No. 17-1624

# In The
# Supreme Court of the United States

CITIZEN POTAWATOMI NATION,

*Petitioner,*

v.

OKLAHOMA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

The parties agreed to an arbitration clause in an inter-sovereign compact on the condition that any such arbitration would be subject to de novo review in federal court. Later, this Court decided *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008), which held that such de novo review clauses were unenforceable under the Federal Arbitration Act. The court below accordingly held that this portion of the compact was invalid.

The parties also agreed to a severability clause, which states that "[i]n the event that a federal district court shall find any provision, section, or subsection of this Compact to be invalid, the remaining provisions, sections, and subsections of this Compact shall remain in full force and effect, unless the invalidated provision, section or subsection is material." Based on the language of the compact, the court below held that the de novo review clause was material to the agreement to arbitrate, and thus it could not be severed from the arbitration agreement.

The Question Presented is:

> Did the court below err in interpreting the agreement between the two parties in this case by holding that the provision requiring de novo review of arbitration awards in federal court was material to the agreement to arbitrate?

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## STATEMENT

### A. The Sales Tax Dispute

1. The Citizen Potawatomi Nation ("Nation") operates grocery stores, a convenience store, and two casinos in Pottawatomie County, Oklahoma. C.A. State App. 565-69. The State of Oklahoma ("State") and Nation have had a long-running dispute about the collection of state taxes on the Nation's sale of goods to persons who are not members of the tribe. In 1991, this Court held that "under the doctrine of tribal sovereign immunity, the State may not tax such sales to Indians, but remains free to collect taxes on sales to nonmembers of the tribe." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 507 (1991). But, the Court held, tribal sovereign immunity barred suit in federal court against the tribe for failure to collect taxes on sales to nonmembers—despite the State's complaint that this ruling gives the State "a right without any remedy." *Id.* at 514.[1] The Court suggested several alternative remedies were available and did so again in 2014. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2035 (2014). One of these suggested alternatives is to deny the tribe state licenses for failure to comply with the terms of the license. *Id.*

[1] Given that the State litigated this issue several decades ago all the way up to this Court, Petitioner's suggestion that the present dispute "is the first and only time the State has taken any enforcement action . . . asserting that State sales taxes apply to all sales by a Native American Tribe to nontribal members" is odd. Pet. 7.

2. The Nation continued to refuse to collect state sales taxes on sales to nonmembers and, for some years, the Nation filed sales tax reports claiming that all of its sales were exempt from taxation. In 2014, the Oklahoma Tax Commission ("OTC") sent an audit request to the Nation in its capacity as the holder of a sales tax permit. C.A. State App. 560. The OTC's audit request sought to review the Nation's sales records to confirm the veracity of those claimed exemptions. *Id.* The Nation refused to comply with the audit, *id.*, in violation of the conditions of its state sales tax license, Okla. Stat. tit. 68, § 206(a). After this Court in *Bay Mills* suggested action on state licenses as an available remedy to ensure compliance with state law, the OTC instituted an administrative action against the Nation for revocation of the Nation's state sales tax permits. *See* C.A. State App. 559.

3. In response to this and other licensing disputes,[2] the Nation contended that the State's administrative tribunals were not the proper forum, but instead demanded that the disputes be resolved in arbitration pursuant to the state-tribal compact on casino gambling (the "Gaming Compact"). Pet. App. 8-9. The State contested the assertion that these sales tax disputes arise under the Gaming Compact. *See* C.A.

[2] The Nation was also engaged in a dispute with the State's alcohol regulator, which sought administrative revocation of the Nation's state liquor licenses for violations of state law that prohibited Sunday sales of liquor in counties that had not authorized such sales. *See* Pet. 6 n.1.

State Br. 8-12. The state administrative agencies reached the same conclusion, rejecting the Nation's arguments on the Gaming Compact. *See* C.A. State App. 340-48, 363-64. The Nation's appeal of the administrative proceedings has been stayed by the Oklahoma Supreme Court pending resolution of this federal court litigation concerning arbitration under the Gaming Compact. Orders, No. 114,695 (Okla. June 13, 2018); No. 115,851 (Okla. Apr. 24, 2017).

### B. The Gaming Compact

1. The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*, permits "Class III gaming" (such as "casino games, slot machines, and horse racing") on Indian lands "only pursuant to, and in compliance with, a compact it has negotiated with the surrounding State." *Bay Mills*, 134 S. Ct. at 2028 (citing 25 U.S.C. § 2710(d)). "In 2004, the State of Oklahoma established a model tribal gaming compact that effectively constitutes a 'pre-approved' offer to federally recognized tribes in the State." *Oklahoma v. Hobia*, 775 F.3d 1204, 1206-07 (10th Cir. 2014). This model language was drafted in consultation with numerous Indian tribes and ultimately codified in statute after approval by the people of Oklahoma in a referendum. Many tribes in Oklahoma chose to enter into a gaming compact with the State; the Nation's compact with the State was

approved by the federal government in 2005. *See* Pet. App. 3-4; Notice of Class III Gaming Compacts Taking Effect, 70 Fed. Reg. 6,903 (Feb. 9, 2005).

2. At issue in this case are the Gaming Compact's dispute resolution provisions. Part 12(2) provides, in relevant part, that:

> Subject to the limitation set forth in paragraph 3 of this Part, either party may refer a dispute arising under this Compact to arbitration under the rules of the American Arbitration Association (AAA), subject to enforcement or pursuant to review as provided by paragraph 3 of this Part by a federal district court. The remedies available through arbitration are limited to enforcement of the provisions of this Compact. The parties consent to the jurisdiction of such arbitration forum and court for such limited purposes and no other, and each waives immunity with respect thereto.

Pet. App. 105-06. This provision twice conditions each party's agreement to arbitrate and waiver of sovereign immunity on paragraph 3 of Part 12, which provides:

> Notwithstanding any provision of law, either party to the Compact may bring an action against the other in a federal district court for the de novo review of any arbitration award under paragraph 2 of this Part. The decision of the court shall be subject to appeal. Each of the parties hereto waives immunity and consents to suit therein for such limited purposes,

> and agrees not to raise the Eleventh Amendment to the United States Constitution or comparable defense to the validity of such waiver.

*Id.* at 106-07.

Together, these provisions reflect the parties' agreement to enter into arbitration and waive sovereign immunity for the limited purpose of resolving disputes arising under the Gaming Compact, provided that each party is guaranteed the safeguard of de novo review by a federal court.

The Gaming Compact also includes a severability clause in Part 13(A):

> Each provision, section, and subsection of this Compact shall stand separate and independent of every other provision, section, or subsection. In the event that a federal district court shall find any provision, section, or subsection of this Compact to be invalid, the remaining provisions, sections, and subsections of this Compact shall remain in full force and effect, unless the invalidated provision, section or subsection is material.

Pet. App. 107.

3. The Nation's theory as to why the sales tax disputes "aris[e] under" the Gaming Compact hinged on Part 5(I) of the Compact, which requires that "The sale and service of alcoholic beverages in a [Compact] facility shall be in compliance with state, federal, and tribal law in regard to the licensing and sale of such

beverages."[3] The State disagreed with this theory, arguing that the Nation's sales tax and licensing obligations arise independently of the Compact, and Part 5(I) does not automatically transform every dispute that might affect the Nation's alcohol sales into a gaming dispute that requires mandatory arbitration under the Compact.

### C. The Proceedings Below

1. Over the State's protest, the sales tax disputes were submitted to arbitration and, on April 4th, 2016, the arbitrator issued his award. Pet. App. 52. The arbitrator determined that the dispute was arbitrable under the Gaming Compact. Pet. App. 46-48. The arbitrator also concluded that federal law preempts Oklahoma's ability to levy a tax on sales by the Nation to individuals that are not members of the tribe—a result that directly conflicts with this Court's holding in *Oklahoma Tax Commission*, 498 U.S. 505. Pet. App. 49-52.

2. On April 13, 2016, Petitioner filed the present action seeking enforcement of the arbitration award. Pet. App. 36. The district court rejected Respondent's "request[ ] that the Court conduct de novo review of the [arbitration] award" as required by Part 12(3) of the

[3] Unfortunately, the arbitrator, the district court, and Petitioner's appendix all misquote this provision, replacing "and" with "or". *Compare* Okla. Stat. tit. 3A, § 281, *with* Pet. App. 39, 44, 74 *and* C.A. State App. 48-49; *see also* State's C.A. Br. 7 n.16. The parties agree that "and" is the proper term. Pet. 5; C.A. State App. 225-32, 844.

Compact. Pet. App. 41. Relying upon this Court's decision in *Hall Street*, the court held that "to engage in de novo review as requested by [Respondent] would improperly broaden the permissible grounds for setting aside the award" from those provided by the Federal Arbitration Act ("FAA"). Pet. App. 41-42 (citing *Hall Street*, 552 U.S. at 587). But having found that the de novo review provision was unenforceable, the district court failed to address Respondent's next argument: that the de novo review provision was material to the agreement to arbitrate and therefore not severable from the rest of that arbitration clause. Pet. App. 18.

3. The Tenth Circuit reversed. Pet. App. 1. The panel first affirmed the district court's conclusion that the Compact's de novo review clause was unenforceable under *Hall Street*. Pet. App. 21-25.

The panel then proceeded to hold that, under the explicit terms of severability in the Compact, the de novo review provision was material to the arbitration clause and therefore not severable from the agreement to arbitrate. Pet. App. 32. The court began by noting that "[a]rbitration is a matter of contract," Pet. App. 26 (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)), and "the court determines the parties' intent from the language of the agreement itself," Pet. App. 28 (citations omitted). Looking to the text of the Compact, the panel observed that "[t]he Compact contains a specific severability provision," providing that "[e]ach provision . . . of this Compact shall stand separate and independent of every other provision," and "[i]n the event that a federal district court shall find

any provision . . . to be invalid, the remaining provisions . . . of this Compact shall remain in full force and effect, unless the invalidated provision . . . is material." Pet. App. 29 & n.20 (quoting Gaming Compact Part 13(A)). The Compact thus "requires a materiality analysis to determine whether the parties would have agreed to engage in binding arbitration if they had known de novo review of an arbitration award was unavailable." Pet. App. 29.

In conducting this materiality analysis, the court noted that several provisions are explicitly linked to the availability of de novo review in federal court. Indeed, the sentence authorizing arbitration conditions such arbitration on de novo review—twice:

> *Subject to the limitation set forth in paragraph 3 of this Part*, either party may refer a dispute arising under this Compact to arbitration under the rules of the American Arbitration Association (AAA), *subject to enforcement or pursuant to review as provided by paragraph 3 of this Part by a federal district court.*

Pet. App. 29-30 (quoting Part 12(2)) (emphasis in original). Paragraph 3 referenced in this language is the paragraph that requires de novo review in federal district court. Pet. App. 106.

After emphasizing its duty to "construe the Compact to give meaning to every word or phrase," Pet. App. 29 (citing *United States v. Brye*, 146 F.3d 1207, 1211 (10th Cir. 1998)), the panel concluded that "[w]hen considered as a whole, Compact Part 12 makes

clear that the parties' agreement to engage in binding arbitration was specifically conditioned on, and inextricably linked to, the availability of de novo review in federal court." Pet. App. 29. The court below further buttressed its conclusion by observing that "the Compact makes clear that the parties' waiver of sovereign immunity is only for purposes of the type of de novo review contemplated in Part 12(3)." Pet. App. 30. "Given the importance of immunity as an aspect of sovereignty, *Alden v. Maine*, 527 U.S. 706, 713 (1999), the narrow and purposeful waiver in Part 12(3) makes clear that the availability of de novo review was a material aspect of the parties' agreement to arbitrate." *Id.*[4] As a result, the panel held that the de novo review provision was "material" to, and thus not severable from, the agreement to arbitrate. Pet. App. 30. Having determined that this arbitration agreement was unenforceable per *Hall Street*, the court below remanded the case, directing the district court to vacate the arbitration award. Pet. App. 32.

The Nation now petitions for a writ of certiorari.

[4] Petitioner "d[id] not argue Compact Part 12(3) or, for that matter, any portion of Part 12 is ambiguous." Pet. App. 31. The panel therefore rejected Petitioner's "reliance on extrinsic evidence" as "inappropriate because, absent such ambiguity, there is no need to look beyond the four corners of the Compact to resolve the question of materiality." Pet. App. 31 (citing *Anthony v. United States*, 987 F.2d 670, 673 (10th Cir. 1993)). The panel also noted that "[e]ven if extrinsic evidence were admissible . . . the extrinsic evidence offered by the Nation is simply not meaningfully relevant to the question of materiality." Pet. App. 31.

## REASONS THE PETITION SHOULD BE DENIED

Petitioner seeks certiorari on a question regarding the interpretation of a particular contract between the two parties in this case. There is no conflict between any lower courts on this question. *See* Sup. Ct. R. 10(a). Petitioner has not demonstrated that interpreting substantially similar contractual provisions is a commonly litigated issue, much less one that has divided this country's courts. This particular case—between two sovereigns concerned about potential waivers of sovereign immunity—is not representative of the great majority of arbitration agreements between private litigants. The need for review is thus not "compelling," nor does the case present "an important question of federal law." *See* Sup. Ct. R. 10. This Court should not grant certiorari to engage in a case-specific inquiry regarding whether the court below erred in interpreting a particular contract.

### I. There is no division among the courts of appeals on the question presented, nor any other compelling reason to grant certiorari.

Petitioner does not contend that the panel below "entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). Nor does Petitioner even cite a case that comes to a different conclusion based on a similar contractual provision. Rather, the decision below is in harmony both with this Court's

precedent and the few cases across the country that have ruled on similar issues.

1. Petitioner does not argue that the court below erred in identifying this Court's decision in *Hall Street* as controlling for this case. *See* Pet. 20-21 (characterizing *Hall Street* as "settled law"). And Petitioner agrees with the Tenth Circuit's application of that precedent to this case: the Gaming Compact's de novo review clause is unenforceable. Pet. 20-21. Instead, Petitioner alleges that the Tenth Circuit erred in its case-specific finding that, in the contract at issue here, "the parties' agreement to engage in binding arbitration was specifically conditioned on, and inextricably linked to, the availability of de novo review in federal court," Pet. App. 29. *See* Pet. 21. But analyzing the severability of a legally invalid arbitration agreement—just as one would with any other contract—is contemplated by this Court in *Hall Street* and by the FAA. *See Hall Street*, 552 U.S. at 587 n.6; 9 U.S.C. § 2; *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67-71 (2010).

2. Few courts have addressed questions even remotely similar to the one presented in this case, but those that have are in accord with the court below. For example, in *MacDonald v. CashCall, Inc.*, 883 F.3d 220, 224 (3d Cir. 2018), an individual bringing a putative class action sued the Cheyenne River Sioux Tribe ("CRST") in federal court, despite an arbitration clause that required any dispute to "be resolved by Arbitration, which shall be conducted by the [CRST] Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this

Agreement." But such a "tribal arbitral forum [did] not exist" and the tribe did "not have consumer dispute rules." *Id.* (citations omitted). Faced with an arbitration clause that contemplated a "nonexistent" arbitral forum, the Third Circuit held that "the Loan Agreement reflects that the CRST arbitration provision was an integral, not ancillary, part of the parties' agreement to arbitrate, despite the inclusion of a severability clause in the contract," and so, under New Jersey law, the arbitration clause was not severable. *Id.* at 230. The court ultimately concluded that "[b]ecause the parties' agreement directs arbitration to an illusory forum, and the forum selection clause is not severable, the entire agreement to arbitrate, including the delegation clause, is unenforceable." *Id.* at 223.

3. Where courts have arrived at different conclusions, they have done so on the basis of different contractual language. Petitioner cites only to the Ninth Circuit's pre-*Hall Street* decision in *Kyocera*, which held as a matter of California state law that a particular clause in an arbitration agreement between two private parties that unlawfully provided for expanded judicial review was severable from the larger agreement to arbitrate. Pet. 21; *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000-02 (9th Cir. 2003) (citing *Little v. Auto Stiegler, Inc.*, 63 P.3d 979 (Cal. 2003)). In so holding, the Ninth Circuit did not rely on the language of a severability clause with a materiality exception as is the case here, but instead relied on general California state law on severability—which, needless to say, does not apply to the contract

in this case, *see* Pet. App. 26-29. Nor did *Kyocera* involve arbitration language that, like the Gaming Compact at issue here, explicitly and repeatedly conditions the agreement to arbitrate and waivers of sovereign immunity upon de novo federal court review. *Compare Kyocera*, 341 F.3d at 990-91, *with* Pet. App. 29-30.[5]

4. The paucity of Petitioner's citations to similar cases also demonstrates that the question presented is not a recurring issue in the courts. As Petitioner concedes, "[i]n its research, the Nation could not locate a published decision which has coupled a *Hall Street* finding with an invalidation of an entire arbitration clause" thereby "demonstrat[ing] the rarity of" this type of issue. Pet. 21. Given the infrequency with which the question presented arises in the lower courts, the need for review is not compelling. At a minimum,

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[5] Similarly, the language at issue in *Hall Street* provided for de novo federal court review without any textual indication that the agreement to arbitrate was conditioned upon such review:

> The arbitrator shall decide the matters submitted based upon the evidence presented and the applicable law. The arbitrator shall issue a written decision which shall state the basis of the decision and include specific findings of fact and conclusions of law. The United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award, or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.

*Hall Street Assocs., LLC v. Mattel, Inc.*, No. 06-989, Br. for Petitioner at 5 (July 27, 2007).

review of such an issue should await further development and percolation among the courts of appeals.

In short, the sum total of the few cases that are relevant to the question presented show only that courts will interpret different contractual provisions differently. This does not demonstrate a division among the courts of appeals; rather, it shows lower courts applying this Court's settled law the same way to different factual scenarios on a case-by-case basis. Such proper operation of the lower courts does not warrant this Court's intervention.

## II. The Petition presents a poor vehicle to address the question presented.

Even were this Court inclined to provide guidance on how lower courts should conduct a severability analysis on an arbitration clause after determining that a portion of the agreement is invalid under *Hall Street*, this case presents a poor vehicle for doing so.

1. To start, the severability question in this case arises from contractual language unique to Oklahoma's tribal gaming compacts, rather than in some frequently recurring context, such as securities agreements. *Cf. J. Alexander Sec., Inc. v. Mendez*, 511 U.S. 1150, 1150 (1994) (O'Connor, J., respecting denial of certiorari). Highly-regulated IGRA gaming compacts are not representative of arbitration agreements governed by the FAA. Gaming compacts must comply with a separate federal statutory regime and obtain approval from the Department of the Interior. 25 U.S.C.

§§ 2705, 2710. In this case, Petitioner attempts to invoke unique canons of construction that would be inapplicable to almost all other arbitration agreements. *See, e.g.*, Pet. 22 (invoking the canon of construction "that ambiguity in the Compact . . . be resolved in favor of the Nation") (citing *Winter v. United States*, 207 U.S. 564 (1908)). *But see* Pet. App. 31 (noting that Petitioner did not argue below that any part of the Gaming Compact was ambiguous). And the question of severability at issue in this case—which involves an agreement between two sovereign parties—is tightly braided with the parties' longstanding and significant concerns over sovereign immunity. *See, e.g.*, Pet. 28; Pet. App. 30. This weighty consideration is completely absent from typical arbitration agreements among private actors.

2. Nor would this case provide substantial guidance among other gaming compacts. Compacts made under IGRA contain vastly different language, as "[t]he terms of each compact may vary extensively depending on the type of gaming, the location, the previous relationship of the tribe and State, etc." S. Rep. No. 100-446, at 14, 3084 (1988).[6]

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[6] Petitioner has not pointed to any other gaming compact outside Oklahoma's model compact that includes the same de novo review provision. For example, Arizona's model compact allows for review of arbitration pursuant to the FAA. Ariz. R.S. § 5-601.02(15)(c)(11)-(12). Other compacts specifically foreclose review in federal court. *See, e.g.*, Snoqualmie Indian Tribe and the State of Washington Class III Gaming Compact, Part 12(C)(5) (Feb. 15, 2002) ("The decision of the arbitrator shall be final and unappealable."). Nor has Petitioner been able to identify any other gaming compact that includes the same severability clause

3. At most, the Petition alleges that this case could affect the interpretation of Oklahoma's thirty-one other tribal-state gaming compacts "which contain arbitration clauses identical to the one at issue in this cause." Pet. 24, 26-31. Even so, all such compacts are within the Tenth Circuit's jurisdiction, such that the Tenth Circuit's decision at most creates a uniform interpretation for these compacts. *See* Pet. App. 18-19. Thus, it would be impossible for a circuit split to arise on this issue, and highly unlikely for this issue to arise ever again even within the Tenth Circuit. This is especially true in light of Petitioner's additional contention that "[t]hese Compacts facially expire on January 1, 2020," Pet. 30, such that the interpretation of this particular model compact language may soon become a moot issue.

4. In any event, Petitioner's complaints about the decision below do not even center around the compact language common to the compacting tribes in Oklahoma. As the court below noted, Petitioner does not contend there is any ambiguity in the Compact language, nor does Petitioner's disagreement with the panel's conclusion stem from any particular words in the Compact. *See* Pet. App. 31. Instead, Petitioner seeks to upset the plain reading of the contract by asking this Court to examine extrinsic evidence about the particular contract negotiations between the two parties, *see* Pet. 11-15, 24—in violation of the parol evidence rule, *see* Pet. App. 28-29. In other words,

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requiring a materiality analysis. *Cf.* Ariz. R.S. § 5-601.02(18); Cal. Gov. Code § 98004(14); N.M.S.A. § 11-13, APP(17).

Petitioner seeks certiorari in order for this Court to engage in fact-bound error correction. Such petitions alleging "erroneous factual findings" are "rarely granted." Sup. Ct. R. 10.[7] And granting certiorari could very well multiply, rather than reduce, IGRA litigation in the state, since under Petitioner's theory each compact would be interpreted pursuant to disparate negotiating histories rather than uniform contract language.

5. Finally, this Petition presents a poor vehicle because the judgment below can be affirmed on alternative grounds. This Court reviews cases only "in the context of meaningful litigation," and when the challenged issue may not affect the ultimate judgment of the court below, that issue "can await a day when [it] is posed less abstractly." *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959).[8] Here, because the judgment below ordering vacatur of the arbitration

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[7] *See also NLRB v. Hendricks Cty. Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (dismissing as improvidently granted a case that was "primarily . . . a question of fact, which does not merit Court review"); *Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J., respecting denial of certiorari); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

[8] *See also California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (stating that the Court "reviews judgments, not statements in opinions"); *McClung v. Silliman*, 6 Wheat. (19 U.S.) 598, 603 (1821) ("The question before an appellate Court is, was the judgment correct, not the ground on which the judgment professes to proceed.").

award is supported on the alternative ground that this dispute is not subject to mandatory arbitration under the Gaming Compact, review by certiorari is not warranted.[9]

The Compact's mandatory arbitration clause only applies to disputes "arising under" the Compact. Pet. App. 105. But here, the dispute arose from an audit by the tax commission pursuant to preexisting sales tax laws—not pursuant to any power granted by the Compact. *See* Okla. Stat. tit. 68, §§ 206(a), 248; C.A. State App. 88-89.[10] Petitioner has attempted to shoehorn this dispute into the Compact by claiming that because noncompliance with sales tax laws may affect their alcohol permit, and because Part 5(I) of the Compact requires compliance with all state alcohol laws for the sale of alcohol at gaming facilities, *see* Pet. App. 74, this audit request is now a gaming dispute. But this three-steps-removed interpretation of the Compact does not accord with any understanding of the well-worn phrase "arising under." *Cf.* 28 U.S.C. § 1331.

Nor is it even possible that the Nation's sales tax obligations *could* arise under the Compact. The Compact disclaims any alteration to state civil adjudicatory

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[9] The State fully presented this argument to the court below, State C.A. Br. 35-39, but the court determined it did not need to rule on the issue because it held the arbitration clause was invalid, Pet. App. 18-21.

[10] *Cf. also Gallegos v. San Juan Pueblo Bus. Dev. Bd. Inc.*, 955 F. Supp. 1348 (D.N.M. 1997) (holding that a state law replevin claim against a pueblo was not preempted by IGRA even though the dispute involved an alleged agreement over slot machines).

jurisdiction. Pet. App. 92. The Compact similarly declares it is not to be construed to authorize a new tax. Pet. App. 103. Moreover, the Compact excludes the Oklahoma Tax Commission from administering any part of the Compact. Pet. App. 65-66. So any dispute between the Tax Commission and the Nation must arise, not under the Compact, but instead under preexisting licensing laws that were specifically "not alter[ed]" by Part 9 of the Compact. Pet. App. 92. Indeed, it is difficult to envision how arbitration could have ever afforded the State the relief it sought in the first place—auditing of tribal businesses, including convenience and grocery stores—when the Compact limits remedies to "enforcement of the provisions of this Compact." Pet. App. 105-06. The Compact, after all, was entered into only "with respect to the operation of covered games . . . on the tribe's Indian lands as defined by the Indian Gaming Regulatory Act." Pet App. 58.

Part 5(I), to be sure, would allow the State to demand an end to gaming operations wherein alcohol was being purveyed illicitly, but to the extent Part 5(I) is relevant to *this* dispute, it only confirms the Nation's preexisting obligation to comply with the State's "licensing" laws, Pet. App. 74—including the licensing law requiring adjudication of licensing disputes before state administrative and court forums, not before an arbitrator, *see* Okla. Stat. tit. 68, §§ 212(A), 221, 248, 1365(A). Petitioner's contrary interpretation—that any action that affects compact facilities or seeks to

enforce existing state law relating in any way to alcohol licensing must be arbitrated under the Compact—would lead to absurd results. Such logic would require felony trials of a casino manager to be arbitrated under the Compact provision prohibiting employment of felons at casinos. *See* Pet. App. 95-96. Thus, the court below was correct in ordering vacatur of the arbitration award, regardless of the answer to the question presented.

## III. The decision below is correct.

Petitioner supplies no reasoned basis for disturbing the judgment below.

1. The court below correctly acknowledged that, because it held a portion of the arbitration clause unlawful, it was necessary to consider next whether the invalid provision was severable from the rest of the agreement to arbitrate. Pet. App. 25-28. The Compact itself provides that in the event a federal court finds a provision of the Compact invalid, each remaining provision is severable and remains in full force unless the invalid provision is "material." Pet. App. 107. This language must be enforced as it would be in any other contract, including with respect to arbitration clauses, which stand on equal footing with all other contractual agreements. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (citing 9 U.S.C. § 2).

The court below correctly began with the language within the four corners of the Compact to determine materiality. Pet. App. 28-30. The agreement to arbitrate in the Compact is bookended by two separate clauses that state, in no uncertain terms, that the agreement to arbitrate is conditioned upon de novo review in federal court as provided by paragraph 3 of Part 12 of the Compact. *See* Pet. App. 105-06 (stating that "[s]ubject to the limitation set forth in paragraph 3 of this Part," the parties may refer disputes arising under the Compact to arbitration, "subject to enforcement or pursuant to review as provided by paragraph 3 of this Part by a federal district court"). Indeed, Respondent stated to the arbitrator that arbitration under the Compact is "subject to de novo review by a federal district court." C.A. State App. 329.

Moreover, the Compact also contains two separate waivers of sovereign immunity for both parties but explicitly limits both waivers "for such limited purposes" of de novo federal district court review, and no other. Pet. App. 30, 106-07. Given that such waivers are necessary for any federal court to review or confirm the arbitration award, the narrow scope of these waivers only confirms the materiality of the de novo review provision. Waivers of sovereign immunity, after all, implicate an important aspect of sovereignty, Pet. App. 30 (citing *Alden v. Maine*, 527 U.S. 706, 713 (1999)), and so are to be narrowly construed, *see United States v. Mottaz*, 476 U.S. 834, 851 (1986). The inherent materiality of the scope of waivers of sovereign immunity is only heightened in cases where, as here, the arbitrator

so broadly interpreted his own power as to encompass a declaration that state laws were unconstitutional as applied to Respondent. Thus, the unambiguous language of the Compact reveals that the de novo review provision was material to the agreement to arbitrate, and therefore not severable from that agreement. The court below has it right.

2. Petitioner principally relies upon extrinsic evidence, offered in contravention of the hornbook parol evidence rule, to urge a different interpretation of the Compact. *See* Pet. 11-15, 24. But the court below properly rejected use of this evidence as contrary to both federal law and Oklahoma law on contract interpretation. Pet. App. 28-29, 31. Moreover, Petitioner's evidence only tends to show that the parties agreed to arbitration for more efficient resolution of disputes, which is "simply not meaningfully relevant to the question of materiality." Pet. 31. And this purported desire makes little sense of the Compact's actual terms, which require de novo federal court review and permit further appeals. Pet. App. 106-07; *Bast v. First Nat'l Bank of Ashland*, 101 U.S. 93, 96 (1879) ("[W]e have been referred to no case where, in the absence of fraud or mistake, parol evidence has been admitted to alter the plain and unequivocal terms of a written instrument.").

Petitioner also invokes canons of contract construction that, like the use of extrinsic evidence, apply only when contract language is ambiguous. Pet. 22-24. But Petitioner never argued below that any part of the compact was ambiguous. Pet. App. 31. Ultimately,

Petitioner's only textual argument is that "the mere presence of the 'de novo' language neither states nor implies such integrality" as to render the provision material. Pet. 23. But this argument rests on a facially false premise. As discussed above, Respondent and the court below point to four separate provisions that each independently confirm the provision's materiality beyond its "mere presence." *See* Pet. App. 29-30.[11]

3. Finally, Petitioner resorts to a smattering of other arguments that have no apparent relevance to the present issue of contract interpretation. For example, Petitioner claims that the Tenth Circuit's decision in *Bowen* should have put the State, the tribes, and the Department of Interior on notice of the invalidity of the de novo review provision, but concedes that the issue was not ultimately resolved until this Court's decision in *Hall Street*, which was handed down years after the Compact agreement. Pet. 23-24 (citing *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001)). And any suggestion that the entire Compact was not negotiated in "good faith" as required by IGRA, Pet. 24, has little relevance to this action, the claims in this case, and the relief sought now by Petitioner. *Cf. Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California*, 813 F.3d 1155, 1172 (9th Cir. 2015) (The procedures a tribe must follow if a state does not

[11] In contrast, the cases of *Kyocera* and *Hall Street* provide good examples of where the "mere presence" of expanded review language is insufficient to show its integrality with the arbitration clause as a whole. *See supra* n.5 and accompanying text.

negotiate in good faith under IGRA "by their own language, simply do not apply when the State and the Tribe *have actually reached a Compact*.").

Petitioner also claims that the State has in the past consented to federal court confirmation of arbitration awards without contending that federal court de novo review was invalid under *Hall Street* and that it was material to the arbitration agreement. Pet. 24-25. But the State did not contest confirmation of the award in those cases, and neither party—unlike Petitioner—sought invalidation of the federal court review provision, so the issue never arose. *See Choctaw Nation of Okla. v. Oklahoma*, 724 F. Supp. 2d 1182, 1184 & n.1, 1186 (W.D. Okla. 2010); *Iowa Tribe of Okla. v. Oklahoma*, No. 5:15-CV-01379-R, 2016 WL 1562976 (W.D. Okla. Apr. 18, 2016).[12]

Petitioner next contends that the severability clause is an "all-or-nothing proposition," requiring invalidation of the whole Compact if any single provision is invalid and determined to be "material." Pet. 25-26. But that reading conflicts with the language of the Compact, which declares all provisions "shall stand separate and independent" and requires that all provisions "remain in force" except those for which the invalidated provision is "material." Pet. App. 107. This is

[12] Petitioner intimates that the State violated its Compact agreement to "defend the validity of the Compact" by arguing that the invalid de novo review provision was material to the arbitration agreement, Pet. 18, but of course this was only in response to Petitioner's initial attack on the Compact, arguing the provision's invalidity to avoid de novo review in federal court.

the opposite of an "all-or-nothing proposition," and instead requires the surgical analysis of materiality in which the court below engaged. And invalidation of the entire Compact would only lead to the same judgment already mandated in this case: vacatur of the arbitration award.

Petitioner also attempts to fall back on ethereal contentions sounding in "federal policy" or what it speculates to be the parties' "central purpose" of the waivers of sovereign immunity. *See* Pet. 21-22, 26. But again, as the Tenth Circuit correctly noted, where the text contained in the four corners of a contract is not ambiguous, courts need not resort to such policy considerations. Pet. App. 31-32.

Petitioner lastly raises concerns about the enforceability of the Compact without the arbitration clause. Pet. 26-31. Such considerations do not override the plain language of the Compact. Pet. App. 31-32. And alternative remedies may be available, such as voluntary consent to a forum by the parties, remedies explicitly provided by IGRA, and injunctive suits against state or tribal officers—even if such remedies are not those that one or both parties deems ideal. *See Bay Mills*, 134 S. Ct. at 2028-29, 2034-35; *Okla. Tax Comm'n*, 498 U.S. at 514. In the end, these concerns about remedies arise only because of sovereign immunity—a perennial reality of inter-sovereign relations that the State has long encountered and that

created the circumstances leading to this dispute in the first place. *See Okla. Tax Comm'n*, 498 U.S. at 514.

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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