IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

SCHAGHTICOKE TRIBAL NATION, *Plaintiff*, v. DENISE W. MERRILL, in her official capacity as Connecticut Secretary of the State, and JONATHAN A. HARRIS, in his official capacity as Commissioner of the Connecticut Department of Consumer Protection, *Defendants*.	: : : : : : : : : : : :	3:16-cv-00380-AWT MAY 2, 2016

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT

Plaintiff Schaghticoke Tribal Nation ("STN") challenges Connecticut Special Act 15-7 ("SA 15-7" or "the Act") (Exh. 1).[1] By way of background, pursuant to federal law, the Mashantucket Pequot Tribe and the Mohegan Tribe of Indians of Connecticut (collectively "the Federal Tribes") operate two separate casinos on federal tribal lands in Connecticut. Last year, the Federal Tribes approached the state to explore the possibility of operating a third casino outside of federal tribal lands.

The General Assembly did not allow the Tribes to operate a third casino last year. Instead, it passed SA 15-7, which imposes certain requirements on the

[1] This case is related to *MGM Resorts International Global Gaming Development, LLC v. Malloy*, 3:15-cv-01182-AWT ("*MGM*"), which also challenges SA 15-7. *See Notice of Related Case* (Docket No. 2). Defendants moved to dismiss MGM's Amended Complaint in that action on standing, ripeness and Eleventh Amendment grounds. (Docket No. 44 in *MGM*). Defendants' Motion to Dismiss is currently pending before this Court.

Federal Tribes in connection with their efforts under the Act to move toward a third casino. Those requirements include that the Federal Tribes operate jointly (even though they are direct competitors) and that the Federal Tribes submit monthly status reports to twelve separate state officials or entities regarding any negotiations toward a development agreement with a municipality, to ensure the process is fully transparent. The Federal Tribes' participation in that process guarantees them nothing. As STN acknowledges, SA 15-7 makes explicit that the process it sets forth cannot itself result in the Federal Tribes operating a third casino—any development agreement that results must be contingent on the state passing a new and separate law to allow any casino to operate and no casino can operate unless and until state law is changed to expressly permit it.

STN nonetheless asks this Court to hold SA 15-7 unconstitutional because—in STN's view—SA 15-7 excludes STN from moving forward with developing a casino in Connecticut. STN is incorrect; SA 15-7 in no way excludes STN from taking any steps toward developing a Connecticut casino that it is ready and able to take.

SA 15-7 does not injure STN, and STN lacks standing to challenge it. Moreover, even if STN could claim some injury, its claims are not ripe. Indeed, events since SA 15-7 was enacted highlight just how speculative and hypothetical STN's claims of injury are. Therefore, Defendants respectfully request that this Court dismiss this action in its entirety.

FACTUAL BACKGROUND

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

STN challenges the constitutionality of Special Act 15-7 (Exh. 1), which began as Senate Bill 1090. *Compl.*, ¶ 33. "As originally drafted, S.B. 1090 . . . authoriz[ed] the Commissioner of the Department of Consumer Protection to 'issue up to three casino gaming facility licenses to the Mashantucket Pequot Tribe and the Mohegan Tribe of Indians of Connecticut to authorize such tribes to act jointly to establish and operate up to three casino gaming facilities in the state.'" *Id.* (quoting S.B. 1090, § 2(a)(2)). No further legislative action would have been necessary to permit the Federal Tribes to operate casinos.

Concerns were raised regarding that version of the bill and the General Assembly "amended S.B. 1090, and that version of the bill was signed into law by the Governor on June 19, 2015, as Special Act No. 15-7." *Compl.*, ¶ 36; *see also id.* at ¶¶ 34-35 (discussing the concerns raised regarding the initial version of the bill). Critically, in contrast to the initial version of S.B. 1090, SA 15-7 "does not allow" the Tribes to operate a casino (as STN rightly acknowledges). *Compl.* at ¶ 45. To the contrary, SA 15-7 expressly provides that any possible eventual casino operation may not be established unless and "until the General Assembly has amended state law to provide for the operation of and participation in a casino gaming facility by [a] tribal business entity and such law has taken effect." *SA 15-7*, § 1(d).

Specifically, SA 15-7 requires the Federal Tribes to follow a detailed process in connection with any attempt they make to obtain a possible additional Connecticut casino. It requires that the Federal Tribes operate jointly, and that they register a joint "Tribal business entity" with the Secretary of the State. *Id.* at § 1(a)(1) & 1(f).

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

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

A tribal business entity's monthly reports must be "in accordance with the provisions of section 11-4a of the general statutes," *id.*, which means that the tribal business entity—like a state commission, task force, committee or agency—has to "submit its [monthly] report[s] electronically to the clerks of the Senate and the House of Representatives and the Office of Legislative Research, and shall file one copy with the State Librarian." Conn. Gen. Stat. § 11-4a. SA 15-7 also imposes the additional requirement that any tribal business entity that issues a RFP submit its monthly reports to

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

SA 15-7, § 1(e).

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

B. STN's Allegations

STN alleges that it is "a Connecticut Native American Tribe," *Compl.*, ¶ 1, and that "Connecticut . . . has recognized STN as a Native American Tribe since 1736." *Id.* at ¶ 3; *see also id.* at ¶ 16 (making similar allegations). "Today, STN has a 400-acre [state] reservation in Litchfield County, Connecticut, within the boundaries of the Town of Kent." *Id.* at ¶ 16.

STN's state recognition grants it considerable benefits but does not grant it the right to operate a casino, because the Indian Gaming Regulatory Act ("the IGRA")—the federal law governing tribal gaming—"authorizes tribal gaming only by tribes recognized by the United States Bureau of Indian Affairs ('BIA')" and only on certain types of land held by or for a federally recognized tribe. *Compl.*, ¶ 23. "STN has sought federal recognition for over three decades" in an effort to *inter alia* obtain "the ability to pursue casino development opportunities under IGRA." *Id.* at ¶ 63.

Despite past "backing and support from several high profile in-state and out-of-state casino-minded investors," STN's efforts to attain federal recognition have thus far been unsuccessful, *id.* at ¶ 79, and STN attributes its lack of success to actions by the state. *See, e.g.*, *id.* at ¶¶ 63-76. Indeed, STN previously brought suit to challenge the state's actions in connection with STN's attempts to obtain federal recognition.

However, after years of litigation and extensive discovery, this Court upheld the denial of STN's petition for federal recognition, the Second Circuit unanimously affirmed this Court's decision holding *inter alia* that "the evidence submitted by the Schaghticoke cannot support a claim of improper political influence" and the Supreme Court denied review. *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132, 134 (2d Cir. 2009) (per curiam), *cert. denied*, 562 U.S. 947 (2010). This Court subsequently held that it was appropriate "to defer to the BIA's factual findings" underlying its denial decision and that the STN was "collaterally estopped from litigating the issue of its status as an Indian tribe and is bound by the BIA's determination that the STN does not qualify as an acknowledged Indian tribe." *United States v. 43.47 Acres of Land*, 896 F. Supp. 2d 151, 158, 162 (D. Conn. 2012), *aff'd sub nom.*, *Schaghticoke Tribal Nation v. Kent School Corp. Inc.*, 595 Fed. Appx. 32 (2d Cir. 2014). Again, the Second Circuit unanimously affirmed. *Schaghticoke Tribal Nation*, 595 Fed. Appx. at 35.

STN's Complaint simply disregards the decisions by this Court and the Second Circuit, and calls SA 15-7 "but the latest unconscionable effort by Connecticut . . . to undermine and interfere with the rights of STN and with STN's economic and development efforts, while supporting the interests of the [Federal] Tribes" who—unlike STN—have obtained federal recognition as sovereigns and, with it, the right to conduct gaming under federal law. *Compl.*, ¶¶ 2 & 23.

STN alleges that it is "ready, willing and able to develop a new and innovative commercial casino," *id.* at ¶ 9, but that SA 15-7 precludes STN from doing so. *See, e.g.*, *Compl.*, ¶ 11. Tellingly, however, STN does not allege facts to support its readiness and ability to develop a new casino beyond steps it allegedly took "[s]everal years ago," *id.* at ¶ 78, unidentified backers and plans STN allegedly had "prior to the [October 2005] Reconsidered Final Determination," and a conclusory statement "[i]f STN is allowed to compete on an equal footing for Connecticut's first commercial casino, STN will pursue that and other such opportunities with [unidentified] in-state and out-of-state partners." *Id.* at ¶ 79.

STN's conclusory allegations of readiness and ability are contradicted by its allegations of the changes in the gaming market since STN's earlier foray. STN acknowledges that there is "increasing competition from casinos—both tribal and commercial—in New York, Pennsylvania, New Jersey, and Rhode Island" and "[i]n 2011, Massachusetts passed its Expanded Gaming Act, which allows for up to three destination resort casinos"—including MGM's planned Springfield casino—as well as a "single slots facility." *Id.* at ¶ 29. STN likewise acknowledges that "under siege from competition around New England" and elsewhere (*id.* at p. 14 n.2 (quotation marks omitted)), the Federal Tribes have faced significant challenges, to the degree that the "Mashantucket Pequot are currently in financial straits, owing over $1.7 billion" and "[a]fter defaulting on debt obligations in 2009" have "entered into forbearance agreements, set to expire December 2016, to forestall debt collection actions." *Id.* at ¶ 28.

Ultimately, despite STN's lack of experience in developing or operating a casino and the admittedly challenging gaming market, STN alleges that it is ready and able to proceed and that SA 15-7 places it at a competitive disadvantage. *See, e.g.*, *id.* at ¶ 89. STN's Complaint sounds in four Counts: Count One alleges a federal equal protection violation, Count Two alleges a state equal protection violation, Count Three alleges a federal dormant Commerce Clause violation and Count Four alleges a state Emoluments Clause violation. *Id.* at pp. 30-36. STN seeks declaratory and injunctive relief, as well as attorneys' fees and expenses. *Id.* at pp. 36-37.[2]

ARGUMENT

I. THE STANDARD OF REVIEW FOR A MOTION TO DISMISS

"A district court properly dismisses an action under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction if the court lacks the statutory or constitutional power to adjudicate it, such as when (as in the case at bar) the plaintiff lacks constitutional standing to bring the action." *Cortlandt St. Recovery Corp. v. Hellas Telecommunications*, 790 F.3d 411, 416-17 (2d Cir. 2015) (quotation marks and citation omitted). A Rule 12(b)(1) motion is also the proper vehicle to raise issues of standing and ripeness, both constitutional and prudential. *See, e.g.*, *Wiltzius v. Town of New Milford*, 453 F. Supp. 2d 421, 428 & n.3 (D. Conn. 2006) (Hall, J.) (constitutional ripeness); *Connecticut v. Spellings*, 453 F. Supp. 2d 459, 491 (D. Conn. 2006), *aff'd as modified sub nom.*, *Connecticut v. Duncan*, 612 F.3d 107 (2d Cir. 2010) (Kravitz, J.) (prudential ripeness).

"A plaintiff asserting subject matter jurisdiction has the burden of proving by

[2] Defendants will discuss STN's allegations in more detail below, as necessary in the context of Defendants' arguments.

a preponderance of the evidence that it exists." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). To meet that burden, the plaintiff "must allege facts that affirmatively and plausibly suggest that it has standing to sue" and the court "need not 'credit a complaint's conclusory statements without reference to its factual context.'" *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 & 146 (2d Cir. 2011) (per curiam) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1954 (2009)). Where defendants file a Rule 12(b)(1) motion raising a jurisdictional defect, the court "may refer to evidence outside the pleadings" to decide the motion. *Id.*

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

STN lacks standing to challenge SA 15-7 for a number of reasons. SA 15-7 imposes requirements on the Federal Tribes, and in no way precludes STN from taking action or otherwise injures it. SA 15-7 also expressly requires additional legislation before the Federal Tribes can operate a Connecticut commercial casino, which renders STN's claims of harm far too speculative to support standing. In addition, STN's failure to allege facts supporting a conclusion that it is able and ready to develop a casino independently precludes it from establishing standing.

“[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013) (quotation marks omitted). “One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue.” *Id.*

(quotation marks omitted). "To establish Article III standing," a plaintiff must allege a cognizable injury and that "injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Id.* at 1147 (quotation marks omitted). "These elements form an 'irreducible constitutional minimum' without which a federal court may not proceed to the merits of a claim." *Cortlandt St. Recovery Corp. v. Hellas Telecommunications*, 790 F.3d 411, 417 (2d Cir. 2015) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998).

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

An "actual injury [is] necessary to establish Article III standing." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 730 (2013) (quotation marks omitted). STN's claimed injury is that SA 15-7 is an "exclusive, discriminatory grant to the [Federal] Tribes of the opportunity to pursue a commercial casino development process in Connecticut." *Compl.*, ¶ 91. But SA 15-7 is no such thing, and STN's putative injury based on a misreading of the Act cannot support standing; "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Nothing in SA 15-7 excludes STN from "pursu[ing] a commercial casino development process in Connecticut." *Compl.*, ¶ 91. Indeed, STN's own actions belie its allegations of injury. STN represents that it has taken initial steps toward developing a casino in Connecticut; "[s]everal years[3] ago, STN conducted a preliminary assessment of potential casino-gaming facility sites" and STN also alleges that it "has completed a market analysis, which shows that a commercial casino in western or southern Connecticut would be feasible and profitable." *Id.* at 78. Neither Connecticut law generally nor SA 15-7 specifically prevented STN from taking those steps toward developing a Connecticut commercial casino.

Nor does SA 15-7 prevent STN from taking its next steps, if STN chooses to and is ready and able to. STN alleges that "[i]f STN is allowed to compete on an equal footing for Connecticut's first commercial casino, STN will pursue that and other such opportunities with in-state and out-of-state partners." *Compl.*, ¶ 79. Nothing in SA 15-7 is stopping STN from pursuing whatever "opportunities" exist and STN qualifies for. *Id.*

Put simply, SA 15-7 has no impact on STN's ability to take whatever steps it chooses to take and is capable of taking toward developing a casino in Connecticut. If "STN is ready, willing and able to develop a new and innovative commercial casino"—as it represents—then it is not "exclude[d]" by the Act from competing for the opportunity to operate a Connecticut commercial casino should such an opportunity ever exist (it does not yet). *Id.* at ¶ 11. SA 15-7 causes STN no injury, and STN therefore lacks standing to challenge it.

STN attempts to create an appearance of injury by casting SA 15-7 as

[3] As discussed in more detail below, STN's allegations are insufficient to establish that STN is able and ready to compete for purposes of standing.

discrimination in favor of the Federal Tribes and against all other potential bidders based on claims that SA 15-7 grants the Federal Tribes exclusive benefits. *See, e.g.*, *id.* at ¶¶ 5, 41-44. But that argument cannot withstand scrutiny. Most of the features of SA 15-7 that STN casts as exclusive benefits to the Federal Tribes are simply procedural requirements the General Assembly imposed on the Federal Tribes because of the unique legal issues and impact on the public interest a potential expansion of gaming by the Federal Tribes presents. *Id.*

Specifically, SA 15-7 creates a framework that ensures that the process surrounding a potential expansion of tribal gaming is transparent and carefully controlled. It requires the Federal Tribes—"who are rivals and direct competitors," *Compl.*, ¶ 32—to operate jointly through a "tribal business entity" that they must register with the Secretary of the State. *SA 15-7*, §§ 1(a)(1) & 1(f) (Exh. 1). That tribal business entity may issue a RFP to municipalities, but SA 15-7 requires both that the RFP include certain information and that the process be public, namely, that the tribal business entity must submit the RFP to the DCP to be posted on the DCP's website. *Id.* at §§ 1(a) & 1(b).

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

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

So, even if the Federal Tribes are able to navigate SA 15-7's requirements and reach a development agreement with a municipality, they will still be required to convince the state to change the law before that agreement could possibly lead to the operation of a casino. To its credit, STN admits as much, acknowledging that "the Act **does not** allow the [Federal] Tribes to 'establish a casino gaming facility . . . until the General Assembly has amended state law to' approve" any "development agreement" the Federal Tribes may eventually be able to negotiate. *Compl.*, ¶ 45 (quoting SA 15-7 § 1(d)) (emphasis added).

As the Secretary of the State expressly informed STN, STN is "free to file articles of organization to form a domestic limited liability company," just not a tribal business entity under SA 15-7. *Compl.*, Exh. 3, p. 3. STN is also free to issue a RFP, negotiate a development agreement with a municipality and ask the state to make the changes to the law that STN admits would be necessary for any such development agreement to be approved and for STN to operate a casino. *Id.* at ¶ 45. But—unlike the Federal Tribes operating under SA 15-7's constraints—STN can do those things without being forced to partner with a direct competitor to create and register a new business entity, without having to include specific information in its RFP and post its RFP on a state website and without having to send monthly public reports to twelve separate state entities detailing the progress of its negotiations toward a development agreement. SA 15-7 imposes constraints on the Federal Tribes (STN's putative competitors) in light of the state's unique interests and concerns in the context of the Federal Tribes' gaming, it does not injure STN.

STN further claims that it is injured because "[w]ithout the passage of the Act, Connecticut municipalities would not be authorized to enter into [casino development agreements] with the [Federal] Tribes." *Compl.*, ¶ 43. That argument lacks any merit.

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

Indeed, Representative Dargan (who co-sponsored SB 1090, *Compl.*, ¶ 40) was specifically asked whether if the bill that became SA 15-7 did not pass there was "anything that would prohibit the tribes . . . from negotiating with towns for possible [off-reservation casino] developments" and he responded that there was not. *Transcript of May 28, 2015 House Proceedings*, pp. 23-25 ("*House Tr.*") (Exh. 2). Similarly, Senator Fasano argued that:

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

Transcript of May 20, 2015 Senate Proceedings, p. 19 ("*Senate Tr.*") (Exh. 3). There is no basis for STN to argue that existing Connecticut law prohibits STN from doing precisely what it claims it has already done and/or claims to want the ability to do, namely, "conduct[] a preliminary assessment of potential casino-gaming facility sites and "complete a market analysis," *Compl.*, ¶ 78, and then pursue whatever "opportunities with in-state and out-of-state partners" that may materialize, *id.* at ¶ 79, including (if STN chooses and is ready and able) issuing a

RFP, entering into a contingent agreement with a municipality and submitting any such agreement to the General Assembly for approval.

STN's attempts to claim injury based on SA 15-7 ring hollow. Despite STN's unsupported statements as to what SA 15-7 says and means, the text of the law itself is clear, as is its legislative history. SA 15-7 does not grant the Federal Tribes exclusive benefits; it places specific constraints on the Federal Tribes to ensure that the unique legal issues arising from any expansion of federal tribal gaming in Connecticut are fully and carefully considered in a transparent and public process.

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

To support standing, a claimed injury must be both "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quotation marks and citations omitted). The Supreme Court has "repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that [a]llegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (emphasis in *Clapper*; quotation marks omitted).

SA 15-7 does not—and will never—cause STN any injury; as discussed above, SA 15-7 imposes obligations on the Federal Tribes and that imposition in no way harms STN. But even if SA 15-7 could somehow be construed as granting some benefit to the Federal Tribes, that alone would not be enough for STN to establish standing. *See, e.g.*, *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 731 (2013) (rejecting the argument that "the mere assertion that something unlawful benefited the plaintiff's competitor" could satisfy Article III and noting that "[w]e have never accepted such a boundless theory of standing"). Rather, "to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending," STN bears the burden of alleging facts to support a conclusion "that sometime in the relatively near future it will" compete for the opportunity to operate a commercial casino and be disadvantaged by SA 15-7's putative benefits to the Federal Tribes. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995) (quotation marks omitted, emphasis in *Adarand*).

STN has not met—and cannot credibly meet—that burden, for two primary reasons. First, SA 15-7 does not grant any entity (including the Federal Tribes) the opportunity to operate a Connecticut commercial casino and it would be pure speculation to conclude that any such opportunity will ever exist, let alone that it will exist "sometime in the relatively near future." *Adarand*, 515 U.S. at 211. Second, even if such an opportunity were certain to exist (it is not), STN cannot credibly allege facts to support a conclusion that it is ready and able to operate a commercial casino.

1. SA 15-7 Expressly Requires Additional Legislation Before the Federal Tribes can Operate any Additional Casino

STN rightly admits that SA 15-7 "does not allow the [Federal] Tribes to 'establish a casino gaming facility . . . until the General Assembly has amended state law to' approve" any "development agreement" the Federal Tribes may eventually be able to negotiate. *Compl.*, ¶ 45 (quoting SA 15-7 § 1(d)). It would be pure speculation to surmise that the Federal Tribes will enter into a contingent development agreement with a municipality and that the General Assembly will pass—and the Governor will sign—the necessary legislation to allow any contemplated casino to go into operation. Unless and until both of those events occur, the Federal Tribes' considerable efforts under SA 15-7 (and associated expense) will come to naught. *See, e.g.*, *Compl.*, ¶ 8 (discussing the Federal Tribes' efforts under SA 15-7).

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

The nature of SA 15-7, its evolution and the events since its enactment all further support the conclusion that *Cuno* already establishes, namely, that STN's claims based on speculation that SA 15-7 will lead to the Federal Tribes operating an additional casino are far too conjectural and hypothetical to support standing.

The initial bill that gave rise to SA 15-7 would have allowed the Federal Tribes—and only the Federal Tribes—to obtain licenses to operate additional casinos in Connecticut. *See, e.g.*, *Compl.*, ¶ 33. The General Assembly later amended the bill to what became SA 15-7 (Exh. 1). *See, e.g.*, *Compl.*, ¶ 36. The legislative history makes clear that the change was intended to take a cautious approach to federal tribal casino expansion.

That legislative caution ultimately manifested in SA 15-7's various transparency and reporting requirements. As noted, once the tribal business entity issues a RFP, SA 15-7 requires that the tribal business entity submit monthly progress reports to various state legislators, officials and committees. Each of those reports will provide a new opportunity for those who have concerns with the potential expansion of casino gaming to voice those concerns to their constituents and the press. The legislative history emphasizes that public participation and involvement in the process "is extremely important." *House Tr.*, p. 27 (Exh. 2).

The Federal Tribes "are required to reach agreement with a municipality" under SA 15-7, so that public participation will be at both the state and municipal levels. *Compl.*, ¶ 48. Municipal approval is a substantial procedural hurdle. Indeed, despite the Federal Tribes' considerable efforts, and expressed desire for an "incredibly aggressive" timeline that would allow them to seek legislative approval in the current legislative session (*id.* at ¶ 58), the Federal Tribes apparently have not entered into a contingent development agreement even though it has been over nine months since SA 15-7 was signed into law.[4] *See, e.g.*, *Compl.*, ¶ 8 (alleging that

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[4] Even if the Federal Tribes were to enter into a development agreement while this Motion is pending, it would not impact the analysis. STN's standing is measured as of March 7, 2016, when this action was filed. *See, e.g.*, *S. Utah Wilderness All. v.*

the Federal Tribes "are now reviewing" responses to their RFP). Municipal approval of a contingent development agreement is far from a *fait accompli*.

Even if the tribal business entity were able to make it through that public process and enter into a contingent development agreement with a municipality, the most difficult hurdle—of obtaining a change in the law—would remain. The idea that the law will be changed has always been so speculative as to *per se* defeat standing, but STN's Complaint highlights that the prospect of such legislation has become even more speculative in the past several months.

When SA 15-17 was being debated and passed in the Spring of 2015, its co-sponsor indicated that "the General Assembly expect[ed] to consider" legislation authorizing gaming in connection with a proposed development agreement "in a comprehensive bill next year" (i.e. 2016). *Compl.*, ¶ 45 (quotation marks omitted). Consistent with that expectation, the Federal Tribes stated that they "intended to move forward expeditiously with the casino development process" and hoped to "partner with a municipality that can help complete a project quickly." *Id.* (quotation marks omitted). To that end, the Federal Tribes set an "incredibly aggressive" timetable for the RFP process and said they wanted "the easiest possible site to develop, in the shortest amount of time." *Id.* at ¶ 58 (quotation marks omitted).

Palma, 707 F.3d 1143, 1153 (10th Cir. 2013) (standing is measured at the time suit is filed); *Jones v. Schneiderman*, 101 F. Supp. 3d 283, 292 (S.D.N.Y. 2015) (appeal pending) (citing cases holding that post-commencement events cannot support standing, including *Fenstermaker v. Obama*, 354 Fed. Appx. 452, 455 n. 1 (2d Cir. 2009)).

Despite the Federal Tribes' best efforts to negotiate an agreement and seek legislative approval this session, they have now publicly acknowledged that they are "not ready to come back to the legislature this session." *Id.* at ¶ 62. Moreover, the Federal Tribes have indicated that even if they are eventually able to enter into a contingent development agreement with a municipality (which they have not done) and obtain legislative approval of such an agreement, it would still be six to nine months before any resulting casino would be operational. *Id.* So, SA 15-7's express language makes clear that a casino may never happen and even STN's own allegations indicate that even if it were to ever happen, it likely would not be until 2017 at the earliest.

STN's allegations also highlight that it would be purely speculative, conjectural and hypothetical to conclude that if any legislation authorizing a commercial casino in Connecticut were to pass, that legislation would inflict legally cognizable harm on STN. Both STN and MGM before it have brought federal lawsuits arguing (Defendants believe incorrectly) that it would be unconstitutional to limit any commercial gaming in Connecticut to the Federal Tribes. SA 15-7's evolution shows that the General Assembly carefully considers the legal framework surrounding casino gaming. Even if the attempts to carefully consider and avoid any potential legal objections to any such future legislation were unsuccessful, legislation was enacted and there were legal challenges, there is no way to predict what form any legislation proposed and passed in the future would take or what the challenges would be. At this point, one can only speculate whether the legislature will allow STN to compete (presuming STN was capable of doing so), decline to authorize an additional casino at all, or take another approach that would obviate any claimed harm to STN or any constitutional concerns.

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

2. STN Has Not Alleged—and Cannot Credibly Allege—that it is Presently Able and Ready to Compete for a Casino

STN seeks to rely on bidder standing cases, in which the Supreme Court has held that a bidder who is "able and ready" to compete for a given benefit may have standing to challenge a denial of equal treatment[5] in competing for that benefit even though there was no guarantee that the bidder would receive it. *See, e.g.*, *Compl.*, ¶ 11; *see also NE Fla. Chapter of Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("To establish standing . . . a party challenging a set-aside program . . . need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis."). A problem for STN is that it cannot credibly allege facts to support a finding that STN is "able and ready" to compete in the casino development process.

As an initial matter, STN does not allege that it has ever operated a casino, is in the business of operating casinos or other facts that would support a conclusion that STN is "able and ready" to issue a RFP for a Connecticut commercial casino

[5] As discussed above, STN's apparent reliance on the bidder standing cases is also misplaced because SA 15-7 does not confer a benefit and does not disadvantage STN.

and negotiate a contingent development agreement with a municipality. If STN is indeed "ready, willing and able to [take current steps toward] develop[ing] a new and innovative commercial casino," *Compl.*, ¶ 9, it is difficult to imagine why it has "not done so already." *United States v. California*, 2008 WL 341449, at *4 (E.D. Cal. Feb. 6, 2008).

STN will likely respond that Connecticut law precludes it from taking any such steps, but its own allegations belie that (incorrect) assertion (*see, e.g.*, *Compl.*, ¶ 78) and—in any event—by September 23, 2015 the state had publicly taken the position that Connecticut law poses no such impediment. *See Motion to Dismiss and Supporting Memorandum in MGM v. Malloy*, 3:15-cv-01182-AWT (Docket No. 21). If STN's representations that it is "ready, willing and able" to proceed were anything more than conclusory statements that cannot credibly be supported by any facts, STN presumably would have taken significant action at that point to avoid its claimed "devastating competitive disadvantage" from the Federal Tribes' alleged head start. *Compl.*, ¶ 90.

But it appears STN took no significant action. It did seek to register a tribal business entity with the Secretary of the State over four months later, but knew that its attempt would ultimately be rejected—just as MGM's was before—because SA 15-7 "explicitly" precluded STN from registering a tribal business entity under SA 15-7. *Compl.*, ¶ 80.[6] That did nothing to establish that STN is ready and able to compete for a casino.

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[6] The Secretary of the State's Office initially accepted the STN's filing in error, but

Beyond that, the only factual allegations STN makes to establish its ability and readiness are that "[s]everal years ago" it "conducted a preliminary assessment of potential casino-gaming facility sites" and "completed a market analysis, which shows that a commercial casino in western or southwestern Connecticut would be feasible and profitable." *Id.* at ¶ 78. In addition, STN alleges that "prior to the [October 2005] Reconsidered Final Determination" STN had various backers and plans and that "[i]f STN is allowed to compete on an equal footing for Connecticut's first commercial casino, STN will pursue that and other such opportunities with [unidentified] in-state and out-of-state partners." *Id.* at ¶ 79.

This Court need look no further than STN's Complaint to see why STN's allegations of assessments done "several years ago" and backers and plans from 2005 (over a decade ago), *id.* at ¶¶ 78-79, are insufficient to establish that STN is able and ready to compete for a casino development in 2016 for purposes of establishing standing. A lot has changed. There is "increasing competition from casinos—both tribal and commercial—in New York, Pennsylvania, New Jersey, and Rhode Island" and "[i]n 2011, Massachusetts passed its Expanded Gaming Act, which allows for up to three destination resort casinos"—including MGM's planned Springfield casino—as well as a "single slots facility." *Id.* at ¶ 29. "[U]nder siege from competition around New England" and elsewhere (*id.* at p. 14 n.2 (quotation marks omitted)), the Federal Tribes have faced significant challenges, to the degree that the "Mashantucket Pequot are currently in financial straits, owing over $1.7

"[t]he very next day" publicly announced that the acceptance was "in error." *Compl.*, ¶ 83.

billion" and "[a]fter defaulting on debt obligations in 2009" have "entered into forbearance agreements, set to expire December 2016, to forestall debt collection actions." *Id.* at ¶ 28.

STN alleges that if the Court rules in its favor, STN intends to pursue unspecified "opportunities" with unspecified "in-state and out-of-state partners" akin to the opportunities STN pursued "[d]uring the time period that STN was seeking federal recognition, prior to the Reconsidered Final Determination" in 2005. *Id.* at ¶ 79. But that is not nearly enough to support bidder standing. The Supreme Court has required "a much more specific and direct showing" to establish standing in this context; to survive this Motion to Dismiss, STN must have "allege[d] facts from which it reasonably could be inferred that, absent" SA 15-7 "there is a substantial probability" that STN would have been able and ready to compete for a casino. *Constr. & Gen. Laborers' Local Union No. 230 v. City of Hartford*, 153 F. Supp. 2d 156, 161 (D. Conn. 2001) (Thompson, J.). STN has not done so.

The Supreme Court's analysis in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), is instructive. There, the Court noted in the bidder standing context that "[a]lthough 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is '*certainly* impending.'" *Id.* at 211 (quotation marks omitted, emphasis in *Adarand*). Therefore, to establish standing to obtain prospective relief, a putative bidder must be able to show that "sometime in the relatively near future it will bid on" a government benefit and be disadvantaged by the alleged discrimination being challenged. *Id.* That is a function of both the putative bidder's history of engaging in the activity and likelihood that the government will award the benefit at issue in the "relatively near future." *Id.* at 211-12.

As noted above, STN does not—and cannot credibly—allege that it has operated a casino, or allege that there is any certainty that STN will be in a position to do so in the relatively near future.[7] The best STN can muster is allegations that if this Court rules in its favor, it plans to pursue unspecified "opportunities" with unidentified partners who may or may not exist and are unlikely to exist given the challenging gaming market STN acknowledges. *Compl.*, ¶ 79. That speculation is insufficient to establish that STN is able and ready to bid and STN therefore lacks standing. *See, e.g.*, *Carroll v. Nakatani*, 342 F.3d 934, 941-43 (9th Cir. 2003) (holding that plaintiff could not establish that he was "able and ready" for standing purposes where even assuming he intended to apply for a business loan, he failed to demonstrate he would be able and ready to compete); *cf. Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 172 F.3d 397, 405 (6th Cir. 1999) (holding that a tribe demonstrated that it was able and ready to compete for a casino based on "the Tribe's background and experience in the operation of a casino," its plans to deal with myriad associated issues, its existing

[7] Of course, as detailed above, STN's own allegations establish that the state will not allow for operation of a commercial casino in the relatively near future since the Federal Tribes have indicated that they will not seek legislation this session and that even if legislation were ever passed, no casino would be operational for at least six to nine months after passage. *Compl.*, ¶ 62. More fundamentally, it is pure speculation that such legislation will ever pass.

"financial strength and backing" and representation that it would have been able and ready to submit a proposal under the existing law allowing for casino operation but for alleged discrimination).

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

STN claims to be harmed "as a result of the Act's exclusive, discriminatory grant to the [Federal] Tribes of the opportunity to pursue a commercial casino development process in Connecticut." *Compl.*, ¶ 91. But striking down SA 15-7 would not remedy STN's claimed injury, and that is an independent reason STN cannot establish standing. "Redressability—a likelihood that the requested relief will redress the alleged injury"—is part of "the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-04 (1998) (quotation marks omitted).

Striking down SA 15-7 will not help STN to pursue the process of developing a Connecticut commercial casino. As discussed above, even with SA 15-7 in place, to the extent (if any) STN is ready and able to do so, STN is free to create a business entity and register it with the Secretary of the State (or not, as it so chooses), to issue a RFP, to negotiate with municipalities and enter into a development agreement with a municipality. If and when STN completed those steps, it would be free to present its proposed development agreement to the General Assembly and seek the changes to state law that would be necessary to allow STN—or any other entity, including the Federal Tribes—to operate a Connecticut commercial casino. *See, e.g.*, *Hartford*, 153 F. Supp. 2d at 162.

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

Similarly, it is true that SA 15-7 would not allow STN to post any RFP it may somehow be able to issue on the DCP's website but the prospect of STN being ready and able to issue such a RFP is too speculative to support standing. In any event, DCP's posting of the RFP under SA 15-7 is part of SA 15-7's broader framework placing constraints on how the Federal Tribes must proceed under the Act in light of their unique historical and legal status. If the bidder standing analysis applies, the relevant question is whether SA 15-7 precludes STN from competing "*on an equal basis*." *NE Fla. Chapter of Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (emphasis added). In measuring equality, the Court must consider SA 15-7 as a whole. So viewed, the requirement that the tribal business entity post its RFP on the DCP's website is not a benefit and, even if it could somehow be construed as a benefit, it certainly does not outweigh the other clear burdens SA 15-7 imposes on its face. *See, e.g.*, *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 731 (2013) (rejecting the argument that "the mere assertion that something unlawful benefited the plaintiff's competitor" could satisfy Article III and noting that "[w]e have never accepted such a boundless theory of standing").

Different treatment alone is not enough to establish standing; STN must "identify some [more than speculative] disadvantage to meet the constitutional requirement of standing." *Youth Alive v. Happauge Sch. Dist.*, 2012 WL 4891561, at *3 (E.D.N.Y. 2012). In recently addressing this issue, the Seventh Circuit held that "[t]he mere allegation of unequal treatment, absent some kind of actual injury, is insufficient to create standing," noting that it had "been unable to find any case in which a plaintiff was deemed to have standing based solely on being treated differently." *Johnson v. U.S. Office of Pers. Mgmt.*, 783 F.3d 655, 665 (7th Cir. 2015).

STN has not identified any non-speculative disadvantage here. STN asks this Court to assume that STN will be disadvantaged but such "assumption[s are] too abstract and conjectural to confer jurisdiction on" this Court. *Jaghory v. New York State Dept. of Educ.*, 131 F.3d 326, 330 (2d Cir. 1997). The end result of SA 15-7 is to put the Federal Tribes "in precisely the same position" STN would occupy if it were capable of taking and actually took steps to issue a RFP and/or negotiate an agreement, namely, the positon to present a proposal to the General Assembly for consideration. *Id.* Given that, the differences in the path STN would need to take to reach that point are insufficient to support standing. *Id.*

D. STN Lacks Standing to Assert a Dormant Commerce Clause Claim

Count Three of STN's Complaint asserts a violation of the federal dormant

Commerce Clause. "[T]he Supreme Court has explained: 'Our dormant Commerce Clause jurisprudence . . . is driven by a concern about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *All. of Auto. Mfrs., Inc. v. Currey*, 610 F. App'x 10, 12 (2d Cir. 2015) (summary order), *cert. denied*, 2016 WL 854220 (U.S. Mar. 7, 2016) (quoting *McBurney v. Young*, —— U.S. ——, 133 S.Ct. 1709, 1719 (2013)); *see also Compl.*, ¶ 121 (similar). STN is located in Connecticut; as an in-state entity, STN lacks standing to bring a dormant Commerce Clause challenge to SA 15-7.

STN's assertion that SA 15-7 "runs afoul of the dormant Commerce Clause is an assertion by" STN, a Connecticut entity, "of the alleged rights of out-of-staters." *L.A.M. Recovery Inc. v. Dep't of Consumer Affairs*, 377 F. Supp. 2d 429, 438 (S.D.N.Y. 2005), *aff'd*, 184 Fed. Appx. 85 (2006) ("*L.A.M.*"). Those out-of-staters are fully capable "of protecting their own interests," as illustrated by MGM's related pending suit challenging SA 15-7. *Notice of Related Claim* (Docket No. 2). STN is not harmed in any way by SA 15-7, but even the harm STN (incorrectly) alleges is not the result of SA 15-7's alleged "burdens upon interstate commerce." *Id.* at 439; *see also City of Los Angeles v. Cty. of Kern*, 581 F.3d 841, 848 (9th Cir. 2009) (holding that in-state entities could not establish standing to raise dormant commerce clause challenge).[8] Therefore, STN lacks standing to bring a dormant

[8] To be clear, there are cases "in which in-state residents were found to have standing to pursue claims under the dormant Commerce Clause," but in those cases "in-staters were harmed by statutes precisely because they burdened interstate commerce." *L.A.M.*, 377 F. Supp. 2d at 439. That is not the case here. STN is an in-state entity, and to the extent it makes cursory allegations that SA 15-7

Commerce Clause challenge to SA 15-7.

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

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

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

If this Court were to somehow conclude that STN's claims are constitutionally ripe, it would still leave the issue of prudential ripeness. *See, e.g.*,

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precludes STN from accessing out-of-state markets, those allegations are insufficient. *Cf. Selevan v. New York Thruway Auth.*, 711 F.3d 253, 261 n.8 (2d Cir. 2013) (per curiam).

New York v. U.S. Army Corps of Engineers, 896 F. Supp. 2d 180, 196 (E.D.N.Y. 2012). The Second Circuit has "repeatedly observed that when a court declares that a case is not prudentially ripe, it means that the case will be *better* decided later . . . [not] that the case is not a real or concrete dispute affecting cognizable current concerns of the parties." *Connecticut v. Duncan*, 612 F.3d 107, 113-14 (2d Cir. 2010) (quotation marks omitted; emphasis in *Duncan*). "Prudential ripeness is, then, a tool that courts may use to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues that time may make easier or less controversial." *Id*. at 114 (quotation marks omitted).

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

STN's claims are not fit for judicial resolution. "The harms that [STN] ultimately [is] concerned about are speculative, and rely on a chain of inferences that may never come to pass." *New York*, 896 F. Supp. 2d at 197. The tribal business entity has not yet negotiated a proposed development agreement. And even if that happened, STN's allegations show that the passage of time has rendered it even more speculative that the General Assembly "'will pass the necessary legislation'" to allow the tribal business entity to operate a casino. *Id.* (quoting *Motor Vehicle Mfrs. v. N.Y. Dep't of Envtl. Conservation,* 79 F.3d 1298, 1305 (2d Cir.1996)). Despite the best efforts of the Federal Tribes to negotiate a contingent development agreement quickly and present it to the General Assembly for approval in 2016, they have now publicly acknowledged that they are "not ready to come back to the legislature this session." *Compl.*, ¶ 62.

Moreover, "it is possible that the content of" that legislation "would affect who would have standing to pursue a claim relating to th[at] (hypothetical) final" legislation. *New York*, 896 F. Supp. 2d at 197. Given the General Assembly's prior efforts to address legal concerns and the pending suits by STN and MGM, STN's claims are "'entirely hypothetical and unfit for adjudication'" for prudential standing purposes. *New York*, 896 F. Supp. 2d at 197 (quoting *Motor Vehicle Mfrs.,* 79 F.3d at 1305).

The second prudential ripeness factor also weighs in favor of dismissal; STN will suffer no hardship if this Court declines to review STN's claims at this time. SA 15-7 does not preclude STN from taking any steps it wishes to—and is able to—take toward developing a Connecticut commercial casino, so it need not be concerned about any potential competitive disadvantage. That is the only concrete claim of hardship STN identifies. To the extent STN is concerned that it will suffer hardship if the Federal Tribes eventually are able to complete all of the required steps—including obtaining new legislation—and operate another casino, that claimed hardship is not enough; "[t]he mere possibility of future injury, unless it is the cause of *some present detriment*, does not constitute the requisite hardship" to overcome an objection on prudential ripeness grounds. *United States v. Johnson*, 446 F.3d 272, 278 (2d Cir. 2006) (emphasis in the original); *see also SC Note Acquisitions, LLC v. Wells Fargo Bank, N.A.*, 934 F. Supp. 2d 516, 526-28 (E.D.N.Y. 2013), *aff'd*, 548 F. App'x 741 (2d Cir. 2014) (holding *inter alia* that claims were not ripe where claim of harm was contingent); *Dresser-Rand Co. v. Ingersoll Rand Co.*, 2015 WL 4254033, at *9 n.8 (S.D.N.Y. July 14, 2015) (noting recent Supreme Court language questioning continued vitality of prudential ripeness but analyzing the issue given that *inter alia* "the Second Circuit has not spoken further on the issue").[9]

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

[9] Given the lack of hardship to STN, this Court could properly dismiss this action on prudential ripeness grounds even if it were to conclude that the issues presented were fit for review and therefore satisfied the first prudential ripeness requirement. *See, e.g.*, *Duncan*, 612 F.3d at 114 (holding that case was not prudentially ripe, even though the "State [wa]s correct that the Secretary's interpretation of the Unfunded Mandates Provision is clear and that the parties have a concrete dispute about its meaning and constitutionality").

F.3d at 114 (quotation marks omitted). Those are precisely the type of issues STN raises in this case.

IV. TO THE EXTENT SA 15-7 COULD BE SEEN AS INJURING STN, SA 15-7 IS UNCLEAR AND THIS COURT SHOULD ABSTAIN

For the reasons discussed in detail above, Defendants believe that the text of SA 15-7 makes clear that it in no way injures STN, and SA 15-7's legislative history reinforces that conclusion. To the extent the Court believes there is any uncertainty, before accepting STN's invitation to hold SA 15-7 unconstitutional, this Court "must pause to consider whether a constitutional adjudication is absolutely necessary" because the federal courts "have a duty to avoid passing on the constitutionality of a statute where possible, especially when . . . dealing with state rather than federal law." *Nicholson v. Scoppetta*, 344 F.3d 154, 167 (2d Cir. 2003) (citations omitted). The Second Circuit recently—and "emphatically"—reiterated that principle, holding that federal courts "cannot hold a duly enacted state law unconstitutional based entirely on speculation that the" state "courts might give it an expansive and arguably problematic reading that its text does not require" and reversing a district court decision that did so. *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 139 (2d Cir. 2015).

That dictates that if this Court somehow concludes that SA 15-7 is materially unclear and could be read to somehow injure STN, this Court should either abstain under *Pullman* to allow the Connecticut courts to address the issues of Connecticut law or, in the alternative, certify any unclear issues of Connecticut law to the Connecticut Supreme Court. *See, e.g.*, *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 500–01 (1941)); Conn. Gen. Stat. § 51-199b (providing for certification procedure). That is particularly appropriate given that the analysis under the Dormant Commerce Clause is often dependent on state law. *See, e.g.*, *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, ___ F.3d ___, 2016 WL 1445100, at *4 (2d Cir. Apr. 13, 2016) (certifying state law question to New York Court of Appeals in dormant Commerce Clause case).

V. IF THIS COURT DISMISSES STN'S FEDERAL CLAIMS IT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION OVER PLAINTIFF'S STATE CLAIMS

STN asserts both federal and state claims. *Compl.*, pp. 30-36. For the reasons discussed above, this Court lacks subject matter jurisdiction over STN's federal claims and should dismiss them. If the Court dismisses the federal claims, Defendants respectfully submit that it should also decline to exercise supplemental jurisdiction over STN's state claims. *See* 28 U.S.C. § 1367(c)(3). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Manson v. Narus*, 2008 WL 4911152, at *5 (D. Conn. Nov. 11, 2008) (Hall, J.) (quoting *Carnegie–Mellon University v. Cohill*, 484 U.S. 343, 350 n. 7 (1988)). "Moreover, considerations of comity militate strongly in favor of allowing a state tribunal to have the first opportunity to consider the proper application of the state Constitution . . . to plaintiffs' claims." *Seabrook v. City of New York*, 2001 WL 40767, at *5 (S.D.N.Y.

Jan. 16, 2001).

VI. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant Defendants' Motion and dismiss Plaintiff's Complaint in its entirety. Defendants also respectfully request that this Court decline to exercise supplemental jurisdiction over Plaintiff's state law claims.

Respectfully submitted,

DEFENDANTS

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2016, a copy of the foregoing was electronically filed. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Robert J. Deichert
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Assistant Attorney General