No. 24-1751

In the United States Court of Appeals for the Seventh Circuit

WAUKEGAN POTAWATOMI CASINO, LLC, an Illinois limited liability company,	)	
Plaintiff-Appellant,	)	Appeal from the United States District Court for the Northern District of Illinois
v.	)	Case No. 1:20-cv-00750
THE CITY OF WAUKEGAN, an Illinois municipal corporation,	)	Hon. John F. Kness
Defendant-Appellee.	)	

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT WAUKEGAN POTAWATOMI CASINO, LLC

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 24-1751

Short Caption: Waukegan Potawatomi Casino, LLC v. City of Waukegan

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Waukegan Potawatomi Casino, LLC

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Cotsirilos, Tighe, Streicker, Poulos & Campbell, Ltd.; Smith, Gambrell & Russell, LLP; Freeborn & Peters, LLP;
O'Donnell Callaghan LLC; Rothstein Donatelli LLP [revised to add Rothstein Donatelli LLP]

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and
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ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:
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(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:
N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:
N/A

Attorney's Signature: /s/ Dylan Smith Date: 6/10/2024

Attorney's Printed Name: Dylan Smith

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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N/A

Attorney's Signature: /s/ John Pavletic Date: 6/10/2024

Attorney's Printed Name: John N. Pavletic, Jr.

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Wouter Zwart Date: 06/04/2024

Attorney's Printed Name: Wouter Zwart

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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JURISDICTIONAL STATEMENT

On January 3, 2020, plaintiff-appellant Waukegan Potawatomi Casino, LLC ("WPC") filed an amended complaint in the Circuit Court of Lake County, Illinois, asserting claims against defendant-appellee the City of Waukegan (the "City") under 42 U.S.C. § 1983 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (Count I), the Illinois Gambling Act (Count II), and the Illinois Open Meetings Act (Count III). (R.1, 56.[1]) On January 31, 2020, the City removed this case to the United States District Court for the Northern District of Illinois under 28 U.S.C. §§ 1441(a), 1443 & 1446. (R.1.) Accordingly, the district court had subject-matter jurisdiction over Count I under 28 U.S.C. §§ 1331 & 1343, and supplemental jurisdiction over Counts II and III under 28 U.S.C. § 1367(a).

On March 29, 2024, the district court issued a memorandum opinion and order granting the City's motion for summary judgment on WPC's federal claim (Count I) and declining to retain jurisdiction over the state-law claims (Counts II and III). (R.171.) On the same date, the district court entered a final judgment in favor of the City and against WPC adjudicating all the claims with respect to all the parties. (R.172.) On April 26, 2024, WPC timely filed a notice of appeal. (R.174.) Accordingly, this Court has appellate jurisdiction under 28 U.S.C. § 1291.

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[1] WPC's First Amended Complaint was attached to the notice of removal (R.1), but WPC subsequently re-filed it at the district court's direction so that it would appear as a stand-alone docket entry. (R.56, 58.)

ISSUES PRESENTED FOR REVIEW

This appeal, which arises from an order entering summary judgment against WPC, presents the following issues for review:

1. Where WPC's equal protection claim does not depend on any sovereign prerogative, is WPC entitled to pursue that claim under § 1983?

2. Where the evidence supports a reasonable finding that the City intentionally and irrationally discriminated against WPC through a rigged casino selection process, negating any conceivable rational basis for the City's discriminatory conduct, does WPC's class-of-one equal protection claim raise genuine fact issues for trial?

STATEMENT CONCERNING ORAL ARGUMENT

WPC respectfully submits that oral argument is appropriate under the criteria of Federal Rule of Appellate Procedure 34(a). This appeal raises substantial and important issues concerning (i) whether and to what extent a tribally-owned entity may sue under § 1983 to vindicate non-sovereign rights, and (ii) the interplay between standards governing summary judgment and class-of-one equal protection claims. The dispositive issues have not been authoritatively decided, and the decisional process would be significantly aided by oral argument.

INTRODUCTION

In 2019, the Illinois legislature authorized the Illinois Gaming Board to license six new casinos, including in the City of Waukegan. Under the gaming expansion law, the Waukegan City Council was to decide which casino proposals to pass along for the Gaming Board's consideration. Later that year, to fulfill this gatekeeping

function, the City Council met to vote on four casino proposals, including a proposal from WPC.

Based on the evidence adduced in discovery, a reasonable jury could find that the City's mayor secretly directed a decisive block of City Council members to vote *against* WPC's proposal at the meeting and in favor of the other three proposals. A reasonable jury could find that this sham vote was the culmination of a casino review process that the mayor rigged against WPC. Further, a reasonable jury could find that the mayor and his allies on the City Council intentionally discriminated against WPC for reasons unrelated to any legitimate government interest—to limit competition for another casino proposal backed by a political benefactor. That other developer not only had donated generously to the mayor's campaign but had bankrolled the campaigns of the City Council members who voted as the mayor directed.

Despite this compelling evidence of intentional and irrational discrimination, the district court entered summary judgment dismissing WPC's class-of-one equal protection claim, on two grounds. First, the district court held that WPC, as a tribally-owned entity, did not fall within the "zone of interests" protected by § 1983. This reasoning is deeply flawed. Under the Supreme Court's *Inyo County* decision, because WPC's equal protection claim does not depend on any purported sovereign prerogative, but instead could have been asserted by any non-sovereign casino applicant, WPC may pursue the claim under § 1983. Moreover, § 1983 is merely a vehicle for asserting substantive rights found elsewhere—here, the Fourteenth Amendment.

WPC's underlying constitutional claim under the Equal Protection Clause is not vulnerable to a "zone of interests" challenge.

Second, the district court held that "conceivable" grounds for the City Council's vote against WPC foreclosed a class-of-one equal protection claim. In essence, the district court treated WPC's claim as if it merely challenged a discrete and independent vote of the City Council. In so holding, the district court misapplied this Court's precedent governing class-of-one claims and improperly resolved disputed fact issues. If, as the evidence reasonably permits, a jury were to find that the City's mayor rigged the casino review process and directed a sham vote against WPC for purely personal reasons, then that finding would negate any conceivable rational basis for the City's conduct. Accordingly, WPC's class-of-one claim raises genuine fact issues for trial.

In sum, the district court's doctrinally confused § 1983 analysis, as well as its usurpation of the jury's role on the merits of WPC's claim, necessitates correction by this Court and reversal of the judgment below.

STATEMENT OF THE CASE

Because this appeal arises from an order entering summary judgment, the evidence must be viewed in the light most favorable to WPC, the non-movant, and all reasonable inferences must be drawn in WPC's favor. *Mlsna v. Union Pac. R.R. Co.*, 975 F.3d 629, 633 (7th Cir. 2020).

The Illinois Legislature Earmarks Waukegan for a Potential Casino

In June 2019, Governor Pritzker signed a bill amending the Illinois Gambling Act to authorize up to six new casinos in Illinois, including one in the City of

Waukegan. 230 ILCS 10/7(e-5). Under the gaming expansion law, the casino's host municipality plays an important gatekeeper role. The Illinois Gaming Board may consider issuing one of the six new casino licenses "only after" the municipality's corporate authority certifies to the Board that certain conditions have been satisfied. *Id.* Specifically, the municipality must certify that the applicant for a casino owners license has negotiated with the municipality in good faith and agreed with it on certain key details of the proposed casino. *Id.*; *see generally Waukegan Potawatomi Casino, LLC v. Ill. Gaming Bd.*, 227 N.E.3d 127, 129–30 (Ill. App. Ct. 2023) (describing Gambling Act's requirements).[2]

A Casino Developer Bankrolls Waukegan Officials' Campaigns

In anticipation of the gaming expansion law, one aspiring casino developer ensured that City officials would favor his proposal. Michael Bond, a former state senator who co-owned and ran a video gaming company, was already a close ally of Waukegan's mayor, Samuel Cunningham. (R.153 ¶¶ 2–3, 5.) In the most recent mayoral election, Bond had advised Cunningham on campaign strategy and contributed the largest amount by far to his campaign. (*Id.* ¶¶ 2, 5.) Unlike most municipalities in Illinois, Waukegan has a strong-mayor form of government. (*Id.* ¶ 1.) Accordingly, with limited exceptions, Cunningham controlled all City departments and could appoint and remove City officers. (*Id.*) Cunningham appointed as corporation

[2] *Waukegan Potawatomi Casino* held that WPC has standing to challenge the Gaming Board's authority to issue a Waukegan casino license. *See* 227 N.E.3d at 129. The case is on appeal to the Illinois Supreme Court. *See Waukegan Potawatomi Casino, LLC v. Ill. Gaming Bd.*, 226 N.E.3d 15 (Ill. 2024).

counsel attorney Robert Long, who previously had represented Cunningham and his family, including on campaign-related issues. (*Id.* ¶ 6.)

Starting in late 2018, with City Council elections looming, Bond vetted candidates to identify those he could depend on to back his casino plans. (*Id.* ¶¶ 7–12.) He then largely bankrolled the campaigns of six such candidates, to whom he also furnished a turnkey campaign operation. (*Id.* ¶¶ 7, 14–24.) Bond also enlisted Cunningham to campaign for his candidates. (R.149 ¶ 26.) Four of the Bond-backed candidates won seats on the nine-person Waukegan City Council. (R.153 ¶ 74 (listing City Council members).)[3] As described further below, because three City Council members opposed any Waukegan casino, Bond's candidates constituted four of the six pro-casino votes on the City Council. (*Id.*)

Shortly after the City Council election, in the spring of 2019, Bond hosted a political strategy session for Cunningham at Bond's lake house. (*Id.* ¶ 27.) In texts around that time, Bond and Cunningham agreed to get together to "think through [Cunningham's City Council] committee assignments." (*Id.* ¶ 28.) That May and June, Bond texted Cunningham about Bond's casino-related efforts, and Cunningham advised Bond that the City was "getting [our] RFQ info together as we speak." (*Id.* ¶¶ 29–31.)

[3] In early 2019, one of the successful Bond-backed candidates, Roudell Kirkwood, became owner of a bar with five video gaming terminals owned by Bond's company (Tap Room Gaming). (R.153 ¶ 25.) Those terminals generated more than $2.5 million in wagering activity in the first ten months of that year. (*Id.*) (Kirkwood has since been indicted for alleged nondisclosures in his video gaming and liquor license applications. "Waukegan Ald. indicted for allegedly false statements on license applications," *Chicago Tribune*, 2022 WLNR 22910774 (July 22, 2022).)

Public Scrutiny Forces the Mayor to Pivot

In early July 2019, to fulfill its gatekeeping role under the gaming expansion law, the City issued a request for qualifications and proposals ("RFQ") inviting proposals to develop and operate a Waukegan casino. (*Id.* ¶ 32.) Despite Bond's status as a likely applicant, Cunningham did not recuse himself from the casino review process. (*Id.* ¶ 42.) The City did not retain an outside consultant to advise on the drafting of its RFQ, and, initially, Cunningham intended to forego an outside consultant to evaluate casino proposals. (*Id.*) Instead, he assembled a casino review team consisting of people beholden to him and/or having a Bond connection. (*Id.* ¶¶ 1, 9, 27, 39, 42.) The team included a mayoral aide who previously worked for Bond's campaign and his video gaming company. (*Id.* ¶¶ 9, 39, 42) Cunningham's team also included a law partner of attorney Michael Del Galdo, who had attended the strategy session at Bond's lake house. (*Id.* ¶¶ 27, 42.)

As the RFQ process moved forward, however, questions about Bond's influence spilled into public view. First, in July 2019, a would-be casino developer alleged in court filings that Bond appeared to have "the inside track" for the casino license. (*Id.* ¶¶ 35, 37.) Cunningham responded by telling the press that the City's "plan" was to recommend multiple developers to the Illinois Gaming Board. (*Id.* ¶ 38.) According to Cunningham, this plan "quash[ed]" any claim of Bond's having undue influence. (*Id.*) Then, in early August 2019, a reporter emailed Cunningham pointed questions for "a story I plan to publish this week about the casino," including about "political donations from [Bond's video gaming company] and its affiliates." (*Id.* ¶ 43.) Among other questions, the reporter asked how Cunningham had chosen his casino "selection

committee" and why it included "an attorney from the Del Galdo Group" (*i.e.*, the firm whose name partner had attended the Cunningham strategy session at Bond's lake house). (*Id.*)[4] The next day, the City belatedly began searching for an outside casino consultant. (*Id.* ¶ 44.)

The City Receives Casino Proposals

On August 5, 2019, the City received five casino proposals in response to its RFQ. After one withdrew from consideration, there remained four contending development groups: (i) Lakeside Casino, LLC (also known as "North Point"), which counted Bond as a partner; (ii) Full House Resorts, Inc. ("Full House"); (iii) CDI-RSG Waukegan, LLC ("Rivers"); and (iv) the Forest County Potawatomi Community of Wisconsin, operating as the Potawatomi Hotel & Casino ("Potawatomi"). (R.131 ¶ 8; R.123-10, First Am. Verified Compl. Ex. 2, Waukegan Potawatomi Casino Proposal, p.1 n.2.)

Potawatomi explained in its proposal that it would "form Waukegan Potawatomi Casino, LLC [*i.e.*, plaintiff WPC] under Illinois law to apply for and hold the Illinois Owners License … and to develop and operate the Waukegan Potawatomi Casino." (*Id.*) Further, unlike Potawatomi's Milwaukee casino, which operates under the Indian Gaming Regulatory Act, WPC would be "licensed by the Illinois Gaming Board and operated subject to the state and local laws of Illinois." (*Id.*) Consistent with that representation, in early October 2019, Potawatomi formed WPC as an

[4] ProPublica, WBEZ, and the Chicago Sun-Times ran the story headlined, "From Truck Stops to Elections, a River of Gambling Money Is Flooding Waukegan; Owners of one of Illinois' largest video gambling companies are behind efforts to influence city politics, expand gambling and build a casino near land they control." (R.153 ¶ 45.)

Illinois limited liability company. (R.131 ¶¶ 12, 14.) Although Potawatomi was exempt from federal taxation on any profits it might earn as WPC's sole member (R.127 ¶ 84), WPC's effective tax rate (including local and state gaming and admission taxes) would be approximately 27%. (R.127 ¶ 69; R.116-35, Ex. 35, Expert Report at 14.) *See* 230 ILCS 10/13 (specifying wagering taxes). In addition to those statutorily mandated taxes, WPC's proposal assumed that the Waukegan casino would be subject to local regulation and real estate taxes. (R.123-10, Ex. 10, First Am. Verified Compl. Ex. 2, Waukegan Potawatomi Casino Proposal, pp. 33–35.)

The City Conducts a Sham Review Process

Two weeks after receiving the proposals, the City belatedly hired an outside casino consultant, C.H. Johnson Consulting ("Johnson Consulting"). (R.131 ¶ 16; R.153 ¶¶ 44, 47.) The retention of Johnson Consulting may have lent the casino review process a veneer of impartiality. But the Cunningham administration manipulated the information considered by Johnson Consulting in a way that intentionally discriminated against WPC and provided cover for a sham vote in the City Council. By doing so, the Cunningham administration also manipulated the City Council's review of the casino application process.[5]

[5] Cunningham and corporation counsel Long reached out multiple times to Johnson Consulting for discussions not involving other City personnel. (R.153 ¶ 47.) As noted, Waukegan had a strong-mayor form of government, with Cunningham presiding over the City's executive functions. The City Council generally met twice monthly, with an occasional special meeting, as when it met on October 17, 2019 to vote on casino proposals, as discussed below. As also discussed below, the City Council ultimately received a written report and oral presentation from Johnson Consulting when the time came to vote on casino proposals, but Cunningham's administration—primarily Long and/or Cunningham—interacted with Johnson Consulting in the interim.

One way the administration did so was by keeping Johnson Consulting in the dark about an important qualification that North Point (the Bond-affiliated group) placed on its casino proposal. In an early October 2019 email to the City (seen only by corporation counsel Long and a couple of City officials), North Point correctly noted that, under the gaming expansion law, the City needed to agree with an applicant on specified items before the City could advance the applicant's proposal to the Gaming Board. (R.153 ¶ 51; R.126-4, Pl. SJ Ex. 92 at 1–2.) Accordingly, North Point proposed to enter into one of two alternative agreements with the City. (*Id.*) If the City advanced only North Point's proposal, then the terms of the proposal would remain unchanged. (*Id.*). But if the City advanced multiple proposals to the Gaming Board, North Point proposed to match the applicant "offering a lower financial contribution to the City." (*Id.*) This downward adjustment would include the revenue to be shared with the City and the consideration to be paid for the City-owned casino site. (*Id.*)

Given Cunningham's avowed "plan" to submit multiple applicants to the Gaming Board, it was now clear that North Point's original casino proposal was illusory. Yet, because Long did not share North Point's email with anyone, the City Council did not know that when it subsequently voted to advance North Point's proposal to the Gaming Board. (R.153 ¶¶ 52, 56; R.130-5, Pl. SJ Ex. 123 at 6:21–7:16, 8:3–9:19.) The City also failed to disclose North Point's email to the Gaming Board, as the Gambling Act required the City to do for any communication with a casino developer. (R.153 ¶¶ 31, 52; R.130-4, Pl. SJ Ex. 93; R. 130-5, Pl. SJ Ex. 123 at 26:11–27:23.)

Elsewhere, as Cunningham and Long knew, Johnson Consulting massaged its analysis to favor WPC's competition, particularly Full House, and disadvantage WPC. In early September 2019, Johnson Consulting provided a detailed summary of casino proposals to Long, which he in turn forwarded to Cunningham. (R.149 ¶ 48; R.130-3, Pl. SJ Ex. 78; R.126-3, Pl. SJ Ex. 79; R.130-3, Pl. SJ Ex. Ex. 80 at 1; R.130-5, Pl. SJ Ex. 133 at 64:15–65:9, 65:23–66:7, 67:2–68:1.) Where the summary revealed gaps and weaknesses in proposals other than WPC's, that negative information did not find its way into the report that Johnson Consulting later drafted for the City Council—either because the City invited the applicant to supplement its proposal or because (as Cunningham and Long knew) the report omitted the negative information.

For example, the City's RFQ had flagged "a significant number of high quality jobs" as one of the City's development objectives. (R.130-2, Pl. SJ Ex. 44 at 2.) Accordingly, the RFQ required each applicant to "quantify . . . estimated economic impacts." (*Id.* at 3.) Johnson Consulting's summary showed that Full House's proposal ignored this critical requirement; it did not include any projections for jobs created or other economic impacts apart from tax revenues. (R.149 ¶ 48; R.126-3, Pl. SJ Ex. 79 at 10; R.130-5, Pl. SJ Ex. 133 at 71:19–72:15.) But the City invited Full House to rectify this critical omission by supplementing its RFQ response. (R.153 ¶ 49; R.130-3, Pl. SJ Ex. 81 at 8, Fig. 4; R.126-4, Pl. SJ Ex. 86 at 1; R.130-5, Pl. SJ Ex. 133 at 99:3–101:10, 104:23–105:23, 106:22–107:8, 174:12–174:24, 184:20–185:3.)

In contrast, when WPC attempted to clarify or supplement its own proposal, Long advised Johnson Consulting that the City would not consider supplemental information from applicants unless the City specifically requested the information. (R.153 ¶ 61.) WPC proposed to purchase the City-owned casino site for its "appraised value +/– 15%." (R.131 ¶ 26.) This offer assumed that negotiations would ensue, and that any appraisal used for the sale of the property would value it as a casino site. (R.130-5, Pl. SJ Ex. 135 at 94:8–94:24, 172:17–175:1; R.130-5, Pl. SJ Ex. 122 at 112:1–114:19.) But Johnson Consulting latched onto an existing City appraisal, not publicly available, that valued the site at $5.625 million, pre-gaming expansion, assuming that its highest and best use was "subdivision into smaller lots for new commercial development." (R.153 ¶ 50; R.130-4, Pl. SJ Ex. 90 at 30, 42 (pp. 29, 41 of appraisal); R.130-5, Pl. SJ Ex. 133 at 112:22–114:13.) Accordingly, in early October, WPC advised that it would pay $12 million for the site. (R.131 ¶ 43). Consistent with Long's instruction, Johnson Consulting refused to consider WPC's updated offer in its analysis. (R.153 ¶¶ 61, 71.)

Similarly, Full House's financial disclosures revealed significant weaknesses, but Johnson Consulting did not include this information in its final report. For example, the RFQ required applicants to submit a financial reference letter. According to the summary that Johnson Consulting provided to Cunningham and Long, WPC's bank reference letter stated that it had the ability to fully fund the project at a cost of $400 to $450 million, while, in contrast, Full House's bank reference letter stated only that the bank had an "interest" in providing debt financing for the proposed

casino. (R.149 ¶ 48; R.126-3, Pl. SJ Ex. 79 at 14.) Johnson Consulting's final report obscured this distinction by merely identifying the bank that had furnished the reference letter. (R.153 ¶ 55.) Johnson Consulting's summary showed Cunningham and Long that Full House's liabilities exceeded its assets in each of the previous three years. (R.149 ¶ 48; R.126-3, Pl. SJ Ex. 79 at 11.) But Johnson Consulting's final report avoided any mention of liabilities, leaving the impression that Full House's balance sheet was positive. (R.149, ¶ 54.)

In its final report, Johnson Consulting assessed "that all [applicant] teams include seasoned professionals with skills and resources necessary to deliver a high-quality project to the Waukegan market." (R.130-3, Pl. SJ Ex. 81 at 10.) Consistent with the City's stated development objectives, WPC's proposal was projected to generate the most annual employment, the most gaming revenue, and (after Rivers) the second-most gaming and admissions taxes for the City. (R.153 ¶ 57.) Nevertheless, the Johnson Consulting report awarded Full House the best "overall ranking," followed by North Point, then Rivers, and ranked WPC last of the four proposals. (R.153 ¶ 58.)

At their depositions, the two responsible Johnson Consulting representatives could not articulate any reproducible method by which they arrived at these rankings. (R.153 ¶ 60; R.130-5, Pl. SJ Ex. 133 at 161:10–164:20, 165:7–169:11, 181:24–182:18; R.130-5, Pl. SJ Ex. 134 at 228:10–229:11 ("You're looking for an engineer and you're talking to an artist."); *id.* at 239:17–242:21 ("I have a brain and it gets information in….").) They also gave diametrically conflicting testimony about how various criteria

factored into their analysis. (R.153 ¶ 59; R.130-5, Pl. SJ Ex. 133 at 171:23–173:3 (WPC's high number of slot machines was relative positive); R.130-5, Pl. SJ Ex. 134 at 235:9–236:22 (claiming WPC's high number of slots worked against it); R.130-5, Pl. SJ Ex. 133 at 174:12–177:11 (most total jobs created and higher projected tax generation were positive factors); R.130-5, Pl. SJ Ex. 134 at 243:11–243:20 (claiming "lower employment numbers were better" as more in keeping with Waukegan).)

The Mayor Secretly Directs City Council Members to Vote Against WPC

The City's window to evaluate casino proposals ran from August 5, 2019, when it received responses to its RFQ, until October 17, when the City Council met to decide which proposals should be passed on to the Gaming Board. (R.131 ¶¶ 8, 44; R.130-4, Pl. SJ Ex. 104 (minutes of 10/17/2019 special meeting).)

Contrary to what the Gambling Act required, the City did not negotiate with any applicant or mutually agree on the statutorily-required items before that October 17 meeting. (R.153 ¶¶ 67–68; R.130-5, Pl. SJ Ex. 122 at 96:5–98:6, 99:22–103:2, 107:19–108:7; R.130-5, Pl. SJ Ex. 123 at 46:2–48:24, 50:5–53:12; R. 130-4, Pl. SJ Ex. 101 at 3, 7, 11.); *see also Waukegan Potawatomi Casino*, 227 N.E.3d at 133 ("[T]he City's corporation counsel admitted that the City did not engage in negotiations with any applicant during the certification process and that it was 'fundamentally impossible' to mutually agree with the applicants on the items as to which the Act requires mutual agreement before the Board may consider issuing an owner's license.").

As the October 17 meeting approached, the City was in litigation against an entity that had become a partner in Rivers. (R.153 ¶¶ 35–37, 62.) In September,

Cunningham was deposed in that suit and questioned about his text messages with Bond. (*Id.* ¶ 63.) Also during the deposition, Cunningham falsely denied that the aide he himself had appointed to the City's casino review team (who formerly worked for Bond) had been part of the City's RFQ process. (*Id.* ¶ 64; *see also id.* ¶¶ 9, 39, 42.) This damaging information was not yet in the public record. (*Id.* ¶ 65; R.130-2, Pl. SJ Exs. 48–49; R.130-5, Pl. SJ Ex. 122 at 141:3–141:17.) But on the day of the City Council meeting, Rivers' lawyers played their trump card, threatening to seek a temporary restraining order if the City Council did not vote in favor of Rivers that evening. (*Id.* ¶ 66.)

Just before the start of the October 17 meeting, according to the deposition testimony of one Bond-backed City Council member, Mayor Cunningham advised him "what the vote was going to be" and instructed him to vote accordingly:

> A. So as I sat on the dais waiting for the meeting to start, preparing, as the mayor entered, he came by, he had to pass by my chair, and he said to me, these are the three that ***we*** want to send to Springfield. Right. And ***that was what the vote was going to be.*** Right. ***Put those three down there.***
>
> Q. … And how did he identify the three that they wanted to send down, did he name them or did he point to something?
>
> A. No. He named them.

(R.153 ¶ 69.)

Before the vote, Johnson Consulting's principal, Charles Johnson, addressed the City Council. (*Id.* ¶¶ 71–73.) He advised that "the process does not allow for supplemental information [provided after the RFQ's submission deadline] to be considered," and that such information therefore was not reflected in Johnson Consulting's

report to the City, "nor from a purchasing standpoint can it be from a technical standpoint included in our analysis." (*Id.* ¶ 71.) This statement was false, as both Cunningham and Long knew: Johnson Consulting's report included employment projections—prominently displayed in graph form—that Full House had provided weeks after the submission deadline. (R.130-3, Pl. SJ Ex. 81 at 8, Fig. 4; *see also* R.149 ¶¶ 48–49; R.130-5, Pl. SJ Ex. 133 at 99:9–101:10, 104:23–105:23, 106:22–107:8, 174:12–174:24, 184:20–185:3; R.126-4, Pl. SJ Ex. 86 at 1.)

Johnson told the City Council that all four applicants were "qualified" and "able to deliver the project." (R.153 ¶ 73.) Referring to his firm's report, he remarked, "I think we provided a ranking based upon the information that was available to us based upon the proposals, which we've supplied in our report; but you can't go wrong with either—all four of these bidders, in our judgment." (*Id.*)

As shown in the following table, the four Bond-backed City Council members (Bolton, Seger, Kirkwood, and Turner, in the **orange** rows) voted precisely as Cunningham instructed—against WPC's proposal and in favor of the other three. The two other "pro-casino" members (Moisio and Newsome, in the **green** rows) voted for all four proposals, including WPC's. But because there were three "anti-casino" members (Rivera, Florian, and Taylor) who voted against all the proposals, the Bond-backed members' votes were enough to torpedo WPC's chances:

Council Member	WPC	North Point (Lakeside)	Full House	Rivers
Bolton	No	Yes	Yes	Yes
Seger	No	Yes	Yes	Yes
Moisio	Yes	Yes	Yes	No
Kirkwood	No	Yes	Yes	Yes
Newsome	Yes	Yes	Yes	Yes
Turner	No	Yes	Yes	Yes
Rivera	No	No	No	No
Florian	No	No	No	No
Taylor	No	No	No	No

(R.153 ¶¶ 3, 7, 14–16, 18–24, 74.)

Cunningham subsequently told a reporter that the City had no problem with WPC, but that he believed Johnson Consulting's last-place ranking played into the City Council vote. (R.153 ¶ 75; R.130-5, Pl. SJ Ex. 119 at 118:24–120:15.) A few days later, the City Council voted to reconsider WPC's proposal, but the result was the same, except that Alderperson Florian voted in favor. (R.131 ¶ 60.) Cunningham yelled at Florian for sponsoring the motion to reconsider. (R.153 ¶¶ 77–79.)

The District Court Enters Summary Judgment

WPC originally filed this suit in the Circuit Court of Lake County, Illinois. (R.1, 56.) As amended, its complaint asserted a federal class-of-one claim under the Equal Protection Clause and state-law claims under the Illinois Gambling Act and the Illinois Open Meetings Act. (*Id.*)

Following removal to the district court (R.1), the City answered the Open Meetings Act claim and moved to dismiss the other two claims. (R.12, 14.) Pending a ruling

on that motion, the parties proceeded with discovery. In May 2021, WPC moved, over the City's objection, for leave to file a second amended complaint asserting the same three claims but adding factual detail based on information obtained in discovery. (R.85, 95.)

On March 29, 2024, the district court granted the City's motion for summary judgment on the federal claim, declined to retain supplemental jurisdiction over the state-law claims, and dismissed as moot the still-pending motion to dismiss and motion for leave to amend. (R.171, A1–27.) The district court ruled that, "as a sovereign entity with openly sovereign interests," WPC was "not [a] 'person' entitled to bring a claim under § 1983," and that, even if its interests "could be characterized as non-sovereign in nature," WPC "[did] not fall within the 'zone of interests' protected by § 1983." (A2, A13–A19.) Alternatively, the district court held that WPC "failed to establish a § 1983 Equal Protection violation claim as a matter of law." (A2.) "No reasonable jury," the district court opined, "could find that [WPC] was similarly situated to the other casino license applicants, and sufficient rational bases exist for the City's decision not to certify [WPC]." (*Id.*; A19–27.) This timely appeal followed. (R.174.)

SUMMARY OF THE ARGUMENT

The district court granted the City's summary judgment motion on two alternative grounds: first, that, as an "arm" of the Potawatomi tribe, WPC was not a "person" entitled to sue under § 1983 for violation of its right to equal protection; and, second, that, because there were "conceivable" rational bases for the City's

discriminatory conduct, the evidence could not reasonably support a finding in WPC's favor on its class-of-one equal protection claim. Each of these conclusions requires reversal.

Under the Supreme Court's *Inyo County* decision and its progeny, whether a tribe can sue under § 1983 depends on the nature of the underlying claim. If the tribe's claim does not depend on the tribe's status as a sovereign, then the tribe is a proper § 1983 plaintiff. Here, because WPC's equal protection claim does not depend on any sovereign prerogative, WPC may pursue that claim under § 1983. The district court erred in holding otherwise. In particular, the district court opined that, under *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), WPC was required to show that it fell within the "zone of interests" protected by § 1983. But because § 1983 is merely a vehicle to enforce an underlying right, and because WPC enjoys a right to equal protection under the Fourteenth Amendment, the district court's invocation of *Lexmark* was fundamentally misguided. Further, to the extent the district court held that WPC failed to "establish" a non-sovereign right, the district court confused the question of WPC's tribal *status* with the relevant question—whether WPC's *claim* seeks to vindicate a non-sovereign right. Because WPC's claim does not depend on any assertion of sovereign status, WPC may pursue it via § 1983.

The district court's analysis of WPC's underlying equal protection claim was fundamentally flawed as well. From the evidence, a reasonable jury could find that the City, without a rational basis, intentionally discriminated against WPC through a rigged casino review process that culminated in a sham City Council vote. The

evidence supports the reasonable inference that the City's mayor rigged the process, and dictated a vote against WPC, for reasons unrelated to any legitimate government interest—to minimize competition for a rival developer that had contributed generously to the campaigns of the mayor and allied City Council members. Yet the district court treated WPC's claim as merely challenging an independent vote by the City Council in which any number of factors "conceivably" might have supported each Council member's decision. By entering summary judgment despite evidence that would negate any conceivable rational basis for the City's intentional discrimination, the district court improperly resolved disputed fact issues and set the admittedly high bar for a class-of-one claim at an improperly unattainable level.

Accordingly, this Court should reverse the district court's judgment.

ARGUMENT

Because WPC appeals from an order entering summary judgment, the standard of review is *de novo*. *Mlsna*, 975 F.3d at 633.

I. WPC Is Entitled to Sue Under § 1983 to Enforce Its Non-Sovereign Right to Equal Protection.

The clear teaching of the Supreme Court's *Inyo County* decision is that a tribe may sue under § 1983 to enforce non-sovereign rights. WPC is an Illinois limited liability company, not a tribe. But even assuming that WPC should be deemed an "arm" of the Potawatomi tribe, WPC's equal protection claim does not depend on any sovereign prerogative. Instead, the claim could have been asserted by any private, non-sovereign entity. Accordingly, under *Inyo* County, WPC may pursue that claim via § 1983.

The district court erroneously held that WPC's purportedly sovereign status categorically precluded suit under § 1983. That holding is contrary to *Inyo County*. In addition, the district court erred in at least two other ways. First, the district court conflated the legally relevant question—whether WPC's *claim* asserted non-sovereign rights—with the separate question whether the tribe's sovereign *status* should be imputed to WPC. Second, the district court grafted onto *Inyo County* a "zone of interests" analysis that has no relevance in the context of a § 1983 claim alleging a violation of the constitutional right to equal protection. The district court's ultimate conclusion—that WPC cannot sue under § 1983 because it falls outside the statute's "zone of interests"—was more than just erroneous. It reflects a doctrinal confusion that cries out for correction by this Court.

A. Under *Inyo County*, a tribe may sue under § 1983 to enforce non-sovereign rights.

Section 1983 permits any "person within the jurisdiction" of the United States to sue for a deprivation of federal rights by another "person" acting under color of state law. 42 U.S.C. § 1983.

In *Inyo County*, the Supreme Court considered whether a tribe asserting sovereign rights qualified "*as a claimant*—a 'person within the jurisdiction' of the United States—under § 1983." *Inyo Cnty., Cal. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 709 (2003). There, county law enforcement officers had executed a search warrant for casino employment records kept by the tribe on its reservation. *Id.* at 704. The tribe sued under § 1983 "to vindicate its status as a sovereign immune from state processes under federal law, and to establish that

state law was preempted to the extent that it purported to authorize seizure of tribal records." *Id.* at 706.

The Supreme Court began by acknowledging that, because "'Congress did not intend to override . . . [t]he doctrine of sovereign immunity'" in enacting § 1983, "a State is not a 'person' amenable to suit" under the statute. *Id.* at 709 (quoting *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 67 (1989)). Accordingly, the Court assumed, "for purposes of [its] opinion, that Native American tribes, like States of the Union, are not subject to suit under § 1983." *Id.* But that assumption did not settle the separate question whether a tribe could sue under § 1983. Rather, "qualification of a sovereign as a 'person' who may maintain a particular claim for relief depends not 'upon a bare analysis of the word 'person,' but on the 'legislative environment in which the word appears." *Id.* at 711 (cleaned up) (citing *Pfizer Inc. v. Govt. of India*, 434 U.S. 308, 317 (1978), and *Georgia v. Evans*, 316 U.S. 159, 161 (1942)). Thus, in *Pfizer* and *Evans*, the Supreme Court had held that a foreign nation and a state, respectively, were "persons" entitled to sue under the antitrust laws. *Inyo Cnty.*, 438 U.S. at 711. In both cases, the sovereign's claim arose from its role as a purchaser of a commercial product. *Id.*

In *Inyo County* by contrast, the tribe's claim of "immunity from the County's process" arose "only by virtue of [its] asserted 'sovereign status.'" *Id.* The Supreme Court made a point of noting the absence of any "allegation that the County lacked probable cause or that the warrant was otherwise defective." *Id.* In other words, the tribe did not invoke the Fourth Amendment or other constitutional provision

applicable regardless of sovereign status. "Section 1983 was designed to secure private rights against government encroachment," the Court opined, "not to advance a sovereign's prerogative to withhold evidence relevant to a criminal investigation." *Id.* at 712. Accordingly, the Court held the tribe could not sue under § 1983 "to vindicate *the sovereign right it here claims*." *Id.* (emphasis added); *see also id.* at 704 ("We hold that, *in the situation here presented*, the Tribe does not qualify as a 'person' who may sue under § 1983.").

Since *Inyo County*, the weight of authority has read the Supreme Court's decision as not categorically foreclosing § 1983 suits by tribes. Rather, consistent with *Inyo County*, a tribe may sue under § 1983 if its claim is not "dependent on its status as a sovereign"—*i.e.*, if the claim likewise could be brought by "other private, nonsovereign entities." *Keweenaw Bay Indian Cmty. v. Rising*, 569 F.3d 589, 596 (6th Cir. 2009); *see also Muscogee (Creek) Nation v. Oklahoma Tax Comm'n*, 611 F.3d 1222, 1234 (10th Cir. 2010) ("[T]he viability of a tribe's § 1983 suit depended on whether the tribe's asserted right was of a sovereign nature."); *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 514 (9th Cir. 2005) (en banc) (distinguishing between suits brought in "capacity resembling a private person" and those asserting sovereign rights) (internal quotations omitted); *Keweenaw Bay Indian Cmty. v. Khouri*, 549 F. Supp. 3d 662, 711 (W.D. Mich. 2021) (denying motion for summary judgment on § 1983 claims that "do not depend on [tribe's] status as a sovereign."); *Texas v. Ysleta del Sur Pueblo*, 367 F. Supp. 3d 596, 607 (W.D. Tex. 2019) (concluding that tribe could sue under § 1983 for claim that "could plausibly be asserted by a nonsovereign

entity"); *State Dep't of Health & Soc. Servs., Div. of Family & Youth Servs. v. Native Vill. of Curyung*, 151 P.3d 388, 398–99 (Alaska 2006) (native villages could sue under § 1983 on members' behalf).[6]

In *Rising* for example, the tribe's § 1983 claim alleged that state officials had improperly withheld federal money that the state was obligated to transfer to the tribe for funding social service programs such as Medicaid. 569 F.3d at 594–95. As here, the district court held that the tribe was not a "person" entitled to sue under § 1983 and entered summary judgment for the defendants. *Id.* at 595. The tribe argued that the district court's ruling was erroneous under *Inyo County* because the funds at issue "were not dependent on its sovereign status." *Id.* If that was true, the Sixth Circuit agreed, then the tribe's sovereign status was irrelevant:

> [I]f the [tribe] is correct, the rights at issue accrued to it simply because it provides healthcare and social services; if those rights can otherwise be vindicated under § 1983, the [tribe's] status as a sovereign would not vitiate that ability any more than, for example, Georgia's status as a sovereign would vitiate its ability to sue under the Sherman Act in its capacity as a buyer, *see Evans*, 316 U.S. at 162–63.

Id. at 596. Accordingly, the court of appeals remanded to determine whether the tribe was entitled to the funds only as a matter of sovereignty or "simply because it provides certain social services," in which case the tribe "should be considered a 'person' within the meaning of" § 1983. *Id.*

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[6] In *Reinhard*, the Fourth Circuit held that a state agency, as an arm of the state, "cannot bring suit" under § 1983. *Va. Off. for Prot. & Advoc. v. Reinhard*, 405 F.3d 185, 190 (4th Cir. 2005). *Reinhard* expressly did "not resolve" whether *Inyo County* "depended upon the sovereign nature of the rights that the tribe happened to be asserting, not simply the fact that the tribe was a sovereign entity." 405 F.3d at 187.

Notably, in *Ysleta del Sur Pueblo*, the district court held that a tribe could pursue an equal protection claim under § 1983 based on the allegation that it was "being treated differently than other, *nontribal* entities that offer gambling." 367 F. Supp. 3d at 607. Having carefully considered *Inyo County* and its progeny, the district court applied the following test: was the claim one the tribe could bring "if it were not a sovereign"? *Id.* at 606. If so, then "*Inyo County* should not preclude the claim"—"even if the claim had some relation to the Tribe's sovereignty." *Id.* Because a non-sovereign entity likewise could allege "that the State's enforcement structure violated its rights and singled it out for special treatment," the tribe was not foreclosed from asserting this claim under § 1983. *Id.* at 608. The district court in *Khouri* applied the same test in holding that a tribe could pursue claims under § 1983 that "do not depend on [the tribe's] status as a sovereign." 549 F. Supp. 3d at 711.

Nevertheless, the district court here held that, as "an arm of the Potawatomi Tribe, if not the Tribe itself," WPC was not a "person" that could sue under § 1983—regardless of whether its claim asserted non-sovereign rights. (A13, A17-19.) The district court's analysis cannot be squared with *Inyo County*.

The district court emphasized that a tribe, "[l]ike a State," is not "a 'person' amenable to suit under § 1983." (A17.) Quoting from the Supreme Court's decision in *Cleveland Indians Baseball*, the district court then opined that "courts 'generally presume that identical words used in different parts of the same [statute] are intended to have the same meaning.'" (A18 (quoting *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001)).) Yet *Inyo County* quoted the same passage in full

to convey the *opposite* point. *See Inyo County*, 538 U.S. at 711 ("'**Although** we generally presume that identical words used in different parts of the same act are intended to have the same meaning, **the presumption is not rigid, and the meaning of the same words well may vary to meet the purposes of the law.**'") (quoting *Cleveland Indians Baseball*, 538 U.S. at 711) (emphasis added). Compounding the confusion, the district court cited *Inyo County* for the categorical view that the "'"legislative environment" in which the word ["person"] appears' does not permit a sovereign like Plaintiff to secure private rights against another sovereign's encroachment." (A18 (citing *Inyo County*, 538 U.S. at 711).)

But *Inyo County* rejected precisely this approach, which posits a false equivalence between uses of the word "person" to bar tribal § 1983 claims categorically. As described above, the Supreme Court took pains in *Inyo County* to emphasize that whether a tribe could sue as a claimant under § 1983 did not depend on a "bare analysis of the word 'person.'" 538 U.S. at 711. *Inyo County* cited *Pfizer* and *Evans*, in which the Supreme Court held that sovereigns *were* "persons" entitled to pursue non-sovereign claims. *Id.* And the Supreme Court distinguished in *Inyo County* between the sovereign right claimed there—immunity from state criminal process—and a hypothetical non-sovereign claim based on a Fourth Amendment violation. *Id.* ("There is in this case no allegation that the County lacked probable cause or that the warrant was otherwise defective."). As a matter of statutory analysis and overall emphasis, the district court's opinion could not be more at odds with *Inyo County*.

Indeed, the defendants in *Rising* argued for the same interpretation as the district court's here—that, under *Inyo County*, "'Indian tribes cannot be considered a "'person"' within the meaning of § 1983 and, therefore cannot be claimants under this statute.'" 569 F.3d at 596 n.5. The Sixth Circuit correctly rejected that reading. The defendants' argument, the Sixth Circuit explained, "would render the *Inyo County* Court's focus on 'the "legislative environment" in which the word appears' and its distinction between private rights and sovereign rights completely superfluous and nonsensical, since it could merely have held, as the State suggests, that 'Indian tribes cannot be considered a "person"' and stopped there." *Id.* This critique applies equally to the district court's opinion in this case.

In short, under *Inyo County*, WPC is entitled to sue under § 1983 to assert non-sovereign rights. And as now discussed below, because its equal protection claim is not dependent on sovereign status, WPC may pursue that claim via § 1983.

B. Because WPC's equal protection claim seeks to vindicate a non-sovereign right, WPC may pursue that claim under § 1983.

WPC's equal protection claim does not depend on any tribal prerogative. Instead, it asserts a non-sovereign interest—the right to equal protection under the Fourteenth Amendment. The claim could have been asserted by any hypothetical participant in the City's casino review process, whether sovereign or not. Under *Inyo County*, therefore, WPC qualifies as a § 1983 claimant.

Accordingly, for purposes of summary judgment, WPC argued that the relationship between WPC and the tribe was "irrelevant" because WPC could "bring its claim regardless" of whether it was deemed an "arm" of the tribe. (R.132 at 23.)

Focusing nevertheless on the relationship between WPC and the tribe, the district court opined that WPC had failed to "establish" the non-sovereign nature of its claim. (A17.) To the extent this skepticism provided an alternative basis for the district court's ruling, there are at least two problems with the district court's approach.

First, the district court confused the question of WPC's sovereign *status* with the question whether its *claim* asserted sovereign rights. As just described, only the latter question is relevant. Indeed, the tribe itself was the § 1983 claimant in *Inyo County*, *Rising*, *Khouri*, and *Ysleta del Sur Pueblo*. Again, if the tribe's sovereign status were enough to determine the availability of § 1983, then the Supreme Court could have held in *Inyo County* that "Indian tribes cannot be considered a 'person' and stopped there." *Rising*, 569 F.3d at 596 n.5. Moreover, on the district court's view, it is difficult to understand why *Inyo County* cited *Pfizer* and *Evans*—two cases in which sovereigns were held to be "persons" entitled to sue. In short, contrary to what the district court appeared to assume, WPC's purportedly "sovereign *status*" (A18 (emphasis added)) is not determinative.

Second, even assuming that WPC's relationship to the tribe was somehow relevant to the sovereign or non-sovereign nature of WPC's *claim*, the district court put its thumb on the scale in a way that Rule 56 does not permit. The district court noted the unremarkable fact that WPC, which was a special purpose entity formed to develop and operate a Waukegan casino, "does not have any employees" and that its "expenses are paid for by the Potawatomi Tribe." (A19.) The district court assumed

that WPC "seeks to enjoy the privileges associated with its sovereign status in operating a Waukegan casino tax-free." (A16.)

The district court's characterization is materially incomplete to the point of leaving a misimpression about the evidentiary record. Potawatomi made clear in its proposal that, unlike with its Milwaukee casino, which is operated on trust land under the Indian Gaming Regulatory Act, WPC would be (and in fact was) formed "under Illinois law to apply for and hold the Illinois Owners License issued by the Illinois Gaming Board and to develop and operate the Waukegan Potawatomi Casino"; the casino would be "licensed by the Illinois Gaming Board and operated subject to state and local laws of Illinois." (R.116-10, Ex. 10, First Am. Verified Compl. Ex. 2, Waukegan Potawatomi Casino Proposal, p.1 n.2.) The district court's assumption that WPC would operate the Waukegan casino "tax-free" is incorrect. To be sure, the Potawatomi tribe would be exempt from federal taxation on any profits it earned as WPC's sole member. (R.127 ¶ 84.) But it was undisputed that WPC's effective tax rate on the Waukegan casino (including local and state gaming and admission taxes) would be approximately 27%. (R.127 ¶ 69; R.116, Ex. 35 at 14.) In addition to statutorily mandated gaming taxes, *see* 230 ILCS 10/13(b), WPC's proposal assumed that the casino would be subject to local regulation and real estate taxes. (R.116-10, Ex. 10, First Am. Verified Compl. Ex. 2, Waukegan Potawatomi Casino Proposal, pp. 33–35.) In short, the district court failed to view the facts in the light most favorable to WPC.

But again, the question whether WPC should be deemed a sovereign is a red herring, because its § 1983 claim asserts a non-sovereign right and is therefore permissible under *Inyo County* regardless.

C. The district court erred by applying *Lexmark*'s "zone of interests" test to foreclose WPC's § 1983 equal protection claim.

To conclude that WPC was not a "person" entitled to sue under § 1983, the district court opined that, under *Lexmark,* WPC must fit "within the zone of interests protected by § 1983." (A15; *see also* A13 (same) (citing *Lexmark*).) The district court then determined that WPC did not fall within § 1983's zone of interests. (A19 (citing *Lexmark*, 572 U.S. at 127).) The district court thus applied *Lexmark*'s zone-of-interests test to circumscribe *Inyo County*. In doing so, the district court misconstrued § 1983 and stretched *Lexmark* beyond its proper bounds.

Lexmark itself had nothing to do with § 1983 or the Equal Protection Clause. Unsurprisingly, neither party cited the case below. The question in *Lexmark* was whether the plaintiff's alleged injury was too indirect to permit suit under the Lanham Act. 572 U.S. at 123–24. In that context, the Supreme Court held that whether the plaintiff could state a Lanham Act claim should be determined based on zone-of-interests and proximate-cause principles. *Id.* at 129–34. Here, the district court cited this Court's opinion in *Crabtree* for the proposition that *Lexmark* requires an inquiry into whether a plaintiff "falls within the zone of interests Congress meant to protect in creating a civil cause of action in [§ 1983]." (A14 (citing *Crabtree v. Experian Info. Sols., Inc.*, 948 F.3d 872, 883 (7th Cir. 2020) (insertion in original).) But the district court's bracketed reference to § 1983 has no basis. *Crabtree* was not a § 1983 case.

See 948 F.3d at 883 (*Lexmark* asks whether claim "falls within the zone of interests Congress meant to protect in creating a civil cause of action in **[15 U.S.C.] § 1681b**").[7]

The district court erred in applying a zone-of-interests test to § 1983. Section 1983 does not confer substantive rights but instead "merely provides a mechanism for enforcing individual rights 'secured' elsewhere, *i.e.*, rights independently 'secured by the Constitution and laws' of the United States." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002). When a plaintiff predicates a section 1983 claim on a federal *statute*, there may be a question whether that underlying statute confers an individual right. *See, e.g.*, *Health & Hosp. Corp. of Marion Cnty v. Talevski*, 599 U.S. 166 (2023) (under *Gonzaga*, statutory provisions must unambiguously confer individual federal rights). But there is no such question where, as here, a § 1983 claim is based on a violation of an individual *constitutional right*, particularly the right to equal protection. *See Cotovsky-Kaplan Physical Therapy Assocs., Ltd. v. United States*, 507 F.2d 1363, 1367 n.12 (7th Cir. 1975) ("When the plaintiff is challenging governmental

[7] *Knopick*, *T.S.*, and *McGarry & McGarry*, also cited by the district court (A14–15), are not § 1983 cases either. *See Knopick v. Jayco, Inc.*, 895 F.3d 525, 528–29 (7th Cir. 2018) (involving claim under Magnuson-Moss Warranty Act); *T.S. ex rel. T.M.S. v. Heart of CarDon, LLC*, 43 F.4th 737, 741 (7th Cir. 2022) (involving claim under Patient Protection and Affordable Care Act); *McGarry & McGarry, LLC v. Bankr. Mgmt. Sols., Inc.*, 937 F.3d 1056, 1063 (7th Cir. 2019) (involving antitrust claim). The parenthetical quotation attributed by the district court to *McGarry & McGarry* appears to reflect an error. The language appears to come from this Court's opinion in *Empress Casino*, which involved a RICO claim. *See Empress Casino Joliet Corp. v. Johnston*, 763 F.3d 723, 734 (7th Cir. 2014) (quoting *Lexmark*, 572 U.S. at 127).

action on constitutional grounds, he necessarily is asserting that his interest is protected by the constitutional guarantee upon which he is relying.") (cleaned up).[8]

Put another way, even assuming a zone-of-interests test could be said to apply to § 1983, a plaintiff alleging a violation of a constitutional right falls squarely within the statute's zone of interests. *See Heffernan v. City of Paterson, N.J.*, 578 U.S. 266, 279 (2016) (Thomas, J., dissenting) ("Section 1983 provides a remedy only if the City has violated Heffernan's constitutional *rights*, not if it has merely caused him harm. Restated in the language of tort law, Heffernan's injury must result from activities within the zone of interests that § 1983 protects.").

Indeed, § 1983 "was enacted for the purpose of enforcing the provisions of the Fourteenth Amendment." *Quern v. Jordan*, 440 U.S. 332, 354 (1979) (Brennan, J., concurring); *see also Talevski*, 599 U.S. at 176–77 (explaining that § 1983 was adopted against backdrop of state actor's deprivation of Thirteenth, Fourteenth, and Fifteenth Amendment rights); *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 681 (1978) (Section 1 of the Civil Rights Act of 1871, later codified as § 1983, "simply conferred jurisdiction on the federal courts to enforce § 1 of the Fourteenth Amendment."). The statute "provides a cause of action for all citizens injured by an

[8] Notably, this case does not concern a structural provision of the Constitution, such as the Emoluments Clause or the Commerce Clause, where a question arguably might arise concerning the existence of an individual right. *See Ass'n of Battery Recyclers, Inc. v. E.P.A.*, 716 F.3d 667, 676 n.3 (D.C. Cir. 2013) (Silberman, J., concurring) (recognizing that Supreme Court, in one possibly "anomalous" decision, applied zone-of-interests test to Commerce Clause claim) (discussing *Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 321 n.3 (1977)).

abridgment" of rights protected by, *inter alia*, the Equal Protection Clause. *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 119–20 (1992).

Whether viewed as a sovereign tribe or as a distinct private entity, WPC unquestionably enjoys a right to equal protection under the Fourteenth Amendment, and the City has never contended otherwise. *See generally Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 500–01 (1979) (while federal government may "enact legislation singling out tribal Indians … that might otherwise be constitutionally offensive, … [s]tates do not enjoy this same unique relationship with Indians"); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 883 (1985) (sustaining corporation's equal protection challenge to domestic preference tax statute).

Accordingly, the zone-of-interests test has no meaningful role to play in this case. The district court erred as a matter of law in holding that WPC fell outside § 1983's "zone of interests" and therefore could not sue as a claimant under the statute to vindicate non-sovereign rights secured by the Equal Protection Clause. The district court's misguided analysis should not be allowed to stand uncorrected.

II. Because a Reasonable Jury Could Find That the City Intentionally and Irrationally Discriminated Against WPC, the District Court Erred by Entering Summary Judgment for the City.

To state a class-of-one equal protection claim, a plaintiff must "adequately alleged that the state actor … intentionally discriminated against him without any rational basis for this differential treatment." *Frederickson v. Landeros*, 943 F.3d 1054, 1060 (7th Cir. 2019) (citing *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000)).

Here, from the evidence adduced in discovery, a reasonable jury could find that the City intentionally discriminated against WPC, and that it did so without any

rational basis. WPC's class-of-one claim thus presents a trial-worthy issue. Nevertheless, the district court opined that, because there was a "conceivable state of facts that could have reasonably explained the City's refusal to certify" WPC's proposal, the City was entitled to summary judgment even if those rationales were not the City's "'actual justification.'" (A25–26 (quoting *145 Fisk, LLC v. Nicklas*, 986 F.3d 759, 771–72 (7th Cir. 2021)).)

The district court's "conceivable" justifications all assume that the City Council exercised independent judgment in voting on casino proposals. That is not WPC's theory of the case, and not what the evidence shows when viewed (as it must be) in the light most favorable to WPC. Rather, the evidence supports the inference that Mayor Cunningham—who did not play any official role in selecting casino proposals—dictated the outcome of the City Council's vote to minimize competition for his preferred candidate. Cunningham did so to benefit Bond, a campaign benefactor, not for reasons related to his official duties as mayor. In other words, there is evidence to support a finding that *would* "negate any of 'the reasonably conceivable state of facts'" hypothesized by the district court. (A25–26.) Accordingly, the City was not entitled to summary judgment.

A. Based on the evidence, a reasonable jury could find that Mayor Cunningham rigged the City's casino review process to favor his political benefactor.

Contrary to the district court's assumption, the evidence strongly supports the inference that the City Council did not independently determine whether to support WPC's proposal. Rather, Mayor Cunningham *directed* the Bond-backed City Council members to vote against WPC and in favor of the other three candidates.

Cunningham told Alderperson Turner "what the vote was going to be" and instructed him, "Put those three down there." (R.153 ¶ 69.) This mandatory language cannot be brushed aside as mere lobbying. Moreover, given Cunningham's advance knowledge of what "the vote was going to be," the fair inference is that he gave a similar directive to the other three Bond-backed City Council members, who voted in lockstep to reject WPC's proposal. (Hence Cunningham's reference to "the three that *we* want to send to Springfield." (*Id.*)) Likewise, Cunningham's earlier pronouncement, before the City even had an opportunity to evaluate casino proposals, that the City had a "plan" to certify multiple applicants (*id.* ¶ 38), is compelling evidence of Cunningham's belief in his ability to control the City Council's vote. By instructing the Bond-backed City Council members to vote against WPC rather than exercise their independent judgment, Cunningham intentionally discriminated against WPC.

Notably, Cunningham delivered his directive in a private aside, not publicly. And then, even though Cunningham knew he had dictated the outcome, he told the press that the Johnson Consulting report "played into" the City Council vote. (R.153 ¶ 75; R.130-5, Pl. SJ Ex. 119 at 118:24–120:15.) This false statement is powerful evidence of Cunningham's intention to use Johnson Consulting as window dressing for a rigged process. In fact, the evidence supports the inference that Cunningham's directive to the City Council was the culmination of that rigged process.

From the beginning, Cunningham showed himself disinclined to establish a casino review process with even a semblance of impartiality. Although the task of evaluating casino proposals called for outside expertise, the City did not retain a

consultant. Instead, Cunningham stacked the deck in favor of Bond's group (North Point)—even including a former Bond campaign aide and employee on the mayor's hand-picked casino review team. (R.153 ¶¶ 9, 39, 42.) Cunningham announced the City's "plan" to support multiple applicants in response to the charge that Bond had the "inside track." (*Id.* ¶¶ 37–38.) Given Cunningham's demonstrated inclination to favor Bond, the fair inference is that any additional applicant would be a mere fig leaf. In other words, the goal was to create the appearance of competition while minimizing any threat to Bond's pole position.

Only after a reporter asked pointed questions about Cunningham's casino review team did the City retain an outside consultant, Johnson Consulting. (*Id.* ¶¶ 43–44, 47; R.131 ¶ 16.) Based on the evidence, a jury could infer that Johnson Consulting's analysis was not independent and free of mayoral interference. Corporation counsel Long chose not to alert Johnson Consulting or the City Council that North Point's proposal was contingent on being the City's only selection. (R.153 ¶¶ 51, 52, 56; R.130-5, Pl. SJ Ex. 123 at 6:21–7:16, 8:3–9:19.) As Cunningham knew from Johnson Consulting's initial summary of proposals, Full House's original proposal included no employment projections, even though the City's RFQ featured job creation as a development objective. (R.130-2, Pl. SJ Ex. 44 at 2; R.149 ¶ 48; R.130-3, Pl. SJ Exs. 78, 80; R.126-3, Pl. SJ Ex. 79 at 10; R.130-5, Pl. SJ Ex. 133 at 71:19–72:15.) After the City invited Full House to fill that gaping hole in its submission, corporation counsel Long instructed Johnson Consulting not to consider supplemental information from WPC because the City had not specifically requested it. (R.153 ¶ 61.)

Johnson Consulting then falsely told the City Council that it had not considered supplemental information from *any* applicant. (*Id.* ¶ 71.) Johnson Consulting ranked Full House's proposal first and WPC's last, but at deposition could not explain this ranking. (R.130-5, Pl. SJ Ex. 134 at 228:10–229:11, 239:17–242:21.) In fact, the two Johnson Consulting representatives who worked on the report gave contradictory answers—one testifying, for example, that WPC's high job projections were a relative plus, while the other testified that they were a strike against WPC. (*Compare* R.130-5, Pl. SJ Ex. 133 at 171:23–173:3, 174:12–177:11, *with* R.130-5, Pl. SJ Ex. 134 at 235:9–236:22, 243:11–243:20.)

The evidence supports the inference that, as the proposal seemingly least threatening to North Point, Full House was the mayor's designated fig leaf. As described above, Cunningham knew from Johnson Consulting's summary that Full House presented notable financial weaknesses, including an underwhelming bank reference letter. (R.149 ¶ 48; R.126-3, Pl. SJ Ex. 79 at 14.) In contrast, WPC could self-fund the development of its proposed casino. (*Id.*) WPC's proposal would also generate the greatest employment gains, the most gaming revenue, and (after Rivers) the second-most tax revenue for the City. (R.153 ¶ 57.) WPC thus presented potentially stiff competition for North Point. So too did Rivers, which Johnson Consulting ranked third, behind Full House and North Point. But Rivers had leverage WPC did not—compromising discovery materials obtained in litigation against the City.

Cunningham thus felt compelled to direct votes for Full House and Rivers as well as North Point. But Cunningham could still minimize competition for his favored

applicant by instructing the Bond-backed City Council members to vote *against* WPC. Viewing the evidence in the light most favorable to WPC, that is what occurred.

B. Based on the evidence, a reasonable jury could find that the City acted without any conceivable rational basis.

As just described, the evidence would permit a reasonable jury to find that Cunningham directed the Bond-backed City Council members to vote against WPC as the culmination of a process rigged in Bond's favor. The motive was to minimize competition for Bond, a Cunningham patron who had funded and engineered the election of four pre-vetted City Council members. WPC thus "has identified [its] specific harasser, provided a plausible motive and detailed a series of alleged actions … that appear illegitimate on their face." *Frederickson*, 943 F.3d at 1063 (cleaned up). As a result of Cunningham's machinations, the City Council did not make an independent, informed choice among competing applicants. There is no rational basis—*i.e.*, no legitimate government interest—that would justify rigging the casino review process in this way. *See Cruz v. Town of Cicero*, 275 F.3d 579, 589 (7th Cir. 2001) (hostility stemming from failure to contribute to campaign "falls in the category of 'totally illegitimate animus'" and was not related to town president's duties or "rationally related to a legitimate government interest").

By hypothesizing conceivable reasons why particular City Council members might have voted against WPC's proposal, the district court erred in two related ways. First, the rational basis inquiry necessarily requires a court to identify the particular government action that a plaintiff challenges as irrational. *See, e.g.*, *id.* at 587. The district court assumed that the challenged government action here was a

discretionary vote in the City Council "refusing *to certify* WPC to the [Board]." (A19–20 (emphasis added); *see* A23 (same).). But, as described, the challenged government conduct was not the mere refusal to certify WPC; rather, it was a rigged process that discriminated against WPC throughout and culminated in a sham vote in which a decisive block of City Council members followed the mayor's instruction to vote against WPC for reasons unrelated to the merits of the proposals. The district court's hypothetical rationales for lack of certification (*see* A23–25) do not conceivably justify that series of discriminatory actions leading up to and subverting the final vote.

Second, as this Court has admonished, rational basis review does not suspend well-settled summary judgment principles. Put another way, where, as here, a jury could find facts that negate any proffered rational basis, even as a conceivable possibility, a defendant is not entitled summary judgment. Indeed, in *Frederickson*, even while applying the "conceivable rational basis" standard, this Court cautioned against "slip[ing] into the forbidden realm of disputed facts." 943 F.3d at 1064. The class-of-one claim in *Frederickson* presented a trial-worthy issue despite the defendant officer's proffered rational basis:

> A trier of fact could find that a need to investigate was not the real reason for [the officer's] decision to prevent Frederickson's registering in Bolingbrook [as a sex offender]. That fact-finder could also conclude that there was no need to investigate at all. This is important because an action withstands rational basis review so long as there is "a *conceivable* rational basis for the difference in treatment," regardless of the actual reason for differential treatment. On these facts, a jury could conclude that there was no "objectively rational basis to investigate" Frederickson's move.

943 F.3d at 1066; *see also Cruz*, 275 F.3d at 589 (upholding plaintiff's verdict on class-of-one claim even though "there is certainly evidence in the record which, if believed by a jury, would have put this case in the category of a run-of-the-mill zoning dispute").

Frederickson rejected a petition for rehearing *en banc* and remains good law. As noted, the case applied the "conceivable rational basis" standard that this Court continues to endorse. The upshot of *Frederickson* is that, if a jury could find facts that would render a purportedly "conceivable" rational basis inoperative, then there is a trial-worthy issue. That is precisely the case here. Because a jury could find that there was a rigged process and a sham vote, "conceivable" reasons why a City Council member might vote against WPC in a legitimate contest do not entitle the City to summary judgment. By holding otherwise, the district court improperly usurped the jury's fact-finding role.

C. Based on the evidence, a reasonable jury could find that the City discriminated against WPC for personal motives unrelated to official duties.

The role motive should play in a class-of-one case is unsettled in this Circuit. *See Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887, 888 (7th Cir. 2012) (en banc) (five-five tied vote). As described above, however, there is abundant evidence that the City discriminated against WPC "for reasons of a personal nature unrelated to the duties of the defendant's position"—*i.e.*, to advantage a campaign benefactor. *See Cruz*, 275 F.3d at 589 (hostility stemming from failure to contribute to campaign is form of "totally illegitimate animus"); *see also Frederickson*, 943 F.3d at 1062 (providing examples of animus other than personal hostility, including "an attempt to use

the plaintiff as a scapegoat"); *Del Marcelle*, 680 F.3d at 892 (separate opinion of Posner, J.) (explaining that hostility to plaintiff (animus) was "only one of the reasons of a personal nature unrelated to the duties of the defendant's position") (cleaned up).

It is important to note that Bond was not just an ordinary campaign contributor. He was an advisor to Cunningham, and the two men regularly texted each other on topics that included City government and casino-related developments. (R.153 ¶¶ 26–31.) Bond not only funded the campaigns of his pre-vetted City Council candidates; he furnished them with a ready-made campaign operation. (*Id.* ¶¶ 7, 14.) Bond's video gaming company indirectly financed a legal challenge to primary opponents of two of his successful candidates (Bolton and Seger). (*Id.* ¶ 15.) A third Bond-backed City Council member (Kirkwood) owned a business that earned substantial revenues from Bond's company's video gaming devices. (*Id.* ¶ 25.) The fourth Bond-backed candidate (Turner) was able to repay a loan he made to his own campaign with funds that Bond's campaign finance network provided weeks *after* the City Council election. (*Id.* ¶ 24.)

In addition to these connections, there is evidence that Cunningham and the Bond-backed City Council members testified falsely in discovery to obscure their connections to Bond and his influence over the casino selection process. A jury could find: that Cunningham testified falsely about a former Bond employee's involvement in the casino review process (*id.* ¶¶ 9, 39, 42, 64); that a Bond-backed City Council member testified falsely that he was unaware of connections between his campaign operation and Bond (*id.* ¶¶ 11, 14, 17); and that the Bond-backed City Council members

testified falsely about why they voted against WPC's proposal (R.131 ¶¶ 49–52.) Such deliberate falsehoods are additional and powerful evidence of improper motive.

Therefore, even were this Court to require a class-of-one plaintiff to demonstrate both irrational discrimination *and* improper motive, WPC satisfies this more demanding standard. And even if such proof is not strictly necessary, the evidence of improper motive in this case supports an inference of irrationality and thus underscores the impropriety of summary judgment. *See Frederickson*, 943 F.3d at 1066 ("The presence of animus is powerful evidence of potentially irrational government conduct."); *Brunson v. Murray*, 843 F.3d 698, 708 (7th Cir. 2016) (whether applicable standard "requires [animus] or only allows its use as evidence, the pattern of harassment and discriminatory acts driven by [the mayor's] personal interests … is sufficient to satisfy both the plurality and dissenting opinions in *Del Marcelle*").

D. The district court erred to the extent it granted summary judgment based on a lack of a similarly situated comparator.

As the district court correctly noted, "[w]hether individuals are similarly situation is usually a question of fact reserved for the jury." (A20 (citing *Fares Pawn, LLC v. Ind. Dep't of Fin. Insts.*, 755 F.3d 839, 846 (7th Cir. 2014).) Nevertheless, the district court opined that WPC "fail[ed] to establish that it was similarly situated to the other casino license applicants." (*Id.*) Yet because this Court has "excused failure to comply strictly with the similarly situated requirement where animus is readily apparent" (A22), the district court went on to evaluate whether the evidence could support a finding that the City acted irrationally. To the extent the district court meant

to suggest that summary judgment could be granted for failure to satisfy the "similarly situated" requirement, that conclusion was erroneous, for two reasons.

First, given the strong evidence of improper motive and irrational discrimination in this case, there is no obligation to present a "near exact, one-to-one comparison" to another applicant. *See Frederickson*, 943 F.3d at 1062 ("If animus is readily obvious, it seems redundant to require the plaintiff to show disparate treatment in a near exact, one-to-one comparison to another individual.") (cleaned up) (citing, *inter alia*, *Swanson v. City of Chetek*, 719 F.3d 780, 784 (7th Cir. 2013)); *see also FKFJ, Inc. v. Village of Worth*, 11 F.4th 574, 589 (7th Cir. 2021) (reiterating that Court has "overlooked [the] failure to strictly comply with the similarly situated element in a very limited number of class-of-one cases where animus is readily apparent."); *Brunson*, 843 F.3d at 706 ("Evidence of similarly situated individuals is not required as part of a formalistic mandate, but such evidence may help to establish disparate treatment. … Some cases, however, present the circumstance where disparate treatment is easily demonstrated but similarly situated individuals are difficult to find.").

Second, as discussed, WPC's claim challenges a *process* rigged against it from the start. Or, as the Illinois Appellate Court aptly described in a related case, WPC alleges "that the City engaged in a predetermined sham to certify applicants despite their applications' contingencies and shortfalls while deliberately shutting [WPC] out of the process." *Waukegan Potawatomi Casino*, 227 N.E.3d at 134. Therefore, WPC was similarly situated to other applicants "in all *relevant respects*." *Paramount Media Grp., Inc. v. Vill. of Bellwood*, 929 F.3d 914, 920 (7th Cir. 2019). That is, like the other

applicants, WPC was (in Johnson Consulting's words) a qualified candidate offering "seasoned professionals with skills and resources necessary to deliver a high-quality project to the Waukegan market." (R.130-3, Pl. SJ Ex. 81 at 10.) Again, to determine what comparators are relevant, it is important to focus on the nature of the discrimination. If the City's goal was to make an informed selection from the best pool of competing applicants, there was *a priori* no reason to rig the entire process against a qualified candidate.

The district court opined that being "qualified" was "only necessary—but not sufficient—to meet the requirement of being similarly situated." (A21.) Here again, the district court erroneously framed WPC's claim as merely challenging the City Council's ultimate selection among competing proposals. (A22 ("Given the multifarious terms of the casino applicants' proposals, no reasonable jury could find that the other casino applicants 'identical in all relevant respects.'"). But because a jury could find that the City Council did not make an independent selection following a nondiscriminatory process, to focus on the proposals' "multifarious terms" is to employ the wrong comparative lens.

* * *

In sum, WPC's equal protection claim presents genuine issues of material fact that must be decided by a jury.

CONCLUSION

For the above reasons, WPC respectfully requests that the Court reverse the district court's judgment and remand for further proceedings.

Dated: June 10, 2024

Respectfully submitted,

/s/ Dylan Smith

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the typeface requirement of Fed. R. Civ. P. 32(a)(5) and Cir. R. 32(b), and the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and Cir. R. 32(c), because (i) it has been prepared in a proportionally spaced typeface using Microsoft Word version 2404 in 12-point Century Schoolbook font, and (ii) excluding the parts of the brief exempted by Fed. R. App. 32(f), the brief contains 12,280 words.

Dated: June 10, 2024

/s/ *Dylan Smith*
Dylan Smith

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WAUKEGAN POTAWATOMI CASINO, LLC, an Illinois limited liability company, Plaintiff, v. CITY OF WAUKEGAN, an Illinois municipal corporation, Defendant.	No. 20-cv-00750 Judge John F. Kness

MEMORANDUM OPINION AND ORDER

This case arises from the City of Waukegan's refusal to certify Plaintiff, an arm of the Potawatomi Indian Tribe, to the Illinois Gaming Board for the issuance of a casino license. After the Illinois legislature amended the Illinois Gambling Act to authorize its Gaming Board to issue one casino license in the City of Waukegan, the City invited prospective casino applicants to submit their proposals for a casino at available sites. Four experienced casino operators submitted their materials. Under the Illinois statute, to be eligible for consideration by the Gaming Board, casino applicants had to first obtain the City's certification. And to obtain a City certification, the statute provided certain prerequisites. On October 17, 2019, the City Council voted against certifying Plaintiff to the Gaming Board. On October 21, 2019,

the City granted Plaintiff's motion to reconsider and again voted against certifying Plaintiff.

Plaintiff originally filed this lawsuit in state court on October 21, 2019, a few hours before the City voted on Plaintiff's motion for reconsideration. The City removed the case to federal court based on federal question and supplemental jurisdiction. Plaintiff's operative complaint includes one claim under 42 U.S.C. § 1983 on the ground that the Gaming Board intentionally discriminated against Plaintiff by refusing to certify it to the Gaming Board in violation its Fourteenth Amendment Equal Protection rights, and two state-law claims under the Illinois Gambling Act and the Illinois Open Meetings Act. The City has since filed a motion for summary judgment.

As explained more fully below, Plaintiff, as a sovereign entity with openly sovereign interests, is not "person" entitled to bring a claim under § 1983. Even if Plaintiff's interests could be characterized as non-sovereign in nature, Plaintiff nevertheless does not fall within the "zone of interests" protected by § 1983. In any event, Plaintiff has failed to establish a § 1983 Equal Protection violation claim as a matter of law. No reasonable jury could find that Plaintiff was similarly situated to the other casino license applicants, and sufficient rational bases exist for the City's decision not to certify Plaintiff. Accordingly, Defendant's motion for summary judgment is granted, and the Court declines to retain jurisdiction over Plaintiff's remaining state-law claims.

I. BACKGROUND

Plaintiff Waukegan Potawatomi Casino LLC ("WPC") is an Illinois limited liability company fully owned by the Forest County Potawatomi Community of Wisconsin, descendants of the Potawatomi Indian Tribe (the "Potawatomi Tribe"). (Response to Defendant's Statement of Material Facts, ("Resp. Def. SOF"), Dkt. 127 (filed under seal) ¶¶ 12, 66–67.) The Potawatomi Tribe, doing business as the Potawatomi Hotel & Casino, formed Plaintiff WPC on October 11, 2019. (*Id.* ¶¶ 14, 70.) The Potawatomi Tribe is the sole member of Plaintiff WPC. (*Id.* ¶ 12.) The Potawatomi Tribe is a government and has a government-to-government relationship with the federal government. (*Id.* ¶ 62.) Plaintiff's board of directors was appointed by the Potawatomi Tribe, which also pays Plaintiff's bills. (*Id.* ¶¶ 81, 83.) Plaintiff does not have any employees and did not have a bank account in 2019. (*Id.* ¶¶ 74, 82).

On June 28, 2019, Illinois Senate Bill 690 went into effect, amending the Illinois Gambling Act to authorize the Illinois Gambling Board ("IGB") to issue a casino license in the City of Waukegan, Illinois. (Resp. Def. SOF ¶¶ 1, 2); *see also* 230 ILCS § 10/7(e-5). Under the statute, the IGB was required to consider issuing a license "only after the [City of Waukegan] has certified to the Board" certain information. *Id.* To be eligible for consideration by the IGB, the City of Waukegan had to certify:

> (i) That the applicant has negotiated with the corporate authority or county board in good faith;
> (ii) That the applicant and the corporate authority or county board have mutually agreed on the permanent location of the riverboat or casino;

> (iii) That the applicant and the corporate authority or county board have mutually agreed on the temporary location of the riverboat or casino;
> (iv) That the applicant and the corporate authority or county board have mutually agreed on the percentage of revenues that will be shared with the municipality or county, if any;
> (v) That the applicant and the corporate authority or county board have mutually agreed on any zoning, licensing, public health, or other issues that are within the jurisdiction of the municipality or county;
> (vi) That the corporate authority or county board has passed a resolution or ordinance in support of the riverboat or casino in the municipality or county;
> (vii) The applicant for a license under paragraph (1) has made a public presentation concerning its casino proposal; and
> (viii) The applicant for a license under paragraph (1) has prepared a summary of its casino proposal and such summary has been posted on a public website of the municipality or the county.
>
> *Id.*

The statute further provides:

> At least 7 days before the corporate authority of a municipality or county board of the county submits a certification to the Board concerning items (i) through (viii) of this subsection, it shall hold a public hearing to discuss items (i) through (viii), as well as any other details concerning the proposed riverboat or casino in the municipality or county. The corporate authority or county board must subsequently memorialize the details concerning the proposed riverboat or casino in a resolution that must be adopted by a majority of the corporate authority or county board before any certification is sent to the Board. The Board shall not alter, amend, change, or otherwise interfere with any agreement between the applicant and the corporate authority of the municipality or county board of the county regarding the location of any temporary or permanent facility.
>
> *Id.*

On July 3, 2019, the City of Waukegan issued a Request for Qualifications and Proposals ("RFQ/P") for those applicants seeking certification by the City to the IGB. (Resp. Def. SOF ¶ 4.) The RFQ/P required applicants to submit materials by August

5, 2019, including property specifications and locations, a description of the proposed development, project team experience, and financial data. (*Id.* ¶¶ 6–7.) Five applicants responded to the RFQ/P with proposals for a casino, but one withdrew. (*Id.* ¶ 8.) The remaining four applicants were: (1) Lakeside Casino LLC ("North Point"); (2) CDI-RSG Waukegan, LLC ("Rivers"); (3) Full House Reports, Inc. ("Full House"); and (4) the Potawatomi Tribe, doing business as the Potawatomi Hotel & Casino (which later formed Plaintiff WPC). (*Id.* ¶¶ 8, 63, 70.)

Each applicant had experience in the casino business. North Point's casino operator, Warner Gaming, operates six casino properties in four states. (*Id.* ¶ 9.) Full House is a publicly traded company that runs five casinos in four states. (*Id.* ¶ 10.) Rivers is owned by Rush Street Gaming and Churchill Downs Incorporated; Rush Street operates four casinos in three states and Churchill Downs is a publicly traded company. (*Id.* ¶ 11.) The Potawatomi Tribe, doing business as the Potawatomi Hotel & Casino, operates two tribal casinos in Wisconsin: one in Milwaukee and the other in Carter. (*Id.* ¶¶ 13–14, 64–65.)

Under the gaming compact between Wisconsin and the Potawatomi Tribe for its casinos, the Potawatomi Tribe is required to pay the State annually 6.5% of net win for the previous fiscal year. (*Id.* ¶ 69.) The annual combined gaming tax and admission fee rates for a Waukegan casino, however, would be over 27%. (*Id.*) The median household income levels for the City of Waukegan are below state and national averages. (*Id.* ¶ 34.) According to a feasibility study and economic analysis prepared for the Potawatomi Tribe, an overwhelming majority of potential gaming

revenue for the proposed casino would emanate from within a 35-mile radius of the casino. (*Id.* ¶ 35.)

For the Potawatomi Tribe, the casino in Waukegan would be an investment made on behalf of a sovereign entity, rather than a private commercial investor. (*Id.* ¶ 84.) The Potawatomi Tribe views the City of Waukegan as within its formally occupied homelands and views its sovereignty as inextricably linked with these former tribal lands. (*Id.* ¶ 76.) The casino in Waukegan would be exempt from federal income tax because it is owned by a tribal entity and would operate for the benefit of its tribal members. (*Id.* ¶¶ 84–85.) As talking points for tribal members on operating a casino in Waukegan, the Potawatomi Tribe noted that it would be the best way to mitigate some of the financial losses at its Milwaukee casino, that it was "consistent with [the] Tribal goal of reclaiming land and commerce in treaty territory," and that it would be a natural progression for the Potawatomi Tribe. (*Id.* ¶ 75.)

On September 18, 2019, the casino applicants gave public presentations on their proposals. (*Id.* ¶ 17.) During the hearing, with approximately 500 people in attendance, the City heard from 44 people and reviewed 17 written comments. (*Id.* ¶ 20.) The City thereafter held the public comment period open for another 17 days, during which it received another 1,249 written or emailed comments. (*Id.* ¶ 21.) The City also received comments from 26 people during its October 7, 2019, City Council Meeting. (*Id.* ¶ 22.)

Each applicant proposed different terms for the development of a casino at the Fountain Square property in Waukegan. Rivers proposed to purchase the site for $11

million or to offer a long-term lease. (*Id.* ¶ 25.) Full House proposed to enter into a 99-year lease with the City for 2.5% of gaming revenues, subject to a minimum annual guarantee of $3 million, with an option to buy the site for $30 million at any time during the lease term. (*Id.*) North Point proposed $22 million for the site, with an initial payment of $10 million and another $1 million paid annually over twelve years. (*Id.*) Plaintiff WPC proposed to purchase the site for an amount equal to "+/- 15%" of the appraised value of the property. (*Id.* ¶ 26.) On June 13, 2019, the Fountain Square property was valued at $5,625,000. (*Id.* ¶ 27.)[1]

Each applicant proposed a casino of different square footage and with a different number of gaming positions. (*See id.* ¶¶ 36–40.) Full House proposed a casino of 75,000 square feet with 1,670 gaming positions. (*Id.* ¶ 36.) North Point proposed a casino of 53,500 square feet with 1,332 gaming positions. (*Id.* ¶ 37.) Rivers proposed a casino with 1,625 gaming positions and did not disclose its proposed square footage. (*Id.* ¶ 38.) Plaintiff WPC proposed a casino of 130,000 square feet with 1,890 gaming positions. (*Id.* ¶ 39.)

Plaintiff's proposal was projected to create the most annual employment, generate the second-most gaming/admission taxes (after Rivers), and generate the most gaming revenue. (Response to Plaintiff's Statement of Additional Material Facts, ("Resp. Pl. SOF") Dkt. 149 (filed under seal) ¶ 57.) Unlike Plaintiff's proposal,

[1] Plaintiff admits that it proposed "+/- 15%" of the appraised value of the property. (Resp. Def. SOF ¶ 26.) Plaintiff contends, however, that its proposal "assumed an appraisal valuing Fountain Square as a casino site" and not its "existing, non-public City appraisal that assumed Fountain Square's highest and best use was other than as a casino site." (*Id.*) Plaintiff disputes that the June 13 appraisal, which predated SB 690's coming into law, valued Fountain Square as a casino site or was an appropriate measure of its offer. (*Id.* ¶ 27.)

however, the proposals by Full House and North Point featured an entertainment complex and additional phases that could include the addition of a hotel. (Resp. Def. SOF ¶¶ 29–30.) Also, the proposals by Rivers, Full House, and North Point included an option for creating a temporary casino. (*Id.* ¶ 31.) Plaintiff's proposal did not include an entertainment complex or a temporary casino. (*Id.* ¶ 32.)

Johnson Consulting, the consulting group retained by the City to evaluate the proposals, ranked Plaintiff last among the applicants. (Resp. Pl. SOF ¶ 58.) The Johnson Consulting report included a "score matrix" that assigned Full House the best "overall ranking," followed by North Point, Rivers, and, in last place, Plaintiff. (*Id.*)

On October 4, 2019, Plaintiff delivered a letter to the City providing a revised offer of $12 million for the Fountain Square Parcel. (Resp. Def. SOF ¶ 43.) On October 10, 2019, Johnson Consulting delivered a summary report of the proposals (the "Johnson Report"). (Resp. Pl. SOF ¶ 53.) The Johnson Report did not include supplemental information provided after the RFP/Q's submittal date. (*Id.* ¶ 71.) The City was also advised by its counsel that it could not consider supplemental information from applicants, including Plaintiff WPC's October 4 letter, unless the City requested the information itself. (*Id.* ¶ 61.) The City did not engage in negotiations with any of the casino applicants during the RFP/Q process. (*Id.* ¶ 67.)

On October 17, 2019, the City Council met in a special session. (Resp. Def. SOF ¶ 45.) During the meeting, a representative from Johnson Consulting stated that all four bidders were "qualified" and "able to deliver the project," and the City "can't go wrong" with any of the four proposals. (Resp. Pl. SOF ¶ 73.) At the meeting, the City voted to certify North Point, Full House, and Rivers to the IGB. (Resp. Def. SOF ¶ 47.) The City voted against certifying Plaintiff by a vote of 7-2. (*Id.* ¶ 48.) A table summarizing the votes is reproduced below:

Council Member	Potawatomi	North Point (Lakeside)	Full House	Rivers
Bolton	No	Yes	Yes	Yes
Seger	No	Yes	Yes	Yes
Moisio	Yes	Yes	Yes	No
Kirkwood	No	Yes	Yes	Yes
Newsome	Yes	Yes	Yes	Yes
Turner	No	Yes	Yes	Yes
Rivera	No	No	No	No
Florian	No	No	No	No
Taylor	No	No	No	No

(Resp. Pl. SOF ¶ 74.)

The City Council members provided different reasons for not certifying Plaintiff's proposal to the IGB. Alderman Bolton "was looking [for] a proposal that would offer more than just a casino[,] but also [a] theater [and] entertainment,

restaurants, [and] things [that] would give us as the city an opportunity to develop economically." (Resp. Def. SOF ¶ 49.) Alderman Seger found Plaintiff's presentation to be short and fast, and its approach seemed to be "hurry up and get it done." (*Id.* ¶ 50.) Alderman Kirkwood found Plaintiff's proposal lacked detail and transparency with respect to the offer price. (*Id.* ¶ 51.) Alderman Turner believed Plaintiff was asking for special consideration as an Indian Tribe and found that to be "a turnoff." (*Id.* ¶ 52.)[2] Aldermen Rivera, Florian, and Taylor voted against all the casino applicants. (*Id.* ¶ 53.)

The day after the City Council's vote, the Potawatomi Tribe delivered a letter[3] to the City requesting that it reconsider its certification vote. (Resp. Def. SOF ¶ 54.) On October 21, 2019, Aldermen Florian and Riviera met with Jeffrey Crawford, the Attorney General of the Forest County Potawatomi Community, and Malcolm Chester, an Illinois gaming legislation monitor for the Potawatomi Tribe. (*Id.* ¶¶ 42, 56.) At the meeting, Crawford communicated that, because the motion for reconsideration had not been placed on the City Council's agenda, the Potawatomi

[2] Alderman Turner also testified that, before the October 17 meeting began, Mayor Samuel Cunningham told him, "[T]hese are the three that we want to send to Springfield. Right. And that was what the vote was going to be. Right. Put those three down there." (Resp. Pl. SOF ¶ 69.) Under Plaintiff's theory of the case, a former Illinois State Senator, Michael Bond, dictated the results of the casino selection process by leading Mayor Samuel Cunningham—for whom Bond was a campaign benefactor—to direct Aldermen Bolton, Seger, Kirkwood, and Turner to vote against Plaintiff and in favor of North Point, of which Bond was a founding partner. (*See* Dkt. 128 at 2–7.) Alderman Turner's admission, to the extent Plaintiff proffers it as evidence of intent or animus towards Plaintiff, is negated by the existence of rational bases, as explained more fully below.

[3] The letter was signed by Jeffrey Crawford in his capacity as the Attorney General of the Forest County Potawatomi Community and bore the letterhead of the Forest County Potawatomi Community Legal Department. (Def. SOF Resp. ¶¶ 55–56.)

Tribe was preparing litigation. (*Id.* ¶ 56.) At some time before 3:30 p.m. on that same day, Plaintiff filed this lawsuit. (*Id.* ¶ 58.) At some time after 7:00 p.m. on that same day, a majority of the City Council voted to approve the motion for reconsideration. (*Id.* ¶¶ 59–60.) On reconsideration, the City Council again voted against certifying Plaintiff WPC by a vote of 6-3, with Alderman Florian now voting in favor of certifying Plaintiff's proposal. (*Id.* ¶ 60.)

Plaintiff filed this action in state court on October 21, 2019. (Dkt. 1.) The City removed the case on January 31, 2020, based on federal question and supplemental jurisdiction. (*Id.*) The First Amended Complaint raises claims for violation of Plaintiff's Fourteenth Amendment Equal Protection rights (Count I), the Illinois Gambling Act (Count II), and the Illinois Open Meetings Act (Count III). (*Id.*)

On February 14, 2020, the City filed a motion to dismiss Counts I and II of the First Amended Complaint. (Dkt. 12.) On May 14, 2021, three days before fact discovery was set to close (*see* Dkt. 77), Plaintiff filed an opposed motion for leave to file a second amended complaint. (Dkt. 85.) The proposed Second Amended Complaint raises the same three causes of action. (Dkt. 86 (filed under seal).) On September 21, 2021, the City filed a motion for summary judgment that is intended to "apply with equal force to either version of the complaint." (Dkt. 114 at 3 n.2.) For the reasons that follow, the City's motion for summary judgment is granted, and the remaining motions are dismissed as moot.

II. LEGAL STANDARD

Summary judgment is warranted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Jewett v. Anders*, 521 F.3d 818, 821 (7th Cir. 2008) (quoting *Magin v. Monsanto Co.*, 420 F.3d 679, 686 (7th Cir. 2005)); *see also* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. As the " 'put up or shut up' moment in a lawsuit, summary judgment requires a non-moving party to respond to the moving party's properly-supported motion by identifying specific, admissible evidence showing that there is a genuine dispute of material fact for trial." *Grant v. Trs. of Ind. Univ.*, 870 F.3d 562, 568 (7th Cir. 2017) (quotations omitted). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). All facts, and any inferences to be drawn from them, are viewed in the light most favorable to Plaintiff as the nonmoving party. *See Scott v. Harris*, 550 U.S. 372, 378 (2007).

III. DISCUSSION

Plaintiff contends that, by not voting to certify its proposal to the IGB, the City discriminated against Plaintiff without any rational basis in violation of its Fourteenth Amendment rights under the Equal Protection clause, disregarded the requirements of the Illinois Gambling Act, and violated the Illinois Open Meetings Act. Defendant argues that summary judgment is appropriate as to all claims because: (1) Plaintiff cannot bring suit under 42 U.S.C. § 1983 as an arm of the Potawatomi Tribe and, even if it could, Plaintiff cannot prove that it was similarly situated or that the City acted irrationally in refusing to certify its proposal; (2) Plaintiff's state-law claims are barred by the Tort Immunity Act;[4] and (3) in the alternative, Plaintiff cannot establish either its ability to invoke the Illinois Gambling Act or that the City failed to comply with the Open Meetings Act. For the following reasons, the Court holds that Plaintiff cannot bring a constitutional claim under § 1983 and, even if it could, Plaintiff has failed to establish the necessary elements of the claim as a matter of law.

A. Plaintiff Is Not a "Person" Under 42 U.S.C. § 1983

As a preliminary matter, to bring a § 1983 claim against the City, Plaintiff must "fall within the zone of interests" protected by that statute. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). The controlling question in a "zone of interests" inquiry is "whether a legislatively conferred cause of action

[4] In its motion for summary judgment, Defendant argues that the Illinois Tort Immunity Act affords it "absolute immunity" against all claims. (*See* Dkt. 114 at 9–11.) Defendant later concedes in its Reply that the Act does not apply to Plaintiff's constitutional claim under § 1983. (Dkt. 148 at 7 n.5.)

encompasses a particular plaintiff's claim." *Id.* at 127. In making this determination, *Lexmark* prescribes applying "traditional principles of statutory interpretation." *Id.* at 128. What earlier cases described as "prudential standing" or "statutory standing," permitting courts to dismiss actions *sua sponte*, *Lexmark* reframed as a determination "on the merits whether the party had a cause of action under the statute." *Knopick v. Jayco, Inc.*, 895 F.3d 525, 529 (7th Cir. 2018); *Lexmark*, 572 U.S. at 128 n.4 (although "statutory standing" is "an improvement" over "prudential standing . . . [,] it, too, is misleading, since the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case." (cleaned up)).

As the Seventh Circuit has since explained, *Lexmark* requires both an Article III standing inquiry "and, separately, [an inquiry into] whether [Plaintiff] falls within the zone of interests Congress meant to protect in creating a civil cause of action in [§ 1983]." *Crabtree v. Experian Info. Sols., Inc.*, 948 F.3d 872, 883 (7th Cir. 2020); *see also T.S. ex rel. T.M.S. v. Heart of CarDon, LLC*, 43 F.4th 737, 741 (7th Cir. 2022) (interpreting the zone-of-interests doctrine to first require ascertainment of the interests to be protected by a statute, and then whether the interests claimed by the plaintiff are within those protections). With respect to Article III standing, the answer is straightforward: Plaintiff, by not having its proposal certified by the City Council as a result of alleged discrimination, suffered a redressable injury-in-fact that is traceable to the City. Under *Lexmark*, however, "identifying an injury is not the same as locating a viable statutory cause of action." *Crabtree*, 948 F.3d at 883; *see also T.S.*

ex rel. T.M.S., 43 F.4th at 741 ("There may be some overlap between zone-of-interests and merits analyses, but a court must take care not to conflate the two."). Accordingly, the Court must determine whether Plaintiff fits within the zone of interests protected by § 1983 and, therefore, has a cause of action under the statute. *See id.*; *see also McGarry & McGarry, LLC v. Bankr. Mgmt. Sols., Inc.*, 937 F.3d 1056, 1063 (7th Cir. 2019) ("whether a plaintiff may sue is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim" (internal quotations omitted)).

In *Inyo County, California v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*, the Supreme Court held that a Native American Tribe "does not qualify as a 'person' who may sue under § 1983." 538 U.S. 701, 704 (2003). In so holding, *Inyo* relied specifically on the nature of the "sovereign right" that the plaintiff, a Native American tribe, was attempting to vindicate, rather than "upon a bare analysis of the word 'person.' " *See id.* at 711–12. The plaintiff in *Inyo* sought relief under § 1983 on the grounds that a District Attorney's search warrant violated its Fourth and Fourteenth Amendment rights and its right to self-government. *Id.* at 706. *Inyo* reasoned that, because § 1983 was designed "to secure private rights against government encroachment, not advance a sovereign's prerogative[,]" the plaintiff's § 1983 claim, asserted "by virtue of [the plaintiff's] 'sovereign' status," did not fall within "legislative environment" of the statute. *Id.*

Plaintiff does not dispute that it is "an arm of" the Potawatomi Tribe, a sovereign Native American Tribe, and therefore enjoys sovereign privileges (*see* Dkt.

128 at 23); instead, Plaintiff argues that, unlike the plaintiff in *Inyo*, its equal protection claim is not based on a sovereign interest but is "one any casino applicant could bring, regardless of tribal status." (Dkt. 128 at 25.) Indeed, *Inyo* did not definitively resolve whether a sovereign could sue under § 1983 to vindicate non-sovereign rights. *See id.* at 711 (suggesting a distinction between an "allegation that the [defendant] lacked probable cause or that the warrant was otherwise defective" and the Tribe relying "only" on its " 'sovereign' status [to] claim[] immunity from the [defendant's] processes"). But *Inyo* does not foreclose such a result either.[5] Nor is it clear that Plaintiff's interest in this suit is non-sovereign.

As the record reflects, Plaintiff WPC is 100% owned by the Potawatomi Tribe and was formed in October 2019 by the Potawatomi Tribe, doing business as the Potawatomi Hotel & Casino. (Resp. Def. SOF ¶¶ 12, 64–67.) It is undisputed that Plaintiff is an arm of a sovereign government, seeks to enjoy the privileges associated with its sovereign status in operating a Waukegan casino tax-free, views its sovereignty as "inextricably linked" with the City of Waukegan, and believes that operating a casino would be "consistent with the Tribal goal of reclaiming land and commerce in treaty territory." Based on the foregoing, it is a Gordian knot to untangle Plaintiff's sovereign status and conspicuously sovereign interests in getting certified

[5] Since *Inyo*, several circuits have provided different answers to that question in differing contexts. *Compare Va. Off. for Prot. & Advoc. v. Reinhard*, 405 F.3d 185, 190 (4th Cir. 2005) (holding a state agency as "an arm of the state" cannot constitute a "person" under § 1983 because it is a sovereign entity), *with Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1234 (10th Cir. 2010) *and Keweenaw Bay Indian Cmty. v. Rising*, 569 F.3d 589, 596 n.5 (6th Cir. 2009) (rejecting the argument that an Indian tribe can never constitute a "person" under § 1983). The Seventh Circuit has not weighed in on the issue.

for a casino license from its putative "non-sovereign" interests. Even if, as Plaintiff argues, a sovereign could assert a § 1983 claim if the claim was not dependent on its status as a sovereign, Plaintiff fails to identify what its supposed "non-sovereign" interests would be under the circumstances. (*See* Dkt. 128 at 23–25.) Given the clear evidence of Plaintiff's sovereign interests, and absent evidence of Plaintiff's "non-sovereign" interests, Plaintiff does not qualify as a § 1983 plaintiff. *Inyo*, 538 U.S. at 704.

To the extent Plaintiff's interest in this suit can be hypothetically distinguished as "non-sovereign"—which, even drawing all reasonable inferences in Plaintiff's favor, Plaintiff has not established—*Inyo* does not preclude a finding that Plaintiff does not fall "within the zone of interests" protected by § 1983. Like a State, which the Supreme Court has previously held not to be a "person" amenable to suit under § 1983, *Will v. Mich. Dep't of State Po.*, 491 U.S. 58 (1989), a Tribe cannot be sued under § 1983, *Inyo*, 538 U.S. at 709 (citing *Kiowa Tribe of Okla. v. Mnfg. Tech., Inc.*, 523 U.S. 751, 754 (1998) ("an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity")). This is because, in enacting § 1983, "Congress did not intend to override well-established immunities or defenses under the common law," such as "[t]he doctrine of sovereign immunity." *Id.* at 709 (quoting *Will*, 491 U.S. at 67). This is consistent with the Court's "longstanding interpretive presumption that 'person' does not include the sovereign" absent "some affirmative showing of statutory intent to the contrary." *Id.* (citing *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 780–81 (2000)).

Section 1983 permits "citizen[s]" and "other *person*[*s*] within the jurisdiction" of the United States to seek legal and equitable relief from "person[s]" who, under color of state law, deprive them of federally protected rights. 42 U.S.C. § 1983 (emphasis added). Applying "traditional principles of statutory interpretation," *Lexmark*, 572 U.S. at 128, courts "generally presume that identical words used in different parts of the same [statute] are intended to have the same meaning." *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001). Congress's decision to use the word "person" to describe both the intended plaintiff and intended defendant under the statute, therefore, creates a presumption that those who are not "person[s]" amenable to suit under § 1983 cannot then also qualify as a "person within the jurisdiction" of the United States to bring a claim under § 1983.

Notwithstanding the traditional principles of statutory interpretation, the " 'legislative environment' in which the word ['person'] appears" does not permit a sovereign like Plaintiff to secure private rights against another sovereign's encroachment. *Inyo*, 538 U.S. at 711. Plaintiff is not "like other private persons" that "would have no right to immunity." *Id.* at 712. It follows that a sovereign, like Plaintiff, cannot both benefit from the immunities of § 1983 as a potential defendant as well as its protections as a potential claimant. *See Muscogee*, 611 F.3d at 1236 ("Of course, a 'person' within the meaning of § 1983 possesses neither 'sovereign rights' nor 'sovereign immunity.' ").

Plaintiff does not dispute its sovereign status and, therefore, its accompanying sovereign privileges. The Potawatomi Tribe is the sole member of WPC and enjoys a

government-to-government relationship with the federal government. (Resp. Def. SOF ¶¶ 12, 62.) Plaintiff's board of directors were all appointed by the Potawatomi Tribe. (*Id.* ¶ 81.) Until October 19, 2019, when Plaintiff was formed by the Potawatomi Tribe, all communications to the City on behalf of, what is now, Plaintiff, were made by representatives of the Potawatomi Tribe. (*See, e.g.*, *id.* ¶¶ 55–56.) In essence, Plaintiff WPC, which does not have any employees (*id.* ¶ 74) and whose expenses are paid for by the Potawatomi Tribe, is undisputedly an arm of the Potawatomi Tribe, if not the Tribe itself. *Cf. Holtz v. Oneida Airport Hotel Corp.*, 826 F. App'x 573, 574 (7th Cir. 2020) ("[W]e have not yet had occasion to consider the application of the 'arm of the tribe' test."). As a sovereign Native American Tribe, or at least an arm of one, Plaintiff is immune from suit under § 1983. *See Muscogee*, 611 F.3d at 1236. Plaintiff does not "fall within the zone of interests" protected by § 1983, *see Lexmark*, 572 U.S. at 127, and thus ought to be precluded from converting the defensive shield of § 1983 into an offensive sword. Accordingly, Plaintiff cannot maintain a § 1983 action against Defendant.

B. Plaintiff's § 1983 Claim Fails as a Matter of Law

Even if Plaintiff were a "person" within the meaning of the statute, Plaintiff fails to establish an Equal Protection violation as a matter of law. Plaintiff argues that Defendant singled it out for disparate treatment without a rational basis in violation of its Fourteenth Amendment rights. Specifically, Plaintiff claims that the

City, by refusing to certify Plaintiff to the IGB, intentionally treated Plaintiff less favorably than other similarly situated applicants.

The Equal Protection Clause of the Fourteenth Amendment protects individuals from governmental discrimination. U.S. Const. amend. XIV, § 1. A plaintiff who is not a member of a "protected class" may bring an Equal Protection claim under a "class-of-one theory." *Fares Pawn, LLC v. Ind. Dep't of Fin. Insts.*, 755 F.3d 839, 841 (7th Cir. 2014) (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). To succeed under this theory, Plaintiff must establish that: (1) defendant intentionally treated it differently from others who were similarly situated, and (2) there is no rational basis for the difference in treatment. *Id.* at 845. So long as a "reasonably conceivable state of facts" exist to explain the disparate treatment—even if it is not "the actual justification"—sufficient rational basis exists as a matter of law. *145 Fisk, LLC v. Nicklas*, 986 F.3d 759, 771 (7th Cir. 2021) (internal citations omitted); *see also Miller v. City of Monona*, 784 F.3d 1113, 1121 (7th Cir. 2015) ("Even at the pleading stage, all it takes to defeat a class-of-one claim is a conceivable rational basis for the difference in treatment." (cleaned up)).

1. *Plaintiff fails to establish that it was similarly situated to the other casino license applicants.*

The Court turns first to the similarly situated requirement. Whether individuals are similarly situated is usually a question of fact reserved for the jury. *Fares Pawn*, 755 F.3d at 846 (quoting *McDonald v. Village of Winnetka*, 371 F.3d 992, 1002 (7th Cir. 2004)). But summary judgment is appropriate where it is clear that "no reasonable jury could find that the similarly situated requirement ha[s] been

met." *Id.* And the Seventh Circuit further requires class-of-one plaintiffs to "strictly comply with presenting evidence of a similarly situated entity at the summary judgment stage." *FKFJ, Inc. v. Village of Worth*, 11 F.4th 574, 589 (7th Cir. 2021). To meet this burden, Plaintiff must establish that the alternatives were "*prima facie* identical in all relevant respects." *Paramount Media Grp., Inc. v. Village of Bellwood*, 929 F.3d 914, 920 (7th Cir. 2019) (quoting *D.S. v. E. Porter Cnty. Sch. Corp.*, 799 F.3d 793, 799 (7th Cir. 2015)).

Plaintiff admits that each applicant proposed different terms for the casino property. (Dkt. 128 at 27 ("Of course, as the City observes, there were differences among the applicants and their proposals.").) Rivers proposed to buy the casino site for $11 million or to enter into a long-term lease. (Def. SOF Resp. ¶ 25.) Full House proposed to enter into a 99-year lease with an option to purchase the casino site for $30 million. (*Id.*) North Point proposed to buy the property for $22 million, to be paid over thirteen years. (*Id.*) Plaintiff proposed to buy the site for "+/- 15%" of the appraised value of the property. (*Id.* ¶ 26.) The proposals also varied in available amenities, casino square footage, and number of gaming positions. (*Id.* ¶¶ 36–40.)

Plaintiff argues that, despite the differences in the other applicants' proposals, all four applicants were "qualified" according to the Johnson Consulting Report and, thus, a reasonable jury could find that Plaintiff was similarly situated to the other bidders, "or at the very least the evidence would support such a finding at trial." (Dkt. 128 at 27–28.) Being equally qualified, however, is only necessary—but not sufficient—to meet the requirement of being similarly situated. *See Paramount*, 929

F.3d at 920. And, at this "put up or shut up" moment in the case, Plaintiff cannot rely on evidence that may come up at trial and "would" support such a finding. *See Grant*, 870 F.3d at 568. Given the multifarious terms of the casino applicants' proposals, no reasonable jury could find that the other casino applicants were "identical in all relevant aspects." *Paramount*, 929 F.3d at 920 (finding no reasonable jury would conclude that two competitors offering different payment terms are similarly situated). Accordingly, Plaintiff has failed to establish as a matter of law that the other casino applicants were similarly situated. *See Fares Pawn*, 755 F.3d at 846.

Where, as here, a plaintiff cannot identify a similarly situated comparator for a class-of-one claim, it is "normally unnecessary to take the analysis any further; the claim simply fails." *Monarch Beverage Co. v. Cook*, 861 F.3d 678, 682 (7th Cir. 2017); *see Paramount*, 929 F.3d at 920 (disposing of a class-of-one claim on the sole basis that the entities were not similarly situated). In a small number of cases, however, the Seventh Circuit has excused failure to comply strictly with the similarly situated requirement where animus is readily apparent. *See, e.g.*, *Swanson v. City of Chetek*, 719 F.3d 780 (7th Cir. 2013); *Geinosky v. City of Chicago*, 675 F.3d 743 (7th Cir. 2012). Allegations of animus come into play, however, "only when courts can hypothesize no rational basis" for the disparate treatment. *145 Fisk*, 986 F.3d at 771 (quoting *Flying J Inc. v. City of New Haven*, 549 F.3d 538, 547 (7th Cir. 2008)). As a result, the Court thus turns to the rational basis requirement of a class-of-one claim.

2. Plaintiff fails to establish that the City acted irrationally.

So long as a "reasonably conceivable state of facts exists" to explain the difference in treatment, Plaintiff cannot prevail on its claim. *See 145 Fisk*, 986 F.3d at 771. The rational basis requirement presents a "low legal bar," requiring only "a rational relationship between the disparity of treatment and some legitimate governmental purpose." *FKFJ*, 11 F.4th at 587 (cleaned up). To survive summary judgment, therefore, Plaintiff must "negative any reasonably conceivable state of facts that could provide a rational basis" for the City's conduct. *145 Fisk*, 986 F.3d at 772.

The record establishes many rational bases for the City's decision not to certify Plaintiff:

- *First*, the City could have reasonably found that Plaintiff's proposal did not match the realities of the economic market in Waukegan. For a City with lower-than-average median household income levels, and one in which a casino would, according to Plaintiff's own study, yield most of its clientele from within a 35-mile radius, Plaintiff's proposed casino could have been too large. Plaintiff's proposal included 1,890 gaming positions—the highest number of positions among the applicants. (*See* Resp. Def. SOF ¶ 37 (North Point proposed 1,332); *id.* ¶ 38 (Rivers proposed 1,625); *id.* ¶ 36 (Full House proposed 1,670).) Plaintiff's proposal also provided for a 130,000 square foot casino—the largest casino size proposed among the applicants. (*See id.* ¶ 37 (North Point

proposed 53,500 square feet); *id.* ¶ 36 (Full House proposed 75,000 square feet); *id.* ¶ 38 (Rivers did not disclose proposed square footage).)

- *Second*, the City could have reasonably preferred, as Alderman Bolton explained, "a proposal that would offer more than just a casino[,] but also [a] theater [and] entertainment, restaurants," and other things that would provide the City with "an opportunity to develop economically." (*Id.* ¶ 49.) Plaintiff's proposal did not include a temporary casino or entertainment complex. (*Id.* ¶¶ 31–32.)
- *Third*, the City could have reasonably prioritized maximizing the amount of money received for the Fountain Square property or, as Alderman Kirkwood explained, have been displeased by the lack of detail and transparency with respect to the offer price. (*Id.* ¶ 51.) Plaintiff was the only applicant that did not provide a specific price for the purchase or lease of the casino site by the August 5, 2019, deadline. Instead, Plaintiff offered "+/- 15%" of the appraised value of the property, without quantifying what it meant by "appraised value." (*Id.* ¶ 26.)
- *Fourth*, the City could have reasonably believed that Plaintiff was not as experienced in running a casino as the other applicants. Plaintiff operated only two casinos in one state while the other applicants operated at least four in multiple states. (*See id.* ¶ 9 (North Point operated six casinos in four states); *id.* ¶ 10 (Full House operated five in four states); *id.* ¶ 11 (Rivers' parent company operated four casinos in three states).) In the alternative, the City

could have conceivably believed that, despite being less experienced, Plaintiff was, as Alderman Turner explained, asking for special consideration as an Indian Tribe. (*Id.* ¶ 52.)

- *Fifth*, the City could have had reasonable competition concerns with Plaintiff's proposal because Plaintiff already operates two other casinos in Wisconsin. (*Id.* ¶¶ 13, 15.) Given the proximity of Plaintiff's Milwaukee casino to Waukegan, and the significantly more favorable revenue sharing rate with Wisconsin for its Milwaukee casino than Plaintiff would have with a Waukegan casino, the City could have reasonably determined that Plaintiff was not fully committed to operating a casino in Waukegan. (*See id.* ¶ 69.)
- *Sixth*, the City could have conceivably found Plaintiff's spiel at the September 18, 2019, hearing to be, as Alderman Seger explained, "hurry up and get it done." (*Id.* ¶ 50.)

Plaintiff argues, under its theory of a "rigged process" by which Michael Bond dictated the results the City's certification, that the City's failure to conduct a fair and transparent hearing "is the height of irrationality." (Dkt. 128 at 29–32.) Plaintiff does not, however, rebut the conceivable state of facts that could have reasonably explained the City's refusal to certify Plaintiff. Even if, as Plaintiff argues, the "Bond-backed City Council members testified falsely in this case about why they voted against Potawatomi's proposal," (*id.* at 32), "the finding of a rational basis is 'the end of the matter—animus or no' "*145 Fisk*, 986 F.3d at 773 (quoting *Fares Pawn*, 755 F.3d at 845). Because Plaintiff does not "negate any of the reasonably conceivable

state of facts that could provide a rational basis" for the City's conduct—even if they were not "the actual justification" for the City's refusal to certify Plaintiff—sufficient rational basis exists as a matter of law. *Id.* at 771–72.

* * *

Plaintiff fails to meet the "very significant burden" of a class-of-one claim. *Bell v. Duperrault*, 367 F.3d 703, 708 (7th Cir. 2004). No reasonable jury could find that Plaintiff was similarly situated to the other applicants. Nor does Plaintiff rebut any of the proffered rational bases. Accordingly, summary judgment as to Count I is granted in favor of Defendant. *See Swanson*, 719 F.3d at 784 (summary judgment appropriate where no reasonable jury could find "[plaintiff] and the comparator were similarly situated, or there was a rational basis for any differential treatment").

When Plaintiff filed its claim, the Court had supplemental jurisdiction over Plaintiff's state-law claims (Counts II and III). *See* 28 U.S.C. § 1367(a) ("[D]istrict courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy"). In view of this outcome on Plaintiff's § 1983 claim (Count I, its only federal-law claim), the Court declines to retain jurisdiction over Plaintiff's remaining state-law claims. *See* 28 U.S.C. § 1367(c)(3) ("[t]he district courts may decline to exercise supplemental jurisdiction [if] . . . the district court has dismissed all claims over which it has original jurisdiction."); *see also Williams v. Rodriguez*, 509 F.3d 392, 404 (7th Cir. 2007) ("As a general matter, when all federal claims have been dismissed prior to trial, the federal court should relinquish jurisdiction over the

remaining pendant state claims."). Counts II and III are therefore dismissed without prejudice.

IV. CONCLUSION

For the foregoing reasons, the City's motion for summary judgment (Dkt. 113) is granted. All remaining motions (Dkt. 12; Dkt. 85; Dkt. 96; Dkt. 158) are dismissed as moot.

SO ORDERED in No. 20-cv-00750.

Date: March 29, 2024

JOHN F. KNESS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

WAUKEGAN POTAWATOMI CASINO, LLC,

Plaintiff,

v.

CITY OF WAUKEGAN,

Defendant.

No. 20-cv-00750
Judge John F. Kness

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of Plaintiff(s)
and against Defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☒ in favor of Defendant CITY OF WAUKEGAN
and against Plaintiff WAUKEGAN POTAWATOMI CASINO, LLC.

Defendants shall recover costs from Plaintiff.

☐ other:

This action was *(check one)*:

☐ tried by a jury with Judge John F. Kness presiding, and the jury has rendered a verdict.
☐ tried by Judge John F. Kness without a jury and the above decision was reached.
☒ decided by Judge John F. Kness on Defendant's motion for summary judgment (Dkt. 113).

Date: March 29, 2024

JOHN F. KNESS
United States District Judge

CIRCUIT RULE 30(d) STATEMENT

The undersign certifies that all the materials required by parts (a) and (b) of Circuit Rule 30 are included in the foregoing appendix.

Dated: June10, 2024

/s/ *Dylan Smith*
Dylan Smith