UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

KG URBAN ENTERPRISES, LLC

Plaintiff,

v.

DEVAL L. PATRICK, in his official capacity as Governor of the Commonwealth of Massachusetts, and

STEPHEN CROSBY, GAYLE CAMERON, ENRIQUE ZUNIGA, JAMES MCHUGH, and BRUCE STEBBINS, in their official capacities as Chairman and Commissioners of the Massachusetts Gaming Commission

Defendants.

Case No. 1:11-cv-12070

Leave to file oversize brief granted on September 17, 2013

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND SUMMARY OF ARGUMENT

In November 2011, the Massachusetts Gaming Act granted explicit, race-based preferences to a single Indian tribe, the Mashpee Wampanoag. That tribe was then, and is now, ineligible for gaming under the federal Indian Gaming Regulatory Act ("IGRA") because it lacks sovereign trust land, which is a categorical prerequisite for IGRA gaming. The Act nonetheless set aside the entire Southeastern region ("Region C") for the Mashpee, and categorically excluded non-tribal competition for more than a year. The Gaming Commission then compounded the effects of the Act's racial preferences by first delaying the start of a commercial application process in the Southeast, and then steadfastly refusing to conduct that process under the same race-neutral terms and conditions that have prevailed in the other two regions since day one. In short, from the day the Act was signed into law and continuing to this very day, the commercial application process in the Southeast has been pervasively and irreparably tainted by racial considerations.

Plaintiff KG Urban Enterprises ("KG") seeks to apply for a commercial license in the Southeastern region. Nearly two years ago, KG brought this suit to vindicate its fundamental constitutional right to "the equal protection of the laws." Eighteen months ago, this Court found that "[t]he unsettled constitutionality of the legal provisions at issue in this case hampers . . . investment in Region C casino developments," and that the "collateral effects" of this uncertainty are "felt acutely by [KG], which must decide whether to expend substantial resources to exercise options on and redevelop the Cannon Street Property." *KG Urban Enters. v. Patrick*, 839 F. Supp. 2d 388, 396 (D. Mass. 2012). And, more than a year ago, the First Circuit held that the Commonwealth's attempts to defend the tribal preferences as somehow "authorized" by IGRA "would become weaker with the passage of time and the continuation of the status that there are no 'Indian lands' in [the Southeast]." *KG Urban Enters. v. Patrick*, 693 F.3d 1, 25 (1st Cir. 2012). The court emphasized that KG may be entitled to equitable relief "at some future date." *Id.* at 27.

That date has now arrived. Since the First Circuit's decision, the Department of the Interior has confirmed that "the Commonwealth was not required to concede any form of gaming exclusivity to the [Mashpee] nor was the Tribe entitled to such exclusivity." DN 72 Ex. 1 at 12. There is accordingly no plausible argument that the tribal preferences can escape strict scrutiny on the ground that the Commonwealth was merely implementing IGRA, and thus "legislating under explicit authority granted by Congress in the exercise of that federal power [over Indian tribes]." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 501 (1979). The preferences are purely a creature of state law and must stand or fall based on the Commonwealth's own constitutionally proscribed ability to discriminate.

Moreover, IGRA makes clear that "tribal gaming may only be conducted by an 'Indian tribe' on 'Indian lands.'" 693 F.3d at 8. Despite a two-year head start over commercial applicants, the Mashpee still have no "Indian lands," and are no closer to an IGRA casino than they were more than a year ago when the First Circuit issued its decision. Indeed, given that the Interior Department rejected the first compact between the Mashpee and the Governor, the tribe has moved *backwards* since the First Circuit's decision. And even an approved compact would be meaningless unless and until the tribe has land-in-trust.

The Commission's recent decision to begin accepting applications for a commercial license in Region C only *increases* KG's need for prompt relief from this Court. Although it has now initiated a commercial application process, the Commission continues to suggest that the whole process may be for naught if the Mashpee make some unspecified degree of "progress" toward an IGRA casino. The chilling effect of that caveat cannot be overstated. Opening the region to commercial applications while continuing to place a thumb on the scale in favor of the Mashpee not only violates the Equal Protection Clause but is a fundamentally flawed business proposition. As long as there is a chance that the whole process may be scuttled based on events

beyond applicants' control, gaming operators and investors will continue to steer clear of the Southeast. As KG undertakes the long and expensive process of applying for a commercial license and attracting needed business partners, it is critical to have a definitive ruling from this Court that the process must be driven by the merits of the applications rather than skewed by an ongoing desire to set aside the Southeast for a tribe that is ineligible for IGRA-compliant gaming.

In sum, any further effort to give the Mashpee a preference over non-tribal applicants is nothing more than a race-based classification that must rest on the Commonwealth's own authority and satisfy strict scrutiny. The Commonwealth has never even attempted to defend the preferences under that exacting standard. KG respectfully requests that this Court grant its motion for summary judgment, declare the Act's tribal preferences unconstitutional, and enter a permanent injunction ordering the Gaming Commission to follow the same race-neutral, merit-based application process in Region C that it has been using since day one in Regions A and B.

BACKGROUND AND PROCEDURAL HISTORY

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

KG is a development company that specializes in the redevelopment and adaptive re-use of urban brownfield sites. *See* DN 2 Ex. B (Stern Decl.) ¶ 4. KG employs an integrated method of development that incorporates gaming, retail, cultural, and commercial activities into the same project, with no artificial barriers between the development and the surrounding community. *Id.* ¶ 5. Unlike developers that focus on "greenfield" sites near highway interchanges, KG focuses on principles of walkability, connectivity, and sustainability, and the rehabilitation of vintage structures found on former industrial sites. *Id.* ¶¶ 4-5.

In February 2007, KG began the process of identifying suitable property for an urban gaming project in Massachusetts. After studying several sites in New Bedford, KG identified a site that houses an abandoned power plant known as Cannon Street Station. *Id.* ¶¶ 8-9. KG

determined that this property is an ideal candidate for redevelopment because of its proximity to downtown New Bedford, its location on the New Bedford harbor, and the dramatic physical presence of the vintage power plant structure. *Id.* ¶ 10. Working with a team of nationally recognized experts, KG prepared a redevelopment plan that includes a multi-level casino, a hotel, restaurants, a conference center, retail shops, and an exhibition hall, all sitting directly on the city's historic harbor and street grid. *Id.* ¶ 14-18. If KG ultimately receives a gaming license for the Cannon Street site, the total project investment is estimated to be nearly $1 billion, including $50 million for a privately financed cleanup of environmental contamination. *Id.* ¶ 21. To date, KG has invested six years of work and more than $8 million in direct costs to prepare its comprehensive development plan for the Cannon Street Station project, and it must continue to make escalating monthly payments to keep options open on the site. *See id.* ¶¶ 11-12, 20.

B. The Gaming Act's Merit-Based Application Process in Regions A and B and Racial Set-Asides in Region C

On November 22, 2011, Governor Patrick signed legislation authorizing a significant expansion of legalized gaming. *See* St. 2011, c. 194. The Act authorizes up to three resort-style casinos—one each in the greater Boston area (Region A), Western Massachusetts (Region B), and Southeastern Massachusetts (Region C)—that will offer table games and slot machines. *See* Act § 16, sec. 19(a). The Act also creates the Gaming Commission and vests that body with broad authority to oversee gaming in the Commonwealth. *See id.* secs. 3-6.

From the start, the Act provided that licenses in the Eastern and Western regions would be awarded on the merits through an open, competitive application process. *See* 693 F.3d at 4-5. Commercial applicants must pay a $400,000 application fee, provide detailed information about their development proposals, hold a binding vote in the host community, and submit to extensive background investigations. Act § 16, secs. 9-15. In deciding whether to issue a license, the

Commission must consider how each applicant's proposal would advance nineteen objectives, including: maximizing capital investment; promoting sustainable development; providing high-quality jobs; protecting local businesses; preventing compulsive gambling; and maximizing tax revenues. *Id.* sec. 18. The Commission has "full discretion as to whether to issue a license," and applicants "shall not be entitled to any further review if denied by the commission." *Id.* sec. 17(g). A successful applicant must pay a fee of $85 million, commit to making a capital investment of at least $500 million, and pay a 25% daily tax on gaming revenue. *Id.* secs. 10, 55(a).

After establishing these merit-based procedures for awarding gaming licenses in Regions A and B, the Act created an entirely separate set of procedures for Region C that were designed to give Indian tribes a categorical advantage over non-tribal applicants. *See* 693 F.3d at 6-7. There are two federally recognized tribes in Massachusetts—the Mashpee Wampanoag and Wampanoag Tribe of Gay Head (Aquinnah). Neither currently possesses Indian lands suitable for gaming. The Aquinnah currently possess only a small parcel of land on a remote corner of Martha's Vineyard. The Commonwealth has taken the position that the Aquinnah—by virtue of a 1985 land settlement—"waived any sovereign right . . . to engage in gaming" on that land. Appellees' Br. at 39 n.103, *KG Urban Enters. v. Patrick*, No. 12-1233 (1st Cir. Apr. 19, 2012).

The Mashpee Wampanoag—whose efforts to open a casino are being bankrolled by the Genting Group, a Malaysian gaming conglomerate, *see* DN 99 Ex. 1 at 75—were first recognized by the federal government in 2007 and possess no Indian lands in Massachusetts. But, under IGRA, any federally approved Indian gaming must take place on "Indian lands"—*i.e.*, a reservation or other federal land-in-trust. *See* 25 U.S.C. §§ 2702, 2703(4), 2710(d)(1)(C). There is no prospect that the Mashpee will obtain such land in the foreseeable future, as the federal land-in-trust process has been in a state of paralysis since the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009). In *Carcieri*, the Court held that the Indian Reorganization Act, 25

U.S.C. § 465, only authorizes the Secretary of the Interior to acquire land-in-trust for Indian tribes that were under federal jurisdiction when the statute was enacted in 1934. 555 U.S. at 382. Thus, the Secretary currently has *no* statutory authority to take land into trust for Indian tribes, such as the Mashpee, that were recognized by the federal government after 1934. Since 2009, there have been various proposals in Congress to overrule *Carcieri* by statute, but those efforts have failed.

Even though neither tribe in Massachusetts has suitable land on which to conduct IGRA-compliant gaming, Section 91 of the Act granted federally recognized Indian tribes the exclusive right to pursue casino gaming in the Southeast until July 31, 2012. Section 91(a) provides that "[n]otwithstanding any general or special law or rule or regulation to the contrary, the governor may enter into a compact with a federally recognized Indian tribe in the [C]ommonwealth." Act § 91(a). If such a compact was negotiated by July 31, 2012, and approved by the legislature, then the tribe would obtain a region-wide gaming monopoly in the Southeast, and the competitive application process for non-tribal entities would be forestalled permanently. *See id.* § 91(e). If, but only if, a federally recognized tribe did not complete those steps by July 31, 2012, then, "not later than October 31, 2012," the Commission was required to issue a request for applications for a commercial license in the Southeast, subject to the same competitive, merit-based application process that applied in the other two regions. *Id.* § 91(e).

The Commonwealth has conceded that Section 91 would not result in the award of a commercial license to a tribe, but instead would postpone the application process for non-tribal applicants in order to allow a tribe to embark on the long and uncertain process of acquiring land-into-trust so that it could someday engage in IGRA-compliant tribal gaming. *See* DN 16 at 16.

C. KG's Complaint and This Court's Initial Decision

KG's project in New Bedford is located in Region C, and thus KG was initially subject to a *categorical* exclusion from the commercial application process on account of race. The day the

Act was signed into law, KG brought suit in this Court challenging the constitutionality of the tribal set-asides and seeking a preliminary injunction barring their enforcement. DN 1.

On February 16, 2012, this Court denied KG's motion for a preliminary injunction and dismissed the complaint. At the outset, the Court rejected the Commonwealth's claim that KG had not been injured by the set-asides, concluding that the "unsettled constitutionality of the legal provisions at issue" was hindering "not only the compact negotiation process but also region-wide investment in [Southeastern] casino developments." 839 F. Supp. 2d at 396-97. The collateral effects of that uncertainty were "felt acutely by [KG], which must decide whether to expend substantial resources to exercise options on and redevelop the Cannon Street Property." *Id.* All of those resources would be "wasted" if KG were locked out of the market by an unconstitutional set-aside. *Id.* The Court further held that KG had standing because "[b]y 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 license, and "would be a competitive candidate if it were given the chance to compete." *Id.* at 397.

The Court nonetheless concluded that KG was unlikely to prevail on the merits. Although it acknowledged that members of an Indian tribe generally "share the same racial heritage," the court held that the Act's tribal set-asides reflected a "political" classification that was subject only to rational basis review. *Id.* at 402-07. Were the Court addressing this issue "as one of first impression," it would have held that "[l]aws granting gratuitous Indian preferences," such as "a law granting tribes a quasi-monopoly on casino gaming," were subject to strict scrutiny. *Id.* at 404. Indeed, the Court "share[d] the plaintiff's frustration" and noted that tribal preferences "undermine[] the constitutional requirement of race neutrality." *Id.* at 405-07. But the Court concluded that it was bound by decisions such as *Morton v. Mancari*, 417 U.S. 535 (1974), to treat the Act's tribal preferences as political classifications subject to rational basis review. The Court

thus denied KG's motion for a preliminary injunction and dismissed the complaint. KG filed a notice of appeal the next day.

D. The First Mashpee Compact

The Mashpee initially met the Act's state-law conditions for obtaining a race-based gaming monopoly throughout the Southeast. On July 12, 2012, while KG's appeal was pending, the Mashpee and the Governor signed a compact for a casino that would be built on a parcel of land in Taunton. The Taunton site is an industrial park at the intersection of Route 24 and Route 140 on which the tribe acquired purchase options through an ordinary commercial real estate deal. That parcel has not been taken into trust by the Secretary of the Interior, and the compact recognized that "[t]he Tribe presently has no lands held in trust, for IGRA Gaming purposes or otherwise." Ex. A to KG Statement of Undisputed Material Facts ("SOF") § 9.1.1. The compact reiterated that any Mashpee gaming must be conducted on "Indian land[], as defined in IGRA, that is legally eligible under IGRA for the conduct of [gaming]." *Id.* § 3.3.

Under the compact, the tribe would have paid 21.5% of gaming revenue from a hypothetical IGRA casino to the Commonwealth, with that percentage falling to 15% if the Commission also issued a commercial license in Region C. *Id.* § 9.2. Section 2.8 of the compact stated in no uncertain terms that nothing in IGRA *required* the Commonwealth to grant regional exclusivity to the Mashpee. Yet, even though the tribe was ineligible for IGRA-compliant gaming because it did not have land-in-trust, the compact repeatedly stated that the tribe was being granted "exclusive" rights to conduct gaming in Region C. *See id.* §§ 2.8, 9.1.4, 9.1.5, 9.2. The compact also contained several provisions designed to prolong the Mashpee's regional monopoly regardless of whether the tribe was making progress towards an IGRA casino. For example, Section 5.2.2 provided that if the Interior Department did not accept the Taunton parcel into trust, the tribe could seek "alternative land in Region C" while still retaining regional exclusivity. And,

if the compact were rejected by the Secretary of the Interior, the Governor agreed to "immediately resume negotiations in good faith with the Tribe for an amended compact." *Id.* § 18.8.

The legislature approved the compact on July 26, 2012. The Mashpee thus initially met the Act's July 31st deadline for obtaining a regional gaming monopoly throughout the Southeast.

E. The First Circuit's Decision

On August 1, 2012, in an opinion by Chief Judge Lynch, the First Circuit affirmed this Court's denial of KG's motion for a preliminary injunction but reversed the dismissal of KG's complaint. The Court squarely rejected the Commonwealth's "all-or-nothing proposition" that this case was controlled by *Morton v. Mancari*. 693 F.3d at 17-18. As the Court explained, *Mancari* found tribal preferences by the *federal* government to be "political" classifications subject to rational basis review, but "it is quite doubtful that *Mancari*'s language can be extended to apply to preferential *state* classifications based on tribal status." *Id.* at 19. In the "present posture of this case," the First Circuit also found it "doubtful" that the Act's tribal preferences were "authorized by IGRA." *Id.* at 20. In particular, "[i]t would be difficult to conclude that the IGRA 'authorizes' the Massachusetts statute . . . where there are no Indian lands in Region C at present within the meaning of the IGRA." *Id.* at 21. And "*Carcieri* may in the end prohibit the Secretary from taking the Mashpee lands into trust and so making them Indian lands." *Id.*

The First Circuit ultimately concluded that whether the Act's tribal preferences were "authorized" by IGRA was "far from clear" and a "difficult question." *Id.* at 24. The Court noted that the Commonwealth could potentially defend the tribal preferences as "facilitat[ing] the purposes of the IGRA" for "a limited period of time" while the Mashpee sought to acquire land-in-trust. *Id.* at 25. But that argument "of course would become weaker with the passage of time and the continuation of the status that there are no 'Indian lands' in [Region C]." *Id.* And that

argument "is qualitatively different, and even weaker, to the extent that Congressional action is required to provide the Secretary authority to take this land into trust." *Id.*

In sum, because of the Commonwealth's "apparent attempt to allow some time for the IGRA process to work (including any *Carcieri* fix)," the First Circuit affirmed this Court's denial of KG's motion for a preliminary injunction. *Id.* at 27. At the same time, the Court reversed the dismissal of KG's complaint because it "[could not] say that KG's equal protection claim as to § 91 fails to state a claim on which relief may be granted, or that the issuance of equitable relief may not be appropriate at some future date." *Id.* The First Circuit concluded by reiterating that "lengthy delays" in the land-in-trust process "would undercut the argument that § 91 is meant as a temporary accommodation of the IGRA process." *Id.*

F. Proceedings on Remand Before This Court and Interior's Rejection of the First Mashpee Compact

On remand from the First Circuit, both the Mashpee and Aquinnah tribes sought to intervene in this case. The Mashpee argued that KG's claims threatened to undermine the compact and impair the tribe's exclusive gaming rights in the Southeast. *See* DN 63. The Aquinnah argued that they should be allowed to intervene to inject into this case their dispute with the Commonwealth over whether that tribe had waived any right to conduct gaming on its Martha's Vineyard land in connection with a land settlement in the 1980s. *See* DN 40.

While those motions were pending, the Interior Department ("DOI") announced on October 15, 2012 that it was rejecting the compact between the Mashpee and the Governor. DN 72 Ex. 1. DOI found the compact's 21.5% revenue-sharing arrangement—which was reduced to 15% in the event a commercial casino was licensed in Region C—to be an "impermissible tax, fee, charge, or other assessment, in violation of IGRA." *Id.* at 17. DOI rejected many of the Commonwealth's purported concessions as not "meaningful" because they were "illusory" or

"symbolic." *Id.* at 13-15. Only regional exclusivity was credited as a valid concession to justify some revenue-sharing, because nothing in IGRA required the Commonwealth to "concede any form of gaming exclusivity to the Tribe." *Id.* at 12. But DOI rejected the specific revenue-sharing formula in the first compact because it required the Mashpee to continue sharing revenue with the Commonwealth even if the tribe no longer had exclusive gaming rights. *Id.* at 15-17.

In light of the intervention motions and the compact rejection, this Court instructed KG to file an amended complaint to sharpen and frame the issues going forward. KG filed its amended complaint on January 7, 2013. *See* DN 83. In addition to challenging the explicit tribal set-asides in Section 91(e) of the Act, KG also added a new equal protection claim against the Gaming Commission based on its ongoing refusal to initiate a commercial application process in Region C under the same race-neutral terms and conditions that applied in Regions A and B.

On June 6, 2013, this Court denied the Mashpee and Aquinnah intervention motions. DN 117. The Court found that the question of whether the Aquinnah had waived their gaming rights was "wholly unrelated to the constitutionality of the Gaming Act." *Id.* at 9-14. As for the Mashpee, the Court held that the tribe's economic interest in being free from competition was not a "legally protected interest" that would justify intervention. *Id.* at 16-19.

G. The Amended Mashpee Compact

After DOI's rejection of the first compact, the Mashpee and the Governor began negotiations on an amended compact, which was signed on March 19, 2013. *See* DN 99 Ex. A. Under the amended compact, the tribe would pay 21% of gaming revenue if it had statewide exclusivity, 17% if it had regional exclusivity in the Southeast, 15% if the Commonwealth licensed a slot parlor in the Southeast, and nothing if the Commonwealth licensed a commercial casino in the Southeast. *Id.* § 9.2. Thus, the amended compact reinforces DOI's recognition that state-law grants of exclusivity are not required by federal law, but are voluntary state-law

concessions that permit revenue-sharing. Moreover, the amended compact appears designed to make the award of a commercial license in Region C economically infeasible. If a commercial license were awarded in Region C, the commercial casino would pay 25% of gaming revenue to the Commonwealth, but a Mashpee casino would pay *nothing*.

Other provisions of the amended compact also confirm the Governor's intent to earmark the Southeast for the Mashpee. Sections 9.1.4 and 9.1.5 emphasize that the Mashpee may have "the opportunity to operate a casino in Region C on an exclusive basis," and underscore that this exclusivity is "extremely valuable to the Tribe." The amended compact further states that regional exclusivity is not a product of IGRA or any other federal law, but is solely a product of state law. For example, Section 9.1.2 emphasizes that IGRA "does not require a state to provide a tribe with geographic exclusivity as to the proposed location for its Gaming."

The amended compact was signed on March 19, 2013, but has not been approved by the Massachusetts Legislature, nor has it been submitted to the Interior Department for approval. Even if the compact is ultimately approved, the Mashpee will still be ineligible for IGRA-compliant gaming unless and until the tribe acquires land-in-trust. *See id.* § 2.6 ("IGRA requires that a tribe's gaming must be conducted on Indian Lands."); *see also* 693 F.3d at 8.

H. The Commission's Preliminary Steps To Begin Accepting Commercial Applications in Region C

While the Southeast was being reserved for the Mashpee, a merit-based commercial application process was moving forward in the Eastern and Western regions. On October 19, 2012, the Commission began accepting "Phase 1" applications for commercial gaming licenses in Regions A and B. Those applications, as well as the $400,000 application fees, were due on January 15, 2013. *See* SOF Ex. B (Timeline). Applicants that pass the initial "pre-qualification" or "suitability" process will then be required to prepare and submit more-detailed "Phase 2"

applications by December 31, 2013. *Id.* The Commission plans to award commercial gaming licenses in Regions A and B by April 2014. *Id.* Six applicants—including several of the largest gaming operators in the world—have applied for the Region A and B commercial licenses. *See* SOF Ex. C (Applications). At least two other applicants had also expressed interest in Regions A and B but ultimately chose not to apply for business reasons.

Throughout the summer and fall of 2012, non-tribal entities in Region C remained categorically barred from applying for a commercial license. But after the First Circuit's decision, DOI's rejection of the Mashpee compact, and the lack of any progress on the tribe's land-in-trust application, the Commission began to explore the possibility of initiating a commercial application process in the Southeast. At its meetings in December 2012, the Commission discussed various proposals for opening Region C, such as a "dual-track" process in which the Commission would begin accepting commercial applications while reserving the right to jettison that merit-based process if the Mashpee made sufficient progress toward a tribal casino. *See* DN 80 Ex. 2; DN 80 Ex. 1 (KG letter explaining flaws of dual-track process). But at its December 18, 2012 meeting, the Commission postponed action on Region C for another 90 days. The sole reason for this delay was "to provide the Tribe a reasonable opportunity to demonstrate its ability to claim the Region C license that was envisioned in the enabling Legislation." SOF Ex. D (Crosby 12-17-2012 Memo).

On April 18, 2013, after another four months with no progress by the Mashpee, the Commission voted unanimously to begin accepting applications for a commercial license in Region C. *See* DN 104 Ex. 1 at 105-06. Phase 1 applications, along with the non-refundable $400,000 application fees, are due on September 30, 2013. SOF Ex. B (Timeline). Phase 2 applications will be due in July 2014 and a decision will likely be made in November 2014. *Id.*

Although the Commission has now *initiated* a commercial application process, it has continued to suggest that there will be a thumb on the scale in favor of the Mashpee. For example,

the Commission has emphasized that its ultimate licensing decision in Region C will "tak[e] into account the economic consequences of the then current status of the Tribal-State and Federal Trust Land process." SOF Ex. E (Commission 4-18-13 Announcement). That is, the Commission envisions an extra procedural step in the Region C application process in which it would "determine what state license, if any, should be awarded to which commercial applicant, in light of the tribe's ability to operate a resort-style casino in the region without state licensure." DN 115 at 12. Chairman Crosby also stated at the April 18th meeting that the Mashpee have a "powerful head start" over commercial applicants, and that "[i]f the Tribe does what the Tribe says it will do, then it has by far the best chance to end up getting what it wants"—namely, regional exclusivity without commercial competition. DN 104 Ex. A at 103.

After the Commission voted to begin accepting commercial applications in Region C, the Commonwealth filed a motion to dismiss this case as moot. DN 115. This Court denied the motion on August 16, 2013, holding that the "voluntary cessation" doctrine applies, and that the case was not moot because it remains "unclear" whether the Commission had granted KG all of the relief it requested in its complaint. DN 131. The Court subsequently set a briefing schedule for cross-motions for summary judgment. DN 134.

STANDARD OF REVIEW

A party is entitled to summary judgment if "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Questions of law are "appropriate for resolution on summary judgment." *Zehner v. Central Berkshire Regional Sch. Dist.*, 921 F. Supp. 850, 857 (D. Mass. 1995).

ARGUMENT

I. THE COMMONWEALTH'S ONGOING STATE-LAW PREFERENCES FOR A LANDLESS TRIBE VIOLATE THE EQUAL PROTECTION CLAUSE

A. The Tribal Preferences for the Mashpee Are Not Authorized by Federal Law

1. It is undisputed that both the Gaming Act and the Gaming Commission have treated Indian tribes differently from commercial applicants in the Southeast. As KG has argued for the last two years, these preferences must satisfy strict scrutiny because they "distribute[] burdens or benefits on the basis of individual racial classifications." *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

In previous briefing before this Court and the First Circuit, the Commonwealth's primary defense of the tribal preferences was that, under cases such as *Morton v. Mancari*, 417 U.S. 535 (1974), the preferences were subject to rational basis review rather than strict scrutiny because they reflected "political" classifications. The First Circuit squarely rejected that "all-or-nothing proposition," finding it "quite doubtful that *Mancari*'s language can be extended to apply to preferential *state* classifications based on tribal status." 693 F.3d at 17-19. As the Court explained, the federal government has a "special trust relationship" with tribes, but states have "no such equivalent authority." *Id.* at 19. Moreover, *Mancari* was limited to the *sui generis* context of hiring by the federal Bureau of Indian Affairs, and the Supreme Court noted that "a preference in all civil service positions . . . might be viewed as race-based discrimination." *Id.*

With *Mancari* off the table, the Commonwealth's only other argument for escaping strict scrutiny is its contention that the tribal preferences were "'enacted under explicit authority granted by Congress in IGRA.'" *Id.* at 20; *see Washington v. Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979) (state may treat Indian tribes differently only if it is "legislating under explicit authority granted by Congress in the exercise of that federal power [over Indian tribes]"). The First Circuit did not directly rule on that issue, but the Court was unquestionably skeptical of the

Commonwealth's position, emphasizing that "[i]t would be difficult to conclude that the IGRA 'authorizes' the Massachusetts statute . . . where *there are no Indian lands in Region C* at present within the meaning of the IGRA." *Id.* at 21 (emphasis added); *see id.* at 20 (finding it "doubtful" in the "present posture of this case" that the preferences are authorized by IGRA).

2. The Commonwealth's defense of the tribal preferences as authorized by IGRA was "difficult" fourteen months ago, and it has only gotten worse since then. In its letter rejecting the first Mashpee compact, the Interior Department stated in no uncertain terms that under federal law "the Commonwealth *was not required to concede any form of gaming exclusivity* to the [Mashpee] nor was the Tribe entitled to such exclusivity." DN 72 Ex. 1 at 12 (emphasis added). Indeed, DOI found regional exclusivity to be a "meaningful" concession that could justify revenue-sharing payments from the tribe to the Commonwealth precisely because exclusivity was a gratuitous concession by the Commonwealth that was *not* required by IGRA or any other provision of federal law. *Id.* The plain text of the amended Mashpee compact reinforces DOI's conclusion. It proclaims that "IGRA does not require a state to provide a tribe with geographic exclusivity as to the proposed location for its Gaming, the games it intends to offer, or on any other basis." Amended Compact § 9.1.2; *see also* First Compact § 2.8 ("Neither federal nor Commonwealth law requires the Governor to negotiate a compact that will provide exclusive gaming opportunities to a tribe, or to negotiate a compact with a tribe before it has land that is qualified under IGRA for gaming."). The Commonwealth's "IGRA-made-me-do-it" defense must accordingly be rejected.

Moreover, as the First Circuit explained, the argument that the preferences are authorized by IGRA "would become weaker with the passage of time and the continuation of the status that there are no 'Indian lands' in [Region C]." 693 F.3d at 25. The Court was apparently willing to tolerate a "limited grace period [for] tribes to attempt to obtain needed approvals" for IGRA-compliant gaming, *id.* at 17, but it emphasized that this must be a "limited period of time," *id.* at

25. Nearly two years after the Gaming Act was signed into law and more than a year after the First Circuit's decision, the waiting continues. If the First Circuit's "grace period" is to be "limited," the time for applying strict scrutiny has come. Not only have the Mashpee failed to make any meaningful progress since the First Circuit's decision—the Mashpee have neither land-in-trust nor a federally approved gaming compact, both of which are categorical prerequisites for IGRA-compliant gaming—the tribe has actually moved *backwards* since the First Circuit issued its decision. At the time of that decision in August 2012, the tribe at least had a state-approved gaming compact. But that compact was subsequently rejected by DOI, and the amended compact has not even been approved by the Massachusetts Legislature, much less DOI.[1]

Even if the amended compact is ultimately approved, it will be meaningless unless the tribe *also* has land-in-trust because, under IGRA, "tribal gaming may only be conducted … on 'Indian lands.'" 693 F.3d at 8. There continues to be no timetable for action on the Mashpee's land-in-trust application. Kevin Washburn, the Assistant Secretary for Indian Affairs at DOI, informed the Commission that he was unable to "give an estimate as to when it would be completed" or "how long it would take." DN 101 Ex. 1 at 188. Mr. Washburn simply stated that "[t]hese are complicated" and "it takes time." *Id.* And Commissioner James McHugh—who is a party to this case—presciently concluded last April that "an outcome favorable to the Tribe" on its land-in-trust application "is unclear at best" and "*unlikely to come soon*." *Id.* at 183 (emphasis added). According to the Commonwealth, "[a] fair reading of the transcript indicates that all five

[1] There are good reasons to believe the amended compact will be rejected by DOI even if it is approved by the Legislature. In the first compact, the "price" of regional exclusivity was 6.5%—the tribe would pay 21.5% if it maintained exclusivity, but only 15% if a commercial license were issued in Region C. DOI rejected that compact because it found the revenue-sharing percentages to be too high. DN 72 Ex. 1. In the new compact, the "price" of regional exclusivity has actually *increased* to 17%—the tribe will pay 17% if it retains its regional monopoly, but *nothing* if a commercial casino is licensed in Region C.

of the Commissioners agreed with the substance of Commissioner McHugh's summary and depictions in these regards." DN 101 at 1.

The Mashpee have repeatedly failed to meet even their own arbitrary benchmarks of "progress" towards land-in-trust. At the December 17, 2012 status conference before this Court, the Mashpee's counsel stated that "we expect a casino will be *up and running* in Taunton in 2014." DN 91 at 19 (emphasis added). At the next status conference, on April 11, 2013, the tribe still claimed to be making "historic and swift progress," but its deadline had slipped by more than a year: the tribe's counsel now speculated only that there would be a *determination* on the land-in-trust application by "the first half of 2014." DN 109 at 20.

The *Carcieri* decision also presents a seemingly insurmountable obstacle to the tribe's land-in-trust application. As the First Circuit explained, the argument that the preferences are authorized by IGRA would become "even weaker" to the extent that "Congressional action is required to provide the Secretary authority to take this land into trust." 693 F.3d at 25. In *Carcieri*, the Supreme Court held that DOI lacks statutory authority to take land into trust for tribes that were not under federal jurisdiction in 1934. Congress has considered several bills to abrogate *Carcieri* by statute, but all of those efforts have failed. In the meantime, DOI has sought to take land into trust for tribes recognized post-1934 under the theory articulated in Justice Breyer's *concurring* opinion—namely, that a tribe may have been "under federal jurisdiction" in 1934 even though the federal government did not believe so at the time. 555 U.S. at 397-98 (Breyer, J., concurring). Opponents of tribal casino projects have challenged DOI's attempted end-run around *Carcieri*, and this issue is currently being litigated in federal district court in Washington, D.C. *See Clark County v. Dep't of the Interior*, No. 1:13-cv-850 (D.D.C.).

At the April 11, 2013 status conference, the Mashpee's counsel claimed that DOI would be making its so-called *Carcieri* determination—*i.e.*, whether the Mashpee satisfy the test set forth in

Justice Breyer's concurrence—by "early 2013." DN 109 at 19-20. In fact, DOI stated in a letter to the tribe one month earlier that "[t]he majority of *Carcieri* determinations require a comprehensive, fact-intensive analysis *that can be time intensive and costly*." DN 99 Ex. 3 (emphasis added). DOI claimed that it was "making substantial progress" and would "continue to actively consider this matter," but it did not offer any timetable for when this determination will occur. It is now late September, which cannot be "early 2013" on anyone's calendar.

3. In all events, the "*Carcieri* determination" will address only whether DOI believes the tribe is *eligible* for land-in-trust under the theory set forth in Justice Breyer's concurrence. Even if the tribe passes that threshold determination, the land-in-trust process is a massive undertaking that requires DOI to evaluate: the tribe's connection to the parcel in question; jurisdictional issues; conflicting land uses; the effect on state and local governments and tax rolls; and the claimed economic benefits. *See* 25 C.F.R. §§ 151.10-11. The land-in-trust process also involves an exhaustive administrative review under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, that routinely takes six years or longer to complete. That process took seven years for the Enterprise Rancheria Tribe, eight years for the North Fork Rancheria, nine years for the Menominee Tribe, and six years for the Cowlitz tribe. *See* SOF ¶¶ 30-33.

The land-in-trust process often draws fierce opposition from neighboring landowners, other tribes with competing casinos, and government entities.[2] It also inevitably leads to litigation raising *Carcieri* challenges as well as challenges to environmental assessments and other matters. *See Match-E-Be-Nash-She-Wish Band v. Patchak*, 132 S. Ct. 2199, 2203 (2012) (plaintiffs alleged that "the Secretary's decision violated environmental and gaming statutes" and was barred by

[2] Notably, the Commonwealth itself opposed the Mashpee's previous attempt to have land taken into trust, based on environmental, traffic, and law-enforcement concerns. *See* Massachusetts Comments to U.S. Dep't of Interior on Mashpee Wampanoag Land-in-Trust Application (Feb. 5, 2008).

Carcieri). The entire process routinely takes a decade or longer. For example, in *Patchak*, the tribe filed its land-in-trust application in 2001, and it then took four years for the Secretary to make a final determination. *Id.* at 2203. Since then, the case has spent eight more years mired in litigation, with no end in sight.

The Mashpee are currently at only a very preliminary stage of the multi-year NEPA review process. *See* SOF ¶¶ 34-38. Under NEPA, the Bureau of Indian Affairs must still issue a draft environmental impact statement ("EIS") for public comment; conduct further review in response to those comments; prepare and issue a final EIS for public comment; and issue a record of decision on the land-in-trust application. In light of the timetable for previous land-in-trust applications, the suggestion that the Mashpee will have land-in-trust by "the first half of 2014" is wishful thinking in the extreme.

B. The Commonwealth's Preliminary Initiation of a Commercial Application Process in Region C Is Insufficient To Remedy KG's Equal Protection Harm

The Commonwealth will likely argue that even if the Gaming Act's initial set-aside of the Southeast violated the Equal Protection Clause, any such violation was rectified in April 2013 when the Commission initiated a commercial application process in Region C. To the contrary, the Commission has made clear that the application process in the Southeast will *not* be identical to those in the other two regions, and will likely still be skewed by tribal preferences. Opening the region to commercial competition while still keeping a thumb on the scale in favor of the Mashpee does not in any way lessen KG's injury. Indeed, the Commission's recent actions have only *increased* KG's need for prompt relief from this Court: as KG begins the long (and expensive) process of applying for a commercial license, with the attendant need to attract commercial partners, it is absolutely imperative for KG and its potential partners to know that the ultimate

outcome of the process will be based on the competitive merits of each application, rather than an ongoing effort to set aside the region for a landless Indian tribe.

In Region C alone, the Commission has reserved the right to scuttle the commercial application process if the Mashpee have made some (unspecified) degree of progress toward an IGRA casino by the time the Commission makes its ultimate decision on the commercial applications. The Commission has emphasized that its licensing decision in Region C will "tak[e] into account the economic consequences of the then current status of the Tribal-State and Federal Trust Land process." SOF Ex. E (Commission 4-18-13 Notice). That is, there will be an extra procedural step in Region C, in which the Commission "determine[s] what state license, if any, should be awarded to which commercial applicant, in light of the tribe's ability to operate a resort-style casino in the region without state licensure." DN 115 at 12. The Commission has not once suggested that a similar procedural step will occur in Regions A and B, even though the proposed commercial casinos in Region A are only 40 miles from the Mashpee's proposed site in Taunton. Moreover, Chairman Crosby has stated that the Mashpee have a "powerful head start" over commercial applicants, and that "[i]f the Tribe does what the Tribe says it will do, then it has by far the best chance to end up getting what it wants"—namely, regional exclusivity without commercial competition. DN 104 Ex. A at 103.

The Equal Protection Clause prohibits *any* attempt to set aside the Southeast for an Indian tribe, whether through an explicit statutory set-aside—such as the one in Section 91(e) of the Act—or a softer, less explicit scheme that reaches the same outcome. As KG explained to both the Commission and this Court, an application process that "remains subject to being aborted based on outside events beyond an applicant's control" would be a "fundamentally flawed business proposition" and a "reckless investment." DN 80 Ex. 1 at 2; *see also* DN 80 (process "that is expressly contingent on the Mashpee's actions" would be "plagued by all of the equal

protection problems for which KG has sought relief in this litigation"). Commercial applicants such as KG are justifiably concerned about running the gauntlet of background checks, host community votes, detailed proposals, mitigation studies, and hearings, *see* Act § 16, secs. 12-17—to say nothing of the non-refundable $400,000 application fee—only to be told at the end of the process that Region C will continue to be set aside for the Mashpee. More importantly, the lingering uncertainty over whether the Southeast will ultimately be set aside for the Mashpee severely hinders non-tribal developers' ability to obtain gaming operator partners and outside investment. *See* DN 2 Ex. C (Gallaway Decl.) ¶¶ 13-21. It is critical for commercial applicants to know, from the start of the process, that licenses will be awarded based on merit rather than race.

Even if the application process in Region C were truly fair and race-neutral, the Southeast will continue to suffer the lingering effects of the Act's tribal preferences. Under Section 91(e), the Southeast was categorically set aside for Indian tribes until July 31, 2012. Thus, even though the Commission has now initiated a commercial application process in the Southeast, that process lags far behind the process in Regions A and B. Gaming applicants in those two regions have had a substantial head start in acquiring business partners and investors, and the Commission expects to award licenses in those regions at least six months before awarding a license (if any) in Region C. *See* DN 2 Ex. C ¶¶ 14-17 (describing harms resulting from delayed opening of Southeast casino). The sole reason the Southeast now lags far behind the Eastern and Western regions is that it was initially subject to a race-based set-aside for the Mashpee.

II. KG IS INCURRING IRREPARABLE HARM AS A RESULT OF THE ONGOING RACIAL PREFERENCES

KG's irreparable injury is self-evident. *Eighteen months ago*, this Court found that "the unsettled constitutionality of the legal provisions at issue in this case hampers . . . region-wide investment in Region C casino developments," and that the "collateral effects" of this uncertainty

are "felt acutely by KG Urban, which must decide whether to expend substantial resources to exercise options on and redevelop the Cannon Street Property." 839 F. Supp. 2d at 396. Several of the largest gaming operators in the world have been competing aggressively for the licenses in Regions A and B, but the Southeast has attracted little interest because of the pall cast by the tribal preferences. *See* DN 2 Ex. C ¶ 20-21. The preferences also make it more difficult for non-tribal developers in the Southeast to attract gaming operator partners and investors. *Id.* ¶¶ 13-21.

To be sure, KG still intends to apply for a commercial license on September 30th, but this does not in any way change the fact that it is being irreparably harmed by the unconstitutional racial preferences. The Commission continues to suggest that the application process in Region C will *not* be a purely merit-based process as in Regions A and B, and that the whole process may for naught if the Mashpee make some unspecified degree of "progress" towards an IGRA casino. The denial of an ability to compete on a level playing field untainted by race is, by itself, both the constitutional violation and the irreparable harm. *See Ass'n for Fairness in Business v. New Jersey*, 82 F. Supp. 2d 353, 363 (D.N.J. 2000) (finding irreparable injury where plaintiffs were forced to "compete on an unfair playing field" as a result of racial preferences). Similarly, "the denial of the right to have [a] bid fairly and lawfully considered constitutes irreparable injury."[3] The fact that KG will be denied the opportunity to compete on a level playing field after having invested millions of dollars and years of work preparing its redevelopment proposal further reinforces both the gravity and irreparability of its injury. *See* DN 2 Ex. B ¶¶ 11-16, 20.

The public interest also lies in ensuring that valuable government benefits are awarded on the merits through a truly competitive process. *See CRAssociates*, *Inc. v. United States,* 95 Fed.

[3] *Ellsworth v. United States*, 45 Fed. Cl. 388 (Ct. Fed. Cl. 1999); *see also CRAssociates v. United States*, 95 Fed. Cl. 357, 390 (Ct. Fed. Cl. 2010) ("lost opportunity to compete on a level playing field for a contract" constitutes irreparable harm); *Nat'l Maritime Union v. Military Sealift Command*, 824 F.2d 1228, 1237 (D.C. Cir. 1987); *Mark Dunning Indus. v. Perry*, 890 F. Supp. 1504, 1517 (M.D. Ala. 1995).

Cl. at 391. Indeed, by making the application process in the other two regions fiercely competitive, the Commonwealth itself has recognized that awarding gaming licenses on the merits is in the public interest. Casino gaming is going to have a tremendous influence on the Massachusetts economy in coming years—implicating issues of job growth, tax collection, local redevelopment, environmental sustainability, and law enforcement—and the public has a powerful interest in ensuring that the operators of those casinos are chosen based on the merits of their proposals rather than the race of their owners.

III. THE COURT SHOULD DECLARE THE TRIBAL PREFERENCES UNCONSTITUTIONAL AND ENJOIN ANY DISPARATE TREATMENT OF COMMERCIAL APPLICANTS IN REGION C GOING FORWARD

As the Chief Justice recently explained, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 551 U.S. at 748. The remedy for the Commonwealth's unconstitutional racial preferences is straightforward: this Court should declare the preferences for a landless tribe unconstitutional, and issue a permanent injunction ordering the Commission to conduct *the entire licensing process* in Region C—up to and including the actual award of a license—under the same race-neutral terms and conditions that currently apply in Regions A and B. That is, the Commission must evaluate each application solely on its own merits, and cannot refuse to issue a license based on speculation that the Mashpee might be eligible for IGRA-compliant gaming at some indeterminate point in the future.

At the moment, KG's primary equal protection harm flows from the Commission's ongoing refusal to conduct a truly race-neutral application process in Region C. But it is also important for this Court to address Section 91(e) in its declaratory judgment and permanent injunction. As reflected by the amended compact, the Governor clearly continues to believe that he is *required* by Section 91(e) to grant regional exclusivity to the Mashpee. *See* Amended Compact § 9.1.5 (regional exclusivity for the Mashpee would "further[] the Commonwealth's

policy of controlling the expansion of gambling within Massachusetts, by limiting the total number of casinos within the Commonwealth to three"—one in Boston, one in the West, and one for the Mashpee). And the Mashpee continue to argue—including to this Court—that Section 91(e) mandates regional exclusivity for the tribe and forbids the Commission from taking *any* steps toward commercial competition in Region C. *See* DN 118 Ex. 2 ("the Commission lacks lawful authority under the plain language of the [Act] even to consider opening Region C for applications for a Category 1 license"). Only a ruling from this Court that Section 91(e) is unconstitutional will make clear, once and for all, that the Equal Protection Clause prohibits any effort to set aside an entire region for a tribe that is ineligible for IGRA-compliant gaming.[4]

CONCLUSION

From the beginning of this litigation nearly two years ago, KG has simply sought an opportunity to compete for a gaming license on the merits, on a level playing field untainted by race—as applicants in Regions A and B have been doing since the day the Act was signed into law. Yet KG was initially subject to a categorical exclusion on account of race, and it is now facing an application process that continues to be skewed by a desire to accommodate an Indian tribe that is ineligible for IGRA-compliant gaming. The only way to bring to a close the ongoing dispute about regional exclusivity is for this Court to rule definitively that setting aside an entire region indefinitely for a landless tribe is simply not an option open to the Commonwealth under the Equal Protection Clause. KG's motion for summary judgment should be granted.

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[4] If this Court declares Section 91(e) unconstitutional, that provision would be severable from the rest of the Gaming Act. Under Massachusetts law, there is a "'well-established judicial preference in favor of severability,'" and "the absence of a specific severability provision . . . is of no consequence." *Peterson v. Commissioner of Revenue*, 825 N.E.2d 1029, 1037-38 (Mass. 2005); *see also* M.G.L.A. c. 4, § 6, Eleventh ("The provisions of any statute shall be deemed severable, and if any part of any statute shall be adjudged unconstitutional or invalid, such judgment shall not affect other valid parts thereof."). There is no indication in the Gaming Act that the legislature was departing from this strong presumption of severability.

September 23, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeffrey M. Harris, hereby certify that on September 23, 2013, Plaintiff KG Urban Enterprises, LLC's Memorandum in Support of Motion for Summary Judgment was filed through the ECF System and will be sent electronically to registered participants as identified on the Notice of Electronic Filing.

/s/ Jeffrey M. Harris