

**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' REPLY IN FURTHER SUPPORT OF THIER
MOTION FOR JUDGMENT ON THE PLEADINGS
UNDER FED. R. CIV P. 12(C)**

Preliminary Statement

As set forth in Oxford Casino's¹ Motion for Judgment on the Pleadings ("Oxford Casino Mot."), a state-created Tribal gaming law solely preferencing an Indian Tribe lacking an express grant of authority from Congress serves as a racial classification and is subject to strict scrutiny. The federal law governing Indian gaming, the Indian Gaming Regulatory Act (IGRA), does not apply in Maine. And there is no other express grant of authority from the federal government to

¹ Capitalized terms not defined herein have the same meaning as in Oxford Casino's Motion for Judgment on the Pleadings. ECF No. 35 ("Oxford Casino Mot.").

Maine to enact preferential Tribal gaming legislation. The Settlement Act and Implementing Act (together, “Settlement Acts”)² ensure that Maine law applies equally across the State and Tribal lands and reserves the power to enact laws benefitting the Tribes to the Federal government. Accordingly, the Act serves as a racial classification which cannot conceivably pass the daunting test of strict scrutiny.

In their oppositions to Oxford Casino’s Motion (each an “Opp’n Br.”), the State and Tribes make two arguments in hopes of avoiding application of these principles. Both fail. *First*, they argue that because the Act relates to the Tribes, it escapes strict-scrutiny review under *Morton v. Mancari*, 417 U.S. 535 (1974). But the First Circuit rejected this argument in *KG Urban Enterprises v. Patrick*, 693 F.3d 1 (1st Cir. 2012), determining that *Mancari* only applied to federal laws. The State’s and Tribes’ attempted rejection of on-point, binding case law addressing state laws (*KG Urban*) in favor of precedent addressing federal laws (*Mancari*) is flawed at its foundation.

Second, the State’s and Tribes’ search for express and clear language in the Settlement Acts granting Maine the power to enact preferential Tribal gaming legislation comes up empty handed. The only statutory text they cite does not address preferential legislation, but instead is a general provision establishing the universal applicability of Maine law, which applies to every Maine citizen, including Tribal members. The State’s and Tribes’ cites to a carefully selected phrase in *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979), which is then unmoored from its context, does not make up for the lack of an express Congressional grant of authority for the State to enact the Act.

² “The Settlement Acts” consist of two statutes, one federal and one state. The Maine Indian Claims Settlement Act of 1980 (“Settlement Act”), Pub. L. No. 96-420, 94 Stat. 1785, is the federal statute. The state statute implementing the federal Settlement Act is the Maine Implementing Act (“Implementing Act”), P.L. 1979, ch. 732 (codified at 30 M.R.S. §§ 6201-6214).

And all other aspects of the Settlement Act run directly counter to the State's and Tribes' confected reading of the Settlement Acts: (i) Congress retained its inherent, plenary, and exclusive power to enact laws preferential to the Tribes, (ii) the municipal model grants the State no power to preference the Tribes in Tribal gaming legislation, (iii) the Settlement Act's legislative history directly refutes that the Settlement Act allows for state laws to confer special status to the Tribes, and (iv) principles of Indian law interpretation disfavor state power over Indian affairs as the State and Tribes advocate here.

From every angle, the Settlement Act cannot be construed as an express grant of authority from Congress to the State to enact preferential gaming legislation. It thus serves as a racial preference, which must satisfy strict scrutiny. And there is no credible argument it can pass that daunting test.

Additionally, because the Act facially discriminates against out-of-state actors, the lack of federal authorization for the Act makes it doubly unconstitutional, violating the Dormant Commerce Clause as well. The State's and Tribes' sleight-of-hand effort to escape the facially nativistic aspect of the Act by focusing on other restrictions they say are the real exclusionary provisions cannot insulate the Act from its Dormant Commerce Clause flaw.

This Court should accordingly grant Oxford Casino's motion for judgment on the pleadings and enjoin the Act, which finds no purchase whatsoever in federal authority and serves as a racial preference violative of the U.S. Constitution's guarantee of equal protection and its prohibition against laws that discriminate against interstate commerce.

Argument

I. The State has no inherent authority to legislate as to Indian Tribes.

As an initial matter, the Tribes acknowledge, as they must, that the State may not legislate as to the Tribes without Congressional authorization. Tribes Opp'n Br. 23. And yet, the State and Tribes argue that—even lacking express authorization—the Act passes Constitutional muster under *Mancari* because it is directed at a political, not racial, group. Tribes Opp'n Br. 22-24. But this argument fails out of the starting gate. The State has no power to enact legislation directed at the Tribes on its own accord. Rather, it is blackletter law, which the Tribes do not dispute, that “Federal supremacy within Indian affairs leaves no room for state regulation of Indian nations.” 1 Cohen’s Handbook of Federal Indian Law § 1.03. Congress’ “power to legislate with respect to the Indian Tribes [is] ‘plenary and exclusive’” *Haaland v. Brackeen*, 599 U.S. 255, 272 (2023) (quoting *United States v. Lara*, 541 U.S. 193, 200 (2004)). In exercising this power, Congress has assumed “that the States have no power to regulate the affairs of Indians on a reservation.” *Williams v. Lee*, 358 U.S. 217, 220 (1959). And when “Congress has wished the States to exercise this power it has expressly granted them the jurisdiction.” *Id.* at 221.

The Tribes’ invitation to ignore these fundamental principles and assess legislation addressing Indian Tribes the same—whether a federal law or a state law—is antithetical to the fundamental division of power the Constitution allots. *See* Tribes Opp'n Br. 23. The State and Tribes argue that even in the absence of express Congressional authorization, *Mancari* approves the State’s government-to-government political classification. Tribes Opp'n Br. 23-24; State Opp'n Br. 19-20. But *Mancari* addressed a *federal* policy enacted by the Bureau of Indian Affairs pursuant to authority granted to it under the Indian Reorganization Act. *Mancari*, 417 U.S. at 537-38. It therefore does not apply when, as here, Congress has not granted specific authority to the

State to enact gaming legislation specifically preferencing the Tribes. *See generally id.* Nor does *Mancari* support an exception to the rule that laws affecting Indian affairs must be made by Congress, not the states. In short, *Mancari* cannot save the State’s and Tribes’ problem that Congress did not expressly authorize the Act. The federal government alone, not the State, has the power to legislate as to Indian Tribes as political sovereigns.³ And in the absence of authorization from Congress, the State’s attempt to prefer the Tribes over all others is a form of racial discrimination and subject to strict scrutiny. *See KG Urban*, 693 F.3d at 19-20. The Act cannot credibly meet such a high standard and therefore must be found to be unconstitutional.

II. Strict scrutiny applies to the Act.

A. *KG Urban* expressly rejects the State’s and Tribes’ arguments that *Mancari* applies.

As explained in Oxford Casino’s Brief in Opposition to the State’s and Tribe’s Motions for Summary Judgment (“Oxford Casino Opp’n Br.”), the State’s and Tribes’ failed efforts to distinguish *KG Urban* rest almost entirely on the same authority that the First Circuit considered in determining that *Mancari*’s rationale did not apply to a state law preferencing Tribes with regards to gaming. ECF No. 40 (“Oxford Casino Opp’n Br.”), at 3-7. Nothing in the State’s and Tribes’ oppositions to Oxford Casino’s Motion unsettles that conclusion. Rather, the State and Tribes only further tie themselves into knots in attempting to escape *KG Urban*’s plain application.

KG Urban specifically addressed Massachusetts’ argument that its exclusive gaming preference granted to one Tribe in Massachusetts, the Mashpee, was “based on tribal status” and thus “political, not racial, in nature, and so subject only to rational basis review.” *KG Urban*, 693

³ The Tribes say that Oxford Casino somehow conceded that federal laws directed at Tribes are subject to rational-basis review. Tribes Br. 2. That is not the case; Oxford Casino explained that courts have limited *Mancari*, and a law’s federal nature does not necessarily mean that equal-protection principles are inapplicable. Oxford Casino Mot. 11-12. But this Court need not decide these issues—the Act is a state, not federal, law.

F.3d at 17. But the First Circuit found that there was “no authority” supporting the argument that “state preferential classifications based on Tribal status which are not authorized by federal law are nonetheless not racial classifications under *Mancari*.” *Id.* at 19. Accordingly, the First Circuit reversed the district court’s determination that KG Urban’s equal-protection claim had failed to state a claim on which relief can be granted. *Id.* at 27.

Notably, *KG Urban* contained two separate analyses of whether different Supreme Court cases applied: (i) whether *Mancari* allowed a state-created law preferencing Indian Tribes to escape strict scrutiny, *id.* at 17-20, and (ii) whether, under *Yakima*, the federal government expressly authorized the preferential legislation, *id.* at 20-25. Both the State and Tribes muddle these two separate inquiries. Tribe Opp’n Br. 25; State Opp’n Br. 22-23. But *Yakima* and *Mancari* start from two different premises. In the First Circuit’s *Yakima* analysis, Congress grants a state authority (through IGRA)⁴ and the question becomes whether the Massachusetts law falls within the express authorization Congress provided. *KG Urban*, 693 F.3d at 20. The First Circuit’s *Mancari* analysis, however, examines if a state-created preference may escape equal-protection strict scrutiny in the *absence* of any federal authorization. *Id.* at 19-20. The critical application of *KG Urban* here is the First Circuit’s determination that *Mancari* does not extend to *state-created* Tribal preferences. *Id.* That determination applies here on all fours. And contrary to the State’s and

⁴ IGRA, which does not apply in Maine, creates a framework for regulating gaming on (non-Maine) Tribal lands. Congress’ central purpose in passing IGRA was to “provide a statutory basis for operation of gaming by Indian Tribes as a means of promoting Tribal economic development, self-sufficiency, and strong Tribal governments.” 25 U.S.C. § 2702(1). IGRA divides gaming on Indian lands into three categories. *Seminole Tribe of Fl. v. Florida*, 517 U.S. 44, 48 (1996). Class III gaming, which includes gaming such as slot machines and casino games, is the most heavily regulated and requires a Tribal-State compact. *Id.* at 48-49.

Tribes' argument, *KG Urban's* application of *Mancari* cannot be distinguished or undercut by its separate *Yakima* analysis.

Indeed, the State and Tribes underscore that there is no credible basis to escape *KG Urban's* application of *Mancari*. For instance, the Tribes assert that the "First Circuit noted 'doubt[]' whether 'Mancari's language' extends to preferential state classifications based on Tribal status." Tribes Opp'n Br. 26 (citing *KG Urban*, 693 F.3d at 19). The entire quote, however, shows quite the opposite. Rather, the First Circuit found it "**quite doubtful** that *Mancari's* language can be extended to apply to preferential *state* classifications based on Tribal status." *KG Urban*, 693 F.3d at 19 (bold emphasis added). In other words, the First Circuit found it "quite doubtful" that *Mancari* authorized state-created legislation that preferred Indian Tribes. The Tribes' extreme and selective quote clipping is what it takes to twist *KG Urban* into something so different that it does not apply here. Such efforts utterly fail to escape *KG Urban's* application.

The Tribes' other attempts at distinguishing *KG Urban* are similarly feeble. The Tribes further argue that the First Circuit did not issue a "holding that strict scrutiny applied." Tribes Opp'n Br. 26.⁵ But that conclusion follows *a fortiori* from *KG Urban's* express determination that no authority supported the conclusion that state classifications based on Tribal status not

⁵ The Tribes' argument that there is somehow a material difference for equal-protection purposes between state laws that distinguish between individual Native Americans and Tribes composed of such individuals, Tribes Opp'n Br. 27, like its other arguments, finds no traction in *KG Urban*. The Massachusetts law at issue there did not preference individuals, but the Mashpee Wampanoag Tribe. *KG Urban*, 693 F.3d at 6.

authorized by federal law are not considered racial classifications under *Mancari*.⁶ *KG Urban*, 693 F.3d at 19. It is a bedrock principle that racial classifications are subject to strict scrutiny.

Next, the State's and Tribes' observations that the affected Massachusetts Tribes did not participate in *KG Urban* are meaningless. Tribes Opp'n Br. 26; State Opp'n Br. 23. The effect of precedent does not turn on which parties to a case litigated it, but the facts and issues involved in the decision. *Precedent*, Black's Law Dictionary (12th ed. 2024) (“[A] decided case that furnishes a basis for determining later cases involving similar facts or issues.”). That Adams was not a party to *Marbury v. Madison* does not circumscribe its application.

The State goes further, arguing that the *KG Urban* court got it wrong and there is “no basis” to find a difference between state laws and federal law that address Tribal relations. State Opp'n Br. 23. Article I of the U.S. Constitution, which grants exclusive power to the federal government over Indian affairs, rejects the State's false equivalency between the state and federal government with regard to Indian Affairs. *See* U.S. Const. art. I, § 8, cl. 3. And regardless of the State's opinion concerning the wisdom of *KG Urban*, the case is binding precedent.

B. Congress has not expressly delegated authority to the State to enact preferential internet-gambling legislation to benefit the Tribes.

Because *KG Urban* forecloses any argument that the Act escapes strict-scrutiny equal-protection review, the State and Tribes fall back on attempting to root the Act in the only grants of Congressional authority that could apply, the Settlement Acts. But the Settlement Acts lack any express provision granting the State the authority to enact preferential Tribal-gaming legislation; Congress retained its plenary power to do so. That conclusion is reinforced several

⁶ The Tribes' argument that there is not a single case applying strict scrutiny to a state law concerning Tribal nations ignores the binding precedent in front of their nose, which determined that state-generated legislation without express federal authorization is a racial preference. *KG Urban*, 693 F.3d at 19. As noted in Oxford Casino's Opposition Brief, other courts have applied strict scrutiny to strike down non-federal laws. Oxford Casino Opp'n Br. at 19 n.8.

times over: (i) by the Settlement Acts’ text; (ii) their structure; and (iii) their legislative history, which repeatedly emphasized the purpose in applying Maine law was to afford equal treatment, not special status. And on top of this, basic tenants of Indian law confirm that the Settlement Acts cannot be read to broadly assume every aspect of Tribal sovereignty, particularly over Tribal gaming, which courts and Congress have recognized is core to Tribal self-determination. Ample authority firmly rejects the conclusion which must logically follow from the State’s and Tribes’ arguments—that Congress abdicated, *sub silentio*, its well-recognized exclusive authority over Tribal affairs wholesale to the State of Maine. No authority supports this proposition.

1. The State and Tribes Misapply *Yakima*.

a. *Yakima*’s holding.

The State and Tribes rely heavily on *Yakima*, 439 U.S. 463 (1979). But the curated phrases they select from that decision cannot bear the weight they place upon them. The State and Tribes repeatedly emphasize a half phrase from *Yakima*, that the Washington state law was “enacted in response to . . . federal measure[s] explicitly designed to adjust the allocation of jurisdiction over Indians.” (the “Readjustment Phrase”). Tribes Opp’n Br. 13, 14; State Opp’n Br. 14, 15. But the State’s and Tribes’ repetition of the Readjustment Phrase is unmoored from *Yakima*’s facts and context. The *Yakima* Court made clear that in enacting the state law at issue (Chapter 36⁷), “Washington was legislating under *explicit authority* granted by Congress in the exercise of that federal power.” *Yakima*, 439 U.S. at 501 (emphasis added). And as explained fully in Oxford Casino’s Opposition Brief, the Congressional grant of that explicit authority, Pub. L. 280,⁸ specifically granted the very jurisdiction that Washington assumed in Chapter 36. Oxford Casino

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

⁸ Act of Aug. 15, 1953, Pub. L. 280, 67 Stat. 588.

Opp'n Br. 11-12. The State and Tribes ignore that key factual context. The out-of-context snippet of *Yakima* the State and Tribes latch onto, however, cannot be isolated from the facts of the case and its ultimate conclusion that Washington acted in response to an *explicit grant of federal authority*. “The language of an opinion is not always to be parsed as though we were dealing with the language of a statute.” *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 373 (2023) (cleaned up). Rather, the language of opinions “must be read with a careful eye to context.” *Id.* at 373-74. And it is clear that the *Yakima* Court had a specific context in front of it: An explicit grant of authority from Congress to the States. That context cannot support the State’s and Tribes’ ballooning the Readjustment Phrase which more generally speaks about “readjust[ing] the allocation of jurisdiction over Indians.” *Yakima*, 439 U.S. at 500. Such “readjustment” made by Pub. L. 280 was not something broad and vague, but clear and direct: “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” *Id.* at 471 n.9 (quoting Pub. L. 280 § 7). To untether the Readjustment Phrase from the context in which it was written, an “explicit authority granted by Congress,” results in an application inconsistent with *Yakima*’s core holding. *Id.* at 500.

This Court should reject the State’s and Tribes’ expansive and impermissible reading of the Readjustment Phrase plucked from *Yakima*, yet divorced from its context. *See Brown v. Davenport*, 596 U.S. 118, 141 (2022) (“We neither expect nor hope that our successors will comb these pages for stray comments and stretch them beyond their context—all to justify an outcome inconsistent with this Court’s reasoning and judgments and with Congress’ instructions. Such an exalted view of this Court’s every passing remark would turn *stare decisis* from a tool of judicial humility into one of judicial hubris.”). On the contrary, the only reading of *Yakima* faithful to its

facts and holding is that any grant of authority from Congress to a state must be expressly made. *Yakima*, 439 U.S. at 500.

b. The Settlement Acts lack an express grant of authority to the State over Tribal gaming.

The Settlement Acts' texts contain no express grant of authority to the State over Tribal-gaming legislation. Indeed, the only language the State and Tribes point to addresses laws generally applicable throughout Maine, not laws specifically addressing gaming or preferencing the Tribes. The Tribes "shall be 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 persons or lands or other natural resources therein.*" 30 M.R.S.A. § 6204 (emphasis added). This grant of authority says nothing about the State's ability to pass legislation that is preferential to the Tribes alone. Indeed, it is directly counter to the establishment of Maine law applying equally everywhere to allow for the unequal application of laws only with regard to the Tribes. The Settlement Acts' grant of authority to allow Maine law to apply to the same extent no matter where within its borders falls far short of an explicit authorization from Congress to grant Maine authority to enact a law specifically preferencing the Tribes regarding Tribal gaming. *See Yakima*, 439 U.S. at 500.

Attempting make up for this fatal shortcoming, the State and Tribes try to fasten a grant of authority over preferential gaming laws to the Settlement Acts by citing a First Circuit decision, *Passamaquoddy Tribe v. Maine*, 75 F.3d 784 (1st Cir. 1996). But again, the State and Tribes expand the language of an opinion far beyond its context. That case says nowhere (and the Tribes cite to no specific language) that the Settlement Acts' "authority includes gaming." Tribes Opp'n Br. 14. Rather, the First Circuit simply sets out the applicable statutory framework by comparing the

nature and scope of IGRA and the Settlement Act. Beginning its opinion in a “Statutory Framework” section, the First Circuit observed:

The Settlement Act and the Gaming Act are vastly different in scope. From a geographic standpoint, the former is narrower in the sense that it applies only in Maine whereas the latter has national implications. From a political standpoint, however, the Settlement Act is broader in that it purposes to cover virtually the entire field of relationships between the State and the Indian Tribes based there whereas the Gaming Act concentrates exclusively on a particular kind of activity, i.e., gambling.

Passamaquoddy Tribe, 75 F.3d at 788. This compare-and-contrast between the Settlement Act and IGRA and the remarks about the “political standpoint” of the Settlement Act, simply provide no support for the conclusion the State and Tribes draw: That the First Circuit determined that Maine had jurisdiction over Tribal gaming issues via the Settlement Act.⁹

Indeed, the First Circuit’s opinion suggests exactly the opposite. If IGRA applied (which it did not because Section 16(b) of the Settlement Act prevented its application in Maine) the Passamaquoddy Tribe, “which is federally recognized and self-governing” would be “home free” in taking advantage of IGRA. *Id.* Nothing in *Passamaquoddy Tribe* suggests that the First Circuit had determined that Congress had *already* granted Maine authority over Tribal gaming in the Settlement Act and thus IGRA could not apply for that reason.

Indeed, at that time, the Passamaquoddy Tribe read the Implementing Act’s “same extent” provision directly counter to the position it, along with the other Tribes, advocates today. In that case, seeking to foreclose application of IGRA, the State had argued that applying IGRA to Maine would “disrupt the principle that Maine Indians are subject to state jurisdiction to the same extent

⁹ The State has expressly admitted that the Implementing Act “does not address gaming or the sovereign status of the Wabanaki Nations for the purpose of gaming.” ECF No. 23 (“State’s Answer”) ¶ 34. This binding admission is dispositive when the proper standard is understood: That Congress must expressly grant authority to the State to escape strict-scrutiny review.

as any other person.” Reply Brief of Plaintiff-Appellant at 8, *Passamaquoddy Tribe v. Maine*, 75 F.3d 784 (No. 95-1922), 1995 WL 17828479. The Passamaquoddy Tribe flatly rejected this argument: “If the State sought such jurisdiction in the Settlement[,] it did not get it” *Id.* And in an accompanying footnote, the Passamaquoddy Tribe concluded that, “[w]hile the Implementing Act bestowed municipal powers on the Tribe, 30 M.R.S.A. § 6206(1), these powers were in addition to the inherent tribal powers which were recognized in the Implementing Act. Termination of that special Tribal status of the Passamaquoddy Tribe was never an ‘essential premise’ of the Maine Settlement.” *Id.* at 8 n.6. These words were penned by the very lawyer who negotiated the Settlement Act on behalf of the Passamaquoddy Tribe. But now, poised to benefit from the monopoly over internet gambling granted by the Act, the Passamaquoddy Tribe alters its tune, arguing the Settlement Act grants Maine near complete authority over all subjects, including Tribal gaming. Tribes Opp’n Br. 17-18. Now, the Passamaquoddy Tribe plucks a phrase from the same case in which it argued that Maine *lacked* jurisdiction over Tribal gaming to support the argument that the Settlement Act expansively granted the State near complete jurisdiction over the Tribes, including gaming. Only now do the Settlement Acts cover “virtually the entire field of relationships between the State and Indian Tribes,” including Tribal Gaming. Tribes Br. 15 (quoting *Passamaquoddy Tribe*, 75 F.3d at 788). The Tribes’ assertion that Oxford Casino’s reading of the Settlement Act “flies in the face” of its contemporaneous understanding and interpretation is directly belied by the Passamaquoddy Tribe’s prior litigation position that the Act did not grant Maine authority over Tribal gaming. *See* Tribes Opp’n Br. 18.

The language of the Implementing Act establishing that Maine law applies over Tribal lands, as it does everywhere else, fails to meet the standard set in *Yakima* of an express grant of authority to enact legislation over Tribal gaming which solely preferences the Tribes.

c. The Settlement Acts' structure runs counter to an express grant of authority to Maine over Tribal-specific issues like gaming.

Moving beyond the only specific text (the “same extent” provision) in the Settlement Acts that the State and Tribes argue constitutes an express grant of authority to the State, solidifies that Congress did not expressly grant the State authority to enact preferential Tribal gaming legislation. For starters, the Settlement Act makes clear that the federal government *retained* the ability to pass legislation specifically for the benefit of Maine’s Tribes. Under Section 6(h) of the Settlement Act, existing Federal laws that “accorded special status or right of or to any Indian, Indian nation, [or] tribe . . .” that affected or preempted the “civil, criminal, or regulatory jurisdiction of the State of Maine” did not apply in Maine. Likewise, *future* federal laws “for the benefit of” Indian Nations that affected the application of Maine law would not apply unless Congress made them specifically applicable to Maine. Settlement Act § 16(b). Thus, the Settlement Act makes clear that Congress, not the State, has the power to enact specific laws for the benefit of the Tribes.

That retention of power is in keeping with the fundamental principles that Congress has exclusive and plenary power over Indian affairs, it alone can abrogate Tribal sovereignty, and if it does so it must be clear and express. *Williams*, 358 U.S. at 220-21. (noting that “States have no power to regulate the affairs of Indians on a reservation” and when “Congress has wished the States to exercise this power it has expressly granted them . . . jurisdiction.”). Courts assume that “Congress legislates with knowledge of our basic rules of statutory construction” including “well-settled presumption[s].” *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). The retention of the ability for Congress to enact legislation specifically benefiting the Tribes runs wholly counter to the State’s and Tribes’ argument that Congress expressly granted Maine that very power.

The “municipal model” established by the Settlement Acts reinforces this conclusion. As brief review, by signing the Settlement Acts, “the Tribes agreed to be treated as municipalities for purposes of defining their relationship with the State of Maine, [thus] state laws that apply to municipalities also routinely apply to the Tribes.” *Great N. Paper, Inc. v. Penobscot Nation*, 2001 ME 68, ¶ 38, 770 A.2d 574. Maine’s relationship *vis a vis* the Tribes was thus one founded on municipal governance. And it is axiomatic that the State could not differentially treat one of Maine’s close to 500 municipalities on the basis of race or national origin. A state law that treated a city or town with a large Congolese population differently because of the racial composition of that municipality would be “contrary to our traditions and hence constitutionally suspect.” *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 309 (2013) (citation omitted). “Because racial characteristics so seldom provide a relevant basis for disparate treatment, the Equal Protection Clause demands that racial classifications be subjected to the ‘most rigid scrutiny.’” *Id.* at 309-10 (cleaned up).

The Tribes chide Oxford Casino, arguing that focusing on the municipal model minimizes their inherent sovereignty. Tribes Opp’n Br. 19-21. But recognition of the Implementing Act’s municipal model does not diminish the Tribes’ inherent sovereignty, it rather emphasizes *which* government has the power to legislate regarding that authority. The Settlement Act makes clear that power remains with the federal, not state government, as the Constitution provides. And that is no surprise; it is in keeping with the deeply rooted principle that only Congress can diminish Tribal sovereignty. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (“Unless and until Congress acts, the Tribes retain their historic sovereign authority.” (citation omitted)). Against this backdrop, with Maine’s and the Tribes’ relationship defined largely by a pre-existing municipal

model, it cannot be concluded that Congress expressly and clearly intended to grant its authority over Tribal gaming issues to the State.¹⁰

d. The Settlement Acts’ legislative history confirms intent not to grant Maine authority to specifically preference the Tribes.

Although the text and structure of the Settlement Acts are clear and unambiguously not an express grant of authority to the State to enact preferential gaming legislation, as shown in Oxford Casino’s Motion, the legislative history patently underscores this conclusion. Oxford Casino Mot. 25-26. If multiple point-blank statements that the Settlement Acts did not create a “nation within a nation” by the high-ranking Maine officials who negotiated the Act were not enough, Oxford Casino Mot. 25-26 (quoting *Great N. Paper*, 2001 ME 68, ¶ 27, 770 A.2d 574), there is more.

Maine’s Attorney General, Richard S. Cohen, wrote to the Senate Select Committee on Indian Affairs emphasizing the equal treatment the Settlement Acts provided. The Maine Attorney General responded to a question asking whether the Acts’ “jurisdictional language bestow a preferential treatment upon the Tribes which will foster an unrelenting chain of legal disputes in the years ahead.”¹¹ The Maine Attorney General responded that “[g]enerally, the Act does not provide Indians with preferential treatment. To the contrary, we believe the Implementing Act establishes a measure of equality between Indian and non-Indian citizens

¹⁰ The Tribes argue that application of this principle gives the State less authority over Tribal gaming than other states and somehow hamstring the State in matters of Tribal gaming. Tribes Opp’n Br. 16. Not so. The State has exercised the ultimate power with regard to Tribal gaming, prohibiting IGRA’s application in Maine. See *Passamaquoddy Tribe*, 75 F.3d 784 (1st Cir. 1991). And if IGRA were to apply in Maine, the State would enter into a Tribal – State compact which it would be free to negotiate against a backdrop of Maine’s historical relationship to Tribal gaming. Maine’s historical position on Tribal gaming shows it has vastly more power than other states on that issue.

¹¹ *Proposed Settlement of Maine Indian Land Claims: Hearing on S. 2829 Before the Select Comm. on Indian Affs.*, 96th Cong. 148 (1980) (Letter from Richard Cohen, Me. Att’y Gen., to Sen. John Melcher), available at <https://babel.hathitrust.org/cgi/pt?id=umn.31951p00324196j&seq=7>.

normally not existing in other States.”¹² Unequivocal statements made by those who negotiated the Settlement Act on behalf of Maine directly dispute the State’s and Tribes’ assertion that the Settlement Act granted Maine authority to enact preferential Tribal-gaming legislation. The legislative record firmly reemphasizes that a core goal of the Settlement Act was equal treatment, not special status.

e. The State and Tribes ignore basic principles of interpretation.

The Supreme Court has emphasized that “the standard principles of statutory interpretation do not have their usual force in cases involving Indian law.” *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). Yet, the Tribes invoke those standard principles. Tribes Opp’n Br. 16 (citing standard principle interpreting use of general words). But they fail to address the applicable principles of interpretation of Indian law which cut directly against their arguments. The State and Tribes ignore the key principle that “[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., concurring). Thus, “ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of [Tribal] sovereignty and with the federal policy of encouraging tribal independence.” *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980).

Application of these principles firmly rejects the State’s and Tribes’ makeshift effort to construct an express grant of Congressional authorization for the State to enact preferential gaming when there is none.

¹² *Id.* at 149.

f. The Tribes' policy-based arguments are inapt and not controlling.

This court's determination of Oxford Casino's Motion turns on the application of law, not policy. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 403 (2024) ("Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences."). The Tribes, however, decry that granting Oxford Casino's Motion would result in disrupting "two centuries" of relations between Maine and the Tribes, Tribes Opp'n Br. 1, and emphasize the purported "sheer destructive force" of Oxford Casio's arguments, Tribes Opp'n Br. 21. Any such policy concerns are vastly overblown.

As an initial matter, Maine's relationship with the Tribes is of no legal moment here until 1976. Until then, "[a]lthough the Tribes were recognized in a cultural sense, they were simply not recognized by the state or the federal government in an official 'political sense.'" *Great N. Paper*, 2001 ME 68, ¶ 22, 770 A.2d 574 (citation omitted). Moreover, the Tribes' trumpeting of this pre-recognition history is strange given Maine's unfortunate long mistreatment of its Tribes. "Maine has treated indigenous people like Andrew Jackson treated the Five Civilized Tribes leading up to the Trail of Tears. From the end of the American Revolution until 1975 [indigenous people] were treated as practically less than human." Michael-Corey F. Hinton, *Isolation and Restraint: Maine's Unique Status Outside Federal Indian Law*, 75 Me. L. Rev. 226, 233 (2023).

After the Tribes' land claims against the State of Maine gained traction in the courts in the mid-1970s, the Tribes achieved, among other things, "federal recognition of their Tribal status" for the first time in the Settlement Acts entered in 1980. *Akins v. Penobscot Nation*, 130 F.3d 482, 484 (1st Cir. 1997) (quoting *Passamaquoddy Tribe*, 75 F.3d at 787). Any reliance on Maine's relationship with the Tribes before federal recognition is misplaced—Congress had no role in exercising its exclusive and plenary power over Maine's Tribes until that moment. And since such

federal recognition in 1980, the Tribes' citation to Maine laws they say treat the Tribes uniquely is modest in scope and number and may not be viewed as preferential legislation at all. Tribes Opp'n Br. 19 n.10. For instance, it is unremarkable the Governor meets with the Tribes annually. She likely does so with dozens of constituent groups. And a particular recognition license plate for members of the Wabanaki Nations is one of many specialty plates for various interests, such as veterans and sportsmen.¹³

Moreover, general policy concerns are limited by the subject of this action. This case addresses a preferential Tribal gaming law. Congress and courts have expressly recognized that Tribal gaming is specifically tied with Tribal sovereignty.¹⁴ "For Tribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes' core governmental functions. A key goal of the Federal Government is to render the Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than rely on federal funding." *Bay Mills*, 572 U.S. at 810 (Sotomayor, J., concurring) (citing IGRA, 25 U.S.C. § 2702(1)).

A different state law, one not directly affecting Tribal sovereignty and Tribal self-government, might not implicate the paramount "respect both for tribal sovereignty itself and for the plenary authority of Congress in this area" which necessitates "caution[]" and "tread[ing] lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). In short, judgment in favor of Oxford Casino far from imperils any and all of

¹³ *Information About Specialty Plates*, Me. Dep't of Sec'y of State (last visited June 25, 2026), <https://www.maine.gov/sos/bmv/vehicles/specialty-plates>.

¹⁴ Although the Settlement Acts pre-date *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), that decision did not come out of thin air; it marked the "culmination of almost a decade of extensive litigation regarding the legality of the growing Indian gaming industry." Robert N. Clinton, *Enactment of the Indian Gaming Regulatory Act of 1988: The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty*, *Robert N. Clinton*, 42 *Ariz. St. L.J.* 17, 44 (2010). Indian gaming as a "commercial venture" was nothing new. *Id.* at 20. It began after World War II. *Id.*

Maine’s laws preferencing the Tribes, which may not even impact equal-protection concerns at all. The only sure “destructive force” granting Oxford Casino’s Motion will have is to stop a plainly unconstitutional law, the Act, from taking effect. *See Tribes Opp’n Br. 21.*

* * *

Nothing in the text, structure, or legislative history of the Settlement Acts supports the conclusion that Congress expressly granted the State authority to enact preferential Tribal gaming legislation like the Act on its own accord. And in the absence of an express grant of Congressional authority to the State, the Act must satisfy strict scrutiny. *KG Urban*, 693 F.3d at 17-20; *see also Malabed v. N. Slope Borough*, 42 F. Supp. 2d 927, 939 (D. Alaska 1999) (subjecting ordinance adopting employment preference for Native Americans to strict scrutiny).

III. The Act cannot satisfy strict scrutiny.

The State and Tribes each attempt to duck the question of whether, if the Act were found to be an unauthorized racial classification, it may survive strict scrutiny. *See State Opp’n Br. 25-27; Tribes Opp’n Br. 29-30.* The Act cannot survive that standard, and the State and Tribes advance only a passing attempt to argue otherwise.

The State and Tribes first argue that the strict scrutiny analysis—i.e., whether the State can demonstrate a compelling government interest and whether the Act has been narrowly tailored to serve that interest—cannot be decided on a Rule 12 motion. *State Opp’n Br. 25-26; Tribes Opp’n Br. 29.* Not so. Various courts of appeals have held that determinations concerning strict scrutiny can be made on Rule 12 motions and, indeed, have made such determinations. *See Jeffery v. City of New York*, 113 F.4th 176 (2d Cir. 2024) (determining whether city curfew survived strict scrutiny on Rule 12 motion); *Walker v. Beard*, 789 F.3d 1125 (9th Cir. 2015) (determining whether prison classification survived strict scrutiny on Rule 12 motion). In any event, and despite arguing the

Court can make this determination only upon a factual record, the State’s and Tribes’ respective motions for summary judgment fail to offer any facts addressing this issue at all. And neither the State nor the Tribes identify what factual material possibly would be used or needed here: the State either enjoyed a public-policy-based reason for the Act at the time of its passage—a point the State may argue on the basis of the existing legislative record—or it did not.

From there, the State and Tribes offer little more. With respect to whether a compelling government interest may support the Act, the State and Tribes argue the Act serves the interest of remedying historical discrimination. *See* State Opp’n Br. at 26-27; Tribes Opp’n Br. at 29-30. But generalized historical discrimination is insufficient to clear the compelling interest bar. *See* Oxford Casino Mot. 27. The closest the State and Tribes come to meeting the required compelling-governmental-interest standard—addressing “specific, identified instances of past discrimination that violated the Constitution or statute,” *Louisiana v. Callais*, 146 S. Ct. 1131, 1152 (2026) (citation omitted)—is noting that the Tribes have historically been “excluded from conducting most forms of gaming in the State,” State Opp’n Br. 26; Tribes Opp’n Br. 29. But the prime cause¹⁵ of such exclusion is the Settlement Act’s prohibition of IGRA under Section 16(b), and neither the State nor Tribes argue the Settlement Act is unconstitutional. The Act cannot meet the strict-scrutiny standard for this reason alone, and the Court need go no further.

Even if the Court accepts the argument that the goal of remedying generalized historical discrimination may serve as a compelling interest, granting the Tribes an exclusive, racially discriminatory monopoly forever cannot possibly meet any standard of tailoring as a matter of law. *See* Oxford Casino Mot. 28-30. An alternative, non-discriminatory version of the Act is easy

¹⁵ The State notes that voters rejected a 2003 Referendum that would have approved a Tribal casino. ECF No. 37 (“State Mot.”), at 7, 20. There is no suggestion that result was unconstitutional.

to picture: the Act simply could have made licenses available to anyone who met neutral criteria, including Tribal interests, without putting a thumb (or in this case, a boulder) on the side of any particular racial group. To the extent the State and Tribes view the Act as remedying historical exclusion from gaming, the above alternative version of the Act would have offered equal treatment to all. Instead, the Act adopts the extreme measure of granting the Tribes a monopoly over all internet gaming. As set forth in Oxford Casino’s opening brief, no case holds that such extreme means meets the necessary standard of narrow tailoring. Oxford Casino Mot. 29. The Act, by creating a new market and then granting the Tribes exclusivity over that market, has constructed the “broadest possible remedy.” *Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997). The exclusive giveaway of a state-created monopoly is “almost by definition not narrowly tailored.” *Id.* at 666.

IV. The Act facially fails Commerce Clause strict scrutiny.

The State and Tribes recycle the Commerce Clause arguments they set forth in their motions for summary judgment to oppose Oxford Casinos Rule 12(c) motion. *See* State Mot. 23-31; ECF No. 38 (“Tribes Mot.”), at 28-35. But as fully set out in Oxford Casino’s Opposition Brief, the State’s and Tribes’ standing and merits-based arguments are unavailing and fail to undermine the legal basis of Oxford Casino’s claim under the Dormant Commerce Clause. Oxford Casino Opp’n Br. 21-26.

Standing. The major thrust of the State’s and Tribes’ standing argument is that Oxford Casino is not a federally recognized Indian Tribe, so it cannot challenge the Act’s protectionist flaw. State Opp’n Br. 28-29; Tribes Opp’n Br. 31-32. But one unconstitutional aspect of the Act (that it violates equal protection) cannot save it from its other constitutional failing—that it violates the Dormant Commerce Clause. The State may not layer additional requirements into a

law banning out-of-state economic actors (like such actors must be unionized) and then argue such (non-union) out-of-state companies lack standing to challenge the law. *See* Oxford Casino Opp'n Br. 22-23.

Next, the Tribes take issue with the fact that only Churchill Downs is an out-of-state corporation. Tribe Opp'n Br. 31-32. But that is enough. When co-plaintiffs have a shared interest in the litigation, such as a close relation and “joint objective,” finding one plaintiff has standing negates the need to go further. *Montalvo-Huertas v. Rivera-Cruz*, 885 F.2d 971, 976 (1st Cir. 1989).

Merits. The State's and Tribes' argument that Oxford Casino and the Tribes are not similarly situated, State Opp'n Br. 30; Tribes Opp'n Br. 32-33, ignores that the basic inquiry is whether the product offered by the out-of-state actor is similar, *see Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997). And here Oxford Casino indisputably offers a similar product (in physical, not virtual form) as to what the Act grants to the Tribes.

The State's and Tribes' citations to *United Haulers* are likewise off base. State Opp'n Br. 29; Tribes Opp'n Br. at 33. *United Haulers* assessed ordinances which benefited a “clearly public facility,” a waste-treatment plant. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007). Waste disposal is a “typically and traditionally a local government function.” *Id.* Internet gambling is not. *United Haulers* is plainly inapplicable. The State's and Tribes' repackaging of its standing argument—that the Act contains multiple restrictions and therefore its ban against out-of-state actors does not matter—gains no more traction in the merits context than it does in addressing standing. State Opp'n Br. at 30; Tribes Opp'n Br. 33. A law facially discriminating against out-of-state actors, however, violates the Dormant Commerce Clause. Whatever additional restrictions are piled on top of any such law cannot fully inoculate the law from a Dormant Commerce Clause challenge.

In a final attempt to blur the distinct lines between federal and state authority with regard to Indian affairs, the Tribes invoke the Indian Commerce Clause. Tribes Opp'n Br. 34. But “virtually all authority over Indian commerce and Indian Tribes’ lies with the Federal Government,” which has not expressly granted authority over preferential Tribal gaming to the State. *See Brackeen*, 599 U.S. at 273 (citation omitted).

The Act Fails Commerce Clause Strict Scrutiny. Contrary to the State’s and Tribes’ efforts to avoid the issue by focusing on other restrictions, the Act facially discriminates against out-of-state economic actors who wish to do business in Maine. The Act restricts Maine’s internet-gambling industry to in-state residents by providing that “[t]o be eligible to receive an Internet gaming license an applicant must be a federally recognized Indian nation, tribe or band *in this State*.” 8 M.R.S. § 1406(2) (emphasis added). The Act is thus purposely nativistic, excluding all other out-of-state participants from the internet-gaming market. Strict scrutiny applies.

Barring out-of-state economic actors from a state-created industry exemplifies the principle that such state protectionism is per se invalid. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Where, as here, the State has “ample alternatives short of a facially discriminatory” policy, the Act violates the Dormant Commerce Clause. *See Camps Newfound/Owatonna, Inc.*, 520 U.S. 564, 582 & n.16 (1997); *cf. Maine v. Taylor*, 477 U.S. 131, 143, 151 (upholding Maine’s ban on importation of live baitfish based on factual finding of a lack of available nondiscriminatory alternatives).

The State and Tribes make no effort to show that the Act can survive strict scrutiny under the Dormant Commerce Clause. The Act is unconstitutional for this additional reason.

V. The State's and Tribes' vague suggestions at equal-protection standing are groundless.

In addition to their facial¹⁶ attack on Oxford Casino's standing to bring its Dormant Commerce Clause claim, *see supra* § IV, the State and Tribes obliquely suggest there may lurk an unresolved factual challenge to Oxford Casino's standing to assert both its Dormant Commerce Clause claim and its Equal Protection claim, which such unresolved challenge purportedly prevents the Court from granting Oxford Casino's motion. *See* State Opp'n Br. 9-10; Tribes Opp'n Br. 11 n.7. But the State and Tribes raise this issue only in drive-by fashion, having failed to challenge the factual basis of Oxford Casino's standing through a Rule 12(b)(1) motion (which neither the State nor the Tribes has filed) or in their respective Rule 56 motions (wherein the State and Tribes attack *only* the facial basis of Oxford Casino's standing to bring its Dormant Commerce Clause claim).

Declining to present any formal motion, argument, or guidance to assist the Court in deciding the issue, the State and Tribes appear content to let the Court ponder on its own whether it may exercise jurisdiction over Oxford Casino's claims. Indeed, the very premise of the State and Tribes' argument—that their denial of factual allegations supporting standing is dispositive of standing—borders on the absurd. Why would a defendant move to dismiss under Rule 12(b)(1) on standing grounds when it could sit back, deny select allegations in the Complaint, and then file a Rule 12(c) motion that standing is wanting because the pertinent facts establishing it are denied? Voila!

¹⁶ Challenges to standing may take only one of two forms: facial challenges, wherein standing is disputed on the face of the allegations set forth in the complaint, and factual challenges, where the allegations set forth in the complaint are disputed and/or supplemented by extraneous factual material. *See Steer v. Charles Stark Draper Lab'y, Inc.*, No. 24-CV-13105, 2026 WL 444637, at *2 (D. Mass. Feb. 17, 2026) (discussing distinction).

But the Court need not go far to reject the State’s and Tribes’ procedural hijinks and determine Oxford Casino enjoys standing to assert its claims on the basis of the facts the State and Tribes have admitted. As one of two casinos in Maine offering table gaming—a point undisputed by either the State or the Tribes¹⁷—the Act clearly harms Oxford Casino by preventing it from expanding those operations into virtual gaming. The Court’s decision in *Portland Pipe Line Corp. v. City of South Portland*, 164 F. Supp. 3d 157 (D. Me. 2016), instructs. There, the plaintiff raised a series of constitutional challenges, including under the Dormant Commerce Clause and Equal Protection Clause, to a local ordinance that prevented the plaintiff from engaging in a line of business closely related to its existing operations. *Id.* at 159, 169. Just as the State and Tribes do here, the defendant argued the plaintiff lacked standing because it failed to adequately allege harm, arguing the pleadings did not support the requisite showing that the plaintiff would pursue the market opportunity but for the ordinance, or, to state it conversely, that the ordinance harmed the plaintiff by preventing the plaintiff from pursuing that opportunity. *See id.* at 180. This Court, however, rejected the defendant’s standing challenge, holding that the plaintiff’s undisputed current presence in the existing market sufficed to demonstrate the ordinance harmed the plaintiff. *Id.* The Court observed that the nature of the law itself made it impossible for the plaintiff to allege with 100% certainty that, but for the law, it definitely would earn new revenue. But that was the point of the lawsuit: as here, the plaintiff sought to “confront ... a barrier” to future operations erected by the challenged statute. *Id.* Accordingly, the mere fact of the plaintiff’s existing presence in the market served to establish standing. *Id.*

¹⁷ Indeed, Champion is the Executive Director of the Maine Gambling Control Unit, which heavily regulates Oxford Casino, one of the two Maine casinos.

Here, the State and Tribes admit Oxford Casino is only one of two casinos currently operating in Maine and offering table gaming to its customers. *Compare* FAC at ¶¶ 13, 44 *with* State’s Answer at ¶¶ 14, 44, *and* ECF No. 34 (“Tribes’ Answer”), at ¶¶ 13, 44. And there is no dispute that the Act denies Oxford Casino the opportunity to offer those same table games virtually by preventing Oxford Casino from obtaining a license to expand its operations into the online realm. That Oxford Casino cannot undisputedly allege it already has *lost* revenue is of no moment; the Act clearly serves as a barrier to its existing activities in the market. Accordingly, “the Plaintiffs have suffered an injury. Moreover, the [Act] is the cause of the injury, and its invalidation would redress the injury.” *Portland Pipe Line Corp.*, 164 F. Supp. 3d at 180. The Court need go no further.

Conclusion

For all these reasons, and the reasons set forth the Oxford Casino’s Motion, this Court should hold that, as a matter of law, the Act is unconstitutional under the Fourteenth Amendment and Dormant Commerce Clause of the United States Constitution and grant Oxford Casino’s motion for judgment on the pleadings.

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Respectfully submitted,

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