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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Tribal-State gaming compact in this case violates the Indian Gaming Regulatory Act (IGRA), 18 U.S.C. 1166-1168, 25 U.S.C. 2701 *et seq.*, by authorizing such gaming off Indian lands.

2. Whether the compact facially violates the Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. 5361 *et seq*.

3. Whether the approval of the compact by operation of law under IGRA violated the equal-protection component of the Fifth Amendment's Due Process Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 71 F.4th 1059. The opinion of the district court (Pet. App. 28-59) is reported at 573 F. Supp. 3d 260.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2023. A petition for rehearing was denied on September 11, 2023 (Pet. App. 62-63). On December 1, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 8, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns a 2021 gaming compact between the Seminole Tribe and the State of Florida, neither of which is a party to this litigation. Pet. App. 7, 19. That compact, as relevant here, addresses internet sports betting that the Tribe conducts by accepting wagers placed by patrons in Florida—including on non-Indian lands—and receiving those wagers at the Tribe's computer servers located on Indian lands. *Id.* at 7-8. The court of appeals held that, under the Indian Gaming Regulatory Act (IGRA), 18 U.S.C. 1166-1168, 25 U.S.C. 2701 *et seq.*, the compact, as approved by operation of law under IGRA, authorized only the relevant gaming activities that occur on Indian lands. Pet. App. 4, 14-15, 19.

1. a. In 1988, "Congress adopted IGRA in response to this Court's decision in *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 221-222 (1987), which held that States lacked any regulatory authority over gaming on Indian lands." *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014). IGRA accordingly establishes a nationwide regulatory framework for tribal gaming "on Indian lands." *Id.* at 795.

IGRA divides Indian gaming on Indian lands into three "classes." See 25 U.S.C. 2703(6)-(8). This case concerns Class III gaming, which "includes such things as slot machines, casino games, banking card games, dog racing, and lotteries." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 48 (1996); see 25 U.S.C. 2703(7)(B) and (8). With an exception not relevant here, Class III gaming activities are "lawful on Indian lands only if such activities," *inter alia*, are conducted pursuant to a "compact entered into by the Indian tribe and the State * * * that is in effect." 25 U.S.C. 2710(d)(1)(C); cf. 25 U.S.C. 2710(d)(7)(B)(vii) (addressing substitute procedures).

IGRA largely leaves the substance of a Tribal-State compact concerning gaming on Indian lands to be determined by the Tribe and the State that negotiate it. See 25 U.S.C. 2710(d)(3)(A). But IGRA expressly provides that such compacts "may include provisions" relating to certain topics. 25 U.S.C. 2710(d)(3)(C). These topics include "the application of the 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 gaming activities; an associated "allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations"; "remedies for breach of contract"; and "any other subjects that are directly related to the operation of gaming activities." 25 U.S.C. 2710(d)(3)(C)(i), (ii), (v), and (vii).

After a Tribe and a State negotiate and enter into a compact, the compact must be submitted for review by the Secretary of the Interior (Secretary). See 25 U.S.C. 2710(d)(3)(B) and (8). IGRA provides that "[t]he Secretary is authorized to approve any Tribal-State compact * * * governing gaming on Indian lands of [that] Indian tribe." 25 U.S.C. 2710(d)(8)(A). IGRA further provides that "[t]he Secretary may disapprove a compact * * * only if such compact violates" "(i) any provision of [IGRA]," "(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands," or "(iii) the trust obligations of the United States to Indians." 25 U.S.C. 2710(d)(8)(B). Those provisions authorizing the Secretary to approve or (in certain circumstances) disapprove a compact do not by their terms require either approval or disapproval. IGRA instead provides that "[i]f the Secretary does not approve or disapprove a compact" within "45 days after" its submis-

sion to the Secretary, "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 [IGRA]." 25 U.S.C. 2710(d)(8)(C).

IGRA provides that the "Secretary shall publish in the Federal Register notice of any Tribal-State compact" that the Secretary has actually approved or that has been approved by operation of law. 25 U.S.C. 2710(d)(8)(D). The "compact shall take effect * * * when notice of [such] approval" is published. 25 U.S.C. 2710(d)(3)(B). When such a compact is "in effect," Class III gaming activity satisfying IGRA's requirements is then "lawful on Indian lands." 25 U.S.C. 2710(d)(1)(C).

b. IGRA does not limit or otherwise alter a State's authority within the State on non-Indian land. "[A] State's regulatory power over tribal gaming outside Indian territory" is therefore "capacious." *Bay Mills*, 572 U.S. at 794.

2. In April 2021, the Chairman of the Seminole Tribe's Tribal Council and the Governor of Florida signed a Tribal-State compact (Compact) governing Class III gaming activities to be conducted by the Tribe. Stay Appl. App. (Stay App.) 44-118 (reproducing the Compact). The Compact defines "'Covered Game'" and "'Covered Gaming Activity'" to cover six categories of gaming, including "Sports Betting." *Id.* at 48, 58. As relevant here, the Compact provides that "[t]he Tribe and State agree that the Tribe is authorized to operate Covered Games on its Indian lands, as defined in [IGRA], in accordance with the provisions of this Compact." *Id.* at 64. The Compact then states that, subject to certain limitations not relevant here, "wagers on Sports Betting * * * made by players physically located within the State using a mobile or other electronic de-

vice 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." *Ibid.*

In July 2021, the Florida Legislature amended the applicable state law to permit the contemplated sports-betting wagers by persons on non-Indian lands. Fla. Stat. § 285.710(13)(b)(7) (2023). Like the Compact, that statute provides that "[w]agers on sports betting * * * 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." *Ibid.* The state statute then provides that "gaming activities authorized [by that provision] and conducted pursuant to a gaming compact [that has been] ratified and approved * * * do not violate the laws of this state." § 285.710(13)(b).

The Compact was submitted to the Secretary for review, but the Secretary did not act to approve or disapprove the Compact within IGRA's 45-day period. Pet. App. 3. In August 2021, the Interior Department's Principal Deputy Assistant Secretary for Indian Affairs wrote the Tribe's Chairman and Florida's Governor informing them that, as a result, the Compact is considered to have been approved by operation of law under IGRA. Stay App. 128, 139. The letter also discussed various aspects of the Compact, including the provisions concerning the placement of wagers by mobile device. *Id.* at 133-135. On August 11, 2021, the Secretary published a Federal Register notice stating that "[t]he Secretary took no action" and that, "[t]herefore, the Compact is considered to have been approved, but only to the extent it is consistent with IGRA." 86 Fed. Reg.

44,037. The Compact "t[ook] effect" upon publication of that notice. 25 U.S.C. 2710(d)(3)(B).

3. Five days later, on August 16, 2021, petitioners—owners of brick-and-mortar casinos in Florida—filed a complaint (Stay App. 1-43) in district court against the Secretary and the Department of the Interior (Department) under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.*, challenging the approval by operation of law of the Compact. Pet. 13; see Stay App. 2, 6-7, 39. Petitioners alleged that the Secretary had "a legal obligation to disapprove the Compact" because, as relevant to the issues raised by petitioners here: (1) the Compact assertedly authorized the placement of online wagers in Florida on non-Indian lands in violation of IGRA; (2) such wagers from non-Indian lands are unlawful under the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), 31 U.S.C. 5361 *et seq.*, because they involve payments in connection with "sports betting that is illegal in Florida"; and (3) the Compact violates the equal protection component of the Fifth Amendment's Due Process Clause by "discriminat[ing] * * * on the basis of race, tribal affiliation, and national origin." Stay App. 39-40. Petitioners also alleged that "the Compact and the Florida legislation ratifying [it]" unlawfully "attempt[ed] to circumvent" the Florida Constitution, which requires a vote by citizen initiative to authorize casino gambling, except for gaming "'on tribal lands'" conducted under a compact pursuant to IGRA. *Id.* at 3-5, 26-28 (citation omitted); see Pet. 1-2.

The district court granted summary judgment to petitioners and "set aside the Secretary's default approval of the Compact," Pet. App. 56; see *id.* at 28-59. The

court rested that judgment on its conclusion that the Compact "violate[d] IGRA's 'Indian lands' requirement" by "attempt[ing] to authorize sports betting both on and off Indian lands," *id.* at 50, 56. See *id.* at 49-56. The court added that, "to be clear," it was "not issuing a final decision on any question of Florida constitutional law." *Id.* at 55.

4. The court of appeals reversed. Pet. App. 1-27. The court determined that the Compact, as properly interpreted, does not violate IGRA because the Compact does not itself authorize sports betting activities on non-Indian lands and, for that reason, "the Secretary did not violate the [APA] in choosing not to act and thereby allowing the Compact to go into effect by operation of law," *id.* at 4-5. See *id.* at 11-19.

a. The court of appeals explained that IGRA "regulates gaming activity on Indian lands, but 'nowhere else.'" Pet. App. 4, 12 (quoting *Bay Mills*, 572 U.S. at 795). For that reason, the court continued, "an IGRA gaming compact can legally authorize a tribe to conduct gaming only on its own lands." *Id.* at 4. The court also observed, however, that IGRA "generally does not restrict or regulate tribal, or any other, activity outside of Indian lands." *Id.* at 12. Instead, "IGRA 'left fully intact' states' 'capacious' regulatory power outside Indian territory." *Id.* at 5 (quoting *Bay Mills*, 572 U.S. at 794).

The court of appeals further determined that "IGRA does not *prohibit* a gaming compact—which is, at bottom, an agreement between a tribe and a state—from discussing other topics, including those governing activities 'outside Indian lands.'" Pet. App. 4 (quoting *Bay Mills*, 572 U.S. at 796). The court explained that IGRA provides that a gaming compact "'may include

provisions relating to' a litany of other topics," including "'subjects that are directly related to the operation of gaming activities.'" *Id.* at 12 (quoting 25 U.S.C. 2710(d)(3)(C)(vii)).

Turning to the compact in this case, the court of appeals concluded that the relevant text "simply states that the Tribe is authorized to operate sports betting on its lands." Pet. App. 14. And although the Compact also discusses wagers placed by patrons on non-Indian lands, the court reasoned that that compact language—which "does not say that these wagers are 'authorized' by the Compact (or by any other legal authority)"—"simply indicates that the parties to the Compact (*i.e.*, the Tribe and Florida) have agreed that they both consider such activity (*i.e.*, placing those wagers) to occur on tribal lands." *Ibid.* That additional language, the court concluded, reflects an allocation of jurisdiction among the Compact's parties and is a provision that, as authorized by IGRA, addresses a subject "'directly related to the operation of' the Tribe's sports book." *Ibid.* (quoting 25 U.S.C. 2710(d)(3)(C)(vii)). The court explained that its interpretation of the Compact reflected the "precept that 'a contractual provision should, if possible, be interpreted in such a fashion as to render it lawful rather than unlawful,'" *id.* at 13 (citation omitted), and that the district court's contrary understanding of the Compact's language erroneously "read[] into the Compact a legal effect it does not (and cannot) have, namely, independently authorizing betting by patrons located outside of the Tribe's lands." *Id.* at 4.

The court of appeals accordingly concluded that "the Compact itself authorizes only the betting that occurs on the Tribe's lands" and "in this respect it satisfied IGRA." Pet. App. 4; see *id.* at 14-15. "The lawfulness

of any other related activity such as the placing of wagers from outside Indian lands, under state law or tribal law, is unaffected by its inclusion as a topic in the Compact." *Id.* at 15. The court emphasized that "[w]hatever the Tribe and Florida * * * may believe, let us be clear: an IGRA compact cannot provide independent legal authority for gaming activity that occurs outside of Indian lands, where that activity would otherwise violate state law." *Id.* at 19. The court then "express[ed] no opinion as to whether the Florida statute ratifying the Compact is constitutional under [the Florida constitution]." *Ibid.* "That question and any other related questions of state law are outside the scope of the Secretary's review of the Compact, are outside the scope of [the court's] judicial review, and as a prudential matter are best left for Florida's courts to decide." *Ibid.*; see *id.* at 4.

b. The court of appeals noted that although the district court "did not reach" petitioners' "UIGEA[] and Fifth Amendment challenges to the Compact," the parties had fully briefed those challenges on appeal and the court of appeals found that they "lack merit." Pet. App. 19-20. The court initially observed that "the justiciability" of those "non-IGRA challenges" under the APA presented a "thorny question" that the court "need not resolve" because, "even assuming that such claims are justiciable," petitioners' "particular challenges fail as a matter of law." *Id.* at 20.

The court of appeals determined that "the Compact does not as a facial matter violate the UIGEA," which prohibits the knowing acceptance of "certain forms of payment in connection with 'unlawful Internet gambling,'" because the Compact does not itself address the form of payments connected with sports betting. Pet.

App. 22-23 (quoting 31 U.S.C. 5363). The court explained that its "review is of the Secretary's decision not to act when presented with the Compact, not whether all hypothetical [future] implementations of the Compact are lawful under all federal statutes." *Ibid.*

The court of appeals also determined that "the Secretary's approval [did not] violate[] the Fifth Amendment's equal protection guarantee" on petitioners' theory that "the Compact impermissibly grants the Tribe a statewide monopoly over online sports betting." Pet. App. 23. The court reasoned that the "Secretary's approval" did not "'authorize[]' all of the activity [discussed] in the Compact (as [the court] ha[d] explained [earlier in its opinion])." *Ibid.* But the court determined that "even if the Secretary's approval" did approve gaming activities on non-Indian lands throughout the State, "it would survive rational basis review, which is the applicable level of scrutiny here." *Ibid.*

5. Later, in September 2023, petitioners petitioned the Florida Supreme Court for a writ of quo warranto, arguing that state officials exceeded their authority by entering the Compact and enacting state implementing legislation because, petitioners argued, the Florida Constitution prohibits the type of online sports betting on non-Indian lands discussed in the Compact. Pet. 18-19. The Florida Supreme Court denied the petition without reaching the merits, holding that "quo warranto is not * * * the proper vehicle to obtain a declaration as to the substantive constitutionality of an enacted law" and that the Florida Constitution "commits [such] review, in the first instance, to [Florida's] trial courts." *West Flagler Assocs., Ltd.* v. *DeSantis*, No. SC2023-1333, 2024 WL 1201592, at *1, *3 (Mar. 21, 2024).

6. While their quo warranto petition was pending, petitioners filed an application to stay the court of appeals' mandate, which this Court denied. Pet. App. 64-65. Justice Kavanaugh, in a statement respecting the denial of the application, agreed that the "application should be denied" because the court of appeals had interpreted the Compact to "authorize[] the Tribe to conduct only on-reservation gaming operations, and not off-reservation gaming operations." *Id.* at 64. Justice Kavanaugh separately expressed the view that "serious equal protection issues" would be raised by Florida state law "[t]o the extent that a separate Florida statute (as distinct from the compact) authorizes the Seminole Tribe—and only the Seminole Tribe—to conduct certain off-reservation gaming operations in Florida," but concluded that this APA challenge to federal agency action does not "squarely present[]" such a question about "the state law's constitutionality." *Id.* at 65.

ARGUMENT

Petitioners contend that the court of appeals erred in upholding the Compact's approval by operation of law because (1) IGRA authorizes the Secretary to approve a compact that authorizes gaming only on Indian lands, Pet. 20-27; (2) the Compact purportedly violates UIGEA, Pet. 29-32; and (3) the Compact purportedly grants a statewide online-sports-betting monopoly to the Seminole Tribe in violation of equal-protection principles, Pet. 32-38. The court of appeals correctly upheld the Compact's approval by operation of law, and its decision does not conflict with any decision of this Court or another court of appeals. This Court previously denied petitioners' application for a stay of the court of appeals' mandate raising the same contentions. The Court should similarly deny certiorari.

1. The court of appeals correctly determined that the Compact here "authorizes only [online sports] betting that occurs on the [Seminole] Tribe's lands," does not "authoriz[e] betting by patrons located outside of the Tribe's lands," and thus is consistent with IGRA. Pet. App. 4; see *id.* at 11-19. Petitioners contend (Pet. 20-27) that the court's decision erroneously held that "IGRA authorized the Secretary to approve a compact that regulates gaming *off* Indian lands," Pet. 22, and therefore conflicts with IGRA and decisions interpreting IGRA. That is incorrect. As Justice Kavanaugh explained in concurring in the denial of petitioners' stay application, the court of appeals determined that the Compact "authorizes the Tribe to conduct only on-reservation gaming operations, and not off-reservation gaming operations." Pet. App. 64. Indeed, the court of appeals repeatedly emphasized that the Compact "'authorizes' only the Tribe's activity on its own lands" and that "[t]he lawfulness of any other related activity such as the placing of wagers from outside Indian lands * * * is unaffected by its inclusion as a topic in the Compact." *Id.* at 14-15; see *id.* at 4, 11-12, 14-15, 21. The court based that understanding on a well-established principle of contract interpretation, and its factbound interpretation of the particular compact in this case is both correct and warrants no further review.

a. The court of appeals correctly determined that IGRA "regulates gaming activity on Indian lands, but 'nowhere else.'" Pet. App. 12 (quoting *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 795 (2014)). The court likewise correctly determined that "IGRA 'le[aves] fully intact' states' 'capacious' regulatory power outside Indian territory." *Id.* at 5 (quoting *Bay Mills*, 572 U.S. at 794). As a result, the court concluded that "IGRA

generally does not restrict or regulate tribal, or any other, activity outside of Indian lands." *Id.* at 12. Indeed, the court emphasized that, "[w]hatever the Tribe and Florida * * * may believe, let us be clear: an IGRA compact cannot provide independent legal authority for gaming activity that occurs outside of Indian lands, where that activity would otherwise violate state law." *Id.* at 19. Petitioners appear to have no disagreement with those conclusions.

The court of appeals also recognized that although "the function of a class III gaming compact is to authorize gaming on Indian lands," such a compact "'may include provisions relating to'" other topics. Pet. App. 12 (quoting 25 U.S.C. 2710(d)(3)(C)). Section 2710(d)(3)(C) identifies a series of subjects that a Tribe and a State may "negotiate[]" and then "may include [as] provisions" in a gaming compact. 25 U.S.C. 2710(d)(3)(C). Those provisions include "provisions relating to" the "application of the 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 gaming activities; the associated "allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations"; "remedies for breach of contract"; and "any other subjects that are directly related to the operation of gaming activities." 25 U.S.C. 2710(d)(3)(C)(i), (ii), (v), and (vii).

As the court of appeals recognized, this Court in *Bay Mills* concluded that those provisions may address "state or tribal activity outside of Indian lands." Pet. App. 12-13. A compact provision, for instance, may authorize a State to sue a tribe for "gaming outside Indian

lands." *Bay Mills*, 572 U.S. at 796. And because Congress has authorized a compact to include "subjects that are directly related to the operation of gaming activities," 25 U.S.C. 2710(d)(3)(C)(vii), a compact may include provisions addressing matters off Indian lands that are directly related to gaming activities conducted on Indian lands.

That makes good sense. States have "capacious" authority to regulate "tribal gaming outside Indian territory." *Bay Mills*, 572 U.S. at 794. And if a State can authorize a tribe to conduct gaming operations on non-Indian lands under state law, the State can also authorize the tribe's gaming activities that occur on non-Indian lands that are related to gaming activities on Indian lands. The gaming activities on Indian lands, of course, must be authorized under IGRA. But there is no apparent reason why a Tribal-State compact that authorizes gaming activities on Indian lands under IGRA cannot also include provisions that concern the State's (independent and non-IGRA) authorization to conduct directly related gaming activities in the State on non-Indian lands, even though IGRA and the Tribal-State compact would not furnish independent authorization for those related activities. For instance, if a proposed brick-and-mortar casino would be situated on both Indian and non-Indian lands, a Tribal-State compact could authorize the portion of casino gaming activities occurring on Indian lands, even though the casino would also require the State's independent authorization of the casino's related gaming activities on non-Indian lands.

That is exactly how the court of appeals construed the Compact here. The court interpreted the relevant Compact provision's statement that "'the Tribe is *authorized* to operate Covered Games on its Indian lands'"

according to its express terms to "authorize[] [the Tribe] to operate sports betting on its lands." Pet. App. 13-14 (citation omitted; emphasis added).

The court of appeals then interpreted the second sentence in that provision addressing sports betting by patrons elsewhere in Florida—which provides that internet wagers on such betting "'shall be deemed to take place exclusively where received'" by computer servers or other devices "'on Indian Lands'"—as reflecting an agreement by the Tribe and the State to "consider such activity (*i.e.*, placing those wagers) to occur on tribal lands." Pet. App. 14 (citation omitted). The court observed that the second sentence, unlike the first, did "not say that these wagers are 'authorized' by the Compact," *ibid.*, and the court therefore properly construed that distinct language in light of the established principle that "a contractual provision should, if possible, be interpreted in such a fashion as to render it lawful rather than unlawful," *id.* at 13 (citation omitted); see *Hobbs* v. *McLean*, 117 U.S. 567, 575-576 (1886) (If a contract provision "is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted."). The court accordingly concluded that the Compact did not itself authorize that wagering activity and that "[t]he discussion of wagers placed from outside Indian lands" qualified as a compact provision concerning the allocation of authority, permitted under IGRA, that "'directly related to the operation of' the Tribe's sports book." Pet. App. 14 (quoting 25 U.S.C. 2710(d)(3)(C)(vii)).

That interpretation reflects the best reading of the Compact and properly accounts for the Compact's selective use of the term "authorized" only to concern

gaming operated on "Indian lands," not gaming elsewhere within Florida. Pet. App. 13-14 (citation omitted). Petitioners simply ignore that disparate textual treatment of gaming activity on and off "Indian lands" in arguing that the Compact "unambiguously authorizes" sports betting throughout the entire State. Pet. 23 (emphasis omitted). Petitioners' related observation (Pet. 23-24) that the legality of online sports gaming wagers placed *off Indian lands* will be lawful only if lawful under state law likewise suggests no error in the court of appeals' decision. The Compact itself—by virtue of IGRA—authorizes only gaming activities that occur *on Indian lands*. The Secretary's approval of a Class III gaming compact under IGRA (here, by operation of law) simply allows the compact to "take effect," 25 U.S.C. 2710(d)(3)(B); and when such a compact is "in effect," Class III gaming activity satisfying IGRA's requirements is "lawful on Indian lands," 25 U.S.C. 2710(d)(1)(C). In short, nothing in the court of appeals' factbound interpretation of the terms of the particular compact in this case warrants this Court's review.

b. Petitioners nevertheless assert (Pet. 20-24) that the court of appeals "h[eld] that IGRA authorized the Secretary to approve a compact that regulates gaming *off* Indian lands." Pet. 22. On that premise, petitioners contend (Pet. 21-23) that the court's decision "contradicts this Court's holding in *Bay Mills*," which determined that IGRA provides tools to "'regulate gaming on Indian lands, and nowhere else,'" and conflicts with decisions of other courts of appeals, which have similarly concluded that IGRA does not regulate "gambling off Indian lands." Pet. 21-22 (quoting *Bay Mills*, 572 U.S. at 795). But as discussed above, petitioners misread the court of appeals' decision, which, as Justice Kavanaugh

explained, determined that the Compact "authorizes the Tribe to conduct *only* on-reservation gaming operations, and not off-reservation gaming operations." Pet. App. 64 (emphasis added); see pp. 7-9, 12, 14-15, *supra* (discussing the decision below). Indeed, in the Florida Supreme Court, petitioners themselves argued—correctly—that the D.C. Circuit held that the "Compact did not and could not authorize off-Indian lands gaming under IGRA"; that the "'lawfulness of * * * placing of wagers from outside Indian lands, under state law or tribal law, is unaffected by [its] inclusion as a topic in the Compact'"; and that the lawfulness of such gaming activities within Florida on non-Indian lands is simply a "matter of state law." Pet. for Writ of Quo Warranto at 10, 31, *West Flagler Assocs., Ltd.* v. *DeSantis*, No. SC2023-1333 (Fla. Sept. 25, 2023) (quoting 71 F.4th 1059, 1066 (Pet. App. 15)); see *id.* at 25-26, 34-35, 54-55.[1]

c. Petitioners additionally contend (Pet. 24-26) that the court of appeals erroneously adopted "a broad inter-

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[1] Petitioners note (Supp. Br. 1-2) that the "factual recitation" in the decision dismissing petitioners' quo warranto action states that "'the compact authorizes mobile sports betting.'" *Id.* at 1 (citation and emphasis omitted). That observation by the state supreme court is correct because the Compact (through IGRA) authorizes such betting on Indian lands where, for instance, the wager is placed from and received on such lands. The supreme court further noted that wagers placed off Indian lands are "'deemed' to occur on tribal lands" under the Compact, but the court did not determine that the Compact itself—as opposed to the state legislation that "ratified the compact"—"authorized" that activity. *West Flagler Assocs., Ltd.* v. *DeSantis*, No. SC2023-1333, 2024 WL 1201592, at *1 (Fla. Mar. 21, 2024). The court had no occasion to resolve that question—particularly in a manner contrary to petitioners' own state-court arguments about the D.C. Circuit's holding—because the court concluded that petitioners could not invoke quo warranto to challenge to the constitutionality of the State's "implementing law." *Id.* at *1-*2.

pretation of 25 U.S.C. 2710(d)(3)(C)," which identifies matters that a Tribal-State gaming compact may address and includes a residual clause covering "any other subjects that are directly related to the operation of gaming activities," 25 U.S.C. 2710(d)(3)(C)(vii). That too is incorrect. The court of appeals noted that the residual clause is "inevitably broader than the more specific topics" that precede it in Section 2710(d)(3)(C); and it adopted a straightforward reading of the residual clause as authorizing the Compact's "discussion of wagers placed from outside Indian lands" because those wagers were "directly related to the gaming activity [on Indian lands] authorized by [the] compact." Pet. App. 14-16.

Petitioners incorrectly contend that that determination "conflicts with the narrow interpretation other circuits have given to [S]ection 2710(d)(3)(C)[vii]." Pet. 25. Although petitioners cite (Pet. 25-26) decisions addressing Section 2710(d)(3)(C)(vii)'s requirement of a direct relationship between a compact provision and the operation of gaming activities, none purports to give that language a "narrow interpretation" (Pet. 25) and each involves compact provisions materially different from the one here.[2] The court of appeals' determination in

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[2] See *Chicken Ranch Rancheria of Me-Wuk Indians* v. *California*, 42 F.4th 1024, 1036-1040 (9th Cir. 2022) (requiring "a 'direct connection' to the operation of gaming activities" and concluding that general family-law, environmental-regulation, and tort-law provisions do not qualify); *Flandreau Santee Sioux Tribe* v. *Noem*, 938 F.3d 928, 934-935 (8th Cir. 2019) (concluding that taxation of purchases at "amenities such as a gift shop, hotel, and RV park are not *directly* related to Class III gaming activity"), cert. denied, 140 S. Ct. 2804 (2020); *Navajo Nation* v. *Dalley*, 896 F.3d 1196, 1212-1216 (10th Cir. 2018) (concluding that although "Congress ex-

this case that a compact provision discussing (but not affirmatively authorizing) wagers placed on non-Indian lands is "directly related" to the Compact's IGRA-authorized gaming activity on Indian lands, Pet. App. 14-16, thus implicates no division of authority. Indeed, the court of appeals specifically relied on two of the four decisions petitioners cite to "confirm [its] understanding" of IGRA. *Id.* at 16.

d. Petitioners separately argue (Pet. 27-29) that "the Compact [i]s invalid for the independent reason that [it] violates" 25 U.S.C. 2710(d)(1)(B), which provides that Class III gaming activities are lawful on Indian lands only if such activities are "located in a State that permits such gaming for any purpose by any person, organization, or entity," *ibid.* Florida law, however, specifically permits the gaming activities at issue by the Tribe and thus permits those activities by "any person, organization, or entity." Fla. Stat. § 285.710(13)(b)(7) (2023). Regardless, petitioners' contentions about Section 2710(d)(1)(B) are not properly before this Court.

As petitioners appear to acknowledge (Pet. 27), their Section 2710(d)(1)(B) contentions were "not addressed in the proceedings below" because petitioners present them for the first time in their certiorari petition. And because this Court sits as "a court of review, not of first

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pressed [the] scope [of Section 2710(d)(3)(C)(vii)] in broad terms," the provision does not extend to provisions addressing civil jurisdiction over slip-and-fall tort claims), cert. denied, 139 S. Ct. 1600 (2019); *Rincon Band of Luiseno Mission Indians of the Rincon Reservation* v. *Schwarzenegger*, 602 F.3d 1019, 1033 (9th Cir. 2010) (concluding that a general revenue-sharing provision would not be "directly related" to the operation of gaming activities based "on the mere fact that the revenue derives from gaming activities"), cert. denied, 564 U.S. 1037 (2011).

view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); its "traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). Petitioners provide no reason to depart from that settled practice here. Moreover, the Section 2710(d)(1)(B) issue that petitioners raise is not fairly encompassed in the first question presented, which concerns IGRA approval of a compact that authorizes gaming activity "off Indian lands." Pet. i. That omission confirms that petitioners' new contentions do not warrant this Court's review. See *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) ("[T]he fact that [petitioners] discussed this issue in the text of [their] petition for certiorari does not bring it before" this Court, because "Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review.") (citation omitted).

2. Petitioners argue (Pet. 29-32) that the Compact violates UIGEA. The court of appeals held that "the Compact does not as a facial matter violate the UIGEA" because the Compact does not address whether the Tribe will accept "certain forms of payment" that could be unlawful under UIGEA and because the court's "review is of the Secretary's decision not to act when presented with the Compact, not whether all hypothetical implementations of the Compact are lawful." Pet. App. 22-23. That limited and factbound determination is correct and warrants no further review.[3]

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[3] Petitioners' contentions implicate an additional threshold question. The government argued below that petitioners' non-IGRA claims were not a proper basis for judicial review of the limited scope of the approval of the Compact by operation of law. Gov't C.A.

UIGEA prohibits "knowingly accept[ing]" certain payment methods in connection with "unlawful Internet gambling," 31 U.S.C. 5363, which the statute generally defines as the placement, receipt, or knowing transmission of a bet or wager using the Internet, where the "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).[4] Petitioners assert (Pet. 30)—without evidentiary support—that "[t]here 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." But petitioners do not address, for instance, whether the Tribe could require a patron to establish and fund in cash a

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Br. 31-35. IGRA provides that if "the Secretary does not approve or disapprove a compact" within 45 days, "the compact shall be considered to have been approved by the Secretary, but *only to the extent* the compact is *consistent with the provisions of* [*IGRA*]." 25 U.S.C. 2710(d)(8)(C) (emphases added). The court of appeals recognized that the limited nature of a compact approval by operation of law under Section 2710(d)(8)(C)—which suggests "inconsistency with IGRA as the only ground" for declining to approve a compact—might reflect that "non-IGRA challenges" are not a proper basis to challenge such a limited approval. Pet. App. 20. The court ultimately found that it "need not resolve that thorny question" because petitioners' non-IGRA challenges, even if reviewable, would "fail as a matter of law." *Ibid.* That threshold issue—which petitioners fail to address—provides another basis for denying certiorari.

[4] Gambling that otherwise qualifies as "'unlawful Internet gambling'" is excluded from that definition if "the bet or wager" is "initiated and received or otherwise made exclusively within a single State," is "expressly authorized by and placed in accordance with the laws of such State," and does not violate certain other federal laws (including IGRA). 31 U.S.C. 5362(10)(B). The court of appeals did not decide whether the placement of wagers outside Indian lands would be permissible under state law.

sport-betting account with the Tribe which the patron could then later use to place online wagers. Nor do petitioners address whether, as a factual matter, other payment mechanisms would be lawful under UIGEA. And petitioners fail to address the Compact's own text, which, although it does not specifically discuss payment methods, requires the Tribe to comply with all "applicable federal laws with respect to the conduct of Sports Betting." Stay App. 79. Petitioners thus provide no sound basis for certiorari to consider UIGEA.

The court of appeals' conclusion that "the Compact does not as a facial matter violate the UIGEA," Pet. App. 23, does not, as petitioners suggest (Pet. 29-30), conflict with *California* v. *Iipay Nation of Santa Ysabel*, 898 F.3d 960 (9th Cir. 2018). As just explained, the court here merely concluded that the Compact itself does not violate UIGEA because it does not address payment methods that might violate UIGEA. Pet. App. 22-23. That case-specific ruling is fully consistent with *Iipay*, which concluded that the online gambling in that case—which was "not subject to [a] tribal-state compact," 898 F.3d at 964 & n.5—occurs "at least" in part where the patron places an online bet or wager, there, on non-Indian lands in California. *Id.* at 967. The *Iipay* court therefore concluded that "some of the 'gaming activity'" (the betting) was not "subject to [the Tribe's] jurisdiction under IGRA," and because "those bets [we]re illegal" when they were made on non-Indian lands in California, the Tribe's acceptance of financial payments "either via a credit card or an electronic funds transfer" "violate[d] the UIGEA." *Id.* at 962, 967. Nothing in that decision conflicts with the court of appeals' decision here.

3. Finally, petitioners contend (Pet. 32-38) that the "[C]ompact * * * grants a statewide monopoly on off-reservation online sports betting to one particular Indian Tribe" and, for that reason, the approval of the Compact under IGRA should be subject to strict scrutiny under equal-protection principles—rather than the rational-basis review applied by the court of appeals—because the purported monopoly was granted based on "the race, ancestry, ethnicity, and national origin of the members of that Tribe," Pet. 35. See Pet. App. 23. Petitioners are incorrect and identify no equal-protection issue warranting review in this case.

a. Petitioners' equal-protection argument rests on two flawed premises. First, petitioners do not dispute Congress's authority in IGRA to authorize gaming on Indian lands pursuant to a Tribal-State compact. Petitioners' argument instead rests on their view that the "[C]ompact * * * grants a statewide monopoly on *off-reservation* online sports betting" to an Indian tribe and because "the Compact provides for a gaming monopoly off Indian lands," it involves considerations different from those that justify "rational basis" review in other tribal contexts. Pet. 35, 37 (emphasis added). But as the court of appeals held, the Secretary's approval of the Compact by operation of law did *not* "authorize[]" gaming outside Indian lands, Pet. App. 23, because it "'authorizes' only the Tribe's activity on its own lands, that is, operating the sports book and receiving wagers," *id.* at 14-15. See pp. 12-17, *supra*.

To the extent that "any other related activity such as the placing of wagers from outside Indian lands" has been authorized, it has been authorized by the State of Florida "under state law." Pet. App. 15. Moreover, the Compact itself does not—and could not—bar any per-

son from conducting gaming activities on non-Indian lands. Any such legal prohibition would exist only in state law. And because approval of the Compact by operation of law under IGRA did not validate or ratify Florida's own decisions about how to regulate gaming outside Indian lands, any allegation that Florida law governing sports betting violates equal-protection principles does not present an equal-protection claim against the Secretary or the Department. Thus, as Justice Kavanaugh recognized in his statement respecting the denial of petitioners' stay application, "[t]o the extent that a separate Florida statute (as distinct from the compact) authorizes the Seminole Tribe—and only the Seminole Tribe—to conduct certain off-reservation gaming operations in Florida," any question about "the state law's constitutionality is not squarely presented" here. Pet. App. 65.

Second, petitioners concede (Pet. 33-34) that this Court's decisions—which petitioners do not question—have held that actions "providing a preference to Indians" are lawful, at least where they are related to "Indian lands, uniquely sovereign interests, or to the special relationship between the federal government and Indian tribes." Petitioners contend (Pet. 37) that the sports betting addressed in the Compact "does not relate to Indian land, tribal status, self-government, or culture." But for the same reasons just discussed, the approval of the Compact by operation of law *does* relate directly to Indian lands, because it approves gaming activity only on Indian lands. And that approval further relates to the Tribe's uniquely sovereign interests and the special relationship between the federal government and Indian tribes.

b. In any event, the compact in this case is an agreement between two sovereigns—the State of Florida and the Seminole Tribe—concerning the Tribe's own conduct of commercial gaming operations within the State. The government has previously explained in this Court why such an agreement between sovereigns does not implicate race-based equal-protection concerns requiring strict scrutiny. Stay App. Opp. 24-25. But the salient point for present purposes is that petitioners provide no sound basis for this Court to grant review on that equal-protection question in this case.

Petitioners' suggestion (Pet. 34-36) that the court of appeals' decision conflicts with *Williams* v. *Babbitt*, 115 F.3d 657 (9th Cir. 1997), cert. denied, 523 U.S. 1117 (1998), is incorrect. The question in *Williams* was whether a federal statute that said "nothing about non-native ownership of reindeer" and did "not by its terms guarantee Alaskan natives a monopoly in the reindeer business" should nevertheless be interpreted to impose a complete ban on "'non-Native [individuals] ent[ering] into the reindeer industry in Alaska.'" *Id.* at 659 (citation omitted). The Ninth Circuit found "no reason to unnecessarily resolve" "[t]he constitutional questions" that could be raised by such a ban because it "interpret[ed] the Reindeer Act as not precluding non-natives in Alaska from owning and importing reindeer." *Id.* at 666. And although the *Williams* court identified what it viewed as serious constitutional issues that could be implicated by such a ban, *id.* at 663-665, the court ultimately did not resolve any of those issues, *id.* at 666. *Williams* thus does not even address, much less resolve, the constitutionality of a law or agreement between a State and a tribe concerning the tribe's own activities similar to the Compact at issue here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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