IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CHEROKEE NATION, *et al*.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:20-cv-02167 (TJK)
	)	
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al*.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF NATIONS' CONSOLIDATED REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE MEMORANDUM IN OPPOSITION TO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

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Pursuant to Fed. R. Civ. P. 56, Plaintiffs Cherokee Nation, Chickasaw Nation, Choctaw Nation of Oklahoma, and Citizen Potawatomi Nation (collectively, "Plaintiff Nations" or "Nations") submit this memorandum in reply to Defendants' responses to Plaintiff Nations' motion for summary judgment and in response to Defendants' cross-motions for summary judgment.[1] The Defendants are: the Department of the Interior; Doug Burgum, Secretary of the Interior ("Secretary"); William Kirkland, Assistant Secretary of the Interior – Indian Affairs; Forrest Tahdooahnippah, Chairman of the Comanche Nation; John R. Shotton, Chairman of the Otoe-Missouria Tribe;[2] and J. Kevin Stitt, Governor of Oklahoma (collectively, "Defendants").

INTRODUCTION

The Secretary's decisions to allow the Comanche Nation ("Comanche") and Otoe-Missouria Tribe ("Otoe-Missouria") Agreements (collectively, "Agreements") to go into effect by inaction are judicially reviewable under 25 U.S.C. § 2710(d)(8)(C), *W. Flagler Assocs., Ltd. v. Haaland*, 71 F.4th 1059, 1063 (D.C. Cir. 2023) (citing *Amador County v. Salazar*, 640 F.3d 373, 383 (D.C. Cir. 2011)), which "'provides the law to apply—that is, the compact is deemed approved but only to the extent the compact is consistent with the provisions of IGRA," *id.* at 1064-65 (quoting *Amador County*, 640 F.3d at 381) (citation modified). "If a compact has not been legally entered into under state law, it is 'invalid' under IGRA." *Cherokee Nation v. U.S. Dep't of Interior*, 643 F. Supp. 3d 90, 98 (D.D.C. 2022) (citing *Kickapoo Tribe of Indians v. Babbitt* (*Kickapoo I*),

[1] *See* Fed. Defs.' Cross-Mot. Summ. J. & Opp'n Pls.' Mot. Summ. J. ("FD Br."), Dkt. No. 230-1; Def. Governor Stitt's Mem. Supp. Cross-Mot. Summ. J. & Opp'n Pls.' Mot. Summ. J. ("Stitt Br."), Dkt. No. 233-1; Comanche Nation Chairman's Mem. Opp'n Pls.' Mot. Summ. J. ("CNC Opp. Br."), Dkt. No. 228; Comanche Nation Chairman's Mem. Supp. Counter Mot. Summ. J. ("CNC CM Br."), Dkt. No. 226-1; Def. Chairman Shotton's Consol. Mem. Opp'n Pls.' Mot. Summ. J. & Supp. Cross-Mot. Summ. J. ("Shotton Br."), Dkt. No. 229-1.

[2] We refer to the Department of the Interior, the Secretary, and the Assistant Secretary of the Interior–Indian Affairs collectively as "Federal Defendants," and to Defendants Tahdooahnippah and Shotton collectively as "Defendant Chairmen."

827 F. Supp. 37, 46 (D.D.C. 1993), *rev'd on other grounds*, 43 F.3d 1491 (D.C. Cir. 1995); and *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1555, 1559 (10th Cir. 1997)). Defendant Stitt lacked authority under state law to enter into the Agreements on behalf of the State, as the Oklahoma Attorney General opined *before* the Agreements were approved by Secretarial inaction in an opinion that was and is binding on the Governor, and as the Oklahoma Supreme Court has repeatedly held in subsequent rulings that Defendant Stitt does not contest. The Secretary was, therefore, obligated to disapprove the Agreements, which are void. *Santa Ana*, 104 F.3d at 1559. What's more, the Secretary was required to disapprove the Agreements because they contain numerous provisions that violate the Indian Gaming Regulatory Act ("IGRA"). Accordingly, this Court should reverse the Secretary's no-action approvals and remand the Agreements for disapproval.

ARGUMENT

I. PLAINTIFF NATIONS HAVE STANDING.

Plaintiff Nations have standing because the Secretary approved the Agreements and there is no genuine dispute that Plaintiff Nations compete with Defendant Chairmen's Tribes.[3]

[3] Federal Defendants assert that Plaintiff Nations have not faced an *increase* in competition, but do not dispute that competition exists. *See* FD Br. at 15-16. In a declaration, Defendant Tahdooahnippah offers his lay opinion based on driving times and distances he found on Google Maps that Comanche Nation does not compete with Plaintiff Nations, CNC CM Br., Ex. 1 at ¶¶ 31-40, Dkt. No. 226-2, but Dr. Wyman surveyed living, breathing casino patrons who said they visit both Plaintiff Nations' and Defendant Chairmen's Tribes' casinos and concluded that Defendant Chairmen's Tribes are diverting revenue from Plaintiff Nations' casinos. Plaintiff Nations' Statements of Fact ("Nations' SOF") ¶¶ 54-62, 75-80, Dkt. No. 223-2. Dr. Wyman's expert conclusions are confirmed when read in the context of the Oklahoma gaming market. At the end of Fiscal Year 2025, there were thirty-three Indian tribes operating 138 gaming facilities offering Class III gaming in Oklahoma. Dkt. No. 226-3 at 16 (Okla. Gaming Compliance Unit, Okla. Off. of Mgmt. & Enter. Servs., *Annual Report Fiscal Year 2025*, at 6 (n.d.)); *see* Nat'l Indian Gaming Comm'n, *Map of Indian Gaming Locations*, https://www.nigc.gov/map/ (last accessed Mar. 14, 2026) ("NIGC Map"). Indian gaming in Oklahoma thus offers patrons a wide selection of choices. The competing facilities' relative proximity is aided by the three major interstate

A. Plaintiff Nations Suffer Equal Footing Injury.

The Secretary's no-action approvals of the Agreements and Defendant Tribal Chairmen's conduct of gaming under the Agreements pursuant to those approvals deprives Plaintiff Nations of their right to compete on an equal footing in the Oklahoma gaming market, because it forces them to compete with unlawful gaming. *See* Pls.' Mem. in Supp. of Mot. for Summ. J. ("Br.") at 5-6, ECF 223-1. As *Lac du Flambeau Band v. Norton* explained, "the denial of equal treatment" is an injury in fact that is sustained when the government imposes barriers on some, but not others. 422 F.3d 490, 497 (7th Cir. 2005) (quoting *Ne. Fla. Ch. Assoc'd Gen. Cont'rs v. City of Jacksonville*, 508 U.S. 656, 666 (1993)). The federal government requires Plaintiff Nations to comply with IGRA to conduct Class III gaming but allows Defendant Chairmen's Tribes to compete in the Oklahoma tribal gaming market in violation of IGRA and denies that the Nations have any right to challenge the Secretary's no-action approvals. That imposes a concrete and particularized injury on Plaintiff Nations, traceable to the Secretary's and Defendant Chairmen's conduct, which will be redressed if the Secretary's no-action approvals are voided, even if Defendant Chairmen's Tribes are later able to return to gaming under the IGRA-compliant Model Compact.

The equal footing injury suffered by the Nations is placed in clear view by the position of the Defendants in this action with respect to the validity of the Agreements. Defendants claim that all that is needed to show that the State has entered into a compact under IGRA is the Governor's certification under 25 C.F.R. § 293.8(c). FD Br. at 20-21; Stitt Br. at 13, 19-21; Shotton Br. at 17-18, 25. Federal Defendants claim that questions of state law are outside the scope of the

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highways that cross Oklahoma, Interstate 35, 40, and 44, *see* NIGC Map, which also bring patrons from other locations into Oklahoma. These judicially-noticeable facts also compel the conclusion that gaming tribes in Oklahoma compete for patrons.

Secretary's compact review, including whether a state has validly entered into a compact, FD Br. at 21. Defendant Stitt claims that whether a compact was validly entered into by the State under state law is outside the scope of the Secretary's review, Stitt Br. at 17-19, and that once a compact is in effect under IGRA, it cannot be invalidated by a state court on the ground that it was not entered into by the State, Stitt Br. at 22-23. Defendant Chairmen agree. CNC Opp. Br. at 8-10; Shotton Br. at 24-26. Federal Defendants also claim that compact provisions that the parties agree are "directly related to the operation of gaming activities," *see* 25 U.S.C. § 2710(d)(3)(C)(vii), are "not contrary [to] IGRA." FD Br. at 25-26. And Defendants assert that a compact can authorize presently illegal activities to be conducted if they ever become legal, FD Br. at 28; Stitt Br. at 34; Shotton Br. at 27, and can approve land acquisitions that have no specifications or existence other than under the compact and that have not met existing regulatory requirements, FD Br. at 31-32; Stitt Br. at 41; Shotton Br. at 40-42. Finally, Federal Defendants assert that the Secretary's no-action approval of a compact that is inconsistent with IGRA is lawful because the compact is approved "only to the extent the compact is consistent with the provisions of [IGRA]." FD Br. at 26 (quoting 25 U.S.C. § 2710(d)(8)(C)).

Taken together, these positions deny the Nations their right to be free from unlawful competition, use the Secretary's no-action approval to bar the Nations from enforcing Federal Defendants' responsibility under IGRA for Defendant Chairmen's Tribes' gaming, and cede to Defendant Stitt complete control over Indian gaming in Oklahoma, which he has exercised by signing these Agreements as if he is the State. These positions impose an equal footing injury on the Nations because, the legal obligations IGRA imposes remain in place for them, while the Secretary's no-action approvals free Defendant Stitt and Defendant Chairmen from IGRA's obligations.

Lac du Flambeau found an equal footing injury in far less extreme circumstances. It concerned the no-action approval of a compact that gave one tribe the ability to prevent Wisconsin from concurring in off-reservation land into trust acquisitions for other tribes, or to require that the State indemnify it for supposed reductions in gaming revenue caused by such acquisitions. 422 F.3d at 494. Another tribe had standing to challenge the approval, because this provision denied equal treatment to other tribes in Wisconsin and deprived them of the "ability to compete on an equal footing." *Id.* at 497. So too here: Plaintiff Nations are denied equal treatment by the Secretary's actions because they must game under compacts approved by the State that comply with IGRA, while Defendant Chairmen's Tribes can game under new Agreements that were not entered into by the State and do not comply with IGRA.

Defendants' efforts to distinguish *Lac du Flambeau* fizzle. Defendant Tahdooahnippah says that case concerned only the pleadings stage. CNC CM Br. at 17. But that only affects the evidentiary standard, which Plaintiff Nations meet because they have shown competition with Defendant Chairmen's Tribes, *see supra* at 3-4; *infra* at 7-11. Defendant Tahdooahnippah then argues that *Lac du Flambeau* is distinguishable because the compact at issue "created a *direct* threat to the plaintiff-tribe's *own* operations." CNC CM Br. at 18. Nothing in *Lac du Flambeau* applies the "direct threat" standard he urges, as the injury "is the denial of equal treatment resulting from the imposition of the barrier." *Assoc'd Gen. Cont'rs*, 508 U.S. at 666; *see id.* at 664 (discussing *Turner v. Fouche*, 396 U.S. 346, 361 n.23 (1970) (plaintiff had standing when he wished to be considered for official appointment)).[4] Defendant Tahdooahnippah also argues that Plaintiff Nations are not suffering an equal footing injury because IGRA compacts can contain

[4] That also disposes of Federal Defendants' effort to distinguish *Lac du Flambeau* or *Forest County Potawatomi Community v. United States*, 317 F.R.D. 6 (D.D.C. 2016), on the basis that one case involved a two-part determination and both involved anticompetitive provisions. FD Br. at 13.

different terms. CNC CM Br. at 18; *see id.* at 6, 8. That presupposes that the terms of the Agreements comply with IGRA. Defendants cannot rely on that merits argument to attack Plaintiff Nations' standing. *See La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 368 (D.C. Cir. 1998) (quoting *Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997)).

For their part, Federal Defendants claim "Plaintiffs have failed to identify any barrier or unequal treatment that impedes their opportunity to obtain a benefit that they are 'able and ready' to seek." FD Br. at 11-12. The controlling rule is different, however:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.

Assoc'd Gen. Cont'rs, 508 U.S. at 666. The barrier here is Federal Defendants' contentions that the Secretary's no-action approval may allow illegal gaming under the Agreements and at the same time deny the Nations judicial recourse to challenge his actions. Federal Defendants also seek to limit the rule to the particular "context of a challenge to a set-aside program," *id.* (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)),[5] but that argument fails because equal footing standing is established when an agency disadvantages some incumbents in a market while favoring other incumbents, *see Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 633-34, 636-37 (5th Cir. 2012). And although Federal Defendants assert that "nothing in the [Agreements]

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[5] Likewise, *Regents of University of California v. Bakke*, 438 U.S. 265, 280 n.14 (1978), and *Tarpley v. Jeffers*, 96 F.3d 921, 924 (7th Cir. 1996), did not purport to limit the doctrine to those cases' contexts. Federal Defendants also rely on *Settles v. United States Parole Commission*, where the D.C. Circuit more broadly described *Associated General Contractors* as "addressing instances where individuals in one group are competing with individuals in another group for a benefit (*such as* a contract or admission to a school)." 429 F.3d 1098, 1102 (D.C. Cir. 2005) (emphasis added). As the D.C. Circuit has itself approved application of the equal footing injury analysis to situations in which plaintiffs compete with others, Federal Defendants cannot criticize application of that doctrine in this context as a "repackaging" of competitor injury, *contra* FD Br. at 13.

restricts Plaintiffs from requesting negotiations with the State over amendments to their compacts," FD Br. at 13, that does not cure their injury because they will have to negotiate within the bounds of IGRA, while Defendant Chairmen's Tribes did not.

B. Plaintiff Nations Face Competitor Injury.

Plaintiff Nations also face competitor injuries. They face an actual or imminent increase in competition because their existing competitors receive benefits under the Secretary's no-action approvals, *including the right to engage in Class III gaming unlawfully*, offer games that Plaintiff Nations cannot offer, and pay a lower substantial exclusivity fee to the State. Br. at 7-10.

Federal Defendants assert that Plaintiff Nations cannot "show that they face 'imminent *increase* in competition,'" because they "operated alongside" Defendant Chairmen's Tribes' casinos before the Agreements went into effect, and Plaintiff Nations have not "connect[ed] any change in competitive conditions to the actual challenged agency action." FD Br. at 15-16 (internal citations omitted). These objections fail because in the D.C. Circuit, competition is increased when "an agency 'lift[s] regulatory restrictions on [a party's] competitors or otherwise allow[s] increased competition,'" *New World Radio, Inc. v. F.C.C.*, 294 F.3d 164, 172 (D.C. Cir. 2002) (quoting *La. Energy*, 141 F.3d at 367), and "when regulations illegally structure a competitive environment—whether an agency proceeding, a market, or a reelection race—parties defending concrete interests … in that environment suffer legal harm under Article III," *Am. Inst. of CPAs v. IRS*, 804 F.3d 1193, 1197 (D.C. Cir. 2015) (quoting *Shays v. FEC*, 414 F.3d 76, 87 (D.C. Cir. 2005)).[6]

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[6] Federal Defendants' assertion that the doctrine applies when "the 'challenged agency action' must '*almost surely* cause petitioner to lose business,'" FD Br. at 14-15, is a misquotation. *El Paso Natural Gas Co. v. FERC* actually said that "when a challenged agency action authorizes allegedly illegal transactions that will almost surely cause petitioner to lose business, there is no need to wait for injury from specific transactions to claim standing." 50 F.3d 23, 27 (D.C. 1995); *contra* FD Br. at 15 (citing *Delta Air Lines, Inc. v. Exp.-Imp. Bank*, 85 F. Supp. 3d 250, 262 (D.D.C. 2015)); *see also CPAs*, 804 F.3d at 1198 ("Because increased competition almost surely injures a seller in one form or another, he need not wait until allegedly illegal transactions hurt him

There is no genuine dispute that Plaintiff Nations' casinos compete with Defendant Chairmen's Tribes' casinos, *see supra* at 3. And the Secretary's no-action approval of the Agreements plainly lifted regulatory restrictions on Defendant Chairmen's Tribes by, *inter alia*, allowing them to conduct gaming under Agreements that are invalid, by reducing their revenue sharing obligations, and allowing them to offer new games under those Agreements. The Governor's preemptive concurrence in off-reservation land-into-trust acquisitions also lifts a significant regulatory burden on Defendant Chairmen's Tribes' future conduct of gaming at new locations. *Contra* CNC CM Br. at 15-16. The lifting of restrictions is entirely due to the Secretary's no-action approvals. Moreover, since the Agreements were no-action approved, Defendant Chairmen's Tribes have operated Class III gaming under the Agreements. *See infra* at 47 n.38; Shotton Br. at 36. So, all the Class III competition Plaintiff Nations face from Defendant Chairmen's Tribes is attributable to the Agreements, which by allowing tribes to conduct Class III gaming without a valid compact "entered into" by the State, serve to "illegally structure[] [the] competitive environment" in which Plaintiff Nations operate.[7]

Federal Defendants assert that the Agreements did not increase competition because Defendant Chairmen's Tribes can game under IGRA and were offering Class III gaming before 2020. FD Br. at 16-17. But the competitive environment changed after the Secretary allowed illegal Agreements to go into effect and Defendant Chairmen's Tribes began gaming under them.

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competitively before challenging the … governmental decision that increases competition." (quoting *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010)).

[7] Federal Defendants misleadingly quote *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000). That case—which expressly did not address standing requirements, *see id.* at 946—concerned only a "provision" of IGRA, not IGRA as a whole, as Federal Defendants modify the quote to say. That provision, 25 U.S.C. § 2719(b), "requires the Secretary to consider the economic impact of proposed gaming facilities on the surrounding communities" when a tribe seeks to conduct gaming off-reservation, *Sokaogon*, 214 F.3d at 943-45, 947. The court did "not resolve the question whether this interest is protectable" under Fed. R. Civ. P. 24, *id.* at 947.

See La. Energy, 141 F.3d at 366-67 (finding a power company that was a current "competitor and customer" of a different power company had standing to challenge FERC action that allowed the second power company to sell power at lower rates than before).

Federal Defendants then assert that "Plaintiffs offer no evidence that the Defendant Tribes are offering any games that are currently not allowed in Oklahoma or have reduced prices or increased jackpots." FD Br. at 17. All Class III gaming that Defendant Chairmen's Tribes are currently conducting is unlawful because it is conducted without a valid compact. That is enough for Plaintiff Nations' competitor standing. Regardless, competitor injury depends on the *regulator's* authorization of illegal transactions. It does not hinge on whether competitors are effectively exploiting their competitive advantages at a given time. *See Shays*, 414 F.3d at 87 (competitors are "at the very least harmed by having to anticipate other actors taking advantage of the regulations to engage in activities that otherwise would be barred"); *La. Energy*, 141 F.3d at 367 ("[P]etitioners sufficiently establish their constitutional standing by showing that the challenged action authorizes allegedly illegal transactions that have the clear and immediate *potential* to compete with the petitioners' own sales. They need not wait for specific, allegedly illegal transactions to hurt them competitively." (internal citation omitted)).[8]

Defendants claim that the Agreements do not authorize event wagering or house-banked games, *see* FD Br. at 26-27; CNC CM Br. at 14, but that merits question does not unsettle Plaintiff

[8] Aside from that, Defendant Tahdooahnippah's contention that the Comanche Nation cannot take advantage of the lower exclusivity rate due to the Comanche Nation's Revenue Allocation Plan ("RAP"), CNC CM Br. at 26-27, holds no water. The RAP only controls how the Comanche Nation distributes revenue remaining *after* its gaming enterprises pay out player winnings, equipment costs, supplies, and other operating expenses; it does not control what the Nation spends on those things. *Id.* at 26-27 n.18 (quoting RAP art. II(f), Dkt. No. 226-2 at 2). The RAP therefore does not stop Comanche Nation from using its increased profitability to compete more effectively than it could otherwise by, e.g., increasing jackpots, buying more attractive equipment, or offering better amenities.

Nations' standing, *see La. Energy*, 141 F.3d at 368.[9] And nothing stops Defendant Chairmen from asserting at any time that, in fact, the Agreements authorize them to offer event wagering or house-banked games. Indeed, the Attorney General determined in the binding opinion in *In re Treat*, 2020 OK AG 8, ¶ 13 n.5, 2020 WL 2304499 at *4 n.5, AR500, and the Oklahoma Supreme Court agreed, *Treat v. Stitt* (*Treat I*), 2020 OK 64, ¶ 6, 473 P.3d 43, 45, that the Agreements *do* purport to authorize those games. Defendant Chairmen might employ those decisions to their benefit at any time. The need to anticipate that possibility establishes injury. *See Shays*, 414 F.3d at 90. Finally, there is no dispute the Agreements currently authorize Defendant Chairmen's Tribes to pay lower exclusivity rates. FD Br. at 28-29; Shotton Br. at 35-36; CNC CM Br. at 26; *see also* Stitt Br. at 37-39.[10]

C. Nations Suffer Economic Injuries.

Plaintiff Nations also suffer economic injuries from Defendant Chairmen's conduct of gaming under the Agreements. Br. at 9-10. As Dr. Wyman concluded, Plaintiff Nations' patrons consistently divert money that they would otherwise spend at Plaintiff Nations' casinos to Defendant Chairmen's Tribes' casinos, which they operate under the Agreements. *Id.* at 10.

Federal Defendants attack Dr. Wyman's report, claiming that it is "speculative" to assert injury based on the potential closure of Defendant Chairman Tribes' casinos. FD Br. at 15-16. That misreads Dr. Wyman's opinion. Dr. Wyman concluded that Plaintiff Nations are *currently* injured because Defendant Chairmen's Tribes are diverting revenue from Plaintiff Nations'

[9] Federal Defendants confuse economics and law when they assert that Plaintiff Nations cannot simultaneously claim Defendant Chairmen's Tribes benefit from lower exclusivity payments and that those payments are an impermissible tax. FD Br. at 17. The new exclusivity payments use an unlawful mechanism to give Defendant Chairmen's Tribes a relative economic benefit.

[10] Defendant Tahdooahnippah wrongly asserts that the exclusivity rates are "not challenged as unlawful under IGRA." CNC CM Br. at 26. Plaintiff Nations challenge them specifically, Br. at 47-49, and challenge the Agreements as unlawful *in toto*, *id.* at 13-39.

casinos. Nations' SOF ¶¶ 54-56, 59-60, 62. He explains that is so because patrons in a shared market said that if Defendant Chairmen's Tribes' casinos did not exist, they would spend more money at Plaintiff Nations' casinos. *Id.* at ¶¶ 59-60. This is similar to the methodology used in *West Flagler*, where a survey asked casino patrons whether a future gaming option would cause them to spend less at the casino. Because Defendant Chairmen's Tribes offer Class III games pursuant to the Agreements, this diversion of revenue is attributable to the Agreements.

The question is not as Defendants assert, *see* CNC CM Br. at 25 & n.16; FD Br. at 14, whether Plaintiff Nations' (or any other tribes') revenue has risen or fallen in absolute terms. An economic actor can be successful while suffering economic injury. *See McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco*, 496 U.S. 18, 48 & n.32 (1990); *Openwave Messaging, Inc. v. Open-Xchange, Inc.*, No. 16-cv-00253-WHO, 2016 WL 6393503, at *6 (N.D. Cal. Oct. 28, 2016); *see also V.S. Int'l, S.A. v. Boyden World Corp.*, No. 90 Civ. 4091, 1993 WL 59399, at *9 (S.D.N.Y. Mar. 4, 1993). Rather, the question is whether Plaintiff Nations would earn "[e]ven 'one dollar' of additional revenue" if the challenged conduct ceased. *See Diamond Alt. Energy, LLC v. EPA*, 606 U.S. 100, 114 (2025); *accord W. Flagler Assocs. v. Haaland*, 573 F. Supp. 3d 260, 268 (D.D.C. 2021) (diversion of gambling spend establishes an economic harm).[11] Defendant Tahdooahnippah tries to distinguish *West Flagler* on the ground that case involved a new competitor entering the scene. CNC CM Br. at 16. But *West Flagler*'s standing conclusion was based on the "basic law of economics," 573 F. Supp. 3d at 267 (quoting *New World Radio, Inc.*, 294 F.3d at 172), and

[11] Defendant Tahdooahnippah's assertions about the "best evidence of whether Plaintiff Nations have actually experienced revenue reductions" are therefore a red herring, *see* Def. Chairman Forrest Tahdooahnippah's Counter-Stmt. Undisputed Facts & Objs. Pl. Nations' Undisputed Facts [ECF No. 223-2], ¶ 59, Dkt. No. 228-1 ("CNC SOF"), and an inapposite invocation of the rule, since the Nations do not use Dr. Wyman's report to "prove [the] contents" of "[a]n original writing, recording, or photograph," *see* Fed. R. Evid. 1002; *Est. of Gaither ex rel. Gaither v. District of Columbia*, No. 03-01458 (CKK), 2013 WL 12320074, at *2 (D.D.C. Jan. 2, 2013).

survey results, *see id.* at 268, which showed "a substantial probability" that a compact would "divert business that would have been spent at [plaintiff's facilities] and cause it to be spent on online sports gaming offered by [a competitor]," *id.* at 267-68. Here, Dr. Wyman's report, which relies on survey results, his expertise, and basic laws of economics, shows more than a "substantial probability" that Defendant Chairmen's Tribes are "diverting business that would have been spent at [Plaintiff Nations'] facilities and caus[ing] it to be spent [at Defendant Chairmen's Tribes' facilities]."[12]

D. Reversal Of The Agreements Would Redress Plaintiff Nations' Injuries.

The relief that Plaintiff Nations seek would redress their injuries by returning Plaintiff Nations to an "equal footing" with Defendant Chairmen's Tribes, re-instating regulatory limits on Defendant Chairmen's Tribes' gaming, and eliminating the economic injuries imposed by Defendant Chairmen's Tribes' gaming under the Agreements.[13]

Defendants say Defendant Chairmen's Tribes could continue to game under the Model Compact. *See* CNC CM Br. at 25-26; FD Br. at 15. The Court does not need to opine on whether Defendant Chairmen's Tribes can do that, since a return to the Model Compact would provide at least a partial remedy to Plaintiff Nations. *See* Br. at 12. Plaintiff Nations would also receive at least a partial remedy if Otoe-Missouria and Comanche "enter into a new compact with Oklahoma," FD Br. at 17, for reasons already explained, *see* Br. at 12 n.7.

[12] Defendant Tahdooahnippah's assertion that Comanche Nation could offer Class II gaming without a compact, CNC CM Br. at 24, does not resuscitate his position. If Defendant Chairmen's Tribes had no compacts, then a significant portion of their gaming offerings would end and under basic laws of economics they would divert less revenue from Plaintiff Nations.

[13] There is no serious dispute that Plaintiff Nations' injuries are traceable to Defendants. Federal Defendants are responsible for the no-action approval of the Agreements and the non-federal Defendants are implementing the Agreements.

But a return to the Model Compact is also not possible. The Defendant Chairmen's Tribes dismissed with prejudice their claims that their former compacts renewed, so they cannot reassert in the future that their compacts were in effect after January 1, 2020.[14] Federal Defendants say that Defendant Chairmen's Tribes can rely on the fact that other tribes won on their renewal claims in *Cherokee Nation v. Stitt*, 475 F. Supp. 3d 1277 (W.D. Okla. 2020), FD Br. at 15, but "[d]ismissal with prejudice 'operates as a rejection of the plaintiff's claims on the merits and [ultimately] precludes further litigation' of them," *Belizan v. Hershon*, 434 F.3d 579, 583 (D.C. Cir. 2006) (second alteration in original) (quotation omitted). As a result of their voluntary decision to dismiss their claims that their former compacts renewed, *see* AR703 (statement of Defendant Chairmen to the Secretary that they "set aside" their claims against the State in their settlement and "multiple *other tribes continue to have a live dispute with the State*" (emphasis added)), Defendant Chairmen's Tribes cannot game under their former compacts.

Defendant Tahdooahnippah asserts that the Comanche Nation dismissed its claims in exchange for the Comanche Agreement pursuant to a settlement, and the settlement could be rescinded under Oklahoma law if that Agreement were not in effect. CNC CM Br. at 22-23. Assuming only *arguendo* that Comanche Nation could rescind the settlement, and then could escape from the judgment, Plaintiff Nations would still have a partial remedy while the Nation sought that relief. Since a dismissal with prejudice operates as a judgment on the merits, the Comanche Nation would need to press its rescission argument in a motion for relief from judgment

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[14] Defendant Shotton says, without any legal support, that Plaintiff Nations cannot make this argument because they "never sought this form of relief in their complaint" and tell the court this "remedy" would be "wholly uncalled for." Shotton Br. at 11. This confuses legal arguments with claims for relief. And because, absent renewal, the Defendant Chairmen's Tribes' former compacts expired at the end of 2019, it does not matter for purposes of the standing inquiry whether the Agreements' supersession clauses were valid, or not. *Contra* Shotton Br. at 11 n.1; CNC CM Br. at 23-24.

under Fed. R. Civ. P. 60(b). *See* CNC CM Br. at 21 (arguing an unenforceable judgment "is subject to reopening or vacatur under long-established principles allowing relief from judgment[]"). Whether or not the court granted relief from judgment, while Comanche Nation sought that relief it could not game under the Model Compact and so could not conduct Class III gaming.

E. The Nations Can Challenge The Agreements' Regulation Of Class II Gaming.

In their Sixth Cause of Action, Plaintiff Nations argue that the Secretary's no-action approvals were arbitrary, capricious, and contrary to law because the Agreements regulate the tribal signatories' conduct of Class II gaming, and the Secretary's no action approvals should be held unlawful for that reason under 5 U.S.C. § 706(2)(A). Second Am. & Supp. Compl. ("Compl.") ¶¶ 257-61, Dkt. No. 104. Defendant Shotton argues that the Nations lack standing to bring this claim, *see* Shotton Br. at 36-38, but that is wrong. The Secretary was required to disapprove the Agreements because they purport to regulate Class II gaming and committed a procedural violation by failing to do so. Compl. ¶ 199. Plaintiff Nations' injuries arise from the Secretary's failure to disapprove the Agreements for that reason, which allowed the Agreements to go into effect by inaction. *Id.* ¶ 200. While "a bare procedural violation, divorced from any concrete harm, [does not] satisfy the injury-in-fact requirement of Article III," *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009); and *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 (1992)), "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact." *Id.* at 342. That is the case here, as the Nations' harm results from the Secretary's no-action approvals, which were arbitrary and capricious and contrary to law because the Agreements regulate Class II gaming in violation of IGRA.[15] The Secretary's approval of compact regulation of Class II gaming constitutes an equal footing injury for the same reasons.

If more were needed, the Secretary's approval of a compact regulation of Class II gaming also constitutes a competitive injury because it subjects Plaintiff Nations to an illegally structured competitive environment, *see supra* at 7-10, in which Defendant Chairmen's Tribes can now engage in "statutorily forbidden … practices," *CPAs*, 804 F.3d at 1197, i.e., offering gaming pursuant to provisions forbidden by law. And gaming conducted pursuant to this provision diverts business from Plaintiff Nations, which imposes economic injuries. Those harms are traceable to Defendants' conduct and will be remedied, at least in part, by Plaintiff Nations' requested relief.

But even if Plaintiff Nations were not injured by the Agreement's regulation of Class II gaming, Plaintiff Nations suffer injuries from the Secretary's no-action approval, and so they may "argue the public interest in support of [their] claim that the agency has failed to comply with its statutory mandate." *Sierra Club v. Adams*, 578 F.2d 389, 392 (D.C. Cir. 1978) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972)); *see DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 n.5 (2006); Br. at 4. Plaintiff Nations fall squarely within this rule. As the Secretary's no-action approval of the Agreements injures them, the Nations are entitled to argue any basis on which the Secretary failed to comply with the law, including his mandate to disapprove purported

[15] Furthermore,

> Plaintiffs need not demonstrate that but for the procedural violation the agency action would have been different. Nor need they establish that correcting the procedural violation would necessarily alter the final effect of the agency's action on the plaintiff's interest. Rather, if the plaintiff[] can "demonstrate a causal relationship between the final agency action and the alleged injuries," the court will "assume[] the causal relationship between the procedural defect and the final agency action."

Mendoza v. Perez, 754 F.3d 1002, 1010 (D.C. Cir. 2014) (second alteration in original) (quotation omitted).

compacts that include provisions that violate IGRA. *See Amador County*, 640 F.3d at 378-79; *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("[T]here is a substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations.'" (quoting *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994))).

F. Defendant Tahdooahnippah Cannot Raise A Zone Of Interests Argument.

Defendant Tahdooahnippah, retreading an issue long since resolved, argues that Plaintiff Nations cannot maintain their APA claims under the zone of interests test described in *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014). *See* CNC CM Br. at 3-4. The Court already rejected this argument, holding that Plaintiff Nations are within the "zone of interests" protected by IGRA, through the APA, because

> IGRA's purposes include, among other things, to provide for federal regulation of "Indian tribe" gaming to protect it from pernicious influences and to prevent it from causing harmful effects. Given these purposes, a party allegedly affected by the improper federal regulation of "Indian tribe" gaming comes within its zone of interests. Such parties include market competitors, even one whose "objectives" in bringing suit "are not eleemosynary in nature."

Cherokee Nation, 643 F. Supp. 3d at 110 (citations omitted).

Defendant Tahdooahnippah provides no valid reason to revisit this law of the case. He argues against a straw man, asserting that Plaintiff Nations do not meet this test because they allegedly assert "they are entitled to compact terms that are the same as, or at least comparable to, the terms the Comanche Nation received in its 2020 Compact with Oklahoma." CNC CM Br. at 4. Not so, as the Comanche Agreement contains unlawful terms and is invalid. Actually, Plaintiff Nations seek to protect their interests in equal footing in treatment by the Government and in freedom from unlawful competition and economic injuries. *See supra* at 3-12. As competitors with Comanche Nation, they have precisely the "interests … such that they in practice can be expected to police the interests that [IGRA] protects." *CSL Plasma Inc. v. U.S. CBP*, 33 F.4th 584, 589 (D.C. Cir. 2022) (quotation omitted). Because Defendant Tahdooahnippah's zone of interests argument mischaracterizes of Plaintiff Nations' interests, it does not unsettle the Court's earlier determination that the Nations are within IGRA's zone of interests.

Defendant Tahdooahnippah also asserts that the Court's earlier ruling no longer counts because it was at the pleading stage. CNC CM Br. at 10-11. But there is no genuine dispute that Plaintiff Nations compete with Defendant Chairmen's Tribes, *see supra* at 3-12, and Plaintiff Nations seek to protect their position from unequal treatment or competitor or economic harms.[16] Finally, Defendant Tahdooahnippah's attempts to distinguish *Amador County* on this point do not hold up. *See* CNC CM Br. at 11. *Amador County*'s rule is indistinguishable from *Lexmark*. *See*

[16] This is supported by the statements of Defendant Tahdooahnippah's predecessor-in-office, his employees, and his former counsel. Nations' SOF ¶¶ 24, 41-42, 47-48, 63, 66. Defendant Tahdooahnippah asserts these statements are hearsay within hearsay. *See* CNC SOF ¶ 24, 41-42, 47-48, 63, 66 (citing Fed. R. Evid. 805). As statements of an opposing party, and of his employee and his attorney during and concerning the scope of their employment, they are not hearsay. *See* Fed. R. Evid. 801(d)(2)(D). The Chairman's Counsel's letter to the editor, Nations' SOF ¶ 47, was adopted by the Comanche Nation, the real-party-in-interest, through republication on the Nation's website. *See* Fed. R. Evid. 801(d)(2)(B). Defendant Tahdooahnippah says that the statement was posted to a "campaign blog," CNC SOF ¶ 47, but it was posted on the Comanche Nation's website without any attribution to a political campaign, *see* Ex. 19 to Pl. Nations' Mot. Summ. J., Dkt. No. 223-21. (And Defendant Shotton does not dispute that these statements are accurate, Def. Chairman Shotton's Resp. Pls.' Stmt. Fact & Stmt. Facts ¶¶ 24, 41-42, 47-48, 63, 66, Dkt. No. 229-2, which is a further adoption by an opponent.) Second, Mr. Rosette's firm issued the April 22, 2020 press release, *see* Nations' SOF ¶ 48, while acting as Defendant Tahdooahnippah's predecessor-in-office's attorney, and so that press release is not hearsay. Fed. R. Evid. 801(d)(2)(D). Finally, even if the publications are hearsay, the non-hearsay statements within them could all be converted into admissible evidence through testimony by the declarants, or in the case of Mr. Rosette, the Tribal Chairmen on whose behalf he spoke. Therefore, they can be considered because "[a]t summary judgment, material will be disregarded only if it 'cannot be presented in a form that would be admissible in evidence' at trial." *Ali v. D.C. Gov't*, 810 F. Supp. 2d 78, 83 (D.D.C. 2011) (quoting Fed. R. Civ. P. 56(c)(2)); *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 38 (D.C. Cir. 1987) (hearsay material can be considered at summary judgment when its substance "is reducible to admissible evidence in the form of trial testimony"); *see Paleteria La Michoacana, Inc. v. Prods. Lacteos Tocumbo S.A. de C.V.*, 69 F. Supp. 3d 175, 192 n.3 (D.D.C. 2014) (hearsay statements may be converted into admissible evidence when a witness with personal knowledge can testify to them at trial).

640 F.3d at 379 (citing *Patchak v. Salazar*, 632 F.3d 702, 705 (D.C. Cir. 2011)).[17] Although Defendant Tahdooahnippah asserts that *Amador County* concerned a "government asserting governmental interests in the land where gaming occurs," that did not feature in the court's zone of interests inquiry. *See id.*

II. SUMMARY JUDGEMENT SHOULD BE GRANTED ON COUNTS 1-3 AND 8 BECAUSE THE AGREEMENTS WERE NOT VALIDLY ENTERED INTO UNDER STATE LAW AND ARE THEREFORE VOID.

Counts one, two, three, and eight of the Complaint "allege that the compacts are entirely illegal and invalid because they were not legally 'entered into' as required by IGRA." *Cherokee Nation*, 643 F. Supp. 3d at 108. The Nations are entitled to summary judgment on each of these counts. *First*, as this Court previously held:

> Once the tribe and the state have negotiated a compact, it then must be "legally entered into by both parties." *See* 25 C.F.R. § 293.7; *see also* 25 U.S.C. § 2710(d)(3)(B), (d)(8)(A). State law governs whether the state has "legally entered into" the compact. *See, e.g.*, [*Kickapoo I*, 827 F. Supp. at 46]; *accord* [*Santa Ana*, 104 F.3d at 1553, 1557-58]. If a compact has not been legally entered into under state law, it is "invalid" under IGRA. *See, e.g.,* [*Kickapoo I*], 827 F. Supp. at 46 (citing 25 U.S.C. § 2710(d)(8)(A)); accord … *Santa Ana*, 104 F.3d at 1555, 1559.

Id. at 98. The Agreements are invalid under IGRA because Defendant Stitt lacked authority under state law to enter into the Agreements on behalf of the State, as the Oklahoma Attorney General determined *before* those Agreements were approved by Secretarial inaction in an opinion that is binding on the Governor, and as the Oklahoma Supreme Court subsequently held in three separate cases. *Second*, the Secretary is required to determine whether a compact was legally entered into by the State during the 45-day review period "because []he has an affirmative duty to disapprove any compacts that do not comply with IGRA before that period expires." *Id.* at 116 (citing *Amador*

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[17] *Patchak* was affirmed in a decision on which *Lexmark* relied. *See Match-E-Be-Nash-She-Wish Band v. Patchak*, 567 U.S. 209, 224-28 (2012); *Lexmark*, 572 U.S. at 130.

County, 640 F.3d at 381). *Third*, the "Secretary's decision to not act within the 45-day window when presented with an IGRA compact" is judicially reviewable under 25 U.S.C. § 2710(d)(8)(C), which "provides the law to apply—that is, the compact is deemed approved but only to the extent the compact is consistent with the provisions of IGRA." *W. Flagler*, 71 F.4th at 1064-65 (quoting *Amador County*, 640 F.3d at 381 (citation modified). The Agreements are therefore invalid and this Court should reverse the Secretary's no-action approvals and remand the Agreements for disapproval.[18]

[18] The Nations do not contend that the law of the case doctrine "demand[s] summary judgment in their favor." *Contra* FD Br. at 24-25 (citing Br. at 13 & n.8). This Court's rulings in *Cherokee Nation* and the Memorandum Opinion and Order of July 9, 2025, Dkt. No. 215 ("Mem. Op."), are the law of the case, which means that "[t]he *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*." Br. at 13 n.8 (quoting *Smith v. Athena Constr. Grp.*, No. 18-CV-02080 (APM), 2024 WL 1213393, at *2 (D.D.C. Mar. 20, 2024)), and as they are correct, they compel summary judgment in the Nations' favor. As *Smith* recognizes, "[t]he law-of-the-case doctrine is 'the practice of courts generally to refuse to reopen what has been decided,' but it is 'not a limit to the[court's] power.'" 2024 WL 1213393, at *2 (quoting *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)). The Secretary also argues that this Court's decision in *Cherokee Nation* should not be applied here because *West Flagler* is an "intervening legal authority [that] makes clear that a prior decision bears qualification." FD Br. at 25. But *West Flagler* makes clear that the Secretary's "approval [of a compact] is a prerequisite for the compact to have legal effect," 71 F.4th at 1068, and reaffirms that "when reviewing a Secretary's decision to not act within the 45-day window when presented with an IGRA compact, … 25 U.S.C. § 2710(d)(8)(C) provides the law to apply—that is, the compact is deemed approved but only to the extent the compact is consistent with the provisions of [IGRA]," *id.* at 1064-65 (quoting *Amador County*, 640 F.3d at 381 (citation modified). *West Flagler* excepts from the Secretary's review only questions of state law relating to gaming off Indian lands, as IGRA "regulates gaming activity on Indian lands, but 'nowhere else.'" *Id.* at 1065 (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 795 (2014)); *see also id.* at 1068. Federal Defendants also assert the law of the case doctrine is inapplicable to a denial of a motion to dismiss because it is an interlocutory order, FD Br. at 24 (citing *Langevine v. District of Columbia*, 106 F.3d 1018, 1023 (D.C. Cir. 1997)), but that overstates *Langevine*, which by stating that "interlocutory orders are not subject to the law of the case doctrine" meant that interlocutory orders "may always be reconsidered prior to final judgment," 106 F.3d at 1023, which *Smith* also recognizes, 2024 WL 1213393, at *2. *See* 18B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4478.1 (3d ed. 2025) ("Occasionally the undoubted power to revise is reflected in statements that law-of-the-case principles do not apply to trial-court rulings. … Only if law-of-the-case rules are seen as constraints on authority is it helpful to say that the rules do not apply to reconsideration by a trial court.") (emphasis added) (footnotes omitted).

A. Under IGRA, A Compact Not Legally Entered Into By The State Is Void.

1. For Class III gaming to be lawful on Indian lands IGRA requires a compact that was legally entered into by the State under State law.

IGRA's plain language provides that Class III gaming "shall be lawful on Indian lands *only* if … conducted in conformance with a Tribal-State compact *entered into by the Indian tribe and the State* under [§ 2710(d)(3)] that is in effect," 25 U.S.C. § 2710(d)(1)(C) (emphasis added), and that the Secretary is only 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," *id.* § 2710(d)(8)(A) (emphasis added); *see also id.* § 2710(d)(8)(B), (C) (both referring to "a compact described in subparagraph (A)"). This plain language requires the Secretary to determine whether a compact was entered into *by the State* before approving it. By contrast, when IGRA authorizes the Governor to take certain action, it says so. *See id.* § 2719(b)(1)(A) (requiring "the Governor … concur[] in the Secretary's determination" for gaming to be permitted on lands acquired after October 17, 1988). Section 2710(d)(8) does not say so, and therefore the Secretary must determine whether the Governor is authorized to enter into a compact for the State.

Defendant Stitt argues that IGRA does not require the Secretary to determine "whether a compact is in fact valid under state law," Stitt Br. at 17 (citing *Rhode Island v. Narragansett Indian Tribe* (*Narragansett I*), No. Civ. A. 94-0619-T, 1995 WL 17017347, at *2 (D.R.I. Feb. 3, 1995)), that "Congress could have chosen to require that a compact be '*lawfully* entered into *under state law*,' but it did not do so," *id.*, and that "when Congress wanted to make other aspects of IGRA turn on state law, it said so expressly," *id.* at 19.[19] That is wrong, for several reasons.

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[19] Similarly, Defendant Shotton contends that even if the Governor lacks authority to enter into a compact, "it is not a violation of IGRA" on which the Secretary can disapprove a compact. Shotton Br. at 17. This is also rejected by the text of IGRA and the authorities discussed *infra* at 27-32.

First, it is not necessary for Congress to state that a statutory requirement must be "lawfully" satisfied because a statutory requirement cannot be satisfied unlawfully. Second, as IGRA does not address the authority of a governor to enter into a compact on behalf of the state, that determination must be made by applying state law, as settled law shows. *Santa Ana*, 104 F.3d at 1557-58 ("IGRA says nothing specific about how we determine whether a state and tribe have entered into a valid compact. State law must determine whether a state has validly bound itself to a compact." (citing *Washington v. Confederated Bands & Tribes* (*Yakima*), 439 U.S. 463, 493 & n.39 (1979)); *Narragansett I*, 1995 WL 17017347, at *4 ("Congress did not purport to specify who is authorized to enter into a compact on behalf of a state. … [A]uthority to act on behalf of the State cannot be determined by reference to IGRA[and] must be determined by reference to state law." (footnote omitted)).[20]

[20] Defendant Stitt's reliance on Antonin Scalia & Brian Garner, *Reading Law* 93 (2012), and *Bates v. United States*, 522 U.S. 23, 29 (1997), to assert that it "impermissibly supplies words that Congress omitted" to require that "a compact be '*lawfully* entered into *under state law*," Stitt Br. at 17, and his argument that the Court should "decline to read a requirement [of legality under state law] into the statute that Congress opted not to include," *id.* at 19 (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)), fail for the same reasons. Furthermore, *Bates* applied the interpretive rule that when Congress uses different terms in the same statute, those terms have different meanings, 522 U.S. at 29-30, and thus when IGRA requires that the "State" to enter into a compact, 25 U.S.C. § 2710(d)(1)(C), (d)(3)(B), it does not mean the "Governor," which IGRA elsewhere uses expressly. *See* 25 U.S.C. § 2719(b)(1)(A). *Reading Law* backfires too, as it acknowledges that "[t]he principle that a matter not covered is not covered is so obvious that it seems absurd to recite it," *id.* at 93, and as IGRA does not specifically address how to determine whether a Governor has authority to enter into a compact for the State, it leaves the matter to be decided by applying state law. Defendant also relies on *West Flagler* to assert that "Congress could have chosen that a compact be '*lawfully* entered into *under state law*,' but it did not do so," but admits that its citation to *West Flagler* concerns "a different provision of IGRA," Stitt Br. at 17-18, that is irrelevant here. Furthermore, while *West Flagler* held that under 25 U.S.C. § 2710(d)(3)(B) a compact "govern[s] gaming on Indian lands," and "decline[d]" to "read the extraneous word 'only' into the preceding statutory language," 71 F.4th at 1067, the word "only" *does* appear in the provision that *is* relevant here, which provides "Class III gaming activities shall be lawful on Indian lands *only* if … conducted in conformance with a Tribal-State compact *entered into by the Indian tribe and the State*," 25 U.S.C. § 2710(d)(1)(C) (emphasis added). We have already shown why Defendant Stitt cannot rely on *Bank of New York v. FDIC*, 453 F. Supp. 2d 82, 94 (D.D.C. 2006), *aff'd*, 508 F.3d

Third, Defendant Stitt's reliance on *Narragansett I* offers no support for his position. In that case, "the threshold question [wa]s whether Governor Sundlun had authority to execute the compact on behalf of the 'State.'" 1995 WL 17017347 at *1. As the court explained, "[i]f the governor did not have authority to bind the State, there would be no need to address any other issues because the compact would be a nullity." *Id.* at *2 (citing *Kickapoo I*). While the court did state that IGRA does not require the Secretary to resolve "state law issues" in the 45-day review period, it did so in rejecting the tribe's argument "that the Secretary's approval is dispositive of the compact's validity irrespective of what state law provides regarding the governor's authority to sign it," *id.* at *2, which is Defendant Stitt's main argument, *see* Stitt Br. at 22-33. The court held that "if the 'compact' was a nullity because the governor lacked authority to execute it on behalf of the 'State,' the Secretary's approval also would be a nullity." *Narragansett I*, 1995 WL 17017347 at *2. The court further held that the Governor's "authority to act on behalf of the State … must be determined by reference to state law," *id.* at *4, and it then certified that question to the Rhode Island Supreme Court," *id.* at *5, which ruled that the Governor did not have authority to enter into the compact on behalf of the state, *Narragansett Indian Tribe v. Rhode Island* (*Narragansett II*), No. 94-0618-T et al., 1996 WL 97856, at *1 (D.R.I. Feb.13, 1996). *Narragansett II* subsequently ordered that "summary judgment shall enter with respect to Count III declaring that" the governor lacked "authority to bind the State." *Id.* at *3.

Defendant Stitt also continues to assert that "'in the absence of a plain indication to the contrary,' Congress does not 'mak[e] the application of [a] federal act dependent on state law,'"

1 (D.C. Cir. 2007), and *Little Sisters v. Pennsylvania*, 591 U.S. 657, 677 (2020). *Compare* Stitt Br. at 18, *with* Br. at 21-23. Finally, Defendant Stitt argues that the IGRA regulations in effect in 2020, specifically 25 C.F.R. § 293.8, allow approval of compacts not "entered into" under state law, Stitt Br. at 19-20, but that is wrong for reasons set forth *infra* at 24-27.

Stitt Br. at 18 (alterations in original) (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989)), and that "[n]o such indication, much less a plain one exists here," *id.* But IGRA *expressly* requires "a Tribal-State compact entered into by the Indian tribe and the State," 25 U.S.C. § 2710(d)(1)(C), not by the governor. Whether a governor can act for the state is a question of state law unless Congress has said otherwise, and it did not do so in IGRA. Furthermore, "[i]t is difficult to imagine a matter more closely related to internal self-government than the question of how a state's powers are allocated among its elected officials." *Narragansett I*, at *4 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991)).

Defendant Stitt also contends that requiring the Secretary to determine whether the Governor has authority to enter into a compact on behalf of the State is contrary to IGRA's framework. Stitt Br. at 18-19; *see also* Shotton Br. at 19 (asserting that requiring Secretary to undertake analysis of state law questions regarding state law approval would "create non-uniformity throughout the country, as it would make the application of IGRA largely dependent on state law"). These arguments fail because IGRA's framework depends on the participation of the State throughout the compacting process, *see* 25 U.S.C. § 2710(d)(3)(A) (the Tribe "shall request the State … to enter into negotiations for the purpose of entering into a Tribal-State compact"); *id.* § 2710(d)(3)(C)(i)-(iv) (provisions that a compact may include, each specifically referring to the State), which is capped by the requirement that the State enter into the compact, *id.* § 2710(d)(1)(C). Allowing the Governor to decide for himself that he has authority to enter into the compact would be directly contrary to IGRA's framework. IGRA "grants *the States* a power that they would not otherwise have, viz., some measure of authority over gaming on Indian lands," *Bay Mills*, 572 U.S. at 795 (emphasis added) (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996)), and under IGRA "an Indian tribe may conduct certain gaming activities only in conformance with a *valid* compact *between the tribe and the State*." *Seminole Tribe*, 517 U.S. at 47 (emphasis added).

Defendant Stitt argues that "when Congress wanted to make other aspects of IGRA turn on state law, it said so expressly," relying on 25 U.S.C. § 2710(d)(5) and *id.* § 2703(7)(E), Stitt Br. at 19 (misciting § 2703(7)(E) as § 2703(E)). But the former subsection refers to state laws that the Tribe and State *agreed* to apply under the compact pursuant to 25 U.S.C. § 2710(d)(3); *see id.* § 2710(d)(3)(C)(i). That section has no relevance here other than to highlight that the compacting process involves the State, not the Governor. And the protection IGRA provides to certain Class II gaming activities "legally operated" before May 1, 1988, 25 U.S.C. § 2703(7)(C)-(E), provides no help to Defendant Stitt for reasons earlier shown, *see* Br. at 21 n.12, which Defendant Stitt ignores.

2. IGRA's regulations confirm that a compact legally entered into by the State under State law is required for Class III gaming to be lawful.

Federal Defendants also assert that 25 C.F.R. § 293.8[21] sets forth all that is "required for the Secretary to confirm that the [c]ompact had been 'entered into' under IGRA." FD Br. at 20-21. They contend the parties only need to submit "an original copy of the compact;" "a tribal resolution 'that certifies that the tribe has approved the compact … in accordance with applicable tribal law,'" and "[c]ertification from the Governor or other representative of the State that he or she is authorized under State law to enter into the compact … ." FD Br. at 20 (quoting 25 C.F.R. § 293.8). Federal Defendants say these requirements were met, and that the "Governor's certification stated that he had authority to enter into the compact and bind the state." FD Br. at 20 (citing AR3, AR36); *accord* Shotton Br. at 17; Stitt Br. at 19-21. Defendant Stitt adds that if

[21] Citations are to the 2008 version of 25 C.F.R. part 293, which was in effect when the no-action approvals occurred.

the Secretary does not act on the compact within 45 days, "it will 'take[] effect on the date that notice of its approval is published in the Federal Register." *Id.* at 13 (quoting 25 C.F.R. § 293.15). This argument fails for several reasons.[22]

First, 25 C.F.R. § 293.8 addresses "[w]hat documents must be submitted with a compact." *Id.* It does not purport to make those submittals determinative of the legality of their terms. Section 293.8(c) does, however, establish that the issue of the Governor's authority is to be decided under state law as he must certify that he is "authorized *under State law* to enter into the compact." *Id.* (emphasis added). In addition, § 293.8(d) ensures that the Secretary is to decide that issue by authorizing him to request "[a]ny other documentation … *that is necessary to determine whether to approve or disapprove the compact*." *Id.* (emphasis added).

Second, these conclusions are confirmed when § 293.8 is read in context of the 25 C.F.R. part 293 regulations as a whole, as it must be. *Connecticut v. U.S. Dep't of Interior*, 363 F. Supp. 3d 45, 65 (D.D.C. 2019). First, "Compact … means an intergovernmental agreement executed *between Tribal and State governments* under [IGRA] that establishes between the parties the terms and conditions for the operation and regulation of the tribe's Class III gaming activities." 25 C.F.R. § 293.2(b)(2) (emphasis added). A compact is therefore not an agreement between an Indian tribe and a governor. When the part 293 regulations were promulgated as a Final Rule, the Secretary rejected a comment that suggested "using the phrase 'State Governor's Office' rather than the generic term 'State' for greater specificity," explaining that that "[t]he final rule continues to refer to 'State' *because IGRA does not specify the 'State Governor's Office*.'" 73 Fed. Reg. 74,004,

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[22] Federal Defendants reliance on the Governor's purported certification also fails for the reasons set forth *infra* at 51-52.

74,005 (Dec. 5, 2008) (emphasis added). Second, 25 C.F.R. § 293.7 expressly states that "[t]he Indian tribe or State should submit the compact or amendment after it has been *legally entered into* by both parties." *Id.* (emphasis added). Defendant Stitt dismisses this regulation as "simply speak[ing] to the *timing* of when parties should submit the proposed compact," but admits that § 293.7 "instructs the *parties* to submit the compact after they have been 'legally entered into' it." Stitt Br. at 20. Thus, while § 293.7 does speak to timing, it does so by making clear that a compact may be submitted only *after* it has been legally entered into by both parties. And whether the State has entered into a compact turns on state law, as § 293.8(c) makes clear and as the Secretary confirmed when the Final Rule was promulgated by stating "[e]ach State's compact approval process is a matter of state law." 73 Fed. Reg. at 74,004. Federal Defendants' assertion that the Governor's certification need only be "facially valid … for the Secretary to confirm that the Compact had been 'entered into' under IGRA," FD Br. at 20-21, is rejected by these terms, as is Defendants' argument that the Governor's certification was all the Secretary need to allow the compacts to go into effect, Stitt Br. at 14, 20-21; Shotton Br. at 17-18, 25.[23]

If more were needed, consider this: in what circumstances would a governor that signed a compact decline to certify that he had authority to enter into the compact for the State? At that point, the governor's incentive to attest to his own authority to act for the State is practically irresistible and if, as Defendant Stitt contends, no one can question that claim, he would face no consequences for attesting to authority that he lacks. To allow the Governor to conclusively determine his own authority would defy the fundamental principle of government that

[23] Defendant Stitt's assertion that the Nations "do not dispute that the [Agreements] were submitted and approved by the Secretary precisely in accordance with these statutory and regulatory requirements," Stitt Br. at 14, is flatly wrong since the Agreements were not legally entered into when they were submitted, as IGRA's text and regulations require. *See* Br. at 13-27; *infra* at 48-63.

> [n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time … .

The Federalist No. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961). *See also In re Murchison*, 349 U.S. 133, 136 (1955) ("[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case.").

3. The Secretary's no-action approval of the Agreements is judicially reviewable.

Even assuming, only *arguendo*, that a governor's proper certification under 25 C.F.R. § 293.8(c) can be sufficient to establish his authority before the Secretary, the Secretary's no-action approval of the Agreements would still be judicially reviewable under 25 U.S.C. § 2710(d)(8)(C), which "provides the law to apply—that is, the compact is deemed approved but only to the extent the compact is consistent with the provisions of IGRA." *W. Flagler*, 71 F.4th at 1064-65 (citation modified) (quoting *Amador County*, 640 F.3d at 381). And "[i]f a compact has not been legally entered into under state law, it is 'invalid' under IGRA." *Cherokee Nation*, 643 F. Supp. 3d at 98 (first citing *Kickapoo I*, 827 F. Supp. at 46; and then citing *Santa Ana*, 104 F.3d at 1555, 1559). Defendants dispute these settled principles, but without success.

a. Federal Defendants misconstrue *West Flagler* in asserting that whether the State validly entered into a compact under state law is not subject to review by the Secretary.

Federal Defendants argue that the D.C. Circuit's decision in *West Flagler* "made clear that questions of state law are outside the scope of the Secretary's compact review." FD Br. at 21 (citing *W. Flagler*, 71 F.4th at 1065).[24] That argument misconstrues *West Flagler*, in which the

[24] The compact at issue in *West Flagler* was executed by the Tribe and Florida in April of 2021. 71 F.4th at 1063. The compact authorized the Tribe to conduct sports betting on its Indian lands and "consider[ed] all bets placed through the Tribe's sports book, regardless of where the person placing the bet is physically located within the state, to occur where the sports book servers are

court held that the compact at issue authorized gaming on Indian lands and discussed—but did not authorize—gaming off Indian lands. 71 F.4th at 1066.[25]

The *West Flagler* court reasoned that IGRA "regulates gaming activity on Indian lands, but 'nowhere else,'" *id.* at 1065 (quoting *Bay Mills*, 572 U.S. at 795), that "while the function of a class III gaming compact is to authorize gaming on Indian lands, it 'may include provisions relating to' a litany of other topics," *id.* (quoting 25 U.S.C. § 2710(d)(3)(C)), and that "such topics can cover state or tribal activity outside of Indian lands," *id.* Applying these principles, the court held that "[t]he Compact 'authorizes' only the Tribe's activity on its own lands, that is, operating the sports book and receiving wagers," and "[t]he lawfulness of any other related activity such as the placing of wagers from outside Indian lands, under state law or tribal law, is unaffected by its inclusion as a topic in the Compact." *Id.* at 1066.

West Flagler urged that "this is problematic because an approved IGRA compact is an 'instrument of federal law' which 'preempts state law[,]' but it would be illogical and unworkable for only some parts of an approved compact to preempt state law." *Id.* at 1067. The court held that "this argument misunderstands the purpose and effect of an IGRA approval," *id.*, and that neither of the two cases the plaintiffs relied on, namely *Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d 1226, 1239 (10th Cir. 2018), and *Forest County Potawatomi Community. v. Norquist*, 45

located—in other words, on tribal land." *Id.* Florida enacted a statute that "ratified and approved the Compact" the month after it was entered into, and in June of 2021 it was submitted to the Secretary for review under IGRA. *Id.*

[25] The Secretary argued "that IGRA cannot provide an independent source of legal authority for gaming outside of Indian lands," but that such gaming "may be addressed in a compact." *Id.* On that basis, the Secretary asserted that "whether or not *that gaming* is authorized or permissible as a matter of Florida state law falls outside the scope of the Secretary's review." *Id.* (emphasis added). The court "agree[d] with the Secretary." *Id.* That is a far cry from Federal Defendants' blanket assertion that *West Flagler* "made clear that questions of state law are outside the scope of the Secretary's review." FD Br. at 21.

F.3d 1079, 1082 (7th Cir. 1995), "stand for the novel proposition that an IGRA compact has the force of federal law with preemptive power." *W. Flagler*, 71 F.4th at 1067-68. "In actuality, the approval process exists so that the Secretary may ensure that a compact does not violate certain federal laws, and her approval is a prerequisite for the compact to have legal effect: nothing more, nothing less." *Id.* at 1068.

The court then reiterated that "an IGRA compact cannot provide independent legal authority for gaming activity that occurs outside of Indian lands, where that activity would otherwise violate state law," *id.*, emphasizing that "we hold only that the Secretary's decision not to act on the Compact was consistent with IGRA," and that

> for avoidance of doubt, we express no opinion as to whether the Florida statute ratifying the Compact is constitutional under Fla. Const. art. X, § 30.[[26]] That question and any other related questions of state law are outside the scope of the Secretary's review of the Compact, are outside the scope of our judicial review, and as a prudential matter are best left for Florida's courts to decide.

Id. While Federal Defendants seize on that text, they recognize that the court was referring to the sports betting clause that "addressed sports betting outside Indian lands." FD Br. at 21-22. The *West Flagler* court was not, in clarifying this matter for the "avoidance of doubt," announcing a

[26] As the court explained, "[m]uch discussion in the briefs concern[ed] the issue of whether the Tribe and Florida sought to circumvent state constitutional law by including the online sports betting provisions in the compact," stating that "in 2018, Florida amended its constitution with a section titled 'Voter Control of Gambling in Florida.'" *Id.* (quoting Fla. Const. art. X, § 30). The amendment provided that "'Florida voters shall have the exclusive right to decide whether to authorize casino gambling in the State of Florida[,]' which can only be done through 'a vote by citizens' initiative.'" *Id.* (quoting Fla. Const. art. X, § 30(a)). "At the same time, the amendment contains an exception for 'casino gambling on tribal lands' pursuant to an IGRA compact." *Id.* (quoting Fla. Const. art. X, § 30(c)). "No voter referendum was ever held regarding online sports betting; therefore, West Flagler argues, the Tribe and Florida would *have* to believe that the IGRA Compact provides the legal basis for that activity." *Id.*

general rule that all questions of state law are outside the scope of the Secretary's review and of the court's judicial review.[27]

Accordingly, Federal Defendants' contention that *West Flagler* means "the Secretary was not required to look behind state law to resolve the dispute over the Governor's authority to enter into the compacts," FD Br. at 22, fails, and their related assertion that "[n]othing in IGRA mandates that the Secretary disapprove a compact for an alleged violation of state law," *id.*, fails because it is contrary to IGRA and its regulations. *See supra* at 20-27. And Federal Defendants admit that "[a]s to whether the state had validity bound itself to the Compacts, and thus entered into those agreements, it is state law that controls." FD Br. at 22 (first citing *Cherokee Nation*, 643 F. Supp. 3d at 116-17; and then citing *Santa Ana*, 104 F.3d at 1557).

Federal Defendants also assert that "[m]ultiple federal courts have reached the same conclusion" as that which it incorrectly ascribes to *West Flagler*. FD Br. at 22 n.4. But they ignore *this Court's* holding that "[i]f a compact has not been legally entered into under state law, it is 'invalid' under IGRA." *Cherokee Nation*, 643 F. Supp. 3d at 98 (first citing *Kickapoo I*, 827 F. Supp. at 46; and then citing *Santa Ana*, 104 F.3d at 1555, 1559). As this Court acknowledged, "[c]ourts in other jurisdictions have reasoned that IGRA does not require the Secretary to resolve 'state law issues' to this effect in the forty-five-day review period." *Id.* at 117 n.16 (first citing *Santa Ana*, 104 F.3d at 1556-57; and then citing *Narragansett I*, 1995 WL 17017347 at *2). "But of course, this Court must follow *Amador County*, which dictates that the Secretary may not no-

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[27] Any such contention is rejected by the court's express recognition that the State had "ratified and approved the compact," 71 F.4th at 1063, that it "authorized [the Tribe] to operate sports betting on its lands," *id.* at 1066, which was "uncontroversial and plainly consistent with IGRA," *id.*, and that the court was not deciding the separate state law question of whether online sport betting was lawful, *id.* at 1068.

action approve a compact that violates IGRA, as such a compact would if it were not validly 'entered into' under state law." *Id.* (citing *Amador County*, 640 F.3d at 381).[28]

Federal Defendants also contend that "[t]he Secretary's decision to decline to resolve the state law issues is especially reasonable given the then-divergent views about state-law requirements," and that "[t]he Secretary has no power to issue binding interpretations of state law so his approval or disapproval would not have answered the disputed questions beyond cavil." FD Br. at 23. That argument fails because before the end of the 45-day review period, the Oklahoma Attorney General issued *In re Treat* and transmitted it to the Secretary. *See* Br. at 36. *In re Treat* established that the Governor lacked authority under state law to enter into the Agreements at issue in this case. 2020 OK AG ¶¶ 12, 15, 2020 WL 2304499, at *4-5. *In re Treat* is binding on the Governor, as the Attorney General made clear, AR518, as Federal Defendants concede, FD Br. at 23, and as this Court has held, *Cherokee Nation*, 643 F. Supp. 3d at 117. Federal Defendants' contentions that "[t]he Secretary has no power to issue binding interpretations of state law" and that *In re Treat* was not binding on the Secretary, FD Br. at 23, are unavailing because *In re Treat* squarely answered the question IGRA put before the Secretary, it was binding on the Governor, and reliance on it by the Secretary to answer that question would have been proper. *Detroit Int'l Bridge*, 883 F.3d at 900 (reliance on Secretary of State's reliance on legal advice of the Michigan Attorney General to address question of Governor's authority was not arbitrary and capricious).

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[28] Federal Defendants' assertion that other federal courts have concluded whether a state entered into a compact is outside the scope of the Secretary's review is also unavailing. *See* FD Br. at 22 n.4 (citing *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); *Narragansett I* at *2; and *Detroit Int'l Bridge Co. v. Gov't of Canada*, 883 F.3d 895, 899-900 (D.C. Cir. 2018)). Their reliance on *Langley* and *Detroit Int'l Bridge* fails for reasons earlier stated, Br. at 18 n.10 (*Langley*), 29-33 (*Detroit Int'l Bridge*), and those set forth *infra* at 42 (*Langley*), 42-43 (*Detroit Int'l Bridge*). Their reliance on *Narragansett I* fails for the reasons set forth *supra* at 22-23.

Accordingly, Federal Defendants' protestations that deciding that issue posed an intractable challenge for the Secretary, FD Br. at 24, fall flat.[29] And in any event, "[a]s noted in [*Amador County*], although Congress gave the Secretary only forty-five days to review compacts, 'Congress had no intention of trading compliance with IGRA's requirements for efficiency in agency proceedings." *Cherokee Nation*, 643 F. Supp. 3d at 116 (quoting *Amador County*, 640 F.3d at 381).

b. Defendant Stitt misconstrues *Amador County* and *West Flagler* in contending that questions of state law are not subject to review by the Secretary, or by this Court.

Defendant Stitt contends that "nothing in the D.C. Circuit's decision in *Amador County v. Salazar* supports Plaintiffs' argument that the Secretary was required to resolve the state-law dispute and independently verify the Governor's certification." Stitt Br. at 21. To the contrary, *Amador County* holds that "just as the Secretary has no authority to affirmatively approve a compact that violates any of subsection (d)(8)(B)'s criteria for disapproval, he may not allow a compact that violates subsection (d)(8)(C)'s caveat to go into effect by operation of law," that

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[29] Federal Defendants rely on *Stenberg v. Carhart*, 530 U.S. 914, 940 (2000), for the proposition that "federal courts do not accept as 'authoritative' an Attorney General's interpretation of state law in all cases," FD Br. at 23, but that contention does not unsettle reliance on *In re Treat* by this Court. The *Stenberg* Court actually said "our precedent warns against accepting as 'authoritative' an Attorney General's interpretation of state law when 'the Attorney General does not bind the state courts or local law enforcement authorities.'" *Id.* at 940 (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 395 (1988)). The Court then noted that "[u]nder Nebraska law, the Attorney General's interpretative views do not bind the state courts." *Id.* (citing *State v. Coffman*, 330 N.W.2d 727, 728 (Neb. 1983)). By contrast, in Oklahoma an Attorney General's opinion is binding on state officers, including the Governor, unless and until the courts of Oklahoma relieve them of that duty. *See infra* at 49-51. Federal Defendants also cite to *Tahoe Regional Planning Agency v. McKay*, 590 F. Supp. 1071, 1074 n.1 (D. Nev. 1984), for providing a survey of the effect of Attorney General opinions in different states, FD Br. at 24, but that survey does not include Oklahoma, *see McKay*, 590 F. Supp. at 1074 n.1. *Compare Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906, 909 n.2 (10th Cir. 2008) ("Under Oklahoma law, the defendants [officials of a state agency] are required to follow an attorney general's opinion until a court determines otherwise.").

caveat being "that the compact is deemed approved 'but only to the extent that the compact is consistent with the provisions of [IGRA],'" *Amador County*, 640 F.3d at 381 (alteration by the court). And because it is undisputed that IGRA provides that Class III gaming "shall be lawful on Indian lands only if … conducted in conformance with a Tribal-State compact *entered into by the Indian tribe and the State*," 25 U.S.C. § 2710(d)(1)(C), the Secretary must determine whether the State entered into the compact to determine whether a compact is consistent with IGRA, and that question turns on state law, as IGRA and its regulations show. *See supra* at 20-27.

Defendant Stitt argues that *Amador County* only concerned "the county's argument [] that the challenged compact authorized gaming that was not even located on Indian lands," that the Plaintiff Nations "seek to *extend Amador County* to require the Secretary to also review the compacts for compliance with state and tribal law," Stitt Br. at 21 (citing Br. at 30), and that "unlike the federal 'on Indian lands' requirement, nothing in IGRA imposes such a requirement," *id.* That argument fails because *Amador County* holds that 25 U.S.C. § 2710(d)(3)(B) "provides the only lawful compacts can become effective, but someone—i.e., the courts must decide whether those provisions are in fact lawful." 640 F.3d at 380. "Further, later decisions applying or referencing *Amador County* confirm the propriety of following this rule here, as those cases have taken this holding at its word by applying it outside the confines of the specific facts of that case." *Cherokee Nation*, 643 F. Supp. 3d at 118. Indeed, *West Flagler* affirmed that "[w]hen reviewing a Secretary's decision to not act within the 45-day window when presented with an IGRA compact, … 25 U.S.C. § 2710(d)(8)(C) 'provides the law to apply[ ]'—that is, 'the compact is deemed approved but only to the extent the compact is consistent with the provisions of [IGRA].'" *W. Flagler*, 71 F.4th at 1064-65 (quoting *Amador County*, 640 F.3d at 381 (alteration in original) (some internal quotation marks omitted)). To be sure, the D.C. Circuit's decision in *West Flagler* establishes that the lawfulness of "the placing of wagers from outside Indian lands, under state or tribal law, is unaffected by its inclusion … in [a] Compact," 71 F.4th at 1066, and "outside the scope of the Secretary's review of the Compact," *id.* at 1068, but the requirement at issue here, that "Class III gaming activities shall be lawful *on Indian lands* only if such activities are—conducted in conformance with a Tribal-State compact *entered into by the Indian tribe and the State*," 25 U.S.C. § 2710(d)(1)(C) (emphasis added), is expressly applicable to gaming on Indian lands and is therefore subject to judicial review under *West Flagler* and *Amador County*.[30]

Defendant Stitt also argues that *West Flagler* "read *Amador County* narrowly in light of the specific context at issue in that case." Stitt Br. at 21-22 (citing *W. Flagler*, 71 F.4th at 1067). But the *West Flagler* court focused on *Amador County*'s statement "that 25 U.S.C. 2710(d)(8)(A) 'authorizes approval only of compacts governing gaming on Indian lands,'" *W. Flagler*, 71 F.4th at 1067 (quoting *Amador County*, 640 F.3d at 381 (some internal quotation marks omitted)), because the issue in *West Flagler* was whether the Secretary was required to disapprove the compact because it "authorize[d] … online wagers placed from outside the tribe's lands." *Id.* Nothing in that discussion purported to limit *Amador County*'s holding with respect to the availability of judicial review of the Secretary's no-action approval of a compact under 25 U.S.C. § 2710(d)(8)(C). And any contrary argument is rejected by *West Flagler's* reliance on *Amador County* without stating or suggesting any such limitation. *Id.* at 1062-63, 1064-65.

Indeed, Defendant Stitt concedes that "[a]pplied here, *Amador County* holds that the question whether a compact was 'entered into' under IGRA is subject to judicial review," but then seeks to limit that review by stating that "it does not require the Secretary to go beyond the

[30] Defendant Stitt also asserts that "unlike the federal 'on Indian lands' requirement, nothing in IGRA imposes [] a requirement" that the Secretary "review the compacts for compliance with state and tribal law." Stitt Br. at 21. That argument fails too. *See supra* at 20-27.

requirements of IGRA and its implementing regulations and determine whether the compact was *validly* entered into under state (and tribal) law." Stitt Br. at 22. That argument fails because IGRA and its regulations require the Secretary to do just that. *See supra* at 20-27.

4. Settled law rejects Defendant Stitt's assertion that a compact that is in effect cannot be invalidated by later state court decisions.

Defendant Stitt argues that 'the compacts took effect when the Secretary published notice of their approval in the Federal Register on June 29, 2020," Stitt Br. at 22 (citing 85 Fed. Reg. 38919 and 25 U.S.C. § 2710(d)(3)(B)) and that "[n]othing in IGRA's text or purpose suggests that, once a compact is 'in effect' under federal law, it can thereafter be invalidated and rendered ineffective by subsequent state court decisions," *id.* at 23. He also reprises his effort to analogize IGRA compacts to Public Law 280 retrocessions, agreements under the International Bridge Act ("IBA"), 33 U.S.C. §§ 535-535i, and interstate compacts approved by Congress under the Compact Clause, U.S. Const., art. I, § 10, cl. 3, contending that under these statutes, an agreement approved under its terms cannot be "unilaterally unwound by later state-law decisions." Stitt Br. at 25-30. These arguments are rejected by the statute that applies here, namely IGRA, and the law of this Circuit that interprets it.

a. A compact not legally entered into by the State under State law is void.

Defendant Stitt argues that "the compacts took effect when the Secretary published notice of their approval in the Federal Register on June 29, 2020," Stitt Br. at 22; *id.* at 23 ("IGRA unambiguously defines the moment when [] a compact 'take[s] effect' under federal law: 'when notice of approval by the Secretary … has been published by the Secretary in the Federal Register.'") (citing 25 U.S.C. § 2710(d)(3)(B)). This argument fails for several reasons.

First, the Secretary did not approve the compacts. Rather,

> The Secretary took no action on the Comanche Nation and State of Oklahoma Gaming Compact and the Otoe-Missouria Tribe and State of Oklahoma Gaming Compact within 45 days of their submission. Therefore, *the Compacts are considered to have been approved, but only to the extent they are consistent with IGRA*. See 25 U.S.C. 2710(d)(8)(C).

85 Fed. Reg. at 38919 (emphasis added). Second, IGRA requires that the tribe and the state "enter into a Tribal-State compact" in order for "such compact" to take effect." § 2710(d)(3)(B). As the D.C. Circuit held in *West Flagler*, "the approval process exists so that the Secretary may ensure that a compact does not violate certain federal laws, and her approval *is a prerequisite for the compact to have legal effect*: nothing more, nothing less." 71 F.4th at 1068 (emphasis added); *Amador County*, 640 F.3d at 380 (while 25 U.S.C. § 2710(d)(3)(B) "provides the only lawful compacts can become effective, [] someone—i.e., the courts must decide whether those provisions are in fact lawful." Thus, publication in the Federal Register of notice that a compact "is approved, or considered to have been approved" under 25 U.S.C. § 2710(d)(3)(D) does not affect a compact's invalidity.

Third, for Class III gaming to be lawful, IGRA requires "a Tribal-State compact entered into by the Indian tribe and to the State under [25 U.S.C. § 2710(d)(1)(C)] that is in effect." *Id.* § 2710(d)(1)(C); *see id.* § 2710(d)(6)(A) and (B) (once the tribal gaming ordinance has been approved by the Chairman of the NIGC, the Johnson Act, 15 U.S.C. § 1175, "shall not apply to any gaming conducted under a Tribal-State compact entered into under [§ 2710(d)(3)] that is in effect."). Because the Agreements were not entered into by the State, *see supra* at 18-19, they are not in effect. As the Tenth Circuit held in *Santa Ana*, "the 'entered into' language imposes an independent requirement and the compact must be validly entered into by a state *before it can go into effect*, via Secretarial approval, under IGRA." 104 F.3d at 1555 (emphasis added). The Tenth Circuit also found that two other federal courts had concluded "that a compact entered into by someone without authority to bind the state is void and without effect, regardless of the Secretary's approval of the compact," and in so holding "had implicitly concluded that the validity of a compact under state law is a separate requirement from Secretarial approval." *Id*. at 1554 (citing *Narragansett I* , 1996 WL 97856 at *2 (holding that a compact signed by the Governor, who lacked authority under state law to sign the compact, "is void in the same sense that any document executed without proper authority is void; namely, it has no legal effect."); *Kickapoo I*, 827 F. Supp. at 46 ("[B]ecause only the Governor—a person without authority—signed the compact, the State did not enter into the compact. Thus, the compact does not comply with § 2710(d)(8)(A) and is invalid."). As *West Flagler*, *Santa Ana*, *Narragansett I*, and *Kickapoo I* all show, it does not "unwind" a compact for a court to determine whether it was lawfully entered into by the State, nor does it "undermine Congress's purposes in enacting IGRA." Stitt Br. at 24.

Defendants assert, unsuccessfully, that *Santa Ana* and *Kickapoo I* are "inapposite and unpersuasive." Stitt Br. at 30; *see also* Shotton Br. at 19-20. Defendant Stitt contends that in *Kickapoo I*, the Secretary "never published notice of [the compact's] approval in the Federal Register, as directed by 25 U.S.C. § 2710(d)(3)(B)," that "[a]s a result, the compact never 't[ook] effect' under IGRA," Stitt Br. at 30 (citing § 2710(d)(3)(B)), and that "*Kickapoo I* thus had no occasion to address whether or how a compact that had already taken effect under IGRA, like the two challenged compacts at issue in this case, could suddenly cease to be 'in effect' as a result of a state-court decision." *Id*. To the contrary, the *Kickapoo I* court squarely held that

> [r]egardless of whether the governor had the authority to bind the state, defendants had an obligation to approve or disapprove of the compact within forty-five days; they did not. Instead, they attempted to postpone acting on the compact pending outside events, an act not tolerated by IGRA. As a result of defendants' failure to act, therefore, § 2710(d)(8)(C) applies, and the compact is considered to have been approved by the Secretary as of April 20, 1992.

827 F. Supp. at 44. Defendant Stitt next asserts that *Kickapoo I* and *Santa Ana* "proceed from the same flawed premise: that IGRA's phrase 'entered into' silently includes an independent requirement that the compact must be lawfully entered into under state law in order for a compact to take effect under federal law." Stitt Br. at 31 (citing *Kickapoo I*, 827 F. Supp. at 40-41l, *Santa Ana*, 104 F.3d at 1555). But in fact, the plain text of IGRA and its regulations impose that requirement. *See supra* at 20-27[31] And while Defendant Stitt then reprises his argument that "nothing in [the Part 293 regulations] supports the idea that the Secretary must look behind the certifications and conclusively determine whether the Governor in fact acted within his state-law authority," Stitt Br. at 31, that argument fails for the reasons shown *supra* at 20-27.

Finally, notwithstanding the collapse of his critique of *Santa Ana*, Defendant Stitt says it "is unpersuasive" and that "[t]he district-court opinions cited by *Santa Ana* are not more

[31] Defendant Shotton mischaracterizes the *Santa Ana* court's reasoning contending it "engage[d] in no meaningful analysis of the statutory text, relying almost entirely on legislative history and vague notions about accommodating 'state interests.'" Shotton Br. at 19. To the contrary the *Santa Ana* decision carefully reviewed the relevant text of the statute, *see* 104 F.3d at 1552, noting that the district court held that "entered into" and the "in effect" components are two distinct requirements, the court "first examine[d] IGRA's language to determine whether the 'entered into' and the 'in effect' requirements are separate or whether, as the Tribes urge us, Secretarial approval of the compacts, placing the compact into effect under IGRA is all that is necessary." *Id.* at 1553. The court evaluated Section 2710(d)(1)(C) and Section 2710(d)(6) and found "[b]oth provisions separate the 'entered into' requirement from the 'in effect' requirement, the later provision more clearly than the former." *Id.* It found the statute is unambiguous in stating a compact goes into "effect" upon publication in the Federal Register, it "does not define what is necessary for a tribe and state to 'enter[ ] into' a compact, nor does it state which branch of state government can or must sign a compact." *Id*. This reflects a careful, detailed analysis of the text. The court then considered legislative history and the analysis of other courts finding no reason to conclude "Congress intended to permit a state to be bound by a compact regulating class III gaming which it never validly entered." *Id.* at 1554. The court considered other courts' analysis of this conclusion and found "[t]wo of the three courts have reached the same conclusion as the three district courts in New Mexico—that a compact entered into by someone without authority to bind the state is void and without effect, regardless of the Secretary's approval of the compact." *Id.*

convincing." *Id.* This argument is rejected by our earlier comprehensive examination of *Santa Ana* and the cases it relies on, *see* Br. at 16-20, which he does not address, or even mention.[32]

b. Defendant Stitt's analogical arguments are irrelevant.

In an effort to avoid this settled law, Defendant Stitt asserts that "in other federal statutory contexts, courts have recognized that state law cannot operate to unwind an agreement that has been approved and gone into effect under state law." Stitt Br. at 23; *see also* Shotton Br. at 21-23. We showed that these arguments have no merit in our opening brief, Br. 27-34, and nothing offered by Defendant Stitt or Defendant Shotton unsettles that conclusion. Defendant Stitt's renewed argument shows nothing more than that different laws have different requirements. Under IGRA, "[w]hen reviewing a Secretary's decision to not act within the 45-day window when presented with an IGRA compact, … 25 U.S.C. § 2710(d)(8)(C) 'provides the law to apply[ ]'—that is, 'the compact is deemed approved but only to the extent the compact is consistent with the provisions of [IGRA].'" *W. Flagler*, 71 F.4th at 1064-65 (quoting *Amador County*, 640 F.3d at 381 (alteration in original) (some internal quotation marks omitted)). IGRA provides that Class III gaming "shall be lawful on Indian lands only if … conducted in conformance with a Tribal-State compact *entered into by the Indian tribe and the State*." 25 U.S.C. § 2710(d)(1)(C), and "[i]f a compact has not been legally entered into under state law, it is 'invalid' under IGRA." *Cherokee Nation*, 643 F. Supp. 3d at 98 (citing *Kickapoo I* and *Santa Ana*, 104 F.3d at 1555, 1559); *Narragansett I* at *2. These requirements are not altered by Defendant's argument that other statutes have different requirements.

[32] Defendant Stitt's reliance on the Solicitor General's brief opposing a grant of certiorari in *Santa Ana*, Stitt Br. at 25 (citing Br. for Fed. Resp'ts Opp. at 11, 13, *Pueblo of Santa Ana v. Kelly*, 522 U.S. 807 (1997) (No. 96-1617)), fails because the decision in *Santa Ana* controls its meaning, not the briefs submitted during the pendency of the litigation.

Defendant Stitt relies on the cases involving the retrocession of jurisdiction acquired by the State under Public Law 280, *see* 25 U.S.C. § 1323; Stitt Br. at 26 (citing *United States v. Brown*, 334 F. Supp. 536 (D. Neb. 1971), *United States v. Lawrence*, 595 F.2d 1149 (9th Cir. 1979), and *Omaha Tribe v. Walthill*, 334 F. Supp. 823 (D. Neb. 1971), *aff'd* 460 F.2d 1327 (8th Cir. 1972)). *Kickapoo I* rejected reliance on these cases, *see* Br. at 27-29 (find[ing] that "an automatic (by operation of law) statutory approval following the Secretary's failure to act," as in the case before the court, "does not warrant the same consideration as an affirmative approval by the Secretary." Defendant Stitt seeks to distinguish *Kickapoo I*, stating that "the 45-day review period had not been *triggered*" in *Kickapoo I*, Stitt Br. at 27 (emphasis added), ignoring the *Kickapoo I* court's holding "that [federal] defendants' failure to act *triggers* the statutory approval mechanism of § 2710(d)(8)(C)," *Kickapoo I*, 827 F. Supp. at 40 (emphasis added); *see id.* at 44 ("[federal] defendants had an obligation to approve or disapprove of the compact within forty-five days" and that "[a]s a result of defendants' failure to act … § 2710(d)(8)(C) applies, and the compact is considered to have been approved by the Secretary as of April 20, 1992."). Defendant Stitt also asserts that "[t]he concerns that *Kickapoo I* deemed absent there—finality of federal action and settled reliance on accepted agreements—are fully present here, where the parties have operated for years under compacts that IGRA deems 'in effect.'" Stitt Br. at 27. That contention fails because "if the compact conflicts with any provision of IGRA, the fact that the Secretary failed to act within the forty-five day approval period is irrelevant; the compact still would be void," *Kickapoo I*, 827 F. Supp. at 44, and because, *see* Br. 28-29, Defendants knew that Secretarial inaction deems a compact approved only "to the extent the compact is consistent with the provisions of [IGRA]," 25 U.S.C. § 2710(d)(8)(C), and *In re Treat* made clear to Defendants *before the Secretary acted* that the compacts were invalid under IGRA.[33]

Defendant Stitt next asserts that *Yakima*, 439 U.S. 483, "held state law governs the procedures a State must follow before its request for retrocession can take legal effect under a federal statute," but that it "does not undermine the relevance of the fundamental principles articulated in the retrocession cases." Stitt Br. at 27. Wrong on both counts. First, *Yakima* was a "challeng[e to] the statutory and constitutional validity of the State's partial assertion of jurisdiction on its Reservation" under § 6 of Public Law No. 83-280, 67 Stat. 588 (1953) ("Public Law 280"). 439 U.S. at 466. It did not concern retrocession. Second, *Yakima*, held that whether § 6 of Public Law 280 requires States with disclaimers of jurisdiction over Indian lands in their constitutions to amend their constitutions to make an effective acceptance of jurisdiction under Public Law 280 turns on state law. "If as a matter of state law a constitutional amendment is required, that procedure must—as a matter of state law—be followed." *Yakima*, 439 U.S. at 493; *Kickapoo I*, 827 F. Supp. at 45 (Explaining that in *Yakima* "the Supreme Court held that it was up

[33] Defendant Shotton argues Otoe-Missouria has a greater interest in finality than the tribes in *Santa Ana* because it does not have "unclean hands." Shotton Br. at 26. However, the court's admonition that tribes must "assure themselves" that the State is authorized to enter into a compact also is applicable to Otoe-Missouria. Defendant Shotton understood the Agreement deviated in significant ways from the Model Compact, the Attorney General issued *In re Treat* before the Secretary's approval, and the Oklahoma Supreme Court ruled in *Treat I* that the Governor lacked authority to enter the Agreement in less than one month after the Agreement was deemed approved. *Compare* 104 F.3d at 1556 (compacts were challenged one month after publication and approximately 120 days later the New Mexico Supreme Court ruled the governor lacked the authority to sign them). Similarly, Chairman Shotton's asserts that at the time the Otoe-Missouria Agreement was "signed and submitted to the Secretary" the law supported the Governor's authority to sign the Agreement, citing the Oklahoma Supreme Court's reference to the "timing of the federal process." Shotton Br. at 25 (quoting *Cherokee Nation*, 2025 OK 4, ¶ 43, 564 P.3d 58, 72). However, the Oklahoma Supreme Court's reference to "timing" in the quoted decision has no bearing on whether the Agreement was "entered into" for purposes of IGRA. And as the Nations have shown, *supra* at 18-27, 55, the Secretary's no-action approval is evaluated based on reference to the law at the time of such approval and at the time the reviewing court rules.

to state law to determine what procedures a state needed to follow in order to amend its constitution."). Thus, *Yakima* plainly *does* "undermine the relevance of the fundamental principles articulated in the retrocession cases," Stitt Br. at 28. *Yakima* shows that a federal statute—there Public Law 280—may properly rely on state law to determine whether a state has complied with requirements of the federal law that depend on state action. *See Santa Ana*, 104 F.3d at 1557-58 (relying on *Yakima* to conclude that "State law must determine whether a state has validly bound itself to a compact" and "agree[ing] with the district court that IGRA's very silence on this point supports the view that 'Congress intended that state law determine the procedure for executing valid gaming compacts.'") (citing *Yakima*, 439 U.S. at 493 & n. 39, and *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1294 (D.N.M. 1996)); *see Kickapoo I*, 827 F. Supp. at 46 ("[T]he court questions the validity of *Brown* and its progeny in light of *Yakima*.").

Defendant Stitt also continues to rely on *Detroit International Bridge Co. v. Government of Canada*, 192 F. Supp. 3d 54 (D.D.C. 2016), and the D.C. Circuit's later decision in that case, 883 F.3d 895 (D.C. Cir. 2018), based on a claimed similarity between those courts' interpretation of the IBA and IGRA. Stitt Br. at 28. This argument fails because IGRA requirements are clear, *see supra* at 20-27, and are set forth in IGRA, not the IBA.

Even if considered, these cases do not help Defendant, as we earlier showed. Br. at 29-33. Defendant quotes the district court's quotation from *Langley*, Stitt Br. at 28, but that case does not help Defendant for reasons earlier shown, Br. 18 n.10. Furthermore, the district court rejected "DIBC's argument that USDS was required to determine whether the Crossing Agreement was lawfully executed under Michigan law" because it was contrary to Congress's intent, and unsupported by the text and legislative history of the IBA, finding that "the legislative history clearly depicts the limited purpose of Secretarial approval of crossing agreements, i.e., to evaluate an agreement's effect on U.S. foreign policy." *Detroit Int'l Bridge*, 192 F. Supp. 3d at 77. The reasoning has no application to IGRA. And while the district court in *Detroit Int'l Bridge* cited cases interpreting IGRA, its discussion of those cases does not help Defendant, as we earlier showed. Br. at 31-33. Furthermore, the district court did not consider *Amador County*, which holds that the Secretary's no-action approval of a compact is judicially reviewable, and that in such a case 25 U.S.C. § 2710(d)(8)(C) "provides [the] law to apply," under which "the compact is deemed approved 'but only to the extent the compact is consistent with the provisions of [IGRA].'" *Amador County*, 640 F.3d at 381 (alteration in original).[34] Defendant also relies on the D.C. Circuit's decision in *Detroit Int'l Bridge*, but that court held that the Secretary of State's function was to "assess the effects the Crossing Agreement would have on the foreign policy of the United States," rather than to inquire into state law, 883 F.3d at 899, and that assuming a state-law inquiry was required, the Secretary of State had properly relied on an opinion by the Office of the Michigan Attorney General, which the court considered to "speak[] authoritatively on Michigan law." 883 F.3d at 900. *In re Treat* speaks authoritatively in this case. *See infra* at 49-54.

Finally, Defendant Stitt continues to analogize the Agreements in this case to interstate compacts, notwithstanding that in *West Flagler* the court rejected the argument that "an approved IGRA compact is an 'instrument of federal law' which 'preempts state law[,]'" 71 F.4th at 1067 (alteration in original), while an interstate compact "is transform[ed] … into a law of the United States'" once approved by Congress. *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 627

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[34] The effect of the *Detroit Int'l Bridge* district court's failure to consider *Amador County* is clear when that holding is read together with *Detroit Int'l Bridge* district court's holding "that IGRA contains two independent substantive requirements: (1) 'a compact entered into by [a] tribe and [a] state [*i.e.*, validity of the compact] (2) which is in effect' [*i.e.*, effectiveness of the compact]." 192 F. Supp. 3d at 75 (quoting *Santa Ana*, 104 F.3d at 1552-53; and citing *Narragansett I*, 1995 WL 17017347, at *1-3; and *Kickapoo I*, 827 F. Supp. at 46 (alterations in original).

n.8 (2013) (quoting *Virginia v. Maryland*, 540 U.S. 56, 66 (2003) (alteration in original)). Defendant Stitt claims his argument survives this distinction because "[*State ex rel. Dyer v. Sims*, 341 U.S. 22 (1951)] did not rely on the federal-law status of interstate compacts; it simply relied on the fact that the 'agreement' had been solemnly entered into between States' and thereafter approved by Congress." Stitt Br. at 29. But Congress gave its approval to the compact, *Dyer*, 341 U.S. at 27, while the compacts at issue in this case were only approved by Secretarial inaction, and are judicially reviewable under 25 U.S.C. § 2710(d)(8)(C), under which "'the compact is deemed approved but only to the extent the compact is consistent with the provisions of [IGRA].'" *W. Flagler*, 71 F.4th at 1064-65 (quoting *Amador County*, 640 F.3d at 381) (alteration in original).

Even if *Dyer* were applicable by analogy, the Supreme Court there determined whether West Virginia had validly entered into an interstate compact *by reviewing state law*, giving "every deference … to what the highest court of a State deems to be the law and policy of its State, particularly when recondite or unique features of local law are urged." 341 U.S. at 28, 30-32. In this case, the Governor has conceded that the Oklahoma Supreme Court's ruling on state law in *Treat I* is correct, *see infra* at 55 n.49, Br. at 35, and state law prevents the Governor from entering into the Agreements for the State for the reasons the Oklahoma Supreme Court and Attorney General have explained, *see infra* at 49-63.[35]

In sum, settled law shows that a compact that had been approved or was considered to have been approved by the Secretary is invalid if the state supreme court subsequently holds the governor did not have authority under state law to enter into the compact. *Kickapoo I*, 827 F. Supp. at 46; *Narragansett II*, 1996 WL 97856, at *3; *Santa Ana*, 104 F.3d at 1559. So too here.

[35] Chairman Shotton's attacks on *In re Treat*, *Treat I* and *Treat II* have no merit, *see infra* at 55 n.49.

5. Defendant Tahdooahnippah's arguments against summary judgment on Count 8 must be rejected.

a. Defendant Tahdooahnippah's argument that there is no *Young* cause of action must be rejected.

Plaintiff Nations sue Defendant Tahdooahnippah under *Ex parte Young*, 123 U.S. 209 (1908), which provides a cause of action against state or tribal officials when "[the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002) (quotation omitted). A prayer for injunctive and declaratory relief to prevent enforcement of an order contrary to federal law is "properly characterized as prospective." *Id.* at 645-46. Here, Plaintiff Nations seek relief that would prevent Defendants Stitt and Tribal Chairmen from continuing to implement the Secretary's no-action approval of the Agreements, since the approval of the Agreements was invalid under federal law, and therefore tribal Class III gaming pursuant to the Agreements also violates federal law. *See* Compl. ¶¶ 4, 7, 241-44, Prayer for Relief ¶ 1(c).[36]

Defendant Tahdooahnippah opposes summary judgment on count eight, on the supposed basis that "[u]nder *Ex parte Young*, Plaintiff Nations must establish that the Comanche Chairman's ongoing conduct violates federal law. They cannot meet this burden and thus cannot overcome tribal sovereign immunity." CNC Opp. Br. at 11; *see id.* at 1, 3, 12 (asserting *Young* only applies "when the plaintiff establishes that the tribal official's conduct actually violates federal law and that the violation is ongoing"). This is flatly wrong. "[T]he inquiry into whether suit lies under

[36] Plaintiff Nations seek, against all Defendants, "a declaratory judgment that the Defendant Governor Stitt did not validly enter into the Agreements under IGRA, that the Agreements are therefore void and have no legal effect, that the Secretary's no action approvals of the Agreement does not make the Agreements valid compacts and has no legal effect, and that the Agreements violate IGRA for the reasons stated in ¶ 4 above." Compl. ¶ 7; *see* Prayer for Relief ¶ 1(c). That defeats Defendant Chairmen's assertion that the Governor may not have been "sued." *See* CNC SOF ¶ 8; Def. Chairman John Shotton's Resp. Pls.' Stmts. Fact & Def. Chairman John Shotton's Stmt. Facts ¶ 8, at 4, Dkt. No. 229-2.

Ex parte Young does not include an analysis of the merits of the claim." *Verizon*, 535 U.S. at 646 (citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997)).

Defendant Tahdooahnippah is also wrong to suggest that there is no *Young* action available against him because IGRA "does not require [Defendant Tahdooahnippah] to adjudicate whether the Secretary correctly determined that the compact was validly 'entered into.'" *See* CNC Opp. Br. at 11. Defendants in *Young* actions are, by definition, not federal officials, and so they are not responsible for adjudicating whether federal officials acted properly. Nor does the fact that a federal official approved the *Young* defendant's actions provide a shield from a *Young* action. For instance, in *Vann v. Kempthorne*, 534 F.3d 741 (D.C. Cir. 2008) (Kavanaugh, J.)—on which Defendant Tahdooahnippah relies, *see* CNC Opp. Br. at 12—the D.C. Circuit determined that a tribal official could be sued under *Young* for allegedly violating federal law in the conduct of a tribal election, which took place under procedures approved by the Secretary of the Interior and the results of which had been accepted by the Secretary, *see id.* at 744-45, 749-50. Moreover, the plaintiffs maintained their *Young* suit alongside APA claims against the Secretary for authorizing tribal elections and recognizing their results. 534 F.3d at 744-45. Consistent with *Verizon*, then, Plaintiff Nations can bring a *Young* claim alleging that implementation of the Comanche Agreement violates federal law, while also challenging the validity of the Secretary's no-action approval of the Comanche Agreement under the APA. *Contra* CNC Opp. Br. at 8 (asserting "a compact can be 'in effect' … even while its validity is challenged in APA proceedings").

b. Defendant Tahdooahnippah and the other non-federal defendants are engaging in an ongoing violation of federal law.

In the course of putting forward his mistaken arguments, Defendant Tahdooahnippah argues the merits of the *Young* claim, asserting that he is not engaged in an ongoing violation of federal law that can be subject to a *Young* suit. He is wrong there, too. Accordingly, his arguments provide no basis to grant him summary judgment on count 8.

Defendant Tahdooahnippah admits that the Comanche Nation is currently operating Class III gaming on Indian lands in Oklahoma. CNC Opp. Br. at 5.[37] Class III gaming is only lawful on Indian lands if it "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under [25 U.S.C. § 2710(d)(3)] that is in effect," *id.* § 2710(d)(1)(C). The Comanche Nation does not satisfy this requirement because a "compact" under 25 U.S.C. § 2710(d)(1)(C) must be "a Tribal-State compact" to which both the Tribe and the State are parties, and the State never entered into the Comanche Agreement. *See infra* at § II(B).

Moreover, any such "Tribal-State compact" must meet two separate requirements. *See* Br. at 31 (citing *Detroit Int'l Bridge*, 192 F.3d at 75 (quoting *Santa Ana*, 104 F.3d at 1552-53; *Narragansett I*, 1995 WL 17017347, at *1-2; and *Kickapoo I*, 827 F. Supp. at 43-46). "[T]he State and Tribe must have 'entered into' a compact *and* the compact must be 'in effect' pursuant to Secretarial approval." *Santa Ana*, 104 F.3d at 1553. Each requirement is necessary, as "we must give effect to every word of a statute wherever possible," *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004), and when requirements are "connected by the conjunctive 'and,' all of them must be met," *United States v. Palomar-Santiago*, 593 U.S. 321, 326 (2021). That is confirmed by 25 U.S.C. § 2710(d)(3) which provides that the State and any Indian tribe "may enter into a Tribal-State compact … *but* such compact shall take effect only when notice of approval by the Secretary of

[37] Defendant Tahdooahnippah asserts that "[t]he record is entirely devoid of evidence describing Comanche's actual gaming operations or the Chairman's involvement therewith," CNC Opp. Br. at 4, but he elsewhere admits that he "continue[s] to conduct Class III gaming under the [Comanche] Agreement," ECF No. 228-1 at 20 (SOF ¶ 50); *accord id.* at 21 (SOF ¶¶ 52-53), and avers that he is closely involved in supervising the Nation's gaming operations, that the Comanche Nation "superseded" its former compact with the Agreement, and that the Comanche Nation engages in Class III gaming at five locations, *see* ECF No. 228-2 at ¶¶ 5, 9, 18, 26, 32, 46.

such compact has been published by the Secretary in the Federal Register." *Id.* § 2710(d)(3)(B). Clearly, a compact must be "entered into" but "takes effect" only when a further condition is satisfied. Under 25 U.S.C. § 2710(d)(3)—like (d)(1)(C)—these are two distinct requirements that any compact must meet for gaming under the compact to be lawful.[38] As Comanche Nation is operating gaming under an Agreement that was not "entered into" by the State, *see* Br. at 13; *infra* at § II(B), Chairman Tahdooahnippah is violating federal law by operating gaming under the Comanche Agreement. The Comanche Agreement is not "in effect" because it was not "entered into" by the State, which is a "prerequisite for a compact to have legal effect." *West Flagler*, 71 F.4th at 1067. *See supra* at 20-27. Because the Agreement was never "entered into" by the State, the Secretary was not authorized to approve it, it was unlawful for him to allow the Agreement to go "in effect," and Defendant Tahdooahnippah is violating IGRA by conducting gaming under the Agreement.[39] And the same is true of the implementation of the Otoe-Missouria Agreement by Defendant Shotton, and the implementation of both Agreements by state officials at the direction of Defendant Stitt.

B. The Agreements Were Not Legally Entered Into By The State And Are Therefore Invalid Under IGRA.

Plaintiff Nations are entitled to summary judgment on counts one, two, three, and eight of the Complaint, each of which "allege[s] that the compacts are entirely illegal and invalid because they were not legally 'entered into' as required by IGRA." *Cherokee Nation*, 643 F. Supp. 3d at

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[38] Another provision of IGRA provides context that confirms this conclusion. *See Santa Ana*, 104 F.3d at 1554. Under § 2710(d)(6)(A), gaming on Indian lands is a criminal offense if it is not conducted under "a Tribal-State compact that – (A) is *entered into* under [25 U.S.C. § 2710(d)(3)] *by a State* in which gambling devices are legal, *and* (B) is in effect." (emphasis added) (indentations omitted).

[39] Defendant Tahdooahnippah is thus incorrect that "whether the Secretary acted properly" is distinct from "whether the 2020 [Agreement] is 'in effect under 2710(d)(3)(B)." CNC CM Br. at 8.

108. "If a compact has not been legally entered into under state law, it is 'invalid' under IGRA." *Cherokee Nation*, 643 F. Supp. 3d at 98 (citing *Kickapoo I*, 827 F. Supp. at 46; *Santa Ana*, 104 F.3d at 1555, 1559). Even before the Secretary's 45-day review period ended, the Agreements at issue here were deemed invalid by *In re Treat*, 2020 OK AG 8, ¶¶ 12-15, 2020 WL 2304499, at *4-5, AR524-25. And the Oklahoma Supreme Court subsequently held in *Treat I* that the Governor lacked authority to enter into those Agreements on behalf of the State and they were "invalid." *Id.* ¶¶ 7-8, 473 P.3d at 45.[40] In *Treat v. Stitt* (*Treat II*), 2021 OK 3, ¶¶ 3, 6, 11, 12, 481 P.3d 240, 241-42, 243-44, the Oklahoma Supreme Court confirmed and expanded on that conclusion, holding that Defendant Stitt also lacked authority to enter into the United Keetoowah Band of Cherokee Indians and Kialegee Tribal Town Agreements on behalf of the State. The court ruled, on terms that apply equally to the Agreements now at issue, that the Governor cannot enter into tribal-state compacts that are inconsistent with the terms of the Model Compact. *Id.* ¶ 11, 481 P.3d at 243. *Treat II* thereby confirmed what was already established under *Treat I* and *In re Treat*. While Defendants contend otherwise, their contentions do not overcome these clear holdings.

1. *In re Treat* establishes that the Agreements were not legally entered into under State law.

The Oklahoma Attorney General's opinion in *In re Treat* held, before the Secretary's forty-five-day review period ended, that "the Governor currently lacks the authority to bind the State to the compacts he recently negotiated with the Comanche Nation and the Otoe-Missouria Tribe,"

[40] The Court further rejected the notion that the Agreements could have been authorized under Okla. Stat. tit. 74, § 1221(C)(1), which provides that tribal-state agreements negotiated by the Governor only become effective if approved by the Joint Committee on State-Tribal Relations. *Treat I* concluded that, even if the Agreements had been submitted to the Joint Committee, it could not have approved the Agreements since they do not conform to the STGA, and "[j]ust as the Governor is constrained by the statutory limitations on Class III gaming, so too is the Joint Committee." 2020 OK 64, ¶ 7, 473 P.3d at 45.

2020 OK AG 8, ¶¶ 12-15, 2020 WL 2304499, at *4, AR524-25. *In re Treat* was transmitted to the Secretary on the day it was issued, with a signed cover letter from the Attorney General, stating that

> [i]n issuing the attached Opinion on the permissibility of the Governor's actions under state law, I act in a quasi-judicial capacity and 'state officers are bound by these Attorney General opinions until relieved of that duty' by the courts of Oklahoma. *State ex rel. York v. Turpen*, 681 P.2d 763, 767 (Okla. 1984).

AR518; *see* AR518-19 (cover letter); AR520-28 (copy of *In re Treat*); Nations' SOF ¶ 32.[41]

Defendant Stitt contends that *In re Treat* does not conclusively establish that the Governor lacked authority to enter into the Agreements and that it established only a dispute over state law that was being litigated at the time. Stitt Br. at 16. To the contrary, as an official opinion by the Attorney General issued in response to request by a state legislator, this decision was "determinative of the law" regarding the subject matter it addressed. Okla. Stat. tit. 74, § 18b(A)(18). That means it both defined the authority of, and was binding on, public officers in Oklahoma—including the Governor. *Keating v. Edmondson*, 2001 OK 110, ¶ 4 & n.8, 37 P.3d 882, 885; *Turpen*, 681 P.2d at 767; *Rasure v. Sparks*, 183 P. 495, 498 (Okla. 1919).[42] And Defendant Tahdooahnippah's assertion that *In re Treat* was not binding because it concerned a constitutional question, misstates the law, *see* CNC SOF ¶ 30 (citing *Turpen*, 681 P.2d at 767). *Turpen* announced a narrow exception to the generally binding nature of Attorney General

[41] The Attorney General's authority under state law to issue a binding opinion rejects Chairman Shotton's attack, Shotton Br. at 14-15, on that opinion's conclusion that the Agreements "purport to grant the State's consent to conduct gambling activities that are prohibited by state criminal law," 2020 OK AG 8, ¶ 12, 2020 WL 2304499, at *4, AR524 (citing Okla. Stat. tit. 21, §§ 941-988).

[42] The pendency of *Treat I* and *II* did not affect the binding nature of the Attorney General's opinion. The Governor has a "duty to follow the Attorney General's opinion *until overturned by a court of competent jurisdiction*," including during the court's consideration of lawsuits challenging it, *see Keating*, 2001 OK 110, ¶ 4, 37 P.3d at 885 (emphasis added).

opinions, under which "an opinion of the Attorney General stating an act of the legislature is unconstitutional should be considered advisory only." 681 P.2d at 767; *see Branch Trucking Co. v. State ex rel. Okla. Tax Comm'n*, 801 P.2d 686, 690 (Okla. 1990); *State ex rel. Fent v. State ex rel. Okla. Water Res. Bd.*, 2003 OK 29, ¶ 16, 66 P.3d 432, 441 ("With the exception of an Attorney General's opinion that an act of the legislature is unconstitutional, an Attorney General's opinion is binding upon the state officials whom it affects." (footnotes omitted)). The *Turpen* exception does not apply, because *In re Treat* did not find a statute unconstitutional but instead concerned the lawfulness of an action by the Governor, a fellow executive officer.

Defendant Stitt's argument that *In re Treat* is not dispositive of his authority to enter into the Agreements also fails because it relies exclusively on the Governor's certification and his general counsel's submission to the Secretary, *see* Stitt Br. at 15 (citing AR3, AR36), neither of which is sufficient to establish a dispute that continued after *In re Treat* was issued.

First, the Governor's certification did not comply with 25 C.F.R. § 293.8, which requires a certification that the Governor "is authorized to enter into *the compact* or amendment in accordance with applicable State law." *Id.* (emphasis added). The Governor only certified that "he is empowered under the laws of the State to enter into *a compact*," and only stated that he has "the power to negotiate and enter into *compacts* with federally recognized Indian tribes." AR3, AR36 (footnote omitted). Whether the Governor has the power to enter into compacts as a general matter does not establish that he caused the State to enter into the Agreements. And these general statements do not address whether the Governor was empowered to enter into the Agreements. Defendant Stitt's assertion that he said, "he had authority to enter into the compacts on behalf of the State, as required by the IGRA regulations," Stitt Br. at 15, is therefore incorrect. Defendant Stitt also says his certification cited constitutional provisions, case law, an Oklahoma statute, and a 2004 Oklahoma Attorney General's opinion confirming the Governor's authority. AR3; AR36 n.1. But none of those authorities addressed his authority to enter into the Comanche and Otoe-Missouria Agreements, as 25 C.F.R. § 293.8 requires.

Second, while Defendant Stitt also relies on a legal memorandum of his general counsel, *see* AR73-82, the issue it addresses is "[d]oes Federal and State law permit the inclusion of Event Wagering in an Oklahoma Gaming Compact," and the position it asserts is that "Federal and State law permit the inclusion of Event Wagering in an Oklahoma Gaming Compact." AR73. To be sure, the memorandum asserts that the Governor has "the sole authority to compact with Indian tribes," AR74, but it does not mention or consider IGRA's requirement that Class III gaming "shall be lawful on Indian lands" "only if … conducted in conformance with a Tribal-State compact *entered into by the Indian tribe and the State*." 25 U.S.C. § 2710(d)(1)(C). And the argument it offers on the points it does address is specious.

The memorandum interprets the Oklahoma Constitution to establish that "the Governor has the sole power in Oklahoma to compact with Oklahoma's tribal sovereigns," relying on Article II, § 8 of the Oklahoma Constitution[43] and *In re Williamson*, 2004 OK AG 27, 2004 WL 2002612. *See* AR74-75. The general counsel's memorandum quotes from Section 1221(C)(1), but omits the text providing that "such agreements shall become effective upon approval by the Joint Committee on State-Tribal Relations." *See* AR75. Perhaps this was due to a mistaken view that *Williamson*'s opinion on the constitutionality of Section 1221(C)(1)'s legislative review provision rendered that provision ineffective. If so, that was error. Unlike *In re Treat*, which opined on the actions of an executive officer, *Williamson* opined on the constitutionality of a state statute, *see* 2004 OK AG

[43] The constitutional provision the memorandum quotes is actually Article VI, § 8.

27, ¶¶ 27-30, 2004 WL 2002612, at *6-7, and so it was not binding under the *Turpen* exception, *see supra* at 50-51.

Moreover, *Williamson* did not, and could not have, considered the effect of the enactment of the statutory Model Compact offer, because it was issued before the STGA was enacted. Therefore, it could not have been "determinative of the law," *see* Okla. Stat. tit. 74, § 18b(A)(18), regarding the Governor's authority in light of the STGA, even setting aside the *Turpen* exception. Had it considered the STGA, *Williamson* would have found that the Governor could not unilaterally enter into the Agreements. That is because, as *Williamson* itself notes, "any agreement negotiated by the Governor must conform to the public policy enacted into law by the Legislature, as the role of the Legislative Branch is to establish public policy, and the role of the Executive Branch is to execute that policy." 2004 OK AG 27, ¶ 30 & n.3, 2004 WL 2002612 at *7 n.3 (citing *Tweedy v. Okla. Bar Ass'n*, 624 P.2d 1049, 1054 (Okla. 1981)).[44] It would not "conform to the public policy enacted into the law by the Legislature" for the Governor to enter into IGRA compacts that deviate from the IGRA compact offer codified in statute. *See id.* The Attorney General so opined in *In re Treat*, concluding that under the "framework embraced" in footnote 3 of *Williamson*, "the Governor currently lacks the authority to bind the State to the compacts he recently negotiated with the Comanche Nation and the Otoe-Missouria Tribes." 2020 OK AG 8,

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[44] Defendant Shotton's reliance on *Williamson* to support his contention that the Governor had the authority to negotiate the Otoe-Missouria Agreement without legislative approval, Shotton Br. at 49 n.41, fails for similar reasons. He ignores the critical proviso in footnote 3 of *Williamson* that tribal-state agreements must conform to public policy established by the legislature. As noted *supra* at 49 n.41, the STGA changed public policy. Chairman Shotton's contention that the STGA "allows tribes the *option* of entering into the Model Compact, but does not state that tribes can *only* enter into the Model Compact," Shotton Br. at 15, fails for that reason. Similarly, his assertion that *In re Treat* acknowledged the Governor's unilateral authority excludes from the quoted text "that any such compacts conform to (and not conflict with) the laws duly enacted by the legislative branch." *In re Treat*, 2020 OK AG 8, ¶ 11, 2020 WL 2304499, at *4, AR523.

¶¶ 12-13, 2020 WL 2304499, at *4, AR524. Yet the Governor's counsel's memorandum ignores this reasoning.

The general counsel's memorandum also relies on dictum from *Sheffer v. Buffalo Run Casino*, *PTE, Inc.*, 2013 OK 77, ¶ 12, 315 P.3d 359, 364, *see* AR75, which addresses only the Governor's authority to *negotiate* compacts.[45] Even if that dictum were correct, the Governor's authority to negotiate compacts—much less enter into them—would still be subject to legislative control for the reasons described *infra* 58-61. For all of these reasons, the general counsel's conclusion that "[a]ccordingly, the legislature does not have a role in approving state-tribal compacts; the Governor has the exclusive authority," AR76, is demonstrably false.

Finally, while the memorandum goes on to discuss IGRA, it does not address IGRA's requirement that Class III gaming "shall be lawful on Indian lands" "only if … conducted in conformance with a Tribal-State compact *entered into by the Indian tribe and the State*." 25 U.S.C. § 2710(d)(1)(C). *See* AR77-79. In short, the general counsel's memorandum is a house of cards.[46] And even if it is regarded as arguing that the Agreements were lawfully entered into under IGRA—*an issue that it never addresses*—that issue was definitively resolved by *In re Treat*, as we have earlier shown. Br. at 36-37; *supra* at 49-54. And after *In re Treat* was issued, Defendant Stitt said nothing to the Secretary to dispute that opinion.

[45] Chairman Shotton later relies on the same dictum, to no greater effect. *See* Shotton Br. at 12 (citing *Sheffer*, 2013 OK 77, ¶ 12 & n.18, 315 P.3d at 364 & n.18).

[46] Defendant Stitt states that Comanche and Otoe-Missouria "submitted a memorandum to the Secretary responding to the *Treat* AG Opinion," "argu[ing] that the Governor had authority to enter into compacts on behalf of the State, and that the challenged compacts were consistent with state law." Stitt Br. at 9 (citing AR695, AR699-701). But the Comanche and Otoe-Missouria memorandum, AR695-704, is subject to the same defects as the Governor's general counsel's memorandum, discussed *supra* at 52-54, *see* AR699 (relying on *Sheffer* and Article VI, § 8),

2. ***Treat I* and *II* also establish that the Agreements were not legally entered into under State law.**

Treat I and *Treat II* are manifestly correct under the text of the Oklahoma Constitution and the prior and subsequent rulings of the Oklahoma Supreme Court.[47] And the decision in *Treat I* that the Agreements are invalid as a matter of state law has been repeatedly reaffirmed by the State Supreme Court. *See Cherokee Nation v. U.S. Dep't of Interior*, 2025 OK 4, ¶ 43, 564 P.3d 58, 72 ("whether or not the compacts received approval under the federal IGRA process, their invalidity under Oklahoma law has been decided by this Court in *Treat I* and *Treat II*"); *Stitt v. Treat* (*Treat III*), 2024 OK 21, ¶ 24, 546 P.3d 882, 892; *Treat II*, 2021 OK 3, ¶ 12, 481 P.3d at 244.[48] This Court should therefore come to the same conclusion as the Oklahoma Supreme Court.

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[47] Subsequent rulings on the meaning of the Oklahoma Constitution and the Agreements further support *Treat I* and *Treat II* because "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994); *accord Nat'l Fuel Gas Supply Corp. v. FERC*, 59 F.3d 1281, 1289 (D.C. Cir. 1995); *Gold Seal Co. v. Marzall*, 190 F.2d 290, 292 (D.C. Cir. 1951) (judicial interpretation of statute "inhered afterward in the … statutes as though it were an integral part thereof").

[48] Furthermore, Defendant Stitt has conceded the invalidity of the Agreements under state law. In the proceedings before the Oklahoma Supreme Court on the question certified to it by this Court, he made clear that: "The Governor has never contested this Court's determinations in *Treat I* and [*Treat II*], 2021 OK 3, 481 P.3d 240] that the compacts are inconsistent with Oklahoma law." Br. in Chief at *4, *Cherokee Nation*, 2025 OK 4, 564 P.3d 58 (No. CQ-122108), 2024 WL 4186106; *id.* at *8 ("The Governor has never contested or refused to recognize the *Treat* decisions, *nor has he ever suggested that they are not the final word on whether the underlying compacts comply with Oklahoma law*." (quotation omitted) (emphasis added)). The Oklahoma Supreme Court then expressly found that "Governor Stitt, a named defendant in the federal case, does not contest this Court's findings in the *Treat I* and *Treat II* cases," and squarely held that "whether or not the compacts received approval under the federal IGRA process, their invalidity under Oklahoma law has been decided by this Court in *Treat I* and *Treat II*. It is Oklahoma law that determines whether a tribal gaming compact is consistent with the IGRA." *Cherokee Nation*, 2025 OK 4, ¶¶ 43, 45, 564 P.3d at 72 (citing *Treat I*, 2020 OK 64, ¶ 6, 473 P.3d at 45). In addition, Federal Defendants have conceded that "[a]s to whether the state has validly bound itself to the Compacts, and thus entered into those agreements, it is state law that controls." FD Br. at 22 (citing *Cherokee Nation*, 643 F. Supp. 3d at 116-17, and *Santa Ana*, 104 F.3d at 1557) (parenthetical omitted)). And Defendant Tahdooahnippah contends that "[u]nder Oklahoma law, a contract executed without legal authority is void *ab initio*, a 'mere nullity' from the beginning that 'binds no one' and leaves

Defendant Shotton's assertion, *see* Shotton Br. at 23, that this Court should not accept the rulings of state courts when "federal rights are at issue" fails because IGRA makes the conduct of Class III gaming contingent on the state law question of whether the State has "entered into" a compact, as IGRA's text, regulations, and caselaw confirms. *See supra* at 20-27; *contra* Shotton Br. at 20. Furthermore, while Defendant Shotton suggests that federal courts do not "inflexibly" follow state court interpretation of state law in some areas, Shotton Br. at 22-23 & n.4 (citing *Moore v. Harper*, 600 U.S. 1, 34 (2023));[49] *id.* at 23 n.5 (citing *Phillips v. Wash. Legal Found.*,

the parties as if no contract had ever been made." CNC CM Br. at 23 (quoting *Isenhower v. Isenhower*, 666 P.2d 238, 241 (Okla. Civ. App. 1983)).

[49] *Moore* concerned the Elections Clause of the U.S. Constitution, which provides that some federal election procedures "shall be prescribed in each State by the Legislature thereof," which "'imposes' on state legislatures the 'duty' to prescribe rules governing federal elections." 600 U.S. at 10 (quoting U.S. Const. art. I, § 4, cl. 1 and *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013)). This requires that *state legislatures* pass rules to govern federal elections. The Court noted that a state legislature's exercise of authority "must be in accordance with the method which the State has prescribed for legislative enactments," *see id.* at 24-26 (quoting *Smiley v. Holm*, 285 U.S. 355, 367 (1932)), and held that state legislatures' actions are reviewable by state courts in the ordinary exercise of judicial review, *id.* at 22; *see also id.* at 27 ("when legislatures make laws, they are bound by the provisions of the very documents that give them life"). However, the Court cautioned that "*state courts* may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in *state legislatures* to regulate federal elections" and that "mindful of the general rule to accepting state court interpretations of state law, we have tempered such deference when required by our duty to safeguard limits imposed by the Federal Constitution." *Id.* at 34-36 (emphasis added). *Moore* confined that rule to "cases implicating the Elections Clause," but did not apply it to that case and gave no precise formula for its application in other disputes. *Id.* at 36-37. *Moore* provides no rule of decision here as this case does not involve an assignment of authority by the U.S. Constitution, such as that in the Elections Clause, that must be safeguarded by the federal courts. To the contrary, IGRA itself establishes a state law requirement by providing that a state must "enter into" a compact, 25 U.S.C. § 2710(d)(1)(C), (3)(A)-(B). Respect for a state's determination of its procedures for "entered into" compacts is consistent with *Moore*'s recognition that state law is applied by state courts. And Defendant Shotton's approach to IGRA would itself raise constitutional concerns, since it would allow the Secretary to use a federal agency action to commandeer state officials and require them to take action under compacts to which the state never consented. *See In re Treat*, ¶ 20, 2020 WL 2304499, at *7, AR527-28.

524 U.S. 156, 164-67 (1998)),[50] those cases concern areas that are not relevant here. Accordingly, Defendant Shotton's plea to reopen *Treat I* and *Treat II*, Shotton Br. at 23-24, should be rejected.

To be sure, *Santa Ana* considered the possibility that it might be "required by [*Sims*, 341 U.S. 22], to independently examine state law, albeit giving deference to the [state] Supreme Court's decision," 104 F.3d at 1558. At the same time, however, it acknowledged that federal courts are "required, absent extraordinary circumstances to accept" the determination of a state supreme court as to state law. *Id.* The court did not decide whether it could independently review state law because "resolution of the matter would not change the outcome of this case." *Id.* at 1559; *see also Kickapoo I*, 827 F. Supp. at 44-46 (acknowledging that the validity of an IGRA compact is a federal question and "accept[ing] the determination of the Supreme Court of Kansas that the Governor did not have the authority to bind the State"). Accordingly, it is flatly wrong to say that *Santa Ana* "implied" an answer to this question. *See* Shotton Br. at 23.[51] Here, as in *Santa*

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[50] In *Phillips*, the Supreme Court found that it could not defer to state *legislative* determinations that "disavow[] traditional property interests long recognized under state law" when evaluating whether a state confiscatory statute violates the Takings Clause. 524 U.S. at 167. That rule recognizes that "the Takings Clause would be a dead letter if a state court simply exclude from its definition of property any interest that the state wished to take." *Tyler v. Hennepin County*, 598 U.S. 631, 638 (2023) (quotation omitted). And those legislative determinations about the nature of property interests are evaluated against the state courts' judicial determinations of state law of property rights, to which the federal courts presumptively defer. *Phillips*, 524 U.S. at 167. That rule—which in any event directs acceptance of states' courts' rulings—does not apply here. Indeed, Defendant Shotton's approach runs counter *Phillips*'s underlying logic, as IGRA's "entered into" requirement would be a dead letter if the Secretary could force the state to comply with a compact to which it never agreed.

[51] Had *Santa Ana* evaluated that question, it would have considered the cases holding that "the views of the state's highest court with respect to state law are binding on the federal courts." *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (per curiam) (citing *Brown v. Ohio*, 432 U.S. 161, 167 (1977)); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("state courts are the ultimate expositors of state law, and … we are bound by their constructions except in extreme circumstances not present here" (citations omitted)); *Saiyed v. CAIR Action Network, Inc.*, 346 F. Supp. 3d 88, 94 (D.D.C. 2018). And although the Tenth Circuit suggested, without deciding, that this rule might be different under *Sims*, *Sims* concerned the unique power of the United States

Ana, it is not necessary for this Court to decide whether to independently review state law, as resolution of that question would not change the result in this case.

Treat I held that the Governor must faithfully execute the law passed by the Legislature, the "law" governing the approval of tribal-state gaming compacts had been enacted by "[t]he Legislature, through the vote of the people," in the STGA, and "the Governor must negotiate the compacts within the bounds of the laws enacted by the Legislature, including the [STGA]." 2020 OK 64, ¶ 5, 473 P.3d at 44; *see* Br. at 37-38. As *Treat II* elaborated, "[t]he Executive branch's authority to advocate and negotiate gaming compacts is statutory—not constitutional. And the use of such authority must be in conformity with statute." 2021 OK 3, ¶ 6, 481 P.3d at 242 (quoting *Treat I*, 2020 OK 64, ¶ 5, 473 P.3d at 44); *see* Br. at 38-39. Those determinations were correct.

Under Oklahoma law, the Legislature has a power unless the Constitution limits that power. *See Wentz v. Thomas*, 15 P.2d 65, 69 (Okla. 1932) ("[w]e look … in the Constitution of the State to ascertain if any limits have been imposed upon the complete power with which the legislative department of the State was vested in its creation"). And "[t]he Governor only has the power and authority which is specifically granted by the Legislature through statutory law, or power conferred upon the Chief Executive by the Constitution." *Ho v. Tulsa Spine & Specialty Hosp., L.L.C.*, 2021 OK 68, ¶ 18, 507 P.3d 673, 678-79. Under these principles, statues prevent the Governor from unilaterally causing the State to enter into IGRA compacts.

The Constitution says that the Governor "shall conduct in person or in such manner as may be prescribed by law, all intercourse and business of the State with other states and with the United States." Okla. Const. art. VI, § 8. That says nothing about the Governor's power to compact with

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Supreme Court, under the federal Constitution, to resolve conflicts between States and cannot be extended beyond that context. *See* Br. at 39.

Indian tribes. When the Oklahoma Constitution does not confer a duty under Article VI, Section 1(A) executive officers—such as the Governor—then legislative enactments determine the scope of that duty. *See, e.g.*, *State ex rel. Cartwright v. Okla. Tax Comm'n*, 653 P.2d 1230, 1232-33 (Okla. 1982); *State ex rel. Howard v. Okla. Corp. Comm'n*, 614 P.2d 45, 48-49 (Okla. 1980); *State v. Cruce*, 122 P. 237, 239 (Okla. 1912). The power over relations with Indian tribes is therefore retained by the Legislature, and the Governor's power to compact with tribes, if any, is that specifically granted by the Legislature. As the Oklahoma Supreme Court has explained:

> Though Article VI, § 8 of the Oklahoma Constitution confers the Governor authority to conduct business of the State, it does not specifically state the authority extends to business with Tribes—rather, it explicitly states the Governor's authority to conduct business is limited to business "with other states and with the United States." Okla. Const. art. VI, § 8. Where the constitution is devoid of language "validly and specifically" granting the Governor authority to negotiate and enter into compacts, the Governor's authority must be created by statute or be considered invalid. "The Governor is without authority to exercise a discretion not validly and specifically granted by the statutory law and not within the power conferred upon the Chief Executive by the Constitution."

Treat III, 2024 OK 21, ¶ 21, 546 P.3d at 891 (citations omitted).

Even if the reference to "intercourse and business of the State with other states and with the United States" could be read to extend to Indian tribes, that authority is subject to legislative control, as the Governor must conduct such affairs "in person or in such manner as may be prescribed by law." *See* Okla. Const. art. VI, § 8. The Oklahoma Supreme Court long ago explained that the Governor is required to comply with "a provision by law for the manner of the conduct of the relation" of the state with other sovereigns and that "[w]hen the Governor acts in person in regard to … intercourse and business … he functions to execute the business authorized by law." *See Wentz*, 1932 OK 636, ¶¶ 152-53, 15 P.2d at 87.[52] Thus, as explained in *Treat III*,

[52] The Legislature has repeatedly exercised its legislative power to prescribe how the State may negotiate and enter into compacts with Indian tribes and other sovereigns, including by prescribing

"[t]he Governor's authority to negotiate and enter into" compacts with Indian tribes "is born of statute," 2024 OK 21, ¶ 23, 546 P.3d at 891, and "[a]ny authority delegated to the Governor is subject to the will of the Legislature and must 'be exercised within the limits of the legislative authorization.'" *Id.* ¶ 28, 546 P.3d at 893 (quoting *Wells v. Childers*, 165 P.2d 358, 361 (Okla. 1945)).[53]

Treat I further explained that the Governor had signed supposed compacts that purport to authorize forms of gaming not authorized in the State-Tribal Gaming Act ("STGA"), and that since "the Governor must negotiate the compacts within the bounds of the laws enacted by the Legislature, including the [STGA]," the Governor lacked authority to enter into the Agreements on behalf of the State and they are "invalid." 2020 OK 64, ¶¶ 5, 7, 473 P.3d at 44-45. *Treat II* then explained that "[t]he new compacts contain terms that are different or outside the Model Compact provisions altogether. Due to the statutory nature of the Model Compact, the new and differing provisions operate as the enactment of new laws and/or amend existing laws, which exceeds the authority of the Executive branch." 2021 OK 3, ¶ 11, 481 P.3d at 243; *see* Br. at 38-

the content of those compacts, Okla. Stat. tit. 2, § 16-35; *id.* tit. 68, §§ 346(C), 500.63, or how they may be negotiated and when they may go into effect, *id.* tit. 52, § 202, or how long they may stay in effect, *see Treat III*, 2024 OK 21, ¶¶ 1-7, 546 P.3d at 885-87. The Legislature has ratified compacts, *see, e.g.*, Okla. Stat. tit. 3A, § 240; *id.* tit. 74, § 150.9b, and designated that another state officer than the Governor may develop or negotiate and enter into compacts, *id.* tit. 47, §§ 2-108.3(B), 1123. This "settled and established practice" shows that in Oklahoma, compacting is subject to legislative control. *See Moore*, 600 U.S. at 32 (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)).

[53] This constitutional assignment of authority to the Legislature renders irrelevant Defendant Shotton's appeal to a four-prong separation of powers test to attack *Treat II*, *see* Shotton Br. at 24, and to theorize about the scope of the Governor's authority, *see id.* at 12-13. *See Treat II*, 2021 OK 3, ¶ 5, 481 P.3d at 242 (citing *Treat I*, 2020 OK 64, ¶ 5, 473 P.3d at 44) ("[t]he Executive branch's role is to administer the State-Tribal Gaming Act by advocating and negotiating compacts within the bounds of the law").

39. These conclusions have been repeatedly reaffirmed by the Oklahoma Supreme Court, *see supra* at 55, and they were also correct.

The State made a statutory offer of the Model Compact to Indian tribes, Okla. Stat. tit. 3A, § 280, after approval by the Legislature and the people of Oklahoma, who exercise legislative power, *see* Okla. Const. art. V, § 1. The Model Compact's terms are prescribed by statute, Okla. Stat. tit. 3A, § 281, and statute provides that the State "enter[s] into" the Model Compact with a tribe once the tribe signs the Model Compact, *id.* § 280. Because the Model Compact offer is codified in statute, *see id.* § 280.1(A) (referring to the Model Compact as "codified compact offer"), and the Governor's authority to negotiate and enter into agreements with Indian tribes is limited by statute, the Governor has no statutory authority to offer terms to Indian tribes, or enter into an IGRA compact, different than those defined in the STGA. *See Treat III*, 2024 OK 21, ¶ 28, 546 P.3d at 893 (quoting *Wells*, 165 P.3d at 361). And there is no dispute that the Agreements have different terms than the Model Compact.

If the STGA were not in effect, the second pathway for negotiating a new compact would be Okla. Stat. tit. 74, § 1221(C), *see Treat III*, 2024 OK 21, ¶ 22, 546 P.3d at 891; Br. 38 n.24. Section 1221(C)(1) authorizes the Governor to "negotiate and enter into cooperative agreements on behalf of this state" with Indian tribes. Any such agreement only goes into effect after "approval by the Joint Committee on State-Tribal Relations." Okla. Stat. tit. 74, § 1221(C)(1). Because his authority to enter into agreements with Indian tribes is controlled by statute, *see supra* at 58-60, the Governor's ability to negotiate and enter into tribal-state compacts is constrained by section 1221(C). There is no dispute that the Governor did not submit the Agreements to the Joint Committee and they did not approve them.

Defendant Stitt did not follow these compacting methods and instead attempted to unilaterally bind the State to agreements that do not comply with Oklahoma statutes because the Agreements were not the Model Compact and were not approved by the Joint Committee.[54] Because the Governor's power to negotiate and enter into agreements with Indian tribes is controlled by statute, his actions were invalid. *Treat I* was correct to so hold.

Defendant Shotton attacks *Treat I* for not addressing supposed limitations in the Agreements on when the signatory tribes can offer event wagering or house-banked games, Shotton Br. at 23, but that argument is not correct, *see infra* at 63-64, nor does it save the Agreements. *In re Treat* determined that the Agreements authorize house-banked table and card games (while reserving decision on whether the Agreements authorize event wagering), 2020 OK AG 8, ¶ 13 n.5, 2020 WL 2304499, at *4 n.5, AR524, and that opinion is still binding on state officials, *see supra* at 50-51. But even if those supposed limitations were in place, the Agreements go beyond the terms of the Model Compact and allow gaming on terms that the Model Compact does not, and so the logic of *Treat I* still defeats them.[55] (And they fail under the logic of

[54] Defendant Shotton's assertion that, based on the Oklahoma Attorney General's nonbinding opinion in *Williamson*, the legislative approval requirement in Section 1221(C) is invalid, Shotton Br. at 12-13, is beside the point and wrong. It is beside the point because no one asserts that the Agreements were approved pursuant to Section 1221(C), and *Williamson* did not address the post-STGA law. Second, *Williamson*'s application of the Oklahoma Constitution to Section 1221(C) was incorrect, for the reasons just shown. *See supra* at 52-54. And its reasoning was superseded by the Supreme Court's decisions in *Treat III*, 2024 OK 21, ¶¶ 20-25, 28, 546 P.3d at 890-93, and *Treat I* and *Treat II*, which generally endorsed the legislative approval provision of Section 1221(C). *See Treat I*, 2020 OK 64, ¶¶ 5, 7 473 P.3d at 44-45 (holding that the Governor is bound by the Model Compact but noting that the section 1221(C) process is specifically unavailable for IGRA gaming compacts); *Treat II*, 2021 OK 3, ¶¶ 10-11, 481 P.3d at 243-44. Moreover, *Williamson* considered only Section 1221(C), not the STGA. *See generally* 2004 OK AG 27, 2004 WL 2002612. When applied to the STGA, footnote 3 of *Williamson* calls for the result confirmed in *Treat I* and subsequent cases. *See Treat III*, 2024 OK 21, ¶ 24, 546 P.3d at 892; *Cherokee Nation*, 2025 OK 4, ¶ 43, 564 P.3d at 72. *See supra* at 58-60 and *infra* at 62-63.

[55] Finally, Defendant Shotton, citing the dissent in *Treat I*, argues that the Court should ignore *Treat I* because Defendant Chairmen's Tribes were not parties to it. Shotton Br. at 23 n.6. This

Treat II for that reason, as well, *see* 2021 OK 3, ¶¶ 7-8, 481 P.3d at 242-43.) The severability clause of the Agreements does not save them, either, as it applies "only if" a federal court rules provisions of the Agreements invalid, and does not govern the state law question of whether the Governor can enter into them in the first place. *See In re Treat*, 2020 OK AG 8, ¶ 13 n.6, 2020 WL 2304499, at *4 n.6, AR524; *contra* Shotton Br. at 23. And as Plaintiff Nations have shown, the offending provisions of the Agreements are not severable in any event. *See* Br. at 40-43; *infra* at 67-68. But even if they were, the remainder of the Agreements *also* deviate from the Model Compact in the STGA and are invalid *in toto* for the same reason. *See In re Treat*, 2020 OK AG 8, ¶ 13 n.6, 2020 WL 2304499, at *4 n.6, AR524. And neither argument cures the fact that the Agreements were not approved by the Joint Committee, which would be independently dispositive if the STGA were not at issue.

3. ***Treat I* did consider whether the Agreements Permit Event Wagering and Covered games.**

Defendant Shotton contends that *Treat I* is wrong because it did not consider the effect of the provisions in the Agreement providing that event wagering is permitted only "to the extent such wagers are authorized by law," and that all covered games must be approved by the state regulatory agency to be authorized. Shotton Br. at 23 (quoting AR42 (Otoe-Missouria Agreement

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non-jurisdictional, procedural complaint is not a basis for collateral attack on the state court judgment. *See Pourbabai v. Lahood*, 2009 WL 801802, at *4 (D.D.C. Mar. 25, 2009). Justice Kane's dissent in *Treat I* is also no reason to disregard it, as she joined the majority in *Cherokee Nation*, and concurred in the portion of *Treat III* that endorsed *Treat I* and *Treat II*, *see* 2024 OK 21, ¶ 1, 546 P.3d at 893-94 (Kuehn, J., concurring in part and dissenting in part), and Defendant Chairmen's Tribes have no claim to be indispensable parties to those cases. Finally, there is no rule requiring dismissal of an original jurisdiction proceeding in the Oklahoma Supreme Court because of the absence of supposedly necessary parties. *Compare Treat I*, 2020 OK 64, ¶ 8, 473 P.3d at 45 (Kane, J., dissenting), *with* Okla. Stat. tit. 12, § 2001 (limiting pleading code to proceedings in state district courts), *and id.* § 1651 (venue limitations on declaratory actions in state district courts).

Part 2.A.6); *id.* at 29. This contention fails because such arguments were presented to and rejected by the Oklahoma Supreme Court. The Governor contended to the court that because event wagering is permitted "to the extent such wagers are authorized by law," "[i]f a determination is made by a court of competent jurisdiction that event wager is not authorized by law, the only consequence is that it will not immediately be a 'Covered Game' that can be conducted under the compacts." Resp. Opp'n App. Br. Supp. App. Assume Original Jurisdiction & Pet. Decl'y Relief at 15, *Treat I*, 2020 OK 64, 473 P.3d 43 (No. O-118829), https://www.oscn.net/dockets/GetDocument. aspx?ct=Appellate&bc=1046939081&cn=O-118829&fmt=pdf. *Treat I* ruled that the Agreements "authorize certain forms of Class III gaming, including house-banked card and table games and event wagering," even though the STGA expressly bars such games. 2020 OK 64 ¶¶ 6, 7, 473 P.3d at 45. Since the Agreements purported to authorize games not authorized by STGA, the court ruled the State "is not and cannot be legally bound by those compacts until such time as the Legislature enacts laws to allow the specific Class III gaming at issue[.]" *Id.* ¶ 8, 473 P.3d at 45.[56] This reasoning likewise applies to Chairman Shotton's contention that *Treat I* should have considered the provision for state regulatory agency approval of covered games. Far from "skirt[ing]" these issues, Shotton Br. at 29, the court considered and rejected them.[57]

[56] The Governor sought rehearing, contending the Agreements authorize event wagering only "to the extent such wagers are authorized by law," and therefore the Agreements "follow the approach of the STGA—not conflict with it." Pet. Reh'g at 5, *Treat I*, 2020 OK 64, 473 P.3d 43 (No. O-118829), https://www.oscn.net/dockets/GetDocument.aspx?ct=Appellate&bc=1046935569&cn=O-118829&fmt=pdf. The Governor asked the court whether "the State could be bound to the compacts as to new forms of gaming at some point in the future [and] [i]n the interim, is the State bound by the compacts as to forms of gaming currently authorized by the STGA, even in the absence of legislative action allowing new forms of Class III gaming?" *Id.* at 6. The Governor also inquired whether the offending provisions are severable. *Id.* The Oklahoma Supreme Court denied rehearing.

[57] That *Treat I* did not discuss the severability clause in the Agreement has no bearing on the validity of the decision for the reasons discussed *supra* at 55-63, 67-68.

III. SUMMARY JUDGMENT SHOULD BE GRANTED ON COUNTS 4 TO 7 BECAUSE THE AGREEMENTS CONTAIN TERMS THAT VIOLATE IGRA.

The Nations are also entitled to summary judgment on counts four, five, six, and seven of the Complaint, *see* Br. at 39, each of which alleges that specific provisions of the Agreements violate IGRA, that therefore the Agreements must be disapproved, and the Secretary acted arbitrarily, capriciously, and contrary to law by failing to do so. "For such claims, … courts 'need no agency reasoning' at all because '[e]ither the compact meets the requirements of IGRA, in which case [courts] must reject the challenge, or it does not, in which case [courts] must direct the Secretary to disapprove the compact.'" Mem. Op. at 8-9 n.4 (quoting *Amador County*, 640 F.3d at 382) (alterations in original).[58]

A. Defendants' Attempts To Avoid Consideration Of The Illegality Of The Provisions Of The Agreements At Issue In Counts 4-7 Are Unsuccessful.

Defendants seek to sidestep the illegality of the Agreement provisions at issue in counts four through seven, but stumble at each step. Defendants argue that these provisions "address activity that is 'directly related to the operation of gaming activities' authorized in the Compacts and are therefore not contrary to IGRA." FD Br. at 26 (quoting 25 U.S.C. § 2710(d)(3)(C)(vii)); Stitt Br. at 33-34. That argument fails because § 2710(d)(3)(C)(vii) cannot authorize a compact to include terms that violate IGRA, as that would leave the entirety of IGRA up for negotiation and invite states to "use gaming compacts as a backdoor to exercise regulatory power over tribes that they otherwise would not have." *W. Flagler*, 71 F.4th at 1066-67. Nor can *West Flagler* be relied on to contend otherwise, as that court only found that "discussion of wagers placed from outside Indian lands is … 'directly related to the operation of' the Tribe's sports book," *id.* at 1066, and

[58] This Court's Mem. Op., at 8-9 n.4, is controlling with respect to that issue, but assuming *arguendo* it were not, the Secretary's no-action approvals are also arbitrary and capricious for reasons earlier shown. Br. at 35 n.22.

no such provision is at issue here.[59] Finally, as *West Flagler* explains, "when reviewing a Secretary's decision not to act within the 45-day window when presented with an IGRA compact, … 25 U.S.C. § 2710(d)(8)(C) 'provides the law to apply'—that is, 'the compact is deemed approved but only to the extent the compact is consistent with the provisions of IGRA.'" *Id.* at 1064-65 (quoting *Amador County*, 640 F.3d at 381) (some internal quotation marks omitted). Accordingly, even compact provisions that are "directly related" to gaming activity are subject to judicial review for consistency with IGRA.

Federal Defendants also recycle their argument that "the Secretary could not have acted arbitrarily or contrary to law" because when a compact is "deemed approved" under 25 U.S.C. § 2710(d)(8)(C), it "shall be considered to have been approved by the Secretary, *but only to the extent consistent with this chapter.*" FD Br. at 26. This Court earlier rejected this argument, holding that "the Secretary 'must … disapprove a compact if it would violate any of the three limitations' in 25 U.S.C. § 2710(d)(8)(B)," *Cherokee Nation*, 643 F. Supp. 3d at 118 (citing *Amador County*, 640 F.3d at 381 and *W. Flagler*, 573 F. Supp. 3d at 273), and that "'[o]ne of those "limitations' envisions disapproval if a compact violates 'any provision' of IGRA," *id.* (citing 25 U.S.C. § 2710(d)(8)(B)(i)). The D.C. Circuit reaffirmed that conclusion in *West Flagler*. 71 F.4th at 1063 ("[I]f [the Secretary] does not act within 45 days, the compact is 'considered … approved[,]' 'but only to the extent the compact is consistent with the provisions of [IGRA].'" (quoting 25 U.S.C. § 2710(d)(8)(C) (alterations in original)). And "someone—i.e., the courts must decide whether those provisions are in fact lawful." *Amador County*, 640 F. 3d at 380.

[59] *West Flagler*'s companion holding that "an IGRA compact cannot provide independent legal authority for gaming activity that occurs outside Indian lands" also applies here. *See* 71 F.4th at 1068.

Defendant Stitt argues that "even if any of the compact provisions did violate IGRA, the compacts' severability clauses make clear that any offending provisions must be severed rather than result in invalidation of the entire compacts." Stitt Br. at 33; *see id.* at 44-45. Likewise, Defendant Shotton contends that "any purported defect can be severed and the remainder of the Compact can be maintained." Shotton Br. at 43. That argument fails because the Agreements were not validly entered into by the State and thus are invalid *in toto*, including their severability clauses. *See supra* at 18-44; Br. at 40. Furthermore, severance is not available here in any case as *Amador County* holds 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)]," one of which is "if such compact violates—(i) any provision of [IGRA]," and that "subsection (d)(8)(C), which governs approval by inaction, includes no exemption from this obligation to disapprove illegal compacts." 640 F.3d at 380-81; *see id.* at 382 ("Either the compact meets the requirements of IGRA, in which case we must reject the challenge, or it does not, in which case we must direct the Secretary to disapprove the compact."); Mem. Op., 8-9 n.4 (quoting *Amador County*, 640 F.3d at 382). Defendant Stitt argues "the opposite is true," asserting that 25 U.S.C. § 2710(d)(8)(C) "itself allows for severance by making the Secretary's approval extend only to lawful terms," Stitt Br. at 44-45 (citing *W. Flagler*, 71 F.4th at 1063-64). Defendant Stitt also says the Secretary has severed compact provisions in the past, but concedes he did not do so here and offers his own policy argument for severance. Stitt Br. at 45. These arguments fail as *Amador County* expressly holds that the Secretary's obligation to disapprove a compact that violates IGRA extends to 25 U.S.C. § 2710(d)(3)(C), and nothing in *West Flagler* unsettles that holding.

Defendant Stitt also maintains that *Citizen Potawatomi*, 881 F.3d at 1240-41, endorses severance in this case. Stitt Br. 44. It does not. The compact provision at issue there provided for de novo review of an arbitration award in violation of the Supreme Court's decision in *Hall Street Associates, LLC. v. Mattel, Inc.*, 552 U.S. 576 (2008). *See Citizen Potawatomi*, 881 F.3d at 1228 (citing *Hall St.*, 552 U.S. at 583-84). No question concerning the applicability of 25 U.S.C. § 2710(d)(8)(C) to the severance of illegal compact provisions was presented. In this case, by contrast, the compacts were approved by the Secretary's inaction, he did not sever any provision of the compacts at issue, and therefore his action is subject to review under the rule of *Amador County*. *See* Br. at 40 n.26. And as we earlier showed, *Citizen Potawatomi* was not an APA case and so is not governed by *Amador County*. *Id.* at 40.

Finally, even if *Amador County* were not controlling, the Court could not sever these provisions and leave the rest of the Agreements in place, because each provision challenged in Counts 4-7 was an "essential part of the agreed exchange" with Defendant Stitt. *See* Br. at 41-43. Defendants ignore this argument and have therefore conceded it.[60]

B. The Agreements Purport To Authorize Illegal Games.

Under IGRA, an Indian tribe may lawfully conduct Class III gaming activities on Indian lands only if "located in a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B). As Federal Defendants concede that "certain games listed under the 'Covered Games' are not yet approved in Oklahoma," FD Br. at 28; *see also* Shotton Br. at 27 ("Defendant Shotton does not dispute that Oklahoma law does not authorize event wagering or house-banked card or table games …"), the Secretary should have disapproved

[60] In his statement of facts, Defendant Tahdooahnippah attacks some of the statements demonstrating the non-severability of these provisions, claiming they are hearsay. CNC SOF ¶ 24. But the underlying statements show Defendants' state of mind, and so at least for the purpose of showing non-severability, they are not introduced to prove the truth of the matter asserted and are not hearsay. *See* Fed. R. Evid. 801(c)(2). And they are not hearsay, or hearsay-within-hearsay, for the additional reasons explained *supra* 17 n.16.

the compacts. For Class III gaming to be lawful on Indian lands, IGRA requires that the State "*permits* such gaming for any purpose by any person, organization, or entity," 25 U.S.C. § 2710(d)(1)(B) (emphasis added), which by using the present tense means that such gaming must be lawful *when the compact is entered into*, not at some future and presently unknown time. Seeking to plug that gap, Federal Defendants argue that the presently illegal games are permissible because they are "directly related to the operation of gaming activities" under § 2710(d)(3)(C)(vii) and are therefore permissible. FD Br. at 28. And Chairman Shotton contends that this Court should apply the presumption that government officials will act lawfully and that the Court should adopt the "plausible" interpretation that "preserves the legality of a tribal-state compact." Shotton Br. at 30. These arguments fail because § 2710(d)(3)(C)(vii) cannot plausibly be read to authorize a compact term that § 2710(d)(1)(B) makes illegal when the compact is entered into—otherwise IGRA would lose its force as law. Defendant Stitt admits that "the Comanche and Otoe-Missouria controls *refer* to forms of gaming—such as event wagering and house-banked games that Oklahoma did not allow at the time the compacts were executed and approved," but says that the Agreements do not authorize those games. Stitt Br. at 34. That argument is rejected by the Governor's denial that Event Wagering is unlawful in Oklahoma, Br. at 45 (citing Ans. Second Am. & Supp. Compl. ¶ 139, Dkt. No. 110 ("Stitt Ans.")), and by his general counsel's statement that Oklahoma presently permits Event Wagering (i.e., sports betting), AR80-82.[61] Accordingly, the Secretary should have disapproved the compacts under 25 U.S.C. § 2710(d)(1)(B).

Defendants further seek to defend the inclusion of the illegal games in the Agreements by offering a tortured reading of the Agreements' terms. FD Br. at 26-28; Stitt Br. at 34-35; Shotton

[61] Even if Defendant Stitt's present statements are credited, it would not deprive the court of the power to determine the legality of the challenged games. *See* Br. at 45-46.

Br. at 28-29.[62] We have shown why that argument should be rejected, Br. at 44-47.[63] But it is not necessary to resolve that dispute, as a compact cannot purport to authorize gaming that is illegal now, but may be legal someday. Accordingly, the Secretary was required to disapprove the Agreements because they purport to authorize illegal games.

C. The Agreements' Revenue Sharing Provisions Impose An Illegal Tax.

IGRA provides that, except for state regulatory assessments that may be negotiated and agreed upon pursuant to 25 U.S.C. § 2710(d)(3)(C)(iii), it does not "confer[] upon a State … authority to impose any tax, fee, charge, or other assessment upon an Indian tribe … to engage in a class III activity," *id.* § 2710(d)(4). The Agreements violate this provision because they purport to justify the payment of revenue sharing in exchange for "substantial exclusivity over class III Covered Gaming consistent with the goals of IGRA," AR27, AR61 (Agreements Parts 10.A., B.). Nothing in the Agreements, however, limits the additional gaming that the State may authorize itself or others to conduct. That makes the promise of substantial exclusivity meaningless, and invalidates the revenue sharing provisions of the Agreements, which therefore impose a "tax, fee, charge, or other assessment" in violation of IGRA, 25 U.S.C. § 2710(d)(4). Defendant Stitt says that "IGRA does not require a concession of *absolute* exclusivity to justify revenue sharing," Stitt Br. at 39; *see also* Shotton Br. at 34-35, but the Agreements at issue here do not provide *any*

[62] Defendant Shotton points to other compacts which he says acknowledged that the tribe would not offer certain games online until others could do so under state law. Shotton Br. at 31-32. But IGRA plainly requires games to be authorized at the time of approval.

[63] Defendants argue that the State Compliance Agency ("SCA") must approve a game before it can be played. FD Br. at 27-28; Stitt Br. at 34-35; *see also* Shotton Br. at 28. That changes nothing, as under the Agreements the SCA could decide for itself whether to permit presently illegal gaming. As for Event Wagering, Defendant Stitt argues that it can only be conducted "to the extent such wagers are authorized by law." Stitt Br. at 35. And Defendant Stitt's and his general counsel's assertions that Event Wagering is lawful now, Stitt. Ans. ¶ 139; AR80-82, deprive of any force Defendant Chairman Shotton's contention that it should be presumed the SCA will not approve event wagering or any other "unlawful" games," *see* Shotton Br. at 28-29.

exclusivity. And as discussed *infra* at 72-75, the section 20 concurrence provisions have no value and offer no meaningful concession. *See* Shotton Br. at 42-43.

D. The Agreements Regulate Class II Gaming In Violation Of IGRA.

The Agreements also violate IGRA by requiring that a certain amount of tribal gaming revenue be derived from Class II games and requiring the signatory Tribe to report on its Class II Games to the SCA. AR14, AR48 (Agreements Part 3.D) (Tribe will certify to the State that certain percentages of gaming revenues are derived from "Covered Games"); AR8 (Comanche Agreement Part 2.A.7.); AR41 (Otoe-Missouria Agreement Part 2.A.6.) (excluding Class II gaming from "Covered Games."). They further provide:

> The Enterprise shall keep a record of, and shall report at least quarterly to the SCA, *the number of Covered Games and class II devices in each Facility, by the name or type of each and its identifying number, and denomination of bets accepted*. This list shall include both class II and class III games. *Failure to report in accordance herewith shall result in a penalty of $5,000 per each Facility per report to be remitted to the SCA for purposes of deposit and expenditure in connection with Part [1]0.C. of this Compact*.

AR19, AR53 (Agreements Part 4.K.) (emphasis added). These provisions regulate Class II gaming in violation of IGRA, which expressly permits tribes to conduct Class II gaming without a compact. *See* 25 U.S.C. § 2710(a)(1); *see also Forest County*, 330 F. Supp. 3d 269, 286 (D.D.C. 2018) (citing statement of Assistant Secretary's statement that "Class II gaming is not an authorized subject of negotiation for Class III compacts" as illustrating that Department "has consistently interpreted tribal-state compact as encompassing only Class III gaming") (citation omitted).[64] The Secretary was required to disapprove the Agreements for that reason. Defendant

[64] Defendant Stitt relies on a statement made by the *Forest County* court in distinguishing the Secretary's disapproval in the case before it from that in another case. *See* Stitt Br. at 40 (quoting *Forest County*, 330 F. Supp. 3d at 288); *see also Forest County*, 330 F. Supp. 3d at 269, 288-89 (distinguishing *Flandreau Santee Sioux Tribe v. Gerlach*, 269 F. Supp. 3d 910 (D.S.D. 2017)). That statement has no impact on the applicability of the holding of *Forest County* that "Class II

Shotton relies, on the disclaimer in Part 3.A. that "nothing in this Compact shall limit the Tribe's right to operate any game that is class II under IGRA," Shotton Br. at 38, but Part 4.K. independently requires the Tribe to report on class II gaming activity and subjecting it to a financial penalty for failure to do so. Such a penalty is more than a "tangential effect," *contra* Shotton Br. at 39. And Defendant Stitt's assertion that provisions regulating Class II gaming are permissible because they are "directly related to the operation of gaming activities," Stitt Br. at 39 (quoting 25 U.S.C. § 2710(d)(3)(C)(vii)), fails, as that provision cannot authorize a compact to include terms that violate IGRA's separate bar to state regulation of Class II gaming.[65]

E. The Governor's Concurrence In Non-Existent Secretarial Determinations Of Land For Gaming Purposes Is Invalid Under IGRA.

IGRA prohibits gaming on lands acquired in trust after October 17, 1988 ("after-acquired lands"), 25 U.S.C. § 2719(a), unless those lands are within or contiguous to the tribe's reservation or former reservation in Oklahoma, *id.* § 2719(a)(1), (2)(A). A tribe can only conduct Class III gaming on after-acquired lands outside of its reservation or former reservation in Oklahoma if (1) the Secretary consults with state and local officials, including nearby tribes, and determines that such gaming would not be detrimental to the surrounding community; and (2) the Governor of the State concurs in the Secretary's determination. *Id.* § 2719(b)(1)(A). In the Agreements, Defendant Stitt purports to authorize Defendant Chairmen's Tribes to conduct Class III gaming at six new facilities, to be located on land to be acquired in specified areas of certain counties, and also to concur in any determination by the Secretary that the lands should be taken in trust for

gaming is not an authorized subject of negotiate for Class III compacts," 330 F. Supp. 3d at 286, to this case, in which the Agreements regulation of Class II gaming is explicit, direct, and punitive, *see* Br. at 49.

[65] Whether the Secretary may not have uniformly enforced the bar on state regulation of Class II gaming, *see* Stitt Br. at 40, makes no difference, *see* Br. at 50 n.30.

gaming purposes and that gaming may be conducted on those lands. AR19, AR53 (Agreements Part 4.J.2.). These provisions violate IGRA for three reasons.

First, taking land in trust for gaming purposes is not an authorized subject of compact negotiations, 25 U.S.C. § 2710(d)(3)(C). If it were, 25 U.S.C. § 2719 would be unnecessary, and could be easily circumvented. Nor is the taking of land in trust for gaming purposes "directly related to the operation of gaming activities" under 25 U.S.C. § 2710(d)(3)(C)(vii), because the acquisition of land acquisition is not a gaming activity. *See Bay Mills*, 572 U.S. at 792. That the Secretary may have allowed such circumvention in other instances, Stitt Br. at 42; *see* Shotton Br. at 41-42, does not justify it here. Nor do the compacts Defendant Stitt cites bear the weight he puts on them. *See* Br. at 51-52. Furthermore, even if the future concurrence provisions were "directly related" to gaming activity, the Secretary's no-action approval of the Agreements would add nothing to their validity as applied to lands outside the Defendant Chairmen's Tribes' reservations or former reservations as "[IGRA] regulates gaming activity on Indian lands, but 'nowhere else.'" *W. Flagler*, 71 F.4th at 1061-62 (quoting *Bay Mills*, 572 U.S. at 795).

Second, 25 U.S.C. § 2719(b)(1)(A) requires that the Secretary consult with state and local officials, including nearby tribes, and determine that gaming on after-acquired lands would not be detrimental to the surrounding community, *before* seeking the Governor's concurrence in the Secretary's determination, as there is otherwise nothing for the Governor to concur in. *See* 25 C.F.R. § 292.22. 25 U.S.C. § 2719 does not authorize the governor of a state to concur in a *non-existent* Secretarial Determination. Defendant Shotton contends IGRA permits the Governor to "pre-concur." Shotton Br. at 42. But Defendant Stitt cannot use 25 U.S.C. § 2710 to circumvent 25 U.S.C. § 2719 by concurring with a Secretarial Determination that does not exist. The possibility that a Secretarial Determination could later be made means only that the Governor may have a later opportunity to concur.

Third, an Indian tribe cannot have land taken into trust within another tribe's reservation or former reservation in Oklahoma unless the other tribe consents, 25 C.F.R. §§ 151.2, 151.7. The future concurrence provisions of the Comanche Agreement concern lands within the Reservation or former reservation of two Plaintiff Nations that have not consented to those acquisitions. *See* Br. at 53. In these circumstances, the Secretary had an obligation to disapprove the future concurrence provisions in the compacts because they violate "the trust obligations of the United States to Indians." 25 U.S.C. § 2710(d)(8)(B)(iii). "[T]he United States maintains a general trust relationship with Indian tribes." *Arizona v. Navajo Nation*, 599 U.S. 555, 565 (2023). While "Congress may style its relations with the Indians a trust without assuming all the fiduciary duties of a private trustee," *id.* (quotation omitted), as Congress has done in § 2710(d)(8)(B)(iii),[66] the United States is still obligated to comply with duties "found in the text of a treaty, statute, or regulation." *Cf. Navajo Nation*, 599 U.S. at 566. Under IGRA, the Secretary owes a general trust responsibility to Indian tribes, as § 2710(d)(8)(B)(iii) recognizes, and "this responsibility is discharged by the [Secretary's] compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255

[66] Defendants maintain IGRA "does not create a fiduciary duty," FD Br. at 31; Stitt Br. at 43 (each quoting *Lac Courte Oreilles Band v. United States*, 259 F. Supp. 783, 790 (W.D. Wis. 2003)), but this is not a breach of trust action seeking to enforce a fiduciary duty. That also makes *El Paso Natural Gas Co. v. United States* inapposite, *see* 750 F.3d 863, 892 (D.C. Cir. 2014), and Defendants' reliance on that case comes to nothing, *see* FD Br. at 31, Stitt Br. at 43. Federal Defendants' reliance in *United States v. Navajo Nation*, 537 U.S. 488 (2003), *see* FD Br. at 31, fails for a like reason. The Court there held that the "'general trust relationship between the United States and the Indian people' … alone is insufficient to support jurisdiction under the Indian Tucker Act." 537 U.S. at 506. This is not an Indian Tucker Act case. The Nations here seek to enforce the trust responsibility *recognized in IGRA*, 25 U.S.C. § 2710(d)(8)(B)(iii), to compel the Secretary to enforce regulatory duties, 25 C.F.R. §§ 151.1, 151.7.

F. Supp. 3d 101, 144 (D.D.C. 2017) (quotation omitted). The future concurrence provisions purport to authorize activity that violates 25 C.F.R. § 151.7, and for that reason they violate the federal trust responsibility and the Secretary should have disapproved the Agreements. Neither the Federal Defendants nor Defendant Stitt show otherwise.

In sum, the Secretary acted contrary to law by failing to disapprove purported compacts that contain terms that violate IGRA. Therefore, this Court should conclude that the Agreements are void, and the Secretary's failure to disapprove them violated IGRA.

CONCLUSION

Plaintiff Nations respectfully submit that this Court should grant Plaintiff Nations' motion for summary judgment and remand to the Secretary for disapproval of the Agreements and deny Defendants' cross-motions for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2026, I electronically filed the above and foregoing document with the Clerk of Court via the ECF System for filing.

/s/ Frank S. Holleman
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