No. 12-1233

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

KG URBAN ENTERPRISES, LLC,

Plaintiff-Appellant,

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-Appellees.

On Appeal from the U.S. District Court for the District of Massachusetts
(No. 1:11-cv-12070-NMG)

APPELLANT'S OPENING BRIEF

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March 21, 2012

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, KG Urban Enterprises, LLC, certifies that it has no parent corporation, and that no publicly held corporation owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over Plaintiff-Appellant KG Urban Enterprises LLC's ("KG") complaint under 28 U.S.C. §§ 1331, 1343(a), and 1367. The district court entered a final order dismissing KG's complaint on February 17, 2012. Add.38a. KG filed a timely notice of appeal on February 21, 2012. JA 7. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court erred by holding that the Commonwealth did not violate the Equal Protection Clause or Massachusetts Declaration of Rights when it granted federally recognized Indian tribes a categorical advantage over all non-tribal applicants in applying for a gaming license in Southeastern Massachusetts.

STATEMENT OF THE CASE

On November 22, 2011, Governor Deval Patrick signed legislation authorizing a significant expansion of legalized gaming in Massachusetts. *See* Act Establishing Expanded Gaming in the Commonwealth, St. 2011, c. 194 ("Act"). The Act authorizes three resort-style casinos. Two of the licenses for those casinos will be awarded on the merits through an open and competitive application process. The third license, however, is explicitly set aside for a federally recognized Indian tribe in the Southeastern region of Massachusetts. That license must be opened for competitive bidding on October 31, 2012, if, but only if, a tribe

does not reach a gaming "compact" with the Commonwealth by July 31, 2012. A tribe that reaches such a compact with the Commonwealth by July 31st can foreclose commercial gaming in the Southeast, simply by meeting the unique state-law conditions imposed by the new Act—regardless of whether it meets *any* of the prerequisites for gaming under the federal Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, such as the possession of sovereign tribal land.

KG is a development company that has invested nearly $5 million in preparing a comprehensive redevelopment plan for a polluted site in downtown New Bedford. Because that site is in the Southeastern region, KG is barred from applying for a gaming license solely because it is not an Indian tribe. The same day the Act was signed into law, KG filed suit against Governor Patrick and the Chairman and Commissioners of the Massachusetts Gaming Commission in U.S. District Court for the District of Massachusetts, alleging that the Act violated the equal protection guarantees of the federal Constitution and Massachusetts Declaration of Rights, and was preempted by IGRA. KG moved for a preliminary injunction barring enforcement of the Act's tribal set-asides. The Commonwealth opposed the motion on the ground that KG's claims were not ripe for review and were unlikely to succeed on the merits.

The district court denied that motion on February 16, 2012. The court rejected the Commonwealth's jurisdictional and procedural defenses, Add.7a-16a, but held that KG had not demonstrated a likelihood of success on the merits, Add.17a-36a. Believing itself bound by precedent, the court concluded that a preference for federally recognized Indian tribes is "political," not racial, and thus subject only to rational basis review rather than strict scrutiny. Add.25a-31a. At the same time, the court identified several significant problems with this doctrine, and noted that it likely would have ruled differently if it "were addressing the issue as one of first impression." Add.28a.

Because KG brought a facial challenge to the Act's constitutionality and "no further briefing or proceedings would affect [the] Court's constitutional analysis," the court entered a final order dismissing KG's complaint. Add.37a. KG filed a timely notice of appeal the next business day, February 21, 2012.

FACTS AND PROCEEDINGS BELOW

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

The Act authorizes a significant expansion of legalized gaming in Massachusetts. The Commonwealth had previously allowed only bingo, wagering on horse and greyhound racing, 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).[1] The Act creates a five-member Massachusetts Gaming Commission ("Commission"), and vests that body with broad authority to oversee gaming in the Commonwealth. *See id.* secs. 3-6.

The Act provides that the gaming licenses in the Eastern and Western regions will be awarded on the merits through an open, competitive application process. The Commission is responsible for "issu[ing] a request for applications" for those licenses. *Id.* sec. 8(a). Applicants must 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; evidence of financial stability; 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). Moreover, no applicant will be "eligible to receive a gaming license" at all unless it

[1] The Act also authorizes one license for a "slot parlor" facility containing up to 1,250 slot machines. *See* Act § 16, secs. 2, 20. Because the challenged set-aside for Indian tribes does not apply to the slot parlor, KG will not address the requirements for obtaining that license.

meets sixteen enumerated criteria, such as: paying a $400,000 application fee, identifying a mitigation plan for infrastructure costs in the host community, and receiving a binding vote from the host community in support of its application. *Id.* sec. 15.

After receiving an application for a gaming license, the Commission must commence an investigation into the applicant's "suitability," including its "integrity, honesty, good character and reputation," its "financial stability," 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; utilizing sustainable development principles; providing high-quality jobs with opportunities for advancement; protecting local businesses in surrounding communities; developing programs to prevent compulsive gambling; 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 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, and compulsive gambling. *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 the Gaming License in Southeastern Massachusetts

None of these finely calibrated regulatory provisions is immediately applicable in the Southeastern region—known as "Region C"—which includes Bristol, Plymouth, Nantucket, Dukes, and Barnstable counties. 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 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, and would need to acquire additional land on the mainland in order to develop a casino. Massachusetts state officials have taken the position that the Aquinnah—by virtue of a 1985 settlement of their land claims—waived any right to conduct gaming on their land in Martha's Vineyard.[2] In all events, the Aquinnah have now made clear that they intend to pursue gaming in the Fall River area, far from any current tribal lands.[3]

The other federally recognized tribe, the Mashpee Wampanoag—whose efforts to open a casino are being backed by the Genting Group, a Malaysian gaming conglomerate[4]—currently possesses *no* Indian lands in Massachusetts. But, under IGRA, any federally approved Indian gaming must take place on

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[2] *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"), *at* http://www.boston.com/news/local/massachusetts/articles/2010/06/09/rival_tribe_says_its_proposed_casino_would_be_better_for_massachusetts/.

[3] *See* George Brennan, *Aquinnah Tribe Considers Fall River Casino*, Cape Cod Times (Mar. 6, 2012), *at* http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20120306/NEWS11/120309842/-1/NEWS.

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

"Indian lands"—*i.e.*, a reservation or other federal land-in-trust. *See* 25 U.S.C. §§ 2702, 2703(4), 2710(d)(1)(C).

Not only do the Mashpee currently lack any "Indian lands," there is no prospect that the tribe will obtain such lands in the foreseeable future. The federal land-in-trust process has been in a state of paralysis since the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009). In *Carcieri*, the Court held that the Indian Reorganization Act—which authorizes the Secretary of the Interior to acquire land in trust "for the purpose of providing land for Indians," 25 U.S.C. § 465—only authorizes the acquisition of land in trust for Indian tribes that were under federal jurisdiction when the statute was enacted in 1934. 555 U.S. at 382. Put differently, the Secretary currently has *no* statutory authority to take land into trust for Indian tribes, such as the Mashpee, that were recognized by the federal government after 1934. Since 2009, there have been various proposals in Congress to overrule *Carcieri* by statute, but all of those efforts have failed.

Even though neither federally recognized tribe in Massachusetts has suitable land on which to conduct IGRA-compliant gaming, Section 91 of the Act grants federally recognized Indian tribes the exclusive right to seek a gaming license in Southeastern Massachusetts at least until July 31, 2012, and likely indefinitely. Section 91(a) 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) (Add.42a). 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 (Add.39a), and requires the Commission to "provide assistance to the governor in negotiating such compact," *id.* § 91(b) (Add.42a). If such a compact is negotiated by July 31, 2012, and approved by the legislature, then the competitive application process in the Southeast will be forestalled permanently. *See id.* § 91(e) (Add.42a).

The Act's requirements for a tribal-gaming applicant to extend the exclusion beyond July 31, 2012, are minimal. Before the Governor can negotiate a compact with a tribe, the tribe need only have "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) (Add.42a). Once those conditions are met, the tribe may negotiate a compact with the Governor which must be "submitted to the [legislature] for approval," along with a "statement of the financial investment rights of any individual or entity which has made an investment to the tribe … for the purpose of securing a gaming license." *Id.* § 91(d) (Add.42a). If the compact is approved by July 31, 2012, then the successful tribe obtains a permanent, region-

wide gaming monopoly in Southeastern Massachusetts. *Compare supra* pp. 4-6 (describing extensive requirements for non-tribal license applicants in the other two regions).[5] If, but only if, a federally recognized tribe does not complete those steps by July 31, 2012, then, "not later than October 31, 2012," the Commission must issue a request for applications for a commercial license in the Southeast, subject to the normal, competitive application process discussed above. *Id.* § 91(e) (Add.42a).[6]

The Act thus effectively grants federally recognized Indian tribes a right of first refusal on a gaming license in the Southeastern region. If a tribe enters into a gaming compact with the governor prior to July 31, 2012, and the legislature approves that compact, then the Commission is barred 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) (Add.42a).

These set-asides build upon prior iterations of the gaming bill that were even more brazen about the legislature's race-based intent. A proposal circulated by

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[5] The license ultimately awarded to the tribe in the Southeast is also 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 may apparently permit gaming in perpetuity.

[6] If the Commission issues a request for applications for a commercial license in the Southeast, Indian tribes would not only be free to compete for that license, but would have a significant *advantage* over other applicants as a result of the work done in connection with their prior compact negotiations.

Senators Stan Rosenberg and Karen Spilka on June 4, 2010, called for one of the three gaming licenses to be a "dedicated license for an approved Native American tribe."[7] 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.

Those prior versions of the Act envisioned giving the tribes the exclusive right to operate a *commercial* casino in the Southeast. Section 91 appeared to have the same intent, as reflected by the Governor's statement immediately after enactment that the Commonwealth wanted "to partner with the [Mashpee] tribe on a commercial license."[8] But, of course, such a race-based set aside of a

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[7] *See* An Act Relative To Gaming in the Commonwealth, § 15(a) (draft proposal of Sens. Rosenberg and Spilka) (June 4, 2010) (attached as Ex. A to Pltf's Mot. for Preliminary Injunction (Dkt. No. 9)); *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"), *at* http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20100609/NEWS/6090323/.

[8] *See* George Brennan, *Tribes Eager to Make Play for Region's Casinos*, SouthCoastToday.com (Nov. 23, 2011), http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20111123/NEWS02/111230324.

commercial license would be blatantly unconstitutional. Thus, the Commonwealth conceded below that Section 91 would not result in the award of any commercial license in the Southeast, but instead would eliminate a commercial license in the region and allow a tribe to embark on the lengthy and uncertain process of taking land-in-trust so that it could ultimately engage in tribal gaming pursuant to IGRA. *See* Dkt. No. 16, at 16 ("Nothing in the Act contemplates issuance of a state license to any tribe or purports to authorize a tribe to engage in gaming without complying with IGRA."). In the interim, the Southeast would lie fallow while gaming moved forward in the other two regions.

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 Massachusetts, 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 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 of 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) (Add.41a). 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. In the other two regions, in contrast, the Act simply awards a seat on the advisory committee to each licensed casino operator. *See* Act § 16, sec. 68(a) (Add.41a) (reserving three seats for "representatives of gaming licensees"). An Indian tribe, however, receives a guaranteed seat *in advance* based solely on race.

C. KG's Redevelopment Proposal for the Cannon Street Station

KG is a development company that specializes in the redevelopment and adaptive re-use of urban brownfield sites. *See* JA 31, ¶ 4. 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. JA 31, ¶ 5; *see also* JA 37, ¶ 9. Many other developers build casinos on undeveloped "greenfield" sites near highway interchanges, but those projects require significant alteration of the natural landscape and the extension of roads, water pipes, power lines, and sewer services to the new sites; they also remain physically isolated from nearby communities. JA 32, ¶ 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. JA 31, ¶ 5.[9] As a result, KG's efforts necessarily focus on specific sites in cities with an industrial history. JA 31, ¶ 4.

[9] 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. JA 32, ¶ 7. That joint venture, with Las Vegas Sands Corporation, invested more than $900 million to convert an abandoned steel plant site into a thriving, multi-use property that includes casino gaming, hotel, entertainment, and retail components. *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. JA 32, ¶ 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. JA 32, ¶ 9. KG determined that this property was 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. JA 32, ¶ 10; *see* JA 37-38, ¶¶ 10-12. KG also concluded that the economically depressed region around New Bedford would benefit greatly from the jobs, development, and tax revenue 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, design firms, a historic preservationist, engineering and project management firms, community outreach advisors, and a team of attorneys. JA 33, ¶ 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. JA 33, ¶ 17. The concept plans include designs for a multi-level casino, a hotel, restaurants, a conference center, retail shops, and an exhibition hall. JA 34, ¶ 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. JA 34, ¶ 21. That figure includes approximately $50 million for a privately financed cleanup of significant environmental contamination on the property. *Id.*

D. KG's Immediate and Irreparable Injury Resulting from the Tribal Set-Asides

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. JA 34, ¶ 20. That investment is specific to the Cannon Street site—it would take years of work and millions of dollars of additional investment to identify another similar property and to prepare a comprehensive development proposal for that site. JA 34, ¶ 23. And KG's investment is not self-sustaining. KG must make escalating monthly payments to keep options open on both the Cannon Street Station property and a replacement site for the current owner of that property. JA 32-33, ¶¶ 11-12.

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 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. JA 34, ¶ 22. Because of the tribal set-asides, however, KG is locked out of the application process for a gaming license until at least July 31, 2012, and may *never* have an opportunity to apply for a license, regardless of the economic merits of its proposal.

The Act's tribal set-asides are also severely distorting the broader competitive landscape in the Southeastern region. Since the Act was passed, five major national gaming operators have announced plans to apply for the gaming license in the Western region, and two of the largest gaming operators in the world (Caesars and Wynn Resorts) have announced ambitious development plans for the Eastern region. JA 47 (Stern Supp. Decl. ¶ 6).[10] The Southeast, however, remains a dead zone for everybody other than Indian tribes. JA 47, ¶ 7. Because of the exclusive opportunity for tribes until July 31, 2012, and the substantial likelihood

[10] The district court found certain statements in Mr. Stern's supplemental declaration to be unduly argumentative, but the court denied the Commonwealth's motion to strike and was willing to consider the factual statements in this declaration.

that those exclusive rights will become permanent, gaming operators and investors have simply steered clear of the Southeast. *Id.*[11]

KG is incurring immediate and irreparable harm as a result of this distortion of competition. KG is an urban redevelopment company, not a casino operator, and its ability to put forth a competitive proposal depends on partnering with a gaming operator and acquiring outside financing. JA 47, ¶ 5. If it were able to obtain a gaming operator partner and additional investors, KG would be taking numerous steps, right now, to improve its development proposal and prepare its license application. For example, KG would be conducting outreach with elected officials, local businesses, and citizens, and would be commencing the lengthy process of obtaining all necessary permits and approvals from the relevant regulatory agencies (which concern wide-ranging issues such as zoning, environmental remediation, traffic mitigation, and historic preservation). JA 47, ¶¶ 9-10. KG would also be preparing more detailed engineering and schematic plans and cost estimates. *Id.*

Moreover, Governor Patrick has made clear that he is actively proceeding with compact negotiations in order to meet the July 31, 2012 deadline. Three

[11] Indeed, industry publications have recognized that "the Mashpee Wampanoag tribe is moving closer to nailing down a monopoly" in the Southeast region. Scott Van Voorhis, *U.S. Regulatory Perspective: Massachusetts Gaming Commission*, Gambling Compliance (Mar. 20, 2012).

hours after signing the Act into law, Governor Patrick met with representatives of the Mashpee Wampanoag Tribe and emphasized that "we want to make sure we do what we can to partner with the tribe on a commercial license," and that work on a compact "will begin as soon as today." *See supra* p.11 n.8. The Commonwealth recently announced that it has hired two law firms and a financial consulting company "to help Gov. Deval Patrick negotiate a potential compact" with the Mashpee.[12] Once those compact negotiations are complete, the tribal gaming monopoly in Southeastern Massachusetts will become permanent, and non-tribal entities such as KG will be irrevocably foreclosed from applying for a license.

Finally, even if 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—KG will still have incurred irreparable harm with ongoing effects. By then, Indian tribes—in particular the Mashpee—will have had a nearly one-year head start to obtain joint venture partners and investors, and work with the Governor and Gaming Commission to prepare their license applications. Even if the Commission ultimately opens the Southeast to competitive applications, the tribes and their commercial partners will have an overwhelming advantage over all other applicants in applying for that license.

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[12] *See* George Brennan, *State Hires Outside Help for Tribe Casino Deal*, Cape Cod Times (Feb. 17, 2012), http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20120217/NEWS/202170326.

E. The District Court's Decision

The day the Act was signed into law, KG brought suit in district court to challenge the constitutionality of the tribal set-asides. KG argued that the categorical tribal preferences violate the Equal Protection Clause and Massachusetts Declaration of Rights, and are preempted by IGRA. KG sought a declaratory judgment and injunctive relief barring enforcement of the tribal set-asides. The Commonwealth opposed the motion on the ground that KG's claims were not ripe for review and were unlikely to succeed on the merits. The district court held a hearing on KG's motion for preliminary injunction on January 31, 2012, and denied that motion on February 16, 2012.

The court rejected nearly all of the Commonwealth's jurisdictional and procedural defenses. Add.7a-16a. First, the court rejected the Commonwealth's argument that KG's claims were not ripe because the Gaming Commission had not yet issued a request for applications from non-tribal applicants in any of the three regions. The court found that the "unsettled constitutionality of the legal provisions at issue" was hindering "not only the compact negotiation process but also region-wide investment in [Southeastern] casino developments." Add.10a. The collateral effects of that uncertainty were "felt acutely by KG Urban, which must decide whether to expend substantial resources to exercise options on and redevelop the Cannon Street Property." *Id.* All of those resources would be

"wasted" if the court postponed resolution of KG's claims until a later date. The court further noted that KG's claims were ripe because "Governor Patrick has already begun negotiations with an Indian tribe but is currently foreclosed from entering into similar negotiations with private entities." Add.10a-11a.

The court next found that KG had standing to challenge the Act's tribal preferences. By "expending $4.6 million to redevelop the Cannon Street Property and by creating a sophisticated urban gaming model in connection with that site, KG Urban has demonstrated that it is 'able and ready' to compete" for a gaming license, and "would be a competitive candidate if it were given the chance to compete." Add.12a.[13] The court also rejected the Commonwealth's assertion of sovereign immunity, finding that the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), applies only to suits "brought against state officials to enforce IGRA," and has no applicability to claims brought under the Constitution. Add.14a-15a. Finally, the court concluded that abstention was unwarranted because there was no "substantial[] uncertain[ty]" about the meaning of the challenged provisions of the Act. Add.16a.

[13] The court held, however, that KG lacked standing to challenge the reservation of a seat on the Gaming Policy Advisory Committee for a member of a federally recognized Indian tribe because "[t]he complaint does not allege that any of KG Urban's employees or agents has been denied appointment" to that committee. Add.13a.

The court concluded, however, that KG was unlikely to prevail on the merits of its claims. Although it acknowledged that members of an Indian tribe generally "share the same racial heritage," the court held that the Act's tribal set-asides reflected a "political," not racial, classification that was subject only to rational basis review. Add.25a-31a. Were the court addressing this issue "as one of first impression," it would have held that "[l]aws granting gratuitous Indian preferences," such as "a law granting tribes a quasi-monopoly on casino gaming," were subject to strict scrutiny. Add.28a-29a. Indeed, the court "share[d] the plaintiff's frustration" and noted that application of the rational basis standard "undermine[d] the constitutional requirement of race neutrality." Add.32a, 36a. But, believing itself bound by decisions such as *Morton v. Mancari*, 417 U.S. 535 (1974), the court held that the Act's tribal preferences were political classifications subject only to rational basis review. Add.29a-36a.

The court also rejected KG's claims that the Act was preempted by IGRA, concluding that "the Gaming Act does not create a separate tribal gaming regime in Massachusetts but rather establishes the procedures by which IGRA-authorized compacting may take place under Massachusetts law." Add.21a. The court further held that there was no conflict between the Act and IGRA because nothing in the Act exempted Indian tribes from the many prerequisites to tribal gaming

established by IGRA—such as the requirement that any gaming be conducted on Indian land. Add.17a-24a.

Because KG brought only a facial challenge to the Act's constitutionality and "no further briefing or proceedings would affect [the] Court's constitutional analysis," the court dismissed KG's complaint. Add.37a. KG filed a timely notice of appeal the next business day, February 21, 2012.

SUMMARY OF ARGUMENT

The Act violates the Equal Protection Clause and Massachusetts Declaration of Rights because it explicitly treats applicants for a gaming license differently on the basis of race. 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 gaming license in the Southeastern region. During that period, non-tribal applicants such as KG are barred from applying for a license, regardless of the economic merits of their proposals. If a tribe reaches agreement on a "compact" before July 31, 2012, and meets a few other state-law conditions, it will obtain a permanent, region-wide gaming monopoly, and non-tribal entities will be irrevocably locked out of the Southeast. Indeed, it appears that if the legislature approves a tribal compact by July 31, 2012, then no commercial license will ever issue for the Southeast. In all events, the Act makes

crystal clear that, unless such an exclusive compact is approved, the open, competitive application process for a commercial license in the region must commence on October 31, 2012.

Because the Act, on its face, allocates valuable government benefits based on the race of the applicant, it must satisfy strict scrutiny—an exacting standard of review that the Act's tribal set-asides cannot remotely meet. It is a bedrock principle of equal protection jurisprudence that a race-based policy is not narrowly tailored if it categorically forecloses consideration of certain applicants solely because of their race. Yet that is precisely the effect of the challenged provisions of the Act. The sole reason KG cannot apply for a gaming license is because its owners do not belong to the preferred racial group.

The district court "share[d] the plaintiff's frustration," and noted that it likely would have ruled in favor if KG if it were "addressing the issue as one of first impression." Add.28a, 32a. But the court believed it was bound by precedent to treat a state's categorical preferences in favor of Indian tribes as a "political" classification rather than a racial one; the court thus applied the far-more-lenient "rational basis" standard of review, instead of strict scrutiny. That holding was plainly incorrect. The Indian Commerce Clause of the Constitution grants the *federal* government authority to legislate with respect to Indian tribes—and, accordingly, to treat those tribes as "political" entities—but states have no

analogous constitutional authority. A state may single out Indian tribes for differential treatment only if it is legislating pursuant to *explicit authority* granted by Congress.

The district court suggested that IGRA granted the Commonwealth that explicit authority. But the court overlooked the critical fact that nothing in IGRA authorizes Section 91 or its unprecedented authorization for tribes to foreclose commercial gaming based not on federal tribal gaming rights but on race alone. Any tribal gaming rights under IGRA are premised on the notion of tribal sovereignty *on Indian land*. Simply put, a tribe that has no Indian land has no rights under IGRA. Nothing in federal law remotely justifies or authorizes a state-law preference in favor of such a tribe, nor does it authorize a state to delegate to Indian tribes the ability to foreclose commercial gaming applications by non-tribal entities. Thus Section 91 cannot be justified as a mere implementation of IGRA and must satisfy strict scrutiny. The Commonwealth has never even advanced an argument that Section 91 satisfies that demanding standard.

Finally, the Commonwealth's reconceptualization of Section 91 as a gateway to tribal gaming under IGRA does not save the law, but only highlights its unfair impact on the Southeast. In the Commonwealth's view, Section 91 does not create an exclusive commercial license for tribes (for that would be obviously unconstitutional). Instead, the Commonwealth asserts that Section 91 only

provides a process that locks out any commercial gaming in the Southeast while the approved tribe embarks upon the long and uncertain process of attempting to obtain land in trust on which to conduct IGRA-compliant gaming—assuming the Secretary of the Interior even has authority to take land into trust for newly recognized tribes after *Carcieri*, which is unlikely.

While that conception of the Act may make its constitutional defects slightly less obvious, it does not eliminate the constitutional problems. The "pre-compact" envisioned by the Attorney General—that sets the terms of IGRA-compliant gaming that may take place years from now, if ever, while eliminating any commercial license in the interim—has no basis in federal law. Whether or not IGRA preempts such a law, it certainly does not *authorize* it such that the state can seek shelter in the special federal authority over tribes which derives from the Indian Commerce and Treaty Clauses. As such, the Act must rest on the Commonwealth's own authority and satisfy strict scrutiny. It does not come close. It is certainly not necessary to facilitate the federal system, as evidenced by its novelty and lack of basis in IGRA. Moreover, its dramatic effect on the Southeast (not to mention KG) in which commercial gaming applications are put on hold based on race-based government action that may or may not result in a tribal casino some day is not remotely justified.

In sum, there is no "Indian gaming" exception to the Equal Protection Clause. This Court should reverse the judgment of the district court and remand with instructions to enter judgment in favor of KG and permanently enjoin the Act's tribal set-asides.

STANDARD OF REVIEW

The district court's dismissal of KG's complaint turned on the court's resolution of questions of law, *see* Add.10a, and is reviewed *de novo*. *See State Street Bank & Trust Co. v. Denman Tire*, 240 F.3d 83, 87 (1st Cir. 2001).

ARGUMENT

I. THE ACT'S TRIBAL-SET ASIDES ARE RACE-BASED PREFERENCES THAT FAIL STRICT SCRUTINY

A. The Act Employs Explicitly Race-Based Classifications That Must Satisfy Strict Scrutiny

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 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 Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors 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 concession to members of one racial group. In contrast to the open competition on the merits in the Eastern and Western regions of the Commonwealth, until July 31, 2012, only federally recognized Indian tribes may seek a gaming license in the Southeastern region. *See* Act § 91(e) (Add.42a). A tribe may convert that temporary exclusion into a permanent one by meeting a few additional state-law conditions and entering a "compact" with the governor that is approved by the legislature by July 31, 2012. *Id.* § 91(c)-(e) (Add.42a). The Act allocates $5 million to the governor to ensure its negotiation, *see id.* § 2A (Add.39a), and obligates 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) (Add.42a). 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.

In addition to its discrimination against non-tribal gaming *applicants* on the basis of race, the Act also disadvantages an entire *region* of the Commonwealth based solely its proximity to Indian tribes. Because the Southeast is located near two federally recognized Indian tribes that might seek to pursue gaming at some point in the future, the Act shuts down the Southeast to all non-tribal competition and gives those tribes a right to ensure that a commercial license is not awarded while a tribe pursues the long and uncertain process of attempting to obtain the land-in-trust that is necessary for IGRA-compliant gaming—even assuming the Secretary still has authority to take land into trust after *Carcieri*, which is unlikely. As a result, the citizens of the Southeastern region will lose out on the greater job creation and economic development that would result from an open, fair, and merit-based competition for the gaming license.

The scrutiny that applies to the Act's classifications is no less strict because the racial preference at issue favors Native Americans, as opposed to a different racial group. While the *federal* government has explicit constitutional authority to "regulate Commerce … with the Indian Tribes," U.S. Const. art. I, § 8, states have no special constitutional license to treat 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). 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 to regulate commerce with Indian tribes. It is well established 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." *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).[14]

Indeed, 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

[14] 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).

agency's construction would be entitled to deference under normal administrative law principles, the court rejected the 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 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.[15] That is especially true of a provision, like Section 91 of the Act, which addresses tribes that do not have any Indian lands suitable for gaming. Whatever scope there is for treating gaming *on sovereign Indian lands* differently from other gaming, there is absolutely no justification for granting tribes race-based set asides for gaming on sites that are not now and may

[15] "Uniquely" Indian interests generally include matters that relate to tribal governance or ceremonial practices. *See Mancari*, 417 U.S. at 554 (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 v. Thornburgh*, 922 F.2d 1210, 1214-16 (5th Cir. 1991) (rejecting challenge to exemption from ban on possession of peyote for the Native American Church).

never be Indian lands, but are ordinary commercial real estate. Federally recognized tribes' federal right to engage in certain gaming activities is entirely derivative of the special status of sovereign Indian land and the limitations on state law enforcement authority over those lands.

A preference for tribes which allows them to freeze out commercial competition while they pursue the difficult effort to obtain land-in-trust suitable for gaming cannot be justified by anything in federal law. And the Act disfavors 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 and no prospect of obtaining such land any time soon, if at all. The Act then completes the 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. Indeed, even the district court noted that the Act adopts "gratuitous Indian preferences" that are "divorced" from any uniquely Indian interests. Add.29a.

At least three federal courts have applied strict scrutiny to state or local ordinances creating similar preferences or set-asides for Native Americans. In *Tafoya v. Albuquerque*, 751 F. Supp. 1527 (D.N.M. 1990), the 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.*

Similarly, in *Kornhass Construction 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 *Mancari*, the state argued 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; *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").

B. The District Court's Application of Rational Basis Review Was Based on a Misreading of Precedent and a Misapplication of IGRA

The district court "share[d] plaintiff's frustration" with the Act's "gratuitous" tribal set-asides, and noted that it likely would have applied strict scrutiny if it were addressing the issue "as one of first impression." Add.28a-29a, 32a. The court nonetheless believed it was bound by precedent to apply rational basis review because the tribal preferences were based on "political," rather than racial, classifications. Add.25a-36a. That holding was clearly erroneous.

1. At the outset, both of the federally recognized Indian tribes in Massachusetts have membership criteria that are explicitly based on ancestry—*i.e.*, race. The Aquinnah limit enrollment to "[a]ny person who can document their direct lineal descent from a specifically identified" tribal member, and the Mashpee limit membership to "[p]ersons who trace lineal descent" to certain 19th-

century individuals.[16] Granting those tribes a preference over all other gaming applicants is no different from a categorical preference for Italian-Americans, Latinos, or Mayflower descendants. KG is ineligible to apply for a gaming license until July 31, 2012, at the earliest, and likely permanently, solely because its owners do not belong to the preferred racial group. There is nothing "political" about this.

The cases the district court believed to be controlling do not support treating the Act's tribal preferences as "political" classifications. *Mancari* is readily distinguishable because it involved the "*sui generis*" context of the federal Bureau of Indian Affairs, which governs the "lives and activities" of Indian tribes in a "unique fashion." 417 U.S. 554-55. The hiring preferences at issue in that case were thus permissible because they were "directed to participation by the governed in the governing agency." *Id.*

More importantly, those preferences were adopted by the *federal* government, which has explicit constitutional authority to legislate with respect to Indian tribes. Nothing in *Mancari* remotely suggests that the federal government's ability to treat tribes as political entities allows states to do so as well and evade

[16] *See* Wampanoag Tribe of Gay Head, Membership Enrollment, http://www.wampanoagtribe.net/Pages/Wampanoag_Member/index; Enrollment Ordinance of the Mashpee Wampanoag, http://mashpeewampanoagtribe.com/MWTEnrollmentOrdinance.pdf.

strict scrutiny. The Indian Commerce and Treaty Clauses allow "the Federal Government to enact legislation singling out tribal Indians" that "might *otherwise* be constitutionally offensive." *Yakima*, 439 U.S. at 500-01 (emphasis added). The word "otherwise" is key, as it underscores that the federal government can address Indian tribes through legislation that would be unconstitutional if enacted by a state. States "do not enjoy [the] same unique relationship with Indians" as the federal government, *id.* at 501, and have no constitutional authority to single out either Indian tribes (federally recognized or not) or individual Native Americans for differential treatment. A state may treat Indian tribes differently only if it is "legislating under *explicit authority* granted by Congress in the exercise of that federal power [over Indian tribes]." *Id.* (emphasis added).

2. The district court further erred in concluding that IGRA provides such "explicit authority" for the Act's tribal preferences. Add.29a-31a. Nothing in IGRA remotely authorizes the Commonwealth's adoption of the wholly unprecedented Section 91 approach to tribes.

After years of negotiations between "tribes, States, the gaming industry, the administration, and the Congress," IGRA was enacted in 1988 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."). IGRA's connection to Indian lands is not incidental; it is the *raison d'etre* of the statute. Indeed, IGRA was a

direct response to the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which had called into question states' authority to regulate gaming *on Indian lands*. Congress responded to that decision by enacting a comprehensive scheme to give states additional authority to regulate gaming on Indian lands, while also recognizing tribes' continuing sovereignty.

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). A gaming compact "shall take effect" only after it is reviewed and approved by the Secretary of the Interior. *Id.* § 2710(d)(3)(B). IGRA further 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).[17]

[17] 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

Before approving a gaming ordinance, the Chairman must 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). IGRA 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).[18]

As the Ninth Circuit has explained, "IGRA pertains *only to Indian lands*," and "regulates activities *only on Indian lands*." *Artichoke Joe's v. Norton*, 353 F.3d 712, 735 (9th Cir. 2003) (emphases added). This limitation is "critical," given the "well-established connection between tribal lands and tribal sovereignty." *Id.* A tribe's "governing powers and economic rights extend only as far as the borders of Indian lands," and the tribes "shed their sovereignty" once "outside" those lands. *Id.*

The district court's reliance on the Ninth Circuit's *Artichoke Joe's* decision, *see* Add.30a-33a, is thus plainly misplaced. That decision holds in no uncertain

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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).

[18] 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).

terms that tribal sovereignty is inextricably linked to Indian lands, and that the federal rights granted by IGRA extend no farther than those lands.[19] The Act's tribal preferences, however, are entirely unmoored from Indian land. Indeed, under the Act, even a tribe with no Indian lands *at all*—such as the Mashpee Wampanoag—is granted a right of first refusal on the gaming license in the Southeast, and has the ability to prevent a commercial license from ever issuing to a non-tribal entity.

Moreover, the Act contemplates granting a tribe a permanent gaming monopoly not only on Indian lands, but throughout one-third of the entire state. It does so not through some race-neutral rule that prohibits two casinos in close proximity, but through a race-based exclusive right to negotiate which can then be extended by permanently foreclosing the issuance of a commercial license in the Southeast. The Act thus deprives an entire region of the Commonwealth of the benefits resulting from full and fair competition for a gaming license, solely because there are Indian tribes in that region that might, someday, be able to engage in IGRA-compliant gaming. The Commonwealth has attempted to defend

[19] Like *Artichoke Joe's*, *United States v. Garrett*, 122 Fed. App'x 628 (4th Cir. 2005), addressed IGRA-compliant gaming *on existing Indian lands*. Neither case, moreover, addressed a state statute that authorized *any* commercial gaming, let alone a state statute that presumptively authorized commercial gaming, but then gave tribes without sovereign land preferential treatment amounting to an effective right of first refusal to foreclose all non-tribal gaming in a large area of the state.

these tribal preferences as a recognition of the "rights of tribes under IGRA," *see* Dkt. No. 16 at 11, but a tribe with no federal land-in-trust simply has no "rights" under IGRA and nothing in IGRA purports to give tribes the right to foreclose commercial gaming.

Implicitly recognizing that a preference for landless tribes does not advance the federal policies embodied in IGRA, the Commonwealth also argued below that the Act addresses the "*possibility* that a tribe may get federal approval to open a casino on *current or future Indian lands*." *Id.* at 10 (emphasis added). IGRA is about actual Indian lands, not potential Indian lands. But, in any event, nothing in IGRA remotely permits a state to shut down any and all commercial gaming in one-third of its territory while a tribe attempts to complete the onerous and time-consuming land-in-trust process. The *Carcieri* decision likely forecloses the Secretary of the Interior from taking *any* land into trust for tribes, such as the Mashpee and Aquinnah, that were recognized by the federal government after 1934. *See* 555 U.S. at 387-96. But even if the Secretary still possessed such authority, the land-in-trust process can take a decade or longer, and often draws fierce opposition from citizens, environmental groups, and state and local governments.[20] The Equal Protection Clause may not bar a state from taking steps

[20] Ironically, even before *Carcieri* significantly curtailed the federal land-in-trust process, Massachusetts *opposed* an application by the Mashpee to have land taken into trust, thus impeding the tribe from meeting a critical precondition to

to accommodate the IGRA process, but it surely prohibits a state from effectively authorizing Indian tribes to shut down commercial gaming applications in an entire region just because one day, at some indeterminate point in the future, one of those tribes *might* be eligible for IGRA-compliant gaming.

Finally, the district court held that Section 91 did "nothing more" than legislation in California and North Carolina that was designed to implement the IGRA compacting process, and that was upheld against equal protection challenges in *Artichoke Joe's* and *Garrett*. Add.30a-31a. Not so. Neither California nor North Carolina authorized *any* commercial gaming; those states simply allowed Indian tribes to conduct IGRA-compliant gaming *on Indian land*. California and North Carolina did not give state-law preferences to any tribes, much less landless tribes, nor did they grant tribes the ability to shut down all commercial gaming throughout an entire region of the state. A state law that allows a tribe to block the award of a commercial gaming license—and, indeed, to block non-tribal entities from even *applying* for a commercial gaming license—while the tribe pursues the uncertain and lengthy process of bringing land into trust is an unprecedented maneuver that is plainly not authorized by IGRA and cannot be squared with the Equal Protection Clause.

IGRA-compliant gaming. *See* Massachusetts Comments on Mashpee Wampanoag Land-in-Trust Application (Feb. 5, 2008) (opposing application because of concerns regarding, *inter alia*, "environmental compliance," traffic, and "exempt[ions of] certain activities on those lands from state and local laws").

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In sum, nothing in IGRA grants the Commonwealth *any* authority—much less "explicit authority," *Yakima*, 432 U.S. at 501—to award categorical, state-law gaming preferences to landless tribes, or to confer on tribes a region-wide monopoly throughout one-third of the state that extends far beyond any actual (or even potential) Indian lands. Nor does it authorize the Commonwealth to block all commercial gaming applications while a tribe attempts to negotiate a gaming compact and obtain land-in-trust. Without specific delegated authority from Congress, the Commonwealth has no more power to grant preferences to Indian tribes than to any other racial or ethnic group. Those tribal set-asides must rest on Massachusetts' own authority and satisfy strict scrutiny.

C. The Act Does Not Remotely Satisfy Strict Scrutiny

The Commonwealth has not once attempted to defend the Act's tribal set-asides under strict scrutiny. Nor can it. The typical compelling interest used to justify race-based preferences—a documented history of racial discrimination, identified "with some specificity" in a particular context, *see City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504 (1989)—is completely inapposite here. 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. Indeed, 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, 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 unique context of education—where "diversity" itself has been deemed a compelling interest, *see Parents Involved*, 551 U.S. at 722-25—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 Gratz*, 539 U.S. at 270-76 (any application process must provide "individualized consideration" to all applicants and cannot make race a "decisive factor").

That is precisely the case here. The Act creates a two-track process for obtaining a 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. Right now, federally recognized tribes can negotiate with the Governor to obtain a state-law compact that will foreclose commercial competition in the Southeast, regardless of whether that compact has been approved at the federal level by the Secretary of the Interior. But KG is ineligible to negotiate with the Governor unless it partners with a federally recognized tribe. Section 91 thus creates a stark, two-track system where the only determining factor is race. 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 the other two regions of Massachusetts. KG selected the New Bedford site because of its location and unique characteristics, which are ideally suited to KG's business model. JA 32, ¶¶ 9-10. In any event, the fact that a person who is denied a particular government benefit could apply for some *other* benefit cannot save a facially discriminatory policy. *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"). The Act fails strict scrutiny because KG is "totally excluded" from applying for the license in the Southeastern region, *id.* at 319, solely because of the race of its owners.

Finally, the Commonwealth cannot point to compliance with IGRA as a justification for Section 91. Compliance with a federal statute is not a compelling interest that would justify a race-based set-aside, but even if it were, Section 91 cannot be defended as necessary to comply with IGRA. As explained above, no other state has enacted anything like Section 91. Granting a tribe the right to block the award of a commercial gaming license while the tribe pursues the uncertain and lengthy process of bringing land into trust is a complete novelty. IGRA neither requires nor justifies that approach. Section 91 is the Commonwealth's own

invention and therefore it must satisfy the demanding standard for state laws classifying based on race, not the relaxed standard for federal laws. The Commonwealth has never even tried to satisfy that demanding burden.

D. The Act Independently Violates the Massachusetts Declaration of Rights

In general, "[t]he 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, for all of the reasons set forth above, this Court should hold that the Act's tribal set-asides violate *both* the federal Equal Protection Clause and the Declaration of Rights.

But the equal protection guarantee of the Declaration of Rights appears to be even more protective than the federal rule in circumstances in which a state can avoid strict scrutiny only by seeking shelter behind the more relaxed standard of review for certain federal actions. There are two situations in which federal action is subject to more forgiving scrutiny than state action based on the federal government's unique constitutional powers over the subject matter: tribes and alienage. The Massachusetts Supreme Judicial Court has narrowly limited the Commonwealth's ability to evade strict scrutiny in the latter context, and that approach logically should apply to the former as well.

In *Finch v. Commonwealth Health Insurance*, 959 N.E.2d 970, 982 (Mass. 2012), the Supreme Judicial Court addressed whether the Declaration of Rights prohibits the Commonwealth from denying health care premium subsidies to certain lawful aliens. As with Indian tribes, a state may single out aliens for differential treatment only if it is directly implementing federal policy. *See id.* at 981-82; *supra* p.31 n.14. In contrast, when a state "*acts on its own authority*, it cannot shelter behind the existence of Congress's plenary authority and its actions are subject to strict scrutiny review." 959 N.E.2d at 981. In *Finch*, the Commonwealth's primary defense to the plaintiffs' equal protection claims, mirroring its defense here, was that it was simply implementing federal law, by denying benefits to aliens who were ineligible for federal benefits. The Supreme Judicial Court squarely rejected that argument.

The court held in no uncertain terms that only a state program that is "mandated by a uniform [federal] rule" can escape strict scrutiny on the ground that the state law is needed to comply with federal law. *Id.* at 982. In contrast, an "independent" or "noncompulsory" state program that discriminates on the basis of alienage must meet strict scrutiny. *Id.* at 981-82. Just so here. Given that IGRA addresses only gaming *on Indian lands*, the Act's set-asides—which apply to tribes that have no land in trust and grant a region-wide monopoly that extends far beyond Indian lands—are not in any way "mandated" by the IGRA regime. To the

contrary, those preferences are simply a "noncompulsory" state program that must rest on the Commonwealth's own authority and must satisfy strict scrutiny. Indeed, the Act's set-aside is unique and unprecedented, and not even the Commonwealth suggests it is required by IGRA.

The district court did not cite or attempt to distinguish *Finch*, even though KG brought this recent decision to the court's attention in a supplemental filing shortly after the Supreme Judicial Court issued its decision. *See* Dkt. No. 19. The district court held that, as a matter of *federal law*, KG had cited "little authority" for adopting a test based on whether the state law was "'mandated by a federal scheme.'" Add.32a-33a. But *Finch* is a state-law case interpreting the Massachusetts Declaration of Rights and, as explained above, its reasoning strongly suggests that the Supreme Judicial Court would apply a similar test in analyzing whether a preference for Indian tribes is consistent with Massachusetts law. In light of *Finch*, this Court should hold that the Act's tribal preferences are not mandated by any uniform federal program, and thus violate the Massachusetts Declaration of Rights.

None of this may matter because the federal test for when state action can escape strict scrutiny is already more demanding than the Commonwealth can satisfy. Under federal equal protection jurisprudence, a state law granting preferences to Indian tribes is subject to strict scrutiny unless it is was adopted

pursuant to "explicit authority granted by Congress." *Yakima*, 439 U.S. at 501. The Commonwealth cannot satisfy that standard for the reasons already explained, *see supra* pp. 37-43, but *Finch* strongly suggests that the circumstances in which the Commonwealth can escape strict scrutiny under the Massachusetts Declaration of Rights are narrower still. Thus, if this Court concludes that Section 91 is subject only to rational basis review under *Yakima*, it should nonetheless apply strict scrutiny under the Massachusetts Declaration of Rights.

E. The Set-Aside for a Seat on the Gaming Policy Advisory Committee Violates the Equal Protection Clause

The Act 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) (Add.41a). 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. For example, the Commonwealth could have awarded 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) (Add.41a) (reserving three seats for "representatives of gaming licensees"). But there is no reason to reserve a seat *in advance* based on race. To the extent the set-aside reflects the legislature's assumption that its racial preference in the Southeastern region will inevitably result in the award of that region's license to an Indian tribe, this only underscores the Act's unconstitutionality.

The district court held that KG did not have standing to challenge the composition of the Gaming Policy Advisory Committee because none of its "employees or agents" had been denied appointment to that committee. Add.13a. But that is not the relevant test. The Supreme Court has made clear that an individual subject to the jurisdiction of a regulatory agency 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). As a potential applicant for a gaming license, KG surely has a "concrete interest" in ensuring that all appointments to the relevant commissions, boards, and committees that will oversee casino gaming are conducted in a lawful and race-neutral manner.

II. IF THE ACT CONTEMPLATES GRANTING TRIBES A GAMING LICENSE OUTSIDE OF THE IGRA PROCESS, THEN IT IS PREEMPTED BY FEDERAL LAW

As explained above, a tribe seeking to engage in gaming under IGRA must meet numerous requirements, such as obtaining federal approval of a compact and gaming ordinance, and possessing Indian lands. *See supra* pp. 37-39. It is far from clear whether the text of the Act requires tribes to meet these requirements before engaging in gaming. What is more, the Governor suggested that Section 91 actually permitted the award of an exclusive commercial license. *See supra* p.11 n.8. KG thus brought a preemption claim in district court, arguing that, to the extent the Act permits gaming outside of the IGRA process, it squarely conflicts with federal law and is thus preempted. *See* Dkt. No. 9, at 29-37.

In response, the Commonwealth conceded that "[n]othing in the Act contemplates issuance of a state license to any tribe or purports to authorize a tribe to engage in gaming without complying with IGRA." *See* Dkt. No. 16, at 16. The

district court accepted that concession and concluded that the Act merely "establishes the procedures by which IGRA-authorized compacting may take place under Massachusetts law." Add.21a; *see id.* 21a-22a (Act "does not purport to supersede the federal procedures required under IGRA"). Based on that reading of the Act, the district court rejected KG's preemption claims.

It is not at all clear that this is the best reading of the Act. Indeed, the legislative history suggests that one goal of the Act was to *circumvent* the IGRA process, thus allowing the Commonwealth to obtain more tax revenue that it would have received if a tribe engaged in IGRA-compliant gaming. *See* Dkt. No. 9, at 33-34.[21] But the meaning of the Act is a question of state law, and the district court accepted the Commonwealth's concession that any tribal gaming must comply with IGRA. This Court should explicitly affirm the district court's holding that any tribal gaming under the Act must be conducted in full compliance with all relevant requirements of IGRA. Any interpretation of the Act that authorizes Indian gaming outside of the IGRA framework—or treats one federally recognized

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

tribe more favorably than another[22]—would necessarily conflict with IGRA, and therefore be preempted under the Supremacy Clause.

III. KG MEETS THE REMAINING REQUIREMENTS FOR ENTRY OF A PERMANENT INJUNCTION

As the district court recognized, this case turns on issues that are "entirely legal in nature." Add.10a. If this Court concludes that the Act's tribal set-asides are unconstitutional, it should remand with instructions to enter judgment in favor

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[22] It is unclear from the text of the Act what would happen if *both* federally recognized tribes claimed the set-asides in Section 91. The Commonwealth seems to assume that only one tribe will ultimately receive a regional monopoly in the Southeast. In defending the Act under rational basis review, the Commonwealth asserted that "[t]he legislature could rationally conclude that it was in the public interest to promote economic development opportunities by allowing *up to one* [] casino in each of the three regions … but *not to have more than one* such gaming establishment in any region." Dkt. No. 16, at 14 (emphasis added). But that explanation of Section 91 seems much more consistent with a law giving the tribes a racial preference for the single commercial license to be awarded in the Southeast, an interpretation of the Act the Commonwealth disclaims. *See id.* at 16. If Section 91 is simply a gateway to the federal IGRA process, it could hardly be interpreted to give one federally recognized tribe a preference over the other. Indeed, if the Commonwealth invokes the Act to *prohibit* one of the two tribes from engaging in gaming, this would result in an unequivocal conflict with IGRA—a state surely cannot purport to implement a federal statute by granting a tribe *fewer* rights than it would have under IGRA alone. Nor could Section 91 permissibly be construed to be the exclusive means by which a federally recognized tribe could seek to engage in tribal gaming. Federal law gives tribes with suitable lands a federal right to pursue IGRA-compliant gaming, and a state could not impose its own deadline, such as July 31, 2012, to use or lose those federal rights. But since federal law gives tribes unique rights to pursue gaming wholly independent of Section 91, the state-law conferral of a right to foreclose the commercial gaming opportunities of others based on the satisfaction of state-law predicates (but not federal law ones) becomes even more curious.

of KG and permanently enjoin the challenged provisions. Time is of the essence, and KG readily satisfies the criteria for entry of such relief. *See Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010) (plaintiff seeking a permanent injunction must demonstrate irreparable injury, inadequate remedies available at law, that the balance of hardships tips in his favor, and that the public interest would be served by an injunction).

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 Association for Fairness in Business v. New Jersey*, 82 F. Supp. 2d 353, 363 (D.N.J. 2000) (finding irreparable injury where plaintiffs were forced to "compete on an unfair playing field" as a result of a set-aside program); *O'Donnell Construction v. District of Columbia*, 963 F.2d 420, 422 (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 v. NASA*, 950 F. Supp. 357, 363 & n.5 (D.D.C. 1996) (finding irreparable injury because, without an injunction, the plaintiff would be "excluded from competing" for a contract because of the challenged "set-aside process").

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, 398 (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 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 Industries 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, by itself, both the constitutional violation and the irreparable harm. The fact that KG will be denied this opportunity after having invested millions of dollars and years of work in preparing its redevelopment proposal further reinforces both the gravity and irreparability of its injury. JA 32-34, ¶¶ 11-16, 20. Moreover, the tribal preferences are severely distorting competition in the

Southeast, right now. Because of those preferences, gaming operators and investors have simply steered clear of non-tribal gaming projects in the Southeast, thus hindering the viability of any such project even if the gaming license in the Southeast is ultimately opened to competitive bidding. JA 47-48, ¶¶ 5-12.

The balance of equities here is not even close. KG seeks 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. Indeed, 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 gaming license based on the economic merits of their respective proposals. In contrast, KG faces severe harm if injunctive relief 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.

Finally, permanently enjoining the Act's tribal set-asides is in the public interest. 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. The overarching public interest lies in ensuring that valuable government benefits are awarded on the merits through an open, fair, and truly competitive process. *See*

CRAssociates, 95 Fed. Cl. at 391; *see also* JA 41, ¶¶ 9-11 (New Bedford City Council members explaining that the Act "deprives the local officials and citizens of [the Southeast] of the opportunity to support the best gaming proposal on the merits," and that "[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").

Casino gaming is going to have a tremendous influence on the economy of Massachusetts in coming years—implicating issues of job growth, tax collection, local redevelopment, environmental sustainability, and law enforcement—and the public has a powerful interest in ensuring that the operators of those casinos are chosen based on the merits of their proposals rather than the race of their owners.

CONCLUSION

The judgment of the district court should be reversed, and the case remanded with instructions to enter judgment in favor of KG.

Respectfully submitted,

March 21, 2012

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that this brief complies with the type-volume limitations in Federal Rule of Appellate Procedure 32(a)(7), because this brief contains 13,934 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14 point Times New Roman font.

/s/ Paul D. Clement

Addendum

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United States District Court
District of Massachusetts

KG URBAN ENTERPRISES, LLC, Plaintiff,	)	
v.	)	Civil No. 11-12070-NMG
GOVERNOR DEVAL PATRICK and CHAIRMAN AND COMMISSIONER OF THE MASSACHUSETTS GAMING COMMISSION, in their official capacities, Defendants.	)	

MEMORANDUM & ORDER

GORTON, J.

Plaintiff KG Urban Enterprises, LLC, a casino development company, challenges provisions of the Act Establishing Expanded Gaming in the Commonwealth which 1) authorize the Governor of the Commonwealth to enter into a Tribal-State casino gaming compact with a federally recognized Indian tribe, 2) appropriate $5 million dollars to facilitate the process and 3) require that at least one member of the Commonwealth's Gaming Policy Advisory Committee be a representative of a federally recognized Indian tribe. The plaintiff alleges that such provisions violate the Equal Protection Clauses of the United States Constitution and the Massachusetts Declaration of Rights and are pre-empted by the Indian Regulatory Gaming Act.

I. Background

A. The Indian Gaming Regulatory Act

In California v. Cabazon Band of Mission Indians, 480 U.S. 202, 212 (1987), the Supreme Court held that states lack the federal statutory authority to regulate gaming on Indian lands.[1] In response, Congress enacted the Indian Regulatory Gaming Act ("IGRA") the following year to establish a statutory basis for Indian gaming on Indian lands, to allow for federal and state regulatory oversight, to shield such gaming from corrupting influences, to clarify that Indian tribes are to be the primary beneficiaries of gaming operations and to ensure that gaming is conducted fairly and honestly. 25 U.S.C. § 2702 (2006).

IGRA creates three categories of gaming and correspondingly ratchets up the level of regulatory oversight commensurate with the stakes involved. Class I gaming, which includes social games with small prizes and traditional forms of tribal gambling, is subject to exclusive regulation by Indian tribes. Id. §§ 2703(6), 2710(a)(1). Class II gaming, which includes bingo and some card games, is subject to joint regulation by tribal authorities and the federal government. Id. §§ 2703(7), 2710(a)(2). Class III gaming is a catch-all category which captures all forms of gaming, including high-stakes gaming, that fall outside the

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[1]This Memorandum and Order will use the term "Indian" instead of "Native American" because the former term is used in the subject statutes and the governing caselaw.

previous two categories. Id. § 2703(8).

At issue in this case is Class III gaming, otherwise known as casino-style gaming, the most heavily regulated and politically controversial form of gaming authorized by IGRA. An Indian tribe may conduct casino-style gaming on tribal lands only if such gaming is 1) otherwise legal in the state in which it is located, id. § 2710(d)(1)(B), 2) authorized by an ordinance or resolution adopted by the tribe and approved by the Chairman of the National Indian Gaming Commission ("NIGC"), id. § 2710(d)(1)(A), and 3) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State, id. § 2710(d)(1)(C), and approved by the Secretary of the Interior, id. § 2710(d)(3)(B).

IGRA's compacting provision permits states and Indian tribes to work together to develop contract-based regulatory schemes to govern tribal gaming. Id. § 2710(d)(3)(C). This delegation of federal authority provides states with the civil authority to regulate Indian gaming they would otherwise lack. In this way,

> IGRA is an example of "cooperative federalism" in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme.

Artichoke Joe's v. Norton, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002).

B. The Act Establishing Expanded Gaming in the Commonwealth

On November 22, 2011, Massachusetts Governor Deval Patrick signed into law the Act Establishing Expanded Gaming in the

Commonwealth, Mass. Session Laws ch. 194, §§ 1-115 (2011) ("the Gaming Act").[2] The Gaming Act authorizes casino gaming in the Commonwealth and creates a five-member Massachusetts Gaming Commission ("the Gaming Commission") to oversee it.

One of the principal duties of the Gaming Commission is to issue casino licenses. Id. § 8. It is authorized to issue one license to operate a gaming establishment with up to 1,250 slot machines and no table games ("Category Two license") and up to three licenses to operate casinos with both slot machines and table games ("Category One licenses"). Id. §§ 19(a), 20(a).

This litigation concerns the more valuable Category One licenses, each of which entitles its holder to conduct casino gaming in a different region of the Commonwealth.[3] Id. § 19(a). The application process for Category One licenses will begin as soon as the Gaming Commission issues a request for applications, id. § 19(a), with one caveat: if Massachusetts enters into a Tribal-State gaming compact with an Indian tribe, the Gaming Commission will not issue a Category One license for Region C.

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[2]The Commonwealth had previously allowed only bingo, horse and greyhound racing (including simulcast wagering).

[3]Region A, which covers the greater Boston area and then some, consists of Suffolk, Middlesex, Essex, Norfolk and Worcester counties. Region B, which covers Western Massachusetts, consists of Hampshire, Hampden, Franklin and Berkshire counties. Region C, which covers Southeastern Massachusetts, consists of Bristol, Plymouth, Nantucket, Dukes and Barnstable counties.

See id. § 91.

Section 91 of The Gaming Act authorizes the Governor to enter into a compact with a "federally recognized Indian tribe" and lays out procedures to govern the compacting process.[4] The Governor may enter into negotiations with a tribe only if that tribe 1) has purchased or agreed to purchase a parcel of land on which to build the proposed tribal gaming development and 2) has scheduled a vote in the host community for approval. Id. § 91(c). An agreed-to compact must be submitted to the Massachusetts Legislature for approval. Id. § 91(d). If a Tribal-State compact is not negotiated and approved before July 31, 2012, or if the Gaming Commission determines on or after August 1, 2012 that the tribe will not have land taken into trust by the federal government, private entities will be permitted to apply for a Region C Category One license. Id. § 91(e).

Sections 2(a) and 68(a) of the Gaming Act contain related provisions. Section 2(a) appropriates $5 million to the Governor to facilitate the "negotiation and execution" of a Tribal-State compact, while section 68(a) provides that at least one member of the Gaming Policy Advisory Committee ("GPAC"), which will convene at least once annually to discuss gaming policy in Massachusetts,

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[4]As the plaintiff points out, there are only two federally recognized Indian tribes in Massachusetts potentially eligible to enter into such a compact: the Mashpee Wampanoag Tribe and the Wampanoag Tribe of Gay Head (Aquinnah).

shall be a representative of a federally recognized Indian tribe.

C. KG Urban Enterprises, LLC

KG Urban Enterprises, LLC ("KG Urban") is a company that specializes in the redevelopment of former Brownfield sites into multi-use casino gaming properties. Betting on the likelihood that the Commonwealth was on the verge of legalizing casino gaming, KG Urban acquired an abandoned power plant in New Bedford, Massachusetts, known as Cannon Street Station, in February, 2007. Its master plan for the site includes a multi-level casino, a hotel, restaurants, a conference center, retail shops and an exhibition hall. To date, KG Urban has invested approximately $4.6 million to prepare and implement its redevelopment plan. If it ultimately receives a Category One license, its total project investment is likely to exceed $1 billion.

KG Urban characterizes the challenged provisions of the Gaming Act as race-based set asides which unlawfully prevent it from competing for a Category One license in Region C, where Cannon Street Station is located. As KG Urban perceives it, applications in Regions A and B will be considered on their merits, while competition in Region C will be forestalled and likely foreclosed on the basis of race.

D. Procedural history

On November 22, 2011, KG Urban filed a complaint against Governor Deval Patrick and the Chairman and Commissioners of the

Massachusetts Gaming Commission (collectively, "defendants") alleging that the Gaming Act 1) violates the Equal Protection Clause of the United States Constitution (Count I), 2) violates the Equal Protection Clause of the Massachusetts Declaration of Rights (Count II) and 3) is pre-empted by IGRA (Count III).

Pending before the Court is plaintiff's motion for a preliminary injunction to prevent the defendants from enforcing the challenged provisions of the Gaming Act. A preliminary injunction hearing was held on January 31, 2012, after which the Court took the matter under advisement.

III. Justiciability

Before reaching the merits of plaintiff's claims, the Court must first decide the threshold issues of whether they are ripe for adjudication, whether KG Urban has standing to bring them, whether the Court has jurisdiction to hear them and, if so, whether it must abstain from doing so until Massachusetts courts have had a chance to construe the Gaming Act.

A. Ripeness

1. Standard

Article III, section 2, of the United States Constitution restricts federal court jurisdiction to actual "cases" and "controversies." U.S. Const. art. III, § 2. Ripeness is a component of the case-or-controversy requirement governing "when a proper party may bring a justiciable action consistent with

Article III." Gilday v. Dubois, 124 F.3d 277, 295 (1st Cir. 1997).

In deciding whether a claim is ripe for review, a court considers 1) "the fitness of the issue for immediate review" and 2) "the hardship to the litigant should review be postponed." Riva v. Commonwealth of Mass., 61 F.3d 1003, 1009 (1st Cir. 1995). A critical aspect of the "fitness" prong is whether the claim "involves uncertain and contingent events that may not occur as anticipated, or indeed may not occur at all." Id. A second consideration is the extent to which the claim is bound up in the facts. Id. at 1009-10.

> Courts are more likely to find a claim ripe if it is of an intrinsically legal nature, and less likely to do so if the absence of a concrete factual situation seriously inhibits the weighing of competing interests.

Id. at 1010. A third factor in the fitness calculus is the "adverseness" of the parties, i.e., whether the facts alleged show a substantial controversy between parties with adverse legal interests and of sufficient immediacy and reality to warrant judicial interdiction. Id. Under the "hardship" prong, a court assesses whether denying relief would impose a significant hardship on a party and whether awarding it would resolve the underlying controversy. Id.

The First Circuit Court of Appeals has cautioned that a constitutional challenge to a statute should not be dismissed on ripeness grounds simply because the challenged provisions have not yet taken effect or are subject to contingent events:

> [W]hen the direct application of a statute is open to a charge of remoteness by reason of a lengthy, built-in time delay before the statute takes effect, ripeness may be found as long as the statute's operation is inevitable (or nearly so). And, even when the direct application of such a statute is subject to some degree of contingency, the statute may impose sufficiently serious collateral injuries that an inquiring court will deem the hardship component satisfied.

Id. (internal citations omitted). Collateral effects can rise to this level when "a party must decide currently whether to expend substantial resources that would be largely or entirely wasted if the issue were later resolved in an unfavorable way." Id.

2. Application

Defendants argue that Counts I and II are not ripe for adjudication. They frame the constitutional violations alleged by KG Urban as "entirely conjectural," highlighting the possibility that a Tribal-State compact may never come to be. Absent the eventual conclusion and approval of such a compact, they reason, KG Urban has no constitutional injury. Defendants also point out that the mechanism currently preventing KG Urban from competing for a Category One license in Region C is not the compacting provisions but the fact that the Gaming Commission has not yet issued a request for applications in any of the regions and does not plan to do so before October, 2012.

This is not the first ripeness challenge predicated on the uncertainty of the gaming compact negotiation process. Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685 (1st Cir. 1994)

arose from Rhode Island's refusal to negotiate a Tribal-State gaming compact with the Narragansett Tribe. The district court concluded that issues relating to state and local jurisdiction over Indian gaming were unripe because the state and local governments could not exercise jurisdiction unless and until a compact was entered into. The First Circuit disagreed. The jurisdiction issue was ripe, it concluded, because the issue was of immediate importance to the parties, the analysis of which would not be altered by further developments and the resolution of which would alleviate the collateral effects of the legal uncertainty. Id. at 693-94.

Similar considerations warrant a finding of ripeness here. The unsettled constitutionality of the legal provisions at issue in this case hampers not only the compact negotiation process but also region-wide investment in Region C casino developments. Its collateral effects are felt acutely by KG Urban which must decide whether to expend substantial resources to exercise options on and redevelop the Cannon Street Property. Those resources would be wasted if this Court were now to stay consideration of plaintiff's claims only to resolve them in defendants' favor at a later date. Such issues, in this facial challenge to the Gaming Act, are entirely legal in nature and do not require the Court to weigh competing hypothetical interests. Furthermore, Governor Patrick has already begun negotiations with an Indian tribe but

is currently foreclosed from entering into similar negotiations with private entities by the Gaming Act.

KG Urban's claims are fit for immediate review and this Court will rule on them.

B. Standing

As with ripeness, standing is a component of the case-or-controversy requirement and a jurisdictional pre-requisite. If ripeness is the "when" of justiciability, standing is the "who." See Erwin Chemerinsky, Federal Jurisdiction (5th ed.) § 2.4, at 117 (2007) ("[S]tanding focuses on whether the type of injury alleged is qualitatively sufficient to fulfill the requirements of Article III and whether the plaintiff has personally suffered that harm, whereas ripeness centers on whether the injury has occurred yet."). Where, as here, a standing issue lurks in the background but defendants do not raise it, the Court will inquire into the matter sua sponte. Fideicomiso De La Tierra Del Cano Martin Peña v. Fortuño, 604 F.3d 7, 16 (1st Cir. 2010).

Article III standing has three core requirements: 1) the plaintiff must have suffered an actual or imminent injury, 2) there must be a causal nexus between the injury and the claimed wrong and 3) it must be likely that the injury will be redressed by a favorable decision. Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 46 (1st Cir. 2011). The burden of proving standing rests on the party seeking to invoke the jurisdiction of

the federal court and remains on that party throughout the litigation. Benjamin v. Aroostook Med. Ctr., Inc., 57 F.3d 101, 104 (1st Cir. 1995).

To establish standing to bring its equal protection challenges with respect to § 91 of the Gaming Act, KG Urban need not show that it ultimately would win the gaming license if it were given the opportunity to compete for it. Rather, a party such as KG Urban alleging that a state law prevents it from competing for a contract or license on a race-neutral basis, "need only demonstrate that it is able and ready to bid . . . and that a discriminatory policy prevents it from doing so on an equal basis." Ne. Fla. Chap. of Assoc'd Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993).

KG Urban has standing to challenge § 91 of the Gaming Act. By expending $4.6 million to redevelop the Cannon Street Property and by creating a sophisticated urban gaming model in connection with that site, KG Urban has demonstrated that it is "able and ready" to compete for a Category One license. Even though the Region C application process has not been and may never be opened, KG Urban has demonstrated that it would be a competitive candidate if it were given the chance to compete. Under the circumstances, that is all that is required. See Gratz v. Bollinger, 539 U.S. 244, 260-68 (2003) (ruling that plaintiff had standing to challenge allegedly discriminatory transfer-student

admissions policy, even though he had not yet applied to transfer, because he was ready and able to do so and would have been a competitive candidate). Given the direct relationship between the two sections, the plaintiff likewise has standing to challenge § 2(a), which appropriates $5 million to facilitate the compact-negotiation process.

In contrast, KG Urban lacks standing to challenge § 68(a) of the Gaming Act because it has not carried its burden of establishing that the provision has caused it any injury. A plaintiff lacks standing to challenge an allegedly discriminatory appointment provision where it has not shown that one of its representatives was denied an appointment on the basis of race nor has alleged any other justiciable injury caused by the appointment restriction. See, e.g., Arakaki v. Hawaii, 314 F.3d 1091, 1097-98 (9th Cir. 2002). The complaint does not allege that any of KG Urban's employees or agents has been denied appointment to the GPAC on account of the restriction, nor do the circumstances indicate that any such person is "ready and able" to apply to the GPAC. Because the plaintiff has failed to allege any specific injury stemming from the appointment restriction, it lacks standing to challenge that provision.

C. Sovereign immunity

The parties dispute whether sovereign immunity deprives this Court of subject-matter jurisdiction to hear plaintiff's federal

pre-emption claim. Plaintiff declares, correctly, that a federal court has federal-question jurisdiction over a pre-emption claim premised on a Supremacy Clause violation. Day v. Bond, 511 F.3d 1030, 1034 (10th Cir. 2007). Defendants respond, correctly, that sovereign immunity displaces a federal court's subject-matter jurisdiction to hear an official capacity suit brought against state officials to enforce IGRA. Seminole Tribe of Fl. v. Florida, 517 U.S. 44, 74 (1996). Jurisdiction does not lie in this case, so say the defendants, merely because KG Urban has refashioned its IGRA claim into one for pre-emption.

In Seminole Tribe, the eponymous Indian tribe sued the Governor of Florida in his official capacity under 18 U.S.C. § 1983 to compel him to negotiate a Tribal-State compact in good faith, notwithstanding the IGRA provisions which provide for mediation in the absence of good-faith negotiation. Id. at 51-52. The Supreme Court held that sovereign immunity prevented the tribe from bringing an official capacity suit in light of IGRA's detailed remedial scheme. Id. at 74. Otherwise, the Court reasoned, parties would simply sue under § 1983 to avoid the hassle of complying with it. Id. at 75.

KG Urban is correct that the Seminole Tribe limitation on official capacity suits does not apply to the current case. Unlike the Seminole Tribe, KG Urban brings neither an IGRA claim nor an official capacity suit to create the illusion of a private

right of action under IGRA. Instead, KG Urban alleges that, to the extent that the Gaming Act conflicts with IGRA, the former violates the Supremacy Clause of the United States Constitution. Where, as here, a pre-emption claim is predicated on the Supremacy Clause, not a specific federal statute, the Seminole Tribe limitation does not apply. Duke Energy Trading & Mktg., LLC v. Davis, 267 F.3d 1042, 1055 (9th Cir. 2001). Accordingly, this Court has jurisdiction to decide the plaintiff's federal pre-emption claim.

D. Abstention

Unlike the doctrines of ripeness, standing and sovereign immunity, which bear directly upon a court's jurisdiction to hear a case, Pullman abstention is a discretionary doctrine with equitable moorings implicated when a federal court is confronted with an allegation that a state law violates federal rights. The doctrine directs federal courts to abstain from deciding an issue, thus avoiding needless federal friction with state policies and unnecessary constitutional rulings, when a state court construction of the law may obviate its need to do so. Pullman abstention is warranted where

> 1) substantial uncertainty exists over the meaning of the state law in question, and 2) settling the question of state law will or may well obviate the need to resolve a significant federal constitutional question.

Barr v. Galvin, 626 F.3d 99, 107 (1st Cir. 2010).

Defendants contend that even if plaintiff's claims are

justiciable and the Court has jurisdiction to hear them, the doctrine of Pullman abstention compels the Court to stay consideration of those claims until Massachusetts courts are given the opportunity to rule on them.

Counts I and II do not require abstention because they implicate parallel equal protection provisions of the Massachusetts and United States constitutions. Guiney v. Roache, 833 F.2d 1079, 1082-83 (1st Cir. 1987) ("[W]here state and federal constitutional provisions are parallel, the state provision is unlikely to be any more ambiguous than the federal provision, and abstention is unnecessary.").

Count III presents a closer question. Plaintiff claims that the Gaming Act indirectly authorizes Indian tribes to engage in casino-style gaming outside of Indian lands and without the necessary federal approvals. Defendants deny the substance of both allegations but submit that if the Court were to find either of them persuasive, it would be duty-bound to abstain to allow Massachusetts courts to interpret the Gaming Act in the first instance. For the reasons expounded in Section IV.A.2.b, infra, the provisions at issue are not "substantially uncertain" or amenable to a construction which would allow the Court to avoid the constitutional issue. Accordingly, abstention with respect to Count III is unwarranted as well.

IV. Preliminary Injunction

To obtain preliminary injunctive relief under Fed. R. Civ. P. 65, the movant must demonstrate:

> 1) a substantial likelihood of success on the merits of the case, 2) a significant risk of irreparable harm if the injunction is withheld, 3) a favorable balance of hardships, and 4) a fit (or lack of friction) between the injunction and the public interest.

Nieves-Márquez v. Puerto Rico, 353 F.3d 108, 120 (1st Cir. 2003). While a court must weigh each factor against the other factors and against the form and magnitude of the relief requested, an injunction will not issue if the movant fails to demonstrate irreparable harm or a likelihood of success on the merits. González-Droz v. González-Colon, 573 F.3d 75, 79 (1st Cir. 2009).

The Court begins with the most important inquiry: whether plaintiff's claims are likely to succeed. Because plaintiff's equal protection claims require the Court to assess whether the Gaming Act was passed pursuant to federal authority delegated pursuant to IGRA, the Court addresses plaintiff's pre-emption claim first.

A. Federal Pre-emption (Count III)

1. Standard

The Supremacy Clause provides that federal law "shall be the supreme law of the land." U.S. Const. art. VI, cl. 2. Consistent with that command, state laws which "interfere with, or are contrary to the laws of Congress" are invalid. Gibbons v. Ogden,

22 U.S. 1, 82 (1824). Congressional intent "is the touchstone of preemption analysis." Grant's Dairy-Maine, LLC v. Comm'r of Me. Dep't of Agric., 232 F.3d 8, 14 (1st Cir. 2000). A court begins with the presumption that a federal law does not pre-empt an otherwise valid state law and sets aside that presumption only in the face of clear contrary congressional intent. City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 432 (2002).

IGRA was intended "to expressly preempt the field in the governance of gaming activities on Indian lands." S. Rep. No. 100-446, at 6 (1988), reprinted in 1998 U.S.C.C.A.N. 3076. That does not mean that all state laws relating to Indian gaming are automatically pre-empted. To the contrary, IGRA plainly envisions a major role for states in regulating Indian casino-style gaming through the compacting process. It does mean, however, that a state may not set up its own Indian gaming regime separate from IGRA or enact laws that frustrate the purpose of IGRA or are incompatible with its provisions. See Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430, 433 (9th Cir. 1994) (striking down as pre-empted a state licensing fee on wagers placed at off-track betting facilities, as it applied to tribal facilities, because it frustrated the purpose of IGRA).

2. Application

According to the plaintiff, the Gaming Act implicates all three bases for pre-emption: a) it establishes a freestanding

Massachusetts tribal gaming regime apart from IGRA, b) it conflicts with IGRA by indirectly authorizing Indian tribes to conduct casino-style gaming outside of Indian lands and without the necessary federal approvals and c) it frustrates the purpose of IGRA by using the prospect of commercial competition to coerce Indian tribes into agreeing to unfavorable compacting terms. The Court addresses each pre-emption theory seriatim.

a. Field pre-emption

The Gaming Act does not specifically mention IGRA or require that Indian gaming be conducted in accordance with federal law. KG Urban seizes upon those omissions as evidence that the Gaming Act establishes a separate tribal gaming regime apart from IGRA. While the plaintiff is correct that "a state has no power whatsoever to create its own Indian gaming regime," that is not at all what the Massachusetts Legislature did here.

Under IGRA, the Tribal-State compacting process is governed by both state and federal law. The tribe and the state must first enter into a compact the validity of which is determined by state law. Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1558 (10th Cir. 1997) ("Congress intended that state law determine the procedure for executing valid gaming compacts."). Once a valid compact is entered into, it does not "take effect" under federal law until the Secretary of the Department of the Interior approves the compact and a notice of approval is published in the

Federal Register. 25 U.S.C. § 2710(d)(3)(B).

While IGRA's compacting provisions are self-executing, i.e., a tribe may invoke its federal compact-negotiation rights regardless of state law, Congress envisioned that states would legislate the procedures by which IGRA-authorized compacting would take place under their respective state laws. California and North Carolina were among the first states to pass such laws. In 2000, California voters approved Proposition 1A, which amended the California Constitution to give the Governor the authority,

> to negotiate and conclude compacts, subject to ratification by the Legislature [permitting Indian gaming] by federally recognized Indian tribes on Indian lands in California in accordance with federal law.

Cal. Const. art. IV, § 19, cl. f. The North Carolina Legislature followed suit in 2004 by enacting a law allowing federally recognized Indian tribes in the state to conduct gaming "in accordance with a valid Tribal-State compact executed by the Governor" and "approved by the U.S. Department of Interior." N.C. Gen. Laws § 71A-8 (2004). As with California, North Carolina included a provision authorizing its Governor to negotiate and enter into Tribal-State compacts as permitted under federal law. N.C. Gen. Laws § 147-12(14) (2004).

The Gaming Act establishes similar procedures for Massachusetts. It authorizes the Governor "to enter into a compact with a federally recognized Indian tribe in the commonwealth." Mass. Session Laws ch. 194, § 91(a) (2011).

Compact negotiations shall not begin until a tribe

> 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.

Id. § 91(c). Once the Governor and a tribe agree on a compact, it "shall be submitted to the [Massachusetts Legislature] for approval." Id. § 91(d).

Considered in that context, the Gaming Act does not create a separate tribal gaming regime in Massachusetts but rather establishes the procedures by which IGRA-authorized compacting may take place under Massachusetts law. Far from conflicting with IGRA, § 91 of the Gaming Act advances the congressional directive that tribes and states negotiate compacts to govern gaming on tribal lands.

b. Conflict pre-emption

IGRA mandates that tribal gaming take place on Indian lands and that a tribe obtain a federal gaming ordinance and approval from the Secretary of the Interior before conducting casino-style gaming. The Gaming Act is silent on those requirements. The plaintiff infers from that silence that the Gaming Act indirectly authorizes Indian tribes to conduct casino-style gaming outside of Indian lands and without federal approval.

Those claims can also be dispatched rather easily. Section 91 of the Gaming Act lists the requirements which must be met for a compact to be valid under state law. It does not purport to

supersede the federal procedures required under IGRA in order for that Tribal-State compact later to take effect under federal law. Nothing in § 91 prevents simultaneous compliance with IGRA.

KG Urban's suggestion that § 91 indirectly authorizes Indian gaming outside of tribal lands fails for the same reason. To avoid pre-emption, a state law giving effect to IGRA need not include a separate provision reiterating that IGRA requires tribal gaming to take place only on Indian lands. Nevertheless, the statute implies as much by directing the Gaming Commission to open up the Region C application process to private entities if

> the commission determines that the tribe will not have [newly acquired] land taken into trust by the United States Secretary of the Interior.

Id. § 91(e). If a tribe acquires land suitable for gaming but the federal government does not take that land into trust, a tribe will presumably be ineligible to enter into a compact.

The Court need not, however, resort to implication. A separate Massachusetts criminal statute, which applies to tribal and non-tribal entities alike, prohibits operating a casino on state land. M.G.L. ch. 271, § 5. The Gaming Act amended that statute to exclude from its purview gaming establishments operating pursuant to a Category One license. Mass. Session Laws ch. 194, § 58 (2011). It did not correspondingly exempt gaming establishments operating pursuant to a Tribal-State compact. If the Massachusetts Legislature had intended to authorize Indian

gaming outside of tribal lands, it surely would have made its intentions clear by amending M.G.L. ch. 271, § 5.

For all of those reasons, plaintiff's "conflict" theory of pre-emption is unavailing.

c. Frustration pre-emption

IGRA contains measures to protect Indian tribes from being taken advantage of during compact negotiations. KG Urban maintains that the Gaming Act frustrates the purpose of those measures by dictating a compact-negotiation deadline. By threatening to open up Region C to commercial competition if a tribe does not agree to terms with the Commonwealth by July 31, 2012, the Gaming Act coerces Indian tribes into accepting unfavorable compact terms. A firm deadline, it is argued, allows Massachusetts to fashion a better deal for itself than IGRA allows.

The plaintiff mistakes an incentive for an obstacle. The Gaming Act surely provides an incentive to a tribe that completes a compact before the July 31, 2012 deadline: that tribe would potentially enjoy a region-wide monopoly on casino gaming.[5] If, however, no compact is reached by the deadline and the Gaming Commission awards a Region C license to a private entity, an

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[5]That prospect does not change the Court's analysis. See, e.g., Artichoke Joe's v. Norton, 353 F.3d 712, 736 n.19 (9th Cir. 2003) ("That Proposition 1A, unlike IGRA, expressly creates a tribal monopoly on class III gaming activities does not alter our conclusion [because it] has no bearing on identifying the appropriate standard under which to review the state law.").

Indian tribe in Massachusetts can still assert its IGRA rights to enter into a Tribal-State compact as long as the tribe acquires land-in-trust beforehand. The only difference, in this scenario, is that the tribe will have to compete against a privately-run casino in Region C. Still, IGRA does not require that Indian tribes be permitted to conduct casino gaming free from private competition; it mandates only that tribes be permitted to conduct casino gaming on their land if it is otherwise allowed in the state.

3. Conclusion

The Gaming Act does not set up a separate tribal gaming regime apart from IGRA, nor does it purport to supersede federal compact-negotiation rights or procedures. It simply establishes the procedures with which both parties must comply for a Tribal-State compact to be recognized as valid under state law and provides an incentive for tribes to exercise their IGRA rights on an expedited timetable. The Gaming Act neither conflicts with nor frustrates the purpose of IGRA and, therefore, is not pre-empted by it.

B. Equal Protection (Counts I and II)

The complaint further alleges that the Gaming Act violates the Equal Protection Clauses of the United States Constitution and the Massachusetts Declaration of Rights. Because the two clauses are coextensive, Brackett v. Civil Serv. Comm'n, 850 N.E. 2d 533, 545 (Mass. 2006) ("The standard for equal protection

analysis under our Declaration of Rights is the same as under the Federal Constitution."), the Court will not bifurcate its equal protection analysis.

1. Classification

Where, as here, a state law singling out a particular class of persons is challenged under the Equal Protection Clause, a court begins by examining the nature of the classification. See Barr, 626 F.3d at 108-09. KG Urban would have this Court characterize "federally recognized Indian tribe" as a racial classification subject to strict scrutiny. Section 91, plaintiff contends, is a stark and unprecedented "race-based set-aside" which will inevitably result in a tribal gaming monopoly in Southeastern Massachusetts. Defendants demur and suggest that the classification makes a political distinction between federally recognized tribes and all other entities (including non-tribal organizations owned or controlled by Native Americans), not a racial classification between individual Native Americans and members of other racial groups.

The starting point for any equal protection challenge to a tribal preference is Morton v. Mancari, 417 U.S. 535 (1974). In Mancari, the Supreme Court ruled that an employment preference for qualified members of "federally recognized tribe[s]" by the Bureau of Indian Affairs did not violate the Equal Protection Clause because "the preference is political rather than racial in

nature." Id. at 554 n.24. According to the Court,

> The preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes.

Id. The Supreme Court went on to explain that because the classification excludes persons who are racially Indian but do not belong to a federally recognized tribe and includes tribe members without Indian blood, it is not a suspect classification. Id. Applying the rational basis test, the Court upheld the challenged law as rationally related "to the fulfillment of Congress' unique obligation toward the Indians." Id. at 555.

The Supreme Court has not addressed whether state or local laws selecting Indian tribes for preferential treatment should be reviewed under the same deferential standard. On the one hand, the nature of a classification, in theory, should not change based upon the identity of the sovereign making it. If a classification is political when the federal government makes it, it is difficult to imagine that it could be anything other than political when a state or local government makes it. On the other hand, state and local entities lack the constitutional permission to regulate Indian tribes that the federal government enjoys. It may be appropriate for courts to apply more searching review to state and local regulation of Indian tribes given their lack of authority to legislate in the field.

Lower courts are split with respect to the nature of state

and local tribal classifications and the corresponding level of scrutiny to which they are subject. Compare Livingston v. Ewing, 455 F. Supp. 825, 830-31 (D.N.M. 1978) (applying rational basis test to state policy permitting only members of federally recognized Indian tribes to sell crafts on museum grounds), and Squaxin Island Tribe v. Washington, 781 F.2d 715, 721-22 (9th Cir. 1986) ("No compelling state interest need be shown since preferential treatment for tribal members is not a racial classification, but a political one."), with Tafoya v. City of Albuquerque, 751 F. Supp. 1527, 1529-31 (D.N.M. 1990) (applying strict scrutiny to ordinance allowing only members of federally recognized Indian tribes to sell wares in the Old Town area of Albuquerque), and Malabed v. N. Slope Borough, 42 F. Supp. 2d 927, 937-42 (D. Alaska 1999) (applying strict scrutiny to employment preference for "any person belonging to an Indian tribe").

The government's power to regulate Indian affairs, which implicates weighty constitutional issues, should not rise or fall on a facile distinction. "Federally recognized Indian tribes" are quasi-sovereign political entities, to be sure, which is why some courts characterize the classification as political. Their members, however, share more than a like-minded spirit of civic participation; they share the same racial heritage.[6] See Paul

[6]The two federally recognized Indian tribes in Massachusetts are no different: both limit tribal membership to those who can establish Indian racial ancestry.

Spruhan, A Legal History of Blood Quantum in Federal Indian Law to 1935, 51 S.D. L. Rev. 1, 12 (2006) (cataloging federal blood-quantum requirements); Kirsty Gover, Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States, 33 Am. Indian L. Rev. 243 (2009) (cataloguing tribal blood-quantum requirements). Mancari ignores this crucial fact and proceeds from the irrational assumption that race is "nothing more than a politically meaningless classification based on ancestry" and that "tribal membership is purely a matter of voluntary civic participation." Annie C. Rolnick, The Promise of Mancari: Indian Political Rights as Racial Remedy, 86 N.Y.U. L. Rev. 958, 1001 (2011).

By characterizing tribal distinctions as solely political, the Supreme Court has avoided grappling with complex constitutional issues such as the scope of congressional power to regulate Indian affairs and the inherent tension between the Indian Commerce Clause and the Equal Protection Clause. As one constitutional scholar put it, the political classification doctrine is "almost talismanic; a magical incantation, without accompanying analysis, to make the issue go away rather than to address it." David C. Williams, The Borders of the Equal Protection Clause: Indians As Peoples, 38 U.C.L.A. L. Rev. 759, 790-91 (1991).

If this Court were addressing the issue as one of first impression, it would treat Indian tribal status as a quasi-

political, quasi-racial classification subject to varying levels of scrutiny depending on the authority making it and the interests at stake. Federal laws relating to native land, tribal status or Indian culture would require minimal review because such laws fall squarely within the historical and constitutional authority of Congress to regulate core Indian affairs. Laws granting gratuitous Indian preferences divorced from those interests, such as Circuit Judge Alex Kozinski's hypothetical monopoly on Space Shuttle contracts, Williams v. Babbitt, 115 F.3d 657, 665 (9th Cir. 1997), or, more germanely, a law granting tribes a quasi-monopoly on casino gaming, would be subject to more searching scrutiny.

This case is not, however, one of first impression. A few years after Mancari, the Supreme Court decided that under at least one circumstance an Indian-related state law is subject to rational basis review as if it were a federal law. In Washington v. Confederated Bands and Tribes of Yakima Indian Nation ("Yakima"), 439 U.S. 463 (1979), the Supreme Court reviewed an equal protection challenge to a Washington law which bestowed upon the courts of that state the authority to assume partial civil and criminal jurisdiction over Indians and Indian tribes on Indian land. The Court began by noting that the federal government has the constitutional authority to single out Indian tribes for special treatment, while "States do not enjoy this same unique relationship with Indians." Id. at 500-01. It went

on to apply rational basis review, despite that critical difference, because the Washington law

> is not simply another state law. It was enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians. . . . For these reasons, we find the argument that such classifications are "suspect" an untenable one.

Id. at 500-01. Thus, if Congress delegates a portion of its Indian regulatory authority to the states, a state law enacted pursuant to that delegated authority is subject to rational basis review as if it were federal law.

Applying that principle, the Ninth and Fourth Circuits have rejected equal protection challenges to state laws authorizing the Governors of California and North Carolina, respectively, to enter into Tribal-State gaming compacts. Artichoke Joe's v. Norton, 353 F.3d 712 (9th Cir. 2003); United States v. Garrett, 122 F. App'x 628 (4th Cir. 2005). The Circuit Courts recognized that IGRA was explicitly designed to re-adjust federal/state regulatory authority over Indian gaming on Indian lands and concluded that the challenged state gaming laws were enacted pursuant to that delegated authority. Artichoke Joe's, 353 F.3d at 736; Garrett, 122 F. App'x at 631-33. In accordance with Yakima, both Circuit Courts applied the rational basis test.

The equal protection principles articulated in Mancari and Yakima compel the same result in this case. Neither party disputes that, by enacting IGRA, Congress delegated a portion of

its authority to regulate Indian gaming to the states. It is likewise evident that the Massachusetts Legislature adopted sections 2(a) and 91 of the Gaming Act pursuant to that delegated authority. Congress envisioned that states would enact laws to govern and facilitate the Tribal-State compacting process. See Section IV.A.2, supra. Sections 2(a) and 91 of the Gaming Act, enacted in the wake of parallel legislation in California and North Carolina, do exactly that and nothing more. Bound by Yakima, this Court will apply the rational basis test.

2. Rational basis review

Under the rational basis test, state tribal classifications are valid unless they bear no rational relationship to any legitimate state interest. Yakima, 439 U.S. at 502. State compacting legislation analogous to § 91 of the Gaming Act has been upheld as rationally related to a state's interest in 1) promoting cooperative relationships with the Indian tribes residing within its borders, 2) fostering tribal sovereignty, economic development and self-sufficiency and 3) regulating vice activities in compliance with a federal scheme which fulfills Congress's unique obligation towards Indian tribes. Artichoke Joe's, 353 F.3d at 736-42; Garrett, 122 F. App'x at 633. Sections 2(a) and 91 are rationally related to the same interests and thus are consistent with the Equal Protection Clauses of the United States Constitution and the Massachusetts Declaration of Rights.

3. Plaintiff's contentions

The plaintiff urgently disagrees and implores the Court to review the Gaming Act under strict scrutiny on the grounds that a) it is not mandated by a uniform federal scheme and b) Mancari is no longer good law. Unfortunately, governing caselaw is to the contrary and while the Court shares the plaintiff's frustration with the prevailing equal protection doctrine, the Court declines plaintiff's invitation to ignore it.

a. Plaintiff's proposed standard ignores precedent and public policy

Plaintiff's first contention relates to the scope of the delegation doctrine announced in Yakima. According to KG Urban, the fact that a state law singles out Indian tribes "in response" to a jurisdiction-shifting federal scheme should not be enough to avoid strict scrutiny. Instead, it proposes, strict scrutiny should apply to any such state law unless it is "mandated by a uniform federal scheme." KG Urban acknowledges that its proposed standard, which it borrowed from alienage law, has not been applied in the Indian law context but it nonetheless reasons that, given the similarities between the two areas of law, the same standard should apply to both.[7]

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[7]Reviewed under the plaintiff's proposed standard, the Gaming Act would almost certainly be subject to strict scrutiny: while IGRA envisions that states will enact supplemental legislation to govern the compacting process, it does not mandate that states do so.

The plaintiff cites precious little authority for its proposed interpretation and finds none in Yakima itself. The federal law in that case permitted but, importantly, did not require, states to assume civil and criminal jurisdiction over Indian land. 439 U.S. at 473 n.9. More recent equal protection cases are similarly unavailing. E.g., Artichoke Joe's, 216 F. Supp. 2d at 1131 n.63 (rejecting plaintiffs' argument that "strict scrutiny applies because Congress did not 'affirmatively direct' the states to adopt a specific policy in favor of class III gaming"). In short, no precedent supports such an abrupt shift.

Moreover, adopting the mandated-by-a-uniform-federal-scheme standard from the alienage context makes little sense as a policy matter. Admittedly, Indian law and alienage law have their similarities. Article I of the Constitution grants Congress plenary power to legislate in both fields and the standard of equal protection review in each field depends, in large part, on which government actor, state or federal, enacted the law. The plaintiff overlooks one crucial distinction, however. A strict, uniform federal alienage policy makes sense: a hodgepodge of state immigration laws would wreak havoc on our federal system. Indeed, the Immigration and Nationality Act of 1952 was enacted, in large part, to prevent one state's immigration policy from imposing negative "externalities" on surrounding states or the federal government.

That concern does not apply to the Indian context. One state's treatment of Indian tribes residing within its borders does not directly impact other tribes or other states. Moreover,

> [i]t makes sense for Indian law doctrine to allow states considerable flexibility when acting consistently with current federal Indian policy.

Shira Kieval, Discerning Discrimination in State Treatment of American Indians Going Beyond Reservation Boundaries, 109 Colum. L. Rev. 94, 129 (2009). A stricter standard would undermine IGRA's balance of cooperative federalism and could cause unnecessary confusion to state governments.

A narrow reading of Yakima's delegation doctrine is both unprecedented as a matter of law and unwarranted as a matter of policy.

b. Mancari is binding precedent

KG Urban confidently asserts that the Supreme Court's initial characterization of tribal classifications as political, not racial, is no longer good law in the afterglow of Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

At issue in Adarand was a federal law that gave minority-owned businesses preference in bidding on federal highway contracts. 515 U.S. at 205. The affirmative action program benefitted a wide variety of racial minorities, including "Native Americans." Id. The Supreme Court struck down the law and announced the current rule that all racial classifications,

whether made by a federal, state or local government actor, are subject to strict scrutiny. Id. at 227. As a result, the government may no longer give preferential treatment to "Native Americans" as a racial group. The Court did not address whether the new rule applied to laws directed at federally recognized Indian tribes but a related issue arose five years later in Rice v. Cayetano, 528 U.S. 518 (2000).

In Rice, the subject law of Hawaii limited the right to vote for the position of Trustee of the Office of Hawaiian Affairs to those with native Hawaiian ancestry. 528 U.S. at 499. The State argued that the classification was not racial because it applied to everyone whose ancestors were in Hawaii at a particular time, regardless of their race. Id. at 514. The Supreme Court rejected that argument and applied strict scrutiny, reasoning that the purpose and effect of the statute was to use ancestry as a proxy for race. Id.

The plaintiff equates the tribal classification in this case with the ancestry classification in Rice. Both classifications, the plaintiff contends, use ostensibly non-racial distinctions as racial proxies. That argument would be persuasive had the Supreme Court not rejected it in Rice. There, the Court declined Hawaii's invitation to predicate preferential treatment of native Hawaiians on the Court's analogous treatment of Indian tribes. Id. at 518-20. The Court first noted that the Constitution

authorizes Congress to treat Indian tribes differently but concluded that such authority does not extend to tribeless native Hawaiians. Id. at 519. The Court further distinguished Mancari by noting that the classification in that case "was political rather than racial." Id. at 520. By distinguishing Mancari instead of overruling or ignoring it, the Supreme Court signaled that tribal classifications are not racial proxies and that Mancari remains good law.

This Court has already expressed its humble opinion that Mancari makes an artificial distinction which undermines the constitutional requirement of race neutrality. Nevertheless, as the foregoing analysis suggests, Mancari remains good law. Even if that conclusion were in doubt, the Court would be obligated to apply Mancari because the Supreme Court has not expressly overturned it. Agostini v. Felton, 521 U.S. 203, 237 (1997) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [a lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

C. Conclusion

Because none of plaintiff's claims is likely to succeed, i.e., the Gaming Act is not pre-empted and does not violate state or federal equal protection clauses, a preliminary injunction is

unwarranted. United States v. Weikert, 504 F.3d 1, 5 (1st Cir. 2007) ("If the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.").

ORDER

In accordance with the foregoing, plaintiff's motion for a preliminary injunction (Docket No. 2) is **DENIED**. Moreover, because plaintiff brings only a facial equal protection challenge to the Gaming Act and no further briefing or proceedings would affect this Court's constitutional analysis, plaintiff's complaint (Docket No. 1) is hereby **DISMISSED**.

So ordered.

Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated February 16, 2012

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

KG Urban Enterprises, LLC
Plaintiff

V.

Deval L. Patrick et al
Defendants

CIVIL ACTION

NO.11-cv-12070 NMG

ORDER OF DISMISSAL

GORTON, D. J.

In accordance with the Memorandum and Order dated 2/16/2012, (Docket No. 26), it is hereby ORDERED that the above-entitled action be and hereby is dismissed.

By the Court,

2/17/2012
Date

/s/ Kellyann Moore
Deputy Clerk

Relevant Statutory Excerpts

Mass. St. 2011, c. 194
An Act Establishing Expanded Gaming in the Commonwealth

SECTION 2A.

OFFICE OF THE GOVERNOR

0411-1004. To provide for certain costs associated with the implementation of expanded gaming including, but not limited to, costs related to legal, financial and other professional services required for the negotiation and execution of a compact with a federally recognized Indian tribe in the commonwealth to establish a tribal casino in region C $5,000,000

0810-1204. For the implementation and operation of the division of gaming enforcement within the department of the attorney general, established in section 11M of chapter 12 of the General Laws, for the investigation and prosecution of criminal activity relating to legalized gaming in the commonwealth pursuant to chapter 23K of the General Laws. $500,000

SECTION 16. The General Laws are hereby further amended by inserting after chapter 23J the following chapter:-

* * *

Section 67. The commission shall continue to evaluate the status of Indian tribes in the commonwealth including, without limitation, gaining federal recognition or taking land into trust for tribal economic development. The commission shall evaluate and make a recommendation to the governor and the chairs of the joint committee on economic development and emerging technologies as to whether it would be in the best interest of the commonwealth to enter into any negotiations with those tribes for the purpose of establishing Class III gaming on tribal land.

SECTION 16. The General Laws are hereby further amended by inserting after chapter 23J the following chapter:-

* * *

Section 68. (a) There shall be a gaming policy advisory committee to consist of the governor or the governor's designee, who shall serve as chair, the commission chair, 2 members of the senate of whom 1 shall be appointed by minority leader, 2 members of the house of representatives of whom 1 shall be appointed by the minority leader, the commissioner of public health or the commissioner's designee and 8 persons to be appointed by the governor, of whom 3 shall be representatives of gaming licensees, 1 shall be a representative of a federally recognized Indian tribe in the commonwealth, 1 shall be a representative of organized labor and 3 shall be appointed from the vicinity of each gaming establishment, as defined by the host community and surrounding communities, upon determination of the licensee and site location by the commission. The committee shall designate subcommittees to examine community mitigation, compulsive gambling and gaming impacts on cultural facilities and tourism. Members of the committee shall serve for 2-year terms. The committee shall meet at least once annually for the purpose of discussing matters of gaming policy. The recommendations of the committee concerning gaming policy made under this section shall be advisory and shall not be binding on the commission.

SECTION 91. (a) Notwithstanding any general or special law or rule or regulation to the contrary, the governor may enter into a compact with a federally recognized Indian tribe in the commonwealth.

(b) The Massachusetts gaming commission shall, upon request of the governor, provide assistance to the governor in negotiating such compact.

(c) The governor shall only enter into negotiations under this section 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. The governing body in the host community shall coordinate with the tribe to schedule a vote for approval of the proposed gaming establishment upon receipt of a request from the tribe. The governing body of the host community shall call for the election to be held not less than 60 days but not more than 90 days from the date the request was received.

(d) A compact negotiated and agreed to by the governor and tribe shall be submitted to the general court for approval. The compact shall include a statement of the financial investment rights of any individual or entity which has made an investment to the tribe, its affiliates or predecessor applicants of the tribe for the purpose of securing a gaming license for that tribe under its name or any subsidiary or affiliate since 2005.

(e) Notwithstanding any general or special law or rule or regulation to the contrary, 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 general court before July 31, 2012, the commission shall issue a request for applications for a category 1 license in Region C pursuant to chapter 23K of the General Laws not later than October 31, 2012; provided, however, 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, the commission shall consider bids for a category 1 license in Region C under said chapter 23K.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2012, this document was filed through the Electronic Case Filing system, and that copies will be sent electronically to the registered participants identified on the Notice of Electronic Filing.

/s/ Paul D. Clement