IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

JANE DOE, by and through her parents and next friend, J.H.,
Plaintiff-Respondent,
v. **No. 29,350**

SANTA CLARA PUEBLO, SANTA CLARA DEVELOPMENT CORPORATION, d/b/a BIG ROCK CASINO, **(Ct. App. No. 25,125)**
Defendants-Petitioners,

First Judicial District Court, Santa Fe County; Hon. Carol Vigil, District Judge

consolidated with

IVAN LOPEZ and LUCY LOPEZ,
Plaintiffs-Respondents,
vs. **No. 29,351**

SAN FELIPE PUEBLO d/b/a SAN FELIPE CASINO HOLLYWOOD and CIS INSURANCE GROUP, **(Ct. App. No. 25,884)**
Defendants-Petitioners.

Thirteenth Judicial District Court, Sandoval County
Hon. Louis McDonald, District Judge

ON WRITS OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

PETITIONERS' CONSOLIDATED REPLY BRIEF

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INTRODUCTION

Petitioners originally filed their consolidated Brief-in-Chief ("Pet. Br.") in this matter on October 17, 2005, asking this Court to reverse the decision of the Court of Appeals. That court held that in the 2001 tribal-state class III gaming compact (the "Compact") that was entered into between the State of New Mexico and a number of Indian tribes in the state, including Petitioner Tribes, the state and the tribes had agreed that tort suits by casino patrons was a subject that was "directly related to, and necessary for, the licensing and regulation of [class III gaming] activity," and was thus within the scope of what could be "allocated" to state court jurisdiction under the provisions of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 - 2721 ("IGRA"), particularly § 2710(d)(3)(C)(ii). *Doe v. Santa Clara Pueblo*, 2005-NMCA-110, 118 P.3d 203. Petitioners urged in their brief that the Compact manifests no such agreement, that IGRA does not permit the shifting of jurisdiction over ordinary tort claims to state courts in any event, and that thus these cases may only be heard in the respective tribal courts of the Petitioner Tribes, or in binding arbitration under the terms of the Compact.

Three briefs have been filed in response, by counsel for Respondent Jane Doe in No. 29,350 ("Doe Br."), by counsel for Respondents Ivan and Lucy Lopez in No. 29,351 ("Lopez Br."), and by *amicus curiae* New Mexico Trial Lawyers Association ("NMTLA Br.").[1] The arguments advanced in these briefs to some extent mischaracterize the issues in the case, and avoid addressing the critical language of IGRA that Petitioners believe to be controlling here. Respondents and amici also make some fairly startling claims as to state jurisdiction in Indian country, and tribal power to waive federal law limits on that jurisdiction, that in some respects, at

[1]Amicus briefs were also filed in support of Petitioners by the Pueblo of Pojoaque, by the Pueblos of Tesuque and San Felipe and the Mescalero Apache Tribe, and by the Pueblos of Laguna, Santa Ana, Taos, Acoma, Isleta, Sandia and San Juan and the Jicarilla Apache Nation.

least, directly contradict the reasoning of the Court of Appeals decision they are defending. Petitioners will address each of the principal arguments advanced by Respondents and the Trial Lawyers, and will explain how those often imaginative claims ultimately fail to overcome the clear language of IGRA and the Compact that controls the issues presented here.

ARGUMENT

I. RESPONDENTS AND AMICI FUNDAMENTALLY ERR BY CONFLATING THE DISTINCT ISSUES OF SOVEREIGN IMMUNITY AND SUBJECT MATTER JURISDICTION.

The Lopez brief is primarily notable for the fact that it is almost entirely premised on a fundamental misstatement of the central issue in this case, a flaw that is shared to some extent by the other two response briefs as well. The issue addressed throughout Petitioners' Brief-In-Chief, as even a glance at the Table of Contents demonstrates, is that state courts lack *subject matter jurisdiction* over suits by casino patrons against tribes or tribal gaming enterprises, and that nothing in IGRA authorizes a tribe and a state to agree to transfer such jurisdiction to state court in a class III gaming compact. Lopez carefully avoids the jurisdictional issue almost entirely, and instead conflates it with the issue of tribal sovereign immunity, around which the entire Lopez brief is constructed. The Lopez argument is essentially that a tribe is free to waive its sovereign immunity (actually, the brief generally frames the point as one of freedom to waive "immunity from suit *in state court*;" *see, e.g.*, Lopez Br. at 2, 4, 6, 14, 19, 22 (emphasis added), demonstrating precisely the conflation of distinct concepts that fatally flaws the entire brief), that nothing in IGRA prohibits it from doing so, that there is a clear waiver of tribal immunity in Section 8 of the Compact, and that there is thus no obstacle to these suits proceeding in state

court. The Doe brief and the Trial Lawyers' brief make essentially the same point, in slightly different terms. Doe Br. at 17-21; NMTLA Br. at 27-30. As will be shown, that a tribe has the ability to waive its immunity from suit is undisputed here, but that does not resolve the issue of subject matter jurisdiction. Thus the bulk of the Lopez brief is essentially irrelevant to the issues before the Court.

There is of course no doubt that in any case in which an Indian tribe, or an entity that is wholly owned by the tribe, is a party, sovereign immunity is an issue, at least impliedly if not expressly. As was explained in Petitioners' Brief-In-Chief at 8 n.6, the waiver of tribal sovereign immunity contained in Section 8(D) of the Compact is expressly limited to actions brought in accordance with the terms of that section, that is, in arbitration proceedings or in a "court of competent jurisdiction." Thus, if the court in which the action is filed has subject matter jurisdiction, there is a corresponding waiver of immunity and the case may proceed. If the court does not have jurisdiction, however, the waiver does not apply, and the action must be dismissed on the grounds both of lack of subject matter jurisdiction and the absence of any applicable waiver of immunity. Petitioners have focused their argument before this Court on the question whether state courts may be deemed "courts of competent jurisdiction" in cases such as these, rather than on the immunity issue, because while the jurisdiction issue is, at best, much disputed, there is no doubt about the existence of the waiver if it is found that the court has jurisdiction.[2]

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[2]The Trial Lawyers' baseless assertion that if Petitioners lose in this Court, they will then claim on remand that "they have no power to waive their sovereign immunity," NMTLA Br. at 25-26, n.12, is thus utterly untrue, besides being impertinent. Similarly, the Doe brief's rant against tribal sovereign immunity, Doe Br. at 22, is entirely irrelevant to the issues here, and equally inappropriate.

The Lopez brief simply tries to paper over and conceal the distinction between the two issues, however, especially in the careful and constant use of the phrase, "waiver of sovereign immunity from suit in state court." This phrase is completely unhelpful. A waiver of immunity does no more than permit the sovereign to be sued in a court that otherwise has subject matter jurisdiction. Subject matter jurisdiction, however, is created by law; it cannot be created by the act of a party, or even by agreement of all parties. The cases so holding, from New Mexico and elsewhere, are plentiful and fully in accord. *See, e.g., Ottino v. Ottino*, 2001-NMCA-012, ¶ 12, 130 N.M. 168, 171 ("parties cannot, by agreement, extend the district court's subject matter jurisdiction"); *Daniels Ins. Agency, Inc., v. Jordan*, 99 N.M. 297, 299, 657 P.2d 624, 626 (1982) ("Parties may not contract to grant or divest a court of subject matter jurisdiction; such jurisdiction is established only by law."); *Castro v. Viera*, 541 A.2d 1216, 1221 (Conn. 1988) ("Subject matter jurisdiction, unlike jurisdiction of the person, cannot be created by consent or waiver."); *Wisconsin's Environmental Decade, Inc., v. Public*, 267 N.W.2d 609, 616 (Wis. 1978) ("It is fundamental that parties cannot confer subject matter jurisdiction on a court by their waiver or consent."); *In re A.C.S.*, 157 S.W.3d 9, 15 (Tex.Ct.App.2004) ("subject matter jurisdiction cannot be conferred by agreement"); *Knowlton v. Knowlton*, 110 P.3d 578, 579 (Okla.Civ.Ct.App.2005) ("Parties may not confer subject matter jurisdiction by consent."); *Stock West, Inc., v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228 (9th Cir. 1989) ("a party cannot waive by consent or contract a court's lack of *subject matter* jurisdiction") (emphasis in original). Many more authorities could be cited.

The important and conclusive distinction between the defense of sovereign immunity, on the one hand, and the question whether a court has subject matter jurisdiction over a suit

involving a tribe or an Indian entity, on the other, has been noted by numerous courts, including courts of this state. For example, in *Weeks Const., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668 (8th Cir. 1986), a suit by a contractor against the tribal housing authority for breach of contract, the contractor argued that its contract with the housing authority included a waiver of immunity from suit in federal court, but the Eighth Circuit explained that that waiver, while it might be effective to eliminate a sovereign immunity defense, could not create subject matter jurisdiction that did not otherwise exist. "Mere consent to be sued, even consent to be sued in a particular court, does not alone confer jurisdiction upon that court to hear a case if that court would not otherwise have jurisdiction over the suit." *Id*. at 671. The waiver of immunity, the court explained, "only nullifies the Housing Authority's use of sovereign immunity as a possible defense to Weeks' breach of contract action. . . . [It] does not determine in what forum a suit against the Housing Authority may properly be brought." *Id*. at 672. The court determined that there was no federal court jurisdiction for the action, and that the tribe's tribal court was probably the appropriate forum for the action. *Id*. at 674.

The same rule applies in state courts, as is shown by the decision of the New Mexico Court of Appeals in *Jicarilla Apache Tribe v. Bd. of County Comm'rs*, 116 N.M. 320, 862 P.2d 428 (Ct. App. 1993), *reversed on other grounds*, 118 N.M. 550, 883 P.2d 136 (1994). In that procedurally unusual case, the tribe brought an action against the county in state district court, seeking to prevent it from maintaining a road over land that the tribe had purchased in fee simple. The state district court, following trial, dismissed the claims, and the tribe (and an adjacent landowner, whose land was also crossed by the road and who had filed separately) appealed.

On appeal, the tribe contended that the state district court had never had subject matter jurisdiction over the tribe's suit in the first place, inasmuch as the suit involved interests in land owned by the tribe that was, the tribe argued, therefore not subject to state jurisdiction. The Court of Appeals was willing to entertain that argument, explaining that the issue of subject matter jurisdiction can never be waived, and that, "although neither party raises the issue of sovereign immunity on appeal, we nevertheless note that, *even if we found that the tribe waived its sovereign immunity, our jurisdictional analysis still would compel reversal of the district court on jurisdictional grounds*." 116 N.M. at 328, 862 P.2d at 436 (emphasis added).[3]

The same point was made in *Tohono O'odham Nation v. Schwartz*, 837 F. Supp. 1024 (D. Ariz. 1993), in which a tribe and its wholly owned housing authority filed suit in federal court to enjoin a state court from entertaining a breach of contract action that had been filed by a contractor against the housing authority. The contractor claimed that the housing authority's waiver of sovereign immunity amounted to a grant of subject matter jurisdiction to the state court, but the federal district court was unpersuaded. As it said, "A housing authority's waiver of sovereign immunity cannot render it universally amenable to action in any forum that a plaintiff selects . . . Rather, *a waiver only renders a housing authority amenable to suit in a court of competent jurisdiction*." 837 F. Supp. at 1031 (emphasis added; citations omitted). Finally, a very recent decision by an appellate court in California, which happened to involve a patron's tort claim against a tribal casino, similarly noted the distinction between an effective waiver of

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[3]On *certiorari* review, this Court, while not disagreeing with the Court of Appeals' point as to the important distinction between subject matter jurisdiction and waiver of sovereign immunity, reversed on the jurisdictional issue, holding that New Mexico courts did have the authority to adjudicate interests in land lying outside of an Indian reservation that arose prior to the land's purchase by a tribe.

immunity and subject matter jurisdiction. I n *Campo Band of Mission Indians v. Superior Court*, ___ Cal.Rptr.3d ___, 2006 WL 473775, *6-*7 (Cal.Ct.App., March 1, 2006), the court ruled that by agreeing to arbitration of patrons' personal injury claims, the tribe had waived its immunity, but it concluded that that waiver did not allow the tribe to be sued in state court to force such arbitration.[4]

As is shown in Petitioners' Brief-In-Chief, Petitioners fully agree with the point so vigorously argued by Lopez and the Trial Lawyers, that a tribe has complete power to waive its sovereign immunity as it sees fit. The Lopez and Trial Lawyers' briefs' arguments on this point do no more, thus, than demolish a strawman. As numerous courts have held, however, waivers of immunity are to be strictly construed, and any limitations on such waivers that are imposed by a tribe "must be strictly construed and applied." *Missouri R. Servs., Inc., v. Omaha Tribe*, 267 F.3d 848, 852 (8th Cir. 2001); *R & R Deli, Inc., v. Santa Ana Star Casino*, 2006-NMCA-020, ¶ 10, 128 P.3d 513, 516. Here, as noted above, the waiver of immunity contained in Section 8(D) of the Compact only applies to claims that are "asserted as provided in this section," that is, in a court of competent jurisdiction or in arbitration. The waiver thus merely poses, but does not answer, the question presented here for decision: is state court a "court of competent jurisdiction" in this context? The Lopez brief fails entirely to address that question, because it

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[4]In a recent decision of the New Mexico Court of Appeals, *R & R Deli, Inc., v. Santa Ana Star Casino*, 2006-NMCA-020, 128 P.3d 513, the court noted that the district court had dismissed the complaint on grounds of both lack of subject matter jurisdiction and tribal sovereign immunity. 2006-NMCA-020, ¶ 6, 128 P.3d at 515. On appeal, appellant claimed that there was an applicable waiver of immunity, but the court of appeals disagreed. It found that that neither of the waivers of immunity claimed by appellant applied, and stated, "Thus, we need not address whether tribal court jurisdiction was exclusive." *Id*. at ¶ 8, 128 P.3d at 515. Plainly, however, were the theory of the Respondents in this case correct, the waiver issue would have been dispositive of the question of jurisdiction.

assumes, completely incorrectly, that the mere fact of the waiver of immunity obviates the need to answer it.

All three response briefs rely heavily on *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001), for the contention that a mere waiver of immunity suffices to give state courts jurisdiction over suits against Indian tribes in all cases, *see* Lopez Br. at 6-7; Doe Br. at 17; NMTLA Br. at 22, 27, but this reliance is completely misplaced. In *C & L Enterprises*, the Supreme Court held that a tribe's agreement to a contract that contained a provision for arbitration of disputes amounted to a "sufficiently clear" waiver of the tribe's immunity from suit to enable the other party to enforce the requirement of arbitration and to enforce any award of the arbitrators in a court of competent jurisdiction, even in the absence of express "waiver" language. The contracting party went to state court to enforce the award, and the Supreme Court upheld that court's ability to entertain the action. But as the facts of the case make clear, the only concern was whether there was an applicable waiver of immunity: there was no issue as to whether the state court had jurisdiction, because the construction project that was the subject of the contract was located outside the tribe's reservation, on non-trust property. 532 U.S. at 414. As the Supreme Court has clearly held, "'Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state.'" *Wagnon v. Prairie Band Potawatomi Nation*, 126 S. Ct. 676, 688 (2005) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)). Nothing in the *C & L Enterprises* decision, thus, either discusses or has any bearing on the rule of exclusive tribal court jurisdiction over causes of action against tribes or tribal members that arise within Indian country.

The Trial Lawyers quote from two previous decisions of this Court, *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 4, 128 N.M. 154, 156, and *Srader v. Verant*, 1998-NMSC-025, ¶ 29, 125 N.M. 521, 529-30, in which this Court observed that tribes may not be sued in tribal, state or federal court without their consent. NMTLA Br. at 30. Those statements were and are true, as far as they go. Both cases were general attacks on Indian gaming in New Mexico, and this Court was dealing with the contention that the gaming tribes were indispensable parties who could not be joined. The fact that the tribes enjoyed sovereign immunity from suit was clear and dispositive, and both cases were decided on that issue. There was no need in either case for the Court to get into the far more complex issue of jurisdiction, and it did not bother.

The Lopez brief cites several decisions from other states in support of its view that any issue of jurisdiction is resolved by a waiver of immunity, but like *Coll* and *Srader*, none of them actually addresses jurisdiction as a distinct issue; rather, they are all focused almost exclusively on whether a tribe had effectively waived its sovereign immunity. *Bradley v. Crow Tribe of Indians*, 67 P.3d 306 (Mont. 2003), deals with the question whether the absence of a signed contract in the record could support a finding that the tribe had waived its immunity, where the former tribal chairman testified that she had signed the contract and the unsigned form did contain such a waiver. The court held that that testimony and partial performance by the tribe was sufficient for a finding that the tribe's immunity had been effectively waived. Dissenting, Justice Nelson observed that there were "two fundamental issues of jurisdiction present in this case, tribal sovereign immunity from suit and tribal court jurisdiction versus state court jurisdiction. . . . The majority opinion fails to properly address either of these issues." 67 P.3d at 312.

Similarly, *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo.Ct. App. 2004) speaks only to the question whether sovereign immunity may be waived by one with apparent authority; the issue of state court jurisdiction is nowhere mentioned. *Smith v. Hopland Band of Pomo Indians*, 115 Cal.Rptr.2d 455 (Cal.Ct.App. 2002), likewise addresses only the issue of whether there was an effective waiver of sovereign immunity, and says nothing whatever of jurisdiction; and indeed, the issue of jurisdiction would have been irrelevant in that case, inasmuch as California is a Public Law 280 state, whose courts thus have full jurisdiction to hear civil causes of action involving Indians arising within Indian country. *See* 28 U.S.C. §1360.

In short, no case cited by either of the Respondents[5] or their amici (or otherwise known to Petitioners' counsel) holds that a waiver of sovereign immunity by a tribe, however effective, *also* serves to permit a state court to assume jurisdiction over an action against the tribe or a tribal entity that would otherwise be within the rule of exclusive tribal court jurisdiction established by *Williams v. Lee*, 358 U.S. 217 (1959). This effort to avoid the jurisdictional issue presented here must be firmly rejected.

II. ABSENT A "GOVERNING ACT OF CONGRESS," *WILLIAMS* DICTATES THAT THESE CASES ONLY BE HEARD IN TRIBAL COURT, AND NO TRIBE HAS "INHERENT AUTHORITY" TO AVOID THAT RULE.

Respondents and the Trial Lawyers go so far as to argue that wholly apart from the Compact, these cases are not ones that would be subject to the exclusive jurisdiction of the Santa Clara and San Felipe tribal courts, respectively, under *Williams*. Lopez Br. at 4-5; Doe Br. at 24-

[5]Lopez also cites the New Mexico Court of Appeals decision in *Sanchez v. Santa Ana Golf Club, Inc.*, 2005-NMCA-003, 136 N.M. 682, but this case, again, deals solely with the issue of tribal sovereign immunity, and affirms the completely undisputed proposition that a tribe has the power to waive that immunity and that the terms of such waivers will be given full effect.

26; NMTLA Br. at 35-38. Were that true, of course, then that would be the end of the discussion: there would be no need to consider whether IGRA provides authority for a *transfer* of jurisdiction to state courts, or whether the Compact manifests an unqualified consent to such transfer, if state courts could hear these cases notwithstanding *Williams*.

Importantly, not even the Court of Appeals in *Doe* would venture onto such obviously thin ice. It acknowledged, as this Court has done repeatedly, that "'[*e*]*xclusive tribal jurisdiction exists* . . . when an Indian is being sued by a non-Indian over an occurrence or transaction arising in Indian country.'" 2005-NMCA-110, ¶ 7, 118 P.3d at 206 (quoting *Found. Reserve Ins. Co. v. Garcia*, 105 N.M. 514, 516, 734 P.2d 754, 756 (1987)) (emphasis added). It further observed that while Congress had provided statutory authority for states to assume jurisdiction over civil cases involving Indians that arise in Indian country, by Public Law 83-280, Act of Aug. 15, 1953, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360) (commonly known as "Public Law 280"), New Mexico had never availed itself of that opportunity. "Therefore," the Court of Appeals declared in *Doe*, "if New Mexico courts have subject matter jurisdiction in this case *it must derive from the IGRA*." 2005-NMCA-110, ¶ 8, 118 P.3d at 206 (emphasis added).

Nonetheless, Respondents contend that these actions are not governed by *Williams*, for two reasons: first, that *Williams* only applies to actions against Indian individuals, and is inapplicable to an action against a tribe where the tribe has waived its immunity from suit (obviously, a variation of the ill-conceived "immunity waiver resolves jurisdiction" theory addressed in the previous section); and second, that regardless of *Williams*, tribes have the "inherent right" to consent to suit in state court. Unsurprisingly, none of the three briefs cites any

case against a tribe in which such a proposition was accepted as overriding the *Williams* rule of exclusive tribal court jurisdiction, and cases not cited by Respondents or the Trial Lawyers demonstrate plainly that these arguments are frivolous.

The first argument is best reflected in the Trial Lawyers' brief at 35-38. The Trial Lawyers contend that *Williams* merely provides a "roadmap" for determining the extent to which state courts may exercise jurisdiction within Indian country, and they cite "*Temple*" [*sic*; should be *Tempest*] *Recovery Servs., Inc.*, *v. Belone*, 2003-NMSC-019, ¶ 14, 134 N.M. 133, 137 for the proposition that that exercise may extend "'up to the point where tribal self-government would be affected'" (quoting *State ex rel. Dep't of Human Servs. v. Jojola*, 99 N.M. 500, 502, 660 P.2d 590, 592 (1983)). From that they reason that since the Pueblos in the Compact "waived their immunity and selected the state district court as a proper forum for litigation," NMTLA Br. at 36,[6] allowing state courts to exercise jurisdiction would in no way "'impinge upon tribal

[6]The Trial Lawyers' brief reflects a striking lack of candor in its characterization of the Compact language regarding where patrons' tort suits may be brought. From start to finish, it represents that the Compact makes a deliberate choice of state court as the proper forum for such suits, as if that were the sum total of the Compact provision regarding available forums. *See* NMTLA Br. at 4, 5, 6, 7, 8, 17, 21, 22, 25, 26, 31, 36, 38. Especially noteworthy is the assertion on p. 31, that "the Pueblos could not have been more emphatic in their stated desire to have immunity-waived tort claims litigated in state district court." In fact, of course, the Compact states, in Section 8(A), that "the Tribe agrees . . . to proceed *either in binding arbitration proceedings or in a court of competent jurisdiction*, at the visitor's election." (Emphasis added.) The last sentence of that paragraph states only that such claims may be brought in state court "unless it is finally determined that IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state courts." (That quoted phrase is almost universally ignored in the Trial Lawyers' frequent references to the "may be brought in state district court" passage.) The Trial Lawyers mention "court of competent jurisdiction" only once in their brief, at 8, and then only when purporting to characterize Petitioners' claims. They never acknowledge that that is actually the language of the relevant Compact provision. They also fail to acknowledge Section 8(E), which is the operative section regarding a visitor's election of forum, and which states, in its entirety, as follows: "A visitor having a claim described in this section may pursue that claim in any court of competent jurisdiction, or in binding arbitration. The visitor shall make a written election that is final and binding upon the visitor." Finally, the Trial Lawyers totally

sovereignty.'" *Id*. at 38 (*quoting Tempest Recovery Servs*., 2003-NMSC-19, ¶ 15, 134 N.M. at 138). A similar argument is made in the Lopez brief at 5, and, in a somewhat distorted form, in the Doe brief at 24-27.[7] The premise of this contention, of course, is that the tribes deliberately elected to have these cases be heard in state court. But that premise is thoroughly belied by the plain language of Section 8(A) of the Compact, which states the central agreement of the parties to be that such claims would be heard in "binding arbitration proceedings or in a court of competent jurisdiction." The agreement to allow suits to be filed in state courts was obviously conditional, and subject to a judicial determination as to whether IGRA permitted the transfer of jurisdiction over such suits to state courts. This is made all the more clear by Section 8(E), which states the procedure to be followed by a prospective claimant in selecting a forum: state court is nowhere mentioned. *See supra* n. 6.

More importantly, however, this awkward contention misses the entire point of *Williams*' language about whether challenged state action "infringed on the right of reservation Indians to make their own laws and be governed by them." 358 U.S. at 220. Seen in context, it is apparent that the Court is not referring in this passage to some direct interference with a tribe's governing

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disregard the arbitration option. This highly selective citation to the record seriously undermines the credibility of the Trial Lawyers' assertions as to tribal sovereignty and rights of self-government, discussed in the text.

[7]The Doe brief, at 23, claims that Petitioners argue that even if IGRA were found to permit the shift of jurisdiction over patrons' tort suits to state court, such a shift would be invalid under the *Williams* rule. This is a serious misreading of Petitioners' argument. The Doe brief essentially has the argument backwards. As is set forth in Petitioners' Brief-in-Chief at 8-12, under the *Williams* rule the instant cases would clearly be within the exclusive jurisdiction of the tribal courts, unless some "governing Act[] of Congress" expressly authorized state courts to assume jurisdiction over them. *Williams*, 358 U.S. at 220. The question that is teed up for decision by Section 8(A) of the Compact, and that is presented here, is whether IGRA is such a "governing Act of Congress" with respect to cases such as these. If is it, that enactment controls, and state courts could hear these cases consistent with *Williams*.

body: the case before the Court, after all, was a mere private suit to collect on an open account for groceries, a case that had nothing whatever to do with the operation of the Navajo tribal government. The Supreme Court was plainly looking much more broadly at the concept of tribal self-government. As it noted, approvingly, "Congress has . . . acted consistently upon the assumption that States have *no power* to regulate the affairs of Indians on a reservation." *Id.* (Emphasis added.) It explained its ruling best in the final paragraph of the opinion, saying, "[t]here can be no doubt that *to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs* and hence would infringe on the right of the Indians to govern themselves." *Id*. at 223 (emphasis added). It was the authority of the tribal courts to determine the rules governing the conduct of Indian people on their own lands that was threatened by the exercise of state court jurisdiction in that case, and that was the broad governmental interest that the Court was protecting.

Thus the arbitrary and irrational parsing and "weighing" of interests reflected in the Doe brief at 24-27 is utterly inappropriate in applying the *Williams* rule. Rather, that decision requires that *any* suit against an Indian or Indian entity that arises within Indian country may *only* be heard in tribal court, and that, indeed, is precisely the reading that this Court has given *Williams*, as is shown by a key passage in *Tempest Recovery Services* that was evidently overlooked by both Respondents and their amici (but that was acknowledged by the court below): "'*Exclusive tribal jurisdiction exists* . . .when an Indian is being sued by a non-Indian over an occurrence or transaction arising in Indian country.'" 2003-NMSC-019, ¶ 14, 134 N.M. at 137 (quoting *Found. Reserve Ins.*, 105 N.M. at 516, 734 P.2d at 756) (emphasis added).

The contention that the considerations that motivated the Supreme Court in *Williams* all evaporate when a tribe waives its immunity is unsupported by anything in that opinion (and is, as has been shown above, contrary to law); indeed, the concerns about not having state courts dictate rules of conduct applicable to Indians on their own land are, if anything, far greater when the defendant is a tribe or tribal entity than when it is an individual dealing in his or her private affairs. The closely related argument that a tribe has an "inherent right" to choose to be sued in state court, moreover, has been expressly rejected by the Supreme Court, in *Kennerly v. District Court*, 400 U.S. 423 (1971). That case, which, like *Williams*, was an ordinary suit on an open account by an on-reservation non-Indian merchant against two tribal members, involved a distinctive fact: the Blackfeet Tribal Council had expressly enacted as part of the Blackfeet Tribal Law and Order Code a provision purporting to grant concurrent jurisdiction to state courts over "'all suits wherein the defendant is a member of the Tribe.'" 400 U.S. at 425 (quoting Blackfeet Law and Order Code, ch. 2, § 1). The question presented to the Court was whether this unilateral action by the Tribal Council, the governing body of the tribe, sufficed to allow Montana state courts to exercise jurisdiction over ordinary civil actions arising on the reservation and involving Indian parties. The Court held that it did not, and that only strict compliance with statutory authority enacted by Congress would suffice to permit state courts to exercise jurisdiction that would otherwise be exclusively in the tribal court under *Williams*.

Kennerly is plainly of central importance to the issues presented here, especially given the arguments that were presented in the responsive briefs. It is thus instructive to examine how Respondents and amici deal with it. The Doe brief and the Trial Lawyers' brief simply ignore the case: neither brief even cites *Kennerly*, much less acknowledges that the Supreme Court has

expressly held that a tribe may not voluntarily consent to suit in state court. Yet the Trial Lawyers, in particular, assert that tribes do in fact have such right. *See* NMTLA Br. at 22 ("Even without express federal permission, Tribes can agree to state court jurisdiction over cases in which the Tribes have waived sovereign immunity, agreed to the application of state law to the dispute and agreed to state court as a forum for litigation."), and 35-36 (referring to Pueblos' "inherent sovereign right" to select state court as forum to hear tort suits).[8] The Lopez brief's primary response to *Kennerly* is to change the subject, making the irrelevant point that the decision does not take away from the rule that tribes "have the inherent authority to waive their sovereign immunity from suit." *Id*. at 9.[9] The brief further attempts to dismiss the case as only being concerned with whether the Blackfeet Tribal Council action complies with Public Law 280, which issue, Lopez contends, is of no consequence here since New Mexico never accepted jurisdiction under that law.[10] The Lopez brief ends its discussion of the case with the contention that "[t]he simple fact that New Mexico did not acquire jurisdiction under P.L. 280 does not mean that P.L. 280 thereby precludes New Mexico from acquiring jurisdiction by other means."

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[8]It must be noted that these contentions, besides being erroneous, are essentially irrelevant in this case: the tribes only agreed that state courts could hear patrons' tort claims if IGRA "permits" such a transfer of jurisdiction. Compact at Section 8(A).

[9]The Lopez brief also makes the stock response that *Kennerly* "clearly is limited to its facts," Lopez Br. at 9, a proposition that finds no support whatever in the decision itself, or in its subsequent treatment by the Court, as is explained in the text.

[10]The Trial Lawyers make the additional argument that Public Law 280 does not, in any event, allow state courts to assume jurisdiction over cases against tribes themselves, NMTLA Br. at 34, and it is true that some courts in P.L. 280 states have so ruled. *See, e.g., LaMere v. Superior Court*, 31 Cal.Rptr.3d 880, 883 (Cal.Ct.App. 2005). But that fact, if true, does not mean that it is therefore *easier* to sue a tribe in state court, as the Trial Lawyers seem to imply; rather, it means that there is *no* federal law exception to the *Williams* rule of exclusive tribal court jurisdiction as to such cases.

Id. at 9. In fact, it means exactly that, unless there is some other "governing Act of Congress" that authorizes such an assumption of jurisdiction.

Kennerly bears careful examination. The opinion notes the "detailed regulatory scrutiny which Congress has traditionally brought to bear on the extension of state jurisdiction, whether civil or criminal, to actions to which Indians are parties arising in Indian country," 400 U.S. at 425 n.1, *and see id.* at 427, and it views *any* assumption of state court jurisdiction over such civil actions as absolutely forbidden, unless in strict compliance with authority enacted by Congress.

The only such authority was Public Law 280. Even before its amendment in 1968, which added the requirement that any transfer of jurisdiction to state courts be approved by a majority vote of tribal members, *see* 25 U.S.C. § 1326, that Act required that the state affirmatively enact legislation assuming such jurisdiction, something that Montana had not done. Consequently, the Court held, the attempted conferral on state courts of concurrent jurisdiction over civil actions arising in Indian country involving tribal members by the Blackfeet Tribal Council was simply void. The fact that the opinion largely focuses on the requirements of Public Law 280, thus, does not, as the Lopez brief contends, make it irrelevant here: the Court looked to that statute because that was the *only* existing authority under which otherwise exclusive tribal court jurisdiction could be transferred to a state court, and if the Tribal Council's action did not comply with that statute's requirements, it was void.[11] The opinion leaves no doubt that there is *no such thing* as an "inherent sovereign right" of a tribe to agree to state court jurisdiction over cases that are otherwise subject to the exclusive jurisdiction of the tribal courts.

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[11]Public Law 280 has been described by the Court as "the primary expression of federal policy governing the assumption by States of civil and criminal jurisdiction over the Indian Nations." *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 884 (1986).

That this is so was made even clearer the next time *Kennerly* was discussed by the Supreme Court, in *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1972), a seminal Indian law decision in which the Court held that a state may not tax the income of a tribal member employed within the tribe's Indian country. Throughout the opinion, the Court noted the absence of state authority over Indian people within Indian country, but it also noted that Congress had provided a method whereby states could assume such jurisdiction, in Public Law 280. Arizona, however, like New Mexico, never took advantage of that statute, and that fact struck the Court as a major weakness in the state's argument in the case before it. Citing *Kennerly*, the Court observed that "a startling aspect of this case is that appellee apparently concedes that, *in the absence of compliance with 25 U.S.C. § 1322(a)* [Public Law 280], *the Arizona courts can exercise neither civil nor criminal jurisdiction over reservation Indians*." 411 U.S. at 178 (emphasis added). It added that unless Arizona believed that it could administer its tax system without judicial intervention, "the admitted absence of either civil or criminal jurisdiction would seem to dispose of the case." *Id*. at 179. In short, the *McClanahan* Court plainly saw compliance with Public Law 280 as the *only* means by which a state court could obtain jurisdiction over civil causes of action involving Indians arising within Indian country.

The Trial Lawyers claim, at pp. 37-38 of their brief, that since the tribes "exercised their sovereign right" to consent to state court jurisdiction in Section 8 of the Compact, for the courts to "honor the Pueblos' choices" would "demonstrate respect for the principles of tribal sovereignty that *Williams v. Lee* protects." Interestingly, the very same claim was made in *Kennerly*, by Justice Stewart, in dissent. He urged that there, where the governing body of the tribe had expressly chosen to allow state courts to hear cases arising on the reservation and

involving tribal members, the exercise of such jurisdiction by a state court surely could not be viewed as "infringing 'the right of reservation Indians to make their own laws and be ruled by them,'" citing *Williams*. Indeed, Stewart opined, it was the Court's refusal to give force to the Tribal Council's enactment that interfered with tribal self-government. 400 U.S. at 430-31. But the majority opinion rejected that reasoning, and neither the Respondents nor the Trial Lawyers offer any rationale as to how it survives that decision.

In short, the contention that the tribes have an unfettered, "sovereign" right to override the *Williams* rule of exclusive tribal court jurisdiction, which is the centerpiece of the Respondents' and Trial Lawyers' arguments here, is simply incorrect. That federal law doctrine may not waived or contracted away, unless Congress has created express statutory authority for such transfer, and that authority is strictly complied with.[12]

III. IGRA'S PURPOSE AND CAREFULLY CRAFTED LANGUAGE DEMONSTRATE THAT ANY ALLOCATION OF JURISDICTION TO STATE COURTS WAS TO BE LIMITED TO THAT NECESSARY FOR REGULATION AND LICENSING OF GAMING ACTIVITY

In their Brief-in-Chief, at 12-23, Petitioners explained that one of the overriding concerns of Congress in crafting IGRA was the possibility that tribal class III gaming would be infiltrated by criminal elements. The states urged, and Congress ultimately agreed, that allowing states to be involved in the regulation of tribal gaming was the best defense to such infiltration, but how to accomplish that consistent with the deeply rooted "'policy of leaving Indians free from state

[12]This Court seems to have understood this principle for a long time. In *Your Food Stores v. Village of Española*, 68 N.M. 327, 330, 361 P.2d 950, 953 (1961), it observed that Article XXI, sec. 2 of the state constitution "left no room for a claim by the state to governmental power over the Indians or Indian lands, *except where such jurisdiction has been specifically granted by Act of Congress* . . ." (Emphasis added.)

jurisdiction and control,'" *McClanahan*, 411 U.S. at 168 (quoting *Rice v. Olson*, 324 U.S, 786, 789 (1945)), was the challenge. The drafters of the bill settled on the device of the tribal-state compact–a negotiated agreement–as the means by which states and tribes could reach an accord as to the extent and nature of state regulation of tribal class III gaming activity, thereby at least avoiding the appearance of a unilateral foisting of state authority on tribes. These concerns, Petitioners urged, should inform the assessment of what jurisdictional transfer is allowed by 25 U.S.C. § 2710(d)(3)(C)(ii), which authorizes a class III gaming compact to provide for the "allocation of criminal and civil jurisdiction between the tribe and the state necessary for the enforcement of . . . laws and regulations [that are directly related to and necessary for the licensing and regulation of class III gaming activity]." Petitioners believe that in view of the stated purposes of the Act, and the concerns motivating Congress as explained in the Act's legislative history, that language should be interpreted in accordance with its plain words, to refer to jurisdiction that relates directly to the governmental regulation of class III gaming activity. Private tort suits by casino patrons are not within the scope of that provision, and no other provision of IGRA permits any transfer to state courts of jurisdiction over such actions, or any others.

The Trial Lawyers' response to this explanation of IGRA's purpose and plan is sheer hyperbole. They claim that Petitioner's view of the Act "has no basis in reality." NMTLA Br. at 10. Like the Lopez brief, they rely almost entirely for their claim that Congress was not worried about criminal infiltration into Indian gaming on a single quote from Sen. McCain. NMTLA Br. at 11; Lopez Br. at 16. This is a desperate position to take, especially in the face of the second of the three stated purposes of the Act set forth in 25 U.S.C. § 2702(2), "to provide a statutory basis

for the regulation of gaming by an Indian tribe *adequate to shield it from organized crime and other corrupting influences*" (emphasis added), and the many cases that have expressly described the Act in exactly the terms set forth above. *E.g., Simms v. Napolitano*, 205 Ariz. 500, 502, 73 P.3d 631, 633 (Ariz.Ct.App. 2003) ("Congress has authorized the states to exercise their police power through tribal-state compacts to keep gaming free from criminal elements and to protect the gaming public, while preserving tribal sovereignty."); *Keweenaw Bay Indian Comty. v. United States*, 136 F.3d 469, 475-76 (6th Cir. 1998) (citing 25 U.S.C. § 2702(2)); *Tamiami Partners, Ltd., v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1033 (11th Cir. 1995) ("The legislative history makes clear the purpose and effect of the statute: to protect the Indian gaming industry from corruption and to provide for extensive federal oversight of all but the most rudimentary forms of Indian gaming."); *Sault Ste. Marie Tribe v. Michigan*, 800 F.Supp. 1484, 1490 (W.D.Mich. 1992) ("The statement of policy itself indicates that Congress was concerned about shielding *Indian Tribes* from organized crime.") (emphasis by the court), *app. dism'd*, 5 F.3d 147 (6th Cir. 1993).

One of the most detailed discussions of IGRA's purposes occurred in one of the first cases to consider it, *Red Lake Band v. Swimmer*, 740 F.Supp.9, 13-14 (D.D.C. 1990), *aff'd*, 928 F.2d 467 (D.C.Cir. 1991) (table), a suit brought by several tribes seeking to have the entire Act declared unconstitutional or in violation of the government's trust obligations to the Indian tribes. In granting the government's motion to dismiss, the district court explained the congressional intent behind the Act, saying,

> The Senate Report on the bill that became the Act reflects concern for the "potential for the infiltration of organized crime or criminal elements in Indian gaming activities." S.Rep. 446, 100th Cong., 2d Sess. 5 (1988), U.S. Code Cong. & Admin. News 1988, p. 3075. In reacting to this concern, Congress "considered how best to preserve the right of

> tribes to self-government while, at the same time, to protect both the tribes and the gaming public from unscrupulous persons." *Id*. at 1-2, ... After deliberation, Congress reached the conclusion that the compact process ultimately settled on "is the best mechanism to assure that the interests of both sovereign entities are met . . . " *Id*.

The case law, thus, fully supports Petitioners' view of the Act's purposes, and of the function of the compact--to provide a vehicle for state regulation of Indian gaming that would be less offensive to the tribes than merely imposing state regulatory authority directly.

The Trial Lawyers contend, however, that Congress had far "broader" concerns than mere infiltration of tribal gaming by crooks: they contend that Congress' central purpose was "providing a platform for Indian Tribes . . . to reach agreement with the States as to the proper balance between Tribal and State interests," NMTLA Br. at 12, meaning, in effect, that the real goal of IGRA–the "preeminent congressional concern"--was to force tribes and states to enter into tribal-state compacts, "negotiat[ing] as equal sovereigns." *Id*. at 12-15. This is an unsupportable proposition, for several reasons. First, tribes and states do not need congressional prodding to enter into intergovernmental agreements: they have done it on their own, hundreds of times, for a wide variety of governmental purposes.[13] Second, the main reason that Congress decided to force tribes to enter into compacts if they wished to engage in class III gaming was to insure that the states would have the opportunity to negotiate for their involvement in the regulation of such gaming. It is certainly true that the compact process gave the states and the tribes the opportunity to address a host of other gaming-related issues, but the cases and the committee report (quoted at length in Petitioners' Brief-in-Chief at 14-16) make unmistakably clear that regulation of gaming–for the purpose of keeping out the crooks and other riffraff–was

[13]The website of the National Congress of American Indians, the country's leading inter-tribal organization, www.ncai.org, has a partial listing of such agreements, under the topic, "State-Tribal Relations."

the tail that wagged the compact dog. But as the Senate committee report explained, the tribes generally resented the fact that they were being forced to reach agreements with the states if they wished to conduct gaming on their own lands. As the report stated, "The Committee balanced [strong state concerns that their laws regulating sophisticated forms of gaming be applicable to Indian gaming activities] against the *strong tribal opposition to any imposition of state jurisdiction over activities on Indian lands*." S.Rep. No. 100-446, 100th Cong. 2d Sess. 1988 (hereinafter, "S.Rep. 446"), at 13, U.S. Code Cong. & Admin. News 1988 ("USCCAN"), p.3083 (emphasis added). That opposition was exactly what prompted the *Red Lake Band* lawsuit, cited above.

Third, and contrary to the idyllic image painted by the Trial Lawyers of tribes and states sitting down together and engaging in "mutually satisfactory and beneficial negotiation between equal sovereigns," NMTLA Br. at 15, the Senate committee recognized very clearly that the compact negotiation process would be sharply tipped in the states' favor, as the states had little incentive to enter into such negotiations in the first place, and in any event did not stand to forego any "governmental rights" in such negotiations, as the tribes did. S.Rep. 446 at 13-14, USCCAN at 3083-84. Indeed, as the Supreme Court later noted, IGRA's compacting process gave the states "a power [*i.e.*, some measure of authority over gaming on Indian lands] withheld from them by the Constitution." *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996). This "unequal balance" between the parties was what motivated the Senate committee to craft an extremely complex process in the bill by which tribes could sue the states, to force "good faith" negotiations. S.Rep. 446 at 14-15, USCCAN at 3084-85; *see* 25 U.S.C. § 2710(d)(7).[14] Even so,

[14]Unfortunately, that attempt at leveling the table was eliminated by the Supreme Court in *Seminole Tribe*, where the Court held that Congress did not have the authority to abrogate state

however, the committee clearly understood that the tribes could face uphill battles in their efforts to secure fair compacts, and it included in the report a hopeful statement of its expectation that the courts in such cases would "interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes." S.Rep. 446 at 15, USCCAN at 3085.[15]

In short, the claim that bringing tribes and states together to negotiate compacts was a goal of IGRA in and of itself seriously misconstrues the plan of the statute: the compact is the device that Congress came up with as the means to enable states to become involved in regulation of class III gaming, but the compact is only a tool. Effective regulation, to keep criminals out of Indian gaming, was and is the primary goal.[16]

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sovereign immunity for the purpose of suits by tribes. Exemplary of the unavoidable result of this decision was the 1997 New Mexico compact and revenue-sharing agreement (requiring the tribes to pay the state 16% of their gross slot revenues), NMSA 1978, §§ 11-13-1, 11-13-2 (1997), which was enacted by the legislature and presented to the tribes as a "'take it or leave it' offer." *Pueblo of Sandia v. Babbitt*, 47 F.Supp.2d 49, 51 (D.D.C. 1999). This experience renders all the more poignant the Trial Lawyers' rhapsodizing about negotiations between "equal sovereigns."

[15]The Trial Lawyers call this passage a "reference to a hoary, perhaps anachronistic canon of construction." NMTLA Br. at 12 n.6. In fact, what is often referred to as the "Indian canon" is alive and well. *See Chickasaw Nation v. United States*, 534 U.S. 84, 93-95 (2001); *and see id.* at 99-101 (O'Connor, J., dissenting). The canon is routinely applied, and the cases are far too numerous to cite exhaustively. It was applied to the interpretation of IGRA in *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Attorney*, 369 F.3d 960, 971 (6th Cir. 2004), *City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir 2003) (rejecting argument that doctrine is outmoded), *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 548 (8th Cir. 1996) and *Sisseton-Wahpeton Sioux Tribe v. United States*, 804 F.Supp. 1199, 1209 (D.S.D. 1992).

[16]Respondents both urge that Congress in fact recognized a much broader range of issues arising from tribal gaming, and authorized states and tribes to address them in their compact. Doe Br. at 11-12; Lopez Br. at 15-16. That is certainly true, and the New Mexico 2001 Compact reflects the breadth of relevant issues. But that does not gainsay the fact that, contrary to the Doe brief's totally unsupported claim that IGRA "provides authority to States and Tribes to compact

That conclusion, moreover, makes even plainer (if greater clarity were needed) the intent of the first two topics listed in 25 U.S.C. § 2710(d)(3)(C), as permissible subjects of a compact. Those provisions read as follows:

> (C) Any Tribal-State compact negotiated [for the conduct of class III gaming operations] may include provisions relating to-
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> > (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are *directly related to, and necessary for, the licensing and regulation of such activity*;
> >
> > (ii) *the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations*;

(Emphasis added.) This is the only provision of IGRA that make any reference to a possible transfer to a state of jurisdiction with respect to tribal gaming.[17] It unquestionably reflects the strong congressional concern for having adequate regulatory provisions in place for tribal gaming, and demonstrates the primary purpose of the compact device–to provide the vehicle for the application of state regulatory regimes. The careful use of restrictive terminology–"directly related to," "necessary for" (a phrase that appears twice)–moreover, manifests the concern expressed repeatedly in the committee report (quoted and discussed at Petitioners' Brief-in-Chief at 16) that the imposition of state jurisdiction be strictly limited to that actually needed for an

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with respect to jurisdiction concerning all matters related to Indian gaming," Doe Br. at 11, Congress strictly limited the subjects as to which jurisdiction could be transferred to the state, to the enforcement of laws directly related to and necessary for the licensing and regulation of gaming. That Congress was willing to take such a drastic step in intruding on tribal sovereignty was solely due to its and the states' concerns about keeping criminals out of tribal gaming.

[17]Other than the language of 18 U.S.C. § 1166(d), discussed in Petitioner's Brief-in-Chief at 19-20, which is in fact a reference to the transfer allowed by 25 U.S.C. § 2710(d)(3)(C)(ii).

adequate regulatory system, and that the compact not become a device for any broader imposition of state authority in Indian country.

A careful reading of clauses (i) and (ii), moreover, shows that those provisions could not plausibly be read as encompassing private tort suits, even apart from their clear purpose to facilitate the effective regulation of gaming. Clause (i) permits the application of "laws and regulations" that are "directly related to, and necessary for, the licensing and regulation" of class III gaming. That passage necessarily refers to written laws and regulations, such as this state's Gaming Control Act, NMSA 1978, §§ 60-2E-1 through 60-2E-61.[18] Clause (ii) allows "the allocation of criminal and civil jurisdiction . . . necessary for *the enforcement of such laws and regulations*." (Emphasis added.) Thus, the only jurisdiction that may be "allocated" under IGRA is jurisdiction to enforce the regulatory and licensing laws and regulations that may be applied to tribal gaming under clause (i). Petitioners would urge, moreover, that the phrase in clause (ii), "necessary for the enforcement" of such laws and regulations, besides imposing further restrictions on the scope of the jurisdiction that may be "allocated," clearly suggests governmental action, not private litigation.[19]

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[18]To be sure, that Act was not applied to tribal gaming in New Mexico by the Compact; it is mentioned only as being exemplary of the kind of "state laws and regulations" that are plainly referred to in 25 U.S.C. § 2710(d)(3)(C)(i).

[19]In their Brief-in-Chief, Petitioners cited two cases in which tribes had been held not to be amenable to private dram-shop actions, even though the states have been granted general authority to regulate the sale of liquor in Indian country. These decisions support the argument here, that private tort suits do not have a sufficiently close nexus to the "regulation of gaming" to be within the scope of allocatable jurisdiction under clause (ii). Pet. Br. at 22. The Lopez brief claims that those cases are "inapposite," because they did not involve "statutory provisions allowing the state to assume jurisdiction" as IGRA does. Lopez Br. at 19. This assertion is incorrect. Congress has expressly given states the authority to regulate sales of alcoholic beverages in Indian country. 18 U.S.C. § 1161; *see Rice v. Rehner*, 463 U.S. 713 (1983). A very similar but much more recent decision, from the Arizona Court of Appeals, reinforces the point

That private tort suits do not fit within this language is shown clearly by the instant cases: one is a typical slip-and-fall case that alleges a negligent premises condition in the parking lot of the San Felipe Casino Hollywood; the other claims that Santa Clara's Big Rock Casino had inadequate outdoor lighting and security, contributing to the alleged abduction of the plaintiff from the parking lot of that facility. Neither claim has anything to do with the fact that the respective facilities whence the cases arose house class III gaming operations; they could have arisen as easily in the parking lots of tribal grocery stores or gas stations. Neither refers to or relies on, much less seeks to "enforce," any law or regulation of the state or the tribe for the licensing or regulation of class III gaming activities. They are founded, rather, on the ordinary common law of tort liability. There is no hint in the language or legislative history of IGRA that Congress ever imagined, much less intended, that it was authorizing the transfer to state courts of such suits against tribes and tribal gaming enterprises. Yet without some clear authority for such cases to be heard in state courts, no exception to the rule of exclusive tribal court jurisdiction over such cases is allowable.

Petitioners submit that viewing these provisions of IGRA as referring only to what they say–laws and regulations dealing with the licensing and regulation of gaming--does not force onto the words a strained or unusual or "cramped" meaning, as the Trial Lawyers claim. NMTLA Br. at 18-19. Rather, that is their plain and ordinary meaning. Respondents and their amici fail to present any other plausible interpretation of these words, and certainly none that would embrace ordinary private tort suits by casino patrons. The Lopez brief quotes the Court of Appeals, saying that IGRA "'provides very general guidance on what issues a tribal-state

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made in the Brief-in-Chief. *Filer v. Tohono O'odham Nation Gaming Enter.*, ___ P. 3d ___, 2006 WL 465841 (Ariz.Ct.App., Feb. 28, 2006).

compact may address,'" Lopez Br. at 17 (quoting *Doe*, 2005-NMCA-110, ¶ 15, 118 P.3d at 208), and that might be true of some of the other five topics listed under § 2710(d)(3)(C). But under no circumstances can the first two topics in that list, quoted above, be described as providing only "general guidance:" they set forth a precisely and narrowly described category of "laws and regulations," and they permit the transfer of such jurisdiction as is "necessary for" their enforcement. The Lopez brief offers no more, other than to retreat into its pointless assertion that this language places "no restriction on the authority of a tribe to waive its sovereign immunity from suit." Lopez Br. at 18. The Doe brief contends that "the language of the IGRA is plain and unambiguous," Doe Br. at 13, but it generally avoids dealing with the language directly, and offers no explanation of the words that would bring these cases within them. It too defers to the decision of the court below; but the Court of Appeals did not actually attempt to interpret the statutory language itself either. It rather claimed, erroneously, that the state and the tribe had agreed in the compact that patrons' tort suits were "'directly related to and necessary for the licensing and regulation of [Class III gaming] activity,'" and it simply said that it would not "second-guess" that determination. *Doe*, 2005-NMCA-110, ¶17, 118 P.3d at 209 (quoting 25

U.S.C. § 2710(d)(3)(C)(i)).[20] But no such agreement can be found in the Compact, nor, without clear authority in IGRA, would one be valid were it there.

The Trial Lawyers' brief, for the most part, when facing the clear language of clauses (i) and (ii), turns to the Compact, and discusses the protracted negotiations, the agreement that the safety of patrons and their entitlement to an effective remedy in the event of injury was viewed by the state and the tribes as important, etc. NMTLA Br. at 17-19. But the Trial Lawyers do embark on a creative, albeit unsuccessful, effort to arrive at an interpretation of the IGRA language that might allow tort suits to squeeze in, citing at length to Chief Justice John Marshall's landmark opinion for the Supreme Court in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). NMTLA Br. at 19-21. That case involved the question whether Congress had the authority under the Constitution to create a national bank, and in finding in favor of the bank Marshall expounded on the Constitution's "Necessary and Proper" clause, art. I, sec. 8, ¶ 18, which gives Congress the power to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." The case was the

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[20]The Doe brief also makes the remarkable assertion that "the issue before this Court, whether the IGRA permits jurisdiction-shifting for personal injury claims, has already been addressed by many courts and they have consistently found that it is permitted by the IGRA." Doe Br. at 9. None of the cases discussed in the section preceding that claim says any such thing. *Hatcher v. Harrah's NC Casino Co.*, 565 S.E.2d 241 (N.C.Ct.App.2002), was a suit by a non-Indian against a non-Indian management company, claiming the company failed to pay a jackpot the plaintiff had won, as to which tribal court jurisdiction would have been inapplicable. In *Ortego v. Tunica Biloxi Indians*, 865 So.2d 985 (La.Ct.App. 2004), the appellate court upheld the *dismissal* of an employee's suit against a tribe, on the ground of *lack of subject matter jurisdiction*. *Simms v. Napolitano*, 205 Ariz. 500, 73 P.3d 631 (Ariz.Ct.App. 2003), was a suit involving licensing by the Arizona Gaming Board, that did not involve any tribe or tribal entity at all, or any jurisdictional issue. Petitioner's counsel is unaware of any reported decision (other than the *Doe* decision below) the meets this description in the Doe brief, nor is any cited in any response brief.

first to affirm a broad reading of congressional power under the Constitution, and, as the Trial Lawyers emphasize, Marshall pointedly construed the term "necessary" in that clause expansively, as having the sense of "conducive to" any express power, thus rejecting the narrow construction urged by the Jeffersonians.[21] The Trial Lawyers contend that a similarly broad meaning should be given to the term in this "charter [*i.e.*, IGRA] providing for State and Tribal sovereigns to determine by agreement their relationship." NMTLA Br. at 20.

There are two main problems with this argument. First, as Marshall himself emphasized, "it is a *constitution* that we are expounding" in *McCulloch*, 17 U.S. at 407 (emphasis in the original), and indeed, a clause of the Constitution that, in effect, acknowledges the implied power of Congress to do whatever it finds appropriate for the carrying out of the specific powers enumerated in the previous seventeen clauses of article I, section 8. As Marshall conceded, "[t]his word ["necessary"], then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view." *Id*. at 414. Petitioners submit that the subject and the context of 25 U.S.C. § 2710(d)(3)(C)(i) and (ii) demonstrate that those provisions bear no similarity whatever to the constitutional "catch-all" clause being considered in *McCulloch*. Clauses (i) and (ii) address the drastic step of applying state regulatory power to tribes and their activities within Indian country, and the Senate

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[21] As Lawrence Tribe points out, however, the opinion indicates that like Madison in the 44th Federalist paper, Marshall actually believed that Congress was possessed of broad implied powers to accomplish all of the specific ends enumerated in the Constitution, regardless whether the Necessary and Proper clause even existed, and he actually decided the case on that ground. He addressed the specific language of the clause only in response to the argument that it *restricted* any implied congressional power. Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 301 n.3 (2d ed. 1988) (citing C. Black, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 14 (1969)).

committee report plainly indicates that that provision was to be strictly and narrowly interpreted and applied. S.Rep. 446 at 14; USCCAN at 3084.

Second, while the word "necessary" is the only arguable term of limitation or restriction in the Necessary and Proper clause, that is not at all true of clauses (i) and (ii). Even if one could somehow justify a broad reading of the word "necessary," there are still "directly related to" and "licensing and regulation of [class III gaming] activities" to be dealt with, and no creative reading of those terms avoids the clear implication of jurisdiction that is solely and narrowly tied to governmental regulation of actual gaming activity. *McCulloch*, in short, cannot be used to justify a magical broadening of this language that would somehow embrace ordinary tort suits.

The Lopez brief and the Trial Lawyers' brief finally argue that even if the language of 25 U.S.C. § 2710(d)(3)(C)(i) and (ii) does not embrace patrons' tort claims, an agreement to allow state courts to exercise jurisdiction over such claims is permissible under clause (vii), the catch-all provision in the list of allowable compact topics in IGRA, which allows a compact to contain provisions relating to "any other subjects that are directly related to the operation of gaming activities." Lopez Br. at 19; NMTLA Br. at 21-24. It is of course true that that provision permits compacts to address a wide range of concerns that arise from the establishment and operation of class III gaming, such as employment conditions, service of alcohol, handling of compulsive gamblers, and even assuring a remedy for patrons who suffer injuries on gaming facility premises. But the proposition that clause (vii) impliedly grants unlimited power to states and tribes to contract away tribal jurisdiction with respect to any matter that could be construed as "directly related to the operation of gaming activities" suffers from at least two significant infirmities: First, it runs head-on into the *Kennerly* rule, discussed *supra* at 15-18, that a tribe

may not agree to have state courts hear cases that would otherwise be within the exclusive jurisdiction of the tribal court, without strict compliance with express statutory authority provided by Congress. The Trial Lawyers' unsupported assertion that "Tribes do not need permission" to transfer such jurisdiction, NMTLA Br. at 22, is simply wrong. And second, it is inconceivable that Congress would take pains to describe with precision and carefully limiting language the narrow scope of jurisdiction that could be "allocated" to a state for purposes of regulating gaming, in one provision of the statute, then barely eight lines below that insert a provision that could be interpreted as allowing unlimited transfers of jurisdiction for virtually unlimited purposes. Especially given the "detailed regulatory scrutiny which Congress has traditionally brought to bear on the extension of state jurisdiction, whether civil or criminal, to actions to which Indians are parties arising in Indian country," *Kennerly*, 400 U.S. at 425 n.1, the claim that clause (vii) permits wholesale transfers of jurisdiction to state courts without limitation does not pass the straight-face test.[22]

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[22]Petitioners had pointed out in their Brief-in-Chief, at 21, that Section 10 of the Compact contains the kind of transfer of jurisdiction for enforcement of state gaming laws that is contemplated by 25 U.S.C. § 2710(d)(3)(C)(ii). The Trial Lawyers note, however, that the language of Section 10(B) appears to allow the state to prosecute crimes that may not be violations of laws regulating gaming, including "any other crime . . . that occurs on the premises of the Tribal Gaming Facility, that is committed by any person who is not a member of the Tribe." The Trial Lawyers reason rather sophistically that if Petitioners are correct as to the narrow construction to be given to clauses (i) and (ii), jurisdiction over that category of crimes could only be transferred under clause (vii), and thus, "*a fortiori*," clause (vii) must also allow the transfer of jurisdiction over patrons' tort claims. NMTLA Br. at 23. But this argument fails, for the same reasons given in the text as to the other arguments based on clause (vii). It should moreover be noted that in general, crimes committed by non-Indians within Indian country, where there is no Indian victim, have long been held subject to state jurisdiction in any event. *United States v. McBratney*, 104 U.S. 621 (1882). If the victim is an Indian, however, the crime is subject to exclusive *federal*, not tribal, jurisdiction. *Donnelly v. United States*, 228 U.S. 243 (1913); *and see United States v. Arrieta*, 436 F.3d 1246 (10th Cir. 2006). Thus, even if this category of crimes were validly transferred to state jurisdiction by Section 10(B) of the Compact, it was federal, not tribal jurisdiction that was being transferred, pursuant to 18 U.S.C. § 1166(d).

IV. THE COMPACT LANGUAGE CANNOT BE CONSTRUED AS AN UNQUALIFIED AGREEMENT BY THE TRIBES TO HAVE PATRONS' TORT SUITS HEARD IN STATE COURTS, AND THE LANGUAGE OF A VOID FORMER COMPACT MAY NOT BE CITED AS EVIDENCE OF WHAT THE 2001 COMPACT MEANS.

Although as Petitioners have repeatedly noted, the question whether IGRA authorizes a transfer to state courts of jurisdiction over suits such as the instant ones must be determinative of this case, it is nonetheless important that there be no confusion over what the tribes actually agreed to in the Compact on this subject. The court below thoroughly misstated that agreement, *Doe*, 2005-NMCA-110, ¶ 17, 118 P.3d at 209 ("The Compact demonstrates the State and Santa Clara's . . . belief that the redress of the Casino's visitors' injuries was 'directly related to, and necessary for, the licensing and regulation of [Class III gaming] activity.'") (quoting 25 U.S.C. § 2710(d)(3)(C)(I)), and the response briefs do likewise, though in different ways. Thus, the Doe brief asserts that the agreement to have these cases heard in a "court of competent jurisdiction," in Section 8(E) of the Compact, "can have no other reading but to include the State District Court as a State Court of competent jurisdiction." Doe Br. at 17. The Trial Lawyers' brief, as has been noted, *supra* n.6, essentially ignores the "court of competent jurisdiction" language, and repeatedly contends that the tribes "selected" state courts as the forum to hear these suits. Indeed, the Trial Lawyers claim, without betraying a hint of irony, that "the Pueblos could not have been more emphatic in their stated desire to have immunity-waived tort claims litigated in state district court." NMTLA Br. at 31. They characterize Petitioners' argument, that the passage allowing these cases to be brought in state court was conditional on a judicial

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And if the purported transfer is not within the scope of what is allowed by that section, to that extent it may be void.

determination that IGRA permitted such a transfer of jurisdiction, as a "strained parsing" of that passage. *Id*. at 8.

Fortunately, the words of the Compact speak best for themselves, and they demonstrate that the agreement of the parties, as shown most especially in Section 8(E), the operative provision regarding a patron's selection of forum, was that these cases could be brought in binding arbitration or in "a court of competent jurisdiction," that is, a court that otherwise has subject matter jurisdiction and has or may acquire personal jurisdiction over the parties. Nothing in Section 8 permits any inference that there was any agreement that state court was deemed to be such a court. Rather, the last sentence of Section 8(A) merely states that such cases could be brought in state court, "unless it is finally determined by a state or federal court that IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court." As Judge Sutin succinctly put it, dissenting from the decision below, "[t]he parties to the Compact expected the issue to be litigated." *Doe*, 2005-NMCA-110, ¶ 28, 118 P.3d at 211 (Sutin, J., dissenting.).

Disregarding one of the most basic rules of contract interpretation, the Doe and Lopez briefs both claim that the Court should interpret the 2001 Compact by referring to the language of Section 8 of the now-void 1997 compact. Doe Br. at 15; Lopez Br. at 20-21. It must be recalled that, as the Court of Appeals recently held, the 1997 compact is no longer in effect, and was fully superceded by the 2001 Compact. *R & R Deli, Inc.,* 2006-NMCA-020, ¶¶ 16-17, 128 P.3d at 517. That decision also noted that "[g]aming compacts are contracts between two parties, and we treat them as such." 2005-NMCA-020, ¶ 20, 128 P. 3d at 518. The parol evidence rule provides that "when a contract has been reduced to writing, which the parties intend to be a complete

statement of their agreement, any other written or oral agreements or understandings . . . made prior to or contemporaneously with the written 'contract' and which relate to the same subject matter are not admissible to vary, contradict or enlarge the terms of the written contract." *Chapman v. Haney Seed Co., Inc.*, 102 Idaho 26, 624 P.2d 408, 410 (1981). New Mexico cases have allowed parol evidence to *explain terms* of a contract, *see, e.g., C.R. Anthony Co. v. Loretto Mall Partners*, 112 N.M. 504, 509, 817 P.2d 238, 243 (1991), but fully adhere to the rule that such evidence is inadmissible to contradict or supplement such terms. *Id*. The 2001 Compact is a fully integrated document, as is expressly stated in Section 14 ("Entire Agreement"), which states, in relevant part, "This Compact is the entire agreement between the parties and supersedes all prior agreements, whether written or oral, with respect to the subject matter hereof." Especially considering the circumstances under which the 1997 compact was produced, *see* Pet. Br. at 26-28, the suggestion that language from that unilaterally-imposed document should be viewed as a relevant "admission" by Petitioners for any purposes here is simply unacceptable. These portions of the Respondents' briefs must be disregarded.

One other aspect of the Lopez brief's argument on this point should be addressed, however. In their Brief-in-Chief, Petitioners had explained their contention that the provisions of Section 8 of the 1997 compact that purported to confer on state courts jurisdiction over tort claims were void, because that compact was never affirmatively approved by the Secretary of the Interior. *See* Pet. Br. at 28. The Lopez brief notes that in his letter explaining his non-action on the compact, the Secretary had mentioned only the revenue sharing and regulatory fee provisions as the "dubious provisions" that led him to conclude that he could not approve the compact. Lopez Br. at 21. "By implication then," that brief continues, the Secretary had no problem with

Section 8. *Id*. But that is not true. As the correspondence from the Department of the Interior cited in the amicus brief of the Pueblos of Acoma, *et al*., demonstrates, the Secretary completely agrees with the position of Petitioners in this case on the question whether jurisdiction over ordinary tort claims may be transferred to state court by a compact. Commenting on proposals that arose during negotiations leading up to the 2001 Compact, the Department made clear its position on this issue, saying,

> We agree with the tribes' statement . . . that *it is not legally possible to give a patron the choice of whether to file tort claims in tribal court or state court because Federal law does not permit such a choice.* State courts generally have no jurisdiction to entertain an action against the tribal entity involving a tort claim arising on Indian lands. The IGRA only permits the allocation of civil jurisdiction between the State and the tribe necessary for the enforcement of civil laws and regulations that are directly related to, and necessary for, the licensing and regulation of [class III gaming activities]. *This authorization for the allocation of civil jurisdiction would not extend to a patron's tort claim* because it is an area that is not directly related to, and necessary for, the licensing and regulation of a class III gaming activity.

Letter of January 28, 2000, from George T. Skibine, Director, Office of Indian Gaming Management, Bureau of Indian Affairs, to Hon. John Arthur Smith, Chairman, Legislative Committee on Compacts, at 1-2 (emphasis added). As the Acoma brief argues, this construction of IGRA by the agency charged with the duty to determine whether a proposed compact complies with the statute, *see* 25 U.S.C. § 2710(d)(8), should be accorded considerable weight.

CONCLUSION

There is, thus, no sound argument that can support the claim that IGRA contains any authority whatever for the transfer to state courts of jurisdiction over ordinary tort suits against Indian tribes or tribal gaming enterprises in New Mexico. The Respondents in these cases may

pursue their claims in tribal courts, or in binding arbitration proceedings; they may not, however, have them heard in state courts, as "there can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs, and hence would infringe on the right of the Indians to govern themselves." *Williams*, 358 U.S. at 223. Petitioners therefore respectfully request that this Court reverse the decision of the Court of Appeals in *Doe*, and its Order denying interlocutory review in *Lopez*, and direct that that court remand these cases to the district courts with directions that the complaint in each case be dismissed for lack of subject matter jurisdiction (and for lack of an applicable waiver of tribal sovereign immunity).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of March, 2006, I caused a true and correct copy of the foregoing Brief-in-Chief to be served on each of the following counsel by deposit of the same in the U.S. mail, first-class postage prepaid:

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