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MEMORANDUM

To: Interested Parties
From: Wisconsin Institute for Law & Liberty
Date: November 11, 2025
RE: Legal and constitutional analysis of AB 601 and SB 592

Executive Summary

Two companion bills—2025 AB 601 and SB 592—seek to decriminalize mobile sports betting in Wisconsin. Instead of reforming inconsistencies in our current law, these bills attempt an end-run around federal law and the state constitution, expanding and exposing an already broken, illegal statewide gambling system.

The bills are unlawful for several reasons. First, the bills violate Article IV, § 24 of the Wisconsin Constitution, which forecloses any legislative approval of gambling schemes like this. Second, the bills violate the federal Indian Gaming Regulatory Act by unleashing tribal betting monopolies off reservation. Third, the bills contravene the constitutional right of equality in the Fourteenth Amendment by handing a race-based monopoly to Tribal gaming operations while closing the door on everyone else.

These legal issues are significant. In our view, if passed, these bills would likely be struck down. Furthermore, litigation over these bills would result in intense judicial scrutiny of Wisconsin's entire gambling apparatus, not just the subject matter presented by these bills.

I. Introduction

Under the Wisconsin Constitution, except for explicit limited exceptions, “the legislature may not authorize gambling in any form.” Wis. Const. Art. IV, § 24. This is a significant limitation on the legislature's power. This memorandum will begin by outlining some background on the early history of gambling in Wisconsin and the development of tribal gaming. The memorandum then analyzes the currently pending legislation under three questions: first, whether the legislation violates the Wisconsin Constitution's prohibition on legislative attempts to authorize gambling; second, whether the legislation violates federal law (specifically, the Indian Gaming

Regulatory Act); and third, whether the legislation violates constitutional guarantees of equal protection.

II. Background

A. Early history of gambling in Wisconsin and initial development of Federal Law

At statehood, the constitution originally provided “The legislature shall never authorize any lottery or grant divorce.” Wis. Const. Art. IV, §24 (1848). Courts in Wisconsin interpreted a “lottery” as anything in which there was “a prize, chance and a consideration.” See, e.g., *State ex rel. Cowie v. La Crosse Theaters Co.*, 232 Wis. 153, 286 N.W. 707 (1939); see also *State ex rel. Regez v. Blumer*, 236 Wis. 129, 294 N.W. 491 (1940); *State v. Laven* 270 Wis. 524, 71 N.W.2d 287 (1955); *Kayden Industries, Inc. v. Murphy*, 34 Wis. 2d 718, 150 N.W.2d 447 (1967).

That original constitutional ban on lotteries has been amended six times: in 1965, 1973, 1977, 1987, 1993 and 1999.¹ The first amendment in 1965 permitted certain kinds of promotional contests by excluding such action as watching a television or radio program, filling out a coupon or entry blank, or visiting an establishment from consideration “as an element of a lottery.” In 1973, an amendment authorized charitable bingo. In 1977, raffles were permitted. In 1987, an amendment authorized pari-mutuel wagering and a state-authorized lottery. The fifth and sixth amendments in 1993 and 1999 will be discussed later in this memorandum.

Shortly before Wisconsin voted on the 1987 amendment, the U.S. Supreme Court decided *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which dealt with whether a state’s criminal laws could be applied to prohibit gaming on tribal lands. The Supreme Court held that if a state’s regulatory scheme was “criminal/prohibitory” (i.e., if it banned all forms of gambling), then the state’s laws would apply to tribal gaming. But if a state’s regulatory scheme was “civil/regulatory” (i.e., if the state allows some gambling) then the state is barred from enforcing its criminal laws against tribal gaming on tribal lands.

The *Cabazon* case triggered action in Congress: the Indian Gaming Regulatory Act (IGRA), creating 25 U.S.C. § 2701, et seq. The key provision of IGRA provides that “Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is

¹ Information in this paragraph on the text of constitutional amendments to Article IV, § 24 of the Wisconsin Constitution is sourced from the State Democracy Research Initiative at the University of Wisconsin Law School, available at: <https://50constitutions.org/wi/constitution/section-amendment-id-69201>.

conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.” 25 U.S.C. § 2701(5). If state law allowed such activity, IGRA required states to negotiate with tribes over gaming compacts.

Under IGRA, gaming is divided into three “classes.” The Seventh Circuit has summarized those three classes as follows:

Class I gaming includes social games and traditional Indian gaming; it is regulated exclusively by Indian tribes. 25 U.S.C. §§ 2703(6), 2710(a)(1). Class II gaming includes bingo and certain nonbanked card games that are “explicitly authorized by the laws of the State, or ... are not explicitly prohibited by the laws of the State and are played at any location in the State.” 25 U.S.C. §§ 2703(7)(A)(ii), 2710(b)(1). (Wisconsin's Legislative Reference Bureau defines nonbanked games as those “in which players compete against one another as opposed to playing against the house.” See Wis. Legislative Reference Bureau, *The Evolution of Legalized Gambling in Wisconsin*, Informational Bull. 12–2 at 24 (Nov. 2012) <http://legis.wisconsin.gov/lrb/pubs/ib/12ib2.pdf>.) Class III gaming is a residual category that covers “all forms of gaming that are not class I gaming or class II gaming.” 25 U.S.C. § 2703(8).

Wisconsin v. Ho-Chunk Nation, 784 F.3d 1076, 1077–78 (7th Cir. 2015). Only “Class III gaming is regulated pursuant to tribal-state compacts.” *Id.* Class III gaming “is permitted if three conditions are met: 1) the tribe has eligible trust lands in the state, 2) the state permits the gaming for any purpose, and 3) the gaming is governed by a state-tribe compact.” *Id.* at 1079.

In the late 1980s, there was a question then in Wisconsin whether under IGRA our state was required to negotiate with tribes over gaming compacts. Then Attorney General Donald J. Hanaway issued an opinion in 1990 stating that Class III games were all prohibited in the state of Wisconsin (except for the state-run lottery and pari-mutuel betting). 79 Op. Wis. Atty. Gen 14. As a result, the state refused to negotiate with tribes on any Class III gaming compacts.

The tribes then sued Wisconsin under IGRA to force negotiations over tribal gaming compacts. See *Lac du Flambeau Band of Lake Superior Chippewa Indians; and the Sokaogon Chippewa Community v. State of Wisconsin et al*, 770 F. Supp. 480 (1991). There, the state had argued, consistent with A.G. Hanaway’s opinion, that because Wisconsin law does not permit the type of gaming, Wisconsin had no duty to negotiate. Disagreeing with the state, Judge Barbara Crabb applied *Cabazon* and concluded, “It is not necessary for plaintiffs to show that the state formally authorizes the same activities plaintiffs wish to offer. The inquiry is whether Wisconsin prohibits those particular gaming activities. It does not.” *Lac du Flambeau*, 770 F.Supp. at 487.

Attorneys at the Wisconsin Department of Justice then filed an appeal, but they missed the deadline, resulting in dismissal. *Lac du Flambeau Band of Superior Chippewa Indians v. State of Wis.*, 957 F.2d 515 (7th Cir. 1992). Interestingly, in 1996, the United States Supreme Court concluded that the provision of IGRA allowing tribes to sue states to enforce the negotiation requirement violated the Eleventh Amendment. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). And so, Judge Crabb's decision was completely undermined by later Supreme Court precedent.

Nonetheless, after Judge Crabb's decision, Wisconsin's governor entered negotiations and subsequently agreed to compacts with all eleven federally recognized Indian tribes in Wisconsin. Those initial compacts were signed between 1991 and 1992 and were for seven-year terms.

B. The 1993 Constitutional Amendment

In 1993, largely in reaction to a growing desire of tribes in Wisconsin to launch full-scale casino-style gaming operations, the People of Wisconsin amended Article IV, § 24 for a fifth time, taking it to its current form that "the legislature may not authorize gambling in any form." Wis. Const. Art. IV, § 24 (current).

As then Attorney General Jim Doyle explained in a formal opinion in 1996, "The 1993 amendment clarified that all forms of gambling should continue to be prohibited by the constitution, unless a specific exception was provided therein." Wis. Att. Gen. Op. 96-02. When the proposed amendment went before the People of Wisconsin for ratification, the question presented was whether the language should be amended to make clear that "all forms of gambling are prohibited . . . and to assure that the state will not conduct prohibited forms of gambling as part of the state-run lottery." 1993 Enrolled Joint Resolution 3; *see also*, Wis. Att. Gen. Op. 96-02 at 4–5 (explaining the same).

C. Subsequent gaming developments in Wisconsin Law

The original compacts were only for seven-year terms, so in 1998 and 1999, Governor Tommy Thompson amended and extended them for an additional five years. In 1999, Article IV, §24 was amended a final time to require that net proceeds from the lottery and any funds received by the state from bingo or pari-mutuel betting would be required to go toward property tax relief. *See* 1999 Enrolled Joint Resolution 2.² In 2003, Governor Jim Doyle amended and extended the compacts again, this time

² The amendment text, and the full joint resolution are available from the State Democracy Research Initiative at the University of Wisconsin Law School, *see* Fn. 1, *supra*.

significantly increasing the games covered by the compacts and making them into “perpetual” agreements with no expiration date.

One of those 2003 amendments was challenged in *Panzer v. Doyle*, 2004 WI 52. In *Panzer*, the court held that “perpetual” nature of the extension “violated the principles of separation of powers.” *Id.* at ¶ 113. Further, the Court found that the expansion of games was unlawful because those games “violate both the constitution and the criminal code...” *Id.* Finally, the Court also struck down a provision of the compact waiving the state’s sovereign immunity, finding that Governor Doyle “did not possess inherent or delegated power to undertake” such a waiver. *Id.*

That latter change was seemingly a failed attempt to get around the United States Supreme Court’s 1996 *Seminole* decision (waiving sovereign immunity, presumably, would have allowed the tribes to bring suits against Wisconsin under IGRA without violating the Eleventh Amendment).

Two years later, the Wisconsin Supreme Court’s composition had changed. The *Panzer* case was decided on May 13, 2004. Wisconsin Justice Diane Sykes, who was with the majority in the *Panzer* decision, was appointed to the U.S. Court of Appeals for the Seventh Circuit and confirmed on June 24, 2004. In August 2004, Governor Doyle appointed Louis Butler to the Supreme Court. That appointment proved decisive.

In 2006, the Wisconsin Supreme Court decided *Dairyland Greyhound Park, Inc. v. Doyle*. Justice Butler wrote the opinion, joined by the dissenting justices in the *Panzer* case, and largely upheld Governor Doyle’s expansion of tribal gaming in the 2003 compact amendments. *Dairyland* essentially overturned one of the key holdings in *Panzer*: the Governor’s ability to expand tribal gaming via amendment to the compact.

In *Dairyland*, the Wisconsin Supreme Court decided that the 1993 amendment did not apply retroactively, and further that the Contracts Clause of the Wisconsin and United States Constitutions controlled, and that because the compact was entered into before the 1993 amendment outlawing all gambling, and further because the original compact contemplated that it would be amended and extended over time, that the 1993 amendment could not be applied to the compact. The *Dairyland* court did not overturn *Panzer*’s striking down of the perpetual contract nor the waiver of sovereign immunity.

The *Dairyland* decision is on shaky constitutional footing. In a divided ruling, Wisconsin Supreme Court strayed far beyond established Contracts Clause jurisprudence, reaching the peculiar conclusion that one party’s mere expectation of negotiating expanded gambling rights at some point unknown in the future gave them the perpetual right to evade any subsequent law. Yet there is no question that

Wisconsin voters enshrined a clear statewide policy in their constitution explicitly to curb the expansion of gambling. The *Dairyland* decision effectively prioritized a single contract party's speculative hope for a favorable future amendment to a contract over the people's sovereign will and public-interest objectives embedded in the state's founding document.

Nonetheless, despite its weak constitutional underpinnings, proponents of tribal gaming in Wisconsin continually rely on *Dairyland*, claiming that it overrides the Constitutional ban on gambling because the compacts were signed before the voters outlawed gaming in 1993. The *Dairyland* decision, they argue, essentially allows unlimited "amendments" to those old compacts, further expanding Indian gaming despite the clear prohibitions in the Wisconsin Constitution. Most recently, Governor Tony Evers agreed to amend various compacts again to allow for sports betting, which is now and has always been illegal under Wisconsin law.

III. The proposed legislation violates the Wisconsin Constitution's prohibition on legislative authorization of gambling

AB 601 and SB 592 were introduced at the end of October 2025. The bills exempt certain bets that would otherwise be subject to Wisconsin's criminal code if: (1) the person making the bet is located in Wisconsin and is using a mobile or other electronic device to place the bet; (2) the server or other device used to conduct the bet is located on tribal lands; and (3) the wager is conducted pursuant to a gaming compact entered into before April 1, 1993.

By "decriminalizing" certain online bets, AB 601 and SB 592 act to "authorize gambling" in the particular form outlined in the legislation. The People of Wisconsin explicitly took away the Legislature's power to do this when they amended Article IV, § 24 in 1993. Thus, AB 601 and SB 592 are unlawful exercises of legislative power and would be reviewable in state court as violating Article IV, § 24 of the Wisconsin Constitution.

A closely analogous fact pattern has already been decided by the Wisconsin Supreme Court in *State v. Laven*, 270 Wis. 524 (1955). In *Laven*, the court interpreted the earlier version of Wis. Const. Art. IV, § 24, which said the legislature could not "authorize any lottery." In that case, a state law purported to "decriminalize" a lottery if it was conducted in a particular manner (similar to how the proposed legislation would "decriminalize" bets made in a particular manner)—an individual was charged and convicted of violating the underlying criminal statute for operating a lottery, and in defense argued that the statutory subsection which explicitly authorized his activities exempted him from conviction. The Court upheld the conviction and struck down the decriminalization exemption because it "authorizes some lotteries under some conditions and is void because it violates art. IV, sec. 24 of the state constitution." *Laven*, 270 Wis. at 529.

Similarly, here AB 601 and SB 592 would “decriminalize” gambling under certain conditions—and this language would thus be an authorization of gambling and would violate the Wisconsin Constitution. The legislative proposals are plainly unconstitutional.

IV. AB 601 and SB 592 would violate the Indian Gaming Regulatory Act

AB 601 and SB 592 would also violate the federal Indian Gaming Regulatory Act (IGRA) because they allow certain gambling activities to occur off tribal lands. As explained above, IGRA classifies games into three classes. Class III gaming, which includes sports betting at issue here, are subject to stringent requirements: they may only be conducted in a state that permits such gaming “for any purpose by any person, organization, or entity” (25 U.S.C. §2710(d)(1)(B)), and which are conducted a gaming compact entered into between the tribe and a state. 25 U.S.C. § 2710(d)(1)(C). Under IGRA, all gaming must also occur “on Indian lands” which are defined by 25 U.S.C. § 2703(4). AB 601 and SB 592 would violate IGRA in two ways. First, that legislation purports to “decriminalize” mobile bets but only for certain tribal gaming operations. Second, that legislation would authorize gambling statewide, including on non-Indian lands.

A. Sports betting is illegal in Wisconsin

Whether tribes in Wisconsin may even partake in sports betting in the first place is an open question. IGRA only authorizes gaming in a state “that permits such gaming for any purpose by any person, organization, or entity” 25 U.S.C. § 2710(d)(1)(B). Wisconsin law has never allowed sports betting, and even at the time the original compacts were entered into before the 1993 anti-gambling amendment, sports betting was unlawful in Wisconsin. There is no dispute, however, that various tribes have now amended their compacts in Wisconsin to purport to allow for sports betting. The legality of those compact amendments in Wisconsin have not been tested. There is, however, no doubt that sports betting in Wisconsin is illegal under state law; otherwise, AB 601 and SB 592 would not be necessary at all.

To be clear, sports betting is popular and an activity that many enjoy participating in. If the people of Wisconsin want to change this policy of the state, they can amend the constitution to empower the Legislature, and then the Legislature can act to remove gambling prohibitions from the criminal code. But they have not done so, and there is no dispute that current law in Wisconsin prohibits such activities.

Thus, any challenge to AB 601 and SB 592 would likely include a broader challenge to any compact provision which authorizes an activity that is clearly not

permitted for any purpose by any person, organization, or entity under Wisconsin law.

B. AB 601 and SB 592 create a statewide sports betting monopoly in Wisconsin, the result of which would violate IGRA

Assuming, for the sake of argument, that the compacts in Wisconsin themselves *can* be amended to allow for sports betting, the next question is the extent of the geographic limitation on that activity, if any. Under IGRA, compacts may only govern “gaming on Indian lands,” 25 U.S.C. § 2710(d)(8)(A). And the Supreme Court has made clear, “Everything—literally everything—in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands, and nowhere else.” *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 795 (2014).

Under current Wisconsin law, a mobile bet placed anywhere in Wisconsin would be illegal, regardless of whether it was “legal” where the server was located. Under the proposed legislation, however, it would become “legal” throughout Wisconsin if using a device to place a bet via a server which is located on Indian lands, and the bet is made pursuant to a gaming compact.

This creates, in effect, a statewide sports betting monopoly for tribes which had a compact in effect prior to April 1, 1993, and allows those tribes in Wisconsin to expand beyond their tribal borders and instead accept bets placed via a mobile device anywhere in Wisconsin. That violates IGRA, which confines tribal gaming to tribal lands, and provides another reason why AB 601 and SB 592 are unlawful.

We also note that within the past few weeks, a District Court in Colorado has been looking at a very similar legal question. In that case, two Colorado tribes argued that mobile wagers placed by bettors anywhere in the state were “on Indian land” because the servers processing the bets were located on tribal reservations. The court rejected that argument, holding that “the gaming occurs where the bettor is located—in this context the location of the bettor is the only determining factor for whether gaming is on Indian land. If the bettor is on Indian land, the gaming activity is on Indian land and IGRA applies. If the bettor is off Indian land, e.g., in Denver, the bettor is not engaged in gaming on Indian land and IGRA does not apply.” *Southern Ute Indian Tribe v. Polis*, No. 1:24-cv-01886-GPG-NRN, ECF No. 69 (D. Colo. Oct. 23, 2025). In other words, the court concluded that wagers placed from off-reservation locations fell outside IGRA’s scope and remained subject to state law. A similar outcome is likely here in Wisconsin, and purporting to extend IGRA to every corner of Wisconsin is likely to fail as a matter of law.

Proponents of the legislation have repeatedly pointed to Florida’s “hub and spoke” model and the *West Flagler Associates v. Haaland* case as providing a legal

framework under which AB 601 and SB 592 could be upheld. But that's wrong for several reasons.

A recently proposed amendment to AB 601 purports to create a legal fiction that any bets placed anywhere in Wisconsin are “deemed to have taken place on those Indian lands in this state on which the server or other device used to conduct such even tor sports wager is physically located.”³ But state law cannot supersede federal law, and under IGRA, “gaming activity” takes place at the location of “the patrons’ act of placing a bet or wager.” *State of California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960, 968 (9th Cir. 2018). IGRA does not “permit an Indian tribe to offer online gaming to patrons located off Indian lands in jurisdictions where gambling is illegal.” *Id.* at 962. Again, IGRA relates only to “gaming on Indian lands, and nowhere else.” *Bay Mills Indian Cmty.*, 572 U.S. at 795; *see also Amador County v. Salazar*, 640 F.3d 373, 376-77 (D.C. Cir. 2011) (“IGRA provides for gaming only on ‘Indian lands.’”); *Artichoke Joe’s California Grand Casino v. Norton*, 353 F.3d 712, 735 (9th Cir. 2003) (“Under IGRA, for example, individual Indians (or even Indian tribes) could not establish a class III gaming establishment on non-Indian lands.”); *North County Cmty. All. Inc. v. Salazar*, 573 F.3d 738, 741, 744 (9th Cir. 2009) (noting that “IGRA limits tribal gaming to locations on ‘Indian lands’ as defined in 25 U.S.C. § 2703(4)”; it is “undisputed” that “IGRA authorizes tribal gaming only on ‘Indian lands’”; and “Tribal gaming on non-Indian lands is not authorized by or regulated under IGRA”).

The decision in *West Flagler Associates* does not conflict with this black-letter law. Instead, that decision avoided this issue by choosing to interpret the Florida compact as if it did not authorize online sports gaming off tribal lands. *W. Flagler Assocs., Ltd. v. Haaland*, 71 F.4th 1059, 1065 (D.C. Cir. 2023), *cert. denied*, 144 S. Ct. 2671 (2024) (“a contractual provision should, if possible, be interpreted in such a fashion as to render it lawful rather than unlawful.”) That is not the issue with these bills, which clearly do authorize online betting throughout Wisconsin—wherever the bettor is located.

V. Granting a statewide monopoly on betting to Indian Tribes violates the Equal Protection Clause of the United States Constitution.

Finally, insofar as AB 601 and SB 592 would grant a statewide betting monopoly to Indian Tribes, they also violate the equal protection guarantee in the United States Constitution.

State-law racial classifications, including those benefiting Native Americans, violate the 14th Amendment’s guarantee of equal protection of the laws “except in

³ *See*, Assembly Amendment 1 to Assembly Bill 601, available at: https://docs.legis.wisconsin.gov/2025/related/amendments/ab601/aa1_ab601

the most extraordinary case.” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 208, 212 (2023) (“*SFFA*”) (striking down racial classifications, including a preference for Native Americans, under the Fourteenth Amendment). “[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

SFFA’s standard contains five independent requirements, all of which must be established by the government before a race-conscious policy may be permitted. First, race may only be used to remedy “specific, identified instances of past discrimination that violated the Constitution or a statute.” *SFFA*, 600 U.S. at 207. Second, race-based remedies must be narrowly tailored to achieve that interest. *Id.* Third, race may never be used as a negative, operating as a hurdle for an individual or business seeking access to a government benefit. *Id.* at 218. Fourth, race may never be used as a stereotype: judging someone “by ancestry instead of his or her own merit or essential qualities.” *Id.* at 220 (quotation omitted). And fifth, any race-based policy must have a “logical end point.” *Id.* at 221.

According to the Supreme Court, “race-based state action” is almost always unconstitutional because “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

The proposed betting monopoly is a race-based classification. Under AB 601 and SB 592, only Indian Tribes with compacts may qualify. All eleven federally recognized tribes in Wisconsin have compacts. See Wis. Dep’t of Admin., *Tribal Compacts & Amendments*, available [here](#). And these Wisconsin tribes base their membership on racial blood quantum requirements, rather than some other non-racial membership requirements. See, e.g., Ho-Chunk Nation, *Tribal Enrollment & Membership Code*, 2 HCC § 7 (last amended June 20, 2017), available [here](#) (defining “Ho-Chunk Blood” in racial terms). In fact, to be a member of an Indian Tribe in Wisconsin, most members prove their qualifications with a “Certificate of Degree of Indian Blood” form from the Bureau of Indian Affairs. See BIA, *Certificate of Degree of Indian or Alaska Native Blood*, available [here](#). At the very least, Wisconsin Indians must prove racial ancestry through a lineal descendant. Therefore, Wisconsin’s preference to permit only Indian Tribes the power to game is, in fact, a racial preference that must meet the daunting requirements of *SFFA*.

There is simply no way a race-based Indian preference, granting a betting monopoly in Wisconsin, could satisfy any of the criteria in *SFFA*, let alone even one. The State of Wisconsin has never contended that its purpose in granting betting preferences to Indian Tribes is to remedy a “specific, identified instance[] of past discrimination that violated the Constitution or a statute.” *SFFA*, 600 U.S. at 207.

Past discrimination against Indian tribes has nothing to do with gaming or betting. Yet even if Wisconsin could establish such a claim, granting a statewide betting monopoly would do little to remedy that past violation, since a racial-betting monopoly benefits far more individuals than could ever establish a “specific, identified instance” of discrimination by Wisconsin officials. The monopoly, therefore, would never be held to be “narrowly tailored.” *Id.* Moreover, Wisconsin’s racial preference turns race into a negative by excluding non-Indian-owned business from engaging in betting. Non-Indians are completely barred from the monopoly because of their race. And the preference functions as a stereotype, assuming that “race *qua* race” matters, and that all judgments should be made “by ancestry.” *Id.* at 220. Finally, the State of Wisconsin has never given any indication that its racial preferences towards Indian tribes will end at some point. *Id.* at 221.

In the past, some government agencies have justified tribal preferences by arguing that they are “non-racial,” and therefore not subject to strict scrutiny. This theory is based on the Supreme Court decision in *Morton v. Mancari*, 417 U.S. 535 (1974). *Mancari*, however, has been subsequently undermined by recent precedent, like *SFFA*, and is, by its own terms, cabined to its facts.

Mancari addressed the propriety of a federal employment preference for Native Americans at the Bureau of Indian Affairs (“BIA”). The Court held that the tribal preference was permissible because of the federal government’s unique relationship with tribes: “Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a ‘guardian-ward’ status, to legislate on behalf of federally recognized Indian tribes.” *Id.* at 551.

Moreover, *Mancari* itself is not about race; it is about “an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups.” *Id.* at 554. The Court emphasized that “the legal status of the BIA is truly *sui generis*.” *Id.* The Court went on to point out numerous other instances in which it had upheld “particular and special treatment” by Congress for Indians, *id.* at 554–55 but decided that Congress’ special relationship with Indian tribes was the driving factor in each instance, reasoning: “As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.” *Id.* at 555.⁴

⁴ *Mancari* only shields “those statutes that affect uniquely Indian interests.” See *Malabed v. N. Slope Borough*, 42 F. Supp. 2d 927, 937–38 (D. Alaska 1999), *aff’d*, 335 F.3d 864 (9th Cir. 2003). Gaming is not part of some uniquely Indian interest, or time-honored, tribal tradition. *Mancari*’s rationale is therefore inapplicable here.

The Court since has made clear that *Mancari* stood for a “limited exception,” and States do not have the same interest in Native American tribes as does the federal government. *Rice v. Cayetano*, 528 U.S. 495, 520 (2000). In *Rice*, for example, the Court rejected Hawaii’s argument that *Mancari* applied to a voting scheme that only permitted Hawaiians to vote for trustees of the Office of Hawaiian Affairs. *Id.* at 524. This was not the first time that the Supreme Court observed that “States do not enjoy this same unique relationship with the Indians [as the federal government].” *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 501 (1979); *see also KG Urban Enters., LLC v. Patrick*, 693 F.3d 1, 12-13, 19 (1st Cir. 2012) (addressing the propriety of a state statutory preference for tribal casinos negotiated pursuant to IGRA and reasoning “it is quite doubtful that *Mancari*’s language can be extended to apply to preferential state classifications based on tribal status”).

In the most recent case of tribal preference, *Haaland v. Brackeen*, the U.S. Supreme Court avoided the equal protection claim by deciding that the challengers lacked standing. 599 U.S. 255, 292–96 (2023). Yet Justice Kavanaugh emphasized the importance of the tribal preference issue in his concurrence. *Id.* at 333 (Kavanaugh, J., concurring) (“In my view, the equal protection issue is serious.”) And in a more recent case involving a Florida monopoly for sports betting granted to the Seminole Tribe, Justice Kavanaugh wrote: any Florida law that authorized the Tribe, and only the Tribe, to offer online sports gaming “raises serious equal protection issues.” *W. Flagler Assocs., Ltd. v. Haaland*, No. 23A315 (U.S., Oct. 25, 2023) (citing *SFFA*, 600 U.S. at 206) (Statement of Kavanaugh, J., respecting the denial for the application for stay). Because the Florida law’s constitutionality was not squarely presented, Justice Kavanaugh voted to deny the application for a stay.⁵

If Wisconsin amends state law to create a betting monopoly for Indian tribes, it will create significant risks for all gaming in Wisconsin. Not only will the law itself be susceptible to challenge in federal court as an unconstitutional racial classification, but Wisconsin’s entire gaming apparatus—which also grants preferences based on race—would be challenged.

⁵ The United States government has taken the position that if a state imposes an exclusive benefit for Indian gaming, then the proper target of an equal protection challenge should be state law, not the compact. Deb Haaland, Secretary of the Interior, et al., Brief in Opposition, *W. Flagler Assocs., Ltd. v. Haaland*, No. 23-862 (U.S., May 13, 2024).