IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CITIZEN POTAWATOMI NATION,	)	
	)	
Plaintiff - Appellee,	)	
	)	
v.	)	**CASE NO 16-6224**
	)	
STATE OF OKLAHOMA,	)	
	)	
Defendant - Appellant.	)	

On Appeal from the United States District Court
For the Western District of Oklahoma
The Honorable Robin J. Cauthron
D.C. No. 5:16-cv-361-C

APPELLEE CITIZEN POTAWATOMI NATION'S RESPONSE BRIEF TO APPELLANT'S BRIEF IN CHIEF

Dated October 17, 2016

Respectfully submitted,

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ORAL ARGUMENT IS REQUESTED

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GLOSSARY

AAA – American Arbitration Association

Aplt. App. – Appellant's Appendix, filed September 19, 2016

Appellee Supp. App. – Appellee's Supplemental Appendix, filed contemporaneously with this Brief

Arbitration – AAA Case No. 01-15-0003-3452 *Citizen Potawatomi Nation v. State of Oklahoma*

Arbitrator – Arbitrator Hon. Daniel J. Boudreau, former Justice of the Oklahoma Supreme Court

Award – "Arbitration Award" entered by the Arbitrator in Arbitration on April 4, 2016

Compact – Citizen Potawatomi Nation Tribal Gaming Compact

FAA - Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*

IGRA - Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*

Nation – Citizen Potawatomi Nation

OTC – Oklahoma Tax Commission

OTC Administrative Action – OTC Case No. JM-14-005-K *In re. Revocation of Licenses/Permits of Citizen Potawatomi Nation*

St. Br. - Opening brief filed by Plaintiff/Appellant, State of Oklahoma on September 19, 2016

State – State of Oklahoma

State Court Appeal – Okla. Sup. Ct. Case No. 114,695 *In re. Complaint for Revocation of the Licenses/Permits of the Citizen Potawatomi Nation.*

STATEMENT OF PRIOR AND RELATED APPEALS

Pursuant to 10th Cir. R. 28.2(C)(1), counsel for the Appellee hereby notifies this Court that no other appeal in or from the same civil action in the lower court was previously before this or any other appellate court under the same or similar title.

However, there are several related proceedings pending in Oklahoma state courts and tribunals, including Oklahoma Supreme Court Case No. 114,695 *In re. Complaint for Revocation of the Licenses/Permits of the Citizen Potawatomi Nation*, in which the State purports to have revoked the Nation's licenses and permits on the grounds that the Nation did not assent to the State's sales tax laws. This appeal has been stayed by the Oklahoma Supreme Court pending the outcome of the instant appeal. There are also two proceedings pending in the administrative tribunals of the Oklahoma Tax Commission ("OTC"), a) OTC unnumbered action, *In re. the Protest of the Citizen Potawatomi Nation to the Business Closure Notice*, in which the State has attempted to close all the enterprises of the Nation for a failure to assent to the State's sales tax laws, and b) OTC Case No. JM-16-001-K *In re. the Protest of the Non-renewal of the Licenses and Permits of the Citizen Potawatomi Nation*, where the State has refused to renew the Nation's licenses and permits on the grounds that the Nation will not assent to the State's sales tax code. The first matter has been stayed by the OTC Administrative Law Judge pending the outcome of the Oklahoma Supreme Court appeal. The OTC *en banc* reversed the Administrative Law Judge's order staying the second matter, and that matter is set for administrative hearing on October 26, 2016.

APPELLEE CITIZEN POTAWATOMI NATION'S RESPONSE BRIEF TO APPELLANT'S BRIEF IN CHIEF

Plaintiff Citizen Potawatomi Nation ("the Nation"), respectfully submits this Brief in Response to Appellant's Brief in Chief filed herein on September 19, 2016.

JURISDICTIONAL STATEMENT

This Court possesses jurisdiction pursuant to U.S. Const. art. I, § 10 and 28 U.S.C. §§ 1331 & 1362, because this is a civil action brought by an Indian Tribe arising from a contractual agreement between the Nation and the State.

The Court possesses jurisdiction pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq*., because this application entails the Nation's right to conduct gaming activities in accordance with its Gaming Compact with the State, which have the force of federal law.

The Court possesses jurisdiction pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq*., because this matter entails an arbitration proceeding as between the Nation and the State.

STATEMENT OF THE ISSUE

The issue is whether the District Court correctly confirmed and enforced the Award arising out of Arbitration pursuant to the FAA.

STANDARD OF REVIEW

In reviewing a district court's confirmation of an arbitration award, this Court will review factual findings for clear error and legal determinations *de novo*.[1] Nevertheless, this Court gives extreme deference to the determination of the arbitrator.[2] Once an arbitration award is entered, the finality of arbitration weighs heavily in its favor and cannot be upset except under exceptional circumstances.[3] An arbitration award will only be vacated for the reasons enumerated in the FAA § 10, or, potentially, for a handful of judicially-created reasons.[4]

STATEMENT OF THE CASE

1. This case arises out of the State of Oklahoma's ("State's") attempt to damage the Nation's compacted gaming facilities contrary to the Nation's tribal-state gaming compact, the IGRA, and existing federal law, in an effort to impose nonrelated state sales taxes on the Nation without regard to the federal and tribal preemption of state taxation of on-reservation activities.

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[1] *DMA Intern., Inc. v. Qwest Comm. Intern., Inc*., 585 F.3d 1341, 1344 (10th Cir. 2009); *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001).
[2] *DMA Intern.*, 585 F.3d at 1344; *Brown v. Coleman Co*., 220 F.3d 1180, 1182 (10th Cir. 2000), *cert. denied* 531 U.S. 1192 (2001).
[3] *DMA Intern., 585* F.3d at 1344; *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1146–47 (10th Cir. 1982), *cert. denied* 459 U.S. 838 (1982).
[4] *Hall Street Associates, L.L.C. v. Mattel, Inc*., 552 U.S. 576, 587, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008); *Abbott v. Law Office of Patrick J. Mulligan*, 440 Fed.Appx. 612 (10th Cir. 2011); *DMA Intern*, 585 F.3d at 1344; *Sheldon*, 269 F.3d at 1206.

2. The District Court correctly held that the Award of the Arbitrator was not subject to *vacatur* or modification by any basis contained in FAA § 10(a)(4), and therefore correctly confirmed and enforced the Award.

Factual Background

3. In 2004, the State of Oklahoma ("State") forced a uniform tribal-state gaming compact on all Native American Tribes with territories within the exterior boundaries of the State, requiring the tribes to pay substantial gaming taxes to the State in order to exercise their IGRA legal right to participate in Class III gaming.[5] The Nation accepted Oklahoma's compact terms on November 30, 2004, creating the Citizen Potawatomi Nation Tribal Gaming Compact ("Compact").[6]

4. The Nation did not participate in drafting or negotiating the terms of the Compact.[7] Rather, the State presented the Nation with the same, non-negotiable proposed compact terms offered to all tribes, which were enacted into Oklahoma Statute in 2004 after the State electorate's approval of those terms by legislative referendum.[8]

5. In exchange for paying the state gaming tax, the Nation has secured by gaming compact its IGRA right to operate Class III gaming facilities, bringing millions of dollars in gaming tax revenues to the State, employing thousands of hotel and casino workers, and bringing much needed revenues for the provision of tribal governmental

[5] Testimony of Governor Henry (Aplt. App. at 877); 25 U.S.C. § 2710(d)(3); 3A O.S. Supp. 2004 §§ 280-281;
[6] Compact (Aplt. App. at 262-317).
[7] Testimony of Chairman Barrett (Aplt. App. at 879).
[8] Testimony of Governor Henry (Aplt. App. at 873-877); 3A O.S. Supp. 2004 §§ 280-281; 2004 Okla. Legis. Ref. 335.

services in the form of health, education, law enforcement, community recreation facilities, roads, utilities, and other community services.[9]

6. The tribal-state gaming compacts, dictated by the State, provide for fair and impartial arbitration of all tribal-state disputes arising out of compacted gaming facilities pursuant to the rules of the American Arbitration Association ("AAA").[10] The tribal-state gaming compacts provide the tribes an AAA arbitration forum for the resolution of impermissible State interferences in compacted gaming facility activities.

7. The Compact applies to any Compact "facility," which is defined in the Compact as any tribal building on tribal land within the meaning of the IGRA where the Nation conducts games covered by the Compact.[11] The Nation has two such Compact facilities -- its Grand Casino and its FireLake Entertainment Center, both of which are located on federal trust lands held for the Nation's benefit.[12]

8. The Compact sets the conditions under which the Nation's Compact facilities are entitled to sell and serve alcoholic beverages, and provides at Part 5(I):

> Sale of Alcoholic Beverages. The sale and service of alcoholic beverages in a facility shall be in compliance with state, federal, and tribal law in regard to the licensing and sale of such beverages.[13]

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[9] Expert Report of Joseph P. Kalt, Ph.D. (Aplt. App. at 981-1031).
[10] Compact at Part 12(2) (Aplt. App. at 310-311); 3A O.S. Supp. 2004 § 281(12)(2).
[11] Compact, Part 3(14) (Aplt. App. at 267); 3A O.S. Supp. 2004 § 281(3)(14).
[12] *See* Nation's Application at ¶10 (Aplt. App. at 14); State's Answer at ¶6 (Aplt. App. at 221).
[13] Compact Part 5(I) (Aplt. App. at 278-279); 3A O.S. Supp. 2004 § 281(5)(I).

9. The Nation has numerous enterprises that support the tribal government and citizenry.[14] The Nation imposes its own sales tax on sales of goods and services by tribal businesses on tribal lands to support governmental services and infrastructure for the Nation.[15] The Nation's sales tax rate is equal to or exceeds the cumulative State, county, and city sales taxes imposed in any geographical area adjacent to the Nation's jurisdiction.[16] Per the Compact, the OTC has no role in regulating or oversight of any gaming conducted by the Nation.[17]

OTC Initial Administrative Involvement

10. In 2001, an OTC representative conferred with the Nation's Vice-Chairman and requested that the Nation submit periodic State sales tax reports for sales of goods by tribal businesses on tribal lands, with the express agreement and assurance that the purpose of this request was solely to facilitate administrative convenience to the OTC, and that the Nation should invariably report its sales tax collections for all of its sales as "0".[18] This was consistent with the Nation's historical practice of never collecting the State's sales tax on sales to either tribal or nontribal members.[19]

11. On May 28, 2014 the OTC initiated an adverse administrative complaint against the Nation demanding revocation of all the Nation's alcoholic beverage permits,

[14] Testimony of Dr. James Collard (Aplt. App. at 949-952).
[15] Testimony of Chairman Barrett (Aplt. App. at 878-885).
[16] *Id.*
[17] Compact Part 3(25) (Aplt. App. at 270); 3A O.S. Supp. 2004 § 281(3)(25).
[18] Nation's Application at ¶13 (Aplt. App. at 15); State's Answer at ¶8 (Aplt. App. at 221); Affidavit of Vice-Chairman Linda Capps (Aplt. App. at 704).
[19] *Id.*

including those of Compact facilities, on the ground that the Nation had not reported sales tax collections on the State's behalf (the "OTC Administrative Action").[20] For the first time, the OTC asserted that the Nation was violating State laws by reporting its sales tax collections as "0", as the Nation had been asked to do by the OTC.[21] In the OTC Administrative Action, the OTC did not deny that its representative made the referenced assurances to the Nation in 2001, but instead, contended that such assurances were irrelevant.[22]

12. The OTC Administrative Action is the first and only time the State has taken any enforcement action against any Native American Tribe asserting that State sales taxes apply to all sales by a Native American Tribe to nontribal members.[23]

13. On October 27, 2014, the Nation objected to the proceedings, arguing that the Compact's dispute resolution procedures were the exclusive means by which to resolve the dispute, and moved to either dismiss or to stay the matter pending arbitration.[24] On December 15, 2014, the OTC's Administrative Law Judge declined to dismiss the matter, but issued a stay because the dispute "necessarily implicate(d) a condition under the Compact."[25]

[20] Complaint in OTC Administrative Action (Aplt. App. at 91).
[21] *Id.* at ¶¶5-7, 16.
[22] OTC Proposed Findings at ¶¶ 10, 22 (Aplt. App. at 101, 105).
[23] Nation's Application at ¶15 (Aplt. App. at 16); State's Answer at ¶ 9 (Aplt. App. at 222).
[24] Nation's Arbitration Demand at ¶11 (Aplt. App. at 157).
[25] *Id.*

Early Dispute Resolution and Arbitration Demand

14. All of the State's oversight responsibilities under the Compact are to be carried out by the Office of State Finance or its successor agency.[26] The Compact requires that in the event of any dispute, the party asserting noncompliance must first serve written notice on the other party.[27] The parties are to meet within thirty days of the receipt of this notice to attempt to resolve the dispute amicably and voluntary.[28] If the dispute cannot be resolved amicably, either party may refer the dispute to arbitration under AAA rules.[29]

15. On October 24, 2014, the Nation gave notice to the State to request a meeting for voluntary dispute resolution.[30] The State objected to the sufficiency of the notice.[31] In an attempt to actualize the required meeting, rather than quarreling over the question of notice requirements, the Nation sent a second notice on December 4, 2015 to the State's Governor and the Attorney General, and to State Representative Paul Wesselhoft, the former Chair of the defunct State-Tribal Relations Committee of the Oklahoma Legislature.[32]

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[26] Compact Part 3(25) (Aplt. App. at 270); 3A O.S. Supp. 2004 § 281(3)(25). In 2012, the Office of State Finance was consolidated into the Office of Management and Enterprise Services. *See* 3A O.S. Supp. 2014 § 281(3)(25).
[27] Compact Part 12(1) (Aplt. App. at 310); 3A O.S. Supp. 2004 § 281(12)(1).
[28] *Id.*
[29] Compact Part 12(2) (Aplt. App. at 310-311); 3A O.S. Supp. 2004 § 281(12)(2).
[30] *See* Nation's Arbitration Demand at ¶13 (Aplt. App. at 158).
[31] *Id.*
[32] *See* Nation's Arbitration Demand at ¶13 (Aplt. App. at 158); Compact Part 14 (Aplt. App. at 313); 3A O.S. Supp. 2004 § 281(14).

16. At the January 7, 2015 meeting, without seeking the Nation's consent, the State's representatives placed video cameras in their designated meeting room.[33] The Nation protested that this did not reflect an effort to engage in good faith discussions but proceeded with the meeting nonetheless.[34] The Governor's then General Counsel, Steve Mullins was the State's lead representative, and he argued that the Compact's dispute resolution procedures did not govern the dispute.[35] When the parties reached an impasse on this question, Mr. Mullins asked the Nation to forgo arbitration in favor of seeking immediate federal judicial resolution of the dispute.[36] The Nation declined to deviate from the Compact's terms and issued its Arbitration Demand on April 27, 2015.[37]

Resumption of OTC Administrative Action

17. The OTC *en banc* reversed the ALJ's stay of the OTC Administrative Action on April 14, 2015, and the matter resumed at that time.[38] After a closed hearing, the matter was submitted for decision *via* written presentation.[39] The OTC contended that the State could revoke the alcoholic beverage permits of all the Nation's enterprises -- including specifically its Compact facilities -- on the ground that the Nation refused to submit to the State's demands for all of the Nation's entities and departments to collect, report, and remit sales taxes on sales to nontribal members on tribal lands. The OTC stated:

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[33] *See* Nation's Arbitration Demand at ¶14 (Aplt. App. at 159).
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] Nation's Arbitration Demand at ¶11 (Aplt. App. at 157).
[39] OTC ALJ Order at p. 2 (Aplt. App. at 114).

> The CPN is obligated to collect, report and remit sales taxes on sales to nonmembers.
> …
> Because the CPN is in violation of state tax laws, revocation of its permits/licenses is proper.... Therefore, all of the CPN's licenses/permits, mixed beverage permits, and low point beer permits should be revoked ....[40]

18. The OTC's threat to revoke the Compact facilities' alcoholic beverage permits threatened those facilities' ability to compete in the marketplace by preventing them from selling and serving alcoholic beverages.[41] More pointedly, the OTC's threat was conditioned on the Nation, and all its entities and departments, collecting, reporting, and remitting sales tax on all sales to nontribal members, which have no relation either to the Nation's Compact facilities or to the sale of alcoholic beverages.

19. On October 29, 2015, the OTC's Administrative Law Judge issued an order recommending that the OTC revoke all of the Nation's alcoholic beverage and sales tax permits.[42] On January 14, 2016, on review, the ALJ Order was adopted without alteration by the OTC *en banc*.[43] On February 11, 2016, the Nation appealed this determination in Oklahoma Sup. Ct. Case No. 114,695 *In re. Complaint for Revocation of the Licenses/Permits of the Citizen Potawatomi Nation* ("State Court Appeal"). On the same day in the State Court Appeal, the Nation filed a Motion for Summary Disposition or, in the Alternative, to Stay which argued that the Order of the OTC should be summarily reversed for lack of jurisdiction and legal infirmity. The Nation alternatively asked that the

[40] OTC Proposed Findings at p. 9, ¶18 and pp. 11-12 (Aplt. App. at 105, 107-108).
[41] *See* 37 O.S. §§ 163.7; 528(A)(7); 577.
[42] OTC ALJ Order (Aplt. App. at 113-126).
[43] OTC *En Banc* Order (Aplt. App. at 127).

appeal be stayed pending the Arbitrator's award.[44] On March 28, 2016, the Oklahoma Supreme Court denied the Nation's Motion for Summary Disposition and stayed proceedings in the State Court Appeal for sixty days.[45]

Arbitration

20. Erstwhile, in Arbitration, the Nation maintained that its Compact facilities are in compliance with State laws governing sales of alcoholic beverages, that under the Compact, the State may not lawfully revoke the Nation's alcoholic beverage permits, that the State's enforcement action in its own tribunal against Compact facilities was contrary to the dispute resolution procedures of the Compact, and that the terms of the State's Sales Tax Code do not apply to an Indian Tribe, and that if the terms were applicable, the State's attempts at taxation were preempted by federal and tribal interests.

21. On May 20, 2015, the Arbitrator, the Honorable Daniel J. Boudreau ("Arbitrator") was chosen by agreement of the parties at the suggestion of the State.[46] The Arbitrator was an Oklahoma state court jurist for twenty-four years, including stints as a Justice of the Oklahoma Supreme Court, Vice-Chief Judge of the Oklahoma Court of Civil Appeals, and a Tulsa County Special Judge and District Judge.[47] Since his retirement from the Court, he has worked as a University of Tulsa School of Law professor and as an arbitrator certified by the AAA.[48]

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[44] Nation's Motion to Summarily Reverse or to Stay, (Aplt. App. at 128-135).
[45] Okla. Sup. Ct. Order (Aplt. App. at 136).
[46] Appointment of Arbitrator (Aplt. App. at 162-167).
[47] *Id.*
[48] *Id.*

22. On August 7, 2015, the Arbitrator ruled that the dispute was arbitrable.[49]

23. The arbitration proceeding was conducted on February 16-17, 2016. The Nation's Vice-Chairman Linda Capps and Tribal Counsel Gregory Quinlan testified as to the history of the interaction between the OTC and the Nation.[50] As to the Parties' intended meaning of the Compact's terms at issue, the Nation presented the testimony of former Oklahoma Governor Bradford Henry and the Nation's Chairman John A. Barrett, who were the signatories to the Compact.[51]

24. Former Oklahoma Governor Bradford Henry testified at Arbitration that he directed and oversaw the model gaming compact negotiations and was the State's signatory on the Compact.[52] Governor Henry testified that the Compact provided for arbitration: a) to resolve disputes more quickly and with less expense; and b) to maintain each party's sovereignty by preventing the State from attempting to hale Native American Tribes into State courts to resolve claims.[53]

25. While representatives of certain Native American tribes were included by the State in the process of drafting the model gaming compact language, the Nation was not

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[49] Arbitrator Appointment (Aplt. App. at 162); Arbitrator's Determination (Aplt. App. at 168-169). The Arbitrator would reiterate his arbitrability finding twice more. *See* Section II of this Brief.

[50] Affidavit of Vice-Chairman Linda Capps (Aplt. App. at 704); Declaration of Gregory M. Quinlan (Aplt. App. 792-794).

[51] Testimony of Chairman Barrett (Aplt. App. at 878-885); Testimony of Governor Henry (Aplt. App. at 873-877).

[52] *See* Testimony of Governor Henry (Aplt. App. at 874). Governor Henry is also an experienced attorney. *Id.*

[53] *Id.* (Aplt. App. at 875).

among these tribes.[54] The Compact at issue here was authored by the State and offered to the Nation as a "take-it-or-leave-it" proposition.[55] Accordingly, the Nation could not have conditioned its consent to an arbitration clause on a particular standard of review, and the Nation's Chairman John A. Barrett entered no testimony to that effect.

26. As to the Parties' intended meaning of Part 5(I) of the Compact, both Chairman Barrett and Governor Henry testified that the Compact was not intended to subject the Nation to the taxation urged by the State.[56]

27. Governor Henry testified that Part 5(I) of the Compact, which relates to the sale of alcoholic beverages, was intended to ensure that minors had no access to alcohol, not as leverage to enforce other laws outside of the Compact.[57] Governor Henry explained that model compact negotiations were delicate and that the State's primary goal was to obtain a portion of tribal gaming revenues to supplement funding for education, and

> …the last thing (the State) would have wanted to do, in my opinion, is try to backdoor in some language to require these Tribes that we're trying to get a deal with, to pay other taxes that they weren't paying.[58]

28. Governor Henry acknowledged that because the State could not call its portion of tribal gaming revenues a "tax", the model gaming compact deemed these

[54] *See* Testimony of Chairman Barrett (Aplt. App. at 879).
[55] *See* Testimony of Governor Henry (Aplt. App. at 874-875). *See also* 3A O.S. Supp. 2004 §§ 280-281.
[56] *See* Testimony of Governor Henry (Aplt. App. at 876); Testimony of Chairman Barrett (Aplt. App. at 881-884).
[57] Testimony of Governor Henry (Aplt. App. at 876-877).
[58] *Id.* (Aplt. App. at 876-877).

payments an "exclusivity fee" made in exchange for the State's promise that compacting Tribes would have an exclusive right to conduct Class III gaming in the State.[59]

29. As to the economic aspects of a *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980) preemption analysis, the Arbitrator considered the testimony of the Chairman Barrett,[60] the Nation's Director of Planning and Economic Development, Dr. James Collard,[61] and Dr. Joseph P. Kalt, Professor Emeritus at the John F. Kennedy School of Government at Harvard University, the Nation's expert witness.[62]

30. Dr. Kalt testified that there is an explicit federal policy regarding Native American self-determination and that:

> (T)he federal government has been on a quite consistent path in which it is seeking to fulfill its trust responsibilities to Tribes by letting the Tribes hold the reins of self-government in order to hopefully make better decisions and begin to move Tribes, both culturally and economically, politically forward under their own decision-making as Tribal Nations under self-rules of self-governance.[63]

31. As to the Nation's provision of governmental functions and services, Dr. Kalt testified that:

> (the Nation) is extremely well-known, actually, for its going well beyond its provision of services and performance of governmental functions than what would have been allowed by just the level of federal funding.[64]

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[59] Testimony of Governor Henry (Aplt. App. at 877).
[60] Testimony of Chairman Barrett (Aplt. App. at 878-885).
[61] Testimony of Dr. James Collard (Aplt. App. at 949-952).
[62] Testimony of Joseph P. Kalt, Ph.D. (Aplt. App. at 953-980); Expert Report of Joseph P. Kalt, Ph.D. (Aplt. App. at 981-1031).
[63] Testimony of Joseph P. Kalt, Ph.D. (Aplt. App. at 955).
[64] *Id.* (Aplt. App. at 956).

32. Dr. Kalt testified that given the Nation's millions of dollars of payments in Compact exclusivity fees and mixed beverage taxes, the incremental burdens on the State caused by the Nation's economy were not uncompensated, stating:

> (T)he State of Oklahoma does not have any uncompensated burden. In fact, it's benefitting from a wealthy neighbor, or getting wealthier neighbor, that is producing its own GDP now, the Citizen Potawatomi Nation, that benefits the State of Oklahoma. And there's no evidence that I can find that indicates that the State is suffering some uncompensated burden as a result of the Tribe's success in developing its own economy…
> Two hundred and fifty million dollars spending by the Citizen Potawatomi Nation will generate five hundred million dollars, a little more than five hundred million dollars, of economic activity overall in the region. Well, that level of economic activity will far outweigh any uncompensated burden that we could imagine. It's implausible to imagine that there's, you know, a quarter of a billion or half a billion dollars' worth of uncompensated burden.[65]

33. The State's only witness in Arbitration was former Gubernatorial General Counsel Steve Mullins, who maintained that the State could attach any condition whatsoever, including taxation of activities unrelated to the sale of alcoholic beverages, to the Nation's licensure for alcoholic beverage sales, testifying:

> I believe that there is no restriction to applying Oklahoma law in an Indian gaming facility at this time. We could compact around it, be we have not.[66]

34. General Counsel Mullins went on to testify that he did not believe that the State was seeking to compel the Nation to pay taxes, but that it sought to compel the Nation to file tax reports as a condition of maintaining alcoholic beverage permits at the Compact facilities.[67]

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[65] Testimony of Joseph P. Kalt, Ph.D. (Aplt. App. at 959-962).
[66] Testimony of General Counsel Steven K. Mullins (Aplt. App. at 1039).
[67] *Id.* (Aplt. App. at 1039-1040).

35. The State offered no testimony or other evidence material to a *Bracker* analysis or to the parties' intended meaning of the Compact terms at issue.

36. The Arbitrator issued the Award on April 4, 2016.[68]

37. The Award first reiterated that the underlying dispute was arbitrable.

38. The Award next provided that IGRA does not permit the State to convert invalid on-reservation taxes into valid taxes by merely conditioning alcohol licensure on paying the taxes.

39. The Award next provided that under the term of Compact Part 5(I), the Nation did not consent to invalid on-reservation taxes by applying for an alcohol license.

40. The Award next provided that the Nation meets the definition of the term "taxpayer" in the Oklahoma Sales Tax Code.[69]

41. Next, the Award provided that the State's attempt to levy a tax on sales made within tribal jurisdiction by the Nation to nontribal members is unlawful and barred by the doctrine of federal preemption.[70] This is because the Nation established:

a. Significant federal and tribal interests in the Nation's self-governance, economic self-sufficiency, and self-determination;

[68] Award (Aplt. App. at 30-34).
[69] *See* 68 O.S. §§ 202(d), 1352(18, 25 and 27).
[70] *See Indian Country USA v. Oklahoma Tax Comm'n,* 829 F.2d 967 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

b. The Nation alone invests value in the goods and services that it sells, does not derive such value through an exemption from State sales taxes, and imposes its own equivalent tribal sales tax on the sales;

c. The State possesses no economic interest beyond a general quest for additional revenue in imposing a sales tax on the Nation's transactions and suffers no uncompensated economic burden arising therefrom; and

d. The federal and tribal interests at stake predominate significantly over any possible State interest in the transactions upon which the State seeks to impose its sales tax.

42. Finally, the Award enjoined the State from taking any further action to divest the Nation's Compact facilities of the right to sell and serve alcoholic beverages or threaten other enforcement actions against them on the ground that the Nation does not comply with the State's sales tax laws.[71]

State Administrative and Appellate Proceedings Post-Arbitration

43. On April 5, 2016, in the State Court Appeal, the Nation filed a notice of the Award and a request for a finding the issues presented in the State Court Appeal had been resolved by the Award.[72] On May 16, 2016, the Oklahoma Supreme Court stayed the State Court Appeal until further order of the Court.[73] On July 26, 2016, the State moved to lift

[71] Award (Aplt. App. at 30-34).
[72] Nation's Notice of Final Arbitration Award, (Aplt. App. at 137-142).
[73] Okla. Sup. Ct. Order (Aplt. App. at 1049).

the stay.[74] On September 2, 2016, the Oklahoma Supreme Court stayed proceedings in the State Court Appeal until the conclusion of all Federal Court appeals.[75]

44. On March 2, 2016, while the Arbitrator was deliberating, the State, through its OTC, attempted to close all businesses of the Nation for purported non-compliance with Oklahoma state law.[76] The hearing on the Nation's objection to this notice has been stayed by the OTC Administrative Law Judge pending the outcome of the State Court Appeal.[77]

45. On May 6, 2016, the State, through its OTC, refused to renew the Nation's existing licenses and permits for purported non-compliance with Oklahoma state law. The hearing on the Nation's objection to this action was initially stayed by the OTC Administrative Law Judge pending the outcome of the State Court Appeal, but the OTC *en banc* reversed this order and the matter is set for hearing on October 26, 2016, despite the existence of the District Court's injunction.[78]

Federal Court Confirmation of Arbitration Award

46. On April 13, 2016, the Nation applied for confirmation and enforcement of the Award.[79] On May 4, 2016, the State moved to vacate the award.[80] On June 17, 2016,

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[74] State's Notice Regarding Appeal of Confirmation of Arbitration Award and Motion to Lift Stay in Part, filed July 26, 2016. (Appellee Supp. App. at 4-7).
[75] Okla. Sup. Ct. Order, filed September 2, 2016. (Appellee Supp. App. at 14).
[76] OTC Notice of Business Closure (Aplt. App. at 143-146).
[77] OTC Order to Stay Proceedings (Aplt. App. at 147-149).
[78] OTC Order No. 2016 08 23 21, filed August 29, 2016 in OTC Case No. JM-16-001-K. (Appellee Supp. App. at 8-13).This Order facially refers to the stay issued in the business closure matter, but the OTC's ALJ has determined that this was an oversight and that the OTC *en banc* intended to lift the stay in the nonrenewal matter.
[79] Nation's Application (Aplt. App. at 5-218).
[80] State's Motion to Vacate (Aplt. App. at 238-843).

the District Court heard oral argument on the competing motions and then announced from the bench that it would confirm and enforce the Award in its entirety. The District Court's Memorandum Opinion and Order and Judgment confirming and enforcing the Award were filed on June 21, 2016.[81] The State filed its Notice of Appeal on July 21, 2016.[82]

Chronological Summary

47. The State has incorrectly asserted that the Nation pursued Compact dispute resolution procedures only after the close of administrative proceedings.[83] Because the State's actions in its own tribunals overlapped the Nation's attempts to conform to the dispute resolution provisions of the Compact, those histories have been narratively grouped by matter. For a purely chronological recounting, see below:

EVENT	**DATE**	**MATTER**
OTC asks Nation for "$0" on sales tax reports	2001	Background
Compact signed by Nation's Chairman	November 30, 2004	Background
OTC administrative complaint	May 28, 2014	OTC Admin Case 1
Nation gives State dispute resolution notice	October 24, 2014	Pre-arbitration
Nation moves to dismiss OTC action	October 27, 2014	OTC Admin Case 1
Nation issues second dispute resolution notice	December 4, 2014	Pre-arbitration
OTC ALJ stays action	December 15, 2014	OTC Admin Case 1
Nation/State dispute resolution meeting	January 7, 2015	Pre-arbitration
OTC *en banc* lifts ALJ stay	April 14, 2015	OTC Admin Case 1

[81] Memorandum Opinion and Order (Aplt. App. at 1072-1078); Judgment (Aplt. App. at 1079).
[82] State's Notice of Appeal (Aplt. App. at 1080).
[83] St. Br. at p. 1.

Arbitration Demand	April 27, 2015	Arbitration
Arbitrator appointed	May 14, 2015	Arbitration
Arbitrator rules dispute is arbitrable	August 7, 2015	Arbitration
OTC ALJ order revoking permits/licenses	October 29, 2015	OTC Admin Case 1
OTC *en banc* affirms ALJ order	January 14, 2016	OTC Admin Case 1
Nation appeals OTC order	February 11, 2016	State Appeal
Arbitration Hearings	February 16-17, 2016	Arbitration
OTC issues business closure notice	March 2, 2016	OTC Admin Case 2
OTC ALJ stays business closure proceedings	March 22, 2016	OTC Admin Case 2
Okla. Sup. Ct. stays appeal for 60 days	March 28, 2016	State Appeal
Arbitration Award	April 4, 2016	Arbitration
Nation notifies Okla. Sup. Ct. of Award	April 5, 2016	State Appeal
Nation moves to confirm Award	April 13, 2016	Fed. Dist. Ct.
OTC refuses to renew existing licenses/permits	May 6, 2016	OTC Admin Case 3
Okla. Sup. Ct. stays appeal until further order	May 16, 2016	State Appeal
OTC ALJ stays nonrenewal matter	June 2, 2016	OTC Admin Case 3
Award confirmed	June 21, 2016	Fed. Dist. Ct.
State appeals confirmation	July 21, 2016	10th Circuit
OTC *en banc* lifts stay in nonrenewal matter	August 29, 2016	OTC Admin Case 3
Okla. Sup. Ct. stays appeal until conclusion of federal appeals	September 2, 2016	State Appeal
State files Original Brief	September 19, 2016	10th Circuit

ARGUMENT AND AUTHORITY

I. THE DISTRICT COURT CORRECTLY HELD THAT THE STANDARD OF REVIEW OF THE AWARD IS ESTABLISHED BY THE FEDERAL ARBITRATION ACT'S EXCLUSIVE PROVISIONS

48. The State argues that the District Court erred by declining to replace the exclusive FAA §§ 9-11 standard of review with a "*de novo* review" standard due to language contained in Part 12(2-3) of the Compact. Because this issue has been jurisprudentially resolved, the District Court did not err in identifying its standard of review.

A. Exclusivity of FAA Standard of Review

49. In *Hall Street Associates, L.L.C. v. Mattel, Inc*., 552 U.S. 576, 587, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008), the Supreme Court determined that parties to an arbitration agreement may not contract for an expansion of the exclusive FAA standard, holding:

> …(E)xpanding the detailed categories would rub too much against the grain of the § 9 language, where provision for judicial confirmation carries no hint of flexibility. On application for an order confirming the arbitration award, the court "must grant" the order "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." There is nothing malleable about "must grant," which unequivocally tells courts to grant confirmation in all cases, except when one of the "prescribed" exceptions applies. This does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else.[84]

50. The Nation and State agreed to arbitrate their disputes and agreed that resultant arbitration awards could be confirmed in federal court.[85] The State has previously

[84] *See also Hicks v. Cadle Co*., 355 Fed.Appx. 186, 195-197 (10th Cir. 2009), *cert. denied* 131 S.Ct. 160 (2010); *Abbott*, 440 Fed.Appx. at 617-618; *Bowen v. Amoco Pipeline Co*., 254 F.3d 925 (10th Cir. 2001).

[85] Compact at Part 12(3) (Aplt. App. at 312); 3A O.S. Supp. 2004 § 281(12)(3).

engaged in federal court FAA confirmation proceedings for disputes arising out of substantially similar gaming compacts.[86] As a general matter, contracts entered pursuant to IGRA, which contain arbitration clauses, are subject to the FAA.[87] For all these reasons, the exclusive FAA standard of review avails in this cause as a matter of law.

51. The State first argues, for the first time on appeal,[88] that because the United States Department of Interior's Bureau of Indian Affairs ("BIA") did not object to the "*de novo*" language in the model gaming compact, *Hall Street* is not dispositive of this issue because policies behind IGRA "have more importance" than those undergirding the FAA.[89]

52. The State also does not identify any IGRA language in support of a policy for a particular standard of review in FAA confirmation cases, beyond a general statement of federal jurisdiction over gaming compact negotiation disputes and claims for injunction of class III gaming activity.[90] If IGRA's jurisdictional statement does somehow carry the implication urged by the State, then arbitration confirmation proceedings conducted in

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[86] *See e.g. Choctaw Nation v. Oklahoma*, 724 F.Supp.2d 1182 (W.D. Okla. 2010); *Iowa Tribe of Okla. v. Oklahoma*, 15-cv-1379-R, 2016 WL 1562976 (W.D. Okla. April 18, 2016).

[87] *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Kean-Argovitz Resorts*, 383 F.3d 512, 514 (6th Cir. 2004). The Oklahoma Supreme Court has applied the FAA to a tribal tobacco compact. *See Feather Smoke Shops, LLC v. Oklahoma Tax Comm'n*, 236 P.3d 54, 60 (Okla. 2009).

[88] *See Hicks v. Gates Rubber Co*., 928 F.2d 966, 970 (10th Cir. 1991)(this Court will not ordinarily consider an issue raised for the first time on appeal). In District Court, the State merely argued that the BIA approved the Compact with the included "*de novo*" language, not that there was a transcendent IGRA policy for a particular standard of review in arbitration clauses of gaming compacts. *See* State's Reply at pp. 8-9 (Aplt. App. at 1068-1069).

[89] St. Br. at p. 42.

[90] 25 U.S.C. § 2710(d)(7)(A).

federal courts according to federal law cannot contravene IGRA's jurisdictional statement. The State also fails to identify any legal support for its proposition that an administrative determination, before the fact,[91] may override explicit Supreme Court precedent on a legal question.

53. The District Court correctly determined that *Hall Street* directly resolves the legal question presented.[92] Because there is a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway, the limited FAA grounds for vacation or modification of an arbitral award may not be contractually modified.[93]

54. The State alternatively argues that in making its *Hall Street* finding, the District Court erred by declining to sever the sovereignty waivers and arbitration clause from the Compact. The Nation contends that the District Court correctly and reasonably construed the Compact's severability clause to make the narrowest finding required by *Hall Street*.

55. Part 13(A) of the Compact provides:

> ...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

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[91] The State concedes that *Hall Street* was not decided until four years after the execution of the Compact, but notes that a panel of this Court had held in *Bowen v. Amoco Pipeline Co*., 254 F.3d 925, 936 (10th Cir. 2001), that the FAA standard of review may not be contractually expanded.

[92] While this issue is in the context of jurisprudential precedent, it is logically akin to the statutory general-specific canon. *See e.g. United States v. Porter*, 745 F.3d 1035, 1049 (10th Cir. 2014).

[93] *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064, 2068, 186 L.Ed.2d 113 (2013); *Stolt-Nielsen S.A. v. AnimalFeeds International Corp*., 559 U.S. 662, 691, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010); *Hall Street*, 552 U.S. at 588.

> subsections of this Compact shall remain in full force and effect, unless the invalidated provision, section or subsection is material.[94]

The *Hall Street* Court did not find that the infirm standard of review provision worked to invalidate the entire arbitration clause at issue in that matter.[95] The District Court correctly found that the invalidity of the non-FAA standard of review provision likewise does not work to invalidate any other portion of the Compact.

56. The FAA § 2 provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," and the Supreme Court has held that this is a congressional declaration of a liberal federal policy favoring arbitration agreements.[96] As observed by the Supreme Court in *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2035, 188 L.Ed. 2d 1071 (2014), if a State does not want to arbitrate compact disputes, it may insist on a different method of dispute resolution in compact language.

57. The State first incorrectly alleges that the District Court "failed to conduct any severability analysis at all."[97] The District Court considered the severability arguments forwarded by both parties and reached the unambiguous conclusion urged by the Nation – that the parties could not contractually expand FAA's standard of review. The District

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[94] Compact at Part 13(A) (Aplt. App. at 312); 3A O.S. Supp. 2004 § 281(13)(A).
[95] *Hall Street*, 128 S.Ct. at 1405-1406. The Court also dismissed concerns that the FAA's exclusive review provisions might dissuade parties from submitting to arbitration.
[96] *Moses H. Cone, Mem. Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); *Nesbitt v. FCNH, Inc*., 811 F.3d 371, 376 (10th Cir. 2016). Oklahoma state law likewise recognizes that the FAA embodies a liberal policy favoring enforcement of arbitration agreements. *Oklahoma Oncology & Hematology P.C. v. U.S. Oncology, Inc*., 160 P.3d 936, 943 (Okla. 2007).
[97] St. Br. at 45.

Court did not sever or invalidate any other portion of the Compact. The Nation is unaware of any authority, and the State cites to no authority, requiring a particular form of analysis of a severability clause in a trial court's order.[98]

58. The State argues, despite all of the evidence to the contrary, that narrow severability is not possible because the parties conditioned their consent to arbitration on not just federal court review, but federal court review under a non-FAA standard. In support, the State offers a strained construction of the parties' intent which it argues is derived from the Compact's language. However, the only evidence presented in Arbitration supports the District Court's finding and contradicts the State's *post hoc* construction of the parties' intent.[99]

59. The State offered no evidence that a non-FAA standard of review was central to or inextricable from the State's sovereignty waiver and consent to arbitration, nor any evidence of the State's wariness in entrusting dispute resolution to a single arbitrator to be reviewed in federal court under an FAA standard.

60. In fact, Governor Henry testified that the arbitration clause was included to resolve disputes straightaway and to preserve each party's sovereignty.[100] This is harmonious with *Hall Street*'s primary basis for declining to permit expansion of the FAA standard of review.

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[98] *See Regalado v. City of Commerce City, Colo.*, 20 F.3d 1104 n. 1 (10th Cir. 1994)(trial court is not required to explicitly detail findings and conclusions to support its decision, so long as the holdings are not ambiguous or inascertainable.)

[99] Testimony of Chairman Barrett (Aplt. App. at 879); Testimony of Governor Henry (Aplt. App. at 875).

[100] Testimony of Governor Henry (Aplt. App. at 875).

61. On appeal, the State clarifies that it seeks to nullify the Award through a holding that if *Hall Street* controls, the Compact's arbitration clause and sovereignty waivers are invalid, but the Compact otherwise would remain intact. Such a holding would not only deny Tribes the protections of an impartial forum for dispute resolution, but it would undermine the enforceability of all of the State's model Class III gaming compacts, likely resulting in broad consequences beyond the instant cause.

62. Numerous Native American tribes with territories co-extensive to that of the State have entered into substantially similar State-imposed model gaming compacts with the State. If applied to all of these compacts, the State's requested holding would forestall the possibility of binding arbitration of any model gaming compact dispute.[101] As Governor Henry testified, the arbitration clause was authored to give both the State and tribes a means of efficiently enforcing the model gaming compacts without diminishing their respective sovereignties.

63. The State admits that invalidating the model gaming compacts' sovereignty waivers and arbitration clauses would create enforceability issues but posits that the parties might still have the ability to attempt compact enforcement through suits for injunctive relief contemplated by the IGRA or *Ex Parte Young*.[102] This tack would not be as effective as the State implies.

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[101] The State notes that if the FAA standard were employed by this Court, "it is unclear that this Court would have jurisdiction over the State of Oklahoma or the tribe in the first place." State's Motion to Vacate at p. 21 (Aplt. App. at 258).

[102] 25 U.S.C. § 2710(d)(7)(A); *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

64. As noted above, other than good faith negotiation suits, IGRA injunctive actions are limited to: "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact."[103] Should the State violate a model compact in any way other than sanctioning impermissible class III gaming activity on Indian lands, an IGRA injunctive suit would likely be of little avail to a compacting tribe.

65. Additionally, States and tribes have a limited ability to independently lodge injunctive suits under either IGRA or *Ex Parte Young*.[104] For instance, the State previously was successful in employing Eleventh Amendment defenses to defeat both IGRA and *Ex Parte Young* claims to mandate good faith gaming compact negotiations.[105]

66. These difficulties aside, the injunctive suits would not permit an ordinary remedy. The Compact allows for an arbitration decision requiring the payment of monies.[106] Absent this provision, the injunctive suits suggested by the State, if available, would, for instance, likely leave the State without any means to mandate that a tribe render monetary payment of a model gaming compact's "exclusivity fees" to the State.[107]

67. The Nation cannot identify a good-faith reason why the State would seek to render its own gaming compacts less enforceable rather than be subject to an ordinary FAA

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[103] 25 U.S.C. § 2710(d)(7)(A)(ii).
[104] *See e.g. Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct 1114, 134 L.3d 252 (1996); *Alabama v. PCI Gaming Auth*., 801 F.3d 1278, 1300 (11th Cir. 2015); *Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, 737 F.3d 1075 (6th Cir. 2013) *cert. dismissed* 135 S.Ct. 1151 (2014); *Florida v. Seminole Tribe*, 181 F.3d 1237 (11th Cir. 1999).
[105] *Ponca Tribe of Okla. v. State of Oklahoma*, 89 F.3d 690 (10th Cir. 1996).
[106] Compact at Part 12(3) (Aplt. App. at 312); 3A O.S. Supp. 2004 § 281(12)(3).
[107] Compact at Part 11 (Aplt. App. at 306-310); 3A O.S. Supp. 2004 § 281(11).

standard of review. In response to this begged question, the State seems to rhetorically shrug and nihilistically observe that enforceability, an issue specifically addressed by the Compact, is often a problem in Native American law.[108]

68. Instead of making such a sweeping finding contrary to the only evidence presented to the Arbitrator and the *Hall Street* approach, the District Court correctly found that Part 12(2-3) of the Compact provides for binding arbitration subject to federal court review under the FAA. This finding preserved as much of the Compact as the dictates of *Hall Street* will allow.

B. Scope of FAA Standard of Review

69. The stringency of the governing FAA standard of review is difficult to overstate. Judicial review of arbitration awards is extraordinarily limited and among the narrowest standards known to law.[109] In the recent decision of *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064, 2068, 186 L.Ed.2d 113 (2013), the Supreme Court held:

> Under the FAA, courts may vacate an arbitrator's decision "only in very unusual circumstances." That limited judicial review, we have explained, "maintain[s] arbitration's essential virtue of resolving disputes straightaway." If parties could take "full-bore legal and evidentiary appeals," arbitration would become "merely a prelude to a more cumbersome and time-consuming judicial review process."
>
> Here, Oxford invokes § 10(a)(4) of the Act, which authorizes a federal court to set aside an arbitral award "where the arbitrator[ ] exceeded [his] powers." A party seeking relief under that provision bears a heavy burden. "It is not enough ... to show that the [arbitrator] committed an error—or even a serious error." Because the parties "bargained for the arbitrator's construction of their agreement," an arbitral decision "even arguably construing or applying the contract" must stand, regardless of a court's view of its (de)merits. Only if "the arbitrator act[s] outside the scope of

[108] St. Br. at p. 50.
[109] *DMA Intern.*, 585 F.3d at 1344(*citing Hollern v. Wachovia Secs., Inc*., 458 F.3d 1169, 1172 (10th Cir. 2006)).

> his contractually delegated authority"—issuing an award that "simply reflect[s] [his] own notions of [economic] justice" rather than "draw[ing] its essence from the contract"—may a court overturn his determination. So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong. (Citations omitted)[110]

70. In *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509-510, 121 S.Ct. 1724, 149 L.Ed.2d 740 (2001), the Supreme Court held:

> Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement. We recently reiterated that if an " 'arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.' " It is only when the arbitrator strays from interpretation and application of the agreement and effectively "dispense[s] his own brand of industrial justice" that his decision may be unenforceable. When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's "improvident, even silly, factfinding" does not provide a basis for a reviewing court to refuse to enforce the award.
>
> In discussing the courts' limited role in reviewing the merits of arbitration awards, we have stated that " 'courts ... have no business weighing the merits of the grievance [or] considering whether there is equity in a particular claim.' " When the judiciary does so, "it usurps a function which ... is entrusted to the arbitration tribunal." Consistent with this limited role, we said in *Misco* that "[e]ven in the very rare instances when an arbitrator's procedural aberrations rise to the level of affirmative misconduct, as a rule the court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result." That step, we explained, "would improperly substitute a judicial determination for the arbitrator's decision that the parties bargained for" in their agreement. (Citations omitted.)[111]

71. In *Air Methods Corp v. OPEIU*, 737 F.3d 660, 665 (10th Cir. 2013), *cert. denied* 134 U.S. 2295 (2014), a panel of this Court held:

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[110] *See also Hungry Horse LLC v. E Light Elec. Services, Inc.*, 569 Fed.Appx. 566, 569 (10th Cir. 2014).

[111] *See also Air Methods Corp.*, 737 F.3d at 665.

> …'[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice' " and " 'his award is legitimate only so long as it draws its essence from the collective bargaining agreement.' " However, "[i]n determining whether or not the arbitration award 'draws its essence' from the [collective bargaining agreement], a reviewing court looks to the award itself and not at every phrase contained in the arbitrator's opinion." "A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award." Thus our review is extremely deferential… (Citations omitted.)

72. Pursuant to the FAA, the question before the District Court was whether the Arbitrator had the power to reach the issues for which the State seeks *vacatur*, not whether the Arbitrator correctly decided the merits of these issues.[112] Accordingly, the District Court was to determine whether the issues for which the State seeks review were either submitted to the Arbitrator or contemplated by the Compact's arbitration clause. If so, the District Court was to determine only if the Arbitrator arguably interpreted the Compact in resolving those issues. If so, the District Court was not to reach or review the merits of the Award. Given the broad arbitration clause contained in the Compact and the Arbitrator's reasoned Award, the District Court correctly confirmed and enforced the Award. The District Court correctly recited and applied FAA §§ 9-11 through the lens of applicable jurisprudence.

[112] *Stolt-Nielsen*, 559 U.S. at 694; *ARW Expl. Corp. v. Aguirre*, 45 F.3d 1455, 1463 (10th Cir. 1995), *cert. denied* 525 U.S. 822 (1998).

II. THE DISTRICT COURT CORRECLY HELD THAT THE ARBITRATOR CORRECTLY FOUND THAT THE DISPUTE WAS ARBITRABLE.

73. The State rightly does not allege that the Award is subject to modification or *vacatur* for any of the FAA §10(a)(1-3) grounds relating to fraud, undue means, partiality, corruption, or misconduct. The State also rightly does not seek modification or *vacatur* of the Award under any judicially-created basis such as "manifest disregard of the law" or "violation of public policy."[113]

74. In Arbitration, the Arbitrator was an experienced jurist, the parties were ably represented by competent legal counsel, the proceedings involved extensive pleading and motion practice, and the two-day hearing involved the examination of several witnesses and the presentation of a great volume of evidence.

75. The Nation remarks on the absence of these arguments in order to note that in resisting an ordinary FAA confirmation of the Arbitrator's decision, the State downplays its admission that the Arbitration was conducted fairly and professionally by an unbiased and qualified Arbitrator. In substance, the State does not agree with the result of the Arbitration and asks for the sort of full-bore evidentiary and legal appeal which federal policy so strongly and uniformly disfavors. Short of such a full-bore appeal, the State asks for *vacatur* on FAA § 10(a)(4) grounds. Because the District Court correctly determined that Award was not subject to *vacatur* or modification on those grounds, this Court should affirm the District Court's decision.

[113] *See e.g. Adviser Dealer Servs., Inc. v. Icon Advisers, Inc*., 557 Fed.Appx. 714, 717 (10th Cir. 2014). This Court has yet to hold whether these grounds for *vacatur* survive *Hall Street*'s determinations. *See Abbott*, 440 Fed.Appx. at 620.

76. The State maintained in its own tribunals that the Nation was required to report, collect, and remit State sales tax from all of its enterprises' activities in order to hold alcoholic beverage licenses and permits at its Compact facilities.[114] In Arbitration, the State reframed this position to maintain that the Nation was required only to report taxable sales from all its enterprises, rather than to collect and remit the tax, in order to hold alcoholic beverage licenses and permits at its Compact facilities.[115] On appeal, the State has again attempted to reframe its position to contend that it was merely making an audit request of the Nation.[116] In any event, the State argued in Arbitration that by assenting to Part 5(I) of the Compact, the Nation was assenting to the taxation at issue.[117]

77. The Nation presented two basic questions to the Arbitrator:

a) Pursuant to Part 12 of the Compact, is Arbitration the proper forum in which the State may attempt to enforce the Compact?

b) Does Part 5(I) of the Compact have the effect urged by the State?[118]

78. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.[119] If the parties have agreed to submit the question of arbitrability to

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[114] OTC's Proposed Findings of Fact and Conclusions of Law, at p. 9, ¶18 and pp. 11-12 (Aplt. App. at 105, 107-108).

[115] State's Proposed Arbitration Order (Aplt. App. at 822-829); Testimony of General Counsel Mullins at p. 162 (Aplt. App. at 1040)("Q. But they are requiring the Nation to comply with the reporting requirements. A. That's correct.").

[116] St. Br. at pp. 14, 21.

[117]State's Motion to Dismiss Arbitration, at p. 15 (Aplt. App. at 409); St. Br. at p. 36.

[118] Arbitration Demand (Aplt. App. at 367-378); Nation's Combined Response and Reply, (Aplt. App. at 913).

[119] *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); *Moses H. Cone*, 460 U.S. at 24-25; *In re. Cox*

an arbitrator, this Court will not independently review the merits of the question of whether the parties' dispute is arbitrable.[120] Where an arbitration clause is broad, there arises a presumption of arbitrability and arbitration of even a collateral matter will be ordered if the claim alleged implicates issues of contract construction or the parties' rights and obligations under it.[121] In the absence of any express provision excluding a particular grievance from arbitration, only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.[122]

79. If a court independently determines the parties agreed to arbitrate an issue, it should give extreme deference to an arbitrator's decision regarding the scope of that issue.[123] The arbitrator's interpretation of the scope of his powers is entitled to the same level of deference as his determination on the merits.[124] Part 12(2) of the Compact provides that Arbitration shall be conducted under the rules of the American Arbitration Association ("AAA").[125] AAA Rule R-7 provides:

Enterprises, Inc., ___ F.3d ____, 2016 WL 4492393, * 2 (10th Cir. 2016); *Sanchez v. Nitro-Lift Tech., LLC*, 762 F.3d 1139, 1146 (10th Cir. 2014).

[120] *See Burlington Northern and Santa Fe Ry. Co. v. Public Serv. Co. of Okla.*, 636 F.3d 562, 568 (10th Cir. 2010); *Schoenduve Corp. v. Lucent Technologies, Inc.*, 442 F.3d 727, 733 (9th Cir. 2006); *Major League Umpires Ass'n v. American League of Professional Baseball Clubs*, 357 F.3d 272, 279 (3d Cir. 2004), *cert. denied* 543 U.S. 1049 (2005).

[121] *Sanchez*, 762 F.3d at 1146 (*citing Cummings v. FedEx Ground Package System, Inc.*, 404 F.3d 1258, 1261 (10th Cir. 2005))

[122] *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 584-585, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *In re. Cox Enterprises* at * 2.

[123] *See Moses H. Cone*, 460 U.S. at 24-25; *Hungry Horse*, 569 Fed.Appx. at 570.

[124] *See Burlington Northern*, 636 F.3d at 568 (*citing Sheldon*, 269 F.3d at 1206); *Schoenduve Corp.*, 442 F.3d at 733; *Major League Umpires Ass'n*, 357 F.3d at 279.

[125] Compact at Part 12(2) (Aplt. App. at 310-311); 3A O.S. Supp. 2004 § 281(12)(2).

> The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

80. By submitting to AAA Rules, the Parties agreed that the Arbitrator was to determine the scope of the arbitration agreement and the arbitrability of the claims presented. Therefore, this Court should accord extreme deference to the Arbitrator's arbitrability finding.

81. Part 12(2) of the Compact provides for arbitration of "a dispute arising under this Compact," including disputes alleging noncompliance with the Compact or disputes as to interpretation of the Compact.[126] The Nation argued that under the broad language of Part 12 of the Compact, arbitration was the proper forum in which the State could attempt to enforce the Compact, because the obligations the State sought to impose allegedly arose from Part 5(I) of the Compact.[127] The State responded incongruously that: a) the Arbitrator could determine the threshold question of arbitrability;[128] b) the obligations the State sought to impose did not arise from the Compact;[129] and/or c) the obligations arose from Part 5(I) of the Compact.[130]

82. As to the parties intentions, at Arbitration, Governor Henry testified:

> It was agreed by the parties that any disputes under the compact, relating to compacted facilities, would be resolved through arbitration.[131]

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[126] Compact at Part 12(1-2) (Aplt. App. at 310-311); 3A O.S. Supp. 2004 § 281(12)(2).
[127] Nation's Combined Response and Reply, at p. 1 (Aplt. App. at 913-914).
[128] State's Motion to Dismiss Arbitration, at p. 2, note 4 (Aplt. App. at 396-397).
[129] *Id*. at pp. 5-6 (Aplt. App. at 399-400).
[130] *Id*. at p. 15. (Aplt. App. at 409).
[131] Testimony of Governor Henry (Aplt. App. at 875).

83. The Arbitrator considered the question of arbitrability three times and found the dispute arbitrable in each instance. First, in the context of the State's Motion to Dismiss, the Arbitrator ruled: "The dispute … is substantively arbitrable i.e. falls within the terms of the agreement to arbitrate."[132]

84. Next, in the context of the Parties' competing Motions for Summary Judgment, the Arbitrator ruled:

> The underlying dispute centers primarily on the Nation's contention that they have no obligation to accede to the State's demand for all of the Nation's businesses to collect, report and remit sales taxes on sales to non-tribal members. The Nation's claim is arbitrable."(Emphasis in original.)[133]

85. Finally, in the Award, the Arbitrator reaffirmed that the dispute was arbitrable, finding:

> Given the nature of the Nation's attack (the authority of the State to apply its revenue laws), the broad scope of the arbitration provision in the Compact and the strong federal presumption regarding the application of an arbitration clause, I find the dispute at issue arbitrable."[134]

86. The District Court correctly agreed with the Arbitrator that the underlying nature of the arbitrable dispute was that:

> …(the) dispute centers upon the Tribe's ability to sell alcoholic beverages within its gaming facilities – facilities that operate under the authority of the Compact – without complying with the State's sales tax laws."[135]

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[132] Arbitrator's Determination on Motion to Dismiss at ¶8 (Aplt. App. at 4288).
[133] Arbitrator's Determination on Motions for Summary Judgment at ¶1 (Aplt. App. at 820).
[134] Award, at p. 3 (Aplt. App. at 32).
[135] Memorandum Opinion and Order at pp. 4 (Aplt. App. at 1075).

87. The Arbitrator's determination on the arbitrability of the issues presented was well-reasoned, correct, and within the scope of the Compact's broad arbitration clause. The District Court correctly gave deference to the Arbitrator's finding that the dispute was arbitrable.[136]

III. THE DISTRICT COURT CORRECTLY HELD THAT THE ARBITRATOR'S AWARD AROSE FROM A CORRECT CONSTRUCTION OF THE COMPACT.

88. As stated above, the District Court correctly gave deference to the Award.[137] So long as the Award arguably arose from a construction or application of the Compact, this Court must affirm the District Court's holding.[138]

89. In Arbitration, the Nation argued that the language of Part 5(I) required the Nation to comply only with State law relating to the regulation, rather than the taxation, of the sale and service of alcoholic beverages.[139] The State argued that Part 5(I) required all of the Nation's enterprises to, at minimum, file sales tax reports in order for the Nation's Compact facilities to hold alcoholic beverage licenses and sales tax permits.[140] The Arbitrator reasonably undertook an effort to construe the language of Part 5(I), in the context of governing law, to resolve the issue. The District Court correctly held that the

[136] *Id.* at pp. 3-5 (Aplt. App. at 1074-1076).
[137] *Oxford Health*, 133 S.Ct. at 2068.
[138] *Major League Baseball*, 532 U.S. at 509-510; *United Paperworkers*, 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987); *Adviser Dealer*, 557 Fed.Appx. at 717; *ARW Exploration*, 45 F.3d at 1463.
[139] Nation's MSJ in Arbitration, at ¶17 (Aplt. App. at 611-612)
[140] State's Proposed Arbitration Order, at p. 2 (Aplt. App. at 824).

Arbitrator "… did, in fact, base his decision upon the terms of the Compact and resolved the parties' dispute by relying on those terms, as well as appropriate governing law."[141]

A. The Arbitrator Did Not Exceed His Powers

90. The State first argues that the Arbitrator exceeded his powers through certain legal findings. An Arbitrator's legal findings are due extreme deference by this Court.[142] This Court is not authorized to reconsider the merits of an award, and even an arbitrator's erroneous interpretations or applications of law are not reversible.[143]

91. As to the Parties' intended meaning of Part 5(I) of the Compact, witnesses representing each Compact signatory testified that Part 5(I) was not intended to subject the Nation to the taxation urged by the State.[144] The State offered no testimony or other evidence relating as to the parties' intended meaning of Part 5(I) of the Compact.

92. The Arbitrator determined that IGRA does not allow a State to convert invalid on-reservation taxes into valid taxes by merely conditioning alcohol licensure on paying the taxes, and that by applying for an alcohol license, a tribe does not consent to invalid on-reservation taxes, but that the plain language of Part 5(I) requires the Nation to

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[141] Memorandum Opinion and Order at p. 5 (Aplt. App. at 1076).
[142] *See Stolt–Nielsen S.A.*, 130 S.Ct. at 1767; *Hollern*, 458 F.3d at 1176(*citing Dominion Video Satellite, Inc. v. Echostar Satellite, LLC*, 430 F.3d 1269, 1274 (10th Cir. 2005); *ARW Exploration*, 45 F.3d at 1463 (citing *Wilko v. Swan*, 346 U.S. 427, 436–37, 74 S.Ct. 182, 187, 98 L.Ed. 168 (1953)).
[143] *CEEG (Shanghai) Solar Science & Tech. Co., Ltd. v. LUMOS, LLC*, 829 F.3d 1201, 1206 (10th Cir. 2016)(*citing United Paperworkers*, 484 U.S. at 36 and *ARW Exploration.*, 45 F.3d at 1463).
[144] *See* Testimony of Governor Henry (Aplt. App. at 876-877); Testimony of Chairman Barrett (Aplt. App. at 881-884).

submit to any sales tax on non-tribal members that the State has any authority to impose.[145] In so finding, the Arbitrator rejected the Nation's legal arguments that the State's proffered interpretation of Part 5(I) was facially barred by IGRA and Oklahoma statute.[146]

93. To decide the issue, the Arbitrator proceeded to consider and apply longstanding Federal law relating to State taxation of a Native American Tribe's activities. It is well-established that a State may not ordinarily impose a sales tax on transactions on Tribal lands if either: a) the buyer is a Tribe or Tribal member; or b) the legal incidence of the tax falls primarily on a Tribe or Tribal member.[147] If neither of these conditions exist, the question is subjected to a test for preemption announced in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980). Per *Bracker*, a Federal and Tribal interests must be balanced against State interests to determine whether the tax on the activity is lawful.

94. This balancing test entails consideration of one or more of the following factors: a) whether there are significant Federal and Tribal interests in the Tribe's self-governance, economic self-sufficiency, and self-determination; b) whether value of the activity taxed is generated in Indian Country or attracted to Indian Country solely by the claimed tax exemption; c) whether the State has any economic interest or uncompensated

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[145] Award at p. 4 (Aplt. App. at 33).
[146] Award at p. 4 (Aplt. App. at 33). *See also* 28 U.S.C. §§ 2701 *et seq.*; 68 O.S. §§ 202(d), 1352(18).
[147] *See e.g. California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216, 107 S.Ct 1083, 94 L.Ed.2d 244 (1987); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995).

burden arising from the activity; and d) whether Federal and Tribal interests predominate over State interests in the activity at issue.[148]

95. As previously stated herein, on the economic aspects of a *Bracker* analysis, the Arbitrator considered the testimony of the Nation's Chairman Barrett,[149] the Nation's Director of Planning and Economic Development, Dr. Collard,[150] and Dr. Kalt, the Nation's expert witness,[151] all of which supported the Nation's arguments in favor of preemption. The State offered no testimony or evidence to support a differing preemption analysis.

96. Applying governing law, the Arbitrator found that the tax the State sought to impose was preempted. Such a legal determination was necessary to determine the meaning of the language of Part 5(I), and the Award is grounded in a legal construction of the Compact language. While the Arbitrator may have reached legal conclusions other than those urged by the State, it inarguable that the Arbitrator issued his Award by construing and applying the Compact language in the context of governing law.

97. The Arbitrator went on to enjoin the State from taking actions to prevent the Nation's Compact facilities from selling and serving alcoholic beverages or threaten other enforcement actions against the Nation on the grounds that the Nation is not in compliance with the State's sales tax laws in the manner at issue in the Arbitration.

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[148] *See e.g. Bracker*, 448 U.S. at 142-143; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983); *Indian Country*, 829 F.2d at 985.
[149] Testimony of Chairman Barrett (Aplt. App. at 878-885).
[150] Testimony of Dr. James Collard (Aplt. App. at 949-952).
[151] Testimony of Joseph P. Kalt, Ph.D. (Aplt. App. at 953-980); Expert Report of Joseph P. Kalt, Ph.D. (Aplt. App. at 981-1031).

98. The Nation summarizes the Arbitrator's two-step finding as follows: a) Part 5(I) of the Compact, in light of a *Bracker* analysis, does not require all of the Nation's enterprises to report, collect, and remit State sales taxes on all transactions in order for the Nation's Compact facilities to sell and serve alcoholic beverages, and b) consequently, the State is enjoined from attempting to prevent the Compact facilities from so selling and so serving on such a basis.[152]

99. In making the Award, the Arbitrator construed legal provisions necessary to interpret the Compact, then limited the injunctive portion of the Award to Compact facilities. This distinction evinces the Arbitrator's restraint and his correct understanding of the scope of remedies available under the Compact's arbitration clause.[153]

100. On appeal, the State makes much of the fact that the Arbitrator's *Bracker* analysis did not consider Compact facilities alone. If the Court were to review the merits of this conclusion, it is crucial to note that the State purported to revoke all of the Nation's alcoholic beverage licenses and sales tax permits, as to both Compact and non-Compact facilities, on the grounds that the Nation did not report, collect, and remit State sales tax for all of its enterprises' activities, both Compact and non-Compact.[154] The State's only witness in Arbitration maintained that the State could attach any condition whatsoever, including taxation of activities unrelated to the sale of alcoholic beverages, to the Nation's

[152] Award (Aplt. App. at 30-34).
[153] Compact at Part 12 (Aplt. App. at 310-312); 3A O.S. Supp. 2004 § 281(12).
[154] OTC ALJ's Findings, Conclusions And Recommendations at p. 13 (Aplt. App. at 109); Complaint in OTC Administrative Action at ¶4 (Aplt. App. at 92).

licensure for alcoholic beverage sales in Compact facilities, without any consideration of preemption.[155]

101. Perhaps the State might have presented a narrower question in Arbitration by arguing that Part 5(I) of the Compact required the Nation's Compact facilities to report State sales tax on sales of alcoholic beverages or some other sort of transaction, but the State did not do so. Instead the State presented the issue holistically, that through the Compact Part 5(I), the Nation and all its enterprises assented to entirely submit to State sales tax law, regardless of preemption considerations. This occasioned the Arbitrator's *Bracker* analysis and ruling that the State could not interfere with the Nation's Compact facilities' ability to serve and sell alcoholic beverages on the ground that the Nation did not comply with State sales tax law in the fashion alleged by the State.

102. The District Court correctly found that the Arbitrator did not exceed his powers in entering the Award.

B. The Arbitrator Did Not Imperfectly Execute His Powers

103. The State next argues that, pursuant to 9 U.S.C. §10(a)(4), the Arbitrator imperfectly executed his powers by, in the State's view: a) declining to determine whether arbitration is the exclusive means to resolve all disputes between the parties involving alcohol licensing issues; and b) declining to delineate the sort of State sales tax to which the Award applies. Because the Award finally resolves the issues presented at Arbitration,

[155] Testimony of General Counsel Mullins (Aplt. App. at 1039).

the District Court correctly found that the Arbitrator did not imperfectly execute his powers.

104. As to the first contention, rather than making a broad determination as to the arbitrability of all future disputes as between the Parties relating to alcohol licensure, the Arbitrator made an arbitrability determination as to the actual controversy presented to him. Again, this evinces the Arbitrator's restraint in confining himself to a determination of the issues presented. Should the State or the Nation be presented with some hypothetical future dispute as to licensure, as with any dispute, the question of arbitrability will depend on the circumstances. As demonstrated in more detail in Section II of this Brief, the District Court correctly deferred to the Arbitrator's arbitrability determination as a legally correct and a proper execution of his powers.

105. As to the second contention that the Award does not sufficiently identify the sort of tax at issue, the State seeks to manufacture ambiguity. As noted, the State did not present a narrow theory to the Arbitrator. The State argued that Part 5(I) of the Compact provided that all of the Nation's enterprises must at least report State sales tax as a condition of the Nation's Compact facilities' alcoholic beverage sales licensure.

106. In District Court, the State argued that the Award erroneously purported to create an "unfettered right" in the Nation to sell alcohol.[156] The District Court correctly rejected this argument,[157] and the State has abandoned the argument on appeal. Instead, on appeal, the State claims that it is unclear what sort of state tax or enforcement actions the

[156] State's Motion to Vacate at p. 11 (Aplt. App. at 252).
[157] Memorandum Opinion and Order at p. 5 (Aplt. App. at 1076).

Award references.[158] The Award plainly references "State's sales tax" and "enforcement actions against (the Nation) on the ground that the Nation does not comply with the State's sales tax laws."[159] The District Court viewed these terms as sufficiently intelligible in the context of the Award. Perhaps the State's argument is more accurately understood as an objection to the preclusive effect of the Award as to non-Compact facilities.

107. In the State Court Appeal, the Nation has argued that the Award creates claim preclusion as to its Compact facilities and issue preclusion as to its non-Compact facilities.[160] The District Court correctly held that the question of issue preclusion as to non-Compact facilities is beyond the scope of the instant action and correctly confirmed and enforced the injunction as to Compact facilities, finding:

> (I)t is clear that the arbitrator's award addresses the issues brought before him on which the parties requested resolution, and it provides a clear determination of each side's rights and responsibilities under the terms of the Compact. To the extent Defendant argues that Plaintiff is seeking to apply the arbitrator's award to non-Compact facilities, that is a matter beyond the scope of the present litigation. The arbitration award is, in the relief granted, limited to Compact facilities, and this Court declines to speculate as to any broader impact.
>
> Defendant is enjoined "from taking any further action to divest the Nation's Compact facilities of the right to sell and serve alcoholic beverages or threaten other enforcement actions against them on the ground that the Nation does not comply with the State's sales tax laws."[161]

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[158] St. Br. at pp. 29-31.
[159] Award at p. 5 (Aplt. App. at 34).
[160] Nation's Notice of Final Arbitration Award and Request to Apply Preclusion at pp. 3-4 (Aplt. App. at 139-140).
[161] Memorandum Opinion and Order at p. 5-7 (Aplt. App. at 1076-1078).

108. Also as to the preclusion issue, the State argues also for the first time on appeal[162] that the Award is violative of Part 9 of the Compact by "transferring jurisdiction" to the Arbitrator. If the Court considers this newly lodged argument, the Nation responds that the District Court correctly gave deference to the Arbitrator's arbitrability determinations, as addressed in more detail in Section II of this Brief.

109. Additionally, the State's claims for a lack of clarity as to what enforcement actions are barred by the Award ring hollow. The State continues to pursue multiple enforcement actions against the Nation's Compact and non-Compact facilities alike, despite the existence of the District Court's injunction.

110. Because the District Court correctly found that the Arbitrator reached his decision on the issues presented by correctly construing the Compact in the context of governing law, within the scope of his powers, the Court should affirm the judgment of the District Court.

[162] The Court will not ordinarily address such arguments. *See Hicks*, 928 F.2d at 970.

CONCLUSION

WHEREFORE, the Nation prays that the Court of Appeals affirm the judgment of the District Court and grant the Nation all other and further relief to which it is justly entitled.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 10th Cir. R. 28.2(C)(4), the Nation requests oral argument in this matter. The issue presented arises out of a dispute between two sovereign governmental entities, and the public's interest in the outcome of this matter is substantial.

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTION

I hereby certify that with respect to the foregoing: (1) all required privacy redactions have been made per 10th Cir. R. 25.5; (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents; (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Kaspersky End Point Security 10 for Windows, most recently updated on October 17, 2016, and according to the program are free of viruses.

/s/ Gregory Quinlan
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 12,419 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 10th Cir. R. 32(b). I have used the word processing program to calculate the number of words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 13 point Times New Roman font.

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I hereby certify that on October 17, 2016, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

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