IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WEST FLAGLER ASSOCIATES, LTD., d/b/a MAGIC CITY CASINO, and BONITA-FORT MYERS CORPORATION, d/b/a BONITA SPRINGS POKER ROOM,

Plaintiffs,

v.

DEB HAALAND, in her official Capacity as SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR and UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

No. 1:21-cv-02192-DLF

AMICUS CURIAE BRIEF OF THE STATE OF FLORIDA IN SUPPORT OF THE FEDERAL GOVERNMENT'S MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTEREST OF *AMICUS CURIAE*

The Attorney General of Florida, on behalf of the State of Florida, respectfully submits this amicus brief pursuant to Local Civil Rule 7(o)(1) in support of the federal government's motion to dismiss and in opposition to plaintiffs' motion for summary judgment.

Plaintiffs challenge portions of a gaming compact agreed to between the Governor of Florida and the Seminole Tribe of Florida ("the Tribe"). Following that agreement, the Compact was ratified by overwhelming majorities of both Houses of the Florida Legislature. The Compact was then deemed approved by the federal government pursuant to the Indian Gaming Regulatory Act when the Secretary of Interior allowed it to go into effect. *See* 25 U.S.C. § 2710(d)(8)(C).

The Compact expands and modernizes casino gaming in Florida, including by authorizing—as have 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. It will produce revenue of approximately $2.5 billion for the State in the first five years and create thousands of jobs for Floridians. For these reasons, Florida has a substantial interest in defending the Compact against plaintiffs' bid to undo this cooperative effort supported by three distinct sovereigns.

BACKGROUND

Plaintiffs have sued the U.S. Secretary of the Interior and the U.S. Department of the Interior. Their suit alleges that the defendants violated the Administrative Procedure Act in failing to disapprove the Compact between Florida and the Tribe under the Indian Gaming Regulatory Act ("IGRA"). Plaintiffs claim that provisions of the Compact that authorize the Tribe to conduct online gaming in Florida are unlawful. Plaintiffs have moved for summary judgment, asking for the Court to "set[] aside the Secretary's approval of the Compact as contrary to law." DE19, at 45.

The Department of Justice, on behalf of the defendants, has moved to dismiss the suit and opposed plaintiffs' summary-judgment motion on various procedural grounds. DE25. The Department's brief in support of its motion to dismiss argues, for instance, that plaintiffs lack standing to sue; that Interior has not violated the APA; and that, contrary to plaintiffs' contentions, the Compact does not unconstitutionally discriminate based on race.

Because the Department's brief focuses on procedural matters, the State respectfully submits this brief to address three of plaintiffs' merits arguments: first, the argument that the online-gambling provisions unlawfully permit gaming both on and off "Indian lands," and therefore are unauthorized by IGRA; *see* DE19, at 18–30; second, that the online-gambling provisions violate the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA"), *id.* at 30–32; and third, that those provisions of the Compact violate the Wire Act, *id.* at 32–34.

For the reasons that follow, Florida believes that those arguments are without merit.

ARGUMENT

I. The Compact Is Authorized By The Indian Gaming Regulatory Act.

The Compact authorizes the Tribe to conduct intrastate online gambling within Florida. While that gaming is operated from servers (and other equipment) located on the Tribe's facilities on Indian Lands within Florida, the person making the bet or wager must be physically located within Florida. *See* DE1-1, at 19. The Compact recognizes that such gaming may involve players who are physically located outside of the Indian Lands from which the online gaming is operated (though again within Florida). Addressing this arrangement, the Compact provides that wagers placed 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 and other devices used to conduct such wagering activity at a Facility on Indian Lands." *Id.* at 20. Plaintiffs contend (DE19, at 18–30) that this aspect of the Compact is unauthorized by IGRA because a portion of the online-gambling transactions authorized by the Compact will not physically take place "on Indian lands of such Indian tribe." 25 U.S.C. § 2710(d)(8)(A).

Plaintiffs are mistaken. The relevant provision of IGRA on which they rely provides:

> The Secretary 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. Plaintiffs stress that the statute reflects Congress's intent to regulate gaming on "Indian Lands." DE19, at 19–20 & n.8. But the online-gambling provisions of the Compact do indeed regulate gaming on Indian Lands. The servers and other equipment (as well as the personnel needed to support that physical infrastructure) used to operate the games are physically located on Indian Lands. The Compact "govern[s]" those activities in some detail. The Compact, for instance, requires that such online gaming take place only at seven specific tribal facilities, and requires the conduct of such gaming to abide by detailed procedures. DE1-1, at 21–26. No more is needed to show that the Compact "govern[s]" gaming on Indian Lands.

Plaintiffs are wrong that a compact that governs gaming on Indian Lands is transformed into one that does not simply because the Compact also addresses matters taking place at physical locations outside of Indian Lands. That is evident from the part of IGRA that specifies the permissible subjects of a compact—25 U.S.C. § 2710(d)(3)(C)—which provides:

> Any Tribal-State compact negotiated under [the Indian Gaming Regulatory Act] may include provisions relating to—
>
> (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*;
>
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
>
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

> (v) remedies for breach of contract;
>
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
>
> (vii) *any other subjects that are directly related to the operation of gaming activities.*

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

First, as Interior explained in a letter outlining why it declined to disapprove the Compact, *see* DE1-6, at 6–8, those provisions permit Florida and the Tribe to allocate responsibility among them for the conduct of online-gambling activities that are the subject of a compact. States and tribes may allocate jurisdiction over gaming activities when they are "directly related to, and necessary for" the regulation of "activities actually involved in the *playing* of the [Class III] game." *Navajo Nation v. Dalley*, 896 F.3d 1196, 1207–08 (10th Cir. 2018); *see also Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254, 1264 (D.N.M. 2013) (stating that IGRA permits jurisdiction allocation "as necessary for the enforcement of laws and regulations of the State or Indian tribe, that are directly related to, and *necessary for, licensing and regulation* of class III gaming activities"); *Muhammad v. Comanche Nation Casino*, No. CIV-09-968-D, 2010 WL 4365568, at *6 (W.D. Okla. Oct. 27, 2010) (rejecting restrictive reading of IGRA's jurisdiction allocation provisions as inconsistent with congressional purpose of promoting strong tribal governments). Here, the parties allocated to the Tribe jurisdiction over the online-gambling activities in "deem[ing]" wagering that physically occurs

off Indian Lands, but within the sovereign territory of Florida, to take place on Indian Lands. DE1-1, at 19.

Second, even apart from that allocation of jurisdiction, the statute permits a compact to include in it "other subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii). The bets and wagers placed by individuals physically located off Indian Lands directly relate to the operation of online-gaming activities physically housed on Indian Lands. They therefore are expressly made a permissible subject of the Compact.[1]

That conclusion is bolstered by the history of the statute. 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

[1] Plaintiffs point out, DE19, at 20, that the Supreme Court in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), stated that IGRA "affords tools . . . to regulate gaming on Indian Lands, and nowhere else." *Id.* at 795. The Court made that statement in concluding that IGRA's abrogation of tribal sovereign immunity, *see* 25 U.S.C. § 2710(d)(7)(A)(ii), did not apply to the operation of a casino that was physically located, in its entirety, outside of a tribe's Indian Lands, *Bay Mills*, 572 U.S. at 791. The Court's point was that it made sense that Michigan could not enjoin the tribe's activities because the operation of that casino was not subject to IGRA. *See id.* at 794–95. But here, unlike the casino at issue in *Bay Mills*, the online-gambling activities are operated through servers that are physically present on Indian Lands and therefore are subject to the statute. Thus, the immunity provision discussed in *Bay Mills* would indeed fully apply to those activities, since the operation of the servers on Indian Lands is "located on Indian Lands." 25 U.S.C. § 2710(d)(7)(A)(ii).

lands." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014). The "problem Congress set out to address" in this 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 a 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 sovereign territory, and are closely related to activity physically taking place on Indian Lands, given that it would have plenary jurisdiction and control over those activities quite apart from the statutory authority conferred in IGRA to regulate gaming on Indian Lands.

There is precedent for a gaming compact to involve gaming activities physically occurring off Indian Lands. Such compacts have frequently authorized off-track betting on horse races. *See, e.g.*, *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1053 (9th Cir. 1997) (involving off-track betting authorized by a compact). Interior has approved compacts authorizing off-track betting for play in California, Oklahoma, and Washington.[2] In each of these examples, off-track betting is authorized by the

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[2] *See* Tribal-State Gaming Compact Between the State of California and the Pechanga Band of Luiseño Indians § 3.1(a)(4) (authorizing "[o]ff-track wagering on horse races at a satellite wagering facility"); Off-Track Wagering Compact Between the Iowa Tribe of Oklahoma and the State of Oklahoma § 4; Tribal-State Compact

terms of the compact, even though the conduct of an important part of the gaming activity—the horse race itself—does not occur on Indian Lands. Plaintiffs' position is in tension with those precedents.[3]

II. The Compact Does Not Violate The Unlawful Internet Gambling Enforcement Act.

Plaintiffs err in contending that the Compact authorizes conduct in violation of the UIGEA.

That statute prohibits any "person engaged in the business of betting or wagering" from accepting certain financial payments from individuals who are engaged in "unlawful Internet gambling." 31 U.S.C. § 5363. The term "unlawful Internet gambling" is defined to mean 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).

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for Class III Gaming Between the Squaxin Island Tribe and the State of Washington, Appendix B § 2.3.1(a).

[3] The Ninth Circuit in *Iipay Nation* concluded, consistent with an amicus brief filed by Florida, that IGRA does not grant an Indian tribe exclusive jurisdiction, free from the operation of state law, over online gaming operated on servers physically located on Indian Lands with gamblers physically located off of Indian Lands. *See California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960, 965 (9th Cir. 2018); *see also* Br. of Amicus Curiae States in Support of AT&T Corp. and Affirmance, *AT&T Corp. v. Couer d'Alene Tribe* (9th Cir. 2002) (No. 99-35088), 1999 WL 33622330, at *4. But that case did not involve a compact between a tribe and a state specifically authorizing a tribe to conduct online gambling and "allocat[ing] jurisdiction" between the state and tribe.

Plaintiffs are wrong that "online sports betting is illegal in Florida outside of Indian lands," and thus that the Compact violates these provisions. DE19, at 31. In fact, in ratifying the Compact, the Florida Legislature specifically excepted gaming "conducted pursuant to a gaming compact ratified and approved" under state law from otherwise-applicable state law criminal prohibitions. Fla. Stat. § 285.710(13)(7); *see* Fla. Stat. § 285.710(13)(b)(7). UIGEA is thus inapplicable here because the bets and wagers authorized by the Compact are lawful in Florida.

Plaintiffs invoke *California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960 (9th Cir. 2018), DE19, at 22, 31, but that case reinforces that the Compact is lawful. There, the Ninth Circuit concluded that an Indian tribe violated UIGEA because the tribe had unilaterally established an online gaming business without entering into a compact and in violation of California law. *Iipay Nation*, 898 F.3d at 967–68. As the court observed, UIGEA merely requires "that bets placed over the internet be legal both where they are initiated and where they are received." *Id.* at 968. Here, again, that requirement is satisfied.

III. The Compact Does Not Violate The Wire Act.

Plaintiffs likewise cannot show that the intrastate online gambling authorized by the Compact violates the Wire Act. That law makes it a crime for a person engaged in the business of betting or wagering to "use[] a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on

any sporting event or contest." 18 U.S.C. § 1084(a). In considering whether the Wire Act makes the Compact unlawful, the Court must avoid a reading of the statute that "would dramatically intrude upon traditional state criminal jurisdiction" unless there is "clear indication" that it does so. *Bond v. United States*, 572 U.S. 844, 857 (2014) (internal alterations and citations omitted). Construing the Wire Act to criminalize conduct authorized by the Compact would do far worse: it would criminalize transactions between persons wholly within Florida that are legal not only under Florida law but also under tribal law and authorized by the federal government to boot.

Plaintiffs first summarily suggest that "the Wire Act should apply when the communication is between a person in a state and a person on an Indian reservation," even though here, the Indian reservation and the person would be in the very same state. DE19, at 33. But the statute applies to transmissions "in interstate or foreign commerce," 18 U.S.C. § 1084(a). An Indian tribe is neither a state nor a foreign country. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191 (1989); *Cherokee Nation v. Georgia*, 30 U.S. 1, 20 (1831); *see also* 18 U.S.C. § 1084(e) (not including Indian tribes within the definition of "State" applicable to the Wire Act). That is a distinction recognized by the Constitution itself, which gives Congress the power to regulate "Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8.

Second, Plaintiffs argue that, even though the transmissions authorized by the Compact would be between persons located within Florida, the transmissions may in some instances be "likely to travel across state lines given the interconnected nature of the interstate wire facilities" involved—"phone[s]" and "the internet." DE19, at 33. But the mere interstate intermediate routing of a communication that is otherwise intrastate does not constitute the "use[]" 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"). As the Supreme Court made clear in *United States v. Jones*, 529 U.S. 848 (2000), 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." *Id.* at 848–49. 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. Maintenance Industs.*, 422 U.S. 271, 283 (1975) (reading the phrase "engaged in interstate 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 two parties who are not engaged in interstate commerce, but rather in a wholly intrastate transaction. In other words, such wagers involve interstate routing of information as well as intrastate commerce, but not the "use" of a "wire communication facility for the transmission" of anything "in interstate commerce." 18 U.S.C. § 1084(a).

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 furthermore 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 in 2006 so carefully to carve out such transactions from UIGEA if they were independently unlawful under the Wire Act merely on account of the 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,[4] 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).

CONCLUSION

For these reasons, and those expressed by the federal government, the Court should grant the federal government's motion to dismiss and deny plaintiffs' motion for summary judgment.

[4] *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).

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