STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: JUNE 29, 2012)

NARRAGANSETT INDIAN TRIBE	:	
Plaintiff	:	
	:	
v.	:	
	:	
STATE OF RHODE ISLAND	:	
Defendant	:	
	:	**C.A. No. WC 2011-0621**
UTGR, INC. d/b/a TWIN RIVER	:	
Intervenor	:	
	:	
and	:	
	:	
NEWPORT GRAND, LLC	:	
Intervenor	:	

DECISION

THUNBERG, J. This matter is before the Court for decision upon the Narragansett Indian Tribe's (the "Tribe") constitutional challenge to G.L. 1956 § 42-61.2, et seq., (the "Casino Act") on the specific bases that: (1) the proposed casino would not be "state operated as mandated by the [Rhode Island] Constitution"; and (2) the statute "delegates unconstitutional authority to a private corporation." (Tribe's Opp'n to UTGR, Inc. d/b/a Twin River's Mot. for Summ. J. and Mem. in Supp. of Pl.'s Cross-Mot. for Summ. J. at 14) ("Tribe's Mem.").

Plaintiff's complaint requests, in pertinent part, that this Court issue a declaratory judgment pronouncing the Casino Act unconstitutional as violative of the Rhode Island Constitution article VI, sections 15, 1, and 2. At this juncture, the instant motion regarding the constitutionality of the Casino Act is procedurally styled as follows: Intervenor UTGR, Inc. d/b/a Twin River's ("Twin River") Motion for Summary Judgment; the Tribe's Cross-Motion for Summary Judgment; Defendant State of Rhode Island's ("State") Cross-Motion for Summary Judgment; and Intervenor Newport Grand, LLC's Cross-Motion for Summary Judgment.

I

Historical Context

In Fort Ninigret, Charlestown, there exists a "massive boulder on which words [proclaim] the Narragansett[1] and Niantic tribes as 'The Unwavering Friends and Allies of our Fathers.'"[2] One such "Father" was Roger Williams, who, in 1634, was convicted of sedition and heresy in the General Court of Boston for preaching the notion that religious freedom demanded separation of church and State.[3] After being banished from "the European settlements then existing in

[1] The word "Narragansett" means "People of the Small Point." Barry M. Pritzker, A Native American Encyclopedia: History, Culture, and Peoples 442 (Oxford Univ. Press 2000). We are now all people of the small(est) state, the Tribe preceding us by 400 years.

[2] Robert A. Geake, A History of the Narragansett Tribe of Rhode Island: Keepers of the Bay 114 (The History Press 2011).

[3] See Chief's Aff. in Supp. of Pl.'s Opp'n to Mot. for Summ. J. at ¶ 2 ("Chief's Aff."). Chief Matthew Thomas, Chief of the Narragansett Indian Tribe, has provided the Court with a

Massachusetts [. . ., he] constructed shelters along the bank of the Seekonk River," not realizing that he remained within a Massachusetts colony.[4] "Once led to what would become Providence Plantations, Williams and his group flourished in remarkable time."[5] He then "became friends with Canonicus,[6] the sachem who had been among those who greeted him ashore, as well as [with] his nephew, Miantonomo,[7] another leader whose later stance against European encroachment would leave a legacy as a precursor of the Wampanoag Philip (Metacom) in native resistance."[8] Williams was "most moved by" the "generosity" and "compassion" of the Narragansett, whose "trust [he] gained . . . by virtue of his own honest and fair dealings."[9]

Roger Williams secured land from "Canonicus[10] and Miantonomo, Narragansett sachems, uncle and nephew, whom also he had long known."[11] This

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succinct, yet highly instructive affidavit which chronicles the pertinent history of this indigenous tribe.

[4] Id. at ¶¶ 2-3.

[5] Geake, supra note 2, at 19.

[6] "I learned to love him to his dying day and he let me come where few had ever dared within his old heart. On his last days he asked me to come and be with him and make his shroud of my own cloth." Mary Lee Settle, I, Roger Williams 274 (W. W. Norton & Co. 2001).

[7] "Many a morning I would go to the table before the first of the Indians came to me to trade, and write my disputation so furiously that when friends came, as Canonicus or Miantonomo, they would stand and wait so still I would not know they were there, for they had respect for my writing. They termed it war with the bird's feather." Settle, supra note 6, at 294.

[8] Geake, supra note 2, at 19-20; see also Chief's Aff. at ¶¶ 4-5 (recognizing the welcoming nature of Canonicus and Miantonomo).

[9] Geake, supra note 2, at 21.

[10] "For his part, [Canonicus] said, he would not accept money for the land, but if at any time he required sugar, he would accept my gift. Through the years I was bit often by Canonicus's sweet tooth." Settle, supra note 6, at 275.

transfer of land was part of "[t]he first (verbal) bargain between Roger Williams and the Indians [which] was later ratified by a deed which Canonicus and Miantonomo gave him and which is still preserved in the City Hall at Providence."[12]

"During the latter part of the 17th century, the Tribe was drawn into warfare with Puritan colonists seeking to gain political authority over the Tribe. In the 18th and 19th centuries as Tribal lands were bought off,[13] the State attempted to extinguish the Tribe's identity. Finally, in 1880 the General Assembly voted to disestablish the Tribe with the result that the Tribe was left with approximately two acres of land in Charlestown, Rhode Island."[14]

At the dedication of the aforementioned Monument Rock, on August 30, 1883, tribal representative Joshua Noka "'spoke of the scorn and impatience of some of the tribe's white neighbors,[15] who had lobbied for detribalization.'"[16]

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[11] Emily Easton, Roger Williams Prophet and Pioneer 179 (Houghton Mifflin Co. 1930).
[12] Id. at 180.
[13] Indeed, "[t]he Narragansetts repeatedly petitioned the Rhode Island legislature to ban their sachem from selling more of the tribe's land to pay off his personal debts. . . . But the legislature did nothing." Stuart Banner, How the Indians Lost Their Land: Law and Power on the Frontier 72 (Harvard Univ. Press 2005).
[14] Verified Compl. ¶¶ 6-7.
[15] Chris Eyre, "one of the most prolific and successful Native American filmmakers of all time," said of the 1956 classic "The Lone Ranger," that "'[i]t . . . included [Indians] in the fabric of protagonists and good guys.'" Chuck Thompson, "Great Movie Indians," Cowboys & Indians, Vol. 19, No. 4, June 2011, at 63, 67. The author described "[t]he bad guys" as "greedy white developers who scheme to break yet another treaty in order to move in on their Native neighbors' silver lode. The steadfast Tonto (played by legendary Silverheels, son of a Mohawk chief), rides like a Derby winner, saves his masked partner from an ambush, and helps avert a war between ranchers and Indians." Id. at 67.

Prophetically, "Noka saw a troubled future, a turbulent time in the wake of the tribe's loss."[17]

More than 100 years later, on May 1st, 1997, Randy Noka, first council member of the Narragansett Indian Tribe, in a fervent and eloquent address to the House of Representatives, explained that the Tribe's "anger and dismay over [the] Chafee Rider[18] [was] not so much about gaming. Even more profoundly, it [was] about a disrespect for a sovereign Indian tribe,[19] disregard for the government-to-government relationship that [they] had with the United States and for the responsibilities [which] the United States assumed, as a trustee, to protect Indian tribes."[20]

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[16] Geake, supra note 2, at 114 (citing Rubertone, Memorializing the Narragansett).

[17] Id. at 115.

[18] Noka references an amendment in 1996 Pub. L. 104-208, which included a provision that removed "settlement lands" from "Indian lands" for the purposes of gaming. See 25 U.S.C. § 1708. The inclusion of this provision "effectively extinguished the Tribe's rights to pursue gaming under the [Indian Gaming Regulatory Act] on its trust lands." Verified Compl. at ¶ 14.

[19] The Tribe has a longstanding connection with the State and its history – consider the Narragansett Pacer, horses that were bred in the Narragansett Bay area and cross-bred with the first thoroughbreds brought to America in the 18th century, producing "a horse with proved beauty and easy, elastic gaits." Moira C. Harris & Nicola Jane Swinney, Horses: The Origins and Characteristics of 100 Breeds 130 (Weldon Owen Printing Ltd. 2010) (2011 ed., Metro Books). Today's Saddlebred breed "is based on the Narragansett Pacer." Id. Ironically, "[i]n a May 18, 1934, special election, approximately 75,000 of the state's 300,000 eligible voters gave their approval by a 4-to-1 margin to a statewide statute legalizing pari-mutuel betting on horse racing. Immediately thereafter Walter O'Hara . . . formed the Narragansett Racing Association. . . . By August 1, 1934, a scant seventy-four days after the racing referendum, the facility was completed, and Narragansett Park opened its betting windows to a crowd of nearly 38,000." Patrick T. Conley, An Album of Rhode Island History, 1636-1986 193 (The Donning Company 1986).

[20] Pl.'s Opp'n Ex. 6, Provisions in the 1997 Omnibus Appropriations Act which Removed the Narragansett Indian Tribe of Rhode Island from the Coverage of the Indian Gaming Regulatory

Although the Tribe was "effectively dismantle[d]" in the late 1800s[21] and was "detribalized" in 1883,[22] the Tribe continued to attempt to regain their lands.[23] In 1975, the Tribe "filed suit against the private owners of former tribal lands in Charlestown to gain possession of some 3,200 acres that the [Tribe] cited as aboriginal territory."[24] The United States District Court ultimately held that the "State's attempt to disband the Tribe in 1880 was irrelevant and that the broad principle dictated by the supremacy clause meant that the State statutes could not supersede federally created standards which have been applied, with special vigor, to questions of Indian title to lands."[25]

The resolution of the claims asserted in the federal lawsuit culminated in 1978, with the formation of a Joint Memorandum of Understanding ("JMOU", codified at 1978 U.S.C. 1701 et seq.), signed by the Tribe, then-Rhode Island Governor J. Joseph Garrahy, the Charlestown Town Council, and certain landowners.[26] The JMOU effectuated the transfer of 1800 acres in Charlestown back to the Tribe (in the form of a trust) in exchange for the Tribe's

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Act: Oversight Hearing Before the H. Comm. on Resources, 105th Cong. 46 (1997) (statement of Randy Noka, First Councilman, Narragansett Indian Tribe).

[21] Geake, supra note 2, at 94.

[22] Id. at 101; but see Chief's Aff. ¶ 6 (noting that "the unilateral detribalization of the Tribe by the Rhode Island General Assembly [occurred] in 1881.") and Verified Compl. at ¶ 7 (noting that the vote to detribalize the Tribe was taken in 1880).

[23] Verified Compl. ¶ 8.

[24] Geake, supra note 2, at 131.

[25] Verified Compl. at ¶ 9 (citing Narragansett Tribe of Indians v. So. R.I. Land Devel. Co., 418 F. Supp. 798 (D. R.I. 1976)).

[26] See Geake, supra note 2, at 133; Pl.'s Mem. Ex. 6, supra note 20, at 33-42 (Test. of the Hon. Governor Lincoln Almond, State of Rhode Island).

acknowledgment and agreement that, but for hunting, fishing, and taxation, the civil and criminal laws of the State of Rhode Island would apply to the regulation and usage of and activities upon said land. Therefore, the creation and operation of a casino, or any other enterprise, on the tribal land would be subject to the strictures of applicable Rhode Island law.

II

STANDING

The State of Rhode Island has asserted that the Tribe lacks standing to pursue its claims because it "has simply failed to demonstrate any personal injury." (State's Mem. in Supp. of its Mot. for Summary J. and in Opp'n to Pl.'s Mot. for Summ. J. at 14) ("State's Mem."). In support of its position, the State relies on Burns v. Sundlun, 617 A.2d 114 (R.I. 1992), in which the Rhode Island Supreme Court held that, in order to establish standing, a plaintiff must "demonstrate a personal stake in the controversy that distinguishes his clams from the claims of the public at large." (State's Mem. at 14, citing Burns, 617 A.2d at 116). In Burns, however, the plaintiff's claimed injury was "that he ha[d] been denied his right to vote on the establishment of the off-track betting and the extension of an existing gambling activity." Burns, 617 A.2d at 116. Our Supreme Court declared that such an injury was "shared by each and every voter in the State of Rhode Island" and, thus, plaintiff's "own personal stake in the controversy" was

undistinguishable "from the claims of the public at large." Id. Compellingly, the Supreme Court acknowledged its "tendency [to] confer standing liberally in matters involving substantial public interest" and proceeded to examine the merits of the case. Id.

Twin River requests that this Court "bypass the standing and ripeness issues and rule that the 2011 Casino Act is constitutional." (UTGR, Inc. d/b/a Twin River Mem. in Supp. of Mot. for Summ. J. at 15) ("Twin River Mem."). Twin River notes that its Twin River operation is "the Lottery Division's largest video gaming facility and . . . the ninth-largest slot machine gaming facility in North America [accounting] for $251.6 million – fully 90% – of the Lottery Division's total gross video lottery revenues." (Twin River Mem. at 14).

The Supreme Court has provided this Court with a lucid directive regarding the issue of standing as assessed in In re Advisory Opinion to the Governor, 856 A.2d 320 (R.I. 2004) ("Casino I"). In Casino I, former Governor Donald L. Carcieri "raise[d] concerns" regarding the constitutionality of a "statewide ballot question asking the voters of [Rhode Island]: 'Shall there be a casino in the Town of West Warwick operated by an affiliate of Harrah's Entertainment in association with the Narragansett Indian Tribe?'" Casino I, 856 A.2d at 322-23.

The Supreme Court deemed that the placement of the aforementioned referendum on a statewide ballot raised an issue of "great public and constitutional

importance." Id. at 325. The Supreme Court determined that presenting a void referendum to voters would result in the public's "waste" of "much money, time, effort, and energy to familiarize themselves with the controversial issues that the proposed casino. . . raised." Id. Similarly, if this Court "were to sit idly by while an unconstitutional question was submitted to the voters, only to later [have the Supreme Court issue] a binding decision declaring the [2011 Casino Act and referendum question] void, chaos might well ensue." Id.

The "time, effort, and energy" that Rhode Island voters will surely expend to educate themselves about the proposed referendum, in order to exercise their right to vote in conformance with their convictions, must not be spent in vain. Id. Thus, this Court will confer standing upon the Tribe and proceed to adjudicate the constitutional challenge on its merits.

III

Standard of Review

The Rhode Island Supreme Court has recently restated the well-established "'principle that legislative enactments of the General Assembly are presumed to be valid and constitutional.'" Moreau v. Flanders, 15 A.3d 565, 573 (R.I. 2011) (quoting Newport Court Club Associates v. Town Council of Middletown, 800 A.2d 405, 409 (R.I. 2002) (quoting Rhode Island Depositors Econ. Prot. Corp. v. Brown, 659 A.2d 95, 100 (R.I. 1995))). The Supreme Court's approach to

constitutional questions proceeds "with great deliberation, caution and even reluctance." Id. at 573-74 (citing Gorham v. Robinson, 57 R.I. 1, 7, 186 A. 832, 837 (1936)). "[E]very reasonable intendment in favor of constitutionality [will be attached]" to the questioned enactment which the Court will not void unless the challenger proves beyond a reasonable doubt that the "act violates an identifiable aspect of the Rhode Island or United States Constitution." Id. at 574 (citations omitted).

The Tribe asserts that the Casino Act is unconstitutionally vague and infirm as it contains substantive terms, e.g., "authority to make all decisions," and "full operational control," which are not defined. (Tribe Mem. at 17). The Tribe further avers that the Act is violative of the Rhode Island Constitution's Non-Delegation Doctrine in that "it delegates certain legislative powers to a private corporation without adequate legislative standards or safeguards specified in the statute." (Tribe's Mem. at 18).

The standard utilized by the Rhode Island Supreme Court "to determine vagueness of a statute is dependent upon the nature of the statute itself; thus, vagueness of a criminal statute will be more closely scrutinized than that of an economic regulation." Fitzpatrick v. Pare, 568 A.2d 1012, 1013 (R.I. 1990) (citing City of Warwick v. Aptt, 497 A.2d 721 (R.I. 1985)). "When a legislative enactment fails to delineate or to suggest any standards and contemporaneously

fails to properly delegate rule-making powers sufficient to provide the omitted standards, the statute cannot be saved from unconstitutional vagueness." Id. (citing United Nuclear Corp. v. Cannon, 553 F. Supp. 1220, 1235 (D.R.I. 1982)). "Furthermore, it is well settled that a statute is unconstitutionally vague if it lacks explicit standards from its application and thus delegates power that enables enforcement officials to act arbitrarily with unchecked discretion." Id. (citing Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)).

Applying these foregoing precedential precepts, this Court will proceed to determine the merits of the constitutional arguments raised by the parties.

IV

Analysis

A

"Casino I" and "Casino II"

In each of the above-captioned cases our state Supreme Court, at the request of the Governor and House of Representatives, respectively, issued an advisory opinion regarding the constitutionality of certain proposed legislative enactments pertaining to casino operation.

Casino I involved a request from then Governor Donald L. Carcieri, to the Supreme Court, seeking its opinion as to the constitutionality of a statewide ballot referendum asking Rhode Island voters the following: "Shall there be a casino in

the Town of West Warwick operated by an affiliate of Harrah's Entertainment in association with the Narragansett Indian Tribe?" Casino I, 856 A.2d at 323. The Governor's specific request to the Supreme Court was whether "'the question and the legislation's establishment of a privately-operated casino violate[d] [Rhode Island's] constitutional prohibition' on lotteries in Rhode Island except those lotteries operated by the State or those previously permitted by the General Assembly." Id.

Article VI, section 15 of the Rhode Island Constitution, enacted in 1973, provides that:

> "All lotteries shall be prohibited in the state except lotteries operated by the state and except those previously permitted by the general assembly prior to the adoption of this section, and all shall be subject to the prescription and regulation of the general assembly." R.I. Const. art VI, § 15.

The Supreme Court declared that the identification of a(n) Harrah's affiliate as the proposed operator of the casino doomed the referendum which was in direct disaccord with the constitutional requirement of "state operation."

The Supreme Court could not have been more plainspoken when it stated that:

> "[t]he constitution would no more support a question asking whether a private organization such as Harrah's [could] operate a lottery facility than a question asking whether the government may conduct unlawful searches or seizures, art. 1, sec. 6, require excessive bail, art. 1,

> sec. 8, or take private property for public uses without paying just compensation, art. 1, sec. 16." Casino I, 856 A.2d at 330.

The Court nimbly reasoned that the referendum facially contravened article VI, section 15, and was, thus, "fundamentally flawed." Id.

In In re Advisory Opinion to the House of Representatives, 885 A.2d 698 (R.I. 2005) ("Casino II"), the Supreme Court focused upon the constitutional propriety of the level of operational control vested in the State by the then proposed 2005 Casino Act. Our Supreme Court ultimately opined that the propounded enactment failed to repose sufficient operational control in the Lottery Division which would, in effect, lack the "power to: (1) control the types of non-slot table games; (2) control or deny the extension of credit; (3) choose its partner in the casino service provider contract; and (4) to protect its contractual rights by recognizing the Tribe's absolute waiver of sovereign immunity." Id. at 711-12.

As to the first factor, the Supreme Court observed that the act merely "appear[ed] to give the Lottery Division total control in '[d]etermining and approving' the types of table games 'to be conducted at the casino gaming facility.'" Id. at 703-04 (citation omitted). The Division's "overriding powers," however, were "rendered illusory by the requirement that the Division 'shall permit the casino service provider to conduct at the casino gaming facility any [table game] that is regularly conducted at any other casino gaming facility.'" Id.

at 704 (emphasis removed). Pursuant to the proffered statute, a private gaming company would "be able to exercise de facto and largely unmitigated control over the types of games being played at the . . . facility." Id. The Supreme Court proclaimed such a result to be "clearly inconsistent with the constitutional requirement that the state have the 'power to make decisions about all aspects of the functioning of [the casino].'" Id. (quoting Casino I, 856 A.2d at 331) (emphasis removed).

The second constitutional shortcoming in the 2005 Act was its allocation of control regarding extension of credit to the casino service provider. This provision clearly failed to "satisfy the constitutionally-based requirement that 'all aspects' of the operation of the casino be under state control." Id. at 705.

The Supreme Court also had a cardinal concern regarding the sovereign immunity which it characterized as a "very fundamental and critical matter." Id. at 705-06 n.6. Our Supreme Court stated that "[a]s a general matter of black letter law, '[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.'" Id. at 705 (quoting Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc., 523 U.S. 751, 760 (1998)). The Supreme Court concluded that absent waiver, "sovereign immunity threatens to render nugatory state operational control of the proposed casino." Id. Although our Supreme Court inquired of

counsel "at oral argument about precisely what [would be] the legal mechanism whereby the Tribe could go about waiving its sovereign immunity, [the] Court did not receive anything close to a definitive answer." Id. at 705-06 n.6. Therefore, the Supreme Court deemed it "highly advisable to condition the Division[of Lottery]'s power to enter into any master of casino service contract expressly on the Tribe's absolute waiver of sovereign immunity." Id. at 706.

The fourth deficiency of constitutional proportion in the 2005 proposal was its definition of the casino service provider as "an entity composed of the Narragansett Indian Tribe and its chosen partner." Id. (citing proposed § 41-9.2-2(1)) (emphasis removed). Although the State was accorded the "power '[t]o investigate and determine the suitability of the casino provider," this, the Supreme Court ruled, was tantamount to "mere regulatory power" which "falls short" of operational control. Id. at 706-07. Our Supreme Court "[wished] to stress that merely calling a casino 'state-operated' does not make it so for purposes of fulfilling the very explicit terms of [Rhode Island's] Constitution." Id. at 707 n.8.

B

Constitutionality of the 2011 "Casino Act"

The Tribe's precise allegations regarding the infirmities of the Act are: (1) that "the voters of the State of Rhode Island are being asked to vote on a constitutional question regarding the expansion of gaming without any definition

of what state operation of this expansion will consist of, what specific table games are going to be operated, and what entity or personnel are going to operate them" (Verified Compl. ¶ 32); and (2) the Act "delegates certain legislative powers to a private body where the exercise of such power is not accompanied by adequate legislative standards or safeguards." (Verified Compl. ¶ 34.) The former perceived defect, according to the Tribe, renders the enactment unconstitutionally vague and the latter is violative of the Rhode Island Constitution's "non-delegation doctrine." (Verified Compl. ¶¶ 29, 33, 34.).

In order to pass constitutional muster as to the Tribe's first contention, precedent holds that a law cannot be "'so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application.'" United States v. Cumberland Farms of Connecticut, 647 F. Supp. 1166 (1986) (citing Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); and Winters v. New York, 333 U.S. 507, 515-16 (1948)). The Tribe contends that "[t]he very terms of the 2011 Casino Act leave open a substantial and critical question as to whether voters of 'common intelligence [would be] left to guess as to the statute's meaning' and whether those same voters may 'differ as to its application.'" (Plaintiff's Omnibus Reply at 9.).

The Tribe challenges the following provisions of the Act as being constitutionally impaired: (1) the law does not identify/define what "table games"

will be operated, § 42-61.2-1(8); (2) although the State has the power and authority to establish systems for linking, tracking, deposit and reporting of receipts, audits, annual reports, prohibitive conduct and other such matters, it is not mandated to do so and thus is reduced to the status of a mere regulator, § 42-61.2-2.1(c)(2); (3) the provision according the State power and authority to collect all gaming receipts and require that Twin River collect same in trust for the State through the Division of Lottery creates the "possibility" that Twin River would be required to collect receipts and then hold them "in trust" for the State, § 42-61.2-2.1(c)(3); (4) the provision conferring the State with the power and authority to define and limit the rules of play and odds of authorized casino gaming games, including without limitation, the minimum and maximum wagers for each casino gaming game, was "monastically copied" by the General Assembly from language in Casino II,[27] § 42-61.2-2.1(c)(6); (5) the catch-all segment imbuing the State with "all other powers necessary and proper to fully and effectively execute and administer the provisions of [the] chapter" was also "monastically copied" from Casino II, § 42-

[27] The proposed 2005 enactment §§ 41-9.2-8(a)(19)(iii) and (iv) stated that the Division of Lottery would have the power to "[define] and [limit] the rules of play and odds of authorized games, and the method of operation of such games, including the maximum and minimum wagers." The Supreme Court discerned, in pertinent part, that power to set odds (in that case coupled with the power to set the number of video lottery terminals and non-slot table games) was a "substantial one that undeniably would allow the state to exercise a significant degree of operational control over the casino." Casino II, 885 A.2d at 710-11. Our Supreme Court further stated that it disagreed with the opposition parties' arguments that the "specificity in terms of the number of gaming devices, and minimum payout of those devices [demonstrated] the illusory nature of the Division's actual operational control." Casino II at 711 n.14.

61.2-2.1(c)(10); and (6) although the State would have approval rights over matters relating directly and indirectly to employees, Twin River would actually make day-to-day decisions regarding the selection and interviewing of casino employees, § 42-61.2-2.1(c)(7).

The Tribe's initial complaint that the "table games" to be operated are ill-defined is defeated by § 42-61.2-1(8), which provides that "'casino gaming' means any and all table and casino-style games played with cards, dice or equipment, for money, credit, or any representative of value; including, but not limited to roulette, blackjack, big six, craps, poker, baccarat, pai gow, any banking or percentage game, or any other game of device included within the definition of Class III gaming as that term is defined in Section 2703(8) of Title 25 of the United States Code and which is approved by the state through the division of state lottery." Sec. 42-61.2-1(8).

Under the statutory scheme, the State has full operational control of the casino, including the power and authority to determine the number, type, placement and arrangement of casino-gaming games, tables and sites within the facility. Sec. 42-61.2-2.2(c)(1). The Act reposes "full operational control" in the State, and the State alone, including the foregoing power and authority, without limitation, as well as the authority to make all decisions about all aspects of the functioning of the business enterprise. The subsequent litany of the State's precise

powers and the comprehensiveness of the activities embraced within the State's reach in the exercise of those powers undermines any specter of vagueness in the statute. Neither the Act, nor the proposed referenda asking voters to approve facilities which would include "state operated casino gaming, such as table games," contravene the mandate of the Rhode Island Constitution article VI, section 15.

The concerns that the Tribe raises regarding the enforcement and application of §§ 42-61.2-2.2(c)(2) and 42-61.2-2.2(c)(3) simply do not register on the meter of constitutional validity, under the principles this Court is bound to apply. The Tribe's criticism that § 42-61.2-2.2(c)(2) lacks a mandate presumes that the State will abdicate its authority and negligently reduce itself to a merely regulatory entity. Such speculation would carry this Court into an unacceptable hypothetical realm well beyond the landscape of the statute's facial constitutional validity. Our United States Supreme Court has pronounced that a reviewing court "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449-50 (2008) (citing United States v. Raines, 362 U.S. 7, 22 (1960)). Furthermore, "a plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the [statute] would be valid,' i.e. that the law is unconstitutional in all of its

applications." Id., 552 U.S. at 449 (citing United States v. Salerno, 481 U.S. 739, 745 (1987)) (as cited in State's Mem. at 24).

Similarly, the Tribe's concern that § 42-61.2-2.2(c)(3), from the Tribe's perspective, creates a "possibility" that the statute could be applied in an unconstitutional manner signifies ipso facto that the provision cannot be proven facially unconstitutional under any set of circumstances. See id. Thus, there is nothing before this Court, at this juncture, to be utilized properly as evidence that §§ 42-61.2-2.2(c)(2) and (c)(3) unconstitutionally dispossess the State of full operational control regarding the collection, receipt, deposit and management of gaming revenues.

As to §§ 42-61.2-2.2(c)(6) and (c)(10) relating, respectively, to the State's power to define and limit the rules of play and odds of authorized games and the State's authority to exercise "all other powers necessary and proper," the Tribe complains that these provisions were "monastically copied" from the Supreme Court's language in Casino I and Casino II. The Tribe does not claim or identify any specific constitutional defect, but appears to object to the "copycat" quality of the language included in these subsections.

The Tribe specifically charges that the "drafters attempted to model the statute after Casino I and Casino II, assuming that if they copied every term mentioned by the Supreme Court, they would avoid constitutional problems.

Simply copying the generic language contained in Casino I and Casino II illustrates that the drafters did not contemplate the details of how a full fledged casino, with table games, would actually function day to day." (Tribe's Mem. at 23). Plaintiff then invites the Court, due to the absence of detail in the Act's text, to leap to the extravagant and purely conjectural conclusion "that the State will not really be the entity operating the casino – [Twin River] will." Id.

Our Supreme Court is keenly cognizant of its explicit and temperate footing in the context of furnishing advisory opinions. In the Court's own words, "[w]hen issuing an advisory opinion, the justices of this Court 'do not speak ex cathedra, from the chair of judgment, but only as consultors somewhat like the jurisconsults under the Roman law." Casino I, 856 A.2d at 322 (quoting Opinion to the Governor, 93 R.I. 262, 264, 174 A.2d 553, 554 (1961)). Moreover, the Supreme Court noted, "Speaking in our individual capacities as legal experts rather than Supreme Court justices, we are unable to exercise the fact-finding purview of the Court." Id. (citing In re Request for Advisory Opinion Regarding House Bill 83-H-5640, 472 A.2d 301, 302 (R.I. 1984)). Further, expressed our Supreme Court, "Because this opinion is not an exercise of judicial power, it is not binding and it 'carries no weight.'" Id. (quoting Opinion to the Governor, 93 R.I. at 264, 174 A.2d at 554).

It is an inevitability that the Supreme Court, when evaluating and analyzing the construct of a proposed referendum/enactment, will express with particularity which terms, words, content, or omissions are constitutionally lethal. From the Court's analysis, an astute drafter will be able to obliquely derive guidance (albeit unintended by the Court) as to what language, whether by insertion, deletion or clarification, would resuscitate the enactment.

Replication by the drafters of language they may perceive as collaterally "sanctioned" by the Supreme Court does not, ipso facto, annul the Act. The referendum's inclusion of the generic, oft-utilized phrase "all other powers necessary and proper to fully effectively execute and administer the provisions of the chapter," § 42-61.2-2.2(c)(10), is likewise non-defeating in this particular context.

Article I, Section 8, Clause 18, or the Necessary and Proper Clause, of the United States Constitution provides that the "Congress shall have Power to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Offices thereof." U.S. Const. Art I, § 8, cl. 18. This Necessary and Proper Clause–-also known as the "Elastic Clause," the "Basket Clause," the "Coefficient Clause," and the

"Sweeping Clause"[28] –-was the subject of much debate between the Federalists and the Anti-Federalists during ratification discussions.[29] The Anti-Federalists "argued that the Constitution would destroy the states and create one large, consolidated republic that would deteriorate into monarchy or despotism"[30] while the Federalists "denied that the Constitution would destroy the states or create one large, consolidated republic."[31] "If the clause is taken literally, some useful means would be excluded because they were not strictly 'necessary.' And useful or even strictly necessary means would be excluded if they were not 'proper.'"[32]

The necessary and proper clause in the 2011 Casino Act operates in symbiosis with the statutory framework and cannot transcend its boundaries. Thus, the clause's presence in the proposed statute does not obviate its constitutionality.

The Tribe additionally maintains that the Act "violates the Non-Delegation Doctrine embodied within the Rhode Island Constitution at art. VI, sections 1 and

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[28] See Devotion Garner & Cheryl Nyberg, "Popular Names of Constitutional Provisions," http://lib.law.washington.edu/ref/consticlauses.html (updated Dec. 29, 2008) (last visited June 28, 2012).

[29] See, e.g., The Federalist No. 33, at 84 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed., 1966) ("These two clauses [the Necessary and Proper Clause, and the Supremacy Clause] have been the source of much virulent invective and petulant declamation against the proposed Constitution."); The Federalist No. 44, at 129 (James Madison) (Roy P. Fairfield ed., 2d ed., 1966) ("Few parts of the Constitution have been assailed with more intemperance than [the Necessary and Proper Clause]; yet on a fair investigation of it, no part can appear more completely invulnerable. Without the *substance* of this power the whole Constitution would be a dead letter.") (emphasis in original).

[30] 1 Federalists and Antifederalists: The Debate Over the Ratification of the Constitution 4 (John P. Kaminski & Richard Leffler, eds., Madison House 1989).

[31] Id. at 3.

[32] David F. Epstein, The Political Theory of the Federalist 44 (Univ. of Chicago Press 1984).

2, as it delegates certain legislative powers to a private corporation without adequate legislative standards or safeguards specified in the statute." (Tribe's Mem. at 18). In Plaintiff's view, "this legislation allows the state to potentially delegate disproportionate power to a private entity, namely [Twin River], in violation of the Rhode Island Constitution." Id. at 18-19 (emphasis added).

The Court is compelled to reiterate that it is precluded from engaging in chimerical musings in the present circumstances.

The Act under consideration suffers from none of the constitutional infirmities of its "predecessor" proposals. In Casino I, the constitutionally unacceptable operator was clearly identified as an affiliate of Harrah's Entertainment, a private organization. In Casino II, the service provider's "largely unmitigated control" over such issues as the types of games to be offered, the extension of credit, and the choice of provider ran blatantly afoul of our constitutional requirement that the State be in control of "all aspects" of the casino's operations. 885 A.2d at 704.

The 2011 Act reposes "full operational control" in the State and grants the Lottery Division "the authority to make all decisions about all aspects of the functioning of the business enterprise." Sec. 42-61.2-1 et seq. This Court cannot identify any articulable constitutional transgression of the non-delegation doctrine and thus declines to accept this assertion.

V

Conclusion

The Narragansett Indian Tribe is an integral and elemental feature of Rhode Island's historical tapestry, indeed, in our state's very origination. The body of applicable law, in its present anatomy, does not allow what equity, it could be tendered, demands for this valorous people. Based upon the foregoing analysis, the Court cannot declare that the Tribe has sustained its very heavy burden of proof beyond a reasonable doubt that the Act "violates an identifiable aspect of the Rhode Island or United States Constitution." Thus, the Court grants UTGR, Inc. d/b/a Twin River's Motion for Summary Judgment, Newport Grand LLC's Cross-Motion for Summary Judgment, and the State of Rhode Island's Cross-Motion for Summary Judgment, thereby denying the Narragansett Indian Tribe's Cross-Motion for Summary Judgment.

The Court would like to express its genuine gratitude to all counsel for their thought-provoking and intelligent memoranda and to all of the interested parties for their gracious manners and deportment during the courtroom proceedings.