IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

MGM RESORTS INTERNATIONAL GAMING DEVELOPMENT, LLC, *Plaintiff*,	:	No. 3:15-cv-01182-AWT
v.	:	
DANNEL P. MALLOY, in his official capacity as Governor of Connecticut, DENISE W. MERRILL, in her official capacity as Secretary of the State of Connecticut, and JONATHAN A. HARRIS, in his official capacity as Commissioner of the Connecticut Department of Consumer Protection, *Defendants*.	:	OCTOBER 29, 2015

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

Pursuant to federal law, the Mashantucket Pequot Tribe and the Mohegan Tribe of Indians of Connecticut (collectively "the Tribes") operate two separate casinos on tribal lands in Connecticut. The Tribes have approached the state to explore the possibility of operating a third casino outside of tribal lands.

The General Assembly has not allowed the Tribes to operate a third casino at this time. Rather, it passed Connecticut Special Act 15-7 ("SA 15-7" or "the Act"). SA 15-7 imposes certain requirements on the Tribes in connection with any efforts under the Act to move toward a third casino, including that the Tribes operate jointly (even though they are direct competitors) and that the Tribes submit monthly status reports to twelve separate state officials or entities regarding any negotiations toward a development agreement with a municipality, to ensure the

process is fully transparent. SA 15-7 makes explicit that the process it sets forth cannot itself result in the Tribes operating a third casino—any development agreement that results must be contingent on the state passing a new and separate law to allow any casino to operate and no casino can operate unless and until state law is changed to expressly permit it.

Plaintiff MGM Resorts International Global Gaming Development, LLC ("MGM") asks this Court to hold SA 15-7 unconstitutional because—in MGM's view—SA 15-7 excludes MGM from moving forward with developing a casino in Connecticut. But SA 15-7 in no way excludes MGM from taking steps toward developing a Connecticut casino. To the contrary, MGM alleges that it has taken steps toward such a casino, and nothing in SA 15-7 precludes MGM from taking whatever additional steps it would like to take. MGM *is* precluded from developing a casino in much of Connecticut—including the areas that have thus far expressed a current interest in a casino—by "the 50-mile radius restriction in the [Massachusetts] state license governing MGM Springfield," but that impediment was voluntarily assumed by MGM and, in any event, cannot be attributed to SA 15-7 or to Defendants. *Amended Complaint*, ¶ 49 ("*AC*").

SA 15-7 does not injure MGM, and MGM lacks standing to challenge it. Moreover, even if MGM could claim some injury, its claims are not ripe. MGM's amendments to its Complaint do nothing to change that result. Therefore, Defendants respectfully request that this Court dismiss this action in its entirety.

FACTUAL BACKGROUND

A. The Evolution of Special Act 15-7 and its Requirements

"This action challenges as unconstitutional SA 15-7 ("SA 15-7" or "the Act"), which was signed into law by Governor Malloy on June 19, 2015." *AC*, ¶ 1. SA 15-7 (Exh. 1) began as Senate Bill 1090. In its original form, SB 1090 would have "authorized the Commissioner of Consumer Protection to 'issue up to three gaming licenses to the Mashantucket Pequot and Mohegan Tribe of Indians of Connecticut to authorize such tribes to act jointly to establish and operate up to three casino gambling facilities in the state.'" *AC*, ¶ 22 (quoting SB 1090).

The General Assembly subsequently amended the bill to its current form. In contrast to its original version, SA 15-7 as enacted does not allow the Tribes to become licensed to operate additional casino facilities without further changes in state law. Rather, SA 15-7 expressly provides that any possible eventual casino operation may not be established unless and "until the General Assembly has amended state law to provide for the operation of and participation in a casino gaming facility by such tribal business entity and such law has taken effect." *SA 15-7*, § 1(d).

Specifically, SA 15-7 requires the Tribes to follow a detailed process in connection with any attempt they make to obtain a possible additional Connecticut

casino. It requires that the Tribes operate jointly, and that they register any such joint "Tribal business entity" with the Secretary of the State. *Id*. at § 1(a)(1) & 1(f).

Upon the Tribes' creation and registration of a "tribal business entity," that entity "may issue a request for proposals [("RFP")] to municipalities regarding the establishment of a possible casino gaming facility in such municipality." *Id*. at § 1(a). SA 15-7 dictates that any such RFP "shall include . . . a description of the needs of the tribal business entity for the purpose of carrying on the business of a casino gaming facility." *Id*. at § 1(b). SA 15-7 also requires that the tribal business entity submit any RFP to the Department of Consumer Protection ("the DCP"), so the DCP can post it publicly on the DCP's website. *Id*.[1]

The tribal business entity's issuance of its RFP triggers its reporting requirements under SA 15-7. "[N]ot later than one month after the issuance of the" RFP, any tribal business entity must begin submitting monthly reports "on or before the twenty-fifth day of each month." *Id*. at § 1(e). Those reports must "summariz[e] the activities of the tribal business entity with regard" to any RFP it may issue. *Id*.

A tribal business entity's monthly reports must be "in accordance with the provisions of section 11-4a of the general statutes," *id*., which means that the tribal business entity—like a state commission, task force, committee or agency—has to "submit its [monthly] report[s] electronically to the clerks of the Senate and the

[1] After Plaintiff filed its original Complaint, the Tribes registered a tribal business entity and registered it with the Secretary of the State. *AC*, ¶ 55. The tribal business entity then issued a RFP, which was posted on the DCP's website. *Id*. at ¶¶ 57-58.

House of Representatives and the Office of Legislative Research, and shall file one copy with the State Librarian." Conn. Gen. Stat. § 11-4a. SA 15-7 also imposes the additional requirement that any tribal business entity that issues a RFP submit its monthly reports to

> the president pro tempore of the Senate, the majority leader of the Senate, the minority leader of the Senate, the speaker of the House of Representatives, the majority leader of the House of Representatives, the minority leader of the House of Representatives, the joint standing committee of the General Assembly having cognizance of matters relating to public safety and to the Attorney General.

SA 15-7, § 1(e).

After the tribal business entity issues its RFP, "[a]ny municipality may respond to such" RFP and enter into negotiations with the tribal business entity, subject to the public reporting requirements set forth above. *Id.* at § 1(c). If those negotiations are successful, "[t]he tribal business entity may enter into a development agreement with a municipality regarding the establishment of a possible casino gaming facility in such municipality." *Id.* Critically, "[a]ny such development agreement shall be contingent upon amendments to state law enacted by the General Assembly that provide for the operation of and participation in a casino gaming facility by such tribal business entity." *Id.* As discussed above, "[t]he tribal business entity may not establish a casino gaming facility in the state until the General Assembly has amended state law to provide for the operation of and participation in a casino gaming facility by such tribal business entity and such law has taken effect." *Id.* at § 1(d).

B. MGM's Allegations

MGM alleges that it "is ready, willing and able to compete for an opportunity to develop a commercial casino gaming facility in Connecticut, but is excluded by the Act from competing for this opportunity." *AC*, ¶ 6. However, MGM acknowledges—as it must—that it is subject to a "50-mile radius restriction in the [Massachusetts] state license governing MGM Springfield." *Id*. at ¶ 49. Therefore, MGM is precluded from applying for a license for, managing, operating or having a financial interest in a casino located in most of Connecticut; the radius restriction covers all of Hartford, Tolland and Windham counties, and large portions of Litchfield, New Haven and Middlesex counties. It also covers much of New London county, which is home to the Tribes' existing casinos.

Notwithstanding MGM's inability to develop a casino in most of Connecticut, it claims to have "completed a preliminary feasibility study, which analyzes the viability of a potential casino development in Connecticut located outside the 50-mile radius restriction . . . and reaches the preliminary conclusion that such a development is both feasible and desirable for MGM and MGMRI." *AC*, ¶ 47. MGM alleges that its "preliminary feasibility study indicates that having casinos in both Springfield and Connecticut would be commercially attractive to MGM and MGMRI." *Id*. at ¶ 50.

MGM claims that it is "ready willing and able to compete for the opportunity to develop a commercial casino gaming facility in Connecticut, but is excluded by the Act from competing from this opportunity." *Id*. at ¶ 6. But, even after having

amended its Complaint in light of Defendants' Motion to Dismiss the original Complaint, the only fact MGM pleads to support its claim of exclusion is that the Secretary of the State rejected MGM's attempt to register a tribal business entity under SA 15-7. *Id*. at ¶¶ 52-54. MGM makes conclusory allegations that the Act also precludes MGM from issuing a RFP, engaging in negotiations with municipalities and signing development agreements with them and claims that time is of the essence. *See, e.g.*, *id*. at ¶¶ 6 & 66. However, MGM points to no language in SA 15-7 precluding entities other than the tribal business entity from taking those steps, and SA 15-7's legislative history makes clear that it does not impose any such prohibition.

Relatedly, though MGM makes conclusory allegations that Connecticut law independent of SA 15-7 bars MGM from taking steps to propose, negotiate and present a casino development agreement for legislative approval (*AC*, ¶¶ 28 & 32), that is both legally incorrect and belied by SA 15-7's legislative history, MGM's own factual allegations and the historical attempts to develop a casino that are referenced in MGM's materials. Lastly, MGM does not allege that it has actually tried to issue a RFP or engage in negotiations with municipalities and been precluded from doing so by SA 15-7 or any other state law.

MGM's Amended Complaint has four counts. Counts One and Two are Equal Protection claims, with the first claiming that SA 15-7 creates a racial classification that is subject to—and fails—strict scrutiny analysis, and the second claiming that SA 15-7 would also fail rational basis scrutiny. Counts Three and Four are dormant

Commerce Clause claims, with Count Three alleging that SA 15-7 discriminates against interstate commerce on its face and Count Four alleging that SA 15-7 as applied unconstitutionally burdens interstate commerce.

Based on those claims, MGM asks this Court to declare SA 15-7 unconstitutional in its entirety or "at a minimum to the extent it" authorizes only the Tribes to: (a) "Register a tribal business entity with the Secretary of the State;" (b) issue a RFP to be "disseminated by" the DCP; (c) "Negotiate with municipalities regarding development of a casino gaming facility;" and (d) "Enter into an agreement for development of a casino gaming facility with a municipality." *Compl.*, pp. 17-18. MGM also asks this Court "enjoin Defendants from enforcing, or exercising any authority under the unlawful provisions of" SA 15-7. *Id.* at 24.

In addition to the above forms of relief that also appeared in MGM's original Complaint, MGM's Amended Complaint asks this Court to declare that Defendants Merrill and Harris violated the federal Constitution by registering the tribal business entity and posting the tribal business entity's RFP on the DCP's website, respectively, and enjoin them to undo those actions and from exercising any authority under SA 15-7. *Id.* at 24-25. MGM's Amended Complaint also asks this Court to declare that any future development agreement or state legislation allowing the Tribes or the tribal business entity to operate an additional casino "is the product of an unconstitutional process . . . and is thus invalid, null, and void in its entirety." *Id.* at 25. Finally, MGM asks for any other relief this Court deems proper, including attorney's fees under 42 U.S.C. § 1988. *Id.*

ARGUMENT

I. THE STANDARD OF REVIEW FOR A MOTION TO DISMISS

"A district court properly dismisses an action under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction if the court lacks the statutory or constitutional power to adjudicate it, such as when (as in the case at bar) the plaintiff lacks constitutional standing to bring the action." *Cortlandt St. Recovery Corp. v. Hellas Telecommunications*, 790 F.3d 411, 416-17 (2d Cir. 2015) (quotation marks and citation omitted). A Rule 12(b)(1) motion is also the proper vehicle to raise issues of ripeness—both constitutional and prudential—and the Eleventh Amendment. *See, e.g.*, *Wiltzius v. Town of New Milford*, 453 F. Supp. 2d 421, 428 & n.3 (D. Conn. 2006) (constitutional ripeness); *Connecticut v. Spellings*, 453 F. Supp. 2d 459, 491 (D. Conn. 2006), *aff'd as modified sub nom.*, *Connecticut v. Duncan*, 612 F.3d 107 (2d Cir. 2010) (Kravitz, J.) (prudential ripeness); *Benoit v. Connecticut Dep't of Motor Vehicles*, 2012 WL 32962, at *2 n.1 (D. Conn. Jan. 6, 2012) (Arterton, J.) (Eleventh Amendment).

"A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). To meet that burden, the plaintiff "must allege facts that affirmatively and plausibly suggest that it has standing to sue" and the court "need not 'credit a complaint's conclusory statements without reference to its factual context.'" *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 & 146 (2d Cir. 2011) (per curiam) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937,

1954 (2009)). Where defendants file a Rule 12(b)(1) motion raising a jurisdictional defect, the court "may refer to evidence outside the pleadings" to decide the motion. *Id.*

II. MGM HAS NOT MET ITS BURDEN TO ESTABLISH THAT IT HAS STANDING TO CHALLENGE SA 15-7

"[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013) (quotation marks omitted). "One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *Id.* (quotation marks omitted). "To establish Article III standing," a plaintiff must allege a cognizable injury and that "injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Id.* at 1147 (quotation marks omitted). "These elements form an 'irreducible constitutional minimum' without which a federal court may not proceed to the merits of a claim." *Cortlandt St. Recovery Corp. v. Hellas Telecommunications*, 790 F.3d 411, 417 (2d Cir. 2015) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998).

Even after amending its Complaint, MGM has not met its burden to establish standing based on the existence of SA 15-7. SA 15-7 does not injure MGM at all. It

imposes specific obligations on the Tribes—not MGM—and leaves MGM free to pursue whatever plans it may have to develop a Connecticut casino. The gravamen of MGM's claimed injury appears to be MGM's belief that SA 15-7 somehow gives the Tribes an advantage over MGM in the development process. But MGM's subjective belief has no basis in SA 15-7 and cannot support standing.

A. SA 15-7's Imposition of Additional Requirements on the Tribes Does Not Injure MGM

An "actual injury [is] necessary to establish Article III standing." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 730 (2013) (quotation marks omitted). MGM's claimed injury is that SA 15-7 creates an "exclusive, no-bid process, which allows only the Preferred Tribes to move forward with developing a casino in Connecticut." *AC*, ¶ 67; *see also id.* at ¶¶ 1, 6, 19, 30-32, 36, 39, 66 (claiming that SA 15-7 excludes MGM). But SA 15-7 does no such thing, and MGM's putative injury based on a misreading of the Act cannot support standing; "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).[2]

[2] Defendants believe SA 15-7 is clear on this issue. To the extent there is any uncertainty, before accepting Plaintiff's invitation to hold SA 15-7 unconstitutional, this Court "must pause to consider whether a constitutional adjudication is absolutely necessary." *Nicholson v. Scoppetta*, 344 F.3d 154, 167 (2d Cir. 2003). The federal courts "have a duty to avoid passing on the constitutionality of a statute where possible, especially when . . . dealing with state rather than federal law." *Id.* (citations omitted). Thus, if the Court somehow concludes that SA 15-7 is materially unclear, this Court should either abstain under *Pullman* to allow the Connecticut courts to address the issues of Connecticut law or, in the alternative, certify any unclear issues of Connecticut law to the Connecticut Supreme Court. *See, e.g.*, *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 500–01 (1941)); Conn. Gen. Stat. § 51-199b (providing for certification procedure).

Nothing in SA 15-7 excludes MGM from "mov[ing] forward with developing a casino in Connecticut." *AC*, ¶ 67. Indeed, MGM's own actions belie its allegations of injury. MGM represents that it has begun the process of developing a casino in Connecticut; it has already "analyzed the Connecticut gaming market," *id.* at ¶ 47, and "completed a preliminary feasibility study, which analyzes the viability of a potential casino development in Connecticut and reaches the preliminary conclusion that such a development is . . . feasible and desirable for MGM and MGMRI," *id.* at ¶ 41, and "commercially attractive." *Id.* at ¶ 44. SA 15-7 did not prevent MGM from taking those steps toward developing a Connecticut casino.

Nor does SA 15-7 prevent MGM from taking its next steps, should MGM choose to. MGM represents that it "has the resources and expertise to prepare a competitive request for proposals for a Connecticut casino and to evaluate the responses." *Id.* at ¶ 42. Nothing in SA 15-7 is stopping MGM from doing those things, or from negotiating and "enter[ing] into a casino development agreement with a municipality and . . . submit[ting] such an agreement to the Connecticut legislature for approval." *Id.* at ¶ 1.

Put simply, SA 15-7 has no impact on MGM's ability to take whatever steps it chooses to take toward developing a casino in Connecticut.[3] If "MGM is ready, willing, and able to compete for the opportunity to develop a commercial casino gaming facility in Connecticut"—as it claims—then it is not "excluded by the Act

[3] Of course, as discussed further below, MGM's "50-mile radius restriction in the state license governing MGM Springfield" excludes MGM from developing a casino in much of Connecticut, but that impediment cannot be attributed to SA 15-7 or to Defendants and would not be removed by a Judgment in MGM's favor. *AC* at ¶ 49.

from competing for th[at] opportunity." *AC*, ¶ 6. SA 15-7 causes MGM no injury, and MGM therefore lacks standing to challenge it.

MGM attempts to create an appearance of injury by casting SA 15-7 as "discrimination in favor of the Preferred Tribes and against all other potential bidders," *AC*, ¶ 4, based on claims that "[a]ll benefits of the Act—including formation of the tribal business entity, issuance of a request for proposals, and negotiation of a development agreement—are reserved exclusively for the Preferred Tribes." *Id*. at ¶ 30. But that argument cannot withstand scrutiny. The features of SA 15-7 that MGM casts as exclusive "benefits" to the Tribes are simply procedural requirements the General Assembly imposed on the Tribes because of the unique legal issues and impact on the public interest a potential expansion of gaming by the Tribes presents. *Id*.

Specifically, SA 15-7 creates a framework that ensures that the process surrounding a potential expansion of tribal gaming is transparent and carefully controlled. It requires the Tribes—despite their "two decades as fierce gaming competitors[4]"—to operate jointly through a "tribal business entity" that they must register with the Secretary of the State. *SA 15-7*, §§ 1(a)(1) & 1(f) (Exh. 1). That tribal business entity may issue a RFP to municipalities, but SA 15-7 requires both that the RFP include certain information and that the process be public, namely, that the tribal business entity must submit the RFP to the DCP to be posted on the

[4] Kenneth R. Gosselin, *Tribes' Search for Hartford-Area Casino Site: Broad Statements, Few Details*, Hartford Courant (Oct. 1, 2015) (Exh. 2) (cited in *AC*, ¶¶ 35 & 61).

DCP's website. *Id*. at §§ 1(a) & 1(b).

The tribal business entity's issuance of a RFP triggers extensive reporting requirements. Not more than one month after the tribal business entity issues a RFP, the tribal business entity must begin submitting monthly reports summarizing its activities with regard to the RFP, which would include any responses the tribal business entity had received from municipalities and the status of the resulting negotiations. *Id*. at § 1(e). The tribal business entity has to send those monthly reports to twelve separate state entities, including several legislative leaders and the Attorney General. *Id*. at § 1(e). Therefore, SA 15-7 requires that the Tribes conduct their negotiation process in full view of the General Assembly, the executive branch of state government and the public with all the attendant complications.

If the tribal business entity is able to enter into a development agreement with a municipality after all that, the tribal business entity still has no guarantee that it will be able to actually operate a casino. Any development agreement must "be contingent upon amendments to state law enacted by the General Assembly that provide for the operation of and participation in a casino gaming facility by such tribal business entity." *Id*. at § 1(c). In addition, SA 15-7 expressly provides "[t]he tribal business entity may not establish a casino gaming facility in the state until the General Assembly has amended state law to provide for the operation of and participation in a casino gaming facility by such tribal business entity and such law has taken effect." *Id*. at § 1(d). So, even if the Tribes are able to navigate SA

15-7's requirements and reach a development agreement with a municipality they will still be required to convince the state to change the law before that agreement could possibly lead to the operation of a casino.

MGM is free to create a business entity (just not a *tribal* business entity), register it with the Secretary of the State, issue a RFP, negotiate a development agreement with a municipality and ask the state to make the changes to the law that would be necessary for the agreement to be approved and for MGM to operate a casino. But—unlike the Tribes operating under SA 15-7's constraints—MGM can do those things without being forced to partner with a direct competitor to create and register a new business entity, without having to include specific information in its RFP and post its RFP on a state website and without having to send monthly public reports to twelve separate state entities detailing the progress of its negotiations toward a development agreement. SA 15-7 imposes constraints on the Tribes (MGM's competitors) in light of the state's unique interests and concerns in the context of tribal gaming, it does not injure MGM.[5]

In its Amended Complaint, MGM—for the first time—signals that in a further effort to create an appearance of injury, MGM plans to argue that

[5] To the extent MGM is excluded from having to comply with the procedural obligations SA 15-7 imposes on the Tribes, that is not an injury. But, even if it could somehow be construed as one, to support standing "'[a] procedural injury claim . . . must be tethered to some concrete interest adversely affected by the procedural deprivation.'" *Lynch v. Malloy*, 2015 WL 3408795, at *5 (D. Conn. May 27, 2015) (Meyer, J.) (quoting *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013). Not being forced to comply with SA 15-7's strictures in no way adversely impacts any concrete interest MGM may have in moving forward with developing a Connecticut casino.

Connecticut law generally precludes municipalities from negotiating casino development agreements and that absent SA 15-7 no municipality could negotiate such an agreement with any entity, whether a non-tribal entity such as MGM or a tribal entity. *AC*, ¶¶ 28 & 32. That argument lacks any merit. It is true that pre-SA 15-7 Connecticut law "forb[ade] operation of commercial casino gaming facilities," *AC*, ¶ 32, but so does SA 15-7. *SA 15-7*, §§ 1(c) & 1(d) (forbidding operation of a casino pursuant to a development agreement absent additional changes to Connecticut law).

SA 15-7 does not allow the Tribes or municipalities to do anything they (or MGM) could not already do before SA 15-7 was enacted. Municipalities generally have the authority to execute contracts, and there is no question that they have the ability to negotiate potential contracts that are expressly contingent on future legislative approval granting statutory authority for the specific contract at issue. *See, e.g.*, Conn. Gen. Stat. § 7-194 (providing that "in addition to all powers granted to towns, cities and boroughs under the constitution and general statutes," municipalities shall have the power "to provide for the execution of contracts").

Indeed, Representative Dargan (who co-sponsored SB 1090 and whose comments MGM relies on elsewhere in its Amended Complaint, *AC*, ¶ 40) was specifically asked whether if the bill that became SA 15-7 did not pass there was "anything that would prohibit the tribes . . . from negotiating with towns for possible [off-reservation casino] developments" and he responded that there was not. *Transcript of May 28, 2015 House Proceedings*, pp. 23-25 ("*House Tr.*") (Exh. 3).

Similarly, Senator Fasano argued that:

> I know we don't really need this bill. There is nothing that prohibits these people to start talking. There's nothing that prohibits the tribe to go out and talk to municipalities about what they wanna do, [w]here they wanna do it while we determine if we can do it. Nothing prohibits them. These are two private entities who can get together and discuss proposals and put plans and do projections and write-ups and be ready to go.

Transcript of May 20, 2015 Senate Proceedings, p. 19 ("*Senate Tr.*") (Exh. 4). There is no basis for MGM to argue that existing Connecticut law prohibits MGM from doing precisely what it claims it has already done and claims to want the ability to do, namely, analyze the "Connecticut gaming market," *AC*, ¶ 47, study viable locations, *id.* at ¶ 44, "prepare a competitive request for proposals for a Connecticut casino and . . . evaluate the responses," *id.* at ¶ 42, and—finally—"enter into a casino development agreement with a municipality and . . . submit such an agreement to the Connecticut legislature for approval." *Id.* at ¶ 1.

Moreover, MGM's own pleadings contradict any such argument. In an effort to establish injury despite MGM's existing Massachusetts agreement that precludes it from having casino operations in most of Connecticut, MGM claims that Bridgeport is a viable location outside that radius and implies that MGM is injured because SA 15-7 bars MGM from pursuing a Bridgeport casino (though MGM notably does not allege that it actually wants to pursue a casino in Bridgeport). *AC*, ¶ 49.

That allegation undermines MGM's cause, it does not support it. The legal premise that SA 15-7 bars MGM from approaching Bridgeport is incorrect for the

reasons discussed above. Factually, MGM alleges that Bridgeport "was considered in the 1990s as the site for a development of a casino by Mirage (before it was acquired by MGMRI)," *id.*, and relies on news articles discussing the 1990s attempts by developers—both non-tribal and tribal—to modify Connecticut law to allow such an off-reservation casino. Susan Haigh, *Latest casino bill differs from 1995 Bridgeport Effort*, New Haven Register (April 18, 2015) (Exh. 5) (cited in *AC*, ¶ 39). That belies MGM's allegation that—absent SA 15-7—Connecticut law prohibits municipalities and developers from pursing casino development plans and presenting them to the General Assembly. Twenty years before SA 15-7 was enacted, there was interest from "[b]ig names in casinos, including Trump and Wynn" and a proposal for a Bridgeport casino reached the General Assembly where ultimately "the state Senate defeated the legislation, 24-to-10, ending four years of debate over whether casinos should be located off tribal reservations." *Id.*

MGM's attempts to claim injury based on SA 15-7 ring hollow. Despite MGM's extensive reliance on press accounts interpreting what SA 15-7 says and means, the text of the law itself is clear, as is its legislative history.[6] SA 15-7 does not grant the Tribes exclusive benefits; it places specific constraints on the Tribes to ensure that the unique legal issues arising from any expansion of tribal gaming

[6] Again, to the extent—if any—SA 15-7 could be seen as materially unclear, recent Second Circuit precedent reinforces that this Court should abstain under *Pullman*, which "allows federal courts to avoid both (a) premature decisions on questions of federal constitutional law, and (b) erroneous ruling with respect to state law." *Expressions Hair Design v. Schneiderman*, __ F.3d __, 2015 WL 5692296, at *13 (2d Cir. Sept. 29, 2015) (holding that district court erred by speculating as to interpretation of state law and vacating decision holding state law unconstitutional based on speculative interpretation).

are fully and carefully considered in a transparent and public process.

B. MGM's Claim of Injury is too Speculative to Support Standing

To support standing, a claimed injury must be both "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quotation marks and citations omitted). Whether a plaintiff has met its burden to establish standing is measured as of the time the suit is brought. *See Id.* at 570 n.4. "While it may be tempting to use subsequent events to validate what were nothing more than prognostications" when the plaintiff filed suit, "the fact remains that Article III standing cannot be established through hindsight alone; instead, a plaintiff must have standing at the time the complaint is filed." *New York Bankers Ass'n, Inc. v. City of New York*, 2014 WL 4435427, at *10 (S.D.N.Y. Sept. 9, 2014).

SA 15-7 sets forth a process that contemplates at least seven steps before the Tribes could operate an additional casino in Connecticut that would compete with MGM's planned casino in Springfield, Massachusetts. *AC*, ¶ 67 (claiming that MGM is harmed by the Tribes being allowed "to move forward with developing a casino in Connecticut"). The first six steps are expressly set forth in the Act: (1) the Tribes create a joint tribal business entity, *SA 15-7*, § 1(1); (2) the Tribes register that tribal business entity with the Secretary of the State, *id.*; (3) the tribal business entity issues a RFP, *id.* at § 1(b); (4) the tribal business entity submits the RFP to the DCP to be put on the DCP's web site, *id.*; (5) a municipality or municipalities respond to the RFP, *id.* at § 1(c); and (6) the tribal business entity

negotiates and enters into a development agreement with a municipality. *Id.* The steps increase in difficulty and the seventh step is the most important, difficult and uncertain—the General Assembly must "amend[] state law to provide for the operation of and participation in a casino gaming facility by such tribal business entity" and that law must "take[] effect" before any tribal business entity can operate another casino. *Id.* at § 1(d).

When MGM brought this suit (and when standing is measured), none of those seven steps had been completed. *See, e.g.*, *Lujan*, 504 U.S. 555, 570 n.5 (1992) ("standing is to be determined as of the commencement of suit"); *S. Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1152-53 (10th Cir. 2013) (explaining that while the court can consider an amendment in assessing standing, even after an amendment the standing "inquiry focuses on whether [the plaintiff] had standing when the original complaint was filed" so events that occur after the original complaint was filed cannot establish standing).[7] That renders MGM's claim of injury far too speculative to meet MGM's burden to establish standing.

The Supreme Court has "repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that [a]llegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (emphasis in *Clapper*; quotation marks omitted). SA 15-7 does not—

[7] Since MGM brought suit, the first four steps appear to have been completed but it remains far from certain that a municipality will respond to the tribal business entity's RFP in a manner that will lead to successful negotiations and—even if one did—it is pure speculation to believe that the General Assembly will change Connecticut law to allow the operation of a casino in a manner that harms MGM.

and will never—cause MGM any injury, let alone one that supports standing; MGM is independently barred from developing a casino in most of Connecticut and even if it were not, SA 15-7 explicitly requires additional legislation that may or may not ever be enacted before the Tribes can operate an additional Connecticut casino.

1. The Radius Restriction in MGM's Massachusetts Agreement Precludes MGM from Operating a Casino in any of the Areas Under Consideration

When MGM filed this action, it was far from certain that the statutory steps would be completed at all, let alone in a manner that would injure MGM. Indeed, it appeared—and still appears—likely that most, if not all, of the municipalities likely to respond to any RFP that may be issued are within the "50-mile radius restriction in the state license governing MGM Springfield." *AC*, ¶ 49.

The news articles MGM references in its Amended Complaint (many of which MGM also referenced in its original Complaint) refer to the contemplated facility variously as being "north of Hartford," in "north central Connecticut" and as "Hartford-area" and refer to East Hartford, Enfield, East Windsor, Windsor and Windsor Locks as potential host municipalities. Brian Hallenbeck, *Tribal chairmen bullish on third state casino*, New London Day (July 17, 2015) (Exh. 6) (referenced in *AC*, ¶ 29); Kenneth R. Gosselin, *Threat by MGM Boss Launches Casino Border War; Tribes Fire Back*, Hartford Courant (July 16, 2015) ("*Gosselin*") (Exh. 7) (referenced in *AC*, ¶ 40). Indeed, one of the articles reported that "MGM made it clear that the Hartford area was a key battleground as it vied for the coveted western Massachusetts casino license in 2014" and quoted a MGM executive as

saying MGM was "'ideally positioned to go into Hartford and attack.'" *Gosselin* (Exh. 7).[8]

MGM would be unable to compete for a casino in any of those areas because of the radius restriction in its Massachusetts license, and that precludes MGM from establishing standing to challenge SA 15-7. *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 228-229 (2003) (holding that plaintiff could not establish standing where other laws independently barred action plaintiff sought to engage in), *overruled on other grounds*, *Citizens United v. FEC*, 130 S. Ct. 876 (2010). Standing is measured when the initial Complaint is filed and MGM made no allegation in its initial Complaint that it had plans to propose a casino outside of the restricted area.

After Defendants noted in their initial Motion to Dismiss that MGM's existing radius restriction excludes MGM from all of the areas presently under discussion for an additional casino, MGM attempted to avoid the consequences of its Massachusetts agreement by amending its Complaint to discuss Bridgeport and unidentified "[o]ther sites outside the 50-mile radius that are equally viable." *AC*, ¶ 49. But MGM's claimed injury remains too hypothetical to support standing, even if this Court could validly consider the post-filing events referenced in the amendment for standing purposes (which it cannot).

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[8] *See, e.g.*, *Brahms v. Carver*, 33 F. Supp. 3d 192, 197 (E.D.N.Y. 2014) (holding that in deciding a motion to dismiss the court may consider news articles "referenced in the complaint and provided in full by defendants with their briefing, notwithstanding that [plaintiff] declined to attach these documents"); *see also McKithen v. Brown*, 481 F.3d 89, 95-96 (2d Cir. 2007) ("[I]n resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), [we] ... may refer to evidence outside the pleadings.").

Tellingly, even after having the opportunity to amend in light of Defendants' arguments, MGM stops short of alleging that it actually intends to seek to establish a casino in Bridgeport (or anywhere else outside the radius restriction). *Id.* Nor—despite its allegations that delay would result in a competitive disadvantage—does MGM's Amended Complaint allege that it has actually taken any concrete steps toward an agreement with Bridgeport or that Bridgeport has expressed a present interest in a casino. *AC*, ¶ 66. Even if MGM actually believed that Connecticut law precluded it from approaching Bridgeport (despite the contrary evidence discussed above), by September 23rd Defendants had filed their initial Motion to Dismiss publicly indicating that MGM was free to take whatever steps it deemed fit. Therefore, if MGM actually wanted to pursue a Bridgeport casino, it could have had a head start over the Tribes—the tribal business entity did not issue its RFP until September 30th. *Id.* at ¶ 57. But MGM apparently has done nothing.

That may be because there is no indication that the City of Bridgeport—or any other municipality outside the radius restriction—currently[9] has an interest in

[9] MGM references two articles to support its allegations as to Bridgeport, both from 2014. *AC*, ¶ 49. The first indicates that the Democratic Town Committee Chairman stated that he wanted a casino in Bridgeport but acknowledged that "a casino might not be appropriate . . . [and that] the city should look at adding slot machines." Rob Sullivan, *Talk of a New Casino Resurfaces in Bridgeport*, Bridgeport Daily Voice (Nov. 25, 2014) (Exh. 8). The article also quoted Bridgeport residents who did not support the plan. *Id.* The second article is an opinion piece by an author with no apparent connection to Bridgeport expressing a general interest in the idea of a Bridgeport casino. David Collins, *How About a Bridgeport Casino Too?*, New London Day (Nov. 14, 2014) (Exh. 9). Neither article indicates that the City of Bridgeport expressed an official present interest in a casino, and MGM has not made any allegations to support a conclusion that any current interest (official or unofficial) exists for a Bridgeport casino.

a casino or that the General Assembly has any interest in approving a casino in Bridgeport, or anywhere else that MGM could actually operate one. As noted, the 1990s attempt to create a casino in Bridgeport failed and the only reference to Bridgeport in SA 15-7's legislative history is from a representative who indicated that the "suburban towns" surrounding Bridgeport "are terrified of a casino moving to Bridgeport . . . [b]ecause all the communities around casinos have increased police costs, increased Social Service costs, increased crime, [and] increased gambling problems." *House Tr.*, pp. 51-52 (Exh. 3). MGM's implication that SA 15-7 injures MGM because without it MGM would issue a RFP for a Bridgeport casino, Bridgeport would respond favorably to that RFP and that would lead to a development agreement is pure speculation, speculation that MGM could have sought to test but has declined to do so. MGM has not met its burden to establish standing on that ground alone.

2. Even if MGM Could Overcome the Radius Restriction, SA 15-7 Expressly Requires Additional Legislation Before the Tribes can Operate any Additional Casino

Even if MGM could overcome the radius restriction, SA 15-7's express requirement that the General Assembly must "amend[] state law to provide for the operation of and participation in a casino gaming facility by such tribal business entity" and that law must "take[] effect" before any tribal business entity can operate another casino precludes MGM from claiming an injury based on SA 15-7 that is not completely hypothetical. *SA 15-7*, § 1(d); *see also id.* at § 1(c) (providing that any development agreement must be contingent on legislative approval). The

Supreme Court has made clear that an "alleged injury is [too] . . . conjectural or hypothetical" to support standing where it "depends on how legislators respond" to future circumstances and how those legislators exercise their "policy judgment committed to the broad and legitimate discretion of lawmakers, which the courts cannot presume either to control or to predict." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344-45 (2006) (quotation marks omitted). "Under such circumstances, we have no assurance that the asserted injury is imminent—that it is certainly impending." *Id.* at 345 (quotation marks omitted). That is fatal to MGM's attempt to establish standing to challenge SA 15-7.

SA 15-7's requirement of further legislative action before any tribal business enterprise may operate a casino *per se* precludes MGM from establishing standing. But it is worth noting that SA 15-7's evolution, legislative history and procedures make it all the more clear that it would be pure speculation to base standing on an assumption that the framework established in SA 15-7 will lead to the operation of an additional Connecticut casino by the Tribes.

The initial bill that gave rise to SA 15-7 would have allowed the Tribes—and only the Tribes—to obtain licenses to operate additional casinos in Connecticut. *AC*, ¶ 22 (quoting SB 1090). The General Assembly later amended the bill to what became SA 15-7. The legislative history makes clear that the change was intended to take a cautious approach to tribal casino expansion.

That legislative caution ultimately manifested in SA 15-7's various transparency and reporting requirements. As noted, once the tribal business entity

issues a RFP, SA 15-7 requires that the tribal business entity submit monthly progress reports to various state legislators, officials and committees. Each of those reports will provide a new opportunity for those who have concerns with the potential expansion of casino gaming to voice those concerns to their constituents and the press. The legislative history emphasizes that public participation and involvement in the process "is extremely important." *House Tr.*, p. 27 (Exh. 3).

That public participation will be at both the state and town levels. SA 15-7 makes clear that any response to the tribal business entity's RFP will require municipal approval, and that is reflected in the RFP itself. *RFP*, p. 9 (Exh. 10); *see also AC*, ¶ 58 (referencing the RFP). That is a substantial procedural hurdle that, depending on public reaction, may constitute an obstacle. One can anticipate a variety of opinions among the public, including opposition among some at the municipal level. Municipal approval of even a response to the RFP—let alone an actual contingent development agreement—is far from a *fait accompli*.

Even if the tribal business entity were able to make it through that public process and enter into a development agreement with a municipality, the most difficult hurdle—of obtaining a change in the law—would remain. That obstacle alone renders any claim by MGM too speculative to support standing. There is no way to predict whether any proposed legislation—particularly on a subject as sensitive and controversial as the expansion of casino gaming—would pass the General Assembly and the Governor would sign it.

Nor is there any way to predict what form any legislation proposed and passed in the future would take. MGM hypothesizes that "it is unlikely that subsequent legislation would allow MGM or other entities to compete for a Connecticut casino," but that is, of course, pure speculation. *AC*, ¶ 66. Although Defendants believe that MGM's challenge to SA 15-7 would fail on the merits even if this Court had jurisdiction, there is no basis for this Court to predict how the General Assembly, which has thus far proceeded so carefully, will act, particularly in light of this legal challenge. At this point, one can only speculate whether the legislature will allow MGM to compete (presuming MGM could do so contractually), decline to authorize an additional casino at all, or take another approach that would obviate any claimed harm to MGM or any constitutional concerns.

Ultimately, MGM's claimed injury is far too speculative to support standing and invoke this Court's jurisdiction. At its core, the Complaint seeks to enjoin the state from doing something it may never wind up doing.

C. Ruling in MGM's Favor Would Not Redress its Claimed Injury

MGM's claimed injury is based on its (incorrect) conclusion that SA 15-7 "allows only the Preferred Tribes to move forward with developing a casino in Connecticut." *AC*, ¶ 67. To redress that claimed injury, MGM asks this Court to *inter alia* declare SA 15-7 "invalid, null and void in its entirety, or at a minimum to the extent it" allows only the Tribes to register a tribal business entity, issue a RFP and have it put on the DCP's website, negotiate with municipalities and enter into a development agreement with a municipality. *AC*, pp. 24-25.

But striking down SA 15-7 would not remedy MGM's claimed injury, and that is an independent reason MGM cannot establish standing. "Redressability—a likelihood that the requested relief will redress the alleged injury"—is part of "the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-04 (1998) (quotation marks omitted).

Striking down SA 15-7 will not help MGM "to move forward with developing a casino in Connecticut." *AC*, ¶ 67. As discussed above, even with SA 15-7 in place, MGM is free to create a business entity and register it with the Secretary of the State (or not, as it so chooses), to issue a RFP, to negotiate with municipalities and enter into a development agreement with a municipality. If and when MGM completed those steps, it would be free to present its proposed development agreement to the General Assembly and seek the changes to state law that would be necessary to allow MGM to operate a Connecticut casino.

It is true that any entity MGM registers would not be a "tribal business entity" under SA 15-7, but that in no way harms MGM. The tribal business entity is not granted any benefits that MGM could not obtain by registering a corporate entity. To the contrary, as discussed above, SA 15-7 imposes obligations on the tribal business entity that would not exist for other entities—MGM's ability to operate without creating such an entity is a benefit, not a detriment, to MGM.

Similarly, it is true that SA 15-7 does not allow MGM to have its RFP "disseminated" by the state through placement on the DCP's website. *AC*, ¶ 6. But

that "dissemination" is part of a larger framework—it comes with a number of other restrictions and reporting requirements that outweigh any benefit to MGM from being able to post on the DCP's website and MGM makes no allegations to the contrary. Indeed, SA 15-7's legislative history indicates that the posting on the DCP website had no cost (or value)[10] and the lack of any benefit to the Tribes is borne out by the fact that the tribal business entity is utilizing an independent website to primarily coordinate responses to the RFP. *See RFP*, p. 5 (Exh. 10); *see also AC*, ¶ 58 (referencing the RFP); Ryan Blessing, *Tribes release request for proposals for third casino*, Norwich Bulletin (Oct. 1, 2015) (Exh. 11) (cited in *AC*, ¶ 61) (noting the separate website).

The radius restriction in MGM's Massachusetts license also highlights MGM's inability to establish redressability. Nothing this Court can do will remove that restriction, which independently prevents MGM from developing a casino in much of Connecticut and all of the areas that are the most likely candidates for an additional casino. *AC* at ¶ 49. "[I]f the Court were to strike down" SA 15-7, "it would not remedy . . . plaintiffs' alleged injury [both] because" SA 15-7 does not cause MGM's injury and because the existing radius restriction "would remain unchanged." *McConnell v. FEC*, 540 U.S. 93, 228-229 (2003), *overruled on other grounds*, *Citizens United v. FEC*, 130 S. Ct. 876 (2010). The ruling MGM seeks would not redress its claimed injury, and MGM therefore has not met—and cannot meet—its burden of establishing standing.

[10] *House Tr.*, pp. 18-19 (Exh. 3).

III. MGM'S CLAIMS ARE NEITHER CONSTIUTIONALLY NOR PRUDENTIALLY RIPE

"Ripeness is not one doctrine, but two, 'constitutional ripeness' and 'prudential ripeness,' which entail distinct inquiries." *Alliance of Auto. Mfrs., Inc. v. Currey*, 984 F. Supp. 2d 32, 44 (D. Conn. 2013), *aff'd*, 610 F. App'x 10 (2d Cir. 2015) (Hall, J.) (quoting *Simmonds v. I.N.S.*, 326 F.3d 351, 356–59 (2d Cir.2003)). For a claim to be constitutionally ripe, "it must present a real, substantial controversy, not a mere hypothetical question." *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687 (2d Cir. 2013) (quotation marks omitted). "A claim is not [constitutionally] ripe if it depends upon contingent future events that may not occur as anticipated, or indeed may not occur at all. The doctrine's major purpose is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Id.*

Constitutional ripeness and "the actual injury aspect of Article III standing" are closely related. *Id.* at 688. As a result, this Court lacks jurisdiction over MGM's claims because they are not constitutionally ripe for the same reasons (discussed above) that MGM lacks standing; SA 15-7 has not caused—and will never cause—MGM a cognizable injury.

If this Court were to somehow conclude that MGM's claims are constitutionally ripe, it would still leave the issue of prudential ripeness. *See, e.g.*, *New York v. U.S. Army Corps of Engineers*, 896 F. Supp. 2d 180, 196 (E.D.N.Y. 2012). The Second Circuit has "repeatedly observed that when a court declares that a case is not prudentially ripe, it means that the case will be *better* decided later . . .

[not] that the case is not a real or concrete dispute affecting cognizable current concerns of the parties." *Connecticut v. Duncan*, 612 F.3d 107, 113-14 (2d Cir. 2010) (quotation marks omitted; emphasis in *Duncan*). "Prudential ripeness is, then, a tool that courts may use to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues that time may make easier or less controversial." *Id.* at 114 (quotation marks omitted).

"In determining whether a claim is prudentially ripe, we ask whether [the claim] is fit for judicial resolution and whether and to what extent the parties will endure hardship if decision is withheld." *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 725 F.3d 65, 110 (2d Cir. 2013), *cert. denied sub nom.*, *Exxon Mobil Corp. v. City of New York, N.Y.*, 134 S. Ct. 1877 (2014). Both of those factors weigh against finding MGM's claims prudentially ripe here.

MGM's claims are not fit for judicial resolution. "The harms that [MGM] ultimately [is] concerned about are speculative, and rely on a chain of inferences that may never come to pass." *New York*, 896 F. Supp. 2d at 197. Several more contingent events must occur before the tribal business entity could even have a proposed development agreement. And even if that happened, it is pure speculation to assume that the General Assembly "'will pass the necessary legislation'" to allow the tribal business entity to operate a casino. *Id.* (quoting *Motor Vehicle Mfrs. v. N.Y. Dep't of Envtl. Conservation,* 79 F.3d 1298, 1305 (2d Cir.1996)). Moreover, "it is possible that the content of" that legislation "would affect who would have

standing to pursue a claim relating to th[at] (hypothetical) final" legislation, particularly given MGM's radius restriction. *Id.* MGM's claims are "'entirely hypothetical and unfit for adjudication'" for prudential standing purposes. *Id.* (quoting *Motor Vehicle Mfrs.,* 79 F.3d at 1305).

The second prudential ripeness factor also weighs in favor of dismissal; MGM will suffer no hardship if this Court declines to review MGM's claims at this time. SA 15-7 does not preclude MGM from taking whatever steps it wishes to take toward developing a Connecticut casino, so it need not be concerned about any potential competitive disadvantage. *AC*, ¶ 66. That is the only concrete claim of hardship MGM identifies. To the extent MGM is concerned that it will suffer hardship if the Tribes eventually are able to complete all of the required steps—including obtaining new legislation—and operate another casino, that claimed hardship is not enough; "[t]he mere possibility of future injury, unless it is the cause of *some present detriment*, does not constitute the requisite hardship" to overcome an objection on prudential ripeness grounds. *United States v. Johnson*, 446 F.3d 272, 278 (2d Cir. 2006) (emphasis in the original); *see also SC Note Acquisitions, LLC v. Wells Fargo Bank, N.A.*, 934 F. Supp. 2d 516, 526-28 (E.D.N.Y. 2013), *aff'd*, 548 F. App'x 741 (2d Cir. 2014) (holding *inter alia* that claims were not ripe where claim of harm was contingent).[11]

[11] Given the lack of hardship to MGM, this Court could properly dismiss this action on prudential ripeness grounds even if it were to conclude that the issues presented were fit for review and therefore satisfied the first prudential ripeness requirement. *See, e.g.*, *Duncan*, 612 F.3d at 114 (holding that case was not prudentially ripe, even though the "State [wa]s correct that the Secretary's interpretation of the Unfunded

Both prudential ripeness factors counsel against finding this action ripe. Consequently, this Court can—and should—dismiss this action on that ground, even if it somehow concludes that MGM's claims are constitutionally ripe. Prudential ripeness is intended to allow this Court "to enhance the accuracy of [its] decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues that time may make easier or less controversial." *Duncan*, 612 F.3d at 114 (quotation marks omitted). Those are precisely the type of issues MGM raises in this case.

IV. THE GOVERNOR IS NOT A PROPER DEFENDANT AND THE ELEVENTH AMENDMENT BARS MGM'S CLAIMS AGAINST HIM.

MGM asks this Court to declare SA 15-7 unconstitutional and "[p]reliminarily and permanently enjoin Defendant [state officials] from enforcing, or exercising any authority under, the unlawful provisions of the Act." *AC*, pp. 24-25. The Eleventh Amendment generally bars suits against a state, but *Ex Parte Young* creates a "narrow exception" to permit suits against state officers seeking prospective relief. *Connecticut v. Cahill*, 217 F.3d 93, 110 (2d Cir. 2000). "To fall within this exception, the defendant state officer 'must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.'" *Connecticut Ass'n of Health Care Facilities, Inc. v. Rell*, 2010 WL 2232693, at *5 (D.

Mandates Provision is clear and that the parties have a concrete dispute about its meaning and constitutionality").

Conn.), *aff'd*, 395 F. App'x 741 (2d Cir. 2010) (Dorsey, J.) (quoting *Ex Parte Young*, 209 U.S. 123, 157 (1908)).

Governor Malloy does not fall within the *Ex Parte Young* exception. All of MGM's allegations as to the Governor involve his past conduct, and SA 15-7 does not contemplate any specific prospective role for the Governor in its enforcement or implementation. *See AC*, ¶¶ 1, 9, 24, 33, 41-42 (allegations as to the Governor); *see also SA 15-7* (Exh. 1) (making no reference to the Governor). Neither the Governor's past role in the process that led to SA 15-7's enactment nor his "general duty to execute and enforce state laws" are sufficient to invoke the *Ex Parte Young* exception. *Rell*, 2010 WL 2232693, at *5; *see also Kuck v. Danaher*, 822 F. Supp. 2d 109, 142-43 (D. Conn. 2011) (Bryant, J.) (similar); *HealthNow New York, Inc. v. New York*, 739 F. Supp. 2d 286, 294-95 (W.D.N.Y. 2010), *aff'd on other grounds*, 448 F. App'x 79 (2d Cir. 2011) (claims against Attorney General not within exception). Therefore, this Court should dismiss this action as to Governor Malloy, even if this Court concludes it otherwise has jurisdiction and chooses to exercise it. *Rell*, 2010 WL 2232693 at *5.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court dismiss this action in its entirety and enter Judgment in Defendants' favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2015, a copy of the foregoing was electronically filed. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Robert J. Deichert
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