No. ________

In The

Supreme Court of the United States

CITIZEN POTAWATOMI NATION,

Petitioner,

v.

STATE OF OKLAHOMA,

Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals erred in reversing the District Court's confirmation and enforcement of the Arbitrator's Award pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*.

PARTIES TO THE PROCEEDING

Petitioner, the Citizen Potawatomi Nation, is a federally recognized Native American Tribe. Petitioner was the plaintiff in the District Court and the appellee in the Tenth Circuit.

Respondent is the State of Oklahoma. The State was the defendant in the District Court and the appellant in the Tenth Circuit.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 881 F.3d 1226 (10th Cir. 2018) (App. 1). The Court of Appeals' order denying rehearing and rehearing *en banc* is not reported (App. 53). The district court's memorandum opinion and order are not reported and may be found at 2016 WL 3461538 (App. 35). The Arbitrator's Award is not reported (App. 44).

JURISDICTION

The Court of Appeals filed its opinion on February 6, 2018. It denied the Nation's timely petition for rehearing or rehearing *en banc* on March 6, 2018. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 2 of Title 9, United States Code provides in pertinent part: "(Arbitration agreements) shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Section 9 of Title 9, United States Code provides in pertinent part: "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time

within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. . . ."

Section 10(a) of Title 9, United States Code provides: "In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

Section 11 of Title 9, United States Code provides: "In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the

award upon the application of any party to the arbitration –

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties."

STATEMENT

This case arises out of the State's attempt to impose nonrelated state sales taxes on the Nation, contrary to the Nation's tribal-state gaming compact, the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq*., and without regard to the federal and tribal preemption of state taxation of on-reservation activities.

In 2004, the State presented a uniform tribal-state gaming compact on all Native American Tribes with territories within the exterior boundaries of the State,

requiring the tribes to pay substantial gaming taxes to the State in order to exercise their IGRA right to participate in Class III gaming. The Nation accepted Oklahoma's compact terms on November 30, 2004, creating the Citizen Potawatomi Nation Tribal Gaming Compact ("Compact").

The Nation did not participate in drafting or negotiating the terms of the Compact. Rather, the State presented the Nation with the same, non-negotiable proposed compact terms offered to all tribes, which were enacted into Oklahoma Statute in 2004 after the State electorate's approval of those terms by legislative referendum. 3A O.S. Supp. 2004 §§ 280-281.

In exchange for paying the state gaming tax, the Nation has secured by gaming compact its IGRA right to operate Class III gaming facilities, bringing millions of dollars in gaming tax revenues to the State, employing thousands of hotel and casino workers, and bringing much needed revenues for the provision of tribal governmental services in the form of health, education, law enforcement, community recreation facilities, roads, utilities, and other community services.

The tribal-state gaming compacts, dictated by the State, provide for fair and impartial arbitration of all tribal-state disputes arising out of compacted gaming facilities pursuant to the rules of the American Arbitration Association ("AAA"). 3A O.S. Supp. 2004 § 281(12)(2). The tribal-state gaming compacts provide the tribes an AAA arbitration forum for the resolution

of impermissible State interferences in compacted gaming facility activities.

The Compact applies to any Compact "facility," which is defined in the Compact as any tribal building on tribal land within the meaning of the IGRA where the Nation conducts games covered by the Compact. The Nation has two such Compact facilities – its Grand Casino and its FireLake Entertainment Center, both of which are located on federal trust lands held for the Nation's benefit.

The Compact sets the conditions under which the Nation's Compact facilities are entitled to sell and serve alcoholic beverages, and provides at Part 5(I):

> The sale and service of alcoholic beverages in a facility shall be in compliance with state, federal, and tribal law in regard to the licensing and sale of such beverages.

The Nation has numerous enterprises that support the tribal government and citizenry. The Nation imposes its own sales tax on sales of goods and services by tribal businesses on tribal lands to support governmental services and infrastructure for the Nation. The Nation's sales tax rate is equal to or exceeds the cumulative State, county, and city sales taxes imposed in any geographical area adjacent to the Nation's jurisdiction. Per the Compact, the Oklahoma Tax Commission ("OTC") has no role in regulating or oversight of any gaming conducted by the Nation.

OTC Initial Administrative Involvement

In 2001, an OTC representative conferred with the Nation's Vice-Chairman and requested that the Nation submit periodic State sales tax reports for sales of goods by tribal businesses on tribal lands, with the express agreement and assurance that the purpose of this request was solely to facilitate administrative convenience to the OTC, and that the Nation should invariably report its sales tax collections for all of its sales as "0". This was consistent with the Nation's historical practice of never collecting the State's sales tax on sales to either tribal or nontribal members.

On May 28, 2014, the OTC initiated an adverse administrative complaint against the Nation demanding revocation of all the Nation's alcoholic beverage permits, including those of Compact facilities, on the ground that the Nation had not reported sales tax collections on the State's behalf (the "OTC Administrative Action").[1] For the first time, the OTC asserted that the Nation was violating State laws by reporting its sales tax collections as "0", as the Nation had been asked to do by the OTC. In the OTC Administrative Action, the OTC did not deny that its representative made the

[1] The Court of Appeals references a dispute between the Nation and the State's Alcoholic Beverage Laws Enforcement Commission as to whether the Nation was permitted to sell alcoholic beverages "by the drink" on Sundays in light of a county restriction. This matter has been dismissed as moot because county voters repealed the restriction in the 2016 general election. *See* Pott. Cty. Okla. Dist. Ct. Case No. CV-2015-30, *Citizen Potawatomi Nation v. Oklahoma ABLE Commission* (dismissed by agreed order on November 18, 2016).

referenced assurances to the Nation in 2001, but instead, contended that such assurances were irrelevant.

The OTC Administrative Action is the first and only time the State has taken any enforcement action against any Native American Tribe asserting that State sales taxes apply to all sales by a Native American Tribe to nontribal members.

On October 27, 2014, the Nation objected to the proceedings, arguing that the Compact's dispute resolution procedures were the exclusive means by which to resolve the dispute, and moved to either dismiss or to stay the matter pending arbitration. On December 15, 2014, the OTC's Administrative Law Judge declined to dismiss the matter, but issued a stay because the dispute "necessarily implicate(d) a condition under the Compact."

Early Dispute Resolution and Arbitration Demand

All of the State's oversight responsibilities under the Compact are to be carried out by the Office of State Finance or its successor agency. 3A O.S. Supp. 2004 § 281(3)(25). The Compact requires that in the event of any dispute, the party asserting noncompliance must first serve written notice on the other party. *Id.* at (12)(1). The parties are to meet within thirty days of the receipt of this notice to attempt to resolve the dispute amicably and voluntarily. If the dispute cannot be resolved amicably, either party may refer the dispute to arbitration under AAA rules. *Id.* at (12)(2).

On October 24, 2014, the Nation gave notice to the State to request a meeting for voluntary dispute resolution. The State objected to the sufficiency of the notice. In an attempt to actualize the required meeting, rather than quarreling over the question of notice requirements, the Nation sent a second notice on December 4, 2015 to the State's Governor and the Attorney General, and to State Representative Paul Wesselhoft, the former Chair of the defunct State-Tribal Relations Committee of the Oklahoma Legislature. 3A O.S. Supp. 2004 § 281(14).

At the January 7, 2015 meeting, without seeking the Nation's consent, the State's representatives placed video cameras in their designated meeting room. The Nation protested that this did not reflect an effort to engage in good faith discussions but proceeded with the meeting nonetheless. The Governor's then General Counsel, Steve Mullins, was the State's lead representative, and he argued that the Compact's dispute resolution procedures did not govern the dispute. When the Parties reached an impasse on this question, Mr. Mullins asked the Nation to forgo arbitration in favor of seeking immediate federal judicial resolution of the dispute. The Nation declined to deviate from the Compact's terms and issued its Arbitration Demand on April 27, 2015.

Resumption of OTC Administrative Action

The OTC *en banc* reversed the ALJ's stay of the OTC Administrative Action on April 14, 2015, and the matter resumed at that time. After a closed hearing,

the matter was submitted for decision via written presentation. The OTC contended that the State could revoke the alcoholic beverage permits of all the Nation's enterprises – including specifically its Compact facilities – on the ground that the Nation refused to submit to the State's demands for all of the Nation's entities and departments to collect, report, and remit sales taxes on sales to nontribal members on tribal lands. The OTC stated: "The CPN is obligated to collect, report and remit sales taxes on sales to nonmembers."

The OTC's threat to revoke the Compact facilities' alcoholic beverage permits imperiled those facilities' ability to compete in the marketplace by preventing them from selling and serving alcoholic beverages. *See* 37 O.S. §§ 163.7; 528(A)(7); 577. More pointedly, the OTC's threat was conditioned on the Nation, and all its entities and departments, collecting, reporting, and remitting sales tax on all sales to nontribal members, which have no relation either to the Nation's Compact facilities or to the sale of alcoholic beverages.

On October 29, 2015, the OTC's Administrative Law Judge issued an order recommending that the OTC revoke all of the Nation's alcoholic beverage and sales tax permits. On January 14, 2016, on review, the ALJ Order was adopted without alteration by the OTC *en banc*. On February 11, 2016, the Nation appealed this determination in Oklahoma Sup. Ct. Case No. 114,695 *In re. Complaint for Revocation of the Licenses/ Permits of the Citizen Potawatomi Nation* ("State Court Appeal"). On the same day in the State Court Appeal,

the Nation filed a Motion for Summary Disposition or, in the Alternative, to Stay which argued that the Order of the OTC should be summarily reversed for lack of jurisdiction and legal infirmity. The Nation alternatively asked that the appeal be stayed pending the Arbitrator's Award. On March 28, 2016, the Oklahoma Supreme Court denied the Nation's Motion for Summary Disposition and stayed proceedings in the State Court Appeal for sixty days.

Arbitration

In Arbitration, the Nation maintained that its Compact facilities are in compliance with State laws governing sales of alcoholic beverages, that under the Compact, the State may not lawfully revoke the Nation's alcoholic beverage permits, that the State's enforcement action in its own tribunal against Compact facilities was contrary to the dispute resolution procedures of the Compact, and that the terms of the State's Sales Tax Code do not apply to an Indian Tribe, and that if the terms were applicable, the State's attempts at taxation were preempted by federal and tribal interests.

On May 20, 2015, the Arbitrator, the Honorable Daniel J. Boudreau ("Arbitrator") was chosen by agreement of the Parties at the suggestion of the State. The Arbitrator was an Oklahoma state court jurist for twenty-four years, including stints as a Justice of the Oklahoma Supreme Court, Vice-Chief Judge of the Oklahoma Court of Civil Appeals, and a Tulsa County Special Judge and District Judge. Since his retirement

from the Court, he has worked as a University of Tulsa School of Law professor and as an arbitrator certified by the AAA.

On August 7, 2015, the Arbitrator ruled that the dispute was arbitrable.

The arbitration proceeding was conducted on February 16-17, 2016. The Nation's Vice-Chairman Linda Capps testified as to the history of the interaction between the OTC and the Nation. As to the Parties' intended meaning of the Compact's terms at issue, the Nation presented the testimony of former Oklahoma Governor Bradford Henry and the Nation's Chairman John A. Barrett, who were the signatories to the Compact.

Former Oklahoma Governor Bradford Henry testified at Arbitration that he directed and oversaw the model gaming compact negotiations and was the State's signatory on the Compact.

Governor Henry explained why the State adopted arbitration as the Compact's dispute resolution method, testifying:

> To the best of my recollection, I think it was maybe a couple of reasons: Number one, arbitration is generally less expensive and cumbersome than litigation, and you can get to a resolution quicker; number two, there were concerns about maintaining the sovereignty of both sides, the state's and the tribe's. And the tribes obviously didn't want the state trying to pull them into state court to resolve

> claims. And it was decided that arbitration was the best way to maintain the sovereign immunity on both sides. (App. 116).

While representatives of certain Native American tribes were included by the State in the process of drafting the model gaming compact language, the Nation was not among these tribes. The Compact at issue here was authored by the State and offered to the Nation as a "take-it-or-leave-it" proposition. Accordingly, the Nation could not have conditioned its consent to an arbitration clause on a particular standard of review, and the Nation's Chairman John A. Barrett entered no testimony to that effect.

As to the Parties' intended meaning of Part 5(I) of the Compact, both Chairman Barrett and Governor Henry testified that the Compact was not intended to subject the Nation to the taxation urged by the State.

Governor Henry testified that Part 5(I) of the Compact, which relates to the sale of alcoholic beverages, was intended to ensure that minors had no access to alcohol, not as leverage to enforce other laws outside of the Compact. Governor Henry explained that model compact negotiations were delicate and that the State's primary goal was to obtain a portion of tribal gaming revenues to supplement funding for education, and " . . . the last thing (the State) would have wanted to do, in my opinion, is try to backdoor in some language to require these Tribes that we're trying to get a deal with, to pay other taxes that they weren't paying." (App. 118).

Governor Henry acknowledged that because the State could not call its portion of tribal gaming revenues a "tax", the model gaming compact deemed these payments an "exclusivity fee" made in exchange for the State's promise that compacting Tribes would have an exclusive right to conduct Class III gaming in the State. (App. 117).

As to the economic aspects of a *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) preemption analysis, the Arbitrator considered the testimony of Chairman Barrett, the Nation's Director of Planning and Economic Development, Dr. James Collard, and Dr. Joseph P. Kalt, Professor Emeritus at the John F. Kennedy School of Government at Harvard University, the Nation's expert witness.

Dr. Kalt testified that there is an explicit federal policy regarding Native American self-determination and that:

> (T)he federal government has been on a quite consistent path in which it is seeking to fulfill its trust responsibilities to Tribes by letting the Tribes hold the reins of self-government in order to hopefully make better decisions and begin to move Tribes, both culturally and economically, politically forward under their own decision-making as Tribal Nations under self-rules of self-governance. (App. 114).

As to the Nation's provision of governmental functions and services, Dr. Kalt testified that:

> (The Nation) is extremely well-known, actually, for its going well beyond its provision of services and performance of governmental functions than what would have been allowed by just the level of federal funding. (App. 114).

Dr. Kalt testified that given the Nation's millions of dollars of payments in Compact exclusivity fees and mixed beverage taxes, the incremental burdens on the State caused by the Nation's economy were not uncompensated, stating:

> (T)he State of Oklahoma does not have any uncompensated burdens. In fact, it's benefitting from a wealthy neighbor, or getting wealthier neighbor, that is producing its own GDP now, the Citizen Potawatomi Nation, that benefits the State of Oklahoma. And there's no evidence that I can find that indicates that the State is suffering some uncompensated burden as a result of the Tribe's success in developing its own economy . . .
>
> Two hundred and fifty million dollars spending by the Citizen Potawatomi Nation will generate five hundred million dollars, a little more than five hundred million dollars, of economic activity overall in the region. Well, that level of economic activity will far outweigh any uncompensated burden that we could imagine. It's implausible to imagine that there's, you know, a quarter of a billion or half a billion dollars' worth of uncompensated burden. (App. 115).

The State's only witness in Arbitration was former Gubernatorial General Counsel Steve Mullins, who maintained that the State could attach any condition whatsoever, including taxation of activities unrelated to the sale of alcoholic beverages, to the Nation's licensure for alcoholic beverage sales, testifying:

> I believe that there is no restriction to applying Oklahoma law in an Indian gaming facility at this time. We could compact around it, but we have not. (App. 113).

General Counsel Mullins went on to testify that he did not believe that the State was seeking to compel the Nation to pay taxes, but that it sought to compel the Nation to file tax reports as a condition of maintaining alcoholic beverage permits at the Compact facilities. (App. 113).

The State offered no testimony or other evidence material to a *Bracker* analysis or to the Parties' intended meaning of the Compact terms at issue.

The Arbitrator issued the Award on April 4, 2016, first reiterating that the underlying dispute was arbitrable, then finding that the State's attempt to levy a tax on sales made within tribal jurisdiction by the Nation to nontribal members is unlawful and barred by the doctrine of federal preemption. This is because the Nation established:

> a. Significant federal and tribal interests in the Nation's self-governance, economic self-sufficiency, and self-determination;

> b. The Nation alone invests value in the goods and services that it sells, does not derive such value through an exemption from State sales taxes, and imposes its own equivalent tribal sales tax on the sales;
>
> c. The State possesses no economic interest beyond a general quest for additional revenue in imposing a sales tax on the Nation's transactions and suffers no uncompensated economic burden arising therefrom; and
>
> d. The federal and tribal interests at stake predominate significantly over any possible State interest in the transactions upon which the State seeks to impose its sales tax. (App. 50)

Finally, the Award enjoined the State from taking any further action to divest the Nation's Compact facilities of the right to sell and serve alcoholic beverages or threaten other enforcement actions against them on the ground that the Nation does not comply with the State's sales tax laws. (App. 51).

State Administrative and Appellate Proceedings Post-Arbitration

On April 5, 2016, in the State Court Appeal, the Nation filed a notice of the Award and a request for a finding that the issues presented in the State Court Appeal had been resolved by the Award. On May 16, 2016, the Oklahoma Supreme Court stayed the State Court Appeal until further order of the Court. On July 26, 2016, the State moved to lift the stay. On September 2, 2016, the Oklahoma Supreme Court stayed

proceedings in the State Court Appeal until the conclusion of all federal court appeals.

On March 2, 2016, while the Arbitrator was deliberating, the State, through its OTC, attempted to close all businesses of the Nation for purported non-compliance with Oklahoma state law. The hearing on the Nation's objection to this notice has been stayed by the OTC Administrative Law Judge pending the outcome of the State Court Appeal.

On May 6, 2016, the State, through its OTC, refused to renew the Nation's existing licenses and permits for purported non-compliance with Oklahoma state law. The hearing on the Nation's objection to this action was initially stayed by the OTC Administrative Law Judge pending the outcome of the State Court Appeal, but the OTC *en banc* reversed this order and the ALJ heard the matter on October 26, 2016, despite the existence of the District Court's injunction. On February 9, 2017, the OTC *en banc* adopted the Administrative Law Judge's recommendation to deny the renewal applications for CPN's non-Compact facilities, but staying a determination as to the renewal applications for CPN's Compact facilities. The Nation appealed this determination to the Oklahoma Supreme Court, which consolidated the matter into the existing State Court Appeal. On September 2, 2016, the Oklahoma Supreme Court stayed the consolidated state court appeals pending the outcome of these federal court proceedings.

District Court Confirmation of Arbitration Award

On April 13, 2016, the Nation applied for confirmation and enforcement of the Award. The District Court possessed jurisdiction pursuant to U.S. Const. art. I, § 10; 9 U.S.C. §§ 1 *et seq*.; 25 U.S.C. § 2710; and 28 U.S.C. §§ 1331 & 1362.

On May 4, 2016, the State moved to vacate the Award, arguing that because the Compact's arbitration clause called for "de novo" review, the State was either entitled to review of the Award under a standard other than that contained in the Federal Arbitration Act ("FAA") or that the arbitration clause should be vacated. This, despite the Compact's requirement that the Parties are to defend the validity of the Compact. *See* 3A O.S. Supp. 2004 § Part 13(B). The State also asserted FAA § 10(a)(4) arguments for vacation of the Award and challenged the Award on its merits.

On June 17, 2016, the District Court heard oral argument on the competing motions and then announced from the bench that it would confirm and enforce the Award in its entirety. The District Court determined that, pursuant to *Hall Street Associates, L.L.C. v. Mattel, Inc*., 552 U.S. 576 (2008), the FAA standard of review was exclusive, and the arbitration clause was valid. The District Court then engaged in an FAA review of the Award and found the State's FAA § 10(a)(4) arguments unpersuasive.

The District Court's Memorandum Opinion and Order and Judgment confirming and enforcing the

Award were filed on June 21, 2016. (App. 35; 43). The State filed its Notice of Appeal on July 21, 2016.

Court of Appeals' Reversal of District Court Judgment

The Tenth Circuit Court of Appeals heard oral arguments on March 22, 2017, and issued its opinion on February 6, 2018, reversing the District Court's judgment and remanding the matter with an order to vacate the Arbitration Award. (App. 1).

In vacating the Award, the Court of Appeals did not reach the State's FAA § 10(a)(4) arguments or the merits of the Award. Instead, the Court of Appeals determined that the non-FAA standard of review contained in the Compact's arbitration clause was so integral that the entirety of the Compact's arbitration clause was unenforceable and should be severed from the Compact. The Court of Appeals directed the District Court to vacate the Arbitration Award.

This decision is contrary to the aims of the FAA, the federal policy favoring arbitration agreements, the mechanics of decisions reviewing arbitration agreements which contain non-FAA standards of review, and the language of the Compact.

The Court of Appeals declined to grant rehearing or rehearing *en banc* on March 6, 2018.

REASONS THE PETITION SHOULD BE GRANTED

I. THIS COURT'S DECISIONS IN *HALL STREET* AND *CONCEPCION* DO NOT MANDATE AN INVALIDATION OF THE COMPACT'S ARBITRATION CLAUSE

The question of whether parties to an arbitration agreement may contractually alter the FAA standard of review is settled law.

In *Hall Street*, 552 U.S. at 578 (2008), this Court held:

> But (FAA) § 9 makes evident that expanding § 10's and § 11's detailed categories at all would rub too much against the grain: § 9 carries no hint of flexibility in unequivocally telling courts that they 'must' confirm an arbitral award, 'unless' it is vacated or modified 'as prescribed' by §§ 10 and 11. Instead of fighting the text, it makes more sense to see §§ 9-11 as the substance of a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway.

In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011), this Court succinctly reiterated: "(P)arties may not contractually expand the grounds or nature of judicial review." (*citing Hall Street*, 552 U.S. at 578.)

The District Court and Court of Appeals correctly determined that the Compact's non-FAA standard of

review was infirm. However, the Court of Appeals erred in finding that the entire arbitration clause was thereby invalidated.

The Court of Appeals also correctly observed that in *Hall Street*, this Court declined to determine whether the arbitration clause at issue in that case could survive the severed standard of review. However, the Court of Appeals noted that the Ninth Circuit opinion giving rise to *Hall Street*, relying on a previous Ninth Circuit decision to the same effect, found that the arbitration clause survived invalidation of the non-FAA standard. *Hall Street Associates, L.L.C. v. Mattel, Inc*., 113 Fed. Appx. 272, 273 (9th Cir. 2004) (*citing Kyocera Corp. v. Prudential-Bache Trade Services, Inc*., 341 F.3d 987, 1002 (9th Cir. 2003).

In 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. While this falls short of an affirmative prohibition on such a determination, it demonstrates the rarity of the Court of Appeals' decision.

The Nation contends that this is because federal policy so strongly favors the enforcement of arbitration agreements. The FAA § 2 provides that:

> (Arbitration agreements) shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

This is a congressional declaration of a liberal federal policy favoring arbitration agreements. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24 (1983). The FAA's central purpose is that arbitration agreements be enforced according to their terms. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp*., 559 U.S. 662, 664 (2010). An agreement to arbitrate may only be invalidated by generally applicable contract defenses such as fraud, duress, or unconscionability. *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

This Court will resolve any ambiguities as to the scope of the arbitration clause itself in favor of arbitration. *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ*., 489 U.S. 468, 476 (1989). This Court's canons of construction also provide that any ambiguity in the Compact is to be resolved in favor of the Nation. *Winters v. United States*, 207 U.S. 564 (1908).

The Court of Appeals did not identify a particular contract defense as its grounds for invalidating the Compact's arbitration clause. Instead, the Court of Appeals found that the Parties' Compact-based sovereignty waivers are linked to "de novo" judicial review of arbitration awards, and so the State would not have consented to arbitration under an FAA standard of review. The Nation contends that the Parties' mutual sovereignty waivers are more meaningfully linked to the central purpose of obtaining an arbitration venue and a mutually effective means of Compact enforcement.

The Court of Appeals determined that the Compact's language unambiguously demonstrated that the "de novo" language was so integral that the State would not have assented to arbitration without federal de novo review. The Nation contends that the mere presence of the "de novo" language neither states nor implies such integrality.

As noted by the panel decision, neither Party offered its conception of whether the Compact's "de novo" language contemplated issues of fact, law, or both. The Nation declined to speculate because of *Hall Street*'s dictate that any non-FAA standard of review is impermissible. However, if, as the Court of Appeals suspected, the State contends that it contemplated a full-bore federal trial de novo post-arbitration, it would make arbitration a futile exercise if the non-prevailing Party could simply start from scratch in federal court.

If the State contends that it contemplated some more limited federal de novo review, the State would have had at least constructive knowledge that the Tenth Circuit had determined in *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001), that the FAA standard of review may not be contractually expanded, though the issue was not resolved in all federal courts until this Court's 2008 *Hall Street* decision.

As the Court of Appeals observed, parties to a compact cannot alter federal law. *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997). If the State included the "de novo" language with the intent that arbitration was entirely non-binding or with the

intention to arbitrate only if *Bowen* were overturned, this would seem to constitute less than the good faith compact negotiation required by IGRA. 25 U.S.C. § 2710(d)(7)(A)(i).

The State concedes that it has no extrinsic evidence to support its contention as to the integrality of the standard of review. The panel recognized that the Nation had no role in drafting the standard of review language, and that, at minimum, Governor Henry did not testify that a "de novo" standard of review was integral to the State's inclusion of the Compact's arbitration clause.

Further, the State's prior conduct regarding the arbitration clause does not suggest that the State believed that "de novo" review was as integral as the Court of Appeals determined. According to the records of the Oklahoma Secretary of State, there are thirty-two tribal-state gaming compacts which contain arbitration clauses identical to the one at issue in this cause.[2]

The Nation is unaware of any previous instance in which the State has argued in federal court that the arbitration clause in its model compact is unenforceable in light of *Bowen* or *Hall Street*.

To the contrary, the State has previously arbitrated gaming compact disputes and assented to

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[2] *See* https://www.sos.ok.gov/gov/tribal.aspx. Oklahoma's tribal gaming compacts are grounded in the Model Tribal Gaming Compact, codified at 3A O.S. Supp. 2004 §§ 280-281.

federal court confirmation of the arbitral awards. *Choctaw Nation v. Oklahoma*, 724 F.Supp.2d 1182 (W.D. Okla. 2010); *Iowa Tribe of Okla. v. Oklahoma*, 15-cv-1379-R, 2016 WL 1562976 (W.D. Okla. April 18, 2016); *Sheffer v. Buffalo Run Casino, PTE, Inc*., 315 P.3d 359, 362-363 (Okla. 2013).

Additionally, the Court of Appeals' construction of the Compact's severability clause is erroneous. Part 13(A) of the Compact reads:

> 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.

The Parties agreed that federal courts are empowered to determine that any portion of the Compact is invalid, and the remaining portions will remain in effect unless the invalidated provision is material. This is crafted as an all-or-nothing proposition.

The Nation argued that *Hall Street* required the District Court to invalidate the "de novo" language, but that the provision was not so material as to prevent the remaining portions of the Compact from remaining in full force and effect.

The State sought, and obtained, a construction not permitted by the text – that if the "de novo" language was invalid, it was so material as to require the invalidation of the arbitration clause, but not so material as to invalidate the remainder of the Compact. The Compact's text does not permit this sort of intermediate materiality determination.

The Nation requests that the Court reverse the Court of Appeals' determination that because the "de novo" language cannot survive a *Hall Street* analysis, the Compact's entire arbitration clause is thereby invalid.

II. THE COURT OF APPEALS' DECISION POTENTIALLY RENDERS THIRTY-TWO STATE-TRIBAL GAMING COMPACTS UNENFORCEABLE

The Court of Appeals expressed uncertainty as to whether it was required to consider the consequences of its invalidation of the arbitration clause, out of a concern that this might be tantamount to a public policy determination. (App. 32). The Nation submits that there is an express federal policy in favor of the enforcement of arbitration agreements. This federal policy inheres a consideration of the consequences of judicial invalidation of an arbitration clause. Further, the Court of Appeals examined the relationship between the arbitration clause and the Parties' sovereignty waivers.

The Court of Appeals found that "(i)n its brief on appeal, Oklahoma solemnly states it will readily litigate (gaming compact) disputes in federal court." The Nation infers that the Court of Appeals believes that the State has conceded that, in compact enforcement disputes, the State must transpose its Compact Part 12(3) sovereignty waiver from federal arbitration confirmation actions to federal compact enforcement actions brought as a matter of first instance.

The State observed in its Court of Appeals Reply Brief that: "(T)the State has told the Tribe that it will readily litigate (gaming compact) disputes in federal court." However, this statement is colored by the State's contention in its Court of Appeals Brief in Chief that:

> The text of the arbitration agreement conditions the availability of arbitration on de novo judicial review, and it contains sovereign immunity waivers that would not be effective without de novo review. (App. 118).

The State goes on to posit that compact enforcement in federal court might be possible not due to the Compact's express waivers, but through IGRA actions initiated by the State or "officer suits" potentially available to both parties.

These approaches are hardly equivalent to the Compact's enforcement mechanisms, both because of their limited subject matter and their inability to provide an avenue for the recovery of money. *See e.g.* 25 U.S.C. § 2710(d)(7)(A)(ii); *Seminole Tribe v. Florida*,

517 U.S. 44 (1996); *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278 (11th Cir. 2015); *Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, 737 F.3d 1075 (6th Cir. 2013); *Florida v. Seminole Tribe*, 181 F.3d 1237 (11th Cir. 1999); *Ponca Tribe of Okla. v. State of Oklahoma*, 89 F.3d 690 (10th Cir. 1996).

Perhaps most materially, IGRA permits a state to enjoin class III gaming activity conducted on Indian lands in violation of a gaming compact, but it does not create a concomitant cause of action whereby a tribe may enforce the provisions of a gaming compact against a state. 25 U.S.C. § 2710(d)(7)(A)(ii). This lack of comprehensive, bilateral enforceability is precisely why this and other gaming compacts contain arbitration clauses.

The Nation has a reasonable apprehension that the State may consider the statement in its Reply Brief as something other than an express waiver of Eleventh Amendment defenses.

The Court of Appeals' decision rightly recognizes that immunity is an important aspect of sovereignty and that the Compact's waivers are "narrow and purposeful." (App. 30). *See e.g. Seminole Tribe*, 517 U.S at 54-55 (a Tribe's waiver must be express); *MCI Telecommunications Corp. v. Public Serv. Comm'n of Utah*, 216 F.3d 929, 936 (10th Cir. 2000) (a State's waiver must be express and unequivocal).

Should the entirety of Part 12(2) of the Compact be stricken, the Compact will read as follows:

In the event that either party to this Compact believes that the other party has failed to comply with any requirement of this Compact, or in the event of any dispute hereunder, including, but not limited to, a dispute over the proper interpretation of the terms and conditions of this Compact, the following procedures may be invoked:

1. The goal of the parties shall be to resolve all disputes amicably and voluntarily whenever possible. A party asserting noncompliance or seeking an interpretation of this Compact first shall serve written notice on the other party. The notice shall identify the specific Compact provision alleged to have been violated or in dispute and shall specify in detail the asserting party's contention and any factual basis for the claim. Representatives of the tribe and state shall meet within thirty (30) days of receipt of notice in an effort to resolve the dispute;

3. 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.

> Nothing herein shall be construed to authorize a money judgment other than for damages for failure to comply with an arbitration decision requiring the payment of monies. (App. 107).

The parties' mutual immunity waivers are for the limited purpose of federal court review of an arbitration award. Additionally, the parties' consent to imposition of a monetary judgment is limited to damages for failure to comply with an arbitration decision requiring the payment of monies. If Part 12(2) is excised, the parties' waivers would be rendered problematic if neither party may obtain: a) the arbitration award predicate to federal court review; or b) monetary relief in arbitration.

As noted above, to the best of the Nation's knowledge, the State has entered into thirty-two tribal gaming compacts with identical arbitration clauses. These Compacts facially expire on January 1, 2020, and may be automatically renewed for fifteen year terms. *See* 3A O.S. Supp. 2004 § 281 (Part 15(B)).

The panel decision acknowledges that the effect of the decision will extend to all compacting tribes. (App. 19). Any enforcement problems would not be confined to the Nation but would extend to the other tribes who have compacted with the State, as well as to the State itself. Amending the State's voter-approved take-it-or-leave-it model compact is not a simple proposition.

In 2015, Oklahoma's 124 compacted gaming facilities employed an annual average of 27,944 people.[3] In fiscal year 2017, compacting tribes paid nearly $134 million in exclusivity fees to the State.[4] Jeopardizing the enforceability of these compacts will likely have significant economic consequences.

Because this decision may have the effect of limiting the ability of both the State and the compacting tribes to enforce their gaming compacts, this Court should grant certiorari to: a) reverse the Court of Appeals' decision to invalidate the Compact's arbitration clause; b) affirm the finding that the "de novo" standard of review is violative of *Hall Street*; and c) remand for a review of the decision of the District Court under an ordinary FAA review.

[3] http://oiga.org/wp-content/uploads/2018/01/OIhttps://ok.gov/OSF/documents/GameCompAnnReport2017-e.pdfGA-Impact-Report-2016.pdf

[4] https://ok.gov/OSF/documents/GameCompAnnReport2017-e.pdf

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted

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