No. 23-6041

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WICHITA AND AFFILIATED TRIBES,

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

On appeal from the United States District Court
for the Western District of Oklahoma
The Hon. Timothy DeGiusti, Chief Judge
No. 19-cv-1198-D

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ORAL ARGUMENT NOT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

GLOSSARY

Compact	The gaming compact between the Wichita and Affiliated Tribes and the State of Oklahoma
HB 3538	House Bill 3538, codified at OKLA. STAT. tit. 3A, § 724.5
IGRA	Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, *et seq.*
OLC	The Oklahoma Lottery Commission
OMES	Oklahoma Office of Management and Enterprise Services
OSBI	Oklahoma State Bureau of Investigation
Part 11(A)	Part 11(A) of the Compact; OKLA. STAT. tit. 3A, § 281.
Part 11(E)	Part 11(E) of the Compact; OKLA. STAT. tit. 3A, § 281.
SQ 705	State Question 705, 2003 Okla. Sess. Laws ch. 58
SQ 712	State Question 712, 2004 Okla. Sess. Laws ch. 316
State	State of Oklahoma
STGA	State Tribal Gaming Act; OKLA. STAT. tit. 3A, § 261 *et seq.*
Wichita Tribe/Tribe	Wichita and Affiliated Tribes

PRIOR OR RELATED APPEALS

There are no prior related appeals in this case.

ISSUES PRESENTED

1. Whether the Governor of Oklahoma is the proper party for injunctive relief under Count XIII given that the Governor does not exercise the conduct the Wichita Tribe seeks to enjoin.

2. Whether Oklahoma violated its gaming compact with the Wichita and Affiliated Tribes merely by expanding access to the Oklahoma lottery, which already existed at the time the Compact was entered into by the parties.

3. Whether the Wichita Tribe is an "eligible tribe" entitled to liquidated damages without having specified facts necessary to trigger Oklahoma's responsibility to collect a portion of increased revenues of a non-tribal entity.

4. Whether Oklahoma is immune from liability for monetary damages, an aspect of sovereignty it has never waived.

STATEMENT OF THE CASE

In 2004, Oklahoma voters approved two state questions that did three things: (1) they authorized tribal casinos to offer Class III electronic gambling machines on tribal lands pursuant to a state-tribal gaming compact, (2) they authorized horse-racing tracks to offer a limited number of electronic gambling machines, and (3) they created a state lottery in Oklahoma. *See* 2003 Okla. Sess. Laws ch. 58; 2004 Okla. Sess. Laws ch. 316.

State Question 712 (SQ 712), which authorized electronic gaming machines at racetracks for "organization licensees," was promoted as a way to save horse-racing tracks and the struggling horse-racing industry in Oklahoma. *See* 2004 Okla. Sess. Laws ch. 316; Aplt. App. Vol. VII at 1313–14. It also opened the door for the State and tribes located in Oklahoma to negotiate compacts to allow Class III electronic gaming machines and devices on tribal lands under the Indian Gaming Regulatory Act (IGRA). *See* 2004 Okla. Sess. Laws ch. 316. The State Tribal Gaming Act (STGA), which was created by SQ 712, is "game specific," allowing for "specified forms of Class III gaming." *Treat v. Stitt*, 473 P.3d 43, 45 (Okla. 2020). State Question 705 (SQ 705) created the Oklahoma Education Lottery Act, which, among other things, established the Oklahoma Lottery Commission (OLC). *See* 2003 Okla. Sess. Laws ch. 58; Aplt. App. Vol. VII at 1311, ¶ 2.

Both state questions provided the State with a revenue stream, a substantial portion of which was earmarked for education. For example, under SQ 712, after a fixed sum of fees ($20,833.33) collected under any state-tribal gaming compact each month go to mental health, 88% of the remaining fees go to the Education Reform Revolving Fund. OKLA. STAT. tit. 3A, § 280(2)(b). Meanwhile, all the net proceeds after the payment of prizes from the state lottery are used for education. In fact, the stated purpose of the lottery is to "maximize[] net proceeds available for educational purposes and programs." OKLA. STAT. tit. 3A, § 702(3); *see also* Aplt. App. Vol. VII at 1311, ¶ 2.

A spokeswoman for the Chickasaw Nation said of SQ 705 that "[t]he lottery has the potential to provide some much-needed new funding to our public education system, from which all Oklahomans benefit," and the Chickasaw Nation supported it because "it is the right thing to do." Aplt. App. Vol. VII at 1317. A spokesman for the Cherokee Nation said that tribal casinos do not compete with the lottery as "[t]hey're not necessarily the same dollar," that is, "a lot of people who go buy gas and buy a lottery ticket . . . will never come to [tribal] gaming facilities" and the existence of a state lottery would not have a considerable effect on tribal casinos. *Id.*

In 2006, the State and the Wichita Tribe, like many other tribes, entered into a state-tribal gaming compact—the Compact—under IGRA and the STGA. The Wichita Tribe entered in to the Compact due to its "desire[] to offer the play of covered games . . . as a means of generating revenues." Aplt. App. Vol. I at 133, Part 2(5).

Under the Compact, "the tribe is authorized to operate covered games" on tribal lands. *Id.* at 136, Part 4(A). Moreover, the State and the Wichita Tribe "acknowledge[d] and recognize[d] that th[e] Compact provides tribes with substantial exclusivity . . . through gaming . . . in respect to the covered games." *Id.* at 150, Part 11(A). The Wichita Tribe agreed that "so long as the state does not change its laws after the effective date of this Compact to permit the operation of any additional forms of gaming by [an] organization licensee, or change its laws to permit any additional electronic or machine gaming within Oklahoma," it would pay to the State exclusivity fees derived from the tribe's "adjusted gross revenues . . . from the play of electronic

amusement games, electronic bonanza-style bingo games and electronic instant bingo games." *Id.* at 150, Part 11(A)(1), (2)(a–c).

Oklahoma agreed that if it were to "permit the nontribal operation of any machines or devices to play covered games" or to permit "electronic or mechanical gaming devices" outside racetracks then it would "require any nontribal entity which operates any such device[] or machine[] . . . to remit to the state" at least fifty percent of increased revenue following the change in law. *Id.* at 151. The State would then send that amount to tribes "operating gaming . . . within forty-five (45) miles of [the] [nontribal] entity which is operating covered games machines" under the new state law. *Id.* at 151, Part 11(E).

The State agency responsible for the administration and oversight of the state-tribal gaming compacts is the Oklahoma State Bureau of Investigation (OSBI), in coordination with the Oklahoma Office of Management and Enterprise Services (OMES). OKLA. STAT. tit. 74, §§ 63, 1223; *see* OMES, Gaming Compliance Unit, https://oklahoma.gov/omes/services/gaming-compliance-unit.html ("Gaming Compliance oversees and monitors exclusivity fees from tribes to the state pursuant to the Tribal Gaming Compact."). The OLC is the state agency responsible for the administration and oversight of the Oklahoma state lottery. OKLA. STAT. tit. 3A, §§ 702, 704; *see also* Aplt. App. Vol. VII at 1311–12, ¶¶ 2, 5. In Oklahoma, "participation in the Lottery is . . . only available through retailers licensed by the OLC." Aplt. App. Vol. II

at 258, ¶ 112; *see also id.* at 310, ¶ 112 ("Oklahoma admits that patrons may only purchase lottery tickets through retailors licensed by the OLC.").

Oklahoma's lottery specifically excludes the type of electronic games authorized by the STGA. OKLA. STAT. tit. 3A, § 703(9), (15); Aplt. App. Vol. VII at 1311, ¶ 3. It is "game-specific" and does not "allow the operation of any other form of Class III gaming . . . unless specifically allowed by law and by a cooperative agreement with a federally recognized Indian tribe in this state." OKLA. STAT. tit. 3A, § 735.

To maximize education funding, the OLC is authorized to "advertise and promote the lottery and lottery games." OKLA. STAT. tit. 3A, § 709(A)(10). One way it does so is through promotions, such as second-chance drawing promotions. *See* OKLA. STAT. tit. 3A, § 724(G). Lottery players do not purchase entries into second-chance drawing promotions, however. Rather, lottery players enter these promotions by virtue of a previous purchase of lottery tickets from a lottery retailer at no additional charge. *See id.*; *see also* Aplt. App. Vol. VII at 1312, ¶¶ 5–6.

Leading up to January 1, 2020, a dispute arose between Oklahoma Governor Kevin Stitt (Governor) and several tribes regarding the proper interpretation of Part 15 of the Compact. Specifically, they disputed whether the Compact expired or automatically renewed. This led to the initial claims of the Cherokee, Chickasaw, and Choctaw Nations in this lawsuit. *See* Aplt. App. Vol. I at 43–65. The initial tribal plaintiffs brought their claim on the grounds that "[t]he Compact renews automatically at the close of its initial term if electronic gaming continues to be offered at state-

regulated horse racetracks or by others at that time, as the Compact the State offered to the Tribes expressly provides." *Id.* at 52, ¶ 33. The Governor, on the other hand, claimed that the Compact did not automatically renew. *See id.* at 74, ¶ 33. The Oklahoma Attorney General's Office did not participate in this lawsuit initially.

The initial tribal plaintiffs were eventually joined by several other tribes who intervened in this case, including the Muscogee (Creek) Nation, the Quapaw Nation, the Citizen Potawatomi Nation, the Seminole Nation, and the Delaware Nation. *See e.g.* Aplt. App. Vol. I at 29; Aplt. App. Vol. VII at 1201. The Wichita Tribe intervened as well. *See* Aplt. App. Vol. I at 168–70. The district court later held that the Compacts automatically renewed under the original legal theories of the original plaintiffs. *See id.* at 1209 (District Court: "No more was required for the Compacts to automatically renew on January 1, 2020, for a successive 15-year term.").

Significant here, the intervenor Wichita Tribe also brought additional claims that no other tribal plaintiff joined. *See* Aplt. App. Vol. II at 230–289; *see also* Aplt. App. Vol. VII at 1260, 1265 ("Of the plaintiff tribes, the Wichita Tribe is the only plaintiff with claims remaining"). The additional claims are not unique to the Wichita, though, as the same model compact codified in the STGA, containing the same provisions subject to the Wichita Tribe's claims, was used by all the plaintiff tribes. *See* Aplt. App. Vol. VII at 1259–60 (District Court: "[T]he Compacts . . . are identical. . . ."). It was only after the district court's order in favor of the original plaintiffs that the Attorney General

took over the Governor's defense solely with respect to the Wichita Tribe's additional claims. *See* Aplt. App. Vol. I at 40; Aplt. App. Vol. VII at 1275–77.

> The district court summarized those remaining claims as follows:
>
> > All [remaining] claims concern the State-Tribal Gaming Compact in effect between the parties . . . , which utilizes the Model Tribal Gaming Compact provided by Okla. Stat. tit. 3A, § 281. In Count XIII of the Amended Complaint, the Tribe seeks declaratory relief regarding the proper interpretation of an exclusivity provision of the Compact. [] Specifically, the Tribe claims the State "has violated the exclusivity provision contained in . . . Part 11.A . . . by permitting the operation of additional forms of gaming and changing its laws to permit additional electronic gaming" and, as a result of this violation, the Tribe allegedly "is entitled to damages from the State pursuant to Part 11.E of the Compact." In Count XIV,[1] the Tribe claims Governor Stitt engaged in conduct that "breached both the State's obligation [under Part 13.B] to defend the Compacts [sic] and violated his constitutional duty to faithfully execute the State's laws."

Aplt. App. Vol. IX at 1546 (footnote 2 and other citations omitted). The Wichita Tribe also sought injunctive relief against the Governor in Count XIII, Aplt. App. Vol. II at 283–84, ¶ 205, relief that is relevant only if its interpretation of the Compact's

[1] The Wichita Tribe offers no argument in support of this claim in its appeal. "Issues not raised in the opening brief are deemed abandoned or waived." *Tran v. Trs. of State Colleges in Colo.*, 355 F.3d 1263, 1266 (10th Cir. 2004) (citations omitted). Thus, it appears the tribe has wholly abandoned the claims set forth in Count XIV of its First Amended Complaint. *See* Aplt. App. Vol. II at 284–85. This is consistent with the district court's observation that "it appears the Tribe has abandoned [Count XIV]." Aplt. App. Vol. IX at 1559. The district court additionally exercised its discretion in not deciding this declaratory judgment claim. *Id.* at 1559–61. This Court should grant summary judgment in favor of the Governor as to Count XIV due to the Wichita Tribe's abandonment. Appellee nonetheless stands on previous arguments supporting summary judgment on Count XIV set forth in the Motion for Summary Judgment on the Wichita Tribe's First Amended Complaint. *See* Aplt. App. Vol. VII at 1293–95.

exclusivity provision prevails. The district court did not reach this issue because it disagreed with the Wichita Tribe's exclusivity interpretation. *See* Aplt. Vol. IX at 1546 n.2, 1554–59.

In particular, the Wichita Tribe argued that, after the effective date of the Compact, the State permitted "additional electronic gaming" in violation of Part 11(A) in three different ways:

> 1) by enacting H.B. 3538 (Okla. Stat. tit. 3A, § 724.5), the State permitted additional electronic gaming in the form of lottery-sponsored promotions and second-chance drawings in which players can participate using an internet website or computer application; 2) the State permitted additional electronic gaming by enacting H.B. 1836 and amending Okla. Stat. tit. 3A, § 262(B) to expand the hours of operation for horse racetracks to conduct authorized gaming; and 3) the State permitted additional electronic gaming through the constitutional amendment that allows liquor stores to sell general merchandise, which expanded the locations where the Commission can place player terminals or kiosks.

Aplt. App. Vol. IX at 1555–56.

The Wichita Tribe argued that Part 11(A) "should be read broadly" and "consistent with a common understanding of the words and their ordinary meanings in dictionary definitions." *Id.* But such an assertion, the district court found, "ignore[d] the well-settled rule that the meaning of words used in a contract must be read in context of the contract as a whole, giving meaning to 'every word or phrase.'" *Id.* (citing *Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d 1226, 1239 (10th Cir. 2018)). And because the phrase "any additional electronic gaming" appeared in a section "regarding substantial exclusivity in Class III gaming authorized by the Compact," the court refused to

"untether 'any additional electronic gaming' from the context in which the phrase appears." Aplt. App. Vol. IX at 1556.

The district court analyzed electronic gaming authorized in the Compact, *see id.* 1556–57, and found that "changes in Oklahoma law that have expanded access to lottery games and promotions do not constitute 'additional electronic gaming' that impinges the Tribe's substantial exclusivity to conduct covered games." *Id.* at 1557. The Wichita Tribe's arguments related to laws purportedly infringing the exclusivity provision "largely rel[ied] on . . . laws expanding the availability of lottery games, particularly through the use of the Internet and personal computers, including cellular telephones." *Id.* (internal quotations omitted). But before the Compact took effect, "Oklahoma had authorized the Commission to conduct the lottery and lottery promotions, including 'on-line' lottery games operated through computers and computer terminals." *Id.* These, the district court determined, were not covered by the Compact, and because the Wichita Tribe was not authorized to conduct such gaming, its exclusivity rights were not violated by the expansion of lottery access. *Id.*

The district court also found that the Wichita Tribe's arguments about organization licensees ignored the context of the specific provision related to such businesses in the Compact. *Id.* at 1558. The Wichita Tribe essentially argued that organization licensees' expanded hours of operation, authorized by HB 1836, resulted in additional electronic gaming. *Id.* However, the exclusivity provision related to organization licensees requires the Wichita Tribe to remit exclusivity fees "so long as

the state does not change its laws . . . to permit the operation of any additional form of gaming" by an organization licensee. *Id.* (emphasis in original). The Wichita Tribe, the district court said, did not contend that such a change occurred, and it held that simply adding hours of operation does not amount to an additional form of gaming. *Id.*

The district court did not reach the Wichita Tribe's request for declaratory relief for liquidated damages pursuant to to Part 11(E) of the Compact because it found the State enjoys immunity from monetary damages. *Id.* at 1554. Contrary to the Wichita Tribe's argument, the court held that "[t]he State's prior conduct in this case does not prevent it from asserting a defense of sovereign immunity from liability for damages," as "the Tribe identifie[d] no legal basis or authority to overcome the States' immunity from a claim for monetary relief." *Id.* Thus, the court found that the State enjoyed immunity to that aspect of the Wichita Tribe's Count XIII. *Id.* Notwithstanding immunity, the district court noted it would nevertheless have found the Wichita Tribe failed to establish "a right to damages under Part 11.E" for the same reasons the court declined to follow the Tribe's interpretation of Part 11(A). *Id.* at 1554, n.8. Moreover, the district court determined the Wichita Tribe failed to present facts necessary to establish it as a tribe eligible for liquidated damages. *Id.*; *see infra*, Part III.

Thus, in the end, the district court found that:

> the Tribe is not entitled to summary judgment on any remaining claim but the State is entitled to summary judgment on the Tribe's claim in Count XIII asserting an alleged violation of substantial exclusivity under Part 11.A of the Compact. The part of Count XIII seeking a declaration of entitlement to

> damages is dismissed for lack of jurisdiction. The Court declines to entertain the declaratory judgment claim asserted in Count XIV.

Id. at 1561. From this order, the Wichita Tribe appeals. For the following reasons, the appeal is meritless.

SUMMARY OF THE ARGUMENT

The district court correctly granted summary judgment to the Governor because the lottery does not breach restrictions on electronic gambling found in the Compact. The lottery itself was enacted along with the Compact, not in violation of it. Simply entering one's name and address into a lottery web form, or entering previously-purchased lottery tickets for promotions, does not transform those actions into electronic gaming covered by the Compact, nor is buying a lottery ticket from a vending machine an act of electronic gaming, regardless of where that machine is placed.

Moreover, organization licensees—entities authorized to conduct electronic gaming—are only prohibited from conducting additional *forms* of gaming. Principles of contract interpretation make it clear that the Compact's first exclusivity provision applies to organization licensees. That provision places no limits on the organization licensees' hours of operation. Because there are no facts indicating that the organization licensees have conducted additional forms of gaming, rather than just changes in hours, the Wichita Tribe's theory of breach relating to such licensees must fail.

Fianally, this Court need not reach the Wichita Tribe's claims requesting injunctive relief and monetary damages because the Tribe failed to name a proper party

and the State is immune from damages. The Governor does not administer or oversee the State lottery, and the Wichita Tribe has otherwise failed to allege facts of any actions taken by the Governor which could be enjoined. Even assuming the Wichita Tribe could pierce the State's immunity, it has altogether failed to allege any facts entitling it to liquidated damages. The Wichita Tribe offers this Court nothing to establish that it is an eligible tribe, and it fails to name a single non-tribal entity breaching exclusivity, which would trigger the liquidated damages provision.

ARGUMENT

This Court reviews grants of summary judgment de novo, applying the same legal standard as the district court. *Wilkins v. City of Tulsa*, 33 F.4th 1265, 1271-72 (10th Cir. 2022). Summary judgment shall be granted only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Here, the Governor made that showing.

I. The Wichita Tribe failed to sue any proper party.

As an initial matter, Governor Stitt is not the proper party for the injunctive relief sought in Count XIII, which concerns state lottery promotions and gaming enforcement, because neither falls within the duties of the Governor. Regardless, if this

Court determines that the State did not violate the exclusivity provision of the Compact, it need not reach this issue.[2]

When "the statutory scheme vests enforcement power in [a state entity] . . . independent of the Governor," the Governor is not the proper party to the suit. *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 967–68 (10th Cir. 2021). In *Bishop v. Oklahoma*, for example, this Court held that "the Oklahoma [Governor's] generalized duty to enforce state law, alone, is insufficient to subject [Governor Henry] to a suit challenging [Oklahoma's 2009 definition of marriage] [he] ha[d] no specific duty to enforce." 333 F. App'x 361, 365 (10th Cir. 2009) (unpublished). The "claims [were] simply not connected to the duties of . . . the Governor." *Id.* at 365. The Eleventh Circuit has similarly held that "[a] governor's 'general executive power' is not a basis for jurisdiction in most circumstances." *Women's Emergency Network v. Bush*, 323 F.3d 937, 949–50 (11th Cir. 2003). Nor can a governor be sued merely for signing a bill into law. *Cf. Supreme Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 731–34 (1980) (applying legislative immunity to judicial officials); *see also Savage v. Fallin*, 663 F. App'x 588, 591 (10th Cir. 2016) (unpublished) ("[B]ecause '[a]bsolute legislative immunity attaches to all actions taken in the sphere of legitimate legislative activity,' members of

[2] The district court decided not to reach this issue because it determined the Governor prevailed on the merits—that is, the State did not violate the exclusivity provision of the Compact. *See* Aplt. App. Vol. IX at 1546 n.2, 1559.

the executive branch are also entitled to absolute immunity when they are performing legislative acts." (quoting *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998))).

Here, the Wichita Tribe expressly "denie[d] that this litigation was brought against the State of Oklahoma. Rather, [it claimed that] this litigation was brought against [the Governor] specifically based on specific actions taken by [the Governor]." Aplt. App. Vol. III at 356, ¶ 10. But the Tribe has not alleged any specific actions taken by the Governor regarding lottery promotions or gaming hours. Nor could it.

The Tribe likewise does not address the proper party issue in its opening brief on appeal. In Oklahoma, the OLC, not the Governor, is the "instrumentality of the state" that administers and oversees the state lottery. OKLA. STAT. tit. 3A, § 704; *see also id.* at § 709(A) ("The Oklahoma Lottery Commission shall have any and all powers necessary or convenient to its usefulness in carrying out and effectuating the purposes and provisions of the Oklahoma Education Lottery Act."). More specifically, it is the OLC that is responsible for "promot[ing] the lottery and lottery games," *id.* at § 709(A)(10), including accepting "[e]ntries submitted by lottery players . . . for lottery-sponsored promotions and second-chance drawing promotions offered by the Commission" submitted "using a web application provided or sponsored by the Commission," *id.* at § 724.5(A). Similarly, the OSBI administers the Gaming Compliance Unit, which oversees gaming hours in Oklahoma. *See supra* p. 5. Therefore, the Governor is not a proper party in this case.

Nor is the State a party to this suit, as the Governor lacks the power to add it as a party. Sovereign immunity in Oklahoma is a statutory doctrine. S*ee* OKLA. STAT. tit. 51, § 152.1; *Freeman v. State ex rel. Dep't of Hum. Servs.*, 145 P.3d 1078, 1079 (Okla. 2006). The Legislature has not conferred on the Governor the power to waive that statute. As a result, no pleading on the Governor's behalf can enlarge his power to waive sovereign immunity, nor could a court otherwise invade that immunity. *See* U.S. CONST. amend. XI.

Additionally, the Wichita Tribe failed to follow the procedures to make the State a party. It did not follow Part 12(1) of the Compact before bringing this "dispute over the proper interpretation of the terms and conditions of the Compact." Aplt. App. Vol. I at 152, Part 12. Unlike with the original claim relating to automatic renewal of the model compacts, the Wichita Tribe did not provide any form of written notice of this new dispute. Nor did it attempt to meet and confer with the State with the goal of "resolv[ing] all disputes amicably and voluntarily." *See* Aplt. App. Vol. I at 152, Part 12(1). That requirement was a predicate to adding the State as a party, and the Wichita Tribe failed to comply with that Compact term.

In sum, an injunction against the Governor cannot offer any relief against OLC or OSBI, and the State is not a party here. Thus, Plaintiff is not entitled to summary judgment under Count XIII because no relief is possible against the Governor.

II. The Governor is entitled to summary judgment on Count XIII.

The Wichita Tribe's interpretation of both the Compact and the term "electronic gaming" remains peculiar and inaccurate. Its present analysis of the relevant passages, which differs from the contentions it made below, is that "electronic gaming" has sweeping meaning, divorced from other provisions in the relevant section. Instead of facing the obvious shortcomings of its expansive argument head-on, the Wichita Tribe avoids defining the parameters of its interpretation by offering a flippant explanation: "'any additional electronic or machine gaming' means what it says." Aplt. Br. at 33. Its cursory breach arguments rely on those minimal and inaccurate interpretations. Below, Appellee first puts forth the correct understanding of the Compact and electronic gaming, then it explains why—as the district court found, and as the other tribes apparently believe—there have been no alleged breaches by the State in light of the correct understanding.

A. Part 11(A) of the Compact contains two exclusivity provisions applying to two different sets of entities, and the latter exclusivity provision does not apply to organization licensees.

Under the terms of the Compact, in return for "substantial exclusivity . . . in respect to the covered games," the Wichita Tribe agreed that "so long as the state does not change its laws . . . to permit [1] the operation of any additional forms of gaming by [an] organization licensee, or . . . [2] any additional electronic or machine gaming within Oklahoma," it will pay an exclusivity fee "derived from covered game revenues"

to the State.[3] Aplt. App. Vol. I at 150, Part 11(A)–(A)(1). The relationship between these two provisions is straightforward: they limit the organization licensees to the game forms contemplated in the Compact, and they prevent the State from licensing anyone beyond those licensees to offer those games, providing the tribes substantial exclusivity *for those games* in exchange for a fee.

The first exclusivity provision refers to one key term: organization licensees. "Organization licensee," for purposes of the Compact, refers "to no more than three organization licensees operating [horse] racetrack locations" that may conduct "[a]uthorized gaming," within "the organization licensee's racing enclosure." OKLA. STAT. tit. 3A, § 262(B)–(C). These racetracks may offer "electronic amusement games . . . electronic bonanza-style bingo games . . . and electronic instant bingo games . . . and any type of gaming machine or device that . . . an Indian tribe in this state" may offer at a capped number of "player terminals." *See* OKLA. STAT. tit. 3A, § 262(C)(2).

The second exclusivity provision refers to another key term: "electronic or machine gaming," with only electronic gaming at issue in this case. The STGA defines "[e]lectronic gaming" as "[1] the electronic amusement game, [2] the electronic bonanza-style bingo game and [3] the electronic instant bingo game *described in this act*,

[3] In fact, the original plaintiffs alleged that "[t]he Compact authorizes the compacting Tribe to conduct Class III gaming, specifically the 'covered games' defined at Compact Part 3.5." Aplt. App. Vol. I at 51, ¶ 32. The Wichita Tribe acknowledges the same in its brief: "In simple terms, the agreement between the Tribe and the State is that the Tribe may conduct 'covered games,' as defined in the Compact." Aplt. Br. at 24.

which are included in the authorized gaming available to be offered by organization licensees." OKLA. STAT. tit. 3A, § 269(A)(8) (emphasis added). The Compact confirms this definition, as the exclusivity fee is derived from the tribe's "adjusted gross revenues . . . from the play of [1] electronic amusement games, [2] electronic bonanza-style bingo games and [3] electronic instant bingo games." Aplt. App. Vol. I at 150, Part 11(A)(1),(2)(a–c).

The STGA provides further context by defining electronic gaming machines as devices utilizing a "player terminal" for the play of electronic games in an "electronic environment." OKLA. STAT. tit. 3A, § 269(5-8), (11); *id.* at § 270(A) ("Electronic amusement games shall be played through the employment of player terminals"), *id.* at § 273(A) ("Electronic bonanza-style bingo games . . . shall only be conducted using a system which utilizes linked player terminals"), *id.* at 274(A) ("Electronic instant bingo games . . . shall only utilize player terminals"). "Player terminals" are "electronic or electromechanical terminals housed in cabinets with input devices and video screens or electromechanical displays on which players play [1] electronic bonanza-style bingo games, [2] electronic instant bingo games or [3] electronic amusement games . . . ." Aplt. App. Vol. I at 135, Part 3(16); *see also* OKLA. STAT. tit. 3A, § 269(A)(11).

In turn, the Compact contains the following definitions:

- **"Electronic amusement game"** means a game that is played in an *electronic environment* in which a player's performance and opportunity for success can be improved by skill . . . ;

- **"Electronic bonanza-style bingo game"** means a game played in an *electronic environment* in which some or all of the numbers or symbols are drawn or electronically determined before the electronic bingo cards for that game are sold . . . ; and

- **"Electronic instant bingo game"** means a game played in an *electronic environment* in which a player wins if his or her electronic instant bingo card contains a combination of numbers or symbols that was designated in advance of the game as a winning combination.

Aplt. App. Vol. I at 134–35, Part 3 (10–12) (emphases added).

On appeal, the Wichita Tribe appears to maintain its initial interpretation that the second exclusivity provision interchangeably and broadly applies to organization licensees. *Compare* Aplt. Br. at 25 n.9, 26–28; *with* Aplt. App. Vol. VIII at 1346. This argument is incorrect because it renders the first exclusivity provision a nullity. "A compact is a form of contract." *Citizen Potawatomi Nation*, 881 F.3d at 1238 (quoting *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1556 (10th Cir. 1997)). As a contract, it "must be considered as a whole so as to give effect to all its provisions." *Pitco Prod. Co. v. Chaparral Energy, Inc.*, 63 P.3d 541, 546 (Okla. 2003). The first exclusivity provision mandates that organization licensees are only limited in the *form* of gaming, not in the amount of gaming. Yet in the Wichita Tribe's view, the first provision never applies because the second provision prevents licensees from making any changes ever, whether in form or amount. This reading of the Compact improperly renders the first exclusivity provision superfluous because it treats organization licensees as subject to the more expansive restrictions of the second exclusivity provision. *Cf. Moran v. City of Del City*, 77 P.3d 588, 591 (Okla. 2003), *as corrected* (June 17, 2003) ("A statute must be

read . . . to avoid rendering parts thereof superfluous or useless."). The correct and obvious reading of the Compact is that the first exclusivity provision applies to organization licensees, while the second exclusivity provision applies to other entities. This is what the district court held. *See* Aplt. App. Vol. IX at 1558 (District Court: "Part 11.A contains a separate proviso that expressly addresses a change in state laws for authorized gaming by [organization licensees]."); *see also id.* at 1550.

The Wichita Tribe also argues that the second exclusivity provision's reference to "additional" electronic gaming "means what it says," Aplt. Br. at 33, and thus that it is not limited to the definition of electronic gaming contemplated in the Compact as a whole. That argument is contrary to canons of construction: terms in a contract are interpreted consistently throughout a contract, "each clause helping to interpret the others." OKLA. STAT. tit. 15, § 157. Using these principles, the second exclusivity provision is a counterpart to the first version, addressing actions of anyone other than the three organizational licensees. Thus, the correct reading of the "additional" electronic gaming prohibition is that it prohibits *additional entities* to engage in the gaming that is otherwise limited to only organization licensees and compacting tribes, not a term of art that suddenly assumed an undefined meaning in Part 11 of a compact.

Appellee agrees that "[t]he Compact is both statute and contract[,]" Aplt. Br. at 31, and that the Compact "was entered into using the Model Tribal Gaming Compact" from that statute. Aplt. App. Vol. VIII at 1344. Accordingly, the model compact is based on statutory definitions, and it would not abandon those statutory definitions

without an express agreement to a different definition. For example, the definition of "organization licensee" does not arise from the Compact, but from elsewhere in the SGTA. *See* OKLA. STAT. tit. 3A, § 262(B)–(C). With respect to "electronic gaming," similarly, far from abandoning the STGA definition, the Compact actually uses that definition in the exclusivity section. *Compare* OKLA. STAT. tit. 3A, § 269(8) *with* Aplt. App. Vol. I at 150, Part 11(A)(1), (2)(a-c). Because the Wichita Tribe does not expound upon what additional electronic gaming "means what it says" entails, one can only speculate that the Wichita Tribe's desired meaning is expansive. That is, if one takes the Wichita Tribes's interpretation seriously, its meaning could encompass even non-gambling games such as computer games, arcade games, Nintendo Switches, XBoxes, and electronic board games. That obviously cannot be the case. Textualism is not absurd literalism, divorced from context. Thus, the most reasonable interpretation of the Compact is that the lack of a different definition for "electronic gaming" means that it assumes the STGA's definition.

As a practical matter, the district court was correct in its observation that the Wichita Tribe is trying to "untether 'any additional electronic gaming' from the context in which it appear[s]," Aplt. App. Vol. IX at 1556, and muddle the terms of the Compact because the most natural reading cuts heavily against its arguments. Properly

understood, the Compact does not support its theories of breach, which is presumably why no other tribe joined these arguments.

The Wichita Tribe's newly proposed "preamble" and "promise" dichotomy of Part 11(A), *see e.g.*, Aplt. Br. at 25, was not an argument that was presented below. *See McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 999 (10th Cir. 2002) ("It is clear in this circuit that absent extraordinary circumstances, we will not consider arguments raised for the first time on appeal" and the same is true where appellant raises "a new theory on appeal that falls under the same general category as an argument presented at trial.") (citation and internal quotations omitted). That said, it is no more convincing than its previous attempt below to untether the context of "any additional electronic gaming" from the context of the Compact's Part 11(A). The bulk of the Wichita Tribe's present argument centers on extricating the so-called "preamble" from the rest of the exclusivity provision. In other words, the Tribe wants this Court to look only to the so-called "promise"—to the exclusion of everything else (*i.e.*, "substantial exclusivity . . . in respect to the covered games")—when interpreting "any additional electronic gaming." But the Wichita Tribe's tactics again ignore the Tenth Circuit's method of construing compacts "to give meaning to every word or phrase," which was applied in a case the Wichita Tribe makes passim citation to in its Brief. *See Citizen Potawatomi Nation*, 881 F.3d at 1239.

Moreover, the Wichita Tribe's apparent justification for its proposed Part 11(A) schism relies heavily on negotiations or statements extrinsic to the Compact itself. *See*

Aplt. Br. at 19–22, 25–26, 29, 33–38. But the Wichita Tribe previously admitted "[t]he Compact . . . is not ambiguous." Aplt. App. Vol. VIII at 1475. The district court agreed. *See* Aplt. App. Vol. IX at 1555 ("Both parties contend Part 11.A of the Compact is unambiguous . . . the Court agrees . . . ."). Thus, the Tribe's lengthy diversion relying heavily on extrinsic evidence should receive no weight. *See Citizen Potawatomi Nation*, 881 F.3d at 1239 ("Under federal contract principles, if the terms of a contract are not ambiguous, this court determines the parties' intent from the language of the agreement itself."). Besides, entertaining the Wichita Tribe's argument that there is no "meaningful concession" if its incorrect interpretation of the Compact's exclusivity provision is not adopted, Aplt. Br. at 34–38, implicitly entertains similar arguments that the numerous other model gaming compacts entered into between Oklahoma tribes and the State also violate IGRA—arguments that no other tribes have supported.

Moreover, aside from the Wichita Tribe's incorrect interpretation of the Compact, the subjects of its breach arguments provide very little context. *See id.* at 25 n.9, 27–28, 39–40. In fact, besides minimal argument about what the Wichita Tribe calls "iLottery games" appurtenant to House Bill 3538 (HB 3538), *id.* at 39–40, the Wichita Tribe attempts to sneak through its self-serving conclusions relating to hours of operations by organization licensees and lottery vending machines as undisputed underlying facts. *Id.* at 28. Not only is this false, but the Wichita Tribe's claims are inadequately presented issues. *See Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020) ("Issues . . . that are inadequately presented in an opening brief . . . [, such as those

presented] only in a perfunctory manner" are waived) (citations and internal quotations omitted). Other than admitting the organization licensees' authorized gaming hours prior to the passage of House Bill 1836 (an irrelevant fact), *see* Aplt. App. Vol. II at 317, the Governor denied the Wichita Tribe's allegations to the extent they were inconsistent with the laws or legal authority it interpreted. *See id.* at 314–15, ¶¶ 133–136; 316–17, ¶¶ 146–150; 319, ¶¶ 164–66; and 325, ¶ 203. Therefore, the Wichita Tribe's conclusions are unsupported by fact or law.

B. Altering the hours of organization licensees does not relieve the Wichita Tribe of its promise to pay exclusivity fees.

With the Compact properly interpreted, the Wichita Tribe's arguments regarding HB 1835—and the hours of operation for organization licensees—must fail. *See* Aplt. Br. at 25 n.9 ("An element of the Tribe's claims is the State's increase in the hours during which organization licensees may conduct gaming."); *id.* at 27 ("[T]he State . . . permit[ted] additional electronic or machine gaming by significantly expanding the number of hours organization licensees may conduct electronic or machine gaming . . . ."). The Wichita Tribe, in effect, appears to have abandoned this argument, *see supra Sawyers*, 962 F.3d at 1286, as it only offers conjecture. The Wichita Tribe's only half-hearted attempt at a Compact breach argument relates to what it calls "iLottery." Aplt. Br. at 39–40. Notwithstanding, the Governor addresses the Wichita Tribe's summary judgment arguments *infra*.

The first exclusivity provision, and not the second, applies to organization licensees. *See supra* Part II.A. Under that provision, organization licensees cannot be permitted to offer additional forms of games, but there is plainly no limit on the hours they can offer the same forms of electronic gaming. The Wichita Tribe does not allege any different forms of electronic gaming. The district court noted the Wichita Tribe failed to contend such a change occurred. *See* Aplt. App. Vol. IX at 1553, n.6 ("The Tribe does not assert that any change in Oklahoma law impacts the other proviso of Part 11.A, that the State not 'permit the operation of any additional form of gaming by any such organization licensee.'"); *id.* at 1558. Thus, the laws regarding hours cannot violate the exclusivity provision that applies to licensees, as the hours do not affect compliance with the relevant exclusivity provision.

C. Allowing entry into an existing lottery promotion via an app does not relieve the Wichita Tribe of its promise to pay exclusivity fees.

The passage of HB 3538 does not violate the second exclusivity provision's limit on additional electronic gaming. *Contra* Aplt. Br. at 27, 39–40. Rather, HB 3538 merely allowed for entries for *existing* "lottery-sponsored promotions and second-chance drawing promotions . . . [to] be submitted using a web application." OKLA. STAT. tit. 3A, § 724.5(A). That's it. The Legislature's intent not to create an additional form of gaming is facially clear: "If passage of this section of law is deemed by a court of law to allow any other form of Internet gambling activities in the state, then this section of law shall be rendered null and void." *Id.* at § 724.5(B). It decidedly does not.

To start, the web application ("app") authorized by HB 3538 does not constitute "electronic gaming" under the STGA. *Cf.* OKLA. STAT. tit. 3A, § 269(8) ("'Electronic gaming' means the electronic amusement game, the electronic bonanza-style bingo game and the electronic instant bingo game described in the Act, which are included in the authorized gaming available to be offered by organizational licensees."). It does not change game play at all, as is evident in the statute's text. *See generally* OKLA. STAT. tit. 3A, § 724.5. The statute's title, found in the bill itself, further supports the limited nature of the law: "An Act . . . authorizing use of web application to submit lottery-sponsored and second-chance promotions . . . ." *See* 2018 Okla. Sess. Laws ch. 128; *see also Kratz v. Kratz*, 905 P.2d 753, 756 (Okla. 1995) ("The title to an Act is a valuable aid in its construction and may be considered in determining legislative intent.").

The manner in which entries are made into free lottery promotions was simply not contemplated by the Compact's exclusivity provision. It does not fit within the definition of "electronic gaming" found in § 269, so it does not encroach upon the Wichita Tribe's "substantial exclusivity" to electronic gaming revenue. It is the Wichita Tribe's revenue from electronic gaming—the gaming defined in the STGA—at its casinos that forms the basis for exclusivity fees. But HB 3538 does not encroach upon "substantial exclusivity" to electronic gaming revenue as it does not allow any non-tribal entity any revenue from electronic or machine gaming.

The Wichita Tribe offers no adequate explanation as to how the statutory creation of a simple app used to participate in existing promotions is the creation of *new*

electronic gaming. *See* Aplt. Br. at 39–40. The Tribe tries to argue that HB 3538 created new games. *See id.* at 39 ("In 2018" the State "approved the use of two games . . . ."). But that is simply false, again based on a plain reading of the statute. *See* OKLA. STAT. tit. 3A, § 724; *see also* Aplt. App. Vol. IX at 1557 (District Court: "The Tribe's arguments regarding additional electronic gaming largely rely on changes in the State's laws *expanding the availability of* lottery games . . . ." (emphasis added)).

Nevertheless, merely entering one's name and address into an online form for a drawing instead of using a paper form constitutes electronic gaming in Oklahoma, according to the Tribe. For example, a gas station promotion that a person enters on their cell phone rather than with a pencil or pen would suddenly constitute new electronic gaming under this interpretation. But no authority supports the proposition that any entry into a drawing constitutes gaming if you type your entry instead of hand-writing it. The Attorney General Opinion cited by the Wichita Tribe only held that using a web application was not authorized by law yet; it said nothing about such an authorization constituting a *new* electronic game as opposed to a different way to use an existing lottery game. *See* Op. Att'y Gen. 2017-2, 2017 WL 1901894, at *5 (May 4, 2017) ("Because the Commission is not specifically authorized to accept lottery game or promotion entries over the internet, the Commission may not accept entries for promotional second-chance drawings through an internet-based web application.").

Indeed, the app authorized by HB 3538 does not satisfy *multiple* elements related to electronic gaming found in the STGA. The app is not a platform "on which players

play authorized gaming." OKLA. STAT. tit. 3A, § 269(11). Nor does the app utilize a "player terminal" to play electronic bonanza-style bingo games, electronic instant bingo games, or electronic amusement game in an "electronic environment." *See, e.g., id.* § 274(A). And so on.

Regulations for terminals, in particular, confirm how far removed the web application is from electronic gaming. Terminals must meet certain standards "including technical specifications for component parts, requirements for cashless transaction systems, software tools for security and audit purposes, and procedures for operation of such games." *Id.* § 269. They must employ an "electronic accounting system" that "provides a secure means to receive, store and access data and record critical functions and activities." *Id.* §§ 269, 276. The player terminal must have "[a]n on/off switch that controls the electrical current that supplies power to the player terminal." *Id.* § 275. None of these regulations or the additional ones in state law make much sense when applied to the app at issue.

Again, HB 3538 does not meaningfully change the state lottery system; rather it only expands how a lottery player can enter an *existing* lottery promotion. The state lottery itself clearly does not trigger relief from exclusivity fees, and the Wichita Tribe does not argue as much, at least not explicitly. *See infra* Part II.D. The app here is nothing more than a way to enter an existing promotion in the state lottery. By way of analogy, the app is much like IGRA's "technologic aid," which does not transform a Class II game into a Class III game. *See United States v. 162 MegaMania Gambling Devices*, 231 F.3d

713, 724 (10th Cir. 2000) (finding that "technologic aids" are not considered an introduction of a new type of gambling, rather these simply "broaden the participation levels of participants"), *potentially abrogated on other grounds as recognized by Johnson v. Lindon City Corp.*, 405 F.3d 1065, 1068-69 (10th Cir. 2005).

Under the Oklahoma Education Lottery Act, a lottery is defined to include certain "on-line games," but it excludes "electronic or video forms of . . . gambling activities" that tribes can conduct via gaming compacts. OKLA. STAT. tit. 3A, § 703 (9), (15). As stated above, lottery-sponsored promotions and second-chance drawing promotions are nothing new. These promotions are the same sort of free games and drawings that have been authorized by the Lottery Act since its inception. *See* Op. Att'y Gen. 2017-2, 2017 WL 1901894, at *4 (discussing OKLA. STAT. tit. 3A, § 709(A)(10)). Promotions are simply a part of the state lottery. Regardless of technology, the state lottery is not a "covered game," much less a form of "electronic gaming" that encroaches upon the Wichita Tribe's electronic gaming revenue.

D. Allowing lottery vending machines does not relieve the Wichita Tribe of its promise to pay exclusivity fees.

The Wichita Tribe takes issue with liquor stores carrying lottery vending machines, calling these vending machines electronic gaming. *See* Aplt. Br. at 27, 52. Aside from a few conclusory sentences, though, it provides no real substantive argument for this and thus the argument should be considered waived. *See Sawyers*, 962

F.3d at 1286. In any event, these alleged instances of "additional electronic gaming" have no merit.

The Wichita Tribe focuses on liquor stores alone, but its argument (to the extent that it is not waived) is an attack on the lottery itself. The Compact prohibits any non-tribal entity but the racetracks from conducting electronic gaming. *See supra* Part II(A). If the lottery is electronic gaming, or its vending machines are electronic gaming, then *all lottery retailers violate the Compact*. In contrast, if the Compact allows the lottery, then its provisions limiting electronic gaming to the racetracks do not apply here, regardless of whether vending machines are involved. The Wichita Tribe likely focused on liquor stores because it knows that the lottery itself cannot violate the Compact, but its arguments at their core are really about the lottery itself. *See* Aplt. Br. at 40.

When viewed properly, all the Wichita Tribe's arguments are meritless. There is no reasonable argument, and the Wichita Tribe provides no analysis for such an argument, that the lottery itself is electronic gaming prohibited by the Compact, as "[b]efore the Compact took effect . . . Oklahoma had authorized the Commission to conduct the lottery and lottery promotions . . . ." Aplt. App. Vol. IX at 1557. When authorized, the lottery included draw games, or "on-line" games. *See* Aplt. App. Vol. VIII at 1335 (a draw game is a game "where a player *can* allow the Lottery terminal to randomly select the numbers for the chance to win a prize." (emphasis added)). A draw game has always involved picking numbers or letting a computer pick the numbers, communicating those numbers to a central computer, watching the television or reading

the paper for the winning numbers, and then validating winning tickets through the central computer. *See* OKLA. STAT. tit. 3A, § 703(15) (describing "[o]n-line games" as using "a network of computer terminals" and "a central computer" in 2003).

The mere existence of lottery vending machines does not change the analysis. *Contra* Aplt. Br. at 27. Nothing about the machines changes the underlying lottery. Simply put, as the district court held, expanding "access to lottery games" does "not constitute 'additional electronic gaming.'" Aplt. App. Vol. IX at 1557. They do not change the player's role, but instead change the retail clerk's role. With or without a vending machine, a scratcher player purchases a ticket, scratches it, and (if it is a winner), then claims his or her winnings. Likewise, with or without a vending machine, a draw game player purchases a ticket, selects his numbers, views the results, and if it is a winner, then claims his or her winnings. The only change is whether a clerk or a machine hands the player a game ticket and whether the player personally has to scan his or her own ticket to verify it with the central computer instead of having the clerk scan it. The game is always played through wires that sell draw game tickets and verify all tickets. The core electronic nature of the lottery is the same now as it was in 2005, and the vending machines do nothing to change the game itself. *Cf. 162 MegaMania Gambling Devices*, 231 F.3d at 724.

In sum, the lottery was authorized along with the compacts and has never been a violation of their terms. The lottery is still the same core game it has always been. None of its sales at any retailer—liquor store or otherwise, by clerk or machine—render

it an electronic game prohibited by the Compact. To hold otherwise would have enormous and negative ramifications for both the Oklahoma lottery and Oklahoma education funding. *See supra* at 3–4.

III. The Wichita Tribe has failed to present any facts establishing its eligibility for liquidated damages.

Even ignoring all of these issues that would clearly preclude relief, the Wichita Tribe is also not entitled to—or eligible for—liquidated damages under Part 11(E) of the Compact because it has failed to offer any evidence that it is an eligible tribe. The district court reached the same conclusion, finding that "the Tribe has not presented sufficient facts to show the State has permitted nontribal entities to operate gaming machines or devices 'in excess of the number and outside of the designated locations authorized by the State-Tribal Gaming Act,' as required by Part 11.(E)." Aplt. App. Vol. IX at 1154 n.8 (citation omitted).

To start, as explained above, *supra* Part II, none of the laws the Wichita Tribe points to are violations of exclusivity set forth in the STGA. But there is more. Under Part 11(E), an "eligible tribe" may be entitled to liquidated damages only if the State permits a "nontribal entity" to operate "any machines or devices to play covered games or electronic or mechanical gaming devices . . . in excess of the number and outside of the designated locations authorized by the [STGA]." Aplt. App. Vol. I at 151, Part

11(E).[4] Liquidated damages are derived from "any increase in [a] [nontribal] entities' adjusted gross revenues following the addition of . . . excess [gaming] machines" permitted by the State. *Id.* If the State permits additional covered game machines "in excess of such number or outside of the designated location[,]" the State must collect fifty percent of the increase in the revenues of the nontribal entity for the appropriate time period and remit that amount to "eligible tribes." *Id.* A tribe is eligible for a pro rata share of liquidated damages if the nontribal entity is "operating covered game machines in excess of the number authorized by, or outside the location designated by, the [STGA]" within 45 miles of the tribe's gaming operation. *Id.*

The Wichita Tribe has not proven it is an "eligible tribe" to receive liquidated damages under Part 11(E). The Wichita Tribe has not identified a single nontribal entity that is operating any electronic gaming device or machine "in excess of [the] number or outside of the designated location" to trigger liquidated damages, much less one that is doing so "within forty-five (45) miles" of the Wichita Tribe's gaming operation. Aplt. App. Vol. I at 151, Part 11(E). It is not nearly enough for the Wichita Tribe to parrot suppositions related to Oklahoma laws. *See* Aplt. Br. at 52. Nor did the Wichita Tribe include in its denied motion to supplement the record information establishing it as an "eligible tribe." *See* Aplt. App. Vol. IX at 1511–44. Even under the Wichita Tribe's attempt to turn the summary judgment standard on its head—*i.e.*, "[v]iewed in light

[4] Of note, the Wichita Tribe previously acknowledged that the exclusivity provision is narrower than the automatic-renewal provision. *See* Aplt. App. Vol. VII at 1179.

most favorable to the tribe, these factual assertions are sufficient to support declaratory judgment in favor of the Tribe[,]" Aplt. Br. at 52–53—and its flawed interpretation that the lottery is a covered game under the Compact, *id.* at 40, it has not alleged that a nontribal entity is operating as a lottery retailer within 45 miles of its gaming operation. Nor has the Wichita Tribe alleged that a nontribal lottery retailer has sold a lottery ticket that is eligible for a lottery-sponsored promotion or a second-chance drawing promotion.

Finally, the State is not within the definition of "nontribal entit[ies]" from which the State collects adjusted gross revenues to form liquidated damages. The Compact defines both "State" and "Tribe," and when it wants to refer to one of those sovereigns it does so. *See* Aplt. App. Vol. I at 136, Part 3(24), (29). Indeed, it is a general rule that phrases like "person" or "entity" do not include the sovereign, like the federal government or states. *See, e.g.*, *Return Mail, Inc. v. United States Postal Serv.*, 139 S. Ct. 1853, 1861–62 (2019). And when Part 11(E) refers to a "nontribal entity," it is clearly referring to a third-party that the State has "permit[ted]" to conduct electronic gaming. Aplt. App. Vol. I at 151, Part 11(E). If the State permits this third-party "nontribal entity" to do so, then the State must "require [the] nontribal entity" to remit fifty percent of the "entities' adjusted gross revenue" from electronic gaming to the State. The State then remits that amount to eligible tribes. *Id.* The State and the OLC in particular, whose net

revenues go to state education, are certainly not what was contemplated by the plain text of Part 11(E).

In the end, the Wichita Tribe is seeking a windfall where it gets exclusivity on Class III gaming and gets payments from the lottery, reinterpreting deals made in 2005 in a way no other tribal entity in Oklahoma apparently thinks is correct. And because it fails to identify a single non-tribal lottery retailer close to it, all it offers this Court is an academic exercise in hopes of obtaining that windfall. No declaratory judgment is appropriate on this meager offering.

IV. The State is immune from liability for monetary damages.

Notwithstanding a finding that the Wichita Tribe is an "eligible tribe" under Part 11(E), the State is nevertheless immune from monetary damages and therefore the tribe's request for liquidated damages must fail. "A foundational premise of the federal system is that States, as sovereigns, are immune from suits for damages, save as they elect to waive that defense." *Coleman v. Ct. of Appeals of Maryland*, 566 U.S. 30, 35 (2012) (citing *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 72–73 (2000); *Alden v. Maine,* 527 U.S. 706 (1999)).[5] The U.S. Supreme Court has held that IGRA itself does not waive Eleventh Amendment state sovereign immunity. *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 47 (1996). Nor does merely entering into a gaming compact change that calculus.

[5] *See also Mojsilovic v. Oklahoma ex rel. Bd. of Regents for the Univ. of Oklahoma*, 101 F. Supp. 3d 1137, 1139–40 (W.D. Okla. 2015), *aff'd sub nom. Mojsilovic v. Oklahoma ex rel. Bd. of Regents for Univ. of Oklahoma*, 841 F.3d 1129 (10th Cir. 2016).

Cf. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 783 (2014) (noting that leverage can be gained from IGRA to negotiate a waiver of immunity).

Although Oklahoma entered into a limited waiver of sovereign immunity in the compact, the grounds for that waiver were held legally invalid by this Court. *See Citizen Potawatomi Nation*, 881 F.3d at 1237–38. The State's model gaming compact waived sovereign immunity "to the jurisdiction of [an] arbitration forum" described in Part 12(2) for the purpose of resolving disputes described in Part 12(1) and "no other." OKLA. STAT. tit. 3A, § 281. The State further "agree[d] not to raise the Eleventh Amendment . . . or comparable defense" to "an action . . . in federal district court for the de novo review of any arbitration award under paragraph 2 of [Part 12]." *Id.* at Part 12(3). But in *Citizen Potawatomi Nation*, this Court held that de novo review in federal courts of arbitration awards was incompatible with the Federal Arbitration Act under the doctrine set forth in *Hall St. Assocs., LLC. v. Mattel, Inc.*, 552 U.S. 576, 583–84 (2008). It thus struck Part 12(3) of the compact, which provided for de novo review. The Court further held that "Part 12 makes clear that the parties' agreement to engage in binding arbitration was specifically conditioned on, and inextricably linked to, the availability of de novo review in federal court." *Citizen Potawatomi Nation*, 881 F.3d at 1239–40. And "[i]mportantly, the Compact links the parties' waivers of sovereign immunity to the kind

of judicial review available." *Id.* at 1240. Thus, "[g]iven the importance of immunity as an aspect of sovereignty," it severed Part 12(2) from the compact. *Id.* at 1241.

Instead of grappling with the "foundational premise" that sovereigns "are immune from suit for damages," *see Coleman,* 566 U.S. at 35, the Wichita Tribe continues to "confuse[] two discrete doctrines," Aplt. App. Vol. IX at 1553, and attempts to disguise its request for monetary damages as declaratory relief by seeking "declaratory judgment that it is entitled to liquidated damages pursuant to Section 11.E." Aplt. Br. at 42. Not only does this wordplay betray the Wichita Tribe's true request for monetary damages, but it also begs the question—what facts establishing a right to monetary damages can the Wichita Tribe provide? *See supra*, Part III.

The Wichita Tribe fixates on the district court's previous rulings in this case relating to consent to suit and waiver of immunity. *See* Aplt. Br. at 41–42. But the district court already pointed out that "[t]he State's prior conduct in this case does not prevent it from asserting a defense of sovereign immunity from liability for damages." Aplt. App. Vol. IX at 1554. Rather than "identif[y] [a] legal basis or authority to overcome the States' immunity from a claim for monetary relief," *id.*, the Wichita Tribe conjures the *Ex Parte Young* doctrine to argue that what they are really seeking is prospective relief for illusory future violations of exclusivity. Aplt. Br. at 44. In essence, that is, what the Wichita Tribe actually seeks is an order for declaratory relief for monetary damages for violations that do not exist for an indefinite prospective period without providing a

legal or factual basis for such relief. This Court should not unsettle the district court's decision based on this this paltry showing.

Accordingly, the State is immune from suit for monetary damages regardless of how the Wichita Tribe chooses to characterize its claim.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's ruling and grant summary judgment in favor of the Governor.

STATEMENT REGARDING ORAL ARGUMENT

Appellee does not request oral argument.

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CERTIFICATE OF COMPLIANCE

This response complies with the typeface requirements of Fed. R. App. P. 32 because it was prepared in a proportionally spaced font (Garamond, 14-point) using Microsoft Word 365. The document complies with the type-volume limitation of Fed. R. App. P. 32, because it contains 10,162 words, excluding the parts exempted.

s/ *Garry M. Gaskins, II*
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CERTIFICATE OF DIGITAL SUBMISSION

All required privacy redactions have been made as required by 10th Cir. R. 25.5 and the ECF Manual. Additionally, this filing was scanned with Crowdstrike antivirus using the latest version updated on June 26, 2023.

s/ *Garry. M. Gaskins, II*
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CERTIFICATE OF SERVICE

I certify that on July 24, 2023, I caused the foregoing to be filed with this Court and served on all parties via the Court's CM/ECF filing system. The seven required paper copies, each of which is an exact replica in form and content, will be dispatched via commercial carrier for receipt within five business days after the court issues a notice that the electronic version is accepted for filing.

s/ *Garry M. Gaskins, II*
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