IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Cherokee Nation, **et al.**, Plaintiffs, v. **U.S. Department of the Interior**, **et al.**, Defendants.	Case No. 1:20-cv-02167-TJK

Reply in Support of
Federal Defendants' Renewed Motion to Dismiss

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INTRODUCTION

Counts One through Seven should be dismissed. As explained in our opening brief, the Complaint fails to adequately allege an injury in fact that would demonstrate standing for the Complaint's Administrative Procedure Act claims against the Secretary. In response, Plaintiffs resposture their alleged harms. Plaintiffs now claim that they are (or are at a substantial of) suffering an injury in fact because: (1) the Comanche Nation's and Otoe-Missouria Tribe's continued operation of their gaming facilities under the new compacts results in a competitive injury; (2) new gaming ostensibly covered by the new compacts would infringe upon the "substantial exclusivity" purportedly afforded Plaintiffs' in their own compacts; and (3) the Governor's concurrence to future land acquisitions by the Department of the Interior infringes upon Plaintiffs' purported geographic "zone of exclusivity" for gaming.

Plaintiffs' reposturing of harms fails because, even as amended, the Complaint fails to adequately allege an injury in fact. Plaintiffs do not allege that Comanche's and Otoe-Missouria's current operations are different from those Tribes' operations under their prior compacts. Plaintiffs do not point to anything new that would constitute an injury in fact traceable to the Secretary. And Plaintiffs provide no factual allegations supporting their theory that the new compacts' revenue sharing provisions create an on-the-ground competitive advantage for the Compacting Tribes. Similarly, any alleged harm that could result from new games that the Compacting Tribes may offer under the new compacts is not certainly impending because Oklahoma's legislature would need to authorize those new games. The Governor's concurrence also does create a substantial risk of harm because any land acquisitions would need to go through several federal regulatory processes before the acquisition (or any gaming thereon) could occur. Any harm from possible future government decisions is speculative.

Even if the Complaint adequately alleged standing, it would still fail to state a plausible APA claim. The Indian Gaming Regulatory Act (IGRA) does not require the Secretary to disapprove a compact over an internal State dispute as to compacting authority. And because the compacts became approved by operation of statute (rather than by affirmative approval), they were approved only to the extent they were consistent with IGRA. Thus, Plaintiffs have no basis in law for their assertion that the Secretary acted arbitrarily by allowing provisions that are contrary to IGRA to go into effect. Counts One through Seven should be dismissed.

ARGUMENT

I. The Complaint Does Not Adequately Allege an Injury In Fact.

Counts One through Seven should be dismissed because the Complaint does not adequately allege an injury in fact for purposes of Article III standing.

A. Plaintiffs Cannot Base Standing on Generalized Grievances and Alleged Procedural Violations Untethered to Specific Injuries.

To adequately allege standing, a plaintiff must allege, among other things, an actual or certainly impending injury in fact. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409–10 (2013). As explained in our opening brief, the Complaint here fails to do so. *See* Fed. Defs. Mem. in Supp. of Mot. to Dismiss ("US Mem.") 10-28, ECF No. 106-1. In response, Plaintiffs retrench their Complaint as adequately alleging a "substantial risk" of harm. Pls.' Mem. of Points & Authorities in Opp'n to Mot. to Dismiss ("Resp.") 6-7, ECF No. 114. While courts "[i]n some instances . . . have found standing based on a 'substantial risk' that the harm will occur," a *substantial* risk of harm is only potentially sufficient if it "may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." *Clapper*, 568 U.S. at 414 n.5. The Supreme Court has thus questioned whether "the 'substantial risk' standard is relevant and . . . distinct from the 'certainly impending' requirement." *Id*. Regardless, "plaintiffs bear the burden of pleading and

proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm" and cannot "rely on speculation" regarding the choices of independent actors—such as, under the circumstances here, the Oklahoma legislature—that are not before the court. *Id*.

Even if distinct from the "certainly impending" requirement, Plaintiffs have not met their burden of pleading concrete facts showing that the Secretary's actions have caused a substantial risk of injury. Plaintiffs' reliance on *Susan B. Anthony List v. Driehaus* is unavailing because Plaintiffs identify no intention to engage in a course of action that subjects Plaintiffs to a credible threat of criminal prosecution. *See* 573 U.S. 149, 159 (2014). *Department of Commerce v. New York* is not to the contrary, as the plaintiffs there established standing by showing that "third parties will likely react in predictable ways" to government action, thereby causing concrete injuries that directly flowed from a census question. 139 S. Ct. 2551, 2565-66 (2019). But "guesswork"—which is largely what Plaintiffs do here—is different than concrete alterations with predictable results and is therefore insufficient to support standing. *Trump v. New York*, 141 S. Ct. 530, 536 (2020)

Plaintiffs' discussion of alleged procedural violations misses the mark because, even if IGRA granted Plaintiffs a procedural right, Plaintiffs must allege that their concrete interests are harmed by the alleged procedural deprivation. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009); *In Def. of Animals v. Salazar*, 713 F. Supp. 2d 20, 26 (D.D.C. 2010). Plaintiffs cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Plaintiffs' focus on alleged procedural violations, Resp. at 10-12, 27, sidesteps that critical issue.

Plaintiffs implicitly admit, *id*. at 11-12, that they must make a "heightened showing" because they allege injury from the government's regulation of a third party. Plaintiffs are

correct. *See Renal Physicians Ass'n v. U.S. Dep't of HHS*, 489 F.3d 1267, 1273 (D.C. Cir. 2007). And Plaintiffs cannot rely speculation or assumption to meet that burden—"even at the pleading stage, a party must make factual allegations showing that the relief it seeks will be likely to redress its injury." *Id.* at 1276.

Similarly, Plaintiffs "may not 'employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government.'" *Citizens for Resp. & Ethics v. U.S. Office of Special Counsel*, 480 F. Supp. 3d 118, 133 (D.D.C. 2020) (citation omitted); *United States v. Hays*, 515 U.S. 737, 743 (1995) ("generalized grievance against allegedly illegal governmental conduct" insufficient for standing.). An alleged injury must be "certainly impending" and cannot rely "on a highly attenuated chain of possibilities." US Mem. at 11, 16-18, 27 (citing *Clapper*, 568 U.S. at 409–10)). Thus, under the circumstances here, Plaintiffs must adequately allege an actual or certainly impending injury in fact resulting from the compacts becoming deemed approved under IGRA. As explained below and in our opening brief, they have failed to do so.[1]

B. Plaintiffs Still Have Not Adequately Alleged any Injury Sufficient to Support Standing.

In the Complaint and in response to Federal Defendants' first motion to dismiss, Plaintiffs based their claims on four alleged injuries, none of which are sufficient to support constitutional standing. US Mem. at 10-13. Plaintiffs now abandon any purported harms

[1] We will not respond to Plaintiffs' merits arguments, which have no bearing on whether Plaintiffs adequately alleged an injury. We note, however, that Plaintiffs' arguments belie their claim that IGRA prohibits tribes from entering compacts prior to obtaining land. The challenged Kialegee compact is Kialegee's second. Resp. at 48 n.43. But Kialegee does not operate a Class III gaming facility. US Mem. at 11 n.6. The Secretary has approved other compacts where lands had not yet been found eligible for gaming. *See e.g.,* Indian Gaming Notice, 76 Fed. Reg. 11258-02 (Mar. 1, 2011); Indian Gaming Notice, 79 Fed. Reg. 46275-01 (Aug. 7, 2014).

resulting from the allegedly illegal taxation and regulation of the Compacting Tribes. Resp. at 11 (citing to these purported harms "not to establish an injury").

Plaintiffs reposture their remaining injury allegations into three types. First, Plaintiffs allege that Comanche's and Otoe-Missouria's continuation of gaming in ten casinos inflicts a competitive injury from "increased competition." Resp. at 13-20. Second, Plaintiffs contend that the challenged compacts create a substantial risk that the Compacting Tribes and third parties—by offering new games that Plaintiffs' compacts do not permit—will infringe upon the substantial exclusivity to which Plaintiffs are entitled under their own compacts. *Id*. at 21-30. Finally, Plaintiffs allege potential new gaming facilities that may result from the new compacts will infringe upon Plaintiffs' "zone of exclusivity"—that is, the Compacting Tribes will game in a geographic area(s) in which only Plaintiffs should be entitled to game. Resp. at 30-43. These new articulations of harm still fail to adequately allege any actual or certainly impending injury that resulted from the compacts becoming approved by operation of IGRA.

1. Plaintiffs do not suffer a competitive injury from the compacts becoming approved by operation of statute.

Federal Defendants established in their opening brief that Plaintiffs fail to adequately allege that the challenged compacts provide the Compacting Tribes with any competitive advantage that would translate into a certainly impending injury for purposes of Article III. Specifically, the Complaint bases these supposed competitive injuries on speculative harms from games that: (1) are not currently permitted by Oklahoma law; (2) the Compacting Tribes do not currently operate; and (3) the Compacting Tribes' leaders have recognized cannot be offered in Oklahoma until the Oklahoma legislature changes Oklahoma law. US Mem. at 13-24.

Perhaps recognizing the speculative nature of the supposed competitive injury, Plaintiffs attempt to reframe two of the challenged compacts as inflicting a competitive injury on Plaintiffs

by permitting Comanche and Otoe-Missouria to continue to game at all. Resp. at 13-20. This makes little sense. Plaintiffs acknowledge that Comanche and Otoe-Missouria continue to operate the same casinos as under prior compacts. *Id*. at 13-20; Second Am. Compl. ("SAC") ¶ 231.q, ECF No. 104. And Plaintiffs fail to allege any change in gaming by Comanche and Otoe-Missouria as a result of the new compacts, much less a competitive injury from such a change. Plaintiffs' effort to characterize competitive stasis as "increased competition" finds no support in their allegations or caselaw. Further, to the extent Plaintiffs allege an injury from continued gaming in ten existing facilities, Plaintiffs themselves recognize that they could not achieve the redress of destroying Comanche and Otoe-Missouria's preexisting gaming. Pages 8-9, below.

Plaintiffs contend that Comanche's and Otoe-Missouria's continued gaming falls within a "competitive injury doctrine," which Plaintiffs claim applies when "'agencies lift regulatory restrictions on their competitors or otherwise allow increased competition against them." Resp. at 13 (quoting *Int'l Bhd. of Teamsters v. U.S. Dep't of Transp*., 724 F.3d 206, 211-12 (D.C. Cir. 2013)). But rather than identify any current injury from gaming restrictions being lifted, Plaintiffs have repeatedly indicated that they do not object to Comanche and Otoe-Missouria continuing the gaming they conducted under their prior compacts. Pls.' Reply in Supp. of Mot. to Am. and Suppl. Compl. ("Pls.' Reply") 15, ECF No. 103 ("Comanche Nation's ability to offer gaming consistent with IGRA [is not] at issue in this case. . . . [F]ederal law *guarantees* Indian tribes equal rights and privileges to enter that market consistent with IGRA."); *id*. ("Plaintiff Nations accept *legal* competition"). And rather than identify how the new compacts lifted a regulatory restriction, Plaintiffs contend that the challenged compacts should be voided because they overregulate and illegally tax the Compacting Tribes. SAC ¶¶ 87, 166, 181, 189-200, 229; Pls.' Mem. of Points & Authorities in Opp'n to Mot. to Dismiss ("Pls.' Mem.") 10, ECF No. 72.

Indeed, Plaintiffs' fifth and sixth causes of action are based on purportedly unlawful taxation and regulation of the Compacting Tribes, which Plaintiffs allege would *decrease* competition from Comanche and Otoe-Missouria by "increase[ing] the amount of revenue paid to the State." SAC ¶¶ 251-61. This allegation refutes Plaintiffs' effort to argue the new compacts provide the Compacting Tribes with a competitive advantage through underregulation. *See* Resp. at 13 (citing SAC ¶¶ 107-231.z); *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 55 (D.C. Cir. 2015) (no competitor standing where plaintiff's competitor had a "*greater* regulatory burden").

Even assuming that there was some new, lower regulation in the new compacts, that lower regulation, standing alone, would not be sufficient. Plaintiffs would need to tie that lower regulation to an increase in gaming competition. But Plaintiffs simply rely on the continuation of the same gaming at the ten facilities Comanche and Otoe-Missouria operated under their old compacts. Resp. at 13-20; SAC ¶ 231.q. Perhaps the addition of a new gaming type could support competitor standing by theoretically increasing competition. But the Complaint does not identify a single new game that any Compacting Tribe is operating in light of the new compacts, much less a non-speculative chain of events through which that new gaming would increase competition. Plaintiffs cannot base a purported "competitive injury" on the continuation of existing gaming. *See New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002) (Competitor standing applies only when an agency "provides benefits to an existing competitor or expands the number of entrants in the petitioner's market, not an agency action that is, at most, the first step in the direction of future competition."); *W. Flagler Assocs. v. Haaland,* No. 21-cv-2192 (DLF), 2021 WL 5492996 at *3, *5-6 (D.D.C. Nov. 22, 2021) (presumed increase in competition from newly offered sports betting was sufficient for standing).

Plaintiffs miss the point in focusing on whether this Court must assume that they will be successful on the merits of their claims. Resp. at 19-20. The merits are of no matter. The question is whether Plaintiffs have alleged an injury in fact resulting from the compacts being approved by operation of statute. "To demonstrate their personal stake [in a case for standing purposes], plaintiffs must be able to sufficiently answer the question: 'What's it to you?'" *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (quotation omitted). Plaintiffs' representations that they do not object to Comanche and Otoe-Missouria engaging in gaming, Pls.' Reply at 15, ECF No. 103, make that question particularly relevant here. Plaintiffs' response does not answer it, instead hedging on whether they object to Comanche and Otoe-Missouria's continuing to offer the same games they did prior to the challenged compacts. Resp. at 17. Plaintiffs thus fail to credibly identify any gaming that inflicts a competitive injury.[2]

Perhaps Plaintiffs' theory is based upon a presumption that, should the Court vacate the Comanche and Otoe-Missouria compacts, those Tribes could not continue operating their existing facilities because those Tribes would not have a compact in effect. But Plaintiffs undercut that theory's viability. In prior litigation, Plaintiffs argued that the Model Compact—to which Comanche and Otoe-Missouria were signatories—"automatically renewed on January 1, 2020." Pls.' Mot. for Summ. J. at 36, ECF No. 125, *Cherokee v. Stitt*, 19CV1198-D (May 22,

[2] The Court should also not lose sight of the redressability issues inherent in Plaintiffs' alleged harms from gaming that was occurring under the prior compacts. *See Hawkins v. Haaland*, 991 F.3d 216, 224 (D.C. Cir. 2021), *petition for cert. filed*, No. 21-520 (Oct. 8, 2021) ("Redressability requires a litigant to demonstrate 'a likelihood that the requested relief will redress the alleged injury.'" (citation omitted)). If Plaintiffs' arguments about competitive harm to be believed, any redress would require eliminating Comanche's and Otoe-Missouria's ability to continue the gaming they previously (and lawfully) conducted. To the extent Plaintiffs suggest that they may use IGRA as a sword to destroy all gaming by the Compacting Tribes, the point fails in light of Plaintiffs' admission that IGRA guarantees all tribes the right to game.

2020) (Ex. A); *id*. at 14, 17-21.[3] According to Plaintiffs, "[e]ach Nation therefore has a federal law right to conduct Class III gaming in accordance with the term of the [Model] Compacts." *Id.* at 36. Plaintiffs note that an Oklahoma District Court dismissed (with prejudice) Comanche's and Otoe-Missouria's claims to enforce their old compacts following a settlement with Oklahoma after agreeing to the compacts challenged in this case. Resp. at 19. But Plaintiffs do not explain how they can retreat from their prevailing argument. *Cherokee Nation v. Stitt*, 475 F. Supp. 3d 1277, 1279 (W.D. Okla. 2020) ("Each movant seeks a determination . . . [on] whether the [Model] Compacts between the Native American tribes and the State of Oklahoma automatically renewed or expired on January 1, 2020."). Plaintiffs also represent to this Court that "the Comanche Nation's ability to offer gaming consistent with IGRA" is not at issue because "[F]ederal law *guarantees* Indian tribes equal rights and privileges to enter that market consistent with IGRA." Pls. Reply at 15. Plaintiffs do not explain how their alleged harm from the continuation of gaming squares with their admission that Comanche and Otoe-Missouria have a guaranteed right to game and that their Model Compacts automatically renewed.

Plaintiffs' cited cases also do not support their standing theory. Indeed, some of the language Plaintiffs rely upon, Resp. at 13, is dicta from decisions dismissing claims for lack of standing. *See El Paso Nat. Gas Co. v. FERC*, 50 F.3d 23, 27 (D.C. Cir. 1995) ("it is uncertain whether petitioner would have standing . . . even if they were currently competing"). Similarly, *United Transportation Union* actually held that unsupported allegations of anti-competitive

[3] This is particularly so here because Plaintiffs successfully opposed KTT's and UKB's intervention in the District of Oklahoma case by arguing that the Model Compacts, including Comanche's and Otoe-Missouria's, created "vested" rights by automatically renewing through 2035. Plaintiffs' Opposition to Motion for Permissive Intervention by Kialegee and UKB, ECF No. 60, *Cherokee v. Stitt*, 19CV1198-D (Feb. 18, 2020) ("Compacts have the force of federal law . . . and vest each compacting tribe with rights . . . including the right to automatic renewal that is expressly set forth in Compact Part 15.B, which is central to the dispute between the parties.").

behavior were insufficient to support standing. *United Transp. Union v. ICC*, 891 F.2d 908, 921 (D.C. Cir. 1989). Plaintiffs rely on other cases that, at most, find standing where a plaintiff is "compelled to expend additional resources to keep pace, which necessarily requires anticipatory business planning and action." Resp. at 15 (citing *Sanchez v. Office of State Superintendent of Educ.*, No. 18-975 (RC), 2019 WL 935330, at *4-5 (D.D.C. Feb. 26, 2019)). *See also, Pub. Citizen Health Research Grp. v. Pizzella*, 513 F. Supp. 3d 10, 22-23 (D.D.C. 2021) (Plaintiffs must show that "they expended resources to counteract their alleged injuries."). Neither the Complaint nor Plaintiffs' response brief makes any such allegation.

Plaintiffs' assertion that the "competitive injury doctrine" provides some "requisite 'common-law analogue'" that makes their alleged injuries concrete, Resp. at 16, is disproved by the case they cite: "[A]n injury in law is not an injury in fact. Only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue." *TransUnion*, 141 S. Ct. at 2205. Just as the mere existence of a misleading alert in *TransUnion* did not constitute a concrete injury, Plaintiffs must do more than allege that Comanche and Otoe-Missouria are operating under an illegal compact. *Id*. at 2209.

Plaintiffs make three other attempts to illustrate an injury in fact from current gaming operations. None of them withstand scrutiny.

First, Plaintiffs make vague allegations regarding electronic gaming machines. *See* Resp. at 18-19. Plaintiffs contend that the challenged compacts "purport to authorize the conduct of gaming using Gaming Machines that are illegal under state law." Resp. at 27. But Plaintiffs' compacts also permit "machine gaming." Ex. 2 ("Chickasaw Compact") at 22, ECF No. 71-2. Other than block quoting the respective provisions, Plaintiffs do not allege how "machine gaming" under their compacts differs from "gaming machines" under the challenged compacts in

any manner that might impose any risk, let alone a substantial risk, of competitive harm. Plaintiffs do not allege that a single gaming machine exists that is permissible under the challenged compacts but impermissible under Plaintiffs' compacts. Nor do Plaintiffs explain how the mere operation of that unidentified machine would competitively harm them. Perhaps most notably, despite Comanche and Otoe-Missouria continuing to operate ten facilities after the challenged compacts went into effect in June 2020, Plaintiffs do not allege that either Tribe is currently offering a gaming machine that Plaintiffs cannot offer. No basic law of economics can supply the multiple connections necessary to support Plaintiffs' assertion, Resp. at 15-18, that Comanche's and Otoe-Missouria's continuation of gaming injures Plaintiffs.[4]

Second, Plaintiffs allege that they suffer harm from increased competition as a result of the compacts' multiple revenue sharing provisions. Resp. at 15-16. This allegation is also insufficient. For one, and as noted above, Plaintiffs elsewhere allege that some of these provisions harm *the Compacting Tribes* rather than Plaintiffs. SAC ¶¶ 87, 166, 181, 189-200, 229, 251-61. And any allegation of competitive harm to Plaintiffs is based only on speculation. As explained in our opening brief, the Complaint does not provide any allegations explaining how the differing revenue sharing provisions translate into an on-the-ground competitive advantage for the Compacting Tribes. US Mem. at 12, 21-23. Plaintiffs' response relies upon purported "basic laws of economics." Resp. at 15-16. But Plaintiffs identify no basic economic law. Nor do Plaintiffs explain how their many contradictory allegations about the challenged compacts' advantageous and disadvantageous bargains can be applied to any basic economic law

[4] Plaintiffs are incorrect, Resp. at 18-19, that *Treat v. Stitt* addressed Plaintiffs' perceived distinction in the definition of electronic gaming, much less held that the changed language injures Plaintiffs. 481 P.3d 240, 243 (Okla. 2021). Plaintiffs' speculation regarding a potential definitional distinction thus falls far short of alleging an actual injury.

to show competitive harm. Indeed, Plaintiffs have not identified a single concrete competitive impact that they have incurred since the new Comanche and Otoe-Missouria compacts went into effect in June 2020. *Cf. New Jersey v. EPA*, 989 F.3d 1038, 1046 (D.C. Cir. 2021) (identifying "stricter recordkeeping and reporting requirements" that were now necessary).

Plaintiffs instead rely on chain of speculative possibilities. To reach Plaintiffs alleged harm, one has to assume: 1) the complex revenue sharing agreement will result in the Compacting Tribes obtaining more net revenue from gaming (US Mem. at 12); 2) the revenue sharing benefit will also overcome any harm to the Compacting Tribes from allegedly illegal overregulation and overtaxation (*Id.* at 21-23); 3) the Compacting Tribes will invest any net increase in available revenue to attract new casino guests rather than use it for "essential governmental purposes," as Plaintiffs contend they invest their revenues (Resp. at 15); 4) unidentified potential casino guests will respond to that casino investment by visiting the Compacting Tribes' casinos instead of Plaintiffs' casinos; 5) those visits will increase the Compacting Tribes' net revenue (*Id*. at 15). Such a chain of possible events, many of which are dependent on the actions of third parties, is too speculative to support standing. *Arpaio v. Obama*, 797 F.3d 11, 23 (D.C. Cir. 2015); *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 990-91 (D.C. Cir. 2021), *cert. granted sub nom. N. Am. Coal Corp. v. EPA*, No. 20-1531, 2021 WL 5024617 (U.S. Oct. 29, 2021) (standing based on independent actions of third parties too speculative).

Third, Plaintiffs argue that Comanche's purported increase in net revenue allows it to acquire new property eligible for gaming. Resp. at 15. But here, too, Plaintiffs rely on nothing but speculation. Even ignoring the speculation regarding Comanche's net revenue and intended use of any increase therein, Plaintiffs offer nothing more than speculation that Comanche will seek, and the federal government will approve, future fee-to-trust acquisitions for gaming. Those

not-yet-initiated regulatory processes simply do not harm Plaintiffs. Pages 18-22, below. And to the extent that Plaintiffs rely on a new Comanche facility in Cache, Oklahoma, they argue themselves out of Court by claiming that the facility is not authorized by the challenged compact. Resp. at 15, 28 n.23. If so, the compact is not the cause of Plaintiffs' alleged harms.

Plaintiffs' wholesale attack on continued gaming by Comanche and Otoe-Missouria places them firmly outside precedent finding that tribes have standing to challenge compacts to impose anticompetitive barriers to entry. US Mem at 22-23. And the Complaint's failure to identify any "competitive advantage" from the continuation of preexisting gaming leaves them unable to rely on current gaming to supply their standing.

2. Plaintiffs' alleged harm to their purported substantial exclusivity is based only on speculation regarding new games.

Plaintiffs have also failed to adequately allege an injury in fact in asserting that the Compacting Tribes alleged offering of new games is "depriv[ing]" Plaintiffs of "substantial exclusivity" rights purportedly secured by Parts 11.A and 11.E of Plaintiffs' compacts with Oklahoma. Resp. at 21-23. The effort fails on both the face of the compacts and because the Complaint lacks the factual allegations that would be necessary to allege such an injury.

As for the compacts, Plaintiffs' argument fails because Part 11 in Plaintiffs' compacts protects Plaintiffs from, at most, "*nontribal* operation[s]" licensed by Oklahoma. Chickasaw Compact at 22-24, ECF No. 71-2 (emphasis added); Resp. at 23. Oklahoma may only "authorize organizational licensees (horse racetracks) to conduct electronic gaming if they meet statutory and regulatory requirements." *Cherokee Nation*, 475 F. Supp. 3d at 1283. In other words, Plaintiffs' exclusivity under Part 11 of their compacts cannot be infringed upon as a matter of law unless Oklahoma's statutes and regulations permit the infringement. Plaintiffs, however, do not explain (or allege) that the Comanche and Otoe-Missouria compacts provide for a third-party

gaming facility with authorization absent further action by Oklahoma. Nor do Plaintiffs allege that Oklahoma has taken that further action. Plaintiffs instead allege the opposite—that Oklahoma has *not* changed its laws to license any additional non-tribal gaming. Resp. at 21, 24. Moreover, Plaintiffs identify no basis for interpreting their compacts, which were entered into by multiple tribes, as providing Plaintiffs with gaming exclusivity *as to other tribes*. Plaintiffs do not identify a harm, much less a certainly impending one, from theoretical infringement of a right against nontribal licensees.

While the Court need proceed no further, Plaintiffs have also failed to adequately allege standing because the Complaint does not allege that the Compacting Tribes are offering (or planning to imminently offer) the additional games Plaintiffs fear. Critically, the Complaint fails to identify a single purportedly illegal game that is currently being offered. *E.g. id*. at 27 (alleging "procedural" harm), pages 7-11, 14-16, above. And although Plaintiffs do not contest that the compacts only permit gaming machines that have been approved by Oklahoma's State Compliance Agency, Plaintiffs identify no new machine that has been approved. US Mem. at 15. In sum, Plaintiffs identify no new gaming machine that is impermissible under Plaintiffs' compacts but permissible under the challenged compacts, much less allege that such a machine is currently putting Plaintiffs at a competitive disadvantage.

Thus, Plaintiffs' claim that the compacts infringe on their "substantial exclusivity" hinges on new gaming machines, iLottery, and event wagering being offered *in the future*. Resp. at 27-30. Here, too, Plaintiffs fail. They allege no facts showing a substantial risk that a Compacting Tribe will infringe upon their purported exclusivity. *See Clapper*, 568 U.S. at 409-10.[5]

[5] Plaintiffs' reframing of their Complaint precludes them from challenging the possibility that the compacts may one day lead to additional table games. Plaintiffs narrow their complaint

First, we have already explained that any alleged injuries from gaming that is currently not authorized under Oklahoma law are speculative because the compacts only authorize gaming that is authorized by Oklahoma law. US Mem. at 13-18. Plaintiffs concede the point in admitting that Comanche only "intends to conduct [the feared games] when such games are authorized by state law." Resp. at 30.[6] To be sure, the challenged compacts do not prevent Oklahoma from changing its laws in a manner that adds gaming options in Oklahoma. But this only highlights that any potential injury is contingent on possible future changes to state law. *See* Resp. at 21. Such speculative fears regarding hypothetical future infringements of Plaintiffs' purported exclusivity do not support standing.

Second, Plaintiffs' allegations regarding iLottery are similarly speculative. The challenged compacts define "iLottery" as a "system that may be conducted by the Oklahoma Lottery Commission, subject to applicable law." SAC Ex. 1 at 7. As explained in our opening brief, the State of Oklahoma does not need an IGRA compact to operate its own iLottery. US Mem. at 16-17. In any event, iLottery may only be conducted by Oklahoma in a manner that conforms with Oklahoma law. So Plaintiffs are unfounded in arguing that the compacts infringe on their purported exclusivity regardless of whether the state changes its laws. Resp. at 24-25. And even though it appears irrelevant to Plaintiffs' repackaged claim, the Complaint does not

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regarding "substantial exclusivity" to "additional electronic or machine gaming." Resp. at 21-24. Table games are neither electronic nor machine gaming, and thus outside of Plaintiffs' reframed "substantial exclusivity" allegations.

[6] Should Oklahoma law ever expand to authorize the gaming Plaintiffs fear, Plaintiffs acknowledge they could seek a modification to their compacts to cover the same games. Resp. at 30. Plaintiffs' assertion, *id*. at 30, that the Secretary might then harm Plaintiffs by delaying action on such a compact modification is beyond speculative. It is also legally incorrect. As with the challenged compacts, the compact modifications would be considered approved by operation of IGRA if the Secretary did not act within 45 days. 25 U.S.C. § 2710(d)(8)(C).

allege that Oklahoma has authorized the "iLottery" Plaintiffs fear. *Id*. Nor does the Complaint allege that the Compacting Tribes may conduct iLottery under the challenged compacts. Thus, any supposed injury from such gaming is not traceable to the Secretary's actions.

Third, the supposed injury from event wagering is not sufficient because the challenged compacts only permit event wagering "to the extent such wagers are authorized by law." SAC Ex. 1 at 4, Comanche Agreement Part 2.A.13. Showcasing their speculation, Plaintiffs admit that "Event Wagering is not authorized under state law." Resp. at 24. Plaintiffs do not allege that any Compacting Tribe is offering (or plans to offer) event wagering. Regardless, because the challenged compacts do not authorize event wagering absent changes to state law, the challenged compacts cannot be the cause of any future event wagering.

Plaintiffs' fears, Resp. at 28, that Comanche and Otoe-Missouria may offer iLottery or event wagering that are not permitted by law are rendered speculative by Plaintiffs' admissions that those Tribes have stated such gaming will not be conducted absent a change in Oklahoma's law. SAC ¶¶140, 146. Contrary to what Plaintiffs seem to assume, they cannot overcome this admission with speculation that the Compacting Tribes' position may change. *See N.Y. Immigration Coal. v. Rensselaer Cty. Bd. of Elections*, No. 1:19-CV-920, 2019 U.S. Dist. LEXIS 204717, at *15 (N.D.N.Y. Nov. 25, 2019) ("hypothetical adoption" of policy proposed in press release too speculative to support standing) *cf. Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992) (past exposure to illegal conduct insufficient without present effects.). Plaintiffs also attempt to overcome this speculation by relying upon statements by an attorney for two of the Compacting Tribes that "new games" will provide a competitive advantage. Resp. at 28-29. But Plaintiffs do not contest that the statements were made in an April 21, 2020 letter. *See* Fed. Defs. Resp. to Pls.' Mot. for Leave to Amend at 6, ECF No. 100; Pls.' Reply at 11 n.9. Thus, the

statements predate the Compacting Tribes' repeated statements that they will not offer the feared games absent a change in law. Plaintiffs identify no statement since April 2020 indicating an intention to offer the feared games and admit subsequent statements that no gaming would occur until legalized by Oklahoma. Resp. at 27-28. Regardless, the compacts do not permit event wagering or iLottery absent changes to Oklahoma law. Pages15-16, above.

Plaintiffs' assertion, Resp. at 27, that their exclusivity is infringed upon because the challenged compacts provisionally allow new games in the event that Oklahoma changes its laws to permit such games is undermined by Plaintiffs' own compacts. Like the challenged compacts, Plaintiffs' compacts define "covered game" to include "any other game, if the operation of such game by a tribe would require a compact and if such game has been: . . . (ii) approved by state legislation for use by any person or entity, or (iii) approved by amendment of the State-Tribal Gaming Act." Chickasaw Compact at 2, ECF No. 71-2. Plaintiffs also fail to allege that their compacts' dispute resolution provisions would be inapplicable to any future Oklahoma action authorizing the feared gaming. Those provisions provide procedures for resolving allegations that Oklahoma "failed to comply with any requirement of [the] Compact." *See id*. at 24-25. It is thus far from certain that any future change to Oklahoma law will impose a competitive injury.

Plaintiffs' Notice of Supplemental Authority, ECF No. 119, illustrates Plaintiffs' failure to plead a sufficient injury. In *West Flagler*, Judge Friedrich found that a non-tribal gaming operator had standing to challenge the Secretary's inaction on a compact involving online sports betting where: 1) the state had passed a statute, meaning that "online sports betting is now available in Florida"; and 2) the compacting tribe had "in fact launched online betting." 2021 WL 5492996 at *2. Here, of course, Plaintiffs lack both state authorization and actual gaming under the allegedly-illegal compact provisions. This is fatal to Plaintiffs' standing.

Plaintiffs' assertion that the Compacting Tribes might someday change their position and offer event wagering fails for another reason. Because Plaintiffs are challenging the Secretary' regulation of third-party tribes, standing is more difficult to establish. U.S. Mem. at 19. Plaintiffs must at least allege facts "sufficient to demonstrate a substantial likelihood that the third party directly injuring the plaintiff would cease doing so as a result of the relief the plaintiff sought." *Hawkins v. Bernhardt*, 436 F. Supp. 3d 241, 249 (D.D.C. 2020), *aff'd sub nom. Hawkins*, 991 F.3d 216 (citation omitted). Plaintiffs' response is based on the opposite allegation—that the compacting tribes will conduct games even though they are not authorized by Oklahoma law. Resp. at 21-22, 31-32. Such gaming would be outside the scope of the challenged compacts and, thus, not traceable to the compacts' having been approved by operation of IGRA. Plaintiffs' effort to establish standing thus fails for one of two reasons: 1) Plaintiffs are not injured because the Compacting Tribes, consistent with their stated intentions, SAC ¶ 140, will not conduct the feared games absent a change in law; or 2) Plaintiffs' harms are neither caused by the Secretary nor redressable because the Compacting Tribes will conduct the challenged games regardless of whether they are authorized. Plaintiffs have failed to adequately allege standing under either scenario.

3. The mere possibility that future gaming facilities may result from future regulatory decision does not infringe upon Plaintiffs' purported geographic "zone of exclusivity."

As we explained in our opening brief, Plaintiffs cannot base standing on hypothetical competitive harms that could result from future gaming that could be conducted on lands that may in the future be acquired by the United States in trust for the Compacting Tribes. US Mem. at 24-28. Any gubernatorial concurrence in those future acquisitions that may appear in the challenged compacts does not determine the outcome of those future federal processes. *Id*.

Instead, the concurrence provisions address one of several steps in potential future "determination[s] by the Secretary of the Interior that land 'should be taken in trust for gaming purposes, and such lands are eligible for Gaming under 25 U.S.C. 2719(b)(1)(A)." Resp. at 33.

In response, Plaintiffs change tact. They now allege that the Governor's concurrence in possible future regulatory processes infringes on an alleged geographical "zone of exclusivity" within each Plaintiff's reservation. Resp. at 30-43. But Plaintiffs' reframed injury fails for the same reason it first failed—the challenged compacts neither authorize nor create a substantial risk of new casinos anywhere because the regulatory processes that would be necessary for gaming to occur have not even begun and because many regulatory hurdles would remain before a tribe's desire to game on newly acquired lands might lead to a new casino. US Mem. at 24-28.

As the D.C. Circuit held, a party wishing to challenge potential gaming lacks standing where the potential gaming cannot occur absent additional regulatory processes. *Yocha Dehe Wintun Nation v. U.S. Dep't of Interior,* 3 F.4th 427, 431 (D.C. Cir. 2021). These additional processes would include "federal approval of a tribal gaming ordinance" and a successful application for a specific "parcel to be taken into trust . . . [which] requires 'additional procedures and distinct determinations, including an environmental review' to comply with the National Environmental Policy Act, 42 U.S.C. § 4321." *Id.* Plaintiffs have not identified any material distinction between the potential future gaming here and that at issue in *Yocha Dehe*. Resp. at 29 n. 25, 38.

To the contrary, Plaintiffs do not contest that Interior would need to engage in some of the same additional regulatory processes that the D.C. Circuit found relevant in *Yocha Dehe* prior to any conceivable infringement of Plaintiffs' purported exclusivity. Resp. at 35. Plaintiffs, for example, admit that "other requirements must be met for off-reservation land acquisitions" under

25 C.F.R. 151.10-11, Resp. at 34-36, including the environmental review cited in *Yocha Dehe*. 3 F.4th at 431. Plaintiffs are correct, Resp. at 31, that the Compacting Tribes must navigate two separate regulatory processes prior to gaming on newly acquired lands: 1) the land into trust regulations, 25 C.F.R. Part 151; and 2) 25 U.S.C. § 2719(b)(1)(A), which determines whether gaming is permissible on such trust lands. Moreover, these regulations require Interior to consider ten criteria or issues in evaluating any future land into trust applications, including the type of jurisdictional issues upon which Plaintiffs base their claims. *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1012 (8th Cir. 2010) ("The interests of the defendants are protected by administrative procedures . . . in which trust acquisitions are balanced against a multitude of factors, including '[j]urisdictional problems and potential conflicts of land use.' 25 C.F.R. § 151.10(f)"). These processes require consultation with "nearby Indian tribes." *See* US Mem. at 25. Plaintiffs may still engage in any future decision making process and, assuming all the requirements for justiciability had been met, sue once that process ripens into a decision.[7] These additional processes render Plaintiffs' alleged harm much less than certainly impending. US Mem. at 26-27.

Plaintiffs' allegations that the Compacting Tribes are taking steps to position themselves to submit applications to take land into trust for future gaming does not make the outcome of the still-lacking regulatory processes any more certain. Tribes can purchase fee land within the Chickasaw Reservation regardless of whether any gaming compact exists. *See Lummi Indian Tribe v. Whatcom Cty., Wash*., 5 F.3d 1355, 1359 (9th Cir. 1993) (tribal fee lands are not inalienable). The compacts thus are not implicated in any such purchase of fee land. Plaintiffs'

[7] Rather than allege that they are likely to suffer harm from Oklahoma's concurrence in a future land-into-trust application, Plaintiffs allege the opposite—that Oklahoma's concurrence is of "illusory value." SAC ¶ 85.

claim that the Chickasaw Nation would violate IGRA if it did not resist any Comanche efforts to game within the Chickasaw Reservation, Resp. at 41-42, also does not cure the standing deficiency. Chickasaw may raise its concerns regarding alleged Comanche infringement of Chickasaw's jurisdictional integrity through comments on a potential land-into-trust application should Comanche ever submit such an application.

Plaintiffs' assertions that they have standing because of a *possible* infringement on their sovereignty, Resp. at 41, are refuted by the cases upon which they rely. *See, e.g., Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 463 (2d Cir. 2013) ("Article III's standing requirement is not satisfied by mere assertions of trespass to tribal sovereignty"). Plaintiffs' reliance on *Mescalero Apache Tribe v. New Mexico*, Resp. at 42, is illustrative. In *Mescalero*, a tribe had standing to challenge then-ongoing regulation. 630 F.2d 724, 728 (10th Cir. 1980). That regulation imposed "direct and immediate" impacts and the challenge was "as ripe for resolution as it will ever be." *Id.* Here, by contrast, Plaintiffs admit that they do not even know with certainty the county in which alleged future harm might occur. *E.g.* SAC ¶ 231.s. Plaintiffs' reliance on *Clinton v. New York* is similarly illustrative. Resp. at 40 n.40. There, the President used a line item veto to impose a "multibillion dollar contingent liability" unless the government made a second decision to waive required repayment. 524 U.S. 417, 430 (1998). Injury was certain absent more government action. Here, by contrast, the "future concurrence" provisions would only apply to different, still-uncommenced regulatory processes. Resp. at 36.

Finally, Plaintiffs' speculation regarding the outcome of any future process falls far short of establishing standing. *Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (assuming previous actions were illegal, this "does nothing to establish a real and immediate threat that" future actions will be illegal). The compacts do not bind Interior to a specific outcome on future fee-to-

trust applications. The Secretary's actions here have therefore not created any certainly impending harm from gaming on future land acquisitions. *See Worth v. Jackson*, 451 F.3d 854, 860 (D.C. Cir. 2006) (No standing where plaintiff "rest[s] his claim instead on speculation, untethered to any written directive, about how [agency] is likely to make future . . . decisions."). As in *Worth*, Plaintiffs lack standing because "[w]hatever the agency chooses to do, there exists a healthy chance that it will never harm the[m]." *Id*.

Plaintiffs themselves highlight the fundamental flaw in their argument regarding the future concurrence provisions: "Whether the Secretary would honor the Chickasaw objections to an on-Reservation acquisition by Comanche . . . is uncertain, given her expressly stated position that the outcome of such an objection is uncertain." Resp. at 43. Exactly. Because Plaintiffs' alleged harm from the concurrence provision—and any related impact on their supposed "zone of exclusivity"—hinges on speculation regarding uncertain future actions, Plaintiffs have failed to adequately allege an injury in fact for standing purposes. *Clapper*, 568 U.S. at 409. *See also Whitmore v. Arkansas*, 495 U.S. 149, 159-60 (1990) ("It is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case."); *Al Odah v. United States*, 62 F. Supp. 3d 101, 109 (D.D.C. 2014) (no jurisdiction "based entirely upon speculation that federal government officials will refuse to carry out their apparent legal responsibilities"). Plaintiffs have failed to adequately allege an injury in fact for Counts One through Seven.

II. Counts One Through Seven Fail to State a Plausible Claim for Relief.

Even if the Complaint had adequately alleged an injury in fact, Counts One through Seven would still need to be dismissed for failure to state a claim.

A. IGRA Does Not Require the Secretary to Disapprove a Compact Where There Is An Unresolved Dispute as to State Authority.

Counts One through Three fail to plead a plausible claim for relief. The three claims assert that the Secretary acted arbitrarily and capriciously or contrary to law in allowing the compacts to be considered approved by operation of IGRA because the Governor allegedly lacked authority to enter into the compacts on the State's behalf. *See* SAC ¶¶ 232–44.

As our motion explained, IGRA says only that "[t]he 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." 25 U.S.C. § 2710(d)(8)(A). For purposes of determining that a compact has been "entered into," Interior Department regulations require, as relevant here, "[c]ertification from the Governor or other representative of the State that he or she is authorized under State law to enter into the compact or amendment." 25 C.F.R. § 293.8(c). The Complaint does not allege that any compact lacked a tribal or gubernatorial certification. *See* SAC ¶¶ 3, 81-82, 101, 112. And IGRA does not require the Secretary to resolve a dispute about gubernatorial authority, nor to disapprove a compact because such a dispute exists. *See Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997). Counts One through Three therefore fail to state a plausible claim for relief. *See Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (Rule 12(b)(6) "authorizes a court to dismiss a claim on the basis of a dispositive issue of law.").

In response, Plaintiffs acknowledge that a Rule 12(b)(6) motion "does not test a plaintiff's ultimate likelihood of success on the merits; rather, it tests whether a plaintiff has properly stated a claim." Resp. at 6 (quoting *Connecticut v. U.S. Dep't of Interior*, 344 F. Supp. 3d 279, 295 (D.D.C. 2018)). Plaintiffs nonetheless dedicate their response to arguing the merits of Counts One through Three, explaining why they believe the Secretary acted arbitrarily and

capriciously with respect to the state authority question. Resp. at 45–52. Those arguments presuppose that Counts One through Three state plausible claims for relief in the first place.

Where Plaintiffs do focus on the question presented by Rule 12(b)(6), they posit that there was no state law question for the Secretary to resolve because the Oklahoma Attorney General had opined that the Governor lacked authority to enter into the compacts. *See* Resp. at 46–49. But Plaintiffs (and the Oklahoma Attorney General) make their point *by interpreting state law*. *See* Resp. at 47–48; Pls.' Mem. Ex. 7, ECF No. 72-7. And the Complaint acknowledges that the Governor also provided a legal opinion to the Secretary, reaching the opposite conclusion. *See* SAC ¶ 82; Mem. from Office of Gen. Counsel, Okla. Gov. Office, to P. Hart (Ex. B). Thus, rather than resolve the dispute, the Attorney General's opinion only evidenced its existence. *See also* Letter from Mike Hunter to Greg Treat 3, Pls.' Mem. Ex. 7, ECF No. 72-7 (stating the question "implicate[d] core notions of [Oklahoma's] constitutional structure . . . ."). Indeed, the dispute actually spawned state court litigation regarding the extent of the Governor's authority for each of the compacts. The Complaint acknowledges that the state court litigation (*Treat I* and *Treat II*) remained pending at the close of the Secretary's statutorily-mandated 45-day review period for the relevant compacts. *See* SAC ¶¶ 81, 91-92, 96, 101, 103, 231.i. Thus, the decisions in *Treat I* and *Treat II*—and the question of whether the compacts remain valid under state law today—are distinct from the question of whether the Secretary had been presented with a dispute over state law authority.

Plaintiffs seem to believe the Secretary, rather than the Oklahoma Supreme Court, should have decided the state authority question with finality. But neither IGRA nor the Department of the Interior's regulations require the Secretary to resolve a dispute about state authority. *See* 25 U.S.C. § 2710(d)(8)(A); 25 C.F.R. §§ 293.7-8. All the cases the parties cite on the topic

concluded that IGRA does *not* impose such a duty. *See Santa Ana*, 104 F.3d at 1557; *Langley v. Edwards*, 872 F. Supp. 1531, 1535 (W.D. La. 1995), *aff'd sub nom. Langley v. Dardenne*, 77 F.3d 479 (5th Cir. 1996) (per curiam); *Rhode Island v. Narragansett Indian Tribe*, No. 94–cv–0619–T, 1995 WL 17017347 at *2 (D.R.I. Feb. 3, 1995).

Plaintiffs seek refuge in administrative decisions quoted in *Santa Ana* and *Narragansett* in which the Secretary stated that Interior defers to a governor's representations of authority "unless it is clear beyond cavil that a Governor lacks the authority to sign a compact." *See* Resp. at 48 (citing *Santa Ana*, 104 F.3d at 1557, and *Narragansett*, 1995 WL 17017347 at *3). But *Santa Ana* and *Narragansett* pre-date Interior's present regulations that set forth what compacting parties must submit to demonstrate that a compact has been "entered into." *See* 25 C.F.R. § 293.8(b), (c) ; Tribal State Gaming Compact Process, 73 Fed. Reg. 74,004 (Dec. 5, 2008) (final rule). The regulations include no "clear beyond cavil" standard. In any event, *Santa Ana* and *Narragansett*—despite the references to which Plaintiffs cite—both interpreted IGRA as *not* requiring the Secretary to resolve a state law dispute as to compacting authority. *Santa Ana*, 104 F.3d at 1557 ("[T]he Secretary is not expected to *resolve* state law issues regarding that authority in the 45–day period given to him to approve a compact."); *Narragansett*, 1995 WL 17017347 at *2 ("Nothing in IGRA even suggests that Congress intended that the Secretary determine who is authorized to execute such compacts on behalf of states.").

Even if Interior's regulations included a "clear beyond cavil" standard, Counts One through Three would still fail to state a claim. The Amended Complaint alleges that: (1) the Secretary was presented with competing legal memoranda regarding the scope of the Governor's authority under state law (SAC ¶¶ 82, 89); and (2) by the close of the statutorily-mandated 45-day review period, litigation before the Oklahoma Supreme Court regarding the Governor's

authority remained pending (*see id.* ¶¶ 81, 91-92, 96, 101, 103, 231.i). Those alleged facts are hardly trivial enough to make any lack of authority "clear beyond cavil."

Plaintiffs also turn to prior compact approvals in Oklahoma, arguing that Interior has already resolved the question of authority under Oklahoma law. Resp. at 48 n.43 (citing Pls.' Exs. 5, 8–13). But the prior approvals simply stated a fact with respect to those compacts: the legislature had approved them. *See, e.g.,* Pls.' Ex. 8 at 1 ("The Compact is authorized by recent legislation enacted by the State of Oklahoma."). Interior's prior approvals did not opine on the extent, if any, of the Governor's compacting authority under Oklahoma state law. Nor are Plaintiffs correct that the federal government commandeers state function when compacts become approved by operation of IGRA. *See* Resp. at 51–52. The Secretary cannot force action by any of the compacting parties as Plaintiffs suggest; the Secretary is not a party to the compacts and did not affirmatively act to approve them. Because IGRA does not require the Secretary to resolve internal state separation of powers disputes regarding authority to enter into a compact, nor to disapprove a compact because such a dispute exists, Counts One through Three fail to state a plausible claim for relief and should be dismissed.

B. When the Secretary Does Not Act, Compacts Are Approved by Operation of Statute, But Only to the Extent They Are Consistent With IGRA.

Counts Four through Seven also fail to state a plausible claim for relief. The claims assert that, because certain provisions in each of the four compacts are allegedly contrary to IGRA, the Secretary acted arbitrarily and contrary to law by allowing the compacts to become approved by operation of IGRA. SAC ¶¶ 245–65.

As an initial matter, Plaintiffs' response misstates our argument. We have not argued that the Administrative Procedure Act—the right of action upon which Plaintiffs rely—is unavailable here. *See* Resp. at 52 (claiming that we have argued Plaintiffs "lack a cause of action"). Rather,

Counts Four through Seven fail, as a matter of law, to state plausible claims for relief under that right of action. *See* US Mem. at 31–34. The Secretary could not have acted arbitrarily or contrary to law here because, by IGRA's own terms, a compact is only considered to be approved "to the extent the compact is consistent with [the statute]." 25 U.S.C. § 2710(d)(8)(C).

Thus, Plaintiffs' reliance on *Amador County* is misplaced. *See* Resp. at 52–54. Contrary to what Plaintiffs seem to assume, *Amador County* did not hold that, a plaintiff always states a plausible APA claim whenever challenging agency action under 25 U.S.C. § 2710(d)(8)(C). *See Amador Cnty. v. Salazar*, 640 F.3d 373, 383 (D.C. Cir. 2011). Further, the underlying issue in *Amador County* was different than that presented by Counts Four through Seven. The plaintiff in *Amador County* argued that the tribe was not eligible to game because the land in question was not "Indian lands," a statutory requirement under 25 U.S.C. § 2710(d)(1). *See* 640 F.3d at 377; *id.* at 376–77 ("[C]ritical to this case, IGRA provides for gaming only on 'Indian lands.'" (citation omitted)). Thus, the entire compact, not some provision of it, was alleged to have been contrary to IGRA. Counts Four through Seven do not allege a similar all-or-nothing infirmity. Instead, Plaintiffs allege that a limited number of specific provision within each compact are contrary to IGRA. Plaintiffs have not shown that the Circuit anticipated the present circumstances when broadly stating that "[t]he Secretary must . . . disapprove a compact if it would violate any of the three limitations in [25 U.S.C. § 2710(d)(8)(B)]." Resp. at 53 (quoting *Amador Cnty.*, 640 F.3d at 381). Indeed, if Plaintiffs' reading were correct, then the D.C. Circuit would have erased the last clause of § 2710(d)(8)(C). Such a result would violate the rule of statutory construction requiring courts to give meaning to all words in a statute. *See Moskal v. United States*, 498 U.S. 103, 109–10 (1990).

Plaintiffs theorize that, should a provision in a proposed compact violate IGRA, *Amador County* obligates the Secretary "to prevent that section from going into effect by disapproving it." Resp. at 53-54. But that was effectively the outcome here: "the Compacts are considered to have been approved, but only to the extent they are consistent with IGRA." 85 Fed. Reg. 38,919 (June 29, 2020); 85 Fed. Reg. 55,472 (Sept. 8, 2020); *see also* SAC ¶¶ 93, 106 (citing the two Federal Register notices).

Plaintiffs' reading of *Amador County* is also surprising. In 2006, the Secretary allowed compacts from Plaintiff Choctaw Nation and Plaintiff Citizen Potawatomi Nation to become approved by operation of IGRA despite finding that a termination provision in each compact was "inconsistent with IGRA." Pls.' Mem. Ex. 10 at 3, ECF No. 72-10; Pls.' Mem. Ex. 11 at 3, ECF No. 72-11. Under the legal theory that forms the basis for Counts Four through Seven, the Secretary could not have lawfully allowed Plaintiffs' compacts to go into effect and should have disapproved them in their entirety. Of course, that was not the case. Those two compacts, like the four at issue here, are considered to be approved by operation of statute, but only to the extent consistent with IGRA. *See* 25 U.S.C. § 2710(d)(8)(C).

The other four cases upon which Plaintiffs rely also do not support a conclusion that Plaintiffs have stated a plausible APA claim. *See* Resp. at 54. Only one of the cases involved a claim under IGRA. *See Stand Up for Cal.! v. U.S. Dep't of Interior*, 71 F. Supp. 3d 109, 112 (D.D.C. 2014). But the opinion addressed the adequacy of the administrative record rather than whether the complaint had stated a plausible claim for relief. *See id.*

Nor does Judge Friedrich's recent decision in *West Flagler* mean that Plaintiffs have stated a plausible APA claim. *See* Pls.' Notice of Recent Decision (ECF No. 119) (citing *W. Flagler*, 2021 WL 5492996). The opinion is not binding precedent. *See Scotts Valley Band of*

Pomo Indians v. U.S. Dep't of the Interior, No. 19-cv-1544-ABJ, 2020 WL 8182061, *3 (Dec. 4, 2020) (citing *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011)). Also, the Court did not address Rule 12(b)(6), despite the Secretary having moved to dismiss on that ground. *See W. Flagler*, at *3. Instead, the Court addressed a separate summary judgment motion and concluded that the compact "allow[ed] patrons to wager throughout Florida, including at locations that are not Indian lands." *Id.* at *9. Thus, the court reasoned, just as the plaintiff in *Amador County* had alleged, the compact "violate[d] IGRA's 'Indian lands' requirement." *Id.* at *11.

Plaintiffs' brief asserts—without citing to the Complaint—that the KTT and UKB compacts "do not deal with 'Indian lands.'" Resp. at 53. To the contrary, however, the compacts state that they govern gaming "on the Tribe's Indian Lands." *See* UKB Compact at 1, SAC Ex. 3, ECF No. 104; KTT Compact at 1, SAC Ex. 4, ECF No. 104. Certainly, the compacts anticipate future lands that the United States may take into trust for the Compacting Tribe's benefit. But, once in trust, those lands would be "Indian lands." *See* 25 U.S.C. § 2703(4); *accord id.* § 2719(b)(1)(B) (creating exception to prohibition on newly acquired lands for certain categories lands "taken into trust"). Plaintiffs do not point to anything in the compacts that contemplates, let alone authorizes, tribal Class III gaming off Indians lands.

Because any provisions of the compacts that are inconsistent with IGRA are not considered to be approved, Plaintiffs have failed to state a plausible claim for relief for Counts Four through Seven.[8]

[8] Count Four and Count Seven fail to state a claim for additional reasons. *See* US Mem. at 33–34. We will not repeat those arguments other than to note that Plaintiffs concede Count Seven is just a restatement of the other counts' allegations that the Secretary violated the APA by acting contrary to IGRA. *See* Resp. at 55.

CONCLUSION

The Complaint fails to allege a certainly impending injury in fact from the compacts becoming approved by operation of statute. Further, because the Complaint's legal theories are incorrect as a matter of law, it fails to state a plausible claim for relief. The Complaint's claims against Federal Defendants should be dismissed.

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