IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MONTERRA MF, LLC, et al., *Plaintiffs*, v. DEB HAALAND, in her official capacity as Secretary of the United States Department of The Interior, et al., *Federal Defendants.*	Civil Action No. 1:21-cv-02513-DLF

FEDERAL DEFENDANTS' MOTION TO DISMISS

Federal Defendants Deb Haaland, in her official capacity as Secretary of the Interior ("Secretary"), and the United States Department of the Interior ("Interior") (collectively, "Federal Defendants"), by and through their undersigned counsel, hereby respectfully move, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, for dismissal of all claims in the Complaint (ECF 1). The grounds for dismissal of this suit are set forth in the accompanying memorandum.

Respectfully submitted this 15th day of October, 2021.

TODD KIM
Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice

/s/ Rebecca M. Ross
REBECCA M. ROSS, Trial Attorney
HILLARY K. HOFFMAN, Trial Attorney
Indian Resources Section
Environment and Natural Resources Division
United States Department of Justice

OF COUNSEL:
JODY H. SCHWARZ
Senior Attorney
Office of the Solicitor
Division of Indian Affairs

P.O. Box 7611, Ben Franklin Station
Washington, DC 20044
Telephone: (202) 616-3148
Facsimile: (202) 305-0275
Email: rebecca.ross@usdoj.gov

Attorneys for Federal Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MONTERRA MF, LLC, et al., *Plaintiffs*, v. DEB HAALAND, in her official capacity as Secretary of the United States Department of The Interior, et al., *Federal Defendants.*	)	Civil Action No. 1:21-cv-02513-DLF

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS

TABLE OF CONTENTS

INTRODUCTION

Plaintiffs Monterra MF, LLC et al. ("Plaintiffs") filed this suit against the Secretary of the Interior ("Secretary"), and the United States Department of the Interior ("Interior") (collectively, "Federal Defendants"), seeking judicial review of the approval, by operation of law, of a Tribal-State Compact ("Compact") negotiated by and entered into between the State of Florida ("State" or "Florida") and the Seminole Tribe of Florida ("Seminole" or "Tribe"). As expressly provided by the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21 ("IGRA"), the Secretary took no action on the Compact during the statutorily-identified forty-five day review period, which means that, as a matter of law, the Compact was "deemed approved," but only to the extent the Compact is consistent with the statute. *Id.* at § 2710(d)(8)(C). After such deemed approval occurs, IGRA requires that the Secretary publish notice in the *Federal Register*, *id.* at § 2710(d)(8)(D), which the Secretary did, *see Indian Gaming; Approval by Operation of Law of Tribal-State Class III Gaming Compact in the State of Florida*, 86 Fed. Reg. 44,037, 44,037 (Aug. 11, 2021). Thereafter the Secretary had, and continues to have, *no role whatsoever* with respect to the Compact or how it might be implemented.

Despite the fact that Federal Defendants have no role in implementing the Compact, Plaintiffs, who own property and businesses in Florida, and who generally oppose the "expansion" of gaming in the State, contend that if the Compact is implemented such that the Tribe "expands" its businesses on its Hollywood Reservation, ECF 1 at 7-8 (¶¶ 22-24), or if West Flagler Associates, Ltd. ("West Flagler")—which is not a party to this suit—decides to partner with the Tribe to offer online sports betting at a "proposed" new facility, *id.* at 8-10 (¶¶ 25-29), such circumstances will lead to purported increases in traffic, crime, and congestion, and will also reduce "open spaces" and "property values." ECF 1 at 34 (¶ 107). Such

speculative, attenuated, and entirely unsubstantiated allegations of harm fail to establish Plaintiffs' standing in this case, requiring dismissal of this suit in its entirety.

In addition, Plaintiffs advance two counts that fail to state plausible claims for relief, providing the Court with another basis to dismiss this case. Count 1 contends that the Secretary was required to disapprove the Compact because, Plaintiffs argue, the Compact violates the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21 ("IGRA"); the Wire Act of 1961, 18 U.S.C. §§ 1801 *et seq*. ("Wire Act"), the Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361 *et seq*. ("UIGEA"); and Article X, Section 30 of the State of Florida's Constitution ("Fla. Const. amend 3"), ECF 1 at 3-4 (¶¶ 3-4), 34-38 (¶¶ 109-26). IGRA, however, provides that the Secretary may take no action on a compact, and it does not require that the Secretary look behind the representations made by state officials to independently investigate issues of *state* law as part of compact review. Count 2 is a claim under the Declaratory Judgment Act, 28 U.S.C. § 2201 ("DJA"), *id.* at 38-39 (¶¶ 129-137), which does not provide an independent source of federal jurisdiction. And because the claim relies on the allegations supporting Count 1, it too also fails to state any plausible claim for relief. The Court should therefore deny Plaintiffs' Motion and dismiss this suit in its entirety.

STATUTORY AND REGULATORY BACKGROUND

IGRA "creates a framework for regulating gaming activity on Indian lands." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 785 (2014). In enacting IGRA, Congress sought to establish a system that would balance the competing interests of two sovereigns: tribal and state governments. On the one hand, IGRA aims "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1); *Confederated Tribes of the Grand Ronde*

Cmty. of Or. v. Jewell, 830 F.3d 552, 557 (D.C. Cir. 2016) ("[T]he whole point of the IGRA is to 'provide a statutory basis for the operation of gaming by Indian tribes as means of promoting tribal economic development, self-sufficiency, and strong tribal governments.'") (quoting *Diamond Game Enters. v. Reno*, 230 F.3d 365, 366-67 (D.C. Cir. 2000)). On the other hand, the statute contemplates a regulatory and supervisory role for the states and the federal government to prevent the infiltration of "organized crime and other corrupting influences." 25 U.S.C. § 2702(2).[1]

IGRA divides gaming into three classes. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 48 (1996). The third of these—Class III gaming—is implicated here and includes "casino games" such as blackjack, roulette and slot machines. *See Bay Mills Indian Cmty.*, 572 U.S. at 785. Class III gaming can occur on Indian lands only if "conducted in conformance with" an approved tribal-state compact "entered into by the Indian tribe and the State," 25 U.S.C. § 2710(d)(1)(C), or pursuant to procedures issued by the Secretary, *id.* at § 2710(d)(7). "The rationale for the compact system is that 'there is no adequate Federal regulatory system in place for Class III gaming, nor do tribes have such systems for the regulation of Class III gaming currently in place,' and thus 'a logical choice is to make use of existing State regulatory systems' through a negotiated compact." *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1549 (10th Cir. 1997) (quoting S. Rep. No. 100-446, at 13-14, reprinted in 1988 U.S.C.C.A.N. 3071, 3083-84).

IGRA provides no role for the federal government in the compact negotiation process between tribes and states. The Secretary holds authority to approve or, for limited reasons, disapprove a compact to which the state and the tribe do agree. 25 U.S.C. § 2710(d)(8)(A)-(B).

[1] Congress passed IGRA in response to the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-222 (1987), which had held that states lacked regulatory authority over gaming on Indian lands. *See Bay Mills Indian Cmty.*, 572 U.S. at 794.

Congress also directed, however, that "[i]f the Secretary does not approve or disapprove a compact . . . before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of [IGRA]." *Id.* § 2710(d)(8)(C). Compacts approved by the Secretary, or deemed approved by operation of statute when the Secretary does not act, become effective after the Secretary publishes notice in the *Federal Register*. *See id.* § 2710(d)(3)(B), (d)(8)(D). Lastly, Interior regulations set out the requirements for states and Indian tribes to properly submit compacts or compact amendments to Interior for the Secretary's review. *See* 25 C.F.R. pt. 293.

FACTUAL AND PROCEDURAL BACKGROUND[2]

On June 21, 2021, the State and the Tribe submitted the Compact to the Secretary, together with a tribal resolution and state certification, ECF 1-5 at 1 n.1, as required by 25 C.F.R. § 293.8. This submission commenced the statutorily-identified forty-five day review period allowed under IGRA. 25 U.S.C. § 2710(d)(8). The State and the Tribe further submitted a copy of a state statute that ratified and approved the Compact. ECF 1-5 at 1 n.1; *see also* ECF 1 at 23-

[2] Plaintiffs may seek expedited review on the merits of their claims, but because they lack standing and fail to state plausible claims for relief, they are not entitled to be heard on the merits. Moreover, judicial review of the merits of final agency action (or inaction) in APA cases must be "based on the record the agency presents to the reviewing court," *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985), "not some new record made initially in the reviewing court," *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Any such record would not be due until after Federal Defendants answered the Complaint. *See* Local Civil Rule 7(n). That rule's purpose is to "assist the Court in cases involving a voluminous record (e.g., environmental impact statements) by providing the Court with copies of relevant portions of the record relied upon in any dispositive motion." LCvr 7(n) (cmt.). This motion does not rely on an administrative record and thus compliance with Local Rule 7(n) is unnecessary. *See Connecticut v. U.S. Dep't of Interior*, 344 F. Supp. 3d 279, 294 (D.D.C. 2018). In any event, Federal Defendants generally dispute Plaintiffs' factual assertions to the extent they conflict with the assertions made herein or in Federal Defendants' related filings.

24 (¶¶ 72-73) (discussing the state statute implementing the Compact) ("State Implementing Law"). The Secretary took no action on the Compact within the forty-five day review period (*i.e.*, on or before August 5, 2021), and thus, by operation of law, the Compact was deemed approved, "but only to the extent the compact is consistent with" IGRA. *Id.* at § 2710(d)(8)(C). Thereafter, and as required by the statute, *id.* at § 2710(d)(8)(D), the Secretary published notice of the deemed approval in the *Federal Register* on August 11, 2021. *See Indian Gaming; Approval by Operation of Law of Tribal-State Class III Gaming Compact in the State of Florida*, 86 Fed. Reg. 44,037, 44,037 (Aug. 11, 2021) (Because the "Secretary took no action on the Compact between the Tribe and the State . . . the Compact is considered to have been approved, but only to the extent it is consistent with IGRA.").

On September 27, 2021, Plaintiffs filed this suit, asserting two claims. Count 1 asserts that the deemed approval violated the APA because it purportedly violates IGRA, the Wire Act, the UIGEA, and the Florida Constitution and thus, Plaintiffs assert, the Secretary was required to disapprove the Compact. ECF 1 at 34-38 (¶¶ 106-126). Count 2 relies on the allegations supporting Count 1 to request declaratory and injunctive relief against Federal Defendants. ECF 1 at 38-39 (¶¶ 129-137).

ARGUMENT

I. The Court Should Dismiss this Suit In Its Entirety

The first task for the Court in this case is to evaluate whether it has the requisite jurisdiction to proceed, even though Plaintiffs may want to pressure this Court or another[3] to expedite review of the merits of their claims.[4] "Without jurisdiction the court cannot proceed at

[3] *See Federal Defendants' Motion to Transfer Venue*, filed concurrently herewith.
[4] Federal Defendants recognize that the "court has leeway 'to choose among threshold grounds for denying audience to a case on the merits.'" *Lab. Corp. of Am. Holdings v. NLRB*, 942 F.

all in any cause." *Ex parte McCardle*, 74 U.S. 506, 514 (1868). This Court has "an independent obligation to determine whether subject-matter jurisdiction exists," and when it is lacking, the proper course is dismissal. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). As set forth below, Plaintiffs fail to demonstrate standing and further fail to assert plausible claims for relief in this case. Accordingly, the Court should reject Plaintiffs' Motion and dismiss this suit in its entirety pursuant to Rule 12.

A. Standard of Review for Dismissal Pursuant to Rule 12

"The Constitution limits the 'judicial Power of the United States' to 'Cases' or 'Controversies,' U.S. Const. art. III, §§ 1-2, and the requirement of standing is 'rooted in the traditional understanding of a case or controversy.'" *Twin Rivers Paper Co. LLC v. SEC*, 934 F.3d 607, 612 (D.C. Cir. 2019) (citation omitted). Subject matter jurisdiction is a threshold issue, which should be addressed prior to any consideration of the merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998). Federal courts presumptively lack jurisdiction "unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (quotation marks and citation omitted); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("It is to be presumed that a cause lies outside this limited jurisdiction . . . , and the burden of establishing the contrary rests on the party asserting jurisdiction.") (internal citations omitted). Therefore, to survive a motion to dismiss pursuant to Rule 12(b)(1), a

Supp. 2d 1, 3 (D.D.C. 2013) (quoting *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007)). But because the Court must be assured of its jurisdiction to proceed in this case, Federal Defendants contend that it should address that issue first, which means resolving this motion and the Tribe's motion to dismiss, *see* ECF 31-4, to confirm that it may proceed forward, or in the alternative transfer, *see NLRB*, 942 F. Supp. at 3, before reaching the merits of Plaintiffs' claims.

plaintiff bears the burden of establishing that the court has subject matter jurisdiction over all of its claims. *Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007).

"A court evaluating a Rule 12(b)(1) motion 'must treat the complaint's factual allegations as true and must grant plaintiff the benefit of all inferences that can be derived from the facts alleged.'" *Weissman v. Nat'l R.R. Passenger Corp.*, No. 20-CV-28 (TJK), 2020 WL 4432251, at *2 (D.D.C. July 31, 2020) (quoting *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000)). "But the court need not accept the plaintiff's legal conclusions or the inferences he draws 'if [they] are unsupported by facts alleged in the complaint.'" *Id.* (quoting *Williams v. Wilkie*, 320 F. Supp. 3d 191, 195 (D.D.C. 2018)). "[W]here necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992). Moreover, "[w]hen evaluating a Rule 12(b)(1) motion, a court may consider materials outside the pleadings to determine whether jurisdiction exists." *Dick v. Holder*, 67 F. Supp. 3d 167, 175 n.4 (D.D.C. 2014) (citing *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1107 (D.C. Cir. 2005)).

"A Rule 12(b)(6) motion tests the legal sufficiency of a claim or complaint." *Sickle v. Torres Advanced Enter. Solutions, LLC*, 884 F.3d 338, 344 (D.C. Cir. 2018) (citation omitted). Under Rule 12(b)(6), courts determine whether the complaint alleges "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citations omitted). "A claim is facially plausible when the pleaded factual content 'allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Anthony v. Int'l Ass'n of Machinists & Aerospace Workers Dist. Lodge 1*, 296 F. Supp. 3d 92, 95 (D.D.C. 2017) (quoting *Iqbal*, 556

U.S. at 678). Courts, however, need not accept as true inferences unsupported by factual allegations nor legal conclusions. *Warren v. District of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004); *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). Rule 12(b)(6) "authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). And in a ruling on a motion to dismiss for failure to state a claim, a court may ordinarily consider only "the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice." *Anthony*, 296 F. Supp. 3d at 95 (internal quotations omitted).

B. Plaintiffs Lack Standing Because the Complaint Does Not Adequately Allege that the Compact's Deemed Approval Has or Will Imminently Injure Them

Plaintiffs lack standing because they fail to adequately allege an actual or certainly impending injury in fact that derives from the Compact becoming effective by operation of law. Plaintiffs broadly assert, in a cursory and unsubstantiated fashion, that the gaming contemplated by the Compact and the State Implementing Law, if implemented in a particular way by the Tribe or West Flagler, will necessarily result in increased traffic, crime, and congestion, and will reduce "open spaces" and "property values," ECF 1 at 38-39 (¶ 133), in some unspecified way that could affect them or their businesses. Plaintiffs provide no support whatsoever for these purported "impacts," offering instead bare assertions of future potential harm and a citation to a report prepared by the National Association of Realtors concerning impacts to residential home prices in Springfield, Massachusetts. *Id.* at 13 n.2.[5]

At most, Plaintiffs identify highly speculative, hypothetical injuries that could only occur if: (1) the Tribe implements the Compact on its Hollywood Reservation in such a way that might

[5] Such report says nothing about Florida, and focuses instead on the potential impact a proposed new casino in Springfield, Massachusetts might have on the residential housing market.

directly result in increases in traffic, crime, and congestion, or will reduce "open spaces" and "property values," ECF 1 at 38-39 (¶ 133), near the independent senior living facility owned by some of the Plaintiffs, *id.* at 7-8 (¶¶ 22-24); and (2) West Flagler decides to partner with the Tribe to offer sports betting, then offers such game at an unidentified, "proposed Edgewater location," and further decides to offer such game in a manner might directly cause traffic and other impacts to Plaintiffs, *id.* at 8-10 (¶¶ 25-29). Plaintiff No Casinos entirely fails to identify any injury, beyond general opposition to the "expansion" of gaming in Florida. Such contentions fail to establish standing and thus this suit must be dismissed.

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). The Supreme Court has made "clear that . . . abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III." *Id.* at 40.

A plaintiff bears the burden of proof to establish federal jurisdiction. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). To meet the Article III standing requirements, Plaintiffs must establish three elements. *Id.* First, Plaintiffs must show that they have suffered an "injury in fact" that is "concrete and particularized" and actual or imminent, not "conjectural" or "hypothetical." *Id.* at 560 (citations omitted). Plaintiffs' injury must be "certainly impending" and cannot rely "on a highly attenuated chain of possibilities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409-10 (2013).

"[A]llegations of possible future injur[ies] are not sufficient." *Id.* at 409 (emphasis, quotation marks and citations omitted); *Ctr. For Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009); *La. Env't. Action Network v. Browner*, 87 F.3d 1379, 1384

(D.C. Cir.1996) (claim that "dire consequences . . . would befall [the plaintiff] if" certain events were to transpire insufficient to "state an injury sufficiently imminent and concrete for constitutional standing"). Second, Plaintiffs must establish a causal connection between the injuries complained of and the challenged agency action. Plaintiffs' injuries must therefore be "fairly . . . trace[able]" to Federal Defendants' action (or, as here, inaction). *Lujan*, 504 U.S. at 560. Third, Plaintiffs must show it is "likely, as opposed to merely speculative, that the injury will be addressed by a favorable decision" of the Court. *Id.* at 561 (internal quotation marks and citation omitted).

i. Plaintiffs Cannot Establish Standing in this Suit Based on the Hypothetical Future Conduct of the Tribe

Plaintiffs Monterra MF, LLC, Armando Codina, and James Carr contend they could be impacted by "expanded" gaming at the Tribe's Hard Rock Casino and Resort in Hollywood, Florida, *id.* at 7-8 (¶¶ 22-24), but because such claims are neither concrete nor particularized, *Lujan*, 504 U.S. at 560, and they would only occur at some unknown future date, if at all, *Clapper*, 568 U.S. at 409, such claims fail to establish injury-in-fact. These Plaintiffs point to provisions in the Compact that purportedly support their prediction about gaming "expansion," including that the Compact permits the Tribe to offer "any new game authorized by Florida law for any person for any purpose." ECF 1 at 23 (¶ 72). Not only was this same language included in the Tribe's earlier compact with the State,[6] but its inclusion in the Compact does not necessarily mean the Tribe will simply add new games to its existing offerings as opposed to replacing old games with new ones. Indeed, over the course of the Compact's thirty-year term,

[6] *See* GAMING COMPACT BETWEEN THE SEMINOLE TRIBE OF FLORIDA AND THE STATE OF FLORIDA, Part III.F(4) (2010), *available at* https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-026001.pdf.

the Tribe may decide to replace slot machines with electronic machines simulating craps or roulette,[7] or may decide to replace such electronic craps or roulette games with physical tables offering those same games.

Likewise, both the Tribe's earlier compact and the current Compact allow the Tribe to replace or expand its gaming facilities,[8] and both documents define "facility" as a "building or buildings" where the Tribe offers games covered by the respective compact.[9] Plaintiffs point to the fact that the Compact allows the Tribe "to add three additional gambling facilities in Hollywood," ECF 1 at 23 (¶ 72), obscuring the language of the Compact itself, which authorizes the Tribe to add up to three additional "Facilities"—*i.e.*, a new building or buildings—"on the parcel which is part of the Tribe's Hollywood Reservation and which is east of the present location of the Florida Turnpike." ECF 1-1 at 22. Plaintiffs do not explain the connection between such provision and the alleged harms that may befall the senior residential facility they own. Even if such connection was explained and substantiated, the fact that the Tribe *might* exercise this option under the Compact sometime between now and 2051, or may never exercise this option at all, demonstrates that Plaintiffs' claims are neither "concrete," *Lujan*, 504 U.S. at 560, nor "certainly impending," *Clapper*, 568 U.S. at 409, to establish injury-in-fact.

---

[7] *See* Seminole Tribe of Florida, *Lucky Roulette Makes National Debut at Seminole Hard Rock Casino & Hotel in Hollywood, Fla.*, May 31, 2019, https://press.seminolehardrockhollywood.com/casino-gaming/lucky-roulette-makes-national-debut-at-seminole-hard-rock-hotel-casino-in-hollywood-fla/ (announcing introduction of electronic roulette machines).

[8] *Compare* GAMING COMPACT BETWEEN THE SEMINOLE TRIBE OF FLORIDA AND THE STATE OF FLORIDA, Part III.K (2010), *available at* https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-026001.pdf, *with* ECF 1-1 at 8 (Part III.K).

[9] *Compare* GAMING COMPACT BETWEEN THE SEMINOLE TRIBE OF FLORIDA AND THE STATE OF FLORIDA, Part IV.C (2010), *available at* https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-026001.pdf, *with* ECF 1-1 at 22 (Part IV.C).

At bottom, Plaintiffs simply point to provisions of the Compact, speculate about what the Tribe may or may not do to implement it, then speculate as to how such choices might result in traffic or other impacts to their senior residential facility. Their purported future injury plainly relies "on a highly attenuated chain of possibilities," *Clapper* 568 U.S. at 410, that fails to establish standing in this case. More problematic, however, is that such "chain of possibilities" turns on actions and decisions the *Tribe* may make in the future, and thus the purported harm Plaintiffs complain of is no way "fairly . . . trace[able]" to Federal Defendants' action (or inaction). *Lujan*, 504 U.S. at 560.

ii. Plaintiffs Cannot Establish Standing in this Suit Based on the Hypothetical Future Conduct of West Flagler

Plaintiffs Norman Braman and his businesses present an even more attenuated claim of injury. ECF 1 at 8-10 (¶¶ 25-29). These Plaintiffs assert that, should West Flagler decide to partner with the Tribe to offer sports betting, and should West Flagler decide to offer such game at a "proposed" facility in the "Edgewater neighborhood" of Miami, Florida, such series of decisions could purportedly lead to traffic or other impacts that will allegedly harm Plaintiffs. *Id.* at 8-10 (¶¶ 25-30); *id.* at 33 n.14. Again, this "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, upon which Plaintiffs rely, and which further turn on "the independent action of some third party not before the court," *Lujan*, 504 U.S. at 560, entirely fails to demonstrate Plaintiffs' standing in this case.

These Plaintiffs base their alleged harm on nothing more than the sheer possibility that West Flagler may make a series of independent decisions that might eventually lead to an outcome that could have some impact on them. Although not adequately explained in the Complaint, Plaintiffs appear to presume that, should West Flagler partner with the Tribe to offer sports betting at their "proposed" facility, such effort will draw patrons to their facility,

presumably causing traffic and other impacts. ECF 1 at 8-10 (¶¶ 25-29). West Flagler itself disagrees, *see West Flagler Assoc., Ltd. et al. v. Haaland et al.*, Plaintiffs' Motion and Memorandum in Support of Summary Judgment or in the Alternative, a Preliminary Injunction at 16, No. 21-CV-2192 (D.D.C. Sept. 21, 2021) (asserting that a partnership with the Tribe to would not benefit them, and that they will lose "walk-in" business under such arrangement), demonstrating the inherently speculative nature of trying to predict what will occur if sports betting is introduced in Florida. Thus, under even the most favorable reading of the Complaint, Plaintiffs have failed to demonstrate that their assumed future harms are anything but speculative and hypothetical, and have further failed to demonstrate that they are in any way "fairly . . . trace[able]" to any action (or inaction) taken by Federal Defendants. *Lujan*, 504 U.S. at 560.

iii. Plaintiff No Casinos Fail to Establish Organizational Standing

An organization such as Plaintiff No Casinos "can assert standing on its own behalf, on behalf of its members or both." *Equal Rts. Ctr. v. Post Prop., Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011) (citing *Abigail All. for Better Access to Dev. Drugs v. Eschenbach*, 469 F.3d 129, 132 (D.C. Cir. 2006)). No Casinos only asserts standing on its own behalf in the Complaint, and in that effort, they fail. The organization's general disapproval of any "expanded" gaming anywhere in the State, their alleged role in amending the Florida Constitution, and the fact that they "divert[ed] important resources to address" the purported "unlawful expansion of gambling" in the Compact, ECF 1 at 10 (¶ 30), fail to establish standing to advance any claims in this suit.

As with the other Plaintiffs in this case, No Casinos "must allege such a personal stake in the outcome of the controversy to warrant the invocation of federal-court jurisdiction." *Nat'l Ass'n of Home Builders v. Envt'l Prot. Agency*, 667 F.3d 6, 11 (D.D.C. 2011) (internal brackets and quotations omitted). This requires No Casinos to "demonstrate that it has suffered injury in

fact, including such concrete and demonstrable injury to the organization's activities—with a consequent drain on the organization's resources—constituting . . . more than simply a setback to the organization's abstract social interests." *Id.* (internal brackets and quotations omitted). Stated another way, the fact of a "conflict between a defendant's conduct and an organization's mission is alone insufficient to establish Article III standing," because "[f]rustration of an organization's objectives is the type of abstract concern that does not impart standing." *Ctr. for L. & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1161-62 (D.C. Cir. 2005) (internal citations and quotations omitted); *see also Am. Legal Found. v. FCC*, 808 F.2d 84, 92 (D.C. Cir. 1987) (organization must offer "more than allegations of damage to an interest in 'seeing' the law obeyed or a social goal furthered" to establish injury in fact). Beyond stating a general opposition to the "expansion of gambling in Florida," ECF 1 at 10 (¶ 30), Plaintiff No Casino alleges no actual or imminent, concrete or particularized injury stemming from the Compact's deemed approval.

And No Casinos' vague statements about "divert[ing] important resources," *id*, is insufficient to establish standing. For example, No Casinos fails to explain how some action (or inaction) of Federal Defendants "perceptibly impaired a non-abstract interest" germane to the organization so as to demonstrate a concrete injury. *Id.* The bare and sparse allegations in the Complaint also fail to explain how the expenditures were not simply those "normally expended," or were otherwise made to support this litigation, neither of which is sufficient to establish standing. *Nat'l Ass'n of Home Builders*, 667 F.3d at 12. At bottom, "no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem," No Casinos' abstract interest in preventing gaming "expansion" across the State is insufficient to establish standing in this case. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

Plaintiffs cannot simply layer speculation upon speculation to establish standing in this case. Their conjectural, unsubstantiated, and attenuated claims fall far short of alleging a concrete, particularized, actual injury. *Lujan*, 504 U.S. at 560; *Amnesty Int'l USA*, 568 U.S. at 409-10. The Complaint thus fails to allege any certainly impending injury in fact that derives from the deemed approval of the Compact. The Complaint should therefore be dismissed for lack of jurisdiction.

C. Plaintiffs Fail to State Plausible Claims for Relief

i. Count I Fails Because the Deemed Approval of the Compact Does Not Violate the APA

Even if Plaintiffs had the requisite standing to pursue Count I, and they do not, they have failed to state a plausible claim for relief. Plaintiffs assert that, because certain provisions in the Compact are allegedly contrary to IGRA, the Wire Act, and the UIGEA, the Secretary acted arbitrarily and contrary to law by allowing the Compact to become effective. ECF 1 at 34-38 (¶¶ 106-26). This claim not only fails as a matter of law to plead a plausible claim for relief, but by asserting the claim, Plaintiffs have pled themselves right out of court.

IGRA plainly states that "[i]f the Secretary does not approve or disapprove a compact . . . before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, *but only to the extent the compact is consistent with the provisions of this chapter*." 25 U.S.C. § 2710(d)(8)(C) (emphasis added). If Plaintiffs are correct that certain provisions of the Compact are contrary to IGRA, then under their own theory, those provisions were not actually deemed approved. As a result, the Secretary could not have made the allegedly unlawful approvals that form the basis of Count I.

The D.C. Circuit's decision in *Amador County v. U.S. Dep't of Interior*, 640 F.3d 373

(D.C. Cir. 2011), does not call for a different conclusion. Plaintiffs appear to rely on *Amador County* to assert that the Secretary violated the APA by not disapproving the Compact, *see*, *e.g.* ECF 1 at 3-4 (¶¶ 3-5), but such reliance is misplaced. *Amador County* addressed whether a statutory deemed approval of a compact was judicially reviewable under the APA, and it concluded it was. *Amador County*, 640 F.3d at 380–83. But the question of whether a private right of action exists under the APA is distinct from the question of whether Plaintiffs have pled a plausible claim for relief.

While the *Amador County* court did state in the context before it that IGRA obligates the Secretary to disapprove (rather than not act upon) a compact that violates provisions of IGRA, *see id.* at 381, 382, the *Amador County* court did not actually conclude in that case that the Secretary should have disapproved the subject compact at issue. Instead, the court remanded the matter to the district court to consider a separate question relevant to the basis for the challenge—*i.e.*, whether the County was precluded from arguing that the subject Indian tribe's reservation did not constitute "Indian lands" under IGRA. *Id.* at 384. The district court concluded that the County was so precluded, and the deemed approval remained intact as a result. *See Amador Cty. v. S.M.R. Jewell*, 170 F. Supp. 3d 135, 144-47 (D.D.C. 2016), *aff'd*, *Amador Cty., Cal. v. U.S. Dep't of Interior*, 707 Fed. App'x 720, 721 (D.C. Cir. Nov. 27, 2017).

And unlike this case, *Amador County* did not involve a claim that specific compact provisions violated IGRA; rather, the County challenged the entire compact on the premise that the subject tribe's reservation did not constitute "Indian lands" under IGRA. Moreover, the *Amador County* court did not explain how it might "direct the Secretary to disapprove [a] compact" that had been deemed approved, *Amador County*, 640 F.3d at 382, given that by such time, the forty-five day review period would have expired and the Secretary would be without

authority to make any decision on such compact. Nor did the *Amador County* court endorse what Plaintiffs propose here, namely a provision-by-provision examination of the legality of a Compact under various federal and state laws. As a result, *Amador County* fails to support Plaintiffs. Indeed, if Plaintiffs' reading of the case were correct, then the D.C. Circuit in effect erased the last clause of 25 U.S.C. § 2710(d)(8)(C). Such a result would violate the rule of statutory construction that Courts must give meaning to all words in a statute. *See Moskal v. United States*, 498 U.S. 103, 109-10 (1990). If the D.C. Circuit had intended such a sweeping rewrite of IGRA, surely it would have expressly said so.

Count I also fails to state a claim for another reason. The Complaint alleges that the Secretary acted arbitrarily because the Compact purportedly authorizes gaming that is not otherwise permitted in Florida, contrary to 25 U.S.C. § 2710(d)(1)(B). ECF 1 at 3-4 (¶¶ 1, 3, 5), 36-37 (¶¶ 114-119, 121), 38 (¶ 126).[10] But IGRA authorizes Class III gaming on Indian lands where the tribe has an approved ordinance and the gaming is "(B) located in a State that permits such gaming for any purpose by any person, organization, and entity; *and* (C) conducted in conformance with a Tribal-State compact . . . ." 25 U.S.C. § 2710(d)(1)(B)-(C) (emphasis added). The requirements in subparagraphs (d)(1)(B) and (d)(1)(C) are conjunctive. Having an approved tribal-state compact under (d)(1)(C) does not authorize a tribe to conduct gaming activities that would otherwise be contrary to the limitation in (d)(1)(B). Thus, Count I fails to a state a claim that the Secretary unlawfully "authorized" otherwise impermissible gaming.

Moreover, nothing in IGRA or Interior regulations requires the Secretary to resolve an

[10] Plaintiffs' statements concerning the prospect that "bettors can purchase software and apps to evade" the geographical limitations contemplated by the Compact, ECF 1 at 5 (¶ 9), do not make their claims for relief any more plausible. Such speculative and overbroad assertions are irrelevant to the question of the Secretary's obligations under IGRA, and moreover have nothing to do with what the Compact allows or contemplates.

issue of state law before allowing a compact to become deemed approved under IGRA. *See* 25 U.S.C. § 2710(d)(8)(A); 25 C.F.R. §§ 293.7, 293.8. *See also Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997) ("[T]he Secretary is not expected to *resolve* state law issues regarding that authority in the 45-day period given to [her] to approve a compact") (emphasis in original). Interior regulations set forth what compacting parties must submit to demonstrate that a compact has been "entered into" between a state and an Indian tribe. 25 C.F.R. § 293.8(a)-(c) (an original copy of the compact or amendment; a tribal resolution "that certifies that the tribe has approved the compact or amendment in accordance with applicable tribal law"; and "[c]ertification from the Governor or other representative of the State that he or she is authorized under State law to enter into the compact or amendment"). Here, the Tribe and the State submitted to the Secretary not only the Compact, a tribal resolution, and a certification from the Governor, *see* ECF 1-5 at 1 n.1, but further submitted a copy of legislation enacted by the Florida legislature ratifying the Compact, *id.* Nothing more was required for the Secretary to confirm that the Compact had been "entered into" such that the forty-five day review period set by IGRA commenced. *See Pueblo of Santa Ana*, 104 F.3d at 1555 (IGRA requires that a compact be "entered into" "before it can go into effect"); *see also Class III Tribal State Gaming Compact Process*, 73 Fed. Reg. 74,004, 74,005 (Dec. 5, 2008) (regulation codified at 25 C.F.R. § 293.8 promulgated so as to require "documentation from both the tribe and the State certifying that their respective representatives were authorized to execute the proposed compact or amendment" such that it can go into effect). Plaintiffs' allegations are premised on the notion that Interior was required to look behind the State's certification and duly enacted state legislation submitted with the Compact to confirm whether the documents submitted by two branches of Florida's government complied with the Florida constitution. Neither IGRA nor Interior regulations

impose such a requirement.[11]

In summary, taking "no action" on a compact is permissible under IGRA and only requires publication in the *Federal Register* that the deemed approval occurred. 25 U.S.C. § 2710(d)(8)(A)-(D). *Amador County* does not and did not impose additional obligations on Interior with respect to the Compact.

ii. Count 2 Fails Because Plaintiffs' Request for Declaratory or Injunctive Relief Rests on the Same Shaky Ground as Count 1 and Thus Must be Rejected

Even assuming that Plaintiffs otherwise have standing, Count 2—in which they invoke the DJA to request declaratory and injunctive relief against Federal Defendants—should be dismissed because it likewise fails to state a plausible claim for relief. It is a "well-established rule that the Declaratory Judgment Act 'is not an independent source of federal jurisdiction.'" *C&E Servs., Inc. of Wash. v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 201 (D.C. Cir. 2002) (quoting *Schilling v. Rogers*, 363 U.S. 666, 677 (1960)). Through the DJA, "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). "Rather, 'the availability of [declaratory] relief presupposes the existence of a judicially remediable right." *Ali v. Rumsfeld*, 649 F3d 762, 778 (D.C. Cir. 2011). Because Plaintiffs cannot obtain relief under the APA, they cannot do so through the DJA either.

[11] To the extent Plaintiffs contend that the Secretary was to consider traffic or the other "impacts" they identify in the Complaint as part of the Compact review, Plaintiffs are mistaken. IGRA identifies the bases upon which the Secretary may disapprove a compact, and considerations such as traffic impacts are not included. Plaintiffs make no claim that compact submission triggered an obligation to prepare an analysis under the National Environmental Policy Act ("NEPA"), but even if they did, courts have consistently held that compact reviews do not trigger the requirements of NEPA. *See, e.g.*, *Jamul Action Committee v. Chaudhuri*, 837 F.3d 958, 963 (9th Cir. 2016); *Stand Up for California! v. United States Dep't of Interior*, No. 2:16-CV-02681, 2021 WL 3418729, at *10 (E.D. Cal. Aug. 5, 2021).

CONCLUSION

Because Plaintiffs lack standing to maintain this suit, and they fail to state plausible claims for relief, Federal Defendants respectfully request that the Court dismiss this suit in its entirety.

Respectfully submitted this 15th day of October, 2021.

TODD KIM
Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice

/s/ Rebecca M. Ross
REBECCA M. ROSS, Trial Attorney
HILLARY K. HOFFMAN, Trial Attorney
Indian Resources Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington, DC 20044
Telephone: (202) 616-3148
Facsimile: (202) 305-0275
Email: rebecca.ross@usdoj.gov

Attorneys for Federal Defendants

OF COUNSEL:
JODY H. SCHWARZ
Senior Attorney
Office of the Solicitor
Division of Indian Affairs

CERTIFICATE OF SERVICE

I, Rebecca M. Ross, hereby certify that on October 15, 2021, I caused the foregoing FEDERAL DEFENDANTS' MOTION TO DISMISS to be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ *Rebecca M. Ross*
REBECCA M. ROSS, Trial Attorney
Indian Resources Section
Environment and Natural Resources Division
United States Department of Justice