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

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

PLAINTIFF TEXAS'S REPLY IN SUPPORT OF SECOND AMENDED MOTION FOR CONTEMPT AND MOTION FOR ORDER TO SHOW CAUSE

Plaintiff Texas requests that the Court hold a show-cause hearing on its pending motion for contempt of the 2002 Injunction. *Alabama-Coushatta Tribes of Tex. v. Tex.*, 208 F. Supp. 2d 670 (E.D. Tex. 2002) (2002 Injunction), *aff'd*, 66 F. App'x 525 (5th Cir.) (per curiam), *cert. denied*, 540 U.S. 882 (2003) (mem.); *see also* Docs. 160-6 (proposed order setting hearing), 157 (scheduling order setting trial date). Defendant Alabama-Coushatta Tribe of Texas (Tribe) asserts four theories why it should not be held in contempt of the 2002 Injunction after such hearing. Doc. 161 ("Response to Sate's Second Amended Motion for Contempt and Motion for Order to Show Cause," (Resp.)). For the reasons set forth herein, each of these theories lacks legal support, and—after hearing the evidence—the Court should hold the Tribe in contempt.

I. The 2002 Injunction is appropriate in scope given the Restoration Act violations established.

The Tribe contends that the 2002 Injunction is overly broad.[1] Not so. The Fifth Circuit has explained that an injunction must be "tailored to remedy the established

[1] The 2002 Injunction prohibits the "Alabama-Coushatta Tribe, its Tribal Council and all persons acting by, through or under the Tribe and its Tribal Council" from "operating, conducting, engaging

violations," meaning tailored to the "specific action which gives rise to the order as determined by the substantive law at issue." *Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016) (cleaned up). Put differently, "an injunction is necessarily overbroad [where] it exceeds the extent of the violation established." *John Doe #1 v. Veneman*, 380 F.3d 807, 819 (5th Cir. 2004) (holding that order was overbroad because it exceeded relief sought by the plaintiffs in the case).

The 2002 Injunction is appropriately tailored. The "violation established" in 2002 was that the Tribe engaged in illegal gambling activity, illegally promoted gambling activity, illegally kept a gambling place, and illegally possessed gambling devices in violation of the Restoration Act.[2] *Alabama-Coushatta*, 208 F. Supp. 2d at 679. In making those findings, the Court referenced uncontested evidence in the record including the parties' "Joint Stipulations" and "a video tape showing the activities" at the Alabama-Coushatta Entertainment Center. *Id*. As a result, the Court enjoined the Tribe from operating, or allowing others to operate, illegal gaming activity on the Tribe's lands. *Id*. at 681.

Thus, the "range of activity" proscribed by the 2002 Injunction precisely matched the "violation established" by the Court. The injunction did not "exceed the extent of the violation established." *Veneman*, 380 F.3d at 819. Rather, it was "tailored" to the "specific action which g[ave] rise to the order as determined by the substantive law

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*, 208 F. Supp. 2d at 681.

[2] The United States Code omits the Restoration Act. "Though no longer codified, the Restoration Act is still in effect." *Texas v. Alabama-Coushatta Tribe of Texas*, 918 F.3d 440, 442 n.1 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 855 (2020). The Act is available on the Government Printing Office website at https://www.govinfo.gov/content/pkg/STATUTE-101/pdf/STATUTE-101-Pg666.pdf.

at issue." S*chedler*, 826 F.3d at 211; *see also Veneman*, 380 F.3d at 818. In this case, that was the Restoration Act and the Texas gaming law it federalizes.

The Tribe argues that the 2002 Injunction cannot bar its current gaming, because it is not identical to the gaming that the Tribe was conducting in 2002. Resp. 5–7.[3] But that cannot be squared with the language of the injunction itself, which prohibits the Tribe from "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*, 208 F. Supp. 2d at 678–79.

Nor can it be squared with the Supreme Court's guidance that a "federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past." *N.L.R.B. v. Express Publishing, Inc.*, 312 U.S. 426, 435 (1941). Accordingly, the Fifth Circuit has observed that "[r]equiring relatedness between the violations on record and the violations prohibited in the order does not mean that a broad order is never justified." *N.L.R.B. v. U.S. Postal Serv.*, 477 F.3d 263, 268 (5th Cir. 2007). Instead, the Fifth Circuit recognizes that "[t]he judicial authority to enjoin actions is broad but with clear boundaries, requiring some relation between the acts proven and the acts restrained." *Id.* As noted above, in 2002, the State proved multiple violations of the Restoration Act based on the Tribe's operation of gaming that was not otherwise permissible in Texas. That is sufficient to justify the scope of the 2002 Injunction.

[3] Citations to the Response refer to the ECF page numbers.

Indeed, the Supreme Court has recognized that, where appropriate to effectuate legislation, injunctions "in broad terms are granted even in acts of the widest content, when the court deems them essential to accomplish the purposes of the Act." *May Dep't Stores Co. v. N.L.R.B.*, 326 U.S. 376, 391 (1945). This logic applies in the case of a litigant "who challenges the purposes of the Act," because such litigant "challenges the entirety of the Act." *N.L.R.B. v. U.S. Postal Serv.*, 477 F.3d at 268. "In such cases, an order encompassing the entirety of the Act can be enforced, not because the relatedness requirement falls away, but because the relatedness requirement is satisfied." *Id. See also, e.g.*, *United States v. Buttorff*, 761 F.2d 1056, 1059 (5th Cir. 1985) ("When an injunction is explicitly authorized by statute, proper discretion usually requires its issuance if the prerequisites for the remedy have been demonstrated and the injunction would fill the legislative purpose."); *Sec. & Exch. Comm'n v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1103 (2d Cir. 1972) ("There can be no abuse of discretion in framing an injunction in terms of the specific statutory provision which the court concludes has been violated.") (citation omitted).

The 2002 Injunction was, and remains, crucial to effectuating the purpose of Restoration Act § 207 and the Texas gaming laws and regulations that it federalizes. In the 2002 proceedings, the Tribe challenged the scope of the Restoration Act as applied to gaming on the Tribe's lands. *See Alabama-Coushatta*, 208 F. Supp. 2d at 674. The Court noted that the Tribe had "continued to profit from its unlawful enterprise" and that "the threatened injury of continuing operation of the Entertainment Center to the State outweighs the potential harm to the Tribe." *Id.* at 681. Accordingly, it was sensible for the Court to issue an injunction that was

commensurate with the violations of the Restoration Act that the Court found, and that was responsive to the Tribe's challenge to the Restoration Act's entire gaming provision. For these reasons, the 2002 Injunction is not overly broad.

II. The 2002 Injunction is not vague.

The Tribe also contends that the 2002 Injunction is impermissibly vague and is thus an improper "obey the law" injunction. Resp. 7–9. But "[t]he district court need not anticipate every action to be taken in response to its order, nor spell out in detail the means in which its order must be effectuated." *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 578 (5th Cir. 2000); *see also, e.g.*, *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 917 (5th Cir.1996) ("Although this order does not choreograph every step, leap, turn, and bow of the transition ballet, it specifies the end results expected and allows the parties the flexibility to accomplish those results."). Thus, an injunction is impermissibly vague only where it fails to give the defendant notice of what activity it proscribes. *See Schedler*, 826 F.3d at 211. "The specificity requirement is not unwieldy. An injunction must simply be framed so that those enjoined will know what conduct the court has prohibited." *Meyer v. Brown & Root Const. Co.*, 661 F.2d 369, 373 (5th Cir. 1981). "[T]he degree of particularity required depends on the nature of the subject matter." *Planetary Motion, Inc. v. Techsplosion*, Inc., 261 F.3d 1188, 1204 (11th Cir. 2001).

Fifth Circuit precedent makes clear that what counts as adequate notice to an enjoined party is largely circumstance-dependent. For example, in *Test Masters Educ. Servs., Inc. v. Singh*, the Fifth Circuit acknowledged a district court's authority to issue an injunction that "permanently enjoined [the defendant] from using the

["Testmasters" or "Test Masters"] marks *or any confusingly similar marks* within Texas or directed at Texas, including but not limited to uses via the Internet." 428 F.3d 559, 577 (5th Cir. 2005) (emphasis added). The rationale for such an injunction is clear: it would be impossible to list every conceivable permutation of "Testmasters." Thus, enjoining a defendant from using "confusingly similar marks" was permissible even though that injunction prohibited future conduct similar, but not necessarily identical to, the conduct that led to the injunction. *See id.* at 577–78.

Similarly, the Supreme Court upheld an injunction directing parties to follow the minimum-wage, overtime, and record-keeping provisions of the Fair Labor Standards Act. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191–95 (1949). Likewise, in *Gulf King Shrimp Co. v. Wirtz*, the Fifth Circuit upheld an order that "permanently enjoined and restrained [the defendant] from violating the provisions of sections 15(a)(4) and 15(a)(5) of the Fair Labor Standards Act," in certain enumerated ways. 407 F.2d 508, 517 (5th Cir. 1969). The court opined that "[t]he fact that the decree includes specific references to sections of the Fair Labor Standards Act is not, as here used, inconsistent with the requirements of Rule 65(d)." *Id.*; *see also* FED. R. CIV. P. 65(d)(1) (providing for injunctions to be specific and reasonably detailed).

Like those in *Gulf Coast*, *McComb* and *Test Masters*, the 2002 Injunction is crafted in compliance with Federal Rule of Civil Procedure 65. It carefully considers the violations established, and then restricts particular behavior from occurring on the Tribe's lands based on those violations of law. Moreover, it would be impossible to list every possible configuration of gaming software that would violate Restoration Act Section 207. Thus, the 2002 Injunction prohibiting "illegal gambling" is specific

enough to satisfy the non-vagueness requirement, but also broadly worded to protect the State in the event of future violations that might be mere alterations of the same kind of conduct.

Not only does a sophisticated actor like the Tribe know what this Court's 2002 Injunction ordered it not to do, even "an ordinary person reading the court's [injunction] order would be able to ascertain from the document itself exactly what conduct is proscribed," *Schedler*, 826 F.3d at 211—engaging in, hosting, or possessing equipment to engage in gaming that is not permitted in Texas, on the Tribe's lands. Indeed, the Tribe does not dispute that its current gaming activity does not comport with Texas's gaming laws and thus, the 2002 Injunction. *See, e.g.*, Docs. 136 at 4; 160-5 at 7. Nor does the Tribe contend that Texas gaming laws have substantially changed between 2002 and today. The essential elements of chance, prize and consideration constituting unlawful lottery have been a component of Texas law for almost a century. *See City of Wink v. Griffith Amusement Co.*, 100 S.W.2d 695, 701 (Tex. 1936). Tellingly, the Tribe does not argue that it cannot discern whether its current gaming activity runs afoul of the 2002 Injunction.

Moreover, the procedural history of this case demonstrates that the Tribe has (better than) fair notice of the scope of the 2002 injunction. The State seeks a contempt remedy based on *current* violations of the injunction. The evidence demonstrates that the Tribe passed a revised gaming ordinance in July 2020. *See* Doc. 161-3. That ordinance came several months after the Fifth Circuit "re-reaffirmed" that Texas gaming laws and regulations operate as surrogate federal law on the Tribe's lands. *State v. Ysleta del Sur Pueblo*, 955 F.3d 408, 414 (5th Cir. 2020),

as revised (Apr. 3, 2020), *petition for cert. filed*, (U.S. October 15, 2020) (No. 20-493) (construing Restoration Act in suit involving the Pueblo, the other Tribe subject to the Act). Accordingly, the Tribe is on fair notice of the gaming that is impermissible in Texas and under the Restoration Act, and therefore cannot plausibly claim that the 2002 Injunction does not specify the conduct that it prohibits.

III. This Court's enforcement of the 2002 Injunction does not give Texas "regulatory jurisdiction" over the Tribe.

Contrary to the Tribe's assertion, the Court's enforcement of the 2002 Injunction would not amount to an exercise of "regulatory jurisdiction" by the State of Texas. *See* Resp. 9–11. Rather, it would simply afford the State the same contempt remedy available to any litigant who obtains a valid injunction (particularly one like the 2002 Injunction, which the Fifth Circuit upheld on direct appeal, 66 F. App'x 525, and recently refused to vacate or modify, 918 F.3d at 449). The Tribe supports its "regulatory jurisdiction" argument with citation to a proceeding involving the Pueblo, where the U.S. District Court for the Western District of Texas noted that the Restoration Act was not intended to "transform the federal courts into 'a quasi-regulatory body overseeing and monitoring the minutiae of [a tribe's] gaming related conduct.'" Resp. 10 (quoting *Texas v. Ysleta del Sur Pueblo*, No. 99-CV-320-KC, 2016 WL 3039991, at *19 (W.D. Tex. Mar. 27, 2016)). But in that case, Judge Cardone expressly recognized that seeking contempt would be appropriate if the evidence supported it. *Texas v. Ysleta del Sur Pueblo*, No. 3:99-cv-00320-KC, Doc. 625 (W.D. Tex. Mar. 10, 2017) ("Moreover, the Court reiterates that if Plaintiff can establish through 'clear and convincing evidence' that Defendants have violated an Order of

this Court in the instant case, a motion for civil contempt is appropriate in the instant case."). This Court's enforcement of the 2002 Injunction does not give Texas any "regulatory jurisdiction" over the Tribe.

IV. The Tribe's Gaming Violates the Restoration Act.

Finally, the Tribe's claim that its current gaming activity does not violate the Restoration Act is based upon a theory that this and other courts have repeatedly and universally rejected. The argument goes like this: because the Bingo Enabling Act allows certain actors to play particular types of bingo, Texas "regulates" (rather than prohibits) bingo. And because the Tribe calls its current gaming activity "bingo," that activity does not violate the Restoration Act (or, in turn, the 2002 Injunction). *See* Resp. 11–17.

The Fifth Circuit conclusively rejected this argument in *Ysleta del sur Pueblo v. Texas* ("*Ysleta I*"), 36 F.3d 1325 (5th Cir. 1994), *cert. denied*, 514 U.S. 1016 (1995). *Ysleta I* considered the Pueblo's assertion that, "[b]ecause the State permits one type of game where the elements are prize, chance and consideration, the State no longer prohibits any other games with the same elements [but] instead, merely regulates them." *Id.* at 1333. After reviewing the law and legislative history (including tribal resolutions disavowing gaming that violates Texas laws and regulations), the court was left with "the unmistakable conclusion that Congress—and the Tribe—intended for Texas' gaming laws and regulations to operate as surrogate federal law on the Tribe's reservation in Texas." *Ysleta I*, 36 F.3d at 1334.

The Pueblo tried the same argument again in 1999, and it was (again) rejected. *Texas v. del Sur Pueblo* ("*Ysleta II*"), 220 F. Supp. 2d 668, 687 (W.D. Tex. 2001),

modified (May 17, 2002), *aff'd sub nom. State v. del sur Pueblo*, 31 F. App'x 835 (5th Cir.), *cert. denied*, 537 U.S. 815 (2002). *Ysleta II* emphasized that the Restoration Act does not permit the Tribe to violate State gaming provisions, whether laws *or* regulations, holding that—to the extent Texas regulates gaming—the Tribe cannot engage in "'regulated' gaming activities unless it complies with the pertinent regulations." *Ysleta II*, 220 F. Supp. 2d at 690, 695–96. Accordingly, the court permanently enjoined the Tribe from continuing its gaming operations, and the Fifth Circuit upheld the injunction. 69 F. App'x 659 (5th Cir. 2003), *cert. denied*, 540 U.S. 985, *and order clarified sub nom. Texas v. Ysleta Del Sur Pueblo*, No. EP-99-CA-320-H, 2009 WL 10679419 (W.D. Tex. Aug. 4, 2009).

If that left any doubt, the Fifth Circuit settled the matter when the Tribe appealed this Court's 2018 order reaffirming that the Restoration Act governs gaming by the tribes it covers, stating, "Texas' gaming laws *and regulations* to operate as surrogate federal law on the Tribe's reservation in Texas." *Texas v. Alabama-Coushatta Tribe of Texas*, 918 F.3d at 448. When asked to revisit the case *en banc*, the court of appeals declined, Order, *Alabama-Coushatta Tribe of Texas v. Texas*, (No. 18-40116) (5th Cir. May 24, 2019), and Supreme Court denied certiorari. 140 S. Ct. 855 (2020). And when the Pueblo *yet again* argued that the Restoration Act distinguished between "regulated" and "prohibited" activity, the Fifth Circuit "re-reaffirm[ed]" that "the Restoration Act—plus the Texas gaming laws and regulations it federalizes—provides the framework for determining the legality of gaming activities on the [Tribe's] lands." *State v. Ysleta Del Sur Pueblo*, 955 F.3d at 414 (citing *Alabama-Coushatta*, 918 F.3d at 442).

Thus, the Tribe is incorrect to state that "[t]he question," in this case "is whether Texas laws and regulations 'prohibit' the 'gaming activity' of bingo." Resp. 11. Instead, "the question" is whether Texas laws and regulations "prohibit" the Tribe's ongoing gaming activity. The Tribe concedes as much, *e.g.*, Docs. 136 at 4; 160-5 at 7. As a result, it should be held in contempt of the 2002 Injunction.

The Tribe seeks to distract from this inevitable result by citing *California v. Cabazon Band of Mission Indians* and *Seminole Tribe of Florida v. Butterworth* for the proposition that "[g]aming 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." Resp. 12 (citing 480 U.S. 202, 214–22 (1987), *superseded by statute as stated in Mich. v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014); 658 F.2d 310 (5th Cir. Unit B 1981)). But *Cabazon Band* and *Butterworth* concerned Public Law 280, a 1953 statute giving enumerated states specified jurisdiction to enforce state law in Indian country. In assessing the scope of Public Law 280 jurisdiction, the Supreme Court distinguished between criminal/prohibitory statutes (on one hand), and civil/regulatory statutes (on the other). The Court held that "a state law is criminal, and thus applicable under Public Law 280, if it generally prohibits certain conduct, but a state law is civil, and presumptively inapplicable, if it regulates the conduct at issue." *Ysleta I*, 36 F.3d at 1330 (construing *Cabazon Band*, 480 U.S. at 209–10)).

But—for reasons *Ysleta I* explained in detail—*Cabazon Band*'s civil-regulatory/criminal-prohibitory dichotomy is beside the point here, because "Congress did not enact the Restoration Act with an eye towards *Cabazon Band*." 36 F.3d at 1333–34. Last year, the Tribe pushed the Fifth Circuit to revisit this holding

(much like it asks the Court to do here). Again, the court of appeals rejected the Tribe's argument:

> The Tribe suggests that the Restoration Act's application of Texas laws to the Tribe's gambling is somewhat empty because Texas does not "prohibit" gaming as defined in [*Cabazon Band*]. This court expressly rejected that theory in *Ysleta I*, holding that "Congress did not enact the Restoration Act with an eye toward *Cabazon Band*." Instead, we were "left with the unmistakable conclusion that Congress—and the [Pueblo]—intended for Texas' gaming laws and regulations to operate as surrogate federal law on the [Pueblo's] reservation in Texas."

Alabama-Coushatta, 918 F.3d at 449, n.21 (quoting *Ysleta I*, 36 F.3d at 1333–34).

Because the Fifth Circuit has rejected their application to the Restoration Act, neither *Butterworth* nor *Cabazon Band* is helpful to the Tribe. Instead, as the 2002 Injunction order itself recognized,

> [t]he Fifth Circuit has carefully considered and rejected the Tribe's assertion that the Restoration Act codified the Supreme Court's decision in *Cabazon Band*. The Fifth Circuit has also rejected the argument that the State of Texas may not prohibit gaming on the Tribe's reservation because State law authorizes a lottery and other games of chance.

Alabama-Coushatta, 208 F. Supp. 2d at 677 (citations omitted).

In so holding, this Court—like the Fifth Circuit in *Ysleta I*—rejected the very same legislative history argument the Tribe raises here. *Compare id.* (holding that, "[e]ven in light of testimony presented at trial which shows that Congressman Morris Udall's statement was not a twelfth hour statement and that the games authorized under Texas law are comparable to the games being played in the Tribe's Entertainment Center in some respects, this Court concludes that the well[-]reasoned analysis of the Fifth Circuit controls this case.") *with* Resp. 15 (citing Udall statement as evidence of legislative intent).

The Tribe does not contest that its gaming violates Texas gaming laws and regulations. Nor does the Tribe contend that it is in full compliance with the statutes and regulations governing the game of bingo in Texas. That gaming therefore violates the Restoration Act and should be enjoined.

CONCLUSION

The Tribe should be ordered to show cause why the Court should not hold it in contempt of the 2002 Injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that that on November 2, 2020, this document was filed electronically via the Court's CM/ECF system, causing electronic service upon all counsel of record.

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