No. 16-6224

In the United States Court of Appeals
for the Tenth Circuit

CITIZEN POTAWATOMI NATION,

Plaintiff-Appellee,

v.

STATE OF OKLAHOMA,

Defendant-Appellant.

On appeal from the United States District Court
for the Western District of Oklahoma
No. 5:16-CV-00361-C (Cauthron, J.)

APPELLANT'S REPLY BRIEF

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REPLY BRIEF OF APPELLANT

The question never squarely addressed by the Tribe is why the arbitration agreement should be enforced against the State despite a court having stripped out the critical de novo review provision—a provision upon which the State conditioned its agreement to arbitrate. It is undisputed that the district court did not address this issue despite the State having raised it in briefing and argument. Rather, the Tribe merely argues that this Court should hold that the district court *sub silentio* found the arbitration agreement remained enforceable despite the unenforceability of one of its material terms.

As the State explained in its opening brief, the materiality of the de novo provision is demonstrated by the plain text of the Gaming Compact, which in multiple places links the parties' consent to arbitration to de novo review by a federal court of any arbitration award. And if evidence is needed to demonstrate *why* the parties memorialized de novo review as a material condition to the agreement, one need look no further than this litigation. The State simply would not have agreed to arbitration knowing that the Tribe could do what it has done here: invoke the arbitration agreement to seek resolution of a dispute that was unrelated to the Gaming Compact, and then in federal court seek confirmation of the arbitration award through disavowal of the de novo review provision, all in order to insulate the

arbitrator's flawed decision from meaningful review. The de novo review provision was inserted in the Gaming Compact as a check against precisely this sort of scenario.

If de novo review is not available, the district court should have found that the arbitration provision and waivers of sovereign immunity were no longer enforceable, and thus should not have confirmed the arbitration award. The district court's decision to confirm the award despite the absence of de novo review and concomitant waivers of sovereign immunity should be vacated.

Argument

I. The plain text of the Gaming Compact demonstrates that the agreement to arbitrate gaming disputes was conditioned on the arbitrator's decisions being subject to de novo review by a federal court.

The critical issue raised by this appeal is whether the district court was correct in holding that the parties are bound by an arbitration agreement that has been fundamentally altered by a Supreme Court decision that rendered one of its material terms unenforceable. The Tribe's brief largely attempts to deflect this issue by (1) claiming that the Gaming Compact was "forced" on it and thus it never truly consented to its terms, and (2) arguing that extrinsic (and self-serving) evidence demonstrates that the Tribe does not consider the de novo review provision a material term of the Gaming Compact. Neither is persuasive.

A. The Tribe consented to the Gaming Compact.

As to the first, the Tribe's position seems to be that the Gaming Compact is an adhesion contract to which they never consented.[1] Even were this true, that would be an argument in favor of invalidating the *entire* Gaming Compact[2]—the very agreement that the Tribe's invoked to obtain the arbitration award upon which they now rely. And therein lies the oddity of the Tribe's newly-minted position: they seek to invoke and rely on the Gaming Compact on one hand, while disavowing it—or at least the portions of it that are inconvenient to their position—on the other. Inconsistency and legal irrelevance aside, the Tribe makes numerous factual and legal misstatements when they say that the State "forced a uniform tribal-state gaming compact on all Native American Tribes with territories within the exterior boundaries of the State, requiring the tribes to pay substantial gaming taxes to the State in order to exercise their IGRA legal right to participate in Class III gaming."[3]

First, there is no "IGRA legal right to participate in Class III gaming." IGRA simply authorizes tribes to engage in Class III gaming so long as they enter into a

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[1] Resp. Br. at 3-4, 11-12.

[2] *See* **Restatement (Second) of Contracts** § 208, comment g (**Am. Law. Inst.**)(explaining that the proper remedy for an unconscionable contract is to declare the entire contract unenforceable, reserving the remedy of severance for situations where only certain terms are deemed unconscionable).

[3] Resp. Br. at 3.

federally-approved gaming compact with the State.[4] In other words, a gaming compact is not a barrier to a tribe's exercise of a "right to game," but rather a legal precondition to casino gaming in compliance with federal law. To the extent the Tribe has a problem with the requirement it compact with the State, that is not a quarrel with the State, it is a quarrel with Congress.

Second, the Tribe provides an incomplete picture of how the Gaming Compact came into existence. The State, under the leadership of the Governor (whom the Tribe now relies upon as a friendly witness) and with the input of tribal stakeholders, developed a draft model gaming compact.[5] That compact was voted on and approved by the people of Oklahoma[6]—including the thousands of tribal citizens living in Oklahoma.[7] To describe the adoption of the model gaming compact as occurring solely through State actors simply is not correct as a matter of fact or law.

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[4] 25 U.S.C. § 2710(d)(1)(C).

[5] D. Michael McBride III, *Indian Gaming Compacts in Oklahoma: Respecting Tribal Jurisdiction and Enforcing Understanding—A Continuing Role for Class II Gaming*, INDIAN GAMING, May 2010, at 14, *available at* http://www.indiangaming.com/istore/May10_McBride.pdf (describing the role tribes played in negotiating the Class III model gaming compact).

[6] *See generally* 3A Okla. Stat. § 281.

[7] *See* McBride, *supra* note 5, at 14 (describing the overwhelming support for the 2004 ballot initiative); *see also* Tony Thornton, *Gaming Compact Questioned Interior Department Letter to Tribe Called Routine*, THE OKLAHOMAN (Nov. 27, 2004) http://newsok.com/article/2875619 (noting that the law passed with nearly 60% of the vote and that multiple of the State's largest tribes (Chickasaw, Choctaw, and Cherokee) visibly endorsed the law, each contributing a minimum of $250,000 toward a vote-yes media campaign).

Third, the Tribe's claim that it was "forced" to enter into the Gaming Compact is equally inaccurate. The Tribe, just like every tribe in Oklahoma, had the option of whether to enter into the Gaming Compact with the State. Some tribes elected to accept the Compact's terms and enter into it, while others declined[8]—a fact that definitively debunks the Tribe's claim that it was "forced" to agree to the Compact.

Fourth, the federal government reviewed and deemed approved the Gaming Compact after the Tribe agreed to it—the very federal government with a trust obligation to advance the Tribe's best interests.[9] Thus, even if the Tribe is suggesting now that it was forced to agree to the terms of the Gaming Compact, it certainly made no such suggestion to the federal government when it sought approval of the Gaming Compact, nor did the federal government view the Gaming Compact as being contrary to the Tribe's interest. The federal government *could have* argued that the de novo review provision was unenforceable under federal law, as it did with an unrelated provision in the Compact,[10] or even argue that the provision did not advance the Tribe's best interest, but it did neither. This is so because all parties to the

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[8] *See* Compacted Tribes, OKLAHOMA OFFICE OF STATE FINANCE GAMING COMPLIANCE UNIT, https://www.ok.gov/OGC/Compacted_Tribes/index.html (last visited Nov. 2, 2016) (listing the Oklahoma tribes with gaming compacts).

[9] 25 U.S.C. § 2710(d)(3)(B)(requiring federal approval of any compact); U.S. Dep't of Interior, Letter approving the Gaming Compact between the State of Oklahoma and the Citizen Potawatomi Nation (Jan. 6, 2006) ("D.O.I. Letter"), State App. at 420-423.

[10] *See* D.O.I. Letter at 3, State App. at 422 (arguing that part 15(D) of the Compact is unenforceable under the Indian Gaming Regulatory Act).

Compact understood at the time of execution that the de novo review provision was not only enforceable, but also necessary and desirable.

Lastly, while the Tribe may now, for litigation's sake, paint the Gaming Compact as being an adhesion contract, the Tribe's adoption of the Gaming Compact has worked a revolution in the economic development of the Tribe. Tribal revenues have exploded as a result of the Compact,[11] allowing the Tribe to grow in unprecedented ways, such as the numerous tribal businesses whose sales sparked the tax-records dispute that prompted this litigation.[12] And, of course, if the Tribe actually believed what it suggests here about the nature of the Gaming Compact, the Tribe could move to terminate the Gaming Compact. But the Tribe has not, and will not, because outside of the context of this litigation, it embraces the Gaming Compact and the economic development the Gaming Compact makes possible.

In sum, any suggestion by the Tribe that it has not fully consented to *all* of the terms of the Gaming Compact is belied both by the facts and by the Tribe's reliance on the Gaming Compact as a basis for this litigation.

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[11] *See* McBride, *supra* note 5, at 14 ("With this model compact, Indian gaming catapulted into the Class III 'big leagues.' In 2009, the growth rate of Indian gaming in Oklahoma led the nation . . . .").

[12] Enterprises, CITIZEN POWAWATOMI NATION, https://www.potawatomi.org/enterprises (last visited Nov. 2, 2016) (describing the Tribe's numerous commercial enterprises).

B. The terms of the Gaming Compact demonstrate the materiality of the de novo review provision.

Because the terms of the Gaming Compact are fully enforceable against the Tribe, the Tribe needed to demonstrate to the district court that the de novo review provision is both (1) unenforceable, *and* (2) capable of being severed from the Compact without materially altering the parties' agreement to arbitrate.[13]

Even assuming that the de novo review provision cannot be enforced due to the Supreme Court's decision in *Hall Street Associates L.L.C. v. Mattell, Inc.*,[14] the Tribe offers no meaningful response to the State's argument that the plain terms of the Gaming Compact demonstrate the materiality of the de novo review provision.[15] Instead, ignoring the fact that it bears the burden of proof as the party seeking invalidation and severance of the de novo review provision, the Tribe argues that "[t]he State offered no evidence that a non-FAA standard of review was central to or inextricable from the State's sovereignty waiver and consent to arbitration, nor any

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[13] Compact Part 13(A), State App. at 82 (providing that an invalidated provision be severed unless it is a "material" term of the Compact).

[14] 552 U.S. 576 (2008).

[15] The Tribe misleadingly claims that because "[t]he State has previously engaged in federal court FAA confirmation proceedings for disputes arising out of substantially similar gaming compacts... the exclusive FAA standard of review avails in this cause as a matter of law." Resp. Br. at 20-21. What the Tribe fails to recognize is that in neither of the two arbitration award confirmation cases it cites was the validity of the de novo review provision in question because in both cases the State agreed that the arbitration award should be confirmed. *Id.* at 21 (citing *Choctaw Nation v. Oklahoma*, 724 F.Supp.2d 1182 (W.D. Okla. 2010); *Iowa Tribe of Okla. v. Oklahoma*, 15-cv-1379-R, 2016 WL 1562976 (W.D. Okla. April 18, 2016).)

evidence of the State's wariness in entrusting dispute resolution to a single arbitrator to be reviewed in federal court under an FAA standard."[16] What the Tribe means to say is that the State did not rely on *extrinsic* evidence to establish the materiality of the de novo review provision. But the State certainly offered ample evidence in the form of the terms of the Gaming Compact itself.

Specifically, as the State explained in its opening brief, the terms of the Gaming Compact demonstrate that the agreement to arbitrate—and accompanying reciprocal waivers of sovereign immunity—are premised on the availability of de novo review. Indeed, the very sentence that authorizes arbitration twice specifically subjects that authorization to de novo judicial review:

> **Subject to the limitation set forth in paragraph 3 of this Part**, either party may refer a dispute arising under this Compact to arbitration under the rules of the American Arbitration Association (AAA), **subject to enforcement or pursuant to review as provided by paragraph 3 of this Part by a federal district court**.[17]

Paragraph 3, in turn, is the de novo review provision:

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

[16] Resp. Br. at 24.

[17] Compact Part 12(2), State App. at 80–81 (emphasis added). Paragraph 3 contains the de novo review clause. Compact Part 12(3), State App. at 82.

> hereto waives immunity and consents to suit therein for such limited purposes . . . .[18]

Critically important is that the State and Tribe concomitantly waived their respective sovereign immunity in federal court *only* for "such limited purposes" of de novo review of any arbitration agreement.[19] Nothing is more material to a sovereign than its sovereignty,[20] and for the Tribe to disavow the condition that was placed on its waiver of sovereign immunity—*i.e.*, that it was only for "such limited purposes" of de novo review—is antithetical to the deep respect of sovereign immunity that is ingrained into our laws.[21] The Tribe offers no evidence that the parties to the Gaming Compact viewed the limitation placed on their waivers of sovereign immunity as immaterial because no evidence exists. Sovereign immunity and the limited purposes for which it is waived are *inherently* material to sovereigns like states and tribes. It was wholly improper for the district court to jettison the de novo review provision without even

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[18] Compact Part 12(3), State App. at 82.

[19] Compact Part 12(2), State App. at 80–81.

[20] *See Alden v. Maine*, 527 U.S. 706, 713 (1999) (describing sovereign immunity from suit as a "fundamental aspect of sovereignty").

[21] *Beers v. State*, 61 U.S. 527, 529 (1857) ("[I]t is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted[.]).

discussing—much less making a finding about—whether the arbitration agreement and the concomitant limited waiver of sovereign immunity remained effective.

The Tribe does not argue that the de novo review provision, or any portion of the arbitration agreement for that matter, is ambiguous. Thus, its reliance on extrinsic evidence is inappropriate because, absent such ambiguity, there is no need to look beyond the four corners of the Gaming Compact to resolve this question of materiality.[22] Therefore, when the Tribe says that "the only evidence presented in Arbitration supports the District Court's finding and contradicts the State's *post hoc* construction of the parties' intent,"[23] it is ignoring the legally relevant evidence offered by the State—the terms of the Compact itself—while relying solely in the legally irrelevant extrinsic evidence they offered. Absent ambiguity the analysis begins and ends with the text of the Compact. The State's reliance on that text does not amount to "*post hoc* construction of the parties' intent," but rather the only legally permissible basis upon which to ascertain the materiality of the provision.

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[22] *See, e.g., Otis Elevator Co. v. Midland Red Oak Realty, Inc.*, 483 F.3d 1095, 1102 (10th Cir. 2007) (holding that extrinsic evidence is admissible to resolve an ambiguous contractual term, but even then such extrinsic evidence may not "vary, modify or contradict the written provision absent fraud, accident, or proof of mistake."); *Gamble, Simmons & Co. v. Kerr-McGee Corp.*, 175 F.3d 762, 767 (10th Cir. 1999) (acknowledging that, in Oklahoma, "if the contract is unambiguous its language is the only legitimate evidence of what the parties intended, and [courts] will not rely on extrinsic evidence to vary or alter the plain meaning"); *see also* 15 Okla. Stat. § 154 ("The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve absurdity.")

[23] Resp. Br. at 24.

Even if extrinsic evidence were admissible, the extrinsic evidence offered by the Tribe proved nothing with respect to the question of materiality. The Tribe in its brief relies solely on a witness's statement that "the arbitration clause was included to resolve disputes straightaway and to preserve each party's sovereignty," which the Tribe argues "is harmonious with *Hall Street's* primary basis for declining to permit expansion of the FAA standard of review."[24] But that the arbitration clause was included to "resolve disputes straightaway" says nothing about the parties' decision to include a de novo review provision. To the contrary, inclusion of the provision in light of this purported intent to "resolve disputes straightaway" tells us that the parties understood that "straightaway resolution" *included* de novo review by a federal court. And whatever *Hall Street's* basis for invalidating de novo review clauses, *Hall Street* says nothing about the materiality of the de novo provision at issue there because the question of materiality was not before that Court.[25]

Finally, the Tribe speculates that finding the arbitration clause unenforceable might result in enforcement problems when hypothetical future disputes arise between the State and this and other tribes. Of course, this is only true if the Tribe is taking the position that it will invoke its sovereign immunity to avoid federal-court adjudication of future Gaming Compact disputes because the State has told the Tribe

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[24] Resp. Br. at 24.

[25] *See* 552 U.S. at 590 (specifically cabining the Court's holding to the issue of whether the de novo review provision was valid in light of the FAA); *id.* at 587, n.6 (noting that Petitioners did not seek certiorari on the issue of severability).

that it will readily litigate such disputes in federal court.[26] And given that in the Gaming Compact the Tribe and the State explicitly agreed to waive sovereign immunity in federal court for the purpose of de novo review of arbitration decisions, the Tribe cannot now plausibly argue that submitting disputes to federal courts for resolution as an initial matter would somehow work to its detriment. Nor should it be overlooked that this "lack of forum" problem created by the Tribe is no problem at all with regard to proper resolution of *this* dispute, which was being resolved in an adequate forum (state courts and administrative proceedings) until the Tribe sought to transform the dispute into an alleged casino gaming dispute so that it could invoke arbitration.

C. The district court undisputedly failed to analyze whether the de novo provision was immaterial to the parties' agreement to arbitrate.

The Tribe does not dispute that the district court failed to explicitly analyze the materiality of the de novo review provision. The Tribe instead argues that the district court *sub silentio* addressed and rejected the State's argument that the arbitration agreement could not be enforced without the de novo review provision.[27] But

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[26] And even then, as the State noted in its opening brief, the Indian Gaming Regulatory Act abrogates tribal sovereign immunity for State-initiated injunctive claims, and officer suits may be available to both tribal and state plaintiffs. State Br. at 20.

[27] The Tribe also attempts to defend the failure to sever by arguing that "[t]he *Hall Street* Court did not find that the infirm standard of review provision worked to invalidate the entire arbitration clause at issue in that matter." Resp. Br. at 23. But that is so because the materiality question was not before the *Hall Street* Court. *See* 552 U.S. at 587, n.6. And

whatever the Tribe may divine from the court's silence, the very fact that the court failed to address the issue constitutes plain error.[28]

Given that the Gaming Compact's severability clause directs that a clause may only be severed when it is deemed not a "material" term,[29] the district court was obligated to *actually* analyze the materiality of the de novo review provision and to make a finding that the provisions it was severing were not material. The district court did not do so, and the Tribe's convenient interpretation of that failure cannot free the district court from its duty under FRCP 52 to "assur[e] the appellate court . . . that it has considered strongly conflicting evidence and come to grips with apparently irreconcilable conflicts."[30]

This failure is particularly egregious where the sovereign parties waived their sovereign immunity for the express limited purpose of de novo review, and no other. Thus, the district court not only severed the de novo review provision from the

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even if it were, that case did not involve sovereign parties where the waiver of sovereign immunity for purposes of federal court review was expressly limited to de novo review.

[28] *Griffin v. City of Omaha*, 785 F.2d 620, 628 (8th Cir. 1986) ("A district court's findings are clearly erroneous to the extent that they fail to recognize important incidents and reject or fail to draw inferences which we have found inescapable from the record.") (internal quotation marks and citation omitted); *see also United States v. Valenzuela-Puentes*, 479 F.3d 1220, 1229 (10th Cir. 2007) (quoting *Griffin* in support of the court's decision to remand where district court failed to adequately explain its decision on a "principal point of contention" in the case, calling the district court's silence "troublesome").

[29] Compact Part 13(A), State App. 82 (providing that an invalidated provision be severed unless it is a "material" term of the Compact).

[30] *Griffin*, 785 F.2d at 628.

arbitration agreement, but also severed the "for such limited purposes" provision from the waivers of sovereign immunity, and did both with no analysis of the materiality of what it was severing.

II. The Gaming Compact does not grant an arbitrator the right to resolve disputes that do not arise out of the Gaming Compact.

With respect to the actual merits of the arbitration award, the Tribe seeks to insulate the flawed award from meaningful review by arguing that the District Court not only lacked the power to review it de novo, but that it also lacked the power to even "reach or review the merits of the Award"[31] under *any* standard of review. The FAA, however, permits a district court to vacate any arbitration award where "arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."[32] And here, the arbitration award should have been vacated because the arbitrator exceeded his powers by deciding a dispute that did not arise from the Gaming Compact.

On this point, it bears repeating that, while the Tribe continues to insist that the underlying dispute arises from an attempt by the State "to enforce the Compact,"[33] the facts prove otherwise.[34] For example, in support of its claim that the

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[31] Resp. Br. at 29.

[32] 9 U.S.C. § 10(a)(4).

[33] Resp. Br at 31.

[34] Remarkably, the Tribe claims that the arbitrator's decision is binding on the State *even with regard to non-gaming facilities.* Resp. Br. at 42. Notwithstanding the legal infirmity of this extraordinary claim, the fact that the arbitrator's decision involves issues that

dispute was arbitrable because "the obligations the State sought to impose allegedly arose from Part 5(I) of the Compact," the Tribe claims that the State itself argued that the reporting obligations in question "arose from Part 5(I) of the Compact,"[35] and cites the State's arbitration brief in support of this claim.[36] An examination of the page cited by the Tribe reveals no such argument. What the State actually argued with respect to Part 5(I) is that it demonstrated that the dispute was *not* arbitrable because the section makes clear that the obligations in dispute arose not from the Gaming Compact but from state law pre-dating the Compact.[37] As the State repeatedly insisted:

> [N]either of the administrative enforcement proceedings at issue are based on requirements of the Compact, nor are they disputes arising under the Compact. They deal exclusively with the enforcement of requirements imposed by the alcoholic beverage licenses and permits. The State Compliance Agency has not raised any complaints or instituted any proceeding alleging any failure to comply with the Compact.[38]

Thus, because the Gaming Compact authorizes its dispute resolution procedures only for disputes involving whether a party has "failed to comply with any requirement" of the Gaming Compact or in the event of a dispute arising under the

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arise at non-gaming facilities, wholly unrelated to any Gaming Compact-based activity, is indicative of the non-gaming nature of the issues decided by the arbitrator.

[35] *Id.*

[36] Resp. Br. at 31. (citing State App. at 409).

[37] State App. at 399.

[38] *Id.* at 399-400.

terms of the Gaming Compact,[39] and because the dispute resolution procedures at Part 12(2) mandate that the "remedies available through arbitration are limited to enforcement of the provisions" of the Gaming Compact,[40] it was improper for the arbitrator to claim the authority to decide these disputes.

To clarify, the disputes here arose from two separate administrative proceedings, neither of which involved casino gaming nor involved any claim that the Tribe was violating an obligation arising out of the Gaming Compact. The first proceeding was sparked by the Tribe's sales of alcohol on Sundays in a county where such sales are illegal.[41] The State's alcohol regulators initiated an administrative proceeding to revoke the Tribe's state-issued licenses to sell alcohol as a result of the Tribe's failure to comply with the legal obligations that attach to those licenses.[42] The second proceeding arose after the State asked the Tribe to provide documentation to support its claim that none of the sales it made to non-members at its various tribal enterprises were taxable sales.[43] In response to that request, the Tribe not only refused to provide the documentation (despite their obligation as a holder of state issued sales tax permits to be responsive to audit requests), but they also stopped making reports of sales (another obligation

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[39] Compact Part 12, State App. at 80–82.

[40] Compact Part 12(2), State App. at 80–81.

[41] State Br. at 4-5.

[42] *See* ABLE Order at 1, State App. at 334.

[43] *See* Complaint for Revocation/Cancellation of the Citizen Potawatomi Nation's Licenses/Permits, Oklahoma Tax Commission (May 28, 2014), State App. at 560-62.

imposed on all holders of state issued tax permits).[44] Because of the Tribe's refusal to comply with its state law obligations as a holder of sales tax permits, the State's tax regulator initiated an administrative proceeding to revoke the Tribe's sales tax permits.[45] Neither of these issues arose out the Gaming Compact, and in neither administrative proceeding did the State regulators purport to be enforcing any term of the Gaming Compact. To the contrary, both proceedings were sparked by the Tribe's failure to comply with state laws with which the Tribe was obligated to comply irrespective of the Gaming Compact.

Against this backdrop, the Tribe's claim that these disputes actually arise out of Section 5(I) of the Gaming Compact makes little sense as a matter of logic or law. The Tribe's argument is as follows: because they agreed in the Compact to abide by state and local liquor laws as a precondition to selling liquor in their casinos, any time the State wishes to do *anything* that might have the downstream consequence of affecting the Tribe's ability to sell liquor in their casinos, the Tribe can invoke arbitration. This cannot be the case. For example, if the Gaming Compact contained a provision whereby the Tribe agreed that its casino manager must "comply with the State's felony criminal laws," and the Tribe's casino manager was subsequently

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[44] *See id.* The Tribe's Response brief describes the State as having out-of-the-blue initiated proceedings to revoke their sales tax permits and alcoholic beverage permits. Resp. Br. at 6. This is not accurate. The administrative proceedings were initiated as described in the State's opening brief, pages 4-6, and herein.

[45] *See generally* Complaint for Revocation/Cancellation of the Citizen Potawatomi Nation's Licenses/Permits, Oklahoma Tax Commission (May 28, 2014), State App. at 560-64.

charged with a felony, no one would think that the Tribe could insist that the manager's case be tried before the gaming arbitrator. His conviction would have the downstream consequence of bringing the Tribe out of compliance with its Compact obligation, but an arbitrable issue arises only *after* the conviction. For example, if the State sought removal of the felon as casino manager, and the Tribe in response disputed that the criminal conviction constituted the requisite "failure to comply with the State's felony criminal laws," an arbitrator could properly decide *that* Compact-based dispute.

The same is true here. The dispute that the arbitrator claimed power to decide was not one arising out of the Gaming Compact, nor was it based on a violation of the Compact. While it certainly might, at some point after the state proceedings were final, cause the Tribe to be out of compliance with their Compact obligations *if* they continued to sell liquor, an arbitrable dispute based on Section 5(I) could only exist *after* the State sought to force the Tribe to cease liquor sales in their casinos due to their failure to comply with Section 5(I). In *that* case, the arbitrator could properly evaluate whether the Tribe's lack of the requisite licenses and permits constituted a violation of Section 5(I). But the underlying dispute, which does not arise out of the Compact, which is unrelated to casino gaming, and which involves a claim of violation of state law, is not arbitrable and should be resolved in state forums.

III. The arbitration award did not resolve all issues presented to the arbitrator.

As the State explained in its opening brief, the district court should also have vacated the arbitration award due to its failure to failure to resolve all disputes submitted for arbitration.[46] The district court offered nothing on this point save the *ipse dixit* that "upon review it is clear that the arbitrator's award addresses the issues brought before him on which the parties requested resolution."[47] Despite that unsupported conclusion by the district court, it remains undisputed that the Tribe invoked arbitration on the question of whether arbitration is the exclusive means for resolving licensing disputes between the State and the tribe, yet the arbitrator did not answer that question. Indeed, the Tribe's primary response on this point is to now disavow the issue *they* presented for arbitration as "hypothetical" and to applaud the arbitrator for his "restraint" in failing to decide the issue.[48] Neither response justifies the arbitrator's failure to satisfy the FAA's requirement that he issue a "final . . . award upon the subject matter submitted."[49]

The Tribe also argues that the State's pursuit of "multiple enforcement actions against the Nation's Compact and non-Compact facilities alike, despite the existence of the District Court's injunction" is evidence that the arbitration award properly and

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[46] State Br. at 22-26.

[47] Op. at 6.

[48] Resp. Br. at 41.

[49] 9 U.S.C. § 10(a)(4).

finally decided all issues in dispute between the State and Tribe. To the contrary, the uncertainty and lack of finality after the arbitrator's incomplete decision are the very reason for the continued disputes between the State and Tribe. The arbitration award muddied the waters by deciding issues beyond the arbitrator's powers, by failing to decide issues that were squarely presented to it, and by deciding other issues in a vague manner. Even under the FAA standard, the district court erred in confirming the award.

Conclusion

For these reasons, the decision below should be reversed, and judgment should be entered in favor of the State, vacating the arbitration award.

Respectfully submitted,

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STATEMENT CONCERNING ORAL ARGUMENT

Because of the important issues presented, counsel believes oral argument may be helpful to the Court.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5305 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ Patrick R. Wyrick
Patrick R. Wyrick

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing as digitally submitted via the court's CM/ECF system is an exact copy of the written document filed with the Clerk.

s/ Patrick R. Wyrick
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I hereby certify that all required privacy redactions have been made.

s/ Patrick R. Wyrick
Patrick R. Wyrick

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2016, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

Gregory Quinlan, gquinlan@potawatomi.org
Attorney for Appellee Citizen Potawatomi Nation

George J. Wright, George.wright@potawatomi.org
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s/ Patrick R. Wyrick
Patrick R. Wyrick