No. 23-862

IN THE
Supreme Court of the United States

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

v.

DEBRA HAALAND, *et al.*,
Respondents.

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

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF FOR PETITIONERS

1.a. The centerpiece of the Government's IGRA argument is that the Court of Appeals correctly interpreted the Compact as not authorizing any sports gaming off Indian lands and therefore the approval of the Compact did not violate IGRA. By contrast, the Government effectively concedes that if the Compact authorized gaming off Indian lands, then its approval would have violated IGRA and the Court of Appeals' decision would have conflicted with decisions of this Court and other circuits, necessitating review and reversal by this Court.

Thus, the central IGRA question boils down to whether the Court of Appeals properly held that it could "interpret" the Compact as not authorizing sports gaming off Indian lands. If it did, then no review is warranted. If it did not, then even the Government implicitly concedes that review and reversal are needed.

As shown in the Petition, the Court of Appeals' purported "interpretation" of the Compact was nothing more than an effort to uphold an IGRA approval that was plainly unlawful. Pet. at 23-24. The Government never responds to this.

First, the Court of Appeals ignored this Court's holding that a court may construe a contract in a manner that avoids illegality only when the contract is ambiguous. Pet. at 23 (citing and quoting *Walsh v. Schlecht*, 429 U.S. 401, 408 (1977)). The Government ignores this in its opposition.

The relevant language in the Compact is not ambiguous. Instead, it expressly creates a device designed to authorize sports gaming off Indian lands.

The "key language" on which the Court of Appeals focused is this:

> **Part IV. AUTHORIZATION AND LOCATION OF COVERED GAMES**
>
> The Tribe and State agree that the Tribe is authorized to operate Covered Games on its Indian lands, as defined in the Indian Gaming Regulatory Act, in accordance with the provisions of this Compact. Subject to limitations set forth herein, wagers on Sports Betting and Fantasy Sports Contests made by players physically located within the State using a mobile or other electronic device shall be deemed to take place exclusively where received at the location of the servers or other devices used to conduct such wagering activity at a Facility on Indian Lands.

JA76 (Part IV.A).

The Court of Appeals held that the first sentence "simply states that the Tribe is authorized to operate sports betting on its lands" which "is uncontroversial and plainly consistent with IGRA." App.14. It then held that the second sentence had nothing to do with authorization, but merely "discusses wagers on sports betting 'made by players physically located within the State using a mobile or other electronic device,' which are 'deemed to take place exclusively where received.'" *Id.* The Court of Appeals reasoned: "The Compact does not say that these wagers are 'authorized' by the Compact (or by any other legal authority). Rather, it 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." *Id.*

This is absurd. The whole point of the "shall be deemed" language in the second sentence of Part IV.A is to ensure that sports gaming bets placed "exclusively" from ***off*** Indian lands "shall be deemed" to have been placed from ***on*** Indian lands so as to be authorized by the prior sentence in Part IV.A. It is an obvious device designed to "deem" all of the off-reservation sports gaming to be gaming that is "on" Indian lands precisely in order to fall within IGRA's approval authority. For the Court of Appeals to say this "shall be deemed" sentence had nothing to do with authorization was simply a way of evading the question presented by the "deeming" contrivance.

Other Compact provisions confirm that the "deeming" provisions were intended to authorize sports gaming from off Indian lands. As shown above, the Compact authorizes the tribe to conduct "Covered Games" on Indian lands. It defines "Covered Games" to include "Sports Betting." JA60 (Part III.F). It then defines "Sports Betting" to include any bets on competitive sports, subject to the following:

> "All such wagering **shall be deemed** at all times to be **exclusively** conducted by the Tribe **at its Facilities** where the sports book(s), including servers and devices to conduct the same, are located, **including any such wagering undertaken by a Patron physically located in the State but not on Indian Lands** using an electronic device connected via the internet, web application or otherwise."

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

Again, the whole point of this "shall be deemed" clause, like the one in Part IV.A, is to create a device

that ensures that the placing of sports gaming bets from ***off*** Indian lands shall be treated as if it occurred "exclusively" ***on*** Indian lands so it can be "authorized" by the Compact in supposed accordance with IGRA.

The issue for the courts below was whether such a device should be respected for purposes of IGRA. The district court correctly held that it should not be. App.50-56. That was consistent with the Ninth Circuit's reasoning in *California v. Iipay Nation of Santa Isabel* 898 F.3d 960, 967 (9th Cir. 2018) that gambling occurs both where bets are placed and where they are received, and with the prior positions of the Government and the National Indian Gaming Commission which said the same thing.[1] But the Court of Appeals evaded the question by purporting to "interpret" the unambiguous Compact as if it did not say what it expressly says.

Where an important question of federal law is squarely presented, this Court should not treat a decision by a lower court to evade that question through misinterpretation of unambiguous language as a mere "fact-bound" error not warranting review. This Court should look at the substance of the decision below, not merely its form. And the substance is that the Court of Appeals upheld the IGRA approval of a Compact that adopted a transparent device that was intended to use an IGRA compact to authorize

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[1] *See* Brief for the United States of America as Amicus Curiae Supporting Appellee at 13-14, *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002) (No. 99-35088), 1999 WL 33622333; Appellees' Joint Answering Brief at 33-34, *California v. Iipay Nation*, 898 F.3d 960 (9th Cir. 2018) (No. 17-55150), 2017 WL 3174118; JA227-35 (advisory letters of NIGC).

gambling ***off*** Indian lands by pretending that it occurred ***on*** Indian lands.

This Court has also made clear that the doctrine of construction invoked by the Court of Appeals applies only to render a contract "legal and enforceable." *Walsh*, 429 U.S. at 408. As explained in the Petition, the only way for the Compact's online sports gaming provisions to be lawful under state law would be for there to be a statewide referendum approving such gambling. Pet. at 23-24. No such referendum has occurred. Thus, the Court of Appeals' decision does not render the Compact "legal and enforceable." Instead, it construed the Compact so as to place it in immediate violation of Article X, § 30 of the Florida constitution.

Of course, the requirement for a referendum to authorize all new Class III gaming that is set forth in Article X, § 30 of the Florida constitution has an exception: it states that it will not apply "to limit 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***." Fla. Const. art. X, § 30(c) (emphases added). Thus, the state law question of whether the online sports gaming provided for in the Compact is legal bounces back to a question of federal law. It is authorized ***only if*** federal law accepts the "deeming" provisions and holds that IGRA authorizes the online sports gaming that occurs off Indian lands. IGRA does not authorize such gaming, and it is the job of the federal courts to so hold.

It is worth noting that when the illegality of the Compact's off-reservation gambling was challenged in

state court following the decision by the Court of Appeals, the State of Florida responded by arguing (among other things) that "the compact falls within the IGRA exception" of Article X, § 30 of the Florida Constitution. [2] This confirms that the state law question points back to Federal law, and that the Court of Appeals decision has simply placed the Compact into legal limbo. Meanwhile, the Tribe has been actively conducting online sports gaming since November 7, 2023. The State and the Tribe both obviously think that the only thing they needed was for the IGRA Compact to survive challenge in the federal courts, and once that occurred, they viewed the off-reservation gambling to be authorized—even though the Court of Appeals said the Compact had nothing to do with such authorization.

This legal limbo is the direct result of the erroneous decision below. The Court of Appeals applied a rule of contractual construction that conflicts with the rule articulated by this Court. Instead of adopting a rule that interprets ambiguous contractual language in a manner that renders the contract "legal and enforceable," it adopted a rule that evades a question of federal law presented by unambiguous language. It thereby converted that unambiguous language into a provision that renders the contract unlawful under state law—putting the contract into legal limbo while state law challenges are combatted through claims of immunity and invocations that the federal court approval has

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[2] *See* Response to Petition for a Writ of Quo Warranto at 45-52, *West Flagler Assocs. Ltd. v. DeSantis*, No. SC2023-1333, 2024 WL 1201592 (Fla. Mar. 21, 2024).

already authorized the conduct in question (contrary to the decision below). That "rule of construction" is not a rule at all; it is just a way of evading the federal question that was squarely presented. It should not be allowed to stand.

b. On the scope of 25 U.S.C. § 2710(d)(3)(C), the Government argues that none of the circuit court decisions cited in the Petition "purports to give that language a 'narrow interpretation.'" Opp. at 18. That is wrong. The Government ignores the Ninth Circuit holding that "the phrase 'directly related to the operation of gaming activities' imposes meaningful limits on compact negotiations," *Chicken Ranch Rancheria of Me-Wuk Indians*, 42 F.4th 1024, 1035 (9th Cir. 2022), and the Eight Circuit holding that "'Directly related to the operation of gaming activity' is narrower than 'directly related to the operation of the Casino.'" *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 935 (8th Cir. 2019). These decisions impose narrow constructions on language the D.C. Circuit has now interpreted to cover a statewide monopoly over sports gaming. The Court should grant review on this basis as well.

c. The Petition argued that certiorari is also warranted because the Court of Appeals decision holds that IGRA authorizes the approval of compact provisions that IGRA does not authorize. Pet. at 26-27. As shown in the Petition, this makes no sense, and conflicts with the fact that other circuits have held that an IGRA approval gives the IGRA compact the force of federal law. Pet. at 26-27 (citing cases). It also creates confusion "by improperly holding there are two different kinds of IGRA approval." *Id.*

The Government completely ignores this argument. It has no answer, confirming this is yet another ground for certiorari.

If the D.C. Circuit truly believed that the Compact and IGRA did not authorize the off-reservation sports gaming, then instead of reversing the district court decision in full, it should have vacated the automatic IGRA approval only with respect to that gaming, leaving it intact as to all other provisions.

d. The Government urges the Court not to resolve the meaning of 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." While this issue was not briefed below, it is nonetheless a fact that there is a circuit split over what it means; if it means what it plainly says, as the Seventh and Eighth Circuits would hold, but as the Ninth and D.C. Circuits would not, then the sports gaming provisions in the Compact are invalid. Pet. at 27-29. This Court has discretion to resolve this circuit split and should do so.

2. Even if it were permissible for the Court of Appeals to dodge IGRA's "on Indian lands" requirement by pretending the Compact did not authorize gambling off Indian lands, that would merely create an obvious violation of UIGEA. UIGEA prohibits payment by credit card, electronic funds transfer, or various other means to pay for gambling over the internet that is unlawful where the bet is "initiated, received, or otherwise made." 31 U.S.C. § 5362(10); Pet. at 8, 29-32. If the Compact did not authorize the online sports gaming off Indian lands,

and if it is a state law question whether such gambling is lawful (it plainly is not), then the Court was obliged to address that state law question to determine whether the Compact provided for a blatant violation of UIGEA.

The Government says the Court of Appeals correctly held the Compact did not "facially" violate UIGEA because there theoretically might be ways to pay for sports gaming over the internet without using one of the methods proscribed by UIGEA. It completely ignores the fact, cited on page 30 of the Petition, that the Tribe has published Terms and Conditions for its online sports gaming that expressly state, in relevant part, that payments "can be made using several different and convenient ways, including . . . your credit or debit card; . . . ACH transfer . . . ; Wire transfer; . . . PayPal, Venmo, or other digital wallets . . . ."[3]

The Court can take judicial notice of this. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 199 & n.18 (2008); Fed. R. Evid. 201(b).

Thus, there is no question that the payment methods proscribed by UIGEA are being used for the Tribe's online sports gaming set forth in the Compact. The only question under UIGEA, therefore, is whether the sports gaming bets being paid for by those methods are legal both where made and where received. To answer that federal question, the Court of Appeals was required to address the question of whether sports betting is legal when the bets are

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[3] *Terms & Conditions* at § 14.4, HARDROCKBET.COM - Seminole Gaming, https://www.hardrock.bet/t-cs/florida (last visited May 21, 2024).

placed from Florida locations that are off Indian lands. That is how the Ninth Circuit resolved the UIGEA question in *Iipay Nation*. *See* 898 F.3d at 967. That is what the D.C. Circuit failed to do in this case. Even as it strained to evade the violation of the "on Indian lands" requirement in IGRA by saying the legality of gambling was entirely an issue of state law, it then ignored the clear illegality of that gambling under state law in order to evade the violation of UIGEA.

This Court should grant review of the UIGEA question both because there is a circuit split with the Ninth Circuit as to the need to resolve state law issues in deciding UIGEA questions, and because the lower court's decision authorizes a federal approval of conduct that blatantly violates federal law.[4]

3. The Government argues the IGRA approval of the Compact could not give rise to an Equal Protection claim against the Secretary because the Compact could never prevent another party from conducting online sports betting—only state law could do so. This ignores that the Compact ***expressly promises*** the Tribe exclusivity in its online sports gaming. *See* JA110. Part XII states: "The intent of this Part is to provide the Tribe with the right to operate Covered Games on an exclusive basis throughout the State . . ." *Id.* It then provides that if that exclusivity is lost, then the Tribe has reduced payment obligations to the State. JA110-11.

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[4] In a footnote, the Government argues it is permissible to uphold an IGRA approval of a compact that violates any federal law other than IGRA, but that conflicts both with the plan text of IGRA, 25 U.S.C. § 2710(d)(8)(B), and with common sense.

The Government is wrong that the Compact cannot itself violate Equal Protection, and that a State can violate Equal Protection only through legislation.[5] It is therefore also wrong to assert that the Federal Government cannot violate Equal Protection by approving a compact that itself violates Equal Protection. To hold otherwise would be to countenance the federal approval of any state contract that expressly promises that the state will engage in racial discrimination.

The remainder of the Government's response to the Equal Protection argument collapses into the tautology that so long as the Compact is understood as only authorizing gambling ***on*** Indian lands, the Equal Protection challenge to the Federal approval of an exclusive race-based monopoly ***off*** Indian lands is not presented. But as shown above and in the Petition, there is no doubt that the Compact intends to give the Tribe a race-based monopoly for sports-betting off Indian lands. For the Federal government to approve such a compact triggers constitutional scrutiny of the Federal action. And while the decision in *Williams v. Babbitt*, 115 F. 3d 657, 664 (9th Cir. 1997), may not have had to apply strict scrutiny to Indian preferences granted off Indian lands, it avoided doing so only through statutory construction, and undeniably stated that such scrutiny should otherwise apply, contrary to the decision below.

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[5] *E.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Batson v. Kentucky*, 476 U.S. 79 (1986).

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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