

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

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

TEXAS’S MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION

Nearly 25 years ago, the Fifth Circuit held that “Texas gambling laws and regulations are surrogate federal law” within the bounds of Defendant Ysleta del Sur Pueblo’s reservation. *Ysleta del Sur Pueblo v. State of Tex.*, 36 F.3d 1325, 1334 (5th Cir. 1994) (“*Ysleta I*”). This case represents the latest round of litigation “to test the limits of Texas law,” with this Court “serving as an arbiter of those limits.” Doc. 77 at 37. The extensive discovery in this case reveals that the Tribe’s gaming activities, though purportedly “bingo,” have once again exceeded those limits. A permanent injunction is necessary to halt these continuing violations of the law.

Texas seeks summary judgment on the two counts in its First Amended Complaint (Doc. 8):

- **Count I:** Texas is entitled to a declaratory judgment that the Tribe’s gaming activities violate Chapter 47 of the Texas Penal Code. *See* Doc. 8 ¶ 31 (citing, *inter alia*, TEX. PENAL CODE §§ 47.01(7) (prohibition on lotteries); *id.* § 47.02 (gambling); *id.* § 47.03(a)(1), (5) (operating a gambling promotion); *id.* § 47.04(a) (keeping a gambling place); *id.* § 47.06(a), (c) (possessing gambling devices, equipment, or paraphernalia). These violations of Chapter 47 are also, in turn,

violations Section 125.0015(a)(5) of the Texas Civil Practice and Remedies Code, which prohibits common nuisances, including the gambling activities proscribed by Chapter 47. Because the Tribe is violating Texas law, the Tribe is violating the federal Restoration Act. *See* 25 U.S.C. §1300g-6(a).

- **Count II:** Texas has demonstrated actual success on the merits; that it will suffer irreparable harm each day its laws are violated; that the balance of equities tilts in its favor; and that an injunction is in the public interest. The Court should issue a permanent injunction prohibiting the Tribe from engaging in the gambling activities described in this motion that violate the Restoration Act.¹

For these reasons and those discussed in more depth below, Texas’s motion for summary judgment and permanent injunction should be granted.

I. FACTUAL BACKGROUND

A. A prior injunction prohibits the Tribe from violating Texas law.

Texas’s efforts to stop the Tribe’s illegal gambling activities long predate this case. Two years after Texas filed suit against the Tribe in 1999, a permanent injunction issued that prohibited the Tribe from violating Chapter 47 of the Texas Penal Code. *Texas v. Ysleta del Sur Pueblo*, 220 F. Supp. 2d 668, 697–98 (W.D. Tex. 2001), *modified* May 17, 2002. Notwithstanding that the Fifth Circuit upheld the injunction on appeal, 69 F. App’x 659 (5th Cir. 2003), further litigation, including two findings that the Tribe was in contempt of the injunction, ensued. *See Tex. v. Ysleta del Sur Pueblo*, 431 F. App’x 326 (5th Cir. 2011); *Tex. v. Ysleta del sur Pueblo*, 2015

¹ The other named Defendants in this case are the Ysleta del Sur Pueblo Tribal Council and Governor Carlos Hisa, in his official capacity. *See* Doc. 8 ¶¶ 2–3. For simplicity, this motion will generally refer to Defendants collectively as the “Tribe.”

WL 1003879 (W.D. Tex. Mar. 6, 2015); *State of Tex. v. Ysleta del Sur Pueblo*, 2016 WL 3039991 (W.D. Tex. May 27, 2016).

In 2016, after the Tribe was ordered to shut down illegal sweepstakes gaming, *see* 2016 WL 3039991, at *26–27, Texas learned that the Tribe was preparing to roll out a modified form of gambling when the Tribe’s attorney informed the media that the Tribe was “transitioning to bingo.” *See* Marty Schladen, Tiguas ending sweepstakes, starting bingo, EL PASO TIMES (July 23, 2016).² After conducting an inspection of the premises and finding ongoing violations of the law, Texas brought this suit. *See* Docs. 1, 8.

B. The Tribe transitioned from illegal sweepstakes to illegal one-touch machines.

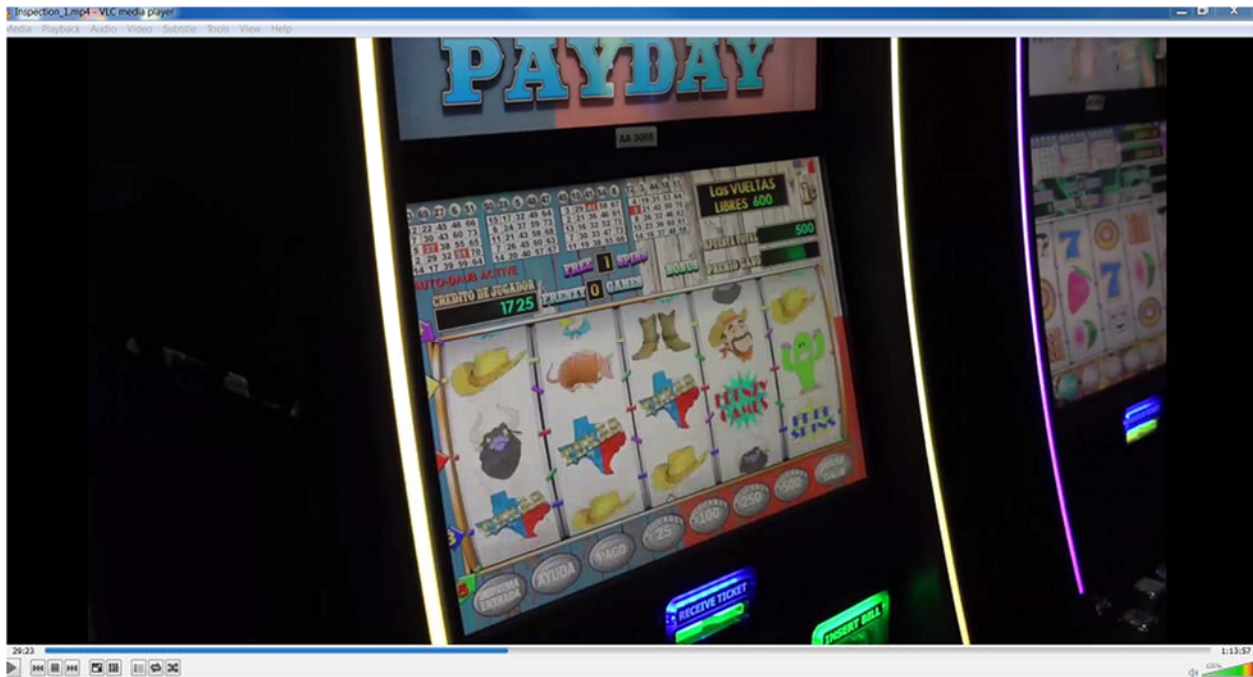
Texas inspected the Speaking Rock Entertainment Center on May 17, 2017.³ Ex. A, Video of Inspection at 01:10-01:21; Ex. B, Declaration of Captain Daniel Guajardo ¶ 1. During the inspection, Texas found hundreds of gaming machines available for play to the public.⁴ Ex. A at 02:36-03:10; Ex. B ¶ 5. These one-touch machines feature large spinning reels that activate during play and line up graphics in the player’s direct line of vision. Ex. A at 29:00-30:20, 32:10-33:52, 35:20-41:36.

² The article is available online at <http://www.elpasotimes.com/story/news/local/elpaso/2016/07/23/tiguas-ending-sweepstakes-starting-bingo/87458650/>.

³ The parties have stipulated that video footage from the May 2017 inspection “is representative of the current operations on the Ysleta del Sur Pueblo’s reservation.” Doc. 105 ¶ 3.

⁴ Throughout this litigation, the parties have disagreed about the correct terminology for these machines. Texas submits the most accurate and least confusing term is “one-touch machine.” Calling these machines “card-minders,” as the Tribe proposes, is a misnomer; card-minders track live-called bingo games, a function the one-touch machines do not fulfill. *See* Ex. N, Declaration of Alfonso Royal ¶ 17; *see also* 16 TEX. ADMIN. CODE § 402.323(d) (requiring card-minding devices to be able to daub electronic cards as the numbers are being called).

When the reels line up in a winning pattern, flashing lights, sound effects, and a notification of the amount won accompany the cessation of the wheels' spinning. *Id.*



See Ex. A at 29:23 (example of a one-touch machine at Speaking Rock); see also Ex. C, Deposition of Eclipse Gaming Systems at 24:24-25 (acknowledging that the games are contained in “gaming cabinet[s]” that are “similar to look and feel of a slot machine.”). Gaming on these machines occurs “on a 24-hour basis; seven (7) days a week.” See Ex. D, Ysleta del Sur Pueblo Regulatory Commission Regulation 000154.00; Ex. E, Deposition of Ysleta del Sur Pueblo Regulatory Commission at 35:17-20.

All told, there are approximately 2,550 one-touch machines available to be played on the Tribe’s reservation. See Ex. F, Re-Opened Deposition of Karl Maahs at 11:16-25–12:1-12. The majority are at Speaking Rock, which houses about 2,400 one-

touch machines, but a second site on the Tribe's reservation, the Socorro Tobacco Outlet, offers approximately 150 of the same machines. *Id.* Three vendors offer one-touch games on the Tribe's reservation: American Amusements Co., Eclipse Gaming Systems, and Winter Sky, LLC. *Id.* at 10:12-24. These one-touch machines work as follows:

- Players insert cash directly into the machine, or they insert a ticket that contains credits from previous winnings and which stores any future winnings. Ex. A at 27:30-31:39, 32:05-34:28, 34:52-41:53; Ex. B ¶ 5; Ex. C, Deposition of Eclipse Gaming Systems at 27:7-12. The player can redeem this ticket at any time for cash with a cashier. Ex. A at 45:10-45:30; Ex. G, Original Deposition of Karl Maahs at 33:9-19.
- Once a patron has inserted cash or a voucher redeemable for a ticket, a session is established between the one-touch machine and a server operated by one of the vendors. *See* Ex. H, Deposition of Winter Sky LLC, at 23:3-7; Ex. C, Deposition of Eclipse Gaming Systems, at 25:19-24; Ex. I, Deposition of American Amusements Co., at 27:19-25.
- The one-touch machine pulls an electronic “bingo card” from a stack of cards hosted on a Speaking Rock server. Ex. H, Deposition of Winter Sky LLC, at 26:12-20. The cards are pulled sequentially from a pre-loaded electronic deck of cards. Ex. I, Deposition of American Amusements Co., at 28:10-21; Ex. C, Deposition of Eclipse Gaming Systems, at 29:8-25–30:1-7. Some of the machines allow a player to choose the card he wants to play, while others do not. Ex. I, Deposition of American Amusements Co., at 31:19-22 (player cannot go to help menu and change card); Ex. C, Deposition of Eclipse Gaming Systems, at 29:8-11 (player can choose bingo card).
- Once the player has placed his bet and pressed “play,” *see* Ex. H, Deposition of Winter Sky LLC, at 27:15-20, a historical ball draw is pulled that is provided from Speaking Rock's server. Ex. I, Deposition of American Amusements Co., at 31:1-7; Ex. C, Deposition of Eclipse Gaming Systems, at 35:10-25; Ex. H, Deposition of Winter Sky LLC, at 24:18-22.
- The cards hosted on Speaking Rock's server are electronic representations of cards that have been played in paper form during a

live-called paper-card bingo game at Speaking Rock. Ex. I, Deposition of American Amusements Co. at 22:21-25–23:1-5.

- The ball draws that are pulled from Speaking Rock’s server are prior ball draws from live-called bingo games at Speaking Rock. *See* Ex. J, BMM Evaluation Report at 2–3; Ex. I, Deposition of American Amusements Co. at 22:21-25–23:1-5.
- The historical ball draw is applied to the player’s card for a determination of whether the numbers that have been marked achieve a pre-designated winning pattern. *See* Ex. H, Deposition of Winter Sky LLC, at 27:15-20; 28:20-25; 30:2-5.
- If the player has achieved a winning pattern, the reels on the screen spin to reflect the win. Ex. H, Deposition of Winter Sky LLC, at 30:6-12. Even if the player has not won, the reels spin until the game has concluded. *E.g.*, Ex. A at 29:00-30:20, 32:10-33:52, 35:20-41:36.
- Players can win cash prizes if they attain a winning pattern. *See id.* A player can choose how much to “buy in” to the game; “[t]he higher the buy-in, the higher the prizes.” Ex. H, Deposition of Winter Sky LLC, at 26:3-5.
- The time between the player pushing the button and the results being displayed is typically between 5-10 seconds. Ex. A at 29:00-30:20, 32:10-33:52, 35:20-41:36.
- The machines track and credit the amount that a player has won in prizes. Ex. I, Deposition of American Amusements Co. at 40:5-7; Ex. H, Deposition of Winter Sky LLC, at 36:4-9; Ex. C, Deposition of Eclipse Gaming Systems, at 42:21-25–43:1-7.

The Tribe also operates lived-called paper card bingo games. Ex. E, Deposition of Ysleta del Sur Pueblo Regulatory Commission at 30:2-6. Live-called bingo—that is, bingo where a caller calls out numbers, and players mark their cards in real time—is available 24 hours a day, 7 days a week at Speaking Rock. *See* Ex. D, *supra*. Patrons can manually daub their paper cards or play with the assistance of hand-held card-minding devices, which track the numbers as they are being called and automatically

daub the cards being played on the card-minder. Ex. E, Deposition of Ysleta del Sur Pueblo Regulatory Commission at 30:2-6. Texas regulations limit the number of cards that can be tracked on a card-minder in one game to 66 cards; the card-minders at Speaking Rock exceed that limit. 16 TEX. ADMIN. CODE § 402.322(r); Ex. K, Defendants' Response to Plaintiff's Request for Admission No. 11. It does not appear that the hand-held card-minders were provided by a licensed distributor or manufacturer approved by the Texas Lottery Commission. Ex. G, Original Deposition of Karl Maahs at 45:10-12; TEX. OCC. CODE § 2001.407(c), (e).

C. The Tribe does not attempt to conform its gaming to Texas law.

The Ysleta del Sur Pueblo Regulatory Commission promulgates the only regulations governing gaming on the Tribe's reservation. Ex. E, Deposition of Ysleta del Sur Pueblo Regulatory Commission at 84:21-25–85:1-12. The Regulatory Commission was established by the Tribal Council to oversee the Tribe's bingo ordinance. *Id.* at 15:11-15. The members of the Regulatory Commission can be removed at the discretion of the Tribal Council. *Id.* at 24:15-19. Speaking Rock pays the Regulatory Commission \$37,500 per quarter for its services. *Id.* at 74:13-24.

The Regulatory Commission asks BMM North America, an independent testing agency, to review the software in use on the reservation, but only against the standards provided by the Tribe. Ex. L, Deposition of BMM Testlabs at 22:7-15. BMM does not evaluate whether those standards comport with any applicable regulatory or legal standards. *Id.* at 53:9-15. And the Regulatory Commission acknowledged during its Rule 30(b)(6) deposition that it does not evaluate or take into consideration

whether the Tribe is complying with the Texas Penal Code or the Bingo Enabling Act. Ex. E, Deposition of Ysleta del Sur Pueblo Regulatory Commission at 85:14-22. The gaming on the Tribe's reservation is not operated pursuant to any license from the Texas Lottery Commission. See Ex. G, Original Deposition of Karl Maahs, at 41:19-24 (conceding that the one-touch machines are not operated with a license from the Texas Lottery Commission); Ex. K, Defendants' Response to Plaintiff's Request for Admission No. 6.

The Regulatory Commission asked that BMM North America test for the following criteria, and only the following criteria:

Testing criteria for Pueblo Bingo Facility Vendors:

1. *No RNG of any kind anywhere within a system.*
2. *Bingo cards for all programs must come from a pre-printed play provided by Speaking Rocks bingo paper provider OR an electronic version of the same from provider. There can be no shuffling of the cards. They must be drawn sequentially out of the "stack" of cards provided.*
3. *Ball draw must come from the data collected by Speaking Rock, either real time or from the "pre-drawn" pool created by actual draws at Speaking Rock.*
4. *Pull tabs must meet the above, where applicable.*

Ex. M, Ysleta del Sur Pueblo Regulatory Commission Regulation 000103.00.⁵ The Regulatory Commission could regulate the amount of prizes awarded, but has chosen

⁵ A "RNG" is a random number generator. Ex. E, Deposition of Ysleta del Sur Pueblo Regulatory Commission at 41:13-16.

not to do so. Ex. E, Deposition of Ysleta del Sur Pueblo Regulatory Commission at 36:13-20.

In 2017, gross profits from the gaming at Speaking Rock were approximately \$70 million. Ex. G, Original Deposition of Karl Maahs at 107:12-13.

II. STANDARD OF REVIEW

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); FED. R. CIV. P. 56(a). A genuine issue of material fact only exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Texas requests declaratory relief on its claims that the Tribe is violating Texas law, and therefore, the Restoration Act. Declaratory relief is available under the federal Declaratory Judgments Act to “declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a).

III. ARGUMENT

Chapter 47 of the Texas Penal Code prohibits illegal lotteries—games with the elements of chance, prize, and consideration—and those elements are present in the Tribe’s gaming at Speaking Rock and Socorro Tobacco Outlet. Because the Tribe is violating Chapter 47, the Tribe is violating the Restoration Act. There is no dispute of material fact on how the games operate or whether those games violate Texas law.

A. The Restoration Act federalizes Texas’s gambling laws and regulations.

Texas brings this suit under the Restoration Act, which provides that “[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on the lands of the tribe.” 25 U.S.C. §1300g-6(a). The Restoration Act incorporates both civil and criminal laws: “[a]ny violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas.” *Id.* Rather than limiting itself to Texas criminal law, the Act’s prohibition encompasses all gaming illegal under “the laws of the State of Texas,” regardless of whether such gaming is subject to criminal penalties, civil penalties, or both. *Id.* As the Fifth Circuit has put it, the Act provides that “Texas gambling laws and regulations are surrogate federal law” on the Tribe’s reservation. *Ysleta I*, 36 F.3d at 1335.

Texas law, for its part, includes both civil and criminal penalties for illegal gaming. The genesis of these provisions is the Texas Constitution’s prohibition of illegal lotteries: games of chance, prize, and consideration. TEX. CONST. art. III §47(a) (“[t]he Legislature shall pass laws prohibiting lotteries and gift enterprises in this State[.]”). Given this Constitutional prohibition, the Texas Penal Code criminalizes, *inter alia*, gambling (TEX. PENAL CODE § 47.02); operating a gambling promotion (TEX. PENAL CODE §§ 47.03(a)(1) & (a)(5)); keeping a gambling place (TEX. PENAL CODE § 47.04(a)); and possessing gambling devices, equipment, or paraphernalia or any subassembly thereof (TEX. PENAL CODE §§ 47.06(a) & (c), 47.06(a)).

Texas law also provides for civil injunctive relief against common nuisances, which include, *inter alia*, gambling as defined by the Penal Code and related activity. See TEX. CIV. PRAC. & REM. CODE § 125.002(a) (“A suit to enjoin and abate a common nuisance described by [§]125.0015(a) or (b) may be brought by an individual, by the attorney general, or by a district, county, or city attorney...”); *id.* § 125.0015(a)(5) (person maintains a common nuisance by tolerating “gambling, gambling promotion, or communicating gambling information as prohibited by the Penal Code.”).

B. Charitable bingo is permissible in limited circumstances.

Charitable bingo in Texas, authorized under the Bingo Enabling Act and regulated by the Texas Lottery Commission’s Charitable Bingo Operations Division, is an exception to the Constitution’s broad prohibition on “lotteries and gift enterprises.” TEX. CONST. art. III, § 47(a), (b). All charitable bingo in Texas must comply with the requirements of the Bingo Enabling Act; subject to very limited exceptions, it is a third-degree felony to conduct bingo in Texas without a license issued under the Act. TEX. OCC. CODE § 2001.551(c).

Bingo is defined as a game of chance “in which prizes are awarded based on designated numbers or symbols conforming to randomly selected numbers or symbols.” *Id.* § 2001.002(4). Charitable bingo can only be played during a bingo occasion, which “is a single gathering or session, at which a bingo game or a series of bingo games, including selling and redeeming pull-tab bingo tickets, are conducted on the day and at the times listed on the license issued to a licensed authorized organization.” *Id.* § 2001.002(6). A bingo occasion may not exceed four hours, and a

licensed authorized organization⁶ may not conduct more than three bingo occasions per calendar week. *Id.* § 2001.419(a), (b). A prize for a single game of bingo cannot exceed \$750, and the aggregate value of prizes awarded during a bingo occasion cannot exceed \$2,500 (excepting games of pull-tab bingo and bingo games that award prizes of \$50 or less). *Id.* § 2001.420.

Texas allows the use of card-minder systems to aid players during bingo occasions. These are electronic or computerized devices “interfaced with, or connected to, equipment used to conduct a game of bingo.” 16 TEX. ADMIN. CODE § 402.321(2). The devices allow players to play multiple cards at one time—up to 66 in any one game. *Id.* § 402.322(r). However, these devices may not be used:

- 1) to generate or determine the random letters, numbers, or other symbols used in playing the bingo card played with the device’s assistance;
- 2) as a receptacle for the deposit of tokens or money in payment for playing the bingo card played with the device’s assistance; or
- 3) as a dispenser for the payment of a bingo prize, including coins, paper currency, or a thing of value for the bingo card played with the device’s assistance.

TEX. OCC. CODE § 2001.409(a). Lottery Commission regulations prohibit the use of card-minders to track and store, replay, or credit winnings. 16 TEX. ADMIN. CODE § 402.323(m)(1)-(3).

⁶ A “licensed authorized organization” means an “authorized organization that holds a license to conduct bingo.” TEX. OCC. CODE § 2001.002(14). Under the Texas Constitution, a “church, synagogue, religious society, volunteer fire department, nonprofit veterans organization, fraternal organization, or nonprofit organization supporting medical research or treatment programs” may conduct charitable bingo. TEX. CONST. art. III, § 47(b).

C. The Tribe is operating an illegal lottery in violation of Chapter 47.

The one-touch machines on the Tribe's reservation violate the lottery and gambling prohibitions in Chapter 47 of the Texas Penal Code.

Subject to limited exceptions not applicable here, a gambling device is an “electronic, electromechanical, or mechanical contrivance . . . that for a consideration affords the player an opportunity to obtain anything of value, the award of which is determined solely or partially by chance[.]” TEX. PENAL CODE § 47.01(4). This includes, but is not limited to, “gambling device versions of bingo, keno, blackjack, lottery, roulette, video poker, or similar electronic, electromechanical, or mechanical games, or facsimiles thereof, that operate by chance or partially so, that as a result of the play or operation of the game award credits or free games, and that record the number of free games or credits so awarded and the cancellation or removal of the free games or credits.” *Id.* § 47.01(4)(A). Tracking this definition of “gambling device,” the Penal Code defines “lotteries” to mean “any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win anything of value.” *Id.* § 47.01(7). And the Penal Code defines “gambling place” as any real estate or other property on which a lottery is being conducted or a gambling device is being played. *Id.* § 47.01(3).

The elements of an illegal lottery—chance, prize, and consideration—are present in the activities on the Tribe's reservation. *See, e.g., City of Wink v. Griffith Amusement Co.*, 129 Tex. 40, 50, 100 S.W.2d 695, 701 (1936) (a lottery has “three necessary elements, namely, the offering of a prize, the award of the prize by chance,

and the giving of a consideration for an opportunity to win the prize”). As Captain Guajardo observed, the machines contain the element of chance, because no skill is involved in pressing a button and whether a prize is awarded is random; prize, because a player may be awarded a cash prize or credits for playing the game; and consideration, because a player must insert cash or a cash equivalent prior to play. *See Ex. B, Declaration of Daniel Guajardo ¶ 5.* Accordingly, the operation of the one-touch machines is an illegal lottery under Texas law. *See TEX. PENAL CODE § 47.01(7).* The one-touch machines, moreover, constitute gambling devices because they are an “electronic contrivance . . . that for a consideration affords the player an opportunity to obtain anything of value, the award of which is determined solely or partially by chance[.]” *Id.* § 47.01(4). And because the Tribe is utilizing gambling devices to conduct a lottery, the Tribe is also illegally:

- (1) gambling in violation of Texas Penal Code § 47.02(a)(3) (prohibiting the playing or betting for money with a gambling device);
- (2) operating a gambling promotion under Texas Penal Code §§ 47.03(a)(1) and (a)(5) (making it an offense to operate or participate in the earnings of a gambling place and to sell any tickets or other devices that serve as evidence of participation in a lottery);
- (3) keeping a gambling place under Texas Penal Code § 47.04(a); and
- (4) possessing gambling devices, equipment, or paraphernalia under Texas Penal Code § 47.06(a) and (c); and/or Texas Penal Code § 47.06(a) as to the servers owned by the vendors and those operated by Speaking Rock which are a “subassembly or essential part of a gambling device.” *Id.*

The Tribe does not appear to challenge this evidence; instead, the Tribe argues that bingo is allowed in Texas under the Bingo Enabling Act, and thus, that what is

ongoing at Speaking Rock and Socorro Tobacco Outlet is lawful.⁷ But the Tribe ignores the interplay between Chapter 47 and the Bingo Enabling Act: the relevance of the Bingo Enabling Act to the Chapter 47 analysis is that a defendant can raise an affirmative defense to prosecution for violations of Chapter 47 if the lottery is *authorized* under the Bingo Enabling Act. TEX. PENAL CODE § 47.09(a)(1)(A). Otherwise, the Tribe is violating Chapter 47 with no applicable affirmative defenses.⁸ See Tex. Atty. Gen. Op. JC-0480, 2002 WL 463418, at *1 (Mar. 25, 2018) (noting that awarding raffle ticket as prize in a bingo game could violate the Texas Penal Code and that “[a]s the conduct is not expressly authorized by either the Bingo Enabling Act or the Charitable Raffle Enabling Act, the conduct would not fall within the defenses to gambling offenses” listed in Section 47.09).

The primary dispute in this case thus winnows down to one question: are the Tribe’s violations of Chapter 47 “authorized” under the Bingo Enabling Act? Cf. *Alabama-Coushatta Tribes of Tex. v. Tex.*, 208 F. Supp. 2d 670, 679 (E.D. Tex. 2002) (finding the Alabama Coushatta in violation of various provisions of the Texas Penal Code and noting that “[f]acts do not exist which would give rise to the defenses

⁷ The Tribe raises these issues in its First Amended Counterclaim by seeking a declaration that “bingo is a gaming activity” and that “the laws of the State of Texas do not prohibit bingo.” Doc. 121 at 23. The Court should deny the Tribe’s request for declaratory relief because it is unnecessary to the resolution of this case and avoids the Chapter 47 inquiry that this Court must undertake to determine the legality of the gaming at issue.

⁸ The offense of “gambling” contains a slightly different defense: that the actor “reasonably believed” the conduct “was permitted” under the Bingo Enabling Act. TEX. PENAL CODE § 47.02(c)(1). This defense is unavailable to the other offenses in Chapter 47, and does not protect the Tribe here. For the reasons discussed *infra*, the Tribe could not “reasonably believe[]” that the one-touch machines are permitted under the Bingo Enabling Act: the Act affirmatively prohibits several of the machines’ defining features.

provided by these statutes.”). The answer is no, and resoundingly so. The Bingo Enabling Act itself does not authorize, and in fact directly prohibits: (1) bingo played 24 hours a day, 7 days a week, with no durational limits on bingo occasions, TEX. OCC. CODE § 2001.409; (2) bingo that does not strictly limit the prize money that can be awarded, *id.* § 2001.419; (3) bingo played on “card-minding devices” that serve as receptacles for cash, *id.* § 2001.409(a)(2); (4) bingo played on “card-minding devices” that dispense payment of cash prizes or their equivalent, *id.* § 2001.409(a)(3); and (4) bingo conducted by an unauthorized and non-licensed organization, *id.* § 2001.551(c).⁹

The Tribe seems to suggest that its conduct is legal because it uses historical ball draws to determine the winning patterns on the one-touch machines. The Bingo Enabling Act does not expressly approve of, nor directly contemplate, the use of historical ball draw data, and the regulations passed by the Texas Lottery Commission contemplate that bingo must be played as a live-called game. See Ex. N, Declaration of Alfonso Royal ¶ 17; 16 TEX. ADMIN. CODE § 402.323(d) (describing the methods for a card-minding device to daub electronic cards); *id.* § 402.200(k) (“The caller shall . . . call all numbers and make all announcements in a manner clear and audible to all of the playing areas of the bingo premises.”). Because there are no affirmative provisions of Texas law authorizing historical ball data, and there are

⁹ The Tribe’s expert witness, Philip Sanderson, acknowledged at the hearing on Texas’s motion for preliminary injunction and during his deposition that the Tribe’s one-touch machines are not legal under the Bingo Enabling Act. See Ex. O, Deposition of Philip Sanderson, at 63:13-25–64:1.

affirmative provisions in Texas's regulations prohibiting it, the Tribe has no basis to claim that its gaming activities are authorized by the Bingo Enabling Act.

For similar reasons, even the Tribe's paper-based bingo runs afoul of Chapter 47. Bingo is a game of chance that, for consideration, allows players the opportunity to win a prize. It contains all of the elements of an illegal lottery. *See State v. Amvets Post No. 80*, 541 S.W.2d 481, 482 (Tex. App.—Dallas 1976, no writ). The paper-based bingo at Speaking Rock is open 24 hours a day, 7 days a week, which is prohibited by the Bingo Enabling Act. *See* TEX. OCC. CODE § 2001.409, *supra*. And the use of card-minders that track more than 66 cards is not expressly authorized by the Bingo Enabling Act and is directly prohibited by Texas Lottery Commission regulations. 16 TEX. ADMIN. CODE § 402.322(r).

Both the Tribe's one-touch machines and the paper-based bingo violate Chapter 47; the Texas Civil Practice and Remedies Code, which prohibits persons from maintaining a common nuisance by tolerating "gambling, gambling promotion, or communicating gambling information as prohibited by the Penal Code," TEX. CIV. PRAC. & REM. CODE § 125.0015(a)(5); and thus, violate the Restoration Act, which federalizes Texas's gaming laws. *Ysleta I*, 36 F.3d at 1334.

D. The Court should issue a permanent injunction.¹⁰

The standard for the issuance of preliminary and permanent injunctions is “essentially the same,” except that, for a permanent injunction, a plaintiff must show “actual success” on the merits rather than a likelihood of success. *See Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 546 n.12 (1987). Accordingly, to obtain a permanent injunction, a plaintiff must establish (1) actual success on the merits; “(2) a substantial threat that it will suffer irreparable injury absent the injunction; (3) that the threatened injury outweighs any harm the injunction might cause the defendants; and (4) that the injunction will not impair the public interest.” *Enrique Bernat F., S.A. v. Guadalajara, Inc.*, 210 F.3d 439, 442 (5th Cir. 2000).

i. Texas will suffer irreparable harm absent an injunction.

It is for the electorate of the State of Texas—through its elected representatives, and the Constitution’s voter approval requirement—to decide what, if any, gaming may go on in the State. *See* TEX. CONST. art. III § 47; TEX. PENAL CODE ANN. § 47.01(7). The Tribe’s one-touch gaming machines have no such approval. The litany of Texas anti-gambling legislation discussed above, together with the Texas Constitution’s mandate, demonstrates the status quo: Texas sees gambling as sufficiently harmful that it is prohibited, subject to limited and carefully circumscribed exceptions.

¹⁰ A “court may grant a permanent injunction without a trial on the merits if there are no material issues of fact and the issues of law have been correctly resolved.” *Calmes v. United States*, 926 F. Supp. 582, 591 (N.D. Tex. 1996); *see also Texas v. Ysleta del Sur Pueblo*, 220 F. Supp. 2d 668, 672, 697–98 (W.D. Tex. 2001) (granting Texas’s motion for summary judgment and issuing injunctive relief).

The State has a fundamental interest in enforcement of its laws. *E.g.*, *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 742 (S.D. Miss. 2014) (“The State . . . has a significant interest in enforcing its enacted laws.”). When the State is prevented from enforcing those laws, it suffers irreparable injury. *E.g.*, *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (“[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (citations omitted)); *see also* *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) (recognizing that, if enforcement of duly enacted State law is enjoined, “the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws[.]”).

ii. The balance of equities favors Texas.

The Tribe’s trust relationship with the federal government—and all attendant benefits—derives from the Tribe’s agreement to refrain from gambling. This was the agreement the Tribe made with the United States Government to pass the Restoration Act. *See* 25 U.S.C. § 1300g-6a; Tribal Resolution No. T.C.-02-86 (1986); *Ysleta del Sur Pueblo v. State of Tex.*, 36 F.3d 1325, 1328 (5th Cir. 1994) (quoting Tribal Resolution No. T.C.-02-86 (1986); citing Restoration Act’s legislative history). It recognizes the Tribe as an Indian Nation, and secures to the Tribe aid and services from the United States, which it would not enjoy absent that trust relationship. Speaking Rock generates revenue from illegal gaming each day—and an enormous \$70 million annually. Ex. G, Deposition of Karl Maahs at 107:12-13.

The injunction sought here would restore what the *legal* status quo has been all along. The Tribe will not be permitted to operate lotteries illegal under Texas law, and will continue to receive the federal recognition and assistance that motivated it—as recently as 1987—to forego the possibility of such activity. For these reasons, the balance of equities weighs in favor of the requested injunction. See *Texas v. Ysleta del Sur Pueblo*, 220 F. Supp. 2d 668, 672, 697 (W.D. Tex. 2001) (“What the Defendants characterize as ‘equities’ in this case are not such in the eyes of the law. They are matters which might, however, be brought to the attention of the Congress of the United States or the legislature of the State of Texas, for it is only through legislative change that the Defendants could possibly be permitted to carry on a casino operation of the type they presently conduct on the Pueblo’s reservation.”).

iii. An injunction is in the public’s interest.

As noted above, it is for the Texas Legislature, and its electorate—not the Tribe—to determine what, if any, lotteries it may permit. As also noted, Texas’s host of anti-gaming legislation indicates that the Texas electorate does not, at this time, believe one-touch gaming machines should be permitted. Therefore, a grant of permanent injunctive relief enjoining the Tribe from operating illegal lotteries through its one-touch machines lies in the public interest, as determined by the people of the State.¹¹

¹¹ As the Court has already found, based on its analysis of the charter for the Ysleta del Sur Pueblo Fraternal Organization, Doc. 83-1, this injunction will be effective against the Fraternal Organization, which operates the gaming on the reservation in concert with the Tribe. See Doc. 115 at 23 (“[I]f an injunction were issued in this case, the injunction would stop both the Tribe and the Fraternal Organization from continuing the bingo activities because the entities act in concert with

IV. CONCLUSION

The Court should grant Texas's motion for summary judgment and permanent injunction and enjoin the Tribe from committing the violations of Texas and federal law described in this motion.

Respectfully submitted.

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each other.”); *see also* Ex. G, Original Deposition of Karl Maahs, at 62:11-15 (stating that the Fraternal Organization “conduct[s] the bingo itself.”).

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 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. I further certify that Plaintiff's Exhibit A has been produced in discovery to counsel for Defendants and is being sent via certified mail, return receipt requested, on November 14, 2018 to the following:

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