16-2158-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MGM RESORTS INTERNATIONAL GLOBAL GAMING DEVELOPMENT, LLC,
Plaintiff-Appellant,

v.

DANNEL P. MALLOY, in his official capacity as Governor of Connecticut; DENISE MERRILL, in her official capacity as Connecticut Secretary of the State; JONATHAN A. HARRIS, in his official capacity as Commissioner of the Connecticut Department of Consumer Protection,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Connecticut, No. 3:15-cv-1182 (Thompson, J.)

REPLY BRIEF OF APPELLANT MGM RESORTS INTERNATIONAL GLOBAL GAMING DEVELOPMENT, LLC

Kevin King
Thomas Brugato
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
(202) 662–6000
kking@cov.com
tbrugato@cov.com

(Additional counsel listed on inside cover)

Neil K. Roman
Cléa Liquard
COVINGTON & BURLING LLP
The New York Times Building
620 Eighth Avenue
New York, NY 10018
(212) 841-1000
nroman@cov.com
cliquard@cov.com

Counsel for Appellant MGM Resorts International Global Gaming Development, LLC

James K. Robertson Jr.
CARMODY TORRANCE SANDAK & HENNESSEY LLP
50 Leavenworth Street
Waterbury, CT 06721
(203) 575-2636
jrobertson@carmodylaw.com

Counsel for Appellant
MGM Resorts International Global
Gaming Development, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

The State's position is astonishing: It urges the Court to adopt a theory under which *no one* would have standing to challenge Special Act 15-7's selective grant of casino-development rights, even if the Act afforded those rights exclusively to white men, Catholics, Mexican Americans, Democrats, or University of Connecticut graduates—rather than to the Preferred Tribes. Indeed, under the State's theory of the case, no one would *ever* have standing to challenge the Act because, in the State's view, it grants the Preferred Tribes no legal rights or advantages. The State's position is irreconcilable with established standing doctrine, the Act's text, and the record.

The State's errors begin with the threshold Article III injury requirement. The State insists that the Act does not harm MGM even though it grants the Preferred Tribes the right to have their request for proposals ("RFP") publicized on a state agency's website, while denying that right to MGM and all others. This "unequal treatment in the provision of" legal rights inflicts "a type of personal injury [courts] have long recognized as judicially cognizable." *Heckler v. Mathews*, 465 U.S. 728, 738 (1984).

More broadly, the State is off-base in arguing that the Act does not prevent MGM from "compet[ing] on an equal footing" in the casino-development process. *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S.

656, 666 (1993). The State ignores the exclusive rights afforded the Preferred Tribes by the Act and instead presents the Act as imposing unique burdens. The Act, however, does not require the Tribes to do anything unless they elect to form a tribal business entity and proceed under the Act rather than pursue a casino outside the Act's framework. The Tribes' choice to proceed under the Act speaks volumes about the value of the rights it affords and confirms what its sponsors and the Tribes themselves have long maintained—the Act creates a special pathway designed to give the Tribes a competitive advantage in developing Connecticut's first commercial casino. The Act injures MGM by enshrining that advantage in law, as *Jacksonville* makes clear.

Left with no foothold in the law or the facts, the State focuses its fire on an injury MGM does not allege: the inability to *operate* a casino. This argument, made throughout the brief as if repetition makes it so, ignores that MGM's injuries arise instead from the Act's unequal allocation of development rights and the competitive inequality resulting from that discriminatory scheme. In glossing over these injuries, the State asserts that they are insufficiently "imminent" and that MGM will not be injured unless Connecticut authorizes the Preferred Tribes to open and operate their proposed casino—again overlooking the *current* competitive harms inflicted by the Act, which arose when Governor Malloy signed the Act into law and will continue as long as the Act remains in effect. Ongoing

injuries of this kind provide ample basis for the declaratory and injunctive relief sought by MGM. *See Texas v. Lesage*, 528 U.S. 18, 21 (1999).

The State's remaining arguments reflect a determination to avoid the merits at all costs. Although the State feigns surprise—and cries waiver—at the sight of MGM's *Mathews* and dormant Commerce Clause arguments, this Court has held that arguments in favor of standing cannot be waived, *Wight v. BankAmerica Corp.*, 219 F.3d 79, 90 (2d Cir. 2000), and in any event MGM presented both arguments to the district court. The State's abstention, certification, and ripeness arguments, meanwhile, merely repackage the flawed injury and imminence arguments addressed above and fail for the same reasons.

Finally, the unequal treatment mandated by the Act—and the competitive disadvantages that flow from it—would be redressed by a declaration that the Act is unconstitutional under the Equal Protection or Commerce Clauses. Forward-looking relief is warranted, and these issues are ripe for immediate review, because the Preferred Tribes are exercising their exclusive rights under the Act *right now*.

ARGUMENT

I. THE STATE'S INJURY ARGUMENTS ARE CONTRARY TO PRECEDENT, THE ACT'S TEXT, AND THE RECORD.

A. MGM Has Adequately Alleged Equal Protection Injuries.

Contrary to the State's arguments, MGM has plausibly alleged that Special Act 15-7 inflicts three types of equal protection injury, each sufficient to support standing.

1. MGM Has Adequately Alleged Injury Caused by the Act's RFP-Publication Provision.

MGM first alleges a textbook equal protection injury: unequal allocation of legal rights. *See* MGM Opening Brief ("MGM Br.") 28-33. The Act grants the Preferred Tribes free, state-sponsored publicity of their RFP on a state agency website while denying MGM and all others access to that right. *See* Act § 1(b).

Although the State argues (at 20) that MGM is not injured by this discriminatory provision because the Preferred Tribes have also posted their RFP on another website, the State provides no support for its demonstrably false assertion that the Tribes' "duplicative" posting of the RFP diminishes—much less eliminates—the benefit provided by the Act. That the Tribes voluntarily use an additional publication channel does not negate the fact that the Act injures MGM

by "subject[ing] [it] to unequal treatment in the provision of" RFP-publication rights. *Mathews*, 465 U.S. at 737-40.[1]

The State's fallback argument (at 34-35)—that *Mathews* does not apply because the injury inflicted by the Act's RFP-publication provision is not imminent—fares no better. As shown in Part I.C, *infra*, MGM's injury has been ongoing since Governor Malloy signed the Act into law and is materially identical to the one at issue in *Mathews*: just as "benefits were already being distributed" in *Mathews*, State Br. 35, the Act's exclusive RFP-publicity rights are "already being distributed" to the Preferred Tribes. *See* A24 ¶¶ 57-58.

Along these lines, the State has no answer for *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630 (5th Cir. 2012). Although the State attempts to distinguish *Hudson* based on the cursory assertion (at 35 n.20) that it "involve[d] imminent injury," a review of the facts in *Hudson* and here shows that the cases are materially identical. Like the plaintiffs in *Hudson*, MGM is challenging a statute that "facially discriminates against" MGM "by extending [a] benefit" to MGM's "competitors while denying that same benefit" to MGM. *Hudson*, 667 F.3d at 636 (citation omitted). This "[d]iscriminatory treatment at the hands of the government

[1] The State's argument (at 20) that the Act does not injure MGM because publishing the Preferred Tribes' RFP involves "no fiscal cost" is equally irrelevant. Whether it costs Connecticut to discriminate against MGM in allocating RFP-publication rights has no bearing under *Mathews*.

is an injury … recognizable for standing irrespective of whether the plaintiff will sustain an actual or more palpable injury as a result of the unequal treatment." *Id.* Thus, "no further showing of suffering based on that unequal positioning is required for purposes of standing," and MGM, like the *Hudson* plaintiffs, has standing to sue. *Id.*; *see also* MGM Br. 30-32.

The State also mischaracterizes (at 35) MGM's argument as involving "exposure to a racial classification alone" and thus insufficient under *Allen v. Wright*, 468 U.S. 737 (1984). That argument fails because MGM meets *Allen*'s requirement that a plaintiff be "personally denied equal treatment" to have standing. *Id.* at 755 (citation omitted). MGM was denied equal treatment when the Connecticut Secretary of the State rejected MGM's application to register a tribal business entity that could exercise the Act's exclusive rights. A23-24.

Finally, the State's suggestion (at 33) that MGM has waived its *Mathews* argument is meritless. This Court has made clear that "arguments for or against standing may not be waived." *Wight*, 219 F.3d at 90. Even if waiver were possible, MGM preserved the issue by raising the RFP-publication injury in its district court brief, quoting the operative language from *Mathews*, and noting that the RFP-publication provision "by itself renders the Act unconstitutional" and inflicts "a classic example of injury-in-fact." MGM Opp. to Motion to Dismiss, ECF 47, at 20-21 ("MGM DCt. Opp.").

2. MGM Has Adequately Alleged Injury Caused by the Act's Conferral of Competitive Advantages on the Preferred Tribes.

Similarly, the State fails to address head-on MGM's allegations that the Act injures MGM more broadly by preventing it from competing on equal terms with the Preferred Tribes. *See* MGM Br. 34-43. MGM has standing to assert that claim so long as it alleges that "(1) there exists a reasonable likelihood that the plaintiff is in the disadvantaged group, (2) there exists a government-erected barrier, and (3) the barrier causes members of one group to be treated differently from members of the other group." *Comer v. Cisneros*, 37 F.3d 775, 793 (2d Cir. 1994). MGM's Amended Complaint addresses each of those requirements, *see* A11 ¶ 6; A17 ¶¶ 30-32; A19 ¶¶ 36, 39; A20 ¶ 40; A26 ¶ 63; A27 ¶ 66, and those well-pled allegations must be taken as true at the motion-to-dismiss stage, *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.a.r.l*, 790 F.3d 411, 417 (2d Cir. 2015).

The main tactic employed by the State (at 17-24) to distract from this simple analysis is to argue that MGM has suffered no injury because the Act does not take the final step of authorizing a casino. This argument once again ignores the current harms alleged by MGM, none of which depends on further legislative action. *See* MGM Br. 49-50. By granting the Preferred Tribes (and *only* the Preferred Tribes) an exclusive RFP-publication right, an express right to execute casino-site contracts with municipalities, and access to a special development pathway, the Act signals that the Tribes' development effort has the State's backing and gives

the Tribes an advantage in the development process. *Id.* at 34-37. That process is underway right now, and there is no way MGM can participate in it on equal terms given the Act's discriminatory framework. *Id.*

The State also falsely claims that the Act burdens the Preferred Tribes, rather than granting them competitive advantages, because it "requires" them to register a tribal business entity and issue an RFP. *See* State Br. 3, 14, 18-20. The Act does neither of those things. Rather, it *allows* the Tribes to form a tribal business entity and provides that the Tribes "*may* issue a request for proposals." Act §§ 1(a)(1), 1(b) (emphasis added). Again, the fact that the Tribes, given a choice between proceeding under the Act or seeking to develop a casino outside the Act, chose the former shows that the Act confers benefits and advantages. *See* MGM Br. 34-36, 38-40.[2]

More broadly, the State fails to acknowledge the basic test for injury in the equal protection context: "denial of equal treatment." *Jacksonville*, 508 U.S. at 666; *see also Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 498 (7th Cir. 2005); *Comer*, 37 F.3d at 793. MGM began to suffer that injury as soon as the legislature passed the Act, and it will continue as

[2] Although the Act requires the Tribes to issue reports if they form a tribal business entity, courts do not weigh a discriminatory law's benefits against any burdens in determining whether a plaintiff has standing. *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 265 (2d Cir. 2006).

long as the Act is in effect. MGM—and everyone other than the Preferred Tribes—has been treated unequally and put at a disadvantage in competing for casino-development opportunities, including disseminating RFPs and contracting with municipalities.[3]

The adequacy of MGM's competitive-injury allegations is underscored by the Seventh Circuit's decision in *Flambeau*, which the State addresses only in passing in a footnote (at 32 n.15). In *Flambeau*, the Secretary of the Interior approved a compact between the Ho-Chunk tribe and Wisconsin that required Wisconsin to indemnify the Ho-Chunk for lost revenues if another tribe were allowed to conduct off-reservation gaming in the state. *Id.* at 494. The Lac du Flambeau tribe sued, alleging that it suffered an equal protection injury because the indemnification obligation made it less likely that Wisconsin would approve its request to open its own casino. *Id.* at 494. The court held that although Lac du Flambeau's application might be rejected for legitimate reasons, the tribe had standing because "the harm lies in 'the denial of equal treatment,' in this case, being forced to seek approval under the cloud created by" Wisconsin's

[3] The State does not cite authority for its argument that an ultimate *benefit* for which parties are competing must be imminent, as opposed to the *injury* of unequal treatment. In any event, competition is underway for concrete benefits, including a casino-site contract with a municipality. Such a contract, like an option contract or right of first refusal, has value even though there is no guarantee that the legislature will authorize a new casino. The State does not claim that execution of a casino-site agreement or other steps necessary to develop a casino are not imminent; its sole, and incorrect, focus is on the imminence of a fully authorized casino.

indemnification obligations. *Id.* at 498. The court also explained that because of the multi-step process of developing a casino, tilting the scales against the Lac du Flambeau would harm the tribe by decreasing its ability to attract investors. *Id.*

The same principles apply here. As in *Flambeau*, MGM's development efforts necessarily take place "under the cloud" established by the Act's discriminatory framework. The advantages the Act confers upon the Preferred Tribes, like the covenant at issue in *Flambeau*, make it impossible for MGM to compete on equal footing in courting potential investors, executing contracts with municipalities, and taking other steps to develop a casino.

The State responds with an irrelevancy. Although the State cites (at 17) trademark and contract cases for the broad proposition that a law does not inflict injury-in-fact merely by conferring an unlawful advantage on the plaintiff's competitors, that argument overlooks the rule that "injury cannot be determined without reference to applicable law." *Williams v. Lambert*, 46 F.3d 1275, 1280 n.3 (2d Cir. 1995). Here, in the equal protection context, unequal treatment itself constitutes cognizable injury, *see* MGM Br. 29-32.[4]

[4] Likewise, the cases cited by the State bear no resemblance to this one. For instance, in *Already*, the plaintiff sought to have a competitor's trademark invalidated, not because it planned to use the trademark itself, but because its competitor's use of the trademark benefitted the competitor. *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 731 (2013). By contrast, MGM alleges that it is ready and able to compete for development of a casino, but is hindered in doing so by the Act.

The State also incorrectly relies (at 21) on *DaimlerChrysler v. Cuno*, 547 U.S. 332 (2006), which did not disturb the well-established rule that a plaintiff suffers injury-in-fact when denied equal treatment. *See id.* at 343. In holding that the taxpayer plaintiffs in that case lacked standing, the Supreme Court observed that it was unclear whether the challenged tax breaks would have a net negative effect on the state treasury and that even assuming a reduction in revenue, plaintiffs' allegation that the tax breaks would increase their own taxes required speculating about "how legislators [would] respond" to a revenue shortfall. *Id.* at 344. Those facts are not similar to MGM's allegations; whereas the *DaimlerChrysler* plaintiffs might never have experienced increased taxes, MGM has already suffered (and continues to suffer) denial of equal treatment. *See Selevan v. New York Thruway Auth.*, 584 F.3d 82, 89 (2d Cir. 2009) (rejecting *Cuno*-based standing objection on similar grounds).

3. MGM Has Adequately Alleged That the Act Injures MGM by Excluding it from Connecticut's Only Legal Casino-Development Pathway.

As to MGM's third equal protection injury—exclusion from the only lawful process for developing a new commercial casino in Connecticut—the State largely recapitulates (at 8-14) the district court's flawed reasoning, which MGM has already rebutted. *See* MGM Br. 43-47.

The State's only new argument is the incorrect assertion (at 11-12) that a "key colloquy" among legislators shows that the Act is merely "symbolic" and does not authorize municipalities or the Preferred Tribes to do anything they could not already do. The colloquy, however, addressed whether in the Act's absence the Preferred Tribes could "negotiat[e] with towns"—*not* whether they could execute casino-development contracts. A133. The same is true of Senator Fasano's statement, which referred only to "talking" with municipalities and "discuss[ing]" proposals. A203.

Along these lines, the State misses the point in characterizing (at 13) MGM's complaint as alleging that the Act "preclude[s] [MGM] from proceeding" with casino development. MGM does not contend that mere discussion of a potential casino is unlawful. What MGM does argue is that only the Act authorizes a Connecticut municipality to *execute* a legally binding casino-development agreement, a point not addressed in the cited colloquy. *See* MGM Br. 44. The State cannot cite any legislative history or other authority suggesting that execution of a casino-development contract with a municipality would be authorized in the Act's absence.

B. The State's Commerce Clause Arguments Miss The Mark.

The standing inquiry is equally straightforward with respect to MGM's dormant Commerce Clause claims: The Act injures MGM, an out-of-state

competitor, by granting casino-development rights exclusively to the Preferred Tribes, two in-state entities. *See* MGM Br. 54-55.

Here, too, there is nothing to the State's waiver argument. Not only does the State again overlook binding precedent, *see Wight*, 219 F.3d at 90, MGM preserved the issue by arguing in the district court that it has standing to assert a dormant Commerce Clause claim, *see* MGM DCt. Opp. at 1, 12-14. Indeed, the State admits (at 36) that MGM cited and discussed Commerce Clause standing cases in its district court briefing.

On the merits, the State invokes (at 36-38) the same mantra of "imminence" that appears throughout its brief, which fails for the reasons given in Part I.C. below—namely, that MGM is suffering ongoing injuries as a result of the Act's discriminatory provisions.

C. The State's Imminence Argument Is Meritless.

As noted, the State has placed—more accurately, misplaced—emphasis on its position (at 16, 29-33) that MGM must demonstrate "imminent" injury to have standing and that to be imminent, MGM must show that "a casino will be approved" shortly. The State is wrong for two principal reasons.

First, the law is clear that an *ongoing* constitutional violation or injury is sufficient to support standing. Accordingly, a plaintiff "who challenges an *ongoing* race-conscious program" may obtain "forward-looking relief," and an

"allegation of an *ongoing* or imminent constitutional violation" is sufficient "to support a claim." *Lesage*, 528 U.S. at 21 (emphasis added); *see also, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1997) (injury must be "*actual or* imminent" (emphasis added, citation omitted)); *Park v. Forest Service*, 205 F.3d 1034, 1037 (8th Cir. 2000) ("In the case of complaints for injunctive relief, the 'injury in fact' element of standing requires a showing that the plaintiff faces a threat of *ongoing* or future harm." (emphasis added)); *Weser v. Glen*, 190 F. Supp. 2d 384, 394 (E.D.N.Y. 2002) (standing to challenge "*ongoing* denial of an opportunity to compete on an equal footing" (emphasis added, citation omitted)).

The Act inflicts such ongoing injury on MGM: every day, it provides the Preferred Tribes with exclusive rights, thus preventing MGM from competing in the casino-development process on equal terms. That injury satisfies Article III's requirements and supports MGM's claims for declaratory and injunctive relief. *See, e.g.*, *Tolls Bros., Inc. v. Township of Readington*, 555 F.3d 131, 138 n.5 (3d Cir. 2009) ("present injury" sufficient for "injunctive relief" so long as challenged zoning ordinance "remain[ed] in force" (citation omitted)); *Freedom from Religion Found., Inc. v. Shulman*, 961 F. Supp. 2d 947, 951 (W.D. Wis. 2013) ("[B]ecause the Foundation alleges that the IRS's policy is ongoing, the injury is more than actual and imminent—the Foundation is being deprived of equal treatment right now.").

Second, even past violations present a case or controversy if accompanied by "continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974); *see also, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) ("[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief … *if unaccompanied by any continuing, present adverse effects*." (emphasis added, omission in original, citation omitted)); *Lujan*, 504 U.S. at 564 (same).

MGM has standing under this doctrine because MGM suffers "continuing, present adverse effects" from the Act's conferral of unequal benefits on the Preferred Tribes. *Lyons*, 461 U.S. at 102; *see also, e.g.*, *Mhany Mgmt. Inc. v. Incorporated Vill. of Garden City*, 4 F. Supp. 3d 549, 553 (E.D.N.Y. 2014). Specifically, the Tribes are using the Act's exclusive rights and framework to pull ahead in executing a casino-site contract with a municipality and in the other steps necessary to develop a commercial casino. *See* MGM Br. 34-37, 49.

In short, the State is wrong in asserting that MGM must show "imminent" injury: MGM has alleged a current and ongoing injury, which is sufficient. *See Lujan*, 504 U.S. at 560.

The State's argument is also undermined by the First Circuit's decision in *KG Urban Enterprises, LLC v. Patrick*, 693 F.3d 1 (1st Cir. 2012). There, the allegedly discriminatory statute similarly did not authorize the Indian tribe's

operation of a casino; it simply provided that the casino-licensing process be placed on hold while the tribe tried to obtain approvals to develop a casino under IGRA. *Id.* at 6. The tribe may *never* have obtained such approvals, which would have meant that the normal competitive process would have proceeded, and there was no evidence that IGRA approvals were imminent. *See id.* at 6, 25-26; *KG Urban v. Patrick*, 839 F. Supp. 2d 388, 397 (D. Mass. 2012) (standing even though casino "application process has not been and may never be opened"). Nevertheless, the court held that standing existed for the casino-development company challenging the legislation because the statute imposed differential barriers that hindered the plaintiff's ability to compete in the casino-development process. *See KG Urban*, 693 F.3d at 16, n.13. The same rationale applies here.

Likewise, casino approval was not imminent in *Flambeau*. There, the plaintiff's casino application was still pending with Wisconsin and the Secretary of the Interior, and a rejection by either would have meant that the plaintiff would have been unable to develop a casino. *Flambeau*, 422 F.3d at 498. Nevertheless, the court held that the plaintiff was suffering a present injury because of the "denial of equal treatment" in considering plaintiff's casino application. *Id.*

Indeed, the State's argument, if adopted, would lead to absurd results. Under the State's imminence theory, *no one* would have standing to challenge the Act even if it conferred even more glaringly obvious competitive advantages—for

instance by authorizing state employees to assist the Preferred Tribes in obtaining permit approvals or providing an architect to draft casino plans. According to the State, such a discriminatory framework would be immune from judicial review until the legislature took the final step of authorizing a casino. That is not the law.

D. The State Fails To Justify Either Abstention Or Certification.

The State's abrupt abstention and certification arguments (at 14-15) fail for three principal reasons.

First, abstention and certification are not warranted where, as here, a state law "is clear on its face." *Williams*, 46 F.3d at 1281-82. The State does not deny that the Act is unambiguous: It expressly grants the Preferred Tribes—and *only* the Preferred Tribes—the rights to register a tribal business entity, publish an RFP on a state agency's website, and execute casino-development contracts with municipalities. *See* Act §§ 1(a)(1), 1(b), 1(c). Not only does the State fail to contest that the Act discriminates in these ways, but the agency charged with administering the Act has *twice* given the Act its plain and exclusionary meaning and made that interpretation a matter of public record. *See* A23-24 ¶ 53 (MGM excluded from Act's framework because it "ha[s] no affiliation with" Preferred Tribes); MGM Mot. for Judicial Notice Ex. C at 2 (Secretary Merrill's concession that Special Act 15-7 provides "a grant of legal authority" only to "the tribes

named in the Special Act"). Accordingly, referring this case to state court would serve no purpose.

The State cites *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 821 F.3d 265, 270 (2d Cir. 2016), but that case highlights why certification is unwarranted. The question presented in *Flo* involved a "significant and unresolved issue" of New York common law, resolution of which involved "essentially a public policy choice appropriately resolved by a New York court." *Id.* at 267, 270 (alteration and citation omitted). Here, in contrast, the responsible state agency has already addressed the Act's meaning and the State has not offered a competing interpretation that would avoid the need to confront MGM's constitutional claims.

Second, *Pullman* abstention is improper because constitutionality of the Act is not presented by this appeal.[5] *Pullman* abstention allows federal courts "to avoid passing on the constitutionality of a [state] statute where possible." *Nicholson v. Scoppetta*, 344 F.3d 154, 167 (2d Cir. 2003). The constitutionality of the Act, however, is not implicated by the State's motion to dismiss and thus is not at issue at this preliminary stage of the litigation. Rather, the only questions before the Court are MGM's standing to challenge the Act and the ripeness of its claims.

Third, unlike in *Nicholson* and every other case applying *Pullman* abstention, there is no way to avoid the constitutional question that *is* presented

[5] MGM concedes that *Pullman* abstention cannot be waived. *See* State Br. 15.

here: Whether MGM has Article III standing. A court may abstain under *Pullman* only if it determines that it has subject-matter jurisdiction over the case, and so that question cannot be avoided. *See City of S. Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231, 232 (9th Cir. 1980); 6A Charles A. Wright et al., *Federal Practice and Procedure* § 4243 (3d ed. 2016) ("Since abstention presupposes that jurisdiction exists, the court ought not consider whether to abstain until it has satisfied itself that it has jurisdiction of the case.").

At bottom, the State's abstention and certification arguments are meritless pleas for delay. This Court should reject that gambit and decide the questions presented. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) (emphasizing federal courts' "virtually unflagging" duty to decide issues within their jurisdiction).

II. THE STATE'S CURSORY CAUSATION AND REDRESSABILITY ARGUMENTS REHASH THE STATE'S FLAWED INJURY ARGUMENTS.

The State also attempts (at 39-40) to defeat standing by contending that MGM's injuries are not traceable to the Act and would not be redressed by a ruling in its favor, but in so arguing the State merely repeats the misguided arguments addressed above.

A. The State Ignores Injuries Caused By The Act And Seeks To Impose Legal Requirements On MGM That Do Not Exist.

The State first argues (at 39) that MGM's injury is not traceable to the Act, but rather is "self-inflicted" because MGM has not taken steps to develop a Connecticut casino.

Putting aside that the State's argument doubles down on the State's misconception of MGM's injury, MGM is not required to "make costly futile gestures" and compete in the face of state-imposed disadvantage to establish standing. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397, 406 (6th Cir. 1999). To the contrary, an allegation that a party "would have" taken action in the absence of disparate treatment is sufficient. *Gratz v. Bollinger*, 539 U.S. 244, 261-62 (2003). For example, in *Lac Vieux*, the court held that the plaintiff was not required to submit a casino-development plan to establish standing; it was "sufficient that [the plaintiff] ha[d] shown that it *could have* submitted a timely proposal and that it was still ready to do so, *should the preference be struck down* and the bidding process started over." *Lac Vieux*, 172 F.3d at 406 (emphasis added). Likewise, the plaintiff in *Gratz* had standing to challenge prospective application of a university's race-conscious policy relating to transfer applications because he was "able and ready" to apply—that he had not actually applied did not defeat standing. *Gratz*, 539 U.S. at 262; *see also Shea v. Kerry*, 796 F.3d 42, 50 (D.C. Cir. 2015).

MGM is situated identically to the plaintiffs in *Lac Vieux* and *Gratz* because it has alleged facts showing that it is "able and ready" to compete for casino-development opportunities once there is a level playing field. *See, e.g.*, A11 ¶ 6, A22 ¶¶ 46-49. MGM need not show that it has attempted to defy the odds by taking steps to compete at a disadvantage for those opportunities.

Similarly, the State's argument (at 39) that MGM's injuries are not traceable to the Act because the State has "publicly taken the position … that nothing in SA 15-7 … precludes MGM from participating in the casino-development process" is a red herring. Again, it does not matter whether MGM can "participat[e] in the casino-development process," *id.*, if it is unable to do so "on an equal basis," *Jacksonville*, 508 U.S. at 666. In any event, taking the "position" that the Act does not injure MGM obviously does not make it so; regardless of what the State argues, the reality is that the Act injures MGM by denying it equal access to RFP-publication rights and other advantages.

Finally, contrary to the State's assertion (at 21), nothing about MGM's standing argument requires speculation about decisions of third parties.[6] "The

[6] The case on which the State relies for this proposition involved a challenge to a statute authorizing surveillance, but there it was unclear whether the government would *ever* seek to monitor the plaintiff's communications, and even if it did, whether surveillance would be approved. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148-50 (2013). Those facts bear no resemblance to this case, where the unlawful conduct MGM challenges has already begun and continues to occur.

injury in cases of this kind is that a discriminatory classification prevent[s] the plaintiff from competing on an equal footing," and the Court need not evaluate whether MGM (or anyone else) would have successfully developed a casino, executed a site contract with a municipality, or completed other aspects of the casino-development process. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995) (citation omitted) (alteration in original).

B. The State Also Ignores The Redressability Of MGM's Injuries.

Although the State insists (at 40) that a favorable ruling will have "no … impact" on MGM's ability to compete, that argument simply repeats the State's flawed argument that the Act does not injure MGM or prevent it from competing on equal terms.

Nor is there anything to the State's contention that the contractual restriction that precludes MGM from developing a casino within 50 miles of Springfield, Massachusetts bars MGM from competing for a casino in Connecticut. *Id.* MGM's allegations that "there are many potential casino sites in Connecticut beyond the 50-mile radius restriction" and that it is "ready and able" to compete for the opportunity to develop casinos in those areas, A22 ¶ 49, defeat any radius-based redressability challenge at the motion-to-dismiss stage.[7] MGM Br. 50-53.

[7] The State's arguments (at 27-29) regarding "the key areas for potential future casino development" and whether Bridgeport is a viable casino location are based (continued…)

Similarly, the State's reliance (at 17, 40) on *Allco Finance Ltd. v. Klee*, 805 F.3d 89 (2d. Cir. 2015), for the proposition that invalidating a competitor's contract would not redress the plaintiff's injury is misplaced. That case is irrelevant because it was not brought under the Equal Protection Clause, where it is well-established that requiring the government to treat parties equally by definition redresses the injury of unequal treatment. Indeed, the State ignores the rule that removing unequal treatment, including by striking down an unlawful preference, satisfies the redressability requirement in equal protection cases. *See Mathews*, 465 U.S. at 738 ("[W]hen the right invoked is that of equal treatment, the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." (citation omitted)); *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 426-27 (2010) ("[W]hen unlawful discrimination infects … legislative prescriptions, the Constitution simply calls for *equal treatment*," which may be accomplished "by extension or invalidation of the unequally distributed benefit or burden."); *Morales-Santana v. Lynch*, 804 F.3d 520, 536 (2d Cir. 2015) (following *Mathews*).

on speculation and in any event cannot defeat the well-pled allegations of MGM's complaint on a motion to dismiss.

More fundamentally, the State's causation and redressability arguments underscore its mistaken view that MGM is injured only if the legislature allows the Preferred Tribes to *operate* their planned casino. As noted, that is neither the injury MGM has alleged nor the one MGM needs to show to establish standing. Indeed, the conclusion that MGM's allegations satisfy the causation and redressability prongs of standing is *compelled* by the definition of the injury alleged here. *See Jacksonville*, 508 U.S. at 666 n.5 ("[i]t *follows from our definition of* '*injury in fact*' that petitioner has sufficiently alleged both that the city's ordinance is the 'cause' of its injury and that a judicial decree directing the city to discontinue its program would 'redress' the injury" (emphasis added)).

III. THE STATE'S TIME-OF-STANDING ARGUMENT IS NEITHER DISPOSITIVE NOR MERITORIOUS.

Contrary to the State's claim (at 41-43), the Court must consider the facts in existence when MGM filed its Amended Complaint to resolve the standing issue.

As an initial matter, the State's argument is academic because MGM has standing regardless of which approach the Court takes. When MGM filed its original complaint in August 2015, the Act had been signed into law and MGM had already been denied access to the rights it provides. A9, 23-24. The events that occurred between August 2015 and October 2015, when MGM filed its Amended Complaint—such as the Preferred Tribes' registration of a tribal business entity and use of the exclusive rights provided that entity, A24-26—

merely underscore the ongoing nature of MGM's injuries (and confirm that some of MGM's injuries were imminent when MGM filed its original complaint).

If the Court does resolve the time-of-standing question, it should reject the State's crabbed argument (at 41-43) that the Court may look only to the state of affairs when MGM filed its original complaint. The general rule that standing is determined as of the commencement of the suit "does not apply when," as here, "there has been an amended complaint." *Effie Film, LLC v. Murphy*, No. 11-Civ-783, 2012 WL 716556, at *3 (S.D.N.Y. Mar. 6, 2012). Rather, "[w]hen a plaintiff files a complaint … and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction." *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473-74 (2007); *see also United States ex rel. Gadbois v. Pharmerica Corp.*, 809 F.3d 1, 5 (1st Cir. 2015) ("subject matter jurisdiction falls within the cluster of defects that may be cured by a supplemental pleading"). The Supreme Court confirmed as much in *Mathews v. Diaz*, 426 U.S. 67, 75 & n.8 (1976), concluding that a plaintiff may satisfy "a nonwaivable condition of jurisdiction" by filing a "supplemental complaint."

Courts have repeatedly relied on *Rockwell* and *Diaz* in holding that "the proper focus in determining jurisdiction are the facts existing at the time the complaint *under consideration* was filed." *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1337 (Fed. Cir. 2008) (emphasis in original, citations omitted).

Courts have applied that rule in the context of Article III standing[8] as well as other threshold jurisdictional matters.[9] Federal Rule of Civil Procedure 15(d), which allows plaintiffs to file "a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the [original] pleading," provides further support for the principle that standing must be judged based on the operative complaint. *See, e.g.*, *Gadbois*, 809 F.3d at 5.[10]

This Court agrees. In *Travelers Insurance Co. v. 633 Third Associates*, 973 F.2d 82, 83-84, 88 (2d Cir. 1992), the Court concluded that the plaintiff's original complaint failed to establish standing, but nevertheless granted leave to amend and held that "[i]f the complaint as amended alleges sufficient facts to support the requisite injury … plaintiff will have established standing to sue." *See also Hackner v. Guaranty Trust Co.*, 117 F.2d 95, 98 (2d Cir. 1941) (amended complaint provided basis for jurisdiction).

---

[8] *See, e.g., Northstar Fin. Advisors Inc. v. Schwab Investments*, 779 F.3d 1036, 1043-45 (9th Cir. 2015); *Daniels v. Arcade*, 477 F. App'x 125, 130-31 (4th Cir. 2012); *G&E Real Estate v. Avison Young-Washington, D.C., LLC*, — F. Supp. 3d —, 2016 WL 777908, at *9 (D.D.C. Feb. 26, 2016).

[9] *See Gadbois*, 809 F.3d at 4-5; *Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 347 (4th Cir. 2014); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1488-89 (11th Cir. 1990); *Prasco*, 537 F.3d at 1337; *Campbell v. Nowlin*, No. 92-Civ.-4177, 1993 WL 205127, at *1-2 (S.D.N.Y. June 9, 1993) (Leval, J.).

[10] MGM's Amended Complaint is properly considered a supplemental pleading under Rule 15(d) because it alleged facts that postdated the original complaint. *See Prasco*, 537 F.3d at 1337; *Franks v. Ross*, 313 F.3d 184, 198 & n.15 (4th Cir. 2002); *G&E*, 2016 WL 777908, at *9 & n.9.

The State's argument cannot be squared with these authorities. Indeed, most of the cases cited by the State are inapposite because they did not involve amended or supplemental pleadings. The lone exception—*Southern Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1153 (10th Cir. 2013)—did not address *Rockwell*, *Diaz*, or Rule 15(d).

Perhaps most fundamentally, the State's suggested rule makes no sense. If the State were to prevail on this argument, the case would be dismissed without prejudice,[11] MGM would file a new complaint, the district court presumably would rule against MGM on the same grounds as before, and the parties would be back before this Court on a second appeal. The State's rule would thus "elevate form over substance" and introduce "needless formality and expense." *Northstar*, 779 F.3d at 1044 (alteration and citation omitted); *see also id.* at 1047 (rejecting argument identical to State's as "turn[ing] on the technical distinction between a new complaint and a supplemental pleading").

Judges of this Court have agreed with that assessment. As Judge Clark, the principal architect of the Federal Rules of Civil Procedure, wrote for the Court in *Hackner*, requiring dismissal even though jurisdiction is supported by an amended pleading would be "purely formal" and contrary to "the wide and flexible content

[11] *See Carter v. Healthport Techs., LLC*, 822 F.3d 47, 54 (2d Cir. 2016) (dismissal "for lack of Article III standing … must be without prejudice").

given to the concept of action under the new rules." 117 F.2d at 98. Similarly, then-District Judge Leval reasoned in *Campbell* that "[t]o dismiss the complaint and require refiling" would be "wasteful and pointless." 1993 WL 205127, at *2.

IV. THE STATE'S RIPENESS OBJECTION FAILS FOR THE SAME REASONS AS ITS STANDING ARGUMENTS.

The State effectively concedes (at 44) that if MGM has standing to challenge the Act, this lawsuit is also constitutionally ripe. Because MGM has demonstrated its standing, it necessarily satisfies the constitutional ripeness requirements. *See Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 688 (2d Cir. 2013).

As for prudential ripeness, this Court should decline to apply that doctrine in light of recent Supreme Court decisions casting doubt on its vitality. *See* MGM Br. 57-58. Although the State implies that this Court *must* consider prudential ripeness, the doctrine is "discretionary." *Gutay Christian Fellowship v. Cnty. of San Diego*, 670 F.3d 957, 980 (9th Cir. 2011).

Should the Court nevertheless apply the prudential ripeness criteria, the State's arguments fail.

The State's first argument (at 45)—that this litigation is "unfit for adjudication" because Connecticut has not yet passed legislation enabling the Preferred Tribes to operate a commercial casino—misfires again by focusing on the wrong injury. *See* Parts I.A.2, I.C, *supra.* The constitutionality of these provisions is a question of law that would not benefit from further factual

development, making the claims asserted in MGM's Amended Complaint fit for immediate judicial review. *See Driehaus*, 134 S. Ct. at 2347. Significantly, the State does not cite a single case in the equal protection or Commerce Clause contexts finding an allegation of unequal competition to be prudentially unripe.

Likewise, the State fails in its attempt (at 45-46) to downplay the hardship MGM faces in the absence of judicial review. MGM was deprived of its constitutional rights the moment the Act was passed—and that harm continues and grows as the Preferred Tribes exercise their exclusive rights, moving closer to a casino-development agreement. *See* MGM Br. 15-16, 49-50.

Recent developments confirm that the Tribes continue to press ahead in an effort to close a deal with a municipality. On August 24, 2016, the Connecticut Airport Authority's General Counsel testified that there are "ongoing discussions for a casino" with the Preferred Tribes and that two locations for a casino "are under active consideration."[12] Hearing Before Connecticut Freedom of Information Commission at 51:22-51:47, 55:20-55:52 (Aug. 24, 2016). According to the General Counsel, these negotiations have advanced to the point of discussing

[12] *Available at* http://www.ctn.state.ct.us/ctnplayer.asp?odID=13182.

lease terms for property that would house a casino. *Id.* at 54:06-55:13, 55:40-56:35, 1:13:19-50.[13]

Although the Tribes' development efforts may be proceeding slower than they anticipated, that does not render the legal questions posed by MGM's suit unripe. To the contrary, that active casino-development negotiations are underway *right now* confirms the need for immediate judicial review.

CONCLUSION

For the foregoing reasons and those set forth in MGM's opening brief, the judgment should be reversed and the case remanded for further proceedings.

[13] The Court may consider these facts because the ripeness analysis turns on the state of affairs when the Court renders its decision. *See* MGM Br. 56.

Respectfully submitted,

James K. Robertson Jr.
CARMODY TORRANCE SANDAK & HENNESSEY LLP
50 Leavenworth Street
Waterbury, CT 06721
Tel: 203.575.2636
jrobertson@carmodylaw.com

/s/ Kevin King
Kevin King
Thomas Brugato
COVINGTON & BURLING LLP
One CityCenter
850 Tenth St. NW
Washington, D.C. 20001-4956
(202) 662–6000
kking@cov.com
tbrugato@cov.com

Neil K. Roman
Cléa Liquard
COVINGTON & BURLING LLP
The New York Times Building
620 Eighth Avenue
New York, NY 10018
(212) 841-1000
nroman@cov.com
cliquard@cov.com

Counsel for Appellant MGM Resorts International Global Gaming Development, LLC

September 7, 2016

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because it contains 6,990 words, exclusive of the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman and 14 point font.

September 7, 2016

/s/ Kevin King

Kevin King
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on September 7, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

September 7, 2016

/s/ Kevin King

Kevin King
Counsel for Appellant