

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

(1) THE HONORABLE GREG TREAT,)
Senate President Pro Tempore, in his)
official capacity, and)
(2) THE HONORABLE CHARLES MCCALL,)
Speaker of the House, in his official capacity,)
Petitioners,)

v.)

Case No. 118,913

THE HONORABLE J. KEVIN STITT,)
Governor of the State of Oklahoma,)
in his official capacity,)
Respondent.)

**PETITIONERS' REPLY BRIEF IN SUPPORT OF APPLICATION
TO ASSUME ORIGINAL JURISDICTION, PETITION FOR DECLARATORY
RELIEF AND REQUEST FOR EXTRAORDINARY RELIEF**

V. GLENN COFFEE, OBA # 14563
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ATTORNEYS FOR PETITIONERS

AUGUST 24, 2020

While Case No. O-118,829 (“*Treat-McCall P*”) was still pending, Respondent, the Honorable J. Kevin Stitt, Governor of the State of Oklahoma, engaged in the very conduct sought to be prevented—a violation of the separation of powers. On the same day as this Court’s Referee Hearing, Governor Stitt signed two additional gaming agreements (“Second Agreements”) that broke with both the Model Compact offered in the State Tribal Gaming Act (“STGA”), *see* 3A O.S. §§ 280-281, and the First Agreements at issue in *Treat-McCall I*, creating an Executive-Branch-only patchwork of gaming agreements across the State. Petitioners the Honorable Greg Treat, Senate President Pro Tempore, and the Honorable Charles McCall, Speaker of the House, urge this Court to find the Second Agreements equally as invalid as the First Agreements.

I. INTRODUCTION

In this Court’s Memorandum Opinion in *Treat-McCall I*, 2020 OK 64, this Court stated that the relevant issue there was “the core notion of our constitutional structure: separation of powers.” *Id.* ¶ 4. The Court articulated that the Legislative Branch sets public policy pursuant to Article 5, Section 1 of the Oklahoma Constitution, while the Governor’s primary role “is in the faithful execution of the law. OKLA. CONST. art. VI, §§ 8 & 11.” 2020 OK 64, ¶ 4. The Court further emphasized that this balance “is evident in the State’s negotiation of tribal gaming compacts with Indian Tribes.” *Id.* Finally, the Court identified and answered the “limited question” before it as follows: “whether Governor Stitt had the authority to bind the State with respect to the new gaming compacts with the Comanche Nation and Otoe-Missouria Tribes. We hold he did not.” *Id.* ¶ 3. This Court’s clear articulation of the issue and its answer to the limited question are equally applicable here.

II. DISCUSSION

- A. **The Governor continues to conflate negotiation with entering into, erroneously asserting that he is empowered to bind the State to new gaming agreements.**

In *Treat-McCall I*, this Court clearly distinguished between the Governor’s “authority to bind the State,” ¶ 3, and his “statutory authority to negotiate gaming compacts,” *id.* ¶ 5. This Court thus identified the two components of authority: negotiation and entering into (or binding).

As to the first component—negotiation—this Court held that “the Governor must negotiate the compacts within the bounds of the laws enacted by the Legislature, including the [STGA].” *Id.* ¶ 5. Indeed, the Governor is constitutionally required to see that *all* laws enacted by the Legislature be faithfully executed. *See* OKLA. CONST. art. 6, § 8. As to the second component—entering into—this Court held that the Governor did not possess this authority. 2020 OK 64, ¶ 3.

The Court’s bifurcation of the Governor’s asserted authority is completely in accord with this Court’s jurisprudence. In *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 2013 OK 77, this Court stated: “The Executive Branch of the State of Oklahoma, specifically the Governor, has been and continues to be the party responsible for *negotiating* compacts with the sovereign nations of this state.” *Id.* ¶ 12 (emphasis added). Additionally, the STGA acknowledged that it was the Governor’s role in negotiating the Model Compacts authorized there. *See* 3A O.S. § 280.

Nevertheless, the Governor contends that “Petitioners seek to usurp the Governor’s authority entirely and to recast the process of compacting with other sovereigns solely as a legislative function” Resp’t’s Resp. 3. But the Governor conspicuously fails to identify what that authority is, often citing law addressing negotiation alone. Resp’t’s Resp. 3–4. And contrary to the Governor’s assertion, Petitioners seek not the usurpation of power, but to have the separation of powers between the Executive and Legislative Branches respected and observed. And *Treat-McCall I* addressed the contours of authority: The Governor may negotiate within the confines of the law as it exists, but he cannot bind the State.

Regardless, the Governor apparently interprets this Court’s Opinion as permitting him to bind the State to gaming agreements so long as those agreements “do not conflict with the STGA

and/or State Criminal Laws.” Resp’t’s Resp. 4. Under the Governor’s narrow interpretation then, his unilateral revision of other public policies is permissible so long as he scrubs the gaming agreements of patently unauthorized covered games. That interpretation is not supported by this Court’s Opinion or other authority the Governor has sought to rely upon.

B. The Governor’s constitutional duty to ensure that the laws of the State be faithfully executed extends to *all* the terms and conditions of gaming agreements.

In *Treat-McCall I*, this Court held that the STGA “sets forth the *terms and conditions* under which the State’s federally recognized tribes can engage in Class III gaming on tribal land through Model Gaming Compacts.” 2020 OK 64, ¶ 5 (emphasis added). While this Court acknowledged the Governor’s statutory authority to negotiate for gaming compacts, this Court emphasized that such negotiation must comport with “the laws [public policy] enacted by the Legislature” including the STGA. *Id.*

This holding fits squarely with the Governor’s duty to see that the laws of the State be faithfully executed. OKLA. CONST. art. 6, § 8. Indeed, even Attorney General Opinion 2004-27 states that “any agreement negotiated by the Governor must conform to the public policy enacted into law by the Legislature, as the role of the Legislative Branch is to establish public policy, and the role of the Executive Branch is to execute that policy.” 2004 OK AG 27, ¶ 30 n.3.

Nevertheless, the Governor baldly asserts that so long as the agreements he negotiates exclude Class III games unauthorized by law, the Second Agreements “are not violative of *the Court’s holding*.” Resp’t’s Resp. 4 (emphasis added). But such a reading is contrary to the public policy expressly established by the Legislature in the STGA and Title 21.¹

¹ The Model Compact allows the Governor to negotiate with respect to *rates* and *exclusivity fees*, but nowhere allows the Governor to renegotiate the *terms* of the gaming compacts. 3A O.S. § 281, Part 15(B). Further, the STGA provides a limited exception to the general criminal prohibitions against gaming, *see* 21 O.S. §§ 941-982, through execution of the Model Compact “as set forth in Section 281.” 3A O.S. § 280. Thus, by entering into compacts that deviate from the Model Compact, Governor Stitt not only exceeded his own statutory authority, but potentially makes the legality of these agreements under state criminal law questionable as well.

The Governor further contends that the spirit of cooperation evident in 74 O.S. § 1221 modified Oklahoma law, *see* Resp't's Resp. 7, but a spirit of cooperation in no way relieves the Governor of his duty to see the laws of the State faithfully executed and certainly does not empower him to negotiate for terms and conditions which offend existing constitutional provisions and statutes. While the Second Agreements may not offend the Governor's extremely narrow interpretation of this Court's Opinion in *Treat-McCall I*, they do not comport with the terms of the STGA and are violative of *Oklahoma law* as discussed below.

C. The Governor included provisions that squarely conflict with Oklahoma public policy and so represent another attempt at legislating from the Executive Branch.

In *Treat-McCall I*, Petitioners notified the Court that the First Agreements contained problematic provisions beyond the inclusion of illegal forms of Class III gaming. *Treat-McCall I*, Pet'r's Br. 1, 12, 13. Petitioners identified specific problematic provisions in reply, *Treat-McCall I*, Reply 4-5, and discussed them at length before the Referee. Petitioners' challenge to the Governor's wholesale revisions of Oklahoma law should thus come as no surprise to the Governor.

While the Governor attempts to redefine problematic terms in potential obfuscation of true intentions, Petitioners present this Court with three glaring revisions to constitutional and statutory provisions included in the Second Agreements. At Part 6(F), the Governor gave himself "exclusive authority to settle and negotiate any dispute arising under the Compact pursuant to Article 6, Section 8 of the Oklahoma Constitution." Petitioners are unaware of any authority interpreting the Governor's constitutional duty to ensure faithful execution as permitting him to vest with himself exclusive authority to settle disputes. Rather, the Attorney General, also a constitutionally-created executive branch official, is Chief Law Officer of the State and statutorily vested with "complete dominion over every litigation in which he properly appears," a law which Petitioners identified in their Brief and the Governor ignored. *Compare* Pet'r's Br. 14 n.8 *with*

Resp't's Resp. 9 ("Nothing in the STGA—or any other Oklahoma law—prohibits a different form of dispute resolution.")

Parts 9(E) and 10(B)(4) create sanctions and fees and then appropriate such sanctions and fees to the Office of Management and Enterprise Services, an Executive branch agency, in contravention of Article 5, Section 55 of the Oklahoma Constitution. The Governor responds that "[t]here is no appropriation—defrayment can be recognized at the appropriate level of governmental funding." Resp't's Resp. 11. But the "defrayments" here have been appropriated by the Governor himself, and not the Legislature which must designate "the appropriate level of governmental funding." In contrast, under the STGA for example, the fees derived through a Model Compact are appropriated pursuant to 3A O.S. § 280, but because this is not a Model Compact and does not fall within the STGA, Section 280 does not apply. So the Governor appropriated the funds by himself to his agency.

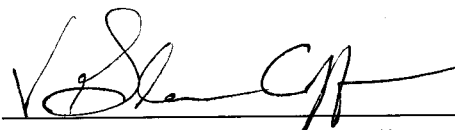
Finally, Part 3(B) of the Second Agreements still contain an "iLottery" for which there is no statutory authorization. The Governor responds that "[t]his provision merely reflects forward thinking—avoiding any potential for controversy should the State determine it will engage in such gaming." Resp't's Resp. 13. The Court already rejected such an argument in *Treat-McCall I*.

While the Second Agreements thus omit Class III gaming unauthorized by Oklahoma law, they include terms and conditions in contravention of Oklahoma constitutional and statutory provisions. The Governor's attempt to so legislate is also a separation of powers violation.

III. CONCLUSION

Like *Treat-McCall I*, this proceeding also presents a separation of powers query regarding the Governor's authority to bind Oklahoma to gaming agreements that were not executed pursuant to the STGA but yet include terms and conditions outside the bounds of Oklahoma law. Petitioners urge this Court to find the Second Agreements equally as invalid as the First.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August 2020, a true and correct copy of the foregoing was mailed by first class and electronic mail to the following:

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