IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 16-2205

NAVAJO NATION; NORTHERN EDGE NAVAJO CASINO,
Plaintiffs-Appellants,

v.
BRADFORD J. DALLEY, District Judge, Eleventh Judicial District, New Mexico, in his official capacity; HAROLD MCNEAL; MICHELLE MCNEAL,
Defendants-Appellees.

Appeal from a Decision of the United States District Court for the District of New Mexico Honorable Martha Vázquez, District Judge

BRIEF OF THE PUEBLO OF SANTA ANA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT IN FAVOR OF REVERSAL

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INTRODUCTION AND INTEREST OF *AMICUS*

The Pueblo of Santa Ana (the "Pueblo") is a federally recognized Indian tribe located in New Mexico. The Pueblo wholly owns Tamaya Enterprises, Inc. ("TEI"), a federally chartered corporation that operates the Santa Ana Star Casino ("Star Casino"), solely on Pueblo of Santa Ana lands. TEI is licensed under Pueblo law to conduct class III gaming at the Star Casino, and conducts class III gaming pursuant to the Pueblo's Gaming Code, the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.*, and a gaming compact between the Pueblo and the State of New Mexico ("Santa Ana-NM Compact"). The Santa Ana-NM Compact contains jurisdiction-shifting language that is the same jurisdiction-shifting language in the Navajo Nation-New Mexico gaming compact that is at issue in this case, which language provides that claims against TEI for bodily injury or property damage arising on Pueblo lands may 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 lawsuits to state court." Santa Ana-NM Compact at Section 8(A).[1] Thus, the decision in this case

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[1]The Pueblo recently entered into the 2015 version of the compact with the State (as did the Navajo Nation). The only substantive difference between the 2015 version of the compact and the prior one, as to Section 8(A), is that the clause that formerly provided that the Pueblo "agrees to proceed either in binding arbitration or in a court of competent jurisdiction," now provides that the Pueblo "agrees to proceed either in binding arbitration or in Tribal, State, or other court of

will have precedential effect on the Pueblo.

For several years, the Pueblo has been actively seeking a determination that IGRA does *not* authorize the jurisdiction-shifting provision of the Santa Ana-NM Compact. In 2013, a dram shop action was filed against TEI in state court. TEI challenged the state court's jurisdiction. The district court dismissed the case, but it was overruled on appeal. *Mendoza v. Tamaya Enterprises, Inc.*, 2011-NMSC-030, 258 P.3d 1050. Shortly thereafter, the Pueblo of Santa Ana and TEI filed an action in the District Court for the District of New Mexico. In that action, Judge LeRoy Hansen entered a declaration that IGRA "does not authorize an allocation of jurisdiction from tribal court to state court over a personal injury claim arising from the allegedly negligent serving of alcohol on Indian land and further that the New Mexico State District Court does not have jurisdiction in the [state court dram shop action]." *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254, 1266-67 (D.N.M. 2013). Judge Vázquez, in contrast, in the case below determined that state courts *do* have jurisdiction over claims against tribal casinos arising on tribal lands. Memorandum Opinion and Order ("Opinion"), Aplt. App. at 182. Such a

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competent jurisdiction." The jurisdiction-shifting provision of Section 8(A) in the 2015 version is not substantively different from the prior version. As will be shown below, the Pueblo believes that this change in language has no effect on the legal issue presented here.

ruling "necessarily infringe[s] on the authority of the [Pueblo] to make [its] own laws and be ruled by them," *Williams v. Lee*, 358 U.S. 217, 223 (1959), and is wholly at odds with U.S. Supreme Court precedent. *Id.*; *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014). Accordingly, a determination by this Court that IGRA does not authorize the jurisdiction-shifting provision of the New Mexico-Tribal gaming compacts is required to settle this matter in accordance with IGRA's plain language and Supreme Court precedent.

All parties consent to the filing of this brief, Fed. R. App. P. Rule 29(a), and no party's counsel authored this brief in whole or in part. Fed. R. App. P. Rule 29(c)(5)(A).

ARGUMENT

I. Tribal Courts Have Exclusive Jurisdiction over Claims Against Tribal Entities Arising on Tribal Lands

It is a bedrock principle of federal Indian law that tribal courts retain exclusive jurisdiction over lawsuits arising on tribal lands against tribes, tribal members or tribal entities. *See Williams v. Lee*, 358 U.S. 217, 220 (1959). Indeed, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945) In *Williams*, the Court held that an Arizona state court had no jurisdiction to hear a

claim by a non-Indian trader against a Navajo Indian couple based on an open account for goods sold at an on-reservation trading post. 358 U.S. at 217-18. The Court determined, based on the principle of inherent tribal sovereignty, that absent a grant of jurisdiction by Congress "the States have no power to regulate the affairs of Indians on a reservation." *Id.* at 220; *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). The Court further determined that "when Congress has wished the States to exercise this power it has *expressly* granted them the jurisdiction which Worcester v. State of Georgia had denied." *Williams,* 358 U.S. at 221 (emphasis added). The Court noted that by enacting Public Law 83-280, *codified as amended at* 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326 ("P.L. 280"), Congress had expressly granted, to those states willing to assume it, jurisdiction over civil and criminal disputes involving reservation Indians. *Williams*, 358 U.S. at 222. The fact that Arizona had never accepted such jurisdiction supported the conclusion that its courts had no jurisdiction over the case before the Court. *Id.* at 223.

In the absence of such direct congressional authority, the Court continued, "the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220. The Court concluded that the exercise of state jurisdiction over the ordinary debt

collection suit before it would necessarily infringe on the authority of the tribe (and the tribal court) to establish the rules governing the conduct of its members. *Id.* at 223. In a decision more recent than *Williams*, concerning state-versus-tribal court jurisdiction, the Supreme Court observed, "to the extent that [the decision under consideration] permitted North Dakota state courts to exercise jurisdiction over claims by non-Indians against Indians . . ., it intruded impermissibly on tribal self-governance." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 148 (1984) (citing *Williams*).[2] To put it succinctly, "Unless there is a specific federal law stating otherwise, [tribal members] are subject to exclusive tribal jurisdiction. Congress's plenary authority over Indian affairs and the tradition of tribal autonomy in Indian country combine to preempt the operation of state law." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (N. Newton, ed., 2012) ("COHEN"), at 489 (footnotes omitted).

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[2]It must be acknowledged that beginning in 1997, with *Strate v. A-1 Contractors*, 520 U.S. 438 (1996), the Supreme Court issued a series of decisions that have, in sum, imposed significant limitations on the jurisdiction of tribal courts in civil actions brought *against non-Indians*. *See also, Nevada v. Hicks*, 533 U.S. 353 (2001); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008). But each of those cases involved assertions of jurisdiction by tribal courts over non-Indian defendants. The Court has never given any indication that any of those holdings has weakened the *Williams* rule of exclusive tribal court jurisdiction where the matter arises on tribal land and the defendant is a tribe, tribal member or tribal entity.

New Mexico was required to relinquish any claim to jurisdiction over Indian lands within the State by the New Mexico Enabling Act, Act of August 11, 1912, § 2, 37 Stat. 42, and did so in Art. XXI, § 2 of the New Mexico Constitution. It never elected to assume jurisdiction over tribal lands under P.L. 280. *Doe v. Santa Clara Pueblo,* 2007-NMSC-008, ¶ 20 n.5, 154 P.3d 644; *Your Food Stores v. Village of Española*, 1961-NMSC-041, ¶ 15, 68 N.M. 327, 361 P.2d 950. The New Mexico Supreme Court has thus recognized, following *Williams*, 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*." *Found. Reserve Ins. Co. v. Garcia*, 1987-NMSC-024, ¶ 10, 105 N.M. 514, 734 P.2d 754 (emphasis added); *Tempest Recovery Svcs., Inc., v. Belone,* 2003-NMSC-019, ¶ 14, 134 N.M. 133, 137. That rule of exclusive jurisdiction may be defeated only by authority expressly granted to the states by Congress.

II. A Tribe Cannot Relinquish its Exclusive Jurisdiction over Cases Arising Within its Indian Country Except as Authorized by Congress

There is no question that a tribe may waive its sovereign immunity. But sovereign immunity is not the issue here; rather, the issue is whether a tribe may voluntarily relinquish its exclusive jurisdiction over cases arising within its Indian country. The Supreme Court has held that a tribe may not relinquish such

exclusive jurisdiction without strictly complying with a federal statute that expressly authorizes such relinquishment. *Kennerly v. District Court,* 400 U.S. 423, 429 (1971). At issue in *Kennerly* was the jurisdiction of the Montana state court over a lawsuit against individual members of the Blackfeet Indian Tribe arising from private commercial transactions that occurred on the Blackfeet Indian Reservation. The state had previously assumed jurisdiction over criminal offenses that occurred on the Flathead Reservation pursuant to the Act of August 15, 1953 (the "1953 Act"), but it had not taken any legislative action (required by the 1953 Act) as to either criminal or civil jurisdiction with regard to the Blackfeet Indian Reservation. In 1967, the Blackfeet Tribal Council amended its tribal code to provide that the tribal court and the state court had "concurrent and not exclusive jurisdiction" over all civil lawsuits wherein the defendant is a member of the tribe. *Kennerly*, 400 U.S. at 425. In 1968, Congress enacted Title IV of the Civil Rights Act of 1968 (25 U.S.C. §§ 1321-1326) (the "1968 Act"), which repealed the 1953 Act and authorized states (that had not already done so under the 1953 Act) to assume civil jurisdiction over lawsuits against tribal members arising in Indian country only with the consent of the tribe, as evidenced by a majority vote of adult Indians of the tribe. 400 U.S. at 428-29. *See* 25 U.S.C. § 1326.

In *Kennerly*, the Montana Supreme Court had determined that the tribal

council's enactment of the foregoing "concurrent jurisdiction" provision gave the state court jurisdiction over the underlying lawsuit, theorizing that "the transfer of jurisdiction by unilateral tribal action is consistent with the exercise of tribal powers of self-government." *Kennerly*, 400 U.S. at 427. The U.S. Supreme Court rejected that theory, and determined that the tribal council's unilateral action was ineffective to vest the state court with jurisdiction over actions against Indians arising in Indian country under either the 1953 Act (because the state had failed to take the requisite legislative action) or the 1968 Act (because tribal consent was not manifested by a majority vote). 400 U.S. at 427-29. Clearly, had the tribe's unilateral action to transfer its exclusive civil court jurisdiction to state courts been sufficient, the Court's analysis would have begun and ended with that action. The Court's analysis makes clear 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 county." *Kennerly*, 400 U.S. at 424 n.1. And importantly, just as unilateral action by a tribe purporting to confer jurisdiction over actions against tribal members in state court is completely ineffective absent strict compliance with express congressional authorization, a contractual agreement with a state, by which the tribe purports to accomplish the same thing, is equally void, again, absent express congressional

authorization.

The rationale of the opinion below in favor of state court jurisdiction is similar to the rationale that the Supreme Court rejected in *Kennerly*[3]: Judge Vázquez determined that because "the tribe is an inherent sovereign entity and such an entity can waive its sovereign immunity, it is clear that the Navajo Nation can consent to suit in New Mexico state court."[4] Opinion, Aplt. App. at 182. This

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[3]Judge Vázquez never addresses *Kennerly*, or *Williams v. Lee*, in her Opinion, despite the Navajo Nation having argued those cases in its briefs. *See* Reply in Support of Motion for Summary Judgment [Doc. 19] at 6-7.

[4]The quoted language and the following statement that "[a] Tribe may also waive immunity by consenting to suit in a specific forum," Opinion, Aplt. App. at 182 (a statement that is not supported by the authority it cites), demonstrate an apparent failure to appreciate the distinction between tribal sovereign immunity as a subject matter jurisdiction issue, and the entirely separate and different issue of lack of subject matter jurisdiction based on the rule of *Williams v. Lee*, 358 U.S. 217 (1959). The defense of tribal sovereign immunity is typically characterized as a matter of subject matter jurisdiction. *See, e.g., Breakthrough Management Group, Inc., v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173,1196 (10th Cir. 2010). But that is a very different issue from that of lack of subject matter jurisdiction based on *Williams*. *See, e.g.*, *Weeks Const., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir. 1986) ("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."); *Tohono O'odham Nation v. Schwartz*, 837 F. Supp. 1024, 1031) (D. Ariz. 1993) ("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*.") (emphasis added; citations omitted); *Jicarilla Apache Tribe v. Bd. of County Comm'rs*, 116 N.M. 320, 328, 862 P.2d 428, 436 (Ct. App. 1993) ("even if we found that the tribe waived its sovereign immunity, our jurisdictional

ruling cannot stand in the face of *Kennerly*. Moreover, as the Supreme Court has observed,

> the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. *Compare, e.g., United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886), with *Kennerly v. District Court*, 400 U.S. 423, 90 S.Ct. 480, 27 L.Ed.2d 507 (1971).

McClanahan v. Arizona, 411 U.S. 164, 172 (1973) (footnotes omitted). In other words, simple invocation of idealized notions of tribal sovereignty do not resolve the issue. There must be a federal law that authorizes state jurisdiction, and here, as Judge Vázquez seemed to acknowledge, the only candidate is the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* ("IGRA"). As will be shown,

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analysis still would compel reversal of the district court on [*Williams v. Lee*] jurisdictional grounds"), *reversed on other grounds*, 118 N.M. 550, 883 P.2d 136 (1994). (The New Mexico Supreme Court in *Jicarilla Apache Tribe* did not disagree with the quoted statement, but it reversed the court of appeals on the *Williams* subject matter jurisdiction issue.) Judge Vázquez is not alone, as the New Mexico Supreme Court committed the same error in *Doe v. Santa Clara Pueblo*, 2007-NMSC-008 ¶27 n. 6, 154 P.3d at 651 n.6, as did Judge Hansen in *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d at 1263 (Judge Hansen cited to *Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc.*, 523 U.S. 751, 754 (1988) to support his statement that a valid, clear waiver of tribal immunity could effect a transfer of exclusive tribal court jurisdiction to state court. But *Kiowa* did not concern a challenge based on *Williams v. Lee*, and therefore does not support the foregoing assertion.)

IGRA does in fact allow state courts to exercise jurisdiction over actions arising in Indian country, but only in narrowly defined circumstances, and the decision below improperly ignored the express and unambiguous language of the statute in holding that it extended to simple tort claims such as the one at issue here.

III. The Indian Gaming Regulatory Act Does Not Authorize Tribes to Relinquish Exclusive Jurisdiction over Personal Injury Claims Against Tribes or Tribal Entities Arising on Tribal Lands[5]

A. The Decision Below Is Contrary to the Plain Language of IGRA

The decision below delves extensively into the legislative history of IGRA and the history of Indian gaming prior to its enactment, Opinion, Aplt. App. at 164-72, and determines that the legislative history of IGRA "bolstered th[e] Court's conclusion that IGRA allows Tribal-State Compacts to include jurisdiction-shifting provisions for tort law regulation of Indian gaming." *Id*., 32. Judge Vazquez' approach is at odds with rules of statutory construction. As this Court has observed, when interpreting a statute, "[the Court's] analysis must begin and end with the language of the statute itself, for where the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *Woods v. Standard Insurance Company*, 771 F.3d 1257, 1263 (10th Cir. 2014).

[5] *Amicus* focuses on the district court's analysis of IGRA, and expresses no opinion on the relevance, if any, of the Navajo Nation Sovereign Immunity Act.

Here, the language of IGRA is plain and should be enforced according to its terms.[6] *See Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d at 1264-65 ("[g]iven the ambiguity and randomness of parsing through and placing absolute reliance on isolated portions of legislative history, the Court has opted instead to rely on the clear statutory language and structure of the IGRA.") Moreover, the analysis of the Opinion below is contrary to U.S. Supreme Court precedent construing IGRA, as will be shown.

The class III gaming compact between the state and the Navajo Nation (the "Compact") that was in effect when the events alleged in the underlying state lawsuit occurred, provides that the validity of the jurisdiction-shifting provision would be determined in accordance with IGRA. The Compact states, at Section 8(A), which deals with personal injury suits against gaming enterprises, that

> the Navajo Nation agrees . . . to proceed either in binding arbitration proceedings *or in a court of competent jurisdiction*, at the visitor's election, with respect to claims for bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise. For purposes of this Section, any such claim may be brought in state district court, including claims arising on tribal land, *unless it is finally determined by a state or federal court that IGRA does not permit the shifting of jurisdiction over*

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[6]To the extent that the Court determines that the statutory language is ambiguous, it must approach this case mindful of the guiding principle that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

visitors' personal injury suits to state court.

Section 8(E) reads, in its entirety,

> E. 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.

Id. Thus, the parties agreed in the Compact that personal injury suits against the tribal gaming enterprise could be heard either in binding arbitration or in a "court of competent jurisdiction," but that unless it was finally determined through litigation of the issue that "IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court," the tribe would agree that such cases could be heard in state courts.[7]

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[7]To understand why the tribes agreed to this language in the Compact, it is instructive to examine the comparable language that was written into the compact enacted by the state legislature in 1997, which is codified in the state statutes at NMSA (1978) § 11-13-1 (1997). That compact was enacted after the state Supreme Court and this Court had found an earlier compact, that the tribes had negotiated with then-Governor Gary Johnson, to be void. *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (1995); *Pueblo of Santa Ana v. Kelly*, 104 F.2d 1546 (10th Cir. 1997). The 1997 compact was not the product of negotiations, but was simply written 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). Section 8 of that compact, which had been drafted by the New Mexico Trial Lawyers Association and was adopted by the legislature over vigorous tribal opposition (and the opposition of the Secretary of the Interior; *see Doe*, 2007-NMSC-008, ¶ 41 n.7, 154 P.3d at 655 n.7), specifically provided for "concurrent jurisdiction" of state and tribal courts over visitors' personal injury claims (as well as for binding arbitration). When, after the enactment of the Compact Negotiation Act, NMSA (1997) §§ 11-13A-1 through 11-13A-5 (1999),

Preliminarily, as explained above, any claimed authority in IGRA allowing a transfer of tribal jurisdiction to the states must be express; it cannot be implied. "'Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.'" *Iowa Mut. Ins. Co. V. La Plante*, 480 U.S. 9, 18 (1987)(quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 n.14 (1982)). Thus, IGRA must provide clear and specific authority for a state court to assume jurisdiction over cases such as the underlying state court case. This "rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2031-32 (2014) (citations omitted).

Class III gaming[8] activities are governed by 25 U.S.C. 2710(d) ("Class III gaming activities; authorization; revocation; Tribal-State compact"). Section

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the tribes were able to enter into meaningful negotiations for a new compact with the state, although they were able to get most of Section 8 rewritten, negotiations over the court jurisdiction language ended with an understanding that the issue would "be litigated." *Doe*, 2007-NMSC-008, ¶ 55, 154 P.3d at 658-59 (Minzner, J., dissenting).

[8]Class III gaming includes casino-style games, slot machines, and lotteries. Opinion, Aplt. App. at 169 n. 5.

2710(d)(1)(C) provides that "*Class III gaming activities* shall be lawful on Indian lands only if *such activities* are . . . conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) . . . ." 25 U.S.C. § 2710(d)(1)(C) (emphasis added). Paragraph (3)(A) provides:

> Any Indian tribe having jurisdiction over the Indian lands upon which a *class III gaming activity* is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the *conduct of gaming activities*. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

25 U.S.C. § 2710(d)(3)(A) (emphasis added). Paragraph 3(B) provides that a Tribal-State compact "*governing gaming activities*" will take effect upon publication of the Secretary of Interior's approval of the compact. 25 U.S.C. § 2710(3)(B) (emphasis added). Paragraph (3)(C) sets forth the provisions that may be included in a Tribal-State compact "negotiated under subparagraph (A)," 25 U.S.C. § 2710(d)(3)(C), that is, a compact governing the conduct of *class III gaming activities*. 25 U.S.C. § 2710(d)(3)(A). As Judge Hansen observed, "IGRA limits permissible subjects of negotiation in order to ensure that tribal-state compacts cover only those topics that are related to the *conduct of gaming activities*, and are consistent with the IGRA's stated purposes," 972 F. Supp. 2d at 1264 (emphasis added), which stated purposes are "solely relate[d] to [the]

operation, regulation and oversight of Indian gaming." *Id*. at 1263.

The permissible topics that may be addressed in Tribal-State class III compacts are set forth as follows:

> (C) Any Tribal-State compact negotiated under subparagraph A [governing the conduct of *class III gaming activities*] may include provisions relating to-
>
> > (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*;
> >
> > . . .

25 U.S.C. § 2710(d)(3)(C) (emphasis added). Thus, subsection (d)(3)(C)(ii) permits the *allocation* of criminal and civil jurisdiction *only* as "necessary for the enforcement" of laws and regulations that are "directly related to, and necessary for the licensing and regulation" of *class III gaming activities*. This provision embodies the congressional decision that, if agreed to by the tribe in a compact, a state could directly apply its laws concerning the licensing and regulation of *gaming activities* to tribal gaming, and its courts could hear actions for the enforcement of those laws. *See Colorado R. Indian Tribes v. Nat'l Indian Gaming*

Comm'n, 383 F. Supp. 123, 135-36 (D.D.C. 2005).

The specific terminology used in § 2710(d)(3)(C)(i) and (ii) is worth careful examination. The clauses permit allocation of criminal and civil jurisdiction "necessary for the enforcement of [the] laws and regulations" of the state that are applied to tribal gaming under § 2710(d)(3)(C)(i).[9] The term "enforcement" generally refers to governmental compulsion to obey officially prescribed norms. Like "licensing and regulation," that term strongly suggests direct governmental oversight of gaming, not private remedies for compensation. The jurisdiction that is to be "allocated" under § 2710(d)(3)(C)(ii), thus, is governmental regulatory authority, not court jurisdiction over private civil actions. Second, the use of the term "allocation of . . . jurisdiction," rather than "transfer" (as appears in 18 U.S.C. § 1166(d), which was enacted as part of Section 23 of IGRA, referring to the shift of specific *federal* criminal jurisdiction to a state), is suggestive of establishing jurisdiction that is not pre-existing; *e.g.*, creating new authority on the part of a state to enforce its gambling laws within Indian country–authority that "was withheld from [the States] by the Constitution." *Seminole Tribe v. Florida*, 517

[9]Clause (C)(i) actually refers to the laws and regulations of "the Indian tribe or the State," but that is undoubtedly meant to display evenhandedness. A tribe plainly does not need authority in a compact to apply its own laws and regulate its own activity on its own land.

U.S. 44, 58 (1996). Importantly, none of this language even suggests that Congress contemplated the transfer to the state courts of pre-existing tribal court jurisdiction over ordinary private, civil causes of action, that have no relation to the conduct of gaming other than the fact that they arose on the premises of a gaming facility. As Judge Hansen observed in *Pueblo of Santa Ana v. Nash*,

> Congress could have worded subparagraph (ii) in a way that obviously or necessarily included a shifting of jurisdiction over such claims as the one in the underlying state court litigation, as a permissible topic for negotiations of compacts. It did not do so. Even allowing that there are many issues to be resolved in negotiating compacts, the IGRA takes a narrow view of what jurisdiction shifting may occur and the language it employs is restrictive rather than expansive.

972 F. Supp.2d at 1265.[10]

Section 10 of the Compact contains precisely the type of provision as is contemplated by 25 U.S.C. § 2710(d)(3)(C)(ii) (and by 18 U.S.C. § 1166(d)). That section allows the State to investigate and prosecute, in state courts, any violations of state gambling laws made applicable to Indian country by § 1166(a), by non-tribal members. As crimes committed by non-Indians against an Indian gaming

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[10]Judge Hansen also correctly concluded that "the fact that th[e] statutory language does not expressly *prohibit* jurisdiction, is irrelevant [because] to conclude otherwise would be contrary to the explicit language of § 2710(d)(3)(C) . . . ." 972 F. Supp. 2d at 1265 (emphasis in original). Thus the district court's conclusion that IGRA does not *prohibit* shifting of jurisdiction over tort actions to state court, Opinion at 197-98, misses the mark.

enterprise within Indian country, these crimes would normally be subject to exclusive *federal* jurisdiction. COHEN, § 9.03, at 754; 18 U.S.C. § 1166-68. Section 10 sets out detailed procedures by which the State is to exercise such authority, including provisions relating to the involvement of tribal regulatory and law enforcement personnel and regular reporting to the tribe on state enforcement activity. This is the kind of jurisdiction-shifting that the cited sections of IGRA authorize, not some broad power over ordinary civil suits.

Judge Vázquez also erred when she determined that another provision of Section 2710(d)(3)(C), which is a catch-all category that authorizes a Tribal-State compact to include "any other subjects that are directly related to the operation of gaming activities," 25 U.S.C. § 2710(d)(3)(C)(vii), authorizes tribes and states to shift jurisdiction over tort claims. Opinion, Aplt. App. at 193. That provision merely broadens the categories of matters that may be addressed in a compact; *it does not include any language permitting any transfer of jurisdiction of any kind to the state*. Indeed, no provision of IGRA other than § 2710(d)(3)(C)(ii) permits the parties to a compact to allocate certain jurisdiction to the state. *See Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d at 1264 ("[s]ubparagraph (ii) [is] the only subparagraph in the statute that mentions jurisdiction . . . ."). Thus, Judge Vazquez' reliance on the "catch-all" category was completely misplaced.

B. The Decision Below Is Contrary to the U.S. Supreme Court's Holding in *Michigan V. Bay Mills Indian Community*

The U.S. Supreme Court, in *Bay Mills*, recently confirmed that a plain reading of the words "class III gaming activity" is essential to a correct interpretation of Section 2710(d)(3)(C). At issue in *Bay Mills* was whether the state could sue the tribe for operating a class III gaming casino *off* of its reservation lands. While IGRA authorizes a state to sue a tribe (in federal district court) to "enjoin a class III gaming activity *located on Indian lands* and conducted in violation of any Tribal-State compact," 25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added), that authorization clearly does not extend to off-reservation class III gaming activities. *Bay Mills*, 134 S. Ct. at 2032. The state attempted to bring the suit within the purview of § 2710(d)(7)(A)(ii) by "relocating the 'class III gaming activity' to which it was objecting" to Indian lands by arguing that the tribe "'authorized, licensed and operated' that casino from within its own reservation," and that "necessary administrative action – no less than say, dealing craps – is 'class III gaming activity'" that occurred on Indian lands. *Bay Mills*, 134 S.Ct. at 2032. The Court rejected that argument "because numerous provisions of IGRA show that 'class III gaming activity' means just what it sounds like – the stuff involved in playing class III games." *Id*. As the Court explained,

> Section 2710(d)(3)(C)(i)[11] refers to "the licensing and regulation of [class III gaming] activity" and § 2710(d)(9) concerns the "operation of a class III gaming activity." Those phrases make perfect sense if "class III gaming activity" is what goes on in a casino – each roll of the dice and spin of the wheel. But they lose all meaning if, as Michigan argues, "class II gaming activity" refers equally to the off-site licensing or operation of the games. (Just plug those words in and see what happens.) See also §§ 2710(b)(2)(A), (b)(4)(A), (c)(4), (d)(1)(A) (similarly referring to class II or III "gaming activity"). The same holds true throughout the statute. Section 2717(A)(1) specifies fees to be paid by "each gaming operations that conducts a class II or class III gaming activity" – signifying that the gaming activity is the gambling in the poker hall, not the proceedings of the off-site administrative authority. . . . Indeed, consider IGRA's very first finding: Many tribes, Congress stated, "have licensed gaming activities on Indian lands," thereby necessitating federal regulation. § 2701(1). The "gaming activit[y]" is (once again) the gambling.

Bay Mills, 134 S.Ct. at 2032-33 (alterations in original). Applying the reasoning of *Bay Mills* to this case, Section 2701(d)(3)(C)(i) and (ii) can only be read to authorize the parties to a tribal-state class III gaming compact to include in that compact provisions relating to the application of state criminal and civil laws *directly related to and necessary for the licensing and regulation of class III gaming activity*, that is, "what goes on in a casino – each roll of the dice and spin of the wheel . . . [or] the gambling in the poker hall," 134 S.Ct. at 2032, and the *allocation of jurisdiction necessary for the enforcement of those laws and regulations*. Judge Vázquez' determination that "issues regarding tortious conduct

[11]The very clause at issue here.

related to Indian gaming fall directly under the first two provisions of Section 11(d)(3)(C) [§ 2701(d)(3)(C)(i) and (ii)], . . .[and] under the catchall provision in Section 11(d)(3)(C)(vii) [§ 2701(d)(3)(C)(vii)]," Opinion, Aplt. App. at 193, ignores the plain language of IGRA and renders meaningless the words "class III gaming activity," and so must be reversed. As the Supreme Court observed,

> This Court has no roving license, even in ordinary cases of statutory interpretation, to disregard clear language simply on the view that [] Congress "must have intended" something broader. . . And still less do we have that warrant when the consequence would be to expand an abrogation of immunity, because [] "Congress must 'unequivocally' express [its] purpose" to subject a tribe to litigation.

Bay Mills, 134 S.Ct. at 2034.

CONCLUSION

The firmly established principle that tribal courts have exclusive jurisdiction over claims against tribes, tribal members, and tribal entities, can only be overcome by a clear expression of congressional authority and strict compliance with such statutory authority. Nowhere in the Indian Gaming Regulatory Act has Congress authorized state courts to exercise jurisdiction over such claims. The authority in IGRA to shift jurisdiction from the tribe to the state as necessary for the enforcement of state laws and regulations is limited to such laws and regulations that are directly related to and necessary for the licensing and

regulation of *class III gaming activities*. Because the underlying tort suit does not fall within this narrow category, this Court should reverse the court below and hold that IGRA does not permit the jurisdiction-shifting provision of the Compact.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24TH day of October, 2016, I filed the foregoing electronically through the CM/ECF system, which caused counsel of record for the plaintiff to be served by electronic means.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation and contains 5,826 words according to the word count utilized by Microsoft Word 2013.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk. I also certify that the digital submissions have been scanned on October 24, 2016, for viruses with the most recent version of a commercial virus scanning program, Malwarebytes Anti-malware, and according to the program, are free of viruses.

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