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
United States District Court for the District of Massachusetts

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Brief of Amicus Curiae Suffolk University Law School's Indian Law and Indigenous Peoples Clinic

In Support of Appellees and Affirmance

For the Amicus Curiae:
Prof. Jeffrey Pokorak, *Counsel of Record*
Prof. Lorie Graham
Nicole Friederichs
Indian Law and Indigenous Peoples Clinic
Suffolk University Law School
120 Tremont Street
Boston, MA 0210
Tel. (617) 573-8100

CORPORATE DISCLOSURE STATEMENT
PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 26.1

Amicus curiae Indian Law and Indigenous People's Clinic of Suffolk University Law School certifies that it is a program of Suffolk University which is a non-profit educational institution that does not issue stock, has no parent corporation(s) and that no publically held corporation owns 10% or more of the institution.

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IDENTITY STATEMENT OF *AMICUS*

Amicus Indian Law and Indigenous Peoples Clinic, located in Boston, Massachusetts is one of Suffolk University Law School's many excellent direct representation clinics.

Suffolk University Law School has always valued the practice of law. Historically, a great number of our graduating students have entered the practice of law through government placements (such as District Attorney, Public Defender, or State and Federal Agencies), small to medium size firm practice or in solo practice. These former students have, though starting in these locally-focused legal practices, risen through the ranks to become judges, legislators and elected officials throughout the region.

Suffolk University Law School's Clinical Programs seek to teach students about the enduring value of prepared, reflective and ethical practice. Through both in-house clinical programs and an extensive externship program, all Suffolk law students have the opportunity to experience legal practice in real world settings before graduation. Suffolk Law Clinical Programs is currently ranked as one of the nation's best clinical programs in the U.S. News and World Report specialty ranking.

Amicus Indian Law and Indigenous Peoples Clinic's purpose is to provide law students with opportunities to develop their practical lawyering skills and build

their knowledge of federal Indian law by working on legal projects which support New England's Indian Tribes. Students offer technical assistance to Tribal courts, legal advice on international indigenous rights issues, treaty obligation analysis, Indian Child Welfare Act issues, and educational efforts aimed at courts, legislatures, bar associations, tribal members and the general public.

The issue currently before the Court implicates questions of Tribal sovereignty, federal Indian Law and the respectful relationships among Tribes and other State entities; be they domestic or international. *Amicus* believes that it possesses a unique and important perspective to share with this Court as it works to fairly decide the issues presented.

Amicus Curiae sought and received the consent of both Plaintiff/Appellant, KG Urban Enterprises LLC, and the Defendants/Appellees Deval L. Patrick and the Chairman ad Commissioners of the Massachusetts Gaming Commission, through their attorney, the Attorney General of Massachusetts. Therefore, no party objects to the filing of this brief.

STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(C)(5)

No party or party's counsel authored this brief in whole or in part or contributed money intended to fund preparing or submitting this brief. Moreover, no person other than the *amici curiae* (including their members and counsel) contributed money intended to fund preparing or submitting this brief.

ARGUMENT

I. Summary of Argument

Controlling principles of federal Indian law as applied to this case favors the Appellee Commonwealth of Massachusetts ("Massachusetts" or "Commonwealth") over the claims of KG Urban Enterprises, LLC ("KG Urban"). First, Appellant asks this Court to ignore the unique status of Indian Tribes as political entities in the structure of our nation; to deny the right of the federal government to regulate commerce with the Indian Tribes; and to exclude States in a plan to create harmonious dealing between Tribes, States and the Federal Government.

Second, KG Urban asks this Court to find that the process that has been developed by the Commonwealth of Massachusetts is wholly outside the process of direct State and Tribal cooperation contemplated by Congress when it enacted the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721. IGRA recognizes the inherent right of Tribes to pursue gaming and in fact retains the ultimate authority for allowing such gaming as a fundamental matter between the federal government and tribes. The animating principle of IGRA is to encourage States, who have the closest relationship to both Tribes and the likely consumers of resident Tribal gaming institutions, to work out all issues among the interested parties: States, Tribes, local communities and ultimately, the United States. It is in

the interest of all sovereign entities involved to insure that such activity is developed and managed in the least contentious and most efficient manner. Congress, through IGRA, recognized this reality and in effect mandated State/Tribe cooperative efforts in such matters as a means of encouraging sovereign comity.

IGRA mandates good faith negotiation on the part of the State with Tribes. The Commonwealth of Massachusetts has pursued this IGRA mandate in a reasoned and State-appropriate fashion in the enactment of the gaming licensing procedures of the Act Establishing Expanded Gaming in the Commonwealth, St. 2011, c. 194 (2011) ("Massachusetts Act"). Following the requirements outlined in IGRA, Section 91 of the Massachusetts Act ("Section 91) strikes a fair balance between sovereign interests and needs. The alternative to Section 91 under IGRA would be a system in which the federal government negotiates directly with Massachusetts tribes regarding gaming interests without including State interests in the process. This alternative, which is the logical result of KG Urban's argument, benefits no party to these complicated endeavors. The efforts of the Commonwealth to meet the process of State to Tribe cooperation mandated by IGRA should be applauded, not obstructed.

KG Urban tries to make this case about "race," but such an attempt to apply the law associated with individual characterization classification to a political entity

creates more heat than light. First, to say that an Indian nation is nothing more than the racial make-up of its members not only ignores history and the Constitutional recognition of tribal sovereignty, it also abandons over 180 years of well settled precedent recognizing "Indian nations [as] distinct, independent political communities." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). To use the language of racial set asides and discrimination, as cleverly done by KG Urban, misleads this Court into a mode of analysis utterly unsupported by controlling precedent. For this Court to follow Appellant's rhetorical lead and apply a race or culture-based identity analysis to a political entity based on unsubstantiated and unproven presumptions regarding the characteristics of its members would be to upend the ability of the Federal Government to fulfill its constitutional duties under the Commerce Clause and other relevant provisions.

Moreover, application of KG Urban's theory would lead to absurd results -- for if their identity argument would apply to Tribal political entities it would likewise apply to other political entities like States. KG Urban's efforts to equate political entities with the demographic makeup of their constituent individuals, invites Courts to likewise judge Federal to State actions based on the demographic make-up of that State's citizens rather than considered fairly as actions between separate sovereigns. For example, a federal law that benefits the State of Vermont, one of the most ethnically homogeneous States in the country, could be challenged as

primarily benefiting white non-Hispanic peoples. Similarly, a federal law which benefits the State of Maine, which has a majority female population, could be challenged on gender bias grounds. This theory applied to its logical conclusion would thereby overturn the basic principles of separate sovereignty upon which the Republic is based. These absurd results point out what is patently obvious in the context of any sovereign: The whole of the political entity is greater – in fact is quite another thing altogether – than the sum of its individual members.

Finally, as fully outlined in the brief of the Commonwealth, the argument of KG Urban is additionally predicated on the existence of events that have not yet happened. Section 91 strikes a reasonable balance between the efforts to negotiate in good faith with a sovereign tribe and yet preserve the free market state system of competitive bidding should that first effort falter. For this Court to find in Appellant's favor, this Court would further have to take the step of holding that, as contemplated by Section 91, there can be no community approval, that there will never be Indian lands, and that the process is in fact doomed to fail *ab initio*. Each of these assumptions is not supported by any factual record but rather by assertion alone. Making assumptions about the results of processes, negotiations, and community decisions that have not yet occurred not only involves this Court in issues of ripeness, but is also a recipe for realizing the well-known human foible of over confident predictions of the future when facts are in short supply.

II. Indian Tribes are Sovereign Governments

Within the United States there are three distinct sovereigns: the federal government, the States and Indian Tribes. *See* Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 1 (1997). In fact, the sovereignty of Indian Tribes "predates" the sovereignty of the United States and individual States. *See Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir. 1994) ("The Tribe's retained sovereignty predates federal recognition—indeed, it predates the birth of the Republic."); *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 172 (1973) ("It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.") Indeed, the United States, through all three branches of government, has long recognized the sovereign status of Tribes and that recognition endures today both under domestic and international law.

The sovereignty of Indian Tribes is expressly recognized within the Commerce Clause of the Constitution which empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the *Indian tribes*." U.S. Const. art. I, § 8, cl. 3 (emphasis added). In addition to conferring exclusive federal power over Indians affairs, the "Indian commerce clause recognizes tribes as sovereigns along with foreign nations and the several states." *Cohen's*

Handbook of Federal Indian Law, § 4.01[1][a] (Nell Jessup Newton ed., 2005) [hereinafter *Cohen's*].

The Supreme Court's early jurisprudence clearly recognized this sovereign status of tribes as "distinct, independent political communities," *Worcester*, 31 U.S. at 559, "capable of managing [their] own affairs and governing [themselves]." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). More recently, the Supreme Court reaffirmed the sovereign status of Indian Nations in *United States v. Lara*, in which the Court recognized tribes as "separate sovereign[s]" distinct from the federal government. *United States v. Lara*, 541 U.S. 193, 210 (2004) (holding that the double jeopardy clause did not apply to a subsequent federal prosecution, because the individual had been prosecuted by two distinct sovereigns, an Indian nation and the federal government.) Similarly, citing *Morton v. Mancari*, 417 U.S. 535 (1974), the District Court below made it clear that the powers of Indian Tribes vis-à-vis the federal government are "political" in character, stemming from their inherent powers as self-governing entities. *Morton*, 417 U.S. at 554, n. 24.[1] *See also* Matthew L.M. Fletcher, *The Original*

[1] Specifically in *Morton*, it is membership in a tribe, a tribe which has a *political and government-to-government* relationship with the federal government, that is the determining factor for the Court's decision. In fact, determining membership rules is a recognized component of tribal sovereignty. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32 (1978) ("A tribe's right to define its own membership…has long been recognized as central to its existence as an *independent political community*") (emphasis added).

Understanding of Political Status of Indian Tribes, 82 St. John's L. Rev. 153, 181 (2008) (offering "a clear pattern of historical evidence that the original understanding of the Indian affairs power under the Constitution is political in character, not racial.")

In the exercise of its plenary authority over Indian affairs, Congress has enacted numerous laws recognizing tribes as sovereign governments. In addition to IGRA, discussed more fully below, other examples include the Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4270, which found that "the tribal right to self-government flows from the inherent sovereignty of Indian tribes and nations," 25 U.S.C. § 458aa; several federal environmental statutes which explicitly authorize the Environmental Protection Agency to treat tribes in the same manner as states, *see, e.g.*, Federal Water Pollution Control Act, 33 U.S.C. § 1377(e) (2010); and most recently, the Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (2010), which strengthens the ability of tribes to combat crime on their lands by enhancing the cross-deputizations of tribal police officers to enforce violations of federal law, *id.* § 222, and expands the sentencing authority of tribal courts, *id.* § 234. The President has similarly affirmed that "[t]he United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions." Exec. Order No.

13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000). *See also* Memorandum on Tribal Consultation, 74 Fed. Reg. 57879 (Nov. 9, 2009).[2]

Each branch of the federal government has thus recognized the enduring government-to-government relationship tribes have with the United States. The Appellant offers no jurisprudential reason to depart from that longstanding recognition.

III. Under the Indian Gaming Regulatory Act, Congress Exercised its Plenary Authority to Regulate Indian Gaming and Carefully Balanced the Interests of the States and Indian Tribes

This section examines more closely the powers of the federal government in relation to tribes. As noted above, the Indian Commerce Clause "'provide[s] Congress with plenary power to legislate in the field of Indian affairs.'" *Lara*, 541 U.S. at 200 (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)). It is the principal constitutional provision conferring federal power over tribes and Indians, and this Court has construed it as broadly authorizing Congress to regulate Indian affairs.[3]

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[2] Additionally, under international law, Indian nations "have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions." United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 4, U.N. Doc. A/RES/61/295 (Oct. 2, 2007) (in December 2010, the President endorsed this Declaration on behalf of the United States).

[3] Other constitutional provisions that do not specifically reference Indians, such as the Treaty Clause (U.S. Const. art. II, § 2, cl. 2), and the Property Clause (*id.* art. IV, § 3, cl. 2), are additional sources of federal authority over Indian matters.

In conjunction with the Indian Commerce Clause, the federal government has a unique trust obligation to Tribal nations, arising out of treaties and other relevant laws, which includes broad protection of the inherent sovereign rights of tribes. *See Cohen's*, *supra* § 5.04[4]. However, the Indian Commerce Clause and the United States' trust responsibility do not merely authorize the United States to exercise authority over the Indian Tribes. They incorporate into our constitutional structure a recognition of both the Tribes' sovereign status and the United States' unique obligation towards them.[4]

IGRA is one such example of Congress' use of its plenary power and trust responsibility. Not only does it regulate Indian gaming, it "promot[es] tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. § 2702(1), and "grant[s] states some role in the regulation of Indian gaming." *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 715 (9th Cir. 2003). Generally, through IGRA, Congress established an intricate structure that distinguishes among different types of gaming, provides federal regulatory oversight, and subjects certain gaming to the requirements of a State compacting process to address off-reservation effects of gaming.

Together, these constitutional provisions confer upon the federal government a broad power to regulate Indian affairs. *See generally Cohen's*, *supra* § 5.01.

[4] In *Morton*, the Supreme Court recognized that one of the purposes of the preference at issue in that case was to "further the Government's *trust obligation* toward the Indian tribes…." *Morton*, 417 U.S. at 541 (emphasis added).

IGRA recognizes the strong interests of both Indian Tribes and States in gaming. *See* Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 Harv. J. on Legis. 39, 50 (2007); *see also Cohen's*, *supra* § 12.02[5] (describing the role of states in Indian gaming under IGRA). It is colloquially known as a "cooperative federalism" statute, and contemplates joint federal and state regulation. *Artichoke Joe's*, 353 F.3d at 715. The act balances the competing sovereign interests of the federal, state and tribal governments by giving each a role in effectuating a regulatory scheme for gaming. The Tribal-State compacting process, discussed below, is viewed as a "viable mechanism for settling various matters between two equal sovereigns." S. Rep. No. 100-446, at 13 (1988).

In response to and in an effort to conform to IGRA, several states passed laws to address Indian gaming within their borders. Section 91 of the Massachusetts Act is one such law. The below section discusses how Section 91 comports with the federal provision for tribal-state compacting.

IV. The Massachusetts Legislature Carefully Crafted Section 91 of the Massachusetts Act to Conform to IGRA

Congress, in its effort to insure smooth relationships among federal, State and Tribal governments mandated in IGRA that States should negotiate in good faith with Tribes regarding gaming. Section 91 of the Massachusetts Act complies with both the spirit and the substance of that Congressional goal.

A. Both IGRA and Section 91 of the Massachusetts Act Require Tribal-State Compacts

Congressional intent for promoting a means of balancing state, tribal, and federal interests is met by the implementation of Section 91 of the Massachusetts Act, evidenced by the fact that IGRA provides for gaming regulation through a tribal-state compact. IGRA states that in the case of Class III gaming activities, they are to be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." 25 U.S.C. §2710(d)(1)(C). Section 91(a) of the Massachusetts Act, in accordance with the aforementioned IGRA provision, is the crucial first step in the establishment of a tribal-state compact by recognizing the ability of the Governor of Massachusetts to "enter into a compact with a federally recognized Indian tribe in the Commonwealth." Section 91(b) of the Act also requires assistance by the Massachusetts Gaming Commission to negotiate such compacts, and requires voting and approval of such a compact by the governing and host communities. This effectively meets IGRA's goal of addressing state concerns over Class III gaming, while recognizing the inherent right of Tribal nations to partake in this form of economic development.

Similar to Section 91 of the Act, a North Carolina state law facilitates tribal gaming by specifically granting the Governor the power and duty to "negotiate and enter into Class III gaming compacts, and amendments thereto, on behalf of the State consistent with State law and the [IGRA], as necessary to allow a federally

recognized Indian tribe to operate gaming activities in [North Carolina] as permitted under federal law." *United States v. Garrett*, 122 F. App'x 628, 630 (4th Cir. 2005) (citing N.C. Gen. §147-12 (2004)). In upholding the North Carolina law, the *Garrett* court found that in accordance with IGRA's compacting process, "the statute relates to *tribal status and tribal self-government. The very nature of a Tribal-State compact is political*." *Garrett*, 122 F. App'x at 632 (quoting *Artichoke Joe's*, 353 F.3d at 734-35) (emphasis added). Thus, the agreements that relate to that compacting process are themselves agreements between two sovereigns, an Indian Tribe and a State.

In the same way, Massachusetts is exerting its IGRA sanctioned role in Indian gaming by requiring that the Governor and a federally recognized tribe enter into a compact. In both IGRA and Section 91, a Tribal-State compact is a means of developing Class III tribal gaming within a particular State. Section 91 gives effect to IGRA by implementing parallel mechanisms to achieve the overall Congressional goal to promote tribal self-sufficiency within Massachusetts.

B. Both IGRA and Section 91 Require Indian Gaming to Take Place on "Indian Lands"

Section 91 also relates to IGRA in that it requires Indian gaming to take place on Indian lands. IGRA defines Indian land as "all lands within the limits of any Indian reservation; and any lands title to which is either held in trust by the United

States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4). Section 91(c) of the Massachusetts Act conforms to IGRA's definition of "Indian lands" because it requires trust lands for the purpose of gaming. Massachusetts Act, 91(e). If the Massachusetts Gaming Commission determines, at any time on or after August 1, 2012, that a Tribe will not have land taken into trust by the United States Secretary of the Interior, then it must consider other bids for the region. *See id.*

C. Both IGRA and Section 91 of the Act Discuss Support from Surrounding Communities, the Governor, and the Tribe

IGRA provides several additional mechanisms for situations involving gaming lands acquired by Tribes after 1988. One of those mechanisms include a determination by the "Secretary, after consultation with the Indian tribe and appropriate State and local officials" that "a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the

Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." 25 U.S.C. § 2719(b)(1)(A).[5]

To achieve this same goal, with regards to land acquisition agreements, Section 91(c) states, "[t]he governor shall… enter into negotiations . . . with a tribe that has . . . 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." Both section 2719(b)(1)(A) of IGRA and section 91(c) of the Massachusetts Act are therefore consistent with one another, in facilitating the process of reaching a negotiated compact with a federally recognized Indian Tribe for Class III gaming within the Commonwealth of Massachusetts.

The parallels between Section 91 and IGRA support the notion that Section 91 of the Act gives effect to the implementation of IGRA in Massachusetts. Section 91 neither derogates from the purpose of IGRA - to provide a mechanism for state involvement of Class III tribal gaming through its compacting process, nor does it expand the IGRA definition of Indian lands. Finally, both statutes allocate

[5] Other possibilities under IGRA include lands "taken into trust as part of (i) a settlement of a land claim, (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B).

provisions which seek to address and satisfy the interests and concerns of all parties involved, and effectively create a regulatory scheme in line with the Congressional intention underlying the adoption of IGRA.

V. Conclusion

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

/s/ Jeffrey J. Pokorak

Professor Jeffrey J. Pokorak, *Counsel of Record*
Court of Appeals for the First Circuit #1152304
Professor Lorie Graham
Nicole Friederichs, Practitioner in Residence
Alice Keh, Student Attorney Rule 3:03
Sheena Knox, Student Attorney Rule 3:03
Sulma Khalid, Student Attorney Rule 3:03
Indian Law and Indigenous Peoples Clinic
Suffolk University Law School
120 Tremont Street
Boston, MA 02108
Tel. (617) 573-8100

April 27, 2012

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,404 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & (6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word 2010.

/s/ Jeffrey J. Pokorak

CERTIFICATE OF SERVICE

I hereby certify that this document was filed through the Electronic Case Filing (ECF) system on April 27, 2012, and thus copies will be sent electronically by that system to counsel for all parties in the case.

/s/ Jeffrey J. Pokorak