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

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

PLAINTIFF/COUNTER-DEFENDANT STATE OF TEXAS'S MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS

Almost a year into this lawsuit, Defendants bring counterclaims seeking six declarations. Doc. 87 at 12–13. Five of the six declarations are redundant of issues already before the Court: Defendants simply request the opposite of the declarations sought in Texas's First Amended Complaint, Doc. 8. And one of those five—which asks the Court to declare that the "State of Texas's efforts to prohibit bingo[1] from being offered at Speaking Rock violate the Restoration Act," Doc. 87 at 13—is incompatible with *Ysleta del Sur Pueblo v. State of Texas*, 36 F.3d 1325 (5th Cir. 1994) and this Court's ruling on Texas's motion for preliminary injunction, which analyzed *Ysleta* and affirmed Texas's right to seek injunctive relief in federal court for violations of the Restoration Act. Doc. 77 at 17–18.

Defendants' sixth and final request for declaratory judgment—that Texas is

[1] Texas disputes that the gaming on the Pueblo's reservation qualifies as bingo under Texas law.

violating the Fourteenth Amendment's Equal Protection Clause by pursuing this case—fails for two independent reasons. First, it is barred by Texas's sovereign immunity and the Eleventh Amendment, which prohibit suits against the State. While there is a limited exception to this prohibition—first recognized by the Supreme Court in *Ex Parte Young*, 209 U.S. 123 (1908)—this exception only permits suits for prospective injunctive relief to conform a State official's future conduct to the requirements of federal law. Defendants have named no such defendants here. And even if Defendants had pleaded a counterclaim to conform a State official's future conduct to the Equal Protection Clause, absolute prosecutorial immunity would prevent the claim from proceeding. Defendants' countersuit should be dismissed.

ARGUMENT & AUTHORITY

I. Five of Defendants' six counterclaims should be dismissed under Rule 12(b)(6) as redundant of claims already before the Court.

Defendants invoke the Declaratory Judgment Act to bring their counterclaims. Doc. 87 ¶19 ("[t]his Court has jurisdiction to grant the declaratory relief requested in this action under the Declaratory Judgment Act, 28 U.S.C. §§2201, 2202."). Courts have "broad discretion in determining whether to entertain a declaratory judgment action under 28 U.S.C. §2201." *Regus Mgmt. Group, LLC, v. Int'l Bus. Mach. Corp.*, 2008 WL 2434245, at *2 (N.D. Tex. June 17, 2008). "If a request for a declaratory judgment adds nothing to an existing lawsuit, it need not be permitted." *Id.* Moreover, "[i]n the Federal Rule of Civil Procedure 12(b)(6) context, courts regularly reject declaratory judgment claims that seek resolution of matters that will already be resolved as part of the claims in the lawsuit." *Id.* (collecting cases).

Five of Defendants' six counterclaims should be dismissed because they seek declarations which will necessarily be decided on the merits of Texas's existing claims. Defendants seek the following redundant declarations:[2]

A. That bingo is a gaming activity;
B. That the laws of the State of Texas do not prohibit bingo;
C. That the machines used at Speaking Rock as an aid to bingo are not a gaming activity;
D. That the manner in which bingo is conducted at Speaking Rock is not a gaming activity;
E. That the State of Texas's efforts to prohibit bingo from being offered at Speaking Rock violate the Restoration Act.

Doc. 87 at 12–13. These proposed declarations capture the very same issues Texas has raised (Defendants are violating Texas gaming law and the Restoration Act), and the affirmative defense Defendants have attempted to mount in response (they are engaged in authorized charitable bingo). For instance, Texas contends that although certain forms of bingo are permitted by the Bingo Enabling Act, TEX. OCC. CODE § 2001.001 *et seq.*, Defendants' gaming activities violate Texas gambling laws including that Act, and violate the Restoration Act. *E.g.*, First Am. Compl. ¶21. Similarly, the Tribe's fourth proposed declaration—that "bingo . . . conducted at Speaking Rock is not a gaming activity"—is another way of framing the question of whether Defendants are violating Texas gaming laws, and thus, the Restoration Act. *Id.* ¶20.

[2] Defendants state their requested declarations in terms of "bingo," as if the Court has already concluded that the gaming on the Tribe's reservation *is* "bingo." Texas disputes this characterization, because the activities on the Tribe's reservation are not lawful bingo as defined by Texas law. In any event, the Court has suggested that whether Defendants' activities constitute permissible charitable bingo under Texas law is necessary to deciding Texas's claims. *E.g.*, Doc. 77 at 29 (noting, in denying Texas's request for a preliminary injunction, that it remained to be determined "exactly which laws are being violated, and how exactly the machines [on the Pueblo's reservation] violate those laws."). Thus, even though they are stated in a conclusory (and contested) terms insofar as they treat the gambling on the Pueblo's reservation as "bingo," Defendants' requested declarations are redundant.

None of these declarations adds anything to the existing litigation, and therefore, the requests for these declarations should be dismissed. *See, e.g.*, *Hanson Aggregates, Inc. v. Roberts & Schaefer Co.*, 2006 WL 2285575, at *3 (N.D. Tex. Aug. 9, 2006) (dismissing declaratory judgment counterclaim that raised issues that would be covered at trial); *City of Waco v. Kleinfelder Cent., Inc.*, 2016 WL 5854290, at *9 (W.D. Tex. Oct. 6, 2016) (finding that a counterclaim for a declaration of a party's rights under a contract was "unnecessary because Plaintiff has already placed the issues relevant to Defendant's counterclaim before the Court.").

Moreover, Defendants' claim that "Texas's efforts to prohibit bingo from being offered at Speaking Rock violate the Restoration Act," Doc. 87 at 13, cannot be squared with *Ysleta*, in which the Fifth Circuit noted Texas's right to pursue injunctive relief in federal court to enjoin violations of Texas gaming laws. 36 F.3d at 1334 ("Under §107(c), the state of Texas is authorized to file suit in a federal court to enjoin any violation by the Tribe of the provisions of §107(a)."). Similarly, Judge Cardone noted in prior litigation between the parties that Texas "may seek to file a new case in this Court seeking injunctive relief, if it has reason to believe Defendants are otherwise in violation of the Restoration Act." *State of Texas v. Ysleta del Sur Pueblo*, Case No. 3:99-cv-00320-KC (W.D. Tex. Mar. 10, 2017), Doc. 625 at 3. And this Court noted in its order denying Defendants' motion to dismiss "that Plaintiff has pleaded a plausible claim that Defendants are engaged in an activity in violation of Texas law." Doc. 76 at 9. Texas is not violating the Restoration Act by seeking the remedy that Congress specifically authorized, in the venue that Congress specified.

See 25 U.S.C. §1300g-6(c).

For these reasons, the Court should dismiss Defendants' five counterclaims seeking declaratory relief under Federal Rule of Civil Procedure 12(b)(6) as redundant of the claims raised in Texas's First Amended Complaint.[3]

II. Defendants' Equal Protection claim should be dismissed for lack of jurisdiction under Rule 12(b)(1).

Defendants' sixth and final counterclaim asserts that "Texas is violating the Pueblo Defendants' right to equal protection under the laws and Constitution of the United States, including U.S. Const. amend. XIV § 1." Doc. 87 at 13. This claim should be dismissed under Federal Rule of Civil Procedure 12(b)(1) because it is barred by Texas's sovereign immunity and the Eleventh Amendment. *See* FED. R. CIV. P. 12(b)(1); *Cozzo v. Tangipahoa Parish Council-President Gov't*, 279 F.3d 273, 280 (5th Cir. 2002) ("Sovereign immunity is jurisdictional."). Moreover, even if Defendants sought (and the Court granted) leave to amend and Defendants re-pleaded their Equal Protection claim under the limited *Ex Parte Young* exception to Texas's sovereign immunity, that claim would be barred by absolute prosecutorial immunity.

Sovereign immunity bars suits against states in federal court unless the State has expressly waived that immunity, or it has been validly and explicitly abrogated by Congress. *E.g., Hans v. Louisiana*, 134 U.S. 1, 13 (1890). The Eleventh Amendment "confirms…first, that each State is a sovereign entity in our federal

[3] The Declaratory Judgment Act is not an independent source of federal court jurisdiction, and does not confer a right to recover attorney's fees. *E.g., Self-Ins. Inst. of Am., Inc. v. Korioth*, 53 F.3d 694, 697 (1995). Thus, even if Defendants' requests for declarations were included in this lawsuit going forward—and even Defendants prevailed—they would not be entitled to attorney's fees.

system; and second, that it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 54 (1996) (citations and punctuation marks omitted). The Supreme Court has "found a surrender of [state] immunity against particular litigants in only two contexts: suits by sister States, and suits by the United States." *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 782 (1991) (citing *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904); *United States v. Texas*, 143 U.S. 621 (1892)). The Court has rejected the notion that states have surrendered immunity to "either foreign sovereigns or Indian tribes." *Id.* Thus, Texas is immune to suit by the Tribe.

Congress did not abrogate Texas's immunity under the Restoration Act. "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Dellmuth v. Muth*, 431 U.S. 223, 227-28 (1989). No such language appears in the Restoration Act with respect to Texas's immunity. *Cf., Tex. v. Ysleta del Sur Pueblo*, 79 F. Supp. 2d 708, 710 (W.D. Tex. 1999) ("§1300g-6 does represent an unequivocal waiver of *tribal* immunity...") And Texas does not waive its immunity to counterclaims merely by filing a suit Congress authorized in the Restoration Act, in the venue Congress chose for it. *See* 25 U.S.C. §1300g-6(c) (providing for jurisdiction in the "courts of the United States."); *Beightler v. Office of the Essex Cty. Prosecutor*, 342 F. App'x 829, 832 (3d Cir. 2009) (state office did not waive sovereign immunity by appearing in federal court when the forum was chosen for it). *See also* Sossamon v. Texas, 563 U.S. 277, 284 (2011) ("[w]aiver [of State sovereign immunity] may not

be implied.") (citations omitted).

The Equal Protection clause does not waive Texas's immunity here, either. Under 42 U.S.C. §1983, Congress created a "private cause of action against state actors for constitutional violations," including violations of the Equal Protection Clause. *Udeigwe v. Texas Tech Univ.*, --- F. App'x ---, 2018 WL 2186485, at *3 (5th Cir. May 11, 2018) (noting that a constitutional claim could not be brought as standalone claim under the Fourteenth Amendment). But under §1983, courts have only "found federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to 'end a continuing violation of federal law.'" *Seminole Tribe of Fla. v. Fla.*, 517 U.S. at 73 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)).[4] And such claims can only be brought against a "person," who, acting under color of law, is engaged in ongoing violations of federal law. 42 U.S.C. §1983. This is known as the *Ex Parte Young* exception to sovereign immunity.

The Supreme Court and the Fifth Circuit have consistently held that a state is not a person who can be sued under §1983. *E.g., Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) ("[A] state is not a 'person' within the meaning of §1983."). Instead, constitutional claims must be pursued against a state official in his official capacity, under the limited in *Ex Parte Young* exception to sovereign immunity. *Stotter v. Univ. of Texas at San Antonio*, 508 F.3d 812, 821 (5th Cir. 2007) (finding that public university, as arm of the state, was not a "person" under §1983 and citing

[4] *See also, e.g., Edelman v. Jordan*, 415 U.S. 651, 677 (1974) ("Though a §1983 action may be instituted by public aid recipients such as [state officials], a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief[.]")

Will for the proposition that "neither a state or persons acting in their official capacities are 'persons' under §1983, though state officials in their official capacities, when sued for injunctive relief, are 'persons' under §1983."). Because Defendants have sued Texas—and not a state official acting in his official capacity—under §1983, Defendants' Equal Protection counterclaim cannot proceed under the limited exception to immunity recognized under *Ex Parte Young* and its progeny.

Even if an Equal Protection counterclaim had been brought against an official capacity defendant under *Ex Parte Young*,[5] it would still be barred by Texas's absolute prosecutorial immunity. Indeed, "prosecutors are absolutely immune from liability under §1983 for their conduct in 'initiating a prosecution and in presenting the State's case,' insofar as that conduct is 'intimately associated with the judicial phase of the criminal process.'" *Burns v. Reed*, 500 U.S. 478, 486 (1991) (citation omitted). The policy considerations supporting prosecutorial immunity include "the interest in protecting the prosecutor from harassing litigation that would divert his time and attention from his official duties and the interest in enabling him to exercise independent judgment when 'deciding which suits to bring and in conducting them in court.'" *Kalina v. Fletcher*, 522 U.S. 118, 125 (1997) (citation omitted). Without absolute immunity, "the fear of suit may cause the prosecutor to 'shade his decisions

[5] Should defendants seek leave to amend their Amended Answer to add an individual defendant in an attempt to salvage their equal protection claim, such motion should be denied. The deadline to amend or supplement pleadings or join additional parties was February 9. Doc. 46 at 2. There is no reason Defendants could not have brought this counterclaim sooner, and thus, they cannot show good cause to belatedly make this argument. *E.g., S&W Enterprises, L.L.C. v. SouthTrust Bank of Alabama, NA*, 315 F.3d 533, 536–37 (5th Cir. 2003) (holding that Rule 16(b)'s good cause standard applies to amendment of pleadings after a scheduling order deadline). Moreover, such amendment would be futile given the other jurisdictional bars to this suit set forth in this filing.

instead of exercising the independence of judgment required by his public trust.'" *Lampton v. Diaz*, 639 F.3d 223, 228 (5th Cir. 2011) (citation omitted). It is "well established that this absolute prosecutorial immunity extends to state attorneys and agency officials who perform functions analogous to those of a prosecutor in initiating and pursuing civil and administrative enforcement proceedings." *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1489 (10th Cir. 1991).

Prosecutorial immunity applies in this context. The Texas Attorney General's Office has brought this case to enforce State law under the Restoration Act, which federalizes Texas gambling laws—both civil and criminal. *See*, *e.g., Ysleta*, 36 F.3d at 1334–35; TEX. CIV. PRAC. & REM. CODE §125.0015(a)(5) (defining a common nuisance to include a place where persons habitually go to gamble); *id.* §125.002(a) (authorizing the Attorney General to sue to enjoin and abate a common nuisance). *See also* TEX. GOV'T CODE §467.105(b) ("The attorney general may apply for injunctive or declaratory relief to enforce a law under the commission's jurisdiction or a rule adopted by the commission.").

In *Metro Charities, Inc. v. Moore*, a charitable bingo sponsor brought a civil rights action against the Mississippi Attorney General, who had filed a civil action to enjoin the sponsor's illegal bingo operation. 748 F. Supp. 1156, 1158 (S.D. Miss. 1990). The court noted that "[a]bsolute immunity is afforded those charged with the civil enforcement of state laws." *Id.* at 1163. The sponsor argued, however, that the Attorney General was acting as a plaintiff, rather than a prosecutor, by filing a civil action. *Id.* at 1164. The court disagreed, noting that Mississippi Attorney General

was acting in a prosecutorial capacity on behalf of the State, and that he was therefore entitled to absolute immunity. *Id.* (citing *Russell v. Millsap*, 781 F.2d 381 (5th Cir. 1985), for the proposition that prosecutors seeking to enjoin operation of massage parlor and prostitution activities were performing typical prosecutorial functions for which they had absolute immunity).

Like the Mississippi Attorney General in *Metro Charities*, the Texas Attorney General's Office is exercising its civil enforcement powers—provided for under the Restoration Act, which federalizes Texas law including its nuisance statutes and the Bingo Enabling Act—on behalf of the State to enjoin illegal gambling activities. *See, e.g.,* TEX. PENAL CODE § 47.01(7) (prohibition on lotteries); *id.* §47.02 (gambling); *id.* §47.03(a)(1), (a)(5) (operating a gambling promotion); *id.* §47.04(a) (keeping a gambling place); *id.* §47.06(a), (c) (possessing gambling devices, equipment, or paraphernalia); TEX. OCC. CODE §§2001.101 (Authorized Organization); 2001.407 (Equipment and Supply Transactions); 2001.409 (Card-Minding Devices); 2001.411 (Persons Operating or Conducting Bingo); 2001.419 (Bingo Occasions). As discussed above, officials charged with civil enforcement of such laws have absolute prosecutorial immunity. Defendants' sixth counterclaim should be dismissed.

CONCLUSION & PRAYER

The Court should dismiss Defendants' countersuit in its entirety.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

ANGELA V. COLMENERO
Chief, General Litigation Division

/s/Anne Marie Mackin
ANNE MARIE MACKIN
Texas Bar No. 24078898
MICHAEL R. ABRAMS
Texas Bar No. 24087072
BENJAMIN S. LYLES
Texas Bar No. 24094808
Assistant Attorneys General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 475-4074 | FAX: (512) 320-0667
anna.mackin@oag.texas.gov
michael.abrams@oag.texas.gov
benjamin.lyles@oag.texas.gov

ATTORNEYS FOR PLAINTIFF/COUNTER DEFENDANT THE STATE OF TEXAS

CERTIFICATE OF SERVICE

I hereby certify that on this the 29th day of May, 2018, 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
ANNE MARIE MACKIN
Assistant Attorney General