IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

OXFORD CASINO HOTEL,

777 Casino Way, Oxford, ME 04270,

BB DEVELOPMENT, LLC,

777 Casino Way, Oxford, ME 04270,

CHURCHILL DOWNS INCORPORATED,

600 N. Hurstbourne Parkway, Suite 400, Louisville, KY 40222,

Plaintiffs,

v.

MILTON F. CHAMPION, in his official capacity as Executive Director of the Maine Gambling Control Unit,

45 Commerce Drive, Suite 5, Augusta, ME 04333,

Defendant.

Civil Action No.
1:26-cv-00046-LEW

PLAINTIFFS' OPPOSITION TO THE STATE'S AND TRIBES' MOTIONS FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

Preliminary Statement

As explained in Oxford Casino's[1] Rule 12(c) motion, a state lacks inherent authority to legislate specifically as to Indian affairs. The Constitution grants that power solely to the federal government. Any delegation of the federal government's exclusive authority to a state must be express and clear.

As a state law, the Act is not an inherent exercise of the plenary and exclusive power the Constitution grants Congress to enact legislation specifically directed to Indian Tribes. Federal supremacy within Indian affairs leaves the State no room to legislate unilaterally, as it has done with the Act. Nor has Congress expressly authorized the Act. Indeed, the comprehensive statute Congress passed to address tribal gaming, IGRA, does not apply in Maine. The terms of the Settlement Act and Implementing Act (collectively, "Settlement Acts") specifically reserve to Congress, not the State, the ability to pass laws "for the benefit of Indians." The Settlement Acts are not clear and express grants of Congressional authority to the State to enact preferential tribal gaming legislation. As such, the Act serves as a racial classification subject to strict scrutiny under the Fourteenth Amendment.

The State's and Tribes' Motions for Summary Judgment ("Motions") confirm the only conclusion which can be drawn from applying these principles: The Act is unconstitutional. The Motions underscore that (i) the State lacks inherent authority to enact the Act and (ii) Congress did not expressly grant the State authority to do so under the Settlement Acts.

First, the State's and Tribes' arguments that Maine has some inherent power to enact a state-generated gaming preference to the Tribes were rejected by the First Circuit in *KG Urban*. But rather than present this Court with a compelling reason why that decision has been brought

[1] Capitalized terms not defined herein shall have the same meaning as in Oxford Casino's Rule 12(c) Motion.

into disrepute, the State and Tribes largely regurgitate the same authority the *KG Urban* court considered, and rejected, in determining that a state-generated preference was a racial preference. Rehashing those arguments before this Court cannot compel a different result. *Stare decisis* disposes of the State's and Tribes' arguments that the Act is a political preference escaping strict equal-protection analysis.

Second, the Settlement Acts contain not so much as a fingerhold to support the Act's constitutionality. The Settlement Acts do not address Tribal gaming at all and specifically retain Congress' power to enact legislation preferential to the Tribes. Comparing the Settlement Acts to an express grant of Congressional authority as shown in *Yakima* only underscores that Congress did not expressly grant its power to the State to enact preferential gaming legislation. Incantations of the "unique" relationship between the State and Tribes do not substitute for an explicit grant of Congressional authority to enact preferential Tribal gaming legislation. On the contrary, the text and structure of the Settlement Acts establishes that the Federal government retained its authority to enact laws specifically benefiting the Tribes. Indeed, accepting the State and Tribes' position that Congress *already* delegated authority over Tribal gaming to Maine would foreclose the potential application of IGRA, which under the Settlement Act Congress could make applicable to Maine at any time.

Accordingly, the Act serves as a state-based racial preference for purposes of equal-protection jurisprudence, must survive strict scrutiny, and, as neither the State nor the Tribes dispute, ultimately cannot do so. Moreover, the Act discriminates against out-of-state actors on its face, in violation of the Dormant Commerce Clause. The State's and Tribes' attempts to use the Act's unconstitutional racial preferences to rectify its clear protectionism is unavailing.

The weak offense the State and Tribes attempt to muster in their Motions fails to defend the Act's constitutionality. The Act is unconstitutional (i) because it is a state law that Congress did not clearly and expressly authorize and therefore serves as racial preference violative of the Fourteenth Amendment and (ii) it facially discriminates against out-of-state actors contravening the Dormant Commerce Clause. The Court need not venture far to make these calls; the pleadings are sufficient. Facts have no bearing on whether Congress expressly granted the State the ability to pass preferential gaming legislation like the Act. And on its face, the Act expressly discriminates against out-of-state actors. Such laws are virtually per se invalid. The scores of immaterial facts the State and Tribes proffer in purported support of their motions fail as patchwork for these two fatal, unconstitutional shortcomings. The State's and Tribe's Motions highlight that the pleadings and law are sufficient to deny the Motions and grant Oxford Casino's Rule 12(c) Motion.

Argument

I. The State's and Tribes' Efforts to Dodge Equal Protection Strict Scrutiny Fails

A. Binding First Circuit precedent squarely rejects the State's and Tribes' arguments that a state-created classification based on tribal status is not a racial classification.

The State and Tribes first try to cure the Act's constitutional infirmities by arguing that, by granting the Tribes a monopoly over internet gambling, the State is engaging with a political group and not legislating based on race. *See* State Br. 13-16; Tribes Br. 17-20. And yet—although one would hardly know it from the State's and Tribes' briefs—the First Circuit specifically rejected the same argument in *KG Urban,* determining that state-created preferential classifications based on

tribal status serve as racial classifications for purposes of equal protection jurisprudence. *KG Urban Enters., LLC v. Patrick*, 693 F.3d 1, 17-19 (1st Cir. 2012).

In *KG Urban*, Massachusetts raised the same defense to its law granting a tribal preference to gaming that the State and Tribes advance here. Indeed, the exact language from the *KG Urban* opinion applies wholesale: "The defendants' first argument is that a state-granted preference to a tribe is not a racial preference and so entails only rational basis review." *Id.* at 17. The First Circuit rejected that argument after surveying virtually the same authority the State and Tribes rehash here.[2] The First Circuit concluded that "no authority" supported the argument that a state-generated preferential classification based on tribal status unauthorized by federal law was not a racial classification under *Manacri*. *Id.* at 19. Rather, that authority supported only the conclusion that federal, not state, legislation preferencing tribes could sometimes escape heightened review under the Fourteenth Amendment. *Id.* at 18-20.

To escape *KG Urban's* application, the State and Tribes would have to present this Court with authority unmistakably casting it into disrepute. *Cushing v. McKee*, 738 F. Supp. 2d 146, 156 (D. Me. 2010) ("Until a court of appeals revokes a binding precedent, a district court within the circuit is hard put to ignore that precedent until it has unmistakably been cast into disrepute by supervening authority." (citation omitted)); *Brazier v. Oxford Cnty.*, 575 F. Supp. 2d 265, 269 (D.

[2] The following cases were cited in either or both of the State's and Tribes' briefs in support of their argument that legislation preferential to the Tribes is not a racial preference and were considered by the *KG Urban* Court in rejecting that same argument: *Morton v. Mancari*, 417 U.S. 535 (1974); *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979); *United States v. Antelope*, 430 U.S. 641 (1977); *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003); *N.Y. Ass'n of Convenience Stores v. Urbach,* 699 N.E.2d 904 (N.Y. 1998); *United States v. Garrett*, 122 Fed. App'x 628 (4th Cir. 2005); *Squaxin Island Tribe v. Washington*, 781 F.2d 715, 722 (9th Cir. 1986); *Greene v. Comm'r of Minn. Dep't of Hum. Servs.*, 755 N.W.2d 713 (Minn. 2008).

Me. 2008). They do nothing of the sort. Instead, the State and Tribes add mere garnishes to a dish composed mainly of previously rejected authority.

First, the State and Tribes cite a non-merits *brief* filed by the Solicitor General, one opposing an application to stay the mandate pending a petition for a writ of certiorari. State Br. 13; Tribes Br. 18 (citing U.S. Opp'n to Stay Application, *W. Flagler Assocs., Ltd. v. Haaland*, 144 S. Ct. 10 (2023) (No. 23A315), 2023 WL 7042578). That is not authority at all. *Second,* the Tribes go little further, citing a Minnesota intermediate appellate court decision. Tribes Br. 18 (citing *Krueth v. Indep. Sch. Dist. No. 38*, 496 N.W.2d 829, 836 & n.3 (Minn. Ct. App. 1993)). But that non-controlling case, decided nearly 20 years before *KG Urban*, is distinguishable. It addressed, like *Mancari*, a government-employment preference for American Indians. *Krueth*, 469 N.W.2d at 832. In *Krueth*, the preference was for American Indian teachers, regardless of their seniority, and applied to school districts with ten or more American Indian children enrolled. *Id.* The school-district defendant was "located entirely on Red Lake Reservation and consist[ed] of a student population almost 100% American Indian." *Id.* at 837. Nowhere does *Krueth* analyze the salient principle that it is the federal government, not the states, that has sole authority over Indian affairs. *See generally id.*; *cf. KG Urban*, 693 F.3d at 19.

Third, the Tribes cite to a string of cases they say uphold the principle that laws may single out Native Americans without triggering strict-scrutiny equal protection review. Tribes Br. 19. But these cases merely emphasize the point that "*federal* laws giving preference based on 'Congress' unique obligation toward Indians'" may be sustained. *KG Urban*, 693 F.3d at 18 (citation omitted). In *Fischer v. Dist. Ct. of Sixteenth Jud. Dist. of Mont.*, 424 U.S. 382 (1976) (per curiam), the Supreme Court held that a *federal* statute conferring the Northern Cheyenne Tribe with the power to "govern itself independently of state law" necessarily precluded Montana from jurisdiction over

adoption proceedings where all parties were Tribal members. *Moe v. Confederated Salish & Kootenia Tribes of Flathead Rsrv.*, 425 U.S. 463 (1976) addressed federal preemption of certain state taxation of Indians. In *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 75 (1977), the Court assessed a challenge to another *federal* statute: "An Act of Congress providing for the distribution of funds to certain Delaware Indians, pursuant to an award by the Indian Claims Commission to redress a breach by the United States of an 1854 treaty . . . ." And *United States v. Antelope*, 430 U.S. 641, 645 (1977) (a case the *KG Urban* court considered), upheld *federal* regulation of criminal conduct. Finally, *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 661-62 (1979) (again, cited by *KG Urban* in support for the principle that federal laws giving preference to Indians have been upheld) addressed a series of treaties entered into between the *federal* government and Indian tribes. Not one of these cases addresses state-created legislation—the issue here with the Act. And *Yakima,* discussed in detail below, addresses a different issue, whether Congress expressly delegated its authority over Indian affairs to a state. *Infra* § I(C).

Fourth, the State cites miscellaneous state statutes that define the Tribes akin to various governmental units. State Br. 14-15. But whether the State defines "federally recognized" Indian tribes as a "State," 14 M.R.S.A. § 402(4) (Supp. 2026), or an Indian tribe as a "[u]nit of local government," 30-A M.R.S.A. § 5250-I(22) (Supp. 2026), has no effect on whether a different statute, the Act—which expressly preferences the Tribes—passes muster under equal-protection grounds. Nor could Maine's engagement with the Tribes on environmental rules and issues serve to rectify the Act's equal-protection shortcomings. *See* State Br. 15-16. As explained throughout, the relevant inquiry for purposes of the Fourteenth Amendment is whether Congress expressly and clearly granted authority to the State to enact legislation specifically benefiting Indian Tribes.

State statutes using different labels to describe the Tribes have no relevance to that analysis, which must necessarily examine *federal* statutes to determine what Congress has expressly authorized.

Rather than support the State's and Tribes' positions, the limited authority not considered by the *KG Urban* court underscores that only laws preferencing Indian tribes enacted by the *federal* government may escape strict-scrutiny review.[3] And none of the authority they cite unsettles the binding nature of *KG Urban*.

B. The State's and Tribes' fainthearted attempts to distinguish *KG Urban* fail.

Trying to dodge *KG Urban,* the State and Tribes reach for immaterial differences and fail to address why its reasoning does not control here. Indeed, despite asserting the same argument advanced in *KG Urban*—that a state-granted preference to a tribe is not a "racial" preference—and advancing that argument with largely the same authority, the State and Tribes now claim that *KG Urban* does not apply. But the best the State and Tribes can muster are irrelevant procedural differences. The State first notes that *KG Urban* addressed a Rule 12(b) motion, while it presents the court with a motion for summary judgment. State Br. 21. So what? The legal issue in *KG Urban* is the same and requires no facts to resolve, simply the application of Supreme Court case law and the U.S. Constitution. Second, the State says the Tribes' intervention here makes *KG Urban* inapplicable. State Br. 22. Individual facts about certain Tribes (all of which are federally recognized), however, do not play a role in determining whether *Mancari's* reasoning, which addressed the federal government's BIA hiring preferences, supports a determination that a state-created preference is not a racial preference.[4] Next, the State asserts that the question of IGRA's

[3] For the reasons set out in Oxford Casino's Rule 12(c) motion, the interplay between Congress's Indian Affairs power and Equal Protection principles is not so clearly defined as to automatically lower the strict-scrutiny standard. Because the Act is state-created, this Court need not resolve that issue here. ECF No. 35 at 12.

[4] It is worth noting that, in addition to the Massachusetts Attorney General, Suffolk University Law School's Indian Law and Indigenous Peoples Clinic filed an amicus brief in support of Massachusetts. There, the Indian Law Clinic included

inapplicability in *KG Urban* is a difference maker. State Br. 22. That position, however, ignores entirely the first part of *KG Urban*, which determined the legal issue dispositive here—that *Manacri* does not apply to a state-created Tribal preference, thus making such a preference a racial preference subject to strict scrutiny for purposes of Equal Protection law. *See KG Urban*, 693 F.3d at 17-20. The issue of whether IGRA applied came into play only in addressing Massachusetts's argument that the state law was "enacted under explicit authority granted by Congress in IGRA and so is subject to rational review under *Yakima*." *Id.* at 20. IGRA had no bearing on *KG Urban's* separate determination that, absent express authorization from Congress, a state-created tribal preference serves as a racial preference. *See id.* at 17-20.

The State's final attempt to distinguish *KG Urban* is not so much an effort to distinguish the decision but rather a disagreement with its reasoning. The State asserts that *KG Urban* "conflated tribal status with a State's authority to act with respect to federally recognized tribes." State Br. 22. The State asserts that Tribal status "does not change based on whether the Wabanaki Nations are interacting with the United States or Maine." State Br. 22. The State asserts there is "no basis" to conclude that the Tribes are "sovereign political entities under federal law or when engaging with the United States, but somehow transmogrify into mere racial groups under state law or when engaging with Maine." State Br. 22-23. But the basis for a federal/state distinction with regard to Indian affairs is, as the *KG Urban* court recognized, a fundamental one: the U.S. Constitution. *See KG Urban*, 693 F.3d at 19. The Constitution grants exclusive and plenary power with regard to Indian Tribes to the federal government. *Id.* "The states have no such equivalent

in their brief a main argument that "Indian Tribes are Sovereign Governments." Brief for Suffolk Univ. L. Sch.'s Indian L. & Indigenous Peoples Clinic as Amicus Curiae Supporting Appellees, *KG Urban Enters., LLC v. Patrick*, 693 F.3d 1 (1st Cir. 2012) (No. 12-1233), 2012 WL 1572557, at *5. Thus, the First Circuit *did* have the "benefit" of arguments directly addressing the sovereignty of Indian Tribes, from groups representing the Tribes' interests. *See* State Br. 22. The Tribes' sovereignty is undisputed and not determinative.

authority . . . ." *Id.* "Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *William v. Lee*, 358 U.S. 217, 220 (1959).[5] The State's request to treat federal and state laws directed at Indian tribes the same, State Br. 23, invites turning aside the Constitution's grant of exclusive and plenary authority over Indian affairs to the federal government. U.S. Const. art. I, § 8, cl. 3; U.S. Const. art. II, § 2, cl. 2. Contrary to the State's apparent desire to jettison the consequences of the Constitution's allocation of power within a federal system of government, "the Federal government [may] enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive. States do not enjoy this same unique relationship with Indians … ." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979). The State's oblique criticism of *KG Urban* falls far short of undermining the substantial and correct basis for its reasoning.

C. *Yakima* highlights that the Act lacks explicit Congressional authorization.

i. Congress explicitly and directly granted consent to enact the state law at issue in *Yakima*.

Relying on *Yakima*, the State and Tribes alternatively argue the Act should be construed as if it were a federal law because Congress explicitly granted Maine authority to enact such

[5] This federal-state distinction is not unique to Indian affairs and features elsewhere in the Constitution. For instance, the Constitution grants to Congress "broad power over naturalization and immigration." *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976). Thus, "it is the business of the political branches of the federal government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens." *Id.* at 84. So the equal protection analysis "involves significantly different considerations" when it involves "the relationship between aliens and the States rather than between aliens and the Federal Government." *Id.* at 84-85. Thus, "state classifications based on alienage are subject to strict judicial scrutiny." *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 602 (1976) (citation omitted). But when the federal government asserts a national interest as justification for a discriminatory rule based on alienage, the standard is relaxed and the government need only provide a "legitimate basis" for such a law. *See, e.g.*, *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976). Moreover, Indian affairs are not the only subject area exclusive to the federal government: treaties with foreign nations, patents, and even operation of the postal service all reflect powers uniquely granted to the federal government, rather than to states. Observing that the Constitution grants some powers to the federal government and other powers to the states is not revelatory, and the State's argument that this is somehow strange ignores the Constitution's federal structure.

preferential gaming legislation to the State via the Settlement Acts. State Br. 16-19; Tribes Br. 22-24. As Oxford Casino's Rule 12(c) motion showed, however, neither Act supports the conclusion that Congress expressly delegated its exclusive authority over Indian Affairs to Maine to enact preferential gaming legislation. ECF No. 35 at 21-26. *Yakima* underscores this conclusion—it shows what an express delegation of authority from Congress to a state looks like. And when such an explicit grant is contrasted with the Settlement Acts, the only conclusion that can be drawn is that those Acts wholly lack such direct authorization.

Yakima involved a "a dispute between the State of Washington and the Yakima Indian Nation over the validity of the State's exercise of jurisdiction on the Yakima Reservation." 439 U.S. at 465. Yakima Nation challenged Washington's assertion of partial jurisdiction over its reservation, arguing that Washington had not complied with the federal statute—Pub L. 280[6]—on which Washington asserted authority to exercise jurisdiction over the Nation. *Id.* at 466-67.

Public Law 280 was enacted "in part to deal with the 'problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement.'" *Id.* at 471 (quoting *Bryan v. Itasca Cnty.*, 426 U.S. 373, 379 (1976)). The law was the "first federal statute of general applicability to Indian reservation lands." *Id.* at 463. The law took effect differently depending on a state's status. "To five States it effected an immediate cession of criminal and civil jurisdiction over Indian country," except as to three tribes. *Id.* at 471-72. Other states had the "option to assume jurisdiction over criminal offenses and civil causes of action" without the consent of affected tribes. *Id.* at 473-74. Under Section 6 of the law, states whose constitutions or statutes disclaimed jurisdiction over Indian country were granted permission to amend their

[6] Act of Aug. 15, 1953, Pub. L. 280, 67 Stat. 588 (conferring jurisdiction on states with respect to criminal and civil offenses on Indian reservations).

existing laws "to remove any legal impediment to the assumption of jurisdiction under the Act." *Id.* at 474. Section 7 addressed states where that legal impediment did not apply or was removed. *Id.* In that Section, Congress expressly authorized those states to assume specific jurisdiction over Indian territory in clear and unambiguous terms:

> The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Id. at 471 n.9 (quoting Pub. L. 280, § 7).

Yakima Nation opposed jurisdiction on three separate grounds. First, it argued that as a matter of procedure, Washington had to amend its constitution before enacting the law pursuant to Public Law 280. *Id.* at 476. Second, it argued that Public Law 280 did not authorize Washington's assumption of partial jurisdiction. *Id.* at 477. Third, it argued the state law violated equal-protection principles. *Id.* at 477-78. The Court rejected Yakima Nation's argument that it had to amend its Constitution. *Id.* at 493. The Court then turned to the question of whether Washington could assume partial jurisdiction over Yakima Nation. To do so, it turned to Section 7, which it found granted Washington "statutory authorization for the state jurisdictional arrangement." *Id.* at 495.

Having determined that Washington's assumption of jurisdiction was proper under Public Law 280, the Court finally addressed Yakima Nation's argument that the state law that assumed jurisdiction under Public Law 280, Chapter 36,[7] violated the Equal Protection Clause. Addressing this argument, the Court noted that while it was "settled" that the federal government could enact

[7] An Act relating to state jurisdiction over Indians, reservations, and other lands, ch. 36, 1963 Wash. Session Laws 346.

legislation "singling out tribal Indians" that would "otherwise be constitutionally offensive," states did not have that same "unique relationship with Indians." *Id.* at 500-01. The Court noted, however, that Chapter 36 was "not simply another state law." *Id.* at 501. Rather, "[i]t was enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians." *Id.* And Washington's Chapter 36, contrary to Yakima Nation's challenge, was "within the scope of authorization of Pub. L. 280." *Id.* The Court concluded,

> It is well established that Congress, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian tribes. In enacting Chapter 36, Washington was legislating under explicit authority granted by Congress in the exercise of that federal power.

Id. (citation omitted).

Yakima thus shows how Congress may effect an explicit grant of authority to a State to assume jurisdiction over a particular aspect of tribal affairs. In Public Law 280, Congress was explicit. It affirmatively offered the "consent" of the United States to states lacking "jurisdiction with respect to criminal offenses or civil causes of action" to "assume jurisdiction . . . by affirmative legislative action." *Id.* at 471 n.9 (quoting Pub. L. 280, § 7). Such a grant of authority gave Washington "explicit authority" to assume partial jurisdiction over Yakima Nation as done in Chapter 36. *Id.* at 501. Thus, when Washington did so, its law did not offend the Equal Protection Clause.

ii. The authority granted to Maine under the Settlement Act and Implementing Act does not meet the standard established in *Yakima*.

a. The text of the Settlement Act and Implementing Act is not an explicit grant of authority over preferential gaming legislation to the State.

The Act falls far short of the standards set in *Yakima* and cannot be construed to flow from an express delegation of Congress' authority over Indian Affairs to Maine regarding tribal-gaming issues. For starters, Congress did not grant Maine explicit consent to restrict the sovereign power of the Tribes with respect to gaming. The Settlement Act and Implementing Act do not mention gaming at all. By contrast, in *Yakima*, the United States gave consent for Washington to assume jurisdiction over criminal offenses or civil causes of action. And Washington directly responded to this affirmative grant of consent by doing just that—Chapter 36 "obligated the state to assume civil and criminal jurisdiction over Indians and Indian territory within the State," subject to a certain condition. *Id.* at 465.

Here, in contrast to *Yakima*, there is no such direct relationship between the Settlement Act and/or Implementing Act, and the Act authorizing internet gambling. Tellingly, the Tribes do not cite to any specific language of either the Settlement Act or Implementing Act which grants the State explicit authority to assume jurisdiction over tribal gaming issues. *See* Tribes Br. 22-24. The State does little better. It does not cite to a portion of the Acts addressing gaming (such provisions do not exist). Nor to parts of the Act granting the State the ability to enact preferential legislation at all (that authority under the Acts rests with the Federal government). Rather, the State cites to a general provision in the Implementing Act and similar provision in Mi'kmaq Nation Act providing that "all Indians, Indian nations, and tribes and bands of Indians in the State" and lands held by them are "subject to the laws of the State and to the civil and criminal jurisdiction

of the courts of the state to the same extent as any other person or lands or other natural resources therein." State Br. 17-18 (citing Implementing Act § 6204; Mi'kmaq Nation Restoration Act § 7204). This, according to the State "allocates jurisdiction over tribal gaming (among other matters) to Maine." State Br. 18. The Implementing Act's general provision that Maine law applies to the Tribes, however, is not an explicit grant of Congressional authority to enact legislation preferencing the Tribes alone. It is one thing for Maine law to apply equally throughout the state, including on Tribal lands, and entirely another for the State to pass a law specifically preferencing the Tribes, such as the Act. For Congress to relinquish its plenary authority over legislation specifically as to the Tribes, it must grant the State "explicit authority" to do so. *Yakima*, 439 U.S. at 501. The Implementing Act's general provision that Maine law applies on tribal lands falls far should of the explicit authorization required to vest Maine with power over preferential Tribal gaming legislation.

Moreover, the State's blinkered focus on the criminal and civil application of Maine law to the Tribes ignores the federal government's *retention* of authority in the Settlement Act. Solely focusing on a provision allowing Maine law generally to apply to the Tribes ignores an important element of the Settlement Act: Congress maintained its plenary power to pass laws specifically benefiting the Tribes. Given this provision, those Acts are unambiguously not an unqualified ceding of the federal government's plenary power over Indian Tribes to the State. Importantly, Section 16(b) of the Settlement Act makes clear that, after its enactment, Congress may enact laws "for the benefit of Indians, Indian nations, or tribes or bands of Indians" which may be "specifically made applicable within the State of Maine." Settlement Act § 16(b). Congress's retention of such power to enact laws for the specific benefit of the Tribes makes plain that it did not expressly grant to the State that same authority.

b. Accepting the State's broad assertion of jurisdiction would render Federal retention of jurisdiction under the Settlement Act ineffectual.

In addition to affronting Congress's retention of power under Section 16(b), acceptance of the State's position that it has been granted Congressional authority over Tribal gaming (and other issues, as it asserts) would serve to deny the Tribes from reaping the rewards of federal legislation benefiting the Nation's tribes. Take IGRA. In the future, Congress could pass legislation making IGRA "specifically applicable . . . within the State of Maine." *See id.* In the words of the First Circuit, were it not for the text of Section 16(b), the Tribes would be "home free" in benefiting from that tribal-gaming law. *Passamaquoddy Tribe*, 75 F.3d at 788. Indeed, it was the Passamaquoddy Tribe's position in that case that IGRA applied in Maine, not that Congress had already delegated its authority to Maine on issues of Tribal gaming. *Id.*

But now, according to the State, the federal government has "allocate[d] jurisdiction over tribal gaming" to Maine. State Br. 18. The State's argument here that Congress had already granted it the power to assert its authority over tribal gaming would be at odds with the position that the Tribes could simply take advantage of Federal law (IGRA) concerning that same subject. And if, as the State argues, the general grant of criminal and civil jurisdiction gives it authority over Tribal gaming issues, it is difficult to imagine what, if any, areas of Tribal sovereignty remain retained by the federal government and not delegated to State under the Settlement Act and Implementing Act.

Recognizing, perhaps, that the State's proffered assertion of jurisdiction under the Settlement Act would shortchange a great deal of the Tribes' sovereignty, the Tribes do not expressly go so far. *See* Tribes Br. 22-23. Rather, the Tribes latch onto broad language in *Yakima*, arguing that the Act is "enacted in response" to "federal measure[s] explicitly designed to readjust

the allocation of jurisdiction over Indians." Tribes Br. 23 (alteration in original) (quoting *Yakima*, 439 U.S. at 500). Although it is certainly true that the Settlement Acts "readjusted" the allocation of jurisdiction over the Tribes, the Supreme Court's language in *Yakima* cannot be applied here so broadly. Rather, the Court has "often cautioned that 'general language in judicial opinions should read as referring in the context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering.'" *Oliver v. City of Brandon, Miss.*, 146 S. Ct. 916, 925 (2026) (quoting *Turkiye Halk Bankaski A.S. v. United State*s, 598 U.S. 264, 278 (2023)). As noted above, *Yakima* addressed the "circumstances" of an explicit grant of authority to Washington that the State legislated in direct response to. *Supra* § I(C)(i). That is not the case with the Act.

Moreover, the Tribes' broad reading of *Yakima* would encompass any state's assertion of power over Indian affairs that the state "enacted in response" to any federal grant of authority. And, in the Tribes' expansive reading, that language would have supported state assertion of authority over Tribal gaming under Public Law 280—a federal measure adjusting jurisdiction over Indians. The Supreme Court rejected such an assertion of power. *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 721-22 (9th Cir. 2003) ("Under *Cabazon,* the Supreme Court applied the long-standing general rule that a state has jurisdiction over Indian lands only if Congress has explicitly ceded that jurisdiction. . . . One of the bases of the holding in *Cabazon* was that Congress had not explicitly ceded regulatory authority for gaming in states in Public Law No. 280 or otherwise.").

c. Canons of Indian law affirm *Yakima* and resolve any ambiguities against the State's assertion of jurisdiction over Tribal gaming activities.

If *Yakima* alone is not enough to reject the State's and Tribes' arguments that the State has been expressly delegated authority over tribal gaming via the settlement acts (which it is), the great weight of related authority confirms that any derogation of tribal sovereignty—which can only be diminished by Congress—must be clearly indicated. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) ("Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence is that sovereign power remains intact." (cleaned up) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 n.14 (1982))). Indeed, this rule of interpretation "reflects an enduring principle of Indian law: Although Congress has plenary power over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014); *see also Ex parte Crow Dog*, 109 U.S. 556, 572 (1883) ("To justify a departure, in such a case, [abrogating tribal self-government] requires a clear expression of the intention of congress, and that we have not been able to find."); *see also* 1 Cohen's Handbook of Federal Indian Law § 3.01[1] & n.5 (collecting cases) ("The basic Indian law canons of construction require: … that tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous."). Thus, "[a]ny ambiguities in Congress's work must be resolved in favor of tribal sovereignty and against state power." *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 669 (2022) (Gorsuch, J. dissenting). In sum, "state governments have no authority to regulate Indian affairs absent *express* congressional delegation or grant." Restatement of the Law of American Indians 1 Rep. Intro. (emphasis added). Ample authority confirms that a state may exercise authority and restrict the retained sovereign powers of Indian tribes only when "legislating under explicit

authority granted by Congress in the exercise of that federal power." *Yakima*, 439 U.S. at 501. And any ambiguity must be resolved in favor of Congress's retention of its plenary power and in favor of tribal sovereignty. Application of these twin principles soundly rejects the State's argument that in the Settlement Acts Congress expressly ceded authority over an unaddressed issue, tribal gaming, to the State.

iii. The Act is not commensurate with IGRA.

Finally, the State claims the Act is in "harmony" with IGRA. State's Br. at 18. It is not. A state's role in regulating Tribal gaming under IGRA is limited to ensuring the formation of a Tribal-State compact. *See Massachusetts v. Wampanoag Tribe of Gay Head*, 36 F. Supp. 3d 229, 236 (D. Mass. 2014). There is no IGRA compact here. "IGRA sets in place a sophisticated regulatory framework for gambling on Indian lands . . . ." *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618, 623 (1st Cir. 2017) (cleaned up). And "Congress established the National Indian Gaming Commission ("NIGC") to administer IGRA; its responsibilities include approving Class II gaming ordinances submitted to it by Indian tribes." *Id.* IGRA also "allowed the Tribes to offer class III games—like blackjack and baccarat—but only pursuant to negotiated tribal/state compacts." *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 685 (2022). The Act skirts the federal regulatory framework and administration entirely. The Act's allowance for one specific type of gaming—internet gaming—and ducks the complex federal statutory and regulatory regime that Congress established for Tribal gaming. It cannot be deemed to be in harmony with IGRA. *See KG Urban*, 693 F.3d at 7 ("IGRA allows the states a limited and closely defined role in the [regulation of gaming hosted by Tribes].").

D. Rational-Basis Review Would Afford the State Near Complete Leeway in Laws Singling out the Tribes.

For the many reasons stated above, strict scrutiny applies to the Act. But turning to the State's and Tribes' arguments, Oxford Casino concedes that if rational-basis scrutiny applied to the Act, it would clear that threshold. That review is a very low bar. Under the rational-basis test, a law is upheld if it is "rationally related to a legitimate government purpose." *Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 47 (1st Cir. 2003) (citation omitted). Such laws bear a "strong presumption of validity" and "even foolish and misdirected provisions" pass the test. *Id.* (cleaned up and citations omitted).

Applying rational-basis review to the State's laws differentially treating the Tribes shows why a lack of strict judicial scrutiny is inappropriate.[8] As the Tribes note, the State "historically has excluded the Wabanaki Nations from participating in economic activities that have fueled tribal self-determination in other parts of the country." Tribes Br. 2. And there have been "many bumps in the road of state-tribal relations." *Id.* at 11. In short, "[t]he history of tribal-state relations in Maine has been marred by conflict." *Id.* at 27. Although today Maine and the Tribes are aligned as to a specific Maine law (the Act) singling the Tribes out for differential treatment, history unfortunately shows that progress is not linear. Under different political circumstances, the State, acting by a legislative majority, could pass a law singling out the Tribes for differential

[8] The Tribes proclaim that striking down the Act on equal protection grounds would be without precedent. Tribes Br. 3. Not so. In *Tafoya v. City of Albuquerque*, 751 F. Supp. 1527, 1531 (D.N.M. 1990), the district court applied strict scrutiny to strike down a local ordinance permitting only members of federally recognized Indian tribes to sell wares in the Old Town Zone of Albuquerque. ("The Albuquerque City counsel has considerably less power than the United States Congress to pass law discriminating in favor of members of federally recognized Indian tribes and pueblos. In this respect, *Morton* is in applicable to this case. Strict scrutiny is applicable . . . .") Similarly, in *Malabed v. N. Slope Borough*, 42 F. Supp. 2d 927, 942 (D. Alaska 1999) the district court, applying strict scrutiny, struck down a state-law employment preference for hiring Native Americans by a political subdivision of Alaska. The apparent distinction the Tribes draw, that these cases do not concern laws "directed" at Tribal governments fails to unsettle their central holding that non-federal laws preferential to Indians are subject to strict scrutiny.

treatment for less benevolent reasons or, indeed, even for invidious reasons.[9] If rational-basis review applied, such future state laws could entirely escape meaningful judicial review and avoid the bulwark against racial discrimination the Fourteenth Amendment aims to establish. *See Loving v. Virginia*, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."); *Gratz v. Bollinger,* 539 U.S. 244, 270 ("It is by now well established that all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." (citation omitted)). Applying rational-basis review to Maine laws that single out the Tribes could create a significant hole in the otherwise steadfast principle that "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded on the doctrine of equality" which can only "be overridden . . . in the most extraordinary case." *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 208 (2023) (citation omitted).

II. The Act Violates the Dormant Commerce Clause.

The State and Tribes try to spin the Act—which is facially discriminatory to interstate commerce—into a law that treats in-state and out-of-state interest the same. The Act's text says otherwise. Oxford Casino is harmed by the Act, as it plainly alleges. The State and Tribe's arguments that Oxford Casino lacks standing to challenge the Act's facially discriminatory treatment of out-of-state interests violative of the Dormant Commerce Clause are unavailing.

[9] For example, if the State wished to build a large highway opposed by local communities, it could choose to site the highway in a manner that intruded upon the quiet enjoyment, or otherwise harmed, Tribal lands. The State should not then be permitted to "preference" the Tribe by granting the Tribe exclusive rights to certain toll revenue and spinning the project as promoting Tribe's "economic sovereignty." Even if the re-routing was animated by discrimination, it would avoid strict scrutiny if the State successfully grounded the decision in the grant of authority provided in the Settlement Acts.

A. Oxford Casino has standing to assert its Dormant Commerce Clause Claim.

The State and Tribes argue that Oxford Casino lacks standing to challenge the Act. State Br. 25-27; Tribes Br. 29-32. To do so, the State and Tribes latch onto a First Circuit case, *Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1 (1st Cir. 2007). But there, the circuit court addressed claims only by in-state resident plaintiffs. *Id.* at 12. As a consequence, "if favoritism exists, none of them could conceivably have suffered any cognizable harm as a result of [the state's residency requirements]." *Id.* That "deficiency" distinguished the case from "cases like *Houlton* in which claimants have succeeded in making out the rudiments of standing." *Id.* (citing *Houlton Citizens' Coal. v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999)). That deficiency, however, is not present here. Churchill Downs is not a Maine resident. FAC ¶ 15. And it has plainly alleged injury. FAC ¶¶ 43-50. This alone is enough to conclude the standing issue for all Plaintiffs. "Where coplaintiffs have a shared stake in the litigation—close identity of interests and a joint objective—the finding that one has standing to sue renders it superfluous to adjudicate the other plaintiffs' standing." *Montalvo-Huertas v. Rivera-Cruz*, 885 F.2d 971, 976 (1989).

On top of this, *Houlton* supports finding standing for in-state businesses injured by a discriminatory law. *See Houlton*, 175 F.3d at 183 (1st Cir. 1999). There, a state-resident plaintiff lost business and that injury could be "traced directly to the Town's neoteric [Selya-speak for "new"] waste management scheme; and the injury would be adequately redressed by equitable relief . . . against the Town." *Id.* So too with Oxford Casino Hotel. It and Plaintiff BB Development, though Maine corporations, will suffer harm as a result of the Act due to decreased market share. FAC ¶¶ 44-48. That injury would be redressed by the injunctive relief they have requested. They have made the rudimentary showing required for standing.

The State's and Tribes' next standing argument is even further off base. The State and Tribes argue that Oxford Casino lacks standing to challenge the Act's interstate protectionist element because it is not a federally recognized Indian Tribe. State Br. 26-27; Tribes Br. 29-32. The State and Tribes argue that Oxford Casino suffers no harm from the state-protectionist measure of the Act because it could never take advantage of the Act's benefits, regardless of location, because Oxford Casino is not a federally recognized Indian Tribe. Putting aside the fact that the Act's sole preference for the Tribes violates equal-protection principles (*supra* Section I), simple logic rejects this argument. The Act contains *two* separate unconstitutional infirmities—it violates the Equal Protection Clause and the Dormant Commerce Clause. Its equal-protection shortcomings cannot eliminate standing to separately challenge its unconstitutional restriction on interstate commerce. Under the State and Tribe's logic, a Hispanic resident of New Hampshire would not have standing to bring a Dormant Commerce Clause challenge to a Maine law restricting licenses to operate a liquor store to white Mainers. Rather, only a white out-of-state resident would have standing to assert that constitutional claim. Logic and justice plainly reject such a result.

Addressing the State's and Tribes' arguments at a higher level further shows its faultiness. The State cannot escape subjecting a law to Dormant Commerce Clause review by adding an additional protectionist measure and then arguing the out-of-state business fails to satisfy that restriction and is therefore boxed out of court. Take, for example, a Maine law requiring that all fishing rods must be purchased at a family-owned outdoor businesses in operation for at least 100 years in Maine. If that law were then challenged by a private-equity-owned, decade-old, out-of-state fishing retailer, the State could not argue that retailer lacks standing to challenge the law

because its many non-residency restrictions exclude the retailer and that the residency requirement is of no moment.

B. The State's and Tribes' merits-based arguments similarly fail.

Having missed the mark with their standing-based arguments, the State and Tribes then empty the chamber by firing off merits-based arguments that similarly go astray. The State and Tribes next argue that Oxford Casino (1) is not a government; (2) the Act does not discriminate against out-of-state interests; (3) the Indian Commerce Clause applies; and (4) only Mainers can internet gamble under the Act. None of these arguments hit the target.

First, the State and Tribes latch onto the fact that the Tribes are governments, not private businesses, and argue that Oxford Casino is not sufficiently "similarly situated" with the Tribes to mount a Dormant Commerce Clause challenge. State Br. 27-28; Tribes Br. 32-34. This argument, however, finds no traction in Dormant Commerce Clause jurisprudence. The relevant inquiry with respect to similarity concerns the *product* subject to commerce, not the person or entity making the product. As the case favored by the Tribes explains, the reason for ensuring that similar products are involved is "that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997). That is because the basis for the Dormant Commerce Clause jurisprudence is "the notion that the Constitution implicitly established a national free market." *Id.* (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992) (Scalia, J., dissenting)). Thus, "[d]isparate treatment constitutes discrimination only if the *objects* of the disparate treatment are, for relevant purposes, similarly situated. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 602 (1997) (Scalia, J., dissenting) (emphasis added) (citing *Gen. Motors*, 519 U.S. at 298-99). Here, it cannot be disputed that Oxford

Casino offers products that are similarly situated to those subject to the Act. Indeed, Oxford Casino Hotel offers the same table games in a physical environment in Maine. FAC ¶¶ 20-24. And Churchill Downs similarly offers online gaming experiences. FAC ¶ 49.

The State and Tribes also cite to *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.,* 550 U.S. 330 (2007). State Br. 28; Tribes Br. 33. There, the Court assessed flow-control ordinances which "benefit a clearly public facility"—a public benefit corporation empowered to "collect, process, and dispose of solid waste generated" in local counties. *Id.* at 335, 342. The Court found that the ordinances enabled county governments to "pursue particular policies with respect to the handling and treatment of waste." *Id.* at 343. In so doing, the Court specifically found that "waste disposal is both typically and traditionally a local government function." *Id.* at 344 (cleaned up and citation omitted). And it would hesitate to interfere with that function by invoking the Commerce Clause. *Id. United Haulers* is not applicable here because the Act does not establish a public facility providing a traditional public service, waste disposal. Rather, the Act grants licenses to operate internet gambling which is certainly not a traditional local function, nor one that a local government undertakes. *See id.*

Second, the State and Tribes each assert that the Act is not discriminatory to out of state interests. State Br. 28-29; Tribes Br. 33-34. But the text of the Act provides that a precondition to receiving a license outright or by transfer to conduct internet gambling is being an Indian Tribe *in this state.* 8 MRSA § 1406(2). The State's and Tribes' suggestions that the Act "applies equally to in-state and out-of-state businesses" is belied by the Act's text. *See* State Br. 29; Tribes Br. 33-34. The Tribes' cite to an unpublished Fourth Circuit case that rejected an individual's claim that the Dormant Commerce Clause saved him from a criminal conviction does not help their cause. *United States v. Garrett*, 122 F. App'x 628, 631 (4th Cir. 2005). *Garrett* involved a state law that

treated non-residents and residents alike by prohibiting them from providing "gambling mechanisms . . . to non-Native American establishments." *Id.* at 634. Quite obviously, that law, which treated in-state and out-of-state individuals the same, did not affront the Dormant Commerce Clause. *Id.* at 634. Here, by contrast, the Act draws an express distinction between in-state and out-of-state actors. As explained above, the layering of additional restrictions in the Act cannot cure the its facial discrimination against out-of-state economic actors. Removing such barriers was "a principal reason for the adoption of the Constitution." *See Tennessee Wine & Spirits Retailers Asso'n v. Thomas*, 588 U.S. 504, 515 (2019).

Third, the Tribes invoke the Indian Commerce Clause and argue its application here forestalls subjecting the Act to a Dormant Commerce Clause inquiry. Tribes Br. 34-35. But the Indian Commerce Clause simply underscores the power of Congress, not the states, to regulate Indian affairs. "The Indian Commerce Clause authorizes Congress '[t]o regulate Commerce . . . with the Indian Tribes." *Haaland v. Brackeen*, 599 U.S. 255, 273 (2023) (alterations in original) (quoting U.S. Const. art. I, § 8, cl. 3). The Supreme Court has interpreted the Clause to "reach not only trade, but certain 'Indian affairs' too." *Id.* And "[w]hile under the Interstate Commerce Clause, States retain 'some authority' over trade, [the Court] ha[s] explained that 'virtually all authority over Indian commerce and Indian tribes' lies with the Federal Government." *Id.* (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996)). The powers granted by the Indian Commerce Clause rest emphatically with the Federal Government, not with the State. And absent an express delegation of that authority, which Congress has not done with the Act, *see supra* § I, the State cannot invoke the power the Constitution vested to Congress alone—and certainly cannot do so as a basis for trampling on the federal government's authority to regulate commerce.

Fourth, the State suggests that the Dormant Commerce Clause does not apply because internet betting will occur entirely in the State. State Br. 30. That a state-sanctioned business can occur only within Maine does not obviate the application of the Dormant Commerce Clause. For instance, the First Circuit found the Dormant Commerce Clause applied to invalidate a residency requirement for Maine's medical-marijuana law that addressed marijuana sale only within Maine's borders (and which is criminalized federally). *Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Me.*, 45 F.4th 542, 547 (1st Cir. 2022). Moreover, Oxford Casino is prejudiced by the Act not because it wishes to play online blackjack in Maine, but because it would pursue the opportunity to offer such games if allowed. FAC ¶¶ 44-45. That internet gamblers must be in Maine is of no moment to the Act's restriction against any out-of-state business from obtaining a license to offer such services. And the State's argument that, somewhere along the line, an out-of-state business may be involved in providing some internet-gambling machinery, cannot rectify the Act's initial gatekeeping of allowing only four, in-state, licenses. State Br. 30-31.

III. The Facts Submitted By The State and Tribes Are Immaterial.

As shown in Oxford Casino's Rule 12(c) motion, and in this Opposition, determining the Act's constitutionality requires no factual inquiry. Assessing Oxford Casino's Equal Protection Clause claim requires (i) application of *KG Urban* and examination of Congress's delegation of authority under two related statutes, the Settlement Act and Implementing Act. Facts are irrelevant to making these legal calls. *See Eldridge v. Fordon Bros. Grp., LLC*, 863 F.3d 66, 77 (1st Cir. 2017) ("[A] fact is 'material' if its existence or nonexistence 'might affect the outcome of the suit under the governing law.'") (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Indeed, this Court and the First Circuit already have determined issues relating to the application of the Settlement Acts under Rule 12(c). *Passamaquoddy Tribe*, 75 F.3d at 788. This Court can do

the same. *Id.*; *see also Simmons v. Galvin*, 575 F.3d 24, 30 (1st Cir. 2009) ("[Q]uestions of statutory interpretation are questions of law ripe for resolution at the pleadings stage.").

Likewise, the Court can determine Oxford Casino's Dormant Commerce Clause claim without factual inquiry. Because the Act is not an express delegation of authority to the State from Congress, the State lacks power under the Commerce Clause (Dormant or Indian) to discriminate against out of state actors, which the Act does on its face. In such circumstances, "the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). No facts are necessary to determine the Act's validity under the Dormant Commerce Clause.

The State's and Tribes' use of these so-called "material" facts underscores their irrelevance. Of the 242 facts, the first 206 are hardly cited but to illustrate the singular point that the Tribes perform sovereign functions. *See, e.g.*, State Br. 22 (citing SMF ¶¶ 1-206 as "detailing sovereign interests of Wabanaki Nations"). That is a legal, not factual, proposition which can be largely captured in a single legal cite: The Settlement Acts make the Tribes "'subject to all duties, obligations, liabilities and limitations of a municipality of and subject to the law of the State,' but preserve[] the tribes' sovereignty over internal tribal matters." *Wampanoag Tribe of Gay Head (Aquinnah) v. Massachusetts Comm'n Against Discrimination*, 63 F. Supp. 2d 119, 125 n.6 (D. Mass. 1999). And it is fundamental that "[t]he special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress." *Bay Mills*, 572 U.S. at 801.

The State's and Tribes' Motions for Summary Judgment highlight that facts are not material to the legal analysis necessary to determine the Act's unconstitutionality.

Conclusion

For all these reasons, this Court should deny the State's and Tribes' Motions and grant Oxford Casino's motion for judgment on the pleadings.

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Respectfully submitted,

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