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-299

TRIBE'S SUR-REPLY TO STATE'S SECOND AMENDED CONTEMPT MOTION

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I. PRELIMINARY STATEMENT

Far from merely "call[ing] its current gaming activity 'bingo,'" Reply at 9, the evidence will show that the gaming that the Tribe licenses and operates on its tribal lands is "bingo"—a gaming activity that was not at issue when the Court entered the 2002 Injunction. Nor was bingo (or any other "regulated" gaming activity) before the Fifth Circuit when it decided *Ysleta I.* Both the 2002 Injunction and *Ysleta I* addressed factual circumstances and legal issues concerning gaming activities that were indisputably "prohibited by the laws of the State of Texas." The Court should reject the State's attempts here to overextend that inapplicable authority to foreclose gaming activities that are merely regulated—not prohibited—by Texas law.

II. ARGUMENT

A. No "Ordinary Person" Would Say That The 2002 Injunction Covers Bingo.

The Reply begins (at 1–3) by arguing a point that the Tribe did not raise, asserting that the Injunction was "appropriately tailored" to "precisely match" the gaming violations that occurred in 2002. The Tribe is not contesting whether the Injunction reaches the types of gaming at issue nearly 20 years ago. It challenges whether—given the Injunction's language and context—the State can extend the Injunction to cover the Tribe's decision to offer bingo.

The Reply offers two broad arguments on that issue, one substantively nonresponsive and one that lacks merit. The Reply first tries to establish (at 3–5) that the Injunction forever bars the Tribe from engaging in any conduct that might constitute "violations of the Restoration Act based on the Tribe's operation of gaming that [is] not otherwise permissible in Texas." The Injunction does so, the Reply contends (at 3), because it "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,'" which the Restoration Act federalizes.

That framing, however, provides only another variation on the Reply's argument (at 5–8) that the Injunction is not an impermissible "obey the law" order, which it indisputably must be if any violation of Texas gaming law is sufficient to subject the Tribe to contempt. *See, e.g.*, Reply at 6–7 ("Thus, the 2002 Injunction prohibiting 'illegal gambling' is specific enough . . . ."). Injunctions police the reoccurrence of specific types of conduct that a court affirmatively adjudicated and concluded to be prohibited by a statute. They do not reach all future behavior that might violate the same law. "[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." *NLRB v. Exp. Pub. Co.*, 312 U.S. 426, 435–36 (1941). Even under the Reply's approach, one cannot discern the scope of the Injunction without considering matters outside its four-corners. The Fifth Circuit and other courts have repeatedly rejected that view of contempt in analogous cases, including where a district court enjoined a party from committing further violations of Title VII. *Payne v. Tavenol Labs.*, 565 F.2d 895, 897–98 (5th Cir. 1976); 11A Wright, Miller & Kane, Fed. Prac. & Proc. § 2955 at 361 (2013) ("[O]rders simply requiring defendants to 'obey the law' uniformly are found to violate the specificity requirement" of Rule 65(d).).

The Reply ultimately turns (at 5–8), as it must, to whether the Injunction "fails to give the defendant notice of what activity it proscribes," the crucial issue implicated by obey-the-law injunctions. Although the Reply acknowledges (at 5) "that what counts as adequate notice to an enjoined party is largely circumstance-dependent," it chides the Tribe (at 7–8) for not understanding—like an "ordinary person" ostensibly would—that the Tribe's bingo "is not permitted in Texas" and thus "constitute[s an] unlawful lottery" prohibited by Texas law.

The State cannot possibly show at trial—let alone by clear and convincing evidence—that an ordinary person would read the Injunction to foreclose the Tribe from offering bingo. As an initial matter, this proceeding involves the Bingo Enabling Act—an entirely different statute unrelated to the gaming at issue in 2002, none of which was bingo. The State cannot dispute that the Tribe's gaming is bingo; at this juncture, the State's disagreement with the Tribe appears limited to whether the Tribe's bingo complies with the time, place, and manner restrictions of Texas bingo regulations. The Injunction's generic references to prohibited "gaming and gambling activities" and implied reference to the gaming provisions of the Texas Penal Code do not provide adequate notice to an ordinary person that they will act in contempt of the Injunction by offering bingo—which Texas law does not prohibit.

Nor would the vastly dissimilar factual "circumstances" between this proceeding and those in 2002. The Tribe opened its bingo facility—over 14 years after the Injunction issued—only after it received permission to do so from the federal government (via the National Indian Gaming Commission ("NIGC")), which concluded that the Tribe could conduct bingo under the Indian Gaming Regulatory Act ("IGRA"). In approving the Tribe's Class II bingo ordinance , the NIGC necessarily considered whether the State prohibits bingo gaming, 25 U.S.C. § 2710(b)(1)(A), (e), and found that it does not. Indeed, if the State prohibits bingo gaming, then the NIGC would have had to reject the Tribe's bingo as impermissible under § 2710(b)(1)(a) of IGRA. *Id.* § 2710(d)(1)(B). That the Fifth Circuit ultimately concluded that the NIGC's ruling did not supplant *Ysleta I* under precedent issued by the Supreme Court after the Injunction—a question that this Court viewed as complex and close—does not establish that an ordinary person would have understood that the Injunction foreclosed the Tribe from following the federal government's guidance.

It does not matter, contrary to the Reply (at 7–8), that the Fifth Circuit has "'reaffirmed' that Texas gaming laws and regulations operate as surrogate federal law on the Tribe's lands." As the Tribe explained in its Response, that decision does not address whether the State can force the Tribe to comply with its charitable bingo laws and regulations given the ordinary meaning of the word "prohibit" in § 207(a) and the express withholding from the State of "civil or criminal regulatory jurisdiction" over "gaming activities" in § 207(b) of the Restoration Act. That issue—unaddressed by prior precedent and the Injunction—matters because, when the Injunction issued, the Tribe engaged in gaming activities that the State forbids (*i.e.*, prohibits) in all forms throughout Texas. Now, however, the Tribe offers bingo gaming that the State permits in a regulated format under a licensing regime overseen by the Texas Lottery Commission. The State cannot show by clear and convincing evidence at trial that an ordinary person would understand that the Tribe cannot offer bingo, given the absence of any authority explaining the scope of § 207(b)'s express ouster of State regulatory jurisdiction over non-prohibited gaming activities and the Injunction's silence about <u>any</u> specific gaming activities, let alone bingo.[1]

B. <u>The State Ignores What Judge Cardone Did In The Ysleta Case.</u>

The Court should follow the lead of Judge Cardone and reject as an impermissible assertion of regulatory jurisdiction the State's attempt to procure a contempt remedy using the nearly 20-year-old Injunction. The Reply resists this conclusion (at 8–9) by pointing to Judge Cardone's benign observation that contempt remains appropriate where the evidence shows a violation of a prior court order. In doing so, the Reply refuses to engage with what Judge Cardone actually did. There, as here, the State attempted to extend a longstanding injunction to the Pueblo's bingo

[1] The Reply's arguments are not aided by its reliance on cases concerning injunctions containing "specific references" to prescriptive provisions of the Fair Labor Standards Act and a specific trademark. Reply at 5–6. The Injunction contains <u>no</u> specific references.

gaming by filing a contempt pleading in an ongoing proceeding that concerned different gaming activities. At that point, Judge Cardone instructed that the appropriate remedy under the Restoration Act was not contempt, but a new proceeding. *See Tex. v. Ysleta del Sur Pueblo*, No. 99-CV-320, 2016 WL 3039991, at *19–21 (W.D. Tex. May 27, 2016); Order [DE 625], *id.* (W.D. Tex. filed Mar. 10, 2017). The State did not appeal that conclusion; it filed a new lawsuit seeking an injunction against the Pueblo's bingo. *Tex. v. Ysleta del Sur Pueblo*, No. 3:17-CV-179. The State has not explained why it should not be required to do the same here.

C. The Restoration Act Does Not Prohibit the Tribe From Engaging in Bingo.

The Reply also contends (at 9) that the Tribe's interpretation of the Restoration Act is "based upon a theory that this and other courts have repeatedly and universally rejected." It is not. Rather, the Reply misunderstands the Tribe's statutory-construction argument, a construction that the Fifth Circuit has not addressed and for which the State offers no contrary interpretation.

1. The Tribe Is Not Making The "Criminal-Prohibitory/Civil-Regulatory" Argument Rejected by *Ysleta I* and Subsequent Courts.

The Tribe argues for an interpretation of the Restoration Act consistent with its plain language. Section 207(a) "prohibits" on the Tribe's lands those gaming activities that are "prohibited," as opposed to "regulated," by Texas law—an interpretation that harmonizes with § 207(b)'s withholding of state regulatory jurisdiction and with legislative history that references only gaming "bans" on the Tribe's lands. The Tribe's argument does not depend on, nor does it invoke, the "criminal-prohibitory/civil-regulatory" analysis applied in Public Law 280 cases to determine whether a state law falls within a state's criminal or civil jurisdiction.

Public Law 280, Pub. L. No. 83-280 (1953), grants certain states the authority to enforce state criminal laws (*i.e.*, criminal jurisdiction) on Indian reservations; it does not permit states to apply state civil laws (*i.e.*, civil jurisdiction) on Indian reservations. *See Cal. v. Cabazon Band*,

480 U.S. 202, 207–12 (1987). To that end, the Supreme Court adopted a framework for classifying state laws as "criminal" or "civil," where only conduct prohibited outright as a matter of state public policy falls within the state's "criminal jurisdiction" under Public Law 280. *See id*. at 209–10. Applying that framework in *Cabazon*, the Supreme Court determined that California's gambling laws were "civil-regulatory," and not "criminal-prohibitory," because California did not prohibit all gambling outright as a matter of public policy. California permitted some gaming activities—such as a state lottery, pari-mutuel horse betting, and bingo—while prohibiting other gaming activities. *Id*. at 210–11. Thus, the Supreme Court concluded that California's gambling laws fell within the state's "civil jurisdiction" and were not enforceable on tribal lands under Public Law 280. *Id*. at 211–12.

The Tribe does not rely on that portion of *Cabazon* here. However, because the gaming activities at issue in *Ysleta I* were indisputably prohibited (and not regulated) by Texas law, the Pueblo argued at that time for an interpretation of "prohibit" beyond that term's ordinary meaning based on *Cabazon*. *See Ysleta del Sur Pueblo v. Tex.*, 36 F.3d 1325, 1333 (5th Cir. 1994). The Pueblo asserted that the term "prohibit" in § 107(a) had "special significance in federal Indian law"—that the Restoration Act only applied Texas gaming laws to the extent Texas "criminally prohibited" gaming activities—as in Public-Law-280 cases. *See id*. Relying on *Cabazon*, the Pueblo argued that Texas gaming laws that prohibited baccarat, blackjack, craps, roulette, and slot machines were not "criminal" in nature because Texas did not prohibit all gambling outright as a matter of public policy; it only prohibited some forms of "lottery" while permitting others. *Id*. at 1332. The Pueblo thus contended that none of Texas's "civil" gaming prohibitions applied to the Pueblo's lands. *See id*.

The *Ysleta I* court disagreed, holding the Public Law 280 "criminal-prohibitory/civil-regulatory" analysis inapplicable to § 107(a). *See id*. at 1333–34. It reasoned that § 107(a) applies Texas gaming prohibitions *regardless* of whether they fall within the state's criminal or civil jurisdiction. *See id*. Where Public Law 280 makes only state prohibitions that fall within the state's criminal jurisdiction applicable to tribal lands, *Ysleta I* reasoned that § 107(a) necessarily went further because its text referenced both criminal and civil laws and its legislative history mentioned regulations. *See id*. at 1333. Thus, rather than incorporate *Cabazon*'s Public Law 280 definition of "criminal" prohibitions, *Ysleta I* concluded that "prohibit" in § 107(a) retained its "ordinary meaning" to "prohibit" the Pueblo "from engaging in any gaming activity prohibited by Texas state law." *Alabama-Coushatta Tribe of Tex. v. Texas*, 66 F. App'x 525 (5th Cir. 2003).

In contrast to *Ysleta I*, the Tribe's argument does not depend on a classification of Texas's gaming laws as "criminal" or "civil" prohibitions. Rather, consistent with *Ysleta I*, the Tribe's interpretation assumes that Texas laws that "prohibit" a gaming activity apply to its lands, regardless of whether they are considered "civil" or "criminal" under a Public Law 280 analysis.

That the Restoration Act does not allow the State to enforce laws "regulating" gaming activities on the Tribe's lands is grounded in § 207(a)'s plain language and § 207(b)'s withholding of "civil or criminal regulatory jurisdiction" from the State, not *Cabazon*'s criminal-prohibitory/civil-regulatory analysis. Thus, the Reply's reliance (at 9–12) on *Ysleta I* and subsequent cases citing that decision's rejection of the "criminal-prohibitory/civil-regulatory" argument are inapposite. None of the cases cited by the State constitute binding precedent with respect to the Tribe's statutory-construction argument.[2]

[2] Although the Pueblo—and the Tribe as *amicus curiae*—made similar arguments to the Fifth Circuit, the Fifth Circuit did not address them when it concluded that *Ysleta I* foreclosed two other arguments raised by the Pueblo. *See generally Texas v. Ysleta Del Sur Pueblo*, 955 F.3d 408 (5th

2. *Ysleta I*'s Reference to Texas Laws "and Regulations" Does Not Foreclose the Tribe's Statutory Construction Argument.

The Tribe's Response sets forth (at 10–17) an interpretation of the Restoration Act that is grounded in numerous statutory-construction principles. The Reply offers no response to these arguments based on the Act's text or legislative history. Instead, the Reply relies only on imprecise language from *Ysleta I* that says "Texas laws and regulations" are "surrogate federal law" on the Tribe's lands as grounds for enforcing its regulatory bingo regime against the Tribe.[3] The problem with that position is three-fold.

First, *Ysleta I*'s reference to "laws and regulations" finds no support in the Restoration Act's text. It is derived entirely from extra-statutory documents that the Act references in § 207(a), but does not incorporate. As discussed in *Ysleta I*, the Tribes approved—on threat of not obtaining the restoration of their federal rights—Tribal Resolutions requesting that Congress include language in the Restoration Act "which could provide that all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, shall be prohibited on the Tribe's reservation or on tribal lands." 36 F.3d at 1327–28 (emphasis added). Although Congress initially acceded to the Tribe's requested language to ban all gaming on their lands, it

Cir. 2020), *as revised* (Apr. 3, 2020), *petition for cert. filed* (U.S. Oct. 9, 2020) (No. 20-493) (holding that *Ysleta I* foreclosed Pueblo's arguments that IGRA governed its tribal gaming and Restoration Act incorporated criminal-prohibitory/civil-regulatory analysis). It is "black letter law" that "'a question [that is] not . . . discussed in the opinion of the court' has not 'been decided merely because it existed in the record and might have been raised and considered.'" *De La Paz v. Coy*, 786 F.3d 367, 373 (5th Cir. 2015) (quoting *United States v. Mitchell*, 271 U.S. 9, 14 (1926)); *see also Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (explaining an opinion is not binding precedent on an issue "never squarely addressed" even if the opinion "assumed" one resolution of the issue); *Macktal v. U.S. Dept. of Labor*, 171 F.3d 323, 329 (5th Cir. 1999) (concluding that a panel's "silence on a particular issue . . . is not binding" precedent).

[3] The Fifth Circuit has referred back to this language in affirming that the Restoration Act, and not IGRA, governs gaming on the Tribe's lands following *Ysleta I*. *See Alabama-Coushatta*, 918 F.3d at 448, *Ysleta*, 955 F.3d at 414. But contrary to the Reply's contention (at 10), it did not "settle" any dispute over the Restoration Act's construction with respect to "regulated" gaming activities.

ultimately removed that draft language following the Supreme Court's decision in *Cabazon*, which held that important federal and tribal interests preempt state regulation of tribal gaming absent express congressional consent. The language ultimately enacted by Congress prohibits on the Tribe's lands only those "gaming activities that are prohibited by the laws of the State of Texas," and restricts the State from exercising "regulatory jurisdiction" over tribal gaming activities. *See id*. at 1329 (emphasis added). Language found in extra-statutory Tribal Resolutions cannot control over the express language that Congress approved in the Act's text.

But even accepting *Ysleta I*'s pronouncement that Texas laws "and regulations" apply as surrogate federal law also does not resolve this case in the State's favor. Implicitly (re-)inserting "regulations" into § 207(a) means that "[a]ll gaming activities that are prohibited by the laws [and regulations] of the State of Texas" are prohibited on the Tribe's lands. By its plain language, then, § 207(a) still only applies those "laws and regulations" that "prohibit," as opposed to "regulate," a gaming activity. *Compare* Restoration Act, Pub. L. No. 100-89, § 207(a), *with* Wampanoag Tribal Council of Gay Head, Inc. Indian Claims Settlement Act of 1987, Pub. L. No. 100-95, § 9 (1987) (enacted same day as Restoration Act; subjecting tribal lands to "those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance" (emphasis added)). And section 207(b) continues to bar the State from exercising "civil or criminal regulatory jurisdiction" over the Tribe's "gaming activities."

Second, application of that imprecise language to the instant case would violate *stare decisis* principles. *Stare decisi*s "'means that like facts will receive like treatment in a court of law.'" *Taylor v. Charter Med. Corp*., 162 F.3d 827, 832 (5th Cir. 1998) (citation omitted). *Ysleta I*'s language concerning Texas laws "and regulations" should not be extended for any purpose of authority in this case, because *Ysleta I* addressed banned—not regulated—gaming activities. *See*

Hall v. La., 884 F.3d 546, 550 (5th Cir. 2018) (noting the "basic judicial tenet that 'cases cannot be read as foreclosing an argument [with which] they never dealt'" (citation omitted)). *Ysleta I* should be limited to, and construed in light of, the particular facts and issues involved in that case, which concerned gaming banned by Texas law. *See Mut. Benefit Health & Acc. Ass'n v. Bowman*, 99 F.2d 856, 858 (8th Cir. 1938).

Third, even if the State were correct that Fifth Circuit precedent foreclosed the Tribe's arguments (and it is not), the Supreme Court's recent interpretation of "gaming activities" in IGRA would override that precedent. *See Gahagan v. USCIS*, 911 F.3d 298, 302 (5th Cir. 2018). As the Response notes, the Supreme Court concluded that "gaming activity" refers to the stuff "involved in playing [the] games," not the licensing and operation of the game. *Mich. v. Bay Mills Indian Cmty.*, 572 U.S. 782, 792–93 (2014). The same legislative body that enacted IGRA used the same term in the Restoration Act, when it prohibited on the Tribe's lands those "gaming activities prohibited by" Texas laws. Thus, Texas laws that concern the licensing or operation of bingo have no application to the Tribe's lands under the Restoration Act, including the Texas Bingo Enabling Act's prohibitions concerning who may operate charitable bingo games. TEX. OCC. CODE § 2001.101(a) (limiting definition of "an authorized organization eligible for a license to conduct bingo" to certain defined entities). The Reply offers no response to this authority.

III. CONCLUSION

The State cannot show by clear and convincing evidence that the Tribe has acted in contempt of the 2002 Injunction in opening and operating Naskila. The Tribe therefore respectfully asks that, following trial, the Court deny the State's request to hold the Tribe in contempt.

Dated: November 12, 2020

Respectfully submitted,

By: */s/ Danny S. Ashby*

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CERTIFICATE OF SERVICE

I certify that on November 12, 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.

By: */s/ Danny S. Ashby*
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