12-1460

United States Court of Appeals for the Second Circuit

DANIEL T. WARREN

Plaintiff-Appellant,

-v-

UNITED STATES OF AMERICA, Individually, and as Trustee of the goods, credits and chattels of the federally recognized Indian nations and tribes situated in the State of New York, LYNN SCARLETT, in her official capacity as Acting Secretary of the United States Department of the Interior, JAMES CASON, in his official capacity as the Acting Assistant Secretary of the Interior for Indian Affairs, UNITED STATES DEPARTMENT OF THE INTERIOR, PHILIP N. HOGEN, in his capacity as Chairman of the National Indian Gaming Commission, NATIONAL INDIAN GAMING COMMISSION, GEORGE E. PATAKI, as Governor of the State of New York, CHERYL RITCHKO-BULEY, as Chairwoman of the New York State Racing and Wagering Board, DIRK KEMPTHORNE, in his official capacity as Secretary of the United States Department of Interior,

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of New York

BRIEF FOR STATE APPELLEES

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PRELIMINARY STATEMENT

Plaintiff Daniel T. Warren appeals from a judgment of the United States District Court for the Western District of New York (Skretny, C.J.), filed March 14, 2012, that dismissed the amended complaint and denied plaintiff's motion for leave to amend the complaint again.

Plaintiff commenced this action against the New York State Governor and the Chair of the New York State Racing and Wagering Board (the "state defendants") and various federal defendants to challenge a gaming compact entered into between the State of New York and the Seneca Nation of Indians (the "Compact") pursuant to the federal Indian Gaming Regulatory Act ("IGRA"). IGRA provides that a State and an Indian Tribe may enter into a compact governing gaming on Indian lands within the State. With respect to so-called Class III gaming, which includes casino games, the Act provides that such gaming may be permitted if located in a State that permits Class III gaming "for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B). Plaintiff alleges that the Compact violates a New York State constitutional prohibition on gambling and therefore

violates IGRA. The district court dismissed the claims against the state defendants as barred by the Eleventh Amendment.

The district court's dismissal of the amended complaint should be affirmed. The Eleventh Amendment bars claims in federal court by private parties against state officials in their official capacities and plaintiff does not allege an ongoing violation of federal law qualifying for the narrow exception to Eleventh Amendment immunity in *Ex parte Young*.

Alternatively, plaintiff's claims are legally deficient for three other reasons. First, the New York Court of Appeals has already rejected plaintiff's state law argument underlying his federal claim, holding that the New York Constitution permits Class III gaming within the meaning of 25 U.S.C. § 2710(d)(1)(B). *See Dalton v. Pataki*, 5 N.Y.3d 243, 835 N.E.2d 1180, *cert. denied*, 546 U.S. 1032 (2005). Second, the claims are barred by *res judicata* pursuant to a judgment in a state court action in which plaintiff unsuccessfully litigated a challenge to the same Compact. Third, plaintiff's speculative concerns about crime or other effects emanating from the gaming site are an insufficient injury-

in-fact to confer Article III standing to sue. Each of these grounds is sufficient by itself to affirm the district court's judgment. Accordingly, this action was properly dismissed.

ISSUES PRESENTED

1. Whether plaintiff's claims against the state defendants, challenging the gaming compact between the State of New York and the Seneca Nation of Indians, are barred by the Eleventh Amendment, and the complaint fails to allege an ongoing violation of federal law qualifying for the narrow exception in *Ex parte Young*.

2. Alternatively, whether the complaint fails to state a viable cause of action that the State lacked authority under state law to enter into the Compact.

3. Alternatively, whether this action is barred by *res judicata* because of a prior state court judgment against plaintiff.

4. Alternatively, whether plaintiff lacks Article III standing to sue.

STATEMENT OF THE CASE

A. The Indian Gaming Regulatory Act

In 1988, Congress passed IGRA to provide a statutory basis for the operation and regulation of gaming by Indian tribes. *See* 25 U.S.C. § 2702. IGRA divides gaming into three classes, with a different regulatory scheme for each. Class III gaming activities, the most heavily regulated, include such things as casino games and slot machines. 25 U.S.C. § 2703(8). The Act provides that Class III gaming activities shall be lawful on Indian lands where such activities are: (1) 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; (2) located in a State that "permits such gaming for any purpose by any person, organization, or entity"; and (3) conducted in conformance with a Tribal-State compact entered into by the Tribe and the State. 25 U.S.C. § 2710(d)(1).

IGRA requires any Indian tribe having jurisdiction over Indian lands on which Class III gaming is being, or will be, conducted to request that the State in which the land is located to enter into

negotiations to enter into a Tribal-State compact governing the gaming activities. 25 U.S.C. § 2710(d)(3)(A). After receiving such a request, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." *Id.* The Act provides specific remedies where a State fails to enter into compact negotiations or to conduct such negotiations in good faith. 25 U.S.C. 2710(d)(7); *but see Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (Congress lacked authority under the Indian Commerce Clause to abrogate the States' Eleventh Amendment immunity in IGRA and the doctrine of *Ex parte Young* was inapplicable in light of IGRA's intricate remedial provisions for failure of State to negotiate in good faith).

Once a compact is entered into, it is ineffective unless approved by the Secretary of the Interior. 25 U.S.C. § 2710(d)(3)(B). The statute provides that "[a]ny State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register." *Id.* The Secretary may disapprove

a compact only if it violates IGRA, any other federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligations of the United States to Indians. 25 U.S.C. § 2710(d)(8)(B). If the Secretary does not approve or disapprove the compact within 45 days of submission, the compact "shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of [IGRA]." 25 U.S.C. § 2710(d)(8)(C).

B. The Compact

In 2001, the New York State Legislature enacted N.Y. Executive Law § 12, authorizing the State, through its Governor, to execute up to four Tribal-State compacts pursuant to IGRA. On August 18, 2002, the Governor entered into a compact with the Seneca Nation pursuant to § 12 and IGRA (A106-A158).

On September 10, 2002, the compact was submitted to the Secretary of the Interior for approval (A234). By letter dated November 12, 2002, the Secretary of the Interior stated that because she had neither approved nor disapproved the Compact within 45 days, it was deemed approved by operation of 25 U.S.C. § 2710(d)(8)(C), but only

to the extent the Compact is consistent with the provisions of IGRA (A240-A241).

C. Plaintiff's Prior State Court Action

In 2004, plaintiff sued the Governor and Chair of the State Racing and Wagering Board in New York State court, challenging the Seneca Compact (A9-A15). Plaintiff raised the same claims he asserts against the state defendants here, including that Executive Law § 12 and the Compact violated state constitutional provisions and that the Compact violated IGRA (A9-A15). Summary judgment was granted in favor of the defendants and the complaint was dismissed (A98-A101). Plaintiff filed a notice of appeal from the judgment, but did not perfect that appeal (A6).

D. The New York Court of Appeals' Decision in *Dalton v. Pataki*

In 2005, the New York Court of Appeals held in another case that Executive Law § 12, authorizing the Governor to enter into the Seneca Compact, did not violate the New York State Constitution's prohibition on commercial gambling. *Dalton v. Pataki*, 5 N.Y.3d 243, 835 N.E.2d

1180, *cert. denied*, 546 U.S. 1032 (2005). The Court explained that under IGRA, Class III gaming is permitted on Indian land if "located in a State that permits [Class III] gaming for *any* purposes by *any* person, organization, or entity.'" *Id.* at 259 (quoting 25 U.S.C. § 2710(d)(1)(B)) (emphasis added by the Court). The Court explained that "[t]his language is intentionally broad and includes the limited gaming permitted by the New York State Constitution under the supervision and authority of the New York State Racing and Wagering Board." *Id.* Thus, "[s]ince New York allows some forms of class III gaming -- for charitable purposes -- such gaming may lawfully be conducted on Indian lands provided it is authorized by a tribal ordinance and is carried out pursuant to a tribal-state compact." *Id.* Accordingly, the Court held that "the state constitutional prohibition against commercial gambling does not apply to Indian lands that are in compliance with IGRA and governed by a valid tribal-state compact." *Id.*

E. Course of Proceedings and Decision Below

In 2006, plaintiff commenced this federal action against the Governor of the State of New York, the Chair of the New York State Racing and Wagering Board, and various federal defendants. In the amended complaint, plaintiff alleged that he resides within 6 miles, and works within 1.5 miles, of a casino proposed pursuant to the Seneca Compact (A160). Plaintiff alleges that he is concerned about increased crime and other environmental, health and social consequences potentially emanating from the casino (A160).

As to the state defendants, the amended complaint alleges in the third cause of action[1] that N.Y. Executive Law § 12, which authorized the Compact, was passed by the New York Legislature in violation of provisions of the New York State Constitution (A171-A174). It further alleges that "the Compact is illegal and unconstitutional in that it violates the State Constitutional prohibition on commercial gambling" (A173-A174).

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[1] Plaintiff confirms in his brief that only the third cause of action is asserted against the state defendants (Br. at 4-5).

The state defendants moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) (A295). The state defendants asserted that plaintiff's claims against the state defendants: (1) are barred by the Eleventh Amendment; (2) are barred by *res judicata*; (3) are time-barred; and (4) fail to state a cognizable cause of action. Plaintiff moved for leave to amend the amended complaint.

By decision and order filed on March 13, 2012, the district court granted the state defendants' motion to dismiss and denied plaintiff leave to amend the amended complaint. The court held that plaintiff's claims against the state defendants were barred by the Eleventh Amendment (SPA18-SPA25). The court rejected plaintiff's contention that he could sue the state defendants in federal court under the Administrative Procedures Act, which authorizes suit only against federal agencies (SPA20-SPA21). The court held that plaintiff failed to allege that the state defendants were engaged in an ongoing violation of federal law for purposes of the exception to Eleventh Amendment immunity recognized in *Ex parte Young*, 209 U.S. 123 (1908). The court explained that plaintiff's claim that the Compact violated state law did

not trigger this exception. The court explained that "even assuming the Compact Governor Pataki entered into violates the New York Constitution, this, in itself, does not constitute a violation of IGRA because a compact between a state and a tribe has no effect at all unless and until it receives federal approval" (SPA22). The court rejected plaintiff's arguments that the court's supplemental jurisdiction over state claims overrode the Eleventh Amendment and that the State had waived its immunity by asserting jurisdictional defenses in a prior state court action (SPA24).

The court held that plaintiff's proposed second amended complaint would be futile as to the state defendants because it would be deficient for the same reasons (SPA24-SPA25). Having found the claims barred by the Eleventh Amendment, the court did not address the remaining grounds for the state defendants' motion.

The district court also dismissed the claims asserted against the federal defendants (SPA8-SPA15). Among other things, the court held that plaintiff lacked Article III standing to sue. The court explained that plaintiff did not live, work or own property in the immediate

vicinity of the Buffalo casino site and thus his alleged concerns about the effect of the development, which were conjectural and hypothetical, did not constitute a concrete, individualized injury-in-fact required for standing (SPA16-SPA18).

Accordingly, a judgment dismissing the action was filed on March 14, 2012 (SPA35).

STANDARD OF REVIEW

This Court reviews a district court's holding on Eleventh Amendment immunity *de novo*. See *Hale v. Mann*, 219 F.3d 61, 67 (2d Cir. 2000). The Court also reviews *de novo* a district court's dismissal for lack of standing, *Selevan v. New York Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009), and "may affirm the district court's decision on any ground appearing in the record." *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 49 (2d Cir. 2010).

SUMMARY OF THE ARGUMENT

The district court correctly dismissed the amended complaint. Plaintiff's claims against the state defendants are barred by the Eleventh Amendment. Plaintiff's claim that the Compact was entered into in violation of state law does not allege an ongoing violation of federal law qualifying for the exception recognized in *Ex parte Young*. That doctrine is inapplicable to a claim based on state law. And the complaint does not allege a cognizable violation of IGRA by the state defendants, let alone an ongoing one, because New York's highest court has rejected plaintiff's state law argument underlying his federal claim. Even if the complaint alleged an ongoing violation of federal law, the injunctive relief requested would undermine the administration of a sovereign compact between the State and the Tribe and invade New York's sovereign right to determine the meaning of state law, and thus *Ex parte Young* is inapplicable.

Not only is this action barred by the Eleventh Amendment, but also it is legally deficient for three other independent reasons. The complaint fails to state a viable claim that the Compact violates state

law. In *Dalton v. Pataki*, 5 N.Y.3d 243, 835 N.E.2d 1180, *cert. denied*, 546 U.S. 1032 (2005), the New York Court of Appeals rejected the state law argument underlying plaintiff's federal claim, holding that the New York Constitution permits Class III gaming within the meaning of 25 U.S.C. § 2710(d)(1)(B). In addition, the action is barred by *res judicata* because plaintiff unsuccessfully litigated a challenge to the same Compact in state court. Finally, plaintiff does not live, work or own property in the immediate vicinity of the gaming site and his speculative concerns about crime or other effects emanating from the gaming site are an insufficient injury-in-fact to confer Article III standing to sue.

POINT I

THE ELEVENTH AMENDMENT BARS PLAINTIFF'S CLAIMS AGAINST THE STATE DEFENDANTS CHALLENGING THE GAMING COMPACT BETWEEN THE STATE OF NEW YORK AND THE SENECA NATION OF INDIANS

The district court correctly dismissed the claims against the state defendants as barred by the Eleventh Amendment. State officials sued in their official capacities are immune from claims by private parties in

federal court, and plaintiff does not allege an ongoing violation of federal law that qualifies for the exception in *Ex parte Young*.

Pursuant to the Eleventh Amendment, an unconsenting State is immune from suits brought in federal court by her own citizens as well as citizens of another State. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *see also Virginia Off. for Protection and Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011) ("absent waiver or valid abrogation, federal courts may not entertain a private person's suit against a State"). The doctrine exists not only to prevent federal court judgments that must be paid out of a State's treasury, but "also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996). The Amendment also bars "a suit against state officials when the state is the real party in interest," *Pennhurst,* 465 U.S. at 101 (internal quotation marks omitted), and thus generally bars suits in federal courts against state officials sued in their official capacity. *See Gollump v. Spitzer*, 568 F.3d 355, 365 (2d Cir. 2009). Accordingly, the district court properly held

that plaintiff's suit against the New York State Governor and Chair of the New York State Racing and Wagering Board, in their official capacities, is barred by the Eleventh Amendment.

The district court correctly held that the complaint does not allege a claim falling within the narrow exception to Eleventh Amendment immunity recognized in *Ex parte Young*, 208 U.S. 123 (1908). That exception may, under certain circumstances, permit "federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief to 'end a continuing violation of federal law.'" *Seminole Tribe*, 517 U.S. at 73 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)). Plaintiff's assertion that N.Y. Executive Law § 12 was enacted, and the Compact entered into, in violation of state constitutional provisions does not fall within this doctrine for several reasons.

First, the gravamen of plaintiff's claim is purported violations of state, not federal, law. The *Ex parte Young* doctrine is "inapplicable in a suit against state officials on the basis of state law." *Pennhurst*, 465 U.S. at 106. Indeed, "[i]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on

how to conform their conduct to state law," and "[s]uch a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Id.* Thus, plaintiff's claims that a state statute and the Compact violate state law cannot trigger federal court jurisdiction under *Ex parte Young*.

Second, the complaint alleges no cognizable violation of IGRA by the state defendants, let alone an ongoing one, because New York's highest court has already rejected plaintiff's state law argument underlying his purported federal claim. In *Dalton v. Pataki*, 5 N.Y.3d 243, 835 N.E.2d 1180, *cert. denied*, 546 U.S. 1032 (2005), the New York Court of Appeals considered whether the State "'permits [Class III] gaming for *any* purpose by *any* person, organization, or entity.'" *Id.* at 259 (quoting 25 U.S.C. § 2710(d)(1)(B)) (emphasis added by the Court). Construing the New York State Constitution, the Court held that "[s]ince New York allows some forms of class III gaming -- for charitable purposes -- such gaming may lawfully be conducted on Indian lands provided it is authorized by a tribal ordinance and is carried out pursuant to a tribal-state compact." *Id.* Accordingly, the Court held

that "the state constitutional prohibition against commercial gambling does not apply to Indian lands that are in compliance with IGRA and governed by a valid tribal-state compact." *Id.* Thus, plaintiff's claim that the Compact was entered into in violation of state law has been rejected by New York's court of last resort, and no ongoing violation of IGRA is alleged.

Third, even if the complaint had alleged an ongoing violation of federal law, *Ex parte Young* would not properly apply here. The doctrine rests on the "premise -- less delicately called a 'fiction' -- that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign immunity purposes." *Virginia Off. for Protection and Advocacy*, 131 S. Ct. at 1638. However, "[t]he doctrine is limited to that precise situation, and does not apply when the state is the real, substantial party interest." *Id.* (internal quotation marks omitted). The "general criterion for determining when a suit is in fact against the sovereign is the *effect* of the relief sought." *Pennhurst*, 465 U.S. at 107 (emphasis in original). Thus, *Ex parte Young* does not apply where the claim

"implicates special sovereignty interests" of the State, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997), or "when the judgment sought would expend itself on the public treasury or domain, or interfere with public administration." *Virginia Off. for Protection and Advocacy*, 131 S. Ct. at 1638 (internal quotation marks omitted).

Here, although the suit is nominally against the New York State Governor and Chair of the State Racing and Wagering Board, it seeks to impugn the validity of a Compact entered into by the "State of New York" (A106), as sovereign, with the Seneca Nation of Indians. The relief sought seeks to interfere with the public administration of a sovereign Compact that, among other things, provides for substantial revenues for the State (A123), with a consequent impact on the state treasury. *Ex parte Young* does not countenance this interference with the State's sovereign prerogatives and fiscal interests. *Cf. Barton v. Summers*, 293 F.3d 944, 951 (5th Cir. 2002) (suit contesting State's allocation of funds from Master Settlement Agreement of tobacco litigation was interference with special sovereignty interest foreclosing relief under *Ex parte Young*).

In addition, plaintiff's claim implicates New York's sovereign authority to determine the meaning of state law. *See Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("state courts are the ultimate expositors of state law"). As noted above, New York's highest court has rejected plaintiff's state law argument underpinning his federal claim. While, for this reason, the complaint fails to state a viable cause of action in any event (*see* Point II, *infra*), the fact that plaintiff's claim is in derogation of New York's sovereign authority to determine the meaning of its own Constitution confirms that Eleventh Amendment immunity applies. *See Allen v. Cuomo*, 100 F.3d 253, 260 (2d Cir. 1996) (where state courts had already rejected state law claim underlying plaintiffs' due process claim, Court would not consider the claim "in the interest of Federalism and as a matter of comity").

Finally, plaintiff's allegations do not, in any event, meet the usual equitable requirement for an injunction against state officials, *i.e.*, that it is "necessary to prevent great and irreparable injury." *Hoffman v. Pursue, Ltd.*, 420 U.S. 592, 603 (1975). As discussed below (Point IV, *infra*), plaintiff lives several miles from the casino (A160) and his

speculative and generalized concerns about its effects are insufficient even to confer standing to sue. Plaintiff does not allege great and irreparable injury to himself in the absence of an injunction.

For all of the foregoing reasons, the district court's holding that plaintiff's claims against the state defendants are barred by the Eleventh Amendment should not be disturbed.

POINT II

THE COMPLAINT FAILS TO STATE A VIABLE CLAIM THAT THE STATE LACKED AUTHORITY UNDER STATE LAW TO ENTER INTO THE COMPACT

The dismissal of the complaint may also be affirmed on the alternative ground that the complaint fails to state a viable cause of action that the Compact violates state law and thus violates IGRA. As the state appellees pointed out below, New York's highest court has held that plaintiff's interpretation of state law is incorrect.

IGRA provides in pertinent part that Class III gaming will be permitted on Indian lands if "located in a State that permits such gaming for any purpose by any person, organization, or entity."

25 U.S.C. § 2710(d)(1)(B). In *Dalton v. Pataki*, 5 N.Y.3d 243, 835 N.E.2d 1180, *cert. denied*, 546 U.S. 1032 (2005), the New York Court of Appeals held that "[t]his language is intentionally broad and includes the limited gaming permitted by the New York State Constitution under the supervision and authority of the New York State Racing and Wagering Board." *Id.* at 259. Thus, "[s]ince New York allows some forms of class III gaming -- for charitable purposes -- such gaming may lawfully be conducted on Indian lands provided it is authorized by a tribal ordinance and is carried out pursuant to a tribal-state compact." *Id.* Accordingly, the Court held that "the state constitutional prohibition against commercial gambling does not apply to Indian lands that are in compliance with IGRA and governed by a valid tribal-state compact." *Id.*

The New York Court of Appeals, the final arbiter of state law, has held that the New York Constitution permits Class III gaming within the meaning of 25 U.S.C. § 2710(d)(1)(B). Accordingly, the state law predicate for plaintiff's federal claim is meritless and no violation of IGRA is stated.

POINT III

PLAINTIFF'S CLAIMS AGAINST THE STATE DEFENDANTS ARE BARRED BY *RES JUDICATA*

The decision below may also be affirmed on the alternative ground that this action is barred by the preclusive effect of a prior state court judgment against plaintiff.

As the state appellees explained below, in 2004 plaintiff sued the Governor and Chair of the State Racing and Wagering Board in state court, challenging the same Compact he seeks to challenge here (A5-A16). Plaintiff raised the same claims he asserts against the state defendants here, including that Executive Law § 12 and the Compact violate state constitutional provisions and that the Compact violates IGRA (A9-A15). After full briefing, summary judgment was granted in favor of the defendants and the complaint was dismissed (A98-A101). Plaintiff filed a notice of appeal from the judgment, but did not perfect that appeal, so the judgment stands (A6).

When determining the preclusive effect of a state court judgment, a federal court is required to apply the preclusion law of the state

rendering the judgment. *See Giannone v. York Tape & Label, Inc.*, 548 F.3d 191, 192-93 (2d Cir. 2008). Under New York law, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Id.* at 193 (internal quotation marks omitted); *see Duane Reade, Inc. v. St Paul Fire and Marine Ins. Co.*, 600 F.3d 190, 195-96 (2d Cir. 2010).

In the prior state court action, plaintiff challenged the same Compact and either did, or could have, raised all of the challenges to the Compact that he seeks to litigate here. Accordingly, this action is barred by *res judicata*.

POINT IV

PLAINTIFF LACKS STANDING TO SUE

Finally, the decision below may be affirmed on the alternative ground that the plaintiff lacks standing to bring this claim. In light of the foregoing fatal deficiencies in the complaint, the state defendants did not brief plaintiff's standing to sue below, but the federal defendants did and the district court correctly held that plaintiff lacked standing

(SPA15-SPA18). Although, because of the Eleventh Amendment bar, it is unnecessary for the Court to reach this issue with respect to the claims against the state appellees, plaintiff also lacks Article III standing to sue on these claims as well. *See United States v. Hays*, 515 U.S. 737, 742 (1995) (question of Article III standing goes to federal court jurisdiction and is not subject to waiver).

Plaintiff had the burden of establishing three elements for Article III standing: (1) an injury-in-fact -- "invasion of a legally protected interest which is concrete and particularized" and "actual or imminent," not conjectural or hypothetical; (2) causation -- a fairly traceable connection between the injury and the defendants' actions; and (3) redressability -- a nonspeculative likelihood that the injury would be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (2009). For the reasons stated by the district court, plaintiff fails to allege that he has suffered a concrete and particularized injury-in-fact from the Compact sufficient to confer standing. Plaintiff does not allege that he lives, works or owns property in the immediate vicinity of the Buffalo gaming site and thus does not allege a concrete,

individualized injury resulting from the Compact (SPA16-SPA17). Moreover, his concerns about crime or other consequences emanating from the casino are speculative and hypothetical and do not comprise an actual or imminent injury-in-fact for standing purposes (SPA17-SPA18). Accordingly, the complaint fails for this reason as well.

CONCLUSION

The judgment appealed from should be affirmed.

Dated: Albany, New York
October 26, 2012

Respectfully submitted,

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