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United States Court of Appeals for the Tenth Circuit Follows Hall Street Precedence, Voids Arbitration Clause in Gambling Compact: A Comment On Citizen Potawatomi Nation v. Oklahoma

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UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FOLLOWS *HALL STREET* PRECEDENCE, VOIDS ARBITRATION CLAUSE IN GAMBLING COMPACT: A COMMENT ON *CITIZEN POTAWATOMI NATION V. OKLAHOMA*

By
Mary Bonacchi*

I. INTRODUCTION

The Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.* has had a wide-ranging impact upon the types of review permitted under the Federal Arbitration Act ("FAA") in the United States. The court in *Hall Street* held that the only permissible forms of review in arbitration are listed in 9 U.S.C. §§ 9-11 of the FAA.[1] Those remedies are exclusive, and parties subject to the FAA may not contract for a different method of review by the courts.[2] This principle was recently examined in *Citizen Potawatomi Nation v. Oklahoma*.[3] In this case, an arbitration clause within a gambling compact was deemed void when the United States Court of Appeals for the Tenth Circuit found that an impermissible *de novo* review provision violated the FAA.[4] This case allowed the Tenth Circuit to re-examine the principles of the *Hall Street* case and re-assert the reasoning for rejecting *de novo* review of an arbitration proceeding by the federal courts.[5] This case demonstrates that the principles first expressed in *Hall Street* are still the preference of the Tenth Circuit. *Citizen Potawatomi Nation* also establishes that while contract freedom is a cornerstone of American arbitration, parties to an arbitration agreement will not be permitted to exceed the limited review areas permitted by the FAA in sections 9,10, and 11.[6] Finally, this case illustrates the uneven bargaining power that may exist in the arbitration process when one party, even another sovereign party, agrees to sign an arbitration agreement with a much savvier and powerful legal opponent.

II. CASE BACKGROUND

On November 30, 2004, the Chairman of the Citizen Potawatomi Nation ("the Nation") signed a Tribal-state gambling compact ("the Compact") with the state of Oklahoma.[7] The

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[1] *See* Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 578 (2008).

[2] *See* Hall St. Assocs., 552 U.S at 586-87.

[3] Citizen Potawatomi Nation v. Oklahoma, 881 F.3d 1226, 1228 (10th Cir. 2018).

[4] Citizen Potawatomi Nation v. Oklahoma, 881 F.3d at 1228.

[5] *Id.* at 1236-37.

[6] *Id.*

[7] *Id.* at 1228.

Compact, which became effective on February 9, 2005, allowed Class III gaming to take place on tribal lands.[8] The Compact stated the sovereignty of both parties, and the historic right of the Nation to self-determination and self-governance.[9] The Compact focused on the gambling rights that the Nation would enjoy at their two facilities, the FireLake Grand Casino and the FireLake Entertainment Center, and the responsibilities of the parties towards each other.[10] Part 5(I) of the Compact stated that the tribal facilities had to be in compliance with Oklahoma and tribal alcohol laws.[11] The Compact's arbitration clause provided for the parties to submit any disputes arising under the Compact to arbitration under the rules of the American Arbitration Association ("AAA"). In addition, the Compact stated that "either party to the Compact may bring an action against the other in a federal district court for the *de novo* review of any arbitration award under paragraph 2 [the arbitration clause] of this Part. The decision of the court shall be subject to appeal."[12]

Issues between the parties began when Oklahoma's Alcohol Beverage Laws Enforcement Commission ("ABLE") alleged that the Nation was selling alcohol on Sundays in violation of Oklahoma law.[13] As ABLE began proceedings against the Nation, the Oklahoma Tax Commission ("the OTC") also sent a request to obtain the sales tax returns of the Nation regarding their alcohol sales.[14] Oklahoma Law required the Nation to obtain licenses from both ABLE and the OTC.[15]Both ABLE and the OTC were able to revoke those licenses if a violation was committed.[16] In response to these allegations, and while the ABLE and OTC proceedings were ongoing, the Nation invoked the arbitration clause of the Compact.[17] The Nation believed that the ABLE allegations and alcohol sales tax issues fell under Compact Part 5(I).[18] Oklahoma moved to dismiss the Nation's arbitration claim, arguing that, as the substantive issues central to the dispute were regulatory, they should be handled through administrative proceedings as opposed to arbitration.[19] The arbitrator ruled that the issue was arbitrable, agreeing with the Nation's

[8] Citizen Potawatomi Nation, 881 F.3d at 1229.

[9] *Id*.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Citizen Potawatomi Nation, 881 F.3d at 1230.

[14] *Id.*

[15] *Id.* at 1229-1230; Okla. Stat. tit. 37, §§ 527.1, 528; Okla. Stat. tit. 37, §§ 163.7, 577; Okla. Stat. tit. 68, § 212(A)(2).

[16] *Id.*

[17] Citizen Potawatomi Nation, 881 F.3d at 1230-31.

[18] *Id.*

[19] Citizen Potawatomi Nation, 881 F.3d at 1231.

theory that the arbitration agreement in the Compact was the only remedy for licensing disputes.[20]

The arbitrator then conducted a hearing, where the Nation prevailed.[21] The arbitrator ruled that the sovereignty of the Nation prevented Oklahoma from enforcing a sales tax on items sold by the Nation.[22] The arbitrator enjoined Oklahoma from attempting to halt the Nation's ability to sell alcohol at Compact facilities or from taking further legal action against the Nation to force them to pay state sales taxes.[23]

After the award was announced, the Nation filed an action in the United States District Court for the Western District of Oklahoma to enforce the award; Oklahoma filed a motion for vacatur of the award.[24] Along with other claims, including their insistence that the arbitration went beyond the bounds of the Compact, Oklahoma argued that they were entitled to *de novo* review of the "factual and legal issues" in the arbitration hearing.[25] The district court found for the Nation, agreeing with the arbitrator's determinations with regards to the Compact, and ordered that the award be enforced.[26] Speaking to Oklahoma's assertion that they were entitled to *de novo* review, the district court found that Oklahoma's argument was "foreclosed by Supreme Court precedent."[27] The district court found that, in accordance with Supreme Court precedence in the *Hall Street* decision, only those grounds contained in §§ 10 or 11 of the FAA could modify or vacate an arbitration award; the *de novo* review contained in the Compact was impermissibly broad and not within the scope of §§ 10 and 11.[28] While the district court noted that the *de novo* review was improper, they did not enter into a discussion as to whether the entire arbitration clause was nullified by the *de novo* review provision.[29]

On appeal, Oklahoma made several arguments as to why the arbitration award should be vacated based on the merits of the arbitration, namely that the issues were not all

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[20] *Id.* at 1230-31.

[21] *Id.* at 1233.

[22] *Id.*

[23] *Id.*

[24] Citizen Potawatomi Nation, 881 F.3d at 1233; 9 U.S.C. § 9; 9 U.S.C § 10(a)(4).

[25] Citizen Potawatomi Nation, 881 F.3d at 1234.

[26] *Id.*

[27] Citizen Potawatomi Nation v. Oklahoma, No. CIV-16-361-C, 2016 U.S. Dist. LEXIS 80405, at *9 (W.D. Okla. June 21, 2016).

[28] Citizen Potawatomi Nation, 2016 U.S. Dist. LEXIS 80405, at *9.

[29] Citizen Potawatomi Nation, 881 F.3d at 1234.

arbitrated and that the matters arbitrated exceeded the arbitrator's power.[30] Oklahoma, however, also advanced two theories as to the *de novo* review portion of the arbitration agreement.[31] First, Oklahoma argued that the district court erred in not granting *de novo* review on the merits which the Compact provided for.[32] Specifically, Oklahoma argued that the Indian Gaming Regulatory Act ("the IGRA"), and its preference for federal litigation to resolve disputes, overruled the FAA.[33] In Oklahoma's view, as the Secretary of the Interior had approved the Compact, *Hall Street* and the FAA could not discredit it.[34] In the alternative, the state argued that if *de novo* review was prohibited, then the district court should have severed the arbitration agreement from the Compact, as the *de novo* review provision was a material aspect of the arbitration clause of the Compact.[35]

The Nation argued that disallowing the *de novo* review clause would not make the arbitration agreement invalid; the *de novo* review clause simply could be separated from the rest of the Compact.[36] The Nation also did not provide that any portion of the Compact was ambiguous.[37] They instead pointed to extrinsic evidence they presented during the arbitration to assert that the *de novo* provision was not material to the Compact.[38] Finally, the Nation suggested that if the arbitration clause was invalidated, the ability to resolve future disputes between the Nation and Oklahoma would be compromised, as would their sovereignty which the Nation had sought to protect.[39]

III. APPELLATE COURT'S ANALYSIS

To begin their analysis, the Tenth Circuit dismissed several of Oklahoma's claims as irrelevant to the central issue of the case.[40] The court determined that it would be unproductive to look at the merits of the arbitrator's award or use other forms of review.[41]

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[30] Citizen Potawatomi Nation, 881 F.3d at 1234-35. (Oklahoma attempted to argue that, instead of interpreting the Compact, the arbitrator instead attempted to make public policy by declaring Oklahoma's sales tax laws invalid in relation to the Nation's gaming facilities under the Compact. *See* footnote 11.)

[31] *Id.* at 1235.

[32] *Id.* at 1235.

[33] *Id.* at 1236-37; Oklahoma's Opening Br. at 42-44.

[34] *Id.*

[35] Citizen Potawatomi Nation, 881 F.3d at 1235-37.

[36] *Id.* at 1238; *See* The Nation's Br. at 23.

[37] Citizen Potawatomi Nation, 881 F.3d at 1240; The Nation's Br. at 24.

[38] *Id.*

[39] Citizen Potawatomi Nation, 881 F.3d at 1241.

[40] *Id.* at 1235-36.

[41] *Id.* at 1235-36.

If *de novo* review was determined to be a material aspect of the Compact, then the arbitration agreement would be void, making any other analysis moot.[42] The court, therefore, mainly focused on the claims of materiality and severability of the arbitration clause raised by Oklahoma. [43]

The court began its analysis by examining whether the *de novo* review portion of the arbitration agreement was invalid.[44] The court "quickly disposed" of the notion that the *de novo* review prescribed in the Compact was "still valid and enforceable."[45] While Oklahoma argued that the principles behind the IGRA overruled the FAA, the appellate court disagreed.[46] The appellate court found that no policies that Oklahoma cited could overrule the FAA and the Supreme Court's decision in *Hall Street*.[47] The court reasoned that no portion of the IGRA affected arbitration, nor expressed supremacy over the FAA.[48] As the purpose of the FAA was to create an expedited review of judicial matters, the appellate court was unwilling to view the IGRA as overruling the FAA.[49] The court finished its review of this issue by stating, "Because Hall Street Associates makes clear the *de novo* review provision set out in Compact Part 12(3) is legally invalid, this court must turn to the question whether that provision is a material aspect of the parties' agreement to engage in binding arbitration."[50]

The Tenth Circuit then moved to the issue of whether the *de novo* portion of the arbitration agreement was a material part of the parties' agreement and, if it was, could therefore be severed from the Compact in part or in full.[51] The court determined that the decision in *Hall Street* did not discuss whether severability of the arbitration clause was the correct remedy to an improper *de novo* review clause.[52] Therefore, *Hall Street* did not

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[42] Citizen Potawatomi Nation, 881 F.3d at 1236.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at 1236; Oklahoma's Opening Br. at 42.

[47] Citizen Potawatomi Nation, 881 F.3d at 1236-37.

[48] *Id.* at 1237

[49] *Id.*

[50] *Id.* at 1238.

[51] *Id.* at 1238-41.

[52] Citizen Potawatomi Nation, 881 F.3d at 1238; *see* Hall St. Assocs., 552 U.S at 587 n. 6.

have any bearing on whether the arbitration clause could be severable.[53] The Tenth Circuit then engaged in its own severability analysis.[54]

The court's severability analysis began by stating precedent from previous cases.[55] The court established that not only was arbitration based in contract law, but when enforcing an arbitration agreement, a court might invalidate the arbitration agreement based on traditional contract defenses.[56] A gaming compact is a contract.[57] As such, the Compact was subject to contract law and federal common law.[58] Federal common law principles wouldthen determine if the *de novo* review clause was a material part of the contract.[59] The court noted that federal contract law states that if a contract is not ambiguous, the court will determine the meaning of the contract from its wording only.[60] Parol, or extrinsic, evidence, can only be considered if the terms of the contract are unclear.[61] Using this standard, "[w]hen considered as a whole," the court stated, "[c]ompact 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."[62]

The court then examined the Compact itself.[63] First, the Compact itself contained a severability provision, which analyzed whether the parties would have agreed to the arbitration clause if the *de novo* review section was not included.[64] Second, while the Compact contained a waiver of sovereign immunity to allow for *de novo* review by a

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[53] Citizen Potawatomi Nation, 881 F.3d at 1238.

[54] *Id.* at 1238-41.

[55] *Id.* at 1238-39; *see* Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 67-68 (2010); Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1556 (10th Cir. 1997); Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation v. California, 813 F.3d 1155, 1163 (9th Cir. 2015); Anthony v. United States, 987 F.2d 670, 673 (10th Cir. 1993); *see also* Arizona v. Tohono O'odham Nation, 818 F.3d 549, 560-61 (9th Cir. 2016).

[56] Citizen Potawatomi Nation, 881 F.3d at 1238; *see* Rent-A-Center, West, 561 U.S. at 67-68.

[57] Citizen Potawatomi Nation, 881 F.3d at 1238-39; *see* Pueblo of Santa Ana, 104 F.3d at 1556.

[58] Citizen Potawatomi Nation, 881 F.3d at 1239; *see* Pauma Band of Luiseno Mission Indians, 813 F.3d at 1163 (9th Cir. 2015) (holding compacts governed by the IGRA were under the purview of federal common law).

[59] *Id.*

[60] Citizen Potawatomi Nation, 881 F.3d at 1239; *see* Anthony, 987 F.2d at 673; *see also* Tohono O'odham Nation, 818 F.3d at 560-61.

[61] Citizen Potawatomi Nation, 881 F.3d at 1239; *see* Tohono O'odham Nation, 818 F.3d at 560-61.

[62] Citizen Potawatomi Nation, 881 F.3d at 1239-40.

[63] *Id.* at 1240-41.

[64] *Id.* at 1240.

federal court; this waiver did not apply to other portions of the arbitration agreement and demonstrated to the appellate court that *de novo* review was a material part of the contract.[65] Finally, the court dismissed the Nation's reliance on extrinsic evidence and their claim that voiding the arbitration clause would result in future Compact enforcement problems between the Nation and the state of Oklahoma.[66] Since the Compact as it was written was not ambiguous, and the extrinsic evidence provided was not relevant to the materiality of the *de novo* review provision, the court declined to give these arguments weight in their analysis.[67] As for the Nation's fears about enforcement problems, the court was dismissive, stating that public policy concerns could not override a court's determination that a material element of a contract was improper.[68]

In conclusion, the Tenth Circuit held that the *de novo* review portion of the Compact was a material part of the arbitration agreement and that the Supreme Court's precedence in *Hall Street* barred *de novo* review.[69] Therefore, the arbitration clause of the Compact was severed and invalidated.[70] As a result, the court ordered that the case be remanded to the district court, and that the arbitration award should be vacated.[71]

IV. SIGNIFICANCE

The federal courts' preference for judicial deference to arbitration has allowed parties to contract their arbitration with little interference from federal courts.[72] The *Hall Street* case represented a recent limitation that affected the contracting powers of parties creating an arbitration agreement.[73] This limitation significantly affected the outcome in *Citizen Potawatomi Nation*, where not complying with *Hall Street* led to the severing of the parties' arbitration clause from their gambling compact.[74] This decision is significant in several ways, as it reaffirms: (1) that the pre- *Hall Street* circuit split has been resolved; (2) that federal arbitration policies still have preference over state concerns; and (3) that an

[65] Citizen Potawatomi Nation, 881 F.3d at 1240; *see* Alden v. Maine, 527 U.S. 706, 713 (1999).

[66] Citizen Potawatomi Nation, 881 F.3d at 1240-41.

[67] *Id.*

[68] *Id.* at 1241.

[69] *Id.*

[70] *Id.*

[71] Citizen Potawatomi Nation, 881 F.3d at 1241.

[72] *See* Major League Baseball Players Assoc. v. Garvey, 532 U.S. 504, 508 (2001).

[73] *See* Hall Street Assocs., 552 U.S. at 576-592; *see also* David W. Rivkin and Eric P. Tuchmann, *Hall Street Associates v. Mattel, Inc.: Protecting Both the FAA and Party Autonomy: The Hall Street Decision*, 17 Am. Rev. Int'l. Arb. 537, 538 (2006) (discussing the impacts of *Hall Street* on autonomy in contracts).

[74] Citizen Potawatomi Nation, 881 F.3d at 1241.

incorrect review provision of an arbitration agreement in violation of the *Hall Street* precedent can sever the entire arbitration agreement.

In the years before the *Hall Street* decision, the federal circuits were split as to whether review provisions, like the one at the center of *Citizen Potawatomi Nation*, could exist within the framework of the FAA.[75] The Ninth and Tenth Circuits held in several cases that parties "may not contract for expanded judicial review."[76] The Eighth Circuit expressed agreement with the Ninth and Tenth Circuits, albeit in dicta.[77] However, the First, Third, Fifth, and Sixth Circuits allowed the expanded grounds for judicial review in their opinions.[78] The Fourth Circuit also supported this position in an unpublished opinion.[79] The Supreme Court in *Hall Street* ended the circuit split over whether parties could add other grounds than the ones listed in Section 10 of the FAA to institute judicial review of an arbitration decision.[80] By upholding their past precedence and the precedent in *Hall Street*, the Tenth Circuit in *Citizen Potawatomi Nation* re-affirmed that expanded judicial review is not permitted by sections 10 and 11 of the FAA.

Additionally, the Tenth Circuit roundly rejected that federal or state law principles could overrule the FAA.[81] Oklahoma had argued that the Indian Gaming Regulatory Act and the approval of their Secretary of the Interior should take precedence before the FAA when deciding if the arbitration clause was valid.[82] The Tenth Circuit's dismissal of these arguments was significant, demonstrating that the FAA and the *Hall Street* decision were not limited by other principles of federal law. The limitation on review that would normally be allowed by other federal statutes shows that the arbitration policy laid out in *Hall Street* will be binding on arbitration, even if other statutes are implicated.

Finally, this case answers a question that was left untouched by the *Hall Street* court, whether an arbitration agreement could be severed from a contract if it contained an impermissible review provision.[83] Before the Tenth Circuit decided *Citizen Potawatomi*

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[75] *See* Hall St. Assocs., 552 U.S. at 583 n.5.

[76] *See* Hall St. Assocs., 552 U.S. at 583 n.5; *see also* Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 1000 (9th Cir. 2003) (en banc); Bowen v. Amoco Pipeline Co., 254 F.3d 925, 936 (10th Cir. 2001).

[77] *See* Hall St. Assocs., 552 U.S. at 583 n.5; *see also* UHC Management Co. v. Computer Sciences Corp., 148 F.3d 992, 997-998 (8th Cir. 1998).

[78] *See* Hall St. Assocs., 552 U.S. at 583 n.5; *see also* Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp., 427 F.3d 21, 31 (1st Cir. 2005); Jacada (Europe), Ltd. v. International Marketing Strategies, Inc., 401 F.3d 701, 710 (6th Cir. 2005); Roadway Package System, Inc. v. Kayser, 257 F.3d 287, 288 (3d Cir. 2001); Gateway Technologies, Inc. v. MCI Telecommunications Corp., 64 F.3d 993, 997 (5th Cir. 1995).

[79] *See* Hall St. Assocs., 552 U.S. at 583 n.5; *see also* Syncor Int'l Corp. v. McLeland, No. 96-2261, 1997 U.S. App. LEXIS 21248 (4th Cir. Aug. 11, 1997).

[80] *See* Hall St. Assocs., 552 U.S. at 583 n.5.

[81] Citizen Potawatomi Nation, 881 F.3d at 1236-38.

[82] Citizen Potawatomi Nation, 881 F.3d at 1236-37; Oklahoma's Opening Br. at 42-44.

[83] Citizen Potawatomi Nation, 881 F.3d at 1238; Hall St. Assocs., 552 U.S at 587 n. 6.

Nation, it was unclear whether an entire arbitration clause could be severed from a contract. The district court, in initially taking the case, only sought to invalidate the offending *de novo* portion of the agreement.[84] However, the appellate court rejected this analysis.[85] The court instead applied contract law to the agreement and determined the materiality of a non-approved method of review to the arbitration agreement determines whether it will invalidate the entire arbitration agreement or just that individual clause.[86]

V. CRITIQUE

Citizen Potawatomi Nation highlights several issues with the arbitral process that are still debated throughout the United States. First, the case demonstrates that severing an arbitration clause can leave the parties to a contract without remedy. Second, while contract freedom is valued in arbitration, there is a limit as to what the courts and the FAA will permit. Finally, this case demonstrates that when there is a perceived unfairness in an arbitration, or one party to a contract is perceived to have greater bargaining power than the other, arbitration has the potential to be distrusted by the public.

The central issue of *Citizen Potawatomi Nation* was whether the arbitration clause as a whole was severable, or if the *de novo* review portion of the Compact alone was severable.[87] To make this determination, the court engaged in a materiality analysis.[88] If the *de novo* review clause was a material part of the contract, then it would invalidate the entire arbitration clause; if not, then only the *de novo* review portion of the Compact would be struck.[89] The Tenth Circuit's materiality analysis was straightforward and based in well-established contract principles, providing a clear roadmap for the district courts in their circuit.

However, even if the Tenth Circuit correctly determined the materiality of the *de novo* provision, the court's vacatur of award and their severing of the arbitration clause did away with the only form of relief available to both Oklahoma and the Nation under the Compact. The Compact was created by the Oklahoma legislature for the purpose of engaging with various sovereign native nations that reside within the state's borders with regards to gaming issues.[90] The separation of the arbitration clause in the Compact does not just affect

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[84] Citizen Potawatomi Nation, 881 F.3d at 1234.

[85] *Id.* at 1238-41.

[86] *Id.*

[87] *Id.* at 1238.

[88] *Id.* at 1238-41.

[89] Citizen Potawatomi Nation, 881 F.3d at 1238-41.

[90] *See* CPN Public Information Office, *10th Circuit panel decision makes tribal-state gaming compact unenforceable, reverses arbitration decision*, CITIZEN POTAWATOMI NATION, https://www.potawatomi.org/10th-circuit-panel-decision-makes-tribal-state-gaming-compact-unenforceable-reverses-arbitration-decision/ (Feb. 8, 2018).

the parties in this case, but any nation that has signed a gambling compact with Oklahoma.[91] Each of those parties now has no clear remedy to resolve disputes under the Compact.[92] While the court's legal conclusion may have been technically correct, the court inappropriately dismissed the public policy concerns inherent in declaring the Compact's arbitration clause void, as doing so created far reaching enforcement issues for both native nations and Oklahoma.

Furthermore, contract freedom is also curtailed in *Citizen Potawatomi Nation* through the precedent of its predecessor, *Hall Street*. The power of parties to contract into an arbitration agreement that offers review of the arbitration is limited by the decision of *Hall Street* and the remedies listed in sections 10 and 11 of the FAA.[93] Oklahoma vigorously argued before that Tenth Circuit that the arbitration clause that the state and the Nation had contracted for was allowed by federal law, and therefore, should not be severed from the compact.[94] However, in both this decision and in *Hall Street*, the federal courts have maintained that measures not in the FAA may not be contracted into an arbitration agreement.[95] As the *Hall Street* court maintained, the FAA made it clear that the forms of review in sections 9 through 11 were exclusive.[96] No contract and no federal regulations can circumvent the dictates of *Hall Street*.

In addition, the outcome of the case could be seen to reinforce a pervasive criticism of arbitration: the stronger, better-equipped party in an arbitration agreement will prevail over the weaker party. The Compact was an Oklahoma law, and the Citizen Potawatomi Nation paid more than $4 million in 2017 in exclusivity fees to be a party to this Compact.[97] The Nation received a favorable outcome from the arbitration process they were compelled to agree to by the terms of the Compact.[98] The state of Oklahoma then argued against the very arbitration clause it had created, stating that the clause was invalid due to the precedent in *Hall Street*.[99] The court's decision to sever the entire arbitration agreement removes a form of recourse that the Citizen Potawatomi Nation saw as essential to maintaining their

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[91] *See* CPN Public Information Office, *10th Circuit panel decision makes tribal-state gaming compact unenforceable, reverses arbitration decision*, CITIZEN POTAWATOMI NATION, https://www.potawatomi.org/10th-circuit-panel-decision-makes-tribal-state-gaming-compact-unenforceable-reverses-arbitration-decision/ (Feb. 8, 2018).

[92] *Id.*

[93] *See* Hall St. Assocs., 552 U.S at 578.

[94] Citizen Potawatomi Nation, 881 F.3d at 1236-37; Oklahoma's Opening Br. at 42-44.

[95] Citizen Potawatomi Nation, 881 F.3d at 1238.

[96] *See* Hall St. Assocs., 552 U.S at 578.

[97] *See Id.*.

[98] Citizen Potawatomi Nation, 881 F.3d at 1233.

[99] *Id.* at 1235-37.

sovereignty.[100] Judge Murphy, writing for the court, admitted that, in his opinion, the Nation would more than likely waive its sovereign immunity when taking new complaints before a federal court as opposed to their previous arbitration proceedings.[101] To the Citizen Potawatomi Nation, that has been the focus of Oklahoma's attempt to widen its taxation jurisdiction, as well as the wider native community that has seen five recent Indian Law petitions to the Supreme Court rejected (including the writ of certiorari for the present case), the decision in *Citizen Potawatomi Nation* only serves as another example of a disparate arbitration and court system that ignores native sovereignty.[102]

VI. CONCLUSION

Citizen Potawatomi Nation was decided according to the precedent set by the Supreme Court in *Hall Street*.[103] However, freedom of contract issues, disputes between federal laws, and public policy concerns raise several questions as to the viability of such a precedent. For the time being, however, the circuit split of the pre-*Hall Street* days[104] remains in the past and the federal courts seem willing to sever arbitration agreements that run afoul of this case. When formulating their arbitration agreements, parties must ensure that their contracts do not contain methods of review not explicitly mentioned in the FAA. While the Nation and Oklahoma must wait until the present Compact expires in 2020 to create a new Compact, the decision of the Tenth Circuit gives the parties a clear guideline as to what methods of review are acceptable.[105]

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[100] Citizen Potawatomi Nation, 881 F.3d at 1241.

[101] *Id.* at 1241 n.21.

[102] *Citizen Potawatomi Nation hits end of the line at Supreme Court*, Indianz.com, https://www.indianz.com/News/2018/10/15/citizen-potawatomi-nation-hits-end-of-th.asp (Oct. 15, 2018).

[103] Citizen Potawatomi Nation, 881 F.3d at 1236-37.

[104] *See* Hall St. Assocs., 552 U.S. at 583 n.5.

[105] *Id.*