UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

THE PUEBLO OF POJOAQUE, POJOAQUE PUEBLO GAMING COMMISSION, and POJOAQUE GAMING, INC.,

Plaintiffs,

v. No. 1:21-CV-00373-MV-JHR

HONORABLE MATTHEW J. WILSON, District Judge, and HENRY MARTINEZ,

Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs, Pueblo of Pojoaque, Pojoaque Pueblo Gaming Commission, and Pojoaque Gaming, Inc. (hereafter collectively "Pojoaque"), through undersigned counsel, Ripley B. Harwood, Esq. (Ripley B. Harwood, P.C.), pursuant to Fed. R. Civ. P. 56 and D. N.M.LR-Civ. 56, submit this Memorandum in Support of their Motion for Summary Judgment:

I. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. The Pueblo of Pojoaque is a federally recognized Indian tribe located in Santa Fe County, New Mexico. Doc. 1, ¶ 4; accord, Doc. 6, ¶ 4.

2. Plaintiff Pojoaque Pueblo Gaming Commission is a governmental body that enforces gaming regulations at the Pueblo. Doc. 1, ¶ 5.

3. Plaintiff Pojoaque Gaming, Inc. is a tribally chartered corporation wholly owned by the Pueblo of Pojoaque doing business on Pueblo land in the State of New Mexico. Doc. 1, ¶ 6.

4. Pojoaque Gaming, Inc., operates the Cities of Gold Casino within Indian Country. Doc. 1, ¶'s 6 & 9; 18 U.S.C. §1151(b).

5. Defendant, Henry Martinez, was walking across the Cities of Gold Casino floor when he slipped and fell. Doc. 36, Ex. E & Doc. 37; Doc. 1, ¶ 10; Doc. 1-2, ¶ 12; Doc. 5, ¶ 9; Doc. 6, ¶ 10.

6. Henry Martinez filed suit for personal injuries in the First Judicial Court for the State of New Mexico. Doc. 1, Ex. 1; Doc. 5, ¶ 9; Doc. 6, ¶ 10.

7. The operative provisions of Pojoaque's Gaming Compact with the State of New Mexico in effect at the time of Mr. Martinez' fall are identical to those under consideration in *Dalley*. Doc. 1-3, §8 at p. 21; compare *Dalley* 896 F. 3d 1196, fn. 2.

ARGUMENT

I. *STARE DECISIS* ENTITLES POJOAQUE TO SUMMARY JUDGMENT

The Tenth Circuit decided *Navajo Nation* v. *Dalley*, 896 F.3d 1196 (10th Cir. 2018) more than two years before the Plaintiff below, Henry Martinez, filed his personal injury lawsuit in the First Judicial District Court. *See* Doc. 1-2. In *Dalley*, the plaintiff allegedly slipped and fell on a wet bathroom floor at the Northern Edge Navajo Casino. *Id*., 896 F.3d at 1200. In this case, Mr. Martinez alleges he was traversing the Cities of Gold Casino floor when he slipped and fell. *See* UMF 5 above, and supporting citations.

Mr. McNeal in *Dalley* was presumably answering a call of nature when he fell. Mr. Martinez in this case was walking on the casino floor. *Id*. Neither of them were engaged in gaming at the time of their respective falls.[1] Activities such as traversing a

[1] Mr. Martinez will argue otherwise, but the claim is not "genuine" because he admits he was walking across the casino floor at the time of his fall and video proves this is the case. UMF 5 and supporting citations. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). Rather, "[o]nly disputes over facts that might affect the outcome of the suit under the

casino floor or answering a call of nature at a casino bathroom are tangential to the activity of engaging in Class III gaming. *Dalley*, 896 F.3d at 1210. Tangential matters like the safety of walking surfaces in casinos, are not activities for which Congress authorized Indian Tribes to shift subject matter jurisdiction under IGRA. *Id*.

The Tenth Circuit has explained that "precedent ... includes not only the very narrow holdings of … prior cases, but also the reasoning underlying those holdings, particularly when such reasoning articulates a point of law." *United States ex rel. King v. Hillcrest Health Ctr., Inc.,* 264 F.3d 1271, 1279 (10th Cir.2001)(quoting *United States v. Meyers,* 200 F.3d 715, 720 (10th Cir.2000)). *Dalley* is on all fours with the present case.

District courts adhere to the principles of horizontal and vertical *stare decisis*. *Romero v. Saul*, No. CV 19-0092 JHR, 2020 WL 1677074, at *8 (D.N.M. Apr. 6, 2020). Horizonal *stare decisis* requires "a court [to] adhere to its own prior decisions…". *Id*. (citations to supporting authority omitted). Vertical *stare decisis* requires a court to "strictly follow the decisions of higher courts in its jurisdiction." *Id*. This Court adhered to vertical *stare decisis* when it entered its Final Judgment and Order in *Navajo Nation v. Dalley*, No. 1:15-CV-00799-MV/KK (Doc. 36 05/20/2019). Respectfully, both horizontal and vertical *stare decisis* now compel it to enter the same declaratory judgment in this indistinct case.

II. IRONICALLY, STATE LAW *STARE DECISIS* COMPELS FEDERAL DECLARATORY JUDGMENT

The general rule is that federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them." *Ankenbrandt v. Richards,* 504 U.S. 689, 705, 112

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governing law will properly preclude the entry of summary judgment." *Id.* at 248. *See also*, §III, below.

S.Ct. 2206, 119 L.Ed.2d 468 (1992). This Court has, since at least 2016, regarded precisely this kind of case as emblematic of the kind of "justiciable controversy [that is] appropriate for declaratory judgment." *Navajo Nation* v. *Dalley*, 2016 WL 9819590 at *7 (D. N.M. 08/03/2016 Vazquez, J. Mem. Op. & Ord.).

However, this controversy is in need of a prompt and decisive declaratory judgment for overarching reasons which eclipse its déjà vu, mundane facts. Declaratory judgment is principally necessary in this case to check the repeated and willful frustration of now settled Tenth Circuit law in an area where federal law expressly preempts the field. *Id.*,2016 WL 9819590 at *4. In this very case and others like it,[2] personal injury plaintiffs persist in invoking *Doe* v. *Santa Clara Pueblo*, 2007-NMSC-008, holding district court judges such as co-defendant Wilson in this matter, hostage with the spear of state law *stare decisis*. *Even though Santa Clara Pueblo* is simply wrong, state district court judges continue to conclude that they are bound to that precedent by *stare decisis*. Unless and until the New Mexico Supreme Court takes action to reverse *Santa Clara,* Pojoaque respectfully submits that it is incumbent on the federal courts for no less than constitutional reasons, to reassert *Dalley*, and to enjoin state court actions such as this which frustrate Congress' plenary power over Indian affairs.[3]

The doctrine of preemption is an outgrowth of the Supremacy Clause of Article

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[2] *See Pueblo of Pojoaque and Buffalo Thunder, Inc. v. Honorable Bryan Biedscheid, individually and in his official capacity as District Judge, New Mexico First Judicial District Division VI; and Rudy Pena*, Cause No.: 1:20-CV-00166-JB-GBW, currently pending on summary judgment before Judge Browning.

[3] Pojoaque does not prospectively seek injunctive relief because it believes such relief is only available if Judge Wilson were to violate a declaratory decree of this Court. *See Pueblo of Santa Ana et al. v. Nash et al*., Civ. No. 11-0957 BB-LFG, Doc. 43 at pp. 16-17 (and authority cited therein discussing statutory changes affecting injunctive relief against state courts).

VI of the United States Constitution. Congress may, in certain areas of the law, promulgate a uniform federal policy that States may not frustrate through judicial interpretation. *Self v. United Parcel Service, Inc.*, 126 N.M. 396, 400, 970 P.2d 582, 586 (1998). Congress has chosen to do so respecting Indian affairs.

Congress possesses plenary power over Indian affairs. *See e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343, 118 S. Ct. 789, 139 L.Ed.2d 773 (1998). Thus, if state court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987); *Cohen's Handbook of Federal Indian Law* § 7.03[1][a][ii], at 608 (Nell Jessup Newton ed., 2012). This federal supremacy forecloses state court jurisdiction over Indian affairs absent proof of congressional consent. *Cohen's*, *supra*, § 7.07[4], at 673. As *Dalley* now makes clear, in enacting IGRA Congress neither authorized nor consented to the shifting of jurisdiction away from traditional tribal court venues for torts occurring on premises in Indian Country engaged in Class III gaming.

III. MR. MARTINEZ WAS NOT GAMING AT THE TIME OF HIS FALL AND TORT CLAIMS IN GENERAL ARE MERELY TANGENTIAL TO THE REGULATION OF CLASS III GAMING

Pojoaque is aware that this Court has intimate knowledge of the issues raised in this case and has no wish to needlessly rehash the analysis of a statute which both this Court and the Tenth Circuit have already examined minutely. However, it appears that Mr. Martinez is now claiming that he was engaged in the activity of Class III gaming at

the time of his accident. *See* Doc. 10, p. 2-3; Doc. 12, p.1, bullet 1.[4] Thus, Pojoaque submits the following analysis of *Dalley* and its import in general on tort claims arising at Class III gaming venues in Indian Country.

The analysis begins with the Tenth Circuit's determination that IGRA is an unambiguous statute. *Dalley*, 896 F.3d at 1211. An appellate court's conclusion that a statute is unambiguous has binding *stare decisis* effect. *N. New Mexico Stockman's Ass'n v. United States Fish & Wildlife Serv.*, 494 F. Supp. 3d 850, 985 (D.N.M. 2020).

"When the terms of the statute are clear and unambiguous, that language is controlling absent rare and exceptional circumstances…". *Wilson v. Stocker*, 819 F.2d 943, 948 (10th Cir.1987). If "construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." *United States v. Missouri Pacific Railroad Co.*, 278 U.S. 269, 278, 49 S.Ct. 133, 73 L.Ed. 322 (1929).

"Courts should not resort to legislative history when the statutory language is unambiguous and to do so is improper." *Dalley*, 896 F.3d at 1216 (citations to supporting authority omitted). "In construing [unambiguous] statutes, the Court is 'not [to] inquire what the legislature meant; [rather, the Court] ... ask[s] only what the statute means." ' *Chickasaw Nation v. Dep't of Interior*, 161 F. Supp. 3d 1094, 1099 (W.D. Okla. 2015), citing *St. Charles Investment Co. v. Commissioner of Internal Revenue*, 232 F.3d 773, 776 (10th Cir.2000).[5]

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[4] See fn. 1, *supra*. This new assertion is an expansion upon the facts Mr. Martinez has previously represented. **See Mr. Martinez' Response to Pojoaque's state court Motion to Dismiss at p. 6, attached as Exhibit A**.

[5] See *Pueblo of Pojoaque et al. v. State of New Mexico, et al.*, No. CIV 15-0625 JB/GBW, Doc. 149, p. 150 (IGRA's extraordinary preemptive power with respect to gaming on

The *Dalley* Court borrowed from *Bay Mills* to note that "we underscore that we have "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." *Dalley* at fn. 6, citing *Bay Mills*, 134 S.Ct. at 2034. The Court went on to endorse the view that "[i]t is not our function 'to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have' intended." *Id*., citing *Wis. Cent. Ltd. v. United States*, ––– U.S. ––––, ––––, 138 S.Ct. 2067, 2073, 201 L.Ed.2d 490 (2018).

The *Dalley* Court scrutinized every potentially applicable subsection of § 2710(d)(3)(C) for evidence that IGRA contemplated jurisdiction-shifting for torts occurring on gaming premises, and could find none. The word "activity" appears no less than thirty-two times throughout *Dalley*. The Court looked specifically for evidence that Congress contemplated jurisdiction-shifting for 'activity' that included torts occurring on gaming premises. It found none and had to invent two hypotheticals in a footnote to illustrate potential exceptions to the general rule it announced. 'Activity' concluded the Court (again borrowing from *Bay Mills*), is "what goes on in a casino—[that is,] *each roll of the dice and spin of the wheel*." *Dalley* at 1210, citing *Bay Mills*, 134 S.Ct. at 2032 (*emphasis* in original). Unsurprisingly, the Court arrived at the logical conclusion from its plain but in-depth reading of IGRA, that only gaming activities themselves are directly related to the core purpose of IGRA: warding off the corruption and criminal infiltration of Indian casinos.[6] Other activities, such as the unpacking of a

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Indian lands is clear and manifest. IGRA's enactment "enshrines" a Congressional purpose to preserve Indian tribes' sovereign authority over gaming on Indian lands.)

[6] State and federal interests both mesh and peak respecting *police powers* over Indian gaming: New Mexico has enacted laws that "strictly regulate "gaming in the state "to ensure honest and competitive gaming that is free from criminal and corruptive

new slot machine (this case), or the mopping of a bathroom floor (*Dalley*) are as ancillary to the business of gaming as they are to the operation of any other type of business. Torts occurring in consequence are, again unsurprisingly, properly viewed as tangential.

After the Tenth Circuit's *Dalley* decision, there is simply no longer any room to 'interpret' IGRA as permitting jurisdictional agreements regarding tort claims arising out of gaming activity, as a means of regulating dangers arising from those activities. This case thus also affords the Court the opportunity to announce a bright-line standard applicable to negligence claims arising at IGRA-governed New Mexico Indian casinos. The exaggeration in this case that traversing a casino floor constitutes engaging in the activity of Class III gaming, itself highlights the necessity of a bright line standard to deter the increasingly routine disregard of preemptive and dispositive federal law.

A. *That the tort law is a form of regulation with salutary purposes does not mean that Congress incorporated it into IGRA*

No one disputes, and the *Dalley* Court agreed, that the tort law is fairly viewed as a form of regulation with the salutary purposes of promoting the exercise or ordinary care and preventing the harms that result from negligence. *Dalley* at 1207. This statement however, is a universal truth. It holds true from coast to coast, including throughout all of Indian Country. Yet when torts occur in Indian Country at locations other than those which happen to conduct IGRA-governed Class III gaming, the uniform and long-standing rule is that such occurrences are dealt with by Indians applying their laws in their courts. *Williams v. Lee*, 358 U.S. 217, 219–20 (1959) (a bedrock proposition of Indian Law derived from the sovereign status of Indian tribes, that tribal

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elements and influences." *Pueblo of Pojoaque et al. v. State of New Mexico, et al*., No. CIV 15-0625 JB/GBW, Doc. 149, p. 148, citing N.M.S.A. § 60-2E-2(A).

courts have exclusive jurisdiction over claims arising on tribal lands against tribes, tribal members, or tribal entities).

Throughout Indian Country, at least at locations other than those authorized to conduct IGRA-regulated Class III gaming, federal law accords Indians the sovereign right to apply their own laws to curb the undesirable consequences of negligence. Elsewhere throughout Indian Country the overarching sovereign interests which compel this result are viewed as eclipsing state interests in administering the tort law. What then is so distinctive about torts occurring at Indian casinos as to upend this traditional analysis? *Dalley* strongly suggests that the answer is 'nothing': personal-injury lawsuits may fairly be viewed as effectuating societal regulation, but it is a *non-sequitur* to thereafter conclude that this form of regulation is directly related to, and necessary for the licensing and regulation of Class III gaming, as required by IGRA. The uncoupling of casino torts from IGRA was indeed the principal lesson of *Dalley*. *Id.,* 896 F.3d at 1209-10.

It was a stretch for the *Dalley* Court even in *dicta* to hypothesize facts that could 'colorably' be said to arise from the playing of Class III games. *Dalley*, fn. 7. The notion that unintentional torts occurring by happenstance on casino premises are "directly related to, and necessary for, the licensing and regulation of [Class III gaming]" (25 U.S.C. § 2710(d)(3)(C)(i)), simply finds no support in IGRA. *Dalley* analyzed a slip-and-fall claim indistinguishable from the one involved in this case by rigorous, thorough, and restrictive analysis of subparts (i), (ii), & (vii) of this operative IGRA provision and unsurprisingly concluded that "Appellee's… arguments come up short." *Dalley* at 1211-16.

The lesson from the kind of studious IGRA review which *Dalley* exemplifies, is that there is no basis in the language of IGRA to believe that Congress intended to exalt torts occurring on casino premises over those occurring anywhere else in Indian Country, much less to accord them jurisdiction-altering status that is antithetical to settled precedent. Courts must presume that Congress understood the remedial purposes of the tort law when it enacted IGRA. *Dalley* and *Nash*[7] both looked to the unambiguous structure of IGRA and both concluded that if Congress had intended "to permit tribes to allocate jurisdiction [over tort claims], it could have crafted language to effectuate that purpose, but it did not do so." *Dalley* at 1211. *Nash* was even more explicit:

> 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.

Nash, 972 F.Supp.2d at 1265.

Not only is such authorization absent from IGRA, one might well postulate that it is absent for a multiplicity of reasons: first, as set forth above, the vindication of civil wrongs arising from tortious conduct at casinos is conceptually remote from the core purpose of IGRA. Second, torts occurring at casinos are indistinct from torts occurring elsewhere in Indian Country such that the happenstance of occurrence at a casino gives rise to no logical basis for displacing the long-standing rule that such occurrences are to be dealt with by Indians applying their laws in their courts. Third and relatedly, the notion that only state tort law and process suffice to protect public health and

[7] *Pueblo of Santa Ana* v. *Nash*, 972 F.Supp.2d 1254 (D. N.M. 2013).

safety in Indian Country merely because tortious conduct happens to occur on casino premises has no logical grounding. It also represents a resurrection of an unseemly paternalism that was emblematic of federal policy towards Indians in the nineteenth century, but which is anathema to modern law and policy encouraging self-determination, self-governance, autonomy, equality and independence.

So while this Court should decline to revisit IGRA's legislative history in connection with this Motion, it should analyze this unambiguous statute against the broader framework of Indian Law and policy within which the statute is embedded. The takeaway from that overview is reflected in the *Nash* Court's conclusion that IGRA's jurisdiction-shifting provision is narrow and that the language employed is restrictive, not expansive.

For more than sixty years, Congress has embraced the bedrock axiom that "absent clear congressional authorization, state courts lack jurisdiction to hear cases against Native Americans arising from conduct in Indian Country." *Dalley* at 1204, citing *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). For this overarching reason, the *Dalley* Court observed that "Congress has 'authorized' the tribes and states to make such jurisdiction-altering agreements 'in only a few specific instances'…" *Dalley* at 1205 (citations to referenced authorities omitted).

IGRA is one of those few instances. It is an exception because regulation of gaming is important. But gaming regulation is important not because Congress was afraid slip-and-fall plaintiffs might not receive a fair shake in Indian Country, but because of fears of the infiltration of organized crime into these enterprises. 25 U.S.C. §2702(2); see *Pueblo of Santa Ana v. Kelly,* 932 F.Supp. 1284, 1292 (D. N.M. 1996) (central purpose is to protect against the infiltration of organized crime into high-stakes

gaming).

For these reasons it is high time for a bright-line rule on this point. A bright-line rule would avoid revisiting settled Indian law subject matter jurisdictional issues whenever a new tort law fact scenario arises at an IGRA-regulated gaming facility. A bright-line rule is needed because every such tort, irrespective of factual nuances, is as susceptible of adequate remedy in a tribal court as it is in any state court.

Global consideration of the subject of torts occurring on Indian casino premises leads to the logically inexorable conclusion that such claims can and should *categorically* never be viewed as being directly related to the licensing and regulation of gaming activity. Nothing about the business of gaming distinguishes it with respect to tort claims from any other commercial activity, alters the indirect nature of torts occurring in consequence of such activities, or warrants super-elevated jurisdictional analysis. Class III gaming is instead distinguished only by apprehensions of infiltration by criminal enterprises. Given the complete disconnect between this fear and the objectives of civil tort law, is no wonder that the *Dalley* Court found itself "hard pressed to see how tort claims arising from [the tangential activities of casino patrons] could be viewed as directly related to, and necessary for, the regulation of Class III gaming… ". *Dalley* at 1208. Even the examples envisioned in *Dalley* footnote 7, tied as directly as clever judges could envision to the actual physical activity of gaming, are nevertheless in the final analysis merely risks peculiar to this particular business activity, indistinct from similar tangential risks inherent in the operation of any business; utterly unrelated to the primary goal of IGRA of preventing the infiltration of organized crime into Indian gaming. *Doe v. Santa Clara Pueblo*, 2007 NMSC-008, ¶ 35.

The resolution of tort claims occurring on casino premises, no matter how directly they may arise from the activity itself, bears no relationship whatsoever to IGRA's overarching goal, and so bears no relationship whatsoever to the licensing and regulation of gaming activity as that term was envisioned in IGRA and as it has since been narrowly construed by the courts. The idea that Congress could have intended waiver for torts even arising directly out of the playing of Class III games is a stretch that finds no support in the language of the statute itself nor in case law identifying its enforcement power as having to do with "the power to shut down crooked blackjack tables." *Dalley* at 1208, citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S.782, 792, 134 S.Ct. 2024, 2033, 188 L.Ed.2d 1071 (2014).

B. Victims of casino torts are not without remedies

As in *Santana v. Muscogee (Creek) Nation*, 508 Fed. Appx. 821 (10th Cir. 2013), the gaming compact to which Pojoaque subscribed at all times material to Mr. Martinez' lawsuit establishes due process for the protection of visitors. Sections 8.A and B of that compact prescribe a tribal court remedy for such claims and establish an eight-figure insurance compensation fund. Doc. 1-3. Pojoaque also has in place a Law and Order Code with specific procedures and remedies for tort claims. Thus, even if states have a residual interest in seeing that victims of Indian casino premises torts are fairly compensated, there is simply no basis to believe that this interest is unaddressed. If anything, compact mandated insurance and remedies afford casino visitors greater protection and recourse than is available at most businesses elsewhere in Indian Country, or even outside of Indian Country.

There is simply a disconnect between the language and purpose of IGRA and the repeated attempts of personal injury claimants to shoehorn into it unexpressed,

unstated, and implied waivers of sovereign immunity. This Court should apply *Dalley* and *Nash*, reject those arguments, grant Pojoaque summary judgment, and declare that the New Mexico State District Courts lack subject matter jurisdiction not only over Mr. Martinez' casino floor slip and fall, but also over all unintentional torts occurring on IGRA-regulated casino premises throughout this district's Indian Country.

For all of the foregoing reasons, Pojoaque requests that this Court declare that the exclusive venue for unintentional torts of whatever kind and character, occurring in Indian Country at Indian gaming facilities operating under the auspices of IGRA, shall be in the tribal courts. Plaintiffs request that this Court grant this Motion and authorize them to thereafter seek injunctive relief in the event that the state district court were to proceed with Mr. Martinez' lawsuit despite this Court's declaration. Plaintiffs request such other and further relief as this Court deems proper.

Respectfully submitted,

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By: **/s/** *Ripley B. Harwood*
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