

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

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

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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.*

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

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**BRIEF OF THE NATIONAL INDIAN GAMING ASSOCIATION, THE  
UNITED SOUTH AND EASTERN TRIBES SOVEREIGNTY  
PROTECTION FUND, THE CALIFORNIA NATIONS INDIAN GAMING  
ASSOCIATION, THE ARIZONA INDIAN GAMING ASSOCIATION AND  
SEVERAL FEDERALLY RECOGNIZED INDIAN TRIBES  
AS AMICI 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

- The National Indian Gaming Association, The United South and Eastern Tribes Sovereignty Protection Fund, The California Nations Indian Gaming Association, The Arizona Indian Gaming Association and ten federally recognized Indian Tribes (Confederated Tribes of Siletz Indians, Coquille Indian Tribe, Estom Yumeka Maidu Tribe of the Enterprise Rancheria, Guidiville Rancheria of California, Redding Rancheria, Rincon Band of Luiseno Indians, Tunica-Beloxi Tribe of Louisiana, Wampanoag Tribe of Gay Head (Aquinnah), Wilton Rancheria, and the Yuhaaviatam of San Manuel Nation), *amici curiae*
- Seminole Tribe of Florida, *amicus curiae*
  - (Putative limited-intervenor-appellant in related case No. 21-5265)
  - (motion for leave to file pending)
- 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, 2021 WL 5492996 (D.D.C. Nov. 22, 2021) (J. Dabney L. Friedrich), Memorandum Opinion and Order

**RELATED CASES***Pending in the D.C. Circuit:*

- *W. Flagler Assocs., Ltd. v. Haaland*, 573 F. Supp. 3d 260, No. 1:21-cv-02192, 2021 WL 5492996 (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, 2021 WL 5492996 (D.D.C. Nov. 22, 2021) (J. Dabney L. Friedrich) (dismissed as moot due to decision in *W. Flagler Assocs., Ltd. v. Haaland*, 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*, No. 4:21-cv-00270 (N.D. Fla. Oct. 18, 2021) (J. Allen Winsor) (Order of Dismissal dismissing case due to plaintiffs' lack of standing), *appeal docketed*, No. 21-14141 (11th Cir. Nov. 29, 2021), *voluntary dismissal granted* (11th Cir. Dec. 20, 2021).

Dated: August 24, 2022

s/ Scott Crowell

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**GLOSSARY OF ABBREVIATIONS**

<b>ABBREVIATION</b>	<b>DEFINITION</b>
2021 Compact	Class III Gaming Compact between the State of Florida and the Seminole Tribe of Florida approved in 2021
Department	U.S. Department of the Interior
IGRA	Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq.
NIGC	National Indian Gaming Commission
West Flagler	Plaintiffs-Appellees West Flagler Associates, Ltd. and Bonita-Fort Myers Corporation

**STATEMENT OF THE IDENTITY OF THE *AMICI CURIAE*,  
THEIR INTEREST IN THE CASE, AND THE SOURCE OF *AMICI  
CURIAE* AUTHORITY TO FILE**

The *Amici*, the National Indian Gaming Association (“NIGA”), the United South and Eastern Tribes Sovereignty Protection Fund (“USET SPF”), the California Nations Indian Gaming Association (“CNIGA”), the Arizona Indian Gaming Association (“AIGA”) and several federally recognized Indian Tribes (collectively referred to as “*Amici Tribes*”), submit this brief as *amici curiae* pursuant to Fed. R. App. P. 29 and Circuit Rule 29. The *Amici Tribes* conferred with counsel for the parties regarding the *Amici Tribes*’ participation as *amici curiae*, and the parties do consent to the *Amici Tribes*’ filing of a timely *Amici* Brief that conforms to all relevant rules. This brief provides this Court with additional background and argument in addition to, and not repetitive of, the arguments made in the Opening Brief of Federal Appellants, ECF No. 1959740, or the *amicus* brief submitted by putative-limited-intervenor below, the Seminole Tribe of Florida (“Seminole Tribe”), ECF No. 1960550. Although the *Amici Tribes* concur and join in the analysis submitted by the Federal Appellants and the Seminole Tribe, the *Amici Tribes* believe the additional background and argument included in the *Amici Tribes*’ brief will be helpful for this Court’s deliberation of this case.

*Amicus*, NIGA is an inter-tribal non-profit organization of one hundred and twenty federally recognized Indian tribes that operate gaming enterprises throughout

Indian Country. NIGA also has non-voting members representing organizations, tribes, and businesses engaged in tribal gaming enterprises around the country. NIGA's mission is to advance the economic, social, and political interests of Indian people. NIGA strives to preserve and promote tribal sovereignty, self-sufficiency, and economic development by advocating for tribally owned governmental gaming enterprises. In pursuit of these goals, NIGA operates as an educational and public-policy resource for tribes, policy makers, and members of the public concerning Indian gaming issues and tribal community development.

*Amicus*, USET SPF is a non-profit organization representing thirty-three federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico. USET SPF works at the regional and national level to educate federal, state, and local governments about the unique historic and political status of its member Tribal Nations.

*Amicus*, CNIGA is a non-profit association comprised of forty-two federally recognized tribal governments located throughout California and is dedicated to the protection of tribal sovereignty and the inherent right of tribes to have gaming on Indian lands. CNIGA serves as a coordinating organization for legislative and communications efforts on behalf of its tribal members, as well as a repository of information on tribal gaming in California.

*Amicus*, AIGA is a non-profit association comprised of eight federally recognized tribal governments. AIGA is committed to protecting and promoting the welfare of Tribes striving for self-reliance by supporting tribal gaming enterprises on Arizona Indian lands. AIGA is deeply committed to maintaining and protecting Indian sovereign governmental authority.

NIGA, USET SPF, CNIGA and AIGA all have a strong interest in this case because of its potential to have a significant impact on the member tribes' rights regarding the ability to offer gaming activities as a means to generate needed governmental revenue. Such revenue is crucial to provide essential tribal programs and to reach the goals of self-governance and self-sufficiency.

*Amici* federally recognized Tribes are ten "Indian tribes" within the meaning that term is given in IGRA. 25 U.S.C. § 2703(5): (1) Confederated Tribes of Siletz Indians, (2) Coquille Indian Tribe, (3) Estom Yumeka Maidu Tribe of the Enterprise Rancheria, (4) Guidiville Rancheria of California, (5) Redding Rancheria, (6) Rincon Band of Luiseno Indians, (7) Tunica-Biloxi Tribe of Louisiana, (8) Wampanoag Tribe of Gay Head (Aquinnah), (9) Wilton Rancheria, and (10) Yuhaaviatam of San Manuel Nation. Each is a separate and distinct tribal government, possessing the sovereign authority to govern gaming activities on its Indian lands, including the regulation and operation thereof. Each has a direct and immediate interest in securing substantive rights regarding the governance of

gaming activities affirmed by the Supreme Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 212-221 (1987) and codified by Congress in the passage of IGRA. And each knows that the District Court's decision in this matter, if affirmed on appeal, poses a very real threat to the rights of all Indian tribes to offer statewide internet sports betting in those states that authorize such gaming for any person, organization or entity for any purpose, which in turn poses a very real threat to the *Amici Tribes'* ability to achieve the goals of tribal self-sufficiency and self-governance intended by Congress in the passage of IGRA. 25 U.S.C. 2702(1).

Complete lists of those tribes which are members of *Amicus* NIGA, *Amicus* USET SPF, *Amicus* CNIGA, *Amicus* AIGA, as well as a list of the ten *Amici* federally recognized Indian Tribes, are included in Appendix A.

**STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS;  
CERTIFICATION OF NECESSITY FOR SEPARATE *AMICI* BRIEFS**

The *Amici Tribes* paid the entire cost of this brief, and undersigned counsel, which do not represent any party in this appeal, authored this brief. None of the *Amici Tribes* are a party to the underlying suit. The *Amici Tribes* are aware that purported-limited-intervenor Seminole Tribe is seeking leave to submit an *amicus* brief. Legal counsel for *Amici Tribes* consulted with legal counsel for the Seminole Tribe, which is a member of both *Amicus* NIGA and *Amicus* USET SPF, and concluded that a combined *amici* brief is not practicable. *Amici Tribes* certify that a separate brief is necessary because *Amici Tribes'* interests and arguments are

directed to those issues with national implications beyond Florida, while *Amici Tribes* understand the Seminole Tribe's *amicus* brief to address issues unique or specific to the structure of the compact and to the State of Florida.

## ARGUMENT

Statewide internet sports betting is rapidly becoming commonplace as state, after state, after state enact laws authorizing such gaming for persons, organizations and entities for various purposes, mostly state lotteries, sports franchises and commercial casinos and operators for profit. In the last four years alone, the number of states authorizing sports betting has grown from four to thirty-two, and many more states are positioned to authorize such gaming activities within the next year. This emerging market, with an estimated value between \$ 80 billion and \$380 billion per year, is properly accessible to Indian tribes under IGRA, through negotiated compacts and compact amendments between tribes and those states newly authorizing such gaming. But the District Court Decision at issue in this appeal threatens to exclude tribes from this emerging market. The *Amici Tribes* concur with the analysis in the Opening Brief of Federal Appellants and in the *amicus* brief submitted by the purported-limited-intervenor Seminole Tribe of Florida, but are compelled to submit this *Amici* Brief to provide additional argument and context not raised in the other briefs submitted in this matter.

This *Amici* Brief provides context to Congress' intent in the passage of IGRA regarding tribes' rights to offer those gaming activities that a state permits for any person, organization or entity for any purpose. This *Amici* Brief informs the Court with detail and context of the rapid expansion of statewide internet sports betting. Importantly, this *Amici* Brief provides extensive detail and concrete examples of compacts negotiated between tribes and states and approved by Federal Appellants over the past 30 years under IGRA wherein critical elements of gaming activities (prize, chance and consideration) occur *off* of Indian lands. These examples reveal the most fundamental error of the District Court: IGRA's Indian lands requirement establishes that IGRA applies if *any* critical elements of the gaming activity occur on Indian lands. The District Court is simply wrong in holding that IGRA requires *all* critical elements of the gaming activity to occur on Indian lands. Finally, if this Appeals Court does not reverse the decision of the District Court, the *Amici Tribes* propose a narrow ruling, which would affirm the District Court's result without interpreting IGRA in a manner that deprives tribes of advancing their goals of tribal self-governance and self-sufficiency as states move rapidly to authorize statewide internet sports betting.

**I. Congressional intent in the passage of IGRA: Congress intended for tribes to be able to offer all forms of gaming that the surrounding state allows for any person, organization or entity for any purpose.**

*Amici Tribes* concur with the United States’ description of the history and purpose of IGRA in its Opening Brief For Federal Appellants filed in this matter at pp. 4-6, but expands on that analysis in one key respect: the states’ obligation to compact for “permitted” gaming, which should be considered as this Appeals Court deliberates the merits of the appeal. The Supreme Court in *Cabazon Band* made clear that states cannot interfere with tribal governance of gaming activities that are otherwise permitted in a state, and even though California was vested with some jurisdiction over Indian lands pursuant to Public Law 280, California could not impose its civil/regulatory scheme regarding gaming activities on the Cabazon Band. *Cabazon Band*, 480 U.S. at 212-221 (1987). Congress codified this important language:

Findings: . . . (5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. § 2701(5).

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are . . . (B) located in a state ***that permits such gaming for any purpose by any person, organization, or entity***, and . . .

25 U.S.C. § 2710(d)(1)(B) (emphasis added). Courts have since consistently interpreted this language to prevent states from using IGRA or the compacting process to deny tribes the ability to offer such permitted gaming activities. *Mashantucket-Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1029 (2nd Cir. 1990) (“The Senate Committee stated that it anticipated that the federal courts would rely on the *Cabazon* distinction between regulatory gaming schemes and prohibitory laws.”); *Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1086 (7th Cir. 2015) (“States may choose to bypass this regulatory scheme if they are willing to ban gaming across the board. But the states lack statutory authority to deny an Indian tribe the ability to offer gaming that is roughly equivalent to what the state allows for its residents”); *Northern Arapaho Tribe v. Wyoming*, 389 F.3d 1308, 1311 (10th Cir. 2004) (“we conclude that Wyoming must negotiate with the Tribe under either approach<sup>1</sup> regarding the full gamut of any ‘game, wager or transaction’”); *Fort Independence Indian Community v. California*, 679 F.Supp.2d 1159, 1183 (E.D. Cal. 2009)(“[I]n light of the fact that the State now ‘permits such gaming for any purpose

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<sup>1</sup> There is some inconsistency in the interpretation of “permitted gaming” over whether a state, by permitting one form of gaming, is obligated to compact for different, but similar forms of gaming. Compare, *Dairyland Greyhound Park v. Doyle*, 719 N.W.2d 408, 463 (Wisc. 2006) (concurring opinion), with *Rumsey Indian Rancheria v. Wilson*, 64 F.3d 1250, 1256-58 (9th Cir. 1994). But that nuance is not at issue here: once a state has authorized a particular form of gaming activity, namely statewide internet sports betting, the state, at a minimum, is obligated to compact with tribes to offer the same gaming activity.

by any person, organization or entity, IGRA compels the State to negotiate on this issue.”); *Dewberry v Kulongoski*, 406 F.Supp.2d 1136, 1151 (D. Ore. 2005) (“if the state allows a particular game for any purpose, it must negotiate with the Tribe for that specific game”); *Lac du Flambeau Band v. Wisconsin*, 770 F.Supp. 480, 488 (W.D. Wis. 1991) (permitted games “must be the subject of negotiations”).

Here, the Seminole Tribe and the State of Florida reached a compact that included a form of gaming activity that had previously been a prohibited gaming activity. Such a compact allowing for a game expressly prohibited by state law may possibly be reached without a change in state law. *See, e.g., Dalton v. Pataki*, 835 N.E.2d 1180, 1189 (N.Y. App. 2005) (upholding compact for slot machines even though such games were prohibited at the time by the State Constitution). But that is not at issue here. Florida changed its state law both in the context of legislation ratifying the Seminole Tribe’s 2021 Compact and in the passage of enabling legislation. Fl. Stat. § 285.710(13)(b). As discussed below, the *Amici Tribes* are confronted, or are soon to be confronted, with situations wherein state law expressly authorizes statewide internet sports betting for other persons, organizations or entities. Once Florida enacted the enabling legislation, Florida bound itself under IGRA with the obligation to compact with the Seminole Tribe for the operation of statewide internet sports betting. It is in this context, that the District Court’s decision is so troubling to the *Amici Tribes*.

Some may question whether IGRA precludes a state from providing tribes with exclusive rights to offer particular forms of gaming. That issue was raised in West Flagler's Complaint, but was not the basis for the District Court's decision. *Amici Tribes* concur with the analysis of the Opening Brief for Federal Appellants at 41-42, and further note that every court to address the issue has found that states may choose as a matter of policy to enter into such exclusive relationships. *See, e.g., Artichoke Joes California Grand Casino v. Davis*, 353 F.3d 712 (9th Cir. 2003) (California Compacts: slot machines and banked card games); *Flynt v. California Gambling Control Commission*, 104 Cal.App.4th 1125 (Cal. App. 2002) (same); *McCracken and Amick, Inc. v. Perdue*, 687 S.E.2d 690 (N.C. App. 2009) (North Carolina Compacts: casino style games); *Knox v. Idaho*, 223 P.3d 266 (Idaho 2010) (Idaho Compacts: Tribal video gaming machines).

This aspect of IGRA, the scope of permitted gaming, is critical to this appeal. To the extent the District Court interpreted IGRA to prevent a Tribe from offering statewide internet sports betting in a state wherein any person, organization or entity (including other Indian tribes) is authorized to offer statewide internet sports betting for any purpose, the District Court not only erred, but also defied the Congressional intent of IGRA, and stripped tribes of a fundamental sovereign right confirmed in *Cabazon Band*. The District Court reaches the opposite result intended by Congress – affirmance will enable states to exclude Indian tribes from the very gaming market

Congress intended for tribes to access, consistent with the tribes' authority under IGRA and *Cabazon Band*. As the Opening Brief for Federal Appellants points out at pp. 5-6, the compacting process is the means by which tribes secure the ability to offer those games that the state permits for any person, organization or entity for any purpose. As discussed below, statewide internet sports betting, wherein the operator accepts wagers over the internet, including laptop computers and cell phones, is rapidly becoming available in every corner of this Country. If the District Court decision stands, IGRA may no longer be the vehicle to promote tribal self-governance and self-sufficiency; it could become the obstacle that keeps tribes on the outside, looking in.

**II. Statewide internet sports betting is soon to be allowed almost anywhere throughout this Country, except for a few isolated States.**

Statewide internet sports betting quickly became commonplace across the United States within just the last four years since the Supreme Court struck down the Professional and Amateur Sports Protection Act ("PASPA") in 2018 as unconstitutional. *Murphy v. National College Athletic Ass'n*, 138 S.Ct. 1461 (2018). Prior to PASPA being stricken, sports betting of any kind was prohibited as a matter of federal law, except in four grandfathered states (Nevada, Delaware Montana and Oregon), 28 U.S.C. § 3704(a)(2), and of those, only Nevada had a robust industry.

Thirty-two states now authorize sports betting. Of those thirty-two states, twenty-four have Indian lands within their boundaries. Of those thirty-two states, twenty-seven have authorized wagers to be made online from anywhere within the state's boundaries. Of those twenty-seven states, twenty-one (Arizona, Colorado, Connecticut, Florida, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Montana, Nebraska, Nevada, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Virginia, and Wyoming) have Indian lands within their boundaries. The massive expansion over the past four years is poised to continue. Legislation or ballot measures are pending in nearly every other state, including California, the largest untapped market and home to one hundred and ten federally recognized Indian tribes, such that within the next three years, statewide internet sports betting is likely to be allowed almost anywhere within the United States. This phenomenal growth industry is now estimated to be worth between \$80 billion and \$380 billion annually. See John T. Holden, Marc Edelman, *A Short Treatise on Sports Gambling and the Law: How America Regulates its Most Lucrative Vice*, 2020; 907 Sports Gambling and the Law, 2020 Wisc. L. Rev 907, 921 (2020). IGRA sets forth the process for tribes to participate in this emerging market, entitling tribes within those twenty-one states (and rapidly growing) to offer the same games to their patrons. Of those twenty-one states, only Florida and Colorado have entered into compacts that

allow for tribes to offer statewide internet sports betting under IGRA<sup>2</sup>, and in the case of Colorado, it was by operation of law under the terms of compacts negotiated in the 1990s that became operative when the State authorized statewide internet sports betting in the wake of the *Murphy* decision.

**III. Since the passage of IGRA, compacts have frequently and commonly been approved for games where critical elements of the game occur *OFF* of Indian lands.**

Over a span of thirty years since the passage of IGRA in 1988, compacts routinely have been approved authorizing tribes to offer gaming activities - specifically off-track betting, lotteries and sports betting - wherein a critical element of the gaming activity, the element of chance, occurs *off* of Indian lands. The District Court wrongly concludes that “IGRA authorizes sports betting *only on* Indian lands”. *West Flagler Associates v. Haaland*, 573 F.Supp.3d 260, 272 (D.D.C. 2021) (emphasis added). Throughout its decision, the District Court references IGRA’s “Indian lands” requirements as if they prohibit any critical element of the gaming

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<sup>2</sup> Four states, Arizona, Connecticut, Maine and Michigan, accommodate for tribes to compete in the new statewide internet sports betting market, but outside of IGRA and only off of Indian lands, without the protections provided by IGRA, including IGRA’s requirements that the Tribe be the primary beneficiary of the gaming activity, 25 U.S.C. §§ 2710(b)(2)(A) and 2710(d)(2)(A), and receive at least sixty percent (60%) of the net revenue generated from the activity, 25 C.F.R § 522.10(c), and IGRA’s prohibition of state taxation of tribal gaming revenue, 25 U.S.C. § 2710(d)(7)(B)(iii)(II). As discussed above, these statutory structures treating tribes as non-sovereign corporations, are inconsistent with Congressional intent in the passage of IGRA.

activity from occurring off of Indian lands. They do not. These approved compacts reveal the error of the District Court in requiring that the wager (the critical element of consideration) occur on Indian lands.

A review of the tribal-state gaming compacts approved by the Department since IGRA's enactment in 1988, all available on the official web page of the Department's Office of Indian Gaming at [www.bia.gov/as-ia.oig/gaming-compacts](http://www.bia.gov/as-ia.oig/gaming-compacts), confirms that off-track betting is and has always been an integral part of the gaming opportunities available to patrons of tribal gaming facilities. Of the twenty-one states that have reached gaming compacts with tribes within their borders, which compacts have been approved by the Department, fifteen states expressly authorize off-track betting [Arizona, California, Colorado, Connecticut (conditional), Idaho, Iowa, Mississippi (conditional), Montana, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, and Washington State], often making express reference to "simulcasting" or "satellite" transmission of the live track signal. One more State (Louisiana), while not expressly mentioning off-track betting, allows for it with the operative compact language. Compacts with tribes in four states (Michigan, Minnesota, New Mexico and Nevada) are silent regarding off-track betting. Only two states (Massachusetts and Kansas) include language expressly prohibiting off-track betting. At least three states (California, Oklahoma and South Dakota) have negotiated stand-alone compacts that only address and authorize off-

track betting. Indeed, Oklahoma and California both negotiated for only off-track betting as the initial tribal-state gaming compacts in those two states. The compacts between Connecticut and the Mohegan Tribe, and between Mississippi and the Mississippi Choctaw Tribe, are particularly instructive in that they expressly authorize off-track betting, but only if the parties agree or a court determines that off-track betting is permitted by a person, organization or entity for a lawful purpose in those states. Notably, the location of the player when making the wager is not a condition of authorization. The bottom line for purposes of this *Amici* Brief: not only is off-track betting allowed in the compacts approved by the Department over the last thirty years, it is pervasive.

Similarly, a review of the compacts since 2018, when the Supreme Court struck down PASPA, reveals that eight states (Arizona, Michigan, Mississippi, North Carolina, South Dakota, Washington State, Oregon<sup>3</sup> and Wisconsin) have expressly agreed to sports wagering among the gaming opportunities available to patrons at tribal gaming facilities. Tribes in at least six states (Colorado, Mississippi, Nevada, New Mexico, Oregon and New York) are now operating sports books at their gaming facilities based on pre-existing language in their compacts which

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<sup>3</sup>Because of differences in the operative language of the Oregon Compacts, some Tribes required amendments expressly approving sports betting; others did not.

allowed sports books to become available by operation of law after PASPA was struck down by the Supreme Court in 2018.

Similarly, many compacts allow for the play of lottery games. Although the *Amici Tribes* are unaware of any situation where a state lottery has lawfully installed its “green machines” on Indian lands, it is not for a lack of effort or legality. The Washington State Lottery made a vigorous effort to place its green machines on the Spokane Tribe’s Indian lands, and the Spokane Tribe requested an NIGC opinion on its legality. The NIGC determined that such activity could occur on Indian lands so long as the Washington State Lottery guaranteed a minimum of sixty percent (60%) of the terminals’ net revenue was paid to the Spokane Tribe as required by IGRA. *See* NIGC Game Classification Opinion Letter to Carol Evans, Chairwoman, Spokane Tribe, dated October 16, 2017.<sup>4</sup> In the end, the effort by the Washington State Lottery fell through not because the drawing of winning numbers occurred off Indian lands, but because the Washington State Lottery was unwilling to share at least sixty percent (60%) of the net revenue with the Spokane Tribe as required by IGRA.

Certainly, West Flagler will argue that these pervasive examples are distinguishable because the wagers are still being made at the tribal gaming facilities.

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<sup>4</sup> Available on the official web page of the NIGC at [www.nigc.gov/images/uploads/game-opinions/WashStateLottery.pdf](http://www.nigc.gov/images/uploads/game-opinions/WashStateLottery.pdf)

But that is a distinction that only reinforces the error of the District Court. It is the horse racing event, or the sporting event, or the drawing of the winning lottery numbers that determines the outcome of each game. Hence, the outcome of the game is determined completely off Indian lands. The racing event, or the sporting event, or the drawing of the lottery numbers, is the critical element of chance, or “roll of the dice or spin of the wheel” identified by the Supreme Court in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 792 (2014). The correct reading of *Bay Mills* is that no critical elements of the gaming activity itself occurred on Indian lands; therefore, the activity was not governed by IGRA and the State of Michigan could not look to IGRA for an enforcement action against the disputed gaming activities. *Id.* Historically, courts have found the three critical elements of any gaming activity are prize, chance and consideration. *See, e.g., Kater v. Churchill Downs, Inc.*, 886 F.3d 784, 786 (9th Cir. 2018); *Automatic Music and Vending Corp. v. Liquor Control Comm’n*, 396 N.W.2d 204, 206 (Mich. 1986); *State v. Pinball Machines*, 404 P.2d 923, 925 (Alaska 1965); *Westerhaus Co. v. City of Cincinnati*, 135 N.E.2d 318, 320 (Ohio 1956); *State ex. rel. Evans v. Brotherhood of Friends*, 247 P.2d 787, 797 (Wash. 1952)(*en banc*) (“all forms of gaming involve prize, chance and consideration”); *State v. Coats*, 74 P.2d 1102, 1106 (Ore. 1938). The element of chance, or ensuring the fairness of the “roll of the dice and spin of the wheel” is arguably the most significant element regarding IGRA’s goal of ensuring the

fairness and honesty of the gaming activity. 25 U.S.C. § 2702(2). An interpretation of IGRA that allows the “roll of the dice and spin of the wheel” (element of chance) to occur off of Indian lands, while prohibiting the wager (element of consideration) from occurring off of Indian lands is contradictory and makes no sense. The District Court’s analysis goes even further by interpreting IGRA to require ***all*** critical elements of the gaming activity to occur “only” on Indian lands. The correct analysis, consistent with thirty years of compact negotiations and Department approvals, is if ***any*** critical element of the gaming activity occurs on Indian lands, then IGRA applies. Just as the horse race in Kentucky upon which an off-track wager is made is subject to and must comply with federal and Kentucky State law, and the Yankees/Mets baseball game upon which a sports wager is made must comply with federal and New York State law, and the drawing of the winning Washington State Lottery numbers must comply with federal and Washington State law, the wager made over the internet must comply with the laws of the state where the wager is made. *Cf., California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960, 967–69, 968 n.15 (9th Cir. 2018) (Tribe prohibited from operating statewide internet bingo, not because it violated IGRA, but because California State law prohibited such wagers over the internet and, therefore the Tribe’s acceptance of such wagers violated the Unlawful Internet Gaming Enforcement Act, 31 U.S.C. §§ 5361 *et seq.*). When any critical element of the game occurs on Indian lands, then the United States, the Tribe

and the State (only to the limited degree provided in negotiated compacts, *see Sycuan Band of Mission Indians v. Roach*, 54 F.3d 535, 538 (9th Cir. 1995)) all have concurrent jurisdiction over the on-reservation activity. The state's jurisdiction over a wager placed off Indian lands does not foreclose negotiation and federal approval of a compact contemplating both (1) the wager placed off Indian lands and (2) other critical elements of the gaming activity occurring on Indian lands. The District Court erred to the extent it concluded otherwise.

**IV. This Appeals Court could affirm on narrow grounds such that IGRA is not used to prevent tribes from compacting for statewide internet sports betting.**

*Amici Tribes* believe the 2021 Compact is valid and the District Court decision should be reversed. However, there is a narrow ground on which this Court could affirm that does not set precedent or authority that prevents tribes from offering statewide internet sports betting pursuant to compacts or compact amendments under IGRA. The District Court's opinion could be read to require that Florida's authorization for statewide internet sports betting must occur prior to, or independent of, an amendment to Florida's compact with the Seminole Tribe. This would require the State to first expressly authorize statewide internet sports betting by statute or state-wide initiative, and thereafter execute the compact amendment. Under such a narrow holding, this Court could remand the case with instructions for the District Court to afford the parties the opportunity to cure the defect.

The District Court’s analysis is ambiguous as to the basis for its decision, often referring to the 2021 Compact as the vehicle that authorizes statewide sports betting in Florida. Some courts have questioned whether a tribe and state can ‘bootstrap’ the permitted gaming requirement with the compact requirement. *See Artichoke Joes*, 353 F.3d at 720-21 (recognizing the bootstrap argument, but dismissing it because the authorizing initiative expressly authorized the play of the games at issue); *Citizen Band Potawatomi Indian Tribe v. Green*, 995 F.2d 179, 181 (10th Cir. 1993) (holding that a Tribal–State compact allowing the importation of gambling devices onto a tribe's lands violated the Johnson Act because, standing alone, the compact could not satisfy IGRA’s “permits such gaming” requirement); *United States v. Santa Ynez Band of Chumash Mission Indians*, 33 F.Supp.2d 862 (C.D. Cal. 1998) (describing games that are illegal under state law as “uncompactable”). A possible reading of the District Court’s decision is that IGRA was not violated because the 2021 Compact provides for the acceptance of wagers placed off Indian lands, but rather because the 2021 Compact itself, rather than Florida State law *authorizes* placement of wagers off Indian lands. The District Court reasoned:

[T]he plain text of *the Compact affirmatively authorizes* sports betting both on and off Indian lands . . . . Other provisions in the Compact make clear that the “deemed” clause in Section IV(A) plays an *authorizing*, rather than regulatory role . . . . The final problem with the Secretary's argument is that, although it attempts to read the Compact *in pari materia* with Florida law, its account of that law is inconsistent

with the Florida Constitution. Article X, Section 30 of that Constitution provides that the State may expand sports betting only through a citizen's initiative or an IGRA gaming compact. *See* Fl. Const. art.X, §§ 30(a)-(c). And *because no citizens' initiative has approved online sports betting, such betting can be lawful in Florida only if it is authorized by a gaming compact. See id.* Against this backdrop, it makes little sense to argue that the Florida Legislature authorized sports betting independently of the instant Compact.

*West Flagler* 573 F.Supp.3d at 274-276 (emphasis added). But compare *Id.* at 265 (“Pursuant to that Compact, as well as a Florida statute that implements its terms, *see* Fl. Stat. § 285.710(13)(b), online sports betting is now available in Florida”). Throughout the opinion, the District Court exclusively refers to the 2021 Compact, instead of Florida State law, as the operative vehicle authorizing the acceptance of wagers made off of Seminole Indian lands.

The *Amici Tribes* believe affirmance on the grounds that the 2021 Compact— independent of Florida State law—authorized placement of off-reservation wagers would be in error because the Florida Legislature established its public policy authorizing statewide internet sports betting by ratification of the compact, *see Florida House of Representatives v. Crist*, 999 So.2d 601, 610-12 (Florida 2008) (Governor’s execution of compact is void without legislative ratification because it is the Legislature and not the Governor that establishes state policy) and by enacting other enabling legislation, Fl. Stat. § 285.710(13)(b), authorizing such gaming. Affirmance on such narrow grounds, however, would mitigate negative precedential impacts to the *Amici Tribes* because they are confronted, or will likely be confronted,

with circumstances where state law has already authorized such gaming. Affirmance on such narrow grounds would also provide the State of Florida and the Seminole Tribe a clear path to cure the defect with the subsequent passage of such state legislation, or with a voter-approved initiative, independent of compact ratification.

### CONCLUSION

The *Amici Tribes* respectfully request that this Court find that the statewide internet sports betting provisions in the 2021 Compact comply with IGRA for the reasons set forth in the Opening Brief of Federal Appellants, the *amicus* brief submitted by purported-limited-intervenor Seminole Tribe, as well as the additional arguments provided by this *Amici* Brief. As demonstrated herein, affirmance will have a disastrous effect on Indian tribes throughout the country wherein IGRA, the vehicle that Congress intended to ensure that tribes could compete in emerging gaming markets, will be used against tribes, to keep them out as states authorize lotteries, commercial casinos and sports franchises to offer statewide internet sports betting – an unconscionable result.

Respectfully submitted this 24th day of August, 2022.

s/ Scott D. Crowell

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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 5,337 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.

Dated: August 24, 2022

s/ Scott Crowell

**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.

Dated: August 24, 2022

s/ Scott Crowell

**APPENDIX A: *Amici Tribes*<sup>1</sup>**

***Amicus*, National Indian Gaming Association (NIGA)**

include the following member Tribes:

Agua Caliente Band of Cahuilla\*\*  
Alabama-Coushatta Tribes of Texas\*  
Big Sandy Rancheria  
Blue Lake Rancheria of California\*\*  
Bois Forte Band of Minnesota Chippewa Tribe  
Cahuilla Band of Mission Indians\*\*  
Cherokee Nation  
Cheyenne and Arapaho Tribes of Oklahoma  
Chicken Ranch Rancheria  
Chitimacha Tribe of Louisiana\*  
Choctaw Nation of Oklahoma  
Citizen Potawatomi Nation  
Coeur d' Alene Tribe  
Confederated Tribes of Grand Ronde  
Confederated Tribes of Siletz  
Coquille Indian Tribe  
Cowlitz Indian Tribe  
Coyote Valley Band of Pomo Indians  
Delaware Nation  
Eastern Shawnee Tribe of Oklahoma  
Elk Valley Rancheria\*\*  
Federated Indians of Graton Rancheria\*\*  
Fond du Lac Band of Lake Superior Chippewa  
Forest County Potawatomi Community  
Fort Independence Paiute Tribe  
Fort McDowell Yavapai Nation  
Gila River Indian Community  
Grand Traverse Band of Ottawa

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<sup>1</sup> \* indicates that Tribe is a member of both NIGA and USET SPF

\*\* indicates that Tribe is a member of both NIGA and CNIGA

\*\*\* indicates that Tribe is a member of both NIGA and AIGA

Habematolel Pomo of Upper Lake  
Hannahville Indian Community Tribe of Potawatomi  
Jamestown S'Klallan Tribe  
Kalispel Tribe of Indians  
Kaw Nation  
Keweenaw Bay Indian Community  
Kickapoo Tribe of Kansas  
Kickapoo Tribe of Oklahoma  
Koi Nation of Northern California  
Kootenai Tribe of Idaho  
La Posta Band of Mission Indians  
Leech Lake Band of Ojibwe  
Little River Band of Ottawa  
Little Traverse Bay Band of Odawa Indians  
Lower Elwha Klallam Tribe  
Lower Sioux Community  
Mashantucket Pequot Tribal Nation\*  
Mashpee Wampanoag Indian Tribe\*  
Match-E-Be-Nash-She-Wish Band of Potawatomi  
Menominee Indian Tribe of Wisconsin  
Miami Tribe of Oklahoma  
Middletown Indian Rancheria\*\*  
Mille Lacs Band of Ojibwe  
Morongo Band of Mission Indians\*\*  
Muckleshoot Indian Tribe  
Muscogee Creek Nation  
Navajo Nation  
Nooksack Indian Tribe  
North Fork Rancheria\*\*  
Northern Arapaho Tribe  
Oneida Indian Nation\*  
Oneida Nation of Wisconsin  
Pala Band of Mission Indians  
Pawnee Nation  
Pechanga Band of Luiseno Indians\*\*  
Peoria Tribe of Indians of Oklahoma

Picayune Rancheria of the Chukchansi Indians\*\*  
Poarch Band of Creek Indians\*  
Pokagon Band of Potawatomi Indians  
Ponca Tribe of Nebraska  
Prairie Band Potawatomi Nation  
Prairie Island Indian Community  
Pueblo of Sandia  
Puyallup Tribe of Indians  
Quapaw Nation  
Redding Rancheria\*\*  
Sac and Fox Nation of Oklahoma  
Saginaw Chippewa Indian Tribe  
Salt River Pima Maricopa Tribe  
San Carlos Apache Tribe\*\*\*  
Santa Ana Pueblo  
Santa Ynez Band of Chumash Indians\*\*  
Scotts Valley Band of Pomo Indians  
Seminole Nation  
Seminole Tribe of Florida\*  
Seneca Nation of Indians\*  
Shakopee Mdewakanton Sioux Indian Community  
Sherwood Valley Rancheria\*\*  
Shoshone-Bannock Tribes  
Sisseton Wahpeton Oyate-Dakota Nation  
Snoqualmie Tribe  
Soboba Band of Luiseno Indians\*\*  
Spirit Lake Tribe  
Spokane Tribe of Indians  
Squaxin Island Tribe  
St. Regis Mohawk Tribe\*  
Stockbridge Munsee Community  
Suquamish Indian Tribe  
Susanville Indian Rancheria  
Sycuan Band of the Kumeyaay\*\*  
Table Mountain Rancheria\*\*  
The Blackfeet Nation

The Cayuga Nation  
The Chickasaw Nation  
The Mohegan Tribe  
Three Affiliated Tribes  
Tohono O'odham Nation\*\*\*  
Tolowa Dee-Ni' Nation  
Tulalip Tribes  
Tule River Tribe of California  
Tunica-Biloxi Tribe of Louisiana\*  
Tuolumne Band of Me-Wuks  
Twenty-Nine Palms Band of Mission Indians  
Ute Mountain Ute Tribe  
White Earth Nation  
White Mountain Apache Tribe  
Wichita and Affiliated Tribes  
Winnebago Tribe of Nebraska  
Wyandotte Nation  
Yakama Nation  
Yuhaaviatam of San Manuel Nation\*\*

***Amicus*, The United South and Eastern Tribes Sovereignty Protection Fund**  
include the following member Tribal Nations:

Alabama-Coushatta Tribe of Texas\*  
Catawba Indian Nation  
Chickahominy Indian Tribe  
Chickahominy Indian Tribe-Eastern Division  
Chitimacha Tribe of Louisiana\*  
Coushatta Tribe of Louisiana  
Eastern Band of Cherokee Indians  
Houlton Band of Maliseet Indians  
Jena Band of Choctaw Indians  
Mashantucket Pequot Tribal Nation\*  
Mashpee Wampanoag Tribe  
Mi'kmaq Nation  
Miccosukee Tribe of Indians of Florida  
Mississippi Band of Choctaw Indians

Monacan Indian Nation  
Nansemond Indian Nation  
Narragansett Indian Tribe  
Oneida Indian Nation  
Pamunkey Indian Tribe  
Passamaquoddy Tribe-Indian Township  
Passamaquoddy Tribe-Pleasant Point  
Penobscot Indian Nation  
Poarch Band of Creek Indians\*  
Rappahannock Tribe  
Saint Regis Mohawk Tribe\*  
Seminole Tribe of Florida\*  
Seneca Nation of Indians  
Shinnecock Indian Nation  
The Mohegan Tribe of Cayuga Nation  
Tunica-Biloxi Tribe of Louisiana\*  
Upper Mattaponi Indian Tribe  
Wampanoag Tribe of Gay Head (Aquinnah)

***Amicus, the California Nations Indian Gaming Association***  
include the following member tribes:

Agua Caliente Band of Cahuilla Indians\*\*  
Augustine Band of Cahuilla Indians  
Bear River Band of the Rohnerville Rancheria  
Bishop Tribe  
Blue Lake Rancheria\*\*  
Buena Vista Rancheria of Me-Wuk Indians  
Cahto Tribe of the Laytonville Rancheria  
Cahuilla Band of Indians\*\*  
Chemehuevi Indian Tribe  
Chicken Ranch Rancheria  
Elk Valley Rancheria\*\*  
Estom Yumeka Maidu Tribe of the Enterprise Rancheria  
Federated Indians of Graton Rancheria\*\*  
Greenville Rancheria  
Ione Band of Miwok Indians  
Middletown Rancheria of Pomo Indians of California\*\*  
Mooretown Rancheria  
Morongo Band of Mission Indians\*\*

North Fork Rancheria\*\*  
Pechanga Band of Luiseño Indians\*\*  
Picayune Rancheria of Chukchansi Indians\*\*  
Pit River Tribe  
Redding Rancheria\*\*  
Rincon Band of Luiseño Indians  
San Pasqual Band of Mission Indians  
Santa Rosa Band of Cahuilla Indians  
Santa Ynez Band of Chumash Mission Indians\*\*  
Sherwood Valley Rancheria\*\*  
Shingle Springs Band of Miwok Indians  
Soboba Band of Luiseno Indians\*\*  
Sycuan Band of the Kumeyaay Nation\*\*  
Table Mountain Rancheria\*\*  
Tachi Yokut of Santa Rosa Rancheria  
Tejon Indian Tribe  
Tolowa Dee-ni Nation  
Tyme Maidu Tribe-Berry Creek Reservation  
Viejas Band of Kumeyaay Indians  
Wilton Rancheria  
Yuhaaviatam of San Manuel Nation\*\*  
Yurok Tribe

***Amicus, the Arizona Indian Gaming Association***

include the following member tribes:

Ak-Chin Indian Community  
Cocopah Indian Tribe  
Fort Yuma Quechan Tribe  
Kaibab Band of Paiute Indians  
San Carlos Apache Tribe\*\*\*  
Tohono O'odham Nation\*\*\*  
White Mountain Apache Tribe  
Pueblo of Zuni

***Amici, several federally recognized Indian Tribes include the following:***

Confederated Tribes of Siletz Indians

Coquille Indian Tribe<sup>2</sup>

Estom Yumeka Maidu Tribe of the Enterprise Rancheria<sup>3</sup>

Guidiville Rancheria of California

Redding Rancheria<sup>4</sup>

Rincon Band of Luiseno Indians<sup>5</sup>

Tunica-Beloxi Tribe of Louisiana<sup>6</sup>

Wampanoag Tribe of Gay Head (Aquinnah)<sup>7</sup>

Wilton Rancheria<sup>8</sup>

Yuhaaviatam of San Manuel Nation<sup>9</sup>

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<sup>2</sup> Also a member of NIGA

<sup>3</sup> Also a member of CNIGA

<sup>4</sup> Also a member of NIGA and CNIGA

<sup>5</sup> Also a member of CNIGA

<sup>6</sup> Also a member of NIGA and USET SPF

<sup>7</sup> Also a member of USET SPF

<sup>8</sup> Also a member of CNIGA

<sup>9</sup> Also a member of NIGA and CNIGA