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 REPLY BRIEF

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Massachusetts spends exactly eight of the fifty-one pages in its brief addressing the critical issue in this case—whether the Act's unique and categorical preferences for Indian tribes are subject to strict scrutiny or rational basis review. The rest of its brief is devoted to jurisdictional arguments that the district court squarely rejected, and lengthy responses to minor points.

What is most revealing is what is *not* disputed in Massachusetts' brief. Massachusetts does not dispute that the Act categorically bars KG from seeking a commercial gaming license in the Southeast, in order to give a single Indian tribe (the Mashpee Wampanoag) an exclusive opportunity to identify a gaming site and negotiate a gaming compact agreeable to the Governor. Nor does it dispute that the Mashpee and its commercial partners[1] can make this temporary exclusion permanent—and forever foreclose all non-tribal competition in the Southeast—by meeting a few relatively undemanding state-law criteria. Most important, Massachusetts does not dispute that if the Mashpee reach an agreement with the Governor by July 31, 2012, then non-tribal competitors such as KG will be prohibited from even *applying* for a commercial gaming license in the Southeast, regardless of the economic merits of their proposals. This is a race-based exclusion that cannot remotely satisfy strict scrutiny.

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[1] The Mashpee's efforts to obtain a casino are being underwritten by the Genting Group, a Malaysian gaming conglomerate. KG Br. 7 n.4.

Massachusetts' sole substantive response is that the Act makes "political," rather than racial, classifications subject only to rational basis review. But that position is deeply flawed both as a matter of law and as a matter of fact. As a legal matter, it is well-settled that while the *federal* government can rely on the treaty power and Indian Commerce Clause to treat tribes as "political" entities, states have no comparable power. And Massachusetts' contention that the Act's tribal preferences are explicitly authorized by the federal Indian Gaming Regulatory Act ("IGRA"), and thus subject to the relaxed scrutiny applicable to federal action, cannot be reconciled with the stubborn reality of how the Act actually operates. While Massachusetts initially characterized the Act as a neutral means of accommodating the IGRA rights of federally recognized tribes, it now admits that it operates solely for the benefit of a *single* tribe, the Mashpee. And while Massachusetts invokes the unique rights of tribes on Indian land, it cannot deny that the sole tribe it seeks to benefit has no Indian lands, and the Act sets aside an entire region for that tribe and its commercial partner to negotiate a commercial real estate arrangement in order to develop a casino. Precedents allowing gaming only on tribal land provide no support for the sordid spectacle of reserving an entire region for the benefit of a single tribe and its commercial partners.

The reality on the ground demonstrates that the Act operates no differently from the blatantly unconstitutional, explicit set-aside of the region's commercial

license that the Massachusetts Legislature initially proposed. The Mashpee and their commercial partners have behaved no differently from commercial developers in the rest of the Commonwealth, with one key difference—they operate free from competition by virtue of the race-based set-aside of the entire region. After surveying a variety of sites in the region, and rejecting sites in Fall River and Middleboro, the Mashpee announced their development plan for a site in Taunton.[2] Their selection of the Taunton site had nothing to do with tribal sovereignty or proximity to Indian land. The Mashpee simply selected a site they deemed commercially viable and negotiated a real estate deal.

Their ability to reach such an agreement free from the competitive environment that prevails in the rest of Massachusetts and then make their temporary monopoly permanent has no precedent and certainly cannot be justified as explicitly authorized by IGRA. Indeed, to the extent it grants a tribe a state-law racial benefit that the tribe can only make permanent by reaching an agreement with the Governor by a date certain, the Act actually distorts the IGRA negotiation process. In all events, this state-law, region-wide racial set aside for a single tribe without any current Indian lands is entirely a creature of state law, and, as such, must rest on Massachusetts' own authority and satisfy strict scrutiny.

[2] Mark Arsenault, *Mashpee Tribe Would Put a Casino in Taunton*, Boston Globe (Feb. 29, 2012), http://articles.boston.com/2012-02-29/metro/31108340_1_tribal-casino-major-casino-companies-casino-law.

Massachusetts wisely does not even try to defend the tribal preferences under that demanding standard.

* * *

The sole relief that KG seeks in this proceeding is the *opportunity* to compete for a commercial gaming license on the merits, on a level playing field untainted by racial considerations. That is exactly the process that will prevail in the Eastern and Western regions, but not in the Southeast where race is dispositive. The Act's categorical tribal preferences cannot be squared with the first principles of the federal and Massachusetts Constitutions.

ARGUMENT

I. KG'S EQUAL PROTECTION CLAIMS ARE RIPE

Massachusetts' lead argument (at 18-21) is one the district court rejected, Add.9a-11a, namely, that KG's claims are not ripe. But Massachusetts offers no persuasive reason to disturb that holding. KG's equal protection claims are ripe for three independent reasons.

First, KG's injury—being denied the opportunity to compete for a gaming license on a level playing field—results directly from *the Act itself*, which categorically forecloses KG from negotiating with the Governor or otherwise seeking a license until July 31, 2012, at the earliest, solely because its owners do not belong to the preferred racial group. *See* Act § 91(e) (Add.42a). Contrary to

Massachusetts' suggestion (at 18), KG does not need to await the details of the regulatory minutiae before it can bring a facial challenge to the statute. The Act itself imposes the challenged set-asides, and any regulations that did not include the tribal preferences in section 91 would be *ultra vires*. When the statutory obligations being challenged are "clearly establishe[d]," the case is ripe even though "regulations under the Act have not been promulgated." *Retail Indus. Ass'n v. Fielder*, 475 F.3d 180, 188 (4th Cir. 2007).

Second, Massachusetts cannot deny that, right now, only the Mashpee can negotiate with the Governor concerning a casino in the Southeast. *See* Add.10a-11a (noting that "Governor Patrick has already begun negotiations with an Indian tribe but is currently foreclosed from entering into similar negotiations with private entities"). That immediate race-based preference alone is sufficient to defeat any suggestion that KG's injury is "conjectural." Regardless, the immediate preference can only produce one of two outcomes, both of which injure KG. Either this temporary race-based preference will be made permanent—in which case presumably even Massachusetts would concede ripeness—or there will be a competitive process in the Southeast in which the Mashpee and its commercial partners will enjoy the considerable advantage of having had exclusive discussions with the Governor and Commissioners about Massachusetts' preferences and

priorities. Either way, the current race-based preference for the Mashpee distorts fair competition in the Southeast.

Massachusetts contends (at 19-21) that KG's claims are premature because, if the compact negotiations do not come to fruition by July 31, 2012, then KG may have the opportunity to apply for a commercial license. But that argument ignores the considerable advantages the Mashpee will retain from months of exclusive access to and detailed discussions with the Governor and Commissioners, and gets the ripeness analysis exactly backward. Any uncertainty about how long the exclusion will last does not detract one iota from the reality that the Act is imposing a race-based exclusion *right now*.

In any event, Massachusetts undermines its own argument by suggesting (at 18-19) that it may choose to flout the October 31, 2012 statutory deadline for requesting commercial applications in the Southeast if a compact is not signed and approved by July 31, 2012. *See* Act § 91(e) (Add.42a) (mandating that "the commission *shall* issue a request for applications for a category 1 license in Region C … *not later than* October 31, 2012," if an approved compact is not reached by July 31st) (emphasis added).[3] Massachusetts cannot rely on the looming

[3] Citing *Cullen v. Building Inspector*, 234 N.E.2d 727, 732 (Mass. 1968), Massachusetts describes the deadline as "directory and not mandatory." But, in *Cullen*, the agency's action was only five days late, and the deadline in question did not "go to the essence of the thing to be done." *Id.* Here, in contrast, the

possibility of a competitive application process in arguing about ripeness, while simultaneously claiming authority to disregard the statutorily mandated deadline for initiating that very process. Nor does Massachusetts address whether its asserted ability to ignore statutory deadlines extends to the July 31st deadline for making the Mashpee's temporary race-based exclusivity permanent.[4]

Third, the tribal set-asides in the Act are severely distorting the competitive landscape in the Southeast right now. Since the Governor signed the Act last November, there has been intense competition among at least seven major national gaming operators for the commercial licenses in the Eastern and Western regions, but the Southeast remains a dead zone for everyone other than tribes and their commercial partners. JA 47, ¶¶ 6-7. Because of the exclusive opportunity for tribes (and now, apparently, just the Mashpee) until July 31, and the substantial likelihood that those exclusive rights will become permanent, gaming operators and investors unaffiliated with tribes have steered clear of the Southeast, while the Mashpee and their commercial partners have enjoyed a clear field to survey

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October 31, 2012 deadline is critical and the Commonwealth appears to assert the power to delay matters indefinitely.

[4] If Massachusetts' deadlines-are-precatory theory extends to the July 31st deadline as well as the October 31st deadline, then, unless the set-asides are struck down, the Commission could indefinitely extend the tribal exclusivity period.

potential development sites.[5] As a result, KG is unable to take critical steps toward furthering its development proposal—the same steps that are being taken by the Mashpee in the Southeast and commercial developers in the other two regions. JA 47-48, ¶¶ 9-10.[6]

Massachusetts (at 20) dismisses all of this as the "ipse dixit of KG's managing director," but—tellingly—does not actually dispute any of the facts set forth in KG's declarations. Massachusetts also ignores the district court's specific factual findings that "[t]he unsettled constitutionality of the legal provisions at issue in this case hampers … region-wide investment" in the Southeast, and that the "collateral effects" of that uncertainty are "felt acutely by [KG], which must decide whether to expend substantial resources to exercise options on and

[5] Massachusetts' own analysis found that the Western region license would likely be the *least* valuable of the three. *See Gaming Market Analysis* 9 (Mar. 31, 2010), http://uss-mass.org/documents/Spectrum_Market%20Analysis3_31_10.pdf. Yet the West has attracted five major gaming operators, while the more-valuable Southeast lies fallow.

[6] Massachusetts (at 20) cites *URI Student Senate v. Narragansett*, 631 F.3d 1 (1st Cir. 2011), for the proposition that "voluntary third-party behavior" cannot give rise to a constitutional claim. But *URI* involved a due process claim based on alleged "stigma" or "reputational harm." *Id.* at 10-11. Courts have long applied a heightened standard of proof of injury unique to such cases, but have never extended it to equal protection claims challenging a race-based exclusion from competing for government benefits. That part of the injury from a race-based preference flows from third parties' rational economic reactions to the government's racial preferences hardly diminishes the constitutional injury.

redevelop the Cannon Street Property." Add.10a.[7] In rejecting Massachusetts' ripeness argument, the district court correctly recognized the substantial risk that those resources would be "wasted" if resolution of this case were postponed. *Id.*

Finally, Massachusetts argues (at 21) that KG lacks standing because, even if it is shut out of the application process, "its investment to date would not be rendered worthless." That is nonsense. This is a claim for the fundamental guarantee of equal treatment, not some regulatory takings claim that is not cognizable unless property is rendered worthless.[8] KG's injury is the denial of the *opportunity to apply* for a commercial gaming license. Countless decisions have recognized that denial of the opportunity to compete for a valuable government concession is, by itself, sufficient both to confer standing on the plaintiff and to give rise to irreparable injury—regardless of whether the plaintiff could have refocused its efforts on some other opportunity. *See Ne. Florida General*

[7] Massachusetts is thus flatly wrong to assert (at 20 n.78) that the district court "disregard[ed]" the portions of Mr. Stern's supplemental declaration that address how the tribal set-asides are deterring investment and distorting competition in the Southeast.

[8] Massachusetts' only authority for this astonishing argument is, not surprisingly, a regulatory taking case. Mass.Br.21 (citing *Gilbert v. Cambridge*, 932 F.2d 51, 63 (1st Cir. 1991)). But, while a regulatory takings claim will lie only if there is a complete deprivation of economic value, *see Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992), a race-based denial of the opportunity to compete is sufficient for an equal protection challenge. Even modest race-based advantages that do not render competitors' investments worthless are subject to strict scrutiny.

Contractors v. Jacksonville, 508 U.S. 656, 666 (1993); *O'Donnell Construction v. D.C.*, 963 F.2d 420, 423, 428-29 (D.C. Cir. 1992).

Applying these principles, the district court correctly determined that KG has standing. 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. That is more than enough to bring this challenge.

II. THE ACT'S CATEGORICAL TRIBAL PREFERENCES VIOLATE THE EQUAL PROTECTION CLAUSE AND DECLARATION OF RIGHTS

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

1. States Have No Inherent Authority to Legislate with Respect to Tribes as "Political" Entities

Massachusetts' effort (at 28-32) to avoid strict scrutiny by asserting its ability to deal with tribes as "political" entities suffers from a fatal flaw. The Constitution is not silent as to which level of government has the authority to treat tribes as "political" entities. The Constitution quite clearly grants the *federal* government—and not the states—the authority to enter treaties with tribes and to "regulate Commerce … with the Indian Tribes." U.S. Const. art. I, § 8. Just as states have no constitutional authority to set their own foreign policy, *see Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), they similarly lack any explicit

constitutional authority to negotiate treaties or engage in "political" relations with tribes. Massachusetts argues (at 30) that 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. In light of the treaty power and the Indian Commerce Clause, however, there should be no difficulty in concluding that states have far less authority than the federal government to deal with tribes as "political" entities. Indeed, that is black-letter law. When state action regarding tribes is not explicitly authorized by federal law, it must rest on the state's own authority and satisfy strict scrutiny.

Massachusetts (at 29) continues to rely on inapposite cases involving *federal* authority over Indian tribes. *Morton v. Mancari*, 417 U.S. 535, 553-54 (1974), is doubly inapplicable, as it involved action at the federal level by the Bureau of Indian Affairs ("BIA"), which governs the "lives and activities" of Native Americans "in a unique fashion." The Court emphasized that "the legal status of the BIA is truly *sui generis*," and that it "need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations." *Id.*

Massachusetts (at 29-30) cites several cases for the proposition that states may treat activities by tribes on Indian lands differently from the conduct of private businesses elsewhere. But each of those cases involved preferences regarding

tribes' activities *on their own Indian lands*. *See Squaxin Island Tribe v. Washington*, 781 F.2d 715, 722 (9th Cir. 1986) (addressing tribal liquor enterprises on Indian reservations); *N.Y. Convenience Stores v. Urbach*, 92 N.Y.2d 204, 212-13 (1998) (addressing taxation of cigarette and gasoline sales by tribes on tribal land). This principle also explains *United States v. Antelope*, 430 U.S. 641 (1977), which rejected an equal protection challenge to the federal Major Crimes Act, a statute that treats crimes committed by Native Americans on reservation land differently. Not one of those cases involved preferences for a landless tribe, nor did they foreclose non-tribal commercial activity outside Indian lands, let alone grant tribes an exclusive right to negotiate for a valuable commercial opportunity throughout an entire region.

Citing *Artichoke Joe's v. Norton*, 353 F.3d 712 (9th Cir. 2003), and *United States v. Garrett*, 122 Fed. App'x 628 (4th Cir. 2005), Massachusetts argues (at 30) that "[a] state law that allows Indian tribes to open a casino pursuant to an IGRA-sanctioned compact, but does not allow casinos outside of Indian lands, makes a political distinction between federally-recognized tribes and the rest of the world." But that is *not* what the Act does. It is one thing to treat Indian lands differently from non-tribal land, but it is quite another to treat an entire region of the Commonwealth as "potential Indian lands," and give a single tribe the exclusive opportunity to strike a commercial development deal that will be a basis for

foreclosing all competition in the region, especially when the rest of the state remains open to competition.

Unlike the California and North Carolina laws at issue in *Artichoke Joe's* and *Garrett*, the Act *does* authorize commercial gaming by non-tribal entities. That distinction is critical because it both provides a race-neutral basis for evaluating Massachusetts' actions and makes clear that Massachusetts, unlike California and North Carolina, is not simply attempting to accommodate the unique federal rights of tribes to conduct gaming on Indian lands. If Massachusetts had pursued its initial plan to award three commercial casinos and reserve the Southeast license for the Mashpee, it would have obviously run afoul of the Equal Protection Clause. KG Br. 10-12. But the Act's more-convoluted path to the same end is no more constitutional. By setting aside an entire region and granting a landless tribe the ability to negotiate a commercial real estate agreement that will permit it to permanently foreclose competition in that region, the Act provides a valuable economic advantage to the Mashpee that is completely untethered to any unique considerations that might attach to extant tribal lands. The fact that the actions of the Mashpee and its commercial partners in the Southeast resemble the actions of commercial developers in the rest of the Commonwealth—except for the lack of competition—only underscores the actual effect of the Act, and how

different the Act is from the state laws approved in *Artichoke Joe's* and *Garrett*. No other state has ever tried anything like this.

Massachusetts argues (at 25) that the Act's departure from "territorial uniformity" does not give rise to an equal protection violation. That badly misconstrues KG's argument. The crux of KG's equal protection argument is that, based on the race of its owners, *KG itself* has been deprived of opportunities reserved for the Mashpee in the Southeast, and has been treated worse than commercial developers in the other two regions solely because the Southeast has been reserved for the Mashpee. The fact that an entire region is being treated differently based on its perceived proximity to a landless tribe is not the crux of KG's claim, but does demonstrate both that cases involving differential treatment of Indian lands are inapposite, and that the collateral damage of Massachusetts' impermissible use of race extends well beyond KG to deprive the Southeast of a valuable economic opportunity being actively and competitively pursued in the other two regions. If Massachusetts succeeds in reserving the Southeast for the Mashpee to pursue IGRA-compliant gaming, the one certainty is that—as a result of the lengthy, complex, and uncertain process of having land taken into trust, *see infra* 20-21—the economic benefits of gaming will reach the economically disadvantaged Southeast years after the rest of the Commonwealth. *See* JA 40-41.

Massachusetts' position boils down to a simple "greater-includes-the lesser" argument. Because it could prohibit *all* commercial gaming, as California and North Carolina did, Massachusetts reasons that the section 91 regime—in which the Mashpee are granted a right of first refusal to shut down commercial gaming in the Southeast—is necessarily constitutional. But the greater power emphatically does not include the lesser power where equal protection concerns are implicated. For example, cities and states have broad discretion to choose whether certain officials should be elected or appointed, but "'once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause.'" *Kramer v. Union Sch. Dist.*, 395 U.S. 621, 628-29 (1969). Here, Massachusetts surely could not defend a policy limiting commercial gaming licenses to individuals of Portuguese or Italian descent on the ground that it could have banned commercial gaming altogether. Once Massachusetts chose to open itself up to commercial gaming, it became bound by the Equal Protection Clause to implement that gaming in a race-neutral manner—regardless of whether it could have chosen not to have commercial gaming at all.

2. The Act's Set-Asides Are Not Explicitly Authorized by IGRA

States "do not enjoy [the] same unique relationship with Indians" as the federal government, *Washington v. Yakima Indian Nation*, 439 U.S. 463, 501 (1979), and have no inherent constitutional authority to single out either tribes or

individual Native Americans for differential treatment. A state law may take shelter in the lower standard of review that applies to certain federal laws regarding tribes only if the state "legislat[es] under *explicit authority* granted by Congress." *Id.* (emphasis added). Massachusetts asserts (at 33) that the Act's preferences "echo" classifications in IGRA, "follow the federal lead," or were enacted "in response to" IGRA, but that mischaracterizes the governing standard. Under *Yakima*, a state must be legislating under "explicit authority granted by Congress" in order to avoid strict scrutiny. 439 U.S. at 501. Massachusetts' attempt to find such authority in IGRA is unavailing, as the Act is a unique creation of state law that must stand or fall on its own.

Massachusetts seeks to avoid the real issue in this case by focusing on the *compacting* process, rather than on the Act's unprecedented tribal preferences. KG does not dispute that IGRA authorizes states to enter into compacts with tribes for IGRA-compliant gaming on Indian lands. But the Act goes much farther than that, by granting a landless tribe an effective veto over non-tribal commercial gaming in an entire region, which the tribe can make permanent if and only if it reaches an agreement with the Governor by July 31, 2012. In every state but Massachusetts, the effect of a tribal-state gaming compact is to authorize a tribe to engage in gaming on its sovereign tribal lands. Here, in contrast, the effect of the compact is not simply to authorize gaming on Indian lands, but to preclude commercial

gaming throughout one-third of the Commonwealth, on behalf of a landless tribe. Those effects—which provide a categorical economic advantage to the tribe and operate to the absolute detriment of commercial gaming entities—arise purely as a matter of state law.

Neither the region-wide monopoly nor the fact that it evaporates if the tribe does not agree to the Governor's terms by a date certain are remotely authorized by IGRA. These provisions have nothing to do with Indian lands, extend a race-based advantage well beyond anything envisioned by IGRA, and condition the tribe's ability to maintain that state-law race-based advantage in a manner that distorts the IGRA negotiating process. Simply put, nothing in IGRA explicitly authorizes setting aside a third of a state for a single, hand-picked tribe to negotiate a commercial real estate arrangement, which will form the basis for permanently excluding commercial competition if, but only if, the tribe agrees to terms with the Governor by a date certain. Indeed, it is not clear where even the federal government, which has special authority over Indian tribes and lands, would get the authority to enact a comparable law.

This mechanism is entirely a creature of state law. For example, to make its temporary region-wide monopoly permanent, a tribe must schedule a vote in the host community and enter into a compact that is signed by the Governor and approved by the Legislature by July 31, 2012. Act § 91(c)-(e) (Add.42a). But

IGRA contains no deadlines for negotiation of a compact, nor does it require a tribe to win a vote in the host community. Indeed, nothing in IGRA allows a state to limit tribal gaming to one particular region. Far from acting *pursuant* to IGRA, Massachusetts would likely be in *violation* of IGRA if it refused to enter compact negotiations for gaming on Indian land with a tribe that failed to win a host-community vote, missed the state-imposed deadline, or sought to convert land-into-trust for gaming in one of the other two regions. As far as federal law and IGRA are concerned, the Mashpee have the same rights before and after July 31st. The unprecedented region-wide monopoly that expires on July 31st unless the Mashpee agree to terms is entirely Massachusetts' invention and must stand or fall on its own.

The related flaw with Massachusetts' "IGRA-made-me-do-it" defense is the lack of any connection between the Act's tribal preferences and Indian lands. The very case on which Massachusetts relies most heavily holds in no uncertain terms that "IGRA pertains *only to Indian lands*," and regulates activities "*only on Indian lands*." *Artichoke Joe's*, 353 F.3d at 735 (emphasis added). This is a "critical" limitation, 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 tribes "shed their sovereignty" once "outside" those lands. *Id.*

Massachusetts asserts that it is irrelevant that the preferences extend to landless tribes because the Secretary of the Interior has approved a gaming compact on the condition that the tribe in question (the Warm Springs Tribe) subsequently have its land taken into trust. *See Notice of Compact Taking Effect*, 76 Fed. Reg. 11,258 (2011). But, less than one year earlier, the Interior Department had advanced the exact opposite position, emphasizing that IGRA "does not authorize the Secretary to approve a compact for the conduct of Class III gaming activities on lands that *are not now, and may never be, Indian lands of such Indian tribes*." Letter from Office of Indian Gaming to Bert Johnson (June 16, 2010) (Ex.C to Dkt.No.18) (emphasis added). In its one-paragraph order approving the Warm Springs compact, the Department did not even acknowledge its prior interpretation of IGRA, making it unclear whether this was a valid change of policy. An agency must at least "display awareness that it *is* changing position," and may not "depart from a prior policy *sub silentio*." *FCC v. Fox Television*, 556 U.S. 502, 515 (2009). In any event, the National Indian Gaming Commission has also rejected a tribal gaming ordinance pertaining to land that "has not yet been acquired in trust by the Secretary of the Interior." Letter from NIGC to Tohono O'odham Nation (Aug. 24, 2011) (Ex.D to Dkt.No.18).

But the question whether the Interior Department can approve an IGRA compact with a landless tribe is ultimately beside the point. Whatever issues might

be raised by a compact with a landless tribe in a state that permitted commercial gaming on a non-discriminatory basis or allowed gaming only on Indian lands, Massachusetts' approach is fundamentally different. Massachusetts, and Massachusetts alone, has arbitrarily set aside a third of the Commonwealth as an area where no commercial gaming will be allowed if a single tribe purchases land somewhere in the region through a commercial real estate deal that may ultimately lead to an approved compact for IGRA-compliant gaming if that land is taken into trust. Nothing in federal law authorizes setting aside an entire region—and immediately precluding any commercial competition—for a tribe to try to take land-into-trust. Both IGRA and the land-in-trust process apply state-wide. Massachusetts' decision to set aside only one region as the one where a landless tribe should focus its efforts to bring land-into-trust for gaming and then foreclose non-tribal commercial competition in that region is both unprecedented and unconstitutional.

The ongoing uncertainty over the scope of federal authority to take land into trust for tribes recognized after 1934 (such as the Mashpee) further strains the already-tenuous link between IGRA and the Act's tribal preferences. Absent an act of Congress, *Carcieri v. Salazar*, 555 U.S. 379 (2009), likely bars the Secretary from taking *any* land into trust for the Mashpee. Massachusetts contends (at 35-36) that *Carcieri* might not *completely* preclude the Mashpee from having land

taken into trust. But, even under that narrow view of *Carcieri*, a tribe seeking land-in-trust would have to prove it was "under federal jurisdiction" in 1934 in order to even be *eligible* to have land taken into trust.

That additional showing would only further delay the land-in-trust process. Indeed, the Mashpee—the sole intended beneficiaries of Massachusetts' tribal preferences—are likely a decade or more away from having land-in-trust, and may never obtain such land. The land-in-trust process is a massive undertaking that requires the Secretary to evaluate: the tribe's connection to the parcel in question; environmental impacts; jurisdictional issues; potentially conflicting land uses; the effect on state and local governments and tax rolls; and the claimed economic benefits. *See* 25 C.F.R. §§ 151.10-151.11. This process often draws fierce opposition from neighboring landowners, government entities, other tribes, and environmental groups, and inevitably leads to legal challenges; indeed, *Massachusetts itself* opposed the Mashpee's prior attempt to take land into trust. KG Br. 41-42 n.20. Nothing in IGRA authorizes granting a categorical state-law preference to an Indian tribe that has not even begun this long, onerous, and ultimately uncertain process (assuming it is even possible for the Secretary to take land into trust for the Mashpee after *Carcieri*).

Massachusetts attempts to minimize the impact of the tribal preferences by noting (at 36) that if the Commission "determines that the tribe will not have land

taken into trust," then it must issue a request for commercial applications in the Southeast. Act § 91(e) (Add.42a). But that provision is cold comfort to non-tribal entities, as it includes no deadline for making that determination. This purported safety valve is also quite unusual in that it requires the Commission to prove a negative (that land will *not* be taken into trust) based on speculation about the future actions of a federal agency. If anything, this provision simply reinforces that the set-asides benefit tribes that may *never* be eligible for IGRA-compliant gaming, and yet the Act nonetheless empowers those tribes immediately and indefinitely to postpone commercial gaming in the Southeast.

Finally, even if Massachusetts' unprecedented approach were somehow deemed authorized by IGRA, it would still be subject to strict scrutiny. The federal government's unique authority to treat tribes as political entities flows from the tribes' unique status as sovereigns, which in turn is tied to unique sovereign aspects, like tribal self-governance and Indian lands. Thus, Massachusetts' decision to give tribes the exclusive ability to survey potential casino sites throughout a third of the Commonwealth and then make the temporary exclusion permanent would exceed even the federal government's ability to escape strict scrutiny. There is a fundamental difference between a federal statute that grants tribes unique rights on their sovereign lands and a federal statute that attempts to give tribes or tribal members a preference for engaging in a particular commercial

enterprise. *See Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997) (limiting scope of federal statute and noting that "we seriously doubt that Congress could give Indians a complete monopoly on the casino industry or on Space Shuttle contracts," which have nothing to do with "uniquely Indian interests"). Not only does IGRA not authorize Massachusetts' regional set-aside, but such an unprecedented scheme, completely untethered to Indian lands, would be subject to strict scrutiny even if IGRA did authorize it.

B. The Tribal Preferences Are Unlawful Under Any Standard of Review

Massachusetts does not defend the tribal preferences under strict scrutiny, which is an exacting standard that the Act cannot remotely meet. But even if the Court concludes that the tribal preferences are "political" classifications, Massachusetts' ever-shifting and internally inconsistent defenses of the Act fail even the rational basis standard.[9]

Massachusetts (at 37-38) advances two justifications for the tribal preferences: (1) creating a framework for IGRA-compliant gaming; and (2) ensuring there is "not … more than one" casino in the Southeast. But those two

[9] KG has not waived this argument. KG's counsel argued below that "we don't concede" "any argument on rational basis" because "if the government comes forward with rational bases that … don't work on their own terms, it does suggest that something else is going on." Tr. 20-21. That is precisely the case here.

interests are squarely at odds with one another. If Massachusetts' goal is to facilitate IGRA-compliant gaming, then there is no rational justification for limiting the number of casinos or limiting the exclusion to the Southeast. IGRA grants *all* federally recognized tribes the right to conduct gaming on Indian land, and multiple tribes might seek to engage in IGRA-compliant gaming. At the same time, a policy limiting each region to one casino would undermine, rather than advance, the goals of IGRA. Such a limitation would bar certain tribes from engaging in gaming even if they were eligible to do so under federal law, thus granting the tribes *fewer* rights than they would have under IGRA alone. KG Br. 54 n.22.

The only way these two purported interests can be reconciled is if the Act is really designed to grant *one* IGRA compact to a *single* tribe in the Southeast—namely, the Mashpee. Massachusetts essentially admits this was its goal, as it now asserts (at 38-40 & n.103) that the Aquinnah have waived any right to conduct gaming. Thus, under Massachusetts' view, the Mashpee are now, and always have been, the *only* tribe eligible for the set-asides. But Massachusetts could have engaged in compact negotiations with the Mashpee even without section 91. All section 91 adds is the provision allowing the Mashpee to permanently exclude commercial gaming in the Southeast if they reach an agreement with the Governor by July 31st. That provision is wholly unnecessary for IGRA-compliant gaming,

and there is nothing "rational" about a gratuitous giveaway of an important public concession. Regardless of the standard of review, it is plainly irrational for Massachusetts to lock all non-tribal entities out of the Southeast without even *considering* the merits of their proposals—all on behalf of a landless tribe that is not, under current law, eligible for federal land-in-trust.

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

The Act also violates the Equal Protection Clause by reserving a seat on the Gaming Policy Advisory Committee for "a representative of a federally recognized Indian tribe." Act § 16, sec. 68(a) (Add.41a). Massachusetts' sole substantive defense (at 40) is that tribes "have a particular interest in and perspective on gaming." That argument is based on nothing more than the "offensive and demeaning assumption" that there is a single "Indian perspective" on gaming—*i.e.*, that all Native Americans "'think alike [and] share the same political interests.'" *Miller v. Johnson*, 515 U.S. 900, 911-12 (1995). The absurdity of Massachusetts' position is demonstrated by the fact that the seat could be awarded to a representative of the Aquinnah tribe, which the Commonwealth views as permanently barred from gaming. Moreover, if the Commission opens the Southeast to competitive applications, the tribal representative on the Committee would be providing advice about the application process in which the tribe itself might well be competing.

Relying on *Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir. 2002), Massachusetts argues (at 23) that KG lacks standing. In *Arakaki*, the court held that the plaintiffs lacked standing to challenge a state law limiting appointments to the Office of Hawaiian Affairs ("OHA") to Native Hawaiians. *Id.* at 1097-98. The sole purpose of the OHA was to "'address the needs of the aboriginal class of people of Hawaii,'" and plaintiffs, who were white, could not establish how they were affected by the appointment process. *Id.* at 1093, 1097-98. This would be akin to KG challenging the appointment rules for the Mashpee tribal council, which it obviously lacks standing to do.

Far more pertinent is *Buckley v. Valeo*, 424 U.S. 1, 115-18 (1976), which holds that an individual subject to the jurisdiction of a regulatory agency has standing to challenge the legality of appointments to that body. If the Committee could regulate the industry directly, then KG could indisputably challenge the appointment. The fact that the Committee affects the industry by providing high-level advice to the Governor and the Commission does not change the analysis. KG, as a potential license applicant, surely has a "concrete interest" in ensuring that appointments to this body are made in a lawful manner. *Id.* at 117. Indeed, if KG does not have standing to challenge the composition of the committee, then it is unlikely *anyone* would have standing. Massachusetts created this Committee, gave it the ear of the Governor and Commission, and specified its membership.

Having done so, it should not be allowed to turn around and dismiss the Committee's role as too insignificant to give anyone standing to challenge its composition.

D. The Tribal Set-Asides Independently Violate the Massachusetts Declaration of Rights

The Act's set-asides also violate the Declaration of Rights. KG did not waive this argument—KG included a separate state constitutional claim in its complaint, *see* Dkt.No.1 at 19, and the key decision which extends state-law protection beyond the federal guarantee, *Finch v. Commonwealth Health Insurance*, 959 N.E.2d 970, 982 (Mass. 2012), was not issued until January 2012, two months after KG filed its motion for preliminary injunction. KG promptly brought this decision to the district court's attention and explained how it was relevant to the state-law claims. Dkt.No.19.

Massachusetts contends (at 42-44) that *Finch* is distinguishable because it involved alienage-based classifications rather than tribal preferences.[10] But that is a distinction without a difference, as the two contexts are analytically similar, as Massachusetts recognized below. *See* Dkt.No.16 at 13. In both contexts, the Constitution grants explicit authority to *Congress* to regulate a particular subject, but grants no comparable authority to the states. *See* U.S. Const. art. I, § 8. Thus,

[10] Massachusetts asserts (at 42-43 & n.112) that "[t]he district court correctly distinguished *Finch*," but the district court did not even cite that decision.

in both cases, any state action must be premised on some express delegation of authority from Congress or satisfy strict scrutiny. The Supreme Judicial Court has held that an "independent" or "noncompulsory" state program—such as the tribal preferences in the Act—"cannot shelter behind the existence of Congress's plenary authority and [is] subject to strict scrutiny review." *Finch*, 959 N.E.2d at 981-82.[11]

III. IF THE ACT CONTEMPLATES TRIBAL GAMING OUTSIDE OF THE IGRA PROCESS, IT IS PREEMPTED BY FEDERAL LAW

Massachusetts conceded below 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." Dkt.No.16 at 16. That is not an obvious reading of the Act, but the district court accepted Massachusetts' concession, holding that the Act "does not purport to supersede the federal procedures required under IGRA." Add.21a-22a. That non-obvious reading of section 91 avoids what would otherwise be egregious preemption problems. This Court should affirm the district court's reasoning and holding on this issue. KG Br. 52-54.

Contrary to Massachusetts' argument (at 46), KG has not "waived" anything. KG has consistently argued that "[t]o the extent the Act permits a tribe

[11] Citing *Pennhurst v. Halderman*, 465 U.S. 89 (1984), Massachusetts argues (at 41-42) that this Court lacks jurisdiction to issue an injunction ordering state officials to conform their conduct to state law. But KG has also requested declaratory relief, *see* Dkt.No.1 at 19, which avoids any Eleventh Amendment issue. *Allstate Ins. v. Serio*, 261 F.3d 143, 153 n.15 (2d Cir. 2001) (Calabresi, J.).

to engage in class III gaming without obtaining the federal approvals required by IGRA," it conflicts with federal law and is preempted. Dkt.No.9 at 33; *see* KG Br. 53. Moreover, to the extent that section 91 distorts the IGRA negotiation process by granting the Mashpee a temporary and unconstitutional benefit that only becomes permanent if they agree to terms based on a state-law deadline, it is also preempted. But this Court need not reach that issue because to the extent section 91 is not explicitly authorized by IGRA, it is unconstitutional wholly apart from whether it is affirmatively preempted.[12]

CONCLUSION

The decision below should be reversed, and the case remanded with instructions to enter judgment in favor of KG and permanently enjoin enforcement of section 91(e) of the Act, which delays the application process for a gaming license in the Southeast and gives tribes an effective veto over commercial gaming in that region. If section 91(e) is enjoined, then commercial gaming in the Southeast will necessarily be governed by the same competitive, merit-based application procedures that apply to the Eastern and Western regions (and would also apply in the Southeast but-for the carve-out in section 91(e)).

[12] Massachusetts suggests (at 48) that KG is seeking to bar tribes from applying for a commercial license. But KG has repeatedly emphasized that "nothing in IGRA prevents a tribal entity from competing equally for a commercial gaming license." Dkt.No.9 at 35; KG Br. 10 n.6.

Respectfully submitted,

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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 6,996 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

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May, 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.

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