No. 23-862

In the
Supreme Court of the United States

WEST FLAGLER ASSOCIATES, LTD.,
DBA MAGIC CITY CASINO, ET AL.,
Petitioners,

v.

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* DANIEL WALLACH IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT.. 4

I. THE COMPACT "AUTHORIZES" OFF-RESERVATION TRIBAL GAMING ACTIVITY... 4

A. The Plain Language of the Compact 5

B. Prior Admissions by the Compacting Parties 10

C. State Law Did Not Independently Authorize Online Sports Betting 15

D. Online Wagering Cannot be Shoehorned into IGRA's Ancillary Provisions 16

II. THE CLEAR VIOLATION OF IGRA's "INDIAN LANDS" LIMITATION WARRANTS SUMMARY REVERSAL; ALTERNATIVELY, CERTIORARI SHOULD BE GRANTED DUE TO THE CIRCUIT CONFLICT AND HIGH LIKELIHOOD OF ISSUE RECURRENCE IN FUTURE CASES 21

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Amador Cnty., Cal. v. Salazar,
640 F.3d 373 (D.C. Cir. 2011) 4, 5

Artichoke Joe's California Grand Casino v. Norton,
353 F.3d 712 (9th Cir. 2003) 22, 23

Backman v. Guy,
126 N.W.2d 910 (N.D. 1964) 18

Cole v. Burns Int'l Security Servs.,
105 F.3d 1465 (D.C. Cir. 1997) 7

CSX Transp., Inc. v. Ala. Dep't of Revenue,
562 U.S. 277 (2011) 19

Giuffre v. Andrew,
579 F. Supp. 3d 429 (S.D.N.Y. 2022) 6, 7

Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n,
117 F.3d 1328 (11th Cir. 1997) 6, 7

Gustafson v. Alloyd Co.,
513 U.S. 561 (1995) 19

Marmet Health Care Center, Inc. v. Brown,
565 U.S. 530 (2012) 21

Michigan v. Bay Mills Indian Cmty.,
572 U.S. 782 (2014) 4, 19, 20, 21, 22

Murphy v. NCAA,
584 U.S. 453 (2018) 3, 9, 10

Navajo Nation v. Dalley,
896 F.3d 1196 (10th Cir. 2018) 5

North County Cmty. Alliance, Inc. v. Salazar,
573 F.3d 738 (9th Cir. 2009) 4, 22, 23

Paladino v. Avnet Computer Techs., Inc.,
134 F.3d 1054 (11th Cir. 1998) 7

Premier Ins. Co. v. Adams,
632 So.2d 1054 (Fla. 5th DCA 1994) 7

Pueblo of Pojoaque v. New Mexico,
863 F.3d 1226 (10th Cir. 2017) 22

RSUI Indem. Co. v. The Lynd Co.,
466 S.W.3d 113 (Tex. 2015) 6

State of California v. Iipay Nation of Santa Ysabel,
898 F.3d 960 (9th Cir. 2018) 15, 22, 23

United States v. Pittman,
151 F.2d 851 (5th Cir. 1945) 18, 19

STATUTES

25 U.S.C. § 2703(4) 4, 23

25 U.S.C. § 2710(a)(1)... 4

25 U.S.C. § 2710(a)(2)... 4

25 U.S.C. § 2710(b)(1)... 4

25 U.S.C. § 2710(b)(2)... 4

25 U.S.C. § 2710(b)(4)... 4

25 U.S.C. § 2710(d)(1)... 2, 4

25 U.S.C. § 2710(d)(2)(a) 4

25 U.S.C. § 2710(d)(2)(C).. 4

25 U.S.C. § 2710(d)(3)(A) 4, 18
25 U.S.C. § 2710(d)(3)(B) 18
25 U.S.C. § 2710(d)(3)(C)(i)-(ii) 16, 17, 19
25 U.S.C. § 2710(d)(3)(C)(vii) 20
25 U.S.C. § 2710(d)(5) 4
25 U.S.C. § 2710(d)(7)(A)(ii) 4
25 U.S.C. § 2710(d)(8)(a) 2, 4, 5
Ch. 2021-268, Laws of Fla., § 2 16
Fla. Stat. § 285.710 .... 15, 16
Fla. Stat. § 285.710(13)(b) (2021) 16
Fla. Stat. § 285.710(13)(b)(7) (2021) 10, 16

RULES

Sup. Ct. R. 16.1 .... 3, 21

REGULATIONS

Notice of Proposed Rulemaking, Class III Tribal State Gaming Compacts, U.S. Dept. of Int., Bureau of Indian Affairs, 87 Fed. Reg. 74,916 (Dec. 6, 2022) 23

OTHER AUTHORITIES

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Comments of the Seminole Tribe of Florida on Proposed Rule for Part 293 (Class III Tribal State Gaming Compact Review Process), Comment ID BIA-2022-0003-0006, Bureau of Indian Affairs, Feb. 23, 2023, http://tinyurl.com/y8f48728 11

Ron DeSantis, *Governor Ron DeSantis Strikes Historic Gaming Compact with Seminole Tribe of Florida*, News Release, Apr. 23, 2021, http://tinyurl.com/2p9cwxfv [https://perma.cc/F3Q9-LU5D] 11

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Daniel Wallach (@WALLACHLEGAL), X (formerly Twitter) (Nov. 10, 2021, 8:49 AM), http://tinyurl.com/3zm8z7fv [https://perma.cc/GHP4-XBFN] 11

INTEREST OF *AMICUS CURIAE*

Amicus Curiae is a Florida gaming law practitioner and academic focusing on sports betting law and regulation.[1] He is the co-founding director of the University of New Hampshire School of Law's Sports Wagering & Integrity online certificate program and teaches a course on sports betting law and regulation at the University of Miami School of Law. *Amicus Curiae* is a member of the International Masters of Gaming Law, an invitation only organization for attorneys who have distinguished themselves through demonstrated performance and publishing in gaming law, significant gaming clientele, and substantial participation in the gaming industry.[2]

This brief addresses the crucial question of whether the compact between Florida and the Seminole Tribe "authorized" off-reservation tribal gaming operations. While touched upon briefly in the petition,[3] this issue warrants a more detailed treatment in light of Justice Kavanaugh's recent statement that if the compact "authorized" off-reservation tribal gaming operations, then it would "likely" violate the Indian

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received timely notice of the intent to file this brief as required in Rule 37.2.

[2] Institutional affiliations are listed for identification purposes only and do not constitute or reflect institutional endorsement of the views expressed herein.

[3] *See* Petition at 10.

Gaming Regulatory Act ("IGRA"). App.64-65.[4] *Amicus Curiae*, who has written several articles analyzing this issue, will demonstrate – through a careful examination of the compact's plain language, its legislative history, the relevant case law, and the prior statements of the key stakeholders – that the compact indisputably "authorized" off-reservation tribal gaming operations, including online sports betting, and therefore violates IGRA.

SUMMARY OF ARGUMENT

Justice Kavanaugh has already identified the key issue in this case. In his statement accompanying this Court's denial of West Flagler's application for stay of the D.C. Circuit's mandate, Justice Kavanaugh wrote that "[i]f the compact authorized the Tribe to conduct off-reservation gaming operations, either directly or by deeming off-reservation gaming operations to somehow be on-reservation, then the compact would likely violate the Indian Gaming Regulatory Act, as the District Court explained." App.64-65 (citing 25 U.S.C. §§ 2710(d)(1), 2710(d)(8)(a)).

The "authorization" issue highlighted by Justice Kavanaugh merits closer scrutiny at the certiorari stage, particularly in light of the D.C. Circuit's hair-splitting conclusion that the compact "discusses" online sports betting off tribal lands but does not "authorize" it[5]—even though the effect of the compact was to grant the Tribe the exclusive right to operate sports betting throughout Florida for 30 years. As explained below, the

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[4] All references to "App.__" are to Petitioner's Appendix.

[5] App.11 & 14.

D.C. Circuit's pronouncement that the compact "authorizes" only "on-reservation" gaming operations is belied by: (i) the plain language of the compact; (ii) the prior statements of the compacting parties; (iii) the prior statements of the Department of the Interior; (iv) the plain language of the Florida statute ratifying the compact; and (v) the Florida statute's legislative history. These sources all decidedly point to the same conclusion and leave no doubt that the compact "authorized" off-reservation tribal gaming operations.

This Court's decision in *Murphy v. NCAA*, 584 U.S. 453 (2018), compels the same conclusion. In *Murphy*, this Court applied the ordinary meaning of the word "authorize" – i.e., to "permit," "empower," or give one "the right or authority to act" – in concluding that New Jersey's repeal of a state law banning sports gambling had the effect of authorizing that activity. The Court's reasoning in *Murphy* applies with even greater force here since the compact affirmatively approves off-reservation sports gambling operations – which were not permitted under any prior compacts – and also gives the Tribe the "right or authority to act" by granting it the exclusive right to operate such gaming. That is the essence of an "authorization."

Since the compact "authorized" off-reservation tribal gaming operations – a plain violation of IGRA's "Indian lands" limitation – the D.C. Circuit's decision and judgment should be summarily reversed pursuant to Supreme Court Rule 16.1. Alternatively, this Court should grant West Flagler's petition for writ of certiorari.

ARGUMENT

I. THE COMPACT "AUTHORIZES" OFF-RESERVATION TRIBAL GAMING ACTIVITY

It is well-settled that IGRA authorizes Class III gaming activities (which include sports betting) *only* on Indian lands. This requirement stems from IGRA § 2710(d)(8)(a), which authorizes the Secretary to approve compacts "governing gaming on Indian lands." 25 U.S.C. § 2710(d)(8)(a). It is repeated in IGRA § 2710(d)(1), which lists the conditions under which "[c]lass III gaming activities shall be lawful on Indian lands." *Id.*, § 2710(d)(1). Altogether, over a dozen provisions in IGRA regulate gaming on "Indian lands,"[6] and none regulate gaming in another location. *See North County Cmty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 744 (9th Cir. 2009) ("Tribal gaming on non-Indian lands is not authorized by or regulated under IGRA.").[7] Indeed, if there were any doubt on this issue, this Court has made clear that "[e]verything—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, 791 (2014).

Consequently, a compact may not be approved if it authorizes tribal-regulated gaming activities outside of Indian lands. *See Amador Cnty., Cal. v. Salazar*, 640 F.3d 373, 381-82 (D.C. Cir. 2011) (holding that IGRA imposes "an obligation on the Secretary to affirmatively

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[6] These provisions include 25 U.S.C. § 2710(a)(1), (a)(2), (b)(1), (b)(2), (b)(4), (d)(1), (d)(2)(a), (d)(2)(C), (d)(3)(A), (d)(5), (d)(7)(A)(ii), and (d)(8)(A).

[7] *See also id.* at 741("IGRA limits tribal gaming to locations on 'Indian lands' as defined in 25 U.S.C. § 2703(4).").

disapprove any compact" that is inconsistent with its terms; "[E]ven if disapproval were otherwise discretionary, subsection (d)(8)(a) authorizes approval only of compacts 'governing gaming on Indian lands,' suggesting that disapproval is obligatory where that particular requirement is unsatisfied."); *Navajo Nation v. Dalley*, 896 F.3d 1196, 1205 n.4 (10th Cir. 2018) (cautioning that "the negotiated terms of the Compact cannot exceed what is authorized by the IGRA.").

A. The Plain Language of the Compact

A careful examination of the relevant compact provisions confirms that off-reservation tribal gaming activities are expressly "authorized" by the compact. Section III.F of the compact lists "Sports Betting" as a "Covered Game," JA60,[8] and subsequently defines it to include "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. . . ." JA71, § III.CC.2 (emphasis added). Section IV of the compact, revealingly titled "*Authorization* and Location of Covered Games," in turn declares that "the Tribe is *authorized* to operate Covered Games on its Indian lands," JA76 (emphasis added)—a category that includes sports betting. Section IV(A) then provides, in the very next sentence, that sports wagers "made by players *physically located within the State using a mobile or other electronic device* shall be *deemed* to take place exclusively . . . on Indian Lands" at the

[8] All references to "JA__" are to the Joint Appendix filed by the parties in the D.C. Circuit.

"location of the servers or other devices used to conduct such wagering activity. . . ." *Id.*, § IV(A) (emphasis added).

The inclusion of the "deemed" language in the "Authorization" section of the compact is significant because it shows that the parties recognized the inextricable connection between the "authorization" of sports betting on Indian lands and the "deeming" of all wagers across Florida to occur on those same lands. Their placement in back-to-back sentences within Section IV(A) is telling. *See* District Court Opinion [App.54] ("By simultaneously authorizing sports betting on Indian lands and deeming gaming across Florida to occur on those same lands, Section IV(A) purports to authorize sports betting throughout the State."). Even "[t]he title of Section IV, '*Authorization* and *Location* of Covered Games,'" the District Court observed, "suggests that the *location* of gaming is relevant to its *authorization*." *Id.* (emphasis added).[9]

It is a basic rule of contractual construction that a contract should be construed, whenever possible, in a manner that gives meaning to every word and phrase. *Giuffre v. Andrew*, 579 F. Supp. 3d 429, 440 (S.D.N.Y. 2022).[10] The presumption is that

[9] *See RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 121 (Tex. 2015) (recognizing that "the title, like every other portion of a contract, may be looked to in determining its meaning because headings and titles provide context and can inform the meaning of the sections they label.").

[10] *See also Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 117 F.3d 1328, 1338 (11th Cir. 1997) ("'[A]n interpretation which gives a reasonable meaning to all provisions of a contract is preferred to one which leaves a part

contracting parties do not include words or phrases for no purpose. *Id.* Here, the contracting parties deliberately chose the word "authorize" to describe both the types of games that would be allowed under the compact and the locations of such games. The inclusion of the "deeming" language in the "Authorization" section of the compact – rather than in the compact's stand-alone section on "Jurisdiction" (Part IX) – underscores that this was an "authorization" of off-reservation online sports betting and not an allocation of regulatory jurisdiction. In straining to find the latter despite clear authorizing language, the D.C. Circuit curiously invoked the interpretive principle that "a contractual provision should, if possible, be interpreted in such a fashion as to render it lawful rather than unlawful." App.13. But that interpretive principle applies *only* when the contractual provision at issue is "unclear." *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1058 (11th Cir. 1998) ("'It is well understood that, *where a contract is unclear on a point*, an interpretation that makes the contract lawful is preferred to one that renders it unlawful.'") (quoting *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1486 (D.C. Cir. 1997)) (emphasis added). It was improperly invoked here since the compact clearly authorized sports betting both on and off Indian lands.

Importantly, the effect of the compact was to permit the Tribe to do something that it lacked the power and authority to do previously, which is to

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useless or inexplicable.'") (quoting *Premier Ins. Co. v. Adams*, 632 So.2d 1054, 1057 (Fla. 5th DCA 1994)).

operate sports betting throughout Florida on an exclusive basis. That is the essence of an "authorization." The ordinary meaning of the word "authorize" is "to permit." *See* Black's Law Dictionary 133 (6th ed. 1990) ("authorize" means "[t]o empower; to give a right or authority to act," or "[t]o permit a thing to be done in the future."). Prior to entering into this compact, the Tribe were not permitted to offer sports betting at all; it was not a covered game under its earlier compact with Florida. The 2021 compact changed all that – it classified "sports betting" as a "covered game" for the first time,[11] and "authorized" the Tribe to "operate Covered Games on its Indian lands, as defined in [IGRA]," (JA76, § IV.A), and further provided that all in-state wagers on sporting events "shall be deemed . . . to be exclusively conducted by the Tribe at its Facilities where the sports book(s) . . . are located," even those that are made "using an electronic device" "by a Patron physically located in the State, but not on [the Tribe's] Indian lands." (JA71, § III(CC)(2)); *see also* JA76, § IV.A (providing that "wagers on Sports Betting . . . shall be deemed to take place exclusively where received at the location of the servers. . . ."). In this manner, the 2021

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[11] *See* Seminole Tribe of Florida's Motion for Limited Intervention and Statement of Points of Law and Authorities in Support, *West Flagler Assocs., Ltd. v. Haaland*, United States District Court for the District of Columbia, Case No. 1:21-cv-02192-DLF, D.E. 13, at 1 (filed Sept. 17, 2021) ("The 2021 Compact adds several new forms of gaming exclusively made available to the Tribe, including sports betting. Under the 2021 Compact, the Tribe may conduct sports betting through use of electronic devices connected via the internet.").

compact "authorizes" the Tribe to operate online sports betting throughout the State of Florida.

This Court's decision in *Murphy v. NCAA*, 584 U.S. 453 (2018), is instructive. In *Murphy*, this Court concluded that New Jersey's repeal of a state law banning sports gambling amounted to an "authorization" of that activity. *Id.* at 467-68. In reaching this conclusion, the Court explained how its holding comports with the ordinary meaning of the word "authorize":

> When a State completely or partially repeals old laws banning sports gambling, it "authorize[s]" that activity. This is clear when the state-law landscape at the time of PASPA's enactment is taken into account. At that time, all forms of sports gambling were illegal in the great majority of States, and in that context, the competing definitions offered by the parties lead to the same conclusion. The repeal of a state law banning sports gambling not only "permits" sports gambling (petitioners' favored definition); it also gives those now free to conduct a sports betting operation the "right or authority to act"; it "empowers" them (respondents' and the United States' definition).

Id.

Applying the ordinary meaning of the word "authorize" in the present case, it is clear that the compact not only "permits" off-reservation sports

gambling activities – which were not compacted previously – but also gives the Tribe the "right or authority to act" by granting it the exclusive right to operate such gaming. JA110, Part XII ["Grant of Exclusivity; Reduction of Tribal Payments Because of Loss of Exclusivity Or Other Changes in Florida Law"] ("The intent of this Part is to provide the Tribe with the right to operate Covered Games on an exclusive basis *throughout the State*. . . .") (emphasis added). That "empowerment" would not exist without the compact. It certainly does not exist independently under the state implementing statute, which is completely tethered to the compact.[12] Thus, if a repeal can be an "authorization" when the resulting effect is "to permit" an activity that had previously been banned and endow a limited class of stakeholders with the right to operate that activity (as was the case in *Murphy*), then a compact which affirmatively approves an activity previously banned – and confers the right under federal law to operate that activity on an exclusive basis – is similarly an "authorization."

B. Prior Admissions by the Compacting Parties

Consistent with the compact's plain language, the compacting parties repeatedly characterized the compact as having "authorized" off-reservation tribal

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[12] *See* Fla. Stat. § 285.710(13)(b)(7) (2021) ("[T]he following class III games . . . are hereby *authorized* to be conducted by the Tribe *pursuant to the compact* . . . 7. Sports betting. Wagers on sports betting, *including wagers made by players physically located within the state using a mobile or other electronic device* . . . .") (emphasis added).

gaming operations. When the new compact with Florida was signed in April 2021, the Seminole Tribe issued a press release proclaiming that "[t]he 2021 Compact authorizes the Tribe to accept sports wagers in person and from patrons physically located in the State via mobile devices."[13] On that same day, Governor DeSantis – who signed the compact on behalf of Florida – issued his own press release declaring that the 2021 compact is "[l]arger and more expansive than any other gaming compact in U.S. history," and "[m]ost notably, . . . modernizes the gaming industry through the authorization of sports betting in Florida through the Tribe."[14]

During the proceedings below, the State of Florida – represented by Florida's Attorney General – openly acknowledged that the compact "authorized" online sports betting. In its amicus curiae brief filed with the District Court, the State declared that "[t]he

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[13] *See* Daniel Wallach (@WALLACHLEGAL), X (formerly Twitter) (Nov. 10, 2021, 8:49 AM), http://tinyurl.com/3zm8z7fv [https://perma.cc/GHP4-XBFN]. *See also* Comments of the Seminole Tribe of Florida on Proposed Rule for Part 293 (Class III Tribal State Gaming Compact Review Process), Comment ID BIA-2022-0003-0006, Bureau of Indian Affairs, Feb. 23, 2023, at 11, http://tinyurl.com/y8f48728 ("In 2021, the Tribe and the State of Florida entered into a gaming compact (2021 Compact) that *authorized* the Tribe to accept sports betting wagers that were to be made remotely by patrons physically located in the State where they were authorized, with the bets accepted by servers located on the Tribe's Indian lands.") (emphasis added).

[14] Ron DeSantis, *Governor Ron DeSantis Strikes Historic Gaming Compact with Seminole Tribe of Florida*, News Release, Apr. 23, 2021, http://tinyurl.com/2p9cwxfv [https://perma.cc/F3Q9-LU5D].

Compact expands and modernizes casino gaming in Florida, including by *authorizing*—as have many other states—*intrastate internet sports betting*."[15] In its amicus curiae brief filed with the D.C. Circuit, the State reiterated that "[t]he Compact expands and modernizes gambling in Florida, including by *authorizing*—like many other states—*intrastate internet sports betting*."[16]

Florida legislative officials likewise acknowledged that the compact "authorized" off-reservation gaming operations. During the May 2021 special session which resulted in the legislative approval of the compact, Florida Senate leaders prepared a fact sheet for lawmakers titled "FREQUENTLY ASKED QUESTIONS SB 2A – IMPLEMENTATION OF THE 2021 GAMING COMPACT." Page 7 of that document asserts that "[t]he 2021 Gaming Compact *authorizes sports betting* on professional and collegiate sport events *by players physically located in Florida who may use a mobile or other electronic device*, exclusively by and through sports books conducted and operated by the Seminole

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[15] Amicus Curiae Brief of the State of Florida in Support of the Federal Government's Motion to Dismiss and in Opposition to Plaintiffs' Motion for Summary Judgment, *West Flagler Assocs., Ltd. v. Haaland*, United States District Court for the District of Columbia, Case No. 1:21-cv-02192-DLF, D.E. 28, at 1 (filed Oct. 19, 2021) (emphasis added).

[16] Brief for Amicus Curiae State of Florida in Support of Federal Appellants' Request for Reversal, *West Flagler Assocs., Ltd. v. Haaland*, United States Court of Appeals for the District of Columbia Circuit, Case No. 22-5022, at 1 (filed Aug. 24, 2022) (emphasis added).

Tribe."[17] Similarly, a bill analysis and fiscal impact statement prepared for Florida lawmakers prior to the vote on Senate Bill 2A acknowledged that "[t]he 2021 Gaming Compact . . . *[a]uthorizes sports betting* on professional and collegiate sport events *by players physically located in the State who may use a mobile or other electronic device*, exclusively by and through sports books conducted and operated by the Seminole Tribe . . . ."[18] Finally, the official Bill Summary for the approved SB 2A recites that "[t]he 2021 Gaming Compact . . . *[a]uthorizes sports betting . . . by players physically located in the State who may use a mobile or other electronic device*, exclusively by and through sports books conducted and operated by the Seminole Tribe . . . ."[19]

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[17] FREQUENTLY ASKED QUESTIONS SB 2A–IMPLEMENTATION OF THE 2021 GAMING COMPACT, Florida Senate, May 17, 2021, at 7, http://tinyurl.com/4srnauvk [https://perma.cc/8J5M-EGEU] (emphasis added); *see also id.* at 8 ("The 2021 Compact authorizes . . . two forms of gaming that utilize the Internet, sports wagering and fantasy sports contests.").

[18] BILL ANALYSIS AND FISCAL IMPACT STATEMENT, CS/SB 2-A, Implementation of the 2021 Gaming Compact Between the Seminole Tribe of Florida and the State of Florida, The Florida Senate, May 17, 2021, at 1-2, http://tinyurl.com/4r9nf4ar [https://perma.cc/A44J-6HCB] (emphasis added).

[19] BILL SUMMARY, CS/SB 2-A – Implementation of the 2021 Gaming Compact Between the Seminole Tribe of Florida and the State of Florida, The Florida Senate, Committee on Appropriations, 2021-A Summary of Legislation Passed, May 20, 2021, http://tinyurl.com/5x6csxmx [https://perma.cc/56JY-9N2P] (emphasis added).

Even the federal government took a decidedly different view of the compact before any legal disputes arose. In a letter dated August 6, 2021, announcing the approval of the compact "by operation of law to the extent that it complies with IGRA and existing Federal law,"[20] Bryan Newland, the DOI's Principal Assistant Secretary for Indian Affairs, acknowledged that the compact "*authorizes* the Tribe to conduct Class III gaming on its lands and *expands* the allowable scope of gaming to *include mobile sports betting*, amongst other games."[21] Citing specific provisions of the compact, Secretary Newland stated that "[t]he Tribe is . . . *authorized* to conduct the following new games: . . . *sports betting* (at casinos and *on mobile devices*) . . . ."[22] He acknowledged that "*both the Compact* and the State law *authorize* the Tribe to engage in *mobile sports betting* and provide that the gaming takes place on Indian lands where: (1) the Tribe owns and operates the gaming, (2) the server is located on Indian lands; and (3) the player is located within the geographic bounds of the State."[23]

This straightforward description of the Compact's "authorizing" effect is carried forward in the appellate briefs filed below by Secretary Haaland and the Department of the Interior. In their Opening Brief filed with the D.C. Circuit, the Secretary and the DOI acknowledged that "[t]he Compact *authorizes* the Tribe to offer *online sports betting* through servers

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[20] JA214.

[21] JA215 (emphasis added).

[22] JA216 (emphasis added).

[23] JA220 (emphasis added).

located on Indian lands in the State."[24] On page 28, the Federal Appellants acknowledged that it is "true" that "the Compact states that the Tribe '*is authorized*' to operate an *online sports book* and that 'wagers . . . made by players physically located within the State using a mobile or other electronic device shall be deemed to take place' on Indian lands."[25] They acknowledged that this language "could be read . . . as an attempt to declare that all such gaming occurs on Indian lands *for purposes of IGRA*, such that IGRA itself authorizes both the placing and receiving of wagers."[26] "That reading," they conceded, "would indeed be problematic" in light of the Ninth Circuit's decision in *State of California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960 (9th Cir. 2018),[27] which held that the *placing* of internet wagers by patrons from locations outside of Indian lands constituted "gaming activity" that was beyond IGRA's scope. *Id.* at 968.

C. State Law Did Not Independently Authorize Online Sports Betting

Along the same lines, the D.C. Circuit's implicit finding that Florida state law – rather than the compact – "authorized" online sports betting is contradicted by the plain language of the Florida statute ratifying the compact. That statute – Section

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[24] Opening Brief for Federal Appellants, *West Flagler Assocs., Ltd. v. Haaland*, United States Court of Appeals for the District of Columbia Circuit, Case No. 22-5022, at 1 (filed Aug. 17, 2022).

[25] *Id.* at 28 (emphasis added).

[26] *Id.* (emphasis in original).

[27] *Id.*

285.710, Florida Statutes [titled "Compact authorization"] – clearly and unambiguously states that off-reservation sports betting is "authorized" to be conducted by the Tribe "pursuant to the compact." (*See* Ch. 2021-268, Laws of Fla., § 2 [adding Section 285.710(13)(b)(7) to specify that ". . . the following class III games are hereby *authorized* to be conducted by the Tribe *pursuant to the compact* . . . Sports betting, . . . *including wagers made by players physically located within the state using a mobile or other electronic device* . . . ."]) (emphasis added). In other words, there was no independent state law authorization that is untethered from the compact. As Section 285.710(13)(b) makes plain, the State's authorization of off-reservation online sports betting is strictly and solely "pursuant to the compact."

D. Online Wagering Cannot be Shoehorned into IGRA's Ancillary Provisions

In characterizing the "deeming" language as an allocation of regulatory jurisdiction permitted by section 2710(d)(3)(C)(i)-(ii) of IGRA, the D.C. Circuit improperly conflated the compact's patron dispute resolution procedure (§ VI(A)) with a broad transfer of civil regulatory jurisdiction over *all aspects* of the Tribe's off-reservation gaming operations. *See* App.14 ["Because the Compact requires all gaming disputes be resolved in accordance with tribal law, *see* J.A. 702 (Compact, § VI(A), this 'deeming' provision simply allocates jurisdiction between Florida and the Tribe, as permitted by 25 U.S.C. § 2710(d)(3)(C)(i)-(ii)."]. Section VI(A) of the compact does not sweep as broadly as the D.C. Circuit suggests. By its plain terms, Section VI(A) only addresses "Patron disputes"

involving gaming (such as contested-winning disputes).[28] It does not purport to "regulate" the entire online sports betting transaction "from start to finish," as the Tribe asserted below.[29] Thus, the reliance of the D.C. Circuit on Section VI(A) is misplaced due to the provision's limited scope.

But even more fundamentally, IGRA's allowance for jurisdictional allocations is confined to "Indian lands" activity and does not extend to off-reservation tribal gaming operations. The relevant provision, section 2710(d)(3)(C)(i)-(ii), states:

> Any Tribal-State compact negotiated *under subparagraph (A)* may include provisions relating to – (i) the application of criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of *such activity*; [and] (ii) the allocation of criminal and civil jurisdiction between the State and the Indian Tribe necessary for the enforcement of such laws and regulations; . . .

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

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[28] JA86, § VI(A) ("All Patron disputes involving gaming will be resolved in accordance with the procedures established in the Seminole Tribal Gaming Code. . . .").

[29] *See* Brief of Seminole Tribe of Florida As Amicus Curiae in Support of Federal Defendants' Request For Reversal, *West Flagler Assocs., Ltd. v. Haaland*, United States Court of Appeals for the District of Columbia Circuit, Case No. 22-5022, at 12 (filed Aug. 24, 2022).

Read together, subsections (i) and (ii) allow compacts "negotiated under subparagraph (A)" to shift jurisdiction between States and Indian tribes for the enforcement of laws and regulations directly related to, and necessary for, the licensing and regulation of "*such activity*." (emphasis added). The key words are "subparagraph (A)" and "such activity." The cross-reference to subparagraph (A) incorporates section 2710(d)(3)(A), which provides the reference point for the meaning of the phrase "such activity" in subparagraph (C). The only "activity" mentioned in subparagraph (A) is "Class III gaming activity" conducted "on Indian lands." *See* 25 U.S.C. § 2710(d)(3)(A) ("Any Indian tribe having jurisdiction *over the Indian lands upon which a Class III gaming activity is being conducted*, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities.") (emphasis added).

The next clause – subparagraph (B) – likewise refers to "gaming activities on Indian lands." 25 U.S.C. § 2710(d)(3)(B) ("Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe. . . .").

Under the last antecedent rule of statutory construction, the word "such," when used in a statute, must, in order to be intelligible, refer back to some antecedent, i.e., "something previously spoken of, something that has gone before, something that has been specified." *Backman v. Guy*, 126 N.W.2d 910, 914-15 (N.D. 1964); *see also United States v. Pittman*, 151 F.2d 851, 852 (5th Cir. 1945) ("We cannot throw

away the word 'such.' It is descriptive and limiting, referring always to a class just before pointed out."). Consequently, the use of the phrase "such activity" in subparagraph (C) necessarily refers to the "activity" specified in the preceding two subparagraphs, which is "gaming activity" on "Indian lands."

It is also a well-established interpretative rule that terms within a statute are to be interpreted in a consistent manner throughout the statute. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995) ("[W]e adopt the premise that the term should be construed, if possible, to give it a consistent meaning throughout the Act. That principle follows from our duty to construe statutes, not isolated provisions."). Consistent with its treatment throughout IGRA, the phrase "such activity" – as used in section 2710(d)(3)(C)(i)-(ii) and clarified by the incorporated subparagraph (A) – refers to gaming activity conducted on Indian lands only. *See Bay Mills*, 572 U.S. at 795 ("Everything—literally everything—in IGRA affords tools . . . to regulate gaming *on Indian lands*, *and nowhere else*.") (emphasis added). To read section 2710(d)(3)(C)(i)-(ii) as permitting the transfer of regulatory jurisdiction over *all* gaming activities regardless of geographic location – even those occurring hundreds of miles away from tribal lands – would render the phrase "such activity" in subsection (C) completely meaningless and nullify subparagraph (A)'s reference to "gaming activities" on "Indian lands." *See CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 291 (2011) ("[A] statute should be interpreted so as not to render one part inoperative.").

Finally, the D.C. Circuit's attempt to shoehorn statewide remote wagering into IGRA's catchall provision – 25 U.S.C. § 2710(d)(3)(C)(vii) – completely misapprehends the statutory language. The placing of wagers from outside Indian lands is not a "subject" that is "directly related to the operation of gaming activities" – instead, that is the "gaming activity" itself. The federal government has conceded that.[30] *See also Bay Mills*, 572 U.S. at 792-93 ("gaming activity" for purposes of IGRA is "the stuff involved in playing Class III games . . . each roll of the dice and spin of the wheel."). The D.C. Circuit's use of § 2710(d)(3)(C)(vii) as a vehicle for allowing the compacting of off-reservation gaming activities (i.e., bets placed from outside Indian lands), if accepted, would illogically transform that provision to mean "*gaming activities* . . . directly related to the operation of *gaming activities*." Such a circular description would eviscerate IGRA's "Indian lands" boundaries.

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[30] *See* Federal Defendants' Supplemental Memorandum, *West Flagler Assocs., Ltd. v. Haaland*, United States District Court for the District of Columbia, Case No. 1:21-cv-02192-DLF, D.E. 41, at 8 (filed Nov. 9, 2021) ("Federal Defendants do not . . . dispute that the placement of a wager or bet is 'gaming activity' under IGRA – including when the wager is transmitted over the Internet or through other electronic means.").

II. THE CLEAR VIOLATION OF IGRA's "INDIAN LANDS" LIMITATION WARRANTS SUMMARY REVERSAL; ALTERNATIVELY, CERTIORARI SHOULD BE GRANTED DUE TO THE CIRCUIT CONFLICT AND HIGH LIKELIHOOD OF ISSUE RECURRENCE IN FUTURE CASES

The compact's authorization of off-reservation tribal gaming operations constitutes a clear violation of IGRA's "Indian lands" limitation. *See Bay Mills*, 572 U.S. at 795 ("Everything—literally everything—in IGRA affords tools (for either federal or state officials) to regulate gaming *on Indian lands*, *and nowhere else*.") (emphasis added). The D.C. Circuit's strained interpretation of IGRA as allowing for compacted tribal gaming activities outside of Indian lands is fundamentally at odds with IGRA's plain language, the compact's clear terms, and the *Bay Mills* decision. As such, the appropriate remedy would be for this Court to enter a summary disposition on the merits reversing the decision of the D.C. Circuit. *See Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 532 (2012) (summary reversal is appropriate under Rule 16.1 when a lower court's interpretation of a statute is "both incorrect and inconsistent with clear instruction in the precedents of this Court.").

In the alternative, this Court should grant West Flagler's petition for writ of certiorari for several reasons. First, the D.C. Circuit's decision – which holds that IGRA can "address" tribal-operated gaming activity *outside* of Indian lands – is in direct conflict with *Bay Mills* and at least four federal appeals court decisions declaring that IGRA has no application to

off-reservation tribal gaming activities. *See Iipay*, 898 F.3d at 967-68 (holding that tribal-operated internet bingo game was not protected under IGRA because the "gaming activity" – the patrons' act of placing a bet or wager on the bingo game – did not take place on Indian lands and was beyond IGRA's scope);[31] *Pueblo of Pojoaque v. New Mexico*, 863 F.3d 1226, 1235 (10th Cir. 2017) ("[IGRA] does not address gaming activities that occur off Indian lands."); *N. County Cmty. Alliance*, 573 F.3d at 744 ("Tribal gaming on non-Indian lands is not authorized by or regulated under IGRA."); *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 735 (9th Cir. 2003) ("Under IGRA, . . . individual Indians (or even Indian tribes) could not establish a class III gaming establishment on non-Indian lands.").

Second, the petition raises important questions of federal law that, unless resolved, are highly likely to recur in future cases. Denying certiorari would encourage tribes and states in other jurisdictions to enter into compacts for internet gaming, similar to the Florida compact, in reliance on the D.C. Circuit's

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[31] As the federal government explained in its appellate court filing in *Iipay*, allowing statewide remote wagering rests on "an interpretation of IGRA . . . wholly inconsistent with the Act's express terms, its legislative history, and the Supreme Court's own interpretation of the Act in *Bay Mills*. To adopt [this] broad view, this Court would not only have to ignore the Supreme Court's holding . . . but would also have to re-write the Act itself." *State of California v. Iipay Nation of Santa Ysabel*, Case No. 17-55150, United States Court of Appeals for the Ninth Circuit, Joint Answer Brief of Appellees United States of America and State of California, 2017 WL 3174118, at *12 (filed July 17, 2017).

decision.[32] The resulting compacts could spur new litigation in other circuits over the compactability of internet gaming but yielding different outcomes and exacerbating the already-existing intercircuit conflict over IGRA's applicability to off-reservation tribal gaming operations.[33]

In addition, there will likely be legal challenges to the proposed Bureau of Indian Affairs ("BIA") rule that would allow states and tribes to compact for internet gaming under the premise that it is an "allocation of jurisdiction" rather than an "authorization."[34] Not surprisingly, the proposed rule drew its inspiration from the Florida compact.[35] Thus,

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[32] See Matthew Kredell, *How The Seminole Compact Ruling Impacts California Tribes' Path To Online Sports Betting*, PlayUSA.com, July 11, 2023, http://tinyurl.com/5ax9xww9 ("California Indian tribes see the federal court ruling reaffirming the Seminole Tribe of Florida's compact as a potential game-changer for their path to online sports betting.").

[33] In California, for example, any compact that includes provisions for tribal-operated internet gaming would be highly vulnerable to a legal challenge based on the abundant Ninth Circuit decisional law – namely, *Iipay*, *North County Cmty. Alliance*, and *Artichoke Joe's* – holding that IGRA limits tribal gaming to "Indian lands" as defined in 25 § U.S.C. 2703(4).

[34] Notice of Proposed Rulemaking, *Class III Tribal State Gaming Compacts*, U.S. Dept. of Int., Bureau of Indian Affairs, 87 Fed. Reg. 74,916, 74,919, 74,942 & 74,947 (Dec. 6, 2022) (adding proposed section 293.29 to 25 CFR Part 293 to provide that a tribe and a state may compact for statewide remote wagering or internet gaming under IGRA), http://tinyurl.com/bd2zhybn [https://perma.cc/NHM3-Z3Q4].

[35] *See* Transcript of Tribal Consultation Meeting, Gaming Compact Process Regulations, 25 CFR Part 293, U.S. Dept. of Interior, Bureau of Indian Affairs, Phoenix, Az., Jan. 13, 2023, at

if certiorari is denied, the BIA will presumably finalize the proposed rule, sparking even more litigation over the same issue. Indeed, numerous state and local governments (including the attorney generals of 20 states) and gaming industry stakeholders have submitted public comments in opposition to the proposed rule, arguing, *inter alia*, that it would overstep the BIA's statutory authority by disregarding the requirement that gaming conducted under IGRA must occur on tribal lands.[36] These objectors are the likely plaintiffs in any future federal court challenges under the Administrative Procedure Act, thereby ensuring that the question of IGRA's applicability to off-reservation tribal gaming persists beyond the current litigation. Therefore, the Court should accept certiorari to address this critical federal question, given its high likelihood of recurrence in future cases.

46:11-17, (commenting that the proposed rule "breathes life into the approach taken in the . . . Florida compact, even if, God forbid, the DC Circuit affirms the district court in West Flagler. . . ."), http://tinyurl.com/yt9trnwm [https://perma.cc/TM6U-5GK4].

[36] *See* Public Comments, Proposed Rule, *Class III Tribal State Gaming Compacts*, Bureau of Indian Affairs, Mar. 1, 2023, http://tinyurl.com/2zvzw6em [https://perma.cc/BJD4-DSHK].

CONCLUSION

For the foregoing reasons, *Amicus Curiae* requests that this Court enter a summary disposition on the merits reversing the decision and judgment of the D.C. Circuit, or, in the alternative, granting West Flagler's petition for writ of certiorari.

Respectfully submitted,

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