IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

STATE OF TEXAS, *Plaintiff*, v. ALABAMA-COUSHATTA TRIBE OF TEXAS, *Defendant*.	§ § § § § § § § § § § § §	NO. 9:01-CV-00299

DEFENDANT ALABAMA-COUSHATTA TRIBE OF TEXAS'S RESPONSE TO STATE'S SECOND AMENDED MOTION FOR CONTEMPT AND MOTION FOR ORDER TO SHOW CAUSE

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I. PRELIMINARY STATEMENT

Nearly eighteen years ago, the State and Tribe litigated whether the Tribe could operate what the State characterized as a "Las Vegas-style casino" that offered "blackjack, poker, and various slot machines"—but not bingo. Pretrial Order at 3 [DE 18]; *see also* State's Orig. Ans. & Counterclaim at 10–12 [DE 2] (alleging that the Tribe provided slot machines, video gambling machines, blackjack and poker card games); State Appl. for Prelim. Inj. at 3–5 [DE 4] (seeking to enjoin blackjack, poker, and slot machines). Relying on the Fifth Circuit's opinion in *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994) ("*Ysleta I*"), another court in this District concluded that the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act ("Restoration Act"), Pub. L. No. 100-89, 101 Stat. 666 (1987)—and the Texas law it federalizes—determines what gaming activities are "prohibited" on the Tribe's lands. Because blackjack, poker, and slot machines are "prohibited by the laws of the State of Texas," the court enjoined the Tribe from offering those gaming activities. The injunction reads in full: "[T]he Alabama-Coushatta Tribe, its Tribal Council and all persons acting by, through or under the Tribe and its Tribal Council are ORDERED to cease and desist operating, conducting, engaging in, or allowing others to operate, conduct, or engage in gaming and gambling activities on the Tribe's Reservation which violate State law." *Alabama-Coushatta Tribes of Tex. v. Texas*, 208 F. Supp. 2d 670, 681 (E.D. Tex. 2002) (the "2002 Injunction").

Since the issuance of the 2002 Injunction, the Tribe has not offered slot machines, blackjack, or poker on its lands. Instead, the State seeks to hold the Tribe in contempt for operating a different type of gaming—bingo—under an entirely different factual and legal context. *See generally* Sec. Am. Mot. for Contempt & Mot. for Order to Show Cause ("Contempt Motion") [DE 160]. The State overreaches on several levels.

To begin, the Contempt Motion fails because the State is attempting to secure indirectly what it is prohibited from doing directly. As another court considering a similar issue held, the Restoration Act's limited waiver of the Tribe's sovereign immunity extends only to the State's ability to request injunctions against specific instances of gaming that the State believes violate the Restoration Act. The Restoration Act prohibits the State from exercising continuing "regulatory jurisdiction" over gaming on the Tribe's reservation merely by procuring a single injunction and then repeatedly seeking contempt remedies.

As will be shown at trial, that is precisely what the State intends by attempting to shoehorn the Tribe's bingo within the 2002 Injunction. The 2002 Injunction addressed only the gaming activities then-conducted on the Tribe's reservation (poker, blackjack, and slot machines) that the court concluded violated the Restoration Act. The State cannot hold the Tribe in contempt absent a showing that the Tribe currently is offering the same type of gaming at Naskila. It is not, and to grant the State a contempt remedy here also would subject the Tribe to an "obey the law" injunction that fails to give fair notice of the specific conduct that it prohibits.

The State's request also fails on the merits. Adhering to the Restoration Act's plain terms and Supreme Court and Fifth Circuit precedent, only Texas laws and regulations that "prohibit" a "gaming activity" operate as "surrogate federal law" on the Tribe's lands under Restoration Act § 207(a). Texas laws and regulations do not *prohibit* the gaming activity of bingo. Rather, the State seeks to apply its laws and regulations that merely *license* and *regulate* the operation of bingo—a gaming activity that Texas indisputably permits.

The application of such regulatory laws to the Tribe has not been expressly authorized by Congress, as is required to abrogate the Tribe's sovereign immunity. Quite the opposite: § 207(b) of the Restoration Act unequivocally bars the State from exercising any "civil or criminal

regulatory jurisdiction" over gaming activities on the Tribe's lands. Section 207(b) by its express terms also forecloses any interpretation of § 207 that would erode the Tribe's sovereign immunity, stating: "Nothing in this section [207] shall be construed as a grant of civil or regulatory jurisdiction to the State of Texas." Accordingly, the Tribe respectfully requests that the Court deny the Contempt Motion following the bench trial scheduled for March 1, 2021, as the State will be unable to establish—let alone by clear and convincing evidence—that the Tribe has violated the 2002 Injunction.

II. ARGUMENT

A. The 2002 Injunction Does Not Extend to Bingo Gaming Activities.

Through its Contempt Motion, the State hopes to use the 2002 Injunction to "pass upon the legality" of a type of gaming that was not at issue in 2002. That request would impermissibly expand the 2002 Injunction, which "must be construed to be limited to the particular violation which brought it into being." *Russell C. House Transfer & Storage Co. v. United States*, 189 F.2d 349, 351 (5th Cir. 1951); *see Youakim v. McDonald*, 71 F.3d 1274, 1283 (7th Cir. 1995) ("[The court] must construe injunctions in light of the circumstances that produced them, which may include the nature of the original claim, the relief that was sought, the evidence presented at any hearing or trial, the issues actually decided by the earlier tribunal, and the mischief the injunction was designed to eradicate."); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established.").

The 2002 Injunction addressed the State's request for a permanent injunction against "the operation of the Alabama-Coushatta Entertainment Center, a Las Vegas style casino," 208 F. Supp. 2d at 672, which offered gaming in the form of slot machines, card games, blackjack, poker, and keno, *see, e.g.*, Pretrial Order at 3; State's Br. in Support of Perm. Inj. at 20 [DE 26]. The State limited its request for injunctive relief to the gaming that was then "currently conducted by the

Tribe," *see, e.g.*, State's Br. in Support of Perm. Inj. at 18, a point it made throughout the proceedings, *see, e.g.*, *id.* at 33 ("The State of Texas will be irreparably injured if the Court does not issue an injunction because the Tribe is *currently* violating both federal and state law." (emphasis added)); *id.* at 35 ("The plain language of the Restoration Act prohibits the *current* gambling operations of the Tribe . . . ." (emphasis added)). Likewise, the arguments and evidence presented at trial only concerned the card games and slot machines that were then-offered by the Tribe. *See, e.g.*, Trial Tr. 38:14-39:10 [DE 19] (discussing slot machines, poker, and blackjack used to conduct gambling games); *id*. at 44:11-21 (discussing Tribal Council's desire to expand facility to "add additional slot machines and maybe additional card games").

Although the State has likened the Tribe's bingo machines to *slot* machines, *see, e.g.*, Contempt Motion at 3 (noting that the machines display "reels and other sounds and images that *resemble* slot machines" (emphasis added)), the evidence will show that the Tribe's machines play electronic *bingo*, *see, e.g.,* Ex. A, Expert Report of Nick Farley at 2 (concluding that "[t]he gaming systems installed at the Naskila Gaming Facility ('Naskila') facilitate the play of what is commonly known as Bingo"). And neither bingo nor electronic bingo machines were in dispute in 2002. The prior court did not hear evidence, consider legal arguments, make any factual findings, or reach any legal conclusions regarding the gaming activity of bingo under the Restoration Act. Indeed, the fact that the Contempt Motion here focuses on the Bingo Enabling Act and Texas bingo regulations belies that the current dispute concerns aspects of Texas law and a factual context different from those underlying the 2002 Injunction.

The State cannot stretch the existing 2002 Injunction to cover such dissimilar circumstances. *See, e.g.*, *NLRB v. Express Pub. Co.*, 312 U.S. 426, 435–36 (1941) ("[T]he mere fact that a court has found that a defendant has committed an act in violation of a statute does not

justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged."); *Scott v. Schedler*, 826 F.3d 207, 214 (5th Cir. 2016) ("[A district court's] injunction may not encompass more conduct than was requested or exceed the legal basis of the lawsuit."); *Russell C. House*, 189 F.2d at 351 ("[T]he court should not enjoin [a party] in general terms not to violate [a statute] in any particular and thus subject [the party] to contempt proceedings if it should at any time in the future commit some new violations, unlike and unrelated to that with which it was originally charged."). The Tribe therefore respectfully requests that the Court deny the Contempt Motion after trial because the evidence will establish that the Tribe is not engaged in "the particular type of violation which brought [the 2002 Injunction] into being." *Russell C. House*, 189 F.2d at 351 (reversing contempt order).

B. The Injunction Does Not Provide Fair Notice Because It Simply Orders the Tribe to Obey the Law.

The Tribe cannot be held in contempt of the 2002 Injunction for an additional reason: an "obey the law" prohibition cannot give the Tribe adequate notice of the conduct it circumscribes. Such an injunction may only reach the specific gaming activities that were at issue in 2002.

Rule 65(d)(1) requires "[e]very order granting an injunction" to "state its terms specifically" and to "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." FED. R. CIV. P. 65(d)(1). The Fifth Circuit strictly construes and applies these principles. *Seattle-First Nat'l Bank v. Manges*, 900 F.2d 795, 800 (5th Cir. 1990). And they are "no mere technical requirements"; they were "designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). Accordingly, "orders simply requiring defendants to 'obey

the law' *uniformly* are found to violate the specificity requirement" of Rule 65(d). 11A Wright, Miller & Kane, Federal Practice & Procedure § 2955 at 361 (2013) (emphasis added); *Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369, 373 (5th Cir. 1981) ("A general injunction which in essence orders a defendant to obey the law is not permitted.").

The operative language of the 2002 Injunction that the State relies upon requires the Tribe to "cease and desist operating, conducting, engaging in, or allowing others to operate, conduct, or engage in gaming and gambling activities on the Tribe's Reservation which violate State law." 208 F. Supp. 2d at 681. This language is indistinguishable from "a general injunction against all possible breaches of the law" that the Supreme Court, Fifth Circuit, and other courts have found impermissibly vague. *See Swift & Co. v. United States*, 196 U.S. 375 (1905). In *Payne v. Tavenol Laboratories, Inc.*, for example, the Fifth Circuit vacated an injunction that prohibited a defendant from "[d]iscriminating on the basis of color, race, or sex in employment practices or conditions of employment" at a specific facility, holding that the injunction did little more than repeat Title VII's general prohibitions against employment discrimination. *See* 565 F.2d 895, 897–98 (5th Cir. 1976). Closer to the facts here, a New York federal court declined to adopt a proposed injunction that, in an effort to prevent gaming activities, would have required a tribe to refrain from engaging in "any activity on the [tribe's] land that violates Town zoning laws." *See New York v. Shinnecock Indian Nation*, 560 F. Supp. 2d 186, 188 (E.D.N.Y. 2008), *vacated for lack of jurisdiction*, 686 F.3d 133 (2d. Cir. 2012).

In line with these "obey the law" injunctions, the 2002 Injunction merely orders the Tribe to avoid conduct that "violate[s]" Texas law. *Cf. Hughey v. JMS Dev. Corp.*, 78 F.3d 1523 (11th Cir. 1996) (striking down injunction that forbid the "discharge of stormwater . . . if such discharge would be in violation of the Clean Water Act"). This is not the kind of "clear and unambiguous

order . . . that 'leaves no uncertainty in the minds of those to whom [it] is addressed,'" and "'[t]he longstanding, salutary rule in contempt cases is that ambiguities and omissions in orders redound to the benefit of the person charged with contempt.'" *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 142–43 (2d Cir. 2014) (citations omitted). These rules are "essential" in any case, but they are "absolutely vital" where, as here, the injunction has been used to "nullify" the acts of a sovereign. *Gunn v. Univ. Comm. to End War in Viet Nam*, 399 U.S. 383, 389 (1970). Because extending the 2002 Injunction to bingo would violate Rule 65, the Tribe respectfully requests that the Court decline to hold it in contempt after trial on the merits. *See SEC v. Smyth*, 420 F.3d 1225, 1233 n.14 (11th Cir. 2005) (noting that the Eleventh Circuit "has held repeatedly that 'obey the law' injunctions are unenforceable" (collecting cases including Fifth Circuit precedents)).

C. The State Cannot Use the Injunction to Regulate the Tribe.

As the court presiding over a similar case involving the Ysleta del Sur Pueblo tribe reasoned, the State's ongoing attempts to enforce an injunction's broad terms through contempt proceedings also creates special problems in the context of the Restoration Act. *See Texas v. Ysleta del Sur Pueblo*, No. 99-CV-320, 2016 WL 3039991, at *19–21 (W.D. Tex. May 27, 2016).

Courts have long warned against using contempt remedies to short-circuit constitutional and statutory procedures and protections. *See, e.g.*, *SEC v. Sky Way Global, LLC*, 710 F. Supp. 2d 1274, 1280–82 (M.D. Fla. 2010). That is precisely what the State proposes to do here. Unless abrogated by a specific and unequivocal act of Congress, the Tribe retains sovereign immunity against suit. *See, e.g.*, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030–32 (2014). The Restoration Act contains such a waiver of immunity that permits the State to sue "exclusively" in federal court "to enjoin violations" of the Act, that is "gaming activities which are prohibited by the laws of the State of Texas." P.L. 100-89 § 207(a), (c).

The Restoration Act expressly prohibits the State from exercising "civil or criminal regulatory jurisdiction" over the Tribe. *Id.* § 207(b). As the *Ysleta* court observed, the Restoration Act "never contemplated" that the State could use its injunctive remedy to transform the federal courts into "a quasi-regulatory body overseeing and monitoring the minutiae of [a tribe's] gaming-related conduct." *See Ysleta*, 2016 WL 3039991, at *19. For that reason, the *Ysleta* court refused to perform the role the State asks the Court to assume here. Instead of reviewing whether each new effort at tribal gaming is a contemptible act under a longstanding injunction, the court held that the proper procedure for enforcing the Restoration Act consists of separate proceedings to "pass upon the legality" of gaming that was not at issue "at the time" the injunction issued. *See id*. at *20–21 & n.8. Under this approach, an existing injunction permits review only of whether gaming activities subject to the injunction have persisted. *See id.*

Once it is established at trial that the gaming activity conducted by the Tribe is bingo, the State cannot use the 2002 Injunction as "a mechanism" to "determin[e] the[] legality" of the Tribe's current operations, as neither bingo nor the Bingo Enabling Act were at issue in the proceedings underlying the 2002 Injunction. *See id.* at *20. To conclude otherwise would afford the State "the simple expedient of filing a motion to enforce the injunction, thereby circumventing important procedural, jurisdictional, and constitutional requirements" embodied in the Restoration Act. *See Sky Way Global*, 710 F. Supp. 2d at 1286. For example, the State could obtain preliminary injunctive relief against the Tribe's bingo operations in a new proceeding only after establishing a likelihood of success on the merits, the existence of irreparable harm, and other traditional injunction factors as applied to the present factual and legal context. Not only does the State attempt to avoid this burden here—which the Restoration Act requires in § 207(c)—it affirmatively seeks to tax the Tribe with paying the costs of the State's tactical decision to reopen

this case, despite nothing in the Restoration Act suggesting that the Tribe's waiver of sovereign immunity extends to paying the State's litigation expenses incurred in bringing an injunction action in the first instance. The Tribe therefore respectfully requests that the Court deny the Contempt Motion after trial on the merits.

D. The Tribe's Charitable Bingo Does Not Violate the Restoration Act.

As suggested by the arguments above, the State ultimately cannot prevail on the merits because bingo is not a "gaming activit[y] prohibited by the laws of the State of Texas." P.L. 100-89 § 207(a). The Restoration Act only "prohibit[s]" the Tribe from offering "gaming activities that are prohibited by the laws of the State of Texas." Texas law thus "functions as surrogate federal law" on the Tribe's lands only to the extent those laws and regulations "prohibit" a "gaming activity." The question, then, is whether Texas laws and regulations "prohibit" the "gaming activity" of bingo?

They do not. Unlike the blackjack, poker, and slot machines that were the subject of the 2002 Injunction, the Texas Constitution expressly allows the Texas legislature to "authorize and regulate bingo games." TEX. CONST. art. 3, § 47. And the Texas legislature accepted that invitation by enacting the Texas Bingo Enabling Act, which defines "bingo" as "a specific game of chance, commonly known as bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols conforming to randomly selected numbers or symbols." TEX. OCC. CODE § 2001.002(4).

As the evidence will demonstrate at trial, the gaming activities conducted on the Tribe's lands qualify as "bingo" under that statute. *See* Ex. B, Deposition of Nick Farley at 23:4–24, 25:4–26:3. Moreover, the bingo conducted on the Tribe's lands meets the charitable purposes contemplated by the Texas Constitution and the Bingo Enabling Act. Although the Tribe may not qualify as "a charitable organization within the letter of [that] statute," it certainly falls "within the

spirit of its permissive intent." *See Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310, 314 n.7 (5th Cir. 1981). Similar to the § 501(c)(3) charitable organizations identified in the Bingo Enabling Act, the Tribe is treated as a tax-exempt organization for charitable purposes under the Internal Revenue Code, just under a different section (§ 7871) applicable to Indian tribes. Furthermore, the Tribal Gaming Ordinance that governs the Tribe's bingo gaming directs net revenues to tribal government agencies or programs that provide for the general welfare of the Tribe and its members, promote tribal economic development, fund operations of local government agencies, and donate to charitable organizations. Ex. C, Tribal Gaming Ordinance at 9. These include, among other things, funding for the Tribe's police, fire, a health clinic, housing, a tribal court, social services, forestry, environmental protection, roads and maintenance, education, elder services, and child care.

The State does not—and cannot—argue that bingo is prohibited by Texas law. The State instead contends that the Tribe's bingo does not comply with state laws and regulations that *license* and *regulate* charitable bingo operations. But the Restoration Act's plain language and legislative history forbids the State from enforcing those provisions against the Tribe's bingo. Gaming activities that are not prohibited by state law fall within the Tribe's sovereign jurisdiction to license and regulate according to its rules and procedures. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214–22 (1987); *see also* Ex. C, Tribal Gaming Ordinance (subjecting gaming activities on the Tribe's lands to licensing requirements, regulations, and fines and penalties and establishing a Tribal Gaming Agency to regulate gaming operations).

That conclusion follows from the Restoration Act's plain language, its legislative history, and the cannons of construction that apply to statutes affecting Indians. Statutory interpretation begins by reading a statute in light of the "'ordinary meaning of [its] language.'" *Engine Mfrs*

Ass'n v. S. Coast Air Quality Mgmt Dist., 541 U.S. 246, 252 (2004). The Restoration Act only "prohibits" on the Tribe's lands those "gaming activities" that are "prohibited" by state law. The ordinary meaning of the word "prohibit" is unambiguous. It means "to forbid," "to prevent from doing," to "effectively stop," or "to make impossible." Webster's Third New Int'l Dictionary 1813 (1986); *see also* Black's Law Dictionary 1405 (10th ed. 2014) (defining "prohibit" to mean "1. To forbid by law. 2. To prevent, preclude, or severely hinder."). Accordingly, to "prohibit" a "gaming activity" under the Restoration Act means to forbid that gaming activity by law, as one would expect a state to do if it desired to make that activity impossible to conduct.

That concept starkly contrasts with gaming that is "regulated." By definition, to "regulate" a gaming activity necessarily means to allow it, even if the State may also "fix the time, amount, degree or rate of" that activity "according to rule[s]." Webster's Third New Int'l Dictionary 1913 (1986); *see also* Black's Law Dictionary 1475 (10th ed. 2014) (defining "regulate" to mean "1. To control (an activity or process) esp. through the implementation of rules.").

By the Restoration Act's plain terms and consistent with *Ysleta I*, the Tribe therefore may engage in gaming activities so long as they are not *prohibited* by Texas law. *See* 36 F.3d at 1335 (The Restoration Act "govern[s] the determination of whether gaming activities proposed by the [Tribe] are *allowed* under Texas law, which functions as surrogate federal law." (emphasis added)). The Restoration Act says nothing about applying Texas laws that *regulate* non-prohibited gaming activities like bingo.

If that had been its intent, Congress "would have expressly said so," *Bryan v. Itasca Cnty*, 426 U.S. 373, 390 (1976), particularly against the backdrop in which it legislated. Sixth months prior to the Restoration Act's passage, the Supreme Court concluded—in a case that specifically addressed the application of state civil and criminal bingo laws and regulations to tribal bingo

operations—that states could not regulate gaming activities on tribal lands absent express congressional consent.[1] *Cabazon Band*, 480 U.S. at 214–22. "[S]tate jurisdiction is preempted," the Supreme Court held, "if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *Id*. at 216 (quotations and citation omitted). The Supreme Court also found that the "important" federal and tribal interests of promoting Indian self-government (by encouraging tribal self-sufficiency and economic development) through tribal bingo gaming preempted any purported state interest in regulating bingo gaming on tribal lands. *Id*. at 217–21. In support, the Supreme Court relied on the President's 1983 Statement on Indian Policy and a Department of the Interior directive, stating that the Department would "strongly oppose" any legislation that would subject tribes to state gambling regulation. *Id*. at 217–18 & n.21. The Court further noted that, consistent with these federal interests, tribal games were the sole source of revenues for the tribes' government operations and tribal sources, as well as a major source of employment on the reservations. *Id*. at 218–19. Congress reiterated those same interests in the comprehensive Indian Gaming Regulatory Act, enacted by the same Congress that earlier had passed the Restoration Act. *See* 25 U.S.C. §§ 2701–02.

Cabazon Band immediately affected Congress's consideration of the Restoration Act. The Tribe previously had acceded to a gaming provision that would have "prohibited" "all gaming as defined by the laws of the state of Texas" on the Tribe's lands. *See Ysleta I*, 36 F.3d at 1329. However, the Senate struck that language after *Cabazon Band* issued in favor of the language that now appears in the Act—that is, only gaming activities "which are prohibited by the laws of the

[1] The Supreme Court further concluded that Congress did not consent to California regulating tribal gaming in either Public Law 280 or the Organized Crime Control Act of 1970. *See Cabazon Band*, 480 U.S. at 207–14.

State of Texas" are "prohibited" on the Tribe's lands. S. Rep. No. 100-90 at 8 (Aug. 3, 1987). Congress also made clear that the State could not exercise "civil or criminal regulatory jurisdiction" with respect to gaming activities on the Tribe's lands. *See id*. at 9. As the House Committee Chair explained, the "Senate amendments to [§§ 107 & 207] are in line with the rational[e] of the recent Supreme Court decision in the case of Cabazon Band of Mission Indians versus California. This amendment in effect would codify for [the Tribes] the holding and rational[e] adopted in the Court's opinion in the case." 133 Cong. Rec. H6972-05, 1987 WL 943894 (Aug. 3, 1987) (Statement of Rep. Udall). In short, Texas could prohibit gaming activities on the Tribe's lands by prohibiting them outright, but federal and tribal interests in Indian self-government preempted the state's interest in regulating non-prohibited gaming on tribal lands.

Congress knew how to apply the full breadth of Texas's gaming laws and regulations to the Tribe's lands if that had been its wish, but it did not. Instead, it changed course on that precise issue after *Cabazon Band*. In a prior bill (H.R. 1344), the House had proposed language that would have required the Tribe's "tribal gaming laws, regulations, and licensing requirements [] be identical to the laws and regulations of the State of Texas regarding gambling, lottery and bingo." 131 Cong. Rec. H12012, 1985 WL 205091 (Dec. 16, 1985); *see Ysleta I*, 36 F.3d at 1327. But that language was rejected. Meanwhile, in another settlement act passed the same day as the Restoration Act, Congress explicitly directed that the tribal lands there should be "subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (including those laws and regulations **which prohibit or regulate** the conduct of bingo or any other game of chance)." Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. No. 100-95, § 9, 101 Stat. 704, 709-10

(1987) (emphasis added). Restoration Act § 207(a) is conspicuously silent regarding the application of Texas laws that "regulate" gaming activities.

That the Restoration Act § 207(a) only "prohibit[s]" on the Tribe's lands those gaming activities that Texas laws and regulations "prohibit" outright to all Texans finds further support from its neighboring provisions. A "cardinal rule" of statutory construction requires "that a statute [] be read as a whole, in order not to render portions of it inconsistent or devoid of meaning." *In re Burnett*, 635 F.3d 169, 172 (5th Cir. 2011) (quotations and citations omitted). Section 206(f) *extends* the State's "civil and criminal jurisdiction within the boundaries of [its] reservation" under Public Law 280. Section 207, however, expressly limits that extension of general jurisdiction as to tribal "gaming activities." As to tribal gaming, Section 207(b) instructs that "[n]othing in [§ 207] shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." Even *Ysleta I*—which did not concern bingo—acknowledged that the Restoration Act's identical prohibitions on the State's exercise of regulatory jurisdiction over gaming in §§ 107(b) and 207(b) was a codification of *Cabazon Band*'s teachings to that end. *See* 36 F.3d at 1334.

When given its ordinary meaning, § 207(a) complements § 207(b) by forbidding on the Tribe's lands those gaming activities *banned* by Texas law while precluding the State from having any say over gaming activities conducted on the Tribe's lands that the State permits elsewhere, albeit in a regulated format. Indeed, the State held that view in *Ysleta I*, when it urged the Supreme Court to overturn *Ysleta I*'s determination that IGRA did not apply to the Tribe, stating that "it would not be possible [for the state] to regulate those [bingo] activities since the state has no regulatory, civil or criminal jurisdiction over gaming on Tribal lands" under the Restoration Act. State's Cross-Pet. for Cert., 1995 WL 17048828, at *8 (Jan. 30, 1995). To interpret § 207(a) otherwise would nullify § 207(b) by permitting the State to regulate a permitted gaming activity—

the same one, in fact, that both the Supreme Court and Fifth Circuit held outside of state regulatory jurisdiction prior to the Restoration Act's passage. *See Cabazon Band*, 480 U.S. at 211–12 (rejecting California's argument that it could regulate bingo because the playing of "*unregulated* bingo" was subject to criminal and civil penalties under California law; "But that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub. L. 280."); *Butterworth*, 658 F.2d at 314–15 (rejecting Florida's argument that its charitable bingo statute applied to an Indian tribe because it contained both civil and "penal sanctions"; "A simplistic rule depending on whether the statute includes penal sanctions could result in the conversion of every regulatory statute into a prohibitory one. . . . . Where the state regulates the operation of bingo halls to prevent the game of bingo from becoming a money-making business, the Seminole Indian tribe is not subject to that regulation" because the state's decision not to prohibit the gaming shows that "the game of bingo is not against the public policy of the state of Florida.").

Because the plain text of the Restoration Act's gaming provisions foreclose the State's position, the Court's inquiry may end there. Yet the Restoration Act's legislative history also supports an interpretation consistent with § 207's ordinary meaning. The legislative reports omit any mention of an intent to subject the Tribe's lands to state laws licensing or regulating gaming activities otherwise permitted by Texas law, which, as the Supreme Court has observed, "has significance in the application of the canons of construction applicable to statutes affecting Indian immunities, as some mention would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress," *Bryan*, 426 U.S. at 381. Such an omission is particularly glaring since the Restoration Act's codification

followed *Cabazon Band*'s holding that "important" federal and tribal interests in encouraging tribal self-government preempted state laws that seek to regulate gaming activities on tribal lands.

Instead, the Act's legislative history speaks only in terms of enforcing a gaming "ban" or "banning" gaming activities—not licensing, regulating, or controlling gaming activities—on the Tribe's lands. *See, e.g.*, S. Rep. No. 100-90. The Senate Report states 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." *Id*. at 8-9 (emphasis added). And, the Report explains, § 207(b) was "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." *Id*. at 9 (emphasis added). Similarly, the Report says that § 207(c) "grant[s] to the federal courts exclusive jurisdiction over offenses committed in violation of the federal gaming *ban* and make[s] it clear that the State of Texas may seek injunctive relief in federal courts to enforce the gaming *ban*." *Id.* (emphasis added).

Moreover, the State cannot apply a complex licensing and regulatory scheme that governs gaming activity *operations* when the Restoration Act only applies "gaming activity" prohibitions to the Tribe's lands. *See, e.g.*, Contempt Motion at 7 (only a "licensed authorized organization" may conduct bingo on the days and times listed on the operator's license); *id*. at 8-9 (card minders may not be used as a method for accepting money to play bingo or for dispensing prizes). As the Supreme Court observed in interpreting the same term in IGRA, the phrase "gaming activity" "means just what it sounds like—the stuff involved in playing [the] games." *Bay Mills*, 572 U.S. at 792. That is, a " gaming activity" refers to "each roll of the dice and spin of wheel"—here, the actual game of bingo—not the licensing and operation of the game. *See id*. As two statutes enacted by the same legislative body, IGRA may be regarded as a legislative interpretation of that phrase

in the earlier-enacted Restoration Act. *See United States v. Stewart*, 311 U.S. 60, 64 (1940) ("[A] later act can . . . be regarded as a legislative interpretation of the earlier act in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting." (citation omitted)). Construing the Restoration Act *in pari materia* with IGRA then, *see id*., Texas laws that concern the *licensing* or *operation* of a gaming activity have no application to the Tribe's lands under the Restoration Act.

But if any ambiguity remains, it must be resolved in favor of the Tribe. The Supreme Court has long stated that state laws may be applied to tribal lands only "if Congress has expressly so provided," *Cabazon Band*, 460 U.S. at 207, and if Congress's expressions are ambiguous, then they must "be construed liberally in favor of the Indians," *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). That Congress must "unequivocally" express when it intends to abrogate tribal sovereignty and immunity in favor of state encroachment "reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Id*. "Indian tribes retain 'attributes of sovereignty over both their members and their territory,' and that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.'" *Cabazon Band*, 480 U.S. at 207 (citation omitted).

Consequently, the State cannot regulate bingo on the Tribe's lands because—applying the ordinary meaning of "prohibit"—Texas's laws and regulations do not forbid the gaming activity of bingo, and the State cannot subject the Tribe's gaming activities to the "regulatory jurisdiction" of its Lottery Commission. *See* Ex. D-1, Charitable Bingo Operations Division "About Us" Page (as of July 26, 2020) (describing the Charitable Bingo Operations Division's "regulatory requirements" and "regulatory activities"); Ex. D-2, "Charitable Bingo Operations Division" Page

(as of July 26, 2020) ("The Charitable Bingo Operations Division of the Texas Lottery Commission is responsible *for regulating all aspects of licensed bingo activities*." (emphasis added)).

III. CONCLUSION

The Tribe respectfully requests that the Court deny the Contempt Motion following the bench trial scheduled for March 1, 2021. The evidence will show that the Tribe is engaged in the gaming activity of bingo and, thus, cannot be held in contempt of a 2002 Injunction directed at different gaming activities. Moreover, the bingo conducted on the Tribe's lands complies with the terms of the Restoration Act, as the Texas laws and regulations do not prohibit that gaming activity.

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Respectfully submitted,

By: */s/ Danny S. Ashby*

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CERTIFICATE OF SERVICE

I certify that on October 23, 2020, I caused a true and correct copy of the foregoing to be served on all counsel of record by email through the Court's CM/ECF system.

Dated: October 23, 2020

By: */s/ Danny S. Ashby*
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