EimerStahl LLP

Memorandum

To: Interested Parties

From: Ryan J. Walsh

Re: Validity of Wisconsin Assembly Bill 601, Senate Bill 592, and Associated Tribal–State Gaming Compacts Under Federal and State Law

Date: November 16, 2025

I. Executive Summary

The Forest County Potawatomi Community retained me to analyze whether Wisconsin Assembly Bill 601 and Senate Bill 592 (the "Bill"), along with Tribal–State gaming compacts amended in reliance on those bills if enacted, would be valid under federal and state law. *See* 2025 A.B. 601; 2025 S.B. 592. The answer is yes.

The Bill would amend the definition of a "bet" in Wisconsin Statutes § 945.01(1) to clarify that it does not cover remote sports wagering offered by Indian tribes to persons physically located in Wisconsin where the servers used to conduct the wagering are physically located on Indian lands and the wagering is conducted pursuant to a valid, existing Tribal–State gaming compact.

In my view, the Bill and associated compacts would not violate any provision of the U.S. Constitution, federal law, or the Wisconsin Constitution and should be upheld in any litigation.

The Bill and amended compacts would comply with federal law. Recently, the United States Court of Appeals for the D.C. Circuit rejected a challenge to a compact that addressed statewide remote wagering under the federal Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*, and the Equal Protection Clause, U.S. Const. amend XIV, § 1, and the U.S. Department of the Interior ("Interior") has revised IGRA implementing regulations to clarify that gaming compacts "may include provisions addressing statewide remote wagering or internet gaming that is directly related to the operation of gaming activity on Indian lands." 25 C.F.R. § 293.26. U.S. Supreme Court precedent also makes clear that state legislation rationally related to effectuating federal policy towards Indian tribes, such as promoting tribal economic development and self-government, does not constitute invidious racial discrimination under the Equal Protection Clause. Applying this precedent, federal courts of appeal

are uniform in holding that state laws granting gaming monopolies to Indian tribes operating under an approved compact are constitutional.

The Bill would also comply with state law. It would not violate the 1993 Amendment to Article IV, Section 24 of the Wisconsin Constitution, which provides that "the legislature may not authorize gambling in any form." In the first place, the Bill itself would not authorize gambling; only an approved compact can do that. Absent compact amendments, the making of a mobile sports wager between a person physically located in Wisconsin and a tribe offering such gaming would remain unlawful. In any event, deeming is not authorizing. Wisconsin law already excludes insurance, securities, and other regulated transactions from the definition of a "bet" without thereby authorizing gambling, and a deeming provision operates the same way: classifying the making of a remote bet offered under an approved compact as subject to a different regulatory regime, rather than granting permission to engage in it. That distinction matters because a bet is not formed until a proposed wager is accepted, and that occurs only after the wager reaches a server on Indian lands and is accepted pursuant to a pre-1993 compact. Until that moment, no "bargain" exists, and no gambling occurs within the meaning of Wisconsin's criminal gambling statutes. The Bill therefore does not authorize a gambling transaction to occur off Indian lands. Instead, the Bill simply clarifies that if a compact is amended to authorize mobile wagering, the legally cognizable bet occurs where the authorized gaming activity actually takes place. In doing so, the Bill determines the situs of the conduct and allocates jurisdiction based on the location of the servers conducting the wagers, consistent with IGRA and similar statutes in other states. Because the 1993 Amendment does not restrict the legislature's power to make such a determination or to enact a deeming provision specifying the situs of wagers made under an approved compact, the Bill does not violate the Wisconsin Constitution.

II. Background

Under Wisconsin Statute § 945.02, any person who "makes a bet" is guilty of a Class B misdemeanor. Wis. Stat. § 945.02(1). A "bet" is defined as "a bargain in which the parties agree that, dependent upon chance even though accompanied by some skill, one stands to win or lose something of value specified in the agreement." *Id.* § 945.01(1). But "a bet does not include" valid, "[b]ona fide business transactions" such as those for securities, futures, indemnity, and insurance contracts, "[o]ffers of purses, prizes or premiums to the actual contestants in any bona fide contest for the determination of skill, speed, strength, or endurance or to the bona fide owners of animals or vehicles entered in such contest," bingos, raffles, pari-mutuel wagering, and state-conducted lotteries, "[a]n agreement under which an employee is given an opportunity to

win a prize, the award of which is determined by chance, in return for the employee making a referral or identification," and participation in certain savings programs offered by federally chartered financial institutions, including programs "under which a person is given an opportunity to win a prize after depositing money in an account" at a bank or credit union. *Id.* § 945.01(1)(a)–(g).

On October 29, 2025, Assembly Bill 601 was introduced in the Wisconsin Legislature. 2025 A.B. 601 would amend the definition of "bet" in Section 945.01 to add to the list of things that a "bet does not include" a new subsection 945.01(1)(h):

> An event or sports wager made by a person physically located in this state using a mobile or other electronic device if the server or other device used to conduct such event or sports wager is physically located on a federally recognized American Indian tribe's Indian lands and if the event or sports wager is conducted pursuant to an Indian gaming compact under s. 14.035 originally entered into prior to April 1, 1993.

2025 A.B. 601, § 1, *available at* https://docs.legis.wisconsin.gov/2025/related/proposals/ab601/1/_1 (last visited Nov. 13, 2025). The Legislative Reference Bureau issued accompanying analysis explaining:

> Under current law, it is a Class B misdemeanor to make a bet. This bill excludes from the definition of "bet" an event or sports wager made by a person physically located in this state using a mobile or other electronic device if the server or other device used to conduct such event or sports wager is physically located on a federally recognized American Indian tribe's Indian lands and if the event or sports wager is conducted pursuant to a compact between a tribe and this state under the federal Indian Gaming Regulatory Act of 1988 that was originally entered into prior to April 1, 1993.

Id., Analysis by the Legislative Reference Bureau.

A proposed amendment to 2025 A.B. 601 would change the bill to read:

> An event or sports wager made by a person physically located in this state using a mobile or other electronic device if the server or other device used to conduct such event or sports wager is physically located on a federally recognized American Indian tribe's Indian lands **in this state** and if the event or sports wager is conducted pursuant to an Indian gaming compact under s. 14.035

> originally entered into prior to April 1, 1993. **Such event or sports wagers are deemed to have taken place on those Indian lands in this state on which the server or other device used to conduct such event or sports wager is physically located.**

Assembly Amend. 1, to 2025 A.B. 601, Nov. 11, 2025, *available at* https://docs.legis.wisconsin.gov/2025/related/amendments/ab601/aa1_ab601 (emphasis showing proposed new language).

III. Analysis

A. The Bill Would Comply With Federal Law

1. The Bill Would Not Violate the Indian Gaming Regulatory Act

The Indian Gaming Regulatory Act, Pub. L. No. 100-497, Oct. 17, 1988, 102 Stat. 2467, *codified at* 25 U.S.C. 2701 *et seq.*, "creates a framework for regulating gaming activity on Indian lands." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 785 (2014). IGRA "divides gaming on Indian lands into three classes—I, II, and III—and provides a different regulatory scheme for each class." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 48 (1996). Class III gaming, which includes sports betting, *see W. Flagler Assocs., Ltd. v. Haaland*, 71 F.4th 1059, 1062 (D.C. Cir. 2023), is "lawful on Indian lands" only where it is, among other things, "conducted in conformance with a Tribal–State compact entered into by the Indian tribe and the State," 25 U.S.C. § 2710(d)(1).[1] A Tribal–State gaming compact must be submitted to the Secretary of the Interior ("Secretary") for review, and the Secretary may disapprove of a compact that violates IGRA, "any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands," or "the trust obligations of the United States to Indians." *Id.* § 2710(d)(8)(B).

IGRA allows a state and a tribe to enter into a compact "governing gaming activities on the Indian lands of the Indian tribe," 25 U.S.C. § 2710(d)(3)(B), and prescribes a list of permissible subjects of such compacts, including the application of criminal and civil laws, the allocation of criminal and civil jurisdiction, assessments to defray the costs of regulation, taxation by the tribe, remedies for breach of contract, standards for the operation and licensing of the gaming activities and maintenance of the gaming facilities, and a catchall

[1] Class III gaming also includes "the types of games that most would associate with casinos: slot machines, craps, roulette, and banked card games like blackjack." *Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1079 (7th Cir. 2015).

provision for "any other subjects that are directly related to the operation of gaming activities." *Id.* § 2710(d)(3)(C). The Supreme Court has stated that IGRA authorizes regulation only of gaming "on Indian lands, and nowhere else." *Bay Mills Indian Cmty.*, 572 U.S. at 795 (holding that IGRA did not abrogate tribal sovereign immunity for suits by a state to enjoin a tribe from operating a casino on non-Tribal lands).

The D.C. Circuit's recent (and correct) decision in *West Flagler Associates, Ltd. v. Haaland* confirms that the Bill would comport with IGRA. 71 F.4th at 1061–62. In *West Flagler*, plaintiffs challenged the Secretary's failure to disapprove of a compact between the State of Florida and the Seminole Tribe of Florida that permitted sports books operating on Indian lands to receive bets placed remotely from outside those lands by "deem[ing]" such bets to "take place" on the Indian lands where the servers receiving the bets sit. *Id.* at 1061, 1063. To enable the compact, Florida had enacted a statute with similar language to that contained in the Bill. *See id.* at 1063 (citing Fla. Stat. § 285.710(13)(b)(7)). Relying on the statement in *Bay Mills* that IGRA authorizes regulation only of gaming "on Indian lands, and nowhere else," plaintiffs argued that IGRA prohibits a compact from authorizing gaming outside Indian lands. *Id.* at 1061. The district court agreed. *Id.*

The D.C. Circuit reversed. It explained that, although "an IGRA gaming compact can legally authorize a tribe to conduct gaming only on its own lands," Supreme Court precedent confirms that IGRA does not bar states from regulating gaming outside Indian territory and thus "does not *prohibit* a gaming compact—which is, at bottom, an agreement between a tribe and a State—from discussing other topics, including those governing activities outside Indian lands." *Id.* at 1062 (emphasis in original). In fact, IGRA "expressly contemplates that a compact 'may' do so where the activity is 'directly related to' gaming." *Id.* (quoting 25 U.S.C. § 2710(d)(3)(C)(vii)) (emphasis in original). A compact also "may include provisions relating to … the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity," and "the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations." *Id.* at 1062, 1065 (quoting 25 U.S.C. § 2710(d)(3)(C)(i), (ii)). The compact's "deeming" provision satisfied Section 2710(d)(3)(C) both because it is "directly related to the operation" of a tribe's sports book and because it "allocates jurisdiction between Florida and the Tribe." *Id.* at 1066.

The court emphasized that a compact must "authorize[] a substantial amount of gaming on Indian lands separate and apart from online wagers

placed from outside the Tribe's lands," and that "an IGRA compact cannot provide independent legal authority for gaming activity that occurs outside of Indian lands, where that activity would otherwise violate state law." *Id.* at 1067–68; *see also id.* at 1062 ("Whether it is otherwise lawful for a patron to place bets from non-tribal land within Florida may be a question for that State's courts, but it is not the subject of this litigation and not for us to decide.").[2]

After the D.C. Circuit's decision, Interior promulgated a new rule expressly providing that a compact or an amendment to a compact "may include provisions addressing statewide remote wagering or internet gaming that is directly related to the operation of gaming activity on Indian lands" and "may specifically include, for regulatory purposes, provisions allocating State and Tribal jurisdiction within the State over remote wager or internet gaming originating outside Indian lands where," as relevant here, "(a) State law and the compact or amendment deem the gaming to take place, for the purposes of State and Tribal law, on the Tribe's Indian lands where the server accepting the wagers is located." 25 C.F.R. § 293.26.[3] Interior's rule governs the Secretary's review and approval or disapproval of compacts. 25 C.F.R. § 293.1(b).

The Seventh Circuit and Wisconsin courts would likely reach the same conclusion as in *West Flagler*.[4] First, the D.C. Circuit's holding is consistent with *Bay Mills*, which explained that, while IGRA does not automatically abrogate a tribe's sovereign immunity for gaming activities occurring outside Indian lands, a tribe and a state can negotiate a waiver of sovereign immunity for such activities in their compact. *See* 572 U.S. at 796–97. Nor has any other

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[2] The Supreme Court denied certiorari in 2024, with only Justice Kavanaugh stating that he would grant the petition. *W. Flagler Assocs., Ltd. v. Haaland*, 144 S. Ct. 2671 (2024) (mem.). In an earlier decision denying the plaintiffs' request for a stay, Justice Kavanaugh issued a separate statement that he "agree[d] that the stay application should be denied in light of the D. C. Circuit's pronouncement that the compact … authorizes the Tribe to conduct only on-reservation gaming operations, and not off-reservation gaming operations, but "if the compact authorized the Tribe to conduct off-reservation gaming operations, either directly or by deeming off-reservation gaming operations to somehow be on-reservation, then the compact would likely violate the Indian Gaming Regulatory Act, as the District Court explained." *W. Flagler Assocs., Ltd. v. Haaland*, 144 S. Ct. 10 (2023) (statement of Kavanaugh, J.). As explained in Part III.A.3, below, Justice Kavanaugh also stated that a state law granting a monopoly over gaming to an Indian tribe would raise serious equal protection concerns, but no other Justice joined his statement.

[3] In addition to the "deeming" requirement, Rule 293.26 also requires that "the Tribe [must] regulate[] the gaming" and that "the player initiating the wager [must not be] located on another Tribe's Indian lands within the State, unless that Tribe has lawfully consented." *Id.* § 293.26(b)–(c).

[4] That is not least because the Seventh Circuit generally requires "quite solid justification" to create a circuit split—it does "not lightly conclude" that another circuit is "wrong." *United States v. Tuggle*, 4 F.4th 505, 522 (7th Cir. 2021) (internal quotation marks and citation omitted).

circuit reached a contrary holding. Plaintiffs in *West Flagler* cited *California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960 (9th Cir. 2018), but that case held only that a tribe cannot rely on IGRA to "offer online gaming to patrons located off Indian lands in jurisdictions" of *nonconsenting* states "where such gambling is illegal." *Id.* at 964. While the Ninth Circuit opined that "at least some of the 'gaming activity' associated with" online sports betting "does not occur on Indian lands" for purposes of IGRA, *id.* at 967 (quoting 25 U.S.C. § 2710(d)(1)), the court did not hold that IGRA prohibited a compact to which a state has consented from deeming the submission of online wagers to occur on Indian lands.[5]

Second, the submission of wagers to sports books operated on Indian lands is "directly related to the operation of gaming activities" and thus fits within Section 2710(d)(3)(C)'s residual clause. There is no question that a tribe operating a sports book and accepting wagers constitutes the operation of a gaming activity. Some courts have adopted a narrow interpretation of "directly related to the operation of gaming activities" to prevent states from using compacts "as a subterfuge for imposing State jurisdiction on tribal lands." *W. Flagler*, 71 F.4th at 1067 (quotation marks omitted). *Compare, e.g.*, *Navajo Nation v. Dalley*, 896 F.3d 1196, 1207 (10th Cir. 2018) ("Class III gaming activity relates only to activities actually involved in the *playing* of the game, and not activities occurring in proximity to, but not inextricably intertwined with, the betting of chips, the folding of a hand, or suchlike."), *with Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024, 1035 (9th Cir. 2022) (stating that "topics of negotiation that have attenuated relationships to the operation of gaming activities, or merely tangential, incidental, or collateral relationships, are not permitted"); *cf. Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 934 (7th Cir. 2008) (doubting, but ultimately not deciding, whether revenue-sharing agreements are directly related to the operation of gaming activities). But it would be hard to imagine anything more directly and inextricably intertwined with operating a sports book and receiving wagers than the initiation of those wagers. *See* 89 Fed. Reg. 13232-01, 13251 (Feb. 21, 2024) (explaining that "the negotiation between a Tribe and State over Statewide remote wagering or i-gaming … is inherently directly related to the operation of gaming").

Third, a deeming provision addresses "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" and

[5] *Southern Ute Indian Tribe v. Polis*, No. 1:24-cv-01886-GPG-NRN, ECF No. 69 (D. Colo. Oct. 23, 2025), likewise involved tribes seeking to rely on IGRA to offer online betting to patrons located off Indian lands over the objection of a nonconsenting state. *See id.* at 2.

"the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations." 25 U.S.C. § 2710(d)(3)(C)(i), (ii). The operation of remote wagering by an Indian tribe could give rise to uncertainty or conflicts regarding whether the Tribe's or the State's criminal and civil laws apply and whether the Tribe or the State has jurisdiction to enforce those laws. A deeming provision avoids such uncertainty and prevents conflict by allowing the parties to decide where a remote wager is made or conducted "for regulatory purposes." 25 C.F.R. § 293.26; *see also* 89 Fed. Reg. at 13251 ("The negotiation between a Tribe and State over Statewide remote wagering or i-gaming falls under [the] broad categories of criminal and civil jurisdiction.").

Fourth, to the extent there is any ambiguity about whether IGRA prohibits the Bill or a compact entered pursuant to the Bill from including a deeming provision, the Seventh Circuit, like most courts, applies "a long-standing canon that the language of treaties and statutes dealing with Indian tribes should be liberally construed or interpreted in their favor." *Oneida Tribe of Indians of Wisconsin v. State of Wisconsin*, 951 F.2d 757, 763 (7th Cir. 1991); *see Ho-Chunk Nation*, 784 F.3d at 1081 (stating that "the standard principles of statutory construction do not have their usual force in cases involving Indian law" (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985))).

2. The Bill Would Not Violate the Unlawful Internet Gambling Enforcement Act

The federal Unlawful Internet Gambling Enforcement Act (UIGEA) defines "unlawful internet gambling" to include receiving a bet or wager placed over the internet if the bet or wager "is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made." 31 U.S.C. § 5362(10)(A). In essence, the UIGEA "create[s] a system in which" an internet "'bet or wager' must be legal both where it is 'initiated' and where it is 'received.'" *Iipay Nation of Santa Ysabel*, 898 F.3d at 965. The Ninth Circuit has held that, because IGRA does not itself authorize or provide tribal jurisdiction over internet wagers placed from outside tribal lands, a tribe violates UIGEA by "offer[ing] online gaming to patrons located off Indian lands in jurisdictions where such gambling is illegal." *Id.* at 964, 967–68 ("Even if [the service] is completely legal in the place where the bet is accepted, on Iipay's lands, the bets are not legal in the jurisdiction where they are *initiated*, in this case California." (emphasis in original)).

Here, receiving a sports bet in conformance with a compact negotiated between a Tribe and the State of Wisconsin authorizing remote gaming pursuant to the Bill's deeming provision would not be "unlawful internet gambling"

under the UIGEA. First, the effect of such a compact would be to make receiving sports bets on Tribal land lawful under federal law. That is because whether it is legal for a Tribe to "receive[]" or "otherwise ma[k]e" an event or sports wager on Indian lands depends on the terms of the compact, not state law, as *West Flagler* makes clear. *See also, e.g.*, *Forest Cnty. Potawatomi Cmty. v. Norquist*, 45 F.3d 1079, 1082 (7th Cir. 1995) (stating that an IGRA compact confers upon a tribe a "federal right" to conduct gaming on its own lands); *Dairyland Greyhound Park, Inc. v. Doyle*, 295 Wis.2d 1 (2006) (holding that 1993 amendment to Wisconsin Constitution prohibiting the legislature from authorizing gambling did not invalidate gaming authorizations in preexisting Tribal–State compacts and, under the Contracts Clause, could not preclude such a compact from being amended to authorize new forms of gaming).

Second, the Bill would provide that it is not illegal for a person physically located in the State to "initiate[]" an event or sports wager remotely "if the server or other device used to conduct such event or sports wager is physically located on a federally recognized American Indian tribe's Indian lands [in this state] and if the event or sports wager is conducted pursuant to" a pre-1993 compact. 2025 A.B. 601 (amended text in brackets). This would make the activity lawful under "applicable . . . State law." 31 U.S.C. § 5362(10)(A).

3. The Bill Would Not Violate the Equal Protection Clause

The Bill also would not violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, which guarantees that "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause serves "as a guard against state and local government discrimination on the basis of race, national origin, sex, and other class-based distinctions." *FKFJ, Inc. v. Village of Worth*, 11 F.4th 574, 588 (7th Cir. 2021) (quotation marks omitted). Courts apply different tiers of scrutiny—strict, heightened, or rational basis—to equal-protection claims depending on the kind of distinction at issue. *Hope v. Comm'r of Indiana Dep't of Correction*, 9 F.4th 513, 529 (7th Cir. 2021).

While race-based distinctions generally are subject to strict scrutiny, "legislation directed specifically at Indian tribes" is a special case. *United States v. Cohen*, 733 F.2d 128, 139 (D.C. Cir. 1984) (Scalia, J.) (quoting *United States v. Antelope*, 430 U.S. 641, 649, n. 11 (1977)). Because of Congress's unique relationship and history with Indian tribes, federal legislation affording separate treatment "to members of 'federally recognized tribes'" (as opposed to legislation "directed toward a 'racial' group consisting of 'Indians'") is considered "political rather than racial in nature" and is valid so long as it "can be tied rationally to the fulfillment of Congress' unique obligation toward the

Indians." *Morton v. Mancari*, 417 U.S. 535, 554–55 & n.24 (1974); *see also Antelope*, 430 U.S. at 645–46 (explaining that "federal regulation of Indian tribes . . . is governance of once-sovereign political communities" and thus is "not based upon impermissible racial classifications"). "Justice Scalia . . . put the matter this way: "in a sense the Constitution itself establishes the rationality of the ... classification, by providing a separate federal power that reaches only the present group." *Am. Fed'n of Gov't Emps., AFL-CIO v. United States*, 330 F.3d 513, 521 (D.C. Cir. 2003) (citation omitted).

And, critically, although States plainly "do not enjoy th[e] same unique relationship" with tribes that Congress has, the Supreme Court long has held that States nevertheless "may adopt laws and policies to reflect or effectuate Federal laws designed 'to readjust the allocation of jurisdiction over Indians' without opening themselves to the charge that they have engaged in race-based discrimination." *In re New York Ass'n of Convenience Stores*, 699 N.E.2d 904, 908 (N.Y. 1998) (quoting *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 501 (1979)). Hence the *Morton* line of cases governs challenges to such state enactments with the same force as it applies to federal challenges.

Consistent with these well-settled principles, courts have uniformly rejected claims that compacts and state laws granting Indian tribes exclusive gaming rights, including online sports betting, constitute invidious racial discrimination or otherwise violate equal protection. *See W. Flagler*, 71 F.4th at 1070 (holding that compact granting a tribe "a statewide monopoly over online sports betting" through a deeming clause "plainly promote[d] the economic development of the Seminole Tribe" and was "rationally related to the legitimate legislative purposes laid out in IGRA by 'ensur[ing] that the Indian tribe is the primary beneficiary of the gaming operation'" (quoting 25 U.S.C. § 2702(2));[6] *U.S. v. Garrett*, 122 F. App'x 628, 633 (4th Cir. 2005) (unpublished) (holding that "gaming preferences given" to an Indian tribe under North Carolina law were "rationally related to a legitimate governmental interest" in "promot[ing] the economic development of federally recognized Indian tribes (and thus their members)," which "[t]he Supreme Court has explicitly held … constitutes not just a legitimate, but an important governmental interest") (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216–17 (1987)); *Artichoke*

[6] In a statement respecting the Supreme Court's denial of the plaintiffs' request for a stay of the *West Flagler* decision, Justice Kavanaugh opined that "to the extent that a separate Florida statute (as distinct from the compact) authorizes the Seminole Tribe—and only the Seminole Tribe—to conduct certain off-reservation gaming operations in Florida, the state law raises serious equal protection issues." *W. Flagler Assocs., Ltd. v. Haaland*, 144 S. Ct. 10 (2023) (statement of Kavanaugh, J.). No other Justice joined his statement, and the Court later denied certiorari. *See* note 2, above.

Joe's California Grand Casino v. Norton, 353 F.3d 712, 741 (9th Cir. 2003) (upholding California constitutional amendment that permitted casino-style gaming only on Indian lands because, among other things, "by providing exclusive rights to engage in class III gaming, California gives Indian tribes valuable tools to promote the general welfare of their members").

The Supreme Court's decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (*SFFA*), 600 U.S. 181 (2023), does not undermine this long line of settled precedents. In the first place, *SFFA* addressed only race-based distinctions, and laws dealing with Indian tribes make no such distinctions, as the Court has held for decades. Laws addressing tribal matters concern "once-sovereign political communities"—they are "*not* based upon impermissible racial classifications." *Antelope*, 430 U.S. at 645 (emphasis added). Nothing in *SFFA* suggests that the Court is rethinking this proposition. Quite the contrary, a decision issued within weeks of *SFFA* suggests that laws addressing tribal matters will continue to enjoy a *sui generis* status under the Equal Protection Clause. See *Haaland v. Brackeen*, 599 U.S. 255, 274 (2023) (favorably citing *Morton*). It therefore remains a "bedrock principle" of our Constitution, as Justice Gorsuch wrote separately in *Haaland*, "that Indian status is a 'political rather than racial' classification." 599 U.S. at 310 (Gorsuch, J., concurring) (quoting *Morton*, 417 U.S. at 553 n.4); *United States v. Harjo*, 122 F.4th 1240, 1245–46, n.5 (10th Cir. 2024) (Tymkovich, J.) (noting, post-*SFFA*, that the Supreme Court continues to cite *Morton* and related cases "favorably, recognizing the continued validity of the underlying principle"); David E. Bernstein, Students for Fair Admissions *and the End of Racial Classification As We Know It*, Cato Sup. Ct. Rev., 2022–2023 143, 166–67 (opining that *SFFA* may affect the law as it relates to disparate treatment of "individuals as American Indian" or "racially Indian" based on "factors other than tribal membership" but not questioning the longstanding principle "that tribal membership is not a racial classification").

In effectuating IGRA, Wisconsin has, like California, long granted Indian tribes a monopoly over certain types of gaming, including event and sports wagers. *See Dairyland Greyhound Park, Inc.*, 295 Wis.2d at 32–34 (holding that Wisconsin Constitution article XII, § 1 intentionally exempted Class III conducted pursuant to a pre-1993 Tribal–State compact from its statewide prohibition of most forms of gambling). That decision is rationally related to effectuating IGRA's policies of "promot[ing] tribal economic development, tribal self-sufficiency, and strong tribal government," 25 U.S.C. § 2701(4), as well as a rational decision by the State "to recognize the separate sovereign interests of the tribes and to allow the tribes to make a different moral and economic choice than is made by the State as a whole," *Artichoke Joe's*, 353 F.3d at 741. The same is true of previous decisions by the State to amend existing compacts

to allow tribes to conduct new forms of gaming, as countenanced by *Dairyland*. 295 Wis.2d at 17.

The Bill is therefore consistent with longstanding Wisconsin policy and federal equal-protection precedents. What is more, as *West Flagler* explains, provisions such as those contained in the Bill address "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 [Class III] gaming activity" and "the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations." 71 F.4th at 1065–66 (quoting 25 U.S.C. § 2710(d)(3)(C)). In enacting legislation to enable compacts to address such matters, Wisconsin is "effectuat[ing] Federal law[] designed 'to readjust the allocation of jurisdiction over Indians,'" *In re New York Ass'n of Convenience Stores*, 699 N.E.2d at 908 (quoting *Yakima Indian Nation*, 439 U.S. at 501), and "legislating with reference to the authority that Congress had granted to the State … in IGRA," *Artichoke Joe's*, 353 F.3d at 736, and is entitled to the same deferential review afforded to federal legislation. *Id.*

B. The Bill Would Not Violate the Wisconsin Constitution

The Bill would not violate the 1993 amendment to Article IV, Section 24 of the Wisconsin Constitution (the "1993 Amendment"). The 1993 Amendment provides that, with certain enumerated exceptions, "the legislature may not authorize gambling in any form." Wis. Const. art. 4, § 24. Enactment of the Bill, however, would not "authorize gambling." The Bill does not permit anyone to "make a bet" (*i.e.*, enter into "a bargain in which the parties agree that, dependent upon chance even though accompanied by some skill, one stands to win or lose something of value specified in the agreement"). Wis. Stat. § 945.01(1). It only clarifies that it is not illegal under Wisconsin law for a person physically located in the State to *initiate* a bet remotely as long as the resulting "bargain" or "agreement" is made on servers physically located on Indian lands "pursuant to a compact between a tribe and [the] state under" IGRA "that was originally entered into prior to April 1, 1993," because such a bargain is deemed to have been made on Indian lands. 2025 AB 601.

No such Tribal–State compact currently authorizes mobile sports betting, and absent an amendment doing so, the making of a mobile sports wager between a person physically located in Wisconsin and a tribe offering such gaming would remain unlawful under the enacted Bill. Under IGRA, a tribe may offer Class III gaming on Indian lands only if the specific activity is expressly authorized by a valid compact. 25 U.S.C. § 2710(d)(1)(C). Because no operative compact currently authorizes mobile sports betting, a wager placed by a bettor located off tribal land would not be "conducted in conformance with"

such a compact, and accepting that wager would constitute unauthorized Class III gaming under IGRA. *Id*.

If the relevant compact were amended to permit mobile sports betting, then the wager would be authorized. But that would not be the result of AB 601; it would be the result of the terms of the compact. *Dairyland* already holds that the 1993 Amendment and Chapter 945's criminal prohibitions cannot apply to a bet made in conformance with a pre-1993 compact. *See* 295 Wis. 2d at 70–71 (explaining that "if the provision of the constitution or the legislative act of a state impairs a substantial contractual right, the constitutional provision or statute is utterly void" (quotation marks omitted)); *see also id.* at 50 (noting that each of the pre-1993 Tribal–State compacts provides that "[t]o the extent that State law or Tribal ordinances, or any amendments thereto, are inconsistent with any provision of this Compact, this Compact shall control"). And *Dairyland* also makes clear that a compact can be amended to permit new forms of gaming, such as event or sports wagers conducted between a tribe and persons using "mobile or other electronic device[s]." *See id*. at 68; 2025 A.B. 601, § 1.

Contrast *State v. Laven*, 270 Wis. 524, 71 N.W.2d 287 (1955), where the court struck down a statute because it expressly permitted certain broadcast games that otherwise met the definition of an illegal lottery. The court held that the statute, which permitted television or radio lotteries where the only "consideration" provided was "listening to a radio, or listening to and watching a television show," violated Article IV, Section 24 because it "authorize[d] some lotteries under some conditions" notwithstanding the constitutional command that "the legislature shall never authorize any lottery." *Id.* at 528–529. Here, by contrast, the Bill contains no affirmative permission for gambling that is otherwise illegal and thus would not implicate the constitutional prohibition articulated in *Laven*. *Compare* 270 Wis. 524 at 529 ("[I]t is by virtue of such permission that he contends his operation of 'Banko' is legal."). The Bill merely clarifies that, where an Indian tribe is "conduct[ing]" electronic event or sports wagers in conformance with a compact that does authorize such wagers, the bet is deemed to have been made where the servers receiving the wager are physically located. 2025 A.B. 601, §1. Consistent with IGRA, the Bill thus appropriately allocates jurisdiction over mobile or electronic event and sports wagers based on whether the server is located on Indian lands or on non-Indian lands, consistent with IGRA, instead of based on where the person making a remote wager is physically located.

Nothing in the 1993 Amendment restricts the legislature's power to make such an allocation by specifying the geographic location where a bet is made. As noted in Part II, Section 945.01(1) contains several other exclusions

from the definition of "bet" to clarify that the Chapter's criminal prohibitions do not apply to certain conduct that is regulated or permitted under separate legal regimes, such as securities and futures contracts, insurance policies, employee referral prizes, and participation in savings promotions programs offered by federally chartered financial institutions. Just as excluding insurance contracts from Section 945.01(1) is not an authorization of gambling, a deeming provision does not authorize gambling but merely makes a permissible legislative classification.

Indeed, "deeming" statutes are common in other states with constitutional gaming restrictions. For example, and in addition to the Florida statute at issue in *West Flagler*, similar statutes have been enacted in New Jersey, *see* N.J. Const. art. IV, § 7, ¶ 2(D) (generally limiting gaming to Atlantic City); N.J. Stat. § 5:12–95.20 (deeming internet gaming "to take place where a casino's server is located in Atlantic City regardless of the player's physical location within [the] State"), and Rhode Island, *see* R.I. Const. art. VI, § 22 (requiring a voter referendum to expand gaming types or locations); R.I. Gen. Laws § 42-61.2-1(22) (providing that online sports wagers "shall be deemed to be placed and accepted . . . at the premises of a hosting facility"). The constitutionality of the Rhode Island statute was upheld against a claim that it "expands the location of gambling which are permitted in the state." *Harrop v. Rhode Island Div. of Lotteries*, No. PC-2019-5273, 2020 WL 3033494, at *13 (R.I. Super. June 1, 2020). As the court explained, under the statute, all of the servers, gaming systems, software, and hardware used for the challenged betting had to be located in an existing gaming facility, and "[n]o activity other than the transmission of information … along common carriage lines takes place outside of" the existing facility.

Under the Bill, like the Rhode Island statute at issue in *Harrop*, the servers and other gaming systems used for remote event and sports wagering must all be located on Indian lands, and the only activity that occurs outside Indian lands is the "transmission of information … along common carriage lines." This is not a façade: until a wager offered by a patron is accepted on such servers, no "bargain" has occurred, and no "bet" has been "ma[d]e." Wis. Stat. §§ 945.01(1), 945.02(1). Thus, the event or sports wagers are taking place only on Indian lands, pursuant to and as authorized by an approved compact, and the Bill itself would not be authorizing any gambling.

IV. Conclusion

Opponents have threatened to bog down the Bill and gaming compacts entered into in reliance on the Bill with litigation challenging the Bill's validity under federal and state law. As this memorandum explains, these challenges are likely to be rejected. The plain terms of IGRA allow Tribal–State gaming

compacts and state laws designed to effectuate such compacts to address remote wagering and the allocation of tribal and state jurisdiction over such wagers. Attempts to block online wagering measures in Florida and Rhode Island have failed, and there is strong federal circuit court precedent sustaining state Indian gaming laws and compacts against equal-protection challenges.