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

PLAINTIFF'S OPPOSITION TO COMMONWEALTH'S MOTION FOR SUMMARY JUDGMENT

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The Commonwealth's position in its motion for summary judgment greatly simplifies this Court's task. The Commonwealth no longer takes the "all-or-nothing" position that the tribal preferences are mere political classifications, presumably because the First Circuit's decision forecloses any such argument. Moreover, in the wake of the Department of the Interior's clarification that nothing in federal law requires the Commonwealth to grant the Mashpee exclusive gaming rights throughout the Southeastern region, the Commonwealth wisely abandons any argument that the ongoing preferences are somehow "authorized" or "required" by the federal Indian Gaming Regulatory Act ("IGRA"). And in light of the perpetual delay and uncertainty surrounding the Mashpee land-in-trust application, the Commonwealth does not contend that we remain in some limbo period in which commercial gaming in the Southeast can constitutionally await resolution of the land-in-trust process. Indeed, the Commonwealth readily concedes (at 13) that the "limited period of time" in which the First Circuit would allow the tribal preferences to escape strict scrutiny "has come to an end."

Instead, the Commonwealth's sole argument in support of its motion for summary judgment is that there are no longer any tribal preferences at all. That contention is puzzling, especially in light of this Court's rejection of essentially the same argument in the mootness context. *See* DN 131. While some arguments work better as merits arguments than as mootness arguments, the argument that the government wins because it is no longer discriminating is not one of them. In all events, the Commonwealth's argument fails for the even more basic reason that it is directly contrary to numerous statements by the Gaming Commission, the Governor, and the Mashpee, as well as the widespread perception within the industry. In its press release acknowledging receipt of KG's application on September 30th, the Commission once again emphasized that its ultimate licensing decision in Region C will "take into account" the status of

Indian tribes in some unspecified way. And the Chairman of the Commission further recognized what the industry has known all along—namely, that the "potential for a tribal casino" is "chilling" private investment in Region C. *Compare* DN 5 at 5 (KG arguing in motion for preliminary injunction in November 2011 that "the race-based advantages the Act grants to Indian tribes … are already skewing what should be a level playing field and diverting potential investors and gaming operators to the other two regions of the Commonwealth"). In short, even though the Commission has nominally opened the Southeast to commercial competition, there is no question that the application process in Region C differs from that in the rest of the Commonwealth, and continues to be plagued by an ongoing desire to accommodate an Indian tribe that is ineligible for gaming under federal law.

As explained in KG's initial memorandum in support of its motion for summary judgment, there is no reason for further delay or factual development before granting KG's motion for summary judgment. Likewise, no further factual development is necessary to deny the Commonwealth's motion. But it would not be possible to grant the Commonwealth's motion for summary judgment in light of the pervasive uncertainty over *how* the Commission intends to "take into account" the status of Indian tribes in making its licensing determination in Region C. The Commission has never even attempted to articulate the criteria it will use when it performs its "Indian check" before issuing a Region C commercial license. That is, the Commission is reserving the right to withhold a commercial license in Region C to accommodate the Mashpee *even if the tribe still does not have land-in-trust* when the Commission makes its determination.

As this Court recognized in its opinion denying the Commonwealth's motion to dismiss for mootness, "the Gaming Commission claims the discretion to suspend the [Region C application] process whenever it deems appropriate." DN 131 at 11-12. In light of the First

Circuit's mandate, it would be plainly unconstitutional for the Commission to indefinitely set aside Region C to accommodate a landless tribe, but the Commission has reserved its ability to do exactly that. The proper way to resolve this uncertainty is to declare that the proper way to "take into account" the Indian situation in Region C is not at all, and to decree that the commercial licensing process in Region C strictly mirror the process in the rest of the Commonwealth. But at an absolute minimum, summary judgment for the Commonwealth is inappropriate given that the Commission has offered no explanation whatsoever about how it intends to "take into account" the status of Indians during the commercial licensing process.

Finally, even if the Commission had actually promised that its licensing decision would be based solely on merit rather than race, the lingering effects of the tribal preferences would continue to plague the application process in Region C. Because Region C was initially subject to a categorical race-based set-aside under Section 91(e) of the Gaming Act, the application process in the Southeast now lags far behind the processes in Regions A and B. There is no doubt that the Commonwealth's decision to place Region C behind the other two regions has harmed the region and continues to put KG at a substantial disadvantage in competing for investment, business partners, and customers. And there is no doubt that this delay was caused solely by the Gaming Act's and Gaming Commission's initial attempts to categorically (and unconstitutionally) reserve Region C for Indian tribes.

Not only has the Commission not addressed that competitive disadvantage, it has now added insult to injury by suggesting that unsuccessful applicants for the Region A and B licenses may be able to jump into the Region C process and obtain another bite at the apple; needless to say, no applicant in Region A or B faces a similar possibility of additional, last-minute competition. Worse yet, unsuccessful applicants for the Category 2 slot parlor license will also

be able to make a belated entry into the Region C application process, but not the process in Region A or B. KG has spent the last six years diligently and methodically developing its proposal and working with local officials to ensure that its project meets the unique needs of the New Bedford community. But, solely because of the lingering effects of the unconstitutional tribal preferences, KG—unlike commercial applicants in Regions A and B—will face an ever-shifting competitive landscape and the ongoing prospect of new competition at the last minute. Thus, even if the Commission has committed itself to an entirely race-neutral process going forward—which it has not—KG would still be entitled to equitable relief ordering the Commission to remedy the ongoing negative effects of the initial statutory tribal preference. Something that was never a competitive possibility in Region A or B (*i.e.*, "region-jumping" by an unsuccessful applicant for a different license) cannot now be permitted in Region C without inflicting additional harm on Region C applicants.

ARGUMENT

I. THE COMMONWEALTH UNQUESTIONABLY CONTINUES TO TREAT APPLICANTS IN REGION C DIFFERENTLY ON THE BASIS OF RACE

A. The Commonwealth Continues To Suggest That the Region C Application Process Will Be Skewed by Tribal Preferences

The Commonwealth's sole substantive argument is its contention (at 13-15) that KG's equal protection claims were "extinguishe[d]" by the Commission's decision last April to begin accepting commercial applications in Region C. In its three-page discussion of that issue, the Commonwealth insists (at 13) that it has now committed itself to "the same decisional calculus in Region C as it will employ in the other two regions." The Commonwealth previously unsuccessfully invoked its April decision as a basis for finding this case moot. *See* DN 131 (order denying motion to dismiss for mootness). The argument fares no better as a merits argument than it did as a mootness argument. The fundamental problem in both contexts is that

the Commission has not committed to a truly race-neutral process in Region C that mirrors the process in the rest of the Commonwealth. And because the Commonwealth has chosen to deny, rather than justify, its continuing differential and discriminatory treatment of Region C, there is no basis whatsoever for granting the Commonwealth's motion for summary judgment.

On September 30th, KG submitted its application for a commercial license in Region C, along with its non-refundable $400,000 application fee. The Commission was unable to even acknowledge receipt of KG's application without mentioning Indian tribes in the same breath. In its press release issued shortly after KG submitted its application, the Commission reiterated that any decision about a license 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." Ex. B to KG Response to Commonwealth's Statement of Undisputed Facts (DN 150) (MGC Sept. 30, 2013 Press Release). Needless to say, there was no comparable caveat offered when applications were received in Regions A and B.

Chairman Crosby went further and candidly acknowledged what KG has been saying from the beginning of this lawsuit—namely that the Commonwealth's favoritism of the Mashpee beginning in Section 91(e) of the Gaming Act and continuing through the "Indian check" imposed on Region C and Region C alone has had a chilling effect. While Chairman Crosby stated that he was "delighted that there's at least one (applicant)" in Region C, he acknowledged that "[f]rom all educated comment from outside experts and bidders themselves, (the potential for a tribal casino is) *clearly a chilling factor on their financial calculations*." Ex. C to KG Response to Commonwealth's Statement of Undisputed Facts (DN 150) (DeCosta Sept. 30, 2013 article) (emphasis added). That is, Chairman Crosby—a defendant in this case—has now unequivocally recognized that the widespread perception that the Region C process is rigged for

the Mashpee is "chilling" private investment in the Southeast. But rather than responding to that chilling effect by promising a truly fair and merit-based application process, the Chairman continues to suggest that the licensing process in the Southeast will be skewed by a desire to accommodate a landless Indian tribe.

These are just the latest in a long line of public statements in which the Commission has made clear that the commercial application process in Region C will continue to be distorted by racial preferences, and that there will continue to be a thumb on the scale in favor of the Mashpee. *See* KG Mem. 20-22 (DN 143).[1] For example, the Commission has stated in no uncertain terms that its licensing decision in Region C will include an extra procedural step in which it will "tak[e] into account the economic consequences of the then current status of the Tribal-State and Federal Trust Land process." Ex. E to KG Statement of Undisputed Facts (DN 142). The Commission has not once suggested that a similar step will occur in Regions A and B, even though the proposed casinos in the Boston area are a mere 40 miles from the Mashpee's proposed site in Taunton. It would certainly come as a shock to Wynn Gaming and Caesar's Entertainment—which are competing aggressively on the merits for the Boston license—to learn that the Commission might decline to issue a license in Region A because an

[1] Bafflingly, the Commonwealth asserts (at 13) that KG argued "for the first time in opposing the defendants' motion to dismiss" that the application process in Region C would not be subject to the same process currently being followed in Regions A and B. KG's opposition to the Commonwealth's motion to dismiss was its first substantive filing after the Commission initiated a commercial application process in Region C, so it is unclear how KG could have raised this issue any sooner. In all events, from the beginning of this lawsuit, the gravamen of KG's Equal Protection Clause claim is that it is entitled to participate in a commercial gaming application and licensing process that is unskewed by racial considerations and mirrors the race-neutral processes in Regions A and B. *See* DN 1 at 19 (KG complaint alleging that the Act is unlawful because it "imposes race-based limitations on open competition for a gaming license in Southeastern Massachusetts, while the competitive process of awarding licenses in the other two regions remains untainted by race").

Indian tribe might someday be eligible for an IGRA casino less than an hour away in Taunton. The three regions may be nominally separate as a result of the artificial lines drawn in the Gaming Act, but in a truly merit-based selection process, it would be nonsensical to treat a hypothetical Mashpee casino as *irrelevant* to commercial gaming in Region A but potentially *dispositive* with respect to commercial gaming in Region C.

Chairman Crosby similarly 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 throughout the Southeast without commercial competition. DN 104 Ex. A at 103. The Governor has also emphasized that the Mashpee will be given preferential treatment. For example, the Governor has stated that Section 91(e) was designed to ensure that the Mashpee will get a license one way or the other, asserting that he "would bet on" a Mashpee casino in Taunton, and that "we'll know whether it's a commercial facility or a tribal facility fairly soon." Ex. A to KG Response to Commonwealth's Statement of Undisputed Facts (DN 150) (Murphy July 13, 2012 article).

The Commonwealth suggests (at 14) that consideration of "the possibility of competition from an Indian casino" is "not different in kind from the factors the Commission will be weighing in the other regions," such as "demographics or other conditions in their host communities." That is nonsense. It is one thing to conduct a totality-of-the-circumstances analysis that considers race-neutral factors such as population, demographics, and competition from other casinos. But because the Mashpee *have no Indian lands in Massachusetts*, any "consideration" or "accommodation" of the tribe is nothing more than an impermissible racial preference.

If there were Indian lands in the Southeast on which an IGRA-compliant casino could be built, then the Commission could potentially consider that fact in making its licensing decision. *See Artichoke Joe's v. Norton*, 353 F.3d 712, 735 (9th Cir. 2003) (holding that "IGRA pertains only to *Indian lands*" and that tribes "shed their sovereignty" once "outside" those lands). But whatever scope there is for considering what Indian tribes might do on extant Indian lands, there is absolutely no justification for giving special solicitude to a tribe that does not currently possess such lands. *Potential* Indian lands do not confer any "rights" under IGRA, and any attempt to delay or skew the commercial application process while a currently landless tribe embarks on the long and uncertain process of acquiring land-in-trust would plainly run afoul of the Equal Protection Clause and the First Circuit's mandate. *See* KG Mem. 15-20 (DN 143); *KG Urban Enters. v. Patrick*, 693 F.3d 1, 25 (1st Cir. 2012) (argument that the tribal 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]").

The Commonwealth further contends (at 14) that any ongoing tribal preference in the Southeast is merely a product of the fact that "one or more tribes with possible federal gaming rights happen to be located in Region C." But there is currently only *one* tribe with "Indian lands" in Region C—the Aquinnah—and the Commonwealth has taken the position that this tribe waived any right to conduct gaming as part of a land settlement in the 1980s. *See* Appellees' Br. at 39 n.103, *KG Urban Enters. v. Patrick*, No. 12-1233 (1st Cir. Apr. 19, 2012). The Mashpee—the tribe that has always been the Commonwealth's hand-picked choice for a Region C casino—have no land-in-trust anywhere in Region C. The Mashpee announced in March 2012, five months *after* the Gaming Act was enacted, that they intend to pursue a casino in Taunton. But the tribe and its financial backers acquired options on the Taunton parcel (which

currently houses an industrial park) through an ordinary commercial real estate deal. As far as IGRA is concerned, the Mashpee could have just as easily chosen a site in downtown Boston (Region A) or Springfield (Region B) for their casino project. Indeed, as far as IGRA is concerned, there is absolutely no basis for distinguishing between Regions A, B, and C—those regions and the unique disabilities foisted on Region C are entirely a product of Massachusetts law. It is thus disingenuous for the Commonwealth to suggest that it is merely accommodating the "presence of Indian tribes" in the Southeast, when the only presence that matters for purposes of IGRA is Indian lands, and the Mashpee had no qualifying lands in any region when the Commonwealth launched its discriminatory venture. The Commonwealth's decision to saddle Region C with unique disabilities was solely a product of state decisionmaking, and was wholly untethered from Indian lands or any tribal "rights" under federal law.

Regardless, nothing in the Equal Protection Clause authorizes the Commonwealth to discriminate in favor of Indian tribes in Region C simply because Indian tribes happen to live in Region C. The mere presence of a racial group does not justify a racial preference. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505, 541 (1989) (city "failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race," even though 50% of the population was African-American but only 0.67% of contracts had been awarded to minority-owned businesses). The Southeast also has a large population of Portuguese-Americans, but it would have been patently unconstitutional for the Commission to give some special solicitude to Portuguese applicants during the licensing process. An Indian tribe without federal land-in-trust is no different from any other racial group, and state-law preferences for such tribes are subject to strict scrutiny just like preferences for any other group.

Finally, the Commonwealth contends (at 15) that "all of the factors making Region C 'different' were known to KG Urban long before the Gaming Act was passed," and that KG "must live with the consequences" of its "business decision" to pursue a gaming project in New Bedford. But that assertion undermines the Commonwealth's principal contention that Region C is not being treated differently. If the Commission is not, in fact, granting a preference to the Mashpee, it is unclear what "consequences" KG is being forced to "live with."

In all events, the fact that KG could have competed for a license on a level playing field in one of the *other* two regions does not remotely justify discrimination in the Region C application process. The Commonwealth's argument is no different from an assertion that Allan Bakke had no equal protection claim against the University of California because he should have simply "live[d] with the consequences" of his "calculated" decision to apply to the University in spite of its racial set-asides. That is self-evidently wrong. The Supreme Court did not reject Bakke's challenge to the admissions policy at the University of California at Davis simply because he could have avoided the quota by applying to UCLA or Stanford. Instead, the Court made clear that the denial of a fair opportunity to compete *for the desired benefit* is both the constitutional violation and the irreparable injury. *See Regents of University of California v. Bakke*, 438 U.S. 265, 305 (1978) ("When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect."). The fact that KG made a "business decision" to pursue a site in New Bedford rather than one of the other two regions does not in any way absolve the Commonwealth's violation of the Equal Protection Clause.

* * *

In sum, the Commonwealth's suggestion that the Region C application process will be the same as the process in the other two regions does not withstand scrutiny. From the very beginning, Region C has been singled out for distinct treatment in order to favor the Mashpee. It is now clear that those efforts were not justified by federal law and have not ceased. Far from providing a clear promise of non-discrimination and a process that mirrors the process in the rest of the Commonwealth, the Commission has promised that it will "take into account" the status of Indian tribes at the time of its licensing decision in Region C and Region C alone. The continuing distorting effect of that discrimination is clear to everyone—including Chairman Crosby, who acknowledges the "chilling effect" on the Southeast.

B. At a Minimum, the Commonwealth's Motion for Summary Judgment Must Be Denied in Light of Pervasive Uncertainty Over How the Commission Intends To "Take into Account" the Status of the Mashpee

At a minimum, the pervasive and ongoing uncertainty over *how* the Commission intends to "take into account" the status of the Mashpee is—by itself—easily sufficient to defeat the Commonwealth's motion for summary judgment. This Court must "view the evidence and all factual inferences therefrom in the light most favorable to the non-moving party." *Aponte-Santiago v. Lopez-Rivera*, 957 F.2d 40, 41 (1st Cir. 1992). "Uncertainty as to the true state of any material fact defeats the motion." *Gibson v. American Broadcasting Cos.*, 892 F.2d 1128, 1132 (2d Cir. 1989).

Here, there are far too many unanswered questions about the commercial application process in Region C for this Court to hold that the Commonwealth is entitled to judgment as a matter of law. Critically, the Commission has never articulated the *criteria* it will apply when it "takes into account" the status of Indian tribes at the time of its Region C licensing decision. For example, what if the Mashpee have nominally obtained land-in-trust but that determination

remains mired in legal challenges under *Carcieri* and *Patchak*? Or what if at the time of the Region C licensing decision, the tribe still has not obtained land-in-trust but continues to boast (as it has for the last two years) that a favorable decision is imminent? Under either of these scenarios, both the Equal Protection Clause and the First Circuit's mandate would clearly bar any attempt to continue to set the region aside for the Mashpee. But the Commission is apparently reserving its right to do just that, as this Court recognized in its decision denying the Commonwealth's motion to dismiss on mootness grounds. As the Court explained, "nothing precludes the Gaming Commission here from simply changing its mind and cancelling the commercial application process in Region C," and the Commission "claims the discretion to suspend the process whenever it deems appropriate." DN 131 at 11-12.

Thus, at a minimum, the Commission's refusal to specify *how* it intends to "take into account" the status of Indian tribes in its commercial licensing decision in Region C should be easily sufficient, by itself, to defeat the Commonwealth's motion for summary judgment.

C. The Commonwealth Is Not Entitled to Summary Judgment Because the Region C Application Process Currently Lags Far Behind the Process in Regions A and B

Even if it were crystal clear that the Region C process would be governed by the same race-neutral standards as Regions A and B, the Commonwealth would still not be entitled to summary judgment. As the Commonwealth concedes (at 13), under the current licensing timetable, the Commission's decision regarding the Region C license will lag at least six months behind the decision for Regions A and B.

Because of the statutory tribal preferences in Section 91(e), applicants in Regions A and B have had a powerful head start over applicants in the Southeast in seeking investors and gaming operator partners. Regions A and B had a merit-based application process from day one, but from November 2011 through April 2013, the Southeast was subject to a categorical

exclusion of non-tribal competition. *See* KG Statement of Undisputed Facts ¶¶ 39-46 (DN 142). The Commission then compounded the effects of that initial race-based set-aside by issuing a licensing schedule in which Region C will continue to lag at least six months behind the other two regions. As a result, applicants in the Southeast will continue to be chilled in their ability to partner with investors and gaming operators, and the ultimate licensees in Regions A and B will have a significant head start in winning customers and business partners. *Id.* ¶¶ 7-9. Moreover, Region A and B applicants had fourteen months to prepare their initial applications (from November 2011, when the Act was signed into law, until January 2013), but Region C applicants had a mere five months (from April 2013 until September 2013). The *sole* reason why Region C lags behind the other two regions—and why Region A and B applicants have had much more time to prepare their applications and obtain investors and gaming operator partners—is because it was initially subject to a categorical race-based set-aside for Indian tribes under Section 91(e) of the Act.

To add insult to injury, the Commission has now suggested that unsuccessful applicants for the licenses in Regions A and B may be able to parachute into the Region C process after the Region A and B licenses are awarded. Similarly, unsuccessful applicants for the Category 2 "slot parlor" license will be able to make a belated entry into the application process for Region C—but not Region A or B—after the slot parlor license is awarded in January 2014. *See* Ex. B to KG Response to Commonwealth's Statement of Undisputed Facts (DN 150) (noting that Region A and B applicants and slot parlor applicants "are not required to submit Phase 1 applications for Region C," but "may choose to pursue Region C depending upon the outcome of other licensing decisions"). That is, after spending more than a year perfecting its proposal and refining its project, KG may learn at the last minute that it will also face an entirely new and

different set of competitors. Applicants in Regions A and B, in contrast, will face no such risk, and the sole reason for this differential treatment is the delay resulting from the initial statutory tribal preferences.

Thus, even if the Commission had promised a truly fair and race-neutral application project in Region C, it would still be critical for this Court to grant equitable relief addressing the ongoing effects of the initial set-aside. *See* KG Amended Complaint at 20 (DN 83) (requesting as equitable relief "provisions designed to ensure that non-tribal gaming applicants are not placed at an unfair disadvantage as a result of the lengthy delay in opening the Southeast to a competitive process"). Given that the explicit preferences in Section 91(e) of the Act continue to affect Region C in direct and concrete ways, the Commonwealth cannot plausibly contend that KG's equal protection harm has been "extinguished."

D. The Ongoing Preferences for a Landless Tribe Are Not in Any Way "Authorized" by IGRA

If the Court concludes that there are ongoing preferences for the Mashpee, the only remaining steps would be to deny the Commonwealth's motion for summary judgment, grant KG's cross-motion for summary judgment, and permanently enjoin any differential treatment of Region C going forward. *See* KG Mem. 24-25 (DN 143). The Commonwealth's only substantive argument in its motion for summary judgment is that there are no longer any preferences at all. That is, the Commonwealth has chosen to deny its discriminatory treatment, rather than try to defend it. Indeed, the Commonwealth readily concedes (at 13) that the "limited period of time" during which the tribal preferences could escape strict scrutiny "has come to an end."

Fourteen months ago, the First Circuit held that the argument that the tribal preferences were authorized by IGRA "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]." 693 F.3d at 25. The Commonwealth concedes (at 10) that the Mashpee land-in-trust proceeding "has been ongoing for more than two years now," and that "while the tribe has furnished this Court with several portents of a near-term resolution," there is "no clear timetable for [the Bureau of Indian Affairs'] resolution of that question (or for any appeals that may be taken therefrom)." Under these circumstances, the First Circuit's decision makes clear that any additional preference for the Mashpee is not remotely authorized by IGRA. *See* KG Mem. 15-22 (DN 143). Indeed, the only relevant intervening event is that the Department of Interior has made clear that nothing in federal law requires the Commonwealth to grant a region-wide monopoly to the Mashpee. *See id.* at 16. Thus, any additional attempts to skew the application process in Region C in favor of Indian tribes must instead rest on the Commonwealth's own authority and satisfy strict scrutiny. The Commonwealth has never even attempted to defend the tribal preferences under that exacting standard, and reiterates its view (at 6) that the level of scrutiny question is outcome determinative.

II. THE COMMONWEALTH'S "PRIMARY JURISDICTION" ARGUMENTS SHOULD BE REJECTED

The Commonwealth asserts (at 4-5) that "[s]ince this case was restored to this Court's docket in September 2012, the Court has stayed its hand, implicitly deferring to the primary jurisdiction of the federal agencies where the Mashpee Wampanoag Tribe's applications (to approve the tribal-state compact and to take land into trust) remained pending." That is wishful thinking. Although the Commonwealth sought a stay based on primary jurisdiction, *see* DN 55 at 6-11, and repeatedly invoked the concept, *see* DN 105 at 2 n.3, this Court has never suggested that it agreed with those arguments. As KG explained, the only issue in this case is a constitutional challenge to state action, and it is *this Court*—not some federal agency—that has

primary jurisdiction to adjudicate alleged violations of the Equal Protection Clause. *See* DN 58 at 4-6; *see also Envt'l Tech. Council v. Sierra Club*, 98 F.3d 774, 789 (4th Cir. 1996) (refusing to apply primary jurisdiction to dormant Commerce Clause challenge to state law because such issues are "properly within the traditional purview of an Article III court, and are not those to which EPA could conceivably lend some degree of expertise"); *Hamad v. Nassau County Med. Ctr.*, 191 F. Supp. 2d 286, 298 (E.D.N.Y. 2000) (declining to apply primary jurisdiction to due process and equal protection claims challenging state action).

The Commonwealth now repeats many of those same arguments, asserting (at 15-19) that the Interior Department has "primary jurisdiction" to decide in the first instance whether the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009), applies to the Mashpee's land-in-trust application. In reality, even on that question, it is the federal courts' views that will carry the day. After all, far from deferring to the Secretary, the Supreme Court in *Carcieri* rejected the Interior Department's view of its own statutory authority. *Id.* at 387-93. In all events, KG's complaint does not challenge the Secretary's statutory authority to take land into trust for tribes that were not federally recognized in 1934. KG only challenges *the Commonwealth's* ongoing refusal to conduct a truly fair and race-neutral application process in Region C. In light of the First Circuit's decision, this Court need only hold that any further *delays* in conducting a race-neutral process in Region C would violate the Equal Protection Clause. The Mashpee can, of course, continue to pursue land-in-trust as they deem appropriate, but that fact must play no role whatsoever in the commercial licensing process for Region C.

In all events, although the Commonwealth contends (at 10) that "it remains an open question whether the BIA may legally take land into trust on behalf of a tribe that had not yet attained federal recognition in 1934," the *Carcieri* decision speaks for itself. Five Justices joined

the majority opinion but did not join (or even acknowledge) the alternative theory set forth in Justice Breyer's concurring opinion. It is thus highly unlikely that the Secretary can evade the majority opinion through the "under federal jurisdiction" theory advanced in the concurrence. *See United States v. Angel-Guzman*, 506 F.3d 1007, 1012 n.3 (10th Cir. 2007) (concurrence has "no formal precedential weight" when the concurring Justice also "joined in the opinion (and not merely the judgment) of the majority"). And the fact that Congress has considered a number of proposals to overrule *Carcieri* by statute—all of which have failed—only reinforces that the Secretary does *not* currently have authority to take land into trust for tribes that were not federally recognized in 1934. *See* 693 F.3d at 25 (First Circuit noting that the Commonwealth's defense of the tribal preferences as authorized by IGRA would be "even weaker to the extent that Congressional action is required to provide the Secretary authority to take this land into trust").

CONCLUSION

The Commission's public statements leave no doubt that the commercial application process in Region C is still being skewed by racial preferences for a tribe that is ineligible for IGRA-compliant gaming. At the very least, the Commission's failure to specify *how* it intends to "take into account" the status of the Mashpee—as well as the fact that the Region C application process currently lags far behind the process in Regions A and B—precludes entry of judgment as a matter of law. The Commonwealth's motion for summary judgment should be denied.

October 18, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeffrey M. Harris, hereby certify that on October 18, 2013, Plaintiff KG Urban Enterprises, LLC's Opposition to the Commonwealth's 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