UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

KG URBAN ENTERPRISES, LLC *Plaintiff,* v. DEVAL L. PATRICK, in his official capacity as Governor of the Commonwealth of Massachusetts, and CHAIRMAN AND COMMISSIONERS OF THE MASSACHUSETTS GAMING COMMISSION, in their official capacities *Defendants.*	)	Case No. 1:11-cv-12070 **-- LEAVE TO FILE GRANTED ON NOVEMBER 23, 2011 --**

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION AND SUMMARY OF ARGUMENT

After decades of public debate, the Commonwealth of Massachusetts legalized casino gaming on November 22, 2011. *See* An Act Establishing Expanded Gaming in the Commonwealth, St. 2011, c. 194 ("Act"). The Act, however, is riddled with explicit, race-based set-asides that give federally recognized Indian tribes a categorical advantage over all other applicants in seeking a gaming license in Southeastern Massachusetts. At least until July 31, 2012, and most likely permanently, non-Indians need not — indeed, cannot — apply. Nothing in federal law remotely permits these express race-based set-asides; indeed, the Constitution's Equal Protection Clause expressly forbids them. This Court should promptly enjoin enforcement of the Act.

The Act authorizes the creation of three resort-style casinos, one each in the Eastern, Western, and Southeastern regions of the Commonwealth. Two of the casino licenses — for the Eastern and Western regions — will be awarded through an open, competitive application process that carefully assesses the merits of each proposal in terms of its economic benefits, job creation, environmental impact, and the like. In Southeastern Massachusetts, however, things are different. There, race — not competitive factors — dictates the proceedings. The competitive application process is put on hold, at least until July 31, 2012, and likely indefinitely, to provide a period in which Indian tribes are given the exclusive right to enter a gaming "compact" with the governor. If a tribe enters such a "compact" with the governor during that standstill period and meets a few other conditions, then the Act prohibits the Massachusetts Gaming Commission from even "*issu[ing] a request for applications*" from anyone else. Act § 91(e) (emphasis added). That is, non-tribal applicants will not even be *considered* for a gaming license in the Southeastern region, regardless of the economic merits of their proposals. The racial discrimination could not be more overt.

Plaintiff KG Urban Enterprises, LLC ("KG") is an equity development company that specializes in the redevelopment and adaptive re-use of urban brownfield sites. Over the past three years, KG has invested millions of dollars in preparing a comprehensive plan for converting an abandoned and polluted power plant and 29-acre waterfront site in downtown New Bedford into a $1 billion multi-use property that includes a casino gaming floor, restaurants, a hotel, retail shops, and a conference center. But because New Bedford is located in Southeastern Massachusetts, and not one of the other two regions, KG will be unable to apply for a gaming license until July 31, 2012, at the earliest, and likely will *never* have the opportunity to apply.

The Act's tribal set-aside provisions are invalid, for two independent reasons:

First, and most obviously, the Act violates the Equal Protection Clause and Massachusetts Declaration of Rights because it treats applicants for a gaming license differently — both procedurally and substantively — on the basis of race.[1] The racial set-aside here is particularly stark. Race is the sole determinative factor in awarding a commercial gaming license in Southeastern Massachusetts, and completely displaces the normal competitive process that prevails in the rest of the Commonwealth. While gaming license applicants in Eastern and Western Massachusetts must compete on the merits, race is determinative in the Southeast. Until July 31, 2012, federally recognized Indian tribes have the exclusive ability to negotiate with the governor for a commercial gaming license in the Southeastern region. During that period, non-tribal applicants such as KG are barred from applying for a gaming license, regardless of the economic merits of their proposals. And if a tribe reaches agreement on a "compact" with the governor before July 31, 2012, and meets a few other conditions, then non-tribal entities will be

[1] "The standard for equal protection analysis under [the Massachusetts] Declaration of Rights is the same as under the Federal Constitution." *Brackett v. Civil Serv. Comm'n*, 850 N.E. 2d 533, 545 (Mass. 2006). Thus, although KG seeks relief under both the federal and state constitutions, it focuses primarily on federal-law equal protection principles.

permanently foreclosed from applying. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 (1978) (Powell, J.) (finding equal protection violation where the plaintiff was "foreclosed from all consideration . . . simply because he was not the right color or had the wrong surname"). Moreover, unlike non-tribal applicants — which must meet numerous requirements and performance criteria in order to be eligible for a gaming license — Indian tribes may engage in gaming simply by entering into a "compact" with the governor. *See Gratz v. Bollinger*, 539 U.S. 244, 270-76 (2003) (striking down a government policy that "makes race a decisive factor" in "virtually every" case).

The Act also appropriates $5 million in taxpayer funds to the governor for, *inter alia*, "legal, financial, and other professional services" related to the "negotiation and execution" of a gaming compact with an Indian tribe. Act, § 2A. What is more, the commissioners of the Massachusetts Gaming Commission, who are supposed to judge impartially the validity of competing proposals, are obligated to assist the governor in negotiating the compact. *See id.* § 91(b). The Act thus not only dedicates taxpayer funds to the execution of an unconstitutional process, but puts substantial government resources to work in ensuring that a "compact" is successfully negotiated and that the race-based exclusion becomes permanent.

Moreover, not only does the Act treat KG and other non-Indians differently in the Southeastern region based solely on race, it also treats applicants in the Southeast differently from similarly situated applicants in the other two regions based solely on a racial factor — namely, proximity to Indian tribes. It is one thing for the government to treat Indian lands differently from non-Indian lands, but nothing in the Equal Protection Clause or any federal statute allows a state to treat a whole *region* differently based on the presence of Indian tribes in the region. As a final insult to the command of the Equal Protection Clause, the Act also

reserves one out of eight seats on an important gaming policy advisory committee for a member of an Indian tribe. None of this is remotely consistent with the fundamental guarantees of the Equal Protection Clause or the Massachusetts Declaration of Rights. Simply put, there is no Indian gaming exception to the Equal Protection Clause.

Second, the Act is invalid because it conflicts with, and is thus preempted by, the federal Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701–2721. All casino-style Indian gaming nationwide must take place pursuant to IGRA, which is a federal regime that avoids Equal Protection Clause violations solely because of the Indian Commerce Clause and the special federal relationship with Indian tribes. A state law, like the Act, that purports to authorize a tribal commercial gaming license — or a separate tribal licensing process within a commercial gaming regime — *outside* of IGRA is both preempted by IGRA and flatly inconsistent with the Equal Protection Clause.

IGRA authorizes Indian tribes to engage in gaming *only* on Indian lands and *only* if the tribe meets the federal requirements set forth in the statute. The Act is fundamentally different. It purports to give Indian tribes the exclusive right to a commercial gaming license not just on Indian lands — for there currently are no such lands in Massachusetts that are suitable for gaming — but across an entire region of the Commonwealth. The Act is fundamentally incompatible with IGRA, and the legislature did not even hide its intent to circumvent federal law. Earlier versions of the Act expressly envisioned tribes waiving their IGRA rights in order to secure a state gaming license, and senior lawmakers have made clear that the tribal set-aside provision is designed to capture more tax revenue than would be available if Indian tribes conducted gaming under the IGRA framework.

The Act's references to a "compact" should not confuse matters. In limited circumstances, IGRA provides for negotiated compacts between tribes and states that are overseen and ultimately approved by federal authorities. The Act, however, envisions a separate state-overseen process that cannot be squared with IGRA, and is accordingly preempted.

This Court should enter a preliminary injunction enjoining the Act and its race-based preferences. There is a substantial, indeed overwhelming, likelihood that KG will prevail on the merits of its equal protection claim, and courts have repeatedly recognized that a denial of equal protection at the hands of a race-based set-aside program is a *per se* irreparable injury. Here, that irreparable constitutional injury is reinforced by the loss of the millions of dollars and countless hours of time KG has invested in preparing a comprehensive development plan for the New Bedford site. That irreparable harm is further exacerbated by the fact that developers in the other two regions of Massachusetts may compete on a level playing field from the start. Thus, the Court must enjoin the Act in its entirety or otherwise ensure from the outset that gaming in the Southeast proceeds on the same basis as in the other two regions. State money cannot be spent to negotiate an exclusive and unconstitutional "compact," and commissioners cannot be appointed to the Massachusetts Gaming Commission with the prevailing assumption that their duties include treating Indian tribes differently from other license applicants. Particularly in a state with no previous history of this type of gaming, the head start given to license applicants in the other two regions cannot be readily reversed. Indeed, Massachusetts is a single market, and the race-based advantages the Act grants to Indian tribes — and the likelihood that non-tribal entities will be permanently locked out of the Southeast — are already skewing what should be a level playing field and diverting potential investors and gaming operators to the other two regions of the Commonwealth.

The balance of equities and the public interest strongly tip in KG's favor. Without a preliminary injunction, the potential harm to KG is severe: namely, outright exclusion from the application process for a gaming license in the Southeastern region based solely on the race of its owners. There is no countervailing harm to Indian tribes or anyone else. KG is not seeking to obtain a gaming license in this proceeding. It seeks only the opportunity to compete for a license based on the economic merits of its application rather than the race of its owners. Thus, if the Court enjoins enforcement of the tribal set-asides, *all* applicants will have the opportunity to compete for a commercial gaming license on a level playing field in the Southeastern region, just as they can in the other two regions. The tribes, moreover, will remain entitled to the substantial rights provided to them by IGRA. KG is not the only one to suffer irreparable harm from this set-aside. The whole Southeastern region will suffer from the lack of competition and the diversion of investments into other regions. An injunction against the Act will thus benefit the entire Southeast. Finally, there is a powerful public interest in ensuring that valuable government benefits are awarded on the merits through an open, competitive application process, rather than through a set-aside program that privileges one preferred group to the exclusion of all others, and treats an entire region differently based on its mere proximity to Indian tribes.

STATEMENT OF FACTS

A. The Act's Competitive Application Process for Gaming Licenses in the Boston Area and Western Massachusetts

On November 22, 2011, Governor Patrick signed legislation authorizing a significant expansion of legalized gaming in Massachusetts. The Commonwealth had previously allowed only bingo, horse and greyhound racing (including simulcast wagering), and the Massachusetts Lottery, but the Act authorizes up to three resort-style casinos — one each in the greater Boston

area, Western Massachusetts, and Southeastern Massachusetts — that will offer table games and slot machines, as well as hotel and entertainment facilities. *See* Act § 16, sec. 19(a).[2]

The Act creates a five-member Massachusetts Gaming Commission ("Commission"), and vests that body with broad authority to oversee casino gaming in the Commonwealth. *See id.* secs. 3-6. In particular, the Commission is responsible for "issu[ing] a request for applications" for gaming licenses. *Id.* sec. 8(a). The Act requires applicants for a gaming license to provide extensive information about their development proposals, finances, and corporate structures, including but not limited to: the identity of all persons with an interest in the business; "clear and convincing evidence of financial stability"; a description of proposed internal controls and security systems; a description of mitigation measures for compulsive gambling; the design of the proposed casino and the construction timetable; a description of hotel, restaurant, and entertainment facilities; the number of workers to be employed, including pay and benefit information; studies showing the economic benefit to the region and estimated tax revenue; and an assessment of the facility's impact on the environment and public infrastructure. *Id.* sec. 9(a).[3]

After receiving an application for a gaming license, the Commission must commence an investigation into the "suitability" of the applicant, including its "integrity, honesty, good

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[2] The Act refers to the three resort-style casinos as the "category 1" facilities. *See* Act § 16, sec. 2. The Act also authorizes one license for a "slot parlor" facility containing up to 1,250 slot machines, which is referred to as the "category 2" license. *See id.* secs. 2, 20. Because the challenged set-aside for Indian tribes does not apply to the category 2 license, KG will not address the requirements for obtaining that license.

[3] The Act further provides that "[n]o applicant shall be eligible to receive a gaming license" at all unless it meets sixteen enumerated criteria, such as: paying a $400,000 application fee, identifying a "mitigation plan" for infrastructure costs in the host community, owning the land on which the casino will be built (or having the ability to acquire such land within 60 days), receiving a binding vote from the host community in support of its application, and adopting an affirmative-action plan for construction and operation of the gaming facility. *Id.* sec 15.

character and reputation," its "financial stability," its "business practices," and its "history of compliance with gaming licensing requirements in other jurisdictions." *Id.* sec. 12(a). In deciding whether to grant a license to a particular applicant, the Commission must consider how that applicant's proposal would advance nineteen enumerated objectives, including: maximizing capital investment; protecting the state lottery from adverse impacts; protecting local businesses in surrounding communities; developing programs to prevent compulsive gambling; utilizing sustainable development principles; providing high-quality jobs with opportunities for advancement; and maximizing tax revenues. *Id.* sec. 18.

The Commission must conduct a public hearing on each application in the proposed host community, and must issue a final decision within 90 days after the hearing. *See id.* sec. 17(c)-(e). The Commission has "full discretion as to whether to issue a license," and applicants "shall not be entitled to any further review if denied by the commission." *Id.* sec. 17(g). A successful applicant for a gaming license must pay a one-time license fee of at least $85 million, must commit to making a capital investment of at least $500 million, and must pay a 25 percent daily tax on gross gaming revenue. *Id.* secs. 10, 55(a). The licensee must also comply with twenty-five additional requirements regarding tax payments, capital expenditures, law enforcement, ownership structure, compulsive gambling, and affirmative action for employees and suppliers. *See id.* sec. 21. The Act provides that each gaming license "shall be valid for an initial period of 15 years," and instructs the Commission to establish procedures for the "renewal" of those licenses. *Id.* sec. 19(b).

B. The Tribal Set-Aside Provisions for a Commercial Gaming License in Southeastern Massachusetts

None of these finely calibrated regulatory provisions is immediately applicable in the Southeastern region. After establishing the general procedures for awarding gaming licenses

through a competitive application process, the Act creates an entirely separate set of procedures that apply only to federally recognized Indian tribes seeking a commercial gaming license in Southeastern Massachusetts. At least until July 31, 2012 — and likely permanently — no one other than a tribe may apply.

There are two federally recognized Indian tribes in Massachusetts — the Mashpee Wampanoag Tribe and Wampanoag Tribe of Gay Head (Aquinnah). Neither currently possesses Indian lands suitable for gaming, yet both have indicated that they intend to pursue gaming in Southeastern Massachusetts. The Aquinnah currently possess only a small parcel of land on a remote corner of Martha's Vineyard. However, Massachusetts state officials have taken the position that the Aquinnah — by virtue of a 1985 settlement of their land claims — waived any rights to conduct gaming in the Commonwealth.[4] Thus, under the Commonwealth's view, only one Indian tribe, the Mashpee Wampanoag, is potentially eligible to pursue a commercial gaming license.[5] But the Mashpee Wampanoag tribe currently possesses no Indian lands — neither a reservation nor any federal land-in-trust in Massachusetts. Because IGRA limits federally approved gaming to Indian lands — and the federal process for awarding land-in-trust

[4] *See* 25 U.S.C. §§ 1771, 1771g (federal government's approval of the Aquinnah's land claim settlement); *see also* Casey Ross, *Rival Tribe Says its Casino Would Be Better for Mass.*, Boston Globe (June 9, 2010) (quoting Gregory Bialecki, Secretary of Housing and Economic Development, as stating that the Aquinnah tribe "waived its right to build a casino on sovereign tribal land in an agreement it signed with the state in 1985" that is "binding and legally enforceable"), *available at* http://www.boston.com/news/local/massachusetts/articles/2010/06/09/rival_tribe_says_its_proposed_casino_would_be_better_for_massachusetts/.

[5] *See* George Brennan, *Casino Vote Deals Wampanoag Tribe Winning Hand*, Cape Cod Times (Nov. 16, 2011) (describing the Mashpee tribe as the "odds-on favorite" for the gaming license in the Southeast, and quoting tribal council Chairman Cedric Cromwell as being "ecstatic" about the gaming legislation), *available at* http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20111116/NEWS/111160341.

is in a state of paralysis[6] — there is no prospect that the Mashpee Wampanoag will be in a position to engage in casino-style gaming consistent with IGRA in the foreseeable future.

The Act nonetheless grants federally recognized Indian tribes (and given the Commonwealth's position on the effect of the Aquinnah's settlement — a single tribe) the exclusive right to seek a commercial gaming license in Southeastern Massachusetts at least until July 31, 2012, and likely indefinitely. Section 91(a) of the Act provides that "[n]otwithstanding any general or special law or rule or regulation to the contrary" — such as the exhaustive, race-neutral application procedures outlined above — "the governor may enter into a compact with a federally recognized Indian tribe in the [C]ommonwealth." Act § 91(a). The Act allocates $5 million to the governor for, *inter alia*, "costs related to legal, financial, and other professional services required for the negotiation and execution" of that compact, *id.* § 2A, and requires the Commission to "provide assistance to the governor in negotiating such compact," *id.* § 91(b). If such a compact is negotiated by July 31, 2012, and approved by the General Court,[7] then the competitive process in the Southeast will be forestalled permanently. *See id.* § 91(e).

The Act's requirements for a tribal-gaming applicant are minimal. The governor can negotiate a compact only with a tribe that has "purchased, or entered into an agreement to purchase, a parcel of land for the proposed tribal gaming development and scheduled a vote in the host communities for approval of the proposed tribal gaming development." *Id.* § 91(c). And the tribal-state gaming compact must be "submitted to the [G]eneral [C]ourt for approval," along with a "statement of the financial investment rights of any individual or entity which has

[6] The Supreme Court held in *Carcieri v. Salazar*, 555 U.S. 379 (2009), that the Secretary of the Interior lacks statutory authority under the Indian Reorganization Act to take land into trust for Indian tribes — such as the Mashpee Wampanoag — that were recognized by the federal government after 1934.

[7] In Massachusetts, the state legislature is known as the "General Court."

made an investment to the tribe . . . for the purpose of securing a gaming license." *Id.* § 91(d). But those are the only requirements to grant a tribe an exclusive license to engage in commercial gaming in Southeastern Massachusetts. *Compare supra* at 6-8 (describing extensive requirements for non-tribal license applicants). And the license ultimately awarded to the tribe in the Southeast is much more valuable than the licenses available to non-tribal entities. While non-tribal gaming licenses are limited to an initial period of 15 years, *see* Act § 16, sec. 19(b), tribal compacts permit gaming in perpetuity.

The Act categorically precludes the consideration of an application by any non-Indian entity in the Southeastern region until at least July 31, 2012.[8] The Commission is authorized to "issue a request for applications" for a gaming license in the Southeast for non-tribal applicants if and only if "a mutually agreed-upon compact has not been negotiated by the governor and Indian tribe or if such compact has not been approved by the [G]eneral [C]ourt before July 31, 2012." *Id.* § 91(e). The Act thus effectively grants federally recognized Indian tribes a right of first refusal on a commercial gaming license in the Southeastern region. If a tribe enters into a gaming compact with the governor prior to July 31, 2012, and the General Court approves that compact, then the Commission is prohibited from even *considering* applications from non-tribal entities for a gaming license in the Southeast, regardless of the economic merits of their proposals. *See id.* § 91(e).

These race-based set-asides build upon prior iterations of the gaming bill which were even more brazen about the legislature's race-based intent. A proposal circulated by Senators Stan Rosenberg and Karen Spilka on June 4, 2010, called for one of the three gaming licenses to

[8] The Act refers to Southeastern Massachusetts as "Region C," which includes Bristol, Plymouth, Nantucket, Dukes, and Barnstable counties. *See* Act § 16, sec. 19(a).

be a "dedicated license for an approved Native American tribe."[9] Similarly, Senate Bill 2495, a precursor to the Act, authorized the governor to "enter into a gaming contract with a federally recognized Native American tribe in the [C]ommonwealth," that would provide "a grant of *permanent exclusivity* in the applicable region." S.2495, § 69(b), (d) (introduced June 18, 2010) (emphasis added). No one but a federally recognized tribe was eligible for such a permanent regional monopoly. The Act as passed is no different in intent or effect.

There are two primary effects of the Act's set-aside provisions. *First*, the Act treats non-tribal entities fundamentally differently from Indian tribes, and completely excludes non-tribal entities from seeking a gaming license in the Southeastern region, at least until July 31, 2012, and likely indefinitely. *Second*, the Act treats non-Indian applicants in the Southeast fundamentally differently from applicants located elsewhere in the Commonwealth, and places the economically depressed Southeastern region at a disadvantage compared to the other two regions. In Eastern and Western Massachusetts, gaming licenses will be awarded through an open and fair application process that is carefully designed to choose the best proposal on the merits, thus maximizing economic development, job creation, tax revenue, and other benefits to the area. In contrast, because of the tribal set-aside provision, the commercial gaming license in the Southeast will be awarded through a closed, one-sided process in which Indian tribes are given a categorical advantage over all other applicants, regardless of the economic merits of the tribes' gaming proposals. The Southeast is singled out for this disfavored treatment not because

[9] *See* An Act Relative To Gaming in the Commonwealth, § 15(a) (draft proposal of Sens. Rosenberg and Spilka) (June 4, 2010) (attached hereto as Ex. A); *see also* Steve DeCosta, *New Bedford Demands Fair Chance at Casino*, SouthCoastToday.com (June 9, 2010) (noting that, at a hearing on the proposed bill, "New Bedford officials made impassioned pleas . . . that any gaming licenses issued by the state be done under an open and competitive bidding process and not simply handed over to an Indian tribe"), *available at* http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20100609/NEWS/6090323/.

of race-neutral factors such as the need for economic revitalization — which would only *favor* the Southeast — but instead because of its proximity to Indian tribes.

Finally, the Act also includes an explicitly race-based set-aside for one of the seats on the newly created Gaming Policy Advisory Committee, which "meet[s] at least once annually for the purpose of discussing matters of gaming policy." Act § 16, sec. 68(a). The Act requires at least one member of that committee to be "a representative of a federally recognized Indian tribe in the [C]ommonwealth." *Id.* Thus, the Act provides that one seat on an important public advisory committee will be allocated solely based on race.

C. KG's Investment in the Cannon Street Station Project

KG is a development company that specializes in the redevelopment and adaptive re-use of urban brownfield sites. *See* Declaration of Andrew M. Stern, ¶ 4 (Ex. B) ("Stern Decl."). KG employs an integrated method of development that incorporates gaming, retail, cultural, and commercial activities into the same project, with no artificial barriers between the development and the surrounding community. *Id.* ¶ 5; *see also* Declaration of Steven M. Gallaway, ¶ 9 (Ex. C) ("Gallaway Decl."). While many other developers build casinos on undeveloped "greenfield" sites near highway interchanges, those projects require significant alteration of the natural landscape and the extension of roads, bridges, water pipes, power lines, and sewer services to the new sites; they also remain physically isolated from nearby communities. *See* Stern Decl. ¶ 6. In contrast, KG's "urban gaming" model focuses on the principles of walkability, connectivity, and sustainability, and focuses in particular on former industrial sites and the rehabilitation of the vintage industrial structures found on such sites. *Id.* ¶ 5. As a result, KG's efforts necessarily focus on specific sites in cities with an industrial history, as opposed to greenfield sites, which offer a casino developer greater flexibility in site selection. *Id.* ¶ 4.

KG's principals are partners in a joint venture that recently completed the initial phases of an urban gaming redevelopment project on the 130-acre Bethlehem Steel site in Bethlehem, Pennsylvania. *Id.* ¶ 7. That joint venture, with Las Vegas Sands Corporation, invested more than $900 million to convert an abandoned and deteriorating steel plant site into a thriving, multi-use property that includes casino gaming, hotel, entertainment, and retail components; it also contemplates the eventual residential conversion of the former Bethlehem Steel headquarters building. *Id.*

In February 2007, KG began the process of identifying suitable property for an urban gaming project in Massachusetts, which had been on the verge of legalizing casino gaming for several years. *Id.* ¶ 8. After studying several sites in New Bedford — an industrial city that fit the profile of KG's business model — KG identified a site that currently houses an abandoned power plant known as Cannon Street Station. *Id.* ¶ 9. Based on a careful market study and exhaustive site analysis, KG identified the Cannon Street property as an ideal candidate for redevelopment because of its proximity to downtown New Bedford's cultural and entertainment center, its location on the historic New Bedford harbor, and the dramatic physical presence of the vintage power plant structure. *Id.* ¶ 10; *see also* Gallaway Decl. ¶¶ 10-12. KG also concluded that the economically depressed region around New Bedford would benefit greatly from the jobs, development, and tax revenue that that the Cannon Street Station project would provide. *Id.*

Upon identifying the Cannon Street property, KG assembled a team of nationally recognized experts to evaluate all aspects of the property and begin creating a master plan for the site's redevelopment and environmental cleanup. This team consisted of environmental remediation firms, a casino design firm, an open space and landscape design firm, a historic preservationist, a nationally recognized interior design firm, engineering and project

management firms, and a team of attorneys. *See* Stern Decl. ¶ 14. According to the concept plans, KG and a joint venture partner would rehabilitate the Cannon Street property, remediate environmental contamination, and stabilize both the Cannon Street power plant and the antique granite foundry located on the property. *Id.* ¶ 17. The concept plans include designs for a multi-level casino, a hotel, restaurants, a conference center, retail shops, parking garages, and an exhibition hall. *Id.* ¶ 18. This entire property will sit directly on the city's historic harbor and street grid, with walking connections throughout downtown New Bedford. *Id.* If KG ultimately receives a gaming license for the Cannon Street site, the total project investment is estimated to be in excess of $1 billion. *Id.* ¶ 21. This figure includes approximately $50 million for a privately financed cleanup of the severe environmental contamination on the property. *Id.*[10]

To date, KG has invested more than four years of work and approximately $4.6 million in direct costs to prepare its comprehensive development plan for the Cannon Street Station project. *Id.* ¶ 20.[11] That investment is not self-sustaining. KG must make escalating monthly option payments and periodic lump sum premium payments to keep options open on both the Cannon Street Station property and a replacement site for the current owner of that property. *Id.* ¶¶ 11-12; *see also* Carroll Decl. ¶¶ 9-15. KG also incurs ongoing legal expenses to maintain those option contracts. *See* Stern Decl. ¶ 12.

KG firmly believes that its proposal — which is environmentally sustainable, makes extensive use of existing infrastructure, and employs the best practices of urban design — will

[10] *See also* Declaration of David Glendon, ¶¶ 6-14 (Ex. D) (describing the environmental contamination on the Cannon Street site and KG's assumption of responsibility for remediation of that contamination if KG receives a gaming license for that site); Declaration of Stephen Carroll, ¶¶ 6-8 (Ex. E) ("Carroll Decl.") (same).

[11] KG's investment in the Cannon Street Station project is specific to that site. It would take years of work and millions of dollars of additional investment for KG to identify another site with similar characteristics and to prepare a comprehensive development proposal for that site. *See* Stern Decl. ¶ 23.

offer the greatest economic benefit to the citizens of New Bedford and Southeastern Massachusetts. KG intends to apply for a gaming license for the Cannon Street site as soon as it is permitted to do so. *Id.* ¶ 22. Because of the Act's race-based set-asides, however, KG will be locked out of the application process for a gaming license until at least July 31, 2012, and may *never* have an opportunity to compete for a license, regardless of the economic merits of its proposal.

Even in the unlikely event that a tribe does not enter an approved gaming "compact" by July 31, 2012 — in which case a competitive application process will ensue for the license in the Southeast — the ultimate licensee will incur significant harm. Indeed, pervasive uncertainty about whether non-tribal entities will ever be able to apply for a gaming license in the Southeast is *already* deterring investors and gaming operators from pursuing opportunities in that region. *See* Gallaway Decl. ¶¶ 18-21. Because Massachusetts is a single market, those investors and gaming operators are simply bypassing the Southeast and focusing on the other two regions. Moreover, as a result of the tribal exclusivity period, there is a substantial likelihood that the casinos in the Eastern and Western regions — in which there is an open application process from day one, with no tribal preference — will become operational before the casino in the Southeastern region. Thus, as a result of the race-based limits on the application process in the Southeast, the licensees in the other two regions will have a significant head start in seeking investors, development partners, customers, and advertisers. *Id.* ¶¶ 13-17.

KG brings this action to ensure that it will have a full and fair opportunity to apply for a gaming license based on the *economic merits* of its development proposal rather than the race of its owners. The Equal Protection Clause requires nothing less.

STANDARD OF REVIEW

A party seeking a preliminary injunction must satisfy the familiar four-factor test that looks to whether the plaintiff "is likely to succeed on the merits, . . . is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The four factors "must be considered together and are interrelated in that the strength of one factor may offset the weakness of another and vice versa." *McLaughlin v. Boston School Committee*, 938 F. Supp. 1001, 1011 (D. Mass. 1996). Courts have routinely found the preliminary injunction criteria to be satisfied in cases where a race-based set-aside program foreclosed certain groups from competing for valuable government benefits on a level playing field. *See, e.g., O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420, 428-29 (D.C. Cir. 1992); *Association for Fairness in Business Inc. v. New Jersey*, 82 F. Supp. 2d 353, 359-64 (D.N.J. 2000); *Cortez III Service Corp. v. Nat'l Aeronautics & Space Admin.*, 950 F. Supp. 357, 360-63 (D.D.C. 1996).

ARGUMENT

I. KG IS LIKELY TO PREVAIL ON THE MERITS OF ITS EQUAL PROTECTION AND PREEMPTION CLAIMS

A. The Equal Protection Clause and Massachusetts Declaration of Rights Prohibit Massachusetts from Using Separate Evaluation Processes and Separate Selection Criteria Based on the Race of the Applicant for a Gaming License

The starkness of the race-based set-aside at issue here is something rarely seen in modern times. Race is the sole factor in awarding a commercial gaming license in Southeastern Massachusetts, and results in a complete exclusion of non-tribal applicants, at least until July 31, 2012, and likely indefinitely. The fact that this exclusion benefits Native Americans may explain, but does not remotely excuse, the starkness of the race-based set-aside. There is no

Indian gaming exception to the Equal Protection Clause. States, unlike the federal government, do not have a constitutional basis for treating Indian tribes differently from other racial groups, and the Act cannot be justified as an implementation of the federal policies embodied in IGRA. This is, in short, as stark a racial set-aside as any federal court is likely to see, and this Court should act with dispatch to enjoin this unconstitutional law and ensure that the commencement of lawful gaming in Massachusetts is not permanently skewed by a manifestly unconstitutional race-based selection process.

The Act gives federally recognized Indian tribes, at a minimum, a nearly one-year head start to begin negotiations for the commercial gaming license in Southeastern Massachusetts. That head start can be converted into a permanent, region-wide race-based monopoly if a tribe meets a few additional conditions. Non-tribal entities, such as KG, will be allowed to apply for a gaming license in the Southeastern region if, but only if, a tribe does not enter into a gaming compact with the governor that is approved by the General Court by July 31, 2012. *See* Act § 91(e). The Act allocates $5 million of taxpayer funds to ensure that such a compact is negotiated, *id.* § 2A, and requires the Commission to "provide assistance" to the governor in negotiating a compact, *id.* § 91(b). Thus, the Commission that would ultimately judge the suitability of competing bids — and is ostensibly required to be neutral and unbiased in making such judgments — is charged with assisting the governor in negotiating a race-based set-aside for a single bidder in the Southeast.

Moreover, while non-tribal applicants must meet an extensive list of requirements in order to apply for a gaming license, the Act imposes only minimal requirements on Indian tribes, and rewards them with a permanent license available to no one of a different race. Thus, non-tribal applicants such as KG will be denied the right to compete for a gaming license on a level

playing field, and the entire Southeastern region will be denied the opportunity to choose its gaming operator through a full and fair competition based on the economic merits of each proposal, as the Act requires in the Eastern and Western regions.

Not only does the Act unlawfully discriminate between tribal and non-tribal applicants within the Southeast, it also discriminates between applicants in the Southeast and applicants in the rest of the Commonwealth based solely on proximity to Indian tribes. Whatever authority the *federal* government has to treat Indians lands distinctly, nothing in the Equal Protection Clause remotely allows a state to award a tribe a region-wide monopoly or treat applicants in a third of the state differently based on their proximity to Indian tribes. Finally, the Act also includes an explicit tribal set-aside for one of the seats on the Gaming Policy Advisory Committee, which will provide advice about gaming issues to high-level policymakers.

In sum, the Act allocates valuable government benefits using both procedures and substantive criteria that differ based on the race of the applicant. It must accordingly be evaluated under strict scrutiny — an "exacting" standard that the Act cannot come close to satisfying.[12]

1. The Act Employs Race-Based Classifications That Must Be Assessed Under Strict Scrutiny

a. The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV. It is "well

[12] KG plainly has standing to bring an equal protection challenge to the Act. "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993). Instead, the "'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.*; *see also Dynalantic Corp. v. Dep't of Defense*, 115 F.3d 1012, 1016 (D.C. Cir. 1997).

established" that when the government "distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720 (2007); *see also Johnson v. California*, 543 U.S. 499, 505-06 (2005); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Const. Inc. v. Pena*, 515 U.S. 200, 211 (1995). As the Supreme Court has explained, racial classifications are "'simply too pernicious to permit any but the most exact connection between justification and classification.'" *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (citation omitted). Any person, "of whatever race," has the right to insist that the government "justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand*, 515 U.S. at 224.

Despite this clear constitutional teaching, the Act grants exclusive access to an important government license to members of one racial group. In contrast to the open competition on the merits in the other two regions of the Commonwealth, for nearly one year only federally recognized Indian tribes may seek a commercial gaming license in the Southeastern region. *See* Act § 91(e). The tribe may convert that temporary exclusion into a permanent one by meeting a few additional conditions and entering a "compact" with the governor that is approved by the General Court by July 31, 2012. *Id.* § 91(c)-(e). And the commercial gaming license granted to the tribe at the end of that process is unlike any license available to anyone of a different race; it provides a *permanent* gaming monopoly for an entire region. The Act all but guarantees that a compact will be entered by allocating $5 million to the governor to ensure its negotiation, *see id.* § 2A, and by obligating the Commission — the same Commission that is supposed to neutrally judge applications if a compact is not reached — to "provide assistance" to the governor in negotiating the compact, *id.* § 91(b). There is accordingly no question that the Act, on its face,

"distributes burdens or benefits" on the basis of racial classifications, *Parents Involved*, 551 U.S. at 720, and thus must be assessed under strict scrutiny.

b. That scrutiny is no less strict because the racial preference favors Native Americans, as opposed to a different racial group. Unlike the federal government, states have no special constitutional license for treating tribes differently. And no level of government has any basis for carving out a region-wide monopoly based solely on race.

In *Morton v. Mancari*, 417 U.S. 535 (1974), the Supreme Court applied less-exacting, "rational basis" review in evaluating the constitutionality of a federal preference for Native Americans in hiring by the Bureau of Indian Affairs. The Court emphasized, and has since underscored, that its decision turned 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 (emphasis added); *see also* U.S. Const., art. I, § 8 (granting Congress power to "regulate Commerce . . . with the Indian Tribes"). The Court explained that its holding was "*sui generis*" because the Bureau of Indian Affairs governed the "lives and activities" of Indian tribes in a "unique fashion," and thus the hiring preferences were "directed to participation by the governed in the governing agency." 417 U.S. at 554-55. It would be an "obviously more difficult question" if the preferences applied to other government agencies or if, for example, Congress created "a blanket exemption for Indians from all civil service examinations." *Id.* at 554.

Mancari's limited exception to the application of strict scrutiny does not apply here. Because the Act was passed by a state, the categorical preferences for Indian tribes cannot be justified as an exercise of Congress' power "[t]o regulate Commerce with . . . the Indian tribes." U.S. Const., art. I, § 8. States "do not enjoy [the] same unique relationship with Indians" that

may justify federal "legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979); *see also Rice v. Cayetano*, 528 U.S. 495, 520 (2000) (refusing to extend the "limited exception" of *Mancari* to a state statute that allowed only native Hawaiians to vote in elections for the Office of Hawaiian Affairs).[13] Nor does the Act involve state action that merely implements federal laws that treat tribes differently.

Moreover, even as to federal government action, the limited *Mancari* exception applies only to "[l]egislation that relates to Indian land, tribal status, self-government or culture" — that is, "those statutes that affect *uniquely Indian interests*." *Williams v. Babbitt*, 115 F.3d 657, 664-65 (9th Cir. 1997) (emphasis added). In *Williams*, an administrative agency interpreted the federal Reindeer Industry Act as categorically prohibiting reindeer herding by non-natives in Alaska. The court noted that "[u]nder strict scrutiny, the [agency's] interpretation would almost certainly render the Reindeer Act unconstitutional." *Id.* at 665. To avoid this "grave" constitutional issue, and despite the court's recognition that the agency's construction would be entitled to deference under normal administrative law principles, the court rejected the federal agency's construction and instead construed the statute "as not precluding non-natives in Alaska from owning and importing reindeer." *Id.* at 666. Moreover, the Supreme Court has indicated that federal actions that subject Native Americans to race-based treatment that extends beyond

[13] This differential treatment of state and federal law, with state-law distinctions subject to strict scrutiny and federal-law distinctions subject to more deferential review, is not unique to the tribal context. Just as the Constitution grants Congress unique powers in the Indian Commerce Clause, it also grants Congress "broad power over naturalization and immigration," and thus congressional actions regarding "the relationship between the United States and our alien visitors" are subject to a "narrow standard of review" akin to rational basis review. *Mathews v. Diaz*, 426 U.S. 67, 79-82 (1976). States, however, have no constitutional authority to distinguish between citizens based on alienage, and thus state laws that discriminate against aliens are subject to strict scrutiny. *See Graham v. Richardson*, 403 U.S. 365, 371-72, 376 (1971).

uniquely Indian interests — such as the race-based set-asides in *Adarand*, *Bakke*, and *Gratz*, which included preferences for Native Americans — were subject to strict scrutiny.

Casino gaming — like reindeer herding — is a commercial activity that has nothing to do with "uniquely Indian interests" such as "Indian land, tribal status, self-government or culture." *Id.* at 664-65.[14] That is especially true of a provision, like section 91 of the Act, that is not limited to Indian lands. Whatever scope there is for treating gaming on Indian lands differently from other gaming, there is absolutely no justification for granting a race-based monopoly that extends over an entire region. Here, the Act grants Indian tribes a blanket preference in obtaining a government-conferred right, and that preference is not limited to Indian lands, but covers all of Southeastern Massachusetts. The Act goes on to disfavor the entire Southeast relative to the rest of the Commonwealth based solely on its *proximity* to Indian tribes, even though those tribes currently have no federal land-in-trust on which to conduct gaming. The Act then completes the race-based trifecta by granting one seat on an important advisory committee exclusively to a tribal representative. These explicitly race-based set-asides go well beyond Indian lands or uniquely Indian interests, and cannot escape or survive strict scrutiny.

c. At least three federal district courts have applied strict scrutiny to state or local ordinances creating preferences or set-asides for Native Americans. In *Kornhass Construction, Inc. v. Oklahoma*, 140 F. Supp.2d 1232 (W.D. Okla. 2001), the court struck down a state statute that gave a 5 percent advantage to minority-owned companies bidding for state contracts. Citing

[14] "Uniquely" Indian interests generally include matters that relate to tribal governance or ceremonial practices. *See, e.g.*, *Mancari*, 417 U.S. at 554 (noting that the preference in hiring by the BIA was "directed to participation by the governed in the governing agency"); *Gibson v. Babbitt*, 223 F.3d 1256, 1257-59 (11th Cir. 2000) (rejecting constitutional challenge to exemption from the Bald and Golden Eagle Protection Act for "religious purposes of Indian tribes"); *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1214-16 (5th Cir. 1991) (rejecting equal protection challenge to exemption from ban on possession of peyote for the Native American Church).

Mancari, the state argued in the alternative that the statute should be upheld as applied to Native Americans because strict scrutiny does not apply to preferences in favor of Indian tribes. The court disagreed, holding that the lower level of scrutiny applied in *Mancari* was limited to "special legislation designed to fulfill Congress' unique obligation toward the Indian tribes by furthering tribal self-government," and that "strict scrutiny applies to the Act even so far as it awards a bidding preference to American Indians." *Id.* at 1249.

Similarly, in *Tafoya v. City of Albuquerque*, 751 F. Supp. 1527 (D.N.M. 1990), the district court struck down a municipal ordinance that permitted only members of federally recognized Indian tribes to sell wares in the Old Town Zone of Albuquerque. The court found the rationale of *Mancari* to be "inapplicable" because "[t]he Albuquerque City Council has considerably less power than the United States Congress to pass law[s] discriminating in favor of members of federally recognized Indian tribes." *Id.* at 1531. "Strict scrutiny is applicable because the City of Albuquerque has made no particularized showing of past discrimination against members of federally recognized Indian tribes . . . with respect to such individuals' ability to sell goods in Old Town." *Id.*; *see also Malabed v. North Slope Borough*, 42 F. Supp. 2d 927, 928, 939 (D. Alaska 1999) (holding that a local ordinance granting blanket employment preferences to any "person belonging to an Indian tribe" was "subject to strict scrutiny"); *In re Santos Y.*, 92 Cal. App. 4th 1274, 1318 (Cal. Ct. App. 2001) (applying strict scrutiny to as-applied equal protection challenge to the federal Indian Child Welfare Act because the Act "unquestionably requires Indian children who are dependents of the juvenile court to be treated differently from court dependents who are not Indian children").[15]

[15] The Commonwealth cannot derive any support from the Ninth Circuit's decision in *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003), where the court applied rational basis review to a state law that allowed gaming only on Indian lands. It is not

2. The Act Cannot Remotely Satisfy Strict Scrutiny

The burden for justifying the Act's stark racial preferences rests with the State. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504 (1989). While it is difficult to predict what, if any, compelling government interest the Commonwealth may identify to justify these brazen racial set-asides, it is clear that no sufficient interest exists. The typical compelling interest used to justify race-based preferences — a documented history of racial discrimination, identified "with some specificity" in a particular context — is completely inapposite. *Id.* Nothing in the text or legislative history of the Act suggests that its purpose was to remedy past discrimination against Indian tribes with respect to casino gaming in Massachusetts. Such a showing would be impossible to make: given that Massachusetts did not permit casino-style gaming *at all* until the Act was passed, and now grants Indian tribes a massive preference, the only evidence of discrimination in this context cuts the wrong way for the state.

Even if the Commonwealth could identify some other compelling interest in support of its preferential treatment of Indian tribes — and it cannot — the Act is not narrowly tailored. The Supreme Court has found it "obvious" that an "absolute preference over other citizens based solely on their race" is "not narrowly tailored to remedy the effects of prior discrimination." *Id.* at 508 (holding that a 30 percent set-aside for "minority business enterprises" violated the Equal Protection Clause"). Consistent with that rule, the district court in *Tafoya* held that a city ordinance permitting only members of Indian tribes to sell their wares in Old Town Albuquerque was not narrowly tailored to addressing past discrimination. 751 F. Supp. at 1530-31. Similarly,

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obvious that *Artichoke Joe's* is correctly decided, but it is obvious that it is readily distinguishable. Whatever scope a state has for viewing a statute treating *Indian lands* differently as a political, not racial, classification, the Act — which is in no way limited to Indian lands and creates a race-based monopoly over an entire region — is clearly subject to strict scrutiny.

the court in *Malabed* concluded that a "100 percent blanket preference" for Native Americans in municipal hiring "cannot withstand even cursory analysis" under narrow tailoring principles. 42 F. Supp. 2d at 942.

Even in the context of education — where "diversity" itself has been deemed a compelling interest[16] — a state may not seek to achieve that goal by "insulat[ing]" particular groups from "comparison with all other candidates for the available seats." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315-17 (1978) (Powell, J.). That is, no person may be "*foreclosed from all consideration* . . . simply because he was not the right color or had the wrong surname." *Id.* at 318 (emphasis added). A race-based selection process is not narrowly tailored when certain applicants for a government-conferred benefit are "totally excluded" from consideration "[n]o matter how strong their qualifications," and are "never afforded the chance to compete with applicants from the preferred group[]." *Id.* at 319; *see also Gratz*, 539 U.S. at 270-76 (striking down race-based application process that did not provide "individualized consideration" to each applicant, but instead made race "a decisive factor for virtually every minimally qualified underrepresented minority applicant").

That is precisely the case here. The Act creates a two-track process for obtaining a commercial gaming license, with one set of procedures and substantive criteria for Indian tribes and another set for all other applicants. Worse still, in the Southeastern region there is only a one-track system at least until July 31, 2012, and likely permanently. Non-Indians need not — indeed, cannot — apply. Until July 31, 2012, Indian tribes will have an exclusive right to seek a

[16] Courts have recognized a school's interest in a "diverse" student body as compelling for purposes of strict scrutiny. *See Parents Involved*, 551 U.S. 701 at 722. But that interest is generally limited to the education context. *See id.* at 724-25 (noting that the diversity rationale was based on "considerations unique to institutions of higher learning"); *see also Lomack v. City of Newark*, 463 F.3d 303, 309-10 (3d Cir. 2006) (holding that the "benefits of diversity . . . are not a compelling interest" in the context of hiring by a fire department).

gaming "compact" with the governor. *See* Act § 91(e). The Act all but ensures that such a compact will be consummated by allocating $5 million to facilitating it, and obligating the nominally neutral Commission to assist in that process. If such a compact is reached during that period and approved by the general court prior to July 31, 2012, then non-tribal applicants will not even be *considered* for a gaming license in Southeastern Massachusetts, regardless of the economic merits of their development proposals. *Id.* A government policy that "insulate[s]" one racial group from "comparison with all other [groups]" is the very definition of a policy that is not narrowly tailored. *Bakke*, 438 U.S. at 315-17 (Powell, J.); *see also Croson*, 488 U.S. at 508; *Tafoya*, 751 F. Supp. at 1530-31.

It is no answer to say that KG is still able to apply for a gaming license in one of the other two regions of Massachusetts. The fact that a person who is denied a particular government benefit could apply for some *other* benefit cannot save a facially discriminatory policy. The plaintiff in *Bakke* remained eligible to apply for 84 of the 100 seats in the U.C. Davis Medical School class — or to apply to any number of other public medical schools — but that was plainly insufficient to justify a race-based, dual-track application process. *See Bakke*, 438 U.S. at 280 n.14 (noting that the plaintiff's injury was "the University's decision not to permit [him] to compete for all 100 places in the class, simply because of his race").[17] KG selected the New Bedford site because of its unique location and characteristics, and has invested millions of dollars and countless hours of time in preparing its comprehensive remediation and

[17] Indeed, the Act's explicit preferences for Indian tribes are even more overbroad than the race-based policies that were struck down in *Bakke*, *Gratz*, and *Croson*. In each of those cases, non-minority applicants were still able to compete for some percentage — albeit less than 100 percent — of the government contracts or university seats at issue. Here, in contrast, Indian tribes have an *absolute* right of first refusal on a commercial gaming license in Southeastern Massachusetts. If a tribe exercises that right within the exclusivity period, then non-tribal entities will not even have the opportunity to apply for a license.

redevelopment plan for that particular site. *See* Stern Decl. ¶¶ 4-20. In addition to the complete loss of its invested capital in the New Bedford site, it would take years of work and millions of additional dollars of investment to identify an alternative site in another region of Massachusetts and prepare a comprehensive development plan for that site. *Id.* ¶ 23. Once the Commonwealth chose to legalize casino gaming, it was barred by the Equal Protection Clause from employing a race-based process for awarding commercial gaming licenses.

The fact that gaming licenses in the other two regions will be awarded free of racial considerations further underscores a distinct equal protection defect with the Act. Not only are non-Indians treated differently from Indians in the Southeastern region, but they are treated differently from similarly situated applicants in the other two regions of the Commonwealth. This differential treatment is itself race-based because it is based solely on the Southeastern region's proximity to Indian tribes. Nothing else justifies the differential treatment of the Southeast or the granting of a head start — with permanent advantages — to the other two regions of the Commonwealth, while the most economically challenged region lags behind. Whatever scope there may be to treat *Indian lands* differently, the differential treatment of an entire region of a state just because it happens to include Indian tribes is blatantly unconstitutional.

3. The Act's Tribal Set-Aside for a Seat on the Gaming Policy Advisory Committee Independently Violates the Equal Protection Clause

The Acts completes its pervasive system of race-based discrimination by setting aside a seat on the newly created Gaming Policy Advisory Committee for a tribal representative. That committee is required to "meet at least once annually for the purpose of discussing matters of gaming policy," and to "designate subcommittees to examine community mitigation, compulsive gambling and gaming impacts on cultural facilities and tourism." Act § 16, sec. 68(a). The

committee consists of representatives of the governor's office, the House, and the Senate, as well as eight additional persons appointed by the governor. The Act requires that at least one of those persons "shall be a representative of a federally recognized Indian tribe in the [C]ommonwealth." *Id.*

For the same reasons set forth above, a state law that reserves a position on an important public body for members of a particular racial or ethnic group cannot be squared with the Equal Protection Clause. Just as the Constitution prohibits a state university from reserving 16 out of 100 seats in its class solely for minority applicants, *see Bakke*, 438 U.S. at 315-20 (Powell, J.), so too would it prohibit reserving a seat on the Board of Regents or an advisory body for members of a single racial group. This is particularly true in light of the ready availability of non-race-based alternatives to this set-aside. For example, the Commonwealth could award one seat on the advisory committee to each licensed casino operator — as it already does for the non-tribal gaming licensees. *See* Act § 16, sec. 68(a) (reserving three seats for "representatives of gaming licensees"). But there is no reason to reserve a seat *in advance* based on race. And, to the extent the set-aside reflects the Legislature's assumption that its racial preference in the Southeastern region would inevitably result in the award of that region's license to an Indian tribe, that only underscores the Act's unconstitutionality.[18]

B. Section 91 of the Act Conflicts with IGRA, and is Thus Preempted

The race-based preferences in section 91 cannot be justified by reference to IGRA. Indeed, the Act conflicts with, and is thus preempted by, IGRA. All casino-style Indian gaming

[18] As an entity that will be subject to the policies on which the Committee will be offering advice, KG has standing to challenge the legality of appointments to that body. *See Buckley v. Valeo*, 424 U.S. 1, 115-18 (1976) (*per curiam*) (holding that pre-enforcement challenge to legality of appointments to the Federal Election Commission was ripe for review, and that "[p]arty litigants with sufficient concrete interests at stake" had standing to raise that claim).

must be undertaken in compliance with that federal statute, and the Act's notion of setting aside a commercial gaming license for Indian tribes *outside* the context of IGRA is unprecedented and squarely conflicts with federal law. The only "rights" tribes have to engage in gaming are federal rights conferred by IGRA, and the Act's efforts to set aside commercial gaming licenses for Indian tribes outside that federal process is flatly inconsistent with IGRA and independently forbidden by the Equal Protection Clause.

A state statute is unconstitutional under the Supremacy Clause when it conflicts with federal law — that is, "when compliance with both state and federal regulations is impossible or when state law interposes an obstacle to the achievement of Congress' discernible objectives." *Grant's Dairy-Maine, LLC v. Comm'r of Maine Dep't of Agric.*, 232 F.3d 8, 15 (1st Cir. 2000). The Act purports to authorize Indian tribes to engage in gaming without regard to the federal requirements for tribal gaming set forth in IGRA, and with consequences that extend far beyond Indian lands. Indeed, senior lawmakers have made clear that their purpose in enacting the statute was to obtain tax revenue from tribal gaming that would have been unavailable if that gaming were conducted pursuant to the normal IGRA process. Both the purpose and effect of the Act are squarely at odds with federal law, and the statute is accordingly preempted. *See, e.g., Felder v. Casey*, 487 U.S. 131, 138 (1988) (finding state statute preempted where it "conflicts in both its purpose and effects" with federal law).

1. After years of "negotiations between tribes, States, the gaming industry, the administration, and the Congress," IGRA was enacted in 1988 to respond to the special issues raised by gaming on Indian lands in the wake of the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), and to "formulate a system for regulating gaming on Indian lands." S. Rep. No. 100-446, at 1 (1988), *reprinted in* 1988

U.S.C.C.A.N. 3071 ("S. Rep."). *Cabazon Band* called into question the authority of states to regulate gaming on Indian lands when they permitted similar gaming elsewhere in the state. The express purposes of IGRA are to "provide a statutory basis for the operation of gaming by Indian tribes" on Indian lands, to shield such gaming from "organized crime and other corrupting influences," to "ensure that the Indian tribe is the primary beneficiary of the gaming operation," to "assure that gaming is conducted fairly and honestly," and to establish "independent Federal regulatory authority for gaming on Indian lands." 25 U.S.C. § 2702.[19] The statute pursues these goals through a system of "extensive federal oversight [over] all but the most rudimentary forms of Indian gaming." *Tamiami Partners, Ltd. v. Miccosukee Tribe*, 63 F.3d 1030, 1033 (11th Cir. 1995); *see also Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996) (describing the IGRA regulatory scheme as "comprehensive").

IGRA divides Indian gaming into three classes, with varying degrees of regulatory oversight at each level. *See* 25 U.S.C. §§ 2703(6)-(8). "Class III" gaming includes table games and slot machines, which are the types of games that will be offered in the three new Massachusetts casinos. IGRA provides that class III gaming "shall be lawful on Indian lands only if such activities are," *inter alia*, "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." *Id.* § 2710(d)(1)(C). Importantly, a gaming compact "shall take effect only when notice of approval by the Secretary [of the Interior] of such compact has been published by the Secretary." *Id.* § 2710(d)(3)(B). The statute instructs the Secretary to disapprove a compact if it violates IGRA, "any other provision of Federal law," or the "trust obligations of the United States to Indians." *Id.* § 2710(d)(8)(B). In other words,

[19] *See also* S. Rep. at 1-2 (noting that purpose of IGRA is to simultaneously "preserve the right of tribes to self-government," "protect both the tribes and the gaming public from unscrupulous persons," and "achieve a fair balancing of competitive economic interests").

IGRA authorizes Indian tribes to engage in class III gaming if and only if that gaming is conducted on Indian lands pursuant to a compact approved by *both* the host state *and* the Secretary of the Interior.

Moreover, IGRA provides that Indian tribes may conduct class III gaming only if that gaming is "authorized by an ordinance or resolution" that is adopted by "the governing body of the Indian tribe" and "approved by the Chairman" of the National Indian Gaming Commission ("NIGC"). *Id.* § 2710(d)(1)(A). The Chairman may approve a tribal gaming ordinance only if: (1) the tribe has the "sole proprietary interest and responsibility for" the gaming activities; (2) profits from gaming are used only for government, welfare, charitable, or economic development programs; (3) all gaming revenues and outside contracts are subject to annual audits; and (4) there is an "adequate system" for conducting background checks on gaming managers and key employees. *See id.* § 2710(b)(2), (d)(1)(A)(ii).[20] Before approving a gaming ordinance, the Chairman must also make an express determination that the gaming in question will take place on "Indian lands." *See Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295, 322-27 (W.D.N.Y. 2007). This is critical because IGRA addresses the unique issues associated with sovereign "Indian lands" and envisions that gaming will take place *only* on such "Indian lands."[21]

2. The Act authorizes Indian tribes to engage in class III gaming without obtaining *any* of the approvals discussed above, and includes requirements that are distinct from IGRA's

[20] The Chairman must also review all management contracts for tribal gaming operations, and may approve those contracts only if they are fair and reasonable to the tribe. *Id.* § 2711.

[21] Under IGRA, a tribe may not simply purchase a parcel of land then begin to offer gaming on that land. The statute carefully defines "Indian lands" as land within an Indian reservation, land that has been taken into trust by the federal government, or land over which a tribe exercises sovereignty that is subject by the federal government to restrictions on alienation. *See* 25 U.S.C. § 2703(4). IGRA also places additional restrictions on gaming on lands acquired after October 17, 1988 that are not part of a tribe's "initial reservation." *Id.* § 2719(b)(1)(A).

requirements. In particular, the Act provides that a tribal gaming "compact" must be "agreed to by the governor and tribe [and] shall be submitted to the [G]eneral [C]ourt for approval," Act § 91(d), but does not include any requirement that the compact be approved by the Secretary of the Interior. Nor does the Act require that the tribe have a federally approved gaming ordinance in place prior to engaging in such gaming. Moreover, while IGRA permits gaming only on Indian lands, the Act gives exclusivity to a tribe as long as it has, among other things, merely entered into a commercial agreement to purchase land.[22]

In sum, while the exact interrelationship between the state and federal requirements may not be completely clear, this much is clear: To the extent the Act permits a tribe to engage in class III gaming without obtaining the federal approvals required by IGRA, it squarely conflicts with federal law. Under those circumstances, the Commonwealth would be *authorizing* a tribe to engage in activities that are *prohibited* by IGRA, thus resulting in a direct conflict between state and federal law. Under the Supremacy Clause, federal law must prevail. At a minimum, though, it is clear that because the Act grants Indian tribes a regional gaming monopoly that extends well beyond the "Indian lands" regulated by IGRA, the State cannot defend the Act on the basis that it is required by, or simply implements the requirements of, IGRA.

The notion that the Act is designed to facilitate Indian gaming outside the framework of IGRA is not mere speculation. Senior lawmakers have made clear that the very *purpose* of section 91 is to permit gaming outside the IGRA framework. For example, Senate President

[22] Section 91(e) of the Act does provide that "if, at any time on or after August 1, 2012, the commission determines that the tribe will not have land taken into trust by the United States Secretary of the Interior," then the commission "shall consider bids" for a gaming license from non-tribal applicants. Act § 91(e). This provision suggests that an Indian tribe must at least have begun the process of obtaining land in trust before it conducts gaming in Massachusetts. But that does not save the statute from preemption. The requirement that tribal gaming take place on "Indian lands" is only one of IGRA's many requirements.

Therese Murray released a statement shortly after the Senate passed its version of the gaming bill stating that the Commonwealth could "lose on any gaming revenue from the tribe" if it "[doesn't] establish a compact with the tribe."[23] Gregory Bialecki, the Commonwealth's economic development secretary, has similarly noted that "there's a significant risk [that the tribe would proceed on its own under federal law] if we do not provide this opportunity," in which case the Commonwealth would lose its ability to impose taxes or start-up fees on tribal gaming.[24] Of course, one of the key purposes of IGRA is to ensure that states do *not* extract excessive taxes or fees from Indian tribes. *See, e.g.*, 25 U.S.C. § 2710(d)(4) (noting that nothing in IGRA "shall be interpreted as conferring upon a State . . . authority to impose any tax, fee, charge, or other assessment upon an Indian tribe" to engage in class III gaming).

The same forbidden intent of circumventing IGRA was evident in earlier versions of the Act. Several prior iterations of the Act would have required an Indian tribe to indicate in its license application whether it had "waive[d] its rights under the Indian Gaming Regulatory Act." S.2495, § 13(a)(4) (introduced June 18, 2010); *see also* H.4081, § 6(b) (introduced Apr. 28, 2009) (requiring Indian tribes to "forfeit any rights [they] may have" under IGRA prior to any compact negotiations). The Act simply achieves indirectly what the prior bills would have achieved directly — namely, permitting Indian tribes to engage in casino gaming wholly outside the IGRA framework.

State officials, including the Senate President, have also asserted that the Act's blanket preferences for Indian tribes are permissible because "[t]he tribe has federal rights that have to be

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[23] George Brennan, *State, Tribes Not Backing Down on Area Casino*, The Standard-Times (Oct. 22, 2011), *available at* http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20111022/NEWS02/110220343/.

[24] Noah Bierman, *Casino Provision for Tribe Sparks Debate*, Boston Globe (Aug. 26, 2011), *available at* http://articles.boston.com/2011-08-26/news/29932070_1_casino-critics-native-american-tribe-mashpee-wampanoag.

recognized."[25] That statement is a complete *non sequitur*. The only "federal rights" a tribe has are the rights to engage in gaming under the terms of IGRA. Indian tribes have absolutely no freestanding federal right to engage in gaming *outside* the confines of IGRA. Thus, the Commonwealth cannot defend the Act on the ground that it accommodates federal rights. To the extent the Act authorizes the award of a commercial gaming license to a tribe outside the IGRA framework, it conflicts with *both* IGRA and the Constitution. Needless to say, nothing in IGRA prevents a tribal entity from competing equally for a commercial gaming license outside of IGRA. But a state has no more authority to reserve a commercial gaming license for an Indian tribe than it has to exclude tribes from competing for such licenses on equal terms with other applicants.

Under the Supremacy Clause a state cannot frustrate the federal tribal rights recognized in IGRA by creating a separate state-law compacting process. There is no such thing as a state-issued Indian gaming license, and a state has no power whatsoever to create its own Indian gaming regime.[26] Nor can a state sweeten the pot in the alternative state-law system by extending a race-based monopoly to Indian tribes well beyond Indian lands (or despite the *lack* of such lands) at the direct expense of non-tribal competitors and the constitutional principles of

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[25] George Brennan, *Lawmakers: Wampanoag Casino Bid Shouldn't Have Edge*, Cape Cod Times (Aug. 17, 2011) (statement of David Falcone, a spokesman for Senate President Therese Murray), *available at* http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20110817/NEWS/108170331.

[26] As explained above, Article I, Section 8 of the U.S. Constitution, which gives *Congress* plenary and exclusive constitutional authority over Indian affairs, permits Congress to create a statutory preference for Indian tribes. States, however, do not have the same power as the federal government to pass laws preferring Indian tribes in derogation of the Equal Protection Clause. *See Yakima Indian Nation*, 439 U.S. at 501 (holding that states "do not enjoy [the] same unique relationship with Indians" that may justify federal "legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive"). Indeed, absent the Indian Commerce Clause, even *Congress* would be barred by the Fifth and Fourteenth Amendments from enacting legislation that grants preferential treatment to Indian tribes.

equal protection. The Commonwealth's alternative state-law gaming regime effectively awards a commercial gaming license to a tribe through a process and under criteria that bear no relationship to IGRA, and are actually contrary to its express requirements.

3. Compliance with IGRA's procedures and requirements is no mere formality. The federal approvals described above — in particular, the Secretary's approval of tribal-state gaming compacts (which includes a specific determination that the gaming will take place only on "Indian lands") and the Chairman's approval of tribal gaming ordinances — is designed to ensure that tribal gaming is conducted in accordance with federal law, and is in the best interest of both the tribe and the surrounding community.

Those determinations are "final agency action" that may be challenged in court by competitors of Indian gaming operations (such as KG) or groups that oppose expanded gaming. As one district court has explained, "the NIGC Chairman's approval of [a gaming ordinance] pursuant to 25 U.S.C. § 2710(d) is a final agency action for purposes of reviewing both the reasonableness of the Chairman's decision-making and the permissibility of any statutory construction he may have undertaken in this case." *Citizens Against Casino Gambling*, 471 F. Supp. 2d at 321; *see also Knox v. Dep't of Interior*, 759 F. Supp. 2d 1223, 1237 (D. Idaho 2010) (holding that the Secretary's approval of amendments to tribal-state compacts that authorized additional forms of gaming was reviewable agency action); *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1114-18 (E.D. Cal. 2002) (holding that the Secretary's approval of a tribal compact was final agency action, and that competing gaming companies had standing to challenge the legality of that approval).

By authorizing Indian tribes to engage in class III gaming without first obtaining the necessary federal approvals, in a state process specifically intended to derive more revenue than

the federal-law alternative, the Commonwealth is depriving interested parties of the opportunity to ensure that any tribal gaming in Massachusetts is conducted in accordance with federal law. Neither IGRA nor the Supremacy Clause permits that attempted end-run around federal law.

II. KG MEETS THE REMAINING REQUIREMENTS FOR ISSUANCE OF A PRELIMINARY INJUNCTION

A. KG Will Suffer Irreparable Harm in the Absence of Preliminary Relief

1. Courts have repeatedly found irreparable harm where, as here, a plaintiff alleging an equal protection violation is denied a fair opportunity to compete for a government contract or benefit because of a race-based set-aside program. *See, e.g., Association for Fairness in Business Inc. v. New Jersey*, 82 F. Supp. 2d 353, 363 (D.N.J. 2000) (finding irreparable injury and entering a preliminary injunction where the plaintiffs were forced to "compete on an unfair playing field" as a result of a set-aside program); *O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420, 428 (D.C. Cir. 1992) (finding irreparable injury where 35 percent of construction contracts were set aside for minority-owned business enterprises, and "non-minority firms [were] ineligible to compete" for those contracts); *Cortez III Service Corp. v. Nat'l Aeronautics & Space Admin.*, 950 F. Supp. 357, 363 & n.5 (D.D.C. 1996) (finding irreparable injury because, without a preliminary injunction, the plaintiff would be "excluded from competing" for a contract because of the challenged "set-aside process"). A denial of the constitutional guarantee of equal protection is a classic irreparable injury. Receiving equal treatment at some later date is not enough, and neither that nor a monetary remedy fully addresses the constitutional injury.

Similarly, in cases involving bids for government contracts or licenses, "the denial of the right to have [a] bid fairly and lawfully considered constitutes irreparable injury." *Ellsworth Assoc. v. United States*, 45 Fed. Cl. 388 (Ct. Fed. Cl. 1999); *see also Nat'l Maritime Union of*

Am. v. Commander, Military Sealift Command, 824 F.2d 1228, 1237 (D.C. Cir. 1987) (noting that "[a] disappointed bidder that claims illegality in a procurement alleges an injury beyond its economic loss of the contract," such as "injury to its right to a legally valid procurement process"); *CRAssociates, Inc. v. United States*, 95 Fed. Cl. 357, 390 (Ct. Fed. Cl. 2010) (holding that "a lost opportunity to compete on a level playing field for a contract" is sufficient to show irreparable harm); *Mark Dunning Indus., Inc. v. Perry*, 890 F. Supp. 1504, 1517 (M.D. Ala. 1995) (holding that monetary relief was "insufficient to compensate an unsuccessful bidder for the wrongful award of a government procurement contract"). The plaintiff need not demonstrate that he would, in fact, have been awarded the contract. The denial of an ability to compete on a level playing field unskewed by race is itself both the constitutional violation and the irreparable harm.

2. Absent preliminary relief, KG will suffer not only the irreparable constitutional injury of being denied a fair opportunity to compete based on race, but will suffer related injuries that are both concrete and irreparable. KG is ready and able to apply for a gaming license for the New Bedford site, *see* Stern Decl. ¶ 22, but it has been "excluded from competing" for that license because of the challenged "set-aside process." *Cortez III Service Corp.*, 950 F. Supp. at 363 n.5. To date, KG has invested several years of work and approximately $4.6 million in direct costs to prepare its comprehensive redevelopment plan for the Cannon Street Station site. *See* Stern Decl. ¶ 20. Among other expenses, KG's direct costs include the cost of acquiring options on the Cannon Street property, the fees of its architecture and design firms, the costs of preparing an environmental assessment and cleanup plan for the site, and the fees of its gaming market consultants, attorneys, and government relations advisors. *Id.* ¶¶ 11-16, 20. These are not simply sunk costs. In order to maintain the possibility of developing the Cannon Street

property in the event the racial exclusion is lifted by the courts or proves only temporary, KG must make option payments and other continuing investments simply to maintain the possibility of competing in the future — *i.e.*, just to preserve its existing position. *Id.* ¶ 12.

KG's investment is site-specific to the New Bedford property. As explained above, KG employs an integrated method of urban development that incorporates gaming, retail, cultural, and commercial activities into the same project, with no artificial barriers between the development and the surrounding community. *Id.* ¶ 5. Because of its unique approach to gaming development — which focuses on walkability, sustainability, and connectivity — KG must carefully select its development sites and urban locales to ensure that they are compatible with its design, preservation, and redevelopment philosophy. KG and its advisors determined that the Cannon Street property is an ideal candidate for redevelopment because of its close proximity to downtown New Bedford's cultural and entertainment center, its location on the historic New Bedford harbor, and the dramatic physical presence of the vintage power plant structure. *Id.* ¶ 10. It would take years of work and millions of dollars of investment for KG to locate another suitable parcel in Massachusetts and to prepare a comprehensive development plan for that site. *Id.* ¶ 23.

KG believes that its proposal offers the best value to the citizens of New Bedford and Southeastern Massachusetts in terms of economic development, job creation, sustainability, and tax revenue, and KG intends to apply for a gaming license for the New Bedford site as soon as it is permitted to do so. *Id.* ¶ 22. Because of the tribal set-aside provision, however, KG will be completely locked out of the application process for a gaming license until July 31, 2012. If, during that period, an Indian tribe reaches a compact with the governor that is approved by the General Court, then KG will never have even the *opportunity* to apply for a gaming license in

Southeastern Massachusetts. *See* Act § 91(e). Its investment in the Cannon Street property will be rendered worthless, not because its project was rejected on the economic merits, but solely because its owners were of the "wrong" race.

3. Even if an Indian tribe does not reach a gaming compact with the governor by July 31, 2012 — in which case, the Commission may seek competitive applications for the gaming license in Southeastern Massachusetts — KG will still suffer irreparable harm. There is no *de minimis* period for the denial of the constitutional guarantee of equal protection. The denial of equal protection for two-thirds or three-fourths of a year is still irreparable injury. But KG will also suffer long-term and irreparable injuries vis-à-vis competitors in other regions who will never be subject to subject to race-based classifications or the attendant delay.

As a result of the exclusivity period for Indian tribes, the competitive licensing process in Southeastern Massachusetts, if it happens at all, may lag behind the licensing process in the other two regions. The ultimate licensee in the Southeast would thus be at a significant disadvantage in competing against the other two Massachusetts casinos for customers, advertisers, and business partners. *See* Gallaway Decl. ¶¶ 13-17. Casinos make extensive use of special offers and rewards programs to build a loyal customer base, and — particularly in a state with no history of casino gaming — the delays caused by tribal exclusivity period will allow the licensees in the Eastern and Western regions to lock up many Massachusetts customers before the casino in the Southeastern region enters the market. *Id.* ¶¶ 15-17.

Moreover, the pervasive uncertainty over whether — and when — non-tribal entities will be able to apply for a gaming license in the Southeastern region is *already* hindering KG's ability to attract investors, capital, and gaming operator joint venture partners, and is diverting resources to the other regions of the Commonwealth. *Id.* ¶¶ 18-21; Stern Decl. ¶ 24. Massachusetts is a

single market, and — because of the tribal set-aside — many gaming operators are only willing to consider partnerships with developers in the other two regions of the Commonwealth, in which the Act provides for an open and fair application process from the start. *See* Gallaway Decl. ¶¶ 20-21.

B. The Balance of Equities Favors Entry of a Preliminary Injunction

The balance of equities clearly favors entry of a preliminary injunction prohibiting enforcement of the Act and its tribal set-aside provisions pending a final determination on the merits. KG is seeking only a "forward-looking injunction [that] would not upset any contractual relations already in place," thus "minimizing the adverse impact on third parties." *O'Donnell*, 963 F.2d at 429; *see also CRAssociates*, 95 Fed. Cl. at 391 (finding that the balance of hardships favored applicant for a government contract whose bid was not properly evaluated, even where the contract had already been awarded to another bidder, and "curative action[]" would result in "delay and administrative burdens").

Here, the only "harm" to third parties — if it can even be considered harm — is that they would have to compete against other applicants for a commercial gaming license based on the economic merits of their respective proposals. Indeed, Indian tribes not only would have a full and fair opportunity to compete on the merits, but they would also retain all of their rights under IGRA, without the distorting effects of the Commonwealth's effort to capture more revenue than the federal process allows. In contrast, KG faces severe harm if a preliminary injunction is denied — namely, *outright exclusion* from the application process, resulting in the loss of years of effort and millions of dollars that the company has invested in preparing its redevelopment proposal for the Cannon Street Station site. *See, e.g.*, *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 173 (D.D.C. 2000) (finding that the balance of the equities favored entering a preliminary

injunction where "competition [was] likely to be impaired" absent such relief, and "an injunction [was] needed to provide interim protection of competition while the case proceeds to a full administrative hearing"). Thus, the balance of equities here is not even close.

C. It is in the Public Interest for Gaming Licenses To Be Awarded through a Competitive Application Process that Evaluates Each Proposal on the Merits

KG is not seeking to obtain a gaming license in this proceeding. It seeks only the opportunity to *compete* for a license on a level playing field, based on the economic merits of its application rather than the race of its owners. Courts have repeatedly recognized the strong public interest in ensuring an open and fair process through which valuable government benefits are conferred. For example, in *CRAssociates*, the government committed numerous substantive and procedural errors in evaluating the plaintiff's bid for certain health-care contracts. *See* 95 Fed. Cl. at 390. The court granted the plaintiff's motion for a preliminary injunction, holding that "the public's interest . . . lies in preserving the integrity of the competitive process," particularly where — as here — the contact in question involves a "large procurement" that will affect the relevant community "for an extended period of time." *Id.* at 391; *see also O'Donnell*, 963 F.2d at 429 (noting that a preliminary injunction would "serve the public's interest in maintaining a system of laws free of unconstitutional racial classifications"); *Association for Fairness in Business*, 82 F. Supp. 2d at 364 (holding that "the public has a vital interest in not having an unconstitutional statute and regulation enforced, no matter how well-intentioned" it may be).

These general principles apply with particular force here, where the economic development benefits of gaming that have been cited to justify the Act statewide will be delayed and perhaps denied altogether in the region most in need of an economic boost. Certainly, an

open competition is more likely to maximize economic development than a single-bidder system in which only a single racial group may apply.

Numerous government officials in Massachusetts have similarly recognized the strong public interest in an open, competitive application process for gaming licenses. During the debates leading to the Act, Senator James Welch introduced an amendment to lower the license fee in Western Massachusetts in order to attract more applicants, emphasizing that "[t]he more competition that we get, the reality is, *the better the proposals are going to be.*"[27] Similarly, several members of the New Bedford City Council have explained that the process through which the commercial gaming license will be awarded in Southeastern Massachusetts "deprives the local officials and citizens of that region of the opportunity to support the best gaming proposal on the merits." Joint Declaration of New Bedford City Council Members, ¶ 9 (Ex. F). In contrast, "[a] truly competitive application process, such as the one used for the rest of the Commonwealth, would ensure that the ultimate licensee provides the region with the maximum economic benefit, jobs, and tax revenue." *Id.* ¶ 11.

Likewise, the public interest clearly favors not having seats on important public advisory groups set aside on the basis of race. In a similar fashion, the public interest is served by ensuring that the Commissioners, who are supposed to evaluate gaming license applications impartially, are not tasked with providing assistance to the governor in negotiating a racially exclusive "compact" that is inconsistent with both IGRA and the Equal Protection Clause. Finally, the public interest is hardly served by the expenditure of $5 million in taxpayer funds to facilitate the negotiation of an unlawful agreement. To the contrary, what would serve the public

[27] 22News, Senate takes on supple budget, casinos (Oct. 6, 2011) (emphasis added), *available at* http://www.wwlp.com/dpp/news/politics/Senate-takes-on-supple-budget,-casinos.

interest is to enjoin the Act in its entirety or, at a minimum, ensure that a competitive process moves forward in the Southeast on the same terms as in the other two regions.

CONCLUSION

KG's motion for a preliminary injunction should be granted. This case involves the most blatant racial favoritism any court is likely to see. It is difficult to imagine the legislature enacting such a blatant racial set-aside to benefit any other group. The government appears to think that there is an Indian gaming exception to the Equal Protection Clause. There is not. The only "federal rights" to gaming enjoyed by Indian tribes are those provided by IGRA. A state law reserving a commercial gaming license for an Indian tribe *outside* of the IGRA framework is an equal protection violation, pure and simple.

The remedy for this violation is clear. The Defendants should be preliminarily enjoined from enforcing the Act. Given that the racial set asides permeate the Act and role of the Commissioners and destroy what should be a level playing field across the Commonwealth, the simplest course is to enjoin the Act in its entirety. At a minimum, the Court should enjoin the provisions that: (a) grant federally recognized Indian tribes an exclusive right to seek a commercial gaming license in Southeastern Massachusetts at least until July 31, 2012, and likely indefinitely; (b) allow Indian tribes to engage in gaming without meeting the same substantive requirements that non-tribal license applicants must meet; (c) impose race-based limitations on open competition in Southeastern Massachusetts, while the competitive process of awarding license in the other two regions are untainted by race, (d) require Commissioners to "provide assistance" to the governor is negotiating an unlawful compact; (e) appropriate $5 million to facilitate the negotiation of such a compact; and (f) reserve one seat on the Gaming Policy Advisory Committee for a member of a federally recognized Indian tribe. The Court should

further enjoin Defendants from enforcing the Act to the extent it authorizes Indian tribes to engage in gaming without following the procedures set forth in IGRA.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(d), KG respectfully submits that oral argument will assist the Court's resolution of these issues.

Respectfully submitted,

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