IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

THE HONORABLE GREG TREAT, Senate President Pro Tempore, in his official capacity, and THE HONORABLE CHARLES MCCALL, Speaker of the House, in his official capacity,	)	
Petitioners,	)	
vs.	)	Case No. 118,913
THE HONORABLE J. KEVIN STITT, Governor of the State of Oklahoma, in his official capacity,	)	
Respondent.	)	

RESPONSE IN OPPOSITION TO APPLICATION AND BRIEF IN SUPPORT OF APPLICATION TO ASSUME ORIGINAL JURISDICTION, PETITION FOR DECLARATORY RELIEF AND REQUEST FOR EXTRAORDINARY RELIEF

Phillip G. Whaley, OBA No. 13371
Daniel G. Webber, Jr., OBA No. 16332
Patrick R. Pearce, Jr., OBA No. 18802
Matthew C. Kane, OBA No. 19502
RYAN WHALEY
400 North Walnut Avenue
Oklahoma City, OK 73102
Telephone: (405) 239-6040
Facsimile: (405) 239-6766

Mark E. Burget, OBA No. 1326
Jeffrey C. Cartmell, OBA No. 31012
State of Oklahoma
Office of the Governor
2300 N. Lincoln Blvd., Suite 212
Oklahoma City, OK 73105

Attorneys for Respondent

August 4, 2020

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

THE HONORABLE GREG TREAT, Senate President Pro Tempore, in his official capacity, and THE HONORABLE CHARLES MCCALL, Speaker of the House, in his official capacity,	)	
Petitioners,	)	
vs.	)	Case No. 118,913
THE HONORABLE J. KEVIN STITT, Governor of the State of Oklahoma, in his official capacity,	)	
Respondent.	)	

RESPONSE IN OPPOSITION TO APPLICATION AND BRIEF IN SUPPORT OF APPLICATION TO ASSUME ORIGINAL JURISDICTION, PETITION FOR DECLARATORY RELIEF AND REQUEST FOR EXTRAORDINARY RELIEF

Phillip G. Whaley, OBA No. 13371
Daniel G. Webber, Jr., OBA No. 16332
Patrick R. Pearce, Jr., OBA No. 18802
Matthew C. Kane, OBA No. 19502
RYAN WHALEY
400 North Walnut Avenue
Oklahoma City, OK 73102
Telephone: (405) 239-6040
Facsimile: (405) 239-6766

Mark E. Burget, OBA No. 1326
Jeffrey C. Cartmell, OBA No. 31012
State of Oklahoma
Office of the Governor
2300 N. Lincoln Blvd., Suite 212
Oklahoma City, OK 73105

Attorneys for Respondent

August 4, 2020

SUBJECT INDEX

Petitioners' instant Application and Brief ("Application") is the latest in a series of efforts by legislators to wrest away the executive authority of the Governor to negotiate and enter into compacts with Indian tribes and improperly vest such power solely in the legislative branch. In the first original action, *Treat v. Stitt*, 2020 OK 64, ¶ 7 ("*Treat I*"), this Court recognized Governor Stitt's authority to enter into tribal gaming compacts with the Comanche Nation and Otoe-Missouria Tribes (the "First Agreements"), but held that the Governor exceeded his authority because the compacts included forms of Class III gaming not authorized by the State-Tribal Gaming Act ("STGA").[1] The new compacts the Governor negotiated and entered into with the United Keetoowah Band of Cherokee Indians and the Kialegee Tribal Town (the "Second Agreements") that are the subject of this Application do ***not*** include any additional forms of Class III gaming. Consequently, the "Second Agreements" should be deemed binding pursuant to Oklahoma law.

Historically, Petitioners recognized "the Governor's authority to enter into cooperative agreements." Petitioners' Letter, *Treat I,* Pet. Appx. Ex. 4. Petitioners only took issue with the fact that "the Legislature has not yet authorized sports betting in Oklahoma." *Id.*[2] Petitioners then requested an opinion from the Oklahoma Attorney General ("OAG"), asking if the Governor had the authority to "enter into new compacts with tribes which contain gaming activities expressly prohibited by Oklahoma Statute." OAG 2020-8, at 1. The OAG responded: "It is…the official Opinion of the Attorney General that: The Governor lacks authority to enter into and bind the State to compacts with Indian tribes that authorize gaming activity prohibited by law." *Id.* at 9. On June 4, 2020, Petitioners filed *Treat I.* In their Brief in *Treat I*, they stated:

[1] Respondent expressly incorporates the arguments and authorities set forth in his Response to Petitioners' Application, Reply to the OAG's Response, and Notice filed in *Treat I.*

[2] They further stated that "[t]he inclusion of sports betting is one of a number of flaws" in the compacts. *Id.* at 3. However, they made no attempt to identify what other purported flaws existed.

"[T]he Governor purports, by his unilateral approval of the terms he negotiated, to authorize forms of gaming that are expressly prohibited by Oklahoma law." *Id.* at 1. Throughout the Brief in *Treat I*, they repeatedly challenged the nature of the games contemplated by the First Agreements.[3] However, the "Second Agreements" do not contain these additional forms of Class III gaming. Nevertheless, Petitioners here ("*Treat II*") ask this Court now to broadly find that the Governor simply has no authority to enter into tribal gaming compacts.

I. The Second Agreements do not Include Sports Betting or House-Banked Games.

From the beginning, Petitioners' primary (and nearly exclusive) complaint about the First Agreements was that they included provisions related to sports betting. After intentionally and explicitly casting themselves and the legislature to the sidelines of the gaming compact process, Petitioners suddenly became critical of the Governor's efforts to negotiate and enter into tribal gaming compacts the day after the First Agreements were entered. They sent a letter to the Governor which explicitly acknowledged "the Governor's authority to enter into cooperative agreements." *Treat I,* Pet. Appx. Ex. 4

The First Agreements specifically defined "event wagering" as "the placing of a wager on the outcome of a Sport event, including E-Sports, or any other events, **to the extent such wagers are authorized by law**." *Treat I,* Pet. Appx. 2, Comanche Compact, Part II.A.13 (emphasis added). While the issue of whether such form of gaming is the proper subject of a compact is a federal question under the Indian Gaming Regulatory Act ("IGRA"), the First Agreements specifically recognized that additional action could be necessary to authorize or

[3] *See, e.g., id.* at ¶1 ("they include covered games...such as house-banked card games, house-banked table games, and event wagering"); ¶2 ("even to the extent of including gaming prohibited by state law"); ¶12 ("permitted gaming is game-specific"); ¶13 ("the unauthorized forms of gaming...house-banked card and table games and event wagering"); ¶14 ("the Agreements included unauthorized forms of gaming"); ¶15 ("sports betting – like other of the unauthorized forms of gaming – is prohibited").

legalize sports betting. Indeed, these First Agreements recognized what this Court ultimately held, that the legislature may need to "enacts laws to allow the specific Class III gaming at issue." *Treat I*, 2020 OK 64, ¶ 8.

But Petitioners are not satisfied with the authority to pass laws regarding which Class III gaming is, or is not, authorized by Oklahoma law. Petitioners now ask this Court in *Treat II* to "declare that state law does not authorize the Governor unilaterally and independently to enter into gaming compacts on behalf of the State." Brief at 1. In other words, Petitioners seek to usurp the Governor's authority entirely and to recast the process of compacting with other sovereigns solely as a legislative function – contrary to Oklahoma's separation of powers principle and Oklahoma's express law. *See In re Oklahoma Dep't of Transp.*, 2002 OK 74, ¶¶ 14-21, 64 P.3d 546, 551-52, as corrected (Dec. 11, 2002).

The Second Agreements do not include sports betting or house-banked card and table games – the **singular focus** of the OAG Opinion and all of Petitioners' concerns prior to their *Treat I* Reply. This reflects Petitioners' continued practice of relying on OAG opinions when they find those opinions convenient while failing to acknowledge that not a single OAG opinion suggests the Governor is without authority to enter into state-tribal compacts or that a gaming compact must be approved by the Joint Committee. Regardless, Petitioners argue the Governor's signing of the Second Agreements "demonstrates disregard for our constitutional democracy and suggests a lack of respect for co-equal Branches of government." Brief at 1. Petitioners also contend, without support, that the Governor "accelerated" and "escalated" such compacting. *Id.* at 1-2. Nothing could be further from the truth. Tribal sovereigns desired to obtain compacts with the State. Litigation was pending over the compacts entered under the STGA's Model Compact. The State has an obligation to negotiate such gaming compacts in

good faith under IGRA. The Oklahoma Constitution, statutes, jurisprudence and OAG opinions each vest the authority to do so with the Governor. Petitioners now seek to recast history, contrary to their previous filings[4] and the clearly established facts.

On July 21, 2020, the Court entered its Opinion in *Treat I*, which focused exclusively on the scope of Class III gaming addressed in the First Agreements.[5] This Court determined that the State was not bound by the First Agreements "until such a time as the Legislature enacts laws to allow the specific Class III gaming at issue, and, in turn, allowing the Governor to negotiate additional revenue." *Treat I*, 2020 OK 64, ¶ 8.

II. The Governor is Vested with Authority to Enter Compacts which *Do Not* Conflict with the STGA and/or State Criminal Laws.

In *Treat I*, this Court concluded as follows:

> The State-Tribal Gaming Act is "game-specific" and allows for specified forms of Class III gaming. The State-Tribal Gaming Act expressly bars house-banked card games, house-banked table games involving dice or roulette wheels, and event wagering. The Legislature has yet to amend the State-Tribal Gaming Act to include house-banked card and table games and event wagering as covered games. As a result, the tribal gaming compacts at issue authorize types of Class III gaming expressly prohibited by the State-Tribal Gaming Act. In turn, any revenue to the State, the Comanche Nation Tribe or the Otoe-Missouria Tribe that would result from the tribal gaming compacts is prohibited.

Treat I, ¶ 7. Because *Treat II* does not involve compacts that address types of class III games the Court found were barred by 3A O.S. § 262(H), the Second Agreements are not violative of the Court's holding. The Oklahoma Constitution (Art. VI, § 8), Oklahoma jurisprudence (*Sheffer v. Buffalo Run Casino, PTE, Inc.*, 2013 OK 77, ¶ 12, 315 P.3d 359, 364 and n.18 and

---

[4] Ironically, despite their ever-changing strategy, Petitioners contend that it is "the Governor [who] has attempted to confuse the question presented, claiming that the only real questions of law regard the permissible scope of gaming under [IGRA]." Brief, at 4.

[5] Notably, the Court had Petitioners' Reply, with its newly-found focus on non-gaming issues, as well as the instant Application, when it rendered its determination limited exclusively to specific games.

Opinion, *Treat I*), Oklahoma statutes (74 O.S. § 1221), OAG opinions (04-27, 06-39, 20-8), and at least 37 existing compacts (*Treat I,* Resp. Appx. 13) establish and clarify the Governor's obligation and authority to negotiate and enter into cooperative agreements with Indian tribes. Such authorities, and the unconstitutionality of any purported statutory requirement in § 1221 that the legislature (or a joint committee thereof) must approve such agreements, are detailed in the Governor's Response (*e.g.* 1-2, 5-9) and Reply (*e.g.,* 1-2) filed in *Treat I.* Not a single case cited by Petitioners involves a constitutional provision like Oklahoma's, a statute like Oklahoma's, OAG Opinions, etc. – all of which recognize the Governor's authority to enter into gaming compacts with tribes, subject to the limitation imposed in *Treat I.*

In *Treat I,* the Court expressly rejects Petitioners' position that approval of gaming compacts entered by the Governor by the Joint Committee is either necessary or sufficient to make them valid under 74 O.S. § 1221. *See Treat I,* 2020 OK 64, ¶ 7 (holding that the Governor is constrained by the statutory limitations on Class III gaming, independent of any review by the Joint Committee). Indeed, OAG Opinion 04-27, ¶ 27, expressly provides: "[A]ny requirement that individual agreements or compacts negotiated by the Governor on behalf of the State with other sovereigns, such as Indian tribes, be approved by the Legislature would violate the principles of separation of powers." This Court has held that the separation of powers provision was constitutionally violated where a legislative oversight committee[6] was given the power to review and approve grants issued by the Department of Transportation. *See In re Oklahoma Dep't of Transp.,* ¶¶ 14-21, 64 P.3d at 551-52. Subjecting individual compacts to legislative approval, whether by the full body or by a "mini-legislature" comprised of sitting

[6] Both the Committee here and the Legislative Bond Oversight Committee previously ruled unconstitutional by the Court are comprised of sitting members of the legislature appointed by the Speaker of the House and the President Pro Tempore of the Senate. *See In re Oklahoma Dep't of Transp.,* ¶ 15, 64 P.3d at 551.

legislators, "would result in complete control by the Legislature...by which the executive department is being subjected to the coercive influence of the legislative department," and is constitutionally infirm. 2004 OK AG 27, ¶ 27.

Regardless, even if Joint Committee approval were constitutional, Subsection C of § 1221 expressly provides that "[i]f the cooperative agreements specified and authorized by paragraph 1 of this subsection involve trust responsibilities," then "approval by the Secretary of the Interior or designee shall be required" – rather than approval by the Joint Committee. This plain reading is further confirmed by the fact that Subsection D of § 1221 (addressing compacts involving political subdivisions of the state) employs the same structure. Joint Committee and Governor approval is required "except as otherwise provided by this subsection." The exceptions in Subsection D include subparagraphs (2) juvenile detention facilities, (3) groundwater, (4) military juvenile facilities and (5) roads and bridges. The plain language of the statute clearly supports the interpretation advanced here by the Governor. Two of the subparagraphs (4 and 5) of subsection D are completely exempted from any approval of the Joint Committee or the Governor (which cannot be consistent with Petitioners' interpretation that the "except" language in the subsection really means "and"), and one subparagraph (3) requires consent of the Legislature (which under Petitioners' interpretation would somehow require the redundant approval of the Joint Committee ***and*** the Legislature).

The Governor's reading is not "tortured," as Petitioners suggest. Rather it is Petitioners' reading which ***expressly*** includes "additional words." Brief at 4, 10 ("the Joint Committee must approve an agreement for it to become effective under state law, ***and*** when trust responsibilities are involved, the Secretary of the Interior or designee must approve, ***too***.") (emphasis added). Petitioners do not even attempt to explain the existence of other articulated "exceptions" in

Subsections C and D which do not support their strained reading. Petitioner Treat specifically tried ***and failed*** to change this statutory language in 2016, and now seeks to do so by circumventing the very legislative body whose interests he contends he is supporting here. *See Treat I,* Response at 2.

Petitioners also ignore another key issue related to § 1221. Even if the statute could be read to require approval of the Joint Committee for compacts to be effective, then they are not invalid, they just are not effective absent such approval, and the matter is not ripe for this Court's consideration.

III. Oklahoma's Public Policy Supports the Governor's Efforts to Work in a Spirit of Cooperation with Indian Tribes to Enter Gaming Compacts.

Relying on a footnote in OAG 04-27, which provides that the Governor should exercise his authority to enter into compacts consistent with state public policy, Petitioners continue to advance an argument that the Governor is not in compliance with or is attempting to alter state public policy. However, Petitioners similarly continue to ignore the fact that Oklahoma public policy is explicitly stated in § 1221(B). As noted in the Notice filed by the Governor in *Treat I*, a number of prominent former Oklahoma lawmakers and the Chickasaw and Choctaw Nations represented to the United States Supreme Court, in an amicus brief specifically relied on by the United States Supreme Court in the recent *McGirt* decision, that:

> ***State policy is to "recognize[] the unique status of Indian tribes within the federal government and . . . work in a spirit of cooperation with all federally recognized Indian tribes in furtherance of federal policy for the benefit of both the State of Oklahoma and tribal governments." Okla. Stat. tit. 74, § 1221(B).***

Amicus Brief, at 13-14 (emphasis added). That state policy is specifically reflected in § 1221(C), which requires the Governor to "negotiate and enter into" state-tribal compacts and excludes any requirement for Joint Committee approval where approval by the Department of

the Interior must be obtained. Petitioners may not like the result, but that is what the statute provides. Moreover, when the State enacted the STGA on nontribal lands, it made clear the public policy that class III gaming is not prohibited, but merely regulated, on both tribal and nontribal lands, and IGRA became part of that public policy on gaming going forward.

IV. Petitioners Have Failed to Identify any Provision of the Second Agreements that Authorize Gaming Prohibited by the STGA.

Because *Treat II* does not involve compacts that purport to authorize types of class III games the Court found were barred by 3A O.S. § 262(H), the Second Agreements are not in violation of the Court's holding. Indeed, the STGA specifically authorizes the Governor to negotiate additional and different terms with Indian tribes, and merely states that "[n]o tribe shall be *required* to agree to terms different than the terms set forth in the" Model Compact. 3A O.S. § 280. This Court acknowledges the Governor's authority to negotiate and enter into compacts that are not inconsistent with the STGA in *Treat I.*

Notwithstanding, Petitioners' Brief contains a laundry list of provisions which they contend, without support, are *ultra vires* acts of the Governor. While impossible to address each with any level of detail given page constraints, a brief response to each reveals that Petitioners have not cited any authority for such claims or otherwise identified any provision of the Second Agreements that violates the STGA and/or *Treat I.* In fact, many of the cited provisions which the Petitioners contend violate Oklahoma law are identical to, or very closely track, the language found in the Model Compact, 3A O.S. § 281:

- **Gaming.** Petitioners contend that the Second Agreements would expand the powers of the executive, by vesting the Governor with unilateral, prospective power to approve new forms of gaming. To the contrary, Section 3(F) of the Second Agreements – just like the Model Compact, Part 3.5, and 3A O.S. § 280.1 – simply recognizes that additional games can be added by agreement and amendment.

- **Dispute Resolution.** While the dispute resolution provision in the Second Agreements is different than Section 12 of the Model Compact, that was required because the Tenth Circuit has ruled that Section 12 was invalid and legally unenforceable. *See Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d 1226 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 375 (2018). Nothing in the STGA – or any other Oklahoma law – prohibits a different form of dispute resolution.

- **Payments to Treasury.** Despite Petitioners' contention that the Second Agreements improperly appropriate funds to a state agency, the collection and use of fees from compacting tribes is consistent with the Model Compact. *Compare* Second Agreements, Part 10(B)(3) and 3A O.S. § 281, Part 11(A)(2) ("Payments of such fees shall be made to the Treasurer of the State of Oklahoma. Nothing herein shall require the allocation of such fees to particular state purposes...").[7]

- **Power of the Court.** Further, Petitioners contend that the Governor has attempted to "[u]surp the power of this Court" in Part 13 of the Second Agreements. But this language is entirely consistent with the Model Compact, which provides: "Each provision, section, and subsection of this Compact shall stand separate and independent of every other provision, section, or subsection. **In the event that a federal district court shall find** any provision, section, or subsection of this Compact to be invalid, the remaining provisions, sections, and subsections of this Compact shall remain in full force and effect...." 3A O.S. § 281, Part 13(A) (emphasis added).

- **Survivability.** Similarly, Part 13(F), stating that the Second Agreements shall survive any repeal or amendment of the STGA, is virtually identical to the language in the Model Compact: "This Compact shall constitute a binding agreement between the parties and **shall survive any repeal or amendment of the State-Tribal Gaming Act**." 3A O.S. § 281, Part 13(B) (emphasis added).

The following chart further briefly responds to Petitioner's unsupported laundry list of contentions and includes both the reference to the challenged provision and responsive authority establishing its legitimacy:

[7] It is also a common practice in other compacts entered by the Governor with Indian tribes. *See, e.g.*, Choctaw Hunting and Fishing Compact, *Treat I*, Resp. Appx. 13, at 0210-0211 ("Within the first fifteen (15) business days of January of each calendar year, the Nation shall provide a lump sum payment of $200,000 to the ODWC, which may be expended at the exclusive discretion of the ODWC for any lawful conservation purpose."); *see also* 2009 OK AG 17 (finding that custodial funds and other special funds are not subject to legislative appropriation under Okla. Const. art. V, § 55).

Purported Wrong	Cited Provision of Second Agreement	Oklahoma Authority and Compliance
"Vesting his office with the unilateral, prospective power to approve new forms of gaming." *Brief* at 13.	Part 3(F) – "If and when new forms of Covered Games become available in the market following the Effective Date of this Compact, such new games may be authorized in the form of an Amendment to this Compact as agreed by the Parties."	This provision is specifically limited to "Covered Games," a defined term. *See* Part 2.6. The Governor has not retained any unilateral power to expand "Covered Games." The definition of "Covered Games" in the Model Compact (Part 3.5) similarly allowed the authorization of new games, as does 3A O.S. § 280.1.
"Declaring that the only actions necessary for the Agreements to become effective are: (1) approval by the Tribe, (2) execution by the Governor, (3) approval by the Department of the Interior, and (4) publication in the *Federal Register*." *Id.*	Part 12(A)	This is correct and consistent with §280, ¶1; §281(A)(2);Parts 15(A) and 16 of the Model Compact. As discussed throughout, these are the only steps required under the STGA, the Oklahoma Constitution, § 1221 and IGRA.
"Endowing his office with singular and 'exclusive authority to settle and negotiate any dispute arising under the Compacts.'" *Id.*	Part 6(F)	Again, the Oklahoma Constitution, Art. VI, Sec. 8 and § 1221, and the STGA § 280, ¶1; § 281, Parts 15(A) and 16 of the Model Compact, all provide the Governor such authority. Moreover, such authority has clearly been recognized by various parties (*e.g.*, the Governor and not the OAG was sued in federal court).
"Creating an entirely new procedure for the resolution of gaming compact disputes between the State and the Tribes, including submitting to the jurisdiction of federal courts, issuing a qualified sovereign immunity waiver, and vesting his own office with exclusive authority to negotiate and settle disputes." *Id.*	Part 6 – Dispute resolution procedure.	Again, the Oklahoma Constitution, Art. VI, Sec. 8 and § 1221, and the STGA, all provide the Governor such authority. Additionally, a new dispute resolution provision was required because the Model Compact version was nullified by the federal court. Numerous other compacts, including those established without

Purported Wrong	Cited Provision of Second Agreement	Oklahoma Authority and Compliance
		Joint Committee approval, contain similar dispute resolution provisions. *See, e.g.*, Resp. Appx 13.
"Expanding the powers and duties of the Office of Management and Enterprise Services ("OMES")" *Id.* at 14.	Part 7 – OMES is the state monitoring compliance provision very similar to that in the Model Compact.	There is no expansion of powers and duties of the OMES here. This part only additionally provides OMES with central computer access and an annual review – issues of frequency and accessibility of OMES supervision, but no change in its powers.
"Imposing the possibility of monetary sanctions on the Tribes for violations of the Agreements-and then ***appropriating*** those funds to OMES." *Id.* (emphasis in original).	Part 9(E) – "Violations of this Part shall result in a penalty of Five Thousand Dollars ($5,000.00) per violation to be remitted to the SCA for purposes of deposit and expenditure in connection with Part 10(C) of this Compact, unless otherwise agreed to by the Parties. Such penalty shall be in addition to the Annual Oversight Assessment amount set forth in Part 10(C) of this Compact."	This provision provides for the collection of funds to be utilized consistent with Part 10(C) of the Second Agreements. Part 10(C) addresses the collection of an annual oversight assessment, which is meant to "defray the costs associated with oversight of this Compact." *Id.*, Part 2(3). There is no appropriation – defrayment can be recognized at the appropriate level of governmental funding. Additionally, the annual oversight assessment process was authorized in the Model Compact. Part 11(B).
"Imposing fines for untimely payment of exclusivity fees by the Tribes-and then ***appropriating those*** funds to OMES." *Id.* (emphasis in original).	Part 10(B)(4) – "A single failure to remit exclusivity fees as provided for in subsection B of this Part shall result in a penalty of Five Thousand Dollars ($5,000.00) to be remitted to the SCA for purposes of deposit and expenditure in connection with subsection C of this Part for each thirty (30) day period the fee(s)	Same as immediately preceding discussion.

Purported Wrong	Cited Provision of Second Agreement	Oklahoma Authority and Compliance
	remain outstanding. Such penalty shall be in addition to the Annual Oversight Assessment amount set forth in subsection C of this Part..."	
"Vesting the federal court with sole jurisdiction to declare any portion of the Agreements void or invalid." *Id.*	Part 13 – "...If any clause or provision of this Compact is subsequently determined by any federal court to be invalid or unenforceable under any present or future law, including but not limited to the scope of Covered Games, the remainder of this Compact shall not be affected thereby..."	While this Court has determined that the Governor did not have authority to enter compacts that conflict with state criminal laws, there simply is no basis to suggest that any court but a federal court would have jurisdiction to adjudicate the validity of terms of a compact subject to IGRA. Part 13 in the new compacts simply conforms to Part 13(A) of the Model Compact ("In the event that a federal district court shall find...").
"Binding the State to the determination of third party 'experts' for recalculation of the exclusivity fees due to the State by the Two Tribes." *Id.*	Part 10(B)(5) – This provisions simply provides an agreed means to determine exclusivity fees.	The Oklahoma Constitution, Art. VI, Sec. 8 and § 1221 provide the Governor authority to enter and negotiate compacts. Renegotiating rates is clearly part of that duty. Moreover, under the Model Compact, the Governor had the exclusive authority to negotiate such rates. Part 15(B). There is no reason that he could not choose to utilize this process for that purpose.
"Declaring that the Agreements shall survive any repeal or amendment of the State Tribal Gaming Act, 3A O.S. § 260 *et seq.*" *Id.*	Part 13(F) - Survival. This Compact shall constitute a binding agreement between the parties and shall survive any repeal or amendment of the State-Tribal Gaming Act, 3A O.S. § 260 *et seq.*	This language is identical to the Model Compact, Part 13(B).
"Expanding an 'iLottery' to be operated by the	Part 3(B) - The Tribe agrees that the substantial	Nowhere in the Compact does the Governor purport

Purported Wrong	Cited Provision of Second Agreement	Oklahoma Authority and Compliance
Oklahoma Lottery Commission, where games would be conducted through the internet, including on web, mobile, and social media applications." *Id.*	exclusivity provided for in this Compact shall not prohibit the operation of iLottery by the State.	to create the iLottery. This provision merely reflects forward thinking – avoiding any potential for controversy should the State determine it will engage in such gaming.

V. The Indian Tribes are Necessary Parties.

Treat I (¶ 2) acknowledges the compacting tribes were not parties but were sovereigns which had not submitted to the Court's jurisdiction. The Court does not opine on their status but makes it clear it has no jurisdiction over those tribes. In a dissenting opinion, Justice Kane stated that the case should be dismissed for lack of these tribes as indispensable parties. The Court limited its ruling to whether the State was bound to the First Agreements and the State's inability to collect revenues associated with them (presumably because only a federal court can address whether gaming compacts are "in effect" under IGRA). *Id.*, ¶ 7. Given that the validity of the compacts cannot be challenged here because they do not address gaming not authorized by the STGA as in *Treat I* and the extensive briefing by Petitioners asking the Court to analyze specific compact terms, the Governor will address the issue further.

Petitioners contend that "***the Governor is missing the point***" because this case is about separation of powers and not "***contractual rights.***" Brief at 4 (emphasis in original). However, in *Treat I*, Petitioners explicitly stated: "***The only remedy is for this Court to declare the contracts void.***" *Treat I* Brief at 15 (emphasis added); *see also* 1 ("Governor Stitt's execution of these Agreements exceeded his authority…rendering them void...").[8]

[8] Unsurprisingly given Petitioners' new perspective – attempting to find some theory to improperly exclude the compacting tribes – Petitioners in the present action chose not to expressly challenge the validity of the compacts (although they are effectively doing so with

Notwithstanding, and despite taking yet another bite at the same apple, Petitioners still have no answer to the fact that the compacting tribes are necessary parties. *Clark* explicitly predicates its determination on the nature of the relief requested:

> The Governor has argued that the Tribes and Pueblos with whom he signed the compacts and agreements are indispensable parties to this proceeding. We disagree. In a mandamus case, a party is indispensable if the "performance of an act [to be compelled by the writ of mandamus is] dependent on the will of a third party, not before the court." *Chavez v. Baca*, 47 N.M. 471, 482, 144 P.2d 175, 182 (1943). That is not the case here. Petitioners seek a writ of mandamus against the Governor of New Mexico, not against any of the tribal officials.

State ex rel. Clark v. Johnson, 1995-NMSC-048, ¶ 21, 120 N.M. 562, 570, 904 P.2d 11, 19. Given the particular nature of the relief requested (mandamus) – which is not the request Petitioners seek here (a declaration) – the *Clark* Court determined the tribes were not necessary parties. Indeed, the New Mexico Supreme Court has at least twice rejected a broader application of *Clark* based on the fact that the subsequent matters were not brought seeking mandamus. *Srader v. Verant*, 1998-NMSC-025, ¶ 37, 125 N.M. 521, 531, 964 P.2d 82, 92 (dismissing case based on tribes' status as necessary parties and holding *Clark* inapplicable because it "articulates an indispensability rule based on the special character of mandamus."); *State ex rel. Coll v. Johnson*, 1999-NMSC-036, 128 N.M. 154, 158, 990 P.2d 1277, 1281 (quoting and approving *Srader* to distinguish *Clark* given its mandamus posture and dismissing action given tribes' status as indispensable parties).

In addition to *Dewberry v. Kulongoski*, 406 F. Supp. 2d 1136, 1147 (D. Or. 2005) (which also expressly distinguished *Clark* as a writ of mandamus), courts have repeatedly found tribes were necessary parties in actions where validity of their compacts was at issue. *See Enter. Mgmt. Consultants, Inc. v. U.S. ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989)

---

this action). Instead they request this Court "issue a judgment that the Governor was without authority to enter into the Second Agreements, as with the First Agreements." Brief at 15.

(holding tribe is an indispensable party to a suit involving the validity of its contract, which would "effectively abrogate the Tribe's sovereign immunity by adjudicating its interest in that contract without consent"); *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1027 (9th Cir. 2002) ("The tribes with gaming compacts issued pursuant to A.R.S. § 6–501(A) are necessary and indispensable parties to this litigation."); *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 327 F. Supp. 2d 995 (W.D. Wis. 2004), *aff'd*, 422 F.3d 490 (7th Cir. 2005) (dismissing attempt to void paragraph in amendment to gaming compact because tribe was a necessary party); *see also Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 768 (D.C. Cir. 1986) (dismissing case because "the Wichita and Delaware tribes were indispensable parties who could not be joined because of their tribal immunity").

Indeed, "[n]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 540 (10th Cir. 1987) (quotation omitted). To the extent Petitioners ask this Court to adjudicate the validity of the Compacts, the tribes remain necessary parties.

CONCLUSION

Respondent respectfully requests that the Application be denied. Alternatively, Respondent requests that the Court enter a judgment that:

(1) The Governor alone has constitutional and statutory authority under Oklahoma law to negotiate and enter into gaming compacts with Indian tribes under IGRA;

(2) The Governor has not exceeded his authority by entering into gaming compacts consistent with Oklahoma law.

(3) Such compacts are not subject to approval, either by the entire legislature or by a committee thereof.

(4) The Second Agreements are valid and legal.

Respectfully Submitted,

Phillip G. Whaley, OBA No. 13371
Daniel G. Webber, Jr., OBA No. 16332
Patrick R. Pearce, Jr., OBA No. 18802
Matthew C. Kane, OBA No. 19502
RYAN WHALEY
400 North Walnut Avenue
Oklahoma City, OK 73102
Telephone: 405-239-6040
Facsimile: 405-239-6766
pwhaley@ryanwhaley.com
dwebber@ryanwhaley.com
rpearce@ryanwhaley.com
mkane@ryanwhaley.com

Mark E. Burget, OBA No. 1326
Jeffrey C. Cartmell, OBA No. 31012
State of Oklahoma
Office of the Governor
2300 N. Lincoln Blvd., Suite 212
Oklahoma City, OK 73105
Telephone: (405) 521-2342
mark.burget@gov.ok.gov
jeffrey.cartmell@gov.ok.go

Attorneys for Respondent

CERTIFICATE OF SERVICE

This is to certify that on the 4 day of August, 2020, a true and correct copy of the Response in Opposition to Petitioners' Application and Brief in Support of Application to Assume Original Jurisdiction and Petition for Declaratory Relief and Request for Extraordinary Relief was sent via U.S. Mail, first-class, postage prepaid, to:

V. Glenn Coffee
Cara Rodriguez
Denise Lawson
GLENN COFFEE & ASSOC., PLLC
P.O. Box 437
Oklahoma City, OK 73101
Attorneys for Petitioners

Phillip G. Whaley