UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

WEST FLAGER ASSOCIATES, LTD., a Florida Limited Partnership d/b/a MAGIC CITY CASINO, and BONITA-FORT MYERS CORPORATION, a Florida Corporation d/b/a BONITA SPRINGS POKER ROOM,

Plaintiffs,

v. CASE NO. 4:21-cv-00270-AW-MJF

RON DESANTIS, in his official capacity as Governor of the State of Florida, and JULIE BROWN, in her official capacity as Secretary of the Florida Department of Business and Professional Regulation,

Defendants.
_____/

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

Ex parte Young and "ultra vires" are not causes of action. Instead, as Plaintiffs themselves recognize, *Ex parte Young* is an exception to sovereign immunity. *See* ECF 27 at 3. What Plaintiffs fail to recognize is that *Ex parte Young* is *nothing more than* an exception to sovereign immunity.

As an exception to sovereign immunity, *Ex parte Young* creates a "legal fiction" whereby a plaintiff whose rights are violated by ongoing unlawful state

action can name the responsible state official (in an official capacity) as a defendant when seeking prospective equitable relief, which sovereign immunity otherwise precludes. Courts have employed the phrase "ultra vires" in the context of explaining how this "legal fiction" operates. *See*, *e.g.*, *Reproductive Health Servs. v. Strange*, 3 F.4th 1240, 1255 (11th Cir. 2021) ("Courts have understood *Ex parte Young*'s exception to sovereign immunity to be based on the legal fiction that state officials act ultra vires 'when they enforce state laws in derogation of the Constitution,' and are therefore stripped of official immunity."). But it does not follow that a state official's allegedly ultra vires act itself creates a private right of action in favor of any would-be plaintiff.[1] Thus, *Ex parte Young* informs only the determination of whether a state official can be named as a defendant, and not whether a plaintiff has an underlying cause of action. *See*, *e.g.*, *id.* at 1257 (concluding that state officials were "proper defendants" because "the doctrine of *Ex parte Young* applie[d]").

[1] For this reason, the State focused the relevant portion of its motion to dismiss on the other context in which courts have discussed "ultra vires" government conduct—the context in which plaintiffs, like Plaintiffs here, lack a statutory cause of action but nonetheless seek to enforce a statute by way of "nonstatutory review." With Plaintiffs now referring to nonstatutory review as a "non sequitur" and thereby disclaiming any reliance on it as the source of their purported right of action (ECF 27 at 11), they are effectively left to argue that allegedly unlawful conduct by a state official itself creates a cause of action.

With regard to Plaintiffs' statutory claims,[2] a cause of action is the missing link between Plaintiffs' alleged injury and the application of *Ex parte Young*. The State maintains that Plaintiffs have not established standing or the applicability of *Ex parte Young* in any event, particularly with regard to their statutory claims. *See also Va. Office for Protection and Advocacy v. Stewart*, 563 U.S. 247, 260–61 (2011) ("to invoke the *Ex parte Young* exception to sovereign immunity," a plaintiff must have a federal right that it seeks to enforce). The point here simply is that Plaintiffs cannot supply the missing link by engaging in equity-related incantations, which is all they offer in response to the State's motion to dismiss.[3]

Instead, as explained below, the existence of a cause of action is a jurisdictional requirement separate and apart from whether sovereign immunity bars suit, and a cause of action requires an enforceable right. The *Strange* decision

---

[2] Plaintiffs protest that their claims based on IGRA, the Wire Act, and the UIGEA are distinct from "statutory causes of action." ECF 27 at 10. Accordingly, the State employs the term "statutory claims" here, as it is unsure which nomenclature is appropriate to describe claims that the law does not recognize.

[3] In arguing that the Administrative Procedure Act did not limit "[t]he equitable tradition" on which they rely, Plaintiffs cite *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988). ECF 27 at 8, n. 3. Ironically, *Dart* has been cited as an example of the sort of "nonstatutory review" that Plaintiffs now clarify they do not seek. *See*, *e.g.*, *Rhode Island Dept. of Environmental Mgmt. v. U.S.*, 304 F.3d 31, 42 (1st Cir. 2002) ("The basic premise behind nonstatutory review is that, even after the passage of the APA, some residuum of power remains with the district court to review agency action that is ultra vires.") (citing *Dart*). As explained below and in the State's initial memorandum, Plaintiffs cannot sue to vindicate statutory rights that they do not possess, regardless of how their claims are styled.

on which Plaintiffs rely demonstrates this point. The plaintiffs there brought claims under the Due Process, Privileges and Immunities, and Equal Protection Clauses of the United States Constitution, all of which create private rights that are therefore enforceable by private action. 3 F.4th at 1249. Here, by contrast, Plaintiffs seek a determination that the Compact violates three federal statutes—IGRA, the Wire Act, and the UIGEA—that confer no rights or benefits on them.[4]

The absence of statutory rights in Plaintiffs' favor forecloses not only an express or implied statutory right of action but also judicial review "in equity." The "unassailable history" and "long tradition of equitable review" that Plaintiffs invoke lend no support to their arguments. *See* ECF 27 at 8–9. To the contrary, "any motion or suit for a traditional injunction must be predicated upon a cause of action" because "[t]here is no such thing as a suit for a traditional injunction in the abstract." *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1097–98 (11th Cir. 2004). "[A] traditional injunction is a remedy potentially available only after a plaintiff can make a showing that some independent legal right is being

[4] With regard to Plaintiffs' claim under the Equal Protection Clause, the State certainly recognizes that the Equal Protection Clause is enforceable by way of a private right of action and argues instead that Plaintiffs have no cognizable equal protection claim. *See* ECF 22 at 30–32; *Davis v. Passman*, 442 U.S. 228, 241 (1979) ("[T]he question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution.").

infringed—if the plaintiff's rights have not been violated,[5] he is not entitled to any relief, injunctive or otherwise." *Id.* Thus, a traditional injunction is not "even theoretically available" where, as here, a plaintiff fails to state a claim "that would withstand scrutiny under Fed. R. Civ. P. 12(b)(6)." *Id.* at 1097.

Plaintiffs' statutory claims under the Declaratory Judgment Act ("DJA") fare no better. The DJA allows federal courts, "upon the filing of an appropriate pleading," to "declare the rights and other legal relations of any interested party seeking such declaration[.]" 28 U.S.C. § 2201(a). But the Court's discretion under the DJA "does not extend to the declaration of rights that do not exist under law. Like a preliminary injunction, a declaratory judgment relies on a valid legal predicate." *Chevron Corp. v. Naranjo*, 667 F.3d 232, 244 (2d Cir. 2012). *See also Rebuild NW Fla., Inc. v. FEMA*, No. 3:17-cv-441-MCR-CJK, 2018 WL 7351690, at *1 (N.D. Fla. July 12, 2018) (declaratory judgment is designed to serve as a remedy for an underlying cause of action) (citing *Musselman v. Blue Cross and Blue Shield of Alabama*, 684 F. App'x 824, 829 (11th Cir. 2017)) (Tjoflat, J., concurring specially); *Eveillard v. Nationstar Mortg. LLC*, No. 14–CIV–61786, 2015 WL 127893, at *9 (S.D. Fla. Jan. 8, 2015) ("Declaratory relief is a procedural

[5] Even if Plaintiffs could establish a concrete, particularized injury from the operation of the online sports betting component of the Compact (which the State disputes), that is plainly not tantamount to establishing that their *rights* have been violated.

device which depends on an underlying substantive cause of action and cannot stand on its own.") (collecting cases).

Here, Plaintiffs seek a declaration regarding the application of three federal statutes that confer no rights in their favor and that create no legal relations between them and the State of Florida. Simply put, they have no statutory rights for this Court to declare. *See also Hogan v. Praetorian Ins. Co.*, Case No. 1:17-cv-21853-UU, 2018 WL 8266803, at *8 (S.D. Fla. Jan. 11, 2018) ("[T]here can be no viable request for declaratory relief without Plaintiff identifying the precise legal rights and the source of such legal rights"). Similarly, they have no "uncertainty or insecurity" regarding their rights under those statutes. *See Sierra Equity Grp., Inc. v. White Oak Equity Partners, LLC*, 650 F. Supp. 2d 1213, 1230 (S.D. Fla. 2009) ("The purpose behind the Declaratory Judgment Act is to afford a[ ] form of relief from uncertainty and insecurity with respect to rights, status, and other legal relations.") (alteration in original) (quotation omitted). As Plaintiffs have failed to allege an appropriate basis for declaratory relief under IGRA, the Wire Act, and the UIGEA, the Court should dismiss those claims. *Id.* at 1231.

Although Plaintiffs make much of Justice Scalia's opinion in *Armstrong*, it does not supply a lifeline for their statutory claims. *See* ECF 27 at 7–10 (citing *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015)). If anything, the Supreme Court's recognition that "the Supremacy Clause does not confer a right of

action" demonstrates the State's point: Plaintiffs must identify some independent right that has been infringed rather than simply alleging that a component of the Compact violates a federal statute and that such violation ipso facto entitles them to relief on the basis that state law is subordinate to federal law. *Armstrong*, 575 U.S. at 326. Indeed, the Court in *Armstrong* recognized that a plaintiff "cannot, by invoking [the Court's] equitable powers, circumvent Congress's [implicit] exclusion of private enforcement" of a statute. *Id.* at 328.

A post-*Armstrong* decision by the Tenth Circuit Court of Appeals demonstrates in searching detail why Plaintiffs are wrong about *Armstrong* and, more generally, their asserted right to an amorphous action in equity. *See Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2017). *Safe Streets* arose from Colorado's legalization of recreational marijuana. *Id.* at 876. An interest group, as well as two landowners who claimed injury from an adjacent, Colorado-licensed marijuana manufactory, asserted "purported causes of action 'in equity' against Colorado and one of its counties for . . . having injured the landowners' property by licensing that manufactory." *Id.* at 876–77. As the basis for their action "in equity," Plaintiffs asserted that Colorado's legalization regime was preempted by the Supremacy Clause because it violated the federal Controlled Substances Act ("CSA"). *Id.* at 877.

The court in *Safe Streets* concluded that the plaintiffs did not "purport to have any *federal substantive rights* that have been injured by Colorado or the county's actions. And because they have no substantive rights in the CSA to vindicate, it follows inexorably that they cannot enforce [the CSA] 'in equity' to remedy their claimed injuries." *Id.*

Just as Plaintiffs do here, the plaintiffs in *Safe Streets* relied on *Armstrong* "and its progenitors for the contention that Congress has not *foreclosed* equitable *relief* to remedy" the purported statutory violations. *Id.* at 898. In rejecting their attempt to assert an action in equity, the Tenth Circuit explained that the plaintiffs "critically misread *Armstrong* and relatedly either ignore[d] or, at best, misunderst[ood] the threshold, dispositive issue here." *Id.* at 899.[6]

The court proceeded to detail the "familiar three-step analysis" in which the *Armstrong* Court engaged to determine the viability of a claim, which begins with "discern[ing] what alleged substantive rights the plaintiffs were seeking to vindicate." *Id.* at 899 (citation omitted). The court explained that the plaintiffs in *Armstrong* were Medicaid service providers who sought to vindicate their federal property right to Medicaid reimbursements by asserting an action in equity to

[6] Notably, the Tenth Circuit then remarked in light of *Armstrong* "how odd it is that the [plaintiffs] are suggesting that they have a lingering right in equity to enforce every federal statute if they suffer any injury, and unless Congress withdraws that so-called right." *Id.* at 900 n. 11. Yet that is precisely what Plaintiffs appear to suggest here. *Compare* ECF 27 at 8.

obtain the statutory reimbursement to which they were entitled. *Id.* Here, by contrast, Plaintiffs have no federal statutory rights under IGRA, the Wire Act, or the UIGEA.

The authorities that Plaintiffs cite only highlight this critical distinction. In their attempt to demonstrate that courts "have expressly recognized suits for injunctive relief asserting IGRA violations" (ECF 27 at 9 n. 4), Plaintiffs cite two district court cases in which *Indian tribes* asserted IGRA claims. *Tohono O'odham Nation v. Ducey*, 130 F. Supp. 3d 1301, 1308 (D. Ariz. 2015); *Pueblo of Pojoaque v. New Mexico*, 233 F. Supp. 3d 1021 (D.N.M. 2017). But while Indian tribes obviously have statutory rights under IGRA, private casino operators such as Plaintiffs do not.[7]

Moreover, like the plaintiffs in *Safe Streets*, Plaintiffs "devote near-singular attention" to "whether Congress foreclosed equitable relief" for the alleged statutory violations. *Safe Streets*, 859 F.3d at 901; *compare* ECF 27 at 8–10. But "[u]nlike the providers in *Armstrong*," Plaintiffs do not assert "any substantive rights" under the federal statutes on which their claims are based. *Safe Streets*, 859 F.3d at 901. And that is dispositive here, as "this threshold inquiry into whether the

[7] The same threshold requirement of an underlying statutory right explains why the other authorities on which Plaintiffs rely are equally unavailing. *See*, *e.g.*, *Transcontinental Gas Pipe Line Co. v. 6.04 Acres*, 910 F.3d 1130, 1152 (11th Cir. 2018) ("holding that a district court may, in appropriate circumstances, issue a preliminary injunction granting a pipeline company immediate access to property that it has an established right to condemn under the Natural Gas Act").

plaintiff has a substantive right in the federal statute she or he seeks to enforce transcends the division between law and equity." *Id.* at 902. In sum, Plaintiffs' "fixation on federal equitable relief begs the question whether a private citizen has a federal substantive right to begin with." *Id.* at 904. As Plaintiffs have no substantive rights under IGRA, the Wire Act, or the UIGEA, the Court should—indeed, it must—dismiss Counts I, II, and III of the Amended Complaint with prejudice.[8]

Finally, Plaintiffs' claim under the Equal Protection Clause also must be dismissed. Plaintiffs rely on *Rice v. Cayetano* in arguing that the online sports betting component of the Compact is an impermissible racial or national-origin preference. ECF 27 at 32 (citing *Rice v. Cayetano*, 528 U.S. 495 (2000)). As a preliminary matter, *Rice* did not involve Indian tribes or a claim under the Equal Protection Clause, but instead involved a Fifteenth Amendment challenge to "an explicit, race-based voting qualification" for a Hawaii state office. *Id.* at 498.

[8] For this reason, the State does not address the substance of Plaintiffs' claims under those three statutes beyond what was argued in the State's initial memorandum. However, with regard to Plaintiffs' ongoing insistence that the Court cannot countenance the "fiction" of deeming an online wager to occur at the location of a server (ECF 27 at 32), the State notes that this practice has already been employed in other states and has become increasingly common. *See*, *e.g.*, Mich. Comp. Laws Ann. § 432.304(2); N.J. Stat. Ann. § 5:12-95.20; 42 R.I. Gen. Laws Ann. § 42-61.2-1(16); W. Va. Code Ann. § 29-22E-15(f); N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 1367-a(d).

These fundamental distinctions are themselves sufficient to demonstrate that *Rice* does not support Plaintiffs' equal protection claim.

Moreover, the District Court in *Rice* apparently drew an analogy between the United States' relationship with Indian tribes and its "guardian-ward relationship with the native Hawaiians," and then used that analogy as the basis for upholding Hawaii's race-based voting classification. *Id.* at 511. In reversing, the Court expressed substantial skepticism of this analogy and seemingly would have rejected it had it been necessary to decide the issue. *See id.* at 518–19 (recognizing the dispute whether Congress can even "treat the native Hawaiians as it does the Indian tribes[,]" and noting that the Court could "stay far off that difficult terrain" in deciding the case). The Court's rationale for avoiding that "difficult terrain" was that even if it took "the substantial step of finding authority in Congress, delegated to the State, to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of this sort." *Id.* at 519. This simply underscores that *Rice* was confined to voting rights involving native Hawaiian people. It did not involve a federally recognized Indian tribal government, and it has no bearing on Plaintiffs' equal protection claim regarding gaming activity. In sum, *Rice* has no application here.

Instead, the applicable Supreme Court decision is *Morton v. Mancari*, 417 U.S. 535 (1974), which affirmed the constitutionality of preferential treatment of

federally recognized Indian tribes. *Id.* at 553. While Plaintiffs attempt to "limit[] *Mancari* to its facts" (ECF 27 at 32), *Mancari* is not nearly as limited as Plaintiffs contend. To the contrary, the Supreme Court has catalogued numerous decisions that relied on *Mancari* in upholding preferences that favored Indian tribes in a variety of contexts. *Rice*, 528 U.S. at 519 (collecting cases). In fact, the Court explained that its decision in *Mancari* upheld a hiring preference in favor of Indian tribes *even though that classification had an explicit "racial component"* by virtue of its application to persons having "one-fourth or more degree Indian blood." *Id.* There is no such "racial component" here.

Ultimately, gaming preferences that favor federally recognized Indian tribes are political rather than racial. *U.S. v. Garrett*, 122 F. App'x 628, 632 (4th Cir. 2005) (citations omitted). This fundamental principle does not turn on geographic considerations, notwithstanding Plaintiffs' suggestion that an otherwise "permissible preference ends at the edge of the reservation." ECF 27 at 32–33. Indeed, if such a preference were racial in nature, it is difficult to see how the mere addition of a geographic component could transform the nature of the preference to a political one and thereby avoid the strict scrutiny that the Constitution otherwise requires of racial preferences.[9] Perhaps for this reason, Plaintiffs' memorandum is

[9] In *Mancari* and in numerous other cases and contexts, courts have upheld Indian preferences without regard to geography. *See*, *e.g.*, *Am. Fed. of Govt. Emps., AFL-CIO v. U.S.*, 330 F.3d 513, 516–19 (D.C. Cir. 2003) (Defense Appropriations Act

conspicuously devoid of any authority in which a court has actually found that a preference in favor of an Indian tribe constituted a racial preference—let alone when such a preference related to gaming activities.

WHEREFORE, Defendants respectfully request that the Court grant this motion, dismiss the Amended Complaint with prejudice, and enter judgment in Defendants' favor.

Respectfully submitted,

/s/ Raymond F. Treadwell
Raymond F. Treadwell
Florida Bar No. 93834
Chief Deputy General Counsel
EXECUTIVE OFFICE OF THE GOVERNOR
Office of General Counsel
The Capitol, PL-5
400 South Monroe Street
Tallahassee, FL 32399
Phone: (850) 717-9310
Facsimile: (850) 488-9810
Ray.Treadwell@eog.myflorida.com
Gov.Legal@eog.myflorida.com

/s/ David Axelman
David Axelman
Florida Bar No. 90872
General Counsel
FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
Office of General Counsel
2601 Blair Stone Road
Tallahassee, FL 32399

---

preference for Indian-owned firms did not constitute racial discrimination in violation of equal protection component of Due Process Clause).

Phone: (850) 717-1241
David.Axelman@myfloridalicense.com

Counsel for Defendants Ron DeSantis, in his official capacity as Governor of the State of Florida, and Julie Brown, in her official capacity as Secretary of the Florida Department of Business and Professional Regulation

LOCAL RULE 7.1(F) CERTIFICATION

Pursuant to Local Rule 7.1(F), I hereby certify that the foregoing memorandum contains 3,093 words, excluding the case style, signature block, this certification, and the certificate of service.

/s/ David Axelman

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on all counsel of record through the Court's CM/ECF system on this 22nd day of September, 2021.

/s/ David Axelman