IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WEST FLAGLER ASSOCIATES, LTD., d/b/a MAGIC CITY CASINO, and BONITA-FORT MYERS CORPORATION, d/b/a BONITA SPRINGS POKER ROOM,

Plaintiffs,

vs.

DEB HAALAND, in her official capacity as SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR and UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

Case No. 1:21-cv-02192-DLF

PLAINTIFFS' MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, A PRELIMINARY INJUNCTION

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Plaintiffs West Flagler Associates, Ltd. ("West Flagler") and Bonita-Fort Myers Corporations d/b/a Bonita Springs Poker Room ("Bonita") submit this Motion and Memorandum in Support of Plaintiffs' Motion for Summary Judgment or in the Alternative, a Preliminary Injunction, against defendants Deb Haaland, in her official capacity as Secretary of the United States Department of Interior (the "Secretary"), and the United States Department of the Interior ("DOI").

INTRODUCTION

The Indian Gaming Regulatory Act ("IGRA") provides that any Indian tribe that wishes to conduct certain "Class III" gaming activities on their tribal lands may do so only pursuant to a "compact" entered into with the state in which its lands are located. It further provides that such a compact is valid only if it is approved by the Secretary of the U.S. Department of the Interior. It then states as follows: "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***." 25 U.S.C. § 2710(d)(8) (emphasis added). Consistent with this language, IGRA compacts submitted for approval to the Secretary have previously always dealt with gambling operations conducted by the tribe in question "on Indian lands of such Indian tribe."

In this case, the Seminole Tribe of Florida (the "Tribe") entered into a compact with Florida Governor Ron DeSantis on April 23, 2021, which was later ratified by the Florida legislature (the "Compact"). Among other things, this Compact authorizes the Tribe to offer online sports betting (a form of Class III gambling) to any person located ***anywhere*** within the state of Florida, without that person ever having to set foot on any of the Tribe's six reservations. The plain text of IGRA does not permit this. IGRA authorizes the Secretary to approve only those State-Tribal compacts that authorize "gaming on Indian lands of such Indian tribe." It does authorize the Secretary to approve compacts that give an Indian tribe the right to conduct gaming that is ***not*** on the "Indian

lands of such Indian tribe." No prior compact has sought to authorize such off-the-reservation gaming, and the Secretary plainly has no authority to approve any such compact.

Furthermore, with minor exceptions related to certain "pari-mutuel" betting on sports such as jai alai and horse racing (explained in more detail below), a Florida statute generally prohibits betting on sporting events throughout the State. Thus, prior to this Compact, there was no lawful way for anyone in Florida to place or receive bets on major sporting events such as football, basketball, baseball, golf, hockey or most other sports. The Compact now purports to give the Tribe the sole right to conduct such sports betting, and it allows the Tribe to offer such sports betting online – *i.e.*, using the internet to offer such betting to anyone in Florida, regardless of whether they are on Tribe lands or not. This effort to use an IGRA compact to confer such a statewide gambling monopoly on an Indian tribe is unprecedented and unlawful.

When the Florida legislature approved this Compact, it enacted a law that exempted the Tribe's conduct of online sports betting from the Florida statute that has for decades prohibited such gambling operations. Moreover, as part of the same implementing law, the Florida legislature ***escalated*** the criminalization of sports gambling conducted by any person other than the Tribe – changing it from being a second degree misdemeanor to being a third degree ***felony***. So in one fell swoop, the State of Florida decided that (a) the Capital tribe would have a monopoly to offer online sports gambling everywhere in the State (regardless of whether the bettor was on tribal land), and (b) anyone else who did so was guilty of a felony. This is an unlawful abuse of IGRA that goes way beyond anything Congress ever intended. It also violates the Constitution's Equal Protection Clause by discriminating in favor of one specific Tribe (a group defined by race, ethnicity, and/or national origin), who is given a monopoly to conduct a gambling business, while providing that if any person belonging to a different race, tribe, ethnicity, or national origin tries

to engage in the same gambling business, then they are guilty of committing a ***felony***. The Constitution does not permit either the State or Federal government to create a "monopoly versus felony" discrimination based on race, ethnicity, or national origin.

On or around June 21, 2021, the Compact was presented to the Secretary for approval under IGRA. IGRA provides that if the Secretary does not approve such a compact within 45 days of submission, the compact is "deemed approved." Here, the Secretary technically did not approve or disapprove the Compact by the 45th day, and therefore the Compact was approved by operation of law on August 5, 2021. On August 6, 2021, the Secretary's staff in the Bureau of Indian Affairs sent a 12 page, single-spaced letter to the Chairman of the Tribe and to the Florida Governor explaining the nature of the Secretary's action (or inaction) ("DOI Letter"). To Plaintiffs' knowledge, such a letter is highly unusual, perhaps unique, in instances where the Secretary allows a compact to be "deemed approved" under IGRA. The letter makes clear that the Secretary strongly supported the ability of the Tribe to engage in the gambling authorized by the Compact, including the online sports gaming monopoly discussed above. In any event, regardless of the contents of the DOI Letter, the D.C. Circuit has previously held that when a compact is "deemed approved" under IGRA, this Court has jurisdiction to hear an APA challenge to such action in the same way as if the Secretary had given a formal, express approval.[1]

While the DOI Letter purports to address the legal issues raised by the Compact's authorization of the Tribe to offer online sports betting to anyone in the state (which it recognizes is an issue of "first impression," ECF 1-6 at 6), it actually fails to come to grips with the Compact's numerous fatal legal defects. The Secretary's approval was contrary to law and must be set aside for numerous reasons, including:

[1] *Amador County v. Salazar*, 640 F.3d 373, 383 (D.C. Cir. 2011).

- IGRA authorizes the Secretary to approve State-Tribal compacts only if they authorize gambling "*on Indian lands*." 25 U.S.C. § 2710(d)(8)(A) (emphasis added). The plain text of IGRA, as well as its policy and overall structure, makes clear that it does not allow the Secretary to approve a compact that purports to authorize a tribe to conduct gaming outside of its reservations, especially where that gambling is otherwise illegal under the laws of the state in question. The Secretary, Tribe, and Florida all implicitly admit this by inserting into the Compact a provision stating that all bets placed from outside the reservation are "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." That is a false artifice that cannot save the unlawful Compact.

- The Compact also violates the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA"). This statute prohibits using the internet to transmit payments relating to sports bets or wagers from a jurisdiction where sports gaming is legal to a jurisdiction where it is not legal. Here, the Compact allows the transmission of payments relating to sports bets and wagers from a jurisdiction where sports betting is illegal (the State of Florida outside of the Tribe's reservations) to a jurisdiction where it is legal (pursuant to the Compact) – i.e., the Tribe's reservations.

- The Compact also violates the Wire Act, 18 U.S.C. § 1081, which prohibits using a wire communication facility to transmit certain kinds of gambling information, including bets placed on most sporting events. The Wire Act has a safe harbor when the bet is placed between two jurisdictions that both authorize such betting, and when the wire facilities are used only to transmit facilitating information – but neither of those conditions apply here.

- The Compact also violates the Equal Protection Clause of the Fourteenth Amendment, and the Secretary's approval of it violates the Equal Protection guarantee of the Fifth Amendment. U.S. CONST. amend. XIV, V. While prior precedents allow certain preferences to Indian tribes on their own reservations, no court has ever upheld such a blatant discriminatory act that seeks to confer a ***statewide monopoly*** on a valuable business on one particular racial tribe, to the exclusion of all others, who are treated as ***criminals*** if they engage in the same business conduct.

For all these reasons, as explained in more detail below, the Court should grant summary judgment setting aside the Secretary's "deemed approval" of the Compact.[2] Alternatively, to protect Plaintiffs (and others) from suffering irreparable harm once the online sports gaming

[2] Plaintiffs' motion relates only to claims that can be resolved without the production of the administrative record. Plaintiffs reserve their rights on all other claims.

provisions go into effect, the Court should enter a preliminary injunction enjoining the Secretary's approval until the final adjudication of this case.

Plaintiffs note that they do not challenge the Secretary's approval of any provisions of the Compact other than the online sports betting provisions. And the DOI Letter states that the "deemed approval" applies only "to the extent that it complies with IGRA and existing Federal law." ECF 1-6 at 1. Further, the Compact itself contains a severability clause stating that if any provision is declared invalid, the remainder of the Compact remains valid. ECF 1-1, Part XIV, Sec. A. Accordingly, to the extent the Court concludes that it is appropriate and lawful to set aside (or preliminarily enjoin) the Secretary's approval only as it relates to the online sports gambling provisions, Plaintiffs also seek that alternative relief.

FACTUAL BACKGROUND

A. Prior To The 2021 Compact Whose Approval Is Challenged Here, Virtually All Sports Betting In Florida, Including All Online Sports Betting, Was Illegal.

Prior to the 2021 Compact, Florida statute § 849.14 prohibited almost all sports betting, including online sports betting. FLA. STAT. § 849.14. Indeed, this statute made sports betting (minus a few minor exceptions) a "felony of the third degree" punishable with fines and prison time. *Id.*; *see also* FLA. STAT. § 775.082(3)(e), FLA STAT. § 775.083(1)(c). The limited exceptions to this prohibition included certain kinds of "pari-mutuel" gaming authorized by statute. Pari-mutuel wagering is defined as "a system of betting on races or games in which the winners divide the total amount bet, after deducting management expenses and taxes, in proportion to the sums they have wagered individually and with regard to the odds assigned to particular outcomes." FLA. STAT. § 550.002(22). Thus, a pari-mutuel system limits the gains for the bettors and the profits for the business offering the gaming. Further, even pari-mutuel betting has only been permitted for certain kinds of events, such as jai alai, horse racing, and simulcasts of dog racing. *See* FLA. STAT.

§ 550.155(1) (pari-mutuel wagering pools contemplates "wagering on the results of a horserace, or on the scores or points of a jai alai game"); *see also Id.* (limiting pari-mutuel wagering to "within the enclosure of any pari-mutuel facility licensed and conducted under this chapter but are not allowed elsewhere in this state").

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

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

The Florida Constitution was amended in 2018 to provide "that Florida voters shall have the exclusive right to decide whether to authorize casino gambling in the State of Florida." FLA. CONST. art. X, § 30(a). This amendment to the Florida Constitution explicitly states: "This amendment requires a vote by citizens' initiative pursuant to Article XI, section 3, in order for casino gambling to be authorized under Florida law." *Id.* The amendment defines "casino gambling" as meaning "any of the types of games typically found in casinos and that are within the definition of Class III gaming in the Federal Indian Gaming Regulatory Act," including as defined in 25 C.F.R. § 502.4. That regulation expressly includes "any sports betting" within the definition of "Class III gaming."[3]

[3] 25 C.F.R. § 502.4(c) also encompasses "parimutuel wagering" alongside sports betting, but the Florida constitutional amendment explicitly carves pari-mutuel wagering out from the prohibition.

Accordingly, given Article 10, §30 of the Florida Constitution and the prohibitions in FLA. STAT. § 849.14, there are only two ways that conducting an online sports betting operation can become legal in Florida. First, both of the foregoing provisions recognize that compacts properly approved under IGRA can constitute exceptions. IGRA authorizes the Secretary to approve a compact between a recognized Indian Tribe and the State of Florida that authorizes "gaming on Indian lands of such Indian tribe." 25 U.S.C. § 2710(d)(8). Thus, an Indian Tribe could seek to conduct sports betting through such an IGRA compact, so long as the sports betting took place "on Indian lands of such Indian tribe." Second, any entity wishing to change the law to permit sports betting ***outside*** of Indian lands in Florida would need to organize a successful citizens' initiative pursuant to Article XI, Section 3 of the Florida Constitution to authorize such sports gambling.

C. The 2021 Compact Purports To Allow The Tribe To Offer Online Sports Gambling To Persons Located ***Anywhere*** In The State Of Florida, Not Limited To The Tribe's Reservation And Without Requiring Any Referendum.

On April 23, 2021, Governor DeSantis and the Tribe signed the Compact at issue here. ECF 1-1. Renewing and extending the timeline for the gaming already permitted under a 2010 Compact negotiated with Governor Crist, the new Compact continues to allow the Tribe to conduct slot machines, raffles and drawings, and banked card games on its own reservations. *Compare Id.* Part II, Sec. F, *and* Part III, Sec. F, *and* Part XVI, Sec. B, *with* ECF 1-4, Part III, Sec. 4, *and* Part XVI, Sec. B. However, the Compact also allows the Tribe to conduct new forms of gaming, including craps, roulette, "Fantasy Sports Contest(s)" and "Sports Betting." *Id.*, Part III, Sec. F. The Compact defines "Sports Betting" as:

> wagering on any past or future professional sport or athletic event, competition or contest, any Olympic or international sports competition event, any collegiate sport or athletic event (but not including proposition bets on such

FLA. CONST. art. X, § 30 ("As used herein, 'casino gambling' does not include pari-mutuel wagering on horse racing, dog racing, or jai alai exhibitions.").

> collegiate sport or event), or any motor vehicle race, or any portion of any of the foregoing, including but not limited to the individual performance statistics of an athlete or other individual participant in any event or combination of events, or any other 'in-play' wagering with respect to any such sporting event, competition or contest, except 'Sports Betting' does not include Fantasy Sports Contests, pari-mutuel wagering….

ECF 1-1, Part III, Sec. CC.

The Compact permits "Sports Betting" to be conducted via online gaming and thereby purports to authorize persons not physically present on the Tribe's reservations to engage in such online gaming, so long as the bettor is "physically located in the State." *Id.*, Part III, Sec. CC.2 (wagering shall be deemed to occur at the location of the Tribe's servers including "any such wagering undertaken by a Patron physically located in the State but not on Indian Lands"). This arrangement is described as a "hub and spoke," in which the Tribe is the hub and Florida's transient and permanent adult population are millions of potential spokes. *See* ECF 1-6 at 2.

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

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

ECF 1-1, Part IV, Sec. A (emphasis added).

After the Compact was submitted to the Florida Legislature for ratification, the Compact was amended to provide that the Tribe will not implement online sports betting before October 15, 2021. ECF 1-5.[4]

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

On May 19, 2021, the Florida Legislature ratified the Compact as amended, by passing the Implementing Law. *See* ECF 1-2. The Implementing Law adopts the definitions in the Compact and amends Florida law to ratify and approve the amended Compact. *Id.* at 4-6 (amending FLA. STAT. § 285.710(13)(b)). The Implementing Law also echoes the Compact's fictional "deeming" as to the location of where online sports bets are placed:

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

ECF 1-2 at 5 (amending FLA. STAT. § 285.710(13)(b)) (emphasis added).

On May 25, 2021, Governor DeSantis approved the Implementing Law. *See* Fla. Senate, CS/SB 8-A: Gaming, Bill History, https://www.flsenate.gov/Session/Bill/2021A/8A.

D. The Secretary Allowed The Compact To Be "Deemed Approved" By Operation Of Law, Then Wrote A Lengthy Letter Defending The Approval But Also Noting Concerns.

On June 21, 2021, the State and/or the Tribe submitted the 2021 Compact to the Secretary Haaland for approval. ECF 1-6 at 1.

Under IGRA, if the Secretary does not approve or disapprove such a compact within 45 days after it is submitted to the Secretary for approval, "the compact shall be considered to have been approved by the Secretary." 25 U.S.C. § 2710(d)(8)(C). Here, the Secretary took no action to disallow the online sports betting portions of the Compact prior to the expiration of the forty-fifth day. The Compact thus was deemed approved and became effective on August 11, 2021, when notice of the approval was published in the Federal Register. Approval by Operation of Law of Tribal-State Class III Gaming Compact in the State of Florida, 86 Fed. Reg. 44,037 (Dep't of Interior Aug. 11, 2021).

Although the Secretary did not take formal action on the Compact, on August 6, 2021, Bryan Newland, Principal Deputy Assistant Secretary – Indian Affairs of the DOI, sent a twelve-page, single spaced letter to the Chairman of the Tribe and Governor DeSantis explaining why the Secretary permitted the approval of the Compact. ECF 1-6. The DOI Letter began by stating that the Compact was approved by operation of law, but only "to the extent that it complies with IGRA and existing Federal law." *Id.* at 1.

Notwithstanding this caveat, and a later, explicit representation that DOI reviews tribal state compacts "to ensure that they comply with Federal law," *id.* at 6, the DOI Letter conducts almost no analysis of the express language of IGRA limiting its application to "Indian lands." *See generally id.* In fact, the sole express discussion of IGRA's "Indian lands" requirement in the letter is in a footnote in which the DOI remarkably concludes that the Tribe must "geofence" its gaming to ensure that bettors are not located on the "Indian lands" of other Florida tribes. *Id.* at 8 n.14. The letter makes no effort to reconcile this express admission that IGRA's limitation to "Indian lands" requires consideration of where a wager is initiated if the bettor is located on the lands of another tribe with the DOI's general acceptance of the Compact's provisions deeming that the location of the bettor will be disregarded when the bettor is located anywhere else in Florida.

Instead of evaluating the meaning of "Indian lands" under IGRA, the DOI Letter asserts that Florida and the Tribe entered into an effective "jurisdictional agreement" when they agreed to "deem" that the sole location of online wagers placed from anywhere in Florida would be on the Tribe's reservations. *Id.* at 7-8. In support, the DOI Letter cites 25 U.S.C. § 2710(d)(3)(c)(i)-(ii) – a provision of IGRA that allows a state and tribe to negotiate the application of *their own* laws, regulations, and jurisdiction, but says nothing about their ability to negotiate the application of *federal* jurisdiction. *Id.* The DOI Letter justifies this novel reading of IGRA with the assertion that

"the Department must apply the law in a manner that ensures tribes are not hindered from utilizing new technology in an evolving industry," followed by a lengthy explication of changes in gambling technology since the implementation of IGRA, *id.* at 6-8, but never analyzes whether IGRA's definition of "Indian lands" is consistent with such evolution.

Although the Secretary is required to determine whether the Compact violates federal law, the DOI Letter also makes no mention of the Wire Act or UIGEA. *See generally id.* Moreover, even though the legality of the online gaming portions of the Compact under those laws necessarily turns on the legality of online sports betting in Florida, the DOI Letter states that Defendants are not permitted to consider questions of state law in their review. ECF 1-6, at 5 n.8.

Finally, the DOI Letter makes no attempt to analyze whether the Compact's grant of a statewide monopoly on most forms of sports betting to the Tribe, while criminalizing such gaming for non-Native Americans, violates the Equal Protection guarantee provided in the Fifth Amendment to the United States Constitution. *See generally id.*

E. The Plaintiffs Operate Pari-Mutuel Gaming Businesses In Florida, Are Competitors Of The Tribe's Gaming Operations, And Will Suffer Irreparable Harm If The Approval Of The Compact Is Not Enjoined.

Plaintiff West Flagler is a Florida limited partnership that since 2009 has owned and operated the casino known as Magic City Casino located in Miami, Florida. Savin Decl. ¶ 3. West Flagler has been owned and operated by the Havenick family for over sixty-five years. *Id.* ¶ 4. West Flagler held a pari-mutuel permit to conduct greyhound racing at what is now known as Magic City Casino for more than fifty years. *Id.* ¶ 5. In 1996, when Florida legalized both cardrooms and "simulcasting," West Flagler expanded Magic City to permit customers physically present at its location to bet on other jai alai, horse, and dog racing taking place around the nation. *Id.* ¶ 7. It also began operating poker rooms, and currently operates a poker room open seven days a week, with nineteen tables offering the most popular games such as "limit" Texas hold'em, "no

limit" Texas hold'em, Omaha, and 7-card stud. *Id*. In 2009, after Florida allowed slot machines to be legalized by local referendum and such referenda passed in Miami-Dade and Broward Counties, Magic City became the first casino in Miami to offer Las Vegas-style slot machines. *Id.* ¶ 8.

Today, Magic City Casino offers over 800 slot machines, electronic table games, such as blackjack, roulette, craps and baccarat, poker tables and tournaments, off-track betting, and other live entertainment. *Id.* In 2018, following a successful declaratory judgment confirming that a jai alai permit holder is an "eligible facility" under the state's slot machine law, Magic City Casino added live-action jai alai and a state-of-the-art glass-walled jai alai fronton. *Id.* ¶ 9. Also in 2018, live greyhound and other dog racing were banned in Florida, but slots and poker were allowed to continue as "grandfathered" businesses. *Id.* ¶ 10; *See also* FLA. CONST. art. X, § 32. As a result of the ban on greyhound racing, Magic City Casino closed its greyhound track in May 2020, and undertook extensive renovations to build out its casino facilities. Savin Decl. ¶ 11. As part of this effort, West Flagler has invested over $55,000,000 on capital improvements, and continues to make additional capital improvements to the casino each year. *Id.*

Magic City Casino has approximately 425 employees, and is located less than thirty miles from the Tribe's Hard Rock Hollywood Casino, which first opened in 2004. *Id.* at ¶¶ 13-14. The Tribe's Hard Rock Hollywood Casino has been enormously successful,[5] and since 2009, when

[5] *See* ECF 1-6 at 3 (The "Tribe's gaming operations have resulted in an incredible success story. Through a mix of business savvy and shrewdness, the Tribe has grown its gaming operations from limited class II facilities to globally-recognized class III gaming operations . . . ."); *id.* at 10 ("The Tribe has a proven record of success with its gaming operations . . . ."); Fla. Off. of Econ. & Demographic Res., *Seminole Compact: Revenue Overview*, at 1, 6 (Jan. 2017), http://edr.state.fl.us/content/presentations/gaming/GamingCompactRevenueOverview2017.pdf (showing a tribal casino net win of $2.2 billion for fiscal year 2014-15, and projected to grow); Lauren Debter, *An Alligator Wrestler, a Casino Boss and a $12 Billion Tribe*, Forbes (Oct. 19,

West Flagler began operating Magic City Casino, it has competed with the Tribe for gaming patrons. Savin Decl. ¶ 14. Thus, since 2009, the Tribe's Hard Rock Hollywood Casino has been a serious competitor of Magic City Casino.

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

The Bonita Springs Poker Room is located approximately twenty-one miles from the Tribe's Immokalee Casino, and one hundred and fifty miles from the Tribe's Tampa Hard Rock Casino. *Id.* ¶ 18. The Bonita Springs Poker Room has approximately 150 employees. *Id.* ¶ 17 and its predecessors have competed with the Tribe for gaming patrons since 2009. *Id.* ¶¶ 14, 18.

Both Magic City Casino and Bonita will suffer irreparable harm if the Secretary's approval remains in effect, thereby allowing the Tribe to offer online sports betting to any person physically located anywhere in Florida. Neither Magic City Casino nor Bonita are permitted to offer online sports betting to anyone, anywhere. Indeed, with the exception of the very limited pari-mutuel

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2016), https://www.forbes.com/sites/laurengensler/2016/10/19/seminole-tribe-florida-hard-rock-cafe/ (describing a $1.5 billion per year in profits).

betting on sports such as jai alai, horse racing, and simulcast dog racing (as described above), Florida law prohibits Magic City Casino and Bonita from offering any form of generalized sports betting (on major, big money sports such as football, basketball, baseball, golf, and hockey) to anyone. Yet the Compact permits the Tribe – and only the Tribe – to offer such sports betting to anyone in Florida. This will obviously harm the business of both Magic City Casino and Bonita in numerous ways.

Most obviously, the Compact's online sports betting provisions will divert business that would have been spent at Plaintiffs' facilities and cause it to be spent on online sports gaming offered by the Tribe. *See* Savin Decl. ¶¶ 25-26. Plaintiffs hired experts to conduct and analyze a survey of Plaintiffs' customers regarding the likely impact of the Compact's online sports gaming provisions on those customer's gaming habits. *Id. at* ¶ 26. *See also* September 21, 2021 Declaration of Luis Padron (explaining the methodology of the survey); September 21, 2021 Declaration of Jonathan Chavez, Ex. A ("Chavez Report") (analyzing the results of the survey). The results of that survey confirmed Plaintiffs' concerns that the Tribe's online sports betting business will cannibalize Plaintiffs' in-person gaming business, both by permitting customers to gamble remotely, and by offering types of sports gaming that Plaintiffs are not permitted to offer by law. Savin Decl. ¶ 26; *see also* Chavez Report. In particular, the survey revealed that, even using the most conservative statistical methodology, Plaintiffs' existing customers expect to divert between 10% and 16% of their current spend on pari-mutuel gaming and poker to online sports betting if it becomes available in Florida. *See* Chavez Report at 11. Using the statistical methodology used by real world business planners, the survey revealed that Plaintiffs' existing customers expect to

divert significantly more of their existing gaming spend to online sports betting. *Id.* at 11-12.[6] Such losses would be expected to increase over time. *Id.* at 13.

In addition to the foregoing, the Tribe's ability to offer online sports gaming to everyone in Florida regardless of where they are located is likely to diminish the amount of new business and new customer bases that can be generated by traditional pari-mutuel facilities such as those operated by Plaintiffs. Savin Decl. ¶ 27. That is, at least some potential new customers who otherwise would have traveled to those facilities to conduct in-person gaming will prefer the convenience of the Tribe's online sports betting business. *Id.*

Further, the loss of current and future business will diminish West Flagler's and Bonita's goodwill. As discussed above, West Flagler and Bonita have spent decades building their in-person gaming facilities. Over that time, they have developed significant goodwill in the form of name recognition, a substantial, loyal customer base and intellectual property. *Id.* at ¶ 28. If the Tribe begins offering online sports betting, the goodwill that West Flagler and Bonita have developed over decades of hard work will erode. *Id.* At the same time, West Flagler and Bonita will incur significant additional expenses to maximize the retention of customers. Those expenses include, among others, increased advertising expenses, increased promotional expenses, increased entertainment expenses, and the cost of enhancements to the in-person gaming facilities. *Id.* at ¶ 31.

[6] For example, between 49% and 52% of customers said they would open an online sports wagering account if online sports betting became available. *Id.* at 11. Of those respondents, 15% to 36% said they would place wagers *only* online (not through kiosks or cash), another 52% to 75% said that at least some of their sports betting wagers would be online. *Id.* 11-12. These results suggest a much larger impact to Plaintiffs than the most conservative estimates.

While the Compact provides that pari-mutuel facilities willing to contract with the Tribe will be permitted to offer the Tribe's online sports betting through electronic devices located at the pari-mutuel facilities, ECF 1-1, Part III, Sec. CC.3, these provisions do not benefit Plaintiffs. Plaintiffs are left with a choice of participating in the Tribe's unlawful scheme in a manner that yields very little positive value, particularly in comparison to the income they would receive from the diverted gaming, or foregoing the offering at the cost of losing even more general business revenue and traffic. Savin Decl. ¶¶ 33-39. Under the first choice, Plaintiffs would expend significant resources to enter into the business, *id.* ¶31, but would receive a significantly lower return on the ensuing business than they receive on their current gaming offerings, *id.* ¶¶ 36-39 (comparing the typical net revenues from Plaintiffs' poker and pari-mutuel gaming with those that could be expected contracting with the Tribe). Given the significant investments that Plaintiffs would need to make to enter into that business, it is unclear whether it would be possible for Plaintiffs to make any profit off the program. *Id.* ¶ 36.

Under the second choice, Plaintiffs would lose both the walk-in traffic from those who will choose to gamble online through the Tribe and the additional walk-in traffic to pari-mutuels who participate in the Tribe's business. *Id.* ¶ 39. The lost walk-in revenue that would result would affect Plaintiffs' revenue from slot machines, card rooms, and pari-mutuel wagering, as well as the ancillary entertainment and dining options offered to patrons of their facilities. *Id.* Moreover, the Tribe will be able to largely dictate the terms of and contracts with pari-mutuel businesses, *id.* at ¶ 40, and it is possible that the program will not go forward at all, either through the Tribe's choice, or because the DOI has called the program into question. *Id.* at ¶¶ 41-42; *see also* ECF 1-6 at 11-12.

Plaintiffs and their owners are not members of the Seminole Tribe. Savin Decl. at ¶ 19.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT

The Secretary's passive approval of the Compact was a final agency action subject to judicial review under the Administrative Procedure Act ("APA"). *Amador County v. Salazar*, 640 F.3d 373, 383 (D.C. Cir. 2011) (Secretary's IGRA approval by inaction of tribal-state gaming compact was reviewable agency action). The Secretary's legal arguments over the interpretation of IGRA are not entitled to deference pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Connecticut v. U.S. Dep't of the Interior*, 344 F. Supp. 3d 279, 307-08 (D.D.C. 2018) (ruling that DOI is entitled to no deference regarding a dispute over the interpretation of IGRA).

The APA requires that a reviewing court "shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). For APA cases, "the summary judgment standard functions slightly differently" than the standard under Fed. R. Civ. P. 56(a). *Pol'y & Rsch., LLC v. U.S. Dep't of Health & Hum. Servs.*, 313 F. Supp. 3d 62, 74 (D.D.C. 2018). When evaluating an agency decision under the APA "the reviewing court generally . . . reviews the [agency's] decision as an appellate court addressing issues of law." *Pol'y & Rsch., LLC*, 313 F. Supp. 3d at 74 (alterations in original) (quoting *Henry v. Sec'y of Treasury*, 266 F. Supp. 3d 80, 86 (D.D.C. 2017)). "A district court considering a challenge to agency action under the APA treats the 'entire case on review [as] a question of law', because the 'complaint, properly read, actually presents no factual allegations, but rather only arguments about the legal conclusion to be drawn about the agency action.'" *Ascension Borgess Hosp. v. Becerra*, No. 20-139 (BAH), 2021 WL 3856621, at *4 (D.D.C. Aug. 30, 2021) (quoting *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009)). Where the challenge to an agency action is exclusively a legal challenge that can be

determined with nothing beyond the statute and the action taken, courts have been willing to rule without requiring an administrative record be produced. *See Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 271 F.3d 262, 266 (D.C. Cir. 2001); *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 440 n.37 (5th Cir. 2001).

A. The Secretary Acted Contrary To Law In Allowing The Approval Of A Tribal-State Compact That Authorizes The Tribe To Conduct Online Gaming With Persons Located Outside Of The Tribe's Lands.

1. The plain text of IGRA makes clear the Secretary's approval was invalid.

Here is the plain text of the types of compacts IGRA authorizes the Secretary to approve:

> 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***.

25 U.S.C. § 2710 (emphasis added).

There is nothing in IGRA, or anywhere else, that authorizes the Secretary to approve a Tribal-State compact that governs gaming that occurs somewhere other than "***on Indian lands of such Indian tribe***."

The Compact expressly permits the Tribe to offer online sports betting to persons located ***anywhere*** in Florida – i.e., ***not*** on the Tribe's land. *See, e.g.*, ECF 1-1, Part III, Sec. CC.2. Thus, the Secretary had no authority to approve the Compact, and no authority to allow the Compact to be "deemed approved" by operation of IGRA. Allowing such an approval violated the plain text of IGRA. No further analysis is required to invalidate the "deemed approval" as contrary to law.

2. The policy and structure of IGRA confirm that the Secretary's approval was invalid.

In numerous ways, IGRA makes abundantly clear that its provisions are limited to gaming conducted "on Indian lands." *See* 25 U.S.C. § 2710 (d)(8).[7] Indeed, IGRA refers to gaming on "Indian lands" ***thirty-four times***, and does not once discuss gaming that occurs outside of Indian lands.[8]

As explained by the National Indian Gaming Commission ("NIGC") on its website, the whole reason Congress enacted IGRA in 1988 was "to regulate the conduct of gaming ***on Indian lands***." *See* Nat'l Indian Gaming Comm'n, *Indian Gaming Regulatory Act*, https://www.nigc.gov/general-counsel/indian-gaming-regulatory-act (last visited Sep. 12, 2021) (emphasis added). The Act categorizes gaming into three classes and provides for escalating regulation based on each class. It provides that Class III gaming includes sports betting (among other things). 25 U.S.C. § 2703(8); 25 C.F.R. § 502.4. While it generally grants tribes "the exclusive right to regulate gaming activity ***on Indian lands***," 25 U.S.C. § 2701(5) (emphasis added), with respect to Class III gaming IGRA provides that such "activities shall be lawful ***on Indian lands only if***" such gaming meets certain conditions, including that it is "conducted in conformance with a Tribal-State compact." *See* 25 U.S.C. § 2710 (d)(l). Such compacts must in turn be approved by the Secretary. 25 U.S.C. § 2710(d)(3)(B). And, as shown above, the Secretary's authority to approve such Tribal-State compacts is limited to compacts that address "gaming ***on Indian lands of such Indian tribe***." 25 U.S.C. § 2710(d)(8) (emphasis added).

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[7] "Indian lands" are defined as Indian reservations or lands held in trust by the United States for the benefit of a federally recognized Indian tribe. *See* 25 U.S.C. § 2703(4).

[8] 25 U.S.C. §§ 2701(1), (3), (5), 2702(3) (twice), 2703(4), (7)(D), (7)(E), 2706(b)(1), (b)(2), (b)(4), 2710(a)(1), (a)(2), (b)(1) (twice), (b)(1)(A), (b)(2), (b)(4)(A) (thrice), (d)(1), (d)(2)(A), (d)(2)(C), (d)(2)(D)(i) (twice), (d)(3)(A), (d)(3)(B), (d)(5), (d)(7)(A)(ii), (d)(7)(B)(iii)(II), (d)(7)(B)(iv), (d)(7)(B)(vii)(II), (d)(8)(A), (d)(8)(B)(ii).

With one exception not relevant here,[9] IGRA explicitly limits all of its provisions to gaming "on Indian lands." *See, e.g.*, 25 U.S.C. § 2710(d)(l) (authorizing Class III gaming "on Indian lands"); 25 U.S.C. § 2710(d)(8)(A) (permitting the Secretary to approve tribal-state compacts governing "gaming on Indian lands"); 25 U.S.C. § 2701(5) ("Indian tribes have the exclusive right to regulate gaming activity *on Indian lands* …"); 25 U.S.C. § 2702(3) (declaring that a "Federal regulatory authority for gaming *on Indian lands*," and "Federal standards for gaming *on Indian lands*," "are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue"); 25 U.S.C. § 2710 (a), (b) (concerning Class I and Class II "gaming *on Indian lands*"). Indeed, binding precedent dictates that "IGRA affords tools . . . to regulate gaming on Indian lands, *and nowhere else*." *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 795 (2014) (emphasis added).

3. Florida and the Tribe cannot convert gambling that occurs ***off*** Indian lands into gambling that occurs ***on*** Indian lands.

In an effort to evade the obvious invalidity of the Compact under IGRA, the Tribe and Florida included a provision in the Compact stating: "All such [online sports] wagering shall be deemed at all times to be exclusively conducted by the Tribe at its Facilities… *regardless of the location in Florida at which a Patron uses the same*." ECF 1-1, Part III, Sec. CC.2. Such a provision cannot change the analysis of what is actually happening here. When a bet is placed by a gambler using the internet somewhere in Florida that is not on a reservation, that person is engaging in sports betting off the reservation. That is a fact, and no agreement between the Tribe and Florida can change that fact. Further, that fact is recognized as a fact by federal law, and just as they cannot change the facts, the Tribe and Florida also cannot change federal law.

[9] The exception is for lands acquired for Indians in trust by the DOI Secretary after October 17, 1988, if the land and acquisition meet certain conditions. 25 U.S.C. § 2719(a)-(b).

As explained by the U.S. Supreme Court, "Placing and receiving a wager are opposite sides of a single coin. *You can't have one without the other*." *United States v. Calamaro*, 354 U.S. 351, 354 (1957) (emphasis added). Federal law has long recognized that gambling consists of two acts, the placing of the bet and the receipt of the bet, and that they may occur in separate locations. For example, both the Wire Act and UIGEA prohibit the transmission of wagers ***between*** jurisdictions with differing laws on gambling. *See* 18 U.S.C. § 1084(a) (assessing fines on anyone who "knowingly uses a wire communication facility ***for the transmission*** in interstate or foreign commerce ***of bets or wagers***"); *id.* § 1804(b) (providing safe harbor "for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal"); 31 U.S.C. § 5362(10)(A) ("Unlawful Internet gambling" is the use of the internet to place, receive or transmit a bet or wager "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.").

IGRA likewise includes multiple references to the location, motives, and activities of the bettors, distinct from the recipients of those wagers. *See, e.g.*, 25 U.S.C. § 2703 (6) (defining "class I gaming" to include "traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations"); § 2703(7)(A) (class II gaming means, inter alia, games similar to bingo if played by players in the same location as bingo is played); 25 C.F.R. § 502.3(b) (same); 25 C.F.R. § 502.3(c)(2) (class II gaming includes nonbanking card games in which "[p]layers play in conformity with state laws and regulations concerning hours, periods of operation, and limitations on wagers and pot sizes").

The Ninth's Circuit's decision in *California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960 (9th Cir. 2018) specifically recognized the dichotomy between the location of the bettor and the location of the recipient in the context of IGRA. There, the Iipay Nation launched a server-based bingo game that permitted people located throughout California to play computerized bingo online. *Id.* at 962. As in the Compact here, the Tribe operated the gaming through a set of servers on Iipay's tribal lands, and the online bingo game was otherwise illegal in California. *Id*. at 962, 967. California and the United States sued, arguing that the bingo game violated UIGEA, which prohibits use of the internet for gaming where the gaming is illegal either where the bet is placed or where it is received. *See* Section I.B, below. In determining that the online bingo game violated UIGEA, the Ninth Circuit also expressly recognized that the tribe's internet gaming occurred both on Indian lands and at the location of the bettors:

> Two key conclusions can be drawn from these uncontested findings. First, as the Government argues, the patrons are engaging in "gaming activity" by initiating a bet or a wager in California and off Indian lands. Consistent with the Supreme Court's holding in *Bay Mills*, the act of placing a bet or wager is the "gambling in the poker hall," not "off-site licensing or operation of the games." As a result, *it seems clear that at least some of the "gaming activity" associated with DRB does not occur on Indian lands and is thus not subject to Iipay's jurisdiction under IGRA.*

Id. at 967 (emphasis added) (quoting *Bay Mills*, 572 U.S. at 792); *see also id.* at 967 ("the bets are not legal in the jurisdiction where they are *initiated*, in this case California") (emphasis added).[10]

Until now, the federal government has recognized that IGRA prohibits internet gaming for bettors located off Indian lands. Not only was the United States a plaintiff in *Iipay Nation*, but it

[10] *Iipay Nation* also specifically rejected the argument that a patron's decision to submit a bet is a mere "pre-gaming communication," 898 F.3d at 966, a conclusion that is reinforced by the U.S. Supreme Court's decision in *Bay Mills Indian Community*, which found that that the phrase "on Indian lands" in IGRA distinguishes between the location of "gaming activity" and the location of administrative functions supporting that gaming. 572 U.S. at 792.

also filed an amicus brief in support of the plaintiff in a challenge to online telephone-based lottery established by the Couer d'Alene Tribe in Idaho. *See, e.g.*, Brief for the United States of America as Amicus Curiae Supporting Appellee, *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002) (No. 99-35088), 1999 WL 33622333, at *12-14 (ECF 1-3); *see also id.* at *13-14 ("It follows that 'wagering,' 'gambling,' or 'gaming' occur in both the location from which a bet, or 'offer,' is tendered and the location in which the bet is accepted or received.").[11]

Similarly, the NIGC, an independent federal agency within the DOI, repeatedly has opined that IGRA does not provide for gaming off Indian lands via the internet via servers located on Indian lands. *See* Letter from Kevin Washburn, General Counsel, NIGC, to Joseph Speck, Nic-A-Bob Productions, re: WIN Sports Betting Game (Mar. 13, 2001) ("The use of the Internet, *even though the computer server may be located on Indian lands*, would constitute off-reservation gaming to the extent any of the players were located off of Indian lands." (emphasis added)); Letter from Kevin Washburn, General Counsel, NIGC, to Robert Rossette, Monteau, Peebles & Crowell, re: Lac Vieux Desert Internet Bingo Operation (Oct. 26, 2000) (as the [Indian operated internet bingo] "seeks to draw any player who can log on to the internet site from any location and who is willing to pay the fee. *The game itself does not depend on the player being located in a tribal bingo facility or even on Indian lands*" and is not authorized by IGRA (emphasis added)); Letter from Penny J. Coleman, Deputy General Counsel, NIGC, to Terry Barnes, Director of Gaming, Bingo Networks (June 9, 2000) (concluding that game allowing players to open an account via the internet with a reservation-based game center was off-reservation gaming not authorized by

[11] In the DOI Letter, Defendants took the position that these cases are distinguishable because the state did not consent to the gaming and the gaming was illegal under state law. ECF 1-6 at 6-7 & n.10. But, as explained in Section I.E below, the online sports betting at issue here is unlawful under Florida law. In addition, a State cannot consent to conduct that is prohibited by federal law or otherwise expand IGRA's scope beyond gaming that takes place on Indian lands.

IGRA); Letter from Montie Deer, Chairman, NIGC, to Ernest L. Stensgar, Chairman, Coeur d'Alene Tribe, re: National Indian Lottery (June 22, 1999) (concluding an Indian internet lottery gambling enterprise was not authorized by IGRA) (collectively, the "NIGC Letters," ECF 1-7).[12]

Given all of the foregoing authorities that recognize the simple fact that a bet placed on the internet is an act of gambling that occurs where that bet is placed (as well as where it is received), this Court cannot accept the artifice constructed by the Tribe and Florida. They do not have the legal power to "deem" facts to be different than they are; nor do they have the legal power to override federal law. The definition of "Indian lands" and the boundaries of "gaming on Indian lands" are set by federal statute, and the Tribe and State cannot contract those definitions away or act as if they did not exist.

4. The DOI's own "deemed approved" letter expressly confirms that the placing of a sports bet over the internet constitutes gambling in the place where the bet was placed.

The DOI Letter itself makes clear that the Secretary knows that gambling occurs in the place where the online bet is placed, not just where it is received. The DOI Letter briefly addresses the situation where the would-be online sports bettors under the Compact are located on Indian lands owned by tribes ***other than*** the Seminole Tribe of Florida. ECF 1-6 at 8 n.14. The problem in that situation is that sports gambling (like other Class III gambling) is not permitted on the lands of those other tribes unless they have a compact with the State that the Secretary has approved – which is not the case for any tribe in Florida except the Tribe. The DOI Letter recognizes this

[12] Florida also previously has taken the position that off-reservation betting via the internet is unauthorized under IGRA. *See* Brief of *Amici Curiae* States in Support of AT&T Corporation and Affirmance, *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002) (No. 99-35088), 1999 WL 33622330 at *4 ("The existence of a phone bank and a centralized computer system on the Coeur D'Alene reservation does not change the uncontested fact that the person making the wager is located outside of Idaho, and clearly not on the Coeur D'Alene reservation.").

problem, and in so doing completely contradicts its own rationale in accepting the artifice adopted by Florida and the Tribe that all the bets are "deemed" to constitute gambling only on the land of the Tribe.

First, after explaining all the reasons why it was reasonable to accept the Compact's false artifice that the online sports betting will occur only on the land of the Tribe, the DOI Letter reaches the following conclusion, which contains an oblique caveat we emphasize below:

> Accordingly, ***provided that a player is not physically located on another Tribe's Indian lands***, a Tribe should have the opportunity to engage in this type of gaming pursuant to a tribal-state gaming compact.

ECF 1-6 at 8 (emphasis added). This caveat undermines the entire effort by DOI to defend the Compact's false artifice about where the gambling is taking place. As the DOI Letter explains in footnote 14 that follows the foregoing sentence:

> Class III gaming is "lawful on Indian lands" only if such gaming is authorized by the "Indian tribe having jurisdiction over such lands." 25 U.S.C. § 2710(d)(l)(A)(i). Thus, to be permissible under the IGRA, a tribe must geofence its gaming to ensure players are not located on other Indian lands.

Id. at 8 n.14.

None of this makes any sense unless a person who places an online sports bet with the Tribe while located on the land of another, non-Seminole tribe within Florida is herself engaged in the act of Class III gaming. That is the central fact which renders the approval (or "deemed approval") of the Compact invalid. Yet even after spending two full, single-spaced pages trying to explain that fact away, the DOI then admits the fact, undermining its analysis and the Compact at the same time. Thus, the DOI's position on "geofencing" simply confirms the untenable nature of the central fiction (*i.e.*, the falsity) on which the approval of the Compact depends.

5. The other defenses in the DOI Letter all fail.

As referenced above, the DOI Letter spends over two pages trying to explain why the "hub and spoke" model of online sports gaming is permissible under IGRA. But calling it "hub and spoke" does not change the central falsity of the Compact: *i.e.*, that its legitimacy depends on the proposition that when a person places a bet on the internet while located in a place that is not on the Tribe's land, there has been no sports gambling that has taken place anywhere other than on the Tribe's land, because that is where the bet was received. As explained above, that is false as a matter of fact and law. The DOI's defenses fail to show otherwise (and instead, as shown above, confirm that the Compact's central artifice is false).

a. 25 U.S.C. § 2710(d)(3) does not give states and tribes the power to negotiate the boundaries of "Indian Lands."

The DOI Letter asserts that all the Tribe and Florida have done in creating online sports gaming everywhere in the state is to have negotiated a "jurisdictional agreement." ECF 1-6 at 7-8. Specifically, the DOI Letter cites to 25 U.S.C. § 2710(d)(3)(C)(i)-(ii), which provides as follows:

> (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 the State and the Indian tribe necessary for the enforcement of such laws and regulations;

These provisions obviously do not say anything about the ability of a compact to authorize online gaming with people located outside of Indian lands. They also do not authorize the State and Tribe to negotiate anything regarding the meaning of *federal* jurisdiction, or "laws and regulations," such as the meaning of "Indian lands" and "gaming on Indian lands." Instead, they are dealing with entirely different matters about coordinating local criminal and civil jurisdiction.

That the DOI tried to invoke these routine jurisdictional provisions in defense of the Compact's revolutionary authorization of gaming outside of Indian lands reveals how unsupported the Compact is.

b. The IGRA legislative history does not support approval of the Compact.

The DOI Letter attempts to support its novel reading of IGRA through selective quotations from the Senate Committee Report for IGRA (the "Report"). *See* ECF 1-6 at 7 (quoting S. Rep. No. 100-446, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083 (1988)). But the Report does not support the DOI's reading. The DOI Letter cites language from the Report that "[s]tates and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribes [sic] and States." ECF 1-6 at 7 (alterations in original). But the DOI does not include the next two sentences of the report, which refer to the tribe's governmental interests in "regulating activities of persons *within its jurisdictional borders*" and the "State's governmental interests with respect to class III gaming *on Indian lands*." S. Rep. No 100-446, at 13 (emphasis added). Similarly, the DOI Letter cites language from the Report addressing the ability of the tribe and the state to "allocate . . . jurisdictional responsibility," ECF 1-6 at 7, but does not note the final sentence of that paragraph: "The Committee does not intend that compacts be used as a subterfuge for imposing State jurisdiction *on tribal lands*." S. Rep. No 100-446, at 14 (emphasis added). The Report clearly did not intend for § 2710(d)(3) to permit a renegotiation of the boundaries of "Indian lands," or to somehow authorize the Secretary to use IGRA to approve compacts that allow a Tribe to conduct otherwise unlawful gaming outside of Indian lands.

c. Congress did not intend for technological advances in gaming to eliminate IGRA's restriction to "Indian Lands."

The DOI Letter also asserts that its novel reading of IGRA is justified because, "[w]hile Congress did not contemplate the new era of internet gaming when it adopted IGRA, it crafted

IGRA as a flexible statute that acknowledged tribal sovereignty, was enacted for the benefit of tribal economic development, and for promoting tribal-state cooperation." ECF 1-6 at 6. The DOI Letter justifies this leap from IGRA's purported intent to the unprecedented conclusion that IGRA permits statewide internet gaming by reference to a single (selectively quoted) statement in the Report. *Id.* at 6 n.9 ("Even in 1988, Congress provided context for evolving technological gaming changes, specifically noting in the context of class II gaming that 'tribes should be given the opportunity to take advantage of modem methods' of conducting the gaming and that ['For example, ***linking participant players at various reservations*** whether in the same or different States,] by means of telephone, cable, television or satellite [may be a reasonable approach for tribes to take]." (alterations match original quoted material) (quoting S. Rep. 100-446, at 9)). This language undermines the Secretary's preference given its express reference to "linking participant players at various reservations" – thereby once again reiterating that IGRA is focused solely on gaming on Indian reservations.

More fundamentally, legislative history cannot expand the law beyond its plain language. *See Facebook, Inc. v. Duguid*, 141 S.Ct. 1163, 1171-72 (2021) (rejecting argument that Telephone Consumer Protection Act prohibited a social networking website's system of notifying users of attempts to access their accounts by unknown devices was not an "automatic telephone dialing system" within the meaning of the TCPA, reasoning "That Congress was broadly concerned about intrusive telemarketing practices, however, does not mean it adopted a broad autodialer definition. Congress expressly found that the use of random or sequential number generator technology caused unique problems for business, emergency, and cellular lines."); *see also U.S. Dep't of Just. v. Landano*, 508 U.S. 165, 178 (1993) (refusing to expand the plain meaning of an exemption to the Freedom of Information Act based on legislative history); *Checkrite Petroleum, Inc. v. Amoco*

Oil Co., 678 F.2d 5, 10 (2d Cir. 1982) (holding that "the legislative history of the [Petroleum Marketing Practices Act] expresses no congressional intent to go beyond these plain terms"). This is particularly true with respect to arguments that statutes should be read to accommodate technical advances. *See Duguid*, 141 S. Ct. at 1173 ("Duguid's quarrel is with Congress, which did not define autodialer as malleably as he would have liked.") Nothing regarding technological flexibility is in IGRA's definition of "Indian lands," its statutory "findings" or its "declaration of policy." *See* 25 U.S.C. § 2703 (definitions) § 2701(findings), § 2702 (declaration of policy). In addition, the legislative history cited by the DOI concerned Class II gaming, not Class III, and further elaborated with examples of reservations and tribes working together to offer "simultaneous games," all occurring *on Indian lands*.[13] There is no basis for departing from IGRA's unambiguous provisions making clear that the only compacts the Secretary is authorized to approve are those which relate solely to gaming "on Indian lands."

The Secretary also offers policy justifications that are as strikingly imprecise as they are unrooted in statutory text. For example, the Secretary proclaims that "evolving technology should not be an impediment to tribes participating in the gaming industry." ECF 1-6 at 6. Here, the approval of the Compact does not remove an impediment but grants an exclusive monopoly to the Tribe to offer online sports gaming anywhere in Florida. It is for Congress, not the Secretary, to determine if IGRA and other laws should be amended to allow such an expansion of the rights of Indian tribes to conduct otherwise unlawful gambling activity. Further, as explained below, even

[13] *See* S. Rep. No 100-446, at 9 ("For example, linking participant players *at various reservations* whether in the same or different States, by means of telephone, cable television, or satellite may be a reasonable approach for tribes to take. Simultaneous games participation *between and among reservations* can be made practical by use of computers and telecommunications technology so long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games…") (emphasis added).

if Congress had expressly authorized the Secretary to approve this Compact, its discriminatory provisions violate the Equal Protection Clause, and hence the Secretary's approval would still have to be set aside and enjoined.

d. State legislation authorizing internet gambling does not permit a misreading of IGRA.

The DOI also attempts to justify its reading of IGRA with the observation that "[m]ultiple states have enacted laws that deem a bet to have occurred at the location of the servers, regardless of where the player is physically located in the same state." ECF 1-6 at 8. But regardless of what state legislatures have tried to do within their own jurisdictions (in ways that may well violate federal statutory law and/or the Constitution), IGRA has not been amended to similarly modify federal law. Moreover, Congress has considered making such amendments, but has not done so,[14] further reinforcing that IGRA does not permit the online sports betting at issue here.

B. Because The Compact Authorizes Internet Gambling Between A Jurisdiction Where Such Gambling Is Unlawful And A Jurisdiction Where It Is Lawful, The Compact Violates UIGEA And Its Approval Was Therefore Invalid.

In 2006, Congress enacted UIGEA to strengthen the enforcement of existing prohibitions against illegal gambling on the Internet. *See* 31 U.S.C. § 5361(4) (UIGEA is "necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders."). The statute prohibits anyone "engaged in the business of betting or wagering" from "knowingly accept[ing]," various types of commonly-accepted electronic payments "in connection with the participation of another person in unlawful Internet gambling." *See* 31 U.S.C. § 5363. Betting or

[14] *See, e.g.*, H.R. 5502, 116th Cong. (2019) (proposing an act "To remove Federal barriers regarding the offering of mobile sports wagers on Indian lands when the applicable State and Indian Tribe have reached an agreement, and for other purposes"), https://www.congress.gov/bill/116th-congress/house-bill/5502/text.

wagering on "sporting event[s]," like the online sporting betting provisions of the Compact, is explicitly covered by UIGEA. 31 U.S.C. § 5362 (1)(A).

"Unlawful Internet gambling" occurs when an individual knowingly places, receives or transmits a "bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made." 31 U.S.C. § 5362(10)(A).

Here, as shown in Fact Sections A and B, online sports betting is illegal in Florida outside of Indian lands (other than certain kinds of pari-mutuel betting that are not at issue here). Yet the Compact specifically permits a person located in Florida to use the internet to engage in sports betting. Accordingly, the Compact authorizes online sports wagers "initiated" in an area in which such wagers are illegal (everywhere in Florida other than the Tribe's land), then received on the Tribe's lands (where such sports gambling would be legal under the Compact). This arrangement violates the plain text of UIGEA. *See Iipay Nation*, 898 F.3d at 967 (holding that gaming that does not occur on Indian lands is not subject to jurisdiction under IGRA and IGRA cannot serve as a shield from the application of the UIGEA); *see also id.* ("the bets are not legal in the jurisdiction where they are *initiated*, in this case California," when "Iipay accepts financial payments over the internet as part of those bets or wagers, Iipay violates the UIGEA.").

UIGEA includes a safe harbor for certain bets or wagers "initiated and received or otherwise made exclusively within a single State," where both "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 . . . .*" *See* 31 U.S.C. § 5362(10)(B) (emphasis added). This safe harbor does not apply to the Compact because the Tribe is not a "State" under

UIGEA. *See* 31 U.S.C. § 5362(9) (defining "State" as "any State of the United States, the District of Columbia, or any commonwealth, territory or other possession of the United States."); *see also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192-93 (1989) ("Tribal reservations are not States"); *Iipay Nation*, 898 F.3d at 967-68. Accordingly, bets placed between the Tribe's lands and other locations in Florida do not qualify as bets made "exclusively within a single State." Further, the safe harbor applies only where the bets or wagers are legal ***both*** where received and where "initiated," which is not the case here. *See* 31 U.S.C. § 5362(10)(B).

C. The Online Sports Betting Provisions Of The Compact Authorize Conduct That Violates The Wire Act – Providing Yet Another Reason Why The Secretary's Approval Was Contrary To Law.

The Wire Act of 1961, 18 U.S.C. § 1081, *et seq.*, applies to transmissions in interstate or foreign commerce and prohibits interstate online sports betting. It makes it illegal for anyone "engaged in the business of betting or wagering" to knowingly use "a wire communication facility for the transmission in interstate or foreign commerce of ***bets or wagers*** or information assisting in the placing of bets or wagers ***on any sporting event or contest***, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers . . . ." 18 U.S.C. § 1084(a) (emphasis added). A "wire communication facility" is "any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission." 18 U.S.C. § 1081.

The Wire Act thus prohibits the Tribe from knowingly transmitting or receiving several types of wagering-related communications relating to "any sporting event or contest:" (1) internet-transmitted bets or wagers; (2) internet-transmitted information to assist in the placing of bets or wagers; (3) bank wire transfers that entitle the recipients to receive money or credit as a result of

bets or wagers; and (4) bank wire transfers that entitle the recipients to receive money or credit for information assisting in the placing of bets or wagers. *See* 18 U.S.C. § 1084(a). While some courts may have assumed that use of the wire facilities "in interstate or foreign commerce" triggers application of the Wire Act only if the communications actually go from one state or country to another,[15] Plaintiffs' submit that the Wire Act should apply when the communication is between a person in a state and a person on an Indian reservation, especially when they are using wire facilities that are clearly used in "interstate and foreign commerce." This is especially true where the communications themselves are likely to travel across state lines given the interconnected nature of the interstate wire facilities. *See generally AT&T Corp. v. Coeur D'Alene Tribe*, 45 F. Supp. 2d 995, 1000-01 (D. Idaho 1998) (gaming activity occurs off the reservation when a phone call is placed from non-tribal lands to participate in a lottery, even if received on tribal lands, and thus would run afoul of the Wire Act), *rev'd on other grounds*, 295 F.3d 899 (9th Cir. 2002); *State ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1109 n.5 (8th Cir. 1999) (regarding a lottery based on tribal lands offered over the internet, the lottery "is not on Indian lands" when a wager is placed from "off the reservation," and noting "that in the criminal statute prohibiting interstate wagering by wire, Congress's limited exemption for lawful gambling requires that the betting be legal in the State from which the bettor places a call").

To permit the use of wire communication facilities to further gambling wagers in locations where the gambling in question is legal, the Wire Act contains a safe harbor for "the transmission of information assisting in the placing of bets or wagers on a sporting event or contest *from a State*

[15] *See United States v. Lyons*, 740 F.3d 702, 713 (1st Cir. 2014) (holding that Wire Act does not criminalize "lawful intrastate gambling," without specifying whether that holding includes online wagering or transmissions between Tribal lands and off-reservation land with different rules in each).

or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal." 18 U.S.C. § 1084(b) (emphasis added). But the safe harbor exception does not exempt from liability the interstate transmission of *bets themselves*, but protects only the interstate transmission of information "assisting" in the placing of bets. *See United States v. Lyons*, 740 F.3d 702, 713 (1st Cir. 2014) (citing *United States v. McDonough*, 835 F.2d 1103, 1104-05 (5th Cir. 1988); *United States v. Bala*, 489 F.3d 334, 342 (8th Cir. 2007)). Moreover, the safe harbor also would not apply here because, as discussed above, sports betting is illegal in Florida off Indian lands, so the requirement that the wagering be legal on both ends of the transaction also fails.

D. Because The Compact Permits Only The Tribe To Offer Sports Betting Off Of Indian Lands, It Violates The Equal Protection Clause Of The Fourteenth Amendment – And The Secretary's Approval Violates The Equal Protection Clause That Applies Through The Fifth Amendment.

The foregoing establishes unambiguously and as a matter of law that the Secretary's approval of the Compact was unlawful and *ultra vires*. The Court therefore need not reach the constitutional problems that would be created if IGRA were construed to authorize State-Tribal compacts that authorize Indian tribes to be given special monopolies to conduct gaming outside of Indian lands. Given the serious constitutional problems raised by any such interpretation of IGRA, the doctrine of constitutional avoidance further weighs against adopting any interpretation of IGRA that could uphold the Secretary's approval. *See, e.g.*, *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (the Court "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.… Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."); *N.L.R.B. v. Cath. Bishop of Chi.*, 440 U.S. 490, 500 (1979) (declining to

construe statute in a manner that could "call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses"); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961) (Supreme Court interpreted Railway Labor Act to avoid "serious doubt" about the constitutionality of the statute based on First Amendment issues).

As a matter of law, the equal protection component of the Fifth Amendment prevents A State from engaging in discrimination based on race, ethnicity, or national origin. *See MD/DC/DE Broads. Ass'n v. F.C.C.*, 236 F.3d 13, 15 (D.C. Cir. 2001). Classifications made on the basis of race, ethnicity, or national origin are subject to strict scrutiny. *MD/DC/DE Broads.*, 236 F.3d at 15; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (holding strict scrutiny applies to race-based classification, including economic affirmative action programs); *Cook v. Babbitt*, 819 F. Supp. 1, 12 (D.D.C. 1993) (holding classifications based on "race, alienage, and national origin" are subject to the "most exacting, rigid, and strict judicial scrutiny"); *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013) (applying strict scrutiny to racial classification). Classification according to ancestry is similarly prohibited. *See Rice v. Cayetano*, 528 U.S. 495, 514 (2000).

A classification survives strict scrutiny only if it is "narrowly tailored to support a compelling governmental interest." *MD/DC/DE Broads.*, 236 F.3d at 15. The measure "must use the least restrictive reasonable means to achieve its goals…." *Am. Fed'n of Gov't Emps., AFL-CIO v. United States*, 104 F. Supp. 2d 58, 65 (D.D.C. 2000); *Kim v. Brownlee*, 344 F. Supp. 2d 758, 761 (D.D.C. 2004) (denying motion to dismiss plaintiff's equal protection claim under the Fifth Amendment). Strict scrutiny is the highest level of scrutiny applied to claims for equal protection.

Here, the Tribe is an "Indian tribe, band, nation, or otherwise organized group or community of Indians," 25 U.S.C. § 2703(5), recognized because of its members' status as Indians and members of the sovereign nation of the Seminole Tribe of Florida. Accordingly, Florida's

decision to grant the Tribe (and only the Tribe) an off-reservation monopoly on online sports betting in Florida, while at the same time treating all other persons who engage in such conduct as engaging in ***a felony***, constitutes an act that discriminates between people on the basis of race, ethnicity, national origin, and ancestry. That discrimination is subject to strict scrutiny. Neither the Compact nor the Implementing Law makes any effort to justify granting an off-reservation, state-wide monopoly to the Tribe, while criminalizing the same conduct by anyone else – much less an effort that could survive strict scrutiny.[16] As a result, the Secretary's failure to disapprove those portions of the Compact is unlawful as a matter of law.

The foregoing is reinforced by prior cases that have upheld certain Native American classifications when closely tied to issues of Native American sovereignty. For example, in the cases of *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 734 (9th Cir. 2003); and *Morton v. Mancari*, 417 U.S. 535, 552 (1974), the Courts were presented with classifications that occurred *on or near Indian lands*. *Artichoke Joe,* 353 F.3d at 734 (rejecting equal protection challenge to a tribal-state compact under IGRA, reasoning that "when a state law applies *in Indian country* as a result of the state's participation in a federal scheme that 'readjusts' jurisdiction over Indians, that state law is reviewed as if it were federal law. If rationally related to both Congress' trust obligations to the Indians and legitimate state interests, the state law must be upheld.") (emphasis added); *Mancari,* 417 U.S. at 552, 554 (upholding federal employment classification that favored hiring Native Americans in the Bureau of Indian Affairs because of the history of preferences for *a constituency* of Native Americans *living on or near reservations*; the preference

[16] With respect to preferences for Indian gaming specifically, Congress already has made the determination in IGRA that, whatever preferences should be given to tribes with respect to gaming end once that gaming is off of "Indian lands." *See generally* 25 U.S.C. § 2701 *et seq.*, and Section I.A.1-2 above. Neither the Compact nor Implementing Law suggest that Florida has a greater interest than Congress in redrawing the boundaries of the Tribe's exclusive Class III gaming rights.

did not violate equal protection guarantees because it was "reasonably designed to further the cause of self-government and to make the BIA more responsive to the needs of its constituent groups"). The Court in *Mancari* further observed that "Literally every piece of legislation dealing with Indian tribes and reservations … single out for special treatment *a constituency* of tribal Indians *living on or near reservations*." *Id.*

Accordingly, the holdings in *Artichoke Joe* and *Mancari* are limited to preferences that assist tribes in self-governing on their own lands. Nothing in either case can be construed to permit a state to give a tribe a preference in licensing businesses outside of their tribal lands, much less a commercial monopoly over a business throughout the entire state while criminalizing the same conduct when engaged in by anyone else. *See also Rice v. Cayetano*, 528 U.S. 495 (2000) (rejecting argument by Hawaii that *Mancari* permitted a Hawaiian constitutional provision limiting to persons of native Hawaiian ancestry the right to vote for trustees of the Office of Hawaiian Affairs: "It does not follow from *Mancari*, that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians to the exclusion of all non-Indian citizens."). Whatever privilege may be appropriate for Native Americans end at the reservation's borders. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 795 (2014) ("Indians going beyond reservation boundaries are subject to any generally applicable state law," unless federal law provides otherwise); *see also Fla. Dep't of Revenue v. Seminole Tribe of Fla.*, 65 So. 3d 1094 (2011) (declining to exempt off-reservation fuel purchases from taxation even though the fuel was used for the tribe's functions as a sovereign government).

Moreover, the federal government has a special relationship with Indian tribes that arises from Congress's treaty obligations to various tribal entities. *See, e.g., Rice*, 528 U.S. at 529-30 (explaining the "fiduciary character of the *special federal relationship* with these once sovereign

peoples" as arising "largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised" (citing *United States v. Kagama,* 118 U. S. 375, 383-384 (1886))) (Stevens, J., dissenting). Florida does not have a similar special relationship with the Tribe that would justify characterizing the Compact's preference for the Tribe as a political preference, rather than one of race, ethnicity, ancestry and/or national origin. And the Secretary cannot approve something the Constitution prohibits the State from doing.

E. Defendants Abrogated Their Duty In Refusing Or Failing To Analyze The Ways In Which The Compact Violates Federal Statutes And The Federal Constitution.

The foregoing sections amply demonstrate that the Secretary's "deemed approval" must be set aside as contrary to law. But they also demonstrate, especially when viewed alongside the DOI Letter, that the Defendants violated both their obligation under IGRA and their trust obligations in failing to consider the Compact's illegality under federal law, and in failing to disapprove it on that basis. *See* 25 U.S.C. § 2710(d)(8)(B); *Amador County*, 640 F.3d at 382-83 (the Secretary by law *must* consider whether a compact complies with federal law); *see also* ECF 1-6 at 6 ("In fulfilling the United States' trust obligations to tribes, the Department reviews compacts to ensure that they comply with Federal law").[17]

The DOI Letter makes no mention of the legality of the online sports betting provisions under the Wire Act or UIGEA. *See generally* ECF 1-6. To the contrary, the DOI Letter ***specifically disavows any obligation*** to consider the legality of gambling in Florida – a necessary element of any analysis of the Wire Act or UIGEA:

[17] Relatedly, the Secretary also is required to determine whether the Compact violates "the trust obligations of the United States to Indians." *See* 25 U.S.C. § 2710(d)(8)(B); *Amador County*, 640 F.3d at 382-83; This inquiry necessarily includes determining whether the Tribe may inadvertently be engaging in criminal conduct.

> At the outset, it is important to note the public concern surrounding the State constitutionality of the legislative authorization of sports betting within the State of Florida. IGRA provides the Secretary with discretionary authority to disapprove a compact only in limited circumstances. ***Those circumstances do not permit the Department to consider questions of State law in its review***. 25 U.S.C. § 2710(d)(8) (B). *See also Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1556 (10th Cir. 1997).

DOI Letter at 5 n.8 (emphasis added).

This assertion is baseless given the content of federal law and the Secretary's dual obligation under IGRA and its trust obligations to consider the legality of Tribal-State obligations. The Secretary does not even account for the fact that in this context, determining compliance with federal law necessarily requires assessment of state law given that it expressly incorporates it. By contrast, *Pueblo* involved a challenge to then-DOI Secretary Babbitt's approval of a tribal-state compact where the governor of New Mexico arguably did not have authority to enter into it. 104 F.3d at 1550, 1557.[18] Although IGRA limits the Secretary's ability to authorize compacts to those "entered into between an Indian tribe and a State," *see* 25 U.S.C. § 2710 (d)(8)(A), the statute does not expressly demand that the Secretary determine whether such compacts are valid. *See generally*, 25 U.S.C. § 2710. In contrast, though, the Secretary by law *must* consider whether a compact complies with federal law. *See* 25 U.S.C. § 2710 (d)(8)(B) *Amador County*, 640 F.3d at 382-83. There is no exception for analysis of federal law that is dependent on state law.

Moreover, contrary to the situation in *Pueblo* and the DOI Letter's suggestion here, there is no real dispute here regarding "the legislative authorization of sports betting within the State of Florida." ECF 1-6 at 5 n.8. The DOI Letter itself acknowledges that "The State legislature authorized mobile sports betting *exclusively for the Tribe* at the time it ratified the Compact," *Id.*

[18] *Pueblo* also didn't state that the Secretary was completely excused from any examination of state law, but rather excused only "extensive" inquiries. 104 F. 3d at 1557.

at 2, thereby acknowledging that mobile sports betting is not otherwise authorized in Florida. *See also* ECF 1-1, Part XI.C.4(e) (reducing Tribe's payment obligations where "the tribe loses the exclusive right to offer Sports Betting"); *id.*; Parts XII.A.3(a), XII.B.(1) (describing consequences exclusivity of Seminole offering, and consequences if others are able to offer Sports Betting); ECF 1-2 at 6 (amending FLA. STAT. § 285.710(13)(b)(7)).

In addition, as discussed in Section B, the portion of the Florida constitution that permits the state to enter into tribal state compacts is expressly constrained by reference to "tribal lands" and to the *federal law* of IGRA. FLA. CONST. art. X, § 30 ("In addition, nothing herein shall be construed to limit the ability of the state or Native American tribes to negotiate gaming compacts *pursuant to the Federal Indian Gaming Regulatory Act* for the conduct of casino gambling *on tribal lands*, or to affect any existing gambling *on tribal lands* pursuant to compacts executed by the state and Native American tribes pursuant to IGRA.") (emphasis added).

Here, there is no factual dispute that the sports betting authorized by the Compact is otherwise criminal under Florida law, and no factual dispute that the Compact is made only pursuant to IGRA. There also can be no serious legal dispute that the express language of Florida's constitution limits Florida's ability to expand gaming without a citizens' initiative to tribal state compacts that fall within the bounds of IGRA. Defendants' refusal to analyze the legality of the Compact's authorization of a monopoly for the Seminoles to conduct online sports betting outside of their tribal lands was an abrogation of duty.

II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT PRELIMINARY INJUNCTIVE RELIEF AGAINST DEFENDANTS

A. Legal Standard for Preliminary Injunction in APA Matters

The APA authorizes courts reviewing agency action to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending

conclusion of the review proceedings." 5 U.S.C. § 705. A request for injunctive relief under the APA is evaluated using the standard framework for preliminary injunctions in this District. *See Nw. Immigrant Rts. Project v. USCIS*, 496 F. Supp. 3d 31, 45 (D.D.C. 2020) ("The standard of review for relief under 5 U.S.C. § 705 is the same as the standard of review for preliminary injunctions"). According to that standard, plaintiffs requesting a preliminary injunction must establish that: (1) there is a likelihood of success on the merits of their claims, (2) they will face irreparable harm in the absence of preliminary relief, (3) the balance of equities favors preliminary relief, and (4) an injunction is in the public interest. *See, e.g.*, *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008); *Ellipso, Inc. v. Mann*, 480 F.3d 1153, 1157 (D.C. Cir. 2007) (citing *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998)). Plaintiffs have met this burden.

B. Plaintiffs Are Likely to Succeed on the Merits of Their Claims.

The "first and most important factor," likelihood of success on the merits, weighs strongly in favor of an injunction. *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014). As set forth in Section I above, Plaintiffs are likely to succeed on the merits of their claims.

C. Plaintiffs Will Suffer Irreparable Harm If the Court Denies Injunctive Relief. [19]

The second factor in the preliminary injunction analysis—a likelihood of "irreparable harm in the absence of preliminary relief"—also favors Plaintiffs. *See Open Top Sightseeing USA v. Mr. Sightseeing, LLC*, 48 F. Supp. 3d 87, 89 (D.D.C. 2014) (quoting *Aamer*, 742 F.3d at 1038).

[19] Given the irreparable harm that Plaintiffs will sustain if the Compact is not enjoined, they obviously satisfy the requirements of Article III standing. As competitors of the Tribe, Plaintiffs fall within the zone of interest of IGRA. *See Match-E-Be-Nash-She-Wish Band of Pottawomi Indians v. Patchak*, 567 U.S. 209, 225 n.7 (2012) (explaining that although "everyone can agree" that IGRA was not intended to protect or benefit people like the plaintiff owner of land near reservation, plaintiff nonetheless had prudential standing to sue because "issues of land use (arguably) fell within" the scope of the statutory provision); *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1117-18 (E.D. Cal. 2002) (competitor had prudential standing to challenge tribal-state gaming compact).

If the online gaming portions of the Compact are permitted to take effect, the Tribe will have a monopoly on such sports betting in the State of Florida.[20] That monopoly will lead to a serious, immediate loss of business for Plaintiffs as Plaintiffs' clients will no longer need to patronize Plaintiffs' businesses in person, but will be able to place sports bets from their living rooms, cars and places of employment.

As explained above in Fact Section E, as competitors of the Tribe in the sports gambling market, Plaintiffs will be seriously handicapped by the inability to provide comparable services. Most obviously, the Compact's online sports betting provisions will divert business that would have been spent at the facilities of the Plaintiffs and cause it to be spent on online sports gaming offered by the Tribe. Plaintiffs also will lose new business and new customer bases, and will suffer a loss of goodwill developed over decades of development of their in-person gaming facilities.[21]

These harms will not be mitigated by the Compact's provisions for pari-mutuel facilities to contract with the Tribe to offer the Tribe's online sports betting through electronic devices located at the pari-mutuel facilities. As explained in Fact Section E, above, that program, even if

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[20] Although it is possible that Plaintiffs will be able to become a "Qualified Pari-Mutuel Permitholder" under the Compact, such a license would be under terms set by the Tribe and Plaintiffs would receive only a portion of the proceeds from such bets. *See* Facts Section E. Moreover, the DOI Letter casts serious doubts on the legality of this portion of the Compact in the first instance. ECF 1-6 at 11-12.

[21] This loss of goodwill is itself a basis for finding irreparable harm. For example, in *Bayer Healthcare*, this Court found that a manufacturer of brand-name drugs would suffer irreparable harm if a new generic competitor drug were permitted to enter the market during the pendency of litigation. *Bayer Healthcare LLC, v. U.S. Food & Drug Admin.*, 942 F. Supp. 2d 17, 26 (D.D.C. 2013); *see also Acumed LLC v. Stryker Corp.*, 551 F.3d 1323, 1328-29 (Fed. Cir. 2008) (irreparable harm where patent infringement would permit entry of new competitor to the market). Here, although Plaintiffs have long competed with the Tribe for in-person gaming customers, the Tribe will be newly competing against Plaintiffs with online gaming and will do so with a state-sanctioned monopoly in that area. *See* Facts Section E and Savin Decl. ¶¶ 34 -41. The loss of market-share and customer goodwill that will inevitably result constitutes irreparable harm. *Bayer*, 942 F. Supp. 2d at 26.

implemented, will yield lower returns than Plaintiffs' existing businesses, will require additional expenses that will minimize or eliminate any potential profit from contracting with the Tribe, and further is likely to require contracting with the Tribe under onerous, take-it-or-leave it terms.

These harms cannot be remedied through money damages because the Secretary, Florida, and the Tribe, all enjoy sovereign immunity that will render Plaintiffs' losses permanently irretrievable. *See Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) (APA does not waive sovereign immunity for damages actions); *Kiowa Tribe of Okla. v. Mfg. Techns., Inc.*, 523 U.S. 751, 760 (1998) (tribal immunity bars contract suits, even for commercial activities not on a reservation); *Gamble v. Fla. Dep't of Health & Rehab. Servs.*, 779 F.2d 1509, 1512 (11th Cir. 1986) (Eleventh Amendment bars suits against states, and no money damages are available unless Congress has abrogated a state's immunity or the state waives its immunity). Where "the plaintiff in question cannot recover damages from the defendant due to the defendant's sovereign immunity … *any* loss of income suffered by a plaintiff is irreparable *per se*." *Feinerman v. Bernardi*, 558 F. Supp. 2d 36, 51 (D.D.C. 2008) (citing *United States v. New York*, 708 F.2d 92, 93-94 (2d Cir. 1983)); *accord Nalco Co. v. U.S. EPA*, 786 F. Supp. 2d 177, 188 (D.D.C. 2011). Where, as here, the irretrievable economic harm is "significant," that conclusion is even stronger. *See, e.g. Xiaomi Corp. v. Dep't of Defense*, 2021 WL 950144 at *9 (D.D.C. March 12, 2021) (finding irreparable harm where significant and irretrievable economic losses would occur in the absence of injunctive relief); *Luokong Tech. Corp. v. Dep't of Def.*, 2021 WL 1820265 (D.D.C. May 5, 2021).

D. The Balance of Equities and The Public Interest Favor an Injunction.

Finally, both the balance of the equities and the public interest strongly favor issuance of an injunction. In evaluating a motion for preliminary injunction, "courts 'must balance the competing claims of injury and consider the effect on each party of the granting or withholding of the requested relief.'" *ConverDyn v. Moniz*, 68 F. Supp. 3d 34, 52 (D.D.C. 2014) (quoting *Winter*,

555 U.S. at 24). Where the federal government is the opposing party, this factor merges with the public interest factor. *Richardson v. Trump*, 496 F. Supp. 3d 165, 177 (D.D.C. 2020) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

It is well established that governmental compliance with federal law is in the public interest. *Cath. Legal Immigr. Network, Inc. v. Exec. Off. for Immigr. Rev.*, 513 F. Supp. 3d 154, 176 (D.D.C. 2021). Accordingly, "there is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters*, 838 F.3d 1, 13 (D.C. Cir. 2016) (collecting cases); *accord Cath. Legal Immigr. Network*, 513 F. Supp. 3d at 176; *Nw. Immigrant Rts. Project*, 496 F. Supp. 3d at 82. Because Plaintiffs have established a high likelihood of success on the merits as to their claims that the compact's approval was contrary to law, the public interest favors an injunction.

Moreover, equity favors an injunction "that serves only to preserve the relative positions of the parties until a trial on the merits can be held," because that is the very purpose of injunctive relief. *Richardson*, 496 F. Supp. 3d 188 (*citing Rufer v. FEC*, 64 F. Supp. 3d 195, 206 (D.D.C. 2014); *Columbia Hosp. for Women Found., Inc. v. Bank of Tokyo-Mitsubishi Ltd.*, 15 F. Supp. 2d 1, 4 (D.D.C. 1997) (applying higher burden where injunction altered status quo); *Sing v. Carter*, 185 F. Supp. 3d 11, 17 n.3 (D.D.C. 2016) (comparing burden in cases where injunction alters and retains the status quo, collecting cases)). Here, Plaintiffs do not challenge the portions of the Compact that do not relate to online sports betting, which already have gone into effect.[22] Representatives of the Tribe have represented to Plaintiffs that the Tribe will not be prepared to begin offering online sports betting until November 15, 2021. Savin Decl. ¶ 23. Accordingly,

[22] Note that Compact permits severance of the online sports betting provisions from the rest of the Compact in the event of successful legal challenges to the online sports betting provisions. ECF 1-1, Part XIV, Sec. A.

enjoining the Secretary's approval of the Compact to the extent that it relates to internet sports betting that has not yet been implemented by the Tribe will maintain the current status of both the online sports betting provisions and the other provisions of the Compact. In contrast, if the online sports betting provisions of the Compact are permitted to go forward, Plaintiffs will suffer severe and immediate irreparable harm.

Plaintiffs' request for an order temporarily enjoining the Secretary's approval (and hence precluding the Compact taking effect) until this litigation is concluded will not result in injury to any party. *Cf. District of Columbia v. U.S. Dep't of Agric.*, 444 F. Supp. 3d 1, 45 (D.D.C. March 13, 2020) (equities "weigh sharply in favor of preliminary relief" where Agency's "only harm is that it will be required to keep in place the existing regulation"). Nor, as this Court has repeatedly emphasized, is any governmental interest served by "a decision that would permit [a] Rule to take effect, only to be set aside months from now." *Nw. Immigrants Rights Proj.*, 496 F. Supp. 3d at 82; *accord Cath. Legal Immigr. Network*, 513 F. Supp. 3d at 176. Therefore, the balance of equities supports the measured injunction Plaintiffs seek.

CONCLUSION

For the reasons set forth above, the Court should either (a) grant summary judgment in Plaintiffs' favor setting aside the Secretary's approval of the Compact as contrary to law, or alternatively (b) enter a preliminary injunction enjoining the Secretary's approval of the online sports betting portions of the Compact pending final judgment in this litigation.

September 21, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2021, this document and all its attachments were filed with the Clerk of the Court of the U.S. District Court of the District of Columbia by using the CM/ECF system, which will automatically generate and serve notices of this filing to all counsel of record.

Dated: September 21, 2021

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