SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES YSLETA DEL SUR PUEBLO, ET AL.,) Petitioners,) v.) No. 20-493 TEXAS,) Respondent.)

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1 IN THE SUPREME COURT OF THE UNITED STATES 2 3 YSLETA DEL SUR PUEBLO, ET AL.,) 4 Petitioners,) 5) No. 20-493 v. 6 TEXAS,) 7 Respondent.) 8 _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ 9 10 Washington, D.C. 11 Tuesday, February 22, 2022 12 13 The above-entitled matter came on for 14 oral argument before the Supreme Court of the 15 United States at 10:00 a.m. 16 17 APPEARANCES: BRANT C. MARTIN, ESQUIRE, Fort Worth, Texas; on behalf 18 19 of the Petitioners. 20 ANTHONY A. YANG, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the 21 United States, as amicus curiae, supporting the 22 23 Petitioners. 24 LANORA C. PETTIT, Principal Deputy Solicitor General, Austin, Texas; on behalf of the Respondent. 25

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1 PROCEEDINGS 2 (10:00 a.m.) 3 CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Ysleta del Sur 4 Pueblo versus Texas. 5 6 Mr. Martin. 7 ORAL ARGUMENT OF BRANT C. MARTIN ON BEHALF OF THE PETITIONERS 8 MR. MARTIN: Mr. Chief Justice, and 9 may it please the Court: 10 11 The question this case presents is 12 whether the Restoration Act subjects the Pueblo to Texas's time, place, and manner restrictions 13 14 as it relates to games that Texas does not 15 flatly prohibit. 16 It does not. In the Restoration Act, 17 Congress codified the Cabazon Band framework and 18 specifically foreclosed Texas's regulatory 19 authority over the tribe's gaming activities. 20 The plain language of the Act provides 21 us with clear support for this interpretation. 2.2 On the heels of this Court's decision in 23 Cabazon, Congress changed the language of the 24 Restoration Act to replicate the prohibitory/ 25 regulatory dichotomy struck in Cabazon. Section

1 107(a) incorporates the Cabazon framework. It 2 federalizes Texas law but only as to prohibited games. And bingo, in the State of Texas, is not 3 a prohibited game. 4 Section 107(b) clearly forecloses any 5 interpretation of Section 107 in its entirety 6 7 where Texas would have regulatory jurisdiction over tribal gaming. And Section 107(b) must 8 9 have meaning in the Act. 10 The problem with the State of Texas's 11 interpretation and the Fifth Circuit's 12 interpretation in Ysleta I is that it reads 107(b) out of the Act entirely. 13 14 This interpretation is also consistent 15 with Congress's extension of the Cabazon 16 framework to IGRA. The two statutes are not in 17 conflict, and you don't have to choose one over 18 the other. And even if that were the case, and 19 we don't think it is, the plain language of the 20 Restoration Act allows my client to engage in 21 non-prohibited gaming activities. 2.2 In Sections 107(a) and 107(b), 23 Congress was sending the clear signal that it 24 was incorporating the prohibitory/regulatory 25 construct from Cabazon into a test applicable to

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1	these tribes. The final text of the Restoration
2	Act reflects the bargain that Congress struck.
3	Each side got something but not everything.
4	Texas was allowed to prevent
5	prohibited games from being played by these
6	tribes. Meanwhile, the tribe was allowed to
7	retain its sovereignty and its freedom from
8	regulation as it related to gaming activities.
9	And, with that, I'd be pleased to
10	answer any questions from the Court.
11	JUSTICE THOMAS: Yes, counsel, the
12	in the Cabazon was a grant of jurisdiction,
13	right?
14	MR. MARTIN: Yes, Your Honor.
15	JUSTICE THOMAS: Is there any
16	difference where is there a grant of
17	jurisdiction in 107(a)?
18	MR. MARTIN: Your Honor, looking at
19	the text of 107(a), it's specifically dealing
20	with the tribal gaming activities. There's not
21	a specific reference to the grant of the
22	jurisdiction.
23	JUSTICE THOMAS: So what do just
24	standing alone, what do you think it's doing?
25	MR. MARTIN: Your Honor, I think it's

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1 dictating -- it's showing that Congress was 2 extending the Cabazon framework to this fact 3 pattern where Congress was federalizing state law as to prohibited gaming activities. 4 JUSTICE THOMAS: So --5 MR. MARTIN: It's taking the Public 6 7 Law 280 structure that was explicated in Cabazon and extending it to this fact pattern. 8 9 JUSTICE THOMAS: So exactly how does it -- how is it doing that? 10 MR. MARTIN: Your Honor, in the text 11 12 itself, the first sentence: "All gaming activities which are prohibited by the laws of 13 the State of Texas are hereby prohibited on the 14 15 reservation and on the lands of the tribes." 16 JUSTICE THOMAS: That seems almost as 17 though it's adopting it as federal law. 18 MR. MARTIN: It's adopting Texas's 19 prohibitory laws as to prohibited gaming activities. It's -- one of the things that's 20 21 interesting, Your Honor, is that, compared to 2.2 previous versions of this Act, this final -- one 23 of the final changes in Section 108 was changing 24 it from "gaming" and "gambling" and those 25 broader terms to the concept of "gaming

activities" and specifying prohibited gaming
 activities.

3 JUSTICE THOMAS: Thank you. CHIEF JUSTICE ROBERTS: Well, I mean, 4 you say that 107 was enacted in light of 5 6 Cabazon. But it was directly enacted in light 7 of the tribal resolution, which said that the tribe was willing at this point, after all the 8 9 back and forth -- they obviously weren't happy 10 about it, but they were willing to provide that all gaming, gambling, lottery, bingo shall be 11 12 prohibited. All, regardless of whether there's 13 some that's permitted and some that's -- that's 14 not according to the laws of Texas. 15 So, I mean, this is an odd case. Т 16 haven't seen in decades briefs that were so full 17 of legislative history and, you know, 18 pre-enactment this or post-enactment that, but, 19 I mean, if that's what we're going to -- if 20 that's the game that's on, I mean, it looks to 21 me like the tribal resolution had a much more 2.2 direct connection to the legislation that was 23 actually passed.

24 MR. MARTIN: Your Honor, if I may, I 25 think the tribal resolution had a much more

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1 direct connection to previous versions of it. 2 And I would agree with you there's a lot of legislative history in here, and some of it's 3 legislative history and some of it is almost 4 textual evolution on what was actually enacted. 5 And one of the things that I would 6 7 point out to Your Honor is the tribal resolution, which, again, was dated March 16th 8 9 of 1986, that total ban or what the State of Texas calls the "operative request" -- and --10 11 and that would have been a total ban. There --12 there's no way to deny that. 13 However, that part of the text was 14 incorporated into the Restoration Act into a 15 version that never actually passed, and that was 16 a version that was set forth in its -- this is 17 in our brief on page 9, Your Honor -- that 18 version was September 23rd of 1986. Now that's 19 interesting because Cabazon comes down and 20 Cabazon is handed down on February 25th, 1987, 21 so well after that version which reflected the tribal resolution was handed down. After --2.2 23 CHIEF JUSTICE ROBERTS: Well, do you 24 think the law would have been passed without the tribal resolution, regardless of the particular 25

1	form that it was enacted?
2	MR. MARTIN: Your Honor, I think I'm
3	focused on the law that was actually passed and
4	the changes that were made by Congress. I I
5	don't know that I want to speculate on what
6	would have happened or would not have happened.
7	All I know is I have the text that we have
8	the text that we have.
9	And and the point that I was going
10	to make was the final version of it is the one
11	that no one here thinks that the final
12	version in 107(a) is a total ban. There's no
13	way you can construct it to where it reflects a
14	total ban.
15	So it can't reflect what Texas calls
16	the "operative request." It has to mean
17	something else. And those final changes that
18	were made to 107(a) talk about the prohibited
19	gaming activities, and that's a different story
20	than the prohibited gaming.
21	And, Your Honor, if I may
22	JUSTICE ALITO: Well
23	CHIEF JUSTICE ROBERTS: Now I don't
24	know
25	JUSTICE ALITO: Go ahead.

1	CHIEF JUSTICE ROBERTS: I'm sorry I
2	was just going to say I don't know who you're
3	including in everybody here, but it says
4	"prohibited." And just as I mean, if you had
5	under Texas law, you can have bingo games
6	sort of, what, up to \$100 at stake, okay, and
7	then what what's happening is the tribe is
8	having bingo games up to \$1,000.
9	Now, if you told somebody that, that
10	they have games up to \$1,000, it would be
11	perfectly natural for that person to say, well,
12	that's prohibited because there's a \$100 cap.
13	MR. MARTIN: Your Honor
14	CHIEF JUSTICE ROBERTS: And you would
15	tell me that, no, you would say they would be
16	able to, you know, gam have the bingo games
17	up to \$1,000.
18	MR. MARTIN: Your Honor, those are the
19	exact type of restrictions that this Court
20	analyzed in Cabazon and determined to be
21	regulatory. And we believe that that's the
22	exact same application that Congress was
23	JUSTICE KAGAN: Well, suppose that
24	that's right, Mr. Martin, but I think what the
25	Chief Justice is suggesting is that it's not the

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1 normal term -- use of the term "prohibited." 2 What you're really relying on is the idea that 3 Cabazon turns this language into a kind of term of art and that Congress was aware of that and 4 that when Congress used the word "prohibited" it 5 6 was incorporating this distinction that had been 7 made in Cabazon. And let's say that your 8 argument really does depend on that. It's not 9 the normal use of the word "prohibited." It's a Cabazon use of the word "prohibited." 10 11 So then the question is, what's your best evidence that this Court -- that the --12 13 that Congress, when it passed this statute, 14 really did have Cabazon in mind rather than was 15 using the normal use of the word "prohibited"? 16 MR. MARTIN: Your Honor, first of all, 17 I -- I think that under Williams versus Taylor, we certainly can assume that Congress was taking 18 19 language from one of this Court's opinions and incorporating it, especially in the exact same 20 21 context of Indian gaming, and that they knew 2.2 what it meant. 23 The second aspect on how I would 24 answer your question, Your Honor, is that under 25 107(a), we set up the prohibited structure and

1 then, in 107(b), we set up the restriction on 2 Texas's regulation. And I think that that 3 clearly evidences --4 JUSTICE KAGAN: I don't really see 5 107(b) as doing that. I mean, if I look at 6 107(b), it seems to me like much more of kind of 7 the mirror image or flip side of 107(c) that says, you know, the federal courts have 8 9 jurisdiction in -- in 107(c), and in 107(b), it 10 says the state courts don't have jurisdiction. 11 Why shouldn't -- so, on -- on that 12 reading, 107(b) doesn't really help you, does 13 it? 14 MR. MARTIN: I -- I think 107(b) helps 15 us greatly, Your Honor, and I think that's the 16 issue that we had with the Fifth Circuit's 17 opinion. 18 Regulatory jurisdiction within 107(b) 19 is hearkening back to the -- the broader term of the state's inability to tax, regulate, license. 20 21 It's the Bryan versus Itasca County test. They 2.2 don't have that regulatory authority. 23 Whereas, in 107(c), in the title 24 alone, it says jurisdiction over enforcement. Ι 25 don't think that you can combine -- and this is

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1 where I -- I respectfully disagree with -- with 2 my friends from the State of Texas. I don't think you can combine 107(b) to say that's 3 enforcement. I think that's confusing 4 jurisdiction with enforcement. 5 6 JUSTICE KAGAN: Could -- could we go 7 back to the first way you answered the question? 8 Because your first sentence was something like, 9 you know, we presume that Congress knows about 10 the law. And, you know, sometimes we do, and 11 then again, sometimes we don't. 12 Do -- do you have a view of -- of --13 of when we should make that presumption and why 14 this case fits within that sphere? 15 MR. MARTIN: I -- my view, Your Honor, 16 would be that if Congress is using the exact 17 same language, such as the use of the word 18 "prohibit," you can then dictate that, whether 19 you call it a term of art or using the same term 20 in the exact same context --21 JUSTICE BARRETT: Counsel, "prohibit," 2.2 though, how many times does "prohibit" appear in 23 the Code, and -- and, you know, one of the 24 briefs counted how many times. I mean, it's not a term of art in that sense, right? 25

1 MR. MARTIN: But -- it is a term of 2 art, Your Honor, when it's six months after 3 Cabazon and you're talking about Indian gaming. That -- that would be the distinction I would 4 5 make. I believe that the cite that they gave 6 7 you, and that was the State of Texas's brief, it talked about it appearing 8,800 times. 8 9 JUSTICE ALITO: But what would they have -- what -- if you were in Congress and you 10 11 were aware of Cabazon and you wanted to use 12 "prohibited" in the normal sense of the word and you said, well, I'm afraid that if I use this 13 14 word "prohibited," people are going to think it 15 has the Cabazon meaning, what would you have --16 how would you have written this? 17 MR. MARTIN: Well, Your Honor, I -- if 18 I -- I would answer it by saying I think that we're talking just about "prohibited" and the 19 20 use of the word "prohibited." We also need to see what it modifies, which is "prohibited 21 2.2 gaming activities," because that was another 23 change --JUSTICE ALITO: Well, maybe what --24 25 what --

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1 MR. MARTIN: -- that affected Cabazon. 2 JUSTICE ALITO: -- what synonym would 3 you have used? All gaming activities which are what? I better say forbidden, I shouldn't say 4 prohibited? Is that the argument? 5 6 MR. MARTIN: I -- Your Honor, my 7 submission would be that by using the word "prohibited" in 107(a) and then using no 8 regulatory jurisdiction in 107(b), that it was 9 10 clear that they were intending to implicate 11 Cabazon. 12 JUSTICE BARRETT: So do you lose 13 without Cabazon? 14 MR. MARTIN: No, Your Honor, I don't 15 think you lose without Cabazon. 16 JUSTICE BARRETT: So, if you take 17 Cabazon out and were just looking at the 18 ordinary meanings of these words, "prohibited" 19 and "regulatory jurisdiction," you think you still win? 20 21 MR. MARTIN: Your Honor, to prohibit 22 under the ordinary meaning is to forbid. Bingo is not forbidden --23 24 JUSTICE SOTOMAYOR: Counsel --25 MR. MARTIN: -- in the State of Texas.

1 JUSTICE SOTOMAYOR: -- counsel, why 2 are you relying just on Cabazon? Bryan, in 3 1976, used the dichotomy of prohibited versus 4 regulatory, correct? 5 MR. MARTIN: Yes, Your Honor. 6 JUSTICE SOTOMAYOR: And said, in the 7 Indian context, regulatory doesn't mean prohibited, correct? 8 9 MR. MARTIN: Absolutely. Yes, Your 10 Honor. 11 JUSTICE SOTOMAYOR: So you're not 12 talking about six months before. You're talking 13 about 10 years before. 14 MR. MARTIN: Yes, Your Honor. Cert --15 JUSTICE SOTOMAYOR: And, secondly, why 16 are you not pointing to the examples of 17 legislation passed on the same day as the 18 Restoration Act? The Winnepaug passed the very same day 19 20 and it used regulations, those laws and regulations which prohibit or regulate. 21 The 22 Seminole, also passed in 1987, also talked about prohibiting and regulating. Correct? 23 24 MR. MARTIN: Yes. Yes, Your Honor. 25 When Congress wants to use the word

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1 "regulations" in this context, it certainly --2 it certainly knows how to. JUSTICE ALITO: Well, Mr. Martin --3 MR. MARTIN: It was the --4 JUSTICE SOTOMAYOR: It showed you it 5 did. 6 7 MR. MARTIN: Yes, Your Honor. JUSTICE GORSUCH: Counsel, could I 8 9 just ask, if you were to prevail, would Indian 10 gaming be completely free for all, or would 11 there still be -- would the Pueblos still be 12 subject to IGRA? 13 MR. MARTIN: We believe that the 14 proper reading of the Restoration Act is that 15 the Pueblo would still be subject to IGRA. It's 16 one of the other issues we have with --17 JUSTICE GORSUCH: And so what --18 MR. MARTIN: -- the official --19 JUSTICE GORSUCH: -- what's the upshot 20 of that? As I -- as I understand it, bingo may be allowed, for example, but blackjack wouldn't. 21 2.2 Is that -- is that -- is that about right? 23 Class III gaming would still be forbidden? 24 MR. MARTIN: In a general sense, yes, 25 Your Honor, Class III would still be subject to

1 either a negotiation of a compact with the 2 state, or they would only be allowed to engage 3 in Class II gaming under IGRA supervised by the 4 NIGC. JUSTICE GORSUCH: Okay. And then one 5 6 more quick question for you. I -- I -- I 7 understand that there's an Ex parte Young possibility of -- of jurisdiction here against 8 the governor of the tribe. But is the tribe 9 10 itself waiving sovereign immunity? Is it before 11 us? 12 MR. MARTIN: I don't believe that that 13 issue is before you, Your Honor, and I'm hesitant to waive sovereign immunity when that 14 15 issue hasn't been briefed. 16 JUSTICE GORSUCH: Well, I'm not asking 17 you to waive sovereign immunity at -- at -- at the podium. That would be a bit much. 18 19 (Laughter.) 20 MR. MARTIN: Okay. 21 JUSTICE GORSUCH: So -- so it's safe 22 to say we're here proceeding just against the 23 governors, is -- is that -- is that right? 24 MR. MARTIN: I believe that's right, 25 Your Honor.

1 JUSTICE GORSUCH: Thank you. 2 Appreciate it. 3 JUSTICE SOTOMAYOR: Can I go to that question, follow up on it? There seems to be a 4 dispute whether this type of bingo by machine is 5 the same as the bingo we know, people in a room 6 7 calling out numbers. You dispute that. You say it's the 8 But assuming that there's -- and I do --9 same. 10 that there's a genuine dispute on that issue, 11 that still would be subject to federal 12 jurisdiction, a court would then decide below whether this type of slot machine is actually 13 14 bingo, correct? 15 MR. MARTIN: Well, Your Honor, first, 16 you know, we would obviously dispute that it's a 17 slot machine. But, if Texas continued -- if 18 this Court remands it back down to the trial 19 court for a finding, Texas brought -- continued its action under 107(c) for an injunction, the 20 21 federal trial court would determine whether or 2.2 not it was a prohibited gaming activity under 23 Section 107(a). 24 And I'm trying to be very careful and 25 precise with my words here. Whether or not

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1 that's bingo, whether or not that's not bingo, I 2 think that there's a number of factors that 3 would factor into the consideration by the trial court, but that would be under the federal 4 court's jurisdiction. 5 6 JUSTICE KAGAN: Mr. Martin, could I 7 take you back to Justice Gorsuch's question about IGRA? If -- if you prevail, the tribe is 8 9 regulated under IGRA. 10 I take it 107(c) would still separate 11 out Texas from other states, is that correct --12 MR. MARTIN: To a certain extent --JUSTICE KAGAN: -- in your view? 13 14 MR. MARTIN: -- yes, Your Honor. The 15 third sentence of 107(c), it -- it has a very 16 interesting construction. It's not -- you can't 17 read it as an affirmative grant of an injunctive 18 relief. 19 It says "nothing herein shall preclude 20 the State of Texas from bringing an injunction," 21 almost suggesting that there -- if there was a 2.2 preexisting right from the State of Texas to 23 have that injunction, that they would still have 24 it. I'm not opining on that, but I'm saying 25 that that would still exist.

1	And to the extent that it was read as
2	an affirmative grant or an additional remedy,
3	that the State of Texas would still have that
4	under the Restoration Act.
5	JUSTICE KAGAN: But I guess what I was
6	asking about is it would still be true that
7	Texas or is this wrong that that
8	that that the that the when 107(c)
9	gives jurisdiction to the federal courts, is
10	that different from the scheme that prevails in
11	IGRA?
12	MR. MARTIN: No, Your Honor. We don't
13	
14	JUSTICE KAGAN: That's the same?
15	MR. MARTIN: Yes, Your Honor.
16	JUSTICE KAGAN: So, really, it's
17	entirely IGRA. I mean, there's no sense in
18	which Texas comes out worse?
19	MR. MARTIN: We certainly believe
20	there is no sense in which Texas comes out
21	worse, Your Honor.
22	CHIEF JUSTICE ROBERTS: Counsel, just
23	one last question from me, and I I'm sure
24	it's not relevant, but I like Justice
25	Sotomayor, I'm pretty curious. You walk in,

1	this thing looks like a slot machine, right?
2	MR. MARTIN: No, Your Honor. I mean
3	
4	CHIEF JUSTICE ROBERTS: No?
5	MR. MARTIN: I would actually
б	dispute that. I think the State of Texas thinks
7	it looks like a slot machine. And I certainly
8	there's been testimony that they think it
9	looks like a slot machine. I could I could
10	tell you the difference
11	CHIEF JUSTICE ROBERTS: What would
12	what what would you say it looks like?
13	MR. MARTIN: I would say it looks like
14	an electronic bingo machine that has a bingo
15	card or
16	CHIEF JUSTICE ROBERTS: What makes it
17	look like a bingo machine?
18	(Laughter.)
19	MR. MARTIN: Well, there's a let
20	let me try to
21	CHIEF JUSTICE ROBERTS: There's a name
22	on it that says bingo?
23	MR. MARTIN: Well, there's actually a
24	card and you can actually switch the cards by
25	pushing a button to change the cards that you're

1 playing. Now are there reels and lights that 2 look -- that would characterize --3 CHIEF JUSTICE ROBERTS: And are there 4 people --5 MR. MARTIN: -- that would fall in 6 that characterization, yes. 7 CHIEF JUSTICE ROBERTS: -- calling out numbers and people -- somebody saying, you know, 8 B-12 or --9 10 MR. MARTIN: There -- there, in fact, 11 is part of our operations, Your Honor, of my 12 tribe's operations is live-called bingo and it's also one of the things that the State of Texas 13 14 has complained about. 15 CHIEF JUSTICE ROBERTS: But that's 16 something different than the slot -- slot 17 machine bingo, right? 18 MR. MARTIN: It is different than the electronic machines, Your Honor, but they've 19 20 complained about all of it. 21 CHIEF JUSTICE ROBERTS: Okay. Thank 22 you. I'm sorry. 23 Justice Thomas? 24 JUSTICE THOMAS: Just one 25 clarification. Who can operate -- under Texas's

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1	law, who can conduct a bingo game legally?
2	MR. MARTIN: The Texas Bingo Enabling
3	Act, as you're referencing, it's specific
4	charitable organizations, Your Honor, that are
5	that are set forth in that regulatory scheme.
6	JUSTICE THOMAS: So why is this not
7	prohibited if it's not a charitable
8	organization?
9	MR. MARTIN: Because, if the games
10	under under not just the Restoration Act but
11	also under IGRA and under the cases that come
12	out of IGRA, if it's allowed to anyone for any
13	purpose, then it's not a prohibited gaming
14	activity. And that's specifically under IGRA,
15	Your Honor.
16	JUSTICE THOMAS: Thank you.
17	CHIEF JUSTICE ROBERTS: Justice
18	Breyer?
19	JUSTICE BREYER: I'm curious about the
20	bingo machines. If if suppose that IGRA
21	applied, and suppose that Texas had a law which
22	said you can play bingo up to the one the
23	Chief gave, up to \$1,000, but not for more than
24	1,000. That's a crime.
25	Well, IGRA says seems like the same

1 problem. It -- it -- it says you have to 2 have -- I guess gaming activity on Indian lands 3 is okay if the -- if you have a compact or under 4 III, I guess, or something, if -- if the gaming 5 activity is conducted within a state, which does not as a matter of criminal law and public 6 7 policy prohibit the gaming activity. All right. So isn't it the same 8 9 problem? I mean, it says -- because they do 10 prohibit it over \$1,000, but they don't prohibit 11 it under \$1,000, but that you want to call 12 regulation, but IGRA doesn't seem to use the 13 word "regulation." 14 MR. MARTIN: Well, Your Honor, it's --15 it's not the same problem, and the --16 JUSTICE BREYER: It's not? 17 MR. MARTIN: It's not, because IGRA 18 actually incorporates that Cabazon prohibited 19 regulatory juris- -- distinction. 20 JUSTICE BREYER: Yes. 21 MR. MARTIN: And that distinction is 22 actually critical to the hypothetical that you 23 posed. JUSTICE BREYER: Right, right, right. 24 25 I understand that. So I didn't understand that

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1 IGRA incorporated it, but I guess it doesn't 2 incorporate it in the language I just read you. 3 So where does it incorporate it? 4 MR. MARTIN: Your Honor, IGRA would be 5 incorporated -- or, I'm sorry, Cabazon would be incorporated into IGRA under 2701(5) and 6 7 2710(b)(1)(A). 8 JUSTICE BREYER: 2710(b)(1)(A), okay. 9 MR. MARTIN: And 2701(5), Your Honor. 10 JUSTICE BREYER: Yeah, but that -that's what I read you, 2701(5). 11 12 MR. MARTIN: Right. And there's 20 --13 JUSTICE BREYER: It didn't say 14 regulatory. 15 MR. MARTIN: Right. Well --16 JUSTICE BREYER: It said prohibited. 17 MR. MARTIN: -- I think, if you read 18 those statutes, our submission would be that that's where IGRA specifically incorporates the 19 20 Cabazon prohibited framework. 21 JUSTICE BREYER: Okay. Okay. 2.2 CHIEF JUSTICE ROBERTS: Justice Alito? 23 JUSTICE ALITO: Well, I'm puzzled by 24 both your argument and by Cabazon and, in 25 particular, by how a court is going to decide

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1 whether these machines, which I don't have a 2 very clear picture of in my mind, are bingo or 3 not bingo. 4 If they are not bingo, they're 5 something else. Let's say they're dingo. 6 (Laughter.) 7 JUSTICE ALITO: And Texas prohibits 8 dingo, then you can't have them, right? 9 MR. MARTIN: If Texas prohibited --10 JUSTICE ALITO: Yeah. Under no --11 MR. MARTIN: -- dingo --12 JUSTICE ALITO: -- circumstances can 13 you have a dingo machine. MR. MARTIN: If it was a criminal 14 15 prohibition against dingo, you would be correct, 16 Your Honor. 17 JUSTICE ALITO: Okay. And how do you 18 decide whether this thing is bingo? I mean, 19 just like the platonic ideal of bingo? 20 MR. MARTIN: Your Honor, I -- I think 21 that you don't have to decide the -- this Court 2.2 _ _ 23 JUSTICE ALITO: No, we don't have to 24 25 MR. MARTIN: -- does not have to --

JUSTICE ALITO: -- but somebody does.

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2 MR. MARTIN: -- decide the platonic 3 ideal --JUSTICE ALITO: But how is the person 4 who has to decide this going to decide whether 5 6 this thing that's not exactly -- it's not the 7 kind of bingo, you know, that you expect people to be playing in church or at the Elks. It's 8 9 something different. How do you decide whether 10 that's bingo? 11 MR. MARTIN: Understood, Your Honor. 12 I think let's -- and let's take the hypothetical 13 that this gets remanded down through to the 14 trial court to make that factual determination. 15 I think that court would take into 16 account a number of things. It would take into 17 account the definition of bingo that Texas has under the Texas Bingo Enabling Act, which 18 19 actually helps us. It would take into account 20 what IGRA considers to be bingo under 2701 and 2710. It would take into account the expert 21 2.2 testimony, much like it did in the contempt 23 hearing below. 24 And I would point out to Your Honor, 25 and this is what -- what I think --

1	JUSTICE ALITO: There are experts who
2	they they they are experts on on the
3	identification of the you put something
4	before these experts and they can say that's
5	bingo, no, that's not bingo? There are people
6	who can be qualified as experts on that?
7	MR. MARTIN: The answer to the
8	question that question is yes, Your Honor,
9	there are.
10	JUSTICE BREYER: Did you ask my
11	grandmother? She was
12	(Laughter.)
13	MR. MARTIN: My my own mother has
14	asked me questions about those very issues, Your
15	Honor. But there are experts, in fact, that
16	talk about whether or not something has a random
17	number generator or not, whether or not the math
18	makes it bingo, whether or not the evidence of
19	the pattern makes it bingo. All of those things
20	are taken into account.
21	All of those same things, Your Honor,
22	are taken into account by the NIGC. You know,
23	the Kickapoo Tribe, which is the only other out
24	of these the three federally recognized
25	tribes in the State of Texas, one of them gets

1 to engage under the NIGC under IGRA and then the 2 two that are controlled by the Restoration Act don't because Ysleta I misread the statute and 3 read 107(b) out of it and talked about it being 4 fed -- a surrogate federal law and that all of 5 6 Texas's laws and regulations are surrogate 7 federal law. We would submit, Your Honor, you can't 8 9 read the Restoration Act that way. It's not the 10 proper way to read it out of --11 JUSTICE ALITO: Can I ask you one --12 one final question? Because I -- I am -- the -this -- the Cabazon Band is more subtle than my 13 14 mind is able to grasp. 15 Do you think that the sale of opioids 16 without a prescription is prohibited, or is it 17 merely regulated? 18 MR. MARTIN: Your Honor, I -- when I 19 would reference Cabazon Band for Restoration Act -- I -- I don't have an opinion on the -- on 20 21 your question, and I want to be very honest with 2.2 you about that because I want to be responsive, 23 but, when you're talking about the Indian gaming 24 context, that is where Cabazon lies. That's 25 where this gauntlet is thrown. And that's what

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1 Congress was responding to in 1986 when it 2 drafted the Restoration Act. 3 CHIEF JUSTICE ROBERTS: Justice 4 Sotomayor? Justice Kagan? 5 6 JUSTICE KAGAN: You know, Mr. Martin, 7 I guess just following up on what Justice Alito talked about, this Cabazon distinction presents 8 9 a wealth of sort of complicated and, quite 10 frankly, weird questions. 11 And the slot machine would just be one 12 of like a thousand of them. I mean, it just --Cabazon tells us to make a distinction about --13 14 between "prohibition" and "regulation" when most 15 of regulation prohibits certain things. 16 And then you're stuck in the middle of 17 trying to figure out what's a prohibition and 18 what's a regulation. But I -- I -- I guess it's 19 like, well, Cabazon is there, it's not unique to 20 the question of slot machines. 21 I mean, how should we figure in any --2.2 any discomfort about Cabazon and the distinction 23 that it makes itself? MR. MARTIN: I think the distinction 24 25 _ _

1	JUSTICE KAGAN: Because I guess I
2	would have thought that your answer to Justice
3	Alito was like: Welcome to the world of
4	Cabazon. Sorry. You know? And and that's
5	it. And it wouldn't really depend on at all
6	on whether there were experts about slot
7	machines. So so that's sort of random
8	thoughts, but, I mean, this is just the world of
9	Cabazon and how do we take that into account?
10	MR. MARTIN: Well, if I may, Your
11	Honor
12	(Laughter.)
13	MR. MARTIN: I think the
14	distinction here and the difference between the
15	opioid
16	JUSTICE KAGAN: It wasn't that funny.
17	(Laughter.)
18	MR. MARTIN: the the opioid
19	questions or the other questions that you could
20	ask along those same lines, which are fair
21	questions, but the difference is the sovereignty
22	aspect of it.
23	You're talking about sovereign tribes
24	and Congress being the only one that has the
25	plenary power to decide certain aspects of it.

1 2 3 have the tribes do this in terms of their self-sufficiency. 4

So I think the sovereignty aspect of 5 it shouldn't be and can't be overlooked because 6 7 that's where 107(b) comes in. That's where the resolution is answered, right? The tribe was 8 9 willing to give up a certain amount of gaming activities in order to not have Texas state law 10 11 apply directly and not be subject to its resolu-12 -- regulation. Congress ultimately decided not to accept their offer and to give them less 13 14 restrictions than they could have in response to 15 Cabazon.

16 So I think all of those fits as a 17 piece, and it is also why, you know, you could talk about the -- the opioid hypothetical, you 18 19 could talk about other hypotheticals along those 20 same lines, but this concept of the sovereignty and the tribe's ability to engage in gaming 21 2.2 activities I do think is a different story. 23 It's not just here's Cabazon, live 24 with it, right? And as you put it, Your Honor, and much more succinctly than I have in a month 25

If you remember in Cabazon, it talked about the fact that Congress made the decision to help --

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1	of prepping for this, it's not just that. It's
2	more there are questions of the sovereignty
3	aspects of it and the regulatory aspects of it,
4	the Public Law 280 aspects of it that I think
5	Congress was answering when it wrote the
6	Restoration Act in response to Cabazon.
7	CHIEF JUSTICE ROBERTS: Justice
8	Gorsuch?
9	Justice Kavanaugh?
10	Justice Barrett?
11	Thank you, counsel.
12	JUSTICE BARRETT: Oh, oh, sorry, I did
13	have a question.
14	CHIEF JUSTICE ROBERTS: Oh, I'm sorry.
15	JUSTICE BARRETT: No, that's okay.
16	CHIEF JUSTICE ROBERTS: You're far
17	away.
18	JUSTICE BARRETT: I'd like to give you
19	a chance, counsel, to respond to the argument
20	that 105(f) I mean, we're talking a lot about
21	Cabazon, and 105(f) essentially imports the
22	Cabazon framework itself into the Restoration
23	Act. So, if this isn't surrogate law, surrogate
24	federal law under the Restoration Act, and we
25	have 105(f) importing the Cabazon framework

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1	directly in, why isn't it then redundant to
2	interpret the Restoration Act as you do?
3	MR. MARTIN: The 105(f) certainly
4	incorporates the Public Law 280 construct, and
5	and there's, I don't think, any way to
б	dispute that, nor would we want to. 107(a) and
7	what it does differently, Your Honor, than what
8	105(f) does is it federalizes Texas law as to
9	prohibited games.
10	I think where the Fifth Circuit went
11	wrong in talking about surrogate federal law was
12	it extended it out to laws and regulations of
13	the State of Texas over all gaming activities.
14	That's not what 107 says. So I think that's one
15	of the differences between 105(f) and 107.
16	The second difference that I would
17	point out to Your Honor is 107(c), which sets up
18	a different enforce enforcement mechanism
19	than what would have existed had just 105(f)
20	been imported and 107 didn't exist.
21	JUSTICE BARRETT: So you agree that
22	sorry. You agree that the Restoration Act
23	establishes Texas law as surrogate federal law;
24	you're saying that it only does that, however,
25	with respect to prohibitions?

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1
               MR. MARTIN: To pro -- I'm actually
 2
      saying it does that with respect to prohibited
 3
     gaming activity.
 4
                JUSTICE BARRETT: Right. Thing that
 5
     are prohibited --
               MR. MARTIN: That's what the text
 6
7
      says.
                JUSTICE BARRETT: -- not those that
8
9
     are regulated.
10
               MR. MARTIN: Yes, Your Honor. So the
11
      _ _
12
                JUSTICE BARRETT: So the only
13
     difference between Cabazon under Section 280 and
     -- or Public Law 280 and the Restoration Act is
14
15
      simply this enforcement mechanism?
16
               MR. MARTIN: It's the enforcement
17
     mechanism and then it is -- it is stating what
18
      laws are federal -- what state laws are
19
     federalized for the Restoration Act.
20
               JUSTICE BARRETT: Okay.
21
               CHIEF JUSTICE ROBERTS: Thank you,
22
      counsel.
23
               Mr. Yang.
24
25
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1	ORAL ARGUMENT OF ANTHONY A. YANG
2	FOR THE UNITED STATES, AS AMICUS CURIAE,
3	SUPPORTING THE PETITIONERS
4	MR. YANG: Mr. Chief Justice, and may
5	it please the Court:
б	Just six months after this Court drew
7	the distinction in Cabazon under Public Law 280
8	between gaming activity that is prohibited
9	versus gaming activity that is regulated by
10	state law, Congress enacted Section 107,
11	mirroring that language to draw the same
12	distinction in the exact same Indian gaming
13	context.
14	Section 107(a) forbids a tribe from
15	engaging in gaming activities that are
16	prohibited under Texas law, and Section 107(b)
17	further provides that Section 107(a) does not
18	grant the state civil or criminal regulatory
19	jurisdiction.
20	Texas has conceded in this Court that
21	Section 107(b) restates the limits of Public Law
22	280. Those limits draw directly from Cabazon,
23	they limit state regulatory jurisdiction, and
24	they make clear that Section 107 adopts the
25	Cabazon framework.

1	The Fifth Circuit's contrary view
2	erroneously relies on legislative history and
3	text that Congress once excluded but then
4	removed from the legislation. This Court should
5	correct that error.
б	JUSTICE THOMAS: Mr. Yang, what's the
7	difference between "prohibited" and "regulated"?
8	MR. YANG: Something that is
9	prohibited is prohibited outright. And the
10	focus, again, is
11	JUSTICE THOMAS: Okay. So a statute a
12	or rule or regulation says all patrons under
13	the age of 21 are prohibited.
14	MR. YANG: Right. That
15	JUSTICE THOMAS: Is that a regulation,
16	or is that a prohibition?
17	MR. YANG: That could be a prohibition
18	but but, here, not in this context. The
19	statute focuses on gaming activities that are
20	prohibited. The gaming activity would not be
21	prohibited in that context. That is a method of
22	conducting the gaming activity with people under
23	the age of 21.
24	This is exactly the distinction that
25	Congress that this Court in Cabazon drew.

1 And I would remind -- I would point to Williams 2 versus Taylor, which -- a unanimous decision of 3 this Court which said that when a later statute on the same subject matter uses words of a prior 4 Supreme Court opinion, those words are given the 5 same meaning unless there's a specific --6 7 specific direction to the contrary. And the word there was "failed." 8 Ιt wasn't -- "failed" can have a lot of different 9 meanings in a lot of different contexts. 10 11 JUSTICE THOMAS: But -- but let me --12 you know, the -- I understand. But going back 13 to what you just said, that if the activity is 14 regulated -- basically, what I'm hearing you say 15 is that if it's permitted in any context, then 16 it's permitted. 17 MR. YANG: That's --18 JUSTICE THOMAS: So the -- the mere 19 fact that bingo is permitted to -- for the 20 churches and the military -- the veterans organizations means it is not prohibited? 21 2.2 MR. YANG: That's right, and when 23 Congress took up IGRA shortly thereafter, the 24 same Congress, Congress adopted the same Cabazon 25 distinction that is embodied in the -- the

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1 provisions you were -- you were just discussing 2 with my friend. The State -- and it does use the term 3 4 "regulation." It allows Indians -- tribes to regulate games that the state does not, as a 5 6 matter of criminal law and public policy, 7 prohibit, such gaming activity, again, drawing on the prohibitory/regulatory distinction in 8 Cabazon. And then it brings -- it 9 10 operationalizes it in 2710(b) and (d) if the 11 state permits such gaming by any person by --12 for any purpose. 13 CHIEF JUSTICE ROBERTS: Mr. Yang --14 MR. YANG: That -- that's the whole 15 standard that it governs the entire United 16 States with respect to activities on tribal 17 lands, except these two tribes under the Fifth 18 Circuit's reading. 19 CHIEF JUSTICE ROBERTS: Mr. Yang, I 20 think your office is going to be very busy over 21 the next 10 years explaining why the word "prohibited," in 18 U.S.C. whatever, still 2.2 23 covers, you know, activities, possession of 24 whatever, even though it's permitted at some 25 level, right?

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1 I mean, it's prohibited to possess a 2 certain amount of whatever, but, you know, at --3 at a level of personal use or medical whatever, it's okay, then you can't prohibit it at all. 4 MR. YANG: We -- we aren't concerned 5 6 about that because, with respect to this 7 distinction -- let me take a step back. This distinction exists in Public Law 280. It's done 8 9 so for a long time. Cabazon was 35 years ago. 10 Public -- Cabazon applied a 11 distinction in Bryan. Bryan understood that 12 there's an important principle at stake here. 13 You need to preserve tribal sovereignty and 14 tribal government and that if you allow state 15 regulatory power on tribal lands, you would 16 destroy tribal sovereignty. That principle in 17 Bryan was extended in Cabazon specifically to 18 the gaming context, where the Court drew this 19 prohibitory/regulatory distinction. 20 We don't think this is a problem with respect to all of 18 U.S. Code -- C because, 21 2.2 when you're interpreting a -- a statute like 23 this, particularly a statute enacted directly on 24 the heels of a Supreme Court decision on the 25 same subject matter using the same language,

1 what you look to is not some general 2 understanding of the word "prohibit;" you look to the way that this Court has used the term 3 4 "prohibit." JUSTICE GORSUCH: Mr. Yang, just to 5 6 follow up on the Chief Justice's point, I -- I 7 -- I take your argument that this is a unique 8 context and -- and we have to read the language in that context. 9 10 But Texas -- Texas argues even in this 11 context, the difference between "prohibition" 12 and "regulation" is just unworkable. It's 13 almost an argument perhaps for overruling 14 Cabazon. 15 I'd -- I'd like your thoughts about 16 whether this distinction remains workable in 17 this context. Forget about the others. 18 MR. YANG: We think it works in this 19 context because it is working under IGRA. This 20 is exactly what goes on under IGRA. 21 If the Court were to agree with our 2.2 submission and that of the tribe, then the NIGC 23 would get to determine whether this is a bingo 24 activity or -- and, in addition, whether it is 25 Class II bingo or potentially Class III bingo,

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1 which would require a compact with the state. 2 JUSTICE GORSUCH: And what would be 3 the negative consequences in the government's view, if any, if we were to elide this 4 distinction, ignore it, overrule Cabazon? 5 MR. YANG: Wow. If the Court -- first 6 7 of all, I don't think that's before the Court. This has been a fundamental distinction that's 8 existed in the law of -- of tribal sovereignty 9 10 and -- and tribal lands for decades upon 11 decades. Again, it goes back before Cabazon. 12 So that's the Public Law 280 context. 13 And then you -- you know, I'm not sure what the Court would do with -- if it was just 14 15 limited to this specific context because 16 Congress has already spoken in IGRA. IGRA 17 exactly parallels this distinction. It's beyond 18 the stage of rethinking now Cabazon. JUSTICE BARRETT: Are --19 MR. YANG: Cabazon is embedded in the 20 law in all kinds of areas. 21 2.2 JUSTICE BARRETT: -- are there 23 problems under IGRA or Public Law 280 in drawing 24 the lines that we've been pressing between 25 "prohibit" and "regulate"?

1	MR. YANG: You know, there may be some
2	close cases, but as in the mine run of cases,
3	we've not seen a a huge wellspring of
4	problems. Again, this has existed since Bryan
5	and since Cabazon 35 years ago, and, again, IGRA
6	has existed for a long time. There are similar
7	
8	JUSTICE BREYER: But if we were
9	JUSTICE GORSUCH: So so, if I
10	JUSTICE BREYER: is it because they
11	
12	JUSTICE GORSUCH: if I understand
13	correctly I'm I'm I'm I just want to
14	I'm please go ahead.
15	JUSTICE BREYER: No. No. Go ahead.
16	JUSTICE GORSUCH: I just wanted to
17	follow up real quick. So, in the government's
18	view, if we were to eliminate the distinction
19	between "regulate" and "prohibit" in in in
20	the Restoration Act, we would all also wind
21	up inevitably doing so in IGRA and that that
22	would have more negative consequences than
23	positive ones. Is is that is that
24	summarizing your view?
25	MR. YANG: I'm not sure how the Court

1 -- I mean, there's -- there's statutory text in 2 IGRA. I'm not sure what the Court's decision 3 would mean for IGRA. It certainly would mean a huge change in the law in terms of governing 4 Public Law 280, which is one of the fundamental 5 6 statutes governing Indian lands. 7 So I would caution the Court not to be overly ambitious here. This case does not 8 9 involve a question of rethinking Cabazon. The 10 ultimate question presented is whether Congress, 11 in enacting the -- the Restoration Act, was 12 adopting the Cabazon framework or instead was 13 applying all of Texas law governing gaming. 14 JUSTICE GORSUCH: Thank you. 15 I'm sorry, Justice Breyer. 16 JUSTICE BREYER: Is the reason that 17 this is not a problem that when it comes up, it's normally a question of where or when or 18 19 under what circumstances can you play this game? 20 But it's not normally a question of how do you 21 play because, if it were how do you play, you 2.2 would have trouble saying, you know, is it bingo 23 or is it, you know, craps or something? I mean 24 25 MR. YANG: Well --

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JUSTICE BREYER: -- is it -- is it --1 2 but -- but it's the first three which are 3 usually fairly easy to decide. 4 MR. YANG: No. JUSTICE BREYER: Am I right or wrong? 5 MR. YANG: No, actually, I think --6 7 JUSTICE BREYER: Wrong? MR. YANG: -- there is the question of 8 9 whether things do constitute bingo and it arises 10 not infrequently in the context of IGRA. 11 You know, this is not in the QP in 12 terms of is this bingo and we've not briefed it, and so I can give you a thumbnail sketch, but it 13 14 would be difficult, I think, to give you the 15 whole lay of the land here. 16 JUSTICE GORSUCH: I'd love to hear 17 what the difference between bingo and dingo is, 18 so please. 19 MR. YANG: Well, I'd not heard of 20 dingo, but I can tell you that bingo has three 21 primary characteristics. These are actually 2.2 codified in IGRA. Congress has recognized that 23 these are the three primary characteristics. 24 One, you have a card bearing numbers or 25 designators. Two, you cover those numbers when

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1 they are drawn or somehow identified. And you 2 win by covering an arrangement of numbers. This is in 2703(7)(A)(i). This is a 3 kind of understanding of what bingo is. And you 4 would ask, is this bingo, or is it a method of 5 6 conducting bingo when you use a computer? 7 Even Texas, by the way, allows card mining devices, which are these devices where 8 9 you can, instead of tracking five cards, you can track up to 66 cards under state law at one 10 11 time. The problem that the district court found 12 was not that this wasn't bingo; it was that 13 Texas law requires that you not submit -- put 14 the money in the device or get paid out by the 15 device. That was the problem under Texas law. 16 There's a legitimate question whether 17 this would be Class II or Class III bingo under IGRA, but, you know, that's not presented here. 18 19 JUSTICE KAVANAUGH: Mr. Yang, can I 20 ask, to follow up on Justice Gorsuch's and Justice Barrett's questions, assume we don't 21 overrule Cabazon, but if we were to rule for the 2.2 23 State of Texas in this case on this statute, 24 would there be any follow-on implications for 25 other statutes, or is it possible to rule for

1 the State of Texas narrowly in this case without 2 such follow-on implications in your view? 3 MR. YANG: You know, I think it would depend on how the Court wrote the opinion. 4 This is a Texas-specific statute, so it might be 5 6 possible. 7 But I would -- you know, so there are some questions that I'd like to still address. 8 One was about the meaning of 20 -- 107(b). I 9 10 think 107(b) has to be read in conjunction with 11 105(f). 105(f) is a grant of civil and criminal 12 jurisdiction to the state under Public Law 280. 13 When they use jurisdiction there, 14 Justice Kagan, it's not with respect to courts. 15 It's with respect to authority, and the use of 16 that term is generally used -- you know, 17 post-Arbaugh we're trying to get away from using 18 jurisdiction when we don't mean court 19 jurisdiction, but this is before Arbaugh and 20 it's quite common both in legislation and in the 21 Court's decisions. 2.2 Then, if you look at 107(b), it uses 23 that same phrase "civil and criminal jurisdiction" but inserts "regulatory." And 24 25 that was the exact distinction that Cabazon

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2	Remember Cabazon was already writing
3	on top of Bryan, which said there's no crim
4	civil regulatory jurisdiction, and it said just
5	because you add a criminal sanction doesn't
б	convert it to a criminal law that you can
7	enforce under Public Law 280. 107(b) directly
8	draws on that same Cabazon distinction, and it
9	says nothing in Section 107 shall be interpreted
10	to grant that authority, which means 107(a),
11	when it says gaming activities prohibited by
12	state law, does not grant regulatory authority,
13	and that is the second half of the Cabazon
14	framework, prohibited, not regulated.
15	The I think also, you know, IGRA is

16 worth considering here because Congress enacted 17 IGRA, same Congress, and as the Court -- Justice 18 Scalia explained in Branch versus Smith, when you have a similar statute and the same body of 19 20 law, you can look at that to clarify the meaning 21 of another statute because it's within the same 22 body of law. You read it in pari materia. And I don't think there's really any 23 24 dispute that by using the same regulated and

25 prohibit language and the provisions that we've

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1 talked about, which are at page 9 of our brief, 2 that Congress in IGRA was adopting Cabazon, 3 Congress was doing the same thing here. And there's no reason to distinctly disadvantage 4 these tribes where Congress uses the same 5 6 language and establishes a --7 JUSTICE GORSUCH: Well, but, Mr. Yang, doesn't that -- doesn't that answer Justice 8 Kavanaugh's question? If -- if we were to 9 ignore Cabazon here in 107, on what basis could 10 11 you continue to recognize that distinction under 12 IGRA? Wouldn't that be pretty hard? MR. YANG: You know, it's a different 13 14 statute. I think it --15 JUSTICE GORSUCH: That's -- that's the 16 best you got? 17 MR. YANG: -- I think it would be 18 difficult to draw that distinction. It really 19 would. These are same context in the, you know, 20 same Indian gaming context, written by the same 21 Congress in the same general legal world 2.2 post-Cabazon, I think it's hard. 23 You know, this -- our view is you should read Public Law 2 -- excuse me, 24 25 Section 107 the same way that you read IGRA.

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1 And I would like to talk about the tribal 2 resolution. 3 JUSTICE BARRETT: Can I just ask one follow-up to Justice Gorsuch's question? 4 MR. YANG: 5 Sure. 6 JUSTICE BARRETT: But, I mean, the 7 common thread in all of these is Cabazon. So, 8 without Cabazon, it sounds like you're taking a slightly different position than your friend. 9 10 It sounds to me like you're saying Cabazon 11 drives this. Without Cabazon, if we're talking 12 about just the ordinary meaning, then it's a lot harder to make the case for this distinction 13 14 between prohibit --15 MR. YANG: Oh, it -- it's much harder 16 to make the -- that -- the case. You know, you 17 could make the case. It would be a much higher 18 hurdle to cross. 19 I'd like to talk about --20 JUSTICE KAGAN: But -- but I take your 21 view to be saying Cabazon is all over this 2.2 statute. In other words, it's not just saying, 23 oh, look, prohibit, six months ago, Cabazon said 24 something about prohibit. But you're making the 25 case that if you just look at this entire

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1 statute, Cabazon is pretty much all over it? 2 MR. YANG: And Cabazon was always in this -- this -- well, once it existed. Section 3 105(f) has always existed in every piece of 4 legislation going back to 1984. 105(f) existed. 5 6 Congress knew when it was adopting 105(f) which 7 would then incorporate the Public Law 280 framework that that comes with Cabazon. And 8 9 then, with respect specifically to gaming, it's 10 the specific provision rather than the general provision in 105(f). It again uses Cabazon's 11 12 language five minutes later. 13 I'd like to talk about the tribal 14 resolution, but --15 CHIEF JUSTICE ROBERTS: I'll give you 16 a minute. 17 MR. YANG: Okay. So the tribal 18 resolution, you know, when -- in 107(a), 19 Congress's reference there respects the tribe's 20 strong opposition to the direct application of 21 state law. And the text, you know, there's been 2.2 debate about the resolution. The text of the 23 statute cannot be read as applying the -- the 24 final request in the resolution because no one 25 thinks and the text does not allow you to read

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1	107(a) to prohibit all gaming prohibited under
2	Texas law. It's just not what happened.
3	There was also a significant textual
4	change. When Congress first adopted the
5	reference to the tribal resolution, it said
6	pursuant to the tribal resolution this is on
7	page 4 of our brief all gaming is prohibited
8	if it's as defined under Texas law. Cabazon
9	came, Congress retooled 107, and then it said
10	instead of said pursuant to the resolution, it
11	said this is enacted in accordance with the
12	resolution. We think that has some more
13	flexibility, and what it really reflects
14	primarily is the tribe's strong opposition to
15	the direct application of state law. That's why
16	Section 107 is federal law, and that's why
17	federal enforcement generally prevails, with the
18	exception of state enforcement, if the state has
19	a preexisting cause of action that it can assert
20	for an injunction against a tribal officer.
21	CHIEF JUSTICE ROBERTS: Thank you.
22	Justice Thomas?
23	JUSTICE THOMAS: No questions.
24	CHIEF JUSTICE ROBERTS: Justice
25	Breyer, anything further?

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Justice Alito? 1 2 JUSTICE ALITO: Didn't the tribal resolution ask that the statute include 3 4 "language which would provide that all gambling" 5 -- "gaming, gambling, lottery, or bingo, as 6 defined by the laws and administrative 7 regulations of the State of Texas, shall be prohibited on the tribe's reservation or on 8 9 tribal land"? Didn't it say that? 10 MR. YANG: It did, and Congress in 11 response adopted verbatim that language. This 12 is on page 4 of our brief. That was in 1986. 13 And then, when H.R. 318 was introduced in 1987, 14 again, on page 4 of our brief, that exact 15 language was in the bill. 16 JUSTICE ALITO: But that's -- that's 17 18 MR. YANG: But then Cabazon came. 19 JUSTICE ALITO: -- in 1-0 -- that is referenced in 107(a), is it not? 20 21 MR. YANG: Which is? 2.2 JUSTICE ALITO: The language I just 23 read. MR. YANG: 107(a) does not have that 24 25 language. It reference -- it says that 107(a)

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1 is enacted in accordance with the tribal 2 resolution. 3 JUSTICE ALITO: Yeah. Okay. MR. YANG: But the tribal resolution 4 had more -- many things in it, and this is a --5 JUSTICE ALITO: So -- all right. I 6 7 understand. I understand. 8 MR. YANG: Right. And so --9 JUSTICE ALITO: I understand your 10 point. 11 MR. YANG: Yeah. Okay. 12 JUSTICE ALITO: I understand your 13 point. 14 One other question. You refer to the 15 Indian canon. Those who favor the 16 interpretation of statutes to mean what the 17 words of the statute are generally understood to 18 mean have some question about some of these 19 substantive canons. Now some of them, like the Rule of 20 Lenity, have a long history. What do you think 21 is the basis for this Indian canon? 2.2 23 MR. YANG: Well, it has a long history 24 in this Court's jurisprudence, and I think it 25 recognizes the special role that -- and our

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1 relationship historically with Indian tribes. 2 Now I don't think you actually need 3 the Indian canon. We didn't make a big deal out of it in our brief. It's certainly part of the 4 Court's jurisprudence that if there -- if you 5 6 find this ambiguous, that you should tip the 7 scale. 8 But we think this is pretty -- a 9 pretty clear-cut case of Congress six months 10 after Cabazon adopting the language of Cabazon 11 to apply Cabazon's distinction in the same 12 gaming context. JUSTICE ALITO: Well, that doesn't 13 14 really answer my question. What is the origin 15 of this? Is it your -- is it your argument that 16 throughout history Congress has always framed 17 statutes in a way that are favorable to Indian 18 tribes? 19 MR. YANG: I've not -- my research for 20 this case, unfortunately, has not gone that far 21 back. I don't have the original -- no one has 2.2 challenged the Indian canon's existence here, 23 and we've not gone back to -- to form an 24 argument for it, Your Honor. Justice 25 CHIEF JUSTICE ROBERTS:

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1 Sotomayor? 2 JUSTICE SOTOMAYOR: Counsel, the 3 tribal -- 1986 tribal resolution, in my mind, 4 seems to serve a variety of different functions. 5 The first, I think, is that you need 6 Indian approval to have any state law apply on a 7 reservation, correct? MR. YANG: Yeah, I think that's --8 9 that's part. 10 JUSTICE SOTOMAYOR: Generally true. MR. YANG: Yes, and -- but, 11 12 significantly, you know, the tribe didn't want the state to impose its laws directly on the 13 14 tribe. That was --15 JUSTICE SOTOMAYOR: Exactly. 16 MR. YANG: -- that was a very 17 significant issue. 18 JUSTICE SOTOMAYOR: So that's where 19 107(c) is in accordance with the resolution, because they didn't want the state to be able to 20 regulate or have its laws --21 2.2 MR. YANG: Well --23 JUSTICE SOTOMAYOR: -- applied directly, correct? 24 25 MR. YANG: -- I agree with that, but I

also think 107(a) is because 107(a) applies as
federal law certain -- a limited set of state
laws that prohibit, and -- and what that does is
significant. It makes a federal criminal
offense to conduct in prohibited gaming
activities.

JUSTICE SOTOMAYOR: If we read this the way the State wants, presume that they are running a bingo game exactly the way the churches do, okay, is it your view that then the federal court would be open to seeing whether or not they have all the signs that are required by the state, whether they have --

14 MR. YANG: Yeah, that's exactly how 15 things have played out since Ysleta I. And as 16 the district court has -- you know, we -- we --17 we cite these cases in our brief, this has not 18 been a good way of providing a regulatory 19 framework through injunctive actions in federal courts where a federal court has to talk about, 20 21 you know, how many cards can you play and what 2.2 hours can you play and what's -- that's not what 23 Congress would have intended, we think.

24 Congress would have intended to put a25 pretty high bar of prohibition, and then, when

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it enacted IGRA, it goes straight to the NIGC 1 2 and the NIGC, the expert agency, gets to decide 3 these questions. JUSTICE SOTOMAYOR: I guess Texas 4 would say we only permit not-for-profits to 5 6 play. This is not for profit, so they shouldn't 7 be playing at all. Isn't that their argument? MR. YANG: That's, I think, part of 8 9 their argument. And I would say that Cabazon 10 directly addressed that. Cabazon was a 11 provision in California law that only allowed 12 charities to operate bingo and that set a limit 13 of \$250, and the Court said, you know what, that 14 is regulating bingo, it is not prohibiting 15 bingo. 16 JUSTICE SOTOMAYOR: Thank you, 17 counsel. 18 CHIEF JUSTICE ROBERTS: Justice Kagan? 19 JUSTICE KAGAN: I'm about to take you 20 outside the scope of this case, so I apologize 21 beforehand. But Justice Alito raised what to me 2.2 is an interesting question that I've been 23 thinking about a good deal about what these 24 substantive canons of interpretation are and 25 when they exist and when they don't exist.

1	They're all over the place, of course.
2	It's not just the Indian canon. Next week,
3	we're going to be thinking about this supposed
4	major questions canon. There are other canons.
5	I mean, if you go through Justice
6	Scalia's book, you'll find a wealth of canons of
7	this kind, these sort of substantive canons.
8	Some of them help the government. Some of them
9	hurt the government.
10	Is there any way that the government
11	has of coming in and saying, like, how do we
12	reconcile our views of all these different kinds
13	of canons? Maybe we should just toss them all
14	out, you know?
15	MR. YANG: Well
16	JUSTICE KAGAN: I mean, I think kind
17	of we should, honestly. Like, what are we doing
18	here? But is there do you have a view of,
19	like, when these canons are the kind that you're
20	going to talk about in your briefs and when
21	these canons are not the kind that you're going
22	to talk about in your briefs?
23	MR. YANG: Well, I think our briefs
24	generally grapple first with the text, right, as
25	we've done here. And canons, I think, can play

1 an important role in certain contexts. I think, 2 for instance, Bryan recognized that in the 3 Indian tribal sovereignty context, there is a very important principle that kind of underlays 4 the body of the law there. 5 6 You do not want to read statutes to 7 grant state regulatory authority on tribal lands without kind of a clear expression of that. And 8 9 I think that those types of principles reflect a background body of law that one brings when 10 11 reading statutes. 12 So it's true, you know, I think I've 13 seen the Court's decision that, you know, 14 sometimes you get canons that conflict, right, 15 that run in contrary directions. These are aids 16 in interpretation, but we always start with the 17 text. 18 CHIEF JUSTICE ROBERTS: Justice 19 Gorsuch? 20 JUSTICE GORSUCH: The government doesn't waive sovereign immunity lightly. 21 22 That's one of our canons, right? MR. YANG: That -- that's exactly 23 24 right. 25 JUSTICE GORSUCH: And -- and isn't the

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1	Indian canon very similar in its function in
2	saying that we don't lightly assume that
3	Congress is allowed state authorities to
4	regulate an independent sovereign?
5	MR. YANG: I think it's similar.
6	There are different underlying principles behind
7	them, but I think there is a similar spirit to
8	the that thought.
9	CHIEF JUSTICE ROBERTS: Justice
10	Kavanaugh?
11	JUSTICE KAVANAUGH: Just to follow up
12	on Justice Kagan's question because I think
13	that's important, and Justice Alito's as well,
14	on on the Indian canon, I just want to
15	isolate what kind of canon it is, because it
16	seems like our substantive canons fall into two
17	buckets. One bucket are in ambiguity-dependent
18	canons; if a statute's ambiguous, do this.
19	Another bucket of canons are plain statement
20	canons for mens rea, extraterritoriality
21	MR. YANG: Right.
22	JUSTICE KAVANAUGH: and the like.
23	The former category, the ambiguity-dependent,
24	like our deference, Rule of Lenity, and I want
25	to confirm that you think the Indian canon is an

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1 ambiguity-dependent canon as it's been 2 traditionally applied. 3 MR. YANG: I think that's generally true, but there's something else going on here 4 too, which is the -- the principle that Bryan 5 6 recognized. In the specific context when you're 7 talking about the application of -- of state regulatory authority in -- on Indian lands, you 8 9 know, you need to be more cautious. 10 Now, admittedly, this is a federal 11 statute that implied -- that applies federal 12 law, but I think some of the caution that Bryan reflects, I think, should -- should quide the 13 14 Court. 15 JUSTICE KAVANAUGH: So that suggests 16 you need more of a clear statement, and those 17 usually -- those clear statement rules usually 18 reflect some constitutional or 19 quasi-constitutional value, due process, 20 extraterritorial structure, the structure of the 21 country. What would that reflect here, that principle you just described? 2.2 MR. YANG: Well, I think it -- it 23 24 reflects that Indian tribes are sovereign 25 nations, that they have before the founding of

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1	this country. And, you know, the Court's
2	opinion in Bay Mills tracks some of this.
3	So, you know, whatever you think about
4	the canons in general and whether that should
5	be, you know, plain statement, just, you know,
б	tip the balance in ambiguity, the Indian canon,
7	at least when we're talking about tribal
8	sovereignty and the application of state law on
9	tribal lands, that does have a strong pedigree
10	and I think, ultimately, it traces to the fact
11	that these are sovereign nations.
12	JUSTICE KAVANAUGH: Thank you.
13	CHIEF JUSTICE ROBERTS: Justice
14	Barrett?
15	JUSTICE BARRETT: I want to follow up
16	on this canon line of questioning. And I'm
17	sorry, I know you said that you weren't thinking
18	about the canons when you came in here today.
19	It was actually my understanding
20	you know, Justice Kavanaugh pointed out that our
21	substantive canons fall into these clear
22	statement and ambiguity buckets.
23	It was my understanding that the
24	Indian canon was in the ambiguity bucket.
25	MR. YANG: Oh. That that that

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1 is generally true and that's the way that we 2 used it in our -- our brief. But, in this case, 3 because of Cabazon, Cabazon was built on Bryan. 4 Bryan applied a stronger version of 5 the -- it's -- actually kind of a -- a brother 6 doctrine, I guess, or a sister doctrine. 7 JUSTICE BARRETT: Was its debut in 8 Bryan? 9 MR. YANG: No, no. This goes back 10 quite a long ways. This goes to, you know, 11 infringements on tribal sovereignty and the 12 recognition that it's generally only the United 13 States that -- that governs dependent sovereigns 14 like tribes. 15 JUSTICE BARRETT: So it's like a 16 sub-Indian canon canon? 17 MR. YANG: I'm not sure that I'm 18 prepared to put a proper label on it, but I can 19 say that it exists in Bryan, which came through Cabazon, and Bryan itself was -- this is cited 20 21 actually on pages 16 to 17 of our brief. We 22 discuss Bryan and some of the principles 23 underlying Bryan. 24 JUSTICE BARRETT: Okay. Thank you. 25 CHIEF JUSTICE ROBERTS: Thank you,

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1	counsel.
2	MR. YANG: Thank you.
3	CHIEF JUSTICE ROBERTS: Ms. Pettit.
4	ORAL ARGUMENT OF LANORA C. PETTIT
5	ON BEHALF OF THE RESPONDENT
6	MS. PETTIT: Thank you, Mr. Chief
7	Justice, and may it please the Court:
8	In the 1980s, everybody in this case
9	wanted something. The tribe wanted federal
10	recognition and was willing to cede some of its
11	sovereignty. Texas wanted to avoid high-stakes
12	gambling, which it saw as an invitation to
13	organized crime, and was willing to cede some of
14	its jurisdiction.
15	The federal government was split about
16	how to balance these sovereign interests. So
17	every so everyone made concessions, which are
18	embodied in the Restoration Act. The tribe got
19	its recognition and may offer gambling to the
20	same extent as other Texans, but further
21	gambling is banned under federal law.
22	The tribe asks to rewrite this
23	legislative bargain based on Cabazon Band, but
24	it's admitted that Cabazon Band did not address
25	how to interpret a statute that federalizes

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1 state law. Its effort to extend Cabazon Band 2 suffers from three primary faults. 3 First, it ignores that when it comes to gambling, the Restoration Act departs from 4 the Cabazon Band framework by treating both 5 civil and criminal penalties and civil and 6 7 criminal regulatory jurisdiction the same way. Second, it overlooks that the Cabazon 8 Band test was written to avoid a form of state 9 encroachment into tribal affairs that isn't 10 11 possible when a federal court is applying 12 federal law. 13 And, third, it depends on a definition 14 of jurisdiction that disregards the close tie 15 between that term in the 1980s and an 16 adjudicator's ability to decide a case. That's 17 how it's used in Public Law 280, in 18 Section 105(f), and, as Justice Kagan noted, in 19 Section 107(c). 20 Applying that same definition to 21 107(b), regulatory jurisdiction encompasses a 2.2 state administrative agency's ability to 23 exercise oversight through, among other things, reporting requirements, inspections, and 24 25 ultimately enforcement actions, not the state's

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1 larger ability to set substantive limits on 2 qambling. 3 I welcome this Court's questions. JUSTICE THOMAS: Counsel, could you 4 give me an example of a regulatory law or rule 5 that applies -- a gaming -- a regulation of 6 7 gaming laws that applies to tribes that do not fall under 107(a)? 8 9 MS. PETTIT: I'm not --10 JUSTICE THOMAS: I'm sorry, that would 11 be covered -- would not count as a prohibition 12 under 107(a)? 13 MS. PETTIT: To the extent -- so 107 14 -- prohibition, as it's generally understood, 15 means it's unlawful. There is -- a regulation that would apply to somebody who's not the tribe 16 17 that wouldn't be a prohibition would, for 18 example, be that the Texas Lottery Commission 19 can typically get access to passwords so that 20 people -- they can have an ongoing oversight into the way that software functions. 21 2.2 That's a regulation that wouldn't 23 apply to the tribe because it's not a 24 prohibition relating to gaming activity. 25 JUSTICE THOMAS: Now we -- there's

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1 been some discussion as to the -- the difference 2 between prohibition and regulation. 3 Would you comment on that? I mean, you've heard all the arguments. 4 MS. PETTIT: So prohibition in this 5 context and as generally understood can include 6 7 a regulation except for, as Justice Barrett noted a couple of times, Cabazon Band. 8 So the regulation distinction made in 9 Cabazon Band was specific to Public Law 280, 10 11 which was trying to decide the difference 12 between criminal and civil laws, which is a 13 question not presented by the Restoration Act. 14 JUSTICE THOMAS: So there seems to be 15 by counsel a suggestion that the mere fact that 16 any group could participate in bingo, for 17 example, the veterans organization or the 18 churches, that even if it's outlawed, as to 19 other organizations or for profit, that that is 20 not a prohibition. 21 MS. PETTIT: Under their view, that's 2.2 my understanding. But it's still a prohibition 23 under Texas law because it goes to a fundamental 24 problem with the public policy shorthand for the 25 criminal/civil jurisdiction distinction that

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1 Cabazon Band was trying to make because, as 2 Justice Alito pointed out, a -- a prohibition is still a matter of public policy, even if it 3 4 includes exceptions when it's not -- when the 5 activity is not prohibited. 6 JUSTICE THOMAS: Thank you. 7 JUSTICE SOTOMAYOR: I'm sorry, 8 counsel. Could you explain that more clearly to 9 me? 10 Just earlier you said to Justice 11 Thomas that a regulation that wouldn't apply to 12 the Indians would be one that required their 13 passwords to play the game, correct? 14 MS. PETTIT: Yes, Your Honor. 15 JUSTICE SOTOMAYOR: And I assume 16 that's because you recognize that the 17 prohibition is on -- on playing bingo, not on 18 how you play bingo, correct? MS. PETTIT: On the gaming activity, 19 yes, Your Honor. 20 21 JUSTICE SOTOMAYOR: All right. So how 22 is that different than what you just said? 23 Meaning --24 MS. PETTIT: So --25 JUSTICE SOTOMAYOR: -- a financial

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1 requirement, a password requirement, I don't 2 know how you can read that into gaming 3 activities which are prohibited by, because bingo's not prohibited by. What does it matter 4 whether it's a not-for-profit or not? 5 6 MS. PETTIT: So the bingo outside of 7 the limited affirmative jurisdiction -- sorry. 8 The offense to prosecution is what the Bingo 9 Enabling Act is. So any bingo that is not --10 that is not conducted pursuant to the Bingo 11 Enabling Act is prohibited as a matter of Texas 12 criminal law. 13 JUSTICE SOTOMAYOR: I -- I -- you 14 can't play bingo unless you give the password? 15 MS. PETTIT: No, Your Honor. 16 JUSTICE SOTOMAYOR: You can't play 17 bingo unless you meet certain financial requirements. You can't play bingo because 18 19 you're not a not-for-profit. 20 MS. PETTIT: No, Your Honor. JUSTICE SOTOMAYOR: I don't know where 21 2.2 I draw those lines. 23 MS. PETTIT: So the password example 24 that I gave was a regulation applicable in -- to 25 the bingo -- to the -- in the larger bingo

1 regulatory framework of Texas law that does not 2 apply to the tribe because it doesn't go to the 3 gaming activity. The gaming activity could for -- to take the Chief Justice's example, be a 4 distinction between low-stakes bingo under \$100 5 or the distinction in Texas of over 750. 6 7 The state's regulatory interest or the 8 state's prohibitory interest, however you want to frame it, is different between low-stakes and 9 10 high-stakes gambling. 11 So the use of the term "law" is 12 another -- is another focus under 107(a), and 13 both the tribe and the United States focused on a earlier version of the bill that ultimately 14 15 became the statute that included the terms 16 "laws" and "regulations." 17 But, under this Court's precedent, the 18 term "laws" typically includes regulations, so 19 you can't really interpret anything by the 20 deletion of redundant language in a draft bill. 21 JUSTICE BARRETT: Counsel, what about 2.2 the other laws that were passed 23 contemporaneously with this one for other tribes 24 that used broader language like "prohibit" or 25 "regulate"? Why shouldn't we look at the

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1 contrast between this more precise or narrower 2 language and those? 3 MS. PETTIT: By looking at the context of each of the statutes, each of the statutes 4 they cite is a settlement act that is enabling a 5 6 preexisting agreement between the parties to 7 litigation. So those -- the language that Your 8 9 Honor is citing is maybe the language that the 10 parties determined was necessary, but it doesn't give much of an indication, if any, about what 11 12 Congress would have determined was necessary if 13 it was on its own. And this also goes to the larger 14 15 context of the Restoration Act because the term 16 "prohibit" and the term "regulate" were in the 17 Restoration Act before Cabazon Band. 18 After Cabazon Band, in the Senate, 19 there was two -- there were two distinct changes to both 107(a) and 107(b) that show a departure 20 21 from Cabazon Band which expressly linked the 2.2 concept of civil and regulatory and criminal and 23 prohibitory, that is, the insertion of civil and 24 criminal penalties in respect to prohibitions in 25 107(a) and the phrase -- and the insertion of

1	"and criminal" into a preexisting statute that
2	said "civil regulatory jurisdiction."
3	JUSTICE BREYER: So, if I I take it
4	the difference is you think the words "prohibit"
5	"prohibited by the laws" refers to all the
б	prohibitions by the criminal laws. And they
7	think it refers to the there is a distinction
8	between regulatory and prohibiting it outright.
9	Okay.
10	MS. PETTIT: Yeah.
11	JUSTICE BREYER: And the whole key
12	here is are they referring to Cabazon, as they
13	think, or are they thinking back back to the
14	resolution, where they said we don't even want
15	Texas. You know, that's the big difference.
16	And everybody is looking at different
17	other statutes which may or may not cast some
18	light. Okay. I think I know the answer, but,
19	look, I'm in an odd position. I'm like the
20	light brigade. I have cannons to the left of me
21	and cannons to the right of me, and I'm going
22	into the valley of death, charged the 400, but,
23	I mean, there used to be ways of finding these
24	things out.
25	You went and you read the report of

1 the Senate committee or the House committee or 2 the conference committee, and you read the testimony before the committees, and you read 3 what the Justice Department told them or the 4 Department of the Interior, and you read what 5 6 other people said on the floor perhaps, and 7 sometimes but not always that, in fact, sheds 8 some light on the proper answer. So my question is, if, pursuing my odd 9 single path perhaps, I did that here, would I 10 11 find anything? 12 MS. PETTIT: You would find the Senate 13 report, which is the only report that deals with 14 the final version of the statute, and the Senate 15 report said that the addition of civil and 16 criminal penalties, what I just mentioned, was 17 designed to build upon what the House was making 18 -- what the House had originally amended to say 19 just "prohibit" to make clear that civil 20 penalties were also applicable, which we 21 respectfully suggest supports our cause. 2.2 CHIEF JUSTICE ROBERTS: Well, I -- I 23 -- I pressed your friend, Mr. Martin, a little bit on the tribal resolution, which I think is 24 25 very strong evidence for you. On the other

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hand, his answer that, well, that wasn't 1 2 addressed in the final bill, it was a 3 predecessor bill, also seemed pretty good. Do you have an answer to that? 4 MS. PETTIT: Your Honor, the 5 6 resolution may have been passed in response to 7 the -- to a prior bill, but it is incorporated into the text or it's at least referenced in the 8 text of the actual bill that was passed and 9 became law, so that has to be given some 10 11 meaning. And the fact that it was aimed at a 12 different bill is not dispositive one way or the 13 other. 14 JUSTICE KAGAN: Ms. Pettit, if -- if, 15 you know, this just said "prohibit" and we were 16 in a world where we didn't have any context on 17 the page or otherwise, I think you would win. 18 The question is, do we have so much 19 context about "prohibit" being used in a 20 specialized way that you lose? And I -- I guess 21 I would just point you to a few things and ask 2.2 you to address them one by one. So the first is 105(f), which I take 23 24 it you acknowledge incorporates Public Law 280, 25 and Public Law 280 had just been interpreted in

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1 Cabazon as having this prohibitory/regulatory distinction. 2 3 MS. PETTIT: Yes, Your Honor. JUSTICE KAGAN: The second is 107(b), 4 which specifically talks about criminal 5 regulatory jurisdiction. Now there's a question 6 7 as to what kinds of -- what kind of jurisdiction it's talking about here because jurisdiction is 8 used in two different senses in this statute, 9 10 but I think that Mr. Yang has an awfully good 11 argument that when they're talking about 12 regulatory jurisdiction, they're not talking about it in the which court sense, they're 13 14 talking about it in the Cabazon sense. 15 So -- so it says, you know, we don't 16 want to give the state regulatory jurisdiction, 17 meaning the state doesn't have any regulatory 18 power here. 19 Then the third thing would be what Justice Barrett said, I think you've responded 20 21 to that, the other statutes passed around the 2.2 same time, actually, on the same day, right, 23 that clearly understand the Cabazon 24 prohibitory/regulatory distinction. 25 So you take all of those together, and

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1	this is what I meant when I said to Mr. Yang
2	Cabazon is, like, written all over this statute.
3	It's not just like we have a world in which we
4	say: Oh, didn't they know about Cabazon? Would
5	that have affected what they were doing? I
б	mean, Cabazon is in this statute in multiple
7	places. So why isn't it in this statute in a
8	way that defeats your claim here?
9	MS. PETTIT: So, in Cabazon, this
10	Court used the phrase "regulatory authority,"
11	not "regulatory jurisdiction." When referring
12	to the power to set laws, this Court has
13	typically used the term "legislative
14	jurisdiction," which is tellingly not the word
15	that Congress had selected.
16	Moreover, the and I would point
17	he made a comment post-Arbaugh that you try to
18	be more careful about jurisdiction. I think
19	that in the 1980s there was a very clear tie
20	between jurisdiction and an adjudicative
21	officer, not necessarily a court. And I would
22	point you to the Fifth Edition of Black's Law
23	Dictionary, which was published in about 1983,
24	which specifically discusses jurisdiction in
25	those terms.

1 So it may not be a court-specific 2 term, but absent the phrase "legislative jurisdiction," it does tend to have an 3 adjudicative meaning. So that is where -- and 4 it's used consistently in 105(f), which Your 5 Honor referenced, in that -- in that sense. 6 And 7 it's used in 107(c) in that sense. And so it would make sense to use it in 107(b) in that 8 9 sense to avoid the charge of the light brigade 10 with various cannons. 11 So, in that -- in reading it in the 12 larger context of how that term was used in the 13 '80s, as opposed to, for example, in the mid-2000s, after this Court's case of City of 14 15 Arlington against FCC, where you equated 16 authority and jurisdiction, helps to clarify any 17 ambiguities. 18 So -- that's all I have. I'm happy to 19 answer any --JUSTICE KAVANAUGH: Given -- given 20 21 Cabazon -- sorry to interrupt. Given Cabazon, 2.2 why wouldn't it have been obvious to members of 23 Congress to say something like the following if you wanted to do this, like "all Texas law 24 25 regulating gaming activities applies to gaming

1	activities on the reservation and lands of the
2	tribe"? Why
3	MS. PETTIT: So
4	JUSTICE KAVANAUGH: I mean, in other
5	words, boy, there's this case, we better be
6	careful. And we're in the world where we're
7	assuming Congress is responding to the case.
8	So why wouldn't the people who wanted
9	this broader authority to extend have been we
10	need to we need to be careful about this and
11	doesn't the then the absence of that suggest
12	something that that hurts your case here?
13	MS. PETTIT: Two responses.
14	First, I heard a lot from both the
15	United States and from the tribe that said that
16	Cabazon Band was was especially informative
17	because of the context. But Cabazon Band
18	addressed may have the facts of Cabazon Band,
19	may have been relating to gambling, but it
20	addressed a statute that applied across the
21	board equally to Texas and to regulation of
22	pharmaceuticals or a number of the other
23	hypotheticals we've had today.
24	So why Congress would have necessarily
25	said: Well, Cabazon Band defines exactly what

1	term we have for gambling, it it's not nearly
2	as close as that.
3	And I believe Justice Alito asked a
4	few minutes ago how you determine whether you
5	are going to apply a canon about assuming
6	Congress or it might have been Justice Kagan
7	I apologize about when you assume Congress
8	was understanding the particular context.
9	Normally, this Court does that when
10	you have a well-established term that's been
11	used a number of times, whereas, here, you have
12	just the term "prohibit," which is a commonly
13	used statutory term, it's been interpreted once
14	in a case that respectfully is not the most
15	precise case this course Court has ever
16	issued. And so assuming that Congress intended
17	to enact and make permanent for all tribes for
18	all uses of "prohibit" based on this one case
19	would be taking that canon too far.
20	And the best way I think I can point
21	this to is differences between the language of
22	IGRA, which, for example, does track Cabazon
23	Band in that it says prohibits "as a matter of
24	criminal law or public policy" in 2701(5).
25	That's not the phrase that we have in

1 -- in the Restoration Act. That is -- what we 2 have simply is the use of the common term 3 "prohibit." You see that again in 2710 when you're talking about when -- when Congress is 4 talking about when the state can or the tribe 5 6 can engage in activity which is whether the 7 state prohibit -- permits it for any purpose, for any person, entity, or organization. 8 9 Again, that tracks the Cabazon Band 10 prohibition -- prohibition language much more closely than here, where we just have that term 11 12 "prohibit." 13 JUSTICE KAVANAUGH: Was -- wasn't it 14 obvious or wouldn't it have been obvious that 15 what happens when a state allows an activity but 16 regulates it heavily, can those regulations 17 apply to the tribes? Wasn't that an obvious 18 question and wouldn't that have been addressed 19 in a different way, I quess, again, if we're in this world where we're trying to speculate what 20 21 Congress was thinking? 2.2 MS. PETTIT: This is why it's always 23 dangerous to speculate what Congress was 24 thinking. 25 JUSTICE KAVANAUGH: Yeah, that's a

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1 good answer. 2 MS. PETTIT: But laws -- laws 3 typically does include -- does -- do -- the term 4 "laws" typically does include regulations, 5 unless Congress specifies otherwise, which it 6 didn't do here.

7 And this goes back to a number of the questions we've had today about the signage that 8 9 is at -- at casinos and whether that would apply to the tribe. And it doesn't because it doesn't 10 11 go to the gaming activity as this Court defined 12 that in Bay Mills, where it was the -- the -- I 13 think the words of the Court were the throw of 14 the dice or the turn of the wheel, the actual 15 game that's being played and not the offsite 16 administrative or regulatory body, so --

JUSTICE BARRETT: But, Ms. Pettit, why would it make sense? You know, here, in 107(c), the federal court is given jurisdiction if the state wants to bring an action for an injunction to stop, in your view, regulatory violations on the gaming activity.

Why would it make sense to enlist federal district courts to police all these aspects of gaming? It -- it just seems to me

1 like that would be an odd system. 2 MS. PETTIT: So the -- we are only 3 entitled to bring a -- an injunctive action for violations of the substantive limitations on 4 gambling, not the regulations that don't go to 5 6 the gaming activities, but it does make sense 7 because, as the United States pointed out, the 8 tribe was very against the direct application of 9 state laws in state courts, which was the issue in Cabazon Band. 10 11 So there isn't the direct application 12 of state law here. There's this third party, a 13 federal judge that is a -- neutral might be a 14 loaded term for this context, but I'll use it 15 anyway -- a neutral arbiter to apply the issue 16 rather than having to, for example, go into the 17 state's home court. 18 JUSTICE KAGAN: But it's a huge --19 JUSTICE BARRETT: Let me clarify. I 20 think I misspoke. I didn't mean -- I mean, I 21 know that you concede that you don't have 2.2 regulatory jurisdiction in the sense of an 23 agency oversight and on all these other aspects, 24 but I'm talking about the disputed number of 25 things, once bingo is allowed, is it, you know,

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1 allowed by non-charitable organizations? Is it 2 allowed for profit? Is it allowed above this 3 amount, those kinds of things? I mean, the district courts in Texas 4 have complained about all of these things 5 heading to the district court. 6 7 MS. PETTIT: So the district courts have said that a version of the -- a previous 8 injunction issued in 2002 had turned them into a 9 10 sort of pre-clearance type of regime that hadn't 11 been contemplated by the Restoration Act. We 12 agree that wasn't contemplated by the 13 Restoration Act, but it was necessitated by the 14 tribe's actions, who had not attempted to comply 15 with the Restoration Act. 16 But, fortunately, we're no longer in 17 that regime. We have brought a separate 18 complaint, and most of the issues that are 19 covered in the current injunction before the 20 Court are statutory ones, not regulations. 21 JUSTICE KAGAN: Right. But your 2.2 position requires you to accept the idea that, 23 for example, if Texas has a statute that says 24 bingo has to end at 1 a.m. and instead it goes 25 to 1:10, that all of a sudden that's a federal

1 crime adjudicable in federal court.

2 I mean, that's your position. It's 3 not -- you know, the other side's position is essentially no, the federal courts are there 4 when Texas has a statute that says no table 5 6 games, and all of a sudden a casino opens up 7 with craps, but your position is like everything, you know, the -- the -- the -- the 8 9 amount of the betting, the hours, the -- the --10 the -- I mean, everything that relates to the 11 turn of the wheel or whatever, and that's a lot 12 of stuff. MS. PETTIT: But it does create a 13 14 blight -- a bright-line rule, Your Honor, which 15 gets the federal court out of the second 16 question that would be necessitated by applying 17 Cabazon Band, namely whether one particular 18 restriction or another is a matter of 19 fundamental state public policy, and there are 20 law and order concerns that sometimes drive 21 issues like closing down gambling halls at 2.2 midnight or limiting the amount of money that is 23 at stake because there is a -- there -- it's a 24 different regulatory and a different public 25 policy and a different just risk involved in

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some -- in some forms of gaming. 1 2 JUSTICE GORSUCH: Counsel, you argue 3 at some length that the Cabazon distinction between "prohibition" and "regulation" is 4 unworkable. Are you asking us to overturn 5 6 Cabazon? 7 MS. PETTIT: No, Your Honor, that's 8 not necessary in this case because, as my 9 opposing counsel has conceded, this is about 10 federalizing state law, and Cabazon doesn't --11 specifically declined to address that question. 12 JUSTICE GORSUCH: But that -- but that -- that -- that -- that's not -- that's not 13 14 quite what I'm getting at. You -- you say the 15 distinction between "prohibition" and 16 "regulation" just generally is not workable. 17 MS. PETTIT: Yes, Your Honor. So --18 JUSTICE GORSUCH: Wouldn't that logic 19 seem to suggest, if that's true, then -- then --20 then Cabazon, we should just get rid of it and 21 scrap it and -- and the consequences for IGRA be 2.2 damned? 23 MS. PETTIT: So the consequences for 24 IGRA, I respectfully disagree with the United 25 States, would not be significant because IGRA

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1 incorporated the pieces of Cabazon Band that it 2 thought were necessary in the language that I 3 previously quoted. But the Court doesn't need to revoke the or repeal -- overturn the Cabazon 4 Band distinction for the -- for the 5 6 circumstances to which it applies. 7 JUSTICE GORSUCH: So you're not asking us to overturn Cabazon? 8 9 MS. PETTIT: No, Your Honor. 10 JUSTICE GORSUCH: And you're asking us 11 to continue to apply that in the IGRA context? 12 MS. PETTIT: I'm asking you to 13 continue to apply IGRA in the IGRA context, 14 which incorporates pieces. 15 JUSTICE GORSUCH: Which incorporates 16 Cabazon? 17 MS. PETTIT: Pieces of Cabazon but not necessarily all of it. 18 19 JUSTICE GORSUCH: Okay. But just this 20 is the one area where we're not going to apply 21 Cabazon? That's -- that's your view? 2.2 MS. PETTIT: Yes, because the language 23 of the statute itself departs from Cabazon Band 24 and in response to Justice Kavanaugh's --25 JUSTICE GORSUCH: And that -- that

1 hinges on whether we -- we -- we agree with your 2 reading of the statute and the enactment the 3 same day involving the tribe in Massachusetts, 4 right? MS. PETTIT: It involves -- it 5 6 definitely depends on your agreement that by 7 slicing and dicing up civil and criminal 8 regulatory and prohibitory, that Congress 9 intended to depart from Cabazon Band, yes. 10 JUSTICE BARRETT: But -- but, Ms. 11 Pettit, why is it uniquely unworkable in this 12 context? Mr. Yang said, look, this has been 13 humming along, everybody's been living with Cabazon Band and this distinction between 14 15 "prohibit" and "regulate" in Public Law 280 and 16 in IGRA. So why is it so uniquely unworkable in this context? 17 18 MS. PETTIT: So the lower courts have 19 suggested that Mr. Yang is incorrect on that point, that, in fact, it's difficult to derive a 20 21 single rule between what is prohibitory and what 2.2 is regulatory precisely because many of the 23 things that are nominally prohibitory are very 24 close -- very close concerns of state public 25 policy, so they just don't track. And to --

1 JUSTICE GORSUCH: Well, isn't that an 2 argument for overturning it in IGRA too and just 3 getting rid of it? MS. PETTIT: So IGRA incorporated a 4 specific part of Cabazon Band that allows the 5 6 tribe in 2710 to engage in Class II gaming, 7 which permits them to -- if the state permits it under any person, any purpose, any organization. 8 9 So that is a different term than 10 prohibitory or regulatory and trying to combine 11 _ _ 12 JUSTICE GORSUCH: I understand that. But -- but -- but if -- you're -- you're --13 you're saying it doesn't work well under IGRA. 14 15 You're disputing Mr. Yang on that. 16 MS. PETTIT: So I'm --17 JUSTICE GORSUCH: But you're saying 18 this is somehow unique, and I guess I'm 19 struggling, like -- like -- like my colleague, to understand how -- how it's uniquely 20 21 problematic here but -- but less problematic, I 2.2 quess, under IGRA? 23 MS. PETTIT: Maybe I misspoke earlier. IGRA -- the Public Law 280 prohibitory/ 24 25 regulatory distinction itself is problematic

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1 outside of IGRA because it doesn't have that any 2 purpose, any person, any language. That creates a bright-line rule, whereas this Court 3 recognized in Cabazon Band itself that the 4 distinction based on what is or is not a matter 5 of fundamental state public policy does not 6 7 create a blight -- bright-line rule. 8 JUSTICE GORSUCH: All right. So just 9 back to Justice Barrett's question, does it work well under IGRA or not? 10 11 MS. PETTIT: Texas doesn't have that 12 much experience under IGRA, so I'm not able to 13 answer that question. 14 JUSTICE SOTOMAYOR: It has some 15 experience. It has the Kickapoo Tribe that's 16 operating under Class II gaming pursuant to 17 So, right now, what you have is one tribe IGRA. 18 under IGRA, another tribe completely out of 19 IGRA, and even worse, you're saying it wasn't even intended to be run like the regulatory 20 prohibition line that Cabazon approved, correct? 21 2.2 MS. PETTIT: Correct. 23 JUSTICE SOTOMAYOR: So you want a 24 system that's unique to everything, to Cabazon, to Bryan, to every other tribe, and you want to 25

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1 create a totally different system now? 2 MS. PETTIT: Congress created a 3 bespoke legislative solution here. 4 JUSTICE SOTOMAYOR: That's assuming we 5 accept your argument --6 MS. PETTIT: Yes, Your Honor. 7 JUSTICE SOTOMAYOR: -- that that was 8 Congress's intent. 9 MS. PETTIT: Yes, Your Honor. That, 10 and the Kickapoo -- the -- my response earlier 11 was that we do not regulate the Kickapoo, so we 12 do not have much insight into what they're doing inside their casino, so it's very difficult for 13 14 me to say whether it's been a problem. 15 JUSTICE SOTOMAYOR: Well, anybody can 16 walk in and play. 17 MS. PETTIT: Yes, Your Honor. But 18 that one --19 JUSTICE SOTOMAYOR: So you could see 20 what they're doing, whether it -- what it's violating, if you chose. 21 2.2 MS. PETTIT: I suspect the tribe would 23 object if we were to send a peace officer in 24 without permission to inspect. 25 JUSTICE SOTOMAYOR: Who said a peace

1 officer? Anybody can walk in. You could send a 2 peace officer, but --3 MS. PETTIT: A -- a state employee could go in without authority and examine it in 4 their personal capacity, but that's not 5 6 typically how laws are enforced. 7 CHIEF JUSTICE ROBERTS: Thank you, 8 counsel. Justice Thomas? 9 Justice Breyer, anything further? 10 11 Justice Alito? 12 JUSTICE ALITO: Suppose you scrapped 13 your laws about bingo and you enacted a statute 14 that says that under specified circumstances, a 15 type of gambling called Texas Traditional Board 16 Game is allowed, and you defined that involving 17 a board and et cetera, et cetera. 18 But this is not bingo. This is the 19 Traditional Texas Board Game. Then would bingo 20 be prohibited, or would it be regulated? 21 If we scrapped the Texas MS. PETTIT: 2.2 Bingo Enabling Act, it would fall within the 23 constitutional prohibitions on lottery and it 24 would be prohibited. It's still prohibited 25 outside the Bingo Enabling Act, but it would be

1 flatly prohibited under state law. 2 JUSTICE ALITO: So this all turns on 3 the fact that you've -- you've used the term "bingo" and that in the -- the -- you know, 4 there is the form of bingo up there and so the 5 next court is going to decide whether this is 6 7 bingo or not? MS. PETTIT: No, Your Honor. 8 This depends on -- the -- the word "bingo" is not the 9 10 relevant question here. And it may be useful to 11 answer your question to distinguish this from 12 the facts in California's instance in Cabazon 13 Band, where they generally permitted gambling 14 except that which we prohibited. 15 Texas has the exact opposite 16 presumption. We have a strong public policy and 17 all gambling is banned under the constitution 18 unless specifically authorized. This -- the 19 Bingo Enabling Act specifically authorizes 20 small-stakes bingo under very limited circumstances as a defense to prosecution. 21 2.2 But, if it -- if we were to scrap that Bingo Enabling Act, it would -- the contact --23 the conduct of the tribe in this instance would 24 25 fall within the state's constitutional ban on

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1 lotteries.

2	CHIEF JUSTICE ROBERTS: Justice
3	Sotomayor, anything further?
4	Justice Gorsuch?
5	Justice Barrett?
6	JUSTICE BARRETT: I just have one
7	question. If you lost and we vacated and
8	remanded and so then the district court has to
9	face the question of whether these electronic
10	bingo games count as bingo, you just revert to
11	the Texas definition and I gather it's Texas's
12	position that these electronic machines would
13	not count as bingo?
14	MS. PETTIT: Yes, Your Honor, because
14 15	MS. PETTIT: Yes, Your Honor, because they are slot machines. They they do not
15	they are slot machines. They they do not
15 16	they are slot machines. They they do not have the competitive aspect of bingo because
15 16 17	they are slot machines. They they do not have the competitive aspect of bingo because what I believe somebody referred to their
15 16 17 18	they are slot machines. They they do not have the competitive aspect of bingo because what I believe somebody referred to their grandmother earlier, that is a you are
15 16 17 18 19	they are slot machines. They they do not have the competitive aspect of bingo because what I believe somebody referred to their grandmother earlier, that is a you are matching numbers and the first person to reach a
15 16 17 18 19 20	they are slot machines. They they do not have the competitive aspect of bingo because what I believe somebody referred to their grandmother earlier, that is a you are matching numbers and the first person to reach a particular pattern wins. And, here, you have
15 16 17 18 19 20 21	they are slot machines. They they do not have the competitive aspect of bingo because what I believe somebody referred to their grandmother earlier, that is a you are matching numbers and the first person to reach a particular pattern wins. And, here, you have one card and it is an instant game that is drawn
15 16 17 18 19 20 21 22	they are slot machines. They they do not have the competitive aspect of bingo because what I believe somebody referred to their grandmother earlier, that is a you are matching numbers and the first person to reach a particular pattern wins. And, here, you have one card and it is an instant game that is drawn against a historic a historic bingo draw, and

1	MS. PETTIT: Under the Restoration
2	Act, we would. It's the same issue under IGRA,
3	which is why the United States was very careful
4	to say that the question of whether or not this
5	is actually bingo under IGRA is a very close
6	one.
7	JUSTICE BARRETT: Thank you.
8	CHIEF JUSTICE ROBERTS: Thank you,
9	counsel.
10	Mr. Martin, rebuttal?
11	REBUTTAL ARGUMENT OF BRANT C. MARTIN
12	ON BEHALF OF THE PETITIONERS
13	MR. MARTIN: Mr. Chief Justice, and
14	may it please the Court. Four quick points.
15	First of all, in response to a
16	question from the bench, I I think that the
17	Justices you certainly understand the
18	distinction and the difficulty that the State of
19	Texas has with making the distinction as to
20	where the regulatory line starts and where the
21	regulatory line stops.
22	If they wanted the passwords, they had
23	to get the passwords. When is that not
24	regulation and when is it if they can, in fact,
25	regulate? And the problem is is that their

1 position requires them to take the position that 2 the entirety of the regulatory construct of Texas law, and this is the same thing the Fifth 3 Circuit said in Ysleta I, is that the entirety 4 of the regulatory construct applies to the 5 That's not what 107(b) says. 6 tribes. 7 And in response to some of the jurisdictional questions, Section 105(f) grants 8 civil and criminal jurisdiction to grant the 9 10 Public Law 280 authority. Jurisdiction there 11 means the substantive authority; it's not 12 limited to court jurisdiction. 13 Section 107(b)'s use of the 14 jurisdiction is the same. Section 107(c) is 15 different, and it specifically says jurisdiction 16 over enforcement. 17 And there was one other aspect of --18 of what the State of Texas has -- has argued 19 just now in this case that I think is -deserves to be said. There's been a lot of 20 21 discussion about whether or not Cabazon applies, 2.2 you know, are we stuck in the Cabazon context, 23 et cetera. Two things I would point out. 24 Justice 25 Breyer, I would point out that Representative

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1 Udall, who was the chairman of the applicable 2 subcommittee, stated on the House floor "this is 3 intended to incorporate Cabazon." 4 That's important. The Senate report 5 that was cited by the State of Texas references 6 the old language that Congress excised, and that 7 should be taken into account. Finally, Your Honor, I would point out 8 9 I can't remember exactly how the State of Texas 10 just put it, but they were talking about 11 Section 107 and they said that it applies to 12 everything, not just gaming. Section 107 is entitled "Indian Gaming." It is -- it is 13 14 intended to govern that exact situation in 15 response to Cabazon. 16 And if there's no further questions. 17 CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted. 18 19 (Whereupon, at 11:33 a.m., the case 20 was submitted.) 21 2.2 23 24 25

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