No. ____

IN THE

Supreme Court of the United States

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

v.

DEBRA HAALAND, *et al.*,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Florida Constitution prohibits casino gambling, including sports gambling, absent a citizen's initiative—unless it occurs "on tribal lands" pursuant to a compact between the State and an Indian tribe that has been approved under the Indian Gaming Regulatory Act ("IGRA").

In April 2021, Florida and the Seminole Tribe executed a Compact that, among other things, provides for the Tribe to offer sports betting over the internet to people located anywhere in Florida, including locations that are not on tribal lands, by "deeming" online sports bets placed off tribal lands to have been made on tribal lands. The Secretary of the Interior allowed that compact to be approved under IGRA, and the D.C. Circuit upheld that approval. The questions presented are:

1. Whether IGRA authorizes the approval of a compact that purports to allow for an online sports gambling monopoly throughout the state and off Indian lands.

2. Whether an IGRA compact violates the Unlawful Internet Gambling Enforcement Act if it provides for internet sports betting that is unlawful where many of the bets are placed.

3. Whether the Secretary's approval of a tribal-state compact violates equal protection principles where it provides a specific tribe with a monopoly on online sports gaming off tribal lands, while state law makes that conduct a felony for everyone else.

PARTIES TO THE PROCEEDING

Petitioners West Flagler Associates, Ltd., and Bonita-Fort Myers Corporation ("Petitioners") were plaintiffs in the United States District Court for the District of Columbia, and appellees in the United States Court of Appeals for the District of Columbia Circuit.

Respondents United States Department of the Interior and Debra Haaland, in her official capacity as Secretary of the Interior, were defendants in the United States District Court for the District of Columbia, and appellants in the United States Court of Appeals for the District of Columbia Circuit.

RULE 29.6 STATEMENT

Petitioner West Flagler Associates, Ltd., a Florida Limited Partnership, is wholly owned by Southwest Florida Enterprises, Inc., and Petitioner Bonita-Fort Myers Corporation, a Florida Corporation, is also wholly owned by Southwest Florida Enterprises, Inc. No publicly held company has a 10% or more ownership interest in Petitioners or their parent company.

RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings:

West Flagler Associates, Ltd. et al. v. Haaland et al., No. 1:21-cv-02192-DLF (D.D.C.), order filed November 22, 2021.

West Flagler Associates, Ltd., et al. v. Haaland, et al., No. 21-5265 (D.C. Cir.), opinion filed June 30, 2023, and petition for rehearing denied September 11, 2023.

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INTRODUCTION

This Petition raises an important question of federal law: may the governor of a State and an Indian tribe use a federal approval of an IGRA compact as a backdoor around state constitutional prohibitions against online sports gambling conducted *off* tribal lands, and thereby create a sports gambling monopoly for the tribe while making the same conduct a felony for everyone else?

This question is exceptionally important not just for the people of Florida, but for the nationwide precedent it will set for other state-tribal compacts if the Court of Appeals' affirmative answer is left undisturbed—as an end-run not just around state-law prohibitions on gaming off tribal lands, but also around Congress' limitation of IGRA's federal imprimatur to gambling *on* tribal lands. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 795 (2014) ("Everything—literally everything—in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands, and nowhere else.").

In 2021, the Governor of Florida and the Seminole Tribe ("the Tribe") executed a compact ("the Compact") that purports on its face to authorize the Tribe to offer online sports gambling anywhere in the State, including locations that are off its tribal lands. The Compact provides that all online sports bets placed from off tribal lands "shall be deemed" to have been placed "exclusively" on tribal lands. Through this artifice, the Compact transparently attempts to get around the Florida Constitution—which requires a popular citizen's initiative to authorize *any* sports betting *except* where authorized by a valid compact under IGRA for gambling "on tribal lands."

Notwithstanding the Compact's clear attempt to abuse IGRA to bootstrap approval of off-reservation sports betting, the Secretary allowed it to enter into force.

Petitioners, who operate traditional "pari-mutuel" gambling establishments in Florida that will suffer competitive injury from this state-sponsored monopoly, brought this suit to challenge the Secretary's *ultra vires* approval of the Compact.

The District Court ruled in favor of Petitioners, holding that IGRA did not authorize the approval of a compact that authorized gambling off Indian lands.

The D.C. Circuit reversed. It agreed that IGRA does not authorize the approval of any compact provision that authorizes gambling off Indian lands but held that it was possible to construe the Compact as merely "discussing" or "referencing" the online sports gambling that would occur off Indian lands, not as "authorizing" it. This "saving construction" was inconsistent with this Court's precedents, and improperly evaded the substantial federal questions presented by the Compact's approval.

The D.C. Circuit's decision allows Florida and the Tribe to have their cake and eat it too. The whole point of the Compact is to provide a hook for dodging Florida's constitutional requirement of a popular referendum to approve off-reservation sports betting. By upholding the approval of the Compact, the Court of Appeals necessarily allowed that fiction to flourish—all while misinterpreting IGRA, the Unlawful Internet Gambling Enforcement Act ("UIGEA"), and this Court's equal protection jurisprudence.

Although this Court denied Petitioners' subsequent application for a stay of the mandate pending appeal, Justice Kavanaugh agreed 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." App.64-65. He also noted that, "[t]o the extent that a separate Florida statute . . . authorizes the Seminole Tribe—and only the Seminole Tribe—to conduct certain off-reservation gaming operations in Florida, the state law raises serious equal protection issues." *Id.* at 65.

Those issues have not gone away. And although the Florida Supreme Court is currently considering a state-law challenge to the Compact, only this Court can correct the D.C. Circuit's erroneous affirmation of the Secretary's approval of the Compact and conclusively resolve the equal protection concerns identified by Justice Kavanaugh. Thus, certiorari is warranted because each of the three federal questions presented by this Petition, which are not currently before the Florida Supreme Court, are of massive importance for the future of online gaming across the country—and can only be conclusively resolved by this Court.

These issues are also urgent. The Tribe launched its online sports gaming app on November 7, 2023—commencing the very gaming the D.C. Circuit said was "not authorized" by the Compact, and thus not approved under IGRA, even though it is set forth in the plain text of the Compact. Yet the Florida Supreme Court rejected Petitioners' request to

expedite the quo warranto proceeding in response to the launch of that gaming. Nevertheless, because there is a scenario in which a Florida Supreme Court decision could moot this Petition, if this Court believed appropriate, Petitioners would acquiesce to an extension of time for any opposition to this Petition until 30 days after a decision by the Florida Supreme Court.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit (App.1-27) is reported at 71 F.4th 1059 (D.C. Cir. 2023). The Opinion of the United States District Court for the District of Columbia (App.28-59) is reported at 573 F. Supp. 3d 260 (D.D.C. 2021).

JURISDICTION

The Court of Appeals issued its opinion and judgment on June 30, 2023, and denied Petitioners' petition for rehearing on September 11, 2023. App.62-63. This Court has jurisdiction under 28 U.S.C. § 1254(1). On December 1, 2023, this Court granted Application No. 23A494, extending the time to file this Petition until February 8, 2024.

STATUTORY PROVISIONS INVOLVED

This Petition presents a question under a provision of the Indian Gaming Regulatory Act ("IGRA"), found at 25 U.S.C. § 2710(d), which is reproduced in the Appendix at App.66-74. This Petition also presents a question under a provision of the Unlawful Internet

Gambling Enforcement Act ("UIGEA"), found at 31 U.S.C. § 5362(10), which is reproduced at App.75-78.

STATEMENT OF THE CASE

A. Legal Background

1. IGRA

In 1987, this Court held that the state of California had no authority to regulate gambling activities conducted on Indian lands, and that states generally had no such authority unless Congress provided for it. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207, 221-22 (1987).

In 1988, Congress reacted to *Cabazon* by enacting the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq*. IGRA attempts to harmonize the federal, state, and tribal interests in regulating gaming on tribal lands.

IGRA distinguishes between three classes of gaming. Class I gaming is defined as "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." *Id.* § 2703(6). IGRA provides that "Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter." *Id.* § 2710(a)(1).

IGRA defines Class II gaming as certain types of bingo and certain card games. *Id.* § 2703(7). IGRA provides that Indian tribes may engage in, license, or regulate Class II gaming if (A) "such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity," and (B) such gaming is approved by an ordinance or resolution adopted by the governing body of the

Indian tribe, and approved by its Chairman, in accordance with the provisions of IGRA. *Id.* §§ 2710(b)(1)(A), (B).

IGRA defines Class III gaming as "all forms of gaming that are not class I gaming or class II gaming." *Id.* § 2703(8). IGRA provides that Class III gaming shall be lawful on Indian lands only if it is (A) authorized by an ordinance or resolution approved by the Indian tribe's governing body, approved by its Chairman, and in accordance with IGRA's Class II provision; (B) "located in a State that permits such gaming for any purpose by any person, organization, or entity"; and (C) "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State" that is in effect pursuant to IGRA. *Id.* §§ 2710(d)(1)(A)-(C).

IGRA provides that a Tribal-State gaming compact "shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register." *Id.* § 2710(d)(3)(B). The Secretary of Interior "is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe." *Id.* § 2710(d)(8)(A). The Secretary may disapprove any compact that violates (A) the provisions of IGRA, (B) the provisions of any other Federal law, or (C) the trust obligations of the United States to the Indian tribes. *Id.* § 2710(d)(8)(B).

If the Secretary does not approve or disapprove a compact within 45 days of its being submitted for approval, "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." *Id.* § 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, 375 (D.C. Cir. 2011).

IGRA was enacted before the advent of the Internet and long before the prospect of mobile or online sports gaming, and therefore has no provisions that address internet gambling.

2. UIGEA

In 2006, Congress enacted the Unlawful Internet Gambling Enforcement Act ("UIGEA"), 31 U.S.C. §§ 5361 *et seq*. UIGEA prohibits anyone "engaged in the business of betting or wagering" from accepting payments by credit card, electronic funds transfer, or various other means "in connection with the participation of another person in unlawful Internet gambling." *Id.* § 5363. "Unlawful Internet gambling" occurs when someone places, receives, or transmits a "bet or wager" using the internet that "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." *Id.* § 5362(10)(A); *see also id.* § 5362(1)(A).

3. Florida Constitution

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.*[1]

The Florida Constitution defines "casino gambling" to include what 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 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).

B. Factual Background

1. 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. JA118.[2] The Compact provides:

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[1] A citizens' initiative pursuant to Article XI, section 3, is a referendum initiated by the voters to amend the Florida Constitution. Fla. Const. art. XI, § 3.

[2] All references to "JA__" are to the Joint Appendix filed by the parties in the Court of Appeals.

> "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."

JA76 (Part IV.A) (emphasis added).

Thus, the Compact authorizes the Tribe to offer "Covered Games." It defines "Covered Games" to include "Sports Betting." JA60 (Part III.F). It 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."

JA70-71 (Part III.CC.2) (emphasis added).

Thus, the Compact unambiguously authorizes the Tribe to offer online Sports Betting to persons located ***off*** Indian lands, and then "deems" such gambling to be treated as if it occurred "exclusively" ***on*** Indian lands.

On May 19, 2021, Florida's Legislature passed a law ratifying the Compact, *see* JA132-140, which the Governor signed on May 25, 2021.[3] Like the Compact, this statute provides that sports betting made from off the Tribe's lands "***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 JA136 (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).

Florida legislators expressed concern about the legality of the online sports gaming provisions in the Compact but were assured that a "court of final decision" would determine the legality of those provisions, and the Compact included a severability provision to ensure that it would survive (and payments from the Tribe to the State would be reduced) if the online sports gaming clauses were invalidated. Appellee Brief at 7-8, *W. Flagler Assocs. v. Haaland*, 71 F.4th 1059 (D.C. Cir. 2023) (No. 21-5265).

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

2. The Secretary Allowed the Compact to Be Approved 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. JA214. The Secretary took no formal action, and the Compact was thus automatically approved under IGRA. 25 U.S.C. § 2710(d)(8). It became effective when notice of the approval was published in the Federal Register. *See* 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 permit automatic approval and explaining why (the "DOI Letter"). JA214-225. The DOI Letter stated that the Secretary reviews Tribal-State compacts "to ensure that they comply with Federal law," *id.* at JA219, 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).

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. JA220-21. 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"). JA221. In support, the letter cited 25 U.S.C. sections 2710 (d)(3)(c)(i) through (ii),

IGRA provisions 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. JA220. The letter claimed that changes in technology since the enactment of IGRA justified this interpretation. JA220-21.[4]

The DOI Letter did not mention UIGEA. Nor did it consider whether the Secretary's approval of a monopoly on online sports betting for the Tribe, while criminalizing the operation of such gaming by non-Seminoles, violates principles of equal protection.

C. District Court Decision

On August 16, 2023, Petitioners challenged the approval of the Compact under both the Administrative Procedure Act and through a constitutional claim. JA13.[5] Petitioners moved for summary judgment and the Secretary cross-moved to dismiss for a want of standing and for failure to state a claim. App.35.

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[4] 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).

[5] Petitioners operate "pari-mutuel" gaming establishments authorized under Florida law and suffer competitive injury from the Compact's online sports gaming provisions.

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." App.58; JA510-20. The District Court denied the Secretary's motion to dismiss for lack of standing, holding that Petitioners adequately established a competitive injury. App.41. The District Court granted summary judgment to Petitioners, holding that IGRA does not authorize the Secretary to approve (or allow approval of) a Compact that provides for gaming off Indian lands. App.58. 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.50 (citing *Amador County*, 640 F.3d at 382).[6] The court further held that the "deeming" language in the Compact was a "fiction" that 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.51.

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[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.49. The District Court found that the Tribe is a required—but not indispensable—party whose interests are adequately represented by the Secretary. App.43, 49; Fed. R. Civ. P. 19(a)-(b).

D. D.C. Circuit Decision

On June 30, 2023, the D.C. Circuit reversed. App.5. 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.11 (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.11, 19.

To reach this result, the Circuit Opinion relied on three subsections of IGRA found in 25 U.S.C. section 2710(d)(3)(C)—a provision that itemizes permissible topics in an IGRA compact. 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 the criminal and civil jurisdiction." 25 U.S.C. §§ 2710 (d)(3)(C)(i)-(ii). *See* App.14. The Circuit Opinion does not mention that the Compact contains sections specifically addressing jurisdictional issues without referring to the Deeming Provisions or any other provision regarding online sports gambling off Indian lands.[7]

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[7] JA78-86 ("Rules and Regulations; Minimum Requirements for Operations"); JA86-91 ("Patron Disputes; Workers Compensation; Tort Claims; Prize Claims; Limited Consent to Suit"); JA91-94 ("Enforcement of Contract Provisions"); JA94-101 ("State Monitoring of Compact"); JA101 ("Jurisdiction").

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 section 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.12. 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 also held that "the Compact does not as a facial matter violate the UIGEA." App.23. 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).

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." App.19.

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 based on its members' race, ancestry, ethnicity, or national origin, was subject only to rational basis

scrutiny under the Equal Protection Clause, which it survived. App.23.

The Circuit Opinion affirmed the District Court's denial of the Tribe's motion to intervene. App.5.

On August 14, 2023, Applicants filed a petition for rehearing *en banc*, which the D.C. Circuit denied on September 11, 2023. App.63. On September 15, 2023, Applicants filed a motion to stay the mandate pending petition for certiorari, which was denied on September 28, 2023.

E. This Court's Disposition of Petitioners' Stay Application

On October 6, 2023, Petitioners filed an application with this Court to stay the mandate from the D.C. Circuit. On October 12, 2023, the Chief Justice temporarily stayed the mandate pending full briefing on the application, ordered a response from the United States to be filed by October 18, and referred the application to the full Court. On October 25, 2023, following receipt of the government's response, the Court issued an Order denying the application. This Order included a Statement from Justice Kavanaugh, which noted agreement with the denial of the stay application "in light of the D.C. Circuit's pronouncement that the compact between Florida and the Seminole Tribe authorizes the Tribe to conduct only on-reservation gaming operations, and not off-reservation gaming operations." App.64. Justice Kavanaugh further stated, "If 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.

Justice Kavanaugh also noted that any Florida law that authorized the Tribe, and only the Tribe, to offer online sports gaming "raises serious equal protection issues." *Id.* (citations omitted). Justice Kavanaugh further wrote that the state law's constitutionality was not squarely presented in the application for a stay, and that "the Florida Supreme Court is in any event currently considering state-law issues related to the Tribe's potential off-reservation gaming operations." *Id.*

F. The Petitioner's Quo Warranto Petition to the Florida Supreme Court and the November 7, 2023 Launch of the Tribe's Online Sports Betting Application

On September 25, 2023, Petitioners filed a petition for a writ of quo warranto in the Florida Supreme Court against the Florida Governor, the Speaker of the Florida House of Representatives, and the President of the Florida Senate. The petition seeks a writ declaring that the execution of the Compact and approving legislation were unlawful under the Florida Constitution's prohibition on casino gambling absent a citizen's initiative (*i.e.*, a referendum). It also asked the Florida Supreme Court to exercise its "All Writs" jurisdiction under the Florida Constitution to suspend operations of the offending laws pending final resolution of the quo warranto petition.

The Respondents obtained an extension on the deadline for their response to the petition, and

briefing on the petition was completed by December 23, 2023. As of the time of filing of this petition, no decision has been rendered and no argument has been scheduled in the petition to the Florida Supreme Court.

On November 7, 2023, the Tribe launched its online sports betting application. In response, the Petitioners filed a petition with the Florida Supreme Court seeking expedited consideration of their All Writs petition pending final resolution of their quo warranto petition. On November 17, 2023, the Florida Supreme Court denied this request for expedited consideration.

REASONS FOR GRANTING THE PETITION

I. IGRA Does Not Authorize the Approval of a Compact That Provides a Statewide Tribal Monopoly over Online Sports Gaming.

A. The Circuit Opinion Conflicts With the Plain Text of IGRA, this Court's Holding in *Michigan v. Bay Mills*, and Other Circuit Court Decisions Limiting IGRA to Gaming Activity on Indian Lands.

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. JA76 (Part IV.A); JA60, 70-71 (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*, 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 it 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 section 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.

Thus, this Court's decision in *Bay Mills* 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 section 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, 221-22 (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.

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 Seminole Tribe here, 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.'"); *California v. Iipay Nation*, 898 F.3d 960, 967 (9th Cir. 2018) (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").

The Circuit Court sought to avoid the foregoing problems under IGRA by choosing to "interpret" the Compact as if it did not authorize online sports gaming from off tribal lands. It invoked the doctrine that "a contractual provision should, if possible, be interpreted in such a fashion as to render it lawful rather than unlawful." App.13.

This is absurd, for two reasons. First, as this Court has made clear, the interpretive principle invoked by the Circuit Court applies only when the contract is "ambiguously worded." *Walsh v. Schlecht*, 429 U.S. 401, 408 (1977). Here, the Compact unambiguously ***authorizes*** the Tribe to offer online sports betting: it authorizes the Tribe to conduct "Covered Games," JA76 (Part IV.A), and defines "Covered Games" to include "Sports Betting," JA60 (Part III.F). And in two different places, it makes clear that Sports Betting includes placing bets on sports over the internet from ***any*** location within the State, but then "deems" such bets to occur exclusively on Tribal lands. *See* JA76 (Part IV.A); JA70-71 (Part III.CC.2). There is nothing ambiguous about these provisions. They unambiguously authorize the Tribe to offer online sports gambling to people located off the Tribe's lands anywhere in Florida.

Second, the interpretive principle of *Walsh v. Schlecht* is properly applied only to arrive at an interpretation that renders the contract "legal and enforceable." 429 U.S. at 408. Here, however, the Compact's online sports gaming provisions can be "legal and enforceable" only if it is lawful for the Tribe

to offer sports gambling off its tribal lands. Under unambiguous state law that the D.C. Circuit refused to consider, the only way for that sports gambling to be lawful was for it to be either (a) approved by a citizen's initiative (which has not occurred), or (b) "deemed" to be gambling "on tribal lands" pursuant to a valid IGRA compact. That latter path was the only one that could make the Compact's online sports gaming provisions lawful, and it raised a question of federal law: could the online sports gaming from off Indian lands be "deemed" to occur on Indian lands? The answer is obviously "No." But the D.C. Circuit wrongly dodged that question in favor of a misguided "interpretation" that rendered the contract neither "legal" nor "enforceable."

B. The Circuit Opinion's Broad Interpretation of § 2710(d)(3)(C) Conflicts With This Court's Jurisprudence and the Narrow Interpretation Given by Other Circuits.

The Circuit Opinion relied on a broad interpretation of 25 U.S.C. § 2710 (d)(3)(C) to uphold the Compact's provision for online sports gaming from off Indian lands. Its expansive interpretation of section 2710(d)(3)(C) contradicts this Court's repeated admonition that 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).

First, the Circuit Opinion held that the Compact's provision that online sports gaming "shall be deemed" to occur "exclusively" on tribal lands "simply allocates jurisdiction between Florida and the Tribe" under §§ 2710(d)(3)(C)(i)-(ii). This ignores the fact that the

Compact contains at least five different sections allocating jurisdictional issues between the State and the Tribe. *See* note 7, *above*. The Deeming Provisions are not found in any of those provisions and have nothing to do with jurisdiction. Instead, the Deeming Provisions were a transparent effort to treat the online sports gaming that occurs ***off*** Indian lands ***as if*** it occurred ***on*** Indian lands so that it could be approved under IGRA and could satisfy the exemption in Article 30 of the Florida Constitution. *See* Fla. Const. art. X, § 30(c).

Second, the Circuit Opinion held that the Compact's online sports gaming provisions fall within the residual clause of section 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). But provisions allowing gaming activity off Indian lands are not "directly related" to the "gaming activity" authorized by the Compact; instead, they themselves constitute the gaming activity authorized by the Compact.

The Circuit Opinion conflicts with the narrow interpretation other circuits have given to section 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); *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 section 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 section 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.

C. The Circuit Opinion Creates Uncertainty in the Law by Improperly Holding There Are Two Different Kinds of IGRA Approvals.

The Circuit Opinion effectively holds that IGRA authorizes the approval of compact provisions that IGRA itself does not authorize. App.4. No other case has held this. This holding conflicts with the holdings of other circuits and creates confusion in the law.

Other circuit courts have held that when an IGRA compact is approved by the Secretary of the Interior, it becomes an instrument of federal law. *See e.g. Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d 1226, 1238-39 (10th Cir. 2018). As such, a valid IGRA compact preempts state law. *See*, *e.g.*, *Forest County Potawatomi Community v. Norquist*, 45 F.3d 1079, 1082 (7th Cir. 1995) (upholding tribe's "federal right"

under IGRA compact to operate "free from state or city interference").

By contrast, the Circuit Opinion here suggests that an IGRA approval can have either of two different meanings: (1) an IGRA approval for compact provisions that IGRA itself authorizes may thereafter have the force of federal law, but (2) an IGRA approval for compact provisions that are not "authorized" by IGRA are subject to challenge and invalidation under state law. App.19. It makes no sense for an IGRA approval to have two different meanings depending upon whether the provisions being approved are also "authorized." The Court should grant certiorari to correct this confusing and incorrect precedent regarding the operation of IGRA.

D. Certiorari Is Also Warranted to Resolve the Meaning of § 2710(d)(1)(B).

In addition to requiring a valid compact, IGRA provides that Class III gaming is lawful on Indian lands only if it is "located in a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B). Here, Florida law expressly prohibits all entities other than the Tribe from conducting sports gaming. *See* Fla. Stat. § 849.14. Thus, the approval of the Compact was invalid for the independent reason that the Compact violates the plain text of section 2710(d)(1)(B).

Section 2710(d)(1)(B) was not addressed in the proceedings below. Nevertheless, this Court has discretion to address and resolve the issue. *See Yee v. Escondido*, 503 U.S. 519, 534 (1992); *Lebron v.*

National R.R. Passenger Corp., 513 U.S. 374, 383 n.3 (1995); *Egbert v. Boule*, 596 U.S. 482, 497 (2022).

The circuit courts have differed in their interpretation of section 2710(d)(1)(B).

Three circuits have suggested that tribal compacts may only authorize gambling that is similar to what state law permits non-tribal entities to conduct. For example, the Seventh Circuit has interpreted the provision to mean that IGRA permits tribes to compact for class III gaming "only in states that allow at least some non-Indian groups to conduct similar gambling." *Stockbridge-Munsee Cmty. v. Wisconsin*, 922 F.3d 818, 819 (7th Cir. 2019). The Eighth Circuit held that "it would be illegal, in addition to being unfair to the other tribes, for the tribe to offer traditional keno to its patrons" where South Dakota did not permit others to offer traditional keno. *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 279 (8th Cir. 1993). The Eleventh Circuit has held that "the extent to which a tribe may engage in class II or class III gaming depends on how the state where the Indian lands are located has chosen to regulate such games in the state as a whole," since "IGRA permits a tribe to conduct each class of gaming only if such gaming is allowed in some form within the state where the Indian lands are located." *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1284 (11th Cir. 2015).

On the other hand, the Ninth Circuit held that the language of section 2710(d)(1)(B) is ambiguous, and then applied the *Blackfeet* presumption in favor of Indian tribes to hold that so long as state law expressly permits the tribe itself to conduct the

gaming in question, section 2710(d)(1)(B) is satisfied. *Artichoke Joe's*, 353 F.3d at 720-31.

Given the rapid increase in sports gaming and Indian gaming throughout the country, the Court should grant certiorari to address the divergence of views in the circuits on the meaning of section 2710(d)(1)(B).

II. The D.C. Circuit's Analysis of UIGEA Conflicts With the Ninth Circuit Interpretation in a Similar Case.

The Circuit Opinion held that "the Compact does not as a facial matter violate the UIGEA." App.23. But it erroneously reached this conclusion without analyzing whether the online sports bets provided for in the Compact would be legal where "initiated"—*i.e.*, when initiated from locations in Florida that are off Indian lands. It is impossible to analyze the legality of the Compact under UIGEA without analyzing whether the online sports betting would be legal where "initiated, received, or otherwise made." 31 U.S.C. § 5362(10).

Faced with very similar facts, the Ninth Circuit Court of Appeals held that a tribe that offered online bingo was violating UIGEA. *Iipay Nation*, 898 F.3d at 965-69. In that case, the Iipay Nation tribe was offering online bingo throughout the State of California. While the bets were received on the tribal lands of the Iipay Nation, and while the tribe was authorized to offer bingo as a form of Class II gaming permitted under IGRA, for locations off tribal lands, California law prohibited offering "percentage games,"

and thus prohibited offering bingo gambling. *Id.* at 967.

The Ninth Circuit explained that while UIGEA "does not prohibit otherwise legal gambling," it "does create a system in which a 'bet or wager' must be legal both where it is 'initiated' and where it is 'received.'" *Id.* at 965. Thus, the only way to determine if the Compact in this case will lead to inevitable UIGEA violations is to determine whether the online sports betting will be "legal both where it is 'initiated' and where it is 'received.'" *Id.* Yet the Circuit Opinion failed to make this determination. App.22-23.

There is no way to reconcile the decision below with *Iipay Nation*. Previously, the Secretary has tried to do so by suggesting it might somehow be possible to implement the online sports betting provisions of the Compact without accepting payment in any of the forms that trigger UIGEA. That is specious. There is no way to transfer money over the internet other than credit card transactions, electronic fund transfers, or the other payment methods addressed in UIGEA. *See* 31 U.S.C. § 5363 (identifying multiple payment methods covered by UIGEA). Further, the Tribe has admitted both before and after the Compact was approved that it will use the payment methods covered by UIGEA. *See* JA774-76 (Letter from the Seminole Tribe to DOI addressing fact that UIGEA payment methods would be used, but arguing UIGEA not violated because of the "Deeming Provisions"); Terms & Conditions HARDROCKBET.COM - Seminole Tribe, https://www.hardrock.bet/t-cs/florida/ (last visited Feb. 8, 2024) (identifying "your credit or debit card," "ACH transfer," and "wire transfer" as permissible payment methods).

There is no dodging the fundamental fact that because Florida law prohibits sports betting off Indian lands, the Compact violates UIGEA. As shown above, the Florida Constitution makes sports betting (and all other forms of casino gambling) unlawful absent a citizen's initiative approving such gambling, which has not occurred. Fla. Const. art. X, §30(a)-(b). 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 online sports gaming provisions in the Compact expressly provide for violations of UIGEA. That means the Secretary should have rejected the Compact pursuant to the IGRA provision allowing disapproval of compacts that violate federal laws outside of IGRA. 25 U.S.C. § 2710(d)(8)(B)(ii). It also makes the approval of the Compact "not in accordance with law," so that it should have been set aside under the APA. 5 U.S.C. § 706(2)(A).

As internet gambling and sports gambling proliferate in many but not all jurisdictions, it is going to be essential for federal courts to apply UIGEA faithfully. Here, the D.C. Circuit tried to avoid applying UIGEA by refusing to look at state law. But to determine whether UIGEA is violated, the court necessarily had to analyze state law. By failing to do

so, the D.C. Circuit wrongly upheld the IGRA approval of a compact that violates UIGEA. Its decision conflicts with the Ninth Circuit's decision in *Iipay* and creates confusion in the law regarding how UIGEA is to be applied, just as it becomes most important for that law to be clear. This Court should grant certiorari and reverse.

III. This Case Raises an Important National Issue Regarding the Constitutionality of Granting a Statewide Gambling Monopoly to an Indian Tribe.

Certiorari should also 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*, 599 U.S. 255 (2023). The Court avoided the Equal Protection issue by deciding that the challengers lacked standing. *Id*. at 292-96. However, Justice Kavanaugh emphasized the importance of the tribal preference issue in his concurrence. *Id.* at 333 (Kavanaugh, J., concurring) ("In my view, the equal protection issue is serious.").

In *Morton v. Mancari*, 417 U.S. 535 (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.* at 555. 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.[8]

Only two circuits have weighed in on preferences that do not fit these special circumstances: (1) the Ninth Circuit in *Williams v. Babbitt*, 115 F. 3d 657, 664 (9th Cir. 1997), which rejected an effort by the BIA to ban non-natives from the Alaskan reindeer industry, and (2) the Circuit Opinion, App.24-25, 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 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

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[8] *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) .

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.* at 665 (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.* 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. *Id.*

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.23-24. For anyone of a different race, ancestry, ethnicity, or national origin, the state law approving the Compact made the same conduct a felony punishable by up to 5 years in prison. *See* JA135-36; 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 Petitioners citing and discussing that case in their briefing. Appellee Brief at 40, *W. Flagler Assocs. v. Haaland*, 71 F.4th 1059 (D.C. Cir. 2023) (No. 21-5265).

The Circuit Opinion provided little analysis of the Equal Protection issue. *See* App.23-24. It cited only the D.C. Circuit's prior decision in *American Federation of Government Employees, AFL-CIO v. United States*, 330 F.3d 513, 522-23 (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." App.23. 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 *American Federation* addressed a specific, Congressional preference for native-owned firms in defense contracts. 330 F.3d at 516. 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.* at 520.

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. at 524 (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, 501 (1979) (discussing *Mancari* and observing "States do not enjoy this same unique relationship with the Indians"); *KG Urban Enters., LLC v. Patrick*, 693 F.3d 1, 12-13, 19 (1st Cir. 2012) (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. Since the Compact provides for a gaming monopoly off Indian lands, Congressional approval through IGRA cannot itself be a basis for *Mancari* rational basis scrutiny.

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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. Since that decision, approximately 38 numerous states have

taken steps to legalize sports betting, sometimes through compacts with Indian tribes and sometimes more broadly. [9] As different jurisdictions make different decisions regarding the legality of sports betting, it is critical that this Court not allow the unlawful approach taken by Florida to become a model, or for the D.C. Circuit decision to create confusing and misleading precedent. The Court should grant certiorari to ensure clarity in the law regarding the scope of IGRA and UIGEA, and to make clear that providing a statewide gambling monopoly to an Indian tribe while making the conduct a felony for all others is unconstitutional.

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[9] *See* Analis Bailey, *Race for legal sports betting continues*, Axios.com (Nov. 26, 2023), https://www.axios.com/2023/11/26/legal-sports-betting-states; *Tribal Sports Betting*, UNLV, https://www.unlv.edu/icgr/tribal.

CONCLUSION

The Court should grant the petition.

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