

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

STATE OF TEXAS,

Plaintiff,

v.

YSLETA DEL SUR PUEBLO,
THE TRIBAL COUNCIL, THE
TRIBAL GOVERNOR CARLOS HISA
or his SUCCESSOR,

Defendants.

No: 03:17-CV-00179-PRM

JURY TRIAL REQUESTED

YSLETA DEL SUR PUEBLO,
THE TRIBAL COUNCIL, THE
TRIBAL GOVERNOR CARLOS HISA
or his SUCCESSOR,

Counter-Plaintiffs,

v.

KEN PAXTON, in his OFFICIAL
CAPACITY AS THE TEXAS
ATTORNEY GENERAL,

Counter-Defendant.

PUEBLO DEFENDANTS' FIRST AMENDED COUNTERCLAIM

Pueblo Defendants/Counter-Plaintiffs Ysleta del Sur Pueblo, the Tribal Council and Governor Carlos Hisa or his Successor (“Counter-Plaintiffs”) submit this First Amended Counterclaim pursuant to the Court’s grant of leave to amend their original counterclaim in its August 27, 2018 Order. ECF No. 115. Because an amended pleading “replaces the original pleading *in toto*,” this First Amended Counterclaim incorporates the subject of the Order,

declaration F, as well as declarations A and B from Counter-Plaintiffs' original counterclaim. *Wells Fargo Bank, N.A. v. Farkas*, No. A-15-CV-00165-LY-ML, 2015 WL 11004539, at *1 (W.D. Tex. June 12, 2015). To the extent the amended answer and original counterclaim filed by the Counter-Plaintiffs on May 7, 2018 (ECF No. 87) could be read to create a single original pleading, and in order not to restate their existing amended answer, Counter-Plaintiffs incorporate their amended answer from ECF No. 87 by reference herein.

For their First Amended Counterclaim, Counter-Plaintiffs aver:

PARTIES

Counter-Plaintiffs

1. Counter-Plaintiff Ysleta del Sur Pueblo is a federally recognized Indian nation.
2. Counter-Plaintiff Tribal Council is the governing body of the Ysleta del Sur Pueblo.
3. Counter-Plaintiff Carlos Hisa is the current Governor of the Ysleta del Sur Pueblo.

Counter-Defendant

4. This Court has granted Counter-Plaintiffs leave to amend their counterclaim by way of an *Ex Parte Young* pleading for the opportunity to bring their constitutional claim in federal court. ECF No. 115 at 35-38.
5. Counter-Defendant Ken Paxton in his official capacity is the lawyer for the State of Texas and is charged by the Texas Constitution to defend the laws of the State of Texas.
6. Suits against state officials in their official capacity can be treated as suits against the State.
7. The case against Counter-Plaintiffs was brought by the Texas Office of the Attorney General. ECF No. 8.

8. Counter-Defendant Ken Paxton is the named official representing the State of Texas in this pending action and the first lawyer listed on the Amended Complaint filed against Counter-Plaintiffs. ECF No. 8.

9. Counter-Defendant Ken Paxton in his official capacity is the state actor unconstitutionally enforcing the laws at issue.

10. Counter-Plaintiffs bring this counterclaim against Ken Paxton in his official capacity, and not as a claim against the State of Texas acting as sovereign.

JURISDICTION

11. This Court has jurisdiction over the subject matter of this counterclaim pursuant to both 28 U.S.C. §§ 1331 (federal question) and 1362 (suit by Indian tribe).

12. This Court has jurisdiction to grant declaratory relief to prevent ongoing violations of federal law by State officials. *Ex Parte Young*, 209 U.S. 123 (1908).

13. An actual controversy exists between the parties within the meaning of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

CROSS-PLAINTIFFS' FACTUAL AVERMENTS

The Ysleta del Sur Pueblo and Indian Nations within the State of Texas

14. There are only three federally recognized Indian nations in Texas: the Ysleta del Sur Pueblo, the Alabama-Coushatta Tribe of Texas and the Kickapoo Traditional Tribe of Texas.

15. The Federal Government has a trust relationship with federally recognized Indian nations.

16. The Ysleta del Sur Pueblo is the only Pueblo Indian nation within the exterior boundaries of the State of Texas.

17. The people of the Ysleta del Sur Pueblo were moved into what is now the El Paso, Texas area over 300 years ago after Pueblo Indians known as Tiguas were relocated by Spanish settlers who were forced out of what is now New Mexico during the Pueblo Revolt of 1680.

18. The Ysleta del Sur Pueblo has maintained and continues to maintain its government, political system, traditional culture and ceremonial practices.

19. In 1968, the United States Congress passed the Tiwa Indians Act, which confirmed the Ysleta del Sur Pueblo as a federally recognized Indian nation, but then transferred the Federal Government's trust responsibilities for the Ysleta del Sur Pueblo to the State of Texas.

20. The State of Texas created a Texas Commission of Indian Affairs in 1965.

21. In 1981, as a result of a hunting rights dispute between the Texas Parks and Wildlife Department and members of the Alabama-Coushatta Tribe, the Executive Director of the Texas Parks and Wildlife Department asked the Texas Attorney General for an opinion regarding the authority of the Texas Parks and Wildlife Department to enforce its code within the confines of the Alabama-Coushatta Tribe's reservation.

22. In response, the Texas Attorney General issued Opinion JM-17, in which he concluded, among other things, that there was a valid claim that the Alabama-Coushatta Tribe's land was an "Indian Reservation," and that there could be no trust relationship between the State of Texas and the Alabama-Coushatta Tribe.

23. In Opinion JM-17, the Texas Attorney General opined that the Alabama-Coushatta Tribe was "merely an unincorporated association under Texas law, with the same legal status as other private associations."

24. In Opinion JM-17, the Texas Attorney General opined that after the Alabama-Coushatta Tribe's federal status was terminated in 1954, the Alabama-Coushatta Tribe ceased to exist as a political body.

25. After the publication of Opinion JM-17, the Ysleta del Sur Pueblo and Alabama-Coushatta Tribe sought federal legislation to restore their federal trust relationship with the Federal Government.

History of the Restoration Act

26. It took several years for the Ysleta del Sur Pueblo and the Alabama-Coushatta Tribe and their members to secure restoration of their trust relationship with the Federal Government.

27. Congressmen Ronald Coleman (R. 18th District, Texas) and Charlie Wilson (D. 2nd District, Texas) introduced the first version of the Restoration Act, H.R. 6391, on October 3, 1984.

28. H.R. 6391 made no mention of gaming.

29. Congress adjourned prior to any action being taken on H.R. 6391.

30. On February 26, 1985, Congressmen Coleman and Wilson reintroduced the Restoration Act and the bill was captioned H.R. 1344. *See* H.R. 1344, 1st Session 99th Congress.

31. There was no mention of gaming in H.R. 1344.

32. On October 17, 1985, there was a hearing before the Committee on the Interior and Insular Affairs of the House of Representatives on H.R. 1344. *See* Congress.gov (Library of Congress) Report on all Congressional Action on H.R. 1344 (99th Congress).

33. Because gaming was not an issue, none of the speakers on October 17, 1985, mentioned gaming or the possibility that the Ysleta del Sur Pueblo or Alabama-Coushatta Tribe might someday engage in gaming. *See* House Committee on Interior and Insular Affairs, Report No. 99-444 (1985).

34. The regulation of bingo in Texas, which had been authorized by Texas Constitutional amendment in 1980, was the responsibility of Texas Comptroller Bob Bullock's office.

35. In a press release issued on November 22, 1985, Bob Bullock argued that H.R. 1344 would allow unregulated gaming.

36. In the November 22, 1985 news release, Bob Bullock stated that "if this bill passes like it is written we might as well get the highway department to put a sign at the state line that says, 'Gangsters Welcome.'"

37. In the November 22, 1985 news release Bob Bullock stated that he had asked Congressmen Coleman and Wilson to amend the bill to provide for state regulation of gaming.

38. Congressman Coleman then offered a gaming amendment to H.R. 1344. *See* House Report No. 99-444 (1985).

39. Bob Bullock issued another press release on November 25, 1985, in which he stated that the Coleman amendment would not stop high stakes gaming.

40. In spite of Bob Bullock's protestations, H.R. 1344 was amended on December 4, 1985, to include Congressman Coleman's amendment on gaming. *See* Congress.gov (Library of Congress) Report on all Congressional Action on H.R. 1344 (99th Congress).

41. The House passed H.R. 1344 as amended by voice vote on December 16, 1985.

42. Having failed in the House, Bob Bullock took his opposition to the gaming provisions in H.R. 1344 to the United States Senate.

43. In 1985, Bob Bullock and other Texas state officials were putting tremendous financial pressure on both the Ysleta del Sur Pueblo and Alabama-Coushatta Tribe.

44. In 1985, Bob Bullock questioned whether state appropriations in Texas could be expended on the Texas Indian Commission.

45. In 1985, the Texas Legislature cut all general revenue funding to the Alabama-Coushatta Tribe.

46. In 1985, the Texas Legislature began taking steps to cut all general revenue funding to the Ysleta del Sur Pueblo.

47. In 1985, the State of Texas's taxing entities, such as school districts, counties, water districts, and others began issuing tax notices to both the Ysleta del Sur Pueblo and Alabama-Coushatta Tribe imposing state taxes on tribal lands and resources.

48. In response to this pressure, the Ysleta del Sur Pueblo and Alabama-Coushatta Tribal Councils passed resolutions asking that Congressman Coleman's House amendments to H.R. 1344 be struck and language prohibiting gaming be substituted. *See* Alabama-Coushatta Tribal Resolution ACITC No. 86-07 and Ysleta del Sur Pueblo Council Resolution No. TC-02-86.

49. On June 25, 1986, the Senate Indian Affairs Committee held a hearing on H.R. 1344 at which Sections 107 (relating to the Pueblo) and 207 (relating to the Tribe) of the House bill were amended to read:

All forms of gaming, gambling, betting, lottery, and bingo on the reservation of the Tribe or on any land acquired after the date of the enactment of this Title and added to the reservation or held in trust status for the Tribe is hereby prohibited. For the purposes of this Section, the term "gaming," "gambling," "betting," "lottery," and

“bingo” shall have the meaning given those terms under the laws and administrative regulations of the State of Texas.

See Senate Report No. 99-771 (1985).

50. In prepared remarks to the Senate Indian Affairs Committee, Bob Bullock withdrew his objection to H.R. 1344, stating that this amendment to the bill satisfied his concerns.

51. On September 23, 1986, the Senate received a favorable report from the Senate Committee on Indian Affairs. *See* Congress.gov (Library of Congress) Report on all Congressional Action on H.R. 1344.

52. H.R. 1344 was passed in the Senate by voice vote on September 24, 1986.

53. However, on September 25, 1986, Senator Phil Gramm, through the administrative procedure of having a voice vote vitiated, killed H.R. 1344.

54. The 99th Congressional Session ended before any further action was taken on H.R. 1344.

55. On January 6, 1987, Congressmen Coleman and Wilson introduced H.R. 318. *See* Congress.gov (Library of Congress) Report on all Congressional Action on H.R. 318 (100th Congress).

56. On February 25, 1987, after the introduction of H.R. 318, the United States Supreme Court issued its opinion in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

57. In *Cabazon*, the Supreme Court found that California state law permitted gaming, subject to regulation, rather than prohibiting it.

58. The Supreme Court in *Cabazon* ruled California could not prohibit Indian nations in California from offering gaming.

59. After the Supreme Court's decision in *Cabazon*, the House Committee on Interior and Insular Affairs voted to amend Sections 107 of H.R. 318 and 207 to strike the gaming language inserted into H.R. 1344, simplifying the prohibition on gaming to read that "all gaming as defined by the laws of the State of Texas shall be prohibited on the tribal reservation and on tribal lands." See House Committee on Interior and Insular Affairs, Report 100-36.

60. On April 21, 1987, H.R. 318, as amended, passed the House by voice vote.

61. On April 22, 1987, H.R. 318 was received in the Senate and referred to the Committee on Indian Affairs.

62. On June 17, 1987, the Senate Committee on Indian Affairs met and amended H.R. 318. See Report of Senate Committee on Indian Affairs, No. 100-90.

63. The Indian Affairs Committee amended Section 107 in three ways.

64. First, the Senate Indian Affairs Committee rejected the absolute prohibition on all gaming and amended Section 107 to provide:

(a) IN GENERAL. – All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and lands of the tribe. Any violation of the prohibition provided in this subject 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.

65. Second, the Senate Indian Affairs Committee added a new clause in Section 107 that addressed regulatory jurisdiction:

(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.

66. Third, the Senate Indian Affairs Committee added a third clause to Section 107 that concerned jurisdiction and enforcement:

(c) JURISDICTION OVER ENFORCEMENT AGAINST MEMBERS. – Notwithstanding Section 105(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.

67. On July 23, 1987, H.R. 318 as amended passed the Senate by voice vote. *See* Report of House Committee on Interior, No. 100-36.

68. The House received the Senate version of H.R. 318 on July 24, 1987. *See* Report of House Committee on Interior, No. 100-36.

69. During the debate on the Senate version of H.R. 318, Representative Morris Udall, then the Chairman of the House Committee on Interior and Insular Affairs, requested that the House act on the Senate amendments to the Restoration Act by unanimous consent, stating:

It is my understanding that the Senate amendments to [Section 107] are in line with the rational[e] of the recent Supreme Court decision in the Cabazon Band of Mission Indians versus California. This amendment in effect would codify for those tribes the holding and rational[e] adopted in the Court's opinion in the case.

70. The House agreed to the Senate amendments to H.R. 318 by unanimous consent. *See* Congress.gov (Library of Congress) Report on all Congressional Activity on H.R. 318.

71. On August 18, 1987, President Ronald Reagan signed H.R. 318 as amended by the Senate into law, which became Public Law 100-89.

The Relationship between Federal Law and State Law

72. The plenary power of Congress to deal with the unique issues concerning Indian nations is drawn both explicitly and implicitly from the United States Constitution.

73. Article I, Section 8, Clause 3 of the United States Constitution is known as the Commerce Clause.

74. The Commerce Clause grants Congress plenary power to regulate commerce between the United States and three other forms of sovereign entities: the states, foreign nations, and Indian nations.

75. Article I, Section 8, Clause 3 states, in part: “The Congress shall have Power to...regulate Commerce...with the Indian Tribes...” This language in Article I, Section 8, Clause 3 is known as the Indian Commerce Clause.

76. The United States Constitution, through the Indian Commerce Clause, grants Congress plenary and exclusive powers to legislate in respect to Indian tribes.

77. Under the United States Constitution Congress also has the power to preempt state law.

78. State law is naturally preempted to the extent of any conflict with a federal statute.

79. Preemption occurs “where it is impossible for a private party to comply with both state and federal law, and where “under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000).

80. When Congress intends federal law to “occupy the field” state law in that area is preempted.

81. Congress has occupied the field of Indian gaming for the Ysleta del Sur Pueblo in at least the Restoration Act, and also in the Indian Gaming Regulatory Act.

82. Federal agencies, acting under federal laws, have sought to implement Congressional recognition of Indian gaming interests by overseeing tribal bingo and other

gaming activities not only with the Ysleta del Sur Pueblo and the Alabama Coushatta Tribe, but with hundreds of other Indian nations.

83. No state law or enforcement of a state law may be enforced if it is in conflict with federal law that occupies the field.

Gaming in Texas

84. The State of Texas does not prohibit all gaming activities.

85. In 1980, the Texas Constitution was amended to authorize bingo. Texas Const. Art. III, § 47.

86. Bingo is a gaming activity.

87. The bingo amendment to the Texas Constitution only allows bingo to be conducted by a “church, synagogue, religious society, volunteer fire department, nonprofit veterans organization, fraternal organization, or nonprofit organization supporting medical research or treatment programs.”

88. The bingo amendment to the Texas Constitution required the Texas Legislature to authorize bingo by law.

89. The bingo amendment to the Texas Constitution required the Texas Legislature to statutorily regulate bingo.

90. In 1981, after bingo was authorized by constitutional amendment, the Texas Legislature passed the Bingo Enabling Act.

91. The Bingo Enabling Act allowed only the following organizations to conduct bingo: religious societies; nonprofit organizations; fraternal organizations; veterans organizations; volunteer fire departments and a volunteer emergency medical services provider that has existed in this state for at least three years.

92. The Bingo Enabling Act includes regulatory provisions that regulate the time, place and manner of bingo in the State of Texas.

93. The Bingo Enabling Act's regulatory provisions are administrated by the Texas Lottery Commission, which is a regulatory body.

94. How a bingo game may be played in the State of Texas is regulated by the Texas Lottery Commission.

95. The Bingo Enabling Act has been amended on at least the following occasions: 1999, 2003, 2009, 2011, 2013 and 2017.

96. The Texas bingo industry is responsible for providing tens of millions of dollars to charities, cities and counties in the State of Texas, and tens of millions of dollars to the State of Texas's General Revenue Fund.

97. In 2016, the total gross receipts from bingo in the State of Texas exceeded \$761 million.

98. In 2016, \$19.1 million in gross receipts from bingo in the State of Texas was deposited into the State of Texas's General Revenue Fund.

99. In 2016, \$13.9 million in gross receipts from bingo in the State of Texas was given to cities and counties.

100. In 2016, \$30 million in gross receipts from bingo in the State of Texas was given to charities for charitable purposes.

101. In 2016, the State of Texas had a population of 27.9 million people.

102. In 2016, 15.2 million people attended Texas bingo games.

103. The State of Texas does not prohibit game rooms.

104. A game room is a for-profit business located in a building or place that contains six or more:

(A) amusement redemption machines; or

(B) electronic, electromechanical, or mechanical contrivances that, for consideration, afford a player the opportunity to obtain a prize or thing of value, the award of which is determined solely or partially by chance, regardless of whether the contrivance is designed, made, or adopted solely for bona fide amusement purposes.

105. The State of Texas does not prohibit “amusement redemption machines” in game rooms.

106. Amusement redemption machines are defined as “electronic, electromechanical, or mechanical contrivances that accept money or other consideration and reward a player with a prize determined solely or partially by chance.”

107. A game played on an amusement redemption machine is a gaming activity.

108. An amusement redemption machine is not a gaming activity.

109. The State of Texas does not prohibit “electronic, electromechanical, or mechanical contrivances that, for consideration, afford a player the opportunity to obtain a prize or thing of value, the award of which is determined solely or partially by chance, regardless of whether the contrivance is designed, made, or adopted solely for bona fide amusement purposes” in game rooms.

110. Electronic machines that accept money are not a gaming activity.

111. Electronic machines that accept money are not prohibited by the laws of the State of Texas.

112. Machines that use an entertaining video display are not a gaming activity.

113. Machines that use an entertaining video display are not prohibited by the laws of the State of Texas.

114. Machines that provide something of value to a person after money, a credit card, or specially designed card is inserted into the machine are not a gaming activity.

115. Machines that provide something of value to a person after money, a credit card, or specially designed card is inserted into the machine are not prohibited by the laws of the State of Texas.

116. The State of Texas allows certain counties to regulate the operation of game rooms. Tex. Loc. Gov't Code § 234.133.

117. Harrison County, Texas has an ordinance that allows game rooms in the County to make available for play to the public electronic, electromechanical, or mechanical contrivances that, for consideration, afford a player the opportunity to obtain a prize or thing of value, the award of which is determined solely or partially by chance, regardless of whether the contrivance is designed, made, or adopted solely for bona fide amusement purposes.

118. On information and belief, there are game rooms in operation in Harrison County, Texas that make available electronic, electromechanical, or mechanical contrivances that, for consideration, afford a player the opportunity to obtain a prize or thing of value, the award of which is determined solely or partially by chance, regardless of whether the contrivance is designed, made, or adopted solely for bona fide amusement purposes.

119. Harris County, Texas has an ordinance that allows organizations in the County to make available electronic, electromechanical, or mechanical contrivances that, for consideration, afford a player the opportunity to obtain a prize or thing of value, the award of which is

determined solely or partially by chance, regardless of whether the contrivance is designed, made, or adopted solely for bona fide amusement purposes.

120. On information and belief Harris County has issued at least seventy-two permits for game rooms to operate in the county.

121. On information and belief, the following game rooms in Harris County are permitted to offer electronic, electromechanical, or mechanical contrivances that accept money or other consideration and reward a player with a prize determined solely or partially by chance: Joker's Wild Aces High; Golden 7 Game Room; Horseshoe Game Room; Lucky 77 Game Room; Lucky Seven Game Room; Golden Pot Game Room; Game Room King; Treasure Island Too Game Room; Super Seven; Four Aces Game Room; Wild Aces; Mr. Lucky; Caesars Palace Game Room; Easy Money; High Rollin Game Room; and Jacks or Better Game Room.

122. The towns of Dangerfield and Lone Star are located in Morris County, Texas.

123. On information and belief, Morris County is not authorized under Texas law to license and regulate game rooms.

124. Rite Track in Dangerfield offers electronic, electromechanical, or mechanical contrivances that, for consideration, afford a player the opportunity to obtain a prize or thing of value, the award of which is determined solely or partially by chance.

125. Mobil, Texas Stop #2 and Shop n Go, in Lone Star, both offer electronic, electromechanical, or mechanical contrivances that, for consideration, afford a player the opportunity to obtain a prize or thing of value, the award of which is determined solely or partially by chance.

126. The town of McKinney is located in Colin County, Texas.

127. McKinney, Texas has an ordinance that allows organizations to make available electronic, electromechanical, or mechanical contrivances that, for consideration, afford a player the opportunity to obtain a prize or thing of value, the award of which is determined solely or partially by chance.

128. Lucky Gem Game room and Lucky's Game room in McKinney offer electronic, electromechanical, or mechanical contrivances that, for consideration, afford a player the opportunity to obtain a prize or thing of value, the award of which is determined solely or partially by chance.

129. The City of El Paso is located in El Paso County, Texas.

130. In El Paso, Bingo Plus, Golden Sweepstakes, Red's Game Room, West Texas Machines Game Room offer electronic, electromechanical, or mechanical contrivances that, for consideration, afford a player the opportunity to obtain a prize or thing of value, the award of which is determined solely or partially by chance.

131. The State of Texas allows "The Improved Order of the Red Men" to offer gaming activities and game room machines.

132. The Improved Order of the Red Men is a federally chartered fraternal organization with a national office in Waco, Texas.

133. The Improved Order of the Red Men consists of "tribes" of non-Indian men with names like "Teepee Tribe No. 6," "Wampum Tribe No. 5" and "Tejas Tribe No. 11."

134. There is a non-Indian women auxiliary of the Improved Order of the Red Men that refers to themselves as the "Degree of Pocahontas."

135. The Improved Order of the Red Men purports to “perpetuat[e] the beautiful legends and traditions of a once-vanishing race and the keeping alive some of the traditional customs, ceremonies, and philosophies.”

136. On information and belief, thirty out of the fifty-one chartered chapters of the Improved Order of the Red Men in Texas sponsor bingo games.

137. Upon information and belief, the Improved Order of the Red Men also offer electronic, electromechanical, or mechanical contrivances that, for consideration, afford a player the opportunity to obtain a prize or thing of value, the award of which is determined solely or partially by chance.

138. Bingo is conducted at Fort Bliss, a federal installation within the exterior boundaries of the State of Texas, by the United States Army and/or the United States Army Installation Management Command.

139. The language of the Texas Constitution, Article III, Sec. 47(b) does not include the “United States Army” or the “United States Army Installation Management Command.”

The Gaming Activity of Bingo on Ysleta del Sur Pueblo

140. The gaming activity of bingo is not prohibited by the laws of the State of Texas.

141. The Ysleta del Sur Pueblo is entitled to engage in gaming activities “not prohibited by the laws of the state of Texas” as a federal right and interest under the Restoration Act.

142. Bingo cards are not a gaming activity.

143. Bingo cards are not prohibited by the laws of the State of Texas.

144. Bingo card minders are not a gaming activity.

145. Bingo card minders are not prohibited by the laws of the State of Texas.

146. Pre-drawn bingo games are not prohibited by the laws of the State of Texas.

147. The Ysleta del Sur Pueblo has been offering bingo as a gaming activity under the Restoration Act since 2016.

148. The Ysleta del Sur Pueblo has a gaming ordinance that has been approved by the National Indian Gaming Commission.

149. The Ysleta del Sur Pueblo has a Regulatory Commission to regulate gaming on the lands of the Ysleta del Sur Pueblo.

150. Bingo offered on the Ysleta del Sur Pueblo provides over ninety percent of the revenue for the operation of the Ysleta del Sur Pueblo's government.

151. Bingo provides the revenue to support over ninety percent of the employment for Ysleta del Sur Pueblo's members.

Counter-Defendant Ken Paxton's Actions Against the Ysleta del Sur Pueblo

152. Counter-Defendant Ken Paxton is prohibited from enforcing laws in manner that violates the United States Constitution.

153. Counter-Defendant Ken Paxton is prohibited from enforcing state law when preempted by federal law.

154. Any interest by the Counter-Defendant in preventing the bingo games at issue in this action is not sufficient to overcome the preemptive force of the federal and tribal interests affected.

155. The Counter-Defendant does not have the authority to enforce laws concerning the State of Texas's regulatory jurisdiction on the Ysleta del Sur Pueblo reservation or lands of the Ysleta del Sur Pueblo.

156. In 2017, Counter-Defendant Ken Paxton filed this action against the Counter-Plaintiffs to “enforce the Restoration Act” concerning the bingo offered on the Ysleta del Sur Pueblo. ECF No. 8 at 1.

157. Counter-Defendant Ken Paxton seeks to prohibit the conduct of bingo on the Ysleta del Sur Pueblo that does not conform to regulations imposed on bingo in the State of Texas.

158. In doing so, Counter-Defendant Ken Paxton seeks to unlawfully deprive the Counter-Plaintiffs their federal right and interest.

159. In 2017, Counter-Defendant Ken Paxton also filed an action against the Alabama-Coushatta Tribe seeking to prohibit the Alabama Coushatta Tribe from offering Class II, bingo style gaming, under the Restoration Act.

160. On information and belief, Counter-Defendant Ken Paxton has never brought a civil legal action to prevent the conduct of bingo against any entity other than a federally recognized Indian nation and its members.

161. Counter-Defendant Ken Paxton contends that the “Bingo Enabling Act establishes parameters for certain qualified Texas operators to obtain licenses from the Lottery Commission and lawfully offer approved types of bingo” and avers that the Ysleta del Sur Pueblo is “violating [those] legal parameters” by conducting bingo on its reservation. ECF No. 8.

162. The Texas Constitution’s Bingo Amendment, by allowing certain organizations the right to conduct bingo, but omitting Indian nations and their members from that list, violates the Equal Protection protections guaranteed to Counter-Plaintiffs in the United States Constitution.

163. Counter-Defendant Ken Paxton, by taking action to enforce the Texas Constitution's limitations on the organizations that can conduct bingo by seeking to prohibit Counter-Plaintiffs from conducting Bingo because Indians and Indian nations are not one of the listed organizations, is violating Counter-Plaintiffs' right to Equal Protection under the United States Constitution.

164. The Texas Bingo Enabling Act, by allowing certain organizations the right to conduct bingo, but omitting Indians and Indian nations from that list, violates the Equal Protection protections guaranteed to Counter-Plaintiffs in the United States Constitution.

165. Counter-Defendant Ken Paxton, by taking action to enforce the Texas Bingo Enabling Act's limitations on the organizations that can conduct bingo by seeking to prohibit Counter-Plaintiffs from conducting Bingo because Indians and Indian nations are not one of the listed organizations, is violating Counter-Plaintiffs' right to Equal Protection under the United States Constitution.

166. Counter-Defendant Ken Paxton explicitly omits names of Indian nations and Indian members on its list of "operators" authorized to conduct bingo under the regulations of the State of Texas.

167. In his Amended Complaint, Counter-Defendant Ken Paxton cites to the Restoration Act and Section 125.002(a)(5) of the Texas Civil Practice and Remedies Code as authority to bring this pending lawsuit. ECF No. 8.

168. Upon information or belief, Counter-Defendant Ken Paxton has never brought suit against non-Indians based upon Texas Civil Practice and Remedies Code Section 125.015(a)(5).

169. In his Amended Complaint, Counter-Defendant Ken Paxton cites to the Restoration Act and Section 125.002(a)(5) of the Texas Civil Practice and Remedies Code as authority to bring this pending lawsuit. ECF No. 8.

170. Counter-Defendant Ken Paxton has worked for years to stop bingo on the Ysleta del Sur Pueblo and has brought litigation against the Counter-Plaintiffs citing the Restoration Act and Section 125.002(a)(5) of the Texas Civil Practice and Remedies Code solely for the purpose of stopping bingo, while non-Indians are allowed to participate in regulated and unregulated bingo games and game rooms in the State of Texas.

171. Counter-Defendant Ken Paxton allows bingo to occur at Fort Bliss, but not at Ysleta del Sur Pueblo, even though both occur on federal lands within the exterior boundaries of the State of Texas.

172. Any enforcement of state law by the Counter-Defendant against Counter-Plaintiffs impacting a federal law that protects rights guaranteed to Counter-Plaintiffs must occur in strict compliance with the federal law, or it is a violation of Equal Protection rights guaranteed to Counter-Plaintiffs under the United States Constitution.

173. The well-being of Counter-Plaintiffs and their Pueblo members continue to be threatened by the Counter-Defendant's actions because those actions violate the Equal Protection guaranteed to Counter-Plaintiffs under the United States Constitution, and because if bingo is prohibited on the Ysleta del Sur Pueblo, all Pueblo programs will be affected, leaving the Counter-Plaintiffs without the means to provide government services, employment and other governmental benefits to its members.

174. Counter-Defendant intentionally and unjustly is taking legal action against the Counter-Plaintiffs and Pueblo members based upon the unconstitutional categorization of the

Ysleta del Sur Pueblo as an Indian nation, and the unconstitutional categorization of the Governor and Tribal Council members as Indians, which denies the Counter-Plaintiffs their fundamental rights and interests under the Constitution and laws of the United States of America.

175. The United States Constitution prohibits state action that treats persons differently under the law. U.S. Const. amend. XIV, § 1.

176. Counter-Defendant Ken Paxton has specifically targeted Indian nations and reservation Indians for increased scrutiny and increased legal burdens in violation of the Equal Protections guaranteed by the United States Constitution and the laws of the United States of America.

177. By bringing this counterclaim, Counter-Plaintiffs seek prospective relief to prevent future violations by the Counter-Defendant and his agents of the fundamental rights and interests secured to Counter-Plaintiffs under the Constitution and laws of the United States of America.

REQUEST FOR RELIEF

The Ysleta del Sur Pueblo, the Tribal Council and Governor Carlos Hisa or his Successor, respectfully requests that the Court order the following relief:

1. Declare that Counter-Defendant Ken Paxton is violating the Counter-Plaintiffs' right to equal protection under the laws and Constitution of the United States, including U.S. Const. amend. XIV, § 1.
2. Declare that bingo is a gaming activity; and
3. Declare that the laws of the State of Texas do not prohibit bingo.

4. An award of attorney's fees and costs from the date of the May 17, 2017 physical inspection which the Counter-Plaintiffs allowed the Counter-Defendant to conduct until the date of the Court's final judgment; and
5. Such further relief to which the Counter-Plaintiffs may be entitled.

JURY DEMAND

Pueblo Defendants, as provided by Fed. R. Civ. P. 38, demand trial by jury in this action of all issues so triable.

Dated: September 7, 2018

Respectfully Submitted,

/s/ Randolph H. Barnhouse

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification to the following:

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