IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

WEST FLAGLER ASSOCIATES, LTD., d/b/a MAGIC CITY CASINO, and BONITA-FORT MYERS CORPORATION, d/b/a BONITA SPRINGS POKER ROOM, *Plaintiffs,* vs. DEB HAALAND, in her official capacity as SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR and UNITED STATES DEPARTMENT OF THE INTERIOR, *Defendants.*	Case No. 1:21-cv-02192-DLF

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER VENUE OR IN THE ALTERNATIVE, STAY THIS PROCEEDING

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INTRODUCTION

Plaintiffs in this action challenge the Secretary of the Department of the Interior's unlawful approval of an Indian gaming compact that would cause irreparable harm to Plaintiffs and introduce online sports betting throughout the State of Florida. Plaintiffs brought this action in the U.S. District Court for the District of Columbia, which is where Defendants are located, where the decision was reached and published where Defendants conducted what they claim was a "thorough review", and where Defendants prepared and issued a 12-page, single-spaced letter purporting to justify and explain the decision. For these reasons, Defendants do not and could not dispute that the action was properly filed in this District. Nonetheless, they move to transfer the case to the U.S. District Court for the Northern District of Florida pursuant to 28 U.S.C. § 1404(a).

Defendants' Motion should be denied first because the case could not have been brought in the Northern District of Florida. The actions that gave rise to the challenged actions in this case (which is an APA record review case) took place in Washington, D.C. Nor can Plaintiffs' location be used as a basis for venue as Defendants claim because while Plaintiffs' businesses are located in "Florida," they are located in Southern Florida, not in the Northern District.

Nor can Defendants justify transfer regardless of whether this case could have been brought in that District. The District of Columbia is the Plaintiffs' choice of forum, which even Defendants acknowledge is entitled to a level of deference. Further, the District of Columbia was the most appropriate forum given that Defendants are located in this District, and the entirety of the challenged action and policy review took place here. Plaintiffs routinely challenge IGRA decisions involving compacts from all over the country in this Court, and the Department of Justice routinely fails even to object to such consideration. Plaintiffs appropriately chose to bring their lawsuit where the Defendants are located and took their challenged actions. By contrast, transfer would be severely disruptive, unduly delay consideration of Plaintiffs' claims and cause irreparable harm

both to Plaintiffs and the public by introducing unlawful online sports betting throughout the state of Florida.

Defendants present no justification for depriving Plaintiffs of their choice of forum, disrupting this litigation and causing these harms, and it is their burden to do so. Moreover, the nearly exclusive basis that Plaintiffs offered for transferring to the Northern District of Florida—a lawsuit against state defendants based on different actions related to the Compact—is effectively moot. Since Defendants filed their Motion to transfer, that lawsuit was dismissed without prejudice on standing grounds related to asserted limitations on the authority of the state defendants. *See* Ex. 1. Plaintiffs do not intend to amend.

Moreover, this case never warranted transfer in the first place. Defendants' claims of overlap and potential inconsistency in the two cases ignored from the start that the primary points of contention in the two lawsuits are case/defendant-specific. While Plaintiffs contend in both cases that online sports betting from anywhere in Florida does not take place "on Indian lands," that issue so obviously favors Plaintiffs that Federal Defendants have not even bothered to dispute it in their Summary Judgment Opposition. Instead, Defendants' Summary Judgment Opposition focuses on issues that are unique to the Federal Defendants and APA in this case. Those issues include the reviewability of deemed approvals under the APA, D.C. Circuit precedent addressing that issue, and the Secretary's contention that it had no obligation to examine state law under the APA. Likewise, the Tribe's Motion in this District presents different Rule 19 issues because of the unique relationship between the federal government and Native American tribes and the various cases addressing it.

Defendants thus have nothing to justify transfer, and it is their burden to justify disrupting the Plaintiffs' choice of forum. They do not account for the harms from delay, and never even

address the harm that would arise from the unlawful introduction of online gambling throughout an entire state. Further, they wrongly attempt to minimize the relevance of what took place in this District as "ministerial" while ignoring, among other things, the lengthy substantive letter they issued (the "DOI Letter") and the "thorough review" in which the D.C. officials purportedly engaged. *See* ECF 1-6.

Finally, Defendants' newfound commitment to local courts deciding purportedly local issues is demonstrably self-serving and *ad hoc* given the numerous instances where IGRA compact issues have been litigated in this District. Moreover, it ignores the clear national importance of the statutory and constitutional issues in this case, including whether IGRA may be used to introduce online off-reservation betting into states through compacts. The Secretary herself acknowledged the national importance of the issue in her letter, pointing to it as an issue that other states have addressed.

The interests of justice and judicial economy thus overwhelmingly require denial of Defendants' Motion. Indeed, when paired with Defendants' Opposition to Plaintiffs' Motion for summary judgment, or in the alternative, a preliminary injunction, it becomes clear that Defendants' Motion is entirely injustice-driven, aiming to avoid adverse D.C. Circuit precedent recognizing the reviewability of deemed approvals and seeking to foreclose review of a clearly unlawful action. But regardless of its motives, it does not come close to justifying transfer and must be denied.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On April 23, 2021, the State of Florida and the Seminole Tribe of Florida (the "Tribe") entered into a tribal-state compact (the "Compact") pursuant to the Indian Gaming Regulatory Act ("IGRA"). Although IGRA authorizes tribal gaming only to the extent such gaming occurs on Indian lands, the Compact purports to authorize the Tribe to conduct online sports betting from

anywhere in Florida, so long as wagers are received at servers located on the Tribe's reservations. The Compact does not admit that it authorizes such off-reservation gaming, however, both because IGRA does not permit it, and because such sports betting is illegal in Florida. Rather, the Compact "deems" wagers placed from outside Indian lands to occur at the location of the server on which they are received. Despite the facial illegality of the Compact, Florida's legislature ratified the Compact and simultaneously escalated sports betting in Florida from a Class II misdemeanor to a Class III felony.

Thereafter, Plaintiffs—the owners and operators of brick-and-mortar gaming facilities in Southern Florida and competitors of the Tribe—filed a lawsuit in the Northern District of Florida against Florida's Governor and the head of Florida's Department of Business and Professional Regulation ("DBPR"), which is responsible for implementing the Compact (The "Florida State Officials Action"). That action alleges among other things that the defendant state officials violated or will violate state and federal law by entering into and/or implementing the Compact. That action was dismissed for lack of standing on October 18, 2021, *see* Ex. 1,[1] and Plaintiffs do not intend to amend their complaint in that action.

As a check on the content of tribal-state gaming compacts, IGRA provides that gaming compacts of the type at issue here are valid only if approved by the Defendant Secretary. "The Secretary, however, is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming ***on Indian lands of such Indian tribe***." 25 U.S.C. § 2710(d)(8)(A) (emphasis added). IGRA also provides that the Secretary must disapprove any compact that violates either IGRA or any other federal statute. 25 U.S.C. § 2710(d)(8)(B).

[1] The Court in the Florida State Officials Action gave Plaintiffs seven days to seek leave to amend their complaint in that action and defendants seven days to respond. Order, *West Flagler Assocs. Ltd. v. DeSantis*, No. 4:21-cv-270-AW-MJF (N.D. Fla.), Ex. 1.

On or around June 22, 2021, Florida submitted the Compact to the Secretary for approval. By not acting within forty-five days of submission, the Secretary approved the Compact on August 5, 2021. Contrary to Defendants' assertions here, that approval process was far from ministerial. Indeed, Defendants issued the DOI Letter the following day from the DOI's offices in Washington, D.C. that explained the Secretary's decision in detail. ECF 1-6.

Shortly thereafter, Plaintiffs filed the present suit in this District, challenging the Secretary's approval of the Compact as arbitrary and capricious, ultra vires and unlawful under the Administrative Procedure Act. In addition, because the Secretary approved the grant of a state-wide commercial monopoly to the Tribe, where such commercial activity is criminal for all other persons located in Florida, Plaintiffs alleged that the Secretary violated the Equal Protection guarantee of the Fifth Amendment to the U.S. Constitution. ECF 1 ¶¶ 136-144.

Although Plaintiffs chose this District, Defendants are resident in this District and all actions relating to the Secretary's approval of the Compact occurred within this District, Defendants nonetheless have moved to transfer this litigation to the Northern District of Florida, where no parties are located and none of the conduct at issue occurred.

ARGUMENT

The threshold inquiry under the statute governing transfer, 28 U.S.C. § 1404(a), is whether the case *might have been brought* in the district where transfer is sought. *Hoffman v. Blaski*, 363 U.S. 335, 336, 342-43 (1960) (holding that district court is not "empowered by s 1404(a) to transfer the action, on the motion of the defendant, to a district in which the plaintiff did not have a right to bring it"). If the movant satisfies this threshold, a court will transfer a case only if transfer supports convenience and the interests of justice. *See Bederson v. United States*, 756 F. Supp. 2d 38, 45-56 (D.D.C. 2010) (explaining this two-step process). Defendants have the "heavy burden" to prove that the Court should disturb Plaintiffs' chosen forum and transfer the case to the Northern

District of Florida. *Katopothis v. Windsor-Mount Joy Mut. Ins. Co.*, No. 14-0380 (ABJ), 2014 WL 12929446, at *2 (D.D.C. Nov. 12, 2014) (describing defendant's burden as "heavy"); *Carpenters Indus. Council v. Jewell*, No. 13-0361 (RJL), 2014 WL 12776413, at *1 (D.D.C. Jan. 30, 2014). Defendants have not met this heavy burden, and their Motion must be denied.

I. PLAINTIFFS COULD NOT HAVE BROUGHT THIS SUIT IN THE NORTHERN DISTRICT OF FLORIDA.

Defendants' Motion first fails because Plaintiffs could not have brought this suit in the Northern District of Florida. Pursuant to 28 U.S.C. § 1391(e)(1), a civil action against a federal defendant may be brought only in a judicial district in which:

> … (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action.

Here, neither Plaintiffs nor Defendants reside in the Northern District of Florida and no real property is at issue. ECF 1 ¶¶ 10-14. Accordingly, venue is proper in the Northern District of Florida only if a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in that district.

To determine "where a substantial part of the underlying events occurred," courts "often focus on the relevant activities of the defendant." *Covey Run, LLC v. Wash. Cap., LLC*, 196 F. Supp. 3d 87, 99 (D.D.C. 2016) (quoting *Abramoff v. Shake Consulting, L.L.C.*, 288 F. Supp. 2d 1, 4 (D.D.C. 2003)). In the District of Columbia Circuit, "the measure of the contacts giving rise to where the claim arose is 'ascertained by advertence to events having *operative* significance in this case, and a commonsense appraisal of the implications of those events for accessibility to witnesses and records.'" *Id.* at 100 (quoting *Sharp Elec. Corp. v. Hayman Cash Reg. Co.*, 655 F.2d 1228, 1229 (D.C. Cir. 1981)) (emphasis added); *Great Socialist People's Libyan Arab Jamahiriya v.*

Miski, 496 F. Supp. 2d 137, 142 (D.D.C. 2007) (same).[2] Accordingly, in cases brought under the APA, "courts generally focus on where the decisionmaking process occurred to determine where the claims arose." *Ctr. for Biological Diversity v. Ross*, 310 F. Supp. 3d 119, 125 (D.D.C. 2018) (discussing where the claims arose in the context of a motion to transfer venue, which the court denied) (quoting *Nat'l Ass'n of Home Builders v. EPA*, 675 F. Supp. 2d 173, 179 (D.D.C. 2009)). Here, Plaintiffs' claims arose in the District of Columbia—not the Northern District of Florida. The Defendants' approval, and the consideration thereof, all occurred in this District, where Defendants are located, where the DOI Letter was issued, and where the asserted "thorough review" that letter references took place. No federal action occurred in Florida, which sets this case apart from others cited by Defendants in support of their Motion. *See, e.g., New Hope Power v. United States Army Corp. of Eng'rs.*, 724 F. Supp. 2d 90, 95 (D.D.C. 2010); *Trout Unlimited v. U.S. Dep't of Agric.*, 944 F. Supp. 13, 17 (D.D.C. 1996); *DeLoach v. Philip Morris Companies, Inc.*, 132 F. Supp. 2d 22, 25 (D.D.C. 2000).

Defendants incorrectly focus on the actions of Governor DeSantis in executing the Compact and the authority of the DBPR to implement the Compact. They also attempt to minimize Defendants' role in this APA controversy to the purportedly "ministerial" act of publication of the approval of the Compact in in the Federal Register. ECF 26 at 9. Defendants thus ignore the different operative events in the two lawsuits arising from the different roles played by the

[2] *Covey Run* was brought under 28 U.S.C. § 1391(b), which governs venue in civil actions in general (i.e., when defendants are not United States officers or agencies). Under Section 1391(b)(2), venue lies in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred…." This standard is the same as the standard under 28 U.S.C. § 1391(e)(1)(B), and case law, including *Covey Run*, which discusses the general venue rule, is applicable here. *See Gordon v. Napolitano*, 2011 WL 13370124, at *4 (D.D.C. Nov. 15, 2011) (noting that Section 1391(b)'s substantial events requirement "is identical to section 1391(e)'s substantial event requirement") (citing *Modaressi v. Vedadi*, 441 F. Supp. 2d 51, 57 (D.D.C. 2006)).

respective defendants. The "operative event" giving rise to Plaintiffs' claims in this APA lawsuit is Defendants' approval of the Compact. *Covey Run, LLC*, 196 F. Supp. 3d at 99-100. No "operative events" relative to this APA case occurred in the Northern District of Florida and no substantial part of the events or omissions giving rise to the claims occurred there.

Moreover, in suggesting that the D.C. events were solely ministerial, Defendants ignore the centrality of final agency action to an APA action and the various other parts of the decisionmaking process that occurred here. In particular, Defendants never even address the twelve-page single-spaced letter that Defendants issued from Washington, D.C. the day following the conclusion of the 45-day period. As in Defendants' cases, the DOI Letter reflects extensive analysis and commentary by Defendants relating to this dispute *and* that such analysis and commentary occurred here. *See generally* ECF 1-6. The "decisionmaking" and "operative event" of this litigation thus occurred in Washington D.C., and so the lawsuit could not have been brought in the Northern District of Florida. *See Ctr. for Biological Diversity*, 310 F. Supp. 3d at 125. The Court therefore must deny Defendants' Motion to Transfer on this basis alone.

II. TRANSFERRING THIS CASE TO THE NORTHERN DISTRICT OF FLORIDA WOULD CAUSE SEVERE DISRUPTION, DELAY, AND RESULTING IRREPARABLE HARM AND IS OTHERWISE UNWARRANTED AND NOT IN THE INTEREST OF JUSTICE.

If the Court determines that this case could have been brought in the Northern District of Florida, it should transfer the case pursuant to 28 U.S.C. § 1404(a) *only if* "the balance of convenience of the parties and witnesses and the interest of justice" support transfer. *Bederson*, 756 F. Supp. 2d at 46. In reaching this decision, courts weigh a set of private and public interest factors to determine whether a case should be transfer for convenience and justice. Ultimately, courts analyze transfer on a case-by-case basis, and the decision to transfer or not transfer is within the Court's discretion. *Bederson,* 756 F. Supp. 2d at 47. Applying these factors, this District

routinely reaches the merits of IGRA cases involving tribes and Indian land throughout the country. This occurs generally without objection from Defendants and the Department of Justice, including at least nine times over the past decade.[3] It also was unsuccessful in transferring in two out of the three instances where Defendants did object, and the one instance where it succeeded involved a longstanding local dispute where the transferee court had demonstrable expertise.[4]

It is Defendants' burden to justify disrupting the Plaintiffs' choice of forum, and they do not come close to doing so here. Instead, the various factors support a denial of Defendants' Motion.

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[3] *See Native Village of Eklutna v. U.S. Dep't of Int.*, No. 19-CV-2388, 2021 WL 4306110, at *1 (D.D.C. Sept. 22, 2021) (Indian lands determination in Alaska); *E. Band of Cherokee Indians v. United States Dep't of the Interior*, No. CV 20-757, 2021 WL 1518379 (D.D.C. Apr. 16, 2021) (approval to take North Carolina parcel into trust for building of casino); *Stand Up for California! v. U.S. Dep't of Interior*, 410 F. Supp. 3d 39 (D.D.C. 2019) (decision to acquire land in trust for tribe in California to build casino); *Fort Sill Apache Tribe v. Nat'l Indian Gaming Comm'n*, 317 F. Supp. 3d 504 (D.D.C. 2018) (ruling the Tribe could not engage in gaming on particular land in New Mexico); *Amador Cty. v. S.M.R. Jewell*, 170 F. Supp. 3d 135, 137 (D.D.C. 2016); *Amador Cty. v. S.M.R. Jewell*, 170 F. Supp. 3d 135, 137 (D.D.C. 2016) (DOI deemed approval in California); *Confed. Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, 75 F. Supp. 3d 387, 392 (D.D.C. 2014) (gaming complex in Washington); *City of Duluth v. Nat'l Indian Gaming Comm'n*, 7 F. Supp. 3d 30, 33 (D.D.C. 2013) (notice of violation issued by NIGC related to gaming facility in Minnesota); *Bd. of Comm'rs of Cherokee Cty., Kan. v. Jewel*, 956 F. Supp. 2d 116, 119 (D.D.C. 2013) (requested invalidation of land acquisition for casino on borders of Kansas, Missouri, and Oklahoma); *Neighbors of Casino San Pablo v. Salazar*, 773 F. Supp. 2d 141 (D.D.C. 2011) (determinations concerning tribal gaming in San Pablo California).

[4] *Forest Cty. Potawatomi Cmty. v. United States*, 330 F. Supp. 2d 269, 274 (D.D.C. 2018) (denying motion to transfer in case concerning DOI disapproval of amendment to gaming compact in Wisconsin); *Stand Up for California! v. U.S. Dep't of Interior*, 919 F. Supp. 2d 51, 65 (D.D.C. 2013) (denying motion to transfer venue in challenging DOI's deemed approval of Compact between North Fork Tribe and California and reaching merits of request for preliminary injunction); *Villa v. Salazar*, 933 F. Supp. 2d 50, 52 (D.D.C. 2013) (granting transfer involving issues related to restored tribe status where a significant part of the federal action occurred in the district and two other cases challenging the same highly complicated regulatory scheme agency decision were pending).

A. The Private Interest Factors Support Denying Transfer.

The private interest factors include: (1) the plaintiff's choice of forum; (2) the defendant's choice of forum; (3) where the claim arose; (4) the convenience of the parties; (5) the convenience of the witnesses; and (6) the ease of access to the sources of proof. *Bederson*, 756 F. Supp. 2d at 47-50. Each of these factors weighs against transfer here.

1. Plaintiffs' Choice of Forum

Plaintiffs' choice of forum is "a paramount consideration that is entitled to great deference in the transfer inquiry." *Carpenters Indus. Council*, 2014 WL 12776413, at *2 (denying motion to transfer venue) (quoting *Renchard v. Prince William Marine Sales, Inc.*, 28 F. Supp. 3d 1, 11 (D.D.C. 2014)); *Bederson*, 756 F. Supp. 2d at 47, 50 (giving heftier deference to plaintiff's choice of forum than defendant's). Plaintiffs chose to file this suit in the District of Columbia where the Defendants are located and made the challenged decision, and the Court should give great weight to this preference.

Defendants assert that less deference is owed where a plaintiff is not a resident of the forum. Their own authority makes clear that some deference is almost always afforded and that where less deference was afforded, the operative events had only a limited connection to the forum. *See Trout Unlimited*, 944 F. Supp. at 17 ("The court must afford some deference to the plaintiff's choice of forum" even if mitigated); *New Hope Power Co.*, 724 F. Supp. 2d at 95 (granting some deference, though less deference, to plaintiffs where they were not residents of the District of Columbia and the action had "insubstantial" ties to the district); *Greene v. Nat'l Head Start Ass'n*, 610 F. Supp. 2d 72, 75 (D.D.C. 2009) (granting less deference where "a plaintiff is not a resident of the forum and most of the relevant events occurred elsewhere." (internal quotations omitted)); *Miller v. Insulation Contractors, Inc.*, 608 F. Supp. 2d 97, 102, 104 (D.D.C. 2009) (denying motion to transfer even though plaintiff was not a District of Columbia resident); *Louis v. Hagel*, 177 F.

Supp. 3d 401, 407 (D.D.C. 2016) (denying motion to transfer, because "even though the Plaintiff does not live in this district, his choice of forum is entitled to deference because his claims have a connection to this forum and relevant events occurred here").

Defendants cite several cases to support their argument that involvement by defendant federal agencies is not determinative here. They ignore that in those cases there was considerable federal activity within the transferee districts, including specifically by the agency field offices in the relevant districts in two of the cases. *See Shawnee Tribe v. United States*, 298 F. Supp. 2d 21, 25-26 (D.D.C. 2002) (finding General Service Administration's field offices in Texas and Washington State were "actively involved" in the possible disposal of the property in dispute); *Alaska Wilderness League v. Jewell*, 99 F. Supp. 3d 112, 113, 115 (D.D.C. 2015) (finding that the decisionmaking process occurred in Alaska because "As the chief of the Fish and Wildlife Service's Marine Mammals Management Program explains, "all of the substantive work leading to the publication of the [incidental-take regulation] was done in Alaska."). Defendants make no such claim here.

2. Defendants' Choice of Forum

Defendants, both residents of the District of Columbia, seek to transfer this case to the Northern District of Florida, where neither they nor Plaintiffs reside. Moreover, both Plaintiffs' and Defendants' attorneys are located in this District. The Court must grant Defendants' preference less deference, because it is not their home forum. *Bederson*, 756 F. Supp. 2d at 48 ("diminished deference" granted to defendant who seeks to transfer case to forum where [she] does not reside). In evaluating a defendant's choice of forum, courts also will examine whether the proposed forum aligns with the situs where the claim arose. *Id*. (defendant's choice of forum "does not overwhelmingly weigh in favor of transfer" because defendant is not a resident of the forum where he seeks to transfer the case and the events underlying the claim arose both in plaintiff's and

defendant's preferred forums). As articulated *infra* at Section 2.A.3, although Florida's execution and ratification of the Compact occurred in the Northern District of Florida, the key events for this APA case occurred in the District of Columbia. The Court therefore should give little deference to Defendants' choice of the Northern District of Florida.

3. Where the Claims Arose

In APA cases "courts generally focus on where the decisionmaking process occurred to determine where the claims arose." *Ctr. for Biological Diversity*, 310 F. Supp. 3d at 125 (quoting *Nat'l Ass'n of Home Builders v. EPA*, 675 F.Supp.2d 173, 179 (D.D.C. 2009)). The decisionmaking Plaintiffs challenge here—Defendants' consideration and approval of the Compact—arose exclusively in the District of Columbia. This factor therefore weighs heavily in favor of keeping the case in this District.

As an initial matter, Defendants' analysis loses all credibility from the outset because they do not even address the DOI letter or the purported "thorough review" it references.

Contrary to Defendants' assertions, the location of the negotiation and execution of the Compact and Implementing Law by state and tribal officials is not part of the analysis of where the claims arose. Defendants cite *Center for Environmental Science* to argue that their residence in this District is "overshadowed" by the "culmination of decisions that were made and carried out in Florida" that led to the Compact and Implementing law. ECF 26 at 19, 20, citing *Ctr. for Env't Sci., Accuracy & Reliability v. Nat'l Park Serv.*, 75 F. Supp. 3d 353, 358 (D.D.C. 2014)). Plaintiffs there challenged a decision by a National Park Service project located in California—to divert fresh water in California which allegedly jeopardized endangered fish species—and approvals of that decision made in this District. The court held the claims arose in California because the decisions made in this District concerned a *federal* "government project in California that affect[s] the diversion of water flows in rivers in California, among other reasons." *Ctr. for Env't Sci.*, 75

F. Supp. 3d at 357; *see also Pac. Mar. Ass'n v. N.L.R.B.,* 905 F. Supp. 2d 55, 61, 63 (D.D.C. 2012) (cited by *Center for Environmental Science* for the proposition that transfer was appropriate where decisionmaking of D.C. officials was "overshadowed by the fact that their decisions were based on work done by government employees in Oregon") (quoting *Airport Working Grp. of Orange Cnty., Inc. v. U.S. Dep't of Def.*, 226 F. Supp. 2d 227, 230 (D.D.C.2002)). The court also was heavily persuaded by the significant local controversy concerning the scarcity of water in California. *Ctr. for Env't Sci.*, 75 F. Supp. 3d at 359.

Unlike in *Center for Environmental Science*, Plaintiffs here challenge a decision entirely within the purview of Defendants that was made solely in Washington D.C., with no allegation of local federal involvement in the Northern District of Florida. Under such circumstances, this factor weighs in favor of maintaining venue in this District. *See Garcia v. Acosta*, 393 F. Supp. 3d 93, 109 (D.D.C. 2019) (Plaintiffs' challenge of Secretary's policy and practice occurred in this District, because "the Department is headquartered here, the senior officials responsible for setting national policy are presumably located here" and "Plaintiffs' claims do not turn on the Chicago National Processing Center's adjudication of any specific [visa] application."); *see also Ctr. for Biological Diversity*, 310 F. Supp. 3d at 125-26 (plaintiffs' APA claim "largely arose in Massachusetts," because the biological opinion that was being challenged was entirely prepared and drafted by biologists in a regional office in the State).[5]

[5] *See also Wilderness Soc'y v. Babbitt*, 104 F. Supp. 2d 10 (D.D.C. 2000) ("where the claims arose" factor is inconclusive because "DOI conducted its research in Alaska, and the disputed FEIS was drafted in Alaska," but the "Secretary signed the Record of Decision here in the District of Columbia and at least some policy review occurred at DOI's Washington headquarters"); *see also* 15 Wright & Miller, *Fed. Prac. & Proc.* § 3848 (4th ed.) ("Without more, it is not enough . . . merely to show that the claim arose elsewhere").

4. Convenience of the Parties

Convenience of the parties supports maintaining this case in this District. Defendants reside here, and Plaintiffs have chosen to be here. And although certainly not the primary driver, it also is relevant that this District is the most convenient for Plaintiffs' and Defendants' counsel. *Staley v. Gruenberg*, No. 12-391 (RMC), 2012 WL 13036857, at *2 (D.D.C. May 4, 2012) (in case where venue was improper in Washington D.C., granting transfer to the Eastern District of Virginia because plaintiff's counsel is in close proximity to that district and defendant's counsel is located in Arlington).

Defendants' arguments to the contrary are unavailing. First, Defendants argue that because Plaintiffs reside in Florida, they will not be inconvenienced by transfer to the Northern District of Florida. ECF 26 at 19. But a defendant "cannot assert plaintiff's inconvenience in support of a motion to transfer under 28 U.S.C. § 1404(a)." *Bederson*, 756 F. Supp. 2d at 48-49 (quoting *Wireless Consumers All., Inc. v. T-Mobile USA, Inc.*, 2003 WL 22387598, at *4 (N.D. Cal. Oct. 14, 2003)) (holding "the Court is not persuaded by [defendant's] appeal to Plaintiff's convenience" because "[e]ven assuming, arguendo, that litigating this case in the District were inconvenient for Plaintiff, Plaintiff has elected to endure this inconvenience, and as such this fact does not weigh in favor of transferring venue"). Moreover, this argument assumes that the State of Florida is a single judicial district, or at a minimum, that it is convenient for Southern Florida businesses to litigate in Tallahassee. This is not the case. Plaintiffs reside and conduct their business in the Southern District of Florida, not the Northern District.

Defendants also argue that convenience supports transfer because the parties to the Compact are all located in Florida. ECF 26 at 17. But neither is party to this litigation. Although the Tribe has moved to intervene for a limited purpose, that Motion should be denied, and even if

it is granted, it is solely for the purpose of filing a motion by counsel located in Washington, DC that already is scheduled for hearing on November 5. ECF 22.

Finally, Defendants allege that their residency in this district is "overshadowed" by the fact that the Compact and the ratifying legislation both occurred in Florida. ECF 26 at 19-20. As discussed in Section II.A.3 above, however, the operative actions by the Defendants took place in the District of Columbia.

5. Convenience of the Witnesses and Ease of Access to the Sources of Proof

Plaintiffs and Defendants generally agree that because this dispute is purely legal and can be decided on the law, the "convenience of the witnesses" and "ease of access to the sources of proof" factors likely are not relevant to the transfer analysis. *See*, *e.g.,* ECF 26 at 19 n.6 (arguing the fifth and sixth private interest factors "should not be implicated here"). *See also Stockbridge-Munsee Community v. United States*, 593 F. Supp. 2d 44, 47-48 (D.D.C. 2009) ("Plaintiff and Defendants agree that this case is to be decided based on the administrative record; therefore, convenience to witnesses is a non-factor. Given that APA challenges are limited to the administrative record compiled by the agency, neither does 'the ease of access to sources of proof' constrain the Court from transferring the case.") (internal citations and quotations omitted); *Sierra Club v. Flowers*, 276 F. Supp. 2d 62, 69 (D.D.C. 2003) (location of witnesses "not a significant factor" in action that involves administrative review that the court likely will determine on the papers); *New Hope Power Co.*, 724 F. Supp. 2d at 96-97 (finding these two convenience factors neutral because parties conceded that judicial review generally is limited to the administrative record and neither side argue these factors favor them).

Although the pending Motion for Summary Judgment here does not turn on the administrative record, the location of the administrative record in the District of Columbia weighs

slightly in favor of maintaining this case here. *See Sierra Club*, 276 F. Supp. 2d at 69 (finding the "location of the administrative record … carries some weight in transfer determinations").

Further, on the issue of standing raised by Defendants at the same time as the current Motion, the only witnesses challenged by Defendants are Plaintiffs' own Chief Operating Officer (who has chosen this District for this litigation), and Plaintiffs' expert Jonathan Chavez, who lives in Massachusetts. *See* ECF 25, at 10-11, 13-14; ECF 19-3; ECF 19-4, ¶ 1.[6] In the exceedingly unlikely circumstance that witnesses were needed on the merits of the case, they would come from the ranks of Defendants' employees who work in this District, not from Florida or Tribal officials. Accordingly, Defendants' argument that the "witnesses would likely reside in Florida" misses the mark. *Cf.* ECF 26 at 19 n.6.

B. THE PUBLIC INTEREST FACTORS SUPPORT DENYING TRANSFER.

The public interest factors include: (1) the local interest in making local decisions regarding local controversies; (2) the relative congestion of the transferee and transferor courts; and (3) the potential transferee court's familiarity with the governing law. *Bederson*, 756 F. Supp. 2d at 50-53.

The public interest factors all weigh against transfer here.

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[6] Plaintiffs also submitted the testimony of Luis Padron, who conducted the survey designed and analyzed by Mr. Chavez, but Defendants do not challenge Mr. Padron's testimony. ECF 25 at 11. In any event, Mr. Padron is located in Miami, in the Southern District of Florida, and not in the Northern District of Florida. ECF 19-2, ¶ 4; ECF 19-2 Ex. 1 at 11. Further, as the past 18 months have demonstrated, remote depositions and hearings are now routine and provide courts and litigants with more than adequate ability to reach witnesses everywhere.

1. Local Interest in Making Local Decisions Regarding Local Controversies

Defendants purport to rely on the importance of having local federal courts decide local issues. As an initial matter, Defendants routinely do not seek transfer of IGRA disputes from case involving Indian gaming compacts around the country.

Further, the "central question" in deciding the 'local interest' factor is not whether the people of Florida "have an interest—even a strong one—in the outcome of this case. Instead, the Court must determine whether this is a *question[] of national policy or national significance*." *Ctr. for Biological Diversity*, 310 F. Supp. 3d at 127 (alteration in original) (emphasis added) (internal citations omitted) (quoting *Oceana, Inc. v. Pritzker*, 58 F. Supp. 3d 2, 7 (D.D.C. 2013)). The present case presents multiple questions of national importance. *First*, it addresses whether IGRA's "on Indian lands" language authorizes compacts that introduce online gaming statewide, or whether that limitation (and federal statutory limitations generally) may be circumvented by "deeming" them satisfied. Defendants can hardly deny the importance of this issue when the DOI Letter comments on it.[7] *See Stand Up for Cal. v. U.S. Dep't of the Interior*, 919 F. Supp. 2d at 65 ("The controversy in this case also has national implications regarding the scope of the Secretary's authority to make such acquisitions and the standard by which such acquisition decisions should be judged").

Second, this case addresses what constitutional standard applies under the Equal Protection guarantee of the Fifth Amendment in granting exclusive gambling franchises to Indian tribes, not just on Indian lands but also online and statewide. This is a civil rights question of national scope,

[7] The DOI letter states that "Multiple states have enacted laws that deem a bet to have occurred at the location of the servers, regardless of where the player is physically located in the state." DOI Letter at 8, & 8 n.15 (citing Mich. Comp. Laws Ann. § 432.304(2); N.J. Stat. Ann. § 5:12-95.20; R.I. Gen. Laws Ann. § 42-61.2-1(16); W. Va. Code Ann. § 29-22E-15(f)).

and the essentially un-cabined deference called for by Defendants would apply even beyond gambling to other exclusive economic privileges, both online and otherwise.

Third, Defendants' arguments for preventing a review on the merits also are issues of national importance. By preventing judicial review, they threaten to make Defendants complicit in approving a scheme under which millions of persons as well as federally regulated institutions through which their bets are made may violate criminal statutes – UIGEA and the Wire Act – by transmitting wagers over the internet from a jurisdiction that outlaws such wagers to a jurisdiction that permits them, *see* ECF 19 at 30-34.

Courts consider a range of factors to determine whether a controversy is local, including, "where the challenged decision was made; whether the decision directly affected the citizens of the transferee states; the location of the controversy, whether the issue involved federal constitutional issues rather than local property laws or statutes; whether the controversy involved issues of state law, whether the controversy has some national significance; and whether there was personal involvement by a District of Columbia official." *Otay Mesa Prop. L.P. v. U.S. Dep't of Interior*, 584 F. Supp. 2d 122, 126 (D.D.C. 2008).

Applying this test here makes clear that this case does not concern a mere local controversy. As previously discussed, the challenged decision was made in this District. In addition, as shown in the issues identified above, this case does not involve local property laws or statutes, but federal criminal statutes and the U.S. constitution. *See Forest Cty. Potawatomi Cmty. v. United States*, 169 F. Supp. 3d 114, 118 (D.D.C. 2016) (case had "national implications" by raising questions regarding "the scope of a State's authority under the IGRA to agree to certain provisions in gaming compacts"); *Stand Up for Cal. v. U.S. Dep't of the Interior,* 919 F. Supp. 2d at 65 (relying on national implications of issue presented concerning the scope of the Secretary's authority);

Wilderness Soc'y, 104 F. Supp. 2d at 17 (denying motion to transfer because "DOI's decision to open the National Petroleum reserve in Alaska to oil and gas leasing is a decision of national significance," because the Secretary was involved in the decision, and because "disputed DOI decision" affects "a national energy reserve," among other reasons); *Ctr. for Biological Diversity*, 310 F. Supp. 3d at 127-28 (denying transfer to Massachusetts of challenge to biological opinion relating to the effects of the lobster fishery on a whale population where the case involved a national controversy—the lobstering industry along the East Coast and the threat to a far-ranging endangered species); *Garcia*, 393 F. Supp. 3d at 109 (denying transfer of case challenging Secretary of Labor's alleged policy and practice of certifying employers to hire immigrant workers at lower than prevailing wages because the "core of Plaintiffs' remaining claims challenges a Department-wide policy and practice").[8]

Defendants assert in a footnote that the issues raised by this case are not of national importance because they apply to a Florida compact. ECF 26 at 16 n.16. But the law generally, the cases discussed above, and the legal questions presented by this case do not turn on issues unique to Florida, but rather have significant national implications. Defendants also ignore the numerous cases where this Court has considered IGRA cases from all around the country with no objection from the Department. Defendants also assert that courts in jurisdictions other than Washington, D.C. can address issues of national importance. *Id*. But they therefore miss the point that it is their

[8] By contrast, the cases cited by Defendants concerned local property interests and species. *See e.g., Alaska Wilderness League*, 99 F. Supp. 3d at 117-18 (controversy looked "local at every turn" and challenge to regulation that applied only in the sea around Alaska's territory and only to a species in Alaska where the District of Alaska had "significant (and recent) experience weighing the federal government's interest in the protection of walruses") (alterations in original); *Gulf Restoration Network v. Jewell*, 87 F. Supp. 3d 303, 316 (D.D.C. 2015) (concerning restoration project to be located in the State of Alabama's Gulf State Park); *Alabama v. U.S. Army Corps of Eng'rs*, 304 F. Supp. 3d 56, 67 (D.D.C. 2018) (decision addressing local water supply where the federal decision "overwhelmingly occurred in the Corps' offices in George and Alabama").

burden to justify transfer, and that the national issues further undermine Plaintiffs' attempt to portray the dispute as a uniquely localized controversy.

2. Relative Congestion of the Transferee and Transferor Courts

Under this factor, courts perform a comparative analysis of congestion in the transferee and transferor districts, reviewing information such as median filing times to disposition in the districts and number of filings received in the districts. This factor and its overall purpose (facilitating expeditious case resolutions) unequivocally favor denying transfer. A hearing date is set in this case for November 5, when the Court will have fully briefed dispositive motions for two cases. It would foster pointless disruption and delay to transfer the cases and also would cause irreparable harm given the impending deadline for commencing statewide online gambling.

Further, the traditional metrics addressed under this factor likewise favor denial of transfer. *See Smith v. Yeager*, 234 F. Supp. 3d 50, 60 (D.D.C. 2017) (median filing-to-disposition time in DDC was 8.0 months in 2017 compared to 5.2 months in Eastern District of Virginia, which favored transfer). This year and the past several years, median filing times to disposition in civil cases has been higher in the Northern District of Florida. As of June 30 2021, the median filing time to disposition of civil cases in the District of Columbia was 4.8 months compared to 5.1 months in the Northern District of Florida, which weighs very slightly against transfer. Fed. Cts. Mgmt. Stats., *National Judicial Caseload Profile*, at 2, 90 (June 30, 2021) https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2021.pdf.[9]

[9] Plaintiffs present this longer term perspective, because the COVID-19 pandemic likely has had an important impact on times to disposition, and data further into the past is a better reflection of future congestion levels in the respective districts as courts begin returning to normal. This perspective shows substantially more congestion in the Northern District of Florida. Median time from filing to disposition in civil cases in the District of Columbia was 6.0 months as of June 30, 2018; 5.6 months as of June 30, 2019; and 5.3 months as of June 30, 2020. *Id*. Median time from

Further, in the District of Columbia as of June 30, 2021 there were 4,666 filings and 396 cases pending per judgeship. *Id*. The Northern District of Florida is substantially more congested as of that same date, with 106,754 filings and 61,353 cases pending per judgeship. *Id*. This data all weighs against transfer.

Defendants do not apply the standard 'congestion' analysis in their Motion and instead cite *Villa v. Salazar*, 933 F. Supp. 2d 50, 56 (D.D.C. 2013) to argue that the 'congestion' factor is neutral here because the Northern District of Florida is hearing the Florida State Officials Action already, "and will be doing so without regard to whether this Court retains this case." ECF 26 at 17 (quoting *Villa*, 933 F. Supp. 2d at 57). This assertion both pre-dates the dismissal of the Florida litigation and misrepresents *v*, in which the transferee court was reviewing the same administrative record and the court found that "[t]here is no reason to have two courts reviewing the same administrative record without extraordinary need." *Id*. at 57. The Florida State Officials Action does not seek judicial review of Defendants' agency decision and the Northern District of Florida will not be reviewing the agency record, rendering *Villa* inapposite to this case.

3. Potential Transferee Court's Familiarity with the Governing Law and Pendency of Related Actions

Defendants identify no comparative familiarity that the transferee court has on this issue. This Court is best suited to hear Plaintiffs' challenge to Defendants' approval of the Compact under the Administrative Procedure Act and the equal protection guarantee of the Due Process Clause of the Fifth Amendment. The District of Columbia regularly considers IGRA cases involving tribes from all over the country. *See supra* n.3. Further, Defendants have not alleged that the Northern District of Florida "has any unique expertise in adjudicating APA challenges of

filing to disposition in civil cases in the Northern District of Florida was 7.7 months as of June 30, 2018; 6.8 months as of June 30, 2019; and 11.3 months as of June 30, 2020. *Id*.

this type." *Garcia*, 393 F. Supp. 3d at 109-10. The 'governing law' factor therefore supports maintaining this case in the District of Columbia.

Defendants assert that Plaintiffs' claims implicate state law issues but ignore the nature of those issues, the lack of any comparative expertise on the issue in question, and their own arguments. Plaintiffs' IGRA claim regarding gaming "on Indian lands" requires no inquiry into state law. Moreover, the state law issue presented by UIGEA and the Wire Act defines its only relevant exception here in terms of the *federal law of IGRA*.[10] In addition, Defendants' Opposition to Plaintiffs' Motion for Summary Judgment, ECF 25, cites no such law and focuses entirely on *federal* administrative law issues, including the District of Columbia Circuit's decision in *Amador*. *See* ECF 25 at 18-21; *Amador County v. U.S. Dep't of Interior*, 640 F.3d 373 (D.C. Cir. 2011).[11] This case also is unlike *Trout Unlimited*, 944 F. Supp. at 19, which Defendants cite, because there the court held that the district court in Colorado was "already thoroughly familiar and experienced" with the Colorado law issues of local water rights and the Forest Service that might underpin the case.

The now dismissed Florida State Officials Action also provides no basis for transfer, nor did it do so prior to the dismissal. Defendants argued that the existence of that case counsels in favor of transfer because transfer would save "the judiciary's time and resources" and to "avoid

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[10] *See* FLA. CONST. art. X, § 30(c); ECF 19 at 6-7.

[11] Even were this Court required to analyze Florida-specific law to resolve the questions in this case, there is no obstacle to it doing so, and the state law issues here are not complicated. *See Katopothis*, 2014 WL 12929446, at *4 ("[f]ederal courts today … are often called upon to apply state laws" and "there is little need to transfer a case that does not involve complex issues of foreign law") (alterations in original) (quoting *Thayer/Patricof Educ. Funding, L.L.C. v. Pryor Res., Inc.*, 196 F. Supp. 2d 21, 31 (D.D.C. 2002); *see also Thayer/Patricof*, 196 F. Supp. 2d at 36 (quoting *Coker v. Bank of America,* 984 F. Supp. 757, 766 (S.D.N.Y.1997) for the proposition that "[T]he fact that the law of another jurisdiction governs the outcome of the case is a factor accorded little weight on a motion to transfer ... especially in an instance such as this where no complex questions of foreign law are involved.") (alterations in original).

inconsistent findings." ECF 26 at 11-14. Here, there is no such advantage. The case in the transferee court has been dismissed on standing grounds specific to the state officials in the case, and Plaintiffs do not intend to amend their complaint. The Court here has established a briefing schedule for multiple motions and a hearing date for November 5. Transfer would therefore only lead to gross inefficiency and delay and take the date for decision well past the anticipated date for the introduction of online sports betting on November 15. This in turn would cause irreparable harm to Plaintiffs and great harm to the public interest by introducing unlawful gambling throughout the State of Florida. While academic at this point, it bears emphasis that the pending case in Florida provided no basis for transfer even prior to its dismissal. The schedule and procedural posture of this case put it ahead of that case. Further, in addressing the purported overlap between the cases, Defendants ignore that the central points of contention in the cases are defendant and case-specific. Both cases address Plaintiffs' contention that online sports betting occurs "on Indian lands," but the issue so obviously favors Plaintiffs that Defendants here do not even bother to dispute that issue in their motion papers. Defendants instead focus on the reviewability of deemed approvals and D.C. Circuit precedent addressing the issue. *See* ECF 25. The same is true of the state law issues that Defendants assert overlap between the cases, but do not address in their Motion or Opposition, instead arguing that they had no obligation to review state law. Defendants do not dispute that UIGEA and the Wire Act depend on state law or that state law does not authorize the online sports betting in question. Similarly, the Tribe's Motion to Intervene in this matter focused on issues unique to the federal Defendants here. ECF 13 at 4-5. Moreover, the Tribe's sole reason for seeking to intervene is to assert tribal sovereign immunity—which requires no expertise beyond this Court's abilities to resolve.

Defendants also allude to the first-to-file rule in support of their argument that this case should be transferred to the Northern District of Florida. ECF 26 at 11. However, even had the Florida State Officials Action not been dismissed, the rule would be inapplicable here. "The usual rule in this circuit has been that where two cases between *the same parties* on the same cause of action are commenced in two different Federal courts, the one which is commenced first is to be allowed to proceed to its conclusion first." *Wise v. United States*, 128 F. Supp. 3d 311, 317-18 (D.D.C. 2015) (emphasis added) (quoting *UtahAmerican Energy, Inc. v. Dep't of Lab.*, 685 F.3d 1118, 1124 (D.C. Cir. 2012)). The parties here are different from the parties in the Florida State Officials Action, therefore the first-to-file rule does not apply.

III. A STAY OF THIS CASE IS NOT APPROPRIATE.

Defendants did not even attempt to offer a basis for a stay even prior to the dismissal of the Northern District of Florida action, and a stay would obviously be unjustifiable when there is no other ongoing case to await. To determine whether to issue a stay, courts consider "(1) harm to the nonmoving party if a stay does not issue; (2) the moving party's need for a stay – that is, the harm to the moving party if a stay does not issue; and (3) whether a stay would promote efficient use of the court's resources. *Ctr. for Biological Diversity*, 419 F. Supp. 3d at 20. Defendants' argument in support of a stay only skims the surface and it is not clear what harm Defendants allege. *See* ECF 26 at 8, 12, 14. They have not met their burden under *Ctr. for Biological Diversity*, 419 F. Supp. 3d at 20.

Importantly, as explained in *Garcia*, "the Supreme Court has cautioned that, 'if there is even a fair possibility that the stay … will work damage to someone else,' the movant must 'make out a clear case of hardship or inequity in being required to go forward.'" *Garcia*, 393 F. Supp. 3d at 110 (alterations in original) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)).

A stay will work hardship on Plaintiffs, as it will delay a ruling on Plaintiffs claims before November 15, 2021, when the Tribe has indicated it will begin to offer online sports betting. *See* ECF 19 at 8 n.4, 44. Accordingly, Defendants have not made out "a clear case of hardship or inequity" for why Plaintiffs claims against them should not proceed without delay. *Garcia*, 393 F. Supp. 3d at 110 (denying stay); *Am. Ctr. for Civ. Just. v. Ambush*, 794 F. Supp. 2d 123, 130 (D.D.C. 2011) (denying motion to transfer and denying motion to stay the case because, among other reasons, movant did not prove hardship or inequity); *Water & Sand Int'l Cap., Ltd. v. Capacitive Deionization Tech. Sys., Inc.,* 563 F. Supp. 2d 278, 285-86 (D.D.C. 2008) (refusing to stay the case, because the "Court is unwilling to delay proceedings in this District until results from the remaining Texas case are available," where allowing "such delay would only serve to detract" from opponent's right to pursue claims in this District).

CONCLUSION

For the above reasons, Defendants' Motion to Transfer Venue or in the Alternative Stay this Proceeding should be denied.

October 19, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2021, this document and all its attachments were filed with the Clerk of the Court of the U.S. District Court of the District of Columbia by using the CM/ECF system, which will automatically generate and serve notices of this filing to all counsel of record.

Dated: October 19, 2021

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