NOT YET SCHEDULED FOR ORAL ARGUMENT
No. 22-5022
(consolidated with No. 21-5265)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WEST FLAGLER ASSOCIATES, LTD., a Florida Limited Partnership d/b/a MAGIC CITY CASINO,

BONITA-FORT MYERS CORPORATION, a Florida Corporation d/b/a BONITA SPRINGS POKER ROOM,

Plaintiffs-Appellees,

v.

DEBRA A. HAALAND, in her official capacity as Secretary of the United States Department of the Interior,

UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants-Appellants,

On Appeal From The United States District Court
For The District Of Columbia, No. 1:21-cv-2192 (DLF)

BRIEF FOR AMICUS CURIAE STATE OF FLORIDA IN SUPPORT OF FEDERAL APPELLANTS' REQUEST FOR REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), undersigned counsel certifies the following:

Parties, Intervenors, and Amici

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Federal Appellants.

Rulings Under Review

References to the rulings at issue appear in the Brief for Federal Appellants.

Related Cases

Pending in the D.C. Circuit:

- *W. Flagler Assocs., Ltd. v. Haaland*, 573 F. Supp. 3d 260, No. 1:21-cv-02192 (D.D.C. Nov. 22, 2021) (Friedrich, J.), *appeal docketed*, No. 21-5265, *and consolidated with* No. 22-5022 (D.C. Cir. Jan. 25, 2022).

Resolved in the D.C. Circuit:

- *Monterra MF, LLC v. Haaland*, 573 F. Supp. 3d 260, No. 1:21-cv-02513 (D.D.C. Nov. 22, 2021) (Friedrich, J.), *appeal docketed*, No. 22-5010 (D.C. Cir. Jan. 20, 2022), *voluntary dismissal granted* (D.C. Cir. June 1, 2022).

Resolved in the Eleventh Circuit:

- *W. Flagler Assocs., Ltd. v. DeSantis*, 568 F. Supp. 3d 1277, No. 4:21-cv-270 (N.D. Fla. Oct. 18, 2021) (Winsor, J.), *appeal docketed*, No. 21-14141 (11th Cir.

Nov. 29, 2021), *voluntary dismissal granted sub nom. W. Flagler Assocs., Ltd. v. Governor of Fla.*, 2021 WL 7209340 (11th Cir. Dec. 20, 2021).

Dated: August 24, 2022

/s/ *Henry C. Whitaker*
Henry C. Whitaker

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
Compact	Class III Gaming Compact between the State and Tribe approved in 2021
Department	U.S. Department of the Interior
IGRA	Indian Gaming Regulatory Act
Secretary	Secretary of the U.S. Department of the Interior
State	State of Florida
Tribe	Seminole Tribe of Florida
UIGEA	Unlawful Internet Gambling Enforcement Act

PERTINENT STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the addenda to the initial briefs for the Federal Appellants and the Tribe.

STATEMENT OF THE IDENTITY OF THE AMICUS CURIAE, ITS INTEREST IN THE CASE, AND THE SOURCE OF ITS AUTHORITY TO FILE

The Attorney General of Florida, on behalf of the State of Florida, respectfully submits this amicus brief in support of the federal appellants' request for reversal.

Plaintiffs challenged the Secretary's approval of a gaming compact between the Governor of Florida and the Seminole Tribe of Florida. The Compact expands and modernizes gambling in Florida, including by authorizing—like many other states—intrastate internet sports betting; the addition of Vegas-style craps and roulette; and the establishment of three new casino facilities in South Florida. The new compact also extended the relationship between the State and the Tribe, currently governed by a 2010 gaming compact that was set to last until 2030, for an additional 21 years. The Compact was ratified by overwhelming majorities of both Houses of the Florida Legislature. It was then deemed approved by the federal government pursuant to the Indian Gaming Regulatory Act (IGRA) when the Secretary of Interior allowed it to go into effect. *See* 25 U.S.C. § 2710(d)(8)(C). The district court, however, granted plaintiffs' motion for summary judgment and "set aside the Secretary's default approval of the Compact." JA 578.

Florida has a substantial interest in reinstating the Compact, either in whole or in part. It will produce revenue of approximately $2.5 billion for the State in the first five years and create thousands of jobs for Floridians. Florida therefore files this amicus brief pursuant to Federal Rule of Appellate Procedure 29(a)(2).

ARGUMENT

The 2021 Compact provides enormous economic benefits to both the State of Florida and the Tribe. And that Compact is lawful. The State thus agrees with the Department and the Tribe—the district court's decision vacating the Secretary's approval should be reversed. To begin with, the district court erroneously concluded that IGRA compacts that indisputably govern gaming on Indian lands may not also address portions of those same gaming transactions that occur off Indian lands. Such a compact, contrary to the district court's reasoning, *does* "gover[n] gaming on Indian lands." 25 U.S.C. § 2710(d)(8)(A). Underlying the district court's conclusion was another incorrect premise: that the Compact itself authorizes online sports betting throughout Florida. To the contrary, Florida state law independently authorizes such betting included in the Compact, and whether that state law comports with Florida's constitution does not control whether the Secretary's deemed approval was lawful.

No alternative basis for affirmance exists, either. As the federal appellants correctly point out, the Secretary need not survey, and verify compliance with, the

entire universe of federal law before deeming a compact approved; the Secretary need only ensure its compliance with IGRA. But even if the Secretary were required to consider other federal laws, the Compact would not violate either the Wire Act or the Unlawful Internet Gambling Enforcement Act (UIGEA), for the reasons discussed below.

Quite apart from the merits, the district court's remedy was improper. Under the Administrative Procedure Act, IGRA, and the text of the Compact, the district court should have vacated the Secretary's approval of the Compact only as to the online sports betting provisions. The district court's only basis for not doing so was that the Secretary supposedly "forfeited" the matter by not arguing that the purportedly invalid portions of the Compact were severable—but at oral argument, plaintiffs requested only partial vacatur as a remedy.

I. THE COMPACT DOES NOT VIOLATE THE INDIAN GAMING REGULATORY ACT.

The district court erred in concluding that the Compact violates IGRA. In the district court's view, it is "well-settled that IGRA authorizes sports betting only on Indian lands," and because "the Compact authorizes gaming both on and off Indian lands," the "Secretary had an affirmative duty to reject it." JA 572, 577. Because the Compact addresses wagers placed off Indian lands, the district court concluded, it violates IGRA. The district court derived this syllogism from language in IGRA

providing that the Secretary "is authorized to approve any Tribal-State compact . . . governing gaming on Indian lands." 25 U.S.C. § 2710(d)(8)(A). But nothing in that language nor anything else in IGRA precludes a compact that governs gaming on Indian lands from also addressing gaming off Indian lands. And the Compact itself did not "authorize" any gaming off Indian lands, at least not as a matter of federal law.

The Compact plainly "govern[s] gaming on Indian lands," *id.*, by regulating the gaming activity conducted by the Tribe on Indian lands. *See* JA 692-93. Pertinent here, the online sports betting provisions of the Compact govern the receipt and processing of sports wagers at servers housed on tribal lands. That the Compact *also* addresses gaming *off* Indian lands, however, does not transform a compact that governs gaming on Indian lands into one that does not. To the contrary, IGRA expressly contemplates that Compacts may address subjects other than gaming on Indian lands: compacts "may include provisions relating to," among other things, "(i) 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 such activity"; (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations"; and "(vii) any other subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C).

As a result, and as the federal appellants point out, compacts commonly address matters that cannot be described as "gaming on Indian lands." Fed. Br. 22-23. Those matters include how a state regulates gaming off Indian lands, such as exclusivity agreements; they also include agreements that a state will permit gaming off Indian lands related to gaming on Indian lands, such as off-track betting. Fed. Br. 20. A state and a tribe could even "bargain for" a waiver of tribal sovereign immunity for activities (including gaming) occurring off Indian lands. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 796-97 (2014).

Put another way, a compact must "gover[n] gaming on Indian lands," but the compact may also "govern" other things, such as the matters set forth in § 2710(d)(3)(C). Nowhere does IGRA insist that the other matters that may lawfully be addressed in an IGRA compact involve conduct occurring only on tribal lands.

IGRA's history confirms as much. Congress enacted IGRA in 1988 "in response to [the Supreme Court's] decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22 (1987), which held that States lacked regulatory authority over gaming on Indian lands." *Bay Mills*, 572 U.S. at 794. The "problem Congress set out to address" in the statute was the Supreme Court's "ouster of state authority" over gaming on Indian Lands. *Id.* The statute thus was enacted to give the states *additional* regulatory tools—not to preclude a state from otherwise exercising

its sovereign authority over gaming in its own territory, including through negotiating an IGRA compact with an Indian tribe. No cogent reason warrants construing the statute to preclude a state from addressing matters in an IGRA compact that occur within its own sovereign territory, particularly matters closely related to activity taking place on Indian lands. After all, a state has plenary jurisdiction and control over activities on its sovereign territory, even apart from the statutory authority conferred in IGRA for a state to regulate gaming on Indian lands.

Here, the portions of the Compact addressing wagers placed off Indian lands[1] are expressly made a permissible subject of an IGRA compact, both because "IGRA permits compacts to include agreements on 'any other subject[]'—including gaming outside Indian lands—provided that it is 'directly related to the operation of' gaming on Indian lands" (Fed. Br. 24 (quoting 25 U.S.C. § 2710(d)(3)(C)(vii)), and because the Compact's discussion of wagers off Indian lands are provisions relating to the application of state and tribal laws or the allocation of jurisdiction between the Tribe and the State. *See* Tribe Amicus Br. 6-19.

Amador County v. Salazar is not to the contrary. 640 F.3d 373 (D.C. Cir. 2011). There, the plaintiff argued that the land on which a compact governed gaming did not qualify as "Indian land" and thus that the compact violated IGRA because it

[1] For purposes of state law, the Compact "deem[s]" those wagers to have occurred on tribal lands where the Tribe's servers are housed. JA 687.

did not regulate "Indian land" in any respect. *Id.* at 375. Among other things, the Court held that the Secretary's deemed approval was judicially reviewable under the APA. In so doing, the Court explained that § 2710(d)(8)(A) "suggest[s] that disapproval" by the Secretary "is obligatory" when a compact does not "gover[n] gaming on *Indian lands*." *Id.* at 381. But here, unlike *Amador County*, there is no dispute that the Compact governs gaming on Indian lands—even if it *also* addresses gaming off Indian lands that is a direct incident of gaming on Indian lands.

The district court's erroneous conclusion that the Compact violates IGRA because it addresses gaming off Indian lands may have been informed by its similarly mistaken premise that the Compact itself "authorizes" such gaming as a matter of federal law. JA 573-77. An approved compact can "render 'lawful' class III gaming 'on Indian lands,'" but 'the statutory text gives the Secretary's approval no such power over non-Indian land gaming discussed in a compact." Fed. Br. 27. After all, "IGRA affords tools . . . to regulate gaming on Indian lands, and nowhere else." JA572 (quoting *Bay Mills*, 572 U.S. at 795). In other words, concluding a compact with a tribe does not in and of itself change state law or result in "authorization" of online sports betting off Indian lands regardless of the content of state law.

The district court therefore misunderstood Florida law in asserting that the language of the Compact "affirmatively authorizes sports betting . . . off Indian lands" JA 575. On the contrary, the "authorization" of gaming that occurs *on* Indian

lands, and that gaming that occurs *off* Indian lands, stem from different sources. The Compact "authorizes" gaming *on* Indian lands for purposes of IGRA—given that the state otherwise would lack jurisdiction over such lands. *See Cabazon*, 480 U.S. at 221-22. For gaming that occurs off Indian lands, however, "authorization" under federal law is unnecessary, and the Compact merely "authorizes" such gaming as a matter of *Florida law*. In particular, Article X, section 30(c) of the Florida Constitution explicitly ties the Florida Legislature's authority to regulate such gaming (without first holding a popular referendum) to whether that gaming is a subject of a "gaming compac[t] pursuant to the Federal Indian Gaming Regulatory Act for the conduct of casino gambling on tribal lands." For the reasons stated above and below, that is exactly what the Compact does. *See also infra* at 13-15.

Thus, as a factual matter, the Compact "allows patrons to wager throughout Florida" (JA 573) only because the Florida Legislature enacted implementing legislation providing such state-law authority. Specifically, the Legislature established that "[g]ames and gaming activities authorized under this subsection," including sports betting, "and conducted pursuant to a gaming compact ratified and approved under subsection (3) do not violate the laws of this state." Fla. Stat. § 285.710(13); *see also* Fla. Stat. § 285.710(13)(b)(7) ("Wagers on sports betting, including wagers made by players physically located within the state using a mobile or other electronic device, shall be deemed to be exclusively conducted by the Tribe where the servers

or other devices used to conduct such wagering activity on the Tribe's Indian lands are located.").

As the federal appellants explain, whether those state statutes authorizing the placement of wagers consistent with the Compact are lawful under Florida's Constitution is irrelevant to whether the Compact violates IGRA. Fed. Br. 26-28, 30, 40. But as noted above, it *is* relevant to correctly construing what the Compact "purports" (JA 576) to authorize, contrary to the district court's analysis. And again, to be clear, federal law is no bar to such state regulation: "*Cabazon* left fully intact a State's regulatory power over tribal gaming outside Indian territory," and such authority is "capacious." *Bay Mills*, 572 U.S. at 794.

In short, the Secretary's deemed approval was lawful because nothing in IGRA prohibits a compact that governs gaming on Indian lands from also addressing gaming off Indian lands—gaming that is authorized by Florida law, not the Compact. Affirming the district court's reading of IGRA would deny the State and the Tribe the massive economic benefits flowing from their agreement and would have considerable nationwide impact. *See* Tribe Amicus Br. 4-6.

II. NEITHER THE WIRE ACT NOR UIGEA PROVIDES ANY BASIS FOR AFFIRMING.

The State agrees with the federal appellants that even if the Compact violated a federal law other than IGRA, the Secretary was not required to disapprove it. *See* Fed. Br. 31-35. The State also agrees that, even if the Secretary *were* required to do

so, the Compact would not violate the Wire Act or UIGEA. Fed. Br. 35-41. A few additional points bear mentioning, however.

1. "[T]he terms of the Compact itself do not violate the Wire Act" (Fed. Br. 36) because the Wire Act merely authorizes federal prosecutions for transmissions "in interstate or foreign commerce," 18 U.S.C. § 1084(a). But even if the Compact were implemented in such a way that "a wager placed and received in Florida may nevertheless bounce between servers in and out of State between its origin and destination," Fed. Br. 36, and even if (as seems generally unlikely) the federal government chose to prosecute such an alleged violation, that conduct would not violate the Wire Act.

Under the Wire Act, the mere interstate intermediate routing of a communication that is otherwise intrastate does not constitute the "us[e]" of "a wire communication facility for the transmission in interstate or foreign commerce." 18 U.S.C. § 1084(a); *see United States v. Lyons*, 740 F.3d 702, 713 (1st Cir. 2014) (observing that the Wire Act "prohibits interstate gambling without criminalizing lawful intrastate gambling"). A statute that criminalizes the "use" of an item in commerce requires "active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce." *Jones v. United States*, 529 U.S. 848, 855 (2000). And because the Wire Act is limited to the "use . . . in interstate or foreign

commerce"—as opposed to also reaching activities that "affect" interstate commerce—the "active employment" that the statute requires is an actual interstate commercial transaction involving parties located in different states. *See United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, 283 (1975) (reading the phrase "engaged in commerce" to require "the production, distribution, or acquisition of goods or services in interstate commerce"); *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001) (explaining that unlike with statutes that use the phrases "affecting commerce" and "involving commerce," a statute employing the phrase "in commerce" is "understood to have a more limited reach").

Here, purely intrastate wagers—even if those wagers involve intermediate routing that may incidentally cross state lines—involve a wholly intrastate transaction between two parties in the same state. In other words, such wagers involve interstate routing of information as well as intrastate commerce, but not the "us[e]" of "a wire communication facility for the transmission" of anything "in interstate . . . commerce." 18 U.S.C. § 1084(a); *cf.* Fed. Br. 37 (arguing that Wire Act may require knowledge of the interstate nature of the transmission as an element of the crime).

The view that such transactions violate the Wire Act is also in tension with UIGEA, which was enacted in 2006—decades after the Wire Act in 1961. UIGEA

specifically excepts from the definition of "unlawful Internet gambling" bets or wagers that are "initiated and received or otherwise made exclusively within a single State." 31 U.S.C. § 5362(10)(B)(i). It makes clear that "[t]he intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made." *Id.* § 5362(10)(E). It would have been anomalous for Congress to carve out such transactions from UIGEA if they were independently unlawful under the Wire Act because of the mere intermediate routing of electronic data. And in apparent reliance on this UIGEA exception, at least 14 states and the District of Columbia have allowed mobile sports gambling within their borders,[2] and several others are in the process of establishing regulatory regimes that would allow mobile sports betting. The Court should avoid a reading of the Wire Act that would result in "criminaliz[ing] a broad range of apparently innocent conduct." *Liparota v. United States*, 471 U.S. 419, 426 (1985).

2. Next, "the Compact itself does not violate [UIGEA]," because it "does not specify what forms of payment the Tribe must accept in connection with its online sportsbook." Fed. Br. 37-38. But even if the Compact were implemented so that the

[2] *See, e.g.*, Ariz. Rev. Stat. § 5-1304(D); Colo. Rev. Stat. § 44-30-1506(8); Conn. Gen. Stat. § P.A. 21-23, § 14(a)(2); 230 Ill. Comp. Stat. 45/25-35(d); Ind. Code §§ 4-38-1-1 to 4-38-11-2; Iowa Code § 99F.7A(2); Mich. Comp. Laws § 432.404(1)-(7); Mont. Code § 23-7-103(7)(a); N.H. Rev. Stat. § 287-I:7(I)-(VI); Or. Rev. Stat. tit. 36A, Ch. 461, Refs & Annos; R.I. Gen. Laws § 42-61.2-3.3(a)(1)(ix)-(xii); Tenn. Code § 4-51-302(18); Va. Code §§ 58.1-4030 to 58.1-4047; Wyo. Stat. § 9-24-102(a)-(c); D.C. Code § 36-621.11(a)(1)-(2).

Tribe would use the payment methods listed in UIGEA, that would not violate the statute: It "exempts from the definition of 'unlawful Internet gambling' any wagers that are lawful 'in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.'" Fed. Br. 38 (quoting 31 U.S.C. § 5362(10)(A)). And the bets and wagers referred to in the Compact are lawful in Florida. *See* Fla. Stat. § 285.710(13). The state statute authorizing the online wagers, *id.*, has not been invalidated and is presumed constitutional. *See Fla. Dep't of Health v. Florigrown, LLC*, 317 So. 3d 1101, 1111 (Fla. 2021).

Although the federal appellants are understandably less definitive about it, *see* Fed. Br. 38-40, the Compact and the state statute authorizing the placement of wagers pursuant to the Compact are fully consistent with Florida's Constitution. Article X, section 30(a) of the state constitution (commonly referred to as "Amendment 3") provides 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). Subsection (c) of Amendment 3 states that nothing in it "limit[s] the ability of the state or Native American tribes to negotiate gaming compacts pursuant to the Federal Indian Gaming Regulatory Act for the conduct of casino gambling on tribal lands." *Id.* § 30(c). This language expressly permits the State to enter into an IGRA compact with an Indian tribe without a referendum: If the compact is one that is "pursuant to [IGRA] for the conduct of casino gambling on tribal lands"—*i.e.*, if it is a compact

like the Compact here, which governs gambling on the Tribe's lands—the State is authorized to negotiate and enter into it, and to pass the necessary enabling legislation. In other words, like IGRA itself, *see supra* at 7-8, Amendment 3's IGRA-compact exception does not require that every component of the gaming described in an IGRA compact occur physically "on tribal lands"; the "on tribal lands" requirement instead simply describes the type of compact contemplated by the IGRA-compact exception—one that, like the Compact here, "govern[s] gaming activities . . . on Indian lands." 25 U.S.C.§ 2710(d)(3)(B).

That interpretation is consistent with the views expressed by the sponsor of Amendment 3, as well as with the interpretation of the Amendment adopted by the Florida Supreme Court. When explaining to the Florida Supreme Court why the ballot language corresponding to the Amendment was accurate and should therefore be approved for ballot placement, the Amendment's sponsor represented that Amendment 3 would "not affect the legislature's . . . regulatory authority over gambling or federal law with regard to compacts entered under the Indian Gaming Regulatory Act." Br. of Sponsor, *Advisory Op. to the Att'y Gen. Re: Voter Control of Gambling*, 2016 WL 3655206, at *9 n.1 (Fla.). The Florida Supreme Court agreed, interpreting this exception as applying to "compacts executed under federal law." *Advisory Op. to the Att'y Gen. Re: Voter Control of Gambling*, 215 So. 3d 1209, 1216 (Fla. 2017). Thus, a compact that comports with IGRA, as this one does, need not be submitted

to Florida voters for approval before the Legislature may implement it under Florida law.

Below, plaintiffs appeared to contend that allowing the State to negotiate gaming compacts pursuant to the Federal Indian Gaming Regulatory Act means only that they may work toward a preliminary agreement that must, in turn, be approved by referendum. Yet the language of the amendment states that "nothing" in it "shall be construed to limit the ability of the state or Native American tribes to negotiate" such compacts. Fla Const., Art. X, § 30(c). If the State and a tribe could not execute a compact without approval of the voters, the negotiations of the parties would be severely limited. Moreover, the term "negotiate" includes not only actions "[t]o communicate" about a transaction, but also "bring[ing] about," or completing, a transaction. NEGOTIATE, *Black's Law Dictionary* (11th ed. 2019). Plaintiffs' reading of Amendment 3 also would make the IGRA-compact exception meaningless. After all, nothing in the voter-approval requirement purports to forbid preliminary talks between the State and Indian tribes towards a compact agreement. If that is all the exception accomplished, it would have been unnecessary to include in the first place.

Thus, because the Secretary was not required to consider whether the Compact violated any federal law other than IGRA before deeming it approved, and because even if she were the Compact would violate neither the Wire Act nor UIGEA, federal appellants are correct: No alternative basis for affirmance exists.[3]

III. THE DISTRICT COURT ERRED IN SETTING ASIDE THE ENTIRE COMPACT.

After erroneously holding that "the Compact authorizes gaming both on and off Indian lands" in violation of IGRA's "Indian lands" requirement, the district court doubled down on its error by concluding that "the appropriate remedy is to set aside the Secretary's default approval of the Compact." JA 577-78. And although "[a]t oral argument, the *West Flagler* plaintiffs suggested that the Court could set aside the compact only to the extent that it conflicts with IGRA," the district court

[3] In fact, as the Tribe explains in its opening brief, an alternative basis for reversal exists: The district court failed to *sua sponte* consider whether this case should be dismissed under Rule 19 due to the State's sovereign immunity. *See* Tribe Br. 17 n.3; *see generally* Tribe Br. 11-32. Had it done so, it would have had to afford the State's sovereign immunity appropriate weight, *see* Tribe Br. 12-17, and conclude that the State is an indispensable party for many of the same reasons as is the Tribe. Under Rule 19(b): (1) the prejudice to the State of a judgment issued in its absence is obvious, *see* Tribe Br. 18-20; (2) that prejudice could not be lessened or avoided (particularly without partial vacatur, *see infra* at 17-21); (3) the judgment might be adequate but only as to the plaintiffs; and (4) the fact that plaintiffs would lack an adequate remedy if the action were dismissed does not favor nonjoinder when the absent party is entitled to sovereign immunity, *see* Tribe Br. 30-32.

decided to grant them even broader relief. JA 578. In its view, "the Secretary forfeited any request for severance" and, even if she had not, this Court's decision in *Amador County* "foreclosed line-by-line review of the Compact's terms." *Id.*

The district court was wrong on both counts. Even if the district court were correct that the Compact violates IGRA, setting aside the Compact only in part would be fully consistent with both the APA and IGRA, and the Secretary did not forfeit anything by failing to request a remedy that plaintiffs themselves were seeking.

A. To the extent the Compact conflicts with IGRA, the appropriate remedy would be to set aside the Secretary's approval only as to the conflicting provisions.

The APA defines challengeable "agency action" to include "the whole *or a part of* an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13) (emphasis added); *see also Wilmina Shipping AS v. Dep't of Homeland Sec.*, 75 F. Supp. 3d 163, 171 (D.D.C. 2014) ("[T]he APA specifically provides that a reviewing court may hold unlawful an 'agency action,' and the definition of agency action 'includes the *whole or a part of*' an agency order."). Consistent with the statutory text, this Court has allowed severance—and "partial affirmance"—in APA cases unless "there is substantial doubt that the agency would have adopted the same disposition regarding the unchallenged portion if the challenged portion were subtracted." *North Carolina v. FERC*, 730

F.2d 790, 796 (D.C. Cir. 1984). District courts within this Circuit have also allowed severance when the portion of the decision at issue is not intertwined with the remainder of the decision, asking "whether the action 'sensibly serve[s] the goals for which it was designed' without the severed portion." *Wilmina Shipping*, 75 F. Supp. 3d at 171 (quoting *MD/DC/DE Broads. Ass'n v. FCC*, 253 F.3d 732, 734 (D.C. Cir. 2001)). In the IGRA context, the Tenth Circuit has severed an arbitration clause in an IGRA compact after a Supreme Court case rendered the parties' agreed-upon scope of review unenforceable. *Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d 1226, 1238-41 (10th Cir. 2018).

Here, there is no reason to doubt that the Secretary would have approved the Compact even without the online sports betting provisions. Neither plaintiffs nor the district court asserted that any other portion of the Compact is inconsistent with IGRA. The State and Tribe, moreover, have already agreed that the Compact should stand even without the online sports betting provisions:

> In the event that a federal district court in Florida or other court of competent jurisdiction shall find any provision, section, or subsection of this Compact to be invalid, the remaining provisions, sections, and subsections of this Compact shall remain in full force and effect . . . If at any time the Tribe is not legally permitted to offer Sports Betting as described in this Compact, including to Patrons physically located in the State but not on Indian Lands, then the Compact will not become null and void, but the Tribe will be relieved of its obligation to pay the full Guaranteed Minimum Compact Term Payment.

JA 738-39. Nothing warrants frustrating the compacting parties' intent as reflected in the Compact's plain terms.

The mechanism by which the Secretary approved the Compact here provides further support for so limiting any remedy. Because the Secretary did not approve or disapprove the Compact within 45 days, it was deemed approved under 25 U.S.C. § 2710(d)(8)(C) by operation of law. Under that provision, a compact is deemed approved "only to the extent the compact is consistent with the provisions of this chapter." *Id.* Excising only the sports betting provision would undisputedly leave a Compact that is "consistent with the provisions with this chapter"—*i.e.*, the Secretary's deemed approval of *that* Compact would be lawful. The district court thus contravened IGRA's clear text in refusing to partially vacate the Secretary's approval.

In concluding that wholesale vacatur of the Secretary's approval was the only appropriate remedy, the district court relied on *Amador County*. But there, the validity of an *entire compact* was at issue, because the question was whether the tribe had any Indian lands on which the compact would govern gaming. *Amador Cty.*, 640 F.3d at 383. The Court thus had no occasion to consider whether vacating only part of the Secretary's approval was permissible. And although the Court explained that the Secretary must "disapprove a compact if it would violate" any of the requirements in § 2710(d)(b)(8), *id.* at 381, that the *Secretary* may be constrained to either

approve or disapprove a Compact in its entirety says nothing about whether a *court* can hold unlawful only part of the Secretary's approval under the APA.

What is more, if affirmed, the district court's remedy decision would have adverse consequences. It would require courts considering APA challenges to IGRA compacts to vacate an entire compact anytime a single portion—even one covered by a severance provision—is held unlawful, again, contrary to the plain language in IGRA explicitly contemplating severance. *See* 25 U.S.C. § 2710(d)(8)(C). Here, the Tribe and the State navigated an arduous political process to negotiate and enact a historic agreement, knowing that the online sports betting provisions might be challenged, and included severance provisions to govern that precise contingency. When the district court set aside the entire Compact rather than follow IGRA's plain text by upholding the Compact "to the extent the [C]ompact is consistent with the provisions" of IGRA, *id.*, it failed to honor the intent of the parties, who attached significant monetary value to those severance provisions during negotiations.

Nor is the district court's remedy ruling limited to IGRA compacts. The court's reasoning, after all, was simply that "[t]he issue is governed by § 706 of the APA, which directs courts to 'hold unlawful and set aside agency action' that is "not in accordance with law.' The 'agency action' under review is the Secretary's default

approval of the Compact." JA 577 (quoting 5 U.S.C. § 706(2)(A)). That same reasoning could apply to any decision by any agency, allowing wholesale invalidation of any "agency action."

B. The Secretary did not forfeit the remedy plaintiffs requested.

The district court also rejected plaintiffs' request for partial vacatur of the Secretary's approval, concluding that the Secretary forfeited "any request for severance by omitting it from its motions to dismiss, its corresponding replies, and its supplemental briefs." JA 578. That, however, has it backwards. As discussed above, partial vacatur is a remedy supported by IGRA and the Compact itself, and the Secretary need not have specifically sought partial vacatur when *plaintiffs* requested it. JA 578. The only "remedy" the Secretary sought was affirmance of the deemed approval; by contrast, plaintiffs requested partial vacatur of the Secretary's approval. The district court did not explain how the Secretary, as defendant, could forfeit a remedy sought by plaintiffs.

And because the district court was on notice of the argument that partial vacatur would be appropriate, it is unclear what value the district court advanced in deeming the Secretary to have "forfeited" it. The underlying rationale for forfeiture of a claim or argument is that a failure to raise it in the first instance deprives the district court of the opportunity to address it—an opportunity the district court plainly did not lack here. *Cf. In re Sealed Case*, 356 F.3d 313, 318 (D.C. Cir. 2004).

In short, because the plaintiffs requested partial vacatur, and because the possibility of partial vacatur was raised and passed on below, the district court's forfeiture holding was erroneous and presents no bar to the Court considering partial vacatur here.

In any event, to the extent there was any forfeiture, the district court erred in failing to excuse it. Given the massive significance of the Compact to Florida and the Tribe, it would be extraordinary for the Court to permit the *federal government*'s litigation error to doom the vast bulk of the Compact regardless of whether it is lawful under IGRA.

CONCLUSION

For the foregoing reasons, and for the reasons explained in the appellants' briefs, the district court's judgment should be reversed.

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Respectfully submitted.

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I hereby certify that on this 24th day of August, 2022, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

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