No. 10-50804

In the

United States Court of Appeals

for the Fifth Circuit

STATE OF TEXAS,
Plaintiff – Appellee,

v.

YSLETA DEL SUR PUEBLO; TIGUA GAMING AGENCY; TRIBAL COUNCIL; ALBERT ALVIDREZ, Tribal Governor; CARLOS HISA, Tribal Lieutenant Governor,
Defendants – Appellants.

On Appeal from the United States District Court
for the Western District of Texas, El Paso, No. 3:99-cv-00320-HLH

BRIEF OF APPELLANTS

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STATE OF TEXAS,

Plaintiff – Appellee

v. **Case No. 10-50804**

YSLETA DEL SUR PUEBLO;
TIGUA GAMING AGENCY; TRIBAL COUNCIL;
ALBERT ALVIDREZ, Tribal Governor;
CARLOS HISA, Tribal Lieutenant Governor,

Defendants - Appellants

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

1. The State of Texas, Plaintiff-Appellee
2. Attorney General of the State of Texas, Counsel for Plaintiff-Appellee (William Deane)
3. Ysleta del Sur Pueblo, Defendant-Appellant
4. Tigua Gaming Agency, Defendant-Appellant
5. The Ysleta del Sur Pueblo Tribal Council, Defendant-Appellant
6. Tribal Governor Francisco Paiz or his Successor, Defendant-Appellant

7. Lieutenant Governor Carlos Hisa or his Successor, Defendant-Appellant

8. Luebben Johnson & Barnhouse LLP, Counsel for Defendants-Appellants (Randolph Barnhouse)

9. Kemp Smith LLP, Trial Counsel for Defendants-Appellants (Richard Bonner)

s/ Randolph H. Barnhouse
Randolph H. Barnhouse
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Attorneys of record for Defendants-Appellants Ysleta del Sur Pueblo, Tigua Gaming Agency, The Tribal Council, Tribal Governor Francisco Paiz or his Successor, and Lieutenant Governor Carlos Hisa or his Successor

STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellants respectfully request oral argument. This appeal addresses the propriety of imposing criminal contempt sanctions in civil contempt proceedings, and the authority of the federal judiciary to empower state agents to enforce federal law in federal enclaves. It raises substantial statutory and constitutional questions as to the power of the federal judiciary. The Ysleta del Sur Pueblo and all other defendants submit that oral argument will significantly aid this Court's decisional process. *See* Fed. R. App. P. 34(a)(2)(C).

TABLE OF CONTENTS

25 U.S.C. § 1300g-6

Tex. Penal Code § 47.01

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

JURISDICTIONAL STATEMENT

A complaint seeking injunctive relief was brought by the State of Texas against the Ysleta del Sur Pueblo and others, pursuant to 28 U.S.C. § 1331 and 25 U.S.C. § 1300g-6. On August 27, 2001, the United States District Court for the Western District of Texas entered a permanent injunction against the defendants. Doc. 115, USCA5 44 (amended on May 17, 2002 [Doc. 165, USCA5 49]). In response to a motion for contempt filed by Appellee, the Honorable Harry Lee Hudspeth of the United States District Court for the Western District of Texas entered a contempt order against defendants, amended on August 3, 2010. Doc. 324, USCA5 306. Defendants filed a timely notice of appeal from the Amended Contempt Order on August 26, 2010. Doc. 325, USCA5 309. The Amended Contempt Order is a final contempt order from a post-judgment contempt proceeding to enforce a previous final judgment (permanent injunction), and is appealable pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the district court erred when it imposed perpetual criminal sanctions in civil contempt proceedings.
2. Whether the district court exceeded its authority when it entered a contempt order that would require state agents be allowed to conduct regulatory inspections on a federal enclave to enforce federal law.

STATEMENT OF THE CASE

Congress confirmed the Ysleta del Sur Pueblo's right to engage in gaming in the Restoration Act, 25 U.S.C. § 1300g *et seq*. In doing so, Congress provided exclusive jurisdiction over alleged violations of the Act's gaming provisions in the courts of the United States, and Congress further limited remedies available to the State of Texas solely to injunctions:

> Jurisdiction over enforcement against members. Notwithstanding section 105(f) [25 USCS § 1300g-4(f)] the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

25 U.S.C. § 1300g-6(c); *see* district court August 3, 2009 order, Doc. 281 at 2, USCA5 261. This exclusive grant of jurisdiction and limitation of remedies is part of the overall enforcement mechanism adopted by Congress, a critical component of which is 25 U.S.C. § 1300g-6(b) of the Act, which reads in its entirety:

> No State regulatory jurisdiction. Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

This section expands on the general limitation on state jurisdiction contained in 25 U.S.C. § 1300g-4(f) of the Act, which reads in its entirety:

> Civil and criminal jurisdiction within reservation. The State shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction with the

> consent of the tribe under sections 401 and 402 of the Act entitled "An Act to prescribe penalties for certain acts of violence or intimidation, and for other purposes." and approved April 11, 1968 (25 U.S.C. 1321, 1322).

Plaintiff-Appellee State of Texas ("Appellee" or "State") filed a complaint in the Western District of Texas against the Ysleta del Sur Pueblo and other defendants ("Appellants" or "the Pueblo") seeking injunctive relief – the only remedy available to it under the Restoration Act. 25 U.S.C. § 1300g *et seq.* On September 27, 2001, the district court granted summary judgment and entered an injunction against the Pueblo. Doc. 115, USCA5 44. The district court amended the injunction by order dated May 17, 2002. Doc. 165, USCA5 49. On March 14, 2008, Appellee moved for contempt based on alleged violations of the amended injunction [Doc. 204, USCA5 69], and amended its motion on March 17, 2008, ("FAMC").[1] Doc. 205, USCA5 130. The motion sought an order of contempt based entirely on one specific alleged violation of the Texas Penal Code: that the Pueblo was violating Tex. Penal Code Title 10 (offenses against public health, safety and morals) Section 47 (gambling) Subsection 47.01 (definitions) Subsection 4 (gambling device) by using mechanical devices that did not fall within any exception under Subsection 4(B). FAMC at 5-6, Doc. 205, USCA5

[1] District Court Doc. 205, USCA5 130. As counsel for Appellee confirmed at the hearing on the motion, the FAMC is the same as the original motion except for a change in the case caption. Transcript ("Tr.") of July 30, 2009, Hearing on Motion for Contempt. Tr. at 1-6, lns 14-17, USCA5 318.

134-35. There is no dispute between the parties that eight liners are legal in Texas if they meet the requirements of Tex. Penal Code Section 47.01(4)(B). Tr. at 1-48, lns 10-24, USCA5 360.

The district court held an evidentiary hearing on the amended motion for contempt on July 30, 2008. Doc. 330, USCA5 313. The court specifically ruled that the hearing was limited to the one issue raised in the FAMC: whether the operation of mechanical devices that the Appellee described as "eight liners" met the exception under Subsection 47.01(4)(B). Other activities at Speaking Rock Entertainment Center were not included in Appellee's motion for contempt and the district court refused to expand its consideration of the motion or the evidentiary hearing beyond the limited issue raised by Appellee. August 3, 2010 Order at 2 [Doc. 324, USCA5 307] ("the language of the contempt order was over broad. The Plaintiff's motion for contempt, and the Court's order granting it, focused on the use and abuse of the devices known as 'eight-liners'"). Specifically, the issues of bingo and sweepstakes were not before the district court, nor are either before this Court on appeal. Tr. at 1-11, lns 17-23 [USCA5 323]. [2]

[2] See also Tr. at 1-8, ln 18 through 1-9, ln 1; and at 1-9, lns 14-15, USCA5 320-21:

> MR. BONNER: Good morning, Your Honor. Our position is that paragraphs 5 and 6 of the plaintiff's amended motion, as well as the original motion speak to 8-liners. Nowhere does it talk about sweepstakes.
>
> THE COURT: That's the way I view it.
>
> MR. BONNER: We're entitled to fair notice, and we think that they haven't given us fair notice of the sweepstakes.

Following the hearing, the court entered its memorandum opinion and order granting the motion for contempt, which it amended by order dated August 3, 2010. In its contempt order, as amended, the district court ordered the Pueblo to:

> allow the designated representatives of the State of Texas access on a monthly basis to the Casino and any other location at which gaming activities are conducted by the Defendants, and access to the records maintained by the Defendants with respect to the operation of the devices known as "eight-liners," for the purpose of verifying that such devices are not being operated in a manner contrary to the laws of the State of Texas or the terms of the injunction and contempt order in this case.

Doc. 324 at 3, USCA5 308.

The Pueblo timely appealed the amended contempt order on August 26, 2010. Doc. 325, USCA5 309.

STATEMENT OF THE FACTS

The Ysleta del Sur Pueblo is a federally recognized Tribe of Indians. Federally Recognized Indian Tribe List 75 Fed. Reg. 60810, 60813. The Pueblo's reservation is located within the exterior boundaries of El Paso County, Texas. August 3, 2009, Order, Doc. 281 at 2, USCA5 261. The Pueblo's sovereign right to conduct gaming was restricted, but not eliminated, by Congress in the Restoration Act. 25 U.S.C. § 1300g-6. Specifically, the Pueblo continues to have the right to engage in any gaming activity not prohibited by the laws of the State of

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> THE COURT: I agree with that 100 percent . . . I'm going to restrict it to what's in the motion for contempt, so I've already ruled on that.

Texas. 25 U.S.C. § 1300g-6(a). The State of Texas has no civil or criminal regulatory jurisdiction over gaming activities on the Pueblo. 25 U.S.C. § 1300g-6(b). The Pueblo engaged in gaming activities until ordered to discontinue doing so by the Federal District Court for the Western District of Texas. September 27, 2001, injunction, Doc. 115, USCA5 44. Following entry of the injunction, the Pueblo discontinued all gaming activity. Order Modifying Sept. 27, 2001, Injunction, Doc. 165 at 6, USCA5 54.

The district court's injunction allows the Pueblo to use "eight liner devices" so long as they comply with the requirements of Tex. Penal Code Title 10, Chapter 47.01(4)(B). Order Modifying Sept. 27, 2001, Injunction, Doc. 165 at 8-11, USCA5 56-59. Specifically, Subsection 47.01(4) defines "gambling device" as:

> any electronic, electromechanical, or mechanical contrivance not excluded under Paragraph (B) that for a consideration affords the player an opportunity to obtain anything of value, the award of which is determined solely or partially by chance.

A device is "excluded under Paragraph (B)" if it:

> rewards the player exclusively with noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or $5, whichever is less

Tex Penal Code Title 10, Chapter 47.01(4)(B). Devices meeting this exception are referred to in this Brief as "Subsection B compliant."

At the time of the evidentiary hearing in this matter, the Pueblo offered entertainment using machines it believed were Subsection B compliant. The Texas Department of Public Safety, disagreeing that the machines were Subsection B compliant, conducted an undercover criminal investigation at Speaking Rock Entertainment Center on March 4 and 5, 2008. Plaintiff's Hearing Exhibit 1.[3] Appellee did not ask the United States District Court to allow Texas Department of Public Safety criminal agents to conduct the undercover criminal investigation, nor did Appellee conduct the undercover criminal investigation pursuant to the Federal Rules of Civil Procedure. Instead, the investigation was ordered by "superiors" at the Texas Department of Public Safety ("DPS") (Tr. at 1-15, lns 4-7, USCA5 327), and was conducted pursuant to instructions from Appellee's lawyers (Tr. at 1-55, ln 21 through 1-56, ln 14, USCA5 367-68).

The officers conducting the investigation had never before been involved with investigating alleged gambling activities. Tr. at 1-15, lns 12-15, USCA5 327.[4] During their criminal investigation, the undercover criminal intelligence

[3] The hearing exhibits are not yet part of the record on appeal. Appellant and Appellee are working to correct that, but at the time of filing this brief those exhibits are not available for docket citation. Appellant understands that Exhibit 2 to Plaintiff-Appellee's motion for contempt is the same report introduced at the hearing on the motion as Plaintiff's Hearing Exhibit 1. The version of the report attached to Plaintiff-Appellee's motion for contempt is located at Doc. 204, USCA5 105.

[4] Notwithstanding their lack of experience, the only preparation undertaken by the officers was to "review" (not read) the applicable statutes (Tr. at 1-48, lns 1-4, USCA5 360), drive around the outside of Speaking Rock, and obtain a hidden video camera. Tr. at 1-15, ln 16 through 1-16, ln 2, USCA5 327-28; Tr. at 1-47, lns 4-11, USCA5 359.

service agents bought cards which they used to win prizes on the Subsection B compliant machines at issue. Tr. at 1-31, lns 1-5, USCA5 343; Tr. at 1-37, lns 1-4, USCA5 349. None of the Subsection B compliant machines provided the criminal investigators a single award greater than ten times the amount charged or $5. Tr. at 1-37, lns 16-19, USCA5 349. The criminal investigators received a representation of value redeemable for merchandise in the form of a gift/debit card with restrictions against payment of cash to the cardholder. Tr. at 1-40, lns 1-2, USCA5 352; Tr. at 1-63, lns 3-12, USCA5 375; Tr. at 1-66, ln 7 through 1-68, ln 15, USCA5 378-80; Tr. at 1-71, ln 21 through 1-73, ln 11 (and defendants' exhibit 1), USCA5 383-85. The single issue before the district court was whether receiving a gift card as a representation of value was beyond the scope of those prizes permitted to be offered by Subsection B compliant devices. Tr. at 1-79, lns 19-24 [USCA5 391]; Tr. at 1-84, lns 18-21, USCA5 396.

SUMMARY OF ARGUMENT

The district court erred when it improperly imposed criminal sanctions in a civil contempt proceeding, and when it failed to adopt available, less restrictive alternatives. The district court exceeded its authority when it ordered the Pueblo to allow state agents onto a federal enclave to conduct regulatory inspections to enforce federal law all contrary to federal law and in excess of state regulatory jurisdiction.

STANDARD OF REVIEW

This Court reviews de novo a district court's invocation of its inherent powers of contempt and reviews the sanctions granted under its inherent power for an abuse of discretion. *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 619 F.3d 458 (5th Cir. 2010). When considering a district court's contempt order, this Court reviews the underlying findings of fact for clear error and the underlying conclusions of law de novo. *Af-Cap Inc. v. Republic of Congo*, 462 F.3d 417, 423 (5th Cir. 2006) (vacating district court's contempt order); *Martin v. Trinity Indus., Inc.*, 959 F.2d 45, 46-47 (5th Cir. 1992) (reversing remedial portion of contempt order that too broadly extended governmental investigative powers).

The movant in a civil contempt proceeding bears the burden of establishing by clear and convincing evidence: (1) that a court order was in effect; (2) that the order required certain conduct by the respondent; and (3) that the respondent failed to comply with the court's order. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *Northside Realty Associates, Inc. v. United States*, 605 F.2d 1348, 1352 (5th Cir. 1979). "In a civil contempt action the proof of the defendant's contempt must be 'clear and convincing', a higher standard than the 'preponderance of the evidence' standard, common in civil cases, although not so high as 'beyond a reasonable doubt.'" *United States v. Rizzo*, 539 F.2d 458, 465 (5th Cir. 1976).

In a criminal contempt proceeding, the accused is clothed with the presumption of innocence and the government has the burden of proving guilt beyond a reasonable doubt. *Hood v. United States*, 326 F.2d 33, (5th Cir. 1964) (reversing district court's criminal contempt order where contemnor's guilt was not proven beyond a reasonable doubt).

ARGUMENT

I. The District Court Erred when it Imposed Perpetual Criminal Sanctions in a Civil Contempt Proceeding.

A. Applicable law confirms the district court's sanction is criminal.

A federal court cannot impose criminal contempt sanctions in a civil contempt proceeding. Fed. R. Crim. P. 42; *Smith v. Smith*, 145 F.3d 335, 343 (5th Cir. 1998) (reversing district court criminal contempt order, noting "the district court undoubtedly could hold Defendant Smith in civil contempt for her failure to comply with the court's orders to appear, or in criminal contempt following an adequate hearing" held pursuant to Fed. R. Crim. P. 42) (internal citation omitted). Indeed, in criminal contempt proceedings, all criminal procedural safeguards must be afforded the alleged contemnor. *Johnson v. United States*, 344 F.2d 401, 411 (5th Cir. 1965)(criminal contempt "partakes so much of the nature of a criminal proceeding that comparable procedural safeguards must be accorded one charged with criminal contempt").

The key factor courts consider when determining whether a contempt sanction is criminal or civil is whether the sanction is unconditional or conditional. In other words, if there is some action the alleged contemnor can take to purge the sanction, the sanction is civil. But if the sanction cannot be purged by any action of the alleged contemnor, the sanction is criminal. *Lamar Fin. Corp. v. Adams*, 918 F.2d 564, 566 (5th Cir. 1990) ("A key determinant in this inquiry is whether the penalty imposed is absolute or conditional on the contemnor's conduct," *citing In re Rumaker*, 646 F.2d 870 (5th Cir. 1980)). Where, as here, the alleged contemnor does not "carry 'the keys of their prison in their own pockets,'" the contempt sanctions are criminal. *Shillitani v. United States*, 384 U.S. 364, 368 (1966). The court's characterization of a proceeding is not conclusive. *Southern Ry. Co. v. Lanham*, 403 F.2d 119, 124 (5th Cir. 1968). Instead, "[w]hen a contempt order contains both a punitive and a coercive dimension, [f]or purposes of appellate review it will be characterized as a criminal contempt order." *Lamar*, 918 F.2d at 567 (5th Cir. 1990) (vacating, in part, district court's contempt order).

This Court has confirmed the essential distinctions between civil and criminal contempt:

> (1) civil contempt lies for refusal to do a commanded act, while criminal contempt lies for doing some forbidden act;
>
> (2) a judgment of civil contempt is conditional, and may be lifted if the contemnor purges himself of the contempt, while punishment for criminal contempt is unconditional;

> (3) civil contempt is a facet of the original cause of action, while criminal contempt is a separate cause of action brought in the name of the United States;
>
> (4) the notice for criminal contempt must indicate the criminal nature of the proceeding.

Rizzo, 539 F.2d at 463. Applying the four *Rizzo* factors to the district court's contempt sanction confirms that the district court improperly entered a criminal sanction in a civil contempt proceeding, requiring reversal of the district court's order.[5]

B. All four *Rizzo* factors confirm the district court improperly entered a criminal contempt sanction in these civil proceedings.

(1) There is no evidence that the Pueblo refused to do a commanded act.

Appellee presented no evidence on, nor did the district court identify, any refusal by any defendant to do a commanded act. Indeed, Appellee did not argue, and instead claimed it did not need to show, any willful refusal to do a commanded act to support its contempt motion. April 29, 2008 Reply, Doc. 233 at 9, USCA5 244. Instead, as noted below, all of Appellee's evidence went to its allegation that the Pueblo was doing some forbidden act – specifically offering prizes that were

[5] This Court has recognized additional limitations on civil contempt, including that "a contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant, and *is not intended chiefly as a deterrent to offenses against the public*." *Walling v. Crane*, 158 F.2d 80, 83 (5th Cir. 1946) (reversing district court) (emphasis added). Because the injunction in this case is based on allegations of public nuisance, any sanction is by definition criminal as it would be "intended chiefly as a deterrent to offenses against the public." Doc. 115 at 2, USCA5 44.

outside the scope of those allowed to be awarded by Subsection B compliant machines. Based on the evidence, the court only identified purported actions that the court held were forbidden – specifically awarding a gift card as a representation of value that the court held was not "noncash merchandise" as required by Tex. Penal Code § 47.01(4)(B). August 3, 2009, order, Doc. 281 at 5, USCA5 264. Therefore, because the Appellee alleged the Pueblo was engaged in a forbidden act, and the district court so held, the first *Rizzo* element confirms that the sanction imposed by the district court against the Pueblo is an improper criminal sanction.

(2) The sanction is criminal because it is unconditional.

Under the second *Rizzo* criteria, the sanction entered by the district court is criminal because it is unconditional. Ordering state agent access in perpetuity to confidential books and records to which the state otherwise has no right of access and over which the state has no regulatory authority provides no mechanism by which the Pueblo can "comply" and thereby avoid the sanction.[6] Instead, the Pueblo's only choice is to refuse to allow the agents access, exposing itself to further sanctions, or accept the sanction and do nothing. The unconditional nature of the sanction makes it an improper criminal sanction under the second *Rizzo* element.

[6]At the evidentiary hearing, Appellee's counsel did not ask for the perpetual criminal sanction ultimately imposed by the district court. Tr. at 1-80, ln 1 through 1-81, ln 18, USCA5 392-93.

(3) The motion and order are not facets of the original cause of action.

Appellee did not seek court authority to investigate whether the injunction was being violated. Instead, the Texas DPS' criminal intelligence service (notably not the Texas Lottery Commission or the Texas Attorney General) sent criminal investigators to conduct an undercover criminal investigation, following which the State Attorney General's office sought criminal sanctions. A more notable divergence from the original civil injunctive action is hard to imagine. *Gompers v. Bucks Stove & Range Co*., 221 U.S. 418, 445 (1911) ("proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause"). This criminal investigation resulted in the district court ordering a criminal sanction: permanent state regulatory access on a federal enclave. Not only does that sanction exceed the one limited remedy Congress did provide, it also eviscerates Congress' specific mandate that the State have no civil or criminal regulatory authority over the Pueblo.[7]

It is uncontroverted that the investigation that led to Appellee's contempt motion was a criminal investigation. Indeed, Appellee's own witness unequivocally testified to that very fact. When asked why certain action was taken as part of the investigation, Sergeant David Wilbourn testified:

[7] 25 U.S.C. § 1300g-6(b).

> "A. It was part of the criminal investigation that we were doing at the time."

Tr. at 1-55, lns 24-25, USCA5 367.

Instead of proceeding pursuant to the Federal Rules of Civil Procedure, the Appellee unilaterally conducted a criminal investigation. Sergeant Wilbourn's affidavit admitted into evidence as part of Plaintiff's Ex. 1 confirms that he viewed the investigation as criminal. For example, in his affidavit, Sergeant Wilbourn states under oath:

1. "I am currently a Sergeant in the *Criminal Enforcement* Division of the Texas Department of Public Safety;"

2. "Part of my duties . . . require me to investigate complaints of *illegal* gaming;"

3. "I . . . investigated a report of *illegal* gaming at the Speaking Rock . . . Entertainment Center;"

4. "*All of my actions* in conducting this investigation *were done in the course and scope of my duties as a Sergeant in the Criminal Enforcement Division* of the Texas Department of Public Safety;"

5. "In my opinion, this Investigation report shows the possible violation at Speaking Rock Casino of . . . the Texas *Penal* Code."

Plaintiff's Hearing Ex. 1[8] (emphasis added). Notably absent is any reference to the district court's injunction.

[8] *See* Footnote 3, *supra*.

Sergeant David Wilbourn's written report, Plaintiff's Hearing Exhibit 1[9], also confirms that the investigation was not a "facet of the original cause of action," but instead an entirely separate *criminal* investigation. For example, it includes in its title that it was prepared by the Texas DPS "Criminal Intelligence Service." The written report confirms that the investigation was not part of this lawsuit, but instead was conducted based on "information from the El Paso Police Department regarding . . . illegal gambling." Exhibit A to Plaintiff's Exhibit 1, p. 2 (captioned "Page 1 of 6"). *Id.* at 2, USCA5 106. And most tellingly, this was not an investigation pursuant to the Federal Rules of Civil Procedure, and not even pursuant to a discovery order from the federal district court, but instead was intended to be, and was, a *criminal* investigation conducted "in an undercover capacity." *Id.*[10]

Testimony of both of Appellee's witnesses confirms that their undercover investigation, and the subsequent contempt proceeding, were intended to be criminal, diverging sharply from the original civil proceeding, and making neither a facet of the original civil case. For example, Sergeant Wilbourn, in response to questions from Appellee's own lawyer, testified:

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[9] *See* Footnote 3, *supra*.

[10] This undercover *criminal* investigation was conducted without court approval, and in defiance of federal law that unequivocally states: "No State regulatory jurisdiction. Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." 25 U.S.C. § 1300g-6(b).

> MR. VINSON: "What is your current job title?
>
> A. Sergeant, with Criminal Intelligence Service.
>
> Q. And what are the duties associated with that job title?
>
> A. To accrue criminal intelligence and reference criminal organizations and conduct criminal investigations."

Tr. at 1-14, lns 19 through 23, USCA5 326.

Appellee's witnesses never testified that the scope of their investigation was to determine compliance with the civil injunction. Instead, they testified the scope was, "To enter the facility and to see if they were in possession of illegal gambling devices and promoting gambling." Tr. at 1-15, lns 10-11, USCA5 327.

Any doubt that Appellee viewed this as a criminal proceeding is eliminated by Appellee's decision to use criminal exhibit stickers on its exhibits at the civil evidentiary hearing, and to counsel's reference to its exhibits as "State's exhibit" as opposed to "plaintiff's exhibit," an approach Appellee's counsel argued to the district court should be permitted:

> THE COURT: Did you call it State's Exhibit 1?
>
> MR. VINSON: I believe that's how it's marked, Your Honor.
>
> THE COURT: Well it shouldn't be. It's a plaintiff's exhibit.
>
> . . .
>
> MR. VINSON: They're premarked, Your Honor. Would you indulge us and allow us to call them State's Exhibits? Maybe we could make a modification or--

> THE COURT: No, sir. It's a plaintiff's exhibit. This is a civil case.
>
> MR VINSON: Yes, it is.
>
> THE COURT: This is not a criminal prosecution in State Court, so I don't care if you're the State or whatever, you're the plaintiff.
>
> MR. VINSON: Very well.

Tr. at 1-16, ln 18 through 1-17, ln 11, USCA5 328. Appellee's counsel also confirmed that Appellee understood this to be a criminal investigation through his objections to questioning by the Pueblo's lawyer. For example, when the Pueblo's lawyer asked Sergeant Wilbourn whether he knew if any other DPS officers had gone to Speaking Rock, Appellee's counsel objected, stating:

> MR VINSON: Your Honor, I'm going to object as referring to the details of potential *criminal investigation*. And to that extent, it's protected by privilege.

Tr. at 1-43, lns 6-8, USCA5 355 (emphasis added). And when the Pueblo's lawyer asked about Sergeant Wilbourn's supplemental report that was not introduced into evidence, Appellee's counsel again objected, stating:

> MR. VINSON: Your Honor, I'm again going to object as relating to the details *of an ongoing criminal investigation* and therefore, subject to privilege.

Tr. at 1-44, lns 16-18, USCA5 356 (emphasis added).

The Texas DPS, not a party to this civil litigation, pursued its criminal investigation initiated by information it received from a local police department, based upon which Appellee's legal counsel conducted a hearing it treated, in all

respects, as a criminal contempt hearing. This was not a facet of the original civil injunction proceeding, but instead a divergent criminal proceeding. As a result, under the third *Rizzo* criteria, the sanction imposed by the district court is an improper criminal sanction, and must be reversed.

(4) The notice did not indicate the criminal nature of the proceeding.

Criminal contempt proceedings require that the alleged contemnor receive all of the procedural safeguards afforded any criminal defendant. *United States v. Columbia Broad. Sys., Inc.*, 497 F.2d 107, 109 (5th Cir. 1974) ("Although contempt proceedings may be initiated by a judge on his own motion, the prosecution, taken over by Government attorneys, nevertheless must prove a charge of criminal contempt beyond a reasonable doubt"). Moreover, criminal contempt in federal courts is a separate cause of action brought in the name of the United States. *Rizzo*, 539 F.2d at 463. As a result, because it could not itself bring criminal contempt proceedings, Appellee labeled its actions as "civil." In doing so, not only did the Appellee fail to indicate the criminal nature of the proceeding in its filing with the district court, when the Pueblo advised the court that Appellee was improperly seeking criminal contempt, the Appellee vehemently denied that was the case. Doc. 233 at 9-11, USCA5 244-46. Yet as noted above, the DPS undercover criminal investigation, and Appellee's admissions at the evidentiary hearing, all confirm that Appellee and its criminal investigators knew their

allegations against the Pueblo were criminal charges. As such, they had to be brought by the United States, and the Pueblo had to be accorded all due process safeguards required in a criminal proceeding. *Bloom v. Illinois*, 391 U.S. 194, 202 (1968) (reversing Court of Appeals, holding alleged criminal contemnor entitled to jury).

In sum, the sanction ordered by the district court is unconditional, and was imposed based on the Appellee's argument, and the district court's belief, that the Pueblo was doing some forbidden act. There is nothing the Pueblo can do to purge the coercive criminal sanction imposed -- unfettered state regulatory access on a federal enclave -- absent future court order. As such, the sanction is an improper criminal sanction requiring reversal by this Court.

II. The District Court Exceeded its Authority when it Entered a Coercive Contempt Order that Would Require State Agents be Allowed to Conduct Regulatory Inspections on a Federal Enclave to Enforce Federal Law.

A. 25 U.S.C. § 1300g-4(f) prohibits state regulatory jurisdiction, enhanced by the mandate of 25 U.S.C. § 1300g-6(b).

Congress specifically, and unambiguously, defined the scope of state jurisdiction over the Ysleta del Sur Pueblo in 25 U.S.C. § 1300g-4(f). Under that section, the State of Texas is allowed to "exercise civil and criminal jurisdiction within the boundaries of the [Ysleta del Sur] reservation" only to the extent permitted in 25 U.S.C. §§ 1321 and 1322. Section 1300g-4(f) is not a grant of

general civil regulatory authority. *Accord T T E A v. Ysleta Del Sur Pueblo,* 181 F.3d 676, 685 (5th Cir. 1999) (addressing jurisdictional limitations under the Restoration Act, including § 1300g-4(f)). *See also Bryan v. Itasca County*, 426 U.S. 373, 383 (1976) (no state authority to tax on reservation mobile home); *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310, 313 (5th Cir. 1981) (under Congress' grant of limited civil and criminal jurisdiction "states do not have general regulatory power over the Indian tribes").

As to gaming, Congress further limited the State's remedies, only granting the State the right to bring an action in federal court to enjoin alleged violations of the "gaming activities" section of the Restoration Act. 25 U.S.C. §1300g-6(c). That remedy does not include the authority to grant state agents unsupervised, monthly regulatory review of tribal documents on a federal enclave. *Cf. United States v. James*, 980 F.2d 1314 (9th Cir. 1992) (refusing to enforce subpoena issued to a tribe). As the Court noted in *James*:

> The fact that Congress grants jurisdiction to hear a claim does not suffice to show Congress has abrogated all defenses to that claim. The issues are wholly distinct. Thus, the mere fact that a statute grants jurisdiction to a federal court does not automatically abrogate the Indian tribe's sovereign immunity.

Id. at 1319 (citations and internal quotations omitted)). As this Court has confirmed, it is improper for a federal district court to impose a contempt sanction that exceeds the statutory authority granted by Congress. *Martin v. Trinity Indust.,*

Inc., 959 F.2d 45, 46-47 (5th Cir. 1992) (reversing remedial portion of contempt order that too broadly extended governmental investigative powers).

B. Rules of statutory construction prohibit extending regulatory jurisdiction to the State of Texas.

The statute, on its face, could not be more specific in its exclusion of regulatory jurisdiction to the State of Texas:

> No State regulatory jurisdiction. Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas**.**

25 U.S.C. § 1300g-6(b).

Where, as here, the statutory language is clear, the Court need look no further. *TLI, Inc. v. United States*, 100 F.3d 424, 427 (5th Cir. 1996) ("Statutory construction begins with the ordinary meaning of the text"); *Julius M. Isr. Lodge of B'nai B'rith No. 2113 v. Comm'r*, 98 F.3d 190, 191 (5th Cir. 1996) (The starting point for interpreting the meaning of a statute, "is the plain language of the statute"). Nevertheless, to the extent the Court believes there is any ambiguity in the statute's prohibition of state regulatory authority, basic canons of statutory construction require that the statute be liberally construed in favor of the Pueblo, and that any ambiguities be resolved in favor of the Pueblo. *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1219 (5th Cir. 1991) ("we are mindful of the settled principle of statutory construction that statutes passed for the benefit of

dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians" (internal quotation and citation omitted)).

Yet here, the district court exceeded Congress' grant of injunctive authority, ignored Congress' limitation on state regulatory authority, and instead entered a coercive criminal sanction empowering state agents to exercise regulatory authority in a federal enclave. Indeed, entry onto land and inspection of books and records by state agents is a familiar and well-recognized form of state regulatory jurisdiction. Texas has repeatedly codified its regulatory authority to "inspect books and records." One of many such examples can be found in Section 402.703, which provides the Texas Lottery Commission with regulatory authority to inspect books and records of a licensee. 1 Tex. Admin. Code § 402.703(a) (2005) [Books and Records Inspection].[11] Moreover, the fact that entry onto private land by state agents is in itself an exercise of regulatory authority underscores the fact that entry onto a federal enclave by state agents is similarly an exercise of state regulatory jurisdiction.[12]

[11] *See also* 16 Tex. Admin. Code § 303.62 (1999) [Records] (providing Texas Racing Commission regulatory authority to inspect records of racetrack); 4 Tex. Admin. Code § 57.12 (2003) [Dealer Records] (providing Texas Animal Health Commission regulatory authority to inspect records of poultry dealer).

[12] For example, *see Puryear v. Red River Auth.*, 383 S.W.2d 818 (Tex. Civ. App. 1964) (discussing Texas statute creating state agency with authority to enter onto private land to conduct surveys).

Finally, a grant of authority to the Appellee in this civil action "for the purpose of verifying that [certain] devices are not being operated in a manner contrary to the laws of the State of Texas" is a grant of regulatory authority prohibited by federal law, including the United States Constitution and the Restoration Act. *McDaniel v. Camp*, 59 F.3d 548, 551 (5th Cir. 1995) ("even if a court has general jurisdiction to act, a judgment is void if the actual action taken orders a remedy not within the court's jurisdiction").

The district court's order, by requiring the Pueblo to allow state agents to come onto its sovereign territory— a federal enclave—and to inspect its books and records would require the Pueblo to submit to an exercise of regulatory authority by the State that is prohibited by federal law. 25 U.S.C. § 1300g-6(b) (no State regulatory jurisdiction). Congress not only declined to extend this type of regulatory jurisdiction to the State, it unequivocally confirmed that no such regulatory jurisdiction exists.

C. Extending unfettered regulatory powers to a plaintiff in civil litigation is an improper delegation of judicial authority and constitutionally impermissible.

It is an improper delegation of judicial authority to grant a party to litigation unfettered access to the opposing party's books and records to "verify" compliance with a court order. As noted by the court in *Morrow v. Corbin*:

> We are equally clear that the power thus confided to our trial courts must be exercised by them as a matter of nondelegable duty, that they

> can neither with nor without the consent of parties litigant delegate the decision of any question within their jurisdiction, once that jurisdiction has been lawfully invoked, to another agency or tribunal, and that any legislative act attempting to authorize such a delegation of authority is inconsistent with those provisions of the Constitution which confer jurisdiction on the trial [t]ribunals.

122 Tex. 553, 62 S.W. 2d 641, 645 (1933); *cf. In re Xpedior Inc.*, 354 B.R. 210, 222 (N.D. Ill. 2006) ("it is inappropriate and would be unseeming to authorize any participant in the bankruptcy process to undertake unsupervised control of estate assets," noting court should not delegate judicial authority to individuals).

Moreover where, as here, a party in civil litigation is appointed to enforce a criminal contempt sanction, the appointment violates Constitutional protections. *Young v. United States ex rel. Vuitton Et Fils S. A.*, 481 U.S. 787, 814 (1987) (holding it constitutionally impermissible for a district court to appoint a "prosecutor of a contempt action who represents the private beneficiary of the court order allegedly violated"). As this Court has noted in a similar context:

> the argument that [counsel for a party seeking contempt] was not actually acting as a prosecutor—in the sense that he only investigated and presented the evidence, leaving to the judge and defendants the entirety of the legal argument—is of no moment in this context. As we have expressly held in the past, where criminal contempt is involved, there must actually be an independent prosecutor of some kind, because the district court is not constitutionally competent to fulfill that role on its own.

Crowe v. Smith, 151 F.3d 217, 227-28 (5th Cir. 1998).

D. The State does not have police power to enforce federal law.

The law at issue in this civil litigation is federal law, not state law. *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1334 (5th Cir.1994); *cert. denied*, 514 U.S. 1016 (1995). It is axiomatic that state agents, unless Congress specifically grants them federal police power to enforce federal law, do not have the jurisdiction to do so. As noted in another context:

> The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. . . . It is appropriate to recall these origins, which instruct us as to the nature of the two different governments created and confirmed by the Constitution.

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838-39, (1995) (Kennedy, J., concurring). *See also Tennessee v. Davis*, 100 U.S. 257, 263 (1879) (the federal government "can act only through its officers and agents, and they must act within the States").

In those situations where Congress believes it appropriate to establish a mechanism to grant state government police power to enforce federal laws, Congress has specifically done so. *E.g.*, 18 U.S.C. § 3055 (extension of federal authority to non-federal officers to enforce liquor laws); 25 U.S.C. § 2804 (procedures to extend federal enforcement authority to state law enforcement in Indian country). When doing so, Congress has incorporated protections and limitations into the process. *E.g.*, 25 U.S.C. § 2804(c) ("Limitations on use of

personnel of non-Federal agency"). The practical effects of this division of jurisdiction are significant, both to the states and to the federal government. *E.g.*, *Grimes v. United States*, 234 F.2d 571 (5th Cir. 1956) (evidence obtained in unauthorized search by state officers is admissible in a prosecution by the United States for violation of federal law); *accord* 28 U.S.C. § 2671 (federal tort claims procedures); *Provancial v. United States*, 454 F.2d 72, 75 (8th Cir. 1972) (city police officer "deputized special officer of the Department of Interior" subject to suit under federal Tort Claims Act).

Moreover, in this case the Appellee is nothing more than a party in a civil proceeding.[13] As such, the district court has no authority to grant the Appellee authority to enforce federal law, especially in connection with these contempt proceedings. *Young*, 481 U.S. 787 at 813-14 (1987) (district court acted unconstitutionally when it appointed counsel for interested party in civil proceeding to represent the United States in the investigation and prosecution of conduct allegedly contumacious of the court's injunctive order); *accord United States v. Providence Journal Co*., 485 U.S. 693, 708 (1988) (dismissing writ of certiorari to review criminal contempt prosecution brought to vindicate the authority of the judiciary and to punish disobedience of a court order where petition for writ was not approved by Solicitor General).

[13] Tr. at 1-16, ln 18 through 1-17, ln 11, USCA5 328 ("THE COURT: This is not a criminal prosecution in State Court, so I don't care if you're the State or whatever, you're the plaintiff").

The rule limiting the exercise of federal police power to federal agents is particularly significant in the context of the federal government's relationships with Indian Tribes. *See generally* F. Cohen, *Handbook of Federal Indian Law* § 2.01[2] (Nell Jessup Newton ed., 2005) ("Federal supremacy in Indian law is a bedrock principle of Indian law . . . . The field of federal Indian law has been centrally concerned with protecting Indian tribes from illegitimate assertions of state power over tribal affairs").

Because the law in this case is federal, and because the State is a party to civil litigation and as such has no applicable federal police power, it cannot be given the authority to enforce federal law. Only the United States government may do so.

E. The trial court erred when it failed to adopt less restrictive alternatives.

Instead of granting Appellee the unfettered perpetual right to enter a federal enclave and comb through protected books and records, other alternatives were available to confirm the Pueblo's ongoing compliance with the district court's injunction. The district court could have ordered the defendant Tigua Gaming Agency to submit quarterly compliance reports. The district court itself has recognized the regulatory competency of the Tigua Gaming Agency, stating "[t]he Defendants are correct in pointing out that there is not, on the present record, any issue of inadequate regulatory oversight." *Texas v. Ysleta del Sur Pueblo*, 220 F.

Supp. 2d 668, 674 (W.D. Tex. 2001). To ensure these compliance reports fully addressed the court's concerns, the court could have required submittal of an annual review and confirmation by an independent test laboratory with expertise in regulatory compliance. These and other less restrictive options were suggested to, but not adopted by, the district court.

Having less restrictive alternatives available, but rejecting them in favor of coercive criminal sanctions, is a violation of Due Process. Contempt powers may be exercised only if essential to preserve the authority of the court and the sanction chosen must employ "'the least possible power adequate to the end proposed.' If there is a reasonable probability that a lesser sanction will have the desired effect, the court must try the less restrictive measure first." *Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc.*, 86 F.3d 464, 467 (5th Cir. 1996) (*quoting Spallone v. United States*, 493 U.S. 265 (1990)) (holding civil contempt sanction entered was an abuse of discretion).

CONCLUSION

This Court should reverse the district court's order of contempt in its entirety.

November 9, 2010

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on this November 9, 2010, pursuant to 5th Cir. R. 25, I caused the foregoing to be served electronically on the following through the ECF System:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because this brief contains 7,148 words (as counted by Microsoft Word 2007), excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman typeface (except for the footnotes, which are in 12-point Times New Roman typeface).

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Randolph H. Barnhouse

ECF CERTIFICATIONS

I certify that the required privacy redactions have been made pursuant to 5th Cir. R. 25.2.13, the electronic submission is an exact copy of the paper submission, and the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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Dated: November 9, 2010

ADDENDUM

25 U.S.C. § 1300g-4

25 U.S.C. § 1300g-6

Tex. Penal Code § 47.01

LEXSTAT 25 USC 1300-G-4

*** CURRENT THROUGH PL 111-284, APPROVED 10/18/10 ***

TITLE 25. INDIANS
CHAPTER 14. MISCELLANEOUS
YSLETA DEL SUR PUEBLO: RESTORATION OF FEDERAL SUPERVISION

Go to the United States Code Service Archive Directory

25 USCS § 1300g-4

§ 1300g-4. Provisions relating to tribal reservation

(a) Federal reservation established. The reservation is hereby declared to be a Federal Indian reservation for the use and benefit of the tribe without regard to whether legal title to such lands is held in trust by the Secretary.

(b) Conveyance of land by State. The Secretary shall--
(1) accept any offer from the State to convey title to any land within the reservation held in trust on the date of enactment of this Act [enacted Aug. 18, 1987] by the State or by the Texas Indian Commission for the benefit of the tribe to the Secretary, and
(2) hold such title, upon conveyance by the State, in trust for the benefit of the tribe.

(c) Conveyance of land by tribe. At the written request of the Tribal Council, the Secretary shall--
(1) accept conveyance by the tribe of title to any land within the reservation held by the tribe on the date of enactment of this Act [enacted Aug. 18, 1987] to the Secretary, and
(2) hold such title, upon such conveyance by the tribe, in trust for the benefit of the tribe.

(d) Approval of deed by Attorney General. Notwithstanding any other provision of law or regulation, the Attorney General of the United States shall approve any deed or other instrument which conveys title to land within El Paso or Hudspeth Counties, Texas, to the United States to be held in trust by the Secretary for the benefit of the tribe.

(e) Permanent improvements authorized. Notwithstanding any other provision of law or rule of law, the Secretary or the tribe may erect permanent improvements, improvements of substantial value, or any other improvement authorized by law on the reservation without regard to whether legal title to such lands has been conveyed to the Secretary by the State or the tribe.

(f) Civil and criminal jurisdiction within reservation. The State shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under sections 401 and 402 of the Act entitled "An Act to prescribe penalties for certain acts of violence or intimidation, and for other purposes." and approved April 11, 1968 (*25 U.S.C. 1321*, *1322*).

(g) Acquisition of land by the tribe after August 18, 1987.
(1) Notwithstanding any other provision of law, the Tribal Council may, on behalf of the tribe--
(A) acquire land located within El Paso County, or Hudspeth County, Texas, after the date of enactment of this Act [enacted Aug. 18, 1987] and take title to such land in fee simple, and
(B) lease, sell, or otherwise dispose of such land in the same manner in which a private person may do so under the laws of the State.

(2) At the written request of the Tribal Council, the Secretary may--

(A) accept conveyance to the Secretary by the Tribal Council (on behalf of the tribe) of title to any land located within El Paso County, or Hudspeth County, Texas, that is acquired by the Tribal Council in fee simple after the date of enactment of this Act [enacted Aug. 18, 1987], and

(B) hold such title, upon such conveyance by the Tribal Council, in trust for the benefit of the tribe.

HISTORY:

(Aug. 18, 1987, P.L. 100-89, Title I, § 105, 101 Stat. 667.)

LEXSTAT 25 USC 1300-G-6

*** CURRENT THROUGH PL 111-284, APPROVED 10/18/10 ***

TITLE 25. INDIANS
CHAPTER 14. MISCELLANEOUS
YSLETA DEL SUR PUEBLO: RESTORATION OF FEDERAL SUPERVISION

Go to the United States Code Service Archive Directory

25 USCS § 1300g-6

§ 1300g-6. Gaming activities

(a) In general. All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.

(b) No State regulatory jurisdiction. Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

(c) Jurisdiction over enforcement against members. Notwithstanding section 105(f) [*25 USCS § 1300g-4(f)*] the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

HISTORY:
(Aug. 18, 1987, P.L. 100-89, Title I, § 107, 101 Stat. 668.)

LEXSTAT TEX. PENAL CODE § 47.01

*** CURRENT THROUGH THE 2009 FIRST CALLED SESSION ***
*** Federal case annotations: Mar. 27, 2010 postings on Lexis.com ***
*** State case annotations: July 7, 2010 postings on Lexis.com ***

PENAL CODE
TITLE 10. OFFENSES AGAINST PUBLIC HEALTH, SAFETY, AND MORALS
CHAPTER 47. GAMBLING

GO TO TEXAS CODE ARCHIVE DIRECTORY

Tex. Penal Code § 47.01 (2010)

§ 47.01. Definitions

In this chapter:

(1) "Bet" means an agreement to win or lose something of value solely or partially by chance. A bet does not include:

(A) contracts of indemnity or guaranty, or life, health, property, or accident insurance;

(B) an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered in a contest; or

(C) an offer of merchandise, with a value not greater than $ 25, made by the proprietor of a bona fide carnival contest conducted at a carnival sponsored by a nonprofit religious, fraternal, school, law enforcement, youth, agricultural, or civic group, including any nonprofit agricultural or civic group incorporated by the state before 1955, if the person to receive the merchandise from the proprietor is the person who performs the carnival contest.

(2) "Bookmaking" means:

(A) to receive and record or to forward more than five bets or offers to bet in a period of 24 hours;

(B) to receive and record or to forward bets or offers to bet totaling more than $ 1,000 in a period of 24 hours; or

(C) a scheme by three or more persons to receive, record, or forward a bet or an offer to bet.

(3) "Gambling place" means any real estate, building, room, tent, vehicle, boat, or other property whatsoever, one of the uses of which is the making or settling of bets, bookmaking, or the conducting of a lottery or the playing of gambling devices.

(4) "Gambling device" means any electronic, electromechanical, or mechanical contrivance not excluded under Paragraph (B) that for a consideration affords the player an opportunity to obtain anything of value, the award of which is determined solely or partially by chance, even though accompanied by some skill, whether or not the prize is automatically paid by the contrivance. The term:

(A) includes, but is not limited to, gambling device versions of bingo, keno, blackjack, lottery, roulette, video poker, or similar electronic, electromechanical, or mechanical games, or facsimiles thereof, that operate by chance or partially so, that as a result of the play or operation of the game award credits or free games, and that record the number of free games or credits so awarded and the cancellation or removal of the free games or credits; and

(B) does not include any electronic, electromechanical, or mechanical contrivance designed, made, and adapted solely for bona fide amusement purposes if the contrivance rewards the player exclusively with noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or $ 5, whichever is less.

(5) "Altered gambling equipment" means any contrivance that has been altered in some manner, including, but not limited to, shaved dice, loaded dice, magnetic dice, mirror rings, electronic sensors, shaved cards, marked cards, and any other equipment altered or designed to enhance the actor's chances of winning.

(6) "Gambling paraphernalia" means any book, instrument, or apparatus by means of which bets have been or may be recorded or registered; any record, ticket, certificate, bill, slip, token, writing, scratch sheet, or other means of carrying on bookmaking, wagering pools, lotteries, numbers, policy, or similar games.

(7) "Lottery" means any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win anything of value, whether such scheme or procedure is called a pool, lottery, raffle, gift, gift enterprise, sale, policy game, or some other name.

(8) "Private place" means a place to which the public does not have access, and excludes, among other places, streets, highways, restaurants, taverns, nightclubs, schools, hospitals, and the common areas of apartment houses, hotels, motels, office buildings, transportation facilities, and shops.

(9) "Thing of value" means any benefit, but does not include an unrecorded and immediate right of replay not exchangeable for value.

HISTORY: Enacted by Acts 1973, 63rd Leg., ch. 399 (S.B. 34), § 1, effective January 1, 1974; am. Acts 1987, 70th Leg., ch. 313 (H.B. 342), §§ 1, 2, effective September 1, 1987; am. Acts 1989, 71st Leg., ch. 396 (S.B. 807), § 1, effective June 14, 1989; am. Acts 1993, 73rd Leg., ch. 774 (S.B. 522), § 1, effective August 30, 1993; am. Acts 1993, 73rd Leg., ch. 900 (S.B. 1067), § 1.01, effective September 1, 1994; am. Acts 1995, 74th Leg., ch. 318 (S.B. 15), § 19, effective September 1, 1995.