IN THE UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION
CASE NO: 4:21-cv-00270-AW-MJF

WEST FLAGLER 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.

RONALD DION DESANTIS, in his official capacity as Governor of the State of Florida, and JULIE IMANUEL BROWN, in her official capacity as Secretary of the Florida Department of Business and Professional Regulation, Defendants.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, A PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1, Plaintiffs West Flagler Associates, Ltd. and Bonita-Fort Myers Corporation ("Plaintiffs"), through undersigned counsel, file this Motion for Summary Judgment or, In the Alternative, A Preliminary Injunction. The grounds for this Motion are set forth in the accompanying memorandum.

DATED: September 24, 2021

Respectfully Submitted

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PLAINTIFFS' MEMORANDUM OF LAW SUPPORTING THEIR MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, FOR PRELIMINARY INJUNCTIVE RELIEF

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Plaintiffs, West Flagler Associates, Ltd., and Bonita-Fort Myers Corporation, through their undersigned counsel, and under Federal Rule of Civil Procedure 56, and Local Rule 56.1, move for summary judgment against Defendants, Ronald Dion DeSantis, in his official capacity as Governor of the State of Florida ("Governor") and Julie Imanuel Brown, in her official capacity as Secretary of the Florida Department of Business and Professional Regulation ("Secretary") (collectively, "Defendants") or, alternatively, seek preliminary injunctive relief.

I. PRELIMINARY STATEMENT

Plaintiffs seek a declaration that (1) the Governor acted *ultra vires* in executing the 2021 Gaming Compact containing off-reservation sports betting ("OSB") provisions and (2) the Implementing Law ratifying provisions—that "deem" patrons who are betting off reservation are fictionally betting on reservation through servers located on Seminole Tribe land—is unauthorized under the Indian Gaming Regulatory Act's ("IGRA") "on Indian lands" requirement, and, thus, *ultra vires*. Plaintiffs' position coincides with legal positions the State of Florida took in other cases, judicial decisions construing IGRA, regulatory opinions, and failed Congressional attempts to change IGRA. The OSB also violates the Wire Act and Unlawful Internet Gambling Enforcement Act ("UIGEA")'s plain language. Given the undisputed facts and Congress' plain language, Plaintiffs are entitled to summary judgment. Alternatively, this Court should order preliminary injunctive relief to

prevent irreparable harm Plaintiffs will suffer if the Seminole Tribe implements online gaming as reported on or around November 15, 2021.

II. STATEMENT OF UNDISPUTED FACTS

A. Prior to Florida's Approval of the 2021 Compact, Most Sports Betting in Florida, Including All Online Sports Betting, Was Illegal.

Prior to Florida's approval of the 2021 Compact, Florida prohibited almost all sports betting, including online sports betting. Fla. Stat. § 849.14 (2020). Limited exceptions to this prohibition included certain kinds of "pari-mutuel" wagering. Pari-mutuel wagering is defined as "a system of betting on races or games in which the winners divide the total amount bet, after deducting management expenses and taxes, in proportion to the sums they have wagered individually and with regard to the odds assigned to particular outcomes." Fla. Stat. § 550.002(22). Thus, a pari-mutuel system limits the gains for the bettors and the profits for the business offering the gaming. Further, even pari-mutuel betting has only been permitted for certain kinds of events, such as jai alai, horse racing, and (most recently) simulcasts of dog racing. *See* Fla. Stat. § 550.155(1) (pari-mutuel wagering pools contemplates "wagering on results of a horserace, or on the scores or points of a jai alai game"); *see also id.* (limiting pari-mutuel wagering to "within the enclosure of any pari-mutuel facility licensed and conducted under this chapter but are not allowed elsewhere in this state").

Thus, putting aside a few limited exceptions, betting on major sporting events (professional and college football, basketball, baseball, hockey, and the like) was illegal ***everywhere*** in Florida, prior to legislation ratifying the 2021 Compact, including on all Indian Tribe reservations located within the state. Further, two different federal laws (UIGEA and the Wire Act) prohibit using the internet or interstate telecommunications (respectively) to conduct sports betting between different jurisdictions where at least one of those jurisdictions prohibits sports betting (even if the other jurisdiction allows it). 31 U.S.C. §§ 5361-5367; 18 U.S.C. §§ 1081-1084.

B. The Only Ways To Obtain The Right To Offer Sports Betting In Florida Are Through (1) An IGRA Compact For Gaming ***On*** Tribal Reservations Or (2) A Referendum For Gaming ***Not On*** Tribal Reservations.

The Florida Constitution was amended in 2018 to provide "that Florida voters shall have the exclusive right to decide whether to authorize casino gambling in the State of Florida." Fla. Const. Art. X, § 30. The amendment explicitly states: "This amendment requires a vote by citizens' initiative pursuant to Article XI, section 3, in order for casino gambling to be authorized under Florida law." It defines "casino gambling" as meaning "any of the types of games typically found in casinos and that are within the definition of Class III gaming in the Federal Indian Gaming

Regulatory Act," including as defined in 25 C.F.R. § 502.4. That regulation expressly includes "any sports betting" within the definition of "casino gambling."[1]

Accordingly, given Article 10, Section 30, Fla. Const., and the prohibitions in Fla. Stat. § 849.14, there are only two ways that conducting a sports betting operation can become legal in Florida. One is a through a legislatively ratified compact pursuant to IGRA. *Fl. House v. Crist*, 990 So.2d 1035 (Fla. 2008). IGRA authorizes the Secretary of the US Department of the Interior to approve a compact between a recognized Indian Tribe and the state that authorizes "gaming on Indian lands of such Indian tribe." 25 U.S.C. § 2710(d)(8). Thus, an Indian Tribe could seek to conduct sports betting through such an IGRA compact, so long as the sports betting took place "on Indian lands of such Indian tribe." Second, someone wishing to change the law to permit sports betting ***outside*** of Indian lands in Florida would need to organize a successful citizens' initiative pursuant to Article XI, Section 3, Fla. Const., authorizing it.

[1] 25 C.F.R. § 502.4(c) also encompasses "parimutuel wagering" alongside sports betting, but the Florida Constitution explicitly carves pari-mutuel wagering out from the prohibition. Fla. Const. Art. X, § 30 ("As used herein, 'casino gambling' does not include pari-mutuel wagering on horse racing, dog racing, or jai alai exhibitions.").

C. The 2021 Compact and the Implementing Law Purport to Allow the Tribe to Offer OSB to Persons Located Anywhere in the State, Not Limited to The Tribe's Reservation and without Requiring Any Referendum.

On April 23, 2021, Governor DeSantis and the Tribe signed the 2021 Compact. (Ex. A). Renewing and extending the timeline for the gaming already permitted under an existing 2010 Compact, the new Compact continues to allow the Tribe to conduct slot machines, raffles and drawings, and banked card games on its own reservations. (Ex. A, II.F; III.F; XVI.B). However, the 2021 Compact also allows the Tribe to conduct new forms of gaming, including craps, roulette, "Fantasy Sports Contests" and "Sports Betting." (Ex. A, III.F). The Compact defines "Sports Betting" as:

> "wagering on any past or future professional sport or athletic event, competition or contest, any Olympic or international sports competition event, any collegiate sport or athletic event (but not including proposition bets on such collegiate sport or event), or any motor vehicle race, or any portion of any of the foregoing, including but not limited to the individual performance statistics of an athlete or other individual participant in any event or combination of events, or any other 'in-play' wagering with respect to any such sporting event, competition or contest, except 'Sports Betting' does not include Fantasy Sports Contests."

(Ex. A, III.CC).

The Compact permits "Sports Betting" to be conducted via online gaming as well as from the premises of selected pari-mutuels that enter into management

agreements with the Tribe, and thereby purports to authorize persons not physically present on the Tribe's reservations to engage in such sports betting using the internet or mobile devices, so long as the bettor is "physically located within the State." (Ex. A, III.CC.2) (wagering shall be deemed to occur at the location of the Tribe's servers including "any such wagering undertaken by a Patron physically located in the State but not on Indian Lands"). The arrangement allowing pari-mutuel participation is described as a "hub and spoke," in which the Tribe is the hub and pari-mutuels are the spokes. (Ex. F, 2).

To evade IGRA's requirement that gaming pursuant to tribal-state compacts must occur "on Indian lands," the Compact seeks to "deem" this vital condition to be met. It declares:

> "wagers on Sports Betting and Fantasy Sports contests made by players physically located within the State using a mobile or other electronic device *shall be deemed to take place exclusively where received* at the location of the servers or other devices used to conduct such wagering activity at a Facility on Indian Lands."

(Ex. A, IV.A) (emphasis added).

Subsequent to submission to the Legislature for ratification, the Compact was amended to provide that the Tribe will not implement online sports betting before October 15, 2021. (Ex. B).[2]

The Legislature ratified the Compact as amended, and further amended state gaming law, including sports betting, by passing series of bills (the "Implementing Law"). *See* Laws of Florida, Chs. 2021-268, 2021-269, 2021-271. In ratifying and approving the amended Compact, the Implementing Law adopts the definitions in the Compact. Laws of Florida, Ch. 2021-268 at 1-3 (amending Fla. Stat. § 285.710(13)(b)). In addition to granting the Tribe a monopoly on all sports betting throughout Florida, the Implementing Law also adopts the Compact's fictional "deeming" as to the location of where sports bets are placed:

> "wagers on sports betting, *including wagers made by players physically located within the state* using a mobile or other electronic device, *shall be deemed to be exclusively conducted by the Tribe* where the servers or other devices used to conduct such wagering activity on the Tribe's Indian lands are located."

Fla. Stat. § 285.710(13)(b)) (emphasis added).

The Implementing Law further created Fla. Stat. §849.142(1), legalizing sports betting activities authorized under §285.710(13) and conducted pursuant to a

[2] Since Plaintiffs filed the Complaint, agents of the Tribe have informed Plaintiffs that the Tribe will not implement online sports betting until November 15, 2021. Savin Decl. ¶ 23.

gaming compact ratified and approved under s. 285.710(3). Pursuant to Fla. Stat. 285.710(7), until July 1, 2022, DBPR's Division of Parimutuel Wagering[3] is the designated state compliance agency overseeing every aspect of the Compact, including continued supervision and regulation of pari-mutuels. Under the Implementing Law, its authority has expanded to include, for example, investigations of violations of gambling laws, resolving disputes between the Tribe and bettors, receiving reports of suspicious or potentially corrupt sports betting or other activities, and verifying compliance with the Compact by the Tribe. Laws of Florida, Ch. 2021-269; (Ex. A, III.CC.8., V.A.2, VI.A. VII.C., VIII). Subject to federal approval, the Implementing Law took effect May 25, 2021. Laws of Florida, Chs. 2021-268, 2021-269, 2021-271.

D. Plaintiffs Operate Pari-Mutuel Gaming Businesses in Florida, Are Competitors of the Tribe's Gaming Operations, And Will Suffer Irreparable Harm If the OSB Provisions of the Implementing Law Are Not Enjoined.

Plaintiff West Flagler is a Florida limited partnership that since 2009 has owned and operated the casino known as Magic City Casino ("MCC") in Miami, Florida. (Ex. C, Savin Declaration, ¶ 3). Owned and operated by the Havenick family for over sixty-five years, West Flagler held a pari-mutuel permit to conduct greyhound racing at what is now known as MCC for more than fifty years. *Id.* ¶ ¶ 4-

[3] The Secretary serves at the Governor's pleasure. Fla. Stat. §20.165(1).

5. In 1996, when Florida legalized both cardrooms and "simulcasting," West Flagler expanded MCC to permit customers physically present at its location to bet on other jai alai, horse, and dog racing taking place around the nation and began operating poker rooms, currently open seven days a week, with nineteen tables offering the most popular games such as "limit" Texas hold'em, "no limit" Texas hold'em, Omaha, and 7-card stud. *Id.* ¶ 7. After Florida allowed slot machines to be approved by local referenda in Miami-Dade and Broward, MCC became the first casino in Miami to offer Las Vegas-style slot machines. *Id.* ¶8.

Today, MCC offers over 800 slot machines, electronic table games, poker tables and tournaments, off-track betting, and other live entertainment. *Id.* ¶8. In 2018, after successfully suing the state, MCC added live-action jai alai and a state-of-the-art glass-walled jai alai fronton. *Id.* ¶9. Following a constitutional amendment banning live greyhound racing, MCC closed its greyhound track in 2020, and undertook extensive renovations building out its casino facilities, with over $55,000,000 in capital improvements, and continues to make additional capital improvements to the casino annually. *Id.* ¶ 10-11.

With approximately 425 employees, MCC is less than thirty miles from the Tribe's Hard Rock Hollywood Casino ("Hard Rock"), which first opened in 2004.

Id. ⁋⁋13-14. The Hard Rock has been enormously successful.[4] Since 2009, when West Flagler began operating as MCC, it has competed with the Tribe for gaming patrons. *Id.* ¶14. Thus, since 2009, the Hard Rock has been a serious competitor of MCC.

Plaintiff Bonita, the Florida corporation that operates Bonita Springs Poker Room, is an affiliate of MCC also indirectly controlled by the Havenick family. *Id.* ¶15. As with West Flagler, the Bonita Springs Poker Room represents an investment made over 50 years ago, when the Havenick family acquired the Naples-Fort Myers Greyhound Racing & Poker. *Id.* After closing the greyhound racing portion of the facility in May 2020, Bonita constructed a new 32,000-square foot facility to house what is now the Bonita Springs Poker Room, at a cost of approximately $10,000,000. *Id.* ¶16. Bonita offers wagering on simulcast of horse racing and jai-alai and card games, such as ultimate Texas hold'em, three-card poker, high-card flush, jackpot hold'em and DJ wild, year round. *Id*.

Bonita has approximately 150 employees and is located approximately twenty-one miles from the Tribe's Immokalee Casino and one hundred and fifty

[4] Fla. Office of Econ. and Demographic Research, Seminole Compact: Revenue Overview, at 1, 6 (January 2017), available at http://edr.state.fl.us/content/presentations/gaming/GamingCompactRevenueOverview2017.pdf (showing a tribal casino net win of $2.2 billion for fiscal year 2014-15, and projected to grow).

miles from the Tribe's Tampa Hard Rock Casino. *Id.* ¶¶17-18. Since 2008, it has competed with the Tribe for gaming patrons. *Id.* ¶18.

Plaintiffs will suffer irreparable harm if the Implementing Law's OSB provisions remain in effect, thereby allowing the Tribe exclusively to offer off-reservation and online sports betting to any person physically located anywhere in Florida. Neither MCC nor Bonita are permitted to offer sports betting—online or in-person—to anyone, anywhere. Indeed, with the exception of the very limited pari-mutuel betting on sports such as jai alai, horse racing, and simulcast dog racing (as described above), Florida law prohibits Plaintiffs from offering any form of generalized sports betting (on major, big money sports such as football, basketball, baseball, golf, and hockey) to anyone. Yet the Compact permits the Tribe—and only the Tribe—to offer such sports betting to anyone in Florida. This will obviously harm Plaintiffs' business in numerous ways.

Most obviously, the OSB will divert business that would have been spent at Plaintiffs' facilities and cause it to be spent on online sports gaming offered by the Tribe. Plaintiffs' expert consultant conducted and analyzed a survey of customers as to the likely impact of the Compact's online sports gaming provisions. (Ex. C, Savin Decl., ‖26; Ex. E, Padron Declaration ‖14). That survey confirmed Plaintiffs' concerns that the OSB will cannibalize Plaintiffs' in-person gaming business, both by permitting customers to gamble remotely, and by offering types of sports gaming

that Plaintiffs are not permitted to offer by law. In particular, the survey revealed that, using the most conservative methodology, between 10% and 16% of Plaintiffs' existing customers expect to divert some portion of their current spend on pari-mutuel gaming and poker to online sports betting if it becomes available in Florida. (Ex. D, Chavez Declaration, Expert Report, at 10). Using the methodology used by business planners, the survey revealed that Plaintiffs' existing customers expect to divert significantly more business. *Id.* at 11-12. This lost business will also diminish Plaintiffs' goodwill developed over decades of investing in their in-person gaming facilities. (Ex. C, ¶28).

In addition to the foregoing, the Tribe's ability to offer OSB to everyone in Florida regardless of location is likely to diminish the amount of new business and new customer bases that can be generated by traditional pari-mutuel facilities such as those operated by Plaintiffs. (Ex. C, ¶29).

While the Compact provides that pari-mutuel facilities willing to contract with the Tribe will be permitted to offer the Tribe's online sports betting through Tribe-connected kiosks located at the pari-mutuel facilities (Ex. A, III.CC.) or through their own branded electronic portal (or "skins"), these provisions do not benefit Plaintiffs. Plaintiffs are left with a choice of participating in the Tribe's unlawful scheme in a manner that yields very little positive value, particularly in comparison

to the income they would receive from the diverted gaming, or foregoing the offering at the cost of losing even more general business revenue and traffic.

Under the first choice, Plaintiffs would expend significant resources to enter into the business, Ex. C, ¶34, but would receive a significantly lower return on the ensuing business than they receive on their current gaming offerings. *Id.* ¶¶35-36 (while average returns are 7%, Plaintiffs would receive returns from the Tribe in the range of 3% prior to their own expenses).

Under the second choice, Plaintiffs would lose both the walk-in traffic from those who will choose to gamble online through the Tribe and the additional walk-in traffic to pari-mutuels who participate in the Tribe's business. *Id.* ¶39. The resulting lost walk-in revenue would affect Plaintiffs' revenue from slot machines, card rooms, and pari-mutuel wagering, as well as the ancillary entertainment and dining options offered to patrons of their facilities. *Id.* Moreover, the Tribe will be able to largely dictate the terms of and contracts with pari-mutuel businesses, *id.* ¶40, and it is possible that the program will not go forward at all, either through the Tribe's choice, or because the DOI has called the program into question. *Id.* ¶41; *see also* (Ex. F).

III. SUMMARY JUDGMENT STANDARD

Summary judgment is a "threshold inquiry" to determine "whether there is the need for a trial." *MSPA Claims 1, LLC v. Tower Hill Prime Ins. Co.*, No. 1:18-cv-

157-AW-GRJ at *7, n.3 (N.D. Fla. Mar. 31, 2021). The party resisting summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986).

A "party may file a motion for summary judgment at any time until 30 days after the close of all discovery." Fed.R.Civ.P. 56. "[N]o answer need be filed before a defendant's motion for summary judgment may be entertained." *Pena v. City of Rio Grande City*, 398 F. Supp. 3d 127, 143 (S.D. Tex. 2019) (citing nationwide authority). Summary judgment is appropriate when "neither side asserts that there are any factual disputes that would preclude summary judgment." *MSPA Claims 1, LLC*, No. 1:18-cv-157-AW-GRJ, at *7 n.3.

IV. LEGAL ARGUMENT

A. The State of Florida's Prior Judicial Positions, Failed Congressional Attempts to Change IGRA, Regulatory Opinions, and Judicial Decisions Construing IGRA Support Plaintiffs.

Florida has long acknowledged that a bet is placed both where the bettor is located and the bet received and that, under IGRA, no bet can be placed from outside Indian lands:

> The existence of a phone bank and a centralized computer system on the Coeur D'Alene reservation does not change the uncontested fact that the person making the wager is located outside of Idaho, and clearly not on the reservation. As a consequence, because the wager is

> placed off the reservation, the gaming activity is not conducted "on Indian lands" as plainly required by IGRA.

See Brief for Amici Curiae in Support of AT&T Corporation and Affirmance, 1999 WL 33622330 at *4, *Coeur D'Alene Tribe v. AT&T Corp*., 295 F.3d 899 (9th Cir. 2002) (No. 12) (filed by Florida and Minnesota attorney generals) (footnotes and citations omitted).

Besides Florida's admission, Congress rejected two opportunities to amend IGRA to permit online off-reservation sports betting. *See, e.g.*, H.R. 5502, 116th Cong. (2019) (proposing an act "To remove Federal barriers regarding the offering of mobile sports wagers on Indian lands when the applicable State and Indian Tribe have reached an agreement, and for other purposes"), available at https://www.congress.gov/bill/116th-congress/house-bill/5502/text; and various tribes rejected Congressional request in 1998. 144 Cong. Rec. S8117 (1998) (Ex. G).

Moreover, the National Indian Gaming Commission ("NIGC"), an independent federal agency within the DOI, repeatedly has opined that IGRA does not authorize gaming off Indian lands via internet servers located on Indian lands. *See, e.g.*, March 13, 2001 Advisory Opinion Letter from Kevin Washburn, General Counsel, NIGC, opining that "the use of the Internet, even though the computer

server may be located on Indian lands" is off-reservation gaming for players not on Indian land. (Composite Ex. H).[5]

The only circuit court of appeals to address the issue expressly found that the location of a server on Indian lands does not convert an off-reservation bet into a bet on Indian lands. In *California v. Iipay Nation of Santa Ysabel* ("*Desert Rose*"), 898 F.3d 960, 967-968 (9th Cir. 2018), the Ninth Circuit held that the tribe could not operate an online bingo site despite the server being on Indian lands. ("IGRA protects gaming activity conducted on Indian lands. However, the patrons' act of placing a bet or wager on a game of DRB while located in California constitutes a gaming activity that is not located on Indian lands.").

Given this overwhelming authority, Defendants are without legal authority to "deem" facts to exist to override federal law. The definition of "Indian lands" and the boundaries of "gaming on Indian lands" are set by federal statute, which law is supreme.

B. Plaintiffs Have a Right Under Federal Law to Seek Equitable Relief.

To stop this ongoing *ultra vires* conduct, Plaintiffs invoke a traditional, non-statutory equitable cause of action for claims that state officers are acting *ultra vires*

[5] The NIGC General Counsel Advisory Opinion Letters are publicly available online at https://www.nigc.gov/general-counsel/legal-opinions

in violating federal law, as set forth in *Armstrong v. Exceptional Child Center, Inc*., 575 U.S. 320 (2015). "[W]e have long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law." *Id*. at 326-27.

Equitable actions seeking to enjoin *ultra vires* or unconstitutional conduct are entirely different from statutory causes of action. They are not premised on the deprivation of a statutory right, nor depend on the existence of a statutory cause of action. Instead, they seek equitable relief, "a judge-made remedy," *Armstrong*, 575 U.S. at 327, for injuries that stem from unauthorized official conduct. Rather than invoking a legislatively conferred cause of action to vindicate a legislatively created right, such actions rest on the historic availability of equitable review to obtain prospective injunctive relief from harm caused by "unconstitutional" or "ultra vires conduct." *Dalton v. Specter*, 511 U.S. 462, 472 (1994).

Like the plaintiffs in *Armstrong*, Plaintiffs here allege that the *ultra vires* actions of state officials threaten to deprive them of a property right—the fruits of their half-century investment in legal, state-sanctioned gaming businesses—by granting the Tribe rights outside its reservation that no other business has. [DE18;¶ ¶139-149, 235]. *Cf. Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 899 n.9) (10th Cir. 2017) (noting that majority in *Armstrong* assumed plaintiffs were vindicating property rights conferred by statute, but *Safe Streets* plaintiffs had none).

Further, IGRA affords tribes preferential treatment for gaming rights that neither Plaintiffs nor any other non-tribal citizen can possess. But IGRA limits gaming to Indian lands. Defendants acted *ultra vires* in determining otherwise. Plaintiffs assert this *ultra vires* action violates their equal protection rights under the Fourteenth Amendment. As explained *infra* at 30, no authority permits racial preferences unsupported by any Congressional legislation. When a plaintiff asserts a constitutional violation, *Safe Streets* recognizes that "substantive federal law requirement" is satisfied. *Id*. at 901 n.14 (plaintiffs had not sought vindication of own constitutional rights).

Beyond Plaintiffs' property and equal protection rights, *Safe Street* is further distinguishable. In *Safe Streets*, the court held that "[w]here a federal statute 'simply does not create substantive rights,' the Supreme Court has explained that it is 'unnecessary to address [any] remaining issues" about a private citizen's ability to enforce that statute or obtain relief.'" 859 F.3d at 903. Unlike the *Safe Street* plaintiffs, Plaintiffs possess substantive federal rights in IGRA. In *Amador County v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011), the court found that whether tribal compacts comport with federal law does implicate privately enforceable rights, expressly recognizing that non-state, non-tribe parties have a judicially enforceable interest in whether a compact was lawful. *Id*. at 379. The *Safe Street* plaintiffs did not possess those substantive rights under § 903 or elsewhere in the Controlled

Substances Act by which they can enforce the CSA's preemptive effects—differentiating them from Plaintiffs here.

Equity provides a cause of action even if the statutes Plaintiffs seek to enforce aren't privately enforceable *i.e.*, that they're not "rights-creating statutes." Even assuming *Armstrong* requires statutes to be "rights-creating statutes," IGRA, the Wire Act, and UIGEA all offer private causes of action independent of a *criminal* prosecution, which was the sole means of enforcing the CSA at issue in *Safe Streets*.[6] Thus, insofar as *Safe Streets* would only allow equitable claims to enforce federal statutes that are themselves subject to civil judicial enforcement (as opposed to criminal prosecution alone), all three of the statutes at issue here meet that test, whereas the Act in *Safe Streets* does not.

C. The Implementing Legislation Can't Ratify a Compact Unauthorized Under IGRA, and the Governor Can't Agree to It.

25 U.S.C. § 2710(d)(1) provides that "Class III gaming activities ***shall be lawful on Indian lands*** only if such activities are," among other things, located in a State that permits such gaming and conducted in conformance with a Tribal-State compact.

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[6] IGRA and the UIGEA each create private causes of action [25 U.S.C. § 2710(d)(7); 31 U.S.C. § 5365]; and violations of the Wire Act can be privately enforced through the civil RICO cause of action under 18 U.S.C. § 1964 (the definition of "racketeering activity" includes violations of the Wire Act, see 18 U.S.C. § 1961(1)(B)).

Despite IGRA's express language, the Compact includes online sports betting in patrons' Florida homes or at pari-mutuels off Indian lands. The Compact is only authorized if consistent with IGRA.[7] 25 U.S.C. § 2710(d)(8)(C) (DOI Secretary can only approve compact complying with IGRA); *Amador Cty.*, 640 F.3d at 380 (sub-section (d)(8)(C) "provides that only lawful compacts can become effective"). Because the Compact can only address gaming on tribal lands, but the Compact permits gaming off tribal lands, the Governor's actions and Implementing Law are *ultra vires* as unauthorized under IGRA. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 795 (2014) ("Everything-literally everything-in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands, and nowhere else.").

Compacts that purport to authorize gaming in circumstances in which IGRA does not apply are, by definition, inconsistent with IGRA. IGRA is designed to provide a statutory framework for gaming on Indian lands, not off Indian lands. *See Coeur D'Alene Tribe*, 295 F.3d at 915 (Gould, J., dissenting) ("IGRA protects and advances on-reservation gaming; the proposed national lottery involves and encourages illegal gaming nationwide off the reservation and is not within the purview of the IGRA").

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[7] The act creating the Implementing Law specifically states it is made under IGRA. Laws of Florida, Ch. 2021-268, Section 7.

No ambiguity exists here, the plain meaning is clear. Gambling must occur "on Indian lands." It is undisputed that the Implementing Law allows a patron to bet online even when miles away from the Tribe's land. The Implementing law must "deem" it to be occurring on the Tribe's land for it to be on Indian land—because it is not. Fla. Stat. § 285.710(13)(a)7. Under Section 2710(d)(1)'s plain meaning, Class III gaming falls under IGRA's protections only if ***ON*** Indian land. No amount of "deeming" can magically transport a patron sitting at her home into the Tribe's casinos.

A state governor and legislature do not have the legal power to "deem" facts to be different than they are; nor do they have the legal power to override federal law.[8] The definition of "Indian lands" and the boundaries of "gaming on Indian lands" are set by federal statute. The Governor cannot contract those definitions away or act as if they did not exist, especially when the Implementing Law cannot otherwise legalize Class III gaming absent passage of a citizen-sponsored constitutional amendment.

Given the undisputed facts, the OSB provisions of the Implementing Law fail to comply with IGRA's "on Indian lands" requirement. The Implementing Law

[8] Regardless whether other states deploy this fiction outside the IGRA framework, IGRA has not been amended to similarly modify federal law.

cannot ratify the OSB provisions and implement them, because they are unauthorized under IGRA and, thus, *ultra vires*. 25 U.S.C. §§ 2703(4); 2710(d).

D. The Implementing Legislation Is Ultra Vires because it Authorizes Violation of The Wire Act; the Governor's Execution of the Compact Was Likewise Ultra Vires.

The Implementing Law purports to ratify provisions of the Compact in violation of the Wire Act, which makes it illegal to use "wire communication facility" to transmit sports bets through "interstate… commerce" unless the bettor and bet recipient are both in a state ***where such bets are legal***. 18 U.S.C. § 1084(b). Likewise, the Governor exceeded his authority when he executed the Compact including those provisions.

The OSB provisions violate these prohibitions. First, the online mobile transmissions made over the internet involve interstate commerce. *United States v. MacEwan*, 445 F.3d 237, 244 (3d Cir. 2006) ("Regardless of the route taken, however, we conclude that because of the very interstate nature of the Internet, once a user submits a connection request to a website server . . . the data has traveled in interstate commerce.").

Second, sports betting is prohibited in Florida. *Supra*, at 7-8. Outside the narrow confines of a lawful compact, the Governor and legislature are without power to authorize any new forms of gambling, including sports betting, unless the citizens approve it pursuant to a citizen-initiated referendum. Art. X, Sec. 32, Fla. Const. It's

undisputed that Florida's constitution has not been amended to include sports betting. "Neither the Governor nor anyone else in the executive branch has the authority to execute a contract that violates state criminal law." *Crist*, 990 So. 2d at 1050. Given the undisputed facts, the OSB provisions violate the express provisions of the Wire Act; any action by any state official to enact it was *ultra vires*.

E. The Implementing Legislation Is *Ultra Vires* Because It Authorizes Violation of The UIGEA; the Governor's Execution of the Compact Was Likewise *Ultra Vires*.

UIGEA prohibits "unlawful Internet gambling." 31 U.S.C. § 5361(4). Unlawful Internet gambling occurs when an individual places, receives or transmits a "bet or wager by any means which involves the use, at least in part, of the Internet where 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." 31 U.S.C. § 5362(10)(A).

Under UIGEA, for a bet or wager placed over the Internet to be lawful, the bet must be legal in the State or Tribal lands where the bet or wager is placed ***and*** in the State or Tribal lands where the bet or wager is received. 31 U.S.C. § 5362(10)(A). Online sports betting is illegal in Florida; the legislature cannot expand gambling unless approved by voters *via* a citizen's initiative. *Supra at 7-8.*

Using a person's physical location as the litmus test for these laws coincides with other Florida precedent. *Fla. Dep't of Rev. v. Seminole Tribe of Fla.*, 65 So. 3d

1094 (Fla. 4th DCA) (enforcing tax on fuel purchased off tribe's reservation, even if used for tribe's sovereign functions); *See Fla. Stat.* § 212.05965 (A buyer physically located in Florida making a purchase from an out of state seller must pay sales tax on the purchase). Florida law establishes that what matters for online activity is the physical location of the purchaser, not where the seller's server is located. *See* analogously *Otoe-Missouria Tribe of Indians v. N.Y. Dep't of Fin. Servs*., 974 F. Supp. 2d 353, 360 (S.D.N.Y. 2013) (rejecting tribe's argument that when a consumer comes to a tribe's website for a loan, the "consumer travel[s] to Tribal land via the Internet").

Desert Rose requires declaratory judgment in Plaintiffs' favor. There, a California tribe began operating Desert Rose Casino and launched a game called Desert Rose Bingo ("DRB"), an exclusively server-based bingo game that allowed its patrons to play bingo over the internet. California sought injunctive relief to prohibit the tribe from operating DRB because it violated IGRA and UIGEA. The Court agreed and affirmed summary judgment in favor of the state. *Ipay Nat.*, 898 F.3d at 965. Defendants cannot distinguish *Desert Rose* in any meaningful way.

This background establishes that UIGEA's plain language requires the Court apply the law where both the bet is made and wager received. *See* 31 U.S.C. § 5362(10)(A). Given the undisputed facts, this Court should enter a declaratory

judgment that the Implementing Law and the Governor's execution of the Compact are *ultra vires* insofar as they approve online sports betting throughout Florida.

F. Defendants' Actions Also Violate Plaintiffs' Equal Protection Rights.

The equal protection clause of the Fourteenth Amendment forbids a state from engaging in discrimination based on race, ethnicity, or national origin. *See Johnson v. Bd. of Regents of the Univ. of Ga.*, 2673 F. 3d 1234, 1243 (11th Cir. 2001) (collecting cases). Classifications made on the basis of race, ethnicity, or national origin are subject to strict scrutiny. *Id*. at 1243. Classification according to ancestry is similarly prohibited. *See Rice v. Cayetano*, 528 U.S. 495, 514 (2000).[9]

A classification survives strict scrutiny only if it is "narrowly tailored to support a compelling governmental interest." *Johnson* 263 F. 3d at 1244. It "is the burden of the party proposing a racial preference to show that its approach is narrowly tailored to achieving its asserted interest." *Id*. at 1251 (assuming compelling interest was shown). To withstand summary judgment, Defendants must show that a reasonable factfinder could conclude that there is sufficient record evidence supporting their claim that the Implementing Law is narrowly tailored to

[9] Given the serious constitutional problems raised by Defendants' interpretation of IGRA, the doctrine of constitutional avoidance weighs against adopting any interpretation of IGRA that could uphold the Implementing Law. *See, e.g.*, *Ashwander v. Tenn. Valley Auth*., 297 U.S. 288, 346 (1936).

achieve a compelling state interest. *Id*. at 1242; *see also Florida A.G.C. Council, Inc. v. Florida,* 303 F. Supp. 2d 1307, 1316 (N.D. Fla. 2004) (summary judgment striking on equal protection grounds spending quotas for Black, Hispanic-American, Asian-American and Native American contractors). They cannot.

Here, the Tribe is an "Indian tribe, band, nation, or otherwise organized group or community of Indians," 25 U.S.C. § 2703(5), recognized because of its members' status as Indians and members of the sovereign nation of the Seminole Tribe of Florida. Accordingly, Florida's decision to grant the Tribe (and only the Tribe) an off-reservation monopoly on online sports betting in Florida, while at the same time treating all non-Tribal casino owners who don't contract with the Tribe as would be felons, discriminates between similarly situated people on the basis of race, ethnicity, national origin, and ancestry. No compelling reason exists here. The Implementing Law nowhere justifies granting an off-reservation, state-wide monopoly to the Tribe, while criminalizing the same conduct by anyone else. Nor does it pretend to tailor the preference narrowly.

In a strikingly similar case, the First Circuit Court of Appeals held that strict scrutiny under the Equal Protection Clause *does* apply to state gaming compacts granting preferences in favor of Indian tribes *outside* the bounds of their reservation. *KG Urban Enters., LLC v. Patrick*, 693 F.3d 1 (1st Cir. 2012). The court there reversed a district court dismissal of a race-based Equal Protection challenge to a

Massachusetts law granting exclusivity to Indian tribes in certain regions of the state. *Id*. at 16. As here, the preferred treatment involved gaming outside tribal lands. *Id*. at 21.

In doing so, the court found "it is quite doubtful that [*Morton v.*] *Mancari*'s language can be extended to apply to preferential state classifications based on tribal status." *Id*. at 19 (distinguishing *Morton v. Mancari*, 417 U.S. 535 (1974)). The court noted that the "defendants cite no authority holding that state preferential classifications based on tribal status which are not authorized by federal law are nonetheless not racial classifications under *Mancari*. *Id*. The court further found "the state's broad reading of *Mancari* is inconsistent with the Court's later decision" in *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979), explaining that *Yakima* held that "[s]tates do not enjoy this same unique relationship with Indians" which "permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive." *Id*. n.16.

Further, the holdings in *Mancari*, 417 U.S. at 552, and *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 734 (9th Cir. 2003), are limited to Congressionally-mandated preferences that assist tribes in self-governing *on their own lands or support specific federal programs*. Neither case permits a state to give a tribe a preference in licensing businesses outside of their tribal lands, much less a

commercial monopoly over a business throughout the entire state while criminalizing the same conduct when engaged in by anyone else. *See also Rice v. Cayetano*, 528 U.S. 495 (2000) (rejecting argument by Hawaii that *Mancari* permitted a Hawaiian constitutional provision limiting to persons of native Hawaiian ancestry the right to vote for trustees of the Office of Hawaiian Affairs). "It does not follow from *Mancari*, that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians to the exclusion of all non-Indian citizens." *Id*. 520. *Mancari* was careful to note that the case was confined to the authority of the BIA, an entity that is *sui juris*. *Rice*, 528 U.S. at 520, *citing Mancari,* 417 U.S. at 554. Whatever privilege may be appropriate for Native Americans ends at the reservation's borders. *See Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 795 (2014) ("Indians going beyond reservation boundaries are subject to any generally applicable state law," unless federal law provides otherwise).

Unlike Florida, the federal government has a special relationship with Indian tribes arising from Congress's treaty obligations to various tribal entities. *See, e.g., Rice*, 528 U.S. at 529-30 (*citing United States v. Kagama*, 118 U. S. 375, 383-384 (1886))) (Stevens, J., dissenting); *KG Urban*, 693 F.3d at 19 ("[S]tates have no such equivalent authority"). Florida has no similar special relationship with the Tribe that would justify characterizing an extra-reservation monopoly for the Tribe as a

political preference, rather than one of race, ethnicity, ancestry and/or national origin. Accordingly, the Implementing Law cannot be justified as political decision to promote the Tribe's sovereignty. It's a preference that permeates the entire state based on race or national origin and violates Equal Protection on its face.

G. This Court Should Enter A Declaration Finding That Execution and Ratification of the OSB Compact Provisions Are Ultra Vires And Enjoin Defendants From Implementing or Enforcing The Invalid Provisions

1. *Plaintiffs are entitled to Declaratory relief.*

Plaintiffs are entitled to a declaration because a controversy exists between Defendants and Plaintiffs regarding the construction and applicability of IGRA to the terms of the Compact and the effect of the Compact and the legality of the OSB provisions under the Wire Act, UIGEA, and the Constitution. If a controversy exists, the court "may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a).

"[T]he question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of such immediacy and reality to warrant the issuance of a declaratory judgment." *Am. Ins. Co. v. Evercare Co*., 430 F. App'x 795, 798 (11th Cir. 2011) (*quoting GTE Directories Pub. Corp. v. Trimen Am., Inc*., 67 F.3d 1563, 1567 (11th Cir. 1995)).

The dispute between Plaintiffs and Defendants fall within the ambit of the Declaratory Judgment Act. The parties disagree that federal law authorizes Defendants *ultra vires* conduct. For all the reasons expressed above, this Court should issue the declarations for Counts I-IV of the Amended Complaint, as more fully outlined below.

2. *Plaintiffs are entitled to Injunctive relief.*

To obtain a permanent injunction, a plaintiff must satisfy a four-factor test:

(1) an irreparable injury;

(2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury;

(3) considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and

(4) the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). Plaintiffs easily satisfy each factor.

a. Plaintiffs Suffer Irreparable Injury.

If the online gaming portions of the Implementing Law take effect, the Tribe will have a monopoly on Florida sports betting. That monopoly will lead to a serious loss of Plaintiffs' business. Plaintiffs' clients will not need to patronize Plaintiffs' businesses, but will be able to place sports bets from their living rooms, cars and

places of employment. As competitors of the Tribe in the gaming market, Plaintiffs will be seriously handicapped by the inability to provide comparable services.

Plaintiffs also will suffer irreparable harm because they will lose market share and customer goodwill when an existing competitor has access to a new sports gaming product no other competitor can offer. The Compact creates new competition for Plaintiffs' casinos. (Ex. C).

The Competitor Standing doctrine applies here. This doctrine "relies on economic logic to conclude that a plaintiff will likely suffer an injury-in-fact when the government acts in a way that increases competition or aids the plaintiff's competitors." *Connecticut v. Dep't of Interior*, 344 F. Supp. 3d 279, 299 (D.D.C. 2018) citing *Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1332 (Fed. Cir. 2008)). In *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010), the court said it "[saw] no reason any one competing for a governmental benefit should not be able to assert competitor standing when the Government takes a step that benefits his rival and therefore injures him economically."

These cases explain that "[t]he logic of the competitor-standing doctrine . . . is that a plaintiff is injured by increased competition." *Connecticut*, 344 F. Supp. At 299 (D.D.C. 2018) (citing *Air Transp. Ass'n of Am. v. Export-Import Bank of the U.S.*, 878 F. Supp. 2d 42, 62 (D.D.C. 2012), *rev'd on other grounds*, *Delta Air Lines, Inc. v. Export-Import Bank of the U.S.*, 718 F.3d 974 (D.C. Cir. 2013)).

Here, although Plaintiffs have long competed with the Tribe for in-person gaming customers, the Tribe will be given an edge with a product no one else can offer, and will do so with a state-sanctioned monopoly in that area. The loss of market-share and customer goodwill that will inevitably result constitutes irreparable harm. *Jysk Bed'N Linen, Inc. v. Dutta-Roy*, 810 F.3d 767, 780 (11th Cir. 2015).

b. Plaintiffs' Remedies are Inadequate.

Plaintiffs' losses cannot be remedied through money damages because Florida and the Tribe enjoy sovereign immunity, rendering Plaintiffs' losses permanently irretrievable. *See Kiowa Tribe of Okla. v. Mfg. Techns., Inc.*, 523 U.S. 751, 760 (1998) (tribal immunity bars contract suits, even for commercial activities not on a reservation); *Gamble v. Fla. Dep't of Health & Rehab. Ser*vs., 779 F.2d 1509, 1512 (11th Cir. 1986) (Eleventh Amendment bars suits against states; money damages unavailable unless Congress has abrogated a state's immunity or the state waives its immunity.).

c. The Balance of Hardships Weighs in Plaintiffs' Favor.

Plaintiffs will lose substantial patrons and revenue if the OSB is not enjoined. Yet an injunction will do no more than require Defendants' compliance with IGRA, the Wire Act, UIGEA and the Constitution. *Greyhound Lines, Inc. v. City of New Orleans*, 29 F. Supp. 2d 339, 341 (E.D. La. 1998) (holding that "compliance with

federal law under the Supremacy Clause" does not constitute a hardship). "Defendants suffer no hardship by being required to comply with the law, whereas Plaintiffs suffer hardship in being deprived of their legal rights." *Broadcast Music, Inc. v. Bayside Boys*, 2013 WL 5352599, at *7 (E.D.N.Y. Aug. 21, 2013); *see also Mitchell v. Pidcock*, 299 F.2d 281, 287 (5th Cir.1962) (compliance with federal law does not constitute a hardship for it only "requires the defendants to do what the Act requires anyway—to comply with the law").

d. A Permanent Injunction Would Serve the Public Interest

Finally, the "public interest would be served by an injunction compelling Defendants to comply with a law which they have willfully violated." *Broad. Music, Inc*., 2013 WL 5352599, at *7. As this Court has said, "[t]he public has no interest in enforcing an unconstitutional ordinance." *Gale Force Roofing and Restoration, LLC. v. Brown*, 4:21cv246-MW/MAF, at *40 (N.D. Fla. July 11, 2021) (*quoting KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006)).

H. If Any Disputed Facts Exists, This Court Should Alternatively Enter A Preliminary Injunction

No disputed facts exist to preclude this Court from entering a final declaration of the parties' rights. But if this Court finds otherwise, Plaintiffs request a preliminary injunction to maintain the *status quo* until this Court can resolve those factual disputes. Equity favors an injunction "to preserve the relative positions of the parties until a trial on the merits can be held," because this is the very purpose of

injunctive relief. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1133–34 (11th Cir. 2005).

The requirements for a preliminary injunction parallel that for permanent injunctive relief. *United States v. Florida*, 870 F. Supp. 2d 1346, 1348 (N.D. Fla. 2012). None of these elements control. "[R]ather, this Court must consider the elements jointly, and a strong showing on one element may compensate for a weaker showing on another." *Brown*, 4:21cv246-MW/MAF, at *8 (citing *Fla. Med. Ass'n, Inc. v. U.S. Dep't of Health, Educ., & Welfare*, 601 F.2d 199, 203 n.2 (5th Cir. 1979)). Though a permanent injunction requires showing actual success on the merits, a preliminary injunction requires showing a substantial likelihood of success on the merits. *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (C.A.10, 2007); *Vo v. Gee*, 301 F. Supp. 3d 661 (E.D. La. 2017).

Plaintiffs have shown a substantial likelihood for success on the merits. Defendants are unable to articulate any real defense to their brazen defiance of IGRA, the Wire Act, or UIGEA. For all the other reasons expressed above, Plaintiffs satisfy the elements for preliminary injunctive relief.

V. CONCLUSION

Because there is no genuine issue of material fact and Plaintiffs are entitled to judgment as a matter of law, this Court should grant Plaintiffs' Motion and enter summary final judgment declaring that:

The Governor's execution, and the Implementing Law's ratification and implementation, of the OSB provisions of the Compact:

I. Are unauthorized under IGRA and, thus, ultra vires;

II. Violate the Wire Act pursuant to the Supremacy Clause and, thus, ultra vires;

III. Violate the UIGEA pursuant to the Supremacy Clause and, thus, ultra vires;

IV. Violate Plaintiffs' Equal Protection rights under the Fourteenth Amendment.

Plaintiffs further request the following equitable relief:

Because the OSB provisions are unauthorized or illegal, they are automatically severed from the Compact ratified under the Implementing Law, and the Court should permanently enjoin Defendants from implementing or enforcing such provisions.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)

Pursuant to Local Rule 7.1(F), undersigned counsel certifies that the above filed Motion and Memorandum of Law contain a total 7963 words, excluding the case style, tables, signature block, this certification, and the certificate of service.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 24, 2021, I electronically filed the foregoing document with the Clerk of Court using CM/ECF, which will send a Notice of Electronic Filing to the following: to all counsel of record that are registered with the Court's CM/ECF system.

/ Raquel A. Rodriguez
Raquel A. Rodriguez, FBN 511439