NOT YET SCHEDULED FOR ORAL ARGUMENT
Case No. 22-5022
(Consolidated with No. 21-5265)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WEST FLAGLER ASSOCIATES, LTD., a Florida Limited Partnership
d/b/a MAGIC CITY CASINO,

BONITA-FORT MYERS CORPORATION, a Florida Corporation
d/b/a BONITA SPRINGS POKER ROOM,
Plaintiffs-Appellees,

v.

DEB HAALAND, in her official capacity as Secretary of the
United States Department of the Interior,

UNITED STATES DEPARTMENT OF
THE INTERIOR,
Defendants-Appellants.

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

BRIEF OF SEMINOLE TRIBE OF FLORIDA AS AMICUS CURIAE IN SUPPORT OF FEDERAL DEFENDANTS' REQUEST FOR REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel certifies the following:

PARTIES AND AMICI

1. District Court
   - Seminole Tribe of Florida, *putative-limited-intervenor*
   - West Flagler Associates, Ltd., *plaintiff*
   - Bonita-Fort Myers Corporation, *plaintiff*
   - Deb Haaland, Secretary of the U.S. Department of the Interior, *defendant*
   - U.S. Department of the Interior, *defendant*
   - State of Florida, *amicus curiae*

2. Circuit Court of Appeals
   - Seminole Tribe of Florida, *amicus curiae*
     - (*Putative limited-intervenor-appellant* in related case No. 21-5265)
   - West Flagler Associates, Ltd., *plaintiff-appellee*
   - Bonita-Fort Myers Corporation, *plaintiff-appellee*
   - Deb Haaland, Secretary of the U.S. Department of the Interior, *defendant-appellant*
     - (*Defendant-appellee* in related case No. 21-5265)
   - U.S. Department of the Interior, *defendant-appellant*
     - (*Defendant-appellee* in related case No. 21-5265)

RULINGS UNDER REVIEW

- *W. Flagler Assocs., Ltd. v. Haaland*, 573 F. Supp. 3d 260, No. 1:21-cv-02192 (D.D.C. Nov. 22, 2021) (J. Dabney L. Friedrich), JA 554–79 (Order and Memorandum Opinion).

RELATED CASES

Pending in the D.C. Circuit:

- *W. Flagler Assocs., Ltd. v. Haaland*, 573 F. Supp. 3d 260, No. 1:21-cv-02192 (D.D.C. Nov. 22, 2021) (J. Dabney L. Friedrich), *appeal docketed*, No. 21-5265 (D.C. Cir. Nov. 24, 2021), *consolidated with No. 22-5022* (D.C. Cir. Jan. 25, 2022).

Resolved in the D.C. Circuit:

- *Monterra MF, LLC v. Haaland*, 573 F. Supp. 3d 260, No. 1:21-cv-02513, (D.D.C. Nov. 22, 2021) (J. Dabney L. Friedrich) (dismissed as moot due to decision in *W. Flagler Assocs., Ltd. v. Haaland*, 573 F. Supp. 3d 260, No. 1:21-cv-02192 (D.D.C. Nov. 22, 2021) (J. Dabney L. Friedrich)), *appeal docketed*, No. 22-5010 (D.C. Cir. Jan. 20, 2022), *voluntary dismissal granted* (D.C. Cir. June 1, 2022).

Resolved in the Eleventh Circuit:

- *W. Flagler Assocs., Ltd. v. DeSantis*, 568 F. Supp. 3d 1277, No. 4:21-cv-270 (N.D. Fla. Oct. 18, 2021) (J. Allen Winsor) (dismissing case due to plaintiffs' lack of standing), *appeal docketed*, No. 21-14141 (11th Cir. Nov. 29, 2021), *voluntary dismissal granted sub nom. W. Flagler Assocs., Ltd. v. Governor of Fla.*, 2021 WL 7209340 (11th Cir. Dec. 20, 2021).

Dated: August 24, 2022

/s/ Joseph H. Webster

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GLOSSARY OF ABBREVIATIONS

ABBREVIATION	DEFINITION
2021 Compact	Class III Gaming Compact between the State and Tribe approved in 2021
Interior	Defendants-Appellants U.S. Department of the Interior and Secretary of the Interior
IGRA	Indian Gaming Regulatory Act
State	State of Florida
Tribe	Seminole Tribe of Florida
West Flagler	Plaintiffs-Appellees West Flagler Associates, Ltd. and Bonita-Fort Myers Corporation

STATUTES AND REGULATIONS

Except for those set out in the Addendum attached to this brief, all applicable statutes, etc., are contained in the addendum to the Tribe's opening brief in consolidated case No. 21-5265. ECF No. 1959733.

STATEMENT OF AMICUS CURIAE'S IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

Amicus Curiae the Seminole Tribe of Florida (the Tribe) is a party to the 2021 gaming compact (the 2021 Compact) between the Tribe and the State of Florida (the State) that the Tribe submits was erroneously ruled unlawful by the District Court in its November 22, 2021, Memorandum Opinion and Order. Joint App'x (JA) 554–79. As a party to the 2021 Compact, the Tribe has a fundamental and undeniable interest in upholding its continued validity.

The Tribe submits this brief as Amicus Curiae pursuant to Federal Rule of Appellate Procedure 29 and D.C. Circuit Rule 29. This brief provides the Court with additional background on the importance of the 2021 Compact between the Tribe and the State not briefed by Defendants-Appellants, the Secretary of the Interior and the U.S. Department of the Interior (together Interior). It also discusses an independent source of supporting authority in the Indian Gaming Regulatory Act (IGRA) for the 2021 Compact's inclusion of the online sports betting provisions, which Interior noted but did not fully explain in its brief. The Tribe believes this

additional background and the arguments included in the Tribe's brief will be helpful for the Court in its consideration of this case.

The Tribe conferred with counsel for the parties regarding the Tribe's participation as Amicus Curiae. Interior consents to the Tribe's filing of a timely amicus brief that conforms to all relevant rules, while Plaintiffs-Appellees, West Flagler Associates, Ltd., and Bonita-Fort Myers Corporation (together West Flagler) do not oppose this filing.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No party's counsel authored this brief in whole or in part, and no party or party's counsel, or person or entity other than the Tribe, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

The Tribe is not a party to the underlying suit. Instead, the Tribe is a necessary but indispensable party that could not be joined as a party in the proceeding below due to its sovereign immunity from suit. The Tribe has separately appealed the District Court's denial of its Motion for Limited Intervention, to which was attached its proposed Motion to Dismiss for failure to join the Tribe as a necessary and indispensable party under Rule 19 of the Federal Rules of Civil Procedure.

ARGUMENT

The gaming industry in the United States is moving inexorably online, particularly with respect to sports betting. The District Court's interpretation of IGRA effectively erects a wall around tribal lands and prevents tribes from keeping pace with online advancements in the gaming industry. Contrary to the District Court's interpretation, nothing in IGRA prevents a state and a tribe from agreeing to allow a tribal casino located on Indian lands to accept wagers from players physically located elsewhere within the state when placement of the wagers is permitted under state law and properly included in a compact.

In its opening brief, ECF No. 1959740, Interior argues that the placement of online sports betting wagers authorized as a matter of State law and received by the Tribe on its Indian lands may lawfully be addressed in the 2021 Compact because they fall within the scope of IGRA's catch-all compacting provision, 25 U.S.C. § 2710(d)(3)(C)(vii). The Tribe fully agrees with this argument and does not need to repeat it here.[1]

However, there is another strong basis of authority in IGRA to support the online sports betting provisions' inclusion in the 2021 Compact: IGRA's jurisdiction allocation provisions, 25 U.S.C. § 2710(d)(3)(C)(i)–(ii). While Interior noted that

[1] The Tribe briefed this argument, as well as the argument discussed herein, when it submitted the 2021 Compact to Interior for approval on June 21, 2021. JA 774–79.

the Tribe and State employed IGRA's jurisdiction allocation provisions to shift jurisdiction between them for regulatory purposes, IGRA's jurisdiction allocation provisions also provide an independent basis of authority for including the online sports betting provisions in the 2021 Compact.

In addition to providing background on development of the 2021 Compact, this brief explains to the Court how IGRA's jurisdiction allocation provisions serve as an independent basis of authority for inclusion of the online sports betting provisions in the 2021 Compact. This brief also corrects a misstatement by Interior in its brief, clarifying that the parties to the 2021 Compact understood that IGRA *alone* was not sufficient to authorize the gaming activity, and that a change to State law was also necessary.[2]

I. The 2021 Compact Between the State and Tribe Was an Historic Agreement that Resolved Years of Disputes over Gaming in the State and Preserved the Tribe's Ability to Continue to Generate Important Tribal Government Revenue

IGRA was a compromise between upholding the rights of tribes to conduct gaming on their own lands, explicitly recognized by the U.S. Supreme Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), and the

[2] The Tribe has separately appealed the District Court's denial of its Motion for Limited Intervention, to which it attached a Motion to Dismiss for failure to join the Tribe, a necessary but indispensable party under Rule 19 of the Federal Rules of Civil Procedure that could not be joined due to its sovereign immunity. It is the Tribe's position that the District Court's decision should be overturned by this Court for the reasons set out in the Tribe's brief on appeal alone.

conflicting strong desire of the states to regulate gaming within their borders. Congress intended the compacting process in IGRA to provide a method for both sovereign governments to memorialize an agreement governing the conduct of tribal gaming in the state, an agreement which would then need to be approved by the third sovereign involved, the United States. *See generally* 25 U.S.C. § 2710(d). In recognition of the sovereign and jurisdictional needs of the tribes and the states, Congress authorized them to specifically and broadly allocate jurisdiction between them, 25 U.S.C. § 2710(d)(3)(C)(i)–(ii), and to include gaming-related activities in their compacts, 25 U.S.C. § 2710(d)(3)(C)(vii). The 2021 Compact and the related amendments to the State's gaming laws are an example of exactly the type of cooperation between sovereigns that IGRA authorizes and encourages.

It must be remembered that, for tribes nationwide, gaming revenue is not ordinary business revenue, but it is rather a source of essential funds that is needed because most tribes do not receive sufficient federal funds from the United States to operate their governmental programs and are not able to generate such funds through a tax base as other sovereigns do to make up the difference. *See* Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. Rev. 759, 771–74 (2004). Congress structured IGRA to help fill that gap and to ensure that tribal gaming provides maximum resources to tribes and their members. IGRA sets out limited uses to which tribal gaming revenue

can be put, including "to fund tribal government operations or programs" and "to provide for the general welfare of the Indian tribe and its members." 25 U.S.C. § 2710(b)(2)(B)(i)–(ii). It also specifically requires that tribes be the primary beneficiaries of their gaming operations. *Id.* §§ 2702(2), 2710(b)(2)(A).

Tribal gaming has been an indispensable engine that has lifted tribes, including the Seminole Tribe, and their members from the poverty and destitution they have experienced at the hands of the United States and its citizens dating back to the nation's birth. It has allowed them to greatly develop their economies, operate modern tribal governments, and invest in their communities—Native and non-Native alike.

Yet as with everything else in the 21st-century economy of the United States, the gaming industry is inexorably and undeniably moving online. There is no doubt that tribes must be able to participate in online gaming in order to stay competitive and protect this indispensable source of essential government funding that they depend on.

II. Inclusion of the Online Sports Betting Provisions in the 2021 Compact Was Clearly Authorized by IGRA's Jurisdiction Allocation Provisions

Nearly all of the gaming activity associated with the online sports betting authorized by the 2021 Compact and associated State legislation takes place on the Tribe's Indian lands. The gaming software that enables the transactions to occur and

accepts players' wagers is found on servers located on the Tribe's Indian lands. The individual players' accounts, balances, winnings, and losses are maintained, tracked, and accounted for on servers on the Tribe's Indian lands. The calculation of odds, winnings, losses, and payment are all controlled by software on servers on the Tribe's Indian lands. Even some of the wagers are placed on the Tribe's Indian lands. Finally, the 2021 Compact provides that any disputes between patrons and the Tribe are to be adjudicated on the Tribe's Indian lands.

Because so much of the gaming activity involved in the online sports betting transaction occurs on the Tribe's Indian lands, the parties utilized IGRA's jurisdiction allocation provisions to include the wagers in the 2021 Compact and to shift regulatory jurisdiction over those wagers from the State to the Tribe. They accomplished this jurisdictional shift by deeming the wagers placed on the Tribe's Indian lands where received.

The parties' use of the "deeming" language in conjunction with IGRA's jurisdiction allocation provisions was not an attempt to avoid State law so that IGRA and the 2021 Compact *alone* authorized the online sports betting—an assertion by the District Court, JA 575–76, repeated by Interior, *see* ECF No. 1959740 at 28–29 ("Indeed, the Tribe's submission letter endorsed both possible readings of the

'deemed' language in the alternative.").[3] Instead, the 2021 Compact authorizes the Tribe to engage in the overall online sports betting transaction, as major portions of the transaction take place on the Tribe's Indian lands and thus must be covered in an IGRA compact. *See* 25 U.S.C. § 2710(d)(1)(C). However, the element of gaming activity occurring outside the Tribe's Indian lands—placement of some wagers—is, and must be, specifically permitted by State law.[4] The "deemed" language represents the parties' use of IGRA authority to include the wagers in the 2021 Compact and shift regulatory jurisdiction over them to the Tribe, and nothing more.

The 2021 Compact's online sports betting provisions fall squarely within the scope of IGRA's jurisdiction allocation provisions and thus were properly included in the 2021 Compact for that reason. It must be remembered that IGRA affirmatively anticipates and specifically authorizes states and tribes to allocate jurisdiction over regulation of a plethora of gaming-related activities between them through an IGRA compact. IGRA provides that compacts may include the following subjects:

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[3] According to Interior's brief, if IGRA's catch-all compacting provision is used as the primary vehicle for inclusion of the online sports betting provisions in the 2021 Compact, State law authorizes placement of the wagers, and the purpose of the "deeming" language is to shift regulatory jurisdiction from the State to the Tribe such that the regulatory requirements of the 2021 Compact apply to the wagers. *See* ECF No. 1959740 at 28–29. The Tribe agrees. But we note that State law and the "deeming" language serve similar roles when IGRA's jurisdiction allocation provisions are used as the primary vehicle.

[4] The parties negotiated corresponding changes to State law, which are discussed below.

> Any Tribal-State compact negotiated under [IGRA] 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*;
>
> . . . ; and
>
> (vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(C) (emphasis added).

The touchstone of the inquiry regarding whether a subject falls within the scope of IGRA's jurisdiction allocation provisions is whether the subject is "directly related to and necessary for" the regulation of the play of Class III gaming activities occurring on the tribe's Indian lands. Courts have rejected attempts by states to allocate jurisdiction in a compact over non-gaming-related activity, such as certain tort claims. *Navajo Nation v. Dalley*, 896 F.3d 1196, 1211 (10th Cir. 2018); *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254, 1266–67 (D.N.M. 2013); *see also Chicken Ranch Rancheria of Me-Wuk Indians v. California*, — F.4th —, No. 21-15751, 2022 WL 2978615, at *20 (9th Cir. July 28, 2022) (holding IGRA's catch-all compacting provision, 25 U.S.C. § 2710(d)(3)(C)(vii), does not authorize parties to include family, environmental, or tort law provisions in IGRA compacts).

But those same courts have recognized that IGRA clearly authorizes allocation of jurisdiction over "activities actually involved in the *playing* of the game." *Navajo Nation*, 896 F.3d at 1207; *see also Pueblo of Santa Ana*, 972 F. Supp. 2d at 1264 (stating IGRA authorizes jurisdiction allocation for "resolution of issues involving the licensing and regulation of class III gaming"); *Chicken Ranch*, 2022 WL 2978615, at *8 (citing 25 U.S.C. § 2710(d)(3)(C)(i)–(ii)) (stating IGRA's jurisdiction allocation provisions "pertain to the licensing and regulation of gaming activities and the enforcement of the same").

Congress recognized that allowing states and tribes to allocate jurisdiction over specific gaming-related activities would be necessary if the new complex compacting requirements were to be workable. *See, e.g.*, S. Rep. No. 100-446, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084 ("A compact may allocate most or all of the jurisdictional responsibility to the tribe, to the State or to any variation in between."). Congress also recognized that compacting parties would consider their own expertise and existing regulatory mechanisms when deciding which entity should exercise jurisdiction over particular gaming activities encompassed within an IGRA compact, and that some states may have no interest in regulating such gaming. *See, e.g.*, 134 Cong. Rec. 24024 (1988) (statement of Sen. Evans) ("It is entirely conceivable that a particular State will have no interest in operating any part of the regulatory system needed for a class III Indian gaming activity . . . . Each compact

will need to consider, among other items, the experience and expertise of the particular tribe and State with gaming, and the existence of regulatory mechanisms within each government."); *id*. (statement of Sen. Inouye) ("[T]he idea is to create a consensual agreement between the two sovereign governments and it is up to those entities to determine what provisions will be in the compacts. . . . Some tribes can assume more responsibility than others and it is entirely conceivable that a State may want to defer to a tribal regulatory authority and maintain only an oversight role.").

As so much of the gaming activity making up the online sports betting transaction occurs on the Tribe's Indian lands, regulating placement of the wagers by patrons physically located outside the Tribe's Indian lands is directly related to and necessary for the regulation of the remainder of that gaming activity. The wagers are activities actually involved in the *playing* of the game. As a result, they clearly fall within the scope of IGRA's jurisdiction allocation provisions.

Because jurisdiction over the placement of any wager occurring off of Indian lands would normally fall to the State, the compacting parties used IGRA's jurisdiction allocation provisions to allocate the State's jurisdiction over that specific aspect of the online sports betting transaction to the Tribe for regulatory purposes. The parties intended the Tribe to regulate placement of the wagers under the regulatory requirements contained in the 2021 Compact. They accomplished this jurisdictional shift for purposes of the 2021 Compact by including language deeming

the wagers associated with online sports betting to occur where received and processed on the Tribe's Indian lands. The 2021 Compact provides that:

> All [sports betting] wagering shall be deemed at all times to be exclusively conducted by the Tribe at its facilities where the sports book(s), including servers and devices to conduct the same, are located, including any such wagering undertaken by a Patron physically located in the State but not on Indian Lands using an electronic device connected via the internet, web application or otherwise, including, without limitation, any Patron connected via the internet, web application or otherwise of any Qualified Pari-mutuel Permitholder(s) and regardless of the location in Florida at which a Patron uses the same.

JA 71 (2021 Compact Part III.CC.2); *see also* JA 76 (2021 Compact Part IV.A). As a result, the Tribe exercises regulatory jurisdiction, under the provisions of the 2021 Compact, over the entire online sports betting transaction from start to finish.

However, to legally effectuate this jurisdictional shift, the State also enacted tandem State legislation. The State used similar "deeming" language to shift its regulatory jurisdiction over placement of the wagers to the Tribe, stating:

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

JA 136 (S.B. 2-A, § 2 (Fla. 2021) (codified at Fla. Stat. § 285.710(13)(b)(7))).

The State also authorized placement of the wagers as a matter of State law as long as the wagers were permitted under the terms of the 2021 Compact.[5] To do so, it enacted State legislation providing that "[g]ames and gaming activities authorized under this subsection and conducted pursuant to a gaming compact ratified and approved under subsection (3) do not violate the laws of this state." JA 136 (S.B. 2-A, § 2 (Fla. 2021) (codified at Fla. Stat. § 285.710(13))). Online sports betting wagers were specifically enumerated. JA 136 (S.B. 2-A, § 2 (Fla. 2021) (codified at Fla. Stat. § 285.710(13)(b)(7)).

The parties to the 2021 Compact understood that—regardless of whether IGRA's catch-all compacting provision or IGRA's jurisdiction allocation provisions were relied upon to support the online sports betting provisions' inclusion in the 2021 Compact—a combination of State law and IGRA would be necessary to make legal the underlying gaming activity. In neither case is IGRA alone sufficient to allow the Tribe to accept wagers from patrons located beyond its Indian lands. It is for this reason that the State legislature not only ratified the 2021 Compact but also amended State law to permit the gaming. Had IGRA been a sufficient source of authorization, the parties would not have sought amendments to State law.

[5] The 2021 Compact and the tandem State legislation comply with Amendment 3 of the State's Constitution, a position expressed in the 2021 Compact itself, JA 59 (2021 Compact, Part II.I), which the State Legislature ratified, JA 133 (S.B. 2-A, § 1 (Fla. 2021) (codified at Fla. Stat. § 285.710(3)(b))).

The Tribe, as a negotiating party to the 2021 Compact, explained the need for both the 2021 Compact language and State law in its submission to Interior on June 21, 2021. JA 775 ("Here, in sharp contrast, the specific off-reservation activity involved would be separately permitted by State law and that would remove the potential concern that the off-reservation actions contemplated would, in themselves, violate State law. IGRA, as federal law, would authorize the entire gaming activity as provided by the 2021 Compact."). Indeed, the Tribe repeatedly explained that the 2021 Compact is different from other tribal attempts to engage in electronic gaming because here State law permits the placement of the wagers. *E.g.*, JA 781 ("[U]nlike the situation in *Santa Ysabel*, the player activities outside the Tribe's Indian lands that [] are contemplated under the 2021 Compact are expressly permitted by State law."). The Tribe further explained the "deemed" language in the 2021 Compact and associated State legislation as a "jurisdictional agreement" that allows the online sports betting transaction to be "solely *regulated* under the applicable provisions of IGRA" and the 2021 Compact by the Tribe. JA 774–75 (emphasis added).

Allocating jurisdiction by deeming wagers placed where received is a common tool used by states to deal with the regulation of online and other commercial transactions. Many states deem online wagers to be placed where they are received in order to streamline regulation and also to comply with geographic

limitations under state law regarding the location of legal gaming. For example, the State of New Jersey authorizes online gaming within the state through a similar "deeming" provision that provides that "[i]nternet gaming in this State shall be deemed to take place where a casino's server is located in Atlantic City regardless of the player's physical location within this State." N.J. Stat. Ann. § 5:12-95.20; *see also* N.J. Assemb. Comm. Statement, A.B. 2578 (May 10, 2012). Its constitution limits gaming to Atlantic City. N.J. Const. art. IV, § 7, ¶ 2(D). The State of Rhode Island also followed this approach. 42 R.I. Gen. Laws Ann. § 42-61.2-1(21) (defining "online sports wagering" so that "wagers are accepted by a server-based gaming system located at the premises of a hosting facility authorized to accept sports wagers and administer payoffs of winning sports wagers; all such wagers shall be deemed to be placed and accepted at the premises of a hosting facility"); R.I. Const. art. VI, § 22 (requiring voter referendum to expand gambling types or locations). Rhode Island's approach has already been upheld as lawful. *Harrop v. R.I. Div. of Lotteries*, No. PC-2019-5273, 2020 WL 3033494, at *13 (R.I. Super. Ct. June 1, 2020) ("[T]he Court finds that the 2019 Online Sports Wagering Legislation does not expand the locations of gambling which are permitted within the state and thus did not require voter approval pursuant to article 6, section 22 of the Rhode Island Constitution."), *appeal filed*, No. SU-2020-0183-A (R.I. July 29, 2020). There are other such examples. *See, e.g.*, Mich. Comp. Laws Ann. § 432.304(2); W.

Va. Code Ann. § 29-22E-15(f); N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 1367-a(2)(d); 006.06.21 Ark. Code R. § 013(20.055).

Similarly, Florida, like other states, has enacted numerous laws deeming commercial transactions to occur in one location or another as a matter of law for tax or other purposes.[6] Such laws, like the State law ratifying and implementing the 2021 Compact, are common and used to address the practical challenges of regulating commerce occurring in more than one jurisdiction by deeming a transaction to occur in one location or the other as a matter of law.

Interior in its deemed approval letter agreed that IGRA's jurisdiction allocation provisions could serve as the basis for inclusion of the online sports betting provisions in the 2021 Compact.[7] In its letter, it recognized that the 2021 Compact's online sports betting provisions presented an issue of first impression, and that they were unlike prior attempts by other tribes to unilaterally conduct online

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[6] *See, e.g.*, Fla. Stat. § 456.47(5) (deeming delivery of telehealth services to occur either where act was performed or in patient's county of residence for jurisdiction purposes); Fla. Stat. § 212.054(3) (deeming motor vehicle sales to occur in county where purchaser resides for determining applicability of county sales tax); Fla. Stat. § 365.172(9)(d) (deeming transactions for prepaid wireless services to occur in county where consumer's shipping address is located for tax purposes); Fla. Stat. § 212.05(1)(e)(1)(a)(II) (deeming transactions for prepaid calling arrangements to occur at customer's shipping address for tax purposes).

[7] Interior concluded in its deemed approval letter that the online sports betting provisions were also lawfully included in the 2021 Compact under IGRA's catch-all compacting provision because the wagers were subject to State law and were sufficiently gaming-related. JA 215, 220. Interior makes this argument throughout its opening brief. ECF No. 1959740.

gaming without the consent of the state pursuant to a compact and where state law prohibited the contemplated form of online gaming. JA 219–20. Interior acknowledged that, while Congress limited the scope of subjects that can be addressed in a compact, IGRA specifically allows tribes and states to negotiate the allocation of criminal and civil jurisdiction over subjects directly related to the regulation of tribal gaming. JA 220 (citing 25 U.S.C. § 2710(d)(3)(C)(i)–(ii); S. Rep. No. 100-446, at 14). It noted that the allocation of jurisdiction in the 2021 Compact was specifically authorized by these provisions of IGRA, JA 220–21, and it stated that it "would not read restrictions into IGRA that do not exist," JA 221.

The District Court without specific analysis summarily dismissed Interior's reasoned conclusion encompassed within its deemed approval letter. JA 574–75. The District Court concluded the 2021 Compact violated IGRA by authorizing gaming activity off Indian lands, JA 572, broadly asserting that IGRA's jurisdiction allocation provisions "concern states and tribes' regulatory responsibilities, [and] say nothing about whether gaming activity occurs on 'Indian lands,'" JA 574. But the plain language of IGRA's jurisdiction allocation provisions extends to all "criminal and civil laws and regulations of the Indian tribe or the State" when those laws and regulations are "directly related to, and necessary for, the licensing and regulation of such [gaming] activity." 25 U.S.C. § 2710(d)(3)(C)(i); *see also id.* § 2710(d)(3)(C)(ii). There is no language limiting the scope of these provisions to

activities occurring on Indian lands or preventing the shifting of regulatory jurisdiction over activities occurring outside Indian lands, especially when such a shift is expressly authorized and implemented by state law. Jurisdiction necessarily has a territorial component, so the fact that IGRA allows jurisdiction to be allocated between states and tribes necessarily means that states may allocate their regulatory jurisdiction to tribes over activities within states' usual territorial boundaries when those activities are sufficiently related to Class III gaming activities that take place on a tribe's Indian lands.

While a number of courts have rejected attempts by tribes to unilaterally conduct online gaming where the servers are located on Indian lands but the wager occurs off of Indian lands, all of those cases involved situations where the placement of the wager was unlawful under state law and where there was no IGRA compact covering the gaming, much less one that utilized IGRA's jurisdiction allocation provisions. *See, e.g.*, *AT&T Corp. v. Coeur D'Alene Tribe*, 45 F. Supp. 2d 995, 1004 (D. Idaho 1998), *rev'd on other grounds*, 283 F.3d 1156 (9th Cir.), *amended and superseded by* 295 F.3d 899 (9th Cir. 2002); *California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960, 967–69, 968 n.15 (9th Cir. 2018); *State ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1108–09 (8th Cir. 1999).

Importantly, the courts in those cases indicated the outcome would have been different had the tribes and states negotiated an agreement to allow the gaming. In

Coeur D'Alene, the court noted that "IGRA does not contemplate that a tribe's class III gaming operation can be operated in a state without first addressing, through the negotiation of a compact, that state's legitimate interest in regulating gaming activities within its borders." 45 F. Supp. 2d at 1002. In *Iipay Nation*, the tribe sought to conduct online wagering from locations off the tribe's Indian lands where the wagers were unlawful. *California v. Iipay Nation of Santa Ysabel*, No. 14-cv-02724, 2016 WL 10650810, at *1 (S.D. Cal. Dec. 12, 2016), *aff'd*, 898 F.3d 960 (9th Cir. 2018). The court noted that the case was unlike another situation where the Iowa Tribe of Oklahoma and the State of Oklahoma entered into an IGRA compact that allowed online wagers placed off Indian lands, but only from jurisdictions where such wagering was lawful. *Id.* at *12.[8]

Here, the Tribe and the State have utilized IGRA's jurisdiction allocation provisions to include within the 2021 Compact the entire online sports betting transaction so that the Tribe may regulate the transaction from start to finish under the terms of the 2021 Compact. The State has enacted tandem State legislation both carrying out the regulatory jurisdiction shift and authorizing placement of the wagers as a matter of State law as long as they are permitted under the 2021 Compact.

[8] The arbitration award upholding that compact's online gaming provisions was later certified by a federal court. *Iowa Tribe of Okla. v. Oklahoma*, No. 5:15-CV-01379, 2016 WL 1562976, at *3 (W.D. Okla. Apr. 18, 2016).

III. The District Court Failed to Consider the Indian Canon of Construction or Grant Interior's Letter the Deference It Was Due

The District Court reviewed Interior's deemed approval letter *de novo* and failed to give any regard to the well-established rule that statutes must "be construed liberally in favor of the Indians." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *see also Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444–45 (D.C. Cir. 1988) ("[I]f the [statute] can reasonably be construed as the Tribe would have it construed, it *must* be construed that way."). The District Court failed to even mention this canon, let alone give it the consideration required in this Circuit.

The District Court also failed to give Interior's deemed approval letter any deference, where its interpretation of IGRA should have received at least *Skidmore* deference. *See* Kevin K. Washburn, *Agency Pragmatism in Addressing Law's Failure: The Curious Case of Federal "Deemed Approvals" of Tribal–State Gaming Compacts*, 52 U. Mich. J. L. Reform 49, 90–93 (2018) (referring to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

CONCLUSION

The Tribe respectfully requests that the Court find the online sports betting provisions in the 2021 Compact comply with IGRA for the reasons set forth in this amicus brief and in Interior's brief.

Respectfully submitted this 24th day of August, 2022.

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CERTIFICATE OF COMPLIANCE WITH D.C. CIR. RULE 29

Pursuant to D.C. Cir. Rule 29(d), undersigned counsel certifies that joinder in a single brief with any other amicus would be impracticable and a separate amicus brief of the Seminole Tribe of Florida is necessary because the Tribe is a sovereign Tribal government and because the Tribe is uniquely positioned to present its perspective as the singular Tribal governmental party to the compact in dispute in this case.

Dated: August 24, 2022

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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I certify that this brief complies with the type volume limitations of Fed. R. App. P. 29(a)(5) because this brief contains 4,969 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) and this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point font in the Times New Roman style.

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2022, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

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