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.

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

Respondent.

Case No. 118913

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

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ATTORNEYS FOR PETITIONERS

JULY 14, 2020

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I.
INTRODUCTION

On July 1, 2020, during Oral Argument before the Referee in Case No. O-118,829, Counsel for Respondent, the Honorable J. Kevin Stitt, stated that the Governor had every intention of signing additional gaming agreements with interested tribes. Apparently, the Governor was signing two additional gaming agreements that very same day. The Governor's action demonstrates disregard for our constitutional democracy and suggests a lack of respect for co-equal Branches of government: the Legislature, Petitioners here, and the Judiciary, this Court who had undertaken to review the separation of powers challenge presented.

In the course of Oral Argument, Counsel for the Governor also ridiculed the idea that this Court should serve as referee any time a dispute such as this should arise between the Executive and Legislative Branches. Counsel for Petitioners affirmed that being the umpire in our separation of powers is ***precisely*** this Court's role: so long as the Executive Branch engages in an unchecked—and now escalated—assertion of power, of course Petitioners must seek this Court's intervention. So here we are again.

This original jurisdiction proceeding—like Case No. O-118,829—raises one question for this Court's consideration: ***Who*** under Oklahoma law has the authority to enter into new gaming compacts with tribes that alter the State's public policy, thereby binding the State to a compact's terms? This is a separation of powers question. This proceeding—like Case No. O-118,829—asks this Court to determine if the Executive Branch usurps the role of the Legislature by entering into gaming compacts while ignoring statutory requirements. Petitioners again ask this Court to assume original jurisdiction, declare that state law does not authorize the Governor unilaterally and independently to enter into gaming compacts on behalf of the State, and issue any and all other appropriate relief this Court may find just or proper.

II.
BACKGROUND

On April 22, 2020, the Governor entered into gaming agreements with the Otoe-Missouria Tribe and the Comanche Nation ("First Agreements"). On June 4, 2020, Petitioners filed an Application to Assume Original Jurisdiction and Petition for Declaratory Relief with this Court contesting the validity of the First Agreements under Oklahoma law and which this Court filed as Case No. O-118,829.

This Court ordered Oral Argument before Referee Ann Hadrava, and Oral Argument was had on July 1, 2020. That same day and notwithstanding the original jurisdiction proceeding then pending, the Governor signed two additional gaming agreements with the United Keetowah Band of Cherokee Indians and the Kialegee Tribal Town ("Second Agreements").[1]

Like the First Agreements, the Second Agreements did not follow one of the two statutory paths for execution of gaming compacts and also contained numerous provisions violative of public policy. Indeed, the Second Agreements, like the First Agreements, even contain a direct appropriation to a state agency in violation of Article 5, Section 55 of the Oklahoma Constitution. In short, the Governor, undeterred by the current action or the comity historically extended to co-equal Branches of government in preservation of the balance of powers, apparently intends to continue inking deals while questions regarding his authority to do so loom.

III.
DISCUSSION

A. The Governor has accelerated his go-it-alone brand of compacting such that the urgency central to an original jurisdiction action has increased, necessitating this Court's early intervention.

[1] *See* App. 1, United Keetowah Band of Cherokee Indians and State of Oklahoma Gaming Compact (executed July 1, 2020); App 2, Kialegee Tribal Town and State of Oklahoma Gaming Compact (executed July 1, 2020).

Article 7, Section 4 of the Oklahoma Constitution provides that "[t]he original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts . . . ." This Court assumes original jurisdiction over a case or controversy when (1) the matter is affected with the public interest and (2) there is some urgency or pressing need for early intervention. *Keating v. Johnson*, 1996 OK 61, ¶ 10, 918 P.2d 51. Both factors were satisfied in Case No. O-118,829, while this proceeding demonstrates an increased need for such speedy resolution.

First, this matter is affected with the public interest. Here, the Governor has once again unilaterally entered into gaming agreements without the authority to do so. As discussed in Case No. O-118,829 and below, the Governor followed neither of the statutory paths for entering into gaming agreements, attempting to bind the State to agreements that include violations of public policy and that create entirely new law. That action is violative of Article 4, Section 1 of the Oklahoma Constitution—the separation of powers provision which forms the bedrock of our constitutional democracy. And as Justice Kauger stated in her dissent in *Keating v. Johnson*, 1996 OK 61, 918 P.2d 51, this Court "act[s] as the ultimate interpreter of the Constitution." *Id.* ¶ 10 (Kauger, J., dissenting). And as she observed in *Keating*, Case No. O-118,829 and this proceeding present "a substantial quarrel between two branches of government." *Id.*

Second, this proceeding, like Case No. O-118,829, presents an urgent need for this Court's immediate attention. Shockingly, the same day Case No. O-118,829 was argued before the Referee, the Governor was signing the Second Agreements—all while fully aware that his authority to enter into such agreements on behalf of the State was squarely at issue before this Court. Moreover, as discussed more fully below, while Case No. O-118,829 and this proceeding ask the same question of law regarding the Governor's authority, the First and Second Agreements are not identical. Thus, unlike the Model Compact approved by the people of the State, codified by the Legislature, and offered by the Governor based on statutory authorization to do so, the Governor is creating

a patchwork of agreements independent of the Legislature. The need for this Court's intervention could not be more urgent.

B. This case presents a clear separation of powers dispute between two, co-equal Branches of government.

In briefing and at Oral Argument in Case No. O-118,829, the Governor has attempted to confuse the question presented, claiming that the only real questions of law regard the permissible scope of gaming under the Indian Gaming Regulatory Act ("IGRA"),[2] and contending that the tribes must be necessary parties because this is a contract dispute. ***But the Governor is missing the point.*** The instant action, like Case No. O-118,829, has far broader implications than the scope of permissible gaming and is clearly not a case about ***contractual rights***. This case is a ***separation of powers challenge***, asking whether the Governor has the authority to execute the contract in the first place.

For example, in support of the argument that the Otoe-Missouria Tribe and the Comanche Nation are necessary parties to Case No. O-118,829, the Governor cited to *Dewberry v. Kulongoski*, 406 F. Supp. 2d 1136 (D. Or. 2005). But *Dewberry* was a case brought by private parties seeking to invalidate a compact based upon general grievances akin to a nuisance claim. *Id.* at 1142. Further, *Dewberry* was brought a full year after the Department of Interior approval of the underlying gaming compact. *Id.* at 1140. In short, *Dewberry* was ***not*** a dispute among the branches of government about the appropriate separation of powers.

Alternatively, in *State ex rel. Clark v. Johnson*, 1995-NMSC-048, 120 N.M. 562, 904 P.2d 11, the New Mexico Supreme Court considered a case concerning executive power and overreach—not a contract dispute. Indeed, the *Clark* court's reasoning is particularly applicable here:

> Resolution of this case requires only that ***we evaluate the Governor's authority under New Mexico law to enter into the compacts and agreements absent legislative authorization or ratification.*** Such authority cannot derive from the

[2] 25 U.S.C. §§ 2701-21; *see also* Pet'rs' Reply Br., Case No. O-118,829.

> compact and agreement; it must derive from state law. ***This is not an action based on breach of contract, and its resolution does not require us to adjudicate the rights and obligations of the respective parties to the compact.***

(emphasis added). 1995-NMSC-048, ¶ 21. This reasoning accords with decisions reached by the Supreme Court of Florida, the Supreme Court of Kansas, and the New York Court of Appeals, among others. *See Fla. House of Representatives v. Crist*, 999 So.2d 601, 616 (Fla. 2008); *State ex rel. Stephan v. Finney*, 836 P.2d 1169, 1178 (Kan. 1992), *Saratoga County Chamber of Commerce v. Pataki*, 798 N.E.2d 1047, 1061 (N.Y. 2003).

Thus, like the separation of powers questions presented in New Mexico, Florida, Kansas, and New York and decided under those States' laws, the question presented here is one of ***Oklahoma law***, not federal law. IGRA undoubtedly provides a "comprehensive regulatory framework for gaming activities on Indian lands" which "seeks to balance the interests of tribal governments, the states, and the federal government," *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1548 (10th Cir. 1997), but "***state law*** determines when and how the State consents to a compact negotiated within IGRA's framework." 2020 OK AG 8, ¶ 19 (emphasis in original); *see also Kelly*, 104 F.3d at 1553 (providing that "state law determines the procedures by which a state may validly enter into a compact" under IGRA). And that question can only be answered by review of the contours of power—Legislative versus Executive—as expressed through the Oklahoma Constitution and as interpreted by this Court.

C. The Governor's authority to conduct business with the tribes is not derived from the Oklahoma Constitution but from statute, and the Second Agreements—once again—flout the statutory methods for entering into gaming compacts.

As this proceeding, like Case No. O-118,829, presents a separation of powers dispute, we begin with the Oklahoma Constitution's separation of powers provision. Article 4, Section 1 of the Oklahoma Constitution provides:

> The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others.

To determine whether a particular Branch is acting *ultra vires*, we ask whether it is exercising "powers properly belonging to that branch." *Vandelay Entm't, LLC v. Fallin*, 2014 OK 109, ¶ 14, 343 P.3d 1273. And the relevant standard for making such determination is whether the "subject matter is so ultimately connected and bound up with a branch's function that the right to define and regulate the subject matter naturally and logically belongs to the branch of government." *Id.* (internal quotation omitted).

Article 6, Section 1 of the Oklahoma Constitution vests the executive power of the State in various officers—the Governor chief among them.[3] Further, the Governor has a constitutionally-prescribed duty to cause "all laws of the State to be faithfully executed." OKLA. CONST. art. 6, §§ 2, 8. The Governor is also constitutionally empowered to "conduct . . . all intercourse and business of the State with other states and with the United States." OKLA. CONST. art. 6, § 8.

On the other hand, "the state's policy-making power is vested exclusively in the Legislature." *Okla. Educ. Ass'n v. State ex rel. Okla. Legislature*, 2007 OK 30, ¶ 20, 158 P.3d 1058. Specifically, Article 5, Section 1 of the Oklahoma Constitution identifies the Legislative Branch as the one that sets the public policy of the State by enacting law not in conflict with the Constitution. Further, by virtue of Article 5, Section 36 of the Oklahoma Constitution, a "supreme legislative

[3] On May 6, 1947, the Legislature commissioned through Senate Resolution No. 17 a Constitutional Survey Committee ("Committee") to undergo a year-long study of the Oklahoma Constitution. DR. H. V. THORNTON, OKLAHOMA CONSTITUTIONAL STUDIES OF THE OKLAHOMA CONSTITUTIONAL SURVEY AND CITIZEN ADVISORY COMMITTEES (1950) (hereinafter "REPORT OF THE CONSTITUTIONAL SURVEY COMMITTEE"). The Committee observed that the "responsibility for the administration of law in Oklahoma is widely diffused" and that the Governor of the State of Oklahoma "is denied broad general powers by which he might direct and control the administration in the over-all sense." REPORT OF THE CONSTITUTIONAL SURVEY COMMITTEE 143.

power" is reserved to the Legislature and is "rebutted only when either the State Constitution or federal law prohibits that enactment." *Hart v. Warner*, 2017 OK CIV APP 29, ¶ 3, 395 P.3d 861; *see State ex rel. Okla. Tax Comm'n v. Daxon*, 1980 OK 28, ¶ 16, 607 P.2d 683 (providing that "the legislature of the state of Oklahoma is constitutionally vested with the power and authority to pass legislation on any subject not withheld" by either the state or federal constitutions).

As discussed at length in Petitioners' *Brief in Support of Application to Assume Original Jurisdiction and Petition for Declaratory Relief* and *Reply Brief*,[4] the Governor has no independent, constitutional authority to conduct business with the tribes. Instead, the Governor can enter into gaming compacts by one of two statutory methods—through the Model Tribal Gaming Act ("Act"), 3A O.S. §§ 261-282, or after approval by the Joint Committee on State-Tribal Relations ("Joint Committee") via 74 O.S. § 1221. With respect to the Second Agreements, the Governor—once again—followed neither path. Neither Agreement conforms to the Act, and neither Agreement was presented to the Joint Committee for review or approval.

Despite this, the Governor has claimed that his authority to enter into gaming compacts is constitutional, citing Article 6, Section 8 of the Oklahoma Constitution, or that it rests on a statutory basis, providing an atextual reading of 74 O.S. § 1221. He has thus concluded that he is authorized to negotiate for and bind the State to terms that violate state law. But the Governor's arguments suffer from three main defects—two discussed below and the third discussed in full at Part III(D) *infra*.

i. The Governor has no independent, constitutional authority to conduct business with the tribes.

First, Article 6, Section 8 of the Oklahoma Constitution applies to the Governor's power to conduct business "with other states" and the federal government—not Indian tribes. In

[4] To avoid duplication of arguments already briefed in Case No. O-118,829, Petitioners refer the Court to the briefing, including the Brief filed by the Attorney General.

multiple Attorney General Opinions, including some cited by the Governor in Case No. O-118,829, multiple Attorneys General have opined that the phrase "with other states" excludes tribes. *See* 2020 OK AG 8, ¶; 2006 OK AG 39, ¶ 17; 2004 OK AG 27, ¶ 9. Such interpretation comports with the canon of statutory construction, *expressio unius est exclusio alterius*, which provides that the mention of one thing implies the exclusion of another.[5]

Further, the Governor ignores the fact that the provision begins by stipulating that the Governor may conduct intercourse with other states and the federal government "*in such manner as may be prescribed by law.*" *Id.* (emphasis added). In other words, even if the Governor could claim some independent constitutional authority to conduct business with the tribes—none exists—that authority could never be beyond the bounds of what is authorized by statute.

And indeed, the Governor's authority to negotiate and enter into binding compacts with the tribes is ***entirely statutory***:

> While the Oklahoma Constitution at Article VI, Section 8 empowers the Governor to 'conduct in person or in such manner as may be prescribed by law, all intercourse and business of the State with other states and with the United States,' it does not address who in state government shall conduct business and intercourse with Indian tribes. ***Rather, such matters are left to the Legislature to determine.***

2004 OK AG 27, ¶ 17 (emphasis added). That is, because our Constitution does not authorize the Governor to conduct business with the tribes, the power to make laws respecting that authority falls to the Legislature by operation of Article 5, Section 36 of that document.

Clearly then, because the only source of the Governor's authority to conduct business with the tribes is statutory—not constitutional—the use of such authority must be in conformity with

[5] Additionally, in the REPORT OF THE CONSTITUTIONAL SURVEY COMMITTEE, the Committee reviewed Article 6, Section 8 of the Oklahoma Constitution, stating that "the Governor as Chief Magistrate should ultimately represent Oklahoma in its relations with the United States and other States." REPORT OF THE CONSTITUTIONAL SURVEY COMMITTEE 599. Nowhere does the discussion ever reference tribes, strongly negating from a historical perspective that tribes were contemplated as included within Article 6, Section 8's ambit.

statute. And when the Governor exercises this authority, what he negotiates must comport with the public policy of the State. "Of course, 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 (citing *Tweedy v. Okla. Bar Ass'n*, 1981 OK 12, ¶ 9, 624 P.2d 1049). Once again, the Governor's entering into the Second Agreements was not in conformity with statutory authorization nor do the Second Agreements conform to the public policy enacted into law by the Legislature.

ii. The Governor did not follow either statutory method for entering into a gaming agreement.

Second, in briefing and at Oral Argument, the Governor relied upon 74 O.S. § 1221 as the statutory authorization to enter into gaming compacts—but then selectively disregards the requirement of Joint Committee approval pursuant to § 1221(C). Section 1221 provides:

> The Governor is authorized to negotiate and enter into cooperative agreements on behalf of this state with federally recognized Indian tribal governments within this state to address issues of mutual interest. . . . Except as otherwise provided by this subsection, such agreements shall become effective upon approval by the Joint Committee on State-Tribal Relations.
>
> []If the cooperative agreements specified and authorized by paragraph 1 of this subsection involve trust responsibilities, approval by the Secretary of the Interior or designee shall be required.

§ 1221(C).

In a tortured reading of the statute, the Governor contends that because gaming compacts must be approved by the DOI, then no approval by the Joint Committee is required. Resp't's Resp. 10. In its most favorable light, this reading takes the phrase "except as otherwise provided by this subsection" to mean that "approval" by the Secretary of the Interior supplants "approval by the Joint Committee," and in so arguing, the Governor apparently seeks to cede the State's sovereign authority to the federal government. But to reach this reading, this Court would be

compelled to read additional words into Section 1221, i.e. "If the cooperative agreements specified and authorized by [] this subsection involve trust responsibilities, in lieu of Joint Committee approval, approval by the Secretary of the Interior or designee shall alone by required," or perhaps "If the cooperative agreements specified and authorized by [] this subsection involve trust responsibilities, approval by the Secretary of the Interior or designee shall be required in lieu of approval by the Joint Committee."

But as written, Section 1221 expressly requires two separate approvals for a compact to become effective when trust responsibilities are involved. That is, 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. This is entirely in accord with Tenth Circuit precedent. As explained by the Tenth Circuit in *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, "validity of a compact under state law is a separate requirement from Secretarial approval." *Id.* at 1554. "IGRA imposes two separate requirements—the State and the Tribe must have 'entered into' a compact and the compact must be 'in effect' pursuant to Secretarial approval." *Id.* at 1553. But even if the Governor's reading were correct—and it is not—then the Governor must concede that this proceeding presents a separation of powers issue as there is no contract yet in effect to interpret.

Additionally, and as a means of attempting to circumvent Joint Committee review, the Governor cites to Attorney General Opinion 2004-27 for the proposition that legislative approval of agreements negotiated by the Governor would violate the separation of powers provision. But the 2004 Attorney General Opinion references review by "the Legislature" multiple times, 2004 OK AG 27, ¶¶ 27, 29, going so far as to state that approval "by the ***entire*** Legislature would place the Legislature not in a cooperative role . . . ." *Id.* ¶ 29 (emphasis added). But the Joint Committee does not constitute approval by the entire Legislature. On the contrary, ratification through

approval of a quorum of the Joint Committee exemplifies the cooperative nature the Legislature was striving to codify, and even Attorney General Opinion 2004-27 recognized that it is the Legislature that sets the gaming policy.

Moreover, the 2004 Attorney General Opinion relied heavily on *In re Oklahoma Department of Transportation ("In re ODOT")*, 2002 OK 74, 64 P.3d 546, in which this Court adopted the Kansas Supreme Court's "*Bennett* Factors," *Schneider v. Bennett*, 547 P.2d 786 (Kan. 1976), to hold that the Legislative Bond Oversight Commission had usurped the power of the Executive Branch in that case. *In re ODOT*, 2002 OK 74, ¶¶ 8-13, 21. The *Bennett* Factors consider: (1) the essential nature of the power being exercised; (2) what degree of control the Legislature is trying to exercise; (3) an examination of the Legislature's objective; and (4) the "practical result of the blending of powers as shown by actual experience over a period of time where such evidence is available." *Id.* ¶ 13.

Application of the *Bennett* factors here shows that, first, the essential nature of the power being executed with respect to gaming compacts under Section 1221 is legislative. The New Agreements are evidence of this. Second, the Legislature has sought ratification power because it is the branch that writes law, and that ratification power was discussed with approval by the Supreme Courts of New Mexico and Kansas. *See Johnson*, 1995-NMSC-048, ¶ 21; *Finney*, 836 P.2d at 1185. Indeed, the Joint Committee serves the added benefit of clarifying questions of policy as they relate to gaming compacts. So third, and relatedly, the Joint Committee can ensure cooperation between the Legislative and Executive Branches as to gaming compacts. And finally, the practical result of this blending of powers as shown by actual experience is that it appears to have worked well and to the benefit of the State and tribes, at least as recently as November 2019

when the Governor signed a compact having gone through the approval process of the Joint Committee by evidence of the signature of its Chair.[6]

But even if this Court concludes that Section 1221 presents a separation of powers problem, then the whole statute must be stricken. Apart from the four factors identified above, *Bennett* establishes a two-sided coin: on one, separation of powers, and on the other, non-delegation. *Bennett* states that an unrestricted grant of power "constitutes a delegation of legislative power without adequate standards or guidelines" which that court held unconstitutional. 547 P.2d at 709. The solution is thus severance of the offending provision.

As this Court said in *In re ODOT*, the Court must examine whether the legislative purpose in passing a law would be significantly undercut by severance of an offensive provision. 2002 OK 74, ¶ 27. But Chapter 35A governing State-Tribal Relations and under which Section 1221 is codified contains no severability provision. And the Legislature would have never given the Governor *carte blanche* authority to bind the State to gaming compacts, especially as here when the Governor has created entirely new state law. So if the Joint Committee is problematic, then the whole of Section 1221 must be stricken, leaving the Act as the only statutory method for binding the State to gaming compacts. Like the First Agreements, the Governor did not follow the Act in entering into the Second Agreements.

Third and as explained more fully below, even assuming, *arguendo*, that the Governor ***could*** enter into compacts outside of the Act and without Joint Committee approval, the Second Agreements are ***still*** invalid because they contain provisions that violate Oklahoma public policy. Indeed, the Governor has been fully unable to provide this Court with an explanation of how he can bind the State to provisions that conflict with current state statute. Nor could he, because such

[6] *See* App. 3, Emergency Services Agreement between the City of Guymon, Oklahoma and the Shawnee Tribe (Nov. 20, 2019).

action is in direct violation of his constitutional duty to cause "all laws of the State to be faithfully executed." OKLA. CONST. art. 6, § 8.[7]

D. The Second Agreements—once again—include provisions that plainly violate constitutional provisions and public policy.

Finally, the Second Agreements are replete with examples of *ultra vires* acts, wherein the Governor has ordained himself both Chief Executive and sole policymaker for the State of Oklahoma. Many of the same defects that existed in the First Agreements exist here. The Second Agreements purport to:

- Expand the powers of the Executive by:
    - Vesting his office with the unilateral, prospective power to approve new forms of gaming. (Part 3(F))
    - 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.* (Part 12(A))
    - Endowing his office with singular and "exclusive authority to settle and negotiate any dispute arising under the Compacts." (Part 6(F)).
    - 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. (Part 6)
- Expand the powers of and appropriate funds to a state agency by:

[7] Likewise, the Legislature is without power to delegate the authority to create law to any entity—including the Governor. *In re Initiative Petition No. 366*, 2002 OK 21, ¶ 17, 46 P.3d 123 ("The non-delegation doctrine prevents the Legislature from abdicating its policy-making role by delegating its authority to an agency."); *State ex rel. Hart v. Parham*, 1966 OK 9, ¶ 22, 412 P.2d 142 ("It is well settled in this jurisdiction that the power to determine the policy of the law is primarily legislative and cannot be delegated. . ."); *Dobbs v. Bd. of Cty. Comm'rs of Oklahoma Cty.*, 1953 OK 159, ¶ 43, 257 P.2d 802 ("The authority of the Legislature extends to all rightful subjects of legislation not withdrawn by the Constitution or in conflict therewith.")

- Expanding the powers and duties of the Office of Management and Enterprise Services ("OMES"). (Part 7)

- Imposing the possibility of monetary sanctions on the Tribes for violations of the Agreements—and then ***appropriating*** those funds to OMES. (Part 9(E))

- Imposing fines for untimely payment of exclusivity fees by the Tribes—and then ***appropriating*** those funds to OMES. (Part 10(B)(4))

- Usurp the power of this Court by:

  - Vesting the federal court with sole jurisdiction to declare any portion of the Agreements void or invalid. (Part 13)

- Enact new law and public policy by:

  - Binding the State to the determination of third party "experts" for recalculation of the exclusivity fees due to the State by the Two Tribes. (Part 10(B)(5))

  - Declaring that the Agreements shall survive any repeal or amendment of the State Tribal Gaming Act, 3A O.S. § 260 *et seq.* (Part 13(F)).

  - Expanding an "iLottery" to be operated by the Oklahoma Lottery Commission, where games would be conducted through the internet, including on web, mobile, and social media applications. (Part 3(B)).

As elsewhere discussed, the Governor is without power to compact for provisions outside of the bounds of Oklahoma law. He cannot endow his office with extra-statutory power to negotiate new forms of gaming in the future. He cannot vest his office as the sole entity that can resolve disputes—a role that is statutorily reserved to the Attorney General of Oklahoma.[8] He cannot

[8] By reserving to the Governor ***alone*** the power to negotiate and to settle disputes, the First and Second Agreements are in clear violation of the powers of the Attorney General of this State pursuant to 74 O.S. § 18. *See State ex rel. Derryberry v. Kerr-McGee Corp.*, 1973 OK 132, ¶ 20, 516 P.2d 813 ("The Attorney General, by statute, 74 O.S.1971 § 18 is the Chief Law Officer of the State. In the absence of explicit legislative or constitutional expression to the contrary, he possesses complete dominion over every litigation in which he properly appears in the interest of the State, whether or not there is a relator or some other nominal party.")

appropriate money to a particular state agency.[9] He simply cannot legislate from the Governor's Office.

In Case No. O-118,829, the Governor continually pointed to IGRA as the sole standard by which to measure the legality of the scope of games covered by a compact—and claimed those determinations were reserved only to a federal court. As discussed at length in *Petitioners' Reply* and the *Brief of the Attorney General* in Case No. O-118,829, those arguments are fully misplaced. But even assuming this argument was correct—that IGRA determines the lawful scope of covered games in compacts—***nothing in IGRA can empower the Governor of a State to compact for other provisions that are clearly violative of state law.*** IGRA does not permit the Governor to appropriate money or to enhance the power of his office at the expense of other co-equal Branches of government. Federal law offers the Governor no refuge here.

IV.
CONCLUSION

Based on the above, Petitioners the Honorable Greg Treat, President Pro Tempore of the Senate, and the Honorable Charles McCall, Speaker of the House of Representatives, ask this Court to assume original jurisdiction, issue a judgment declaring that the Governor was without the authority to enter into the Second Agreements, as with the First Agreements, and issue any and all other appropriate relief this Court may find just or proper.

[9] By directing the flow of funds to OMES, the Governor usurps the Legislature's constitutional authority to appropriate state funds. *See* OKLA. CONST. art. 5, § 55.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July 2020, a true and correct copy of the foregoing was mailed by first class and electronic mail to the following:

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