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

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

V. GLENN COFFEE, OBA # 14563
CARA RODRIGUEZ, OBA #21794
DENISE LAWSON, OBA #31532
GLENN COFFEE & ASSOC., PLLC
P.O. Box 437
Oklahoma City, OK 73101
Phone: (405) 601-1616
gcoffee@glenncoffee.com
cara@glenncoffee.com
denise@glenncoffee.com

ATTORNEYS FOR PETITIONERS

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I.
INTRODUCTION

On April 21, 2020, Oklahoma Governor J. Kevin Stitt announced[1] that he had reached terms with the Comanche Nation and Otoe-Missouria Tribes ("Otoe and Comanche Nations") on new gaming agreements ("Agreements"), which according to the Governor constituted Tribal-State compacts entered into under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21.[2] Governor Stitt's execution of these Agreements exceeded his authority under the Oklahoma Constitution, rendering them void as a matter of Oklahoma law.

In forming these Agreements, Governor Stitt disregarded Oklahoma's legislatively-established two-track system for establishing Tribal-State compacts, for IGRA or any other purpose, that effectively bind the State to their terms. And the Agreements provide several illustrations of the problems inherent in executive overreach. Among other things, they "include covered games . . . such as house-banked card games, house-banked table games, and event wagering . . . ." 2020 OK AG 8. ***As such, the Governor purports, by his unilateral approval of the terms he negotiated, to authorize forms of gaming that are expressly prohibited by Oklahoma law.***

The Agreements garnered immediate rebuke from state leaders including Petitioners and Attorney General Mike Hunter.[3] *See* Letter from President Pro Tempore Treat and

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[1] *See* App. 1, Oklahoma Governor Kevin Stitt press release (with embedded links to press conference video and the Agreements), Apr. 21, 2020, available at https://www.governor.ok.gov/articles/press_releases/governor-stitt-signs-two-new-gaming-compacts.

[2] *See* App. 2, "Comanche Nation and State of Oklahoma Gaming Compact" and "Otoe-Missouria Tribe and State of Oklahoma Gaming Compact."

[3] *See* App. 3, Randy Krehbiel, "Oklahoma's legislative leaders tell Gov. Stitt his new tribal gaming compacts are invalid," *TULSA WORLD* (Apr. 22, 2020), available at https://www.tulsaworld.com/news/local/government-and-politics/oklahomas-legislative-leaders-tell-gov-stitt-his-new-tribal-gaming-compacts-are-invalid/article_958c7b77-5573-50d5-96bf-a0c57dfb8203.html; Randy Krehbiel, "Oklahoma AG Mike Hunter says Gov. Stitt's new tribal gaming compacts 'not authorized' by state law," *TULSA WORLD* (Apr. 22, 2020), available at https://www.tulsaworld.com/news/local/government-and-politics/oklahoma-ag-mike-hunter-says-gov-stitts-new-tribal-gaming-compacts-not-authorized-by-state/article_1e9bd0d3-3d50-50c0-8233-a3d924f01f44.html.

Speaker McCall to Governor Stitt, App. 4. Further, on May 5, 2020, Attorney General Hunter issued Attorney General Opinion 2020-8, opining that "[t]he Governor lacks authority to enter into and bind the State to compacts with Indian tribes that authorize gaming activity prohibited by state law." *See* 2020 OK AG 8, ¶ 22, App. 5. And that same day, Attorney General Hunter sent a letter to the Secretary of the Department of Interior ("DOI"), David Bernhardt, asking the DOI to disapprove the Agreements based upon the reasons expressed in his opinion. *See* Letter from Hunter to DOI, App. 6.

State officials were not alone in their rebuke. Governor Bill Anoatubby, Governor of the Chickasaw Nation, has sent multiple letters and memoranda to the DOI, asking for the Agreements to be disapproved because of inconsistency with state law requirements. Likewise, the Quapaw Nation and the Wichita and Affiliated Tribes have also requested the DOI to disapprove the Agreements. *See* Letters from Chickasaw Nation, Wichita and Affiliated Tribes, and Quapaw Nation to DOI, App. 7.

Nevertheless, Governor Stitt has continued to assert that he—and he alone—has the authority to bind the State to tribal gaming compacts, even to the extent of including gaming prohibited by state law. *See* Mem. of J. Kevin Stitt, App. 8, at 2; Okla.'s Mot. to Clarify Parties' Authority to Comply with Court's Mediation Order and Br. in Supp., App. 9, at 10. But Governor Stitt's go-it-alone brand of state policymaking does not comport with the Oklahoma Constitution, IGRA, or state statutes. This unilateral power grab also places him at odds with the legislative branch, the Attorney General, and even tribes who might otherwise benefit from his claims of expanded gaming in Oklahoma. Petitioners the Honorable Greg Treat, President Pro Tempore of the Senate, and the Honorable Charles McCall, Speaker of the House of Representatives, thus ask this Court to declare that state law does not authorize the Governor to enter into the Agreements on behalf of the State.

II.
BACKGROUND

This case presents a straightforward question regarding the Governor's authority, but its genesis is complex. On July 8, 2019, Governor Stitt surprised tribal leaders—and possibly members of his own Cabinet—with a *Tulsa World* Op Ed, in which he stated that model compacts currently in effect between the State and signatory tribes terminate as of January 1, 2020.[4] He vowed to do the "hard work of closely reviewing and negotiating new compacts that reflect the state of affairs today." *Id.* Though negotiations between the tribes and the Governor commenced through the work of the Attorney General during the summer of 2019, the parties were still unable to reach an agreement after a meeting on October 28 of that year.[5] Thereafter, Attorney General Hunter withdrew as the State's representative with respect to gaming negotiations, and identified the Governor's office as the entity continuing negotiations.[6] Ultimately, on December 31, 2019, the Cherokee, Chickasaw, and Choctaw Nations filed suit against Governor Stitt in federal court, seeking a declaration that the compacts automatically renewed on January 1, 2020, pursuant to Part 15(B) of the Model Tribal Gaming Compact ("Model Compact"), 3A O.S. § 281.[7]

But on April 21, 2020, Governor Stitt and the Otoe and Comanche Nations—parties to the federal action—filed a Joint Motion for Leave of Court to File Stipulations of Dismissals with Prejudice.[8] Simultaneous with the filing, Governor Stitt and the Otoe and Comanche Nations purported to enter into the Agreements. Eight of the tribes remaining in the federal action

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[4] *See* App. 10, Gov. Kevin Stitt, "Gov. Kevin Stitt: New Gaming Compacts must protect the interests of the tribes and the state," *Tulsa World* (July 8, 2019), available at https://www.tulsaworld.com/opinion/columnists/gov-kevin-stitt-new-gaming-compacts-must-protect-the-interests/article_ae5596f7-e9e5-5613-9bbb-c6341af9259f.html.

[5] *See* App. 11, Barbara Hoberock, "State, tribes hold historic meeting on gaming compacts: 'You have to walk before you can run,'" *TULSA WORLD* (Apr. 22, 2020), available at https://www.tulsaworld.com/news/local/government-and-politics/state-tribes-hold-historic-meeting-on-gaming-compacts-you-have/article_5eb79db2-4cdc-595f-ae50-d01178f2b1b0.html.

[6] *See* App. 12, Tres Savage, "Stitt pitch to tribes: Sign temporary gaming extension" *NONDOC* (Dec. 17, 2019), available at https://nondoc.com/2019/12/17/stitt-pitches-temporary-gaming-extension/.

[7] *See Cherokee Nation et al. v. Stitt,* Civ. No. 19-1198 (W.D. Okla.).

[8] *Id.* (Doc. No. 120).

filed a "qualified objection" to the dismissal, arguing among other things that movants had not submitted their purported settlements and, thus, they could not meaningfully evaluate whether the settlements would prejudice their interests.[9] The federal court dismissed the Comanche and Otoe Nations.

On May 28, 2020, notwithstanding his prior statements of confidence in his claimed authority, Governor Stitt filed a Motion to Clarify Parties' Authority to Comply with Court's Mediation Order and Brief in Support ("Motion to Clarify") in the federal action, purportedly seeking "***clarification***" as to whether he has "the authority to bind the State to compact provisions related to exclusivity, rates, covered games, and other significant subjects that differ from or are not found in the Model Compact."[10]

Undeterred by the questions of his own authority he admits exist, however, Governor Stitt had already submitted the Agreements to the DOI for review and approval under IGRA, and the Secretary of the Interior's decision to approve or disapprove a proposed compact, which must be made within forty-five (45) days of a proposed compact's submission, is expected imminently. 25 U.S.C. § 2710(d)(8)(C).

Thus, notwithstanding (1) the objections raised by Petitioners herein through public statements; (2) the objections raised by the Attorney General through public statements and the issuance of an Official Opinion of the Attorney General; and (3) the Governor's own pursuit of clarification regarding his authority to negotiate brand new compacts that include class III gaming he acknowledges is prohibited by state law, Governor Stitt has yet to indicate any intention of withdrawing the Agreements now pending before the DOI. As explained below, Governor Stitt's

[9] *Id.* (Doc. No. 123) at ¶ 7.
[10] *Id.* (Doc. No 131) at ¶ 12.

questions properly lie before this Court as they squarely and exclusively present matters of state law, which law emphatically counsels against the Governor's actions here.

III.
DISCUSSION

The distribution of governmental powers into three separate departments is a bedrock of our constitutional system. 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.

In addressing the importance of the separation of powers, this Court has opined that "[t]he true import of the doctrine . . . is that the whole power of one department shall not be exercised by the same hands which possess the whole power of either of the other departments; and that no one department ought to possess *directly* or *indirectly* an overruling influence over the others." *State ex rel. York v. Turpen*, 1984 OK 26, 681 P.2d 763, 767 *(citing Bailey v. State Bd. of Public Affairs*, 194 Okl. 495, 153 P.2d 235 (1944)).

Article 6, Section 1 of the Oklahoma Constitution vests the executive power of the State in various officers—the Governor chief among them. 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.

Article 5, Section 1 of the Oklahoma Constitution, on the other hand, 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, Article 5, Section 36 of the Oklahoma Constitution provides:

> The authority of the Legislature shall extend to all rightful subjects of legislation, and any specific grant of authority in this Constitution, upon any subject whatsoever, shall not work a restriction, limitation, or exclusion of such authority upon the same or any other subject or subjects whatsoever.

This Court has held that the Legislature is vested via Section 36 with "a supreme legislative power" that 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, 864; *see State ex rel. Okla. Tax Comm'n v. Daxon*, 1980 OK 28, ¶ 16 (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).

It is against this backdrop—the demarcation between executive and legislative constitutional authority—that we address the Governor's authority with respect to gaming compacts.

A. State—not federal—law controls who has the authority to negotiate and enter into binding compacts with Indian tribes, and the authority Oklahoma law vests in the Governor to conduct such business *solely* derives from statute.

IGRA 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). And while "IGRA creates the framework for state, tribes and the federal government to cooperate in the regulation of tribal gaming, [] ***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).

Indeed, consistent with IGRA, this Court has acknowledged that state law controls with respect to who is authorized to conduct business with the tribes:

> The U.S. Supreme Court has not determined ***where the authority lies*** within a state's governmental framework to compact with Indian tribes. ***It has ruled that where the involved federal statute is silent on the issue of state authority, that issue will be determined under state law. . . . IGRA is silent*** as to where state authority lies to enter into gaming compacts with Indian tribes.

Griffith v. Choctaw Casino of Pocola, 2009 OK 51, ¶ 12 n.10 (abrogated on other grounds by *Sheffer v. Buffalo Run Casino, PTE, INC.*, 2013 OK 77) (emphasis added). The questions raised herein are thus squarely questions of state law.

Although the Governor maintains constitutional authority to conduct business ***with other States and the United States***, OKLA. CONST. art 6, § 8, he has no independent, constitutional authority to do so ***with the tribes***. Instead, 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 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).

Indeed, "[s]tatutes must be read to render every part operative, and to avoid rendering it superfluous or useless." *Odom* v. *Penske Truck Leasing Co.,* 2018 OK 23, ¶ 36. It would thus be a strange outcome were the Governor statutorily authorized to negotiate and enter into agreements that violated other statutes. Further, the Governor himself is duty-bound to act consistently with the laws of the State by virtue of his duty to faithfully execute the laws under Article 6, Section 8 of the Oklahoma Constitution. Negotiating and entering into a compact that is not authorized by law is a serious dereliction of such duty. Put simply, when the Governor purports to enter into agreements that authorize violations of state statutes, he is not "executing" the law, he is attempting to legislate. That is not the function of the executive branch.

Thus, contrary to his assertions, the Governor's authority to negotiate and bind the state to his Agreements is a state law question. In Oklahoma, the Legislature has delineated the Governor's authority regarding gaming compacts in statute, and as is discussed below, the Governor is entirely incorrect in asserting that he—and he alone—has the authority to bind the State to such compacts.

B. Under state law, the Governor can negotiate and enter into gaming compacts by one of two methods: (1) pursuant to the Model Tribal Gaming Act, or (2) via 74 O.S. § 1221 and after approval by the Joint Committee on State-Tribal Relations.

Because the Governor's authority to negotiate and enter into gaming compacts is by operation of statute, the Governor must exercise authority pursuant to statute. The current statutory scheme dictates that the Governor's authority related to tribal gaming compacts can be exercised in one of two ways: via the Model Tribal Gaming Act ("Act") or via the Joint Committee on State-Tribal Relations ("Joint Committee"). With respect to the Agreements, the Governor followed neither path.

First, in 2004, the Legislature passed the Act and sent it to a vote of the people. Section 281 of that Act included the Model Compact. 3A O.S. § 281. The Model Compact "may not be

viewed as an ordinary private contract because it is a voter-approved statute codified in the Oklahoma Statutes." *Griffith*, 2009 OK 51, ¶ 7. The Model Compact is an "all or none" offer to the tribes, "which if accepted, constitutes the gaming compact between this state and the accepting tribe for purposes of IGRA without any further action on behalf of the State." *Id.* ¶ 14.

Acceptance of the Model Compact by a tribe requires no further action from the States because:

> [t]he State of Oklahoma through the concurrence of the Governor after considering the executive prerogatives of that office and the power to negotiate the terms of a compact between the state and a tribe, ***and by means of the execution of the State-Tribal Gaming Act, and with the concurrence of the State Legislature through the enactment of the State-Tribal Gaming Act***, hereby makes the following offer of a model tribal gaming compact regarding gaming . . . .

3A O.S. § 280 (emphasis added). Plainly, then, while the Governor's executive prerogatives are noted in the statement of Oklahoma's compact offer to the tribes, the State bound itself to the Model Compact's offer by (1) enactment of legislation and (2) approval of the terms of the offer by a vote of the people, which resulted in formal codification of those terms in state statute. The Act nowhere indicates that the Governor has the discretion to conduct business with the tribes however he sees fit and, moreover, entirely on his own, and in conflict with existing state law.

Second, prior to enactment of the Act, the Legislature in 1988 "authorized the Governor to negotiate and enter into cooperative agreements with federally recognized Indian tribes in furtherance of federal policy and state-tribal relations, subject to approval by a legislative Joint Committee on State-Tribal Relations." *Griffith*, 2009 OK 51, ¶ 12. Title 74, Section 1221 of the Oklahoma Statutes provides, in relevant part:

> C. 1. ***The Governor,*** or named designee, 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.***

(emphasis added). The Joint Committee consists of five members from the Senate appointed by the President Pro Tempore and five members from the House of Representatives appointed by the Speaker, and acts upon a majority vote of a quorum of the members present. 74 O.S. § 1222(A), (D). And beyond doubt, the Joint Committee's authority to approve compacts extends to gaming compacts. *See* 74 O.S. § 1221(C), 1223.

Further, the Joint Committee is still active and has continued to approve gaming compacts since the Act was passed. *See* App. 13, State of Oklahoma, Cherokee Nation Off-Track Wagering Compact (May 2010). Consequently, if a proposed gaming compact does not meet the statutory requirements of the Model Compact, it must be negotiated and approved pursuant to 74 O.S. § 1221.

Nevertheless, in the Memorandum of J. Kevin Stitt, *See* App. 8, at 3, the Governor asserts in reliance on Attorney General Opinion 2004-27, that approval by the Legislature of agreements negotiated by the Governor would violate the separation of powers provision. The Governor relies heavily on that opinion's explanation that Oklahoma's Constitution does not contain an Advice and Consent Clause like Article II, Section 2 of the United States Constitution.

But the Governor reads the 2004 Attorney General opinion far too broadly. That 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). Perhaps sensing this, the Governor refined his argument in his Motion to Clarify, there contending that "the tribes seem to suggest that the full Oklahoma Legislature must be present at the bargaining table (contrary to a prior AG opinion)." App. 14, at 8.

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. Further, there would be no need to apply an Advice and Consent Clause like that of the United States Constitution which requires presentment of treaties to the entire Senate and concurrence of two-thirds of the body then present, *see* U.S. CONST. art. II, § 2, when an entire body of even one house is not required under 74 O.S. § 1222.

Moreover, the Joint Committee is referenced numerous times by the federal court, this Court, and even in the 2004 Attorney General opinion upon which the Governor relies and without so much as a passing reference to a separation of powers problem posed by that entity. *See Muhammad v. Comanche Nation Casino*, CIV-09-968-D, 2010 WL 4365568, at *11 (W.D. Okla. Oct. 27, 2010); *Griffith*, 2009 OK 51, ¶ 12; 2006 OK AG 39, ¶ 17; 2004 OK AG 27, ¶ 4. And *State ex rel. Clark v. Johnson*, 904 P.2d 11 (N.M. 1995), strongly supports the constitutionality of such a body when, as there, the Supreme Court of New Mexico noted that the Governor could not enter into a compact solely on his own authority, but "the legislature might authorize the Governor to enter into a gaming compact or ratify his actions with respect to a compact he has negotiated." *Id.* at 23. Indeed, Oklahoma's two-track statutory method by which the Governor can negotiate and enter into compacts with the tribes is well-supported by the methods adopted in other States.

Finally, if 74 O.S. § 1221 is unconstitutional, then the governor has ***no*** independent statutory authority to negotiate and enter into compacts. After all, the Legislature granted the Governor compacting authority only if exercised in conjunction with the Joint Committee, so if the statute giving the Joint Committee such power is unconstitutional, the Governor loses the power granted by that same statute. This would mean that the ***only*** authorized gaming compacts under state law are those entered into in conformity with the Act.

In sum, the Governor could have negotiated and entered into compacts in accordance with the Act or through approval by the Joint Committee. He followed neither process with

respect to the Agreements. And because the Governor has no independent constitutional authority to conduct such business, his actions were *ultra vires.*

C. Regardless how the Governor negotiates and enters into compacts with tribes, he simply lacks any unilateral authority to bind the State to terms that would otherwise be prohibited by state law.

Regardless of the method by which the Governor conducts business with the tribes, the Governor cannot negotiate and enter into compacts which include provisions prohibited by state law. For example, and in addition to other problematic provisions in the Agreements, Class III gaming is only lawful under the terms of IGRA if authorized by tribal ordinance and "located within a State that permits such gaming for any purpose by any person, organization or entity" and is "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and State . . . that is in effect." 25 U.S.C. § 2701(d)(1).

Just as IGRA points to state law for a determination regarding who is authorized to negotiate with the tribes, IGRA points to state law for a determination of what gaming is permitted under state law. IGRA examines "the state's public policy toward the specific gaming activities proposed by the tribes." *Seminole Tribe of Fla. v. State of Fla.*, No. 91-cv-6756, 1993 WL 475999, at *8 & n.1 (S.D. Fla. Sep. 22, 1993). And "where a state does not 'permit' gaming activities sought by a tribe, the tribe has no right to engage in these activities, and the state thus has no duty to negotiate with respect to them." *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1256 (9th Cir. 1994).

In Oklahoma, permitted gaming is game-specific. The Act provides that (1) "the operation of ***slot machines, house-banked card games, house-banked-table games involving dice or roulette wheels, or games where winners are determined by the outcome of a sports contest" ("unauthorized forms of gaming") is not permitted*** and (2) the operation of any other form of gaming shall not be construed as permitted "unless specifically allowed by this act."

3A O.S. § 262(H). For that reason, the Act was amended in 2018 to include an additional form of covered game—non-house-banked table games—and necessitated compacting tribes to enter into a written supplement to the Model Compact. 3A O.S. § 280.1.

The unauthorized forms of gaming included in the Agreements—house-banked card and table games and event wagering—are unequivocally not authorized under Oklahoma law. Simply because Oklahoma has compacted to permit pari-mutuel horserace wagering does not mean that event wagering, for example, has been authorized. If it were, the Oklahoma Legislature would not have had cause to consider event wagering yet decline to enact it in the 2018 legislative session. *See* App. 14, HB 3375 (Enrolled), HB 3375 (Introduced).

The Governor's inclusion of unauthorized forms of gaming, in addition to other problematic provisions, stands as a reason for which legislative ratification on the back-end as by the Joint Committee is required. Indeed, returning to the Supreme Court of New Mexico:

> If the entry into the compacts reasonably can be viewed as the execution of law, we would have no difficulty recognizing the attempt as within the Governor's authority as the State's chief executive officer. If, on the other hand, his actions in fact conflict with or infringe upon what is the essence of legislative authority—the making of law—then the Governor has exceeded his authority. . . . We have no doubt that the compact . . . does not execute existing New Mexico statutory or case law, but that it is instead an attempt to create new law.

Clark, 904 P.2d at 22; *see also State ex rel. Stephan v. Finney*, 836 P.2d 1169, 1178 (Kan. 1992) (finding the Governor's "*carte blanche* interpretation" of his authority problematic). So too here.

In his Motion to Clarify, the Governor contends that "[n]othing in the 2020 Compacts makes any change to state legislation; the compacts affect activities conducted by Tribes on Indian lands." *See* App 9 at 25. But even if this were so and the Agreements did not invade the legislative prerogative—they do—the Governor is wrong. Persons who are not members of Indian tribes routinely participate in the gaming offered on Indian lands, and nonmembers participating in gaming prohibited by state law remain subject to criminal prosecution unless such gaming is in

conformity with the Model Compact. 3A O.S. §§ 262(A), 280. The Governor cannot immunize such persons from alleged violations of state law, yet that is essentially what he claims the power to do. Thus, contrary to his assertions, the Governor has attempted to cram down a substantive change in Oklahoma law, and his attempt to do so is a violation of the separation of powers principles identified at Part III(A) above.

D. Here, because the Agreements were not entered by the State according to either compacting method and because the Governor included unauthorized forms of gaming violative of public policy, no amount of severance can correct these egregious separation of powers violations.

Finally, the Agreements contain a severance clause that states, in relevant part: "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."[11] (emphasis added). Curiously, according to the Governor, the only available mechanism for severance is a ***federal court determination of a state law issue***. By its terms, it would thus seem that a determination by this Court on a matter of state law would not, according to the Governor, warrant severance of an offending provision. Moreover, as an expression of the contracting parties' intent, the parties did not apparently intend for a state court determination that the Governor lacked authority to negotiate and enter into the Agreements to allow for remedy by severance. That being so, the entire document should be declared invalid and unenforceable.

Additionally, because the Agreements included unauthorized forms of gaming and because the Governor failed to follow the public policy established by the Legislature as well as the two-track statutory method for negotiating and entering into gaming compacts, no amount of severance can correct the Agreements. The Governor does not have the authority to execute a

[11] *See* App. 1, Comanche Compact, Part 13(B); Otoe-Missouria Tribe Compact, Part 13(B).

gaming compact that offends existing state statutes. *See* 2020 OK AG 8; *see also Clark*, 904 P.2d at 21 ("The legislature of this State has unequivocally expressed a public policy against unrestricted gaming, and the Governor has taken a course contrary to that expressed policy. . . we conclude that the Governor of New Mexico negotiated and executed a tribal-state compact that exceeded his authority as chief executive officer.") In Oklahoma, sports betting—like other of the unauthorized forms of gaming—is prohibited. The Governor has a duty to ensure that the laws of this State are faithfully executed; he thus has no authority to negotiate and enter into a gaming compact inclusive of prohibited law and contrary to the State's public policy. Coupled with the fact that the Governor's only power to conduct business with the tribes is statutorily set and that the Governor wholly failed to follow the statutes pertaining thereto, he had no authority to negotiate and enter into the Agreements. No amount of severance can save compacts that were unlawful from inception.

In short, Governor Stitt believes that he can compact for prohibited provisions, follow his own extra-statutory procedure for doing so, and remove any question regarding the validity of such actions to a federal court. This does not comport with his duties under Article 6, Section 8 of the Oklahoma Constitution and usurps the role of the Legislature in setting the public policy of the State. The only remedy is for this Court to declare the contracts void.

V.
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 and to issue a judgment declaring that the Governor acted *ultra vires* when he purported to enter into the Agreements and that the Agreements do not validly bind the State.

Respectfully submitted,

V. GLENN COFFEE, OBA # 14563
CARA RODRIGUEZ, OBA #21794
DENISE LAWSON, OBA #31532
GLENN COFFEE & ASSOCIATES, PLLC
P.O. Box 437
Oklahoma City, OK 73101
Phone: (405) 601-1616
gcoffee@glenncoffee.com
cara@glenncoffee.com
denise@glenncoffee.com

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June 2020, a true and correct copy of the foregoing was mailed by Certified Mail, Return Receipt Requested and electronic mail to the following:

The Honorable J. Kevin Stitt
Governor, State of Oklahoma
Oklahoma State Capitol
2300 North Lincoln Boulevard, Room 212
Oklahoma City, OK 73105