaming regulation yet in place, Congress enacted the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes Restoration Act, Pub. L. 100-89, 101 Stat. 666 (1987) ("Restoration Act"), *previously codified at* 25 U.S.C. §§ 731–737 (Alabama-

Coushatta Tribe of Texas), *and* §§ 1300g–1300g-7 (Ysleta del Sur Pueblo); and the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. 100-95, 101 Stat. 704 (1987) ("Settlement Act"), *previously codified at* 25 U.S.C. §§ 1771–1771i. Each statute contained provisions subjecting gaming at the effected Tribes to some State law. Restoration Act, § 106 (Ysleta del Sur Pueblo), § 207 (Alabama-Coushatta Tribe of Texas); Settlement Act, § 9.

Then in 1988, Congress enacted the Indian Gaming Regulatory Act. Pub. L. 100-497, 102 Stat. 2467 (1988) ("IGRA"), *codified at* 25 U.S.C. §§ 2701 *et seq.* In IGRA, Congress declared that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(4). IGRA "provide[d] a statutory basis for the operation of gaming by Indian tribes as a means of promoting" those goals. *Id.* at §2702(1).

Thus arose a dilemma. Did IGRA include Tribes governed by the Restoration Act and the Settlement Act? Or were those Tribes bound by the provisions of their earlier statutes? Two years ago, the U.S. Circuit Court of Appeals for the First Circuit held that Congress intended for IGRA to apply to the Wampanoag Tribe of Gay Head (Aquinnah), and that IGRA impliedly repealed contrary provisions of the Settlement Act. *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618 (1st Cir. 2017). Where IGRA and the Settlement Act conflict, the court

held, IGRA prevails because "'the general rule is that where two acts are in irreconcilable conflict, the later act prevails,'" and because to hold otherwise "'would do great violence to the essential structure and purpose of [IGRA].'" *Id.* at 627 (quoting *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 704-05 (1st Cir. 1994)). With respect to the Restoration Act, however, two panels of this Court have held the opposite—that the Restoration Act prevails in the conflict between it and IGRA. *Texas v. Alabama-Coushatta Tribe of Texas*, No. 18-40116, slip op. at 2 (5th Cir. Mar. 14, 2019) ("Op."); *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1332, 1335 (5th Cir. 1994).

This Court should grant rehearing *en banc* to review *Alabama-Coushatta*, and to reconsider its analysis and conclusions in *Ysleta*. *Ysleta* erroneously concluded that Congress intended to exclude certain Tribes from IGRA—despite the lack of any textual basis for such exclusion, and contrary to Congress's intent that IGRA would establish a uniform regulatory framework for gaming on Indian lands nationwide. *Ysleta* also failed to adhere to the maxim that statutes enacted for the benefit of Indians "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). Rehearing *en banc* is necessary to ensure that IGRA's purpose is effectuated in the Fifth Circuit, and that this Court's opinions conform with those of the Supreme Court and other Circuits.

ARGUMENT

I. *EN BANC* REVIEW IS NECESSARY TO ENSURE THAT IGRA IS IMPLEMENTED IN THE FIFTH CIRCUIT CONSISTENT WITH ITS PLAIN LANGUAGE AND CONGRESS'S INTENT.

A. Congress intended that IGRA gaming would strengthen Tribal economies and Tribal governments.

Congress's primary goal of encouraging tribal economic development is explicit in both IGRA's text and legislative history. 25 U.S.C. § 2702(1);[2] Senate Report at 2-3.[3] And it works: tribal gaming generated $32.4 billion in revenues in Fiscal Year 2017 alone. National Indian Gaming Commission, *2017 Indian Gaming Revenues Increase 3.9% to $32.4 Billion* (June 26, 2018), *available at* https://www.nigc.gov/news/detail/2017-indian-gaming-revenues-increase-3.9-to-32.4-billion.

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

[3] Courts considering IGRA emphasize its central purpose of tribal economic development. *See, e.g.*, *Citizens Against Casino Gambling v. Chaudhuri*, 802 F.3d 267, 288 (2d Cir. 2015) ("The explicit policy underlying IGRA was to benefit tribes by helping them to achieve self-sufficiency and to grow economically."); *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Attorney for W. Dist. of Mich.*, 369 F.3d 960, 971 (6th Cir. 2004); *Ho-Chunk*, 784 F.3d at 1079 (IGRA intended to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments" (internal quotations and citations omitted)); *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 730 (9th Cir. 2003) (citing IGRA's declaration of policy); *City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003) ("The general purpose of IGRA is promoting tribal economic development and self-sufficiency" (internal quotations and citations omitted)).

B. Congress intended that IGRA would apply uniformly nationwide.

IGRA's text and legislative history demonstrate Congress's intent that IGRA apply nationwide, excepting only those states that ban all gaming as a matter of public policy. IGRA defines "Indian tribe" broadly to include all Federally recognized Tribes. 25 U.S.C. § 2703(5). Likewise, IGRA defines "Indian land" broadly to include all land within the boundaries of any Indian reservation and Indian (tribal or individual) trust or restricted fee land "over which an Indian tribe exercises governmental power." *Id.* at § 2703(4); *see also Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 791 (2014) (identifying "Indian lands" definition as "reflecting IGRA's overall scope"). Neither of these definitions excludes the Restoration Act Tribes or their lands from IGRA.

The Senate Report explains that IGRA was "intended to expressly preempt the field in the governance of gaming activities on Indian lands." Senate Report at 6; *see also Tamiami Partners v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1033 (11th Cir. 1995) (quoting Senate Report). In addition, the Senate Report identifies only five states where gaming was prohibited as a matter of public policy and expressly states that IGRA applies everywhere else: "In the other 45 States, some forms of bingo are permitted and *tribes with Indian lands in those States are free to operate bingo on Indian lands*, subject to the regulatory scheme set forth in the bill."

Senate Report at 11-12 (emphasis added).[4] Because Texas is not one of the five states, it follows that IGRA applies to Tribes in Texas.

C. The panel decision conflicts with IGRA's language and Congress's intent.

This Court has twice held that Congress intended to exclude the Restoration Act Tribes from IGRA. The *Alabama-Coushatta* panel concluded that while IGRA's "stated purpose is broad, IGRA does not specifically preempt the field of Indian gaming law," Op. at 3-4, notwithstanding the explicit statement to the contrary in the Senate Report. Senate Report at 6. The *Ysleta* panel looked for support to the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993,[5] 36 F.3d at 1335 n.22, and the panel in this case followed. Op. at 12 n.20. But that statute was enacted *after* IGRA, by the 103rd Congress, and says nothing about the intentions of the 100th Congress, which enacted IGRA.

The decisions of this Court undermine IGRA's text and Congress's unmistakably clear intent in enacting IGRA. *En banc* review is necessary to correct that error.

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

[5] Pub. L. 103-116, 107 Stat. 1118, *previously codified at* 25 U.S.C. §§ 941-941n.

II. *EN BANC* REVIEW IS NECESSARY TO SECURE UNIFORMITY WITH DECISIONS OF THE U.S. SUPREME COURT, THIS COURT, AND OTHER CIRCUIT COURTS.

A. The panel decision conflicts with Supreme Court precedent and other Circuit Courts concerning the scope of IGRA.

Ysleta concluded that IGRA does not apply to the Restoration Act Tribes. *See* Part I.C, *supra*. That holding—which the panel here understandably followed given the rule of orderliness—is contrary to IGRA's text and Congress's intent, and it conflicts with Supreme Court and other Circuit Court precedent concerning IGRA's scope.

When examining the reach of IGRA's waiver of tribal sovereign immunity, the Supreme Court looked in part to IGRA's definition of "Indian lands," noting that the phrase is "repeated some two dozen times in the statute" and "reflect[s] IGRA's overall scope." *Bay Mills*, 572 U.S. at 79. IGRA's definition of "Indian lands" is comprehensive, evincing no Congressional intent to exclude any Tribe or Tribal lands. Circuit courts, too, frequently describe IGRA as "creat[ing] a comprehensive regulatory framework for the operation of gaming by Indian tribes" *Ho-Chunk*, 784 F.3d at 1079 (internal quotations and citations omitted); *see also Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996) (describing IGRA's "comprehensive treatment of issues affecting the regulation of Indian gaming"); *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1548 (10th Cir. 1997) (IGRA creates a "comprehensive regulatory framework for gaming activities

on Indian lands"); *Tamiami*, 63 F.3d at 1032 (IGRA is "a comprehensive statute governing the operation of gaming facilities on Indian lands").

B. The panel decision conflicts with Supreme Court and Fifth Circuit precedent by failing to employ the Indian canon of statutory construction.

Even if IGRA's text was not clear, there is an interpretive tool applicable to Indian statutes that must be employed. The Supreme Court repeatedly has held "that 'statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit.'" *Chickasaw Nation v. United States*, 534 U.S. 84, 93-94 (2001) (quoting *Blackfeet*, 471 U.S. at 766); *see also Choate v. Trapp*, 224 U.S. 665, 675 (1912). The Indian canon of construction "rooted in the unique trust relationship between the United States and the Indians." *Cty.of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985). This Court has described the Indian canon as a "settled principle of statutory construction." *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1219 (5th Cir. 1991); s*ee also Tonkawa Tribe of Okla. v. Richards*, 75 F.3d 1039, 1043-44 (5th Cir. 1996).

This canon applies to interpretations of IGRA and other statutes affecting Indian gaming. "[B]ecause Congress has chosen gaming as a means of enabling the [Indian] Nations to achieve self-sufficiency, the Indian canon rightly dictates that Congress should be presumed to have intended" for Tribes to benefit from IGRA.[6]

[6] The Supreme Court has even held that, in the arena of taxation, where the Indian canon and alternative canons of construction suggest different outcomes, the Indian canon should prevail.

Chickasaw, 534 U.S. at 99-100 (O'Connor, J., dissenting). This Court itself applied the Indian canon in a seminal pre-IGRA Indian gaming case that ultimately supported the Supreme Court's decision in *Cabazon*. *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310, 316 (5th Cir. 1981) (holding P.L. 280 did not allow Florida to regulate tribal bingo).

The failure in *Ysleta* to employ the Indian canon is even more glaring upon review of cases from other Circuits, where the Indian canon's "applicability to ambiguous statutes purporting to benefit Indians is settled," *Roseville*, 348 F.3d at 1032, and it is routinely used to interpret IGRA. *See, e.g.*, *id; Citizens Against Casino Gambling*, 802 F.3d at 288; *Grand Traverse*, 369 F.3d at 971; *Ho-Chunk*, 784 F.3d at 1081; *Gaming Corp.*, 88 F.3d at 547; *Artichoke Joe's*, 353 F.3d at 729-30; *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 718 (10th Cir. 2000).

Ysleta also failed to apply the Indian canon to the Restoration Act—which, no less than IGRA, was enacted for the benefit of Indians. *See Connecticut v. U.S. Dep't of Interior*, 228 F.3d 82, 92-93 (2d Cir. 2000) (Indian canon applies to interpretation of statute settling Connecticut Indian land claims); *Roseville*, 348 F.3d at 1032 (Indian canon applies to statute restoring terminated California tribe).

Chickasaw, 534 U.S. at 100 (citing *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973); *Squire v. Capoeman*, 351 U.S. 1 (1956); *Choate*, 224 U.S. 665) (O'Connor, J., dissenting).

Of course, a court need not employ the Indian canon—or any canon—if it can discern a statute's meaning from the plain text. *South Carolina v. Catawba Tribe, Inc.*, 476 U.S. 498, 506-07 (1986). But as the *Alabama-Coushatta* panel observed, *Ysleta* "appl[ied] canons of construction and legislative history" to interpret the Restoration Act and used later-enacted statutes to interpret IGRA without regard to the Indian Canon. Op. at 12; *see also Ysleta*, 36 F.3d at 1332-35. That places *Ysleta* in conflict with precedent from the Supreme Court, this Court, and other Circuits. *En banc* review is necessary to correct this error.

CONCLUSION

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

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April 18, 2019

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 2,588 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Word 2016.

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By: /s/
Daniel Lewerenz

April 18, 2019

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April 18, 2019

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