ORAL ARGUMENT NOT YET SCHEDULED

No. 22-5022
(consolidated with No. 21-5265)

UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

WEST FLAGLER ASSOCIATES, LTD., et al.,
Plaintiffs-Appellees,

v.

DEBRA HAALAND, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the District of Columbia
No. 1:21-cv-02192 (Hon. Dabney L. Friedrich)

OPENING BRIEF FOR FEDERAL APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The parties who have entered an appearance in this appeal are:

(1) *Plaintiffs-appellees*: West Flagler Associates, Ltd., a Florida Limited Partnership d/b/a Magic City Casino; Bonita-Fort Myers Corp., a Florida Corporation d/b/a Bonita Springs Poker Room.

(2) *Defendants-appellants*: United States Department of the Interior; Debra Haaland, in her official capacity as Secretary of the Interior.

The following additional parties have entered an appearance in consolidated appeal No. 21-5265: Seminole Tribe of Florida.

In addition, the following entities have entered an appearance as amicus curiae in this appeal and/or the consolidated appeal: Monterra MF, LLC; Armando Codina; James Carr; Norman Braman; 2020 Biscayne Boulevard, LLC; 2060 Biscayne Boulevard, LLC; 2060 NE 2nd Avenue, LLC; 246 NE 20th Terrace, LLC; No Casinos.

One additional amicus curiae appeared before the district court but has not yet entered an appearance in this Court: the State of Florida.

B. Rulings under Review

The ruling under review is the district court's November 22, 2021 order and opinion granting plaintiffs' motion for summary judgment, denying the federal government's motion to dismiss, and denying the Seminole Tribe's motion to intervene. Joint Appendix 554, 555-79.

C. Related Cases

Counsel is unaware of any related cases presently pending in this Court or any other court, within the meaning of D.C. Circuit Rule 28(a)(1)(C).

/s/ *Rachel Heron*
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GLOSSARY

APA	Administrative Procedure Act
IGRA	Indian Gaming Regulatory Act

INTRODUCTION

The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, encourages states and federally recognized Indian tribes to mutually set the conditions under which a tribe may offer certain kinds of gaming on Indian lands within a state's borders. Tribal-state gaming compacts may also memorialize agreements on other directly related topics. Compacts become effective either when approved by the Secretary of the Interior or, in some cases, when the Secretary takes no action after 45 days.

At issue in this case is a gaming compact between the Seminole Tribe of Florida and the State of Florida. The Compact authorizes the Tribe to offer online sports betting through servers located on Indian lands in the State. Customers may place bets at the Tribe's casinos on Indian land. Florida has also enacted legislation of its own allowing customers within the State but outside Indian land to place bets, and the Compact provides that the State and Tribe will deem such wagers to occur on Indian lands and be regulated primarily by the Tribe. Per IGRA, the Compact became effective after the Secretary took no action within 45 days of submission.

Plaintiff Florida gaming rooms (collectively, "West Flagler") believe that Florida violated its own constitution by allowing customers throughout the State to place wagers through West Flagler's online sportsbook, which they view as a

competitor to their brick-and-mortar facilities. This lawsuit is not against Florida, however, but against the Secretary. West Flagler claims that the Secretary had a judicially enforceable duty to disapprove the Compact.

The district court held that the Secretary was required to disapprove the Compact because it violates IGRA itself. In particular, the district court held that because IGRA is concerned only with gaming on Indian lands, the Compact necessarily violates IGRA by contemplating some gaming that occurs outside Indian lands. This was error. Gaming outside Indian lands cannot be *authorized* by IGRA, but it may be *addressed* in a compact. The Secretary has no duty—nor even any authority—to disapprove a compact that validly authorizes gaming on Indian lands simply because the compact also contemplates that the state will enact legislation permitting persons outside Indian lands to participate in that gaming. This is true regardless of whether that legislation comports with state law.

No alternative basis for affirmance exists. West Flagler argued below that the Secretary had a separate duty to disapprove the Compact because the Compact violates federal laws other than IGRA. But IGRA does not oblige the Secretary to evaluate a compact's compliance with the entire universe of potentially relevant federal laws within 45 days of submission. West Flagler's alternate challenges to the Compact itself thus are not justiciable and lack merit in any event. This Court should reverse.

STATEMENT OF JURISDICTION

The district court had jurisdiction over the claim it resolved in West Flagler's favor under 28 U.S.C. § 1331, because that claim arises under a federal statute, the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* JA 50, 559-61. The district court's judgment was final: it resolved all claims against all defendants. JA 554. This Court therefore has jurisdiction under 28 U.S.C. § 1291. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B) because the district-court judgment was entered on November 22, 2021, and the federal government filed a notice of appeal on January 19, 2022. JA 554, 651.

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that the Compact violates IGRA because, in addition to validly authorizing gaming on Indian lands, the Compact addresses directly related activities occurring outside Indian lands.

2. With regard to West Flagler's alternate claim that the Compact violates federal laws other than IGRA:

(a) Whether the district court should have dismissed the claim, because IGRA imposes no duty on the Secretary to disapprove a compact within 45 days on any ground except that the compact violates IGRA itself; and

(b) To the extent the claim is justiciable, whether the Compact itself is consistent with non-IGRA federal law.

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes are set forth in the addendum following this brief.

STATEMENT OF THE CASE

I. Legal framework governing gaming on Indian lands

A. Tribal and state authority under IGRA

"Indian tribes are domestic dependent nations that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014). Unless curtailed by Congress—which can limit tribes' exercise of sovereign powers, *see generally id.* at 788—that inherent authority includes the power to decide whether and to what extent gaming is permitted on tribal lands. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207, 221-22 (1987).

States, for their part, likewise have "capacious" authority to determine whether and under what conditions to permit gaming on lands within their jurisdiction. *Bay Mills*, 572 U.S. at 794. But according to a 1987 Supreme Court decision, states—even states that otherwise acquired jurisdiction over tribal land under Public Law 280—generally have *no* authority to regulate gaming on tribal lands, unless Congress so provides. *Cabazon*, 480 U.S. at 207, 214-21.

Congress responded by enacting IGRA. *Bay Mills*, 572 U.S. at 794. IGRA recognizes the importance of tribally owned or licensed gaming facilities as a way

for tribes to raise revenue to provide critical governmental services to their members. 25 U.S.C. §§ 2701(1), 2702(1). It also recognizes the benefits of coordination between a tribe and the state in which tribal lands are located when setting the conditions under which tribes will offer what the statute calls class III gaming on Indian lands. *See id.* § 2710(d). "Class III gaming" may include table games, slot machines, and (as relevant here) sports betting. *Id.* § 2703(8). "Indian lands," in turn, include "all lands within the limits of any Indian reservation," as well as any lands "held in trust by the United States for the benefit of any Indian tribe or individual." *Id.* § 2703(4).

To further both ends, IGRA sets out a compacting process by which states and tribes may reach mutual decisions about class III gaming on Indian lands. *See generally id.* § 2710(d)(3). To give that process teeth, IGRA declares that, subject to an exception not relevant here, class III gaming "shall be lawful on Indian lands only if" it is "conducted in conformance with" a valid tribal-state compact. *Id.* § 2710(d)(1)(C).[1] IGRA places no conditions or restrictions on gaming on *non*-Indian lands, however. *See Bay Mills*, 572 U.S. at 794-95. To the contrary, it

[1] Such gaming must also be authorized by a valid tribal ordinance or resolution approved by the Chairman of the National Indian Gaming Commission and occur in "a State that permits such gaming for any purpose by any person, organization, or entity." *Id.* § 2710(d)(1)(A)-(B). Those two requirements are not at issue here.

recognizes a state's inherent authority over what kinds of gaming to allow on non-Indian lands. *See* 25 U.S.C. § 2710(d)(1)(B).

IGRA's compacting process requires any tribe proposing to offer class III gaming on Indian lands to ask the state in which the relevant Indian lands are located to enter negotiations and further requires the state to negotiate "in good faith." *Id.* § 2710(d)(3)(A). But the statute leaves the substance of the compact largely to its signatories' discretion. *See id.* § 2710(d)(3). Moreover, tribes and states "may" include in a compact their agreements on topics other than Indian-land gaming itself. *Id.* § 2710(d)(3)(C). These topics include "the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to" gaming, *id.* § 2710(d)(3)(C)(i); "the allocation of criminal and civil jurisdiction" to regulate gaming between the state and tribe, *id.* § 2710(d)(3)(C)(ii); and—critically—"any other subjects that are directly related to the operation of gaming activities," *id.* § 2710(d)(3)(C)(vii).

B. The Secretary's limited role in approving or disapproving tribal-state compacts

When a state and tribe reach agreement on the conditions for gaming on Indian land, the federal government's role with regard to the resulting compact is limited. IGRA requires that a compact be submitted to the Secretary of the Interior before it may go into effect. *Id.* § 2710(d)(3)(B). But the Secretary's options for acting on a submitted compact are circumscribed. She may approve "any Tribal-

State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe." *Id.* § 2710(d)(8)(A). Alternately, she "may disapprove a compact," but only when one of three conditions is present: the compact violates IGRA, "any other provision of Federal law," or "the trust obligations of the United States to Indians." *Id.* § 2710(d)(8)(B).

The Secretary's only other option is to take no action on a submitted compact, in which case the compact may become effective as a matter of law. *Id.* § 2710(d)(8)(C). Specifically, "[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* [*i.e.*, IGRA]." *Id.* (emphasis added); *see also Amador County v. Salazar*, 640 F.3d 373, 380-81 (D.C. Cir. 2011). The statutory text does not provide a comparable proviso about the underlying compact's consistency with other federal laws or the United States' trust obligations—the other two grounds on which the Secretary has authority to disapprove a compact.

C. Other relevant federal statutes

While IGRA itself does not prohibit gaming outside Indian lands, other federal laws may constrain gaming activity that occurs on both Indian and non-Indian land. Potentially relevant to this appeal is the Wire Act of 1961, which

prohibits the "knowing[] use[] [of] a wire communication facility"—including the internet or a mobile phone network—"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." 18 U.S.C. §§ 1081, 1084(a).

Also potentially relevant is the Unlawful Internet Gambling Enforcement Act ("Enforcement Act"), which prohibits a "person engaged in the business of betting or wagering" from "knowingly accept[ing], in connection with the participation of another person in unlawful Internet gambling," certain forms of payment, including credit card transactions, checks, and electronic fund transfers. 31 U.S.C. § 5363. The Act defines "unlawful Internet gambling" as "to place, receive, or otherwise knowingly transmit a bet or wager" using the internet, but only where the bet or wager "is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made." *Id.* § 5362(10)(A). The Act expressly exempts from that definition "Intrastate transactions," which are defined to include "placing, receiving, or otherwise transmitting a bet or wager where . . . the bet or wager is initiated and received, or otherwise made exclusively within a single State;" where the wager "is initiated and received" in accordance with State law, and State law includes requirements "reasonably designed" to prevent minors and persons

outside the state from placing wagers; and where the wager does not violate any of four named federal laws, including IGRA. *Id.* § 5362(10)(B).

II. The Compact

The Seminole Tribe has for years generated revenue to support its governmental services and programs by operating casinos on Indian lands within the State of Florida. *See* JA 673-74. At issue in this appeal is a 2021 Compact between the State and the Tribe, which superseded a prior compact.

As relevant to this appeal, the 2021 Compact provides that the Tribe may offer "Sports Betting," defined as "wagering on any past or future professional sport or athletic event, competition or contest, any Olympic or international sports competition event, any collegiate or athletic event . . . or any motor vehicle race, or any portion of any of the foregoing." JA 686. Specifically, the 2021 Compact—unlike the older compact—allows the Tribe to maintain one or more online portals, or sportsbooks, which users may access in order to place wagers via the internet or mobile networks. JA 676, 686-93. The online sportsbooks must be hosted on servers located at one or more of the Tribe's existing casinos on Indian land. JA 687.

As part of the Compact, the Tribe agrees to certain requirements in operating its online sportsbook, including that it will implement a registration process for verifying a player's identity and an anti-money laundering process to track

transactions and verify the source of any funds, and will also use "geo-fencing" to bar wagers from players who are physically located outside set geographic boundaries. JA 691. The Tribe further agrees to share a portion of the revenue derived from sports betting with the State. JA 717-26. Florida, in turn, agrees that the Tribe's sportsbook will be the exclusive online sportsbook authorized to operate in the State, or that Florida will forfeit contemplated revenue payments. *See* JA 717-18, 726-35.

Most important to this litigation, Florida also agrees that, in addition to customers who are physically located at the Tribe's casinos, persons located on non-Indian lands in the State will be allowed to place wagers through the Tribe's online sportsbook. JA 676, 686-87, 692. Under the Compact, the State and Tribe "deem[]" such wagers to occur on Indian lands, and therefore those wagers will be regulated primarily by the Tribe, subject to requirements stated in the Compact. JA 687, 692, 694-97, 707-10.

The Chairman of the Tribal Council and the Governor of Florida signed the Compact in its final form on May 17, 2021. JA 747. The Tribal Council subsequently adopted a resolution approving the Compact, and the Florida legislature enacted a statute ratifying it. JA 749-51, 753-61. The Florida legislature also amended existing state law in the ways contemplated by the Compact. Specifically, the legislature declared that listed games "conducted pursuant to a

gaming compact . . . do not violate the laws of this state." JA 757. Included on that list are "[w]agers on sports betting, including wagers made by players physically located within the state using a mobile or other electronic device." *Id.* Such wagers "shall be deemed to be exclusively conducted by the Tribe where the servers or other devices used to conduct such wagering activity on the Tribe's Indian lands are located." *Id.*

III. The Secretary's abstention on the submitted Compact

The State and Tribe submitted the Compact to the Secretary for approval on June 21, 2021. JA 668. The Secretary did not act within the 45-day window. *See* JA 214. At that point, the Compact was "considered to have been approved," to the extent consistent with IGRA. 25 U.S.C. § 2710(d)(8).

The current Assistant Secretary – Indian Affairs (then the Principal Deputy Assistant Secretary) subsequently sent letters to the State and Tribe, notifying both of the Secretary's decision to take no action. The letter stated that "the Compact is 'considered to have been approved by the Secretary, but only to the extent [it] is consistent with the provisions of [IGRA].'" JA 225 (quoting 25 U.S.C. § 2710(d)(8)(C)) (alterations in letter). Elsewhere, the letter stated that "the Compact is considered to have been approved by operation of law to the extent that it complies with IGRA and existing Federal law." JA 214.

Although IGRA does not require the Secretary to provide any explanation for a decision to take no action, *see* 25 U.S.C. § 2710(d)(8)(C), the Assistant Secretary elected to provide some observations on the Compact. With regard to sports betting in particular, the letter observed that all online sports betting contemplated by the Compact is "done with the consent of a State," in contrast to prior unsuccessful efforts by tribes to offer online gaming without going through IGRA's compacting process. JA 219-20. The letter further noted that IGRA expressly permits compacts to address "the allocation of criminal and civil jurisdiction and laws directly related to the regulation of Indian gaming," as the Compact's "deemed" language does. JA 220. Thus, "provided that" the Compact is not construed to authorize customers to place wagers from *another* tribe's Indian lands in Florida (which would constitute class III gaming on Indian lands in the absence of a compact entered by that tribe), the online sports-betting provisions do not offend IGRA. JA 221. The letter reached that conclusion without venturing an opinion on the legality of Florida's choices under state law. JA 218-19 ("any concern surrounding the State's authorization of sports betting is outside the scope of the Department's review.").

IV. West Flagler's lawsuit against the Secretary

West Flagler takes issue with Florida's decision to allow users across the State to place wagers through the Tribe's sportsbook—a choice which West

Flagler believes will harm its own gaming facilities. JA 559. It sued two State officials in federal district court in Florida, claiming that the Compact violates federal statutes prohibiting certain online activities unless authorized by relevant state law, because the Florida constitution forbids any expansion of "casino gambling" in the State except by voter initiative. First Am. Compl., *West Flagler Assocs., Ltd. v. DeSantis*, N.D. Fla. 4:21-cv-00270, 17-25, 50-74 (Aug. 17, 2021); *see generally* Fla. Const. art. X, § 30. Those claims were dismissed without prejudice because West Flagler did not demonstrate Article III standing. 568 F. Supp.3d 1277, 1288 (N.D. Fla. 2021).

West Flagler tried another tack in this lawsuit. It sued the Secretary under the APA, claiming that the Secretary had a duty to disapprove the Compact within IGRA's 45-day window. JA 50. West Flagler offered two theories why: *first*, that the Compact violates IGRA itself, and *second*, that it violates other federal laws—specifically, the Wire Act, the Enforcement Act, and the equal-protection component of the Fifth Amendment. JA 50-53.[2] The Tribe filed a motion to intervene for the limited purpose of arguing that the Tribe is a required and

[2] A different set of plaintiffs also brought claims against the Secretary in a separate lawsuit, which the district court considered together with West Flagler's. JA 560-61. The court entered judgment for the government on the other plaintiffs' claims. *See* D.D.C. No. 1:21-cv-02513, ECF No. 54; Minute Order of March 23, 2022. They have not appealed.

indispensable party within the meaning of Federal Rule of Civil Procedure 19, and the suit should be dismissed in its absence. JA 560. The federal government opposed dismissal on that particular ground. But it urged dismissal on other grounds—including that West Flagler's claim regarding non-IGRA federal laws is not justiciable, because IGRA does not oblige the Secretary to determine whether a compact complies with every federal law in the 45-day review period. JA 440-42.[3] The federal government also rebutted all claims on the merits. JA 523-50.

The district court sided with West Flagler, denying the Tribe's motion to intervene, denying the federal government's motion to dismiss, and holding that the Secretary had an obligation to disapprove the Compact because the Compact violates IGRA by "attempt[ing] to authorize sports betting both on and off Indian lands." JA 572-77, 579. The court rejected the Secretary's explanation that IGRA properly authorizes those activities that take place on Indian lands, and that the legality of other activities contemplated by the Compact is a matter of State law, which the Secretary is not required to approve or disapprove. JA 575-77. The court did not dispute that a compact may address issues that are themselves beyond IGRA's scope, but faulted the Compact for using language that "purports to authorize" the non-Indian lands activity. *Id.* The court also questioned whether the

[3] That argument is the only justiciability argument the federal government renews on appeal.

Florida legislature itself has power to authorize online sports betting absent a voter initiative, although it cautioned that it was "not issuing a final decision on any question of Florida constitutional law." JA 577. The court then vacated the Secretary's constructive approval without reaching West Flagler's alternate argument that the Compact violates non-IGRA federal laws. JA 577-79. This appeal followed.

SUMMARY OF ARGUMENT

IGRA expressly authorizes the Secretary to take no action on a tribal-state gaming compact submitted for her approval. The Secretary acted lawfully in exercising the option to abstain here.

1. There is only one situation in which this Court has held the Secretary *must* affirmatively disapprove a compact within the 45-day review window: when the compact violates IGRA itself. The Compact at issue in this case is fully consistent with that statute, notwithstanding that it contemplates that Florida will allow customers physically located outside Indian lands to place wagers through the Tribe's sportsbook. IGRA places conditions on class III gaming "on Indian lands." It does *not* place conditions on many of the directly related subjects a state and tribe may elect to discuss in a compact. To the extent IGRA does not govern those subjects, agreements on those subjects cannot violate IGRA.

The district court erred in concluding otherwise. Contrary to that court's view, the Compact does not impermissibly "authorize" gaming outside Indian lands. While a compact may appropriately discuss various subjects, IGRA makes the existence of a valid compact a prerequisite to only one: class III gaming on Indian lands. As a matter of law, then, class III gaming on Indian lands is the only activity that a compact *authorizes*. The legality of any non-Indian land activities discussed in a compact is instead a matter of state law: if the state courts ultimately decide that those activities are not authorized by state law, then those activities will not be permitted, regardless of what the compact contemplates. But the Secretary has no duty to predict what the state courts will say about those non-Indian lands activities when deciding whether to approve the compact in the first place.

The district court did not contend otherwise. It nevertheless held that the Secretary had a duty to disapprove here because it read the language in the Compact "deeming" all wagers—including those placed outside Indian lands—to occur on Indian lands as a declaration that such wagers are authorized by IGRA itself. But it is settled law that a contract that *can* be read to comply with governing law, *should* be so read. Here, the "deemed" language can be read to describe how the State and Tribe will treat such bets as a matter of state and tribal law for purposes of allocating regulatory jurisdiction. So read, the "deemed" language fits squarely in the list of topics IGRA allows a compact to cover.

2. No alternate basis for affirming the district court's judgment exists. West Flagler's remaining claim—that the Secretary was required to disapprove the Compact within 45 days because it violates federal laws other than IGRA—should have been dismissed. Neither statutory text nor this Court's precedent suggests that Congress intended to oblige the Secretary to evaluate a submitted compact's consistency with every potentially applicable federal law inside 45 days.

Moreover, even if West Flagler's claim was justiciable, it has not shown that the Compact itself violates the laws cited. *First*, the Wire Act bars the knowing transmission of wagers in interstate commerce. But all wagers contemplated by the Compact will be placed and received in the same state, and the Compact itself does not address the routing of any such wagers that may pass through other states in the course of transmission. *Second*, the Enforcement Act, for its part, does not prohibit online gaming itself, but only certain methods of payment—a topic the Compact does not cover. There has also been no determination whether gaming contemplated by the Compact falls within any exemption from the Enforcement Act. *Third*, West Flagler's equal-protection argument is inconsistent with binding precedent.

For these reasons, the decision below should be reversed.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo. *Mayo v. Reynolds*, 875 F.3d 11, 19 (D.C. Cir. 2017). It likewise reviews de novo a district court's conclusion whether agency action violates the APA. *See id.*

ARGUMENT

I. The district court erred in vacating the approval of the Compact by operation of law because the Compact is itself consistent with IGRA.

IGRA gives the Secretary explicit discretion to take no action on a tribal-state compact submitted for her approval. 25 U.S.C. § 2710(d)(8)(C). Binding precedent restricts that discretion in one respect: the Secretary must act within 45 days to disapprove a compact that is not "consistent with" IGRA itself. *Amador County*, 640 F.3d at 380-83; 25 U.S.C. § 2710(d)(8)(C).[4] The Compact submitted by Florida and the Tribe *is* consistent with IGRA. The district court erred in concluding otherwise.

[4] For purposes of this appeal, the federal government does not dispute that West Flagler's IGRA-based claim is reviewable under *Amador County*, notwithstanding factual differences between the two cases.

A. IGRA allows compacts to discuss gaming outside Indian lands and does not require the Secretary to verify the state-law basis for such gaming.

1. Compacts may discuss gaming outside Indian lands that is directly related to gaming on Indian lands.

Although tribal-state compacts "govern[] gaming activities on [] Indian land," they are not strictly limited to discussing gaming on Indian land. *Id.* § 2710(d)(3)(B). To the contrary, Section 2710(d)(3)(C) lists six specific topics that a compact may address, plus "any other subjects . . . directly related to the operation of gaming activities." *Id.* § 2710(d)(3)(C); *see generally In re Indian Gaming Related Cases*, 331 F.3d 1094, 1110-11, 1115-16 (9th Cir. 2003) (mandatory contributions to revenue-sharing trust to benefit other tribes, labor protections fell in catch-all category); *but cf. Chicken Ranch Rancheria of Me-Wuk Indians v. California*, --F.4th--, 2022 WL 2978615, at *8 (9th Cir. July 28, 2022) ("topics of negotiation that have attenuated relationships to the operation of gaming activities . . . are not permitted.").

A state's treatment of directly related gaming activities that occur outside Indian lands fits within that catch-all category. It is well settled that the "other topics" a compact may discuss include matters outside Indian lands. *See, e.g.*, *In re Indian Gaming*, 331 F.3d at 1110-11; *cf. Bay Mills*, 572 U.S. at 796-97 (noting that a state and tribe could "bargain for" a waiver of tribal sovereign immunity for activities that occur outside Indian lands). And nothing in the statute excludes

gaming outside Indian lands from that broadly phrased catch-all, provided that such gaming is "directly related to" gaming on Indian lands.

Indeed, in practice, tribal-state compacts not infrequently discuss how a state will regulate gaming outside Indian lands. One particularly common example is exclusivity provisions, in which a state agrees that it will not permit a tribe's competitors to offer certain kinds of gaming outside Indian lands. *See, e.g.*, JA 726-35; *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1038 (9th Cir. 2010). Such provisions are often held up as a "meaningful concession" that a state may offer as a good-faith exchange to justify a tribe's agreement to share gaming revenues. *See id.* at 1036-37; *see generally* 25 U.S.C. § 2710(d)(4) (barring a state from demanding the right to tax the tribe as a condition for negotiating a compact).

Compacts contemplating that a state will permit gaming outside Indian lands also exist. As one example, various tribes simulcast horse races taking place at racetracks outside Indian lands and allow their patrons to place wagers in real time, like bettors at the racetrack itself. *See, e.g.*, *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1053 (9th Cir. 1997); JA 778 (noting examples from California, Washington, and Oklahoma). Such "off-track betting" provisions necessarily contemplate that the state will permit the racetracks to operate, notwithstanding that they are located outside Indian lands.

2. IGRA itself places no requirements on gaming outside Indian lands, even when discussed in a compact.

While IGRA makes the existence of a valid compact a prerequisite for class III gaming *on* Indian lands, it does not place any restrictions on a state's "capacious" authority to decide what gaming to permit *outside* Indian lands within its borders. *Bay Mills*, 572 U.S. at 794-95. Nor is IGRA the source of the state's authority to permit such gaming. As such, *IGRA* is not concerned with whether a state has complied with its own laws or constitutional provisions when it agrees in a compact to expand gaming outside Indian lands. In fact, IGRA does not even give the Secretary authority to disapprove a compact on the ground that the state failed to do so—unless that failure results in a violation of federal law or the federal government's trust duties toward tribes. *See* 25 U.S.C. § 2710(d)(8)(B). In this choice, "as in any field of statutory interpretation," it is the federal courts' "duty to respect not only what Congress wrote but, as importantly, what it didn't write." *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900 (2019).

Congress' choice, moreover, makes good sense. The Secretary does not have the power to issue binding interpretations of state law. Requiring her to approve or disapprove a compact based on her construction would thus serve little purpose: her approval could not guarantee consistency with the relevant law, nor her disapproval inconsistency, and a federal court's resolution of an APA challenge to the Secretary's decision *still* would not yield a definitive answer. *Cf. Wash. State*

Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1010 (2019) (state judiciary is the ultimate arbiter of state law).[5] Vehicles for obtaining dispositive resolution of the question may exist—such as a lawsuit, filed under state law, against a state or its officials for violating its own law, to the extent the state supplies a cause of action. But an APA claim against the Secretary is not one of them.

There is nothing anomalous about this result. As discussed, IGRA allows compacts to discuss various topics other than Indian-land gaming, but places few or no independent restrictions on what the state and tribe may decide on many of those topics. For example, Section 2710(d)(3)(C) provides that a compact may set "remedies for breach of contract." *Id.* § 2710(d)(3)(C)(v). But IGRA itself does not

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[5] Related considerations led the Tenth Circuit to conclude that "Congress did not intend to force the Secretary to make extensive inquiry into state law" even in one of the limited circumstances where IGRA makes the validity of *on*-Indian land gaming turn on state law. *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1556-57 (10th Cir. 1997) (considering claim that compact was invalid under IGRA because governor lacked signing authority under state law); *see also* 25 U.S.C. § 2710(d)(1)(B) (forbidding on Indian lands types of games that are categorically prohibited under state law).

Whether *Amador County* would require the Secretary to parse state law in those limited circumstances is an open question and one the Court has no occasion to address here. West Flagler has not raised a claim about signing authority. Nor can there be any argument that online sports-betting is *categorically* prohibited by Florida law: Florida's legislature has expressly authorized online sports betting under the Compact, and West Flagler has not questioned that law's validity as applied to customers physically located at the Tribe's casinos. *See* JA 13.

delineate what remedies are appropriate, what statute of limitations a plaintiff must satisfy, etc. For that reason, the terms chosen by the state and tribe would not, generally speaking, violate IGRA; they simply discuss matters that IGRA itself does not govern.[6]

To be sure, there are non-IGRA sources of law that may restrict the parties' latitude on issues other than Indian-land gaming. A hypothetical agreement between a state and tribe that a two-year statute of limitations shall apply to all contract claims against a tribal casino, for example, might founder absent an amendment to existing law if applicable tribal or state law provides a shorter or longer limitations period. But even a provision that squarely conflicts with existing tribal or state law would not violate *IGRA itself*. The same rules hold true for compact provisions in which a state agrees to legalize certain kinds of gaming outside Indian lands. As with provisions of a compact addressing contract remedies or other topics on which IGRA does not express a view, the consistency of the underlying agreement with state law is simply beyond IGRA's ken.

[6] To be clear, such provisions may violate IGRA or conflict with federal trust responsibilities to the extent they serve as a smokescreen for imposing broad state jurisdiction over Indian lands, contrary to IGRA's intent. *See id.* § 2710(d)(3)(C)(i)-(ii); S. Rep. No. 100-446 (1988), at 14 ("The Committee does not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands."). West Flagler has raised no such claim here.

B. The district court erred in concluding that the Compact violates IGRA.

In light of the foregoing, the disputed provisions of Florida and the Tribe's Compact do not violate IGRA. The Compact provides that the Tribe may operate an online sportsbook through servers on Indian lands. JA 676, 686-87, 692. West Flagler does not dispute that the Tribe's receipt of wagers placed by customers who are physically located at the Tribe's casinos is gaming "on Indian lands" that may be authorized by a tribal-state compact. *See* JA 13. Instead, West Flagler takes issue with Florida's agreement that customers located on non-Indian lands in the State will be allowed to place wagers that are then received by the Tribe on Indian lands. West Flagler is right that those transactions do involve some gaming activities that take place outside Indian lands. *See State of California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960, 965-67 (9th Cir. 2018) (at least some "gaming activity" associated with tribe's online bingo game took place outside Indian land where players accessed game from outside Indian land). But those activities, while not governed by IGRA, are still permissibly addressed in an IGRA compact.

As stated, IGRA permits compacts to include agreements on "any other subject[]"—including gaming outside Indian lands—provided that it is "directly related to the operation of" gaming on Indian lands. 25 U.S.C. § 2710(d)(3)(C)(vii). Here, the question of who may lawfully access and place

wagers through the Tribe's online sportsbook is plainly "directly related" to the Tribe's operation of that sportsbook. Its inclusion therefore does not offend IGRA—just like state agreements to limit competitor casinos outside Indian lands, or to allow horse racing outside Indian lands which tribes may simulcast.

Indeed, a contrary rule could functionally bar tribes from offering any online gaming to patrons outside their Indian-land casinos, given that such transactions necessarily include gaming activity both on Indian lands (the tribe's receipt of wagers) and outside Indian lands (placing the wagers in the first place), and the former *must* be addressed in a valid compact. *See* 25 U.S.C. § 2710(d)(1)(C).[7] Although IGRA's enactment predates the rise of internet gaming, nothing in the statute suggests that Congress intended to disadvantage tribes relative to other gaming facilities in that way. To the contrary, IGRA's declared purpose is "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"—a goal that is ill-served by putting up a roadblock to tribes that does not apply to their non-tribal competitors. 25 U.S.C. § 2702(1); *see also id.*

[7] Notably, as the Assistant Secretary's letter recognized, tribal online gaming offerings not conducted in conformance with an IGRA compact have been deemed unlawful, including where the tribe unilaterally attempted to serve customers in states that affirmatively prohibited such gaming. *See Iipay*, 898 F.3d at 969-69; JA 219-20 (noting examples).

§ 2701(4); JA 220 ("IGRA should not be an impediment to tribes that seek to modernize their gaming offerings").

Moreover, the Enforcement Act—which *does* explicitly address transactions related to online sports betting—contemplates that tribes may be permitted to accept online wagers from persons outside Indian lands. As discussed above, that statute excludes from its definition of "unlawful Internet gambling" certain intrastate transactions where the wager is "initiated and received . . . in accordance with the laws of such State," *and* "the bet or wager does not violate" IGRA. 31 U.S.C. § 5362(10)(B)(ii)-(iii). Given that the act contains a separate exception for bets or wagers that are both initiated and received on Indian land, *id.* § 5362(10)(C), the intrastate exception's invocation of IGRA—a statute that *only* addresses gaming on Indian lands, *see* pp. 21-23, *supra*—shows that Congress understood there could be lawful transactions between Indian and non-Indian lands in a single state.

For these reasons, the Compact's contemplation of gaming outside Indian lands is consistent with IGRA. This is true regardless of whether, as West Flagler contends, Florida violated its own constitution when it agreed to allow persons outside Indian lands to place wagers through the Tribe's sportsbook. As discussed, *IGRA* does not address whether a state has followed its own laws when it agrees to expand gaming on lands within its jurisdiction. Nor should IGRA be read to make

the legality of gaming on Indian lands turn on the legality of related gaming outside Indian lands. The statutory text includes no such requirement. *See* 25 U.S.C. § 2710(d)(1); *Virginia Uranium*, 139 S. Ct. at 1900.

To be clear, IGRA's agnosticism about the lawfulness of gaming activity outside Indian lands is not a blank check for tribes and states seeking to evade state-law restrictions. While the Secretary's approval of an IGRA compact can render "lawful" class III gaming "on Indian lands," 25 U.S.C. § 2710(d)(1), the statutory text gives the Secretary's approval no such power over non-Indian land gaming discussed in a compact. To the contrary, IGRA does not make a valid compact a prerequisite to such gaming, *see id.*, and thus approval of a compact cannot be said to authorize it. As a result, a compact's reference to such gaming is no defense if that gaming is later held to be inconsistent with state law: a state and tribe that discuss such gaming in a compact do so subject to the risk that those provisions may prove unenforceable.

The district court's conclusion that the Compact between Florida and the Tribe "authorized" gaming outside Indian lands is therefore wrong as a matter of law. In the event that Florida exceeded its constitution in permitting online wagering outside Indian lands, then placing such wagers is unlawful, period, regardless of what the Compact contemplates. The district court did not disagree as a general matter, but nevertheless held that the language of this particular Compact

violated IGRA by "purport[ing]" to legalize gaming outside Indian lands. JA 575-77. Not so.

IGRA compacts are interpreted according to "[g]eneral principles of federal contract law." *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 618 F.3d 1066, 1073 (9th Cir. 2010). It is established under those principles that "a contractual provision should, if possible, be interpreted in such a fashion as to render it lawful rather than unlawful." *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 954 (D.C. Cir. 1983); *see generally Walsh v. Schlecht*, 429 U.S. 401, 408 (1977). Here, the Compact can—and thus should—be read to be consistent with IGRA.

True, the Compact states that the Tribe "is authorized" to operate an online sportsbook and that "wagers . . . made by players physically located within the State using a mobile or other electronic device shall be deemed to take place" on Indian lands. JA 692. That "deemed" language could be read, per the district court, as an attempt to declare that all such gaming occurs on Indian lands *for purposes of IGRA*, such that IGRA itself authorizes both the placing and receiving of wagers. The language, so read, would indeed be problematic. *See Iipay*, 898 F.3d at 967.

But the Compact can also be read to declare that all such gaming occurs on Indian lands *for purposes of state and tribal law*—such that the Tribe has primary responsibility for regulating both the receipt and placement of wagers, consistent

with the Compact's terms. IGRA expressly allows tribes and states to reach such agreements on the allocation of jurisdiction over gaming, as the Assistant Secretary noted in his letter announcing the no-action decision. JA 220-21 (citing 25 U.S.C. § 2710(d)(3)(c)(i)-(ii)). Indeed, the Tribe's submission letter endorsed both possible readings of the "deemed" language in the alternative. *See* JA 774-75, 779; *cf. Papago*, 723 F.2d at 955 (extrinsic evidence of parties' intent can be consulted to interpret ambiguous contract).

Contrary to the district court's belief, *see* JA 576, reading the Compact to comport with IGRA does not render the Compact's "deemed" language superfluous to the sections of the compact placing specific requirements on the Tribe's operation of the sportsbook. The Compact contains many general provisions regarding the Tribe's relationship with gaming customers—including that patron disputes involving gaming will be resolved in accordance with tribal law, JA 702; that the Tribe partially waives its sovereign immunity to certain claims, JA 705; and that the Tribe will "regulate its own gaming activities" in the first instance with the State to conduct random inspections, JA 710. The federal government understands the Compact's "deemed" language to confirm that such provisions are intended to apply fully to gaming by customers outside Indian lands.

Because the Compact can—and thus should— be read to comport with IGRA, the Secretary had no duty to disapprove the Compact for violating that

statute, and the district court's contrary conclusion should be reversed. This Court can and should do so without addressing whether Florida law permits online wagering outside Indian lands—a question which, for the reasons above, is immaterial to the Compact's compliance with IGRA and which is better left to Florida's state courts. To the extent this Court disagrees and concludes despite IGRA's text that the Secretary must disapprove a compact if a state lacks authority to permit non-Indian lands activity contemplated by the compact, this Court should issue an opinion vacating the district court's flawed opinion and certifying that question to Florida's Supreme Court, for the reasons discussed below. *See* pp. 38-41, *infra*.

To reiterate, the Secretary has no desire—and no power—to bless non-Indian land wagers that are ultimately held to violate state law. But whether any wagers contemplated by the Compact do in fact violate state law is simply not a question that the Secretary has the expertise to answer when deciding whether to approve a submitted compact.

II. There is no alternate basis for affirming.

For the foregoing reasons, the district court's stated basis for granting judgment to West Flagler was erroneous. To the extent West Flagler invokes its undecided claim that the Compact itself violates non-IGRA federal laws as an

alternate basis for affirming that flawed judgment, its claim is neither justiciable nor meritorious.

A. West Flagler's remaining claim is not justiciable.

West Flagler's remaining claim cannot save the judgment below first and foremost because it is not justiciable. Even assuming West Flagler is correct that the Compact violates some non-IGRA federal law, IGRA permits the Secretary to take no action on a compact—except, under this Court's precedent, where the compact violates IGRA itself. A claim seeking to compel disapproval on any other ground is therefore not cognizable. *Cf. Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62-64 (2004).

IGRA's plain text demonstrates as much. As discussed elsewhere, IGRA sets out "only" three grounds on which the Secretary *may* disapprove a compact: the compact violates IGRA, non-IGRA federal laws, or the United States' trust obligations. 25 U.S.C. § 2710(d)(8)(B). IGRA also gives the Secretary the option to take no action on a submitted compact, in which case the compact will be deemed approved after 45 days "but only to the extent the compact is consistent with the provisions of this chapter"—that is, with IGRA itself. *Id.* § 2710(d)(8)(C). This Court has interpreted that caveat as a limit on the Secretary's discretion to abstain: she must disapprove a compact that violates IGRA within 45 days and can be sued if she does not. *Amador County*, 640 F.3d at 381-83. Section

2710(d)(8)(C) does not articulate any other limitation on a compact's being considered as approved through inaction, however—not even where a compact violates one of the other two grounds for disapproval. Congress' choice to set three grounds for permissibly disapproving a compact, and to list only one of them in Section 2710(d)(8)(C), demonstrates at the least that Congress did not intend to limit the Secretary's authority to take no action on the basis of the other two grounds. *See, e.g.*, *Intel Corp. Investment Pol'y Cmte. v. Sulyma*, 140 S. Ct. 768, 777 (2020) (presuming that "Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another").

Statutory context supports that plain-text reading. IGRA provides only 45 days for the Secretary to decide what to do with a submitted compact before the statute takes the decision out of her hands, without exception. *See* 25 U.S.C. § 2710(d)(8)(C). That narrow window is consistent with IGRA's "implicit goal . . . to allow expedited authorization of tribal gaming." *Stand Up for California! v. U.S. Dep't of the Interior*, 959 F.3d 1154, 1164 (9th Cir. 2020). But it is inconsistent with an assumed Congressional intent that the Secretary must verify a compact's consistency with every potentially relevant letter of the United States Code, including statutes that fall outside Interior's bailiwick and in which the Secretary may have no particular expertise.

That does not mean, of course, that activities taken pursuant to a compact which in fact violate applicable federal law will be immunized by the Secretary's inaction. To the contrary, when IGRA intends Secretarial approval of a compact to displace otherwise applicable federal law, it says so expressly. *See* 25 U.S.C. § 2710(d)(6) (providing that federal statute restricting slot machines "shall not apply" to gaming under an in-effect compact). It simply means that the Secretary is not required to bar the compact from going into effect within 45 days; affected persons may still dispute the legality of activities taken under that compact, including through litigation against the state, tribe, or individuals if an appropriate cause of action exists. And the federal government would also have authority to enforce violations of federal law, including through criminal prosecution.

This Court's decision in *Amador County* supports this reading of IGRA. *Amador County* held justiciable a claim that the Secretary was required to disapprove a compact that allegedly violated IGRA by not addressing any lands that the plaintiffs considered "Indian lands," and it remanded to the district court to consider that claim in the first instance. 640 F.3d at 381-84. It did not decide whether a claim based on an alleged violation of other, non-IGRA federal laws is justiciable. But it nevertheless contrasted such a claim with the claim before it based on the language of the statute. While opining that the Secretary "must . . . disapprove a compact if it would violate any of the three limitations" in Section

2710(d)(8)(*B*),[8] it recognized that Section 2710(d)(8)(*C*) singles out compacts that violate IGRA itself. *Id.* at 381. With regard to the latter, the Court concluded that the express caveat "demonstrates that Congress had no intention of trading compliance with IGRA's requirements for efficiency" during the 45-day review period. *Id.* But with regard to compacts that may violate the other disapproval criteria, the Court acknowledged that the Secretary "may be correct" that "Congress' intent was not to embroil the Secretary in lengthy investigations" during the 45-day window. *Id.*

The Assistant Secretary's post-decisional letter does not say otherwise. At the outset, IGRA does not require the Secretary to give any explanation for her decision to take no action on a submitted compact, *see* 25 U.S.C. § 2710(d)(8)(C); *Amador County*, 640 F.3d at 381, and the Assistant Secretary's voluntary decision to provide feedback on the Compact to the parties had no legal effect. Moreover, while that letter did incorrectly paraphrase Section 2710(d)(8)(C) at one point by saying that the Compact is deemed approved to the extent compliant with IGRA *and* existing Federal law, JA 214, the letter correctly quoted Section 2710(d)(8)(C)

[8] That statement is dicta as regards the non-IGRA grounds for disapproval, which were not at issue in the case. *See id.* at 375. And even as regards the IGRA ground, the Court concluded in the alternative that "[i]n any event . . . even if disapproval were otherwise discretionary," other provisions of IGRA bar the Secretary from approving a compact that, as alleged by plaintiffs in that case, does not involve "Indian lands." *Id.* at 381.

throughout and offered views on the compact's consistency with IGRA only, demonstrating the agency's awareness of the Secretary's limited task. JA 214, 218-25.

For these reasons, the Secretary had no duty to affirmatively disapprove the Compact based on any alleged violation of non-IGRA federal law within the 45-day window, and her decision to take no action may not be overturned on that basis. To the extent West Flagler believes that some activity contemplated by the Compact violates other federal laws, it is free to pursue any judicial avenues that may exist for enjoining those activities; the Secretary's non-action on the Compact—which made no findings with regard to compliance with non-IGRA federal laws—will be no barrier. But as with West Flagler's arguments about the Compact's consistency with state law, its recourse does not lie against the Secretary.

B. In any event, West Flagler's remaining challenge to the Compact itself fails on the merits.

Were this Court to reach the merits of West Flagler's alternate claim, there would still be no basis to affirm judgment for West Flagler. West Flagler has not shown that the Compact itself violates any of the three federal laws it cites, meaning that West Flagler likewise has not shown that the Secretary was required to disapprove the Compact on that basis.

First, the terms of the Compact itself do not violate the Wire Act. Under the Wire Act, no one may "knowingly use a wire communication facility for the transmission *in interstate or foreign commerce* of bets or wagers." 18 U.S.C. § 1084(a) (emphasis added). The Compact does not refer to any interstate transmission of bets or wagers, however: all wagers will be placed within Florida's borders and received at servers on the Tribe's Indian lands, also within Florida's borders. In fact, the Compact requires the Tribe to use geo-fencing to ensure that all wagers received are placed from inside the State. JA 691; *see also* JA 707 (the Tribe "shall ensure" "strict compliance" with the Wire Act).

West Flagler argued below that the Compact could be implemented in a way that violates the Wire Act because, given the nature of the internet, a wager placed and received in Florida may nevertheless bounce between servers in and out of State between its origin and destination, and that such transmission would violate the Wire Act. That may be. As stated below, it is the position of the United States that the Wire Act may be implicated and violated if a wager or bet is routed or transmitted out of state. JA 545. But the fact that a compact *could*—but need not—*be implemented* in a way that violates non-IGRA federal law does not mean that the compact itself violates non-IGRA federal law. Because IGRA authorizes the Secretary to disapprove a compact "only if *such compact* violates" federal law, 25 U.S.C. § 2710(d)(8)(B) (emphasis added), the possibility of unlawful

applications not specified by the compact itself does not trigger an obligation to disapprove within 45 days.

Moreover, there is a question about whether or in what circumstances out-of-state transmissions of the kind West Flagler posits would violate the Wire Act. As stated, the Act requires that the defendant "knowingly use[] a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers." 18 U.S.C. § 1084(a). Although *mens rea* requirements usually do not apply to jurisdictional elements such as the requirement that a transmission occur in interstate or foreign commerce, *see Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019), some courts have determined that the specific language and structure of the Wire Act indicates an intent of Congress to treat "knowledge of the interstate nature of the wire facility transmission" as an "element of the crime." *United States v. Southard*, 700 F.2d 1, 24 (1st Cir. 1983), cert. denied, 464 U.S. 823; *United States v. Barone*, 467 F.2d 247, 249 (2d Cir. 1972); *but see United States v. Swank*, 441 F.2d 264, 265 (9th Cir. 1971) (per curiam).

Second, the Compact itself does not violate the Enforcement Act. The Enforcement Act does not proscribe the transmission of wagers itself, only "knowingly accept[ing]" certain forms of payment in connection with "unlawful Internet gambling," including credit card transactions, checks, and electronic fund transfers. 31 U.S.C. § 5363. Because the Compact does not specify what forms of

payment the Tribe must accept in connection with its online sportsbook, the Compact itself does not require that the Tribe take any action that would fall within the Enforcement Act's purview. To be sure, the Tribe might in practice seek to use forms of payment listed in the Enforcement Act. *See* JA 691 (requiring the Tribe to employ anti-money laundering protections for any transactions connected with the sportsbook); *but see* JA 707 (obliging the Tribe to "ensure . . . strict compliance" with "all other applicable federal laws with respect to the conduct of Sports Betting"). But as stated above, that the Compact could be implemented in a way that violates non-IGRA federal law does not oblige the Secretary to disapprove the Compact.

In any event, West Flagler has not established that the Tribe's use of listed payment methods actually would violate the Enforcement Act. The statute exempts from the definition of "unlawful Internet gambling" any wagers that are lawful "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); *see also id.* § 5362(10)(B). West Flagler argued below that wagers placed outside Indian lands are not lawful in the place initiated, because the Florida statute authorizing those wagers exceeded the legislature's constitutional authority. The Florida executive and legislature, however, maintain that the statute is valid. *See* JA 675, 754; *cf.* JA 482.

There is no question that the relevant provision of Florida's constitution is intended to limit the legislature's authority to legalize new forms of gambling in the State. *See* Fla. Const. art. X, § 30. In the absence of any controlling precedent on the issue, it is difficult for the federal government to assess whether it requires the kind of gaming contemplated by the Compact to be approved via voter initiative.[9] There appear to be arguments that it does not. For one, the requirement applies only to "casino gambling," a term that the constitution defines more narrowly than class III gaming for IGRA purposes. *See* Fla. Const. art. X, § 30(a), (b) ("'casino gambling' means any of the types of games typically found in casinos *and* that are within" IGRA's definition of class III gaming (emphasis added)). Online sports betting is not a form of gaming typically associated with attendance at a brick-and-mortar casino, and none of the listed examples of casino gambling involve the remote placement of wagers through a personal electronic device, versus using a device at a specific physical location. *See id.*[10]

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[9] The Florida Supreme Court has issued one advisory opinion approving the voter initiative that eventually became the relevant constitutional provision for placement on the ballot. *Advisory Opinion to the Attorney General Re: Voter Control of Gambling*, 215 So.3d 1209 (Fla. 2017). To the federal government's knowledge, no court has construed the provision since its adoption.

[10] The examples do include "internet sweepstakes devices." *Id.* But that term is typically associated with "Internet cafes that sell Internet time cards attached with instant-win sweepstakes entries, much like the code underneath a Coke bottle or a McDonald's Monopoly game piece," also called "convenience casinos." Steve Silver, *The Curious Case of Convenience Casinos: How Internet Sweepstakes*

Alternatively, even if online sports betting is a form of casino gambling, the voter-initiative requirement includes a carve-out "for the conduct of casino gambling on tribal lands" under a compact. *Id.* § 30(c). While placing bets outside Indian land undoubtedly constitutes gaming on non-Indian land for purposes of federal law, *see Iipay*, 898 F.3d at 965-67, the Compact and state legislation "deem[]" it to occur, for purposes of state law, on the Indian lands where the bet is received. JA 687, 692, 757. Whether that language is sufficient to show that the gaming occurs "on tribal lands" for purposes of the state constitution is a question for the Florida courts, not the Secretary.[11]

As discussed elsewhere in this brief, this open question of state constitutional law cannot be definitively resolved by the federal courts. For that reason, it is not a question this Court should attempt to answer for itself. To the contrary, were this Court to conclude that West Flagler's lawsuit cannot be disposed of without resolving the state-law question, the appropriate course would be to issue an opinion reversing and vacating the decision below (which is flawed for separate reasons), explaining that resolution of the case turns on an open

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Cafes Survive in A Gray Area Between Unlawful Gambling and Legitimate Business Promotions, 29 J. Marshall J. Computer & Info. L. 593, 593 (2012).

[11] Similar language is commonly employed by states, particularly those whose constitutions place restrictions on gambling. *See, e.g.*, N.J. Stat. Ann. § 5:12-95.20; R.I. Gen. Laws. Ann. § 42-61.2-1(21); Mich. Comp. Laws Ann § 432.304(2).

question of state law, and certifying that open question to the Florida Supreme Court. *See* Fla. R. App. P. 9.150(a). In reality, however, there is no need for the Court to go down that road, because the open state-law question is *not* determinative of West Flagler's APA suit against the Secretary in this case. For the reasons already stated, regardless of whether the Tribe would violate the Enforcement Act by accepting certain payments in connection with wagers that are not authorized by state law, the Compact does not itself violate the Enforcement Act, and the Secretary therefore had no duty to disapprove it.

Third, the Compact does not violate Fifth Amendment equal-protection principles. West Flagler contends that the Secretary violated equal protection by approving a Compact that treats the Tribe differently than private gaming companies by giving the Tribe a statewide monopoly on online sports betting. JA 51-53. As stated, however, the Secretary's approval did not itself authorize any of the non-Indian land gaming contemplated by the Compact. *See* pp. 26-30, *supra*. Moreover, as domestic dependent sovereigns with whom the United States shares a government-to-government relationship, tribes *are* different than private gaming companies. And even if the Compact were read to treat tribal *members* differently than non-tribal members, it is settled law that federal classifications based on the political fact of membership in a recognized tribe are not suspect racial classifications under the Fifth Amendment. *Morton v. Mancari*, 417 U.S. 535, 553-

55 (1974); *see, e.g.*, *Am. Fed. of Gov't Employees, AFL-CIO v. United States*, 330 F.3d 513, 520-21 (D.C. Cir. 2003).[12] IGRA's compacting regime is rationally related to the United States' legitimate interest in promoting tribal economic development and self-sufficiency. *See* 25 U.S.C. § 2702. West Flagler's claim is baseless.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted,

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August 17, 2022
DJ # 90-6-16-01173

[12] The Supreme Court recently granted certiorari in a case raising *Mancari*'s application to the Indian Child Welfare Act, which sets minimum federal standards for state-court child-custody proceedings involving an Indian child. *See generally Haaland v. Brackeen*, S. Ct. No. 21-376. That statute is not at issue here.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation set forth in this Court's order of July 8, 2022, because the brief contains 9,979 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1), according to the count of Microsoft Word.

/s/ Rachel Heron
RACHEL HERON

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2022, I electronically filed the foregoing final brief and attached addendum with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Rachel Heron
RACHEL HERON

ADDENDUM

18 U.S.C. § 1084 ..... A1

25 U.S.C. § 2710(d) A3

31 U.S.C. § 5362(10) A14

31 U.S.C. § 5363 ..... A19

18 U.S.C. § 1084

§ 1084 Transmission of wagering information; penalties

(a) Whoever being engaged in the business of betting or wagering knowingly uses 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, shall be fined under this title or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or 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.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished

by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.

(e) As used in this section, the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory or possession of the United States.

25 U.S.C. § 2710(d)

§ 2710 Tribal gaming ordinances

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

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

(A) authorized by an ordinance or resolution that--

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

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

(iii) is approved by the Chairman,

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

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

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

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

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

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

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

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

(D)(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or

resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

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

(iii) Notwithstanding any other provision of this subsection--

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

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

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

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

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

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

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

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

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

(v) remedies for breach of contract;

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

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

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

in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

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

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

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

(B) is in effect.

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

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

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and

conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions

of this chapter, and the relevant provisions of the laws of the State, and

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

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

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

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

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

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

31 U.S.C. § 5362(10)

§ 5362 Definitions

In this subchapter:

…

(10) Unlawful internet gambling.--

(A) In general.--The term "unlawful Internet gambling" means to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(II) appropriate data security standards to prevent unauthorized access by any person whose age and current location has not

been verified in accordance with the applicable tribal ordinance or resolution or Tribal-State Compact; and

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

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

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

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

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

(D) Interstate horseracing.--

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

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

(iii) Sense of Congress.--It is the sense of Congress that this subchapter shall not change which activities related to horse racing

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

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

31 U.S.C. § 5363

§ 5363 Prohibition on acceptance of any financial instrument for unlawful Internet gambling

No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling--

(1) credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card);

(2) an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person;

(3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or

(4) the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person.