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

STATE OF TEXAS, *Plaintiff*,	§	
v.	§	EP-17-CV-179-PRM-LS
YSLETA DEL SUR PUEBLO, THE TRIBAL COUNCIL, AND THE TRIBAL GOVERNOR CARLOS HISA OR HIS SUCCESSOR, *Defendants*.	§	

PLAINTIFF TEXAS'S POST HEARING BRIEF

At the outset of the preliminary injunction hearing, the Court posed two questions: first, can a party seek injunctive relief in federal court to enjoin existing violations of criminal law? Second, if the answer to that question is yes, who can do so? In other words, what is the source of Texas's power to seek a federal injunction of violations of Texas gambling laws?[1]

This post-hearing brief answers these questions. Federal courts have long recognized that their equitable power can reach, and halt, ongoing criminal activity. And through the Restoration Act, Congress federalized Texas gambling law and gave Texas the right to sue in federal court to enjoin violations thereof. The Senate Committee on Indian Affairs explained that the Restoration Act "authorizes the State of Texas to seek injunctive relief in Federal court to enforce the federal ban on gaming," *see infra* Section III, and every court to have considered the Restoration Act in the years since its passage has reached the same conclusion.

[1] November 13, 2017 Preliminary Injunction Hearing Transcript at 14:6-15.

As shown below, Congress authorized and expressly created jurisdiction for this action, Plaintiff Texas has standing to bring it, and the evidence that the Tribe's slot machines violate Texas law is overwhelming. An injunction should issue to prohibit the Tribe's operation of those machines during the pendency of this case.

ARGUMENT

I. Civil courts can enjoin violations of criminal law.

The "general rule" is that civil courts cannot enjoin violations of criminal law. *See United States v. Jalas*, 409 F.2d 358, 360 (7th Cir. 1969). Three exceptions to this general rule, however, are sufficiently well-worn as to have the status of general rules themselves, and two of those exceptions are apposite here: public nuisances and cases where a specific statutory grant of power exists. *See id.* at 360 ("Historically th[e] doctrine [that courts have no power to enjoin the commission of a crime] has been subject to exception in only three general situations: National emergencies, widespread public nuisances, and where a specific statutory grant of power exists." (citations omitted)); *see also United States v. Santee Sioux Tribe of Nebraska*, 135 F.3d 558, 565–66 (8th Cir. 1998) (enjoining operation of illegal gaming devices that constituted public nuisance under Nebraska law).

What unifies the exceptions to the general rule is that they are cases where prosecution of the criminal charge would not provide the plaintiff with an adequate remedy. The Fifth Circuit has stated the rule, in the context of the nuisance exception, quite plainly: "[w]e recognize that '[a]s a general rule, courts are reluctant to issue injunctions against the commission of a crime,' although 'if the court finds

that the prosecution of the criminal charge is not an adequate remedy, as when the conduct is creating a widespread public nuisance . . . the fact that a crime is involved should not prevent the court from entering an injunction.'" *United States v. Buttorff*, 761 F.2d 1056, 1063 (5th Cir. 1985) (quoting 11 Wright & Miller, FED. PRAC. & PROC. §2942 at 386–87).

In *Buttorff*, the Fifth Circuit upheld an injunction against activity that violated the Internal Revenue Code.[2] The court observed that one factor weighing in favor of the "appropriate[ness]" of the injunction was that the "[a]ppellant ha[d] been found liable for illegal conduct" in the past, which was similar to the activity enjoined and which "showed a disdain for the [relevant] laws." *Id.* at 1062. That factor is present here, too. In 2014, the Tribe was operating slot-machine style devices that violated the Texas Penal Code.[3] In 2016, Judge Cardone ordered the Tribe to "within sixty (60) days of the entry of this Order . . . cease the gaming activities described above . . . as violating Texas Penal Code Sections 47.03(a)(5), 47.01(7), and 47.06(a), to the extent the Pueblo Defendants are still offering such activities." *Texas v. Ysleta del Sur Pueblo,* 2016 WL 3039991, at *27 (W.D. Tex. May 27, 2016). After closing for 60 days, the Tribe re-opened Speaking Rock, and is again operating one-touch, slot-machine style devices that violate Texas gambling law.[4] Under *Buttorff*, such demonstrated "disdain for the [relevant] laws" counsels in favor of an injunction.

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[2] The Internal Revenue Code provisions at issue in *Buttorf* were "Promoting abusive tax shelters, etc.," 26 U.S.C. §6700 and "Actions to enjoin specified conduct related to tax shelters and reportable transactions," 26 U.S.C. §7408.

[3] Testimony of Lt. James Ferguson, November 13, 2017 Preliminary Injunction Hearing Transcript at 184:6-12.

[4] Testimony of Commander Daniel Guajardo, November 13, 2017 Preliminary Injunction Hearing Transcript at 86:7-19.

Buttorff found it decisive that the statute "expressly authoriz[es] injunctive relief . . . against actions denounced as wrongful by positive, public law." *Id.*; *cf. United States v. Zenon*, 711 F.2d 476, 478–79 (1st Cir. 1983) (explaining that "[a] court has power to enjoin a trespass if it would cause irreparable injury, or if there are repeated instances of trespassing, and a single injunction might forestall a multiplicity of legal actions . . . The fact that the trespass may be punishable as a crime does not bar injunctive relief.") (citations omitted). So too here. Texas criminal law bans gambling, TEX. PENAL CODE §§47.01-47.07, and Texas civil law authorizes a suit to enjoin and abate common nuisances—which include violations of Texas criminal laws. *See* TEX. CIV. PRAC. & REM. CODE §125.002(a); *Id.* §125.0015(a)(5) (stating that a person maintains a place of common nuisance by tolerating "gambling, gambling promotion, or communicating gambling information as prohibited by the Penal Code."); *Nasits v. Texas*, 100 S.W.2d 783, 785–86 (Tex. Civ. App.—Texarkana 1936, no writ) (affirming injunction against cabin in tourist camp as a common nuisance where bookmaking and betting on horse races in violation of Texas Penal Code were being conducted).

And, of course, Congress authorized the injunctive relief Texas seeks in this case. *See* Sections II, III, *infra*. The mere fact that the activity violates criminal law does not preclude the injunction Texas seeks. *See Airlines Reporting Corp. v. Barry*, 825 F.2d 1220, 1224 (8th Cir. 1987) ("No court, state or federal, is barred from enjoining activity that causes or threatens injury to property merely because the activity, in addition to being tortious, is a violation of the criminal law.").

For these reasons, courts have enjoined violations of criminal law in a diverse array of circumstances. *See, e.g.*, *Mott's LLP v. United Food & Commercial Workers*, 2010 WL 3238944, at *4 (N.D. Tex. Aug. 5, 2010)) (finding that "[b]ecause of the uncertain nature of the damages . . . [the plaintiff] ha[d] no adequate remedy at law," and enjoining violations of federal anti-tampering laws, which are punishable by "fine . . . or imprison[ment] not more than three years, or both," 18 U.S.C. §1365(b).); *Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 518 F. Supp. 993, 1016–17 (S.D. Tex. 1981) ("enjoin[ing] self help tactics of threats of violence and intimidation," including gun pointing, cross burning, and boat burning, perpetrated by Ku Klux Klan members against Vietnamese shrimp fishermen); *Featherstone v. Indep. Serv. Station Ass'n of Tex.*, 10 S.W.2d 124, 127 (Tex. Civ. App. 1928) (enjoining the operation of an illegal lottery and observing that "courts of equity will interfere to prevent such an injury, notwithstanding the commission would constitute a criminal offense, not because it would be a crime, but because the injury to . . . rights would be irreparable"); *Lawson v. State*, 283 S.W.3d 438, 441–42 (Tex. App.—Fort Worth 2009) (upholding the constitutionality of Texas Civil Practice and Remedies Code provision allowing local governments to "enjoin[] gang members from engaging in . . . illegal activities within a specified area").

Because the Restoration Act specifically provides for injunctive relief against the Tribe's violations of Texas gambling law, and because, under Texas law, gambling constitutes a common nuisance, this case falls within not just one, but two of the three

exceptions to the general presumption against civil injunctions of criminal law violations.

II. The Restoration Act vests the United States Courts with jurisdiction to civilly enjoin violations of Texas gambling laws and regulations on the Tribe's Reservation.

a. History of the inter-sovereign relationship between the tribes, the states, and the federal government.

Federally recognized tribes are "dependent domestic nations," and thus, have a unique relationship with the United States federal government and the sovereign states of the Union. *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985). Because Tribes are "dependent domestic nations," Tribal sovereignty is of a "unique and limited character," and exists "only at the sufferance of Congress and is subject to complete defeasence" by the United States. *Rice v. Rehner*, 463 U.S. 713, 719 (1983) (citations omitted). Thus, states may exercise some authority on Indian reservations, but only to the extent that Congress has expressly provided for such authority.

The Supreme Court has described this intra-sovereign relationship as follows:

> The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance. Of course, because of the peculiar 'quasi-sovereign' status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy. And this aspect of tribal sovereignty, like all others, is subject to plenary federal control and definition. Nonetheless, in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.

Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, 476 U.S. 877, 890-891 (1986) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *United*

States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 513 (1940); *McClanahan v. Arizona St. Tax Comm'n*, 411 U.S. 164, 173 (1973)).

Historical context aids in understanding the interplay between federal, state, and tribal governments. The Supreme Court explored this relationship in *Worcester v. Georgia*, where Chief Justice Marshall opined that state intervention on reservations is "repugnant to the constitution, laws and treaties of the United States," because it "interfere[s] forcibly with the relations established between the United States and the [Indian] nation, the regulation of which…are committed exclusively to the government of the union." 31 U.S. 515, 561 (1832). Over 100 years on, the Court reiterated that "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945).

Still, "the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation," and "State sovereignty does not end at a reservation's border." *Nevada v. Hicks*, 533 U.S. 353, 361 (2001). As the Supreme Court remarked in 2001, "[t]hough tribes are often referred to as 'sovereign' entities, it was 'long ago' that 'the Court departed from Chief Justice Marshall's view [in *Worcester v. Georgia*] that 'the laws of [a state] can have no force' within reservation boundaries." *Nevada v. Hicks*, 533 U.S. at 361 (citation omitted).

b. Changed Circumstances: Lawlessness & Public Law 280

Life in the United States has changed since the 1832 *Worcester* decision, and "[n]ot surprisingly, the [Indian sovereignty] doctrine has undergone considerable evolution in response to changed circumstances." *McClanahan v. Arizona State Tax*

Comm'n, 411 U.S. 164, 171 (1973). These changed circumstances included increasing lawlessness and the proliferation of illegal activity on Indian reservations, which prompted Congress to pass Public Law 280 in 1953. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207-08 (1987) (superseded by statute as stated in *Mich. v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014)) ("Congress' primary concern in enacting Pub. L. 280 was combating lawlessness on reservations.") (citing *Bryan v. Itasca Cnty.*, 426 U.S. 373, 379-80 (1976)).

In Public Law 280, "Congress expressly granted six States, including California, jurisdiction over specified areas of Indian country within the States and provided for the assumption of jurisdiction by other States." *California v. Cabazon Band*, 480 U.S. at 208. The six enumerated states—which did not include Texas—were "granted broad criminal jurisdiction over offenses committed by or against Indians within all Indian country within the State." *Cabazon*, 480 U.S. at 208 (citations omitted); 18 U.S.C. §1162(a) ("State jurisdiction over offenses committed by or against Indians in the Indian country," listing of mandatory jurisdiction states).

Public Law 280's "grant of civil jurisdiction was more limited," but it, too, expressly grants certain civil jurisdiction to six enumerated states. *Cabazon*, 480 U.S. at 208 (citations omitted); 28 U.S.C. §1360(a) (listing of mandatory jurisdiction states). In the civil context, the Supreme Court has construed Public Law 280 to grant "States jurisdiction over private civil litigation involving reservation Indians in state court, but not to grant general civil regulatory authority." *Cabazon*, 480 U.S. at 208.

In states where jurisdiction is not mandatory, Public Law 280 provides for the assumption of civil and criminal jurisdiction, with the consent of the tribe. 25 U.S.C. §1321 ("Assumption by State of Criminal Jurisdiction" by states without mandatory jurisdiction); 25 U.S.C. §1322 ("Assumption by State of Civil Jurisdiction" by states without mandatory jurisdiction). *See also*, e.g., *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993) (In 1968, Congress amended Public Law 280, and "added a requirement that the tribes involved consent before a State can assume jurisdiction over Indian country.") (citations omitted).

"[W]hen a State seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under [the broad grant of authority], or civil in nature, and applicable only as it may be relevant to private civil litigation in state court." *Cabazon*, 480 U.S. at 207-08. Similarly, and consistent with the notions of tribal sovereignty and federal preemption, suits brought against Indian tribes pursuant to the terms of Public Law 280 are barred by tribal immunity absent a legislative pronouncement to the contrary. *E.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. at 892 ("the United States Supreme Court has held that Public Law 280 and its amendments, entitled the Indian Civil Rights Act of 1968, do not constitute a waiver of tribal immunity.").[5]

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[5] *See also, e.g., Rodewald v. Kan. Dep't. of Revenue*, 296 Kan. 1022, 1033 (Kan. 2013) ("Essentially, P.L. 280 authorized the transfer to those six states of the federal government's jurisdiction over tribes to prosecute crimes and handle other private civil affairs. At the time P.L. 280 was enacted, Congress also granted the remaining states authority to assume civil and criminal jurisdiction over the tribes

Both United States and Texas courts have recognized that "suits brought against Indian tribes pursuant to the terms of Public Law 280 are barred by tribal immunity absent a legislative pronouncement to the contrary." *Silva v. Ysleta del Sur Pueblo*, 28 S.W.3d 122, 125 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978)).

c. The Restoration Act specifically rejects Public Law 280 in the context of gaming activities in violation of the Texas law.

In establishing the relationship between the sovereign State of Texas and the quasi-sovereign Tribe, the Restoration Act took two important steps. First, in 25 U.S.C. §1300g-4(f), it provided *generally*—under "Provisions relating to tribal reservation,"—that "[t]he 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 [§§]1321 and 1322 of this title." As noted above, §§1321 and 1322 provide for states to assume jurisdiction on an Indian reservation under the terms applicable to Public Law 280 mandatory jurisdiction states.

But second—and crucially here—Congress foreclosed the application of the Public Law 280 in this particular context, by including the following *specific* provision entitled "Gaming activities" in the Restoration Act:

> **(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

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within their respective states. That power, however, was limited by a 1968 Amendment requiring approval of the tribe before the state could assume jurisdiction. Before the amendment, nine additional states—Nevada, Idaho, Iowa, Washington, South Dakota, Montana, North Dakota, Arizona, and Utah—assumed jurisdiction in at least some form over the tribes within their respective states. The remaining 35 states—including [Texas]—fall under the general rule that they must obtain the express permission of the tribe or the federal government before they may assert jurisdiction over tribal members or land.") (citations omitted)

> 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 1300g–4(f) of this title, the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) of this section 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.

It is a maxim of statutory construction that, "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (citation omitted). Here, plainly, 25 U.S.C. §1300g-4(f) is the general statute, and cannot nullify or control over 25 U.S.C. §1300g-6—the *specific* provision governing "gaming activities." Thus, the Public Law 280 analysis is inapposite in this case.[6] As this Court has held:

> The Tigua Nation enjoys the status of a federally recognized tribe under the Ysleta Del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas

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[6] As Texas's El Paso Court of Appeals has held, relying upon United States Supreme Court precedent, "[S]ection 1300g-4(f) merely authorizes the State of Texas to exercise the type of jurisdiction described in [§§]1321 and 1322. As stated above, the jurisdiction authorized by these sections is derived from Public Law 280 which, according to the Supreme Court, does not mandate the surrender of tribal immunity. If, in passing [§]1300g-4(f), Congress intended the total surrender of tribal immunity, it would not have limited Texas' jurisdiction to the type of jurisdiction Texas may obtain with the consent of the tribe under Section 1321 and 1322. Because [§]1300g-4(f) does not obliterate [] tribal immunity…we affirm the judgment of the trial court." *Silva v. Ysleta del Sur Pueblo*, 28 S.W.3d 122, 125 (Tex. App.—El Paso 2000) (citation omitted).

> Restoration Act of 1987. Since the Tigua Nation has waived tribal immunity only regarding the State's gaming statutes, [the Tigua] are immune from suit to the extent [a litigant] sues them in their official capacities.

Order Adopting Report and Recommendation, *Pais v. Sinclair*, No. EP-06-CV-137-PRM, 2006 WL 3230035 at *1 (W.D. Tex. Nov. 2, 2006).

"Consequently, the plain language of the Restoration Act—"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"—divested the Tribe of any sovereignty it might otherwise have had over gaming activities on its reservation. Tribal sovereignty is dependent on, and subordinate to, the federal government. *Rice v. Rehner*, 463 U.S. at 719. Congress's decision to prohibit the Tribe from engaging in those gaming activities forbidden by the laws and regulations of Texas was a legitimate exercise of the federal government's superior sovereignty, and the plain language of the Restoration Act reveals that intent.

Moreover, this Court need not undertake the *Cabazon* analysis, because the Restoration Act specifically provided that the courts of the United States shall have exclusive jurisdiction over any gambling offense in violation of the Act. 25 U.S.C. §1300g-6(c). The Act also provides that any violation of the gambling provision shall be subject to the same civil and criminal penalties that are provided by the State of Texas. 25 U.S.C. §1300g-6(a). In this section, Congress made explicit that, with respect to gambling, a federal court should apply the laws of the State of Texas, both civil and criminal, on the Tribe's reservation. The Fifth Circuit specifically rejected the application of Public Law 280 to the Tribe, *see Ysleta del Sur Pueblo v Texas*, 36

F.3d 1325, 1333–34, (5th Cir. 1994), and no court since then has found anything to the contrary.

In adopting 25 U.S.C. §1300g-6, Congress specifically rejected the *Cabazon* regulatory/prohibitory statutory scheme when it comes to gaming on the Tribe's reservation.

III. The Restoration Act permits Texas to bring this suit.

Congress provided a cause of action to Texas to seek injunctive relief in federal court to enjoin violations of the Restoration Act. *See* 25 U.S.C. §1300g-6(c) ("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."). In the 100th Congress, the Senate considered H.R. 318, which later became the Restoration Act. *See* Exhibit A, Senate Select Committee on Indian Affairs, Senate Report 100-90 at 1. The Committee substituted new sections 107 and 207 (later codified at 25 U.S.C. §1300g-6 for the Ysleta del Sur Pueblo and 25 U.S.C. §737 for the Alabama-Coushatta Tribe of Texas), which formed the basis of the gaming ban that Texas filed this suit to enforce. The Committee explained in passing these provisions that Congress intended to provide Texas with a right to seek injunctive relief in federal courts for violations of the gaming ban:

> Sections 107 and 207 are stricken and new sections 107 and 207 are inserted. However, the central purpose of these two sections - to ban gaming on the reservations as a matter of federal law – remains unchanged. Both Tribes, by formal tribal resolution, requested that this legislation incorporate their existing law and custom that forbids gambling. The Committee's amendments simply expand on the House version to provide that anyone who violates the federal ban on gaming contained in Sections 107 and 207 will be subject to the same civil and

> criminal penalties that are provided under Texas law. New subsections 107(b) and 207(b) were added to make it clear that Congress does not intend, by banning gaming and adopting state penalties as federal penalties, to in any way grant civil or criminal regulatory jurisdiction to the State of Texas. ***New subsections 107(c) and 207(c) grant to the federal courts exclusive jurisdiction over offenses committed in violation of the federal gaming ban and make it clear that the State of Texas may seek injunctive relief in federal courts to enforce the gaming ban.***

Id. at 8–9 (emphasis added). The Committee later reiterated that Section 107 "provides that the Federal courts shall have exclusive jurisdiction over violations of the federal ban on gaming established by this section and ***further authorizes the State of Texas to seek injunctive relief in Federal court to enforce the federal ban on gaming***." *Id.* at 11 (emphasis added). It was thus the unequivocal view of the committee responsible for recommending the passage of the Restoration Act that Texas could seek injunctive relief in federal court if the Tribe were violating Texas gambling laws federalized by the Restoration Act.

Every court to have interpreted this language, including the Fifth Circuit, has tracked this understanding, directly equating the language that "nothing shall preclude" Texas from bringing suit with terms like permit, allow, and authorize. In an opinion affirming a contempt order of an injunction issued against the Tribe under the Restoration Act, the Fifth Circuit explained that "[t]he Restoration Act ***permits*** Texas to seek an injunction in federal court if the Tribe should engage in gaming activities prohibited by Texas law." *Texas v. Ysleta Del Sur Pueblo*, 431 F. App'x 326, 328 (5th Cir. 2011) (citing U.S.C. §1300g-6(c)). Similarly, in 1999, this Court unambiguously found that "the Restoration Act ***allows*** the State of Texas to bring

suit in federal court to enjoin any such violations [of the Restoration Act]." *Texas v. Ysleta del Sur Pueblo*, 79 F. Supp. 2d 708, 710 (W.D. Tex. 1999). And a judge sitting in the Eastern District of Texas reached the same conclusion in a Restoration Act suit brought by Texas against the Alabama-Coushatta Tribe of Texas. *See Alabama-Coushatta Tribes of Texas v. Texas*, 208 F. Supp. 2d 670, 680 (E.D. Tex. 2002) ("The injunction sought by the State of Texas is ***authorized*** by both state and federal statutes.").

Indeed, Texas's right to sue in federal court for violations of the Restoration Act is so firmly entrenched that the Tribe has conceded it twice in prior iterations of this litigation. *See* Exhibit B, *Texas v. Ysleta Del Sur Pueblo et al.*, No. 10-50804 (5th Cir.), Appellants' Brief at 21–22 (contending that Congress limited Texas's remedies to "the right to bring an action in federal court to enjoin alleged violations of the 'gaming activities' section of the Restoration Act."); Exhibit C, *Ysleta Del Sur Pueblo v. Bush et al.*, No. 98-50859 (5th Cir.), Appellant's Brief, 1999 WL 33658598, at *19 (acknowledging that "[t]he State of Texas may bring an action in the courts of the United States to enjoin gaming activities of the Pueblo under the Restoration Act").

If the "nothing shall preclude" language in 25 U.S.C. §1300g-6 were interpreted differently, it would render the provision a nullity. It is a "'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute.'" *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (citation omitted). Courts interpreting language like the "nothing shall preclude" clause in the Restoration Act have also interpreted that expression to be coextensive with the

terms permit or authorize. *See, e.g.*, *Bensi v. El Camino Hosp.*, 2012 WL 607979, at *8 (N.D. Cal. Feb. 24, 2012) (noting that a collective bargaining agreement "expressly permits subcontracting" because it provided that "Nothing shall preclude the Hospital from utilizing contractors for emergency work, construction work, operational needs, and/or work for which employees lack the skill, training, or experience to perform.").

Moreover, courts have recognized that causes of action can be implied in a statute, even if no cause of action is expressly included in the statutory framework. *See, e.g.*, *Canon v. Univ. of Chicago*, 441 U.S. 677 (1979) (finding implied private right of action in favor of plaintiffs to sue for violations of Title IX). In conducting that analysis, courts consider "'(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.'" *Wright v. Allstate Ins. Co.*, 500 F.3d 390, 395 (5th Cir. 2007) (quoting *Cort v. Ash*, 422 U.S. 66 (1975)). "[T]he determinative question is whether Congress intended to create a private right of action in favor of the plaintiff." *Id.*

That factor is overwhelming vis-à-vis the Restoration Act. The "legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." *Canon*, 441 U.S. at 694. With respect to the Restoration Act, however, the Senate Committee on Indian Affairs

indicated an unambiguous intent to confer a cause of action onto Texas, and then did so. *See* Ex. A, *supra*, at 8–9, 12. And, of course, these suits are consistent with one of the central purposes of the Restoration Act: "to ban gaming on the reservation[] as a matter of federal law." *Id.* at 8. For these reasons, Texas can continue to pursue its claims for injunctive relief under 25 U.S.C. §1300g-6(c), just as it has done for past violations of Texas gambling laws.

CONCLUSION

The procedural questions that the Tribe characterized as thorny and unsettled are, in fact, quite the opposite. They can be resolved by reference to the Restoration Act's legislative history, the text of the Restoration Act itself, binding Fifth Circuit precedent, and the courts' longstanding powers in equity to issue injunctive relief.

The substantive question that the Court must resolve—whether the Tribe's activities violate Texas law—must be answered affirmatively based on the uncontested evidence presented during the hearing. Two licensed peace officers, Commander Daniel Guajardo and Lieutenant Tim Ferguson, testified that the Tribe's gambling activities violate the Texas Penal Code. *See* November 13, 2017 Preliminary Injunction Hearing Transcript at 86:7-19 (testimony of Commander Guajardo that the machines are gambling devices under the Texas Penal Code); *Id.* at 191:4-16 (testimony of Lieutenant Ferguson agreeing with Commander Guajardo's conclusions). No evidence to the contrary was offered to the Court. And the director of the Charitable Bingo Operations Division of the Texas Lottery Commission explained that the Tribe's slot machines would not be approved by the Commission.

Id. at 152:13-25–153:1-11 (describing the Tribe's machines as "slot machine[s]"). Remarkably, the Tribe's expert agreed with that conclusion. November 14, 2017 Preliminary Injunction Hearing Transcript at 20:7-14 (stating that the Tribe's machines are not legal cardminders).

No one in Texas can do what the Tribe wishes to continue doing. The injunction that Texas requests comports with the Restoration Act's plain text and Congress's intent in passing it. Indeed, the permanent injunction entered against the Tribe in 2001 has been litigated repeatedly through 2016 without any successful challenge to Texas' standing or the Court's jurisdiction. Texas thus respectfully requests that the Court issue a report and recommendation that the injunction Texas seeks should issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 27th day of November, 2017, a true and correct copy of the foregoing was filed using the Court's CM/ECF system, causing electronic service upon all counsel of record.

/s/Anne Marie Mackin
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