IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

JANE DOE, by and through her
parents and next friend, J.H.,
Plaintiff-Respondent,

v.

No. 29,350
(Ct. App. No. 25,125)

SANTA CLARA PUEBLO, SANTA
CLARA DEVELOPMENT CORPORATION
d/b/a BIG ROCK CASINO,
Defendants-Petitioners.

First Judicial District Court, Santa Fe County
The Honorable Carol Vigil, District Court Judge

consolidated with:

IVAN LOPEZ and LUCY LOPEZ,
Plaintiffs-Respondents,

v.

No. 29,351
(Ct. App. No. 25,884)

SAN FELIPE PUEBLO d/b/a SAN FELIPE
CASINO HOLLYWOOD and CIS INSURANCE
GROUP,
Defendants-Petitioners.

Thirteenth Judicial District Court, Sandoval County
The Honorable Louis P. McDonald, District Court Judge

ANSWER BRIEF OF PLAINTIFFS-RESPONDENTS IVAN LOPEZ AND LUCY LOPEZ

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INTRODUCTION

In October 2001, San Felipe Pueblo entered into a Tribal-State Class III Gaming Compact (the "2001 Compact") with the State of New Mexico. (R.P. at 41-64). Section 8 of the 2001 Compact is intended to provide for the safety and protection of visitors to San Felipe Pueblo's gaming facility by "assuring that any such persons who suffer bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise have an effective remedy for obtaining fair and just compensation." (2001 Compact, § 8(A), R.P. at 56). As such, the 2001 Compact requires San Felipe Pueblo to carry insurance coverage for such claims, waives their sovereign immunity from suit for such claims, and allows visitors to prosecute such claims by way of arbitration "or in a court of competent jurisdiction, at the visitor's election[.]" (*Id.*) "For purposes of this Section, *any such claim may be brought in state district court*, including claims arising on tribal land, *unless* it is finally determined by a state or federal court that IGRA *does not permit the shifting of jurisdiction* over visitors' personal injury suits to state court." (*Id.*) (emphasis added).

In *Doe v. Santa Clara Pueblo*, 2005-NMCA-110, 138 N.M. 198, 118 P.3d 203, the Court of Appeals upheld the foregoing contractual provisions as a proper exercise of tribal-state authority under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq*. (1994).[1] The Court of Appeals reached its well-reasoned decision based upon its recognition of the inherent rights of equal sovereigns – the State of New Mexico and Santa Clara Pueblo – to negotiate for the transfer of jurisdiction to state court over claims for bodily injury or property damage arising on the premises of tribal gaming facilities. *See Doe*, 2005-NMCA-110, ¶ 19. Nevertheless, Judge Sutin dissented

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[1] Santa Clara Pueblo and San Felipe Pueblo both entered into the same 2001 Compact with the State of New Mexico.

based on his belief that IGRA does not allow a state to exercise jurisdiction over claims arising from negligent conduct on the premises of gaming casinos. *See id.* ¶ 35 (Sutin, J., dissenting). As such, Judge Sutin opined that the majority's holding ran afoul of the "rule of exclusive tribal court jurisdiction over general torts arising on Indian land except pursuant to an express congressional grant of jurisdictional authority." *Id.* (citing *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959)).

On appeal, San Felipe Pueblo d/b/a San Felipe Casino Hollywood and CIS Insurance Group (hereinafter "Petitioners") assert that the holding in *Doe* threatens the right of tribes to govern their own affairs. Ironically, the net effect of Petitioners' arguments would be to constrain a tribe's inherent right to waive its sovereign immunity from suit in state court under Petitioners' strained interpretation of federal law. The essence of the question presented on appeal is whether IGRA forbids the transfer of subject matter jurisdiction from San Felipe Pueblo to the State of New Mexico over an action based on personal injury occurring on the premises of San Felipe's tribal gaming facility. This question must be answered in the negative.

First, tribes, as sovereign nations, have the inherent authority to waive their immunity from suit in whatever court they deem fit to exercise jurisdiction over a given category of claims.[2] Second, San Felipe Pueblo expressly waived its sovereign immunity from suit in state court for actions based on personal injury arising on the premises of its tribal gaming facility. Third, a recognition of this

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[2] The Court of Appeals decided that the authority to transfer jurisdiction to state courts in *Doe* ultimately derived from IGRA. *See id.* ¶¶ 4, 8, 17. While it is true that IGRA does not bar the transfer of jurisdiction at issue, (*see* Argument § IV(A)-(D), *infra*, at 14-20), neither is the authority of IGRA a necessary prerequisite to the waiver of a tribe's sovereign immunity, because an Indian tribe is free to waive its immunity without Congressional authorization as a matter of sovereign right. (*See* Argument § I(B), *infra*, at 6-8).

waiver actually supports tribal sovereignty and the right of the tribes to govern their own affairs. Under these circumstances, the general rule set forth in *Williams*, *supra*, is without any application to the case at bar. Finally, IGRA clearly does not forbid such a waiver of immunity and transfer of jurisdiction to state courts but, in fact, supports it. This Court should therefore affirm the Court of Appeals' denial of Petitioners' Application for Interlocutory Appeal from the district court's denial of their motion to dismiss against Plaintiffs-Respondents Ivan and Lucy Lopez (hereinafter "Respondents"), and remand this case to the district court for proceedings consistent with this Court's opinion.

SUMMARY OF PROCEEDINGS

Respondents do not take issue with Petitioners' summary of the proceedings below.[3] However, Respondents do take issue with Petitioners' reliance on wholly unsupported factual assertions in a futile attempt to create uncertainty regarding the unambiguous provisions of § 8(A) of the 2001 Compact. (*See, e.g.*, Br. at 27 (claiming that § 8 of 1997 Compact was "drafted by the New Mexico Trial Lawyers Association and was adopted by the legislature over strong tribal objection"); *id.* at 29-30 (asserting that "the State was unwilling to delete all references to state courts" and that the State and the Tribes during negotiations were "[p]lainly unable to agree on the question whether a state court may properly be considered [a court of competent jurisdiction]" under the compact at issue); *id.* at 30 (asserting that "the current language of Section 8 is the product of a

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[3] Petitioners, together with a host of *amici* in support of their position, filed their opening briefs in October, 2005. By an order dated December 16, 2005, this Court allowed the Respondents in both cases consolidated before this Court until January 31, 2006, to file their answer briefs. This Answer Brief is therefore timely in accordance with the Court's order.

legal tug-o'-war over the jurisdictional issue that has spanned 10 years of compact negotiations in New Mexico.")). There are numerous reasons to discount these unsupported assertions.

First, Petitioners' factual allegations "must be accompanied by references to the record proper, transcript of proceedings or exhibits[.]" Rule 12-213(A)(3) NMRA 2005; *see Drake v. Trujillo*, 1996-NMCA-105, ¶ 18, 122 N.M. 374, 924 P.2d 1386. Second, these "facts" were not presented to the district court below on Petitioners' motion to dismiss by way of affidavit or otherwise. (*See generally* R.P. at 37-64). Third, parole evidence regarding the intent of contracting parties is not admissible to vary the terms of plain and unambiguous contractual provisions. *Acquisto v. Joe R. Hahn Enters., Inc.*, 95 N.M. 193, 195, 619 P.2d 1237, 1239 (1980). Here, the provision set forth in the 2001 Compact that claims for personal injury "may be brought in state court" is plain and unambiguous, and subject to disavowal *only* if the effect of that provision is absolutely forbidden by IGRA. (2001 Compact § 8(A), R.P. at 56).

ARGUMENT

I. SAN FELIPE PUEBLO POSSESSES THE INHERENT AUTHORITY TO WAIVE ITS SOVEREIGN IMMUNITY FROM SUIT IN STATE COURT WITHOUT AN ACT OF CONGRESS ALLOWING IT TO DO SO.

In reliance on *Williams, supra*, Petitioners incorrectly assert, as did the dissent in *Doe*, that an Indian tribe or tribal entity may not be sued in state court absent an act of Congress. (*See* Br. at 5-6, 9, 13). A governing act of Congress is only one way by which a tribe's immunity may be waived. A tribe clearly possesses its own inherent authority to expressly waive its immunity from suit in state court. On that basis, Petitioners' steadfast reliance on *Williams* misses the mark and actually serves to undermine tribal sovereignty and the ability of tribes to govern their own affairs for the purpose of engaging in broad-based economic development.

A. **The holding in *Williams* is limited to circumstances in which a state attempts to unilaterally usurp jurisdiction over Indians in the absence of Congressional approval.**

Initially, *Williams* concerned a lawsuit brought in Arizona state court by a non-Indian against two tribal members for a debt they allegedly owed for goods purchased on credit at his store on the Navajo Reservation. *Id.* 358 U.S. at 217-18, 79 S.Ct. 269. *Williams* was not a case involving a suit against a tribe or a tribal entity. *Id.* Nor was there consent, either express or implied, by the Navajo Nation to any suit in state court against its citizens. *See id.* After the entry of a judgment against the respondents in state court, the Supreme Court of Arizona affirmed, "holding that since no Act of Congress expressly forbids their doing so Arizona courts are free to exercise jurisdiction over civil suits by non-Indians against Indians though the action arises on an Indian reservation." *Id.* at 218. The Supreme Court granted certiorari to decide the narrow issue whether a state could exercise jurisdiction as such in the absence of Congressional authorization. *See id.*

The Court reviewed the law of the day, which allowed suits by Indians against non-Indians in state courts, and the criminal prosecution in state courts of non-Indians for crimes committed against other non-Indians on tribal lands. *Id.* at 219-20. However, the Court cautioned that the states were not free to exercise jurisdiction over Indians for acts committed on the reservations absent Congressional authorization. *Id.* at 220. "[T]he question has always been whether the state action infringed on the right of the reservation Indians to make their own laws and be ruled by them." *Id.* Critically, the Court was not presented with, and did not consider, the issue of a tribe's consent to state court jurisdiction. The Court did, however, envision the eventual transfer of jurisdiction over Indians to the states as an expression of federal policy. *Id.* at 220-21 (stating federal policy "contemplates criminal and civil jurisdiction over Indians by any State ready to assume the burdens

that go with it as soon as the educational and economic status of the Indians permits the change without disadvantage to them."). As the following discussion demonstrates, that day has clearly come.

B. San Felipe Pueblo's sovereignty carries with it the inherent right to waive its immunity from suit in state court.

In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 111 S.Ct 905, 112 L.Ed.2d 1112 (1991), the Court reaffirmed that, as "domestic dependent nations," tribes "exercise inherent sovereign authority over their members and territories."[4] *Id.* at 508 (citing *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed 25 (1831)). "Suits against Indian tribes are thus barred by sovereign immunity *absent a clear waiver by the tribe* or congressional abrogation." *Id.* (emphasis added) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978)). In *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998), the Court held that an Indian tribe is not subject to suit in state court even for breach of contract involving off-reservation commercial conduct unless "Congress has authorized the suit *or* the tribe has waived its immunity." *Id.* at 754, 760 (emphasis added).

More recently, the Supreme Court resolved the issue whether an Indian tribe had waived its immunity from suit in state court by entering into a contract containing an arbitration clause specifically governed by state law, and subjecting the parties to enforcement "'in any court having jurisdiction thereof.'" *C&L Enterprises, Inc. v. Potawatomi Indian Tribe*, 532 U.S. 411, 414, 121

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[4] "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa v. Polyblank*, 205 U.S. 349, 353, 27 S.Ct. 526, 51 L.Ed. 834 (1907).

S.Ct. 1589, 149 L.Ed.2d 623 (2001). Notably, the petitioning contractor did not argue that an act of Congress had abrogated tribal immunity – clearly none was necessary – but only that the Tribe itself had waived its immunity from suit. *Id.* at 418. Under these circumstances, the Court observed that "a tribe's waiver must be 'clear'" to become effective. *Id.* (quoting *Oklahoma Tax Comm'n, supra*, 498 U.S. at 509). On that basis, the Court found that the Tribe had waived its immunity from suit in state court by agreeing to the arbitration of contractual disputes, the application of state law, and entry of a judgment upon an arbital award in a "court of competent jurisdiction." *Id.* at 419-20; *see also Smith v. Hopland Band of Pomo Indians*, 95 Cal.App.4th 1, 115 Cal.Rptr.2d 455 (2002) (holding Tribe entered into contract that clearly and explicitly waived its sovereign immunity); *Bradley v. Crow Tribe of Indians*, 67 P.3d 306 (Mont. 2003) (holding that Tribal member's suit against Tribe was permitted in state court based on provision in employment contract that any action to enforce contract be instituted in state court and under state law); *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo. App. 2004) (holding Tribe's Chief Financial Officer had apparent authority to sign contract with computer services provider, and thereby waive Tribe's sovereign immunity from suit in state court).

New Mexico courts have also acknowledged the right of Indian tribes to waive sovereign immunity without prior Congressional approval. For example, the Court of Appeals in *Sanchez v. Santa Ana Golf Club, Inc.*, 2005-NMCA-003, 136 N.M. 682, 104 P.3d 548, noted that tribes possessed a common law sovereign immunity but declared, without qualification, that "[a] tribe can waive its own immunity by expressing such a waiver." *Id.* at ¶ 5. The *Sanchez* court also noted that Tribal power to waive sovereign immunity could be exercised "either generally or with respect to particular transactions. *Id.* at ¶ 19.

Collectively, these cases demonstrate that an Indian tribe may waive its sovereign immunity from suit, whether by law or by contract, as long as the waiver is "clear" though it need not be express. The waiver may allow suit in state court for whatever class of claims deemed suitable for state court jurisdiction by the tribe. Foremost, a tribe's waiver of immunity is not conditioned upon Congressional authorization.

C. Petitioners wholly fail to demonstrate that a tribe is powerless to waive its sovereign immunity absent Congressional authorization.

While opting to avoid a frontal attack on the obvious conclusion that San Felipe Pueblo could properly choose to waive its sovereign immunity via the 2001 Compact, Petitioners indirectly argue that the parties could not have accomplished a waiver of San Felipe's sovereign immunity by agreement. (*See* Br. at 7 (stating "the law is clear that parties may not create state court jurisdiction by agreement") (citing *Kennerly v. District Court*, 400 U.S. 423, 91 S.Ct. 480, 27 L.Ed.2d 507 (1971)). However, the cases set forth above belie Petitioners' assertion in this regard. An Indian tribe may unequivocally waive its sovereign immunity from suit "by tribal law or *by contract* as long as it is 'clearly' done." *Cohen's Handbook of Federal Indian Law*, Section 7.05[1][c], pg. 642 (Lexis/Nexis 2005) (emphasis added). Moreover, *Kennerly* is easily distinguishable.

In *Kennerly*, the Supreme Court refused to allow the State of Montana to assume jurisdiction over Indian lands based on the unilateral adoption by the tribal counsel of a tribal law providing for concurrent tribal and state court jurisdiction over all suits in which the defendant was a tribal member. *Kennerly*, 400 U.S. at 425. However, the Court limited its analysis exclusively to whether the tribal law alone was sufficient to confer state court jurisdiction under P.L. 280. *Id.* at 424-25 (stating that state assumption of civil jurisdiction over Indians under § 7 of the Act of 1953, 67 Stat.

590, required "affirmative legislative action" by the state, and made no provision whatsoever for tribal consent); *id.* at 429 (holding that Public Law 83-280 ("P.L. 280"), *as amended*, 25 U.S.C. §1322, required that "the tribal consent that is prerequisite to the assumption of state jurisdiction . . . must be manifested by a majority vote of the enrolled Indians within the affected area of Indian country."). The Court cautioned that "this case presents no question concerning the power of the Indian tribes to place time, geographical, or other conditions on the 'tribal consent' to state exercise of jurisdiction." *Id.* Rather, the Court was "presented solely with a question of the procedures by which 'tribal consent' must be manifested under [P.L. 280]." *Id.*

While the holding in *Kennerly* may have surface appeal for Petitioners, it clearly is limited to its facts and no doubt fails to take this case out from under the established rule that the Indian tribes have the inherent authority to waive their sovereign immunity from suit in state court. *See C&L Enterprises, Inc., supra.* Petitioners' reliance on P.L. 280, even though New Mexico has not opted to acquire jurisdiction under P.L. 280, *see Your Food Stores v. Village of Española*, 68 N.M. 327, 332, 361 P.2d 950, 954 (1961), is thus ineffectual. Additionally, P.L. 280 "was intended to facilitate, not to impede, the transfer of jurisdictional responsibility to the States." *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 490, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979). The simple fact that New Mexico did not acquire jurisdiction under P.L. 280 does not mean that P.L. 280 thereby precludes New Mexico from acquiring jurisdiction by other means.

Neither does Petitioners' reliance on Article XXI, § 2 of the New Mexico Constitution afford them safe-haven. (Br. at 10). Article XXI, § 2 merely provides that New Mexico "disclaim[s] all right and title" to Indian lands and that the State shall not tax Indian lands. *Id.* Article XXI, § 2 does

not disclaim state court jurisdiction over tort claims brought under a valid waiver of immunity such as that set forth in the 2001 Compact. The constitutional provision is only "a disclaimer of proprietary interest" in title to Indian lands, "and not a disclaimer of governmental control." *Sangre De Cristo Development Corp. v. City of Santa Fe*, 84 N.M. 343, 350, 503 P.2d 323, 330 (1972); *see also United States v. Superior Court*, 697 P.2d 658 (Ariz. 1985) (holding that similar constitutional provision in Arizona State Constitution merely "waives any claim of right, title, or interest to Indian lands as property" while permitting adjudication of Indian water rights in state court).

Petitioners next cite several New Mexico court decisions in which the State was found to be without jurisdiction over Indian tribes, tribally-owned entities, or tribal members. (Br. at 10-11). In one of these cases, the court analyzed whether the tribe had waived its sovereign immunity, concluding that it had not. *See DeFeo v. Ski Apache Resort*, 120 N.M. 640, 642, 904 P.2d 1065, 1067 (Ct. App. 1996) (stating tribe's sovereign immunity may be waived where it is "unequivocally expressed") (internal quotation marks omitted). But the clear import of *DeFeo* is that New Mexico recognizes the well-established rule that a tribe may subject itself to suit in state court given an appropriately clear waiver of immunity. The other cases cited by Petitioners concerned suits brought against tribal members as a result of incidents occurring on tribal land, and are therefore of no assistance to Petitioners. *See Hartley v. Baca*, 97 N.M. 441, 640 P.2d 941 (Ct. App. 1981); *Chino v. Chino*, 90 N.M. 203, 561 P.2d 476 (1977).

Petitioners also cite *Kizis v. Morse Diesel Int'l, Inc.*, 794 A.2d 498 (Conn. 2002), in which the Connecticut Supreme Court held that state courts lacked subject matter jurisdiction over a claim brought by an injured non-Indian patron against non-Indian employees and the tribal gaming

authority. *Id.* at 501. However, that court's holding was based on an express provision in a Class III gaming compact providing that jurisdiction for such claims would lie only in the Tribe's Gaming Disputes Court. *Id.* at 504; *see also Diepenbrock v. Merkel*, 97 P.3d 1063, 1068 (Kan. App. 2004) (holding that language of gaming compact gives tribal court exclusive jurisdiction over tort claims occurring on premises of gaming facility). Interestingly, the court expressly recognized the State's authority to bargain for subject matter jurisdiction over tort claims arising at the Tribe's gaming facility under IGRA. *Id.* at 505 (stating that "the gaming act [IGRA] provided the state with a mechanism to negotiate with the tribe, to establish the manner in which to redress torts occurring in connection with casino operations on the tribe's land."). On that basis, *Kizis* strongly supports Respondents' claims that the transfer of state court jurisdiction set forth in § 8(A) of the 2001 Compact is a proper exercise of tribal-state authority under IGRA.

II. SECTION 8(A) OF THE 2001 COMPACT CLEARLY WAIVES SAN FELIPE PUEBLO'S IMMUNITY FROM SUIT IN STATE COURT.

Petitioners contend that the 2001 Compact "makes no allocation of [state court] jurisdiction, absent clear and express authority therefor in IGRA." (Br. at 6). But the 2001 Compact expressly states otherwise. Initially, one of the express purposes of the Compact is to assure that casino visitors injured by the negligence of the "Gaming Enterprise have an effective remedy for obtaining fair and just compensation." *Doe*, 2005-NMCA-110, ¶ 6 (quoting 2001 Compact, § 8(A)). To further that objective, San Felipe Pueblo specifically "waive[d] its defense of sovereign immunity" and agreed to the application of New Mexico state law to determine the substantive rights of claimants. (2001 Compact, § 8(D)). Consistent with the above-stated purpose, and in order to best accommodate the application of New Mexico state law, § 8(A) "expressly allows visitors to bring

their claims in state court." *Id.* ¶ 10. The dissent in *Doe* did not take issue with that conclusion. Indeed, Petitioners are forced to concede, although somewhat reluctantly, that visitors to tribal gaming facilities may bring tort claims in state court. (See Br. at 25 (quoting 2001 Compact, § 8(A)).

Having agreed that state court jurisdiction is appropriate unless prohibited under IGRA, San Felipe Pueblo is left with an attempt to avoid the express provisions of § 8(A) based in part on the assertion that it did not expressly agree to state court jurisdiction because it always intended to litigate this issue.[5] (*See* Br. at 25); *see also Doe*, 2005-NMCA-110, ¶ 28 (Sutin, J., dissenting)) (speculating that "[t]he parties to the Compact expected the issue to be litigated [under IGRA]))))." Indeed, Petitioners attempt to bootstrap this contention in reliance on unsupported factual assertions regarding the course of negotiations leading up to the 2001 Compact. (*See* Summary of Proceedings, *supra*, at 3-4). As set forth above, these assertions are improperly raised in this appeal. (*Id.*)

In sum, San Felipe Pueblo has the inherent right to waive its immunity from suit in the manner and to the extent it deems fit in the exercise of its sovereign authority. Such a waiver may be accomplished by law or by contract, so long as it is expressed in clear language. San Felipe Pueblo having clearly waived its immunity from suit for actions based on personal injury arising on the premises of its tribal gaming facility in § 8(A) of the 2001 Compact, the application of IGRA is

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[5] The language in § 8(A) regarding a state or federal court's determination under IGRA might just as easily have been included in the 2001 Compact as a recognition, albeit unwarranted, that the National Indian Gaming Commission's ability to impose penalties and fines under IGRA, which would ultimately be subject to judicial review. *See* 25 U.S.C. § 2705(a)(1) and (2) (providing that Chairman, on behalf of Commission, may issue orders of temporary closure of tribal gaming enterprises and levy and collect civil fines); 25 U.S.C. § 2712 (providing for review and approval of contracts); 25 U.S.C. § 2713 (providing for imposition of civil penalties); 25 U.S.C. § 2714 (providing for review of decisions made by Commission by federal district court).

without consequence.[6] This Court should affirm the Court of Appeals' denial of Petitioners' application for Interlocutory Appeal on these grounds alone.

III. THE RECOGNITION OF SAN FELIPE PUEBLO'S WAIVER OF IMMUNITY ACTUALLY SUPPORTS TRIBAL SOVEREIGNTY AND THE RIGHT OF THE PUEBLO TO GOVERN ITS OWN AFFAIRS.

As stated above, *Williams* does not necessarily bar the exercise of a state court's subject matter jurisdiction over an Indian tribe, tribally-owned entity, or tribal member. (*See* Argument § I(A) and (B), *supra*, at 5-8). Rather, *Williams* merely provides a guide for determining the extent to which state courts may exercise their powers of subject matter jurisdiction without infringing upon tribal sovereignty. In making that determination, courts must ultimately decide whether the proposed exercise of jurisdiction "interferes with Indian self-government." *State Securities, Inc. v. Anderson*, 84 N.M. 629, 632, 506 P.2d 786, 789 (1973); *see also Chino*, *supra*, 90 N.M. at 205, 561 P.2d at 478; *Temple Recovery Services, Inc. v. Belone*, 2003-NMSC-19, ¶¶ 13-14, 134 N.M. 133, 74 P.3d 67. The only issue conceivably presented under *Williams* is thus whether tribal self-government would be undermined if New Mexico district courts assert jurisdiction over tort claims arising on the premises of San Felipe Pueblo's tribal gaming facilities given the agreement set forth in the 2001 Compact. That question must be answered in the negative.

A refusal to recognize the allocation of tribal-state court jurisdiction in the 2001 Compact would severely undermine San Felipe Pueblo's ability to govern itself, because it would serve to deny the Pueblo's right to determine the contours of its own sovereign immunity from suit. (*See* Argument § I(B), *supra*, at 6-8). The *Williams* infringement test is not violated when a state

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[6] Although the Court of Appeals in *Doe* held that any subject matter jurisdiction in the state courts "must derive from the IGRA," *id.*, 2005-NMCA-110, ¶ 8, these Respondents are not certainly not bound by the law of that case.

simply chooses to enforce an Indian government's express contractual agreement. Further, San Felipe Pueblo carefully reserved the right to apply tribal law in tribal court to claims brought by tribal members based on the apparent determination that this reservation may be necessary to its ability to fully exercise its powers of self-government. (*See* 2001 Compact, § 8(D) ("[T]he trial court may but shall not be required to apply New Mexico law to a claim brought by a member of the Tribe.")); *see also Anderson, supra*, 84 N.M. at 631, 506 P.2d at 788 (stating that powers generally necessary for Indian self-government include exclusive "jurisdiction over an accident on the reservation between two Indians") (citations omitted). This further demonstrates that San Felipe Pueblo was clearly aware that it was agreeing to waive its sovereign immunity from suit in state court for claims brought by non-Indian visitors to its casino.

In sum, San Felipe Pueblo thoughtfully exercised its right to negotiate and enter into a gaming compact with New Mexico, by which it made a careful determination to waive its sovereign immunity from suit in state court for a limited class of claims. The right to Indian self-government about which *Williams* is concerned therefore requires that this Court ratify the Pueblo's determination, not override it.

IV. IGRA DOES NOT PROHIBIT A TRIBE'S VOLUNTARY AND EXPRESS WAIVER OF IMMUNITY FROM SUIT IN STATE COURT BUT, IN FACT, SUPPORTS IT.

As discussed above, San Felipe Pueblo has the inherent authority to waive its sovereign immunity from suit in state court for personal injuries occurring at its gaming facility without Congressional authorization. (Argument § I(B), *supra*, at 6-8). This authority is not curtailed by IGRA. Rather, as the *Doe* court recognized, IGRA actually supports the jurisdictional agreement set forth in § 8(A) of the 2001 Compact.

A. **IGRA gives each tribe and each states wide latitude to tailor gaming compacts in order to meet a broad range of circumstances.**

Initially, a tribal-state compact may include provisions relating to:

> (I) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity; [and]
>
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations[.]

25 U.S.C. § 2710(d)(3)(C)(I)-(ii)). In *Doe*, the Court of Appeals engaged in a lengthy analysis of the legislative history of IGRA, before concluding that this statutory language evinced Congress' intent that "the scope of each tribal-state gaming compact to be determined by the parties in the course of their negotiations as equal sovereigns." *Doe*, 2005-NMCA-110, ¶ 10; *see id.* ¶ 15 ("Congress created a mechanism by which each tribe and each state could negotiate over how to apportion jurisdiction over tribal gaming."). Within this framework, the *Doe* court properly concluded that Congress left it to the tribes and states to decide whether the application of the criminal and civil laws and regulations of the Indian tribe or the State in a tribal-state gaming compact "are directly related to, and necessary for, the licensing and regulation of such activity." *See Doe*, 2005-NMCA-110, ¶ 17. Therefore, "the State and Santa Clara acted within the scope of the IGRA when they formed the compact." *Id.* The legislative history of IGRA supports the *Doe* court's conclusion.

B. **The Legislative history of IGRA demonstrates a much broader purpose than that asserted by Petitioners.**

Petitioners rely heavily on their narrow interpretation of IGRA's legislative history in order to arrive at their conclusion that IGRA does not authorize San Felipe Pueblo to shift jurisdiction to

New Mexico courts for certain claims as set forth in the 2001 Compact. (See Br. at 14-17). The court in *Doe* addressed the legislative history behind IGRA at length. 2005-NMCA-110, ¶¶ 11-15. This history demonstrates that the infiltration of Indian gaming by "criminal elements" was not Congress' sole concern.

"The dispute over Indian gaming began when the Seminole Tribe of Florida opened its first bingo hall in 1979." *Doe*, 2005-NMCA-110, ¶ 11. In the mid-1980's, several options concerning Indian gaming were discussed – including federal and state regulatory control of such matters. S. Rep. 100-446 at 3-4. Tribes adamantly opposed any state regulatory control, and preferred no Congressional authority to engage in Class III gaming activities rather than submit to state regulation. *Id.* at 4. On the other hand, "representatives of the Department of Interior and Department of Justice testified in support of tribal bingo, regulated by a federal agency, but in opposition to class III gaming *unless conducted under state jurisdiction*." *Id.* at 3 (emphasis added).

When the Supreme Court granted certiorari in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed2d 244 (1987), Congress was finally able to work out a compromise between state and tribal interests given the apparent inevitability of increased state control over tribal gaming operations. *Doe*, 2005-NMCA-110, ¶ 12. control, did a spirit of compromise surface. However, a fear of the infiltration of organized crime was only one concern of many expressed by Congress. For example, Senator McCain noted that "in 15 years of gaming activity on Indian reservations, there has never been one clearly proven case of organized criminal activity." S. Rep. 100-446 at 33. Further, Senator Evans expressed his belief that the real thrust of IGRA was a concern that tribes be prevented from obtaining an unfair economic advantage over states engaged in similar gaming activities. 134 Cong. Rec. at S12654.

Given competing concerns, Congress ultimately "adopted a flexible solution that allowed competing state and tribal interests to be balanced on a case-by-case basis." *Doe*, 2005-NMCA-110, ¶ 14; *see* S.Rep. 100-446 at 13 (stating that "the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises such as . . . casino gaming . . . ."). These "interests" were many. *See* S. Rep. 100-446 at 13 (setting forth broad range of state and tribal interests, including amongst others "the interplay of such gaming with the State's public policy, safety, law and other interests").

Thus, IGRA "provides very general guidance on what issues a tribal-state compact may address and leaves the scope of each compact to be determined by the states and tribes." *Doe*, 2005-NMCA-110, ¶ 15 (citing 25 U.S.C. § 2710(d); 134 Cong. Rec. at S12651 (statement of Haw. Sen. Daniel Inouye noting that "the idea [behind the compact approach] is to create a consensual agreement between two sovereign governments and it is up to those entities to determine what provisions will be in the compacts."). This legislative history clearly demonstrates Congress' strong belief that the best solution to the issue of tribal gaming was best left to the tribes and states to be decided, within the loose framework of IGRA, on a case-by-case basis. These considerations demonstrate, as discussed below, that the Court of Appeals properly recognized that the negotiated agreement of Santa Clara Pueblo and the State was a proper exercise of sovereign authority under IGRA.

C. **The application state law in state district court to visitors' tort claims for the safety and protection of visitors to tribal gaming facilities is directly related to, and necessary for, the licensing and regulation of gaming activities sufficient to allow the express allocation of civil jurisdiction set forth in the 2001 Compact.**

The *Doe* court determined that the 2001 Compact "demonstrates the State and Santa Clara's concern for the safety of visitors to the Casino and their belief that the redress of the Casino's visitors' injuries was 'directly related to, and necessary for, the licensing and regulation of Class III Gaming activity." *Id.* ¶ 17. Petitioners attack this finding based on their assertion that 25 U.S.C. §§ 2710(d)(3)(C)(i) and (ii) only allow tribes and states to negotiate jurisdiction shifting with respect to matters which are absolutely necessary for the protection of tribal gaming activity "from criminal influences." (Br. at 21-22). That over restrictive interpretation is contradicted by both the legislative history of IGRA, as set forth above, and the express provisions of IGRA.

Given San Felipe Pueblo's previously existing right to waive its sovereign immunity from suit, any provision in IGRA restricting that right must be expressly stated.[7] (*See* Argument §I(B), *supra*, at 6-8); *see also* 25 U.S.C. § 2710(d)(5) (providing "nothing in this subsection shall impair the right of an Indian tribe to regulate Class III gaming on its Indian lands concurrently with the State . . . ."). However, the plain terms of §§ 2710(d)(3)(C)(i) and (ii) place no such restriction on the authority of a tribe to waive its sovereign immunity from suit. Thus, the parties' agreement as set forth in § 8(A) of the 2001 Compact that patron safety is necessary and directly related to licensing and regulation of gaming is entitled to its full effect. *See Doe*, 2005-NMCA-110, ¶ 17.

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[7] Petitioners incorrectly presume that the 2001 Compact must affirmatively authorize them to provide for state court jurisdiction. Clearly, San Felipe Pueblo agreed to state court jurisdiction, "*unless* IGRA does not permit the shifting of jurisdiction." (2001 Compact, § 8(A) (emphasis added)). Thus, San Felipe Pueblo has the power to enter such agreements unless IGRA forbids it.

Petitioners cite two state cases for the proposition that Congress' express transfer to states of regulatory authority liquor control in Indian country does not necessarily confer a waiver of a tribe's sovereign immunity from suit from dram shop-type actions. (Pet. Br. at 22) (citing unpublished opinion in *Greenridge v. Volvo Car Finance, Co.*, 2000 WL 1281541 (Conn. Super. Aug 25, 2000) and *Holguin v. Ysleta Del Sur Pueblo*, 954 S.W.2d 843 (Tex. Ct. App. 1997)). Both of these cases are inapposite. Neither of these cases involved statutory provisions allowing the state to assume jurisdiction in the manner that IGRA does, and neither of the tribe's in these cases had waived their immunity from suit (although both courts recognized a tribe's right to do so, *Greenridge*, 2000 WL 1281541, *3; *Holguin*, 954 S.W.2d at 846).

D. Alternatively, the allocation of jurisdiction set forth in the 2001 Compact is a proper exercise of tribal-state authority under § 2710(d)(3)(vii).

Even if the Court were to conclude that §§ 2710(d)(3)(C)(I) and (ii) do not authorize the allocation agreed upon by the parties to the 2001 Compact, § 2710(d)(3)(C)(vii) would clearly authorize San Felipe Pueblo's waiver of immunity from suit in state court. That provision states that a tribal-state-gaming compact "may include provisions relating to . . . (vii) any other subjects that are directly related to the operation of gaming activities." Petitioners make the incorrect assumption that, because there is no affirmative grant of the right to shift jurisdiction to state courts in this sub-section, such jurisdiction is not allowed. (Pet. Br. at 18, n.10; *see* n.7, *supra*). This argument is unavailing, because § 2710(d)(3(C)(vii) is an affirmative grant of broad authority for tribes and states to contract as they see fit in furtherance of the goals of IGRA. (*See* Argument § IV(B), *supra*, at 15-17). Section 2710(d)(3(C)(vii) does not identify any prohibition against San Felipe Pueblo's inherent right to waive its sovereign immunity as would be require d to undo the allocation of jurisdiction to

state courts set forth in the 2001 Compact. § 8(A). In short, a tribe's waiver of sovereign immunity for visitors' claims for personal injuries arising on the premises of tribal gaming facilities is a perfectly reasonable and allowable exercise of authority "directly related to the operation of gaming activities." § 2710(d)(3(C)(vii).

E. The history surrounding the 1997 Compact strongly supports Respondents' argument that IGRA does not prohibit the allocation of jurisdiction accomplished in the 2001 Compact.

As Petitioners observe, the 1997 Compact drafted by the New Mexico legislature also contained comprehensive provisions relating to the transfer of jurisdiction to state courts over visitors' tort claims arising on the premises of tribal gaming facilities. (Br. at 27). Specifically, the 1997 Compact provided that the "safety and protection of visitors to a Gaming Facility and uniformity and application of laws and jurisdiction of claims *is directly related to and necessary for the regulation of Tribal gaming activities in this state*." NMSA 1978, § 11-13-1, Compact, § 8(A) (1997) (emphasis added). This provision had the effect of expressing the parties' determination that apportioning jurisdiction over visitors' tort claims was "directly related to, and necessary for, the licensing and regulation of [Class III] gaming activity". *See* §§ 2710(d)(3)(C)(I) and (ii). "To that end, the general civil laws of New Mexico and concurrent civil jurisdiction in the State courts and the Tribal courts shall apply to a visitor's claim of liability for bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise[.]" *Id.* A visitor with a claim pursuant to the 1997 Compact § 8, could thus elect to "pursue that claim in the State court of general jurisdiction for such claims or the Tribal court or, at the option of the visitor, may proceed to enforce the claim in binding arbitration." § 11-13-1, Compact, § 8(E).

Although New Mexico's tribes, including San Felipe Pueblo, signed the 1997 Compact, Petitioners claim that they did so only under the imminent threat that they might otherwise have to close their already existing gaming operations. (Br. at 28). Nevertheless, San Felipe Pueblo's agreement to be bound by the 1997 Compact demonstrates its intent that the language regarding the allocation of subject matter jurisdiction was expressly considered a proper exercise of authority under IGRA. Lastly, Petitioners' imply that the Secretary's decision to allow the 1997 Compact to take effect by expiration of the 45-day approval period, rather than by express approval, indicated the Secretary's concern that its provision allowing jurisdiction over tort claims in state court might not be consistent with IGRA. (Br. at 28). In fact, the Secretary expressly stated that "the Department is particularly concerned about two provisions in the Compact that appear inconsistent with IGRA, *i.e.*, the revenue sharing provisions and the regulatory fee structure." *Pueblo of Sandia v. Babbitt*, 47 F.Supp.2d 49, 51 (D.C. Cir. 1999). These are the only "dubious provisions," (Br. at 28), of the 1997 Compact about which the Secretary stated any concern. By implication then, the Secretary and the Department of Interior had no qualms with the jurisdiction-shifting provision regarding visitors' tort claims, because such provision is clearly in accord with IGRA. *See id.* The broad discretion afforded tribes and states under IGRA to fashion tribal-state compacts that will be responsive to the unique circumstances involved in each such negotiation commands that this Court reach the same result.

CONCLUSION

San Felipe Pueblo clearly possessed the inherent authority to waive its immunity from suit before the passage of IGRA. There is nothing in that Act that divested San Felipe Pueblo of that right. Further, recognition of that right promotes tribal sovereignty and self-governance. The

express provision in the 2001 Compact waiving San Felipe Pueblo's sovereign immunity from suit in state court for actions based on personal injury arising on the premises of its tribal gaming facility must be given full force and effect. This Court should therefore affirm the Court of Appeals' denial of Petitioners' Application for Interlocutory Appeal from the district court's denial of their motion to dismiss against Plaintiffs-Respondents Ivan and Lucy Lopez (hereinafter "Respondents"), and remand this case to the district court for proceedings consistent with this Court's opinion.

Respectfully submitted,

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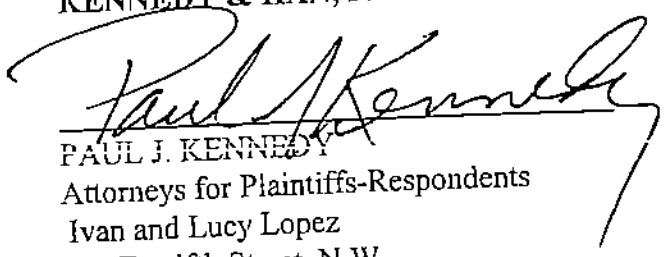

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