

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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YSLETA DEL SUR PUEBLO, ET AL., )

Petitioners, )

v. ) No. 20-493

TEXAS, )

Respondent. )  
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Pages: 1 through 98

Place: Washington, D.C.

Date: February 22, 2022

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3   YSLETA DEL SUR PUEBLO, ET AL.,        )  
4                                    Petitioners,        )  
5                                    v.                        ) No. 20-493  
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:

18   BRANT C. MARTIN, ESQUIRE, Fort Worth, Texas; on behalf  
19                                   of the Petitioners.

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Ysleta del Sur Pueblo versus Texas.

Mr. Martin.

ORAL ARGUMENT OF BRANT C. MARTIN

ON BEHALF OF THE PETITIONERS

MR. MARTIN: Mr. Chief Justice, and may it please the Court:

The question this case presents is whether the Restoration Act subjects the Pueblo to Texas's time, place, and manner restrictions as it relates to games that Texas does not flatly prohibit.

It does not. In the Restoration Act, Congress codified the Cabazon Band framework and specifically foreclosed Texas's regulatory authority over the tribe's gaming activities.

The plain language of the Act provides us with clear support for this interpretation. On the heels of this Court's decision in Cabazon, Congress changed the language of the Restoration Act to replicate the prohibitory/regulatory dichotomy struck in Cabazon. Section

1 107(a) incorporates the Cabazon framework. It  
2 federalizes Texas law but only as to prohibited  
3 games. And bingo, in the State of Texas, is not  
4 a prohibited game.

5 Section 107(b) clearly forecloses any  
6 interpretation of Section 107 in its entirety  
7 where Texas would have regulatory jurisdiction  
8 over tribal gaming. And Section 107(b) must  
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  
13 107(b) out of the Act entirely.

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.

22 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

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

1 dictating -- it's showing that Congress was  
2 extending the Cabazon framework to this fact  
3 pattern where Congress was federalizing state  
4 law as to prohibited gaming activities.

5 JUSTICE THOMAS: So --

6 MR. MARTIN: It's taking the Public  
7 Law 280 structure that was explicated in Cabazon  
8 and extending it to this fact pattern.

9 JUSTICE THOMAS: So exactly how does  
10 it -- how is it doing that?

11 MR. MARTIN: Your Honor, in the text  
12 itself, the first sentence: "All gaming  
13 activities which are prohibited by the laws of  
14 the State of Texas are hereby prohibited on the  
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  
20 activities. It's -- one of the things that's  
21 interesting, Your Honor, is that, compared to  
22 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"

1 activities" and specifying prohibited gaming  
2 activities.

3 JUSTICE THOMAS: Thank you.

4 CHIEF JUSTICE ROBERTS: Well, I mean,  
5 you say that 107 was enacted in light of  
6 Cabazon. But it was directly enacted in light  
7 of the tribal resolution, which said that the  
8 tribe was willing at this point, after all the  
9 back and forth -- they obviously weren't happy  
10 about it, but they were willing to provide that  
11 all gaming, gambling, lottery, bingo shall be  
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. I  
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  
22 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



1 direct connection to previous versions of it.  
2 And I would agree with you there's a lot of  
3 legislative history in here, and some of it's  
4 legislative history and some of it is almost  
5 textual evolution on what was actually enacted.

6 And one of the things that I would  
7 point out to Your Honor is the tribal  
8 resolution, which, again, was dated March 16th  
9 of 1986, that total ban or what the State of  
10 Texas calls the "operative request" -- and --  
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  
22 tribal resolution was handed down. After --

23 CHIEF JUSTICE ROBERTS: Well, do you  
24 think the law would have been passed without the  
25 tribal resolution, regardless of the particular

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

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  
4 of art and that Congress was aware of that and  
5 that when Congress used the word "prohibited" it  
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  
10 Cabazon use of the word "prohibited."

11 So then the question is, what's your  
12 best evidence that this Court -- that the --  
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,  
18 we certainly can assume that Congress was taking  
19 language from one of this Court's opinions and  
20 incorporating it, especially in the exact same  
21 context of Indian gaming, and that they knew  
22 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  
8 says, you know, the federal courts have  
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  
20 the state's inability to tax, regulate, license.  
21 It's the Bryan versus Itasca County test. They  
22 don't have that regulatory authority.

23 Whereas, in 107(c), in the title  
24 alone, it says jurisdiction over enforcement. I  
25 don't think that you can combine -- and this is

1 where I -- I respectfully disagree with -- with  
2 my friends from the State of Texas. I don't  
3 think you can combine 107(b) to say that's  
4 enforcement. I think that's confusing  
5 jurisdiction with enforcement.

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,"  
22 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  
25 a term of art in that sense, right?

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.  
4 That -- that would be the distinction I would  
5 make.

6                   I believe that the cite that they gave  
7 you, and that was the State of Texas's brief, it  
8 talked about it appearing 8,800 times.

9                   JUSTICE ALITO: But what would they  
10 have -- what -- if you were in Congress and you  
11 were aware of Cabazon and you wanted to use  
12 "prohibited" in the normal sense of the word and  
13 you said, well, I'm afraid that if I use this  
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  
19 we're talking just about "prohibited" and the  
20 use of the word "prohibited." We also need to  
21 see what it modifies, which is "prohibited  
22 gaming activities," because that was another  
23 change --

24                   JUSTICE ALITO: Well, maybe what --  
25 what --

1 MR. MARTIN: -- that affected Cabazon.

2 JUSTICE ALITO: -- what synonym would  
3 you have used? All gaming activities which are  
4 what? I better say forbidden, I shouldn't say  
5 prohibited? Is that the argument?

6 MR. MARTIN: I -- Your Honor, my  
7 submission would be that by using the word  
8 "prohibited" in 107(a) and then using no  
9 regulatory jurisdiction in 107(b), that it was  
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  
20 still win?

21 MR. MARTIN: Your Honor, to prohibit  
22 under the ordinary meaning is to forbid. Bingo  
23 is not forbidden --

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  
8 prohibited, correct?

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?

19 The Winnepaug passed the very same day  
20 and it used regulations, those laws and  
21 regulations which prohibit or regulate. The  
22 Seminole, also passed in 1987, also talked about  
23 prohibiting and regulating. Correct?

24 MR. MARTIN: Yes. Yes, Your Honor.  
25 When Congress wants to use the word

1 "regulations" in this context, it certainly --  
2 it certainly knows how to.

3 JUSTICE ALITO: Well, Mr. Martin --

4 MR. MARTIN: It was the --

5 JUSTICE SOTOMAYOR: It showed you it  
6 did.

7 MR. MARTIN: Yes, Your Honor.

8 JUSTICE GORSUCH: Counsel, could I  
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  
21 be allowed, for example, but blackjack wouldn't.  
22 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.

5 JUSTICE GORSUCH: Okay. And then one  
6 more quick question for you. I -- I -- I  
7 understand that there's an Ex parte Young  
8 possibility of -- of jurisdiction here against  
9 the governor of the tribe. But is the tribe  
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  
14 hesitant to waive sovereign immunity when that  
15 issue hasn't been briefed.

16 JUSTICE GORSUCH: Well, I'm not asking  
17 you to waive sovereign immunity at -- at -- at  
18 the podium. That would be a bit much.

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  
4 question, follow up on it? There seems to be a  
5 dispute whether this type of bingo by machine is  
6 the same as the bingo we know, people in a room  
7 calling out numbers.

8 You dispute that. You say it's the  
9 same. But assuming that there's -- and I do --  
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  
13 whether this type of slot machine is actually  
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  
20 its action under 107(c) for an injunction, the  
21 federal trial court would determine whether or  
22 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

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  
4 court, but that would be under the federal  
5 court's jurisdiction.

6 JUSTICE KAGAN: Mr. Martin, could I  
7 take you back to Justice Gorsuch's question  
8 about IGRA? If -- if you prevail, the tribe is  
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 --

13 JUSTICE KAGAN: -- in your view?

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  
22 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  
6 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  
8 numbers and people -- somebody saying, you know,  
9 B-12 or --

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  
13 also one of the things that the State of Texas  
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  
19 electronic machines, Your Honor, but they've  
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



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 -- 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  
6 not as a matter of criminal law and public  
7 policy prohibit the gaming activity.

8 All right. So isn't it the same  
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.

24 JUSTICE BREYER: Right, right, right.  
25 I understand that. So I didn't understand that

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  
6 incorporated into IGRA under 2701(5) and  
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 --  
11 that's what I read you, 2701(5).

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  
19 that's where IGRA specifically incorporates the  
20 Cabazon prohibited framework.

21 JUSTICE BREYER: Okay. Okay.

22 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

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.

14 MR. MARTIN: If it was a criminal  
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  
22 --

23 JUSTICE ALITO: No, we don't have to  
24 --

25 MR. MARTIN: -- does not have to --

1 JUSTICE ALITO: -- but somebody does.

2 MR. MARTIN: -- decide the platonic  
3 ideal --

4 JUSTICE ALITO: But how is the person  
5 who has to decide this going to decide whether  
6 this thing that's not exactly -- it's not the  
7 kind of bingo, you know, that you expect people  
8 to be playing in church or at the Elks. It's  
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  
18 under the Texas Bingo Enabling Act, which  
19 actually helps us. It would take into account  
20 what IGRA considers to be bingo under 2701 and  
21 2710. It would take into account the expert  
22 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  
3 don't because Ysleta I misread the statute and  
4 read 107(b) out of it and talked about it being  
5 fed -- a surrogate federal law and that all of  
6 Texas's laws and regulations are surrogate  
7 federal law.

8 We would submit, Your Honor, you can't  
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 --  
13 this -- the Cabazon Band is more subtle than my  
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  
20 Act -- I -- I don't have an opinion on the -- on  
21 your question, and I want to be very honest with  
22 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

1 Congress was responding to in 1986 when it  
2 drafted the Restoration Act.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Sotomayor?

5 Justice Kagan?

6 JUSTICE KAGAN: You know, Mr. Martin,  
7 I guess just following up on what Justice Alito  
8 talked about, this Cabazon distinction presents  
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 --  
13 Cabazon tells us to make a distinction about --  
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 --  
22 any discomfort about Cabazon and the distinction  
23 that it makes itself?

24 MR. MARTIN: I think the distinction  
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 If you remember in Cabazon, it talked about the  
2 fact that Congress made the decision to help --  
3 have the tribes do this in terms of their  
4 self-sufficiency.

5 So I think the sovereignty aspect of  
6 it shouldn't be and can't be overlooked because  
7 that's where 107(b) comes in. That's where the  
8 resolution is answered, right? The tribe was  
9 willing to give up a certain amount of gaming  
10 activities in order to not have Texas state law  
11 apply directly and not be subject to its resolu-  
12 -- regulation. Congress ultimately decided not  
13 to accept their offer and to give them less  
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  
18 talk about the -- the opioid hypothetical, you  
19 could talk about other hypotheticals along those  
20 same lines, but this concept of the sovereignty  
21 and the tribe's ability to engage in gaming  
22 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,  
25 and much more succinctly than I have in a month

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

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  
6 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?

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 --

6                   MR. MARTIN: That's what the text  
7 says.

8                   JUSTICE BARRETT: -- not those that  
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  
14 -- or Public Law 280 and the Restoration Act is  
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

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:

6                   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.

6           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  
4 on the same subject matter uses words of a prior  
5 Supreme Court opinion, those words are given the  
6 same meaning unless there's a specific --  
7 specific direction to the contrary.

8 And the word there was "failed." It  
9 wasn't -- "failed" can have a lot of different  
10 meanings in a lot of different contexts.

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  
21 organizations means it is not prohibited?

22 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



1 provisions you were -- you were just discussing  
2 with my friend.

3           The State -- and it does use the term  
4 "regulation." It allows Indians -- tribes to  
5 regulate games that the state does not, as a  
6 matter of criminal law and public policy,  
7 prohibit, such gaming activity, again, drawing  
8 on the prohibitory/regulatory distinction in  
9 Cabazon. And then it brings -- it  
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  
22 "prohibited," in 18 U.S.C. whatever, still  
23 covers, you know, activities, possession of  
24 whatever, even though it's permitted at some  
25 level, right?

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,  
4       it's okay, then you can't prohibit it at all.

5           MR. YANG: We -- we aren't concerned  
6       about that because, with respect to this  
7       distinction -- let me take a step back. This  
8       distinction exists in Public Law 280. It's done  
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  
21       respect to all of 18 U.S. Code -- C because,  
22       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  
3 to the way that this Court has used the term  
4 "prohibit."

5 JUSTICE GORSUCH: Mr. Yang, just to  
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  
9 in that context.

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  
22 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,

1 which would require a compact with the state.

2 JUSTICE GORSUCH: And what would be  
3 the negative consequences in the government's  
4 view, if any, if we were to elide this  
5 distinction, ignore it, overrule Cabazon?

6 MR. YANG: Wow. If the Court -- first  
7 of all, I don't think that's before the Court.  
8 This has been a fundamental distinction that's  
9 existed in the law of -- of tribal sovereignty  
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  
14 what the Court would do with -- if it was just  
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.

19 JUSTICE BARRETT: Are --

20 MR. YANG: Cabazon is embedded in the  
21 law in all kinds of areas.

22 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  
4 huge change in the law in terms of governing  
5 Public Law 280, which is one of the fundamental  
6 statutes governing Indian lands.

7 So I would caution the Court not to be  
8 overly ambitious here. This case does not  
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,  
18 it's normally a question of where or when or  
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  
22 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 --

1 JUSTICE BREYER: -- is it -- is it --  
2 but -- but it's the first three which are  
3 usually fairly easy to decide.

4 MR. YANG: No.

5 JUSTICE BREYER: Am I right or wrong?

6 MR. YANG: No, actually, I think --

7 JUSTICE BREYER: Wrong?

8 MR. YANG: -- there is the question of  
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,  
13 and so I can give you a thumbnail sketch, but it  
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  
22 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

1 they are drawn or somehow identified. And you  
2 win by covering an arrangement of numbers.

3 This is in 2703(7)(A)(i). This is a  
4 kind of understanding of what bingo is. And you  
5 would ask, is this bingo, or is it a method of  
6 conducting bingo when you use a computer?

7 Even Texas, by the way, allows card  
8 mining devices, which are these devices where  
9 you can, instead of tracking five cards, you can  
10 track up to 66 cards under state law at one  
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  
18 IGRA, but, you know, that's not presented here.

19 JUSTICE KAVANAUGH: Mr. Yang, can I  
20 ask, to follow up on Justice Gorsuch's and  
21 Justice Barrett's questions, assume we don't  
22 overrule Cabazon, but if we were to rule for the  
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  
4 depend on how the Court wrote the opinion. This  
5 is a Texas-specific statute, so it might be  
6 possible.

7 But I would -- you know, so there are  
8 some questions that I'd like to still address.  
9 One was about the meaning of 20 -- 107(b). I  
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.

22 Then, if you look at 107(b), it uses  
23 that same phrase "civil and criminal  
24 jurisdiction" but inserts "regulatory." And  
25 that was the exact distinction that Cabazon

1 drew.

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  
6 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  
19 you have a similar statute and the same body of  
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*.

23 And I don't think there's really any  
24 dispute that by using the same regulated and  
25 prohibit language and the provisions that we've

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  
4 there's no reason to distinctly disadvantage  
5 these tribes where Congress uses the same  
6 language and establishes a --

7 JUSTICE GORSUCH: Well, but, Mr. Yang,  
8 doesn't that -- doesn't that answer Justice  
9 Kavanaugh's question? If -- if we were to  
10 ignore Cabazon here in 107, on what basis could  
11 you continue to recognize that distinction under  
12 IGRA? Wouldn't that be pretty hard?

13 MR. YANG: You know, it's a different  
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  
22 post-Cabazon, I think it's hard.

23 You know, this -- our view is you  
24 should read Public Law 2 -- excuse me,  
25 Section 107 the same way that you read IGRA.

1 And I would like to talk about the tribal  
2 resolution.

3 JUSTICE BARRETT: Can I just ask one  
4 follow-up to Justice Gorsuch's question?

5 MR. YANG: 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  
9 slightly different position than your friend.  
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  
13 harder to make the case for this distinction  
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  
22 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

1 statute, Cabazon is pretty much all over it?

2 MR. YANG: And Cabazon was always in  
3 this -- this -- well, once it existed. Section  
4 105(f) has always existed in every piece of  
5 legislation going back to 1984. 105(f) existed.  
6 Congress knew when it was adopting 105(f) which  
7 would then incorporate the Public Law 280  
8 framework that that comes with Cabazon. And  
9 then, with respect specifically to gaming, it's  
10 the specific provision rather than the general  
11 provision in 105(f). It again uses Cabazon's  
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  
22 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

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?

1 Justice Alito?

2 JUSTICE ALITO: Didn't the tribal  
3 resolution ask that the statute include  
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  
8 prohibited on the tribe's reservation or on  
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  
20 referenced in 107(a), is it not?

21 MR. YANG: Which is?

22 JUSTICE ALITO: The language I just  
23 read.

24 MR. YANG: 107(a) does not have that  
25 language. It reference -- it says that 107(a)

1 is enacted in accordance with the tribal  
2 resolution.

3 JUSTICE ALITO: Yeah. Okay.

4 MR. YANG: But the tribal resolution  
5 had more -- many things in it, and this is a --

6 JUSTICE ALITO: So -- all right. I  
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.

20 Now some of them, like the Rule of  
21 Lenity, have a long history. What do you think  
22 is the basis for this Indian canon?

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



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  
4 of it in our brief. It's certainly part of the  
5 Court's jurisprudence that if there -- if you  
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.

13 JUSTICE ALITO: Well, that doesn't  
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  
22 challenged the Indian canon's existence here,  
23 and we've not gone back to -- to form an  
24 argument for it, Your Honor.

25 CHIEF JUSTICE ROBERTS: Justice

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?

8 MR. YANG: Yeah, I think that's --  
9 that's part.

10 JUSTICE SOTOMAYOR: Generally true.

11 MR. YANG: Yes, and -- but,  
12 significantly, you know, the tribe didn't want  
13 the state to impose its laws directly on the  
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,  
20 because they didn't want the state to be able to  
21 regulate or have its laws --

22 MR. YANG: Well --

23 JUSTICE SOTOMAYOR: -- applied  
24 directly, correct?

25 MR. YANG: -- I agree with that, but I

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

7 JUSTICE SOTOMAYOR: If we read this  
8 the way the State wants, presume that they are  
9 running a bingo game exactly the way the  
10 churches do, okay, is it your view that then the  
11 federal court would be open to seeing whether or  
12 not they have all the signs that are required by  
13 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  
20 courts where a federal court has to talk about,  
21 you know, how many cards can you play and what  
22 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 a  
25 pretty high bar of prohibition, and then, when

1 it enacted IGRA, it goes straight to the NIGC  
2 and the NIGC, the expert agency, gets to decide  
3 these questions.

4 JUSTICE SOTOMAYOR: I guess Texas  
5 would say we only permit not-for-profits to  
6 play. This is not for profit, so they shouldn't  
7 be playing at all. Isn't that their argument?

8 MR. YANG: That's, I think, part of  
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  
22 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  
4 very important principle that kind of underlays  
5 the body of the law there.

6 You do not want to read statutes to  
7 grant state regulatory authority on tribal lands  
8 without kind of a clear expression of that. And  
9 I think that those types of principles reflect a  
10 background body of law that one brings when  
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  
21 doesn't waive sovereign immunity lightly.  
22 That's one of our canons, right?

23 MR. YANG: That -- that's exactly  
24 right.

25 JUSTICE GORSUCH: And -- and isn't the

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

1 ambiguity-dependent canon as it's been  
2 traditionally applied.

3 MR. YANG: I think that's generally  
4 true, but there's something else going on here  
5 too, which is the -- the principle that Bryan  
6 recognized. In the specific context when you're  
7 talking about the application of -- of state  
8 regulatory authority in -- on Indian lands, you  
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  
13 reflects, I think, should -- should guide the  
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  
22 principle you just described?

23 MR. YANG: Well, I think it -- it  
24 reflects that Indian tribes are sovereign  
25 nations, that they have before the founding of



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,  
6 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

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  
20 Cabazon, and Bryan itself was -- this is cited  
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,

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

1 state law. Its effort to extend Cabazon Band  
2 suffers from three primary faults.

3 First, it ignores that when it comes  
4 to gambling, the Restoration Act departs from  
5 the Cabazon Band framework by treating both  
6 civil and criminal penalties and civil and  
7 criminal regulatory jurisdiction the same way.

8 Second, it overlooks that the Cabazon  
9 Band test was written to avoid a form of state  
10 encroachment into tribal affairs that isn't  
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  
22 state administrative agency's ability to  
23 exercise oversight through, among other things,  
24 reporting requirements, inspections, and  
25 ultimately enforcement actions, not the state's

1 larger ability to set substantive limits on  
2 gambling.

3 I welcome this Court's questions.

4 JUSTICE THOMAS: Counsel, could you  
5 give me an example of a regulatory law or rule  
6 that applies -- a gaming -- a regulation of  
7 gaming laws that applies to tribes that do not  
8 fall under 107(a)?

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  
16 that would apply to somebody who's not the tribe  
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  
21 into the way that software functions.

22 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

1       been some discussion as to the -- the difference  
2       between prohibition and regulation.

3                    Would you comment on that?  I mean,  
4       you've heard all the arguments.

5                    MS. PETTIT:  So prohibition in this  
6       context and as generally understood can include  
7       a regulation except for, as Justice Barrett  
8       noted a couple of times, Cabazon Band.

9                    So the regulation distinction made in  
10      Cabazon Band was specific to Public Law 280,  
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  
22      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

1 Cabazon Band was trying to make because, as  
2 Justice Alito pointed out, a -- a prohibition is  
3 still a matter of public policy, even if it  
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?

19 MS. PETTIT: On the gaming activity,  
20 yes, Your Honor.

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

1 requirement, a password requirement, I don't  
2 know how you can read that into gaming  
3 activities which are prohibited by, because  
4 bingo's not prohibited by. What does it matter  
5 whether it's a not-for-profit or not?

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 -- 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  
18 requirements. You can't play bingo because  
19 you're not a not-for-profit.

20 MS. PETTIT: No, Your Honor.

21 JUSTICE SOTOMAYOR: I don't know where  
22 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  
4 for -- to take the Chief Justice's example, be a  
5 distinction between low-stakes bingo under \$100  
6 or the distinction in Texas of over 750.

7 The state's regulatory interest or the  
8 state's prohibitory interest, however you want  
9 to frame it, is different between low-stakes and  
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  
14 a earlier version of the bill that ultimately  
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  
22 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

1 contrast between this more precise or narrower  
2 language and those?

3 MS. PETTIT: By looking at the context  
4 of each of the statutes, each of the statutes  
5 they cite is a settlement act that is enabling a  
6 preexisting agreement between the parties to  
7 litigation.

8 So those -- the language that Your  
9 Honor is citing is maybe the language that the  
10 parties determined was necessary, but it doesn't  
11 give much of an indication, if any, about what  
12 Congress would have determined was necessary if  
13 it was on its own.

14 And this also goes to the larger  
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  
20 to both 107(a) and 107(b) that show a departure  
21 from Cabazon Band which expressly linked the  
22 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  
6 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  
3 testimony before the committees, and you read  
4 what the Justice Department told them or the  
5 Department of the Interior, and you read what  
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.

9 So my question is, if, pursuing my odd  
10 single path perhaps, I did that here, would I  
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.

22 CHIEF JUSTICE ROBERTS: Well, I -- I  
23 -- I pressed your friend, Mr. Martin, a little  
24 bit on the tribal resolution, which I think is  
25 very strong evidence for you. On the other

1 hand, his answer that, well, that wasn't  
2 addressed in the final bill, it was a  
3 predecessor bill, also seemed pretty good.

4 Do you have an answer to that?

5 MS. PETTIT: Your Honor, the  
6 resolution may have been passed in response to  
7 the -- to a prior bill, but it is incorporated  
8 into the text or it's at least referenced in the  
9 text of the actual bill that was passed and  
10 became law, so that has to be given some  
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  
22 you to address them one by one.

23 So the first is 105(f), which I take  
24 it you acknowledge incorporates Public Law 280,  
25 and Public Law 280 had just been interpreted in

1 Cabazon as having this prohibitory/regulatory  
2 distinction.

3 MS. PETTIT: Yes, Your Honor.

4 JUSTICE KAGAN: The second is 107(b),  
5 which specifically talks about criminal  
6 regulatory jurisdiction. Now there's a question  
7 as to what kinds of -- what kind of jurisdiction  
8 it's talking about here because jurisdiction is  
9 used in two different senses in this statute,  
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  
13 about it in the which court sense, they're  
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  
20 Justice Barrett said, I think you've responded  
21 to that, the other statutes passed around the  
22 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

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  
6 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  
3 jurisdiction," it does tend to have an  
4 adjudicative meaning. So that is where -- and  
5 it's used consistently in 105(f), which Your  
6 Honor referenced, in that -- in that sense. And  
7 it's used in 107(c) in that sense. And so it  
8 would make sense to use it in 107(b) in that  
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  
14 mid-2000s, after this Court's case of City of  
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 --

20           JUSTICE KAVANAUGH: Given -- given  
21 Cabazon -- sorry to interrupt. Given Cabazon,  
22 why wouldn't it have been obvious to members of  
23 Congress to say something like the following if  
24 you wanted to do this, like "all Texas law  
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  
4 you're talking about when -- when Congress is  
5 talking about when the state can or the tribe  
6 can engage in activity which is whether the  
7 state prohibit -- permits it for any purpose,  
8 for any person, entity, or organization.

9           Again, that tracks the Cabazon Band  
10 prohibition -- prohibition language much more  
11 closely than here, where we just have that term  
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 guess, again, if we're in  
20 this world where we're trying to speculate what  
21 Congress was thinking?

22           MS. PETTIT: This is why it's always  
23 dangerous to speculate what Congress was  
24 thinking.

25           JUSTICE KAVANAUGH: Yeah, that's a

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  
8 questions we've had today about the signage that  
9 is at -- at casinos and whether that would apply  
10 to the tribe. And it doesn't because it doesn't  
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 --

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

23 Why would it make sense to enlist  
24 federal district courts to police all these  
25 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  
4 violations of the substantive limitations on  
5 gambling, not the regulations that don't go to  
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  
10 in Cabazon Band.

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  
22 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,

1 allowed by non-charitable organizations? Is it  
2 allowed for profit? Is it allowed above this  
3 amount, those kinds of things?

4 I mean, the district courts in Texas  
5 have complained about all of these things  
6 heading to the district court.

7 MS. PETTIT: So the district courts  
8 have said that a version of the -- a previous  
9 injunction issued in 2002 had turned them into a  
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  
22 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  
4 essentially no, the federal courts are there  
5 when Texas has a statute that says no table  
6 games, and all of a sudden a casino opens up  
7 with craps, but your position is like  
8 everything, you know, the -- the -- the -- the  
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.

13 MS. PETTIT: But it does create a  
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  
22 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

1 some -- in some forms of gaming.

2 JUSTICE GORSUCH: Counsel, you argue  
3 at some length that the Cabazon distinction  
4 between "prohibition" and "regulation" is  
5 unworkable. Are you asking us to overturn  
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  
13 -- that -- that -- that's not -- that's not  
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  
22 damned?

23 MS. PETTIT: So the consequences for  
24 IGRA, I respectfully disagree with the United  
25 States, would not be significant because IGRA



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  
4 to revoke the or repeal -- overturn the Cabazon  
5 Band distinction for the -- for the  
6 circumstances to which it applies.

7 JUSTICE GORSUCH: So you're not asking  
8 us to overturn Cabazon?

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  
18 necessarily all of it.

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?

22 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?

5 MS. PETTIT: It involves -- it  
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  
14 Cabazon Band and this distinction between  
15 "prohibit" and "regulate" in Public Law 280 and  
16 in IGRA. So why is it so uniquely unworkable in  
17 this context?

18 MS. PETTIT: So the lower courts have  
19 suggested that Mr. Yang is incorrect on that  
20 point, that, in fact, it's difficult to derive a  
21 single rule between what is prohibitory and what  
22 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?

4 MS. PETTIT: So IGRA incorporated a  
5 specific part of Cabazon Band that allows the  
6 tribe in 2710 to engage in Class II gaming,  
7 which permits them to -- if the state permits it  
8 under any person, any purpose, any organization.

9 So that is a different term than  
10 prohibitory or regulatory and trying to combine  
11 --

12 JUSTICE GORSUCH: I understand that.  
13 But -- but -- but if -- you're -- you're --  
14 you're saying it doesn't work well under IGRA.  
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,  
20 to understand how -- how it's uniquely  
21 problematic here but -- but less problematic, I  
22 guess, under IGRA?

23 MS. PETTIT: Maybe I misspoke earlier.  
24 IGRA -- the Public Law 280 prohibitory/  
25 regulatory distinction itself is problematic

1 outside of IGRA because it doesn't have that any  
2 purpose, any person, any language. That creates  
3 a bright-line rule, whereas this Court  
4 recognized in Cabazon Band itself that the  
5 distinction based on what is or is not a matter  
6 of fundamental state public policy does not  
7 create a blight -- bright-line rule.

8 JUSTICE GORSUCH: All right. So just  
9 back to Justice Barrett's question, does it work  
10 well under IGRA or not?

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 IGRA. So, right now, what you have is one tribe  
18 under IGRA, another tribe completely out of  
19 IGRA, and even worse, you're saying it wasn't  
20 even intended to be run like the regulatory  
21 prohibition line that Cabazon approved, correct?

22 MS. PETTIT: Correct.

23 JUSTICE SOTOMAYOR: So you want a  
24 system that's unique to everything, to Cabazon,  
25 to Bryan, to every other tribe, and you want to

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  
13 inside their casino, so it's very difficult for  
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  
21 violating, if you chose.

22 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  
4 could go in without authority and examine it in  
5 their personal capacity, but that's not  
6 typically how laws are enforced.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 Justice Thomas?

10 Justice Breyer, anything further?

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 MS. PETTIT: If we scrapped the Texas  
22 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  
4 "bingo" and that in the -- the -- you know,  
5 there is the form of bingo up there and so the  
6 next court is going to decide whether this is  
7 bingo or not?

8 MS. PETTIT: No, Your Honor. This  
9 depends on -- the -- the word "bingo" is not the  
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  
21 circumstances as a defense to prosecution.

22 But, if it -- if we were to scrap that  
23 Bingo Enabling Act, it would -- the conduct --  
24 the conduct of the tribe in this instance would  
25 fall within the state's constitutional ban on

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  
15      they are slot machines. They -- they do not  
16      have the competitive aspect of bingo because  
17      what -- I believe somebody referred to their  
18      grandmother earlier, that is a -- you are  
19      matching numbers and the first person to reach a  
20      particular pattern wins. And, here, you have  
21      one card and it is an instant game that is drawn  
22      against a historic -- a historic bingo draw, and  
23      that's just not bingo.

24                  JUSTICE BARRETT: And you'd make that  
25      argument based on Texas law?



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  
3 Texas law, and this is the same thing the Fifth  
4 Circuit said in *Ysleta I*, is that the entirety  
5 of the regulatory construct applies to the  
6 tribes. That's not what 107(b) says.

7           And in response to some of the  
8 jurisdictional questions, Section 105(f) grants  
9 civil and criminal jurisdiction to grant the  
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 --  
20 deserves to be said. There's been a lot of  
21 discussion about whether or not *Cabazon* applies,  
22 you know, are we stuck in the *Cabazon* context,  
23 et cetera.

24           Two things I would point out. Justice  
25 Breyer, I would point out that Representative

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.

8 Finally, Your Honor, I would point out  
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  
13 entitled "Indian Gaming." It is -- it is  
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,  
18 counsel. The case is submitted.

19 (Whereupon, at 11:33 a.m., the case  
20 was submitted.)

21

22

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