No. 23A315

IN THE SUPREME COURT OF THE UNITED STATES

WEST FLAGLER ASSOCIATES, LTD., ET AL., APPLICANTS

v.

DEBRA HAALAND, SECRETARY OF THE INTERIOR, ET AL.

RESPONDENTS' RESPONSE IN OPPOSITION TO APPLICATION TO STAY MANDATE PENDING A PETITION FOR A WRIT OF CERTIORARI

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The Solicitor General, on behalf of the Secretary of the Interior and the Department of the Interior, respectfully submits this response to the application to stay the court of appeals' mandate pending the filing and disposition of a petition for a writ of certiorari. The application should be denied.

STATEMENT

This case concerns a 2021 gaming compact between the Seminole Tribe and the State of Florida, neither of which are parties to this litigation. Appl. App. 198, 208. That compact, as relevant here, addresses internet sports betting that the Tribe intends to conduct by accepting wagers placed by patrons in Florida -- including on non-Indian lands -- and receiving those wagers at the Tribe's computer servers located on Indian lands. Id. at 198-199. The court of appeals held that, under the Indian Gaming Regulatory Act (IGRA), 18 U.S.C. 1166-1168, 25 U.S.C. 2701 et seq., the

compact, as approved by operation of law under IGRA, authorized only the relevant gaming activities that occur on Indian lands. Appl. App. 196, 205, 208. And although the compact discussed "related activity" involving the "placing of wagers from outside Indian lands," the court determined that IGRA permits compacts to address such related activity and that the "lawfulness" of that activity under state law is "unaffected" by the compact's discussion of it. Id. at 205; see id. at 203, 208.

1. a. In 1988, "Congress adopted IGRA in response to this Court's decision in California v. Cabazon Band of Mission Indians, 480 U.S. 202, 221–222 (1987), which held that States lacked any regulatory authority over gaming on Indian lands." Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 794 (2014). IGRA accordingly establishes a nationwide regulatory framework for tribal gaming "on Indian lands." Id. at 795.

IGRA divides Indian gaming on Indian lands into three "classes." See 25 U.S.C. 2703(6)-(8). This case concerns Class III gaming, which "includes such things as slot machines, casino games, banking card games, dog racing, and lotteries." Seminole Tribe v. Florida, 517 U.S. 44, 48 (1996); see 25 U.S.C. 2703(7)(B) and (8). Class III gaming activities are "lawful on Indian lands only if such activities," inter alia, are conducted pursuant to a "compact entered into by the Indian tribe and the State * * * that is in effect." 25 U.S.C. 2710(d)(1)(C).[1]

[1] IGRA also provides for the use of substitute Class III procedures following a suit by a tribe in certain circumstances. 25 U.S.C. 2710(d)(7)(B)(vii). That provision is not at issue in this case.

IGRA largely leaves the substance of a Tribal-State compact concerning gaming on Indian lands to be determined by the Tribe and the State that negotiate it. See 25 U.S.C. 2710(d)(3)(A). But IGRA expressly provides that such compacts "may include provisions" relating to certain topics. 25 U.S.C. 2710(d)(3)(C). These topics include "the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation" of gaming activities; an associated "allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations"; "remedies for breach of contract"; and "any other subjects that are directly related to the operation of gaming activities." 25 U.S.C. 2710(d)(3)(C)(i), (ii), (v), and (vii).

After a Tribe and a State negotiate and enter into a compact, the compact must be submitted for review by the Secretary of the Interior (Secretary). See 25 U.S.C. 2710(d)(3)(B) and (8). IGRA provides that "[t]he Secretary is authorized to approve any Tribal-State compact * * * governing gaming on Indian lands of [that] Indian tribe." 25 U.S.C. 2710(d)(8)(A). IGRA further provides that "[t]he Secretary may disapprove a compact * * * only if such compact violates" "(i) any provision of [IGRA]," "(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands," or "(iii) the trust obligations of the United States to Indians." 25 U.S.C. 2710(d)(8)(B). Those provisions authorizing the Secretary to approve or (in certain circumstances) disapprove a compact do not by their terms require

either approval or disapproval, nor do they establish a statutory period in which such action must be taken. IGRA instead provides that "[i]f the Secretary does not approve or disapprove a compact" within "45 days after" its submission to the Secretary, "the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of [IGRA]." 25 U.S.C. 2710(d)(8)(C).

IGRA provides that the "Secretary shall publish in the Federal Register notice of any Tribal-State compact" that the Secretary has actually approved or that has been approved by operation of law. 25 U.S.C. 2710(d)(8)(D). The "compact shall take effect * * * when notice of [such] approval" is published. 25 U.S.C. 2710(d)(3)(B).

b. IGRA does not limit or otherwise alter a State's authority within the State on non-Indian land. "[A] State's regulatory power over tribal gaming outside Indian territory" is therefore "capacious." Bay Mills, 572 U.S. at 794.

2. In April 2021, the Chairman of the Seminole Tribe's Tribal Council and the Governor of Florida signed a Tribal-State compact (Compact) governing Class III gaming activities to be conducted by the Tribe. Appl. App. 44-118 (reproducing the Compact). The Compact defines "Covered Game" and "Covered Gaming Activity" to cover six categories of gaming, including "Sports Betting." Id. at 48, 58. As relevant here, the Compact provides that "[t]he Tribe and State agree that the Tribe is authorized to operate Covered Games on its Indian lands, as defined in the Indian Gaming Regulatory Act, in accordance with the provisions of this

Compact." Id. at 64. The Compact then states that, subject to certain limitations not relevant here, "wagers on Sports Betting * * * 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." Ibid.

In July 2021, the Florida Legislature amended the State's statutory law to permit the contemplated sports-betting wagers by persons on non-Indian lands. Fla. Stat. § 285.710(13)(b)(7) (2023).[2] Like the Compact, that statute provides that "[w]agers on sports betting * * * 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." Ibid. The state statute then provides that "gaming activities authorized [by that provision] and conducted pursuant to a gaming compact [that has been] ratified and approved * * * do not violate the laws of this state." § 285.710(13)(b).

The Compact was submitted to the Secretary for review, but the Secretary did not act to approve or disapprove the Compact within IGRA's 45-day period. Appl. App. 128, 195. In August 2021, the Interior Department's Principal Deputy Assistant Secretary for Indian Affairs wrote the Tribe's Chairman and Florida's Governor informing them that the Compact had been approved by operation of

[2] See Appl. App. 123; The Florida Senate, CS/SB 2-A: Implementation of the 2021 Gaming Compact Between the Seminole Tribe of Florida and the State of Florida, https://www.flsenate.gov/Session/Bill/2021A/2A (last visited Oct. 17, 2023).

law in light of the Secretary's inaction and discussing various aspects of the Compact, id. at 128, 139, including the provisions concerning the placement of wagers by mobile device, id. at 133-135. On August 11, 2021, the Secretary published a Federal Register notice stating that "[t]he Secretary took no action" and that, "[t]herefore, the Compact is considered to have been approved, but only to the extent it is consistent with IGRA." 86 Fed. Reg. 44,037. The Compact "t[ook] effect" upon publication of that notice. 25 U.S.C. 2710(d)(3)(B).

3. Five days later, on August 16, 2021, applicants -- owners of brick-and-mortar casinos in Florida -- filed this suit in district court against the Secretary and the Department of the Interior (Department) under the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., 701 et seq., challenging the approval of the Compact. Appl. App. 2, 6-7, 39; see id. at 1-43 (complaint). Applicants alleged that the Secretary had "a legal obligation to disapprove the Compact" because, as relevant to the issues raised by applicants here: (1) the Compact assertedly authorized the placement of online wagers in Florida on non-Indian lands in violation of IGRA; (2) such wagers from non-Indian lands are unlawful under the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), 31 U.S.C. 5361 et seq., because they involve payments in connection with "sports betting that is illegal in Florida"; and (3) the Compact violates the equal protection component of the Fifth Amendment's Due Process Clause by "discriminat[ing] * * * on the basis of race, tribal affiliation, and national origin." Appl. App. 39-40. Applicants alleged that "the Compact and the Florida

legislation ratifying [it]" unlawfully "attempt[ed] to circumvent" the Florida Constitution, which requires a vote by citizen initiative to authorize casino gambling, except for gaming "on tribal lands" conducted under a compact pursuant to IGRA. Id. at 3-5, 26-28; see Appl. 1-2.

The district court granted summary judgment to applicants and "set aside the Secretary's default approval of the Compact," Appl. App. 191. See id. at 168-192. The court rested that judgment on its conclusion that the Compact "violated IGRA's 'Indian lands' requirement" by "attempt[ing] to authorize sports betting both on and off Indian lands," id. at 186, 190. See id. at 185-190. The court added that, "to be clear," it was "not issuing a final decision on any question of Florida constitutional law." Id. at 190.

4. The court of appeals reversed. Appl. App. 193-216. The court determined that, based on circuit precedent, "[t]he Secretary's decision to take no action within 45 days of receiving the compact * * * is judicially reviewable" "under the APA." Id. at 198, 201-202 (citing Amador Cnty. v. Salazar, 640 F.3d 373, 381, 383 (D.C. Cir. 2011)). The court then determined that the Compact, as properly interpreted, does not violate IGRA because the Compact does not itself authorize sports betting activities on non-Indian lands and, for that reason, "the Secretary did not violate the [APA] in choosing not to act and thereby allowing the Compact to go into effect by operation of law," id. at 196. See id. at 202-209.

a. The court of appeals explained that IGRA "regulates gaming activity on Indian lands, but 'nowhere else.'" Appl. App. 202

(quoting Bay Mills, 572 U.S. at 795); see id. at 196. For that reason, the court continued, "an IGRA gaming compact can legally authorize a tribe to conduct gaming only on its own lands." Id. at 196. The court also observed, however, that IGRA "generally does not restrict or regulate tribal, or any other, activity outside of Indian lands." Id. at 203. Instead, "IGRA 'left fully intact' states' 'capacious' regulatory power outside Indian territory." Id. at 197 (quoting Bay Mills, 572 U.S. at 794).

The court of appeals further determined that "IGRA does not prohibit a gaming compact -- which is, at bottom, an agreement between a tribe and a state -- from discussing other topics, including those governing activities 'outside Indian lands.'" Appl. App. 196 (quoting Bay Mills, 572 U.S. at 796). The court explained that IGRA provides that a gaming compact "'may include provisions relating to' a litany of other topics," including "'subjects that are directly related to the operation of gaming activities.'" Id. at 203 (quoting 25 U.S.C. 2710(d)(3)(C)(vii)).

Turning to the compact in this case, the court of appeals concluded that the relevant text "simply states that the Tribe is authorized to operate sports betting on its lands." Appl. App. 204. And although the Compact also discussed wagers placed by patrons on non-Indian lands, the court reasoned that that compact language -- which "does not say that these wagers are 'authorized' by the Compact (or by any other legal authority)" -- "simply indicates that the parties to the Compact (i.e., the Tribe and Florida) have agreed that they both consider such activity (i.e., placing those wagers) to occur on tribal lands." Ibid. That

additional language, the court concluded, reflects an allocation of jurisdiction among the Compact's parties and is a provision that, as authorized by IGRA, addresses a subject "'directly related to the operation of' the Tribe's sports book." Id. at 205 (quoting 25 U.S.C. 2710(d)(3)(C)(vii)). The court explained that its interpretation of the Compact reflected the "precept that 'a contractual provision should, if possible, be interpreted in such a fashion as to render it lawful rather than unlawful,'" id. at 203 (citation omitted), and that the district court's contrary understanding of the Compact's language erroneously "read[] into the Compact a legal effect it does not (and cannot) have, namely, independently authorizing betting by patrons located outside of the Tribe's lands." Id. at 196.

The court of appeals accordingly concluded that "the Compact itself authorizes only the betting that occurs on the Tribe's lands" and "in this respect it satisfied IGRA." Appl. App. 196; see id. at 205. "The lawfulness of any other related activity such as the placing of wagers from outside Indian lands, under state law or tribal law, is unaffected by its inclusion as a topic in the Compact." Id. at 205. The court emphasized that "[w]hatever the Tribe and Florida * * * may believe, let us be clear: an IGRA compact cannot provide independent legal authority for gaming activity that occurs outside of Indian lands, where that activity would otherwise violate state law." Id. at 208. The court then "express[ed] no opinion as to whether the Florida statute ratifying the Compact is constitutional under [the Florida constitution]." Id. at 209. "That question and any other related questions of

state law are outside the scope of the Secretary's review of the Compact, are outside the scope of [the court's] judicial review, and as a prudential matter are best left for Florida's courts to decide." Ibid.; see id. at 196.

b. The court of appeals noted that although the district court "did not reach" applicants' "UIGEA[] and Fifth Amendment challenges to the Compact," the parties had fully briefed those challenges on appeal and the court of appeals found that they "lack merit." Appl. App. 209. The court initially observed that "the justiciability" of those "non-IGRA challenges" under the APA presented a "thorny question" that the court "need not resolve" because, "even assuming that such claims are justiciable," applicants' "particular challenges fail as a matter of law." Id. at 209-210.

The court of appeals determined that "the Compact does not as a facial matter violate the UIGEA," which prohibits the knowing acceptance of "certain forms of payment in connection with 'unlawful Internet gambling,'" because the Compact does not itself address the form of payments connected with sports betting. Appl. App. 211-212 (quoting 31 U.S.C. 5363). The court explained that its "review is of the Secretary's decision not to act when presented with the Compact, not whether all hypothetical [future] implementations of the Compact are lawful under all federal statutes." Id. at 212.

The court of appeals also determined that "the Secretary's approval [did not] violate[] the Fifth Amendment's equal protection guarantee" on applicants' theory that "the Compact impermis-

sibly grants the Tribe a statewide monopoly over online sports betting." Appl. App. 212-213. The court reasoned that the "Secretary's approval" did not "'authorize[]' all of the activity [discussed] in the Compact (as [the court] ha[d] explained [earlier in its opinion])." Id. at 212. But the court determined that "even if the Secretary's approval" did approve gaming activities on non-Indian lands throughout the State, "it would survive rational basis review, which is the applicable level of scrutiny here." Ibid.

c. On September 11, 2023, the court of appeals denied rehearing. Appl. App. 217. No judge requested a vote. Ibid.

5. On September 25, 2023 -- 11 days before applicants filed their application in this Court to stay the court of appeals' mandate -- applicants petitioned the Florida Supreme Court for relief, arguing that state officials exceeded their authority by entering the Compact because, applicants argued, the Florida Constitution prohibits the type of online sports betting on non-Indian lands discussed in the Compact. See Pet. for Writ of Quo Warranto at 33-60, West Flagler Assocs. Ltd. v. Desantis, No. 2023-1333 (Fla.). The Florida Supreme Court has called for a response to the petition and has set a briefing schedule under which applicants' reply brief is due November 21, 2023. See 9/29/2023 Fla. Sup. Ct. Order, West Flager, supra.[3]

[3] The Florida Supreme Court's online docket for case number 2023-1333, which provides access to applicants' quo warranto petition and the other filings in that case, is available at https://acis.flcourts.gov/portal/search/case.

6. On September 28, 2023, the court of appeals denied applicants' motion to stay its mandate. Appl. App. 219. On October 6, the court of appeals issued its mandate.

That same day, applicants filed in this Court their application to stay that mandate. On October 12, 2023, the Chief Justice ordered that the court of appeals' mandate "is hereby recalled and stayed pending further order of the undersigned or of the Court." 10/12/2023 Order.

ARGUMENT

An applicant seeking a stay of a court of appeals' mandate pending the filing and disposition of a petition for a writ of certiorari must establish (1) "a reasonable probability that four Justices will consider the issue[s] sufficiently meritorious to grant certiorari"; (2) "a fair prospect that a majority of the Court will vote to reverse the judgment below"; and (3) "a likelihood that irreparable harm will result from the denial of a stay." Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam); see Teva Pharms. USA, Inc. v. Sandoz, Inc., 572 U.S. 1301, 1301 (2014) (Roberts, C.J., in chambers); see also Merrill v. Milligan, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring). In addition, a stay is never "a matter of right, even if irreparable injury might otherwise result." Nken v. Holder, 556 U.S. 418, 433 (2009) (citation omitted). "It is instead 'an exercise of judicial discretion,'" and "'the propriety of its issue is dependent upon the circumstances of the particular case,'" including "the public interest." Ibid. (brackets and citations omitted). "The party requesting a stay bears the burden of showing

that the circumstances justify an exercise of that discretion," id. at 433-434, by demonstrating that the balance of the relevant "equities" warrants a stay, Hollingsworth, 558 U.S. at 190. Applicants fail to satisfy any of those requirements.

I. THIS COURT WOULD NOT LIKELY GRANT CERTIORARI, OR REVERSE THE COURT OF APPEALS, ON ANY OF THE THREE QUESTIONS THAT APPLICANTS PRESENT

Applicants present three questions concerning IGRA, UIGEA, and constitutional equal protection, Appl. 6; see Appl. 3-5, on which they contend that the court of appeals erred, Appl. 27-37. Each of those contentions lacks merit, and none presents a conflict with any decision of this Court or another court of appeals. The Court therefore is not reasonably likely to grant certiorari, and there is no fair prospect that the Court would reverse the court of appeals' judgment if it did grant review.

A. The Compact Is Consistent With IGRA

This Court is unlikely to grant review, and there is no fair prospect that the Court would reverse, based on applicants' IGRA question. See Appl. 15-19, 27-31. Applicants contend (Appl. 17) that the court of appeals "h[eld] that IGRA authorized the Secretary to approve a compact that regulates gaming off Indian lands." That is incorrect. The court of appeals repeatedly emphasized that the Compact that was deemed approved by operation of law "'authorizes' only the Tribe's activity on its own lands" and that "[t]he lawfulness of any other related activity such as the placing of wagers from outside Indian lands * * * is unaffected by its inclusion as a topic in the Compact." Appl. App. 205; see id. at 196, 202, 204, 211. The court based that understanding on a well-

established principle of contract interpretation, and its fact-bound interpretation of the particular compact in this case is both correct and warrants no further review.

1. The court of appeals correctly determined that IGRA "regulates gaming activity on Indian lands, but 'nowhere else.'" Appl. App. 202 (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 795 (2014)). The court likewise correctly determined that "IGRA 'le[aves] fully intact' states' 'capacious' regulatory power outside Indian territory." Id. at 197 (quoting Bay Mills, 572 U.S. at 794). As a result, the court concluded that "IGRA generally does not restrict or regulate tribal, or any other, activity outside of Indian lands." Id. at 203. Indeed, the court emphasized that, "[w]hatever the Tribe and Florida * * * may believe, let us be clear: an IGRA compact cannot provide independent legal authority for gaming activity that occurs outside of Indian lands, where that activity would otherwise violate state law." Id. at 208. Applicants appear to have no disagreement with those conclusions.

The court of appeals also recognized that although "the function of a class III gaming compact is to authorize gaming on Indian lands," such a compact "'may include provisions relating to' a litany of other topics." Appl. App. 203 (quoting 25 U.S.C. 2710(d)(3)(C)). Section 2710(d)(3)(C) identifies a series of subjects that a Tribe and a State may "negotiate[]" and then "may include [as] provisions" in a gaming compact. 25 U.S.C. 2710(d)(3)(C). Those provisions include "provisions relating to" the "application of the criminal and civil laws and regulations of

the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation" of gaming activities; the associated "allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations"; "remedies for breach of contract"; and "any other subjects that are directly related to the operation of gaming activities." 25 U.S.C. 2710(d)(C)(3)(i), (ii), (v), and (vii).

As the court of appeals recognized, this Court in Bay Mills concluded that those provisions may address "state or tribal activity outside of Indian lands." Appl. App. 203. A compact provision, for instance, may authorize a State to sue a tribe for "gaming outside Indian lands." Bay Mills, 572 U.S. at 796. And because Congress has authorized a compact to include "subjects that are directly related to the operation of gaming activities," 25 U.S.C. 2710(d)(C)(3)(vii), a compact may include provisions addressing matters off Indian lands that are directly related to gaming activities conducted on Indian lands.

That makes good sense. States have "capacious" authority to regulate "tribal gaming outside Indian territory." Bay Mills, 572 U.S. at 794. And if a State can authorize a tribe to conduct gaming operations on non-Indian lands, a State can also authorize the portion of a tribe's gaming activities that occur on non-Indian lands where the balance of the activities occurs on Indian lands. The gaming activities on Indian lands, of course, must be separately authorized under IGRA. But there is no apparent reason why a Tribal-State compact that authorizes gaming activities on

Indian lands under IGRA cannot also include provisions that concern the State's (independent and non-IGRA) authorization to conduct directly related gaming activities in the State on non-Indian lands, even though IGRA and the Tribal-State compact would not independently authorize those related activities. For instance, if a proposed brick-and-mortar casino would be situated on both Indian and non-Indian lands, a Tribal-State compact could authorize the portion of casino gaming activities occurring on Indian lands, even though the casino would also require the State's independent authorization of the casino's related gaming activities on non-Indian lands.

That is exactly how the court of appeals construed the Compact here. The court interpreted the relevant Compact provision's statement that "'the Tribe is authorized to operate Covered Games on its Indian lands'" according to its express terms to "authorize[] [the Tribe] to operate sports betting on its lands." Appl. App. 204 (citation omitted; emphasis added).

The court of appeals then interpreted the second sentence in that provision addressing sports betting by patrons elsewhere in Florida -- which states that internet wagers on such betting "'shall be deemed to take place exclusively where received'" by computer servers or other devices "'on Indian Lands'" -- as reflecting an agreement by the Tribe and the State to "consider such activity (i.e., placing those wagers) to occur on tribal lands." Appl. App. 204 (citation omitted). The court observed that the second sentence, unlike the first, did "not say that these wagers are 'authorized' by the Compact," ibid., and the court

therefore properly construed that language in light of the established principle that "a contractual provision should, if possible, be interpreted in such a fashion as to render it lawful rather than unlawful," id. at 203 (citation omitted); see Hobbs v. McLean, 117 U.S. 567, 575-576 (1886) (If a contract provision is fairly open to two interpretations, "one of which it would be lawful and the other unlawful, the former must be adopted."). The court accordingly concluded that the Compact did not itself authorize that wagering activity and that "[t]he discussion of wagers placed from outside Indian lands" qualified as a compact provision concerning the allocation of authority, permitted under IGRA, that "'directly related to the operation of' the Tribe's sports book." Appl. App. 205 (quoting 25 U.S.C. 2710(d)(3)(C)(vii)).

2. Applicants assert (Appl. 16-17) that the court of appeals "h[eld] that IGRA authorized the Secretary to approve a compact that regulates gaming off Indian lands." Appl. 17. Applicants then argue that that decision "conflicts with this Court's decision in Bay Mills," which determined that IGRA provides tools to "'regulate gaming on Indian lands, and nowhere else,'" and with decisions of other courts of appeals, which have similarly concluded that IGRA does not regulate "gambling off Indian lands." Appl. 16-18 (quoting Bay Mills, 572 U.S. at 795) (emphasis omitted).

Less than two weeks before filing their application in this Court, however, applicants took a different view of the D.C. Circuit's decision in their filing in the Florida Supreme Court seeking a declaration that sports-betting wagers placed off Indian lands are inconsistent with the State's constitution. In that

state-court filing, applicants explained that the D.C. Circuit in this case held that the "Compact did not and could not authorize off-Indian lands gaming under IGRA"; that the "'lawfulness of * * * placing of wagers from outside Indian lands, under state law or tribal law, is unaffected by [its] inclusion as a topic in the Compact'"; and that the lawfulness of such gaming activities within Florida on non-Indian lands is simply a "matter of state law." Pet. for Writ of Quo Warranto at 10, 31, West Flagler Assocs. Ltd. v. Desantis, No. 2023-1333 (Fla. Sept. 25, 2023) (quoting 71 F.4th 1059, 1066 (Appl. App. 205)); see id. at 25-26, 34-35, 54-55 (similar). Applicants' state-court filing, for the reasons above, is correct. See pp. 7-10, 13-14, supra. The D.C. Circuit's decision thus does not conflict with Bay Mills or other appellate decisions.

Applicants additionally contend (Appl. 18-19) that the court of appeals' decision "conflict[s] with the narrow interpretation other circuits have given to [Section] 2710(d)(3)(C)[vii]," which provides that a compact may include provisions relating to "any other subjects that are directly related to the operation of gaming activities," 25 U.S.C. 2710(d)(3)(C)(vii). That is incorrect. Although each decision that applicants cite addressed Section 2710(d)(3)(C)(vii) and its language requiring a "direct[] rela-t[ionship]" between a compact provision and the operation of gaming activities (ibid.), none purports to give that language a "narrow interpretation" (Appl. 18) and each involves compact provisions

materially different from the one here.[4] The court of appeals' determination in this case that a compact provision discussing (but not affirmatively authorizing) wagers placed on non-Indian lands is "directly related" to the Compact's IGRA-authorized gaming activity on Indian lands, Appl. App. 204-205, thus implicates no division of authority. Indeed, the court of appeals specifically relied on two of the four decisions applicants cite to "confirm [its] understanding" of IGRA. Id. at 206.

B. The Compact Is Consistent With UIGEA

This Court is also unlikely to grant review, or reverse, on applicants' UIGEA contentions. See Appl. 19-22, 33-35. The court of appeals simply determined that "the Compact does not as a facial matter violate the UIGEA" because the Compact does not address whether the Tribe will accept "certain forms of payment" that could be unlawful under UIGEA and because the court's "review is of the

[4] See Chicken Ranch Rancheria of Me-Wuk Indians v. California, 42 F.4th 1024, 1036-1040 (9th Cir. 2022) (requiring "a 'direct connection' to the operation of gaming activities" and concluding that general family-law, environmental-regulation, and tort-law provisions do not qualify); Flandreau Santee Sioux Tribe v. Noem, 938 F.3d 928, 934-935 (8th Cir. 2019) (concluding that taxation of purchases at "amenities such as a gift shop, hotel, and RV park are not directly related to Class III gaming activity"), cert. denied, 140 S. Ct. 2804 (2020); Navajo Nation v. Dalley, 896 F.3d 1196, 1212-1216 (10th Cir. 2018) (concluding that although "Congress expressed [the] scope [of Section 2710(d)(3)(C)(vii)] in broad terms," the provision does not extend to provisions addressing civil jurisdiction over slip-and-fall tort claims), cert. denied, 139 S. Ct. 1600 (2019); Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger, 602 F.3d 1019, 1033 (9th Cir. 2010) (concluding that a general revenue-sharing provision would not be "directly related" to the operation of gaming activities based "on the mere fact that the revenue derives from gaming activities"), cert. denied, 564 U.S. 1037 (2011).

Secretary's decision not to act when presented with the Compact, not whether all hypothetical implementations of the Compact are lawful." Appl. App. 211-212. That limited and factbound determination is correct and warrants no further review.[5]

UIGEA prohibits "knowingly accept[ing]" certain payment methods in connection with "unlawful Internet gambling," 31 U.S.C. 5363, which the statute generally defines as the placement, receipt, or knowing transmission of a bet or wager using the Internet, where the "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).[6] Applicants assert (Appl. 20) -- without evidentiary

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[5] Applicants' contentions implicate an additional threshold question. The government argued below that applicants' non-IGRA claims were not a proper basis for judicial review of the limited scope of the approval of the Compact by operation of law. Gov't C.A. Br. 31-35. IGRA provides that if "the Secretary does not approve or disapprove a compact" within 45 days, "the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of [IGRA]." 25 U.S.C. 2710(d)(8)(C) (emphases added). The court of appeals recognized that the limited nature of a compact approval by operation of law under Section 2710(d)(8)(C) -- which suggests "inconsistency with IGRA as the only ground" for declining to approve a compact -- might reflect that "non-IGRA challenges" are not a proper basis to challenge such a limited approval. Appl. App. 209-210. The court ultimately found that it "need not resolve that thorny question" because applicants' non-IGRA challenges, even if reviewable, would "fail as a matter of law." Id. at 210. That threshold issue provides another basis for concluding that the extraordinary relief of a stay is unwarranted here.

[6] Gambling that otherwise qualifies as "'unlawful Internet gambling'" is excluded from that definition if "the bet or wager" is "initiated and received or otherwise made exclusively within a single State," is "expressly authorized by and placed in accordance with the laws of such State," and does not violate certain other

support -- that "the only way for the Tribe to offer online sports betting is for the Tribe to receive payment by credit card or electronic fund transfers" that would be unlawful under UIGEA. But applicants do not address, for instance, whether the Tribe could require a patron to establish and fund in cash a sport-betting account with the Tribe which the patron could then later use to place online wagers. Nor do applicants address whether, as a factual matter, other payment mechanisms would be lawful under UIGEA. And applicants fail to address the Compact's own text which, although it does not specifically address payment methods, requires the Tribe to comply with all "applicable federal laws with respect to the conduct of Sports Betting." Appl. App. 79. Applicants thus provide this Court no sound basis for review or reversal based on their UIGEA arguments.

Applicants contend (Appl. 20-21) that review is warranted because the court of appeals' decision on UIGEA conflicts with California v. Iipay Nation of Santa Ysabel, 898 F.3d 960 (9th Cir. 2018). That too is incorrect. As just explained, the court here merely concluded that the Compact itself does not violate UIGEA because it does not address payment methods that might violate UIGEA. Appl. App. 211-212. That case-specific ruling is fully consistent with Iipay, which concluded that the online gambling in that case -- which was "not subject to [a] tribal-state compact," 898 F.3d at 964 & n.5 -- occurs "at least" in part where the patron

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federal laws (including IGRA). 31 U.S.C. 5362(10)(B). The court of appeals did not decide whether the placement of wagers outside Indian lands would be permissible under state law.

places an online bet or wager, there, on non-Indian lands in California. Id. at 967. The Iipay court therefore concluded that "some of the 'gaming activity'" (the betting) was not "subject to [the Tribe's] jurisdiction under IGRA," and because "those bets [we]re illegal" where they were made on non-Indian lands in California, the Tribe's acceptance of financial payments "either via a credit card or an electronic funds transfer" "violate[d] the UIGEA." Id. at 962, 967. Nothing in that decision conflicts with the court of appeals' decision here.

C. The Secretary's Approval Of The Compact Is Consistent With Equal-Protection Principles

Applicants do not dispute the court of appeals' determination that the Compact survives rational-basis equal-protection review. Appl. App. 212-213. Applicants instead contend (Appl. 22-27, 35-37) that this Court would likely grant certiorari, and then reverse, on the ground that the State's agreement in the Compact to authorize the Tribe to conduct internet sports betting on non-Indian lands -- betting which the State expressly authorized by statute, Fla. Stat. § 285.710(13)(b)(7) (2023) -- constitutes a racial preference subject to strict scrutiny under equal-protection principles. That contention lacks merit.

1. As an initial matter, applicants' equal-protection arguments rest on two flawed premises. First, applicants' equal-protection claim against the federal government rests on their view (Appl. 25) that the "compact . . . grants a statewide monopoly on off-reservation online sports betting to one particular Indian Tribe." But as the court of appeals held, the Secretary's approval

of the Compact by operation of law did not "authorize[]" gaming outside Indian lands, Appl. App. 212, because it "'authorizes' only the Tribe's activity on its own lands, that is, operating the sports book and receiving wagers," id. at 205. See id. at 196, 208. To the extent that "any other related activity such as the placing of wagers from outside Indian lands" has been authorized, it has been authorized by Florida "under state law." Id. at 205. And because approval of the Compact by operation of law did not validate or ratify Florida's own decisions about how to regulate gaming outside Indian lands, any allegation that Florida law governing sports betting violates equal-protection principles does not present an equal-protection claim against the Secretary and the Department.

Second, applicants concede (Appl. 24) that this Court's decisions -- which applicants do not question -- have held that actions "providing a preference to Indians" are lawful, at least where they are related to "Indian lands, uniquely sovereign interests, or to the special relationship between the federal government and Indian tribes." Applicants contend (Appl. 27) that the sports betting addressed in the Compact here "does not relate to Indian land, tribal status, self-government, or culture." But for the same reasons just discussed, the approval of the Compact by operation of law does relate directly to Indian lands, because it approves gaming activity only on Indian lands. Appl. App. 196, 205, 208, 212. And that approval further relates to the Tribe's uniquely sovereign interests and the special relationship between the federal government and Indian tribes. This case against the

Secretary and the Department therefore does not present the equal-protection question on which applicants would seek review.

2. In any event, the Compact in this case is an agreement between two sovereigns -- the State of Florida and the Seminole Tribe -- concerning the Tribe's own conduct of commercial gaming operations within the State. That agreement between sovereigns does not implicate race-based equal-protection concerns. A sovereign government has no race. And so long as an agreement between sovereigns does not contain provisions based on racial classifications of individuals, an equal-protection challenge to the agreement is properly analyzed under rational-basis review. See Fitzgerald v. Racing Ass'n, 539 U.S. 103, 107 (2003).

Applicants identify no decision concluding otherwise. Applicants invoke (Appl. 23-24) cases involving challenges to "employment preference[s]" given to individuals, Morton v. Mancari, 417 U.S. 535, 537 (1974); "placement preferences" for selecting individuals to be awarded custody of certain Indian children, Haaland v. Brackeen, 143 S. Ct. 1609, 1624, 1638 (2023); id. at 1661 (Kavanaugh, J., concurring); and criteria that limit which individual State citizens may vote for the State's public officials, Rice v. Cayetano, 528 U.S. 495, 520 (2000). None of those decisions is pertinent to a State's compact with a sovereign Tribe.

The compact here does not specify advantages or disadvantages that a government provides or imposes on classes of individuals. But even if governmental preferences for individual members of the Tribe were at issue, it is a "bedrock principle that [such] Indian status is a 'political rather than racial' classification." Brac-

keen, 143 S. Ct. at 1648 (Gorsuch, J., concurring) (quoting Mancari, 417 U.S. at 553 n.24); see, e.g., United States v. Antelope, 430 U.S. 641, 645-647 (1977); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 479-480 (1976). As such, classifications directed "only to members of 'federally recognized tribes'" are "not directed towards a 'racial' group consisting of 'Indians.'" Rice, 528 U.S. at 519-520 (quoting Mancari, 417 U.S. at 553 n.24).

3. Applicants err (Appl. 24-26, 36-37) in suggesting that the court of appeals' decision conflicts with Williams v. Babbitt, 115 F.3d 657 (9th Cir. 1997), cert. denied, 523 U.S. 1117 (1998). The question in Williams was whether a federal statute that said "nothing about non-native ownership of reindeer" and did "not by its terms guarantee Alaskan natives a monopoly in the reindeer business" should nevertheless be interpreted to impose a complete ban on "non-Native" individuals "ent[ering] into the reindeer industry in Alaska." Id. at 659. The Ninth Circuit found "no reason to unnecessarily resolve" "[t]he constitutional questions" that could be raised by such a ban because it "interpret[ed] the Reindeer Act as not precluding non-natives in Alaska from owning and importing reindeer." Id. at 666. And although the Williams court identified what it viewed as serious constitutional issues that could be implicated by such a ban, id. at 663-665, the court ultimately did not resolve any of those issues, id. at 666. Williams thus does not even address, much less resolve, the constitutionality of a law or agreement between a State and a tribe concerning the tribe's own activities.

II. APPLICANTS FAIL TO DEMONSTRATE IRREPARABLE HARM OR EQUITIES WARRANTING RELIEF FROM THIS COURT

Finally, applicants fail to demonstrate that either irreparable harm or the balance of the equities warrants relief from this Court. Applicants contend (Appl. 37-39) that the court of appeals' "[o]pinion permits the Tribe and Florida officials to circumvent * * * the Florida Constitution's prohibition on casino gambling (including sports gambling)." This, they contend, will result in a "major shift in [the State's] public policy" and will result in (purportedly unlawful) internet sports betting in Florida that will harm "Florida's citizenry," Appl. 37, and cause applicants, who operate casinos, economic harm from that competetion. Appl. 38. Those contentions -- which rest wholly on applicants' view of the Florida Constitution -- lack merit. And applicants' two-year delay in bringing a state-court action to present their state-law contentions fatally undermines their claim to the equitable relief of a stay.

As an initial matter, applicants' contention (Appl. 37) that the court of appeals' "[o]pinion" will be the source of gaming activities on non-Indian lands is incorrect. As the court of appeals repeatedly emphasized, "[t]he lawfulness of * * * activity such as the placing of wagers from outside Indian lands" is governed by "state law," which the court did not purport to interpret or apply. Appl. App. 205, 208; see pp. 17-18, supra.

In any event, applicants' assertions of irreparable harm are misplaced. Applicants contend (Appl. 37-38) that "Florida's citizenry" will be harmed. But Florida's Legislature -- presumably

acting in its citizens' best interests and reflecting its own understanding of the Florida constitution -- enacted a statute in 2021 specifically authorizing the internet sports betting addressed in the Compact. See p. 5, supra. Florida's Governor, also presumably acting on behalf of the State's citizenry, entered into the Compact on behalf of the State, representing for the State that the gaming activities discussed therein "comply in all respects with the Florida Constitution." Appl. App. 47.

By seeking a stay of the appellate mandate, which reversed the district court's judgment setting aside the Compact's approval, applicants effectively seek in this suit -- in which the State is not even a party -- to stay the operation of the state statute authorizing the relevant gaming activities on non-Indian lands. This is not an appropriate case in which to seek such relief.

Applicants' contention (Appl. 38) that they will suffer irreparable economic harm from sports-betting competition is likewise insufficient. Applicants recognize (Appl. 39 n.16) that their gain would be the Tribe's loss but, in applicants' view, the Tribe's "harm would be solely economic in nature, and not irreparable." But the Tribe, which also is not a party to this suit, would appear to have no way to recoup its losses from its inability to conduct sports-betting activities. And if applicants are correct that the Tribe's economic harm is not "irreparable" in the relevant sense, then it would appear that applicants' asserted economic harm is not irreparable either.

Finally, although applicants ultimately base (App. 37) their claims of harm on their view that the court of appeals' "[o]pinion

permits the Tribe and Florida officials to circumvent * * * the Florida Constitution's prohibition on casino gambling," applicants fail to demonstrate an equitable entitlement to relief on that theory. Applicants' contentions under the Florida Constitution, if adopted, would have the effect of declaring a Florida statute invalid under the state constitution. Both federal courts in this case have appropriately declined applicants' invitation to resolve that state-law question, which "as a prudential matter [is] best left for Florida's courts to decide." Appl. App. 209; see id. at 190. And despite presenting their state constitutional contentions in federal court mere days after the Compact took effect in August 2021, see pp. 6-7, supra, applicants delayed for over two years to bring those same contentions in the forum most suited to resolve them: Florida state court. Furthermore, although applicants seek emergency relief from this Court, they have not sought to expedite resolution of their pending state-court case in which they seek a "declar[ation] that the [State's] Governor and Legislature exceeded their powers in authorizing off-reservation sports betting," which, they contend, "will negate" the Florida statute authorizing that activity on non-Indian lands, Pet. for Writ of Quo Warranto at 60, West Flagler, supra. See p. 11 & n.2, supra. If the Florida Supreme Court concludes that the Florida Legislature's authorization of the placement of wagers outside Indian lands is not permissible under the Florida Constitution, that would afford applicants the relief they seek. That pending case provides the appropriate forum to resolve applicants' claims based on the

meaning of state law. In these circumstances, equity counsels strongly against a stay from this Court.

CONCLUSION

The application to stay the court of appeals' mandate pending a petition for a writ of certiorari should be denied.

Respectfully submitted.

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