IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

STATE OF TEXAS,	§	
	§	
Plaintiff,	§	
	§	**No: 03:17-CV-00179-PRM**
v.	§	
	§	
YSLETA DEL SUR PUEBLO,	§	
THE TRIBAL COUNCIL	§	
AND THE TRIBAL GOVERNOR	§	
CARLOS HISA or his SUCCESSOR,	§	
	§	
Defendants.	§	
	§	

PUEBLO DEFENDANTS' MEMORANDUM OF LAW:

THE RESTORATION ACT DOES NOT PROVIDE PLAINTIFF AN AFFIRMATIVE BASIS FOR RELIEF

INTRODUCTION

At the preliminary injunction hearing, the Court asked "how does the State of Texas come into federal court to seek an injunction to stop the violation of federal law, albeit state law federalized?" Tr. of Hr'g (Day 1) at 14:13–15. This line of questioning by the Court correctly identified an issue that precludes Plaintiff from obtaining preliminary injunctive relief and, if Plaintiff fails to identify a different predicate for relief, it prohibits Plaintiff from receiving any relief at all in this pending action.

In its First Amended Complaint, ECF No. 8 ("FAC"), the Plaintiff asserts two claims for relief: one for a declaratory judgment "under the federal Declaratory Judgments Act," FAC ¶ 30, and one for injunctive relief "to enforce the gambling prohibitions in the Restoration Act," *id.* ¶ 36. Neither claim provides a basis for the relief sought by Plaintiff. As the Supreme Court long ago explained, "the Declaratory Judgments Act is not an independent source of federal

jurisdiction; the availability of such relief presupposes the existence of a judicially remediable right." *Schilling v. Rogers*, 363 U.S. 666, 677 (1960) (internal citation omitted). Plaintiff thus necessarily relies on the Restoration Act to supply the requisite "judicially remedial right" it asserts in this case.

But as the Court reasoned at the preliminary injunction hearing, the plain text and structure of the Restoration Act reserves its remedial rights solely to the federal government—not Plaintiff. Section 107(c) of the Restoration Act, the lynchpin of Plaintiff's request for injunctive relief, is a "savings clause" that says only that nothing in Section 107 itself displaces other authorities that might provide Plaintiff with the right to seek injunctive relief against Defendants. For Plaintiff to proceed with this case, it must identify a source *extrinsic to* the Restoration Act that provides it with a basis for injunctive relief against Defendants.

ARGUMENT

I. The Restoration Act's Limited Waiver of Sovereign Immunity Operates Only as to the Federal Government—Not Plaintiff.

A. The Restoration Act Denies Regulatory Jurisdiction to the State.

"Indian tribes" like the Pueblo "have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). That "immunity applies no less to suits brought by States (including in their own courts) than to those by individuals." *Michigan v. Bay Mills Indian Cmty.*, U.S.134 S. Ct. 2024, 2031 (2014). Under fundamental sovereign-immunity principles, Plaintiff can sue the Pueblo only if "Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfr.. Techs., Inc.*, 523 U.S. 751, 754 (1998) (collecting cases). Because important aspects of tribal self-determination are at issue whenever Congress passes legislation affecting tribal governance, courts will not infer that Congress intended "[t]o

abrogate tribal immunity" unless it "'unequivocally' express[es] that purpose." *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (citation omitted). "Thus, unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Bay Mills*, 134 S. Ct. at 2030 (citation omitted).

Congress partially abrogated the Pueblo's immunity in Section 107 of the Restoration Act. Section 107(a) "prohibit[s] on the reservation and on lands of the tribe" the operation of "[a]ll gaming activities which are prohibited by the laws of the State of Texas." 25 U.S.C. § 1300g-6(a)[1]. This restriction represents a serious intrusion on the Pueblo's sovereignty; tribes have an inherent sovereign right to offer some forms of gaming. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214–22 (1987) (affirming sovereign right of Indians to engage in gaming on tribal lands).

The Restoration Act's text cabins that intrusion in a number of ways. For one thing, it reserves regulatory enforcement authority exclusively to the federal government. Section 107(b)—entitled "No State regulatory jurisdiction"—provides that "[n]othing in [Section 107] shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." 25 U.S.C. § 1300g-6(b). To reinforce this restriction, Section 107(c) places "exclusive jurisdiction" in "the courts of the United States" for "any offense in violation of" the provisions of state law essentially federalized in Section 107(a). *Id.* § 1300g-6(c). Notably, Congress opted against incorporating into federal law the full panoply of remedies available for those offenses under Texas law; the federal government can obtain only "the same *civil and criminal penalties* that are provided by" Texas law. *Id.* § 1300g-6(a) (emphasis added). Section 107 thus simultaneously

[1] The Restoration Act, Pub. L. No. 100-89, 101 Stat. 666 (Aug. 6, 1987), was formerly codified at 25 U.S.C. 1300g-1, *et seq*. However, it is now omitted from the U.S. Code.

abrogates the Pueblo's sovereign immunity as to the federal government and reaffirms it as to Plaintiff. As counsel for Plaintiff acknowledged at the preliminary injunction hearing, these provisions work together to "divest" Plaintiff of "general regulatory authority" over gaming offered by the Pueblo, forcing Plaintiff to locate its putative "enforcement" authority in Section 107(c). Tr. of Hr'g (Day 2) at 26:1–6.

B. Section 107(c) Is a "Savings Clause," Not a Jurisdictional Grant.

But Section 107(c) can operate as a grant of enforcement authority only to the extent it unequivocally waives the Pueblo's immunity or expressly empowers Plaintiff to seek injunctive relief. As the Supreme Court put it in *Bay Mills*, "[u]nless Congress has authorized [a state's] suit, [Supreme Court] precedents demand that it be dismissed." 134 S. Ct. at 2032. Congress has not done so in the Restoration Act.

Section 107(c) contains no unambiguous expression of congressional intent to authorize Plaintiff's action for injunctive relief. After granting exclusive jurisdiction to the federal courts, it only says that "nothing in this section [107] 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). This language falls far short of the pellucid language required to abrogate tribal immunity: "Nothing on the face of [the statute] purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive and declaratory relief." *Santa Clara Pueblo*, 436 U.S. at 59. At most, Section 107(c) hints that some unspecified provision, in some unspecified statute, *might* afford Plaintiff a judicially cognizable right to injunctive relief vis-à-vis the Pueblo.

Yet the law rejects an abrogation-by-implication approach to sovereign immunity. "It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally

expressed.'" *Id.* at 58 (internal quotation marks and citation omitted). Accordingly, if Plaintiff wishes to enjoin the Pueblo from gaming, it must point to something besides Section 107(c). *See, e.g., Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 891 (1986) ("[I]n the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States."); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (noting that sovereign immunity waivers must be "unmistakably clear in the language of the statute" and cannot be based on "inferences from general statutory language"), *superseded by statute on other grounds*, 42 U.S.C. § 2000d-7.

The Pueblo anticipates that Plaintiff will object to this conclusion with some variation of three overarching arguments. First, Plaintiff probably will argue, as it did at the preliminary injunction hearing, that "if the language [of Section 107(c)] weren't read as an affirmative grant" of authority to sue the Pueblo, then "it would largely be superfluous language because it would just say nothing precludes the state from doing this [injunctive suit], but it wouldn't . . . signify anything." *See, e.g.*, Tr. of Hr'g (Day 1) at23:2-24:1. Second, Plaintiff likely will assert that Congress could not have intended for the Restoration Act to lack an enforcement remedy for the State. *See, e.g.*, Tr. of Hr'g (Day 2) at33:1-1; 34:5-15. And third, Plaintiff will rely on Judge Hudspeth's prior observation that Section 107 operates as a waiver of sovereign immunity sufficient to support injunctive relief by Plaintiff and that tribal immunity does not bar claims for injunctive relief asserted against tribes. *See Texas v. Ysleta Del Sur Pueblo*, 79 F. Supp. 2d 708, 711 (W.D. Tex. 1999). None of these arguments has merit.

As to the first issue, the canon against surplusage poses no obstacle to the Pueblo's arguments against reading Section 107(c) as a grant of authority to sue. As explained by case law addressing analogous statutes, Section 107(c)'s "nothing in this section" language is not

surplusage, but instead is a "savings clause" that disclaims congressional intent to "limit[] any other remedies which might exist." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 328 (1981). In *City of Milwaukee*, for example, the Supreme Court held that a similar statute did not "evince[] an intent to preserve the federal common law of nuisance," even though it provided: "Nothing *in this section* shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." *Id.* (Emphasis in original.) This phrasing "means only that the provision of [certain remedies in a statute] does not revoke other remedies." *Id.* at 329. The *City of Milwaukee* Court observed that this statutory language is "common." *Id.* Indeed, in the context of sovereign immunity, courts routinely interpret the preface "nothing in this section" to simply connote that the party relying on a purported immunity "waiver in [a statute] must demonstrate that a source outside of the [proffered statute] entitles it to the relief sought." *In re Frankin Savings Corp.*, 385 F.3d 1279, 1286 (10th Cir. 2004) (bankruptcy law); *Jove Eng'g, Inc. v. IRS*, 92 F.3d 1539, 1549 (11th Cir. 1996) (same). Courts have deployed the same reasoning in analyzing the existence of jurisdictional grants. *See, e.g.*, *Sabhari v. Reno*, 197 F.3d 938, 942 (8th Cir. 1999) (holding, in the immigration context, that "use of the phrase 'nothing in this section' implies that other sections remain viable jurisdictional alternatives because that phrase contrasts so sharply with other, more strongly worded, jurisdiction-stripping provisions . . . . which employ the more forceful phrase 'not withstanding any other provision of law'" (internal citations omitted)).

By contrast, courts *do* hold sovereign immunity abrogated when Congress specifies that nothing in a section *or in any other law* forecloses an enumerated remedy. The Clean Air Act's "citizen suit" provision, for example, has been held by multiple courts to abrogate the federal

government's sovereign immunity, despite also containing a savings clause in its first sentence. *See City of Jacksonville v. Dep't of the Navy*, 348 F.3d 1307, 1317–18 (11th Cir. 2003); *United States v. Tennessee Air Pollution Control Bd.*, 185 F.3d 529, 532 (6th Cir. 1999). That provision reads:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section *or in any other law of the United States* shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from--
>
> (1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or
>
> (2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,
>
> against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution.

42 U.S.C. § 7604(3) (emphasis added).

The "other laws" modifier includes both rights-creating statutes and rights-limiting doctrines. *Tennessee Air Pollution Control Bd.*, 185 F.3d at 532. Because "'[any] other law' obviously includes the law of sovereign immunity," its presence after "nothing in this section" means "that nothing in the law of sovereign immunity shall be construed to prohibit [a party] from obtaining" a particular remedy. *Id.* Here, on the other hand, the careful omission of "any other law" from Section 107(c) reflects Congress's considered intent to preserve the effect of laws outside of the Restoration Act. *See City of Milwaukee*, 451 U.S. at 328. It is Plaintiff's burden to identify an extrinsic law that unequivocally abrogates the Pueblo's sovereign immunity.

C. That Section 107 Contains No Express Remedy Reserved to Plaintiff Does Not Convert It Into an Authorization for Plaintiff to Sue the Pueblo.

These rules apply even if it leaves Plaintiff without a jurisdictional basis for "civil enforcement of [its] laws in this court." Tr. of Hr'g (Day 2) at42:2-3. "There is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa Tribe*, 523 U.S. at 755. Absent clear and "specific textual or structural features" that unmistakably abrogate the Pueblo's immunity, this court cannot essentially "revise [Section 107], as [Plaintiff] proposes, just because the text as written creates an apparent anomaly as to some subject it does not address" and because Plaintiff believes that "Congress 'must have intended' something broader." *Bay Mills*, 134 S. Ct. at 2033–34. "'Congress wrote the statute it wrote.'" *Id.* (citation omitted). For sovereign immunity purposes, it simply does not matter that Congress might have abrogated the Tribe's immunity in a way that vests the federal government with the exclusive responsibility for carrying out the provisions of Section 107. The Pueblo's sovereignty does not depend on whether Plaintiff has a readily available judicial remedy to enforce the Restoration Act. *See, e.g.*, *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1243–44 (11th Cir. 1999) (collecting cases including *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) ("Sovereign immunity may leave a party with no forum for its claims.")).

Here, moreover, Plaintiff complains not that it will be deprived of all remedies it might have against the Pueblo's gaming, only that honoring the Pueblo's sovereign immunity might "bar[] [the State] from pursuing the most efficient remedy." *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991).[2] Yet Plaintiff has other, "adequate alternatives." *Id.* Plaintiff still "can request that the United States prosecute the

[2] Plaintiff has not shown the Court, nor even argued to the Court, that it has no other remedies.

Tribe or its members for violating applicable state or federal gambling laws," *Seminole Tribe*, 181 F.3d at 1244, as Plaintiff did once, but nearly a decade ago, Tr. of Hr'g (Day 2) at 49:3–17. Plaintiff could even negotiate with the Pueblo and reach a mutually agreeable resolution about the scope of gaming that it could tolerate on the Pueblo's lands, or it could seek "appropriate legislation from Congress" that supplements the Restoration Act's enforcement provisions with one expressly granting authority to Plaintiff. *Cf. Oklahoma Tax Comm'n*, 498 U.S. at 514. It simply is not the case that enforcing the Pueblo's sovereign immunity will nullify the Restoration Act and "allow the tribe to escape enforcement of the Texas criminal gambling laws."[3] Tr. of Hr'g (Day 2) at 34:11-12.

Ironically, Plaintiff's decades-long quest to foreclose the Indian Gaming Regulatory Act's ("IGRA") application to the Pueblo has removed the clearest avenue for obtaining injunctive relief extrinsic to Section 107(c): IGRA's express injunctive remedy for violations of State-Tribal gaming compacts. *See* 25 U.S.C. § 2710(d)(7)(A)(ii). Legislative history, in fact, indicates that in the final version of the bill that it adopted, Congress intended for any gaming conducted by the Pueblo to be governed by future federal gaming laws, notwithstanding the Restoration Act. *See* 133 Cong. Rec. H2050-03, 1987 WL 935391 (Apr. 21, 1987) (Statement of Rep. Udall) ("[G]ambling would remain prohibited *unless allowed by a future act of Congress*." (emphasis added); *see also* 133 Cong. Rec. H6972-05, 1987 WL 943894 (Aug. 3, 1987)

[3] To the extent Plaintiff contends that the Pueblo's sovereign immunity should be abrogated on the basis of an alleged "agree[ment] to be bound by [Texas law] in order to secure passage of [the Restoration Act]," Tr. of Hr'g (Day 2) at 34:13-14, the law is clear that "'waivers of tribal sovereign immunity cannot be implied on the basis of a tribe's actions, but must be unequivocally expressed," or in other words, "'[m]anifested by direct and appropriate language, as distinguished from that which is inferred from conduct.'" *Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224, 1235 (11th Cir. 2012) (alteration in original) (citations omitted). An ostensible promise to comply with state law is not an express, unequivocal waiver of sovereign immunity. *See id.*

(Statements of Reps. Vento and Udall) (explaining that the Restoration Act "codif[ied] . . . the holding and rational[e] adopted" by the Supreme Court in *Cabazon Band*).[4] Section 107(c) thus arguably anticipates that IGRA or some other Indian gaming statute would provide Plaintiff with an injunctive remedy, but Plaintiff now cannot access that remedy because it continues to successfully argue that the Pueblo falls outside of IGRA's ambit.

In this respect, Plaintiff is somewhat a victim of its own success: Plaintiff brings this action because it has been unable to convince the federal government to use its authority under the Restoration Act to regulate the Pueblo's gaming. The federal government's inaction, however, stems at least in part from conclusions independently reached by the Department of the Interior and the National Indian Gaming Commission—the only federal bodies that directly regulate Indian gaming—that the Pueblo can conduct Class II bingo, including electronic bingo, under IGRA. *See Texas v. Ysleta del Sur Pueblo, et al.*, No. EP-99 CA-320-H, ECF No. 523-2 (Attached as Exhibit A). Plaintiff cannot abrogate the Pueblo's immunity merely because it has committed itself to a statutory gaming regulatory scheme that lacks an express waiver of sovereign immunity.

D. Judge Hudspeth's Prior Sovereign Immunity Ruling Has No Preclusive Effect and Has Been Abrogated by Subsequent Supreme Court Precedent.

Finally, Plaintiff cannot use the 1999 order entered by Judge Hudspeth to vitiate the Pueblo's sovereign immunity. *Ysleta*, 79 F. Supp. 2d at708. That decision contains two

[4] "[B]oth of the parties, and this Court, agree that the amendatory language did significantly, if not substantially, change the statute [Section 107 of the Restoration Act]." *Texas v. del Sur Pueblo*, 220 F. Supp. 2d 668, 687 (W.D. Tex. 2001), *modified* (May 17, 2002), *aff'd*, 31 F. App'x 835 (5th Cir. 2002), and *aff'd sub nom. State of Texas v. Pueblo*, 69 F. App'x 659 (5th Cir. 2003), and *order clarified sub nom. Texas v. Ysleta Del Sur Pueblo*, No. EP-99-CA-320-H (W.D. Tex. Aug. 4, 2009).

conclusions central to Plaintiff's arguments: (1) that Section 107(c) "allows the State of Texas to bring suit" for injunctive relief "in federal court," and (2) that "tribal immunity is not a defense to a claim for injunctive relief when brought against tribal officials *and the Tribe itself*." *Id.* at692 (emphasis added). Supreme Court precedent, however, holds that these rulings are nonbinding on this Court.

As an initial matter, Plaintiff cannot insulate either ruling from review via preclusion principles. *See, e.g.*, Tr. of Hr'g (Day 1) at 52. Although "general res judicata principles" usually prevent "collateral attacks on subject matter jurisdiction," those principles permit collateral attacks on previously determined subject matter jurisdiction when it "would serve an important policy extrinsic to the judicial system," such as preserving a sovereign's immunity to suit. *See generally* Karen Nelson Moore, *Collateral Attack on Subject Matter Jurisdiction*, 66 CORNELL L. REV. 534, 542–43, 560–61 (1981).[5] The Supreme Court has expressly held as much. Because "[c]onsent alone gives jurisdiction to adjudge against a sovereign," the "suability of the United States *and the Indian Nations* . . . depends upon affirmative statutory authority," the absence of which renders "the attempted exercise of judicial power . . . void." *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 514 (1940) (emphasis added). The Fifth Circuit follows this authority and views the "doctrine of immunity" as "sufficiently important to prevail over the application of the doctrine of *res judicata*." *Republic Supply Co. v. Shoaf*, 813 F.2d 1046, 1054 n.9 (5th Cir. 1987). As a result, Judge Hudspeth's prior opinion does not preclude the Pueblo from asserting—and this court from holding—both that Section 107(c) is an insufficiently

[5] There is no similar policy that would allow the Court to avoid the res judicata effect of the Court's lack of capacity ruling in that same order.

express abrogation of tribal sovereign immunity and that Plaintiff otherwise cannot obtain declaratory and injunctive relief directly against the Pueblo.

As to the latter issue, the Supreme Court also subsequently has clarified that states cannot seek such relief directly from Indian tribes, but must follow the teachings of *Ex parte Young*, 209 U.S. 123 (1908), which permits claims for equitable relief to be raised only against officials of a sovereign. *See, e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73–74 (1996); *Brennan v. Stewart*, 834 F.2d 1248, 1252 (5th Cir. 1988) (explaining that "any suit seeking to enjoin wrongful—and *ipso facto* unauthorized—acts by state officials is not a suit against the state" and may be brought against state officials in their official capacities). In his 1999 order, Judge Hudspeth reasoned that Plaintiff could obtain equitable relief, but not damages, from both the Pueblo and tribal officials based on its reading of *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999). Yet *TTEA* held only that "[s]tate sovereign immunity does not preclude declaratory or injunctive relief against *state officials*." *Id.* at 680 (emphasis added) (citing *Ex parte Young*). *TTEA* did note, immediately prior to that holding, that Justice Stevens had "suggested" in his concurring opinion in *Oklahoma Tax Commission* that "tribal sovereign immunity might not extend 'to claims for prospective equitable relief against a tribe,'" *id.* (quoting 498 U.S. at 515), but nothing in *TTEA* actually adopted that rule, which would have been inconsistent with the *TTEA* court's overarching goal of harmonizing the "federal common law doctrine of tribal sovereign immunity" with the "now-constitutionalized doctrine of state sovereign immunity." *Id.*; *see also In re Intramta Switched Access Charges Litig.*, 158 F. Supp. 3d 571, 577 (N.D. Tex. 2015) (ruling that *TTEA* held only "that a suit for injunctive or declaratory relief can be brought against a *tribal official*) (emphasis in original).

Regardless, the Supreme Court's decision in *Bay Mills* definitively resolves any doubt over *TTEA*'s—and thus the Court's 1999 order's—scope. *See In re Intramta*, 158 F. Supp. 3d at 577–78. In discussing potential remedies available to the State of Michigan as against an off-reservation gaming facility, the *Bay Mills* Court instructed that "Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction." 134 S. Ct. at 2035. It then emphasized the point, summarizing its precedent as holding that "tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct." *Id.* (citing *Santa Clara Pueblo*, 436 U.S. at 59) (emphasis in original).[6] At minimum, then, the Court should dismiss the Pueblo from this case. If Plaintiff is to obtain any equitable relief here, it must be through its official capacity claims against the Pueblo's Tribal Council and Governor—not against the Pueblo itself.

II. The State Also Cannot Obtain an Injunction Against the Individual Defendants.

Even where a plaintiff alleges that tribal sovereign immunity fails to extend to tribal officials in a particular case,[7] that plaintiff still cannot proceed if the underlying authority for its claims does not contain an express or implied right of action. *See, e.g., Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1293–1300 (11th Cir. 2015) (holding that 18 U.S.C. § 1166, which generally incorporates state civil and criminal gaming laws and regulations into federal law, does

[6] *See also Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017) ("The identity of the real party in interest dictates what immunities may be available. Defendants in an official-capacity action may assert sovereign immunity. An officer in an individual-capacity action, on the other hand, may be able to assert *personal* immunity defenses, such as, for example, absolute prosecutorial immunity in certain circumstances. But sovereign immunity does not erect a barrier against suits to impose individual and personal liability" (citations and internal quotations omitted) (emphasis in original).

[7] In making the following argument, the Pueblo Defendants argue only that, assuming *arguendo* that sovereign immunity does not apply to the official-capacity Defendants, the Restoration Act still affords Plaintiff no private right of action. Defendants do not waive immunity.

not provide a state with a private right of action for declaratory or injunctive relief to enforce those laws in federal court). The Restoration Act supplies no right of action to Plaintiff that could support official-capacity claims for declaratory or injunctive relief, and the sole "federalized" state law Plaintiff relies on—a claim for common nuisance under the Texas Civil Practice and Remedies Code—was amended by the Texas Legislature in its most recent session to expressly exclude the type of activity engaged in by the Pueblo. Plaintiff's official-capacity claims thus should be dismissed as well.

A. The Restoration Act Implies No Right of Action to the State.

1. There is No Express Right of Action for Plaintiff in the Restoration Act.

Plaintiff has the burden to demonstrate to this Court that Congress intended to provide it a private right of action in the Restoration Act. *Suter v. Artist M.*, 503 U.S. 347, 363–64 (1992). To satisfy that burden, Plaintiff must do more than allege "that a federal statute has been violated" and that it has been "harmed" as a consequence. *Cannon v. Univ. of Chicago.*, 441 U.S. 677, 688 (1979). Because "[t]he question of the existence of a statutory cause of action is, of course, one of statutory construction," the "analysis must begin with the language of the statute itself." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979).

Turning first to whether the Restoration Act creates an express right of action, the language of Section 107 "itself does not expressly authorize a State to sue anyone, much less an Indian tribe." *See Michigan v. Bay Mills Indian Cmty.*, 695 F.3d 406, 415 (6th Cir. 2012), *aff'd* 134 S. Ct. 2024. Instead, as discussed above, it unambiguously divests Plaintiff of "civil and criminal regulatory jurisdiction" in Section 107(b), while expressly granting exclusive jurisdiction to the federal courts in Section 107(c) and enforcement authority to the federal government in Section 107(a). 25 U.S.C. § 1300g-6. The only other reference to the rights of

the "State of Texas" in Section 107 is Section 107(c)'s general savings clause, which—far from expressly authorizing Plaintiff to seek injunctive relief—simply says that "nothing in" Section 107 bars Plaintiff from obtaining injunctive relief *under some other provision*, if one exists. *Id.* § 1300g-6(c).

2. There is No Implied Right of Action for Plaintiff in the Restoration Act.

If the Restoration Act gives Plaintiff a right to seek injunctive relief at all, it would have to do so through implication and under the implied-remedy factors from *Cort v. Ash*, 422 U.S. 66 (1975). These factors, which were created by the Supreme Court as part of an "increasingly more stringent" approach to the creation of implied private rights, have been summarized by the Fifth Circuit as "(1) whether the plaintiff is one of a class for whose especial benefit the statute was enacted; (2) whether there is an indication of legislative intent to create or deny such remedy; (3) whether such a remedy would be inconsistent with the underlying legislative purpose; and (4) whether the cause of action is one traditionally relegated to state law." *Till v. Unifirst Fed. Sav. & Loan Ass'n*, 653 F.2d 152, 157 (5th Cir. Unit A 1981) (citing *Cort*, 422 U.S. at 78). Although none of the four *Cort* factors are met in this case, where, as here, the first two *Cort* factors show no congressional intent to imply the sought-after remedy, "it is unnecessary to inquire further" into the third and fourth factors. *California v. Sierra Club*, 451 U.S. 287, 298 (1981).

As to the first *Cort* factor, the text and legislative history of the Restoration Act contain no indication that it was enacted for the special benefit of Plaintiff. Indeed, the statute and congressional record reflect Congress's paramount concerns in passing the legislation were-as its name suggests-to restore the trust relationship between the federal government and the Pueblo, as well as to protect the public fisc. *See, e.g.*, 25 U.S.C. § 1300g-2; 133 Cong. Rec. S10568-03,

1987 WL 946721 (July 23, 1987) (Statement of Sen. Gramm) ("The Federal recognition of these two small Indian tribes is vitally important to the preservation of their identity. We have had a long effort under-way, trying to come up with an approach that protects the taxpayer but also protects the legitimate rights of the members of these two tribes.").

Looking more specifically at the precise statutory provision relied on by Plaintiff, nothing on the face of Section 107 suggests that "Congress intended to confer federal rights upon" Plaintiff, and Plaintiff cannot bring itself within a benefited class by contending that it would "benefit" from gaining access to an injunctive remedy. *See Sierra Club*, 451 U.S. at 294. By essentially ousting Plaintiff from exercising civil or criminal jurisdiction over tribal gaming, moreover, Section 107 strongly suggests that it was enacted to protect the Pueblo's sovereign gaming interests *against* interference from Plaintiff. *See Northwest Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 92 (1981) (reasoning that a party whom a statute works against "'can scarcely lay claim to the status of 'beneficiary' whom Congress considered in need of protection"' under the first *Cort* factor). At best for Plaintiff, Section 107 can be interpreted to focus either on the Pueblo as "the person regulated," the federal government as the entity "that will do the regulating," or the federalized state laws and penalties themselves; and even then, each of these constructions would lead to the same conclusion: that Section 107 "create[s] 'no implication of an intent to confer rights on a particular class of persons."' *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (quoting *Sierra Club*, 451 U.S. at 294)); *PCI Gaming Auth.*, 801 F.3d at 1297.

Plaintiff's request for an implied injunctive remedy also fails under the second *Cort* factor, as Section 107's text lacks any "[r]ights-creating language [that] 'explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff,"' and its structure already

"'provides a discernible enforcement mechanism'" independent of the requested "'private right of action.'" *PCI Gaming Auth.*, 801 F.3d at 1295 (some alterations in original; citations omitted). Like 18 U.S.C. § 1166, Section 107 of the Restoration Act "extends the reach of state law" by federalizing it, but the statute "merely describes how the *federal government* will effectuate or enforce rights," and thus "does not contain rights-creating language." *Id.* at 1297 (emphasis in original). Additionally, the only express enforcement mechanism in Section 107 consists of the federal government enforcing federalized state law in federal court, with Plaintiff expressly divested of jurisdiction in Section 107(b) and reliant on the general savings clause in 107(c). "'[I]t is an elemental canon of statutory construction, that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.'" *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14–15 (1981) (citation omitted). And as numerous courts have held, "[t]he existence of a general savings clause in a federal statute does not license a court to create a federal cause of action when the plaintiff cannot meet the normal requirements of *Cort v. Ash*." *Musson Theatrical, Inc. v. Fed. Express Corp.*, 89 F.3d 1244, 1252 (6th Cir. 1996); *see also, e.g.*, *Nat'l Sea Clammers*, 453 U.S. at 15–16; *Firstcom, Inc. v. Qwest Communications*, 618 F. Supp. 2d 1001, 1004 (D. Minn. 2007).

Plaintiff likely will argue, as did Alabama in *PCI Gaming Authority*, that the Restoration Act incorporates state civil laws and thus permits a private right of action "because it may sue to enjoin illegal gambling as a nuisance under state law." 801 F.3d at 1298. But this "assum[es] that [Section 107] incorporated the entirety of [Texas's] law pertaining to the licensing, regulation, or prohibition of gambling into federal law, including all civil remedies and criminal punishments." *Id.* As this Court consistently has held, it does not. *See, e.g., Texas v. Ysleta del*

Sur Pueblo, et al., No. EP-99 CA-320-H, ECF No. 483 at 3-4 (August 24, 2014) (holding that Texas gaming law applies "only to the extent that it 'govern[s] the determination of whether gaming activities proposed by the Ysleta del Sur Pueblo' are legal under the [Restoration] Act.").

Section 107(a) makes federalized violations of Texas law "subject" *only* "to the same civil and criminal *penalties* provided by" Texas law. 25 U.S.C. § 1300g-6(a) (emphasis added). This plain language thus carves out of the Restoration Act precisely the *equitable* relief sought by Plaintiff here. As such, "there is no provision explicitly creating a federal [injunctive] remedy for violation of a state civil law," *PCI Gaming Authority*, 801 F.3d. at 1299, further demonstrating that Congress could not have intended to provide Plaintiff with an implied right of action for declaratory or injunctive relief in the Restoration Act itself.[8] *See Nat'l Sea Clammers*, 453 U.S. at 15–16 (considering it "doubtful" that Congress could have intended to imply a right of action in "the very statute in which" it expressed only an intent to leave remedies outside of the statute undisturbed); *cf. Seminole Tribe*, 517 U.S. at 74 ("Where Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary."); *United States v. Santee Sioux Tribe of Neb.*, 135 F.3d 558, 565 (8th Cir. 1998) (holding that 18 U.S.C. § 1166 implied a right of action for injunctive relief to the *federal government* under federalized state law claim).

[8] Refusing to imply such a cause of action is especially appropriate under the circumstances, where the primary predicate for the State's injunction is, in reality, Chapter 47 of the Texas Penal Code. Courts "traditional[ly] rule that equity will not enjoin the commission of a crime." *Seminole Tribe*, 181 F.3d at 1249. The recognized exceptions include "a national emergency" and "a widespread public nuisance." *See, e.g.*, WRIGHT ET AL., 11A FED. PRAC. & PROC. § 2942 (3d ed. Apr. 2017 Update). The State, however, complains of gaming activities taking place at one gaming facility, on one small Indian reservation, located in the far western reaches of Texas.

B. Even If the State Could Seek Declaratory or Injunctive Relief Through the Restoration Act, It Cannot Seek That Relief Under Texas Nuisance Law.

The court should reach the same conclusion even if infers a private right of action in the Restoration Act. Plaintiff's claim for injunctive relief relies on its putative federalized "common nuisance" claim under Section 125.002 of the Texas Civil Practice and Remedies Code, which affords Plaintiff civil remedies for, among other things, violations of the Texas Penal Code. *See* TEX. CIV. PRAC. & REM. CODE § 125.0015(5). A recent amendment to the definition of "common nuisance" in Section 125.0015(e), however, exempts from the definition of "common nuisance" any "activity exempted, authorized, or otherwise lawful activity regulated by federal law." As argued in detail in the Pueblo Defendants' Motion to Dismiss and Reply in Support, ECF Nos. -13 & 19, federal law exempts from state regulation, authorizes, and regulates the electronic and paper bingo offered at the Tribe's gaming center. The Pueblo Defendants incorporate and reurge those arguments herein, which compel the dismissal of Plaintiff's claims based on Texas common nuisance law.

CONCLUSION

The Restoration Act does not provide Plaintiff with a private right of action for injunctive relief.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2017, I caused a true and correct copy of the foregoing to be served electronically by the Court's CM/ECF system on the following counsel of record:

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