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WHAT ARE THE ODDS? A COMMENT ON THE SEMINOLE TRIBE OF FLORIDA'S ABILITY TO HOLD EXCLUSIVE GAMING RIGHTS IN FLORIDA

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I. INTRODUCTION

The Seminole Tribe of Florida (Seminoles) has, and continues, to play an important role in the power of Indian¹ Sovereignty and the origin and development of Indian gaming in the United States. The Tribal gaming industry has expanded greatly under the enactment of the Indian Gaming Regulatory Act (IGRA).² This Act allows Indian Tribes to conduct gaming activities on Indian reservations.³ As of 2021, “250 tribes operate 515 tribal casinos or other gaming locations across the country,”⁴ and accumulated tribal gambling revenue of \$27.83 billion in 2020 alone.⁵ Today, a new era of online gaming is growing, as

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¹ There are many names given to people of indigenous ancestry, I chose the term “Indian” because it is the legal term of art that is used throughout the United States Code and the Indian Gaming Regulatory Act.

² 25 U.S.C. § 2710 (2022); *A Vital Sector Supporting Tribes and Local Communities*, AM. GAMING ASS'N, <https://www.americangaming.org/policies/tribal-gaming/> (last visited Mar. 22, 2024).

³ 25 U.S.C. § 2710 (2022).

⁴ *A Vital Sector Supporting Tribes and Local Communities*, *supra* note 2.

⁵ *Revenue of the Tribal Gambling Market in the United States from 2016 to 2020*, STATISTA, <https://www.statista.com/statistics/1313189/tribal-gambling-revenue-us/> (last visited Mar. 22, 2024).

the number of users of online games is expected to rise to 1.2 billion users by 2027.⁶ However, this is not an era in which Tribes are currently able to partake.

The IGRA geographically restricts tribal gaming only to be conducted on Indian reservations and does not explicitly include the possibility of online gaming controlled by the Tribes.⁷ However, the Seminole Tribe has recently made headway in attempting to hold exclusive control of online gaming in the State of Florida.⁸ Yet, these actions have been put to a halt.⁹

This comment will provide an analysis of whether the Seminole Tribe can exclusively operate commercial online gambling activities within the State of Florida without violating the IGRA or Florida's State Constitution. Under the current regulation of the IGRA and Florida's State Constitution, the Seminoles would be able to gain exclusive control over commercial online gambling within Florida, specifically within the terms of their most recent 2021 Gaming Compact.¹⁰

Part II of this comment will provide a brief history of the Seminole Tribe in the State of Florida and evaluate the growth of gaming activities on Indian reservations. Part III will discuss the development of gambling activities for the Seminole Tribe within the State of Florida and examine the Seminole Tribe's most recent actions involving gaming activities in Florida. Part IV will discuss the challenges the Seminoles face in gaining exclusive control of commercial online gambling within the State of Florida, specifically under the IGRA and Florida's State Constitution. Part V will provide the final analysis of whether the Seminoles can prevail at gaining full exclusivity over online gaming in the State of Florida.

⁶ *Online Games - Worldwide*, STATISTA, <https://www.statista.com/outlook/dmo/digital-media/video-games/online-games/worldwide#:~:text=Online%20Games%20%20Worldwide%201%20Revenue%20in,amount%20to%201%2C252.6m%20users%20by%202027.%20More%20items> (last visited Mar. 22, 2024).

⁷ *A Vital Sector Supporting Tribes and Local Communities*, *supra* note 2.

⁸ Mary Ellen Klas, *Federal Judge Throws out Florida Sports Betting Compact with Seminole Tribe*, TAMPA BAY TIMES (Nov. 23, 2021), <https://www.tampabay.com/news/breaking-news/2021/11/22/federal-judge-throws-out-florida-sports-betting-compact-with-seminole-tribe/>.

⁹ Emily McCain, *Federal Judge Throws out Florida, Seminole Tribe Gaming Compact*, ABC ACTION NEWS (Nov. 24, 2021, 3:52 AM), <https://www.abcactionnews.com/news/state/federal-judge-throws-out-florida-seminole-tribe-gaming-compact>.

¹⁰ See *2021 Gaming Compact Between the Seminole Tribe of Florida and the State of Florida*, <https://www.flgov.com/wp-content/uploads/pdfs/2021%20Gaming%20Compact.pdf>.

II. HISTORY OF THE SEMINOLE TRIBE AND GAMING ACTIVITIES ON INDIAN RESERVATION

The Seminole Tribe has played a critical role in the history of the growth in sovereign powers of Indian Tribes across the State of Florida and the United States. Over multiple decades, the Seminoles have strived for peace and business prosperity within the State of Florida.¹¹ Under the IGRA, Congress has allowed Indian Tribes to conduct business within their state in ways that tribes could not have before.¹² The amount of progress between states and tribes under the regulation of the IGRA was only the beginning part of the history of tribes and Indian gaming.

A. History of the Seminole Tribe in Florida

The Seminole Tribe of Florida resided in Florida for thousands of years before the arrival of the Spanish, who brought with them multiple diseases that devastated the Seminole ancestors.¹³ The Seminoles originally settled across Florida, Georgia, and Alabama until their move to the swamps of Florida to remain free from U.S. colonization.¹⁴ The Seminoles largely descended from Miccosukee (or Mikasuki) language speakers and fought against American forces in numerous wars.¹⁵ These nineteenth-century conflicts between the Seminoles and American forces were violent and forced the Seminoles to develop a culture of governance that now thrives off of survival.¹⁶ These conflicts moved the Seminoles into their current residence, in what is now the State of Florida.¹⁷ Today, the Seminoles “continue to fight for [their] freedom, but have moved the war from the battlefield to the courtroom.”¹⁸

In the early nineteenth century, the Seminoles developed their standards of governance, which included the election of leaders and the annual Green Corn Ceremonies.¹⁹ The Green Corn Ceremonies included an annual feast called the

¹¹ See *Government: Introduction*, SEMINOLE TRIBE OF FLA., <https://www.semtribe.com/government/introduction> (last visited Mar. 22, 2024).

¹² Christopher Irwin, *IGRA Then & Now*, TRIBAL GOV'T GAMING, <https://tribalgovernmentgaming.com/article/igra-then-now/> (last visited Mar. 22, 2024).

¹³ *History: Introduction*, SEMINOLE TRIBE OF FLA., <https://www.semtribe.com/history/introduction> (last visited Mar. 22, 2024).

¹⁴ *Id.*

¹⁵ Matthew L.M. Fletcher, *The Seminole Tribe and the Origins of Indian Gaming*, 9 FIU L. REV. 255, 256 (2014).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ SEMINOLE TRIBE OF FLORIDA, *supra* note 12.

¹⁹ Fletcher, *supra* note 15, at 257.

Green Corn Dance, which took place during the moon's first quarter in June.²⁰ Here, all the living members of the Seminoles assembled in the neighborhood of Chief Tallahassee's abode to hold discussions and make all their laws.²¹ They would deliberate for days until all had been heard.²² During this time, the elders met to discuss the previous year's criminal incidents and conduct an event sometimes called "court day", which also hosted multiple marriages.²³ The Seminoles are reported to be orderly people, with a high standard of morality, and respect for private property, and they especially do not gamble.²⁴ By 1957, the Seminoles largely voted in favor of a constitution and federal charter of incorporation, both proposed by the Secretary of the Department of the Interior.²⁵ However, this period, "the heart of the [T]ermination [E]ra of federal Indian policy," was not the best time for "an Indian tribe to be reorganizing from a traditional to a constitutional and corporate form of government."²⁶ Now there is a different twentieth-century style conflict between the Seminoles and opposing governments. These battles assisted the rise of Tribal gaming in Florida and the United States.

B. Growth of Gaming Activities on Indian Reservation

On October 17, 1988,²⁷ Congress enacted the IGRA to regulate gaming on Indian reservations.²⁸ President Ronald Reagan signed the IGRA²⁹ into law two decades after the first piece of legislation was introduced by Congress involving gaming on Indian lands.³⁰ The IGRA initially succeeded in establishing its goals of "strong tribal governments, tribal self-sufficiency, and solid economic

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 258-59.

²⁵ Matthew L.M. Fletcher, *The Seminole Tribe and the Origins of Indian Gaming*, 9 FIU L. REV. 255, 260 (2014).

²⁶ *Id.* at 261.

²⁷ *Indian Gaming Regulatory Act*, NAT'L INDIAN GAMING COMM'N, <https://www.nigc.gov/general-counsel/indian-gaming-regulatory-act> (last visited Mar. 22, 2024).

²⁸ Fletcher, *supra* note 15, at 261.

²⁹ Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 ARIZ. ST. L.J. 99, 99 (2010).; *see also* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (This Act reached the attention of Congress and President Regan after the State of California tried to deny Native American tribes of their bingo enterprises, however, the court held that California lacked authority to regulate bingo gambling conducted by Indian tribes on Indian land within the state.).

³⁰ Ducheneaux, *supra* note 29, at 99. *See also* Indian Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 73 (1968). The first piece of Legislation introduced to Congress was the Indian Civil Rights Act of 1968, which allowed the application of most of the Bill of Rights requirements and guarantees to tribal governments.

development and growth.”³¹ Senator John McCain (R-Ariz.), one of the architects of the IGRA, “contended that Congress did not foresee the [gaming] industry’s overwhelming success.”³² From 2000 to 2017, Indian gaming revenues rose from \$11 billion to over \$37.3 billion.³³ However, states have been opposing tribal efforts to expand gaming on their reservations, and some states have even succeeded at preventing tribes from developing their gaming operations.³⁴

Under the IGRA, “[a] tribe cannot conduct high-stakes, or ‘[C]lass III,’ gambling activities without a compact, which is an agreement negotiated between the tribe and the state.”³⁵ The IGRA evaluates gaming activities and categorizes them into three different classes.³⁶ Class I is traditional gaming, including social gaming of immaterial amounts, which is beyond the reach of federal or state regulation.³⁷ Class II gaming consists of bingo-style games and certain card games, which are subject to IGRA regulations.³⁸ Class III gaming consists of games that are not considered Class I or Class II gaming.³⁹ The Act provides that:

[C]lass III gaming is lawful on Indian lands only if such activities are: (1) authorized by an ordinance or resolution of the Indian tribe, (2) located in a state that permits such gaming for any purpose by any person, organization, or entity, and (3) conducted in conformance with tribal-state compact entered into by the tribe and the state.⁴⁰

³¹ Ducheneaux, *supra* note 29, at 99.

³² Kathryn R.L. Rand & Steven Andrew Light, *How Congress Can and Should “Fix” the Indian Gaming Regulatory Act: Recommendations for Law and Policy Reform*, 13 VA. J. SOC. POL’Y & L. 396, 396 (2006).

³³ *Meet Our Chairman: Ernest L. Stevens Jr.*, INDIAN GAMING ASS’N, <http://www.indiangaming.org/about> (last visited Mar. 22, 2024).

³⁴ T. Barton French Jr., *The Indian Gaming Regulatory Act and the Eleventh Amendment: States Assert Sovereign Immunity Defense to Slow the Growth of Indian Gaming*, 71 WASH. U. L. Q. 735, 735-36 (1993); See, e.g., *Ponca Tribe v. Oklahoma*, 834 F. Supp. 1341 (W.D. Okla. 1992); *Pueblo of Sandia v. New Mexico*, No. 92-0613 JC (D.N.M. Nov. 13, 1992); *Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*, 800 F. Supp. 1484 (W.D. Mich. 1992); *Poarch Band of Creek Indians v. Alabama*, 776 F. Supp. 550 (S.D. Ala. 1991); *Spokane Tribe of Indians v. Washington*, 790 F. Supp. 1057 (E.D. Wash. 1991).

³⁵ French Jr., *supra* note 34, at 736; See 25 U.S.C. § 2710(d)(7)(A) (2022) (IGRA mandates that United States district courts shall have jurisdiction over suits brought by the tribes “arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith.”).

³⁶ Kurtis A. Kemper, *Preemption of State Law by Indian Gaming Regulatory Act*, 27 A.L.R. FED. 2d 93, *2 (2008).

³⁷ *Id.*; 25 U.S.C. § 2703(6) (2024).

³⁸ Kemper, *supra* note 36, at *2; 25 U.S.C. § 2703(7) (2024); 25 U.S.C. § 2710(b) (2024).

³⁹ Kemper, *supra* note 36, at *2; 25 U.S.C. § 2703(8) (2024).

⁴⁰ Kemper, *supra* note 36, at *2; 25 U.S.C. § 2710(d)(1) (2024).

Therefore, a tribe must request the state to negotiate with them to develop a tribal-state compact if they want to conduct Class III gaming on their reservation.⁴¹ Under the IGRA, the Secretary of Interior must approve all Tribal-State compacts⁴² and therefore reject gaming compacts that violate its terms.⁴³ Although, if a state stalls or refuses to negotiate a compact with a tribe then the tribe has a cause of action in federal district court.⁴⁴ However, states are not forced to consent to such lawsuits because, in the U.S. Supreme Court ruling from *Seminole Tribe of Florida v. Florida*,⁴⁵ the “IGRA does not abrogate the states’ Eleventh Amendment immunity to these suits.”⁴⁶

Today, over a thousand tribal-state gaming compacts have been enacted across various states.⁴⁷ The first tribal-state gaming compacts were signed in 1990 in multiple states including California, Minnesota, Nevada, and South Dakota.⁴⁸ In 1990 alone, Minnesota signed nine different tribal-state gaming compacts with various tribes in the state,⁴⁹ making Minnesota tribes the first in the nation to negotiate and sign gaming compacts with a state government.⁵⁰ Since the initial creation of these compacts, many more states and tribes have joined the trend and agreed to compacts for gaming in their respective states.⁵¹

III. OVERVIEW OF SEMINOLE’S PRIOR LEGAL HISTORY

The IGRA was a milestone in bringing power to Indian Sovereignty. However, the true expansion of power within Indian gaming was heavily influenced by the Seminoles’ actions. While past struggles with negotiating with the State of Florida for gaming powers have stalled the overall progress made by the Seminoles, this has not restricted the Seminoles from continuing to strive

⁴¹ Kemper, *supra* note 36, at *2.

⁴² 25 U.S.C. § 2710(d)(8)(A) (2024).

⁴³ *W. Flagler Assocs. v. Haaland*, No. 21-cv-2192 (DLF), 2021 U.S. Dist. LEXIS 259571, at *1-2 (D.D.C. Nov. 24, 2021).

⁴⁴ 25 U.S.C. § 2710(d)(7)(A)(i) (2024); French Jr., *supra* note 35, at 736.

⁴⁵ *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

⁴⁶ Allison Sirica, *A Great Gamble: Why Compromise is the Best Bet to Resolve Florida’s Indian Gaming Crisis*, 61 FLA. L. REV. 1201, 1207 (2009).

⁴⁷ For all the enacted Gaming compacts across the United States, see *Indian Affairs: Gaming Compacts*, U.S. DEP’T OF INTERIOR, https://www.bia.gov/as-ia/oig/gaming-compacts?year=all&field_us_state_s__value=All&field_tribe_s__target_id=All (last visited Mar. 22, 2024).

⁴⁸ See *Indian Affairs: Gaming Compacts*, *supra* note 47.

⁴⁹ *Id.*

⁵⁰ Tribal State Gaming Compacts, MINN. DEP’T OF PUB. SAFETY: ALCOHOL AND GAMBLING ENF’T, <https://dps.mn.gov/divisions/age/gambling/Pages/tribal-state-gaming-compacts.aspx#:~:text=Minnesota%20tribes%20were%20the%20first%20in%20the%20nation,that%20the%20compacts%20should%20be%20effective%20in%20perpetuity> (last visited Mar. 22, 2024).

⁵¹ See *Indian Affairs: Gaming Compacts*, *supra* note 47.

for new developments in the gaming industry that have impacts on tribes across the entire United States.

A. Seminole Tribe's Gambling Activities and Rights

At the start of Indian gaming, the Seminoles started a national tribal gaming movement in 1979 by opening the first-ever high-stakes bingo⁵² in Hollywood, Florida.⁵³ Within a year, the Seminoles had tremendous success from their bingo halls, hitting revenues of \$1 million per month.⁵⁴

The Seminoles then overcame their first legal obstacle in 1981 when a federal appellate court held that the Indian tribes' rights to "engage in, or license and regulate, gambling activities on their reservations [were] free from control by state law."⁵⁵ In *Seminole Tribe of Florida v. Butterworth*,⁵⁶ the Seminoles contracted to open up a bingo hall on its reservation.⁵⁷ Broward County Sheriff Butterworth anticipated a violation of Florida's bingo statute and threatened to arrest members of the Seminoles under Fla. Stat. Ch. 849.093.⁵⁸ This statute permitted bingo games to be played by certain qualified organizations, which did not include Indian Tribes.⁵⁹ This case addressed whether this Florida statute is subject to restrictions by the state that are either civil and regulatory or criminal and prohibitory in nature.⁶⁰ Here, the court had to decide whether Florida's gambling laws applied to the tribe and Indian country within the state.⁶¹ This was done by applying the *Bryan Test*; a criminal/prohibitory versus civil/regulatory test.⁶²

The *Bryan Test* originated from *Bryan v. Itasca County*,⁶³ where petitioner Russell Bryan, a member of the Minnesota Chippewa tribe, brought suit against Minnesota and the County.⁶⁴ He alleged that Minnesota and the County lacked the authority to impose a tax on the personal property of an Indian living on the

⁵² Robert M. Jarvis, *The 2007 Seminole-Florida Gambling Compact*, 12 GAMING L. REV. 13, 13 (2008).

⁵³ *History: Seminoles Today*, SEMINOLE TRIBE OF FLA., <https://www.semtribe.com/history/seminoles-today> (last visited Mar. 22, 2024).

⁵⁴ Fletcher, *supra* note 15, at 264.

⁵⁵ Ducheneaux, *supra* note 29, at 109.

⁵⁶ *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310, 310 (5th Cir. 1981).

⁵⁷ *Id.* at 311.

⁵⁸ *Id.* (Broward County, Florida Sheriff Robert Butterworth informed the state that the Seminoles violated state law).

⁵⁹ *Id.* at n.1.

⁶⁰ *Id.* at 313.

⁶¹ *Id.* at 312.

⁶² *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310, 313 (5th Cir. 1981).

⁶³ *Bryan v. Itasca Cnty.*, 426 U.S. 373 (1976).

⁶⁴ *Id.* at 375.

reservation and that the imposition of this tax conflicted with federal law.⁶⁵ In *Bryan*, Public Law 280⁶⁶ was interpreted to grant “civil jurisdiction to the states only to the extent necessary to resolve private disputes between Indians . . . and private citizens.”⁶⁷ Additionally, the Court in *Bryan* contended that if Congress had “intended to confer upon the States general civil regulatory powers, . . . it would have expressly said so.”⁶⁸ Here, the *Bryan* test was applied to the Florida statute in terms of the state’s public policy concerning bingo and gambling in general.⁶⁹ The court in *Butterworth* considered if Florida’s statute is within the civil/regulatory meaning from *Bryan*; if not, then the statute cannot be enforced against the Seminoles.⁷⁰ “The court determined that Broward County exceeded Public Law 280’s grant of civil jurisdiction because Florida allowed bingo.”⁷¹ Therefore, the state did not have civil authority over the tribes.⁷² Thus, the Seminoles were authorized to continue their bingo operations in Broward County without restriction from Florida law.⁷³ The Fifth Circuit’s decision in *Butterworth* allowed the Seminoles to continue their gambling activities on Indian reservations despite the State’s objections.⁷⁴ Derived from the success of the Seminole’s case, “more than 80 tribes across the nation opened bingo halls to help generate revenue for their tribes and further their economic development.”⁷⁵

In efforts to continue their gaming business, the Seminoles attempted to negotiate a Class III gaming compact in 1991 with the State of Florida.⁷⁶ These negotiation attempts were not successful, which led the Seminoles to file a

⁶⁵ *Id.*

⁶⁶ Paul C. Alexander II, *Money Is for Nothing: The Inherent Want of Consideration Found in Substantial Exclusivity Terms within Tribal-State Compacts*, 5 AM. INDIAN L.J. 167, 174 (2017) (“In 1953, Congress passed Public Law 280 to delegate criminal and civil jurisdiction over tribes to California, Minnesota, Nebraska, Oregon, and Wisconsin. Public Law 280 also allowed all other states to voluntarily assume both civil and criminal jurisdiction over tribes within their jurisdiction.”).

⁶⁷ *Butterworth*, 658 F.2d at 313.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 313-15.

⁷¹ Alexander II, *supra* note 66, at 175.

⁷² Erin D. Brock, *Betting on the Tribes: United States Endorsement of the United Nations Declaration on the Rights of Indigenous People And the Indian Regulatory Act*, 3 AM. INDIAN L.J. 381, 398 (2015).

⁷³ *Butterworth*, 658 F.2d at 316.

⁷⁴ French Jr., *supra* note 34, at 739.

⁷⁵ Brock, *supra* note 72, at 399 (The success of the Seminoles’ case led to more advancements in the tribal gaming industry and the later prominent gaming case, *Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)).

⁷⁶ Sirica, *supra* note 45, at 1210.

lawsuit a year later against the State.⁷⁷ The Seminoles alleged the State did not act in good faith to negotiate a compact, thereby violating 25 U.S.C.S. § 2710(d)(3).⁷⁸ The provision of the IGRA at issue established that any Indian tribe having jurisdiction over the Indian lands that wishes to conduct Class III gaming activity must request the State to enter into negotiations for a Tribal-State Compact and that the State shall negotiate in good faith to enter a Compact.⁷⁹ However, in *Seminole Tribe v. Florida*, the court concluded that the Eleventh Amendment barred the tribe's suit.⁸⁰ The lawsuit was then dismissed as the State asserted Eleventh Amendment immunity.⁸¹ Nevertheless, irrespective of this 5-4 vote from the Supreme Court against the Seminoles, they went on to build a total of seven Class II casinos throughout Florida.⁸²

After *Seminole Tribe v. Florida*, the Seminoles continued their attempts to negotiate for compacts that established Class III gaming.⁸³ It was not until 1999 that one of the negotiations finally got the attention of the Department of the Interior.⁸⁴ Unfortunately, the informal conference that was supposed to be held for the Secretary, the Seminoles, and the State was temporarily suspended at the request of the State.⁸⁵ In 2001, the Secretary issued a decision in relation to the informal conference that was held over a year earlier.⁸⁶ This decision allowed the Seminoles to offer a wide range of Class III games.⁸⁷ Five months later, the Secretary withdrew the decision without any notice "in order to evaluate the important issues raised in this matter."⁸⁸ This issue spanned over five years.⁸⁹ It was not until 2006 that the Secretary ordered another conference and warned the State and the Seminoles to reach an agreement within sixty days otherwise, the Department would issue Class III gaming procedures.⁹⁰ Six months later, no

⁷⁷ *Id.*

⁷⁸ *Id.*; *Seminole Tribe v. Fla.*, 517 U.S. 44, 52 (1996); 25 U.S.C.A. § 2710(d)(3) (2022).

⁷⁹ *Seminole Tribe*, 517 U.S. at 49.

⁸⁰ *Id.* at 76.

⁸¹ Sirica, *supra* note 46, at 1210.

⁸² Jarvis, *supra* note 52, at 13.

⁸³ Sirica, *supra* note 46, at 1210.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 1210-11.

⁸⁸ *Id.* at 1211 (quoting Complaint at 8, *Seminole Tribe of Fla. v. U.S.*, 2007 WL 5077484 (S.D. Fla. 2007) (No. 07-60317)).

⁸⁹ Allison Sirica, *A Great Gamble: Why Compromise is the Best Bet to Resolve Florida's Indian Gaming Crisis*, 61 FLA. L. REV. 1201, 1211 (2009).

⁹⁰ *Id.* See 25 U.S.C.A. § 2710 (d)(7)(B)(vii)(I)-(II) (2024)

progress had been made and the Seminoles sued the Department in federal court.⁹¹ The Department issued another warning to the Governor of Florida to enter negotiations with the Seminoles for a tribal-state compact by November 15, 2007, or the Department would issue Class III gaming procedures.⁹²

On November 14, 2007, one day before the deadline,⁹³ Florida Governor Charles Crist signed Florida's first twenty-five-year Gaming Compact with the Seminoles.⁹⁴ This Compact ended a sixteen-year battle with the Seminoles who had first asked for gaming rights in June 1991 under the IGRA.⁹⁵ Under this Compact, the Seminoles were given rights "to conduct several types of Class III gaming including slot machines, any banking or 'banked' card games,⁹⁶ and high stakes poker games, all of which are illegal under Florida law."⁹⁷ The terms of this Compact allowed for the "partial but substantial exclusivity" to operate the games for the payment to the State of Florida of a share of its gaming revenue totaling more than \$100 million a year.⁹⁸

However, shortly after the enactment of the Compact, the Speaker of the Florida House of Representatives sued Governor Crist in the Florida Supreme Court.⁹⁹ The Florida Supreme Court held the Governor lacked the authority to bind the State to a gaming compact that did not align with "the State's public

(If the State does not consent during the 60-day period . . . to a proposed compact submitted by a mediator . . . , the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures--(I) which are consistent with the proposed compact selected by the mediator . . . , the provisions of this chapter, and the relevant provisions of the laws of the State, and (II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction).

⁹¹ Sirica, *supra* note 46, at 1211.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 1203. See *2007 Compact Between the Seminole Tribe of Florida and the State of Florida*, https://www.bia.gov/sites/default/files/dup/assets/as-ia/oig/pdf/508_compliant_2008.01.07_seminole_tribe_tribal_state_gaming_compact.pdf (last visited Mar. 17, 2024).

⁹⁵ Jarvis, *supra* note 52, at 13.

⁹⁶ See Sirica, *supra* note 46, at 1203.

A "banked" game is a type of Class III gaming "in which the house is a participant in the game, taking on players, paying winners, and collecting from losers or in which the cardroom establishes a bank against which participants play." In contrast, a "nonbanked" game is a form of Class II gaming in which participants play against each other rather than against the house. While Florida law permits "nonbanked" games, it expressly prohibits "banked" card games.

Id. at 1209-10.

⁹⁷ *Id.* at 1203.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1204.

policy by legalizing types of gaming that are illegal everywhere else in the state.”¹⁰⁰ Nevertheless, while the validity of the Compact was uncertain, the Seminoles continued to operate their gaming activities.¹⁰¹

After political disputes and an amended Compact between the Seminoles and the State of Florida, the Florida Legislature allowed Governor Crist to continue executing Tribal Gaming Compacts with the Seminoles, leading to their next deal in 2010.¹⁰² The 2010 Gaming Compact allowed for slot machines, banked card games, and raffles and drawings at all seven Seminole gaming facilities.¹⁰³ Additionally, the Seminoles were granted “partial but substantial exclusivity” for the operation of banked card games and slot machines across the entire state, other than in Broward and Miami-Dade counties, and the Seminoles agreed to revenue-sharing with the state in exchange.¹⁰⁴ This twenty-year Compact¹⁰⁵ stated that the Seminoles were to pay twelve percent of the first \$2 billion from the profits of its casinos, then fifteen percent from profits above \$2 billion, and so on.¹⁰⁶ The Compact also guaranteed the payment of \$1 billion to the State for the first five years.¹⁰⁷

The deal for exclusivity was intended to last for five years with an exception that the Seminoles could continue to offer the games in the case the State failed to protect their exclusive rights.¹⁰⁸ This scenario is what occurred in 2016 when a federal judge ruled that the State failed to protect the Seminole’s exclusivity by allowing non-Indian facilities to offer card games.¹⁰⁹ Additionally, this Gaming Compact violated another provision of the IGRA, since it prohibits a state from “receiving a share of a tribe’s gaming revenue to cover expenses or in exchange for a benefit such as an exclusivity over operating banked card

¹⁰⁰ *Id.* (quoting Fla. H.R. v. Crist, 999 So. 2d 601, 603 (Fla. 2008)). See Fla. H.R. v. Crist, 999 So. 2d 601 (Fla. 2008).

¹⁰¹ Sirica, *supra* note 46, at 1204.

¹⁰² Fletcher, *supra* note 15, at 272-73.

¹⁰³ Esteban Leonardo Santis, *Revenue from New Gaming Compact Could Bolster Florida’s Long-Term Recovery*, FLA. POL’Y INST. (May 19, 2021), https://www.floridapolicy.org/posts/revenue-from-new-gaming-compact-could-bolster-floridas-long-term-recovery?42f82863_page=7#:~:text=The%202010%20Compact%20had%20a%20term%20of%20,raffles%20and%20drawings%29%20at%20seven%20Seminole%20gaming%20facilities.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Fletcher, *supra* note 15, at 273.

¹⁰⁷ *Id.*

¹⁰⁸ Santis, *supra* note 103.

¹⁰⁹ *Id.*; *Seminole Tribe Wins Big Decision in Gaming Dispute with Florida*, INDIANZ (Nov. 10, 2016), <https://www.indianz.com/IndianGaming/2016/11/10/seminole-tribe-wins-big-decisi.asp>.

games.”¹¹⁰ Thus, the Seminoles stopped revenue sharing.¹¹¹ After this decision that made the 2010 Gaming Compact moot, the Seminoles and Florida Governor Ron DeSantis began the negotiations for their next deal.

B. The Seminole Tribe’s Most Recent Compact

On April 23, 2021,¹¹² the Seminoles and the State of Florida enacted the 2021 Gaming Compact.¹¹³ Governor DeSantis said in an interview that this Compact was a “mutually beneficial agreement [that] will grow [Florida’s] economy, expand tourism and recreation, and provide billions in new revenue to benefit Floridians.”¹¹⁴ Within this agreement, “the Seminoles agreed to pay the state at least \$2.5 billion over the first five years in exchange for having control over sports betting in the state and being allowed to add roulette and craps to the tribe’s casino operations”¹¹⁵ including the popular Hard Rock facilities in Hollywood and Tampa.¹¹⁶ Through this Compact, the Seminoles launched a digital sports betting platform accessible through their Hard Rock Digital App.¹¹⁷ This Compact allows for online gaming throughout Florida; however, all bets would have to be made through the Seminoles’ servers which are located on their reservations.¹¹⁸ The Seminoles’ right to online betting would include that anyone age twenty-one and over within the State of Florida could wager “on any professional and collegiate sports team and individual performance, motor sports event, and Olympic competition.”¹¹⁹ Marcellus

¹¹⁰ Santis, *supra* note 103.

¹¹¹ *Id.*

¹¹² *Summary of 2021 Gaming Compact*, FLA. STATE S., <https://www.flstate.gov/PublishedContent/Offices/2020-2022/President/Documents/Summaryof2021Compact.pdf#:~:text=The%202021%20Gaming%20Compact%20executed%20by%20the%20Seminole,spe cified%20gaming%20activities%20in%20Florida%2C%20as%20detailed%20below> (last visited Mar. 17, 2024).

¹¹³ See *2021 Gaming Compact Between the Seminole Tribe of Florida and the State of Florida*, <https://www.flgov.com/wp-content/uploads/pdfs/2021%20Gaming%20Compact.pdf> (last visited Mar. 17, 2024). The Seminole Tribe has created a website for this ‘Historic deal for Florida.’ *Home*, SEMINOLE COMPACT, <https://seminolecompact.com/index.html> (last visited Apr. 25, 2024).

¹¹⁴ David Selig, *Florida Sports Betting Cleared for Oct. 15 start*, LOCAL 10 NEWS (Aug. 6, 2021), <https://www.local10.com/news/florida/2021/08/06/florida-sports-betting-cleared-for-oct-15-start/>.

¹¹⁵ Klas, *supra* note 7.

¹¹⁶ Selig, *supra* note 114.

¹¹⁷ *Seminole Tribe Fights for the Future of Sports Betting in Florida*, GAMBLING FLORIDA (Nov. 15, 2022), <https://www.gambling-florida.com/seminole-tribe-florida/>. For access to Florida’s Hard Rock Digital Website, see *Florida*, HARD ROCK BET, <https://www.hardrock.bet/florida/> (last visited Apr. 25, 2024).

¹¹⁸ *Seminole Tribe Fights for the Future of Sports Betting in Florida*, *supra* note 116.

¹¹⁹ Mary Ellen Klas, *DeSantis Signs Gambling Agreement with Seminole Tribe, but Lawmakers Must Approve*, TAMPA BAY TIMES, <https://www.tampabay.com/news/florida-politics/2021/04/23/desantis-signs-gambling-agreement-with-seminole-tribe-but-lawmakers-must-approve/> (Apr. 24, 2021).

Osceola Jr., chairman of the Seminole Tribe of Florida, states that the signing of the Compact “is a great day for the people of Florida, who will benefit not only from a \$2.5 billion revenue-sharing guarantee over five years but also from statewide sports betting and new casino games . . . and mean[s] more jobs for Floridians and more money invested in this state.”¹²⁰

Once the Compact was approved by both parties, Governor DeSantis and the Seminoles signed it.¹²¹ According to the IGRA, the deal was then sent to the Department of Interior, which had to determine if the deal aligned with the IGRA and other federal laws within forty-five days of receiving the deal.¹²² However, Department of Interior Secretary Deb Haaland did not take action on the deal within these forty-five days.¹²³ Thus the Compact was approved by default, under the IGRA.¹²⁴ The next day, Secretary Haaland sent a letter to the Seminoles that explained her no-action decision.¹²⁵ This letter also explained to the Seminoles that they could offer online sports betting under the IGRA even though the people placing the wagers would not be physically located on the tribal lands.¹²⁶ This letter also noted that the IGRA allowed states and tribes to negotiate the “allocation of criminal and civil jurisdiction,” although it also insisted that the Florida residents could not place sports bets while “physically located on another tribe’s Indian lands.”¹²⁷

Secretary Haaland then published notice of the Compact in the Federal Register.¹²⁸ Five days later, two brick-and-mortar casinos in Florida, West Flagler Associates and Bonita-Fort Myers Corporation, brought a civil action against the Secretary’s approval of the Compact.¹²⁹ These casinos alleged that the Compact violates the IGRA because it authorizes Class III gambling activities outside of “Indian lands.”¹³⁰ The Federal District Court for D.C. decided that there are no avenues to authorize online betting in Florida for the

¹²⁰ Selig, *supra* note 113. See Klas, *supra* note 119 (The Seminoles have 4,300 members and if combined all their business enterprises, employ over 20,000 people across the entire state).

¹²¹ Klas, *supra* note 8.

¹²² W. Flagler Assocs. v. Haaland, 573 F. Supp. 3d 260, 264 (D.D.C. 2021), *overruled by* W. Flagler Assocs., Ltd. v. Haaland, 71 F.4th 1059 (D.C. Cir. 2023).

¹²³ *Id.* at 265.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ W. Flagler Assocs. v. Haaland, 573 F. Supp. 3d 260, 265 (D.D.C. 2021), *overruled by* W. Flagler Assocs., Ltd. v. Haaland, 71 F.4th 1059 (D.C. Cir. 2023).

¹²⁹ *Id.*

¹³⁰ *Id.*

Seminoles within this Compact.¹³¹ Thus, the Seminole and the State may renegotiate a new compact to allow for online gaming solely on Indian lands.¹³² Federal Judge Friedrich ruled that this Gaming Compact violated the IGRA, therefore invalidating the entire agreement.¹³³ Judge Friedrich stated that making it permissible for people to use electronic devices to place bets when they are anywhere in the state and not just on Indian lands “grants the Tribe a monopoly over both all online betting and all wagers on major sporting events.”¹³⁴

On June 30, 2023, Federal Court of Appeals Judge Robert Wilkin reversed the Federal Court for D.C.’s decision that invalidated the Seminole’s Compact.¹³⁵ In a unanimous vote, the Court decided that the Compact did not violate the IGRA.¹³⁶ The Court stated that “they ‘see the case differently,’ acknowledging that while an IGRA gaming compact ‘can legally authorize a tribe to conduct gaming on its own lands,’ nothing in IGRA prohibits a compact from ‘discussing’ other activities, including those taking place outside of Indian lands.”¹³⁷ Additionally, the Federal Court of Appeals determined that any “gaming activity outside of Indian lands,” such as an online sports bet, is “directly related to the gaming activity authorized by a compact” and thus “appropriately falls” within the scope of IGRA’s ‘catch-all’ provision.¹³⁸

On August 14, 2023, Bonita-Fort Myers Corporation and West Flagler Associates filed a petition for a rehearing.¹³⁹ The Petitioners argue that no other case has ever read the IGRA provision § 2710(d)(3)(C) so expansively to be considered a “catch-all” provision, as this court did, and this opinion does not follow precedent cases from other circuits.¹⁴⁰ The Petition also argues that the

¹³¹ *Id.* at 276.

¹³² *Id.*

¹³³ *Federal Judge Throws Out Florida Sports Betting Compact with Seminole Tribe*, CBS MIAMI (Nov. 24, 2021), <https://www.cbsnews.com/miami/news/federal-judge-throws-out-florida-sports-betting-compact-seminole-tribe/>.

¹³⁴ McCain, *supra* note 9.

¹³⁵ *Haaland*, 71 F.4th 1059 at 1062.

¹³⁶ Daniel Wallach, *Rehearing May Be Sought in Florida Sports Betting Case, but SCOTUS is Better Vehicle for Changed Outcome*, FORBES (Aug. 14, 2023), <https://www.forbes.com/sites/danielwallach/2023/08/14/rehearing-may-be-sought-in-florida-sports-betting-case-but-scotus-is-better-vehicle-for-changed-outcome/?sh=5039ae1c984>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Petition for Rehearing En Banc at *1*, *W. Flagler Assocs., Ltd. v. Haaland*, 2023 WL 5985186 (No. 21-5265).

¹⁴⁰ *Id.* at 9 (*Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024, 1035 (9th Cir. 2022) (provides that “the context of § 2710(d)(3)(C)’s list of six specific topics followed by a catch-all seventh, it is

“state’s decision to confer a statewide monopoly on sports gaming to one tribe, while simultaneously making it a felony for any other group or person to offer such gaming,” is why “the Court should rehear the case *en banc* to reverse.”¹⁴¹ This motion was denied on September 11, 2023, and the court provided no reasoning for their decision.¹⁴²

By September 15, 2023, West Flagler Associates filed a motion to put the panel decision on hold, arguing the decision conflicts with other appellate rulings and “enables an extreme shift in public policy on legalized gaming that, once started, may be difficult to stop.”¹⁴³ The Petitioners emphasize that the outcome of this case establishes a “blueprint for expanding gaming outside of Indian lands,” and announce that they will be petitioning to the U.S. Supreme Court.¹⁴⁴ However, the Court ruled in favor of the Department and refused to put a hold on the ruling.¹⁴⁵ Thus, the Seminoles are allowed to start their online gaming operations while the litigation disputes continue.¹⁴⁶ On November 20, West Flagler Associates was granted an extension for its filing deadline to the United States Supreme Court until February 9, 2024.^{147*}

While uncertainty looms on the federal level, West Flagler Associates did not choose to wait for its revelation. On September 26, 2023, West Flagler Associates filed a lawsuit in Florida’s Supreme Court for a petition against the Florida Governor, Ron DeSantis, Speaker of the Florida House of Representatives, Paul Enner, and President of the Senate, Kathleen

more natural to read ‘may’ in its restrictive sense, as a ‘may only’”); *Navajo Nation v. Dalley*, 896 F.3d 1196, 1205 n.4 (10th Cir. 2018) (“the negotiated terms of the Compact cannot exceed what is authorized by the IGRA”); *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 935 (8th Cir. 2019) (“‘Directly related to the operation of gaming activity’ is narrower than ‘directly related to the operation of the Casino.’”).

¹⁴¹ *Id.* at 3-4.

¹⁴² *W. Flagler Assocs., Ltd. v. Haaland*, No. 21-5265, 2023 WL 5985186 (D.C. Cir. Sept. 11, 2023); Dara Kam, *Seminole Tribe of Florida Gets Another Win in Sports Betting Case*, USATODAY (Sept. 15, 2023), <https://www.usatoday.com/story/news/local/state/2023/09/15/sports-betting-in-florida-seminole-tribes-gaming-of-florida-gets-another-win-in-sports-betting-case/70834890007/?bingParse>.

¹⁴³ Dara Kam, *Sports Betting Fight Heading to Supreme Court*, FLORIDA COURIER (Sept. 22, 2023), https://www.flcourier.com/news/sports-betting-fight-heading-to-supreme-court/article_5157d76a-5935-11ee-a149-f70d75f16b83.html.

¹⁴⁴ *Id.*

¹⁴⁵ Dara Kam, *Court Ruling Helps Seminole Tribe, but Sports Betting Still on Hold in Florida*, SUNSENTINEL (Sept. 28, 2023), <https://www.sun-sentinel.com/2023/09/28/court-ruling-helps-seminole-tribe-but-sports-betting-still-on-hold-in-florida/>.

¹⁴⁶ *Id.*

¹⁴⁷ Brant James, *West Flagler Asks SCOTUS for Extension in Florida Sports Betting Bid*, GAMINGTODAY (Nov. 20, 2023), <https://www.gamingtoday.com/news/west-flagler-asks-scotus-for-extension-in-florida-sports-betting-bid/>. This Comment was updated as of January 12, 2024, thus does not include the remaining litigation timeline.

Passidomo.¹⁴⁸ The petition alleged that the Florida Legislature and Governor overstepped their power by allowing the expansion of casino gambling in Florida, which violated the Florida Constitution Article X, Section 30.¹⁴⁹ This provision of the Florida Constitution expressly states that casino gambling can only be permitted when approved by Florida Voters, with its only exception being the mandating of casino gaming “on tribal lands” that is approved by the IGRA.¹⁵⁰ The Seminoles and Governor DeSantis contend that “since the servers that would handle the online sports betting were going to be housed on tribal land, the compact followed the amendment.”¹⁵¹ They have asked the Florida Supreme Court to reject West Flager Associates’ challenges arguing that “Amendment 3 in no way disallows the sports betting arrangement and neither does the federal law.”¹⁵² West Flagler Associates had also requested that the Florida Supreme Court block any attempt to expand gaming under the 2021 Compact while the court hears the case.¹⁵³ This was denied as well.¹⁵⁴

The Florida Supreme Court can rule on this issue any day now.¹⁵⁵ However, there are two other potential routes the Court may pursue.¹⁵⁶ First, there is the possibility the case can stretch out over a few years.¹⁵⁷ Or second, the Court can deny and transfer the case to a circuit court to avoid ruling on this issue entirely.^{158**}

¹⁴⁸ Case View: West Flager Associated, Ltd., et al. v. Ron D. DeSantis, etc., et al., FLA. APP. CASE INFO. SYS., <https://acis.flcourts.gov/portal/court/68f021c4-6a44-4735-9a76-5360b2e8af13/case/0E5D7FD2-697D-4DA7-A447-B1E4BCCB450B> (last visited Mar. 4, 2024).

¹⁴⁹ *W. Flagler Assocs. v. Ron DeSantis*, SC2023-1333, 2 (U.S. Sept. 26, 2023) (No. 182557928).

¹⁵⁰ *Id.* at 1-2; FLA. CONST. art. X, § 30(a), (c) (2023).

¹⁵¹ Christie Zizo, *Fight over Sports Betting in Florida now heading to state Supreme Court*, CLICKORLANDO (Sept. 26, 2023), <https://www.clickorlando.com/news/politics/2023/09/26/fight-over-sports-betting-in-florida-now-heading-to-state-supreme-court/>.

¹⁵² Michael Moline, *Seminole Tribe Asks FL Supreme Court to Toss Challenge to Mobile Sports Betting*, FLA. PHOENIX (Dec. 8, 2023), <https://floridaphoenix.com/2023/12/08/seminole-tribe-asks-fl-supreme-court-to-toss-challenge-to-mobile-sports-betting/>.

¹⁵³ Christie Zizo, *Florida Supreme Court will not block Seminole sports betting while case is heard*, CLICKORLANDO.COM (Nov. 17, 2023), <https://www.clickorlando.com/news/local/2023/11/17/florida-supreme-court-will-not-block-seminole-sports-betting-while-case-is-heard/>

¹⁵⁴ *Id.*

¹⁵⁵ Shira Moolten, *Sports Betting Opponents’ Final Plea to Florida Supreme Court: Don’t Let DeSantis Usurp Voters’ Power*, SUNSENTINEL (Jan. 2, 2024), <https://www.msn.com/en-us/sports/nba/sports-betting-opponents-final-plea-to-florida-supreme-court-don-t-let-desantis-usurp-voters-power/ar-AA1mMJJa>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* This Comment was updated as of January 12, 2024, thus does not include the remaining litigation timeline. For the most up-to-date news on sports betting in Florida, see *Florida Sports Betting*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/florida/> (last visited Apr. 25, 2024).

As of December 7, 2023, “Craps, roulette, and sports betting will launch to the public . . . at all three Seminole Casinos in South Florida[.]”¹⁵⁹ These new games are now also available at the Seminole Casinos in Tampa, Immokalee, and Brighton.¹⁶⁰ Additionally, Florida residents twenty-one and older can place bets for multiple professional leagues and college athletics from anywhere in the state through the Digital Hard Rock App.¹⁶¹

IV. THE FUTURE OF COMMERCIAL ONLINE GAMBLING WITHIN THE STATE OF FLORIDA

At the time of the IGRA’s enactment over three decades ago, Congress did not envision that the growth of online gaming would become a prevalent aspect of the economic development of an Indian Tribe’s business. This section will provide an analysis of what the Seminole Tribe will have to overcome to prevail in its attempt to hold exclusive online gaming activities in Florida. The first issue is with Florida’s State Constitution which forbids casino gambling without Florida voters’ approval. Second is challenges within the IGRA for allowing additional gaming power to Indian Tribes that may exceed the limits of Indian reservations. As further explained below, the Seminoles will prevail at holding exclusive control of online gaming within the State of Florida.

A. Florida’s Constitution

In 2018, with a 71% majority vote,¹⁶² Florida voters passed a constitutional amendment that “ensures that Florida voters shall have the exclusive right to decide whether to authorize casino gambling in the State of Florida.”¹⁶³ As of December 2023, Florida voters have not voted on legalizing online gaming in the state.¹⁶⁴ However, no state or federal regulation prohibits Florida residents

¹⁵⁹ Alfred Charles & Joan Murray, *Seminole Tribe Announces Expanded Gambling Options – Craps, Roulette, Sports Betting – At All Florida Locations*, CBS NEWS MIAMI (Nov. 1, 2023), <https://www.cbsnews.com/miami/news/seminole-tribe-announces-expanded-gambling-options-craps-roulette-sports-betting-at-all-florida-locations/>.

¹⁶⁰ *Id.*

¹⁶¹ See HARD ROCK BET, <https://www.hardrock.bet/sportsbook/> (last visited Mar. 18, 2024).

¹⁶² *Florida Amendment 3, Voter Approval of Casino Gambling Initiative (2018)*, BALLOTPEdia, [https://ballotpedia.org/Florida_Amendment_3_Voter_Approval_of_Casino_Gambling_Initiative_\(2018\)](https://ballotpedia.org/Florida_Amendment_3_Voter_Approval_of_Casino_Gambling_Initiative_(2018)) (last visited Feb. 22, 2023).

¹⁶³ FLA. CONST. art. X, § 30(a).

¹⁶⁴ *Florida Legal Online Gambling 2022*, LEGAL BETTING ONLINE, <https://www.legalbettingonline.com/states/florida/#:~:text=At%20this%20time%2C%20Florida%20has%20not%20moved%20on,access%20reputable%2C%20legal%2C%20and%20secure%20international%20gambling%20sites> (last visited Feb. 28, 2023).

from gambling using regulated offshore gambling sites.¹⁶⁵ Currently, the Seminoles are challenging the federal regulation of online gaming under the IGRA.¹⁶⁶ The Seminoles want to hold exclusive control of online gaming in the state, however, Class III gaming can only be lawful on Indian lands if the activities are “located in a state that permits such gaming for any purpose by any person, organization, or entity.”¹⁶⁷ While no state or federal regulation prohibits online gaming in Florida, there is also no state regulation permitting online gaming.¹⁶⁸ West Flagler Associates have cited conflicting precedents of the standing of validity under the IGRA to establish their foundation for a Florida Supreme Court review as well.¹⁶⁹

Notable efforts have been made by third-party providers, such as FanDuel and DraftKings, to support an amendment to the Florida Constitution to allow online gaming.¹⁷⁰ In 2021, FanDuel and DraftKings contributed \$10 million each to the Florida Education Champions political committee.¹⁷¹ This committee leads the charge for funding a ballot initiative to legalize sports betting in Florida.¹⁷² The Seminoles have already publicly expressed their opposition to the ballot initiative and stated that “out-of-state corporate dollars” are not going to “manipulate the people of Florida” out of something that is a benefit to them.¹⁷³ The Florida Education Champions committee states that their initiative benefits Florida, and, if passed, ensures that Florida “shares in the sports betting revenue that is currently draining to the offshore, illegal market.”¹⁷⁴

However, despite the efforts of the Florida Education Champion committee, sports betting did not make it to the Florida ballot in 2022.¹⁷⁵ Florida voters did not have the chance to vote on online betting, even with the assistance

¹⁶⁵ *Id.*

¹⁶⁶ Kam, *supra* note 143.

¹⁶⁷ 25 U.S.C.S. § 2710(d)(1) (2024).

¹⁶⁸ *Florida Legal Online Gambling 2022, supra* note 164.

¹⁶⁹ Petition for Rehearing En Banc at 9, *W. Flager Assocs., Ltd. v. Haaland*, 2023 WL 5985186 (No. 21-5265).

¹⁷⁰ Grant Holcomb, *DraftKings and FanDuel Put Millions on Florida Constitutional Amendment*, TENN. STAR (July 14, 2021), <https://tennesseestar.com/the-south/florida/draftkings-and-fanduel-put-millions-on-florida-constitutional-amendment/gholcomb/2021/07/14/>.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Krystal S., *DraftKings and FanDuel Put \$20 Million into Sports-Betting Initiatives for the 2022 Ballot*, FLA. INSIDER (July 16, 2021), <https://floridainsider.com/sports/draftkings-and-fanduel-put-20-million-into-sports-betting-initiatives/>.

¹⁷⁵ News Service of Florida, *Sports Betting Initiative Backed by Online Portals Won't Make Florida Ballot This Year*, ORLANDO SENTINEL, <https://www.orlandosentinel.com/2022/01/28/sports-betting-initiative-backed-by-online-portals-wont-make-florida-ballot-this-year/> (last updated Jan. 28, 2022, 6:58 PM).

of FanDuel and DraftKings, because the committee failed to collect the minimum number of valid signatures required to place the initiative on the ballot.¹⁷⁶ The Committee submitted 472,927 valid signatures out of the required 891,589 signatures needed.¹⁷⁷ The Committee believes that the limited number of signatures derived from their inability to collect in-person signatures due to the COVID-19 outbreak.¹⁷⁸ Despite the lackluster execution of this initiative in 2022, DraftKings' CEO has very high hopes that the initiative will be on the Florida ballot in 2024 and hopes to launch sports betting in Florida in 2025.¹⁷⁹ Thus, regardless of how the courts may decide on the validity of the Seminole's 2021 Gaming Compact, this initiative will likely still be proposed for the 2024 Florida ballot.¹⁸⁰

The Seminole Tribe of Florida and third-party online betting providers both have one common argument: they want to put an end to the illegal offshore betting that is currently being conducted by Florida residents. Florida clearly wants to enter the online gaming market; however, this is an arms race to who reaches the final decision first: Florida voters or the Seminole Tribe. And if trends continue, the winner may be the Seminole Tribe.

The West Flagler Associates lawsuit against the Florida Legislature and Governor opens up the possibility of having online gaming in Florida without the approval of Florida voters. For the Florida Supreme Court to side with the Seminole Tribe, it would have to decide whether the 2021 Gaming Compact falls under article X section (c) of the Florida Constitution, which is the mandating of casino gaming "on tribal lands" that are approved by the IGRA.¹⁸¹ However, for the Florida Supreme Court to decide on that issue would be an overstep of their power as it would have to decide on the Compact's validity under the IGRA, and it is reluctant to make that decision. The Court will likely deny the case from being heard and remand it to the circuit court.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Dara Kam, *Sports Betting Will Not Be on the Florida Ballot in 2022*, WUSF PUBLIC MEDIA (Jan. 28, 2022), <https://wusfnews.wusf.usf.edu/politics-issues/2022-01-28/sports-betting-will-not-be-on-the-florida-ballot-in-2022>.

¹⁷⁹ Robert Linnehan, *DraftKings CEO Confident in Potential 2024 Florida Sports Betting Ballot Initiative*, SATURDAY DOWN S., <https://www.saturdaydownsouth.com/sports/draftkings-ceo-confident-in-potential-2024-florida-sports-betting-ballot-initiative/> (last visited Mar. 3, 2024).

¹⁸⁰ *Id.*

¹⁸¹ FLA. CONST. art. X, § 30(c).

Up until recently, Florida has been adamant about prohibiting gaming activity initiatives from appearing on the Florida ballot.¹⁸² Even if Florida can get gaming activities on the ballot, voters will still be reluctant to vote in favor of passing it.¹⁸³ If this proposal makes the ballot, it would allow online gaming to be accessible to third-party online gaming providers to come into the State of Florida, in direct competition with the Seminoles. Under the issue presented in the current lawsuit against Governor DeSantis and the Seminoles, the court would have to decide whether the gaming compact is admissible under the section 30(c) exception, which would be beyond the scope of the court's discretion. However, Federal Court of Appeals Judge Wilkins notes that its ruling "only" verified the Gaming Compact "was consistent" with federal law, and the matter of noncompliance with the 2018 constitutional amendment is a matter left for the State Court.¹⁸⁴ Thus, West Flagler Associates will have a difficult time proving otherwise to receive a favorable ruling.

Additionally, if the state court decides to rule on whether the gaming compact is considered under the section 30(c) exception, it could ultimately be challenged as an attempt by the Seminole Tribe to monopolize online gaming in Florida.¹⁸⁵ This challenge would likely be received from third-party online betting providers and other Indian tribes located in Florida; each would have great opposition to the decision. Those challenges would ultimately lead to more litigation and an even bigger obstacle to the Seminoles' plan to tap into the online gaming market.

¹⁸² Only eight proposals have made the Ballot in Florida for a constitutional amendment involving gaming. See *Gambling on the Ballot: Florida*, BALLOTEDIA, https://ballotpedia.org/Gambling_on_the_ballot#Florida (last visited Mar. 3, 2024).

¹⁸³ Up until 2004, Florida Voters have consistently rejected proposed constitutional amendments involving gaming. *History of Gambling in Florida*, NOCASINOS, <https://dos.elections.myflorida.com/initiatives/> (last visited Mar. 18, 2024). For the database of proposals and passage rate of initiatives and amendments in Florida, see *Initiatives / Amendments / Revisions Database*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/> (last visited Mar. 3, 2024).

¹⁸⁴ Dara Kam, *Florida's Sports Betting Deal with the Seminole Tribe Gets a Big Win in Court*, WFSU PUBLIC MEDIA (July 2, 2023), <https://news.wfsu.org/state-news/2023-07-02/floridas-sports-betting-deal-with-the-seminole-tribe-gets-a-big-win-in-court>.

¹⁸⁵ McCain, *supra* note 9.

B. Indian Gaming Regulatory Act

As established above, this issue has conflicting precedents,¹⁸⁶ rulings,¹⁸⁷ and analysis of impact after the case,¹⁸⁸ all of which build a foundation that should warrant U.S. Supreme Court review. However, that may not occur in this case.

The Supreme Court will likely be reluctant to make a ruling on this issue. In this case, if the Supreme Court grants certiorari, the case would call into question the validity of the Court's recent 2018 precedent from *Murphy v. NCAA*.¹⁸⁹ The Court struck down the federal Professional and Amateur Sports Protection Act that forbids states from authorizing betting on sports games.¹⁹⁰ The Court said this "law was 'unconstitutional' because it forces the states to comply with the federal government, which violated constitutional principles that prohibit Congress from controlling the states."¹⁹¹ Historically, the United States Supreme Court is not likely to disturb a decision it recently ruled on which in this case is a mere five years ago. If the U.S. Supreme Court votes in favor of the Seminoles, the result would permit every state to enter gaming compacts with a respective tribe to permit online gaming. Such a result would receive major backlash from third-party online betting providers and other Indian Tribes alleging an attempt to monopolize online gaming in these states. However, to rule against the Seminoles would restrict any Tribe from expanding their own online gaming business, which is a larger constraint to the control the federal government wants to have over Tribes and their gaming businesses. Therefore the U.S. Supreme Court will be hesitant to accept the case at all, leaving the Seminoles to conduct their expanded gaming operations in Florida. Given the trends in the current ruling made by the Court in this case thus far, the odds continue to fall in favor of the Seminoles.

¹⁸⁶ See *Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024, 1035 (9th Cir. 2022) (provides that "the context of § 2710(d)(3)(C)'s list of six specific topics followed by a catch-all seventh, it is more natural to read 'may' in its restrictive sense, as a 'may only'"); *Navajo Nation v. Dalley*, 896 F.3d 1196, 1205 n.4 (10th Cir. 2018) ("the negotiated terms of the Compact cannot exceed what is authorized by the IGRA") (quoting *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254, 1266 (D.N.M. 2013); *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 935 (8th Cir. 2019) ("Directly related to the operation of gaming activity' is narrower than 'directly related to the operation of the Casino'").

¹⁸⁷ See *W. Flagler Assocs. v. Haaland*, 573 F. Supp. 3d 260, 263 (D.D.C. 2021) (ruling in favor of W. Flagler Assocs.) *overruled by* *W. Flagler Assocs., Ltd. v. Haaland*, 71 F.4th 1059, 1062 (D.C. Cir. 2023) (ruling in favor of Seminoles & Haaland).

¹⁸⁸ Kam, *supra* note 143.

¹⁸⁹ Alexa Lardieri, *Supreme Court Overturns Law Banning Sports Betting Across U.S.*, USNEWS (May 14, 2018), <https://www.usnews.com/news/politics/articles/2018-05-14/supreme-court-overturns-law-banning-sports-betting-across-us>; see *Murphy v. NCAA*, 584 U.S. 453, 486 (2018).

¹⁹⁰ Lardieri, *supra* note 189.

¹⁹¹ *Id.*

Additionally, with the Seminoles' launch of their Hard Rock Digital App for online gaming, allowing Florida residents to submit their bets from anywhere in the state, the Seminoles would also lose their ability to claim criminal/prohibitory versus civil/regulatory under the *Bryan* test. The *Bryan* test allowed the Seminoles to conduct gaming and business ventures under the protection of restricted civil jurisdiction over Indian lands.¹⁹² Once the Seminoles take the activities outside their protected land, the *Bryan* Test does not follow. Thus, any online gaming conducted outside of Seminole land is subject to Public Law 280 and may include criminal/prohibitory conduct toward the Seminoles. While the Seminoles can now reap the reward of online gaming in the state, there would be the risk of potentially sacrificing their limited civil jurisdiction by now conducting business off their land.

V. CAN THE SEMINOLES OBTAIN EXCLUSIVE CONTROL OF ONLINE GAMING IN THE STATE OF FLORIDA?

For the Seminoles to gain exclusive control over online gaming within the State of Florida, they would have to overcome the opposition from the amendments of the Florida Constitution, the regulations of the IGRA, and the initiative of third-party online betting providers create. However, even with these odds stacked against the Seminoles, the Seminoles are going to prevail in their efforts for exclusivity in online gaming in Florida. While there have been very few states that allow for a single online gaming provider for the entire state, none of these providers have been an Indian tribe.¹⁹³ The U.S. Supreme Court and the Florida Supreme Court seem very hesitant to accept the case and open the door to a lot more legal battles involving online gaming. Online gaming will most likely continue to be present and controlled by the Seminoles under the terms of the 2021 Gaming Compact.

VI. CONCLUSION

The Seminoles will obtain the exclusive operation of commercial online gambling activities within the State of Florida. Since the Seminoles started their

¹⁹² Brock, *supra* note 72, at 398.

¹⁹³ Geoff Zochodne, *If Florida's Gaming Compact Wins, Sports Bettors Could Still Lose*, COVERS (Oct. 6, 2023), <https://www.covers.com/industry/florida-competitive-market-online-sports-betting-legal-battle-october-2023>. For a list of what providers are available in each state, see Steven Petrella, *A Full List of United States Sportsbooks by State: Where Every Site Operates*, ACTION NETWORK (last updated Feb. 5, 2024), <https://www.actionnetwork.com/legal-online-sports-betting/sportsbooks-by-state>; Chris Bengel & Shanna McCarriston, *U.S. Sports Betting: Here is Where all 50 States Currently Stand on Legalizing Online Sports Betting Sites*, CBS SPORTS (Nov. 17, 2023), <https://new.cbssports.com/general/news/u-s-sports-betting-heres-where-all-50-states-currently-stand-on-legalizing-online-sports-gambling-sites/>.

first bingo hall in Hollywood, Florida,¹⁹⁴ they have been a substantial part of the growth of Indian Sovereignty. Thus, regardless of the outcomes from the U.S. Supreme Court or Florida Supreme Court and the potential for online gaming to appear on the 2024 Florida ballot, the Seminoles will establish yet another major precedent for Indian tribes across the country.

¹⁹⁴ *History: Seminoles Today*, SEMINOLE TRIBE OF FLA., <https://www.semtribe.com/history/seminoles-today> (last visited Mar. 6, 2024).