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## One Buffalo in Texas: Legal and Ethical Issues in Native American Gaming Operations

Tammy W. Cowart

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# ONE BUFFALO IN TEXAS: LEGAL AND ETHICAL ISSUES IN NATIVE AMERICAN GAMING OPERATIONS

Tammy W. Cowart

*Abstract*

There are three federally recognized Native American tribes in Texas: the Alabama-Coushatta, the Ysleta del Sur Pueblo, and the Texas band of Oklahoma Kickapoo. The Kickapoo tribe is the only one allowed to operate a gaming center within the state of Texas, due solely to a federal law that the federal government passed thirty years ago. The Alabama-Coushatta and Ysleta del Sur Pueblo tribes are some of the only tribes prohibited from operating gaming operations under the Indian Gaming Regulatory Act. The result is detrimental to these tribes and the Texas economy. This paper will examine the history of the tribes, the litigation between the tribes and the state, and the legislative efforts which have attempted to rectify the exclusion of the tribes from the Indian Gaming Regulatory Agency. Finally, ethical considerations will be examined, and the very recent U.S. Supreme Court decision will be discussed.

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I. INTRODUCTION

Native American casinos are big business in the United States.<sup>1</sup> According to the website, *500 Nations*, just over 40% of federally recognized Native American tribes in the country (or 245 of 574) own the 524 Native American gaming operations.<sup>2</sup> The National Indian Gaming Commission reports that annual gross revenue for Native American gaming reached a record high \$39 billion in 2021.<sup>3</sup> Twenty-nine states

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<sup>1</sup> *2021 Indian Gaming Revenue Jumps to Record High \$39 Billion, Increases 40%*, NAT'L INDIAN GAMING COMM'N, <https://www.nigc.gov/news/detail/2021-indian-gaming-revenue-jumps-to-record-high-39-billion-increases-40> (last visited Sept. 13, 2022).

<sup>2</sup> *Indian Casinos*, 500 NATIONS, [https://www.500nations.com/Indian\\_Casinos.asp](https://www.500nations.com/Indian_Casinos.asp) (last visited Feb. 4, 2022).

<sup>3</sup> *2021 Indian Gaming Revenue Jumps to Record High \$39 Billion, Increases 40%*, Nat'l Indian Gaming Comm'n [in small caps], <https://www.nigc.gov/news/detail/2021-indian-gaming-revenue-jumps-to-record-high-39-billion-increases-40> (last visited Sep. 14, 2022).

allow for Native American gaming operations, and those casinos generate 43% of the total casino gaming revenue.<sup>4</sup>

Something different has happened in Texas, however.<sup>5</sup> “There are three federally recognized Indian tribes in Texas: the Alabama-Coushatta Tribes of Texas, the Ysleta del Sur Pueblo, and the Texas band of Oklahoma Kickapoos (Kickapoo Traditional Tribe).”<sup>6</sup> Although Texas does not allow casino gambling,<sup>7</sup> the Kickapoo Traditional Tribe has operated the Kickapoo Lucky Eagle Casino and Hotel in Eagle Pass, Texas for over twenty years.<sup>8</sup> For the past thirty years, the Ysleta del Sur Pueblo and Alabama-Coushatta tribes have fought in federal court against their own state government for the right to operate gaming facilities like the Kickapoo Traditional Tribe.<sup>9</sup> The Fifth Circuit Court of Appeals has ruled on multiple occasions in favor of the State of Texas and against the Native American tribes.<sup>10</sup> However, in October 2020, the Ysleta del Sur Pueblo appealed the Fifth Circuit’s latest decision denying its request to operate its gaming facility, Speaking Rock Entertainment Center.<sup>11</sup> In February 2021, the United States Supreme Court requested that the U.S. Solicitor General file a brief expressing the views of the United States, and that brief, filed in August 2021, supported the position of the Ysleta del Sur Pueblo and urged the Court to grant the writ of certiorari.<sup>12</sup> Then, on October 18, 2021, the U.S. Supreme Court granted certiorari to hear an appeal in the case of *Ysleta del Sur Pueblo v. Texas*.<sup>13</sup> Numerous briefs

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<sup>4</sup> *Indian Casinos*, *supra* note 2.

<sup>5</sup> *Lucky Eagle Casino TX*, 500 NATIONS, <https://www.500nations.com/casinos/tx-kickapoo-lucky-eagle-casino.asp> (last visited Jan. 17, 2022).

<sup>6</sup> Michael E. Wheeler, *One White Buffalo, Why Not Three?: Native American Gaming in the Lone Star State*, 26 MISS. COLL. L. REV. 147, 148 (2006).

<sup>7</sup> *Texas Casinos | Updates 2022*, 500 NATIONS, [https://www.500nations.com/Texas\\_Casinos.asp](https://www.500nations.com/Texas_Casinos.asp) (last visited Oct. 5, 2022).

<sup>8</sup> *Lucky Eagle Casino TX*, *supra* note 5 (noting Lucky Eagle Casino is a Class II gaming facility that opened in 1996).

<sup>9</sup> See *Lucky Eagle Casino TX*, *supra* note 5.

<sup>10</sup> Robert Moore, *Federal Judges Side with Texas in Fight over Native American Gambling*, TEX. MONTHLY, (Mar. 29, 2019) <https://www.texasmonthly.com/news-politics/federal-judges-side-with-texas-in-fight-over-native-american-gambling/>.

<sup>11</sup> Brief for Petitioner, *Ysleta del Sur Pueblo v. Texas*, 142 S.Ct. 1929 (2022) (No. 20–493).

<sup>12</sup> Brief for the United States as Amicus Curiae at 19, *Ysleta del Sur Pueblo v. Texas*, 142 S.Ct. 1929 (2022) (No. 20–493).

<sup>13</sup> Order Granting Certiorari, *Ysleta del Sur Pueblo v. Texas*, 142 S.Ct. 1929 (2022) (No. 20–493).

have been filed since, and the Court heard oral arguments on February 22, 2022.<sup>14</sup> Moreover, the Supreme Court granted the Solicitor General leave to participate in oral argument.<sup>15</sup> On June 15, 2022, the U.S. Supreme Court ruled in favor of the Ysleta del Sur Pueblo tribe, holding that Texas could not prohibit bingo gaming on Native American lands when Texas regulates that gaming elsewhere in the state.<sup>16</sup>

The case has important implications for the future of the Ysleta del Sur Pueblo, the Alabama-Coushatta tribes, and the viability of Native American gaming activities in the United States. Part II of this paper will examine the history of Native American gaming in the United States. Part III will cover the history of the Alabama-Coushatta and Ysleta del Sur Pueblo tribes of Texas. In Part IV, the major cases filed by both tribes over the past 30 years will be summarized. Part V will address the unsuccessful legislative actions which have attempted to rectify the legal issues the tribes have faced, and, finally, Part VI will cover some of the ethical issues involved with gambling and Native American casinos.

## II. HISTORY OF NATIVE AMERICAN GAMBLING IN THE UNITED STATES

Native American tribal gaming began in the 1970s when certain tribes in California, Connecticut, Florida, and Wisconsin opened low-stakes bingo halls on their reservations.<sup>17</sup> When officials in those states began to question the authority of the tribes to operate the casinos, tribal leaders asserted their sovereignty and claimed that the state laws did not apply to them.<sup>18</sup> Throughout the 1980s, state governments and Native American tribes fought in courts over who could regulate tribal gaming.<sup>19</sup> While states asserted limitations on gaming activities, tribes sought declaratory judgments that tribal sovereignty exempted them from state bingo statutes.<sup>20</sup> States relied on Public Law 83-280 (Public Law 280), which granted some states criminal jurisdiction over offenses committed by or against Native American within their boundaries, to argue against

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<sup>14</sup> See *Ysleta Del Sur Pueblo v. Texas*, 142 S.Ct. 1929 (2022).

<sup>15</sup> Order Granting Solicitor General Leave, 142 S.Ct. 1929 (2022) (No. 20–493).

<sup>16</sup> See *Ysleta*, 142 S.Ct. at 1934.

<sup>17</sup> Nicholas C. Peroff, *Indian Gaming, Tribal Sovereignty, and American Indian Tribes as Complex Adaptive Systems*, 25 AM. INDIAN CULTURE & RSCH. J. 143, 143 (2001).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 144.

<sup>20</sup> Wheeler, *supra* note 6, at 148–49.

gaming facilities.<sup>21</sup> In *Bryan v. Itasca County*, the U.S. Supreme Court held that Public Law 280 granted state courts jurisdiction over private civil litigation without granting general civil regulatory authority.<sup>22</sup> At the federal level, officials recognized that Native American tribes could make a substantial profit from gaming, which could reduce the tribes' dependence on federal funds.<sup>23</sup> In some cases, federal officials went so far as to guarantee construction loans for tribal bingo facilities.<sup>24</sup>

In 1987, the U.S. Supreme Court decided the seminal case of *California v. Cabazon Band of Mission Indians*, in which the Court addressed whether the State of California could prevent the Cabazon Indians from operating a gaming facility on its reservation.<sup>25</sup> The practical implication involved the civil-regulatory versus criminal-prohibitory framework from *Bryan v. Itasca County*.<sup>26</sup> If state law outright prohibited gaming activity without any exceptions, then that state's prohibitory ban could be applied to Native American gaming.<sup>27</sup> If, however, the state regulated, rather than prohibited, gaming conduct, then the state could only regulate but not prohibit gaming on Native American lands.<sup>28</sup> Ultimately, the Court in *Cabazon* ruled in favor of the tribes that California law enforcement could not prohibit Native American gaming.<sup>29</sup> The ruling reinforced the principle that tribes are sovereign and that state and local laws have limited applicability on Native American lands.<sup>30</sup> *Cabazon*

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<sup>21</sup> Pub. L. No. 83-280, 67 Stat. 488 (1953) (codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360).

<sup>22</sup> *Bryan v. Itasca Cnty.*, Minn., 426 U.S. 373, 385, 388–90 (1976).

<sup>23</sup> Matthew L. M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS. 39, 45 (2007).

<sup>24</sup> William E. Horowitz, *Scope of Gaming Under the Indian Gaming Regulatory Act of 1988 After Rumsey v. Wilson: White Buffalo or Brown Cow?*, 14 CARDOZO ARTS & ENT. L. J. 153, 171–72 (1996).

<sup>25</sup> Wheeler, *supra* note 6, at 149.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987). The Court said, “if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280’s grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation.” *Id.*

<sup>29</sup> Robert N. Clinton, *Enactment of the Indian Gaming Regulatory Act of 1988: The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty?* 42 ARIZ. ST. L. J. 17, 50 (2010).

<sup>30</sup> Steve J. Coleman, *Lottery Logistics: The Potential Impact of a State Lottery on Indian Gaming in Oklahoma*, 27 AM. INDIAN L. REV. 515, 519 (2003).

enabled Native American gaming to grow, but tribes urged Congress to pass federal legislation to protect their sovereignty and preserve gaming for economic development.<sup>31</sup>

In 1988, on the heels of *Cabazon*, Congress passed the Indian Gaming Regulatory Act (IGRA), which established that “Indian tribes have the exclusive right to regulate gaming activity on Indian lands” if the activity is not prohibited by federal law and conducted in a state which does not prohibit that gaming activity.<sup>32</sup> The IGRA adopted the civil-regulatory scheme from *Cabazon*.<sup>33</sup> While Public Law 280 considers the civil-criminal distinction to determine whether a state could enforce its criminal gambling laws on a Native American reservation, the IGRA looks at the civil and criminal laws to determine “whether the state permits gaming activities of the type at issue.”<sup>34</sup> In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, the court offered a simple test for determining state policy when interpreting the IGRA:

If the policy is to prohibit all forms of gambling by anyone, then the policy is characterized as criminal-prohibitory and the state’s criminal laws apply to tribal gaming activities. On the other hand, if the state allows some forms of gambling, even subject to extensive regulation, its policy is deemed to be civil-regulatory and it is barred from enforcing its gambling laws on the reservation.<sup>35</sup>

Judge Crabb wrote, “Congress did not intend the term ‘permits such gaming’ to limit the tribes to the specific types of gaming activity actually in operation in a state.”<sup>36</sup>

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<sup>31</sup> Chris J. Thompson, *Internet Gambling: Road to Strengthening Tribal Self-Government and Increasing Tribal Self-Sufficiency While Protecting American Consumers*, 37 AM. INDIAN L. REV. 229, 233 (2012).

<sup>32</sup> Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721.

<sup>33</sup> *Id.*

<sup>34</sup> *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480, 485 (W.D. Wis. 1991).

<sup>35</sup> *Id.*; Steve J. Coleman, *Lottery Logistics: The Potential Impact of a State Lottery on Indian Gaming in Oklahoma*, 27 AM. INDIAN L. REV. 515, 526 (2003).

<sup>36</sup> *Lac du Flambeau*, 770 F. Supp. at 486. *But see* *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1258 (9th Cir. 1994) (A state “need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have.”); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 279 (8th Cir. 1993) (The IGRA “does not require the state to negotiate with respect to forms of gaming it does not presently permit.”).

While readers could interpret this law as a limitation of tribal power, it is more likely a compromise between state and tribal interests.<sup>37</sup> Many tribes opposed the IGRA and saw the legislation as an attempt to usurp their sovereignty.<sup>38</sup> However, it in fact marked the first opportunity for capital flow into Native American lands outside of natural resource extraction industries and some federal grant projects.<sup>39</sup>

Perhaps the most important thing the IGRA did was establish the National Indian Gaming Commission, a part of the U.S. Department of the Interior with offices on the infamous K Street in Washington D.C.<sup>40</sup> The National Indian Gaming Commission comprises a three-person commission overseeing federal standards regarding Native American gaming on federal lands.<sup>41</sup> The IGRA also identifies gaming as a means of generating revenues for the tribes.<sup>42</sup>

Despite limited published empirical research, the effects of Native American gaming appear to be profoundly positive.<sup>43</sup> Assistant Secretary of Indian Affairs Kevin Washburn said, “Indian gaming is simply the most successful economic venture ever to occur consistently across a wide range of American Indian reservations.”<sup>44</sup> Native American gaming yields sustained revenues for nearly all tribes that built gaming facilities.<sup>45</sup> Those revenue gains have allowed tribes to invest in school construction, college scholarships, and housing.<sup>46</sup>

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<sup>37</sup> Wheeler, *supra* note 6, at 150.

<sup>38</sup> Clinton, *supra* note 29, at 18.

<sup>39</sup> Randall K. Q. Akee, Katherine A. Spilde & Jonathan B. Taylor, *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, 29 J. OF ECON. PERSPECTIVES 185, 190 (2015). Tribes with larger land bases could gain income from timber, hydropower, and trophy elk, while other tribes built motels, industrial parks, and malls with federal grant money. However, these projects “typically received only a single cycle of investment” and then left. *Id.* at 191.

<sup>40</sup> NATIONAL INDIAN GAMING COMMISSION, *About Us*, <https://www.nigc.gov/commission/about-us> (last visited Sept. 13, 2022).

<sup>41</sup> *Id.*

<sup>42</sup> Indian Gaming Regulatory Act, 25 U.S.C. §2702(3), *supra* note 32.

<sup>43</sup> Akee et al., *supra* note 39.

<sup>44</sup> Akee et al., *supra* note 39, at 196.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*



III. HISTORY OF THE ALABAMA-COUSHATTA AND THE YSLETA DEL  
SUR PUEBLO TRIBESA. *Alabama-Coushatta Tribal History*

Although technically two separate tribes, the Alabama and Coushatta have been associated together for a long time.<sup>47</sup> The first written reference to these tribes was recorded in 1541 and related to the explorations of Hernando de Soto.<sup>48</sup> The tribes initially settled in present day Alabama—named for the Alabama Native American—and established a friendly relationship with the French settlers and traders there.<sup>49</sup> In 1763, the Alabama and Coushatta began migrating west, likely due to the shortage of game brought about by the “deerskin economy.”<sup>50</sup> Small groups, as opposed to a mass exodus, left and settled in present-day western Louisiana.<sup>51</sup> In the 1780s, the tribes moved across the Sabine River into Spanish Texas.<sup>52</sup> The Spanish welcomed the Native Americans as a barrier to French expansion.<sup>53</sup> After the Louisiana Purchase was completed, the Alabama and Coushatta enjoyed friendly relationships with both the Americans and the Spanish.<sup>54</sup>

The land where the tribes settled in the Big Thicket region of East Texas was such a wilderness that the Spanish skirted it when travelling through the area.<sup>55</sup> This allowed the Alabama and Coushatta to establish several hunting camps and villages with little interruption from the Spanish or White settlers.<sup>56</sup> During the early days of the Republic of Texas, the Native Americans enjoyed a good relationship with the Texans, even participating in the famous “Runaway Scrape” to assist Texas settlers in escaping Santa Anna’s army.<sup>57</sup>

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<sup>47</sup> Howard Martin, *Alabama-Coushatta Indians*, TEX. ST. HIST. ASS’S, HANDBOOK OF TEX. ONLINE, <http://www.tshaonline.org/handbook/online/articles/bma19> (last visited Feb. 4, 2022).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Martin, *supra* note 47.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

In 1836, Governor Mirabeau Lamar adopted a policy that included extermination of hostile tribes and the removal of friendly tribes to reservations.<sup>58</sup> The Alabama and Coushatta were largely untouched by this harsh policy, although much of their land was claimed by White settlers.<sup>59</sup> In the 1850s, the state of Texas purchased land for the Alabama and Coushatta tribes in East Texas, and the Alabama and Coushatta settled there together.<sup>60</sup>

After 1865, the Native Americans had land, but few could speak English or find jobs.<sup>61</sup> In the post-Civil War Reconstruction era, more White settlers came to East Texas, forests were cleared, and land was plowed.<sup>62</sup> This negatively impacted the hunting, fishing, and gathering practices of the tribes.<sup>63</sup> Eventually, many of the Native Americans began to obtain jobs working in the timber industry, which improved their living conditions.<sup>64</sup>

From 1929 to 1955, the federal government held the Alabama-Coushatta reservation in trusteeship.<sup>65</sup> After the Indian Reorganization Act was passed in 1934, the tribes formally organized as a single tribe with a constitution and charter.<sup>66</sup> Subsequently, the federal government relinquished its trusteeship in 1955, and the State of Texas assumed responsibility as trustee for the tribe.<sup>67</sup> Then in 1987, the state withdrew as trustee over the tribe and the federal government resumed control.<sup>68</sup>

#### B. *Ysleta del Sur Pueblo Tribal History*

The Tigua Indians of the Ysleta del Sur Pueblo originally came from the Albuquerque, New Mexico area to the El Paso, Texas area in

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<sup>58</sup> Martin, *supra* note 47.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Martin, *supra* note 47.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* The Restoration Act restored the federal relationship between the Ysleta del Sur Pueblo and Alabama-Coushatta tribes. *See*, Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 666 (1987).

1680, after the Pueblo Revolt.<sup>69</sup> The King of Spain granted land to the tribe in 1751, and it was protected by both Spanish and Mexican authorities for many years.<sup>70</sup> In 1854, the state of Texas recognized the Ysleta del Sur Pueblo in the Ysleta Relief Act; however, subsequent actions by the state legislature and others resulted in the Ysleta del Sur Pueblo losing its land grant.<sup>71</sup> The Texas Legislature incorporated the lands as the Town of Ysleta, which disqualified the tribe's recognition as a tribal nation.<sup>72</sup> However, in 1967, the Ysleta del Sur Pueblo was recognized as a federal tribe and filed legal action to claim its original lands.<sup>73</sup> The Tiwa Indians Act transferred the trust responsibility for the tribe from the federal government to the State of Texas.<sup>74</sup> In 1983, Texas withdrew as trustee over the tribe, and the federal government resumed control with the passage of the Restoration Act.<sup>75</sup>

Today, the Ysleta del Sur Pueblo occupies about twenty-six acres of land and lives in government housing on the reservation.<sup>76</sup> The tribe has historically farmed corn, wheat, cattle, and horses to sustain itself.<sup>77</sup> Many of its members have lived in extreme poverty without access to electricity or plumbing.<sup>78</sup>

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<sup>69</sup> Bill Wright, *Tigua Indians*, HANDBOOK OF TEXAS ONLINE (Aug. 12, 2020) [www.tshaonline.org/handbook/entries/tigua-indians](http://www.tshaonline.org/handbook/entries/tigua-indians).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* See also Kathryn Almond, *A Fouled Hand: Ysleta del Sur Pueblo's Struggle to Game in Texas*, 49 TEX. TECH L. REV. 403, 420 (2017).

<sup>72</sup> BILL WRIGHT, THE TIGUAS: PUEBLO INDIANS OF TEXAS 15 (1993).

<sup>73</sup> *Id.*

<sup>74</sup> An Act relating to the Tiwa Indians of Texas, 90 Pub. L. No. 90-287, 82 Stat. 93 (Apr. 12, 1968).

<sup>75</sup> *Ysleta del Sur Pueblo v. Texas*, 142 S. Ct. 229 (1929)

<sup>76</sup> WRIGHT, *supra* note 72.

<sup>77</sup> *About Us*, YSLETA DEL SUR PUEBLO, <https://www.ysletadelsurpueblo.org/about-us> (last visited Sept. 17, 2022).

<sup>78</sup> *Ysleta del Sur Pueblo and Alabama-Coushatta Tribes of Texas Equal and Fair Opportunity Settlement Act*, H.R. 4985, 115th Cong. (2018) (statement of Governor Carlos Hisa, Ysleta del Sur Pueblo), <https://docs.house.gov/meetings/II/II24/20180913/108701/HHRG-115-II24-Wstate-HisaC-20180913.pdf>.

IV. PROCEDURAL HISTORY OF LEGAL BATTLES OVER GAMING AT THE ALABAMA-COUSHATTA AND YSLETA DEL SUR PUEBLO

In 1987, Congress passed the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act (Restoration Act).<sup>79</sup> This Act restored a federal trust relationship between the tribes and the United States.<sup>80</sup> Moreover, the Act stated that the “reservation is hereby declared to be a Federal Indian reservation for the use and benefit of the tribe”<sup>81</sup> and “the tribe and the members of the tribe shall be eligible . . . for all benefits and services furnished to federally recognized Indian tribes.”<sup>82</sup> Section 107 of the Restoration Act contains a provision that “[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe.”<sup>83</sup> This section regulates gaming on the lands of these two tribes, but also precludes Texas from restricting otherwise legal gaming on the tribes’ reservations and lands.<sup>84</sup> The Restoration Act does not apply to the Kickapoo Traditional Tribe of Texas.<sup>85</sup>

One year later, in 1988, Congress passed the IGRA, which set out “Federal standards for gaming on Indian lands.”<sup>86</sup> The IGRA established the National Indian Gaming Commission “to protect such gaming as a means of generating tribal revenue.”<sup>87</sup> Specifically, the IGRA defined three classes of gaming activities in which federally recognized tribes could participate.<sup>88</sup> Class I gaming, consisting of “social games solely for prizes of minimal value or traditional forms on Indian gaming” associated

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<sup>79</sup> Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 666 (codified as amended at 25 U.S.C. §§ 731-737).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* § 105(a).

<sup>82</sup> *Id.* § 103(c).

<sup>83</sup> *Id.* § 107(a).

<sup>84</sup> See Brief for the United States as Amicus Curiae, *Ysleta del Sur Pueblo v. State of Texas* at 10–11 (2021) No. 20-493. In fact, the tribes only agreed to the gaming ban in order to regain federal recognition and did not anticipate the passage of the IGRA a year later. Almond, *supra* note 71, at 422.

<sup>85</sup> Kolby KickingWoman, *Supreme Court Hands Down Another Tribal Sovereignty Win*, ICT (June 15, 2022), <https://indiancountrytoday.com/news/supreme-court-hands-down-another-tribal-sovereignty-win>

<sup>86</sup> Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (1988).

<sup>87</sup> 25 U.S.C. § 2702(3).

<sup>88</sup> 25 U.S.C. § 2703(6)-(7).

with ceremonies, are within the exclusive jurisdiction of the tribes.<sup>89</sup> Class II gaming, including “game[s] of chance commonly known as bingo” and card games, must be permissible by state law.<sup>90</sup> Class II gaming must occur “within a State that permits such gaming for any purpose by any person, organization or entity.”<sup>91</sup> Class III gaming includes all forms of gaming not in Class I or Class II; this includes full casino gaming.<sup>92</sup> Tribes can only operate Class III gaming operations with federal administrative and state approval.<sup>93</sup> The Act instructs the National Indian Gaming Commission to “promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter.”<sup>94</sup>

Despite the establishment of a federal regulatory scheme to regulate gaming operations on Native American lands, the Fifth Circuit has ruled that the IGRA has not preempted the field on Native American gaming law.<sup>95</sup> The long-running dispute has revolved around the question of whether the IGRA or the Restoration Act governs the right of the Alabama-Coushatta and Ysleta del Sur Pueblo to operate a Class II gaming facility.<sup>96</sup>

#### A. *Ysleta I*

The Ysleta del Sur Pueblo opened the Speaking Rock Casino in 1993 and during its initial operation generated more than \$60 million a year for the tribe.<sup>97</sup> In the beginning, the Ysleta del Sur Pueblo Tribe attempted to negotiate a compact with the State of Texas for the Class II gaming facility under the provisions of the IGRA.<sup>98</sup> The State of Texas refused, citing the section of the Restoration Act that allowed it to prohibit

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<sup>89</sup> 25 U.S.C. §§ 2703(6), 2710(a)(1).

<sup>90</sup> 25 U.S.C. § 2703(7)(A). Excepted from Class II are baccarat, chemin de fer, or blackjack, and electronic games of chance and slot machines. *See also* 25 U.S.C. § 2703(7)(B).

<sup>91</sup> Indian Gaming Regulatory Act, 25 U.S.C. § 2710(b)(1)(A) (1988).

<sup>92</sup> 25 U.S.C. § 2703(8).

<sup>93</sup> 25 U.S.C. § 2710(d)(2)(B).

<sup>94</sup> 25 U.S.C. § 2706(b)(10).

<sup>95</sup> *Texas v. Ala.-Coushatta Tribe of Tex.*, 918 F.3d 440, 443 (5th Cir. 2019).

<sup>96</sup> *Id.* at 444.

<sup>97</sup> Diana Washington Valdez, *Tiguas Get Favorable Decision on Some Gaming*, EL PASO TIMES (Oct. 27, 2015, 11:00 PM), <https://www.elpasotimes.com/story/news/2015/10/27/tiguas-get-favorable-decision-some-gaming/74689832/>.

<sup>98</sup> *Ysleta del Sur Pueblo v. Texas*, 852 F. Supp. 587, 588 (W.D. Tex. 1993).

gaming activities which were otherwise prohibited in the state.<sup>99</sup> The Ysleta del Sur Pueblo tribe sued the State of Texas, and the district court found in favor of the Ysleta del Sur Pueblo.<sup>100</sup> The district court ruled that gaming was not completely prohibited in Texas since the state had introduced laws regulating bingo and the Texas Lottery, and that the IGRA, not the Restoration Act, controlled the question.<sup>101</sup>

However, the Fifth Circuit reversed, finding that the two acts established two different regulatory schemes, and that “the Restoration Act prevails over IGRA when gaming activities proposed by the Ysleta del Sur Pueblo are at issue.”<sup>102</sup> The Ysleta del Sur Pueblo argued that the “IGRA impliedly repeals the Restoration Act,” but the Fifth Circuit disagreed with that argument since a general statute like the IGRA cannot control a more specific one like the Restoration Act.<sup>103</sup> Based on the Fifth Circuit’s ruling, the Ysleta del Sur Pueblo was forced to close the Speaking Rock Entertainment Center in 2002.<sup>104</sup>

In 2015, the Ysleta del Sur Pueblo petitioned the National Indian Gaming Commission for approval of a gaming ordinance pursuant to the IGRA.<sup>105</sup> The National Indian Gaming Commission approved the request and concluded that the IGRA applied to the Ysleta del Sur Pueblo gaming operations conducted on Native American land.<sup>106</sup> Nonetheless, Texas agents inspected Speaking Rock, decided that the bingo machines violated state law, and sued the Ysleta del Sur Pueblo in federal court for injunctive relief.<sup>107</sup> The federal district court, following *Ysleta I*, granted the state’s request for an injunction against Speaking Rock but stayed the injunction pending an appeal.<sup>108</sup> The Fifth Circuit Court of Appeals reaffirmed *Ysleta*

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 592, 595–96.

<sup>102</sup> *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1332 (5th Cir. 1994), *cert. denied*, 514 U.S. 1016 (1995) (“*Ysleta I*”).

<sup>103</sup> *Id.* at 1334–35.

<sup>104</sup> Valdez, *supra* note 97.

<sup>105</sup> Letter from Jonodev O. Chaudhuri, Chairman, Nat’l Indian Gaming Comm’n, to Carlos Hisa, Governor, Ysleta del Sur Pueblo (Oct. 5, 2015) (available at <https://www.nigc.gov/images/uploads/gamingordinances/20151005Ysleta2.pdf>).

<sup>106</sup> *Id.*

<sup>107</sup> *Texas v. Ysleta del Sur Pueblo*, No. EP-99-CV-320-KC, 2016 WL 3039991 (W.D. Tex. May 27, 2016) [hereinafter 2016 Order].

<sup>108</sup> *Texas v. Ysleta del Sur Pueblo*, 2019 WL 639971 (W.D. Tex. Feb. 14, 2019).

*I* and affirmed the injunction.<sup>109</sup> The U.S. Supreme Court granted Ysleta del Sur Pueblo’s writ of certiorari, in 2021,<sup>110</sup> oral arguments were held February 22, 2022, and the Supreme Court ruled in favor of the Ysleta tribe on June 15, 2022.<sup>111</sup>

#### B. *Alabama-Coushatta*

The Alabama-Coushatta litigated with the State of Texas in 2001, seeking a declaratory judgment that the Tribe could operate a gaming operation under the IGRA.<sup>112</sup> In 2002, based on the prior ruling of the Fifth Circuit in *Ysleta I*, the district court found that the gaming operation violated Texas law and permanently enjoined the Tribe from operating a Class II gaming facility.<sup>113</sup> The Fifth Circuit affirmed in April 2003,<sup>114</sup> and the United States Supreme Court denied the Tribe’s petition for writ of certiorari.<sup>115</sup> Then, the Alabama-Coushatta ceased its gaming operation for twelve years.<sup>116</sup>

In 2015, the Alabama-Coushatta Tribe also began the process of applying for approval to operate a Class II gaming facility using the procedures outlined in the IGRA.<sup>117</sup> The Alabama-Coushatta Tribe adopted an ordinance authorizing Class II bingo gaming, which is permitted in Texas in several forms,<sup>118</sup> and submitted the application to the National Indian Gaming Commission for approval.<sup>119</sup> The Chairman of the National Indian Gaming Commission approved the ordinance and included the statement that “nothing in the IGRA’s legislative history indicates that the Pueblo is outside the scope of the [National Indian Gaming Commission]’s jurisdiction.”<sup>120</sup> The letter further stated that the reservation constituted Indian lands under the IGRA, which are thus

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<sup>109</sup> Texas v. Ysleta del Sur Pueblo, 955 F.3d 408 (5th Cir. 2020).

<sup>110</sup> Ysleta Del Sur Pueblo v. Texas, 142 S.Ct. 395 (2021).

<sup>111</sup> Ysleta Del Sur Pueblo v. Texas, 142 S.Ct. 1929 (2022).

<sup>112</sup> Ala.-Coushatta Tribes of Texas v. Texas, 208 F.Supp. 2d 670 (E.D. Tex. 2002).

<sup>113</sup> *Id.* at 672.

<sup>114</sup> Ala.-Coushatta Tribe of Tex. v. Texas, No. 02-41030, 2003 WL 21017542 (5th Cir. Apr. 16, 2003).

<sup>115</sup> Ala.-Coushatta Tribe of Tex. v. Texas, 540 U.S. 882, 882 (2003).

<sup>116</sup> Letter from Jonodev O. Chaudhuri, *supra* note 105, at 1.

<sup>117</sup> *Id.*

<sup>118</sup> Texas allows charitable Bingo under the Bingo Enabling Act. TEX. OCC. CODE ANN. tit. 13, § 2001 (West 1999).

<sup>119</sup> Letter from Jonodev O. Chaudhuri, *supra* note 105, at 1.

<sup>120</sup> *Id.* at 3.

eligible for gaming under the IGRA.<sup>121</sup> The Chairman’s letter concluded by approving the application, since the Tribe’s ordinance was consistent with the IGRA and National Indian Gaming Commission regulations.<sup>122</sup>

Based on National Indian Gaming Commission approval, the Alabama-Coushatta began construction of the Naskila Entertainment Center, a Class II gaming center offering electronic bingo.<sup>123</sup> The Tribe and State of Texas signed a pre-litigation agreement in 2016 that the Tribe could operate the Naskila Center pending state inspection.<sup>124</sup> When the state inspected the facility, it determined that the electronic bingo operation violated Texas gaming law and filed a motion for contempt based on the 2002 permanent injunction.<sup>125</sup> Texas asserted that the “IGRA does not apply to the Tribe because IGRA did not repeal the Restoration Act,” so the Tribe could not operate Class II gaming on its lands.<sup>126</sup> The Tribe argued that the National Indian Gaming Commission’s decision constituted a change in law and eliminated the legal basis for the injunction.<sup>127</sup> The district court ruled in favor of the State of Texas, and the Tribe appealed.<sup>128</sup> The district court stayed its ruling pending appeal.<sup>129</sup>

The Fifth Circuit did not stray from its prior interpretation of the issue.<sup>130</sup> It found that the Restoration Act and the IGRA set up fundamentally different regulatory schemes.<sup>131</sup> It further asserted that Congress did not intend for the IGRA to apply to all Native American gaming.<sup>132</sup> The court concluded “that the Restoration Act and the Texas law it invokes—and not IGRA—govern the permissibility of gaming operations on the Tribe’s lands. IGRA does not apply to the Tribe, and the [National Indian Gaming Commission] does not have jurisdiction over the

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<sup>121</sup> *Id.* at 3.

<sup>122</sup> *Id.* at 4.

<sup>123</sup> *Texas v. Ala.-Coushatta Tribe of Tex.*, 918 F.3d 440, 445 (5th Cir. 2019).

<sup>124</sup> *Id.* at 446.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Texas v. Ala.-Coushatta Tribe of Tex.*, 918 F.3d at 446.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 444; *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1332 (5th Cir. 1994).

<sup>131</sup> *Texas v. Ala.-Coushatta Tribe of Tex.*, 918 F.3d at 444.

<sup>132</sup> *Id.*



Tribe.”<sup>133</sup> The Alabama-Coushatta filed a petition for writ of certiorari with the U.S. Supreme Court, which was denied January 13, 2020.<sup>134</sup>

Following the denial of the writ of certiorari, the State of Texas went back to the district court to seek a contempt order for the Alabama-Coushatta’s violation of the 2002 injunction.<sup>135</sup> The State of Texas requested an order closing bingo operations, a monetary penalty for operation, court costs, and attorney fees.<sup>136</sup> The Tribe countered that it had complied with the terms of the Restoration Act, since bingo was not a prohibited gaming activity.<sup>137</sup> This time, the district court found that Texas regulates bingo operations as opposed to prohibiting it.<sup>138</sup> The district court determined the issue to be whether the gaming operation at the Alabama-Coushatta facility was a gaming activity allowed under Texas law.<sup>139</sup> While Texas “does not prohibit bingo by law or regulation,”<sup>140</sup> Texas does in fact regulate bingo gaming.<sup>141</sup> Since bingo is not prohibited within the meaning of the Restoration Act, the Alabama-Coushatta Bingo Gaming Facility is not subject to Texas law unless Texas prohibits bingo outright.<sup>142</sup> The district court denied the contempt order and request to enjoin the tribe from operating its gaming facility.<sup>143</sup>

### C. *The Legal Argument for the Tribes*

The Restoration Act prohibits the tribes from engaging in any gaming that is prohibited by Texas law.<sup>144</sup> The question then becomes: is electronic bingo offered at the tribes’ facilities prohibited by Texas law?

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<sup>133</sup> *Id.* at 449.

<sup>134</sup> *Ala.-Coushatta Tribe of Tex. v. Texas*, 140 S. Ct. 855 (2020) (mem).

<sup>135</sup> *Texas v. Ala.-Coushatta Tribe of Tex.*, No. 9:01-CV-299, 2021 WL 3884172, at \*5 (E.D. Tex. Aug. 31, 2021).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at \*9 (“The Bingo Enabling Act therefore regulates the manner and means by which bingo may be conducted in the State of Texas.”); *see* TEX. OCC. CODE ANN. § 2001.002(4) (West 2021) (defining bingo as a “specific game of chance, commonly known as bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols conforming to randomly selected numbers or symbols.”).

<sup>139</sup> *Id.*

<sup>140</sup> *Texas v. Ala. Coushatta Tribe of Tex.*, Civil Action 9:01-CV-299, 1, 22 (E.D. Tex. Aug. 31, 2021).

<sup>141</sup> *Id.* at 18.

<sup>142</sup> *Id.* at 25.

<sup>143</sup> *Id.*

<sup>144</sup> *Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act*, 25 U.S.C. § 107(a).

Texas actually regulates bingo, as opposed to prohibiting it, and criminalizes bingo that is not in accordance with the Texas Bingo Enabling Act.<sup>145</sup> Thus, the tribes should be allowed to operate a gaming facility which offers lottery, dog and horse race betting, and charitable raffle bingo since Texas regulates and does not prohibit those activities.<sup>146</sup>

A regulatory versus prohibitory framework invokes the Cabazon Band criminal/civil distinction. Moreover, under Section 107(b) of the Restoration Act, Texas may not recover either civil or criminal penalties through an enforcement action because “[n]othing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.”<sup>147</sup> The State of Texas made the argument that Section 107(b)’s use of “prohibited,” instead of criminal/civil, forecloses the possibility that Congress intended to incorporate the Cabazon Band framework.<sup>148</sup> However, the focus in Section 107 on “prohibited” focuses on statutory prohibitions rather than regulations.

The IGRA was passed by Congress “to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal government.”<sup>149</sup> It further provides for the “establishment of Federal standards for gaming on Indian lands.”<sup>150</sup> This acknowledges the fact there were no previous federal standards for gaming on Native American lands,<sup>151</sup> or “all lands within the limits of any Indian reservation.”<sup>152</sup> Despite the fact that the Restoration Act was passed less than a year earlier, Congress did not exclude the Ysleta del Sur Pueblo and Alabama-Coushatta tribes from the IGRA and the intent of the plain language of the IGRA applies to all Native American reservations.<sup>153</sup>

Nonetheless, the Fifth Circuit found that the more general IGRA must fall to the more specific Restoration Act.<sup>154</sup> The court wrote that, “(1) the Restoration Act and IGRA establish different regulatory regimes with

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<sup>145</sup> TEX. OCC. CODE § 2001.551 (West 2021).

<sup>146</sup> Almond, *supra* note 71, at 442.

<sup>147</sup> Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, 25 U.S.C. § 107(b).

<sup>148</sup> Almond, *supra* note 71.

<sup>149</sup> Indian Gaming Regulatory Act § 2702(1).

<sup>150</sup> 25 U.S.C. § 2702(3).

<sup>151</sup> Almond, *supra* note 71, at 444.

<sup>152</sup> 25 U.S.C. § 2703(4)(A).

<sup>153</sup> *Id.*

<sup>154</sup> Ysleta I, *supra* note 102.

regard to gaming” and “(2) the Restoration Act prevails over IGRA when gaming activities proposed by the Ysleta del Sur Pueblo are at issue.”<sup>155</sup> A specific statute is not controlled by a general one, regardless of priority of enactment.<sup>156</sup> Even so, “when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”<sup>157</sup> It is possible to read the IGRA as consistent with the Restoration Act since the Restoration Act forecloses the tribes from operating gaming activities that are *prohibited* by Texas law, and the Class II gaming facilities operated by the tribes offer gaming activities that are *regulated* by Texas law.<sup>158</sup>

The Fifth Circuit also failed to recognize the National Indian Gaming Commission and Department of the Interior’s letters regarding the Class II gaming application by the tribes.<sup>159</sup> The Department of the Interior (DOI) is the federal agency responsible for Native American tribes.<sup>160</sup> The *Chevron* doctrine, applying here, lays out the following two-step process for courts to evaluate an agency’s interpretation of a statute: “[W]hether Congress has directly spoken to the precise question at issue,” and if not, “whether the agency’s answer is based on a permissible construction of the statute.”<sup>161</sup> The *Chevron* Court gave three reasons to justify its deference to administrative agencies like the DOI, that: agencies have greater expertise in an area, they are politically accountable, and courts have a limited role in making political decisions.<sup>162</sup> In the cases of the Ysleta del Sur Pueblo and Alabama-Coushatta, the *Chevron* doctrine should apply to give deference to the DOI and National Indian Gaming Commission interpretations of gaming applications.<sup>163</sup>

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<sup>155</sup> *Id.*

<sup>156</sup> *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974).

<sup>157</sup> *Id.* at 551. *See also* *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (“When there are two acts upon the same subject, the rule is to give effect to both if possible.”); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1616 (2018) (“When confronted with two Acts allegedly touching on the same topic, this Court must strive ‘to give effect to both’” (quoting *Morton*, 417 U.S. at 551)).

<sup>158</sup> *Ysleta I*, *supra* note 102, at 1329, 1333.

<sup>159</sup> *Almond*, *supra* note 71, at 448.

<sup>160</sup> *DOI Roles and Responsibilities*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/oepe/doi-roles-and-responsibilities> (last visited Sept. 13, 2022).

<sup>161</sup> Peter S. Heinecke, Comment, *Chevron and the Canon Favoring Indians*, 60 U. CHI. L. REV. 1015, 1017 (1993); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

<sup>162</sup> *Id.* at 1018

<sup>163</sup> *Id.* at 1015–16.

Moreover, the canon favoring Indians may apply to interpret ambiguities in treaties and statutes in favor of Native Americans.<sup>164</sup> The canon is based on the wardship relation between the United States and the Native American tribes.<sup>165</sup> Courts have applied the canon in cases involving treaties,<sup>166</sup> federal tax statutes,<sup>167</sup> and land grants.<sup>168</sup> Ambiguities in harmonizing the Restoration Act with the IGRA should be read in favor of the tribes in keeping with the canon favoring Indians.<sup>169</sup> Of course, Congress can change the law through its plenary power, as the State of Texas has argued. Congress can change the law through its plenary power, however, until Congress acts, “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.”<sup>170</sup>

## V. LEGISLATIVE EFFORTS

### A. *H.R. 4985 Ysleta del Sur Pueblo and Alabama-Coushatta Tribes of Texas Equal and Fair Opportunity Settlement Act (2017-2018)*

One avenue to correct this inequality would require Congress taking legislative action.<sup>171</sup> Indeed, U.S. representatives have filed two bills to address the inequities these two tribes have experienced.<sup>172</sup> In February 2018, U.S. Representative Brian Babin (R-Texas) introduced House Bill 4985 to “restore an opportunity for tribal economic development on terms that are equal and fair.”<sup>173</sup> The brief bill had

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<sup>164</sup> *Id.* at 1029.

<sup>165</sup> *Id.*

<sup>166</sup> *Worcester v. Georgia*, 31 U.S. 515 (1832).

<sup>167</sup> *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

<sup>168</sup> *Alaska Pacific Fisheries v. U.S.*, 248 U.S. 78, 89–90 (1918).

<sup>169</sup> *See generally* Heinecke, *supra* note 161.

<sup>170</sup> *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

<sup>171</sup> *See generally* Ysleta del Sur Pueblo and Alabama-Coushatta Tribes of Texas Equal and Fair Opportunity Settlement Act, H.R. 4985, 115th Cong. (2018).

<sup>172</sup> *See The Ysleta del Sur Pueblo and Alabama-Coushatta Tribe of Texas Equal and Fair Opportunity Settlement Act: Hearing on H.R. 4985 Before the H. Subcomm. of Indian, Insular and Alaska Native Affairs of the House Natural Resources Committee*, 115th Cong. (2018); *The Ysleta del Sur Pueblo and Alabama-Coushatta Tribe of Texas Equal and Fair Opportunity Settlement Act: Hearing on H.R. 4985 Before the H. Subcomm. of Indian, Insular and Alaska Native Affairs of the House Natural Resources Committee*, 115th Cong. (2018).

<sup>173</sup> Ysleta del Sur Pueblo and Alabama-Coushatta Tribes of Texas Equal and Fair Opportunity Settlement Act, H.R. 4985, 115th Cong. (2018).

eighteen cosponsors and proposed to amend the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act by adding Section 301 that states: “Nothing in this Act shall be construed to preclude or limit the applicability of the Indian Gaming Regulatory Act.”<sup>174</sup> The bill was introduced in the House of Representatives then referred to the House Natural Resources Committee, which held a hearing on September 13, 2018.<sup>175</sup>

At the hearing, the Committee heard testimony from the Ysleta del Sur Pueblo Governor, Carlos Hisa.<sup>176</sup> He testified that in the 1960s, the tribe averaged a fifth grade education and 70% unemployment.<sup>177</sup> Housing consisted of dirt foundations and one or two overcrowded rooms.<sup>178</sup> Over the years, the Pueblo Tribe worked toward self-sustenance, and one of those strategies involved the Speaking Rock Entertainment Center.<sup>179</sup> During the time Speaking Rock was in operation from 1993 to 2002, the unemployment rate went from 40% to nearly zero.<sup>180</sup> Over 785 jobs were created with over \$823 million in direct and indirect regional impact.<sup>181</sup> When the State of Texas challenged the gaming operation of the Pueblo tribe in court in 2002, the district court injunction forced the closure of Speaking Rock.<sup>182</sup> The unemployment rate rose to 28%, citizens lost their homes and retirement funds, and tribal services like elder meals and education scholarships were cut.<sup>183</sup>

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<sup>174</sup> *Id.*

<sup>175</sup> *The Ysleta del Sur Pueblo and Alabama-Coushatta Tribe of Texas Equal and Fair Opportunity Settlement Act: Hearing on H.R. 4985 Before the H. Subcomm. of Indian, Insular and Alaska Native Affairs of the House Natural Resources Comm.*, 115th Cong. (2018) (statement of Governor Carlos Hisa, Ysleta del Sur Pueblo).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *The Ysleta del Sur Pueblo and Alabama-Coushatta Tribe of Texas Equal and Fair Opportunity Settlement Act: Hearing on H.R. 4985 Before the H. Subcomm. of Indian, Insular and Alaska Native Affairs of the House Natural Resources Comm.*, 115th Cong. (2018) (statement of Governor Carlos Hisa, Ysleta del Sur Pueblo).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

Jo Ann Battise, Chairperson of the Alabama-Coushatta Tribe of Texas, also testified at the hearing.<sup>184</sup> She urged the passage of H.R. 4985 to restore the ability of the tribe to engage in gaming on parity with the Kickapoo Tribe of Texas, which has offered Class II electronic bingo in Texas since 1996.<sup>185</sup> She stated that the alcohol-free Naskila gaming facility is the third largest employer in Polk County, with 346 individuals earning \$16.8 million in annual salaries and benefits.<sup>186</sup> Moreover, 70% of Naskila employees are non-tribal members, which increases the regional economic impact of the gaming facility.<sup>187</sup> An independent study found that 95% of the gaming facility's customers came from outside the county, and these customers injected more than \$100 million annually into the local economy.<sup>188</sup> The chairperson closed by urging Congress to end the thirty years of litigation and allow the two tribes to be formally recognized under the Indian Gaming Regulatory Act.<sup>189</sup> Unfortunately, the bill died in committee.<sup>190</sup>

B. *H.R. 2208 Ysleta del Sur Pueblo and Alabama-Coushatta Tribes of Texas Equal and Fair Opportunity Settlement Act (2021-2022)*

In March of 2021, U.S. Representative Veronica Escobar (D-El Paso), along with cosponsors Tony Gonzales (R-San Antonio) and Henry Cuellar (D-Laredo), introduced the second Ysleta del Sur Pueblo and Alabama-Coushatta Tribes of Texas Equal and Fair Opportunity Settlement Act.<sup>191</sup> The text of this bill is identical to the H.R. 4985 bill that died in committee two years earlier.<sup>192</sup> However, this time the House voted

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<sup>184</sup> *The Ysleta del Sur Pueblo and Alabama-Coushatta Tribe of Texas Equal and Fair Opportunity Settlement Act: Hearing on H.R. 4985 Before the H. Subcomm. of Indian, Insular and Alaska Native Affairs of the House Natural Resources Committee*, 115th Cong. (2018) (statement of Jo Ann Battise, Tribal Council Chairperson, Alabama-Coushatta Tribe of Texas).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *History of Bills and Resolutions* 581, GPO, <https://www.govinfo.gov/content/pkg/GPO-CRECB-1948-pt13/pdf/GPO-CRECB-1948-pt13-2.pdf>.

<sup>191</sup> Ysleta del Sur Pueblo and Alabama-Coushatta Tribes of Texas Equal and Fair Opportunity Settlement Act, H.R. 2208, 117th Cong. (2021).

<sup>192</sup> *Id.*; see also Ysleta del Sur Pueblo and Alabama-Coushatta Tribes of Texas Equal and Fair Opportunity Settlement Act, H.R. 4985, 115th Cong. (2018).

to suspend the rules and passed the bill on a voice vote in May of 2021.<sup>193</sup> Texas Governor Greg Abbott wrote to House Speaker Nancy Pelosi and Minority Leader Kevin McCarthy prior to the bill's passage in the House, voicing his opposition to the bill.<sup>194</sup> He urged that tribes “can only offer gaming to the extent it is authorized by the State of Texas.”<sup>195</sup> Notably, Representative Don Young (R-Alaska), the longest serving House representative, said, “It’s a strange thing: you hang around here long enough, you keep seeing the other end of your tail . . . When we introduced these bills, there was never any intention to exclude these two tribes. Never.”<sup>196</sup> On May 13, 2021, the Senate received the bill and referred it to the Senate Indian Affairs Committee, which has taken no further action.<sup>197</sup>

### C. Texas Legislative Resolutions

Meanwhile, two bills introduced in the Texas Legislature proposed constitutional amendments to allow the operation of casinos in Texas.<sup>198</sup> One proposal would allow casino gambling on the Kickapoo tribal reservation and in state coastal areas,<sup>199</sup> while the other would create a Texas Gaming Commission, authorize four resort destination casinos in the state, and allow gaming operations by any recognized Native American

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<sup>193</sup> Ysleta del Sur Pueblo and Alabama-Coushatta Tribes of Texas Equal and Fair Opportunity Act, S.4196, 117th Cong. (2021).

<sup>194</sup> Anthony Jackson, *Fair Tribal gaming bill benefitting El Paso’s Tiguas passes U.S. House, moves to Senate*, EL PASO TIMES (May 12, 2021, 5:10 PM), <https://www.elpasotimes.com/story/news/2021/05/12/us-house-fair-tribal-gaming-bill-tiguas-veronica-escobar-anthony-gonzales/5057225001/>.

<sup>195</sup> *Id.*

<sup>196</sup> Michael Marks, *Bipartisan Bill Pushes for Parity In Texas Tribal Gaming*, KUT 90.5 (May 19, 2021, 5:41 PM), <https://www.kut.org/business/2021-05-19/bipartisan-bill-pushes-for-parity-in-texas-tribal-gaming>.

<sup>197</sup> *H.R.2208 - Ysleta del Sur Pueblo and Alabama-Coushatta Tribes of Texas Equal and Fair Opportunity Act*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/2208/committees?r=12&s=1> (last visited Sept. 18, 2022).

<sup>198</sup> H.R.J. 26, 87th Leg. (Tx. 2021); H.J. Res. 133, 57th Leg., (Tex. 2021)

<sup>199</sup> H.J.Res. 26, 87th Leg. (Tx. 2021) (Proposing a “constitutional amendment to authorize the operation of casino gaming in certain state coastal areas to provide additional money for residual windstorm insurance coverage and catastrophic flooding assistance in those areas and to authorize the Kickapoo Traditional Tribe of Texas to conduct casino gaming by executing a gaming compact with this state.”).

tribe.<sup>200</sup> The push was led by the Las Vegas Sands Corporation and its now-deceased CEO, Sheldon Adelson.<sup>201</sup> Dozens of lobbyists were hired to persuade legislators, and television advertisements urged Texans to vote in favor of building four world-class casinos in Texas.<sup>202</sup> Both proposals failed to make it to a floor vote, dying at the end of the legislative session.<sup>203</sup> However, Governor Abbott signaled that he was not opposed, saying he wanted to hear opinions from lawmakers and their constituents, while Lieutenant Governor Dan Patrick remained pessimistic.<sup>204</sup>

## VI. ETHICAL CONSIDERATIONS

Despite the Fifth Circuit's interpretation that IGRA does not control the Restoration Act, and that the Restoration Act precludes these two tribes from all gaming activities,<sup>205</sup> the question remains whether treatment of the tribes has been ethical.<sup>206</sup>

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<sup>200</sup> H.J. Res. 133, 57th Leg., (Tex. 2021) (It proposed a “constitutional amendment to foster economic development and job growth and to provide tax relief and funding for education and public safety by creating the Texas Gaming Commission [and] authorizing and regulating casino gaming at a limited number of destination resorts and facilities licensed by the commission.” It further proposed that Section 47a(e)(4) be amended to authorize the Texas Gaming Commission to “allow an Indian tribe recognized by the United States government under federal law to operate slot machines or casino gaming on its Indian land.”).

<sup>201</sup> *Id.*

<sup>202</sup> Patrick Svitek, *Las Vegas Sands went all in on legalizing casinos in Texas. Here's why the multimillion-dollar effort did not make it far this session*, THE TEX. TRIB. (June 16, 2021, 5:00 AM), <https://www.texastribune.org/2021/06/16/las-vegas-sands-texas-casino-gambling/>.

<sup>203</sup> See H.J. Res. 133, 87th Leg., (Tex. 2021); H.J. Res. 26, 87th Leg., (Tex. 2021).

<sup>204</sup> *Id.* Sheldon Adelson donated \$500,000 to Governor Abbott in 2020. *Donor Lookup*, OPEN SECRETS (last visited Sept. 17, 2022), <https://www.opensecrets.org/donor-lookup/results?cand=&cycle=&employ=&name=Sheldon+Adelson&order=desc&sort=D&state=&zip=89109>.

<sup>205</sup> *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1332 (5th Cir. 1994), *cert. denied*, 514 U.S. 1016 (1995).

<sup>206</sup> Mariano Cholí, *Ethical Gambling: A Necessary New Point of View of Gambling in Public Health Policies*, 6 *Frontiers in Pub. Health* 1 (2018).



A. *Ethics and Gambling*

Governments are aware of the adverse consequences of gambling,<sup>207</sup> and the State of Texas has expressed concerns over allowing the tribes to operate gaming facilities that would expand gambling.<sup>208</sup> Gambling is a potentially addictive activity since it activates the same reward circuits in the brain as drugs, and the characteristics of gambling disorders are the same as those of drug addictions or alcoholism.<sup>209</sup> A gambling disorder is a serious mental disorder, and pathological gamblers find it impossible to stop their gambling activity despite the financial and personal losses they sustain.<sup>210</sup> Gaming establishments increase profits as gamblers continue to lose.<sup>211</sup> Mariano Choliz recommends limiting the number of casinos and the type of advertising they conduct.<sup>212</sup> Moreover, evidence has shown that a distance of only ten miles between a casino and a gambler's home supports a gambling disorder.<sup>213</sup>

Even so, gambling businesses bring tax revenue and employment opportunities to the states where they are allowed,<sup>214</sup> although some evidence shows that casinos negatively affect state revenues, while lotteries have a positive effect.<sup>215</sup> Some studies also indicate a demonstrable economic benefit when legislation allows casino gambling, but that benefit may decline over time.<sup>216</sup>

B. *Native American Casinos*

Other studies report that Native American casinos result in a mixed bag of benefits and detriments to surrounding communities, citing

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<sup>207</sup> Linda Hancock & Garry Smith, *Critiquing the Reno Model I-IV International Influence on Regulators and Governments (2004–2015) – the Distorted Reality of “Responsible Gambling,”* 15 INT. J. MENT. HEALTH & ADDICTION 1151 (2017).

<sup>208</sup> See Svitek, *supra* note 202.

<sup>209</sup> See Choliz, *supra* note 206.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 3.

<sup>213</sup> *Id.* at 2.

<sup>214</sup> M. Neil Browne & Nancy K. Kubasek, *Should we encourage expansion of the casino gaming industry?*, 18 REV. OF BUS. 3, 10 (1997).

<sup>215</sup> Douglas M. Walker & John D. Jackson, *The Effect of Legalized Gambling on State Government Revenue*, 29 CONTEMP. ECON. POL'Y 101, 103 (2011).

<sup>216</sup> *Id.* at 113.

improved economic well-being and job opportunities.<sup>217</sup> This includes a 2% reduction in mortality rates,<sup>218</sup> and a 26% increase in tribal employment.<sup>219</sup> Indeed, many tribes cite increased employment and reduced welfare payments as a result of gaming operations<sup>220</sup>—as well as new school construction, college scholarships, drug rehabilitation programs, and Native language revitalization programs.<sup>221</sup> Children exposed to tribal casinos also had substantial positive impacts on educational outcomes in high school and college.<sup>222</sup> After passage of the IGRA, “[r]eal per capita income earned by Indians living on reservations in the contiguous 48 states grew by 33.3 percent in the 1990s,” while the national average was 11.4%.<sup>223</sup> Also, larger gains were realized on reservations which operated a gaming facility.<sup>224</sup> However, there were also increases in bankruptcy rates, violent crimes, and thefts.<sup>225</sup> Some tribes opened gaming facilities and then closed them due to low consumer demand.<sup>226</sup> It is difficult, however, to imagine a causal link between casinos and criminal activity.

### C. Larger Questions of Equity and Ethics

The written law is sometimes deficient and “speaks universally and absolutely, but it has no right to do so.”<sup>227</sup> Thus, there are questions of equity in the application of the Restoration Act to these two tribes.<sup>228</sup>

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<sup>217</sup> Melissa S. Kearney, *The Economic Winner and Losers or Legalized Gambling* 1–39 (Nat’l. Bureau of Econ. Rsch., Working Paper No. 11234, 2005), <https://www.brookings.edu/wp-content/uploads/2016/06/200502kearney.pdf>.

<sup>218</sup> *Id.* at 7.

<sup>219</sup> William N. Evans & Julie H. Topoleski, *The Social and Economic Impact of Native American Casinos* 1–66 (Nat’l Bureau of Econ. Rsch., Working Paper No. 9198, 2002), [https://www.nber.org/system/files/working\\_papers/w9198/w9198.pdf](https://www.nber.org/system/files/working_papers/w9198/w9198.pdf).

<sup>220</sup> See Akee et al., *supra* note 39, at 194, 196–197.

<sup>221</sup> Akee et al., *supra* note 39, at 196. Studies have found a decline in Indian welfare dependence when gaming facilities open. See also Don A. Cozzetto, *The Economic and Social Implications of Indian Gaming: The Case of Minnesota*, 19 AM. INDIAN CULTURE & RSCH. J. 119 (1995).

<sup>222</sup> Owen Thompson, *Tribal Gaming and Educational Outcomes in the Next Generation*, 38 J. OF POL’Y ANALYSIS & MGMT. 629, 631 (2019).

<sup>223</sup> Akee et al., *supra* note 39, at 198.

<sup>224</sup> *Id.*

<sup>225</sup> Evans & Topoleski, *supra* note 219, at 2.

<sup>226</sup> Akee et al., *supra* note 39, at 193.

<sup>227</sup> Roger A. Shiner, *Aristotle’s Theory of Equity*, 27 LOY. L.A. L. REV. 1245, 1255 (1994).

<sup>228</sup> *Id.*

“Equity is distinct from law and corrects the law—not the other way around.”<sup>229</sup> In his article on equity in the law, Professor Henry E. Smith notes that equity functions to not only regulate the law without changing it but also alters the application of the law to serve end goals.<sup>230</sup> An equitable maxim states that “*equity regards substance rather than form*.”<sup>231</sup> A party who relies on technicality of the form—an ill-timed tribal resolution in this case—over the substance of the act is said to act as an opportunist<sup>232</sup>. One court wrote, “it is said that equity looks to the substance and not the shadow, to the spirit and not the letter; it seeks justice rather than technicality, truth rather than evasion, common sense rather than quibbling.”<sup>233</sup> Yet another equitable maxim relevant to this dispute is “*equality is equity*”—a maxim based on fairness.<sup>234</sup> Certainly, allowing one tribe to operate a gaming facility within a state while the two other tribes are prohibited from doing so violates this sense of equality.<sup>235</sup> “Ultimately rule-of-law values require a spirit of equity as part of a culture of the rule of law . . .”<sup>236</sup> While the Alabama-Coushatta and Ysleta del Sur Pueblo tribes have been enjoined from operating a gaming facility, the Kickapoo Tribe has been allowed by the state to operate its Lucky Eagle facility without interference.<sup>237</sup> Based on a technicality in a law, the State of Texas has spent considerable time and money in court to prevent two of its three Native American tribes from operating a gaming facility.<sup>238</sup>

Texas attorney general Ken Paxton has opposed the bill introduced by Representative Brian Babin,<sup>239</sup> writing in a letter to Babin that, “if enacted, it will not fully resolve all questions of law surrounding what types of gambling would be allowed on lands owned by the Ysleta

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<sup>229</sup> Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1067 (2021).

<sup>230</sup> *Id.* at 1069.

<sup>231</sup> *Id.* at 1122.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 1122 (quoting *Fed. Land Bank of Omaha v. Bollin*, 408 N.W.2d 56, 62 (Iowa 1987)).

<sup>234</sup> *Id.* at 1125.

<sup>235</sup> See *supra* Part I.

<sup>236</sup> *Id.* at 1143.

<sup>237</sup> Brief for the United States as Amicus Curiae, *supra* note 12.

<sup>238</sup> “[The Alabama-Coushatta and Ysleta del Sur Pueblo tribes] are also the only tribes that operate gaming on Indian lands outside of IGRA’s regulatory structure,” Brief for the United States as Amicus Curiae, *supra* note 12, at 21, while the third tribe in Texas, “the Kickapoo Traditional Tribe of Texas, operates Class II gaming pursuant to an ordinance approved by the NIGC,” *Id.* at 21 n.4.

<sup>239</sup> Ysleta del Sur Pueblo and Alabama-Coushatta Tribes of Texas Equal and Fair Opportunity Settlement Act, H.R. 759, 116th Cong. (2019).

del Sur Pueblo and Alabama-Coushatta [T]ribes.”<sup>240</sup> Texas Governor Greg Abbott has also voiced his opposition to the bill introduced by Babin, writing, “I strongly encourage Congress to reject this attempt to restrict Texas’[s] power to regulate activities within its borders.”<sup>241</sup> Yet, Abbott received \$200,000 in campaign contributions from Houston-based Tilman Fertitta of Fertitta Entertainment,<sup>242</sup> which owns the Golden Nugget Casinos and Hotels in bordering Louisiana.<sup>243</sup> Notably, Texans wager an estimated “\$2.5 billion annually on gambling operations in other states,” with most of that going to the neighboring states of Louisiana and Oklahoma.<sup>244</sup> Then, perhaps, it is not ironic that a poll by the *Dallas Morning News* and The University of Texas at Tyler found that 57% of Texans support casino gambling within the state.<sup>245</sup> “Law without reference to ethics and community moral values is in danger of becoming disconnected from the public will.”<sup>246</sup> This case suggests legal “interpretations at odds with strongly held community attitudes and values . . . may . . . weaken the institution of the law itself.”<sup>247</sup> The intent of

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<sup>240</sup> Moore, *supra* note 10.

<sup>241</sup> Jacob Dick, *After 5 Years in Court, East Texas Tribe Beats Paxton in Battle over Gaming Facility*, HOUS. CHRON., <https://www.houstonchronicle.com/news/houston-texas/texas/article/East-Texas-tribe-nets-gaming-win-in-U-S-District-16478841.php> (Sept. 22, 2021, 10:14 AM).

<sup>242</sup> *Tilman & Paige Fertitta*, TRANSPARENCY USA, <https://www.transparencyusa.org/tx/donor/tilman-and-paige-fertitta?cycle=2020-election-cycle> (last visited Jan. 22, 2022). The Fertittas also donated \$200,000 to Lt. Governor Dan Patrick and \$25,000 to Attorney General Ken Paxton, all of whom have opposed allowing the Ysleta del Sur Pueblo and Alabama-Coushatta to operate their gaming facilities. *Id.*

<sup>243</sup> *See* FERTITTA ENTERTAINMENT, <https://www.fertittaentertainmentinc.com/> (last visited Sept. 16, 2022). The Fertittas also donated \$200,000 to Lt. Governor Dan Patrick and \$25,000 to Attorney General Ken Paxton, both of whom have opposed allowing the Ysleta del Sur Pueblo and Alabama-Coushatta to operate their gaming facilities, *see* Moore, *supra* note 10.

<sup>244</sup> *See* Gromer Jeffers Jr., *Most Texans Want Casino Gambling, but Lawmakers Unwilling to Roll the Dice*, DALL. MORNING NEWS (Mar. 8, 2021, 5:15 AM), <https://www.dallasnews.com/news/politics/2021/03/08/most-texans-want-casino-gambling-but-lawmakers-unwilling-to-roll-the-dice/>.

<sup>245</sup> *Id.*

<sup>246</sup> Thomas W. Dunfee, *On the Synergistic, Interdependent Relationship of Business Ethics and Law*, 34 AM. BUS. L.J. 317, 319 (1996).

<sup>247</sup> *Id.*

legislators, then, should be “to make the[ir] citizens better by accustoming them with the good.”<sup>248</sup>

## VII. THE SUPREME COURT DECISION

On June 15, 2022, the U.S. Supreme Court handed down its decision in *Ysleta del Sur Pueblo v. Texas* and ruled 5 to 4 in favor of the Ysleta Tribe.<sup>249</sup> Justice Gorsuch delivered the majority opinion, joined by Justices Breyer, Sotomayor, Kagan, and Barrett.<sup>250</sup> The Court began by noting the Restoration Act’s “dichotomy between prohibition and regulation.”<sup>251</sup> As Texas allows bingo, “it would seem to follow that Texas’s laws fall on the regulatory rather than prohibitory side of the line—and thus may not be applied on tribal lands.”<sup>252</sup> The majority opinion rejected the State’s argument that it *regulated* bingo “by fixing the time, place, and manner” of the game while *prohibiting* it outside of those regulations.<sup>253</sup> The Court took the “contextual clues” of the “regulatory/prohibitory framework” in the Restoration Act and found similarities to *Cabazon* as well as two other statutes passed around the same time as the Restoration Act.<sup>254</sup> “That Congress chose to use the language of *Cabazon* in different ways in three statutes closely related in time and subject matter seems to us too much to ignore.”<sup>255</sup> Because *Cabazon* “clinches the case,”<sup>256</sup> Texas can bar tribes from offering gaming activities prohibited in Texas, but not bingo, which it regulates.<sup>257</sup>

The Supreme Court vacated the judgment of the Fifth Circuit and remanded the case,<sup>258</sup> and the Fifth Circuit vacated the district court’s judgment as well,<sup>259</sup> ending the quarter-century legal battle with the Ysleta del Sur Pueblo Tribe. Just a few weeks later, Texas Attorney General Paxton notified the Fifth Circuit Court of Appeals that he would not pursue an appeal of the district court’s order in *Texas v. Alabama-Coushatta Tribe*

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<sup>248</sup> Alexandru Florin Magureanu, *Equity, Justice and Law*, 3 J.L. & ADMIN. SCI. 223, 224 (2015).

<sup>249</sup> See *Ysleta del Sur Pueblo v. Texas*, 142 S. Ct. 1929 (2022).

<sup>250</sup> See *id.*

<sup>251</sup> *Id.* at 1938.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 1939. The Court further wondered, referring to the Kickapoo Traditional Tribe, why “something like the *Cabazon* test can work for one Tribe in Texas but not another.” *Id.* at 1944.

<sup>254</sup> See *id.* at 1938–41.

<sup>255</sup> See *Ysleta del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1941 (2022).

<sup>256</sup> *Id.* at 1940.

<sup>257</sup> See *id.*

<sup>258</sup> *Id.* at 1944.

<sup>259</sup> *State v. Ysleta del Sur Pueblo*, 41 F.4th 481, 482 (5th Cir. 2022).

of Texas,<sup>260</sup> decided in favor of the Alabama-Coushatta in 2021, effectively ending their dispute.<sup>261</sup> In a press release, Alabama-Coushatta Tribal Council Chairman Ricky Sylestine said, “For years, the state’s efforts have created uncertainty for our Tribe, Naskila Gaming employees, and our East Texas neighbors. Now we can put those threats behind us and look to a brighter future.”<sup>262</sup>

### VIII. CONCLUSION

In *Cabazon*, the U.S. Supreme Court noted the importance of “traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its ‘overriding goal’ of encouraging tribal self-sufficiency and economic development.”<sup>263</sup> Indeed, Native American tribes are supposed to be in an era of self-determination and tribal self-governance.<sup>264</sup> In *McGirt v. Oklahoma*, the U.S. Supreme Court decided a case involving the jurisdiction of the Creek Nation in Oklahoma under the Major Crimes Act. In that opinion, Justice Gorsuch wrote that states should not have authority to reduce federal reservations within their borders because it would “leave tribal rights in the hands of the very neighbors who might be least inclined to respect them.”<sup>265</sup> Justice

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<sup>260</sup> See *Ysleta*, 142 S. Ct. at 1945. Chief Justice Roberts dissented along with Justices Thomas, Alito, and Kavanaugh. Roberts wrote, “A straightforward reading of the statute’s text makes clear that all gaming activities prohibited in Texas are also barred on the Tribe’s land. The Court’s contrary interpretation is at odds with the statute’s plain meaning, conflicts with an unambiguous tribal resolution that the Act was ‘enacted in accordance with,’ . . . and makes a hash of the statute’s structure.” *Id.*

<sup>261</sup> *Texas A’s office drops legal fight with Naskila Gaming after June Supreme Court ruling*, FOX 4 BEAUMONT (July 12, 2022), <https://fox4beaumont.com/texas-ags-office-drops-legal-fight-with-naskila-gaming-after-june-supreme-court-ruling>.

<sup>262</sup> *Id.*

<sup>263</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987).

<sup>264</sup> Justin Neel Baucom, *Bringing Down the House: As States Attempt to Curtail Indian Gaming, Have We Forgotten the Foundational Principles of Tribal Sovereignty*, 30 AM. INDIAN L. REV. 423, 442 (2006).

<sup>265</sup> *Id.* Notably, the 5–4 majority opinion in *McGirt* aligns with the *Ysleta* majority opinion authors, with the exception of Justice Ginsburg in the *McGirt* case and Justice Barrett in the *Ysleta* case. It will be interesting to see if this group of justices signal broader protections for Native Americans. Ronald Mann, *Divided court rejects Texas’ bid to control gambling in tribal casinos*, SCOTUSBLOG (Jun. 16, 2022, 10:45 AM) <https://www.scotusblog.com/2022/06/divided-court-rejects-texas-bid-to-control-gambling-in-tribal-casinos/>.

Gorsuch's observation is not a new one. Over a hundred years ago, the United States Supreme Court acknowledged, "Because of the local ill feeling, the people of the States where [Native Americans] are found are often their deadliest enemies."<sup>266</sup>

The federal government effectively penalized the Alabama-Coushatta and Ysleta del Sur Pueblo tribes by recognizing them under the Restoration Act just one year before passing the IGRA.<sup>267</sup> The Fifth Circuit cited this specific Restoration Act language as the reason for the tribes' exclusion from the IGRA.<sup>268</sup> This interpretation of the two laws resulted in extreme inequities for the tribes since the third tribe in Texas was not affected in the same way.<sup>269</sup> Moreover, the efforts of the tribes to be included under the IGRA resulted in protracted and expensive litigation over the last thirty years.<sup>270</sup>

During this same period, Texas has lost billions of dollars of economic benefit to casinos and gaming facilities in Louisiana and Oklahoma as Texans stream across the state borders every weekend.<sup>271</sup> Despite the ethical concerns of casino owners paying contributions to Texas politicians' campaigns, many politicians are still likely to oppose efforts to expand Native American gaming. Since the U.S. Supreme Court has ruled that the Fifth Circuit misinterpreted the Restoration Act, the two tribes are now free to operate their casino-style bingo operations on their reservations.<sup>272</sup> Pursuant to the IGRA, the National Indian Gaming Commission—not the state of Texas—will likely govern the Class II gaming operations of the Alabama-Coushatta and the Ysleta del Sur Pueblo tribes.<sup>273</sup> Until lawmakers or courts address whether the "permits such gaming" clause of the IGRA calls for a game-specific approach or

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<sup>266</sup> United States v. Kagama, 118 U.S. 375, 384 (1886).

<sup>267</sup> Mike Andrews, Miles Indest & Paul Chappell, *High Court's Tribal Ruling May Enable More Gambling In Texas*, LAW360 (June 23, 2022, 6:32 PM EDT), <https://www.law360.com/articles/1505344/high-court-s-tribal-ruling-may-enable-more-gambling-in-texas>.

<sup>268</sup> *Id.*

<sup>269</sup> Melissa S. Taylor, *Categorical vs. Game-Specific: Adopting the Categorical Approach to Interpreting 'Permits Such Gaming'*, 43 TULSA L. REV. 89 (2007).

<sup>270</sup> See Andrews et al., *supra* note 267.

<sup>271</sup> Paul O'Donnell & Laurie Joseph, *How much gambling revenue is Texas leaving on the table?*, DALLAS MORNING NEWS (Jan. 3, 2019), <https://www.dallasnews.com/business/economy/2019/01/03/how-much-gambling-revenue-is-texas-leaving-on-the-table/>.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

categorical gaming approach,<sup>274</sup> it will be difficult for Texas to enforce any state regulations against the tribal gaming operations or gain financial benefits from them.<sup>275</sup> The Supreme Court noted that the Ysleta tribe could not conduct any gaming activity it wished, explaining that “if a gaming activity is prohibited by Texas law it is also prohibited on tribal land as a matter of federal law.”<sup>276</sup> However, the Court also noted that other types of gaming activities are governed by tribal regulations and must conform to federal law and the IGRA.<sup>277</sup> This could leave the door open for further disputes between the state and tribes based on interpretations of regulated gaming activities.

Even though the Supreme Court’s ruling has provided long overdue and needed relief for these two tribes,<sup>278</sup> Congress should act to clarify any lingering questions found in the interpretation of the Regulatory Act. Congresswoman Veronica Escobar (D-Texas) released a statement after the Supreme Court opinion was published urging the Senate to bring H.R. 2208, the Ysleta del Sur Pueblo and Alabama-Coushatta Tribes of Texas Equal and Fair Opportunity Act, to the Senate floor for a vote.<sup>279</sup> In the Senate, S. 4196 was introduced by Martin Heinrich (D-New Mexico) and Jon Tester (D-Montana) on May 12, 2022, and referred to the Committee on Indian Affairs.<sup>280</sup> While acknowledging the affirmation of their tribal sovereignty, Alabama-Coushatta Tribal Council Chairman Ricky Sylestine said, “[t]he Senate can and should

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<sup>274</sup> See Taylor, *supra* note 269.

<sup>275</sup> Andrews, et al., *supra* note 267. See also Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285, 289 (2003), noting that “a state that has thoroughly prohibited all forms of casino gaming, but has continued to allow charitable bingo, may find so-called ‘Class II’ slot machines on Indian reservations within the state.”

<sup>276</sup> Ysleta del Sur Pueblo v. Texas, 142 S. Ct. 1929, 1941 (2022).

<sup>277</sup> *Id.*

<sup>278</sup> See Taylor, *supra* note 269.

<sup>279</sup> *Congresswoman Escobar State on Supreme Court Opinion on Ysleta del Sur Pueblo v. Texas*, CONGRESSWOMAN VERONICA ESCOBAR (June 15, 2022), <https://escobar.house.gov/news/documentsingle.aspx?DocumentID=951>.

<sup>280</sup> Ysleta del Sur Pueblo and Alabama-Coushatta Tribes of Texas Equal and Fair Opportunity Act, S. 4196, *117th Congress*, (2022). Note that neither of the Texas Senators have supported the Senate bill. In fact, Senator John Cornyn has said, “Under Texas law, most forms of gambling are prohibited, including on Ysleta del Sur Pueblo and Alabama-Coushatta tribal lands.” Elizabeth Thompson, *Gaming Bill for Texas Tribes passes U.S. House, must face Cornyn opposition in Senate*, THE DALLAS MORNING NEWS, (May 12, 2021, 3:34 PM), <https://www.dallasnews.com/news/politics/2021/05/12/gaming-bill-for-texas-tribes-passes-the-house-must-face-cornyn-opposition-in-the-senate/>.



provide our employees, visitors and community partners even greater certainty by passing this legislation before the end of this year.”<sup>281</sup> Congress should therefore act to ensure there is always more than one buffalo in Texas.

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<sup>281</sup> FOX4 BEAUMONT, *supra* note 261.