No. 23A-_____

In the Supreme Court of the United States

WEST FLAGLER ASSOCIATES, LTD., et al.,
Petitioners,

v.

DEBRA HAALAND, et al.,
Respondent and
SEMINOLE TRIBE OF FLORIDA, *Respondent*

PETITIONERS' APPLICATION FOR STAY OF THE DISTRICT OF COLUMBIA CIRCUIT'S MANDATE PENDING PETITION FOR CERTIORARI

**Directed to the Honorable John G. Roberts, Jr.
Chief Justice of the Supreme Court of the United States and
Circuit Justice for the United States Court of Appeals for the District of Columbia Circuit**

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Applicants West Flagler Associates, Ltd., and Bonita-Fort Myers Corporation ("Applicants") respectfully request a stay of the D.C. Circuit's mandate pending this Court's disposition of Applicants' forthcoming petition for certiorari, which Applicants commit to file 45 days from the date this Application is filed. Additionally, because the mandate might issue at any time, Applicants respectfully ask this Court to administratively stay issuance of the mandate pending disposition of this Application. Finally, to the extent any mandate issues before this Application is granted, Applicants ask that such mandate be both recalled and stayed.

INTRODUCTION

In *Murphy v. National Collegiate Athletic Association*, 138 S. Ct. 1461, 1483 (2018), this Court invalidated the provisions of the Professional and Amateur Sports Protection Act ("PASPA") that precluded states from legalizing sports betting. The Court held that such a prohibition violates the anti-commandeering rules implicit in the Tenth Amendment. As recognized in *Murphy*, the nation has long had widely divergent views on the wisdom of legalizing gambling on sports, and thus "the legalization of sports gambling requires an important policy choice." *Id.* at 1484. Accordingly: "Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own." *Id.* at 1484–85.

Following the decision in *Murphy*, in November 2018, Florida voters approved a referendum that amended the Florida Constitution to ensure that the only way any form of casino gambling could be authorized in Florida would be through a subsequent referendum passed by the voters. FLA. CONST. Art. X § 30 (a). In effect, this referendum

prohibited all forms of casino gambling (also known as "Class III gambling"), which includes sports gaming; indeed, its proponents recognized its special importance to prohibiting sports gambling in light of this Court's decision in *Murphy*.[1] Florida's voters have not passed a referendum allowing sports gambling since the 2018 amendment to the Florida Constitution. Thus, sports gambling remains unlawful in Florida.

However, the 2018 amendment contains one exemption—that the prohibition on casino and sports gambling does not apply to "the conduct of casino gambling on tribal lands" pursuant to compacts negotiated and approved under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, *et seq.* ("IGRA"). FLA. CONST. Art. X § 30(c).

In 2021, Florida's Governor executed an IGRA compact (the "Compact") with the Seminole Tribe of Florida (the "Tribe") that, among other things, gives the Tribe the right to offer online sports betting throughout Florida—including locations that are off the Tribe's own lands—so long as the sports bets are received by servers located on the Tribe's lands. The Compact provides that all bets placed by persons "physically located in the State but not on Indian Lands" shall be "deemed" to have been placed "exclusively" on the Indian lands of the Tribe. App. 59. Through this "deeming" artifice, the Compact seeks to use the IGRA exception to the Florida constitutional prohibition to give the Tribe a monopoly to offer online sports gaming ***everywhere*** in Florida.[2]

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[1] *See* Brian Bandell, *Supreme Court Ruling on Sports Gambling Could Raise Stakes for Amendment Vote in Florida*, S. Fla. Bus. J. (May 29, 2018), https://www.bizjournals.com/southflorida/news/2018/05/29/supreme-court-ruling-on-sports-gambling-could.html ("John Sowinski, who heads the Yes on Three campaign for No Casinos, said the amendment would apply to sports betting, meaning it could not be introduced in Florida without another statewide referendum. . . 'People like the idea of voters, not Tallahassee politicians and lobbyists, being in charge of these issues,' Sowinski said.").

[2] Moreover, when the Florida Legislature ratified the Compact, it increased the penalty for sports gaming

As required by IGRA, the Tribe submitted the Compact for approval by the Secretary of the Interior (the "Secretary"). The Secretary chose to take no formal action during the specified 45-day period for approving or disapproving of a compact, which under IGRA meant that the compact is "considered to have been approved by the Secretary." 25 U.S.C. § 2710 (d)(8)(C). Applicants filed suit under the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.* ("APA"), challenging the legality of that approval, and the District Court ruled that the approval was not authorized by IGRA. App. 186–90. The D.C. Circuit reversed. App. 196.

The decision by the D.C. Circuit ("Circuit Opinion") raises three questions of exceptional importance:

First, the Circuit Opinion raises the question of whether IGRA authorizes the federal approval of a compact that purports to allow a tribe to conduct gambling activities off Indian lands. By its plain terms, IGRA authorizes the Secretary "to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming ***on Indian lands of such Indian tribe***." 25 U.S.C. § 2710(d)(8)(A) (emphasis added). Nothing authorizes the approval of a compact that provides for gambling off Indian lands. As this Court has held: "Everything—literally everything—in IGRA affords tools . . . to regulate gaming *on Indian lands, and nowhere else*." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 795 (2014) (emphasis added). The Circuit Opinion conflicts with IGRA and *Bay Mills*. Further, while it ostensibly recognizes that IGRA cannot

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by anyone else from a misdemeanor to a felony. FLA. STAT. § 849.14.

"authorize" a compact providing for gambling off Indian lands, it strains to conclude that IGRA somehow allows the "approval" of such a compact. This holding is inconsistent with decisions from other circuits. There is therefore a strong likelihood this Court will grant certiorari and reverse the Circuit Opinion on this IGRA question.

Second, the Circuit Opinion raises the question of whether the Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361, *et seq*. ("UIGEA"), is violated when an Indian tribe uses the internet to offer gambling in locations outside of its own lands, and in the territory of a state where such gambling is unlawful. The Ninth Circuit expressly addressed that issue in *California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960, 967 (9th Cir. 2018), which held that UIGEA was violated by such conduct. The Circuit Opinion holds that the same conduct did *not* violate UIGEA. It fails to cite or discuss *Iipay Nation*. *Iipay Nation* was clearly correct, and there is a strong likelihood this Court will grant certiorari and reverse the Circuit Opinion on this UIGEA question.

Third, the Circuit Opinion raises the question whether the Equal Protection Clause of the Constitution is violated by a federal government approval of an IGRA compact in which a state gives an Indian tribe a statewide monopoly to conduct online sports gaming while simultaneously making such conduct a felony if done by anyone of a different race, ancestry, ethnicity, or national origin. No case supports giving an Indian tribe such a naked preference that is untethered to its unique sovereign status, its tribal lands, or its culture. The only case to address anything approaching such a gross preference was the Ninth Circuit in *Williams v. Babbitt*, 115 F.3d 657, 664 (9th Cir. 1997), which held that strict scrutiny should apply to a rule excluding non-natives from

the Alaskan reindeer industry since the industry was "not uniquely native," and the preference "in no way relate[d] to native land, tribal or communal status, or culture." Both *Babbitt* and the case law from this Court and the other circuits show that the D.C. Circuit should have applied strict scrutiny to the tribal preference at issue here, and should have invalidated the IGRA approval on that additional basis. The Circuit Opinion failed to cite or discuss *Babbitt*. There is a strong likelihood this Court will grant certiorari and reverse the Circuit Opinion on this Equal Protection question.

There is also good cause for the stay as a matter of public policy. Unless the mandate is stayed, the Circuit Opinion will upset the status quo in Florida by permitting the Tribe to conduct online sports gaming throughout the State, even though the Florida Constitution prohibits any such gaming absent a citizens' initiative, and UIGEA prohibits use of the internet to transmit payments between a jurisdiction where gambling is illegal (Florida) and one where it is legal (the Tribe's land). Absent a stay, the Compact will give rise to hundreds of thousands, if not millions, of sports betting transactions that violate both state and federal law before this Court has the opportunity to address the merits. The Circuit Opinion enables a dramatic change in public policy on legalized gaming that, once started, may be difficult to stop. It is in the public interest to preserve the status quo with respect to online gaming until such time as this Court has a chance to review Applicants' petition for a writ of certiorari.

QUESTIONS PRESENTED

1. Does IGRA authorize the Secretary of the Interior to approve (or allow automatic approval of) a compact between a State and an Indian Tribe that provides for the Indian Tribe to offer Internet sports gambling throughout the State and thus off Indian lands?

2. Is UIGEA violated by an IGRA compact that provides for a Tribe to offer online sports betting to persons located off the Tribe's lands, in the territory of a State whose constitution prohibits such sports betting unless it is conducted on Tribal lands pursuant to a valid IGRA compact?

3. Does it violate the Equal Protection Clause for the Secretary of the Interior to approve (or allow automatic approval of) a compact between a State and an Indian Tribe that provides the Tribe with a statewide monopoly for offering Internet sports gambling, while making such conduct a felony if engaged in by any person who is not a member of that Indian Tribe?

BACKGROUND

A. Statement of Facts

1. The Florida Constitution Prohibits Sports Gambling Absent a Referendum by the Public Approving Such Gambling.

In 2018, Florida amended its Constitution to provide "that Florida voters shall have the exclusive right to decide whether to authorize casino gambling in the State of Florida." FLA. CONST. Art. X § 30 (a). The amendment "requires a vote by citizens' initiative pursuant to Article XI, section 3, in order for casino gambling to be authorized under Florida law." *Id.*[3]

The Florida Constitution defines "casino gambling" to include those games that 25 C.F.R. § 502.4 designates as "Class III gaming." *Id.* at § 30(b). And 25 C.F.R. § 502.4(c) defines Class III gaming to include "[a]ny sports betting." Thus, the Florida Constitution prohibits sports gambling absent a public referendum to amend the

[3] A citizens' initiative pursuant to Article XI, section 3, is a public referendum to amend the Florida Constitution. FLA. CONST. Art. XI § 3.

Constitution to permit sports gambling. There has been no such referendum.

The 2018 amendment has one exception to the referendum requirement: it says that "nothing herein shall be construed to limit the ability of the state or Native American tribes to negotiate gaming compacts pursuant to the Federal [IGRA] for the conduct of casino gambling *on tribal lands*." FLA. CONST. Art. X § 30(c) (emphasis added).

2. The Tribe and Florida Governor Executed an IGRA Compact Providing for the Tribe to Offer Online Sports Gaming off Indian Lands.

On April 23, 2021, Florida's Governor and the Tribe signed the Compact. App. 118. Among other things, it expressly authorizes the Tribe to offer online sports betting to persons located off the Tribe's lands, as follows:

> The Tribe and State agree that **the Tribe is authorized to operate Covered Games on its Indian lands**, as defined in the Indian Gaming Regulatory Act, in accordance with the provisions of this Compact. Subject to limitations set forth herein, **wagers on Sports Betting and Fantasy Sports Contests made by players physically located within the State using a mobile or other electronic device shall be deemed to take place exclusively where received** at the location of the servers or other devices used to conduct such wagering activity at a Facility **on Indian Lands**.

App. 64 (Part IV.A) (emphasis added). The Compact defines "Covered Games" to include "Sports Betting," App. 48 (Part III.F), and defines "Sports Betting" to include any bets on competitive sports, subject to the following provision:

> All such wagering shall be **deemed** at all times to be exclusively conducted by the Tribe at its Facilities where the sports book(s), including servers and devices to conduct the same, are located, **including any such wagering undertaken by a Patron physically located in the State but not on Indian Lands using an electronic device connected via the internet, web application or otherwise**.

App. 58–59 (Part III.CC.2) (emphasis added).

On May 19, 2021, Florida's Legislature passed a law ratifying the Compact, *see*

App. 119–27, which the Governor signed on May 25, 2021.[4] Like the Compact, this statute provides that wagers on sports betting "made by players physically located within the state using a mobile or other electronic device, shall be **deemed** to be exclusively conducted by the Tribe where the servers or other devices used to conduct such wagering activity on the Tribe's Indian lands are located." *Id.* at App. 123 (emphasis added) (together with Compact Parts IV.A, and III.CC.2 above, the "Deeming Provisions"). Florida's Legislature simultaneously increased the penalty on all others offering sports betting from a second-degree misdemeanor to a third-degree felony punishable by up to five years in prison. FLA. STAT. § 849.14; FLA. STAT. § 775.082 (3)(e).

3. The Secretary Approved the Compact under IGRA, and Published a Letter Defending its Legality.

On June 21, 2021, the Tribe submitted the Compact for the Secretary's approval under IGRA. App. 128. IGRA provides that if the Secretary does not formally approve or disapprove a compact within 45 days, "the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter." 25 U.S.C. § 2710(d)(8)(C). The D.C. Circuit has held that when a compact is "considered to have been approved by the Secretary," that automatic approval is judicially reviewable under the APA. *Amador County v. Salazar*, 640 F.3d 373, 383 (D.C. Cir. 2011).

The Secretary took no formal action and the Compact was automatically approved under IGRA. It became effective when notice of the approval was published in the

[4] *See* Fla. Senate, CS/SB 8-A: Gaming, Bill History, https://www.flsenate.gov/Session/Bill/2021A/8A.

Federal Register. *See* Indian Gaming; Approval by Operation of Law of Tribal-State Class III Gaming Compact in the State of Florida, 86 Fed. Reg. 44,037-01 (Aug. 11, 2021). Five days earlier, the Principal Deputy Assistant Secretary of the Interior for Indian Affairs sent a lengthy letter to the Chairman of the Tribe and Florida's Governor advising that the Secretary would permit automatic approval and explaining why (the "DOI Letter"). App. 128–39. The DOI Letter stated that the Secretary reviews Tribal-State compacts "to ensure that they comply with Federal law," *id.* at App. 133, but included virtually no analysis of the various provisions of IGRA limiting IGRA compacts to governing gaming "on Indian lands." *See, e.g.*, 25 U.S.C. § 2710(d)(8)(A) (authorizing the Secretary to approve compacts governing gaming "on Indian lands"). The DOI Letter only refers to such provisions in footnote 14, which states that because "Class III gaming is 'lawful on Indian lands' only if such gaming is authorized by the 'Indian tribe having jurisdiction over such lands,'" (citing 25 U.S.C. § 2710(d)(1)(A)(i)), it follows that "to be permissible under the IGRA, a tribe must geofence its gaming to ensure players are not located on other Indian lands." App. 135 n.14.

With respect to the Compact's provisions allowing the Tribe to offer "Sports Betting" to any person "physically located in the State but not on Indian Lands," the DOI Letter accepted the Deeming Provisions. App. 134–35. The DOI Letter reasoned that these provisions were merely a "jurisdictional agreement" treating online wagers as if they had occurred exclusively on the Tribe's reservations (and thus "on Indian lands"). App. 135. In support, the letter cited 25 U.S.C. §§ 2710(d)(3)(c)(i)–(ii)—provisions of IGRA that allow a State and Tribe to determine the application of their own laws and

jurisdictions under a compact, but that say nothing about the ability to determine what qualifies as "Indian lands" for purposes of federal law. App. 134. The letter claimed that changes in technology since the enactment of IGRA justified this interpretation. App. 134–35.[5]

The DOI Letter did not mention UIGEA. Nor did it consider whether the Secretary's approval of the grant of a monopoly on online sports betting to the Tribe based on its members' race, ancestry, ethnicity and national origin—while criminalizing the operation of such gaming by non-Seminoles—violates the Equal Protection guarantee of the Fifth Amendment to the United States Constitution.

4. Applicants Compete with the Tribe and Will Suffer Irreparable Competitive Injury from the Tribe Offering Online Sports Gaming Throughout the State.

While Florida has long outlawed gambling on the country's major sports, it does permit certain kinds of "pari-mutuel" gaming on horse racing, dog racing, and jai alai. FLA. STAT. § 550.155(1).

Applicants operate Bonita Springs Poker Room, which offers simulcasts of horse racing and jai alai, and its patrons can engage in pari-mutuel betting on those events. App. 144. It also features games such as ultimate Texas hold 'em, three-card poker, high-card flush, jackpot hold 'em and DJ wild, year-round. *Id.* The Bonita Springs Poker Room is located approximately 21 miles from the Tribe's Immokalee Casino, and 155 miles from the Tribe's Tampa Hard Rock Casino. *Id.* The Bonita

[5] Congress since has considered, but not enacted, a bill that would amend IGRA to do exactly what the Compact purports to do—deem online sports wagers to occur where received by servers on Indian lands. *See* Removing Federal Barriers to Offering of Mobile Sports Wagers on Indian Lands Act, H.R. 5502, 116th Cong. § 3 (2019).

Springs Poker Room and its predecessors have competed with the Tribe for gaming patrons since 2009. App. 143–44. Applicants will therefore be harmed by the Tribe's operation of online sports betting throughout Florida. App. 149–55.

B. District Court Proceedings

Applicants filed this APA case on August 16, 2021, to challenge the IGRA approval of the Compact. App. 2. Applicants moved for summary judgment and the Secretary cross-moved to dismiss for a want of standing and for failure to state a claim. *See* App. 169.

Following full briefing, argument, and supplemental briefing, the District Court resolved the motions in a single order on November 22, 2021, three weeks after the Tribe launched a statewide "Hard Rock Sportsbook." *See* App. 157–67, 169. The District Court denied the Secretary's motion to dismiss for lack of standing, holding that Applicants adequately established a competitive injury. App. 178. The District Court granted summary judgment to Applicants, holding that IGRA does not authorize the Secretary to approve (or allow approval of) a Compact that provides for gaming off Indian lands. App. 192. To the contrary, a compact that provides for gaming off Indian lands triggers the Secretary's "obligation . . . to affirmatively disapprove any compact that is inconsistent with [IGRA's] terms." App. 185 (citing *Amador County*, 640 F.3d at 382).[6] The court further held that the "deeming" language in the Compact was a "fiction" that

[6] The District Court also denied a motion by the Tribe to intervene under Fed. R. Civ. P. 24(a) for the "limited purpose" of filing a motion to dismiss under Rule 19 on the ground that it was an indispensable party that could not be joined by virtue of its sovereign immunity. App. 184. The District Court found that the Tribe is a required—but not indispensable—party whose interests are adequately represented by the Secretary. App. 180, 184; Fed. R. Civ. P. 19(a)–(b). That holding was affirmed on appeal by the D.C. Circuit, App. 196, and is not a subject of this Application.

the court "cannot accept": "When a federal statute authorizes an activity only at specific locations, parties may not evade that limitation by 'deeming' their activity to occur where it, as a factual matter, does not." App. 186.

C. D.C. Circuit Proceedings

On June 30, 2023, the Circuit Opinion reversed. App. 196. The court accepted the Secretary's argument that: "Gaming outside Indian lands cannot be *authorized* by IGRA, but it may be *addressed* in a compact." App. 202 (emphasis in original). In other words, while the Circuit Opinion agreed that "an IGRA compact cannot provide independent legal authority for gaming activity that occurs outside of Indian lands," it held that it was permissible for the Compact to "discuss" or "address" gambling off Indian lands. App. 202, 208.

To reach this result, the Circuit Opinion relied on three subsections of IGRA found in 25 U.S.C. § 2710(d)(3)(C)—the provision that itemizes the permissible topics that may be addressed in an IGRA compact.[7] First, the Circuit Opinion stated that the Compact's provision for online sports gambling off Indian lands could be read as merely an allocation of jurisdiction that could fall within either or both of subsections (i) and (ii), which respectively permit an IGRA compact to address "the application of criminal and civil laws and regulations of the Indian tribe," and "the allocation of criminal and civil jurisdiction." 25 U.S.C. §§ 2710(d)(3)(C)(i)–(ii). *See* App. 204–205. The Circuit Opinion does not mention that the Compact contains sections specifically addressing

[7] Courts have read § 2710(d)(3)(C) to provide an exclusive list of topics that may be included in an IGRA compact. *See* Section I.A.(2 below.

jurisdictional issues without referring to the Deeming Provisions or any other provision regarding online sports gambling off Indian lands.[8]

Next, the Circuit Opinion stated that the Compact's provision for online sports gambling off Indian lands could also fall under the final, residual clause of § 2710(d)(3)(C)—which allows a compact to address "any other subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii). *See* App. 203. It does not explain how gambling conducted off Indian lands is "related to the operation" of gaming activities, as opposed to being the gaming activity itself.

The Circuit Opinion rejected the argument that it is improper to interpret an IGRA approval as sometimes being an "authorization" and sometimes not. App. 207–208. It states that "the [IGRA] 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." App. 208.

The Circuit Opinion also held that "the Compact does not as a facial matter violate the UIGEA." App. 212. UIGEA prohibits the receipt of electronic payments for Unlawful Internet Gambling, which is defined to mean:

> **to place**, receive, or otherwise knowingly transmit **a bet or wager by any means which involves the use, at least in part, of the Internet** where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager **is initiated, received, or otherwise made**.

31 U.S.C. § 5362(10)(A) (emphasis added).

[8] App. 66–74 ("Rules and Regulations; Minimum Requirements for Operations"); JA86–91 ("Patron Disputes; Workers Compensation; Tort Claims; Prize Claims; Limited Consent to Suit"); App. 79–82 ("Enforcement of Contract Provisions"); App. 82–89 ("State Monitoring of Compact"); App. 89 ("Jurisdiction").

While analysis of state law is necessary to determine whether a UIGEA violation occurs, the Circuit Opinion disavows reaching any decision on questions of Florida law, which it held "are best left for Florida's courts to decide."[9]

The Circuit Opinion also held, with minimal analysis, that the Secretary's approval of Florida's grant of a statewide gaming monopoly to the Tribe on the basis of its members' race, ancestry, ethnicity or national origin, was subject only to rational basis scrutiny under the Equal Protection Clause. App. 212.

On August 14, 2023, Applicants filed a petition for rehearing *en banc*, which the D.C. Circuit denied on September 11, 2023. App. 217. On September 15, 2023, Applicants filed a motion to stay the mandate pending petition for certiorari, which was denied on September 28, 2023. App. 219.

JURISDICTION

The final judgment of the Circuit Opinion is subject to review by this Court under 28 U.S.C. § 1254(1). This Court therefore has jurisdiction to consider and grant this Application for a stay of the mandate pending filing of a petition for certiorari under 28 U.S.C. § 2101(f).

REASONS FOR GRANTING A STAY OF THE MANDATE

The applicant for a stay pending review must show that the relief "is not available from any other court or judge." Sup. Ct. R. 23.3. This condition is satisfied because the D.C. Circuit denied Applicants' timely motion to stay issuance of its mandate pending

[9] App. 209 ("And particularly, 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. 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.").

filing of Applicants' petition for certiorari. App. 219.

Once Rule 23.3 is satisfied, a stay is appropriate if there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of the stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). In close cases, the Circuit Justice or the Court will "balance the equities" to explore the relative harms to the applicant and respondent, as well as the interests of the public at large. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).

I. THERE IS A STRONG LIKELIHOOD THAT FOUR JUSTICES WILL GRANT CERTIORARI.

A. This Case Implicates Issues of Nationwide Importance Regarding the States' Ability to Use IGRA to Legalize Gaming off Indian Lands.

The Circuit Opinion raises a question of nationwide importance regarding the ability of States and Tribes to use IGRA compacts to provide for gaming off Indian lands. The Circuit Opinion conflicts with the plain text of IGRA, with this Court's decision in *Bay Mills*, and with several decisions by other circuits. There is a strong likelihood that four justices will vote to grant certiorari to resolve this important question and to eliminate these conflicts.

1. The Circuit Opinion Conflicts with the Plain Text of IGRA and this Court's Holding in *Michigan v. Bay Mills*.

IGRA authorizes the Secretary "to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming ***on Indian lands of such Indian tribe***." 25 U.S.C. § 2710(d)(8)(A) (emphasis added). Nothing in IGRA authorizes

the Secretary to approve a compact that provides for gaming ***off*** Indian lands. The Compact at issue here clearly provides for gaming off Indian lands. App. 64 (Part IV.A); App. 48, 58–59 (Part III.F & CC.2). By upholding the IGRA approval of that Compact, the Circuit Opinion conflicts with the plain text of the statute.

The Circuit Opinion also conflicts with this Court's decision in *Bay Mills*. *See* 572 U.S. 782. There, Michigan sought to enjoin an Indian tribe from operating a casino off Indian lands. *Id.* at 785. The tribe invoked sovereign immunity. *Id.* Michigan argued that IGRA permitted the lawsuit because abrogates tribal immunity from claims brought by a state to "enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact." *Id.* at 791 (describing Michigan's argument under § 2710(d)(7)(A)(ii)). Michigan argued that while the casino was located off Indian lands, the tribe was licensing and operating that casino from offices located ***on*** Indian lands, triggering the application of § 2710(d)(7)(A)(ii). *Id.* at 786. This Court rejected that argument, holding that the licensing and operation of class III activity was not itself "class III gaming activity on Indian lands." *Id.* at 791. It thus adopted a strict construction of IGRA that refused to use an operational linkage between activity on and off Indian land to apply IGRA to gambling activity off Indian lands. The Circuit Opinion does the opposite by using the provisions of § 2710(d)(3)(C)(vii) to conclude that it is permissible for the Secretary to approve a compact that provides for gambling off Indian lands.

Michigan also argued that it would make no sense for Congress to have abrogated tribal immunity for gambling ***on*** Indian lands, but not for gambling that occurs ***off***

Indian lands, and within the State's sovereign jurisdiction. *Bay Mills*, 572 U.S. at 794. The Court rejected that purpose-based argument as well, holding that "'Congress wrote the statute it wrote'—meaning, a statute going so far and no further." *Id*. (citations and quotations omitted). The Court explained that IGRA was enacted in response to the Court's decision in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 221–222 (1987), which held that states had no jurisdiction to regulate gaming "on Indian lands." Accordingly, "the problem Congress set out to address in IGRA (*Cabazon*'s ouster of state authority) arose on Indian lands alone. And the solution Congress devised, naturally enough, reflected that fact." 572 U.S. at 794–95. This Court then aptly concluded:

> **Everything—literally everything—in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands, and nowhere else**.

Id. at 795 (emphasis added).

By holding that IGRA authorized the Secretary to approve a compact that regulates gaming ***off*** Indian lands, the Circuit Opinion contradicts this Court's holding in *Bay Mills*. That contradiction warrants review by this Court. Indian tribes ought not to be able to have it both ways. The Bay Mills Indian Community benefited from IGRA's narrow reach of only applying to gaming "on Indian lands," by avoiding IGRA's abrogation of immunity. By the same token, other tribes, including the Tribe, must recognize that IGRA's narrow reach to gaming "on Indian lands" means the Secretary cannot approve a compact that provides for gaming ***off*** Indian lands.

More generally, the Circuit Opinion is the first case to suggest that IGRA could

apply to gambling off Indian lands. All prior case law uniformly has said the opposite. *See Bay Mills*, 572 U.S. at 795; *Amador County*, 640 F.3d at 376–77 ("IGRA provides for gaming only on 'Indian lands.'"); *Iipay Nation*, 898 F.3d at 967 (expressing doubt that IGRA would permit Tribe to receive bingo bets placed over the internet from off Indian lands but received on Indian lands, since it "does not occur on Indian lands"); *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 735 (9th Cir. 2003) ("Under IGRA, for example, individual Indians (or even Indian tribes) could not establish a class III gaming establishment on non-Indian lands."); *North County Cmty. All. Inc. v. Salazar*, 573 F.3d 738, 744 (9th Cir. 2009) (noting that "IGRA limits tribal gaming to locations on 'Indian lands' as defined in 25 U.S.C. § 2703(4)"; it is "undisputed" that "IGRA authorizes tribal gaming only on 'Indian lands'"; and "Tribal gaming on non-Indian lands is not authorized by or regulated under IGRA").

2. The Circuit Opinion's Broad Interpretation of § 2710(d)(3)(C) Conflicts with Other Circuits' Narrow Interpretation.

The Circuit Opinion relied on a broad interpretation of 25 U.S.C. § 2710(d)(3)(C) to hold that the Compact's provision for online sports gaming from off Indian lands:

- "simply allocates jurisdiction between Florida and the Tribe" under §§ 2710(d)(3)(C)(i)–(ii); and/or
- falls within the residual clause of § 2710(d)(3)(C)(vii), which allows compacts to include "any other subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii).

These holdings strain to fit the Deeming Provisions into one or more of the ancillary topics that § 2710(d)(3)(C) says may be included in an IGRA compact. They conflict with the narrow interpretation other circuits have given to § 2710(d)(3)(C). *See Chicken Ranch Rancheria of Me-Wuk Indians*, 42 F.4th 1024, 1035 (9th Cir. 2022) ("[T]he

phrase 'directly related to the operation of gaming activities' imposes meaningful limits on compact negotiations."); *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 935 (8th Cir. 2019) ("'Directly related to the operation of gaming activity' is narrower than 'directly related to the operation of the Casino.'"); *Navajo Nation v. Dalley*, 896 F.3d 1196, 1205 n.4 (10th Cir. 2018) ("[T]he negotiated terms of the Compact cannot exceed what is authorized by the IGRA.") (quotation omitted); *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1040 (9th Cir. 2010).

While the foregoing cases address topics other than sports betting off Indian lands, they stand for the proposition that § 2710(d)(3)(C) cannot be used to crowbar into an IGRA compact provisions or subjects that clearly exceed the sole focus of IGRA—i.e., to provide a regime for authorizing gambling ***on*** Indian lands. They recognize that IGRA compacts must be focused on gaming on Indian lands and ancillary matters, and § 2710(d)(3)(C) does not permit different subjects to be added in through some tenuous connection or strained reading of the plain text. The Circuit Opinion's conflicting approach independently warrants review by this Court.

B. The Circuit Opinion's UIGEA Decision Conflicts with a Decision of the Ninth Circuit Court of Appeals.

UIGEA prohibits the receipt of credit card payments or electronic fund transfers in connection with "Unlawful Internet Gambling," which is defined as follows:

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

31 U.S.C. § 5362(10).

By providing for the Tribe to offer online sports gambling to persons located anywhere in Florida, the Compact should obviously trigger scrutiny under UIGEA. First, the only way for the Tribe to offer online sports betting is for the Tribe to receive payment by credit card or electronic fund transfers—there is no other way to receive money over the internet. Second, the Compact provides for online sports bets to be "initiated" from locations in Florida that are ***off*** Indian lands. App. 123. Thus, if it is unlawful under "State law" to bet on sports in Florida (outside of tribal lands), then the Compact, on its face, provides for a violation of UIGEA.

As shown above, the Florida Constitution makes sports betting (and all other forms of casino gambling) unlawful absent a public referendum approving such gambling, which has not occurred. And while gambling pursuant to a validly approved IGRA compact is exempted from the constitutional prohibition, that exemption only applies to gambling "on tribal lands." FLA. CONST. Art. X § 30(c). Thus, Florida law unambiguously outlaws sports betting from anywhere in the State that is not on tribal lands. That includes placing online sports bets in locations off Indian lands, regardless of where those bets are received.

This unambiguous illegality of online sports betting under Florida state law means that the Compact will lead to violations of UIGEA. That makes the approval of the Compact "not in accordance with law," so that it should be set aside under the APA. 5 U.S.C. § 706(2)(A).

The Circuit Opinion rejected this argument but did not explain its holding that

"the Compact does not as a facial matter violate the UIGEA." App. 212. Regardless of its reasons, however, that holding conflicts with the Ninth Circuit decision in *Iipay Nation*. *See* 898 F.3d at 967. In that case, the Iipay Nation tribe offered an online bingo gambling game that patrons could use from off the tribe's lands. *Id.* at 962. However, California outlawed such gambling when done off Indian lands (it was permitted on the tribe's lands). *Id.* at 967.

The Ninth Circuit recognized that *Iipay Nation* presented "an issue of first impression regarding the interrelation between IGRA and the UIGEA," and that ""[n]o other circuit has opined on whether an Indian tribe can offer online gaming to patrons located off Indian lands in jurisdictions where such gambling is illegal." *Id.* at 964. It then walked through the statutory framework of both IGRA and UIGEA, and summarized UIGEA as follows:

> Thus, the UIGEA does not prohibit otherwise legal gambling. But the UIGEA does create a system in which a "bet or wager" must be legal both where it is "initiated" and where it is "received." This requirement makes sense in light of how the internet operates. If a bet merely had to be legal where it was received, a bettor could place an illegal bet (on a game of poker, for instance) from anywhere in the United States, so long as the bet was legal in the jurisdiction hosting the servers for a game (Las Vegas or Atlantic City, for instance, in the case of online poker). In effect, the UIGEA prevents using the internet to circumvent existing state and federal gambling laws, but it does not create any additional substantive prohibitions.

Id. at 965.

The Iipay Nation argued that its online bingo game was a "gaming activity" that occurred "on Indian lands"—and thus was permitted by its IGRA compact. *Id.* The Ninth Circuit rejected that argument. *Id.* It likewise rejected the argument that the

activity of the patrons off Indian land was merely "pre-game communication" that did not rise to the level of "gaming activity" under IGRA or initiating a bet under UIGEA. *Id.* at 966. It also rejected the argument that the legality of its online bingo game should be assessed "exclusively through examining IGRA, without reference to the UIGEA." *Id.* at 968. The Ninth Circuit explained as follows:

> What Iipay's arguments fail to acknowledge is that the UIGEA does not have to make DRB the game illegal in order to make Iipay's operation of that game—specifically, its decision to accept wagers and financial payments over the internet from patrons located in California—illegal. Whether DRB is permitted by IGRA or not, Iipay's operation of DRB violates the UIGEA's requirement that bets placed over the internet be legal both where they are initiated and where they are received.

Id.

There is no way to reconcile the Ninth Circuit's decision in *Iipay Nation* with the Circuit Opinion. If the Ninth Circuit decision is correct (which it is), then the question of whether UIGEA is violated by the online sports gaming provisions in the Compact depends on the question of whether sports betting off Indian lands can be legal under Florida law without a referendum. Yet the Circuit Opinion said that it would not address that question. App. 212. Moreover, it failed even to cite, let alone discuss, the Ninth Circuit's decision in *Iipay Nation.*

Given the rapidly changing legal landscape governing sports betting, this conflict presents a question of nationwide importance that four or more Justices are likely to agree should be resolved by this Court.

C. This Case Raises an Important National Issue Regarding the Constitutionality of Tribal Preferences Untethered to Unique Tribal Interests.

Certiorari is also likely to be granted because the Circuit Opinion raises an issue

of national importance regarding the constitutionality of granting an Indian tribe a statewide monopoly over sports betting, while making the same conduct a felony for everyone else.

This Court recently heard a case regarding the propriety of tribal preferences in the context of child welfare protections. *Haaland v. Brackeen*, 143 S. Ct. 1609 (2022). The Court avoided the Equal Protection issue by deciding that the challengers lacked standing. *Id.* at 1638. However, Justice Kavanaugh emphasized the importance of the tribal preference issue in his concurrence. *Id.* at 1661 (Kavanaugh, J., concurring) ("In my view, the equal protection issue is serious.").

In *Morton v. Mancari*, 417 U.S. 535, 535–55 (1974), this Court addressed the propriety of a Congressionally legislated employment preference for qualified Indians at the Bureau of Indian Affairs ("BIA"). The Court found that the preference was permissible under the Equal Protection Clause (made applicable through the Fifth Amendment) because of Congress' unique relationship with tribes:

> Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally recognized Indian tribes. …

Id. at 551.

The Court found that the BIA preference at issue did not constitute racial discrimination or even a racial preference but was "rather an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups." *Id.* at 554. The Court emphasized, however, that "the legal status of the BIA is truly *sui generis*." *Id.* The

Court went on to point out numerous other instances in which it had upheld "particular and special treatment" by Congress for Indians, *id.* at 554–55, but again made clear that Congress' special relationship with Indian tribes was the driving factor in each instance, reasoning: "As long as the special treatment can be tied rationally to the fulfilment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* The Court since has made clear that *Mancari* stood for a "limited exception." *Rice v. Cayetano*, 528 U.S. 495, 520 (2000).

Since *Mancari*, other federal actions providing a preference to Indians have been upheld, but only when tied to Indian lands, uniquely sovereign interests, or to the special relationship between the federal government and Indian tribes.[10]

Only two circuits have weighed in on preferences that do not have any of these special circumstances: 1) the Ninth Circuit in *Babbitt*, 115 F.3d at 663–64, which rejected an effort by the BIA to ban non-natives from the Alaskan reindeer industry, and 2) the Circuit Opinion, which affirmed a decision by the Secretary to permit Florida's decision to confer a statewide sports gaming monopoly (both on and off Indian lands) on the basis of race, ancestry, ethnicity, and national origin—while making the same conduct a felony for everyone else.

In *Babbitt*, non-native reindeer herders challenged BIA's interpretation of the

[10] *See United States v. Antelope*, 430 U.S. 641, 646 (1977) (federal regulation of criminal conduct within Indian country); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 481 (1976) (tax "on personal property located within the reservation," fee "applied to a reservation Indian conducting a cigarette business for the Tribe on reservation land," and tax on "on-reservation sales by Indians to Indians"); *Fisher v. District Court*, 424 U.S. 382, 389 (1976) (on-reservation adoption proceedings); *United States v. Garrett*, 122 Fed. App'x 628, 631 (4th Cir. 2005) (gaming *on* tribal lands); *Artichoke Joe's*, 353 F.3d at 735 n.16 (same); *KG Urban Enters., LLC v. Patrick*, 693 F.3d 1 (1st Cir. 2012).

Reindeer Industry Act of 1937, 25 U.S.C. §§ 500, *et seq*. (the "Reindeer Act"), to categorically forbid non-natives from commercial reindeer herding within the state of Alaska. 115 F.3d at 659. The Ninth Circuit found for the plaintiffs. The court emphasized that legislation that "relates to Indian land, tribal status, self-government or culture passes *Mancari*'s rational relation test because 'such regulation is rooted in the unique status of Indians as a "separate people with their own political institutions."' *Id*. at 664 (citation omitted). It observed that the *Mancari* Court "did not have to confront the question of a naked preference for Indians unrelated to unique Indian concerns," whereas the BIA's interpretation of the Reindeer Act created just such a preference. *Id.* It explained: "According to the BIA, the Reindeer Act provides a preference in an industry that is *not uniquely native*, whether the beneficiaries live in a remote native village on the Seward Peninsula or in downtown Anchorage." *Id*. (emphasis added). Although the Ninth Circuit did not view *Mancari* "as limited to statutes that give special treatment to Indians on Indian land," it did "read it as shielding only those statutes that *affect uniquely Indian interests*." *Id*. (emphasis added). "For example, we seriously doubt that Congress could give Indians a complete monopoly on the casino industry or on Space Shuttle contracts." *Id.* at 665. The Ninth Circuit applied strict scrutiny to the BIA's interpretation of the Reindeer Act and ruled that non-natives could engage in the commercial reindeer trade in Alaska.

In contrast, the Circuit Opinion here upheld the IGRA approval of a compact that grants a statewide monopoly on off-reservation online sports betting to one particular Indian Tribe – *i.e.*, on the basis of the race, ancestry, ethnicity, and national origin of the

members of that Tribe. App. 212–13. For anyone of a different race, ancestry, ethnicity, and national origin, the state law approving the Compact made the same conduct a felony punishable by up to 5 years in prison. *See* App. 122–23; FLA. STAT. § 849.14; FLA. STAT. § 775.082(3)(e).

This is a "naked preference" of the kind that correctly triggered strict scrutiny from the Ninth Circuit in *Babbitt*. Yet the D.C. Circuit did not even cite *Babbitt*, let alone discuss or distinguish it—despite Applicants extensively citing and discussing that case in their briefing.

The Circuit Opinion provided little analysis of the Equal Protection issue. App. 212. It cited only the D.C. Circuit's prior decision in *Am. Fed'n of Gov't Emps., AFL-CIO v. United States*, 330 F.3d 513 (D.C. Cir. 2003), as support for the proposition that "promoting the economic development of federally recognized Indian tribes (and thus their members)," is constitutional "if rationally related to a legitimate legislative purpose." *Id.* It then held that because the "exclusivity provisions in the Compact plainly promote the economic development of the Seminole Tribe," they satisfy rational basis review. *Id.* But *Am. Fed'n* addressed a specific, Congressional preference for native-owned firms in defense contracts. 330 F.3d at 520. The decision upholding that preference limited the reach of its holding to "legislation regulating commerce with Indian tribes"—a function unique to the federal government under the Constitution's Indian Commerce Clause. *Id.*

By contrast, a *state's* right to confer tribal preferences on its own is much less likely to qualify for rational basis review. *See Rice*, 528 U.S. 495 (rejecting claim by State

of Hawaii that *Mancari* applied to a voting scheme that permitted only descendants of the aboriginal tribes inhabiting the Hawaiian Islands in 1772 to vote for trustees of the Office of Hawaiian Affairs). *See also Washington v. Confederated Bands & Tribes of the Yakima Indian Nation* ("*Yakima*"), 439 U.S. 463 (1979) (discussing *Mancari* and observing "States do not enjoy this same unique relationship with the Indians . . ."); *KG Urban Enters.*, 693 F.3d 1 (addressing the propriety of a state statutory preference for tribal casinos negotiated pursuant to IGRA where no tribe in the state yet held "Indian lands," and reasoning "it is quite doubtful that *Mancari*'s language can be extended to apply to preferential state classifications based on tribal status"). Thus, the state-conferred monopoly in this case does not fall within *Mancari* and its progeny.

Moreover, the state-conferred sports gaming monopoly at issue here does not relate to Indian land, tribal status, self-government, or culture. The Secretary's power to approve the Compact derives from IGRA, which *solely* relates to gaming "on Indian lands and nowhere else," *Bay Mills*, 572 U.S. at 795, and thus cannot be itself a basis for *Mancari* rational basis scrutiny. *See Yakima,* 439 U.S. at 501 (holding that Washington state law enacted in response to specific delegation of authority by Congress to the state triggered only rational basis scrutiny under *Mancari* where the state law was "within the scope of authorization" of the federal law).

II. THERE IS A STRONG LIKELIHOOD THAT THE COURT WILL OVERTURN THE CIRCUIT OPINION.

A. IGRA's Plain Language Required the Secretary to Disapprove the Portions of the Compact Agreeing to Gaming off Indian Lands

1. IGRA Does Not Permit Compacts for Gaming off Indian Lands

Contrary to the Circuit Opinion's holding, there is no room in the IGRA statutory

scheme for "discussion" of matters outside the IGRA regime. The statutory language, the history of IGRA, and this Court's prior precedent regarding the interaction between Indians and states all preclude such state-law encroachment.

a) IGRA is Limited to Gaming "on Indian lands"

The face of IGRA limits its reach to gaming on Indian lands. IGRA authorizes the Secretary to approve a "Tribal-State compact entered into between an Indian tribe and a State governing ***gaming on Indian lands*** of such Indian tribe." 25 U.S.C. § 2710(d)(8)(A) (emphasis added). Moreover, with one exception not relevant here,[11] IGRA explicitly limits all its provisions to gaming "on Indian lands."[12] *See also Bay Mills*, 572 U.S. at 791 (referring to "on Indian lands" as "three words reflecting IGRA's overall scope (and repeated some two dozen times in the statute)").

b) IGRA's Legislative History Confirms That It Does Not Permit "Discussion" of Off-Reservation Gaming

IGRA was enacted after this Court's holding in *California v. Cabazon Band of Mission Indians*, 480 U.S. at 221– 22, that state regulation of gaming on Indian lands would "unlawfully infringe on tribal self-government," because Indian sovereignty, self-sufficiency, and self-government outweigh any countervailing state interest in discouraging organized crime. Congress responded by enacting IGRA, which "*creates a*

[11] The exception is for lands acquired for Indians in trust by the Secretary after October 17, 1988 that meet certain conditions. 25 U.S.C. § 2719(a)–(b).

[12] *See, e.g.*, 25 U.S.C. § 2710(d)(l) (authorizing Class III gaming "on Indian lands"); 25 U.S.C. § 2710(d)(8)(A) (permitting the Secretary to approve tribal-state compacts governing "gaming on Indian lands"); 25 U.S.C. § 2701(5) ("Indian tribes have the exclusive right to regulate gaming activity *on Indian lands* …"); 25 U.S.C. § 2702(3) (declaring that a "Federal regulatory authority for gaming *on Indian lands*," and "Federal standards for gaming *on Indian lands*," "are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue"); 25 U.S.C. § 2710 (a), (b) (concerning Class I and Class II "gaming *on Indian lands*").

framework" for states to regulate gaming *on Indian lands* (within various limits). *Bay Mills*, 572 U.S. at 785. Because *Cabazon* "left fully intact" states' "capacious" regulatory power *outside* Indian lands, *Bay Mills*, 572 U.S. at 794, there was no need (and no place) for IGRA to provide a mechanism for recognition or agreement as to such activities, which do not implicate tribal sovereignty or self-sufficiency.

Given this backdrop, state regulation of gaming on non-Indian lands must remain *solely* within the ambit of state law.[13] The federal IGRA process—and the Secretary's approval—should not address such state law in any manner as an IGRA compact is a creation of federal law specifically enacted to permit regulation of gaming *on Indian land*, "*and nowhere else*." *Bay Mills*, 572 U.S. at 795 (emphasis added). *See Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997) ("IGRA prescribes the permissible scope of the Compacts."). *See also Navajo Nation*, 896 F.3d at 1205 n.4 ("[T]he negotiated terms of the Compact cannot exceed what is authorized by the IGRA.") (quotation omitted).

Here, the Compact "discusses" off-reservation gaming by "deeming" actions that occur *off* Indian lands to occur *on* Indian lands. App. 122–23. The Deeming Provisions not only attempt to redefine IGRA's legislatively enacted scope of "Indian lands,"[14] but also manipulate the IGRA process to upset the carefully established balance of tribal,

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[13] Where IGRA operates (*i.e.*, on Indian lands), it carries "extraordinary preemptive force," *precisely* because it covers those activities which *Cabazon* held fall exclusively within the jurisdiction of Congress. *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 547 (8th Cir. 1996). *See also id.* ("Congress thus left states with no regulatory role over gaming except as expressly authorized by IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact.").

[14] Numerous authorities hold that gambling occurs both where a bet is placed and where it is received. *See, e.g.*, *United States v. Calamaro*, 354 U.S. 351, 354 (1957) ("Placing and receiving a wager are opposite sides of a single coin. You can't have one without the other."); *Iipay Nation*, 898 F.3d at 967.

state and federal interests enacted in IGRA. *See also Gaming Corp.*, 88 F.3d at 546 ("Tribal-state compacts are at the core of the scheme Congress developed to balance the interests of the federal government, the states, and the tribes. They are a creation of federal law, and IGRA prescribes the permissible scope of a Tribal-State compact.").

For these reasons, every court to consider the issue of off-reservation gaming in IGRA compacts has found that the Secretary may not approve a compact that regulates gaming off Indian lands. *See Amador County*, 640 F.3d at 376–77 ("IGRA provides for gaming only on 'Indian lands.'"); *see also Iipay Nation*, 898 F.3d at 967 (holding that IGRA cannot regulate mobile bets placed off Indian lands because part of the bet "does not occur on Indian lands").[15]

c) The Secretary's Inconsistent Positions in This Case Further Show that the Circuit Opinion Should be Reversed.

Finally, the Secretary's own statements show how untenable her position is. The DOI Letter recognized that "to be permissible [under IGRA]," online sports betting needed to be lawful where the bets would be placed. App. 135 n.14. That is why it said the Tribe could not offer online sports betting to players "located on other Indian lands," since the other tribes need separate compacts to have Class III gaming on their land. *Id.* Yet before the D.C. Circuit, the Secretary argued that IGRA permits the

[15] Until this case, the federal government agreed. The United States was a plaintiff in *Iipay Nation*, discussed in Section I.B. The United States also filed an amicus brief in support of the plaintiff in a challenge to online telephone-based lottery established by the Couer d'Alene Tribe in Idaho. *See, e.g.*, Brief for the United States of America as Amicus Curiae Supporting Appellee, *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002) (No. 99-35088), 1999 WL 33622333, at *12–14 (ECF 1-3); *see also id.* at *13–14 ("It follows that 'wagering,' 'gambling,' or 'gaming' occur in both the location from which a bet, or 'offer,' is tendered and the location in which the bet is accepted or received."). And the National Indian Gaming Commission, an independent federal agency within the DOI, repeatedly has opined that IGRA does not provide for gaming off Indian lands via the internet via servers located on Indian lands. App. 21.

Secretary to "approve" without "authorizing" a compact that provides for gambling off Indian lands, in places that prohibit such gambling under state law. It makes no sense for DOI to require the Tribe to geofence online gaming from other tribes' lands for the Compact "to be permissible under IGRA," while also taking the position that the legality of online sports betting in Florida is irrelevant to the IGRA approval when the Compact explicitly provides for players to place online sports bets off Indian lands in Florida.

2. The Compact's Online Sports Gaming Provisions Are Not Permissible Ancillary Provisions Under 25 U.S.C. § 2710(d)(3)(C).

The Circuit Opinion's holding that a provision "deeming" bets placed off Indian lands to occur on Indian lands might be permissible under 25 U.S.C § (d)(3)(C) also fails. *See* App. 203. That subsection does not reference gaming off Indian lands. Given IGRA's careful and repeated limitation of its scope to gaming "on Indian lands,"[10] provisions that authorize and govern gaming off Indian lands cannot be read into the list of ancillary subjects permitted by § 2710(d)(3)(C). As this Court has held, Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1626–27 (2018). The fact that "Everything" in IGRA concerns gaming on Indian lands, *Bay Mills*, 572 U.S. at 795, underscores that the mouseholes in § 2710(d)(3)(C) cannot be read to allow IGRA compacts to include provisions authorizing gaming off Indian lands.

The Circuit Opinion also misreads the individual subsections of § 2710(d)(3)(C). *See* App. 203–06. Section 2710(d)(3)(C)(i) permits provisions regarding "the application of the criminal and civil laws and regulations of the Indian tribe or the State," but only

those "directly related to, and necessary for, the licensing and regulation of such activity." The phrase "such activity" refers to the "gaming activities on the Indian lands" the previous two sections authorize an IGRA compact to govern. 25 U.S.C. §§ 2710(d)(3)(A) & (B). Similarly, § 2710(d)(3)(C)(ii) permits provisions regarding "the allocation of criminal and civil jurisdiction between the State and the Indian tribe," but only those "necessary for the enforcement of such laws and regulations," a direct reference to the "laws and regulations" described in subsection (i). The plain text of these subsections solely addresses the application and allocation of laws, regulations, and jurisdiction to the gambling activity that occurs "on Indian lands."

The Circuit Opinion also held that the Deeming Provisions could be permissible under § 2710(d)(3)(C)(vii), which wraps up the list of permissible ancillary matters with a reference to "any other subjects that are directly related to the operation of gaming activities." *See* App. 203–06. This holding overrides the limitations of subsections (i) and (ii) and renders them nugatory, violating principles of statutory construction. *Navajo Nation*, 896 F.3d at 1215–16 (If subsection (vii) "were read to allow for compacts to allocate jurisdiction with respect to any subjects directly related to the operation of Class III games, the more specific and limited jurisdictional-allocation language of clause (ii) would be (in substance) duplicative, nugatory, and of no effect—*i.e.*, surplusage."). It also is contrary to the canon "that catchall clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated." *Paroline v. United States*, 572 U.S. 434, 447 (2014) (internal quotations and citations omitted) (cleaned up). The other topics in § 2710(d)(3)(C) are concerned with gaming "on Indian lands," 25

U.S.C. § 2710(d)(3)(C), just like "[e]verything—literally everything—in IGRA." *Bay Mills*, 572 U.S. at 795.

For these reasons, every other court to address the scope of § 2710(d)(3)(C) has interpreted the clauses to be narrow. See Section __ above.

B. The Compact Violates UIGEA.

For the reasons set forth in Section I.B, there is a strong likelihood this Court will hold that the Compact violates UIGEA, and therefore the IGRA approval of the Compact was "not in accordance with law" and must be set aside under the APA. 5 U.S.C. § 706(2)(A).

There should be no question that the UIGEA issue is justiciable, and that courts have power under the APA to set aside an automatic IGRA approval that violates any Federal law, including UIGEA. Section 2710(d)(8)(C) provides that if the Secretary does not approve or disapprove a compact within 45 days of its submission, the compact is "considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter." By providing that the Compact "shall be considered to have been approved by the Secretary," IGRA provides that such an approval should be treated no differently than if the Secretary had herself made the approval. That means the statutory approval is an "agency action" that can be challenged and set aside under the APA for being "not in accordance with law." 5 U.S.C. § 706(2)(A). Thus, if Applicants show that the statutory approval was contrary to federal laws other than IGRA (such as UIGEA), it is justiciable under the APA.

Even if the statutory approval is analyzed as a "failure to act," the result is the

same. Section 2710(d)(8)(B) provides that the Secretary may disapprove an IGRA compact if it violates (i) IGRA, (ii) "any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands," or (iii) the U.S. trust obligations to Indians. In *Amador County*, the D.C. Circuit correctly opined: "The Secretary ***must*** . . . ***disapprove*** a compact if it would violate any of the three limitations in that subsection, and those limitations provide the 'law to apply.'" 640 F.3d at 381 (emphasis added). *Amador County* based this conclusion on *Dickson v. Sec'y of Defense*, 68 F.3d 1396 (D.C. Cir. 1995), which rejected an argument that a statute had committed a matter to agency discretion because it said the agency "may excuse a failure to file [if it is in] the interest of justice." *Id.* (alteration in original) (quoting *Dickson*, 68 F.3d at 1399). In that context, *Dickson* held that "may" meant "shall." 68 F.3d at 1402 & n.7 (citing two other cases in which courts, relying on statutory context, have read "may" to mean "shall"). The D.C. Circuit in *Amador County* applied the same reasoning to § 2710(d)(8)(B). As such, the Secretary's failure to disapprove a compact for any of the reasons set forth in that statute is a reviewable "failure to act" under the APA. There is no basis for limiting this reasoning to just the first provision of § 2710(d)(8)(B). If "may" means "shall" for one subsection of § 2710(d)(8)(B), it should mean that for all provisions. Further, when IGRA states that a compact "shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter," § 2710(d)(8)(C), that refers to ***all*** the provisions "of this chapter." That includes § 2710(d)(8)(B), and its reference to whether a compact violates "any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands." A compact

that violates a federal law (such as UIGEA) cannot be said to be "consistent with" the provisions of IGRA.

C. The Approval of the Compact Violated the Equal Protection Clauses of the Fifth and Fourteenth Amendments.

The Compact provides the Tribe with a statewide monopoly on internet sports betting, for bettors located both on and off tribal lands. It further exempts from state prosecution those who conduct sports betting pursuant to an IGRA compact on non-Indian lands, App. 48, 59, 64, while those who conduct sports betting on such lands *without* an IGRA compact commit a felony. *See* FLA. STAT. § 849.14; FLA. STAT. § 775.082(3)(e).

. Florida chose to provide that monopoly to the Tribe (and criminalize sports betting by all others) precisely because it hoped to shoehorn off-reservation gaming into an IGRA compact that might satisfy the Florida constitution's IGRA exception to the ban on any expansion of casino gaming in the state. That is, the Tribe was selected for the monopoly precisely because of its members' race, ancestry, ethnicity and national origin.

As explained above in Section I.C, the Circuit Opinion's determination that the Secretary's approval of this choice was subject to rational basis scrutiny is contrary to *Mancari* and its progeny, and in particular to the Ninth Circuit's decision in *Babbitt*. It remains unclear what is left of *Mancari* after this Court's subsequent decision in *Adarand*, which held that racial classifications imposed by the federal government are subject to strict scrutiny. *Adarand Constructors, inc. v. Pena*, 515 U.S. 200 (1995). *See Brackeen*, 143 S. Ct. at 1661 (Kavanaugh, J., concurring) ("So the equal protection issue remains undecided. In my view, the equal protection issue is serious."). Several courts

of appeal have noted a tension between the two cases. *See Babbitt*, 115 F.3d at 665 ("If Justice Stevens is right about the logical implications of *Adarand*, *Mancari*'s days are numbered."); *Brackeen v. Haaland*, 994 F.3d 249, 394 n.75 (5th Cir. 2021) (same). And at least part of the rationale for invalidating "purportedly benign" classifications in the college admission context might justify doing the same in the Indian gaming context. *See Students for Fair Admissions, Inc. v. Presidents and Fellows of Harvard College*, 143 S. Ct. 2141 (2023) ("History has repeatedly shown that purportedly benign discrimination may be pernicious."). But there is a strong argument that the classification in this case exceeds even what *Mancari* permits. Cases before and after *Mancari* have held that rational basis review applies only if a tribal preference is tied to Indian lands, to uniquely sovereign interests, or to the special relationship between the federal government and Indian tribes. *See* n.10 above. None of those factors are implicated when a state seeks to single out an Indian tribe for special regulation *beyond* its Indian lands.

As shown in Section I.C above, the reasoning of *Babbitt* would require strict scrutiny here, which would not be satisfied. Plaintiffs in *Babbitt* challenged the BIA's interpretation of the Reindeer Act to forbid non-Native citizens from owning reindeer in Alaska. 115 F.3d at 659. The Ninth Circuit rejected that interpretation, emphasizing that legislation that "relates to Indian land, tribal status, self-government or culture passes *Mancari*'s rational relation test because 'such regulation is rooted in the unique status of Indians as a "separate people" with their own political institutions.'" *Id.* at 664 (citation omitted). The court then concluded that the Reindeer Act "in no way relate[d]

to native land, tribal or communal status, or culture," in part because it provided "*a preference in an industry that is not uniquely native*," and in part because *the Act regulated activities outside of Indian lands*. *Id.* (emphasis added). The Reindeer Act accordingly succumbed to strict scrutiny.

In contrast, the Circuit Opinion applied a rational basis test after noting that the Compact provisions "promot[e] the economic development of federally recognized Indian tribes." App. 212. Although a statewide reindeer monopoly in favor of Indians would promote that same interest, it was not enough for the Ninth Circuit to apply a rational basis test. In fact, the *Babbitt* court expressed serious "doubt that Congress could give Indians a complete monopoly on the casino industry," because doing so would be "unrelated to Congress' unique obligation toward the Indians." 115 F.3d at 661.

III. IRREPARABLE HARM WILL OCCUR WITHOUT A STAY.

A. The Circuit Opinion Authorizes a Sea Change in Florida's Public Policy Regarding Online Gaming

The Circuit Opinion permits the Tribe and Florida officials to circumvent the Florida Constitution by shoehorning the off-Indian land sports gaming provisions into the IGRA exception to the Florida Constitution's prohibition on casino gambling (including sports gambling). There is no doubt that, upon the issuance of the mandate in this matter, the Tribe will launch a mobile sports betting application accessible throughout Florida. App. 157–67. Florida's citizens have not authorized this major shift in public policy, which was enabled solely through the Circuit Opinion's expansion of IGRA. Even if later overturned by this Court, Florida's citizenry will have been irreparably harmed by the conduct of a wide-spread illegal gaming operation in the

interim. *See, e.g.*, *Murphy*, 138 S. Ct. at 1483 (interpreting federal law to "respect the policy choices of the people of each State on the controversial issue of gambling"); *id.* at 1484 ("The legalization of sports gambling is a controversial subject."). *See also New York v. Shinnecock Indian Nation*, 280 F. Supp. 2d 1, 5 (E.D.N.Y. 2003) (finding that Tribe's "proposed violations of the State's criminal laws and public policy against gambling constitute irreparable harm to members of the public").

B. Non-Tribal Entities Offering Legal Gaming Will Be Harmed by Competing with the Tribe's Unlawful Monopoly.

If the Tribe is permitted to launch a statewide online sports betting operation, Applicants (and other non-tribal operators of gaming facilities that cannot offer online sports betting) will be irreparably harmed. Sworn testimony shows that Applicants will suffer lost revenue and profits, increased expenses, and diminished goodwill as a result of the statewide tribal monopoly. App. 150. Further, the loss of customers includes the loss of goodwill, which is generally held to be irreparable. *See, e.g.*, *Quality Carriers, Inc. v. MJK Distrib., Inc.*, 2002 WL 506997, at *12 (S.D. Ill. Apr. 3, 2002) (finding irreparable harm in business where "goodwill takes years to build up and only seconds to lose"). Although Applicants' harm would be economic in nature, that is immaterial where sovereign immunity would preclude it from recovering damages. *See Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988); *Kiowa Tribe of Okla. v. Mfg. Techns., Inc.*, 523 U.S. 751, 760 (1998). Such irreparable harm provides good cause to stay the mandate. *See Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers) (staying mandate when "expenditures cannot be recouped" because "the loss may be irreparable").

C. The Balance of the Equities and the Public Interest Support a Stay.

In balancing the equities, the Court considers whether implementation of the agency's decision "would fundamentally alter the ground rules for doing business in a substantial industry, with potentially fatal consequences for a number of the firms currently in the trade . . . ." *Commodity Futures Trading Comm'n v. British Am. Commodity Options Corp.*, 434 U.S. 1316, 1321–22 (1977). Here, the Compact creates a fundamental change in legalized gaming in Florida that would harm both Applicants and the people of Florida. *See* Sections I, III.A, & III.B above.

The Secretary will not be harmed by the proposed stay. Assessing the harm to the opposing party and weighing the public interest "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). And governmental compliance with federal law is in the public interest. *Cath. Legal Immigr. Network, Inc. v. Exec. Off. for Immigr. Rev.*, 513 F. Supp. 3d 154, 176 (D.D.C. 2021). Accordingly, "there is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters v. Newby*, 838 F.3d 1, 13 (D.C. Cir. 2016) (collecting cases). The Secretary's possible motive to assist the Tribe is irrelevant as, "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021).[16]

[16] The Tribe cannot claim harm from the stay. The Tribe's motion to intervene in this litigation was denied by the District Court, App. 169, a decision affirmed by the Circuit Opinion, *Id.* 215. Moreover, even if it had standing to assert harm from the stay, its harm would be solely economic in nature, and not irreparable. Further, the Tribe can "'have no vested interest in an illegal business activity' and any loss of income from an illegal activity is not an irreparable harm." *See United States v. RX Depot, Inc.*, 297 F. Supp. 2d 1306, 1310 (N.D. Okla. 2003).

CONCLUSION

The mandate of the District of Columbia Circuit should be stayed pending Applicants' petition for certiorari.

Respectfully submitted,

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