UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

WEST FLAGER ASSOCIATES, LTD., a Florida Limited Partnership d/b/a MAGIC CITY CASINO, and BONITA-FORT MYERS CORPORATION, a Florida Corporation d/b/a BONITA SPRINGS POKER ROOM,

Plaintiffs,

v. CASE NO. 4:21-cv-00270-AW-MJF

RON DESANTIS, in his official capacity as Governor of the State of Florida, and JULIE BROWN, in her official capacity as Secretary of the Florida Department of Business and Professional Regulation,

Defendants.
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DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

Defendants, Ron DeSantis, in his official capacity as Governor of the State of Florida, and Julie Brown, in her official capacity as Secretary of the Florida Department of Business and Professional Regulation, hereby file this motion to dismiss the Amended Complaint for Declaratory Judgment and Injunctive Relief (ECF No. 18; "Complaint") pursuant to Rules 12(b)(1), 12(b)(6), 12(b)(7), and 19, Federal Rules of Civil Procedure, and in support state as follows:

Plaintiffs invoke three federal statutes in challenging the legality of the Compact's online sports betting component: the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq*., the Wire Act of 1961 (the "Wire Act"), 18 U.S.C. §§ 1081 *et seq.*, and the Unlawful Internet Gaming Enforcement Act (the "UIGEA"), 31 U.S.C. §§ 5361 *et seq*. But none of these statutes provides a private right of action.

Furthermore, the Governor and the Secretary are not the state officials who enforce the Compact provisions, so they are improperly named in this action for purposes of the *Ex parte Young* doctrine, and the state's sovereign immunity bars this action. Additionally, the Seminole Tribe of Florida is a necessary and indispensable party but has not been joined in this action, so the Complaint must be dismissed under Rule 19, Federal Rules of Civil Procedure. Finally, Plaintiffs have not alleged any of the prerequisites to establish standing. Plaintiffs cannot show any concrete and particularized injury caused by the operation of the Tribe's sportsbook, and they fail to establish traceability and redressability as well. Plaintiffs' claims therefore fail for each of these threshold deficiencies.

The substance of Plaintiffs' action fares no better. Plaintiffs concede that the Compact and ratifying legislation authorize online sports betting offered by the Tribe, yet Plaintiffs inexplicably maintain that online sports betting remains illegal. *See, e.g.*, Compl. ¶¶ 2, 6, 79. Although Plaintiffs hint that the ratifying legislation

might be unconstitutional under the Florida Constitution, *see* Compl. ¶¶ 75–79, 125–126, Plaintiffs explicitly refrain from directly challenging its constitutionality. *Id.* at 5 n.5. Thus, the ratifying legislation must be presumed valid under state law for purposes of this action.[1]

The parties to the Compact properly utilized IGRA's jurisdiction allocation provisions to deem all online sports betting wagers to occur on the Tribe's Indian lands, and thus IGRA authorizes the gaming activity. Further, the State's ratifying legislation explicitly provides that this activity does not violate state law. Thus, the placement of online sports betting wagers is legal—including by patrons physically located within the state and outside the Tribe's Indian lands—and does not give

[1] Presumably, this is because Plaintiffs recognize that a federal court lacks jurisdiction to grant relief against state officers on the basis that they violated state law. *Pennhurst State School & Hosp. v. Haderman,* 465 U.S. 89 (1984). Furthermore, this Court should decline Plaintiffs' invitation to interpret *in dicta* a provision of the Florida Constitution as a matter of first impression. *See*, *e.g.*, *Merkison v. Jones*, No. 4:14cv376–MW/CAS, 2015 WL 1285788, at *3 (N.D. Fla. Mar. 18, 2015) ("It is not, however, the role of the federal court to interpret a state's constitution."); *Townsend v. Ericsson*, No. 4:05-CV-0038 AS, 2005 WL 1683976, *3 (N.D. Ind. July 18, 2005) ("Under the federal system, federal courts do not interpret state constitutions, though they may apply settled interpretations of a state constitution established by state courts."); *Richey v. Lane*, No. 09–5195FDB/JRC, 2009 WL 1531778, at *2 (W.D. Wash. June 1, 2009) ("The Court can think of no greater intrusion into a state's sovereignty than when a Federal Court interprets a State's Constitution."); *cf. Linnemeier v. Indiana University-Purdue University Fort Wayne*, 155 F. Supp. 2d 1044, 1056 (N.D. Ind. 2001) (declining to exercise supplemental jurisdiction over state constitutional claim where doing so would require a court "to embark on an interpretation" of the state constitution "virtually unguided by state court precedent"); *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc.*, 140 F.3d 478, 487 (3d Cir. 1998) (same).

rise to a violation of the federal statutes at issue, which would require an independent source of illegality. For this reason and more, Plaintiffs' statutory claims would fail on the merits even if they had standing and a private right of action.

Finally, Plaintiffs also invoke the Equal Protection Clause of the United States Constitution. But their constitutional claim fails in light of well-settled precedent establishing that classifications favoring federally recognized Indian tribes are political classifications rather than racial (or otherwise suspect) classifications.

I. BACKGROUND

Plaintiffs own and operate licensed pari-mutuel facilities in Florida that offer a variety of gambling activities. Compl. ¶¶ 9–22. In general, Plaintiffs compete with the Seminole Tribe of Florida (the "Tribe") within the Florida gambling market. *Id.* ¶¶ 139, 144, 149.

The State of Florida and the Tribe negotiated a new Compact under IGRA in 2021, which governs the new forms of gaming the Tribe is now authorized to conduct. Compl. ¶¶ 97–104 (citing ECF 18-1). The Compact was signed by the Governor and the Tribe on April 23, 2021, and it was amended on May 17, 2021. Compl. ¶¶ 97, 105, 109. On May 19, 2021, the Compact was ratified with overwhelming bipartisan support by the state legislature. Compl. ¶ 112. The

ratifying legislation was signed into law on May 25, 2021, and became effective that day. Compl. ¶¶ 114–115.

The Compact authorizes the Tribe to conduct sports betting. Compl. ¶¶ 100–101, 104. Sports betting may be conducted through use of electronic devices connected via the internet, regardless of the physical location within the state at which a patron uses the device. Compl. ¶ 119. Under the Compact, qualified pari-mutuel permitholders may enter into written contracts with the Tribe to provide marketing and similar services related to the Tribe's online sports betting. Compl. ¶ 125; *see also* ECF 18-1, Part III, Sec. CC.3–4.

The Compact deems wagers placed by patrons physically located outside the Tribe's Indian lands but within the state to take place where the wagers are received by servers on Indian lands. Specifically, the Compact provides as follows:

> All such [sports betting] wagering shall be deemed at all times to be exclusively conducted by the Tribe at its Facilities where the sports book(s), including servers and devices to conduct the same, are located, including any such wagering undertaken by a Patron physically located in the State but not on Indian Lands using an electronic device connected via the internet, web application or otherwise, including, without limitation, any Patron connected via the internet, web application or otherwise of any Qualified Pari-mutuel Permitholder(s) and regardless of the location in Florida at which a Patron uses the same.

Compl. ¶¶ 123, 160; *see also* ECF 18-1, Part IV.A. The legislation ratifying the Compact contains similar language. Compl. ¶ 121 (citing Fla. Stat. § 285.710(13)(b)(7)); *see also* ECF 18-2, Sec. 2.

The ratifying legislation also makes explicit that gaming under the Compact, including online sports betting, does not violate state law, providing that "[g]ames and gaming activities authorized under this subsection and conducted pursuant to a gaming compact ratified and approved under subsection (3) do not violate the laws of this state." ECF 18-2, Sec. 2 (codified at Fla. Stat. § 285.710(13)). It also provides that, "[f]or the purpose of satisfying the requirement in 25 U.S.C. s. 2710(d)(1)(B) that the gaming activities authorized under an Indian gaming compact must be permitted in the state for any purpose by any person, organization, or entity," certain games are "hereby authorized to be conducted by the Tribe pursuant to the compact," including sports betting. Compl. ¶ 118 (citing Fla. Stat. § 285.710(13)(b)); *see also* ECF 18-2, Sec. 2.

The Department of the Interior received the Compact on June 21, 2021. Compl. ¶ 116. On August 11, 2021, it published its approval of the Compact in the Federal Register. *See Indian Gaming; Approval by Operation of Law of Tribal-State Class III Gaming Compact in the State of Florida*, 86 Fed. Reg. 44,037 (Aug. 11, 2021). The Department of the Interior issued a letter dated August 6, 2021, containing its reasoning for allowing the Compact to take effect. **EXHIBIT 1**, Letter from United States Dept. of Interior. The Department of the Interior in its letter provided a detailed analysis of the legality of the online sports betting provisions, and it said "[t]he Department must apply the law in a manner that

ensures tribes are not hindered from utilizing new technology in an evolving industry." *Id.* at 6.

Plaintiffs attempt to invalidate the online sports betting component of the Compact and the ratifying legislation under the Supremacy Clause and the Equal Protection Clause of the United States Constitution. Compl. ¶¶ 1, 7. In particular, Plaintiffs seek declaratory relief that the Compact and ratifying legislation, to the extent they authorize online sports betting, are unlawful under IGRA, the Wire Act, and the UIGEA, and therefore are *ultra vires*. Compl. at 6, 44–70. Plaintiffs also seek injunctive relief to (1) enjoin the Governor from "implementing the 2021 Compact in its current form as mandated by the Implementing Law"[2] and (2) enjoin the Secretary from implementing the provisions of Section 285.710, Florida Statutes, with respect to online sports betting wagers placed by patrons located outside the Tribe's lands. Compl. ¶ 8.

II. MOTION TO DISMISS STANDARD

"To survive a motion to dismiss" for failure to state a claim, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting

[2] In their original Complaint, Plaintiffs sought to enjoin the Governor only from "cooperating with the Tribe to secure approval of the 2021 Compact in its current form as mandated by the Implementing Law." ECF 1 at 66. Now that the Department of Interior has approved the Compact, rendering that requested relief moot, Plaintiffs seek to enjoin the Governor from "implementing" the Compact generally.

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678. Thus, in considering a motion to dismiss, a court should "1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, 'assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.'" *Kivisto v. Miller, Canfield, Paddock and Stone, PLC*, 413 F. App'x 136, 138 (11th Cir. 2011) (quotation omitted).

The same standards apply to a motion to dismiss for lack of standing under Rule 12(b)(1), where the motion constitutes a "facial attack" based on the allegations in the complaint. *See*, *e.g.*, *Tsao v. Captiva MVP Restaurant Partners, LLC*, 986 F.3d 1332, 1337–38 (11th Cir. 2021) (applying plausibility standard to standing analysis); *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 996 (11th Cir. 2020) ("Thus, at the motion-to-dismiss stage, [plaintiffs] bore the burden of alleging facts that plausibly establish their standing.").

III. ARGUMENT

A. The Governor is not a proper defendant, and there is no basis to enjoin him.

Although *Ex parte Young*, 209 U.S. 123 (1908), provides a narrow exception to state sovereign immunity for suits "alleging a violation of the federal

constitution against a state official in his official capacity for injunctive relief on a prospective basis," *Osterback v. Scott*, 782 F. App'x 856, 858 (11th Cir. 2019)), Plaintiffs may not simply "challenge a state law by choosing whichever state official appears most convenient and haling them into federal court." *Support Working Animals, Inc. v. DeSantis*, 457 F. Supp. 3d 1193, 1208 (N.D. Fla. 2020). Instead, litigants must bring their claims "against the state official or agency responsible for enforcing the allegedly unconstitutional scheme." *Osterback*, 782 F. App'x at 858–59 (internal quotation marks omitted) (quoting *ACLU v. Fla. Bar*, 999 F.2d 1486, 1490 (11th Cir. 1993)); *see also Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1248 (11th Cir. 1998) ("[W]here the plaintiff seeks a declaration of the unconstitutionality of a state statute and an injunction against its enforcement, a state officer, in order to be an appropriate defendant, must, at a minimum, have some connection with enforcement of the provision at issue."). This is because "[w]here the named defendant lacks any responsibility to enforce the statute at issue, the state is, in fact, the real party in interest, and the suit remains prohibited by the Eleventh Amendment." *Osterback*, 782 F. App'x at 858–59 (internal quotation marks omitted) (quotation omitted). Accordingly, "[u]nless the state officer has some responsibility to enforce the statute or provision at issue, the 'fiction' of *Ex parte Young* cannot operate." *Support Working Animals*, 457 F. Supp. 3d at 1208 (quotation omitted).

Plaintiffs acknowledge that the Governor's only statutory duties here are to negotiate and execute tribal-state gaming compacts and then, for this particular gaming compact, to "cooperate with the Tribe in seeking approval of [the Compact] from the United States Secretary of the Interior." Compl. ¶ 23 (quoting Fla. Stat. § 285.710(3)(b)). The Governor does not have any direct responsibility for enforcing or administering the online sports betting component of the Compact or the ratifying legislation. Plaintiffs now also allege that the Compact requires the Governor to "defend its validity." Compl. ¶ 23. But a duty to defend the validity of the Compact obviously does not constitute authority to enforce the law being challenged, nor does it constitute authority to "implement" the Compact (which is the subject of the only injunctive relief that Plaintiffs seek against the Governor).[3] Accordingly, the Governor is not a proper defendant in this challenge to that component.[4] As the *Ex parte Young* doctrine does not apply to the claims against the Governor, the state's sovereign immunity bars these claims.

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[3] Just as plainly, if the Governor's only duty and authority is to defend the validity of the Compact, then that is all the Court theoretically could enjoin him from doing. Yet the Court cannot enjoin the Governor from defending a lawsuit in which he has been named. If Plaintiffs do not wish that the Governor defend the validity of the Compact in this litigation, they can simply consent to the Governor's request that he be dismissed as a defendant.

[4] Governor DeSantis' status and authority as Governor of Florida do not, as a matter of law, make him a proper party to this case. *See Harris v. Bush,* 106 F. Supp. 2d 1272, 1276 (N.D. Fla. 2000) (citing multiple cases supporting this principle); *see also Women's Emergency Network v. Bush*, 323 F.3d 937, 949 (11th

Moreover, because the Governor's direct responsibility here goes no further than urging approval of the Compact by the Secretary of the Interior, that responsibility no longer exists. As the Compact has been approved and does not direct the Governor to "implement" its terms, there is no basis for the Governor to be enjoined, and he should be dismissed from this action entirely. For this reason, the remainder of this Motion to Dismiss does not address other shortcomings related to the claims against the Governor.

B. The Secretary is not a proper defendant.

Similarly, the Secretary is not a proper defendant under *Ex parte Young*. The Compact and the ratifying legislation do not confer "enforcement" authority over the Tribe's online sports betting on the Secretary. *Osterback*, 782 F. App'x at 858–59. If anything, they allow the Secretary to merely monitor the sports betting component of the Compact. Therefore, the *Ex parte Young* doctrine does not apply to the claims against the Secretary, and the state's sovereign immunity bars these claims.

Cir. 2003) ("A governor's 'general executive power' is not a basis for jurisdiction in most circumstances."); *Osterback*, 782 F. App'x at 859 ("[T]he Governor's constitutional and statutory authority to enforce the law and oversee the executive branch do not make him a proper defendant under *Ex Parte Young*.") Similarly, the Governor's enactment authority, by itself, does not subject him to this Court's jurisdiction because "[u]nder the doctrine of absolute legislative immunity, a governor cannot be sued for signing a bill into law." *Women's Emergency Network*, 323 F.3d at 950 (citation omitted). Otherwise, the Governor would be a proper defendant in any challenge to a state statute. *Id.* at 949.

Further, as explained below, even if the Secretary were otherwise a proper defendant under *Ex parte Young*, the Secretary still would not be a proper defendant because Plaintiffs lack standing to assert their claims against her.

C. The Complaint should be dismissed due to Plaintiffs' failure to join the Tribe as a defendant.

In addition to improperly naming the Governor and the Secretary as defendants, Plaintiffs failed to name a necessary and indispensable party—the Tribe. This Court has held that the Tribe is an indispensable party to IGRA litigation that attempts to invalidate a gaming compact to which the Tribe is a party. *PPI, Inc. v. Kempthorne*, No. 4:08CV248-SPM, 2008 WL 2705431, at *3–4 (N.D. Fla. July 8, 2008). Accordingly, this action should be dismissed pursuant to Rules 12(b)(7) and 19, Federal Rules of Civil Procedure. The Governor and the Secretary adopt and incorporate by reference the arguments in the Tribe's Motion to Dismiss (ECF No. 21), which sets forth the indispensable party argument in more detail.

D. Plaintiffs have no private right of action under the federal statutes at issue.

None of the three federal statutes that Plaintiffs invoke—IGRA, the Wire Act, and the UIGEA—provides a private right of action. "It is well established that the mere 'fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.'"

Alabama v. PCI Gaming Auth., 801 F.3d 1278, 1293–94 (11th Cir. 2015) (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688 (1979)). Instead, Congress must have expressly or impliedly created a private right of action. *Id.* at 1294.

"To determine whether a statute provides an express right of action," the Court must "look for an 'express provision granting [ ] a federal cause of action to enforce the provisions of that act.'" *Id.* (alteration in original) (quotation omitted). There is no such express provision in IGRA, the Wire Act, or the UIGEA. *See* 25 U.S.C. §§ 2701 *et seq.* (IGRA); 18 U.S.C. §§ 1081 *et seq.* (Wire Act); 31 U.S.C. §§ 5361 *et seq.* (UIGEA). "To determine whether Congress intended to create an implied right of action," by contrast, the Court must look "first and foremost" for "rights-creating language" in each statute. *PCI Gaming*, 801 F.3d at 1295 (quotation omitted). "Rights-creating language 'explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff in the case.'" *Id.* (quoting *Cannon*, 441 U.S. at 690 n. 13) (alterations in original). Again, no language in the foregoing three statutes explicitly confers rights on entities such as Plaintiffs. *See also Gonzaga Univ. v. Doe*, 536 U.S. 273, 283–84 (2002) (Congressional intent to create a private right of action is "definitively answered in the negative" where a "statute by its terms grants no private rights to any identifiable class.") (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 576 (1979)).

With respect to IGRA, the Eleventh Circuit has concluded that "because Congress provided a 'multitude of express remedies' in IGRA, we would not read into IGRA an additional implied right of action." *PCI Gaming*, 801 F.3d at 1296 (quoting *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1248–49 (11th Cir. 1999)). Doing so would "upset the carefully-struck congressional balance of federal, state, and tribal interests and objectives." *Id.* Moreover, Congress's stated intent was that "under IGRA the federal government would be the principal authority regulating Indian gaming." *Id.* at 1299. Plaintiffs even acknowledge that IGRA places a duty on the Secretary of the Department of the Interior to reject any compact that violates IGRA. Compl. ¶¶ 37–39. Accordingly, a private right of action is unavailable under IGRA. *See also Hartman v. Kickapoo Tribe Gaming Commission*, 319 F.3d 1230, 1232–33 (10th Cir. 2003) (IGRA creates neither an express nor an implied private right of action).

The UIGEA similarly specifies that only federal authorities and state attorneys general may institute actions for alleged violations. 31 U.S.C. §§ 5364–5366. Thus, the UIGEA provides no private cause of action beyond what IGRA would permit in a compact. *See Chiras v. Unibank*, No. 11-40201-FDS, 2011 WL 6370033, at *2 (D. Mass. Dec. 16, 2011) (no private right of action under the UIGEA).

Finally, the UIGEA and the Wire Act are both criminal statutes and do not otherwise authorize civil remedies for alleged violations. *See* 31 U.S.C. § 5366; 18 U.S.C. § 1084(a). "Criminal statutes generally do not provide a private cause of action." *Chen ex rel. V.D. v. Lester*, 364 F. App'x 531, 536 (11th Cir. 2010) (citation omitted).

Apparently cognizant that these statutes supply no private right of action, Plaintiffs resort to what the D.C. Circuit Court of Appeals has likened to a "Hail Mary pass" by alleging that the online sports betting provisions of the Compact are *ultra vires* and thereby invoke the doctrine of "nonstatutory review." *Nyunt v. Chairman, Broadcasting Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009); Compl. at 50, 57, 63. Plaintiffs' repeated references to the allegedly "*ultra vires*" nature of the Compact appear to be for the purpose of working around the absence of a statutory right of action. *See*, *e.g.*, *Griffith v. Fed. Labor Relations Authority*, 842 F.2d 487, 492 (D.C. Cir. 1988) ("Even where Congress is understood generally to have precluded review, the Supreme Court has found an implicit but narrow exception, closely paralleling the historic origins of judicial review for agency actions in excess of jurisdiction."); *see also Adamski v. McHugh*, 304 F. Supp. 3d 227, 236–37 (D.D.C. 2015) (explaining that "non-statutory" *ultra vires* claims sometimes can be asserted in federal court where a plaintiff cannot otherwise assert the claim on the basis of a statutory review provision). "The

leading case is *Leedom v. Kyne*," which is "intended to be of extremely limited scope." *Griffith*, 842 F.2d at 492–93 (citing *Leedom v. Kyne*, 358 U.S. 184 (1958)).

Kyne has no application here. "*Kyne* involved an action in District Court challenging a determination by the National Labor Relations Board (NLRB) that a unit including both professional and nonprofessional employees was appropriate for collective-bargaining purposes—a determination in direct conflict with a provision of the National Labor Relations Act." *Bd. of Governors of Fed. Reserve Sys. v. MCorp Financial, Inc.*, 502 U.S. 32, 42 (1991). "The Act, however, did not expressly authorize any judicial review of such a determination." *Id.* "Concluding that the Act did not bar the District Court's jurisdiction," the Court in *Kyne* explained that it "cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Id.* at 43 (quoting *Kyne*, 358 U.S. at 190).[5]

"Thus, in order to justify the exercise of [*Kyne*] jurisdiction, a plaintiff must show, first, that the agency has acted 'in excess of its delegated powers and contrary to a specific prohibition' which 'is clear and mandatory,' . . . and, second, that barring review by the district court 'would wholly deprive [the party] of a

[5] As a state agency, the Department's powers are not delegated by Congress, and the cases in which federal courts have engaged in nonstatutory review of allegedly *ultra vires* acts appear to be confined to review of federal agency actions. For this reason as well, it appears that the already-limited doctrine of nonstatutory *ultra vires* review has no application here.

meaningful and adequate means of vindicating its statutory rights[.]'" *Nat. Air Traffic Controllers Ass'n AFL-CIO v. Fed. Svc. Impasses Panel*, 437 F.3d 1256, 1263 (D.C. Cir. 2006) (alteration in original) (quotations omitted). As to the first requirement, even if Plaintiffs could present a colorable argument that the online sports betting component violates federal law, the federal statutes at issue are hardly "clear and mandatory" in that regard. *See* Section III-F, *infra*.[6] As to the second requirement, these statutes confer no rights on Plaintiffs.

As the Supreme Court has clarified, its earlier *Kyne* decision does not "authoriz[e] judicial review of *any* agency action that is alleged to have exceeded the agency's statutory authority." *Id.* at 43 (emphasis added). Instead, "the fact that the Board's interpretation of the Act would wholly deprive the union of a meaningful and adequate means of vindicating its statutory rights" was "central" to the *Kyne* decision. *Id.*

Here, Plaintiffs have no statutory rights to vindicate. IGRA, the Wire Act, and the UIGEA do not confer on Plaintiffs any rights relating to sports betting or

[6] Moreover, even if the Department's monitoring of the online sports betting component of the Compact could be considered a violation of a "clear and mandatory" statutory prohibition, the statutes allegedly violated are not in the Department's enabling statute. *See U.S. Dept. of Interior v. Fed. Labor Relations Auth.*, 1 F.3d 1059, 1062 (10th Cir. 1993) ("[T]he clear and mandatory statutory prohibition the Board violated in *Kyne* was contained in its enabling act. When the Board acted in violation of that statute, it exceeded its delegated authority and used a power that Congress had expressly denied it. Here, to the contrary, we are not concerned with a violation of the agency's enabling act.").

otherwise. Plaintiffs' inability to identify any statutory right of their own is dispositive of their attempted end-run around the absence of a private right of action. *See Town of Portsmouth, R.I. v. Lewis*, 813 F.3d 54, 62 n. 5 (1st Cir. 2016) (The availability of nonstatutory review "depend[s] upon the existence of an enforceable federal right in the first instance, which does not exist here.").

E. Plaintiffs do not have standing to challenge the Compact or the ratifying legislation.

Even if some sort of private right of action were to exist, Plaintiffs have not alleged and cannot allege any particularized injury based on the Compact or the ratifying legislation. To satisfy the fundamental requirements of standing, Plaintiffs must allege a concrete and particularized injury caused by the defendants — one which affects each Plaintiff in an individual way and which is real, and not abstract, hypothetical, or speculative. *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1113 (11th Cir. 2021); *Salcedo v. Hanna*, 936 F.3d 1162, 1167 (11th Cir. 2019).

Plaintiffs acknowledge that they have the option to participate in the online sports betting component by marketing the Tribe's sportsbook and receiving sixty percent (60%) of the profit. Compl. ¶¶ 134–139, 143. Despite these favorable financial possibilities, Plaintiffs rely on two conclusory assumptions to attempt to establish an injury. First, Plaintiffs seemingly assume that they will not reach an agreement with the Tribe to participate in the Tribe's online sports betting

operation. Second, Plaintiffs assume that their overall revenue will decrease when the Tribe's online sports betting operation commences, due to the alleged increased competition in the gambling market. Compl. ¶¶ 139, 142–144. These deeply flawed assumptions and speculations are insufficient to confer standing.

"Where, as here, the plaintiff seeks only declaratory or injunctive relief, as opposed to damages for injuries already suffered, the injury-in-fact requirement insists that a plaintiff allege facts from which it appears there is a substantial likelihood that he will suffer injury in the future." *Esteves v. SunTrust Banks, Inc.*, 615 F. App'x 632, 635 (11th Cir. 2015) (internal quotations omitted). Because a court "should not speculate concerning the existence of standing," it is insufficient to allege facts "from which [the court] could *imagine* an injury sufficient to satisfy Article III's standing requirements." *Id.* (quotation omitted).

Seemingly for the purpose of establishing standing, Plaintiffs allege that "online, off-reservation sports betting [] will have an adverse effect on [their] revenues, due to the expected cannibalization of in-person betting at pari-mutuel facilities once the 2021 Compact is implemented and online sports betting becomes available through the Tribe's exclusive arrangements." Compl. ¶ 142. But sports betting is and would be illegal *at Plaintiffs' pari-mutuel facilities* regardless of the Compact, and Plaintiffs fail to establish why patrons wishing to engage in sports betting would visit Plaintiffs' facilities but for the Compact.

The only category of wagering activity of which Plaintiffs complain—"online, off-reservation sports betting"—by its very nature is not conducted in person. Compl. ¶ 142. Plaintiffs make no non-speculative allegation why that form of betting nonetheless would "cannibalize" in-person betting at their facilities. *Id.* The would-be sports bettor who wishes to place a bet online necessarily would not visit tribal lands *or* Plaintiffs' facilities in person, so there is no factual basis for Plaintiffs' speculative allegation that the Compact's online sports betting component would deter such a bettor from visiting Plaintiffs' facilities. Similarly, Plaintiffs do not contest that a sports bettor could (in light of the Compact) lawfully place a sports bet in person on tribal lands even while sports betting is prohibited at Plaintiffs' own facilities. Thus, the allegation that the online sports betting authorized in the Compact would "cannibalize" in-person betting at Plaintiffs' facilities is simply conjectural. Without more, Plaintiffs have not shown a "substantial likelihood" that this alleged harm will come to pass and therefore have not established standing. *Esteves*, 615 F. App'x at 635.[7]

[7] Plaintiffs also acknowledge that the Tribe has initiated communications with Plaintiff Magic City regarding a potential sports-betting relationship in accordance with the Compact (Compl. ¶ 138), but they do not allege that they have rejected (let alone definitively rejected) such overtures, or that they are among the pari-mutuels "that are unable to, or choose not to, enter into a marketing agreement with the Tribe." Compl. ¶ 139. For this reason as well, they have failed to allege a "substantial likelihood" that they will suffer a concrete injury as a result of the Compact.

Moreover, the speculative harm that Plaintiffs allege is not fairly traceable to the challenged, anticipated actions of the Secretary, nor is it likely to be redressed by the relief requested against the Secretary. The Department of Business and Professional Regulation's Division of Pari-mutuel Wagering is the current "state agency having authority to carry out the state's oversight responsibilities under the compact." Fla. Stat. § 285.710(1)(f), (7). The "oversight" responsibilities in the Compact, however, are monitoring responsibilities that do not extend to preventing the Tribe's online sports betting and thus do not impact Plaintiffs' alleged harm in any way.[8] The harms alleged are not traceable to the Secretary (or to the Department that she oversees), who "plays [no] role in determining" whether online sports betting will be allowed in Florida. *Jacobson v. Fla. Sec. of State*, 974 F.3d 1236, 1253 (11th Cir. 2020). "Because the [Secretary] didn't do (or fail to do) anything that contributed to [their] harm," Plaintiffs "cannot meet Article III's traceability requirement." *Id.* (quoting *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1301 (11th Cir. 2019)) (alterations in original).

Nor would the requested relief against the Secretary redress the alleged harms. The sports betting component of the Compact does not rest on the

[8] These oversight responsibilities are set forth in the Compact and include proposing rules and regulations for the Tribe's consideration (ECF 18-1, at 24, Part V.A.1.); receiving reports from the Tribe and from qualified pari-mutuel permitholders regarding abnormal or illegal betting activity (ECF 18-1, at 26, Part V.2.(j)); deciding disputes between the Tribe and a patron (ECF 18-1, at 32, Part VI.A); and other similar responsibilities.

Secretary's "oversight" and would remain in effect even if the Secretary is enjoined from oversight responsibilities. *Compare Jacobson*, 974 F.3d at 1254 Importantly, "it must be *the effect of the court's judgment on the defendant*—not an absent third party—that redresses the plaintiff's injury." *Id.* (emphasis in original).

"[P]laintiffs' real problem" is with the Compact "itself—its existence—and the economic consequences that its passage has visited or will visit on their businesses." *Support Working Animals, Inc. v. Governor of Fla.*, No. 20-12665, 2021 WL 3556779, at *4 (11th Cir. Aug. 12, 2021). Here, Plaintiffs have not even plausibly pled that such negative economic consequences will occur, but they nonetheless wish to block the sports betting provisions of the Compact. What Plaintiffs presumably wish to enjoin, as a practical matter, is the operation of the Compact itself insofar as it authorizes online sports betting. But the Secretary has no power to prevent the operation of the Compact, and its existence and operation are not attributable to the Secretary. *Compare Support Working Animals*, 2021 WL 3556779, at *4 (plaintiffs lacked standing to sue the Florida Attorney General because "[n]one of [the plaintiffs' 'real problem'] appears to be due to any past, present, or likely future conduct of the Attorney General").

In sum, the relief requested against the Secretary would do nothing to stop or even limit the online sports betting that the Compact authorizes, and therefore

would do nothing to redress the harms that Plaintiffs allege. Even if the Court were to enjoin the Secretary as requested,[9] the Compact "would remain on the books," online sports betting would remain authorized as provided in the Compact, and Plaintiffs "would remain in the same position they were in when they filed the operative complaint." *Support Working Animals*, 2021 WL 3556779, at *5.

F. The online sports betting component does not violate IGRA (Count I).

The main substantive flaw in the Complaint is Plaintiffs' contention that gaming activities are strictly bifurcated into what Indian tribes may do on Indian lands and what "private entities" may do on non-Indian lands, with no cross-over between them. Compl. ¶ 27. In other words, Plaintiffs contend that Indian tribes are never permitted to offer gaming activities to patrons who are physically located off their Indian lands. Compl. ¶¶ 41, 157, 161. This is not so.

The State and the Tribe have properly utilized IGRA's jurisdiction allocation provisions in the Compact to deem the gaming activity of patrons placing wagers while located physically outside Indian lands but within the state to take place on

[9] Plaintiffs also seek declaratory relief, but the Federal Declaratory Judgment Act itself does not create a cause of action. *See Musselman v. Blue Cross and Blue Shield of Alabama*, 684 F. App'x 824, 829 (11th Cir. 2017) ("Congress plainly intended [for] declaratory judgment to serve as a primary remedy available for any underlying cause of action."). "Declaratory relief is a procedural device which depends on an underlying substantive cause of action and cannot stand on its own." *Padilla v. Porsche Cars North America, Inc*., 391 F.Supp.3d 1108 (S.D.Fla. 2015) (quotation omitted). As explained in Section III-D, *supra*, Plaintiffs have no underlying cause of action.

the Tribe's Indian lands. 25 U.S.C. § 2710(d)(3)(C)(i), (ii). However, assuming *arguendo* that the online sports betting component involves gaming activities that are *off* Indian lands, despite the Compact and ratifying legislation dictating otherwise, Plaintiffs' claim under IGRA would still fail.

"IGRA does not govern gaming that occurs outside of Indian lands; a state's authority to regulate such gaming is 'capacious.'" *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1283 (11th Cir. 2015) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014)). Thus, IGRA does not prohibit gaming activity taking place outside Indian lands. Further, such legal gaming activity may be included in an IGRA compact when the necessary nexus to Class III gaming activity is met. *Chicken Ranch Rancheria of Me-Wuk Indians, et al. v. Newsom, et al.*, No. 1:19-cv-00024, 2021 WL 1212712, at *2 (E.D. Cal. Mar. 31, 2021), *appeal filed*, No. 21-15751 (9th Cir.). Even the Supreme Court has acknowledged that a state and a tribe are free to negotiate a compact that includes terms governing conduct or gaming outside Indian lands. *Bay Mills*, 572 U.S. at 796–97.

Here, the Compact and the ratifying legislation authorize the online sports betting component for patrons located on or off Indian lands. Nothing in IGRA prohibits this jurisdictional arrangement. Indeed, the Department of Interior recently described the new arrangement in Florida as "a modern understanding of how to regulate online gaming." *See* **EXHIBIT 1**, p. 8. "[E]volving technology,"

it wrote, "should not be an impediment to tribes participating in the gaming industry[,]" and therefore "IGRA should not be an impediment to tribes that seek to modernize their gaming offerings . . . ." *Id.* at 6. "The Department will not read restrictions into IGRA that do not exist." *Id.* at 8. Because IGRA does not prohibit the unique jurisdictional arrangement set forth in the Compact and the ratifying legislation, Count I would fail even if properly presented.

G. The online sports betting component does not violate the Wire Act (Count II).

Plaintiffs acknowledge that the Compact requires that online sports wagers placed by patrons physically located off Indian lands must be placed in Florida. Compl. at ¶ 119. They contend nonetheless that this form of sports betting would violate the Wire Act. Compl. ¶ 57. The substantive prohibition of the Wire Act provides as follows:

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1084(a).

Plaintiffs contend that the online sports betting component of the Compact implicates this criminal prohibition because it "can involve interstate commerce"

by virtue of the use of the Internet, mobile phone transmissions, and credit or debit card payment processors located in multiple states. Compl. ¶¶ 46–48. But under Plaintiffs' expansive reading of the statute, even *onsite* sports betting would violate the Wire Act because there can be no doubt that Internet transmissions and out-of-state payment processor transmissions are utilized in that context as well. Indeed, in Plaintiffs' apparent view, *all intrastate, onsite* casino operations would violate the Wire Act to the extent that they rely on the Internet or involve the electronic transmission of payments. The Wire Act cannot, and does not, extend that far.

Instead, the Wire Act is concerned with interstate gambling activity. *See*, *e.g.*, *U.S. v. Lyons*, 740 F.3d 702, 713 (1st Cir. 2014) ("The Wire Act prohibits *interstate gambling* without criminalizing lawful intrastate gambling or prohibiting the transmission of data needed to enable intrastate gambling . . . .") (emphasis added). Simply put, if the betting activity is legal on both ends of the transaction, the Wire Act is not implicated regardless of whether an Internet communication is "transmitted to a satellite" (Compl. at ¶ 47), and regardless of whether a payment processor is located in a third state.

Here, regardless of whether online sports bets are deemed to have been made on Indian lands where the servers are located—as the State and the Tribe have agreed through use of the IGRA jurisdiction allocation provisions—or deemed to have been made elsewhere in Florida, the placement and receipt of the wagers are

legal both in Florida and on the Tribe's lands by virtue of the execution of the Compact and the ensuing ratifying legislation. Accordingly, the Compact does not violate the Wire Act.[10]

Plaintiffs emphasize that the safe-harbor provision in Section 1084(b) does not apply because the Tribe does not fall within the statutory definition of a "State."[11] Compl. ¶¶ 51–53. But as with their UIGEA-based claim, there is no need for resort to statutory exceptions when the statutory prohibition is not implicated in the first place.

H. The online sports betting component does not violate the UIGEA (Count III).

The UIGEA prohibits "person[s] engaged in the business of betting or wagering" from "knowingly accept[ing]" various methods of payments or proceeds related to another person's participation in "unlawful Internet gambling." 31 U.S.C. § 5363. Section 5362(10)(A) of the UIGEA defines "unlawful internet gambling" to mean "to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where

[10] Indeed, it appears that no federal court has ever considered whether the Wire Act has any application to gaming activity involving Indian lands.

[11] Section 1084(b) provides as follows: "Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal."

such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made."

The online sports betting authorized by the Compact and the ratifying legislation does not fit within the statutory definition of "unlawful internet gambling," as it is legal where the bets would be placed and received. *See* Fla. Stat. § 285.710(13)(b) ("Games and gaming activities authorized under this subsection and conducted pursuant to a gaming compact ratified and approved . . . do not violate the laws of this state.").

The UIGEA itself does not make any betting illegal. *Interactive Media Entm't & Gaming Ass'n Inc. v. Atty. Gen. of U.S.*, 580 F.3d 113, 116 (3d Cir. 2009); *see also California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960, 965 (9th Cir. 2018) ("UIEGA does not make gambling legal or illegal directly."). Instead, the UIGEA "create[s] a system in which a bet or wager must be legal both where it is initiated and where it is received." *Iipay Nation of Santa Ysabel*, 898 F.3d at 965 (quotations omitted). The sports betting model authorized in the Compact complies with that system because the bets or wagers placed thereunder are now legal where initiated and received by virtue of the execution and ratification of the Compact.

Plaintiffs' claim that the Compact violates the UIGEA rests on the erroneous, blanket assertion that "sports betting is illegal in Florida." Compl. ¶ 70. By approving the Compact through the ratifying legislation, of course, the

Legislature has made sports betting legal in Florida to the extent authorized in the Compact and has explicitly stated that such gaming does not violate state law. *See also* Compl. ¶ 71 (acknowledging that "gambling in Florida is largely illegal" except when the Legislature says otherwise).

Plaintiffs rely on the Ninth Circuit's decision in *Iipay Nation*. As a preliminary matter, the *Iipay Nation* case was brought by the government (which the UIGEA authorizes to bring suit) rather than a private party. *Iipay Nation*, 898 F.3d at 963; *see also* Section III-D, *supra*. And importantly, California claimed more than just a violation of the UIGEA; it alleged that the tribe's operation of the bingo game at issue "violated the tribal-state compact between California and Iipay regarding Class III gaming[,]" *id.* at 963–64, and that it was illegal under state law. *California v. Iipay Nation of Santa Ysabel*, No. 14cv2724 AJB (NLS), 2014 WL 12526720, at *4 (S.D. Cal. Dec. 12, 2014).

In the critical portion of the Ninth Circuit's decision that distinguishes it from the case at bar, the court explained that the tribe had "admitted that patrons initiate bets or wagers within the meaning of the UIGEA while located in California, *where those bets are illegal*." *Id.* at 967 (emphasis added). The court concluded that even if the bingo game was "completely legal in the place where the bet is accepted, on Iipay's lands, the bets are not legal in the jurisdiction where they are initiated, in this case California[,]" and therefore that the tribe violated the

UIGEA by accepting payments over the Internet. *Id.* Here, by contrast, the State contends that the sports betting component authorized in the Compact and ratifying legislation is *legal* both on the Tribe's Indian lands and in Florida by virtue of the ratifying legislation and federal approval of the Compact. It follows that this model does not violate Florida law, and that the Tribe's operation of the sports betting component approved in the Compact cannot serve as the predicate for a violation of the UIGEA. *Cf. Iipay Nation*, 2014 WL 12526720, at *4 ("[T]he State alleges that the betting initiated off of Indian lands is illegal under state law" and therefore "serve[s] as a predicate for UIGEA relief.").

I. The online sports betting component does not violate the Equal Protection Clause (Count IV).

Finally, Plaintiffs claim that the online sports betting provisions of the Compact "discriminate against non-tribal persons on the basis of race and national origin." Compl. ¶ 230. Plaintiffs assert that differential treatment based on "tribal affiliation" is "presumptively unconstitutional and subject to strict scrutiny," citing a decision that says no such thing. Compl. ¶ 229 (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985)). To the contrary, the Supreme Court has recognized that "[l]iterally every piece of legislation dealing with Indian tribes . . . single[s] out for special treatment tribal Indians living on or near reservations." *Morton v. Mancari*, 417 U.S. 535, 553 (1974). Given the obvious implications, the Court has rejected the notion that preferences in favor of Indian tribes constitute

"racial" preferences and has "[o]n numerous occasions" upheld "legislation that singles out Indians for particular and special treatment." *Id.* at 553–55.

Although *Mancari* involved a due process claim, the same principle has led appellate courts to reject similar claims challenging state actions under the Equal Protection Clause. *See Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003) (tribe's monopoly on Class III gaming in California did not violate equal protection clause); *U.S. v. Garrett*, 122 F. App'x 628 (4th Cir. 2005) (rejecting equal protection defense and finding that gaming preferences given to tribes satisfy rational basis review). The courts have applied the following test: "When a state law applies in Indian country as a result of the state's participation in a federal scheme that 'readjusts' jurisdiction over Indians, that state law is reviewed as if it were federal law. If rationally related to both Congress' trust obligations to the Indians and legitimate state interests, the state law must be upheld." *Artichoke Joe's*, 353 F.3d at 734.

As the Ninth Circuit succinctly explained in *Artichoke Joe's*, the "very nature of a Tribal–State compact is political; it is an agreement between an Indian tribe, as one sovereign, and a state, as another." *Id.* The court found that a state law granting to Indian tribes the exclusive right to conduct class III gaming was enacted in response to, and echoed the classifications made in, IGRA. *Id.* at 736. Thus, employing rational-basis review, the court concluded that IGRA and the

compact were rationally related to fulfilling federal trust obligations, and the state law at issue bore a "rational connection" to the legitimate state interests of regulating vice activity and "promot[ing] cooperative relationships between the tribes and the State by fostering tribal sovereignty and self-sufficiency." *Id.* at 736–37.

In sum, "[p]references given to Indian tribes . . . are *not racial preferences*," *Garrett*, 122 F. App'x at 632, and the Compact's online sports betting provisions easily survive rational-basis review.

CONCLUSION

For the foregoing reasons, the Amended Complaint should be dismissed.

WHEREFORE, Defendants respectfully request that the Court grant this motion, dismiss the Amended Complaint, and enter judgment in Defendants' favor.

Respectfully submitted,

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LOCAL RULE 7.1(F) CERTIFICATION

Pursuant to Local Rule 7.1(F), I hereby certify that the foregoing memorandum contains 7,968 words, excluding the case style, signature block, this certification, and the certificate of service.

/s/ Raymond F. Treadwell
Raymond F. Treadwell

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served to all counsel of record through the Court's CM/ECF system on this 31st day of August, 2021.

/s/ Raymond F. Treadwell
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