No. ____

IN THE

Supreme Court of the United States

WEST FLAGLER ASSOCIATES, LTD., *et al.*,
Petitioners,

v.

DEBRA HAALAND, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Florida Constitution prohibits casino gambling, including sports gambling, absent a citizen's initiative—unless it occurs "on tribal lands" pursuant to a compact between the State and an Indian tribe that has been approved under the Indian Gaming Regulatory Act ("IGRA").

In April 2021, Florida and the Seminole Tribe executed a Compact that, among other things, provides for the Tribe to offer sports betting over the internet to people located anywhere in Florida, including locations that are not on tribal lands, by "deeming" online sports bets placed off tribal lands to have been made on tribal lands. The Secretary of the Interior allowed that compact to be approved under IGRA, and the D.C. Circuit upheld that approval. The questions presented are:

1. Whether IGRA authorizes the approval of a compact that purports to allow for an online sports gambling monopoly throughout the state and off Indian lands.

2. Whether an IGRA compact violates the Unlawful Internet Gambling Enforcement Act if it provides for internet sports betting that is unlawful where many of the bets are placed.

3. Whether the Secretary's approval of a tribal-state compact violates equal protection principles where it provides a specific tribe with a monopoly on online sports gaming off tribal lands, while state law makes that conduct a felony for everyone else.

PARTIES TO THE PROCEEDING

Petitioners West Flagler Associates, Ltd., and Bonita-Fort Myers Corporation ("Petitioners") were plaintiffs in the United States District Court for the District of Columbia, and appellees in the United States Court of Appeals for the District of Columbia Circuit.

Respondents United States Department of the Interior and Debra Haaland, in her official capacity as Secretary of the Interior, were defendants in the United States District Court for the District of Columbia, and appellants in the United States Court of Appeals for the District of Columbia Circuit.

RULE 29.6 STATEMENT

Petitioner West Flagler Associates, Ltd., a Florida Limited Partnership, is wholly owned by Southwest Florida Enterprises, Inc., and Petitioner Bonita-Fort Myers Corporation, a Florida Corporation, is also wholly owned by Southwest Florida Enterprises, Inc. No publicly held company has a 10% or more ownership interest in Petitioners or their parent company.

RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings:

West Flagler Associates, Ltd. et al. v. Haaland et al., No. 1:21-cv-02192-DLF (D.D.C.), order filed November 22, 2021.

West Flagler Associates, Ltd., et al. v. Haaland, et al., No. 21-5265 (D.C. Cir.), opinion filed June 30, 2023, and petition for rehearing denied September 11, 2023.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Rules

Regulations

Other Authorities

INTRODUCTION

This Petition raises an important question of federal law: may the governor of a State and an Indian tribe use a federal approval of an IGRA compact as a backdoor around state constitutional prohibitions against online sports gambling conducted *off* tribal lands, and thereby create a sports gambling monopoly for the tribe while making the same conduct a felony for everyone else?

This question is exceptionally important not just for the people of Florida, but for the nationwide precedent it will set for other state-tribal compacts if the Court of Appeals' affirmative answer is left undisturbed—as an end-run not just around state-law prohibitions on gaming off tribal lands, but also around Congress' limitation of IGRA's federal imprimatur to gambling *on* tribal lands. *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.").

In 2021, the Governor of Florida and the Seminole Tribe ("the Tribe") executed a compact ("the Compact") that purports on its face to authorize the Tribe to offer online sports gambling anywhere in the State, including locations that are off its tribal lands. The Compact provides that all online sports bets placed from off tribal lands "shall be deemed" to have been placed "exclusively" on tribal lands. Through this artifice, the Compact transparently attempts to get around the Florida Constitution—which requires a popular citizen's initiative to authorize *any* sports betting *except* where authorized by a valid compact under IGRA for gambling "on tribal lands."

Notwithstanding the Compact's clear attempt to abuse IGRA to bootstrap approval of off-reservation sports betting, the Secretary allowed it to enter into force.

Petitioners, who operate traditional "pari-mutuel" gambling establishments in Florida that will suffer competitive injury from this state-sponsored monopoly, brought this suit to challenge the Secretary's *ultra vires* approval of the Compact.

The District Court ruled in favor of Petitioners, holding that IGRA did not authorize the approval of a compact that authorized gambling off Indian lands.

The D.C. Circuit reversed. It agreed that IGRA does not authorize the approval of any compact provision that authorizes gambling off Indian lands but held that it was possible to construe the Compact as merely "discussing" or "referencing" the online sports gambling that would occur off Indian lands, not as "authorizing" it. This "saving construction" was inconsistent with this Court's precedents, and improperly evaded the substantial federal questions presented by the Compact's approval.

The D.C. Circuit's decision allows Florida and the Tribe to have their cake and eat it too. The whole point of the Compact is to provide a hook for dodging Florida's constitutional requirement of a popular referendum to approve off-reservation sports betting. By upholding the approval of the Compact, the Court of Appeals necessarily allowed that fiction to flourish—all while misinterpreting IGRA, the Unlawful Internet Gambling Enforcement Act ("UIGEA"), and this Court's equal protection jurisprudence.

Although this Court denied Petitioners' subsequent application for a stay of the mandate pending appeal, Justice Kavanaugh agreed that, "[i]f the compact authorized the Tribe to conduct off-reservation gaming operations, either directly or by deeming off-reservation gaming operations to somehow be on-reservation, then the compact would likely violate the Indian Gaming Regulatory Act." App.64-65. He also noted that, "[t]o the extent that a separate Florida statute . . . authorizes the Seminole Tribe—and only the Seminole Tribe—to conduct certain off-reservation gaming operations in Florida, the state law raises serious equal protection issues." *Id.* at 65.

Those issues have not gone away. And although the Florida Supreme Court is currently considering a state-law challenge to the Compact, only this Court can correct the D.C. Circuit's erroneous affirmation of the Secretary's approval of the Compact and conclusively resolve the equal protection concerns identified by Justice Kavanaugh. Thus, certiorari is warranted because each of the three federal questions presented by this Petition, which are not currently before the Florida Supreme Court, are of massive importance for the future of online gaming across the country—and can only be conclusively resolved by this Court.

These issues are also urgent. The Tribe launched its online sports gaming app on November 7, 2023—commencing the very gaming the D.C. Circuit said was "not authorized" by the Compact, and thus not approved under IGRA, even though it is set forth in the plain text of the Compact. Yet the Florida Supreme Court rejected Petitioners' request to

expedite the quo warranto proceeding in response to the launch of that gaming. Nevertheless, because there is a scenario in which a Florida Supreme Court decision could moot this Petition, if this Court believed appropriate, Petitioners would acquiesce to an extension of time for any opposition to this Petition until 30 days after a decision by the Florida Supreme Court.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit (App.1-27) is reported at 71 F.4th 1059 (D.C. Cir. 2023). The Opinion of the United States District Court for the District of Columbia (App.28-59) is reported at 573 F. Supp. 3d 260 (D.D.C. 2021).

JURISDICTION

The Court of Appeals issued its opinion and judgment on June 30, 2023, and denied Petitioners' petition for rehearing on September 11, 2023. App.62-63. This Court has jurisdiction under 28 U.S.C. § 1254(1). On December 1, 2023, this Court granted Application No. 23A494, extending the time to file this Petition until February 8, 2024.

STATUTORY PROVISIONS INVOLVED

This Petition presents a question under a provision of the Indian Gaming Regulatory Act ("IGRA"), found at 25 U.S.C. § 2710(d), which is reproduced in the Appendix at App.66-74. This Petition also presents a question under a provision of the Unlawful Internet

Gambling Enforcement Act ("UIGEA"), found at 31 U.S.C. § 5362(10), which is reproduced at App.75-78.

STATEMENT OF THE CASE

A. Legal Background

1. IGRA

In 1987, this Court held that the state of California had no authority to regulate gambling activities conducted on Indian lands, and that states generally had no such authority unless Congress provided for it. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207, 221-22 (1987).

In 1988, Congress reacted to *Cabazon* by enacting the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq*. IGRA attempts to harmonize the federal, state, and tribal interests in regulating gaming on tribal lands.

IGRA distinguishes between three classes of gaming. Class I gaming is defined as "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." *Id.* § 2703(6). IGRA provides that "Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter." *Id.* § 2710(a)(1).

IGRA defines Class II gaming as certain types of bingo and certain card games. *Id.* § 2703(7). IGRA provides that Indian tribes may engage in, license, or regulate Class II gaming if (A) "such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity," and (B) such gaming is approved by an ordinance or resolution adopted by the governing body of the

Indian tribe, and approved by its Chairman, in accordance with the provisions of IGRA. *Id.* §§ 2710(b)(1)(A), (B).

IGRA defines Class III gaming as "all forms of gaming that are not class I gaming or class II gaming." *Id.* § 2703(8). IGRA provides that Class III gaming shall be lawful on Indian lands only if it is (A) authorized by an ordinance or resolution approved by the Indian tribe's governing body, approved by its Chairman, and in accordance with IGRA's Class II provision; (B) "located in a State that permits such gaming for any purpose by any person, organization, or entity"; and (C) "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State" that is in effect pursuant to IGRA. *Id.* §§ 2710(d)(1)(A)-(C).

IGRA provides that a Tribal-State gaming compact "shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register." *Id.* § 2710(d)(3)(B). The Secretary of Interior "is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe." *Id.* § 2710(d)(8)(A). The Secretary may disapprove any compact that violates (A) the provisions of IGRA, (B) the provisions of any other Federal law, or (C) the trust obligations of the United States to the Indian tribes. *Id.* § 2710(d)(8)(B).

If the Secretary does not approve or disapprove a compact within 45 days of its being submitted for approval, "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 this chapter." *Id.* § 2710(d)(8)(C). The D.C. Circuit has

held that when a compact is "considered to have been approved by the Secretary," that automatic approval is judicially reviewable under the APA. *Amador County v. Salazar*, 640 F.3d 373, 375 (D.C. Cir. 2011).

IGRA was enacted before the advent of the Internet and long before the prospect of mobile or online sports gaming, and therefore has no provisions that address internet gambling.

2. UIGEA

In 2006, Congress enacted the Unlawful Internet Gambling Enforcement Act ("UIGEA"), 31 U.S.C. §§ 5361 *et seq*. UIGEA prohibits anyone "engaged in the business of betting or wagering" from accepting payments by credit card, electronic funds transfer, or various other means "in connection with the participation of another person in unlawful Internet gambling." *Id.* § 5363. "Unlawful Internet gambling" occurs when someone places, receives, or transmits a "bet or wager" using the internet that "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." *Id.* § 5362(10)(A); *see also id.* § 5362(1)(A).

3. Florida Constitution

In 2018, Florida amended its constitution 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(a). The amendment "requires a vote by citizens' initiative

pursuant to Article XI, section 3, in order for casino gambling to be authorized under Florida law." *Id.*[1]

The Florida Constitution defines "casino gambling" to include what 25 C.F.R. § 502.4 designates as "Class III gaming." *Id.* at § 30(b). And 25 C.F.R. § 502.4(c) defines Class III gaming to include "[a]ny sports betting." Thus, the Florida Constitution prohibits sports gambling absent a public referendum to amend the Constitution to permit sports gambling. There has been no such referendum.

The 2018 amendment has one exception to the referendum requirement: it says that "nothing herein shall be construed to limit the ability of the state or Native American tribes to negotiate gaming compacts pursuant to the Federal [IGRA] for the conduct of casino gambling *on tribal lands*." Fla. Const. art. X, § 30(c) (emphasis added).

B. Factual Background

1. The Tribe and Florida Governor Executed an IGRA Compact Providing for the Tribe to Offer Online Sports Gaming off Indian Lands.

On April 23, 2021, Florida's Governor and the Tribe signed the Compact. JA118.[2] The Compact provides:

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[1] A citizens' initiative pursuant to Article XI, section 3, is a referendum initiated by the voters to amend the Florida Constitution. Fla. Const. art. XI, § 3.

[2] All references to "JA__" are to the Joint Appendix filed by the parties in the Court of Appeals.

> "The 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. Subject to limitations set forth herein, 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."

JA76 (Part IV.A) (emphasis added).

Thus, the Compact authorizes the Tribe to offer "Covered Games." It defines "Covered Games" to include "Sports Betting." JA60 (Part III.F). It defines "Sports Betting" to include any bets on competitive sports, subject to the following provision:

> "All such wagering **shall be deemed** at all times to be exclusively conducted by the Tribe at its Facilities where the sports book(s), including servers and devices to conduct the same, are located, including any such wagering undertaken by a Patron physically located in the State but not on Indian Lands using an electronic device connected via the internet, web application or otherwise."

JA70-71 (Part III.CC.2) (emphasis added).

Thus, the Compact unambiguously authorizes the Tribe to offer online Sports Betting to persons located ***off*** Indian lands, and then "deems" such gambling to be treated as if it occurred "exclusively" ***on*** Indian lands.

On May 19, 2021, Florida's Legislature passed a law ratifying the Compact, *see* JA132-140, which the Governor signed on May 25, 2021.[3] Like the Compact, this statute provides that sports betting made from off the Tribe's lands "***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." *Id.* at JA136 (emphasis added) (together with Compact Parts IV.A, and III.CC.2 above, the "Deeming Provisions").

Florida's Legislature simultaneously increased the penalty on all others offering sports betting from a second-degree misdemeanor to a third-degree felony punishable by up to five years in prison. Fla. Stat. § 849.14; Fla. Stat. § 775.082 (3)(e).

Florida legislators expressed concern about the legality of the online sports gaming provisions in the Compact but were assured that a "court of final decision" would determine the legality of those provisions, and the Compact included a severability provision to ensure that it would survive (and payments from the Tribe to the State would be reduced) if the online sports gaming clauses were invalidated. Appellee Brief at 7-8, *W. Flagler Assocs. v. Haaland*, 71 F.4th 1059 (D.C. Cir. 2023) (No. 21-5265).

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[3] *See* Fla. Senate, *CS/SB 8-A: Gaming, Bill History*, https://www.flsenate.gov/Session/Bill/2021A/8A.

2. The Secretary Allowed the Compact to Be Approved under IGRA and Published a Letter Defending Its Legality.

On June 21, 2021, the Tribe submitted the Compact for the Secretary's approval under IGRA. JA214. The Secretary took no formal action, and the Compact was thus automatically approved under IGRA. 25 U.S.C. § 2710(d)(8). It became effective when notice of the approval was published in the Federal Register. *See* 86 Fed. Reg. 44,037-01 (Aug. 11, 2021).

Five days earlier, the Principal Deputy Assistant Secretary of the Interior for Indian Affairs sent a lengthy letter to the Chairman of the Tribe and Florida's Governor advising that the Secretary permit automatic approval and explaining why (the "DOI Letter"). JA214-225. The DOI Letter stated that the Secretary reviews Tribal-State compacts "to ensure that they comply with Federal law," *id.* at JA219, but included virtually no analysis of the various provisions of IGRA limiting IGRA compacts to governing gaming "on Indian lands." *See, e.g.*, 25 U.S.C. § 2710(d)(8)(A).

With respect to the Compact's provisions allowing the Tribe to offer "Sports Betting" to any person "physically located in the State but not on Indian Lands," the DOI Letter accepted the Deeming Provisions. JA220-21. The DOI Letter reasoned that these provisions were merely a "jurisdictional agreement" treating online wagers as if they had occurred exclusively on the Tribe's reservations (and thus "on Indian lands"). JA221. In support, the letter cited 25 U.S.C. sections 2710 (d)(3)(c)(i) through (ii),

IGRA provisions that allow a State and Tribe to determine the application of their own laws and jurisdictions under a compact, but that say nothing about the ability to determine what qualifies as "Indian lands" for purposes of federal law. JA220. The letter claimed that changes in technology since the enactment of IGRA justified this interpretation. JA220-21.[4]

The DOI Letter did not mention UIGEA. Nor did it consider whether the Secretary's approval of a monopoly on online sports betting for the Tribe, while criminalizing the operation of such gaming by non-Seminoles, violates principles of equal protection.

C. District Court Decision

On August 16, 2023, Petitioners challenged the approval of the Compact under both the Administrative Procedure Act and through a constitutional claim. JA13.[5] Petitioners moved for summary judgment and the Secretary cross-moved to dismiss for a want of standing and for failure to state a claim. App.35.

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[4] Congress since has considered, but not enacted, a bill that would amend IGRA to do exactly what the Compact purports to do—deem online sports wagers to occur where received by servers on Indian lands. *See* Removing Federal Barriers to Offering of Mobile Sports Wagers on Indian Lands Act, H.R. 5502, 116th Cong. § 3 (2019).

[5] Petitioners operate "pari-mutuel" gaming establishments authorized under Florida law and suffer competitive injury from the Compact's online sports gaming provisions.

Following full briefing, argument, and supplemental briefing, the District Court resolved the motions in a single order on November 22, 2021, three weeks after the Tribe launched a statewide "Hard Rock Sportsbook." App.58; JA510-20. The District Court denied the Secretary's motion to dismiss for lack of standing, holding that Petitioners adequately established a competitive injury. App.41. The District Court granted summary judgment to Petitioners, holding that IGRA does not authorize the Secretary to approve (or allow approval of) a Compact that provides for gaming off Indian lands. App.58. To the contrary, a compact that provides for gaming off Indian lands triggers the Secretary's "obligation . . . to affirmatively disapprove any compact that is inconsistent with [IGRA's] terms." App.50 (citing *Amador County*, 640 F.3d at 382).[6] The court further held that the "deeming" language in the Compact was a "fiction" that the court "cannot accept": "When a federal statute authorizes an activity only at specific locations, parties may not evade that limitation by 'deeming' their activity to occur where it, as a factual matter, does not." App.51.

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[6] The District Court also denied a motion by the Tribe to intervene under Fed. R. Civ. P. 24(a) for the "limited purpose" of filing a motion to dismiss under Rule 19 on the ground that it was an indispensable party that could not be joined by virtue of its sovereign immunity. App.49. The District Court found that the Tribe is a required—but not indispensable—party whose interests are adequately represented by the Secretary. App.43, 49; Fed. R. Civ. P. 19(a)-(b).

D. D.C. Circuit Decision

On June 30, 2023, the D.C. Circuit reversed. App.5. The court accepted the Secretary's argument that: "Gaming outside Indian lands cannot be *authorized* by IGRA, but it may be *addressed* in a compact." App.11 (emphasis in original). In other words, while the Circuit Opinion agreed that "an IGRA compact cannot provide independent legal authority for gaming activity that occurs outside of Indian lands," it held that it was permissible for the Compact to "discuss" or "address" gambling off Indian lands. App.11, 19.

To reach this result, the Circuit Opinion relied on three subsections of IGRA found in 25 U.S.C. section 2710(d)(3)(C)—a provision that itemizes permissible topics in an IGRA compact. First, the Circuit Opinion stated that the Compact's provision for online sports gambling off Indian lands could be read as merely an allocation of jurisdiction that could fall within either or both of subsections (i) and (ii), which respectively permit an IGRA compact to address "the application of criminal and civil laws and regulations of the Indian tribe," and "the allocation of the criminal and civil jurisdiction." 25 U.S.C. §§ 2710 (d)(3)(C)(i)-(ii). *See* App.14. The Circuit Opinion does not mention that the Compact contains sections specifically addressing jurisdictional issues without referring to the Deeming Provisions or any other provision regarding online sports gambling off Indian lands.[7]

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[7] JA78-86 ("Rules and Regulations; Minimum Requirements for Operations"); JA86-91 ("Patron Disputes; Workers Compensation; Tort Claims; Prize Claims; Limited Consent to Suit"); JA91-94 ("Enforcement of Contract Provisions"); JA94-101 ("State Monitoring of Compact"); JA101 ("Jurisdiction").

Next, the Circuit Opinion stated that the Compact's provision for online sports gambling off Indian lands could also fall under the final, residual clause of section 2710(d)(3)(C)—which allows a compact to address "any other subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii). *See* App.12. It does not explain how gambling conducted off Indian lands is "related to the operation" of gaming activities, as opposed to being the gaming activity itself.

The Circuit Opinion also held that "the Compact does not as a facial matter violate the UIGEA." App.23. UIGEA prohibits the receipt of electronic payments for Unlawful Internet Gambling, which is defined to mean:

> "to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where 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).

While analysis of state law is necessary to determine whether a UIGEA violation occurs, the Circuit Opinion disavows reaching any decision on questions of Florida law, which it held "are best left for Florida's courts to decide." App.19.

The Circuit Opinion also held, with minimal analysis, that the Secretary's approval of Florida's grant of a statewide gaming monopoly to the Tribe based on its members' race, ancestry, ethnicity, or national origin, was subject only to rational basis

scrutiny under the Equal Protection Clause, which it survived. App.23.

The Circuit Opinion affirmed the District Court's denial of the Tribe's motion to intervene. App.5.

On August 14, 2023, Applicants filed a petition for rehearing *en banc*, which the D.C. Circuit denied on September 11, 2023. App.63. On September 15, 2023, Applicants filed a motion to stay the mandate pending petition for certiorari, which was denied on September 28, 2023.

E. This Court's Disposition of Petitioners' Stay Application

On October 6, 2023, Petitioners filed an application with this Court to stay the mandate from the D.C. Circuit. On October 12, 2023, the Chief Justice temporarily stayed the mandate pending full briefing on the application, ordered a response from the United States to be filed by October 18, and referred the application to the full Court. On October 25, 2023, following receipt of the government's response, the Court issued an Order denying the application. This Order included a Statement from Justice Kavanaugh, which noted agreement with the denial of the stay application "in light of the D.C. Circuit's pronouncement that the compact between Florida and the Seminole Tribe authorizes the Tribe to conduct only on-reservation gaming operations, and not off-reservation gaming operations." App.64. Justice Kavanaugh further stated, "If the compact authorized the Tribe to conduct off-reservation gaming operations, either directly or by deeming off-reservation gaming operations to somehow be on-

reservation, then the compact would likely violate the Indian Gaming Regulatory Act, as the District Court explained." App.64-65.

Justice Kavanaugh also noted that any Florida law that authorized the Tribe, and only the Tribe, to offer online sports gaming "raises serious equal protection issues." *Id.* (citations omitted). Justice Kavanaugh further wrote that the state law's constitutionality was not squarely presented in the application for a stay, and that "the Florida Supreme Court is in any event currently considering state-law issues related to the Tribe's potential off-reservation gaming operations." *Id.*

F. The Petitioner's Quo Warranto Petition to the Florida Supreme Court and the November 7, 2023 Launch of the Tribe's Online Sports Betting Application

On September 25, 2023, Petitioners filed a petition for a writ of quo warranto in the Florida Supreme Court against the Florida Governor, the Speaker of the Florida House of Representatives, and the President of the Florida Senate. The petition seeks a writ declaring that the execution of the Compact and approving legislation were unlawful under the Florida Constitution's prohibition on casino gambling absent a citizen's initiative (*i.e.*, a referendum). It also asked the Florida Supreme Court to exercise its "All Writs" jurisdiction under the Florida Constitution to suspend operations of the offending laws pending final resolution of the quo warranto petition.

The Respondents obtained an extension on the deadline for their response to the petition, and

briefing on the petition was completed by December 23, 2023. As of the time of filing of this petition, no decision has been rendered and no argument has been scheduled in the petition to the Florida Supreme Court.

On November 7, 2023, the Tribe launched its online sports betting application. In response, the Petitioners filed a petition with the Florida Supreme Court seeking expedited consideration of their All Writs petition pending final resolution of their quo warranto petition. On November 17, 2023, the Florida Supreme Court denied this request for expedited consideration.

REASONS FOR GRANTING THE PETITION

I. IGRA Does Not Authorize the Approval of a Compact That Provides a Statewide Tribal Monopoly over Online Sports Gaming.

A. The Circuit Opinion Conflicts With the Plain Text of IGRA, this Court's Holding in *Michigan v. Bay Mills*, and Other Circuit Court Decisions Limiting IGRA to Gaming Activity on Indian Lands.

IGRA authorizes the Secretary "to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming ***on Indian lands of such Indian tribe***." 25 U.S.C. § 2710(d)(8)(A) (emphasis added). Nothing in IGRA authorizes the Secretary to approve a compact that provides for gaming ***off*** Indian lands. The Compact at issue here clearly provides for gaming off Indian lands. JA76 (Part IV.A); JA60, 70-71 (Part III.F & CC.2). By upholding the IGRA approval of that Compact, the Circuit Opinion conflicts with the plain text of the statute.

The Circuit Opinion also conflicts with this Court's decision in *Bay Mills*, 572 U.S. 782. There, Michigan sought to enjoin an Indian tribe from operating a casino off Indian lands. *Id.* at 785. The tribe invoked sovereign immunity. *Id.* Michigan argued that IGRA permitted the lawsuit because it abrogates tribal immunity from claims brought by a state to "enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact." *Id.* at 791 (describing Michigan's argument under § 2710(d)(7)(A)(ii)). Michigan argued that while the casino was located off Indian lands, the tribe was

licensing and operating that casino from offices located ***on*** Indian lands, triggering the application of section 2710(d)(7)(A)(ii). *Id*. at 786. This Court rejected that argument, holding that the licensing and operation of class III activity was not itself "class III gaming activity on Indian lands." *Id*. at 791.

Thus, this Court's decision in *Bay Mills* adopted a strict construction of IGRA that refused to use an operational linkage between activity on and off Indian land to apply IGRA to gambling activity off Indian lands. The Circuit Opinion does the opposite by using the provisions of section 2710(d)(3)(C)(vii) to conclude that it is permissible for the Secretary to approve a compact that provides for gambling off Indian lands.

Michigan also argued that it would make no sense for Congress to have abrogated tribal immunity for gambling ***on*** Indian lands, but not for gambling that occurs ***off*** Indian lands, and within the State's sovereign jurisdiction. *Bay Mills*, 572 U.S. at 794. The Court rejected that purpose-based argument as well, holding that "'Congress wrote the statute it wrote'—meaning, a statute going so far and no further." *Id*. (citations and quotations omitted). The Court explained that IGRA was enacted in response to the Court's decision in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 221-22 (1987), which held that states had no jurisdiction to regulate gaming "on Indian lands." Accordingly, "the problem Congress set out to address in IGRA (*Cabazon*'s ouster of state authority) arose on Indian lands alone. And the solution Congress devised, naturally enough, reflected that fact." 572 U.S. at 794-95. This Court then aptly concluded: "Everything—literally everything—in IGRA affords tools (for either state or

federal officials) to regulate gaming on Indian lands, and nowhere else." *Id.* at 795.

By holding that IGRA authorized the Secretary to approve a compact that regulates gaming ***off*** Indian lands, the Circuit Opinion contradicts this Court's holding in *Bay Mills*. That contradiction warrants review by this Court. Indian tribes ought not to be able to have it both ways. The Bay Mills Indian Community benefited from IGRA's narrow reach of only applying to gaming "on Indian lands," by avoiding IGRA's abrogation of immunity. By the same token, other tribes, including the Seminole Tribe here, must recognize that IGRA's narrow reach to gaming "on Indian lands" means the Secretary cannot approve a compact that provides for gaming ***off*** Indian lands.

More generally, the Circuit Opinion is the first case to suggest that IGRA could apply to gambling off Indian lands. All prior case law uniformly has said the opposite. *See Bay Mills*, 572 U.S. at 795; *Amador County*, 640 F.3d at 376-77 ("IGRA provides for gaming only on 'Indian lands.'"); *California v. Iipay Nation*, 898 F.3d 960, 967 (9th Cir. 2018) (expressing doubt that IGRA would permit Tribe to receive bingo bets placed over the internet from off Indian lands but received on Indian lands, since it "does not occur on Indian lands"); *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 735 (9th Cir. 2003) ("Under IGRA, for example, individual Indians (or even Indian tribes) could not establish a class III gaming establishment on non-Indian lands."); *North County Cmty. All. Inc. v. Salazar*, 573 F.3d 738, 744 (9th Cir. 2009) (noting that "IGRA limits tribal gaming to locations on 'Indian lands' as defined in 25 U.S.C. § 2703(4)"; it is "undisputed" that "IGRA

authorizes tribal gaming only on 'Indian lands'"; and "Tribal gaming on non-Indian lands is not authorized by or regulated under IGRA").

The Circuit Court sought to avoid the foregoing problems under IGRA by choosing to "interpret" the Compact as if it did not authorize online sports gaming from off tribal lands. It invoked the doctrine that "a contractual provision should, if possible, be interpreted in such a fashion as to render it lawful rather than unlawful." App.13.

This is absurd, for two reasons. First, as this Court has made clear, the interpretive principle invoked by the Circuit Court applies only when the contract is "ambiguously worded." *Walsh v. Schlecht*, 429 U.S. 401, 408 (1977). Here, the Compact unambiguously ***authorizes*** the Tribe to offer online sports betting: it authorizes the Tribe to conduct "Covered Games," JA76 (Part IV.A), and defines "Covered Games" to include "Sports Betting," JA60 (Part III.F). And in two different places, it makes clear that Sports Betting includes placing bets on sports over the internet from ***any*** location within the State, but then "deems" such bets to occur exclusively on Tribal lands. *See* JA76 (Part IV.A); JA70-71 (Part III.CC.2). There is nothing ambiguous about these provisions. They unambiguously authorize the Tribe to offer online sports gambling to people located off the Tribe's lands anywhere in Florida.

Second, the interpretive principle of *Walsh v. Schlecht* is properly applied only to arrive at an interpretation that renders the contract "legal and enforceable." 429 U.S. at 408. Here, however, the Compact's online sports gaming provisions can be "legal and enforceable" only if it is lawful for the Tribe

to offer sports gambling off its tribal lands. Under unambiguous state law that the D.C. Circuit refused to consider, the only way for that sports gambling to be lawful was for it to be either (a) approved by a citizen's initiative (which has not occurred), or (b) "deemed" to be gambling "on tribal lands" pursuant to a valid IGRA compact. That latter path was the only one that could make the Compact's online sports gaming provisions lawful, and it raised a question of federal law: could the online sports gaming from off Indian lands be "deemed" to occur on Indian lands? The answer is obviously "No." But the D.C. Circuit wrongly dodged that question in favor of a misguided "interpretation" that rendered the contract neither "legal" nor "enforceable."

B. The Circuit Opinion's Broad Interpretation of § 2710(d)(3)(C) Conflicts With This Court's Jurisprudence and the Narrow Interpretation Given by Other Circuits.

The Circuit Opinion relied on a broad interpretation of 25 U.S.C. § 2710 (d)(3)(C) to uphold the Compact's provision for online sports gaming from off Indian lands. Its expansive interpretation of section 2710(d)(3)(C) contradicts this Court's repeated admonition that Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1626-27 (2018).

First, the Circuit Opinion held that the Compact's provision that online sports gaming "shall be deemed" to occur "exclusively" on tribal lands "simply allocates jurisdiction between Florida and the Tribe" under §§ 2710(d)(3)(C)(i)-(ii). This ignores the fact that the

Compact contains at least five different sections allocating jurisdictional issues between the State and the Tribe. *See* note 7, *above*. The Deeming Provisions are not found in any of those provisions and have nothing to do with jurisdiction. Instead, the Deeming Provisions were a transparent effort to treat the online sports gaming that occurs ***off*** Indian lands ***as if*** it occurred ***on*** Indian lands so that it could be approved under IGRA and could satisfy the exemption in Article 30 of the Florida Constitution. *See* Fla. Const. art. X, § 30(c).

Second, the Circuit Opinion held that the Compact's online sports gaming provisions fall within the residual clause of section 2710(d)(3)(C)(vii), which allows compacts to include "any other subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii). But provisions allowing gaming activity off Indian lands are not "directly related" to the "gaming activity" authorized by the Compact; instead, they themselves constitute the gaming activity authorized by the Compact.

The Circuit Opinion conflicts with the narrow interpretation other circuits have given to section 2710(d)(3)(C). *See Chicken Ranch Rancheria of Me-Wuk Indians*, 42 F.4th 1024, 1035 (9th Cir. 2022) ("[T]he phrase 'directly related to the operation of gaming activities' imposes meaningful limits on compact negotiations."); *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 935 (8th Cir. 2019) ("'Directly related to the operation of gaming activity' is narrower than 'directly related to the operation of the Casino.'"); *Navajo Nation v. Dalley*, 896 F.3d 1196, 1205 n.4 (10th Cir. 2018); *Rincon Band of Luiseno*

Mission Indians v. Schwarzenegger, 602 F.3d 1019, 1040 (9th Cir. 2010).

While the foregoing cases address topics other than sports betting off Indian lands, they stand for the proposition that section 2710(d)(3)(C) cannot be used to crowbar into an IGRA compact provisions or subjects that clearly exceed the sole focus of IGRA—*i.e.*, to provide a regime for authorizing gambling ***on*** Indian lands. They recognize that IGRA compacts must be focused on gaming on Indian lands and ancillary matters, and section 2710(d)(3)(C) does not permit different subjects to be added in through some tenuous connection or strained reading of the plain text. The Circuit Opinion's conflicting approach independently warrants review by this Court.

C. The Circuit Opinion Creates Uncertainty in the Law by Improperly Holding There Are Two Different Kinds of IGRA Approvals.

The Circuit Opinion effectively holds that IGRA authorizes the approval of compact provisions that IGRA itself does not authorize. App.4. No other case has held this. This holding conflicts with the holdings of other circuits and creates confusion in the law.

Other circuit courts have held that when an IGRA compact is approved by the Secretary of the Interior, it becomes an instrument of federal law. *See e.g. Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d 1226, 1238-39 (10th Cir. 2018). As such, a valid IGRA compact preempts state law. *See*, *e.g.*, *Forest County Potawatomi Community v. Norquist*, 45 F.3d 1079, 1082 (7th Cir. 1995) (upholding tribe's "federal right"

under IGRA compact to operate "free from state or city interference").

By contrast, the Circuit Opinion here suggests that an IGRA approval can have either of two different meanings: (1) an IGRA approval for compact provisions that IGRA itself authorizes may thereafter have the force of federal law, but (2) an IGRA approval for compact provisions that are not "authorized" by IGRA are subject to challenge and invalidation under state law. App.19. It makes no sense for an IGRA approval to have two different meanings depending upon whether the provisions being approved are also "authorized." The Court should grant certiorari to correct this confusing and incorrect precedent regarding the operation of IGRA.

D. Certiorari Is Also Warranted to Resolve the Meaning of § 2710(d)(1)(B).

In addition to requiring a valid compact, IGRA provides that Class III gaming is lawful on Indian lands only if it is "located in a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B). Here, Florida law expressly prohibits all entities other than the Tribe from conducting sports gaming. *See* Fla. Stat. § 849.14. Thus, the approval of the Compact was invalid for the independent reason that the Compact violates the plain text of section 2710(d)(1)(B).

Section 2710(d)(1)(B) was not addressed in the proceedings below. Nevertheless, this Court has discretion to address and resolve the issue. *See Yee v. Escondido*, 503 U.S. 519, 534 (1992); *Lebron v.*

National R.R. Passenger Corp., 513 U.S. 374, 383 n.3 (1995); *Egbert v. Boule*, 596 U.S. 482, 497 (2022).

The circuit courts have differed in their interpretation of section 2710(d)(1)(B).

Three circuits have suggested that tribal compacts may only authorize gambling that is similar to what state law permits non-tribal entities to conduct. For example, the Seventh Circuit has interpreted the provision to mean that IGRA permits tribes to compact for class III gaming "only in states that allow at least some non-Indian groups to conduct similar gambling." *Stockbridge-Munsee Cmty. v. Wisconsin*, 922 F.3d 818, 819 (7th Cir. 2019). The Eighth Circuit held that "it would be illegal, in addition to being unfair to the other tribes, for the tribe to offer traditional keno to its patrons" where South Dakota did not permit others to offer traditional keno. *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 279 (8th Cir. 1993). The Eleventh Circuit has held that "the extent to which a tribe may engage in class II or class III gaming depends on how the state where the Indian lands are located has chosen to regulate such games in the state as a whole," since "IGRA permits a tribe to conduct each class of gaming only if such gaming is allowed in some form within the state where the Indian lands are located." *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1284 (11th Cir. 2015).

On the other hand, the Ninth Circuit held that the language of section 2710(d)(1)(B) is ambiguous, and then applied the *Blackfeet* presumption in favor of Indian tribes to hold that so long as state law expressly permits the tribe itself to conduct the

gaming in question, section 2710(d)(1)(B) is satisfied. *Artichoke Joe's*, 353 F.3d at 720-31.

Given the rapid increase in sports gaming and Indian gaming throughout the country, the Court should grant certiorari to address the divergence of views in the circuits on the meaning of section 2710(d)(1)(B).

II. The D.C. Circuit's Analysis of UIGEA Conflicts With the Ninth Circuit Interpretation in a Similar Case.

The Circuit Opinion held that "the Compact does not as a facial matter violate the UIGEA." App.23. But it erroneously reached this conclusion without analyzing whether the online sports bets provided for in the Compact would be legal where "initiated"—*i.e.*, when initiated from locations in Florida that are off Indian lands. It is impossible to analyze the legality of the Compact under UIGEA without analyzing whether the online sports betting would be legal where "initiated, received, or otherwise made." 31 U.S.C. § 5362(10).

Faced with very similar facts, the Ninth Circuit Court of Appeals held that a tribe that offered online bingo was violating UIGEA. *Iipay Nation*, 898 F.3d at 965-69. In that case, the Iipay Nation tribe was offering online bingo throughout the State of California. While the bets were received on the tribal lands of the Iipay Nation, and while the tribe was authorized to offer bingo as a form of Class II gaming permitted under IGRA, for locations off tribal lands, California law prohibited offering "percentage games,"

and thus prohibited offering bingo gambling. *Id.* at 967.

The Ninth Circuit explained that while UIGEA "does not prohibit otherwise legal gambling," it "does create a system in which a 'bet or wager' must be legal both where it is 'initiated' and where it is 'received.'" *Id.* at 965. Thus, the only way to determine if the Compact in this case will lead to inevitable UIGEA violations is to determine whether the online sports betting will be "legal both where it is 'initiated' and where it is 'received.'" *Id.* Yet the Circuit Opinion failed to make this determination. App.22-23.

There is no way to reconcile the decision below with *Iipay Nation*. Previously, the Secretary has tried to do so by suggesting it might somehow be possible to implement the online sports betting provisions of the Compact without accepting payment in any of the forms that trigger UIGEA. That is specious. There is no way to transfer money over the internet other than credit card transactions, electronic fund transfers, or the other payment methods addressed in UIGEA. *See* 31 U.S.C. § 5363 (identifying multiple payment methods covered by UIGEA). Further, the Tribe has admitted both before and after the Compact was approved that it will use the payment methods covered by UIGEA. *See* JA774-76 (Letter from the Seminole Tribe to DOI addressing fact that UIGEA payment methods would be used, but arguing UIGEA not violated because of the "Deeming Provisions"); Terms & Conditions HARDROCKBET.COM - Seminole Tribe, https://www.hardrock.bet/t-cs/florida/ (last visited Feb. 8, 2024) (identifying "your credit or debit card," "ACH transfer," and "wire transfer" as permissible payment methods).

There is no dodging the fundamental fact that because Florida law prohibits sports betting off Indian lands, the Compact violates UIGEA. As shown above, the Florida Constitution makes sports betting (and all other forms of casino gambling) unlawful absent a citizen's initiative approving such gambling, which has not occurred. Fla. Const. art. X, §30(a)-(b). And while gambling pursuant to a validly approved IGRA compact is exempted from the constitutional prohibition, that exemption only applies to gambling "on tribal lands." Fla. Const. art. X, § 30(c). Thus, Florida law unambiguously outlaws sports betting from anywhere in the State that is not on tribal lands. That includes placing online sports bets in locations off Indian lands, regardless of where those bets are received.

This unambiguous illegality of online sports betting under Florida state law means that the online sports gaming provisions in the Compact expressly provide for violations of UIGEA. That means the Secretary should have rejected the Compact pursuant to the IGRA provision allowing disapproval of compacts that violate federal laws outside of IGRA. 25 U.S.C. § 2710(d)(8)(B)(ii). It also makes the approval of the Compact "not in accordance with law," so that it should have been set aside under the APA. 5 U.S.C. § 706(2)(A).

As internet gambling and sports gambling proliferate in many but not all jurisdictions, it is going to be essential for federal courts to apply UIGEA faithfully. Here, the D.C. Circuit tried to avoid applying UIGEA by refusing to look at state law. But to determine whether UIGEA is violated, the court necessarily had to analyze state law. By failing to do

so, the D.C. Circuit wrongly upheld the IGRA approval of a compact that violates UIGEA. Its decision conflicts with the Ninth Circuit's decision in *Iipay* and creates confusion in the law regarding how UIGEA is to be applied, just as it becomes most important for that law to be clear. This Court should grant certiorari and reverse.

III. This Case Raises an Important National Issue Regarding the Constitutionality of Granting a Statewide Gambling Monopoly to an Indian Tribe.

Certiorari should also be granted because the Circuit Opinion raises an issue of national importance regarding the constitutionality of granting an Indian tribe a statewide monopoly over sports betting, while making the same conduct a felony for everyone else.

This Court recently heard a case regarding the propriety of tribal preferences in the context of child welfare protections. *Haaland v. Brackeen*, 599 U.S. 255 (2023). The Court avoided the Equal Protection issue by deciding that the challengers lacked standing. *Id*. at 292-96. However, Justice Kavanaugh emphasized the importance of the tribal preference issue in his concurrence. *Id.* at 333 (Kavanaugh, J., concurring) ("In my view, the equal protection issue is serious.").

In *Morton v. Mancari*, 417 U.S. 535 (1974), this Court addressed the propriety of a congressionally legislated employment preference for qualified Indians at the Bureau of Indian Affairs ("BIA"). The Court found that the preference was permissible under the Equal Protection Clause (made applicable

through the Fifth Amendment) because of Congress' unique relationship with tribes: "Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." *Id.* at 551.

The Court found that the BIA preference at issue did not constitute racial discrimination or even a racial preference but was rather "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups." *Id.* at 554. The Court emphasized, however, that "the legal status of the BIA is truly *sui generis*." *Id.* The Court went on to point out numerous other instances in which it had upheld "particular and special treatment" by Congress for Indians, *id.* at 554-55, but again made clear that Congress' special relationship with Indian tribes was the driving factor in each instance, reasoning: "As long as the special treatment can be tied rationally to the fulfilment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555. The Court since has made clear that *Mancari* stood for a "limited exception." *Rice v. Cayetano*, 528 U.S. 495, 520 (2000).

Since *Mancari*, other federal actions providing a preference to Indians have been upheld, but only when tied to Indian lands, uniquely sovereign

interests, or to the special relationship between the federal government and Indian tribes.[8]

Only two circuits have weighed in on preferences that do not fit these special circumstances: (1) the Ninth Circuit in *Williams v. Babbitt*, 115 F. 3d 657, 664 (9th Cir. 1997), which rejected an effort by the BIA to ban non-natives from the Alaskan reindeer industry, and (2) the Circuit Opinion, App.24-25, which affirmed a decision by the Secretary to permit Florida's decision to confer a statewide sports gaming monopoly (both on and off Indian lands) on the basis of race, ancestry, ethnicity, and national origin—while making the same conduct a felony for everyone else.

In *Babbitt*, non-native reindeer herders challenged BIA's interpretation of the Reindeer Industry Act of 1937, 25 U.S.C. §§ 500 *et seq.* (the "Reindeer Act"), to categorically forbid non-natives from commercial reindeer herding within the state of Alaska. 115 F.3d at 659. The Ninth Circuit found for the plaintiffs. The court emphasized that legislation that "relates to Indian land, tribal status, self-government or culture passes *Mancari*'s rational relation test because 'such regulation is rooted in the unique status of Indians as

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[8] *See United States v. Antelope*, 430 U.S. 641, 646 (1977) (federal regulation of criminal conduct within Indian country); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 481 (1976) (tax "on personal property located within the reservation," fee "applied to a reservation Indian conducting a cigarette business for the Tribe on reservation land," and tax on "on-reservation sales by Indians to Indians"); *Fisher v. District Court*, 424 U.S. 382, 389 (1976) (on-reservation adoption proceedings); *United States v. Garrett*, 122 Fed. App'x 628, 631 (4th Cir. 2005) (gaming *on* tribal lands); *Artichoke Joe's*, 353 F.3d at 735 n.16 (same) .

a separate people with their own political institutions.'" *Id.* at 664 (citation omitted). It observed that the *Mancari* Court "did not have to confront the question of a naked preference for Indians unrelated to unique Indian concerns," whereas the BIA's interpretation of the Reindeer Act created just such a preference. *Id.* It explained: "According to the BIA, the Reindeer Act provides a preference in an industry that is *not uniquely native*, whether the beneficiaries live in a remote native village on the Seward Peninsula or in downtown Anchorage." *Id.* (emphasis added). Although the Ninth Circuit did not view *Mancari* as "limited to statutes that give special treatment to Indians on Indian land," it did "read it as shielding only those statutes that *affect uniquely Indian interests*." *Id.* at 665 (emphasis added). "For example, we seriously doubt that Congress could give Indians a complete monopoly on the casino industry or on Space Shuttle contracts." *Id.* The Ninth Circuit applied strict scrutiny to the BIA's interpretation of the Reindeer Act and ruled that non-natives could engage in the commercial reindeer trade in Alaska. *Id.*

In contrast, the Circuit Opinion here upheld the IGRA approval of a compact that grants a statewide monopoly on off-reservation online sports betting to one particular Indian Tribe—*i.e.*, on the basis of the race, ancestry, ethnicity, and national origin of the members of that Tribe. App.23-24. For anyone of a different race, ancestry, ethnicity, or national origin, the state law approving the Compact made the same conduct a felony punishable by up to 5 years in prison. *See* JA135-36; Fla. Stat. § 849.14; Fla. Stat. § 775.082(3)(e).

This is a "naked preference" of the kind that correctly triggered strict scrutiny from the Ninth Circuit in *Babbitt*. Yet the D.C. Circuit did not even cite *Babbitt*, let alone discuss or distinguish it—despite Petitioners citing and discussing that case in their briefing. Appellee Brief at 40, *W. Flagler Assocs. v. Haaland*, 71 F.4th 1059 (D.C. Cir. 2023) (No. 21-5265).

The Circuit Opinion provided little analysis of the Equal Protection issue. *See* App.23-24. It cited only the D.C. Circuit's prior decision in *American Federation of Government Employees, AFL-CIO v. United States*, 330 F.3d 513, 522-23 (D.C. Cir. 2003), as support for the proposition that "promoting the economic development of federally recognized Indian tribes (and thus their members)," is constitutional "if rationally related to a legitimate legislative purpose." App.23. It then held that because the "exclusivity provisions in the Compact plainly promote the economic development of the Seminole Tribe," they satisfy rational basis review. *Id.* But *American Federation* addressed a specific, Congressional preference for native-owned firms in defense contracts. 330 F.3d at 516. The decision upholding that preference limited the reach of its holding to "legislation regulating commerce with Indian tribes"—a function unique to the federal government under the Constitution's Indian Commerce Clause. *Id.* at 520.

By contrast, a *state's* right to confer tribal preferences on its own is much less likely to qualify for rational basis review. *See Rice*, 528 U.S. at 524 (rejecting claim by State of Hawaii that *Mancari* applied to a voting scheme that permitted only

descendants of the aboriginal tribes inhabiting the Hawaiian Islands in 1772 to vote for trustees of the Office of Hawaiian Affairs). *See also Washington v. Confederated Bands & Tribes of the Yakima Indian Nation* ("*Yakima*"), 439 U.S. 463, 501 (1979) (discussing *Mancari* and observing "States do not enjoy this same unique relationship with the Indians"); *KG Urban Enters., LLC v. Patrick*, 693 F.3d 1, 12-13, 19 (1st Cir. 2012) (addressing the propriety of a state statutory preference for tribal casinos negotiated pursuant to IGRA where no tribe in the state yet held "Indian lands," and reasoning "it is quite doubtful that *Mancari*'s language can be extended to apply to preferential state classifications based on tribal status"). Thus, the state-conferred monopoly in this case does not fall within *Mancari* and its progeny.

Moreover, the state-conferred sports gaming monopoly at issue here does not relate to Indian land, tribal status, self-government, or culture. The Secretary's power to approve the Compact derives from IGRA, which *solely* relates to gaming "on Indian lands, and nowhere else." *Bay Mills*, 572 U.S. at 795. Since the Compact provides for a gaming monopoly off Indian lands, Congressional approval through IGRA cannot itself be a basis for *Mancari* rational basis scrutiny.

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In *Murphy v. National Collegiate Athletic Association*, 138 S. Ct. 1461, 1483 (2018), this Court invalidated the provisions of the Professional and Amateur Sports Protection Act ("PASPA") that precluded states from legalizing sports betting. Since that decision, approximately 38 numerous states have

taken steps to legalize sports betting, sometimes through compacts with Indian tribes and sometimes more broadly. [9] As different jurisdictions make different decisions regarding the legality of sports betting, it is critical that this Court not allow the unlawful approach taken by Florida to become a model, or for the D.C. Circuit decision to create confusing and misleading precedent. The Court should grant certiorari to ensure clarity in the law regarding the scope of IGRA and UIGEA, and to make clear that providing a statewide gambling monopoly to an Indian tribe while making the conduct a felony for all others is unconstitutional.

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[9] *See* Analis Bailey, *Race for legal sports betting continues*, Axios.com (Nov. 26, 2023), https://www.axios.com/2023/11/26/legal-sports-betting-states; *Tribal Sports Betting*, UNLV, https://www.unlv.edu/icgr/tribal.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5265
Consolidated with 22-5022

[Filed June 30, 2023]

WEST FLAGLER ASSOCIATES, LTD., A FLORIDA LIMITED PARTNERSHIP, DOING BUSINESS AS MAGIC CITY CASINO AND BONITA-FORT MYERS CORPORATION, A FLORIDA CORPORATION, DOING BUSINESS AS BONITA SPRINGS POKER ROOM, APPELLEES	)
v.	)
DEBRA A. HAALAND, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR AND UNITED STATES DEPARTMENT OF THE INTERIOR, APPELLEES	)
SEMINOLE TRIBE OF FLORIDA, APPELLANT	)

Argued December 14, 2022 Decided June 30, 2023

Appeals from the United States District Court
for the District of Columbia
(No. 1:21-cv-02192)

Rachel Heron, Attorney, U.S. Department of Justice, argued the cause for federal appellants. With her on the briefs was *Todd Kim*, Assistant Attorney General.

Barry Richard argued the cause for appellant Seminole Tribe of Florida. With him on the briefs were *Joseph H. Webster, Elliott A. Milhollin,* and *Kaitlyn E. Klass.*

Barry Richard, *Joseph H. Webster, Elliott A. Milhollin,* and *Kaitlyn E. Klass* were on the brief for *amicus curiae* Seminole Tribe of Florida in support of federal appellants. *Henry C. Whitaker,* Solicitor General, Office of the Attorney General for the State of Florida, argued the cause for *amicus curiae* State of Florida in support of federal appellants. With him on the brief was *Ashley Moody,* Attorney General, and *Christopher J. Baum*, Senior Deputy Solicitor General.

Scott Crowell was on the brief for *amici curiae* The National Indian Gaming Association, et al. in support of federal appellants.

Todd Kim, Assistant Attorney General, and *Rachel Heron*, Attorney, U.S. Department of Justice, were on the answering brief for federal appellees.

Hamish P. M. Hume argued the cause for appellees West Flagler Associates, Ltd, et al. With him on the brief were *Amy L. Neuhardt* and *Jon Mills*.

Jenea M. Reed argued the cause for *amici curiae* Monterra MF, LLC, et al. in support of appellees. With her on the brief was *Eugene E. Stearns*.

Before: HENDERSON, WILKINS and CHILDS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILKINS .

WILKINS, *Circuit Judge*: In 2021, the Seminole Tribe of Florida ("Tribe") and the State of Florida entered into a compact under the Indian Gaming Regulatory Act ("IGRA"), the federal law that regulates gaming on Indian lands. That gaming compact ("Compact"), along with accompanying changes in state law, purported to permit the Tribe to offer online sports betting throughout the state. The Compact became effective when the Secretary of the Interior failed to either approve or disapprove it within 45 days of receiving it from the Tribe and Florida.

The Plaintiffs in this case, brick-and-mortar casinos in Florida, object to the Secretary's decision to allow the Compact to go into effect because in their view, it impermissibly authorizes gaming *outside* of Indian lands, violating IGRA. They also believe that the Compact violates the Wire Act, the Unlawful Internet Gambling Enforcement Act, and the Fifth Amendment, and that the Secretary was required to disapprove the Compact for those reasons as well. The suit named as Defendants the Secretary of the Interior and the

Department of the Interior, and the Tribe moved to intervene for the limited purpose of filing a Rule 19 motion to dismiss based on its tribal sovereign immunity. The District Court denied the Tribe's motion and granted summary judgment for the Plaintiffs, finding that the Compact here "attempts to authorize sports betting both on and off Indian lands[,]" in violation of "IGRA's 'Indian lands' requirement." *W. Flagler Assocs. v. Haaland*, 573 F. Supp. 3d 260, 273 (D.D.C. 2021).

We see the case differently. IGRA "regulate[s] gaming on Indian lands, and nowhere else." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 795 (2014). Thus, to be sure, an IGRA gaming compact can legally authorize a tribe to conduct gaming only on its own lands. But at the same time, 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[.]" *Id.* at 796. In fact, IGRA expressly contemplates that a compact "may" do so where the activity is "directly related to" gaming. 25 U.S.C. § 2710(d)(3)(C)(vii). The District Court erred by reading 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. Rather, the Compact itself authorizes only the betting that occurs on the Tribe's lands; in this respect it satisfied IGRA. Whether it is otherwise lawful for a patron to place bets from non-tribal land within Florida may be a question for that State's courts, but it is not the subject of this litigation and not for us to decide. Today, we hold only that the Secretary did not violate the

Administrative Procedure Act ("APA") in choosing not to act and thereby allowing the Compact to go into effect by operation of law. We also find the Plaintiffs' remaining challenges to the Compact meritless, as a matter of law.

Finally, because this decision will effectively keep intact the Compact, resulting in minimal prejudice to the Tribe, we affirm the denial of the Tribe's motion to intervene, albeit on different grounds than did the District Court. Accordingly, we reverse and remand with instructions to enter judgment for the Secretary.

I.

A.

In 1987, the Supreme Court held that states are powerless to regulate gaming on Indian lands. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In response to that decision, Congress the following year enacted IGRA, 25 U.S.C. § 2701 *et seq.*, which "creates a framework" for doing just that. *Bay Mills*, 572 U.S. at 785. Through IGRA, Congress sought to "balance state, federal, and tribal interests." *Amador Cnty. v. Salazar*, 640 F.3d 373, 376 (D.C. Cir. 2011). IGRA's purposes include "promoting tribal economic development" and "self-sufficiency," "ensur[ing] that the Indian tribe is the primary beneficiary of the gaming operation," and "shield[ing] [tribes] from organized crime and other corrupting influences[.]" 25 U.S.C. § 2702. Both *Cabazon* and IGRA "left fully intact" states' "capacious" regulatory power outside Indian territory. *Bay Mills*, 572 U.S. at 794.

IGRA "divides gaming into three classes." *Id.* at 785. Class III gaming, the kind at issue in this case, is "the most closely regulated" and includes casino games, slot machines, and sports betting. *Id.*; *see also* 25 U.S.C. § 2703(8). A tribe may offer class III gaming on its own lands "only pursuant to, and in compliance with, a compact it has negotiated with the surrounding State." *Bay Mills*, 572 U.S. at 785; *see also* 25 U.S.C. § 2710(d)(1)(C). "A compact typically prescribes rules for operating gaming, allocates law enforcement authority between the tribe and State, and provides remedies for breach of the agreement's terms." *Bay Mills*, 572 U.S. at 785.

Before it takes effect, a tribal-state compact must be approved by the Secretary of the Interior, with notice published in the Federal Register. 25 U.S.C. § 2710(d)(3)(B). When presented with a tribal-state compact, the Secretary can do one of three things. *See Amador Cnty.*, 640 F.3d at 377 (summarizing the approval process). First, she may affirmatively approve the compact. 25 U.S.C. § 2710(d)(8)(A). Second, she "may disapprove" the compact, but "only if" the compact violates IGRA, another federal law, or the federal government's trust obligations to Indians. *Id.* § 2710(d)(8)(B). Third, if she does not act within 45 days, the compact is "considered . . . approved[,]" "but only to the extent the compact is consistent with the provisions of [IGRA]." *Id.* § 2710(d)(8)(C). The Secretary's decision to take no action within 45 days of receiving the compact, thereby allowing the compact to go into effect under subsection (C), is judicially reviewable. *Amador Cnty.*, 640 F.3d at 383.

B.

The Seminole Tribe of Florida is a federally recognized tribal government. In 2010, it entered into a tribal-state compact with Florida, so that it could offer certain forms of class III gaming on its lands. In 2021, the Tribe and Florida entered into a new compact, the one at issue in this case ("Compact"). At that time, sports betting was illegal throughout the state, with exceptions not relevant here. Fla. Stat. § 849.14. The Compact and related amendments to state law changed this, purporting to allow the Tribe the exclusive right to offer sports betting in the state, including online sports betting by individuals not physically located on the Tribe's lands, as follows.

The Compact requires sports bets to be placed "exclusively by and through one or more sports books conducted and operated by the Tribe or its approved management contractor[.]" J.A. 687 (Compact § III.CC.1). Under the Compact, the Tribe and Florida in turn consider all bets placed through the Tribe's sports book, regardless of where the person placing the bet is physically located within the state, to occur where the sports book servers are located—in other words, on tribal land:

> The Tribe and State agree that the Tribe is authorized to operate Covered Games on its Indian lands, as defined in [IGRA]. . . . Subject to limitations set forth herein, 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.

J.A. 692 (Compact § IV.A). Similar language appears in another section of the Compact as well. J.A. 687 (Compact § III.CC.2).

The Tribe and Florida executed the Compact in April 2021, and the following month, Governor DeSantis signed a bill that ratified and approved the Compact. That state law adopted the same "deeming" language from the Compact regarding the location of sports bets. Fla. Stat. § 285.710(13)(b)(7) (noting that all sports wagers "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[,]" and that "[g]ames and gaming activities authorized under this subsection and conducted pursuant to a gaming compact . . . do not violate the laws of this state"). In June, the Tribe transmitted the Compact to Secretary Haaland for her review under IGRA. She did not act within the 45-day window, and the Compact accordingly went into effect under 25 U.S.C. § 2710(d)(8)(C). The Compact was published in the Federal Register on August 11, 2021, making it effective. Indian Gaming; Approval by Operation of Law of Tribal-State Class III Gaming Compact in the State of Florida, 86 Fed. Reg. 44,037-01 (Aug. 11, 2021).

C.

The Plaintiffs in this case, West Flagler Associates, Ltd., d/b/a Magic City Casino, and Bonita-Fort Myers Corporation, d/b/a Bonita Springs Poker Room (collectively, "West Flagler"), operate brick-and-mortar casinos in Florida. They sued Secretary Haaland, in her official capacity, and the Department of the Interior (collectively, "the Secretary"), challenging the decision to not act on the Compact within 45 days. They allege that the Secretary's approval through inaction violated the APA for four reasons: (1) its authorization of gaming off of Indian lands was unlawful under IGRA, (2) it violated the Wire Act, (3) it violated the Unlawful Internet Gambling Enforcement Act ("UIGEA"), and (4) it violated the Fifth Amendment's equal protection guarantee. The Plaintiffs sought an injunction vacating and setting aside the Compact.

In the District Court, the Tribe moved to intervene for the limited purpose of filing a Rule 19 motion to dismiss. The Secretary and Plaintiffs opposed the Tribe's motion. Independently, the Secretary moved to dismiss for lack of standing and for failure to state a claim. The Plaintiffs moved for summary judgment.

The District Court considered all three motions together, along with parallel motions in another case involving a challenge to the same Compact by individuals and entities who are wholly opposed to the expansion of gambling within Florida. *See Monterra MF, LLC v. Haaland*, No. 21-cv-2513 (D.D.C.) (complaint filed Sept. 27, 2021). The District Court first denied the Tribe's motion to intervene, finding that it

was a required party but that its interests in this litigation were adequately represented by the Secretary, and therefore the litigation could proceed in the Tribe's absence in equity and good conscience. *See* FED. R. CIV. P. 19(b). The District Court then granted summary judgment for the West Flagler Plaintiffs, finding that the Compact violated IGRA because its online sports betting provisions impermissibly attempted to authorize gaming *off* of Indian lands; accordingly, the Secretary had an affirmative duty to reject it. Finding that the entire Compact must be set aside, the District Court finally dismissed the motions in the *Monterra* litigation as moot, and that portion of the decision is not on appeal. (The *Monterra* plaintiffs have appeared as *amici* in this case and urge affirmance.)

The Tribe appealed the denial of its motion to intervene, which the Secretary and Plaintiffs oppose. The Secretary appealed the grant of summary judgment for Plaintiffs.

II.

We first address the merits of West Flagler's challenge to the Compact, followed by the Tribe's motion to intervene. We review a district court's decision granting summary judgment *de novo*. *Lopez v. Council on American-Islamic Rels. Action Network, Inc.*, 826 F.3d 492, 496 (D.C. Cir. 2016). No material fact is in dispute; the issues on appeal are purely legal.

West Flagler's claims arise under the APA. The APA requires a reviewing court to "hold unlawful and set aside agency action . . . found to be[] (A) arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law; [or] (B) contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(A)–(B). When reviewing a Secretary's decision to not act within the 45-day window when presented with an IGRA compact, this Court has held that 25 U.S.C. § 2710(d)(8)(C) "provides the 'law to apply[]'"—that is, "the compact is deemed approved 'but only to the extent the compact is consistent with the provisions of [IGRA].'" *Amador Cnty.*, 640 F.3d at 381 (alteration in original).

A.

West Flagler's primary challenge to the Compact is that its online sports betting provisions unlawfully authorize class III gaming outside of Indian lands, in violation of IGRA. In West Flagler's view, our decision in *Amador County* stands for the principle that "IGRA requires the Secretary to 'affirmatively disapprove' any compact that seeks to authorize gaming off Indian lands." West Flagler Br. 20. They argue in turn that the Compact, both in text and effect, necessarily violates that principle. On appeal, the Secretary agrees with the major premise of West Flagler's claim—that IGRA cannot provide an independent source of legal authority for gaming outside of Indian lands—but with one caveat. In her view, "[g]aming outside Indian lands cannot be *authorized* by IGRA, but it may be *addressed* in a compact." Gov't Resp. Br. 2. Thus, the Secretary mainly disputes the minor premise of West Flagler's argument by contending that while the Compact here "discussed" online sports betting off of tribal lands, it did not "authorize" it. And whether or not that gaming

is authorized or permissible as a matter of Florida state law falls outside the scope of the Secretary's review. Thus, the logic goes, she had no obligation to disapprove the Compact.

We agree with the Secretary. For our purposes, IGRA's complex regulatory scheme contains two important, related principles. First, IGRA abrogated tribal sovereign immunity for certain gaming activity on Indian lands, and it regulates gaming activity on Indian lands, but "nowhere else." *Bay Mills*, 572 U.S. at 795. This is the core teaching of *Bay Mills*, in which the Supreme Court stated in no uncertain terms: "Everything—literally everything—in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands, and nowhere else." *Id.* Put another way, IGRA generally does not restrict or regulate tribal, or any other, activity outside of Indian lands.

Second, while the function of a class III gaming compact is to authorize gaming on Indian lands, it "may include provisions relating to" a litany of other topics. 25 U.S.C. § 2710(d)(3)(C). These include, among other things, "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 such activity;" "the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;" and "any other subjects that are directly related to the operation of gaming activities." *Id.* § 2710(d)(3)(C)(i), (ii), (vii). *Bay Mills* also teaches that such topics can cover state

or tribal activity outside of Indian lands. For instance, a state may use a gaming compact to bargain for a waiver of tribal sovereign immunity for a tribe's gaming activity outside of its lands. *See* 572 U.S. at 796–97. And while there are some limits on what a tribe and a state can agree to in an IGRA gaming compact, the purpose of those limits is generally to ensure that states do not use gaming compacts as a backdoor to exercise regulatory power over tribes that they otherwise would not have. That is not a concern in this case.

Following the precept that "a contractual provision should, if possible, be interpreted in such a fashion as to render it lawful rather than unlawful," we find the Compact's text capable of an interpretation in harmony with these two principles. *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 954 (D.C. Cir. 1983); *see also Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1485 (D.C. Cir. 1997) ("[A]n interpretation that makes the contract lawful is preferred to one that renders it unlawful."); 11 WILLISTON ON CONTRACTS § 32:11 (4th ed. May 2023 update) ("Consonant with the principle that all parts of a contract be given effect when possible, an interpretation which renders a contract lawful is preferred over one which renders it unlawful."). Recall that the key language over which the parties quarrel is in Compact § IV.A, titled "Authorization and Location of Covered Games." It reads:

> The Tribe and State agree that the Tribe is authorized to operate Covered Games on its Indian lands, as defined in [IGRA.] . . . Subject to limitations set forth herein,

> 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.

J.A. 692; *see also* J.A. 687 (Compact § III.CC.2, containing the same phrasing).

The first sentence of this section simply states that the Tribe is authorized to operate sports betting on its lands. This is uncontroversial and plainly consistent with IGRA. Next, the Compact discusses wagers on sports betting "made by players physically located within the State using a mobile or other electronic device," which are "deemed to take place exclusively where received." The Compact does not say that these wagers are "authorized" by the Compact (or by any other legal authority). Rather, it 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. Because the Compact requires all gaming disputes be resolved in accordance with tribal law, *see* J.A. 702 (Compact § VI.A), this "deeming" provision simply allocates jurisdiction between Florida and the Tribe, as permitted by 25 U.S.C. § 2710(d)(3)(C)(i)–(ii).

The discussion of wagers placed from outside Indian lands is also "directly related to the operation of" the Tribe's sports book, and thus falls within the scope of § 2710(d)(3)(C)(vii). The Compact "authorizes" only the

Tribe's activity on its own lands, that is, operating the sports book and receiving wagers. 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.

West Flagler contends that reading subsection (d)(3)(C)(vii)—the "catch-all" provision—in this way violates the canon that Congress does not hide elephants in mouseholes. We disagree. To be sure, as one of our sister circuits recently noted: "As a residual clause, § 2710(d)(3)(C)(vii) takes its meaning from, and is limited by, the rest of § 2710(d)(3)(C)." *Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024, 1036 (9th Cir. 2022) (citing *Yates v. United States*, 574 U.S. 528, 545 (2015)). But at the same time, "as a residual clause, § 2710(d)(3)(C)(vii) is inevitably broader than the more specific topics enumerated in the paragraphs that precede it." *Chicken Ranch*, 42 F.4th at 1036 (internal quotations and alteration omitted); *see also Republic of Iraq v. Beaty*, 556 U.S. 848, 860 (2009) ("[T]he whole value of a generally phrased residual clause . . . is that it serves as a catchall for matters not specifically contemplated—known unknowns[.]"). Indeed, § 2710(d)(3)(C) covers vast ground, including not only the allocation of civil and criminal jurisdiction between a state and a tribe (no small topic), but also state taxation, remedies for breach of contract, and licensing standards. The power of a state to tax Indian tribes for activity on its own lands, or a tribe's decision to waive its sovereign immunity from suit by a state, *see Bay Mills*, 572 U.S. at 796, are far from "mouseholes." If they are not

mouseholes, subsection (d)(3)(C)(vii)—which, as a residual clause, is "inevitably broader"—cannot constitute a mousehole. Thus, gaming activity outside of Indian lands that is directly related to the gaming activity authorized by a compact may appropriately fall within the scope of subsection (d)(3)(C)(vii).

Cases from other circuits interpreting the catch-all provision confirm our understanding. In *Chicken Ranch*, the Ninth Circuit held that provisions relating to family law, environmental law, and tort law—on which California insisted in exchange for permitting the tribe to conduct gaming—could not be the subject of a valid IGRA compact, as they were not directly related to gaming. 42 F.4th at 1037–39. Similarly, the Tenth Circuit has held that subsection (d)(3)(C)(vii) does not permit a compact provision allowing state courts to hear tort suits arising from injuries at Indian casinos. *Navajo Nation v. Dalley*, 896 F.3d 1196, 1218 (10th Cir. 2018). The lesson from these cases is clear and is confirmed by IGRA's legislative history: states cannot use compacts "as a subterfuge for imposing State jurisdiction on tribal lands[,]" *contra* IGRA's purpose. S. Rep. No. 100-466, at 14 (1988). But that is not what happened here.

Nor does *Amador County*, on which West Flagler heavily relies, compel a different result. There, we emphasized that 25 U.S.C. § 2710(d)(8)(A) "authorizes approval only of compacts 'governing gaming on *Indian lands*,' suggesting that disapproval is obligatory where that particular requirement is unsatisfied." 640 F.3d at 381. But in that case, the entirety of the gaming activity discussed in the compact was located on a piece

of land known as "the Rancheria," and the dispositive issue was whether the Rancheria constituted Indian lands or not. In other words, if the Rancheria did not qualify as Indian lands, *no* provision of the compact would seek to authorize gaming on Indian lands, and thus any approval would plainly exceed the scope of the Secretary's authority under subsection (d)(8)(A). In contrast, the Compact here authorizes a substantial amount of gaming on Indian lands separate and apart from online wagers placed from outside the Tribe's lands, including Las Vegas-style gambling and in-person sports betting at the Tribe's casinos. That is sufficient to fulfill the "particular requirement" that the Compact "govern[s] gaming on *Indian lands*." *Id.* At bottom, West Flagler's argument invites the Court to read the extraneous word "only" into the preceding statutory language, and we decline to do so.

Finally, West Flagler protests that the Secretary's argument necessarily creates two types of IGRA approvals: (a) for activity on Indian lands, approval authorizes the activity, while (b) for activity outside of Indian lands, approval has no meaning or legal effect. In West Flagler's view, this is problematic because an approved IGRA compact is an "instrument of federal law" which "preempts state law[,]" but it would be illogical and unworkable for only some parts of an approved compact to preempt state law. West Flagler Br. 24–25. However, this argument misunderstands the purpose and effect of an IGRA approval.

To start, neither of the two out-of-circuit cases that West Flagler cites stand for the novel proposition that an IGRA compact has the force of federal law with

preemptive power. One of those cases merely states that IGRA compacts are a "creation of federal law," which is uncontroversial and indisputable given their statutory origin but falls far short of supporting West Flagler's argument. *See Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d 1226, 1239 (10th Cir. 2018). The other cited case simply states that an IGRA compact confers upon a tribe a "federal right" to conduct gaming on its own lands, for the purposes of establishing federal court jurisdiction over the action—again, indisputable and beside the point. *See Forest Cnty. Potawatomi Cmty. v. Norquist*, 45 F.3d 1079, 1082 (7th Cir. 1995).

In actuality, the approval process exists so that the Secretary may ensure that a compact does not violate certain federal laws, and her approval is a prerequisite for the compact to have legal effect: nothing more, nothing less. Much discussion in the briefs concerns the issue of whether the Tribe and Florida sought to circumvent state constitutional law by including the online sports betting provisions in the Compact. By way of background, in 2018, Florida amended its constitution with a section titled "Voter Control of Gambling in Florida." Fla. Const. art. X, § 30. Under that amendment, "Florida voters shall have the exclusive right to decide whether to authorize casino gambling in the State of Florida[,]" which can only be done through "a vote by citizens' initiative." *Id.* § 30(a). At the same time, the amendment contains an exception for "casino gambling on tribal lands" pursuant to an IGRA compact. *Id.* § 30(c). No voter referendum was ever held regarding online sports betting; therefore, West Flagler argues, the Tribe and

Florida would *have* to believe that the IGRA Compact provides the legal basis for that activity.

Whatever the Tribe and Florida—who are not parties to this litigation—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. That is in fact the position advanced by the Secretary—who *is* a party to this litigation—and we agree. *See* Oral Arg. Tr. at 6:14–21 (Counsel for the Secretary: "[I]f the state statute . . . related to this action were to be challenged in Florida state court and were to fall, the compact that they crafted would give no independent authority for the Tribe to continue to receive bets from outside Indian lands.").

Thus, we hold only that the Secretary's decision not to act on the Compact was consistent with IGRA. In reaching this narrow conclusion, we do not give our imprimatur to all of the activity discussed in the Compact. And particularly, for avoidance of doubt, we express no opinion as to whether the Florida statute ratifying the Compact is constitutional under Fla. Const. art. X, § 30. 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 our judicial review, and as a prudential matter are best left for Florida's courts to decide.

B.

The District Court did not reach West Flagler's Wire Act, UIGEA, and Fifth Amendment challenges to the Compact. But because they have been "fully

briefed" and present "purely legal questions[,]" we may decide them. *Assoc. of Am. R.R.s v. U.S. Dep't of Transp.*, 821 F.3d 19, 26 (D.C. Cir. 2016); *see also Consumer Energy Council v. FERC*, 673 F.2d 425, 440 (D.C. Cir. 1982). We conclude that these other challenges lack merit as matter of law.

First, we address the justiciability of these claims. IGRA enumerates a limited number of grounds for which a Secretary "may disapprove a compact[,]" including where the compact violates federal law. 25 U.S.C. § 2710(d)(8)(B)(ii). But where, as here, a compact goes into effect due to the Secretary's inaction, IGRA states that the compact is "approved . . . but only to the extent the compact is consistent with the provisions of this chapter." *Id.* § 2710(d)(8)(C). Because subsection (B) uses "may" rather than "shall," while subsection (C) lists inconsistency with IGRA as the only ground for nullifying a compact considered approved following secretarial inaction, there is a threshold question whether non-IGRA challenges to a compact in these circumstances are judicially reviewable. Dicta from our opinion in *Amador County* strongly suggests that they are, but we have not definitively resolved the question, because the claim in that case was that the compact violated IGRA, not a different federal law. 640 F.3d at 380–83. But we need not resolve that thorny question here, because even assuming that such claims are justiciable, we find that West Flagler's particular challenges fail as a matter of law.

1.

First, West Flagler claims that the Compact authorizes transactions that would violate the federal Wire Act. The Wire Act prohibits anyone "engaged in the business of betting or wagering" from "knowingly us[ing] a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers . . . on any sporting event or contest[.]" 18 U.S.C. § 1084(a). The Act has a safe harbor provision for bets placed to and from states or foreign countries where sports betting is lawful. *Id.* § 1084(b). Violating the Wire Act is a crime punishable by fine or imprisonment. *Id.* § 1084(a).

West Flagler contends that "[o]nline communications are almost invariably routed between servers in and out of state between their origin and destination[,]" and therefore any "realistic implementation of the Compact would require use of wire facilities operating in 'interstate and foreign commerce.'" West Flagler Br. 36. They further argue that the safe harbor provision does not apply, because Indian lands are neither a state nor a foreign country within the meaning of § 1084(b). *Id.* at 36 n.17.

There are several problems with this line of reasoning. As discussed above, the Compact does not itself independently "authorize" wagers placed by patrons located outside Indian lands. That itself forecloses the Wire Act challenge (and the other claims that follow). And even if the Compact did, no matter the scope of our judicial review, IGRA does not require the Secretary to disapprove a compact based on hypothetical violations of federal criminal law that turn

on how the Compact is implemented as well as the *mens rea* of the would-be bettors.

In fact, the Compact contains express language that the Tribe "shall ensure" that its sports book operates in "strict compliance" with the Wire Act. J.A. 707 (Compact § VII.A.1(c)). West Flagler does not contest that it would be technically possible for the Tribe to do so. Moreover, the Wire Act is a criminal statute requiring the government to prove *mens rea* in individual circumstances, a principle at odds with the argument that the Compact as a general matter violates the Act, or that the Secretary was required to disapprove it on that basis. Finally, taking West Flagler's argument to its logical end shows why such a challenge cannot be sustained. Under their view, even online betting by patrons who *are* physically located on Indian lands would violate the Wire Act, because some of those bets may be routed off of Indian lands into a state, and then back. There is no support for the novel and sweeping argument that the Wire Act poses such a broad obstacle to an Indian tribe's ability to offer online gambling on its own lands.

2.

In a related vein, West Flagler claims that the Compact violates the UIGEA. That Act prohibits "knowingly accept[ing]" certain forms of payment in connection with "unlawful Internet gambling" such as credit card transactions, checks, and electronic fund transfers. 31 U.S.C. § 5363. This claim suffers from a similar flaw as the Wire Act claim. Even without defining the precise contours of the scope of our review in this case, our review is of the Secretary's decision

not to act when presented with the Compact, not whether all hypothetical implementations of the Compact are lawful under all federal statutes. How the Tribe and Florida ultimately implement the Compact in practice, and whether that implementation is consistent with UIGEA, may be the subject of a future lawsuit, but the Compact does not as a facial matter violate the UIGEA. The Secretary was therefore not required to disapprove the Compact on that basis.

3.

Lastly, West Flagler argues that the Secretary's approval violates the Fifth Amendment's equal protection guarantee because the Compact impermissibly grants the Tribe a statewide monopoly over online sports betting. But even if the Secretary's approval "authorized" all of the activity in the Compact (as we have explained *supra*, it does not), it would survive rational basis review, which is the applicable level of scrutiny here.

We have held that "promoting the economic development of federally recognized Indian tribes (and thus their members)," if "rationally related to a legitimate legislative purpose[,]" is constitutional. *Am. Fed'n of Gov't Emps., AFL-CIO v. United States*, 330 F.3d 513, 522–23 (D.C. Cir. 2003); *see Morton v. Mancari*, 417 U.S. 535, 554 (1974) (upholding a preference for members of Indian tribes where "reasonably and directly related to a legitimate, nonracially based goal"). The exclusivity provisions in the Compact plainly promote the economic development of the Seminole Tribe. They are also rationally related to the legitimate legislative purposes

laid out in IGRA by "ensur[ing] that the Indian tribe is the primary beneficiary of the gaming operation[.]" 25 U.S.C. § 2702(2). Thus, West Flagler's equal protection challenge fails as a matter of law.

III.

Having determined that West Flagler's challenges to the Compact lack merit and judgment for the Secretary is warranted, we are left to decide the Tribe's motion to intervene. The Tribe moved to intervene as of right under Rule 24(a), for the limited purpose of filing a motion to dismiss under Rule 19. In short, a party seeking dismissal under Rule 19 must show that it is a required party that cannot be joined, and without whom the litigation cannot proceed.

Formally, "Rule 19 analysis has two steps." *De Csepel v. Republic of Hungary*, 27 F.4th 736, 746 (D.C. Cir. 2022). "We first determine whether an absent party is 'required'" under Rule 19(a). *Id.* Relevant here, a party is required where it "claims an interest relating to the subject of the action and . . . disposing of the action in the person's absence may . . . as a *practical* matter impair or impede the person's ability to protect the interest[.]" FED. R. CIV. P. 19(a)(1)(B)(i) (emphasis added). If a party is required but cannot be joined (for instance, due to its sovereign immunity), the court must next determine "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." FED. R. CIV. P. 19(b). Courts refer to step two of this analysis as determining whether the party is "indispensable." *De Csepel*, 27 F.4th at 748. In doing so, a court considers four factors: (1) whether "a judgment rendered in the

person's absence might prejudice that person or the existing parties[,]" (2) whether such prejudice can be "lessened or avoided[,]" (3) "whether a judgment rendered in the person's absence would be adequate[,]" and (4) "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." FED. R. CIV. P. 19(b). The Rule 19 inquiry is equitable and discretionary. *See Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1495 (D.C. Cir. 1995); *De Csepel*, 27 F.4th at 747.

The District Court first concluded that the Tribe's proposed Rule 19 motion to dismiss lacked merit. It then denied the Rule 24 motion to intervene as moot. Because the Tribe will suffer minimal to no prejudice in light of this Court's ruling on the merits, we affirm the denial of the motion to intervene on alternate grounds.

Ordinarily, a court decides a prospective party's motion to intervene before summary judgment. The District Court's analysis proceeded in that sequence, though it decided both motions in the same order, and both are presented in this appeal. Our decision to resolve the merits of the case before deciding the Tribe's motion to intervene in *this* instance heeds the well-settled principle that Rule 19 "calls for a pragmatic decision based on practical considerations in the context of particular litigation." *Kickapoo Tribe*, 43 F.3d at 1495; *cf. Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577–78 (1999) (a court may resolve a case by concluding that it lacks personal jurisdiction before confirming its subject-matter jurisdiction where the former presents an easier question, even though the

latter delineates more foundational limits on a federal court's Article III power to decide a case). As the Advisory Committee Notes to the Federal Rules state, the Rule 19 inquiry is meant, above all, to be "practical," and courts should ask: "Would the absentee be adversely affected in a practical sense, and if so, would the prejudice be immediate and serious, or remote and minor?" FED. R. CIV. P. 19 advisory committee's note to 1966 amendment; *see also* 7 CHARLES A. WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. § 1608 (3d ed. Apr. 2023 update) ("[C]ourts must look to the practical likelihood of prejudice . . . rather than the theoretical possibility that [it] may occur."). This principle underlies the rule itself and is the reason a case may proceed when a non-party's interests are adequately represented by a party.

Here, there is little practical difference between a Rule 19 dismissal on the one hand, and a judgment for the Secretary on the other. Both would keep intact the 2021 Compact, the relief that the Tribe ultimately seeks. In fact, the Tribe did not shy away from expressing its views on the merits of this case; it filed an *amicus* brief explaining the reasons it believes the District Court erred in vacating the Compact, separate and apart from the denial of its motion to intervene. While the ability to file an *amicus* brief is never *per se* "enough to eliminate prejudice," *Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 775 (D.C. Cir. 1986), the Tribe's brief lessens whatever prejudice it would suffer from having this issue resolved favorably in its absence. In reaching this conclusion, we do not discount or take lightly the Tribe's "substantial interest" in its sovereign immunity, *see Republic of*

Philippines v. Pimentel, 553 U.S. 851, 868–69 (2008), but we ultimately find that any infringement on that immunity is "remote" and "theoretical" in these unique circumstances. Because Rule 19's guiding "philosophy . . . is to avoid dismissal whenever possible[,]" we find that the practical benefits of deciding this case on the merits outweighs any prejudice to the Tribe. 7 CHARLES A. WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. § 1604 (3d ed. Apr. 2023 update).

* * *

For these reasons, we vacate the opinion below, and the District Court is directed to enter judgment for the Secretary. We affirm the denial of the Tribe's motion to intervene.

It is so ordered.

APPENDIX B

JFUNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed November 22, 2021]

No. 21-cv-2192 (DLF)

WEST FLAGLER ASSOCIATES *et al.*,
Plaintiffs,

v.

DEB HAALAND,
Secretary, U.S. Department of the Interior,
et al.,
Defendants.

No. 21-cv-2513 (DLF)

MONTERRA MF, LLC *et al.*,
Plaintiffs,

v.

DEB HAALAND,
Secretary, U.S. Department of the Interior,
et al.,
Defendants.

MEMORANDUM OPINION

In August 2021, the Secretary of the Interior approved a gaming compact between the State of Florida and the Seminole Tribe of Florida. The Compact authorizes the Tribe to offer online sports betting throughout the State, including to bettors located off tribal lands. In these related cases, the plaintiffs argue that the Compact violates the Indian Gaming Regulatory Act, the Unlawful Internet Gambling Enforcement Act, the Wire Act, and the Equal Protection Clause. They accordingly ask this Court to "set aside" the Secretary's approval of the Compact pursuant to the Administrative Procedure Act. 5 U.S.C. § 706(2)(A).

Before the Court are the plaintiffs' Motions for Summary Judgment in both the *West Flagler* case and the *Monterra* case, Dkt. 19 (*West Flagler*), Dkt. 37 (*Monterra*); the Tribe's respective Motions to Intervene, Dkt. 13 (*West Flagler*), Dkt. 31 (*Monterra*); and the Secretary's respective Motions to Dismiss, Dkt. 25 (*West Flagler*), Dkt. 35 (*Monterra*).[1] For the reasons that follow, the Court will hold that the Compact violates IGRA and grant the *West Flagler* plaintiffs' motion for summary judgment. Additionally, the Court will deny the *Monterra* plaintiffs' motion as moot, deny the Tribe's motions, and deny the Secretary's motions.

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[1] The Court resolves these cases together because they challenge the same gaming compact, raise overlapping questions of law, and seek overlapping forms of relief. For clarity, the Court will use parentheticals to identify the case name with which each filing is associated.

I. BACKGROUND

A. Statutory Background

The Indian Gaming Regulation Act (IGRA) "creates a framework for regulating gaming activity on Indian lands." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 785 (2014). To that end, the Act divides gaming activities into three classes. *See* 25 U.S.C §§ 2710(a), 2710(d)(1). Class III gaming, the kind involved here, includes both casino games and sports betting. *See id.* §§ 2703(6)–(8); 25 C.F.R. § 502.4(c). To host class III gaming "on Indian lands," a tribe must "enter[] into" a compact with the state in which its lands are located. 25 U.S.C. § 2710(d)(1)(C). These compacts "prescribe[] rules for operating gaming, allocate[] law enforcement authority between the tribe and State, and provide[] remedies for breach of the agreement's terms." *Bay Mills*, 572 U.S. at 785 (citation omitted). As relevant here, a compact may take effect only after the Secretary of the Interior has both approved its terms and noticed its approval in the Federal Register. *See* 25 U.S.C § 2710(d)(3)(B).

IGRA closely regulates the Secretary's review of gaming compacts. To start, it provides that the Secretary may disapprove a compact "only if [it] violates" another provision of IGRA, "any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands," or "the trust obligations of the United States to Indians." *Id.* § 2710(d)(8)(B). IGRA also provides that the Secretary must either approve or disapprove each compact within 45 days of receiving it. *See id.* § 2710(d)(8)(C). Otherwise, the compact shall "be considered to have

been approved by the Secretary, but only to the extent the compact is consistent with" IGRA. *Id.* The D.C. Circuit has squarely held, first, that these default approvals are "reviewable" in federal court and, second, that the Secretary "must . . . disapprove" unlawful compacts. *Amador Cty. v. Salazar*, 640 F.3d 373, 381–83 (D.C. Cir. 2011).

B. Factual Background

This case concerns a class III gaming compact between the State of Florida and the Seminole Tribe of Florida. *See* Compl. Ex. A (Compact), Dkt. 1-1 (*West Flagler*). Before the Compact took effect, Florida law prohibited wagering on "any trial or contest of skill, speed[,] power or endurance." *See* Fl. Stat. § 849.14 (2020). Although that prohibition contained a narrow exception for horse racing, dog racing, and jai alai, *see id.* § 550.155(1), it barred betting on all major sports, including football, baseball, and basketball, *see id.* § 849.14; *see also* State of Fl. Amicus Br. at 1, 8, Dkt. 28 (*West Flagler*). The Florida Constitution also limited the conditions in which the State could expand sports betting going forward. *See* Fl. Const. art. X, § 30(a). Specifically, it provided that the State could only expand such betting through a "citizens' initiative," *id.* §§ 30(a)–(b), with the caveat that "nothing herein . . . limit[s] the ability of the state or Native American tribes to negotiate gaming compacts" under IGRA, *id.* § 30(c).

The compact in this case expanded the Tribe's ability to host sports betting throughout the State. In relevant part, the Compact defines "sports betting" to mean "wagering on any past or future professional

sport or athletic event, competition or contest," Compact § III(CC); classifies "sports betting" as a "covered game," *id.* § III(F); and authorizes the Tribe "to operate Covered Games on its Indian lands, as defined in [IGRA]," *id.* § IV(A). The Compact also provides that all in-state wagers on sporting events "shall be deemed . . . to be exclusively conducted by the Tribe at its Facilities where the sports book(s) . . . are located," even those that are made "using an electronic device" "by a Patron physically located in the State but not on Indian lands." *Id.* § III(CC)(2); *see also id.* § IV(A) (providing that "wagers on Sports Betting . . . shall be deemed to take place exclusively where received"). In this manner, the Compact authorizes online sports betting throughout the State. And because the State has not entered a similar agreement with any other entity, the Compact grants the Tribe a monopoly over both all online betting and all wagers on major sporting events. *See* Tribe's Mot. to Intervene at 1–3, Dkt. 13 (*West Flagler*).

On June 21, 2021, the Secretary of the Interior received a copy of the Compact. *See* Compl. Ex. F (Approval Letter) at 1, Dkt. 1-6 (*West Flagler*). Because the Secretary took no action on it within forty-five days, *see id.*, she approved the Compact by default on August 5, *see* 25 U.S.C § 2710(d)(8)(C). The next day, the Secretary explained her no-action decision in a letter to the Tribe. *See generally* Approval Letter. The letter reasoned that IGRA allows the Tribe to offer online sports betting to persons who are not physically located on its tribal lands. *Id.* at 6–8. To support that conclusion, the letter noted that IGRA allows states and tribes to negotiate the "allocation of criminal and

civil jurisdiction," 25 U.S.C. § 2710(d)(3)(c)(i)-(ii), emphasized that Florida consented to the Compact, and argued that "IGRA should not be an impediment to tribes that seek to modernize their gaming offerings." *Id.* at 7. At the same time, the letter insisted that Florida residents could not place sports bets while "physically located on *another Tribe's* Indian lands." *Id.* at 8 & n.14 (emphasis added). To do so, it reasoned, would violate IGRA's instruction that gaming is "lawful on Indian lands" only if such gaming is authorized by the "Indian tribe having jurisdiction over such lands." *Id.* (quoting 25 U.S.C. § 2710(d)(1)(A)(i)).

On August 11, the Secretary published notice of the Compact in the Federal Register. *See* Indian Gaming; Approval by Operation of Law of Tribal-State Class III Gaming Compact, 86 Fed. Reg. 44,037 (Aug. 11, 2021). At that point, the Compact took effect and acquired the force of law. *See* 25 U.S.C. § 2710(d)(3)(B). Pursuant to that Compact, as well as a Florida statute that implements its terms, *see* Fl. Stat. § 285.710(13)(b), online sports betting is now available in Florida. Although the Tribe initially represented that it would not offer such betting until November 15, *see* Pls.' Mot. for Summ. J. Ex. C (Savin Decl.) ¶ 23, Dkt. 19-3 (*West Flagler*), it in fact launched online betting on November 1, *see* Pls.' Notice of Material Factual Development at 1 & Ex. A, Dkt. 39 (*West Flagler*).

C. Procedural History

On August 16, plaintiffs West Flagler Associates and Bonita-Fort Myers Corporation brought a civil action to challenge the Secretary's approval of the Compact. *See* West Flagler Compl. Both entities own

brick-and-mortar casinos in Florida. *See* Savin Decl. ¶¶ 3, 15. To establish Article III standing, they allege that the Compact's allowance for online betting will divert business from their facilities. *See id.* ¶¶ 25–29. On the merits, they argue that the Compact's authorization of online betting violates IGRA, the Unlawful Internet Gambling Enforcement Act (UIGEA), the Wire Act, and the Equal Protection Clause. *See* Compl. ¶¶ 124–28; Pls.' Mot. for Summ. J. at 18–38, Dkt. 19 (*West Flagler*). Of these, their leading argument is that the Compact violates IGRA because it authorizes class III gambling outside of "Indian lands." Pls.' Mot. for Summ. J. at 18 (quoting 25 U.S.C. § 2710(d)(8)(A)).

On September 17, the Tribe moved to intervene for the limited purpose of filing a motion to dismiss. *See* Tribe's Mot. to Intervene, Dkt. 13 (*West Flagler*). The Tribe argues that it may intervene as of right because it has an economic interest in the Compact and because the Secretary will not adequately protect that interest. *See id.* at 9–13; *see also* Fed. R. Civ. P. 24(a). The Tribe further argues that it is an indispensable party to this litigation, *see* Fed. R. Civ. P. 19, but that its sovereign immunity prevents its joinder. *See* Tribe's Proposed Mot. to Dismiss at 4–11, Dkt. 13-4 (*West Flagler*). Finally, the Tribe argues that filing its motion to intervene did not waive its sovereign immunity. *See id.* at 5–6. To the contrary, it argues that "limited intervention [is] an appropriate mechanism through which parties may file motions to dismiss under Rule 19 . . . based on sovereign immunity." Tribe's Mot. to Intervene at 5. *See also* Tribe's Mot. to Intervene,

Dkt. 31, and Proposed Mot. to Dismiss, Dkt. 31-4 (raising the same argument in the *Monterra* litigation).

On September 27, Monterra MF and its co-plaintiffs filed a separate challenge to the Secretary's approval. *See* Compl., Dkt. 1 (*Monterra*). All but one of these co-plaintiffs live, work, or own property near Florida casinos. *See id.* ¶¶ 22–29. The remaining plaintiff, No Casinos, is a nonprofit organization that opposes the expansion of gambling in Florida. *See id.* ¶ 30. To establish Article III standing, these plaintiffs allege that the expansion of gambling in Florida will increase neighborhood traffic, increase criminal activity, and reduce their property values. *See* Pls.' Mem. in Supp. of Mot. for Summ. J. at 12, Dkt. 37-4 (*Monterra*). On the merits, they join the *West Flagler* plaintiffs in arguing that the Compact's online gambling rules violate IGRA, UIGEA, and the Wire Act. *See id.* at 15–23. They also argue that the Compact's expansion of in-person gambling violates both the Florida Constitution and a separate provision of IGRA, which conditions the lawfulness of class III gaming on whether the state "permits such gaming for any purpose by any person, organization, or entity," 25 U.S.C. § 2710(d)(1)(B). *See id.* at 23–28.

The *West Flagler* plaintiffs moved for summary judgment on September 21. Dkt. 19 (*West Flagler*). The *Monterra* plaintiffs followed suit on October 15. Dkt. 35 (*Monterra*). The Secretary then moved to dismiss both plaintiffs' cases for lack of standing. *See* Gov't's Mot. to Dismiss at 8–17, Dkt. 25 (*West Flagler*); Gov't's Mot. to Dismiss at 8–15, Dkt. 35 (*Monterra*). The Secretary also argued that the plaintiffs failed to state a claim

under IGRA, that IGRA does not require her to consider questions of state law, and that West Flagler's constitutional argument fails. *See* Gov't's Mot. at 17–31 (*West Flagler*); Gov't's Mot. at 15–19 (*Monterra*). The Secretary did not, however, address whether the online gaming contemplated by the Compact occurs on or off "Indian lands," 25 U.S.C. § 2710(d)(8)(A).

On November 5, the Court held a hearing on the above motions.[2] The cases are now ripe for review.

II. LEGAL STANDARD

A court grants summary judgment if the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A "material" fact is one with potential to change the substantive outcome of the litigation. *See Liberty Lobby*, 477 U.S. at 248; *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006). A dispute is "genuine" if a reasonable jury could determine that the evidence warrants a verdict for the nonmoving party. *See Liberty Lobby*, 477 U.S. at 248; *Holcomb*, 433 F.3d at 895.

In an Administrative Procedure Act case, summary judgment "serves as the mechanism for deciding, as a matter of law, whether the agency action is supported

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[2] At the hearing, government counsel was unable to take a position on the location of online gaming under the Compact. *See* Rough Hr'g Tr. at 51–53. The Court thus directed counsel to file a supplemental brief on the merits on or before November 9. *See* Min. Order of Nov. 5, 2021. Counsel has since done so. *See* Dkt. 40–41 (*West Flagler*); Dkt. 52–53 (*Monterra*).

by the administrative record and otherwise consistent with the APA standard of review." *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006). The Court will "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," *id.* § 706(2)(C), or "unsupported by substantial evidence," *id.* § 706(2)(E).

III. ANALYSIS

A. West Flagler Has Article III Standing

Before reaching the merits of either action, this Court must first determine whether at least one plaintiff has Article III standing. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). To establish standing, a plaintiff must demonstrate that he has suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted). The plaintiff must also establish that there is "a causal connection between the injury and the conduct complained of" and that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560–61 (internal quotation marks and citation omitted). Each of these elements "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Id.* at 561. As such, at the summary judgment stage, a plaintiff "can no longer rest on such mere allegations, but must set forth by affidavit or

other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true." *Id.* (internal quotation marks and citation omitted).

Under the "basic law of economics," *New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002) (citation omitted), an "actual or imminent increase in competition" establishes an injury in fact, *Am. Inst. of Certified Pub. Accts. v. IRS*, 804 F.3d 1193, 1197 (D.C. Cir. 2015). Litigants accordingly suffer an injury "when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition against them." *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (internal quotation marks and citation omitted). Because "a loss of even a small amount of money is ordinarily an injury," *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017), any increase in competition suffices to establish Article III standing, *see Ipsen Biopharmaceuticals, Inc. v. Becerra*, 2021 WL 4399531, at *8 (D.D.C. Sept. 24, 2021) (citation omitted).

Here, West Flagler alleges that the Compact "will divert business that would have been spent at [its facilities] and cause it to be spent on online sports gaming offered by the Tribe." Savin Decl. ¶ 25. In its view, this diversion will occur because some customers "will prefer the ease of online gaming" to gaming in-person at West Flagler's casino. *Id.* That prediction is reasonable and hardly "speculative." *Lujan*, 504 U.S. at 561. Indeed, West Flagler surveyed its patrons to prove that very point. *See* West Flagler Mot. for Summ. J. Ex. D (Chavez Decl.), Dkt. 19-4. The survey found that between ten and fifteen percent of those patrons would

"wager online and shift a non-zero amount of their current gambling spending away from" games West Flagler currently offers. *Id.* at 10. The survey further explained that the above percentage rests on "conservative" assumptions and "likely understates the full universe of individuals whose behavior would change." *Id.* at 11. Without discussing those assumptions in detail, the Court reads the survey to show a substantial probability that authorizing online gambling has caused West Flagler some competitive injury.

The Secretary's objections to standing do not persuade.

First, West Flagler's survey supports its bottom-line conclusion. Although the Secretary challenges the survey's methodology, *see* Gov't's Mot. at 10–15 (*West Flagler*), West Flagler retained an expert to both design the survey's approach and defend it in exacting detail, *see* Chavez Decl. at 3–7. Many of the Secretary's objections to that approach lack any merit.[3] And even if they had merit, each of them concerns only to the "magnitude" of West Flagler's competitive injury, "which has no bearing on whether it [] established Article III standing." *Ipsen Biopharmaceuticals*, 2021

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[3] For instance, the Secretary challenges the inference, from a respondent's answer that he would "open an online sports wagering account," Chavez Decl. at 9, that he would "*actually* place bets online," Gov't's Mot. at 13 (emphasis in original). But placing bets online is the obvious purpose of opening an online betting account. And nothing in the requirement of an "imminent" injury, as described in *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), requires ignoring this common-sense connection.

WL 4399531, at *8 (citing *Czyzewski*, 137 S. Ct. at 983). In other words, even if the survey sampled an unrepresentative segment of the casino's patrons, *see* Gov't's Mot. to Dismiss at 11 n.6, it still shows that at least one of those patrons will divert some of his gambling spend to online sports betting. That "loss of even a small amount of money" is enough for competitive standing. *Czyzewski*, 137 S. Ct. at 983.

Second, West Flagler's injury does not "depend[] on [its] own business decisions." *See* Gov't's Mot. to Dismiss at 15. It is true that West Flagler could offer sports betting in its casino by partnering with the Tribe. *See id.* But West Flagler has shown a substantial probability that this partnership would leave it less profitable than it was before. *See* Savin Decl. ¶¶ 34–38. Under the partnership, the Tribe would place sports-betting kiosks in West Flagler's casino and receive up to 40% of the revenue that the kiosks generate. *See* Compact § III(CC)(3)–(4); Savin Decl. ¶ 36. That arrangement would both require substantial upfront investments and substantially decrease the average, long-term yield from the games West Flagler offers. *See* Savin. Decl. ¶¶ 34, 36–37. For those reasons, forcing West Flagler to choose between entering the partnership and losing further competitive ground is itself an injury. That injury is amplified by the Secretary's earlier suggestion that this kind of partnership may independently violate IGRA.[4] *See*

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[4] The Secretary suggested that this kind of partnership may violate 25 U.S.C. § 2710(b)(2)(A) by giving non-Indian entities a proprietary interest in Indian gaming. *See* Approval Letter at 11–12. The Secretary never addresses the tension between

Approval Letter at 11–12. And in any event, even if West Flagler could offer in-person sports betting on the same terms as the Tribe, its inability to host *online* sports betting would still create a competitive injury. *See supra.*

For the reasons above, the Court finds that West Flagler has adequately established a competitive injury. It also finds that this injury was both caused by the conduct challenged in this action and redressable by a favorable decision on the merits. *See Lujan*, 504 U.S. at 560–61. On that first point, there is a "causal connection" between West Flagler's injury and the Secretary's approval of the gaming Compact, *id.*, without which the Tribe could not offer online sports betting, 25 U.S.C. § 2710(d)(1)(C). And on the second, setting aside the Secretary's approval would prevent the Tribe from offering such betting, at least under the current Compact. Because that result would fully redress West Flagler's injury, West Flagler has Article III standing. *See Lujan*, 504 U.S. at 560–61.

This Court need not address whether the other plaintiffs in these actions have standing. As a general matter, "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 52 n.2 (2006). Although the *West Flagler* and *Monterra* suits raise different claims, they seek the same relief—principally, the vacatur of the

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encouraging West Flagler to enter such a partnership in this litigation and advising that such partnerships are unlawful elsewhere.

Secretary's default approval. *See* Compl. at 42 (*West Flagler*); Compl. at 37, Dkt. 1 (*Monterra*). And because the Court will grant that relief in the *West Flagler* action, it has no occasion to consider the separate arguments in the *Monterra* filing, let alone whether the *Monterra* plaintiffs independently have Article III standing. *See Louie v. Dickson*, 964 F.3d 50, 55 (D.C. Cir. 2020) (noting that a case is moot when a court "cannot grant any relief beyond that already afforded").

B. The Tribe Is Not an Indispensable Party

Next, the Court must resolve the Tribe's motion to intervene, *see* Dkt. 13, and motion to dismiss, *see* Dkt. 13-4. As both parties acknowledge, federal courts disagree on whether a sovereign may intervene in an action while preserving its sovereign immunity. *Compare*, *e.g.*, *Cnty. Sec. Agency v. Ohio Dep't of Com.*, 296 F.3d 477, 483 (6th Cir. 2002) (holding that "a motion to intervene is fundamentally incompatible with an objection to personal jurisdiction"), *with MGM Glob. Resorts Dev., LLC v. DOI*, 2020 WL 5545496, at *5–6 (D.D.C. Sept. 16, 2020) (declining to adopt an "'all or nothing' approach to intervention"). At the same time, controlling precedent makes clear that courts may address whether a person is required in or indispensable to an action *sua sponte*. *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 861 (2008) ("A court with proper jurisdiction may also consider *sua sponte* the absence of a required person and dismiss for failure to join."); *see also Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 772 n.6 (D.C. Cir. 1986) (finding an "independent duty to raise" an "indispensable party claim" based on tribal immunity).

In this case, the Tribe moves to intervene solely to argue for dismissal on the ground that it is a required and indispensable party. Accordingly, to conserve judicial resources, the Court will exercise its discretion to decide whether the Tribe is a required and indispensable party before resolving its motion to intervene.

The Federal Rules of Civil Procedure require joining each person that has "an interest relating to the subject of the action" if that person is subject to suit and if "disposing of the action in [his] absence" might "impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i). The Tribe is a "required party," in this respect, because it "has an interest in the validity of [its] compact . . ., and [its] interest would be directly affected by the relief that [West Flagler] seeks." *Kickapoo Tribe of Indians of Kickapoo Rsrv. in Kansas v. Babbitt*, 43 F.3d 1491, 1495 (D.C. Cir. 1995). The Federal Rules further provide that, if a required party "cannot be joined," the court must "determine whether, in equity and good conscience, the action . . . should be dismissed." Fed. R. Civ. P. 19(b). In this case, the Tribe cannot be joined because it "enjoys sovereign immunity." *Kickapoo Tribe*, 43 F.3d at 1495; *see Bay Mills Indian Cmty.*, 572 U.S. at 788 (noting that tribes possess "common-law immunity from suit traditionally enjoyed by sovereign powers" (citation omitted)). Accordingly, to determine whether this action "should be dismissed," the Court must determine whether "equity and good conscience" permit the action to proceed in the Tribe's absence. Fed. R. Civ. P. 19(b).

Federal Rule 19(b) lists four factors that bear on whether a party is indispensable. *See* Fed. R. Civ. P. 19(b). They are, first, "the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;" second, "the extent to which any prejudice could be lessened or avoided;" third, "whether a judgment rendered in the person's absence would be adequate;" and fourth, "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." *Id.* Although the Federal Rules present these factors as non-exclusive, the D.C. Circuit has held that "there is very little room for balancing of other factors" where a necessary party is immune from suit. *Kickapoo Tribe*, 43 F.3d at 1496.

Beginning with the first factor, resolving this case in the present posture would not prejudice the Tribe. *See* Fed. R. Civ. P. 19(b)(1)–(2). Although the Tribe argues that this case implicates its sovereign immunity, *see* Proposed Mot. to Dismiss at 8–9, the Tribe is not a party to this case, and the plaintiffs make no attempt to bind either the Tribe or its agents. *See Wuterich v. Murtha*, 562 F.3d 375, 386 (D.C. Cir. 2009) ("[S]overeign immunity is an immunity from suit."); *see also Mowrer v. DOT*, 14 F.4th 723, 741–43 (D.C. Cir. 2021) (Katsas, J., concurring) (explaining that sovereign immunity is "effectively a rule of personal jurisdiction"). Further, unlike in *Republic of Philippines v. Pimentel*, this case does not resolve the ownership of any asset to which the Tribe has a "nonfrivolous, substantive claim," which would indirectly violate the Tribe's immunity. 553 U.S. at 868–69. Instead, the plaintiffs challenge a decision that

IGRA commits to the Secretary and for which that statute provides "law to apply" in federal court, *Amador Cty.*, 640 F.3d at 381 (citing 25 U.S.C. § 2710(d)(8)(C)). In these circumstances, holding that the *federal* government erred in applying *federal* law would fully respect the Tribe's sovereign immunity.

Moreover, although the Tribe has a financial interest in the Compact, it is unclear how proceeding in its absence would harm that interest. The first factor in Rule 19(b) asks whether a party suffers prejudice from the fact that an adverse decision is "rendered in [its] absence," not simply from the fact that a decision is adverse. Fed. R. Civ. P. 19(b)(1); *see also* Fed. R. Civ. P. 19(a)(1)(B)(i) (similarly asking whether "a person's absence may . . . impair or impede [his] ability to protect [an] interest"). Here, the Tribe's absence is not prejudicial because both the Secretary and the State of Florida have defended the Compact on its merits. *See* Gov't's Mot. to Dismiss at 17–31; Fl. Amicus Br., Dkt. 28; Gov't's Suppl. Memo, Dkt. 41 (all *West Flagler*). The Secretary and the State share the Tribe's position on the key issue in this case—*i.e.*, that the Compact is consistent with IGRA. The Tribe never identifies how its litigation interests differ from those of the other sovereigns. *See* Tribe's Reply in Supp. of Mot. to Intervene at 11–13, Dkt. 24 (*West Flagler*). And although the Tribe asks this Court to simply assume that their interests conflict, *see id.* at 11, its request is inconsistent with applying Rule 19(b) based on "practical considerations in the context of particular litigation," as controlling precedent requires, *Kickapoo Tribe*, 43 F.3d at 1495 (citation omitted). In these circumstances, where there is "no conflict . . . between

the Secretary's interest and the interest of the nonparty Tribe[]," the D.C. Circuit has held that the Secretary may "adequately represent" the Tribe's interests.[5] *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996); *see also Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1259 (10th Cir. 2001) (finding that the potential prejudice to a tribe's interest was reduced by "the presence of the Secretary as a party defendant" with "virtually identical" interests). The Court thus finds that the first Rule 19(b) factor favors permitting this litigation to proceed.

The second Rule 19(b) factor does not alter this analysis. Having found that the extent of any prejudice to the Tribe does not warrant dismissal, it makes little sense to ask whether "protective provisions in [this Court's] judgment" or "shaping [its] relief" would lessen that prejudice. Fed. R. Civ. P. 19(b)(2). The ability to minimize prejudice, in other words, bears on indispensability only when there is prejudice to be minimized.

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[5] The Tribe cites *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312 (D.C. Cir. 2015), to argue that courts "look skeptically on government entities serving as adequate advocates for private parties." *Id.* at 321; *see* Tribe's Proposed Mot. to Dismiss at 3–4. But *Crossroads* noted that skepticism in explaining why an absent party could intervene under Federal Rule of Civil Procedure 24(a), which is allowed more liberally than dismissal under Rule 19(b). *See id.* (noting that the adequacy requirement in Rule 24(a) is "not onerous" and that movants "ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation").

Moreover, because the Court can issue an "adequate" judgment in the Tribe's absence, the third Rule 19(b) factor also favors allowing this action to proceed. Fed. R. Civ. P. 19(b)(3). As used in this context, "adequacy refers to the public stake in settling disputes by wholes, whenever possible." *Pimentel*, 553 U.S. at 870 (quoting *Provident Tradesmens Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 111 (1968)). The adequacy requirement thus furthers the "social interest in the efficient administration of justice and the avoidance of multiple litigation." *Id.* (quoting *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 738 (1977)). Here, the *West Flagler* plaintiffs challenge an action by the Secretary and obtaining relief against the Secretary would fully redress their injury. Those plaintiffs have indicated no interest in suing the Tribe, and the Tribe's sovereign immunity would block most efforts to that effect, *see Bay Mills*, 572 U.S. at 788–89. Accordingly, there is no possibility that the failure to join the Tribe would produce "multiple litigation." *Pimentel*, 553 U.S. at 870 (citation omitted).

Finally, because the plaintiffs would have no "adequate remedy if the action were dismissed for nonjoinder," the fourth Rule 19(b) factor also favors proceeding. Fed. R. Civ. P. 19(b)(4). Dismissing this suit would not allow the plaintiffs to proceed in an alternate forum, for example, after curing a defect in personal jurisdiction. To the contrary, holding that the Tribe is indispensable in this case, where the Tribe has made no particularized showing of prejudice, would require treating tribes as indispensable in *every* case that challenges the Secretary's approval of a gaming compact. And under that rule, those approvals will

never be subject to judicial review because the nonjoinder of a tribe will *always* require dismissal. The D.C. Circuit, which reached the merits in another compact-approval case, has not adopted that extreme and unworkable conclusion. *See Amador Cty.*, 640 F.3d at 378–84.

The Tribe's remaining arguments, both of which rely on unpublished and out-of-circuit decisions, do not persuade. To start, the Tribe invokes *Friends of Amador County v. Salazar*, 554 F. App'x 562 (9th Cir. 2014), which held that the Secretary could not adequately represent a tribe's interest in a challenge to an IGRA gaming compact, *see id.* at 564–66. But there, the government's responses at a status conference "caused the district court to suspect" that the government would litigate the case in line with "its national Indian policy, even if contrary to the Tribe's interests." *Id.* at 564. Consistent with that suspicion, the government later failed to "appear at oral argument or file any brief in the appeal." *Id.* There is no similar evidence of "divergent interests" in this case. *Id.* The Tribe also cites a decision from the Northern District of Florida, which found that a tribe was indispensable to an IGRA compact-approval case while taking no position on whether the tribe's interests diverged from the Secretary's. *See PPI, Inc. v. Kempthorne*, No. 4:08-cv-248, 2008 WL 2705431 (N.D. Fl. 2008). But that decision erred in holding that the judicial review of a no-action approval would violate the tribe's "sovereign right not to have its legal duties judicially determined without consent," *id.* at *4, and also failed to address most of the considerations

discussed above. Accordingly, the Court will not follow the decision here.

For the reasons above, the Court finds that "equity and good conscience" permit this action to continue in the Tribe's absence. Fed. R. Civ. P. 19(b). This conclusion resolves the Tribe's motion to intervene. Because the Tribe moved to intervene solely to move for dismissal, because the Tribe seeks dismissal on the sole ground that it is indispensable, and because the Tribe is not indispensable, the Tribe's motion for limited intervention is denied as moot.

C. The Compact violates IGRA by authorizing gaming off Indian lands

On the merits, it is well-settled that IGRA authorizes sports betting only on Indian lands. This requirement stems from IGRA § 2710(d)(8)(A), which authorizes the Secretary to approve compacts "governing gaming on Indian lands." 25 U.S.C. § 2710(d)(8)(A). It is repeated in IGRA § 2710(d)(1), which lists the conditions under which "[c]lass III gaming activities shall be lawful on Indian lands." *Id.* § 2710(d)(1). Altogether, over a dozen provisions in IGRA regulate gaming on "Indian lands,"[6] and none regulate gaming in another location. Indeed, if there were any doubt on the issue, the Supreme Court has emphasized that "[e]verything—literally everything—in IGRA affords tools . . . to regulate gaming on Indian lands, and nowhere else." *Bay Mills*, 572 U.S. at 795.

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[6] These provisions include 25 U.S.C. § 2710(a)(1), (a)(2), (b)(1), (b)(2), (b)(4), (d)(1), (d)(2)(A), (d)(2)(C), (d)(3)(A), (d)(5), (d)(7)(A)(ii), (d)(8)(A).

It is equally clear that the Secretary must reject compacts that violate IGRA's terms. The D.C. Circuit addressed this very issue in *Amador County v. Salazar*, which held that IGRA imposes "an obligation on the Secretary to affirmatively disapprove any compact" that is inconsistent with its terms, 640 F.3d at 382. The Circuit drew this obligation from IGRA § 2710(d)(8)(C), which provides that secretarial inaction may approve a compact "only to the extent the compact is consistent with" the Act, 25 U.S.C. § 2710(d)(8)(C). *See Amador County*, 640 F.3d at 381–82. And in explaining the obligation, the court held that the above provision creates "law to apply" for the review of secretarial inaction and emphasized that the Secretary "may not allow a compact that violates [the provision's] caveat to go into effect." *Id.* at 381. Because *Amador County* controls here, and because IRGA authorizes gaming only on Indian lands, it follows that the Secretary must reject any gaming compact that authorizes gaming at any other location.

The instant Compact attempts to authorize sports betting both on and off Indian lands. In its own words, the Compact authorizes such betting by patrons who are "physically located in the State [of Florida] but *not on* [*the Tribe's*] *Indian Lands*." Compact § III(CC)(2) (emphasis added). That italicized phrase is no slip of the tongue, but instead describes the basic consequence of authorizing online betting throughout the State. Most locations in Florida are not Indian lands, which IGRA defines to mean lands "within the limits of any Indian reservation," "held in trust by the United States for the benefit of any Indian tribe," or "over which an Indian tribe exercises governmental power," 25 U.S.C.

§ 2703(4). And although the Compact "deem[s]" all sports betting to occur at the location of the Tribe's "sports book(s)" and supporting servers, *see* Compact § III(CC)(2), this Court cannot accept that fiction. When a federal statute authorizes an activity only at specific locations, parties may not evade that limitation by "deeming" their activity to occur where it, as a factual matter, does not. *See CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 291 (2011) ("[A] statute should be interpreted so as not to render one part inoperative."). Accordingly, because the Compact allows patrons to wager throughout Florida, including at locations that are not Indian lands, the Compact violates IGRA's "Indian lands" requirement.

The Supreme Court's decision in *Michigan v. Bay Mills Indian Community* confirms that conclusion. In that case, the State of Michigan sought to enjoin class III gaming at a casino that was operated by an Indian tribe but located outside Indian lands. *Bay Mills*, 572 U.S. at 791–93. To do so, it invoked a provision of IGRA that abrogates sovereign immunity for "gaming activity located on Indian lands," 25 U.S.C. § 2710(d)(7)(A)(ii), under the theory that the casino was "authorized, licensed, and operated" from the tribe's reservation, *Bay Mills*, 572 U.S. at 792. The Court held that the provision did not apply. The Court explained that the phrase "gaming activity" in IGRA describes "the stuff involved in playing class III games," not the administrative actions that support them. *Id.* And because the casino's gaming activity occurred *off* Indian lands, the Court held that IGRA's abrogation of immunity for gaming *on* Indian lands did not apply. *Id.* at 791–792. This same reasoning dooms the instant

Compact, which rests on the theory that online betting occurs not where patrons actually play class III games, but instead at the location of the Tribe's sportsbook and servers. Because the Compact authorizes patrons to wager *off* Indian lands, and because those bets clearly qualify as "gaming," 25 U.S.C. § 2710(d)(8)(A), *Bay Mills* makes clear that the instant Compact authorizes gaming *off* Indian lands.

The Secretary's Approval Letter, as submitted to the Tribe on August 6, 2021, lacks a plausible defense of the Compact's scope. First, the letter notes that IGRA allows gaming compacts to govern the "application" of state and tribal laws that are relevant to class III gaming and the "allocation of criminal and civil jurisdiction" between states and tribes with respect to enforcing those laws, 25 U.S.C. § 2710(d)(3)(c)(i)-(ii). *See* Approval Letter at 7. But those provisions, which concern states and tribes' regulatory responsibilities, say nothing about whether gaming activity occurs on "Indian lands," 25 U.S.C. § 2710(d)(8)(A). Second, the Approval Letter notes that "[m]ultiple states have enacted laws that deem a bet to have occurred at the location of the [hosting] servers" and argues that the "Compact reflects this modern understanding of how to regulate online gaming." Approval Letter at 8. But regardless of what states have done in their own jurisdictions, changes in state law do not affect the federal-law issues in this case. Finally, the Approval Letter argues that online sports betting has practical benefits. *See id.* at 8–9. But "[s]uch policy arguments, though proper for legislative

consideration, are irrelevant" here. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978).[7]

The Secretary's lead argument in this litigation fares no better. That argument insists that the Compact authorizes only the online gaming activities that occur on Indian lands, including the receipt of online sports bets that are placed elsewhere. *See* Gov't's Supplementary Mem. at 9, Dkt. 41 (*West Flagler*). The Secretary further argues that a Florida statute permits the remaining gaming activities, which include placing those bets in the first instance. *See id.* at 9–10 (citing Fl. Stat. § 285.710(13)(b)). Finally, the Secretary argues that the sole purpose of the Compact's "deeming" language is to divide regulatory responsibilities between the State and the Tribe. *See id.* at 12. For these reasons, the Secretary argues that all sports betting in Florida, including both placing bets and processing them, is lawful where it occurs.

The principal problem with the above argument is that it is incompatible with the Compact's text. The interpretation of tribal-state gaming compacts is a question of federal law. *See Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 618 F.3d 1066, 1075–82 (9th Cir. 2010) (reviewing the interpretation of a compact *de novo*). And contrary to

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[7] The Approval Letter also argues that patrons may not wager online while "physically located on another Tribe's Indian lands," Approval Letter at 8 & n.14, on the theory that IGRA allows gaming "on Indian lands" only if that gaming is authorized by the "Indian tribe having jurisdiction over such lands," *id.* (quoting 25 U.S.C. § 2710(d)(1)(A)(i)). That argument concedes that online betting occurs at the bettor's location.

the Secretary's position, the plain text of the Compact affirmatively authorizes sports betting both on and off Indian lands. This authorization appears in Section IV(A) of the Compact, which provides the Tribe "is authorized to operate Covered Games on its Indian lands," Compact § IV(A)—a category that includes sports betting, *see id.* § III(F)(5). Section IV(A) then provides, in its very next sentence, that sports wagers "made by players physically located within the State . . . shall be deemed to take place . . . on Indian Lands" at the "location of the servers or other devices used to conduct such wagering activity." *Id.* § IV(A). By simultaneously authorizing sports betting on Indian lands and deeming gaming across Florida to occur on those same lands, Section IV(A) purports to authorize sports betting throughout the State.

Other provisions in the Compact make clear that the "deemed" clause in Section IV(A) plays an authorizing, rather than regulatory role. *See* Gov't's Suppl. Mem. at 4. The title of Section IV, "Authorization and Location of Covered Games," suggests that the location of gaming is relevant to its authorization. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998). Other provisions of the Compact carefully divide regulatory responsibilities between the Tribe and the State. These responsibilities include promulgating rules on who can participate in sports betting, *see id.* § V(A)(2)(e)–(f), the determination of odds "at which wagers may be placed," *id.* § V(A)(2)(d), the reporting of abnormal betting activity, *see id.* § V(A)(2)(j), and the prevention of compulsive gambling, *see id.* § V(D). They also include the resolution of patron disputes, *see id.* § VI,

the enforcement of the Compact's provisions, *see id.* § VII, and the regular auditing of gaming activities, *see id.* § VIII. Because the Compact allocates these responsibilities in such fine detail, the Court will not ascribe that same function to the Compact's "deemed" clause, which would render that clause superfluous, *see Corley v. United States*, 556 U.S. 303, 314 (2009).

The final problem with the Secretary's argument is that, although it attempts to read the Compact *in pari materia* with Florida law, its account of that law is inconsistent with the Florida Constitution. Article X, Section 30 of that Constitution provides that the State may expand sports betting only through a citizen's initiative or an IGRA gaming compact. *See* Fl. Const. art. X, §§ 30(a)–(c). And because no citizens' initiative has approved online sports betting, such betting can be lawful in Florida only if it is authorized by a gaming compact. *See id.* Against this backdrop, it makes little sense to argue that the Florida Legislature authorized sports betting independently of the instant Compact. *See* Gov't's Suppl. Mem. at 4. To the contrary, the better explanation of the Legislature's conduct is that it intended to remove any state-law barriers to the gaming it understood the Compact to authorize. *See* Fl. Stat. § 285.710(13)(b) (providing that games "conducted pursuant to" the Compact "do not violate the laws of this state"). It is important to be clear: this Court is not issuing a final decision on any question of Florida constitutional law. Nonetheless, to the degree that the Secretary invokes Florida law to explain the Compact's terms, her argument misses the mark.

For the reasons above, the Court concludes that the Compact authorizes gaming both on and off Indian lands. The Compact accordingly violates IGRA's "Indian lands" requirement, which means that the Secretary had an affirmative duty to reject it. This disposition warrants granting the *West Flagler* plaintiffs' motion for summary judgment and eliminates any need to address their other arguments on the merits.

D. The Appropriate Remedy Is to Vacate the Compact

The last issue in this case is the plaintiffs' remedy. The issue is governed by § 706 of the APA, which directs courts to "hold unlawful and set aside agency action" that is "not in accordance with law." 5 U.S.C. § 706(2)(A). The "agency action" under review is the Secretary's default approval of the Compact. *See* Compl. ¶ 1 (*West Flagler*). *Amador County* confirms that vacating the Secretary's approval is appropriate. *See* 640 F.3d at 378 (explaining that, if a plaintiff successfully challenges a default approval, "the Secretary would have to reject the compact"). And because the Tribe may offer online gaming "only with secretarial approval of the compact," *id.*; *see also* 25 U.S.C. § 2710(d)(1)(C), vacating the Secretary's approval will fully redress the *West Flagler* plaintiffs' injury. For those reasons, the Court concludes that the appropriate remedy is to set aside the Secretary's default approval of the Compact.[8]

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[8] At oral argument, the *West Flagler* plaintiffs suggested that the Court could set aside the compact only to the extent that it

The remedy also resolves the *Monterra* action. It is true that the *Monterra* plaintiffs have challenged the Compact under a broader legal theory than is addressed in this opinion. *See* Mem. in Supp. at 23–28 (*Monterra*). But those plaintiffs seek the same relief that this opinion provides. *See* Compl. ¶ 139 (*Monterra*) (requesting an "order setting aside defendants' unlawful approval of the 2021 Compact"). And because vacating the Compact fully redresses the injuries that those plaintiffs allege, their request for summary judgment on other grounds is dismissed as moot. *See Dickson*, 964 F.3d at 55.

* * *

In the Court's understanding, the practical effect of this remedy is to reinstate the Tribe's prior gaming compact, which took effect in 2010, *see* Indian Gaming, 75 Fed. Reg. 38,833 (July 6, 2010), and which may remain in effect until 2030, *see* Compl. Ex. D. (Prior Compact) § XVI(B), Dkt. 1-4 (*West Flagle*r). *See* Fl. Stat. § 285.710(3)(b). In that respect, this decision restores the legal status of class III gaming in Florida to where it was on August 4, 2021—one day before the Secretary approved the new compact by inaction. Because the more recent Compact is no longer in effect, continuing to offer online sports betting would violate

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conflicts with IGRA. But the Secretary forfeited any request for severance by omitting it from its motions to dismiss, its corresponding replies, and its supplemental briefs. In any event, the Court reads *Amador County*, which identifies the appropriate relief in this case as ordering the Secretary "to reject the compact," as foreclosing line-by-line review of the Compact's terms. *See* 640 F.3d at 378.

federal law. *See* 25 U.S.C. § 2710(d)(1)(C) (providing that "[c]lass III gaming activities shall be lawful on Indian lands only if . . . [they are] conducted in conformance with a Tribal-State compact . . . that is in effect").

This decision does not foreclose other avenues for authorizing online sports betting in Florida. The State and the Tribe may agree to a new compact, with the Secretary's approval, that allows online gaming solely on Indian lands. Alternatively, Florida citizens may authorize such betting across their State through a citizens' initiative. *See* Fl. Const. art. X, §§ 30(c). What the Secretary may not do, however, is approve future compacts that authorize conduct outside IGRA's scope. And IGRA, as the Supreme Court explained in *Bay Mills*, authorizes gaming "on Indian lands, and nowhere else." 572 U.S. at 795.

CONCLUSION

For the foregoing reasons, the *West Flagler* plaintiffs' Motion for Summary Judgment is granted, the *Monterra* plaintiffs' Motion for Summary Judgment is denied as moot, the Tribes' Motions to Intervene are denied, and the Secretary's Motions to Dismiss are denied. A separate order consistent with this decision accompanies this memorandum opinion.

/s/ Dabney L. Freidrich
DABNEY L. FRIEDRICH
United States District Judge

November 22, 2021

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 21-cv-2192 (DLF)

[Filed November 22, 2021]

WEST FLAGLER ASSOCIATES *et al.*,
Plaintiffs,

v.

DEB HAALAND,
Secretary, U.S. Department of the Interior,
et al.,
Defendants.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is

ORDERED that the plaintiffs' Motion for Summary Judgment, Dkt. 19, is **GRANTED**. It is further

ORDERED that the Seminole Tribe of Florida's Motion for Limited Intervention, Dkt. 13, is **DENIED** as moot. It is further

ORDERED that the defendants' Motion to Dismiss, Dkt. 25, is **DENIED**.

The Clerk of Court is directed to close this case.

/s/ Dabney L. Freidrich
DABNEY L. FRIEDRICH
United States District Judge

November 22, 2021

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5265
1:21-cv-02192-DLF
September Term, 2023
Consolidated with 22-5022

[Filed September 11, 2023]

West Flagler Associates, Ltd., a Florida Limited Partnership, doing business as Magic City Casino and Bonita-Fort Myers Corporation, a Florida Corporation, doing business as Bonita Springs Poker Room, Appellees	)
v.	)
Debra A. Haaland, in her official capacity as Secretary of the United States Department of the Interior and United States Department of the Interior, Appellees	)

Seminole Tribe of Florida,)
Appellant)
_____)

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges

O R D E R

Upon consideration of appellees' petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

APPENDIX E

Cite as: 601 U.S. ____ (2023)

Statement of KAVANAUGH, J.

SUPREME COURT OF THE UNITED STATES

No. 23A315

WEST FLAGLER ASSOCIATES, LTD., ET AL. *v.*
DEBRA HAALAND, SECRETARY OF THE INTERIOR, ET AL.

ON APPLICATION FOR STAY

[October 25, 2023]

The application for stay presented to THE CHIEF JUSTICE and by him referred to the Court is denied. The order heretofore entered by THE CHIEF JUSTICE is vacated.

Statement of JUSTICE KAVANAUGH respecting the denial of the application for stay.

I agree that the stay application should be denied in light of the D.C. Circuit's pronouncement that the compact between Florida and the Seminole Tribe authorizes the Tribe to conduct only on-reservation gaming operations, and not off-reservation gaming operations. 71 F.4th 1059, 1062, 1065–1068 (2023); Response in Opposition to Application for Stay 7–10, 13–14. If the compact authorized the Tribe to conduct

off-reservation gaming operations, either directly or by deeming off-reservation gaming operations to somehow be on-reservation, then the compact would likely violate the Indian Gaming Regulatory Act, as the District Court explained. 573 F. Supp. 3d 260, 272–274 (DC 2021); see 25 U.S.C. §§2710(d)(1), (d)(8)(A).

To the extent that a separate Florida statute (as distinct from the compact) authorizes the Seminole Tribe—and only the Seminole Tribe—to conduct certain off-reservation gaming operations in Florida, the state law raises serious equal protection issues. See *Students for Fair Admissions, Inc.* v. *President and Fellows of Harvard College*, 600 U.S. 181, 206 (2023); *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 221–222 (1995). But the state law's constitutionality is not squarely presented in this application, and the Florida Supreme Court is in any event currently considering state-law issues related to the Tribe's potential off-reservation gaming operations.

APPENDIX F

25 U.S. Code § 2710 - Tribal gaming ordinances

* * *

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b), and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)

(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b).

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that—

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)

(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection—

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)

(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State

shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

(i) 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 such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of title 15 shall not apply to any gaming conducted under a Tribal-State compact that—

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)

(A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)

(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe [2] to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The

mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)

(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian

tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates—

(i) any provision of this chapter,

(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.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, 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 this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

* * *

31 U.S. Code § 5362 - Definitions

* * *

(10) Unlawful internet gambling.—

(A) In general.—

The term "unlawful Internet gambling" means to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where 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.

(B) Intrastate transactions.—The term "unlawful Internet gambling" does not include placing, receiving, or otherwise transmitting a bet or wager where—

(i) the bet or wager is initiated and received or otherwise made exclusively within a single State;

(ii) the bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and placed in accordance with the laws of such State, and the State law or regulations include—

(I) age and location verification requirements reasonably designed to block access to minors and persons located out of such State; and

(II) appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with such State's law or regulations; and

(iii) the bet or wager does not violate any provision of—

(I) the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.);

(II) chapter 178 of title 28 (commonly known as the "Professional and Amateur Sports Protection Act");

(III) the Gambling Devices Transportation Act (15 U.S.C. 1171 et seq.); or

(IV) the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.).

(C) Intratribal transactions.—The term "unlawful Internet gambling" does not include placing, receiving, or otherwise transmitting a bet or wager where—

(i) the bet or wager is initiated and received or otherwise made exclusively—

(I) within the Indian lands of a single Indian tribe (as such terms are defined under the Indian Gaming Regulatory Act); or

(II) between the Indian lands of 2 or more Indian tribes to the extent that intertribal gaming is authorized by the Indian Gaming Regulatory Act;

(ii) the bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and complies with the requirements of—

(I) the applicable tribal ordinance or resolution approved by the Chairman of the National Indian Gaming Commission; and

(II) with respect to class III gaming, the applicable Tribal-State Compact;

(iii) the applicable tribal ordinance or resolution or Tribal-State Compact includes—

(I) age and location verification requirements reasonably designed to block access to minors and persons located out of the applicable Tribal lands; and

(II) appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with the applicable tribal ordinance or resolution or Tribal-State Compact; and

(iv) the bet or wager does not violate any provision of—

(I) the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.);

(II) chapter 178 of title 28 (commonly known as the "Professional and Amateur Sports Protection Act");

(III) the Gambling Devices Transportation Act (15 U.S.C. 1171 et seq.); or

(IV) the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.).

(D) Interstate horseracing.—

(i) In general.—

The term "unlawful Internet gambling" shall not include any activity that is allowed under the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.).

(ii) Rule of construction regarding preemption.—Nothing in this subchapter may be construed to preempt any State law prohibiting gambling.

(iii) Sense of congress.—

It is the sense of Congress that this subchapter shall not change which activities related to horse racing may or may not be allowed under Federal law. This subparagraph is intended to address concerns that this subchapter could have the effect of changing the existing relationship between the Interstate Horseracing Act and other Federal statutes in effect on the date of the enactment of this subchapter. This subchapter is not intended to change that relationship. This subchapter is not intended to resolve any existing disagreements over how to interpret the relationship between the Interstate Horseracing Act and other Federal statutes.

(E) Intermediate routing.—

The intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made.

* * *

CERTIFICATE OF COMPLIANCE

No. _____

WEST FLAGLER ASSOCIATES, LTD., *et al.*,

Petitioners,

v.

DEBRA HAALAND, *et al.*,

Respondents.

As required by Supreme Court Rule 33.1(h), I certify that the Petition for Writ of Certiorari contains 8,933 words, excluding the parts of the Petition that are exempted by Supreme Court Rule 33.1(d).

State of Ohio
County of Hamilton

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 8, 2024.

Donna J. Moore

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Sworn to and subscribed before me by said Affiant on the date designated below.

Date: February 8, 2024

John D Gallagher

Notary Public

[seal]

JOHN D. GALLAGHER
Notary Public, State of Ohio
My Commission Expires
February 14, 2028

CERTIFICATE OF SERVICE

I, Donna J. Moore, hereby certify that 40 copies of the foregoing Petition for Writ of Certiorari in *West Flagler Associates, Ltd., et al. v. Debra Haaland, et al.*, were sent via Next Day Service to the U.S. Supreme Court, and 3 copies were sent via Next Day Service and e-mail to the following parties listed below, this 8th day of February, 2024:

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All parties required to be served have been served.

State of Ohio
County of Hamilton

I further declare under penalty of perjury that the foregoing is true and correct. This Certificate is executed on February 8, 2024.

Donna J. Moore

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Subscribed and sworn to before me by the said Affiant on the date below designated.

Date: February 8, 2024

John D Gallagher

Notary Public

[seal]

JOHN D. GALLAGHER
Notary Public, State of Ohio
My Commission Expires
February 14, 2028